Toward a TRIPS Truce

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TOWARD A TRIPS TRUCE†

Patricia L. Judd*

INTRODUCTION

The World Trade Organization’s (WTO’s) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS or Agreement),†

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now over fifteen years old, regulates a marketplace characterized by extraordinary dynamism, influenced by the constant forces of globalization and technological evolution. Attempts to regulate this market raise natural, persistent questions concerning the Agreement’s ability to serve its respective constituencies and adapt to change. The Agreement operates in the midst of an age-old dynamic pitting developing and developed countries against one another, especially when it comes to domestic enforcement against piracy and counterfeiting—a dynamic in which TRIPS has been criticized as a one-sided instrument. Further, the TRIPS Agreement’s territorial focus seems outdated in a trade world in which national borders have diminished significantly in importance, and its analog-era approach to intellectual property rights (IPR) faces difficulties in a world dominated by the internet. All of this seemingly complicates the Agreement’s quest for continued relevance as the marketplace it is regulating enters the second decade of the twenty-first century. Yet finding a way to keep TRIPS useful is in everyone’s interests. While various regional and bilateral agreements have

2. These are not ideal characterizations. The use of these terms, both in the general rhetoric related to TRIPS and in this Article, presumes that developed countries are always advocates of strong intellectual property rights (IPR) protection and that developing countries are always against strengthening IPR protection. These are dangerous overgeneralizations. It also ignores that development is a spectrum, that there is no bright line between developed and developing economies, and indeed that the United Nations’ designations differentiate between developing and least developed economies. This Article only reluctantly contributes to the perception that a bright line between “IPR proponents” and “IPR opponents” exists, driven by economic development levels. In truth, most economies—developed and developing—are both IPR-producing and IPR-consuming nations. I elaborate extensively on the discomfort of these categorizations in Part II.A of the Article. However, since both the primary sources and the literature regarding international intellectual property law are replete with such designations, I use them for convenience here.


5. Even if one argues that the gains from TRIPS promised to developing countries on World Trade Organization (WTO) accession have not materialized, one cannot plausibly deny that adherence to TRIPS opened doors for these countries with regards to concessions in other trade sectors. See Frederick C. Abbott, Toward a New Era of Objective Assessment in the Field of TRIPS and Variable Geometry for the Preservation of Multilateralism, 8 J. Int’l Econ. L. 77, 93 (2005) [hereinafter Abbott, Toward a New Era] (“In the Uruguay Round negotiations, developing countries made concessions on TRIPS in exchange for [Organization for Economic Cooperation and Development] commitments to reduce agricultural export subsidies and textile quotas.”); Donald P. Harris, The Honeymoon Is Over: The U.S.-China WTO Intel-
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attempted to build on or clarify TRIPS provisions,6 there is no realistic possibility of replacing or significantly amending the Agreement in the near term.7

This Article argues that TRIPS is neither as one-sided nor as endangered as many assume it to be. In fact, one can interpret the Agreement in a manner that will help bridge the divide between developed and developing countries, minimizing the intransigence that so often characterizes TRIPS discussions and negotiations. Likewise, TRIPS contains features that give it the pliability necessary to keep up with the times, adapting to an intellectual property environment driven

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by the internet and by a decreasing emphasis on territoriality. The TRIPS Agreement is both more equitable and more malleable than its longtime reputation suggests.

A recent WTO dispute settlement case involving two superpowers of the IPR debate—the United States and China—prompted my exploration of this issue at this time. The China—IPR decision resulted from the only TRIPS enforcement case ever to reach the litigation stage and is therefore both groundbreaking and incredibly influential as a first exploration of the meaning of TRIPS enforcement norms. The case featured a claim by the United States that China’s criminal law fell short of its enforcement obligations under Article 61 of TRIPS. Article 61, one of the most important TRIPS obligations with regard to domestic enforcement measures, requires WTO members to provide for criminal penalties “in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale.” The United States claimed that China’s employment of thresholds, below which criminal prosecution was not possible, excluded some commercial-scale piracy and counterfeiting from the ambit of criminalization. The United States challenged the thresholds as articulated in the black letter law, not their application in the Chinese marketplace, and thus provided no evidence of how the criminal law operated in practice. Citing this lack of evidence, the WTO dispute settlement panel denied the U.S. claim, emphasizing the crucial role of practical evidence in assessing the relationship between the pertinent TRIPS obligations and the marketplace for the affected products in China. In other words, the WTO panel was unwilling to determine China’s compliance with TRIPS obligations without a context-specific assessment of the challenged Chinese laws.

This Article suggests ways for both TRIPS stakeholders and future panels to interpret the TRIPS enforcement text looking forward, in light of this groundbreaking decision. First, the Article argues that future WTO panels should follow the case’s lead in approaching TRIPS

10. TRIPS, supra note 1, art. 61.  
12. Id. ¶ 7.416.  
13. Id. ¶ 7.614, 7.629.  
15. Id. ¶ 7.602, 7.606, 7.614.
enforcement cases with a view to a contextually nuanced evaluation of compliance, looking carefully at factors such as the products at issue, local market conditions, and competing societal priorities. The panel decision illustrates that TRIPS is more than a tool used by developed countries to impose their enforcement standards on their less developed negotiating partners. To the contrary, it reinforces the concept that IPR infringement looks different in different contexts—that piracy in China may affect the market differently than piracy in Germany16 and that one must assess piracy of books differently than peer-to-peer trading of digital music files. Plainly, this is good for developing nations because it bolsters their ability to argue for a certain degree of latitude in assessments of TRIPS compliance, thus breathing new life into the Agreement’s flexibilities.17 Compliance with TRIPS—it is now clear—is not "one size fits all."18

Second, this Article adds something new to the fairly intuitive analysis above, arguing that the elimination of a “one size fits all” approach to the TRIPS enforcement text also benefits developed member economies and the IPR producers those members tend to represent. This is a much less obvious insight. The Article shows how breathing new life into TRIPS flexibilities helps rights holders by allowing judgments of compliance to take into account not just geography, but also the market for the particular product in question. This contextualization by product opens the door to discussions about how emerging methods of piracy or counterfeiting are affecting rights holders in ways that may not have been anticipated at the time of TRIPS negotiations. For instance, the impact of seemingly noncommercial systems facilitating peer-to-peer trading of copyrighted files over the internet may need to be assessed differently than the impact of a rogue textbook printer. A highly contextual approach helps panels—and litigants—better define

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16. Thanks to Lawrence Solan for suggesting this example.
17. This is a term of art in the TRIPS context and is appropriately used in the plural. See, e.g., Fact Sheet: TRIPS and Pharmaceutical Patents—Obligations and Exceptions, WTO (Sept. 2006), http://www.wto.org/english/tratop_e/trips_e/factsheet_pharm02_e.htm.
18. See Rochelle Cooper Dreyfuss, TRIPS and Essential Medicines: Must One Size Fit All? Making the WTO Responsive to the Global Health Crisis, in INCENTIVES FOR GLOBAL PUBLIC HEALTH: PATENT LAW AND ACCESS TO ESSENTIAL MEDICINES 51, 53 (Thomas Pogge, Matthew Rimmer & Kim Rubenstein eds., 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443248 (noting that the status of TRIPS as a minimum standards regime may allow WTO members latitude to “tailor their laws to their individual circumstances”); Harris, supra note 5, at 116 (noting the vague wording in the enforcement section of TRIPS and the resulting latitude given to WTO members in implementing enforcement obligations); cf Peter K. Yu, The Objectives and Principles of the TRIPS Agreement, 46 Hous. L. REV. 979, 981 (2009) [hereinafter Yu, Objectives and Principles] (noting the presumed “one-size-fits-all” nature of TRIPS, but also acknowledging the potential effect of flexibilities within the agreement).
the market at issue, and flexibilities help to ensure consideration of market factors that otherwise may have been overlooked. Thus, neither the China—IPR decision nor the reaffirmation of enforcement flexibilities that it represents is all bad for developed nations.

The China—IPR case also benefits rights holders in another way. It portends future panels’ likely views on questions that have plagued TRIPS constituencies since the Agreement’s conclusion fifteen years ago: What is the scope of WTO members’ obligations under the TRIPS enforcement text? Does Article 61’s obligation to “provide for” criminal remedies extend beyond passing a law? Are members who have criminal IPR laws on the books in compliance with TRIPS through that act alone, or do they need to enforce those laws? This Article argues that the China—IPR panel’s context-specific standard for judging TRIPS compliance opens the door to WTO review of national laws as implemented. Indeed, it strongly suggests that compliance of those laws with TRIPS standards should be judged in the context of their application. Thus, future panels examining compliance of national laws with TRIPS Article 61 should look beyond a WTO member’s black letter law. If followed, this suggestion will result in robust examinations of the effectiveness of WTO members’ implementation of laws in their attempts to comply with Article 61—a development that would benefit rights holders by providing for a results-based inquiry.

Finally, this Article attributes to the newly minted interpretation of TRIPS an advantage to developed and developing economies alike that has been overlooked to date. The recent WTO panel interpretation gives TRIPS the malleability that it needs to remain relevant in changing times. The sharp tools provided by the China—IPR panel’s tailored approach provide members with a maneuverability that can become an invaluable part of the Agreement’s quest to avoid obsolescence in an international trade environment dominated by commercial transactions that are virtually oblivious to borders and in an IPR environment dominated by the internet. The emphasis on evaluation of compliance in the context of specific market conditions provides stakeholders with the tools to adapt the Agreement’s otherwise outdated terms to a contextually different and ever-changing world. This Article argues that this pliability strengthens the Agreement as an international IPR instrument and benefits stakeholders on both sides of the TRIPS debate. It also gives panels the freedom to tailor solutions in a given case to the circumstances of that case, both helping to overcome the intransigence that characterizes recent TRIPS policy making discussions and increas-
ing perceptions of legitimacy through the freedom to lend contour to the rather indeterminate TRIPS enforcement text.

Part I of this Article describes the WTO system and the recent China—IPR dispute that has given much needed delineation to the previously untested TRIPS enforcement language. Part II illustrates how the WTO panel’s emphasis on contextual evaluation of compliance with TRIPS standards gives the Agreement a malleability that will better serve TRIPS stakeholders on both sides of the debate. This Part shows how the panel’s interpretation of the Agreement’s key terms breathes new life into TRIPS flexibilities. The emphasis on flexibilities benefits developing countries because it reaffirms that local conditions matter—a position they have taken from the start. It also, however, benefits developed countries, which have long been thought to oppose enforcement flexibilities. Part II also explains why developed countries should embrace a flexible approach, and how they can use such an approach to better achieve their IPR enforcement goals. It also shows how the adaptability resulting from this approach bolsters the Agreement’s continued relevance in a rapidly changing marketplace, exploring briefly the likely impact of this new approach on future Article 61 challenges and using as an example the prominent issue of internet-based piracy of copyrighted materials. Part III examines concerns that this approach may raise, including potential problems with predictability and application. While acknowledging these issues as valid, the Article concludes that the increased ability of stakeholders on both sides of the IPR debate to tailor approaches to TRIPS enforcement, along with the Agreement’s continued relevance in a changing market, outweigh these concerns. Intellectual property stakeholders are living in a new world, and TRIPS is ready to face it.

I. PLAYERS AND STANDARDS

A. The World Trade Organization

The establishment of the WTO in 1994 was one of the most momentous international law developments of all time. The WTO

19. I follow Jeremy Waldron’s lead in using the term “indeterminate” to describe this language. See Jeremy Waldron, Vagueness in Law and Language: Some Philosophical Issues, 82 CALIF. L. REV. 509, 512–13 (1994). Of Waldron’s categories of indeterminacy, the TRIPS enforcement language most aptly fits into the “contestability” category, in that the TRIPS negotiators most likely left the language indeterminate to mask the lack of true convergence of views about what the terms should mean. See id.

expanded the reach of international trade law by transforming a system that had consisted merely of a series of tariff reduction commitments into a broad international regulatory framework governing a variety of commercial practices. Perhaps the most significant feature of the new WTO was its dispute settlement agreement, which provided a mechanism for members to enforce their rights under the various WTO agreements using an established body of review governed by a set of specific procedures and practices. This was a powerful breakthrough because previous treaties had suffered from a lack of practically accessible mechanisms for enforcement. Having a dedicated adjudicatory mechanism—complete with consequences for failing to abide by WTO commitments—brought “teeth” to the vast array of new obligations in a way that was unprecedented in international law.

Under the dispute settlement agreement, a WTO member who believes a trading partner is not complying with its obligations may bring a complaint to the WTO by following a set series of procedures. First, the complainant must engage in consultations with the offending member in an attempt to settle the matter amicably. If consultations fail, the complainant may call for the establishment of a dispute settlement

22. For example, the WTO agreements expanded on the pre-existing GATT to cover services as well. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183.
24. Id.
25. Previous intellectual property instruments, such as the Paris Convention and the Berne Convention, subjected disputes to the jurisdiction of the International Court of Justice. See Berne Convention for the Protection of Literary and Artistic Works art. 33(1), opened for signature Sept. 28, 1979, 828 U.N.T.S. 221 [hereinafter Berne Convention] (amending the original agreement from 1886); Paris Convention for the Protection of Industrial Property art. 28(1), opened for signature July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention] (amending the original agreement from 1883). However, the dispute settlement provisions of these agreements were, somewhat tellingly, never used.
28. DSU, supra note 23, arts. 4-25.
29. Id. art. 4.
panel, consisting of persons chosen either by the parties or by the WTO Secretariat from a list of experts. A series of written submissions and oral arguments in Geneva leads to a panel decision, which the larger WTO membership then adopts unless there is an appeal. If appealed, the case is subject to review by a standing Appellate Body on issues of law. The WTO membership then adopts the Appellate Body decision unless there is a consensus not to adopt it. Once the decision is adopted, the losing party has a reasonable period of time to implement it.

If the dispute settlement agreement is the WTO’s most important addition to international law, the inclusion of intellectual property rights protection within the ambit of world trade agreements is arguably its second-most important contribution. While intellectual property agreements setting forth minimum substantive standards of protection had been around for over a hundred years prior to the WTO’s establishment, the TRIPS Agreement is recognized as a groundbreaking instrument for two reasons. First, being part of the WTO system, it makes substantive IPR protections subject to the dispute settlement mechanism featured in the WTO—marking the first practically accessible mechanism for enforcement of IPR obligations at the international level. Second, it not only contains substantive IPR obligations such as exclusive rights and terms of protection, but also features

30. Panels are ad hoc, consisting of a team of three experts suggested by the WTO Secretariat and selected by the parties. If the parties cannot agree, they may ask the Secretariat to choose the panelists. Potential panelists whose governments are parties to a dispute are usually excluded from serving on a panel for that dispute. For a full description of the process of choosing panelists, see id. art. 8.
31. Both parties typically submit a series of written submissions. Id. art. 12. Third party members who have declared an interest in the case may also make submissions. Id. art. 10.
32. Id. art. 12(10).
33. Id. art. 16.
34. Id. The Appellate Body, unlike the panels, is a standing body of seven elected representatives serving staggered terms. Three Appellate Body experts typically sit in any given case. Although nationals of the members that are parties to the dispute are not automatically disqualified from serving on a case involving their country of origin, all Appellate Body members must avoid direct or indirect conflicts of interest. Id. art. 17.
35. Id. art. 17(6).
36. Id. art. 17(14).
37. “Reasonable” is a subject of negotiation between the parties and usually hovers around fifteen months. Id. art. 21.
38. Dreyfuss & Lowenfeld, supra note 26, at 276–77.
39. Berne Convention, supra note 25, art. 33(1); Paris Convention, supra note 25, art. 28(1).
40. Dreyfuss & Lowenfeld, supra note 26, at 277. No Paris or Berne Union members have engaged in dispute settlement under these treaties to date.
unprecedented minimum standards for domestic enforcement\textsuperscript{41}— obligations to provide for laws that address prevention of IPR infringement in the domestic marketplace.\textsuperscript{42}

In the fifteen years since TRIPS was negotiated, however, questions regarding the precise scope of these domestic enforcement obligations have abounded.\textsuperscript{43} The language of the Agreement fails to indicate clearly whether WTO members are obligated merely to provide enforcement-related laws on the books, or whether (and to what extent) they are obligated to use them.\textsuperscript{44} The China—IPR case may shed some light on that question, as detailed in Part I.B, below.

Finally, to counter, in part, the additional obligations in the enforcement realm, developing countries negotiated a number of flexibilities into the TRIPS text.\textsuperscript{45} These provisions take different

\begin{itemize}
  \item \textsuperscript{41} "Domestic enforcement" should be distinguished from enforcement of WTO obligations, referenced just above in the same paragraph. TRIPS is groundbreaking for its provision of obligations with regard to domestic measures to combat counterfeiting and piracy—domestic "enforcement" measures. These measures, along with the substantive obligations contained in other sections of the TRIPS agreement, are "enforced," in turn, using the WTO's dispute resolution mechanism.
  \item \textsuperscript{42} J.H. Reichman, Compliance with the TRIPS Agreement: Introduction to a Scholarly Debate, 29 Vand. J. Transnat'l L. 363, 366–67 (1996) [hereinafter Reichman, Intro to Debate] ("The TRIPS Agreement is the most ambitious international intellectual property convention ever attempted. The breadth of subject matters comprising the 'intellectual property' to which specified minimum standards apply is unprecedented, as is the obligation of all WTO member states to guarantee that detailed 'enforcement procedures as specified in this [Agreement] are available under their national laws.'" (alteration in original) (footnotes omitted) (quoting TRIPS Agreement, supra note 1, art. 41(1)); see also J.H. Reichman, Enforcing the Enforcement Procedures of the TRIPS Agreement, 37 Va. J. Int'l L. 335, 340–44 (1997) [hereinafter Reichman, Enforcing Enforcement] (providing a thorough overview of TRIPS enforcement procedures, their perceived advantages, and issues they may raise).
  \item \textsuperscript{43} See Reichman, Intro to Debate, supra note 42, at 369–70 ("Once the member states put the requisite enforcement measures in place under the gentle spur of transparency, the unstated inference is that private enforcement actions by rights holders under the domestic laws will, at least for a time, relieve the pressure for 'top down' administrative action at the international level.").
  \item \textsuperscript{44} See Abbott, Toward a New Era, supra note 5, at 80 (noting that incomplete implementation and enforcement was anticipated).
\end{itemize}

No one expected conclusion of the TRIPS Agreement would lead overnight to a shift in economic policies and social attitudes toward IPRs around the world. Built-in transition mechanisms were incorporated in the TRIPS Agreement to soften structural adjustments. Moreover, it was recognized that countries without a history of IP enforcement would not suddenly be transformed into high protection regimes, and that continuing attention to enforcement would—from the Northern Tier perspective—be required to enforce new rent obligations.

\textit{Id.; see also id. at 83} ("Implementation and enforcement is far from perfect, but no one expected perfection.").

\textsuperscript{45} See Heald, supra note 5, at 251–52 ("What usually goes unspoken is that the TRIPS Agreement leaves significant room for a complying WTO member to make choices about its level of intellectual property protection."); Jerome H. Reichman & Rochelle Coo-
forms, but serve one purpose—to allow for WTO members to take into account local priorities, needs, or factors in tailoring their implementation of TRIPS obligations. Examples of flexibilities in the TRIPS Agreement include (a) provisions that specifically mention other objectives with which members may balance IPR enforcement; (b) provisions that provide overt discretion to national governments regarding methods of implementation of commitments; (c) limitations and exceptions to protections afforded by the Agreement; and (d) purposefully indeterminate language, especially in the enforcement section, that leaves significant room for interpretation as to the specific nature of the obligation entailed. These flexibilities play a key role in balancing the need for rigorous IPR protection with the desire to achieve what may at times be deemed incongruous objectives in a particular society. As this Article shows, these flexibilities are taking on a new importance for developing and developed countries alike in the current marketplace.

B. The China—IPR Case

China’s accession to the WTO in 2001 paved the way for foreign entry into the world’s largest potential market and opened options for low-cost production of goods for export across the globe. However, WTO members took a gamble in approving China’s membership—they gambled that the WTO would change China more than China
would change the WTO. They hoped that WTO accession would edge China toward compliance with international legal and business standards to a greater extent than China, as behemoth, would force the WTO toward its own brand of international adhesion. The question now—more than nine years following China's accession—is whether that gamble is paying off, and for whom.

In perhaps no trade sector is the tug-of-war for influence between China and its trading partners more visible than in the protection of intellectual property rights. Both before and after China's WTO accession, the country has faced widespread criticism that its IPR regime falls short of international obligations, giving way to rates of infringement that frustrate legitimate rights owners' efforts to do business and hinder the growth of innovative and creative industries that could contribute significantly to China's economy. Intellectual

53. See Christopher Duncan, Out of Conformity: China's Capacity to Implement World Trade Organization Dispute Settlement Body Decisions After Accession, 18 Am. U. Int'l L. Rev. 399, 405 (2002) ("China has identified WTO membership as one key to fulfilling its global economic policy objectives. The sheer [sic] volume of legislation that China has generated in an effort to build the market-oriented substantive law essential for WTO participation is a testament to this supposition." (footnotes omitted)); Jeffrey L. Gertler, What China's WTO Accession Is All About, in CHINA AND THE WTO: ACCESSION, POLICY REFORM, AND POVERTY REDUCTION STRATEGIES 21, 26 (Deepak Bhattachariya et al. eds., 2004) ("No one can contest that China's participation in the WTO will affect the operations of this organization in substantial ways and over the long term... China will surely be active in the newly launched and future rounds of multilateral trade negotiations, in agriculture, and in services, but also in other areas of mutual concern."); see also Qingjiang Kong, China's WTO Accession: Commitments and Implications, 3 J. Int'l Econ. L. 655, 658 (2000) ("China's membership in international institutions not only served an economic purpose, but also brought changes to the Chinese legal system.").

54. Harris, supra note 5, at 113; see also Kong, supra note 53, at 683 ("It is fair to argue that China's accession agreement per se is evidence of the central government formally committing itself to further pro-market reforms as required by the WTO.").


property rights enforcement is widely seen as ineffective. China has become a poster child for global IPR enforcement problems.

Tensions between China and the United States over China’s purported lack of IPR enforcement culminated in the filing of an April 2007 WTO complaint by the United States. In its complaint, the United States challenged certain Chinese legal measures, claiming that they were out of step with China’s obligations under the enforcement provisions of the TRIPS Agreement. The U.S. complaint alleged that:

1. certain provisions of the Chinese criminal law, as explained by judicial interpretations in 2004 and 2007, set forth thresholds for criminal prosecution of counterfeiting and piracy that were inconsistent with Articles 41.1 and 61 of TRIPS;

2. the regulatory measures governing disposal of seized counterfeit goods were inconsistent with TRIPS Articles 46 and 59; and

3. Article 4 of China’s copyright law, denying copyright protection to “[w]orks the publication or distribution of which is prohibited by law,” violated Article 5 of the Berne Convention, incorporated into TRIPS, as well as Article 41 of TRIPS itself.


59. “Measures” is a term of art, meaning aspects of legislation or regulation subject to WTO review. Both the panelists and the parties seemed to deem the Chinese statutes and legal interpretations featured in the U.S. complaint as within the ambit of measures reviewable by a WTO dispute settlement panel. See China—IPR Panel Report, supra note 8, ¶¶ 2.2, 6.17, 6.19 (referring to the Chinese statutes and judicial interpretations as “measures”).

60. Request for Consultations, supra note 58, at 2.

61. Id. at 1–2; see also Yoshifumi Fukunaga, Enforcing TRIPS: Challenges of Adjudicating Minimum Standards Agreements, 23 BERKELEY TECH. L.J. 867, 914–15 (2008) (“The United States contends that these high thresholds are a major reason for the lack of an effective criminal deterrent.” (internal quotation marks omitted)).

62. Request for Consultations, supra note 58, at 3.


64. Id. This Article focuses solely on the first of these three claims—the criminal law and accompanying judicial interpretations.
In the first claim, which is the sole focus of this Article, the United States asserted that China’s criminal law violated Article 61 of the TRIPS Agreement. Article 61, a key provision in the famed TRIPS enforcement text, provides, in pertinent part: “Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale.” The U.S. concern was that the Chinese criminal law exempted from the realm of potential prosecution infringements involving profits or quantities that did not exceed the thresholds set forth in that law. In short, the Chinese law provided for criminal remedies only if the level of infringement rose above certain thresholds pertaining to the number of copies seized, the value of the copies seized, or the profits made by the infringer. One of the pertinent provisions, for example, excluded seizures of fewer than five hundred infringing copies from the ambit of possible criminal prosecution. The United States argued that, by preventing criminal prosecution for piracy and counterfeiting below those threshold levels, China was failing to provide for criminal penalties applicable to levels of piracy and counterfeiting that—in the U.S. view—clearly fit Article 61’s definition of “commercial scale.”

Exclusion of up to 499 infringing copies from the ambit of criminal prosecution is significant, and some may argue that the United States was justified in assuming that such a large number of copies, by any standard, would qualify as commercial-scale counterfeiting or piracy, triggering Article 61’s mandate. On the basis of that assumption, the United States made a tactical move that ultimately cost it a victory on this claim. The United States did not provide significant evidence probative of how the panel should define commercial-scale piracy in the Chinese market; instead, the United

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65. For ease of discussion, references to China’s “criminal law” include the collective measures at issue in the U.S. claim, including China’s relevant criminal provisions and pertinent binding judicial interpretations.
67. TRIPS, *supra* note 1, art. 61.
68. Request for Consultations, *supra* note 58, at 1–2 (setting forth the specific measures under the Chinese law related to the U.S. challenge).
69. Although the Chinese law contains other limitations, the U.S. request was limited to the presence of the thresholds. *See id.* Thus, reference to other limitations is omitted here.
71. *Id.*
73. *See* Harris, *supra* note 5, at 125.
States asserted that the Chinese law violated the Article 61 standard without regard to how it was applied in the marketplace. The United States seemingly assumed that the thresholds' presence in the law alone would cause a panel to find a violation, and challenged the law "as such," limiting the claim to the wording of the Chinese legal measures themselves.

The U.S. assumption that the thresholds' presence would be enough to convince a panel of a TRIPS violation turned out to be faulty; the panel ruled against the United States on this claim, finding that the wording of the Chinese law itself was not sufficient to support a conclusion that China fell short of the Article 61 obligation. In other words, the panel refused to take "judicial" notice that 499 copies constituted commercial-scale piracy or counterfeiting without evidence of how 499 copies fit into the context of the Chinese marketplace. The panel criticized the United States for failing to address in its submission the state of the market in China for the goods involved in the complaint. In other words, the United States failed to show how the measures, as implemented in the Chinese market for those goods, were out of compliance with TRIPS Article 61. Thus, the U.S. decision to limit the case to a straightforward "as such" case ultimately doomed its success on this claim.

The irony of this outcome may not be intuitively obvious to the reader. After all, in U.S. constitutional jurisprudence, facial challenges to

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75. Id. In WTO practice, "as such" claims challenge the consistency of particular national statutes per se, without any reference to how they are applied in the marketplace. By contrast, "as applied" claims challenge national statutes in their application. Sharif Bhuiyan, National Law in WTO Law: Effectiveness and Good Governance in the World Trading System 101 (2007) [hereinafter Bhuiyan, National Law in WTO Law]. The reader should be careful not to confuse these international trade terms with the distinction between "facial" and "as applied" challenges common in U.S. constitutional jurisprudence. For thorough treatment of this jurisprudence, see generally Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235 (1994); Richard H. Fallon, Jr., Commentary, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321 (2000); Gillian E. Metzger, Facial Challenges and Federalism, 105 Colum. L. Rev. 873 (2005). While there may be some conceptual overlap reflected by the similar terminology, equating the two sets of concepts is dangerous, as both the desirability and the implications of their employment in the international trade context are vastly different than under U.S. law. This Article makes no claim as to the relevance of the U.S. jurisprudential concepts in the international trade context.
77. Id. ¶¶ 7.609, 7.611.
78. See supra note 69 and accompanying text (noting that the United States challenged several different thresholds in the Chinese law). This analysis focuses on the numerical threshold, but the same analysis applies to the other thresholds.
80. Id. ¶¶ 7.614, 7.617.
laws are struck down all the time; they are considered riskier claims than more narrowly tailored “as applied” challenges. Thus, outside the context of international trade doctrines and the debates surrounding TRIPS—in particular, the TRIPS enforcement language—the China-IPR result seems like a perfectly logical outcome. However, the U.S. loss on this claim because of a failure to submit evidence regarding the implementation of the law in the Chinese market is rather ironic because the U.S. decision not to submit the evidence that the panel would have found compelling was purposeful. The United States, by bringing an “as such” challenge, was actually choosing what seemed to be the safer path to victory, and also what in international trade parlance is considered the narrower claim. To understand what led to this strategy, a basic explanation of: (1) the desirable outcomes, and (2) the potential pitfalls of TRIPS enforcement cases is in order.

1. Desirable Outcomes

First, unlike common approaches to domestic law, the most desirable outcome from the complainant’s point of view in a TRIPS enforcement case is not a change in the measure challenged; rather, the most desirable outcome is a change in the effectiveness of the implementation of that measure. Plaguing even an enforcement system as sophisticated as the WTO’s is the constant difficulty of getting members to comply with obligations in meaningful ways. In this respect, passing a statute may not

81. For comprehensive treatment of facial constitutional challenges under U.S. law, see generally the articles by Dorf, Fallon, and Metzger, supra note 75.
82. Fukunaga, supra note 61, at 870 (stating that the U.S. strategy in the China-IPR case “shows that the United States implicitly recognizes the enormous challenges involved in successfully resolving TRIPS disputes concerning the application of statutes or the ineffectiveness of domestic remedies, and consequently seeks to avoid those types of claims”).
83. Id.; see also id. at 911 (“It is noteworthy that the United States has elected to focus its claims on the insufficiency of China’s IP statutes, as opposed to alleging ineffective application of these statutes or insufficient deterrence from domestic remedies. Such a strategy likely reflects the challenges presented by these latter two categories of claims . . .”); id. at 914–15 (noting how the United States avoided an “as applied” case and “strategically chose to pursue” an “as such” challenge, “although it is concurrently pursuing the application and insufficient deterrence facets of the dispute through bilateral diplomacy”).
84. See Harris, supra note 5, at 167 (noting that it is “puzzling” that the United States limited itself to challenging the statute rather than challenging China’s broader enforcement of its criminal penalties). Peter K. Yu, The TRIPS Enforcement Dispute, 89 Neb. L. Rev. (forthcoming 2011) (manuscript at 5) [hereinafter Yu, TRIPS Enforcement], available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=1676558 (noting that despite the call for a broader enforcement complaint against China among some U.S. constituencies, the United States opted for the “narrower” challenge).
85. See, e.g., Harris, supra note 5, at 166–67 (noting that the problem with China is its failure to enforce its legislation strengthening IP rights and that fixing the legislation itself is unlikely to make a significant difference in rights holders’ experiences with enforcement in China).
be enough. A WTO member can pass a statute without actualizing any meaningful change in the effectiveness of its enforcement. The question that has been plaguing WTO members since the passage of TRIPS is whether the black letter law is sufficient to put a member in compliance, or whether compliance is rather judged by a successful implementation of that law—in essence, an outcomes-based inquiry.

In the case of Article 61, the uncertainty boils down to what it means to “provide for” criminal penalties. Recall that Article 61’s language states that “[m]embers shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale.” The precise nature of the obligation to “provide for” penalties has never been entirely clear to WTO members. Thus, the extent to which China was obligated to act upon the measures “provided for” in the law remained unclear at the advent of the case. Had the United States brought an “as applied” challenge, it would have been able to force the panel’s hand in evaluating whether the Chinese measures were TRIPS-compliant as implemented in the marketplace. Should the United States have prevailed on that claim, China would have been asked to bring its criminal prosecution practices into compliance with the TRIPS standard. This would have been a huge victory for the United States, as it would have clarified that the TRIPS obligation encompassed more than having a law on the books, and it may have resulted in meaningful change in the Chinese system to the benefit of U.S. rights holders. By foregoing such a claim, the United States set itself up for a situation in which the maximum gain was a change to the Chinese statute—which may or may not have made any significant difference to U.S. rights holders. Therefore, the “as such” case was the more cautious—and less potentially lucrative—path.

Thus, the potential ramifications of an “as applied” case are much more momentous, at least on a scale that measures heft by practical outcomes, than a WTO ruling that a member has to change its law. The latter ruling is considered a narrower victory because an obligation to change the law still sheds no light on the degree to which that law must be implemented or must result in a particular outcome.

86. See, e.g., id. (noting that the U.S. choice to challenge the black letter law made it unlikely that even a victory would accomplish the U.S. government’s goals for China).
87. See Gervais, supra note 70, at 553.
88. TRIPS, supra note 1, art. 61 (emphasis added).
2. Potential Pitfalls

Second, the U.S. decision to challenge the Chinese law "as such" was likely an attempt to avoid certain potential pitfalls inherent in the evaluation of compliance with TRIPS standards.\(^9\) The "as such" challenge, less desirable though it may be, avoided the dual quagmires of (a) gathering evidence about application of the law in a notoriously non-transparent market\(^9\) and (b) ascertaining the degree of deference China is due in the practical implementation of its own statutes.\(^9\) The lack of transparency in the Chinese market speaks for itself, and it is likely that the United States feared its own potential inability to gather and present reliable, comprehensive information about Chinese application or implementation of its laws.\(^9\) China is well-known for its production of opaque, incomprehensibly aggregated statistics, and unavoidable roadblocks stand in the way of verifying the veracity of Chinese government claims.\(^9\)

Ascertaining the degree of deference China is due is even more difficult. The TRIPS flexibilities, which leave certain issues of implementation to the discretion of members,\(^9\) seem to create a zone of deference to national practices. Thus, evaluating practical implementation in a WTO member’s market is perilous, in that such evaluation may raise sovereignty concerns. Given this possibility, it is likely that panels

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90. See infra Part III.B. These pitfalls may not be specific to TRIPS or even the WTO, but this Article will not explore their application beyond the TRIPS context.

91. For a comprehensive discussion of the difficulties of transparency in the Chinese market and how those difficulties may have influenced this case, see generally Thomas E. Volper, Note, TRIPS Enforcement in China: A Case for Judicial Transparency, 33 BROOK. J. INT’L L. 309 (2007).

92. Fukunaga, supra note 61, at 917.


94. The lack of publication of underlying data, the power of the central government in China and even simple language barriers make gathering and verifying statistics—especially regarding Chinese government actions—a daunting task. See, e.g., id. at 338 (noting the difficulties in obtaining enforcement statistics regarding Chinese judicial decisions). For other examples of Chinese statistics difficult to discern, see Don’t Quote Me (On Statistics), CHINA BUSINESS SERVICES (Feb. 21, 2007), http://www.chinabusinessservices.com/blog/?p=441 (noting the generalizations and lack of transparency in Chinese data); see also Hari Sud, China’s Worthless Economic Statistics, UPI ASIA (Feb. 19, 2010), http://www.upiasia.com/Economics/2010/02/15/chinas_worthless_economic_statistics/6483/ (“[P]rovincial officials routinely fudge and inflate numbers to make them look good. The rigged statistics become gospel and economists . . . use it to polish China’s image. Chinese leaders smilingly acknowledge the attention despite knowing that the statistics are fudged.”).

would proceed cautiously in any such endeavor, making an “as applied” case difficult to win.

The United States therefore had to undertake a calculation of risk in bringing its complaint against China. It had to decide whether the potential benefits of an “as applied” case—the broader, more outcomes-based potential victory to be gained—were worth the dual risks posed by the difficulty of gathering information in the Chinese marketplace and the specter of a potentially highly deferential approach to evaluating China’s compliance.

The United States proved risk-averse, limiting the scope of its request to a change in the Chinese statute. Its reasoning was likely that even if the victory proved only to be a first step in the larger battle for legitimacy in the Chinese IPR marketplace, a sure victory was preferable to the uncertainty of making a broader challenge. Some might say, therefore, that the United States set itself up for what would at most be a hollow victory, as compliance of the Chinese law on paper would not automatically lead to achievement of U.S. rights holders’ objectives in the marketplace.

Why did it do this? The U.S. complaint in the China—IPR case came after months of tense negotiations regarding the Chinese

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96. See Fukunaga, supra note 61, at 911.
97. See Intellectual Property Rights Issues and Imported Counterfeit Goods: Hearing Before the U.S.—China Econ. & Sec. Review Comm’n, 109th Cong. 52 (2006) (statement of Timothy P. Stratford, Assistant U.S. Trade Rep.) [hereinafter Hearing on Intellectual Property Rights], available at http://www.uscc.gov/hearings/2006hearings/transcripts/june7_8/06_06_7_8_trans.pdf (stating that the two criteria for bringing a case are whether the case is winnable and whether bringing a case is “the most effective way for addressing the underlying concern”); see also id. at 98–99 (statement of Patrick A. Mulloy, Comm’r, U.S.—China Econ. & Sec. Review Comm’n) (“[W]e don’t want the United States to bring a case before the WTO on IP issues that we don’t win.”).
98. See Harris, supra note 5, at 166–67 (“[E]ven if the United States were to win a favorable WTO ruling, it is not clear what the United States would gain. . . . The problem with China’s lack of enforcement . . . is not that China has failed to enact legislation strengthening intellectual property rights; it is that China does not enforce such legislation. . . . Thus, there is no guarantee that a successful WTO complaint will result in more criminal complaints and prosecutions. Rather, lower thresholds from a successful complaint must be accompanied by some measure of mandatory criminal prosecutions. Thus, reducing the threshold for criminal prosecution is not likely to make a significant difference.”).
99. Several commentaries noted that a victory may be hollow and would bring affected industries no closer to a mandate that China actually achieve their outcome-related objectives. See Konstantina K. Athanasakou, China IPR Enforcement: Hard as Steel or Soft as Tofu? Bringing the Question to the WTO Under TRIPS, 39 Geo. J. INT’L L. 217, 240 (2007) (noting that “the problem with Chinese IPR [law is that it] does not relate to an offending measure but rather to an alleged inadequate enforcement of provisions”); Harris, supra note 5, at 176 (“[T]he complaint does not address the lack of enforcement, as many scholars believed was the more immediate concern.”); Drajem, supra note 8.
100. Request for Consultations, supra note 58.
provisions at issue. The United States had high stakes—the case had the potential to produce ramifications far beyond its particular parameters, both because of the extensive, high-profile engagement between the United States and China, and because of the case's status as the first TRIPS enforcement case. The United States thus approached the case cautiously, trying to be certain that it brought a case that it could win.

The U.S. strategy in bringing a narrow case highlights an irony of the panel's decision. The U.S. choices regarding the scope and nature of the case were seemingly deliberate. The United States surely did not simply forget to submit evidence regarding the Chinese market, or put the case together poorly. Instead, the United States likely played it safe in hopes that doing so would ensure it a victory. Unfortunately for the United States, this reasoning backfired. Instead of an uncomplicated (if potentially hollow) win, the United States was handed a defeat on its principal claim, on the grounds that it had not submitted adequate evidence to prove that the Chinese law fell short of China's Article 61 obligations. Ironically, had the United States brought the larger "as applied" case, which was riskier but potentially more lucrative for U.S. rights holders, it likely would have submitted evidence about the state of piracy, counterfeiting, and criminal enforcement in the Chinese market, and it certainly would have increased its chances of winning its claim.
C. Ramifications of the Decision

The unanswered question, then, is how does one lose a non-evidence-based claim on evidentiary grounds? The China—IPR panel’s rejection of the U.S. claim for lack of evidence is peculiar given that the U.S. challenge was limited to the black letter wording of the Chinese law. The panel even acknowledged in the report that the U.S. challenge was “as such” but then focused on evidentiary issues anyway, criticizing the lack of U.S. evidence about how the thresholds are applied in the marketplace. In doing this, the panel blurred the distinction between “as such” and “as applied” claims in the TRIPS enforcement context, a significant move that may have profound effects on potential future cases involving TRIPS enforcement provisions.

In rejecting the U.S. claim, the China—IPR panel report suggests that what the United States, in good faith (whether misguided or not), tried to do may not be possible—that one may not be able to judge the meaning of Article 61’s standards based on “ink on paper.” Instead, the panel indicated that one must judge the presence or absence of commercial-scale piracy or counterfeiting in the context of the market in question. In doing so, the panel conflated “as such” and “as applied” standards, raising serious questions about when, if ever, “as such” evaluations of compliance with TRIPS enforcement standards are appropriate. If this reasoning holds persuasive authority for future TRIPS enforcement panels, “as such” challenges to Article 61 may be limited to cases in which there is no criminal remedy available for counterfeiting and piracy at all. Any member wishing to challenge the scope or coverage of another member’s extant criminal IPR provisions would be well-advised to submit evidence of the application of those provisions in the context of the marketplace for the product at issue, thus almost guaranteeing that the claim will need to be characterized as an “as applied” claim. Thus, the panel’s emphasis on context implies a strong

106. See Gervais, supra note 70, at 553–54.
108. Gervais, supra note 70, at 549.
110. As pointed out by at least one previous commentator, this also raises questions about the line between violation complaints and non-violation complaints under the TRIPS Agreement, Gervais, supra note 70, at 549, with the latter currently under a moratorium of application in the TRIPS context, Athanasakou, supra note 99, at 230. Exploration of this issue is beyond the scope of this particular Article.
112. Gervais, supra note 70, at 555.
preference for “as applied” challenges and a disfavor of “as such” enforcement complaints.

Furthermore, this panel has taken a step toward answering the very question from which the United States shied away: whether more than “ink on paper” is required for compliance. If, in order to prove lack of TRIPS compliance, a complainant must show evidence of how the challenged laws operate in the context of the marketplace, this implies that members are committed to use the enforcement-related laws mandated by TRIPS. Any other interpretation would make TRIPS impossible as an enforcement tool—one cannot create a situation in which members must, as a practical matter, challenge laws “as applied” if there is no WTO-related commitment to apply those laws.

Here comes a second irony of the China—IPR case: the panel’s curious decision to require evidence regarding application of the laws in an “as such” case, and its resultant rejection of the U.S. claim, actually may have articulated a rule of TRIPS interpretation that is more helpful to the United States than the rule the United States sought in bringing its narrow case. In other words, the U.S. failure in this case may have inspired the very ruling by the panel that the United States stopped short of seeking directly.

What the United States stopped short of seeking was an explicit exploration by the panel of the criminal prosecution practices as implemented in the Chinese marketplace. However, the panel’s language has opened the door to just such an exploration, indicating that members’ specific practices implementing TRIPS obligations may be subject to dispute settlement panel review. If this is the case, it sheds some light on an uncertainty that has been looming since the conclusion of TRIPS negotiations—what it means to “provide for” criminal penalties.

Thus, the panel’s rejection of the U.S. argument, and apparent disfavor of “as such” challenges under Article 61, leads to a more nuanced

113. The panel decision appears to comport with WTO doctrines on “as such” challenges. This is important because, if the panel erred in rejecting the U.S. “as such” challenge for lack of evidence about the marketplace, the decision’s potential to affect future TRIPS enforcement cases would be limited. Brief research yields the conclusion that there is nothing in either the WTO Agreements or previous dispute settlement jurisprudence that suggests panel error in the China—IPR case. For an overview of the factors used to determine propriety of review, see Isabelle Van Damme, Sixth Annual WTO Conference: An Overview, 9 J. INT’L ECON. L. 749, 763 (2006). To the extent that doctrine touching on the propriety of “as such” and “as applied” challenges exists, it is murky at best and focuses exclusively on the question of ripeness. In other words, all of the cases in this area have focused on whether a law that seems on its face to violate particular provisions of a WTO Agreement may be challenged before the law is implemented—before there is a concrete injury resulting from the violation. This is similar to the “case or controversy” requirement under U.S. law. See Yoshiko Naiki, The Mandatory/Discretionary Doctrine in WTO Law: The U.S.—Section 301 Case and Its Aftermath, 7 J. INT’L ECON. L. 23, 26 (2004) (“Similar to the ripeness doctrine, the manda-
conclusion than initial impressions may yield. The result seems at first glance like a considerable blow to the United States, and more generally to those seeking uncomplicated enforcement of global intellectual property standards, and a victory for China and other WTO members looking to preserve deference to national priorities in WTO dispute settlement analyses. Certainly, the win for China on this claim and the reinforcement of the importance of a tailored, context-based analysis of compliance with TRIPS provisions indicates that the Agreement is not as one-sided in favor of developed countries as some may have painted it to be—the contextual approach naturally complements the use of flexibilities in implementation. However, as illustrated in this discussion, the panel decision is not all bad for the United States and those seeking robust enforcement of intellectual property rights. The decision has both positive and negative ramifications for developed and developing countries alike.

II. TOWARD THE TRUCE

The China—IPR panel emphasized the importance of a context-dependent evaluation of compliance with TRIPS enforcement obligations. It signaled that specific application of measures under those obligations not only is likely to be subject to WTO review going forward, but also is essential to the process of judging compliance with the Agreement.  


tory/discretionary doctrine in GATT/WTO law indicates that when a law is mandatory, a complaint involves the genuine need for decision, and thus, a dispute is ripe, but when a law is discretionary, a dispute is not yet ripe.”). For more information on the “case or controversy” requirement, see generally Allen v. Wright, 468 U.S. 737, 750 (1984); Warth v. Seldin, 422 U.S. 490, 498 (1975); Data Processing Serv. v. Camp, 397 U.S. 150, 151-54 (1970). In the China—IPR case, the issue is not whether the Chinese law is going to be applied in a particular way that risks running afoul of the TRIPS obligation. The panel is not grappling with the ripeness of the U.S. claim, and there is no assertion by China that the U.S. challenge is premature. Instead, the panel is grappling with the proper interpretation of the treaty provision itself. It is the legal requirement, contained in the TRIPS Agreement, that is unclear in the China—IPR case, not how or whether the Chinese law will be applied. Since neither the United States nor China argued that the panel erred as a matter of WTO jurisprudence, this Article will not dwell on the subject. See Sharif Bhuiyan, Mandatory and Discretionary Legislation: The Continued Relevance of the Distinction Under the WTO, 5 J. INT’L ECON. L. 571, 581 (2002) (arguing that under broader international law, international tribunals consider the content and interpretation of the treaty obligation, not the domestic implementing law, as paramount); Reichman, Enforcing Enforcement, supra note 42, at 344 (“The enforcement provisions of the TRIPS Agreement have been drafted in terms of broad legal standards rather than as narrow rules. Their very ambiguity, which some have criticized, allows either the Council for TRIPS or duly appointed dispute-settlement panels to take local circumstances and diverse legal philosophies into account when seeking to mediate actual or potential conflicts between states.” (footnotes omitted)).

This Part examines these developments through the lenses of stakeholders on both sides of the IPR debate, arguing that the decision allows each group to use the Agreement to its own advantage. Furthermore, this Part highlights how the China—IPR analysis increases the malleability of the TRIPS Agreement itself, benefiting all stakeholders by providing means to adapt the Agreement to an increasingly digital and borderless commercial environment that the TRIPS negotiators could not have fully anticipated.

A. A Note on Defining Groups

Before assessing how the goals of relevant stakeholders are converging, I offer a few words on how those stakeholders have been characterized through the years. International intellectual property policy discussions almost invariably place stakeholders in one of two camps, each espousing priorities that often are perceived to compete with one another. One camp consists of rights holders and the governments that find it in their economic interests to make intellectual property protection a top priority. The other camp is more difficult to delineate in a single phrase, but the primary unifying element among members of this camp is the notion that strict protection of intellectual property may interfere with some other social policy or economic priority. This camp is made up of governments that perceive their populations will benefit from more carefully defined (or even weaker) intellectual property protection. These perceptions are based on any number of factors, and may include (a) a judgment that intellectual property infringement is beneficial to the country due to infringement’s effect on the economy and employment, its promotion of inexpensive consumer products, or its role in building an innovative base that can serve as a foundation to later legitimate industry; or (b) a sense that intellectual property protection has a detrimental impact on other societal priorities, such as access to

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116. See Reichman, Intro to Debate, supra note 42, at 384 (citing Hugh Hansen, International Copyright: An Unorthodox Analysis, 29 VAND. J. TRANSNAT’L L. 579, 584 (1996)) (highlighting the somewhat uncomfortable amalgamation of interests that make up the “generic category of ‘users,’ including ‘Internet (net) users, developing nations, consumers, small competitors, and creators of derivative works’”).

117. Ann Bartow, Fair Use and the Fairer Sex: Gender Feminism, and Copyright Law, 14 AM. U. J. GENDER SOC. POL’Y & L. 551, 570 (2006) (“The low barriers approach to copyright law assumes that both individual creators and society will largely benefit from a conservative construction of copyright protection that facilitates a significant amount of unauthorized [activity] by declining to deem it infringing.”).
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educational materials and medicines, that outweighs the advantages of such protection. 118

Breaking the international intellectual property world into two camps is a somewhat dangerous proposition, as it oversimplifies a rather complicated situation. It is increasingly fallacious to think of certain countries as producers of IPR and others as IPR consumers. In truth, virtually all countries fall into both categories.

Further compounding the imprecise nature of the intellectual property categorization is the seemingly overwhelming temptation to associate membership in one IPR camp or the other with a particular economy’s development status. 119 Although such categorizations risk oversimplification or even, increasingly, inaccuracy, the concept that more advanced economies are more likely to have seen the type of sustained growth in creative and innovative industries that leads to a desire for rigorous protection of intellectual property carries some validity. 120 Most of the literature speaks of a correlation between IPR advocacy and development status, 121 highlighting the tug-of-war between developed and developing countries on IPR issues. 122 Thus, as blunt a line as development


119. See, e.g., Fukunaga, supra note 61, at 919 (noting the disparity between developed countries and developing countries regarding views on appropriate levels of IPR protection).

120. See id. at 924–25 (“Since most IP, especially patents, originates within the developed countries, the international IP treaties result in the transfer of material wealth from developing countries to developed countries as a whole.”).

121. Yu, Objectives and Principles, supra note 18, at 980 (“[T]he perspectives of developed and less-developed countries on the role of intellectual property protection and enforcement remain far apart.”). But see, e.g., Jerome H. Reichman, Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?, 46 Hous. L. Rev. 1115, 1123 (2009) [hereinafter Reichman, Twenty-First Century] (“[T]he more that high- and middle-income developing countries become players in the knowledge economy, the more they share some of the fears and risks that usually underlie demands for higher levels of protection by powerful sectors of the advanced technology-exporting countries.”).

122. See, e.g., Jerome H. Reichman, Nurturing a Transnational System of Innovation, 16 J. Transnat’l L. & Pol’y 143, 148–49 (2007) (noting the “enormous challenges and burdens” that TRIPS places on developing countries); Peter K. Yu, International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia, 2007 Mich. St. L. Rev. 1, 2–3 [hereinafter Yu, Intellectual Property] (discussing the disproportionate impact of the TRIPS “one size fits all” language on developing countries); Yu, Enclosure, supra note 3, at 828 n.4, 830 (noting the distinction between developing and least developed countries, calling them collectively “less developed countries”).
status represents, it is useful and convenient as a jumping off point for analysis. Given the extensive use of the correlation in the literature and in the practical experience of many, I preserve here the lines drawn by others.\footnote{123}

The temptation is likewise strong to parlay the intellectual property positions of these uncomfortably defined groups into positions on international legal policy. Much of the literature characterizes developed countries as automatically advocating for international harmonization\footnote{124} of intellectual property enforcement norms while at the same time it portrays developing countries as opposing this harmonization in favor of flexibilities in intellectual property agreements.\footnote{125} Indeed, the word "flexibilities" has degenerated, in certain instances, to a buzz word for "weaker protection"—used by developing countries to push back on TRIPS protections some perceive went too far,\footnote{126} and considered with some disdain by developed country governments and pro-IPR constituents.\footnote{127}


124. See Kapczynski, supra note 7, at 1572–73 ("The refrain that TRIPS is a ‘harmonizing agreement’ implies that the agreement will bring the laws and practices of WTO members into substantial conformity with one another.").


127. Many have noted supposed attempts by developed countries, acting on behalf of rights holders, to derogate from the power of these flexibilities through bilateral agreements that close the space within which trading partners can then maneuver. See Yu, Intellectual Property, supra note 122, at 11–12 (noting the “push by developed countries for TRIPS-plus bilateral and regional trade” deals that constrict the flexibilities preserved in TRIPS).

Some have also noted the increased role of “soft law” in intellectual property norm setting as a manifestation of possible shifting emphases, or at least shifting fora, as a result of dissatisfaction with the particular balance struck in TRIPS. Compare Laurence R. Helfer, Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking, 29 Yale J. Int’l L. 1, 5–6 (2004) (stating that “soft law,” such as declarations, guidelines, and recommendations, is being used to reinterpret existing treaties), with id. (stating that “soft law” and other fora are also used to encourage entirely replacing the old treaties and regimes with new ones). For treatment of this subject, see generally Jose E. Alvarez, The New Dispute Settlers: (Half) Truths and Consequences, 38 Tex. Int’l L.J. 405, 421 (2003) (discussing various definitions for “soft law” and “hard law”); James Thuo Gathii, The Legal Status of the Doha Declaration on TRIPS and Public Health Under the Vienna Convention on the Law of Treaties, 15 Harv. J.L. & Tech. 291, 314 (2002) (arguing that the Doha Declaration has transformed from a non-binding “soft law” interpretation of TRIPS to a binding “hard law” interpretation as a result of customary international law); Gregory C. Shaffer & Mark A. Pollack, Hard vs. Soft Law: Alternatives, Complements, and Antagonists in
This Part highlights why, at present, any attempt to take already uneasily defined categories of intellectual property views and translate them into even more bluntly defined positions on international law is a fallacy. One should no longer, in other words, equate the developed countries' typical position espousing robust IPR protection with a pro-harmonization position. Likewise, one should no longer assume that developing countries are the only ones to benefit from—and thus to advocate for—flexibilities. In fact, flexibilities can be good for developed countries and the rights holders they represent as well. This Part shows why stereotypical roles for developed and developing countries are unraveling, at least in the enforcement context. Changes in the intellectual property marketplace are reducing previous tensions between these stakeholders by highlighting how both groups can use flexibilities to accomplish their divergent goals. Thus, all stakeholders should recognize

International Governance, 94 MINV. L. REV. 706 (2010) (arguing that hard and soft law can lead to conflicting international norms).

128. The assertions that rights holders favor—and users disfavor—harmonization were once more valid than they are today. Prior to the establishment of the WTO, the primary IPR conventions provided some basic minimum levels of protection, but were largely founded on principles of national treatment rather than efforts to harmonize protection. Yu, Intellectual Property, supra note 122, at 3-4; see, e.g., Berne Convention, supra note 25, art. 5(1); Paris Convention, supra note 25, art. 2. Thus, countries could offer levels of protection that differed vastly from one another as long as the protection they offered was nondiscriminatory, creating an extremely uneven marketplace for IPR rights holders. Vincent Chiappetta, The Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion and a Few Other Things, 21 MICH. J. INT’L L. 333, 343-44 (2000); see also Suzanne Scotchmer, The Political Economy Of Intellectual Property Treaties, 20 J.L. ECON. & ORG. 415, 419 (2004). This phenomenon, combined with the nagging lack of accountability under these previous conventions, led to a major push by groups of rights holders to include IPRs in the emerging trade milieu. See Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Meeting of the Negotiating Group of 22 November 1990, MTN.GNG/NG11/28 ¶ 13 (Nov. 29, 1990) (“[F]or the first time international obligations on the protection and enforcement of a large number of intellectual property rights were being negotiated under a single umbrella.”); Robert M. Blunt, Bootlegs and Imports: Seeking Effective International Enforcement of Copyright Protection for Unauthorized Musical Recordings, 22 HOUS. J. INT’L L. 169, 182 (1999) (noting that although the Berne Convention allows for disputes to be brought before the International Court of Justice, “no case has ever been brought before that court”); Helfer, Human Rights Analogy, supra note 123, at 361 (“[N]o state has ever challenged another’s laws under the [Paris and Berne] conventions’ cumbersome dispute settlement mechanisms.”); see also Berne Convention, supra note 25, art. 33(1); Paris Convention, supra note 25, art. 28(1). This push for inclusion of IPR protection in the trade context was convenient for rights holders at the time because they were trying to ensure some level of consistency among IPR protection regimes worldwide. See Abbott & Reichman, Legacy, supra note 7, at 924–25. Since the coming into force of the WTO system, the harmonization of laws that rights holders sought is largely complete, although some may argue that it is outdated. The focus of rights holders’ initiatives, therefore, since the establishment of the TRIPS framework, has been on enforcement of these harmonized standards. Kapczynski, supra note 7, at 1572–73.
the merits of the China—IPR panel’s emphasis on a context-specific evaluation of obligations and compliance.129

B. Toward Reconciliation

The signal by the China—IPR panel that measures’ application in the marketplace is central to compliance analysis leads to new parallels between developed and developing countries’ views of the TRIPS enforcement text. First, it reinforces the need to evaluate TRIPS obligations in a particular context, allowing for consideration of specific factors that affect the market for a given product, in a given place. This pleases proponents of narrower or more tailored IPR protection by allowing for assessment of local market conditions, needs, societal priorities, and resources in the evaluation of TRIPS compliance. It also requires TRIPS complainants to prove violations within a particular context, likely making challenges more difficult. On the other hand, as this Article shows, flexibilities can benefit developed countries and the rights holders they represent as well. A context-dependent judgment of compliance prompts panels to consider factors particular to the product in question—including the impact on that product of a global, digital marketplace—in assessing compliance. Furthermore, the panel’s emphasis on contextual implementation reinforces the notion that particularized implementation is a key component of the obligation. This strengthens the text as an IPR protection agreement by indicating that TRIPS obligations to “provide for” criminal penalties are likely to encompass more than an “ink on paper” provision of penalties. The discussion below addresses these themes.

Measuring compliance with TRIPS enforcement obligations in the context of a given market at issue obviously benefits those wishing to balance IPR enforcement with other priorities. Defining TRIPS obligations in terms of local contexts lends itself nicely to influence by local cultural, geographic, or economic factors in determinations of compliance.130 This interpretation is precisely what developing countries have advocated from the start—flexibility to adapt compliance standards


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Based on local concerns. Focusing on a highly contextual approach to compliance breathes new life into the TRIPS flexibilities, allowing for more tailored assessments that take into account the particular complexities and priorities present in a given system.

Likewise, particularized and tailored evaluation of compliance evokes an air of fairness that lends legitimacy to the Agreement in the midst of the challenge of applying that Agreement to vastly differing markets across the world. As Professor Thomas Cottier has pointed out:

There can be no doubt that the wide divergences of social and economic development among WTO Members amount to profound factual differences that need to be reflected in law. Application of the same rules with the same outcome to all alike, despite factual differences, fails to respond to fundamental precepts of justice and equality. Indeed, differentiation within rules in accordance to factual differences is well established in law.

Affirming the view that not every country’s version of “compliance” will look exactly like the next reinforces that the flexibilities that developing countries have asserted are of paramount importance. In this way, the China—IPR case demonstrates that TRIPS is operating somewhat equitably and can indeed work to the benefit of developing countries.

The zero-sum game mentality that so often characterizes TRIPS debates would lead one to believe that this reaffirmation of the positions of developing countries is a blow for developed countries. After all, a

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131. See generally Frederick M. Abbott, Are the Competition Rules in the WTO TRIPS Agreement Adequate?, 7 J. Int'l Econ. L. 687, 687–88 (2004) (“The negotiation history of the TRIPS Agreement reflects concerns expressed by developing countries with the potential market restricting/anticompetitive effects of IPRs”); Aditya Bhattacharjea, The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective, 9 J. Int'l Econ. L. 293, 296–97 (2006) (noting that even outside the TRIPS context, developing and least developed countries wanted their needs accounted for and “appropriate flexibility provided to address them” (internal quotation marks omitted)).


133. As discussed below, this position may start to shift if users perceive that rights holders are using flexibilities to their advantage, but for this moment the position is valid, and this decision should please user groups.

134. Although China itself is not usually considered a “developing” country for purposes of analyzing TRIPS obligations (it agreed on accession to abide by TRIPS obligations as a developed country), its approach to the arguments in this case aligns more with developing rather than developed countries. See Athanasakou, supra note 99, at 232 (noting that China’s claim for developing country status on WTO accession did not extend to TRIPS); Harris, supra note 5, at 111 (noting that China is considered a developed country for purposes of TRIPS analysis but shares some commonalities with developing countries); Kong, supra note 53, at 675 (noting that “inadequate protection of foreign intellectual property rights in China” is still an issue, but that China “committed itself to implement the TRIPS Agreement immediately upon accession”).
nuanced, context-dependent approach to compliance evaluation risks undermining the harmonization that developed countries are assumed to seek.\textsuperscript{135} The new standard, however, is not as bad for developed countries and their IPR proponents as one might think at first glance, even though the criminal thresholds claim out of which the standard arose is usually characterized as a loss for the United States.\textsuperscript{136} In fact, the new standard is actually good for rights holders for two reasons. First, rights holders can use these flexibilities to their own ends. Second, the focus on context opens the door for fairly robust examinations of implementation practices.

First, an interpretation that maximizes the flexibilities in the TRIPS Agreement—a view long espoused by developing countries—also benefits developed countries because their rights holders can use these flexibilities toward their own ends. A reading of the TRIPS enforcement text that bases compliance on implementation, in a particular context defined by the market for the product at issue, helps the Agreement engender the flexibilities that are necessary to fight IPR infringement in a global, internet-based, technology-driven marketplace.\textsuperscript{137}

IPR rights holders are attempting to protect their works among incessant technological advances that constantly alter the climate in which they try to market their legitimate goods and defeat infringers. Technologies allow for endless possibilities in the expansion, adaptation, and dissemination of IPR-related products. However, those same technologies make it possible to reproduce and disseminate unauthorized copies of those products on an unimaginable scale and more easily than ever before. This technological impact on the market is especially acute given the widespread use of the internet in distribution of intellectual property-protected works—particularly copyrighted works—which increasingly take the form of digital files easily transmitted around the world in a

\textsuperscript{135} Cf. Reichman & Dreyfuss, supra note 45, at 92 (pointing out that harmonization is not always in rights holders' interests and exploring the arguments against harmonization of substantive patent law).

\textsuperscript{136} See, e.g., Gervais, supra note 70, at 553 ("At this juncture, China does not have to change its criminal prosecution thresholds, even though these thresholds have not been found to be compliant . . . ").

\textsuperscript{137} This touches on a larger policy question, namely the continued viability of the WTO as a locus of debates about intellectual property standards going forward. Much attention has been paid to the propensity of rights holders and the nations that represent them to shift the IPR debate again—this time moving it out of the multilateral trade framework and into environs that are perceived to be more "rights holder friendly" or where power differentials are such that "higher" levels of protection can be achieved. Query whether a reading of the TRIPS Agreement that allows flexibilities to be used by rights holders to adapt the Agreement's concepts to the problems they believe are most acute in the marketplace may either reduce the tension between the bilateral, regional, and multilateral agendas, or beckon rights holders to return to the multilateral fold.
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All of this makes IPR enforcement an incredibly unpredictable exercise. The battle rights holders are fighting changes every day. In this climate, the need for adaptable defenses increases.

Building adequate defenses against infringement requires flexibility to (a) adjust laws, and the implementation of them, to fit the changing realities of the marketplace; (b) allow both national and international obligations to accommodate a borderless world; and (c) adapt to new products, new methods of infringement, and new ways of fighting that infringement that the TRIPS negotiators did not envision. Given these needs, developed countries need enforcement flexibilities as much as developing countries do, and the guidance recently given on how to interpret TRIPS enforcement obligations may provide just the sorts of tools that can help developed countries use flexibilities to their respective advantages.

Additionally, by emphasizing that panels should evaluate TRIPS enforcement obligations in the context of implementation, the decision reinforces the importance of a particular marketplace—with all its externalities—to IPR-related analysis. The panel went to great lengths to emphasize the importance of the market for the product at issue. This emphasis cannot be ignored. This focus on the marketplace as a controlling factor in evaluating TRIPS compliance allows interested parties on both sides of the IPR debate to define the market according to the realities they are facing, and to make arguments about how the marketplace changes obligations. If panels are to assess TRIPS obligations based on the market for the product at issue, and the product at issue is reproduced and disseminated effortlessly throughout a global marketplace, the panels must take that situation—and the challenges it poses—into account in assessments of TRIPS compliance.

This very specific focus on context also sets up some interesting potential policy shifts that encourage long-term changes in developed countries’ uses of the Agreement. The day may soon come in which developed countries will want to utilize TRIPS enforcement flexibilities and developing countries will be resistant to them. This reversal of roles has been portended by others, most often in the form of predictions that developed countries’ eagerness to generate rigorous enforcement through commitments to provide technology transfer and technical assistance would backfire, as developing countries use that assistance to become


140. See Reichman, Enforcing Enforcement, supra note 42, at 354.
earnest competitors. These predictions tend to assume a static marketplace—they assume that the game will remain unchanged but that the players most successful in the game will shift. By contrast, this Article suggests that the game is changing, because the marketplace is changing. The nature of the products is transformed, as is the nature of the battles over protecting those products. As the game changes, even assuming the players stay the same and there is no shift in creative and innovative capacity among developed and developing countries, the legal tools used by the players may begin to shift from one side of the debate to the other. In other words, the legal tools heretofore employed by developing countries to minimize the impact of TRIPS obligations may well become the very tools employed by developed countries to allow the TRIPS Agreement to accomplish rights holders' goals. It is the game within which TRIPS is operating that is changing, as much as the players' relative abilities to play the original game.

Until recently, developed countries, and the rights holders they tend to represent, were pushing for international harmonization and high minimum levels of protection, perhaps in opposition to, or at the expense of, developing countries. In the age of the internet and globalization, this previous reality is no longer as relevant as it once was, not so much because of shifting capabilities for innovation among the parties, but because the groups' relative needs for flexibilities are changing. As a result, the premises of debate are likely to shift to reflect this new reality, and

141. Having developed, through technology transfer, competitive industries in particular IPR-intensive areas and the capacity to enforce rigorous IPR standards, developing countries will attain the ability to out-produce and out-compete developed countries at their own game. See, e.g., id. ("Unless developed-country governments proceed with caution, precedents established during the early implementation phase could rebound against them later on, when the terms of trade may be less advantageous or when purely domestic economic conditions favor more competitive, less protectionist policies than those currently in vogue."); see also Reichman, Intro to Debate, supra note 42, at 388–89 ("In the past, the United States and the European Community preached the virtues of competitive markets to developing countries that were mired in command economies. The collapse of these command economies means that the developing countries will now take the developed countries at their word and demand to compete in the world market. The real question is not whether these countries can compete, even in markets for technological and information goods, but whether the developed countries still have the stomach for stiff global competitions once it becomes a legal and economic reality. Contrary to what they preach, the developed countries have embarked on such a sustained protectionist path with respect to technological goods that it may well compromise their future standing in the emerging—and very competitive—global market place.").

142. Dinwoodie & Dreyfuss, supra note 138, at 1210 (noting that new technologies may be a catalyst for legal change and that adjudicators should consider new technologies in assessing the balance of protection for works).

143. It is entirely possible that those abilities and capacities are changing, too. I do not think that the scholars who portend such a switch are incorrect, but they simply have not elaborated on part—the more immediate part—of the picture.

144. See infra Part III.A.
the international trade community may see developed countries begin to argue for flexibilities and more tailored, context-specific interpretations of the treaty obligations.

There may be a concomitant shift in the position of developing countries; a way of "pulling back" against the charge of developed countries seeking to use flexibilities in their favor or an attempt to rein in creative use of the laws by rights holders and freeze the current state of affairs. Governments of developing countries may start to argue in favor of harmonization or limiting enforcement standards to the harmonized set of rules already established. In other words, developing countries may try to use path dependence to their advantage.

I am less convinced of the possibility of this phenomenon occurring, however. First, it is not in developing countries' interests to shift to a more entrenched approach. The predicted shift by developed countries continues to work in developing countries' favor; they will finally get developed countries to come around to their point of view. This benefits everyone. The changing marketplace brings us closer to a cohesive reading of TRIPS in a way that is perceived by both camps as beneficial. This is a phenomenal breakthrough, and one that is supported as a matter of WTO law by the China—IPR case's interpretation of the obligations of TRIPS Article 61.145 Thus, this approach helps to usher the legal analysis into the global technological era in which developed and developing countries alike find themselves operating.

Second, as detailed in Part I.C above, despite the resulting higher evidentiary barriers,146 a highly contextual approach to TRIPS has the potential to increase the Agreement's effectiveness as an IPR enforcement instrument by indicating that panels may—and should—reach into the realm of implementation when evaluating compliance. Blurring the line between "as such" and "as applied" challenges strengthens the underlying goals of developed countries in TRIPS negotiations—effective implementation of the black letter law.147

145. See discussion supra Part I.C.
146. "As applied" analyses are coupled with evidentiary hurdles not required for "as such" challenges. As the United States found out, gathering evidence, especially in the face of some WTO members' overall lack of transparency, may be extraordinarily difficult. See generally Volper, supra note 91.
147. Helfer, Human Rights Analogy, supra note 123, at 381–82. This may require a recharacterization of IPR rights holders' goals in negotiating the TRIPS Agreement in the first place. The goal was not only harmonization, as indicated above, but also effectiveness in implementing IPR protection. See Yu, Enclosure, supra note 3, at 901 ("When the international intellectual property regime was established, the intention of the member states was to coordinate protection to a level that would reduce infringement and commercial piracy."). As noted above, it once may have seemed as if the most effective way to promote IPR protection was harmonization of laws. As I argue below, however, this is not necessarily the case today.
Thus, both developed and developing WTO members can view the panel’s interpretation of TRIPS Article 61 as a step forward. By allowing the Agreement the dynamism necessary to adapt to both local conditions and emerging enforcement difficulties while increasing its potential reach, the panel decision reinforces the TRIPS Agreement’s ability to balance flexibilities with effective implementation. This increases the Agreement’s legitimacy as an IPR-related tool, no matter which side of the IPR debate one is on.

Further, and just as important, the China—IPR panel’s interpretation fosters the Agreement’s ability to remain relevant in an age characterized by rapidly changing markets for IPR-dependent goods. By explicitly calling for a focused, product-centric analysis, the decision paves the way for greater latitude for panels to evaluate TRIPS compliance more specifically. This specificity allows the Agreement, and panels’ interpretations of it, to adapt more effectively to a new technological, global age. The discussion in the next Section highlights the significance of this.

C. Toward Relevance

In addition to interpreting the TRIPS enforcement text in a way that allows developed and developing countries to come together in views of proper methods of interpreting the Agreement, language from the China—IPR decision can also help to ensure that the TRIPS Agreement remains relevant in a changing marketplace. The multiple implications of the China—IPR decision are brought into specific relief when considered in the context of potential future TRIPS cases. This Section explores how the China—IPR panel analysis could be employed in future Article 61 cases. 148 Certainly, the case is instructive for future challenges to

148. A challenge to a WTO member’s law under Article 61 could be based on any one of three premises. First, that member could have no criminal remedies available in its law for piracy and counterfeiting. An Article 61 challenge where a WTO member has no criminal remedies available for IPR infringements should succeed as an “as such” claim. This is rather obvious. After all, if a WTO member is obligated “to provide” criminal remedies, and it does not provide them in any form, its law is incredibly vulnerable to a WTO challenge. These situations are likely to be rare, as it is doubtful that any new WTO member would be allowed to accede without any provision for criminal remedies in its law. Second, a member’s law could explicitly reference the Article 61 “commercial scale” standard in its language, and it does not provide them in any form, its law is incredibly vulnerable to a WTO challenge. These situations are likely to be rare, as it is doubtful that any new WTO member would be allowed to accede without any provision for criminal remedies in its law. Second, a member’s law could explicitly reference the Article 61 “commercial scale” standard in its language, and it does not provide them in any form, its law is incredibly vulnerable to a WTO challenge. These situations are likely to be rare, as it is doubtful that any new WTO member would be allowed to accede without any provision for criminal remedies in its law. Second, a member’s law could explicitly reference the Article 61 “commercial scale” standard in its language, and it does not provide them in any form, its law is incredibly vulnerable to a WTO challenge. These situations are likely to be rare, as it is doubtful that any new WTO member would be allowed to accede without any provision for criminal remedies in its law. Second, a member’s law could explicitly reference the Article 61 “commercial scale” standard in its language, and it does not provide them in any form, its law is incredibly vulnerable to a WTO challenge. These situations are likely to be rare, as it is doubtful that any new WTO member would be allowed to accede without any provision for criminal remedies in its law. Second, a member’s law could explicitly reference the Article 61 “commercial scale” standard in its language, and it does not provide them in any form, its law is incredibly vulnerable to a WTO challenge. These situations are likely to be rare, as it is doubtful that any new WTO member would be allowed to accede without any provision for criminal remedies in its law. Second, a member’s law could explicitly reference the Article 61 “commercial scale” standard in its language, and it does not provide them in any form, its law is incredibly vulnerable to a WTO challenge. These situations are likely to be rare, as it is doubtful that any new WTO member would be allowed to accede without any provision for criminal remedies in its law. Second, a member’s law could explicitly reference the Article 61 “commercial scale” standard in its language, and it does not provide them in any form, its law is incredibly vulnerable to a WTO challenge. These situations are likely to be rare, as it is doubtful that any new WTO member would be allowed to accede without any provision for criminal remedies in its law. Second, a member’s law could explicitly reference the Article 61 “commercial scale” standard in its language, and it does not provide them in any form, its law is incredibly vulnerable to a WTO challenge. These situations are likely to be rare, as it is doubtful that any new WTO member would be allowed to accede without any provision for criminal remedies in its law.
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criminal laws containing thresholds for prosecution. Any member wanting to challenge another member’s criminal thresholds in light of this holding would be wise to file an “as applied” claim, gathering extensive evidence regarding how those thresholds relate to the underlying market for the products at issue. However such challenges are likely to be rare, given the few markets at issue that employ criminal thresholds for IPR crimes. Thus, the more interesting question is how this holding impacts possible future challenges to criminal laws that do not involve whether that compliant law is being enforced. See China—IPR Panel Report, supra note 8, ¶ 7.602 (“As long as a Member in fact provides for criminal procedures and penalties to be applied in cases of willful trademark counterfeiting or copyright piracy on a commercial scale, it will comply with this obligation.”). Laws on paper that explicitly provide criminal penalties for “willful counterfeiting or copyright piracy on a commercial scale,” TRIPS, supra note 1, art. 61, must be challenged with evidence that they are not being implemented in a manner that fulfills the member’s obligation, China—IPR Panel Report, supra note 8, ¶ 7.602. Given the lack of clarity surrounding the obligation itself, and the panel’s statements that this is a relative standard, the law would almost surely have to explicitly use this wording in its statute to fall into this category. This is well supported by the panel’s language in China—IPR. See China—IPR Panel Report, supra note 8, ¶¶ 7.602, 7.610–611. This leaves a third category of cases, in which a member’s law criminalizes some piracy and counterfeiting, but does not use the Article 61 “commercial scale” language as an explicit benchmark in domestic law. This category is likely to encompass the criminal laws of most WTO members. See Harris, supra note 5, at 147–56 (discussing various countries’ laws in this respect and citing several examples, such as Germany’s “on a commercial basis” standard and Brazil’s “for commercial purposes or with gainful intent” standard, that illustrate the relative analysis necessary). The Chinese law falls into this category, as it provides for criminal penalties for some, but not all, counterfeiting and piracy. See Xue Hong & Guo Shoukang, China § 8[4][b], in INTERNATIONAL COPYRIGHT LAW AND PRACTICE, supra. In most cases involving laws in this category, WTO panels would be faced with the task of reconciling different relative standards; that is, panels would need to ascertain the compatibility of the standard for criminalization set forth in the national law with the standard for compliance under the TRIPS language. The challenged Chinese law presented a particular hybrid scenario that may not be found in members’ laws all that often: Instead of having to reconcile varying relative standards in the national law and the TRIPS Agreement, the China—IPR panel was faced with the task of reconciling a fixed numerical standard with the relative language of the TRIPS Agreement. See China—IPR Panel Report, supra note 8, ¶¶ 7.610–611. While certain other WTO members have thresholds in their laws or guidance for ascertaining what may qualify as commercial-scale piracy or counterfeiting, research has not yielded many examples of specific numerical thresholds outside of China. See Harris, supra note 5, at 155 (surveying criminal intellectual property laws in prominent jurisdictions and noting the virtual absence of numeric thresholds above a single instance of infringement). This is an important distinction because it led to the downfall of the U.S. complaint. The United States asserted that China’s rigid numerical thresholds were per se inadequate to meet the TRIPS standard; thus, the Chinese law could be challenged in an “as such” case. See China—IPR Panel Report, supra note 8, ¶¶ 7.416, 7.611. The panel’s response to the U.S. challenge makes clear that the panel views the TRIPS language as too relative to be judged without context at all, no matter how fixed the national law. See id. ¶¶ 7.613–617, 7.629. This raises the question whether future panels will refuse to consider an “as such” claim of violation where a member has any criminal law at all. 149. See Harris, supra note 5, at 155 (noting that “none of the [other surveyed countries’] laws require a threshold limit above one single infringing act to trigger criminal liability”)


thresholds. This Section focuses on that question, examining a particular example of immediate relevance—online infringements of copyrighted digital files. This type of case is especially likely to arise given the prevalence of file-sharing and related activities in the current internet-driven marketplace.

Online infringement is having a significant impact on copyright holders’ abilities to collect revenues for reproduced and distributed digital files of copyrighted products. Both in China and worldwide, internet infringement has become the dominant problem for copyright holders, and criminal laws of WTO members differ widely in their treatment of criminal liability for conduct surrounding the trading of such files. It is not a stretch to think, therefore, that this type of case may be next on the WTO TRIPS enforcement dispute settlement docket.

150. Certainly, the impact of the China—IPR decision on cases beyond the scope of Article 61 could make for an interesting project. Given that the specific applicability of the decision to other TRIPS enforcement cases is not the primary focus of this Article, the analysis here is limited to the exemplary case elaborated upon—that of an internet-based infringement under Article 61—and will not explore ramifications of the China—IPR case beyond the Article 61 mandate.


152. IIPA, supra note 151, at 84; see Letter from Smith, supra note 151, at 14.

1. TRIPS Provisions’ Impact on Internet Piracy

As noted above, the TRIPS Agreement was concluded before the advent of the internet as a meaningful tool for commercial dissemination of IPR-protected works. Thus, it does not contain explicit provisions for dealing with the type of online piracy prevalent in today’s marketplace.\(^\text{154}\)

However, the Agreement’s provisions on piracy generally, including Article 61, do apply in the online context. The key is ensuring that they are adaptable enough to mold to this context.\(^\text{155}\)

Some have criticized the TRIPS Agreement for being too “backward-looking,” failing even at its conclusion in 1994 to take into account fully the rapidly changing economic, trade, and IPR climate that it was attempting to regulate.\(^\text{156}\) Interestingly, much of this criticism states that the Agreement’s backward-looking nature deprives IPR users of appropriate balances in IPR protection by overlooking ways in which new technologies enable rights holders to inhibit use of intellectual property-protected products.\(^\text{157}\) The idea seems to be that the law has not kept up with rights holders’ abilities to manipulate technologies, putting the

\(^{154}\) See Lisa P. Ramsey, Free Speech and International Obligations to Protect Trademarks, 35 YALE J. INT’L L. 405, 464 (2010) (noting that certain Internet-related uses of trademarks were unforeseen at the time of TRIPS negotiations); Katherine J. Strandburg, Evolving Innovation Paradigms and the Global Intellectual Property Regime, 41 CONN. L. REV. 861, 863 (2009) (observing the coincidental relative timing of the conclusion of TRIPS and the rise of the Internet’s influence in daily life); Tanya Woods, Copyright Enforcement at All Costs? Considerations for Striking Balance in the International Enforcement Agenda, 37 AIPLA Q.J. 347, 361 (2009) (“Although it is considered to be a far-reaching instrument dealing with IP protection and enforcement, TRIPS does not address issues that arise in the context of Internet uses of IPRs.”); see also IIPA, supra note 151, at 84 (discussing the high prevalence of digital piracy in China); Laura H. Parsky, Deputy Assistant Att’y Gen., Remarks Before the Major Challenges of Intellectual Property Protection Conference in Rome, Italy, available at http://www.justice.gov/criminal/cybercrime/parskySpeech (last updated Feb. 24, 2005) (discussing the U.S. efforts at combatting the rapidly growing problem of online piracy).

\(^{155}\) Any attempt to apply TRIPS provisions in the online context would immediately raise two difficult questions: (1) How does one adapt the standards set forth in an agreement aimed at a hard-goods world to the digital age? (2) How do the standards apply in a world in which the motivation for infringement may not be overt or direct financial gain?

\(^{156}\) Reichman, Intro to Debate, supra note 42, at 386 (“[T]he principle [sic] weakness of the TRIPS Agreement is its backward-looking character, which ‘stems from the drafters’ technical inability and political reluctance to address the problems facing innovators and investors at work on important new technologies in an Age of Information.’”) (quoting J.H. Reichman, The Know-How Gap in the TRIPS Agreement: Why Software Fared Badly, and What Are the Solutions, 17 HASTINGS COMM. & ENT. L.J. 763, 766 (1995)).

\(^{157}\) Id. (“Professor Hamilton’s main concern is that the TRIPS Agreement, which arrives at a turning point in the history of communications, ignores new information technologies and thereby stacks the deck too much in favor of private rather than public interests.”) (citing Marci A. Hamilton, The TRIPS Agreement: Imperialistic, Outdated, and Overprotective, 29 VAND. J. TRANSNAT’L L. 613, 628–29 (1996)).
practical ability of users to access works out of balance with their legal rights to do so.

While this argument is likely true in some circumstances, viewing technology as a boon to rights holders and a detriment to users without exploring the alternate possible outcome is misguided. The advent of a new technological age can equally stack the deck the other way—against rights holders and in favor of users. While no doubt some rights holders are using technological advantages to extract rents from users by tying up through technological means what could otherwise be termed fair uses, one could argue that users receive an equal advantage due to the difficult task rights holders face in attempting to control uses of works disseminated in digital form. In fact, while many have pointed out that digital locks employed by rights holders may extend monopolies and imperil fair uses, technological influences have made it similarly difficult for rights holders and enforcement bodies to ascertain and enforce the limits to those doctrines. Thus, if the online era provides a relative advantage to one group or another, there is some argument to be made that this advantage goes to users, not rights holders.

Without resolving disagreements over the relative beneficiaries of the TRIPS Agreement's asserted backward-looking nature, this Article takes a step back in order to examine the veracity of claims that the Agreement is indeed impliable in this respect. Those criticizing the TRIPS Agreement's purported inability to adapt to new technological circumstances significantly underestimate its malleability—indeed overlooking in this context the very pliability that was so carefully preserved by the original TRIPS negotiators. True, the particular extent of this malleability has proven somewhat elusive, but as shown in the Sections


161. Kapczynski, supra note 7, at 1573.
below, the China—IPR case lends some direction to this analysis and in
turn enhances the adaptability of the Agreement.

2. China—IPR Analysis Regarding Internet Piracy

One important question arising from the China—IPR case is whether
the panel’s evaluation of commercial-scale counterfeiting and piracy di-
rectly impacts the emerging online marketplace for works. One
increasingly consistent feature of that marketplace is that most online
piracy, at least in the copyright context, is neither motivated nor fueled
by direct financial benefit to the infringer. The panel correctly declined
a direct pronouncement on this issue, as it was outside the scope of the
U.S. complaint. However the panel acknowledged the issue in its opin-
ion, stating:

The Panel wishes to emphasize that its findings should not be
taken to indicate any view as to whether the obligation in the
first sentence of Article 61 of the TRIPS Agreement applies to
acts of counterfeiting and piracy committed without any purpose
of financial gain.

One can conjecture that the panel knew that cases in the near future like-
ly would feature internet piracy and wished to make clear that it was not
expressing an opinion on the issue. Thus, the door is wide open for argu-
ment as to how Article 61 is to be applied in a case of piracy and
counterfeiting that is not overtly commercial.

While the panel explicitly refrained from expressing an official view
on the application of the Article 61 standard to “acts of counterfeiting
and piracy committed without any purpose of financial gain,” its ruling
still has bearing on future analyses of this question. In fact, the panel’s
strong views regarding proper methods of evaluating “commercial scale”
piracy have significant implications for all future cases, including those
involving internet piracy, the most common form of “piracy committed
without any purpose of financial gain.” This Subsection highlights one
way in which the panel’s standards affect future analyses—the issue of
defining the appropriate market.

The China—IPR panel emphasized that assessments of compliance
with Article 61 had to be made in the context of the market at issue.

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162. See INT’L FED’N OF THE PHONOGRAPHIC INDUS., IFPI DIGITAL MUSIC REPORT
2010: MUSIC HOW, WHEN, WHERE YOU WANT IT 5 (2010), http://www.ifpi.org/content/
library/DMR2010.pdf.
164. Id.
165. Id.
166. Id. ¶ 7.604, 7.606.
but it gave little guidance as to how to define that market. The panel seemed to define the market in two ways: geographically and by product.\textsuperscript{167} Using these two benchmarks together is a fairly straightforward task when comparing hard goods because such goods usually are intended for a particular geographic market (such as China or Germany) and sold in discrete channels (such as compact disc retailers or online academic journal databases). In most cases, the product market will serve to narrow the already defined geographic market (such as online academic journal databases in Germany). When, like a Venn diagram, these layers are superimposed on one another, one starts to get a picture of the narrowly tailored market for those goods in that particular country. However, those channels are not so clear in the case of digital files, which transcend both geographic markets and differences in distribution methods among products. Thus, internet-driven distribution of IPR-protected products eludes attempts to use both geography and distribution channels to define the relevant market. Often, these two benchmarks will be incompatible: the nature of the product—a digital file easily transmitted across borders in a split-second transaction—may render a geography-based analysis nonsensical. If a digital file is meant to be marketed in any one of dozens or hundreds of geographic jurisdictions, attempting to limit it by a geographic border through the Venn diagram-like superimposition may fail. While one can try to assess the internet-based market for digital files in Germany or China and evaluate a particular market using those parameters, this is not always successful because trying to limit dissemination of that particular file to China or Germany is next to impossible in today’s marketplace.

Thus, attempts to ascertain compliance with TRIPS Article 61 if one reads the panel opinion in China—IPR as mandating an assessment of a market based on geographical boundaries face significant problems. Such a reading simply does not comport with the realities of the global marketplace in which IPR stakeholders operate, and in which the WTO functions.\textsuperscript{168} These marketplace changes call for a detailed look at the

\textsuperscript{167} See id. ¶ 7.606.

\textsuperscript{168} While the focus of this discussion is on digital files, and this analysis is especially applicable to them, it is not confined to them. Technology is not the only factor to take into account in observing behavior in the current marketplace. While it may still be possible to define the market for a hard good in terms of geographic boundaries, that very definition is breaking down in an era of globalization. See Cottier, supra note 132, at 789–90 ("The basic idea of looking at countries as a whole is increasingly flawed. It dates back to the concept and idea of uniform and homogenous nation states. It fails to reflect the fact that nations are not single and uniform entities. With the progressive liberalization of trade, enhanced interdependence of economies, these differences are accentuated. They no longer can be captured in simple terms of individual uniform nation states."); see also Frank J. Garcia, Globalization and the Theory of International Law, 11 INT’L LEGAL THEORY 9, 13–14 (2005) ("Viewed from the perspective of political theory, globalization is lifting relationships out of the strictly
panel's mandate of a contextual analysis, being careful not to read it too narrowly. In other words, a conclusion that the United States lost because it failed to produce evidence of commercial-scale piracy in China is accurate, but such a conclusion narrows the import of the panel's decision too much. Certainly, the Chinese market played a role in the panel's thinking in this case, and the geographic market likely will often play a role. However, the concept of contextual evaluation of compliance is broader than that, and it lends itself nicely to adaptation within the global, digital, technologically diverse marketplace in which future analyses will find themselves situated.

This context-specific reading provides immediate help to rights holders facing internet-based infringements by allowing them to bring in evidence of the global impact of those infringements as part of a panel's exercise of defining the market. Rights holders are free to emphasize that geographic markets are not the only relevant markets in defining the context in which to assess compliance. This move toward assessment of market factors particular to the product at issue creates an added layer of flexibility to bring factors such as global dissemination and technological advances into the analysis, impacting the most profound challenges that rights holders are facing now—internet infringements that operate in a vastly different market than that envisioned by the

territorial into the 'global' or meta-territorial. The political and legal significance of this change is immediate and fundamental: as the space in which we conduct our social relations changes, our manner of regulating those relations must also change. To be effective, regulatory decisions must increasingly involve the meta-state level. Globalization thus requires a fundamental re-examination of social regulation and governance at the global level, leading to a system in which states may still have a preeminent role, but not the only role." (footnotes omitted).

169. For a general discussion about how territorial "niceties" are breaking down in the age of internet infringements, see Graeme W. Austin, Importing KAZAA—Exporting Grokster, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 577, 577–79 (2006).

170. See id. at 592 ("While some [domestic] liability theories, particularly those that reach communications from one nation that are to be received in other nations, may seem an affront to the traditional territoriality principle, so too is massive unlicensed distribution of copyright protected material by parties who are themselves indifferent to territorial boundaries."). This is not to say that some analysis based on geography is not appropriate. In the China—IPR case, in fact, the panel's analysis focused on the Chinese market. China—IPR Panel Report, supra note 8, ¶ 7.604. However, the panel never specified that the market analysis had to be limited to purely geographic factors. Indeed, it went to pains to emphasize that more than geographic factors may come into play. Id.

171. See Austin, supra note 169, at 604 ("In sum, in all three major branches of intellectual property the concept of territoriality is becoming increasingly flexible."); Graeme B. Dinwoodie & Rochelle Cooper Dreyfuss, TRIPS and the Dynamics of Intellectual Property Lawmaking, 36 CASE W. RES. J. INT'L L. 95, 109–10 (2004) (noting that countries may be in greater need for flexibility in addressing technological advances than in addressing more traditional trade issues).
TRIPS negotiators fifteen years ago. The very flexibilities that those negotiators built into the Agreement—perhaps with a completely different, more immediate vision in mind—can now help to adapt the Agreement’s provisions to the new marketplace. Such flexibility through contextualization is good for all stakeholders, and good for TRIPS.

Allowing for a broader reading of the panel’s emphasis on context in the China—IPR case does two things. First, it provides a mechanism by which to evaluate discrete future TRIPS cases involving goods that are evolving to meet the digital and globalized age. Second, on a more theoretical level, it better equips both groups of TRIPS stakeholders in meeting their goals under the Agreement and helps TRIPS itself become a more effective instrument to accomplish the goals intended in its creation while preserving the policy space and flexibilities so necessary for its ultimate success and implementation.

III. PANEL POWER AND PREDICTABILITY

This Article argues that an evaluation of the TRIPS Agreement’s criminal enforcement obligations focusing on contextual implementation in a particular market is good for developing countries, developed countries, and the Agreement itself. It allows stakeholders with diverging interests to converge in their views of how to interpret the Agreement, beginning the process of bridging the divide between them. It also increases the Agreement’s ability to adapt to a new age. A highly contextual interpretation also draws attention to two potential problems, however. First, the context-specific approach risks undermining predictability. Second, related to the first, a lack of predictability complicates application of the provisions. This Part discusses these problems and assesses their impact. It concludes that, although these problems are valid and worthy of discussion, (a) they are problems that are inherent in the system already (in other words, they do not result from the proposals made here); and (b) the positive results of a context-specific analysis of

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172. See Land, supra note 130, at 4 (discussing the difficulties of territory-based regulation of the internet).

173. “Policy space” describes the realm of discretion afforded to WTO members to interpret commitments in light of their domestic needs and systems. See Henning Grosse Ruse-Khan, A Comparative Analysis of Policy Space in WTO Law 10–12, 45–46 (Max Planck Inst. Intellectual Prop., Competition & Tax Law Research Paper Series No. 08-02, 2008), available at http://www.ssrn.com/abstract=1309526. For a general discussion on the need for this policy space, see Yu, Enclosure, supra note 3, at 828 (discussing how intellectual property is acting as a “fence” just like when common land is turned into private property, in turn reducing the maneuverability of nations needing to adapt IPR commitments to fit their national priorities).
TRIPS enforcement claims, for both developed and developing members, outweigh the concerns.

One problem is that expanding notions of flexibilities and giving power to panels to make highly context-specific judgments about compliance with TRIPS obligations may undermine the Agreement's predictability. The proverbial floor of minimum levels of protection that TRIPS was meant to establish risks becoming rather uneven. This unevenness leads to the second problem—the lack of predictability causes uncertainty in the application of the provisions. Specifically, panels will find it difficult to judge compliance without some fixed standard by which to measure a member’s implementation. Panels will not know how much deference to give member governments, given the indeterminacy of the TRIPS language and the need to apply it contextually. WTO panels will find drawing the lines necessary to make a judgment of legality or compliance to be a complicated task, and this in turn increases uncertainty for WTO members facing dispute settlement proceedings. How can a member judge its risk of WTO action, given that the standard for compliance varies by circumstance?

A. Achieving Compliance: An Uneven Floor

The TRIPS Agreement is supposed to provide minimum standards in a variety of IPR areas, including enforcement, providing a floor of protection standards. A mandate that TRIPS enforcement disputes be analyzed with granular attention to the particular marketplace in which an IPR transaction is taking place, as is both required by the China—IPR analysis and beneficial to the Agreement, risks the floor becoming a rather uneven one. As mentioned previously, what qualifies as commercial-scale piracy in China may not be the same as what meets that standard in Germany. What qualifies as commercial-scale piracy of music files on the internet may not be the same as commercial-scale piracy of business software or counterfeiting of luxury handbags.

174. See id. at 902 (referencing the TRIPS “floor”).
175. See, e.g., TRIPS, supra note 1, arts. 1(1), 41(5) (allowing members the flexibility to account for capacity in enforcement and allocation of resources).
176. Kapczynski, supra note 7, at 1571.
177. See Helfer, Human Rights Analogy, supra note 123, at 360; see also Adrian Otten & Hannu Wager, Compliance with TRIPS: The Emerging World View, 29 VAND. J. TRANSNAT’L L. 391, 394 (1996) (“Like the preexisting international intellectual property conventions, the TRIPS Agreement is a minimum standards agreement.”).
178. See Alex Glashauser, What We Must Never Forget When It Is a Treaty We Are Expounding, 73 U. CIN. L. REV. 1243, 1305 (2005) (“When interpreting treaties, a preliminary . . . question is how meaning changes over not only time but place. . . . Thus, for treaties, the question is not only ‘what is the right interpretation now?’ but also ‘what is the right interpretation here?’”).
Thus, the immediate criticism of this Article’s suggestion of a more liberal, two-sided use of flexibilities is that it creates so many interwoven paths through TRIPS that the Agreement’s standards risk becoming incomprehensible. To some degree, the assumptions that have dominated the debate about TRIPS so far have been reassuring; the roles of developed countries in opposing enforcement flexibilities have served to reinforce a politically sustained baseline of protection. The obvious fear is that if developed countries start using flexibilities alongside developing countries to impact enforcement obligations, uncertainty will rule for everyone.

Certainly, a context-specific judgment of TRIPS compliance does not lend itself to the type of predictability that some would like to see. However, those concerned about preserving the Agreement’s proverbial floor have not lost ground under this formulation. The enforcement standards that were such a groundbreaking development when TRIPS was negotiated are still there. Prior to the China—IPR case, they had not been tested.179 The case has served all stakeholders well by lending some contour to these skeletal provisions. The skeletal provisions provided no framework of predictability; any predictability seen within the provisions before the China—IPR case was illusory.

Furthermore, as posited above, the benefits that an insistence on contextual application of enforcement standards provides outweigh the concerns about lack of predictability, resulting in a net gain for all parties. Those who believe that strong application of IPR laws is a gain for TRIPS benefit from the move toward inspection of meaningful enforcement practices that this approach enables. Those who advocate for thorough consideration of local priorities in the analysis can rest assured that this will happen as well.

Predictability is a desirable trait, and the predictability of decisions on a given law often is tied to that law’s effectiveness. However, predictable laws are not always the best laws. Where laws are too static, lacking nuance and unable to adapt or accommodate real life circumstances, predictability can be a source of ineffectiveness. For a treaty, this type of inflexibility is at best counterproductive and at worst, destructive. If TRIPS can be a more relevant and accommodating agreement in 2011 by giving up some degree of perceived predictability, it will ultimately be more effective and perceived as more legitimate.

179. See Volper, supra note 91, at 337 (noting that previous TRIPS dispute settlement cases involving enforcement obligations all settled prior to any formation of a panel); Yu, TRIPS Enforcement, supra note 84, at 3 (noting that the China—IPR case posed the first opportunity for a panel to focus on interpreting the TRIPS enforcement provisions).
This perception of legitimacy also ties in to the larger life of TRIPS and the WTO. The approach suggested in this Article no doubt shifts a great deal of power to panels to evaluate and accommodate divergent situations in WTO members' implementation of commitments. While the outcome of this—less predictability—may make some uneasy, it also helps the dispute settlement mechanism to better complement the larger policy-making function of the WTO. Intellectual property policy making at the WTO is at an impasse. Reopening policy discussions among the members to lend the needed contour to the TRIPS enforcement provisions is impossible. Thus, shifting some power to panels to fill in gaps where policy making is not an option is a good way to ensure that the Agreement continues to move forward and accommodate the divergent needs of its stakeholders.

Finally, efforts to achieve a degree of predictability continue, through the panels' propensities to examine what previous panels have said and done. While WTO decisions are not precedential, they carry persuasive effect, and panels often cite to previous decisions. Thus, over time, the factors to be taken into account in the application of TRIPS enforcement standards are likely to crystallize, lending themselves to a certain amount of predictability as jurisprudence in this area increases and evolves.

B. Judging Compliance: A Difficult Task

Part and parcel of the lack of predictability is the resulting difficulty faced by panels in judging illegality in the context of a specific system, especially when it comes to the enforcement language. The combination of the TRIPS language's indeterminacy and the flexibilities' reinforcement of deference causes panels reaching into a jurisdiction and judging the compliance of that jurisdiction's actual practices with international norms to bump up against traditional sovereignty tensions. This combination

180. Helfer, Framework for Intellectual Property, supra note 7, at 973–74 (noting that lawmaking at both the WTO and WIPO has been brought "to a virtual standstill").

181. This is especially true in the context of TRIPS, given the climate in the the WTO, but is true of treaties generally as well. See Glashauser, supra note 178, at 1306 (calling the treaty amendment process "a chore" that results in greater need for flexibility in post-negotiation treaty interpretations); see also Reichman, Twenty-First Century, supra note 121, at 1173 (speaking of the specific dynamics of legislating in the TRIPS context).

182. See Reichman & Dreyfuss, supra note 45, at 127 (noting that the WTO's dispute resolution system may "be used to keep the law current"); Waldron, supra note 19, at 510 ("Words do not determine meanings, people do. No amount of staring at the words of a rule, then staring at the world, then staring at the words again, will tell us when we have a proper application.").


184. Fukunaga, supra note 61, at 905.

185. See id. at 908–09 ("[T]he dispute settlement institution may find it difficult to determine the illegality of the situation because the Agreement does not provide any baseline..."
also creates an immediate practical problem—how can a panel ever ascertain when a member has come into compliance after an unfavorable ruling?  

Regarding the first issue—dealing with the indeterminacy in ascertaining what the standard for compliance with a WTO ruling should be—Professor Yoshifumi Fukunaga points out that any panel's attempt to make concrete recommendations as to how a losing party should comply with one of its decisions is a difficult task, as it puts the panel in the position of making recommendations about how a member should best implement the Agreement.  

He points to the provisions in TRIPS Articles 1 and 41(5) that explicitly give members discretion over, among other things, means of implementation and domestic allocation of law enforcement and other resources. Reconciling these provisions with a panel's mandate following an "as applied" dispute is difficult, he states,

because of the discretion given to member governments, the dispute settlement institutions cannot specify the precise concrete measure that the respondent countries ought to take to comply with their effective deterrence responsibilities under the Agreement. By contrast, in a dispute over statutory language the dispute settlement institutions can specify the appropriate measure to be taken: reforming the statute.

In other words, Professor Fukunaga believes that panels should not be put in a position whereby they are asked to meddle in the internal enforcement decisions of a WTO member.

from which to make such a determination. If 90% of broadcasting companies [referencing a particular case] infringe copyrights, the country most likely violates the obligation. If the infringement rate is only 0.1%, copyright owners are expected to appeal to the civil procedures within the country rather than the WTO [Dispute Settlement Body]. However, what if the number is 5%, 10%, or 30%? The dispute settlement institutions must draw a line somewhere. Yet it is highly difficult to do so, not only because of the likely disagreement between nations as to the acceptable level of infringement, but also because a bright-line rule would effectively create safety zones, up to which level of infringement members would be free from charges of TRIPS inconsistency.

Professor Fukunaga also relates this concern to the implementation phase, following a panel ruling of noncompliance. His questions are twofold: (a) How can a panel make recommendations as to implementation of the decision, given that it is poorly situated to ascertain the best method of implementation in local law? (b) How does a losing party prove that it has complied with a decision? See id. at 903–04.

Professor Fukunaga says that this also plays out in the recommendation phase. The Dispute Settlement Body (DSB) is poorly equipped to make recommendations about how to bring enforcement measures in line, as the respondent knows best how to do this in its own country. Id. at 905–06.

Id. at 909 (citing TRIPS, supra note 1, arts. 1, 41(5)).

Id. (footnote omitted).

See id. at 909–10.
Regarding the second issue—assessing when a member has achieved compliance after an adverse ruling—the difficulties are similar. Professor Fukunaga emphasizes that the only immediate showing a member can make toward compliance is a showing of “intent” to bring its practices into compliance with the decision, and he rightly points out that “such intent is logically irrelevant to an ‘as applied’ violation.” Anything beyond a showing of intent will take some time. Even once a change in application of the law has been achieved, there may be disagreements over whether practices have changed adequately, perhaps giving way to further disputes. How are disagreements between the parties over compliance to be decided? When is retaliation warranted, and how much time should a victorious party be required to give for new practices to take effect and have an impact?

Certainly, ascertaining the exact point at which a losing respondent member moves from noncompliance to compliance is a difficult task, and because that is difficult, so will be a panel’s task in recommending steps toward compliance. Discussion of these problems exposes the truth that there is no single line marking compliance with the TRIPS Agreement. What constitutes compliance is open to interpretation, and that interpretation will differ depending on the agendas of the interpreters. In a world of lenses, even seemingly objective statistics vary depending on the particular factors they take into account, and the choice of factors is often influenced by agendas. There is no magic formula.

191. See id. at 904, 906.
192. Id. at 904.
193. See id. at 904–05.
194. Id.
195. See id. at 906.
196. See id. at 910 (discussing the effectiveness of retaliatory measures, and if used, how long they should remain in place). In the end, Professor Fukunaga uses these potential pitfalls to argue that the DSB is ill-suited to hearing TRIPS disputes, especially in the enforcement arena, and that the DSB is well on its way to falling into disuse as a mechanism for IPR enforcement as a result. See id. at 930. His fundamental point is that “potential complainant countries may find it difficult to win disputes regarding the application of statutes and meet with further difficulty in enforcing any decision they may win. These difficulties might effectively discourage them from using the [DSB].” Id. at 906. While it is beyond the scope of this Article to address Professor Fukunaga’s concerns in full, the paragraphs that follow the above text offer a few thoughts in response to his assertions.
197. See Alex Glashauser, Difference and Deference in Treaty Interpretation, 50 VILL. L. REV. 25, 26–27 (2005) (stating that interpretations of treaties can legitimately differ depending on who is interpreting them).
However, this phenomenon is unique neither to context-specific enforcement analyses nor to the TRIPS Agreement. Indeed, the lack of a magic “line of compliance” reflects the nature of international law, and—at least in common law jurisdictions—of law itself.199 What constitutes compliance with a particular law is open to interpretation, and in the United States alone we have seen enough litigation on a wide variety of matters to know that interpretations differ, and that in many cases, a wide variety of interpretations carry some significant measure of validity.

Thus, I agree that panels have a difficult task when it comes to judging TRIPS enforcement text compliance. I further agree that the difficulty is greater in the enforcement setting than it would otherwise be because of the indeterminate nature of the enforcement text and the deference built into the relevant provisions.200 The lack of predictability likely to result from the phenomenon of ad hoc panels taking on such a difficult and nuanced task seems to be at the heart of Professor Fukunaga’s concern. This is closely related to the “uneven floor” concern discussed above.201

However, as stated above, shifting some power to ad hoc panels can be good, especially in an age of policy-making impasse.202 Furthermore, panels do have some constraints in their application of these concepts. First, individual panelists would likely want to preserve their own reputations as jurists. Second, panel reports can be voted down by a consensus of the membership if they do not reflect sound jurisprudence. Third, the nature of ad hoc panels is such that there is not a natural desire toward empire building.203 Finally, decisions are subject to appeal to a standing
Appellate Body,\textsuperscript{204} which presumably has an eye toward institutional consistency. Perhaps this highlights the importance of the Appellate Body as part of the WTO dispute settlement system. Appellate Body members are more likely to take an approach to legal interpretation that keeps the larger body of law in mind.\textsuperscript{205} In other words, Appellate Body members bring some consistency to a process that otherwise naturally lends itself—and always has—to inconsistency and unpredictability.\textsuperscript{206} This is not simply a free-for-all.

Thus, the benefits of having a system that engages in meaningful implementation of the TRIPS enforcement standards outweigh the problems created by the unpredictable nature of compliance. Not only does the suggested approach help panels fill gaps left by policy makers, it also provides contour to provisions that, taken alone, are rather skeletal. Finally, the factors that panels take into account when assessing compliance likely will coalesce over time, leading to higher degrees of predictability, at least as to what types of considerations will be at play in a given dispute.

\textbf{CONCLUSION}

International agreements are in constant danger of becoming dinosaurs, hampered by the time involved in negotiations and implementations and also by the high emotions that accompany controversial subject matter. Polarized perceptions lead to intransigence that inhibits already difficult attempts to fashion solutions that will adequately, effectively, and legitimately govern a wide range of national players, interests, customs, and legal systems. This problem has been exacerbated further in recent

\textsuperscript{204} DSU, \textit{supra} note 23, arts. 16, 17.
\textsuperscript{205} See Dreyfuss & Lowenfeld, \textit{supra} note 26, at 321–24; \textit{see also} Abbott, \textit{Toward a New Era, supra} note 5, at 83–84 ("The [Appellate Body] has pursued a cautious approach, warning against expansive interpretation of TRIPS obligations.").
\textsuperscript{206} What is concerning about Professor Fukunaga’s analysis is not that he points out difficulties in the system, or that he argues that the system is ill equipped for IPR dispute settlement purposes as a result, but rather that he proposes no alternative. \textit{See Fukunaga, supra} note 61, at 930–31. Fukunaga does not address particularly why he thinks the DSB is more poorly situated than any other international adjudicatory mechanism. In other words, he neither suggests that the DSB has fared more poorly than other institutions (whatever those may be), nor posits a prospective solution or improvements to the WTO dispute settlement mechanism that would ameliorate his concerns. Indeed, given the wide range of cases—both domestic and international—to which Professor Fukunaga’s concerns apply, his criticisms easily could be analyzed with respect to a wide variety of courts and institutions.
years by the vast growth in global commerce and burgeoning technological advances that enable instantaneous transactions across borders, without the slightest regard for national boundaries. This leaves territory-focused instruments and institutions in the unenviable position of trying to regulate a marketplace that is not focused on discrete territories at all. Even the forward-thinking negotiators of the WTO agreements likely did not picture the ramifications of today's global marketplace.

While the danger is inevitable, actual obsolescence is not. Where an agreement has built-in mechanisms that parties can interpret in ways that help bridge the divide between seemingly irreconcilable viewpoints and keep the agreement relevant in changing times, learning to use those mechanisms in innovative ways is imperative to the agreement's survival. This is true whether or not the original negotiators intended those mechanisms to serve as instruments of political and technological tailoring.

The China—IPR panel decision helps illuminate the innovative ways that dispute settlement panels can use legal tools already present in TRIPS to help the Agreement better serve its divergent stakeholders. The Agreement is capable of this even if the goals of developed and developing countries remain incongruous. The China—IPR decision paves the way for this Article's suggested approach to judging TRIPS compliance. A context-specific approach strengthens the text it applies in a number of ways. First, the approach guarantees that panels consider local priorities and circumstances as well as evolving enforcement challenges in evaluating TRIPS compliance. Second, such an approach indicates that members' obligations to "provide for" procedures and penalties involve more than laws on paper. Third, the approach moves developed and developing countries toward interpretations of the Agreement that are more consistent with one another, even if their respective fundamental aims in interpreting the Agreement remain divergent. Finally, such an approach empowers panels to forge legal solutions that keep the Agreement relevant and useful in a global marketplace dominated, not by the boundaries of the Agreement's signatories, but by the absence of them.

All of this may result in some degree of uncertainty and discomfort for all stakeholders as both developed and developing countries accommodate their expectations to a more pliable agreement. Despite the discomfort it may generate, a more dynamic, adaptable TRIPS Agreement—one that faces boldly the changes in the market it is attempting to regulate instead of hiding behind perceptions of stagnancy of international agreements—rewards all stakeholders by parlaying the hard work of the WTO negotiators into something that can continue in relevance today.