Now is the time for international lawyers to focus on the issue of fairness in the law. The new maturity and complexity of the system calls out for a critique of law’s content and consequences. Its extensive coverage and its audacious incursions into state sovereignty demand a new emphasis on the system’s values, aims, and effects.¹

¹ THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 9 (1995). Franck discusses how international law has evolved from a relatively straightforward and uncomplicated area into one that is so mature and complex that it requires specialization:

The time when any one scholar could give a definitive overview of the whole of Public International Law is past. Nowadays, scholars and practitioners choose to specialize in international contracts for the sale of goods or in the law of treaties; international tort or criminal law; international resource law or the law of human rights; aviation or law of the seas; communications law or space law; sovereign or diplomatic immunities; conflict of jurisdictions, or of intergenerational claims; unfair business practices or unfair expropriations; international aspects of antitrust laws or of international tax laws; the law of international organizations or of international waterways. This specialization reflects the fact that the law of the international community has, through maturity, acquired complexity.

Id. at 5. In part, Franck attributes the explosion of international law into heretofore unforeseen and unexpected areas to modern science and technology, which
1. INTRODUCTION

Should fairness be considered in international law, as Franck suggests? Consider the following three scenarios:

1. A poor, elderly woman purchases household goods from a local retailer. The goods include items such as draperies, a wallet, a bed, curtains, fans, a typewriter, kitchen chairs, a washing machine, and a stereo. The woman then purchases a new mattress from the same retailer. The retailer presents the woman with a standard sales agreement that contains a "cross-collateral" clause, which provides that if there is a single default on the payment of the contract, the retailer can repossess all of the goods, including goods previously purchased, to secure the outstanding debt. The woman defaults on one payment and the retailer repossess the mattress as well as all of the goods already purchased.\(^2\)

2. An unsophisticated consumer purchases a car from an automobile dealer. The sales representative presents the consumer with a contract that contains a clause limiting its liability in the event that the purchaser gets injured because of a defect in the car. The car's brakes fail and the consumer suffers serious injuries. The consumer brings an action against the dealer for personal injuries. The dealer, relying on the limitation of liability clause, denies liability.\(^3\)

3. A small, unindustrialized country enters into an agreement with a significantly larger, more industrialized country. The agreement must be signed before the small country is permitted to join an exclusive, wealth-generating organization. The small country is facing an epidemic of epic proportions. Already, twenty-two mil-

\(^2\) These facts are based on Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (holding that courts should dismiss traditional norms of contract law when parties with little bargaining power enter into unreasonable commercial contracts).

\(^3\) This case is loosely based on Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960) (holding that commercial sales have an implied warranty of merchantability).
lion of its citizens have died as a result of a deadly virus and over thirty million of its citizens are infected. Almost three million die every year. Thirteen million children are orphaned; 15,000 new people acquire the virus every day. The average fifteen-year-old citizen has more than a fifty percent chance of dying of the virus and is more likely to die of the virus than all other causes combined. Finally, while the virus attacks indiscriminately, it impacts the country’s economic driving force—its farmers, teachers, blue-collar workers, young adults, and parents—particularly hard. The disease is treatable, but at a cost well out of reach of the country’s citizens. The country attempts to address this crisis by implementing two methods, parallel importation and compulsory licensing, which will drastically reduce prices and ensure the supply of drugs at affordable prices. Upon enactment, the larger industrialized country demands that the smaller country halt implementation because the methods violate its obligations under the agreement.

All of the scenarios above involve gross inequity in bargaining power, leading to agreements presented on a “take-it-or-leave-it” basis. Yet only in the first two scenarios, both of which involve individual parties and limited harms, are fairness arguments cognizable defenses. In the third scenario, international law, especially international intellectual property law under the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS” or the “Agreement”), fails to take into account underlying factual circumstances and, more importantly, fairness. This is a mistake.

This article argues that it is undeniably appropriate to question and evaluate whether international treaties are fair. In view of the problems of interdependency, scarcity of resources, economic coer-

4 In many countries, notions of fairness are taken into account when the terms of a contract unfairly advantage one party. In fact, many countries around the world have domestic laws that protect disadvantaged parties in these situations because they have no ability to negotiate the terms of the agreement, have no meaningful choice other than to agree to the terms stated by the party with superior bargaining power, and sometimes have no real ability to comprehend the terms. Courts use the doctrine of contracts of adhesion and the closely related (and sometimes inextricably connected) concept of unconscionability to address these unfair and oppressive “bargains.” See infra Section 1.
cision, and the effects of intellectual property on economic development, access to essential foods, medicines, and public goods, and, ultimately, sustainable development, notions of fairness should be a paramount consideration in treaty interpretation.5

Much of the unfairness in international law results from severe power inequalities among the various nations and the power-based regime that undergirds global governance. The remedy for treaties negotiated unfairly is quite often more treaties or, alternatively, hollow talk of promoting national sovereignty. Neither of these solutions directly attacks the problem. Indeed, there is lack of political will among nations to address the structural defects and power asymmetries in the international system. This article advances a different approach for dealing with the severely disproportionate power disparities in international relations.

Using insights pulled from domestic contract law, the similarities between contracts and treaties, and general principles of law found in the laws of many nations, this article advocates applying the contracts of adhesion doctrine to international agreements. The contracts of adhesion doctrine allows judicial authorities, as a matter of law and public policy, to interpret contracts more favorably to one party because, among other things, the contract is procedurally or substantively unfair. As applied to international agreements, this approach challenges traditional discourse by recognizing and acknowledging the power disparities among countries and developing a “treaties of adhesion” doctrine to address it.6

This article is divided into five sections. Section 1 sets forth the contracts of adhesion doctrine. Generally speaking, these contracts involve either an absence of meaningful choice on the part of one party or contract terms that are unreasonably favorable to the other party. The doctrine demands that ambiguities in the contract be construed against the drafter. At least at the domestic level, taking

5 See FRANCK, supra note 1. Franck argues that the degradation of the earth’s environment has forced individuals and governments to view humanity as a “single gifted but greedy species” that requires a move from the traditional inquiry on whether international law is law to more pointed, important questions about whether international law is effective, enforceable, understood, and, most importantly, fair. Id. at 6.


https://scholarship.law.upenn.edu/jil/vol27/iss3/2
into account the unfairness of agreements, either because of procedural infirmities or substantive inequity, is not novel. Many countries, including the United States, have employed this doctrine. Indeed, "[r]ecognition that contract law should provide some measure of protection against overreaching in contract terms is near universal in modern legal systems.”

Section 2 demonstrates why it is appropriate to apply this equitable doctrine to international treaties. Applying the doctrine to international agreements, while introducing a new line of attack in the scholarly debate on the consequences and capacity of international law, differs in important respects from how conventional international law analysis is applied, which posits that international treaties are the result of bargained negotiation among sovereign equals. The adhesion doctrine is appropriately applied to international agreements if, as it is argued here, the doctrine is a general principle of international law—that is to say, if it is found in a significant number of the world’s legal systems, and, accordingly, represents binding authority for adjudicating international disputes.

Putting theory into context, Section 3 analyzes TRIPS through the lens of this doctrine and concludes that TRIPS is a treaty of adhesion. In the decade since its inception, many have concluded that the Agreement is unfair to developing countries. This alleged unfairness stems from the bargaining and negotiation process leading to the signing of the treaty. This unfairness threatens to undermine the World Trade Organization (“WTO”), as developing

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8 Many of the difficulties created by the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) provisions came to light when developing countries sought access to essential medicines protected by patents. In June 2001, the TRIPS Council convened a special session where many developing countries set forth their opposition to the treaty’s terms. The lead paper was a submission on TRIPS and Public Health from the Africa Group, Barbados, Bolivia, Brazil, the Dominican Republic, Ecuador, Honduras, India, Indonesia, Jamaica, Pakistan, Paraguay, Philippines, Peru, Sri Lanka, Thailand, and Venezuela. Among other things, these developing countries complained that protecting patented drugs drove the cost of necessary medicines outside the price range of the majority of developing countries. Moreover, they argued that TRIPS provisions on compulsory licensing and parallel importation limited their ability to gain access to these medicines. See, e.g., Frederick M. Abbott, The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO, 5 J. INT’L ECON. L. 469, 469 (2002) (declaring the united mission of developing countries to protect their public health interests, even if that meant contravening TRIPS).
countries question whether they should honor an agreement that continues to harm them and provides them very little in terms of countervailing benefits. Rather than dismantle the current international intellectual property system, this new interpretive cannon seeks to rectify the lingering effects of the Agreement’s unfairness.

Section 4 discusses the consequences that flow from the conclusion that TRIPS is a treaty of adhesion. One possible consequence is rescinding TRIPS. Doing so might bring the international intellectual property community back to where it was in 1994, except that countries negotiating intellectual property agreements now fully understand the implications of accepting increased standards. In view of the efforts to draft, negotiate, and implement TRIPS, this outcome is highly unlikely. More likely, with the reasonable assumption that TRIPS is here to stay, the international community—in particular, WTO panels and the TRIPS Appellate Body—may nevertheless take the Agreement’s unfairness into account by using

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10 There is an increasing body of literature criticizing TRIPS. See, e.g., UNITED NATIONS DEVELOPMENT PROGRAM, MAKING GLOBAL TRADE WORK FOR PEOPLE (2003); Marci A. Hamilton, The TRIPS Agreement: Imperialistic, Outdated, and Overprotective, 29 VAND. J. TRANSNAT’L L. 613 (1996) (arguing that TRIPS is outdated because it neglects to address the increase in the international, online intellectual property market); Donald P. Harris, TRIPS’ Rebound: An Historical Analysis of How the TRIPS Agreement Can Ricochet Back Against the United States, 25 NW. J. INT’L L. & BUS. 99 (2004) (describing how TRIPS can have devastating effects on the developing world, and, in turn, the developed world); Martin Kohr, How the South is Getting a Raw Deal at the WTO, in VIEWS FROM THE SOUTH: THE EFFECTS OF GLOBALIZATION AND THE WTO ON THIRD WORLD COUNTRIES 7 (Sarah Anderson ed., 2000) (explaining that many countries feel marginalized by the WTO); A. Samuel Oddi, TRIPS – Natural Rights and a “Polite Form of Economic Imperialism”, 29 VAND. J. TRANSNAT’L L. 415 (1996) (questioning whether TRIPS will have positive economic effects for either developing or developed nations); Ruth L. Okediji, Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement, 17 EMORY INT’L L. REV. 819 (2003) (noting that the dispute settlement policy under TRIPS may adversely affect domestic intellectual property policy). Others argue that unless developing countries feel the game is fair or will benefit them, they simply will fail to comply—even in light of the relatively harsh retaliatory sanctions. See, e.g., Peter M. Gerhart, Reflections: Beyond Compliance Theory – TRIPS as a Substantive Issue, 32 CASE W. RES. J. INT’L L. 357 (2000). Finally, others argue that TRIPS is workable for developing countries if interpreted appropriately. See, e.g., J.H. Reichman & David Lange, Bargaining Around the TRIPS Agreement: The Case For Ongoing Public-Private Initiatives To Facilitate Worldwide Intellectual Property Transactions, 9 DUKE J. COMP. & INT’L L. 11 (1998).
the treaty of adhesion doctrine to interpret its provisions more favorably to developing countries.\(^{11}\) In this section, the doctrine is applied to specific TRIPS provisions. The application of the doctrine helps offset structural imbalances that lie underneath a WTO dispute settlement system that favors its most powerful members.\(^{12}\) Such an approach will rescue the international system, as it will provide developing countries with discretion and flexibility in addressing social, economic, and political concerns. Additionally, it will make these countries feel as if they are part of the international deal and will ensure more compliance with international obligations.

Admittedly, even as to this consequence there is justifiable skepticism as to whether the international community will apply a treaty of adhesion doctrine to international agreements and to TRIPS. International jurists, such as those on the WTO Appellate Body, may be reluctant to embrace such an approach because it is politically motivated and because the doctrine may be controversial. The doctrine is nevertheless important as an attempt to inform a discussion of international treaty interpretation with ideas drawn from the approach. Further, the doctrine may have an indirect forward-looking influence as an indication of policy and principles.


\(^{12}\) Throughout this article, unless specifically noted, the term "developing countries" will refer to both developing countries and least-developed countries, because both occupied relatively similar positions during the TRIPS negotiations. "Developing countries," however, is a broad term, "covering economies ranging from those largely based on subsistence agriculture to those [such as] Brazil and India[,] which have highly industrialized sectors." Gregory Shaffer, How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies, in ICTSD RESOURCE PAPER No. 5 SUSTAINABLE DEVELOPMENT AND TRADE ISSUES 1, 22 (International Centre for Trade and Sustainable Development, March 2003), available at http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf [hereinafter Shaffer Dispute Settlement]. Unlike developing countries, which self-designate their status, the term "least developed country" refers to those countries whose "per capita gross national product (GNP) remains less than $1,000 per year." Id. at 23.
2. CONTRACTS OF ADHESION: ADHESION DEFINED

Traditional contract law is built on the premise that parties consent to be bound by certain obligations. The paradigmatic contract is one between parties of relatively equal bargaining power, achieved through a negotiation process that reflects this power balance.\(^\text{13}\) Of course, not all contracts fall within this paradigm. A number of contracts involve parties with unequal bargaining power where the weaker party has very little opportunity to negotiate the terms of a contract and very little choice in accepting its terms. Such contracts are generally referred to as contracts of adhesion.\(^\text{14}\)

In short, contracts of adhesion allow one party to impose terms on another unwilling or unsuspecting party. This occurs because the party that drafts the contract usually has had the advantage of time and expert advice in preparing the contract, almost inevitably producing a contract slanted in that party's favor. The drafting party then presents the contract to the other party, who not only is relatively unfamiliar with the terms but often does not have the opportunity to read and comprehend those terms, either because they are hidden in fine print or buried in complexity. Even when the non-drafting party has the opportunity to read the contract, that party usually lacks any meaningful choice but to accept the contract—because of a lack of alternatives and because of the accepting party's severely disproportionate bargaining position. This results in a contract presented on a "take-it-or-leave-it" basis "under which the only alternative to complete adherence is outright rejection."\(^\text{15}\)

\(^\text{13}\) See E. Allan Farnsworth, Contracts 285 (4th ed. 2004) (noting that traditional contract law was designed for this paradigmatic equal-bargaining model).

\(^\text{14}\) See, e.g., Edwin W. Patterson, The Delivery of a Life-Insurance Policy, 33 Harv. L. Rev. 198, 222 (1920) (noting that life insurance industry contracts were typically ones of adhesion) [hereinafter Patterson, Delivery].

\(^\text{15}\) Farnsworth, supra note 13, at 286. See also Neal v. State Farm Ins. Cos., 10 Cal. Rptr. 781, 784 (Cal. Dist. Ct. App. 1961) ("The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or to reject it."). A contract of adhesion or standardized contract can benefit the parties because it: (1) "simplif[i]es operations and reduce[s] costs"; (2) "frees sales and office personnel from responsibility for contract terms" because such forms are "the product of [a] skilled drafter"; (3) "facilitates the accumulation of experience"; and (4) "helps to make risks calculable... and increases that real security which is the necessary basis of initiative and the assumption of tolerable risks." Farnsworth, supra note 13, at 285–86. See also Mor-
Describing a contract as one of adhesion—one that resulted from unequal bargaining power—is not by itself dispositive insofar as enforceability is concerned; rather, it is "the beginning and not the end of the analysis." Courts will enforce such contracts unless there are other factors present, such as surprise, gross unfairness, undue oppression, unconscionability, or a contract or provision that is inconsistent with the "reasonable expectations" of the weaker party. Contract provisions that do not "fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced" against that party. Even if the contract or provision is "consistent with the reasonable expectation of the parties, courts will nonetheless deny enforcement if, "considered in its context," a contract or provision is "unduly oppressive or 'unconscionable.'" Thus, labeling a contract as one of adhesion raises a red flag that justifies closer scrutiny of the contract. Theories of assent also play a role. Because real assent is a fundamental condition of contracts, contracts that do not involve such assent—for example, those involving duress, coercion, fraud, and adhesion—are unenforceable. Finally, a court finding that a contract is unenforceable will then rescind the contract, excise the offending provisions, or construe the contract in favor of the weaker party.

**R. Cohen, The Basis of Contract, 46 HARV. L. REV. 553, 558 (1933) (broadly discussing the various rationales for contracting); Edwin W. Patterson, The Interpretation and Construction of Contracts, 64 COLUM. L. REV. 833, 857 (1964) ("The process makes for simplification, clarity, and precision in contracts.") [hereinafter Patterson, Interpretation].**

17 See id. at 172 ("[A] contract of adhesion is fully enforceable according to its terms, unless certain other factors are present which, under established legal rules—legislative or judicial—operate to render it otherwise." (citations omitted)). Adhesion contracts may be unenforceable on at least three different grounds: (1) "there was not true assent to a particular term"; (2) "even if there was assent, the term is to be excised from the contract because it contravenes public policy"; or (3) "the term is unconscionable and should be stricken." JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 399 (5th ed. 2003).
18 See Graham, 623 P.2d at 173.
19 See, e.g., KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960) (arguing that parties do not assent to boiler-plate terms, but instead give a blanket assent to the basic nature of the transaction, a few specifically negotiated terms, and any other terms that are not unreasonable).
20 See, e.g., C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 172 (Iowa 1975) (noting that courts interpreting a form contract should do so in light of the average person entering into that contract); Elliott Leases Cars, Inc. v. Quigley, 373 A.2d 810, 812 (R.I. 1977) (noting that the test to determine meaning of in-
To the theories described above, one commentator adds yet another limitation—distributive fairness. Here, the particular subject matter involved in a contractual controversy plays a key role. Kronman describes this as follows:

Many contracts are contracts of adhesion in the general sense that one party is able to dictate terms to the other, but this alone does not make an agreement objectionable. Suppose, for example, that my neighbor owns a painting I happen to covet. I offer him $5000 [sic] for it. He responds, "$10,000 and no warranties regarding its authenticity. Take it or leave it." Clearly, the fact that I lack bargaining power and must adhere to the terms he proposes does not by itself justify a judicial or legislative effort to tip the balance in my favor. The imbalance in this case, which stems from the fact that he owns the painting and I do not, is unobjectionable because we do not care how control over the painting is distributed.

We feel differently about the distribution of control over society's available housing stock.... The distribution of housing matters more to us than the distribution of paintings.... Those contracts of adhesion that disturb us do so, then, because they reflect an underlying distribution of power or resources that offends our conception of distributive fairness; when distributive concerns are weak or nonexistent, contracts of adhesion are less troubling and the concept of adhesion itself loses meaning. 21

Kronman recognizes the social controls on freedom of contract and overreaching in contracts whenever contracts involve distribution of power over important resources.

Concern over overreaching, lack of assent, and distributive fairness are not confined to the consumer context. While many contracts of adhesion indeed involve consumer contracts, courts have fittingly extended the doctrine to the commercial context as well. 22 This is appropriate, as many commercial relationships in-

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It is not surprising... that courts have been less willing to find unconscionability in agreements where the bargaining position of the parties is

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volve situations in which the parties' bargaining positions are unequal, thus facilitating one party's efforts to impose its terms on another. Accordingly, when the relationship between commercial entities is characterized by an inequality of economic resources and an agreement between them reflects the gross bargaining disparity, courts have also relied on the contracts of adhesion doctrine in interpreting agreements. This is important, as it helps bridge the gap between applying the doctrine to consumers and applying the doctrine to countries.

3. TRIPS IS A TREATY OF ADHESION

3.1. Treaties of Adhesion as International Law

As a preliminary matter, it is worth noting the many similarities between contracts and treaties. Indeed, domestic courts, international tribunals, and scholars have explicitly and repeatedly noted this similarity. For example, the U.S. Supreme Court has stated that treaties are contracts between independent nations. Similarly, the TRIPS Appellate Body has stated that treaties are “the international equivalent of a contract.” Scholars have also noted that “[h]owever styled, [treaties] are in the first place essentially contracts between states.” Scholars and tribunals liken trea-

Of course, not all businesses have equal clout, and in cases where that difference is relevant to the terms of the deal struck, courts have entertained claims of unconscionability.

23 See, e.g., Postal Instant Press, Inc. v. Sealy, 51 Cal. Rptr. 2d 365, 373-74 (Cal. Ct. App. 1996) (declining to award damages to a franchisor because the award would be oppressive given the disparity in bargaining power between a franchisor and franchisee).

24 Some commentators question whether the doctrine is necessary or successful. For example, Maxeiner states that “[w]hile some observers believe that economic self-interest largely prevents standard terms drafters from overreaching and that a control limited to the rare ‘unconscionable’ term is sufficient, others complain that the current control is awkward at best and woefully inadequate at worst.” Maxeiner, supra note 7, at 110 (citations omitted).

25 See, e.g., Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) (“The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations . . . and any conflicting law of the state must yield.”).


27 MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 9 (2d ed. 1993).
ties to contracts for a number of reasons. Treaties, like contracts, settle relations between parties. Both are based on the concept of assent to be bound, as they are presumably formed through a process of negotiation and bargaining. 28 Both are also difficult to draft free of ambiguity. 29 Both are interpreted using particular methods and/or strategies; specifically, both are interpreted using the "text, object and purpose" canons of interpretation. 30 In addition, treaties, like contracts, may be void for public policy rationales (e.g., treaties that violate jus cogens, such as agreements sanctioning slavery or genocide). Finally, neither a treaty nor a contract can bind non-parties. 31

28 But cf. John K. Setear, An Iterative Perspective On Treaties: A Synthesis Of International Relations Theory And International Law, 37 HARV. INT'L L.J. 139, 163 (1996) (challenging the consent-based approach of the law of treaties in explaining why nations are bound to their treaty obligations and discussing the alternative "legitimacy" approach). The legitimacy approach—which argues that governments observe their treaty obligations to increase their legitimacy—flows from an exercise of sovereign power in the case of treaties and freedom of contract in the case of contracts. Whether countries still maintain sovereignty over intellectual property matters since the move from the World Intellectual Property Organization ("WIPO") to TRIPS is debatable. See, e.g., Harris, supra note 10.

29 In fact, treaties may be more vague and ambiguous for reasons such as expediency, political motivation, lack of consensus, and the number of involved parties.

30 Domestic courts rely on the textualist, intentionalist, and teleological approaches to treaty interpretation. See Appellate Body Report, India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R (Dec. 19, 1997) (describing how the domestic court of India will proceed in interpreting facets of the TRIPS agreement); Sullivan v. Kidd, 254 U.S. 433, 439 (1921) (stating that in the U.S. courts "treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals"). International tribunals also rely on the textualist, intentionalist, and teleological approaches to treaty interpretation. See Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331 (describing the factors taken into account when interpreting treaties) [hereinafter VCLT].

31 In treaty vernacular, the notion that a non-party cannot be bound is known as the principle of ius tertii. There are, however, some exceptions to this principle. Among the most notable are "objective regimes," which are understood as binding on non-parties. Examples include the United Nations Charter, the 1959 Antarctic Treaty (and other environmental regimes), and the Treaty Establishing the European Community. See DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 28 (2001) (giving examples of "objective regimes"). There also are critical differences between treaties and contracts and, more importantly, between the domestic legal framework and the international legal framework that make simple importation of contract principles problematic. Paramount among these differences is that international law lacks a single legislature to create laws; a judicial branch to interpret the laws and settle disputes; and an effective enforcement mechanism. Domestic law thus cannot simply be transplanted into international fora. See OSCAR SCHACHTER, 13 DEVELOPMENTS IN INTERNATIONAL LAW: INTERNATIONAL LAW
Similarities to contracts aside, we still must consider whether it is appropriate to apply the doctrine of adhesion to TRIPS. This involves a two-step process. The first step is to analyze to what extent this doctrine is part of international law (i.e., a concept binding on states by treaty, custom, or as a general principle). The second step is to analyze whether the doctrine, if it is in fact a part of international law, can be incorporated into and used to interpret TRIPS.

3.1.1. Sources of international law

Whether the doctrine of adhesion is a legal norm that can be applied to a treaty depends on the “sources doctrine.” Specifically, it is a question of determining what sources contain the norms of international law that can be applied to nations. While there is considerable debate over the sources of international law—such as where one finds sources of international law, whether those sources are exclusive, and what makes international law binding—most international scholars and lawyers concur that the analysis begins with the traditional articulation of sources in Article 38(1) of the Statute of the International Court of Justice (“ICJ Statute”).

To be sure, there are many criticisms of finding international norms in sources such as custom or general principles. Such criticisms revolve around the fact that these sources leave too much wiggle room for the courts, providing no real precision. See Lori F. Damrosch et al., International Law: Cases and Materials 125 (4th ed. 2001) (discussing problems that arise when laws are applications of vague maxims, such as the principle of good faith). A similar criticism is echoed by Kelly, who argues that customary international law is not a viable source of “legitimate norms in a world of conflicting values and interests.” J. Patrick Kelly, Judicial Activism at the World Trade Organization: Developing Principles of Self-Restraint, 22 NW. J. INT’L L. & BUS. 353, 375-78 (2002). He argues that there is no agreed-upon methodology to determine state practice and that customary international law is uncertain and controversial, making it unsuitable for trumping negotiated treaty norms, particularly in view of the many different cultures and values of the states. Id. at 376. Kelly also argues that customary norms sometimes conflict, are generally vague, lack democratic legitimacy, and represents “a poor lawmaking process in a world of over 180 states with diverse values and interests.” Id. at 376-77. These criticisms notwithstanding, general principles and cus-
Article 38 recognizes four different sources: (1) international conventions and treaties; (2) international custom; (3) general principles of law recognized by civilized nations; and (4) judicial decisions and the teachings of the most highly qualified publicists of various nations. By its express terms, Article 38 only applies to the International Court of Justice ("ICJ"); nonetheless, many courts see it as authoritative and apply these sources in resolving international disputes.

3.1.2. Adhesion is a general principle of law recognized by civilized nations

The contracts of adhesion doctrine is not a treaty or a custom; however, it may fall within the category of "a general principle of law recognized by civilized nations." Concededly, general principles are an elusive concept and a very narrow category of binding international law, traditionally limited to filling holes left by international tribunals as authoritative sources of international law and are appropriately used here to evaluate whether TRIPS jurists can apply the contracts of adhesion doctrine to TRIPS disputes.

33 In full, Section 38(1) of the Statute of the International Court of Justice provides:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations;
(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice art. 38(1), June 26, 1945, available at http://www.icj-cij.org/icjwww/basicdocuments/ibasicdocument/ibasicstatute.htm [hereinafter ICJ Statute]. See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102(4) (1987) ("General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.").

34 See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5 (2d ed., 2003) (listing the material sources of custom, including international judicial decisions); MALCOLM N. SHAW, INTERNATIONAL LAW 55 (Cambridge University Press, 4th ed. 1997) ("Although this formulation is technically limited to the sources of international law which the International Court must apply . . . there is no serious contention that the provision expresses the universal perception as to the enumeration of sources of international law.").

35 ICJ Statute, art. 38(1)(c).
ternational treaties and customary international law.\(^{36}\) Moreover, the use of general principles has been more commonly and specifically used for procedural matters and less for substantive law and doctrine.\(^{37}\) This does not, however, foreclose the use of general principles in the context of the adhesion doctrine.

International tribunals and legal scholars have sharply disagreed over what general principles are and how to identify them.\(^{38}\) The concept of general principles as a source of international law is based on at least three underlying concepts. First, rules accepted in the domestic law of civilized nations is evidence of state consensus concerning particular rules. Second, general principles are binding because they reflect a consent to be bound.\(^{39}\) Finally, reliance on general principles recognizes that international law consistently borrows from domestic legal systems.\(^{40}\)

As suggested by Article 38(1)(c), a legal rule becomes a general principle by being recognized in many of the world’s legal systems. The principle need not be universally accepted to be binding. As long as a majority of states or a majority of the states affected by a particular principle are practicing it, general principles can become binding.\(^{41}\)

This section begins with a brief review of how contracts of adhesion are treated under a number of different legal systems. Usually, a general principles analysis must consider a good number of legal systems to determine whether general principles exist. Here, we will consider the legal systems used by some of the major players during TRIPS negotiations: the United States and the European

\(^{36}\) See SCHACHTER, supra note 31, at 52 ("The international cases show . . . use in a limited degree, nearly always as a supplement to fill in gaps left by the primary sources of treaty and custom.").

\(^{37}\) Id. at 50.

\(^{38}\) See BROWNIE, supra note 34, at 16 (describing the views of different scholars on defining general principles).

\(^{39}\) Scholars describe general principles as based on implied consent. See, e.g., DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES 34–35 (1987) (stating that under the positivist view, custom would only bind those who participated in its formulation and where the repeated practice of states was "coupled with a psychological intent to be bound").

\(^{40}\) See BEDERMAN, supra note 31, at 13 ("[T]he international legal system remains primitive and unformed, and . . . often recourse must be had to 'borrowing' legal rules from domestic law.").

\(^{41}\) See, e.g., North Sea Continental Shelf (F.R.G. v. Neth., F.R.G. v. Den.), 1969 I.C.J. 12, 228–29 (Feb. 20) (Lachs, J. dissenting) (stating that a principle of international law may become binding even without universal acceptance so long as a large number or a majority of states practice the principle).
Union (the "EU") (the two dominant powers during TRIPS negotiations); Germany and the United Kingdom (the "U.K.") (two of the most economically and technologically advanced individual members of the EU); Canada; Japan; Korea; and China. Together, these nations represent common and civil law systems, and countries with vastly different economies and cultures (e.g., communism and capitalism). Because a law found in all domestic systems does not ipso facto mean it is international law, the section concludes by arguing why the doctrine of adhesion is worthy of this status.

3.1.2.1. The United States

Most legal systems responded to adhesion contracts in the late nineteenth century, when standard form contracts proliferated.\textsuperscript{42} This was to counteract the rise of monopolies and conglomerates, which used their superior bargaining position to impose one-sided contracts with onerous terms.\textsuperscript{43}

As previously noted, the contract of adhesion doctrine exists in the United States and has been applied for almost a century. The concept did not originate in the United States but was integrated into the legal system in 1919. French philosopher and jurist Raymond Saleilles coined the phrase at the turn of the twentieth century while describing contracts reflecting the will of one party:

Eventually the law must, indeed, yield to the shading and differences that have emerged from social relations. There

\textsuperscript{42} Angelo and Ellinger note that during the eighteenth century and first half of the nineteenth century, the law of supply and demand that governed the manner in which small traders and artisans competed for customers precluded use of standard form contracts that had one-sided terms. A.H. Angelo & E.P. Ellinger, \textit{Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States}, 14 \textit{L.A. INT'L & COMP. L.J.} \textbf{455}, 457 (1992). They observe, however, that by the end of the nineteenth century

\textit{[t]he emergence of large monopolistic companies, such as the early railways, completely changed the balance of power in negotiations. These companies had the power to offer their services on whatever terms they pleased. Any equality of bargaining power between such giants and the average citizen was, and has remained, illusory.}

\textit{Id.} The authors note that in the mid-twentieth century, the rise of multinational corporations and their subsidiaries aggravated the situation.

\textsuperscript{43} See \textit{id.} at 458 (discussing contract terms that greatly favor the stronger party as unconscionable); Maxeiner, supra note 7, at 114 ("Recognition that contract law should provide some measure of protection against overreaching in contract terms is near universal in modern legal systems.").
are pretended contracts that have only the name, the juridi-
cal construction of which remains yet to be made. For
these, in any event, the rules of individual interpretation
should undergo important modifications, if only that one
might call them, for lack of a better term, contracts of adhe-
sion, those in which a single will is exclusively predomi-
nant, acting as a unilateral will which dictates its law, no
longer to an individual, but to an indeterminate collectivity,
and which in advance undertakes unilaterally, subject to
the adhesion of those who would wish to accept the law . . .
of the contract and to take advantage of the engagements
imposed on themselves.44

U.S. scholar Edwin W. Patterson suggested that a term recog-
nizing differences in social relations "seem[ed] worthy of a place in
our legal vocabulary."45 Thus the doctrine was born in the United
States. The EU’s effort to address contracts of adhesion is more re-
cent.

3.1.2.2. The European Union: the European Community’s
Unfair Terms Directive

In 1993, the EU issued Council Directive 93/13/EEC, known as
the Unfair Terms Directive ("Directive").46 The Directive is con-
sumer protection legislation and the first European-wide effort to
address standard term contracts. Standard term contracts include
terms that “one party formulates for use in its contract generally
and provides to other parties for use in their mutual transac-
tions.”47 The terms are not negotiated but are presented at the con-

44 Patterson, Interpretation, supra note 15, at 856 (quoting SALEILLES, DE LA DEC-
LARATION DE VOLONTE, § 89, at 229-30 (1901) (Edwin W. Patterson, trans.)). Patter-
son surmises that “[t]he term ‘adhesion contract’ may have been derived from the
analogy of multilateral treaties, which are drawn up by negotiations between a
few nations who sign and invite other nations to adhere to the treaty later.” Id. at
375 n.96.
45 Patterson, Delivery, supra note 14, at 222 n.106. See 2 M. PLANIOL, TRAITE
ELÉMENTAIRE DE DROIT CIVIL § 972 (1950) (indicating that terms recognizing differ-
ces in social relations abound in French Law); OPPENHEIM’S INTERNATIONAL LAW
§§ 532-33 (1996) (recognizing disparity in the social relations underlying legisla-
tion in different nations).
Terms Directive]. Directives, which are addressed to member states, are “binding
with respect to the results to be achieved,” even though members may choose the
form of implementation. JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS,
47 Maxeiner, supra note 7, at 110.
clusion of contract bargaining.\textsuperscript{48} The Directive applies to all contracts and terms that have not been individually negotiated and requires that member states adopt statutes and standards that protect consumers from overreaching in contracts by requiring certain minimum standards.\textsuperscript{49}

As in the United States, the Directive seeks to address abusive practices, one-sided contracts, and unfair terms.\textsuperscript{50} In addition, the Directive pays particular attention to good faith and the relative strength of the parties' bargaining positions.\textsuperscript{51} Accompanying the Directive is an explanatory memorandum that sheds light on some of its concerns:

Suppliers generally have the advantage in drafting standard contract forms. Individual consumers rarely negotiate those terms and, if they do, they seldom have bargaining power sufficient to protect their interests. The principle of freedom of contract permits suppliers through use of standard terms to impose on consumer terms that 'satisfy the suppliers' interest but disregard the interests of the consumers.'\textsuperscript{52}

The Directive's more important articles include Articles 3, 5, and 6. Consistent with the good faith principles noted above, Article 3 provides: "[a] contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."\textsuperscript{53}

\begin{flushright}
\textsuperscript{48} Id.
\end{flushright}

\begin{flushright}
\textsuperscript{49} See Unfair Terms Directive pmbl., \textit{supra} note 46, at 2. The minimum standards required by the Unfair Terms Directive ("the Directive") are considered more restrictive than U.S. law. Maxeiner, \textit{supra} note 7, at 111.
\end{flushright}

\begin{flushright}
\textsuperscript{50} See, e.g., The Unfair Terms Directive pmbl., \textit{supra} note 46, at 1.
\end{flushright}

\begin{flushright}
\textsuperscript{51} In determining whether terms are unfair, "particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer . . . ." \textit{Id.} at 2.
\end{flushright}

\begin{flushright}
\textsuperscript{52} Maxeiner, \textit{supra} note 7, at 132.
\end{flushright}

\begin{flushright}
\textsuperscript{53} Unfair Terms Directive, \textit{supra} note 46, art. 3(1). Article 3(2) further provides that "[a] term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract." \textit{Id.} art. 3(2).
\end{flushright}
Article 5 provides for a *contra proferentem* rule of contract interpretation: "[i]n the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail."\(^{54}\)

Article 6 establishes the non-binding nature of unfair terms:

\[\text{[m]ember [s]tates shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.}\(^{55}\)

While the Directive is instructive, it is nonetheless an edict that individual members must implement in their respective legislatures. All EU members, including Germany and the U.K., have done so.\(^{56}\)

3.1.2.3. Germany

3.1.2.3.1. Germany's Standard Terms Statute of 1976

While the Directive is limited to the consumer context, it is merely a minimum directive; members are free to provide more protection if they choose to do so. Germany's law provides more protection than the Directive requires. Germany's law on adhesion contracts deserves special mention, as the German Standard Terms Statute of 1976 (the "German Statute") was the "source of inspira-

\(^{54}\) *Id.* art. 5.

\(^{55}\) *Id.* art. 6(1). The Directive also attempts to guard against forum shopping in individual countries. Article 6(2) states that "Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States." *Id.* art. 6(2).

\(^{56}\) Because of the Directive, the individual European Union ("EU") members have similar statutes. Germany and the United Kingdom ("U.K.") are used as examples because they are two of the larger members (in terms of population and economy) and have contrasting legal systems (German is a civil law system and the U.K. is a common law system).
tion” for the Unfair Terms Directive.\(^57\)

Germany’s treatment of standard form contracts comes from both judge-made law and legislation. At the end of the nineteenth century, German judges issued numerous consumer protection opinions to combat, in large part, the widespread use of standard form agreements. The German Statute has a statutory basis in the German Civil Code of 1900. In particular, Section 138 provided that “a transaction that offends good morals (gute Sitten) is void”\(^58\); Section 242 provided that “[o]bligations shall be performed in the manner required by good faith [Treu and Glauben].”\(^59\) The German Supreme Court used these two provisions to limit enforcement of standard terms.\(^60\) The Supreme Court’s decisions during the 1950s and 1960s, along with an emerging consumer movement, “set in motion broader changes in thinking that culminated in the Standard Terms Statute.”\(^60\)

As already noted, standard terms problems arise because dominant parties use their advantage to draft contracts that resolve all issues in their favor, giving the weaker party no opportunity to negotiate certain issues or seek alternative options. The German Statute recognizes that, in these situations, there is little or no freedom of contract. The statute sets limits on the ability of stronger parties to exploit their superior bargaining position to take “inappropriate advantage” of other parties.\(^61\)

The German Statute is comprised of two principal parts. The first part reveals the procedural requirements that should determine what terms would become part of a particular contract. It requires that the party presenting an adhesion contract give the other party notice and an opportunity to review the standard terms contract.\(^62\)

The second part relates to whether and how the substance of the terms should be subject to control.\(^63\) This part is predicated on

\(^{57}\) Maxeiner, supra note 7, at 111-12. Germany also has the largest population of any country in the EU. Therefore, its treatment and implementation of the Directive is most revealing from an economic standpoint.

\(^{58}\) Id. at 142.

\(^{59}\) Id. at 143.

\(^{60}\) Id.

\(^{61}\) Id. at 148.

\(^{62}\) See id. at 151 (defining standard terms as “terms prepared beforehand for a multiple number of contracts and . . . presented . . . by the user to the other party at the contract’s conclusion”).

\(^{63}\) Maxeiner, supra note 7, at 152. Maxeiner refers to the first part (regarding
the absence of agreement between the parties as to the content of the contract terms. German courts use a three-pronged approach to evaluate whether terms in an adhesion contract will govern. First, courts will look to see whether an allegedly offending term is on a "black list" of prohibited terms. Second, courts determine whether the term is on a "grey list" of suspect terms. Finally, the court will test the term against the good faith standard found in a general good faith clause. The good faith clause looks to see whether the contract term is entirely one-sided and fails to take into account the other party's interests. The sum effect of these provisions is that obligations imposed by adhesion contracts must be "reasonable in relation both to the user's own interests and the burden imposed on the other party."

As for contract interpretation, the German statute provides that any doubts in construing standard terms are to be resolved against the user (kundengunstigste Auslegung).

3.1.2.3.2. Germany's implementation of the EU's Unfair Terms Directive

When Germany harmonized the German Statute with the EU's Unfair Terms Directive, only "relatively minor changes" were required. However, the German Statute diverges from the Directive in a number of key respects. First, the German Statute is not limited to the consumer context; it is a general statute that governs standard terms and protects all parties from the misuse of standard terms. Second, because the law governs a particular contract

formal or procedural requirements) as "incorporation control" and the second part (regarding substance) as "content control." Id. at 114-15.

64 See id. at 161.


66 See Maxeiner, supra note 7, at 154 (discussing the standard for violations of good faith).

67 Id. Maxeiner notes that courts rely on principles of necessity and proportionality in deciding which terms of the contract to uphold.

68 Id. at 152.

69 Id. at 162.

70 Id. at 149.
practice generally, it does not require a finding that the exploited party is weak.\textsuperscript{71}

Two other provisions in the German Civil Code of 1900 also merit consideration, as they contain general provisions that relate to adhesion contracts. Section 138(1) provides: "a legal transaction which offends good morals is void."\textsuperscript{72} Section 138(2) also voids a legal transaction when

\begin{quote}

somebody, by exploiting the predicament, inexperience, lack of judgment[,] or considerable weakness of will or the other party, causes pecuniary advantages to be promised or conferred onto him or onto a third party in exchange for performance, whereby these pecuniary advantages are clearly disproportionate to this performance.\textsuperscript{73}
\end{quote}

Courts have used these two general provisions in cases where a party controls the economic freedom of another party such that the party applies a "stranglehold" over that party.\textsuperscript{74}

\subsection*{3.1.2.4. The United Kingdom}

\subsection*{3.1.2.4.1. The United Kingdom’s 1977 Unfair Contract Terms Act}

Similar to Germany law, U.K. law protecting consumers from unconscionable and adhesion contracts is a mixture of common and statutory law. Protection from such contracts dates back to the seventeenth century, when, in limited circumstances, courts granted equitable relief from harsh and unconscionable bargains.\textsuperscript{75} Very early cases granted remedies against oppressive bargains designed to protect the estates of the landed classes (e.g., transactions involving trading on the weakness of expectant heirs).\textsuperscript{76} Up through the nineteenth century, the principle supporting these decisions was the need to remedy inequalities of bargaining power. Angelo and Ellinger summarize U.K. law concerning unconscionability rules.\textsuperscript{77}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{71} Id.
\item \textsuperscript{73} Id. § 138(2).
\item \textsuperscript{74} See Angelo & Ellinger, supra note 42, at 489 (providing history of court cases dealing with unconscionability rules).
\item \textsuperscript{75} Id. at 460–65.
\item \textsuperscript{76} Id. at 460–61.
\end{enumerate}
\end{footnotesize}
able and adhesion contracts during this period as follows:

[T]he English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.\textsuperscript{77}

Common law also developed rules of construction to combat the inequality of bargaining power; chief among these the \textit{contra proferentem} rule.\textsuperscript{78}

As for statutory protection, the English legislature enacted the Unfair Contract Terms Act of 1977 (the "U.K. Act" or "Act"). The U.K. Act's purpose is to protect consumers from clauses that either eliminate or restrict liability for negligence or non-performance of a contract by one party.\textsuperscript{79} It applies primarily to exemption clauses in standard form contracts and provides guidelines for determining the reasonableness of a specific contractual clause. Factors that a court considers in determining reasonableness include:

- the relative strength of the parties' bargaining positions;
- whether the customer received an inducement to agree to the term or had an opportunity to enter into a similar contract without the offending clause with another person; and
- whether the customer knew or should have known of the existence of the exemption clause.\textsuperscript{80}

The Act makes the offending clause void.\textsuperscript{81}

\textsuperscript{77} Id. at 467.


\textsuperscript{79} See Angelo & Ellinger, supra note 42, at 470–71 (clarifying the primary function of the Unfair Contract Terms Act of 1977 (the "U.K. Act" or "Act") in light of its potentially misleading title).

\textsuperscript{80} Id. at 471.

\textsuperscript{81} See id. at 470–71 (discussing the outcome of application of the U.K. Act).
3.1.2.4.2. The United Kingdom’s Implementation of the EU’s Unfair Terms Directive

In 1994, the United Kingdom implemented the Directive by enacting the Unfair Terms in Consumer Contracts Regulations (the “U.K. Regulations” or the “Regulations”). In contrast to Germany, the United Kingdom implemented the Directive not by amending existing legislation but by making secondary legislation—simply transposing the Directive’s text almost verbatim into the Regulations. This left preexisting legislation in place, resulting in significant overlap between the Act and the Regulations.

Because the Act only prohibited businesses from excluding or limiting liability for breach of contract or negligence, the Regulations expanded legal protections by scrutinizing all contracts and contract terms drafted in advance and over which the consumer had little influence. Just like the Act, however, the Regulations included a test of fairness based on both a substantive and procedural definition of unfairness. Substantive unfairness exists when a term creates a “significant imbalance” in the rights and obligations of the parties to the detriment of the consumer. Procedural unfairness exists when the imbalance is “contrary to the requirement of good faith.” The Regulations also reflect U.K. rules of construction. In particular, the Regulations implement the Directive’s requirement that contract terms be expressed in “plain, intelligible language” and provide that “if there is doubt about the meaning of a written term, the interpretation most favourable to the consumer shall prevail”—in other words, the contra proferentem rule itself.

The Regulations made three significant changes to preexisting U.K. law. First, the Regulations introduced the concept of good faith. Prior to the Regulations, English law did not recognize a

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83 See id. at 29 (illustrating the history of adhesion contracts legislation).
84 See id. (observing that “in some cases the Act gives greater protection than the Regulations whilst in others the Regulations give greater protection”).
85 See id. at 32 (detailing similarities between the Regulations and prior law on unfair terms).
86 Id. at 31. This is similar to the English law’s test of reasonableness in weighing whether a contract term was unfair or whether the term “was a fair and reasonable one to include in the particular contract between the parties.” Id. at 28.
87 Id. at 33.
general duty of good faith outside of specific doctrines. Because good faith was alien to U.K. lawyers, the Regulations included a list of factors to guide lawyers. These include a consideration of the parties' relative strength and bargaining position, whether alternate options existed, and whether compliance was practicable.

The second change was the requirement that terms be expressed in plain, intelligible language. According to English scholar Robert Bradgate, this requirement was also unfamiliar to many English lawyers, who were "trained for decades in the tradition of Victorian conveyances to couch even the simplest agreements in complex 'legalese.'" This requirement resulted in the use of fewer standard terms.

The final change was authorizing the U.K. Director General of Fair Trading to bring actions against businesses that use contracts with unfair terms. This is consistent with the Directive's condition that "adequate and effective means exist to prevent the continued use of unfair terms." The Director General has used this power extensively.

3.1.2.5. Korea

Korea's Adhesion Contract Act of 1986 (the "Korea Act") is designed to protect consumers by preventing businesses from using their superior negotiating position to prepare and use adhesion contracts that contain unfair terms. The Korea Act defines adhe-

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90 Bradgate U.K. Report, supra note 78, at 35.

91 See id. at 36 (discussing commentators' negative opinions of the use of plain language in contracts).

92 See, e.g., Collins U.K. Report, supra note 88, at 323 (stating that the method of enforcement is the most important change resulting from the U.K.'s adoption of the Directive.).

93 Unfair Terms Directive art. 7, supra note 46, at 7.

94 See Collins U.K. Report, supra note 88, at 326 (noting that the Director General has issued a number of publications discussing the effects of the Unfair Terms Regulations).

sion contracts as "the general terms and conditions of a contract, regardless of their name, type, or scope, prepared in advance by one party in a certain form for the purposes of entering into a contract with a large number of persons." 96 The Korea Act obligates businesses to explain the content of the adhesion contracts they use "in a way that would generally be expected" and outline the "important particulars" so that customers can understand them. 97 It also provides that if a business violates the its provisions, it cannot claim that the pertinent adhesion contract terms become null and void. Finally, the Korea Act construes adhesion contracts "impartially in accordance with the principle of trust and good faith" and provides that if the meaning of an adhesion contract is unclear it "shall be construed in favor of the [c]ustomer." 98

3.1.2.6. China and Japan

China and Japan have similar laws protecting consumers from businesses that overreach through use of their superior bargaining positions. China's Law on the Protection of Consumer Rights and Interests99 (the "China Law") is designed to protect consumers by requiring that business dealers "adhere to the principles of voluntary [sic], equality, fair deal [sic], honesty, and credibility" when they enter into contracts with consumers. 100 The China Law prevents businesses from using form contracts that are unfair or unreasonable to consumers. 101

Japan's Consumer Contract Act of 2001 (the "Japan Act") recognizes that consumers are at a disadvantage to businesses because businesses possess superior negotiating positions and access to information. In its December 1999 Report, Japan's Social Policy Council recommended that the Diet enact the Japan Act to level the

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96 Id. art. 2.
97 Id. art. 3.
98 Id. art. 5. The Act defines customer as "a person who is a party to a contract and has received from an [e]nterprise an offer to incorporate an adhesion contract into the contract." Id. art. 2.
100 Id. art. 4.
101 Id. art. 24.
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playing field. The Japan Act was passed in 2000 and put into force in 2001.\textsuperscript{102}

In many ways similar to the law in other nations, the Japan Act protects consumers by permitting them to avoid the obligations of contracts in view of “the gap in quality and quantity of information and in the negotiating power between consumers and business,” all of which “unfairly impair the interests of consumers.”\textsuperscript{103} Under the Japan Act, “[c]ertain types of contract terms which are unreasonably disadvantageous to a consumer shall be deemed null and void.”\textsuperscript{104}

3.1.2.7. Canada

Canada’s treatment of adhesion contracts is rooted in case law. In \textit{Manulife Bank of Canada v. Conlin},\textsuperscript{105} the court commented that adhesion contracts are documents drawn on standard forms, each involving a weaker party with little or no part in the negotiation and having no choice but to comply with its terms.\textsuperscript{106} Under these circumstances, Canadian courts hold that “it is eminently fair that if there is any ambiguity in the terms used in the [contract], the words of the documents should be construed against the party which drew it, by applying the \textit{contra proferentem} rule.”\textsuperscript{107} This ruling is not limited to the consumer context.\textsuperscript{108}


\textsuperscript{103} \textit{Id.} art. 1.

\textsuperscript{104} Tsuneo Matsumoto, \textit{Privatization of Consumer Law: Current Developments and Features of Consumer Law in Japan at the Turn of the Century}, 30 H\textsc{i}t\textsc{o}t\textsc{u}b\textsc{a}shi J.L. & Pol. 1, 10 (2002). In addition to this, a consumer has the right to rescind a contract if the business party has misrepresented or intentionally withheld important facts, or if the consumer entered into the contract under duress. \textit{Id.}


\textsuperscript{106} \textit{Id.} at 424.

\textsuperscript{107} \textit{Id.} at 425. The court notes that the \textit{contra proferentem} rule calls for strict interpretation of contract terms so that the meaning least favorable to the author of the contract is applied. \textit{See also} G.H.L. Fridman, \textit{The Law of Contract in Canada} 471 (3d ed. 1994); Kevin Patrick McGuiness, \textit{The Law of Guarantee: A Treatise on Guarantee, Indemnity and the Standby Letter of Credit} 244 (2d ed. 1996).

\textsuperscript{108} \textit{See, e.g.}, ECU-Line N.V. v. Z.I. Pompey Industrie, [2003] 1 S.C.R. 450 (Can.) (noting contract construed against the more powerful party in the commercial context). This review of domestic adhesion law in various countries can be read more narrowly to detect differences. For example, U.S. law is directed at contracts
This brief review of the domestic law in various countries demonstrates that by the implied consent of the nations considered, there is sufficient consensus to make the contracts of adhesion doctrine an established rule of international law. States have uniformly applied this equitable principle since the beginning of the twentieth century. As such, it is a doctrine that can be applied to the international legal system and its treaties.\(^\text{109}\)

As mentioned, it is far from axiomatic that a law becomes international law by virtue of its existence in all domestic systems. A law must first be suitable for application on the international level before it is properly applied there.\(^\text{110}\) In other words, the law must be in an area that has "become the concern of international law."\(^\text{111}\) There are at least three reasons that justify applying the doctrine of adhesion on the international level: (1) the doctrine is consistent with international law; (2) the doctrine is similar to other general principles already recognized by the international community as international law; and (3) the doctrine is central to domestic legal systems worldwide.

International law recognizes and provides a remedy for over-reaching and abusive treaties. Indeed, the Vienna Convention on the Law of Treaties ("VCLT"), which is undeniably customary international law and was adopted by numerous states at an international conference in 1969, invalidates treaties based on coercion and lack of consent.\(^\text{112}\) In particular, VCLT Articles 51 and 52 are that are unconscionable and is not limited to the consumer context. The law in Canada, Japan, Korea, and China is also directed to contracts that exhibit unfairness. The European Directive is a consumer protection directive geared towards unfair terms in contracts. German law is consistent with this focus as well. Nevertheless, all of these laws target contracts that are by themselves unfair or contain unfair terms. Viewed in this manner, contracts with unfair terms are simply a subset of the larger set of adhesion contracts.

\(^\text{109}\) See Siegfried Wiessner, American Indian Treaties and Modern International Law, 7 St. Thom. L. Rev. 567 (1994) (applying the doctrine to American Indian treaties); see also Rudolf B. Schlesinger, Formation Of Contracts: A Study Of The Common Core Of Legal Systems, 7–16 (1968) (explaining the process by which domestic law becomes international law); Michael Bothe & Georg Ress, The Comparative Method and International Law, in INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE 49 (William E. Butler ed., 1980) (describing the relationship between domestic and international law).

\(^\text{110}\) DAMROSCH ET AL., supra note 32, at 120 (describing circumstances in which domestic law can become international law).

\(^\text{111}\) Id. at 121.

\(^\text{112}\) See DUNOFF ET AL., supra note 46, at 39 (noting that as of June 2002, ninety-four states are parties to the VCLT, which codifies or creates international law).
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on point. Art. 51 provides: "[t]he expression of a [s]tate's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect."113 Article 52 provides: "[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."114

As these articles make clear, international law has before now invalidated treaties based on coercion or lack of state consent. In fact, a host of rules in the VCLT and other treaties is designed to ensure the validity of state consent.115 It is important to note, however, that the coercion recognized here relates to physical coercion. Moreover, when these articles were adopted, many developing countries sought an article that would invalidate "unequal treaties" or sought a definition of coercion or force that included "economic and political pressure".116 This triggered "vociferous[] support[] and vehement[] attack[s]."117 In the end, developed countries—which viewed the proposal as sufficiently vague so as to jeopardize the stability of treaty relations118—and developing countries—which relied in part on the principle of the sovereign equality of states to support a broad coercion definition119—reached a unanimous compromise solution. The solution was the Declaration on the Prohibition of Military, Political, or Economic Coercion in the Conclusion of Treaties, which condemned the threat or use of pressure in any form to coerce another state to conclude a treaty.120

The inability of developing countries to adopt an article invalidating unequal treaties before 1969 and the lack of express authority for this in the VCLT might lead some to question whether it is now appropriate to adopt one. There are a number of responses to

The United States is not a party to the treaty, but as the authors note, "the executive branch has described the Convention as 'the authoritative guide to current treaty law and practice.'"

113 VCLT, supra note 30, art. 51.
114 Id. art. 52.
115 Id. arts. 48–51.
116 See Dunoff et al., supra note 46, at 45–47.
117 Id. at 47.
118 Dunoff & Trachtman, supra note 31, at 47.
119 Id.
120 Id.
For one, just because international law only invalidates a treaty on the grounds of physical coercion does not mean that international law does not acknowledge an adhesion doctrine when one exists or delimits the categories of impermissible coercion. While domestic law invalidates contracts procured though physical force, intimidation, and duress, it also allows affected parties to seek redress for adhesion contracts which were created under onerous conditions other than physical coercion. A similar alternative path exists in international law. The international community may already recognize that there are insidious forms of coercion that are no different than physical coercion, such as economic and political coercion. The recent adoption of rules in various states regarding adhesion contracts may be evidence of a trend to rethink or broaden the concept of coercion. Moreover, cries of vagueness from developed countries may be quieted by the more concrete standards these countries now deploy to combat adhesion contracts. Finally, while earlier arguments centered around invalidating unequal treaties, the concept advanced here not only seeks to keep treaties intact but also relies on more than mere inequality of states. The treaty of adhesion doctrine recognizes that equality of states is merely juridical and that, as a practical matter, states are unequal in many respects—including resources, economic strength, size, political clout, and military capacity, all of which necessarily place some states in stronger bargaining positions than others. This difference alone cannot justify invalidating treaties. Rather than invalidating or terminating treaties or allowing countries to withdraw from them, the doctrine seeks to interpret ambiguous provisions in favor of developing countries.

The adhesion doctrine may also be considered a general principle of law applicable to international relations because it is consistent with other general principles of international law. For example, general principles include such equitable principles as res judicata, unjust enrichment, unclean hands,121 estoppel,122 and ac-

121 See DAMROSCH ET AL., supra note 32, at 124 ("Substantive principles applied as 'general' principles by such tribunals have included clean hands, acquiescence, estoppel, elementary principles of humanity, duty to make reparations, equity, equality, protection of legitimate expectations, and proportionality.").

122 As stated by Aust:
A unilateral declaration may, depending on the intention of the state making it and the circumstances, be binding in international law. Underlying this is the fundamental international law principle of good faith. Good faith also underpins the doctrine of estoppel (preclusion), which in
quiescence. Notably, these general principles include equitable substantive and procedural concepts. Friedmann notes that equity as a principle of interpretation "is beyond doubt an essential and all-pervading principle of interpretation" for both common and civil law systems. The International Court of Justice (the "ICJ") has also made clear that equitable principles are not secondary principles of law that operate parallel to international law but are rather part of international law. International law scholars like

international law is a substantive rule and broader and less technical than estoppel in the common law, being founded on the principle that good faith must prevail in international relations. The exact scope of the international law doctrine is far from settled, but in general it may be said that where a clear statement or representations made by one state to another, which then in good faith relies upon it to its detriment, the first state is estopped (precluded) from going back on its statement or representation.


As Friedmann states:

[T]he function of equity as a principle of interpretation... is beyond doubt an essential and all-pervading principle of interpretation in all modern civil codifications, and it is equally important in the modern common law systems, under a variety of terminologies such as 'reasonable,' 'fair' or occasionally even in the guise of 'natural justice.' There is thus overwhelming justification for the view developed by Lauterpacht, Manley Hudson, De Visscher, and Dahm, that equity is part and parcel of any modern system of administration of justice.


As Franck notes:

[T]he justice of which equity is an emanation is not abstract justice but justice according to the rule of law: which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the more peculiar circumstances in an instant case, it also looks beyond it to principles of more general application. This is precisely why courts have, from the beginning, elaborated equita-
Damrosch note that certain general principles embrace the concept of equity, such as principles of "fairness, reciprocity, and consideration of the particular circumstances of a case."\(^{126}\) Two of the most important international law concepts are *pacta sunt servanda* (i.e., treaties must be complied with) and good faith.\(^ {127}\) These have been described as the "fundamental principle[s] of the law of treaties."\(^ {128}\) These examples are important because principles of good faith and equity are precisely the principles that underlie the doctrine of adhesion.

A law intrinsic to the idea of law and basic to all legal systems is appropriately considered a general principle applicable as international law.\(^ {129}\) The notion of protecting weaker parties from the overreaching abuse of stronger parties is intrinsic to the idea of law and underlies the concept of contracts of adhesion. Even in the world's contemporary capitalistic system, there are limits on coercive and consensual hegemony.

### 3.2. Incorporating Treaties of Adhesion into the WTO

After concluding that the doctrine is part of international law, the second part of the analysis concerns whether the doctrine can be incorporated into or used to interpret TRIPS specifically. This second inquiry is necessary because scholars disagree on whether World Trade Organization ("WTO") agreements are subject to

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\(^{126}\) DAMROSCH ET AL., *supra* note 32, at 49. Equity, as a part of law, must be distinguished from the concept of *ex aequo et bono* (i.e., outside the framework of the law). *Id.* at 48-54.

\(^{127}\) Article 26 of VCLT states that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." VCLT, *supra* note 30, art. 26. See DUNOFF ET AL., *supra* note 46, at 54 (discussing the argument that the doctrine of good faith is implied in treaties). *Pacta sunt servanda* is typically translated from Latin as "treaties are to be obeyed." Good faith is further found in the VCLT rules on treaty interpretation. Article 31 states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." VCLT, *supra* note 30, art. 31. See also Josef L. Kunz, *The Meaning and Range of the Norm Pacta Sunt Servanda*, 39 AM. J. INT'L L. 180, 197 (1945) (exploring the meaning of the norm pacta sunt servanda); Hans Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775, 786 (1959) (detailing the history of *pacta sunt servanda*).

\(^{128}\) See Dunoff & Trachtman, *supra* note 31, at 54.

\(^{129}\) DAMROSCH ET AL., *supra* note 32, at 49 (discussing the concept of state sovereignty).
general principles, customary international law, or other mandates outside specific WTO rules. This is an area of much contention and critical importance.

Without question, one of the more difficult topics in international law is that of treaty interpretation. Not only is there widespread disagreement on how to interpret a treaty (e.g., what sources a jurist may look to while interpreting) but also wide disagreement on the aim and goal of treaty interpretation. TRIPS interpretation is not immune from such disagreements. In fact, WTO agreement interpretation adds yet another wrinkle to this problem—namely, whether non-WTO international law is relevant in resolving WTO disputes and, more importantly for our purposes, in interpreting TRIPS.

Stated somewhat differently, the question is whether WTO law is self-contained or whether it is simply part of the broader corpus of international law. The distinction makes a difference. If non-WTO law is relevant, WTO jurists can rely on and apply other general public international law, such as contracts of adhesion doctrine, in interpreting WTO agreements. If not, WTO jurists are limited to specific WTO agreements.

3.2.1. WTO treaty interpretation – the debate

3.2.1.1. Arguments for limiting WTO Law

The lively debate in the international community as to whether

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130 For example, in treaty interpretation there are at least three generally accepted approaches: the subjective (intention of parties), objective (textual meaning) and teleological (object and purpose):

On the one hand, there are those who assert that the primary, and indeed only, aim and goal of treaty interpretation is to ascertain the intention of the parties. There are others who start from the proposition that there must exist a presumption that the intentions of the parties are reflected in the text of the treaty which they have drawn up, and that the primary goal of treaty interpretation is to ascertain the meaning of this text. Finally, there are those who maintain that the decision-maker must first ascertain the object and purpose of a treaty and then interpret it so as to give effect to that object and purpose.


131 WTO jurists may also apply the doctrine as a “relevant rule[ ] of international law applicable in the relations between the parties.” VCLT, supra note 30, art. 31(3)(c). As discussed, infra Section III, WTO scholars concede that the VCLT rules on treaty interpretation are relevant to TRIPS disputes.
or not WTO law is self-contained can be divided into contrasting schools of thought, each of which lie on a continuum. At one end, a number of scholars believe that the WTO is self-contained and completely isolated from general international law. Under this view, WTO jurists are restricted to applying WTO law in WTO disputes and cannot, except in very narrow circumstances, consider other rules of international law. We will call these advocates “interpretive conservatives.” Proponents of this view include Trachtman and Kelly, who argue that the language in the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”) and the specific references to WTO law in WTO agreements provide clear support for using only WTO law in WTO dispute resolution.


133 Whether WTO law should refer to other non-WTO law is referred to by trade specialists as “interpretive linkage.” This is defined as “doctrinal arguments that the WTO's Dispute Settlement Body needs to interpret relevant trade rules in light of other substantive rules of public international law because trade, after all, is not a 'self-contained regime.'” José E. Alvarez, Foreword: The Boundaries of the WTO, 96 Am. J. Int'l L. 1, 2 (2002). See also David W. Leebron, Linkages, 96 Am. J. Int'l L. 5, 21 (2002) (discussing principles of treaty interpretation and their impact on linkage between multilateral agreements).

134 See Michael Lennard, Navigating By the Stars: The WTO Agreements, 5 J. Int'l Econ. L. 17, 41 (2002) (arguing that Article 3.2 is narrowly framed as referring only to sources of law bearing upon interpretation and arguing that "other sources of international law must fall for consideration under another head"); Gabrielle Marceau, WTO Agreements Cannot Be Interpreted in Clinical Isolation from Public International Law, (World Bank Seminar on International Trade Law) (Oct. 24–25, 2000) [hereinafter Marceau, WTO Agreements] ("Under the [Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”)], only provisions of the 'covered agreements' can be the 'applicable law' applied and enforced by panels and the Appellate Body."); Gabrielle Marceau, A Call for Coherence in International Law: Praises for the Prohibition Against “Clinical Isolation” in WTO Dispute Settlement, 33 J. World Trade 87, 110 (1999) [hereinafter Marceau, Call for Coherence] (arguing that the WTO adjudicating bodies may not apply or enforce all sources of law and that Article 7(2) of the DSU only allows the WTO to consider "covered agreements").

135 The term “interpretive conservatives” and the term “interpretive liberals” have no relation to the broader political terms “conservatives” and “liberals.” They are used to denote proponents of a limited and expanded view of WTO interpretive jurisdiction, respectively.

136 Joel P. Trachtman, The Domain of WTO Dispute Resolution, 40 Harv. Int'l L.J. 333, 342 (1999) (arguing that the text of the DSU holds that WTO adjudicating
Interpretive conservatives argue that DSU Articles 3(2), 7, and 11 support their position. Article 3(2) provides that the dispute settlement system "serves to preserve the rights and obligations of [m]embers under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."\(^{137}\) It further provides that "[r]ecommendations and rulings of the [Dispute Settlement Body ("DSB") cannot add to or diminish the rights and obligations provided in the covered agreements."\(^{138}\) The phrase "in accordance with customary rules of interpretation of public international law," they argue, allows incorporation of rules of interpretation but does not allow the use of different substantive international law. Moreover, if WTO jurists incorporated non-WTO norms into the WTO legal system, interpretive conservatives argue that WTO members' rights would be diminished, in that incorporation would give priority to international norms over negotiated rights. Kelly argues that incorporation would "violate the bargain struck in the DSU."\(^{139}\)

Articles 7 and 11 provide further support by directing the WTO panels to look to "covered agreements" — the WTO trade agreements listed in Appendix I to the DSU — to determine whether panel rulings are consistent with those covered agreements.\(^{140}\)

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\(^{138}\) Id.

\(^{139}\) Kelly, supra note 136, at 365. Kelly also states that the DSU authorizes a "contractual approach" rather than the "incorporation approach," as evidenced by the choice of paying compensation or facing retaliation to preserve a measure of sovereignty and national autonomy. Id. at 364–65. However, it is not clear how this is inconsistent with the incorporation of non-WTO norms and rules; incorporating such rules does not change a members' choice of responses to adverse WTO decisions — it only affects the decisions themselves.

\(^{140}\) Article 7 provides that the role of the Dispute Settlement Body ("DSB") shall be "[t]o examine, in the light of the relevant provisions in . . . the covered agreement(s) cited by the parties to the dispute[], the matter referred to the
Trachtman argues that references to "covered agreements" counsel against using non-WTO law. He contends that the language in the DSU "would be absurd if rights and obligations arising from other international law could be applied by the DSB," adding that "with so much specific reference to the covered agreements as the law applicable in WTO dispute resolution, it would be odd if the members intended non-WTO law to be applicable."141

As Trachtman and others view it, WTO jurists may apply non-WTO international law in only two contexts: (1) when referring to customary rules of interpretation of international law and (2) when such non-WTO law is incorporated by reference in WTO law (e.g., the specific references in TRIPS to other international intellectual property treaties, such as the Berne, Paris, and Rome Conventions).142

3.2.1.1.2. Rationale

A core rationale for limiting reliance on non-WTO law to interpret WTO provisions is that the WTO was developed through a political process of negotiation among states and incorporating non-WTO law would interfere with that process—undermining state sovereignty and unfairly undoing agreements achieved during the negotiation process.143 Kelly argues that such incorporation

DSB . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)." DSU art. 7. Article 11 provides that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements . . . ." Id. art. 11.

141 Trachtman, supra note 136, at 342.

142 See, e.g., Kelly, supra note 136, at 366 (describing the incorporation of customary international rules of interpretation into WTO law). See also TRIPS arts. 2, 9. Kelly also recognizes the need to rely on non-WTO law to give definition to vague or ambiguous terms (i.e., "interstitial" development). Kelly, supra note 136, at 366. He distinguishes, however, between a WTO decision-making body determining policy left incomplete because the members failed to agree and the interstitial development of vague standards; the former leaves intact the bargain struck by the members while the latter diminishes the negotiated rights of the members. Id. at 367–68.

143 See, e.g., José Alvarez, How Not to Link: Institutional Conundrums of an Expanded Trade Regime, 7 WIDENER L. SYMP. J. 1 (2001) (evaluating the arguments for constitutionalization of the WTO); Jagdish Bhagwati, Afterword: The Question of Linkage, 96 AM. J. INT’L L. 126 (2002) (arguing that some issues, such as intellectual property rights under TRIPS, should not be included in the WTO because they are too complex and have negative consequences for developing countries); Debra P. Steger, Afterword: The “Trade and . . . .” Conundrum – A Commentary, 96 AM. J. INT’L
amounts to nothing more than judicial activism by the Appellate Body ("AB") or WTO panels. According to Kelly, this activism is incompatible with democratic accountability and WTO legitimacy because: (1) AB judges are not elected; (2) AB decisions are not readily reversible by democratically accountable means; and (3) Member States are deprived of their right to participate in policy decisions. 144

WTO competence is another issue. Broadening WTO jurisdiction will stretch limited WTO resources and may result in inconsistency in international law. 145 By applying non-WTO law, WTO panels and the AB would be required to delve into areas where they have little or no expertise. The appropriate judicial bodies for adjudicating these areas are elsewhere. 146

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144 See Kelly, supra note 136, at 368-70 (discussing the disadvantages of judicial activism in the WTO context). See also Trachtman, supra note 136, at 333-34 (stating that WTO tribunals lack direct democratic legitimacy, which raises the question of whether they should be determining the linkage between trade and other important issues). The fear here is that while WTO dispute resolution helps ensure that members comply with WTO rules, it also involves quasi-legislation, which should be limited to matters that WTO members have already considered and negotiated. Trachtman states that dispute resolution has two roles. First, it "is necessary to the application of legislation." Id. at 339. In this role, Trachtman writes, "dispute resolution is not important for its own sake but as the place where legislation becomes binding and effective. Legislation without adjudication at least raises greater concerns regarding the application and effectiveness of the legislation." Id. Trachtman continues that in its second role, dispute resolution "inevitably interprets and expands upon legislation. In a common law system, indeed, dispute resolution amounts unabashedly to a type of legislation." Id.

145 Marceau has noted the risk of treating the Panels and the AB as "court[s] of general jurisdiction" able to enforce non-WTO international law obligations. Marceau, Call for Coherence, supra note 134, at 109-10. She has also expressed the view that "[w]hile the WTO should ensure that its interpretation and application of WTO rules are consistent with public international law, permitting it to enforce outside rules by providing remedies for breach of public international law would threaten to overload the multilateral trading system." Id. at 111.

146 WTO adjudication may be bad for other areas of international law. For example, the WTO may not understand how to interpret human rights, labor, or environmental law treaties. Moreover, a common law system of adjudication may not be the best way to elaborate norms for areas such as human rights or labor. Allowing the WTO to interpret and apply non-WTO law may amount to anointing the WTO the "Supreme Court" of international law, perhaps implicitly privileging trade law over other areas of law.
3.2.1.2. Arguments for incorporating non-WTO law into the WTO

At the other end of the spectrum, some scholars argue that WTO law is a subset of international law. We shall call these scholars "interpretive liberals." Interpretive liberals view WTO agreements as the starting point for dispute settlement proceedings. They argue that the sources of law contained in Article 38 of the ICJ Statute—including general principles of law—all contribute to WTO law.\textsuperscript{147} The major proponent of this view is Joost Pauwelyn, the former Secretariat of the WTO's Legal Affairs Division.\textsuperscript{148}

Pauwelyn and other interpretive liberals argue that principles and laws developed elsewhere are relevant to interpreting TRIPS because treaties, including WTO law, are "automatically born into general international law."\textsuperscript{149} Moreover, general international law serves a "secondary" gap-filling function—that is, it fills gaps left by treaties and imposes certain default international rights and obligations on states.\textsuperscript{150} Unless states contract out of general international law, treaties are automatically subsumed both under general international law and the wider corpus of public international law.\textsuperscript{151} According to these scholars, the WTO was not "created in a vacuum" but rather "emerged in the context of general interna-

\textsuperscript{147} See, e.g., John H. Jackson, The World Trading System 25 (2d ed. 1997) (explaining that because product trade rules are "the most complex and extensive international rules regarding any subject of international economic relations that exist," it is logical that they would influence development of rules for other international economic areas, such as intellectual property under the WTO); Laurence R. Helfer, Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking, 29 Yale J. Int'l L. 1 (2004) (arguing that soft law, including counter-regime norms, developed in other fora may have an effect on the way WTO jurists interpret TRIPS); Donald M. McRae, The WTO in International Law: Tradition Continued or New Frontier? 3 J. Int'l Econ. L. 27, 28 (2000) (finding "some support in WTO agreements themselves for viewing the WTO within the mainstream of international law").

\textsuperscript{148} See Joost Pauwelyn, The Role of Public International Law in the WTO: How Far Can We Go?, 95 Am. J. Int'l L. 535, 538 (2001) (writing that "WTO law is 'just' a branch of public international law").

\textsuperscript{149} Id. at 537.

\textsuperscript{150} Id. at 536.

\textsuperscript{151} Id. at 537. In addition to WTO rules that contract out of international law, some WTO rules add to international law and confirm preexisting international law. Id. at 540. Even for those that allow contracting out of international law, Pauwelyn cautions that they can only contract out of one or more rules of general international law, not the system of international law entirely. Id. at 539.
3.2.1.2.1. **Textual and legal support**

Interpretive liberals also rely on explicit WTO authority for support. In fact, they rely upon the exact same provisions as the interpretive conservatives. For example, Palmeter and Mavroidis rely on Articles 3(2) and 7 to argue that because Article 3(2) requires WTO panels to "clarify the provisions of [covered agreements] 'in accordance with customary rules of interpretation of public international law,'" WTO jurists can and must take into account public international law (e.g., the VCLT rules of treaty interpretation).\(^\text{153}\) Such rules, in turn, provide that jurists can rely on "any relevant rules of international law applicable in the relations between the parties."\(^\text{154}\) Jurists argue that this approach unambiguously supports reference to international law as long as non-WTO law is relevant for purposes of resolving WTO dispute.\(^\text{155}\)

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\(^{152}\) Id. at 547.

\(^{153}\) David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT’L L. 398, 399 (1998). Interpretive liberals also argue that other traditional sources of public international law have benefited WTO law, which has become an important part of the larger system of public international law. *Id.* at 413.

\(^{154}\) VCLT, *supra* note 30, art. 31(3)(c). Despite the interpretive liberal view that WTO jurists may consider and incorporate other sources of international law, Bartels argues that article 3(2) of the DSU is a general conflict clause that favors WTO rules in cases where they conflict with international law outside covered agreements. *See* Lorand Bartels, *Applicable Law in WTO Dispute Settlement Proceedings*, 35 J. WORLD TRADE 499, 506–07 (2001). In particular, the last sentence of Article 3(2) prohibits the WTO panels from adding to or diminishing the rights and obligations of parties to the dispute. As Pauwelyn notes, rather than address the applicable law before the WTO panels, this language "deal[s] with the inherent limits a WTO panel must observe in interpreting WTO covered agreements. In exercising this judicial function of interpretation, WTO panels may clarify the meaning of WTO covered agreements but they may not 'add to or diminish the rights and obligations provided in the covered agreements.'" Pauwelyn, *supra* note 148, at 564. Pauwelyn adds that "stating what the judiciary can do with the law differs greatly from stating what the legislature (i.e., WTO members) has done, or can do, with the law." *Id.*

\(^{155}\) In response to the interpretive liberal view that VCLT rules allow reliance on any relevant international law, Trachtman states that the language only authorizes the WTO panels to take into account rules of interpretation, not general international law. "However, [DSU Articles 3(2) and 7] refer only to interpretation of relevant provisions of WTO agreements 'in accordance with customary rules of interpretation of public international law.' They cannot be taken as making the WTO dispute resolution system a court of general international law jurisdiction." Trachtman, *supra* note 136, at 342 n.41 (citations omitted) (emphasis in original). As to Pauwelyn's suggestion regarding Article 31(c), Trachtman argues that it "is
Palmeter and Mavroidis also rely heavily on Article 7, which they view as the "WTO substitute" for ICJ Article 38. Under this view, custom and international agreements, along with general principles of law, are available to resolve WTO disputes.

Schoenbaum addresses Article 11, which authorizes panels and the AB to "make such other findings as will assist the DSB in making . . . recommendations or in giving the rulings provided for in the covered agreements." He argues that through this grant of authority, the WTO provides implied powers that require WTO jurists to decide all international legal issues involved in a dispute properly before them. As for WTO competence, Schoenbaum argues that it is appropriate for WTO panels and the AB to decide legal questions not relating to a WTO agreement to avoid "piece-

taken as reflective of customary rules of interpretation" but "refers to applicable international law . . . only to indicate what materials should be taken into account in interpreting treaty texts." Even though he concludes that Article 3(2) does not bring in other sources of international law, Lennard concedes that "customary international law and certain general principles of law may nevertheless apply in WTO relationships, as a legal environment into which the WTO agreements were 'born', and which still applies to the extent that it is consistent with the WTO Agreement (or, in the case of jus cogens, even if there is inconsistency)."

Lennard, supra note 134, at 41. In response to the view that the explicit reference to international law is solely for interpretation and thus necessarily excludes other international law, Lennard states that this reading is neither necessary nor appropriate. Differences in the treatment of international law rules of interpretation and other substantive international law "can be explained by the fact that the customary international law rules of treaty interpretation (as encapsulated in the Vienna Convention) were more likely to be in the minds of negotiators" and that this difference did not carry "any negative implication for other customary international law and general principles of law to the extent that they are consistent with the text of the WTO Agreements, even though sourced outside the WTO Agreement." Id. at 42; see also Pauwelyn, supra note 148, at 538 (stating that it is irrelevant whether WTO treaty negotiators considered public international law when drafting the treaty, and that this issue at most is an excuse used to justify a lack of focus on the relationship between WTO rules and other principles of international law).

156 Palmeter & Mavroidis, supra note 153, at 399 (explaining the role of ICJ Article 38(1) and comparing it to Articles 3(2) and 7 of the DSU).

157 DSU art. 11.

158 Thomas J. Schoenbaum, WTO Dispute Settlement: Praise and Suggestions for Reform, 47 INT'L & COMP. L.Q. 647, 653 (1998) (stating that Article 11 of the DSU "is an 'implied powers' clause which should be interpreted broadly so that the panels and Appellate Body can decide all aspects of a dispute."). Trachtman has a response to the view put forth by Schoenbaum: "[w]hile Schoenbaum adduces reasons why this should be so, this instruction to make 'such other findings' is too general to overcome the more specific language of the DSU limiting panels and the Appellate Body to the 'covered agreements.'" Trachtman, supra note 136, at 342 n.41 (emphasis in original).

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meal decision-making” that leaves relevant legal questions involved in a dispute undecided. Incorporation of non-WTO law is circumscribed, however, in that “non-WTO rules cannot add meaning to WTO rules that goes [sic] either beyond or against the ‘clear meaning of the terms’ of WTO covered agreements.”

3.2.1.2.2. Rationale

In addition to the fact that international law is a backstop for WTO law and that the WTO benefits by having recourse to other traditional sources of public international law, Helfer provides a normative and political justification for relying on non-WTO law in resolving WTO disputes and provides a means to incorporate non-WTO “soft” law into WTO “hard” law. Helfer argues that countries “regime-shift” (i.e., use norms developed in other regimes to help define or inform norms created in the WTO). In other words, countries, non-governmental organizations (“NGOs”), consumer advocate groups, and others attempt to generate “counter-WTO norms” (i.e., norms that fill gaps) in other fora and then push to have WTO panels rely on these norms. Helfer notes that the United States regime-shifted in moving intellectual property from the World Intellectual Property Organization (“WIPO”) to the WTO.

As shown, there is a vigorous debate regarding the proper application of international law to WTO disputes. While both sides make strong arguments, it is hard to look past the explicit reference in DSU Article 3(2) to general international law, e.g., the VCLT rules. These rules provide that jurists can rely on “any relevant rule of international law,” and can inform the meaning and effect of WTO provisions. Non-WTO law rules are tethered to WTO agreements by the proviso that they must be “relevant.” Further, arguments regarding WTO competency and judicial activism, while important, focus on why WTO jurists should not incorporate non-WTO law rather than whether WTO jurists can incorporate

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159 Schoenbaum, supra note 158, at 653 (noting that the implied powers stemming from DSU Article 11 allow WTO panels and the AB to avoid leaving some relevant legal questions unanswered).

160 Pauwelyn, supra note 148, at 573 (explaining that non-WTO rules cannot override WTO rules).

161 Helfer, supra note 147, at 7 (commenting that more powerful states are more adept at regime-shifting than others).

162 VCLT, supra note 30, art. 31(3)(c).
non-WTO law.

Moreover, if WTO practice and law in action is any indication, WTO panels and the AB have answered the question by routinely referring to and applying rules of general or public international law. For example, the WTO panels and the AB have used customary international law (e.g., VCLT Articles 31 and 32) as well as general principles of law (e.g., estoppel) to support their reasoning\textsuperscript{163} in cases such as Canada Patent Term,\textsuperscript{164} India Pharmaceutical Patents,\textsuperscript{165} U.S. Shrimp-Turtle,\textsuperscript{166} and U.S. Reformulated Gasoline.\textsuperscript{167} Most


\textsuperscript{165} Appellate Body Report, \textit{India – Patent Protection for Pharmaceutical and Agricultural Chemical Products}, WT/DS50/AB/R (Dec. 17, 1997) [hereinafter India Pharmaceutical Patents]. The Appellate Body here also advised that the "principles of interpretation [in the VCLT] neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended." \textit{Id.} ¶ 31.


\textsuperscript{167} United States Reformulated Gasoline, art. 31 ("[T]he General Agreement is not to be read in clinical isolation from public international law."); \textit{cf.} Panel Report, \textit{European Communities – Measures Affecting the Importation of Certain Poultry Products}, WT/DS69/R, para. 81 (July 23, 1998) [hereinafter Poultry Products] (holding that a tariff agreement settling a matter between two WTO members does not constitute WTO law applicable by a panel). Even in \textit{Poultry Products}, the Appellate Body "allowed that the Oilseeds Agreement might serve as a supplementary means of interpretation of WTO law"; however, Trachtman writes that the AB "did not apply the Oilseeds Agreements itself as law." \textit{Trachtman, supra} note 136, at 343 n.46. While arguing that the WTO agreements "do not exhaust the sources of potentially relevant law," Palmeter and Mavroidis note that virtually all the sources of law in Article 38(1) of the ICJ Statute have served as sources of law in the WTO to varying degrees. Palmeter and Mavroidis, \textit{supra} note 153, at

https://scholarship.law.upenn.edu/jil/vol27/iss3/2
recently, the WTO panel in *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*,\(^\text{168}\) addressed this specific issue as follows:

Article 31(3)(c) directly speaks to the issue of relevance of other rules of international law to the interpretation of a treaty. In considering the provisions of Article 31(3)(c), we note, initially, that it refers to “rules of international law.” Textually, this references seems sufficiently broad to encompass all generally accepted sources of public international law, that is to say, (i) international conventions (treaties), (ii) international custom (customary international law), and (iii) the recognized general principles of law. In our view, there can be no doubt that treaties and customary rules of international law are “rules of international law” within the meaning of Article 31(3)(c).\(^\text{169}\)

With specific regard to general principles—which it is argued here includes the treaties of adhesion doctrine—the panel stated:

Regarding the recognized general principles of law which are applicable in international law, it may not appear self-evident that they can be considered as “rules of international law” within the meaning of Article 31(3)(c). However, the Appellate Body is US Shrimp made it clear that pursuant to Article 31(3)(c) general principles of international law are to be taken into account in the interpretation of WTO provisions.\(^\text{170}\)

Accordingly, the WTO can apply treaties of adhesion doctrine to WTO disputes.

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\(^{399}\) Of course, one can argue that there are instances where a panel could have but did not look to outside law and thus this might support the interpretive conservative view. See, e.g., Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, ¶¶ 82, 156 (Jan. 16, 1998) (stating that the panel refused to rule on an issue, and that while panels are inhibited from addressing claims that fall outside their terms of reference, nothing in the DSU prohibits a panel from using arguments submitted by the parties or from developing its own legal reasoning to support its conclusions).


\(^{169}\) EU Biotech Products ¶ 7.67.

\(^{170}\) Id.
4. TREATIES OF ADHESION IN WTO TREATY INTERPRETATION

Having established that the contracts of adhesion doctrine can appropriately be applied to international treaties and that, more specifically, it can be applied to TRIPS, we now turn to whether TRIPS is in fact a treaty of adhesion. The common elements distilled from the laws of various countries that possess the general principle of the adhesion doctrine are: (1) a party with superior bargaining position supplies or presents (2) a pre-formulated or form contract (3) on a take-it-or-leave-it basis. This also applies to many international treaties. The treaty of adhesion doctrine, as delineated here, is not so broad. An unenforceable treaty of adhesion must also include the following additional elements: the weaker party (4) lacks the negotiating power to reformulate contract terms which are (5) onerous or unfavorable, or inconsistent with the reasonable expectations of the weaker party and results in unfair surprise. TRIPS satisfies these elements.

4.1. TRIPS

Developed in 1994 under the General Agreement on Tariffs and Trade ("GATT") Uruguay Round trade negotiations, TRIPS is unquestionably the most important development in international intellectual property law since the international intellectual property treaties of the 1880's (e.g., the 1883 Paris Convention for the Protection of Industrial Property and the 1886 Berne Convention for the Protection of Literary and Artistic Works). TRIPS significantly strengthens intellectual property rights worldwide.\textsuperscript{171}

TRIPS is an attempt to reconcile varying levels of intellectual property protection and enforcement. The varying levels are due to each country's widely different goals, values, histories, cultures, political climates, and economic and technological stages of development. To reconcile these varying interests, TRIPS mandates that all countries provide intellectual property protection at specified levels significantly beyond those previously established in any international intellectual property treaty. Arguably, this was accom-

\textsuperscript{171} TRIPS initially began as an effort to curb misappropriation, particularly in the trademark context, with an intent to "extract greater technology rents from developing countries." Abbott, supra note 8, at 473. However, the negotiations very quickly "outgrew the original vision" and were "extended to meet the specific interests of intellectual property owners amid competing, if unacknowledged, policy objectives." Okediji, supra note 10, at 856.
plished through a flawed bargaining process where developed countries coerced developing countries into adopting the treaty.

4.1.1. Developed countries had superior bargaining power

There is no question that at the TRIPS negotiations unequal bargaining power existed between the developing and developed countries. This should come as no surprise, as the classical realist view posits that international relations are predicated on power inequalities.\(^\text{172}\) The decision to move intellectual property from WIPO to the WTO exacerbated this power imbalance.

Prior to 1994, intellectual property matters fell under the purview of WIPO. Because the United States and the EU considered the United Nations ("UN") and its organizations hostile—or, at the very least, indifferent—to developed countries and overly sympathetic to developing countries, the United States began efforts to move intellectual property from WIPO to GATT. GATT's trade regime traditionally favored developed countries with large, attractive export markets. In addition to being a more favorable forum, GATT included the relatively strong and effective enforcement mechanisms lacking in WIPO.\(^\text{173}\) Those mechanisms were one of the prizes sought by the developed countries in TRIPS. The move from WIPO to GATT was monumental, allowing developed countries to flaunt their trade advantage and superior bargaining position within the context of intellectual property rights, inevitably producing an intellectual property treaty slanted in their favor.

That superior bargaining position was considerably augmented by the development of a negotiating bloc made up of developed countries. The United States, the EU, and Japan consistently approached GATT negotiations by first developing a "shared position."\(^\text{174}\) This bloc employed a similar strategy during the TRIPS negotiations, where there was extensive coordination among these groups "as well as the evolution of common negotiating positions.

\(^{172}\) See Okediji, supra note 10, at 838 (accounting for the role power plays in politics). See, e.g., Wiessner, supra note 122.

\(^{173}\) See Doris E. Long, Copyright and the Uruguay Round Agreements: A New Era of Protection or an Illusory Promise?, 22 AIPLA Q.J. 531, 536 (1994) (explaining the enhanced protection of intellectual property rights).

\(^{174}\) Abbott, supra note 8, at 480 (noting the common policy of powerful nations).
over the course of the round." 175 Many of these positions were "firmly considered nonnegotiable." 176

Professor Okediji emphasizes the importance of the developed country block. Grounding her analysis in game theory—specifically, coalition formation theory—Professor Okediji states that the TRIPS negotiations were characterized by the coordination of developed countries to facilitate a common bargaining position. "As with coordination games, developed countries, notwithstanding their own policy differences, recognized that they were each better off with an agreement than none. This resulted in coalitions between developed countries that made negotiation of a global set of standards a feasible objective." 177

Thus, developed countries, already possessing strong negotiating positions by virtue of their large trade markets, had an even stronger position with their new intellectual property coalition. Under these circumstances, the first element of the treaty of adhesion doctrine is easily satisfied.

4.1.2. Pre-formulated contract

Perhaps more problematic is the second element—that a standard or pre-formulated contract exists. Initially, it should be noted that this is not an essential element, just one that is sometimes present in many forms of adhesion contracts. Because the stronger party has the time and expert advice to prepare the standard contract in advance, it facilitates the imposition of onerous terms and makes the imbalance in parties’ rights possible. Arguably, this element was also satisfied during the TRIPS negotiations.

The United States and other developed countries often prepare model agreements covering particular subjects. These model agreements can be adapted to the specific circumstances of future negotiations, particularly in bilateral trade negotiations between a strong and a weak state. 178 Usually, this is the starting point for the

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175 *Id.* at 480 n.45 (mentioning the preference of the powerful nations to come to agreement on basic issues).

176 *Id.*

177 Okediji, *supra* note 10, at 829 ("The shared objective of heightened global standards for intellectual property engendered a cooperative game among developed countries during the TRIPS negotiations.").

negotiations.\textsuperscript{179} In the TRIPS negotiations, the two dominant trade powers, the EU and the United States, each tabled a draft treaty text considered "the spark which ignited the work towards the TRIPS Agreement."\textsuperscript{180} The similarity between the two was unmistakable and strongly suggests that "transatlantic consultation had preceded the tabling of both documents."\textsuperscript{181}

Not coincidentally, the TRIPS Negotiating Group adopted the structure of these documents, which, subject to few changes, provided the framework for what became TRIPS, despite developing country concerns and serious policy objections.\textsuperscript{182} In fact, the developing countries felt that the official draft text, because it adopted the structure supplied by the United States and the EU, was biased and that the Negotiation Group Chairman had "taken sides."\textsuperscript{183} Finally, even though the drafts were only supposed to be a starting point for negotiations, TRIPS "closely resembled" the starting proposal, suggesting that developing countries had very little opportunity to negotiate and no option but to accept TRIPS terms.\textsuperscript{184}

4.1.3. TRIPS was presented on a take-it-or-leave-it basis

The first two elements lead inexorably to the third—TRIPS was presented to developing countries on a take-it-or-leave-it basis. With respect to this, it is clear that developing countries had no meaningful choice but complete adherence to TRIPS. Indeed,

\textsuperscript{179} Peter Drahos, Developing Countries and International Intellectual Property Standard-setting, 17-18 (Commission on Intellectual Property Rights, Study Paper 8). Drahos notes that the United States has very strong incentives to prepare standardized bilateral treaty standards and has developed models or prototypes of bilateral treaties is wishes to have with other countries.


\textsuperscript{181} Id. at 16; see also Abbott, supra note 8, at 480 (noting that the United States and the European Union had a "shared position" during the negotiation process).

\textsuperscript{182} See Okediji, supra note 11, at 848-49 (discussing the process by which the agreements were adopted).

\textsuperscript{183} GERVAIS, supra note 180, at 18-19. It also could be argued that the TRIPS Chairman "took sides" when presenting a draft to the Negotiating Group; in the combined draft, the developed country approach was identified as the "A" approach while developing country approach was identified as the "B" approach to intellectual property issues.

TRIPS was the only game in town—it was part of an overall WTO package that had to be accepted in its entirety. In other words, if developing countries desired to become WTO members, they could not, as in previous GATT practice, choose the individual agreements they wished to adopt. Instead, they had to adopt each and every WTO agreement, including TRIPS.

4.1.4. Developing countries lacked negotiating power

4.1.4.1. Developing countries did not fully participate during the negotiations

The TRIPS negotiations were not generally atypical as far as treaty negotiations are concerned. However, three factors transform TRIPS into a treaty of adhesion: (1) the utter lack of bargaining power and the absence of many developing countries from the entire negotiation process; (2) the repressive economic coercion used against developing countries; and (3) unfair and unforeseeable future effects resulting from TRIPS, enabled by the lack of information presented to the developing countries throughout the process.

The move from WIPO to the WTO, the developed party coalition, and the lack of viable alternatives to the WTO all contributed to developing countries' lack of bargaining power. Furthermore, many developing countries were not even part of TRIPS negotiations and those that were suffered from a lack of information.\(^{185}\)

Regarding the lack of participation, Drahos notes the absence of many developing countries, particularly the African states, during critical TRIPS negotiations:\(^{186}\)

\(^{185}\) Drahos and Braithwaite argue that for TRIPS—indeed, for any system of property rights—to be a force that positively impacts the public good, it must be the result of a democratic process. A democratic process, which is likely to have more efficient property rights, must meet three conditions: "(1) all relevant interests must be represented in the negotiation of the property rights; (2) all involved in the negotiation must have full information about the consequences of various possible outcomes; and (3) one party must not coerce the others." Peter Drahos & John Braithwaite, Information Feudalism: Who Owns the Knowledge Economy? 190 (2003). As commentators point out, TRIPS met none of these conditions.

\(^{186}\) Early developing country participation (e.g., participation from Brazil, Argentina, and India) involved little more than opposing including intellectual property matters within the GATT framework. Gervais, supra note 180, at 10, 16. Thailand and Mexico also expressed concern over the scope of intellectual property inclusion, seeking a more limited scope. Id. at 14.
Egypt and Tanzania were the two most active African states. Neither could be described as a key player. Neither was in the room for the most important or decisive meetings that sentenced millions of African AIDS victims to death for want of drugs that were placed beyond their reach by monopoly profits extended by TRIPS patents. . . . The WTO formally meets the conditions of equal democratic representation for all states, but the informal reality was that most states were not represented until the virtual fait accompli of a chairman’s draft was on the table.187

The UN also noted that many developing countries were absent from the TRIPS negotiations. It observed that TRIPS and, in particular, certain patent provisions in TRIPS, were "negotiated with far too little participation from many developing countries now feeling the impact of their conditions." 188 This was the result of a flawed negotiation process.

4.1.4.2. The "Green Room" process

The TRIPS negotiations can be characterized by the so-called "Green Room" process. Under this process, negotiators from all involved countries bargain by facing each other across a table in the Green Room on the main floor of the WTO building. Drafts are exchanged, progress is noted, and differences are discussed.189 Not being part of this process had obvious consequences for non-engaged countries. The problems that resulted from this lack of participation were exacerbated by the "circle of consensus" that facilitated the Green Room process.

A circle of consensus—used during GATT negotiations but which "reached new heights"190 during TRIPS negotiations—involves small groups coming together to build consensus, then slowly incorporating other members until complete consensus is achieved.191 In the TRIPS scenario, the United States and the EU

187 See DRAHOS & BRAITHWAITE, supra note 185, at 190 (describing the development of the "Green Room" process).


189 DRAHOS & BRAITHWAITE, supra note 185, at 137.

190 Drahos, supra note 179, at 11.

191 Drahos and Braithwaite describe this process as follows:

[A]n inner circle consensus [of the Big Three—the US, European Economic Community, and Japan] was expanded to create larger circles of
first reconciled their differences. Then the EU, United States, and Japan agreed. After this, the “Quad” states—the United States, the EU, Japan, and Canada—came together. Next, the “Friends of Intellectual Property”—including the Quad, Australia, Switzerland, the Nordic countries, and some developing countries—reached consensus. Finally, the entire TRIPS negotiation group convened. Thus, only when consensus was established among developed countries did most of the developing countries have input. That input was necessarily limited and constrained by the consensus already reached.

Gervais describes the process only slightly differently. He points out that the primary negotiations involved only the principal actors: the United States, Japan, the EU, and Switzerland—known as the “most interested parties.” Gervais argues that others outside the group were only able to express their views at formal meetings held much less frequently than the informal meetings between the principal actors. Even then, Gervais notes that the views communicated at these formal meetings had little impact on the draft treaty itself.

Neither was the TRIPS negotiation process transparent to developing country participants. Here, Drahos complains that “the claim that the TRIPS negotiations were a model of transparency is difficult to defend. In truth, it was the transparency of a one-way mirror.” This was due to the consensus building process that allowed the United States to move easily among groups when it seemed appropriate to do so.

consensus until the goals of those in the inner circle had been met. Developing countries for the most part found themselves in outer circles, if they made it into a circle at all.

DRAHOS & BRAITHWAITE, supra note 185, at 137.

Id. at 137–38.

Of course, there were disagreements between the developed countries as well. The so-called “North-North” issues included proposals to create an exclusive long-term rental right on sound recordings (Japan–United States) and imposing a levy on private copying onto blank audio tapes and recording equipment (EU–United States). GERVAIS, supra note 180, at 24. Moreover, many North-North issues did not fully manifest until the enforcement stage of TRIPS. Okediji, supra note 10, at 854.

GERVAIS, supra note 180, at 13, 19–23. The group was also known as the “10 + 10” group. Id.

Id. at 20.

Drahos, supra note 179, at 12.
4.1.4.3. Developing countries did not have "full information"

Developing countries also suffered from an alarming lack of information. In part, the lack of information was due to the fact that intellectual property was being moved to the WTO, which historically treated trade issues only. In this regard, Gervais points out that the developing countries

realised that, if the negotiation of an important part of the area known as "intellectual property" was to be undertaken in the GATT framework, much more information on the possible scope and current problems was necessary. Trade negotiators had to deal with a highly technical and complex field, quite different from those traditionally handled by GATT. 197

Along the same lines, Drahos portrays the TRIPS negotiation process as one in which developing country participants lacked "full information" about the contents and consequences of TRIPS. Using a theory of democratic property rights, he argues that efficiently defined property rights consistent with democratic principles are more likely to emerge if three separate conditions are met: (1) all relevant interests are represented during negotiations—the condition of representation; (2) all participants have full information about the consequences of various possible outcomes—the condition of full information; and (3) one party cannot coerce other parties—the condition on non-domination. Drahos concludes that the TRIPS negotiations did not meet these conditions, particularly conditions two and three. 198 For example, he notes that the African states that signed TRIPS did not fully understand its implications, particularly on such issues as its impact on their citizens' health. 199

This was the result of the United States and the EU providing misinformation, thereby placing a shroud over TRIPS that created a "veil of ignorance" for many developing countries. 200 This was also the result of the structural biases inherent in the international

197 WIPO provided some of this information, particularly regarding the Paris and Berne Conventions. Gervais, supra note 180, at 13 (citations omitted).
198 See Drahos, supra note 179, at 10–14 (describing how developing countries did not have full information and were coerced by other parties).
199 Drahos & Braithwaite, supra note 185, at 191.
200 Id.
system, including the inability of developing countries to develop internal WTO legal expertise because of a lack of resources.\textsuperscript{201}

4.1.4.4. Section 301 actions\textsuperscript{202}

Standard forms, superior bargaining position, and lack of negotiation power are all indications of a treaty of adhesion. As seen earlier, however, this is only the beginning of the analysis; something more must accompany these factors. The economic coercion applied by developed countries solidified the treaty as one of adhesion.

Good faith is an overarching and fundamental principle in nearly all legal systems; it also underlies the treaty of adhesion doctrine.\textsuperscript{203} While trade negotiations are about hard coercive bargaining, "[g]ood faith forbids exacting a hard bargain."\textsuperscript{204} The TRIPS negotiations went beyond extracting a hard bargain to applying oppressive economic coercion. The oppression came in the form of U.S. Section 301 actions, threats to withdraw foreign direct investment, and threats to close off the markets of crucial industrialized nations.

A number of scholars have described this coercive process.\textsuperscript{205} These scholars note that it began as early as the 1980s, when the

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\textsuperscript{202} "Section 301" refers to Title III, Chapter 1, of the Trade Act of 1974, 19 U.S.C. § 2411 (2000) [hereinafter Trade Act]. It provides that when a foreign country denies rights owed to the United States under a trade agreement, unfairly restricts U.S. foreign commerce, or denies adequate and effective protection for intellectual property rights held under U.S. law, the United States can take various retaliatory actions. Notably, these actions may be taken without a breach of an international agreement. While this section focuses on actions taken by the United States under Section 301, it should be noted that the EU enacted a similar statute called Council Regulation 264/84. According to Drahos, however, "the Commission found it difficult to obtain consensus on its use," even though it did move against Thailand and Indonesia for record piracy. Drahos, *supra* note 179, at 13.

\textsuperscript{203} See *supra* Section 3.1.2.2.

\textsuperscript{204} Ralph A. Newman, *The Precepts of Equity*, in *The International Intellectual Property System: Commentary and Materials* 496, 497 (Abbott et al. eds., 1999) ("The bargaining process is looked upon as a transaction between persons... neither of whom need bargain under the pressure of controlling economic compulsion exerted by his adversary, even though such compulsion does not amount to the concepts of duress or undue influence of strict law.").

\textsuperscript{205} See, e.g., Drahos & Braithwaite, *supra* note 185; Sell, *Private Power, Public Law*, *supra* note 188; Susan K. Sell, *Power and Ideas: North-South
TRIPS AND TREATIES OF ADHESION

United States coerced developing countries into agreeing to minimum intellectual property standards by threatening to close its borders to these countries if they did not.\textsuperscript{206}

The coercion and retaliatory trade sanctions were part of the strategy of the United States to achieve increased intellectual property protection worldwide.\textsuperscript{207} Unilaterally, the United States strengthened its domestic laws to promote U.S. intellectual property rights abroad.\textsuperscript{208} To apply pressure on recalcitrant countries, the United States used Section 301 of the U.S. Trade Act ("Section 301"), which allows the U.S. Trade Representative ("USTR") to take retaliatory trade action against a foreign country that failed to protect U.S. intellectual property rights.\textsuperscript{209} These actions include: (1)
withdrawing benefits a foreign country enjoys because of a trade agreement with the United States; (2) entering into new agreements to eliminate the offending action; and (3) imposing duties or other import restrictions against goods or an economic sector of the foreign country.\footnote{Trade Act of 1974, 19 U.S.C § 2411(c) (2000).} Because many of the “target” countries are so heavily dependent on access to the U.S. market, they are especially vulnerable to U.S. threats.\footnote{See SELL, POWER AND IDEAS, supra note 205 (explaining that the target countries include Argentina, Brazil, Chile, China, India, Mexico, South Korea, and Thailand). According to Sell, the percentage of trade that some developing countries have with the United States, as a function of total world trade it does, ranges from 8% (China) to almost 70% (Mexico). Id. at 186. Indeed, it seems that the United States is the biggest importer of most of target countries’ goods (except China). Moreover, with the exceptions of China and Mexico, none of these countries is a significant trading partner for the United States. Thus, the threats levied by the United States carry significant weight. Id. at 182–87.}

Bilateral negotiations on intellectual property started with Taiwan in 1983 and Singapore in 1984. In 1984, the United States strengthened Section 301 because of pressure by the pharmaceutical industry. The United States immediately began using this version against South Korea, demonstrating to the rest of its trade partners what would happen if countries did not comply with U.S. wishes. South Korea succumbed to this pressure and changed its policies.

The United States again amended Section 301 in 1988 to give the USTR additional powers with which to punish countries that did not protect its intellectual property. This time, Brazil, a staunch opponent of increased intellectual property protection, became the example. The Pharmaceutical Manufacturers Association initiated a Section 301 action against Brazil for its failure to adequately protect pharmaceutical intellectual property rights. The United States then punished Brazil for its failure to comply by imposing a 100% tariff on certain Brazilian imports, a retaliatory measure that would cost Brazil a total of $39 million.\footnote{SELL, PRIVATE POWER, PUBLIC LAW, supra note 188, at 108.} Brazil succumbed to this pressure and changed its policies.

In 1989, India became the next target. That year, the USTR actually announced that the new Special 301 targets would be five of the ten developing country “hardliners” in the GATT. These “hardliners” included Brazil, India, Argentina, Egypt, and Yugoslavia. These countries were placed on the USTR’s “watch list” because of their opposition to increased intellectual property protection. The writing was on the wall for the remaining opponents. As Ryan observed, “[o]ne did not have to be a chess grandmaster to figure out that the gambit of opposing the United States on intellectual property at the GATT would provoke a crushing reply.”

The pressure intensified during TRIPS negotiations. The increasing threat that the United States might use Section 301 made countries either immediately change their laws to be consistent with U.S. demands or seek “protection” in the WTO. Developing countries—which “had serious dread” of the United States’ Section 301 bilateralism—were acutely aware that if they did not sign TRIPS, they would have to individually “negotiate” with the United States under threat of Section 301 actions. As Drahos...
notes, "[i]f they did not negotiate multilaterally they would each have to face the [United States] alone. If they resisted the [United States] multilaterally they could expect to be on the receiving end of a [Section] 301 action. This was anything but a veiled threat by the US."\textsuperscript{218} The U.S. strategy succeeded in convincing developing countries to adopt TRIPS.

4.1.5. TRIPS has onerous and unfavorable terms

Developed countries cannot contend that TRIPS's effects and consequences were within the reasonable expectations of the developing countries when they signed. TRIPS patent provisions, for

\textsuperscript{218} DRAHOS \& BRAITHWAITE, \textit{supra} note 185, at 136. In general, policy makers in developing countries did not like TRIPS. However, the Uruguay Round package was more favorable to these countries. Of particular appeal were the procedures for dispute settlement, which would safeguard against the Section 301 trade sanctions used to instill U.S. policy. The package also liberalized the international trade of textiles, accomplished by phasing-out of the Multifiber Arrangements. \textit{See} RYAN, \textit{supra} note 206, at 112 ("The creation of the World Trade Organization conferred a new international legitimacy to the international organization of trade and signing the Uruguay round agreement made a country a founding member of the new organization."). \textit{See also} Frederick M. Abbott, \textit{The WTO TRIPS Agreement and Global Economic Development, in Public Policy and Global Technological Integration} 41-42 (Frederick M. Abbott \& David J. Gerber eds., 1997) (finding that because the WTO agreement mandates that members use the WTO dispute settlement mechanism to settle trade disputes, developing countries believed that if they signed TRIPS, the United States would abide by the WTO dispute mechanism as opposed to unilaterally applying trade sanctions). As it turned out, however, not only did the United States use Section 301 aggressively, it also pushed for even more favorable conditions, a situation commonly referred to as "TRIPS-plus." It also increased the pressure to create bilateral programs protecting intellectual property even after TRIPS was concluded. The strategy of the United States was to employ both bilateral and multilateral treaties; knowing this, one might assume that the developing states were na"\i ve to trust in the multilateral agreements. However, these countries had few alternatives. \textit{See} DRAHOS \& BRAITHWAITE, \textit{supra} note 185, at 194 ("Bilateralism is like cooking an elephant and rabbit stew: however you mix the ingredients, it ends up tasting like elephant. Multilateralism is the only prospect for constraining the elephant by rules under which it agrees to submit to binding arbitration."). Compliance did not preclude Section 301 actions:

Indeed, section 314(c) of the Uruguay Round Agreements Act, which implemented the GATT Agreement, amended the Trade Act to provide expressly that a failure to provide adequate and effective protection of intellectual property could still trigger Special 301 measures "notwithstanding the fact that the foreign country may be in compliance with the specific obligation of the TRIPS Agreement."

DINWOODIE, \textit{et al.}, \textit{supra} note 178, at 809.
example, greatly expanded the definition of patentable subject matter to include inventions in "all fields of technology,"\(^\text{219}\) which prevented developing countries from excluding medicines from intellectual property protection, limited the means by which developing countries could access products from other countries (e.g., parallel importation and compulsory licensing), and lengthened the term of protection to twenty years. While only providing a glimpse of the unfavorable consequences of TRIPS provisions, the patent clauses offer a valuable example of the treaty’s harmful effects—eliminating, for instance, the ability of developing countries to provide medicines to their citizens. One can legitimately question whether these effects were foreseen by developing countries when they signed TRIPS. The idea that these countries did not realize the full impact that TRIPS would have is evidenced by the fact that “no responsible government with a choice would place the public health of its citizens below the interests of a few patent holders.”\(^\text{220}\) The UN laments that the ink was dry on TRIPS “before most governments and people understood the social and economic implications of patents on life.”\(^\text{221}\)

4.2. Distributive Fairness

To the extent that distributive fairness concerns inform the application of the treaty of adhesion doctrine, TRIPS reflects an underlying distribution of power and resources that “offends our conception of distributive fairness.”\(^\text{222}\) TRIPS involves more than coveting a neighbor’s painting; it involves distribution and control

\(^{219}\) TRIPS art. 27.

\(^{220}\) Abbott, supra note 8, at 488.

\(^{221}\) Sell, Private Power, Public Law, supra note 188, at 139. But cf. Okediji, supra note 10, at 839-40 (“Rationalizations that depict the TRIPS Agreement as another example of North-South power disparities tell a much too simple story. Indeed, one of the noted triumphs of the Uruguay Round was the unprecedented level of developing country participation in the negotiations ….”). India and Brazil were major participants during the negotiations and addressed concerns peculiar to many developing countries. Abbott, supra note 8, at 470 n.5. However, these countries did not necessarily represent the concerns of all developing countries and, in the end, also fell victim to the flawed negotiating process. Gervais notes that in 1992—four years after negotiations began—India voiced concerns about TRIPS, particularly about the compulsory licensing provisions, and refused to accept the TRIPS package. Despite these concerns, the 1992 Agreement was not modified substantially and the previous agreement, modeled on the EU/U.S. draft, became the basis for the TRIPS Agreement. Gervais, supra note 180, at 25-26. See also Drahos, supra note 179, at 11.

\(^{222}\) Kronman, supra note 21, at 772.
over important resources, each of which affects critical aspects of society: access to essential medicines; technological and economic development; transfer of technology; and sovereignty and global governance-related issues (e.g., the ability of states to determine for themselves which issues take precedence and where to allocate scarce resources). In this regard, it is noteworthy that the international community has applied equitable principles to resources; in particular, we have witnessed in international tribunals the emergence of principles for the equitable sharing of rivers, lakes, and ground waters that are a common resource of two or more states. Intellectual property deserves the same treatment. Moreover, TRIPS Articles 7 and 8 refer to equitable sharing as a goal (if not an implicit obligation) of the parties.

TRIPS is rife with procedural infirmities and grossly unjust terms. Developed countries control intellectual property, transferred intellectual property bargaining from WIPO to WTO, formed a negotiation block to produce TRIPS, and procured TRIPS through economic coercion of developing countries, which had little choice but to accept the treaty’s one-sided provisions. While there are strong arguments to the contrary, the more compelling conclusion is that TRIPS is a treaty of adhesion. If this is true, what effect, if any, should this conclusion have? This article concludes with some brief and modest suggestions as to how TRIPS panels and the AB might apply the treaty of adhesion doctrine in resolving TRIPS disputes and addresses some possible criticisms of this new doctrine.

5. APPLYING THE TREATY OF ADHESION DOCTRINE

Construing TRIPS as a treaty of adhesion requires that WTO decision-making bodies interpret the treaty in favor of developing countries or against developed countries—the contra proferentum principle. Thus, the WTO can use the adhesion doctrine as an interpretive aid rather than an exit option for developing countries. This recognizes that developing WTO member states need not repudiate all WTO protections in order to avoid the problems with TRIPS and is consistent with the fundamental international law principle of pacta sunt servanda (“agreements must be respected”).

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223 See Continental Shelf (Tunis. v. Libyan Arab Jamahiriya), 1982 I.C.J. 18 (Feb. 24) (demonstrating the application of equitable principles to resources).

224 See supra Section 4.
Two obvious areas in which to apply the doctrine are parallel importation and compulsory licensing. These areas have received a great deal of attention in recent years because of the AIDS epidemic and the effect of TRIPS's patent provisions on developing countries' access to AIDS drugs.

Parallel importation allows countries to seek lower-priced products abroad. Countries import these products rather than purchasing higher-priced versions from local distributors. Utilizing this method, countries are able to "price shop" the price disparities in different countries. The parallel importation principle in TRIPS—known as exhaustion—provides that "[f]or the purposes of dispute settlement... nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights." 225 Since adopting TRIPS, the United States and the EU have argued that this language grants patent owners the right to exclude others from offering to sell or import patented products into the United States or other countries where the product is under patent protection. 226 In contrast, developing countries contend that this language supports their right to allow parallel imports. That noted scholars and experienced trade negotiators could come to opposite conclusions with regard to this TRIPS clause is evidence that the clause is ambiguous.

Applying the treaty of adhesion doctrine would result in the clause being construed so as to benefit developing countries (i.e., allowing developing countries to establish their own exhaustion

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225 TRIPS art. 6.
226 As seen elsewhere:

The legal principle behind parallel importation is exhaustion. Once a patented product is sold or placed on the market by the patent owner (or with their consent), the seller no longer has control over the sale (or export) of that particular product, their rights are "exhausted" by the first sale of the product. Under national exhaustion, a patent right is exhausted only with respect to the country where the product was placed on the market. This does not exhaust patent rights in another country. Thus, for example, if a firm sold a product in India, the firm's rights would be exhausted in India, (i.e. the buyer could sell the product in India), but not in Kenya. International exhaustion means that the patent right is exhausted anywhere in the world when placed on the market anywhere in the world. The sale of a product in India would allow the sale of that product in Kenya, without infringing the patent. Regional exhaustion, which exists in the European Union, means that exhaustion is relegated to a number of specific countries or region, generally broader than the national market.

Harris, supra note 10, at 137 n.154 (emphasis in original).
regime). The TRIPS Council, which administers and monitors the operation of TRIPS, reached an identical result through a different approach.\footnote{This is the result achieved at the 2001 Doha Ministerial Conference. The Doha Declaration provides that the TRIPS provisions regarding the exhaustion of intellectual property rights enable members to design their own rules pertaining to exhaustion, subject to Articles 3 and 4, which govern most favored nation status and national treatment. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration].}

A compulsory license is a state-granted license issued to a third party so that they may manufacture a patented invention without the patent owner's consent.\footnote{See Paul K. Gorecki, Regulating the Price of Prescription Drugs in Canada: Compulsory Licensing, Product Selection, and Government Reimbursement Programmes 25 (1981) (defining a compulsory license as "an involuntary contract between a willing buyer . . . and an unwilling seller . . . imposed and enforced by the state.").} Article 31, the compulsory licensing provision in TRIPS, provides that government can use compulsory licensing subject to a number of conditions, including that as a general rule: (1) an effort should be made to negotiate a voluntary license on reasonable commercial terms;\footnote{This requirement may be waived in case of "national emergency," "other circumstances of extreme urgency," or "in cases of public non-commercial use." TRIPS art. 31(b). This exception allows a government to bypass the step of negotiating compensation with the patent holder in the interests of expediency. In 2002, Zimbabwe invoked this exception to override patents on antiretroviral drugs in response to the AIDS crisis gripping the country. Press Release, Medecins Sans Frontieres, Zimbabwe Government Takes Emergency Action Against HIV/AIDS (May 29, 2002), http://www.msf.org/mfinternational/ invoke.cfm?objectid=74452575-A024-48E7-A499C6808624B57C&component=toolkit.article&method=full_html&CFID=2000923&CFTOKEN=63291554.} (2) the government must provide for "adequate remuneration" to the right holder;\footnote{TRIPS art. 31(f), (h).} and (3) the license use must be "predominantly for the supply of the domestic market."\footnote{As mentioned throughout, there are many exceptions to the general rules, including situations in which a license is used in non-commercial situations. Other conditions include: (1) the scope and duration of the license must be limited to the purpose of the authorization; (2) the license is non-exclusive and is generally non-transferable; (3) the license is terminated when "the circumstances which led to it cease to exist and are unlikely to recur;" and (4) the government's decision is subject to independent judicial review. Id. art. 31(c), (f). Still other bases for compulsory licenses include the need to correct anti-competitive practices and in preventing blocking patents. Id. art. 31(k), (l).} The United States further argued for compulsory licensing under Article 31 to be read together with Ar-
ticle 27.1—this would prevent member countries from being able to protect public health and ensure their citizens' access to critical medicine. Developing countries argued for a less restrictive interpretation, one that would allow the compulsory licensing provision to be read against the backdrop of the treaty's objectives and principles, which would in turn allow developing countries to determine the grounds on which such licenses may be issued.

Since this provision also seems ambiguous, reading this provision in light of adhesion principles would mandate a reading consistent with the interpretation leveled by developing countries. This would allow those countries to import drugs without restrictions under a compulsory license and allow countries with manufacturing capabilities to produce these drugs for developing countries, including situations in which the goods are not placed on the market by, or with the consent of, the patent holders. Again, WTO members resolved this ambiguity by adopting an interpretive decision consistent with the treaty of adhesion approach.

Another obvious area where WTO members could apply the doctrine is in interpreting the entire treaty in light of TRIPS Articles 7 and 8. Article 7 states that:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

The objectives contained in Article 7 have two pillars: to promote inventions and to disseminate technology embodied in such inventions. The principles of the treaty are contained in Article
These principles include, *inter alia*, the ability of countries to adopt measures necessary to protect public health and promote the public interest in sectors of vital importance to their socio-economic and technological development and to prevent the abuse of intellectual property rights or practices that adversely affect the international transfer of technology.

The WTO Panel has yet to fully address Articles 7 and 8, though in *Canada Pharmaceuticals*, the AB stated that its findings did not “in any way prejudge the applicability of Article 7 or Article 8 of the TRIPS Agreement in possible future cases with respect to measures to promote the policy objectives of the WTO [m]embers that are set out in those Articles. Those Articles still await appropriate interpretation.”

Discussions in the TRIPS Council have focused only on whether members have implemented their TRIPS obligations relating to the minimum standards of protection. Rather than being an agreement that balances developing countries’ concerns about technology transfer and promoting the public interest against developed countries’ concern for protecting intellectual property rights, it has instead been converted into a means of enforcing private rights—irrespective of the impact that protecting these rights has on sectors of vital importance to developing countries. Prior to the Doha negotiations, developing countries’ concern about incorporating the treaty’s objectives and principles, such as to accommodate competing public values, were not discussed. As the In-

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237 Members may “adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development” when creating or amending their laws, so long as any new laws do not contradict the agreement. *Id.* art. 8.1. Article 8.2 holds that “[a]ppropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices, which unreasonably restrain trade or adversely affect the international transfer of technology.” *Id.* art. 8.2.


239 This of course excludes the discussion at the Doha negotiations related to developing countries’ access to essential medicines. For developing country proposals requesting effective implementation of Articles 7 and 8, see, e.g., Communication from Kenya on Behalf of the African Group—Preparations for the 1999 Ministerial Conference, WT/GC/W/302 (Aug. 6, 1999), which cites the African Groups’ concerns on, and proposals for, the TRIPS Council’s review of TRIPS provisions. See also Communication from Kenya—Preparations for the 1999 Ministerial Conference, WT/GC/W/233 (July 5, 1999) (listing Kenya’s proposals for “the improvement of the [WTO agreements]... to bring about a degree of balance in
odian delegation lamented "[c]learly, the transfer and dissemination of technology and the consequential increase in trade have been of little concern to the questioning Members." In fact, during many negotiating rounds, some developed countries proposed further strengthening intellectual property rights, again with little regard to overarching public interest concerns. After the Doha negotiations, things improved only slightly, with the Council merely giving lip service to the objectives and principles set forth in Articles 7 and 8 and relegating them to secondary importance as compared to the minimum standards of intellectual property protection. 240

In future cases, the WTO Panel and AB must give weight to the objectives and principles of TRIPS to encourage, among other things, technology transfer. They can achieve this through the treaty of adhesion doctrine. More specifically, the objectives and principles of the treaty assist in balancing the private rights of inventors with the rights of an invention's users. In any debate over TRIPS, therefore, WTO Panels and the AB must recognize and preserve these objectives and principles. 241 They can do so by circumscribing intellectual property rights protection with competing public values embodied in Articles 7 and 8. 242 WTO Panels and the AB can read Articles 7 and 8 as overarching provisions that should qualify, rather than be circumscribed by, other TRIPS provisions. 243

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240 Rather than recognizing the significance of Articles 7 and 8, the Panel limited their application by mentioning them as two of many provisions that relate to TRIPS' object and purpose. Even further, the Panel focused on the limitations of these Articles, further reducing their effectiveness.


242 Id.

243 The clause "provided that such measures are consistent with the provisions of this Agreement" included in Article 8 can be read to negate the principles contained in that Article. Reading Article 8 more favorably to developing countries, however, mandates an interpretation of the Article that will not allow this clause to completely negate the principles of technology transfer contained therein. TRIPS art. 8.
Further, Articles 7 and 8 should be read in conjunction with Article 66, which requires developed countries to provide incentives to their businesses and institutions in order to encourage technology transfers to developing countries so as to “create a sound and viable technological base.” All members recognize that technology transfers are vital for economic growth. Failure to allow technology transfers will lead to a further widening of the technology chasm that exists between developed and developing countries. Yet, as the required annual reports on the implementation of Article 66.2 plainly reveal, technology transfers have not materialized to the extent foreseen. This result stems from the Article being couched in “best endeavor” terms. As the African Group complained: “Best endeavor provisions are fundamentally flawed in that they are neither enforceable nor do they constitute a real benefit for developing and least-developed countries.” A more nuanced reading of Articles 7 and 8, as would be done under a treaty of adhesion analysis, would give more “bite” to Article 66.2 as well.

Yet another area where the WTO can utilize the treaty of adhesion doctrine is in interpreting the limitations and exceptions TRIPS sets for copyrights, trademarks, and patents. The excep-
tions and limitations contained in Articles 13, 17, and 30 must satisfy a tripartite test, in which such exceptions and limitations must: (1) be “limited”; (2) not “unreasonably conflict with normal exploitation” of the intellectual property right in question; and (3) not “unreasonably prejudice the legitimate interests” of the rights owner, “taking account of the legitimate interests of third parties.”

In Canada-Pharmaceuticals Patents, the WTO Panel interpreted Article 30 from the perspective of the right holders, disregarding the policy goals or social purposes of the measure; they did this despite stating that the exceptions should be read in light of Articles 7 and 8. As to two of the conditions (“unreasonably prejudice” and “unreasonably conflict”), the panel evaluated the exception exclusively in light of the economic impact on the rights holder. As to the first condition (“limited”), the panel focused on the extent the rights holders’ legal right was curtailed. In future decisions, WTO panels must construe exceptions and limitations more in favor of developing countries, bearing in mind Articles 7 and 8. This will provide developing countries with greater discretion and flexibility to allow for exceptions to exclusive rights. Again, this can be accomplished through applying the treaty of adhesion doctrine to construe any asserted exception in light of developing countries’ needs and goals, rather than clarifying the ambiguity to vindicate the rights holders’ economic interests.

The examples above represent but a few areas where the treaty of adhesion doctrine may be applied. The examples are illustrative, not exhaustive. The doctrine can—and should—be applied in interpreting other ambiguous TRIPS provisions.

6. COUNTERVAILING CONSIDERATIONS

This final section seeks to address critiques of the treaty of adhesion doctrine. Criticisms are grouped into two categories. One category relates to whether it is appropriate to apply a treaty of adhesion doctrine to international treaties such as TRIPS. The
other category relates to whether TRIPS is in fact a treaty of adhesion.

6.1. Criticisms Regarding Whether it is Appropriate to Apply the Treaty of Adhesion Doctrine to International Treaties and TRIPS

6.1.1. Application of the doctrine amounts to judicial activism

Some might argue that applying the treaty of adhesion doctrine to TRIPS is inappropriate because, as Kelly suggests, doing so amounts to WTO judicial activism, which would allow WTO panels and the AB to rewrite TRIPS provisions and alter members' rights and obligations. Kelly's primary concern would be that in rewriting TRIPS through this new interpretive doctrine, WTO panels and, as a result, developing countries would avoid the democratic framework of the WTO and undo previously negotiated deals. Kelly's point on democratic accountability is well taken. However, his argument is based on the fundamental assumption that TRIPS was the product of a democratic bargaining process, where all countries participated in policy decisions affecting their rights. This was not the case. Democratic process suggests an ability by people or states to participate in governance and in the process by which decisions are made. If, as is posited throughout this article, developing countries were absent in the negotiation process, the democratic negotiation referred to by Kelly was non-existent. Allowing the WTO judicial body to consider deficiencies in the negotiation process can both account for the lack of meaningful participation and better ensure democratic accountability. 250

Moreover, WTO panels are already called upon to interpret TRIPS. The doctrine does not invalidate the treaty nor does it allow WTO jurists to rewrite provisions. Rather, jurists are only called upon to apply the doctrine in a limited manner, when interpreting ambiguous TRIPS provisions. This can—and should—be done within the parameters of members' existing rights and obligations.

250 See, e.g., FRANCK, supra note 1, at 83 ("The right to democracy is the right of people to be consulted and to participate in the process by which political values are reconciled and choices made.").

https://scholarship.law.upenn.edu/jil/vol27/iss3/2
6.1.2. The doctrine is not a general principle of law

Another possible criticism against applying the doctrine is that the doctrine is not a general principle of law recognized by civilized nations as suitable for application on an international level. This could be either because it is not found in a sufficient number of domestic legal systems, or because it is inappropriate for application in international law. The first criticism is not troublesome. A comprehensive review of the world’s legal systems, while desirable, is impracticable here. This article does, however, review a wide range of countries across various cultures and at different economic and technological stages of development, each possessing different philosophical foundations. The second criticism is more troubling. In truth, it may be the most significant hurdle of all.

Admittedly, general principles comprise a very narrow category of international law and are treated with suspicion. Schachter argues that this is so both because they allow too much room for subjectivity and because “they introduce standards that may supersede State needs and goals.”251 Above, it was reasoned that the doctrine amounts to a general principle because of its importance and centrality to the rule of law as well as its consistency with other rules of international law. Beyond this, the doctrine may have indirect influence as an indication of policy and principles.252 Recognizing that the current of law may run in the opposite direction of the doctrine may be enough to change that tide.

6.2 Criticisms Regarding Whether TRIPS is a Treaty of Adhesion

The second line of possible attack against the treaty of adhesion doctrine concerns whether TRIPS is a treaty of adhesion at all. Here, some might argue that TRIPS was produced as a result of bargaining among sovereign and equal states, all having the capacity to conclude treaties. Thus, the coercion necessary to support a treaty of adhesion argument is lacking. Moreover, TRIPS was the result of a larger WTO package that included trade-offs in areas other than and including intellectual property, making the adoption of TRIPS less one-sided than it perhaps seems. Put simply,

251 SCHACHTER ET AL., supra note 31, at 49.
252 See, e.g., id. at 52 (citing a case in which the law of trusts “may possibly have had an indirect influence on the [International] Court’s reasoning in its advisory opinions”).
this argument postulates that TRIPS was the product of conven-
tional treaty negotiation, no different than a myriad of other trea-
ties.

It is a mistake to view treaty negotiation as bargaining among
equally sovereign states. The reality is what Philip Jessup long ago
observed as the "inescapable fact of power differentials" among
states. And, as we acknowledge power differentials among in-
dividuals and corporations, it is time not only to acknowledge, but
to account for the power differentials among countries. Thus, for-
mal equality of states cannot sustain the argument against the
treaty of adhesion doctrine.

Neither, however, can the inequality of states alone sustain an
argument supporting the treaty of adhesion doctrine. Treaties al-
ways involve bargaining among states of unequal bargaining
power. The lopsidedness of agreements, as a result of unequal
bargaining power between states, has not traditionally been con-
sidered an impediment to their validity under traditional interna-
tional law. Aust observes that the concept of unequal or "Leo-
nine" treaties has never been accepted in international law. As he
states: "No two states are ever equal, and to allow a state to avoid
its treaty obligations on this ground could undermine the stability
of treaty relations." Dunoff and others similarly make this point:

Of course, the equality of states is juridical only. As a prac-
tical matter, states vary enormously in size, resources, popula-
tion, military capacity, and economic strength. These disparities necessarily place some states in stronger
bargaining positions than others in the negotiation of par-
ticular treaties. As a general matter, such inequalities do
not preclude the conclusion of a valid treaty any more than
similar inequalities in the bargaining positions of private
parties preclude the formation of valid private contracts.

254 Most traditional international law scholars recognize that formal equality
of sovereignty of states does not translate into a legal requisite of material, or sub-
stantive, equality of power, wealth, technology, or other values possessed by
countries. See, e.g., Aust, supra note 122, at 257.
255 Werner Morvay, Unequal Treaties, in 7 Encyclopedia of Public
International Law 514, 514–16 (Rudolf Bernhardt ed., 1984) (refering to treaties
signed by a weak Chinese government that were upheld under customary law).
256 Aust, supra note 122, at 257.
257 Dunoff et al., supra note 46, at 46.
This article does not advance a theory based solely on the inequality of states. As in the domestic context, the doctrine applies in situations that involve both inequalities in the bargaining positions of the parties and an additional element, such as unfair surprise or oppression. Whether that "additional something" is adequately demonstrated here is another issue.258

Because the treaty of adhesion doctrine requires more than a mere inequality of bargaining position among states, it will not apply to or unravel every treaty previously negotiated. Indeed, the doctrine should be available for other treaties. However, TRIPS is unique among treaties and it is not likely that the doctrine would apply elsewhere.

TRIPS is exceptional for a number of reasons. First, the treaty is far reaching, affecting various sectors vital to a country, including health services, human rights, and economic and technological development. Second, TRIPS significantly altered previous intellectual property regimes by mandating taxing minimum levels of protection beyond previous levels and supplementing this with a well-organized enforcement mechanism, introducing a new dispute settlement procedure and reverse consensus rule "unique in the history of interstate dispute resolution."259 Pre-TRIPS arrangements left considerable flexibility to developing countries to determine domestic intellectual property policy for the public and private benefit of their constituents. TRIPS represents a radical change, unlike the gradual change in the domestic law of the United States and other developed countries. Even though now couched in trade terms, trade theory supported the old GATT because it focused on "negative integration."260 Again, TRIPS is radically different because it is not supported by trade theory—in particular, the theory of comparative advantage. Thus, TRIPS raises

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258 There is an important exception to the treaty of adhesion doctrine. As articulated above, treaties of adhesion could arguably encompass peace treaties. Clearly, however, peace treaties, negotiated to end wars and global armed conflict, are not included in treaty of adhesion analysis, because treaties that end serious and widespread human rights violations and repair the torn fabric of the international society do not create the harms that the treaty of adhesion doctrine seeks to prevent.

259 DUNOFF ET AL., supra note 46, at 784. The "reverse consensus" rule, which essentially reverses the GATT consensus rule, makes all requests for a panel, requests to adopt panel reports, and requests to adopt appellate reports automatic unless there is a consensus by all WTO members against such a request. Id.

260 See generally JAN TINBERGEN, INTERNATIONAL ECONOMIC INTEGRATION (1965) (discussing negative integration and positive integration).
questions about its suitability from an economic standpoint. Finally, as mentioned throughout, a disturbing number of developing countries were simply absent from TRIPS negotiations, which is all the more problematic because there is no alternative—members had no choice but to accept TRIPS on its terms.

Those who view the TRIPS negotiation process as a bargaining process between sovereigns might also point to the concessions developed countries made to developing countries. These concessions include the five- and ten-year transitional periods for developing and least developed countries, respectively, and declarations in the stated objectives and principles in Articles 7 and 8. Developing countries also obtained enhanced trade concessions in the areas of textiles and agriculture.

With respect to the transitional periods, it is absurd to believe that five and ten years will make any impression on the impact of TRIPS. There is little disagreement that TRIPS harms developing countries in the short term; in the long term, there also is very little credible evidence suggesting that TRIPS will benefit developing countries once fully implemented.

Still further, even though TRIPS is one of "three pillars" of WTO agreements, along with the General Agreement on Trade in Services ("GATS") and the Multilateral Agreement on Trade in

261 TRIPS arts. 65–66.
262 Id. arts. 7–8.
263 Under TRIPS, least developed countries were required to comply by January 2006. This was extended to 2016 by the Doha Declaration. See Doha Declaration, supra note 227 ("We also agree that least-developed country Members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 [Patents] and 7 [Protection of Undisclosed Information] of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until January 2016 . . . .").
265 Drahos, supra note 179, at 29 ("The ten years given to LDCs under TRIPS to enact and enforce fully functioning systems of copyright, patent, trademarks is not particularly generous, especially given that the development effects of doing so are anything but clear."); see also Harris, supra note 10, at 109 ("The perceived long-term benefits have not yet materialized and indeed are questionable.").
Goods, the two other agreements were not as critical to the successful completion of Uruguay Round.\footnote{See generally Jackson et al., Legal Problems of International Economic Relations (1986).}

Regarding trade-offs, the argument is as follows: TRIPS is not as one-sided and oppressive as the tale above suggests. Rather, TRIPS is a bargained contract where, in exchange for strengthening and enforcing intellectual property protection, developing countries received liberalization of international trade in textiles and apparel through the phasing-out of the Multifiber Arrangements and trade in agricultural products that would confer export benefits.\footnote{See Agreement on Agriculture, Apr. 15, 1994, WTO Agreements, Annex 1A; L. & Prac. World Trade Org. (Oceana) 27, 27 (Mar. 1995) (petitioning developed countries to take into account the "particular needs and conditions" of developing countries in increasing markets for their agricultural products); Agreement on Textiles and Clothing, Apr. 15, 1994, WTO Agreements, Annex; L. & Prac. World Trade Org. (Oceana) 77, 77 (Mar. 1995) ("[S]pecial treatment should be accorded to the least-developed countr[ies].").} However, TRIPS was so inequitably weighted and the advantages to developing countries so grossly disproportionate to the obligations placed on them that this nonetheless runs afoul of the adhesion doctrine.

For developing countries, TRIPS results in, among other things: (1) lack of access to products; (2) loss of revenue; (3) loss of employment with the loss of pirate industries; (4) political fallout; and (5) the additional costs of implementing the new system. The access to developed world markets for textiles and agriculture is not commensurate with these costs. Moreover, the access to these markets has not yet materialized. In the decade since the implementation of the Agreement on Textiles and Clothing ("ATC"), the United States has been woefully deficient in meeting its obligations. In fact, of a total of 937 quotas applied by the United States on imports of textiles and clothing products from WTO members under the Multifiber Arrangements, the United States had phased out only 103 as of 2004, a mere 11% of the original total.\footnote{See Communication from India, supra note 241.}

Further, trade concessions in exchange for greater market access for agriculture, textiles, and value-added goods were not all that the developing countries "bargained" for. As part of the WTO deal, developing countries agreed to have bound tariffs, which made it difficult to protect domestic industries, and investment measures through the Trade Related Aspects of Investment Meas-

\footnote{266 See generally Jackson et al., Legal Problems of International Economic Relations (1986).}
ures ("TRIMS"), which granted foreign investors greater access to traditionally state-operated industries. In the end, the argument that TRIPS was the result of a bargain rather than coercion is unconvincing.

6.3. Practical Reasons Not to Apply the Doctrine

There also may be arguments concerning the doctrine's limitations in analytical reach and practical political usefulness. One such argument is that applying the doctrine will be an exercise in futility, as the United States and other developed countries will circumvent any adverse interpretation by resorting to unilateral pressures outside TRIPS to obtain the same or greater obligations from developing countries. Indeed, the United States has done so in seeking to strengthen TRIPS by entering into bilateral and regional trade agreements that contain "TRIPS plus" standards.269

This is neither a cynical nor an insignificant argument; rather, it reflects the reality underscored earlier that more powerful nations assert influence over less powerful ones. Nevertheless, to the extent that certain TRIPS outcomes are surprising and oppressive, developing countries can avoid such outcomes under the doctrine of adhesion. They could also avoid similar outcomes in future negotiations. Under the doctrine of adhesion, they can enter agreements "with eyes wide open." This may embolden them in future negotiations. This is consistent with the counter-hegemonic challenges to TRIPS now appearing.270 Additionally, developing countries can negotiate in the shadow of these new interpretive WTO

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269 For an example of a "TRIPS plus" agreement, see Central American Free Trade Agreement, U.S.-Dominican Republic, art. 15, Aug. 5, 2005, available at www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html (last visited Oct. 12, 2006) (providing for, among other things, extensions of patent terms, grace periods, and other protections exceeding those of the TRIPS Agreement).

270 Sell discusses the emergence of such challenges:

[A]s the impact of TRIPS has become more palpable, new pockets of resistance and social mobilization have emerged to challenge TRIPS. With the exception of initial developing country resistance to moving IP issues from WIPO to GATT, opposition to TRIPS emerged rather late—when the ink was dry. This implies that while TRIPS cannot be 'undone' in any direct sense, the fight over loopholes, alternative interpretations of vague language, and perhaps, most importantly, effective resistance to further expansion of global IP rights are on the horizon.

Sell, Private Power, Public Law, supra note 188, at 121.
decisions in view of the treaty of adhesion doctrine bringing about favorable outcomes.

6.4. Practical Reasons to Apply the Doctrine

In addition to the legal arguments outlined above, there are also practical reasons why the WTO should incorporate and apply the treaty of adhesion doctrine. The proposal does not disrupt other assumptions in international law. It is consistent with keeping treaties entact and with binding parties to their obligations. It also has roots in the VCLT provisions on duress and coercion. Equally important, the doctrine may actually ensure more compliance with TRIPS and WTO obligations.

The WTO is a compliance institution concerned with sustaining cooperation in face of dynamic change. Fairness and distributive justice—or at least the perception of fairness and distributive justice—are essential elements in ensuring the stability of treaties: “A collaboration that is perceived by a participant as blatantly unfair cannot be a durable arrangement in international society.”

Moreover, WTO judicial bodies decide cases with due regard to their own institutional interests. They therefore shape decisions to encourage compliance and consensus. The Doha negotiations

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271 Schachter et al., supra note 31, at 61. See also Franck, supra note 1, at 8 (“[T]he perception that a rule or system of rules is distributively fair [that the consequences of the rule are just], like the perception of its legitimacy [that rules are made and applied in accordance with what parties perceive as the right process], also encourages voluntary compliance.”). Fairness and distributive justice are not the only matters that ensure compliance; Jerley identifies a number of factors. Douglas Jerley argues that factors include:

(1) the dramatic influence . . . of developed countries on the dispute settlement process; (2) the [system’s] effectiveness . . . in resolving disputes between countries of diverging . . . power; (3) the non-compliance of developed countries with WTO decisions; (4) the lack of recourse to retaliation; and (5) the lack of . . . resources . . . to file and defend against complaints.


272 Shaffer, supra note 201, at 131 (“WTO judicial bodies, as any court, exercise institutional power when they decide legal cases.”).

273 Id. See also James McCall Smith, WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings, in 2 WORLD TRADE REVIEW 65, 67 (Richard Blackhurst ed., 2003) (“[T]he way in which the Appellate Body—through a series of strategic procedural moves that promote consensus decision making, broaden its access to information, and preserve its judicial discretion—has improved the odds of the DSU’s survival and future development.”).
and the subsequent Doha Declaration (the "Declaration") can be seen as a step in this direction. The Declaration embraced a moral fairness interpretation of TRIPS and, arguably, is an invitation to take this a step further; the treaty of adhesion doctrine provides a vehicle to accomplish just that.274

6.5. Possible Problems in Applying the Doctrine

This final section is included to note some possible problems with the doctrine. Two interrelated problems come to mind. First, which developing countries should be able to take advantage of the doctrine? As developed throughout this article, the doctrine should be available only to those countries that meet the conditions outlined above (i.e., those that did not fully participate, had no meaningful choice, suffered surprise or oppression, and were in unequal bargaining positions). Certainly, India, Brazil, and other larger developing countries not only participated in the negotiations but also are not in the "unequal bargaining position" that many African nations are in. As such, the doctrine should not apply to them.275

Only by participating in the WTO dispute settlement system will developing countries make use of the doctrine and influence the interpretation of TRIPS. Thus far, their participation has been minimal.276 Indeed, "the majority of developing country WTO

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274 The legal effect of the Doha Declaration is not clear. For arguments that it is a legal decision of WTO members equivalent to an interpretation of TRIPS, see Abbott, supra note 8, at 490–504 (describing the "legal effects" of Doha). See also Gathii, supra note 233, at 292-93 (arguing that "the Doha Declaration should now be regarded as an interpretive element in the interpretation of the TRIPS agreement under customary international law").

275 However, this raises another concern. Applying the doctrine to different countries may result in different TRIPS interpretations.

276 Gregory Shaffer, How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies, in ICTSD Resource Paper No. 5, TOWARDS A DEVELOPMENT-SUPPORTIVE DISPUTE SETTLEMENT SYSTEM AT THE WTO 1, 13–14 (International Centre for Trade and Sustainable Development, March 2003), available at http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf (last visited Oct. 27, 2006) (noting that, according to one scholar, "developing countries are one-third less likely to file complaints against developed states under the WTO than they were under the post-1989 GATT-regime"). Shaffer notes that other than Brazil and India, developing countries are less likely to participate actively in WTO litigation because of "structural factors." These include: "(i) individual developing countries' relatively smaller value, volume and variety of exports, resulting in fewer economies of scale in mobilizing legal resources, and (ii) the high cost of access to the system." Id. at 15.
members [has] never participated" and no least developed country has ever initiated a WTO complaint.\textsuperscript{277} The treaty of adhesion doctrine should, however, give developing countries more incentive to participate in the WTO process.

7. CONCLUSION

The WTO is under attack from all sides. Protests at trade rounds and increasing criticism against the WTO and TRIPS cannot be ignored. The WTO must make an effort to include developing countries such that they "feel that they have a real voice in making the decisions that affect them."\textsuperscript{278} Allowing the inequities in the bargaining process and the onerous one-sided provisions in TRIPS to be recognized in WTO dispute settlement resolution is a start. So, too, is incorporating a treaty of adhesion doctrine in international law.

The doctrine will allow WTO judicial bodies to interpret ambiguous TRIPS provisions in favor of developing countries, thus injecting fairness into international law. While there may be tensions between infusing international law with fairness and the \textit{real-politik} of international law, international intercourse and the stability of international relationships depend on a new focus on fairness.

\textsuperscript{277} \textit{Id.} at 14.

\textsuperscript{278} Steger, \textit{supra} note 143, at 141.