

FROM PROGRESSIVE LIBERALIZATION TO PROGRESSIVE REGULATION IN WTO LAW

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ABSTRACT

This paper addresses conceptual problems of special and differential (S&D) treatment of developing countries (DCs). Observing that past and present avenues have largely failed, it suggests the concept of progressive regulation in the field of prescriptive rules. Based on the idea of progressive liberalization, it develops a new concept of graduation inherent to substantive rules and suggests taking recourse to individual scheduling of commitments. Learning from the idea of progressive liberalization, commensurate to diverging levels of development, it is submitted that graduation, based on recourse to economic factors within substantive rules, and scheduling of additional commitments could replace traditional perceptions of S&D treatment and render World Trade Organization (WTO) more responsive to the needs of developing Member States of the WTO. As an example, this paper applies these concepts to the problem of patenting pharmaceutical products.

INTRODUCTION

The tradition of progressive liberalization

The classical body of General Agreement on Tariffs and Trade (GATT) law is based on the philosophy of progressive liberalization. Subsequent rounds of multilateral trade negotiations have served the purpose of *progressively* and *individually* lowering tariff rates and domestic support of Member States in a process of squaring market access and domestic needs of protection, including the needs of social and economic development. The diplomatic process has been driven by economic and political interests. The law of GATT provided the framework and operating system, within which this process of gradual liberalization has taken place. Under the grand principles of most favoured

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nation treatment (MFN) and national treatment, as well as a ban on quantitative restrictions, it offered the possibility of bilateral or multilateral negotiations, including recourse to digressive tariff formulas and sector initiatives. Results are subsequently inscribed into the individual schedule of each Member.

To a large extent, prescriptive GATT rules at the time merely served the purpose of shaping this process and of avoiding circumvention of results achieved in progressive liberalization. They did not define outcomes *per se* but applied to diverging levels of liberalization. Under World Trade Organization (WTO) law, the same principles partly continue to apply to tariff negotiations and to the reduction of domestic support levels. Partly within generally defined parameters, partly allowing for individualized solutions, particular concerns of Members for sensitive products, varying from country to country, can be taken into account. Given an average tariff rate of some 4% in industrial goods, the emphasis has shifted to reduction of tariffs and subsidies in the field of agriculture – the main stumbling block of the present Doha Development Round. Progressive liberalization is by no means an easy process. It has never been. The main emphasis remains on negotiations of concessions. It includes complex and arduous legal dispute settlement by which the implications of the multilateral trading system, in particular the impact of MFN and national treatment and related provisions, are applied to country-specific regulations and individual levels of commitment.

Importantly, the same philosophy of progressive liberalization was introduced for services in 1995. The General Agreement on Trade in Services (GATS) is modelled after the classical body of GATT law. Commitments are inscribed in the schedules of Member States. Again, the rules of GATS serve the purpose of structuring the process of progressive liberalization and of avoiding the circumvention of commitments made. This process is very much in its inception. The Uruguay Round has laid out the framework and operating system for a long-term process during coming decades.

Both in tariffs and services, schedules of countries are structured in a similar manner [according to the Harmonized System (HS) and the United Nations (UN) classifications, respectively] but are highly individualized. Rudolf Adlung aptly describes this in his contribution to this volume of the *Journal*. The schedules implicitly reflect the status of social and economic development and the levels of domestic regulation achieved in a Member State. In the process of claims and responses, Members challenge the market access levels of other Members. They will call for further liberalization. Pressure may be exerted and trade-offs are undertaken. Bilateral or multilateral negotiations normally will not go beyond what an individual Member is prepared to concede. The situation is basically different in the case of new accessions. An acceding State or independent customs union is faced with a multitude of demands and generally finds itself in a weak position to deny such claims unless it is prepared to postpone membership. New accessions, therefore, generally result in advanced levels that sometimes lead to difficulties in implementation to the extent that they go beyond what the economy of

country can presently absorb. Sound policies conducted by the membership *vis-à-vis* applicant countries take this into account, and governments are called upon to carefully handle excessive claims which may be submitted by the private sector but which are not commensurate with levels of development of the applicant and which, upon adoption, would face extensive difficulties in the process of implementation.

Generally, the legal framework of GATT and GATS allows for the taking into account the diverging needs and levels of development of the some 150 Members of the WTO. They allow *per se* for fine-tuning – a goal that in reality will not always be met. To the extent that the schedules do not meet appropriate levels of market access and remain sub-optimal, they merely reflect the outcome of the political bargaining processes. For example, high tariff levels in agriculture reflect domestic choices preserving traditional agricultural structures in industrialized countries and fail to satisfy the needs of efficient producer countries. Likewise, high market access barriers in services in many developing countries (DCs) reflect the domestic choices and fail to satisfy the needs of efficient service providers abroad. This state of affairs, however, does not depend as such on the legal framework: it is neutral and applies irrespective of the level of progressive liberalization achieved. The problem is not a conceptual one, but one of applied policies and interests.

It is, therefore, not astonishing that the basic rules relating to progressive liberalization *per se* do not need to take recourse to the concept of special and differential (S&D) treatment for DCs. The same rules can apply to all Members alike as results can be tailored, taking into account highly diverging levels of development. Part IV of GATT, addressing trade and development, is essentially limited to encourage developed countries to enhance market access in primary goods but is short of any prescriptive commitments and S&D treatment obligations. Article XXXVI:8 GATT, establishing the principle of non-reciprocity, states that developed countries do not expect reciprocity from DCs for commitments made in trade negotiations. Importantly, the provision relates to expectations and conduct in the process of negotiations on progressive liberalization, allowing for enhanced market access of DC products to be taken into account. In this context, binding rules on S&D treatment are limited to allow and justify deviations from MFN treatment. Developed countries are entitled to grant preferred market access to DCs under the 1979 Enabling Clause. Similarly, DCs may enter into non-reciprocal preferential trade agreements beyond the general disciplines set forth by Article XXIV GATT on customs unions as well as reciprocal free trade agreements under the Enabling Clause. In return, DCs pledge to seek stronger integration into the multilateral system commensurate with social and economic development. Paragraph 7 of the Enabling Clause states: ‘Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive

development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement'.¹ This provision provides the basis for policies of so-called graduation. In the context of General System of Preferences (GSP) schemes, DCs may graduate from least-developed countries (LDCs) to DCs status and then to emerging or industrialized countries, thus gradually losing benefits under these schemes. The traditional concept of graduation in WTO law thus is unilaterally applied. For DCs, this is a highly controversial scheme for the reason that it results in importing countries unilaterally determining what criteria will be applied and which decisions will be made. In essence, it places exporting DCs at the mercy of domestically and unilaterally defined thresholds by importing industrialized Members.²

In conclusion, progressive liberalization entails differential treatment of obligations of WTO Members commensurate with their levels of development. S&D treatment, in terms of rights, is limited to preferential market access rights for DCs under the Enabling Clause. Obviously, this falls short of explaining the existence of some 155 S&D treatment provisions scattered throughout current WTO law as well as of some 85 proposals tabled during the Doha agenda.³ They mainly relate to what we call prescriptive rules.

The shift to prescriptive rules and standards defining outcomes

It was important to recall the doctrine of flexible, progressive liberalization at the outset. As an approach, it is different from the process of standard setting that characterizes the more recent history of GATT and now the WTO. As the system matured, and lacunae were filled in light of new regulatory practices of Members, new legal disciplines emerged. Rules and standards have increasingly become prescriptive in the sense that they no longer shape the process of progressive liberalization and flank rules but essentially define uniform outcomes *per se*.

True, the GATT was aware that prescriptive rules applied to all contracting parties alike; however, these rules apply in the context of varying levels of progressive liberalization. For example, the constitutional principles of MFN and national treatment apply to any given level of domestic and, hence, varied regulation. They do not prescribe uniform outcomes. They oblige Members to apply rules, as they are, equally among different Members, and *vis-à-vis* imported products, respectively, but commensurate and consistently with market access levels individually agreed upon. Moreover, prescriptive rules often were not properly enforceable under the then-existing dispute settlement

¹ Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, L/4903, BISD 26S/203, adopted on 28 November 1979.

² For an example discussing the problem, see Trade Policy Review Maldives, Report by the Secretariat, WT/TPR/S/110, p. vii para 1, 32 (13 December 2002).

³ ICTSD/IISD, Special and Differential Treatment, Doha Round Briefing Series Vol. 1 No 13 (February 2003).

system or, as in the case of GATT Article XXIV (regional integration), were even withdrawn from the jurisdiction of panels up to the conclusion of the Uruguay Round in 1995. Prescriptive GATT obligations were, in other words, largely of a soft-law nature and the system was generally assessed as a system framing the negotiating process. It is not astonishing that even today the WTO is still considered to be mainly an instrument of negotiations, rather than a treaty entailing strict rights and obligations, comparable with the European Community (EC).⁴ This characterization is no longer accurate.

The progressive reduction of tariffs over the last fifty years witnessed increasing attention to non-tariff barriers and finally to matters of domestic regulation, such as analysing appropriate domestic procedures in the area of trade remedies, determining appropriate ceilings of domestic farm support, or minimal standards of intellectual property protection. Different generations of trade barrier regulation emerged, ranging from tariffs to non-tariff barriers and, finally, to addressing internal markets and conditions of competition. The Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, negotiated during the Uruguay Round, amounts to the most important emanation of this evolution of defining standards and outcomes *per se*. However, it is not alone, and new disciplines may be added. In the field of services, a similar process is likely to take place over the next decades. To the extent that sectors are increasingly inscribed and subject to national treatment, the impact of other forms of protection in domestic regulation may be increasingly felt. They subsequently will be addressed in negotiations. The contents of GATS Article VI on domestic regulation or on subsidies in Article XV are likely to become more prominent and more elaborate in separate, prescriptive instruments. Eventually, they may develop into sector-specific agreements, comparable with the evolution of specific agreements and understandings under GATT during the various rounds of multilateral trade negotiations. The reference paper in telecommunications is an early example in point, which also entails prescriptive rules on competition between private operators and former monopolists.⁵

The advent of S&D treatment

It is important to note that the legal structure of norms, addressing these kinds of non-tariff or domestic barriers in the second and third generations, has evolved and outgrown the legal framework of progressive liberalization. In the meantime, the multilateral provisions have increasingly moved into proper

⁴ This traditional characterization still prevails in defining the domestic status of WTO law in many countries and is instrumental in denying direct effect or the self-executing nature of WTO rules by legislators and courts; for a discussion see, e.g. Thomas Cottier & Matthias Oesch, *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland*, (Berne and London: Cameron May 2005), 209–32.

⁵ See e.g. Marco Bronckers and Pierre Larouche, ‘Telecommunications Services’, in Patrick F.J. Macrory, Arthur E. Appleton and Michael G. Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2005) vol. 1, 989–1035, 999.

standard setting: most of the agreements and understandings are prescriptive in nature. They set standards and define outcomes as to how national or regional law must be shaped. While the idea of progressive liberalization still prevails in tariffs and services, other obligations apply independently of diverging levels of social and economic development. Hence, the call for S&D treatment for DC Members has emerged largely in parallel to the advent and evolution of prescriptive rules.⁶ On completing the Uruguay Round, there is hardly an agreement that does not contain one or several provisions addressing S&D treatment. The effort was well-intended: to render prescriptive rules more suitable to respond to the needs of social and economic development and to take into account stark factual differences among industrialized and DCs in terms of efficiency and competitiveness. S&D treatment aspired to insert elements of equity, that is, mainly to provide exemptions to fast and hard rules.

The advent of operational S&D treatment, by and large, with the Tokyo Round does not imply that the status of DCs was not a problem before this point in time. From the commencement of the GATT, it has been highly controversial.⁷ Negotiations first led to the adoption of Article XVIII in September 1948. The provision allowed ‘less developed countries’ (as they were called) to operate quantitative restrictions only upon mutual agreement. The 1955 extensive revision of Article XVIII allowed adopting these measures unilaterally to the extent that they would facilitate the objectives of the agreement. In 1958, the Haberler Report concluded that then-existing trade rules were unfavourable to DCs. Based on the report, the contracting parties recommended what would become long-standing claims in the GATT: the reduction of tariffs, the reduction of widespread use of non-tariff barriers in agriculture, and the importance of expanding export earnings of DCs.⁸ The Dillon Round stressed the importance of reducing tariff barriers to products from DCs.⁹ Similarly, trade ministers agreed in May 1964 that tariff reductions for DC products were of key importance.¹⁰ In the wake of the newly

⁶ The different phases are discussed by Alexander Keck and Patrick Low, ‘Special and Differential Treatment in the WTO: Why, When and How?’, Staff Working Papers ERSD-2004-03 (May 2004) p. 3–6, distinguishing four phases: a first phase up to the beginning of the Tokyo Round in 1973; a second phase of the Tokyo Round Agreements, and a third phase beginning with the inception of the WTO in 1995; see also Edwini Kessie, ‘Enforceability of Legal Provisions Relating to Special and Differential Treatment under the WTO Agreement’, http://www.wto.org/english/tratop_e/devel_e/sem01_e/kessie_e.doc (visited August 2006), discussing the advent of S&D, Part IV of GATT, and S&D provisions in the Uruguay Round Agreements.

⁷ For a detailed account, see John H. Jackson, *World Trade and the Law of GATT* (Indianapolis, Kansas City, New York: Bobbs-Merill, 1969) 625–468.

⁸ *Ibid* at 643.

⁹ *Ibid* at 644.

¹⁰ ‘The Committee reaffirms that in the trade negotiations every effort shall be made to reduce barriers of exports of less-developed countries and agrees that this consideration should be borne particularly in mind in the approach to the question of exceptions.’, Meeting of the Trade Negotiations Committee at Ministerial Level, Resolution adopted on 6 May 1964, 13 BISD 109/110 (1965).

founded UN Conference on Trade and Development (UNCTAD), Part IV was introduced and opened for signature in February 1965.¹¹ Again, the prime emphasis was on enhanced market access and export earnings and thus the elimination of trade restrictions by developed countries, albeit in terms of soft law only.¹² The Tokyo Round essentially addressed S&D treatment by inserting a few provisions on S&D treatment in the GATT agreements.¹³ The main strategy, however, was on a different level: firstly, the side agreements were not mandatory and formed part of variable geometry. Member States of the GATT were not obliged to sign on to these new agreements. DCs therefore did not need to worry much about S&D treatment. Secondly, the Enabling Clause opened avenues for preferential treatment of DC exports.¹⁴ The clause, justifying unilateral departure from MFN to the benefit of DC exports, clearly amounted to the most important emanation of S&D treatment in the Tokyo Round Agreements as it bears the potential to realize enhanced market access for DCs on the basis of domestic generalized systems of preferences without creating expectations as to reciprocal treatment.

The Uruguay Round significantly increased the number of S&D treatment provisions.¹⁵ The concept of variable geometry of the Tokyo Round was

¹¹ 13 BISD 1 (1965).

¹² See, in particular, Articles XXXVI(2) and (4); Article XXXVII(1), the latter only 'to the fullest extent possible' and thus, in soft law terms, most of the provisions of Part IV.

¹³ There were relatively few S&D provisions, properly speaking. They mainly relate to third-generation trade barriers. For example, Article 12 of the new TBT Agreement obliged Parties to refrain from adopting standards that create unnecessary obstacles to imports from DCs. Also, DCs were not expected to use international standards not appropriate for their development, financial, and trade needs. Article III of the Government Procurement Agreement obliged to take into account development needs, in particular the establishment of domestic industries. Article 14 of the Subsidy Agreement essentially exempted DCs from disciplines developed. Article 21 of the Customs Valuation Code allowed for delayed implementation to DCs for a period of five years. No S&D provisions can be found in the Agreement on Import Licensing Procedures, except for special considerations to be given to products originating in DCs and especially of LDCs in Article 3(l). Article 13 of the Anti-dumping Agreement required taking into account the special situation of DCs in applying countervailing measures. The first codification of dispute settlement practices recognized procedures set forth for disputes between developed and DCs (14 BISD 18) and contained a number of provisions requiring special attention to the needs of a DC affected; see 26 BISD 20, 35, 73, 130, 158, 184, 210–18 (1978/1979).

¹⁴ Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979 (L/4903), 26 BISD 203 (1979).

¹⁵ For a comprehensive survey, see Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions, Note by the Secretariat, WT/COMTD/W/77 (25 October 2000) and WT/COMTD/W/77/Corr.1 (6 December 2000); Special and Differential Treatment for Least-developed Countries, Note by the Secretariat, WT/COMTD/W/135 (5 October 2004). The Clause and its application was subject to judicial review in WTO Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 1 December 2003 and WTO Appellate Body Report, WT/D246/AB/R/4, adopted April 2004. For a discussion, see Lorand Bartels, 'Conditionality in GSP Programmes', in Thomas Cottier, Joost Pauwelyn, and Elisabeth Bürgi (eds), *Human Rights and International Trade* (Oxford: Oxford University Press, 2005), 463; see also *ibid*, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Programme', 6 JIEL (2002) 56.

reviewed and replaced by the concept of a single undertaking, binding upon all Members with the main exception of the Agreement on Government Procurement. Safeguarding S&D treatment became an important concern. At the same time, the negative impact of dispensation was sought to be remedied, and S&D treatment provisions were frequently reduced to the concept of transitional provisions. Under the Uruguay Round Agreements operating under the doctrine of a single undertaking, newly introduced explicit rules providing for unequal treatment and thus S&D treatment rules are predominantly limited to postpone implementation. This was particularly true for the new TRIPS Agreement, which set minimal standards. DCs and LDCs obtained, under such provisions, more extensive time periods for the creation of domestic legislation. There was a deliberate effort to avoid differentiated rules and to subject these countries to a single and same set of rules in the medium and longer term.

Delaying implementation may be considered as a formal kind of progressive regulation. In substance, however, the delays are fixed in time and are not made dependent on economic performance. The obligation to introduce certain measures is not made conditional and incumbent upon factual economic changes and progress. Delaying implementation merely reflects the need to build capacities and to allow for structural adjustment.

Efforts towards mainstreaming WTO obligations in terms of substance, in return, resulted in enhanced efforts to reintroduce S&D treatment provisions in the aftermath of the Round. The pendulum began to swing back. The concept of S&D treatment was repeatedly affirmed by Ministerial Declarations in 1996 (Singapore), 1998 (Geneva), and 2001 (Doha) as well as the 1993 Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries and the 1996 Comprehensive and Integrate WTO Plan of Action for the LDCs, the 2001 Declaration on the TRIPS Agreement and Public Health, and the Decision on Implementation-Related Issues and Concerns.¹⁶ The importance of S&D treatment was reiterated by the 2005 Hong Kong Ministerial Declaration:¹⁷

We reaffirm that provisions for special and differential (S&D) treatment are an integral part of the WTO Agreements. We renew our determination to fulfil the mandate contained in paragraph 44 of the Doha Ministerial Declaration and in the Decision adopted by the General Council on 1 August 2004 that all S&D treatment provisions be reviewed with a view to strengthening them and making them more precise, effective and operational.

¹⁶ WT/COMTD/WT77/Corr.1 (6 December 2000); Special and Differential Treatment for Least-developed Countries, Note by the Secretariat, WT/COMTD/W/135 (5 October 2004) p. 3.

¹⁷ Doha Work Programme, Ministerial Declaration, WT/MIN (05)/W/3 Rev. 2 (18 December 2005), para 35. See also para 57 (aid for trade), Annex D (special safeguard mechanism for DCs in agriculture), and Annex E (trade facilitation).

In conclusion, the concept of S&D treatment is firmly accepted and anchored in WTO law. At the same time, doubts as to its effectiveness remain and need to be addressed.

The prospects of the Doha Development Agenda

Current efforts on S&D treatment, within the Doha Development Agenda, continue to pursue the classical avenue of seeking special rules, for DCs and, in particular, the group of LDCs. Up to 2003, some 83 proposals were table. They may be classified into five types of rules: (i) dispensation from obligations, (ii) financial support and technical assistance, (iii) preferential market access, (iv) incentives for transfer of technology, and (v) result-oriented, purposive provisions (e.g. rapid and sustained growth of export earnings).¹⁸ Negotiations have not made much progress, and the Chairman of the General Council, Ambassador Carlos Pérez de Castillo, transmitted a comprehensive document containing all proposals tabled as of 5 May 2003 to the heads of delegations of WTO Members. The introductory note summarizes the state of play at that time:

Members will recall that the Special Session of the Committee on Trade and Development has held a very large number of formal and informal meetings since January 2002 in an endeavour to address the various issues and proposals that Members have raised in this regard. In spite of the considerable time that has been spent in trying to come to agreements on these proposals, very little progress has been achieved, which has led to a growing sense of frustration among Members. While a number of reasons have been advocated for this state of affairs, no one would deny that, as part of the development dimension of the Doha Development Agenda, further efforts are required to ensure positive results on the work programme on S&D treatment.¹⁹

By compiling the host of proposals made by delegations, the paper was organized into three categories. A first category contains proposals which, according to the document, were basically agreed upon in February 2003 and contained in Annex III to document TN/CTD/7. A second category lists

¹⁸ There is no agreed classification. The Secretariat describes the different types of rules as follows: 'Special and differential treatment (S&D) provisions can generally be classed in five main groups: provisions aimed at increasing trade opportunities through market access; provisions requiring WTO Members to safeguard the interest of DCs; provisions allowing flexibility to DCs in rules and disciplines governing trade measures; provisions allowing longer transitional periods to DCs; and provisions for technical assistance'. WT/COMTD/WT77/Corr.1 (6 December 2000); Special and Differential Treatment for Least-developed Countries, Note by the Secretariat, WT/COMTD/W/135 (5 October 2004) p. 2. Kessie suggests to classify S&D provisions in the following five categories: (i) provisions aimed at increasing trade opportunities, (ii) provisions that require WTO Members to safeguard the interests of DCs, (iii) provisions permitting DCs to assume lesser obligations, (iv) provisions relating to transitional time periods, and (v) provisions relating to technical assistance, see above n 6.

¹⁹ WTO, 'General Council Chairman's Proposal on an Approach for Special and Differential Treatment', (03)68 JOB (May 5, 2003) (on file with author).

proposals that are likely to obtain ‘a better response within the framework of the negotiations’. Finally, a third group lists proposals that, at the time, were met with ‘wide divergence’. The document reflects a great variety of different proposals relating to the different agreements of the WTO. While some of them envisage strengthening obligations of industrialized country Members, particularly in the field of technology transfer, most of the provisions seek exemptions on the basis of categorization of DCs or LDCs.

It goes beyond the scope of this paper to analyse these proposals in any detail, but it would seem fair to mention that most of them have remained within the orthodoxy of S&D treatment, developed in previous rounds. It is difficult to detect new ideas and concepts, and no progress was made in the field of S&D treatment properly speaking. In fact, commitments made at the Hong Kong Ministerial Meeting in December 2005, in particular the phasing out of export subsidies in agriculture by 2013, the efforts to support trade developing in DCs, and conceptual work on trade facilitation are important, albeit modest, achievements in the classical domain of enhancing market access, rather than creating special rules for DCs. Negotiations will determine what result will be achieved on S&D treatment properly speaking by the closing date of the Doha Round. Even if the goals of more precise and operational rules on S&D treatment can be attained, the result is likely to reflect experiences of the past. S&D treatment provisions have remained without much impact in accommodating real needs of DCs – a finding already made by Professor Hudec in his seminal work published in 1987.²⁰ There is little hope that they may deploy what they have missed to achieve in the past since the term S&D treatment became part of the vocabulary of international trade regulation. At best, the outcome will be mixed, if not harmful, to social and economic development, at least in a longer term perspective.

The problem is particularly severe with provisions generally exempting DCs from multilateral disciplines on the basis of non-reciprocity. While well intended, dispensation of rules and of reciprocity of trade concessions is likely to increase the gap between industrialized and DCs to the extent that the latter will not be subject to structural adjustment due to the international obligations and lock-in functions of WTO rules. Outright dispensation of strict and fast rules often results in widening the gap between industrialized and DCs as the latter are not sufficiently exposed to restructure and to develop new initiatives under competitive pressures.²¹ S&D treatment, combined with weak

²⁰ Robert E. Hudec, *Developing Countries in the GATT Legal System* (Hampshire UK: Aldershot, 1987).

²¹ See also Bernhard Hoekman, Constantine Michalopoulos, and Alan Winters, ‘Special and Differential Treatment for Developing Countries: Towards a New Approach in the WTO’, World Bank (Washington 2003), http://www-wds.worldbank.org/external/default/main?pagePK=64193027&piPK=64187937&theSitePK=523679&menuPK=64187510&searchMenuPK=64187282&theSitePK=523679&entityID=000094946_03082104020550&searchMenuPK=64187282&theSitePK=523679 (visited July 2006): ‘No one supports the making of inappropriate concessions, but the “overuse” of the “non-reciprocity” clauses has, in the past, excluded DCs from the major source of gains from trade liberalization – namely the reform of their own policies’. This position is further discussed below in Section II(C).

domestic constitutional structures and a frequent predominance of vested interests by ruling classes, often results in cementing the status quo, rather than bringing about structural adjustment and long-term progress to the poor and needy. Moreover, S&D treatment provisions inserted in many of the WTO Agreements are often limited to allow for longer implementation periods, sometimes indefinitely, in the light of lacking capacities. The same holds true in procedural matters. At the same time, a number of provisions oblige to provide technical assistance and even the transfer of technology by developed countries, yet without specifying the extent of such obligations. Financial support and technical assistance are likely to increase but do not necessarily translate into enhanced trade flows and income. Preferential market access is important and perhaps the most important component, which, nevertheless, can be successfully dealt with under principles of progressive liberalization. In terms of substantive law, provisions offering a different content and level of commitment have remained rather exceptional. The most important example to this effect remains the Enabling Clause as was discussed above.²² This may be supported, if not superseded, by the Doha Round initiative granting zero tariffs to LDCs. Furthermore, much will depend on how large exceptions for sensitive (agricultural) products will be shaped. Incentives for the transfer of technology are important but difficult to bring about under conditions of market economies, because decisions to invest are primarily a matter for private companies. Legislators may support their efforts by means of tax breaks, a strategy difficult to realize in times of fiscal constraints in most industrialized countries. Finally, provisions remaining purely programmatic, calling for enhanced market access and export revenues, are likely to remain without any practical impact.

Finally, the basic distinction underlying S&D treatment of industrialized countries, DCs, and LDCs is increasingly arbitrary in an age of emerging economies. Except for LDCs, these are not legally defined categories, and yet, the law is built upon such distinctions. The new group of transforming economies (e.g., the former Soviet Union) fails to meet these categories: treating them as developed countries ignores the realities on the ground. More profoundly, it can be observed that different sectors of the economy show different levels of development within a particular country. Industrialized countries show weaknesses, for example in rural development, facing severe problems of neglect and underdevelopment, for example, in non-efficient and mountainous areas. On the contrary, DCs show emerging sectors, while others lag behind. An emerging economy may develop a strong and competitive industry in building civil or military aircraft or biotechnology while its rural areas remain structurally weak and cannot be readily exposed to open markets. The basic idea of looking at countries as a whole is increasingly

²² See text accompanying n 14 and 15.

flawed. It dates back to the concept and idea of uniform and homogeneous nation states. It fails to reflect the fact that nations are not single and uniform entities. With the progressive liberalization of trade, enhanced interdependence of economies, these differences are accentuated. They no longer can be captured in simple terms of individual uniform nation states. A new regulatory approach is warranted, defining different levels of rights and obligations of WTO Members commensurate with their social and economic development. What do research efforts offer to this effect?

Efforts in research

A great deal of mainly economic research has been conducted on the subject of S&D treatment over the last few years, particularly in the lead up to and since the launch of the Doha Development Agenda at the end of 2001. The main centres that have been at the cutting edge of research in this field are the UN World Institute for Development Economic Research,²³ UNCTAD,²⁴ The World Bank,²⁵ the Center for the Study of Globalization and Regionalization, Warwick,²⁶ the WTO,²⁷ the Organization for Economic Co-operation and Development's (OECD's) Trade Directorate,²⁸ and finally the Sussex Institute for Development Studies.²⁹ The research that has taken place on this subject seeks to identify how the current rules on S&D treatment were introduced into the multilateral trading system, as well as to attempt categorizing them according to various criteria such as the legal or economic effects of such clauses or the enforceability of the language in which such treatment is

²³ Kiichiro Fukasaku, 'Special and Differential Treatment for Developing Countries: Does It Help Those Who Help Themselves?', UNU World Institute for Development Economics Research (WIDER) Working Paper No. 197 (Helsinki, 2000), <http://www.wider.unu.edu/publications/wp197.pdf> (visited July 2006).

²⁴ Murray Gibbs, 'Special and Differential Treatment in the Context of Globalization, G-15 Symposium of Special and Differential Treatment in the WTO Agreement (1998)', http://www.wto.org/english/tratop_e/devel_e/sem01_e/gibbs_e.doc (visited June 2006).

²⁵ Constantine Michalopoulos, 'The Role of Special and Differential Treatment for Developing Countries in GATT and The WTO', Paper prepared for WTO Seminar on Special and Differential Treatment for Developing Countries, 7 March (Geneva 2000), [http://wbln0018.worldbank.org/research/workpapers.nsf/0/f427de05fa0079388525691300652b9f/\\$FILE/WPS2388.pdf#search=%22The%20Role%20of%20Special%20and%20Differential%20Treatment%20For%20Developing%20Countries%20In%20GATT%20and%20The%20WTO%22](http://wbln0018.worldbank.org/research/workpapers.nsf/0/f427de05fa0079388525691300652b9f/$FILE/WPS2388.pdf#search=%22The%20Role%20of%20Special%20and%20Differential%20Treatment%20For%20Developing%20Countries%20In%20GATT%20and%20The%20WTO%22) (visited June 2006).

See also Hoekman, Michalopoulos, and Winters, above n 21.

²⁶ John Whalley, 'Special and Differential Treatment in the Millennium Round Centre for the Study of Globalization and Regionalization', Working Paper No. 30 (Coventry 1999), <http://www.warwick.ac.uk/fac/soc/CSGR/wpapers/wp3099.pdf> (visited July 2006).

²⁷ See Keck and Low; and Kessie, above n 6.

²⁸ OECD, 'Analytical criteria for calibrating provisions for special and differential treatment across different beneficiaries', TD/TC.WP(2001)27. OECD Trade Directorate, Trade Committee (Paris 2001).

²⁹ Chris Stevens, 'The Future of Special and Differential Treatment (S&D) for Developing Countries in the WTO', IDS Working Papers – 163, Institute for Development Studies, University of Sussex, (Sussex 2002), <http://www.ids.ac.uk/ids/bookshop/wp/wp163.pdf> (visited June 2006).

enshrined. The research thus conducted is aimed at developing ways rendering those S&D treatment provisions which have found their way into the WTO agreements to be more 'precise, effective, and operational' in line with the objective set out in Paragraph 44 of the 2001 Doha Declaration. Economic theory tells us that S&D treatment may or may not foster development; therefore, the question is ultimately an empirical one. Unfortunately, there is very little quantitative work that has been done regarding how S&D treatment has actually affected the economic performance of DCs. A recent study by Oezden and Reinhardt found perverse effects of GSP, retarding the integration of countries eligible into the world trading system.³⁰

While empirical studies are far from complete, it is increasingly recognized that existing and well-established legal strategies, addressing regulatory problems of DCs and LDCs, are failing in bringing about the results aspired: consideration of developmental needs, competitiveness, and progressive integration into the world trading system, combined with enhanced market access in industrialized markets.

Current efforts to redesign the concept of S&D treatment follow different lines of thinking. Hoekman, Michalopolous, and Winter suggest that current country groupings be renegotiated. They contend that an 'LDC+' group would, by and large, capture those countries in actual need of S&D treatment.³¹ Prowse suggests country-specific 'audits' that would determine a tailored package of temporal exemptions and technical assistance for each developing WTO member.³² While these approaches seek for refined country groupings, Stevens essentially suggested in a seminal paper to determine the application of S&D treatment on the basis of thresholds specific to the application of specific rules, based on relevant economic factors and criteria.³³ This approach was assessed by Keck and Low. While concluding that the 'single biggest challenge for a new individual threshold approach to S&D treatment would consist in defining analytical criteria that are relevant to specific S&D treatment concerns and measurable with existing data,' they encourage further work on this possibility.³⁴ In their view, 'S&D treatment provisions should be defined to the maximum extent possible in terms of economic needs that automatically identify the beneficiary Members'.³⁵ In a recent paper, Hoekman summarized suggestions made for a new approach to

³⁰ Caglar Oezden and Eric Reinhardt, 'The Perversity of Preferences: GSP and Developing Country Trade Policies, 1976–2000', 78 *Journal of Development Economics* (2005) 1.

³¹ See above n 25.

³² Susan Prowse, 'The Role of International and National Agencies in Trade-related Capacity Building', 25 *The World Economy* (2002) 1235–61.

³³ See Stevens, above n 29.

³⁴ See Keck and Low, above n 6, at 27.

³⁵ *Ibid.*, final conclusion at 30.

S&D treatment focusing on implementation of rules:³⁶ (i) acceptance of the principle of ‘policy space’ implying flexibility for all DCs to implement rules ‘as long as this does not impose significant negative (pecuniary) spillovers’; (ii) a country-specific approach rendering implementation commensurate with national policy priorities; (iii) an agreement-specific approach involving *ex ante* criteria that allow countries to opt out of the application of rules for a limited period of time; and finally (iv) a simple rule-of-thumb approach that allows DCs to opt out from what he calls ‘resource-intensive’ agreements. According to him, all these avenues share in common recourse to economic criteria in order to determine the applicability of (resource-intensive) rules. We shall return to this approach shortly.

Another recent line of thinking suggests to turn away from the concept of the single undertaking and to return to the doctrine of variable geometry. Earlier, instead of the single undertaking, contracting parties to the GATT could decide for themselves whether to sign up for complementary agreements (known as *Codes*) which had been hammered out in the context of the Tokyo Round (1973–79). With the advent of the Uruguay Round and the adoption of the Results of the Uruguay Round as a single undertaking, the plurilateral approach embodied by the Tokyo Round Codes was essentially abandoned with the exceptions of three plurilateral agreements of which government procurement is the most important one. The European Commission has been one of the strongest advocates, at least within the WTO membership, for discussing the merits of adopting or returning to a more nuanced approach than that represented by the single undertaking, desiring to obtain broader support for the Singapore Issues (competition, investment, trade facilitation, and government procurement).³⁷ The fact that this idea was generated by the Europeans is not surprising given the pragmatic approach the European Union (EU) has been forced to take, in the context of its own integrationist efforts on a whole range of issues, such as monetary union, justice, and home affairs. Articles 43–45 EU Treaty and Articles 11–12 EC Treaty explicitly provide for variable geometry and procedures, safeguarding the interests of the Member States. Only a limited number of institutions, academic thinkers, and centres seem to have addressed this topic, and none seem to have done so to any great depth. Worth mentioning in this context is, besides the European

³⁶ Bernhard Hoekman, ‘Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment’, 8 *JIEL* (2005) 405, 412.

³⁷ European Commission, Communication from the Commission to the Council, to the European Parliament, and to the Economic and Social Committee: Reviving the DDA Negotiations – The EU Perspective, November 26, 2003, (Brussels 2003), http://www.trade-info.cec.eu.int/doclib/docs/2003/november/tradoc_114259.pdf#search=European%20Commission%2C%20Communication%20from%20the%20Commission%20to%20the%20Council%2C%20to%20the%20European%20Parliament%2C%20and%20to%20the%20Economic%20and%20Social%20Committee%3A%20Reviving%20the%20DDA%20Negotiations%20%E2%80%93%20The%20EU%20Perspective (visited September 2006).

Commission, the Yale Center for International and Area Studies (CIAS),³⁸ UNCTAD,³⁹ and the papers by Lawrence, Crasstek, and Sauvé in this volume of the Journal.

The theory of variable geometry as it now stands asks whether the single undertaking can continue to serve as a useful instrument given the broad range of conflicting economic and development interests which different WTO members pursue within their respective trade policies. It seeks to find alternatives that would allow certain, more willing and able countries to proceed at a faster and more integrated pace towards trade liberalization, while not completely excluding those Members who wish to pursue trade liberalization at a slower, more adjusted pace. For variable geometry, the need for research is even much greater than for S&D treatment. The vast diversity of the WTO membership has and will continue to lead to like-minded groups pursuing high levels of discipline among themselves, either inside the WTO aegis or outside of it. The legal, economic, and political economy implications of this require further study. The impact of variable geometry on Members not participating on higher levels of integration should be assessed in order to define whether a return to this model, particularly in relation to competition and investment, is advisable. The experience of countries abstaining from the Government Procurement Agreement should be explored in order to assess such impacts. Again, while empirical research is warranted, the drawback of variable geometry is likely to be comparable with the one observed for S&D treatment. The political economy will bring about dispensation from obligations and thus may equally further the gap between those that make the effort to lock and bind themselves into multilateral disciplines and those who will abstain on the basis of ruling interests in society and the economy. For such and additional reasons, Hoekman does not include this avenue in recent proposals for enhancing policy space of DCs.⁴⁰

On assessing the pros and cons of different lines of thinking, it is submitted that the line of provision-specific S&D treatment should firstly be further explored. The idea of combining the application of specific rules with economic thresholds is an intriguing one, which deserves further examination, this time from a legal perspective (Sections I–III). Secondly, we need to look into the potential of extending the concept of individual commitments and thus of schedules of commitments of Members to prescriptive rules, beyond the GATT and GATS (Section IV). Both avenues are explored in a preliminary manner in the field of patenting pharmaceuticals (Section V).

³⁸ Philippe I. Levy, 'Do we need an undertaker for the Single Undertaking? Considering the angles of variable geometry', Discussion Paper prepared for the CEPR/ECARES/World Bank Conference, held at the Université Libre de Bruxelles, 14–15 July 2000 (Brussels 2004), http://www.yale.edu/ycias/globalization/levi_2.pdf (visited April 2006).

³⁹ Andrew Cornford, 'Variable Geometry for the WTO: Concepts and Precedents', UNCTAD Discussion Paper (Geneva 2004), http://www.unctad.org/en/docs//osgdp20045_en.pdf (visited May 2006).

⁴⁰ Above n 36, at 417–19, 422–23.

I. A NEW CONCEPT OF GRADUATION

A. The basic idea

This paper seeks to return to the successful concept of *progressive* liberalization. The basic idea is simple: to apply this model to the realm of prescriptive regulation of trade. WTO law essentially serves the functions of creating, and of securing, equal conditions for imported and domestic products.⁴¹

Improving market access by means of progressive liberalization satisfies the first function. Much work still lies ahead. Again and again, DCs have pressed for enhanced market access for their own products. This core function of the WTO remains of paramount importance for DCs in the field of agriculture but also and mainly for industrialized countries for non-agricultural market access (NAMA) and services. Conceptually, preferential market access for DCs under the first function is, as a matter of principle, settled under the GSP and amounts to an established category of S&D treatment. The agreement to grant tariff-free market access to at least 97% of all tariff lines to LDCs, adopted at the 2005 Hong Kong Ministerial Conference, amounts to an important achievement in this field, pursuant to policies initiated under the 1979 Enabling Clause. Whether or not needs of developing of Members are satisfied under this function is a matter of degree. Conceptually, results can be achieved on the basis of progressive liberalization.

Securing equal conditions on markets, once access has been granted, responds to the second function of the WTO. It is where we find most of the prescriptive rules, defining outcomes. And it is here where the idea of progressive regulation should be developed. It was seen that traditional avenues of S&D treatment have largely failed, and new ones are conceptually required.

The idea of progressive regulation needs to be further developed, beyond transitional periods for exemptions. Graduation no longer should depict the classification of different countries but should entail the idea of applying single and uniform rules in a manner that different levels of social and economic development are taken into account as a matter inherent to the rule itself. The model of progressive regulation seeks to entail graduation within the rule of law itself. Ideally, WTO law would then provide a single regime of objectives, principles, rules, and standards by allowing for differential and progressive application of suitable norms⁴² commensurate with the level of competitiveness of industries and sectors concerned. Progressive regulation responds to phasing in of obligations, rather than defining opting out and exceptions. Many questions arise: To what extent, and how, can this idea be applied to

⁴¹ Cf. the organization of WTO law in constitutional principles, regulation of market access, and regulation of conditions of competition in Cottier and Oesch, see above n 4, at 346, 576, 819.

⁴² This paper does not attempt to make distinctions between principles, norms, rules, and standards at this stage but uses these terms interchangeably.

second and third generation barriers of trade and their regulation? To what extent is it feasible to shape single and uniform rules for all Members of the WTO alike, but graduate them in application? How are we to take into account levels of social and economic development? What role should be ascribed to competitiveness? Should Members as a whole, or individual sectors and industries, be determinant? To what extent, and where, could it be useful to render the operational application of rules dependent on thresholds based on economic factors and indicators? To what extent can the approach suggested by Stevens and as endorsed by Keck and Low be generalized and used as the basis of a regulatory theory?

We first turn to the essentials of the rule of law and then address the question as to whether and how differentiation within a general rule can and should be developed. We need to combine legal and economic theory in order to determine how to proceed.

B. Equality before the law

Equality before the law is a fundamental principle. It equally applies to the field of international trade regulation. Because no person should be exempt from or be considered above the law, no Member State of the WTO (and its nationals) must be beyond the law, nor treated separately under a different set of principles and rules. Combating different legal regimes applicable to different social classes has been a main aspiration since the French revolution and its manifold repercussions leading to constitutional democracy in the United States and Western Europe. It is the essence of modern law. The principle also found its way into international law. The process of decolonization brought new and independent States under the basic principle of Equality of States. It is enshrined as a fundamental principle in the UN Charter. It informs all of international law, including international trade regulation. The principle is implicit and reflected in the constitutional principles of WTO law. Most prominently, MFN assures equal treatment of products from different countries. National treatment extends the principles to foreign products in relation to domestic products, bringing about equality before the law. Deviations from the principle need particular justification. Exemptions to MFN under Article XXIV GATT and Article V GATS are circumscribed in relatively precise terms, albeit difficult to enforce in the light of extensive regional or preferential policies of governments. Exemptions under Articles XX and XXI GATT and Articles XIV and XVIbis GATS define conditions under which product differentiation to the benefit of domestic products remains lawful. Waivers under Article IX:3 WTO Agreement are (and should be) subject to strict time-limits, monitoring, and justification. Rules exempting Members from application of WTO disciplines altogether run the risk of losing the constitutional functions of WTO law: the Member is no longer locked-in, with repercussions already addressed. Equality before the law is a prime starting point supporting equal conditions of competition and thus

equal pressures to reform and adjust. It should not be compromised without good cause.

The principle of equality before the law, however, does not *per se* exclude differentiated rules establishing a linkage to the state of development and level of competitiveness of countries and industries. It similarly follows from the principle of equality that like should be treated like, and unlike should be treated unlike in and before the law. The law is required, under the principle of equality, to reflect essential differences in fact. This principle is well established.⁴³ It is inherent to equality, and there is no need to take recourse to broad precepts of equity in order to justify differential treatment. The difficulty remains to determine where to draw the lines, and upon what criteria and factors to base decisions. This is an old and general problem of legal theory. It provides an important basis in constitutional law assessing differential treatment under the concept of arbitrary and capricious conduct, thus limiting the margins of discretion which legislators enjoy in accordance with political preferences and majorities.

There can be no doubt that the wide divergences of social and economic development among WTO Members amount to profound factual differences that need to be reflected in law. Application of the same rules with the same outcome to all alike, despite factual differences, fails to respond to fundamental precepts of justice and equality. Indeed, differentiation within rules in accordance to factual differences is well established in law. Progressive taxation is an example in point. Within a system, different rates apply commensurately with different levels of income or property. In trade regulation, differential tariff reductions take into account the fiscal needs and thus differences in the development of domestic systems of taxation. Similarly, diverging levels of service liberalization reflect different factual backgrounds and are fully compatible with equality of and before the law. These principles, therefore, do not impair seeking differentiation within norms reflecting diverging factual settings and backgrounds, to which they are applied. Indeed, progressive liberalization is compatible with the equality before the law. S&D treatment and variable geometry essentially rely on the same precepts. The problem identified, however, rests on the finding that differentiation undertaken by these concepts is not sufficiently nuanced in the field of prescriptive

⁴³ For a recent application, see the preliminary ruling of the ECJ, Case C-292/97 *Kjell Karlsson and Others v Jordbruksverket*, [2000] ECR I-2737. The Court ruled on the allocation of different milk quotas to new and established farmers in Sweden. It held that differential treatment of farms was justified in terms of goals of agricultural policies. The court restated the principle as follows in para 39 of the Judgment:

The second subparagraph of Article 40(3) of the Treaty, which prohibits all discrimination in the context of the common agricultural policy, is merely a specific expression of the general principle of equal treatment, which requires that comparable situations not be treated differently and different situations not be treated alike unless such treatment is objectively justified (ECJ, Case 203/86 *Spain v Council* [1988] ECR 4563, para 25, and ECJ Case C-15/95 *EARL de Kerlast* [1997] ECR I-1961, para 35).

rules regulating conditions of competition on markets. It fails to bring about adequate pairings of equal and non-equal treatment. The question is whether graduation and thus the idea of progressive regulation could bring about more appropriate results.

Whether or not factual differences should be taken into account in shaping rules depends on the normative structure and purpose of a principle or rule. Given the multitude of factual constellations, the legal order would end up responding in infinite ways. The legislator, therefore, is bound to classify different factual settings together and treat those alike, despite remaining differences. In many areas, treating all alike will be appropriate. In other areas, factual differences need to be taken into account in order to honour the very principle of equal treatment and legal equality. Beyond the broad categories of S&D treatment and variable geometry, entailing entire regulatory areas, such differentiation within existing rules can already be found implicitly within WTO law. This is the case where rules rely on recourse to economic factors and data.

C. Existing regulations based on economic factors and data in WTO law

It is interesting to observe that prescriptive rules of WTO, by the nature of the subject matter, frequently relate to economic factors, conduct, and performance. They inherently take into account factual differences. The interpretation of many of its notions and concepts implies recourse to economic data and analysis. Applying such data and analysis results in different outcomes but essentially are all based on the same and uniform rules. Trade remedies are, of course, the most prominent ones:

- (1) Determination of dumping roughly entails, in accordance with Articles 2 and 3 of the Agreement on Implementation of Article VI of the GATT 1994, price comparison, significant increase of imports, and causation and the impact of dumping, taking into account all the relevant economic factors. This entails extensive economic analysis.
- (2) Determination of a subsidy, injury, nullification, and impairment and serious prejudice under the Subsidy Agreement strongly depends on economic data. The application of rules strongly depends on factual evidence and economic analysis.
- (3) Determination of the lawfulness of a safeguard measure under Article XIX GATT and the Safeguard Agreements entails examination of increased imports, injury, or threat of injury to the domestic industry. The assessment is mostly fact-intensive.
- (4) The trigger levels for additional tariffs under the special safeguard provisions of Article 5 of the Agreement on Agriculture are defined in terms of percentage of existing market access opportunities and in terms of the difference of the import price to the domestic trigger price of the product concerned. The application of these rules thus fully depends on economic data (market access, imports, and price comparison).

Yet, it is important to note that dependence on economic data and factors exists throughout the Agreements, including GATS and TRIPS.

- (1) Determination of the customs value, under the Agreement on Implementation of Article VII, entails extensive economic analysis in pricing and price comparisons and price computations. The application of rules extensively depends on economic factors.
- (2) The *de minimis* exception from Current Total Aggregate Measure of Support (AMS) in Article 6 of the Agreement on Agriculture is defined in terms of percentage of total value of production (5% for developed countries and 10% for DCs). The application of the rules fully depends on production value of a basic agricultural product and the level of support allocated to it.
- (3) Non-actionable research subsidies, under Article 8 of the Subsidy Agreement (currently suspended), are defined in terms of percentage of total costs of industrial research (75%/50%). Similarly, assistance to disadvantaged regions is defined in terms of GDP per capita (85% of average) or unemployment rates (110% of average). Or, the threshold for environmental assistance is limited to 20% of costs of adaptations.
- (4) The concept of substantial sectoral coverage in Article V GATS 'is understood in terms of number of sectors, volume of trade affected and modes of supply' and the absence of an *a priori* exclusion of any mode of supply. The assessment strongly depends on economic analysis. The same is true for assessing the notion of substantially all the trade in Article XXIV GATT.
- (5) Article 11 and Article 14:4 of the TRIPS Agreement exempt Members from introducing rental rights on cinematographic works and phonograms 'unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title'. The provision thus triggers the obligation to introduce rental rights on the basis of economic data, evidencing widespread copying.

Finally, a few provisions can be found where economic data are used in order to define the application or exclusion of provisions of an Agreement to DCs:

- (1) DCs not subject to prohibition of export subsidies under Article 3(1)(b) of the Agreement on Subsidies and Countervailing Measures are defined, in accordance with Article 27(2)(a) and Annex VII by listing a number of countries as long as GDP per capita has not reached USD 1000 per capita. The list was based on World Bank data. The application of the rule, therefore, depends on statistical GNP assessment.

- (2) Safeguard measures, under Article 9 of the Agreement on Safeguards, do not apply to individual DCs, unless the share of imports from this country does not exceed 3 or 9% of all DCs concerned. The application of the rule thus depends on the share of imports from particular countries.
- (3) Special triggers for exempting disciplines of subsidies for DCs under Article 6 Agreement on Agriculture were already mentioned above.

Recourse to data, triggering the application of a provision or substantially shaping the application of the WTO rule, therefore, is not alien and new. There is a long tradition in shaping rules in relation and relying on economic data. Panels and the Appellate Body are well versed in managing the combination of law and economics in dispute settlement. However, only a few of these rules apply to distinguish treatment of developed countries and DCs.

We add that the same phenomenon may also be observed in other areas of international law. A prominent example is maritime boundary delimitation, the principles and rules of which developed in customary and judge-made international law under the broad precepts of equity and equitable principles. While the same set of factors apply (or should apply) to all delimitations alike, the impact of these factors varies as a function of different factual constellations. Such constellations are both defined by geography, such as the shape of coastal lines, and the position of island. They are also defined by a number of economic factors which the courts, in particular the International Court of Justice, developed over time and on a case-by-case basis.⁴⁴ The application of these factors bring about different rules – all within the same set of rules applicable to all maritime boundary delimitations alike.

Finally, it is recalled that competition law, not addressed in WTO law except marginally at this stage of development, essentially relies on consideration of economic factors in assessing relevant markets or dominant positions.⁴⁵ More than any other field of domestic law, the application of legal concepts depends on recourse to economic data relating to particular sectors and industries. The methodologies developed are mature and show that the

⁴⁴ There is an extensive literature available on the subject, exploring the relationship of economic factors and normative concepts of delimitation based on the fundamental concept of equitable principles. See e.g. Nuno Margues Antunes, *Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process* (Leiden/Boston: Martinus Nijhoff Publishers, 2003); Robert Kolb, *Case Law on Equitable Maritime Delimitation: Digest and Commentaries* (the Hague/London/New York: Martinus Nijhoff Publishers, 2003 (in English and French)); S.P. Jagota, *Maritime Boundary* (Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1985); Christopher R. Rossi, *Equity and International Law: A Legal Realist Approach to International Decisionmaking* (Irvington New York: Transnational Publishers Inc., 1993); Masahiro Miyoshi, *Considerations of Equity in the Settlement of Territorial and Boundary Disputes* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993).

⁴⁵ For a comprehensive comparative analysis, see Edward M. Graham, J. David Richardson (eds), *Global Competition Policy* (Washington DC: Institute for International Economics, 1997).

linkage between legal rules and economic factors can be established in a successful manner on a case-by-case analysis and determination.

Returning to WTO law, the rules described above partly imply progressive regulation, e.g. when countries obliged under a rule are defined in terms of economic factors and data, such as GDP per capita. As countries grow, they also grow into WTO obligations on reaching the threshold. These effects, however, are not the result of a deliberate policy and strategy in WTO rule-making, with a view to bring about progressive regulation. They have such effects but were essentially designed to capture complex legal and economic constellations in a given case. The question arises as to whether, and where, recourse to thresholds and triggers could be used more systematically to define the scope of application of a particular rule with a view to take into account different levels of development of Members and competitiveness of industries.

II. TOWARDS PROGRESSIVE REGULATION

A. Defining the field: the purpose of regulation

We first need to discuss where the idea of progressive regulation could reasonably take place. Existing rules on, and discussion of, S&D treatment tend to focus the potential impact on DCs. Little thought, however, has been given in assessing the relationship of S&D treatment and different normative functions of rules in the trading system. Prescriptive rules do not, *per se*, automatically lend themselves to the idea of graduation. It is submitted that the field of potential application depends on the very purpose of a set of norms. Within the universe of WTO law, different prescriptive rules serve different purposes. Some of them are suitable for graduation; some are not.

1. *Safety of products*

The sanitary and phytosanitary (SPS) measures and technical barriers to trade (TBT) measures serve the purpose of protecting public health of human, plants, animals, and the environment. Standards set are defined to achieve these goals, and it is difficult to see how they could be rendered subject to graduation. Whether a product is safe, or whether a production method should be tolerated, must be the same for all products alike, regardless of whether they originate in an industrialized country or DC. Substantive standards, including production and process measures (PPMs), may be considered excessive and even protectionist; the issue, however, needs to be assessed for all products alike under the tests and standards provided for by the respective agreements. Protection of health is indivisible. In the field of technical and food standards protecting health, graduation therefore would need to be limited to facilitating the administration of substantive standards. For example, it is possible to offer lower fees, to provide particular assistance with a view to meeting the standards or to assessing their implementation, or to provide financial support and technical assistance to exporting DCs. The same correlation, it would seem, also applies to general exceptions that

Members may invoke under the General Agreements, including GATS, for the purpose of protecting public health. In these areas, substantive rules are not suitable for graduation and additional policy space, except for procedural and administrative matters.

2. Enhance market access

Other rules of the system serve the purpose of supporting and implementing market access, which is basically defined by progressive liberalization itself (tariff schedules, services' commitments). Rules on customs valuation, on defining the origin of a product, or on defining the likeness of products in the context of GATT and GATS all serve the purpose of avoiding the circumvention and erosion of these commitments and to assure non-discrimination. Are they suitable for graduation? On the one hand, it would seem that these prescriptive rules need to be applied uniformly across the board; the flexibility lies within the commitments itself, and not with the rules flanking these commitments. On the other hand, it could be argued that graduation in this field would bring about additional flexibility. It is thus conceivable to design simpler rules on rules of origin or on customs valuations for countries with low levels of institutional infrastructure and resources. It is submitted that graduation in these areas is not excluded. Whether it is feasible and advantageous is more a question of political will and expediency. While more flexibility may bring about relief in the short time, it risks postponing the development of modern regimes. It tends to widen the gap between rich and poor countries, and graduation may retard progress. We are faced with the same dilemma already observed for provisions on S&D treatment and the concept of variable geometry.

3. Limiting domestic support

A further group of rules of the WTO addresses levels of domestic support to producers. The rules on subsidies in GATT, and (in the future) in GATS, and the Agreement on Subsidies and Countervailing Duties contain prescriptive rules applicable independently of level-specific commitments. Thus, the ban on export subsidies in industrial goods applies across the board. The Agreement on Agriculture, on the contrary, defines different categories but essentially leaves levels of commitments to individual schedules, albeit the level of reduction was negotiated on the basis of fixed formulas. On the one hand, it again can be argued that the disciplines on subsidies serve the very purpose of safeguarding level of commitments made in tariffs and services and thus should be applicable to all in the same manner. On the other hand, it is conceivable to argue that additional flexibility could be introduced by means of graduation of such disciplines. Given the fact that the power and potential to grant subsidies strongly depends on levels of economic development, strict disciplines are necessary for highly developed countries and sectors, while more lenient standards could suffice for countries and sectors of lower levels of development. The examples in WTO law cited prove this point. In the end, it is a matter of providing disciplines for those with a potential

to distort international markets and competition. From this point of view, it is conceivable to shape disciplines on agricultural subsidies in a manner that would primarily target economies and sectors which are able to distort international competition by means of subsidization. Others, not bearing such risk, could be made subject to lower levels of disciplines.

4. Protection from disruptive imports

A further group of WTO rules serves the purpose of protecting markets from disruptive imports. Are trade remedies suitable for graduation? Is it conceivable to have different rules on safeguards and anti-dumping dependent on levels of development of an economy and sectors? On the one hand, trade remedies serve the purpose of protecting domestic industry, and it does not matter as to where a particular threat originates. Trade remedies, from this point of view, should be 'neutral and colour-blind', to borrow an adage from constitutional law. This is certainly true of safeguard measures that are subject to MFN treatment although they often are induced by a specific and contained problem. In the field of countervailing duties against dumping and unlawful subsidies, the measure is origin specific and there is no need for graduation from this point of view. On the other hand, it is conceivable to render disciplines more stringent in relation to exports from countries and sectors which are more vulnerable to such measures and where repercussions are more strongly felt. Graduation would bring about the effect that trade remedies focus on highly competitive and established industries, while others would benefit from higher thresholds before trade remedies can be taken.

5. Protecting property rights

It was seen that intellectual property right (IPR) standards in the TRIPS Agreement are the epitome of prescriptive rules in the WTO. The question thus arises as to whether graduation could be applied to intellectual property protection. Today, these rules apply (subject to extended time periods for implementation) across the board and irrespective of real competitive relations. In reality, lack of protection, or inadequate protection, is mainly felt in relation to highly competitive economies and sectors, while it remains without much impact in relation to non-competitive products. Despite lack of protection, they are not in a position to harm and displace competitive products. Intellectual property does not really matter in such constellations that may frequently be found in DCs, in particular LDCs. On the one hand, the matter could therefore be left to benign neglect of failure to fully comply with obligations. Reality largely follows this model. It is not an accident that WTO disputes on IPRs mainly exist between developed countries. We come back to this when discussing competitive relations below. On the other hand, rules on IPRs could be formally rendered subject to graduation with a view to capture and to focus on products once they reached levels of competitiveness. This would not only enhance legal security and predictability but also the legitimacy of the system. We shall return to this with the example of patenting pharmaceuticals, below.

6. *Procedural rules*

Finally, it should be examined whether procedural rules relating to negotiations and dispute settlement should be subject to differential regulation and graduation. The purpose of these rules consists of the smooth and fair operation of the organization and the safeguarding of rights and obligations in the process of negotiations and dispute settlement. Negotiations are mainly conducted on the basis of diplomatic custom and practices based on the principle of consensus. Existing formal rules apply to all Members alike. *De facto* graduation in negotiations results from diverging political powers in the negotiating process. In dispute settlement, it is difficult to shape procedural obligations in terms of economic criteria, and existing rules on S&D treatment, usually extending deadlines, are no longer necessary upon admission of representation of governments by private counsel. The problem essentially is reduced to financial support. It would seem that as a general rule, procedures relating to negotiations and dispute settlement (other than rules relating to domestic administration of standards discussed above) do not lend themselves for differentiation based on economic factors and indicators. Formally, Members should be on par and enjoy the same rights and obligations. As in the field of health standards, procedural rules are indivisible in that sense. How do we then take into account factual differences in negotiating and litigating powers of formally equal sovereign States? Graduation may take place with respect to efforts supporting Members to meet procedural rules and requirements. Legal assistance, advice, and funding should be sought outside of the regulatory framework strictly speaking, e.g. by means of support by international organizations and non-governmental organizations, as well as efforts in education.

B. The argument of competitive relations

A review of different prescriptive rules of WTO law reveals how they serve different regulatory purposes. Some of these purposes, in particular the protection of human, plant, and animal health, exclude graduation of substantive norms. Other areas serve the purpose of flanking progressive liberalization, and progressive regulation is not *per se* excluded. Procedural rules on negotiations and dispute settlement, finally, should be the same for all alike. What are the underlying criteria to be considered for the differentiation of prescriptive rules?

S&D treatment generally builds on the broad fact of different levels of social and economic development among different Members of the WTO. The very rationale of S&D treatment of exemptions and transitional periods for DCs consists of taking into account these factual differences and of seeking to accelerate the process of development by granting additional policy spaces. Underlying criteria inherently remain very vague, and the difficulties in shaping criteria of eligibility for, and defining the scope of, S&D treatment in the WTO can be ascribed to an underlying overly broad rationale.

Therefore, in operationalizing graduation within the WTO, a more specific rationale needs to be found. Because the WTO *per se* is not a developing agency, but essentially regulates conditions of competition between domestic and imported products, it is submitted that graduation should be based on a rationale of competitive relationship of these products. It is submitted that it is a matter of examining whether economies and, more specifically, sectors or even products find themselves in a competitive relationship. The more this is the case, the less graduation is possible. Economies and sectors competing internationally essentially should be subject to the same rules, creating a level playing field. The less competition exists, the more differential rules, taking into account factual differences, can be taken into account to shape appropriate and differential prescriptive rules. The concept of competitiveness and competition therefore is key in determining the feasibility of graduation. In the final analysis, it should rely on the competitive relationship of domestic and imported products. WTO law assumes a competitive relationship between these products. Where such a relationship does not exist, or does not yet exist, disciplines of WTO law are not, or not yet, economically necessary from this vantage point.

Reality proves this point. Even though DCs are bound by rules, such as patenting pharmaceuticals, there is little interest to have these rules enforced as long as the respective sector has not developed competitiveness on domestic and foreign markets. There are no incentives to enforce such obligations as long as no competitive relation exists between foreign and domestic producers. Perhaps, the greatest amount and impact in terms of *de facto* and real world S&D treatment results, in substance, from attitudes of benign neglect by other WTO Members, observed above, in the process of implementing and enforcing rules, by renouncing either diplomatic pressure or WTO dispute settlement. As soon as economies emerge and grow in quality in specific sectors, this changes. Products become competitive and equal conditions on the market become essential. It is at this point of time that foreign governments start to care about implementation of, and compliance with, obligations of other Member States.

Efforts to expand and enforce the application of WTO rules to DCs and LDCs are thus primarily motivated by increasing competitiveness of their products and the need to define equal level playing fields. As products originating in a country Member of the WTO gain competitiveness, the need to apply legal disciplines to such products in international law increases. The product graduates into a different regulatory environment and category. This is an idea underlying all WTO rules and its application and enforcement. Yet, it also finds explicit recognition. Article 27:5 of the Agreement on Subsidies and Countervailing Duties relates the phasing in of disciplines to export competitiveness in specific sectors and products:

A developing country Member *which has reached export competitiveness in any given product* shall phase out its export subsidies for such product(s) over a

period of two years. However, for a developing country Member which is referred to in Annex VII and *which has reached export competitiveness in one or more products*, export subsidies shall be gradually phased out over a period of eight years (emphasis added).

The provision of Article 27:5 of the Subsidies Agreement is important as it recognizes the relevance of competitiveness as the leading idea of graduation. Importantly, it relates to products and not countries as a whole. The question arises as to what extent the concept can be equally applied explicitly in areas subject to normative graduation. Moreover, it begs the question as to how competitiveness can and should be assessed. This is a difficult problem because it does not relate to a country and an economy as a whole, but rather to specific sectors.⁴⁶

C. The argument of constitutional lock-in

The existence of a competitive relationship of products, however, is not the only motive for seeking legal obligations. Linking an economy to WTO rules is further motivated by the constitutional idea of locking-in with a view to avoid domestic protectionism and to enhance international competitiveness and efficiency of countries in their own interest. The related implication of dispensation and non-reciprocal relations was already mentioned.⁴⁷

Constitutional lock-in is a normative approach, which seeks to enhance competitiveness in the long run. It looks at regulation from a perspective of multi-layered governance.⁴⁸ It ascribes multilateral rules the function of monitoring and checking domestic law and interests, much the same way as constitutional rules monitor legislation and decisions in the nation states, and much the same way as the principles and freedoms in EC law exercise constraints on domestic law of Member States, primarily with a view to curb protectionist policies and rent seeking which otherwise may prevail without the multilateral layer of European law. This motive is primarily of importance to justify certain constitutional principles of WTO law, in particular non-discrimination and transparency, as well as procedural rules relating to negotiations and dispute settlement. Secondly, the concept of progressive liberalization mainly responds to

⁴⁶ Comment on an initial draft of this paper by Professor Richard Baldwin (discussed in relation to patenting): 'Plainly, this is a difficult economic problem and probably one whose solution would be industry specific. The basic problem is the notion of industrial competitiveness, which itself is slippery. The law of comparative advantage tells us that a nation will be competitive in something, regardless of its level of development. Many of the arguments about whether protection allows industries to develop are based on a combination of wishful thinking by governments and old-fashioned special interest politics by the firms that benefit from the protection.' (on file with author).

⁴⁷ See above text accompanying n 21.

⁴⁸ The theory of multilayered governance seeks to integrate domestic and international governance and to consider it, based on traditions of federalism, as an overall system where different layers of government, both national and international interact. For a discussion and the perception to conceive international trade regulation being part of a five storey house, see Thomas Cottier and Maya Hertig, *The prospects of 21st Constitutionalism* (7 Max Planck Yearbook of United Nations, 2003) 261–328.

constitutional lock-in. By gradually taking on obligations and commitments in tariff and services schedules, countries assure that they will not domestically fall back behind levels of market access and competitive relations achieved.

The question arises as to what extent the constitutional function of rules of locking-in governments also applies to prescriptive rules defining specific outcomes where a competitive relationship does not yet exist and the argument discussed above, based on competition, does not yet apply. Should the international system nevertheless insist on uniform rules and avoid graduation?

Although a competitive relationship of products does not yet exist, there may be sound reasons to avoid graduation in order to bring about long-term competitiveness and to avoid protectionism. From this perspective, countries enter into international commitments in self-enlightenment, as a matter and means to bring about structural adjustment. They do so on their own will, and they avoid opting out and graduation. The problem arises as to what extent such policies may be asked for by trading partners and international institutions. It touches on sensitive issues of self-determination and intervention into domestic affairs. Short of an existing competitive relationship based on competing products, obligations imposed should be limited to constitutional principles and rules.

In the absence of competitive relations, trading partners are not legitimized to call for the imposition of prescriptive rules. The field is essentially left to graduation. From the constitutional perspective of locking-in the country's regulatory framework under the disciplines of WTO, scope and application of such rules should thus be primarily self-defined. Members should be free to enter into more obligations than they are required. They may do so in return for concessions otherwise offered.

Evidently, it is difficult to draw a clear line between mandatory principles and prescriptive rules based on competitive relations and areas where the adoption of such rules is mainly based on the argument of constitutional lock-in. The international system and prospective trading partners share interests in promoting good governance (also as part of programmes of development assistance and conditionalities) and bringing about competitive relations in the fields regulated by prescriptive rules. Pressures to avoid graduation and thus, enter into programmes of structural adjustment, may therefore be exerted in negotiations in combination with demands for enhanced market access in the process of progressive liberalization. These demands result in a reluctance to accept graduation of rules and explain why the matter in reality will not be entirely left to self-determination. Within the international system, negotiations on graduation short of established competitive relations therefore need to be combined with negotiations on market access and trade-offs. Appropriate techniques, e.g. by recourse to schedules of Members, need to be developed from this perspective. We shall return to this shortly.⁴⁹

⁴⁹ See, below, Section IV.

III. RECOURSE TO THRESHOLDS

A. The function and scope of thresholds

From the perspective of achieving level playing fields, and partly in order to secure constitutional lock-in functions, the scope of application of a particular agreement or of a particular norm within an agreement for a particular country or industry should be defined by the multilateral system. The pertinent rules form part of the overall package, but application of the agreement to the country and to its industries may be defined on the basis of thresholds founded on economic indicators of competitiveness and development. These minimum standards and thresholds should be mandatory. They are core components of the norm and amount to the essence of rights and obligations. Reaching specific thresholds will trigger the application of the norms concerned. Below the threshold, the Member is not obliged to implement the pertinent rules. Beyond the thresholds, the membership of the WTO, and thus competing economies, legitimately expect that these norms are complied with.

Thresholds would, in other words, focus on prescriptive standards defining competitive relations in terms of outcomes at the outset. It has been determined that problems of S&D treatment mainly relate to such standards. This is where we find the need for graduation. The examination of thresholds should therefore mainly focus on such norms. They entail rules of positive and negative integration; it does not seem possible to draw a clear line between the two. Thresholds may thus apply to standards prohibiting certain conduct and measures. They may also apply to standards obliging the introduction of certain rules. Furthermore, they may relate to conduct of Government and States, or they may relate to conduct and performance of sectors of the economy.

B. Types of thresholds

1. Applicable to Members as a whole

Thresholds could be used to define the application of a particular agreement, or of a particular rule, to a particular Member. Such thresholds look at the state of the economy of a particular country as a whole. They would thus replace recourse to different categories of Members, in particular the (undefined) categories of DC and economies in transformation. The group of LDCs, defined under UN law, may still be used in appropriate areas to define the application of agreements or rules as this facilitates legal security.

Assessing the competitiveness of the country's overall economic performance is required where it is a matter of introducing and implementing general legislation, which essentially defines obligations of the government. For example, whether or not a Member is obliged to provide for the complex rules of customs valuation or whether it may be applied in simplified forms and whether it is subject to more elaborate disciplines of licensing, of rules of origin, of national treatment in investment, of strict rules on regional integration, of

strict rules on general exceptions, and of procedural obligations of judicial review could be made dependent on reaching certain general and overall thresholds of economic performance and strengths of the country concerned.

2. *Applicable to specific industries*

Thresholds could also be used to define the application of a particular agreement, or a particular rule, to a particular industry of a country. Levels of development and competitiveness may strongly vary among different sectors and industries in DCs and LDCs. They are not uniform within a country. It is conceivable that a DC is highly competitive in one sector or industry while not in others. The same holds true for industrialized countries. The scope of application of WTO rules should reflect this fact of life. An approach, addressing industry instead of Members in defining the scope of applicability of rules by means of thresholds, would allow the focus on competitive industries while developing ones would remain outside.

For example, disciplines on agricultural support measures can be made dependent not only on agriculture as a whole but on certain of its specific sectors, as performance may vary, for example, in life stock or crop production. Whether disciplines on safeguards, on anti-dumping, on subsidies, on intellectual property, or on labour standards apply could be made dependent on thresholds applied to the specific sector in case. In the end, it is the development of sectors that will also induce the need to enact pertinent legislation in the field as soon as one of the sectors reaches levels of international competitiveness.

C. Implementation of thresholds

Thresholds defined in agreements will be fully subject to dispute settlement and enforcement. They also are subject to monitoring and early warning within the process of trade policy reviews and the work of specialized committees.

Whether the threshold is met, therefore, is a matter of unilateral or multilateral determination. Unilateral determinations could be discussed, approved, or refuted in respective Committees within the WTO. This technique will be suitable in defining thresholds relating to entire agreements. Whether thresholds are met will also be a matter of treaty interpretation and application in dispute settlement. Measures taken could be challenged and defended on the basis that the relevant threshold has been met or has not been met, respectively. This technique, already known in the field of balance of payment measures (BOP), could also apply to thresholds applicable to individual sectors and industries.

Thus, as economies reach their threshold, governments and legislators are called upon to prepare implementing legislation or to make otherwise sure that the pertinent rules are respected in the process of law application by agencies and courts alike. Graduation therefore reflects progressive regulation. It avoids inclusion or exclusion once and for all but renders the operation of norms dynamic commensurate with social and economic development.

D. How to define thresholds?

Within this framework, the question arises for economists as to how levels of competitiveness can be defined in terms of economic data and indicators. Some norms will need to respond to competitiveness and performance of a country's economy as a whole. Others should be able to assess the competitiveness of a specific sector of the industry.

1. *Recourse to indices*

Economists are called upon to discuss and define relevant thresholds of competitiveness for these two constellations. Models exist to define and rank the competitiveness of economies as a whole. The question arises as to whether such assessments beyond GDP, and the methodologies applied, could be used not only to provide guidance for private operators and investors but also to define legal obligations of States to comply with specific provisions of the multilateral trading system.

The World Bank used to operate an index on competitiveness of countries that has been integrated into World Development Indicators.⁵⁰ A periodical listing is established by the Geneva-based World Economic Forum⁵¹ as well as by the Lausanne-based Institute of Management Development (IMD), mainly for industrialized countries.⁵² Similarly, it should be examined to what extent the UN Development Programme (UNDP) Technology Achievement Index could be used in assessing competitiveness of countries and specific industries.⁵³ To what extent can other indicators of social and economic development, such as education, research, or health care, be referred? To what extent could other indicators of wealth, including tax revenues, be used? Thus, to what extent can indicators such as the UNDP Human Development Index (HDI) be used?⁵⁴ To what extent could more specific obligations be made dependent on percentages of world trade in goods and services or the degree of openness of an economy as this reflects enhanced legitimate interests in protecting imported products from discrimination?⁵⁵

⁵⁰ See World Bank, <http://devdata.worldbank.org/wdi2006/contents/index2.htm> (visited September 2006).

⁵¹ Klaus Schwab (ed.), *Global Competitiveness Report 2002–2003*, World Economic Forum (Oxford: Oxford University Press, 2003).

⁵² This index uses 314 criteria and works with 57 partner institutions, <http://www02.imd.ch/wcc/> (visited June 2006).

⁵³ See UNDP, http://hdr.undp.org/docs/statistics/indices/technote_tai.pdf (visited June 2006).

⁵⁴ See UNDP, <http://hdr.undp.org/statistics/indices/> (visited June 2006). An interesting example of recourse to HID can be found in the field compensation for expropriation of patent rights by way of compulsory licensing, discussed in Section V (below).

⁵⁵ Recourse to this factor was suggested in defining weighted voting rights in the WTO, see Thomas Cottier and Satoko Takenositha, 'The Balance of Power in WTO Decision-Making: Towards Weighted Voting in Legislative Response', 59 *Aussenwirtschaft* (The Swiss Review of International Economic Relations) (2003) 171.

2. Examples

(a) *Food security.* In his seminal paper, Stevens seeks to relate rules on agricultural production subsidies to levels of food insecurity, assuming that such countries are in need of additional instruments supporting domestic production.⁵⁶ Keck and Low succinctly offer a summary and critical assessment of the approach:

Under the assumption that some form of S&D relating to the subsidization of domestic production is provided for food insecure countries at the end of the current negotiations on agriculture, Stevens (2002) asks which country characteristics could usefully be combined to determine access to such a hypothetical provision. He observes that low GDP and reliance upon imported food – seemingly obvious and necessary indicators of growth prospects and food trading possibilities – are not sufficient to capture the phenomenon of national food insecurity. Instead, he proposes *per capita* calorie supply as a basic indicator of countries with significant parts of the population being vulnerable to food insecurity. In addition, the share of agricultural value added in GDP is used as a measure of the degree to which food insecurity may be related to agricultural income and/or potentially alleviated by improved domestic production. Combining an FAO-endorsed minimum per capita calorie intake of 2500/day and a 20 per cent share of agriculture in GDP, a set of 43 countries emerges sharing both criteria and 76 fulfilling at least one. Interestingly, more than a quarter of the first set and almost 40 per cent of the second are neither net food importing developing countries nor least-developed countries. This shows that these two commonly used country categories in the WTO may not suffice to characterize countries to be targeted by S&D. In view of the negative effects that subsidization may have on other countries, Stevens (2002) suggests a third qualifier of a maximum 0.25 per cent share in world agricultural exports. This is similar in principle to the 0.10 per cent merchandise export share used in the SCM Agreement fast-track procedure aimed at limiting possible negative impacts on third countries. The precise threshold figures may obviously take different values, for instance as a function of an agreed maximum cumulative effect.⁵⁷

The example illustrates that threshold criteria inherently need to be rule-specific and cannot be defined in a uniform manner. Different rules are likely to require different criteria. Other areas, where thresholds are examined, necessarily work with different sets of data. In the process of negotiations of rules, it is therefore a matter to find appropriate thresholds, to agree upon them, and to relate them to the agreement or specific norm concerned. Existing norms in the WTO, discussed above, indicate that such an approach, while demanding, is not impossible to implement in the light of the breadth of economic data made available by international institutions. Other regulatory areas confirm this view.

⁵⁶ See Stevens, above n 29.

⁵⁷ See Keck and Low, above n 6, at 26.

(b) *Debt relief.* In the field of debt relief, the World Bank's International Development Association (IDA) started to develop criteria in assessing the level of debt relief of different countries.⁵⁸ A traffic light approach, entailing five different categories of debt distress classification, was developed in order to define grant eligibility based on debt sustainability of countries. The share of grants in total IDA financing to a country is made dependent on the analysis of its risk of debt distress. That risk again is linked to the analysis of the quality of policies and institutions in low-income countries concerned. The system results, for the purposes of financial grants and credit, in five different categories of DCs. Starting with three categories (red, yellow, and green), the system distinguishes five categories (red, orange, yellow, blue, and green). Red countries show very high risks of debt distress. Green countries, on the other side of the spectrum, show no or little debt distress. Accordingly, red countries are entitled to 100% debt relief and do not need credit. Green countries, on the contrary, are not entitled to debt relief but to 100% credit. The intermediate categories show mixed constellations. Blue countries are entitled to 25% grants and 75% relief, yellow countries to 50% relief and 50% grants, and orange countries to 75% grants and 25% relief.⁵⁹ The model and policy thus results in grouping and classifying countries dependent on performance, based on a number of factors. The classification of countries takes into account the net present value (NPV) of the debt to GDP, of debt to exports, of debts to revenues, of debt services to exports, and of debt services to revenues.⁶⁰ Interestingly, general classifications as a heavily indebted poor country (HIPC) are not *per se* taken into account, as this would exclude taking into account specificities. Simultaneously, the approach seeks to ensure that it does not impair a performance-based allocation (PBA) of grants and credits.⁶¹

It is beyond the scope of this paper and the expertise of the author to assess the advantages and disadvantages of the traffic light approach. It is interesting to observe, however, that an effort is undertaken to bring about a ranking of countries based on economic performance, some of them relating to external trade. Entitlement of countries to grants and credits are defined upon thresholds bringing about a more detailed classification and grouping of countries.

⁵⁸ See IDA, *Debt Sustainability and Financing Terms in IDA 14: Technical Analysis of Issues and Options*, September 2004, with further references, in particular to the IMF and World Bank, *Debt Sustainability in Low-Income Countries – Proposal for an Operational Framework and Policy Implications*, Washington DC, February 2004 (Framework Paper); *Debt Sustainability in Low-Income Countries: Further Considerations on an Operational Framework and Policy Implications*, Washington DC, September 2004 (Modalities Paper) (on file with author). I am indebted to Benno Ferrarini for drawing attention to this field.

⁵⁹ *Ibid.*, Table 2.

⁶⁰ *Ibid.*, Box 1.

⁶¹ *Ibid.*, para 32–5, see also para 46–9.

3. *Assessment*

The question arises as to what extent the philosophies applied in the above-mentioned fields (agriculture and in debt relief) and a comparable methodology could also be applied to the determination of trade-related competitiveness of countries and specific sectors. The examples show that a ready toolbox of thresholds and factors is not available. Norm-specific thresholds, suitable for the purpose, need to be defined individually in the process of negotiations. Much work is needed, and it is not sure as to whether criteria can be achieved which are able to provide adequate clarity and legal security. Another problem could be the fact that economic indicators available in trade are not all reliable to the same extent and vary, as the input depends on national data and independent data are not readily available. All this, however, should not impede from discussing the approach and from seeking to develop an appropriate set and kit of data in the future. We recall that recourse to economic factors and indicators is not alien to law, including trade regulation, and it is difficult to see why it should be excluded as a matter of principle for the purpose of defining the applicability of rights and obligations. What is feasible for debt relief may also be achievable for the purposes of graduation and thus progressive regulation of international trade.

IV. RECOURSE TO SCHEDULES OF COMMITMENTS

Besides the idea of graduation within mandatory norms applicable to all Members alike on the basis of thresholds (economic factors), WTO law offers a second avenue to bring about differentiated levels of commitments in the field of prescriptive rules. The question arises as to what extent the concept of country-specific schedules, as applied for tariffs, for domestic support, and for the granting of, and conditioning of, national treatment and thus market access in services, can also be employed to encapsulate prescriptive rules.⁶² Instead of inscribing more advanced regulations into basic agreements, applying where appropriate, economic factors for graduation, progressive regulation can also be achieved by inscribing specific commitments in individual schedules of Members. It was determined, above, that this approach is suitable in areas where the argument of constitutional lock-in prevails, and countries choose to undertake commitments mainly for the purpose of securing and stabilizing domestic reform.⁶³

Such inscriptions occur on the basis of requests and offers and thus fundamentally differ from negotiating general rules. The model is particularly attractive, as it reflects the particular regulatory needs from the point of view of exporters seeking improved conditions of markets in Members of destination.

⁶² I am indebted to Daniela Benavente, former research fellow, NCCR IP 2, Graduate Institute, Geneva, for explicitly pointing out this potential option.

⁶³ See above Section II(C).

It allows Members to specifically address existing problems encountered or envisaged in bilateral relations. Vice versa, Members are able to make offers with a view to enhance and secure conditions of competition as a matter of constitutional locking-in of existing or future regulations, and to obtain commitments of their interest from others in respective fields of interest in return. Negotiations could take recourse to well-established patterns of bilateral negotiations within the WTO, applying the doctrine of initial negotiating rights of principal suppliers, or undertake sectoral initiatives among leading Members in the field. Enhanced recourse to schedules thus would allow discharging the general rules of the agreements from more extensive regulations, limiting those to basic commitments (with or without graduation) that truly apply across the board while specific concerns are addressed in schedules of commitments. Finally, it should be recalled that the commitments, whatever their origins and trade-offs obtained, are subject to MFN and form part of the multilateral system. Scheduling thus would not undermine the principles of the multilateral system while offering additional flexibility for individual Members.

It is submitted that existing schedules relating to the GATT and GATS, as well as the Agreement on Government Procurement, are suitable for prescriptive rules. GATT schedules in fact already contain a considerable number of prescriptive rules. An examination of specific conditions often enshrined in footnotes to schedules, and sometimes the subject matter of dispute settlement,⁶⁴ can be found in schedules. Likewise, disciplines on tariff quotas and limitations on domestic support in agriculture amount to prescriptive rules. The schedules of the GATS Agreement contain such rules in particular in the field of telecommunication, introduced on the basis of the 4th Protocol.⁶⁵ The Agreement on Government Procurement contains additional commitments in country-specific annexes, applicable on the basis of reciprocity and thus to specific Member States only.⁶⁶ Finally, we note that additional commitments, so-called WTO 'plus elements', are sometimes inscribed in the Protocol of Accession, the one on China being the most prominent example.⁶⁷

Similar functions could be inserted into a schedule of concession to the TRIPS Agreement, and the same technique could be used and expanded to other regulatory agreements, in particular the agreements on TBT, SPS (in relation to adopting international standards), import licensing, customs

⁶⁴ E.g. WTO Panel Report, *European Communities – Imports of Beef from Canada*, 28S/92 BISD (1982), adopted 10 March 1981, interpreting the scope of prescriptions recognising phytosanitary testing of meat under MFN.

⁶⁵ See Cottier and Oesch, above n 4, at 877.

⁶⁶ WTO, 'Appendices to the Agreement on Government Procurement', http://www.wto.org/english/tratop_e/gproc_e/loose_e.htm (visited July 2006).

⁶⁷ See Cottier and Oesch, above n 4, at 79.

valuation, agriculture, dumping, and industrial subsidies. Schedules would be designed in a matter to allow for the insertion of specific commitments. We explore the possibility in the field of patenting, below.

It may be objected that graduation by means of scheduling exposes Members to bilateral pressures, similar to those encountered in negotiations on preferential agreements negotiated and concluded outside the framework of the WTO. Additional standards beyond basic rules may be imposed by powerful Members, or concessions are made suitable to special interests and not the public at large. Experience in the WTO, however, shows that Members are less likely to submit to such pressures or special interests in the context of the multilateral system than in bilateral negotiations outside the WTO. Negotiations on market access in goods and services have been generally slow and progressive over long periods of time. In the field of rules and standards, the risk could further be reduced by identifying ceilings and areas where deviation from general rules would be excluded in individual schedules. This approach could be of particular interest in the field of IPRs.

V. EXAMPLE: GRADUATION AND SCHEDULING IN PATENTING PHARMACEUTICALS

A. The problem

An interesting area and testing ground for the idea of graduation and of scheduling can be found in the field of intellectual property protection. It amounts to the epitome of prescriptive rules in WTO law, as observed above. Traditionally, IPRs are applied across the board and independently of sector-specific levels of development. Patenting pharmaceuticals today is a mandatory minimal standard rule under Article 27 of the TRIPS Agreement. DCs were obliged to introduce process and substance protection as of 1 January 2005. LDCs are exempted until 2015 in accordance with the Doha Declaration, subject to further extensions. All DCs are obliged to introduce protection, irrespective of their competitiveness in that sector. They all have to make the necessary institutional investment and to provide for the same outcome in terms of legal protection, independent of the level of development and the state of their pharmaceutical industries.

In the current all-fits-one approach, harmonization of patent protection through international law proved to be one of the thorniest issues of international intellectual property protection and trade regulation.⁶⁸ The achievement of worldwide patenting of pharmaceuticals has caused a great deal of stress on the WTO during the last decade, mainly in relation to access to essential drugs (HIV/AIDS).⁶⁹ A special waiver was negotiated in order to

⁶⁸ See generally Thomas Cottier and Petros Mavroidis (eds), *Intellectual Property: Trade, Competition, and Sustainable Development* (Michigan University Press, 2003).

⁶⁹ For a detailed account, see Frederick M. Abbott, 'The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health', 99 AJIL (2005) 317.

secure access under compulsory licensing to products destined for DCs in need of inexpensive medication. In practical terms, the waiver allows generic producers in DCs and developed countries alike to continue the exportation of drugs otherwise under patent protection in the exporting country.

It is premature to assess the impact of the waiver on the market and on recipient countries and people in need. It is likely that the option to provide compulsory licensing will bring about reduced prices offered by the research-based industries and patent holders. Politically, the experience brought about calls for a rollback of the obligation of DCs to provide patent protection on pharmaceuticals, if not of the TRIPS Agreement as a whole. This is not likely to happen, as both the patenting pharmaceuticals and the TRIPS Agreement form essential and established parts of WTO law. They are of vital importance to research-based industries and industrialized and emerging economies. The driving force for enhanced protection perhaps can be found less in competition by small local firms, but rather the need to provide a level playing field among major exporters and investors on third markets. Indeed, it even needs to be further refined in the light of emerging biotechnology. Existing minimal standards contained in Article 27 of the TRIPS Agreement, allowing for the exclusion of plant and animals other than micro-organisms, arguably will be insufficient in the long run as biotechnology applications increase, in particular in DCs.⁷⁰ Indeed, industrialized countries are pursuing the goals of enhanced standards for patenting life forms in bilateral agreements, e.g. by prescribing patenting requirements on life forms, or the implementation of the International Union for the Protection of New Varieties of Plants (UPOV) Convention or the patenting of plant varieties.⁷¹ Furthermore, broad and categorical exclusions from patenting life forms therefore are unlikely to offer adequate answers in multilateral negotiations taking place under the auspices of the WTO. The wheel cannot be turned back in the light of technological advances and challenges.

These challenges translate into legal research and efforts at reforming the scope of patent protection in international and domestic law. It entails the review of the fundamental balance between private goods and public goods and where the line should be drawn in the field of newly emerging technologies.⁷² These efforts will also consider specific needs of DCs, such as taking into account prior art and the protection of traditional knowledge in the

⁷⁰ Cf. François Dessemontet (ed.), *Le génie génétique, Biotechnology and Patent Law*, 31 CEDIDAC (Lausanne 1996); Josef Straus, 'Biotechnology and Patents', 54 *CHIMIA* (2000) 293–98; Niklaus Thumm, *Research and Patenting in Biotechnology* (Swiss Federal Institute of Intellectual Property Berne, 2003), <http://www.ige.ch/E/jurinfo/documents/j10005e.pdf> (visited August 2006).

⁷¹ See Frederick M. Abbott, 'The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health', 99 *AJIL* (2005) 317, at 349–54.

⁷² Jerome Reichman and Keith E. Maskus, 'The Globalization of Private Knowledge Goods and the Privatization of Public Goods', 7 *JIEL* (2004) 279 (and related contributions in the symposium); Jerome Keith E. Maskus and Jerome Reichman, *International Public Goods and the Transfer or Technology under a Globalized Intellectual Property Regime* (Cambridge: Cambridge University Press, 2005).

context of biotechnology.⁷³ These topics of substantive law are highly controversial, and ideas to review and reform the patent system are strongly contested, because it is feared that patent protection will be unduly restricted. At the same time, it would seem that enhanced protection could not be gained without novel trade-offs in patent law.⁷⁴ The right to health informs regulations which achieve, at the same time, sound basis for research in the private sector (dependent on patents) and reasonable and differential pricing of essential drugs, commensurate with the purchasing and spending power in a given society. In this context, the question arises as to whether a new balance could be found by taking recourse to graduation and to scheduling additional commitments.

B. Recourse to graduation

1. Requirements to introduce patent protection

Could economic factors and criteria be found, based on which the obligation to comply with new patent rules would be triggered in accordance with levels of development and thus of international competitiveness? The question thus arises as to whether a policy of application, based on thresholds, could possibly avoid an overly broad and burdensome obligation for many DCs. Instead of obliging all of them to introduce patent protection, the idea of avoiding distortions contained in Articles 11 and 14.4 of the TRIPS Agreement (rental rights) could be used and a thresholds' approach developed. Countries, whatever their qualification, would be obliged to introduce patent protection for a particular sector once their domestic industry has achieved a defined level of competitiveness in accordance with a threshold defined on the basis of economic factors and data. The rationales of protecting substances and processes at this point in time then make sense, not only from a domestic but also from an international point of view. Below the threshold, industries are allowed to develop in accordance with domestic needs. Up to that point, they could engage in producing generics, irrespective of patent protection abroad. Many countries have, in the past, developed such a basis and built their industrial base.⁷⁵ As they reach

⁷³ Cf. Martin Girsberger, 'Transparency Measures Under Patent Law Regarding Genetic Resources and Traditional Knowledge: Disclosure of Source and Evidence of Prior Informed Consent and Benefit Sharing', 7 *Journal of World Intellectual Property* (2004) 451; Philippe Cullet, 'Intellectual Property rights and Food Security in the South', 7 *The Journal of World Intellectual Property* (2004) 261; Thomas Cottier and Marion Panizzon, 'Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection', 7 *JIEL* (2004) 2, 371–99. See generally Ruth Mackenzie, 'Globalisation and the International Governance of Modern Biotechnology: The International Regulation of modern Biotechnology (2003)', <http://www.gapresearch.org/governance/biotech.html> (visited July 2006); Ruth Mackenzie and Peter Newell, 'Globalisation and the International Governance of Modern Biotechnology: Promoting Food Security? (2002)', <http://www.gapresearch.org/governance/biotech.html> (visited July 2006).

⁷⁴ Cf. UNCTAD-ICTSD, *Intellectual Property Rights: Implications for Development*, Geneva (2003).

⁷⁵ Keith E. Maskus, *Intellectual Property Rights in the Global Economy* (Washington, D.C.: Institute for International Economics, 2000); see also Carsten Fink and Keith E. Maskus (eds), *Intellectual Property and Development: Lessons from Recent Economic Research* (Oxford: Oxford University Press, The World Bank, 2005).

international competitiveness, level playing fields become necessary, both as a matter of efficiency and fairness. By now, competition among domestic industries as well as with foreign companies needs to be addressed. Technology transfers should now be made subject to law, and the production of on-patent generics should no longer be possible without the consent of the right holder.

The question arises with regards to what type of threshold could be used to define the transition and graduation into the realm of internationally defined and enforceable disciplines? How shall we define and assess whether a competitive relationship exists between competing domestic and foreign companies? Could recourse be taken to indices assessing the degree of innovation of economies and sectors, such as UNDP indices mentioned above?⁷⁶ What is the role of market shares of the domestic industry? What is the role of imports? Should exports by the domestic industry be taken into account? Are there other factors that should be considered? Is it feasible to take into account the general level of social and economic development? Along these lines, and following discussions held at the 2004 World Trade Forum, Abbott suggested taking into account objective criteria of development, considering both the producer and consumer side of the equation. Also, he suggested considering market penetration.⁷⁷

Access to essential drugs thus triggers interesting new concepts both for assessing the scope of patent protection as well as for compensation for compulsory licensing. Yet, an additional problem needs to be addressed. So far, ideas of graduation only focus on the state of development and the competitiveness of domestic industries. What is the role of foreign competition on such markets in the absence of a competitive domestic industry? Lack of patent protection could lead to distortions among foreign competitors, as they could engage in patent (or trademark) infringements in the absence of proper protection on the territory. Indeed, this was one of the main, yet often understated, motifs to introduce mandatory patent protection. Should such competition be taken into account? Adherence to the principles of territoriality implies that this is the case and protection is warranted to provide fair competition among foreign exporting competitors.

It is conceivable to render protection between competing foreign operators subject to their home rules and apply those on the basis of extraterritorial effect. Violations would consequently be sued in the home country of the infringing company in control of the marketing operation in a country below the thresholds for patent protection. This approach would allow letting graduation of obligations to grant patents rely on the evolution of domestic industry and its competitiveness on domestic markets. Requirements to provide patent

⁷⁶ See above text accompanying n 53 and 54.

⁷⁷ Frederick M. Abbott, 'Toward a New Era of Objective Assessment in the Field of TRIPS and Variable Geometry for the Preservation of Multilateralism', 8 *JIEL* (2005) 77, 99.

protection could be limited to competitiveness of domestic industries under this model. It would create synergies of existing patent protection in countries with competing industries and avoid costly patent administration in DCs where no real domestic interest is at stake. It would be worthwhile to discuss this model in depth. Moving away from strict territoriality of intellectual property law, of course, entails a departure from cherished concepts of national sovereignty, as reliance would be placed on foreign legal regimes of protection in countries with advanced economies in the field. With the definition of international standards of protection in international agreements, both within the WTO and WIPO, participation of all countries alike can be secured in setting appropriate standards applicable beyond national territories and boundaries.

2. *Graduated compensation for compulsory licensing*

It is interesting to observe that economic factors have been introduced in draft legislation addressing the compensation upon granting compulsory export licenses to generic producers under the Doha Waiver to Article 31(f) of the TRIPS Agreement. It is reported that the Canadian draft legislation – the first effort to implement the waiver decision in domestic law – proposes to take recourse to the UNDP HDI in calculating the amount due for compensation. The legislation takes into account the ranking of a country with a view to reduce the amount due to lower the standard and the ranking of the country of destination concerned. In calculating the compensation due, the difference of the lowest-ranking country is taken into account. The following formula is suggested by the Canadian approach:⁷⁸

$$\frac{1 + (N \text{ HDI} - R \text{ HDI}) \times 0.04}{N \text{ HDI}} = \% \text{ of } EV \text{ Supply Agreement}$$

N = Total number of countries

R = Rank of importing country

EV = Economic value

Examples:

In the case of Nigeria, ranking 151 of a total of 177 countries in terms of HDI, the compensation due amounts to 0.61% of the economic value of the supply agreement. In the case of Libya, ranking 58 of a total of 177 countries in terms of HDI, compensation amounts to 2.7% of the value of the supply agreement.

Thus, taking into account the UNDP HDI, which reflects a number of factors of social and economic development, lower compensation rates are achieved for lower ranking countries than higher ranking ones. Lower rates,

⁷⁸ Source: Ingo Meitinger, 'The Implementation of International and National Law' (Presentation at the workshop on Access to Pharmaceuticals in Developing Countries, held at WTI on 18 November, 2005, on file with author).

therefore, can be translated into lower pricing of the product, to the benefit of patients in need.

The Swiss draft Patent Act of 23 November 2005, implementing *inter alia* the Doha Waiver, takes up the Canadian approach. Article 40(e)(5) of the draft legislation prescribes that an equitable compensation is due to the right holder, to be defined on a case-by-case basis, taking into account the value of the license *and the level of development of the importing country*. The Government is called upon to specify the appropriate method.⁷⁹ The report explicitly refers to the Canadian method set out above, taking into account the UNDP HDI.⁸⁰

C. Scheduling additional commitments

Besides graduation, it is conceivable to apply the model of scheduling additional commitments along the lines sketched above in Section IV. In the field of intellectual property, this approach has never been examined during the Uruguay Round negotiations because the prime goal consisted in the establishment and achievement of minimal standards (which eventually resulted in relatively high levels of protection not anticipated at the outset). Given past experiences and lessons learnt leading to the Doha Declaration on Public Health, it is worthwhile considering it for future developments. On the basis of the existing TRIPS Agreement (with or without graduated rules), Members could enter into additional commitments in their respective schedules which could be attached to the TRIPS Agreement. These commitments result from a process of demands and offers and can be compensated for by concessions, e.g. enhanced market access right or reductions of domestic support, in areas of particular and prime interest to the Member entering such commitments in return. In response to concerns relating to excessive protection, the future TRIPS Agreement could identify regulatory areas where such additional commitments are excluded by defining maximum standards, e.g. in defining maximum patent terms.⁸¹ Moreover, the approach could be combined with the emerging idea of impact assessment prior to adopting rules and standards. Prior to adopting levels of protection, the potential impact of new rules should be evaluated.⁸²

The advantage of additional scheduling lies in a case-to-case assessment of problems. Members are able to identify and assess specific problems in

⁷⁹ Botschaft zur Aenderung des Patentgesetzes und zum Bundesbeschluss über die Genehmigung des Patentrechtsvertrages und der Ausführungsverordnung, November 23, 2005, Bundesblatt 2006 p. 1, 161, http://www.admin.ch/ch/d/ff/2006/index0_1.html (visited May 2006).

⁸⁰ *Ibid.*, at 155.

⁸¹ The need for maximum TRIPS standards in the light of competition policy is discussed in Thomas Cottier, *Trade and Intellectual Property Protection in WTO Law: Collected Essays* 225–227 (London: Cameron May, 2005).

⁸² Abbott, above n 77, at 88–97.

emerging countries and seek patent protection, for example, in the field of genetic engineering without burdening a great number of countries not competing in the field. Vice versa, Members entering such commitments are in a position to call for meaningful trade-offs in areas of their specific interests in the context of package deals. Rights to negotiate would be defined as under the GATT and GATS on the basis of initial negotiating rights based on market shares. In conclusion, Members having strong research-based industries would be primarily entitled to negotiate in the field. Results achieved would be subject to MFN, thus avoiding situations where powerful Members are able to unilaterally benefit from market power and leverage in bilateral diplomacy.

VI. CONCLUSIONS

WTO law is essentially based on the concept of progressive liberalization. Levels of commitments are individually defined and allow taking into account levels of competitiveness of industries and of social and economic development in general. Largely varying tariff schedules and schedules of commitment in services construct the backbone of the system. Other rules, however, are applied uniformly, and it is here that the issue of S&D treatment arises. This paper suggests addressing these rules on the basis of essentially two avenues.

Firstly, the idea of the newly defined concept of graduation is submitted. Instead of defining exceptions to rules under the auspices of S&D treatment, rules could be shaped in a manner to take into account levels of competitiveness and to make application and implementation dependent on appropriate thresholds. These thresholds rely on economic factors and indicators, to be defined in the context of a particular rule. They cannot be uniform but will vary, dependent on the topic and purpose of the rule at stake. It is submitted that today the graduation of rules on international trade regulation in DCs is commensurate with reality. Countries without competing industries are hardly pressed to introduce effective regulatory systems and enforcement. To the extent that countries do not introduce legislation based on enlightened self-interest, real interests in WTO disciplines only emerge as competition is experienced by importing or investing competitors and distortions need to be addressed on the domestic market. In reality, rules are simply not enforced in the absence of competitive pressures. For many countries, this will still be a matter of years, if not decades. Not all countries will develop competitive industries in all fields. The principle of comparative advantage will continue to bring about international division of labour and production to a large extent. Many countries will show economic strength in some sectors, while leaving others weak and dependent on importation. From the point of view of the international trading system, effective rules are required in some, but not in other, areas.

This paper argues that rules of WTO should be partly shaped in a manner that allows taking these varying needs into account. It is a matter of deliberately

addressing the issue of graduation when individual norms are shaped and negotiated. A number of examples already exist in WTO law, but the method could be used in a more systematic manner. Different types of rules could be identified: those applying across the board to all Members alike – constitutional principles and procedural rules – and those addressing the protection of public goods. Others could take levels of competitiveness into account, for example in addressing the scope of industrial and agricultural policies, defining levels of state intervention and support or in defining thresholds of trade remedies. Thresholds based on economic factors and indicators may offer a more targeted, tailor-made and thus, perhaps, a more legitimate approach. Within a single and uniform system, a greater variety of levels of commitment would result where the principle of equality requires taking diverging factual constellations in a world of grossly diverging levels of competitiveness and development. No longer would it be necessary to advocate broad categories of S&D treatment, different and arbitrarily defined groups of states or to allow for variable geometry, departing from the achievements of a single undertaking in WTO law.

Secondly, the paper suggests to expand the concept of individual commitments enshrined in GATT and GATS schedules to prescriptive rules and also to other agreements, in particular the TRIPS Agreement. The goal of differentiation, envisaged by means of graduation of general rules, can alternatively be pursued by defining specific commitments in these schedules in a process of claims and response. It may be subject to impact assessment and to ceilings and limitations enshrined in the Agreement with a view to preserve the idea of graduation and a proper balance of IPRs and competition.

The two approaches serve the purpose of realizing differentiation within the principle of equality before the law, which requires taking into account substantial factual real world differences. The two approaches, however, are subject to different modalities and thus trigger substantial differences in the process of negotiations. While graduation seeks to establish uniform and single rules which will vary in *ex post* application, the focus with scheduling lies on the formulation of country-specific rules beyond general minimal standards. The former requires recourse to thresholds and thus the determination and definition of appropriate economic factors. The latter will fix specific obligations in return for trade-offs that are offered. The process of negotiations and the dynamics are different under both avenues. Both options are available and may be applied in isolation or in combination. They widen the options and provide a basis to replace traditional and ineffective forms of S&D treatment and to make progress in the field of prescriptive norms. They respond more effectively to largely diverging levels of social and economic development among the Members of the WTO.