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## Trapped in China's Shadow? Intellectual Property Protection in Post-WTO-Accession Russia

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# TRAPPED IN CHINA'S SHADOW? INTELLECTUAL PROPERTY PROTECTION IN POST-WTO-ACCESSION RUSSIA

WILLIAM P. LANE\*

**Abstract:** Russia's December 2011 accession to the World Trade Organization means that it has agreed to implement and enforce intellectual property (IP) laws in accordance with the Agreement on Trade-Related Aspects of Intellectual Property. This gives some hope that foreign enterprises, frequently victims of IP infringement in Russia, will receive protection. Yet the parallel experience of China, which acceded in 2001, tempers that enthusiasm because the WTO has been ineffective in stopping infringement there. This Note compares China's and Russia's historical attitudes toward IP rights, economic incentives to adopt Western standards, and institutional challenges to assess the extent to which the WTO's performance in China can predict its efficacy in curtailing counterfeiting and piracy in Russia.

## INTRODUCTION

On December 16, 2011, the Ministerial Conference of the World Trade Organization (WTO) voted to allow Russia entry into the Organization as a full member.<sup>1</sup> Russia's accession presents a momentous contribution to the WTO's goal of creating a unified system of liberalized trade: as the last global economic power to join the organization, Russia will bring an estimated ninety-seven percent of international trade under the WTO's regime.<sup>2</sup> The vote is most significant, however, to Russia itself, closing its nearly twenty-year accession campaign.<sup>3</sup> For Russia, WTO membership represents both symbolic international po-

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<sup>1</sup> David Jolly, *W.T.O. Welcomes Russia as Its Newest Member*, N.Y. TIMES, Dec. 17, 2011, at B2.

<sup>2</sup> See *id.*; *Director-General's Statement on Russia's Accession*, WORLD TRADE ORG. (Dec. 16, 2011), [http://www.wto.org/english/news\\_e/sppl\\_e/sppl213\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl213_e.htm).

<sup>3</sup> See Tom Miles & Douglas Busvine, *Update 4—WTO Approves Russia's Membership After Marathon*, REUTERS (Dec. 16, 2011, 1:44 PM), <http://www.reuters.com/article/2011/12/16/trade-wto-russia-idUSL6E7NG2ZW20111216>.

litical acceptance and the more tangible benefit of increased global economic integration.<sup>4</sup>

Developed countries and their business interests also expect to benefit from Russia's WTO membership through improved investment conditions.<sup>5</sup> Nevertheless, such enthusiasm is tempered by Russia's poor record regarding intellectual property (IP) protection.<sup>6</sup> Weak IP enforcement enables Russian firms to copy patented technology and copyrighted material at great cost to rightholders in developed economies such as the United States and European Union (EU).<sup>7</sup> Such fears are particularly great following China's failure to uphold similar rights after its 2001 WTO accession.<sup>8</sup> As a result, negotiations leading up to Russia's accession vote focused on committing Russia to measures protecting IP rights.<sup>9</sup> Yet the question remains: when Russia's pledges are put into practice, will they be upheld?<sup>10</sup>

Part I of this Note addresses the historical and economic backdrop against which the likelihood of improved Russian IP enforcement must be assessed. It focuses on Russia's accession campaign and the role that its poor IP enforcement played in framing negotiations. Part II discusses the state of existing Russian IP protections, as well as changes proposed during bilateral pre-accession negotiations with developed countries. It lays out a framework for assessing Russia's potential compliance by comparison with China, which shares several common traits as a large country transitioning into a market economy. Part III ana-

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<sup>4</sup> See *Russia Becomes WTO Member After 18 Years of Talks*, BBC NEWS (Dec. 16, 2011, 16:29 ET), <http://www.bbc.co.uk/news/business-16212643>.

<sup>5</sup> See *Deere & Company Applauds Russia's Accession to WTO; Urges Swift Congressional Passage of Permanent Normal Trade Relations*, PR NEWSWIRE (Nov. 10, 2011), <http://www.prnewswire.com/news-releases/deere-company-applauds-russias-accession-to-wto-urges-swift-congressional-passage-of-permanent-normal-trade-relations-133623788.html>; Miles & Busvine, *supra* note 3.

<sup>6</sup> See David A. Dyker, *Will Russia Ever Join the WTO?*, 4 HAGUE J. DIPL. 83, 90 (2009).

<sup>7</sup> See OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2011 SPECIAL 301 REPORT 25–26 (2011) [hereinafter SPECIAL 301 REPORT], available at [http://www.ustr.gov/webfm\\_send/2841](http://www.ustr.gov/webfm_send/2841).

<sup>8</sup> See *Intellectual Property Theft in China & Russia: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. 153 (2005) (statement of Matthew T. Gerson, Senior Vice President, Public Policy and Government Relations, Universal Music Group) [hereinafter *Intellectual Property Theft Hearing*]; Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, ¶ 3.1, WT/DS362/R (Jan. 26, 2009) [hereinafter IP Protection Panel Report].

<sup>9</sup> See *Intellectual Property Theft Hearing*, *supra* note 8, at 157–58.

<sup>10</sup> See Brian A. Benko, Note, *Russia and Allofmp3.com: Why the WTO and WIPO Must Create a New System for Resolving Copyright Disputes in the Digital Age*, 1 AKRON INTELL. PROP. J. 299, 311–12 (2007).

lyzes whether Russia can live up to its commitments under the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and bilateral agreements, despite facing the challenges of economic development. Part III will further explore if and how technology-exporting nations can ensure that Russia fully respects their companies' IP rights through the WTO.

## I. BACKGROUND

### A. *Russia: From GATT Skeptic to WTO Applicant*

Following the turmoil of the Second World War, twenty-four states convened in 1947 to sign the General Agreement on Tariffs and Trade (GATT).<sup>11</sup> They sought mutually-beneficial reductions in trade barriers for the purpose of "raising standards of living . . . and expanding the production and exchange of goods."<sup>12</sup> Although many of the world's largest political and economic powers, including the United States, the United Kingdom, and France, signed the treaty, the Soviet Union (USSR) refused out of fear that opening its economy to international interference would threaten its commitment to a communist non-market economy.<sup>13</sup>

In the early 1980s, the USSR recognized that limited GATT participation might be preferable to isolation, and in 1986 petitioned for the right to participate in the then-upcoming Uruguay Round of trade negotiations.<sup>14</sup> The petition signaled to many in the West that the USSR was willing to loosen its restrictive trade policies.<sup>15</sup> Several nations, most notably the United States, nonetheless opposed Soviet participation as inconsistent with GATT principles, citing the USSR's goals of coercively extending non-market economic theories and political dominion over its neighbors.<sup>16</sup> Yet after the economic reforms of Soviet Premier Mikhail Gorbachev and his successor, Russian President Boris

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<sup>11</sup> General Agreement on Tariffs and Trade pmbl., Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. During the 1986–94 Uruguay Round, an amended version of the treaty—along with several subordinate agreements—became the primary document governing the World Trade Organization, which replaced the GATT. *See* Marrakesh Agreement Establishing the World Trade Organization, art. II, Apr. 15, 1994, 1867 U.N.T.S. 154, available at [http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/wto\\_agree\\_01\\_e.htm](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_01_e.htm).

<sup>12</sup> GATT, *supra* note 11, pmbl.

<sup>13</sup> *Id.*; PETER NARAY, *RUSSIA AND THE WORLD TRADE ORGANIZATION 2* (2001).

<sup>14</sup> NARAY, *supra* note 13, at 17–18.

<sup>15</sup> *See id.* at 18.

<sup>16</sup> *Id.* at 19.

Yeltsin, in the 1980s and 1990s, Western nations began to hope that the GATT system could generate market-oriented development in the USSR and its later former republics.<sup>17</sup> The GATT granted the Soviet Union observer status in 1990, and the WTO, established in 1994 to replace the GATT, permitted Russia to begin accession negotiations in December 1994 in an effort to encourage its transition to a market economy.<sup>18</sup>

Although initial projections expected Russian WTO membership by the end of the 1990s, a series of setbacks prevented a quick accession.<sup>19</sup> Attempts to rapidly transform Russia into a market economy under Yeltsin—particularly through tax reform and privatization—were opposed by the pro-communist Duma.<sup>20</sup> A sharp downturn subsequently crippled Russia's slow growth in 1998, revealing that reforms, especially those regarding financial and monetary policies, were not keeping pace with market expansion.<sup>21</sup> President Vladimir Putin reemphasized global integration after taking office in 2000, but reform has been slow.<sup>22</sup>

Despite delays caused by uneven market-oriented reforms, Russia entered negotiations with individual WTO members in 1998.<sup>23</sup> Outstanding Cold War tensions adversely affected this process.<sup>24</sup> Some Western nations maintained Cold War-era trade restrictions, like the Jackson-Vanik amendment to the U.S. Trade Act of 1974 that prevented normal trade relations with Russia.<sup>25</sup> Russia's often belligerent stance

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<sup>17</sup> See *id.* at 21–22.

<sup>18</sup> *Id.* at 20–22.

<sup>19</sup> See *id.* at 66–69. The shortest accession to the WTO was within three years of application, with the longest prior to Russia taking fifteen years. See *Handbook on Accession to the WTO: Introduction and Summary*, WORLD TRADE ORG., [http://wto.org/english/thewto\\_e/acc\\_e/cbt\\_course\\_e/intro\\_e.htm](http://wto.org/english/thewto_e/acc_e/cbt_course_e/intro_e.htm) (last visited Feb. 16, 2013); *Russia Becomes WTO Member After 18 Years of Talks*, *supra* note 4.

<sup>20</sup> See Christian L. Broadbent & Amanda M. McMillian, *Russia and the World Trade Organization: Will TRIPS Be a Stumbling Block to Accession?*, 8 DUKE J. COMP. & INT'L L. 519, 533–34 (1998).

<sup>21</sup> See Juliet Johnson, *The Banking System*, in RUSSIAN-EURASIAN RENAISSANCE?: U.S. TRADE AND INVESTMENT IN RUSSIA AND EURASIA 335, 344–46 (Jan H. Kalicki & Eugene K. Lawson eds., 2003) [hereinafter RUSSIAN-EURASIAN RENAISSANCE?].

<sup>22</sup> Suzanne S. Lotarski, *Expanding U.S.-Russian Trade*, in RUSSIAN-EURASIAN RENAISSANCE?, *supra* note 21, at 29, 32.

<sup>23</sup> See Broadbent & McMillian, *supra* note 20, at 533.

<sup>24</sup> See Lotarski, *supra* note 22, at 32–33.

<sup>25</sup> Jeremy R. Regal, Note, *Russia in the WTO: How Russia's Institutional Idiosyncrasies May Impede Its Ability to Abide by the WTO's Governing Cornerstones*, 9 UCLA J. INT'L L. & FOREIGN AFF. 97, 103–04 (2004). The application of the Jackson-Vanik Amendment to Russia would prevent Russia from receiving Most-Favored Nation (MFN) treatment from the United States, potentially subjecting its goods to high tariffs. See Lotarski, *supra* note 22, at 33. The United

toward neighboring states, most recently exemplified in its 2008 armed conflict with Georgia, created additional tensions that threatened to derail negotiations.<sup>26</sup> Nevertheless, after a Swiss-mediated October 2011 agreement between Georgia and Russia, the former became the final country to approve the latter's WTO accession.<sup>27</sup> Following a December 16, 2011 WTO Ministerial Conference vote, the Organization welcomed Russia into its ranks, completing an eighteen-year-long process.<sup>28</sup>

### B. *The Shared Benefits of Russian Accession*

Both Russia and prior WTO members have something to gain from Russia's accession.<sup>29</sup> To many within the country itself, membership in the WTO is a necessary geopolitical step.<sup>30</sup> Given Russia's prominent international standing—including permanent membership on the United Nations Security Council—its absence from the rule-making functions of the WTO is notable.<sup>31</sup> Despite Russia's continuing strategic relevance, its outsider status in the international trade regime has prevented it from gaining commensurate economic influence.<sup>32</sup>

Accession's relevance to Russian prestige is outweighed by its significance to trade.<sup>33</sup> Although Russia has experienced generally consistent economic growth since its 1998 economic downturn, it has largely done so by exporting oil rather than by creating a stable and competitive manufacturing sector.<sup>34</sup> Exclusion from the benefits of WTO membership, particularly the non-discriminatory guarantee of Most Favored Nation (MFN) status, has slowed Russia's export rates, presenting another obstacle to industrial growth.<sup>35</sup> Many in Russia view accession as

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States has granted Russia MFN treatment on an annual basis, but is unable to establish permanent normal trade relations while the amendment is in force. *Id.* at 32. Although President Barack Obama has not yet pushed for its repeal, he has indicated that such a move can be expected imminently. *Jackson-Vanik's End in 2012*, MOSCOW TIMES (Nov. 29, 2011), <http://www.themoscowtimes.com/business/article/jackson-vaniks-end-in-2012/448814.html>.

<sup>26</sup> Ellen Barry, *Russia Declares Deal to Join Trade Group*, N.Y. TIMES, Nov. 3, 2011, at A10.

<sup>27</sup> *See id.*

<sup>28</sup> *See* Jolly, *supra* note 1.

<sup>29</sup> *See* Director-General's Statement on Russia's Accession, *supra* note 2.

<sup>30</sup> *See* NARAY, *supra* note 13, at 87. At the accession ceremony, it was even suggested that the WTO adopt Russian as an official language alongside English, French, and Spanish; Director-General Lamy dismissed it as too costly to be feasible. *See* Jolly, *supra* note 1.

<sup>31</sup> *See* NARAY, *supra* note 13, at 87.

<sup>32</sup> *See* Regal, *supra* note 25, at 100.

<sup>33</sup> *See* NARAY, *supra* note 13, at 86–87.

<sup>34</sup> *See* Regal, *supra* note 25, at 101–02.

<sup>35</sup> *See* Dyker, *supra* note 6, at 86–87; Regal, *supra* note 25, at 106.

necessary to diversify and modernize Russia's economy,<sup>36</sup> and have developed policies to innovate and invest in infrastructure in order to do so.<sup>37</sup> Yet despite some foreign investment, Russia lacks the domestic capital to reinvest.<sup>38</sup> WTO membership could thus have two benefits for Russia's modernization efforts: it could increase both capital and technical information flowing into Russia.<sup>39</sup>

In general, other nations share Russia's optimism about the benefits of accession.<sup>40</sup> Although Russia has retained a high level of protection over many of its manufacturing and services sectors, WTO officials have hailed its accession package as a positive step in opening the market to long-term competition and modernization.<sup>41</sup> Foreign investors hope that accession, in providing transparency and predictable governing rules, will improve Russia's regulatory structure regarding trade.<sup>42</sup> Finally, the WTO's Dispute Settlement Body (DSB) ensures that, should Russia fail to live up to its new obligations, investor nations can find relief through litigation.<sup>43</sup>

### C. *The Ongoing IP Problem in Russia*

Despite the hope surrounding Russia's WTO membership, some investors remain hesitant due to the country's historically weak IP enforcement.<sup>44</sup> A grey market of unlicensed copying has consistently undermined the copyrights of foreign and domestic producers alike, with illicit DVDs and CDs constituting the majority of Russia's audiovisual purchases.<sup>45</sup> Software piracy is also rampant, with over seventy percent of all business software in Russia coming from illegal sources.<sup>46</sup> Additionally, Russian servers host numerous websites selling unauthorized

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<sup>36</sup> Dyker, *supra* note 6, at 97.

<sup>37</sup> *Id.*

<sup>38</sup> See Z. Blake Marshall, *Russia's Investment Outlook*, in *RUSSIAN-EURASIAN RENAISSANCE?*, *supra* note 21, at 9, 13–15; Regal, *supra* note 25, at 104.

<sup>39</sup> See Maxim Y. Medvedkov, *Regionalism or Globalization*, in *RUSSIAN-EURASIAN RENAISSANCE?*, *supra* note 21, at 43, 49–50.

<sup>40</sup> See NARAY, *supra* note 13, at 89.

<sup>41</sup> See Jolly, *supra* note 1.

<sup>42</sup> Kenneth Rapoza, *Russia Confirmed as WTO Member*, *FORBES* (Dec. 16, 2011, 10:02 AM), <http://www.forbes.com/sites/kenrapoza/2011/12/16/russia-confirmed-as-wto-member>.

<sup>43</sup> See WORLD TRADE ORG., *UNDERSTANDING THE WTO* 55 (2011); David E. Miller, *Combating Copyright Infringement in Russia: A Comprehensive Approach for Western Plaintiffs*, 33 *VAND. J. TRANSNAT'L L.* 1203, 1218 (2000).

<sup>44</sup> See *Intellectual Property Theft Hearing*, *supra* note 8, at 148–49.

<sup>45</sup> See *id.* at 115 (statement of Eric J. Schwartz, Vice President and Special Counsel, International Intellectual Property Alliance); Dyker, *supra* note 6, at 90.

<sup>46</sup> See Dyker, *supra* note 6, at 90.

copyrighted recordings, largely due to outdated laws.<sup>47</sup> While copyright infringement is the primary concern of IP rightholders, violators frequently infringe patents on products such as pharmaceuticals.<sup>48</sup> Foreign investors lose billions annually to Russian IP violations, with the U.S. film industry alone losing \$750 million.<sup>49</sup> Moreover, the Russian government itself loses hundreds of millions of dollars annually in tax revenue because of this unregulated audiovisual market.<sup>50</sup>

Many hope that accession will foster some improvement, as the WTO has accepted Russian assurances that its IP laws, as reformed through negotiation, conform to TRIPS—the WTO treaty specifying minimum levels of IP enforcement.<sup>51</sup> Yet the precedent set by China in the wake of its accession tempers such optimism.<sup>52</sup> Despite joining the WTO, China has largely failed to protect foreign copyrights and trademarks, and has abused patented technologies from foreign sources.<sup>53</sup> WTO membership has provided some constraints on Chinese practices, notably through other states' use of the DSB to rectify violations.<sup>54</sup> In 2007, the United States challenged several Chinese laws that it deemed inconsistent with TRIPS.<sup>55</sup> A WTO panel found that China's refusal to (1) enforce copyrights in unapproved works and (2) encourage the destruction of infringing works violated TRIPS.<sup>56</sup> Yet despite these DSB actions and direct bilateral consultations, China still leads the U.S. Trade Representative's (USTR) Priority Watch List documenting the countries that raise the most serious IP concerns.<sup>57</sup>

Given China's failure to protect foreign IP rightholders' interests despite its nominal compliance with TRIPS, negotiators were more pro-

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<sup>47</sup> See SPECIAL 301 REPORT, *supra* note 7, at 26.

<sup>48</sup> See Dyker, *supra* note 6, at 90.

<sup>49</sup> *Id.*

<sup>50</sup> *Intellectual Property Theft Hearing*, *supra* note 8, at 117 (statement of Eric J. Schwartz); Dyker, *supra* note 6, at 90.

<sup>51</sup> See Working Party on the Accession of the Russian Federation, *Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization*, ¶¶ 1352–1353, WT/ACC/RUS/70 (Nov. 17, 2011) [hereinafter *Working Party Report*].

<sup>52</sup> See *Intellectual Property Theft Hearing*, *supra* note 8, at 149 (statement of Matthew T. Gerson).

<sup>53</sup> SPECIAL 301 REPORT, *supra* note 7, at 21–22.

<sup>54</sup> IP Protection Panel Report, *supra* note 8, ¶¶ 8.1–4.

<sup>55</sup> *Id.* ¶ 3.1.

<sup>56</sup> See *id.* ¶¶ 7.1–.3, .191–.197, .395. The United States also challenged China's thresholds for criminal punishment of copyright and trademark violations, claiming that they did not meet the standards of TRIPS Article 61; the Panel disagreed, holding that they met all the applicable technical requirements. See *id.* ¶ 7.669.

<sup>57</sup> See SPECIAL 301 REPORT, *supra* note 7, at 19.



active in addressing IP concerns with Russia.<sup>58</sup> The United States led the effort to negotiate Russian concessions, concluding a market access agreement requiring greater efforts to dismantle illegal DVD and CD production, a crackdown on online distribution of copyrighted material, and several other promised measures.<sup>59</sup> To further demonstrate commitment to its IP obligations, Russia concluded a special side agreement with the United States in 2006 through letters between Russian Economic Development and Trade Minister German Gref and USTR Susan Schwab.<sup>60</sup> The Office of the USTR has already noted progress in some areas covered by this agreement, including promised customs reforms and optical disc factory licensing.<sup>61</sup> Nevertheless, Russia remains second only to China in IP piracy, leading the United States to maintain Russia on its Priority Watch List of trading partners with IP concerns.<sup>62</sup>

## II. DISCUSSION

### A. *The TRIPS Agreement*

#### 1. The History and Content of TRIPS

The TRIPS Agreement, adopted January 1, 1995, represents the WTO's effort to bring intellectual property under its purview.<sup>63</sup> Before TRIPS, there were several non-GATT treaties governing IP protection, including the Berne Convention for the Protection of Literary and Artistic Works, the Paris Convention for the Protection of Intellectual Property, and the Treaty on Intellectual Property with Respect to Integrated Circuits.<sup>64</sup> Nevertheless, developed countries, seeking to guarantee their nationals' IP rights in an increasingly globalized world, urged

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<sup>58</sup> See *Intellectual Property Theft Hearing*, *supra* note 8, at 158 (statement of Matthew T. Gerson).

<sup>59</sup> OFFICE OF THE U.S. TRADE REPRESENTATIVE, TRADE FACTS: RESULTS OF BILATERAL NEGOTIATIONS ON RUSSIA'S ACCESSION TO THE WORLD TRADE ORGANIZATION 1-3 (2006), available at <http://www.ustr.gov/sites/default/files/Results%20of%20Bilateral%20Negotiations.pdf>.

<sup>60</sup> See Letter 07-69 from Susan C. Schwab, U.S. Trade Representative, to H.E. German Gref, Minister, Ministry of Econ. Dev. and Trade of the Russ. Fed'n 1-6 (Nov. 19, 2006), available at <http://www.state.gov/documents/organization/96620.pdf> [hereinafter IP Side Letter].

<sup>61</sup> SPECIAL 301 REPORT, *supra* note 7, at 25-26.

<sup>62</sup> See *id.* at 26 (listing China and Russia separately to highlight special concerns).

<sup>63</sup> See Benko, *supra* note 10, at 317.

<sup>64</sup> See Broadbent & McMillian, *supra* note 20, at 524-28.

a new agreement containing comprehensive standards that would define and enforce those rights.<sup>65</sup>

To the developed world, TRIPS offered several advantages over the non-GATT treaties, which were—and still are—administered by the World Intellectual Property Organization (WIPO).<sup>66</sup> First, the Marrakesh Agreement made adherence to TRIPS a condition of WTO membership.<sup>67</sup> The Agreement thus created a uniform set of obligations for all countries seeking to benefit from the WTO's liberal trading regime, replacing the prior fragmented treaties.<sup>68</sup> In addition adopting a treaty providing more modern and rigorous protection standards would better safeguard developed countries' nationals' foreign investments.<sup>69</sup>

The main GATT provisions, contained in Articles I and III, guarantee the MFN and National Treatment norms, preventing one contracting party from discriminating against the products of another, either for its own benefit or the benefit of a third country.<sup>70</sup> Although these provisions safeguard the rights of the contracting parties, they also effectively prohibit contracting parties from enacting certain laws.<sup>71</sup> By contrast, TRIPS imposes an affirmative duty on states to adopt certain levels of protection.<sup>72</sup> Although TRIPS incorporates the MFN and National Treatment restrictions, its chief goal is to mandate that countries enact laws incorporating developed economies' IP norms.<sup>73</sup>

Part II of TRIPS defines the scope of protections that nations must accord to IP rightholders.<sup>74</sup> This Part lays out rules for protecting seven types of IP, including copyrights, trademarks, patents, and circuit designs.<sup>75</sup> Although TRIPS incorporates the definitions set forth in the previous WIPO treaties, its levels of protection exceed those definitions, mirroring developed countries' IP laws.<sup>76</sup> In addition to defining the scope of protected rights, TRIPS also mandates a minimum set of enforcement procedures that each country must make available to

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<sup>65</sup> See Mikhaelle Schiappacasse, Note, *Intellectual Property Rights in China: Technology Transfers and Economic Development*, 2 BUFF. INTELL. PROP. L.J. 164, 170 (2004).

<sup>66</sup> See Broadbent & McMillian, *supra* note 20, at 528; Benko, *supra* note 10, at 319–20.

<sup>67</sup> See Schiappacasse, *supra* note 65, at 169, 170 n.44.

<sup>68</sup> *Id.*

<sup>69</sup> See *id.* at 170, 172–73.

<sup>70</sup> *Id.* at 170 n.46.

<sup>71</sup> See *id.*

<sup>72</sup> See *id.* at 169–70.

<sup>73</sup> See Schiappacasse, *supra* note 65, at 169–70.

<sup>74</sup> Broadbent & McMillian, *supra* note 20, at 528.

<sup>75</sup> *Id.* at 529–30.

<sup>76</sup> See *id.*

rightholders.<sup>77</sup> States can bring DSB claims against others that fail to recognize a defined right or adequately protect it under domestic law.<sup>78</sup>

Trade specialists regard TRIPS obligations as unsuited to the growth needs of developing countries.<sup>79</sup> In theory, well-enforced IP rights would benefit development in the long run: they incentivize foreign investment and technology transfer, allowing countries to modernize their economies and strengthen their infrastructures.<sup>80</sup> A modern economy will lead to domestic innovation, which a strong IP regime will further foster.<sup>81</sup> Nevertheless, there are heavy short-term costs associated with strict IP enforcement.<sup>82</sup> Accepting developed countries' standards for IP rights necessitates recognizing foreign monopolies over critical technologies and processes.<sup>83</sup> Granting such monopolies to firms in developed countries permits them to reap the economic rewards of selling to the developing market while limiting the reciprocal benefits of access to technology.<sup>84</sup> Furthermore, the costs of implementing an adequate protection regime can also be prohibitive, particularly for developing countries that lack the necessary expertise or resources.<sup>85</sup>

Although developed economies' desire for stronger IP protection underlies much of TRIPS, the treaty contains several concessions to developing countries.<sup>86</sup> The Agreement's preamble acknowledges the need to account for "developmental and technological [policy] objectives" in an international IP regime, including the "flexibility . . . to cre-

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<sup>77</sup> See *id.* at 530. Countries are required to provide aggrieved rightholders with access to expeditious and fair civil proceedings, with relief available through injunction and adequate compensatory damages. Agreement on the Trade-Related Aspects of Intellectual Property Rights arts. 42, 44–45, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]. Both administrative and judicial bodies must have the capacity to order preliminary measures enjoining continued harm to a rightholder. *Id.* art. 50. Section 4 of Part III requires customs officials, either upon request or by their own initiative, to take action against infringing imports, including destroying or disposing of unlawful products. *Id.* arts. 58–59. Finally, TRIPS obliges countries to levy criminal sanctions against willful commercial-scale trademark and copyright violators. Broadbent & McMillan, *supra* note 20, at 546. Available punishments must include "imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity." TRIPS Agreement, *supra*, art. 61.

<sup>78</sup> See Benko, *supra* note 10, at 317–18.

<sup>79</sup> See Schiappacasse, *supra* note 65, at 171.

<sup>80</sup> See *id.* at 167.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 168–69.

<sup>83</sup> *Id.* at 168, 171.

<sup>84</sup> *Id.* at 171.

<sup>85</sup> See Schiappacasse, *supra* note 65, at 168–69.

<sup>86</sup> See *id.* at 170–71.

ate a sound and viable technological base.”<sup>87</sup> To that end, countries are free to implement TRIPS requirements as necessary to account for local conditions.<sup>88</sup> Furthermore, Article 31 gives countries facing national emergencies the right to issue compulsory technology licenses for other contracting parties’ patents.<sup>89</sup> Finally, given developing countries’ legal and technical disadvantages, Part VI allows for transitional periods, providing developing countries with additional time to conform to TRIPS requirements.<sup>90</sup> Despite these provisions, TRIPS requirements are generally believed to burden developing economies for the benefit of the developed.<sup>91</sup>

## 2. Dispute Settlement Under the WTO

Inclusion of IP rights under the WTO is particularly important because it gives aggrieved nations access to the DSB, and thus a remedy for infringement.<sup>92</sup> Countries believing that their benefits under the GATT have been “nullified or impaired”<sup>93</sup> by the actions of another member state may request consultations with the alleged infringer.<sup>94</sup> If the parties cannot reach a mutually agreeable solution, a panel of trade experts is convened to hear the case.<sup>95</sup> The panel issues a series of findings regarding the measure, as well as any recommendations for how the parties should bring their laws into conformity with WTO obligations.<sup>96</sup>

While the DSB is a relatively recent development, its approach to dispute settlement mirrors that of Articles XXII and XXIII of the GATT.<sup>97</sup> The DSB’s approach to treaty interpretation has been mostly conservative and textual, emphasizing the primacy of free market access.<sup>98</sup> Nevertheless, its jurisprudence has grown nuanced, stating that

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<sup>87</sup> TRIPS Agreement, *supra* note 77, pmb1.

<sup>88</sup> *See id.* art. 1, para. 1.

<sup>89</sup> *Id.* art. 31.

<sup>90</sup> *Id.* arts. 65–66.

<sup>91</sup> *See* Schiappacasse, *supra* note 65, at 171–72.

<sup>92</sup> *See* Benko, *supra* note 10, at 317.

<sup>93</sup> GATT, *supra* note 11, art. XXIII, para. 1. The “nullification or impairment” may arise from a measure that itself violates WTO treaties or that otherwise contravenes a benefit negotiated under the auspices of the WTO. *Id.*

<sup>94</sup> Benko, *supra* note 10, at 317–18.

<sup>95</sup> *See id.* at 318.

<sup>96</sup> *Id.*

<sup>97</sup> *See* Antonina Bakardjieva Engelbrekt, *The WTO Dispute Settlement System and the Evolution of International IP Law: An Institutional Perspective*, in *INTELLECTUAL PROPERTY RIGHTS IN A FAIR WORLD TRADE SYSTEM* 106, 108–12 (Annette Kur ed., 2011).

<sup>98</sup> *See, e.g.*, Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶¶ 89–90, WT/DS246/AB/R (Apr. 7, 2004) [hereinaf-

governments may violate the GATT with non-binding actions, and looking beyond stated justifications to find protectionist effects.<sup>99</sup> Some cases even suggest the DSB's capacity to advance liberal readings of WTO treaties, accounting for non-trade norms such as environmental protection.<sup>100</sup>

If a party feels that a case has been wrongly decided, it may request review by the Appellate Body, which reviews the panel records and corrects any erroneous legal interpretations.<sup>101</sup> Upon final resolution of the case, the Panel and/or Appellate Body reports are adopted, and the parties negotiate how the respondent may correct any problematic measures.<sup>102</sup> Should the respondent refuse to cooperate with the report, the complainant may enact retaliatory measures to enforce compliance.<sup>103</sup> Passing TRIPS under the WTO system thus creates a judicial process to resolve any perceived issues with IP enforcement.<sup>104</sup>

### B. *From Paper to Practice: Russia's Enforcement Issues*

#### 1. Civil and Criminal Enforcement Provisions

The Soviet government did not recognize IP rights.<sup>105</sup> The USSR first took notice of intellectual property rights—at the insistence of Western nations—as it attempted to integrate itself into the world economy.<sup>106</sup> Its first concerted effort to adapt IP law to international standards came in the early 1990s, after an agreement with the United States to sign the Berne Convention in exchange for normalizing trade relations.<sup>107</sup> Although the USSR collapsed shortly thereafter, Russia agreed

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ter European Communities Appellate Body Report] (holding, based on grammatical construction, that Enabling Clause provided a limited exception to broader MFN obligations).

<sup>99</sup> See Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled or Frozen Beef*, ¶¶ 145–148, WT/DS161/AB/R (Dec. 11, 2000) [hereinafter Korean Beef Appellate Body Report]; Report of the Panel, *Japan—Trade in Semi-Conductors*, ¶¶ 106, 117, L/6309 (Mar. 24, 1988), GATT B.I.S.D. (35th Supp.) at 116, 144 (1988).

<sup>100</sup> See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 129–131, WT/DS58/AB/R (Oct. 12, 1998).

<sup>101</sup> See Benko, *supra* note 10, at 318 n.167.

<sup>102</sup> *Id.* at 318.

<sup>103</sup> See *id.* at 319.

<sup>104</sup> See *id.* at 317.

<sup>105</sup> Susan Tiefenbrun, *Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects on International Trade: A Comparison*, 46 BUFF. L. REV. 1, 46 (1998).

<sup>106</sup> See Connie Neigel, *Piracy in Russia and China: A Different U.S. Reaction*, 63 LAW & CONTEMP. PROBS. 179, 184–86 (2000).

<sup>107</sup> *Id.* at 185.

to undertake similar commitments, passing its first copyright and trademark laws in 1992.<sup>108</sup>

Part IV of the Russian Civil Code contains the current Russian IP enforcement law.<sup>109</sup> Taking effect in January 2008, the law consolidated the existing separate laws governing patent, trademark, and copyright into one comprehensive code.<sup>110</sup> The norms governing Russia's IP regime, including definitions and enforcement policies, are mostly derived from international sources; this reflects an attempt to harmonize Russia's legal structure with its TRIPS obligations.<sup>111</sup>

In theory, Russian enforcement provisions under Part IV and the Criminal Code meet TRIPS requirements.<sup>112</sup> Section 1250 of the Civil Code subjects infringement of any IP right to strict liability, giving the rightholder remedies through the courts.<sup>113</sup> Additionally, the Criminal Code punishes violations of a certain severity with fines and imprisonment.<sup>114</sup> Smaller harms are subject to administrative action under Article 7 of the Code of Administrative Violations, including fines and con-

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<sup>108</sup> Tiefenbrunn, *supra* note 105, at 52.

<sup>109</sup> VLADIMIR ORLOV, INTRODUCTION TO BUSINESS LAW IN RUSSIA 231 (2011).

<sup>110</sup> *Id.*

<sup>111</sup> See *id.*; Greg Creer, *The International Threat to Intellectual Property Rights Through Emerging Markets*, 22 WIS. INT'L L.J. 213, 218 (2004).

<sup>112</sup> See UGOLOVNYI KODEKS ROSSIISKOI FEDERATSII [UK RF][Criminal Code] arts. 146–147, 180–183 (Russ.); Dyker, *supra* note 6, at 96–97.

<sup>113</sup> GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF][Civil Code] art. 1250 (Russ.). Courts generally grant financial remedies such as compensatory damages. *Id.* art. 1252. Certain copyright violations give the plaintiff the right to request, in lieu of actual damages, either double the market value of the infringing copies, double the value for which the right would have been purchased in the open market, or an amount in the court's discretion between 10,000 and 5,000,000 rubles. *Id.* art. 1301. Courts are also empowered to grant equitable remedies, including injunctions “preventing the actions infringing the right or creating a threat of its infringement,” and the destruction of any infringing goods and the materials used to create them. *Id.* art. 1252. Courts may also order the dissolution of any legal entity that it considers a repeat or severe infringer. *Id.* art. 1253.

<sup>114</sup> UGOLOVNYI KODEKS ROSSIISKOI FEDERATSII [UK RF][Criminal Code] arts. 146–147, 180–183 (Russ.). “[L]arge scale” copyright violations may be punished by a fine of up to 200,000 rubles (approximately \$7,000) or two years' imprisonment. *Id.* art. 146. “[E]specially large” violations, or those involving conspiracy or abuse of official power, are punishable by a 500,000 ruble (\$17,250) fine or five years' imprisonment. *Id.* The Code defines “large” scale as causing 50,000 rubles worth of harm, and “especially large” scale as causing 250,000 rubles. *Id.* Repeat trademark violations and those causing more than 1.5 million rubles (\$51,750) of damage can be punished by fines or corrective labor. *Id.* art. 180; *Working Party Report*, *supra* note 51, ¶ 1347.

fiscation of infringing materials.<sup>115</sup> In sum, Russian law provides adequate textual protection to satisfy its WTO obligations.<sup>116</sup>

## 2. Implementation Issues

Despite the strength of Russia's written law, weak implementation has generated criticism in developed countries.<sup>117</sup> The government has been slow to adapt the law, on account of the lack of nuanced norms governing IP.<sup>118</sup> The Russian website, AllofMP3.com, illustrates this problem.<sup>119</sup> The website, which sold copyrighted music to subscribers, maintained contracts with collection groups that claimed to forward royalties to the artists, satisfying Russian copyright law.<sup>120</sup> Yet the individual artists never granted consent or received any payment.<sup>121</sup> Such legal loopholes enabled AllofMP3.com to operate without being challenged in Russian court, thereby precluding foreign artists and rightholders from legal recourse.<sup>122</sup>

Furthermore, Russian courts have developed varying interpretations of the written law.<sup>123</sup> Russia is a civil law country: the only sources of official law are legislative codes and federal agency regulations.<sup>124</sup> Nevertheless, courts often turn to prior decisions when interpreting laws.<sup>125</sup> Russian law sorts cases into two classes: personal, heard in courts of general jurisdiction, and commercial, heard in specialized *arbitrazh* courts.<sup>126</sup> IP cases can arise in either, and the respective courts have developed distinct approaches, with *arbitrazh* courts more inclined to issue decisions favorable to IP rightholders.<sup>127</sup> This division makes case outcomes are harder to predict for foreign and domestic plaintiffs alike.<sup>128</sup>

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<sup>115</sup> КОДЕКС РОССИЙСКОЙ ФЕДЕРАЦИИ ОБ АДМИНИСТРАТИВНЫХ ПРАВОНАРУШЕНИЯХ [KOAP RF][Code of Administrative Violations] art. 7.12 (Russ.).

<sup>116</sup> See TRIPS Agreement, *supra* note 77, arts. 41–61.

<sup>117</sup> See Broadbent & McMillian, *supra* note 20, at 556.

<sup>118</sup> See Benko, *supra* note 10, at 304.

<sup>119</sup> See *id.* at 308–09.

<sup>120</sup> *Id.* at 306–07.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 308.

<sup>123</sup> See Miller, *supra* note 43, at 1207.

<sup>124</sup> ORLOV, *supra* note 109, at 8.

<sup>125</sup> *Id.* at 8–9.

<sup>126</sup> See Miller, *supra* note 43, at 1206, 1208. *Arbitrazh* courts form a wholly separate court system to resolve commercial disputes in Russia. See *id.* at 1208.

<sup>127</sup> See *id.* at 1207.

<sup>128</sup> See NARAY, *supra* note 13, at 60–61.

Inconsistent behavior by Russian administrative and criminal enforcement agencies has likewise created challenges for foreign IP rightholders.<sup>129</sup> Russian authorities do not engage in unannounced inspections of suspected infringement facilities, enabling counterfeiters to prepare for government scrutiny.<sup>130</sup> The state conducts raids only selectively;<sup>131</sup> when they reveal infringement, enforcement officials do not always prosecute and convict involved suspects.<sup>132</sup> Investigation of internet piracy is also limited.<sup>133</sup>

Criminal courts' leniency with IP violators exacerbates already-poor administrative enforcement.<sup>134</sup> Thresholds for criminal penalties are set in uncertain terms, such as "large scale" or "serious harm."<sup>135</sup> Although the government defines fixed amounts corresponding to many of these thresholds, other countries consider them insufficient to deter criminals.<sup>136</sup> Russian courts, particularly those in less-developed legal areas such as IP, also hesitate to apply maximum penalties, often suspending sentences altogether.<sup>137</sup> Furthermore, although courts routinely order the destruction of infringing works, they rarely act against the facilities used to produce them, enabling counterfeiters to repeat their violations.<sup>138</sup> Thus, the legislative imposition of more severe criminal penalties has not generated a commensurate reduction in piracy rates.<sup>139</sup>

The proliferation of Russian corruption and organized crime further complicates enforcement efforts.<sup>140</sup> The Soviet government frequently failed to provide its people with necessary goods and services.<sup>141</sup> Practices thus evolved to circumvent such shortages, including reliance on a strong criminal element to provide security and other

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<sup>129</sup> See *Intellectual Property Theft Hearing*, *supra* note 8, at 118 (statement of Eric J. Schwartz).

<sup>130</sup> See *id.*

<sup>131</sup> See SPECIAL 301 REPORT, *supra* note 7, at 26.

<sup>132</sup> See *Intellectual Property Theft Hearing*, *supra* note 8, at 143–44 (statement of Bonnie J.K. Richardson, Senior Vice President, International Policy, Motion Picture Association of America).

<sup>133</sup> See *id.* at 118 (statement of Eric J. Schwartz).

<sup>134</sup> See Regal, *supra* note 25, at 120–21.

<sup>135</sup> See UGOLOVNYI KODEKS ROSSIJSKOI FEDERATSII [UK RF][Criminal Code] art. 146 (Russ.).

<sup>136</sup> See *Working Party Report*, *supra* note 51, ¶¶ 1346–1349.

<sup>137</sup> See *Intellectual Property Theft Hearing*, *supra* note 8, at 143–44 (statement of Bonnie J.K. Richardson).

<sup>138</sup> See *id.* at 116 (statement of Eric J. Schwartz).

<sup>139</sup> SPECIAL 301 REPORT, *supra* note 7, at 25–26.

<sup>140</sup> See Broadbent & McMillian, *supra* note 20, at 556–57.

<sup>141</sup> See Regal, *supra* note 25, at 118.



goods.<sup>142</sup> Soviet officials also used their positions to procure goods for their personal supporters.<sup>143</sup>

This system of bribery persists in the Russian Federation, where the combination of heavy state-industrial interference and little oversight generates opportunities for private interests to influence government action.<sup>144</sup> This practice is particularly widespread in the judiciary, where lack of institutional independence and low compensation drive judges to grant favors.<sup>145</sup> Despite President Putin's efforts,<sup>146</sup> Russian corruption continues to undermine both domestic and foreign perception of the legal system as legitimate, and cripples Russian IP enforcement.<sup>147</sup>

### 3. Russian Pledges for Reform

Responding to both multilateral pressures from the WTO and bilateral conditions set by nations such as the United States, Russia has made several promises to increase its enforcement effectiveness.<sup>148</sup> These include agreeing to close administrative loopholes that allow counterfeit DVD manufacturers to renew their operating licenses and lease facilities on government-owned land.<sup>149</sup> The government will also grant customs officers greater authority and encouragement to investigate suspected infringement on their own initiative.<sup>150</sup> Russia has also increased enforcement through raids against infringing manufacturing and storage facilities, as well as action to reduce the number of pay-per-download websites selling copyrighted material.<sup>151</sup> The government will also apply criminal penalties at a level sufficient to deter future violations.<sup>152</sup>

The Office of the USTR confirms that Russia has delivered on many of these commitments.<sup>153</sup> In 2010, the Duma passed legislation to

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<sup>142</sup> See NARAY, *supra* note 13, at 63–64.

<sup>143</sup> See Regal, *supra* note 25, at 118.

<sup>144</sup> See *id.* at 119.

<sup>145</sup> *Id.* at 119–20.

<sup>146</sup> See Marshall, *supra* note 38, at 24–25. Early in his first term, President Putin undertook several measures to reduce corruption in Russian business and government, such as forcing the resignations of prominent officials and executives, and publicly prosecuting them. *Id.* He also greatly increased judges' salaries in an effort to curb judicial corruption. *Id.*

<sup>147</sup> See Regal, *supra* note 25, at 120–21.

<sup>148</sup> See IP Side Letter, *supra* note 60, at 2–3.

<sup>149</sup> See *id.* at 1–3.

<sup>150</sup> See *Working Party Report*, *supra* note 51, ¶ 1329.

<sup>151</sup> *Id.* ¶¶ 1335, 1339.

<sup>152</sup> *Id.* ¶ 1350.

<sup>153</sup> SPECIAL 301 REPORT, *supra* note 7, at 25.

account for the government's promises to the WTO, which included a Federal Law on Customs Regulation granting *ex officio* authority to customs officials, as well as amendments to the Law on Activity Licensing preventing the re-granting of licenses or leases to IP violators.<sup>154</sup> Enforcement agencies have also been more proactive in revoking the operating licenses of counterfeiters operating on government property.<sup>155</sup> Likewise, the government has taken increased action against domestic servers that host infringing websites, fulfilling its commitment to combat internet piracy.<sup>156</sup> The Duma also passed new legislation creating a specialized intellectual property court in late 2011.<sup>157</sup> Set to convene in early 2013, the court will feature thirty judges specializing in IP law, and will act as an appeals court (below the Supreme *Arbitrazh* Court) for infringement cases.<sup>158</sup> Several industries have already reported decreases in infringement, but it remains to be seen whether these changes will have a lasting widespread impact.<sup>159</sup>

### C. China: A Prediction of Russia's Future?

Trade officials have viewed Russia's WTO accession with greater scrutiny following China's failure to meet its TRIPS obligations.<sup>160</sup> Although the WTO and its dispute settlement provisions have effected some change in Chinese practice, they have stopped short of ordering that China enact specific criminal sanctions, leaving gaps in Chinese IP enforcement.<sup>161</sup> This has contributed to a growing sense that TRIPS alone may not be enough to correct Russia's IP issues.<sup>162</sup> The comparison is apposite: the Organization for Economic Cooperation and Development (OECD) has designated both as "BRIICS" economies,<sup>163</sup> a

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 26.

<sup>156</sup> See *Working Party Report*, *supra* note 51, ¶ 1339.

<sup>157</sup> Sergey Yuryev, *Court for Intellectual Property Disputes Established*, LEXOLOGY (Feb. 1, 2012), <http://www.lexology.com/library/detail.aspx?g=438ca47d-fe5f-4487-88ff-49df63dd2953>.

<sup>158</sup> See *id.*

<sup>159</sup> See SPECIAL 301 REPORT, *supra* note 7, at 25–26.

<sup>160</sup> See *Intellectual Property Theft Hearing*, *supra* note 8, at 158–59 (statement of Matthew T. Gerson).

<sup>161</sup> See IP Protection Panel Report, *supra* note 8, ¶ 7.669.

<sup>162</sup> See *Intellectual Property Theft Hearing*, *supra* note 8, at 153 (statement of Matthew T. Gerson).

<sup>163</sup> Raed Safadi & Ralph Lattimore, *Introduction*, in GLOBALISATION AND EMERGING ECONOMIES 9, 9 (Raed Safadi & Ralph Lattimore eds., 2008), available at <http://browse.oecdbookshop.org/oecd/pdfs/product/5108061e.pdf>. The acronym BRIICS stands for the six largest non-OECD economies: Brazil, Russia, India, Indonesia, China, and South Africa. *Id.*

set of large, still-developing countries that are not fully integrated into the world economy because of their historically closed markets.<sup>164</sup> Even among the BRIICS, Russia and China's respective post-socialist and socialist legacies of state control are particularly strong.<sup>165</sup> A closer investigation, however, reveals that the challenges and strengths facing Russia and China are not identical.<sup>166</sup>

### 1. Predicting the Success of Municipal IP Norm Implementation

Historically, neither China nor Russia has had a strong legal or cultural conception of intellectual property rights.<sup>167</sup> Both have developed IP laws as a response to foreign pressure to modernize and integrate their economies into the global system.<sup>168</sup> As a result, the success of each country's new IP regime depends on its ability to apply internationally defined norms to its local circumstances.<sup>169</sup>

Commentators have suggested that the degree to which global norms succeed in local implementation depends on both normative and structural factors.<sup>170</sup> The normative success of a given regime depends on the ways that the body charged with applying the regime interprets it in view of national standards.<sup>171</sup> An externally imposed value system is therefore inherently subject to local prejudices when interpreted by a local authority.<sup>172</sup> Factors influencing this process include local authorities' understandings of the regime's content, complementarity (the extent to which international normative values coincide with local needs and preferences), and the local community's perception of

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<sup>164</sup> See Razeen Sally, *Globalisation and the Political Economy of Trade Liberalisation in the BRIICS*, in *GLOBALISATION AND EMERGING ECONOMIES*, *supra* note 163, at 117, 136.

<sup>165</sup> *Id.* at 135–36. Although each enacted pre-WTO political and market reforms, China still operates many state-owned enterprises, and Russia maintains strong protection of its energy market. *See id.* at 129, 135.

<sup>166</sup> *See* Tiefenbrun, *supra* note 105, at 8–9.

<sup>167</sup> *See* Neigel, *supra* note 106, at 182, 190.

<sup>168</sup> *See id.* at 184–87, 193.

<sup>169</sup> *See* Tiefenbrun, *supra* note 105, at 1–2.

<sup>170</sup> *See* Pitman B. Potter, *Introduction: Selective Adaptation, Institutional Capacity, and the Reception of International Law Under Conditions of Globalization*, in *GLOBALIZATION AND LOCAL ADAPTATION IN INTERNATIONAL TRADE LAW* 3, 9–10 (Pitman B. Potter & Ljiljana Biukovic eds., 2011).

<sup>171</sup> *Id.* at 10.

<sup>172</sup> *See id.*

the normative values' legitimacy.<sup>173</sup> Local norm applications may thus give rise to varying selective adaptations.<sup>174</sup>

There may also be several structural impediments to implementing internationally based norms.<sup>175</sup> In developing economies, scarce resources or underdeveloped legal systems may prevent full norm enforcement.<sup>176</sup> In particular, consensus as to an organization's purpose, location, accountability to a central authority, and cohesion between its individuals may all play a role in its efficacy.<sup>177</sup> These factors, collectively known as "institutional capacity," can undermine even the most faithful interpretation of a norm.<sup>178</sup> Thus, assessing Russia's or China's likely compliance with their TRIPS obligations requires an examination of both their willingness and ability to comply.<sup>179</sup>

## 2. Selective Adaptation: Cultural and Economic Pressures

Russia's and China's enforcement issues have several common traits.<sup>180</sup> One explanation is that their respective societies distort the norm during translation to local circumstances.<sup>181</sup> Therefore, the two countries' historical treatment of IP and their present economic situations may shed some light on factors of perception, legitimacy, and complementarity.<sup>182</sup>

Historical denial of intellectual property rights is a common aspect of the Chinese and Russian enforcement problems.<sup>183</sup> The USSR and the People's Republic of China both, shortly after their establishment, acted quickly to suppress private property rights and intellectual freedoms.<sup>184</sup> This resulted in a complete erasure of the legal concept that individuals may control the products of their mental labor.<sup>185</sup> What few

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<sup>173</sup> *Id.* at 11–12.

<sup>174</sup> See, e.g., Wenwei Guan, *A Comparative Study of Olympic Marks Protection and Beyond: The United States, Canada, and China*, in GLOBALIZATION AND LOCAL ADAPTATION IN INTERNATIONAL TRADE LAW, *supra* note 170, at 256, 276–78 (finding differences in protection accorded to Olympic memorabilia by China and the West attributable to lack of emphasis on private rights in China).

<sup>175</sup> See Potter, *supra* note 170, at 12–13, 15.

<sup>176</sup> See *id.* at 12, 15.

<sup>177</sup> *Id.* at 12–13.

<sup>178</sup> See *id.* at 15.

<sup>179</sup> See Tiefenbrun, *supra* note 105, at 2.

<sup>180</sup> See *id.* at 9.

<sup>181</sup> See Potter, *supra* note 170, at 10.

<sup>182</sup> See *id.* at 11.

<sup>183</sup> See Neigel, *supra* note 106, at 182, 191.

<sup>184</sup> See *id.*

<sup>185</sup> See Tiefenbrun, *supra* note 105, at 11–12.

IP provisions did exist under Communism instead existed solely for the benefit of the state: the governments seized innovations that proved useful, while ignoring or banning those that it deemed potentially subversive.<sup>186</sup>

Even before Communism, Russia and China both lagged behind the West in recognizing individual IP rights, but Tsarist Russia developed IP protections far earlier than Imperial China,<sup>187</sup> passing its first copyright law in 1828 and extending protection to foreign authors in 1857.<sup>188</sup> Although Bolshevism eroded the economic basis for recognizing authors' IP rights, the USSR eventually reformed its laws to protect certain moral rights in authors' work, reflecting the vestiges of imperial-era IP protection.<sup>189</sup> By contrast, Imperial China never developed a similar sense of individual ownership of ideas, leaving publishing decisions to the Emperor as protector of public order.<sup>190</sup> Efforts to modernize the Chinese legal system led the pre-Communist government to adopt new IP laws, but the Communist revolution in 1949 erased them before they could gain any traction.<sup>191</sup> Thus, Chinese perception of IP focuses almost exclusively on the public good.<sup>192</sup>

Under these systems, public awareness of, and respect for, individuals' economic stakes in their creations dwindled.<sup>193</sup> The lack of public education regarding IP undermines both the accurate perception and the legitimacy of IP norms in both cultures, which treat the concept with ignorance and even skepticism.<sup>194</sup> Widespread public ignorance of the harm caused by IP violations has contributed to the growth of grey markets in both countries.<sup>195</sup> While consumers in a grey market are generally aware of counterfeit products' illegality, they willingly buy them, perceiving such counterfeiting as economically harmless.<sup>196</sup> This ignorance carries enforcement implications as well: rightholders complain that although both countries provide strict criminal penalties, neither country's authorities pursue them consistently enough to deter violation.<sup>197</sup>

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<sup>186</sup> *Id.*

<sup>187</sup> See Neigel, *supra* note 106, at 181–82, 190–91.

<sup>188</sup> *Id.* at 181.

<sup>189</sup> See Tiefenbrun, *supra* note 105, at 47.

<sup>190</sup> *Id.* at 10.

<sup>191</sup> *Id.* at 10–11.

<sup>192</sup> See Guan, *supra* note 174, at 274–75.

<sup>193</sup> See Tiefenbrun, *supra* note 105, at 11.

<sup>194</sup> See *id.* at 68.

<sup>195</sup> See Creer, *supra* note 111, at 218–20.

<sup>196</sup> See *id.* at 220.

<sup>197</sup> See *Intellectual Property Theft Hearing*, *supra* note 8, at 18–20 (statement of Myron Brilliant, Vice President, East Asia, U.S. Chamber of Commerce).

One cause of this is that the normative foundations of IP law are poorly understood by judges.<sup>198</sup> Enforcement authorities will less likely investigate such offenses, and judges and prosecutors will more likely treat suspected violators leniently.<sup>199</sup>

Economic factors also create obstacles to IP enforcement where the two are seen as non-complementary.<sup>200</sup> Chinese development strategies have enabled rapid economic progress.<sup>201</sup> As a result of former Chinese President Deng Xiaoping's gradual privatization and market opening,<sup>202</sup> China has managed to shift much of its economy to manufacturing.<sup>203</sup> Furthermore, modernization efforts and increased contact with Western technologies have enabled China to diversify by producing more sophisticated goods.<sup>204</sup> This has encouraged the growth of a market for consumer goods, both within and outside of China.<sup>205</sup> Chinese exports have grown both in volume and technological complexity.<sup>206</sup> By contrast, the stagnation of Russia's market during the 1990s has undermined its manufacturing sector, and its domestic market remains heavily import-reliant.<sup>207</sup>

The appearance of diverse consumer markets, though beneficial to China, created a series of additional pressures that have led to weakened IP enforcement.<sup>208</sup> Growth in demand for Chinese products gives China the incentive to boost its production by any means necessary, as continued demand for Chinese products largely relies on their cheap availability.<sup>209</sup> China's grey markets have taken advantage of this fact, using access to pirated foreign technology or counterfeit foreign trademarks to provide products at lower prices.<sup>210</sup> Increased availability of goods, particularly pharmaceuticals and electronics, has muted pub-

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<sup>198</sup> See *id.* at 19–20.

<sup>199</sup> See Creer, *supra* note 111, at 218–20, 229.

<sup>200</sup> See Potter, *supra* note 170, at 11–12.

<sup>201</sup> See Tiefenbrun, *supra* note 105, at 5.

<sup>202</sup> See *id.*

<sup>203</sup> See Malory Greene et al., *China*, in GLOBALISATION AND EMERGING ECONOMIES, *supra* note 163, at 373, 377–78.

<sup>204</sup> See *id.* at 378.

<sup>205</sup> See *Intellectual Property Theft Hearing*, *supra* note 8, at 9 (statement of Ted C. Fishman, Author and Journalist, China, Inc.).

<sup>206</sup> See Greene et al., *supra* note 203, at 379 tbl.10.7. In 1996, petroleum led exports at \$2.8 billion; by 2006, digital ADP machines and radio telephones led the list at \$40.4 billion and \$35.8 billion, respectively. *Id.*

<sup>207</sup> See *supra* notes 19–22, 34–38 and accompanying text.

<sup>208</sup> See *Intellectual Property Theft Hearing*, *supra* note 8, at 9 (statement of Ted C. Fishman).

<sup>209</sup> See *id.*

<sup>210</sup> See Creer, *supra* note 111, at 219–21.

lic outcry.<sup>211</sup> Because piracy satisfies consumer needs while enabling quick short-term manufacturing growth, authorities do not frequently perceive IP enforcement as within their economic interests.<sup>212</sup> Although Russian enforcers are generally ignorant of IP harms, they do not face the same immediate demands for domestic products that impede enforcement in China.<sup>213</sup>

### 3. Institutional Capacity

Russia, like China, also faces significant institutional barriers that undermine its efforts to protect IP.<sup>214</sup> Most of these issues arise from the common inability of each central government to police its outlying regions.<sup>215</sup> This decentralization allows issues of institutional location and cohesion to disrupt each government's enforcement mechanisms.<sup>216</sup>

Although both China and Russia base their governments on direction from strong central authority, their vast land masses have catalyzed decentralization.<sup>217</sup> The processes of decentralization, however, have been markedly different.<sup>218</sup> Russia's independence from the USSR's rigid central control structure generated a rebellion in which individual regions attempted to secure as much autonomy as possible.<sup>219</sup> By the end of the twentieth century, Russia contained eighty-nine substates claiming hegemony over their internal affairs.<sup>220</sup> During his first presidency, Vladimir Putin reduced this fragmentation, consolidating the smaller territories into seven districts governed from Moscow.<sup>221</sup> Yet most administration remains left to local authorities, with little federal oversight.<sup>222</sup>

China, by contrast, has permitted a degree of independence by design.<sup>223</sup> As part of its legal and economic reform prior to WTO acces-

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<sup>211</sup> See *id.* at 230.

<sup>212</sup> See *id.* at 235.

<sup>213</sup> See *supra* text accompanying notes 203–207.

<sup>214</sup> See Potter, *supra* note 170, at 13.

<sup>215</sup> See Pitman B. Potter, *Selective Adaptation of Economic Governance Norms in China: Transparency and Autonomy in Local Context*, in GLOBALIZATION AND LOCAL ADAPTATION IN INTERNATIONAL TRADE LAW, *supra* note 170, at 180, 182–83; Regal, *supra* note 25, at 123–24.

<sup>216</sup> See Potter, *supra* note 170, at 13–15.

<sup>217</sup> See Tiefenbrun, *supra* note 105, at 33–34; Regal, *supra* note 25, at 123–24.

<sup>218</sup> See NARAY, *supra* note 13, at 64–66; Potter, *supra* note 215, at 187.

<sup>219</sup> See Regal, *supra* note 25, at 122.

<sup>220</sup> See NARAY, *supra* note 13, at 64.

<sup>221</sup> See Regal, *supra* note 25, at 122.

<sup>222</sup> See *id.* at 124.

<sup>223</sup> See Potter, *supra* note 215, at 187.

sion, China began experimenting with looser state controls in order to foster foreign investment and privatization.<sup>224</sup> The government selected certain areas with a strong foreign commercial presence and granted economic privileges within those zones to test their effects on development; it also granted the authority to implement the privileges to suit local needs.<sup>225</sup> The government then expanded such policies, contingent upon their success, to other provinces.<sup>226</sup> Although recognizing autonomy's benefits for experimentation, China's government still values central control.<sup>227</sup> To ensure that outlying territories experiment for the good of the nation as a whole, the government conditions grants of resources on meeting centrally planned economic benchmarks.<sup>228</sup> This has increased both local responsiveness to federal cues and local authorities' initiative.<sup>229</sup>

Despite disparate causes, Russia and China face similar challenges from decentralization.<sup>230</sup> As the national governments of each country have ceded control to their local counterparts, different regions have developed at different rates.<sup>231</sup> In Russia, urban and resource-rich regions have developed deeper industrial roots.<sup>232</sup> China's coastal regions, benefitting from freer markets and more access to foreign capital, grew as trading centers, while inland regions still rely on agriculture.<sup>233</sup> Increased foreign investment in developed areas has brought greater contact with international practices and norms, leading to more litigation over such practices and, thus, more judicial expertise.<sup>234</sup> Furthermore, central governments often grant institutions in economically-developed

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<sup>224</sup> Cf. *id.* at 182 (citing centrally planned experimentation and increased local authority to launch development programs as alternative explanations for economic innovation in China).

<sup>225</sup> *See id.*

<sup>226</sup> *Id.*

<sup>227</sup> *See id.* at 183.

<sup>228</sup> *See* Pitman B. Potter, *Courts in Xinjiang: Institutional Capacity at China's Periphery*, in *NEW COURTS IN ASIA* 350, 359 (Andrew Harding & Penelope (Pip) Nicholson eds., 2010).

<sup>229</sup> *See id.*

<sup>230</sup> *See* NARAY, *supra* note 13, at 60–61; Potter, *supra* note 215, at 182–83.

<sup>231</sup> *See* NARAY, *supra* note 13, at 66; Potter, *supra* note 215, at 188.

<sup>232</sup> NARAY, *supra* note 13, at 66.

<sup>233</sup> *See* Potter, *supra* note 215, at 188.

<sup>234</sup> *See, e.g.*, Miller, *supra* note 43, at 1207 tbl.1.



regions greater attention and support.<sup>235</sup> Predictable enforcement therefore depends upon the region concerned.<sup>236</sup>

The independence of individual localities further impacts the institutional cohesion of each country's enforcement authorities.<sup>237</sup> Both Russia and China suffer from heavy corruption, albeit with different causes.<sup>238</sup> In Russia, a legacy of government inefficiency generated a fertile ground for mafia interests.<sup>239</sup> In China, the institution of *guanxi*, or informal favor-trading, has its roots in Confucian culture and its system of interwoven duties.<sup>240</sup> Beyond overt corruption, IP owners also suffer from the lack of oversight through local protectionism, particularly in isolated or underdeveloped regions.<sup>241</sup> Bureaucrats currying local favor are more likely to overlook infringement or minimize enforcement if they see doing so as benefitting local interests—often at outsiders' expense.<sup>242</sup>

### III. ANALYSIS

#### A. *China and Russia: Interpreting Global IP Norms*

The IP enforcement systems in Russia and China face similar normative challenges and institutional defects.<sup>243</sup> The contrast between normative and institutional challenges, however, sheds greater light on Russia's probable strengths and shortcomings in the years to come.<sup>244</sup> Although Russia's economic development strategy ensures that it will prioritize IP, the inability of federal bodies to constrain illegal actors poses a greater threat.<sup>245</sup> As China has demonstrated, these institutional challenges are harder to correct by either internal or external means than are normative challenges.<sup>246</sup>

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<sup>235</sup> See, e.g., Connie B. Carter, *Specialized Intellectual Property Courts in the People's Republic of China: Myth or Reality?*, in *NEW COURTS IN ASIA*, *supra* note 228, at 101, 107 (noting greater investment in the judiciary in large cities and Special Economic Zones based on need).

<sup>236</sup> See SPECIAL 301 REPORT, *supra* note 7, at 26; Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901, 946–47 (2006).

<sup>237</sup> See Potter, *supra* note 215, at 191–92; Regal, *supra* note 25, at 122.

<sup>238</sup> See *infra* notes 239–40 and accompanying text.

<sup>239</sup> See Regal, *supra* note 25, at 118.

<sup>240</sup> Paul D. Carrington, *The International Movement to Stop Corruption: Should China Join?*, *US-CHINA L. REV.*, May 2010, at 1, 4–5.

<sup>241</sup> See Regal, *supra* note 25, at 125.

<sup>242</sup> See *id.* at 124–25.

<sup>243</sup> See *supra* Part II.C.2–3.

<sup>244</sup> See Potter, *supra* note 170, at 15–16.

<sup>245</sup> See *infra* Part III.A–B.

<sup>246</sup> See *infra* Part III.D.2.

## 1. Cultural Perceptions and Attitudes

Given the current state of IP awareness in both Russia and China, it is unlikely that the former will be more successful at establishing a consistent system of enforcement due to perception of norms as more legitimate.<sup>247</sup> Contemporary leaders in both countries have publicly taken steps to signal their understanding and appreciation of strong IP enforcement.<sup>248</sup> Presidents Putin, Medvedev, and several economic ministers have all espoused strong IP protections as part of their plan to bolster a nascent technology industry in Russia.<sup>249</sup> China's "Special Campaign" of increased raids and prosecutions reflects a similar commitment at the upper echelons of government to more systematic enforcement.<sup>250</sup> Nevertheless, public interest in pursuing IP violators remains low in both countries, largely due to the lack of IP protection under socialism.<sup>251</sup>

As growing exposure to foreign trade increases public awareness about the economic impact of piracy, there may be more widespread grassroots support for increased enforcement.<sup>252</sup> The pre-Communist histories of Russian and Chinese IP laws indicate that such development may occur faster in Russia than in China.<sup>253</sup> Despite the recent absence of Western economic justifications for IP, Russia had, even during the later Soviet era, some respect for individual authors' moral rights.<sup>254</sup> Because of this history, the Russian public will likely be more receptive to educational efforts, and thus quicker to embrace global IP norms.<sup>255</sup> In the short term, however, such historical distinctions are unlikely to cause more consistent enforcement, as neither the Russian nor the Chinese people appear responsive toward Western ideals of individual IP ownership.<sup>256</sup>

## 2. Can IP Rights Coexist with Economic Needs?

Even if the Russian public would recognize the need for greater IP enforcement, its willingness to advocate for it may still be tempered by

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<sup>247</sup> See Tiefenbrun, *supra* note 105, at 52–53.

<sup>248</sup> See SPECIAL 301 REPORT, *supra* note 7, at 19, 25.

<sup>249</sup> See Dyker, *supra* note 6, at 97.

<sup>250</sup> See SPECIAL 301 REPORT, *supra* note 7, at 19.

<sup>251</sup> See Tiefenbrun, *supra* note 105, at 9.

<sup>252</sup> See Creer, *supra* note 111, at 238.

<sup>253</sup> See Neigel, *supra* note 106, at 181; Tiefenbrun, *supra* note 105, at 10.

<sup>254</sup> Tiefenbrun, *supra* note 105, at 47–48.

<sup>255</sup> See Creer, *supra* note 111, at 236.

<sup>256</sup> See Tiefenbrun, *supra* note 105, at 68.

economic reality.<sup>257</sup> The willingness of a local authority to give a norm full effect requires not only a perception of legitimacy, but also convergence with present goals.<sup>258</sup> Given the countries' disparate economic conditions, the Chinese experience may not provide an ideal indicator of Russian success.<sup>259</sup> Russia's plans for growth, however, will likely create similar pressures to those that China faces.<sup>260</sup>

Russia does not currently face the same type of demand for its manufactured goods that China faces.<sup>261</sup> Rapid development initiatives' failures deprived Russia of a similar industrial base.<sup>262</sup> Counterfeiting and trademark violations are therefore not as endemic as those in China: Russian infringement is more concentrated in entertainment and software.<sup>263</sup> Because the demand for grey-market products is limited to a few select goods, attempts to eradicate those markets may prove less of a strain on the Russian economy, making the outlook more optimistic.<sup>264</sup>

Nevertheless, Russia's entry into the WTO and its plans to modernize suggest that it will likely develop a greater need for foreign IP.<sup>265</sup> Russian strategies for modernization include a heavy reliance on foreign investment and the introduction of improved technology.<sup>266</sup> This strategy, along with new opportunities resulting from integration into the global market, incentivizes appropriation of foreign IP to benefit economic development.<sup>267</sup> Should Russian local authorities adopt as single-minded an attitude as have their Chinese counterparts, Russia may soon find itself with a manufacturing sector that, like China's, relies on misappropriated IP.<sup>268</sup>

There are indications that Russia intends to avoid such an outcome.<sup>269</sup> Presidents Putin and Medvedev have both touted the importance of reinvestment in Russian educational and research institutions as a primary use of foreign capital, providing the basis for long-term

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<sup>257</sup> See Potter, *supra* note 170, at 11–12.

<sup>258</sup> *Id.*

<sup>259</sup> See SPECIAL 301 REPORT, *supra* note 7, at 21, 25–26.

<sup>260</sup> See *id.*; Dyker, *supra* note 6, at 98.

<sup>261</sup> See *Intellectual Property Theft Hearing*, *supra* note 8, at 9 (statement of Ted C. Fishman) (explaining China's lack of incentive to protect IP due to reliance on manufactured goods).

<sup>262</sup> See *supra* notes 34–38 and accompanying text.

<sup>263</sup> See SPECIAL 301 REPORT, *supra* note 7, at 25–26.

<sup>264</sup> Cf. Creer, *supra* note 111, at 219–20 (citing the breadth of China's counterfeiting problem as an impediment to reform).

<sup>265</sup> See *id.* at 235.

<sup>266</sup> See Dyker, *supra* note 6, at 97–98.

<sup>267</sup> See Creer, *supra* note 111, at 235.

<sup>268</sup> See *Intellectual Property Theft Hearing*, *supra* note 8, at 9 (statement of Ted C. Fishman).

<sup>269</sup> See Dyker, *supra* note 6, at 97.

growth.<sup>270</sup> China has pursued similar investment strategies, but its culture has long embraced the idea of repurposing Western advances to strengthen the state.<sup>271</sup> Modern Chinese IP law reflects this preference for appropriation through “indigenous innovation” policies that predicate government benefits on the assignment of IP rights to a Chinese firm.<sup>272</sup> By contrast, even as its economy flagged during the Soviet era, Russia has proven capable of leveraging its resources to invent technologies that challenged those of U.S. innovators.<sup>273</sup> Whether Russia ultimately lives up to its enforcement pledges could hinge on its ability to continue to do so.<sup>274</sup> In sum, if Russia can harness foreign investment and develop its own IP, then enforcement of TRIPS standards will prove more economically appealing than adopting the Chinese model, basing industrialization on foreign innovation.<sup>275</sup>

### B. *China and Russia: Implementation Issues*

Although China’s development paints a somewhat dismal picture for the prospects of Russian selective adaptation, the latter’s greater cultural appreciation for IP and a strong history of domestic invention make it more likely to embrace TRIPS norms.<sup>276</sup> China’s enforcement issues, however, do not stem solely from misapplication of these norms.<sup>277</sup> Institutional capacity also determines the extent to which Russia will follow in China’s footsteps.<sup>278</sup>

Although disparate routes to decentralization have generated similar challenges, China’s more systematic path has allowed it to develop unique tools to combat those challenges.<sup>279</sup> China’s strategy of boosting economic development through limited autonomy forced it to create a lever for central control through its incentive system.<sup>280</sup> In theory, the economic benchmarks China currently uses to drive innovation could

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<sup>270</sup> *Id.*

<sup>271</sup> *Cf.* Tiefenbrun, *supra* note 105, at 39–40, 45–46 (citing economic needs and legitimization of copying as factors fueling Chinese non-enforcement).

<sup>272</sup> *See* SPECIAL 301 REPORT, *supra* note 7, at 23.

<sup>273</sup> *See* Tiefenbrun, *supra* note 105, at 46.

<sup>274</sup> *See* Dyker, *supra* note 6, at 97–100.

<sup>275</sup> *See id.* at 98.

<sup>276</sup> *See supra* Part III.A.1–2.

<sup>277</sup> *See supra* notes 223–236 and accompanying text.

<sup>278</sup> *See* Potter, *supra* note 170, at 12.

<sup>279</sup> *See* Potter, *supra* note 215, at 187–88.

<sup>280</sup> *See* Potter, *supra* note 228, at 359.

be converted to reflect IP norms.<sup>281</sup> With resources and bonuses as a reward for prioritizing IP crimes, peripheral regions would be more inclined to educate themselves in IP and take enforcement actions that may be to the short-term disadvantage of local interests.<sup>282</sup> Russia, having fragmented in a less-concerted manner, has not yet adapted a similar means of promoting local compliance with federal priorities, making it less likely to be able to compel local action.<sup>283</sup>

Whether China's incentive system has actually proven a boon or bane to IP enforcement is debatable.<sup>284</sup> It has provided a means for China to promote institutional cohesion despite the temptation to favor local interests.<sup>285</sup> China's drive for economic development, however, has suppressed other government priorities.<sup>286</sup> Because China has used its incentives as rewards based solely on economic criteria, human rights, the environment, and IP protection have been overlooked when their enforcement has not aligned with economic growth.<sup>287</sup> Yet such problems seem more to reflect selective adaptation than institutional capacity: they pertain to the ends that China seeks through coordinating regional action, not its ability to coordinate.<sup>288</sup> Due to its incentives-focused approach, China's institutional capacity to coordinate local policies is significantly more advanced than Russia's.<sup>289</sup>

### C. *The Value of Russian Reform Commitments*

The causes, both philosophical and practical, of China's failure to properly enforce IP can, to some extent, predict Russia's success in reforming its IP regime.<sup>290</sup> Differences in the two countries' economic development suggest that Russia will encounter fewer difficulties in its selective adaptation of TRIPS.<sup>291</sup> At the same time, China's institutions have evolved to permit it to combat its incapacities in ways that Russia

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<sup>281</sup> Cf. Potter, *supra* note 215, at 190–91 (citing uses of China's center-driven Western Development Programme to further social interests).

<sup>282</sup> See *id.*

<sup>283</sup> See Regal, *supra* note 25, at 122–23.

<sup>284</sup> See Potter, *supra* note 228, at 359–60.

<sup>285</sup> Cf. *id.* (criticizing the pattern of conditioning resources on performance of central economic goals as unduly constraining local action).

<sup>286</sup> See Potter, *supra* note 215, at 191.

<sup>287</sup> See *id.*

<sup>288</sup> *Id.* at 189–91.

<sup>289</sup> See, e.g., Potter, *supra* note 228, at 359.

<sup>290</sup> See Tiefenbrun, *supra* note 105, at 68.

<sup>291</sup> See *supra* notes 261–275 and accompanying text.

cannot.<sup>292</sup> Therefore, in assessing the probable effects of Russia's reform attempts, its ability to guarantee enforcement will carry greater weight than its willingness to do so.<sup>293</sup>

Russia's institutional capacity issues will affect its ability to implement its legislative reforms.<sup>294</sup> By their very nature, legislative actions reflect a government's willingness to undertake change; whether it can implement such change successfully is still subject to questions of capability.<sup>295</sup> Russia has attempted several legislative efforts to plug enforcement loopholes, such as refusing to renew operating licenses and leases, and encouraging greater independent action by customs agents.<sup>296</sup> Of these two, license revocation is less likely impacted by institutional issues like corruption and local prejudice.<sup>297</sup> Because Russia's factory licensing regime is administered by a central agency, rather than local enforcers, it receives greater oversight and is better isolated from regional concerns.<sup>298</sup> Yet the regime suffers from a major weak link: identifying violators still requires individual prosecutors operating locally.<sup>299</sup> This threshold requirement lays the groundwork for corruption that may prevent central agencies from ever addressing such infringing activities.<sup>300</sup>

The expansion of customs officers' authority may prove more susceptible to institutional defects.<sup>301</sup> Although the new Russian legislation expands customs officers' *ex officio* investigative authority and encourages its use, the choice of whether or not to investigate rests with individual local actors.<sup>302</sup> While the combination of increased discretion and decreased scrutiny may enable more efficient enforcement that is unfettered by excessive bureaucracy,<sup>303</sup> it creates ample potential for local interests and organized crime to intervene.<sup>304</sup> Further reflecting

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<sup>292</sup> See *supra* notes 279–289 and accompanying text.

<sup>293</sup> See Potter, *supra* note 170, at 15.

<sup>294</sup> See *id.* at 12.

<sup>295</sup> Cf. *id.* (cautioning against the use of abstract predictions of compliance with global norms that ignore local political and socioeconomic conditions).

<sup>296</sup> See SPECIAL 301 REPORT, *supra* note 7, at 25.

<sup>297</sup> See *id.* at 26; Potter, *supra* note 170, at 13–14.

<sup>298</sup> See *Working Party Report*, *supra* note 51, at 554 tbl.35.

<sup>299</sup> See UGOLOVNO-PROTSESSUAL'NYI KODEKS ROSSIJSKOI FEDERATSII [UPK RF][Criminal Procedural Code] arts. 146–151 (Russ.).

<sup>300</sup> See Regal, *supra* note 25, at 118–19.

<sup>301</sup> See *id.*

<sup>302</sup> See *Working Party Report*, *supra* note 51, ¶¶ 1328–1329.

<sup>303</sup> See *id.* ¶ 1328.

<sup>304</sup> See Regal, *supra* note 25, at 118–19. This combination has already led to increased corruption in the legal system, which is perceived as crooked by the Russian public at large. *Id.* at 119–20.

selective adaptation issues, customs agents may simply refuse to attach priority to IP infringement because they do not recognize its harms.<sup>305</sup> Russia's expansion of individual officers' authority will thus likely exacerbate problems of local implementation.<sup>306</sup>

Russian pledges to ramp up enforcement through increased raids generate similar institutional and adaptation issues.<sup>307</sup> Corruption, be it by the government or the mafia, remains capable of derailing planned raids or dissuading judges from punishing local violators.<sup>308</sup>

In addition, Russian judges may refuse to penalize infringement heavily because they do not find it economically rational.<sup>309</sup> Central authorities' commitment to increased raids suggests that the government intends to ensure these raids' efficacy, and a strong federal push by Putin could further pressure local authorities to resist corruption.<sup>310</sup> China's "Special Campaign," however, has likewise increased raids without a commensurate increase in convictions.<sup>311</sup> Although some difficulties can be attributed to divergence from economic goals, the fact that China has not been able to ensure consistent local compliance through its incentive system suggests that Russia's attempts to coordinate will meet even less success.<sup>312</sup>

Finally, although the proposed IP court will be insulated from many of the most problematic institutional issues, its ability to remedy those issues will be limited.<sup>313</sup> A unified IP court can solve the challenge of adapting global norms for national use.<sup>314</sup> By setting forth common interpretations of IP norms and transposing them into Russian law, the court can remove uncertainty caused by local courts' differing interpretations.<sup>315</sup> Local judges will then benefit from the guidance of a more experienced bench, and litigants likewise will benefit from more consis-

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<sup>305</sup> See Tiefenbrun, *supra* note 105, at 68.

<sup>306</sup> See Regal, *supra* note 25, at 119.

<sup>307</sup> See Potter, *supra* note 170, at 14–15; Regal, *supra* note 25, at 123.

<sup>308</sup> See Regal, *supra* note 25, at 119–20.

<sup>309</sup> See Tiefenbrun, *supra* note 105, at 68.

<sup>310</sup> Cf. Vlad Frants, Comment, *Russian Corporate Law: Is "Self-Enforcement" Still the Way to Go?*, 13 UCLA J. INT'L L. & FOREIGN AFF. 435, 460–61 (2008) (crediting top-down commitment of the first Putin government with reducing corruption in Russia).

<sup>311</sup> See SPECIAL 301 REPORT, *supra* note 7, at 20.

<sup>312</sup> See Regal, *supra* note 25, at 122–23.

<sup>313</sup> See ORLOV, *supra* note 109, at 9–10; Eugene A. Arieovich & Denis I. Khabarov, *New IP Court Aims to Improve Judicial System*, INT'L L. OFF. (Jan 9, 2012), <http://www.internationalawoffice.com/Newsletters/Default.aspx> (search Jurisdiction: "Russia" and Work Area: "Intellectual Property"; then select "New IP Court Seeks to Improve Patent System" from list).

<sup>314</sup> See Carter, *supra* note 235, at 111–12.

<sup>315</sup> See *id.*

tent results.<sup>316</sup> Furthermore, as a second-level appeals court, the IP court should operate centrally above the easy influence of private parties.<sup>317</sup>

This isolation, however, will limit the court's ability to effect changes in the law.<sup>318</sup> Available only at the second level of review, the court hears a limited range of close cases, and can only respond to violations long after they have occurred.<sup>319</sup> Moreover, Russia's civil legal system attaches no binding force to the interpretations of most courts, so local officials can still ignore decisions that do not coincide with their personal interests.<sup>320</sup> Therefore, although the new court should foster the development of uniform and modern methods of decision-making, its function within the broader Russian civil system effectively limits its corrective role.<sup>321</sup>

#### D. *The Role of the WTO: Will TRIPS Matter?*

IP industry leaders in the developed world have encouraged Russia's accession to the WTO, in part because the organization provides a central forum for grievances through the DSB.<sup>322</sup> Under the WIPO treaties, individual rightholders had the capacity to petition on their own behalf, and individual governments were able to institute unilateral actions such as sanctions or public denunciation.<sup>323</sup> The DSB, by contrast, enables countries to bring the multilateral force of the WTO against noncompliant governments.<sup>324</sup> The DSB's ultimate ability to satisfy that role for Russia's TRIPS obligations, however, is doubtful.<sup>325</sup> The DSB has not evolved to the point where it can effectively address the combination of TRIPS's uniquely affirmative nature and the likely causes of Russian noncompliance.<sup>326</sup> Thus, IP rightholders may face the same insufficient recourse that they did prior to accession.<sup>327</sup>

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<sup>316</sup> See *id.*

<sup>317</sup> See Arieievich & Khabarov, *supra* note 313.

<sup>318</sup> See ORLOV, *supra* note 109, at 9–10.

<sup>319</sup> See Arieievich & Khabarov, *supra* note 313.

<sup>320</sup> See ORLOV, *supra* note 109, at 9–10.

<sup>321</sup> See *id.*; Arieievich & Khabarov, *supra* note 313.

<sup>322</sup> See Elmira Danelyan, *Russia's Long Journey to the WTO: Whose Interests Will Be Served if Russia Joins the World Club?*, LANDSLIDE, Mar.–Apr. 2009, at 52, 54–55.

<sup>323</sup> See Benko, *supra* note 10, at 315–17; see, e.g., Tiefenbrun, *supra* note 105, at 30 (noting threats of U.S. sanctions in retaliation against Chinese piracy).

<sup>324</sup> See Benko, *supra* note 10, at 315–17.

<sup>325</sup> See *id.* at 324.

<sup>326</sup> See Yu, *supra* note 236, at 931–34.

<sup>327</sup> See *id.* at 931–32, 937–38.



## 1. TRIPS Obligations and the Impact of the DSB

Though it was negotiated and passed simultaneously with several other agreements, TRIPS establishes rights different from those guaranteed by the GATT and other WTO treaties.<sup>328</sup> The DSB has proven quite effective at enforcing prohibitive norms.<sup>329</sup> Its conservative textualism, however, having developed to restrict state action, may not prove helpful in enforcing affirmative TRIPS obligations.<sup>330</sup>

The case of *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights* illustrates the challenge of applying traditional WTO modes of dispute settlement to TRIPS's positive requirements.<sup>331</sup> DSB panels' textualist approach limits their ability to find violations where the law, as written, fulfills the treaty's minimum requirements.<sup>332</sup> Yet many TRIPS standards are phrased qualitatively and are not subject to rigid interpretation.<sup>333</sup> For instance, Article 59 merely requires that customs officials be authorized to destroy infringing goods.<sup>334</sup> Accordingly, because China authorized the destruction of infringing goods, the Panel did not consider China to have violated that provision, regardless of actual enforcement practice.<sup>335</sup> Only where China's laws failed to comply with literal TRIPS terms, such as allowing counterfeit trademarked goods into commerce after the counterfeit mark was removed, did the panel rule that China violated the agreement.<sup>336</sup>

In addition, DSB remedies may not prove sufficient to protect rightholders.<sup>337</sup> Although commentators acknowledge that the DSB is more judicial in character than the GATT system, elements of mandated consultation and negotiated implementation remain.<sup>338</sup> Protracted negotiations can weaken the effect of a panel decision, prolonging a measure's economic harm while the parties attempt to negotiate a solu-

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<sup>328</sup> See *supra* notes 70–78 and accompanying text.

<sup>329</sup> See Yoshifumi Fukunaga, *Enforcing TRIPS: Challenges of Adjudicating Minimum Standards Agreements*, 23 BERKELEY TECH. L.J. 867, 909–10 (2008).

<sup>330</sup> See, e.g., IP Protection Panel Report, *supra* note 8, ¶ 7.669 (refusing to consider Chinese criminal thresholds a violation because they were not unreasonable for the Chinese economy).

<sup>331</sup> See *id.*

<sup>332</sup> See Fukunaga, *supra* note 329, at 907–08; see, e.g., European Communities Appellate Body Report, *supra* note 98, ¶¶ 89–90 (considering textual relationships before the object and purpose of the treaty).

<sup>333</sup> See Benko, *supra* note 10, at 325.

<sup>334</sup> See TRIPS Agreement, *supra* note 77, art. 59.

<sup>335</sup> See IP Protection Panel Report, *supra* note 8, ¶¶ 7.352–.355.

<sup>336</sup> See *id.* ¶¶ 7.392–.394.

<sup>337</sup> See Fukunaga, *supra* note 329, at 909–10.

<sup>338</sup> See Engelbrekt, *supra* note 97, at 110–11, 135.

tion.<sup>339</sup> Furthermore, respondents are not required to compensate complainants, so violators effectively retain short-term economic gains.<sup>340</sup> Finally, respondents sometimes refuse to comply with panel decisions, despite the threat of countervailing measures by complainants.<sup>341</sup> If the complainant is unable to exercise sufficient economic leverage on the respondent to induce compliance, individual rightholders must still find other ways to avoid continued losses.<sup>342</sup>

## 2. The Special Problem of Institutional Capacity

The fact that the most likely issues with Russian compliance arise not from poorly structured laws, but from their translation into practice, further complicates the DSB's ability to adequately enforce TRIPS.<sup>343</sup> Although the DSB's jurisprudence encourages panels to look beyond a measure's text to determine its effects, this method has largely been used in other WTO contexts to uncover hidden protectionism.<sup>344</sup> None of the several panel reports involving TRIPS has focused on countries' inability to effectively enforce their laws.<sup>345</sup> Most, like *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, have found violations only where the respondent has failed to correctly enact textual TRIPS norms into its national laws.<sup>346</sup>

Some commentators have suggested that, for cases of non-enforcement, DSB panels should adopt an interpretive norm that focuses on implementation commensurate with community standards.<sup>347</sup> By mandating a similar level of protection for all countries regardless of their respective circumstances, the WTO would give the greatest effect to TRIPS's goal of guaranteeing global enforcement of strong IP rights.<sup>348</sup>

To some extent, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights* adopts such a view, holding that what China considers "commercial scale" in other contexts is irrelevant

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<sup>339</sup> *Id.* at 135–36.

<sup>340</sup> See Creer, *supra* note 111, at 221.

<sup>341</sup> See Engelbrekt, *supra* note 97, at 135–36.

<sup>342</sup> See *id.* at 136–37.

<sup>343</sup> See Fukunaga, *supra* note 329, at 907–10.

<sup>344</sup> See, e.g., Korean Beef Appellate Body Report, *supra* note 99, ¶¶ 145–148 (finding the forced choice between selling domestic and imported beef, while not facially prejudicial, effectively handicapped imports).

<sup>345</sup> See Yu, *supra* note 236, at 931.

<sup>346</sup> See IP Protection Panel Report, *supra* note 8, ¶ 7.394; Yu, *supra* note 236, at 931.

<sup>347</sup> See Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPS Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357, 406–07, 416–18 (1998).

<sup>348</sup> See *id.* at 417–18.

to whether its criminal thresholds for IP violation satisfy TRIPS standards.<sup>349</sup> Nevertheless, the panel did not impose a strict reading of the community standard, finding that “commercial scale,” by necessity, had to account for the status of the Chinese market.<sup>350</sup> One major reason for granting so much national discretion is that, like the GATT system before it, the DSB is generally unwilling to force countries to undertake obligations greater than those contained in the text of the treaties themselves.<sup>351</sup>

A strictly uniform requirement that does not account for local conditions fails to give effect to other stated TRIPS purposes, such as the use of IP law to assist with developing countries’ economic goals.<sup>352</sup> By specifying a particular level at which all countries must absolutely guarantee enforcement, the DSB would ignore the WTO’s significant concessions to developing countries that provide an advantage in undertaking compliance efforts.<sup>353</sup>

Such recognition of developing countries’ implementation difficulties may explain why no panel has yet ruled on the issue of non-enforcement.<sup>354</sup> This undoubtedly represents one of the most common threats to IP rightholders and their economic interests.<sup>355</sup> Nevertheless, all violations thus far have been predicated on interpretive deficiencies rather than institutional failures.<sup>356</sup> A charitable reading of this absence of litigation implies concern for developing countries’ limitations.<sup>357</sup> A more plausible explanation is that pursuing remedies against these countries would be fruitless: a developing country unable to apply its own laws will be no more able to do so simply because a WTO panel says that it should.<sup>358</sup> Because the bulk of Russia’s enforcement problems are likely to stem from such institutional difficulties, the DSB provides no additional guarantee that developed countries’ IP rights will be protected.<sup>359</sup>

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<sup>349</sup> See IP Protection Panel Report, *supra* note 8, ¶ 7.514.

<sup>350</sup> *Id.* ¶ 7.577.

<sup>351</sup> See Benko, *supra* note 10, at 325.

<sup>352</sup> See Engelbrekt, *supra* note 97, at 124.

<sup>353</sup> See *id.*

<sup>354</sup> See *id.*; Yu, *supra* note 236, at 931–33.

<sup>355</sup> See Creer, *supra* note 111, at 235–36.

<sup>356</sup> See Yu, *supra* note 236, at 931–33.

<sup>357</sup> See Engelbrekt, *supra* note 97, at 124.

<sup>358</sup> See Creer, *supra* note 111, at 236; Yu, *supra* note 236, at 937–38. Such proceedings could also be taken as unnecessary bullying by developed countries, leading to further friction with the developing world. See Yu, *supra* note 236, at 937.

<sup>359</sup> See Yu, *supra* note 236, at 931–34.

## CONCLUSION

Russia's problems enforcing IP laws are not a result of isolated non-compliance. Though the concept of IP may meet resistance in transition economies like Russia and China, enforcement issues are largely symptomatic of deeper problems with the rule of law in general. Therefore, Russia's agreement to abide by the WTO's governing rules means little in terms of ensuring improvement in the conditions for technology-sharing and foreign investment. Relying solely on the multilateral pressure of the WTO to correct these problems will be insufficient.

Although the imposition of TRIPS norms is unlikely to effect any change in Russia's enforcement capabilities, Russia's accession to the WTO should still be seen as a positive development for foreign IP rightholders. Russian distrust of IP norms and the deep institutional problems of corruption that undermine its reform efforts are largely byproducts of long-standing economic isolation. Necessity and ignorance have catalyzed illegal activity; increased economic integration and growth will give Russia access to goods and technologies that were previously only available unlawfully. If Russia's development goes according to the government's plans, the incentive to turn to mafia groups and corrupt government officials for necessary products and services will fade.

Yet the idea that economic strength can guarantee IP enforcement in the long term is of little comfort to rightholders facing losses today. In the short term, foreign investment remains something of a gamble, and there may be a temptation to punish Russia's continued enforcement failures with sanctions or a refusal to transfer technology. Yet if Russia is to have any hope of establishing the technological and industrial base necessary for its overall economic and legal reform, this approach would prove harmful to all parties involved. Russia requires an infusion of foreign resources, both intellectual and financial, to stimulate its growth. Increased aid through technical support will generate more progress than punishment through continued exclusion from trade. Unless developed countries commit themselves to aiding Russian development, Russia will not be able to commit itself to institutional reform. Russia's economy will then have little choice but to continue to misappropriate foreign IP, truly giving the world a second China to reckon with.

