The half-day debate, which was subject to Chatham House Rules, was opened by Mr. Kiyoshi Adachi, Legal Officer with UNCTAD's Work Program on Technology Transfer and Intellectual Property (TOT-IP), followed by Dr. Meir Perez Pugatch, Senior Lecturer, University of Haifa and Director of Research, Stockholm-Network, as well as Dr. Ben Prickril, International Advisor, PIIPA.

**Session 1**, which was chaired by Mr. Tom Goodwin, First Secretary at the UK Permanent Mission at Geneva, focused on the question "What is the public interest in the IP area?" Dr. Xuan Li, Lead Economist and Acting Coordinator of the Innovation, Access to Knowledge and IP Programme at the South Centre, presented an economic perspective of the IP and public interest debate. According to Dr. Li, the public interest in IP is subject to the criterion of welfare maximization. The granting of IP rights is justified by the need to address market failures (i.e. the problem of free riding) and the objective to stimulate innovation. As IP abuses may have a negative impact on welfare, governments need to assess whether their respective IP policies need readjustments, taking into account that upstream and downstream innovators are different stakeholders with different interests. Dr. Li described the trend of a shrinking public domain and an expansion of exclusive rights. From a developing country perspective, the pros and cons of this trend should be measured according to four parameters, i.e. potential for economic development, local innovation capacity, governance (top-down vs. bottom-up), and the available human capital (specifically economists, lawyers and scientists). Dr. Li pointed to the fact that developing country governments are often unaware of the impact of an increase in IP protection.

The second speaker, Dr. Prickril, referred to the difficulties of defining the public interest, as different stakeholders would rarely agree on how IP protection can actually be made beneficial to the public. Whereas from an industry perspective, it would seem beneficial to the public to engage in costly and risky research and development (R&D) of innovative products, consumers in any country would not consider IP protection beneficial as long as high prices reduce actual availability of the innovative products. Also, cultural differences in developing countries could result in different views on IP protection, especially to the extent that access to medicines is considered a basic human right which one should not have to pay for. As to a government's perspective, it needs to take both consumers' and the private sector's interests into account. This is done through a "dual role" model, i.e. direct and indirect funding of both the public and the private sectors through various models. Dr. Prickril then expressed the view that despite a number of differences, stakeholders in developed and developing countries share the common interest to have their own assets protected, while gaining access to others' assets. From that perspective, the public interest in any country would
require a balancing of these opposing objectives. Dr. Prickril in this context referred to a study by the Swiss Federal Institute of Intellectual Property, according to which increasing IP protection in Switzerland may promote innovation up to a certain point, beyond which increasing IP protection may have a negative effect and slow down innovation.

In the following discussion, both speakers explained that the ideal level of IP protection varies from country to country and depends on the respective level of development. The ideal level of protection, which generates a maximal level of innovation, represents the optimal balance between protection and access, from a public interest perspective.

A participant expressed the view that this trade off between protection and access applied particularly to the relationship between upstream and downstream innovators, but less so to the producer-consumer dimension. Accordingly, while too much protection may block downstream research, protection of the producer's interests against consumer free riding would not generate comparable problems and would be essential in ensuring the producer's benefits. The participant also expressed the view that on a policy level, IP protection is never designed for the private interest, but always to satisfy a public interest. This perspective of the ideal legislator was challenged by a number of other participants.

In the health context, reference was made to the benefits of product development partnerships (PDPs) between the pharmaceutical industry and governments as an example of a fair balance of interests between public and private concerns. Participants disagreed on the impact of product patents on availability and affordability of medicines. The question to what extent exclusive rights or other issues such as insufficient insurance and drugs distribution systems were the decisive factor in the access to medicines debate was one of the major controversial issues throughout the entire debate.

Under **Session 2**, which was chaired by Dr. Pugatch, the panellists were asked to respond to the following questions.

**Q. 1. Compared with the IP system as a whole, to what extent can non-IP models (open source, benefit sharing, etc) provide a better social outcome in terms of the benefits and costs to society as a whole? (Discussants: Pedro Roffe, Martin Campbel).**

Mr. Pedro Roffe, Senior Research Fellow at the International Centre on Trade and Sustainable Development (ICTSD), stressed that in his view, IP and non-IP models do not have to be contradictory. Whether non-IP models would be more beneficial for developing countries depends on each individual case. In the area of traditional knowledge (TK) and the protection of incremental innovation, compensatory liability regimes (i.e. non-exclusive "use and pay" models) may be more appropriate than patents, but the latter would also have their place in developing countries. To the extent a country chooses to rely on IP rights, Mr.
Roffe highlighted the need for a system of checks and balances to control potential abuses. Very often developing countries lack such a holistic regime of checks and balances, which requires not only the appropriate legal framework, but equally the right policies and individuals to put them into practice. IP categories that are particularly useful in the developing country context would be trademarks, utility models, and trade secrets.

Prof. Martin Campbell-Kelly, Department of Computer Science of Warwick University, stated that due to the Internet, the open source approach is a reality that is here to stay. The development of the Internet and personal computers (PCs) facilitates the open source model, as the Internet provides a means of collaboration at any time, the PC is a means for the cheap (re)production of creative works, and the Internet enables fast product distribution over the web at no cost. Prof. Campbell-Kelly considered that in the copyright area, open source models should not replace closed systems but complement them. As open source solutions make use of both original creations and reverse-engineered versions of successful products, Prof. Campbell-Kelly warned that exclusive reliance on open source models might undermine the continued production of high quality creations.

Q. 2. Can developing countries become more strategic in the use and exploitation of IPRs, and if so how, or are they doomed to fail? (Discussants: Uma Suthersanen, Lukas Pfister)

According to Dr. Uma Suthersanen, Reader in IP at Queen Mary, University of London & Chair, Legal Advisory Board, Creative Commons, advanced developing countries such as India with a keen interest in copyright protection (e.g., movie industry) show that the old dichotomy between developing and developed countries no longer applies, but should be replaced by the categories of exporters/importers of IP products. Dr. Suthersanen expressed the view that the public interest is already contained in the IP system and should be fully used by developing countries, in four respects:

- **Intrinsic legal tools**: these are exceptions to exclusive rights and other possibilities to narrow the scope of IP rights. In addition, the possibility to expand exclusive rights to new subject matter of importance to developing countries, such as TK.
- **Extrinsic legal tools**: these are non-IP legal regimes that affect the IP system, such as contract law, competition law, Human Rights law, and collective models of IP management, licensing, and benefit-sharing.
- **Extrinsic policy strategies**: these are the strategies pushed by the "grass root level", i.e. civil society, but also industry and intergovernmental organizations. Dr. Suthersanen highlighted that developing countries need to develop these strategies, as the bulk of IP-related initiatives come directly from the respective national government.
- **Intrinsic policy strategies**: these are put in place by IP judges, agents and lawyers that put in practice safeguards against IP abuses. In the US, the constitutional framework supports the system and aids the courts as they interpret the law and essentially take part in policymaking. Elsewhere,
such as in the UK, a body of case law assists judges in their decision-making processes. In developing countries, however, such a coherent system of accompanying checks and balances is often missing, *inter alia* due to a lack of trained personnel.

Dr. Lukas Pfister, Director External Affairs of MSD Sharp & Dohme GmbH, referred to WIPO figures on increased patent filings in developing countries such as the Republic of Korea and China to underline his view that developing countries may well participate in the benefits of the IP system. Dr. Pfister highlighted that there is not only a public interest in knowledge dissemination, but also in its creation. In the public health area, he called into doubt the assumption that lower levels of technological development (of the local industry) require lower levels of IP protection, comparing the Czech Republic and Hungary. Dr. Pfister said despite the fact that Hungary introduced patent protection later than the Czech Republic, Czech nationals enjoyed a higher life expectancy, which showed the importance of other, non-IP factors in the public health debate.

Q.3. How should the public feel about software patents (Martin Campbell, Uma Suthersanen)?

Both discussants agreed that software is a technological invention which should in principle be open to patent protection. Prof. Campbell stated that the rationale of patent protection also applied in the software context, i.e. to prevent reverse engineering (which as such is not prevented by copyright) and thus free riding on the inventor's efforts. Dr. Suthersanen pointed to difficulties experienced under the EC Copyright Directive, which limits the patenting of software to computer-implemented software. According to Dr. Suthersanen, this limitation creates gray areas and a number of legal uncertainties. Provided that basic algorithms remain excluded from patentability as basic tools for follow-on creation, Dr. Suthersanen affirmed a public interest in software patents, pointing to other safeguards to take account of access concerns.

Q. 4. From a public perspective, should pharmaceutical IPRs be treated differently from other fields of technology, and if so how? [Lukas Pfister, Pedro Roffe]

Mr. Roffe after providing an historical overview of the different treatment of pharmaceutical IPRs by OECD countries until the late 20th century expressed the view that under certain free trade agreements, pharmaceutical IPRs are rather treated preferentially (in terms of patent term extensions, data exclusivity, patent - regulatory approval linkages). According to Mr. Roffe, the public interest in access to medicines warrants a *differential* treatment of pharmaceutical IPRs, which is to be distinguished from *discriminatory* treatment. In particular, he pointed to the lack in developing countries of a coherent system of IP checks and balances as existent in OECD countries.
Dr. Pfister denied the necessity of different treatment of pharmaceutical IPRs, as in his view IP is not the major problem in the access to medicines context. He referred to insufficient infrastructure and education systems in developing countries, as well as stigmatization of the HI virus even through governments. In addition, he said that those who wish to promote true innovation need to take into account the need to pay for the multitude of expensive tests required to actually arrive at a truly innovative product.

In the final debate, all agreed that there is no such thing as a single public interest in IP, and that there are tensions in striking the balance between protection and access. The positions on public interest and on how to strike the balance change with the different IP categories, with the perspective (legal or economic, and often, but not always, depending on the developing or developed country viewpoint). In the public health area, the idea of differential pricing as the way forward did not receive common approval, as this could be made impossible through the practice of reference pricing. Disagreement persisted over the extent to which exclusive right are required for the sustainable development of medicines. In the copyright area, the benefits for developing countries of an international defence against copyright infringement were mentioned, but at the same time it was warned that to the extent that such a defence flows from national legislation, countries from other legal traditions might have difficulties in implementing it.

Before Mr. Adachi closed the debate, Dr. Pugatch drew the following conclusions:

- There is a public interest in both IP and non-IP systems. These are not necessarily mutually exclusive. One should systematically examine the costs and benefits of each model.

- As far as developing countries are concerned, there is a public interest not only in the level of IP protection but also in the institutional processes of IP policy making and in the transparency of such processes.

- The public has an interest in the "egg and chicken debate" – i.e. should there be first innovation from the public domain and then IPRs may be used (the so called "developmental" approach) or first IPRs as a means of securing innovation (the "elemental" approach).

- In the pharmaceutical context, there is a public interest in defining the boundaries between and the scope of the IP-related and the non-IP-related components that determine access to medicines.