THE EFFECTIVENESS OF WTO LAW IN DEVELOPING COUNTRIES: THE RELEVANCE OF RULE LEGITIMACY AND OWNERSHIP

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I INTRODUCTION

The *General Agreement on Tariffs and Trade* ('*GATT*'),[1] established in 1947, was minimalist in nature. The scope of its subject matter was confined to the reduction of conventional trade barriers such as tariffs and quantitative restrictions. Its addressees were mainly the rich countries of the Organisation for Economic Cooperation and Development ('OECD'), as developing countries were exempted, de facto or de jure, from the application of most of the *GATT*'s disciplines. Even its limited prescriptive rules were largely of a soft law nature, their force resting almost entirely on normative pressure rather than on strict legal enforcement under the *GATT* dispute settlement system. So, in key respects – coverage, depth, addressees, and enforcement – *GATT* law placed only nominal constraints on national policy and regulatory autonomy.[2]

The creation of the World Trade Organization ('WTO')[3] in 1994, however, marked a turning point in the regulation of trade relations among sovereign states. The WTO treaty is no doubt the only global economic agreement with an elaborate, dense and detailed set of rules. It departs fundamentally from the minimalist approach and character of the *GATT 1947*, and has transformed both the legal and institutional structures of the world trading system. This transformation occurs particularly along four dimensions.

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1 For the most recent, and current, version of the *GATT*, see *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995); annex 1A (*General Agreement on Tariffs and Trade*) 1867 UNTS 190. For the original version of the *GATT*, see *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 29 July 1948) ('*GATT 1947*').

2 For a detailed analysis of the *GATT* legal system, see Robert E Hudec, *The GATT Legal System and World Trade Diplomacy* (1995).

3 Established pursuant to the *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) ('*WTO Agreement*').

First, the subject matter of international trade law has expanded beyond the traditional border measures to a significantly greater area of national regulatory activity.[4] Second, under the 'single undertaking' rule, uniform principles and rules now bind all Members irrespective of levels of development.[5] Developing countries, hitherto excluded from most of the *GATT* obligations, had to accept all the multilateral rules as a condition of membership of the WTO. Third, the greater specificity of WTO law obligations and the quasi-judicial nature of the dispute settlement process have eroded the flexibilities inherent in the old *GATT*. And, fourth, while the regulatory philosophy of the *GATT* was defined mainly by the principles of non-discrimination and progressive liberalisation, the new approach entails, in addition, the philosophy of harmonisation and standardisation, further reducing the policy space and regulatory autonomy of states.

The underlying assumption of the new regulatory approach is the domestic constitutional effects of WTO law, namely that the law will trigger trade law reforms, and lock in these reforms, in countries where the qualities of trade and trade-related laws, regulations and institutions are deemed to be deficient. To this end, the *WTO Agreement* itself imposes an overarching compliance requirement. Article XVI:4 states that '[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreement'.

The nature of WTO obligations, however, raises two important empirical questions. First, what is the extent of compliance with WTO obligations by WTO Members? Second, what factors are shaping their compliance behaviour? The first question inquires into the effectiveness of WTO law, by focusing on its real impact or effects on the behaviour of its addressees, as indicated by their compliance or non-compliance with WTO rules. The second considers the preconditions for its effectiveness by investigating the sources of state behaviour, that is, the reasons for compliance or non-compliance.

This article seeks to answer these questions through an empirical analysis of compliance with WTO law by some WTO Members. In particular, it examines the degree of compliance with one set of WTO rules – the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* ('*Agreement on Customs Valuation*' or '*ACV*')[6] – by developing countries in general, but more specifically by South Africa and Nigeria, and identifies the

4 The new trade treaty now includes, in addition to the traditional border measures, non-traditional subjects, such as the *Agreement on Trade-Related Aspects on Intellectual Property Rights 1994* ('*TRIPS Agreement*'), the *General Agreement on Trade in Services 1994* ('*GATS*'), the *Agreement on Trade-Related Investment Measures 1994* ('*TRIMS*'), and the *Agreement on the Application of Sanitary and Phytosanitary Measures 1994* ('*SPS Agreement*'). Each of these agreements are annexed to the *WTO Agreement*, above n 3.

5 Although each of the agreements contains special and differential treatment ('S&D') rules for developing countries, these are predominantly limited to delayed implementation and best endeavour commitments for technical assistance.

6 *WTO Agreement*, above n 3, annex 1A (*Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994*) 1868 UNTS 279.

key variables explaining the determinants of these countries' compliance behaviour.

The article is divided into the following parts. Part II provides an overview of the compliance theory with a view to developing the conceptual and analytical framework for the study. This part also provides justification for the choice of the case studies. Part III describes the negotiating history of the *ACV*. Part IV begins with a snapshot of the compliance behaviour of developing countries generally and then focuses specifically on the compliance records of South Africa and Nigeria by examining the degree of their implementation of the key obligations of the *ACV*. Part V is the explanatory chapter. It uses the variables derived from the theoretical analysis to explain the empirical findings. Part VI concludes and draws out lessons from the case studies.

II THEORETICAL OVERVIEW

A Explaining Compliance

The legal explanations as to why states comply or do not comply with international law are varied. In one book, twelve of those factors are listed;[7] in another, the authors list six variables.[8] However, the dominant paradigms in the literature can be reduced to the following: the rationalist perspective, the managerial school, the normative commitment or sense of obligation argument, and the legitimacy theory. The rationalists emphasise the primacy of enforcement, monitoring and legal sanctions.[9] According to this school, enforcement is one of the strongest conditions of compliance. The background assumption is that states are motivated in their actions by the calculation of interests. So, compliance can be improved by manipulating the burdens and benefits defined in terms of those interests.[10]

Allied to the enforcement school is another rationalist view, which accords pride of place to 'reputational' concerns. Indeed, as Downs and Jones note, 'the dominant view in the literature is that reputation plays an extremely important role in promoting compliance'.[11] One of the strongest proponents of the reputational variable is Robert Keohane, who argues that 'having a good

7 Oscar Schachter, 'Towards a Theory of International Obligation' in Stephen Schewebel (ed), *The Effectiveness of International Decisions* (1971) lists the following: (i) consent; (ii) customary practice; (iii) juridical conscience; (iv) natural law; (v) social necessity; (vi) consensus of the international community; (vii) direct (or 'stigmatic') intuition; (viii) common purposes of the participants; (ix) effectiveness; (x) sanctions; (xi) systemic goals; (xii) shared expectations as to authority; and rules of recognition.

8 Stewart Macaulay, Lawrence M Friedman and John Stookey (eds), *Law and Society: Reading on the Social Study of Law* (1995), list the following as reasons why people obey the law: (i) legal sanctions; (ii) peer groups; (iii) conscience; (iv) moral appeal; (vi) embarrassment and shame; (vii) legitimacy.

9 George W Downs, David M. Rocke and Peter N Barsoom, 'Is the Good News about Compliance Good News about Cooperation?' (1996) 50(3) *International Organisation* 379.

10 Ibid.

11 George W Downs and Michael Jones, 'Reputation Compliance and International Law' (2002) 31(1) *Journal of Legal Studies* S95, S99.

reputation is valuable even to the egoist'.[12] Reputational theorists point out that treaties are both the products and the instruments of iteration and issue linkage, and often encourage the use of reciprocity or retaliation. As such, the combined effects of iteration, issue linkage and reciprocity can accentuate the reputational or credibility problems for a future defector, thereby making rule compliance more likely.[13]

However, the managerial school takes a dim view of the enforcement-based, rationalist arguments. Compliance is better induced, the managerialists argue, through a number of 'instruments of active management'[14] such as normative pressure and the provision of technical and financial assistance and support for capacity building. The managerial or legal process approach is, indeed, based on dialogue, persuasion, argumentation and technical assistance rather than pressure and conditionality.[15]

Both the enforcement and reputational variables, on the one hand, and the management approach, on the other, however, rest on an external system: the rationalists rely on coercive measures, and the 'managerialists' on positive incentives, to influence states to comply with international law. By contrast, scholars of the constructivist or normative bend tend to emphasise the role of values or moral commitments in shaping states' compliance behaviour. According to this school, compliance is not induced by concerns about legal sanctions or reputational costs; rather, states comply with international law because of their normative commitment to the system and a desire to behave appropriately to support the regime rather than undermine it.[16] The logic of appropriateness and a general sense of duty are stronger than the logic of consequences and the explicit calculations of costs and benefits.[17]

In criticising the command or imperative theory of law, H L A Hart argues that rather than an external system of coercion, it is the internal element of legal obligation that leads a state to obey international law even when there is no threat of force compelling them to comply.[18] While the external element cannot be ignored, it is the 'internal point of view', which makes people or states feel a sense of obligation to obey the law. However, Hart also points out that this sense of obligation arises from a state's respect for the legitimacy of the law.[19] In other words, compliance with international law is motivated by a belief in the normative legitimacy of the rule.[20]

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12 Robert O Keohane, *After Hegemony: Cooperation and Discord in World Political Economy* (1984) 85.

13 José E Alvarez, 'The WTO as Linkage Machine' (2002) 96(1) *American Journal of International Law* 146.

14 Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) 32, 33.

15 Jeffrey T Checkel, 'Compliance and Conditionality' (Working Paper No 18, Arena Centre for European Studies, 2005).

16 This is also a 'value of the regime' argument as Keohane, above n 12, puts it.

17 Oran Young, *Compliance with Public Authority* (1979).

18 H L A Hart, *The Concept of Law* (1961).

19 Ibid.

20 Ian Hurd, 'Legitimacy and Authority in International Politics' (1999) 53(2) *International Organisation* 379.

This conclusion makes the legitimacy perspective perhaps the most important of all the variables explaining the determinants of compliance. Clearly, compliance with international law will depend on the interplay of a number of different compliance determinants, but, in the end, as this article will argue, perceptions of legitimacy and ownership of international rules will produce the best explanations for obedience or adherence to these rules. Other determinants can break down or lose their explanatory power when legitimacy fails. Given the primacy accorded in this article to legitimacy as an explanatory variable, it is useful to discuss this perspective in more depth.

B The Role of Legitimacy in Compliance Behaviour

Legal scholars have long focused on legitimacy as an essential source of obligation and 'compliance pull' in law. However, while several authors agree on the role and relevance of legitimacy, there are many views as to what the concept entails. Cottier posits that 'coherence and consistency form the basis of output legitimacy'.[21] This formulation is similar to Lon Fuller's notion on procedural morality, which states that the legitimacy or morality of law requires adherence to, inter alia, the following principles: the rule must be intelligible (ie, clear, precise and accurate); must not be contradictory; and must not be constantly changing.[22] The focus of these principles is, however, more on the character of the law rather than on its content. Legitimacy is viewed not in terms of the fairness of outcomes but of procedures.

A broader concept of legitimacy, however, goes beyond procedural fairness. Thomas Franck makes this distinction. He argues that the compliance pull of international law results from the legitimacy and distributive justice of the rules that it embodies.[23] Voluntary compliance would be improved so far as the law instantiates both procedural and substantive fairness.[24] Broadening the concept even further, Mattias Kumm proposes four principles upon which the legitimacy of international law should rest. These are: formal legitimacy (international legality); jurisdictional legitimacy (the principle of 'subsidiarity'); procedural legitimacy (the principle of adequate participation and accountability); and outcome legitimacy (achieving reasonable outcomes).[25] Insight from negotiation theory also shows that process and outcome matter. Odell argues that no

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21 Thomas Cottier, 'Mini-Symposium: The Future Geometry of WTO Law – Introduction' (2006) 9(4) *Journal of International Economic Law* 775, 775.

22 Lon L Fuller, *The Morality of Law* (revised ed, 1964).

23 Thomas Franck, *Fairness in International Law and Institutions* (1995). On legitimacy as compliance pull, see also Martha Finnemore and Stephen J Toope, 'Alternatives to "Legalisation": Richer Views of Law and Politics' (2001) 53(3) *International Organization* 743. The authors argue that 'law that adheres to [legitimacy] values is more likely to generate a sense of obligation and corresponding change than law that ignore these values': at 749.

24 Pauwelyn describes this as 'input and output legitimacy': Joost Pauwelyn, 'The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalisation and Reforming the WTO' (2005) 8(2) *Journal of International Economic Law* 329, 339.

25 Mattias Kumm, 'The Legitimacy of International Law: A Constitutional Framework of Analysis' (2004) 15 *The European Journal of International Law* 907, 927.

cooperation research or theory should overlook the substantive outcomes of agreements.[26]

To be sure, legitimacy is largely a perception-based concept,[27] which is why a state's voluntary consent and its perception of ownership of the law are important. Consent and ownership are indeed critical legitimacy variables that affect a state's compliance behaviour.[28] Legal positivists argue that *consent*[29] bridges the chasm between sovereignty and legal restraint under international law.[30] Consent is the only way to establish rules that legally bind sovereign states.[31] Franck argues that legitimacy derives from the consent of states.[32]

However, as Kumm has noted, the procedures by which international law is generated have increasingly attenuated the link between state consent and the existence of international law obligation.[33] International law is the end product of a political process in which the weak can be disadvantaged because of unequal bargaining powers. The contractarian view that treaties are freely entered into by the parties concerned, with their voluntary express or explicit consent, does not accord with the realities of the international negotiated order. Often, the weak are confronted with a take-it-or-leave-it option or find the costs of not participating in a treaty prohibitively high because of economic and political pressures, which undermine the legitimating value in a state's consent to a treaty under such circumstances.[34]

Perceptions of injustice or inequity would engender a lack of ownership of rules, thereby making compliance difficult to achieve. Ownership arises when the addressee of a rule internalises its content and re-conceives his or her interests according to the rule.[35] Yet lack of ownership and, therefore, possible non-compliance is likely to be endemic if the original bargain did not adequately reflect the interests of those that would be living under it.[36] Unless the addressees of international rules appreciate the benefits of, and the necessity for, the rules

26 John Odell, *Negotiating the World Economy* (2000).

27 Hurd, above n 20, argues that one of the reasons why many scholars have not given sufficient attention to legitimacy as a key variable explaining the determinant of compliance is because of the methodological problem that it appears to pose: ie, how to understand its operative process.

28 James M Broughton and Alex Mourmouras, 'Is Policy Ownership An Operational Concept?' (Working Paper No 272, IMF, 2002); J Michael Finger, 'The WTO's Special Burden on Less Developed Countries' (2000) 19(3) *Cato Journal* 425, 435.

29 The traditional consent-oriented view of the law treaties, however, has its critics: see, eg Ivan A Shearer, *Stake's International Law* (11th ed, 1994) 21–4.

30 Payson S Wild, 'What is the Trouble with International Law' (1938) 32(3) *The American Political Science Review* 478.

31 Igor L Lukashuk, 'The Principle Pacta Sunt Servanda and the Nature of Obligations Under International Law' (1989) 83(3) *American Journal of International Law* 513.

32 Franck, above n 23.

33 Kumm, above n 25, 914–16.

34 Indeed, one of the grounds that can invalidate a treaty is coercion or force: *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980, arts 51–2. This has been interpreted as capable of denoting economic and political pressure: Louis Henkin et al, *International Law: Cases and Materials* (2nd ed, 1987) 464–6.

35 Hurd, above n 20.

36 Abram Chayes and Antonia Handler Chayes, 'On Compliance' (1993) 47 (2) *International Organization* 175, 183.

and accept responsibility for them, there is likely to be little internal commitment on the part of those charged with their implementation.[37] Ownership and internalisation are thus likely to be enhanced when international law is perceived to be fair and just and to reflect the preferences and needs of those it addresses.

What the foregoing literature survey shows is that the legitimacy theoretical perspective provides strong, perhaps the strongest, variables for explaining the determinants of compliance. This is so because the absence of legitimacy works as a disturbance variable, as legitimacy is decisive for handling compliance problems effectively.[38] This article thus formulates the following broad hypotheses:

- The compliance pull of WTO law is unlikely to derive solely from reliance on the principle of international legality or *pacta sunt servanda*, but on the co-existence of the normative principles of procedural and substantive fairness.
- The voluntary consent of states, as indicated by their endogenous or *ex ante* preferences not merely by formal agreement,[39] is likely to be the strongest predictor of their compliance behaviour *ex post*. In other words, *ex ante* preferences for an agreement are likely to induce better *ex post* compliance with it, and vice versa.

The empirical anchor for these theoretical propositions is compliance with a set of WTO rules by developing countries, focusing particularly on South Africa and Nigeria. However, before examining these case studies, it is useful, first, to justify their selection.

C Justification for the Case Studies

1 *Why developing countries and why South Africa and Nigeria?*

The legalisation of the WTO and the deepening and widening of its rule base have attracted considerable attention from a wide range of scholars. Several have focused on the development dimension of the legal transformation.[40] Yet, little empirical analysis has been undertaken to systematically examine how developing countries are implementing and complying with their WTO obligations, and what factors are shaping their responses. Compliance research

37 Ibid.

38 Christian Joerges and Michael Zurn (eds), *Law and Governance in Postnational Europe: Compliance Beyond the Nation State* (2005) 312.

39 Insights from law and economics literature are useful here. Law judges contracting parties objectively by their words or actions, not their thoughts; thus a formal agreement represents the *consensus ad idem*, that is, the meeting of minds. However, economists adopt a subjective test. Only a contract that involves an actual meeting of minds satisfies the economist's definition of a value-maximising exchange. For economic analysis of contract law, see, eg, H G Beale, W D Bishop, M P Furmstone, *Contract: Cases and Materials* (1990) ch 5.

40 See, eg, Sylvia Ostry, 'The Uruguay Round North–South Bargain: Implications for Future Negotiations' (Paper presented at the Political Economy of International Trade Law Conference, University of Minnesota, 15–16 September 2000); J Michael Finger and Philip Schuler, 'Implementation of Uruguay Round Commitments: The Development Challenge' (Working Paper No 2215, World Bank, 2000) and T N Srinivasan, 'Developing Countries in the World Trading System' (1999) 22(8) *World Economy* 1047.

focusing on developing countries is particularly relevant because much of the tensions that have dogged the WTO since its inception in 1995[41] can be traced to the significant expansion of the legal obligations of developing countries in international trade law and their unhappiness about the nature of the Uruguay Round bargain and its aftermath.

Yet, the WTO continues to have an expansionist agenda. The Doha Round, launched in 2001, may well increase the commitments and legal obligations of these countries. It would thus be useful to investigate how these countries are implementing the existing agreements in their national contexts and why they are behaving in the way that they do. This should provide an insight into the conditions under which both present and future agreements are likely to be effective. WTO law should be assessed in terms of its ability to affect the behaviour of its addressees – in this case developing country Members – rather than solely in terms of its formal legalistic structures.

Developing countries are, however, not a homogenous group: they are at different levels of trade flows and social economic development. It is thus difficult to undertake a study that provides strong generalisations about the likely behaviour of these varied groups. It is partly for this reason that the choice of South Africa and Nigeria is important. The structures and unique configurations of the two countries are such that, in some respects, they can serve as representatives of a cross section of developing countries.

South Africa is a cross between a developed country and a developing one, both in terms of institutional and economic developments.[42] Nigeria, on the other hand, has the characteristics of both developing and least developed countries. These mixed characteristics should allow for some generalisations about the possible compliance behaviour of different categories of other developing countries. However, to further aid comparison and generalisation, the case study includes a shadow investigation of the implementation experiences of developing countries in general as gleaned from their review by the WTO.

Another reason for the choice of South Africa and Nigeria is the different approaches the two countries took during the *GATT* years and Uruguay Round negotiations. While South Africa was broadly supportive of most of the negotiations, seeing its offers as a mechanism to lock in its unilateral domestic reforms that began in the early 1980s, Nigeria saw the whole process as an imposition. The compliance behaviour of these countries should thus, to some extent, support the hypothesis that *ex ante* preferences for an agreement is likely to induce better *ex post* compliance with it, and vice versa. South Africa should be more willing to comply with its WTO obligations than Nigeria.

41 The significance of these tensions is reflected in the fact that of six ministerial conferences held since 1996, two have failed: Seattle (1999) and Cancún (2003). A third, Hong Kong (2005) almost failed and led to the suspension of the Doha Round in July 2006.

42 South Africa's financial, telecommunication and legal systems are among the best developed in the world. As a result, it is often described as a 'First World country in the Third World'.

2 *Why the Agreement on Customs Valuation?*

The selection of the agreement examined in this article involves some choices. First, the preference is for an agreement that involves a significant depth of cooperation in terms of the legal and institutional changes that Members are required to make in order to be in full conformity with their WTO obligations. In this regard, the *ACV*, has, along with a few others,[43] been frequently singled out as one WTO agreement that imposes significant implementation and compliance challenges.[44]

The second consideration is the degree of its acceptance or ownership by developing countries. This is to test one of the key hypotheses of this article, namely that *ex ante* preference for an agreement will induce better *ex post* implementation, and vice versa. As the next section will show, the negotiation of the *ACV* was difficult and contentious. While the developed countries were the main *demandeurs* of this agreement, most developing countries resisted its introduction, and did not accede to the Tokyo Round valuation code. Only through the single undertaking rule did the agreement become mandatory for all WTO Members, including developing countries.

Given the seeming lack of ownership by most of the developing countries, it is useful to examine the impact that the WTO valuation law is really having on the behaviour of these countries. Before doing so, however, it is useful to discuss briefly the negotiating history of the agreement, particularly with respect to the positions or attitudes of developing countries.

III DEVELOPING COUNTRIES AND THE NEGOTIATION OF THE CUSTOMS VALUATION AGREEMENT

A The Tokyo Round Negotiations

The main focus of the Tokyo Round, launched in 1973, was to tackle problems of the rising non-tariff barriers. Although Article VII of *GATT 1947* provided the general principles of customs valuation, varying national valuation practices, which were inconsistent with the *GATT* provision, had constituted barriers to trade.[45] One of the aims of the negotiation of the Tokyo Round Valuation Code was thus to harmonise and ensure uniformity in the application of valuation rules so as to reduce the costs and delays associated with different valuation systems.[46]

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43 These include the *TRIPS Agreement*, the trade remedy rules, particularly the *Agreement on Implementation of Article VI of the GATT 1994* ('*Anti-dumping Agreement*') and the *Agreement on Subsidies and Countervailing Measures* ('*SCM Agreement*'), as well as the *SPS Agreement* and the *Agreement on Technical Barriers to Trade* ('*TBT Agreement*'). These agreements are annexed to the *WTO Agreement*, above n 3.

44 See Finger and Schuler, above n 40; Finger, above n 28; Yukyun Shin, 'Implementation of the Agreement on Customs Valuation of GATT 1994 in Korea – Recommendation for ASEAN Countries in Light of Korea's Experience' (1996) 24 *Korean Journal of Comparative Law* 145.

45 In 1973, the *GATT* Secretariat pointed out this anomaly in a study entitled: *Trade Barriers Arising in the Field of Customs Valuation*, GATT Doc COM.TD/W/195 (1973).

46 John H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd ed, 1997) 152.

However, fundamental differences existed among the *GATT* contracting parties, and the final draft, published in 1979,[47] was rejected by most developing countries. In March 1979, several developing countries circulated proposed amendments to the draft code.[48] These countries, led by India and Brazil, concluded that unless the points in their proposals were included in the draft final agreement, they would be unable to accept the agreement.[49] The developed countries, on the other hand, supported the text of the final draft and stressed that its adoption would form an important part of the global package in the negotiations. According to a statement by the delegations from developed countries 'the text represented the most that could be achieved by way of a multilateral solution …'.[50]

Partial attempt was made to address some of the concerns of the developing countries.[51] However, despite this, only three of these countries – Argentina, Brazil and India – acceded to the Tokyo Valuation Agreement when it came into force on 1 January 1981, and each of these countries invoked the provisions allowing them to delay implementation for five years. A few other developing countries, namely Peru, Mexico, Singapore, Turkey, Morocco and Zimbabwe, later acceded to the Agreement, but also invoked the provisions on delayed implementation. South Africa, Botswana, Lesotho, Malawi joined the Tokyo Round Valuation Agreement without invoking the provisions. Apart from these few countries, the rest of the developing country parties to the *GATT* did not accept or accede to the Tokyo Round Valuation Code.

B The Uruguay Round Negotiations

The concerns and reluctance of developing countries about the Tokyo Valuation Code remained in the lead up to the Uruguay Round negotiations that began in 1986. The addition of the Protocol failed to facilitate application of the agreement by developing countries. Most of these countries cited concerns about the effect of the Code on the ability of their customs administrations to control

47 *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade*, GATT BISD, 26th Supp, 116, GATT Doc MTN/NTM/W/229/Rev.1 (1979).

48 See *Multilateral Trade Negotiations – Group "Non-Tariff Measures" – Sub-Group "Customs Matters" – Customs Valuation*, GATT Doc MTN/NTM/W/222/Rev.1 (1979) (Revision). See also *Negotiating History of the Agreement on Customs Valuation*, WTO Doc G/VAL/W/95 (2002) 8 (WTO Background Document by the Secretariat).

49 *Multilateral Trade Negotiations – Group "Non-Tariff Measures" – Sub-Group "Customs Matters" – Customs Valuation*, GATT Doc MTN/NTM/W/222/Rev.1 (1979) (Revision).

50 *Multilateral Trade Negotiations – Group "Non-Tariff Measures" – Sub-Group "Customs Matters" – Meeting of 3 April 1979*, GATT Doc MTN/NTM/67 (1979) [3] (Chairman's Summing-Up).

51 For instance, a Protocol was added to the Agreement containing a promise to undertake a study to fund 'appropriate solutions' to the concerns of developing countries regarding the role of sole agents, sole distributors and sole concessionaires. See *Multilateral Trade Negotiations – Group "Non-Tariff Measures" – Sub-Group "Customs Matters" – Customs Valuation – Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade*, GATT Doc MTN/NTM/W/229/Rev1/Add 1 (1979) (Addendum). This provision is now Annex III paragraph 5 of the WTO Customs Valuation Agreement.

under-valuation.[52] They pointed out that acceptance of the valuation code could lead to their governments losing a serious amount of customs revenue, which would be difficult to generate by other taxation measures.[53]

Yet, apart from the Protocol and the drafting changes made to bring the Tokyo Round Code into legal consistency with the *WTO Agreement*, the Code remained unchanged during the Uruguay Round. It later became the *ACV* and, like other Uruguay Round multilateral agreements, mandatory and binding on all WTO Members, including developing countries under the single undertaking rule. According to Vinod Rege, who served on the *GATT* Secretariat staff to support the negotiations on the *ACV* and the Agreement on Pre-shipment Inspection, the developed country negotiators were unfamiliar with, and unwilling to learn, the conditions under which customs officials in developing countries operated.[54]

The general view is that this agreement, like many other Uruguay Round agreements, was imposed in a 'do-it-my-way' manner by the developed countries.[55] Given the lack of active developing country participation in the technical negotiation of the agreement,[56] the failure of the developed country negotiators to gain better understanding of developing countries' positions, indeed, supports the view that the agreement was imposed. The lack of voluntary consent and ownership thus raises interesting questions, as with any exogenous law, about the *ex post* compliance behaviour of developing countries.

Against this background, this article seeks to examine compliance by developing countries with the *ACV*. The section that follows begins with a snapshot of the implementation experiences of developing countries in general, as gleaned from the records of the WTO Committee on Customs Valuation, and then examines in greater depth the specific cases of South Africa and Nigeria.

IV DEVELOPING COUNTRIES' IMPLEMENTATION OF THE AGREEMENT ON CUSTOMS VALUATION

A Developing countries in general – an overview

Like all WTO agreements, the *ACV* requires each Member to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the *ACV* (Article 22(1)). Further, Article 22(2) requires each Member to inform the Committee on Customs Valuation of any changes in its laws and regulations relevant to the *ACV* and in the administration of such laws and regulations.

52 See *Committee on Customs Valuation – Negotiating History of the Agreement on Customs Valuation*, WTO Doc G/VAL/W/95 (2002) [26] (Background Document by the Secretariat).

53 Ibid [30].

54 Vinod Rege, 'Developing Country Participation in Negotiations Leading to the Adoption of the WTO agreements on Customs Valuation and Pre-shipment Inspection' (1999) 22(1) *World Competition* 37, 74; see also Finger, above n 28, 434.

55 Finger, above n 28.

56 See further Sheila Page, 'Developing Countries in GATT/WTO Negotiations' (Working paper No 20, Overseas Development Institute, 2003) for a discussion on the participation of developing countries in these negotiations.

The Committee on Customs Valuation has the mandate to review the implementation and operation of the *ACV* in light of its objectives, and to report annually to the Council for Trade in Goods. At its first meeting in 1995, the Committee agreed on procedures for the notification of national legislation.[57] Furthermore, at the same meeting, the Council agreed on procedures for the submission of a checklist of issues drawn from the compliance obligations imposed by the *ACV*.[58]

Virtually all developing countries that were not party to the Tokyo Round Valuation Code invoked the provision of Article 20(1) of the *ACV*, which allowed them to delay implementation of the agreement until 1 January 2000. About nine developing countries,[59] which had signed up to the Tokyo Round Code but had invoked the provisions on delayed implementation for five years, continued the remainder of the transitional period under the *ACV* pursuant to a General Council Decision of 31 January 1995.[60]

The Article 20(1) delay period expired on 1 January 2000. By December 1999, before the five year delay period finally came to an end, about 13 developing countries requested an extension of this period.[61] These countries gave various reasons for their requests, but essentially they indicated that they were not yet in a position to fully assume their obligations. In 1999, Peru, which had acceded to the Tokyo Round Code in 1994, asked for an extension for a period of two years, citing 'exceptional circumstances'.[62] The Committee later granted all the requests.

Many developing countries also invoked other Special and Differential Treatment provisions. For instance, as of December 1996, 47 developing countries invoked Article 20(2), which provided for delayed application of the computed value method.[63] Thirty-one countries invoked Annex III, paragraph 2 that allowed developing country Members, which prior to the entry into force of the *ACV* valued goods on the basis of officially established minimum values, to make a reservation to enable them to retain such values on a 'limited and transitional basis under such terms and conditions as may be agreed to by the

57 See *Committee on Customs Valuation*, WTO Doc G/VAL/M/1 (1995) [29]–[35], [71]–[72] (Minutes of the Meeting of 12 May 1995).

58 Ibid [36]–[39].

59 These countries are Argentina, Brazil, India, Malawi, Mexico, Morocco, Peru, Turkey and Zimbabwe.

60 See *Continued Application Under the WTO Customs Valuation Agreement of Invocations of Provisions for Developing Countries for the Delayed Application and Reservations Under the Customs Valuation Agreement 1979*, WTO Doc WT/L/38 (1995) (Decision approved by the General Council on 31 January 1995).

61 Those that requested extensions included Côte d'Ivoire, Dominican Republic, Egypt, El Salvador, Guatemala, Jamaica, Kuwait, Mauritania, Myanmar, Paraguay, Sri Lanka, Tanzania and Tunisia.

62 See *Minutes of the Meeting of 4 October 1999*, WTO Doc G/VAL/M/11 (1999) (Committee on Customs Valuation).

63 See *Second Annual Review of the Implementation and Operation of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994*, WTO Doc G/VAL/10 (8 January 1997) (Background Document by the Secretariat presented to the Committee on Customs Valuation). This rose to 49 countries by the end of 1997: see *Third Annual Review of the Implementation and Operation of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994*, WTO Doc G/VAL/13 (18 December 1997) (Background Document by the Secretariat).

Members'.[64] About 53 developing countries invoked the provisions of Annex III, paragraph 3, which allowed reservations concerning the reversal of the sequential order of Articles 5 and 6 (as allowed in Article 4 of the *ACV*). Fifty developing countries invoked Annex III, paragraph 4, allowing reservations to the application of Article 5(2) whether or not the importer so requests.[65]

This widespread invocation of the Special and Differential Treatment provisions of the *ACV* by most developing countries was indicative of how these countries perceived the challenges that the implementation of the agreement posed for them. As of December 2004, no Member maintained the Article 20(1) Special and Differential Treatment provision, which allowed for the five year delayed application of the *ACV*, and no Member is entitled to an extension of the five year delay period.[66]

In theory, given that the delay period had expired for all developing countries, and that no further extension was possible, all WTO Members should then be implementing the Agreement. However, according to the Committee on Customs Valuation, in its 2005 annual report, 56 Members had not notified their national implementing legislation, and several had not responded to the checklist of issues.[67] Only 18 African Members of the WTO made notification of their national legislation, and only 8 of these responded to the checklist of issues.[68]

The behaviour of some of the advanced developing countries did not suggest that they were faithfully implementing the agreement either. India has been at the forefront of campaigns for a renegotiation of the *ACV*.[69] It argues that its own practical experience of implementing the agreement for several years has led it to conclude that the agreement was flawed in some respects.[70] For many years, India argued in the Committee on Customs Valuation that it was entitled to extend its Tokyo Round reservation to continue the use of minimum prices to determine customs valuation on the basis that it required 'time to gain sufficient experience with the implementation of the Agreement'.[71] India has also introduced changes in its customs laws, which some Members considered to be

64 For the reservation invoked by 31 countries, see WTO Doc G/VAL/13, above n 62. The passage quoted above is from Annex III[2] of the ACV.

65 See *Tenth Annual Review of the Implementation and Operation of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade* 1994, WTO Doc G/VAL/W/136 (2004) (Background Working Document by the Secretariat).

66 All the approved requests or waivers in respect of such requests have expired in 2004: WTO Doc G/VAL/W/136, above n 65.

67 See *Report of the Committee on Customs Valuation to the Council for Trade in Goods*, WTO Doc G/VAL/W/135 (2004); WTO Doc G/VAL/W/136, above n 65.

68 See *Notification under Article 22 of the Customs Valuation Agreement*, WTO Doc G/VAL/W/139 (2004) (US questions regarding India's legislation related to customs valuation).

69 For India's proposals, which include relaxing the provision of Articles 7 and 8.1(b)(iv) of the Customs Valuation Agreement, see: *Preparations for the 1999 Ministerial Conference*, WTO Doc Job (99)/5868/rev.1 (1999) (Ministerial Text: Revised Draft); *Report of the Chairman to the Committee on Customs Valuation to the General Council*, WTO Doc G/VAL/36 (2000).

70 See, eg, *Minutes of the Meeting of 26 April 1999*, WTO Doc G/VAL/M/10 (1999) (Committee on Customs Valuation).

71 Ibid [5.31].

creating additional criteria for acceptance of a transaction value, the primary valuation method allowed under the agreement.[72]

Other major developing countries also appeared to find the implementation of the agreement particularly problematic. For instance, some Members believe that Brazil's customs laws still provide for the establishment of minimum import prices even though Brazil was required by the Tokyo Round Valuation Committee to abolish officially established minimum values and reference prices not later than July 1988.[73] Brazil argued that it did not use minimum prices but rather used 'reasonable prices' for the purpose of 'combating fraud and circumvention'.[74] On 30 May 2000, the US requested consultations with Brazil concerning the use of minimum import prices for customs valuation. No Panel was, however, established and no settlement was notified to the WTO.[75]

Mexico claimed that it had encountered major problems from duty evasion and, in response, introduced the concept of 'estimated prices' and post-importation verification of exporters.[76] The US has particularly challenged the WTO compatibility of these measures through a series of questions and follow-up questions to Mexico.[77] On 22 July 2003, Guatemala requested consultations with Mexico concerning, inter alia, the use of officially established prices for customs valuation. However, no Panel has been established, and no settlement notified by both parties.[78]

In sum, different categories of developing countries appear to have practical and conceptual problems with the *ACV*.[79] It seems that the contentiousness that

72 See *Notification under Article 22 of the Customs Valuation Agreement*, WTO Doc G/VAL/W/133 (2004) (India's response to questions from the European Union and the United States on the notification in G/VAL/N/1/IND/3) for the questions posed by the EC and the US and India's replies. India claims that the changes were to check valuation frauds such as under-valuation resulting in heavy leakages of revenue.

73 See *Minutes of the Meeting of 26 April 1999*, WTO Doc G/VAL/M/10 (1999) 5 (Committee on Customs Valuation).

74 Ibid.

75 See *Brazil – Measures on Minimum Import Prices*, WTO Doc WT/DS197/1 (2000) (Request for Consultations by the United States). For a recently updated summary of the dispute to date see WTO, *Dispute Settlement: Dispute DS197, Brazil – Measures on Minimum Import Prices* <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds197_e.htm> at 30 August 2007.

76 See Mexico's notification of these amendments in *Reply to the Questions Submitted by Several Countries in the Committee on Customs Valuation with Regard to the Mechanism of Estimated Prices Applied by Mexico*, WTO Doc G/VAL/W/121 (2003) (Communication to the Committee on Customs Valuation).

77 See *Replies to the Questions from the United States to Mexico on Certain Customs Valuation Policies*, WTO Doc G/VAL/W/132 (2004); *Notification under Article 22 of the Customs Valuation Agreement*, WTO Doc G/VAL/W/138 (2004) (US questions regarding Mexico's legislation related to customs valuation).

78 See *Mexico – Certain Pricing Measures for Customs Valuation and Other Purposes*, WTO Doc WT/DS298/1 (2003) (Request for Consultations by Guatemala). For a recent summary of the dispute to date, see also WTO, *Dispute Settlement: DS298, Mexico – Certain Pricing Measures for Customs Valuation and Other Purposes* <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds298_e.htm> at 30 August 2007.

79 Shin, above n 44, also highlights the problems that Korea and other countries of the Association of South East Asian Nations ('ASEAN') faced in implementing the agreement. The implementation challenges are also encapsulated in a compilation by the WTO Secretariat of discussions in various WTO bodies: see *Compilation of Discussions in Various WTO Bodies on Implementation Related Issues Concerning Customs Valuation*, WTO Doc G/VAL/W/97 (2002) (Background Note by the Secretariat).

dogged the negotiation of the Tokyo Round Valuation Code, and carried over to the Uruguay Round, have extended to the post-Uruguay Round implementation of the agreement. In the following sections, the experiences of South Africa and Nigeria in particular are examined to see how the two countries have approached compliance with the agreement and whether some general trends can be established with respect to the compliance behaviour of developing countries.

B South Africa's Implementation Experience

South Africa implemented the Tokyo Round Valuation Agreement on 1 July 1983, making it one of the few developing countries and one of only six African states[80] to accept the *ACV* before it became mandatory under the WTO. Furthermore, unlike most of the other developing countries, including Argentina, Brazil, India and Mexico, South Africa did not invoke the Special and Differential Treatment provisions, which allowed delayed application of the agreement for five years. This was because South Africa always viewed itself as a developed country in *GATT*, and was consistent with the approach that it adopted during the Uruguay Round, when it negotiated as a developed country and assumed developed country levels of obligations.

But what is the extent of its compliance with these obligations? Analytically, the agreement's obligations are divided into procedural, substantive and subsidiary. Procedural obligations are those relating to notification and review of implementing legislation; substantive obligations are those concerning the parts of the agreement that cover the methods of valuation; and the subsidiary obligations are those relating to the administration of the valuation system. The implementation experience of South Africa, and later that of Nigeria, are examined along these broad areas of obligations.

1 *Procedural Obligations*

In August 1996, South Africa notified the Committee on Customs Valuation of changes in its national legislation, the *Customs and Excise Act 91 of 1964* and other rules relating to customs valuation. [81] This notification replaced the earlier one made under the Tokyo Round *ACV*. South Africa indicated, however, that its reply to the 'checklist of issues', given under the Tokyo Round code 'remains valid'.[82]

The Chairman of the Committee on Customs Valuation proposed to conclude the examination of South Africa's valuation laws. As no Member objected, the Committee agreed to conclude the examination.[83] Thus, by notifying the Committee of changes in its valuation laws and by providing responses to the checklist of issues, South Africa was deemed to have complied with the procedural obligations under Article 22(2) of the *ACV*. However, compliance

80 The others were Botswana, Lesotho, Malawi, Zimbabwe and Morocco.

81 See *Notifications Under Article 22.2 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 – South Africa*, WTO Doc G/VAL/N/1/ZAF (1996).

82 Ibid. For the reply to the checklist, see *Information on Implementation and Administration of the Agreement*, GATT Doc VAL/2/Rev.1/Add.13 (6 April 1984) (Checklist of Issues – South Africa).

83 See WTO Doc G/VAL/N/1/ZAF, above n 81.

with the notification requirement does not mean that a country's laws and their application are fully compatible with the provisions of the agreement. This requires examination of compliance with the substantive obligations.

2 *Substantive Obligations*

Article 22(1) of the *ACV* requires each WTO Member to 'ensure, not later than the date of application of the provisions of [the] Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of [the] Agreement'. Given its developed country status, South Africa was expected to implement the agreement when it entered into force on 1 January 1995.

As mentioned above, South Africa notified changes to its valuation laws in August 1996. South Africa's valuation laws and regulations are contained in the *Customs and Excise Act 91 of 1964* ('the Act'), as amended, as well as in the *Customs and Excise Rules 1995* ('the Rules'). The Act and the Rules together contain nearly eighty sections or sub-sections, dealing with specific provisions of the *ACV*.[84] Sections 65, 66 and 67 of the Act implement Articles 1 through 8 of the *ACV*. These sections repeat almost verbatim the words and language used in the agreement.

For instance, section 65(1) provides, as in Article 1 of the *ACV*, that the value for customs duty purposes of any imported goods shall be 'the transaction value thereof', and section 66(1) defines the transaction value as 'the price actually paid or payable for the goods'. Section 67, entitled 'Adjustments to price actually paid or payable', merely repeats, almost verbatim, Article 8 of the *ACV*. South Africa's law (section 66(3) of the Act) also conforms to the provisions of the agreement regarding related party transactions (Article 1(2)(a) and 1(2)(b)), by stating, inter alia, that the fact that a buyer and a seller are related 'shall not in itself be a ground for not accepting the transaction value' (section 66(3) of the Act).

Articles 2 through 7 of the *ACV* provide for other valuation methods, which must be applied sequentially in determining the customs value whenever it cannot be determined under the provisions of Article 1. Here again, South Africa's customs laws implement the valuation agreement. Section 66(4) of the Act provides for determination on the basis of identical goods; section 66(5) provides for similar goods; section 66(6) and (7) refer to the deductive method; and section 66(8) to the computed method. These provisions broadly conform to those of Articles 4, 5 and 6 of the *ACV*.

Section 66(9) of the Act fully conforms to Article 7 of the *ACV* by explicitly excluding the same elements listed in that Article from value determination. These include: the selling price in South Africa; a system which provides for the

84 See South African Revenue Service, *Customs and Excise Valuation Guide* (2002) (copy on file with author). The Correlation Table, at 45, correlates Articles 1–16 of the Customs Valuation Agreement with corresponding provisions of the Customs and Excise Act. The author obtained a copy of the Guide from the South African Revenue Services in 2003. It is understood the Guide is currently being redrafted, although the new version is not yet available and the author's version remains in force at the time of writing: see South African Revenue Service <http://www.sars.gov.za/ce/Brochures/Brochures.htm> at 12 August 2007.

acceptance for customs purposes of the higher of two alternative values; the selling price of goods on the domestic market of the country of origin or of exportation of the imported goods; the price of the goods to a country other than South Africa; and a system of minimum values or arbitrary or fictitious values.

In sum, South Africa appears to be in almost full compliance with the provisions of Articles 1 through 8 of the *ACV*, which set out the essential valuation methods. However, the power of the Commissioner to determine the transaction value of 'any imported goods' (section 65(4)(a)) and to 'amend or withdraw any such determination and make a new determination' (section 65(5)) may raise concern about how such power is used. The United States challenged similar provisions in Thailand's *Customs Act BE 2469*, which states that, 'the Director-General shall have the power to determine the customs value'.[85] Notwithstanding the extent of the Commissioner's discretion, however, South Africa is in near complete compliance with the obligations under the valuation methods. Attention now shifts to the other provisions.

3 *Subsidiary provisions*

Apart from the main provisions of Articles 1 through 8 of the *ACV*, which establish the primary and secondary methods of valuation, there are subsidiary provisions that concern the administration of the valuation system. These include the provisions on the currency conversion (Article 9); confidentiality of information (Article 10); right of appeal and due process (Article 11); transparency (Article 12); and the availability of surety system (Article 13).

(a) Currency Conversion

Sections 73(1) and (2) of the Act were inserted in 1995 to provide for currency conversion. According to section 73(1), conversion of foreign currency for the purpose of calculating customs value would be 'at the selling rate at the date of shipment of the goods as determined by the Commissioner, in consultation with the South African Reserve Bank, or if no such rate is determined for such date, the latest rate determined before that date shall be used'.

This provision appears to leave the determination of the conversion rate to the Commissioner 'in consultation with' the Reserve Bank. This is not in full conformity with Article 9, which requires a market determined rate by stipulating that the exchange rate must reflect 'the current value of such currency in commercial transactions in terms of the currency of the country of importation'. In theory, at least, the Commission's discretion to determine the rate of exchange suggests that he or she could intervene in the normal operation of the market in determining the rate of exchange.

85 *Customs Act BE 2469* (Thailand), s 11 bis. See also *Answers to Questions from the United States regarding Notification under Article 22 of the Agreement on Customs Valuation*, WTO Doc G/VAL/W/130 (2004) 1 (Communication from Thailand).

(b) Confidentiality of information

Section 4(3) of the Act forbids the disclosure of confidential information, but goes on to say that an officer can disclose such information '… in relation to any person as may be required by the Chief of the Central Statistical Services in connection with the collection of statistic in complying with the provisions of the Statistics Act 1976, or any regulation thereunder' (section 4(3)(c)). This provision goes further than Article 10 of the *ACV*, under which the only exception is disclosure 'in the context of judicial proceedings'. If confidential information provided by traders and foreign governments for the purposes of customs valuation can be disclosed in other unrelated legal contexts, other than in judicial proceedings, the object and purpose of Article 10 would, arguably, be undermined.

(c) Right of appeal and due process

The provision of the *ACV* on rights of appeal (Article 11) is implemented in section 65(6) of the Act, which provides that an appeal against any value determination shall lie with 'the division of the Supreme Court having jurisdiction to hear appeals in the area'. However, an individual can lodge an internal administrative appeal under Part A of Chapter XA of the Customs and Excise Act. This is in line with the provision of Article 11(2) of the *ACV*, which states that an initial right of appeal may be to 'an authority within the customs administration', provided there is the right in the final instance to a judicial authority.

The appeal process is, however, often criticised. In theory, the process provides adequate safeguards for the trader. A trader can challenge penalties or other customs decisions administratively, through an internal procedure, or judicially, through the High Court. However, the administrative procedure is not independent of Customs, which is the enforcement agency.[86] Initial appeals are always to the officers who made the decision in the first place and the outcomes of such appeals are often predictable. Often, too, the headquarters review of referrals from Branches simply confirms the facts of the declaration and then issues a determination to that effect.[87] Experts have suggested the need for the Customs authority to develop and publish a complete guideline on how the appeal process is to operate.[88]

(d) Transparency of customs and trade regulations

Article 12 of the *ACV* on transparency requires that laws, regulations, judicial decisions and administrative rulings of general application giving effect to the agreement must be published in conformity with Article X of *GATT*. Article X is the main transparency obligation of the *GATT*, and has been interpreted and

86 Article X:3(b) of *GATT* provides that administrative tribunals or procedures 'shall be independent of the agencies entrusted with administrative enforcement'. The aim is to ensure an objective and impartial review of administrative action relating to customs matters.

87 J Mark Siegrist, Consultant Report for the South African Revenue Service, 8 April 2003 (copy on file with author).

88 Ibid 10.

applied by WTO Panels and the Appellate Body. For instance, in *US – Underwear*,[89] the Appellate Body describes Article X:2 as embodying 'a principle of fundamental importance', namely, that of 'promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality'.[90]

South Africa's trade laws, administrative guidelines and judicial decisions are generally available on the Internet. There are several guidelines, operating procedures and instructions for valuation staff and importers. Part II of the Valuation Guide contains 'Notes for the guidance of importers'. The South African Revenue Service's ('SARS') Intranet and external websites as well as several circulars are further means of providing guidance on valuation practice in a number of specific areas. This suggests that in terms of compliance with the transparency obligations of Article 12 of the *ACV* and Article X of the *GATT*, South Africa has taken positive steps, although there are concerns about whether information and guidelines are up to date and easily accessible by those who need them.

(e) The establishment of a surety system

Although goods can be released on a 'special bond' in South Africa,[91] there is no provision in the Act, or any regulation, explicitly implementing the provision of Article 13 of the *ACV*. The South African Customs authorities argue in Note 35 of 'Notes for the Guidance of Importers' that Article 13 is not intended to cover 'cases which involve violations of Customs Laws or fraud', in which case, the release of the goods or the provision of guarantee in relation to possible penalties 'will fall in the discretion of Controllers'.[92]

This interpretation is arguably self-serving. The Panel in *US – Certain EC Products* confirms that Article 13 allows for a guarantee system to be used when there is uncertainty regarding the customs value of the imported products.[93] Only the courts can establish fraud. A situation where fraud is merely alleged but not yet proved may be covered by a guarantee system. In any case, the last sentence of Article 13 explicitly states that 'the legislation of each Member shall make provisions for such circumstances'. The failure to implement this obligation in South African law is at least a formal non-compliance even though a guarantee system may exist in practice.

In sum, unlike the procedural and substantive obligations discussed earlier, where South Africa is in full or substantial compliance, there appears to be inadequate compliance in areas affecting the exercise of domestic policy or regulatory discretions. For instance, while South Africa has notified its valuation

89 *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WTO Doc WT/DS24/AB/R (1997) (Appellate Body Report adopted 25 February 1997).

90 Ibid 21.

91 See, eg, *Standard General Insurance Company Limited v. Commissioner for Customs and Excise* 2004 (02) SA 622 (SCA).

92 South African Revenue Service, above n 84.

93 *United States – Import Measures on Certain Products from the European Communities*, WTO Doc WT/DS165/R (2000) (Report of the Panel adopted 17 July 2000).

laws and has transposed Articles 1 through 8 of the *ACV* into its domestic laws, there has been lack of formal implementation of the provisions on currency conversion, protection of confidential information and establishment of a surety system. So, South Africa's record of compliance is mixed: it has achieved substantial compliance, but there are areas of inadequate compliance or where compliance is not clear. The focus now shifts to the compliance record of Nigeria.

C Nigeria's Implementation Experience

For many years, Nigeria has been using the Brussels Definition of Value ('BDV')[94] for the valuation of imported goods. Unlike South Africa, it was not a signatory to the 1979 Tokyo Round Valuation Code, and only became bound by the *ACV* under the single undertaking rule. How has Nigeria performed with respect to the implementation of the customs valuation agreement? Its compliance record is examined next.

1 *Procedural Obligations*

Like most other developing country Members of the WTO, Nigeria invoked Article 20(1) to delay application of the provisions of the *ACV* for a period of five years. It also invoked Article 20(2), which allowed it to delay application of the computed value method for a period of three years from the date of application of all other provisions of the *ACV*. Finally, Nigeria reserved the right to provide that Article 5(2) of the *ACV* shall be applied whether or not the importer so requests.[95]

Nigeria did not request an extension of the five year delay period, although it could have done so under Annex III, paragraph 1 of the *ACV*. As a result, as of January 2000, it should have notified its implementing laws and provided replies to the checklist of issues. However, Nigeria has, to date, done neither of these. It has thus failed to comply with the procedural obligations set out in Article 22 of the *ACV*.[96] The lack of notification raises the question about whether or not Nigeria is, in fact, applying the agreement on the ground. The next section, therefore, looks at its compliance with the substantive obligations.

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94 The Brussels Definition of Value ('BDV') is based on an entirely different concept to the WTO valuation system. While the WTO *Customs Valuation Agreement* is founded on a positive concept; the BDV is based on a notional concept. Under the notional concept, there is a single theoretical, standard value: the normal price of the goods. This normal price is the price the goods would fetch on a sale in the open market under specified conditions. However, the approach is starkly different to the positive concept. Here, the primary method of establishing the customs value is not a notional open market price, but rather the real transaction value of the imported goods, that is, the price actually paid or payable for the goods being valued. For a more comprehensive comparison between the two international systems of customs valuations: see World Customs Organisation, *The Brussels Definition of Value and the GATT Valuation Agreement – A Comparison* (1985).

95 *Marrakesh Agreement Establishing the WTO Done at Marrakesh on 15 April 1994 – Communication from Nigeria*, WTO Doc WT/Let/106 (1996).

96 See *Eleventh Annual Review of the Implementation and Operation of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994*, WTO Doc G/VAL/W/150 (2005) (Background Working Document by the Secretariat).

2 *Substantive Obligations*

As noted earlier, before the WTO *ACV* entered into force, Nigeria was using the BDV for customs valuation. Nigeria's customs laws are contained in the *Customs and Excise Management Act 1990* ('CEMA') and subsidiary legislation, such as the *Customs and Excise (Dumped and Subsidised Goods) Act 1958* and the *Pre-Shipment Inspection Decree 1979*, as amended. The provisions on valuation for customs purposes are set out in the First Schedule of the CEMA, and these are based on the BDV.

Paragraph 1(1) of the First Schedule provides that 'the value of any goods imported for use in Nigeria shall be taken to be the normal price, that is to say, the price which, in the *opinion* of the Board such goods *would* fetch at the time when the duty becomes payable on a sale in the open market between a buyer and a seller acting independent of each other' (emphasis added). Paragraph 5 provides that currency conversion for valuation purposes are to be based on 'the current official rate of exchange in Nigeria'.

These provisions are clearly at odds with those of the *ACV*, which require that customs value be determined on the basis of the transaction value method (Article 1 read with Article 8)) or where it cannot be determined on the basis of the transaction value, then the use, sequentially, of methods based on the identical goods, similar goods, deductive value, computed value, and other 'reasonable means consistent with the principles and general provisions' of the *ACV* (Articles 2 through 7). Article 9 of the *ACV* states that exchange rates must reflect the current value in commercial transactions. Furthermore, Nigeria's existing legislation is incompatible with the subsidiary provisions of the *ACV* dealing with currency conversion, protection of confidential information, rights of appeal and due process, and the establishment of a surety system.

(a) Recent Developments: the Customs and Excise Amendment Act

In June 2003, the Nigerian Parliament adopted legislation for the implementation of the *ACV*. The *Customs and Excise (Amendment) Act 2003* sought to implement some of the obligations of the customs valuation agreement. In particular, the amending Act substitutes a new Schedule for the First Schedule of the CEMA, 1990. Paragraph 1 of the new Schedule replaces the BDV with a system based on the transaction value. However, the act is deficient in many respects. For instance, as the WTO points out, the Nigerian 'customs regulations do not contain provisions concerning appeal of customs decisions'.[97]

Yet, although the new legislation was introduced since 2003, it has, as of May 2007, not come into effect, and has not been notified to the Committee on Customs Valuation.[98] Nigeria's failure to bring the new legislation into force means that its valuation regime still reflects existing practice and therefore is incompatible with WTO rules. Many senior customs officers have argued that,

97 *Trade Policy Review Body – Trade Policy Review: Nigeria*, WTO Doc WT/TPR/S/147 (2005) 28 (Report by the Secretariat).

98 Nigeria's notifications to the WTO are available at WTO, *Nigeria and the WTO*, <http://www.wto.org/english/thewto_e/countries_e/nigeria_e.htm> at 12 August 2007. No notification has been made in respect of the customs valuation agreement.

despite the new legislation, the *ACV* could not be implemented in Nigeria unless the Act establishing the Pre-Shipment Inspection System was repealed. As one put it, 'if we do not repeal the *Pre-shipment Inspection Decree No 11 of 1996*, establishing the PSI scheme, we cannot begin to implement the *GATT* Valuation Agreement'.[99]

Nigeria has operated the pre-shipment inspection ('PSI') scheme intermittently for over 25 years in order to tackle the problems of customs malpractices. Despite recent promises to replace the PSI scheme with a destination inspection scheme, the pre-shipment inspection decree remains part of the legal framework of the Nigerian customs administration. Currently, Nigeria operates a double inspection system, requiring both pre-shipment inspection and 100 per cent on-arrival or destination inspection. Pre-shipment inspection agents appointed by the government inspect all imported products and are also authorised to carry out the customs valuation, using the BDV. Even though many WTO Members regard the use of the BDV as unacceptable,[100] Nigeria's valuation regime is still based on this system.

In sum, Nigeria has effectively ignored the implementation of the *ACV*. Nearly ten years since Nigeria became legally bound to implement the agreement it has failed to comply with its obligation. The implementing legislation introduced in 2003, even though defective in some respects, has, to date, not been brought into effect or notified to the WTO.

All the cases examined in this article, indeed, show some degrees of non-compliance or partial compliance with the agreement. While Nigeria represents the extreme case of complete non-compliance, South Africa presents a mixed picture of substantial yet incomplete compliance. As for the wider developing countries, the evidence suggests either non-compliance, for the vast majority of poor developing countries, and partial compliance, for some of the advanced developing countries. It remains now to explain the behaviour of these countries in the light of the theoretical argument made earlier in the article.

V EXPLAINING THE COMPLIANCE BEHAVIOUR OF SOUTH AFRICA AND NIGERIA

The obvious question that follows from the above findings is: what are the reasons for the behaviour of these countries or which of the variables discussed in the theoretical section above best explain their compliance behaviour? There is little evidence that enforcement and reputational factors have played any major role in influencing the behaviour of these countries. Although WTO Members frequently challenge the WTO compatibility of one another's valuation regime, there has, to date, been no dispute resulting in requests for the establishment of Panels. There is, indeed, little evidence that Members are acting in the shadow of

99 Interview with a Deputy Comptroller-General of the Nigerian Customs (Abuja, Nigeria, 8 December 2003).

100 The US states that it attaches importance to the issue because the use of the BDV is unfavourable to its exporters, see *Minutes of the Meeting of 11 April 2001*, WTO Doc G/VAL/M/20 (2001) 11 (Committee on Customs Valuation).

the law – concerned about litigation or legal enforcement. Also, the managerial variable fails to provide strong explanation for the behaviour of these countries.

The WTO Secretariat has worked closely with the World Customs Organization ('WCO') and the United States Agency for International Development ('USAID') to provide technical assistance and support for capacity building for many developing countries on customs valuation.[101] Nigeria and many other developing countries have benefited from these technical assistance and capacity building initiatives. In 1997, Nigeria informed the Committee on Customs Valuation about the technical assistance it had received,[102] and confirmed in 1998 that it had received advice from the WCO on the drafting of its valuation legislation and procedures.[103] Yet, despite this assistance and support, Nigeria has, to date, failed to bring its law into conformity with the agreement.

The variables that seem to provide the strongest explanation are lack of normative commitment to the *ACV* and the negative perceptions of its legitimacy and fairness. For instance, even though India and Brazil later acceded to the Tokyo Valuation Code after initial strong opposition to it, their attitude to the WTO valuation agreement strongly suggests that their *ex post* positions continue to mirror their *ex ante* preferences in the 1970s and 1980s when the valuation agreement was negotiated. As noted earlier, India has consistently called for a renegotiation of the agreement, which it believes to be flawed.

During the Uruguay Round, Nigeria was one of the developing countries that did not support negotiations on customs valuation and pre-shipment inspection, both of which could affect how imported goods are verified and valued.[104] In his speech at the *GATT* ministerial meeting at Brussels in December 1990, the Nigerian Trade Minister complained that Nigeria was 'constrained to negotiate its programme of preshipment inspection which is not a non-tariff measure'.[105] He argued further, in respect to the valuation system, that he could not understand why the developed countries refused 'to accept a price verification procedures based on a broad spectrum',[106] as would be possible under the BDV but not under the *GATT* Valuation system.

That Nigeria is today reluctant to implement the *ACV* is, therefore, of little surprise. The agreement is seen as an exogenous law that hardly reflects the preferences and needs of the country. In Nigeria, customs duties accounted for 21 per cent of total federal government revenue in 1995, second after petroleum

101 For references to the WCO/USAID valuation programme, see *Minutes of the Meeting of 8 March 2004*, WTO Doc G/VAL/M/37 (2004) (Committee on Customs Valuation).

102 See *Minutes of the Meeting of 23 October 1997*, WTO Doc G/VAL/M/6 (1997) (Committee on Customs Valuation).

103 See *Minutes of the Meeting of 8 May 1998*, WTO Doc G/VAL/M/7 (1998) (Committee on Customs Valuation).

104 See Page, above n 56.

105 *Nigeria*, GATT Doc MTN.TNC/MIN(90)/ST/34 (1990) 2 (Statement by Hon Mr Senas J Ukpanah, Minister of Trade and Tourism).

106 Ibid.

profit tax, which accounted for 46 per cent.[107] Concern about loss of revenue from customs malpractices is the primary reason why Nigeria continues to use a double inspection system, requiring both pre-shipment inspection and 100 per cent destination inspection.

But for the single undertaking rule, Nigeria would have remained outside the *ACV*. The agreement is thus, to Nigeria, an imposition, and lacks legitimacy. In 2001, during the Doha Ministerial conference, Nigeria complained that there was no level playing ground in the WTO because 'only one side is heard in arguments and on issues that affect all our countries'.[108] There is no normative commitment to most WTO rules in Nigeria, and lack of ownership as well as negative perceptions about the legitimacy, fairness and appropriateness of these rules are inhibiting their internalisation.

By contrast, South Africa's accession to the Tokyo Round valuation code was endogenous, arising from self-selection. The valuation code came into effect in 1981, and South Africa acceded to it in 1983 without invoking the special and different treatment provisions, given its developed country status. South Africa's near complete compliance with the substantive obligations of the *ACV* appears to be linked to the fact that it accepted the valuation agreement on its own will and did not believe it harms its interests in any significant way. Indeed, South Africa's authorities claim that the agreement 'works well with no major problems arising in the administration thereof and no discernible increase or decrease in revenue which can be attributed to it'.[109]

Yet, it is necessary to put South Africa's attitude to the valuation agreement in proper context. Unlike most developing countries, customs duties assume less relevance in South Africa's fiscal policy. Since the early 1990s, the role played by tariff revenue (customs duties) in South Africa's fiscal policy has declined due to trade liberalisation. While the average tariff revenue in Africa was 19.6 per cent in 1990, falling marginally to 17 per cent in 1998, in South Africa, tariff revenue fell significantly from 9 per cent in 1990 to 4.2 per cent in 1998, and fell further to 3.5 per cent of total revenue in 2002.[110] Therefore, South Africa is less motivated by concerns of loss of revenue from customs duties.

Another important factor in explaining the South African position is the fact that nearly 25 per cent of the country's products are excluded from the coverage of the *ACV*, as these products are subject to non-ad valorem duties.[111] By keeping a quarter of its tariff lines, mostly sensitive products, outside the scope of the *ACV*, South Africa is, arguably, more able to adhere to the WTO valuation rules

107 Central Bank of Nigeria, *2003 Annual Report and* Accounts (2003) available from <http://www.cenbank.org/documents/annualreports.asp?beginrec=21&endrec=40 2003> at 12 August 2007.

108 Oxfam, *Oxfam Position on 27 October draft Doha Ministerial Declaration* (2001) <http://www.oxfam.org.UK/what_we_do/issues/trade/doha27100.htm> at 29 March 2007.

109 See South African Revenue Service, above n 84, 1.

110 Michael Keen (ed), *Changing Customs: Challenges and Strategies for the Reform of Customs Administration* (2003).

111 International Monetary Fund, *South Africa: 2005 Article IV Consultation – Staff Report; Staff Statement; and Public Information Notice on the Executive Board Discussion* (2005) <http://www.imf.org/external/pubs/ft/scr/2005/cr05346.pdf> at 12 August 2007.

without much concern about revenue loss.[112] It seems, therefore, that South Africa is able to comply substantially with the *ACV* largely because it can live with the constraints imposed by its obligations.

Even so, as the findings above show, there is incomplete compliance in areas affecting national regulatory authority, namely: the discretion of the Commissioner; the use of confidential information provided for the purposes of customs valuation; and the provision of a surety system, whereby goods must be released on the provision by the importer of sufficient guarantee. There is incomplete or inadequate compliance with *ACV* obligations in these areas. It would appear that South Africa wants to retain regulatory autonomy or have the policy space or flexibility to intervene in these areas without being constrained by the WTO customs valuation rules. This confirms rather than undermines this article's argument that perceptions of appropriateness, reasonableness and fairness of rules would play a major role in shaping states' compliance with them. So, then, what lessons follow from these findings?

VI CONCLUSION: LESSONS FROM THE CASE STUDIES

This article has examined the nature of the effectiveness of the WTO customs valuation law in some developing countries and has highlighted the key variables explaining the determinants of these countries' compliance behaviour. The findings support the main theoretical arguments or hypotheses in this article, namely that compliance with international rules is largely a function of the legitimacy of the rules; legitimacy being defined in terms of procedural fairness, voluntary consent and fair and just outcomes. The *ACV* violates these normative principles.

First, there was lack of active developing country participation in the technical negotiation of the agreement, due to lack of capacity as well as the 'club-like' nature of the negotiation.[113] Second, the agreement was imposed in a 'do-it-my-way' manner by the developed countries, thereby lacking the voluntary consent of most developing countries. These countries had previously rejected the Tokyo Round valuation agreement, but were left with no option except to accept the same agreement, virtually unchanged, under the Uruguay Round single undertaking rule.

Third, the agreement failed the output or outcome legitimacy test, as its substantive obligations inadequately reflect the preferences and needs of developing countries, most of which rely on customs duties for a high proportion of their fiscal revenue and have legitimate concerns about valuation malpractices,

112 Section 71(2) of the *Customs and Excise Act 91 of 1964* (South Africa) provides that the transaction value method may be applied to motor vehicles imported for personal use.

113 See Rege, above n 54, Finger, above n 28 and Page, above n 56.

such as undervaluation, concealment and forgery.[114] Furthermore, implementing the agreement requires enormous investment in technology and human resources. The violation of the principles of voluntary consent, procedural fairness and reasonable outcome has, thus, undermined the legitimacy of the valuation law.

These findings have far-reaching implications for the WTO. Clearly, the integrity of WTO law and the legal system will be seriously undermined if the legal commitments that governments make are not as dependable as their binding legal form would suggest. The effectiveness of international law depends on whether or not states routinely and voluntarily comply with its rules. Yet, the traditional jurisprudential presumption about states' duty to obey international law can easily be rebutted if the law or the process of formulating it violates other important normative principles. As Kumm argues, 'only if and to the extent that international law is legitimate is there a moral duty to obey international law'.[115]

Perhaps the biggest threat to the legitimacy of WTO law is the single undertaking rule. Although this principle, introduced during the Uruguay Round, was informed by the desire to tackle some of the 'birth defects' of the *GATT*, including the à la carte approach, which allowed contracting parties to pick and choose which agreement to accede to, the real effect of the rule has, however, been to create one-size-fits-all blueprints and force countries, irrespective of their level of development, to accept agreements that they would otherwise not have accepted.[116]

The single undertaking principle departs from the well established treaty doctrine of reservations. It attenuates the link between a state's voluntary (rather than forced) consent and the existence of binding obligations. It then creates a situation in which some developing states do not feel a sufficient sense of duty to implement certain WTO obligations, since they perceive that these commitments were forced on them. These are not the conditions under which any international

114 Article 17 establishes the rights of customs administration 'to satisfy themselves as to the truth or accuracy of any statement, document or declaration presenter for customs valuation purposes'. Also, the *Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value* (also known as the Decision on Shifting the Burden of Proof) appears to strengthen the position of customs officers vis-à-vis fraudulent importers: WTO Doc LT/UR/D-4/2 (1994). However, the requirement in Article 16 that customs officers must explain their decisions on valuation determination in writing is seen by some as limiting their flexibility 'as decisions are often based on intuition or experience with a particular importer and often the invoices produced are expertly falsified in the country of import with the company heading embossed and necessary details and evidence provided': see *Meeting of African Trade Ministers: Libreville 13–15 November 2000*, WTO Doc MM/LIB/WS1/4 (2000). The general view among customs officials is that the real burden of proof is on the customs administrations and not on the importer, notwithstanding the Ministerial Decision. They fear that the implementation of the ACV requires them to accept the declared transaction value – even when unreasonable – unless the customs authorities can unequivocally disprove the authenticity of the supporting invoice: see François Corfmat, 'Issues and Strategies for Technical Assistance to Developing Countries' (Paper presented at the Seminar on Technical Assistance on Customs Valuation, Geneva, 6–7 November 2002).

115 Kumm, above n 25, 908.

116 The notion of legal symmetry that underpins WTO law, whereby all countries are essentially assumed to be formally equal under the law of the WTO ignores the actually reality of economic asymmetry that characterises WTO membership.

law, not least WTO law, with its distributional effects, can induce voluntary compliance by its addressees.

The single undertaking principle has been the subject of considerable scholarly discussions in recent years.[117] In 2005, the Consultative Board, set up by former Director-General of the WTO, Dr Supachai Panitchpakdi, to examine the question of institutional reform in the WTO, discussed the merits and demerits of the single undertaking principle. They concluded that going forward the best approach was 'variable geometry' in WTO commitments or a multi-speed WTO.[118] Thomas Cottier tried to build on the theory of variable geometry by proposing a new regulatory theory, based on progressive regulation, whereby developing countries accept WTO obligations in a graduated manner.[119]

The common trend in these approaches is a recognition that a one-size-fits-all framework of rules is unsuitable for a highly asymmetrical organisation such as the WTO, where Members are at different levels of economic development. Indeed, from an economic point of view, given the reality of economic asymmetry, shaped by different distribution of income and wealth among WTO Members, a one-size-fits-all legal blueprint is unlikely to produce socially efficient outcomes.

From a legal perspective, this thesis has shown that forcing trade commitments on unwilling countries produces resentment and non-compliance, which cannot be remedied by a strong enforcement or punishment regime or even by provision of technical assistance. The principle of good faith fulfilment of treaty obligations derives from, and is kept in force by, the voluntary agreement or consent of states. Genuine and voluntary state consent and ownership of international rules are essential for faithful implementation.

The argument, therefore, is both for differentiation and voluntarism. WTO agreements should be governed by certain irreducible constitutional principles to which any country, regardless of levels of development, must adhere as a condition of membership of the WTO. These constitutional principles are those of non-discrimination, transparency and rules of procedure. That is the extent to which the single undertaking principle should apply. Beyond these basic principles, substantive obligations requiring positive harmonisation, institutional transformation and even market access must be based on genuine consensus and voluntary consent.

The best model for the future is thus one based on differentiation in WTO law and a staged acceptance of WTO commitments by Members. In this regard, the modalities for negotiations on trade facilitation, agreed under the July 2004 Package, appear to reflect this flexible model. The modalities state, crucially, that

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117 See, eg Brian Hindley, 'What Subjects are Suitable for WTO Agreement' in Daniel L M Kennedy and James D Southwick, *The Political Economy of International Trade Law* (2002); Kenneth W. Abbott and Duncan Snidal, 'Values and Interests: International Legalization in the Fight against Corruption' (2002) 13 *The Journal of Legal Studies* S141; Cottier (2004).

118 See Peter Sutherland et al, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (2005).

119 Thomas Cottier, 'From Progressive Liberalisation to Progressive Regulation in WTO Law' (2006) 9(4) *Journal of International Economic Law* 779.

'the *extent* and *timing* of entering into commitments shall be related to the implementation capacities of developing and least developed Members' (emphasis added).[120] The agreement will still include key substantive obligations (for those who are willing and able to assume such commitments) but for developing countries that lack necessary capacity, and where technical assistance is not forthcoming, 'implementation will not be required'.[121] Unlike the *ACV*, which merely allowed for delayed implementation, the modalities for negotiating a WTO trade facilitation agreement are based on genuine differentiation and a multi-speed approach.

If the objective of the shift from the flexible *GATT* system to the 'hard law' regulatory approach of the WTO is to trigger trade law reforms and cause its Members to bring their trade and trade-related policies, rules, and practices into conformity with international trade norms, this article has shown that this objective has not been achieved in all cases or fully achieved in any case. There is little evidence that states are routinely adhering to the principle of good faith fulfilment of the WTO treaty obligations, while some, such as Nigeria, appear not to be implementing some of the agreements at all.

Furthermore, neither the WTO enforcement system nor the Trade Policy Review Mechanism has been used effectively to press many developing countries to bring their trade laws and regulations into conformity with WTO law. This suggests a de facto graduation or multi-speed system exists. Yet, from legal and systemic perspectives, non-compliance and lack of effective compliance mechanisms undermine the integrity of the WTO legal order. To preserve the integrity of WTO law so that states' legal commitments are meaningful, it may be necessary to formalise the de facto arrangements and explicitly provide for variable geometry in WTO law.

120 WTO, *Text of the 'July package' – the General Council's post-Cancún decision* (2004) <http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm> at 28 June 2007, Annex D, [3].

121 Ibid Annex D, [6].