

Session 6A

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LAW & POLICY**

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**SESSION 6: COMPETITION AND COPYRIGHT LAW
6A. FRAND*****Moderators:***

Andrew Bowler
Bristows LLP, London

Ari Laakkonen
Powell Gilbert LLP, London

Speakers:

Marc Sandy Block
IBM Corporation, Armonk, New York
Potholes, Manholes, and Landmines Along the FRAND SEP Highway

Renata B. Hesse
Sullivan & Cromwell LLP, New York
***FRAND and the IP/Antitrust Interface:
What Role Should Antitrust Play***

Panelists:

Jill (Yijun) Ge
Clifford Chance LLP, Shanghai

Wolrad Prinz zu Waldeck und Pyrmont
Freshfields Bruckhaus Deringer LLP, Düsseldorf

Dina Kallay
Ericsson, Washington, D.C.

David Por
Allen & Overy LLP, Paris

Steven Geiszler
Huawei Technologies USA, Inc., Plano

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MR. BOWLER: Good morning, everybody, and welcome to the FRAND session.

We have a great panel here today and it should be an interesting discussion. We've got two moderators. I'm Andrew Bowler from Bristows in London, and this is Ari Laakkonen from Powell Gilbert in London. Two moderators doesn't necessarily reflect that the panel's going to be particularly unruly, I don't think, but Hugh decided to have two. Ari and I are going to try to moderate fairly and reasonably and not discriminate between the views of either patent holders or implementers.

There have been quite a lot of recent developments in the FRAND area. We had the *Qualcomm/Apple* settlement,¹ and perhaps someone on the panel can comment on what is happening with the FTC's *Qualcomm* case, whether that will go ahead or settle.² *Unwired Planet*³ is going to the U.K. Supreme Court in October this year, together with a similar case between Conversant and Huawei⁴ and ZTE,⁵ which involve a jurisdictional question on whether the U.K. court can set the terms of a global FRAND license and require the implementer to accept that or face a U.K. injunction. And there are plenty of cases in the United States, China, and continental Europe for which we are well-covered on this panel.

A few high-level topics that we are hoping to cover include:

- Is the FRAND system working for industry right now, but also thinking ahead to the Internet of Things (IoT) and 5G? We can talk a little bit perhaps about whether there is convergence in the case law around the world.

- Stepping back even more, are courts the best places to sort out FRAND disputes? I've always thought that FRAND was supposed to be a kind of bilateral, consensual process; so are courts really the best way of dealing with that?

- Then, thinking back again to *Unwired Planet* and *Conversant*, what about courts, particularly a U.K. court, determining the FRAND rate for global licenses? You've got the convenience of a "one-stop shop" aspect of that; but, on the other hand, you've got comity considerations, particularly when different courts around the world approach FRAND differently, either from a legal point of view, taking into account competition law rather than contractual law, an economic point of view, and perhaps even cultural considerations. Determining global licenses is something that we will definitely touch upon because that is a hot topic right now.

My co-moderator will introduce the panelists.

¹ See, e.g., Joint Stipulation and Order to Dismiss, *In re Qualcomm Litig.*, No. 3:17-CV-0108-GPC-MDD (S.D. Cal. Apr. 25, 2019).

² On May 21, 2019, Judge Lucy H. Koh ruled that Qualcomm's business practice violated federal antitrust law. *Fed. Trade Comm'n v. Qualcomm Inc.*, No. 17-CV-00220-LHK, 2019 WL 2206013, at *130 (N.D. Cal. May 21, 2019). Qualcomm has filed an appeal. Notice of Appeal at 1, *Fed. Trade Comm'n v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK (N.D. Cal. May 31, 2019).

³ *Unwired Planet Int'l Ltd. v. Huawei Techs. (U.K.) Co.* [2018] EWCA (Civ) 2344 (U.K.).

⁴ *Huawei Techs. Co. v. Conversant Wireless Licensing S.A.R.L.* [2019] EWCA (Civ) 38 (U.K.).

⁵ *ZTE Corp. v. Conversant Wireless Licensing S.A.R.L.* [2019] EWCA (Civ) 38 (U.K.).

MR. LAAKKONEN: Thank you. I think the normal way of doing these things would be for everyone to shortly introduce themselves. But, because we're going to aim to have a very interactive discussion where people may pipe up at any moment, I'll do the introductions now.

Also, if anyone in the audience has any questions, you can ask the panel questions anytime you feel like it and we will have a more interactive discussion.

Let me introduce our panelists. Marc Sandy Block is IBM's Counsel for IP and Standards. Renata Hesse is a Partner at Sullivan & Cromwell and in her previous life had a distinguished career in government, leading the Antitrust Division of the DOJ. David Por, a partner at Allen & Overy in Paris, has been involved in FRAND litigation in numerous situations and specializes in patent litigation. Steven Geiszler is handling Huawei's U.S. IP litigation, and of course we have seen that Huawei has also been involved in some FRAND-related cases in the past couple of years globally. Jill Ge, from Clifford Chance in Shanghai, has been involved in FRAND disputes in various contexts, especially in China, over the last few years, and we all know that China is very important in this area. Dina Kallay leads Ericsson's work on antitrust and FRAND and previously also had a career working for antitrust agencies here in the United States and elsewhere. Wolrad Waldeck, a Partner at Freshfields in Germany, is a patent litigation and FRAND specialist.

MR. BOWLER: First up we will hear from Sandy.

MR. BLOCK: Yes, thank you.

The phone rings in my office, and somebody says, "I'm your high-tech techie. We have to join the standards organization. Our competitors are in there. The customers are hounding us. It's in our area of emerging growth. We really have to be there."

They transmit to me the standard-developing organization's (SDO) IP policy. I start looking through it to see what's going to keep me up at night. We have a lot of great outside and inside counsel writing great patent applications for us, and I have to figure out what is this IP policy, what this is going to do to that portfolio. In that portfolio there may be — and I'm not sure — something called standard-essential patents (SEPs), which I heard yesterday are patents that are needed in order to implement a standard. I want to know what is going to happen to those patents and how they are going to be encumbered if we join the standards organization. Right away, I start asking myself some questions.

The first question is, what is the scope? I look at the policy and I look at various documents because I want to know what I am going to be committing to and what assurance I am going to be making.

Some standards organizations are really good. They focus in on what they are going to do. It may be a special interest or a special technology, so I am able to determine what part of the portfolio may be implicated.

Others are more lax and say, "Anything under the sun made by the standard organization will be subject to your assurance." Whether you are participating in that particular standard or not, you may have forty-five days to review that 300-page spec to see if your patents are implicated. You may find out that there is a whole waterfront of your portfolio that may be subject to a licensing commitment, and that commitment may not have a carefully defined scope.

So the first thing I look at is the IP policy. If I can say, "Oh, this is a pretty narrow scope," I feel pretty comfortable with that.

The second thing to consider is the type of reasonable and nondiscriminatory (RAND) or fair, reasonable, and nondiscriminatory (FRAND) assurance that is required.

Is it royalty-free or can I get a royalty for my essential patents? Some standards organizations are royalty-free, and that works pretty well; everybody determines that's what should be done. There are other ways that income is going to come in, other benefits

to being in the standards group and defining standards. If royalty-free, is my company okay with that?

In this case, I find out that this is FRAND with royalties. That's kind of good on the one hand. But then, all of a sudden, a lot of other alarms go off because FRAND or RAND raise a host of issues. "Reasonable" sounds reasonable, but how do you determine what that is; and, if I don't get that right, is somebody from a competition agency or one of the implementers going to tag me with acting either in an antitrust or noncompetitive way? A number of cases have included anti-competition charges, and in some cases agencies have addressed licensor practices. I've got to think my way through that and how to avoid that risk.

If I have an SEP or a collection of SEPs, I've got to figure out how I am going to license them and how am I going to operate in good faith to avoid the competition issue; and, at the same time, if my prospective licensee is not cooperative, am I able to seek an injunction? These are some of the things that are running around in my head.

Regardless of whether it's royalty-free or there's money involved, I then have to think about: For some patents that I consider my crown jewels, those that I put a little star next to in my database of patents, is there a way for me to protect those from a standards licensing assurance? Does the standards IP policy give me an opt-out or an opt-down or some way to say, "You can have an assurance to all of my patents, but not this one or that one. I am going to tell you about this particular patent and this part of the standard that the patent covers that makes it fair for you so you don't get surprised by a patent that I don't want to license, and at the same time I can identify a really key patent for me and how I want that to be excluded"?

I start considering other things. I have a patent portfolio that I license, and I license it globally. I have more or less an open-licensing policy, but I am also becoming troubled by the nondiscrimination requirement because I know that when I am negotiating a license it doesn't always go according to my plan. When I am trying to license, the other party may come in with factors I didn't see. They may have a research effort that I am not aware of that may affect the terms and conditions as well as the royalties I may charge. How does that get sorted out in nondiscrimination?

Am I safe if I give everybody the same license — if I say: "Here's the license. At a certain level, at 1000 units, your royalty goes down; at 10,000 units your rate goes down even more? That applies to everybody," — is that nondiscriminatory or is that discriminatory against smaller companies that end up having to pay more per unit than the large companies?

My head is swimming. I am trying to figure out: does the case law give me any comfort in this? I have case law wonks who I would probably consult.

I am also trying to figure out: What will it mean for my patent if I'm going to divest part of my business or if I'm going to just sell off some of my patents? How does having a SEP affect my transfer? A lot of standards' IP policies, including the one that I have in front of me, say, "If you transfer your patent, the successors are bound" or "the obligation has to continue." Does that mean that implementers can get that FRAND license even if the patent is transferred? How do I do that? How do I make sure that if I transfer the patent and it gets transferred again and again, that the implementers are taken care of and that we comply with the policy we have agreed to?

These are some of the things that the case law is looking at. Basically, I am going to try to figure out the best thing for my client: whether we should or should not participate in the standard; whether there is something in this particular IP policy that is harmful to our business; or how business needs match up against the patent interests that may make this an even more difficult decision.

That's a practitioner's view of the FRAND and SEP issues.

Now I'll turn it over to Renata, who has a more competitive view of FRAND and SEPs.

MS. HESSE: Thanks, Sandy. It's nice to be here and to be speaking on this subject, which is still near and dear to my heart, although maybe in a slightly different way than it used to be.

I thought I'd pick up a little bit on what Sandy was saying, in part because he said, "I look at this and I think, 'Ooh. Are the competition authorities going to come after me, or do I have a competition problem with things?'"

I want to talk a little bit about the notion, which I think many patent lawyers feel, that antitrust is trying to take over the patent landscape and that there is a battle between antitrust and patents for primacy in the context of FRAND. I don't think that's the case, and I don't think that as a general matter you have to worry about a competition authority coming after you. The reason I don't think that is because, in my view, the competition and antitrust laws have always existed to restrain conduct in the IP context that goes beyond the edge. But they live at the edge, they are not right in the middle, and they do not play a core part in almost anything that happens in the IP context.

What you have to think about when you are thinking about FRAND and competition laws, and potentially what is going on with the agencies, is whether or not your conduct is close to the edge or over the edge. To me it's a little bit like what the Supreme Court said about pornography: "[you] know it when [you] see it."⁶

You have to spend time either with your clients if you are an outside lawyer or internally with your businesspeople figuring out why people are doing things and what is driving their behavior — "Why do you want to demand this royalty? Why do you want to charge these two licensees different rates? Why do you want to license at the level of the final product as opposed to at the level of a component part?" — to determine what is driving those decisions. Once you understand that, then you will be able to figure out whether or not the reason behind what is going on is something that maybe a competition authority would be concerned about.

I have been happy to see the courts being actually more engaged. I think that has been the result of a period of time where bilateral negotiations were not working very well for people. During my time at the Antitrust Division, we had a lot of complaints from both sides, complaints about holdup, complaints about holdout. I am not going to go down the rabbit hole of which one of those two things is better or worse in some sense. But people worry a lot about the breakdown of these negotiations, whether or not market power was being exercised, or whether you had licensees who were not living up to their obligation to negotiate in good faith. I think that is exactly where you want to see the courts come in, and you want to see people taking cases to litigation and hearing what the courts have to say about where the boundaries are. I think that has largely been a successful exercise.

The judicial decisions have not been consistent or clean; I think it has been a little messy. There are different kinds of decisions floating around, and different kinds of decisions around the world. As we go through the process of doing something that probably should have been done a long time ago — which is figuring out what people mean when they say, "I commit to license my patents on FRAND terms" — I think that is a healthy process and that the courts play an important role in that.

To me, FRAND has always been about balance, about making sure that both the licensor and the licensee have their needs met. It has never been about ensuring just that a licensee gets to license a patent for a low rate.

⁶ See *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Finding balance is a tricky thing. There is always a tendency to try to push down on one side of the seesaw, so to speak. I think there are many people who believe that I pushed down too far on the side of the seesaw in favor of implementers. There are people who now think that Makan Delrahim, the current Assistant Attorney General for Antitrust may be going too far in the other direction.

To me, the middle is really where we should all meet, and I think there is room in the middle for all of the views, both the views that I have and the views that Makan and Andrew and others have espoused. The key is not to make too much of the differences and to actually try to find the common ground.

I do think it is important to recognize that there are things that happened in the past administration that were not as imbalanced as people like to say. I will just speak briefly about the joint PTO-DOJ statement⁷ because that statement took a huge amount of work to get out of the administration, including a lot of cooperation with the Patent and Trademark Office, and with David Kappos in particular.

Part of that discussion was about exactly what we are talking about: Can we write a statement that takes account of not just the interests of the licensees but also the interests of the licensors if they face a licensee that is unwilling, that is holding out? I think over the drafting of that statement, and I think a fair reading of that statement is that it actually does that. I think that's why David supported it and agreed with it. To me, we shouldn't just look at that and say, "Well, one part of it doesn't meet our standard of what's right." I think the whole of that document actually is quite balanced, and I think David would not have agreed to it had that not been the case.

I want to try to bring people back to the middle if we can. I hope that whatever happens in the enforcement that goes on at the Division happens in a place where we all agree, and that is in a place where you have either licensors or licensees entering into agreements that harm competition. To me, that's a place where Makan Delrahim particularly has said he is looking and where he is interested, and I would support that. If we have unlawful agreements, then those should be rectified.

MR. BOWLER: Thanks.

Dina, do you have any comments on the antitrust policy implications of the settlement that I mentioned at the beginning between Qualcomm and Apple? Is there anything you would like to say about that?

MS. KALLAY: Before I start, two waivers. One is that I am speaking in my own capacity and not on behalf of my company. The other disclosure is that before joining Ericsson I spent six-and-a-half years working at the FTC. I think very highly of that agency. Maybe I'm not objective, but I think they generally get it right. I wanted to note that.

I do not know anything about what is in the Apple-Qualcomm settlement obviously, other than one sentence that I saw in a *Washington Post* story last weekend.⁸

What I do want to talk about is on a higher level, to put in perspective what we have seen in the past five-or-six years or so.

In most of the world's antitrust enforcement agencies — almost all of them — antitrust is about safeguarding the integrity of the competitive process. It is not about assisting specific competitors or taking sides.

⁷ U.S. DEP'T OF JUSTICE & U.S. PATENT & TRADEMARK OFFICE, POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENT SUBJECT TO VOLUNTARY F/RAND COMMITMENTS (2013), <http://www.justice.gov/atr/public/guidelines/290994.pdf>.

⁸ Reed Albergotti, *Apple Privately Lauded Qualcomm's Technology*, WASH. POST, Apr. 20, 2019, at A10.

In the past five years I think we have seen, on the antitrust agency side at least, three either enforcement actions or opportunities to take positions, and these correspond with three specific commercial disputes.

In 2013, when the *Apple v. Samsung* fight⁹ was raging all over the world¹⁰ and made a lot of private practitioners here happy and rich, we saw a few things coming out of the antitrust agencies. We saw the 2013 Policy Statement that Renata mentioned; we saw FTC filings with the International Trade Commission;¹¹ and, through a later closure statement, we learned that there was an investigation of Samsung by the Department of Justice.¹²

In July 2013, the FTC negotiated a consent order with Google Inc. and its subsidiary Motorola Mobility (MMI) resolving charges that the companies engaged in unfair competition by violating the FRAND commitments for some of MMI's SEPs.¹³ That evolved from a commercial bilateral dispute between Apple and MMI.¹⁴

In early 2017, we saw the FTC complaint that had to do with a commercial dispute between Apple and Qualcomm.¹⁵ The question in my mind is whether it is good use of taxpayers' money to use public servants to assist one party in a bilateral commercial dispute. We see technology users taking advantage of "regulatory holdup" to facilitate getting commercial terms that are useful for them, and I think we saw that probably in that settlement. I assume that the pressure from the FTC got them to where they wanted to go; otherwise they wouldn't have settled.

There is the question of what remedy is left in *Apple/Qualcomm*. We saw on MLex shortly after the announcement of the settlement that the main complainant in what used to be a contestable market announced that it was leaving the market. So it is not clear to me what competitive remedy would be still be left that would be effective here, given that it seems like the complainant doesn't want to be in that market anymore.

⁹ *Apple, Inc. v. Samsung Elecs. Co.*, 920 F. Supp. 2d 1079 (N.D. Cal. 2013), *aff'd in part, rev'd in part*, 786 F.3d 983 (Fed. Cir. 2015), *rev'd and remanded*, 137 S. Ct. 429 (2016).

¹⁰ See Florian Mueller, *List of 50+ Apple-Samsung Lawsuits in 10 Countries*, FOSS PATS. (Apr. 28, 2012, 12:04 PM), <http://www.fosspatents.com/2012/04/list-of-50-apple-samsung-lawsuits-in-10.html>.

¹¹ See U.S. Federal Trade Commission, Statement on the Public Interest in the Matter of Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers and Components Thereof, Inv. No. 337-TA-745 (Jun. 6, 2012), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-united-states-international-trade-commission-concerning-certain-wireless-communication/1206ftcwirelesscom.pdf; U.S. Federal Trade Commission, Statement on the Public Interest in the Matter of Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof, Inv. No. 337-TA-752 (Jun. 6, 2012), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-united-states-international-trade-commission-concerning-certain-gaming-and-entertaining/1206ftcgamingconsole.pdf.

¹² Press Release, U.S. Dep't of Justice Office of Pub. Affairs, Statement of the Dep't of Justice Antitrust Div. on Its Decision to Close Its Investigation of Samsung's Use of Its Standards-Essential Patents (Feb. 7, 2014), <https://www.justice.gov/opa/pr/statement-department-justice-antitrust-division-its-decision-close-its-investigation-samsung>.

¹³ *Motorola Mobility L.L.C.*, No. 121-0120, 156 F.T.C. 147 (2013).

¹⁴ See, e.g., *Apple, Inc. v. Motorola Mobility, Inc.*, 886 F. Supp. 2d 1061 (W.D. Wis. 2012).

¹⁵ Complaint, *Federal Trade Commission v. Qualcomm Inc.*, No. 5:17-cv-00220, 2017 WL 242848 (N.D. Cal. Jan. 17, 2017).

That is all I can say without the benefit of knowing anything from the inside. These are my views. Thanks.

QUESTION [Judge Edger Brinkman, Court of The Hague]: I'm not sure whether this is the right moment to ask this question, but do you think that a lot of the problems or arguments that are occurring about holdup and holdout are maybe due to insufficient transparency on what the rates are?

In a lot of the cases that we get about FRAND, the parties immediately say, "This is all confidential," and they don't want to disclose what the rates are for competitors. That may make it difficult for the implementers to know what rates are applied to their competitors, and when they have the feeling, I suppose, that they are being overcharged, then you get a dispute.

Do you think as a panel that there is also a move to more transparency to avoid arguments about anticompetitive or antitrust behavior? If it is transparent, it is very hard to say that it is antitrust, unless the whole rate system that you publish is antitrust.

MR. BOWLER: I don't know who on the panel would like to answer that.

But, coupled with that, I was reading some comments from Judge Kühnen the other day in the *Unwired Planet* appeal,¹⁶ who was talking about the position where patents have been assigned, which is a point that Sandy mentioned, and he called the situation the "Wild West."¹⁷ I think, again, part of his thinking was the transparency point.

Wolrad, would you like to comment?

MR. WALDECK: Happy to give a couple of comments on that.

I think that is a key point underlying some of the recent German judgments, where the courts say you have the obligation as an IP owner when making your FRAND offer to give your proposed licensee the ability to verify whether that offer corresponds to the non-discriminatory prong, as you just said. That means you have to reveal the license agreement that you have entered into.

In particular, in the *IPB v. HTC* decision, the Landgericht Mannheim stated clearly that is necessary "to provide the transparency that may enable the parties to resolve the issue without the need of litigation."¹⁸ That is at least one key point underlying the obligation and explaining the high threshold the German courts imposed.

And, as you mentioned, the *Unwired Planet* decision raised the bar even higher, in that you have to provide also the license agreements of any legal predecessors where such license agreements are still in force as your offer has to also be nondiscriminatory with regard to your legal predecessor's licensing practice. If you have acquired patent portfolio patents, you have to demonstrate to your prospective licensee beforehand—as part of fulfilling the *Huawei* requirements¹⁹ and before you can assert a patent—that your offer meets the nondiscriminatory effect with regard to all license agreements entered into with regard to that patent, which of course poses a lot of problems for patent owners.

It addresses the issue of the Wild West. However, it has some basic problems, e.g., getting access to the commercial terms of patent licenses agreements of legal predecessors.

¹⁶ Oberlandesgericht [OLG][Higher Regional Court] Mar. 22, 2019, 2 U 31/16, https://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2019/2_U_31_16_Teil_Verzichts_und_Schlussurteil_20190322.html (Ger.).

¹⁷ See Mathieu Klos, "No More Wild West" in *SEP Transfer, Rules Düsseldorf Patent Court*, JUVE PAT. (Feb. 22, 2019), <https://www.juve-patent.com/news-and-stories/cases/no-more-wild-west-in-sep-transfer-rules-duesseldorf-patent-court/>.

¹⁸ See Landgericht[LG][Mannheim Regional Court] Sep. 28, 2018, 7 O 165/16 (Ger.).

¹⁹ See Case C-170/13, *Huawei Techs. Co. v. ZTE Corp.*, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013CJ0170&from=EN> (Jul. 16, 2015).

They may have been lump-sum agreements that have already been paid, so the value would not be something an acquirer of a patent would normally be informed of as it would be irrelevant for him. If you have a mixed portfolio which is built from numerous patents of former licensees, you can imagine how many license agreements you may have to present.

And there are a lot of questions that can be raised about the potential problem of price information exchange between competitors also.

MR. BOWLER: I guess also a question of confidentiality as well in some respects.

QUESTION [Jelle Drok, Freshfields]: I have a follow-on question. Do you think it works both ways, that also the licensee has to show what it pays other patentees for similar technology?

MR. WALDECK: I don't know whether there is an obligation in that regard.

First, at least the German courts have applied a very strict application so far of the *Huawei* requirement. If the FRAND requirement is met by the patent owner, a prospective licensee has no obligation to come back except for saying, "I want to take a FRAND license." The decisions we have seen so far do not get to that aspect because the recent decisions rejected the license offer as not meeting FRAND based on the nondiscriminatory prong and found the patent owner had not met its burden.²⁰

An implementer has to show that what is offered is not a FRAND rate. However, its own license agreements usually cannot inform on the nondiscriminatory prong as they relate to different patent portfolios. However, maybe apart from that, they can serve to demonstrate that a requested royalty rate is not FRAND when it is higher than other comparable license agreements.

This is a point where I think there is room for that. Where the implementer has the obligation to provide evidence for saying the offer is not fair and reasonable, using the license agreements for comparative technology would be one way to do that.

MR. LAAKKONEN: Actually, you get a bonus, I think. You get two answers for the price of one question because David Por has a comment, which may also answer your question.

MR. POR: Actually, no. A couple of comments.

On the latter point, I want to mention that in the French *Conversant v. LG* case there was some discussion on whether the defendant was to produce comparable license agreements and the court said it didn't have to do that.²¹

The other point I wanted to make, which is maybe more substantial, is that I very much agree that transparency would theoretically be the one thing that could improve the market functioning and would decrease litigation. Decreasing litigation is the goal, and that is probably what Judge Kühnen was after in those comments he made as well.

I wonder whether in the end we are not achieving the opposite result by requiring this transparency. As a matter of fact, you cannot typically disclose those comparable license agreements outside the context of litigation. In the context of litigation, you would be able to put those things in under relevant protective orders. But oftentimes the reality is that you cannot provide them outside of the context of actual pending litigation.

I query whether in trying to improve market transparency and in trying to achieve less litigation, we are not in fact encouraging more litigation because of confidentiality issues.

²⁰ See generally Matthias Leistner, *FRAND Patents in Europe in the Post-Huawei Era: A Recent Report from Germany*, in SEPS, SSOs AND FRAND – ASIAN AND GLOBAL PERSPECTIVES ON FOSTERING INNOVATION IN INTERCONNECTIVITY (Reto Hilty & Kung-Chung Liu eds., forthcoming 2019), <https://ssrn.com/abstract=3278769>.

²¹ See Cour d'appel[CA][regional court of appeal] Paris, 1e ch., Apr. 16, 2019, 15/17037.

QUESTIONER [Judge Brinkman]: Maybe I can pick up on that also. In principle, I tend to agree that transparency works both ways, but you could also argue that the moment everybody is transparent and all the license agreements are transparent, then you also know what the licensee is going to pay to other SEP owners.

Just going on from the point of the German courts requiring information on the FRANDness of the SEP owner's offer upfront, it is an interpretation of the *Huawei* decision, and you could argue a different way there, too. It will ultimately be up to the Bundesgerichtshof, and maybe they will ask questions to the CJEU again for clarification of exactly what is meant by the certain paragraph about what information a SEP owner must provide with its first offer. It remains to be seen whether the system that was worked out in Germany will hold up in the near future.

In principle, I think a way out would be to just simply advertise what are the licenses that you can get, what types of licenses, and just say, "I have turnover *X*, *Y*, or *Z*, and that means rate *X*, *Y*, and *Z*," to make things easier. Then you would immediately know if one SEP owner is asking too much by comparing that to the other SEP owner's rate.

MR. BOWLER: That strips everything back to the rates, but of course the other terms of the license are still important and may need to be tweaked between each licensee. Steven had a question.

MR. GEISZLER: First, a disclaimer: I work for Huawei, which obviously has some key cases pending. I am only going to speak on my own behalf, not as Huawei the company or the party to the ongoing litigation.

One thing I want to address on this idea of transparency, of which I'm a big fan, is a practical limitation that we are going to encounter, what you just foreshadowed: Once you get into the litigation end, which is more of what I do (I'm the litigation counsel of Huawei for the United States; I'm not the licensing counsel) and you try to unpack these things — and let's just assume that we have confidentiality under a protective order of the court — and you start looking at these various licenses that are supposed to be comparable, the reality is they often include many things beyond just someone's 3G portfolio or Long-Term Evolution (LTE) portfolio or whatever the standard is that you are dealing with.

The other reality is my licensing counterparts — not necessarily in Huawei but just talking about in the relevant industries generally — are very, very smart people, and they know that transparency is coming. And for various motivations, which may be good motivations or may be bad motivations — I don't want to comment on that — the reality is the licensing people are very good at obscuring the actual valuation and rates.

I have been in multiple situations where everyone had agreed that there are past license agreements that are relevant, but it is for all practical purposes impossible, no matter how much money you want to spend on an economist, to glean from those past agreements what the applicable rate is.

MR. BLOCK: I want to respond to the question about the transparency and advertising your rates. This is something that as a practitioner I wonder about. I am also speaking for myself and not for IBM.

If a patent holder says, "I'm licensing at 1%, and it has been out there for a couple of years, and I need access to those patents," is there some presumption that that rate is legitimate because it is out there, it was publicized, and I and others didn't object? I think there may be some U.S. cases that actually discuss that. This transparency may help the implementer and it may also help the patent holder, but I'd just say be cognizant of what effect that might have.

MR. LAAKKONEN: Sorry. I should have probably added that disclaimer for everyone at the beginning.

I have a follow-up question on the transparency issues, and this is for the whole panel and audience. If all of the licenses that you are looking at are gloriously transparent and you can see everything and there are no confidentiality provisions, why would you not still think that maybe the rates that you see are unfair, they're too high? I guess the question is, why is transparency so absolutely critical?

MS. HESSE: I think it is transparency across negotiations and across licensors and licensees, right? There are lots of different ways of thinking about this, and I think the lack of transparency has been a bugaboo of this area for a long time.

People have tried to think of ways to deal with this problem. Patent pools in a funny way are not a way of addressing transparency exactly, but they are a way of getting over part of this problem, which is how do you value patents and how do you get licenses done on terms that are acceptable for both the patent holder and the licensee.

We issued a Business Review Letter on Intellectual Property Exchange International (IPXI) when I was at the Division, which was a novel but unsuccessful attempt to bundle patents into certain uses and then sell those bundles on more or less an exchange, as a way of trying to set the market value for the IP that was needed for a particular implementation.²² I thought that was a clever idea — not free of risk, but free enough of risk that we were able to issue a neutral Business Review Letter on that.

People have tried to figure out ways to reassure people in the context of a negotiation that they are getting a reasonable deal. There is a lot more in that than just price. There are the other terms too. There is also trust and what you think about your counterparty; do you think they are actually trying to negotiate with you fairly?

It is a complicated problem that I am not sure transparency itself will resolve.

MR. BOWLER: What about having the ND bit of FRAND as hard-edged so that you have to have the same rates?

MS. HESSE: I am not a fan of that. I think you have to accept that licensees are different, that they have different volume needs, that there are all sorts of things that might make a license vary between one licensee or another, at least some. I think making it impossible to vary based on licensees is not a workable solution.

QUESTION [Eeva Hakoranta, Nokia]: If I may, I would like to build on that. I was the head of Nokia's licensing for the past six years, and I am now in a much broader role and no longer doing that long-haul flying constantly with my team and talking to all of the licensees.

On transparency — Ari, your question resonates; and, Renata, a lot of what you said resonates as well—my experience at the negotiating table tells me that every negotiation is an individual negotiation. There are always individual needs. It is always individualized. I can also relate to the judges who would really like to have that transparency because it would make their task much easier. I can assure you that I have not been in one single negotiation where the licensee wouldn't like to get a better deal than everybody else. So that is always there.

My concern with this great interest in transparency is that it will just skew everything down, rather than help, because the same complaints will continue to be that it's still unfair, it's still not right, and we will not be able to provide the full transparency because there are always so many different terms in the agreements. That's what I wanted to bring to this discussion, the real-life licensing.

²² Letter from William J. Baer, Assistant Attorney Gen., U.S. Dep't of Justice Antitrust Div., to Garrard R. Beene, Sullivan & Cromwell LLP (Mar. 26, 2013), <https://www.justice.gov/sites/default/files/atr/legacy/2013/03/28/295151.pdf>.

When we talk about court cases, when we talk about law, when we talk about regulators, we always like to have theoretical and clean resolutions. But we are looking at things where we do not have transparency and where I don't think transparency would help.

My experience tells me that everybody who enters into a licensing negotiation is fully aware of the rates. They have negotiated with a lot of the other big players and, even if there are nondisclosure agreements, the rates are pretty much known to everybody who needs to take a license.

I am questioning whether there is a real need for transparency or whether it is just rhetoric that people use a lot in the FRAND context.

MR. BOWLER: I think Dina has a comment.

MS. KALLAY: Yes. While we're on transparency, I thought it would be a good opportunity to remind us that there is broad agreement that negotiating FRAND is a two-way street. We heard this morning some good thoughts about balance.

When you speak of transparency you probably should keep in mind that it would be good to have some transparency on behalf of the infringers or technology users. Why don't technology users reach out to companies that they know are infringing their technology and tell them that they would like to seek a license, maybe give some truthful information about to what extent they are using the technology, their sales, etc. Transparency is a two-way street, don't forget, and I think you should definitely remember that when it comes to the technology users as well.

MR. BOWLER: Justin, did you want to say something?

QUESTION [Justin Hughes, Loyola Law School, Los Angeles]: Just an observation on which I'd be interested in the panel's views. The relationship governed by FRAND is not one that only concerns the licensor and licensee. The interests of fairness and reasonableness also directly concern consumers who ultimately have to pay their bills. If regulators, in particular, are to keep an eye on markets to make sure that the charges that are being imposed are not unfair or unreasonable to consumers, then I would think transparency also has a role to play in that, I would be interested in comments on that.

MS. HESSE: Seeing no one else wants to take the lead, I will start the discussion.

I guess part of the issue is what regulator you are talking about. I think the antitrust authorities certainly have been committed to ensuring that competitive harm isn't occurring that results then in harm to the downstream consumers who buy the good. A core part of any analysis that goes into all of their work, including the work in the IP context, is a fear that if royalty rates are pushed upward, the consumers will end up paying the bill for that.

Also, if people are thinking about incorporating technology and they do not know what the royalty rate is, maybe they will not incorporate that technology because they fear that the rate will be too high, and then the consumers get inferior products downstream.

On the other hand, I do not think the role of the regulator is to figure out what a "fair price" is. My view has always been that it is the role of the antitrust authorities at least to try to make sure that competition and competitive markets are setting that price. That is one of the reasons why I like the IPXI idea. It is sort of a cool way of getting market pricing into the patent world, which is a very challenging thing to do.

So I take your point, but I am not sure that we can look to the competition and antitrust authorities for that kind of true price setting, at least in the United States, to determine "Is this a fair price?" I think the authorities will shirk from that question.

MR. BOWLER: Those comments segue into another discussion we wanted to have, which is some courts are obviously moving toward setting global FRAND terms —

e.g., the U.K. court setting the FRAND rate in China,²³ which would impact what consumers pay in China—and there is a question as to whether that is going too far or whether that is a sensible thing to do because generally what happens in the world is that companies negotiate global licenses.

But should courts be doing that, and effectively saying that if the implementer does not accept that global FRAND license, then it gets enjoined, which then has an impact on consumers in jurisdictions outside that of the court that is taking that approach? And, following on from that, is there some sort of impetus to then race to that court, either from an implementer's point of view or perhaps, as we're seeing so far, from a patent owner's point of view?

Did you want to say anything on this, Jill?

MS. GE: Yes. I think we know that FRAND disputes have always been a mess, but in the past it has been a balanced mess. Now you suddenly have one court saying that "You can come to the United Kingdom and we'll give you a global license," with no regard to private negotiations the parties will have, and saying, "If you don't accept the global FRAND license, you will be enjoined in the United Kingdom."

I don't know whether form over substance is the right way to look at this, but still this is international coercion. The balance is broken if every court is trying to do that. I am not sure if a Chinese court would be able to do that, but it is possible. And what about other courts?

FRAND licensing allows the parties themselves to negotiate. The beauty of private negotiation is that parties have the necessary information to the extent that is needed for them to reach a license.

I would say that litigation is part of the industry process because to some extent they probably would have to test the essentiality, validity, and infringement, and to have these comparable licenses be discussed in the context of litigation. Why can't we just accept that?

At the end of the day, I am curious as to what extent the license adjudicated by a court will be adopted by the parties in their settlement agreement. Could courts accept the fact that parties will negotiate themselves? It is probably a better approach to allow private parties in the context of FRAND to reach the outcome that is both fair and reasonable and balanced for the implementers as well as for the patent owners. By their nature, FRAND terms are supposed to have wide latitude, and that gives parties the freedom to negotiate. But once you have international coercion, where do they then have freedom?

MR. GEISZLER: Again, a disclaimer that I am talking in my individual capacity. Assuming I were speaking on behalf of Huawei, I would have to give you a disclaimer: My personal jurisdiction in my role at Huawei is U.S.-only. I am not on the team in the *Unwired Planet* case. My colleagues are, and I know them well, so I am very familiar with the U.K. case and I am familiar with the recent German court opinion, but the *Unwired Planet* case is outside of my U.S. jurisdiction.

I live in Dallas, Texas. My office is in Plano. My home judicial jurisdiction is the Eastern District of Texas.

In the Eastern District of Texas, not too long ago we had a related case, actually a related company, *PanOptis v. Huawei*. That received some press, but I've not really heard people talk about it too much here. In this case, Chief Judge Gilstrap of the Eastern District of Texas declined to rule on a global rate because he had already decided that he was a judge in a court of limited jurisdiction, so he would happily rule on U.S. patents and, if

²³ See *Huawei Technologies Co. v Conversant Wireless Licensing S.A.R.L.* [2019] EWCA (Civ) 38.

possible, if necessary, might address a U.S. rate. However, in this case the plaintiff's offer was non-segregable; it could not be broken into a U.S.-only rate. Therefore, because Chief Judge Gilstrap sat in limited jurisdiction, he declined to render an opinion on the global rate.²⁴

I am a little partial because that is my home jurisdiction, it's where ninety-plus percent of my work is done. But my example circles back to the idea of the global race to the courthouse. Perhaps we are on the cusp of that race; but maybe we're not.

I think it really is going to boil down to whether courts are going to have a perspective of "global licensing." If you look at it as global licensing, on that end of the spectrum, then you might think, "Well, maybe one person or one body should make the decision."

However, if you go back to the very beginning of Mr. Block's presentation, his client has patents and has intellectual property rights. Remember, patents are jurisdictional; they have limited jurisdiction. If ultimately we are talking about the licensing of intellectual property rights that are by themselves limited in jurisdiction, then it seems that at least one economic consideration would be: What jurisdictions are most key in terms of the manufacturing or sales of the products at issue; and also, what jurisdictions are home to and are the proper venues for the actual underlying patent assets that are being talked about?

That means there are many stakeholders — the U.S. courts, the Chinese courts, the European courts, the U.K. courts — all of whom have interests either on economic grounds or on just the legal grounds (i.e., the basic idea of who is responsible for the patents of their jurisdictions). All of those people have a stake in what is going on.

I would hope — just personally again, being a Texan and being proud of my home court—that Judge Gilstrap's restraint is something that will resonate as we continue to work through what I think all of us will admit is a very complicated issue. It is very difficult and there is not a simple, easy solution. But, like I said, I hope Judge Gilstrap's ruling will resonate.

MS. HESSE: I have a question. I completely agree that patents are territorial, so I've always wondered, how can you impose a global license when you don't actually have jurisdiction over some of the patents? If you are a U.S. court, you have jurisdiction over the U.S. patents; if you are a U.K. court, you have jurisdiction over the U.K. patents. That completely makes sense.

But one of the complaints you always hear, both from licensees and from licensors, is: "Oh, my God, in order to get my patent enforced I've got to go to twenty different jurisdictions"; or a licensee says, "This patent holder is dragging me all over the world; I'm litigating everywhere."

How do you balance out those two problems, and is arbitration the answer?

MR. GEISZLER: Again, personally speaking, I can't imagine very many ICT²⁵ companies, even companies that make a lot of money, that want to litigate in twenty jurisdictions.

MR. POR: Unfortunately. [Laughter]

MR. GEISZLER: I'm a former law partner, so I know the revenue that you would get from having such clients litigating in twenty jurisdictions simultaneously would be great. I get that counterargument quite a bit.

Again, there are many jurisdictions where there may be a set of patents that are relevant but account for far less than even 1% of the sales that are being spoken of. In fact,

²⁴ See *Optis Wireless Tech., L.L.C. v. Huawei Techs. Co.*, No. 2:17-CV-00123-JRG-RSP, 2018 WL 3375192, at *8 (E.D. Tex. Jul. 11, 2018).

²⁵ Information and communications technology.

that happens quite frequently. So, the question is: How much effect should a jurisdiction that is covering less than 1% of the relevant sales have versus jurisdictions that may be covering 30, 40, 50% of relevant manufacturing or sales activities allegedly covered by the patents?

My point is — although you're right, you are always going to find an exception—I think the practical reality is most companies are not going to want to fight in twenty different jurisdictions simultaneously, despite having patents in all twenty jurisdictions.

But I think there are some key jurisdictions — the United States; Europe, whether the United Kingdom remains part of that or separate; China; Japan; there are several—but at the end of the day I don't think it comes down to the having litigation in twenty jurisdictions for most practical purposes.

MS. HESSE: I was exaggerating to make a point.

MR. GEISZLER: Patent portfolios often do cover twenty-plus jurisdictions, so I have heard that counterargument many times.

MS. HESSE: But the idea of litigating in the most important jurisdictions, as you are saying, is really in the hands of the patent holder who can decide which are the places where the value of his portfolio is highest and just litigate in those places.

MR. GEISZLER: Sure.

MR. BOWLER: Arguably, *Unwired Planet* has just reversed the burden on that, so now you just pay everywhere and the implementer has to knock out the patents in each jurisdiction.

MS. HESSE: Right, right. I understand.

MR. GEISZLER: Since we are in New York, a term you hear a lot on Wall Street is “price discovery.” Once you have some key data points — you don't need to have twenty, but you can have three, four, five data points — you would have enough input so that both sides would then know what the pricing should be.

MR. POR: Coming to this from a European perspective, I think the divide is getting ever bigger. Just a few weeks ago, the Paris Court of Appeals in *Conversant/LG* said, “Even if both parties ask me to set a FRAND rate, I am not going to do it unless I find one patent to be valid and infringed,” which they didn't find in that case.

On the other hand, on the other side of the Channel, London strikes me as being something like a new part of the Eastern District of Texas, certainly in these cases. Everybody is running there, and the British courts appear to be willing to set global FRAND rates, literally, no matter what.

We do need to take into account the fact that the system should not be encouraging parties to litigate in twenty countries, unfortunately. We should be taking that into account. But then, isn't a solution that, wherever the question is litigated (e.g., in a U.K. court), they would need to take into account that, as far as the U.S. economic portion of that litigation is concerned, they are going to apply the principles of FRAND that have come out of the U.S. courts, and, as far as the Chinese economic portion of whatever that litigation covers is concerned, shouldn't they plug in Chinese law?

We all know that jurisdiction and applicable law are two different issues, and I don't think we should mix those two things up in this particular context.

MR. WALDECK: I would like to echo a comment Steven made. You said that once you get a certain set of data points, then you would assume that probably in the other jurisdiction you would get similar results and so you stop litigation.

That is what we are seeing in non-standard-essential patent cases throughout Europe. If you assert a patent and want to enforce it throughout Europe, you go to two-or-three key jurisdictions and, if you get the same results, usually the litigation is then settled. Under the European Patent Convention, that license or settlement is then also enforceable

in all the other EPC countries. Once you have seen the key decisions coming out the same way, the assumption is the others would decide in the same way.

If you step back and look at the litigation for FRAND patents from that perspective, it would speak for a country-by-country effect; that you have to litigate and get a FRAND rate for two-or-three countries, or decisions from different courts, which gives you also some balance, some more nuance maybe, than merely one court applying rigidly one principle and probably then reaching a settlement.

What is the drawback? As an implementer, if you are a really staunch person wanting to hold out, you can say, "Let me get sued in every country, and as long as we don't have fee shifting, that is more burdensome for you than for me." So I think that is a big issue.

What happens if you, after a certain reasonable number of decisions, do not accept the rate? Should you be then penalized by paying a higher cost or fee to get a settlement? I think there has to be some kind of balance, but I believe we are all struggling with how that is best achieved.

Renata, to your point regarding jurisdiction, if I as an implementer want to avoid injunctive relief in Germany, I have to show that I made a FRAND offer; and, if the court says a global license is a FRAND offer, I have to make a FRAND offer for a global portfolio license in order to avoid injunctive relief. So the jurisdictional aspect comes in through the back door. There are some decisions that have held that in that context a global license is appropriate, but that has not yet been decided by the Federal Supreme Court.²⁶

MS. GE: Speaking of litigating in twenty jurisdictions, Ari shared with me a very interesting analogy yesterday. If they are litigating in twenty different jurisdictions, it is like two drunk people punching each other. Perhaps we can admit that in a FRAND dispute the two parties need to punch each other, some of the issues do have to be litigated, but still we want them to do something in a more sober way, not to litigate in twenty countries.

My view is that litigation cost may be an inherent part of the transaction cost of FRAND disputes; but when you look at holdout/holdup transactions, costs are also part of the consideration.

But what if you have one court now saying some Chinese company has to litigate in a jurisdiction with which they probably are unfamiliar, and one where it is, compared to China, much more expensive, and that also has the loser-pay rule? Does that add to the litigation cost? Will that be some sort of court-aided holdup?

MS. KALLAY: I would say the *Unwired Planet* court, at both first instance and on appeal, ruled that a willing licensor and a licensee acting rationally and reasonably could agree on a worldwide license.

I think that is absolutely true. Anybody who is in this business knows that if you are in charge of licensing and your CEO sends you to negotiate a license from a company, if you come back and he asks you, "Well, did you do it?" and you say, "Yes, I negotiated a license for France," you would be fired immediately. Your job is to get "patent peace" for your company. That is the efficient result.

This ties into being willing or unwilling. I think a willing technology user is one that agrees to a global adjudication of the dispute. If you are looking for tactics to avoid a global adjudication of the dispute, that is probably an indicator that you are an unwilling technology user.

QUESTIONER [Judge Brinkman]: I want to weigh in on some of the comments about litigating and the costs of litigating and the jurisdiction problems.

²⁶ See, e.g., Landgericht[LG][Düsseldorf Regional Court] Mar. 31, 2016, 4a O 73/14 (Ger.).

One of the problems, of course, is that in a typical FRAND case you may only be litigating one or a few patents. It is hard for the courts to decide on the whole portfolio, and they are unlikely to do that.

In my personal view, I am not sure whether there is a big role for the courts to play in assessing what is a reasonable royalty rate. I think it is more on the margins, whether one or the other party is being unwilling in the negotiations. As we already heard several times today — which was kind of revealing for me also — it is not just the royalty rate, but there are also a lot of other terms in the contract. The parties involved might not like having a court decide what those other terms are going to be and at the end maybe get something out of a drawer of what the court thinks is right. But when you are litigating in Europe, getting a stipulated global license that includes what the rate is supposed to be in China and other countries doesn't seem to me the way it should go.

Also, there are only a few of the patents that you can litigate, so the strain on the court system is enormous. Litigation that involves maybe only ten patents from a portfolio is a lot of work for a court. Then, also having to look at all the FRAND issues and see whether the licensee or the licensor is acting in good or bad faith and then try to settle the FRAND royalty is not the way I think it should go. But that is again my personal opinion.

MR. BOWLER: We have a few minutes left, so we can take a couple of questions.

QUESTION [Jonas Heitto, Nokia]: I want to make one observation on the German courts requiring a global license. It is not that the courts thought this was the best way to conduct it, but they were actually observing an established customary practice. This was confirmed in at least in one judgment in which the court said, "We are not trying to impose certain kinds of licenses on the industry, but we are just facilitating that the parties conclude the kind of licenses that they otherwise would need." So there is the authority of long practice, a certain duration, and parties consensually entering into these transactions so over time they will observe certain practices, that may become normative.

MR. WALDECK: Just as a side point, in that particular case which you are referring to there was no evidence of such practice in the proceedings. In fact, in that particular case there were two license agreements because the parent company and SEP holder split the portfolio into two, which defeated their own argument against a global license. They split the portfolio into two in order to have a German entity assert the German portfolio. Just for full disclosure.

QUESTIONER [Mr. Heitto]: I agree it is dependent on the evidence. But they said if there is such evidence, then there is a global customer license.

MR. BOWLER: Does anyone else have any other final comments, either from the panel or the audience?

QUESTION [Annsley Merelle Ward, Bristows, London]: I am just trying to parse through what the problems are. We talked about transparency, and then we were touching on basically, if I can summarize, why the U.K. court is having a land grab with FRAND determinations.

If the problem is that we want to take into consideration the U.S. market, the Chinese market, etc., and we want their laws to be applied, is there ever going to be scope for having some sort of international tribunal or amendment to the ETSI IPR policy or other SSO policies to try to get more of an international consensus with judges from those main jurisdictions? Is that ever going to be possible? Because that is the solution, is it not? Otherwise, I can't see what the solution is. I would be interested to hear ideas from the panel.

MR. POR: Are you encouraging more multilateral cooperation in the current world? That seems to me to be a challenge, right?

QUESTIONER: [Ms. Ward]: Everything is a challenge at the moment, but we have to find some solutions. Otherwise, we are going to be back here every year talking about these same issues. So what is the solution?

MR. BOWLER: I do agree that one solution would be to sort this out at the standard-setting level. Whether that is possible or not, I don't know. Probably not.

QUESTION [Ms. Hakoranta]: I am speaking in my personal capacity because these are big questions. I have been speaking on panels and talking to people about these issues. I think that we are not going to see one body anywhere in the world that is going to be the forum for resolving all of the FRAND disputes. I don't think that any sovereign country would agree to give that power to another state. Therefore, I think we need to look for a multitude of solutions, a suite of solutions, which ultimately the two parties will agree to themselves.

At Nokia we have been working with arbitration. We have had FRAND arbitrations and we have some good experiences, some of them not so good, but it works. Then you avoid multijurisdictional litigation in twenty different jurisdictions. Arbitration can be much more efficient, but not everybody opts for it, and it always needs consent from both parties.

I would echo very much the views of the various panelists here, and end by saying that if there's a will, there's a way, and FRAND licensing is no more difficult than that.

MR. LAAKKONEN: I think Claudia has a comment and Judge Brinkman also has one more as well.

QUESTION [Claudia Tapia, Ericsson]: In my personal capacity I wanted to share my experience with you. You were talking about evidence. I cannot tell you the evidence of everyone, but I can just tell you about my experience.

I have been for some years at Ericsson, and before that I was for five years at BlackBerry, involved in litigation both as a licensee and as a licensor. Most of the cases involve patent litigation and usually we reach a settlement. I have not seen any single case where a licensee wanted to have a license only for Germany. All of the companies that manufacture in several countries want to have a worldwide license. Ericsson has 49,000 patents, we have spent a lot of money on research and innovation so we will have new patents in the future, and the licensees want to have freedom to operate. That makes sense for them and that makes sense for us too. That is why we will make cross-licenses. We have worldwide patent portfolios and this is what we see.

Obviously, there might be exceptional circumstances where you have one company just producing in one country, but in all fields I can tell you that is extremely exceptional.

MR. LAAKKONEN: One final comment from Judge Brinkman. This will, I'm afraid, have to be the last word on the subject because our time is up.

QUESTIONER [Judge Brinkman]: Being a judge, I'm used to having the last word. [Laughter]

An international tribunal would be great for resolving FRAND disputes. That is one of the things that I have also been suggesting. The tribunal could be incorporated into the SDO itself. The SDO could also provide an arbitration/mediation facility; or require that the parties first have to go through arbitration or mediation, and then, if they cannot resolve the case, go to the tribunal.

I think that might also be antitrust-proof because making it mandatory to go to arbitration will be difficult due to competition law issues. I think something like that would enable the SDO to set the standard and also set the standard for arbitration.

MR. BOWLER: Thank you very much. We'd better scarper now.

Thank you very much to everyone for coming along today. Also, Ari and I would like to thank the panelists as well. Thank you.