DIRECTORS ROUNDTABLE

WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

Bradford Smith

General Counsel of Microsoft

THE SPEAKERS:

Bradford Smith
General Counsel,
Microsoft

Sir Christopher Bellamy
Senior Consultant
to Linklaters

Roger Enock
Partner,
Covington & Burling LLP

Tyler B. Robinson
Partner, Simpson,
Thacher & Bartlett LLP

Professor Ian Walden
Of Counsel,
Baker & McKenzie

TO THE READER:

General Counsel are more important than ever in global affairs. Boards of Directors are looking increasingly to them to enhance financial and business strategy, compliance, and integrity of corporate operations. In recognition of our distinguished Guest of Honor's career accomplishments, of the vital role of the Corporate Counsel profession, and of the leadership of Microsoft as a corporate citizen, we are honoring Bradford Smith, General Counsel of Microsoft. His address focuses primarily on the legal challenges of managing a global business amidst diverse and uncertain regulatory climates and specific antitrust, intellectual property, and Internet policies in this context. The Distinguished Panelists will speak on international deal-making, antitrust challenges, information technology, and trends in European litigation.

The Directors Roundtable is a civic group which organizes the preeminent worldwide programming for corporate Directors and their advisors, including General Counsel.

Jack Friedman
Directors Roundtable
Chairman & Moderator

Bradford Smith
Senior Vice President, General Counsel, Corporate Secretary, Legal & Corporate Affairs for Microsoft

Microsoft

Brad Smith is Microsoft's Senior Vice President, General Counsel and Corporate Secretary. He leads the company's Department of Legal and Corporate Affairs, which is responsible for all legal work and for government, industry and community affairs activities.

Smith has played a leading role at Microsoft on intellectual property, competition law, and other Internet legal and public policy issues. He is also the company's chief compliance officer. Since becoming general counsel in 2002, he has overseen numerous negotiations with governments and other companies, including Microsoft's 2002 antitrust settlement with state attorneys general, its 2002 data privacy negotiations with the Federal Trade Commission and European Commission, and agreements to address antitrust or IP issues with Time Warner, Sun Microsystems, RealNetworks, IBM and Novell.

Smith is responsible for Microsoft's intellectual property work, including all of its IP portfolio, licensing and public policy activities. He has helped spearhead the growth in the company's patent portfolio and the launch of global campaigns to bring enforcement actions against those engaged in software piracy and counterfeiting and against viruses, spyware and other threats to Internet safety. He is also responsible for the expansion of Microsoft's citizenship and philanthropic activities, work to revise its contracts to make them more customer-friendly, and the strengthening of legal compliance programs, issuing Standards of Business Conduct for all Microsoft employees and creating an Office of Legal Compliance.

Smith previously worked for five years as Deputy General Counsel for Worldwide Sales, and before that, he spent three years managing the company's European Law and Corporate Affairs group, based in Paris. Before joining Microsoft, he was a partner at Covington & Burling, having worked in the firm's Washington, D.C. and London offices and represented a number of companies in the computing industry.

Smith graduated summa cum laude from Princeton University, where he received the Class of 1901 Medal, the Dewitt Clinton Poole Memorial Prize, and the Harold Willis Dodds Achievement Award, the highest award given to a graduating senior at commencement. He was a Harlan Fiske Stone Scholar at the Columbia University School of Law, where he received the David M. Berger Memorial Award. He also studied international law and economics at the Graduate Institute of International Studies in Geneva, Switzerland.

He has written numerous articles regarding international intellectual property and electronic commerce issues, and has served as a lecturer at the Hague Academy of International Law.

JACK FRIEDMAN: Good morning. I'm Jack Friedman, Chairman of the Directors Roundtable. We are very privileged today to present world recognition to Bradford Smith, who is the General Counsel of Microsoft. I'd like to make a few remarks of orientation about the series, and then present the other speakers who will speak after him.

We are a civic group that works worldwide with boards of directors and their advisors, including general counsel, financial institutions, and accountants. We've never charged a penny for anybody to attend any event in 16 countries. The way in which this particular honor, which is called "World Recognition of Distinguished General Counsel," has evolved is that in the discussion we've had with directors, their feeling unanimously has been that their corporations never get a positive word anywhere, any time, for any accomplishment that they have. If they're in the news in any way, it's always critical. And there is the impression that many people have that a corporation does not do the right thing unless the government first beats on them. In order to in some way correct or ameliorate that particular impression, we decided that it would be very worthwhile to host different leaders of the business community – in this case, it's a general counsel – to talk about the leadership of their companies from their perspective.

In terms of the format of the event today, we're going to have our Guest of Honor speak first. Then there will be some brief remarks on relevant topics by our four distinguished panelists. We have Sir Christopher Bellamy, who is a consultant to Linklaters; Professor Ian Walden, Of Counsel to Baker & McKenzie; Tyler Robinson, a partner of Simpson, Thacher & Bartlett; and Roger Enock, a partner of Covington & Burling.

In our series, we have honored previously, on the American side, individuals such as the General Counsel of Citigroup, Ford, Chevron, Intel, and Fidelity. And on the European side, we've honored the General Counsel of Royal Dutch Shell, GlaxoSmithKline, UBS, and Nestlé. It's a truly global honor.

I think it's evident that there is no company in the world which has done more to change modern times in the last few years than has Microsoft, and it's really unique to hear a leader of Microsoft speak about its perspective.

So, without further ado, I'd like to have Brad Smith take the podium here and make his remarks. Thank you.

BRAD SMITH: Thank you. It's a pleasure to be here. Thank you all for coming this morning. What I wanted to do was to introduce the topic, and then I'll be followed by the other four panelists. Then what we are really hoping to do is have a discussion, because I think that's probably a lot more interesting for everybody than just having you all sit there and listen to each of us speak.

It is a pleasure for me to be back in London. Next to Seattle, I've spent more years living and working in London than any place in the world. It is something I've benefited from, in terms of having a perspective on what is happening around the world.

One of the challenges I think that we all have, whether we're working at a company or advising a client, is to look beyond the issues of a particular day to discern some longer-term trends. Obviously, it typically takes the perspective of a number of years to get a sense of the bigger things that are unfolding over time. I personally find it's helpful to look at the experiences of those who've gone before us, whether they were individuals or companies or industries. One often sees the past repeat itself in various ways, or at least provide some instructive analogies.

Indeed, I sometimes ask myself, as a general counsel, "Where did this job come from?" What led to the creation of the in-house counsel role? In the United States, it's actually clearly traceable to a very particular event. In 1869, for the first time, there was the completion of a railroad track that connected New York City with San Francisco. It was a momentous event for our country. Before that, if you wanted to travel from New York to San Francisco, it would take you three months, and there was a 30% probability that you would die before you got there. Literally! Just think about how different that is from our world today. And yet the moment that track was completed, it became a journey of a week; and there was a nearly 100% probability that you would arrive safely at your destination.

It not only connected our country, it transformed it. The railroad changed American society; and as it changed American society, a lot of other things changed in response. The law changed. The next decade – the 1870s – was one of the most controversy-filled decades for the patent law in our country, and there was an enormous spread of litigation and debate about patent reform in the U.S. Congress. It led to the birth of the antitrust law in the United States, the Sherman Act, that we all still talk about in the antitrust field today.

As more and more people relied on railroads, there emerged new issues of public safety and new regulations, first at the state level and then at the federal level. It led companies in the United States, for the first time, to employ lawyers inside their businesses. Before that, it simply wasn't done. And yet it made perfect

sense, because in the course of a day, a railroad train would start in one state, and it might cross the state lines of two or three other states, so companies had to figure out how to comply with multiple state laws in their businesses in new ways. You couldn't just switch trains every time you came to a new state border.

Companies therefore adapted. They adapted through the creation of legal departments. They changed the way they purchased products, because they wanted to centralize their patent arrangements. It led to a whole host of new business organizational models.

All of the changes in technology, the economy, and society led to changes in government, as well. The modern regulatory state, as we know it today, in many respects has its origins in the changes that the railroads unleashed, as people felt first that state governments needed to enact new regulations. Ultimately, there needed to be a real national system of regulation in fields that previously had not been part of the national scene at all.

Personally, I think we're living in a similar time today, but the changes are taking place at the global level instead of on a national basis. There are many technologies that are driving these changes, but certainly one of the leading forces of our generation has been information technology [IT] – first the personal computer, and then its integration with telecommunications, and then its culmination in the Internet and all of the new services that the Internet has unleashed over the last decade.

We're seeing it lead to changes in substantive law over time, and we'll talk about that a little bit this morning. It has led over time to changes in antitrust and competition law. It's leading to changes in intellectual property [IP] law, especially in the copyright field and the patent field; and it's leading to debates and changes in multiple jurisdictions simultaneously, as different governments decide where they want to go.

A bit like the states in the United States in the latter part of the 19th century, different governments, perhaps not surprisingly, are deciding that they sometimes want to go in different directions. Values sometimes differ in different societies, in different cultures. Different policy goals are sometimes given a different priority in different parts of the world. Even though the debate is remarkably similar oftentimes, the outcome sometimes can vary quite a bit.

As these substantive changes unfold – not only in intellectual property and antitrust law but in other areas, like the protection of personal privacy, for example – it's unleashing a series of changes in process, as well. Companies have to adapt. I think the role of the contemporary lawyer today, whether working inside a company or advising a company from a law firm, is often to help clients determine how to navigate these very complicated and often uncertain shoals; to recognize that the exercise of giving legal advice is not only talking about what the law is today, but predicting where it is likely to go in the future; and sorting out how to help companies deal with the complexity that arises, especially when different laws in different countries move in different directions, all at the same time, and yet one is trying to offer a global product or service.

If the challenge for companies is substantial, I think the challenge for governments is equally so. There was an interesting book called A New World Order written a couple of years ago by, Anne Marie Slaughter, the dean of the Woodrow Wilson School of Public and International Affairs at Princeton. One thesis of the book is basically that a new world order is, in fact, emerging through the interaction of regulators around the world. Regulators have become the newest form of diplomats. Officials who previously confined their work to a single national jurisdiction have to spend more time talking with, working with, and sometimes debating with, their counterparts in other countries. Ultimately, one of the big questions for our generation is where these things will evolve over time.

In the latter part of the 19th century, it was difficult for people to contemplate that certain areas of regulatory life would ultimately be dealt with at the national level. In the United States, everyone took for granted that things would be dealt with locally or at the state level, not in far-off Washington, D.C. And yet, over the course of decades – not years, but a few decades – new models emerged. Similarly, we're living in a time where we're seeing more and more international discussion, whether it's about ways to coordinate informally, or have some formal mutual recognition, or ultimately bring things together at a regional level, whether it be the European Union, or a global level in an organization like the World Trade Organization.

It's very difficult to know exactly where things will go; and yet, personally, I do believe that over the course of this century, we are likely to continue to see much increased international and even global integration of certain legal rules. By the time those people who are leaving law schools and starting work in law firms today finish their careers, say three to four decades from now, the legal world in which they work is likely to be quite different from the legal world that those of us in this room first entered when we left school. The four perspectives you'll hear today each draw in some of the various ways on which this increasing international integration is forcing all of us to come to terms with new challenges and new opportunities.

So let me stop there and turn it over to the others. Thank you.

JACK FRIEDMAN: Our next speaker, Sir Christopher, if you'll mention your background with the courts.

SIR CHRISTOPHER BELLAMY: I'll work something in as I go along.

JACK FRIEDMAN: Thank you.

SIR CHRISTOPHER BELLAMY: Now, I first of all compliment Brad on a brilliant introductory speech. I couldn't help thinking, in relation to railroads, how James Watt ruthlessly enforced his patent on steam engines for over 20 years, and I wonder if he would have got away with it today, or if we had had an antitrust law in the 18th century.

I would like to spend just a few moments looking at two aspects at a relatively high level; one on substance, as regards the EU concept of abuse of dominance, and the other on the issue of process in the antitrust area.

As you know, antitrust has spread like wildfire around the globe in the last few years. Many, many jurisdictions have antitrust laws. We've almost got a kind of jus gentium, a kind of universal law. Inevitably, with all those jurisdictions, we now get the clash of the tectonic plates as they jostle for position, particularly as between the European Union and the United States.

In general, and I greatly oversimplify, the world has tended to follow the EU model rather than the U.S. model around the world. The EU model is essentially administrative enforcement by an agency on the basis of the concept of abuse of dominance, with recourse at the end of the process, to a court of some kind to review the decision by the agency.

The U.S. system, on the other hand, is essentially more court-based, where the agency tends to be more the prosecutor than the decision-maker, and the underlying concept is that of monopolization mitigated by a rule of reason.

But because the EU system has been copied so widely around the world, not only in Europe, but also from the point of view of other countries, it's extraordinarily important that the European Union gets it right and develops a sensible system of abuse of dominance under Article 82 of the EC Treaty.

Dominance, as such, is a concept that's not so difficult to understand. Many business people write about dominance embarrassingly in internal papers, with disastrous consequences. It can sometimes be misleading. I was a junior member of the IBM team in the mid-1980s at the time when IBM was regarded as a dominant colossus around the world, practically a nation

state in its own right. Within a few years, as a result of the advent of new technology, including the personal computer, IBM had virtually disappeared from the scene. Dominance can be more apparent than real.

But in the EU context, it's abuse that is the more difficult subject; and I would like to suggest that at the moment the European Union still lacks a coherent theory of abuse grounded in sound economics and the realities of commercial life. One can, perhaps, argue that the Microsoft decision in itself illustrates that. In the end, that case (talking in very general terms now) was decided not on the basis of consumer harm, or a close economic analysis, or a rule of reason, but on a rather form-based test derived from a case called IMS, which was in turn derived from an earlier case called McGill.

Now, the question, I think, is whether this is a satisfactory way forward. When I was a judge of the CFI [Court of First Instance, the European Union's second-highest court] in Luxembourg, in a particular case called European Night Services, we thought we had reoriented Article 81 of the Treaty toward a "rule of reason" approach. If you take cartel cases, the CFI has been very assiduous in controlling the facts of the case. If you take merger cases, like Air Tours and Tetra and so forth, the CFI has been very assiduous in reviewing the reasoning of the decision. But for some reason, and it's quite hard to understand why, in Article 82 cases, the court seems to be much more content to adopt a rather formal approach.

Both McGill and IMS were rather one-off cases, but they've been used in Microsoft to turn what was essentially a rather obscure and idiosyncratic line of reasoning into a series of basic principles.

I wonder if anybody realized that in McGill, which I think I also had the honor to be in at one point, the parties who were alleged to have abused their dominant position actually turned out to make more money after the abuse than you could possibly have imagined, because having been ordered by the court – this was the Radio Times and the T.V. Times – to carry the TV schedules of rival television companies, those products became much more attractive to buyers; and they sold many more copies with carrying their rivals' products than they had done before. So it all backfired as the law of unintended consequences.

So there's a lot to think about in abuse. But in terms of process, what role should the court have? When I had the job of setting up the court system in this country in the antitrust area, the Competition Appeal Tribunal, there was one tweak that most of us insisted upon, which was that the court – the national court, in this case – should have a merits jurisdiction, and not just

a judicial review jurisdiction. It seemed to us absolutely essential, if you've got an agency enforcement-based system, that there should be proper control by the court. In that regard, what is important from a court's point of view, I venture to suggest, is not so much the actual outcome of the case, but the fairness of the process. What gives confidence in the system is the thought that at the end of it, you've got a court that will grapple openly and fairly with the issues and produce a reasoned judgment.

Whether we've got such a situation in Europe at the moment, as far as abuse of dominance is concerned, may be open to question. This is a fast-developing area.

This is my last point, just to bring us right up to date. Last week, we saw – as you've seen reported in the press, so it's in the public domain – a series of dawn raids in the pharmaceutical sector. These raids were not in the context of any alleged cartel activity, not even in the context, as far as one can tell, of any specific allegation of wrongdoing, but in the context of a sector inquiry into the alleged abuse of intellectual property rights in respect of generic competition to ethical pharmaceuticals.

In that context, the Commission has sealed, or raided and sealed, the offices of European general counsel in a number of major pharmaceutical firms, and sought documents relating to litigation in the intellectual property area, and presumably some abuse of some kind in relation to Article 82 is suspected or alleged.

Those kinds of events – striking, confrontational – do highlight the power of the authorities and underline, in my respectful view, the need for an extremely strong judicial control of administration action.

Thank you very much.

JACK FRIEDMAN: I wanted everybody to know that Christian Alborn and his staff at Linklaters have been incredibly generous in their time and expertise, particularly over the holiday period, when many people were on vacation. Professor Walden is our next speaker.

PROFESSOR IAN WALDEN: Thank you. My name is Ian Walden, and I'm Professor of Law at the Center for Commercial Law Studies, Queen Mary, University of London, and affiliated with Baker & McKenzie.

I'm here to talk about, and I started my career in 1987 looking at, information technology law; and clearly Microsoft plays a fundamental role in information technology developments over the last 20 years.

But I really want to talk not about the technology, but about the "I" – the "information" side, and look at the evolving treatment of information products and services over the last five to 10 years.

I break that down into three categories of interest to me as an information lawyer. The first is clearly the increasing harmonization of formal public law rules. We see, as manifest most obviously in the World Trade Organization's TRIPS [Trade-Related Aspects of Intellectual Property Rights] agreement, considerable harmonization at an international level on the way in which we treat the vast range of different information products and services under intellectual property law.

So despite the problems of the multi-jurisdictional environment in which general counsel operate, general counsel have had considerable help over recent years from governments in the increasing harmonization of the treatment of intellectual property, and the increasing strengthening of the intellectual property regimes in terms of public law.

While we've seen harmonization of public law rules, in terms of private law arrangements, what I think is of particular interest in recent years is we've seen a burst of creativity and diversity, which has created great complexities for general counsel in arranging the protection of their information products and services.

We've moved from simple proprietary licensing to the emergence of public domain licensing under the Free Software Foundation, the emergence of the "open source" movement, and most recently, the Creative Commons initiative and the "some rights reserved" movement. They're trying to create a greater variety of private law arrangements to deal with the use and abuse, essentially, of information products and services. Microsoft has participated in that evolution, with the recent announcement between the Creative Commons movement and Microsoft in respect to the licensing tool, a collaboration trying to encourage the use of Creative Commons licensing in association with Microsoft products.

As well as this greater diversity of private law arrangements, we've also seen an evolution within our traditional private arrangements, the proprietary license, in the way in which companies try to protect or offer access to their information products and services.

In particular, in terms of patent licensing, in certain areas of the IT industry we've seen an abandonment of the traditional patent license in favor of covenants not to sue; and we've seen Microsoft, IBM, Sun, make these open promises. A whole range of major IT companies are actually saying, "We have these rights in our

information products and services, but we want to assert to the world, make these promises, covenants, to the world, that we do not intend to assert our rights; we want to encourage their use, access, and exploitation by others."

So we've seen a greater diversity and complexity of the private law arrangements, whether bilateral multinational licensing arrangements or these more unilateral covenants and statements and declarations to the world.

That creates problems for general counsel in terms of issues of software development, for example. How do we control our technologies, as they participate in a huge range of open source development? How do we ensure that they do not export or import code into the companies where we don't actually know under what legal arrangements those products and services have been developed? It creates issues in mergers and acquisitions for general counsel. What sort of information products and services are we actually obtaining under these mergers and acquisitions? We see the emergence of forensic analysis of software in the M&A [mergers and acquisitions] process to try to determine, within this huge code that represents the major asset that is being bought or sold, what within that code is subject to proprietary licensing, open source, public domain, Creative Commons. The complexities and the detail with which we treat our information in a modern commercial environment have changed very significantly.

The final thing I wanted to mention is the role of technology. We have seen the emergence of technical protection mechanisms – the ability of the technology to enhance and even supersede our ability to control the use of information through law. We have seen the use of digital rights management techniques to disclose more about the way in which we obtain, use, and abuse information products and services. But despite the promise of technologies and digital rights management systems, [there's the need] to enable companies to control, access, and use information.

Over very recent years, we've seen the steady abandonment, or the giving up, of such technologies and such possibilities, as the consumers have essentially bucked against those trends. They don't want their property to be interfered with by the technological protection mechanisms that the companies want to insert in their products. They don't want their privacy to be interfered with through the disclosure of digital rights management tools. We've seen the industry having to respond to these consumer concerns, and the role of technology has somewhat fallen away as a mechanism for controlling information products and services.

In conclusion, I want to highlight the fact that in our modern information technology environment, we have a considerable way to go in terms of the legal arrangements that surround access and use of information, because at the end of the day, it's not the technology that we desire; it's the information that underpins that.

Thank you very much.

JACK FRIEDMAN: We have two more speakers, who will be speaking regarding litigation issues; and then we'll turn to the panel discussion where everybody may speak about each topic.

TYLER ROBINSON: I'm Tyler Robinson from Simpson, Thacher & Bartlett, and I'm a U.S. litigator transplanted over here to London. I thought I might introduce some evidentiary issues that come up, certainly in my practice, as e mails and other documents spread around the world.

From a litigator's perspective, whether you're involved in a criminal case or an insurance case or a securities case, evidence is always key. How do you get it? How do you preserve it? Where is it located? How to maximize it when it's good for you and how to minimize its impact when it's bad? And particularly topical for today, how to comply with the expectations of courts and regulators around the world that evidence be preserved and be made available when legal disputes arise?

This is becoming more of an international undertaking, both because business is expanding globally, but also because information technology makes documents easily spread around the globe, literally by the click of a mouse. I'm sure it's no surprise to anybody in this room that e mails are really the modern-day fuel of litigation. Unlike other kinds of fuel, e mails seem to be in limitless supply and turning up everywhere, which is, of course, good for me.

While private litigants and government regulators are increasingly looking overseas and across jurisdictional boundaries to gather evidence – and this is a recipe for conflict – let me offer a couple of anecdotes by way of example.

I was in a deposition not long ago, here in London, in relation to a U.S. action; and I was representing the U.S. subsidiary of a U.K. parent. The witness was a former employee of the U.K. parent; and, for some reason, he didn't want to volunteer in his retirement for a deposition in a U.S. litigation, so he was compelled to do so by an English court order. There were English lawyers in the room, and there were U.S. lawyers in the room. During the course of the deposition, the witness was being asked questions that tried to pry into communications that had involved some of my partners in the United States. The witness, a U.K. national,

wasn't all that conversant in U.S. privilege law, and he had a question that he wanted to ask his lawyer. As the English lawyers in the room explained to us, under English rules, you cannot step out of the room in the middle of a witness's testimony and communicate substantively with the witness about his testimony. In the United States, you can; but you're subject to questions that then elicit the fact that you did, for impeachment purposes. Well, as you can probably imagine, there was a whole lot of yelling and screaming and carrying on in the room about whether the deposition could stop and this guy could leave the room and have his question answered, so that U.S. privilege would be preserved.

Another example: internal investigations. That they are becoming more "popular" is probably not the right word; but they're definitely becoming more common, especially for U.S. companies. This is probably true over here, as well, as leniency programs become available, certainly in the antitrust field. Companies want to know what's going on inside their companies; they want to have the ability to investigate internally when there is reason to suspect that there may be wrongdoing. U.S. companies are really obligated to be able to do so, but that requires access to company data, wherever it may be, including e mails.

In Europe, many European countries have very protective privacy laws that protect employee e mails and other company data maintained on company systems; and you may need to have consent from the employee in order to access that information. If you're a U.S. lawyer and you're trying to investigate possible wrongdoing inside of a company, you potentially compromise your investigation, and perhaps even the evidence that you're trying to preserve, if you have to go and ask everybody inside the company if it's okay if you look at company data. What do you do in that situation?

There are three broad areas that I'll mention for later discussion in which these kinds of problems arise. One is different discovery rules; one is different privacy laws; and one is different privilege doctrines. Just a quick example there. In certain European countries, and before the European Commission, the communications of in house counsel may not be privileged. In the United States, they are. So, legal advice that may be privileged in one jurisdiction may end up not being privileged in another jurisdiction, where it may be sought, either by private litigants or government regulators.

Finally, I just wanted to introduce an interesting law in the United States that is perhaps not as familiar to lawyers overseas as it ought to be. There's a federal law in the United States. (it's called "Section 1782"), and it allows interested persons in foreign proceedings to take American-style discovery of witnesses and documents located in the United States. What this means, potentially, is that if you're a party to a foreign proceeding and you have either witnesses or documents in the United States, you could be at a potential strategic disadvantage vis-à-vis an adversary that doesn't have any ties to the United States and doesn't have anything reciprocally discoverable in the United States.

The big debate now about § 1782 is whether it's available in international arbitration. And there's U.S. case law, a Supreme Court case, suggesting in dicta that it is, and a number of lower court cases thereafter that have directly held that litigants in arbitration can use this statute to take American-style discovery, which, for the arbitrators in the room, is somewhat at odds with the goals of arbitration – to not allow American-style discovery.

So, with that introduction, I'll sit down.

JACK FRIEDMAN: Before our last speaker, just a quick comment about an issue that came up at a prior event, when we honoring the general counsel of Intel. One of the panelists was based in Germany, an intellectual property litigator. He said that in litigation you can't ask for a document in Germany unless you know it exists. You can't just say, "We want all the documents." You have to say, "There is such a document, and we want to see it." In order to know that something exists, parties are able to bring a minor piece of litigation against the same party in the United States; do American discovery for all the documents; and then introduce them into Germany. That was a piece of information that was worth coming to the event right there. I asked him if the German courts cared about this sort of running around them, and he said, "No, they don't care." So that's another tactical issue which we can get into later. It's very clear that many people have not really grasped on a world scale how to use U.S. procedures for their purposes.

Our next speaker is Roger Enock of Covington & Burling.

ROGER ENOCK: Jack, thanks. Jack asked me to talk about the differences in the civil litigation system in the United Kingdom and Europe, in five minutes. So I said, "That's fine! I do what I'm told. I've just joined an American firm; I do what the Americans tell me."

Instead of going through every single country in Europe, which would be a little too interesting, I thought I'd just tell you a story. It's one of those true stories of a case I was doing quite recently in Germany, and it brings out some of the differences. I'll try to be brief. I'll stick to my five minutes, because I'm sure you'll want to get into some questions.

It was a largish case – 50 million for a U.S. client. It was a U.S. general counsel who want-

ed me in London to oversee a case in Germany. I said, "Look, it's Germany; it's not England – it's all very different." But he wanted me to manage the case and to deal with a lot of the things that had happened in London – and to keep a watch over what the Germans were doing, which is never easy, I can tell you.

I got in touch with a partner in Frankfurt who's a litigator, and the first thing he says is, "Roger, look, you've got to arbitrate this case." I said, "Why is that?" And he said, "The German court system is just so bad; it's so slow, it's so unused to this sort of case. You've no idea what sort of judge you could end up before. You've got to arbitrate it. I said, "Well, thanks, but I can't. I've got no arbitration clause in the contract. It submits to the jurisdiction of the courts." And he said, "Yes, you're right, but the other side may take the same view as me. You should still try to arbitrate it." So we tried, and we failed. But that was how it started. It was my introduction to the German court system.

So the next step was, we prepared a beautiful document – 10 out of 10 for technical and artistic merits, a lovely claim document, very full, lots of appendices, diagrams. It was fantastic. And we took it off to court. Just to start the case, we had to pay a fee of 370,000 to the court, a sort of tax on litigants, which was difference number two.

Then I said, "But where's this case going to be heard?" I'm used to London. We've got this lovely building along the Strand and it's got all sorts of courts and any case of any size and importance is heard there and you tend to get quite a good judge (they're not all great, but they're mostly pretty good). So I said, "Where's it going to be heard?" And he said, "Well, there's a rule in Germany which means that you have to sue where the defendant has some assets." And this defendant, which is rather a strange defendant, only has assets that we could identify in a town called Darmstadt, which I had never heard of.

So instead of suing in Düsseldorf, which I am told has a commercial court, or even in Berlin, we end up suing this huge case in Darmstadt. No disrespect to Darmstadt, which I didn't visit, but it's like bringing a case in Eastbourne or Warsaw. Again, no disrespect to Eastbourne or Warsaw at all.

So we go to Darmstadt! We've got this beautiful document; we've paid this huge fee. And I say, "So who's the judge? What sort of person are we going to get as the judge?" And he said, "Well, the judges in Germany, they've gone to law school, like me, and they decided at the end of law school that instead of practicing law, they'd become a judge. So at the age of 28, 29, 30, they become a judge." It's the same in Italy; I think it's the same in France. That's what happens; they don't practice law; they go and sit. What do they do? Well, they do hundreds of cases. This judge will have – the lawyer's wife was a judge, so he knew – 250, 300 cases on the go at any one time. Road traffic, conveyances, matrimonial – you name it. And we had this huge case, this beautiful document that we'd served.

So, anyway, we start. We start the case, and we have a hearing. And the judge says, "I've no jurisdiction over this case whatsoever. I think you've got it wrong. I think you should go to Düsseldorf. It really should be heard in Düsseldorf." I can't

remember why; my take was he just didn't like the look of this case. It was massive.

So we go to Düsseldorf. About a year later, we have a hearing in Düsseldorf. And the Düsseldorf judge says, "No, actually, the judge in Darmstadt got it wrong. It should be heard in Darmstadt." And that's where it stayed. It's sort of veering up and down the motorway between Düsseldorf and Darmstadt.

I then said – I'm exaggerating, but it's basically all there – I then said to the partner in Frankfurt, "Look, in the extremely unlikely event of this case ever actually getting to trial, what can happen between now and actually at the trial? Just talk me through it so I can explain this to the people in the States, who are getting increasingly baffled by the day." Well, there's no discovery. There's no system whatsoever of disclosure of documents by either party to the case at all. Now, in our case, that was great. I was absolutely delighted, having seen our documents. So I thought that was tremendous news. But I pressed him and, yes, there was no system. There will be very, very rare occasions where the judge, acting inquisitorially, may order disclosure of certain types of documents, the precise existence of which is known. But there's no discovery. There's no system of expert witnesses. This would have been a case which required expert evidence in a number of areas to help the court in England. In Germany, the court may appoint its own expert – who knows who that would be in Darmstadt? Are there any experts in Darmstadt in this particular area? Again, no disrespect to Darmstadt. But there was no system at all of parties to litigation calling expert witnesses. If the court appoints an expert, you may ask an expert to help you in analyzing the court-appointed expert's work, and maybe asking him some questions. But it's a different world.

There's no real cross-examination of witnesses. A trial of this quite interesting ethical case would last a day, maybe two days at most. Two days would be a long hearing. Far too long for many of the judges. But probably one day.

It's usually very, very difficult to call anyone who is a witness from a party to the litigation. There's

a sort of presumption – I've come across this in France and other countries – that someone who works for a company who is actually a party to the litigation will not tell the truth. They're biased. They will obviously only advance the case of the person they're employed by. So it is quite rare for there to be evidence of fact from parties to the litigation; to the extent that there is, there will be a hearing at which the judge, by and large, is the person who asks the questions, rather than the parties having the right to cross-examine.

That's an oversimplification, as I'm sure you would gather, but it is quite different to what we have here.

There's something called a Code, I gather in Europe, which lays down the law, in our common law system here.

So, to sum up, if the two people who, in my view, have made the greatest contribution to British legal history, namely the Duke of Wellington and Admiral Lord Nelson, had failed in their task against Napoleon, perhaps the system over here would be as it is on mainland Europe. As it is, we have a system whose principal characteristics, I would say, are that it is extremely centralized in London, so that cases of importance and complexity tend to be heard in London. They are heard before judges who've practiced in the law for at least 20 years, usually at the bar, occasionally as solicitors. They've been there, they've been in the trenches, they're worked with clients, they know what's going on. They've seen all the tricks that lawyers can play. They're highly experienced, and they're totally independent. They're also relatively enthusiastic about the law, which is something not to be underestimated.

You tend to get a full inquiry before the courts in this country, with full disclosure – which may not be a good thing for you, but that's what you've got, with all evidence of fact and expert witnesses. On the whole, you tend to get pretty well-reasoned and well-written judgments, in a common law system, which evolves and is largely judge-made.

It's very expensive, and that's really is the main downside. If you talk to litigators in Europe about the cost of litigation and arbitrations under our system in this country, it is very, very expensive. But it, nevertheless, is a totally different system from the one that exists over the English Channel. It was interesting hearing what Brad had to say about how things are changing, how things are converging. It may well be true in the law of privacy and intellectual property law and maybe regulatory inquiries, but the system for trying cases has not really changed. It has changed remarkably little over the decades. There is remarkably little in common between our system and the American system and the system that exists over the Channel.

> "If you think about software, it costs a very large amount of money to create, and yet any one of us in this room can copy it."
> – *Brad Smith*

Thank you very much.

JACK FRIEDMAN: We're going to start the panel discussion. Brad, what are some of the variety of matters that you, as general counsel, have to deal with in Europe.

BRAD SMITH: I can speak about it from the perspective of an information technology company, and I'd probably point to three or four different groupings. There's first a category that every business has to deal with – a business incorporates in a country, it employs people, it contracts for services and goods. Microsoft, like every global business, has to deal with all of those issues.

In addition to these types of general topics, there are issues that are fairly distinctive in the IT sector. We're an intensely intellectual property-based industry. If you think about software, it costs a very large amount of money to create, and yet any one of us in this room can copy it. We have these things on our desks called PCs that are perfect copying machines. So we do a tremendous amount as an industry to protect what we create under the copyright laws, under the patent laws, under the trademark laws – with patents being the biggest thing that has changed over the last decade or so.

As a company, we patent about 2,500 to 3,000 inventions a year in the United States, and we'll similarly patent a large number in Europe, by filing with the European Patent Office and going to a number of the major member state governments, including the British Patent Office. So we have a very wide array of intellectual property-based challenges that we address.

Because of our market share and because of the focus on the industry in general, competition law has become quite substantial. That's the one area of law that's the most heavily European Union-focused, as distinct from nationality-based. There are national inquiries in a number of countries every year. In any given year, we typically have matters that are under review in probably 20 countries around the world, and at least a third of those are typically in Europe.

Then there are two other categories that are worth touching upon, both of which have been referred to in various ways in some of the comments that people have made. One hugely important issue for our industry is the protection of the privacy rights of customers. If you think about the ways in which customers are using Internet-based services today, consumers provide an enormous amount of information about themselves. If you are using an e mail service – Hotmail or Yahoo mail or Gmail – your e mails are being stored on a server somewhere. It's an important question as to what law is going to protect the confidentiality of your information.

And even if you're not thinking about it, every day you're providing enormous information about yourself. Every time you do a search, a server is keeping a record of that search and the Internet Protocol address of the computer is being saved with that search records. As you visit websites; many of these sites drop a cookie which may enable other sites to see what sites you've visited so that information can be used to help deliver ads to you.

As a result of these changes, the amount of information that is being stored about individuals is growing considerably. One big question therefore is what government will have access to this information and when. Similarly, in a lawsuit, what individuals will have access to that information about you?

You heard the reference to the notion that we have an old-fashioned system for enabling governments to work with each other. We really do. Data from customers in Europe are typically stored, for example, on a server in the United Kingdom or Ireland or the United States. But let's say there's a request that comes from the government of Norway. The government of Norway will contact Microsoft and say, "Here's a Hotmail account; we'd like you to turn over all of the e mails in this Hotmail account so we can look at them." And we say, "Well, the data is not in Norway, it's in Ireland; so you're going to have to go to your embassy and get what's called a Letter Rogatory, and it's going to have to go to their embassy, and then it's going to have to go from their embassy to the Ministry of Justice in Ireland, and then the Ministry of Justice will decide whether we have to respond to it, and we'll turn it over." The Police Department in Norway, not surprisingly, may say, "Why? You do business in Norway. Give us the information, and frankly, we'd like it in about six and a half minutes, because we really want to get on with this investigation."

And our answer is typically, "Look, we've got to deal with governments around the world in a consistent way." So everybody can think of the government that would be top of their list that they'd be most worried about obtaining access to somebody's e mail, whether it's a large government in one part of the world that's had some cases arise because of allegations of persecution. And we say, "Look, we can't turn it over to you, the government of Norway, unless we're prepared to turn it over to them on the same basis. And we don't think you want your citizens to have that information turned over to that government on that basis."

This increasingly is creating issues that are more relevant to the protection of human rights and free expression. We see these arising in Europe every day, and they're much more complicated in other parts of the world.

JACK FRIEDMAN: Isn't Europe way beyond the Americans in terms of the fear of releasing private information, including employees?

BRAD SMITH: There is a particular tradition that comes out of Germany and comes out of the experience in the 1930s that then resulted in strong data protection laws across the European Union. I also think, though, it's worth thinking a little bit about the difference in process. The U.S. system is fundamentally

> "...the amount of information that is being stored about individuals is growing considerably. One big question therefore is what government will have access to this information and when."
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derived from the English legal system. It's enormously important to see how the principles developed in English law were transmitted into the United States. This fundamental focus on an adversary process created a system in which each side gets to tell its story, and then there is an impartial, objective decision maker who is genuinely independent, who listens to each side, and then makes up his or her mind.

It is a creature of the British Isles that then moved to those parts of the world that had British colonies. It's typically not found elsewhere to a comparable degree. I think one can consider a topic such as the protection of personal information and appreciate the importance of process as well as substance. Ultimately, one thing I find each day, even in the context of internal investigations inside a company, is that there is no substitute for having some kind of system of checks and balances that gives each person the right to tell their story and have the decision made by someone who is independent.

JACK FRIEDMAN: I have been told that American companies in the United States were very agitated by a recent French law that said that if you had an investigation of an employee, you had to tell the employee in 48 or 72 hours that they were the subject of an investigation. The problem that the American companies had was how to make the two jurisdictions compatible, because in the United States, the idea is, you don't tell somebody they're the subject until you've investigated to know there's a basis for questions to be raised. The company won't say anything to the employee for a day, a week, a month, or however long it takes to gather information. To be forced by the French government to start doing it the opposite way was driving them crazy, and they complained to the French government. How do corporations deal with this whole issue of privacy, including the electronic privacy issue?

BRAD SMITH: I'll offer two thoughts; other people here probably have other thoughts. First, the general principle in most countries in the world is that the information that employees put on a computer network belongs to the employer and not the employee. As a result, legal experts typically advise that employees should not have an expectation of privacy with respect to that information. It's possible that this might change n some countries over time. I think in a lot of companies, individuals develop a sort of proprietary view of "this is my laptop. What I put on my laptop belongs to me, and I don't feel good about my employer going in and looking at that information."

JACK FRIEDMAN: A jury might feel the same way.

BRAD SMITH: I actually think it points to a broader question. In the wake of Enron and the corporate scandals, especially in the United States, at the start of this decade, there was a huge push – it's still continuing – on companies to ensure compliance with legal rules. That's a good thing. I do think, though, that it's right for there to be more discussion than there has been on ensuring that compliance processes both ensure fair treatment for employees and ensure corporate compliance.

There is a real role for lawyers to contribute more broadly to an informed discussion about the best approach – at least the best practices – for companies to be applying in light of the heightened responsibilities and authorities they have in this context.

JACK FRIEDMAN: Is there a particular department or individual who has to monitor certain of these things?

BRAD SMITH: Yes. Most American companies today, in the wake of the financial scandals, have a Chief Compliance Officer. At Microsoft, that's one of my roles. I'm the Chief Compliance Officer.

We have groups that are investigative groups. One principle that I've been insistent on is separating

the groups that have the investigative role from the groups that have the decision-making role.

JACK FRIEDMAN: Not to have judge, jury, and executioner in the same person.

BRAD SMITH: Exactly. I think it is very difficult to ask a single individual to be the investigator, the prosecutor, the judge, and the jury. I think the potential for people to make assumptions rather than fact-based determinations, and have mistakes creep into the process, is very high.

JACK FRIEDMAN: Going back to the antitrust area, what would be an example of how regulation functions in the European Union and the United States that might be different, in terms of the parties and how the decisions are made?

SIR CHRISTOPHER BELLAMY: In terms of the United States, although Brad will know better than I, the roles of investigation and prosecution and decision-making are really three different roles. They tend to be more split up in the United States than they are in Europe. In terms of the European Commission, they are all rolled into one. Anyone from a common law background has a continuing reservation about the viability of this system. Honest administrators will admit that nothing is more difficult than persuading a team that's been working on a case for two, three, four years, that they've missed something, that they've got it wrong, that they should take a different direction, or whatever it is. The sort of momentum to get to a conclusion is very strong in a system that does not have the internal checks and balances that Brad is talking about.

If you have that administrative system, it then throws an enormous weight on the court end of the process to ensure some sort of fairness. There are really two aspects to that. One is, what is the scope of review by the court? And mostly in Europe, it's what we would call a judicial review scope for procedural error or for manifest error of fact or law, rather than a re hearing.

JACK FRIEDMAN: You mean it's deferring to the agency.

SIR CHRISTOPHER BELLAMY: Exactly. So that is, from a common law perspective, a certain weakness in the review system.

You then have these process differences that you are talking about at the EU level, where at one extreme, you've got the Darmstadt story; but, at least in most cases, you do not have the full panoply of the adversarial process that we are used to in common law countries.

Now, if I may expand anecdotally on that for a little. When I first started at the Bar and I was doing cases before the court in Luxembourg – this is before we had the CFI – it was like

appearing in front of Madame Tussauds. You would get no reaction whatever from the court. This is because, in the French tradition, it is not appropriate for the judge to interrupt an advocate and ask him a question before the advocate has finished his pleading, because you, the judge, are supposed to be simply receiving the argument, and you shouldn't give any indication of which way your mind is going and how you're thinking, before the advocate finishes the argument, because of the risk of pre-judging the case. Now that's the very pure, Napoleonic view of the role of the court. The judge is simply an empty vessel, and you don't say, "Mr. So-and-So, what's going through my mind is whatever is this," because nothing is supposed to be going through your mind; it's supposed to be just receiving information.

Now, with the advent – I'd be very interested to hear from Brad in a moment, how he saw the Microsoft hearing as a hearing – of common law countries to the European Community, of the British and the Irish, the courts (first the main court and then the Court of First Instance) began to become more lively, because the judges realized that there was utility in asking questions, in probing the parties, in putting hypotheses, in having a Socratic debate, admittedly within the limitations of the simultaneous translation system, but you could at least get somewhere. And moreover, from the attorney's point of view, it was much more fun than just sitting there.

So, certainly, when I was at the CFI, within the framework of the Continental system, the hearings actually became much more lively. I used to find them pretty useful; and my colleagues caught on to the idea and started to join in.

I'd be very interested to hear in a moment how you felt at the time, as far as the hearing was concerned, disappointing though the result was.

I'm probably one of the few judges who has worked in both systems. I've seen the Darmstadt sort of thing, where you've got none of the tools that the English judge would have, and I've seen the other side of things.

It's not completely one-sided. The adversarial system is very expensive, and it can sometimes, especially if you've got a human situation, be affected by elements of emotion or feeling. The Continental system is supposed to squeeze out all sorts of emotion; it's a very dry sort of system.

Nonetheless, I think there probably is some compromise position to be made, and certainly in the Competition Appeal Tribunal hearing, we try to synthesize the two systems and get the advantages of both.

The problem is, of course, in Europe, that although you can harmonize substantive law without too much difficulty, procedure completely defies harmonization. It's almost impossible to get any of these legal systems to harmonize. I suspect that over the next 25 years, with the impact of globalization and the increasing integration, at last the civil justice systems, which generally speaking are the last things to change, will start to in a small way.

JACK FRIEDMAN: Many Americans assume that there is a common procedural rule throughout the European Union, just like there is in the federal courts in the United States.

SIR CHRISTOPHER BELLAMY: Absolutely far from it. In general terms, you've got three or probably four different sorts of families. You've got the central Continental countries that are still operating on the procedures that date from Napoleonic times, which are the inquisitorial procedures that Roger was explaining in terms of the courts in Germany, which are typical of Italy and France and Spain and those Continental code-based countries.

You've got the common law countries of the United Kingdom and Ireland and Malta and Cypress and so forth. You've got the Scandinavian countries that are a bit closer to the common law model, but not quite the same. And then you've got Eastern Europe, which I suppose is, in general, closer to the main Continental model, but still very young jurisdictions, very, very underdeveloped procedures.

JACK FRIEDMAN: Any of the others want to comment?

PROF IAN WALDEN: There has been a lot of political effort to harmonize criminal procedure because of the terrorism threat and the concern, which is going to have perhaps a knock on effect eventually to civil procedure. So within Europe, we're starting to see a number of those criminal procedures designed to enhance the movement of information, particularly between law enforcement agencies.

JACK FRIEDMAN: And if you have a European Union hearing, by the way, is it in Brussels? I'm really sorry to ask primitive questions, but this will show you something about how little Americans who are not professional attorneys here know about this.

SIR CHRISTOPHER BELLAMY: Proceedings before the agency are held in Brussels.

JACK FRIEDMAN: Let me thank you, Brad – oh, go ahead.

AUDIENCE MEMBER: I don't mean to be too cynical and post-modern, but don't you still probably end up with different results from different decision makers in different places?

SIR CHRISTOPHER BELLAMY: You probably do. But then I saw a case the other day where a high court judge sitting in the Strand in London had revoked a particular patent on grounds of prior art or whatever it was; and six weeks later, there's a 200 page judgment from the Southern District of New York upholding the same patent. So you can't get it always right.

TYLER ROBINSON: And this, I think, is one of the reasons why international arbitration is so interesting, because it provides a private disputes resolution marketplace in a sense where civil and common law traditions can be combined in the combinations that various arbitration institutions or private parties to arbitration want, and to try different things and see what works, and you can pick and choose.

SIR CHRISTOPHER BELLAMY: It wouldn't be wrong to say that you all know better than I in that context, in the international arbitration context. These various traditions do fuse and reinforce each other and produce a system that is acceptable and workable from the parties' point of view. Of course, there are things to be gained from each side.

TYLER ROBINSON: Right. And international arbitration is, of course, limited to the kinds of disputes that people can agree contractually to resolve.

JACK FRIEDMAN: Brad, as a participant in some of these proceedings, could you make some comments about your observations?

BRAD SMITH: Sure. I've attended more than I ever hoped to, in many countries, actually!

First of all, I was extremely impressed with the hearing that we had before the Court of First Instance, the CFI, in Luxembourg. We had a five-day hearing on the merits, which was unusually long. The court allowed us to come in and set up a computer network with lots of monitors, and then every party in the case was able to use it. We had lots of people there to answer questions. I thought the judges showed quite an impressive command of the facts of the case; they clearly had spent a tremendous amount of time studying and preparing. They did an excellent job of using a relatively informal process to put a question to one side, and then put the same question to somebody from the other side. It was almost a little bit humorous, because the first day, Monday, we had a number of engineers who came from the Seattle area, and we would have to sort of point to them – "You're supposed to answer this question" – and they were a little nervous about it. By Friday, they were running up to the microphone, and the

lawyers didn't even have a chance to tell them whether it was their turn – they had something that they wanted to say to these judges, and the judges really did quite an amazing job of having a very sophisticated discussion.

So to me, that is as high quality a hearing as I think one will see anywhere in the world.

The question I have where I'm a little more skeptical perhaps is on the administrative hearing process. There really is very little discussion or consensus around the world about what a proper administrative process should include. There's less administrative law than desirable, in my view. It would help to have more clarity about how administrative hearings should work. Are there any rules of evidence? Should the decision-maker attend the hearing? If not, how will the decision-maker be informed about what was said at the hearing?

JACK FRIEDMAN: What are some of the issues that you have litigated here in Europe, Brad?

BRAD SMITH: There are two issues that we've unfortunately litigated in a number of countries. One is the boundary or the balance between intellectual property rights and competition law, and how does that balance get struck – you heard a little bit about that before – and in particular, when does a company have a legal duty to license its intellectual property rights to a direct competitor. The Court of First Instance, in our case, found that we had a legal duty to license the intellectual property rights and technology in our communications protocols to competitors. That's one issue.

The other issue relates to the integration of new features into a product, and when does that constitute a tying violation. When we add a new feature to a product like Windows, is that considered a product improvement to a single product, or is that, instead, tying two different products together? In Europe, that was the focus of the Media Player issue. That's a classic example, I think, of a practice that somebody could say is either pro-competitive or anti-competitive, depending on the economic effects. It's not like price fixing, where everybody around the world would say, "Look, price fixing is always bad. There's never any good that can come from it." That would be contemporary antitrust or competition law doctrine.

But product integration can be good, or it can be bad, depending upon one's point of view in different parts of the world, and depending on the economic effects. And as Sir Christopher remarked earlier, there's a question as to how much economics will be used to make that decision, how much it will be grounded in economic data, and what's considered to be a rule of reason analysis versus what would be traditionally considered a per se or rule-based approach that says, "In these conditions, it's always unlawful," and not really looking at the economic factors.

JACK FRIEDMAN: It's often said in the press that American antitrust is more oriented toward the impact on the consumer, and secondly on the impact on the competitor. In contrast, it is said that the European approach is in reverse order; that there's more emphasis on the impact on the competitor, and secondly on the consumer. I don't know if that's fair or not,

SIR CHRISTOPHER BELLAMY: My personal view is that it's a false dichotomy because in some cases-admittedly, they're fairly extreme – it may well be necessary to protect and encourage a competitor in order to serve the ultimate consumer interest in having some competition. So I think that whether you start from one end of the telescope or the other, you should probably reach more or less the same point.

If I could throw one other remark into this general discussion of process and courts and how we're getting on in Europe, which is not something that we can do anything about, but it's perhaps wise not to underestimate the impact of the fact that we now have 27 member states in Europe, including 10 new member states that have only very recently emerged from communist dictatorships of one sort or another and have no really established judicial tradition of the kind that now stretches back for hundreds of years on both the Continent and in the common law countries.

It is inevitable, I think, that the newer judges from the new member states are grappling with problems that, for them, are very unfamiliar, because they won't have encountered the kinds of problems that people are used to dealing with as regards great corporations in Western Europe and the States, and they won't have a background of a sophisticated legal system and all the sort of confidence that that brings to one as a judge. So it may be that we're in for a period of conservatism at the level of the EU court, and that those factors may, to some extent, on some issues, reinforce deference toward what the administrative authority says. It's very hard to analyze this, and I wouldn't want for a moment to be suggesting any criticism of the judges in new member states; far, far from it. It is just a psychological factor that needs to be added to the mix in the decision-making process, and it's rather hard to assess it. But we all tend to assume that we've got judges who have got a lot of experience and know their job and all the rest of it, but it's quite hard for those new judges to catch up and get up to speed on some of these issues.

JACK FRIEDMAN: Have you experienced where a company is given basically different

orders by different countries that are in conflict, such as one says "Keep this secret," and the other one says, "Give them your codes, have them come in and be trained in your secrets"? Are you ever in that situation where logically you can't run a business with such different orders being given to you?

BRAD SMITH: We've faced that kind of dichotomy at two different levels. One level is just diverging policy, but not conflicting rules, where different governments in different continents want to go in a different direction and it's clear that the policy goals are different to some degree. But it's literally possible to comply with one rule in one country and a different rule in another country.

Then we've run into some other situations where potentially the rules would be in direct conflict. In other words, we cannot comply with this rule in Korea and comply with that rule in the United States and this third rule in the European Union, because they are actually...

JACK FRIEDMAN: That has come up?

BRAD SMITH: It has come up in discussions with governments when they have contemplated those kinds of rules. I will say that when we have had that conversation, and we've said, "If you do this, we can do it in your territory, but we can't do it in this other territory because it will throw us into violation of the remedy that was instituted in this other country," the people within the agencies involved have always stopped and listened and –

JACK FRIEDMAN: You mean they actually try to be responsive to....

BRAD SMITH: Yes, they do. They recognize that they can't throw us into violation of the law in another country. That doesn't mean that they won't want to pursue a diverging policy that actually has some degree of regulatory conflict, but [they] stop short of a direct violation with the rule where that's been put in place elsewhere. But they absolutely do listen when it gets to that point.

JACK FRIEDMAN: In American law schools, in about 10 to 20 years, you'll have some professor saying, "Antitrust is dying off as a live field." However, no matter what happens, antitrust just keeps on coming back.

I'd like to open up the discussion to the audience.

AUDIENCE MEMBER: A very complete example of the current disconnect between European legislation and the lack of the European Supreme Court was demonstrated in the case of the database directive, where we thought we understood what that meant in the United Kingdom, and Mr. Justice Maddy gave a very reasoned judgment based on our database regulations. When that judgment appeared in the European court, it turned out that the European conception of what the database directive was saying was completely different, and we've been thrown back on a huge uncertainty. I think that that illustrates the point that the court will defer to the administration. As a European, that gives me great concern, that there isn't a proper checks and balances in the way the Americans have established, in having a Supreme Court that sits separate from the administration, and says, "This is the law; whether you like it or not, in Brussels, this is the law you've got. If you don't like it, you have to change the law."

ROGER ENOCK: A very hot topic at the moment in Europe that reflects very much the traditional Continental concept of an advocate, as distinct from an in house lawyer, is that an in house lawyer still can't be a member of the Bar. This is a way in which the United States and United Kingdom have developed quite differently up to now. But to harmonize all that sort of thing is very difficult.

BRAD SMITH: I'm increasingly struck, I have to say, as the years go by, that the principle of an independent judiciary is, at one level, something that is found in the governmental fabric in many, if not most, countries in the world, and yet is fully understood in the sense that it started in this country in a much smaller number of places. It causes one to appreciate that what happened at what is now this little park next to the Thames at Runnymede, with the Magna Carta, has shaped centuries of culture and thinking about the role of courts and the role of lawyers and law, in all the countries that inherited that tradition.

And yet, when you get outside the countries that inherited that tradition, there is just much greater caution, even among the judiciary and among lawyers, about the extent to which they feel courts should be operating as a check on executive power. In a world where everybody talks about the rule of law to such a degree, really thinking through the real independent role of the judiciary is more important than ever.

JACK FRIEDMAN: Yes, sir.

AUDIENCE MEMBER: I'm a German-qualified lawyer, and funny enough, I was born in Darmstadt! But I think, firstly, if you had the same kind of meeting in Germany or France with expert panelists, you probably would hear opposite opinion and opposite wishes. I think it's important to first of all respect everyone's view in Europe, and when I say "Europe," I include the United Kingdom. And secondly,

what Sir Bellamy said, his observation of where things might go to, I think we will be talking a lot about pros and cons. I wouldn't call it "Napoleon law point of view"; I would rather call it the "Roman law point of view." Transaction contracts that are put in place, a lot of them, they have similar wording coming from the United States. Many clauses and contracts are pure American clauses; nobody in Europe understands why they are in there. In the future, I think more and more we're going to see a stronger influence of Europe in the United States.

And just quickly to add that Darmstadt, the comparison with Eastbourne might not be 100% correct. I don't know if anybody else is interested, but I needed to [address] that. Darmstadt actually has a worldwide known university for engineering; it has the European center of aerospace and science.

JACK FRIEDMAN: I want to say that any time someone born in a small area is such an eloquent speaker he or she should be given a special award by the Chamber of Commerce for the service they've provided the community!

BRAD SMITH: As a business trying to work around the world, I'd like to give you a perspective. Cambodia has a population of about 14 million people. In Africa, Mozambique has a population of about 18 million people. You put those two countries together, there are 30 million people. There are more lawyers right now in this building than there are in those two countries put together. Cambodia has about 240 lawyers; Mozambique has 280 lawyers. That includes all the lawyers engaged in private practice, all the lawyers who work for the government, and all the lawyers who are judges.

I think that one of the things that it's so easy for us to forget is that, in the United States especially, we have more lawyers than the country needs, I would say. And yet, you go to many, many countries around the world, and there just are not enough lawyers, and there never will be anything nearly approaching the kinds of things we're talking about here, until there are more law schools and more lawyers and more judges and more lawyers who are prosecutors working for the government, as well.

JACK FRIEDMAN: How does a company like Microsoft keep itself nimble, quick, and able to respond? What is the role of your department in supporting the business people? Some of them are going to come in and say, basically, "Lawyers are an annoyance, what we want is new technology – let's get it out the door and make it available to customers." So, could you please talk about the business side of Microsoft?

BRAD SMITH: Sure. There are two different questions you asked, and they're both very good ones. The first is frankly, how does any large organization stay nimble? And first of all, I would say, it's a very difficult challenge. Any time you get any organization that has a lot of people, trying to be nimble is a very difficult thing. I've seen in the evolution of Microsoft as we grew, people started to say, "Look, I don't want rules, because that's bureaucracy. And bureaucracy slows things down." And yet, we also realize that not having any rules basically leads to anarchy, and anarchy slows things down, too.

JACK FRIEDMAN: In correcting mistakes.

BRAD SMITH: Not only that; unless you have clarity as to who gets to make decisions, everybody spends every day undoing the decision that somebody else made yesterday, and that really slows an organization down. Within our company, five or eight years ago, one of the things that was really slowing us down was that it wasn't clear who was to make a decision, so everybody thought they could, and people were sort of undoing each other's decisions. I will say it resembled a partnership in a law firm to some degree!

JACK FRIEDMAN: Oh my!

BRAD SMITH: Which are wonderful institutions, but also have questions of how do you stay nimble. And so, yes, I think that what it really forces a company to do as it grows, is to think through, very carefully, who it is going to empower to make which decisions, and how, and when, and to some degree, delegate and empower groups so that they can go drive a certain part of the business and know that they have the resources to make investments. They've got the authority to make decisions; and then they'll be held accountable, not only by the company's management, but by the investing public, because financial results will lead to transparency to the decision-making.

One of the big challenges in information technology is once you establish a position, you have more at risk. The classic process of innovation is for somebody to come in not only with new technology, but a new business model; and it will upset the old business model. You've got to be prepared, if you're going to be successful over a sustained period of time, to risk putting yourself out of business with something new, or you're just going to wait for somebody else to do that to you.

JACK FRIEDMAN: You make yourself obsolete.

BRAD SMITH: Yes.

JACK FRIEDMAN: And somebody else might make you obsolete if you don't do it.

BRAD SMITH: Yes. The transition from the old character-based computing to the graphical user interface, for example, was an interesting case study, where Microsoft was the leader in the operating system for character-based computing, and yet we were prepared to move to the graphical user interface, because we knew that somebody else would if we didn't. So we put our existing success at risk to try to create something new. You could look every day at certain successes we have, and you could say, "Boy, we'd better be willing to put ourselves at risk with something new and different, because if we don't, it's just inevitable that somebody else will do it to us."

JACK FRIEDMAN: Hasn't Bill Gates made comments about how Microsoft may be a very different company in years to come with the change of technology and what businesses you were in?

BRAD SMITH: Absolutely. About every five years, if we don't look substantially different from the way we looked five years before, we're probably on a path to decline. This constant change is just a fact of life; and it means for employees, you'd better thrive on change or you're going to have a hard time being happy.

JACK FRIEDMAN: What is the role of your department and the general counsel in dealing with the business side?

BRAD SMITH: I think that's a great question, as well. At one level, you could say it's to ensure that we do all of these things in a legal manner, which is absolutely true. But it goes beyond that in a couple of respects.

First, in my opinion, great lawyers are great thinkers, and great thinkers don't confine themselves to just thinking about the law, but think about everything that's in front of them. So we try to create an environment in which the lawyers have the opportunity to contribute to business thinking in a broad way. One of the ways we do that is ensure our lawyers are sitting on the management teams of different businesses. Another aspect of this is to try to encourage both our lawyers and our business people to always go back to what is it that we're trying to accomplish – to ask what's the goal. A typical conversation inside the company, or any company, may be a businessperson coming to a lawyer and saying, "I want to do this particular thing. Tell me if I can." And the answer, sometimes, is "No." But the way to have the conversation, in my opinion, is to go back and say, "What are you trying to accomplish? What's your goal?" And a lot of times, if you can have that kind of dialog, you find out that the idea that somebody brought you is not workable from a legal perspective, but there is some other approach that is not only going to work legally, it's going to work better from a business perspective of achieving that goal than the idea that the person walked into your office with.

> "You've got to be prepared, if you're going to be successful over a sustained period of time, to risk putting yourself out of business with something new, or you're just going to wait for somebody else to do that to you."
> – *Brad Smith*

It requires having a very robust relationship, so that the lawyers are involved in business thinking from start to finish and are appreciated inside the company, not only for the quality of their legal reasoning, but for the creativity of their business thinking.

JACK FRIEDMAN: What is the relationship between general counsel and the board?

BRAD SMITH: At our company, and indeed at a lot of American companies, I, as the general counsel, operate as the corporate secretary, as well. So that means that at one level, we manage the process for the board of directors and all of the board committees; manage the work flow. We have certain responsibilities that are legal responsibilities, to ensure that information flows to the board and that the board makes its decisions with a full view of all of its fiduciary and legal responsibilities.

But beyond that, we are the stewards for corporate governance, in my view, and that means that we have the opportunity to ensure that processes work well, that people have thoughtful conversations before they make decisions, and that different points of view get considered along the way.

It is a great opportunity to help ensure that good decisions are made; it's a great opportunity to help contribute and shape decisions at times. It requires that one recognize that when one is the steward of a process, one's first and foremost responsibility is to ensure that the process works well. If you ever have an idea that you believe in so passionately that you put the pursuit of that idea, as a business goal, ahead of the preservation of a great process, you put your stewardship role at risk.

JACK FRIEDMAN: There is a general counsel who has indicated that his company has an annual capital budget of several billion dollars a year, and that there is virtually no time in the entire year where the full board considers that budget. The full board is so busy with regulatory compliance they don't have a chance to really get involved with the direction of the business. What is the feeling about the fact that the people at the top can be so involved with legal compliance that they don't have time to think about the business?

BRAD SMITH: It's a very good question, and it goes back fundamentally to what is the role of a board of directors. One of the roles of a board of directors is to safeguard the shareholders' assets and be sure they're not stolen or wasted. Another role is to ensure that the company adheres to its legal obligations. I think those are two important roles of boards of directors. In the wake of the Sarbanes-Oxley legislation in the United States, the first half of this decade saw the pendulum swing so that boards were spending so much of their time on those two responsibilities that they sometimes were not, in the United States at least, really able to devote as much time as people recognized was important to two other very important roles of a board. One is to ensure that the company's strategy is fundamentally sound, and the second is to decide whether the CEO is doing his or her job, or should be replaced, because it is the board that is uniquely responsible for those two things, as well.

I think over the last two years, the pendulum has swung back a bit; and part of it is that, as the Sarbanes-Oxley and other legal compliance processes have matured, boards have figured out how to do them in a somewhat more efficient way while still giving them all the attention they deserve. The other part of it resulted from a recognition that the attention to strategy was subsiding, and even if it needed to be done in more meetings, boards needed to spend more time on the strategy topics.

JACK FRIEDMAN: What is the feeling in London and on the Continent about the question of serving on boards these days: Is it driving people crazy that they can't get anything done because they have so many regulations, or do you feel it's not as bad as in America?

AUDIENCE MEMBER: Our feeling is that an American director is facing the outside investors more, whereas a director in a European environment is more responsible internally for all kinds of matters.

JACK FRIEDMAN: Brad, how do you approach your selection and relation to outside law firms?

BRAD SMITH: First, in my opinion, most of the time a law firm is serving in one of two distinct roles for a large company. Either the law firm is retained to do a very discrete task. For example, we've got a subsidiary that we're opening in Slovakia. Help us figure out how to do that. What we're hiring is somebody who has expertise in a particular process and will be employed for a discrete project. Or, we're retaining counsel for a role that is strategic, either because the particular issue is of such importance to the bottom line of the company, or it's a broad, long-term issue that we're going to be working on for a long time.

In the first instance, you're looking for somebody who can accomplish a particular task, and in the second context, you're looking for someone who you want to have develop a very deep knowledge of the company, and you want to be able to look to as a strategic advisor for a long period of time.

Most of us would probably say the second role is more interesting and fun than the first. That certainly was my perspective when I was in a law firm, and it's the perspective I typically encounter when talking to outside lawyers today. I continue to believe that the opportunities for people to play a truly strategic and broad and deep role are there; but the changes in the profession have probably made that a little harder to come by than was the norm, say, 20 or 40 years ago.

The second thing that is just a fact of life is this focus on costs, which is a source of consternation and tension sometimes, between the clients and firms everywhere.

JACK FRIEDMAN: One shouldn't think that because you have good profit margins, people aren't worried about your budget.

BRAD SMITH: No – we're a $750 million department, which is a very large cost, and we're pretty public about it.

JACK FRIEDMAN: How many lawyers is that?

BRAD SMITH: We have a thousand employees internally; and yet about 60% of our costs get spent on outside advisors, so it's not too difficult to do the math. And that's a big cost. The company and the company's shareholders are entitled to expect that that money is going to be spent very efficiently and as effectively as possible. In a world where Wall Street starting legal salaries recently went through the $160,000 barrier, there is obvious pressure on rates. All of these things continue to work their way through our profession.

I've actually heard people get fairly emotional in the past year about the whole question of law firm rates, and yet I personally think they are mostly an issue of market economics: rates are rising because of market economics, and yet the more law firm rates rise, the more likely it is that work's going to be done inside a company. You were referring before to the growth of in house legal departments and the number of in house lawyers working in Manhattan. We are living at a time that, among other things, is characterized by the real growth of global legal departments.

When I left my law firm in 1993 to join Microsoft, it was the first time that anybody had left there as a partner to go work inside a company.

JACK FRIEDMAN: Why did you want to go in house?

BRAD SMITH: To be honest, I came to Microsoft with the firm expectation – and I said it to the folks who hired me at Microsoft and I said it to the folks at the firm – that this was something I planned to do for two years and then go back. Then fourteen and a half years later.... I've been stuck – I say that jokingly – I'm very, very happy where I am!

The early 1990s were still a time when people didn't tend to leave law firms to go work in house as frequently unless they thought they were going to get shorter hours. That's what people said. "Oh, you'll go to a company, you'll work shorter hours." But in every other respect, it was considered a step in the wrong direction, almost, for many people's careers.

JACK FRIEDMAN: What are your hours now?

BRAD SMITH: As long as they ever were in a law firm. They always have been. My hours didn't change at all.

But we're able to hire great lawyers out of great law firms around the world; and we're living at a time where, in part because of the cost structure of the profession and in part because of close counseling about tough issues, we really benefit from having lawyers and business people closely intertwined.

This is an era of large legal departments in large companies. So that's changed the profession, both for the lawyers working in house and for the lawyers working in outside firms. The whole nature of the profession has to some degree changed because of that over the last decade.

JACK FRIEDMAN: I try to wind up the discussion with a personal question. With the five minutes a month that you have free, what do you like to do, or what's your idea of a good vacation?

BRAD SMITH: I definitely could do things outside the office. I have two kids, and my wife's a general counsel of a public company in the United States, as well. That's a little bit unusual to have two of us in the same household. But we definitely get away from work.

The question that I'm most often asked in that context, which I'll share with you and I'll give you my answer, because it's really what I find people often really want to know is: "what's it like to be the lawyer for Bill Gates?"

That's what people want to know – what's he like as a client? I've had the opportunity to work with Bill for 14 years, and for the last five and a half years to be down the hall. I'll have that opportunity for another five and a half months; and then he'll be the chairman of our board, but he'll no longer be at Microsoft every day.

He is truly a unique individual, in my opinion, in our generation and in the world, in terms of somebody who is a business leader and a real technologist. It's very unusual to find people who are technical leaders and business leaders. It's usually one or the other; they go in one direction or the other.

But the other thing that has always been, and remains, so unique about Bill is his ability to think about the law. His father is and was a very prominent lawyer in the Seattle community when Bill was growing up, so Bill grew up in this legal family. He is the only really senior business executive whom I've encountered who likes to read judicial decisions. I mean this seriously. He reads patent decisions. He reads Supreme Court decisions.

I will share, sort of in closing, one episode that captured this. I'm going to the World Economic Forum tomorrow, and I remember being there about three or four years ago, and one of the individuals we were going to be with was a U.S. official from the Justice Department. So the week before, I had sent Bill a recent Supreme Court decision, because this particular Justice Department official had worked on taking this case to the Supreme Court and was proud of the decision that resulted. I said, "You might want to read this, because this is a good topic for you to talk about."

As we were in the back of a car driving through a snowy street in Davos on the way to the meeting, I turned to Bill and asked, "Did you have a chance to read that decision?" "Oh, yeah, I read that last week," he responded, and he started reciting the key aspects of the case. Then he said "And footnote 14. That was my favorite footnote! That footnote," and he quoted the footnote, by memory, and sure enough, walked into the meeting and started reciting this. It is an unbelievable experience to have a business client who not only reads cases, but unfortunately has this ability to recite the footnotes back to you! I was sitting there thinking to myself, "What the heck did footnote 14 say?"

JACK FRIEDMAN: Let me thank our Guest of Honor for sharing his wisdom and his time. I want to thank all the panelists for their support and their sharing their thoughts. Most of all, we always thank the audience because our mission is education for the business community and we want to create value for you. Thank you very much for joining us. ■

Sir Christopher Bellamy

Senior Consultant to Linklaters

Prior to joining Linklaters, Sir Christopher set up what is now the Competition Appeal Tribunal (CAT) and held the post of President from 1999 to 2007. The CAT hears appeals from regulatory decisions by the OFT and other regulators under the Competition Act 1998 and Articles 81 and 82 of the EC Treaty, appeals under the Communications Act 2003, reviews in relation to merger and market investigations under the Enterprise Act 2002, and certain damages actions. As President, he was responsible for case management, interlocutory and interim applications, chairing the main hearings and preparing and delivering the judgments.

Prior to joining the CAT, from 1992 to 1999 Sir Christopher was one of 15 judges of the Court of First Instance (CFI). He was President of a 5-judge chamber from 1996 to 1999. Cases where he presided as judge covered a wide range of EU law areas including: anti-dumping; competition; contractual disputes; Euratom; freedom of information; free movement of goods; international law; pharmaceutical licensing; trademarks; and state aid.

Before becoming a judge at the CFI, Sir Christopher was one of the leading QCs at the competition and EU law Bar in London.

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Roger Enock

Partner,
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Roger Enock is a partner in Covington & Burling's Litigation practice group and Managing Partner of the London Office.

Roger has extensive experience advising corporations, financial institutions, liquidators and individuals in a variety of judicial, arbitral and regulatory proceedings in the UK and foreign jurisdictions. His experience has included:

- coordinating multi jurisdictional litigation;
- advising on major restructuring and insolvencies;
- internal investigations in the UK and abroad;
- international and domestic arbitrations
- FSA investigations; and
- representing policy holders in claims against insurers.

Before joining Covington in June 2007, Roger was a litigation partner at Freshfields for 15 years.

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Covington & Burling LLP represents clients in cutting-edge technology, litigation, white-collar defense, transactional, governmental affairs, international, life sciences and other matters. In responding to the needs and challenges of our clients, our lawyers draw upon the firm's expertise and experience in a broad array of industries to provide solutions to difficult, complex, and novel problems and issues, whether in litigation, transactions, or regulatory proceedings.

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Tyler B. Robinson

Partner, Simpson, Thacher & Bartlett LLP

Tyler Robinson is a Partner in the Firm's Litigation Department and is based in the London office. He represents clients in a wide range of complex commercial matters with a focus on international arbitration, litigation and overseas internal investigations. Mr. Robinson's recent experience has included representing a leading global manufacturer of defense systems in LCIA arbitration in London; U.S. hedge funds in judgment enforcement proceedings against a foreign sovereign; Moody's Investors Service in a variety of international litigations and arbitrations in Chile, Uruguay, and Indonesia; a U.S. company with overseas operations in an internal investigation under the Foreign Corrupt Practices Act; Swiss Reinsurance Company in various reinsurance arbitrations and in insurance coverage litigation arising out of the September 11 terrorist attack on the World Trade Center; Royal Indemnity Company in asbestos-related litigation against General Motors Corporation; and General Electric and Bechtel in ICC, AAA and UNCITRAL bilateral investment treaty international arbitrations arising out of India's alleged expropriation of the multi-billion dollar Dabhol Power Project.

Mr. Robinson received his B.A., magna cum laude and Phi Beta Kappa from Macalester College in St. Paul, Minnesota and his J.D., magna cum laude and Order of the Coif from the University of Michigan Law School where he was an Article Editor for the Michigan Law Review. Prior to joining the Firm in 2000, Mr. Robinson served as Law Clerk to the Hon. Ferdinand Fernandez of the U.S. Court of Appeals for the Ninth Circuit and the Hon. Thomas Griesa of the U.S. District Court for the Southern District of New York.

Simpson, Thacher & Bartlett LLP

Simpson Thacher & Bartlett LLP is one of the world's leading global law firms. The Firm was established in 1884 and has more than 800 lawyers. Through its New York City headquarters and its offices in Los Angeles, Palo Alto, Washington, D.C., London, Beijing, Hong Kong and Tokyo, the Firm provides coordinated legal advice on the largest and most complex corporate transactions and disputes.

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Professor Ian Walden

Of Counsel,
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Dr Ian Walden is Professor of Information and Communications Law and head of the Institute of Computer and Communications Law in the Centre for Commercial Law Studies, Queen Mary, University of London. His publications include EDI and the Law (1989), Information Technology and the Law (1990), EDI Audit and Control (1993), Cross-border Electronic Banking (1995, 2000), Telecommunications Law Handbook (1997), E-Commerce Law and Practice in Europe (2001), Telecommunications Law and Regulation (2001, 2005, 2009), Computer Crimes and Digital Investigations (2007) and Media Law and Practice (forthcoming 2009). Ian has been involved in law reform projects for the World Bank, the European Commission, UNCTAD, UNECE and the European Bank of Reconstruction and Development, as well as for a number of individual states. In 1995-96, Ian was seconded to the European Commission, as a national expert in electronic commerce law. Ian has held visiting positions at the Universities of Texas and Melbourne. Ian is a solicitor and is Of Counsel to the global law firm Baker & McKenzie (www.bakernet.com) and is a Trustee and Vice-Chair of the Internet Watch Foundation (www.iwf.org.uk).

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