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Concurrent Sessions II
Session C: Global Issues in IP

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PROF. COHEN: We are going to get going with our panel on the important topic of global issues in IP. My name is Mark Cohen. I'm with the University of California at Berkeley Center for Law and Technology where I run an Asian IP initiative and teach.

We have a great panel to talk about a group of global issues that at one time people would probably have thought were rather isolated in IP chapters of free trade agreements (FTAs) or in plurilateral meetings at the World Intellectual Property Organization (WIPO), but in the past year these issues have exploded

into a trade war with China and $200 billion of punitive tariffs,[1] and that's real money. So what was once very geekish is now a matter of national security and balance-of-trade and other concerns, at least with China. I think we might have an opportunity to explore whether that is justified today.

We are going to run down the table here on a range of global issues in IP, not only free trade agreements. I am going to begin with Kira Alvarez. Kira was my former colleague in the U.S. government. She was at the Office of the U.S. Trade Representative (USTR) handling China issues amongst others, and she is now with the ABA Section of Intellectual Property Law.

The question I have for Kira is, how has the Trump Administration renegotiated IP chapters of FTAs? We have the renegotiated North American Free Trade Agreement (NAFTA 2.0), now called the United States-Mexico-Canada Agreement (USMCA). What are the lessons that we have learned from this? What does the Administration's posture at the World Trade Organization (WTO), WIPO, and other organizations show about its perspective on IP?

MS. ALVAREZ: Thanks, Mark. It's good to be back on a team together.

It's interesting to discuss this because where this Administration is on IP is somewhat schizophrenic.

To start with, one of the first things that President Trump did right after he was inaugurated was to pull the United States out of the Trans-Pacific Partnership (TPP). One of the important parts of TPP was a great IP chapter amongst all the Asian countries. One of the rationales for TPP was to encircle China and, in particular with respect to IP, create a sort of gold standard of IP norms in the region that would eventually force China to achieve that level.

There was an interest from China at some point in how they could get into that club. The thought as part of the TPP negotiations was, *Well, we will set the rules first and then we'll let you join.* But one of Trump's first statements was "We're going to get rid of TPP," and then he goes to war with China over IP, and then at the same time he's renegotiating NAFTA.

Interestingly enough, again, there is a sort of a duality in this Administration. With respect to China, basically it's all about IP. All the tariffs are predicated on the fact that China has been forcing technology transfer and forcing companies to transfer their technology in China to State-owned entities, as well as concerns about trade secrets.

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[1] *See* USTR Press Release, USTR Finalizes Tariffs on $200 Billion of Chinese Imports in Response to China's Unfair Trade Practices (Sept. 18, 2018); USTR Press Release, USTR Issues Tariffs on Chinese Products in Response to Unfair Trade Practices (June 15, 2018); USTR Press Release, Under Section 301 Action, USTR Releases Proposed Tariff List on Chinese Products (Apr. 3, 2018).

China has filed WTO complaints over U.S. tariff measures: DS543 United States - Tariff Measures on Certain Goods from China, regarding the United States' tariff measures on certain Chinese goods which would allegedly be implemented through Section 301-310 of the US Trade Act of 1974 (Apr. 4, 2018); DS544 United States - Certain Measures on Steel and Aluminum (Apr. 5, 2018); G/L/1260 ; WT/DS565/1 United States - Tariff Measures on Certain Goods from China II - Request for consultations by China (Aug. 7, 2018); DS565 United States - Tariff Measures on Certain Goods from China II (Aug. 23, 2018).

Now, that had been going on a long time ago. Mark and I could have written the Section 301 Report that came out this year.[2] But I think we always felt *Okay, we'll write this report; but then what do we do?*

These guys went ahead and did it, and they said, "Okay, we're going to do this." They then said: "This is what we're going to do: we're going to slap tariffs on Chinese goods coming into the United States." In previous administrations, both Republican and Democratic, you wouldn't do that because it would have hurt U.S. consumers (and you will be hurting consumers now, too), but now they think that is a very powerful weapon that they can use, and they don't seem as concerned about the impact on consumers.

The China trade issues were predicated on IP, yet all the discussion you hear from the Administration about the deal they want from the Chinese now is: "How do we rebalance the trade deficit? How do we change the Chinese system?" You haven't heard anything about, "This is what they need to do to fix the trade secrets problem and have an effective trade secrets protection regime." You haven't heard them talk about the need to reform forced technology transfer. It is all about the goods part of the equation, not the IP part of the equation. They are not even really talking, so we are not really getting any forward motion with China on IP.

That's the China side of trade issues

But then, they threw TPP out and they started renegotiating NAFTA, now called the U.S.-Mexico-Canada Agreement. It is all focused on autos, whether or not there should be specific dispute resolution systems with respect to antidumping and countervailing use of trade remedies, and how long should this agreement last. Those were the big political fights in NAFTA 2.0 — never IP. IP was one of the last issues decided, but IP never really arose as a big issue in the public consciousness or in the press during the renegotiation.

As a result, paradoxically, NAFTA 2.0 has one of the strongest IP chapters that I have ever seen. It is actually a stronger chapter than the TPP IP chapter was. The trade secret provisions in the NAFTA agreement are spectacular; they parallel the Defend Trade Secrets Act, and they include a lot of really good norms that were in the TPP.

It's really baffling. When an administration says it cares about IP, it then doesn't get a strong IP chapter. When they don't pay attention to IP, they end up getting a great result. So I don't know what to say. It's intriguing.

PROF. COHEN: Do you think that right now IP is a pretext for the trade war, or was it really the inspiration for the trade war?

MS. ALVAREZ: My personal view is I really do think it was a pretext.

PROF. COHEN: And in terms of NAFTA, it was kind of an afterthought it seems.

MS. ALVAREZ: Yes. The people running that negotiation cared more about autos and other things.

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[2] USTR, Section 301 Report into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation (Mar. 22, 2018).

PROF. COHEN: So thus far we seem to make more progress as an afterthought than as a pretext?

MS. ALVAREZ: Yes.

PROF. COHEN: Okay. I just wanted to get that straight.

MS. ALVAREZ: The other interesting thing is when previous administrations were negotiating the free trade negotiations, all the other countries knew that IP was what the United States wanted. That's what always was held hostage, and it was harder to get because everybody knew that's what the United States wanted. So the United States had to make more concessions to get the strong IP provisions that they wanted included in the agreement. By saying "We don't care so much about IP," they actually were able to seemingly make fewer concessions and get more. It was a better bargain.

PROF. COHEN: We are going to revisit this a little bit more, particularly on the China side of things, as we go down the list of speakers.

Our next speaker is Cynthia Ho. She is at Loyola here in Chicago.

Cynthia, again going back to this renegotiated NAFTA, renegotiated trade agreements, investor-state dispute settlement in IP, what has been the track record there? What does the new NAFTA 2.0 bring to the equation and what can we see looking ahead?

MS. HO: I would say that there are definitely changes in terms of curtailing what was traditionally a robust means for investors to sue. But changing NAFTA doesn't necessarily mean investor-state dispute settlements are going to dramatically change because there are thousands of agreements beyond Chapter 11 of NAFTA that still permit the traditional kind of investor-state agreements.

I don't see a lot of change for the United States because the United States has been very fortunate in not losing the case.[3] Canada has not been so lucky, so maybe this is better for Canada.[4] So it seems like there is going to be more at stake for Mexico, but it doesn't necessarily change things so much for the rest of the world in my mind.

PROF. COHEN: Anything else that we can look at in any other region, or is all we're seeing between the United States and Canada and Mexico in this area?

MS. HO: I think that the renegotiated NAFTA agreement is interesting in suggesting that there may be more impetus to change investor-state disputes.

The last agreement where there was a big discussion of investor-state disputes was in what became the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). In that there was a little bit of pushback where there's a carveout in investor-state for tobacco, but everything else is still in there. There is a lot of ongoing discussion about whether or not we want to

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[3] *See e.g.*, Apotex, Inc. v. USA, US Dep't of State (2012); Canadian Cattlemen v. USA (2005); Grand River v. USA (2004); Glamis Gold v. USA (2003); ADF v. USA (2000); Methanex v. USA (1999). *See generally*, USTR, Fact Sheet: U.S. Investment Agreements (2013); UNCTAD Investment Policy Hub.

[4] S.D. Myers v. Canada (2016); Ethyl Corp. v. Canada (1997); Dow AgroSciences v. Canada (2008). *See generally*, Oost, Sunny Freeman, *NAFTA's Chapter 11 Makes Canada Most-Sued Country Under Free Trade Tribunals*, Huffington Post (Jan. 14, 2015); UNCTAD Investment Policy Hub, *supra* note 3.

even have investor-state disputes that is happening at the United Nations and other places.[5]

But there is still a lot of tension between investor-state and the World Trade Organization: Should the same dispute be before both? Should investor-state defer? So far the panels have not deferred, and so far in all the cases with published decisions states that have been sued have won, so to speak, but only to the extent that they could afford to defend.

Uruguay almost had to just capitulate to the tobacco industry, except they happened to have some billionaire bail them out so that they could go forward. So that case came out positively,[6] but again it could just be because that involved plain packaging and there is a separate agreement that supports what Uruguay was trying to do.

I feel like we haven't seen the end yet of investor-state disputes involving IP. There are some less-well-known cases. For example, Ukraine is capitulating to threats of investor-state claims, and they don't have money to sue. So I think this is still a tool for companies to the extent they want to protect their IP and they don't necessarily want to go the WTO route.

PROF. COHEN: Is this because the Dispute Settlement Understanding (DSU) and the Dispute Settlement Procedures (DSP) at the WTO are now deadlocked, the judges have not been appointed, the United States has blocked a number of appointments; or is this because of substantive issues at the WTO; or are there other reasons that folks are using investor-state rather than seeking a broader plurilateral resolution?

MS. HO: I think that currently companies can do both. They are not prohibited from doing both.

MS. ALVAREZ: Well, the government has to bring a case in the WTO, whereas in an investor-state case obviously it's the investor that brings the case against the government.

PROF. COHEN: Right.

MS. ALVAREZ: So you have a higher bar. One of the reasons I would say that Eli Lilly went the investor-state route against Canada[7] was because the United States wouldn't bring a pharmaceutical case in the WTO.

MS. HO: I totally agree with that. But I also think that there is nothing that would prevent both a country and a related company from doing both disputes. For example, there were parallel disputes involving plain-packaged tobacco and trademark issues for Uruguay and Australia that were brought both as investor-state[8] disputes and also at the WTO.[9]

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[5] *See, e.g.*, CBC, Why NAFTA's unloved investor-state dispute chapter may be in trouble (Sept. 11, 2018); United Nations Comm'n on Int'l Trade Law, Working Group III: Investor-State Dispute Settlement Reform, 36th session 29 October – 2 November 2018, Vienna.

[6] Philip Morris v. Uruguay, ICSID Case No. ARB/10/7 (2016).

[7] Eli Lilly and Co. v. Canada, ICSID Case No. UNCT/14/2 (2013).

[8] Philip Morris Brands Sàrl, Philip Morris Prods. S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (2018). *See also* Andrew D. Mitchell, PMI's International Investment Law Claims Against Australia and Uruguay.

[9] DS467: Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products, Panel Report Circulat-

So I don't think it's just a matter of the WTO being deadlocked. It has always been recognized in the scholarly literature that investors have this option. They have just been previously cautious. Now I think they are floating out little test balloons to see what the reaction is.

PROF. COHEN: It's interesting. They talk about investor-state disputes as exactly the thing that people want to avoid in China because they are afraid of retaliation. They would rather have the government ahead of them, and even then, they are afraid that they will be pinpointed as incenting or activating the government on their behalf. But in other countries, I guess, there is less of a fear of retaliation, perhaps for obvious reasons.

Speaking of the WTO, Peter, the United States filed a WTO case on March 23, 2018.[10] The day after the 301 Report[11] we requested consultations, and we requested composition of a panel two weeks ago regarding licensing.

PROF. YU: Yes.

PROF. COHEN: Again, this gets to a curious observation maybe on a more granular level, that here the United States also is acting a little bit schizophrenically. On the one hand, there are unilateral sanctions and tariffs, saying, "We don't need the WTO," and a very vocal and aggressive ambassador to the WTO in Dennis Shea who has very strong feelings about China. On the other hand, at the same time, we are saying, "Okay, we are going to use the WTO for this particular dispute involving China's licensing practices."

How do you reconcile the two and how do you see that case proceeding?

PROF. YU: I think what this Administration is now doing is trying to go on different fronts at the same time. On the one hand, they want to negotiate bilaterally and also take a very strong position with respect to a lot of the sanctions, a lot of the tariffs, that have been going on. On the other hand, they also want to preserve the WTO path as a way to resolve some of the dispute.

This case is actually quite interesting if you compare it with the last WTO complaint. The last one was about criminal procedures, searches, and Customs.[12]

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ed June 28, 2018; DS434: Packaging. Australia - Tobacco Plain Packaging (Ukraine) (June 30, 2016),

[10] USTR Press Release, President Trump Announces Strong Actions to Address China's Unfair Trade (Mar. 22, 2018). The USTR filed a request for consultations with China at the WTO to address China's discriminatory technology licensing requirements, DS542 China - Certain Measures Concerning the Protection of Intellectual Property Rights (Mar. 24, 2018). The complaint alleges China appears to be breaking WTO rules by denying foreign patent holders, including U.S. companies, basic patent rights to stop a Chinese entity from using the technology after a licensing contract ends, and that China also appears to be breaking WTO rules by imposing mandatory adverse contract terms that discriminate against and are less favorable for imported foreign technology. The U.S. consultation request identifies apparent breaches by China of WTO rules harming the intellectual property rights of U.S. companies and innovators. The U.S. claims under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) relate to China's discrimination against foreign intellectual property rights holders (Art. 3) and failure to ensure patent rights for foreign patent holders (Art. 28).

[11] Section 301 Report, supra note 2; USTR Press Release, Section 301 Report into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation (Mar. 27, 2018); USTR Press Release, Following President Trump's Section 301 Decisions, USTR Launches New WTO Challenge Against China (Mar. 23, 2018).

This complaint is about what we called "forced technology transfer." That covers issues such as national treatment, which is in Article 3 in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), and it covers issues relating to patents and a right to conclude licenses, which is in Article 28 of the TRIPs Agreement. So there are two different regulations that are quite problematic both in the complaint that we have filed as well as in the complaint the European Union has filed.[13]

The first one is the Regulations of the People's Republic of China on the Administration of the Import and Export of Technologies (TIER). Three different issues were highlighted in the complaint.

• Article 24 is about indemnification. Under Article 24, the licensee in China will have the right to get the licensor from other countries to indemnify them if there is any patent infringement.

• Article 27 is about who has the right to file patents on improvements. That is very problematic, especially when a lot of the technology companies want to make sure that your licensee will not compete with you and develop improvements. That is the issue there.

• Article 29 is about whether the licensee in China can actually seek alternative sources of technology, so similar or competing technology.

Those are similar issues that cover a lot of the IP licensing agreements.

But what is really interesting about that part of the Regulation is that those debates about whether this is fair for developing countries have been going on since the 1960s. If you follow what we have in the United Nations Conference on Trade and Development (UNCTAD) Draft Code of Technology Transfer, among the fourteen harmful clauses, technology transfer agreements are somewhat covered. If you think about, for example, the provisions on grantbacks, the provisions on restrictions on improvements, restrictions on expiration of the technology transfer agreements, or restrictions on what exclusive arrangements you can have, those are all considered harmful clauses that have been listed in the UNCTAD Draft.

To the extent that we are trying to challenge this before the WTO it becomes very complicated because it is hard to say that there is a consensus among both the developed and developing countries and the Uruguay Round of the TRIPs Agreement is going to change that. That is the first set of Regulations.

The second set of Regulations that becomes even more complicated is about the equity joint ventures. The idea is that there are a lot of areas in China where you cannot just go into the Chinese market; you need to form a joint venture in order to go in. A very good example will be a frontier technology, so if you are talking about, for example, smart cars, a lot of the green technology, many of those issues will be covered within those specific areas where you need to form a joint venture to go into China.

With respect to joint ventures, technology contracts will last for ten years, and after that the joint venture will have the right to continue to use the technolo-

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[12] DS362 China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights (Apr. 10, 2007).

[13] DS549 China - Certain Measures on the Transfer of Technology (June 1, 2018).

gy. The term that is provided by the TRIPs Agreement is twenty years. If you consider the fact that patent life is between fourteen years to sixteen years, then you are still talking about a gap from ten years afterwards. So you can see the concern right there.

But then the counterargument is that this is a regulation about joint ventures, nobody forces you to enter into a joint venture, and how can you prove that the money you ask for for those ten years doesn't cover the remaining time, knowing exactly what is going on.

One thing that is actually in China's favor is that everyone knows exactly what you are getting into when you enter into those agreements. So it is very hard to say that all of a sudden we don't know whether after ten years you will be able to continue to use that. People know that, and that's why they get into China knowing that, whatever they are going to get out of the contract, they can still compensate for the loss. But if that is the case, then you have to show that they are going to lose out on a lot of the things that they otherwise would get if it is not just ten years. That will be quite interesting.

I think ultimately the big question — Mark and I have been talking about this on other occasions — is what is the endgame? Is the endgame trying to have a panel decision? We know that, as Mark mentioned earlier, a request to establish a panel was filed two weeks ago, so we know that there might be a WTO panel.[14] It will be quite interesting to see whether we are trying to get the decision — that will be one possibility.

The second choice is to have panel-driven negotiations between the two sides either pre-panel, post-panel, or in the middle of the panel. The idea is that the goal is not so much just to go for this panel decision but to have negotiation on top of it.

The third choice is what we typically describe as an Article 63(3) transparency request to try to understand how China actually applies its technology transfer policy. That is quite important when considering how a lot of the policies in China are not very transparent. Therefore, to the extent that you can actually get China to give you a lot of documents about what is going on there and explain them before the WTO panel, that can be quite useful.

The last path is basically you can still win the war even if you lose the battle. A very good example is the last WTO panel decision (DS-362). China prevailed with respect to Customs procedures and penalties, and yet we have seen China slowly changing its laws so that they are actually closer to the U.S. position in 2007. So, ultimately, looking back at the last ten years, the United States may have prevailed in terms of getting them to change to a position they like but at the WTO stage they lost the battle.

PROF. COHEN: Kira?

MS. ALVAREZ: I have a point to make with respect to your statement about joint ventures being voluntary. You could argue that it is voluntary, that you don't have to enter into a joint venture, therefore you don't have to provide the

[14] CNBC, Trevor Hunnicutt & Nerijus Adomaitis, Exclusive - U.S. asks for WTO panel over metals tariff retaliation (Oct. 18, 2018).

technology, except for the fact that many times you are required to enter into a joint venture in order to operate in China. I would have a hard time making the case that it's a truly voluntary decision to enter a joint venture case if I wanted to be in China.

PROF. COHEN: I think the other thing also — Peter and I were just talking about this — is that China, in my view, could theoretically have a licensing regime that applies equally to foreigners' transfers of technology into China with all of these restrictive provisions as long as it applies equally to domestic transactions.

It is basically a Customs regime, if you will, for technology. If you are transferring technology into China or have any form of technology cooperation, there is a different set of laws that applies to that than if it was a purely domestic transaction. The result is foreigners, or at least offshore entities, which theoretically could include a Chinese subsidiary based overseas licensing back into China, are subject to a different set of laws.

China used to have a different set of laws for contracts, taxation, and many other things before it joined the WTO. In fact, there used to be a joke that China wasn't a country that didn't have a legal system; it had two legal systems, one for Chinese and one for foreigners. This is largely a legacy of that regime.

So the question is really: Does this violate national treatment or does this serve some necessary purpose notwithstanding the violation of national treatment?

PROF. CROUCH: Peter, can I ask you a question? My understanding is that China also has filed a dispute against the United States.[15] Will those be handled together or are they totally separate?

PROF. COHEN: Those are separate cases.

PROF. YU: They are separate, except that the negotiations will be somewhat together.

MS. ALVAREZ: Not necessarily.

PROF. YU: I will let Kira respond. Since she has worked for the government, she is in a better position to say what is going on there.

But, just as an academic, when I look at the last WTO dispute where Brazil was fighting with the United States over patent issues, there was one complaint about the working requirements and another complaint with respect to the federal statute on government use (DS199 and DS224). Basically what happened is that both sides decided not to continue to pursue this before the WTO. So it is possible that it is basically being used as part of the discussion in trying to resolve some of the disputes when the two sides are meeting together.

But these are clearly two different complaints. I think the staff involved would be quite different. Kira can tell us a little more about how the U.S. government will operate with respect to those issues. But I think when the two sides get together, they are going to separate the discussion. They are somewhat related to each other, so I think it will color some of the discussion.

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[15] *See supra* note 1.

MS. ALVAREZ: If they were similar, they would be handled together, but at the WTO there are two different issues and two different panels will handle them. Within the Office of the USTR I don't know. Whether they will be aggregated depends on how similar the issues are.

PROF. COHEN: I want to reflect on one thing Peter said, about losing the battle but maybe winning the war, because it also integrates with what Kira and Cynthia were saying about dispute settlement.

If you look at the 2007 WTO enforcement case (DS362), in my mind the two commercially significant issues were: (1) the Article 63 request where we requested China to produce all its cases at a time when its judicial system was very much under construction; and (2) the criminal threshold. I think most people would say objectively that the United States lost both of those battles.

However, as of 2014 China now publishes most of its cases (China Judgments Online). As I said this morning, 470,000 cases have gone online in the past three to four years, and during the period of six or seven years after the WTO case China increased by twentyfold the number of criminal cases, notwithstanding that the United States lost the case. The reason they did, as at least one Chinese justice of the Supreme Court told me, was because the United States identified a real problem in China's legal system and they realized they had to improve it.

I think a purely dispute-oriented approach to trade matters has certain deficiencies, one of which is that WTO remedies are not retrospective, they're only prospective. There is a lot of literature about how China seems to avoid having to incur much of a penalty out of WTO cases because typically, since they are only prospective, then they just change to another set of regimes and they get can get dragged into another case. This is the case certainly in the rare earth dispute, another WTO case (DS431).

Having an approach that is not purely dispute-oriented, that includes things like technical assistance and recognizing where China is going, and diplomacy, is core to pushing real change. I think a purely dispute-oriented approach has clear problems.

Frankly, I think in the long run the USTR won the two critical elements, although I think many colleagues at USTR to this day would be reluctant to acknowledge it because on paper it looks like they didn't win.

With that we'll switch to another topic, which is developments in Europe. Now we are in a bit of a trade tiff with Europe over a bunch of things. We are seeing a lot of interesting developments in Europe in, first of all, more stability in patentability issues; and, second, Europe as a destination for litigation, particularly Germany. We see Chinese litigants going to Europe. *Huawei v. ZTE* obviously was one of many cases discussed.

What are you seeing, Tobias, in Europe?

MR. HAHN: Touching upon first what we just discussed, I think being German we are accused of sort of being a Tier 2 China because of the balance-of-trade issues. We have our little tariff dispute, not to the extent that you have with China, but we have tariffs on Harley-Davidson motorbikes now. I don't know what the United States is doing, but the car industry has only been threatened so far.

PROF. COHEN: And steel, too.

MR. HAHN: Exactly.

MS. ALVAREZ: And German companies have factories in the United States.

MR. HAHN: Yes, that is a difference in practice.

PROF. COHEN: That's hurting them in China, though. BMW is a major exporter to China from South Carolina.

MR. HAHN: Turning to Europe as it applies to litigation, one disclaimer. I can mainly only comment on patents because I work on patents. If you want information on trademarks, designs, etc., I'm probably the wrong person to talk to.

Talking about patents, the question is what sort of place is Europe to litigate? I think the short answer is that Europe as such is no place to litigate patents. So far, for the time being, patent litigation is under the national jurisdictions. That may change with the coming (or not coming) of the Unified Patent Court (UPC). I can just very briefly comment on the status of the UPC.

There are two obstacles to the UPC coming into force: one is a constitutional complaint pending against the enacting law in Germany. I won't go into details, but what happened is that the Supreme Court took on the case and asked our president not to ratify the respective law until the Court has made a decision. That is still the status quo. Germany, the United Kingdom, and France must ratify, plus a total of fifteen states, but it the ratification of Germany is currently blocking the UPC coming into force.

Again a disclaimer: the constitutional complaint is not public, so I can only comment on the complaint from secondary sources and the statements certain associations have been asked to make on the constitutional complaint. It has a number of individual arguments, a lot of very specific German constitutional law.

One of the main attacks against it is the question of independence of the judges because they are elected for a term of seven years and then they need to be reelected. Part of the reelection committee is an advisory board that is staffed with the users of the system, basically the people pleading in front of the judges. That is one concern.

PROF. COHEN: "Independence" meaning independence from the users of the system?

MR. HAHN: Exactly, yes.

I am in no position to make any predictions on the outcome of that case. There is plenty of rumor out there, depending on whether you want the system to come or not. The latest rumor is that the Constitutional Court will decide on the case this year and that it will dismiss the constitutional complaint. But as I said it's pure rumor. We don't know. There is no trial or decision date yet. So we'll see how that plays out. I don't know and it's a bit looking into the crystal ball.

PROF. COHEN: Just on that notion, the reason I asked the question about independence is it's of some interest to me because there are specific obligations in China's accession regarding the independence of the judiciary. Of course, that is also set forth in the WTO in the TRIPs Agreement, and also the TRIPs Agreement has a separate provision on independent counsel, and I think it has never

been explored what that means. It is actually, I think, problematic in China if everybody is a member of the Party, and even law firms have to be members of the Party, whether that constitutes "independence."

My reading of the TRIPs Agreement is that "independent" meant independent of the administrative agency that granted the rights, although one could argue that it means something else, like independent of the Party or self-financing or not elected or whatever. I think some of those push it.

But I never heard "independent of the rights holder." I think actually that it would be a welcome development in many jurisdictions if the IP courts were more responsive to the rights holder community. A different take.

MR. HAHN: I agree there is a difference. I think it's a debatable question whether that reason will actually cross the bar for the Constitutional Court to dismiss the ratification law. We'll see. But I agree there is a difference in that. So that's one thing.

The other thing, of course, is Brexit. I have stopped making predictions about Brexit ever since the decision in the United Kingdom in favor of Brexit. I thought that would never happen because that's insane for Britain but also for the European Union. So, as I said, I've stopped making predictions.

I don't know whether you follow the news, but the negotiations between the European Union and the United Kingdom have been going on for quite some time. There is a two-year limit to these negotiations after which Brexit has to happen. So the question is will there be a "hard" Brexit without any agreement on how things will continue once the United Kingdom has left or will there be some sort of agreement. We'll see. The next five months will tell us.

One possible scenario would the "hard" Brexit scenario — well, I just said I've stopped making predictions, but my gut feeling is there won't be "hard" Brexit. But again, I thought there wouldn't be a Brexit at all. I was wrong once, so why not be wrong twice?

One of the possible other scenarios is that the European Union and the United Kingdom will agree on some transitional period during which they will sort things out, which would mean that for that transition period the United Kingdom would still be part of the European Union, or at least receive some sort of "equal status," and, therefore, it could still become part of the UPC. And then, of course, we will need to sort out what happens once the United Kingdom leaves, but that would then not stop the UPC coming into force.

So a lot of ifs and whens in that equation. But, let's face it, it's politics; it's very irrational. As much as we care about patent law, I think we have to be realistic that 99 percent of the people out there don't think about patent law. So it's just a very tiny fraction of that entire political deal.

For the time being we have national jurisdiction still. Maybe just one remark. Even if we have the UPC, that will just add another layer, the UPC will not replace the national systems, so you can then as a user choose which system you want to use. The national systems will still be relevant.

The true question for the UPC, whether the UPC will succeed or not, to me is twofold. The key question is, will the UPC be able to attract good judges? If the good judges decide to go into the system — and from all we hear that's a real-

istic scenario — then I think it will fly eventually, given a couple of years of adjustment and the appeals court getting the first cases. At the beginning of the system, I think the case law will be very divergent because national judges can't just shed their national heritage. That's the status of the UPC.

PROF. COHEN: Okay, good.

MS. HO: I have a question. I hear what you're saying about it depends on if they get good judges. But I'm wondering if you have any thoughts about whether they will get good judges, in terms of what the procedure is for appointing or electing the judges initially versus the national system?

MR. HAHN: The short answer is yes, I think they will. First of all, a sufficient number of good national judges have applied to become a judge at the UPC.

I think there are a couple of practical matters, for example, whether the national judges can become part-time UPC judges and remain national judges. That's actually a crucial issue because in a lot of jurisdictions, at least in Germany, they get public benefits and they don't want to lose those. These practical issues need to be sorted out, but they will be sorted out. So there is interest and I think there will be sufficiently good judges.

PROF. COHEN: There still seems to be a modest trend in important jurisdictions towards specialized IP courts. If we have the UPC that's one thing. The second thing is China's new IP Tribunal. Both are very significant jurisdictions. Despite criticism of the Federal Circuit and specialized IP courts, I think other countries continue to look at the necessity of establishing specialized courts.

MR. HAHN: Yes. It's sort of the European heritage. The most important national jurisdictions have specialized courts, like Germany, the United Kingdom, Netherlands, France, even now Italy has established one. I think there is common agreement in Europe.

And in Germany we are lucky enough to have in our Supreme Court a specialized senate on patent law. But it's not the Constitutional Court, so we don't have the issue of the patent being in the constitution.

PROF. COHEN: I'll turn to Professor Crouch now. How do all these international developments play out domestically in the United States? Are U.S. companies and U.S. courts increasingly looking at international developments? Do we run the risk of running afoul of some of these things? Are we out of synch or are we coming back into synch? How do you see the domestic developments?

PROF. CROUCH: I was thinking about that a little bit. A few years ago we were really moving in the direction of U.S. courts looking to other countries' courts in a comparative way, especially at the Federal Circuit with Chief Judge Rader, who used his gregarious nature to reach out and become close friends with the leading jurists around the world. We were taking these kinds of major steps really based upon his force of will.

With his stepping down from the Federal Circuit, that has been completely shut down. Now the Federal Circuit or lower courts rarely, if ever, look to any kind of international law issues to consider how to deal with domestic cases and reject the notion that they should be handling issues on a transnational basis or looking at how a similar patent was decided in Germany or in another jurisdiction.

Another thing that is happening here is you know we have history in America. Like in Chicago we've got the history of Chicago gangsters, and those are largely gone; and we've got the Wild West of America, which has kind of been filled in by California. And then we've got this image of the "American innovative entrepreneur" that we have held on to for a long time, and we have had strong political support for the patent system I think based on that notion, with the idea that that's kind of the "American ideal."

One thing that has happened in the past ten years — I don't think it's a coincidence — is a shift to weakening patent law. What has happened in the past ten years is that for the first time in history more U.S. patents are owned by companies that are non-U.S. entities than U.S. entities. Most patents being issued today by the U.S. Patent Office are owned by non-U.S. companies.

That is kind of a big deal, in that usually our political supporters for the patent system talk about how U.S. companies are going to use this to drive our economy, that we've got U.S. innovation and our patent system is driving that. That story doesn't quite work when we have non-U.S. entities enforcing their patents on the U.S. market.

So in many ways going forward we have to think about telling a different story here. Maybe we have to look at the Chinese approach, where the story might be more about some kind of national security and being the driver of technology change for the world, being the one that is the center of that for the world, as opposed to such a U.S.-centric focus.

Those are some big issues that we've got to deal with.

PROF. COHEN: Close to 51 percent, a little over half, of U.S. patent applications are from foreign applicants. In China it's predominantly Chinese applicants, and it has been that way for a very, very long time, I think at least ten to fifteen years, but now even more so. As a percentage, I think foreigners are maybe 15 percent of patent applicants in China.

The usual rhetoric that would hear about China was "China won't protect IP until China has IP of its own to protect." I think people still espouse that, not realizing that in the Chinese Patent Office, which is now bigger than the next twenty patent offices combined, 85 percent of the patent applications come from domestic applicants. It really has very little validity as a tool to judge the Chinese patent system if you think the system has challenges.

On the other hand, I could see Americans thinking *Oh gee, a lot of our patent system is now dominated by foreigners. We really need to think about what the balance means to our innovation.*

Of course, by the standard that "you won't have a good IP system until you have lots of IP to protect," then one could say that the U.S. system is getting progressively weaker. I don't see that emerging as a point of discourse.

MS. ALVAREZ: Dennis's point about more patents being issued in the United States to non-U.S. companies is interesting. Up until perhaps two years ago that wasn't seen as a problem because we were seeing it as "It's okay, we're an open system, and if we become the center of it, it doesn't matter whether they are here, and they are going to produce." We had a more — not to use buzzwords — globalist perspective, that it was okay that we had open doors, and everybody

was coming here. I think it has only become perceived as a problem in the last two years.

AUDIENCE [Albert Keyack, European Patent Office]: If I may comment, that's very interesting. When you look at how the European Patent Office sells itself, they are very proud to have foreign filers. The perception is *Well, we have a good IP system.* No one would have the idea *Ooh, now all these foreigners file patents in our jurisdiction.*

PROF. CROUCH: Yes, right.

MR. HAHN: About half of the patents are issued to foreign filers, 26 percent from the United States and the other quarter from the rest of the world.

PROF. COHEN: That shifts the balance.

MR. HAHN: Just one remark on a point Dennis raised, which is really interesting, the perception of the U.S. courts of foreign decisions. Everyone in Europe knows Judge Rader — everyone.

PROF. CROUCH: He had many friends.

MR. HAHN: Yes. That has sort of died away, which is sad, I think. In fact, when you look at harmonization in the patent field in Europe, I think the most effective harmonization we have is not by statute. The most effective harmonization we have is because judges from the different jurisdictions talk to each other, and particularly between the United Kingdom and Germany it's huge. They are really practically harmonizing patent law even though the statutes are not harmonized.

PROF. COHEN: I would view that as a counterpart to my observation about WTO disputes. There are formal channels, and they have significance and meaning, and we commit a lot of resources to them, but informal channels can be equally important.

MR. HAHN: And probably be more effective.

PROF. COHEN: They can actually accomplish more without all the political baggage.

MR. HAHN: It's below the radar.

MS. ALVAREZ: That's why we used to send Judge Rader to China.

PROF. COHEN: In fact, I will be seeing him in China in early December.

AUDIENCE [Mr. Keyack]: We had Judge Rader come many times.

PROF. COHEN: I would like to go back to one other point made by Professor Crouch. I had a similar discussion when I was in India on Wednesday.

MS. ALVAREZ: Your arms must be really tired. [Laughter]

PROF. COHEN: I am quite tired, but I don't want to make excuses if I'm not saying anything rational.

I got into a dialogue with the director of the Indian Council on Competitiveness. I was told by the people who sent me there, the U.S. Chamber of Commerce, "Don't make comparisons to China because India feels so left behind. They are going to take it very harshly that they are not keeping up with the Chinese," etc.

I said to this fellow — this was my honest response — "Look, I don't think the Chinese business model, the Chinese model of patenting and state inter-

vention, is going to necessarily drive the results you might want to develop an innovative economy."

You hear this more and more, not just about India but many other countries. Of course, the example I often give is: If you look at how China innovates, how it patents, China patents during the fall. So if China really wants to innovate, all they have to declare is this one season in China, the fall. Why is that? Because of state intervention, state subsidies, state awards, state grants. If you have 30–40 percent of your patents granted between September and December, it's because you've got to use up the budget to subsidize the patent filings. That is not necessarily creating value, and there are many other interventions that do not necessarily create value, but they absorb of lot of funds and a lot of attention.

On the other hand, India, like the United States, has a vibrant market, has a lot of transparency, has courts that function, and those should be leveraged to drive value in the IP system. Artificial interventions can actually breed frustration internally, and they can also make it very hard to engage diplomatically because the state is so financially invested in things that don't accomplish much.

So I caution against adopting the Chinese system.

There are some good things actually. I think one thing that China does well, although I have a bit of caution, is access to the IP system. It is cheap to litigate. You have an administrative enforcement system. You have cheaper rights, like utility models and design patents. Granted they can be abused, but the fact is you can give the small inventors rights and you can give them an ability to enforce them that is much harder to obtain in the United States.

PROF. CROUCH: I was suggesting adopting the notion that a strong patent system is in this country's national security interest.

PROF. COHEN: Right, and that's another thing you also hear. I think actually the United States has adopted — and I'd be interested in Peter's observations on this — rhetoric in which we are increasingly recognizing economic security as part of national security. Maybe other countries have done this as well, but China, clearly in its investment catalog and elsewhere, has seen a much closer nexus between national security and economic security.

Any questions or comments?

AUDIENCE [Paul Rauch, Principal, Evan Law Group]: When you talk about the size of the Chinese patent system, that now it's bigger than everybody else's, what happens when you subtract out all the pretty much state subsidization? Is it still that big, and is that size all reflected on the litigation side?

PROF. COHEN: I don't think anybody has done a calculation of how many patents are subsidized. That would be very hard to do because the subsidies are coming from multiple sources, frequently local governments, different ministries.

You can subtract out the utility models and designs, which are cheap and are unexamined, and then you would lose about two-thirds of your patent applications. You'd still have a pretty large Patent Office in invention patents, what we would call utility patents in the United States.

It would be wrong to assume that all of these subsidized rights or cheaper rights are necessarily low quality, though. They are perhaps predominantly low

quality, and many of them are asserted in the courts. In fact, a lot of the utility models and invention patents asserted in the courts are non-service inventions, they're inventions made outside of employment, which the Chinese assume are lower quality.

But if you look at utility model patents, which are the subject of a first filing in China and then a priority filing in the United States, you would find that big companies in China — like Huawei, like Foxconn — frequently use the utility model patent as their first patent in China and then they file the invention patent in the United States. Why? Because there's an immediate market need, they need that patent granted quickly, and the utility model offers that. So actually, in terms of forward citation rates for those applications in the United States, you see a higher rate of forward citation rates on those utility model patents because they are responding to the market.

This gets back to my point about why China is not the best model. When there is a market response China does quite well, but you have to weed out all the other junk in the process. So actually they are not necessarily all bad but many of them are.

AUDIENCE [Alex Pokot, AP Patents]: Where do you see filings by U.S. companies or inventors going in China in the next five years?

PROF. COHEN: First of all, in the last five to ten years we have seen a big ramp-up as the Chinese market has become more important for the companies, as there has been more investment, as China has been a bit of a stranglehold for defensive purposes, because they have to be ready if they are going to be litigated against — China grants injunctive relief quite frequently — so people needed to beef up their portfolios. I think a lot of companies, if funds are limited, would come from other markets, like Japan, because companies decided they needed to file in China.

There is a lot of rhetoric out there that in software patents, FinTech, and other areas China seems to be more stable, and even in pharma, where they are getting better, that there may be more filings, and that China may even be a preferred destination.

Certainly for standard-essential patents (SEPs), where there is more litigation going on in China — we heard about *Huawei v. Samsung;* there's the *Iwncomm v. Sony* case, the *Huawei v. InterDigital* case, the *Qualcomm* cases — it is becoming a bigger forum for litigating SEPS. So, if you're in those sectors that are patent-dense, China is a necessary forum.

I think the trade war throws a bit of an interesting disruptive aspect into this. Companies can't pull their supply chain out of China quickly, and certainly, if I were a major investor in China, I wouldn't necessarily do it solely on the basis of tariffs that are coming into effect January 1.

But if they do persist, if it's not resolved, it will affect how people patent and where they invest. A 25 percent tariff is a huge burden. If I were a multinational company, I would probably be looking at how I can minimize those duties and what that means not only for where I invest and my supply chain, but what that might also mean for where I patent. Maybe I will choose to go to India or Indonesia or some other place.

China has ramped up domestically very rapidly. I would suspect five to ten years out smart American law firms and their clients will also be using some of these tools that Chinese companies use, like utility model patents, like designs. If you have a tight budget and you have something that you only need about ten years' protection for, and if a utility model is appropriate, why not? It's certainly a lot better than having no protection.

And similarly with designs. As China enters the Hague Convention, under which designs get fifteen years' protection, a little bit more robust scope in the amended Patent Law, I think it becomes even more compelling. I would suspect that is going to be more of a trend going forward.

AUDIENCE [Mary Jo Boldingh, Principal, Boldingh IP Law LLC]: You mentioned the prediction or the hope that as more Chinese nationals get Chinese to patents that the system would become fairer. I've also heard that that most patent litigation in China is between Chinese companies.

PROF. COHEN: About 98 percent.

AUDIENCE [Ms. Boldingh]: As the Chinese litigate against each other in patent litigation, do you think it will become fairer?

PROF. COHEN: I think those are old wives' tales. There is very little empirical support. If they did have empirical support, we would have seen it many years ago. Fifteen, twenty years ago the percentage of foreign litigation was maybe 5 percent; it was 95 percent Chinese versus Chinese. The dockets have grown exponentially. Foreigners have also gone up some, but we are a shrinking share, I think to 1.2 percent this year of the litigation docket.

People debate what is a foreign case. I'm using Supreme People's Court data, which may understate the amount of foreign cases because it may look at whether the company is physically located overseas rather than whether it's a subsidiary located in China.

Those assumptions, whether it's most of the patents are being filed by domestic entities and most of the litigation is between domestic entities, probably work better in economies that are purely market-driven without active state intervention. When you have the state actively intervening it's a little bit harder to make those assumptions.

If we look at other factors — maybe licensing revenue, maybe foreign investment in high-tech sectors — there could be other indicators of how well the system is going.

Another thing to reflect on, as I said in the plenary session this morning, is we have to be really careful about how we look at the data about foreign win rates on litigation or injunctive relief. The data that we have is incomplete. It's much better than what we've had before, and I think to a certain degree everybody is just reacting to the fact that now we have data, and we have lots more of it. So this is a gold mine — not just in IP, but for the social sciences generally. People are looking at property confiscations, criminal cases, and divorce cases, because how we have these roughly 30 million cases that came online almost like that [snap of fingers] in the past year or so. That's really significant.

But, on the other hand, there is a question of what is being omitted, the quality of the judgments. I think we are seeing some pretty good developments in

some of the courts. But to extrapolate that nationwide we need to recognize that even people who develop the database recognize that it doesn't include settlements, it doesn't include pleadings, it doesn't include motion practice — it's just purely the final decisions.

People often ask me, "How much SEP litigation is going on in China?" The only number I can give you is based on talking to people because we don't have settlement data, we don't have complaints. Therefore, this is very limited subset of final decisions that the courts have decided to make available.

Within that subset what you see is foreigners winning frequently and injunctions being readily available. Is that representative? When you consider that 1.2 percent of the litigation is foreign-related, it would be very easy to manipulate that number when 30 to 50 percent of the cases are not reported. I'm not saying the Chinese government is doing that. I'm just saying we need more reliability in the data to make conclusions.

AUDIENCE [Ms. Boldingh]: What about the perceived state intervention in even the Chinese-versus-Chinese litigation?

PROF. COHEN: Well, it's interesting. When the Trump Administration was about to sanction ZTE and then pulled back on it after Trump decided he would not impose the sanctions, I was in China. I was speaking with an academic who said, "Too bad. That's a State-owned enterprise. They get away with everything."

So it's not true that all litigants are even treated equally. Local protectionism people talk about it with some frequency. It benefits and hurts Chinese and foreigners. If you are a foreigner litigating a patent case in China, you are naturally going to bring a case in a jurisdiction where you have employment, investment, you're known to the local government. Why wouldn't you?

And Chinese companies of course do the same. If you are a State-owned enterprise and your CEO is appointed by the local People's Congress, just like the judges are, you are probably going to get a little bit better measure of protection as well.

I would be careful. There is a good study done by a sociologist at UC Irvine who looked at commercial cases and said that in general who wins in a commercial case in Shanghai — any commercial dispute — is going to be a local company with a lot of employment; not foreign, not Chinese, just whether you are a local company with a lot of employment.[16]

I think that's it. Thank you very much.

[16] Xin He & Yang Su, *Do the "Haves" Come Out Ahead in Shanghai Courts?*, J. EMPIRICAL LEGAL STUD., Vol. 10, Issue 1, 120–145 (March 2013).