Recent Developments

The Exceptions That Disprove the Rule? The Impact of Abkhazia and South Ossetia on Exceptions to the Sovereignty Principle. By Gregory Dubinsky

On August 7, 2008, Georgia initiated a military operation to seize South Ossetia, a separatist region within internationally recognized Georgian territory. Russia, whose troops were stationed as peacekeepers in South Ossetia, responded with force and expelled the Georgian military. The origins of the conflict are a matter of dispute. Critics of Russia argue that its presence in South Ossetia and Abkhazia, another separatist region, was aimed at perpetuating Georgia's internal divisions, while others hold Georgia responsible for provoking the conflict and for aggressive actions against its purported citizens. On August 26, Russian President Dmitry Medvedev announced Moscow's recognition of Abkhazia and South Ossetia as independent states. To date, only Nicaragua has followed suit. Russia's controversial decision followed on the heels of another prominent secession: in February, the United States and several European Union members, among others, recognized the unilateral declaration of independence by Kosovo, a province of Serbia that had been under U.N. administration since 1999. Kosovo's declaration of independence explicitly stated that it was "a special case" related to the breakup of Yugoslavia and "not a precedent." Nonetheless, Kosovo's declaration of independence was met by protests from Russia and other states with minorities that have potential claims to nationhood. As Medvedev said in an interview with the BBC on August 26: "If Kosovo is a special case, [Georgia] is also a special case." Given Russia's rejection of Kosovo's special claim to independence, this statement can mean one of two things: both are special cases, or neither is.

These recent events have revived the sovereignty debates surrounding other disputed territories in the post-Soviet space. Two of these de facto states—Nagorno-Karabakh in Azerbaijan and Transnistria in Moldova—claim independence based on grievances not dissimilar in principle from those of Kosovo, South Ossetia, and Abkhazia. The creation of each of these de facto states is a product of the breakup of multiethnic states and, with the possible exception of Transnistria, each premises its claim to independence on ethnic

nationalism. Until recently, however, none of the four post-Soviet de facto states had reasonable hopes of legal recognition by an established nation. Deadlock in the U.N. Security Council is likely to prevent U.N. accession for Kosovo or other de facto states for the foreseeable future, but it will not preclude the possibility of a suddenly unfrozen “parade of ethnicities” in the post-Soviet space.

This Recent Development examines Moscow’s rationale for recognizing Abkhazia and South Ossetia and its potential application to other disputed post-Soviet territories. It argues that Russia’s recognition of South Ossetia and Abkhazia has extended the grey zone of partial recognition ushered in by Kosovo and has set the stage for a proliferation of ethnonationalist states. Russia’s rationale, using a similar logic to the case for Kosovo, lays bare the absence of consensus on the application of international law on separatism and self-determination of peoples to multiethnic, former Communist states.

The state of affairs between Georgia and the separatist regions at the start of the August 2008 conflict was set in motion more than ten years prior. Against a backdrop of increasing tensions between ethnic Abkhaz and ethnic Georgians in the final years of Soviet rule, Abkhazia separated from Georgia in a war from 1992-94 that saw the expulsion from Abkhazia of over 200,000 ethnic Georgians. The Agreement on a Cease-Fire and Separation of Forces in 1994, with the approval of U.N. Security Council Resolution 934, established a Russian-led peacekeeper presence under the mandate of the Commonwealth of Independent States (CIS). In 1994, Abkhazia set forth a constitution declaring itself to be a “sovereign democratic state” based on the right of nations to self-determination. A U.N. observer force, UNOMIG, was created in 1993 and empowered by the Security Council to monitor the separation of Georgian and Abkhaz forces and the CIS peacekeeping force. In the years since, internationally sponsored peace negotiations between Abkhazia and Georgia have failed.

South Ossetia has been de facto independent from Georgia since a 1990-92 conflict that followed a declaration by the South Ossetian government of its intent to join North Ossetia in Russia. As recently as 2004, Georgia and South Ossetia signed a ceasefire and a demilitarization pact after a failed Georgian attempt to remove the South Ossetian leadership from power. In August 2008, after weeks of escalating tit-for-tat violence, the Georgian

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6. At the time of the 1989 Soviet census, Abkhaz residents constituted only 17% of the population of Abkhazia, while Georgians constituted 44%. Monica Duffy Toft, Multinationality, Regional Institutions, State-Building, and the Failed Transition in Georgia, in ETHNICITY AND TERRITORY IN THE FORMER SOVIET UNION 123, 140 n.24 (James Hughes & Gwendolyn Sasse eds., 2002). In 2006, according to the International Crisis Group, ethnic Georgians made up “at least” 25% of the population of Abkhazia. INT’L CRISIS GROUP, ABKHAZIA TODAY (2006), available at http://www.crisisgroup.org/home/index.cfm?fuseaction=regional.view&id=4377.


government launched a major military operation to bring South Ossetia under its control. Russia, claiming authority under its peacekeeping mandate, met this move with a swift military response, driving Georgia’s forces from South Ossetia and Abkhazia. It allowed separatist militias to expel additional ethnic Georgians from the two territories and occupied swaths of Georgian territory, before gradually withdrawing to the borders of the disputed states.

Russia’s recognition of Abkhazia and South Ossetia a few weeks after the conflict was predicated as a special exception to the normally inviolable sovereignty of a fellow state. Given the brutality of the August conflict, Moscow maintained, the Abkhaz and South Ossetians could no longer be expected to remain within the same polity as the Georgians. To support this claim, Medvedev cited several bodies of international law on sovereignty and the rights of statehood: the 1970 Declaration on the Principles of International Law Concerning Friendly Relations, the U.N. Charter, and the Helsinki Final Act of 1975.10 The Declaration Concerning Friendly Relations, a defining statement of the post-World War II consensus on sovereignty, holds that each state enjoys “territorial integrity and political independence” that are “inviolable.”11 Yet the Declaration also recognizes the right of peoples to “self-determination,”12 a major component of international law that creates space for external legitimation of a state’s sovereignty.13

The Declaration recognizes “the establishment of a sovereign and independent State” as one of the “modes of implementing the right of self-determination,” but also obliges signatories to “refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.”14 The right is included in Articles 1 and 55 of the U.N. Charter, but it is unclear what groups the framers meant to include in the term “peoples.”15 The Helsinki Act defined self-determination similarly, without explicitly clarifying what constitutes a people: “all peoples always have the right, in full freedom, to determine . . . their internal and external political status.”16

In his speech announcing the recognition—which he called “the only possibility to save human lives”—Medvedev laid out the factual basis for his argument.17 He accused Georgia of committing “genocide” in the August conflict with the objective of “annexing South Ossetia through the annihilation of a whole people” and claimed “the same fate lay in store for

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10. Medvedev, supra note 2.
12. Id. at 124.
17. Medvedev, supra note 2.
Abkhazia.18 To establish Georgia’s persistent lack of good faith in political accommodation with the Abkhaz and South Ossetians, he drew upon the history of Georgia’s first president, Zviad Gamsakhurdia, who initiated a series of actions, such as the downgrading of South Ossetian autonomy and the barring of regional parties, aimed at minimizing non-Georgian political influence.19 He asserted Russia’s role throughout the duration of the separatist conflicts as a “mediator and peacekeeper . . . . guided by the recognition of Georgia’s territorial integrity.”20 These allegations led to his conclusion that Georgia alone had always meant to resolve the dispute by force. The August war, which was the ostensible culmination of this bad intent on Georgia’s part, “dashed all the hopes for the peaceful coexistence of Ossetians, Abkhazians, and Georgians in a single state.”21 As proof of the free exercise of Abkhaz and Ossetian self-determination, Medvedev cited the separatist governments’ appeals for recognition and referenda favoring independence held in Abkhazia (1999) and South Ossetia (1992 and 2006). In an elaboration of his decision, Medvedev set out his broader vision of self-determination, introducing the term “nation” into the discourse of recognition: “Not all of the world’s nations have their own statehood. Many exist happily within boundaries shared with other nations.”22 When “some nations find it impossible to live under the tutelage of another,” they exercise their legal right to freely determine their political status.23 Although the right to self-determination is ascribed to “peoples,” Medvedev’s use of “nation” aimed to establish the legitimacy of the Abkhaz and South Ossetian separatist governments as self-determining units.24

The right of self-determination, however, has traditionally been bestowed to national movements in the context of decolonization,25 where there are clearer demarcations between colonists and ruled. In contrast, the muddied and complex relationship between ethnic groups and territory within postimperial states recently carved from multinational states such as the Soviet Union or Yugoslavia is not easily transposed into this framework.26

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18. The allegation apparently stems from Georgia’s artillery bombardment of Tskhinvali, the South Ossetian capital. However, Russian claims about the number killed in South Ossetia have been found to be inflated. See, e.g., A Caucasian Journey, ECONOMIST, Aug. 21, 2008, at 43.


20. Medvedev, supra note 2.

21. Id.

22. Dmitry Medvedev, Why I Had to Recognise Georgia’s Breakaway Regions, FIN. TIMES, Aug. 27, 2008, at 9 (Asia ed.).

23. Id.

24. It also provokes the question: if “nations” are the units of self-determination in international law, what does this imply for ethnic groups spread out in multiple states, such as the Ossetians, who are concentrated in North Ossetia, a Russian republic, and de facto independent South Ossetia, or for the Kurds, who inhabit swaths of Iraq, Iran, and Turkey?


26. Kosovo’s moves toward a civic, as opposed to ethnically based, concept of nationhood (for example, by choosing not to adopt the Albanian flag) belie the fact that ethnic Albanians comprise 90% of the population and that most Serbs living in the northern part of the province do not recognize
The main criterion for international recognition of post-Soviet states was the status of "union republic" in the Soviet Union, which Georgia held and Abkhazia and South Ossetia did not. In the federal system of the former Yugoslavia, Kosovo was also apportioned a lesser degree of sovereignty than full-fledged republics. Although Russia does not go so far as to contest the validity of the recognition of the other post-Soviet states on the basis of their legal status within the Soviet Union, its arguments from history—arguing Georgia's territorial claims to the regions to be a mere Stalinist carryover—potentially indicate its willingness to challenge the legality of other sovereign arrangements in the post-Soviet space as well.

Indeed, there are no major limiting principles to self-determination within the formula advanced by Moscow. Its rationale for recognition makes central the allegation that the separatist ethnic groups can no longer negotiate in good faith with the Georgian government. Rather than advance an inherent right to independence for the separatist regions, Russia attempts to establish the legitimacy of its recognition on the grounds of a morally and practically untenable coexistence of the minority Abkhaz and Ossetians and the majority Georgians. The Abkhaz and Ossetian right to statehood is based on an inevitably subjective determination that there has been an irreparable breakdown in Georgia's ability to deal on a good faith basis with the Abkhaz and South Ossetian peoples.

This framing establishes a calculus of independence with a chain of logic that is widely encompassing. According to the Russian rationale, the unit of self-determination is a territorial region populated by an ethnic minority population. This region could be a de facto independent polity, but it has at least an organized political structure claiming to be representative of its population. It is engaged in good faith negotiations with its de jure government, which is ruled by an ethnic majority group. The sovereign then commits an egregious act against the separatist region; the possibility of coexistence is closed off; and the sovereign’s putative right to territorial integrity is superseded by the imperative of self-determination. An irreparable breach of good faith has no particular threshold degree of egregiousness: although Russia justified its recognition of South Ossetia by alleging genocide, it claimed that the mere risk of genocide occurring was sufficient cause to recognize Abkhazia. There is also no mention in Medvedev’s speech of the

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28. Russia does not predicate its argument on the effectiveness of separatist governance in the breakaway regions. This is likely because Abkhazia and South Ossetia are dependent on foreign, particularly Russian, aid and assistance. Yet the post-Soviet de facto states claim to be functioning governments to justify recognition of their statehood. Dov Lynch, Separatist States and Post-Soviet Conflicts, 78 INT’L AFF. 831, 835-36 (2002). Under the Montevideo Convention on the Rights and Duties of States, states possess four criteria: a permanent population, a defined territory, government, and a capacity to have relations with other states. Montevideo Convention on the Rights and Duties of States art. I, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.
U.N. resolutions that affirmed Georgia's territorial integrity; for Russia, these commitments are presumably abrogated by the actions of the Georgian government. This omission, which has the effect of subrogating precedent under the banner of the special exception, has ramifications for the international resolution of other post-Soviet separatist conflicts.

To provide contrast to the secession of Abkhazia and South Ossetia, Moscow has held up Chechnya as a model for how a formerly separatist region is retained within a larger multiethnic state, citing the 2003 referendum that reaffirmed Chechnya's place within the Russian Federation. Russian Foreign Minister Sergey Lavrov linked the referendum to an exercise of self-determination of the Chechen people, though he gave no special humanitarian justification for its right to a referendum. Chechnya, like Abkhazia and South Ossetia, was a lesser republic in the Soviet Union, but Russia nonetheless implicitly recognizes its putative right to self-determination—one that theoretically could conflict with its sovereignty. By affirming such an expansive exercise of self-determination in the separatist regions, Russia has given its own separatists legal ammunition for their cause.

The sizeable gap between practice and theory of international law on the right to self-determination in the post-Soviet sphere is likely to come into starker relief in the wake of Russia's recognition of South Ossetia and Abkhazia. The recognition of Abkhazia and South Ossetia may be seen in years to come as having highlighted the void currently inhabited by de facto states, as well as stateless ethnic minority groups. Why Abkhazia and South Ossetia, but not Kosovo, should qualify under Moscow's rationale is unclear; likewise, why Kosovo, but not Abkhazia and South Ossetia (or Darfur, or Xinjiang), has a unique claim to independence is in the eye of the beholder. The presence of Russian troops in some disputed territories and the possibility of de facto states choosing to merge into other nations present further complications. Russia's focus on the centrality of the ability to negotiate in good faith in separatist disputes speaks to the notion of consent: the manner in which territorially distinct minority populations can legitimately revoke their consent to be ruled by a sovereign state, a process that is currently ill-defined. This recent development calls for reexamination of the principle of self-determination, which was codified during decolonization and the Cold War. Given the realities of power and sovereignty in the international system, this would be a difficult process resisted by powerful countries that have invested stakes in certain legal outcomes. As the Abkhazia and South Ossetia cases have demonstrated, however, a rule can only have so many exceptions until it is no rule at all.


30. On June 2, 2006, in reference to holding a referendum in South Ossetia, Russian Foreign Minister Sergey Lavrov stated, "The issue of self-determination is part of international law, which is carried out through an expression of will [of the people] . . . Russia was not afraid to push for this referendum in Chechnya and it was held." S. Ossetia Seis Repeat Independence Referendum, Civ. GEOR., Sept. 11, 2006, http://www.civil.ge/eng/article.php?id=13522.
Recent Developments

The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA). By Margot Kaminski*

Intellectual property (IP) law is on the verge of a drastic change. Thirteen countries have stepped outside of the existing system of treaties and organizations to create a plurilateral agreement that will significantly elevate the enforcement of copyright law worldwide. The overenforcement of IP law raises concerns on an international scale. Personal privacy, freedom of expression, access to education, innovation, and the proportionality of sanctions to offenses are at stake.

In the past decade, interest groups ranging from nonprofits to the governments of developing countries have protested the expanding scope of IP enforcement. The debate has raged predominantly around the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),¹ which removed IP enforcement from the World Intellectual Property Organization (WIPO) and placed it in the hands of the World Trade Organization (WTO). In more recent years, developing countries have been drawing attention to inequities in TRIPS and have successfully pushed for initiatives more reflective of their interests within WIPO. Just as these changes have started to occur, however, a group of countries whose economic and political interests align more with IP producers than consumers (“IP maximalists,” in the terms of the debate) has quietly begun orchestrating the same strategic forum shifting that birthed TRIPS in the first place. This time, the new agreement will be external to any existing multilateral organization; the future of copyright enforcement will be determined outside the bounds of organizational legitimacy and accountability.

The proposed plurilateral Anti-Counterfeiting Trade Agreement (ACTA) would usher in radically stronger enforcement, including increased criminal sanctions and stronger border measures. ACTA is poised to create a new world: one in which criminal sanctions are mandated against peer-to-peer file sharing internationally; governments do legal work on the part of corporate content owners; companies that rely on parallel imports (such as eBay) lose their business model; laptops or iPods may be searched at borders; and the information gleaned from border searches will be shared among border authorities of signatory countries. In light of its enormous potential impact, the shroud of secrecy under which ACTA is being constructed is highly troubling. With no open negotiating process, and no draft publicly available, ACTA is a black box that could contain a bomb.

By most estimates, the new regime will prove significantly more draconian than TRIPS. ACTA will likely be an amalgamation of the strictest enforcement measures from numerous countries, and lack the crucial exceptions that are currently built into individual countries’ laws. This Recent

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Development will outline the areas of international law most likely to be affected by ACTA and will discuss the real world implications of imposing enforcement measures from the top down, without adequate international legal process.

As with much of transnational law, the concept of international harmonization in IP law is a relatively new phenomenon. The first international IP treaty, the Paris Convention, was signed in 1883 by only eleven countries. Its sister treaty, the Berne Convention, was signed three years later. These treaties became the basis for WIPO, created in 1967 as a specialized agency of the United Nations. WIPO served as a venue for treaty negotiations and soft law rather than a source of uniform standards or enforcement measures. WIPO continues to exist today, providing soft law and other resources, but the bulk of international IP regulation now stems from the WTO.

In 1994, international IP law radically changed with the incorporation of intellectual property rights into the newly created WTO, through TRIPS. Laurence R. Helfer convincingly argues that TRIPS represented regime shifting on the part of the United States and the European Community, moving IP law from WIPO to the WTO.\(^2\)

Helfer argues that the United States and the European Community benefited from a shift to the WTO for three reasons: they had more negotiating power in the WTO than in WIPO; they could link IP to numerous other trade concerns; and the WTO dispute settlement system was seen as extremely effective.\(^3\) In other words, the WTO had teeth, and WIPO did not.

TRIPS set the first minimum international standards for copyright, trademarks, geographical indications, industrial designs, patents, integrated circuit designs, and trade secrets.\(^4\) For the first time, these obligations could be enforced internationally through trade sanctions, effectively forcing many countries to sign on to heightened levels of protection against their own interests.\(^5\) TRIPS also included subject material in patent law that had not been standardized internationally: pharmaceutical products, animal varieties, plant varieties, food products, and chemical products, to name a few. Further, it granted copyright in computer programs; prior to TRIPS, only twenty countries protected computer programs through copyright.\(^6\)

This version of IP maximalism had significant consequences. Developing countries argued against shifting to the WTO, knowing that they, as IP importers, would stand to suffer from the change.\(^7\) Since the adoption of TRIPS, developing countries have rallied. In August 2001, the least developed

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3. Id. at 21-22.
4. INTERNATIONAL INTELLECTUAL PROPERTY: PROBLEMS, CASES, AND MATERIALS 26 (Daniel Chow & Edward Lee eds., 2006).
5. Brazil held out against the TRIPS agreement until the United States applied trade sanctions under its unilateral Special 301 process. Then Brazil agreed to sign on to TRIPS. See PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 135 (2002).
6. Id. at 124.
7. Id. at 133.
countries (countries designated by the United Nations as exhibiting the lowest indicators of socioeconomic development), adopted the Zanzibar Declaration, highlighting several TRIPS-related problems. Their concerns included the transfer of technology under Article 66.2 of TRIPS, access to medicines, an extension of the transitional period for implementing TRIPS, and reaffirmation of the flexibility of TRIPS. The WTO responded with the Doha Declaration, adopted on November 14, 2001. The Doha Declaration affirmed that member states have the right to grant compulsory licenses for medicines in cases of public health emergencies. No country has yet implemented compulsory licensing for medicines, but it is an important example of the at least nominal flexibility of TRIPS in the context of the WTO.

WIPO has also been influenced by a TRIPS-related backlash. In 2004, Brazil and Argentina called for a development agenda in WIPO, citing a "knowledge gap" and a "digital divide" between the wealthier nations and their poorer counterparts. International interest groups ranging from research scientists to governments rallied around these concepts, forming the "access to knowledge" movement. In October 2007, WIPO formally established the Development Agenda, adopting a set of forty-five recommendations, and established a Committee on Development and Intellectual Property.

It should be of no surprise that IP maximalists have chafed against the backlash. Maximalist countries have been pushing for a TRIPS-plus regime, adding new requirements to the TRIPS standards through bilateral and regional trade agreements. Since 2001, they have stepped up the pressure, perhaps in response to the increased emphasis on the interests of developing countries in WIPO and the WTO. Their new agenda pushes for further movement toward U.S. intellectual property law, including stronger criminalization measures against copyright infringement, and provisions on the anticircumvention of technological protection measures similar to those contained in the U.S. Digital Millennium Copyright Act (DMCA). This agenda is what Susan K. Sell deems the "TRIPS-Plus-Plus regime." Sell identifies multiple initiatives reflecting this extraorganizational pressure: ACTA, Interpol's SECURE, and WIPO's Advisory Committee on Enforcement (ACE) discussions, among others. As Sell writes, this new round

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8. Meeting of the Ministers Responsible for Trade of the Least Developed Countries, Zanzibar Declaration, WT/L/409 (Aug. 6, 2001).
13. See Peter Drahos, BITs and BIPs: Bilateralism in Intellectual Property, 4 J. WORLD INTELL. PROP. 791, 792-807 (2001) (describing the bilateral agreements negotiated by the European Community and the United States with developing country governments as "TRIPS-plus").
of agreements bypasses multilateral fora like WIPO and the WTO and pressures countries or weaker regions into bilateral compliance.\textsuperscript{15}

ACTA is part of this carefully calculated movement to increase IP protection outside of the existing venues of WIPO or the WTO. What makes ACTA a more radical turning point than even the existing bilateral agreements is that it aims to create not an agreement between several countries, but a global standard on copyright infringement, without going through any true multilateral process. It attempts to apply IP maximalism from the top down, rather than allowing individual countries to choose appropriate levels of sanctions and protection. Since there is important legislation on precisely the same issues pending in, for example, the European Union, ACTA represents a clear attempt to bypass internal process in addition to multilateral process.\textsuperscript{16}

The United States, the European Union, Japan, and Switzerland began the push for ACTA’s adoption; other countries invited to participate include Australia, Canada, Jordan, Korea, Mexico, Morocco, New Zealand, Singapore, and the United Arab Emirates.\textsuperscript{17} Argentina, Brazil, and China have not been invited to participate in initial negotiations. What this implies is that countries with stronger interests in IP exporting will be responsible for drafting the language of ACTA, while countries that sign on later will not have any influence over its terms. With so many large economies linked to ACTA, other countries will struggle to hold out against its provisions.

The justifications behind ACTA are suspect. In linking trademark counterfeiting to copyright infringement, ACTA dangerously and perhaps deliberately conflates two disparate issues. ACTA inappropriately harnesses a growing vocabulary of indignation against the harms of counterfeiting, and applies it against copyright infringement. In 2003, INTERPOL linked counterfeit goods to terrorist financing.\textsuperscript{18} The initial Japanese proposal for an anticounterfeiting and antipiracy agreement was justified by an interest “in the safety and security of consumers,” particularly those who die from counterfeit medicines.\textsuperscript{19} It is hard to argue against increased enforcement against terrorist financing and deadly drugs. It is significantly easier, however, to argue that teenagers downloading music should not be subject to similarly increased sanctions.

ACTA has been forming under the watchful eye of global superpowers for several years. Japan announced a proposal for an anticounterfeiting agreement in late 2005.\textsuperscript{20} The United States independently proposed a similar agreement in late 2006. In October 2007, they were joined by Switzerland and

\textsuperscript{15} Id. at 5.


\textsuperscript{20} Id.
the European Community in announcing a more formal joint treaty.\textsuperscript{21} Nine additional countries participated in informal discussions in the following months, and official negotiations were held in 2008 over the course of meetings in June, July, and October.\textsuperscript{22} As of the publication of this piece, further negotiations are slated to take place in 2009.\textsuperscript{23}

Thus far, no draft of ACTA has been circulated. Bodies external to the negotiating process have no clear sense of ACTA's terms. The most recent document to attempt to sketch out in detail ACTA's potential impact was a white paper published by IP Justice in March 2008, which points to areas of potential impact but does not propose specific language nor identify differences between ACTA and current international standards.\textsuperscript{24} In the absence of a draft agreement, this Recent Development aims to further flesh out the context of ACTA's potential terms by examining the text of U.S. Free Trade Agreements (FTAs). The FTAs give a clear idea of what aspects of IP law the United States Trade Representative is most likely to export abroad.

ACTA is described as an enforcement agreement. Its architects repeatedly affirm that it is not meant to change the scope of rights protection, at least from the perspective of U.S. law. Rather, it is aimed at "improving enforcement practices" by strengthening cooperation and ratcheting up sanctions.\textsuperscript{25} However, there are substantive differences between existing U.S. FTAs and international law, which suggest how ACTA will transform international law.

A leaked 2007 Discussion Paper from the U.S. Trade Representative's office outlines three areas ACTA will affect: International Cooperation, Enforcement Practices, and Legal Framework.\textsuperscript{26} The last category suggests that despite declarations to the contrary, ACTA is indeed meant to create new substantive law, rather than to serve as a mere statement of cooperation under existing international law.

The International Cooperation section of the Discussion Paper emphasizes information sharing and suggests opportunities for public and private advisory groups to share best practices with governments. This section, combined with other aspects of U.S. FTAs, raises concerns over "regulatory capture," whereby government institutions are used to protect private IP interests. Items listed in the Enforcement Practices section also include formal or informal advisory groups and specialized IP groups within law enforcement

\begin{itemize}
\item \textsuperscript{22} In August 2008, the European Commission proposed a mandate from the European Parliament for the negotiation of ACTA. As of publication, this mandate was scheduled for a plenary vote on December 18, 2008.
\item \textsuperscript{26} DISCUSSION PAPER ON A POSSIBLE ANTI-COUNTERFEITING TRADE AGREEMENT, http://wikileaks.org/leak/acta-proposal-2007.pdf [hereinafter DISCUSSION PAPER].
\end{itemize}
structures. This Discussion Paper was leaked prior to the latest round of proposed U.S. copyright law amendments, which create the role of a separate "IP czar" to handle IP enforcement. The Discussion Paper thus suggests that a movement toward specialized IP enforcement agencies was a foregone conclusion on the part of its U.S. negotiators.

The Legal Framework section proposes further criminal enforcement against IP infringements, increased border measures, changes in civil enforcement, and an explicit international incorporation of elements of the DMCA. In comparing the Legal Framework section of the Discussion Paper to U.S. FTAs, six topics stand out as areas ACTA is likely to modify: (1) the scope of rights protected by copyright; (2) the type of infringement incurring criminal sanctions; (3) the level of criminal sanctions; (4) exceptions to or limitations on infringement; (5) border measures and ex officio authority; and (6) the scope of civil sanctions.

If the U.S. FTAs are any indication, ACTA will set a new international standard on what sort of behavior constitutes copyright infringement. ACTA will export a more expansive definition of the scope of copyright protection, without exporting the limitations that exist in U.S. law. Under existing international copyright treaties, the scope of copyright varies from country to country. Two of the most sensitive areas in copyright law are the "making available" right and temporary reproductions. Placing "making available" under the scope of copyright protection implies that one can be held liable for copyright infringement for merely having made a work available online—without the burden of proof that any downloads actually occurred. Temporary reproductions, such as those used in the distribution of information online, are another controversial aspect of copyright law. Since 2002, U.S. FTAs have required trading partners to both accept the "making available" right and treat temporary and transient reproductions as copyright infringement. This pattern strongly suggests that similar language will be incorporated into ACTA.

ACTA will unquestionably alter the current international standard for criminal sanctions against copyright infringement. Under TRIPS, countries must at minimum hold a person to have committed an act of criminal copyright infringement if he or she has willfully infringed on a commercial scale. An example of this sort of behavior is the mass reproduction and sale, for profit, of pirated DVDs. ACTA may change the current international requirement of willfulness and the scale at which infringement must occur for it to be considered criminal. The ACTA Discussion Paper language is notable for four reasons: (1) it explicitly links criminal enforcement to border measures; (2) it omits the TRIPS "willful" requirement with regards to


29. "Members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale." TRIPS, supra note 1, art. 61.
infringement on a "commercial scale"; (3) it criminalizes willful infringements without any motivation for financial gain, provided that they are "significant" and "prejudicially affect the copyright holder;" and (4) it adds criminal sanctions for trafficking in counterfeit labels.30

Most significantly, the Discussion Paper expands the international definition of "commercial scale" to include "private financial gain," which is the standard in U.S. law, and to explicitly include "significant willful infringements without motivation for financial gain to such an extent as prejudicially affect the copyright owner (e.g., Internet piracy)."31 Thus, under ACTA, one would be held subject to international criminal sanctions for large-scale copyright infringement, without explicit willfulness or motivation for financial gain in the commercial sense. This standard potentially criminalizes any large-scale copyright-infringing activity, as long as such behavior can be shown to prejudicially affect the copyright holder through the depletion of an expected market. The downloading of copyrighted files or collection of copyrighted research "for private financial gain" may be found to meet this standard. The danger of this standard is that there is no minimum definition provided for "commercial scale," and no requirement that the scale of the infringement be willful, as long as each individual infringement is willful. This standard has the potential to criminalize the behavior of an enormous number of individuals, worldwide.

ACTA will substantively change the mandated sanctions against infringement. TRIPS allows for criminal sanctions to include fines or imprisonment and sets no minimum standards for either.32 TRIPS also allows (but does not require) seizure, forfeiture, and destruction of goods.33 The Discussion Paper language does not provide specifics about criminal sanctions, but calls for criminal procedures for enforcement and specifically focuses on forfeiture as a remedy.34 If it mirrors recent U.S. law and U.S. FTAs, ACTA will mandate that a signatory provide for criminal fines and imprisonment.35

ACTA will likely impact the exceptions and limitations to copyright law internationally. Countries currently have discretion to enact copyright exceptions and limitations under areas reserved to them as a matter of national sovereignty, according to the exceptions and limitations incorporated in the Berne Convention and the Three Step Test in Article 13 of TRIPS.36 ACTA may override countries' existing copyright exceptions and limitations in favor

31. DISCUSSION PAPER, supra note 26, at 2-3.
32. "Remedies available shall 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, supra note 1, art. 61.
33. "In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods." Id.
34. DISCUSSION PAPER, supra note 26, at 3 (proposing giving officials “authority to seize and destroy IPR infringing goods”).
35. U.S.-S. Korea FTA, supra note 28, art. 18.10.27 (requiring “penalties that include sentences of imprisonment as well as monetary fines sufficient to provide a deterrent to future infringements, consistent with a policy of removing the infringer’s monetary incentive”).
36. TRIPS, supra note 1, art. 13. See also Berne Convention for the Protection of Literary and Artistic Works art. 9, Sept. 28, 1979, 331 U.N.T.S. 217 (stating that it “shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not ... unreasonably prejudice the legitimate interests of the author”).
of U.S. law. Alternatively, it may create a strong international standard for the scope of copyright protection without mandating any limitations, such as fair use.

Moreover, ACTA will significantly increase border measures. The Discussion Paper suggests that ACTA will give customs officials the authority to disclose information about infringing shipments to holders of IP rights, as well as the authority to seize and destroy infringing goods, changing the current evidentiary standard. There is no indication that ACTA will include the TRIPS allowance for de minimis imports, as it is not included in any of the U.S. FTAs. Since ACTA’s language on infringements expands to prohibit infringements even “for private gain,” it may even explicitly eliminate the TRIPS allowance for de minimis imports.

Finally, ACTA seeks to change international standards on the scope of civil sanctions by changing the requirement of preliminary measures, including ex parte searches and the preservation of documentary evidence, and by mandating statutory damages internationally. The Discussion Paper indicates that ACTA will require signatories to implement statutory damages, which presently do not exist in all national copyright laws (Australia is a notable exception). Additionally, by taking a position on the question of whether statutory damages are penal or remedial, ACTA may have the effect of policy laundering within the United States. Currently, there is an ongoing debate within the United States on whether statutory damages are penal or remedial, and therefore should be strictly construed, or are remedial, and therefore can be applied more broadly. ACTA’s push toward the remedial approach suggests that statutory damages within the United States are more broadly applicable.

ACTA is of central significance in three respects: on procedural grounds, regarding the rights of developing nations, and from a civil liberties standpoint. On procedural grounds, ACTA bypasses international institutions in favor of plurilateral treaties. ACTA’s urgency has been emphasized by a focus on the economic impact of counterfeiting on U.S. industry and the insinuation that counterfeiting supports terrorist organizations. Such grandstanding attempts to sneak in substantive changes in other aspects of international IP law under the banner of moral infallibility.

Regarding the rights of developing nations, ACTA is meant to include measures targeted at developing countries, but it does not include any of the major developing countries with IP interests in its negotiating process. Alarmingly, the countries that have finally been able to address concerns over

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37. DISCUSSION PAPER, supra note 26, at 3.
38. Id. at 2.
40. See generally GROSS, supra note 24.
41. Office of U.S. Trade Representative, supra note 17, at 3 (stating that “[w]e look forward to partnering with developing countries through ACTA”).
technology transfer raised by TRIPS will have no say in the construction of ACTA.

From a civil liberties standpoint, ACTA raises serious concerns both in the substantive legal changes it proposes and in the scope of its enforcement measures. Incorporating much of U.S. law, ACTA may have the same results as the DMCA. As Fred von Lohmann of the Electronic Frontier Foundation writes, “the DMCA has harmed fair use, free speech, scientific research, and legitimate competition.” ACTA is not meant to be a comprehensive intellectual property agreement, but its influence will likely extend beyond its proposed bounds. ACTA targets counterfeiting and piracy, and as such, will not explicitly address matters of patent law. Many goods, however, are subject to multiple types of intellectual property protection. For example, while generic medicines may be outside of the explicit scope of ACTA, their movement between countries may be affected by trademark or copyright issues.

Perhaps most frightening are the privacy implications of the increased enforcement measures, particularly information sharing between customs officials of different governments, as well as among governments, Internet service providers (ISPs), and private content holders. The Discussion Paper tries to settle an ongoing international debate over the role of ISPs in policing Internet content, by proposing “procedures enabling right holders . . . to expeditiously obtain information identifying the alleged infringer.” This proposal places new requirements on ISPs with regard to content holders, with troubling privacy implications for content users.

Furthermore, as Robin Gross of IP Justice points out, increased government surveillance is a key component of ACTA, and the privacy protections available in different countries vary greatly. The most extreme view of ACTA sees it as ushering in regular warrantless searches and seizures on borders, including searches of laptops and portable media players such as iPods. Currently, the scope of border measures is being litigated in the United States. ACTA seeks to preempt that litigation and impose policy from the treaty down.

ACTA stands poised to radically increase international IP law enforcement. The agreement reflects a form of international bullying, whereby economically powerful countries, frustrated by the blockades erected in international fora they once supported, have stepped outside those fora to create new standards. However, as the application of these standards within IP maximalist countries has already shown, stringent IP enforcement techniques can threaten innovation and civil liberties. The worst-case scenario of ACTA would be to expand those standards into countries with even fewer protections for civil liberties. Unfortunately, this result is not far from the expected

43. DISCUSSION PAPER, supra 26, at 4.
outcome. The best that can be hoped for is that as the fight for the future of IP plays out in the international arena, interest groups, both nonprofit and for-profit, will effectively raise objections within negotiating countries to derail some of ACTA’s most troubling provisions.