

Session 1D

Emily C. & John E. Hansen Intellectual Property Institute

**TWENTY-SEVENTH ANNUAL CONFERENCE
INTERNATIONAL INTELLECTUAL PROPERTY
LAW & POLICY**

*Fordham University School of Law
Skadden Conference Center, Costantino A/B
150 West 62nd Street
New York, New York
Friday, April 26, 2019 – 9:00 a.m.*

SESSION 1: PLENARY SESSIONS
1D. Views from Judicial Decision Makers

Moderator:

Hugh C. Hansen

Fordham University School of Law, New York

Panelists:

Annabelle Bennett

*Former Judge of the Federal Court of Australia, Sydney;
Bond University, Robina, Queensland*

Tobias Bremi

Swiss Federal Patent Court, St. Gallen; Isler & Pedrazzini AG, Zurich

Edger F. Brinkman

Court of The Hague, The Hague

Klaus Grabinski

Federal Court of Justice, Karlsruhe

Lennie Hoffmann

*Former Second Senior Lord of Appeal in Ordinary;
Queen Mary University of London, London*

Simon Holzer

*Swiss Federal Patent Court, St. Gallen;
Meyerlustenberger Lachenal AG, Zurich*

Gordon Humphreys

European Union Intellectual Property Office, Alicante

Session 1D

Robin Jacob

*Former Lord Justice of Appeal of the Court of Appeal, London;
Faculty of Laws, University College London, London*

Rian Kalden

Court of Appeal of The Hague, The Hague

Pierre Leval

U.S. Court of Appeals for the Second Circuit, New York

Maria Eugénia Martins de Nazaré Ribeiro

Former Judge of the General Court of the European Union, Luxembourg

Paul Michel

*Former Chief Judge, U.S. Court of Appeals for the Federal Circuit,
Washington, D.C.*

Yoshiaki Shibata

Tokyo District Court, 46th Division, Tokyo

Hans van Walderveen

District Court The Hague, The Hague

* * *

PROF. HANSEN: Good morning. This is day two.

How was day one, pretty good? This is where you overwhelmingly stand and applaud. [Applause]

You have before you, judges from all around the world, and this is where we get to know them a little better. It really looks like they're on trial. Look at their faces. [Laughter]

There are two British judges who couldn't make it this year, but they call this little session "ritual humiliation." I don't know where that comes from. We're just trying to get to know them a little better. There will be an opportunity for you to ask questions as well.

Let's get started. In random order, Robin Jacob is first.

PROF. JACOB: Good morning, everybody.

PROF. HANSEN: Stop! What are you doing? You don't just start speaking. Do you know where you are? The presumptiveness of these judges is really kind of amazing. I ask the questions. You provide the answers. I should have put this in the rule book.

PROF. JACOB: All right.

PROF. HANSEN: How are you, Robin?

PROF. JACOB: I'm fine, thank you very much, all the better for being insulted.

PROF. HANSEN: You have done an amazing number of things in your career.

You were the Treasurer of Gray's Inn. What type of job is that?

PROF. JACOB: It's the medieval name for the boss of an organization. We don't call them CEOs and silly things like that. Obviously, the man who's got the money is the

Session 1D

man in charge, the Treasurer. And what does the Treasurer do? What does Gray's Inn do? We teach students and we have nice dinners.

PROF. HANSEN: So this supplemented your income?

PROF. JACOB: No, there's no money in it.

PROF. HANSEN: I know. By the way, happy birthday.

PROF. JACOB: Thank you very much.

PROF. HANSEN: And, by coincidence, it's World Intellectual Property Day; correct?

PROF. JACOB: Correct.

PROF. HANSEN: What does World Intellectual Property Day mean to you?

PROF. JACOB: Bugger off. [Laughter]

PROF. HANSEN: Does anyone on the panel have a question for Robin?

PROF. JACOB: Stop calling us a panel. A collection of judges is known as a "wisdom of judges." [Laughter]

PROF. HANSEN: Not so far. [Laughter]

A little after the Conference last year, the United Kingdom decided to join the Unified Patent Court (UPC), right?

PROF. JACOB: Yes.

PROF. HANSEN: What's happening with that?

PROF. JACOB: It's still on at the moment. I went to a meeting in Milan a couple of weeks ago. We've got plans for what to do about advertising for judges and other things. Unless it becomes impossible, it will happen. "Impossible" may mean if there's—

PROF. HANSEN: So this is going to happen whether there's Brexit or not?

PROF. JACOB: Well, it depends on the kind of Brexit partly (if there is a Brexit) and it also depends on the German Constitutional Court, but my bet is we will find there will be such a court and you will have it on the program next year. It's this year or not at all.

PROF. HANSEN: You started it all, didn't you?

PROF. JACOB: No. That was started a long, long time before I knew anything about it.

PROF. HANSEN: You've gotten very dramatic in your old age, Robin.

PROF. JACOB: Yes. I find that showing off helps. You've been doing that for years.

PROF. HANSEN: My manservant wasn't here today.

PROF. JACOB: I don't blame him.

PROF. HANSEN: Which of all the areas of IP do you think is in the most trouble today?

PROF. JACOB: Patents.

PROF. HANSEN: Why?

PROF. JACOB: That is what I would like to discuss. Have you heard of the expression "creative industries?" People use it all the time to mean people who make films and write things. Why? People who make new medicines, make new telephones, aren't they part of the creative industries? Why is it that patents have a bad image and other IP rights—copyright and trademarks—have a good image? Copyright protection and trademark protection have advanced and continue to advance, beyond probably what many think is a rational amount. But patents are being beaten up on all the time just because they protect new things. I don't get it. But I would love to know what has happened about the image of the patent system.

Session 1D

PROF. HANSEN: One problem with the image of the patent system is the patent lawyers.

PROF. JACOB: Only in the United States.

PROF. HANSEN: What you have is patent lawyers who believe so much in patents they don't have a need to explain it—it's like "Why are you a Catholic, why are you this, or anything else?" "Of course I am, I'm Spanish"—and they never thought through the process of why we needed this thing.

And then, you have people on the other side, and all they think about is why we don't need it. Social media makes patents the bad guys—drugs are too expensive, there's this.

The patent system in your country and other countries are doing what? Free riding on the U.S. consumer. You buy it and you drive down the prices. If it wasn't for the U.S. consumer, pharma wouldn't have enough money to do what it does.

You never thought of it that way, did you?

PROF. JACOB: I thought Europe was quite big. Maybe I'm wrong. I thought Europe was actually a bigger market than the United States.

PROF. HANSEN: It is a bigger market, but it's price-controlled because the government buys pharmaceuticals and says, "We're only going to pay this amount of money." The problem is all over the place with patents because of that. You don't have that situation with copyright and you don't have that with trademarks.

So there are a lot of things with regard to patents that make it more difficult. It's unfortunate, but patent people are going to have start speaking up. Why? We've done all these great things.

PROF. JACOB: There's nothing new about the attacks on the patent system. The abolitionists of the 19th century were even stronger in their voices than the common voice is now. They abolished patents in Holland. The abolitionists were against patents in 1860. Jeremy Bentham had to speak in favor of patents in 1792.

PROF. HANSEN: Robin, this is getting pathetic. We have the current situation. Let's try not to look for excuses or anything else. You know, look in the mirror every once in a while—not you, because you are an advocate for it. But it's difficult to find public advocates of the patent system. That's what we need more of.

Do you have anything final to say?

PROF. JACOB: No.

PROF. HANSEN: Okay.

Gordon, why does a nice boy like you, an English boy, spend your whole life in Europe? What happened there?

MR. HUMPHREYS: I started off in maritime law and my ship went adrift and went off-course and ended up in Alicante.

PROF. HANSEN: No. Before that you were over there. Did your family move over there?

MR. HUMPHREYS: No. I moved over because, funnily enough, one of the English Law Lords, Lord Scarman, when I was a student, suggested that the future lay in Europe for English lawyers. [Laughter]

PROF. HANSEN: You are the Chairperson of the Fifth Board of Appeal at the European Union Intellectual Property Office (EUIPO).

How many judges are on each board?

Session 1D

MR. HUMPHREYS: We're nineteen altogether divided into four trademark boards and one designs board; but the designs board is ad hoc; it mixes up everybody from other boards. So the answer to your question is about five, give or take.

PROF. HANSEN: And each board has a chairperson?

MR. HUMPHREYS: Correct.

PROF. HANSEN: Most of these people are from different countries with different cultures about trademarks; correct?

MR. HUMPHREYS: Correct.

PROF. HANSEN: So this is like herding cats. They have different views of what trademarks should do and should not do; is that correct?

MR. HUMPHREYS: Sometimes, yes.

PROF. HANSEN: And then what happens?

MR. HUMPHREYS: Then we deliberate, meaning we debate the case and we decide by simple majority—well, two out of three—if necessary. But we always seek unanimity where possible.

PROF. HANSEN: And how about the four trademark boards agreeing with each other?

MR. HUMPHREYS: To be frank, one of the big challenges we have is trying to be as consistent as possible. But what we do is we mark decisions down as important and we are supposed to be aware of those decisions. And we have the Grand Board to try to streamline things.

PROF. HANSEN: If Brexit happens, what's going to happen to you?

MR. HUMPHREYS: Fortunately, my Brexit is over because the Management Board of the EUIPO reappointed me last year and that was confirmed by the Council of Ministers in February of this year. So I've got another five years, and hopefully my Spanish nationality will come through by then. [Laughter]

PROF. HANSEN: Do you have a question for anyone else on this distinguished panel?

MR. HUMPHREYS: In the exchanges before this panel started, somebody mentioned the topic of international exchanges with judges. That's actually something that we've really been looking into at the Boards of Appeal because we have the Trade Mark 5 (TM5) and the Industrial Design 5 (ID5) groups of the biggest trademark and design and patent offices in the world—United States, EUIPO, China, Japan, South Korea—and we have been trying to develop contacts with the trial and appeals boards in those countries.

PROF. HANSEN: Is this to harmonize procedure or substantive law or both?

MR. HUMPHREYS: On substantive law it's more difficult, but we are looking at the moment at, for example, the issue of Internet evidence in trademarks and designs, and obviously we hope to expand that further.

My question to the panel would be about the role of international exchanges and whether this is something that is felt to be useful; and whether, given the current political climate that we were talking about yesterday morning, this is going to be able to be continued as in the past.

PROF. HANSEN: Unfortunately, we don't have time to discuss that in this panel.

Thank you very much.

Edger, apparently, you're Dutch.

JUDGE BRINKMAN: Yes, as far as I've checked.

PROF. HANSEN: How long have you been Dutch?

JUDGE BRINKMAN: Since the very beginning.

Session 1D

PROF. HANSEN: Why are you a judge?

JUDGE BRINKMAN: I was in private practice for about six-or-seven years, and then I thought the commercial thing was not the thing that really appealed to me that much, I wanted to decide cases, and that's what I'm doing now.

PROF. HANSEN: What type of cases do you have?

JUDGE BRINKMAN: The majority is patent cases, but also a large chunk is just general IP. Trademarks is a large chunk because we are also looking at the designated EU Trade Mark Court in Holland, and also for the Community designs in that sense. We do a lot of other IP, too.

PROF. HANSEN: You have a chemistry degree. How much does that help you in your day-to-day work?

JUDGE BRINKMAN: It now has been a while since I studied chemistry, but it does help actually. Especially, obviously, in the pharma cases that we get a lot of, it helps to understand it quicker, so you can go through the documentation quicker and you also may pinpoint a little better where the exact problem is when you're talking to an expert or when you're reading expert reports because you can really say, "Well, I'm not so sure about that" and ask questions.

PROF. HANSEN: The view in the United States where we have non-specialist-in-science judges deciding cases; is that where we went wrong?

JUDGE BRINKMAN: I wouldn't be able to comment on that, of course. But it's not that common in Holland either. I think we have one or two other judges who also have a chemistry or physics background, but mostly actually they are not versed in science. It's just the law that they are versed in.

PROF. HANSEN: Do you know Rian?

JUDGE BRINKMAN: Of course I do. We've worked together for a long time.

PROF. HANSEN: And you're both in The Hague?

JUDGE BRINKMAN: Yes.

PROF. HANSEN: The Hague has what, a thousand people and the rest are judges?
[Laughter]

JUDGE BRINKMAN: There are, of course, a lot of courts, yes, such as the International Criminal Court, The Courts of The Hague in first and second instance, as well as the Dutch Supreme Court and the International Court of Justice.

PROF. HANSEN: Do you mostly hang out with judges socially?

JUDGE BRINKMAN: No, I try to keep away from them. [Laughter]

PROF. HANSEN: Do you have a question for anyone on the panel?

JUDGE BRINKMAN: Maybe going on from what Robin commented on about the view the public has of the patent system, I wasn't too sure about whether copyright is that popular because everybody wants to download movies for free, and the whole discussion about the new EU Directive¹ was getting kind of vicious on some sides from the public.

I think one of the problems may be that people envisage patents obviously, or they probably associate patents mostly, with pharma; and then they have to pay too much for their health bills anyway, so that makes it hard for people to understand why a patent is actually necessary, why the price is ten or one hundred times more than the actual cost of the product. I think industry should try to explain patents a little more.

PROF. HANSEN: Couldn't you just say, "You'd be dead without pharma?"

¹ Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92.

Session 1D

JUDGE BRINKMAN: True. That's what I'm saying. If industry would explain a little better why this is the case, probably then the public could understand it better.

Having said that, I think the current patent system has too much incentive in not curing but prolonging—or rather, to say not curing definitely—a disease, but make it so that you have to take a pill every day and then the company gets the best rewards. So in that sense the system is not perfect at this point in time either.

PROF. HANSEN: Okay. Any final comments?

JUDGE BRINKMAN: No.

PROF. HANSEN: And you're pretty comfortable being Dutch?

JUDGE BRINKMAN: No, not at all. I would have loved to be American.

[Laughter]

PROF. HANSEN: Is it Hans or Hans?

JUDGE VAN WALDERVEEN: Hans. Or Hans if you want. I don't care.

PROF. HANSEN: See, that's the thing about being American. Everyone just says, "Whatever," because they're probably not going to be right anyway. I'll go with Hans.

Oh my heavens, The Hague!

JUDGE VAN WALDERVEEN: Another Dutchman.

PROF. HANSEN: Do you know any of the people on this panel?

JUDGE VAN WALDERVEEN: I think so, yes.

PROF. HANSEN: How often in The Hague do you actually run into your three fellow Dutchmen on this panel? How often in your day-to-day life do you actually run into them, see them, or talk to them?

JUDGE VAN WALDERVEEN: My friend Edger every day and Rian two times a month. We are in the same building but in different locations.

PROF. HANSEN: So you have a specialized court of first instance and there are ten specialized patent or IP judges?

JUDGE VAN WALDERVEEN: Yes.

PROF. HANSEN: You do all the patent first-instance cases in Holland?

JUDGE VAN WALDERVEEN: Yes.

PROF. HANSEN: Are you crazy busy now or are you looking for work?

JUDGE VAN WALDERVEEN: We have had a very busy time for the last ten years or so.

PROF. HANSEN: Why are you a judge?

JUDGE VAN WALDERVEEN: I used to be in private practice and—well, more or less for the same reason as Edger replied to you—at a certain point in time, at the end of 2005 I think, I was reading a newspaper and there was an advertisement in it that said they were looking for patent judges. I saw that advertisement and I thought, "This is me." So it happened.

PROF. HANSEN: Are you having fun?

JUDGE VAN WALDERVEEN: Yes, actually.

PROF. HANSEN: More fun than when you were in practice?

JUDGE VAN WALDERVEEN: Yes. This fits me better.

PROF. HANSEN: Do you like to order people around?

JUDGE BRINKMAN: Shut up.

PROF. HANSEN: In patent law how did supplementary protection certificates (SPCs) become a specialty for you?

JUDGE VAN WALDERVEEN: Because someone has to do it. That's just the reason.

Session 1D

PROF. HANSEN: Is that an interesting part of patent law?

JUDGE VAN WALDERVEEN: Yes, it is, because it's a very puzzling area of law. I will explain that in the afternoon session.²

PROF. HANSEN: I know every year people push to have a session on SPCs at the Conference, so it must have importance.

That's basically what I have. Does anyone have any thoughts or questions for Hans?

QUESTION [Thomas Cotter, University of Minnesota Law School, Minneapolis]: I'd like to ask any of the Dutch judges what is the difference between a *kort geding* procedure³ and a preliminary injunction procedure elsewhere in Europe or the United States? Is there any difference?

PROF. HANSEN: No, I'm disallowing that question. We can do that at the end. This is purposely non-substantive because I'm sick of the substance of stuff, frankly. [Laughter] So we're going to just try to keep it on a more mundane level.

We'll go to the next person now, but we'll keep that question in mind.

Next is Paul Michel. You were twenty-two years on the Federal Circuit. You retired in 2010. Why did you retire?

JUDGE MICHEL: Because the patent system was being savaged on all sides and somebody had to speak out. I couldn't do it as a sitting judge because of restrictions on sitting judges dealing with political issues, public policy, big national controversies, so I resigned my lifetime appointment in order to regain my First Amendment right of free speech.

PROF. HANSEN: Give me an idea of how you are fulfilling that goal.

JUDGE MICHEL: Talking to everybody except patent lawyers. The patent system, the IP system overall, and the innovation ecosystem have become so totally politicized and the subject of massive lobbying efforts and propaganda and public relations campaigns and so forth, that it was very important to try to have a more informed discussion about the facts and about the realities instead of about polemics and propaganda.

Everything that is said about the patent system I would say is partially true, but it is so wildly exaggerated, whether it's high drug prices or weak patents or—

PROF. HANSEN: "Bad patents" I think is what we call them.

JUDGE MICHEL: It actually makes no sense to me to talk about a bad patent or a weak patent. It's either valid, in which case it provides some legal right of recourse, or it's invalid, in which case it's a nothing. So I don't like talking about weak patents or bad patents or other such descriptors. This is an example of how the debate has become so—

PROF. HANSEN: Yes. But one of the reasons patent is doing so poorly is the patent people are not facing what the laypeople think is a problem, which is bad patents and everything else, and so defer to the Federal Circuit and all that. But when it looks like that's not going to resolve the problem, you have the Supreme Court doing crazy stuff in

² See *Session 8B: Supplementary Protection Certificates*, EMILY C. & JOHN E. HANSEN INTELL. PROP. INST. FORDHAM L. SCH. (2019).

³ *Kort geding* is a Dutch form of summary proceeding characterized by relative swiftness and informality. See 3 MARIELLE KOPPENOL-LAFORCE AND GLENN HOEK, DIGEST OF COMMERCIAL LAWS OF THE WORLD § 36:198 (Dennis Campbell & Patrick Tinsley eds., 2019-3 ed. 2019); see also Pierre Véron, *Thirty Years of Experience with the Brussels Convention in Patent Infringement Litigation*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 431, 438 (2002) (discussing the impact of *kort geding* on IP litigation in the Netherlands).

Session 1D

an effort to do something. So sometimes you have to just say, “Yes, there are some bad patents, so what should we do about it?”

JUDGE MICHEL: Exactly. And it has to be modulated, it has to be proportionate to the nature and the size of the problem, because if you overcorrect, you create new harm; if you undercorrect, you perpetuate existing harm. So getting it calibrated or modulated correctly is the task.

But it’s difficult now because it’s so politicized, it’s so much the subject of newspaper headlines and TV shows and so forth, that it’s hard to have a rational debate. And the people who know the most about it have a hard time being heard because it has now become the subject—

PROF. HANSEN: All right. What about social media? What do you do on social media? You should have a blog on social media.

JUDGE MICHEL: I’m too antisocial to be on social media. [Laughter]

PROF. HANSEN: No, you would fit right into social media, which is mostly antisocial.

But really, if people like you, who are very elegant, have a good voice—actually, on the Internet and in social media nobody does that, and people like you should be doing that.

JUDGE MICHEL: That’s probably right.

But what I have mainly concentrated on is direct action, talking to journalists, talking to economists, talking to business leaders, talking to union leaders, talking to congressmen and congressional staffers, and everybody else who thinks they understand the patent system but maybe don’t. So I’ve tried to help them have a more informed view in the hope that in the end there will be better policy than we have right now.

PROF. HANSEN: What is your prediction for the future?

JUDGE MICHEL: I think things will continue to get worse until they get so bad that the high-level policy leaders will realize that they have to revive the patent system in the United States, and I would suggest also globally. When it becomes clearer that jobs are fleeing, investment dollars are fleeing, laboratories are fleeing, scientific advance is stalling, then finally the high-level political leaders will wake up and do the right thing.

PROF. HANSEN: The latest broad-based patent legislation in Congress was what?

JUDGE MICHEL: The America Invents Act (AIA) in 2011.⁴

PROF. HANSEN: Just to point up this, if you look at the AIA press conferences, the bill was pushed by them saying, “This is a jobs bill.” I think you’re absolutely right; jobs actually get their attention. Of course, it wasn’t a jobs bill; they were being intellectually dishonest, but I don’t think there’s anything new on that.

But yes, jobs, and in fact the jobs will be fleeing, as you said yesterday, and that may be the way to get the attention.

Anything you want to say about what you think might be the best IP conference in the world?

JUDGE MICHEL: Fordham.

PROF. HANSEN: Judge Shibata is next.

Yoshiaki, how are you?

JUDGE SHIBATA: Fine.

PROF. HANSEN: You actually look like you’re waiting for an execution there. [Laughter]

⁴ Leahy–Smith America Invents Act (America Invents Act), 28 U.S.C. § 1454; 35 U.S.C. §§ 123, 257, 298-99, 321-29 (2012).

Session 1D

What do you want to say? You are from Japan. You're Japanese?

JUDGE SHIBATA: Yes.

PROF. HANSEN: What do you think of the Japanese people, just between you and me? Good people?

JUDGE SHIBATA: Yes, I think so.

PROF. HANSEN: You're now in the Tokyo District Court, the IP Division.

JUDGE SHIBATA: Yes.

PROF. HANSEN: What types of IP cases do you mostly have?

JUDGE SHIBATA: We deal with all kinds of IP cases, some patent cases, some trademark cases, and copyright cases. All kinds of cases.

PROF. HANSEN: Which do you like the best?

JUDGE SHIBATA: I like copyright cases.

PROF. HANSEN: Why?

JUDGE SHIBATA: There are many unsolved problems, so it's very interesting. Maybe there is new technology and maybe there are new products that have copyright issues.

PROF. HANSEN: How did you get interested in being a judge? You became a judge right out of law school, right?

JUDGE SHIBATA: Yes.

PROF. HANSEN: That's your system.

JUDGE SHIBATA: At the beginning I was an assistant judge and then a full-qualification judge. I never practiced law.

PROF. HANSEN: Are you an IP judge just out of chance, or did people say, "We want Judge Shibata to do IP," or did you raise your hand and said, "I want to do IP?"

JUDGE SHIBATA: It depends. One can raise their hand. Some can deal with the IP cases, but not everybody. In Japan judges deal with all kinds of cases. One can raise their hand, but it's not necessarily everybody.

PROF. HANSEN: Do you find the fact that you never practiced, because that's the system in a civil law system much more than in Japan, an aid or a hindrance or it really doesn't matter? In other words, if you were in practice, would you be a better judge or are you a better judge because you weren't sullied by all the things that people do in practice?

[Pause]

I think the answer is yes. Thank you very much.

Eugénia, you're apparently Portuguese.

MS. MARTINS RIBEIRO: Apparently.

PROF. HANSEN: When is the last time you were in Portugal?

MS. MARTINS RIBEIRO: A couple of months ago.

PROF. HANSEN: You don't spend much time there, though?

MS. MARTINS RIBEIRO: No, I don't spend a lot of time in Portugal, unfortunately.

PROF. HANSEN: To what degree is Portugal sort of a non-player in the European Union because they keep to themselves—or are they? In terms of the countries that have the most influence, my impression is Portugal is not that interested in a lot of EU issues.

MS. MARTINS RIBEIRO: It is. I think so, yes. It is really. They are very committed to the European Union.

PROF. HANSEN: So it's very communitarian?

MS. MARTINS RIBEIRO: It is.

Session 1D

PROF. HANSEN: You know who are really punching above their weight? The Dutch. How many people in that country?

JUDGE VAN WALDERVEEN: Seventeen million and counting.

JUDGE BRINKMAN: Seventeen, eighteen million.

PROF. HANSEN: The New York metropolitan area has fifteen million and you have seventeen million yet look at you. Three of you are on this panel. Holland is a country that really seems to take an interest.

PROF. JACOB: They used to own Manhattan. [Laughter]

PROF. HANSEN: Yes, but then they sold it for \$24. That was a mistake. Can you imagine if they'd kept it?

You were a *référéndaire*—a law clerk for Americans—for two judges. One was Judge J.C. Moitinho de Almeida.

MS. MARTINS RIBEIRO: Yes, the first Portuguese judge, in 1986.

PROF. HANSEN: And also for Bo Vesterdorf, who is not Portuguese.

MS. MARTINS RIBEIRO: Yes.

PROF. HANSEN: What was your experience in being the *référéndaire* for those two? Was it dramatically different?

MS. MARTINS RIBEIRO: No, not dramatically different, because the court works in a certain way, so there is not a big difference. But of course, there are different approaches according to the backgrounds and nationalities of judges, so there are always certain differences.

In general, the main aspects of the work are the same. What you were asked to do as the legal secretary or *référéndaire* is exactly the same thing. A legal secretary (a *référéndaire*) has to deal deeply with the cases and may suggest a solution.

PROF. HANSEN: So there was a dramatic difference which you don't want to explore publicly. All right.

MS. MARTINS RIBEIRO: It was just fine to work with both.

PROF. HANSEN: My sense is you really enjoyed being a judge on the General Court; is that correct?

MS. MARTINS RIBEIRO: Yes, of course.

PROF. HANSEN: In fact, you were the President of a chamber or two chambers.

MS. MARTINS RIBEIRO: Yes.

PROF. HANSEN: You were voted to be the President, right?

MS. MARTINS RIBEIRO: Yes, we are elected to be President of Chamber (also Vice President and President). Everybody is elected by the other judges.

PROF. HANSEN: Did you enjoy being President or was it just a job you had to do?

MS. MARTINS RIBEIRO: Yes, I enjoyed it.

PROF. HANSEN: Why did you enjoy it?

MS. MARTINS RIBEIRO: Because when you are elected President of Chamber, you have to deal with consistency of the case law, for instance; that's a very important point. So you have to be attentive to what the judges of the chamber propose, if they are getting away from the line of the case law or if they are consistent. That is one of the main things for a President of Chamber to do.

But there are others, of course. We have to deal with case management and with the organization of the oral hearings and with the procedural issues. And there is a certain influence, of course, on the work and the discussion in general.

PROF. HANSEN: What are you doing now?

Session 1D

MS. MARTINS RIBEIRO: Now I am in different panels for the European Union. I do some consulting, working with lawyers in certain cases. And I am of course in the panel of Article 255 of the Treaty giving advice on the candidates that Member States propose as a judge or an advocate general at the Court of Justice. I am one of seven people who do that work, mainly from the highest jurisdictions in Europe.⁵

PROF. HANSEN: So this is an EU panel?

MS. MARTINS RIBEIRO: Yes, it is.

PROF. HANSEN: Is that a lot of work?

MS. MARTINS RIBEIRO: It is a lot of work. If the panel's opinion is negative, the Member State must choose and propose another candidate, and that is completely accepted by all the Member States. It was difficult at the beginning, but now it is completely accepted.

PROF. HANSEN: Thank you very much.

Is Annabelle here?

MS. BENNETT: Yes. I hate this panel, Hugh. [Laughter] We all do. We all discuss that we hate this panel.

PROF. HANSEN: You know that just makes me feel good inside. [Laughter]

MS. BENNETT: I know.

PROF. HANSEN: Annabelle—

MS. BENNETT: Yes, Hugh? Thank you. That was a lovely session. I really enjoyed it very much.

PROF. HANSEN: You're from Australia.

MS. BENNETT: Yes, I am. Well done. Great country.

PROF. HANSEN: I can see you're very tense about this whole thing.

MS. BENNETT: I'm not at all tense. I'm very relaxed.

PROF. HANSEN: How long were you a judge?

MS. BENNETT: Thirteen years.

PROF. HANSEN: Why did you stop being a judge?

MS. BENNETT: Because I decided after thirteen years that it was time to think about having another career. So that was the time to go.

PROF. HANSEN: From looking at your bio here, it looks like you have eight or nine different jobs right now.

MS. BENNETT: At least.

PROF. HANSEN: Where do you find the time for that?

MS. BENNETT: Day by day. Every day I do what I have to do for the next day.

PROF. HANSEN: Australia is an island basically, isn't it?

MS. BENNETT: Yes.

PROF. HANSEN: How often do you get the chance to leave and come to—I don't want to say civilization—

MS. BENNETT: I leave the civilization of Australia quite often. There has been a lot of travel. I've been doing probably eight or nine trips a year, usually for a few days each. It's a long flight, I'll give you that.

PROF. HANSEN: Now that you're no longer a judge, do you miss it, or are you glad that you were a judge?

⁵ See Consolidated Version of the Treaty on the Functioning of the European Union art. 255, Oct. 26, 2012, 2012 O.J. (C 326) 159; see also Council Decision 2017/2262, art. 1-2, 2017 O.J. (L 324) 50 (EU).

Session 1D

MS. BENNETT: Of course I miss it. I miss parts of it. I miss the people. I miss the other judges because I saw them on a day-by-day basis. While I keep in contact with a lot of them, it's not the same.

I miss doing the cases. We sat in our court, as you know, at first-instance and on appeal cases, so you have that variety. So I miss that. But I'm still doing some arbitration, so that reminds me that what I disliked was writing the judgments.

PROF. HANSEN: How much arbitration are you doing?

MS. BENNETT: It's balanced out with other stuff. I'm doing a lot of work for the Court of Arbitration for Sport, and that's fun, and I do odd other arbitrations.

PROF. HANSEN: Can you make a lot of money doing that?

MS. BENNETT: Not a lot of money, but you make money on it, yes.

PROF. HANSEN: That's good.

What do you do as the Chair of the World Intellectual Property Organization Advisory Group?

MS. BENNETT: That doesn't pay anything.

PROF. HANSEN: What do you do?

MS. BENNETT: It's a recent arrangement set up by Francis Gurry. It's to take a group of judges from all over the world, from I think twelve different countries on the first round. It has only been going for a year and a half now.

We have an annual conference. We had one last year. We're going to have one again this year.

The idea is to bring IP judges from all over the world together to be able to talk to each other, based on the concept that judges will talk more freely with other judges and are probably more open to expressing concerns in areas in which they don't feel comfortable. It gives us a chance to engage—we don't have papers but we have panels—and have a lot of discussion.

We had a master class in Beijing; we're having a master class in Washington this year, and then we have the regular conference.

But what is really good about it is that, after some of these sessions, the judges from all over the world get to know that group, so the judges are able then to communicate with each other and ask each other questions, like "Does anyone out there have a case on such-and-such?"

It's good, not only for the sort of people who may be here, Hugh, but there are also a lot of judges in the developing countries who are facing their first IP cases, and they're stuck with them, they've got to do them, and they don't necessarily have that expertise. So it's a wonderful way for them to be able to reach out to judges from more developed IP jurisdictions and others in their area to get that help.

We are hoping that it will have a really good impact worldwide.

PROF. HANSEN: I thought that probably the goal was to help developing-country judges, and that's great. I'm sure it helps them a lot.

Do you have any questions for anyone else on the panel?

MS. BENNETT: I have lots of questions for other people on the panel, but I'll keep them offline, I think.

PROF. HANSEN: Okay. Thank you very much.

Tobias, you're Swiss?

MR. BREMI: That's right.

PROF. HANSEN: Are you German Swiss?

MR. BREMI: Yes.

Session 1D

PROF. HANSEN: What do you think of the French Swiss?

MR. BREMI: They are Swiss as well, great guys.

PROF. HANSEN: That's not the most effusive thing I've ever heard.

You spend 50% of your time as a judge, 50% as an attorney?

MR. BREMI: Yes, that's right.

PROF. HANSEN: How do you allocate that? Are there certain days of the week you're a judge and the rest an attorney, or what?

MR. BREMI: I try to split that equally, but the sum of it is in any case not 100%, I must admit. But I think it's a great privilege to be active on both sides because if you are just acting as a judge, you keep forgetting how it feels to be an attorney, and how it feels to be an attorney treated in a certain way by a judge. I think that's pretty helpful. So, when you act as a judge and an attorney, I believe you develop some kind of an understanding of what it feels like to be on the other side. For me that's very important and I'm enjoying that a lot.

PROF. HANSEN: How many judges are in the situation where they're half a judge and half an attorney in Switzerland?

MR. BREMI: I'm the only one in Switzerland to have that fifty-fifty split.

PROF. HANSEN: Was this your idea or someone else's idea?

MR. BREMI: It was my idea, and the Parliament agreed that this was a good idea.

PROF. HANSEN: It would be better if all of the judges were fifty-fifty.

MR. BREMI: Maybe. We wouldn't have enough work to have that kind of distribution. I think there should be one full-time judge with a legal background. So I think we have quite an optimum setting.

PROF. HANSEN: It says you were elected permanent judge. Who elected you?

MR. BREMI: The Swiss Parliament, the Bundesversammlung.

PROF. HANSEN: Did you have to run for that position? You created the position, right?

MR. BREMI: Right. I didn't create it, but to have a fifty-fifty distribution, that was something that I discussed with the decision makers.

PROF. HANSEN: And then the rest was probably pretty easy since no one else was doing this, right? So you were a pioneer basically?

MR. BREMI: Yes, that's right. You could call it that. When I was elected, the court didn't exist. That was actually the challenge, to set up the court, which is like setting up a small enterprise. You have to worry about different aspects. That was actually one of the great motivations to take that job.

PROF. HANSEN: I can see all the benefits, but also there's possible conflicts of interest.

MR. BREMI: Yes, that's a huge issue. Basically, for each case that rolls in I have to spend several hours checking conflict-of-interest issues, and about 25% of the cases I have to reject as a judge because I have a conflict of interest. This is because for the other 50% I'm working in one of the largest patent law firms in Switzerland.

PROF. HANSEN: You have a biochemistry background.

MR. BREMI: I studied chemistry and then went into physical chemistry and did nuclear magnetic resonance spectroscopy.

PROF. HANSEN: Do you find that the people who study chemistry and science are somehow different than the people who study history and other things?

MR. BREMI: Oh yes, they are. Sometimes you think it's a differently wired brain. It adds to the pleasure, but it can cause trouble as well. It's really a matter of attitude if you

Session 1D

work together. You get an understanding of how differently the others communicate and think. That's really one of the challenges. I like that a lot.

PROF. HANSEN: Very interesting. Yes, I think most people who go to college realize that scientists are usually on a hill because there's a laboratory there. They're not tremendously social-minded, but they're incredibly focused; and then you have the liberal arts people who are not focused; and then you have fraternity row. It's fascinating really to study it all. I liked the fraternity row part.

Do you have any questions for anyone else?

MR. BREMI: Not for the moment.

PROF. HANSEN: Okay. Thank you.

Rian, when did you determine to be a judge? Was it right out of law school?

JUDGE KALDEN: I was in private practice first, for about eleven years. Actually, I found that it was hard to combine with family because clients can be very demanding. I was at a big commercial law firm, so you couldn't afford to say around six o'clock, "I'm sorry, I'm going to get my children from kindergarten." That was the motivation to look for something else. Then, I think, being a judge allows you to be on maybe the highest intellectual level but still have your life organized.

PROF. HANSEN: You were a judge at a court of first instance but also at the appellate level, correct?

JUDGE KALDEN: Yes. I'm at the Court of Appeal now.

PROF. HANSEN: Which do you prefer?

JUDGE KALDEN: It's hard to say. I quite like the first instance especially for the preliminary injunction cases because they are very fresh and fast and therefore challenging. But I also like the depth of the appellate cases as well.

PROF. HANSEN: Did you work harder as a judge at first instance than as an appellate judge?

JUDGE KALDEN: No, I can't say that.

PROF. HANSEN: Now you're a judge at the Benelux Court of Justice, which is the Netherlands, Belgium, and Luxembourg.

JUDGE KALDEN: That's right.

PROF. HANSEN: Is that a different experience than being a Dutch judge?

JUDGE KALDEN: Well, I was appointed last year. We had the Benelux Court of Justice for the Benelux trademarks. We don't have national trademarks; we only have Benelux trademarks. In order to keep the law harmonized in that respect, we had the Benelux Court of Justice for a long time.

But since we now have the European trademark as well, there is not much caseload nowadays for the Benelux Court of Justice, so they decided to also have a second chamber at the Benelux Court of Justice that deals with all the appeals from the Benelux trademark offices which are located in the three countries in order to harmonize those decisions more than they used to be.

The cases have come in, but so far there has not been a hearing, so I don't have any practical experience with doing cases. I did those kinds of cases early on in The Hague, but it will be quite a new experience dealing with these cases in the Benelux Court of Justice context because there a panel will be composed of one judge from each country, so you will be dealing with a judge from Belgium, a judge from Luxembourg, and one from the Netherlands.

PROF. HANSEN: Why is there a Benelux? What was the need for a Benelux?

Session 1D

JUDGE KALDEN: I think the idea was that if you are small, you'd better team up so you have more economic and political power.

PROF. HANSEN: The common language is what? Is there a common language?

JUDGE KALDEN: There is not, but I think it's mainly French, which is a pity because I don't speak any French.

PROF. HANSEN: How often in your job in Benelux—I know you've only been there a little time—do you speak English?

JUDGE KALDEN: I do speak English quite a lot. For Dutch cases a lot of the documents that I have to read are also in English. The legal statements are in Dutch, the judgment is in Dutch, but a lot of the exhibits, the documents, the expert statements—a lot of it is in English, some of it in German, and hardly ever in French. So I'm lucky in that respect.

PROF. HANSEN: Belgium is only half-French, right?

JUDGE KALDEN: Belgium has a Dutch northern part and a French southern part.

PROF. HANSEN: Except for Brussels.

JUDGE KALDEN: Yes. It's supposed to be bilingual, but it's French for the most part. And in Luxembourg they do speak German mainly.

We did have a couple of meetings in the context of the Benelux Court of Justice. Like in the European Union, everything gets translated. But in a one-on-one conversation English is also very much used.

PROF. HANSEN: Are you having any fun?

JUDGE KALDEN: Yes, I do, especially while I'm here. [Laughter]

PROF. HANSEN: Thank you very much.

MS. BENNETT: She didn't mean this panel. She meant the conference.

PROF. HANSEN: Simon?

MR. HOLZER: I'm here.

PROF. HANSEN: Adjunct Judge of the Swiss Federal Patent Court. What does that mean, Adjunct Judge?

MR. HOLZER: It means, unlike Tobias—with whom you have discussed the Swiss aspects, so I think we can make it short—actually it means I'm appointed on a case-by-case basis. I do not have a fifty-fifty solution like Tobias. I'm appointed as a part-time judge on a case-by-case basis.

PROF. HANSEN: Is the Swiss Army knife trademarkable?

MR. HOLZER: That was a dispute recently. We also had a hearing with some experts who were involved in those cases sitting in the room today. It's not a clear-cut case I would say.

PROF. HANSEN: So you can have a trademark for that Swiss Army knife?

MR. HOLZER: You can have a trademark, yes, under certain circumstances.

PROF. HANSEN: I think in the United States we said it was generic.⁶ So you should probably look at U.S. law in the future.

So you don't do 50% as a judge; you do less than that?

MR. HOLZER: I do much less than 50% as a judge, that's true. I probably have one or two cases a year. Last year I had no case because one of my team members, a former

⁶ See *Forschner Grp., Inc. v. Arrow Trading Co.*, 124 F.3d 402, 406 (2d Cir. 1997) (holding that defendant could designate product as “Swiss Army knife”). *But see* *Victorinox AG v. B&F Sys., Inc.*, 709 F. App'x 44, 49 (2d Cir. 2017), *as amended* (Oct. 4, 2017) (finding design of Swiss Army knife to be trademarkable).

Session 1D

employee of our firm, became the President of the Swiss Federal Patent Court. So, since I cannot decide my own cases, I had no case to decide last year.

PROF. HANSEN: You're in Zurich?

MR. HOLZER: I'm Zurich based, yes.

PROF. HANSEN: And how is that? Do you like that city?

MR. HOLZER: Yes, I like the city of Zurich.

PROF. HANSEN: How would you rank the Swiss cities—number one, number two, number three? What is the best?

MR. HOLZER: Actually I live in Bern, which is more affordable, and I work in Zurich, so I have the best of both worlds.

PROF. HANSEN: So Berne is number one?

MR. HOLZER: For me it's number one. I would say Zurich is a great place to work; probably much better than Berne; you have more options there.

PROF. HANSEN: What is number three?

MR. HOLZER: Geneva.

PROF. HANSEN: What do you like about Geneva?

MR. HOLZER: The French culture. As Tobias was saying, our French colleagues are very nice guys, and if you have a meeting with them or a lunch, you always have a great time and a glass of good red wine.

PROF. HANSEN: Are the French snobby?

MR. HOLZER: They are not. I don't think so.

PROF. HANSEN: Are the German Swiss snobby?

MR. HOLZER: No, also not. You probably should ask someone else about that.

PROF. HANSEN: In your view, what is the most problematic area of IP today?

MR. HOLZER: I tend to disagree with Robin. I also think that the patent system is under pressure, but I also think that most people, if you discuss with them the patent system as such, they fully believe that the rationale behind the patent system is okay.

It really boils down, I think, to prices for pharmaceutical products. The problem we have is that we don't have a proper system to determine how much a new pharmaceutical treatment should cost that, for example, extends the expectation of life for six months; what is a fair price for that achievement? That's the main problem, and that's not mainly or particularly a patent problem.

PROF. HANSEN: Would you say the system is in crisis?

MR. HOLZER: The pricing system for a pharmaceutical is definitely in crisis I would say, yes. The patent system is under pressure and there is a lot of discussion, but I wouldn't say it's in crisis.

PROF. HANSEN: Is all this going to be killing the goose that laid the golden egg or something like that? In other words, at the end you're not going to get any eggs, golden or otherwise, because you don't have the incentives.

MR. HOLZER: That's true, yes.

PROF. HANSEN: Who's your favorite person in your life out of all the people on this panel? Who do you like the best?

MR. HOLZER: I like everybody. I don't know whether I'm the youngest. That's probably true. I attended my first Fordham Conference ten years ago or something like that. It was great to see Lennie and Robin discussing their cases. Those were the highlights I would say.

PROF. HANSEN: See, Annabelle, he answered that question. You would have just said, "None of your business."

Session 1D

MS. BENNETT: He didn't answer that question.

PROF. HANSEN: Lennie.

LORD HOFFMANN: Yes, Hugh.

PROF. HANSEN: How long have you been called Lennie?

LORD HOFFMANN: Since I was born, I think.

PROF. HANSEN: Who named you, your mother or your father or both?

LORD HOFFMANN: Yes. [Laughter]

PROF. HANSEN: This is going to be difficult, Lennie, if you don't listen carefully to the question.

LORD HOFFMANN: I thought both was an option.

PROF. HANSEN: How did you get on with your mother?

LORD HOFFMANN: How did I get on with my mother? [Laughter]

PROF. HANSEN: Well, if you're not going to tell me who did it, I'm going to have to dig deeply into this to see who actually gave you that name.

LORD HOFFMANN: I thought that you regarded this as a Soviet show trial, not as a Freudian couch. [Laughter]

PROF. HANSEN: Actually, I'm much more interested in the Freudian couch. If you're giving me alternatives, let's stick with the Freudian couch.

So your entire life everyone called you Lennie?

LORD HOFFMANN: Yes.

PROF. HANSEN: You're the senior member, I think, of this group I would have to say in experience and everything else. What do you view as the overall future picture for IP?

LORD HOFFMANN: That's too large a question. I used to dabble in IP, but that was more than ten years ago. Now I am an old gentleman living in retirement in Gloucestershire.

PROF. HANSEN: I shouldn't have invited you is what you're saying. But you are the elder statesman.

LORD HOFFMANN: An elder statesman, certainly not. I hope shortly to start raising pigs.

PROF. HANSEN: I don't even know what that means. That must be code for something. Maybe in World War II you said things like that and it meant something.

You still occasionally sit as a judge or not at all?

LORD HOFFMANN: Yes, occasionally, now and again, yes.

PROF. HANSEN: In Hong Kong?

LORD HOFFMANN: Yes, in Hong Kong.

PROF. HANSEN: How's Hong Kong doing in terms of its legal environment?

LORD HOFFMANN: I can't talk about Hong Kong. There might be a case that comes before me.

PROF. HANSEN: Lennie, that's ridiculous. I just said, "How is its legal environment doing generally?" and you say, "I might get a case." What, they're suing the environment or what?

All right, politically you're not going to be able to do it, because it used to be basically British, it's no longer British; the Chinese said they're going to keep it that way, they haven't kept it that way, they're causing all sorts of problems; and you don't want to say anything about this because it is politically—

LORD HOFFMANN: It might be, yes.

PROF. HANSEN: Okay, that is fine.

Session 1D

Basically what should I ask you? You give me the question and I'll ask it. There must be a question I can ask you.

LORD HOFFMANN: You might ask me do I still take an interest in IP.

PROF. HANSEN: Do you still take an interest in IP?

LORD HOFFMANN: I have an interest in watching my successors fuck up various bits of the law which I thought I'd straightened out. [Laughter]

PROF. HANSEN: Now, actually, some of them think you fucked up the system and they're trying to correct it.

This has been very interesting, Lennie. That's all I can say. I think that's all I have. Let's move on to Klaus.

I did make some notes, but I don't actually see them. You look familiar. Hold on.

JUDGE GRABINSKI: I came to Fordham a long time ago. You may remember.

JUDGE VAN WALDERVEEN: You're a lucky man, Klaus.

JUDGE GRABINSKI: May I use the time and ask a question to you, Hugh?

PROF. HANSEN: Yes, you can ask a question to me.

JUDGE GRABINSKI: Why don't you keep order in your papers?

PROF. HANSEN: Because I'm not German.

JUDGE GRABINSKI: It's good for something.

PROF. HANSEN: Actually, I stapled it onto another one. That's what the problem was.

You've been first instance all the way now to the Supreme Court. Do you have any preferences on the level of judgeships?

JUDGE GRABINSKI: I think that there is a time for everything. Being a first-instance judge at the beginning is very good. You get to know about the current trends in litigation. But at some point in time it's also good to be at the Supreme Court level because the good thing there is that you can never get it wrong because there's nobody on top of you. [Laughter]

PROF. HANSEN: How many judges on your particular division of the Supreme Court?

JUDGE GRABINSKI: We are eight judges, but we sit on panels of five judges.

PROF. HANSEN: Do they all have technical expertise?

JUDGE GRABINSKI: They have experience in patent litigation, at least most of them, but they don't have a technical background.

PROF. HANSEN: Is there any thinking—whether it's EU, whether it's German, or something—about restructuring IP or injunctions or something else? Is there anything like that going on?

JUDGE GRABINSKI: You know about the Unified Patent Court project we are having in Europe. I'm still confident that it is going to happen.

PROF. HANSEN: And what is that project going to produce?

JUDGE GRABINSKI: That will probably allow to litigate in one place for a number of Member States, at least thirteen Member States. That makes it easier to litigate. It probably will also help to harmonize our patent law, and maybe even the law in general, because it is the first merger between common-law and civil-law systems in the procedural area.

PROF. HANSEN: In terms of all the countries in the European Union, is it true that it is easier to get a preliminary injunction in a patent case in Germany?

JUDGE GRABINSKI: No, I wouldn't say so. Actually, within the last years they lifted the threshold for getting a preliminary injunction. Normally, if it's not an easy-to-

Session 1D

tackle case, if it's a complex technology, I think a preliminary injunction proceeding is not the right way to deal with it.

A very particular situation is of course an alleged patent infringement on a trade fair where the court has to react within maybe even hours because the trade fair is over in three or four days.

PROF. HANSEN: What is your view of the future of IP?

JUDGE GRABINSKI: I'm not that pessimistic actually. I hear on the political level a lot of criticism, but beneath that level I think the system is working. There is lots of litigation in Germany—and all kinds of litigation, not only the big ones fighting each other, but also small and medium-sized enterprises have a chance to be on the plaintiff's side and to enforce their rights.

Also you know about the cost risk in the system, and you get a judgment within one year, one and a half years, so I think it's working there.

Sometimes that is not that much in the focus of the general public, but it's working.

PROF. HANSEN: You're dealing with the Unified Patent Court, right?

JUDGE GRABINSKI: Yes. I've been on several committees drafting the rules of procedure, etc.

PROF. HANSEN: How close is that? Isn't it Germany that's dragging its feet on this?

JUDGE GRABINSKI: You're right, unfortunately. We are all waiting now for a decision of the Federal Constitutional Court, which, by the way, is only one mile away from my court, but I can't tell you anything more.⁷ We are waiting for the decision.

Then, of course, the other uncertainty is the Brexit situation. But the United Kingdom ratified the UPC and formally it only depends on the ratification from the German side. Then the whole thing would fly.

PROF. HANSEN: Do you think the German Constitutional Court is a little too much full of themselves, think they're too important? They said, "We can declare EU legislation unconstitutional," which of course is completely wrong under the Treaty, but it didn't seem to matter to them.⁸

JUDGE GRABINSKI: They always say, "We could," but they never tried to go a step in that direction.

PROF. HANSEN: The amount of time it is taking — I mean how long have they been considering this?

JUDGE GRABINSKI: I think the action was instituted in April of 2017, so it's now about two years. Of course, they have a lot of other politically important cases. But I am pretty confident we will see a decision within this year.

PROF. HANSEN: It sounds like they can't make up their mind. That's the only reason not to do something in over two years.

JUDGE GRABINSKI: I'm not so sure about that.

PROF. HANSEN: Or they are going to say something and everyone's going to be mad and they don't want to do it, or they must hate the United Kingdom? It could be any of these. So it should be interesting what happens.

Do you have any questions for anyone else?

⁷ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 739/17 (Ger.).

⁸ See, e.g. BVerfG May 29, 1974, 37 BVERFGE 271.

Session 1D

JUDGE GRABINSKI: Maybe one question for Paul Michel. When you think of the last-instance Supreme Court judges, would you prefer generalist judges or specialist judges having the final say?

JUDGE MICHEL: Actually, I think the model of the Federal Circuit is pretty good. I would call that semi-specialized. A big concentration of patent cases and some other IP cases and then a smaller percentage of non-IP cases, so all the judges, whatever their pre-appointment background may have been, are so concentrated that they learn very fast.

I think it has proven to be quite a good model and I would like to see it followed in some other areas in the United States, possibly antitrust law or administrative law, because the more specialized the area is, the harder it is to get good decisions out of generalists who only dabble in it once in a while.

PROF. HANSEN: He asked about the Supreme Court.

JUDGE MICHEL: I think the Supreme Court is a problem because they don't know what they're doing. They don't understand the patent system and how it works, so they make decisions based on language that's one hundred and fifty years old, without understanding the implications and the practical world of investment and invention and business and commerce.

PROF. HANSEN: Paul, don't hold back. Just be frank, okay?

All right. This is great.

I'm sad to say—you're happy to hear—that this is the end of our session. Let's have a round of applause for our "wisdom of judges."