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QUESTION, Professor King: The GATT agreement on intellectual property is a very important development, but one of the key issues should be an adequate dispute settlement mechanism. What is the possibility in the immediate future of having some permanent body, for example in Geneva, specializing in dispute settlement and making precedents for the future?

Presently there is an inadequate method of settling disputes under GATT and I think what is being proposed has limitations. We are biting the bullet on all these intellectual property changes. Why don't we bite the bullet and have a first-class dispute settlement mechanism? Do you have any comments on that, Michael?

ANSWER, Mr. Kirk: I think the prospects for getting that type of dispute settlement mechanism are most likely to occur in the GATT, and more likely to occur if the rest of the agreement is strong and effective. In other words, if there are strong provisions requiring enforcement, then I think you can expect to see a stronger dispute settlement mechanism being negotiated in the GATT process. In terms of seeing a permanent body outside of GATT, located somewhere in Geneva, I would not be too optimistic about that.

COMMENT, Professor Edwards: My concern is somewhat similar. This idea of moving intellectual property into the GATT has always surprised me because I have always viewed GATT dispute settlement provisions as rather unuseful because they are highly political. Typically, most disputes in the GATT are fairly major. It seems to me that many intellectual property matters are relatively small and ought to be handled without political interference.

ANSWER, Mr. Kirk: Well, the GATT process for dispute settlement has its drawbacks, but what other alternative is there right now? The intellectual property agreements in the WIPO have resort to the International Court of Justice, which itself is a very political body.

With respect to the ineffective enforcement in the GATT process, I think that as bad as it may have been, there have been a few successes. For example, the GATT process found that the manufacturing clause in U.S. copyright law was inconsistent with our GATT obligations. The United States accepted this and it was understood that the clause would expire. It was renewed once in 1982 and was about to be renewed again in 1986. The European Commission publicized a list of possible retaliatory measures involving products from South Carolina, which just happened to be a state with a Senator who was the Chairman of the Senate

Judiciary Committee and very quickly lost interest in renewing the manufacturing clause.

So the GATT process can have a positive impact, although it is not perfect. Until somebody comes up with something better, I do not know where else to go.

COMMENT, Mr. Watters: The benefit of the GATT dispute settlement mechanism is that you can institute trade sanctions against another party to the agreement. You have to measure the effectiveness of the dispute settlement mechanism by looking at ultimately what you can do. In looking at a dispute settlement mechanism in the WIPO, what kind of action would you ultimately take? It might be to prevent the intellectual property protection of goods coming from a Third World country. Since not many goods from Third World countries would be eligible for protection, the effectiveness of the dispute settlement mechanism is close to zero.

What will your sanction be against a particular country for abuse of the intellectual property rights? GATT and its mechanism is effective, because you can take trade action against the country.

COMMENT, Professor King: Which is the same action that you take under the Canada-U.S. Free Trade Agreement.

QUESTION, Mr. O'Grady: Not too long ago the Canadian government was arguing that a country like Canada has no national interest in strong patent policy, because on the whole we do not generate or use inventions and ideas. I assume there are member nations of the GATT who feel the same way today. I gather the government has changed its views. Keeping in mind the thrust for a new world economic order, is the only realistic way to get a GATT agreement in that area to considerably shorten the patent protection period?

COMMENT, Mr. Kirk: I cannot see the United States agreeing to considerably shortening the patent protection period. I think right now we are balancing our multilateral efforts to reach an acceptable standard with our bilateral efforts. We have had some successes, notwithstanding certain problems. We have had bilateral successes. I think that if the agreement did not provide a high enough standard, Congress and U.S. industry would tell the Executive Branch, "Forget it, we are perfectly content to continue bilateral efforts."

COMMENT, Mr. Blackburn: I am intrigued by the special section 301 action. I am not aware of previous cases of self-initiated policing actions which apparently are not complaint specific.

COMMENT, Mr. Kirk: In South Korea we did that in the intellectual property area.

QUESTION, Mr. Blackburn: Has it happened in other areas as well? I am not very familiar with U.S. trade law.

ANSWER, Mr. Kirk: I feel almost certain that it has. I know that when we were talking with the Koreans there were also actions involving

the lack of access our companies had to the Korean market. With respect to intellectual property, that was self-initiated. We specifically went after patents, copyrights and to a lesser degree trademarks. Effective July 1, 1987 we had a host of new laws in place granting protection, not only to the United States, but to all countries except Korea.

QUESTION, Mr. Blackburn: The other intriguing thing about the special section 301 actions is the time involved. It operates on a very accelerated pace, and it seems as though you are being pressed to conclusions by the end of December even though there are still nine months of GATT negotiations left. Am I right in assuming that this is designed to put extreme pressure on the GATT negotiations? Is there any other motivation for this timing? It is very fast.

ANSWER, Mr. Kirk: First, I think Congress felt that the Executive Branch was not as aggressive as they had originally intended. Therefore, they were interested in imposing some fairly rigid constraints to force the Executive Branch to act.

Second, I think that the actual initiation of a special section 301 investigation, is not really the objective. In a sense, you have already lost a couple of rounds if that occurs. It is intended to encourage countries to move in the right direction, to start the process, to cooperate.

One of the reasons why a section 301 investigation would not be initiated in the special section 301 statute is that they are cooperating in a multilateral negotiation, i.e. GATT or WIPO, to enhance, to protect the intellectual property. It is a heavy hammer, but it does not have to be used in order to get a result from which everybody benefits.

For example, in Korea quite a few patent applications for pharmaceutical products have been filed by Korean firms. Last I heard, over seventy applications for pharmaceutical products by Korean firms had been filed. So they benefit as well.

Sometimes it takes a process like this to really get over the hump. There may be some small segment or industry that is tying the hands of government. Encouragement of this type may help the government to get over that. In most of these countries everybody is not against the change, usually there are only pockets of resistance, e.g., the video pirate, or the local pharmaceutical industry that is copying proprietary products from other countries, and we can get over that hump.

QUESTION, Professor King: We heard this morning that much of the value of technical property that this country has is trade secrets and know-how. We spoke of patents, trademarks and copyrights. Do you foresee any international developments for the protection of know-how and trade secrets which would parallel those in patents and trademarks? Do you see any parallel development in that area so that that type of technical property would be protected?

COMMENT, Mr. Watters: They are certainly on the table. That is a topic to be negotiated in GATT.

It would appear that trade secrets are becoming an increasingly important part of intellectual property because the pace of technological change is such that very often a patent protection just takes too long. By the time you get your patent protection, that particular technology may have advanced several steps. Therefore, companies are probably relying on trade secret protection more and more. In addition, due to frustration over inadequate intellectual property laws, I think that companies may revert to trade secret protection measures.

One of the difficulties in the Canadian context is that with the federal split in responsibilities, the provincial government has the primary jurisdiction in this area. Therefore, it is going to be more difficult for a country like Canada to be able to look at an appropriate method for protecting trade secrets on a national basis in order to contribute to the international protection of trade secrets.

COMMENT, Mr. Kirk: The United States has a similar problem with our trade secret protection being state law and state statutes. But it is on the table. There is a lot of support for trade secret protection in U.S. industry. It started with the "trilateral industry group" — the Keidanren, UNICE, and the Intellectual Property Committee — focusing primarily on the chemical and pharmaceutical industry concerns with foreign government leaks concerning their safety and efficacy data which they have to submit to foreign governments to register new products. That was the initial emphasis. We have a ground swell of support from those who call themselves the metal cutters. There is a great need for adequate protection of this broad range of business and technical information around the world. It is difficult to predict what will happen, but certainly an effort will be made.

QUESTION, Mr. Bradley: This question is for Mr. Kirk, because he addressed, to a certain extent, the situation that developing countries find themselves in when determining the lack of technological access on a commercial basis.

It seems to me that you are not going to get a large body of middle level developing countries to adhere to a GATT code on intellectual property that is exclusively protectionist without addressing the questions of access to that technology, restrictive barriers, nonworking or what you might call related things, that are in the interest of their development. Quite frankly, many developed countries over the past 300 years, including the United States, and Japan up until about fifteen years ago abused intellectual property rights. Why shouldn't the developing countries have at least some of the same advantages that the developed countries had in the past?

ANSWER, Mr. Kirk: I don't know that I would agree with your characterization that the United States was ripping people off. I think that the developing countries did try to push something through that addresses restrictive business practices and the exercise of intellectual property rights in Geneva and in Montreal, and they will continue to do

so in the future. There will be an effort to include that in negotiations and a strong effort to limit that sort of activity. Probably one of the strongest arguments that anybody can make for getting an effective multilateral agreement on intellectual property, is that it might quiet the crazy Americans with their bilateral activity. So there is something to be gained there.

QUESTION, Professor King: We have heard an awful lot of talk about counterfeiting. Last year we had a speaker from the Anticounterfeiting Coalition, and according to the figures he had, the United States is being severely harmed by this counterfeiting. From the consumer standpoint, it is terrible. The consumer gets a bad product and the other country gets the benefit of U.S. technology. What effect do you think all these negotiations will have on this counterfeiting problem? Do you think it is going to stop?

ANSWER, Mr. Watters: My impression is that there is a better chance of agreement on an international framework to limit counterfeiting and bring it within the GATT than there are on the other parts.

COMMENT, Professor King: I would think you would want to eliminate counterfeiting.

COMMENT, Mr. Watters: Well, you can only limit it in the sense that you will have trade sanctions available if countries still permit counterfeiting to take place.

But the nature of industries in many developing countries is changing. For example, Canada now has a very thriving form of industry whose products are being counterfeited and they want to reduce counterfeiting. Therefore, they are quite willing to negotiate that particular subject matter in the GATT and many other newly industrialized countries are in similar positions. So I think the nature of the industrial changes are such that there is more than surface recognition of this common problem that has to be solved.

COMMENT, Mr. Kirk: I would add that the other component, the internal enforcement component, is going to be important in getting rid of counterfeiting. We found that when we went to Taiwan, the video and record pirates moved down to Indonesia until Indonesia adopted a copyright law. They are now all residing in the Middle East, they are bouncing around. The industry people have actually found machines in Saudi Arabia and in that area of the world, that were just exported from Indonesia because they are cracking down there. So you have to chase these crooks around. But you have to go into the country, you have to have action at the source. Even if counterfeiting is stopped from crossing the border, you still have to get into the country to be most effective. So the combination of both the border enforcement and the internal enforcement should make a dent. It is like prostitution, you are not going to get rid of it.

QUESTION, Professor King: Michael, I had one other question on

Japan. Not too long ago you were quoted in the *Wall Street Journal* about your Japanese negotiations.

In our Conference materials there is testimony by Larry Evans of BP America before Congress. What progress has been made in terms of dealing with the Japanese on this problem of the delay in getting patents, the difficulty that accrues because other people in Japan are trying to stereotype technology while you are applying for the Japanese patents? Is there much progress being made?

ANSWER, Mr. Kirk: Realistically, the answer has to be no. But I do not think anyone expected that we would achieve miracles.

The current argument that we are hearing from Japan, from MITI and the Japanese Patent Office, is that they have done the unthinkable, the unimaginable. They have actually increased their staff by thirty examiners for this current fiscal year. They have gone from 850 to 880, and their backlog is only two and a half million; aren't they doing a wonderful job?

That's ridiculous. They have come up with a number of other pieces of window dressing. They talk about their new automated research and retrieval activity, "F-term" search system. They talk about efforts to encourage Japanese industry to file fewer applications and to request examination of fewer applications that are filed. There are a number of different things they are taking credit for, talking about what a job they are doing to cut back. But when you look at the actual number and statistics, it does not show up. There has been a drop in the number of applications filed, and the number of examinations that are being requested, but that comes one year after a significant Japanese fee increase. So as far as we are concerned, that tells us nothing, and in effect that is what we are saying. I suspect that we will see some extremely contentious times between Japan and the United States before the year is out.

QUESTION, Mr. Norris: You didn't address, and I wonder if it is effective, that Japan had supposedly instituted the accelerated examination? If there is a commercially used application and license they have asserted, that you can accelerate the examination. The criteria for requesting accelerated examination are really nominal, but I do not have any experience as to whether it is working that well or not. They may have offered that as an option to solve some of the backlog problems.

ANSWER, Mr. Kirk: That's correct. They have and they point that out because they say as of the end of 1988 something like 326 requests have been made of which, some very small number, were from the United States. I have talked to a number of people, both private and corporate attorneys, about why they don't use this more, and I don't have a good answer.

We met with the AmJam in Tokyo when we were there and their response is that the details, the procedure for qualifying for the accelerated examination tend to be somewhat rigorous, somewhat of a nuisance.

The Japanese dispute that. They also claim that the process still does not start the examination until the passage of eighteen months when the application is published because they don't take them up for examination before then. So they say that it has limited effectiveness, none of which are good responses to the Japanese. Other than that, I do not have a better answer for you.

COMMENT, Professor King: I want to thank Michael Kirk and David Watters for a great evening. I think there are some very important developments which will have an impact on innovation. As the world becomes more innovative, the innovators have to have protection in order to make the investment.