ST. PETERSBURG INTERNATIONAL ECONOMIC FORUM

JUNE 20–22, 2013

New Catalysts for Change
A GLOBAL SYSTEM OF INTELLECTUAL PROPERTY FROM THE PERSPECTIVE OF THE BRICS COUNTRIES

JUNE 22, 2013

12:00–13:15, Pavilion 4, Conference Hall 4.1

St. Petersburg, Russia

2013

Moderator:

Marina Kim, Anchor, Russia TV Channel

Panellists:

Abdullah Al-Mobty, Abha Chamber President; Chairman of the Board, The Council for Saudi Chambers of Commerce

Kimball C. Chen, Chairman and Chief Executive Officer, Energy Transportation Group

Igor Drozdov, Senior Vice President, Chief of Legal Counsel, Skolkovo Foundation

Anton Ivanov, Chairman, Supreme Court of Arbitration of the Russian Federation

Daphne Koller, Professor, Stanford University

Suresh Prabhu, Chairperson, The Council on Energy, Environment and Water of India

Cui Zhiyuan, Professor, School of Public Policy and Management, Tsinghua University

M. Kim:

Good afternoon, ladies and gentlemen. We are pleased to welcome everyone who has come to attend this session. Today is the final day of the St. Petersburg International Economic Forum. And on this final day, we will have a discussion that may provide a good start to a broader conversation of the topic of intellectual property in Russia.

The topic of our panel is 'A Global System of Intellectual Property from the Perspective of the BRICS Countries'. And today we are pleased to greet our colleagues from the BRICS organization. We will return to the presentations of our panel participants, but right now I will briefly describe the format of today's meeting. After the opening remarks, we will watch a video address by Professor Roberto Unger from Brazil. Anton Ivanov will then present followed by a discussion. Finally, we will take questions from the audience.

I would just like to say that I am not a lawyer, and fine legal points are beyond my understanding. However, we as journalists see the interest that this topic has generated at the Forum. Literally just the other day, at the B20 Summit, we witnessed the fact that participants in the upcoming autumn B20 meeting were very interested in this topic. Viktor Vekselberg, President of the Skolkovo Foundation, raised the issue of intellectual property protection before Vladimir Putin. A certain amount of interest was expressed, and probably come autumn we will see this issue on the B20 agenda. The Russian side is recommending that a global competition protection code be developed. Our discussion will touch on these proposals. So let us begin with our representative from Brazil, Professor Unger. He taught the current US President at Harvard, and is no stranger to the problems of intellectual property protection. And now we will listen to the broadcast.

R. Unger:

To encourage innovation in our societies, we must radically transform the regime of intellectual property and of its protection. The present regime, devised at the end of the 19th century and expressed most characteristically in the patent system, transforms technological innovation into exclusive property. Its result is to leave the most important technological innovations in the control of big capital. We have no reason to accept such a system if our goal is to engage every part of society, including small businesses and independent entrepreneurs and inventors, in the work of innovation. The patent system and all its analogues should be relativized. Their domain of application should be restricted. And we should create alongside it other mechanisms to encourage, finance, and support innovation. One such mechanism would be a system of prizes or rewards that the state would grant to scientific and technological innovators. A second

mechanism would be a system that would enable the inventors or innovators to acquire capital or equity in enterprises that would be established in partnership with the state on the basis of the technological and scientific innovations. In this way, we are beginning to design a long list of alternative mechanisms for the encouragement of innovation and prevent the exclusive system that makes innovation the servant of commercial greed. The problem of intellectual property arises as well in our relation to the global order. Our attitude to the market economy should not be simply ‘more market’ or ‘less market’. We should want the market on different terms with a different form, and similarly, with respect to globalization, we should not be restricted to having more globalization or less globalization; we should be able to demand a different globalization.

M. Kim:

Professor Unger has finished his opening address, and we will now invite Anton Ivanov, Chairman of the Supreme Court of Arbitration of the Russian Federation, to speak. This year a new specialized court will begin to operate within the arbitration court system that will hear cases involving intellectual property issues. Mr. Ivanov, you have the microphone.

A. Ivanov:

Thank you. Indeed, many countries, including BRICS, have expressed a heightened interest in the protection of intellectual property. This is not surprising: if they have their own industrial capacity, then it should be protected. Modern manufacturing is increasingly moving away from the production of parts and hardware to smart products. And this process is constantly gathering pace and deepening. Given the growing attention being paid to intellectual property, we found it necessary to create a court dedicated to rights issues in this area. For the most part, it hears cases dealing with patent rights and trademarks, since here in Russia these issues are very pressing and closely tied to business. Copyright issues are largely outside the purview of this court. However, we also consider this area of development to be very important and promising. Judges from ordinary courts are afraid of intellectual property cases and do not like them (since they are always complex and always require knowledge in a particular branch of engineering, as in our case). Of course, here there is a need for a high degree of specialization. I welcome all participants to our discussion, and I would like to participate in it on par with everyone. So I will limit the length of my opening remarks. Thank you.

M. Kim:

Thank you very much. We are not going in alphabetical order, but in the order of the abbreviation BRICS: we first had representatives of Brazil and Russia speak, and now we will hear from an Indian representative. Mr. Suresh Prabhu has studied intellectual property protection issues in India as a representative of the government. He was previously the Minister of Commerce, and he has been a member of the presidential cabinet in seven governments. Mr. Prabhu, I am turning the microphone over to you. How does India view the current intellectual property regime? Do changes need to be made to this regime along the lines of what Professor Unger was talking about?

S. Prabhu:

Thank you very much. This is a very interesting debate on intellectual property rights, and we feel that the whole debate should be held at any time in any context. We should really understand the background of this. I think if you ask me whether we need innovation, whether we need invention, the answer is yes. The question is: what spurs invention? What is it that results in invention? Does law create invention? Is this what we believe in? Then I think we really need to take another look at our history. Humanity has lived on this planet for hundreds of thousands of years. There is no law which made human beings go from the Stone Age and the Ice Age to today's situation. It was not the World Trade Organization which created this new human civilization to try, to progress, and for humanity to be what it is. We never thought the moon was so close. It was possible not because of the intellectual property rights; it was possible because of human minds which wanted to conquer new directions, new ideas, and the whole purpose was that we must evolve into better human beings, as a society, as a civilization. So what is important is that, even today, after hundreds of thousands of years, we need to progress more. Because in some places we are progressing in the wrong direction, like in the case of energy. We really should keep inventing, because the human mind has unlimited potential. It can grow in manifold directions. So we should not have anything which inhibits that progress, and that is important. Now the question is: intellectual property, the TRIPS regime which came into being in the WTO system, when did it come into existence? Did it come into existence before human beings did? No, it came into existence in just the last few decades. Do you mean to say that so-called 'globalization' was possible because we could move from one end to another,

because we could exchange ideas and information? Was it because of any law? No. It was not something which happened because of that. So I think we really need to look at it. Let me give an example: you asked me about India. An Indian invented the concept of zero. There was no concept of zero in the world; an Indian invented it. Do you know the name of the Indian? Nobody knows! Did he take out a patent? Are we to pay him royalties for inventing zero? No! He is a hero, but we do not know who the hero is. So he actually did it without getting anything out of it. So this is how civilization has progressed. We need to do that. Now the question is: in our present context, do we need a regime which will allow more invention? Yes. Do we need to protect intellectual property? Yes. But what we need to protect is the intellect, not necessarily the property that comes out of it. If we think that only intellect can create property, there is some confusion there. What we really need to do is know how we can bring about more development; that is important. Let me give two or three concrete examples in medicine and healthcare. There is HIV/AIDS, which is a terrible disease that might eliminate humanity; that is what we thought some years ago. And then suddenly we realized that there was a chance that we could create some medicine. Now if you say, “This is my medicine which I am going to invent, and I am going to give it to you only when you pay a huge royalty for it; I do not care whether you die or you live”, is that the right thing to do? We have to think about ourselves. In an Indian context, we believe in intellectual property rights. We have a law, and in fact I was part of the process when we made the law. This law protects invention. We follow the global system. But I personally feel that the human mind is the critical difference between humans and animals, because we are supposed to have wisdom. I think we need to draw the line at where an invention is used for humanity. The line should stop between the invention being used for humanity and the invention being used only for commercial purposes disregarding humanity – I think we really need to draw the line there. But I personally feel we definitely need intellectual property rights to protect invention, because without that property in this present context, invention might not happen as it happened thousands of years ago. But at the same time, this should not be a means of exploitation by a few companies of the rest of humanity, and that is

something which will need to be addressed. I think one small example – because I mentioned energy – is that climate change is something which we feel that we are limiting. We also agree that climate change is because of excessive use of fossil fuel, so that also means that we really need to develop alternative energy. Not only to create new means of energy, but to save the planet, because otherwise it will be destroyed. So if saving the planet is important, is that IP so important that we will not allow the renewable energy source to be used by the global community? We need to think about that. I think wisdom should be used properly, which draws the line between what is necessary for commercial use and what is really necessary for humanity.

M. Kim:

Thank you, Mr. Prabhu. You continued what Professor Unger was saying about how we need to distinguish between the greed for gain, or what we call commercial interest, and the goals for developing innovation and humanity. We want to preserve stimuli for economic growth, but the current intellectual property protection regime is not always conducive to this.

In connection with this I would like to turn the microphone over to the sole female expert at our table: Professor Daphne Koller. First of all, she is a professor at Stanford University, and, secondly, she represents the largest educational resource on the internet, Coursera. This web resource makes it possible for millions of people around the world to be involved in the educational process. You are a scholar, and it goes without saying that you consider the issue of intellectual property rights to be a very delicate and important one. Do you recognize the need to change the existing intellectual property regime, or should everything remain as it is?

D. Koller:

Thank you very much. First let me say that we are not producers of intellectual property. We at Coursera are a dissemination channel for intellectual property produced by some of the greatest minds in the world, because we work with some of the best universities around the globe, which produce some amazing intellectual content that we help to distribute and disseminate to people around the world, who in the normal course of events would never have access to that kind of education. I think education is an important different type of intellectual property than the ones that we have been discussing so far, and I think what we are trying to do is effectively create a revolution in the availability of that kind of

intellectual property to people everywhere. Because for whatever reasons – I think partly because of resource constraints and partly because of a natural inclination to hoard something so precious – the intellectual property defined as great education has until very recently been something that has been deliberately hoarded and provided only to a relatively small fraction of humanity: the people who are fortunate enough to register at top academic institutions and be students there. Sometimes I still get questioned by people when they hear that we take the kind of education that has been provided only to students of Princeton, Stanford, Yale, and similar institutions, and they ask, “If you are giving that same quality” – well not exactly the same quality; you are not there on the Princeton or Stanford campus, but something of very high quality – “and you are opening it up to millions of people around the world, you are going to have all these people who are educated at Stanford standards or Princeton standards, and what are we going to do? How are we going to deal with so many people who have that quality of education?” I look at them and I say, “Would that not be awesome if you had this many people who have that level of education, all of whom are contributing to society, all of whom are coming up with great ideas? Do we need to artificially create strata in society by withholding education from so many people?” So what would be the benefit if you could really make education something that was a freely available commodity to everyone, or at least everyone with an internet connection? I think it really opens up two quite distinct opportunities for us as humanity. The first is just the social good component. I think, in this case, I want to echo some of your comments about the importance of societal good. If you look at the developing world, and you list the issues that plague many of the countries there – be it AIDS that we have already talked about, overpopulation, extremism, infant mortality, unemployment – you list every single one of them; you stratify by educational level, correcting for all other factors – socioeconomic status, ethnic origin, religion – correct for everything else, it is still the case that the more educated a person is, the less likely he is to suffer from all of those issues that are mentioned. So educating people, and by the way, specifically educating girls and women, is one of the mechanisms by which we can make the world a much better place in dramatic ways. So that is

one place where I think in some sense societal good really does trump intellectual property, in the sense that we should not hoard this amongst a small, privileged few. The other is the opportunity to create innovation by giving people access to the kind of resources that can let them transcend the place that they came from and really build on the work of many in order to come up with creative new ideas. I think we open the door to a wave of innovation from parts of the world that you might not normally see that type of innovation, and I think that there is an interesting historical incident here coming, in fact, from India. There was a very famous mathematician in the 20th century called Ramanujan. He came from a small town in India, and did not have a lot of access to education. He happened to get access to a book from which he, initially by himself, learned the basics of mathematics, and after having got to a certain level, he managed to make his way into a more formal education, but really it is the access to that initial level of education that allowed him to become what is one of the most celebrated mathematicians in the last 150 years. I think there might be many other Ramanujans out there in villages in Africa, or India, or Ghana, or Bangladesh who, given access to some basic level of education, could come up with some other great ideas that would make all of our lives better. And so that is, I think, another reason why in this case societal good really should in some sense transcend the hoarding of intellectual property rights.

M. Kim:

Thank you very much. You talked about the need to achieve a balance in education and equalize education levels around the world, and you also stated that an open system of access to knowledge for people from Bangladesh, India, and Africa – from developing countries – allows the creation of new knowledge products and technologies.

I will now turn the microphone over to the representatives of the Ministry of Communications and Mass Media who are present with us. I have the pleasure of presenting Mark Shmulevich, Deputy Minister of Communications and Mass Media of the Russian Federation. Now we will move from the topic of intellectual property to information technology and the approaches proposed by the Ministry of Communications and Mass Media.

M. Shmulevich:

Thank you very much. I am present at the session in the first place as a listener, because the topic is very interesting. It is especially interesting because the Ministry of Communications and Mass Media has recently decided that IT, or information technology, a modern segment with plenty of growth potential, should be its new priority area of attention. Let me say just a few words about why we consider the topic of intellectual property and the strategy in this area to be extremely important for IT. Today it would not be an exaggeration to say that intellectual property protection is not on the list of priorities for representatives of the Russian IT sector. Indeed, intellectual property protection issues are hardly ever raised at our meetings and expert board sessions. But the vast majority of our experts agree that the importance of these issues will increase within the next two to three years. I think that in three or maybe five years the situation will have changed radically, and a workable intellectual property protection mechanism will have come to the fore in the Russian intellectual property field. Today we have not yet collected enough statistics and we have too few legal enforcement cases to understand how these mechanisms work. But we have great hopes.

And these hopes are first of all for our new court, which was just created in March, and for the actual legal enforcement that will come about as a result of its work. In about two years, we will probably be able to make a more concrete judgment.

Secondly, there is a set of amendments to be made to Part 4 of the Civil Code that must be considered during the autumn session. These amendments also make provisions for intellectual property protection. They will allow for improvements in IT, if, of course, they are accepted.

I think that it will be very important to see what kind of legal enforcement will be carried out in relevant cases in the next five years in order to evaluate how well IT companies will be able to develop in Russia. There is a time lag in adapting the experience of the BRICS countries, which you have been discussing, to Russia and in implementing IT sector best practices in Russia. Thank God we still have some time. Thank you.

M. Kim:

Thank you very much. Now I would like to turn the microphone over to those experts who have taken it upon themselves to be pioneers. Igor Drozdov is the Senior Vice President and Chief of Legal Counsel of the Skolkovo Foundation. The Foundation has conducted one of the first Russian studies on the topic of global intellectual property. This is a full-scale scholarly study that touches on all aspects of the current intellectual property protection regime as it applies to Russia. As far as I understand it, there is no time to wait, and the time to act is now. What conclusions have your team of experts reached?

I. Drozdov:

I think it would be an exaggeration to say that our study is comprehensive. It only touches on certain aspects related to intellectual property. In my view, it is essential to realize that we need

to look at the institution of intellectual property differently than what the prevailing view has been in Russia for at least the past 15 years.

Mr. Prabhu has already touched on this point today. And these issues are being raised in Russia. But it has not led to deep research on this topic, and these issues are not being widely discussed. The problem of how to delineate the interests of the rights holder, society, and the state has not yet been resolved.

Today we have already said that modern technology allows the promotion of educational programmes, and that the internet grants people access to knowledge who previously had no such opportunity. But often intellectual property serves those very institutions that, paradoxically, sometimes prevent the use of new technologies in everyday life. This is because allowing consumers to participate in these kinds of programmes is always something to be negotiated with rights holders. This is a process that eventually entails certain costs, because rights holders are not always willing to give away their content for free. In some cases they may be prepared to do so, but it is not always easy to reach them in order to conclude the appropriate agreements. These are obstacles that exist equally in the United States, Europe, and Russia. There are certain exceptions to the kinds of intellectual property subject to copyright protection. I am talking about free use case scenarios, in which a product may be used without the consent of the creator provided that a fee is paid. Or it may be used without the creator's consent and without payment of such a fee. The list of these exceptions exists, and it changes over time. For example, the draft amendment to Part 4 of the Civil Code proposes expanding this list somewhat on the basis of how technology is evolving.

But a number of issues remain unresolved. We are continuing to discuss issues such as whether it is possible for paper documents, such as books, to be digitized and, if so, under what conditions. The situation is similar to the virtual museum creation programme. It is clear that the museums contain paintings protected by copyright. Can we digitize these pictures, and under what terms? We are not talking about entertainment content. I want to stress that we are talking about content that is able to broaden the base for innovation. Here we have just heard the example of a well-known mathematician. It is hard to imagine how many talented people, once they gain access to education, will be able to create something new in the world while at the moment, they are simply excluded from the process of innovation. Is this access advantageous to humanity? Of course it is! But the rights holders will say that you need to pay for that access! And we have to weigh what is more important. How shall we proceed? Professor Unger has proposed some new, maybe even exotic methods, but we should be thinking about how we can compensate the rights holder’s hypothetical losses. However, based on my experience, I am not sure that these losses were or will be significant.

When I was in law school, I did not have the opportunity, whether financial or logistical, to go somewhere and buy a book. I had neither the money nor the ability to go anywhere. If there had been an opportunity, I would have acquired that knowledge. But I did not acquire it, and thus the

rights holder did not earn anything from me. Will many rights holders suffer if students are allowed to read certain works for free? I am talking about limited access for college students, let us say: for example, a lack of ability to download texts for screen reading, and so on. Only libraries have the ability to digitize books. All this can be thought out.

And the second point that I would like to make already applies to the BRICS countries. I agree with Professor Unger: he who owns the technology controls the world. Now technology is concentrated in the hands of large companies and corporations that are located in the G8 countries. And we find ourselves at a disadvantage from the very start, and not because we are somehow less clever.

For example, the Soviet Union, where an intellectual property system was not in operation, produced many discoveries and works that were potentially commercially attractive. But many developers who emigrated took these technologies with them. Then they patented them, and now we have to reacquire them. Do you think this is fair? I am not so sure. Although from the strictly formal point of view, everything is the way it should be. Therefore, in my opinion, we need to think about how to restore the balance and how we can ensure fair competition. Right now it is simply the case that whoever owns a technology or patent often simply prevents another company from entering the market. And this is not because this company intends to use the patent in its own production process – we would welcome that – but because the company simply wants to suppress potential competition. In order to react to this practice properly, I believe it is necessary to develop an anti-monopoly mechanism in this area. In both the US and Europe, approaches to this issue are already being created. It is surprising that in Russia, where we even have exceptions within our internal competition law, the competition regulations somehow do not apply to intellectual property. This is the theme around which we must construct our debate at the national and international levels.

M. Kim:

Our discussion focuses on the BRICS countries, so it would be logical to give the microphone next to the representative from China. Professor Cui mostly studies global economic processes, but the current intellectual property protection regime certainly touches on those processes. How do Chinese researchers and experts view this question? Do you agree with the approaches of Professor Unger, someone with whom you are personally acquainted? Might you expand on that theme for our participants?

Z. Cui:

First, I would like to thank you, and to express my gratitude for being invited to attend the St. Petersburg International Economic Forum. Secondly, I am very happy to see the video by Professor Unger, because he is my old friend. Before I

returned to teach in China in 2004, I taught for 11 years at MIT in Massachusetts, so I have had many personal discussions with Professor Unger. So I basically agree with his views, but I think his views are expressed very succinctly. Sometimes the subject can be misunderstood. I would like to highlight a key sentence from his presentation, in my understanding: relativizing the kind of regime of intellectual property protection. He is not advocating the abandonment of the protection of intellectual property, but the relativizing of the existing regime, and broadening the reach of alternative protection, and encouraging innovation. The two examples he gave were the state giving an award to innovators and also to award inventors with equity interest in a company. He mentioned that maybe they could hold equity in some public companies. This broadening of the traditional list is just to try to extend the length of patent protection which is actually in some cases in contradiction to competition law. In this new report by the Skolkovo Foundation; I thought you did a wonderful job. I especially like, in your report, that you have a chapter to bring together the insight of competition law and IP intellectual property rights law, because the current regime, even the dominant regime of IP protection is in contradiction with competition. But one example is actually compulsory licensing. This was also a point raised by Mr. Suresh Prabhu: actually, the so-called TRIPS – trade-related intellectual property regime – by the WTO is a recent establishment. Only in 1994 was TRIPS written into the WTO rules, but the original idea of the WTO had nothing to do with intellectual property. Actually, this is an example of the small number of lobbies for a small number of big companies, basically the twelve representatives from big companies – just twelve of them set up this Intellectual Property Rights Committee, and they lobbied the WTO very heavily and successfully for this TRIPS regime. This is actually an example from Professor Unger's lecture – this narrowing down of the protection of intellectual property rights into a single phase. But I agree with Unger that we should broaden institutional innovation through more alternative lists of intellectual protection and development. Actually, I would like to give one example of what is so-called 'open innovation' or 'open source'. On the internet, in the email we use every day, for example, we have to rely on something called the Apache Web Server. So Apache is not protected by

any traditional intellectual property rights. Apache is the foundation, and the source code is open to the public, but through this kind of open source, can we have free and wide use of the internet globally. Also the big alternative to the Microsoft Windows operating system is Linux. Linux is based on open source software, and is also not protected by the traditional intellectual property rights. Actually it is protected by the so-called 'copyleft': so it is not 'copyright', but rather 'copyleft'. Actually, the United States court in California has already had the first legal case protecting copyleft, because in order to encourage open innovation, if someone applies, they can kind of monopolize the patent after revising the open source code. It is a violation of copyleft, which can be prosecuted in court. This is another example of an alternative regime of encouragement of intellectual property rights. It is very interesting that in 2003, when Bill Gates visited China and had a meeting with the then Chinese President Jiang Zemin, he specifically agreed that Microsoft would open up its source code for the Windows system only for China. But later on, I found out that actually he has done it for four countries, not only for China. Another is NATO. Actually, I am happy to see that another one is Russia, for the Russian Government, and the third country is Great Britain, so Bill Gates agreed to open this proprietary code to these four countries. I think that is very interesting. This open-source innovation is already a big reality, but unfortunately our theory and our study of intellectual property rights have not fully drawn on the implications of this open source movement. But I hope the BRICS countries can do something together to promote innovation and also protect innovation in an innovative way. Okay, thank you.

M. Kim:

Thank you. Professor Koller, you clearly would like to respond to this point. I know that unfortunately you have to leave for the next session. Please provide us with your closing remarks.

D. Koller:

Thank you very much for giving me the opportunity for one final comment before I unfortunately have to leave for another meeting. I think there is a very fine balance that we have heard around this table between, on the one hand, opening

up innovation in a way that allows a very large segment of society to benefit from it, while at the same time also rewarding people who create this intellectual property so that they feel like their work is worth something to them and can help them or their organization. The copyleft is one such mechanism. There are others; I think there is some interesting work that we have been doing around terms of service that allow individual use, but once you have commercial use – that is something that we exploit, as well as other organizations – then organizations have to pay for commercial use, but the individual use is free. I think that one of the things that we need to be doing in the coming years is to come up with additional mechanisms like this that allow education and intellectual ideas to permeate society while at the same time providing these rewards to people. I am not a lawyer; this is not my area; but we are definitely a consumer of these intellectual property ideas, and would love to have some of these creative solutions benefit us as well as others as we try to disseminate some of the world's best intellectual property to others. Thank you.

M. Kim:

Thank you. I hope that this is not the last discussion that we have on this topic with Professor Koller.

Now I would like to turn the microphone over to representatives of major businesses. Today on our panel we have Kimball C. Chen, who represents transcontinental and American business, though Mr. Chen is originally from China. My question is this: you are managing a large transport company in the energy sector, as well as a major investment fund. In your opinion, what intellectual property protection regime is beneficial to you? On the one hand, you invest money and desire that the product in which you invest be protected. On the other hand, you are interested in innovation and the development of new technologies. What is your position on this issue?

K. Chen:

Let me start by saying that I am a member of the International Chamber of Commerce G20 Advisory Group, which participates as a partner with the host country governments and World Economic Forum in the B20 process. However, today I am speaking in my personal capacity, not as a member of any of these international organizations. Before I talk about my specific experiences, I would

like to make a comment on what I have heard from the other speakers, because it is very clear that this concept of intellectual property rights which we were discussing here is actually the point of coming together of several very complex intellectual and political issues. We are talking about moral issues; we are talking about the concepts of the basic rights of humanity to have access to a better life; we are talking about property rights; we are talking about how to motivate populations to be more creative; we are talking about the competitive standing of governments and the ability of countries to compete with each other; we are talking about different levels of development of different countries and what their differing needs are; and then we are trying to talk about it in the context of attempting to have global regimes which would necessarily involve international cooperation and enough commonality of interest in order to be able to arrive at international regimes which can be enforced, and which people believe in, and which are stable enough to allow decisions to be made. So this is a very complex series of interactions, and Professor Cui and others have commented on the issue of complex interactions. I always caution people against what I call the 'unknown unknowns'. We do not know what the consequences are of making changes to systems when we change them. We are making changes in this complicated system, which affects human commerce, especially the emerging major sources of human commerce, which are based upon high technology and faster and faster cycles of technology development, and clusters of intellectual property which have to be put together in order to be able to compete at all. These are very complex issues which have never faced human commerce before. So I want to also point out that, especially for the least developed countries and the lower level of developing countries, most of the improvement which they need to accomplish in the next 20, 30, or 40 years does not require cutting-edge IP. All the things they need to do to improve their life expectancy, cook more cleanly, educate people, and have 50% more productivity in harvest, is all publicly available information right now. So this IP discussion is really a problem between the more advanced countries and those really large and emerging countries, the BRICS countries, and also a concern of what is a new actor in the world: non-governmental, non-state actors such as multinational

corporations. This is a new phenomenon, where multinational corporations can affect and have almost equal power to or sometimes greater power than nation states, and yet when we talk about IP regimes, it is decisions of nation states with each other. And yet, as Professor Cui pointed out, the WTO was affected by the lobbying of twelve large corporations. These are not nations. These are transnational non-state actors. So we have a very complex series of interactions here. My view on the practical aspects as a businessman is that I would like to ask the academics that advise governments, and governments themselves, to remember that business – and this is the position of the B20 – needs stable, clear legal regimes as much as possible, whether it is tariffs or trade facilitation or IP. So whatever you do, whatever you change, make sure that there is stability and not volatility, and make sure that there is enforcement. Faster enforcement. I just finished a very important ten-year litigation in the US on US intellectual property rights. We went to the Supreme Court. I had a company, and we had to unfortunately file an action against a whole industry worldwide. I will not go into the details here, except to say that it was a very interesting example of what some would consider legal enforcement. Yes, we won; we won unambiguously; but it took ten years. Small and medium-sized enterprise – which is the backbone of world development, especially in developing countries – cannot afford what I can afford, which is to spend tens of millions of dollars on ten years of litigation. So we need fast and fair enforcement, and we need moderate cost of IP, because the cost of getting IP across several different interactive IP regimes is excessive. It is a large obstacle for small and medium-sized enterprise. It is clear that large companies tend to vacuum up intellectual property, so again, as Professor Cui said, intellectual property tends to migrate to large corporations. Now these comments that I have made are questions and challenges to governments and to academics, but they arise out of my personal experience across several major industries. My own most active focus right now is energy. For instance, I was interregional adviser to the People's Republic of China when they wanted to establish an LNG sector. LNG is the principal means of diversification into natural gas, so it means cleaner energy and moderation of carbon emissions. They wanted to understand what kinds of technologies they

needed, and they needed to assess the competitive implications of all the interacting structures that they would have to establish: tariff regimes for utility payments, how to invest, what kind of technologies their industries should try to license from abroad in order to be able to create competitors which could serve their own domestic demand; all the kinds of things that BRICS countries worry about. BRICS countries tend to have a very great interest in developing national champions. That itself means that they want to form enterprises of a critical size to compete eventually in the world. How do you start that? What is the cost of getting technology in to start that? That is part of the ICT debate that we are looking at here. So on issues of national strategy, you can get into most industries relatively cheaply, because there is competition between technologies for ship-building, or manufacturing tyres, or for performing different kinds of petrochemical transformations to basic feed stocks. In some industries, if you do not have access to the critical cluster of foundation patents, you cannot start. So those are sectoral differences between industries. For instance, I am currently the sitting President of the World LPG Association, which is the global association for propane and butane; this is the key heating source for cooking and basic energy needs for 3.5 billion people. The UN has asked me and some others to get a billion people to start using bottled gas instead of traditional solid fuels. All the technology that is needed for this is in the public domain, yet in China there is an inventor – I know this guy – who says, “I have a new chemical additive which will increase the heat generation capability of a tank of LPG by 40%.” The commercial implication is that a developing country user would use 40% less bottled gas. That is a huge economic advantage, but he says, “I cannot patent this; I cannot get the protection for this; I have no way of getting what I think is my fair reward.” So he does not want to let it out. It is know-how; it is hidden; it is not going to happen. He has a stove design which has a 30% increase in efficiency, again reducing the use of fuel. He does not want that out there. So this is an example of inefficiencies in the system which do not motivate the transfer of innovation to the commercial sphere. My basic point is this is a very complex moral, political, and social issue. It is a whole ecosystem of issues, not just in the legal sector or in the government strategy sector. Thanks you.

M. Kim:

We have just heard from the representative of a large, almost transnational corporation, but it was a view from abroad. With us today is Nicholas Sluchevsky, a representative of the Association of Russian Businessmen and the Stolypin Centre of Regional Development. Mr. Sluchevsky is also the great-grandson of Stolypin.

The question is: what problems do our farmers face in the field of intellectual property protection? How does this regime affect you, and how, in your opinion, should it be changed?

N. Sluchevsky:

First I want to thank Kimball for mentioning a very key word here, and that is that we are dealing with an ecosystem. That happens to be a subject that is near and dear to me because I deal with agriculture, but ecosystem has much broader implications. There are so many different vectors from which we can approach the current subject that one hardly even knows where to begin, so I am going to make it very concrete. I will also argue that this particular session today is the single most important session of this entire Forum. I am not doing this out of vanity; let us actually put some numbers on why I am saying this. I know you are probably familiar with the fact that there was a study conducted in the US about Russian émigrés of the last 20 years and their contribution to global GDP. That number is over three trillion dollars. Did any discussion at this Forum today approach those kinds of numbers? That is why I am saying this is a rather important subject. It should be overwhelmingly attended and listened to; the value of this discussion is huge. There is also a political angle and a social angle, which is what my concern is. I am going to completely change the direction of this conversation, and, as I said, make it a bit concrete as it relates to agriculture, and this may strike everybody as a little bit strange. We have a very, very complex problem in today's world, which is about privatizing public space, and nowhere is that more visible than in the world of agriculture. The bulk of the world's food is produced by 90% of the world's population, which has virtually no input into the global financial system. These are subsistence farmers; these are small farmers working in a non-systemic environment, but today they are running headlong into a brick wall that is called trade-related IP rights, which has

fundamentally equated agriculture – in this case, seed genetics – with software. That is a fundamental flaw in today's intellectual property regime. It is embedded within the WTO, and it is leading us headlong into a tragedy. I will give you a concrete example of what happens in that regard. In 1990, W.R. Grace & Company tried (and succeeded) to patent a plant in India that is known as the neem tree. The neem tree is known as a natural pesticide. It has been used as a natural pesticide for millennia, and yet W.R. Grace was able to patent the idea of the neem tree as a pesticide. I do not know a better example of public space, and yet they succeeded. It took 15 years to overturn that patent because it had absolutely no merit. So as Kimball had already mentioned, he was in a privileged position to be able to fight these issues and file multimillion-dollar lawsuits. Occasionally, countries can do the same thing if they are not heavily lobbied by massive corporate interests, but small producers, especially farmers who are responsible for 90% of the world's food supply, have no such power. The regime is fundamentally flawed. There is also an Indo-American Knowledge Initiative. I love those names. It sounds very altruistic. However, what the Indo-American Knowledge Initiative has succeeded in doing is opening up the entire sphere of what would have been sovereign information in India – and I have no problem with open space and sharing information, which farmers have done through millennia – except the idea here was to find a way to patent it and take it out of the commons and put it into the private space, and therefore make billions of dollars out of it. And here is where the 'software equals seed genetics' argument fails completely. Software is built from scratch, and there are many problems with the IP regime in software (I will not even go into that), but at least there is a creative component. In the issue of seed genetics, you have 99.9% of the intellectual value in that seed that has been evolved over millions of years by nature, and yet large corporations add one small gene to it, which may completely change the use, but nevertheless they are building on the basis of millions of years of work that nature has done and they trying to profit from that. I think it is fair to say that that is a ludicrous proposition, and yet the system works that way right now. There is a lack of symmetry in the level of power when you have huge companies controlling GMO streams. And just to bring this home to

something truly Orwellian, in terms of trying to protect its intellectual property, Monsanto has been working on a lovely product that is essentially a trigger or an index of the existence of GMO in plants, so if GMO has crossed over into somebody else's field, this new technology they are working on will change the reflection of the leaves, so that they can now monitor from space when their intellectual property has been violated. It has become that Orwellian. Again, I would like to remind everybody here why this is such a big issue: it is 90% of the world's food supply. In the United States at the time of the Revolution, there were over 1,800 forms of apples. Today there are fewer than 180 in the entire country. We are losing biodiversity because of this control and monetization of what should be a public space issue. Thank you.

M. Kim:

Mr. Prabhu, you study agricultural issues as part of your role in the Indian Government. Do you have any comments?

S. Prabhu:

In fact, I am very glad that he has raised this issue, and in the process raised the debate intellectually to a different level. I really congratulate him for doing that. I credit him fully that the big challenge the world is going to face is in the space of food, because we have limited land in the world; we have limited water in the world, and no-one can produce food without land and water. That is limited, and at the same time the population is rising very rapidly. There are seven billion of us already, and there will be 10.5 billion of us in a short time. There will be 50% more of us than there are now. I would like to remind you that today maybe two billion people do not eat enough because they do not have enough, so there is a lot of hunger in the world. I believe that economic development will lead to more income for people, and therefore, they will have more money to buy food. So if the number of people is going to rise and their food purchasing power increases – and that is something which people want to spend on first when they have money – what is going to happen to agriculture in the world? Therefore, we definitely need technology to make that happen because of the resource limitation of land and water. At the same time, if technology is going to be used in

a manner that we are going to create a situation wherein we talk about market access, the whole purpose of the WTO is to create market access, to help us try to allow goods, services, and technology to move freely without any hindrance. If that is the case, could we afford to have a situation in which maybe two billion out of 10.5 billion people – maybe millions of people – will die because of a situation in which they have the ability to produce, but maybe because of IP, they are not allowed to produce because some company holding that technology? It is a situation where they know the technology but they cannot use the technology. Should we allow a system like that to happen? Therefore, I think we really need to be very cautiously and carefully looking at some sectors in particular. As I said earlier, I am fully in favour of protecting innovation. More than innovation: invention. But what is more important is, when you create that system, to allow the invention to take place because of certain protection you get from the law globally, that is fine. But having created that, some sectors – for example, agriculture, pharmaceuticals, and energy – are very critical sectors in which I feel we really need to introduce a system whereby the people will be able to use it by paying enough. I am not saying that anybody wants it free, but it should not be so exorbitant that it creates a market barrier. That is important, because it goes against the spirit of the WTO itself. Secondly, I want to say that we must draw a distinction between invention and innovation, and you gave the example of Windows. I think you were talking about Microsoft Windows, but I am just using ‘windows’ as another example. I think IP is necessary, and we should keep the main door closed – so we do have protection – but open the window. That is invention and innovation. Invention can be protected by keeping the doors closed, maybe, but keep the window open so that innovation takes place. If we do not do that, I feel that, in the way we are trying to argue that IP protection and new laws allow invention to take place, but if we do not make a distinction between innovation and invention, then we do not allow the invention to take place. So you will achieve exactly the opposite of what you are trying to do. I think we really need to draw the line very carefully. As I said, we definitely need invention, no doubt. You talked about the fact that, even in the case of pharmaceuticals and in the case of agrochemicals, when you develop a new

molecule, it sometimes takes hundreds of millions of dollars; I understand. So therefore, unless you are able to amortize those hundreds of millions of dollars through the market, you will not be able to afford to make another invention. I understand. But you should definitely not try to do it in such a way that, from a billion-dollar investment, you make a hundred billion dollars of profit. That is a moral case. In fact, no law can succeed if it has no moral backing, and therefore the morality of the world should be driving the process of invention and ideas. People should not be prevented from using that just because we feel that profit is an overriding consideration. Profit has to be a consideration, but cannot be the sole consideration of exploitation.

M. Kim:

Thank you, Mr. Prabhu. The time has come to finish our discussion. In conclusion, I would like to address Anton Ivanov, and after some practical examples, I will return our discussion to a legal theme. Today we have discussed various approaches as to what kind of intellectual property protection regime we should have. Is it fair? What have been your impressions from this discussion?

A. Ivanov:

Thank you. I would like to say that intellectual property law, having developed in the nineteenth century, took different paths after that century. And the practices of different countries, though they use the same conventions, vary. I have been a repeat witness at discussions on intellectual property between lawyers who are adherents of two models: the Anglo-Saxon/American one and the Continental one. Their approaches differ radically. I want to emphasize that the American model, as opposed to the Anglo-Saxon one, supports including various property within the purview of intellectual property protection that probably should not be classified as such. This is a general tendency. On the one hand, Americans protect a very wide range of property under copyright. On the other hand, that property that is protected under copyright in many countries is being sucked into the sphere of patent law, making regulation of the corresponding relations even more stringent. The Federal Service for Intellectual Property (Rospatent), for example, which is similar to the corresponding US institution, has now begun to offer patents for recipes for certain dishes. This is funny, but true. Dishes that have been prepared by peoples for thousands of years have now become the objects of patent protection! I think that we will reach the point where everything will be able to be patented, and it will be impossible to do anything freely. This is the primary point. I think that the BRICS countries should move in line with the Continental model, in which copyright and patent law protect only

specific sets of property. There is no need to increase the range of property that is covered. This is key.

The second thing that I see that we need to do – and this is very important – is to extend competitive laws to cover the commercial use of intellectual property. This has already been done in certain situations. I can cite a number of European Commission decisions relating to the internet giants. It is true that these decisions do not always relate to the violation of competition laws. They deal with the violation of rights to personal information or to other items of value. This is another important point that I would like to stress. We are inclined to think that some areas of competition regulation can relate to intellectual property if we are talking about a particular commercial use. This is to say that competition regulation does not itself deny intellectual property rights, but certain types of commercial use undoubtedly must be prohibited. For example, someone deliberately conceals an innovation and receives a patent for it with the goal of never allowing someone else to produce it.

Furthermore, I think that it is very important to review disputes between rights holders and all third parties that are interested in free access, based on the fact that the intellectual property right exists as a prerogative right. But there are other values that are more fundamental and important. I have in mind the right to life, liberty, health, and other values. And in these cases, of course, we must remember that the last categories I mentioned have priority. In some cases, it has been possible to formulate practical conclusions, including in judicial practice, in which intellectual property rights may be infringed upon in the name of these values. I can give an example from very well-known cases involving various drugs, where pharmaceutical companies patented medicines and do not allow other manufacturers to produce generics. When these disputes went to court, the courts said, “We are talking about people's lives here. They cannot afford to buy such an expensive drug sold by some Swiss company. They need to have the choice of buying a cheaper generic version and surviving or of not buying the medicine and dying.” These two values, of course, must be weighed, and the courts must decide the matter on the grounds that the right to life ranks above the right to intellectual property.

Finally, let me say something about the new economy. Perhaps we need new methods of protecting rights. I have in mind, first of all, the internet and other related ways of distributing information. Here, clearly, we must create a separate special international regulation that cannot be obviated. It should, of course, provide for more freedoms than are contained in the provisions of traditional intellectual property law. It should provide for more free use, more use without a licence, and more cases allowing use without permission, provided that some sort of fee is paid.

I welcome Professor Unger’s proposed mechanisms for expanding the opportunities for creating various innovations. He talked about the use of bonuses or incentives. I will provide an example. In the Soviet era, we paid workers who thought of ways to improve production a bonus. It was, in principle, a decent tool. Many took advantage of this practice and were glad

when they had the opportunity to increase their wages. Similarly, in my opinion, it is possible to set up joint funds with the state and innovators, in which the government provides capital but also receives an ownership share. This idea is also good, but in any case, we should not cancel the patent rights monopoly system, because otherwise the incentive for creating intellectual property will cease to function. We need to think about how we might limit this monopoly. I think that the economic concept of covering the costs of inventing a product is very important here. We all know that the major media companies that have collected profitable rights to movies and music have long ago recouped all costs associated with these cash cows. They receive pure rentier income. There is no innovative mechanism here. So we need to create special mechanisms that would allow us to tax this income. It should be possible, for example, to grant free access to these works under relaxed conditions. For example, once the inventor or creator recoups his costs, then the rights fee policy should change. But we must think about how these costs should be calculated and how all of this accounting would be recorded. But it seems to me that it would be good to create these kinds of mechanisms. Thank you.

M. Kim:

Thank you very much, Mr. Ivanov, for such a comprehensive final statement. I think that this is a good note on which to end our discussion.

Our discussion has touched on many issues, including practical ones, from the many theories, ideologies, and approaches to intellectual property protection. Of course, we are optimistic that our discussion today has enriched the understanding of the basic problems that are being discussed in the press and among the general public. In our discussions of intellectual property, we usually say that people should not steal it. And all discussions revolve around this point. It is interesting when this topic receives new treatment, and when we see that the global regime of intellectual property protection is itself a much more complicated problem. We journalists are willing to participate in this discussion, and we will monitor the progress of the ongoing discussions. We will report to our viewers and listeners about the changes that are ongoing right now. Thank you very much to all our panel participants. Until next time!