

UNIVERSITY OF LONDON

**COMPLIANCE WITH WTO LAW IN DEVELOPING COUNTRIES:
A STUDY OF SOUTH AFRICA AND NIGERIA**

OLUSETO FASAN

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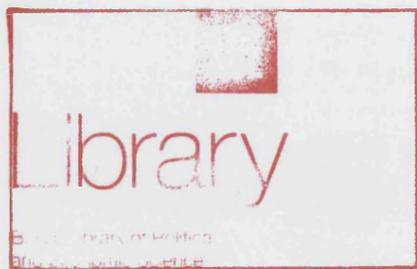


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ABSTRACT

This is a legal impact study. Its concern is the effectiveness of WTO law and its focus is the compliance behaviour of developing countries. Article XVI:4 of the WTO Agreement provides: “Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements” In the light of this overarching compliance obligation, this thesis examines the behavioural impact of WTO law, and investigates the preconditions for its effectiveness. In doing so, the experiences of two developing countries – South Africa and Nigeria – are considered.

Through extensive research conducted both in these countries and in Geneva, involving thorough examination and analysis of national legislation and case law, WTO obligations and jurisprudence, archival materials and other documentary evidence, as well as interview data, this thesis gives systematic and detailed accounts of the compliance experiences of both countries, and identifies the sources of their behaviour.

The research revealed that South Africa substantially complied with its WTO obligations, although there were areas of obvious non-compliance and areas where compliance was unclear. Nigeria, on the other hand, was in substantial non-compliance, with no WTO implementation legislation introduced to date. The research showed that WTO law did not have independent compliance pull. Its effectiveness depended on a combination of legal and non-legal factors.

One important shaping factor was ownership or endogenous preference. It was clear that *ex ante* preference for any agreement induced better *ex post* compliance with it, and vice versa. Domestic-level structures and processes also had strong explanatory powers, as did market considerations. The main contribution of this thesis has been to add to the understanding of the factors that influence developing countries’ compliance with WTO law, and, therefore, of the conditions under which WTO law is likely to be effective in many of these countries.

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Abbreviations

AB	Appellate Body
ACP	African Caribbean and Pacific States
ADA	Anti-Dumping Agreement
AGOA	African Growth Opportunity Act
ANC	African National Congress
ASGISA	Accelerated and Shared Growth Initiative of South Africa
BDV	Brussels Definition of Value
DTI	South Africa Department of Trade and Industry
CVA	Customs Valuation Agreement
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
ECOWAS	Economic Community of West African States
EPA	Economic Partnership Agreement
EU	European Union
FAFT	Financial Action task Force
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
IMF	International Monetary Fund
ITAC	International Trade Administration Commission
ITO	International Trade Organisation
MFN	Most-favoured-nation
NEEDS	National Economic Empowerment and Development Strategy
NEDLAC	National Economic Development and Labour Council
NFP	National Focal Point (Nigeria)
NGO	Non-Governmental Organisation
NT	National Treatment
NTB	Non-Tariff Barriers
NIEO	New International Economic Order
PPA	Protocol of Provisional Application
SACU	South African Customs Union
SADC	Southern African Development Community
SCM	Subsidies and Countervailing Measures Agreement
SDT	Special and Differential Treatment
SPS	Sanitary and Phytosanitary Measures Agreement
TBT	Technical Barriers to Trade Agreement
TPRB	Trade Policy Review Body
TPRM	Trade Policy Review Mechanism
TRIMs	Trade-Related Investment Measures Agreement
TRIPS	Trade-Related Aspects of Intellectual Property Rights Agreement
UNCTAD	United Nations Conference on Trade and Development
USTR	United States Trade Representative
WCO	World Customs Organisation
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

CHAPTER 1

INTRODUCTION:

COMMITMENT AND COMPLIANCE IN INTERNATIONAL TRADE LAW

Background to the Study

On April 15 1994, in Marrakech, Morocco, ministers from over one hundred countries signed the Marrakech Agreement Establishing the World Trade Organisation. This marked a turning point in the regulation of trade relations among sovereign states. Earlier cooperative efforts in the 1920s and 1930s, the interwar years, failed for lack of consensus among the major states. Although the post-war trade regime, under the General Agreement on Tariff and Trade (the GATT), was inspired by the interwar experience, it was nevertheless minimalist in nature, both in terms of its subject matter scope, its legal enforcement, and its addressees.

The legal and institutional transformation brought about by the Uruguay Round Agreement is, however, considerable. The WTO Agreement is the most comprehensive, elaborate, detailed, and legally binding multilateral economic treaty. Its dispute settlement system is “more far-reaching than any multilateral arrangement for resolution of disputes among states in history”.¹ WTO rules and disciplines extend beyond the traditional border measures to a significantly greater area of national regulatory activity. And, as a result of the single undertaking principle, developing countries, hitherto excluded from much of the earlier GATT disciplines, had to accept all the Uruguay Round multilateral rules as a condition of membership of the WTO.

The underlying philosophy of the new regulatory approach suggests that international trade relations are greatly dependent on and governed by legal forms and rules. The main assumption is one of behavioural constraints. WTO law is expected to constrain the behaviour of governments by imposing restraints on how they regulate trade and trade-related matters. Furthermore, WTO law is expected to trigger trade law reforms in countries where the quality of the legal and regulatory environment is deemed to be deficient or inadequate. Thus, Article XVI:4 of the WTO Agreement provides: “Each

¹ Lowenfeld (1995).

Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements". But what is the behavioural impact of this provision? Is there any significant relationship between the law and state behaviour, and if not why?

The overall thrust or concern of this thesis is the effectiveness of WTO law, and its specific focus is the implementation and compliance behaviour of developing countries. Two core research questions are posed:

- How and to what extent have some developing countries implemented and complied to date with their WTO treaty obligations?
- What factors have influenced their behaviour?

The first question seeks to answer the "effectiveness" question, the second focuses on the actual influences on the compliance behaviour of these countries. Thus, the thesis is not only concerned with the nature of the effectiveness of WTO law, but also the preconditions for its effectiveness. By investigating the sources of state behaviour, the thesis seeks to contribute to an understanding of the conditions under which WTO law is likely to prove more or less effective. The different terminologies or concepts are defined below.

Effectiveness, Implementation and Compliance

Effectiveness, used in different contexts, can mean a number of different things. According to Weiss and Jacobson, it relates to the question whether a treaty is effective in attaining its ultimate objectives.² This is a problem-solving approach that examines the degree to which a treaty eliminates or alleviates the problems, such as protectionism, that prompts it. However, effectiveness can also be seen from the point of view of the behaviour of targeted actors rather than the attainment of a particular normative goal.³ In this legal approach, as Oran Young³ put it, effectiveness refers to the degree to which treaty obligations are met.⁴ It is this legal approach that is adopted in this thesis. The study defines effectiveness in the context of specific obligations set out in the WTO treaty.

² Weiss and Jacobson (1998)

³ Victor, Raustiala and Skolnikoff eds. (1998)

⁴ Young ed. (1999).

Implementation and compliance can be confused with each other but they actually mean different things. Implementation refers to measures that states take to make international agreements effective in the domestic law.⁵ It comprises the myriad implementing acts of governments, including enactment, application and enforcement.⁶ Compliance, however, goes beyond implementation. It refers to whether countries, in fact, adhere to the provisions of the international agreement in question.⁷ A government may introduce national legislation to *implement* its international commitments; yet it cannot be assumed that the implementing legislation fully conforms to or *complies with* the provisions of the treaty in question.

Measuring compliance is more difficult than measuring implementation.⁸ In the absence of judicial authority, assessing the extent of compliance is, in the end, a matter of judgement.⁹ In this thesis, the focus is both on implementation and compliance. How this is achieved is explained in the section on methodology below. It is necessary, first, however, to explain the relevance and importance of the thesis.

Relevance of the Thesis

The legalisation of the WTO and the deepening and widening of its rule base have attracted considerable attention from a wide range of analysts and commentators. Several have focused on the development dimension of the legal transformation.¹⁰ However, little empirical analysis has been undertaken to systematically examine how developing countries are implementing and complying with their WTO obligations, and what factors are affecting their responses.¹¹

Yet, claims are often made about the effectiveness of the WTO law that are not empirically substantiated. For instance, Deborah Cass argues that, “it would seem that a habit of obedience to the WTO system is developing, illustrated by the high number of ratifications of the agreements”.¹² She also adds that, “the level of acceptance of

⁵ Weiss and Jacobson (1998, p. 4)

⁶ See Snyder (1993)

⁷ Weiss and Jacobson (1998, p. 4)

⁸ Ibid.

⁹ Ibid.

¹⁰ See, for example, Ostry (2000); Finger and Schuler (2000); and Srinivasan (1999)

¹¹ For studies on the implementation of WTO agreements, see: e.g., Shin (1996), Finger (2001) and Kusumadara (2002)

¹² Cass (2005, p.54).

WTO law and system is widespread". She admits, however, that socio-legal research is needed to prove these claims.¹³

Clearly, the increasing number of accessions to the WTO may indicate the importance that countries attach to the organisation, but it is not necessarily suggestive of their willingness to fully implement its rules or adhere to the principles of *pacta sunt servanda* and good faith fulfilment. This is because states' treaty commitments and their compliance interests are not necessarily in congruence. The legal commitments made by governments may not be as dependable as their binding legal form would suggest. A legal impact study is, thus, useful to assess the law in terms of its success in achieving its goals rather than solely in terms of its formal legalistic structure.

Implementation and compliance research, focusing on developing countries, is also particularly relevant for the following reasons. Developing countries constitute 4/5th of WTO membership¹⁴, yet, since its inception in 1995, the WTO has been crisis-ridden, with at least two failed ministerial conferences (Seattle, in 1999 and Cancun, in 2003), stemming mainly from the unhappiness of most developing countries about the Uruguay Round bargain and its aftermath.¹⁵ It would be useful to investigate whether these countries are faithfully implementing, partially implementing, or, indeed, resisting the implementation of these agreements in their national contexts. It is also useful to establish the factors that are actually influencing their behaviour.

Compliance research on WTO law is also relevant and important because of the expansionist agenda of the WTO. Despite the controversial nature of the Uruguay Round Agreement, there have been increasing pressures to expand the scope of the WTO.¹⁶ The Doha Round, launched in 2001, came about because of proposals to expand WTO rules and to strengthen or amend existing rules. If and when

¹³ Ibid, p. 55.

¹⁴ They account for approximately 120 out of the 150 members.

¹⁵ The launch of the Doha Development Agenda in 2001 was partly due to concerns of developing countries that the Uruguay Round was unfair, unjust and inequitable, leading to calls for renegotiating the WTO treaty and redressing its imbalances.

¹⁶ For instance, proposals to broaden the WTO rules resulted in the so-called Singapore issues, which included competition, investment, trade facilitation, and transparency in government procurement. Although only trade facilitation has been included in the ongoing Doha Round, the demand to broaden the WTO agenda has not subsided, some resulting from the in-built agenda in the WTO treaty itself, others flowing from the offensive interests of WTO members.

completed¹⁷, the round will result in another trade treaty that is bound to increase the commitments of all members, including developing countries.¹⁸ By examining compliance with the existing treaty, this study aims to add to the understanding of the conditions under which both present and future agreements are likely to be effective.

Normatively, the study also seeks to contribute to the wider debate about the legal and institutional reform of the WTO, particularly with respect to systemic issues such as rule making and rule application. For instance, are there merits in forcing all WTO members to sign up to the same sets of agreements *ab initio* under the single undertaking principle? What are the limits of centred decision-making and decentred implementation as a governance strategy? Is an overly legal view of the WTO system desirable or should there be a more nuanced conception of international trade law? Indeed, is law being unduly privileged over other governance structures as determinants of the economic behaviour of states? Based on findings from the case studies, some normative conclusions would be made in respect of these questions.

The Theoretical Argument

The basic argument of this thesis is that, despite the legalisation of international trade norms and the traditional reliance on the principle of *pacta sunt servanda* as their binding force, international trade law does not, in fact, have independent compliance pull; its effectiveness in shaping the behaviour of states will depend on a complex interplay between legal and non-legal factors.¹⁹ Law matters, but often only to the

¹⁷ In July 2006, the Doha Round was suspended after the failure of WTO members to make progress on the negotiating issues. On 24 July, the Director-General, Pascal Lamy, told the Trade Negotiations Committee meeting that it was necessary “to suspend the negotiations across the Round as a whole to allow serious reflection by participants” (the D-G’s statement is available at: http://www.wto.org/english/news_e/news06_e/tnc_dg_sta_24july06_e.htm). On 27 July, the General Council supported the suspension (see http://www.wto.org/english/news_e/news06_e/gc_27july06_e.htm). Although the suspension of the negotiations did not signal death of the Doha Round, efforts to restart the round have so far led to no breakthrough.

¹⁸ The least-developed countries are not expected to make tariff concessions in the Doha Round. However, other developing countries are under pressure to make significant concessions with respect to non-agricultural market access (NAMA), which covers industrial goods. They are also under pressure to accept significant commitments under the agreement on trade in services (GATS), and to accept some obligations with respect to trade facilitation measures. In addition, WTO rules are to be further tightened, especially with respect to trade remedies. In short, the scope of the existing WTO treaty is likely to be broadened.

¹⁹ The pure theory of law and traditional legal scholarship tend to ignore the role of non-legal factors. For instance, Hans Kelsen, who propounded the “pure theory” of law, believed that the existence, validity and authority of law had nothing at all to do with such non-legal factors as politics and

extent that non-legal forces work complementarily to the same end of rule compliance.

Furthermore, the principles of good faith fulfilment cannot be viewed in isolation of complimentary legal principles, such as fairness and equity. A law or regulation may be more or less effectively depending on the value that people place on the legal processes that produced it and whether or not they believe that both the processes and the outcomes are fair and just. These perception-based principles are essential preconditions for the effectiveness of international law generally and international trade law in particular, given its normative bias, distributional consequences, and adjustment costs.

The approach used in this thesis is inter-disciplinary. There is precedent for this approach in jurisprudence, where, for example, economic and sociological jurisprudential methods are used to assess the behavioural impact of law.²⁰ However, the methodological approach is not solely socio-legal. The thesis involves technical legal analyses of the compatibility of national implementing laws with the substantive WTO treaty obligations, and of national and WTO jurisprudence. The theoretical and explanatory chapters, core parts of the thesis, however, apply multidisciplinary theories and methodologies drawn from law and the social sciences.

The Empirical Focus

The empirical anchor for the theoretical arguments is the implementation of and compliance with certain WTO obligations by South Africa and Nigeria. To answer the core empirical question of how and to what extent WTO law affects the behaviour of certain developing countries, this thesis employs a set of dependent variables, namely

morality. However, this theory has been described as “useless as a device for understanding the complexities of laws and legal systems” (see Honderich [ed], 1995). The analytical approach of this thesis departs from the Kelsenian logic.

²⁰ While sociological jurisprudence seeks to determine the extent to which the creation and operation of law are influenced and affected by social interests, economic jurisprudence investigates the effects on the creation and application of the law of various economic phenomena. A political jurisprudential research uses legal and political variables to explain the form and content of law and its impact or consequences (see Danelski, 1983). Professor Hudec’s analytical approach of “transcending the ostensible” in assessing the creation and effect of international trade law is based on its social, economic and political contexts (See Hudec, 1987; see also Kennedy & Southwark, eds. 2002).

compliance with the WTO Customs Valuation Agreement, the TRIPS Agreement, as well as WTO rules on trade remedies and non-tariff measures.

Figure 1: The empirical focus consists of two countries and selected WTO agreements

	Dependent Variables		
	The WTO Customs Valuation Agreement	The TRIPS Agreement	WTO Rules on Trade Remedies and Non-Tariff Measures
SOUTH AFRICA	<ul style="list-style-type: none"> • Implementation and compliance records • Legal and non-legal determinants of regulatory responses 		
NIGERIA	<ul style="list-style-type: none"> • Implementation and compliance records • Legal and non-legal determinants of regulatory responses 		

In examining the implementation experiences and compliance records of these countries, the thesis examines extensively and systematically how and to what extent they have implemented the various agreements in their domestic laws, and have met the specific obligations set out in the agreements. Having established the compliance records of these countries in respect of these agreements, the thesis then attempts to explain their compliance behaviour, using the explanatory variables derived from the literature survey in chapter 2. The selection of the specific WTO agreements and of South Africa and Nigeria, however, needs to be justified, as well as the methodology used in the case studies and analysis.

Why Customs Valuation, TRIPS, Trade Remedies and NTMs?

The selection of the agreements studied in this thesis involves some choices. First, the preference is for agreements that involve a high 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 Customs Valuation agreement, the TRIPS agreement, the trade remedy rules, particularly the agreements on anti-dumping (ADA) and subsidy-countervailing measures (SCM), as well as the agreements on sanitary and phytosanitary measures (SPS) and technical barriers to trade (TBT) have frequently been singled out as the WTO agreements that impose the most significant implementation and compliance challenges.²¹

²¹ See, generally, Finger and Schuler (2000) and Finger (2001). On the implementation challenges of the agreements on anti-dumping and subsidies and countervailing measures, see, for example, Qureshi

These agreements impose “second generation” obligations, which, unlike mere tariff reductions that can be done with a stroke of a minister’s pen²², require significant legal, regulatory and administrative changes. For some developing countries these institutions would have to be created *de novo*; for others substantial changes have to be made in existing structures. Putting these agreements into practice often entails a complex process of adjusting domestic laws to conform to specific systemic rules.

The second consideration in the selection of the agreements is the degree of their acceptance or ownership by developing countries. One of the key hypotheses of this thesis is that *ex ante* preference for an agreement will induce better *ex post* implementation, and vice versa. Clearly, the negotiations of the Customs Valuation and TRIPS agreements, as well as the rules on trade remedies and non-tariff measures, were difficult and contentious.

While the developed countries were the main *demandeurs* of these agreements, most developing countries initially resisted their introduction. For instance, most developing countries did not accept many of the 1979 Tokyo Round codes until they became mandatory under the Uruguay Round Single Undertaking rule. Only three developing countries – India, Brazil and Argentina – acceded to the Tokyo Round valuation code at the outset and each invoked the code’s Special and Differential Treatment provisions.²³ Before the completion of the Uruguay Round, only about 10 developing countries had acceded to the code.²⁴

The Tokyo Round Anti-Dumping and Subsidies codes also had few developing country signatories. As for the TRIPS agreement, the negotiating history is legendary. Most of the developing countries initially resisted vehemently its introduction, and only later grudgingly accepted the agreement after some arm-twisting and side-payments by the developed countries.²⁵

(2000). On the customs valuation agreement, see, e.g. Shin (1996). On TRIPS: see, for example, Primo Braga and Fink (1998).

²² Ibid.

²³ For the negotiating history of the customs valuation agreement, see: Rege (1999) and WTO document G/VAL/W/95.

²⁴ Finger (2001)

²⁵ See Abbott (1998).

The general view is that these agreements are exogenous because of the ‘do-it-my-way’ manner in which the developed countries imposed them during the Uruguay Round.²⁶ The agreements are good candidates for compliance research. Exogenous law often raises the compliance issues that would normally not arise in respect of endogenous law. Given the seeming lack of ownership by most of the developing countries, it is useful to know whether or not they are adhering to the principles of *pacta sunt servanda* and good faith fulfilment of the obligations imposed by these agreements. It is also useful to establish the factors that are actually shaping their behaviour. In doing so, two developing countries, namely South Africa and Nigeria, are specifically examined.

Why South Africa and Nigeria?

The choice of South Africa and Africa is dictated by two factors. The first is the similarities and differences in their institutional and political economy structures. The second is their unique configurations, which should allow for some generalisations to be made about the likely behaviour of different categories of developing countries. In terms of the similarities, both countries are relatively large developing countries and regional powers, with South Africa the dominant economy in Southern Africa (and indeed sub-Saharan Africa), and Nigeria the dominant economic power in the West African sub-region.

There are also some similarities in the social indicators of these countries. Both have high levels of poverty, unemployment, inequalities, and are ravaged by the HIV/AIDS pandemic. Furthermore, while South Africa has a better public administration or bureaucracy than Nigeria, it is still generally beset by problems of capacity. These similarities should point to some convergence in the regulatory behaviour of the two countries. However, the two countries differ in some important respects.

First, South Africa has far more successful economy than Nigeria. South Africa’s GDP of \$213 billion in 2004 qualifies it as an upper middle-income country, while Nigeria’s GDP of \$72bn ranks it as a low-income country, according to the World Bank. Further, with a per capita income of about \$3,650 (World Bank, 2004), South

²⁶ Finger (2000).

Africa is a relatively rich country, while Nigeria's per capita income of \$400 places it among the poorest countries in Africa and the world. South Africa also has a far more sophisticated and diversified economy, and is often described as a "First World Country in the Third World". South Africa also enjoys greater macro-economic and political stability than Nigeria.

Institutionally, South Africa has far more sophisticated "hard" and "soft" infrastructure than Nigeria. For instance, South Africa's financial, telecommunication, and legal, systems are among the best in the world. Furthermore, there are policy differences between the two countries. They both took different approaches during the Uruguay Round. While South Africa was more supportive of most of the negotiations, seeing its offers as a mechanism to lock in its ongoing unilateral domestic reforms, Nigeria saw the whole process more as an imposition. These differences should show some variation in the compliance behaviour of the two countries.

However, the structures of the two countries also allow for some generalisations to be made about the behaviour of other developing countries. In some respects, both countries can serve as representatives of a cross section of developing countries. South Africa is clearly a cross between a developed country and a developing one, particularly in terms of institutional development. 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, each of the main case studies includes a shadow study of the implementation experiences of developing countries in general as gleaned from their reviews by the different WTO bodies.

Methodology

The thesis has two phases of enquiry resulting from the two research questions. The first phase aims to establish the implementation and compliance records of South Africa and Nigeria with respect to all the agreements considered, and the second phase sets out to explain the compliance behaviour of these countries by identifying the sources of their behaviour. The first part largely adopts a black letter law, expository methodological approach, as its focus is the extent of compatibility of

substantive national laws with WTO treaty provisions.²⁷ In doing so, all the compliance obligations of the WTO agreements and relevant WTO jurisprudence are first identified and examined.

Then, the relevant trade and trade-related laws and regulations of the two countries are thoroughly examined for their seeming consistency or inconsistency with the provisions of the agreements considered. The aim is also to identify the changes made since the WTO treaty entered into force, and the extent to which these changes can be said to be in conformity with the provisions of the relevant WTO agreements. The administrative and judicial practices of these countries are also examined. To this end, judgements of courts and administrative decisions, where available and relevant, are examined for their consistency or otherwise with the provisions of the specific WTO agreements.

Furthermore, all the relevant notifications and communications by both countries, and concerning them, are examined to identify the implementation and compliance issues that have been raised by the WTO Secretariat and by other WTO members, and the responses or explanations that both countries have provided. For the same purpose, the minutes of the meetings of the relevant WTO committees or councils from 1995 to December 2005 are examined, and any mentions of the two countries in these minutes are analysed.

While the first part reveals the compliance record of each of these countries, the second part seeks to explain their behaviour and identify its sources. As an explanatory phase, the second part adopts a socio-legal methodology. It relies considerably on interviews, ministerial briefings and other government official statements, records of parliamentary debates, news accounts, legal opinions and judgements of courts, as well as reports from NGOs, including business organisations.

²⁷ The Appellate Body in the *India-Mailbox* case said that “in public international law ...municipal law may constitute evidence of compliance or non-compliance with international obligations” (Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural and Agricultural Chemical Products – Complaint by the United States*, adopted 16 January 1998, WT/DS50/AB/R). Thus, by examining the municipal laws of South Africa and Nigeria vis-à-vis their WTO obligations, it is possible to establish their compliance records.

Reliance is also placed on interview and observation data collected at the WTO Secretariat in Geneva and interactions with the trade community in Geneva, including meetings and interviews with the WTO representatives of the two countries and other trade diplomats in Geneva. Inter-subjective evidence, that is, shared or common understanding, derived from complaints from other WTO members about national compliance by the two countries, as well as the responses provided by them, was also helpful in explaining their behaviour. In all, about 40 officials, trade diplomats and lawyers, academics, interest group representatives, both in Geneva and the capitals, were interviewed.

The Structure of the Thesis

Chapter 2 sets the subject matter of this thesis in historical and theoretical context, by describing the historical development of the GATT/WTO legal system; the nature and scope of the GATT/WTO obligations; and the theories of international rule compliance. The explanatory variables used in explaining the behaviour the two countries are derived from the extensive survey of literature in chapter 2. Chapter 3 focuses on domestic-level structures and processes and provides a snapshot of trade governance in South Africa and Nigeria. This is an essential background chapter that offers useful insights into the factors that might influence the internalisation of, or adjustment to, WTO rules and disciplines by the two countries.

Chapter 4 examines the implementation of Customs Valuation Agreement in South Africa and Nigeria. Chapter 5 does the same with respect to the TRIPS Agreement. Chapter 6 considers compliance by the two countries with the WTO rules on trade remedies and non-tariff measures (NTMs). The aim of chapter 6 is to complement the earlier case study chapters by examining more generally compliance with other WTO agreements. This is intended to provide a broader picture or completeness in the empirical investigation. Although the treatment of the agreements covered in chapter 6 is not extensive, the chapter should nevertheless confirm the patterns of behaviour established in the more detailed case studies.

Chapters 4, 5 and 6 are essentially legal analyses. They examine the conformity or otherwise of the provisions of the national implementing laws with those of the

relevant WTO agreements in the light of their ordinary meaning, context, and the object and purpose of these agreements.

Chapter 7 goes beyond legal analysis, however. It sets out to explain the compliance behaviour of both countries in the light of the findings, using some legal and non-legal explanatory variables. In short, chapter 7 employs the variables derived from the literature survey in chapter 2 and the insights gained from the analysis of the domestic structures of the two countries in chapter 3 to explain their overall compliance behaviour, as revealed by the case studies in chapters 4, 5, and 6.

Chapter 8 is the concluding chapter. It draws together the lessons or insights that emerge from the case studies. In particular, the chapter highlights the implications of the findings for the future of rule-making and rule implementation in the WTO, as well as for future inter-disciplinary research in international economic and trade law. It also makes some normative conclusions.

PART I: SYSTEMIC AND DOMESTIC CONTEXTS

CHAPTER 2

The Nature, Role and Effectiveness of International Trade Law

The purpose of this chapter is to set the subject matter of this thesis in historical and theoretical contexts by examining the historical development, role and effectiveness of international trade law. This overview is essential for the contextual analysis in the subsequent chapters. The chapter begins with a brief discussion on the nature and functions of international economic and trade law, and then its historical development, focusing on the modern system that emerged in the immediate post-war period with the creation of the Bretton Woods system and more recently the establishment of the WTO. This is followed by a description of the nature and scope of the WTO legal system and treaty obligations. Finally, the focus shifts to a survey of the literature on international law compliance. The aim is to develop a set of variables for explaining the compliance behaviour of the two case-study countries.

Introduction: Nature of International Economic Law

International economic law is that sub-system of public international law¹ that regulates trade and commercial relations among states. Its sources are diverse, although it is often associated with state-made law², notably treaties and conventions, which can be bilateral, regional, or multilateral. The instruments include hard law, soft law and, indeed, softer or non-law³. The subject matter of international economic law itself is not well defined, as many scholars in this field of study have noted.⁴ Professor Jackson observes that “90 per cent of international law work is in reality international economic law in some form or another”.⁵ This is a broad definition that

¹ Private international law or, as it is also known, conflict of laws, regulates commercial transactions between private actors from different nations or jurisdictions. See *Dicey & Morris on the Conflicts of Laws* (1993); *Cheshire & North's Private International Law* (1992).

² A predominant feature of global economic governance is, indeed, the increasing diversity of inter-connected law-making processes, which has prompted some scholars to refer to a “system of global legal pluralism” (Snyder, 2002). Thus, the approach that recognises only a state-centred system is wrong, since non-state and sub-state actors are playing increasing role in the development and enforcement of global economic regulatory instruments (Nowrot, 2004).

³ Snyder (1999) and Mistelis in Fletcher *et al* (2001)

⁴ See, e.g. Petersmann (1991), who noted that writing a book on international economic law is “like trying to describe a landscape while looking out the window of a moving train ...” at p.1. See also Jackson (1998) at p. 25; Qureshi, (1999, p.4); Cass (2005 at p. 86).

⁵ *Ibid*, p.8

embraces both the “public law” and “private law” aspects of international commerce. A narrow definition limits the scope to the public international law aspect, that is, rules governing the economic relations between states.⁶

This thesis focuses on WTO law, arguably the core aspect of international economic law. WTO law straddles several activities that belong in the wide net of international economic law, including trade in goods, trade in services (including financial services, telecommunications, electronic commerce etc), customs matters, intellectual property, as well as aspects of investment measures and competition rules. Indeed, given its strong enforcement mechanism, the tendency has been to expand the scope of the WTO by bringing every “trade-related” issue⁷ within the ambit of its legal system.⁸ Why, then, do states sign up to international economic treaties, and what functions are these treaties supposed to serve? The next subsection explains briefly the purpose behind international economic and trade law.

Rationales for International Economic Regulation and Law

There is a reciprocal relationship between law and economic globalisation.⁹ The integration of the global economy has gone hand in hand with the rise of law and law-making in the fields of trade and commercial relations.¹⁰ As Loukas Mistelis put it, “the era of globalisation of law¹¹ will inevitably accompany the globalisation of economy”.¹² Oran Young argues that, “the growth of interdependence increases the capacity of all relevant actors to injure each other”.¹³ Such failure of cooperation or collective rationality can result in the classic “tragedy of the commons”¹⁴, as the

⁶ Qureshi (1999).

⁷ On the question of “trade-relatedness” and linkages in the WTO, see various contributions in *American Journal of International Law*, Volume 96, issue 1 (Jan., 2002)

⁸ Broncker (1999) argues that this broad coverage has led to the WTO being referred to as an “embryo world government”, a sort of a global economic code (p.548).

⁹ For work on the relationship between economic globalisation and the law, see, e.g. the special issue of *European Law Journal* (Vol. 5, No.4 December 1999); Shams (2004); Fletcher et al (2001). On the general subject of global governance and international law, see: e.g. Harlow (2006); Nowrot (2004).

¹⁰ Pistor (2000)

¹¹ The term globalisation of law or global law refers to laws that apply, at least formally, if not *de facto*, uniformly across national boundaries and to most sovereign states. In terms of public international economic law, such global laws arise through binding multilateral conventions or treaties.

¹² Mistelis in Fletcher *et al* (2001, p.6). Mortensen (2000) argues that “globalisation and governance are mutually constitutive phenomena” (p176).

¹³ Young (1982).

¹⁴ Buchanan and Yoon (1999)

unilateral policies of self-interested governments harm the economic interests of other countries and reduce global welfare.

One explanation for the willingness of states to “share sovereignty” and accede to international trade treaties that constrain their regulatory authority is the shared concerns about such externalities. Increased integration and the possibility of externalities thus generate demand for cooperation.¹⁵ In other words, according to the collective goods theory, rational, egoistic state actors favour international rules in order to avoid the suboptimal outcomes of non-cooperation¹⁶, and to attain higher levels of collective welfare.¹⁷ As Clive Schmitthoff remarks, the global integration of international trade law has progressed rapidly because “trading nations appear to realise that in our shrinking world the global unification of international trade law is of immense practical benefit to the international business community”.¹⁸

However, although the globalisation of law, viewed from a functionalist perspective¹⁹, has obvious benefits, there are nevertheless pitfalls or drawbacks, at least from a development perspective. Normatively, all international regimes are biased. They establish hierarchies of values, emphasising some and discounting others.²⁰ From an economic point of view, market failure provides the social efficiency rationale for legal intervention, and trade policy and regulations are among the areas where law is deemed to have economic objectives.²¹ The main object of international trade law,

¹⁵ Milner, (1997).

¹⁶ For a comprehensive discussion of the relationship between rationality and rule creation and rule-following, see Keohane (1982/1984), Buchanan and Yoon (1999), Rittberger ed. (1995), and Abbott and Snidal (1998).

¹⁷ Indeed, other potential sources of gains from international cooperation are economies of scale. By sharing resources through, e.g., coordinated rule-making and surveillance, states may achieve efficiencies that are unlikely to exist in situations of detrimental regulatory competition and unjustified regulatory disharmony (see Dunloff and Trachtman, 1999, p. 16).

¹⁸ Schmitthoff (1990), p.vii.

¹⁹ The functionalist school stresses that international trade rules have important operational functions, such as increasing the predictability, certainty and stability needed for efficient global trade and investment flows (Jackson, 1998). The harmonisation of trade and commercial laws and practices also help to facilitate commerce by reducing regulatory disparity and barriers, and other forms of transaction costs.

²⁰ Puchala and Hopkins (1982).

²¹ For an understanding of the basic principles in economic approach to law, see Posner (1977) and Burrows and Veljanovski (1981). For the economic analysis of international law, see, e.g. Dunloff and Trachtman (1999).

therefore, is to legitimise the economic theory of comparative advantage²² and to elevate economic liberalism.²³ While developing countries often clamour for equity, fairness and justice, the aim of international economic law is mainly to produce an efficient²⁴ rather than a just and equitable regime.

Furthermore, the world trade regime is a projection of the asymmetrical distributions of power and resources in the world economy.²⁵ The developed countries have been far more successful than the developing ones in pursuing their domestic policy objectives and commercial interests through the multilateral trade order.²⁶ The failure of international trade law to take sufficient account of the interests and preferences of developing countries has led to the view, widely held by most of these countries and shared by several commentators²⁷, that the law does not serve a developmental purpose, and, therefore, produces little gains for developing countries, while at the same time constraining their policy and regulatory autonomy.

However, as Hudec has argued, “the normative concepts that underlie the notion of fairness ... are simply not coherent when applied to international trade law”.²⁸ This is because international trade rules are shaped by policy choices and interests, not natural law.²⁹ Self-interest, not altruism, is at the heart of most international trade negotiations.³⁰ Yet, the tendency of international trade law to create normatively biased, one-size-fits all, rules, while failing effectively to address issues of distributive

²² For detailed discussion of the theory of comparative advantage, see, e.g. Krugman and Obstfeld (2000).

²³ Muchlinski (2003) cited in Harlow (2006) distinguishes several variants or degree of economic liberalism, which include hard libertarianism, neo-liberalism, and regulatory functionalism. It is accepted that international economic or trade law is largely informed by the neo-liberal approach, which focuses on eliminating cross-border impediments and ensuring that market mechanisms operate unhindered (see Qureshi, 1999).

²⁴ There is, however, a gap between the developed countries free trade rhetoric and actual trade policy particularly with respect to the reform and liberalisation of their agricultural sector. Furthermore, the economic rationale of some WTO rules, such as those relating to the TRIPS agreement, is often questioned (see chapter 5 for a discussion of TRIPS).

²⁵ Mortensen (2000).

²⁶ Developed countries, under pressure from their corporate actors and driven by their economic interests, were the instigators of virtually all the key WTO agreements, including the TRIPS agreement.

²⁷ See, e.g. Ostry (2000); Noguez (2002); Michalopoulos (1999). See also, Oxfam (2002), “Rigged Rules and Double Standard”.

²⁸ Hudec (2002, p.279)

²⁹ Ibid.

³⁰ Keohane (1984) cautions against viewing regimes through the prism of altruism, arguing that regimes are largely based on self-interest. However, as Dunloff and Trachtman (1999), point out, self interest can sometimes include behaviour “that seems or is normative, altruistic, or self-abnegating” (p.11).

justice and equity, has continued to produce tensions, and has made the rule-making process often difficult and contentious. The following section traces the origins and evolution of rule making in the international trading system.

Origins and Evolution of the Modern System of International Trade Law

The GATT Era

The 1920s and 1930s were characterised by a breakdown of international economic cooperation.³¹ The 19th century regimes that ushered in monetary stability and the “golden era of free trade”³² virtually collapsed under the pressures of the First World War and the Great Depression, and were replaced by beggar-thy-neighbour economic policies.³³ However, regimes often arise against the background of earlier attempts, successful or not, at cooperation.³⁴ Clearly, the post-war international trade regime emerged in response to the experiences of the interwar period.³⁵ In Robert Hudec’s words, “[t]he post-war design for international trade policy was animated by a single-minded concern to avoid repeating the disastrous errors of the 1920s and 1930s”.³⁶

Trade was, however, not the only concern of the post-war economic planners. There were also the issues of monetary stability and post-war reconstruction. Extensive negotiations led to the adoption of the Articles of Agreement of the International Monetary Fund (IMF) and of the International Bank for Reconstruction and Development (“World Bank”) at the Bretton Woods Conference of 1-22 July 1944. In addition to these two, the International Trade Organisation (ITO) was to be established specifically to administer the rules governing international trade.

Simultaneously, as the ITO negotiations continued, 23 of the 50 participants decided in 1946 to negotiate the GATT to reduce and bind customs tariffs.³⁷ But the GATT was a mere agreement, not an organisation. It was conceived only as a temporary

³¹ For detailed accounts for the failure of international economic cooperation during the interwar period: see, e.g. Kindleberger (1976) and Gardner (1980).

³² For a discussion of the trade regime in the 19th century: see, e.g. Polanyi (1944), McKeown (1999); Stein (2000).

³³ Kindleberger (1976)

³⁴ Keohane (1984, p.14)

³⁵ On the normative consensus around the post-war trade arrangements, see Ruggie (1982) and Ikenberry (1992).

³⁶ Hudec (1989, p.5)

³⁷ These 23 countries became the founding GATT “contracting parties”.

measure pending the formation of the ITO. The draft ITO charter was completed at the Havana Conference in 1948, but never came into being because of the reluctance of the US Congress to ratify Charter, which led the President to withdraw it from Congress.³⁸

The death of the ITO thus aborted attempts to create a permanent institution, similar in status to the IMF and the World Bank, for the management of international trade. Nevertheless, the GATT emerged to fill the vacuum. The GATT itself had entered into force in January 1948, while the ITO was still being negotiated. This was possible because of the Protocol of Provisional Application (PPA) signed by eight of the twenty-three original signatories. Under the PPA, the eight signatories agreed to apply the GATT “provisionally on and after 1 January 1948”, while the remaining members would do so soon after.³⁹

However, the GATT survived as the *de facto* replacement for the ITO not only because of the PPA but also, perhaps more importantly, as a result of the commitments of the Contracting Parties, whose constant meetings and negotiations under the aegis of the GATT gave it the appearance of a formal organisation, even though it was not. For nearly 50 years, the GATT, metaphorically speaking, furnished the ‘highway rules’ for the free flow of the ‘traffic’ of world trade.⁴⁰ Between 1947 and 1994, eight multilateral negotiations, known as “rounds”⁴¹ were held under the auspices of the GATT.

However, the GATT’s proper status was still shrouded in uncertainty. Its legal obligations were qualified by “provisional application”, with no carefully designed procedures for interpreting the agreement.⁴² Furthermore, although, as a treaty, the GATT created legal obligations under international law, there was no effective

³⁸ For detailed accounts of the intertwining preparatory histories of the ITO and GATT and the legal as well as the political economic factors that led to the non-ratification of the ITO charter by the US Congress, see Gardner (1980), Milner (1997), Jackson (1998) and Hudec (1989).

³⁹ Jackson (1998), p. 40.

⁴⁰ Shearer (1994).

⁴¹ These “rounds” include, Geneva round (1947), Annecy round (1949), Torquay round (1950-1), Geneva round (1955-6), Dillon round (1960-1), Kennedy round (1963-7), Tokyo round (1973-9), Uruguay round (1986-94). Each of these rounds contributed to substantial reductions in tariffs.

⁴² Hudec (1989, p.52); Jackson, 1998.

mechanism for the management and enforcement of its rules.⁴³ The legal system was based on what Hudec described as a “diplomat’s jurisprudence”, that is, it was created and operated by diplomats rather than lawyers, blending the tools of diplomacy with those of the law.⁴⁴ The force of the GATT legal system rested almost entirely on normative pressure as well as other verbal and symbolic devices of moral suasion.⁴⁵ Indeed, the GATT had no Legal Division or what was termed “Office of Legal Affairs” until in 1981, about 34 years after its inception.⁴⁶

The aim of the compromise between legality and diplomacy was to promote better government compliance.⁴⁷ To some, this weakly legalised system worked well. Goldstein *et al* argue that “(t)he GATT system was relatively effective at deterring opportunism, in spite of its political nature”.⁴⁸ Furthermore, a detailed review of all GATT disputes between 1948 and 1989 found a success rate for valid complaints (resulting in full or partial satisfaction of the complainant) of 88% ... and the compliance record of about 81%.⁴⁹

Despite this record, the GATT was handicapped, according to Professor Jackson, by its “birth defects”. Its lack of a formal structure prevented it from operating effectively, as its workings were too often subject to the vagaries of international trade diplomacy.⁵⁰ The practice of requiring consensus before GATT panels were set up and before panel reports were adopted also meant that some important disputes could not be promptly resolved because of “foot-dragging”, while in some cases the process was blocked at every step by a determined opponent.⁵¹ The lack of a single integrated rule system permitted GATT *a la carte* and forum shopping.⁵² Addressing these “birth

⁴³ For instance, the GATT 1947 says nothing about interpretation and did not regulate in any detail the process of dispute settlement, except with respect to Article XXII (the right to consultation) and Article XXIII (authorisation of withdrawal of concessions in cases of “nullification and impairment” of benefits).

⁴⁴ Hudec (1970)

⁴⁵ *Ibid.*

⁴⁶ Petersmann (1991:XXIX)

⁴⁷ Hudec, (1970)

⁴⁸ Goldstein *et al.* (2000)

⁴⁹ Trebilcock and Howse, (1995: 396).

⁵⁰ Jackson (1998).

⁵¹ One example was the *Beef Hormones* case between the EU and the US, which began in the 1980s but could not be resolved because both parties kept blocking each other’s request for the establishment of a GATT panel. It was eventually dealt with under the WTO.

⁵² Jackson (1998).

defects” and other institutional imperfections became the *raison d’etre* of the Uruguay Round

The Uruguay Round and the WTO

The Punta del Este Declaration of 20 September 1986 contained a broad agenda for the Uruguay Round. This included 15 original negotiating subjects.⁵³ Apart from the traditional issues of tariff and non-tariff barriers, new issues, namely trade-related aspects of intellectual property rights (including trade in counterfeit goods), trade in services, and trade-related investment measures were included in the agenda. All the original GATT articles were up for review, and the functioning of the GATT System (FOGS) became a subject for negotiation.⁵⁴ Dispute Settlement, unsurprisingly, made it to the agenda, with the aim of making GATT rules and disciplines more effective and enforceable, as well as facilitating compliance with adopted recommendations.

A total of 123 countries participated in the negotiations. All accounts show that the negotiations were difficult and contentious. For instance, the round took seven and a half years, almost twice the original schedule. Between September 1986, when the Uruguay Round was launched, and April 1994, when the Uruguay Round Agreement was signed, there were several instances of impending failure.⁵⁵ Key disagreements were between developed and developing countries on the new issues and the Tokyo Round codes. However, negotiations among the developed countries, particularly the US and the EU, also deadlocked on the issues of agricultural market access and the creation of a new institution.

While the EU was defensive and largely isolated on the agriculture negotiations, the US did not favour the creation of a new organisation, which the EU and Canada

⁵³ These were: tariffs, non-tariff barriers, tropical products, natural resource-based products, textiles and clothing, agriculture, GATT Articles, Tokyo Round codes, Anti-dumping, Subsidies and countervailing measures, intellectual property, investment measures, services, dispute settlement, and the GATT system.

⁵⁴ This was to focus, *inter alia*, on enhancing the surveillance in the GATT to enable regular monitoring of trade policies and practices, and improving the overall effectiveness and decision-making of the GATT.

⁵⁵ For instance, both the Montreal ministerial mid-term review in Canada in 1988 and the Brussels “closing” ministerial meeting in 1990 ended in deadlock. Several deadlines came and went, and “negotiation-fatigue was felt in trade bureaucracies around the world” (WTO, 2003, p.19)

supported.⁵⁶ In the end, the WTO was created as a result of a series of trade-offs between the principal actors and groups.⁵⁷ As for the tensions between the developed and developing countries, these were resolved, apparently unsatisfactorily, through trade offs as well as the use of political, economic and diplomatic pressure.⁵⁸

On 15 April 1994, the Marrakech Agreement Establishing the World Trade Organisation was signed by ministers from most of the 123 participating governments in Marrakech, Morocco. The end-game dynamic described above raises the question, posed by Lowenfeld: “(h)ow was it that more than one hundred states, each trumpeting its sovereignty, each giving ‘concessions’ only grudgingly, each claiming to be the best ‘poker player,’ came together on a system of international dispute settlement tighter than international law has known in any field, let alone in the ambiguous arena of trade?”⁵⁹

For this thesis, the question is whether, with respect to certain developing countries, the legal commitments made by these governments are as dependable as their binding legal form would suggest. Are the states’ WTO treaty commitments and their compliance interests in congruence? Does WTO law have any significant impact on their behaviour? What factors are actually shaping their regulatory responses? These are the questions that this thesis aims empirically to answer. Before doing so in subsequent chapters, it is useful, first, to describe the scope of the GATT-WTO obligations and the status of the obligations under international law, and, second, to discuss theories of international law compliance.

The Scope, Nature and Implications of the WTO Obligations⁶⁰

The WTO Legal System: Sources of Law

The results of the Uruguay Round negotiations occupy about 23,000 pages of a document, which covers detailed schedules of tariffs, services trade and other

⁵⁶ Jackson (1998); Winham (1998)

⁵⁷ Winham (1998). The name World Trade Organisation (WTO) was proposed by Canada, while the EU had proposed the Multilateral Trade Organisation (MTO).

⁵⁸ For instance, former Secretary-General of UNCTAD, Rubens Ricupero, was quoted as saying: “[t]he developing countries were given two choices on TRIPS – being boiled or fried” (see Abbott in Kennedy and Southwark eds. (2002, p.316).

⁵⁹ Lowenfeld (1995)

⁶⁰ The specific agreements examined in the case studies are discussed in detail under the relevant chapters.

concessions. The “Legal Texts”, which contain the basic legal rules and obligations of the WTO treaty, include about 60 agreements, annexes, decisions and understandings.⁶¹ The agreements fall into a simple structure with six main parts. In addition to the Marrakech Agreement Establishing the WTO, which is the umbrella treaty, there are six annexes, covering several other agreements.

Annex 1A covers the Multilateral Agreements on Trade in Goods, and includes the following: the General Interpretative Note to the annex; the GATT 1994, together with 6 Memoranda of Understanding (interpretation of certain articles of GATT 1994), the Marrakech Protocol annexed to the GATT 1994, as well as Schedules of Tariff Concessions; and 12 specific agreements⁶². Annex 1B covers the General Agreement on Trade in Services (GATS), Schedules of Specific Commitments, as well as lists of MFN Exemptions. Annex 1C, covers the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).⁶³ Annex 2 covers the Memorandum of Understanding on Rules and Procedures Governing the Settlement of Disputes, otherwise known as the dispute settlement understanding (DSU). Annex 3 embodies the Trade Policy Review Mechanism (TPRM), while annex 4 covers the four plurilateral agreements.⁶⁴

The WTO is no doubt the only global economic institution with such an elaborate set of rules. On the three dimensions of legalisation, namely, obligation, precision and delegation⁶⁵, the WTO is a highly legalised institution because it administers a remarkably detailed set of legally binding international agreements; and it operates a

⁶¹ On the basis of Article 38(1) of the Statute of the International Court of Justice on the sources of international law, it is argued that there are other potential sources of WTO law beyond the covered agreements and their annexes (see Palmetier and Mavroidis, 1998).

⁶² These are the Agreements on: Agriculture; the Applications of Sanitary and Phytosanitary Measures (SPS); Textiles and Clothing; Technical Barriers to Trade (TBT); Trade-Related Investment Measures (TRIMs); Implementation of Article VI (Anti-Dumping Agreement); Implementation of Article VII (Customs Valuation); Pre-shipment Inspection; Rules of Origin; Import Licensing Procedures; Subsidies and Countervailing Measures (SCM); and Safeguards.

⁶³ The TRIPS Agreement incorporates by reference several prior existing treaties administered by the World Intellectual Property Organisation (WIPO). So the agreement must be read with the relevant texts of the Conventions on Intellectual Property Rights.

⁶⁴ These are the Agreement on Trade in Civil Aircraft; the Agreement on Government Procurement; the International Dairy Agreement; and the International Bovine Meat Agreement.

⁶⁵ See special edition of *International Organisation* 54(3) (Summer,2000) on the subject of international legalisation. According to the authors, there are three elements of legalisation. *Obligation* means that states or other actors are bound by a rule or commitment; *precision* means that rules unambiguously define the conduct they require, authorise, or proscribe; *delegation* means that third parties have been granted authority to implement, interpret, and apply the rules.

well-developed dispute settlement mechanism, including an appellate tribunal with significant authority to interpret and apply those agreements in the course of resolving particular disputes.⁶⁶ Andreas Lowenfeld describes the WTO's system of dispute settlement as "more far-reaching than any multilateral arrangement for resolution of disputes among states in history".⁶⁷

While the earlier GATT system had been designed to be negotiation-based rather than being very legalistic, the WTO system marks a shift away from politics to law.⁶⁸ Although the WTO is still a forum for trade negotiations⁶⁹, such negotiations are now conducted with knowledge of the strict legal force of the outcomes. The rigorous dispute settlement system is, however, not the only major transformation in the legal framework of the world trading system. The legal disciplines have been expanded to cover a significantly greater area of national regulatory activity.⁷⁰

Thus, unlike the traditional subject matter of the GATT, which was primarily confined to the reduction of conventional trade barriers, such as tariffs, quotas, discriminatory international taxes and regulations, as well as trade remedies, the WTO Agreement broadens the rule base to cover non-traditional subjects such as

⁶⁶ The core elements of the dispute settlement procedures are (i) compulsory jurisdiction: the right to panel procedure upon second request (DSU Article 4:3); (ii) deployment of the 'reverse consensus' principle and quasi-automatic decision-making procedures; (iii) the establishment of panels (DSU Article 6:1), adoption of panel reports (DSU Article 16:4), adoption of appellate reports (DSU Article 17:4) and the granting of requests for suspension of concessions (DSU Article 22:6); (iv) integrated dispute settlement system: created in order to prevent 'forum shopping', increase predictability, and promote rule-integrity; (v) the provision of an appeal procedure: final legal interpretation which functions as the 'legal quality control', qua the explicit requirements of who are qualified to serve in panels and of impartiality (DSU article 17:3); and (vi) improved effectiveness: stricter time-limit throughout the process (DSU 12:8, 12:9, 16:1, 16:4). See Petersmann (1997)

⁶⁷ Lowenfeld (1995)

⁶⁸ Article 3.2 of the DSU provides that the provisions of the WTO agreements shall be clarified "in accordance with customary rules of interpretation of public international law". This has been interpreted to refer to "general rule of interpretation" contained in Article 31, as well as Article 32, of the Vienna Convention on the Law of Treaties. See *US – Gasoline*, where the Appellate Body held that WTO law could not be "read in clinical isolation from public international law" (Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996). On treaty interpretation by the Appellate body, see Georges (2006).

⁶⁹ Article III.2 of the WTO Agreement states that "(t)he WTO shall provide the forum for negotiations among its Members ..."

⁷⁰ The Uruguay Round did not only result in the legal transformation of the world trading system, it also changed its post-war normative underpinning. For instance, the immediate post-war trade regime (i.e. the GATT) was based on what Ruggie (1982) described as embedded liberalism, which was a mixed system of liberalism and welfare state. However, at the time of the Uruguay Round, the pendulum had shifted decisively in favour of the efficiency model, with less tolerance of government interventions. See Dunoff (1999); Kitschelt *et al* (eds) (1999); and Howse (2002) for a discussion of the breakdown of the post-war social contract and institutional arrangements.

intellectual property (TRIPS), trade in services (GATS), product standards and technical regulation (TBT), as well as sanitary and phytosanitary measures (SPS).

The basic principles of the GATT-WTO Agreement remain non-discrimination in international trade (as embodied in the core obligations of most-favoured-nation (MFN) status⁷¹, the national treatment (NT) principles⁷²); prohibition on the use of quantitative restrictions⁷³; as well as observance of binding levels of tariff concessions, in respect of trade in goods, and of specific commitments, in the case of the trade in services. The transparency of trade policies is also a major principle of the GATT-WTO Agreement.⁷⁴

These principles are however subject to the right to waive them, in certain circumstances and under certain conditions.⁷⁵ These rights thus constitute waivers or exceptions to the basic principles, although the invocation of the exceptions or flexibilities is tightly regulated in the agreements⁷⁶ and narrowly interpreted by WTO panels and the Appellate Body.⁷⁷

While non-discrimination obligations remain central to the WTO Agreement, the regulatory philosophy of international trade law also shifted during the Uruguay Round in favour of positive harmonisation, i.e. requiring states to base their domestic

⁷¹ Article 1 of the GATT; Article II of GATS; and Article 4 of TRIPS.

⁷² Article III of GATT. The principle also applies, with some differences, to trade in services (Article XVII of GATS) and IPR protection (Article 3 of TRIPS).

⁷³ Article XI of GATT prohibits the use of quantitative restrictions.

⁷⁴ Article X of GATT is the main transparency obligation of the agreement, but all the WTO Agreements contain specific transparency requirements.

⁷⁵ The main exceptions are: GATT Article VI (anti-dumping measures); Article XII (safeguard measures for balance of payments); Article XVI (subsidies); Article XIX (emergency safeguard measures); Article XX (general exception); Article XXI (security exceptions); Article XXIV (customs unions and free trade areas); Article IX.3 of the WTO Agreement (waivers); and Part IV of GATT (preferential treatment of developing countries).

⁷⁶ Goldstein and Martin (2000) argue that the increased stringency in the use of escape clauses and other mechanisms of flexibility “may be misplaced”, because the constraints on the use of these exceptions “may bind states more tightly than intended” (p.626).

⁷⁷ For instance, Footer (2001) points out that developing countries feel that there is “a trend towards stricter interpretation of the special and differential treatment (SDT) provisions in various WTO Agreements. For examples of such narrow interpretation, see *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, complaint by the United States, WTO Document WT/DS90/R (6 April 1999) (Panel) and AB-1999-3, WTO Document WT/DS90/AB/R (23 August 1999) (Appellate body), adopted on 22 September 1999. See also *Brazil – Export Financing Programme for Aircraft*, complaint by Canada, WTO Documents WT/DS46/R (panel) and AB-1999-1, WT/DS46/AB/R (2 August 1999) (Appellate body), adopted on 20 August 1999.

regulatory measures on relevant international standards. The new agreements that impose harmonisation obligations include the Agreement on Technical Barriers to Trade (TBT), the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

A breach of any of these agreements does not simply require a finding of discrimination. A member may be found to be in violation if it has failed to comply with the harmonisation obligations in the agreements.⁷⁸ While the original GATT aimed mainly at reducing trade-restricting border measures and eliminating discrimination in international trade (negative harmonisation), the new regulatory regime reflected in the TBT, SPS and TRIPS agreements is orientated towards positive harmonisation. Indeed, the TRIPS Agreement does not only require harmonisation with existing international IP treaties, it imposes minimum international IP standards.

Critics of the harmonisation approach argue that rather than encourage regulatory competition, increased regulatory harmonisation reduces local-content regulation and promotes a “one-size-fits-all” regulatory philosophy, which is unsuited to a fast-moving global market economy, and particularly to an asymmetrical world economy, where countries are at different stages of development.⁷⁹ Petersmann argues that the increasing focus of WTO law on harmonisation of rules beyond the trade policy area “constitutes new ‘constitutional challenges’, which call for additional ‘constitutional reforms’ of WTO law”.⁸⁰

⁷⁸ This harmonisation interpretation has been confirmed by WTO panels and the Appellate Body (AB) in a number of cases. For instance, in the *EC-Sardines* case, the Panel found the EU Regulation at issue in breach of Article 2.4 of the TBT Agreement because the technical regulation was not based on the Codex Stan 94, the international standard set by Codex Alimentarius Commission (Panel Report, *European Communities – Trade Description of Sardine*, WT/DS231/R, para. 4.2). In *EC-Hormones*, the AB held that a WTO member must base its SPS measure on an existing international standard (under Article 3.1 of the SPS Agreement) unless its adoption of a higher standard is based on a scientific justification and risk assessment (in accordance with Article 5). See: Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones) – Complaints by the United States*, WT/DS26/AB/R, adopted 13 February 1998.

⁷⁹ Howse in Coicand and Heiskanen, eds, (2001)

⁸⁰ See Petersmann in Kennedy and Southwark eds (2002, p.51).

There are two other specific features of the new WTO legal system that are also relevant to the contextual analysis in this thesis and, therefore, also worth mentioning. The first is that the WTO agreements are a single, integrated, treaty instrument, which imposes a single undertaking on all WTO members. Secondly, the compliance obligations imposed on members are positive in nature, that is, they require members to take positive steps to ensure legal, regulatory and administrative compliance. A brief discussion of these issues follows.

Single Undertaking Principle

Article II of the WTO Agreement provides that “(t)he agreements and associated legal instruments included in Annexes 1,2 and 3 (hereinafter referred to as “Multilateral Trade Agreements”) are integral parts of this Agreement, binding on all Members”. This article establishes the WTO agreements as a single treaty instrument. The Appellate Body in *Brazil – Deseccated Coconut* affirmed the “single undertaking” nature of the WTO Agreement, stating that “within this framework, all WTO members are bound by all the rights and obligations in the WTO Agreements and its Annexes 1, 2 and 3”.⁸¹

The single undertaking principle owes its origins to the Uruguay Round negotiations and has continued to underpin negotiations in the WTO. It makes virtually every item of negotiations part of a whole and indivisible package, which cannot be agreed separately, and it is based on the rule that “nothing is agreed until everything is agreed”. While reservations are part of a ‘normal’ multilateral treaty⁸², the WTO Agreement is *lex specialis* in this regard in the sense that it makes the application of the treaty in its entirety between all the parties an essential condition of membership of the WTO.⁸³

⁸¹ See Appellate Body Report, *Brazil – Measures Affecting Deseccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:1. See also *Argentina – Footwear*, where the AB held that the GATT 1994 and the Agreement on Safeguards “are both ‘integral parts’ of the same treaty, the WTO Agreement, that are ‘binding on all members’” (Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000).

⁸² See Article 2 of the Vienna Convention on the Law of Treaties.

⁸³ The only exceptions to the principles of non-reservation in the WTO Agreements are provided in the following articles: Agreement on Implementation of Article VI of GATT 1994 (Anti-Dumping Agreement), Article 18.2; Agreement on Implementation of Article VII of GATT 1994 (Customs Valuation Agreement), Article 21 and paragraph 2 of Annex III; Article 15.1 of the TBT Agreement; Article 32.2 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement); and Article 72 of the TRIPS Agreement.

The single undertaking principle has profound implications for developing countries, because, as a condition of WTO membership, most of them had to accept agreements, which they had earlier rejected during the Tokyo Round or were unhappy with during the Uruguay Round. Michael Finger suggests that without the single undertaking approach, developed country negotiators would, perhaps, have succeeded in persuading only a select list of about 20 developing countries to sign up to most of the Uruguay Round commitments. However, the single undertaking rule emboldened them to insist that all developing countries must accept all the commitments.⁸⁴

Yet, as Patrick Low argues, the single undertaking principle “has considerably strained the absorptive and compliance capacity of many developing countries”.⁸⁵ The principle significantly increases the depth of cooperation required from developing countries. While much of the legal, regulatory and administrative requirements of the WTO agreements reflect the standards and practices already established in the developed countries, for most developing countries there was a need to either substantially reform their existing institutions or create them *de novo*. As the next subsection shows, non-compliance with these obligations has significant implications.

The Nature of the Compliance Obligation

The legal force of the rules of international law is derived from the principles *pacta sunt servanda* and good faith fulfilment, as set out in article 26 of the Vienna Convention on the Law of Treaties (VCLT). The first principle places strong emphasis on compliance; the second requires states to do so in good faith. The choice of ways to implement international rules in the domestic sphere is normally left to the discretion of each individual state.⁸⁶ But Article 27 of the VCLT prohibits states from invoking their national law as justification for failure to perform obligations imposed by a treaty. It has been suggested that there is no “general duty” to bring national law into conformity with international obligation, only that national law cannot be used to justify non-observance of international obligation.⁸⁷

⁸⁴ Finger (2000, p. 434).

⁸⁵ Low (1999, p. 53)

⁸⁶ For a discussion of the relationship between national and international economic law, see: Hiff and Petersmann eds. (1993); Cottier and Schefer, (1998); Jackson (1992); Qureshi (1999).

⁸⁷ Some legal scholars, such as Brownlie (1998, p.35) argue that states have a general duty to ensure conformity, while others deny the existence of any such duty (e.g. Cassese, 2001, p.167). Bhuiyan

The situation is, however, different in the case of WTO obligations. The overarching compliance obligation is contained in Article XVI.4 of the WTO Agreement, which provides that “(e)ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements”.⁸⁸ WTO jurisprudence supports this positive obligation. For instance, where a statute merely provides a government with the *discretion* to act inconsistently with WTO rules rather *mandating* a WTO-inconsistent action, the ‘discretionary statute’ as such could be deemed to constitute a violation of WTO law.⁸⁹

Thus, to understand the nature of WTO obligations, it is important to recognise that WTO law requires the adoption of national legislative or other measures to ensure the conformity of laws, regulations and administrative procedures with the WTO obligations. A failure to do so amounts – without more, i.e. without any resulting injury – to a breach.⁹⁰ Indeed, Article 3.8 of DSU creates an automatic presumption of a *prima facie* case of nullification or impairment once a provision of a covered agreement is breached.

Related to the principles *pacta sunt servanda* and good faith fulfilment are those of state responsibility, under which a state in breach of an international legal obligation triggers state responsibility *vis-à-vis* the impaired party.⁹¹ In the WTO context, a losing party in any litigation⁹² is automatically required to bring its inconsistent national law or measure into conformity with the covered agreement deemed to have

(2004, note 14, p.127) concludes, however, that “(i)t seems that the view that there is no such general duty is both supported by state practice and logically more consistent”.

⁸⁸ Each annexed agreement also contains corresponding compliance obligations.

⁸⁹ The Panel in *US – Section 301 Trade Act* held that “(a)s a general proposition, GATT *acquis*, confirmed in XVI:4 of the WTO Agreement and recent WTO panel reports, make it abundantly clear that legislation *as such*, independently from its application in specific cases, may breach GATT/WTO obligations (Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, paras. 7.41-7.42). See also Appellate Body Report, *United States – Anti-Dumping Act of 1916 – Complaint by Japan*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000.

⁹⁰ Bhuiyan (2004, p. 129). See also Fukunaga (2006).

⁹¹ For the International Law Commission’s Articles on State Responsibility, see Crawford (2002).

⁹² However, in respect of non-violation complaints, there is no obligation to withdraw the measure in question; the ‘losing party’ is only required to make “mutually satisfactory adjustment” (Article 26.1(b) DSU).

been violated.⁹³ Furthermore, “prompt compliance” with this recommendation or ruling is obligatory.⁹⁴

The Dispute Settlement Understanding (DSU) allows for compensation by the losing party or, failing that, retaliation (i.e. suspension of concessions) by the winning party.⁹⁵ However, the DSU goes on to state that neither compensation nor retaliation is “preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements”.⁹⁶

Some international trade law scholars disagree on the correct interpretation of this provision. In the famous debate between Professors John Jackson and Judith Hipler Bello, both scholars took contrasting views as to the legal status of a WTO ruling. According to Hipler Bello, compliance, in the sense of changing an offending national law or measure, was “voluntary or elective”.⁹⁷ The choices that any losing party had, she argued, were “to comply, to compensate or to stonewall and suffer retaliation”.⁹⁸ However, Professor Jackson disagreed, arguing that the DSU created a strong preference for changing the offending measure over compensation.⁹⁹

⁹³ DSU Article 19. Compliance often takes the form of complete withdrawal of the offending measure or modifying it by excising or correcting the offending portion. If the measure is a statute, a repealing or amendatory statute is commonly needed; if it is an administrative regulation, a repealing or amendatory regulation is commonly required (see *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, Award of the Arbitrator, WT/DS155/10).

⁹⁴ DSU, Article 21. Where immediate implementation is not possible, the member shall be granted a “reasonable time to do so”, which “should not exceed 15 months from the date of the adoption of a panel or AB report” (Article 21.3). However, immediate or prompt compliance is the primary objective of the DSU and only in compelling cases would exemption from this obligation be allowed (see e.g. *Australia – Measures Affecting Importation of Salmon*, Award of the Arbitrator, WT/DS18/9; *Canada – Patent Protection of Pharmaceutical Products*, Award of the Arbitrator, WT/DS114/13). Only legal considerations relating to compliance will normally be considered in deciding on the reasonable time to comply. Extraneous matters relating to domestic economic and political factors will normally not be taken into account (see *Canada – Patent Protection of Pharmaceutical Products*, Award of the Arbitrator, WT/DS114/13). However, in respect of developing countries, special circumstances, such as deteriorating economic conditions may be taken into account (see *Indonesia – Certain measures Affecting the Automobile Industry*, Award of the Arbitrator, WT/DS54/15).

⁹⁵ DSU, Article 22 (1)

⁹⁶ *Ibid.*

⁹⁷ Bello (1996, p.417)

⁹⁸ *Ibid.*, p. 418

⁹⁹ Jackson (1997, p. 61).

WTO jurisprudence, however, appears to support the *Hipler Bello* view.¹⁰⁰ In the *European Communities – Hormones* case, the arbitrator states that “[a]lthough withdrawal of an inconsistent measure is the *preferred* means of complying ..., it is not necessarily the *only* means ... An implementing Member, therefore, has a measure of discretion in choosing the *means* of implementation, as long as the means chosen are consistent with the recommendations and rulings of the DSB and the with the covered agreements”.¹⁰¹

However, it is clear that Article 22(1) explicitly favours full implementation as the best compliance option. Secondly, full compliance is, in the final analysis, in the best interest of a losing party because compensation must not only be consistent with the covered agreements; it must also be extended on an MFN basis to other members of the WTO.¹⁰² The non-discriminatory nature of compensations should make full compliance more attractive. Furthermore, Article 22(3) of the DSU allows for cross-retaliation, whose aim is to “ensure that the impact of that suspension is strong and has the desired result, namely to induce compliance by the Member which fails to bring WTO-inconsistent measures into compliance with DSB rulings within a reasonable period of time”.¹⁰³

In sum, WTO law imposes binding obligations, requires positive compliance actions, and provides for specific remedies, including trade sanctions. The nature of WTO law raises specific questions about its effectiveness. What impact does it actually have on state behaviour? What factors shape the behaviour of states? It cannot be assumed that the strong enforcement regime is the only or even the main factor that affects the behaviour of states. The task in the remainder of this chapter is to identify, through a literature survey, the factors that shape states’ compliance with international law.

¹⁰⁰ The debate about the bindingness of the DSB recommendations is sometimes linked to the ‘efficient breach’ theory, which posits that there are circumstances when breach of contract is more efficient than performance. However, several international legal scholars have argued that encouraging “efficient” breaches of treaties would undermine the fundamental rule of *pacta sunt servanda* (see Dunloff and Trachtman (1999)).

¹⁰¹ *EC Measures Concerning Meat and Meat Products (Hormones)*, Award of the Arbitrator, WT/DS26/15, para. 38 at pp 12-16.

¹⁰² DSU, Article 22.1. See also Appellate Body Report, *European Communities – Measures Affecting Importation of Certain Products*, WT/DS69/ABR, adopted 23 July 1998.

¹⁰³ *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB/ECU.

Theories of International Law Compliance

Perspectives on the Effectiveness of International Law

One dominant view in the compliance literature¹⁰⁴ is that there is a propensity to comply with international law and that any non-compliance is “benign”, i.e. not as a result of a deliberate decision to violate an international undertaking on the basis of a calculation of interests.¹⁰⁵ Louis Henkin, in his frequently repeated comment, notes: “almost all nations observe all principles of international law and almost all of their obligations almost all of the time”.¹⁰⁶ Robert Keohane argues that “in the world political economy, we observe a good deal of compliance even when governments have incentives, on the basis of myopic self interest, to violate the rules”.¹⁰⁷ This rather sanguine view about compliance contrasts with the rational choice and Realist perspective that rests on the background assumption that compliance is based on a calculation of costs and benefits and the perception of national interests.¹⁰⁸

The assumption about a “propensity to comply” appears to lack strong empirical evidence or, as Downs *et al* argue, may be contaminated by endogeneity and selection problem.¹⁰⁹ A treaty may involve too little depth of cooperation, i.e. requiring states to make only modest departures from what they would have done in the absence of an agreement.¹¹⁰ As Lukashuk points out, when safeguarding such paramount values as peace and security, international law has proven to be insufficiently reliable in restraining states.¹¹¹ Furthermore, the post-war trade and monetary regimes both became weaker during the 1970s due to domestic protectionist and economic pressures in the US and Western Europe.¹¹²

¹⁰⁴ Broadly, the question of compliance with international law has been addressed by international relations and international legal scholars, including Henkin, 1979; Franck, 1990; Chayes and Chayes, 1995; Koh, 1996; Weiss and Jacobson, 1998; Byers, 1999; Keohane, 1992; Simmons, 2000.

¹⁰⁵ See, e.g. Chayes and Chayes (1993/1995).

¹⁰⁶ Henkin (1979, p.47).

¹⁰⁷ Keohane (1985, p.98)

¹⁰⁸ Goldsmith and Posner (2002); Strange (1982)

¹⁰⁹ Downs et al (1996, p.380)

¹¹⁰ Ibid

¹¹¹ Lukashuk, 1989. See also Kennedy (2003) who argues that “many of the most significant aspirations expressed by international judgements and encoded in international instruments have not been implemented” (p.839). Wild (1938) posits that international law may fail to be of service in guiding the policies of states in matters of grave moments.

¹¹² Keohane (1985)

In recent years, the reluctance of both the EU¹¹³ and the US¹¹⁴ to comply with difficult and politically sensitive WTO rulings further suggests that states are not routinely abandoning their self interests in favour of rule-following. It is also the case that compliance is rarely ever complete. Although international agreements are drawn for full compliance, no state complies fully.¹¹⁵ While there is no prevalence of barefaced or headlong disobedience of international law by states in all cases, there is what Snyder describes as “the new challenge of compliance”.¹¹⁶ This occurs when states adopt different strategies such as self-serving interpretations, as well as selective or creative compliance.¹¹⁷ Thus, any claim about compliance needs to be empirically established, and should control for endogeneity and depth of cooperation.

The remainder of this chapter examines the literature on international law compliance so as to derive some variables for explaining the compliance behaviour of South Africa and Nigeria with respect to their WTO obligations. In line with the recurring theme in this thesis, the explanatory theory is divided into two broad categories: legal and non-legal variables. Legal variables are those derived from the nature of the law or related to legal principles. Non-legal variables are those exogenous to the law but which can affect its operation. The key variables and their linkages are discussed.

Compliance as a Function of Legal Considerations

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 listed¹¹⁸; in another, the authors list six variables.¹¹⁹ The dominant factors in the literature can, however, be

¹¹³ One example is the *Beef Hormone* case. See Princen (2004), who analyses the EU’s compliance behaviour in this case. See also van den Broek (2003).

¹¹⁴ Evidence shows that while the US has a generally good compliance record, in difficult rulings that require Congressional intervention to ensure full implementation, compliance has been problematic. Such cases include the *US – Antidumping Act of 1916*, *US-Section 110(5) of the US Copyright Act*, and *US-Tax Treatment of Foreign Sales Corporation*, see: van den Broek, (2003)

¹¹⁵ Brednar (2005), Weiss and Jacobson, (1998)

¹¹⁶ Snyder (1993)

¹¹⁷ According to Pistor (2000) creative compliance refers to where the law is observed formally but circumvented in practice. This can also be described as *de jure* rather than *de facto* compliance.

¹¹⁸ Schachter ed. (1971) cited in Qureshi (1999, p.16) 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.

¹¹⁹ Macaulay, Friedman and Stookey eds. (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.

reduced to the following: enforcement and sanctions; reputational concerns; endogenous preference; normative commitment; domestic regime type; autopoiesis and conflict of legal norms. Each of these is briefly discussed below.

Compliance under the “shadow of the law”

Compliance is often said to take place “in the shadow of the law”. Such “in the shadow of the law” issues that are believed to induce compliance include the possibility of litigation, rule enforcement and legal sanctions.¹²⁰ Enforcement is, indeed, central to the economic analysis of law or the rational choice school, which focuses on how law, *as enforced*, affects behaviour.¹²¹ Thus, to scholars in the enforcement school, enforcement is one of the strongest conditions of compliance.¹²² The background assumption is that states are motivated in their actions by the calculation of interests; therefore, it is only by manipulating the burdens and benefits defined in terms of those interests can compliance be improved.¹²³

Enforcement in this regard refers to direct mechanisms such as sanctions, a credible threat of sanctions and other forms of punishment regime. The principle function of international law, according to the rational choice school, is to eliminate opportunistic behaviour through the enforcement instruments.¹²⁴ In the WTO context, as shown earlier, the dispute settlement system creates a strong enforcement or punishment regime that should induce compliance.

However, the managerial school takes a dim view of enforcement measures.¹²⁵ As Chayes and Chayes argue, sanctioning authority “is rarely granted in treaty, rarely used when granted and likely to be ineffective when used”.¹²⁶ Compliance is better

¹²⁰ Ibid.

¹²¹ See Goldsmith and Posner (2002); Ricardo Faria (1999).

¹²² Downs *et al* (1996)

¹²³ Ibid.

¹²⁴ The command or imperative theories of law are based on the common assumption that international law should be examined as a system of coercive norms controlling the actions of state. The classical imperative theorists are Jeremy Bentham (1748-1832), John Austin (1790-1859) and Hans Kelsen (1881-1973). For the modern theorists, see, e.g., Morgenthau (1961) and Grieco (1978). “Realists”, however, also view international law as epiphenomenal to the powers and interests of states.

¹²⁵ Constructivists generally tend not to emphasise the constraint or social control function of law, but rather argue that there are other functional equivalents, including in particular its constitutive and communicative roles, which can influence outcomes without exerting direct causal impact. See, e.g. Coplin (1965); Yusuaki, (2003); and Kratichwil, (2003).

¹²⁶ Chayes and Chayes (1995, pp32 and 33)

induced, according to this view, through a number of “instruments of active management” such as transparency, reporting, data collection, verification and monitoring, capacity building, and technical and financial assistance”.¹²⁷ The managerial or legal process approach is, indeed, based on dialogue, persuasion, argumentation and technical assistance rather than pressure and conditionality.¹²⁸

Such systems for compliance or implementation review exist in the WTO.¹²⁹ For instance, one of the objectives of the Trade Policy Review Mechanism (TPRM) is “to focus on improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements”.¹³⁰ Although the TPRM is not designed to serve “as a basis for the enforcement of specific WTO obligations”¹³¹, Qureshi argues that it is, indeed, an instrument of enforcement, defined broadly as a process that includes “all mechanism that promote direct or indirect, immediate or over a given period of time, conformity to certain norms”.¹³²

In addition to the TPRM, the transparency requirements under Article X of the GATT and the other agreements impose publication, notification and reporting obligations. Furthermore, WTO councils or committees are charged with monitoring members’ compliance with specific agreements. These bodies provide regular opportunities for peer review, where members use legal arguments to challenge the WTO compatibility of each other’s measure or to offer defence of such measures.

There are linkages between the enforcement and managerial variables. For instance, as Koh notes, the managerial model “sometimes succeeds not solely because of power of discourse but also because of the shadow of sanctions, however rare or remote that possibility might be”.¹³³ Persuasion and dialogue may fall on deaf ears, while pressure and manipulation of incentives may induce compliance.¹³⁴ Yet, the power of sanctions should not be overstated. Threat of penalties or sanctions may not always deter

¹²⁷ Ibid.

¹²⁸ Checkel (2005).

¹²⁹ Victor, Raustiala and Skolnikoff eds (1998).

¹³⁰ See Annex 3, paragraph A (1), of the WTO Agreement.

¹³¹ Ibid.

¹³² Qureshi, (1999, p.492). For a discussion of the TPRM as an enforcement mechanism, see also Qureshi (1995/1996)

¹³³ Koh (1997, p.391)

¹³⁴ Checkel (2005)

governments from bending or breaking regime rules.¹³⁵ Nevertheless, the “in the shadow of the law” variables are important in explaining state behaviour.

International Law as a Reputational Mechanism

Reputational concerns are also rational choice variables, and are often accorded pride of place in the compliance literature. Indeed, as Downs and Jones put it, “the dominant view in the literature is that reputation plays an extremely important role in promoting compliance”.¹³⁶ One of the strongest proponents of the reputational variable is Robert Keohane, who argues that, “having a good reputation is valuable even to the egoist”.¹³⁷ Given that hard law instruments are partly inspired by the desire for credible assurances¹³⁸, it follows that post-contractual defection or opportunism is likely to create reputational or credibility problems for the defector.¹³⁹

Treaties are both the products and the instruments of iteration and issue linkage. Furthermore, they encourage the use of both specific and more diffuse forms of reciprocity, as in the case of the WTO, which provides for cross-measures. All of this enables parties to escape perennial Prisoners’ Dilemmas by replacing short-term calculations of interest with long-term strategic analysis and mutual reliance on long-term reputation.¹⁴⁰ In other words, the combined effects of continuous iteration, issue linkages and reciprocity accentuate the reputational problems of a defector, thereby making rule compliance more likely.¹⁴¹

Yet, reputational concerns are not absolute. Down and Jones introduce the concept of multiple reputations, and argue that reputation varies according to the nature of the

¹³⁵ Strange (1982) argues that “states have all their defences at the ready to reject even the most modest encroachment on what they regard as their national prerogatives” (p.480)

¹³⁶ Downs and Jones (2002, p. S99).

¹³⁷ Keohane (1987, p.85).

¹³⁸ Abbott and Snidal (2000)

¹³⁹ Reputational concerns have broader ramifications than future relationships. According to Oran Young, the forces of “social opprobrium” and “the sense of shame or social disgrace” will work to induce treaty compliance (cited in Downs and Jones (2002, p.S100)). Chayes and Chayes also argue, in their “new sovereignty” theory, that the desire to remain a participant in the international policy-making process may engender compliance, as country that compromises its reputation as a reliable partner “jeopardises its ability to continue to reap organisational benefits” (Chayes and Chayes, 1995, p.152).

¹⁴⁰ Alvarez (2002).

¹⁴¹ Ibid, see also Keohane (1987).

agreements.¹⁴² As the authors put it, “even in an increasingly integrated international system, reputational concerns cannot by themselves begin to ensure a high level of compliance with every international agreement”.¹⁴³ The agreements that get the most reputational help are those that states value the most. If an agreement is of little value to a state, the slightest increase in compliance cost would lead to defection.¹⁴⁴ However, do values and moral commitment play any role in a state’s compliance decision?

Normative Commitment and a Sense of Obligation

The “in the shadow of the law” and reputational variables rest on an external system of legal pressure, direct or indirect, to compel or induce states to comply with their international obligations. However, scholars of the constructivist bend tend to emphasise the role of values and normative or moral commitments in shaping states’ compliance with international law. 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.¹⁴⁵ 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.¹⁴⁶

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.¹⁴⁷ While the external element cannot be ignored, it is the “internal point of view”, which makes people or states feel a sense of obligations to obey the law. However, as Hart also points out, this sense of obligation arises from a state’s respect for the legitimacy of the law.¹⁴⁸ Given the significance of the legitimacy theory, it is discussed below.

¹⁴² Down and Jones (2002).

¹⁴³ Ibid, p. S98.

¹⁴⁴ Ibid.

¹⁴⁵ This is also a “value of the regime” argument as Keohane (1987) puts it.

¹⁴⁶ Young (1979)

¹⁴⁷ Hart, 1961.

¹⁴⁸ Ibid.

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. For instance, Thomas Franck argues that the compliance pull of international law results from the legitimacy and distributive justice of the rules that it embodies.¹⁴⁹ Voluntary compliance with international law would be improved insofar as the law instantiates both procedural and substantive fairness.¹⁵⁰ A state’s perception that the structure of rules of the system is unjust is likely to affect its compliance decision.¹⁵¹

Consent and ownership are critical legitimacy factors that affect a state’s compliance behaviour.¹⁵² Unless the addressees of international rules appreciate the benefits of, and the necessity for, the rules and accept responsibility for them, there is likely to be little internal commitment on the part of those charged with their implementation.¹⁵³ Thus, while the enforcement and reputational variables and the normative commitment arguments are important as explanatory variables, pervasive and fundamental values such as fairness, equity and ownership appear to have stronger explanatory powers.

Legal positivists argue that *consent*¹⁵⁴ bridges the chasm between sovereignty and legal restraint under international law.¹⁵⁵ Consent is the only way to establish rules that legally bind sovereign states.¹⁵⁶ However, international law is always the end product of a political process in which the weak can be disadvantaged because of unequal bargaining power.¹⁵⁷ Lack of ownership would however make compliance difficult to achieve *ex post*. Non-compliance is likely to be endemic if the original

¹⁴⁹ Franck (1995). On legitimacy as compliance pull, see also Finnemore and Toope (2002), who 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” (p. 239).

¹⁵⁰ Ibid. Pauwelyn (2005) describes this as “input and output legitimacy”.

¹⁵¹ North (1997, p.45).

¹⁵² Broughton and Mourmouras (2002); Finger (2000).

¹⁵³ Ibid.

¹⁵⁴ The traditional consent-oriented view of the law treaties, however, has its critics (see, e.g. Shearer, 1994, pp 21- 24)

¹⁵⁵ Wild (1938).

¹⁵⁶ Lukashuk (1989). One of the grounds that can invalidate a treaty is coercion or force (Vienna Convention, arts. 51-52). This has been interpreted as capable of denoting economic and political pressure. See Henkin *et al* (1987, pp 464-466).

¹⁵⁷ Indeed, process matters only to the extent that powers relations are more balanced. Where there are major differences in economic and political powers and influence, these power structures are likely to be the shaping factors in any rule-making process (see Bayne and Woolcock, 2003 and Levi, 1974)

bargain did not adequately reflect the interests of those that would be living under it.¹⁵⁸ Yet, legitimacy alone does not guarantee compliance; there are domestic legal variables that can also affect the compliance process.

The Role of Domestic Rule of Law and Legality

While the foregoing analysis relates to the nature of, and perceptions about, particular international agreements, the present variable concerns the nature of the pre-existing domestic legal and institutional environment in which implementation is to take place. Pistor argues that pre-existing conditions can make or mar international law in the domestic setting.¹⁵⁹ One of such conditions is the domestic regime type. Several scholars take the view that the domestic regime type is essential to understanding international law compliance.¹⁶⁰

Regime-type scholars argue that a state's propensity to comply with international law is a function of whether it has a democratic government, whether or not it shows a strong commitment to the rule of law and legality, and whether it has an independent judiciary.¹⁶¹ The affinity argument is that respect for domestic rule of law and legality would translate into respect for international rule of law. Simmons argues, for instance, that "governments that have invested in and rest on a stable legal framework at home are unlikely to jeopardise this reputation by lightly flouting international legal obligations".¹⁶²

Yet, while a strong commitment to domestic rule of law is likely to contribute positively to international law compliance, it may be far too simple to assume that, even in a rule-of-law state, there will be a smooth transition from existing laws and legal institutions to new ones through a process instigated by international rules.¹⁶³ The legal explanation for such inconsistent behaviour by an otherwise liberal state may be found in the last of the legal variables considered in this chapter.

¹⁵⁸ Chayes and Chayes (1993, at p. 183).

¹⁵⁹ Pistor (2000).

¹⁶⁰ See: Young (1979) Slaughter (1993/1995), Moravcsik (1997) and Haggard (1990).

¹⁶¹ Slaughter (1993/1995) and Carney (2000).

¹⁶² Ibid. (p299).

¹⁶³ Harding (2002)

Clash of Legal Cultures, Tradition and Institutions

Apart from treaty imprecision and constructive ambiguity, which may lead to different and sometimes self-serving interpretations that are inconsistent with good faith observation of the treaty obligation¹⁶⁴, the clash of legal culture, tradition and institutions may make full compliance difficult to achieve. Two concepts are particularly relevant here: these are legal pluralism and legal autopoiesis. Legal pluralism suggests a multitude of legal orders located and produced at different structured sites around the world: domestic, regional, international, state as well as non-state sites.¹⁶⁵ The relations among these sites can be mutually constitutive or autonomous or even dialectical.¹⁶⁶

However, the theory of legal autopoiesis suggests operational closure.¹⁶⁷ Autopoietic systems, such as law, state and economy¹⁶⁸, construct their images of other systems only through the distorting lens of their own perceptual apparatus¹⁶⁹, and can only become open to other systems through structural coupling resulting from perturbations or “productive misreading”.¹⁷⁰ Yet, internal constraints can render mutual constitution or structural coupling highly selective. These constraints can result from “the local specialities of the diverse discourses involved” as well as “resistance of presently existing structures”.¹⁷¹

It is these local specialities and resistance that often create disharmony between international law and domestic law, which, in some respects, can be described as two independent autopoietic systems. Established domestic legal practices and cultures, which are fully embraced by the domestic legal intermediaries, including legislators, courts, judges and lawyers, are unlikely to be readily abandoned in favour of conflicting international norms.¹⁷² Often in international negotiations, powerful states try to sell or even impose their domestic legal and regulatory practices on the rest of

¹⁶⁴ See Chayes and Chayes (1993 for the effect of treaty ambiguity on compliance.

¹⁶⁵ Tuebner (1992); Snyder (1999).

¹⁶⁶ Ibid.

¹⁶⁷ Tuebner (1992).

¹⁶⁸ For the view that law, state and economy are autopoietic systems, see Tuebner (1992), Tuebner and Febbrajo eds (1992)

¹⁶⁹ Black (2004, p4).

¹⁷⁰ Tuebner (1992)

¹⁷¹ Ibid, p.1456.

¹⁷² See Mistelis in Fletcher et al (2001) for the role legal traditions can play in limiting the international harmonisation of law.

the world.¹⁷³ Virtually all states seek to protect their established legal norms and cultures. Where pre-existing domestic legal rules and norms are perceived as serving a legitimate purpose, any conflicting international norm is likely to be internalised only slowly, if at all.¹⁷⁴

In sum, the legal factors that can affect state compliance with international law are varied, ranging from legal sanctions and reputational concerns to normative commitment, legitimacy, domestic regime type, and autopoiesis. Yet there are other factors that do not owe their sources to legal considerations, broadly defined, but which can nevertheless be influential or even decisive in shaping the compliance behaviour of states. These are broadly defined as non-legal variables, and it is to these that the next subsection turns.

*Compliance as a Function of Non-legal Phenomena*¹⁷⁵

The main non-legal factors shaping state's responses to international economic law obligations are social, economic, political and cultural in nature. As Robert Hudec's scholarship teaches, to understand or appreciate international trade law and its operation one needs to understand the culture, environment, and political economy of the states that are subject to its rules and disciplines.¹⁷⁶ In this section, the main variables discussed are: domestic circumstances and policy choices; globalisation and market forces; institutional quality and capabilities; and the role of domestic actors.

Domestic Circumstances and Policy Objectives

The economic and socio-economic conditions that a country faces and the perceptions of government officials as to the appropriate policy responses to these conditions will play a significant role in shaping how that country responds to the opportunities and constraints of international law. For instance, countries may be less likely to comply with international economic law under conditions of macroeconomic and political

¹⁷³ Bayne and Woolcock (2003, p30)

¹⁷⁴ Broek, 2003

¹⁷⁵ This subsection draws heavily from social science theories, such as political economy, institutional economics, as well as rational and public choice theories.

¹⁷⁶ Hudec's analytic approach of "transcending the ostensible" often looks beyond obvious legal factors to explain to how the WTO law and institutions operate. See, e.g. Hudec (1987). For work on the political economy of international trade law, see Kennedy and Southwick eds. (2002).

instability¹⁷⁷ as well as poor socio-economic conditions such as the prevalence of unemployment, poverty and disease.¹⁷⁸ However, economic crisis may generate demands for reforms and more willingness to conform to international norms.¹⁷⁹

The structure of a country's economy and external trade is also a major factor likely to shape its attitude to international economic law obligations. As Milner argues, there is a positive relationship between international cooperation and openness.¹⁸⁰ Trade dependence and openness should thus positively influence better adherence to international trade rules.¹⁸¹ The existence of export opportunities may also provide a favourable climate for outward-oriented policies and international rule compliance,¹⁸² while lack of such opportunities may reduce the incentives to embrace international trade rules.

The role of ideas or ideology in shaping national policies and the behaviour of governments has also been highlighted by a number of scholars.¹⁸³ According to the ideational view, compliance will depend on the underlying ideological norms or consensus prevailing in a particular country. Thus, where trade liberalisation objectives enjoy only very tenuous political and normative support in home capitals, the legal commitments made by governments would often be less dependable than their binding legal form would suggest.¹⁸⁴

As Sikkink argues, “[i]nternational and domestic constraints and opportunities do not exist outside of the individual cognition; rather they are perceived by policy makers based on their conceptual frameworks”.¹⁸⁵ Thus, without prior normative commitment to reforms at home, compliance with international trade obligations that clash with perceived national policy objectives is unlikely to be routine or voluntary.¹⁸⁶ Yet, the

¹⁷⁷ Ho (2002, p.9),

¹⁷⁸ As Rodrik (1996) argues, in hard times and under domestic pressures, the typical pattern is for governments to respond by tightening their restrictions.

¹⁷⁹ The crisis hypothesis is discussed in Williamson (ed) (1994).

¹⁸⁰ Milner (1997)

¹⁸¹ Ibid. Simmons (2000).

¹⁸² See Haggard and Webb (1990)

¹⁸³ For the ideational perspective, see, e.g. Rohrlick (1987), Sikkink (1991), Goldstein (1993) and Woods (1995).

¹⁸⁴ Kennedy *et al* (2004)

¹⁸⁵ Sikkink, 1991, p.25)

¹⁸⁶ Norton in Fletcher *et al* (2001).

domestic circumstances and policy orientation argument should not ignore the role of systemic imperatives or perturbing events.

The Role of Exogenous Factors: Economic Exigencies and Power Pressures

One of the consequences of economic globalisation is the increasing power of the market and, arguably, the retreat of the state.¹⁸⁷ The literature on globalisation and national regulatory processes addresses how international pressures affect the national policy and institutional environment.¹⁸⁸ Arguably, few states can maintain long-term resistance to global pressures for trade and investment liberalisation. The desire for access to global markets, for foreign direct investment, for debt relief, or, indeed, for some political and diplomatic advantages, can motivate some developing countries to comply with international legal norms.¹⁸⁹

The incorporation of law reform requirements in structural reform packages and the continuous monitoring of implementation of such reforms by international financial institutions, such as the IMF and the World Bank, as prerequisites to receipt of ongoing multilateral finance assistance have become modern realities of economic markets.¹⁹⁰ Furthermore, multinational corporations use compliance with these systemic standards as a ‘stability factor’ in evaluating potential international finance and trade opportunities.¹⁹¹ Thus, non-legal phenomena such as purely economic calculations and sheer pressures of power may serve as perturbations¹⁹² and linkage institutions that induce the responsiveness of otherwise operationally closed domestic regimes to international rules.¹⁹³

¹⁸⁷ Strange (1976) argues that “the impersonal forces of world markets are ... more powerful than the states”.

¹⁸⁸ This is a systemic or structuralist view that suggests that international structures, such as global markets and international regimes, shape actors identities, interests and choices. The basic assumption is one of behavioural conformity to structural demands (see Wendt, 1987; Frieden and Rogowski, 1996).

¹⁸⁹ Carney (2000)

¹⁹⁰ Norton (2001) in Fletcher et al (2001).

¹⁹¹ Ibid.

¹⁹² Tuebner (1992) suggests replacing perturbation with “productive misreading” because in legal pluralism, the legal discourse is not only perturbed by processes of social self-production, “but law productively misreads other social discourses as ‘sources’ of norm production” (p. 1447).

¹⁹³ Tuebner (1992); Ho (2002)

Yet, the role of globalisation and international influences should not be overstated.¹⁹⁴ There are instances where states may have the desire to pursue certain policies regardless of external pressures.¹⁹⁵ Internal constraints can make rule convergence impossible or highly selective.¹⁹⁶ Furthermore, two crucial domestic variables can have shaping roles. These are institutional quality and capabilities, and domestic interest groups.

Capacity and Institutional Quality

Several scholars treat state capacity as an intervening variable or a background condition in explaining the effects of international law on state behaviour.¹⁹⁷ Capacity is at the heart of the managerial thesis, which argues that incidence of non-compliance is largely traceable to deficit in domestic regulatory capacity.¹⁹⁸ Civil servants provide an important interface between policy formulation and implementation; therefore, the administrative and technical capacities of the public sector are a critical factor in the compliance process.¹⁹⁹

Institutional variables also include the broader issue of government effectiveness, particularly with respect to legislative efficiency and the operational independence of the Executive.²⁰⁰ For instance, where there are gridlocks between the executive and legislative arms of the government or tensions between central and provincial governments, the domestic impact of international agreements is likely to be hampered.²⁰¹

The “bureaucratic politics” theory of decision-making (the Allison model) also suggests that policy formulation and implementation can be affected by organisational

¹⁹⁴ While admitting a role for international influences, several scholars question the dominant role attributed to globalisation constraints in the literature. They argue that, in fact, domestic factors are more significant in explaining state behaviour and national policies. For the domestic perspectives, see, e.g. Garrett and Lange (1996), Leblang (1997), Garrett (1998), Haggard (1990) and Cortell and Davis Jr (2000).

¹⁹⁵ See Cohen (1990) and Garrett (1998)

¹⁹⁶ Tuebner (1992)

¹⁹⁷ VanDeveer and Dabelko (2001). See also Haas, Levy, and Keohane (1993)

¹⁹⁸ Chayes and Chayes (1993)

¹⁹⁹ Weiss and Jacobson (1998).

²⁰⁰ Ho (2002)

²⁰¹ Ibid.

process and governmental politics.²⁰² For instance, considerable gap can exist between the formulated decision and its implementation because of poor coordination among government departments, due to differences in goals and objectives.²⁰³ Persistent corruption can also result in regulatory compliance failures.²⁰⁴ Corrupt and rent-seeking governments are less likely to respect systemic rules.²⁰⁵ There can also be legislative and regulatory capture by special interests, as discussed below.

Compliance Constituencies, Resister Groups and Government Officials

It is virtually impossible to complete a discussion of the factors influencing state behaviour without consideration of the role of interest groups and compliance constituencies. As Koh puts it, “the process of treaty compliance transpires in a two level game, in which a member’s relations with its treaty partners occur on one chessboard, while its bargaining about compliance with its internal domestic constituencies transpires on a domestic chessboard”.²⁰⁶

The implementation and enforcement of international law involves processes of negotiation with a wide range of actors, whose behaviour does not necessarily change simply because governments adopt international commitments.²⁰⁷ Thus, while international agreements can always be reached, they can only be fully implemented if key domestic actors concur.²⁰⁸ Special interest groups and rent-seekers are given prominence in much of the political economy literature.²⁰⁹

Yet, the effect of domestic pressure by those opposed to compliance should not be overestimated. First, a compliance constituency of actors who support compliance can effectively countervail the pressure from the resister group.²¹⁰ The ability of a “pro-treaty coalition” of domestic and international groups with an interest in or a preference for compliance to successfully countervail the resister group should not be

²⁰² See Rosati (1981) for a discussion and critique of the Allison model.

²⁰³ Ibid.

²⁰⁴ Damania (2003).

²⁰⁵ Ho (2002)

²⁰⁶ Koh (1997), see also Putnam (1988).

²⁰⁷ Victor et al (1998) and Snyder (1993)

²⁰⁸ Milner (1992); Keohane and Milner (1997).

²⁰⁹ See, e.g. Krueger (1974), Bhagwati (1989) and Grossman and Helpman (1994/1995).

²¹⁰ See Kahler (2000); Goldstein and Martin, (2000); Irwin (2002).

ignored.²¹¹ Secondly, the domestic institutional design and government officials can play important roles in producing compliance.²¹² The domestic structures of law can empower the compliance constituencies and disadvantage the resister groups.²¹³ Special interests opposed to compliance can be excluded from the decision-making process.²¹⁴

However, insights from the public choice theory and the new political economy suggest that policy makers, i.e. politicians and bureaucrats, can seek to maximise their short-term interests rather than promote the general good.²¹⁵ Thus, policy makers may collude with resister groups for personal or political gains, and hinder rule compliance.²¹⁶ The attitude of government officials and the kind of the decision-making institutions, therefore, do matter.²¹⁷ Compliance with international law is thus likely to depend largely on the existence of a powerful compliance constituency or pro-treaty coalition, as well as institutional supporters within government.

Conclusion

This chapter has examined a wide range of literature on the nature, role and effectiveness of international trade law. Public international trade law has evolved from the minimalist and flexible structure of the immediate post-war period to an unprecedented international economic treaty that can constrain sovereign states the way no other international treaty can. WTO law imposes legal obligations that are binding; that require positive compliance actions from governments; and that, at least in theory, can be rigorously enforced, with the possibility of legal sanctions.

In light of the nature of the compliance obligations, this thesis aims to examine compliance by two developing countries, and then to explain the sources of their behaviour. Several possible explanatory variables have been identified from the literature survey in the foregoing sections (see Table 1). Clearly, none of these

²¹¹ See Young (1979); Moravsik (1997); and Benvenisti (2001).

²¹² Princes (2004)

²¹³ Finnemore and Toope (1997, p.27).

²¹⁴ Victor et al (1998) argue that the extent of participation of non-state actors in the implementation process and particularly their access to information can shape outcome.

²¹⁵ See Williamson (ed) (1994)

²¹⁶ Ibid; Grossman and Helpman (1994/1995).

²¹⁷ For the public choice view, see: Buchanan and Tullock (1962), Brennan and Buchanan (1985) and Besley (2002).

variables alone can explain the behaviour of these countries. Compliance is likely to be the outcome of the combination of several variables, which suggests that there are linkages between them.

Table 1: Explanatory variables and Definitions

Variable	Description
<i>Legal Variables</i>	
Shadow of the law	This refers to a set of variables that include legal enforcement/sanctions, and “instruments of active management” or “systems of implementation review”, such as monitoring, surveillance and transparency requirements
Reputational factors	Refer to concerns about loss of reputation and credibility
Normative Commitment	Refers to actor’s normative commitment and sense of obligations.
Endogenous preference	Refers to principles such as fairness, justice and equity. It relates to actor’s perception about the legitimacy and ownership of rules.
Domestic regime type	This variable covers domestic governance elements such as democracy, rule of law, legality etc
Clash of legal culture, norms and institutions (autopoiesis and legal pluralism)	Relate to the role of pre-existing domestic legal rules and institutions, and the attitude of legal intermediaries.
<i>Non-legal variables</i>	
Domestic circumstances and policy objectives	This variable refers to domestic economic and socio-economic conditions and the government’s ideas and policy choices
Globalisation: exogenous/external influences	This refers to the role of external economic pressure, including donor conditionalities, market forces, as well as political and diplomatic pressures.
Institutional variables	The variable refers to institutional quality and capabilities
Domestic interest groups	This variable examines the role of special interests opposed to or in favour of compliance, and the mediating role of government officials.

It is these variables and the data derived from them that will underpin the analysis and explanations of the compliance behaviour of South Africa and Nigeria. The aim is to assess the relative roles played by the variables in explaining the behaviour of both countries, as established from the case studies of their implementation and compliance records. Before focusing on the case studies and the explanations, it is necessary to present a broad overview of the domestic structures and processes for trade governance in the two countries. The domestic trade governance structures are crucial for a proper understanding of the behaviour of these countries. The next chapter addresses these governance issues.

CHAPTER 3

Trade Governance in South Africa and Nigeria: An Overview

The previous chapter considered broadly the systemic issues arising from WTO law and the compliance obligations that the law imposes. The discussions in that chapter are relevant for the contextual analysis in the subsequent core chapters of this thesis. The present chapter is also important for the same reason. Its aim is to present an overview of the domestic structures and processes for the foreign trade policy of South Africa and Nigeria. Compliance with international trade law is a decentralised process, taking place at the national level. Therefore, in order to examine how a country has implemented its WTO obligations and to explain its behaviour, it is necessary to look, first, at its domestic governance structures and processes.

The chapter is divided into two parts. The first focuses on South Africa, the second on Nigeria. Each part consists of four sections. Section 1 examines the institutional framework, concentrating on the constitutional, legal and regulatory structures. Section 2 looks at the national trade decision-making and surveillance processes, focusing on the administrative structures as well as the role of governmental and non-governmental actors. Section 3 discusses the foreign trade policy framework, and section 4 focuses on the Uruguay Round participation and commitments of these countries, as well as their post-Uruguay Round strategies and activities in the WTO. The chapter concludes with a brief comparison of the experiences of both countries.

South Africa's Domestic Structures and Processes

Institutional Framework for Trade Policy

Constitutional, Legal and Regulatory Structures

The new South African Constitution was approved by the Constitutional Court in December 1996, and took effect in February 1997. The Constitution has real and potential impact on the development and implementation of national policy in the country. It contains several provisions relating to the roles and functions of the different spheres of government and organs of state, and deals with the status of treaties in domestic law.

The Parliament consists of the National Assembly and the National Council of Provinces (NCOP). Although both participate in the legislative process, they have different functions. For instance, the former is elected to represent the people and to provide general oversight of the exercise of executive powers, while the latter represents the provinces “to ensure that provincial interests are taken into account in the national sphere of government”.¹

National laws affecting the provinces must in general be approved by the NCOP. Furthermore, although the National Executive may intervene in provincial administration to maintain national standards or economic unity, such intervention must end unless the Council approves it within 30 days of its first sitting after the intervention began.² Equally, national legislation affecting the provinces can effectively be vetoed by the NCOP unless overridden by a two-thirds majority in the National Assembly.

Given that there are many functional areas of concurrent national and provincial legislative competence³, the apparent constitutional limitations on the extent of national executive or legislative intervention in provincial administration suggests that certain WTO obligations, in which the Provinces have vested interests, may be hindered by poor implementation at the provincial level.⁴ Potentially, this is a source of political constraints, which could hinder the effective implementation of international obligations. The Constitution, however, enshrines the “principles of cooperative government and intergovernmental relations”⁵, and the Intergovernmental Relations Framework Act of 1995 provides for mechanisms and procedures to facilitate intergovernmental relations and settlement of disputes.

¹ Section 42 (4).

² Section 100 (1) and (2).

³ Schedule 4 of the Constitution lists all the areas, which include agriculture, animal control and diseases, consumer protection, education, environment, health services, industrial promotion, tourism and trade. Indeed, agriculture is specifically classified as a provincial competency under the Marketing of Agricultural Products Act of 1996. This has resulted in disconnect between national and provincial structures for agriculture (Kirsten, 2006).

⁴ WTO Agreements contain what has been described as “federal clauses”, which appear to recognise the effect of constitutional distribution of competence between federal and sub-federal units. These provisions, can be found in Article XXIV:12 of the GATT 1994, Article 13 of the SPS Agreement, Articles 3, 4, and 7 of the TBT Agreement, and Article 1:3 of the GATS. They require members to take only “reasonable measures” to ensure observance by regional and local government and authorities within their territories (See Bhuiyan, 2004 for a discussion on the federal clauses of the WTO law).

⁵ Section 41. All spheres of government are enjoined to settle differences amicably and in good faith.

The Role of Parliament, Courts and Other Organs of State

Apart from the constitutional distribution of competence between the national and provincial governments, there is also separation of power between the executive and the legislative branches. The President, together with his Cabinet, is charged with the responsibility for developing and implementing national policy, while Parliament is required to consider, pass, amend or reject legislation, as well as provide for mechanisms “to ensure that all executive organs of state in the national sphere of government are accountable to it, and to maintain oversight of the exercise of national executive authority ...and (of) any organ of state”.⁶ The National Assembly and the Provinces (represented by the NCOP) could potentially undermine the implementation of South Africa’s international trade treaties, since they could refuse to ratify such treaties or approve relevant implementing legislation.

However, while the separation of powers can result in executive constraints and a divided government due to tension between the legislative and executive branches, this has not been the case in South Africa. According to Polity IV, in its 2003 country report, South Africa scored 7 out of a maximum score of 10 points in the executive constraint indicator.⁷ This suggests that the Executive enjoys a high degree of operational independence and, therefore, can introduce policies with minimal chance of a legislative veto or gridlock.

Parliament is widely seen as playing a marginal role in the policy formation process, while the Executive plays a dominant role. This is attributed to the confluence of two political factors: the ruling party’s electoral dominance⁸ and the party-list system, which helps to ensure party discipline and loyalty.⁹ The result is that although government bills are scrutinised by the relevant Parliamentary Portfolio Committees, they are, in general, routinely passed into law. While the closed nature of executive policy and the limited legislative oversight suggests a lack of transparency and democratic accountability of South Africa’s trade policies, the centralisation reduces the possibility that the implementation of South Africa’s international obligations may be impeded by legislative hindrances.

⁶ Section 55 (1) and (2).

⁷ See <http://www.cidcm.umd.edu/inscr/polity/Safl.htm> (accessed 14/10/2005)

⁸ The ANC had 70 percent of the national vote at the last elections.

⁹ Draper (2005)

South Africa's constitutional structure also affects the manner in which treaties may be given effect in national law. The negotiating and signing of all international agreements, including trade treaties, is the sole responsibility of the national executive.¹⁰ However, an international agreement will not have effect in South Africa unless ratified by the Parliament,¹¹ but an agreement of a technical, administrative or executive nature is, however, binding without approval by Parliament.¹² Furthermore, the Constitution provides that a self-executing provision of any agreement approved by Parliament is binding without further legislative act, unless it is inconsistent with the Constitution or an Act of Parliament.¹³

The South African Parliament approved the ratification of the Uruguay Round Agreement in 1995. However, most of the provisions of the WTO agreements are not self-executing.¹⁴ Thus, even though Parliament has ratified the WTO treaty, the covered agreements do not form part of South Africa's public law and cannot be directly invoked in the courts.¹⁵ This is because, although relevant existing statutes were amended to implement several of the obligations in the WTO agreements, the covered agreements were not themselves specifically promulgated.¹⁶

However, the South African Constitution requires the courts to adopt the principle of consistent interpretation. Section 233 states that "(w)hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law". This suggests that WTO law could serve as a reference and aid in the interpretation of the relevant domestic statute.

¹⁰ South Africa has roughly 1800 treaties in force (Botha in Hollis et al, 2005).

¹¹ Section 231. South Africa is a thus dualist state, since treaties do not become part of domestic law unless ratified by Parliament.

¹² Although such an agreement must be tabled in the National Assembly and the Council within a reasonable time (Section 231(3)).

¹³ Section 231(4). This provision gives direct effect to self-executing provisions of a ratified treaty.

¹⁴ A treaty is self-executing where its language is precise enough that it does not require an added governmental action to implement it. The WTO agreement, in fact, explicitly requires such governmental action (see Article XVI.4 of the WTO Agreement).

¹⁵ This is similar to the situation in the United States, where the "Uruguay Round Agreements Act" (1994) amends various aspects of US law to comply with obligations emanating from the Uruguay Round Agreement, but precludes the Agreement itself from being directly invoked in US courts. Similar situation applies in the EU, where the WTO Agreement has no direct effect (see Jackson, 1998, for the status of WTO law in US and EU law).

¹⁶ Joubert (2005). For a discussion of the interface between the South African Constitution, trade agreements and national trade law, see also Erasmus (2003).

However, one important feature of South Africa's legal system is the constitutionally guaranteed Bill of Rights, which provides for an extensive array of socio-economic rights "that are designed to change South African society fundamentally".¹⁷ According to section 8 of the Constitution, "(t)he Bill of Rights applies to all laws, and binds the legislature, the executive, the judiciary and all organs of state". Several rights are created, including freedom of expression¹⁸, access to health care services¹⁹ and access to information²⁰. All of this also has implications for South Africa's compliance with its international obligations.

The adoption of justiciable constitution and democratic constitutionalism has given law pride of place in the post-apartheid South Africa.²¹ The result is increased pressure group litigation and social activism by lawyers, who use the Constitution in attempts to achieve reform and to establish rights.²² In this respect, the courts may be asked to test the implementation of South Africa's international obligations against the constitutionally guaranteed social and economic rights.²³

South Africa's constitutional order has also increased the role of courts and judges in the political process. Judges are widely believed to have the power to revise government's laws and channel them into new directions, based on their convictions and values.²⁴ Many cases and dicta demonstrate a desire on the part of the judiciary to adapt the law to contemporary needs and the prevailing ethos of freedom, equality and the rule of law.²⁵

¹⁷ Du Bois in Zimmermann *et al* eds. (2004, p.3). See also Klug (2000); Corder (2001); and Andrews and Ellman eds (2001).

¹⁸ Section 16

¹⁹ Section 27

²⁰ Section 32, which states, *inter alia*, that "(e)very one has the right of access to ... (a) any information held by the State, and (b) any information that is held by another person and that is required for the exercise or protection of any rights". The Constitution requires the government to enact legislation to give effect to this right. In 2000, Parliament passed the Promotion of Access to Information Act. See <http://www.info.gov.za/gazette/acts/2000/a2-00.pdf>

²¹ Klug (2000).

²² Du Bois in Zimmermann *et al* eds. (2004).

²³ Mr Justice Harms, speech to the Second Session of the WIPO Advisory Committee on Enforcement, June 28 to 30, 2004; document WIPO/ACE/2/4 Rev.

²⁴ Du Bois in Zimmermann *et al* eds. (2004, p.6).

²⁵ For instance, Marais, J A stated in *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) at para 15 that "[t]here are many areas of the law in which courts have to make policy choices. See also Zimmermann *et al* eds. (2004)

The tendency of judges to play the role of political actors could, however, have implications for the implementation of WTO law in that judges may be less inclined to support faithful implementation of obligations that are perceived to have adverse effects on the socio-economic rights of the citizens.²⁶ However, s. 39, which deals with the interpretation of the Bill of Rights, states that "...a court, tribunal or forum ... (b) must consider international law".²⁷

Another important constitutional provision that may also shape the government's compliance behaviour is that on "just administrative action". Section 33 states that "(e)very one has the right to administrative action that is lawful, reasonable and procedurally fair". It goes on to provide that "(e)very one whose right has been adversely affected by administrative action has the right to be given written reasons". National legislation must be enacted to give effect to these rights.²⁸ This provision complements many of the WTO provisions on transparency, and suggests that domestic legality can serve indirectly the same end as WTO legal obligations.²⁹

In addition to the constitutional provisions, several trade and trade-related laws and regulations define the legal and regulatory structures of South Africa's foreign trade.³⁰ With respect to trade in goods, the main laws are the International Trade Administration Act of 2002, the Anti-Dumping Regulation of 2003, and the Customs and Excise Act, 1964, as amended.³¹ Several laws govern the main areas of intellectual property.³² The Competition Act of 1998 has potential far-reaching impact on South Africa's trade regime, as are the various labour and social laws, designed to address historical injustices.

²⁶ The courts' interpretations of a number of WTO obligations are considered in the case studies.

²⁷ This does not necessarily mean, however, that a court will consider only international trade law. Indeed, it is more likely to consider all relevant international legal instruments, including international human rights law, see Berger (2002).

²⁸ Section 33(3). In 2000, parliament enacted the Promotion of Administrative Justice Act to give effect to the constitutional provision. See: <http://www.info.gov.za/gazette/acts/2000/a3-00.pdf>

²⁹ One view, however, is that there is a significant gap between the law and its effectiveness in South Africa (see du Bois in Zimmermann et al eds, 2004, at p.4)

³⁰ The list of South Africa's trade laws and regulations is available at www.dti.gov.za

³¹ Chapters 4 and 6, dealing respectively with the implementation of the customs valuation agreement and the WTO trade remedy rules will discuss these statutes.

³² South Africa's IP regime, together with that of Nigeria, is the subject of chapter 5 of this thesis.

In sum, the institutional framework for trade in South Africa rests in part on a constitutional structure that appears to impose constraints on the exercise of governmental discretion. The constitutional structure, the administrative and public laws that derive from constitutional principles, as well as the social, economic and political rights guaranteed by the constitution, are all factors that are likely to play a significant role in shaping the government's responses to its international obligations. South Africa's constitutional order is premised on democracy, the rule of law and the pursuit of equality. Consequently, the role of the Constitution and the courts will be important in explaining South Africa's compliance behaviour.

National Trade Decision-making and Surveillance Mechanisms

Governmental structure

The key organ of state responsible for the formulation and coordination of trade policy is the Department of Trade and Industry (DTI). However, given the cross-cutting nature of trade, initiatives on trade issues may come from the Departments of Finance (or the National Treasury), Agriculture, National Health; Mineral and Energy Affairs, and the South African Reserve Bank.³³ The Department of Foreign Affairs (DFA) and the Justice Department play a marginal role.³⁴

South Africa's Permanent Mission at the WTO is also an important part of the trade policy process, both in respect of negotiations in Geneva and compliance with the notification requirements. The Permanent Mission reports to the DTI in the capital. It consists of a "WTO Ambassador and Permanent Representative" and a "Head of Delegation". In addition to the ambassador and the HOD, the Mission has four other delegates that are dedicated to the WTO. Although coordination between Geneva and the capital is relatively effective, and South Africa has been able to meet much of its notification obligations, the participation of the Geneva delegates in WTO activities is hampered by lack of adequate resources and capacity.³⁵

Apart from the above frontline departments, several government agencies have some jurisdiction over various aspects of trade policy. For example, while the DTI

³³ WTO (2003).

³⁴ Draper (2005).

³⁵ As observed by this author, there were several WTO committee and council meetings at which no delegate from South Africa attended.

formulates trade policies and negotiates trade agreements, the key implementing agencies include the International Trade Administration Commission (ITAC), the South African Revenue Service (SARS)³⁶, the Companies and Intellectual Property Registration Office (CIPRO), and the Directorate of Food Control, and the South African Bureau of Standards (SABS), which deal with the SPS and TBT issues respectively.

Trade Policy Coordination and Capacity

Faithful implementation of international rules depends crucially on government effectiveness, including optimal coordination among relevant departments and agencies.³⁷ According to the Kaufmann ratings³⁸ for 2004, South Africa has a point score of 0.74 on government effectiveness indicator³⁹, while UNCTAD, in its 2005 Trade and Development Index (TDI), gave it 2 points (from a scale of 0-4).⁴⁰ With respect to corruption, South Africa ranked 46 out of 148 and had a score of 4.5 points out of a maximum point of 10, according to the Transparency International (TI) corruption index for 2005.⁴¹ In the same corruption category, UNCTAD gave South Africa a score of 2.67 point (from a scale of 0-6)⁴²

What the foregoing shows is that South Africa's record is not spectacular on government effectiveness.⁴³ Indeed, inefficient bureaucracy is often cited as one of the barriers to trade in South Africa, in addition to excessive regulation among others.⁴⁴ According to the Economist Intelligence Unit (EIU), "concerns exist over the capacity of the bureaucracy at the various levels of government".⁴⁵ The government itself admits that there are deficiencies in state organisation, capacity and leadership.

In its recent Accelerated and Shared Growth Initiative, South Africa states: "certain weaknesses in the way government is organised, in the capacity of key institutions,

³⁶ Customs and Excise is a division of SARS.

³⁷ See Rosati (1981) for a discussion of the "bureaucratic politics" model of decision-making.

³⁸ The World Bank governance index.

³⁹ The indicator can take values between -2.5 and 2.5. A higher score indicate better institutions.

⁴⁰ UNCTAD (2005).

⁴¹ Global Corruption Report 2006, Transparency International.

⁴² UNCTAD (2005).

⁴³ This is, however, far better than what obtains in most other African countries.

⁴⁴ USTR (2005).

⁴⁵ *The Economist*, 2006

including some of those providing economic services, and insufficient decisive leadership in policy development and implementation, all constrain the country's growth potential".⁴⁶ Thus, South Africa has capacity problems, although not as acute as those of many other developing countries, including Nigeria.

Trade Consultative and Surveillance Mechanisms

The consultative mechanism, designed to encourage consensus-building on economic issues is the National Economic Development and Labour Council, NEDLAC, established in 1995. As a statutory body, NEDLAC is formally involved in discussing trade and industrial policy.⁴⁷ DTI officials are mandated to present specific issues in trade negotiations to the body through its Trade and Industry Chamber. In practice, however, the NEDLAC process is largely government-driven, with labour and business merely following the lead of government officials. This is due to capacity constraints and government's top-down approach to policy formulation.⁴⁸

Apart from the NEDLAC process, Parliamentary hearings also provide opportunities for stakeholders' input into the legislative process. Indeed, sections 59 and 72 of the Constitution mandate the National Assembly to facilitate public involvement in all its legislative and other processes. Interested stakeholders are frequently invited to make written submissions to the National Assembly or participate in public hearings.⁴⁹ Yet, the effectiveness of such consultative process is often questioned.⁵⁰ This is mainly because, as noted earlier, the policy process is largely state-centred, concentrated within the Executive, with even Parliament playing only a marginal role. The lack of constructive trade policy consultation and dialogue with non-state actors is seen as a major institutional weakness in South Africa's trade policy framework.⁵¹

⁴⁶ See Accelerated and Shared Growth Initiative for South Africa (ASGISA), available at <http://www.info.gov.za/asgisa/asgisa.htm#top> (accessed 18/6/2006).

⁴⁷ See ss. 4 (1) (c) and (d) of the NEDLAC Act, which sets out the functions of the body.

⁴⁸ Monnakgotha (1998); Joubert (2005).

⁴⁹ The Trade Law Centre (Tralac), the Trade and Industrial Policy Strategies (TIPS) and the South African Institute of International Affairs (SAIIA) are some of the most prominent civil society organisations that are active in making contributions to policy debate (see Draper, 2005).

⁵⁰ The view of business, for instance, is that the Parliamentary hearings only serve to rubber stamp measures or policies that had already been decided upon. See: Joubert, 2005, citing the view expressed by the South African Chamber of Commerce (SACOB).

⁵¹ For a more detailed discussion on the role of non-state actors in South Africa's trade policy, see Draper (2005)

According to the Polity IV country report in 2003, South Africa ranks very low in respect of civil society participation in the policy process, scoring 2 out of a maximum point of 10⁵². With respect to trade policy, government officials use the legal and technical complexities of trade issues, as well as the “extreme delicacy” of trade negotiations as reasons to avoid trade policy dialogue with civil society.⁵³ As a result, there is hardly any debate on South Africa’s national trade policy, and consultations are believed to be merely perfunctory.⁵⁴

However, while the closed nature of executive policy may suggest the absence of special interests’ capture of trade policy, interest groups are, in fact, not completely bereft of influence. For instance, global corporate actors and their local subsidiaries are very active with respect to the protection of intellectual property rights. Pressure group litigation is also prevalent. Through their litigious approach, NGOs, such as the Treatment Action Campaign (TAC), have secured some court victories over the government on HIV/AIDS-related issues, which concern the TRIPS agreement.

The increasingly influential black middle class is partly the driver and certainly the focus of the government’s Black Economic Empowerment (BEE) programme, which permeates virtually every aspect of the government policy.⁵⁵ The Congress of South African Trade Unions (COSATU), one of the tripartite-alliance that forms the ANC-led government⁵⁶, has also been the driver of the labour laws passed by the ANC government since 1994⁵⁷. However, in the context of the traditional definition of interest group capture, there is little evidence of such in South Africa. The government’s overall attitude is shaped by policy considerations.

⁵² See <http://www.cidcm.umd.edu/incr/polity/safl.htm>.

⁵³ Keet (2005).

⁵⁴ Ibid.

⁵⁵ Apart from redressing past injustices under apartheid, the government is using the BEE initiative to create the “missing middle” in South Africa (see “In search of the ‘missing middle’”, *Mail & Guardian*, 10.4.2003)

⁵⁶ The alliance is made up of the ANC, COSATU and the South African Communist Party (SACP).

⁵⁷ The web of labour legislation is blamed for the rigidity of the South African labour market, which in turn is partly blamed for the high unemployment rate (IMF, 2005).

South Africa's Trade Policy Framework

South Africa's trade policy was, for much of the 1970s and early 1980s, underpinned by the import-substitution industrialisation (ISI) strategy.⁵⁸ However, by the late 1980s, there was a consensus among key political and business actors, including ANC politicians⁵⁹, that a policy of trade liberalisation should replace the highly distorted system of protection. The early 1990s marked the beginning of serious attempts at trade liberalisation, a trend that continued following the end of apartheid rule in 1994.⁶⁰ Since then, South Africa has been characterised by a more open economy⁶¹ and diversification of the structure of trade⁶² and foreign direct investment⁶³.

The underlying objectives of South Africa's economic and trade policies remain strongly in favour of export-led growth and increased foreign direct investment. This has been the policy thrust since 1994, and was reinforced by the Growth Economic and Reconstruction (GEAR) policy framework of 1996 and the Global Economic Strategy document of 2000. Even the government's recent Accelerated and Shared Growth Initiative for South Africa (ASGISA), which is aimed at addressing domestic structural problems, stresses external trade orientation and international exposure.⁶⁴ Increased FDI and export trade are linked to the competitiveness of South Africa's industries, economic growth, and job creation.⁶⁵

⁵⁸ Marais, (2001; Gelb, (1991).

⁵⁹ In the 1980s, the ANC was threatening a socialist reconstruction of post-apartheid South Africa, with a policy of nationalisation. However, moderate and influential voices in the party prevailed on the leadership to back away from such a policy. Moderates, such as Alec Erwin, who later became Minister of Trade and Industry (and now Minister for Public Enterprises) under the ANC-led government, and Trevor Manuel, first Minister of Trade and, since 1996, Minister of Finance, were liberalisers, who supported the substantial lowering of protective tariffs as well as a constitutional guarantee for the independence of the Reserve Bank, South Africa's Central Bank (Marais, 2001; Gelb, 1991).

⁶⁰ For a discussion of the different phases of trade reform in South Africa, see Cassim *et al* (1993)

⁶¹ For instance, South Africa's share of total trade to GDP increased from 36.71% in 1992 to an average of 56% between 2002 and 2004 (WTO, 2006)

⁶² The share of manufacturing in total exports was 65% in 2004, while fuels and mining products accounted for 27% and agriculture 7.9%. http://stat.wto.org/CountryProfile/ZA_e.htm. (accessed 7/6/2006)

⁶³ Although South Africa is underperforming in terms of foreign direct investment, having attracted only between \$0.5 – 0.9bn in 2003 as well as 2004, it leads the rest of Africa in terms of FDI outflows, as a result of cross-border acquisitions by trans-national corporations from South Africa, following an increasingly liberalised outward investment policy in the country (UNCTAD, 2005)

⁶⁴ The ASGISA promises government interventions to address, *inter alia*, the issues of skills shortages, poverty and to eliminate the "second economy". There will, however, be "no shift in economic policy", based on macroeconomic stability and export orientation. The ASGISA document is available at <http://www.info.gov.za/asgisa/asgisa.htm#top> (accessed 18/6/2006).

⁶⁵ See the Economic Cluster media briefing by Alec Erwin, in which he said the aim of the government's economic policy was, *inter alia*, "to grow the economy" through a four-pronged

However, South Africa's poor social indicators⁶⁶ have, in recent years, been a constant source of domestic pressure for trade protection and direct government intervention to address the social problems.⁶⁷ The growing feeling is that while trade liberalisation may have boosted growth, it has not created that many jobs.⁶⁸ The poor socio-economic circumstances and the government's policy and regulatory responses to them are likely to make full compliance with certain WTO agreements particularly difficult. Recent attempts to slow down the pace of liberalisation, as well as South Africa's more defensive positions in the on-going Doha Round negotiations on issues such as TRIPS, GATS⁶⁹ and agriculture are clearly driven by competing domestic policy objectives.

Yet, given South Africa's strong desire for market access and FDI, the government is acutely aware of the reputational costs of any significant defection from international economic norms. In 2003, a leaked draft version of the mining sector's Black Economic Empowerment (BEE) charter prompted an exodus of portfolio investment in mining shares following rumours that the government would nationalise the sector. Threats of disinvestment by foreign banks and insurance companies also dogged the preparation of the BEE charter for the financial sector.⁷⁰ The government responded by adopting a more cautious and consultative approach.

Thus, while South Africa's regulatory responses to some domestic socio-economic conditions may lead to partial or delayed compliance with certain WTO obligations, its behaviour is also likely to be conditioned and constrained by exogenous factors,

approach that include increased levels of investment and exports:
<http://www.info.gov.za/speeches/2005/0502171411510001.htm>.

⁶⁶ While South Africa has recorded macroeconomic and financial successes, thanks to sound policies and a favourable external environment, it faces challenges in terms of high unemployment, persistent inequalities, widespread poverty and high prevalence of HIV/AIDS (IMF, 2005 Article IV Consultation).

⁶⁷ The rhetoric of ministers is actually in favour of targeted intervention to address the socio-economic problems. See, for instance, speech by Minister of Trade, Mr M Mpahlwa to Parliament on 16 December 2005: <http://www.info.gov.za/speeches/2005/05021714451003.htm>.

⁶⁸ Employment still remains at 26%, although this is an improvement over the 32% of some years ago.

⁶⁹ For instance, South Africa's reluctance to join a consensus on GATS negotiations almost led to the collapse of the Hong Kong Ministerial conference of the WTO. South Africa led a coalition of countries such as Kenya, Jamaica, Venezuela and Cuba, which demanded that the draft text be changed to make it easier for countries essentially to opt out of the services negotiations and shield domestic industries. The group threatened to block a consensus on the entire Hong Kong declaration. (various media reports, e.g. *New York Times*, December 19, 2005).

⁷⁰ See Reg Rumney, "Government treads policy tightrope" (*Business Day*, 24th January 2003)

such the fear of upsetting international investors and its major trading partners.⁷¹ Globalisation or market forces are thus useful explanatory variables. The next section considers South Africa's participation and activities in the multilateral trading system.

South Africa and the GATT-WTO system

Uruguay Round Participation and Commitments

South Africa's initial participation in the Uruguay Round was weak due to the fact that it was still under apartheid rule, which led to domestic hostility and international isolation. However, following the commencement of the transitional negotiations between the apartheid government and the ANC in 1990, South Africa re-entered the Uruguay Round negotiations more actively under the auspices of the National Economic Forum (NEF) and the Transitional Government.

Socialisation engendered by the transitional negotiations⁷², ideological shift within the ANC itself, as well as acceptance of stark economic realities were factors that caused the party to abandon its socialist rhetoric in support of the unilateral economic and trade reforms introduced by the apartheid regime in the early 1990s.⁷³ This unilateral liberalisation played a major role in shaping South Africa's offers in the Round. According to the GATT:

South Africa "looks to its results to support its own restructuring efforts, especially in improved market access for processed mineral products, light manufactures and agriculture. It also views the Round as an avenue for cementing the emerging change in policy direction, particularly with respect to lowering and binding tariffs".⁷⁴

South Africa's offer made to the WTO in 1994 involved comprehensive trade policy reform. For instance, 96.5% of tariff lines in all products were bound, with 100% binding coverage for agricultural products and 96% for non-agricultural products (see

⁷¹ Keet (2005) argues that "South Africa's positions in the WTO have mostly been characterised by a notable cautiousness, a general concern not to challenge but rather to re-assure the majors" (p.11).

⁷² One of the representatives of business during the transitional negotiations was quoted as saying of the ANC's positional shift: "[n]egotiation works. Rhetoric is dropped and reality prevails. The chemistry of negotiations changes people's perception in the negotiating forum" (see Bond, 2002, p.57)

⁷³ For a discussion of the interplay of forces that led the ANC to abandon its threat of a socialist reconstruction of post-apartheid in favour of a more pragmatic acceptance of the realities of the market economy, see, e.g. Gelb (1998); Marais (2001); Bond (2002).

⁷⁴ GATT, 1993, p.45.

Table 1). South Africa’s simple average tariff level dropped to 19%, with 40% on agricultural, and 16% on non-agricultural, products. South Africa’s tariff commitments are the strongest in Africa, and even stronger than those of some of the major developing countries, such as India and Mexico (table 1). However, like most developing countries, South Africa has large gaps between its bound and applied (actual) rates.⁷⁵

Table 1: MFN bound and applied tariffs: selected developing countries

	Binding coverage (%)			Simple average (%) (bound)			Simple average (%) (applied: 2002)			Total Average (%)	
	All	Agr	Non-agr	All	Agr.	Non-agr	All	Agr.	Non-agr	Bound	Applied
South Africa	96.5	99.5	96.0	19.1	39.8	15.8	5.8	9.1	5.3	25	7
Other Africa:											
Angola	100	100	100	59.2	58.8	60.1	8.8	9.7	8.7	59	9
Egypt	98.8	99.7	98.7	37.2	95.3	28.3	19.9	22.8	19.4	53	21
Nigeria	19.3	100	6.9	118.4	150	48.8	30	53.9	26.3	105	37
Other developing:											
Brazil	100	100	100	31.4	35.5	30.8	13.8	11.7	14.1	33	13
Chile	100	100	100	25.1	26.0	25.0	6.0	6.0	5.9	25	6
China	100	100	100	10.0	15.8	9.1	12.4	19.2	11.3	12	14
India	73.8	100	69.8	49.8	114.5	34.3	29.0	36.9	27.7	66	31
Mexico	100	100	100	34.9	35.1	34.9	18.0	24.5	17.1	35	19

Source: WTO (2006)

In addition to these GATT obligations, South Africa is also bound under the Single Undertaking principle by all the other multilateral agreements of the WTO, including the TRIPS Agreement and the General Agreement on Trade in Services (GATS), where South Africa made specific commitments.⁷⁶ A striking feature of South Africa’s Uruguay Round participation is that it negotiated as a developed country and thus has developed-country status in the WTO.⁷⁷ Developed-country status means that

⁷⁵ Large gaps between bound and applied rates mean that a country can move up and down within the bound level without being in legal breach of its obligation under Article II of the GATT. In *Argentina – Textiles and Apparel*, the Appellate Body held that provided that the duties imposed by a member are within the upper limit stated in its Schedule of concessions, it is not in breach of Article II.1(b) of the GATT (Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles and Apparel and Other Items*, WT/DS56/AB/R, adopted 22 April 1998). In trade policy terms, such arbitrary adjustments create uncertainty, but crucially the Appellate Body has rejected the notion of “legitimate expectations”, saying that the only legitimate expectations of a trading partner are with regard to bound tariffs (see Appellate Body Report, *European Communities – Customs Classification of Computer Equipment*, WT/DS62/AB/R, adopted 22 June 1998).

⁷⁶ South Africa’s compliance with its GATS obligations is briefly examined in chapter 6.

⁷⁷ Many current ANC policy makers argued that having developed-country status in the WTO ignored the striking duality of the South African economy and society (interview, Pretoria, 2003). However, some who opposed it at the time later felt that “South Africa was fortunate to be treated as a developed country, by and large, for the purposes of the Uruguay Round negotiations” because it enabled the country to undertake deep reforms (Hirsch in Krueger ed, 1998, p.394)

South Africa cannot invoke or benefit from the various Special and Differential Treatment (SDT) provisions in the WTO agreements.

Post-Uruguay Round Attitude

South Africa attitude to the WTO has been generally positive. Government officials believe that multilateralism is the appropriate response to globalisation.⁷⁸ Furthermore, a rules-based multilateral system offers the best protection for small states in their economic interactions with the major powers. It is thus in the country's best interests to be fully engaged in the WTO.⁷⁹ Despite its normative commitment to multilateralism, South Africa believes that the GATT-WTO system is imperfect, arguing that the outcome of the Uruguay Round reflected the concerns and interests of the industrialised countries.⁸⁰

Thus, to South Africa, the Doha Round should be an opportunity to amend the imbalances and inequities existing in current WTO Agreements and to address decisively developmental issues.⁸¹ South Africa has also called for a renegotiation of provisions of the WTO agreements in areas where it has specific interests, such as anti-dumping, subsidies and intellectual property rights.⁸²

South Africa belongs to some of the key developing country coalitions in the WTO, including the G20⁸³, the Cairns Group⁸⁴, and the African Group. Furthermore, despite its avowed commitment to multilateralism, South Africa has also embarked on fairly aggressive strategy to conclude several bilateral and regional free trade arrangements

⁷⁸ For instance, South Africa's former trade minister, Alec Erwin, argues that the challenges posed by globalisation required new multilateral rules to manage its consequences (*Business Day* 13/06/2001)

⁷⁹ Government officials underscore this by referring to the statement of former President Mandela during the event marking the 50th Anniversary of the GATT-WTO trading system in 1998. In the statement, cited in the WTO booklet, entitled, *Doha Declarations*, Mr Mandela said: "(w)e are firmly of the belief that the existence of the GATT, and now the World Trade Organisation, as a rules-based system, provides the foundation on which our deliberations can build in order to improve ..."

⁸⁰ Alec Erwin: <http://www.businessday.co.za?Articles/TarkArticle.aspx?ID=142834> (19/10/2005)

⁸¹ Ibid.

⁸² Ibid.

⁸³ The G20, formed during the WTO Ministerial Conference in Cancun, Mexico, in 2003, is a coalition of countries pressing for ambitious reforms of agriculture in developed countries with some flexibility for developing countries. It is led by Brazil and consists of countries such as China, India, Egypt and Nigeria.

⁸⁴ The Cairns Group, formed in 1986 in Cairns, Australia, is a group of agricultural exporting nations lobbying for agricultural trade liberalisation.

(FTAs).⁸⁵ These linkages are likely to play a role in shaping the country's compliance with its WTO obligations. The next part of this chapter focuses on the domestic structures and processes for trade governance in Nigeria.

Nigeria's Domestic Structures and Processes

Institutional Framework for Trade Policy

Constitutional, Legal and Regulatory Structures

Nigeria's current Constitution was created in 1999⁸⁶. The Constitution explicitly assigns responsibilities among the federal, state and local governments. The Executive Legislative List (ELL) contains 45 items upon which only the federal government may legislate⁸⁷, while the Concurrent List (CL) contains 29 items on which both the federal and state governments may legislate.⁸⁸ The Residual List contains matters reserved for state or local governments. However, federal law supersedes any state or local government law, where any inconsistency arises between a federal law and state/local government legislation.⁸⁹

The extent of state governments' involvement in Nigeria's economic management is limited. All key economic decisions are taken at the national level. For instance, the exclusive legislative list excludes almost every important economic policy issue, including "international trade and commerce" from the control of sub-federal governments.⁹⁰ Although "industrial, commercial or agricultural development" comes within the concurrent list, state laws that are inconsistent with federal legislation in these areas would be void. Furthermore, all civil causes and matters relating to

⁸⁵ This chapter does not discuss South Africa's regional trade agreements. Suffice it to say, however, that in addition to its traditional economic ties with its neighbours under the Southern African Customs Union (SACU) and the Southern African Development Cooperation (SADC), South Africa has trade agreements with a number of other countries. Its most comprehensive free trade agreement (FTA) to date is, however, with the European Union, under the Trade and Development Cooperation Agreement (TDCA), which entered into force on 1 January 2000. The TDCA was notified to the WTO's Committee on Regional Trade Agreements in November 2000. See WTO document WT/REG113/N/1 of 21 November 2000. South Africa also benefits from preferential trade with the US under African Growth Opportunities Act (AGOA).

⁸⁶ Nigeria's Constitution is available at: <http://www.nigeria-law.org>.

⁸⁷ See Second Schedule, Part I, of the Constitution.

⁸⁸ Part II, Second Schedule

⁸⁹ Section 4(5) of the Constitution.

⁹⁰ The list includes, for instance, all areas of intellectual property rights, trade and commerce.

virtually all subject matters of international economic or commercial relations are placed under the jurisdiction of the Federal High Court.⁹¹

To this extent, the implementation of Nigeria's WTO obligations is constitutionally unaffected by the federal-state structure. Thus, the "federal clauses" in WTO law appear to have no relevance in the case of Nigeria, given that the "implementation of treaties relating to matters on the list", which cover almost every area of WTO agreements, is itself exclusively reserved for the federal authorities.⁹²

The Role of Parliament, Courts and Other Organs of State

The Constitution also separates powers between the Executive and the Legislative branches of government. A bill becomes law only after the National Assembly has passed it and the President has assented to it, or in the event of the President withholding his assent, after each House has again passed the bill by two-thirds majority.⁹³ The relationship between the Executive and the Legislature is, however, often very frosty because of Nigeria's relatively young democracy⁹⁴ and the failure of the two arms of government to delineate the boundaries of their respective authorities.

According to Polity IV, in its 2003 country report, Nigeria's score on the executive constraints indicator, which measures the ability of the Executive to have its bills passed relatively smoothly by the legislature, was 5 out of a maximum score of 10. This compares less favourably to South Africa's score of 7. Relatively few bills have been passed into law since 1999 when Nigeria returned to democracy after decades of military rule.⁹⁵ In January 2006, the President wrote to the National Assembly, expressing concerns that at least 24 executive bills critical to the economic reforms had been "outstanding for so long", and pleaded for priority to be given to the passage of these bills.⁹⁶

⁹¹ See section 251 of the Constitution.

⁹² Part I, Second Schedule.

⁹³ Section 58(5) of the Constitution.

⁹⁴ Nigeria had been under military dictatorship for 28 out of its 45 years of independence from Britain in October 1960. It has, however, enjoyed uninterrupted democracy since May 1999.

⁹⁵ For instance, a total of 459 bills were read on the floor of the Senate and House of Representatives between June 1999 and January 2005; while 179 bills were read between February and December 2005 (<http://www.nassnig.ng/bills>). Yet, only 20 bills have been enacted into law since 1999 (<http://www.nigeria-law.org>).

⁹⁶ See: <http://www.thisdayonline.com/nview.php?=-40181> (accessed 8/2/2006)

As a dualist state, no treaty has the force of law in Nigeria except to the extent to which the National Assembly has enacted any such treaty into law.⁹⁷ Nigeria signed the Marrakech Agreement Establishing the WTO in December 1994 along with other GATT Contracting Parties.⁹⁸ However, to date, the Agreement has not been ratified by Parliament or incorporated into the domestic law. As a result, the legal status of WTO obligations in the Nigeria's domestic law is not clearly established. The clear implication is that notwithstanding Nigeria's accession to the WTO treaty, traders and investors cannot invoke WTO provisions in domestic courts.

Although the Constitution states, in section 19, that Nigeria's foreign policy objectives "shall be ... (d) respect for international law and treaty obligations ...", this provision does not appear to override section 12 on the implementation of treaties, since under this section only treaties ratified by Nigeria's Parliament or given recognition by the enactment of relevant acts of parliament constitute Nigeria's treaty obligations.⁹⁹ Although the Nigerian courts will generally respect international conventions¹⁰⁰, the Constitution does not explicitly provide for the principle of consistent interpretation.¹⁰¹ Furthermore, given Nigeria's legal pluralism, its legal system is very complex.¹⁰²

In sum, Nigeria's constitutional provision on the status of treaties in domestic law is narrow. This is unlikely to induce Nigeria's compliance with its WTO obligations. Neither by incorporation nor direct application nor as aid to interpretation does WTO law appear to have any force of law in Nigeria. Furthermore, although there are

⁹⁷ See s. 12(1) of the Constitution.

⁹⁸ See GATT document Let/1957, 7 December 1994.

⁹⁹ For instance, in *General Sani Abacha & three Others v Chief Gani Fawehinmi* [2000] SC, the Supreme Court held that the African Charter of Human and Peoples Rights Treaty was not superior to the Constitution of Nigeria, and has no force of law in Nigeria

¹⁰⁰ For the response of Nigeria's courts to international economic law, see Belgore (1994) in Sodipo and Fagbemi (eds) (1994).

¹⁰¹ Section 233 of the South African Constitution provides for such principle. It is also a principle of statutory interpretation under the English law to prefer reasonable interpretation that is consistent with international law. See: *Saloman v Commissioners of Customs and Excise* [1967] 2 QB116. The US has the same principle: see The American Law Institute, *Restatement of the Law, Foreign Law of the US*, 1987, cited in Jackson (1998)

¹⁰² The sources of Nigerian law are the constitution, legislation, English law, customary law, Islamic law and judicial precedents. Although English law has a tremendous influence on the legal system, the multiple sources of law make the system complex. See: Obilade (1979) and "Guide to Nigerian Legal Information", available at: <http://www.nyulawglobal.org/globalex/Nigeria.htm> (accessed 10/7/2006).

several laws and regulations relevant to trade in Nigeria¹⁰³, virtually all of these predate the WTO Agreements and none has, so far, been specifically amended to bring Nigeria into conformity with its treaty obligations under these agreements.

National Trade Decision-making and Surveillance Mechanisms

Governmental Structure

The Ministry of Commerce is the lead government body charged with the responsibility of formulating and implementing trade policy, and for preparing Nigeria for international trade negotiations. The Ministries of Industries and Finance, as well as government agencies such as the Central Bank and the Nigerian Customs Service, offer policy inputs and have some jurisdiction over trade and trade-related issues. For instance, the Ministry of Finance determines the tariff levels within its fiscal policy, and controls the Tariff Review Board, which deals with tariff petitions and review.

The External Trade Department (ETD) of the Ministry of Commerce is responsible for Nigeria's external trade relations and participation in the WTO. The Nigerian WTO Mission in Geneva, known as the Nigerian Trade Office, is the overseas arm of the ETD. Its staff strength is pegged at six, but only four of these have delegate status, i.e. able to attend WTO meetings.¹⁰⁴ The Trade Office suffers acute capacity constraints limiting its ability to participate in any effective manner in ongoing negotiations in the WTO. Coordination between the Geneva Mission and the capital in Abuja is also particularly poor. The flow of information is largely from Geneva to Abuja, with little or no feedback from the capital.¹⁰⁵

Trade Policy Coordination and capacity

The mechanism for trade policy coordination within the government is usually through inter-ministerial meetings/committees coordinated by the Federal Ministry of Commerce. In August 2001, the government inaugurated an Enlarged National Focal

¹⁰³ See Trade Policy of Nigeria (2002), pp 85-88, for laws and regulations that directly or indirectly impinge on the trading system in Nigeria.

¹⁰⁴ The Trade Office also handles all trade-related activities in Geneva, such as the activities of the World Intellectual Property Organisation (WIPO), UNCTAD and the International Trade Centre (ITC).

¹⁰⁵ Jerome (2005).

Point (ENFP)¹⁰⁶ to “provide Nigeria with an institutional framework for the effective coordination of the country’s participation in international trade negotiations, particularly the WTO.”¹⁰⁷ This is in addition to the National Council on Trade, which meets once a year to coordinate trade policy formulation and implementation among the ministries and nationally.

However, despite these initiatives, trade policy coordination in Nigeria is extremely poor. For instance, since its re-launch in 2001, the ENFP met three times within that year in preparation for the 4th WTO Ministerial Conference in Doha, and no other meeting was held until July 2003 in the run-up to the WTO Cancun Ministerial Conference. Preparations for the 2005 Ministerial Conference in Hong Kong did not commence until three months before the conference.

To be sure, Nigeria suffers from acute trade resource and capacity deficits.¹⁰⁸ However, these are a reflection of the country’s wider institutional weaknesses. Nigeria’s ratings on the key governance indicators are very low. On government effectiveness, the Kaufmann 2004 ratings¹⁰⁹ gave Nigeria a point estimate¹¹⁰ of -1.02, while UNCTAD, in its 2005 Trade and Development Index (TDI) gave Nigeria a score of 1 (from a scale of 0-4) on the indicator of bureaucratic quality.

On corruption, the Transparency International (TI) index for 2005¹¹¹ gave Nigeria a score of 1.9 points out of the maximum points of 10.¹¹² Nigeria’s country ranking was 152 out of 158, making it, even with recent improvement, the sixth most corrupt country in the world. UNCTAD’s score for Nigeria on the corruption indicator is 1 (from a scale of 0-6).¹¹³ Nigeria’s record on the rule of law and domestic legality is

¹⁰⁶ Earlier, in 1994, the National Focal Point (NFP) was established to oversee Nigeria’s participation in the WTO and the implementation of its obligations. However, the body was moribund. The inauguration of the ENFP was an attempt to make the NFP active and functional.

¹⁰⁷ The Minister of Commerce in an address delivered at the inauguration of the enhanced NFP on 16 August 2001.

¹⁰⁸ Jerome (2005) captures the depth of Nigeria’s trade capacity deficits.

¹⁰⁹ See <http://www.worldbank.org/wbi/governance/pubs/govmatters4.html>

¹¹⁰ The indicator can take values between -2.5 and 2.5, with the higher value representing better institutions.

¹¹¹ Global Corruption Report (2006), Transparency International.

¹¹² 10 equals “highly clean”, while 0 is “highly corrupt”.

¹¹³ UNCTAD (2005)

also extremely poor.¹¹⁴ According to the USTR, “the sanctity of contracts is often violated, and Nigeria’s court system for settling commercial disputes is weak and sometimes biased”.¹¹⁵ Nigeria’s civil service is bloated, corrupt and inefficient. About 70% of Nigeria’s civil servants belong to the unskilled, non-graduate levels, while over 60% are within the age brackets of 40 years and above.¹¹⁶

Trade Consultative and Surveillance Mechanisms

Government departments and agencies dominate trade policy formulation and implementation in Nigeria. The involvement of civil society or research institutes is virtually non-existent. According to Polity IV country report in 2003, Nigeria scored 2 points out of 10 in the category of institutional structure for political expression.¹¹⁷ This suggests weak civil society participation in the policy process. In theory, non-state actors, such as the Organised Private Sector (OPS)¹¹⁸, can participate in the trade decision process through the National Council on Commerce (NCC), the highest body where trade policy and issues are discussed. However, this formal process is ineffective, and lobbying and *ad hoc* interventions tend to be the preferred means of influencing policy.¹¹⁹

Nigeria’s trade regime relies more on administrative fiat rather than legislation to implement policies.¹²⁰ As a result, special interest groups clamouring for more protection have frequently been able to bypass civil servants to secure trade restrictive measures often directly from the President.¹²¹ Trade policy dialogue, where it takes place at all, often excludes other non-governmental actors.¹²² In sum, the trade policy capacity, coordination and dialogue essential for building domestic support for WTO

¹¹⁴ For instance, Nigeria’s rule of law score in the Kaufmann ratings was -1.41 (values between -2.5 and 2.5), while, according to *Doing Business* (World Bank, 2005), enforcing a contract in Nigerian court would normally take 730 days, making Nigeria the eight slowest of the 145 countries surveyed. Nigeria also had the worst record with respect to property registration.

¹¹⁵ USTR (2005).

¹¹⁶ The Head of the Federal Civil Service of Nigeria, Alhaji Yayale Ahmed, in an article entitled “Nigeria’s Civil Servants Aging” (*ThisDay* newspaper, 18 June 2002).

¹¹⁷ See <http://www.cidcm.umd.edu/inscr/polity/nigl.htm>.

¹¹⁸ The OPS includes: the Manufacturing Association of Nigeria (MAN); the National Association of Chambers of Commerce, Industry, Mines and Agriculture (NACCIMA); Association of Nigerian Exporters; National Association of Small Scale Industrialists; banking institutions; labour unions; and professional associations.

¹¹⁹ Jerome (2005).

¹²⁰ IMF (2005)

¹²¹ Ministry of Commerce officials complain that this undermines their authority (interview, 2003).

¹²² WTO (2005).

law are lacking. Attention now shifts to actual trade policies and practices, as shown by the policy framework and Nigeria's participation in the multilateral trading system.

Nigeria's Trade Policy Framework

Since 2003, Nigeria has embarked on comprehensive macro-economic and public sector reforms under the National Economic Empowerment and Development Strategy - NEEDS.¹²³ However, the economic reforms are not complemented by Nigeria's trade policy regime, which, according to the IMF, is "one of the most restrictive in the world".¹²⁴ In its 2005 Trade Policy Review of Nigeria, the WTO noted that Nigeria's trade policy has not matched its economic reforms, and that "since its last TPR in 1998, Nigeria trade regime has become more protective."¹²⁵ Indeed, the 2006 Index of Economic Freedom¹²⁶ gave Nigeria the worst score of 5 points,¹²⁷ suggesting an extremely closed external trade sector.

With an average trade to GDP ratio of 67% from 2002 to 2004¹²⁸, Nigeria can be described as a trading nation, where trade openness is defined in terms of total trade (imports and exports) as a percentage of GDP. However, unlike South Africa, with a continuing rise in the share of manufactures in total merchandise exports (65% in 2004), the lion's share of Nigeria's merchandise exports is crude petroleum, which accounted for 97.9% in 2004, while manufactures accounted for just 2%.¹²⁹

Nigeria is Africa's largest oil producer and the 6th largest exporter in the world.¹³⁰ Its non-oil exports on a per capita basis, over the past decade, amounted to only 1 percent of the world's average – the fourth-lowest share in the world.¹³¹ As the IMF puts it, "Nigeria – with more than 2 percent of the world's population – has a share of the

¹²³ The NEEDS document is available at <http://www.nigerianeconomy.com>.

¹²⁴ IMF (2005)

¹²⁵ See WTO document WT/TPR/S/147.

¹²⁶ The Index of Economic Freedom, published annually by the Wall Street Journal and the Heritage Foundation, measures countries against a list of independent variables divided into broad factors of economic freedom.

¹²⁷ The scores range from 1-5 points, with 1 being the most desirable and 5 the worst. See note 99 above.

¹²⁸ http://stat.wto.org/CountryProfiles/NG_e.htm.

¹²⁹ Ibid.

¹³⁰ Current crude oil reserves are estimated at 31.5 billion barrels, with a daily output of about 2 million barrels.

¹³¹ Total exports of goods and services less oil exports for countries classified as fuel exporters in *World Economic Outlook* (WEO). According to the IMF, among 178 countries for which data are available, only Burundi, Ethiopia, and Rwanda had lower non-oil exports than Nigeria (IMF, 2005).

world's exports of about 1/3rd of 1 percent, of which 90 percent is oil and gas exports".¹³²

Although Nigeria was the largest recipient of FDI in Africa in 2004 and has consistently attracted FDI flows within the range of \$2bn annually¹³³, the composition of its FDI inflows has not shifted significantly away from the natural resources or extractive sector, which has consistently accounted for about 90% of FDI inflows to the country. Indeed, as the IMF put it, "(e)xcept for investment in the oil and gas sectors, foreign investors have been largely absent from Nigeria".¹³⁴

The foregoing suggests that Nigeria's global economic interests are largely limited to the world oil trade sector. The dominance of oil in the Nigerian external trade is clearly a major influence on its trade policy.¹³⁵ Furthermore, the lack of effective export interests outside the oil and gas sector means that Nigeria has limited stakes in the WTO, which does not regulate global oil trade.¹³⁶ Given a long-term policy objective to protect domestic industries and pursue import substitution strategies, the restraints imposed by international trade laws are unlikely to play any significant role in inducing Nigeria's good faith fulfilment of its WTO obligations. Attention now shifts to Nigeria's participation and activities in the multilateral trading system.

Nigeria and the GATT-WTO System

Uruguay Round Participation and Commitments

Nigeria became a Contracting Party to the General Agreement on Tariffs and Trade (GATT 1947) at independence in 1960.¹³⁷ However, like most other developing

¹³² IMF (2005).

¹³³ UNCTAD (2005).

¹³⁴ Ibid. However, recent reforms have attracted some foreign investments into the telecommunications and financial sectors.

¹³⁵ Indeed, oil has widely been described as a curse rather than a blessing for Nigeria. A recent IMF Working Paper, "Addressing the Natural Resource Curse: An Illustration from Nigeria" (July 2003) attributes the poor performance of the Nigerian economy over the last three decades to the discovery of oil. It argues that some natural resources, particularly oil and gas, exert a negative and non-linear impact on growth via their deleterious impact on institutional quality.

¹³⁶ Okoh (2004) argues that Nigeria's non-oil export is price and income inelastic and, therefore, global integration is unlikely to result in improvement in the non-oil sector. According to the author, "(t)he greater openness of the Nigerian economy due to the implementation of the WTO agreements seems to be hurting the economy".

¹³⁷ As a former British colony, it was not obliged to engage in accession negotiations, but rather became a contracting party through sponsorship under Article XXVI, which was designed to facilitate the accession process for former colonies

countries, it did not participate actively in the old GATT. Indeed, during the entire life of the GATT, Nigeria made only few firm commitments: it bound only one tariff item (stockfish) and was a signatory to two Tokyo Round plurilateral Agreements, namely, Arrangement Regarding Bovine Meat and Agreement on Import Licensing Procedures.¹³⁸ Nigeria's participation in the Uruguay Round negotiations was also weak at the beginning¹³⁹, although it later participated actively in some negotiations, particularly those on the formulation of international rules on exports of domestically prohibited goods and other hazardous substances.¹⁴⁰

Evidence from the negotiating history of the Uruguay Round, however, shows that Nigeria was generally not supportive of the direction of the negotiations on most of the issues, and appeared unhappy with the outcomes. In his statement at the GATT Ministerial meeting in Brussels in December 1990, the Nigerian Trade Minister warned against "the danger of running too fast in unfamiliar terrain", and complained that Nigeria was being required "to make contributions inconsistent with our level of development".¹⁴¹ This suggests that the outcomes of the negotiations did not represent the *ex ante* preference of Nigeria.¹⁴²

Nigeria's Uruguay Round negotiations were conducted under an authoritarian military regime, which shunned policy dialogue with key stakeholders.¹⁴³ As a result, Nigeria's negotiating position and offer lacked crucial domestic legitimacy or local ownership. Indeed, it was widely believed that the military regime, which was at the time facing international isolation because of its human and civil rights abuses, signed the Marrakech Agreement to buy off international support. As the former Chairman of House Committee on Industries put it, "when that government found itself in the

¹³⁸ GATT (1991).

¹³⁹ Indeed, until 1990, four years into the Uruguay Round negotiations, Nigeria had no national mechanism for the formulation of its positions on critical issues in the negotiations (Agah, 2003).

¹⁴⁰ One of the issues that Nigeria pushed strongly during the Uruguay Round negotiations was the ban on domestically prohibited goods (see, for instance, document MTN.TNC/W/39). Nigeria was also active in the Negotiating Group on Tropical Products. However, these issues did not make it to the final agreement.

¹⁴¹ See document MTN.TNC/MIN(90)/ST/34 of 4 December 1990.

¹⁴² Nigeria's view contrasted with that of the South African Minister of Finance, Trade and Industry, who stated: "I believe that the implementation of the results of the Uruguay Round will enhance international trade and that they will stand South Africa in good stead" (See GATT document MTN.TNC/MIN(94)/ST/99 of 14 April 1994).

¹⁴³ According to the Chairman of the Nigerian Textile Manufacturers Association, "when we gave a presentation to the then minister (about the Uruguay Round), he said 'the government has made up its mind'" (*This Day*, 20 March 2001)

throes of international economic sanctions, it used the WTO to win political support.¹⁴⁴

Many Nigerian commentators argue that the country made commitments beyond its administrative and institutional capacity to implement.¹⁴⁵ However, with respect to tariffs, Nigeria actually made largely symbolic concessions. It made only a minimal attempt to deepen the level of tariff binding during the Uruguay Round negotiations. Nigeria stated in its 1991 Trade Policy Review in the GATT that while it agreed in principle with tariff binding, “such action must be commensurate with the need to protect developing industries”.¹⁴⁶

Table 2: MFN bound and applied tariffs: selected developing countries

	Binding coverage (%)			Simple average (%) (bound)			Simple average (%) (applied: 2002)			Total Average (%)	
	All	Agr	Non-agr	All	Agr	Non-agr	All	Agr	Non-agr	Bound	Applied
Nigeria	19.3	100	6.9	118.4	150	48.8	30	53.9	26.3	105	37
Other Africa:											
Angola	100	100	100	59.2	58.8	60.1	8.8	9.7	8.7	60	9
Egypt	98.8	99.7	98.7	37.2	95.3	28.3	19.9	22.8	19.4	54	21
Kenya	14.6	100	1.6	95.7	100	54.8	17	20	16.6	80	18
South Africa	96.5	99.5	96.0	19.1	39.8	15.8	5.8	9.1	5.3	25	7

Source: WTO (2006)

The binding offer that it made clearly reflected this thinking (see Table 2). For instance, only 19% of tariff lines in all products were bound, with 100% on agricultural products, and only a mere 7% on non-agricultural products. Nigeria’s total average bound rate is considerably high at 105%, while there are large gaps between bound and applied rates. Under the Single Undertaking principle, Nigeria is also bound by the other WTO agreements, including the TRIPS Agreement (discussed in chapter 5) and the General Agreement on Trade in Services, where Nigeria made limited commitments.¹⁴⁷

Post-Uruguay Round Attitude

Nigeria attitude’s to the WTO has been mixed. Although it has participated in all the Rounds, its behaviour has not suggested a strong normative commitment to the organisation. For instance, Nigeria did not pay its annual subscription to the WTO for

¹⁴⁴ *ThisDay*, 18 April 2001.

¹⁴⁵ Jerome (2005).

¹⁴⁶ GATT (1991, p.5)

¹⁴⁷ Nigeria’s GATS commitments and implementation is briefly discussed in chapter 6.

five years (2000-2005), and only paid up shortly before the Hong Kong Ministerial Conference due largely to the carrot-and-stick strategy adopted by the WTO.¹⁴⁸ Nigeria was appointed a Vice-Chairman for the Ministerial Conference, but WTO officials made it clear that it could be denied the honour unless it paid up its dues. After enormous diplomatic pressure, Nigeria finally paid up a few days before the conference.¹⁴⁹

Nigeria is a member of all the developing country coalitions, set up either to resist pressure to make market access concessions or to put pressure on the developed countries to open up their own markets and extend preferences for developing country exports. For instance, it is a member of the G-33, also called “Friends of Special Products” in agriculture, and belongs to the G-90 coalition, the Africa Group, the ACP Group and the LDC Group¹⁵⁰, all of which wanted the Doha Round to focus decisively on developmental issues. Unlike South Africa, Nigeria has not pursued any serious FTA strategy.¹⁵¹

Nigeria’s attitude to the WTO is set in the mould of the 1970s agitation for a new international economic order (NIEO)¹⁵², which called for a radical restructuring of the rules and institutions of international economic law.¹⁵³ The general feeling is that the world trading system is unfair, inequitable and unjust; and therefore, does not serve the best interests of the country. Section 19 of the Constitution explicitly states that Nigeria’s foreign policy object “shall” include, *inter alia*, “(a) promotion and protection of the national interest ... and (e) promotion of a just world economic

¹⁴⁸ Nigeria’s contribution to the WTO budget was 0.172% in 2006, compared to South Africa’s 0.466% during the same period, see: <http://stat.wto.org>.

¹⁴⁹ In March 2006, Nigeria’s WTO Ambassador, F Y Agah, was appointed as chairman of the Council for Trade in Goods, one of WTO’s main decision-making bodies. This is a remarkable political or diplomatic gesture, considering Nigeria’s less than positive attitude to the WTO.

¹⁵⁰ The ACP represents African, Caribbean and Pacific countries; while the LDC stands for least-developed countries.

¹⁵¹ Its main regional trade agreement is with the Economic Community of West African States (ECOWAS). It, however, also enjoys preferential trade with the US under the AGOA and is currently participating as part of the ECOWAS group in negotiations for a reciprocal economic partnership agreement (EPA) with the EU. Although there are sundry other trade agreements with many other countries, these are by no means comprehensive and are not fully-fledged FTAs.

¹⁵² Indeed, in embracing the NIEO, Nigeria enacted various indigenisation laws from 1972 to 1989, requiring foreign investors to transfer all or part of the ownership of their businesses to Nigerians. See Sodipo and Fagbemi (eds.) (1994).

¹⁵³ For a discussion on the NIEO, see, e.g. Flory (1982), Shearer (1994) and Muchlinski (1995)

order”. Taken together, these constitutional provisions arguably underpin the foreign economic policy of Nigeria and shape its attitude towards the WTO.

Conclusion

This chapter has sought to present a snapshot of foreign trade governance – law, policy and practice – of South Africa and Nigeria. The chapter makes for a very interesting comparison. Both countries have pursued sound macro-economic reforms, although South Africa has a solid record in this respect, while Nigeria’s experience is very recent. However, they differ significantly in terms of trade policy. Nigeria has chosen to adopt a different trade policy agenda, which is highly protective, while South Africa has pursued, since the early 1990s, a largely open trade policy.

The underlying assumptions and objectives of South Africa’s trade policy are geared towards ensuring the international competitiveness of domestic industries and promoting export-led growth. Nigeria, on the other hand, seeks to protect its domestic industries and promote local sourcing of raw materials. The structures of these countries’ economy and trade have led to the different attitudes to trade policy and to international trade rules disciplines. Normatively, South Africa is generally a multilateralist, while Nigeria’s commitment to multilateralism is not strong. Although both countries believe that WTO rules are unbalanced and inequitable, Nigeria accentuates these imperfections far more than South Africa.

The two countries also have differences in their domestic institutional and administrative structures, particularly with respect to the legal, regulatory and constitutional frameworks for trade policy and practices. Furthermore, although there are serious problems in South Africa with respect to government effectiveness and bureaucratic quality, the country performs better on these indicators than Nigeria, whose situation can be described as abysmal.

There are similarities, however, in the socio-economic conditions and circumstances in these countries, with respect to poverty, unemployment, inequalities and the spread of HIV/AIDS. There are also similarities in state-society relations in the two countries, although Nigeria is more prone to interest group capture particularly in the trade policy process. These institutional, social, economic and political factors are

individually and collectively crucial for a proper understanding of the compliance behaviour of both countries.

The task in the remainder of this thesis is, first, to examine extensively and systematically the implementation and compliance records of these countries with respect to specific WTO treaty obligations, and, then, to explain and analyse their compliance behaviour in the light of the factors shaping them. The theoretical analysis in chapter 2 and the insights gained from the background analysis in this chapter will be useful in explaining, in chapter 7, the overall compliance behaviour of the countries. The next chapter begins the first of the case studies.

PART II: CASE STUDIES

CHAPTER 4

Compliance with the WTO Agreement on Customs Valuation

The previous theoretical and background chapters serve as an essential lead-in to the core parts of this thesis: the case studies and explanations. These earlier chapters have set out the main themes and threads that underpin the empirical investigation and analysis. The present chapter examines the first of the three sets of case studies, namely national compliance with the Agreement on Customs Valuation (ACV). The aim is to examine whether and to what extent developing countries have implemented and complied with the key obligations of the Agreement, focusing particularly on the experiences of South Africa and Nigeria.

The chapter begins with a brief discussion of the interface between customs and trade, and the negotiating history of the customs valuation agreement. Section 2 examines the nature and scope of the obligations imposed by the agreement. Section 3 provides a snapshot of the implementation experiences of developing countries in general. Sections 4 and 5 examine respectively the implementation records of South Africa and Nigeria. Section 6 concludes.

The Trade and Customs Interface

Tariff reductions and bindings provide useful mechanisms for limiting tariff protection in international trade. However, the process of estimating the value of products at customs can be as important as the reduction of tariffs on imported goods in the first place. This is because governments can use a number of policy instruments to negate or offset indirectly the benefits of negotiated tariff concessions. The commonest of these instruments are customs-related measures such as incorrect classification of goods, inappropriate valuation of imports, discriminatory and complex rules of origin, and cumbersome customs formalities and procedures.

However, no single customs-related element has greater importance in the trade transaction process than the valuation of imported goods. The valuation system can be used arbitrarily to collect as much revenue as desired, regardless of the formally

negotiated tariff schedule.¹ As Finger points out, the manipulation of customs valuation has long been part of the arsenal of anti-import weapons.² Customs valuation is thus one of the most fundamental elements of the trade facilitation environment. As the next section shows, however, negotiations on valuation rules have long been difficult and contentious.

The Negotiating History of the Customs Valuation Agreement

Article VII of the GATT 1947 was the first successful international agreement on the general principles of customs valuation. It was however not a widely used system. An alternative international system of valuation, known as the Brussels Definition of Value (BDV)³, based on an entirely different concept, entered into force on 28 July 1953. By the late 1960s, about a hundred governments had adopted the BDV either as parties to the Convention or as a matter of domestic law or practice, thus making it by far the most widely used system.⁴

However, the United States, Australia, Canada, South Africa and New Zealand did not use the BDV and used varying systems of valuation.⁵ In 1973, the GATT Secretariat prepared a study, titled “Trade Barriers Arising in the Field of Customs Valuation”⁶, which argued that the varying national valuation practices were inconsistent with Article VII of the GATT and constituted barriers to trade. The study laid the foundation for the negotiation of the Tokyo Round Valuation Code, whose aim was, *inter alia*, to harmonise and ensure uniformity in the application of valuation rules so as to reduce the costs and delays associated with different valuation systems.⁷

However, fundamental differences existed among the GATT CONTRACTING PARTIES, and the Final Draft, published in 1979,⁸ was not accepted by most developing countries.⁹ One of the most controversial matters involved issues

¹ See Hoekman and Kostecki, 1995 at p. 99

² See Finger (1995).

³ Also known as the Convention on the Valuation of Goods.

⁴ See WTO document G/VAL/W/95 of 19 March 2002.

⁵ Ibid.

⁶ See GATT document COM.TD/W/195, 2 August 1973

⁷ Jackson (1998).

⁸ See document MTN/NTM/W/229/Rev.1 (Final draft, 8 April 1979, open to signature 12 April 1979).

⁹ Among the strong critics were India and Brazil. In document MTN/NTM/167/Rev.1, Brazil proposed changes to Article 7 to allow the costs of services such as "engineering, development, artwork, design

concerning “related persons”, which developing countries argued should include sole agents, sole distributors and sole concessionaires. In March 1979, several developing countries circulated proposed amendments to the draft code.¹⁰

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.¹¹ 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 “(t)he text represented the most that could be achieved by way of a multilateral solution ...”¹²

As a partial attempt to address the concerns of the developing countries on “related persons”, a Protocol was added to the Agreement.¹³ Despite this effort, however, when the Tokyo Round Valuation Code came into force on 1 January 1981, only three developing countries, Argentina, Brazil and India, acceded to it, 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 accede to the Tokyo Round Valuation Code. Most of these countries

work, plans and sketches relating to the imported goods" to be included in the transaction value whether or not these assists originated from the country of export or of import. India proposed changes to Article 7, which allows the residual or fall-back method of determining customs value by arguing this method should be defined broadly to include "all residual eventualities". See document MTN/NTM/W/175/Rev.1

¹⁰ See document MTN/NTM/W/222/Rev.1. See also WTO document G/VAL/W/95 page 8.

¹¹ Ibid.

¹² See document MTN/NTM/67, paras 3 and 4.

¹³ Paragraph 6 of the Protocol stated that the Parties to the Agreement: “Recognised that certain developing countries have expressed concern that there may be problems in the implementation of Article 1 of the Agreement insofar as it relates to importations into their countries by sole agents, sole distributors and sole concessionaires. The Parties to the Agreement agree that, if such problems arise in practice in developing countries applying the Agreement, a study of this question shall be made, at the request of such countries, with a view to finding appropriate solutions”. See document MTN/NTM/W/229/Rev1/Add 1. This provision is now Annex III paragraph 5 of the WTO Customs Valuation Agreement.

cited concerns about the effect of the Code on the ability of their customs administrations to control under-valuation.¹⁴ 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.¹⁵

The Uruguay Round Negotiations

The developing country concerns and reluctance remained in the lead up to the Uruguay Round negotiations that began in 1986. Three different ministerial decisions were subsequently adopted to address the three main areas of concern. The first was the *Ministerial Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value*. This Decision allows customs administrations to reject the transaction value of imported goods if, after giving the importer reasonable opportunity to justify the value, they still remain doubtful as to the truth or accuracy of the declaration.

The other ministerial decisions were the *Decisions on Texts Relating to Minimum Values and Imports by Sole Agents, Sole Distributors and Sole Concessionaires*, which were designed to deal with the concerns relating to "minimum values" and "related persons". These provisions are now incorporated into Annex III of the WTO Valuation Agreement.¹⁶ The expectation of the adoption of these three Decisions was that they would facilitate application of the Agreement by developing countries.¹⁷

However, apart from the Protocol and the drafting changes made to bring the Tokyo Round Code into legal consistency with the WTO Agreement, virtually no other changes were made during the Uruguay Round. The Customs Valuation Agreement, like other WTO agreements, became mandatory and binding on developing countries as a result of the Single Undertaking principle. According to Vinod Rege, who served on the GATT Secretariat staff to support the negotiations on the agreements on Customs Valuation and Pre-shipment Inspection, the developed country negotiators

¹⁴ See document G/VAL/W/95, p 9

¹⁵ Ibid, p. 29.

¹⁶ See paragraph 2 of Annex III for the provision on "minimum customs value" and paragraph 5 for the provision on "related parties".

¹⁷ See document G/VAL/W/95 p10.

were unfamiliar with, and unwilling to learn, the conditions under which customs officials in developing countries operated.¹⁸

Given the lack of active developing country participation in the technical negotiation of the agreement,¹⁹ the failure of the developed country negotiators to gain better understanding of the views of their developing country counterparts thus creates the impression that the agreement was imposed. This seeming lack of ownership of the rules raises interesting questions, as with any exogenous law, about the *ex post* compliance behaviour of developing countries. However, before considering the implementation experiences of these countries, it is necessary, first, to describe the nature and scope of the obligations imposed by the agreement.

The Scope of the Customs Valuation Agreement

The aims of WTO Customs Valuation Agreement, as set out in its General Introductory Commentary are the establishment of "a fair, uniform and neutral system" of valuation and the prohibition of "the use of arbitrary or fictitious customs values". To achieve these objectives, Article 1 (see Table 1) establishes the basic method of valuation, namely, the "transaction value", that is, "the price actually paid or payable" for the goods by the importer to the exporter. Crucially, however, Article 1 must be read in conjunction with Article 8, which allows for a number of adjustments to the invoice price.

Table 1: WTO Rules on Customs Valuation

Key provisions	Nature and Scope of Obligations
Article 1: The basic method of valuation	<ul style="list-style-type: none"> • Sets out the basic method of valuation: the transaction value, i.e. "the price actually paid or payable for the goods when sold for export to the country of importation. • This transaction value can be adjusted in accordance with the provisions of Article 8. • The transaction value method applies in respect of related transactions, unless it can be shown that the relationship influenced the price, and the importer must be given a reasonable opportunity to prove that this is not the case. • If the customs value of the imported goods cannot be determined under the provisions of Article 1 resort can be had sequentially to the provisions of Articles 2 through 7 (see table 2 below)
Article 8:	<ul style="list-style-type: none"> • Article 8 contains a list of elements that must be added to price actually paid or payable for the imported goods. These include commissions and

¹⁸ Rege (1999, p.74); see also Finger (2000, p.434)

¹⁹ See further Page (2003) for a discussion on the participation of developing countries in these negotiations.

	<p>brokerage; the value of assists, i.e. "goods and services supplied directly or indirectly by the buyer free of charge or at reduced cost for the use in connection with the production and sale for export of the imported goods", if the value has not already been included in the invoice price (Art.8.1b); royalty and license fees related to the goods, which are payable by the buyer (Art. 8.1c).</p> <ul style="list-style-type: none"> • These additions must be made only on the basis of objective and quantifiable data (Art. 8.3) and only as provided in the Article (Art. 8.4) • Members have the option of adopting either the f.o.b or c.i.f concept in determining the customs value of imported goods.²⁰
Article 9	<ul style="list-style-type: none"> • Where the conversion of currency is necessary to determine the customs value, the rate of exchange used must be duly published i.e. transparent.
Article 10	<ul style="list-style-type: none"> • All confidential information provided for the purposes of customs valuation must be treated as strictly confidential and must not be disclosed without specific permission of the provider unless in the context of judicial proceedings
Article 11	<ul style="list-style-type: none"> • Each member must provide in their laws for a "right of appeal without penalty" in respect of any determination of customs value.
Article 12	<ul style="list-style-type: none"> • members must publish "laws, regulations, judicial decisions and administrative rulings of general application" giving effect to the Agreement in accordance with Article X of GATT 1994.
Article 13	<ul style="list-style-type: none"> • Where the final determination of customs value is being delayed, members must allow the goods concerned to be released if the importer provides sufficient guarantee in the form of a surety etc. Each member must provide in their law for such circumstances.
Article 14	<ul style="list-style-type: none"> • Each member must treat the Interpretative Notes at Annex 1 to the Agreement as an integral part of the Agreement, which must be read and applied in conjunction with their respective notes. Annexes II and III are also an integral part of the Agreement.
Article 15	<ul style="list-style-type: none"> • Defines the different concepts used in the Agreement, such as "customs value of imported goods", "identical goods", "similar goods" etc.
Article 16	<ul style="list-style-type: none"> • If the importer so requests in writing, the customs administration of the country of importation must provide a written explanation as to how the customs value of the importer's goods was determined.
Article 17	<ul style="list-style-type: none"> • States that the Agreement must not be construed as restricting the rights of customs administrations to satisfy themselves as the truth or accuracy of any statement, document or declaration presented for customs valuation purposes.
Procedural Obligations	
Article 22	<ul style="list-style-type: none"> • Each member must ensure the conformity of its laws, regulations and administrative procedures with the provisions of the Agreement (Art. 22.1) • Each member must inform the Committee on Customs Valuation of any changes in its laws and regulations to the Agreement and in the administration of such laws and regulations (Art. 22.2)
Article 23	<ul style="list-style-type: none"> • The Committee on Customs Valuation is mandated to review annually the implementation and operation of the Agreement and to report annually to the Council for Trade in Goods.

Sources: extracted from the Agreement on Customs Valuation.

The transaction value method applies equally to arms-length transactions and those between related parties. However, although the transaction value method is the basic

²⁰ Under the f.o.b (Free On Board) arrangement, the invoice price contains only the cost of the good, as the costs of carriage and insurance are borne separately by the buyer. However, under the c.i.f (Cost, Insurance and Freight), the invoice price contains the price of the goods, as well as costs of insurance and freight since carriage and insurance are arranged by the seller.

and primary method of valuation, where this proves unrealistic in determining the value of the imported goods, members are allowed to use, in sequential order, other methods of valuation set out in Articles 2 to 6 of the Agreement. These alternative methods are the identical goods method, the similar goods method, the deductive value method, the computed value method, and the fall back method (see Table 2).

Table 2: Other valuation methods provided for in the Customs Valuation Agreement

Articles in sequential order	Basic provisions of the sequential Articles
Article 2: the transaction value of identical goods	Where the customs value cannot be determined on the basis of Article 1, it should be established on the basis of the transaction value of identical goods sold at the same commercial level and in substantially the same quantity as the goods being valued, or sold under different circumstances, provided differential adjustments are made.
Article 3: the transaction value of similar goods	If the customs value cannot be determined on the basis of Articles 1 and 2, then it must be determined on the basis of the transaction value of similar goods sold at the same commercial level and in substantially the same quantity as the goods being valued or, sold under different circumstances used provided differential adjustments are made.
Article 5: deductive value	According to Article 4, if the customs value cannot be determined under the provisions of Articles 1, 2 and 3, it should be determined under Article 5 or, when this cannot be done, under the provision of Article 6. The importer may, however, request that the order be reversed i.e. Article 6 before Article 5. Article 5 provides for valuation determination on the basis of deductive method , which is based on the unit sales price in the domestic market of the imported goods being valued or of identical or similar goods after making deductions for such elements as profits, customs duties and taxes, transport and insurance and other expenses incurred in the country of importation.
Article 6: Computed value	Article 6 provides for valuation determination on the basis of computed method . The computed value is determined by adding to the cost of materials and fabrication or other processing employed in producing the imported goods "an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to the country of importation". Article 6 requires the cooperation of authorities in the country of exportation to be effective.
Article 7: Fall back method	Where Article 1 to 6, considered sequentially, cannot be used to determine the customs value of the imported goods, customs administrations are permitted to determine the customs value using "reasonable means consistent with the principles and general provisions" of the Agreement and on the basis of data available in the country of importation. This method is also subject to the conditions set out in Article 7(2)(a-g) and Article 7(3).

Source: extracted from the Customs Valuation Agreement

In principle, the Customs Valuation Agreement attempts to balance the interests of the importers, with respect to fictitious and arbitrary valuation determinations, and those of WTO members, in relation to customs frauds and revenue losses. Thus, in Article 16, the Agreement requires members to give the importer the right to a written explanation “as to how the customs value of the importer’s goods was determined”, while in Article 17, it 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”²¹

Part II of the Customs Valuation Agreement establishes the Committee on Customs Valuation (Article 18), and provides for the establishment of “Technical Committee on Customs Valuation” (TCCV) under the auspices of the World Customs Organisation (WCO).²² Article 19 contains provisions on consultations and dispute settlement. Like other WTO Agreements, the Dispute Settlement Understanding (DSU) is applicable to consultations and the settlement of disputes under the Customs Valuation Agreement.²³

Special and Differential Treatment

The Special and Differential Treatment (SDT) provisions in the Customs Valuation Agreement are mainly limited to the traditional transitional periods for implementing commitments. Part III and Annex III of the Agreement contain these provisions, many of which are time bound. Article 20.1 provides for delayed application of the provisions of the Agreement for five years, up till 1 January 2000, for developing members who were not party to the Tokyo Round Valuation Code. Members invoking the provision of Article 20.1 were required to notify the Director-General of the WTO accordingly.

²¹ Article 17 should also be read with the *Ministerial 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).

²² The TCCV addresses technical questions raised by members or the Committee on Customs Valuation. As a result of the work of the TCCV many valuation issues have been resolved without the need of members to invoke the dispute settlement procedures.

²³ There have been no cases to date resulting in the establishment of panels, although there have been few consultations initiated under the Dispute Settlement Understanding, but none of these have gone into the panel stage.

Annex III, paragraph 1, of the Agreement allowed developing country members who felt that the five-year delayed implementation period was insufficient to request an extension of the five-year delay period before the expiry of that period, that is, before 1 January 2000. Article 20.2 allows developing country members who were not party to the Tokyo Round Code to delay the application of paragraph 2(b)(iii) of Article 1 and Article 6 (that is, the computed value method) for a maximum period of three years from when they began to apply other provisions of the Agreement.

Annex III, paragraph 2, incorporates the Ministerial Decision on minimum customs value, and allowed developing country members, which prior to the entering into force of the Agreement, valued goods on the basis of officially established minimum values to make a reservation to enable them to retain such values on “limited and transitional basis under such terms and conditions as may be agreed to by the Members”. Thus, the provisions of Annex III, paragraph 2 could only be invoked with the support of other members.

Annex III, paragraph 3 allows developing countries to make reservation regarding reversal of the sequential order of Articles 5 and 6. Under Article 4, an importer could request that the order of application of Articles 5 and 6 be reversed. Annex III.3 allows developing countries to make a reservation regarding the provisions of Article 4. Finally, Annex III, paragraph 4 allows developing countries to make a reservation to apply Article 5.2 whether or not the importer so requests.

The task in this chapter, as stated earlier, is to find out how and to what extent South Africa and Nigeria have implemented this Agreement. However, before focusing exclusively on the experiences of these two countries, it is useful to present evidence of the behaviour of developing countries in general as gleaned from the review and assessment of their implementation by the Committee on Customs Valuation.

Overview of Developing Countries’ Implementation Experiences

Like all WTO Agreements, the Agreement on Customs Valuation requires each member to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the Agreement (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 Agreement and in the administration of such laws and regulations. WTO members fall into two categories with respect to the procedural obligations.

Those who were party to the Tokyo Round Valuation Code and had notified their customs laws under that agreement, and had not changed the laws since then²⁴, were not required to make any further notifications under the WTO Agreement, since both agreements do not differ in any substantive manner. However, WTO members who were not party to the Tokyo Round Code were required to make notifications of their implementing laws not later than the date in which they were required to apply the provisions of the Agreement.

The Committee on Customs Valuation has the mandate to review the implementation and operation of the Agreement in the 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.²⁵ 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 Agreement.²⁶

Virtually all developing countries that were not party to the Tokyo Round Valuation Code invoked the provision of Article 20.1 of the WTO Valuation Agreement, which allowed them to delay implementation of the Agreement until 1 January 2000. About nine developing countries²⁷, 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 WTO Valuation Agreement pursuant to a General Council Decision of 31 January 1995.²⁸

²⁴ 15 of the Tokyo Round group indicated that their laws remained valid under the WTO Customs Valuation Agreement. 13 of this group, including Canada, the EC, India, Mexico, Singapore and South Africa submitted new laws (see document G/VAL/12 of 6 November 1997).

²⁵ See document G/VAL/M/1, paragraphs 29-35, 71 and 72.

²⁶ See document G/VAL/M/1, paragraph 36-39.

²⁷ These countries are Argentina, Brazil, India, Malawi, Mexico, Morocco, Peru, Turkey and Zimbabwe.

²⁸ See the Decision on "Continued Application under the WTO Customs Valuation Agreement of Invocation of Provisions for Developing Countries for the Delayed Application and Reservations Under the Customs Valuation Agreement 1979" (document WT/L/38).

The Article 20.1 delayed 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.²⁹ 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".³⁰ 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.³¹ 31 countries invoked Annex III, paragraph 2 that allowed developing country members, which prior to the entry into force of the Agreement, valued goods on the basis of officially established minimum values to make a reservation to enable them to retain such values on "limited and transitional basis under such terms and conditions as may be agreed to by the Members".³² About 53 developing countries invoked the provisions of Annex III, paragraph 3 on reservation concerning reversal of sequential order of Articles 5 and 6, and 50 invoked Annex III, paragraph 4 concerning reservation to apply Article 5.2 whether or not the importer so requests.³³

This widespread invocation of the Special and Differential Treatment provisions of the Customs Valuation Agreement 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 Agreement, and no member is entitled to an extension of the five-year delayed period.³⁴

²⁹ Those that requested extensions included Cote d'Ivoire, Dominican Republic, Egypt, El Salvador, Guatemala, Jamaica, Kuwait, Mauritania, Myanmar, Paraguay, Sri Lanka, Tanzania and Tunisia.

³⁰ See document G/VAL/M/11 of 19 October 1999

³¹ See document G/VAL/10 of 8 January 1997. This rose to 49 by the end of 1997. See document G/VAL/13 of 18 December 1997.

³² See document G/VAL/13 of 18 December 1997.

³³ See document G/VAL/W/136.

³⁴ All the approved requests or waivers in respect of such requests have expired in 2004. See document G/VAL/W/136 of 21 October 2004.

In theory, given that the delay period has expired for all developing countries, and that no further extension is possible, all WTO members should now be implementing the Agreement. However, according to the Committee on Customs Valuation, in its 2005 annual report, 56 members have so far not notified their national implementing legislation, and several have not responded to the checklist of issues.³⁵ Only 18 African members of the WTO have made notification of their national legislation, and only 8 of these have responded to the checklist of issues.³⁶

The behaviour of some of the advanced developing countries did not suggest their faithful implementation of the agreement. India has been at the forefront of campaigns for a renegotiation of the Customs Valuation agreement.³⁷ 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.³⁸ 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”.³⁹

However, the US and many other developed countries rejected India’s claim that it had a valid reservation since there was never a consensus in support of such reservation.⁴⁰ Indeed, the US, which regards customs valuation as a major issue for its exporters, has frequently complained about “apparent increasing use of minimum prices”⁴¹ India has also introduced changes in its customs laws, which some members considered to be creating additional criteria for acceptance of a transaction value.⁴²

³⁵ See documents G/VAL/W/135 of 12 October 2004 and G/VAL/W/136 of 21 October 2004.

³⁶ See document G/VAL/W/139.

³⁷ For India’s proposals, which include relaxing the provision of Articles 7 and 8.1(b)(iv) of the Customs Valuation Agreement, see WTO documents Job (99)/5868/rev. 1 of 19 October 1999 and G/VAL/36 of 7 December 2000.

³⁸ See, for example, WTO document G/VAL/M/10 of 19 October 1999.

³⁹ Ibid

⁴⁰ Ibid

⁴¹ Ibid.

⁴² See WTO document G/VAL/W/133 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.

Other major developing countries also appear 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 1988.⁴³ Brazil argued that it did not use minimum prices but rather use "reasonable prices" for the purpose of "combating fraud and circumvention."⁴⁴ 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.⁴⁵

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.⁴⁶ The US has particularly challenged the WTO compatibility of these measures through series of questions and follow-up questions to Mexico.⁴⁷ 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.⁴⁸

The foregoing shows that some developing countries have difficulties implementing the Customs Valuation agreement. As mentioned earlier, as at the end of 2005, over 56 developing country members had not notified their national implementing laws or responded to the checklist of issues, and, therefore, arguably are not fully implementing the agreement, if at all. Many of the advanced developed countries appear to be using minimum prices for valuation purposes, even though this is

⁴³ See document G/VAL/M/10 of 19 October 1999 at p. 5.

⁴⁴ *Ibid.*

⁴⁵ See *Brazil-Measures on Minimum Import Prices – Compliant by the United States*, WT/DS197/1. See also http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds197_e.htm for up-to-date summary.

⁴⁶ See Mexico's notification of these amendments in document G/VAL/W/121 of 10 June 2003.

⁴⁷ See documents G/VAL/W/132 and G/VAL/W/138 for US's questions and Mexico's replies.

⁴⁸ See *Mexico-Certain Pricing Measures for Customs Valuation and Other Purposes – Complaint by Guatemala*, WT/DS298/1. See also http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds298_e.htm for summary of the dispute to date.

explicitly prohibited by the agreement.⁴⁹ Yukyun Shin also highlights the many problems that Korea and other ASEAN countries faced in implementing the ACV.⁵⁰

Against the background of the foregoing discussion on the implementation requirements and challenges of the customs valuation agreement, and the attitude and behaviour of developing countries generally, the remainder of this chapter focuses specifically on the implementation experiences of South Africa and Nigeria. These countries' notifications to the WTO as well as other communications by and about them in the Committee on Customs Valuation were examined. Their customs laws and regulations⁵¹ were also examined, in addition to relevant administrative and judicial decisions, where available. South Africa's implementation record is examined first, followed by that of Nigeria. The chapter concludes with a brief comparison of their experiences.

South Africa's Implementation of the Customs Valuation Agreement

Pre-Uruguay Round situation

The Tokyo Round Valuation Agreement was adopted in 1979 and entered into force on 1 January 1981. South Africa implemented the agreement on 1 July 1983, making it one of the few developing countries and of only six African states⁵² to accept the valuation agreement 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 year.

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, during which it negotiated as a developed country and assumed developed country

⁴⁹ Article 7 (2)(f) states that “[n]o customs value shall be determined ...on the basis of minimum customs value; or (g) arbitrary or fictitious values”.

⁵⁰ See Shin (1996). The implementation challenges are also encapsulated in a compilation by the WTO Secretariat of discussions in various WTO bodies, see: WTO document G/VAL/W/97 of 26 March 2002.

⁵¹ For South Africa's laws, see <http://www.inf.gov.za/documents/index.htm>. More information on customs matters can be accessed through the website of the South African Revenue Service (SARS), which administers customs. See <http://www.sars.gov.za>. Nigeria's customs laws are available at: <http://www.nigeriacustoms.gov.ng>.

⁵² The others were Botswana, Lesotho, Malawi, Zimbabwe and Morocco.

levels of obligations.⁵³ Yet, it cannot be assumed that South Africa's developed country status and its history of applying valuation rules automatically translate into full implementation of the agreement, especially in the context of the implementation requirements and challenges highlighted above and the experiences of some of the advanced developing countries. Thus, the next sections look at the experience of South Africa in implementing the agreement, beginning with the procedural obligations.

Compliance with the Procedural Obligations

As South Africa was a party to the Tokyo Round Valuation Code and had notified its customs laws under that plurilateral agreement, it was not required, unless it had changed the laws since the original notification, to make any further notification under Article 22.2 of the WTO Customs Valuation agreement. The same applied to responses to the "checklist of issues", which were deemed to be valid unless changes had occurred since they were notified under the Tokyo Round regime.

In August 1996, South Africa notified the Committee on Customs Valuation of changes in its national legislation, the Customs and Excise Act of 1964 and other rules relating to customs valuation. This notification replaced its earlier notification under the Tokyo Round Customs Valuation Agreement.⁵⁴ South Africa indicated, however, that its reply to the "checklist of issues", given under the Tokyo Round code "remains valid".⁵⁵ Although a question was posed by the EC about the definition of the term "seller" in s.66(2)(c) of the Customs and Excise Act⁵⁶, given that the CVA has used the term "supplier", this was not considered material enough to prevent concluding the examination of the legislation. Consequently, the Committee agreed to conclude the examination of South Africa's legislation.⁵⁷

Thus, by notifying changes in its valuation laws and providing responses to the checklist of issues, and since no member raised objection to the conclusion of the examination of the laws, South Africa was deemed to have complied with the

⁵³ See chapter 3 for a discussion of South Africa's participation in the Uruguay Round.

⁵⁴ See WTO document G/VAL/N/1/ZAF of 30 August 1996.

⁵⁵ Ibid. For the reply to the checklist, see document VAL/2/Rev.1/Add.13.

⁵⁶ See document G/VAL/M/4 of 29 November 1996 at p. 6

⁵⁷ Ibid.

procedural obligations of the Customs Valuation Agreement. However, this does not necessarily imply that South Africa's laws and their application are fully compatible with the provisions of the Valuation Agreement.⁵⁸ The next section examines the extent of the substantive compliance.

Compliance with the Substantive Obligations

Article 22.1 of the Customs Valuation Agreement 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.

To be in compliance, members have to make provisions in their national laws to implement the mandatory obligations under the various articles of the agreement (see Table 1). This clearly requires putting in place WTO-compatible, valuation-specific, national laws and associated administrative procedures, guidelines and instructions, as well as valuation rulings and appeal systems. How has South Africa performed in implementing these obligations?

The Basic Valuation Method: The Transaction Value

The valuation laws and regulations of South Africa are contained in the Customs and Excise Act, No 91 of 1964, as amended, as well as in the Customs and Excise Rules. The Act and the Rules together contain nearly eighty sections or sub-sections, dealing with specific provisions of the Agreement.⁵⁹ The relevant provisions of the Customs and Excise Act implementing Articles 1 through 8 of the Valuation Agreement are sections 65, 66 and 67.

Section 65 (1) provides, as in Article 1 of the Agreement, that the value for customs duty purposes of any imported goods shall be "the transaction value thereof", which is defined in s 66 (1) as "the price actually paid or payable for the goods ... adjusted in

⁵⁸ Reviews are designed, *inter alia*, to identify deficiencies in notified laws and regulations. However, if deficiencies are considered commercially insignificant, other members may choose not to raise objections or prevent the conclusion of a review. Yet, this does not suggest that the laws and regulations are fully in conformity with the provisions of the agreement.

⁵⁹ The Correlation Table on page 45 of the Valuation Guide correlates Article of the Valuation Agreement with corresponding provisions of the Customs and Excise Act.

terms of s. 67". Section 67, entitled "Adjustments to Price Actually Paid or Payable", merely repeats, almost *verbatim*, Article 8 of the Agreement, which lists specific elements or considerations that "shall be added" to the price actually paid or payable for the imported goods to the extent that are incurred by the buyer or paid to the seller but are not included in the transaction value. South Africa adopts the f.o.b concept for the purpose of customs valuation (s. 67.2).⁶⁰ Further, under s. 67, the costs of assists⁶¹, if incurred within South Africa, are deductible from the transactions value, in conformity with Article 8(1)(b)(iv) of the Agreement.

Related Party Transactions

Article 1 of the ACV provides that notwithstanding the existence of a relationship between the seller and the buyer, the transaction value method must be applied to the goods involved unless the customs administration has grounds for considering that the relationship influenced the price, and in that case must communicate the grounds to the importer in writing, if so requested, and give the importer a reasonable opportunity to respond (Article 1.2(a)). The burden of proof to demonstrate that the relationship influenced the price clearly rests on the customs administration. Furthermore, members must accept the transaction value whenever the importer "demonstrates" that such value closely approximates to one of the situations set out in Article 1.2(b).

South Africa's customs law and regulations make provisions for related party transactions. S. 66 (3) provides that the fact that a buyer and a seller are related "shall not in itself be a ground for not accepting the transaction value, where – (a) such relationship did not influence the price paid or payable; or (b) the importer proves that the transaction value closely approximates to one of the following values..." This provisions appear to conform to those of Article 1 (2)(a)and(b). However, there is no specific provision for communicating the grounds for regarding a relationship as influencing the transaction value in writing if the importer so requests, as required in Article 1(2)(a), third sentence.

⁶⁰ Article 8.2 of the CVA requires members to stipulate in their laws whether they adopt the c.i.f or the f.o.b concept.

⁶¹ These refer to services such as engineering, development and design work associated with the manufacture of a product.

Other Valuation Methods

Articles 2 through 7 provide methods of determining the customs value whenever it cannot be determined under the provisions of Article 1, that is, where the transaction value for valid reasons cannot form the basis for determining the customs value of the imported goods. The provisions of Articles 2 through 7 must, however, be applied sequentially (see Table 2 above).

South Africa's customs law and regulations implement the provisions of Articles 2 through 7. Section 66 (4) of the Act provides for determination on the basis of identical goods, where value cannot be determined on the actual price paid or payable for the imported goods in question. Section 66(4)(c) provides, as required under Article 2 (3), that if more than one transaction value of the identical goods is found, "the lowest such value shall be the transaction value of the goods to be valued".

Section 66 (5) of the Act provides for valuation on the basis of similar goods, as required under Article 3 of the Agreement. S.66(6) provides for valuation determination on the basis of the deductive method (s.66(7)) and the computed method (s. 66(8)), but allows the importer an option to reverse the order of application of subsections 7 and 8 provided a request for such a reversal is made in writing. These provisions broadly conform to those of Articles 4, 5 and 6 of the Agreement.

S. 66(9) of the Customs and Excise Act implements Article 7 of the Valuation Agreement. It provides for value determinations on the basis of a previous determination or absent such previously determined customs values, by such application as the Commissioner may deem reasonable of any of the other valuation methods. This broadly accords with the provision of Article 7(1), which requires that customs value be determined "using reasonable means", and of Note 1 to Article 7, which states that value determination under the provisions of Article 7 should "to the greatest extent possible, be based on previously determined customs value".

The more noticeable part of Article 7, however, is the elements it excludes from value determination under the provisions of the Article. S. 66 (9) is in full conformity, as it excludes explicitly the same elements, which include: the selling price in South Africa; a system which provides for the 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; 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 Customs Valuation Agreement, which sets out the essential valuation methods. However, the power granted to the Commissioner by the Act to determine the transaction value of “any imported goods” (s. 65.4(a)(i)) and to “amend any determination or withdraw it and make a new determination” (s.65.5) may raise concern about how such power is used. Although, as will be shown below, there are provisions for administrative and judicial review of even the Commissioner’s determinations, businesses, particularly small- and medium-sized ones, are often less emboldened to challenge customs decisions in court.

The US challenged similar provisions in Thailand’s Customs Act, which states that, “the Director-General shall have the power to determine the customs value”. Thailand replied that the “D-G never uses his authority to determine the customs value”, and, as a result the provision would be repealed.⁶² Although South Africa’s courts would normally prevent the arbitrary use of such powers, the Thailand’s experience shows that the authority given to the Commissioner to determine customs value may raise concerns among some WTO members. Notwithstanding this, however, it is the case that South Africa is in near-complete compliance with the obligations under the valuation methods. Attention now shifts to the other provisions.

Subsidiary provisions of the Valuation Agreement

Apart from the main provisions of Articles 1 through 8 of the Valuation Agreement, which establish the basic and other standards of valuation, there are subsidiary provisions that concern the administration of the valuation system (see Table 1 above). 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).

⁶² See WTO document G/VAL/W/130 of 23 February 2004.

Currency conversion

Section 73 (1) and 2 was inserted in the Customs and Excise Act of 1965 was amended in 1995 to provide for currency conversion. According to the section, 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”.

At least in theory, this provision appears to leave the determination of the conversion rate to the Commissioner in consultation with the Reserve Bank. This is arguably not in full conformity with Article 9, which appears to require 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”. The rates of exchange are duly published on the Customs website, as required under Article 9.⁶³ However, this does not resolve the seeming WTO incompatibility of allowing the Commissioner to determine the rate of exchange rather than leaving it to market forces.

Confidentiality of information

With respect to the protection of confidential information provided for the purposes of customs valuation, section 4(3) of the Customs and Excise Act states that no customs officer “shall disclose any information relating to any person, firm or business acquired in the performance of his duties”. But an officer can disclose such information, *inter alia*, “when required to do so as a witness in a court of law” (s.4(3)(b)), or to the Commissioner ... for the purposes of any law with the administration of which he is charged” (s.4(3)(c)).

This provision goes further than Article 10, which creates only one exception, i.e. disclosure “in the context of judicial proceedings”. Clearly, if confidential information provided by traders and foreign governments for the purposes of customs valuation

⁶³ For the SARS rates of exchange, see <https://commerce.sars.gov.za/roe/default.htm>.

can be disclosed in other unrelated legal contexts, other than in judicial proceedings, the object and purpose of Article 10 would arguably be undermined.

Right of appeal and due process

The provision of the Valuation Agreement on rights of appeal (Article 11) is implemented in s. 65 (6) of the Customs and Excise Act, which provides that an appeal against any value determination shall lie to the High Court. Final appeal is to the Supreme Court of Appeal. However, s.95A of the Act provides for an internal administrative appeal. This is in line with the provision of Article 11(2) of the Agreement, 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.

Article 11, however, states that the right of appeal must be “without penalty”. This is described in the Note to Article 11 to mean that the importer “shall not be subject to a fine or threat of fine merely because the importer chose to exercise the right of appeal”. The legal effect of s. 65 (4)(c)(iii) of the Customs and Excise Act could be interpreted to amount to a “penalty”. Paragraph (c)(iii) provides that whenever a court amends or orders the Commissioner to amend any determination, “the Commissioner shall not be liable to pay interest on any amount which remained payable (to the importer) for any period during which such determination remained in force”.

Given that the importer is required under s. 65 (4)(c)(i) to make full payment of assessed customs duty notwithstanding that an appeal has been filed, and given that an appeal may last several months, if not years, the decision not to pay interest on any refund ordered by the court may be deemed to constitute a “fine” and therefore a violation of Article 11 of the Agreement, as explicated by its Interpretative Note. Such a decision could also serve as a threat factor, which could discourage some importers from choosing to exercise the right of appeal. In this regard, the provision in South Africa’s customs law dealing with the rights of appeal is arguably not in full conformity with the provision of Article 11 of the Customs Valuation Agreement.

Indeed, the appeal process is also often highly 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.⁶⁴

Initial appeals are always to the officers who made the decision in the first place and the outcomes of such appeals are often predictable. Divisional managers rarely reverse their initial decisions; the constant refrain appears to be: “sorry, but that is my decision”.⁶⁵ Often, too, the headquarters review of referrals from Branches simply confirms the facts of the declaration and then issues a determination to that effect.⁶⁶ According to a 2003 consultant report for SARS, “[i]t is important for Customs to develop and publish a complete guideline on how the appeal process is to operate”.⁶⁷

Transparency of customs and trade regulations

Article 12 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 1994. Article X is the main transparency obligation of the GATT, and has been interpreted and applied by WTO panels and the Appellate Body.

For instance, in *US – Underwear*⁶⁸, 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”⁶⁹ The panel in *Argentina – Bovine Hides*⁷⁰ notes that private traders are the main beneficiaries of the Article X transparency obligations.

⁶⁴ Article X:3(b) of the 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.

⁶⁵ This view is shared by most of the importers interviewed and confirmed by some Customs officials (interview with the valuation team, 2003).

⁶⁶ J Mark Siegrist, Consultant Report for the South African Revenue service (SARS) 8 April 2003

⁶⁷ *Ibid*, p10.

⁶⁸ Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, 11.

⁶⁹ *Ibid*, para.21

⁷⁰ Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R and Corr. 1, adopted 16 February 2001, DSR 2001:V, 1779

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.

However, while all this represents attempts to comply with the publications and transparency requirements of the WTO valuation agreement, a consultant's report has noted that SARS could go much further.⁷¹ Furthermore, the report highlighted the need to update customs circulars, many of which were several years old, and make them readily available to importers and agents. According to the writer of the report, "the practice must be that anything a customs officer can see with respect to goods importation, the importer/agent can see".⁷² In terms of compliance with the transparency obligations of Article 12 of the CVA and Article X of the GATT, this report suggests that while progress had been made, more needed to be done.

The establishment of a surety system

Article 13 of the CVA obliges members to establish a guarantee or surety system, whereby goods must be released on the provision by the importer of sufficient guarantee. The last sentence of Article 13 requires members to make provisions in their laws for such circumstances. Although goods can be released on a "special bond" in South Africa⁷³, there is no provision in the Customs and Exercise Act, or any regulation, explicitly implementing the provision of Article 13 of the CVA.

The South African Customs authorities describe the implication of Article 13 in Note 35 of "Notes for the Guidance of Importers". According to this Note, Article 13 only arises where Customs needs additional documentation (as part from the normal clearing documents) and where reasonable doubt exists about the invoice value but relevant information is not available at the time of importation. Only then could a provisional release be made on the basis of a guarantee. The Note emphasises that

⁷¹ J Mark Siegrist, Consultant Report for the South African Revenue service (SARS) 8 April 2003.

⁷² Ibid, p.3

⁷³ See for example *Standard General Insurance Company Limited v. Commissioner for Customs and Excise* 2004 (02) SA 622 (SCA)

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”.⁷⁴

It would appear that South Africa has adopted a cautious approach to implementing the provision of Article 13, which some WTO members regard as a key provision of the CVA. For instance, the US argued that Article 13 has been recognised as best customs practice under the International Chambers of Commerce (ICC) guidelines, and is an important element of trade facilitation.⁷⁵ 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.⁷⁶ It is arguable that situations where fraud or a violation of customs laws is merely alleged but not yet proved may be covered by a guarantee system.

To complete the examination of South Africa’s legislative compliance with the provisions of the Customs Valuation Agreement, it should be noted that South Africa incorporates the Interpretative Notes of the Agreement, in accordance with Article 14,⁷⁷ and adopts the definitions of terms set out in Article 15 of the Agreement.⁷⁸ Further, it implements the provision of Article 16, which requires members to make provision in their laws requiring customs authorities to give an explanation in writing, upon written request by the importer, as to how the customs value of the importer’s goods was determined. In implementing this provision, Rule 65.03 of the Customs and Exercise Rules provides that “(i)f any importer so requests, he shall be advised in writing of the method used in determining the customs value of his goods”.

In sum, the evidence presented above shows that South Africa is in substantial compliance with the WTO Agreement on Customs Valuation, to the extent that it has

⁷⁴ See Customs and Exercise Valuation Guide, February 2002.

⁷⁵ See US’s intervention in meeting of the Committee on Customs Valuation, see WTO document G/VAL/M/9 of 28 January 1999.

⁷⁶ See: Panel Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/R, adopted 10 January 2001.

⁷⁷ See section 74A(1) of the Customs and Exercise Act, which provides that the interpretation of sections 65, 66 and 67 shall be subject to the Agreement, “the Interpretative Notes thereto, the Advisory Opinions, Commentaries and Explanatory Notes, Case Studies and Studies issued under the said Agreement on Implementation of Article VII of the GATT”.

⁷⁸ See sections 65 and 66 of the Customs and Exercise Act.

implemented in its national laws most of the provisions of the Agreement. There are however areas of non-compliance, particularly, with respect to the establishment of a guarantee or surety system. Although, this may exist in practice, there is no law explicitly providing for such a system, as required under the last sentence of Article 13, which states that “the legislation of each member shall make provisions for such circumstances”.

There are also areas where compliance is not clear, especially with respect to the contemporaneity of the rate of exchange used for the determination of customs value, the protection of confidential information provided for the purposes of customs valuation, and the fact that rights of appeal must be without direct or indirect penalty. In each of these cases, the power of intervention given to the Commissioner may lead to a suggestion of lack of full compliance with the obligations imposed by the relevant provisions of the Agreement.

It is, however, the case that, at least on paper, South Africa almost fully implements the provisions on the essential valuation methods, as set out in Articles 1 through 8 of the CVA. South Africa’s almost complete legal transposition of the WTO valuation rules into its domestic law is particularly significant considering, as shown earlier, the apparent unhappiness of some of the major developing countries with certain provisions of the CVA.

Clearly, while South Africa has the same problems of valuation malpractices⁷⁹ as countries such as India, Brazil and Mexico, it has not, unlike these countries, dealt with the problems through tinkering with the valuation system, which is substantially in conformity with the provisions of the Customs Valuation Agreement. Nevertheless, while there appears to be little problems with the legal framework, there are practical and administrative problems affecting implementation.

From a legal standpoint, the burden of proof encompasses both the burden of producing evidence, and the burden of persuasion. Once an importer has satisfied the

⁷⁹ The often cited malpractice is transfer pricing, resulting from related party transactions involving multinational corporations. There have also been problems with treatment of royalties and license fees. For example, this was the issue in *The Commissioner for the South African Revenue Service v Delta Motor Corporation (Proprietary) Limited* 2002 SA 297 (SCA).

burden of going forward with evidence, it is incumbent upon the customs administration to accept the evidence supplied or come forward with other evidence to rebut it.⁸⁰ The customs administration bears the burden of proof that the customs value declared by an importer is untrue and inaccurate as a matter of evidence law.⁸¹ Yet the ability of customs to provide this rebuttal evidence depends on being able to gather necessary information and to look beyond the normal clearing documentation.

Like in most other WTO member countries, over 90% of value determination in South Africa is based on the transaction value method. However, although this method is predicated upon the ability of customs to obtain the right information, this information-gathering capacity is deficient in the field enforcement units.⁸² There is also lack of uniformity and standardisation of valuation decisions countrywide, as a result of which importers have been known to shop for entry points where they are most likely to obtain more favourable treatment.⁸³

The aim of the Customs Valuation Agreement is a valuation method that leads to the *correct* import duty.⁸⁴ Striking the correct import duty would mean that the importer is paying no more and no less duty than required and that customs is collecting no more and no less duty than is due to the State. It is not certain that this balance is being achieved in South Africa. The administrative process, rather than the legal framework, appears to be the main weakness of South African implementation of the valuation agreement. The focus now shifts to the compliance record of Nigeria.

Nigeria's Implementation of the Customs Valuation Agreement

Pre-Uruguay Round situation

For many years, Nigeria has been using the Brussels Definition of Value (BDV) for the valuation of imported goods. Unlike South Africa, it was not a signatory to the 1979 Tokyo Round Valuation Code. 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

⁸⁰ Shin (1996, p. 190)

⁸¹ Ibid.

⁸² Interviews with senior staff members of SARS (2003).

⁸³ See SARS HQ Consultant Report, 2003, p.6.

⁸⁴ See the General Introductory Commentary to the Agreement on Customs Valuation.

and valued.⁸⁵ 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 pre-shipment inspection which is not a non-tariff measure”.⁸⁶

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”⁸⁷, as would be possible under the BDV but not under the GATT Valuation system. However, all the protestation did not matter since the Single Undertaking principle turned most of Tokyo Round plurilateral codes into mandatory and binding WTO multilateral agreements. So, then, how has Nigeria fared with its implementation of the CVA? The focus is first on the procedural obligations.

Compliance with the 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 Agreement. Finally, Nigeria reserved the right to provide that Article 5.2 of the Agreement shall be applied whether or not the importer so requests.⁸⁸ Under Annex III, paragraph 1 of the ACV, Nigeria could request an extension of the five-year period. Nigeria made no such request and, therefore, as of January 2000, it should have notified its implementing laws and provided replies to the checklist of issues.

Nigeria has done none of these. At its First Session in 1995, the Committee on Customs Valuation indicated that it would take a more active role in monitoring new Members’ progress towards implementation of the agreement, and, thus, introduced a new agenda item entitled “Progress on implementation”. In 1997, Nigeria informed the Committee about the progress it was making towards implementation and the technical assistance it had received.⁸⁹ In 1998, Nigeria indicated that it had forwarded

⁸⁵ See Page (2002).

⁸⁶ See GATT document MTN.TNC/MIN(90)/ST/34 of 4 December 1990.

⁸⁷ Ibid.

⁸⁸ WTO document WT/Let/106, 20 August 1996.

⁸⁹ See WTO document G/VAL/M/6 of 19 November 1997.

its draft legislation and draft valuation procedures to the World Customs Organisation (WCO) for review, and had received advice.⁹⁰

Despite these assurances and despite having benefited from technical assistance and capacity building initiatives, particularly under the WCO/USAID valuation programme,⁹¹ Nigeria has, as of October 2005, failed to comply with the procedural obligations set out in Article 22 of the Agreement.⁹² The lack of notification of its implementing legislation raises the question as to whether, in fact, Nigeria is applying the agreement. It is therefore necessary to examine compliance with the substantive obligations.

Compliance with the Substantive Obligations

As noted earlier, prior to the entry into force of the WTO customs valuation agreement, Nigeria was using the Brussels Definition of Value for customs valuation. The fact, however, is that it still, in practice, uses the BDV. Nigeria's customs laws are contained in the Customs and Excise Management Act (CEMA) CAP 84 1990 and subsidiary legislation, such as the Customs and Excise (Dumped and Subsidised Goods) Act and the Pre-Shipment Inspection Decree of 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 customs valuation agreement.

⁹⁰ See WTO document G/VAL/M/7 of 17 June 1998; see also WT/TPR/M/39/Add.1 of 12 November 1998.

⁹¹ See WTO document G/VAL/M/37 of 30 April 2004, at p.16.

⁹² See WTO document G/VAL/W/150 of 10 October 2005.

Other practices also put Nigeria in breach of its WTO customs valuation obligations. For instance, the use of differential exchange rates to value “official” and private sector imports is a violation of GATT Article VII and the Agreement on Customs Valuation, since both methods could not be considered to meet the requirement of first use of “transaction value”.⁹³ Nigeria also uses reference prices for customs valuation, which is absolutely prohibited by GATT Article VII and the ACV. Furthermore, Nigeria uses a pre-shipment inspection system, under which importers are required to pay *ad valorem* fee of 1% of fob value on all imports, which is inconsistent with Article VIII of the GATT.⁹⁴ It is thus clear that with respect to customs valuation and pre-shipment inspection, Nigeria is in breach of key WTO obligations.

Recent Developments: Enactment of the Customs and Excise Amendment Act

In June 2003, the Nigerian Parliament adopted legislation for the implementation of the Customs Valuation Agreement. This legislative act brought Nigeria closer to compliance with the key obligations of the customs valuation agreement. However, as of December 2005, the new legislation had not been notified to the Committee on Customs Valuation because it had not come into effect. The obligation to notify arises only after an implementing act has entered into force. Nigeria’s failure to make the new legislation effective has thus delayed its notification. Nevertheless, the legislation itself is examined below for its compatibility with the provisions of the Customs Valuation Agreement. As with the section on South Africa above, the implementation of the key obligations of the agreement are considered systematically.

The Basic Valuation Method: The Transaction Value

The 2003 Amendment Act substitutes a new Schedule for the First Schedule of the CEMA, 1990, which deals with the valuation system. Paragraph 1 of the new Schedule replaces the BDV with a system based on the transaction value. The provision and exceptions in paragraph 1(a)-(c) are similar to those contained in Article 1 of the ACV. The same paragraph provides for adjustments to the invoice price, i.e. the price actually paid or payable for the goods, in accordance with

⁹³ See WTO document WT/TPR/M/39/Add.1.

⁹⁴ Article VIII requires that fees and charges (other than tariffs and other taxes within the purview of Article III of GATT) imposed in connection with exportation or importation must be limited in amount to the approximate cost of services rendered.

paragraph 7(1) of the Schedule. Again, paragraph 7(1) repeats almost verbatim the provisions of Article 8 of the ACV, particularly with respect to what elements can be added to the transaction value.

Members are required to stipulate in their laws whether they adopt the cif or fob concept for valuation purposes (Article 8.2). Nigeria adopts the cif concept, as indicated in paragraph 7(2) of the Schedule. For good measure, the Schedule states that additions to the transaction value shall be made “only on the basis of objective and quantifiable data”, and as provided for in the Schedule (paragraph 7(3)). This conforms to the requirement of Article 8 (3) and (4) of the ACV.

Related Party Transactions

Article 1.2(a) of the ACV states that “the fact that the buyer and the seller are related ... shall not in itself be grounds for regarding the transaction value as unacceptable”. Once the importer has provided information, Customs needs to show grounds for considering that the relationship influenced the price, and communicate such grounds to the importer, who must be given a “reasonable opportunity to respond” (Article 1.2 (a-c)). The ACV thus places the burden of proof in respect of related transactions on the customs administration because it needs to provide grounds for considering that the relationship influenced the price.⁹⁵ However, the language of paragraph 1(d) of the amended First Schedule appears to reverse the burden by requiring the importer to “prove to the satisfaction of the Board” that the relationship did not influence the price. Furthermore, the safeguards in Articles 1:2 (a-c) are not reflected in the Amendment Act.

Other Valuation Methods

Articles 2 through 7 of the ACV provide for alternative methods of valuation, which must be applied in a sequential order, in the event that the transaction value method cannot be applied. The alternative methods are the transaction value of identical goods (Article 2), the transaction value of similar goods (article 3), the deductive value (article 5), the computed value (article 6) and the fall-back or reasonable-value method (article 7).

⁹⁵ See Shin (1996).

The Nigerian Amendment Act provides for all of these alternative methods. For instance, paragraph 2 provides for the transaction value of identical goods; paragraph 3, the transaction value of similar goods; paragraph 4, the deductive value; paragraph 5, the computed value; and paragraph 6, the reasonable value. These provisions broadly conform to the obligations of Articles 2 through 7 of the ACV. However, there appears to be non-conformity with Articles 2 and 3 of the ACV, which require that if more than one transaction value of identical or similar goods is found, “the lowest such value shall be used to determine the customs value of the imported goods”. Paragraphs 2 and 3 of the First Schedule provide, in the same context, that “higher value or figure shall be used as the customs value of the goods being valued”. This is likely to result in additions to the invoice prices of the imported goods.

Subsidiary Provisions of the Customs Valuation Agreement

Specific provisions of the ACV create obligations in respect of subsidiary issues relating 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). How are these obligations implemented in the Nigerian legislation?

Currency conversion

As noted earlier, the First Schedule of CEMA 1990 provides that currency conversion for valuation purposes are to be based on “the current official rate of exchange in Nigeria”. However, paragraph 9 of the new First Schedule now provides, as required by Article 9 of the ACV, that the rate of exchange to be used the conversion of currency shall be that *duly published* by the Federal Ministry of Finance and shall reflect “the current value of the currency in commercial transaction in terms of the *naira*”. However, according to the new Guidelines on Destination Inspection, published by the Nigerian Customs Service, import duty payment is still based on the exchange rate on the approved Form M⁹⁶ rather than at the time of actual exportation or importation, as stipulated in Article 9 of the ACV.

⁹⁶ The Form ‘M’ is the primary document in the import process and it is normally issued long before the actual exportation or importation of the goods.

Confidentiality of Information

Paragraph 11 of the amended First Schedule broadly conforms to Article 10 of the ACV, with respect to confidential information provided for the purposes of customs valuation.⁹⁷ However, while Article 10 provides for only two exceptions to the confidentiality requirement, namely disclosure with the permission of the provider and in the context of judicial proceedings, paragraph 11 adds a third: “to the extent required by the Board in satisfying itself as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes”. It may be argued that this third exception is broader than anticipated by the provisions of Article 10.

Right of Appeal and Due Process

Article 11 of the ACV requires the legislation of each member to provide in regard to a determination of customs value for the right of appeal, without penalty. Article X (3)(b) of the GATT 1994 also requires each member to maintain or institute judicial, arbitral or administrative tribunals or procedures for prompt review and correction of administrative action relating to customs matters. However, as the WTO puts it, the Nigerian “customs regulations do not contain provisions concerning appeal of customs decisions”.⁹⁸

There is a general tendency in Nigeria’s customs laws to protect customs officers from litigation. Thus, for instance, while s. 149 of the Customs and Excise Management Act (CEMA) allows customs officer to stop and search a vehicle or ship suspected to be carrying prohibited goods, sub-section 3 states that “no officer or police officer shall be liable to any prosecution or action at laws on account of any stoppage or search in accordance with the provisions of this section”. The same immunity is provided in s. 150(2) in respect to search of individuals suspected to be carrying any prohibited article. This general legal protection clearly breaches several provisions of WTO law, which requires judicial review of administrative actions.

⁹⁷ See also section 7 of the Customs and Excise Management Act, which provides that “... all information and documents supplied or produced in pursuance of any requirement of customs and excise laws shall be and shall be treated as confidential”.

⁹⁸ See WTO document WT/TPR/S/147 at p.28.

Transparency of customs and trade regulations

The transparency obligations of the ACV are contained in Article 12 of the agreement, which mirrors the provisions of Article X of GATT 1994. It requires that laws, regulations, judicial decisions and administrative rulings of general application concerning customs and valuation matters must be published promptly and in such a manner as to enable governments and traders to be acquainted with them. As the panel in *Argentina – Bovine Hides* makes clear, these provisions are designed to benefit private traders.

For many years, access to customs information by private traders proved particularly difficult as such information was only available in paper form and manually. Recent reform initiatives have, however, made the Nigerian customs more open in its operations. A website was set up in 2004⁹⁹, which contains useful information, such as press releases, media reports, circulars, notices, guidelines and customs laws. Customs also runs a weekly television programme, called “Customs Duty”, which carries customs news. The customs administration also plans to operate “e-services”, whereby traders can, with security codes and password, gain access to many of services provided by customs. These are all novel ideas and their efficiency and sustainability are not certain, especially given the institutional and capacity deficits of the customs administration.

The establishment of a security system

As noted earlier, Article 13 of the ACV requires members to provide in their laws and in practice a guarantee or surety system, whereby goods must be released on the provision by the importer of sufficient guarantee. Paragraph 10 of the amended First Schedule deals specifically with circumstances of delayed valuation, and provides that if it becomes necessary to delay the final determination of the customs value of imported goods, the importer shall be permitted to clear and take possession of the goods on the payment of adequate surety or any form of guarantee. This is broadly in conformity with the provisions of Article 13 of the ACV. However, the guarantee

⁹⁹ See <http://www.nigeriacustoms.gov.ng>.

system requires a sophisticated financial system¹⁰⁰, which is yet not in place in Nigeria, despite the recent reform in the banking sector.

In implementing the interpretative provisions in Article 14 of the ACV, paragraph 14 of the First Schedule states that “(f)or purposes of the interpretation of customs valuation under this Act, the provisions of Article VII of the GATT 1994 as contained in the Agreement on the Implementation of Article VII, together with all the notes to the Articles, and all the Annexes to those Articles, shall apply”. This provision effectively transposes or incorporates by reference the entire Article VII of GATT 1994 and the entire WTO Customs Valuation Agreement into Nigeria’s customs law.

Yet, the provision appears to be misleading. As mentioned in chapter 3, the Nigerian Constitution does not require the courts to adopt the principle of consistent interpretation. Furthermore, the WTO treaty itself and its annexed agreements have not been ratified by the Nigerian Parliament, which raises questions about their legal status in Nigerian domestic law. It is thus not clear how, in interpreting the Customs and Excise Management (Amendment) Act, the court would have recourse to Customs Valuation Agreement, notwithstanding the wording of paragraph 14 of the First Schedule. This is symptomatic of the general incoherence in the Nigerian legal system, where the provisions of one statute can contradict those of another equally relevant one.

For instance, as some senior Nigerian customs officers have argued, despite the changes to the CEMA, the Customs Valuation Agreement could not be implemented 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”.¹⁰¹ The PSI Decree remains, however, part of the legal framework of the Nigerian customs administration. It is thus necessary to discuss the PSI system in the light of the Agreement on Pre-shipment Inspection.

¹⁰⁰ Malone (2002)

¹⁰¹ Interview, Nigerian Customs Officer, 2003.

*Nigeria's Pre-shipment Inspection Regime*¹⁰²

Nigeria has used the pre-shipment inspection system intermittently for over 25 years as a means of dealing with the widespread problems of valuation malpractices, such as under-invoicing, concealment and forgery. In April 1999, after over 20 years of operating the PSI system, the government replaced it with the destination inspection scheme. However, it reintroduced the PSI system in September 1999 due to lack of appropriate structures to support destination inspection.¹⁰³

As mentioned earlier, Nigeria took a defensive stance during the Uruguay Round negotiations on the Agreement on Pre-shipment Inspection, but nevertheless became subject to the agreement under the Single Undertaking principle. The agreement recognises developing countries' need for the use of PSI system to prevent loss of customs revenue from undervaluation of goods, but at the same time provides for safeguards against abuse of the PSI system by user countries.

However, Nigeria's PSI regime was inconsistent with many of the provisions of the PSI Agreement. For instance, Nigeria did not apply the pre-shipment inspection activities on an equal basis to all WTO members¹⁰⁴, contrary to the MFN provision of Article 2.1 of the agreement. Furthermore, although PSI activities are to be carried out in the exporting country (Article 2.3), Nigeria introduced, in 2002, 100% examination of goods at destination in addition to pre-shipment inspection in the country of export. This has created significant delays and increased the burden on importers.

Price verification under the PSI Agreement must be based on the contract price agreed between an exporter and an importer (article 2.20(a)), and the price can only be rejected following a verification process that conforms to the guidelines set out in Article 2.20 (b) through (e), which include comparison of the export price with the price(s) of identical or similar goods. Indeed, the PSI Agreement states that “[t]he obligations of user Members with respect to the services of pre-shipment inspection

¹⁰² South Africa does not operate a PSI system. So this subsection was not covered in the section on South Africa above.

¹⁰³ See “Government Confidence in Pre-shipment Soars” (article in *ThisDay* newspaper, 17/01/2001)

¹⁰⁴ Some countries were exempted from the scheme. See WTO document WT/TPR/S/39 at p.32.

entities (in connection with customs valuation) shall be the obligations which they have accepted” under the Agreement on Customs Valuation.¹⁰⁵

What this means is that the use of the PSI system by any WTO member is not an excuse for deviating from the valuation system mandated under the Customs Valuation Agreement. However, Nigeria continued to use the BDV system, which is based on notional rather than actual price paid or payable for the goods. The PSI companies frequently refused to issue Clean Report of Findings (CFR) to nearly 50% of importers.¹⁰⁶ Furthermore, the Nigerian customs administration could reject the customs duty determined by the PSI companies and may determine a higher (but not lower) rate of duty.¹⁰⁷ Frequently, importers were issued Debit Notes, requiring them to pay higher duties.¹⁰⁸

This is a clear violation of WTO rules. Customs cannot automatically determine a higher dutiable value without following the sequential methods prescribed in the Valuation Agreement.¹⁰⁹ Thus, while Nigeria was entitled to use the PSI system, it nevertheless failed to comply with much of the provisions of that agreement, particularly with respect to price verification and the determination of dutiable value. Nigeria’s PSI system was regularly criticised by other WTO members¹¹⁰, and many regard the use of the BDV as unacceptable.¹¹¹

The adoption of new legislation in June 2003 to implement the Customs Valuation Agreement and the introduction of the destination inspection scheme to replace the PSI system on 1 January 2006 are, in theory, positive steps designed to bring Nigeria into conformity with its WTO obligations in these areas. However, as mentioned earlier, the 2003 Amendment Act, flawed as it is in some areas, has yet to come into force and has not been notified to the WTO. Also, the new destination inspection scheme does not appear to address the problem of customs valuation in Nigeria.

¹⁰⁵ See Article 20 (footnote 4).

¹⁰⁶ WTO document WT/TPR/S/39 at p.32.

¹⁰⁷ Ibid.

¹⁰⁸ See article, “Pre-shipment Inspection is the Problems at the Ports”, available at: <http://www.thisdayonline.com/archive/2001/05/18/20010518bus28.html> (accessed 03/01/2003).

¹⁰⁹ *Business Guide to the World Trading System*, ITC/Commonwealth Secretariat, 1999, p.78

¹¹⁰ See, e.g., WTO document WT/TPR/147.

¹¹¹ For instance, the US states that it attaches importance to the issue because the use of the BDV is unfavourable to its exporters. See WTO document G/VAL/M/20 of 6 August 2001 at p.11.

Countries implementing the Customs Valuation Agreement would normally produce detailed valuation guidelines for importers and customs officers.¹¹² The Destination Inspection Guidelines, published by the Nigerian Customs Service, contain no such valuation guide.¹¹³ The only reference a valuation procedure is the requirement that the importer must submit, *inter alia*, a pro-forma invoice and a Combined Certificate of Value and Origin (CCVO), which must be duly attested to by the Chamber of Commerce of the exporting country. Scanning Companies (SCs) are contracted to generate Risk Assessment Reports (RARs) from these documents. Then, a Verification and Query process is conducted, using the ASYCUDA ++ system¹¹⁴, with emphasis on the values of the imported product. Where any discrepancy is found, a Demand Notice is issued for any additional payment.

The process relies mainly on automation and technology, but is likely to be beset by significant resource and capacity problems. The existence of competent legal and operational personnel, with full knowledge of the valuation system is a *sine qua non* for a successful implementation of the Customs Valuation Agreement. The agreement is largely incompatible with the use of the PSI scheme, since it requires the active involvement of the customs administration. Yet, Nigeria's lack of confidence in its customs is the main reason why it has used the PSI system for decades and why the recent adoption of the destination inspection scheme may be short-lived. It is doubtful whether Nigeria's implementation of the valuation agreement, if at all, can fully conform to the letter and spirit of the agreement.

Conclusion

This chapter has considered the implementation of the WTO Customs Valuation Agreement by South Africa and Nigeria. As table 3 shows, there are significant differences in the compliance records of South Africa and Nigeria, with South Africa in substantial compliance and Nigeria in virtual non-compliance. On the different valuation methods, South Africa's laws are fully in conformity with the provisions of the CVA. South Africa's valuation rules broadly conform to the subsidiary provisions

¹¹² See, for example, South Africa's Valuation Guide (Notes for the Guidance of Importers), as well as Valuation Audit Manual.

¹¹³ The Guidelines are available at: <http://www.nigeriacustoms.gov.ng>. The Guidelines are, however, subject to frequent changes.

¹¹⁴ ASYCUDA or Automated System for Customs Data and Management, is a system developed by UNCTAD for use by customs administrations in developing countries.

of the agreement. However, there are areas where compliance is unclear in respect to these obligations, especially given the Commissioner's discretionary power of intervention. The study further shows that while there is little problem with the legal framework, there are some practical and administrative problems of implementation.

Table 3: CVA - Formal Compliance by South Africa and Nigeria (as of July 2006)

	South Africa	Nigeria
Procedural Obligations <ul style="list-style-type: none"> • Notification of implementing laws • Responses to checklist of issues • Review of laws 	Have notified all laws Have notified responses Review concluded	No notification to date No notification to date Review not yet undertaken due to non-notification
Substantive Obligations <ul style="list-style-type: none"> • Basic valuation method • Other methods 	Laws broadly conform Laws broadly conform	No compatible law in force (BDV probably still being used) No compatible law in force
Subsidiary provisions <ul style="list-style-type: none"> • Currency conversion • Confidentiality of information • Rights of appeal and due process • Transparency of laws and regulations • Surety system 	Partial compliance: Commissioner has broad power to determine rate Partial compliance: information can be used in non-judicial setting Available, but process may discourage traders Internet-based information, guidelines, notices, but may be out of date Not explicitly provided for	No law in force or notified No law in force of notified No law in force or notified (not even contained in recent amendment act) Internet-bases access, but still rudimentary No law in force or notified

In the case of Nigeria, there is so far no compliance. The Amendment Act of 2003 is flawed in many areas, principally for failing to provide for a right of appeal and failing to comply with the principle of procedural due process. The Act itself has not been notified to the WTO because it has yet to come into force. Thus, Nigeria is, to date, not implementing its obligations under the WTO Customs Valuation Agreement, even though the date of application of the provisions of the agreement for Nigeria was 1 January 2000. Nigeria is thus in breach of its procedural and substantive obligations under the agreement. The next chapter considers the implementation by South Africa and Nigeria of another WTO agreement, namely the TRIPS agreement

CHAPTER 5

Compliance with the TRIPS Agreement

The preceding chapter examined the implementation of the Customs Valuation Agreement by South Africa and Nigeria. That chapter showed significant differences in the compliance records of these countries. The purpose of the present chapter is to consider the compliance experiences of both countries with respect to another WTO agreement, namely the TRIPS Agreement. As in the previous case study, the aim is to examine empirically whether and to what extent these countries have given effect in their national laws to the provisions of the agreement.

The chapter is divided into six sections. Section 1 briefly places intellectual property rights in some theoretical context. Section 2 provides a snapshot of the negotiating history of the TRIPS Agreement. Section 3 discusses the implementation experiences of developing countries in general. Sections 4 and 5 examine respectively the compliance records of South Africa and Nigeria with respect to three areas of TRIPS obligations – procedural, substantive and enforcement. Section 6 concludes with a brief comparison of the experiences of the two countries.

Intellectual Property Rights in Context

Legal and Economic Perspectives

Intellectual property law is that area of law that concerns legal rights associated with creative efforts. It involves legal rights granted by the State, conferring on the holder certain exclusive or monopoly ownership over his creative or intellectual works. It creates largely negative rights, that is, a legally enforceable power to *exclude* others from using a resource.¹ The rationales and justifications for the legal protection of IP are founded on many theories², the most potent, perhaps, is the incentive theory, especially because it is more forward looking than the others. The incentive theory links IP protection to the future, i.e. as an incentive to make new inventions and to

¹ See Landes and Posner (1988)

² The natural law or moral rights theory is based on the Lockean “fruit of the labour” argument that posits that people should own the fruits of their labour. The communitarian rights view, however, criticises the fruit of labour argument on the account that “only radically novel creative acts are genuinely individual ...[and other] creative acts are one step in a historical continuum and usually not attributable to a specific person (see Srinivasan, 2002, citing Cohen and Noll, 2000).

invest the necessary time and capital.³ It is thus *quid pro quo* and the law strives to strike a balance between conflicting private and public interests to reach a justifiable compromise.

Legally speaking, the patent system, for example, is a bargain or contract between the inventor and the State, both parties bringing consideration to that contract.⁴ For the limited exclusive rights granted by the State, the inventor in return gives total and complete disclosure of the details concerning the invention and accepts, in addition, certain risks, including the possibility that the State, acting in the public interest, may impose certain conditions that may limit his enjoyment of the exclusive rights.⁵ The same logic underpins copyright protection, which is subject to the exceptions of fair use or fair dealing. There are also limited exceptions in respect of trademarks.

However, intellectual property rights are highly controversial, especially when viewed from an economic perspective.⁶ The arguments in favour of strong IPRs are often linked to their predicted effects on trade flows, foreign direct investment, creation and diffusion of technology, and, generally, other areas of international commercial activity. Yet, most commentators agree that there is paucity of reliable empirical data upon which to base these claims.⁷ As some commentators put it, “most positive and normative effects of IPR reforms are theoretically ambiguous and dependent on circumstances”.⁸ Some have also argued, for instance, that IPRs do not play an important role in influencing total international transactions of major developed countries such as the US⁹, and that “more empirical research is needed to gain more insight regarding the IPR-trade link”.¹⁰

³ Bainbridge (1996)

⁴ Ibid.

⁵ The risk that an investor must be willing to accept includes that details of invention are available for public inspection: that some things can be done during the life of the patent (i.e. non-infringing acts) by others: that the invention may be vulnerable to a compulsory licence: that competition law may impose restrictions on the exploration of the patent; and the risk that the invention may be appropriated by the state (ibid, p. 12)

⁶ For recent economic research on intellectual property and economic development, see Fink and Maskus (eds) (2005),

⁷ Maskus, 2000.

⁸ Fink and Maskus (eds) (2005), p.6

⁹ Fink (2005) in Fink and Maskus (eds) (2005).

¹⁰ Fink and Primo Braga in Fink and Maskus (eds) (2005).

Indeed, it is with regard to the trade-relatedness of intellectual property that the TRIPS Agreement has attracted some of its sharpest criticisms. For instance, Professor Oddi declares that, "TRIPS rests on no solid theoretical or empirical foundations whatsoever".¹¹ Another strong critic, Professor Bhagwati argues that IP "is not a 'trade' issue", and criticises what he regards as the "pseudo-intellectual justification" that suggests otherwise.¹² Other commentators have, however, sought to justify the trade-relatedness of IP by arguing that widespread piracy, counterfeiting and infringement of IP rights constitute a barrier to trade in that the availability of such goods diminishes market access for legitimately traded goods.¹³

With respect to developing countries, it is generally agreed that in static efficiency terms, most developing countries, as net importers of traded IP products, would derive little immediate benefits from strengthened IPRs. Clearly, rents from royalties, license fees and profit repatriation will, at least in the short term, flow away from these countries as IP users to developed countries as IP producers.¹⁴ However, in dynamic efficiency terms, the benefits of stronger IP could produce positive effects on imports of high-technology goods, FDI, and inward technology transfer, although these outcomes will depend on the existence of complementary or collateral policy and institutional reforms.¹⁵ Thus, even the dynamic gains are uncertain or at best conditional.¹⁶

The Uruguay Round Negotiations

It was against the background of such conflicting claims on the costs and benefits of IPRs that the Uruguay Round negotiations on the TRIPS agreement took place. While the traditional reciprocal exchange of tariff concessions that underpinned GATT negotiations was generally welcome because it typically yielded benefits to all the

¹¹ See Reichman (1996), at. 370.

¹² Professor Bhagwati argues that putting TRIPS into the WTO legitimates the use of the WTO to extract royalty payments (Bhagwati, 2002, p127). See also Srinivasan (2005).

¹³ Maskus, 2000, p.111, although he goes on to say that, "identifying how IPRs affect international trade is empirically difficult" (Ibid).

¹⁴ In addition to the net outflows of royalty payments, there are the compliance costs associated with the prohibitive prices of IP products such as medicines, as well the administrative costs of setting up efficient systems for the acquisition, maintenance, and enforcement of intellectual property rights.

¹⁵ Maskus, 2000.

¹⁶ See UNCTAD-ICTSD, 2005.

parties involved, the same could not be said of negotiations to strengthen IPRs, which were, in any case, designed to protect rather than liberalise trade in IP products.¹⁷

Nevertheless, the impetus for increasing the normative standards of IP and for bringing the international regulation of IPRs into the GATT became stronger in the late 1970s, as the developed countries began to question the ability of the World Intellectual Property Organisation (WIPO), traditionally the global regulator of IPRs, to provide for effective protection and enforcement of IPRs.¹⁸ They expressed concerns that the standards in some of the WIPO treaties were weak and vaguely specified, and that the WIPO system did not provide adequate mechanisms for enforcing obligations. Furthermore, given resistance from the developing country members of WIPO, it was difficult to renegotiate the conventions rapidly and flexibly.¹⁹

To be sure, global pharmaceutical, software and recorded entertainment industries played a critical role in pushing the IP issue into the trade agenda. As many commentators²⁰ have noted, TRIPS was a producer/technology-owner driven agreement.²¹ Duncan Matthews notes that: “without the global corporate consensus there quite simply would have been no TRIPS Agreement”.²² Intense pressure from these global corporate actors, which had clear commercial interests in the worldwide stronger protection of IPRs, particularly in developing countries, forced their governments to adopt a much tougher negotiating position.²³

¹⁷ See T.N. Srinivasan in Kennedy and Southwick (eds)(2002); Fink and Reichenmiller (2005).

¹⁸ See Maskus (2000); UNCTAD – ICSTD, 2005.

¹⁹ Ibid.

²⁰ See, for example, Abbott (2004) and Matthews (2002).

²¹ For a discussion of the political economy of intellectual property rights, particularly the extent to which powerful interest groups influence and shape the political dynamism underlying the field of IPRs, see Pugatch (2004)

²² Matthews (2002, p 13).

²³ For instance, there is evidence that the US was willing initially to accept a plurilateral agreement on TRIPS, that is, a code that applied to a limited group of GATT contracting parties, notably all the developed countries and a select few developing countries. See UNCTAD-ICSTD, 2005, at p. 4. See also US’s initial proposal of November 1987, GATT document MTN.GNG/NG11/W/14, 20 October 1987, November 3, 1987.

Despite the initial strong protestations by the Group of Ten developing countries, led by Brazil and India²⁴, which had been quite active and vociferous on the IP issue, the TRIPS Agreement finalised in 1993 largely reflected the position of the developed countries, and was particularly modelled on the demands of US, EC and Japanese business interests.²⁵ The weakening and ultimate dissipation of the initial resistance by the leading developing countries was due to a number of factors.

Clearly, pressure from the US and other developed countries such as the EC and Japan, played a critical role. The US's strategy entailed the use of trade incentives plus threat of trade sanctions.²⁶ Trade concessions in terms of promises to liberalise the agricultural and textile and clothing markets were coupled with threats that the US would continue to pursue section 301 actions, and might even abandon the GATT altogether, if its negotiating agenda was not accepted.²⁷ As Petersmann puts it, "the unilateral trade sanctions applied under Section 301 of the US Trade Act in response to violations of intellectual property rights in foreign countries were instrumental for the negotiation and conclusion of the TRIPS Agreement".²⁸

However, while the TRIPS agreement has been strongly criticised by several commentators as being detrimental to the interests of most developing countries and as being imposed against their wishes²⁹, there are those who argue that, in the end, perhaps reluctantly, developing countries came to see the TRIPS Agreement as an acceptable part of an overall package and appreciated the perceived value of IP protection to their countries.³⁰ The late 1980s and early 1990s were also a period when many developing countries embarked on unilateral trade and economic liberalisation, a situation that arguably also contributed to a willingness to join a consensus on the TRIPS Agreement.³¹

²⁴ The ten countries are Argentina, Brazil, Cuba, Egypt, India, Nicaragua, Nigeria, Peru, Tanzania, and Yugoslavia.

²⁵ In 1988, US, EC and Japanese corporate interest groups jointly presented a 'manifesto' entitled 'Basis Framework of GATT Provisions on Intellectual Property, designed to form the basis of a GATT intellectual property code. See Matthews (2002) and Drahos, 1995.

²⁶ Abbott in Kennedy and Southwick (2004).

²⁷ Ibid.

²⁸ In Kennedy and Southwick (eds), 2004, p.33

²⁹ Critics of the TRIPS agreement from a development perspective are legion and cannot be cited here, but see, e.g. Matthews (2002), Braga and Fink (1998) and Abbott (1998).

³⁰ Abbott in Kennedy & Southwick (eds), 2002, p.315, citing Professor John Jackson.

³¹ Maskus (2000).

What is clear, however, is that the formulation and promulgation of the TRIPS Agreement occurred largely without the active participation of developing countries. Given their defensive stance, these countries had little contribution to make to the final text of the Agreement. Arguably, therefore, the TRIPS Agreement, like the Customs Valuation Agreement, is another exogenous law for most developing countries. Indeed, as a general proposition, most developing countries are dissatisfied with the Agreement, and some have been clamouring for its renegotiation.³² Furthermore, it is generally believed that the costs and difficulties of implementation are beyond what these countries had foreseen.³³

All of this raises valid empirical questions as to whether these countries are adhering to the principle of *pacta sunt servanda* in their implementation of the TRIPS obligations. The fact that the agreement imposes a high depth of cooperation and arguably did not represent the *ex ante* preferences of most developing countries qualifies it for empirical compliance research (Table 1 shows the scope of the TRIPS substantive obligations and Table 2 for the enforcement obligations). Before, focusing on the compliance records of South Africa and Nigeria, it is useful to provide a snapshot of the experiences of developing countries in general, as gathered from the compliance reviews at the Council for TRIPS.³⁴

Overview of Developing Countries' Compliance with the TRIPS Agreement

One of the main preoccupations of the TRIPS Council since its first meeting on 9 March 1995 has been the monitoring of Members' compliance with their procedural obligations, as well as reviews of national implementation legislation. Article 63.2 of the TRIPS Agreement requires Members to notify their IP laws and regulations to the Council for TRIPS in order to assist the Council in its review of the operation of the agreement. Members are also required to respond to a Checklist of Issues on

³² See Abbott in Kennedy & Southwick (eds), 2002. This view, of course, is shared by most commentators (see Reichman, 1996), and can be deduced from the behaviour of most developing countries.

³³ See, e.g. Braga and Fink (1998); Abbott (1998); Finger and Schuler (2000); and UNCTAD-ICSTD (2003).

³⁴ The review is seen as an important dispute-avoidance vehicle, and has specific benefits, including: the clearing up of misunderstandings about a country's legislation; the identification of deficiencies in notified laws and regulations; the identification of differences in interpretation; and, for developing countries, "the insights into how their trading partners are understanding and implementing the provisions of the TRIPS Agreement, and which aspects appear to be more particularly sensitive" (Otten, 1998, pp 525-526)

Enforcement. At its meeting of 9 May 1996, the Council agreed the procedures for review of national legislation³⁵, and began the review of the legislation of the developed countries whose transitional period ended on 1 January 1996. So, how did the developing countries perform with respect to their procedural obligations?

Article 65 of the TRIPS Agreement grants every WTO Member a general transitional period of one year from when the WTO Agreement came into force on 1 January 1995, thus the TRIPS Agreement was not due to be implemented until 1 January 1996. However, paragraph 2 of Article 65 grants developing countries and transitional economies³⁶ a further period of four years, meaning that they were required to implement the agreement by 1 January 2000.³⁷ The purpose of the transitional period is, however, not so much to postpone the adoption of TRIPS compliant laws but to phase in the changes in law gradually.

Yet, many developing countries and transitional economies paid little attention during this period to introducing necessary changes in their IP laws, as evident from their attitude to the notification and review exercises. This appears to be the case with both the small and the more advanced developing countries. For example, the attempt by the US to get some advanced developing countries or transitional economies to make early notifications and to participate early in the review exercise was rebuffed by these countries. Poland³⁸, one of the countries targeted by the US, retorted that it “was *enjoying* the transitional period to which it was entitled under the TRIPS Agreement” (emphasis added).³⁹

Furthermore, rather than seeing the review of the developed countries’ legislation as a good learning process, most developing countries showed little interest in the

³⁵ See document IP/C/M/7, paragraph 6

³⁶ See S. 65.3, which grants transitional economies the same delayed implementation period as developing countries.

³⁷ However, under Article 66.1, the least-developed countries were granted a delayed implementation period of 10 years, until 1 January 2006. Further, based on the Doha Ministerial Decisions, least-developed countries have been granted up to 2016 to implement Sections 5 and 7 of the TRIPS Agreement, dealing patent protection for pharmaceutical products and protection of undisclosed information. On 29 November 2005, the Council for TRIPS agreed to extend the TRIPS implementation period for the least-developed countries to 1 July 2013. See http://www.wto.org/english/news_e/pres05_e/pr424_e.htm for the text of the decision.

³⁸ Poland was a transitional economy and therefore was not classified as a developing country.

³⁹ See WTO document IP/C/M/11 page 9. The countries targeted by the US were Turkey, Singapore, Mexico, Kuwait, Korea, Israel, Hong Kong and Poland (see document IP/C/M/8).

exercise. With the exception of India and, to some extent, Brazil, many developing countries treated the reviews as if it was nothing to do with them.⁴⁰ This was due to a combination of factors, including lack of interest, lack of full understanding of the issues, and lack of capacity. For instance, while the developed countries normally send their IP specialists from Geneva and the capitals to the TRIPS Council meetings, developing countries' representatives are mainly Geneva-based trade diplomats who are only generally broadly familiar with key IP issues.⁴¹

The implementation challenges posed by the TRIPS Agreement are difficult to underestimate. The burden of compliance was too much for some countries. The March 1999 market survey conducted by the *Managing Intellectual Property* journal found that several developing countries were "sailing close to the wind on the TRIPS deadline". In December 1999, shortly before the deadline for full implementation expired, the Indonesian government declared that it could not implement the TRIPS Agreement because of the prevailing circumstances in the country.⁴² Venezuela asked for an extension of the 1 January 2000 implementation deadline.⁴³

In November 2001, Senegal informed the Council that it was reverting to its least-developed country status and invoked the provisions of Article 66.1 and any further extensions that might be granted under it. The US expressed concerns and entered a reservation pending further analysis of the situation and consultation with Senegal on its status.⁴⁴ Although other less advanced developed countries did not adopt such a radical approach, many of them indicated that they were facing significant difficulties in implementing even the basic procedural obligations of the TRIPS Agreement.

⁴⁰ For example, while the developed countries subjected the IP laws and regulations of developing countries to close scrutiny, only three developing countries posed questions to developed countries with respect to their IP laws and regulations. India posed questions to the US and the EC (document IP/C/W/54); Korea posed questions to the US (document IP/Q/USA/1/Add.1) and Brazil posed questions to Australia (document IP/C/M/13).

⁴¹ Also, while some developed countries have up to six representatives assigned to the TRIPS Council meetings, most developing countries have only one. For instance, according to a list of members' representatives to the TRIPS Council meetings, prepared by the WTO Secretariat, the EC and its member states have 27 representatives; the US (7); Japan (6); Canada (4); Malaysia (4); Nigeria (1); South Africa (1).

⁴² Kusumadara (2002, p187)

⁴³ Ibid.

⁴⁴ See documents IP/C/24 and IP/C/M/34. Senegal is one of the countries listed by the United Nations (UN) as a least-developed country (LDC).

Cameroon noted that implementation required considerable time and effort and thus it “would appreciate it if the Council could grant a period of delay enabling (its) Government to carry out the necessary legal reforms ...”⁴⁵ Democratic Republic of Congo cited “domestic political and administrative reasons” for its delegation’s inability to prepare the necessary documents within the deadline for the review of its legislation or to come to Geneva for the review meeting.⁴⁶

For many developing countries, the desire, perhaps, to comply with their legal obligations was severely limited by lack of capacity. For some, there is clear evidence of lack of enthusiasm or willingness to prioritise the issue of compliance. The fact that in 2005 there were still outstanding notifications and responses by countries that should have been implementing the TRIPS Agreement by 1 January 2000⁴⁷ suggests that, for some developing countries, the TRIPS Agreement lacks compliance pull, due, perhaps, to lack of ownership by many of these countries of the agreement.

However, there is also evidence that the law’s impact was not completely muted. For instance, most of the countries with problems of delayed and partial notifications eventually complied. Many developing countries’ reviews have been deleted from the agenda. The practice of keeping a country’s review on the agenda until all outstanding questions were answered served as a normative pressure that appeared to have worked. The flexibility in the Council’s *modus operandi*, particularly with respect to the time period and deadlines provided for notifications and responses to questions, also induced ultimate compliance with the procedural obligations.

Against the background of the broader picture and context presented above, the focus now shifts specifically to the implementation experiences of South Africa and Nigeria. The case studies, however, look beyond the procedural obligations and explore compliance with the substantive and enforcement obligations by the two countries. Archival materials from the WTO Secretariat, including minutes from TRIPS Council meetings and other communications to the WTO by and about the two

⁴⁵ See documents IP/C/M/30 and 34.

⁴⁶ See document IP/C/M/30 at p.5.

⁴⁷ See document IP/C/M/47 of 3 June 2005.

countries, were examined to gain an understanding of their compliance with the procedural obligations of the TRIPS agreement.

The IP laws and regulations of the two countries were examined for their TRIPS compatibility or incompatibility. In the case of South Africa, all the IP statutes were accessed through the government webpage⁴⁸, while in the case of Nigeria, the relevant IP statutes were accessed through a Nigerian law webpage.⁴⁹ The enquiry also examines the application of the IP laws by the domestic courts of the two countries to establish their consistency with the TRIPS commitments. Judgments of the South African Supreme Court of Appeal are available on the Internet and it was possible to access all the IP related cases, since 1999.⁵⁰ Few IP cases are reported in Nigeria⁵¹, because very few IP cases go to court; most are settled out of court, if at all.⁵² The case studies also rely on interview and observation data, gathered both in Geneva and the capitals of the two countries.

Each of the two country analyses below begins with a brief history of the IP regime in each country, focusing on the situation pre-TRIPS. This is followed by an analysis of how and to what extent each country has complied with the three areas of TRIPS obligations described earlier.⁵³ Tables 1 and 3 below contain respectively a brief outline of the mandatory substantive and enforcement obligations.

⁴⁸ All South African statutes are available at: <http://www.info.gov.za/acts>

⁴⁹ See Nigeria-law.org/LFNMainPage.htm. The following acts are available on the webpage: Trade Marks Act, 1990; Copyright Act, 1990; Patents and Designs Act, 1999; Copyright (Amendment) Decree, 1992 and Copyright (Amendment) Decree, 1999.

⁵⁰ For judgments of the Supreme Court of Appeal (from 1999) see <http://wwwserver.law.wits.ac.za/scrtappeal/scaindex.html>. For researching South African law in general, see <http://www.llrx.com/features/southafrica.htm>.

⁵¹ For judgements of some Nigerian courts, see Nigeria-law.org/LawReporting.htm.

⁵² US Department of State Report, 2005.

⁵³ The issue of compliance with the TRIPS agreement is particularly difficult to tackle. This is because of “constructive ambiguities” in the agreement. Some commentators have argued that the ambiguities or flexibilities give developing countries ample room for manoeuvre in their implementation of the agreement (see UNCTAD-ICSTD, 2005; Reichman, 1998). However, several WTO panels and the Appellate Body have adopted a narrow or literal interpretative approach, which, in a sense, limits the so-called flexibilities. For example, with respect to Article 1.1, which grants members freedom to determine the appropriate method of implementation within their own legal system, the Appellate Body in the *India-Mailbox* case has held that that freedom does not preclude a panel from examining whether or not the method of implementation used by a country derogates from its TRIPS obligations. See Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9

Table 1: TRIPS substantive obligations

PART II OF TRIPS: SUBSTANTIVE OBLIGATIONS		
IP Area	Articles	Scope of Obligation
Copyright and Related Rights	9 10 11 12 13 14	<ul style="list-style-type: none"> incorporates Articles 1 through 21 of Berne Convention. Computer programmes and databases to be protected as literary works Rental rights to be granted to authors of computer programmes etc Copyright to be protected for 50 years Limitations and exceptions must not prejudice legitimate interests Related rights, i.e. of performers, sound recordings and broadcasts must be protected for at least 50 years (performers) and 20 (broadcast) Article 14.6 requires rights of performers and producers of sound recordings to be protected retroactively as required under the provisions of Article 18 of the Berne Convention (1971)
Trademarks	15 16 18 19 21	<ul style="list-style-type: none"> Signs, including combination of colours to be registrable; actual use not a filing application for registration; service marks to be registrable (Article 15.4); trademark must be published promptly (15.4) Trademark owner must have exclusive right to prevent unauthorised users, but rights must not prejudice existing prior rights (16.1). Well-known trademarks must be protected (as under Article 6bis of the Paris Convention). Protection for initial 7 period of years and then renewable indefinitely Cancellation solely for non-use must only be after an uninterrupted period of three years of non-use, and certain valid reasons, including those relating to government intervention, must be recognised Right to assign trademarks. No compulsory licensing of trademarks.
Geographical Indications	22 23	<ul style="list-style-type: none"> Members must provide the legal means for interested parties to prevent the use of GIs in a manner, which misleads the public as to the true origin of the good as well as acts of unfair competition. Members must refuse or invalidate the registration of trademarks containing a GI of goods that are misleading as to the true place of origin (22.3) Additional protection must be granted for GIs for wine and spirits. Members are obliged to provide the legal means to interested parties to prevent the use of a GI identifying wines for wines or spirits for spirits not originating in the place indicated even where the true origin is indicated or the GI is used in translation or accompanied by expressions such as “kind”, “type”, “style”, “imitation” or the like. In principle, under the Article 23 protection, there is no need to show that the public has been misled as to the true origin of the good or that an act of unfair occurred (See WTO, 2004).
Industrial designs	25 26	<ul style="list-style-type: none"> Independently created industrial designs that are new and original are to be protected, through industrial design law or through copyright law. Requirements for protecting textile designs, including cost, examination or publication must create unreasonable impairment. The owner of protected industrial designs must have the right to prevent unauthorised third parties from certain acts. Industrial designs must be protected for at least 10 years (26.3).
Patents	27 28	<ul style="list-style-type: none"> Patents must be available for any inventions, whether products or processes, in all fields of technology (27.1). Patents must be available and patent rights enjoyable without discrimination as to place of invention, the field of technology and whether products are imported or locally produced (27.1). Members must patent micro-organisms and non-biological and microbiological processes (27.3b). They must patent plant varieties (either by patent or by an effective <i>sui generis</i> system or by any combination thereof)(23.3b). A patent confers exclusive rights to prevent unauthorised third parties from making, using, offering for sale, selling or importing (unless in respect of parallel importing (see Art 6) the patented product.
	29	<ul style="list-style-type: none"> Applicant must disclose sufficiently clear and complete information about the invention
	30	<ul style="list-style-type: none"> The limited exceptions must not conflict with normal exploitation of the patent or unreasonably prejudice legitimate interests

	31 32 & 33 34	<ul style="list-style-type: none"> Unauthorised use by the government or third parties authorised by the government must satisfy certain conditions, including merits; (31a), prior negotiations⁵⁴ (31b); limited scope and duration (31c); non-exclusivity of licence (31d); non-assignability (31e); use to be predominantly for the domestic market (31f); use must be terminated if circumstances change (31g); patentee must be paid adequate remuneration (31h); the legal validity of any decision to grant a compulsory licence must be subject to judicial review or other independent review by a distinct higher authority (31i); any decision relating to remuneration must be subject to judicial review etc (31j). The grant of dependent patents must meet the conditions set out in Article 31.1 (i, ii & iii). There must be an opportunity for judicial review of any decision to revoke or forfeit a patent (32), and a patent must be granted for a minimum period of 20 years counted from the filing date (33) Burden of proof in respect of process patent must be reversed in civil proceedings.
Layout-designs (Topographies) of Integrated Circuits	35-38	<ul style="list-style-type: none"> Requires layout designs to be protected, but leaves members free to determine the form of protection either under a <i>sui generis</i> regime or under existing modalities of IP right. Protection must be for at least 10 years counted from the date of filing an application for registration
Protection of Undisclosed Information	39	<ul style="list-style-type: none"> State agencies in control of undisclosed information must be able to prevent it from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices, provided such information is secret, have commercial value and reasonable steps have been taken to keep it secret (39. 1a-c). Test data submitted for marketing approval for pharmaceutical or agricultural products must be protected against unfair commercial use and against disclosure except where necessary to protect the public (39.3)
Control of Anti-competitive Practices in Contractual Licences	40	<ul style="list-style-type: none"> Members may enact anti-trust regulations or other competition legislation to prevent licensing practices or conditions pertaining to IPRs which restrain competition and which may have adverse effects on trade or impede the transfer and dissemination of technology (40.1)

Source: extracted from the TRIPS Agreement

South Africa's Implementation Experience

A Brief Overview of IP Regime in South Africa: Situation pre-TRIPS

South Africa is widely believed to have had a relatively strong IP regime prior to the advent of the TRIPS Agreement in 1995. With respect to patents, a study by the Frazer Institute, which measures global patent protection in 1970, 1990 and 1995 (all pre-TRIPS years), using five categories of indicators⁵⁵, rated South Africa at 3.37 (1970), 3.57 (1990) and 3.57 (1995).⁵⁶ These scores compare favourably with those of developed countries such as the United Kingdom, which scored 3.04, 3.57 and 3.57

⁵⁴ But prior negotiations are waived in the case of national emergency or other circumstances of extreme urgency or in cases of public non-commercial use (Article 31(b)).

⁵⁵ These were: extent of coverage, membership of international patent agreements, provisions against loss of protection, enforcement mechanisms, and duration.

⁵⁶ The index of patent rights ranges from 0 to 5, with higher numbers reflecting stronger protection levels. The value of the index is obtained (per country, per time period) by aggregating scores in the five equally weighted categories. The score in each category ranges from 0 to 1 and reflects the extent of legal features in that category available in a particular country at a particular time. See http://oldfraser.lexi.net/publications/forum/1999/03/patent_protection.html (date accessed: 13/07/2005).

during the same periods, and advanced developing countries, such as Israel, with ratings of 3.57, 3.57 and 3.57 respectively. Only the United States had the highest scores at 3.86, 4.52 and 4.86 during the same periods. Indeed, India performed considerably lower at 1.42, 1.48, and 1.17 in the periods in question.⁵⁷

Despite this relatively strong IP regime, however, the TRIPS Agreement exposed the deficiencies in the South African IP laws and regulations. Furthermore, while South Africa's IP laws were always relatively strong on paper, enforcement was historically weak. Judged by the substantive and enforcement provisions of the TRIPS Agreement, South Africa thus needed to make a number of changes to its pre-existing IP laws in order to bring them into conformity with the Agreement. How has South Africa fared in making these changes? This is the focus of the next sections, which begin with the procedural obligations.

Compliance with the TRIPS Procedural Obligations: Notifications and Reviews

South Africa negotiated in the Uruguay Round as a developed country and therefore has developed country status in the WTO.⁵⁸ This meant that unlike advanced developing countries such as India, Brazil and Israel, which had up till 2000 to implement the TRIPS Agreement, South Africa was obliged to implement the agreement by 1 January 1996 at the same time as the developed countries, such as the US, EC, Japan and Canada.

South Africa notified its existing IP laws relatively promptly in a communication to the Council in February 1996.⁵⁹ These included its main dedicated IP laws and regulations and "other laws and regulations", as well as copies of the statutes and regulations. Notifications, however, are only the first step. In addition, South Africa had to provide responses to a checklist of issues and submit to a rigorous review exercise, including providing responses to questions posed by other countries.

⁵⁷ Ibid.

⁵⁸ See chapter 3 for the explanations for this decision.

⁵⁹ See document IP/N/1/ZAF/1.

The review of South African substantive IP laws began in July 1996⁶⁰, with questions and follow-up questions from mainly the EC and its member states, the US, Japan and Switzerland. Responses to some of these questions were provided promptly, others were delayed. However, the main challenge was with respect to responses to the checklist of issues on enforcement and the review of the legislation on enforcement. South Africa could not meet the deadline for the submission of these responses.

While pleading for more time, the South African delegate said that although his country was proud to be the only developing country to assume full and immediate TRIPS obligations, it had come to appreciate the difficulties of undergoing a legislative review process within the context of major domestic institutional and legislative reform. TRIPS issues required "great circumspection" due to the nature of the obligations stipulated and because dealing with them was resource-intensive.⁶¹

South Africa's representative pointed out that the nature and number of the questions posed by other countries and the level of detail required were demanding for his delegation given huge capacity constraints. Although South Africa eventually notified its responses to the Checklist before the Council meeting of 24 February 1998, its delegation informed the Council that it was not ready to have its national legislation on enforcement reviewed at that meeting, citing difficulties of "an institutional nature". South Africa's review remained on the Council's agenda up till April 1999 when it was deleted after the outstanding responses were finally provided.⁶² This shows that despite South Africa's developed country status in the WTO, it faces much of the developmental challenges experienced by many developing countries. The following section focuses on South Africa's compliance with the substantive obligations.

⁶⁰ South Africa's copyright laws were reviewed at the TRIPS Council's meeting of 22 to 25 July 1996 (see document IP/C/M/8); its legislation on trademarks, geographical indications and industrial designs was reviewed in the meeting of 11 to 15 November 1996 (document IP/C/M/11), the legislation in the fields of patents, layout-designs of integrated circuits, protection of undisclosed information and control of anti-competitive practices in contractual licences was reviewed at the meeting of 26-30 May 1997 (document IP/C/M/13). The review of legislation on enforcement took place at the meetings of 24 February 1998 and 12 May 1998 (see document IP/C/M/17 and IP/C/M/18).

⁶¹ See document IP/CM/18 at p.4

⁶² See document IP/C/M/23

*Compliance with TRIPS Substantive Obligations*⁶³

This section examines the IP laws of South Africa and their consistency with the substantive provisions of the TRIPS Agreement. For completeness, the mandatory provisions of all the eight IP areas covered in Part II of the TRIPS Agreement, and set out in Table 1 above, are examined. The aim is to see what changes, if any, South Africa has introduced in order to bring its national laws into conformity with the relevant TRIPS provisions, and what changes, if any, have not been made.

Copyright and Related Rights

Section I of the TRIPS Agreement establishes substantive obligations in the areas of copyright and related rights. The main mandatory obligations are set out in Articles 9 to 14 (see Table I above). South Africa's pre-TRIPS laws on copyright and related rights were deficient in several areas with respect to these TRIPS provisions. The obvious gaps included: the adherence to Articles 1 through 21 of the Brussels (1948) text of the Berne Convention rather than Article 1 to 21 of the Paris (1971) text, as required under Article 9.1 of TRIPS; the non-protection of computer programmes and databases as literary works (Article 10 of TRIPS); the lack of rental rights for authors of computer programmes and cinematographic works (Article 11); and the failure to grant performers and broadcasters the exclusive right to communicate their work in the public (Article 14.1).⁶⁴

Furthermore, the fair dealing exceptions in South Africa's copyright law were very broad, arguably contravening Article 13 of TRIPS, which provides that limitations and exceptions to copyright protection must not unreasonably prejudice the legitimate interests of the right holder. In addition, performers' rights were protected for only 20 years rather than 50 years as required under Article 14.5 of TRIPS; and performances and sound recordings were not protected retroactively, as required under Article 14.6 of TRIPS, read with Article 18 of the Berne Convention (1971). Finally, contrary to the National Treatment provisions of the TRIPS Agreement, sound recordings were not accorded National Treatment; rather protection was based on reciprocity. These

⁶³ The South African IP statutes referred to in this chapter can be found on the South African Government website: <http://www.info.gov.za/documents/index.htm>.

⁶⁴ Until 2002, when the law changed, South Africa was the only country in the world without a copyright law governing the broadcast of a public of sound recording. See: "State steps in to protect musicians". Available at: <http://www.businessday.co.za/Articles/TarkArticle.aspx?ID449984> (Accessed: 19/10/2005).

discrepancies clearly required that changes be made in South Africa laws on copyright and related rights if they were to be TRIPS-compatible.

The Intellectual Property Laws Amendment Act of 1997, which was South Africa's first major attempt to implement its TRIPS obligations, addressed some of these issues. The Act amended, *inter alia*, the Copyright Act of 1978, as well as the Performance Protection Act of 1967. With respect to the deficiencies in the Copyright Act identified above, the following changes were introduced. The definition of literary works was broadened to include "tables and compilations, including table and compilations of data stored or embodied in a computer" (s.1(1)(g) of the Act); a TRIPS-compatible term of protection (50 years) was provided for copyright in a cinematography films, photographs and computer (s.3(2)); and the scope of copyright in computer programme was extended to include exclusive rights to do or authorise the "letting or offering or exposing for hire by way of trade, directly or indirectly, a copy of the computer programme" (s. 11B(h)). This section appears to grant rental rights to authors of computer programmes.⁶⁵

With respect to the Performers' Protection Act, s.7 was amended to extend the term of protection of performers' rights from 20 years to 50 years, in accordance with Article 14.5 of TRIPS, and s. 14 was amended to grant full retroactivity to pre-existing rights of performers and producers of sound recordings, as required under Article 18 of the Berne Convention (see also Article 14.6 of TRIPS).⁶⁶ Further changes were introduced in the amendment acts passed in 2002.

The Copyright Amendment Act, 2002 and the Performers' Protection Amendment Act, 2002, create additional TRIPS-compliant rights in respect of sound recordings and performance, including a "broadcasting" right, a right of "transmission in a diffusion service" and a right to "communicate the sound recording (or the

⁶⁵ It is unclear, however, whether this amounts to rental rights as envisaged in Article 11 of TRIPS. Furthermore, the right is not extended to authors of cinematographic works. Teljeur (2003) argues that "there is no system for rental rights" in South Africa's IP laws.

⁶⁶ However, the retroactivity of South Africa's copyright law is a very complex issue (see section 43(a)(ii) of the Copyright Act) "Works of a technical nature", "published editions" and "computer programmes" may not be protected retroactively. See WTO document IP/Q/ZAF/1 of 4 October 1996 at pp 8-10 for South Africa's explanation. See also Dean (1989) and *Appleton & Another v Harnischfeger Corporation & Another* 1995 (2) SA 247 (A) for the legal authority.

performance) to the public".⁶⁷ Specifically, the performer is granted the right to prevent unauthorised persons from, *inter alia*, reproducing and broadcasting or communicating to the public the performance. These acts cannot be done for commercial purposes without payment of a royalty.

However, despite these TRIPS compliant amendments, South Africa's copyright laws are not fully in conformity with the agreement. South Africa still adheres only to Articles 1-21 of the Brussels (1948) text of the Berne Convention, rather than Article 1-21 of the Paris (1971) text, contrary to Article 9 of TRIPS.⁶⁸ South Africa's copyright law does not make provision for the "*droit de suite*"⁶⁹ referred to in Article 14*ter* of the Berne Convention (1971). Also, although the scope of copyright in computer programmes has been extended, computer programmes are still not protected as literary works, as required by Article 10.1 of TRIPS.

Section 1 of the Copyright Act specifically states that literary work "shall not include a computer programme". The exclusion of a "computer programme" from the definition of "literary work" was introduced in 1992 when the *sui generis* category of copyrightable work, namely, "computer programme" was created.⁷⁰ According to the South African authorities, the objective was to make "computer programmes" and "literary work" mutually exclusive categories.⁷¹ However, this represents lack of formal compliance with the provisions of Article 10 of TRIPS.

⁶⁷ See s. 9 of the Copyright Amendment Act, 2002, and s.3 of the Performers' Protection Amendment Act, 2002.

⁶⁸ South Africa acceded to Berne Convention, Paris Act (1971), on December 24, 1974, but opted out of Articles 1 to 21, incorporated by Article 9 of TRIPS. For South Africa's Berne Accession Notification, see: http://www.wipo.int/edocs/notdocs/en/berne/treaty_berne_64.html (accessed 30/11/2005). It can be argued, however, that by virtue of Article 9 of TRIPS, South Africa's non-accession to the Paris Act (1971) does not matter, since the TRIPS Agreement makes the Act binding.

⁶⁹ Article 14 of the Berne Convention identifies *droit de suite* as one of the "author's rights" comprised in copyright. Also known as resale royalty right, *droit de suite* gives artists the legal right to receive a share of the profits made on the second and subsequent sales of their works during the duration of the copyright.

⁷⁰ Prior to 1992, computer programme was protected as a species of literary work and recognised by the courts as such. See: *Northern Office Microcomputers (Pty) Limited & Others v Rosenstein* [1981](4) SA 123 (C). For the protection of computer programmes in South Africa, see Webster (1996).

⁷¹ See WTO document IP/Q/ZAF/1, page 10. Other reasons given for creating this *sui generis* category were "the difficulty of proving authorship of a computer programme as a literary work for purposes of litigation, the nature of some of the infringing acts, the necessity to make provision for the making of back-up copies and the practicalities of instituting copyright infringement litigation together with the burden of proof under South African litigation procedures" (IP/Q/ZAF/1, p.10)

The limitations and exceptions to copyright under the fair dealing provisions remain fairly broad⁷², thus arguably incompatible with the provision of Article 13 of the TRIPS Agreement.⁷³ The Panel in *US-Section 110(5)*,⁷⁴ held that the conditions in Article 13 apply cumulatively, in other words, limitations and exceptions must be confined to "special cases", must not "conflict with a normal exploitation of the work", and must not "unreasonably prejudice the legitimate interests of the right owner". The Panel stated that the tenor of Article 13 is a narrow one: to provide for exceptions or limitations only of a limited nature, and that an exception will only be allowed if its scope is *de minimis*.⁷⁵ This suggests that any broad fair dealing exception could amount to a violation of Article 13 of TRIPS.

With regard to the non-discrimination principle, s. 4 of the Performers' Protection Amendment Act, 2002, has now extended protection of performers' rights to performers in WTO member countries in accordance to the MFN provision of Article 4 of the TRIPS Agreement. However, this protection is still not based on National Treatment but on reciprocity.⁷⁶ The Appellate Body has stressed the fundamental nature of the National Treatment provision of the TRIPS Agreement.⁷⁷ In the *EC – Protection of Trademarks and GIs* case⁷⁸, the Panel held that the EC Regulation in question violated Article 3(1) of TRIPS and Article III(4) of the GATT because its reciprocity and equivalence conditions modified the effective equality of opportunities available to right holders in all WTO member states.

One other area of non-compatibility often highlighted by the International Intellectual Property Association (IIPA) is the lack of legal presumptions relating to copyright subsistence and ownership in South Africa's copyright law.⁷⁹ While the copyright act

⁷² See sections 12 to 19 of the Copyright Act.

⁷³ See also Berne Articles *2bis*(2), 9(2), 10(1), and 10*bis*(1).

⁷⁴ Panel Report, *United States – Section 110(5) of the Copyright Act*, WT/DS160/R, adopted 27 July 2000, DSR 2000: VIII, 3769.

⁷⁵ See paras 6.93 and 6.97

⁷⁶ S. 4 provides that the right conferred to performances in South Africa shall only be granted to performances in other WTO member countries if those countries extend corresponding protection to South African performances in their countries.

⁷⁷ See Appellate Body Report, *United States – Section 211 Omnibus Appropriation Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, para 297.

⁷⁸ Panel Reports, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R, WT/DS290/R, adopted 20 April 2005.

⁷⁹ See s. 26 (12) of the Copyright Act. According to the IIPA, the withdrawal in 2000 of proposed amendments, which would have introduced further changes into the Copyright Act "demonstrated

provides for various presumptions, the copyright owner is still required to adduce evidence in court and can be subpoenaed. The lack of evidentiary presumption appears to be inconsistent with article 15 of the Berne Convention, which is incorporated by reference in article 9.1 of TRIPS. The focus now shifts to trademarks.

Trademarks

The key TRIPS provisions on trademarks can be found in Articles 15 to 21 of the Agreement (see Table 1 above). South Africa's pre-TRIPS trademark law conformed to some of these provisions⁸⁰; however, there were areas of inconsistency or ambiguity. In particular, trademarks were not being published promptly (Article 15.4); there was no statutory provision for a presumption of likelihood of confusion in the case of use of an identical sign for goods and services (Article 16.1)⁸¹; there were ambiguities regarding certain rights of owners of well-known marks, particularly with regard to how to determine whether a trademark is well known (Article 16.2 read with Article 6*bis* of the Paris Convention); and there was lack of clarity as to the implementation of Article 19 of TRIPS, which deals with the conditions for cancellation of trademarks.

The Intellectual Property Laws Amendment Act of 1997 (s.35) amended the Trade Mark Act with respect to the determination of whether a trademark is well known. In 1996, the Supreme Court of Appeal laid down the criteria in the *MacDonald's* case⁸², where a local business appropriated the name of the popular restaurant McDonald. However, despite this ruling, there was still confusion as to when a trademark would

South Africa's non-committal attitude to compliance with the TRIPS Agreement" (see the IIPA's 2001 Special 3001 Report on South Africa).

⁸⁰ Particularly with respect to the protectable subject matter (Article 15), the registration of service marks and well-known marks (Article 15.4), as well as the duration of trademark protection (Article 18) For instance, Article 18 requires that trademarks be protected for initial period of 7 years and then renewable indefinitely. Under the South African Trade Marks Act, trademarks are protected for an initial period of 10 years and then renewable indefinitely.

⁸¹ In the *EC – Protection of Trademarks and GIs* case (WT/DS174/R), Australia claimed that the EC Regulation in question was inconsistent with TRIPS Article 16.1 "because it does not 'provide for' or 'implement' the presumption of a likelihood of confusion in the case of use of an identical sign for identical goods". However, the Panel held that there is no requirement in Article 16.1 that national law should explicitly provide for this presumption. This case will be discussed in some detail in the section on geographical indications below.

⁸² In 1996, the Appellate Division of the Supreme Court (now known as the Supreme Court of Appeal) held in the *MacDonald's* case (unreported, dated 27 August 1996) that a mark will be considered well-known in South Africa if it is known to a substantial number of persons interested in the goods or services in question. In terms of common law, therefore, Article 16.2 of TRIPS was applicable in South Africa, the amendment act gives it a statutory basis.

qualify as well-known⁸³. To clear the confusions, s. 35 of the 1997 act brought South Africa's law into conformity with Article 6bis of the Paris Convention read with Article 16.2 of TRIPS, although the lack of retroactivity in the law⁸⁴ is believed to be inconsistent with the obligations of Article 2 of TRIPS, to the extent that it incorporates Article 6bis of the Paris Convention, and of Article 16.2 and 16.3 of TRIPS.⁸⁵

South Africa argued that the provision was included in the Act because of the general necessity in terms of South African common law to save vested rights and not to legislate retroactively.⁸⁶ Furthermore, South Africa contended that since it only acceded to the TRIPS Agreement in 1995 and given that the provisions of the Agreement "are not retroactive in effect", the provision of s. 36(2) of the Trade Marks Act was thus not TRIPS incompatible.⁸⁷ South Africa also invoked the limited exceptions allows under Article 17 of TRIPS in support of this provision.

There are other areas in which the amendments to the Trade Marks Act did not appear to ensure full compliance with the TRIPS Agreement. For instance, trademarks are not promptly published, as required by Article 15.5 of TRIPS.⁸⁸ Also there is still

⁸³ According to Article 6bis of the Paris Convention read with Article 16.2 of TRIPS, this should be based on knowledge of the trademark "in the relevant sector of the public including knowledge which has been obtained as a result of the promotion of the trademark"

⁸⁴ See s. 36(2) of the Trademark Act, which denies retroactivity to well-known mark used *bona fide* from a date anterior to 31 August 1991. However, *bona fide* use means honest use, and it is argued that the use of a well-known mark with the intention either to deceive or to make use of another trader's goodwill is not a honest use (see English case: *Baume & Co Ltd v A H Moore Ltd* [1958] RPC 226)

⁸⁵ See document IP/C/W/47 of 11 November 1996, where the US questioned South Africa on this issue.

⁸⁶ Ibid.

⁸⁷ Ibid, at p. 3. In the *US-Havana Club* case (WT/DS176/AB/R) the Panel and Appellate Body treated the task of interpreting the Paris Convention as equivalent to interpreting the TRIPS Agreement, and confirmed that all the substantive provisions of the Paris Convention would be applicable in interpreting the TRIPS Agreement. In *Canada-Terms of Patent Protection* the Panel and the AB rejected Canada's argument that it could not grant retrospective extension of term of patent issued before the TRIPS Agreement entered into force. The Appellate Body upheld the Panel's finding that Article 70.1 of TRIPS does not exclude Old Act patents from the scope of the agreement (Appellate Body Report, *Canada-Term of Patent Protection*, WT/DS170/AB/R, adopted 12 October 2000, DSR 2000:X, 5093). It could thus be argued that South Africa's argument that it was only bound to offer protection to rights acquired after the WTO entered into force may not be supported by WTO case law unless this is expressly stated in the agreement.

⁸⁸ To illustrate the problem, in one case, a plant breeders' right was granted in February 1996 but was not gazetted as required by law until February 2002. The Registrar pointed to "a lack of funds within the Department". According to Harms JA of the Supreme Court of Appeal, "It does not enhance the image of a country that wishes to become a major economic force if, in spite of binding international obligations and parliamentary laws, some state department is unwilling to find or expend a minimal

lack of clarity as to the formal implementation of Article 19.1 of TRIPS. S. 27(1) of the South African Trade Marks Act permits cancellation of a trademark registration if the mark is not used. However, pursuant to s. 27(4) of the Act, the owner of a registered trademark may only prevent cancellation where the non-use is "due to special circumstances in the trade and not to any intention not to use or abandon the mark".

This appears to fall short of the provision of Article 19.1 of TRIPS, which requires the recognition of "valid reason for non-use", namely "circumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the trademark, such as import restrictions on or other government requirements for goods or services protected by the trademark". To a question on this issue by the US, South Africa argued that the phrase "special circumstances" in the Act encompassed the safeguards in Article 19 of TRIPS, although it admitted that it did not know how the courts would interpret the provision.⁸⁹ In sum, South Africa's trademark law is not fully in compliance with TRIPS provisions or needs to be clarified through further amendments. Attention now shifts to the protection of geographical indications.

Geographical Indications

Article 22.2 of TRIPS establishes a minimum standard of protection for all geographical indications (GIs), requiring members to provide "the legal means for interested parties" for GIs in order to avoid misleading the public as to the true origin of the good, and to prevent unfair competition. Article 22.3 further requires that a member must, whether on its own initiative, if allowed by its legislation, or at the request of an interested party, refuse or invalidate the registration of a trademark, which contains misleading geographical indications. The provisions of Article 22.2 to 22.4 apply to all products without exceptions.

However, Article 23 establishes a higher or enhanced level of protection for GIs for wines and spirits, and obliges members to provide additional or special protection for

amount of money". See *Welteverede Nursery (Pty) and other v. The Registrar of Plant Breeders' Rights*, 2002, SA, at para 16.

⁸⁹ See document IP/C/W/47 at p.4

geographical indications for these products. The enhanced level of protection means that geographical indications for wines and spirits, which do not reflect their true origins must not be used even with expressions such as "kind", "type", "style", "imitation" or the like. In other words, only wines and spirits produced in their area of provenance should carry such geographical names. Under Article 23, such geographical indications must be protected even if misuse would not cause the public to be misled or result in unfair competition.⁹⁰ Mere incorrect usage is sufficient to trigger a complaint and, unlike under Article 22, the complainant will not have to establish that the unauthorised use of a GI is misleading or constitutes unfair competition.⁹¹

However, Article 23.3 provides that where two geographical indications are homonymous, i.e. having the same name, spelling or pronunciation, both should be accorded protection, and each member must then determine how the homonymous indications in questions are differentiated from each other. Further exceptions to both Articles 22 and 23 are provided for in Article 24. For instance, Article 24.3 prohibits Members from diminishing the level of GI protection that existed at the time of entry into force of the WTO Agreement. Article 24.4 allows the continued and similar use of GIs for wines and spirits by whomever has used that indication on any goods or services continuously for at least ten years – or less if in good faith – before the date of the Marrakech Agreement establishing the WTO.

Article 24.5 provides for the “co-existence” of GIs and prior trademarks, by stating that where a trademark has been applied for or registered in good faith or where rights to a trademark have been acquired through use in good faith before the protection of a GI, the prior trademark should not be invalidated on the account that it is identical with, or similar to, a geographical indication.⁹² Article 24.6 exempts members from protecting common or generic terms.

⁹⁰ See WTO (2004) for a more comprehensive treatment of the protection of GIs under the TRIPS Agreement, as well as a discussion on the economic theory of geographical indications.

⁹¹ That essentially is the main difference between the requirements under Article 22 and 23. In the case of the former, a complainant must adduce evidence as the “public confusion and deception” of the offending article, while in the case of the latter, a complainant only needs to prove the usage is incorrect.

⁹² One example that is often given is the name "Parma", which is a type of ham from the region of the city of Parma in Italy, but which is a registered trademark in Canada for ham made by a Canadian company.

The recent Panel Reports on the *EC – Protection of Trademarks and GIs*⁹³ case provide the only WTO jurisprudence to date on the protection of GIs under the TRIPS Agreement. One interesting aspect of the Panel findings, for the purpose of the discussion in this chapter, is with respect to the means of implementing the obligation to protect GIs. Articles 22 and 23 require members to provide "legal means" of protection. The Panel held that the assessment of the conformity of implementation measures with Members' obligations generally requires an assessment of the *manner* in which they confer rights or protection on private parties.

In this respect, to be in conformity, a Member must provide legal means to protect GIs. However, the Panel goes on to say that a Member may use other means to implement Article 22.2, and that in order successfully to challenge the TRIPS compatibility of the other means used by a member, the member challenging must demonstrate that "these other measures ... are inadequate to provide protection for interested parties nationals of other Members as required under Article 22.2 of the TRIPS Agreement".⁹⁴

This ruling supports the view that members could employ a wide variety of legal means to protect geographical indications. However given that geographical indications have a specific legal meaning under Articles 22.1 of the TRIPS Agreement and that Article 22.2 imposes specific obligations, it would appear that such alternative means must offer protection for GIs as defined by Article 21.1 and as required under Article 22.2 of TRIPS.

The three forms of protection often highlighted are: protection under laws focusing on business practices, protection under trademark law, and special protection.⁹⁵ Laws focusing on business practices generally relate to unfair competition, passing off, consumer protection, trade descriptions etc. Such laws do not normally protect geographical indications specifically. On the other hand, trademark law may provide protection for geographical indications either by providing protection against the

⁹³ Panel Reports, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R, WT/DS290/R, adopted 20 April 2005.

⁹⁴ US Report, paras. 7.747-751.

⁹⁵ See "Review Under Article 24.2 of the Application of the Provisions of the Section of the TRIPS Agreement on Geographical Indications – Summary of the Responses to the Checklist of Questions", Council for TRIPS, 19 September 2000.

registration and use of geographical indications as trademarks or by protecting geographical indications specifically through mechanisms such as collective, certification or guarantee marks.⁹⁶ Special protection, however, provides for laws that are specifically dedicated to the protection of geographical indications, and the protection provided is generally stronger than that available under the other two categories of means of protection.

In its notification to the TRIPS Council in 1996⁹⁷, South Africa stated that it had no specific law on the protection of geographical indications, although geographical indications are protected under laws focusing on business practices, such as the Merchandise Marks Act of 1941⁹⁸ and the Liquor Products Act of 1989⁹⁹. Furthermore, sections 42 and 43 of the Trade Marks Act of 1993 provide for the protection of registered certification trademarks. Indeed, s. 43(2) of the Act specifically states that, “[g]eographical names or other indications of geographical origin may be registered as collective trademarks”

It is thus clear that, like many other WTO members, South Africa protects geographical indications through laws focusing on business practices and by way of collective or certification marks. Furthermore, under section 10(2)(b) of Trade Mark Act, any mark, which consists exclusively of a sign or an indication which may serve in trade to designate, *inter alia*, geographical origin of goods will not be registered as trademarks, and, if registered, will be liable to be removed from the register. Thus, there is protection against the registration and use of geographical indications as trademarks.

⁹⁶ A collective mark protects distinguishes the goods or services of members of an association or a group of enterprises, which owns the mark from those of other undertakings. A certification or guarantee mark is a mark indicating that the goods or services on which it is used are certified by the proprietor of the mark in respect of geographical origin, material, method of manufacture of goods, standard of performance of services, quality, accuracy, or other characteristics.

⁹⁷ See document IP/N/1/ZAF/1 of 16 April 1996.

⁹⁸ Section 6 of this Act prohibits the false application of a trade description, which applies to inaccurate geographical indications. Section 7 of the same Act prohibits the sale of goods with false descriptions, again, including false geographical indications.

⁹⁹ Section 12 of this Act prohibits false or misleading descriptions of liquor products. According to the authorities “Geographical indications pertaining to liquor products are, in fact, descriptions of such products and, therefore, if they are false or misleading, this Section may be used to deal with the situation” (see document IP/N/1/ZAF/1 of 16 April 1996).

However, South Africa has no law specifically dedicated to the protection of GIs and does not appear to offer enhanced or special protection for wines and spirits. Indeed, trademarks enjoy stronger protection under South African law than geographical indications, with the effect that trademark protection cannot be refused or invalidated based on geographical indications.¹⁰⁰ All of this raises the issue of South Africa's compliance with Article 22 and 23 of the TRIPS Agreement.

The questions posed to South Africa by the EC and US during the review of its IP legislation indicated that these countries did not believe that South Africa offered protection for geographical indications in the context of the TRIPS Agreement.¹⁰¹ South Africa's response to the question whether its laws provide adequate protection for geographical indications within the context of the definition of Article 22.1 of TRIPS was as follows:

“there is no specific provision in South African legislation providing a definition of geographical indications in line with the definition in Article 22.1 of the TRIPS Agreement. However, the scope of protection of existing South African law (common law and statute) ... is considered to be wide enough to include geographical indications as defined in Article 22.1 of the TRIPS Agreement.”¹⁰²

However, in a response to a follow-up question from the EC, South Africa stated that, “the (1997) amendments will ensure that South Africa complies with its obligations under Articles 22 and 23 of the TRIPS Agreement”.¹⁰³ This was an acceptance that further work needed to be done to make South Africa existing laws conform fully with WTO rules on protection of geographical indications. However, despite this promise, the Intellectual Property Laws Amendment Act of 1997 that changed several existing laws to ensure their substantial compliance with the TRIPS Agreement did not introduce any law to protect geographical indications. Indeed, the widely held

¹⁰⁰ Teljeur (2003). Indeed, in South Africa unregistered trademark rights exist side by side with the system of registration and may prevail over registered rights.

¹⁰¹ For instance, the EC asked: “until now, South Africa has not taken any step to implement in its legislation the provisions of Section 3 of Part II (“Geographical Indications”) of the TRIPS Agreement. How and when does South Africa intend to afford this protection?” In another question, the EC asked: “is there any provision in the South African legislation which provides for a protection of geographical indications in line with the definition in Article 22.1 of the TRIPS Agreement?” The US asked: “Please explain how the obligation in TRIPS Articles 22 and 23 with respect to geographical indications are implemented in the South African law” (see document IP/C/W/47 for these questions and South Africa's responses.

¹⁰² See document IP/C/W/47 at p.8.

¹⁰³ See document IP/Q2/ZAF/1 of 12 May 1997 at p.7.

view, even in South Africa, is that the country does not protect geographical indications in the context of the TRIPS Agreement.¹⁰⁴

Industrial Designs

Industrial designs are protected in South Africa through designs law and copyright law, although the main protection is under the Designs Act of 1993. The Act protects industrial designs that are new and original (s 14.1), which are divided into aesthetic designs and functional designs, the former is protected for fifteen years, and the latter for ten years (s. 22.1). The rights granted to owner of a protected designs include the right to exclude others from “making, importing, using or disposing of any article” embodying the protected design (s. 20.1). This conforms broadly with the provision of Article 26.1 of TRIPS.

Section 21 of the Act provides for the grant of compulsory licences in the case of “abuse of rights”, which cover a wide range of circumstances. These provisions arguably go beyond the limited exceptions allowed under Article 26.2 of TRIPS, and may lead to suggestion that the South African design law is not fully TRIPS compatible. Article 5B of the Berne Convention prohibits forfeiture of industrial design “under any circumstance” either by reason of failure to work or by reason of importation. Although compulsory licensing is not the same thing as forfeiture, it is clearly not a limited exception.

Patents

This sub-section examines South Africa’s compliance with the TRIPS obligations on patent protection. The main provisions are contained in Articles 27 to 34 of the TRIPS Agreement (see Table 1 above). As mentioned earlier, South Africa’s pre-TRIPS patents law conformed to the provisions of the agreement in some respects.¹⁰⁵ For example, the Patent Act of 1978 provides patent protection for all fields of technology and for both products and process (Article 27.1 of TRIPS), as well as for micro-organisms and all non-biological and microbiological process and products (Article

¹⁰⁴ See Teljeur, 2003. However, South Africa protects geographical indications in a bilateral agreement with the European Union.

¹⁰⁵ Apart from the WTO (TRIPS), South Africa is also a member of WIPO and acceded to two patent-related treaties, namely, the Paris Convention (Industrial Property), in December 1947 and the Patent Cooperation Treaty (PCT), in March 1999. It is also a member of the International Union for the Protection of New Varieties of Plants (UPOV) since 1978

27.3b).¹⁰⁶ The Patent Act also reverses the burden of proof in process patent as required under Article 34(1)&(2) of the TRIPS Agreement. Furthermore, the Plant Breeders' Rights Act No 22 of 1964¹⁰⁷ offers protection for plant varieties, in accordance with Article 27.3b of the TRIPS Agreement. Finally, patents are protected for 20 years from the date of filing (Article 33).

Notwithstanding the foregoing, the Patents Act was nevertheless not in complete conformity with the TRIPS Agreement. For example, while Article 28 of TRIPS grants a patentee exclusive rights to prevent unauthorised third parties from, *inter alia*... "offering for sale, selling or importing", s. 45(1) of the Act referred only to "disposing of"¹⁰⁸ and did not mention "importing". Section 55 on "dependent patent" did not conform to the provisions of Article 31(l). Also, s. 56 on abuse of patent rights differed significantly from Article 31 (a) (d) (e) and (g), which set out conditions for grant of compulsory licensing.

Article 27.1 of TRIPS provides that "patents shall be available and patent rights enjoyable without discrimination as to whether products are imported or locally produced". However, s. 56 (2)(a) of the Act allows for compulsory licence to be granted where the patented invention "is not being worked (locally) on a commercial scale or to an adequate extent." Section 56 (2)(b) permits the grant of a compulsory licence in circumstances where the working of the invention is prevented or hindered by the importation, and under s.56 (2)(e) a compulsory licence can be granted where the patented product is being imported and the price of such patented product is "excessive".

¹⁰⁶ These are areas where most developing countries have strong defensive interests. India is the strongest advocate both at TRIPS Council meetings and outside for the non-patentability of life forms.

¹⁰⁷ The 1976 Act was amended through the Plant Breeder's Rights Amendment Act 15 of 1996. See also WTO document IP/C/W/273/Rev.1 of 18 February 2003 for South Africa's responses to a checklist of questions on the implementation of Article 27.3b of TRIPS. South Africa confirmed in responses to the questionnaire that it is possible to obtain a patent in the country on a micro-organism that is novel, involved an inventive step and is capable of industrial application. It also confirmed that its laws provide for a *sui generis* form of protection for a new plant variety. As noted above, South Africa is a member of UPOV.

¹⁰⁸ South Africa said in answer to a question from the EC that it was not clear how the South African courts would interpret the phrase "disposing of"; therefore "to remove any uncertainty" it was necessary to use accurate words to reflect the letter and spirit of Article 28 of TRIPS (see document IP/Q3/ZAF/1 of 2 October 1998).

All the above provisions and discrepancies were highlighted during the review of South Africa's patent law by the TRIPS Council, and several questions were posed by the EC, the US and Japan on the compatibility of these provisions with South Africa's TRIPS obligations.¹⁰⁹ South Africa indicated in its responses that it would introduce changes to bring its patents law into conformity with TRIPS Agreement. To this end, the Intellectual Property Law Amendment Act of 1997, which made wide-ranging TRIPS-compliant changes in existing IP laws, actually amended over 20 provisions of the Patent Act.

S. 45 (1) was amended to comply with Article 28.1 of TRIPS. The whole of s.55 on dependent patent was amended to incorporate almost *verbatim* the provisions of Article 31(l) of TRIPS. Equally, s. 56 on abuse of patent rights was changed to reflect the provisions of Article 31 (a)(d)(e)&(g). Section 56(2)(b), which allows compulsory licences to be granted if local working was being prevented or hindered by importation was deleted. Further amendments were made through the Patents Amendment Act of 2002, which, for instance, implements Article 29 of TRIPS by amending s. 32 of the Patents Act of 1978 so that patent applicants are required to disclose the invention in a manner *sufficiently* clear and complete rather than to *fully* describe the invention as previously prescribed in the Act.

However, despite these amendments, South Africa retains all the broad procedures and conditions for issuing compulsory licences, including s.56 (2)(a) on local working of patented inventions on a commercial scale or to an adequate extent, as well as s. 55(2)(e), which allows for the grant of a compulsory license where the patented product is being imported *and* the price is excessive. South African officials justified the retention of these provisions on the ground that granting compulsory licenses in these circumstances would be in the public interest.

Furthermore, they argued that granting a compulsory licence where there is a failure to work the patented invention on commercial scale within prescribed time limits is in compliance with Article 5(2) and (4) of the Paris Convention. However, TRIPS does not contain such a clear and express authorisation. Indeed, under Article 27.1, the

¹⁰⁹ See document IP/Q3/ZAF/1 of 2 October 1998 for questions put to South Africa and its responses.

agreement provides that importation is sufficient to serve local working requirements. Indeed, the Panel in the *Canada – Pharmaceutical Patents* case appeared to suggest that imposing non-working conditions would be TRIPS inconsistent.¹¹⁰

In January 2001, the US launched a challenge against Brazil's legislation that authorised the grant of compulsory licenses and parallel imports in instances when "patents are not locally worked".¹¹¹ However, both parties later made a notification of mutually agreed solution¹¹² following Brazil's undertaking not to use the provision against any US patent holder without consultation with the US. Many ambiguities in the TRIPS provisions leave their precise interpretation open to considerable doubt. However, the US-Brazil case suggests that "non-working" conditions could be subject to challenge under Article 27.

Reflecting TRIPS Flexibilities: The Medicine Act Case

One of the questions often asked in the literature is the extent to which developing countries have reflected the legal flexibilities in the TRIPS Agreement in their national IP laws.¹¹³ South Africa appears, at least *de jure* if not *de facto*, to have reflected some of the flexibilities in its national IP legislation. For instance, apart from retaining the broad provisions on issuing compulsory licenses, as noted above, it has also introduced the "early working" or "Bolar exceptions".¹¹⁴ These exceptions are allowed under the "limited exceptions" provisions of Article 30 of TRIPS.¹¹⁵ The Patents Amendment Act of 2005 contains specific provisions requiring patent

¹¹⁰ Panel Report, *Canada – Patent Protection of Pharmaceutical Products*, WT/DS114/R, adopted 7 April 2000, DSR 2000: V, 2289. According to the Panel there are three ways of working a patent, (a) by selling the product in a market from which competitors are excluded or (b) by licensing other to do so, or (c) by selling the patent right outright. It states in para. 7.55 that "the specific forms of patent exploitation are not static ... for to be effective exploitation must adapt to changing forms of competition due to technological development and the evolution of marketing practices".

¹¹¹ See *Brazil – Measures Affecting Patent Protection (United States – Brazil)*, Request for the Establishment of a Panel by the US, January 9 2001, WT/DS199/3

¹¹² See *Brazil – Measures Affecting Patent Protection, Notifications of Mutually Agreed Solution*, WT/DS199/4, G/L/454, IP/D/23/Add.1 July 19, 2001).

¹¹³ See, e.g. UNCTAD-ICTSD (2005) and the Commission on Intellectual Property Rights (Study Paper 7), which both focused on the issue of flexibilities.

¹¹⁴ S.16 of the Patents Amendment Act of 2002 inserted a new s.69A in the Patent Act of 1978 to allow the non-infringing "Bolar exception". The act, however, prohibits stockpiling.

¹¹⁵ The Panel in the *Canada – Pharmaceutical Patents* case held that the "Bolar Exception", which allows a patented invention to be used for the purposes of seeking regulatory approval for marketing of a product after the expiration of a patent, is not an infringement of a patent and is allowed under Article 30 of TRIPS. However, a stockpiling provision, which allows the production and stockpiling of a patented invention prior to the expiry of the patent would be inconsistent with TRIPS provisions.

applicants to provide information relating to indigenous biological resource, genetic resource or traditional knowledge.

In 1997, the South African government passed the Medicines and Related Substances Control Amendment Act, which contains, *inter alia*, three provisions¹¹⁶ that proved to be controversial, although the general view of most legal commentators¹¹⁷ is that these provisions are consistent with the flexibilities allowed by the TRIPS Agreement.¹¹⁸ However, others argue that South Africa has gone beyond the flexibilities allowed in the agreement.¹¹⁹

However, for three years, 39 pharmaceutical companies, under the umbrella of the Pharmaceutical Manufacturers Association (PMA) of South Africa, were engaged in a legal battle in the domestic courts with the South African government over these provisions, alleging constitutional and TRIPS inconsistencies.¹²⁰ The case collapsed in April 2001, when the pharmaceutical companies withdrew their action in the Pretoria High Court.

The *Medicine Act* case was a classic example of where the complicated relationship between legal and non-legal factors played out so prominently. While the pharmaceutical companies may have won part of their arguments had the case been

¹¹⁶ Section 15C allows parallel importing; s. 22F allows for generic substitution for patented products; and s. 22G, which provides for a pricing committee to regulate the prices of patented drugs.

¹¹⁷ See, for example, Fredrick Abbott in Kennedy and Southwark (eds), 2004, and UNCTAD-ICSTD, 2005.

¹¹⁸ With respect to parallel importing in the context of Article 6 of TRIPS, there is a view, however, that Article 6 of TRIPS only removes parallel imports from the dispute settlement process but is otherwise governed by substantive requirements in functional IPR cases (Cottier, 1998, cited in Maskus, 2000). It is also the view of the US that Article 6 does not authorise parallel imports. In its intervention during the TRIPS Council's Special Session on TRIPS and Access to Medicines, the US delegation argued that "Article 6 of the TRIPS Agreement does not authorise parallel imports", adding, "members must remember that Article 6 does not alter the substantive obligations of the TRIPS Agreement, particularly those contained in Part II of the Agreement" (see document IP/C/M/31 at p.40). The general view, however, is that Article 6 permits parallel imports (See Maskus, 2000; Abbott, 1998; and the views of most WTO members reported in the document referred to above).

¹¹⁹ For instance, the main criticism of the pharmaceutical firms is not that the flexibilities in the Medicines Act are not allowed under the TRIPS Agreement, but that the domestic regulations excluded the safeguards and restraints provided by the TRIPS Agreement, for example, by giving the minister an unfettered power to override patents without following due process, including compensation and judicial review. See PMA Annual Report, May 2001 –April 2002, pp.4 and 5.

¹²⁰ See *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the RSA 2000 (3)* BCLR.

pushed through the domestic courts,¹²¹ a variety of non-legal factors eventually shaped the outcome.¹²² The role of local and foreign media, as well as international and local NGOs such as the Treatment Action Campaign (TAC), in mobilising world opinion against the companies was significant.¹²³ The intervention of the UN Secretary General, Kofi Annan also played a role.¹²⁴

Layout Designs of Integrated Circuits

The protection of layout designs is provided for under Articles 35 to 38 of the TRIPS Agreement (see table 1). South Africa provides protection for integrated circuit and integrated circuit topographies through Designs Act of 1993. The provisions broadly accord with Article 36 of TRIPS with respect to the scope of protection¹²⁵, as well as Article 38, which requires protection to be provided for at least 10 years.¹²⁶ However, the pre-TRIPS Designs Act fell short in terms of Articles 37, with respect to infringement by a third party for private purposes and by an innocent infringer. The pre-TRIPS act was also inadequate with respect to Article 37(2) of TRIPS, which covers the issue of compulsory licensing.

However, South Africa later amended the Designs Act through the Intellectual Property Laws Amendment Act of 1997. Section 14 of the Designs Act was amended

¹²¹ See the recent case *Pharmaceutical Society of SA and Others v. the Minister of Health and Another*, 2004, SCA, 542, in which the Supreme Court of South Africa described s. 22G, which permits regulations that introduced a 'transparent pricing system', as flawed. The court declared as invalid and of no force and effect the Regulations that fixed a 'single exit price', defined as the manufacturer's price, for all medicines sold in South Africa

¹²² Although not mediated through the WTO dispute settlement system, the South African case eventually led to a clarification of and a change in the TRIPS Agreement. For instance, at the 4th Ministerial Conference in Doha 2001, WTO ministers "re-affirmed the rights of members to use, to the full, the provisions of the TRIPS Agreement, which provide flexibility" to protect public health (see WTO document WT/Min(01)DEC/2, paragraph 4). Also, in December 2005, the General Council agreed to amend Article 31(f) of the TRIPS Agreement to allow, subject to certain conditions, countries with insufficient or no manufacturing capacities to import cheap generic drugs, notwithstanding the limitations imposed by Article 31(f) (see WTO document WT/L/641 of 8 December 2005. This followed earlier decision of the General Council in August 2003 to grant such a waiver (see WTO document WT/L/540 of 2 September 2003).

¹²³ For instance, 300,000 people from 130 countries signed a petition against the court case.

¹²⁴ Peter Piot, head of UNAIDS, the United Nations co-ordinating body for HIV/AIDS was said to have helped to broker a secret deal that brought leading pharmaceutical groups together with South African leaders, through the intervention of Kofi Annan, head of the UN (see article in *Financial Times* of July 22 2005 at p.8)

¹²⁵ See s. 20(1) of the Act.

¹²⁶ Integrated circuits are registered as functional designs and are protected for 10 years (see s. 22(1) of the Design Act.

to give greater protection to layout designs than to any other design.¹²⁷ A new s. 20.3(a) was inserted so that the making of an integrated circuit for private purposes or for the sole purpose of evaluation, analysis, research or teaching is not regarded as an act of infringement in line with Article 35 of TRIPS read with Article 6(2) of the IPIC Treaty¹²⁸. Further, a new s. 20.3(b) makes allowance for an innocent infringer, but requires, in accordance with Article 37 of TRIPS, that the innocent infringer must pay to the right holder "a sum calculated on the basis of a reasonable royalty which would have been payable by a licensee".

In addition, s. 21 of the Designs Act was amended to include a new subsection 14 (a) to (d), which implements Article 37.2 of the TRIPS Agreement, with respect to the conditions for granting compulsory licences as set out in subparagraphs (a) through (k) of Article 31 of TRIPS, which apply, under Article 37(2) *mutatis mutandis* to layout-designs. Nevertheless, the amendment still retains fairly broad conditions for granting compulsory licences, as in the case of patents.

Undisclosed Information

Article 39 of the TRIPS Agreement treats undisclosed information, including trade secrets and know-how, as a form of IP and requires it to be protected by actions against unfair competition or dishonest commercial practices. WTO members are also required under Article 39(3) to protect against unfair commercial use of confidential test data submitted in the process of securing regulatory and marketing approval of pharmaceutical and agricultural chemical products.

South Africa has no statute explicitly protecting undisclosed or confidential information, although such information is protected under common law.¹²⁹ However, test data submitted with applications for marketing approval of pharmaceutical and

¹²⁷ Article 14 provides that integrated circuit topography shall not be considered to be new unless an application for the registration of such design is lodged within two years, whereas the period allowed for any other design is six months.

¹²⁸ The Treaty on Intellectual Property in Respect of Integrated Circuits

¹²⁹ Protection under common law leaves a matter to judicial discretion, as common law is a judge-made law. However, statutory protection offers greater protection since it limits, although not completely removes, the exercise of discretion by judges. It can be argued that WTO law and, in particular, the TRIPS Agreement require Members to provide legislation to implement their obligations, where such statutory provisions do not exist. In that case, an argument that an obligation is met under common law may not indicate full compliance.

agricultural chemical products are protected against disclosure under existing laws. For instance, s. 34 of the Medicines and Related Substance Control Act No 101 of 1965 and s. 17 of the Fertilizers, Farm Feeds, agricultural Remedies and Stock remedies Act No 36 of 1947, both of which provide for “preservation of secrecy”. These statutes do not, however, specifically protect against unfair commercial use, so it is unclear whether second applicant can rely on prior data.¹³⁰ Article 39.3 of TRIPS requires that if undisclosed information or data is disclosed protect the public, there must be protection against unfair commercial use.

Control of Anti-competitive Practices

The TRIPS provisions on the control of anti-competitive practices in contractual licences allow members to introduce legislation or regulations to control anti-competitive practices, such as exclusive grant-back conditions, conditions preventing challenges to validity and coercive package licensing. However, although Article 40 gives members considerable latitude in setting such regulation, it provides that such competition rules must be consistent with the other provisions of the TRIPS Agreement. All competition measures are thus subject to the consistency requirement.

Section 90 of the South African Patents Act of 1978 prohibits the inclusion of certain restrictive conditions in licensing agreements. Whereas the old Maintenance and Promotion of Competition Act contained a provision that the act was not to be interpreted so as to limit IPRs, the new Competition Act of 1998 provides for no special treatment of IPRs¹³¹. South Africa’s competition law and principles are likely to impinge on IPRs. Section 4(1)(b)(ii) of the 1998 act, prohibits licensing agreements between competitors in a market. Such practices fall within *per se* prohibitions, meaning that there is no need to prove anti-competitive effect.¹³² This outright prohibition of licensing is arguable in breach of the proportionality requirement¹³³ of Article 8.2, as well as the consistency requirement of Article 40 of TRIPS.¹³⁴

¹³⁰ Thorpe (2003).

¹³¹ Although section 10(4) of the Act provides that an intellectual property owner can apply for an exemption in respect of a particular conduct falling foul of the Act.

¹³² See article by Tim Ball in <http://www.businessday.co.za/Articles/TarkArticles.aspx?ID=1500784> (Accessed 19/10/2005)

¹³³ Article 8.2 requires anti-trust measures to be “appropriate” and “needed” to prevent the abuses and practices covered by the provision (see also UNCTAD-ICSTD, 2004)

¹³⁴ See UNCTAD-ICSTD, 2004, chapter 29.

Further, the Act contains several provisions, which prohibit an agreement or arrangement, where intellectual property rights are concerned, which can have the effect of increasing or fixing prices. For example, s.7 of the Act defines when a firm can be deemed to have dominant market position. The whole of s.8 is concerned with abuse of dominant position or market power. In 2003, the Competition Commission held that in some circumstances the definition of a market could be based on a patent, such that the patentee could be dominant in that market solely by virtue of the patent.¹³⁵

Given the broad provisions on anti-competitive practices in the TRIPS Agreement it is difficult to argue that the South African laws and administrative rulings are incompatible with the TRIPS Agreement. However, *per se* prohibitions of licensing agreements or the definition of market power by a patent with the effect that the patentee can be deemed to be dominant in a market solely by virtue of the patent would arguably amount to a circumvention of the monopoly right that a patent naturally confers on a patent owner. In *Canada – Patent Protection*,¹³⁶ the panel stressed that, “patent laws establish a carefully defined period of market exclusivity as an inducement for innovation, and the policy of those laws cannot be achieved unless patent owners are permitted to take effective advantage of that inducement once it has been defined” Any competition measure that overlooks the nature of IPRs may thus be deemed to be inconsistent with the spirit of the TRIPS Agreement.

Table 2: A synopsis of South Africa’s compliance with TRIPS substantive obligations

TRIPS obligations	Compliance status	Comments
Copyright		
• Art 3.1	X	No national treatment for sound recordings, conditions of reciprocity applies
• Art. 9:	X	South Africa does not adhere to the Paris text
• Art. 10	?	Computer programs are not protected as literary work, although databases are
• Art. 11	?	Rental rights provided in computer programs, but not in cinematographic works
• Art. 12	√	Copyrights protected for at least 50 years
• Art. 13	?	Broad limitations on protection, probably contrary to Article 13
• Art. 14.1	√	Performances and sound recordings protected
• Art. 14.2	√	Term of protection for broadcasts increased to 50 years
• Art. 14.	√	Rights of performers etc now protected retroactively.
Trademarks		
• Art. 15	√	Goods and service marks protected
• Art. 15.4	?	Trademarks not published promptly

¹³⁵ See Competition Commission Press Release entitled "Competition Commission finds pharmaceutical firms in contravention of the Competition Act", 16 October 2003.

¹³⁶ See *Canada-Patent Protection of Pharmaceutical Products*, WT/DS/114/R, para. 7.55

<ul style="list-style-type: none"> • Art. 16.1 • Art. 16.2 	<ul style="list-style-type: none"> √ √ 	<ul style="list-style-type: none"> Exclusive rights granted to owners of trademarks Well-known trademarks protected; determination based on "the relevant sector of the public". But no retroactivity.
<ul style="list-style-type: none"> • Art. 18 • Art. 19 	<ul style="list-style-type: none"> √ ? 	<ul style="list-style-type: none"> Protection for 7 years and renewable indefinitely No TRIPS compliant provision; lack of clarity about compliance
Geographical Indications <ul style="list-style-type: none"> • Art. 22 • Art. 23 	<ul style="list-style-type: none"> ? X 	<ul style="list-style-type: none"> Some protection under laws on business practices and trademark law, but not within the explicit definition in Article 21 No special protection for wines and spirits. GIs on wines and spirits will not be registered.
Industrial Designs <ul style="list-style-type: none"> • Art. 25 • Art. 26 	<ul style="list-style-type: none"> √ √ 	<ul style="list-style-type: none"> Protected provided for industrial designs. Textiles can be protected as aesthetic designs Rights owners granted TRIPS compliant rights; however there are broad compulsory licence conditions. Protection for 10 years
Patents <ul style="list-style-type: none"> • Art. 27 • Art. 27.1 • Art. 27.3b • Art. 28 • Art.29 • Art.30 • Art. 31 • Art. 33 • Art. 34 	<ul style="list-style-type: none"> √ ? √ √ √ ? ? √ √ 	<ul style="list-style-type: none"> Patents for products/processes and all fields of technology Lack of clarity regarding local working conditions Microorganisms etc protected. Plant variety protected Exclusive rights granted to patentee Provision changed to conform to Article 29 TRIPS flexibilities reflected, but lack of clarity remains Several TRIPS compliant changes have been made, but there remains questions regarding local working conditions and compulsory licenses Term of protection (20 years) TRIPS compliant Burden of proof in process patents reversed
Layout Designs <ul style="list-style-type: none"> • Art. 35 • Art. 36 • Art. 37 • Art. 37.2 • Art. 38 	<ul style="list-style-type: none"> √ √ √ √ √ 	<ul style="list-style-type: none"> Layout-designs protected Scope of protection TRIPS compliant TRIPS compliant changes have been made Provisions on compulsory licenses amended Term pf protection (10 years) TRIPS compliant
Undisclosed Information <ul style="list-style-type: none"> • Art. 39.2 • Art. 39.3 	<ul style="list-style-type: none"> ? √ 	<ul style="list-style-type: none"> No statutory protection for confidential information; only in common law Test data protected but not against unfair commercial use
Competition measures <ul style="list-style-type: none"> • Article 40 	<ul style="list-style-type: none"> ? 	<ul style="list-style-type: none"> <i>Per se</i> prohibition of some licensing arrangements and the invalidation of the market exclusivity and monopoly rights of IP owners may violate the consistency requirement in Article 40

In sum, South Africa's compliance record with the substantive obligations of the TRIPS Agreement, as described in the foregoing section, presents a mixed picture (see table 2 for summary). South Africa has taken significant steps to bring its national intellectual property laws into substantial compliance with the provisions of the agreement, but there are still some areas of obvious non-compliance and areas where compliance is not clear due in part to different interpretations resulting from the ambiguities in the TRIPS provisions. Attention now shifts to the enforcement obligations.

Table 3: TRIPS Enforcement obligations

PART III OF TRIPS: ENFORCEMENT OBLIGATIONS		
Types of obligations	Articles	Scope of Obligations
General Obligations	41	<ul style="list-style-type: none"> Members must provide for enforcement procedures in their national law that permit effective action against any act of IP infringement, including expeditious remedies to prevent infringements and remedies that constitute a deterrent to further infringements (41.1). Procedures for IP enforcement must not create barriers to legitimate trade and safeguards must be provided against abuse (41.1). Procedures must not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays (41.2).
Civil and Administrative Procedures and Remedies	42	<ul style="list-style-type: none"> Right holders shall have the right to civil judicial enforcement procedures; there must be no overly burdensome requirements concerning mandatory personal appearances; there must be a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements
	43	<ul style="list-style-type: none"> Members' courts must be given the authority to order an opposing party to a case to produce evidence in his possession, subject to the protection of confidential information
	44	<ul style="list-style-type: none"> The courts must be given the authority to grant an injunction ordering a party to desist from an infringement or to prevent the entry of infringing goods immediately after customs clearance of such goods.
	45	<ul style="list-style-type: none"> Members must give their courts the authority to order the infringer to pay the right holders adequate compensation to the right holder. This must include other expenses, such appropriate attorney's fees. Members may give their courts the authority to order recovery of profits and/or payment of pre-established damages by an innocent infringer (45.2)
	46	<ul style="list-style-type: none"> Members must give their courts the authority to order that infringing goods be disposed of outside the channels of commerce or to be destroyed (unless this would be contrary to existing constitutional requirements. The courts must also be given the authority to order the disposal or destruction of materials and implements to minimise the risks of further infringements.
	47	<ul style="list-style-type: none"> Members may grant their courts the authority to order an infringer to identify third persons involved in the infringing acts
	48	<ul style="list-style-type: none"> Members must give their courts the authority to order a party who has abused the enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for injury suffered. Public authorities and officials must not be exempted from such liability unless their actions are taken or intended in good faith (48.2)
Provisional Measures	50	<ul style="list-style-type: none"> Administrative procedures must conform to principles equivalent to those set forth in the foregoing provisions.
		<ul style="list-style-type: none"> Members must give their courts the authority to order prompt and effective provisional measures to prevent an infringement and to preserve relevant evidence relating to alleged infringement (50. 1a&b) Member must give their courts and judges the authority to adopt provisional measures <i>inaudita altera parte</i> where delay could cause irreparable harm to the right holder or where there is a demonstrable risk of evidence being destroyed (50.2)
Special Requirements related to Boarder Measures	51	<ul style="list-style-type: none"> Members must adopt procedures that enable a right holder with valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods may take place to lodge a written application with the competent authorities for the suspension by customs authorities the release into free circulation of such goods.
	52 - 60	<ul style="list-style-type: none"> Cover provisions regarding application (52), security or equivalent assurance by the applicant (53), notification of the importer and the applicant of the suspension (54), duration of suspension (55), indemnification of the importer and the owner of the goods (56), the right of the right holder to inspection and information of suspended goods (57), ex officio action by competent authorities (58). Public authorities and officials must not be exempted from liability unless

		where actions are taken or intended in good faith. Members must give their courts and judges the authority to order the destruction or disposal of the infringing goods (59). The above provisions may not apply to small quantities of goods of a non-commercial nature (60)
Criminal procedures	61	<ul style="list-style-type: none"> • Criminal procedures and penalties must be provided for wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available must include imprisonment and/or monetary fines sufficient to provide a deterrent, consistent with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available must also include seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence.

Source: extracted from the TRIPS Agreement

Compliance with TRIPS Enforcement Obligations

The “constructive ambiguities” in the TRIPS agreement are more prevalent in the sections on enforcement, where vague words or terms, such as “effective” or “reasonable” can give rise to different, sometimes self-serving, interpretations. Unfortunately, there has been, to date, no WTO jurisprudence of significance on the enforcement provisions of the agreement.¹³⁷ Nevertheless, it is the case that enforcement procedures and remedies must at least be formally consistent with specific requirements of the TRIPS Agreement.¹³⁸ A WTO panel or the Appellate Body is likely to interpret these requirements strictly or narrowly.¹³⁹

The approach used in this section is based on literal comparisons of the enforcement legislation of South Africa with the enforcement provisions of the TRIPS agreement. Given the institutional flexibility allowed under Article 41.5 of TRIPS, it serves no useful purpose, in a legal sense, to focus on enforcement in terms of the institutional capacities of the enforcement agencies, such as customs and the police. The focus, therefore, is mainly on the national enforcement laws rather than on their actual

¹³⁷ In the recent *EC – Protection of Trademarks and GIs* case (WT/DS174/R, WT/DS290/R), Australia claimed that the EC Regulation at issue in the case “is inconsistent with Articles 41.1, 41.2, 41.3 and 42 of the TRIPS...” (General Obligations and Civil and Administrative Procedures and Remedies under Part III of the TRIPS Agreement), but the Panel rejected these claims arguably on technical grounds because Australia’s claims related to the acquisition of intellectual property rights under the Regulation and therefore should have been brought under Part IV of the TRIPS Agreement rather than Part III as Australia did (Australia Report, paras. 7.729 – 731). In the US’s claims, it also invoked Articles 41.1, 41.2, 41.4, 42 and 44.1. The Panel declined to rule on these claims due to judicial economy (See US Report, paras. 7.759 – 761).

¹³⁸ Otten (1998).

¹³⁹ As Reichman (1998) argues, “deference to local law and strict construction of treaties have become the pedestal on which the Appellate Body’s TRIPS jurisprudence rests” (p. 596). However, this does not suggest that national governments have a *carte blanche*; rather their implementing laws will be measured against the black letter rules and spirit of the agreement. Although the judicial policy of strict constructivism is followed by the Appellate Body, with a great emphasis on words, much of the reasoning in interpretation is nevertheless still informed by context, as well as the object and purpose of the covered agreements (see *Abi-Saab*, 2006)

operation on the ground. The key enforcement obligations are discussed under the five main heads, namely, civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal remedies (see table 2).

Civil and Administrative Procedures and Remedies

Various courts have jurisdiction over IPR infringement cases in South Africa. These include the provincial and local divisions of the High Court (in cases of trademark, copyright and design infringement) and the Court of the Commissioner of Patents (in cases of patent infringement). The Commissioner of Patents is appointed from the ranks of High Court judges and has the powers and jurisdiction of a single judge in a civil action in the High Court. The Registrar of Trademarks performs some judicial functions but these only deal with registration and not enforcement issues. Final appeals on IPR cases lie to the Supreme Court of Appeal.

However, although Article 41.4 of TRIPS requires that at least the legal aspects of initial judicial decisions on the merits of a case be subject to a judicial review, in South Africa, interlocutory injunctions ordered by the High Court are neither reviewable nor appealable. According to the South African authorities, this position is not in conflict with Article 41.1 because the decisions on interlocutory injunctions are not in relation to the merits of a case.¹⁴⁰

Other specific obligations under the section on civil and administrative procedures and remedies (s.2 of Part III) relate to: standing and appearances before courts and protection of confidential information (Article 42); the court's authority to order parties to produce evidence (Article 43); injunctions (Article 44); payment of damages, including by an innocent infringer (Article 45); other remedies such as the destruction of infringing goods (Article 46); the court's authority to order an infringer to identify third persons (Article 47); liability against abuse of procedures and against

¹⁴⁰ One of the conditions for granting an injunction is the strength of the applicant's case, that is, there must be a real possibility of success at the trial. Necessarily the question as to whether there is a serious case to be tried will arise, and this will touch on the question of merits. See the British House of Lords' case of *American Cyanamid Co v. Ethicon Ltd* (1975) A.C 396. However, in South Africa, the key requirement is whether there is a *prima facie* case. Arguably, given the low threshold, decisions on interlocutory injunctions do not entail enquiring into the merits of the case because the requisites for the right to claim are different.

public authorities and officials actions are not in good faith (Article 48); and administrative measures (Article 49). How have these obligations been implemented in South Africa's enforcement laws?

Right holders and, generally, licensees have *locus standi* in South African courts as provided in the various IP statutes. There is no requirement for mandatory personal appearances as parties can be represented in court, although where a party needs to give oral evidence personal appearance would naturally be expected. Courts also have the inherent jurisdiction to protect information presented in the course of a hearing. Under Rule 35 of the Rules of Court, the judicial authorities can order an opposing party to produce evidence in his possession during the discovery stage of litigation.

Civil remedies for IPR infringement are provided in the relevant Acts as well as under the Rules of the High Court and of the Court of the Commissioner of Patents. Various remedies may be ordered, including temporary and final injunctions¹⁴¹ (known in South Africa as interdicts); damages or in lieu of damages, the payment of a reasonable royalty; costs, including attorneys fees, are normally awarded; and delivery-up of infringing material or goods. Article 45.2 provides that members may authorise the judicial authorities to order recovery and/or payment of pre-established damages from innocent infringer. In South Africa, a right holder cannot recover damages from an innocent infringer.¹⁴²

Furthermore, South African courts have no authority to order the infringer to name the third persons involved in the infringing acts (Article 47 of TRIPS). South African officials argued that the judicial authorities are "very hesitant" to order any party to disclose the identity of third persons, as such a practice in civil proceedings would be unconstitutional in terms the constitutional law.¹⁴³ South Africa argued further that Article 47 was not peremptory and, therefore, it was not obliged to implement it.¹⁴⁴

¹⁴¹ The requisite for the right to claim a final injunction (interdict) are: a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy. Final interdicts are granted as a matter of course in IP cases in South Africa unless in pharmaceutical patent cases where because of public health concerns, a court may consider whether or not to leave the rights holder to a damages claim instead of a final interdict. See speech by Mr Justice Harms to WIPO's Advisory Committee on Enforcement, WIPO/ACE/2/4 Rev of May 19 2004.

¹⁴² Profits or pre-established damages in cases of innocent infringement will not, generally, be awarded: see Patents Act (s.66(1)); Copyright Act (s.24(2)), and Designs Act (s.35(6)).

¹⁴³ See document IP/N/6/ZAF/1 at p.3.

¹⁴⁴ See response to question by the EC (document IP/Q4/ZAF/1 of 30 April 1999 at p.4.

The power to order a party to disclose the identity of third persons, however, exists in criminal trials.

Article 48 of TRIPS requires members to give their courts the authority to order a plaintiff to pay adequate compensation to a defendant wrongly enjoined. No specific safeguard or indemnification provisions against abuse of enforcement procedures exist under South African law; it is up to each defendant to seek compensation in such circumstances. Public authorities and officials in South Africa are also generally exempted from liability unless their actions are taken in bad faith.

Provisional Measures

Article 50 of TRIPS requires members to provide their courts with the authority to order prompt and effective provisional measures to prevent an infringement and to preserve relevant evidence in regard to the alleged infringement. They are also obliged to provide their courts with the powers to adopt provisional measures *inaudita altera parte*¹⁴⁵ where, for example, any delay is likely to cause irreparable harm to the right holder or where there is a demonstrable risk of evidence being destroyed (Article 50.2). The judicial authorities must, however, also have the authority to impose requirements on the applicant of a provisional measure, including the provision of “a security or equivalent assurance sufficient to protect the defendant and to prevent abuse” (Article 50.3)

South Africa’s courts have the authority to grant urgent, interim, injunctive relief in cases of IPR infringement where urgency exists and where the “balance of convenience” favours the applicant. To protect the defendant and prevent abuse, the applicant is normally required to furnish security for costs and/or damages. However, although an Anton Piller order (a search and seize order) exists in common law, South African courts have traditionally been conservative in their approach to common law Anton Pillar. In *Shoba*¹⁴⁶, the leading case on common law Anton Pillar orders, the Supreme Court of Appeal adopted a rather strict approach to granting such orders.¹⁴⁷

¹⁴⁵ Latin for “Without hearing the other Party” also referred to as *ex parte*, Latin for “one-sided”

¹⁴⁶ See *Shoba v. OC, Temporary Police Camp, Wagindrift Dam*, 1995 (4) SA 1 (A).

¹⁴⁷ To obtain the order an applicant must prima facie establish that: (a) it has a cause of action against the respondent that it intends to pursue; (b) the respondent has in its possession specific (and specified) documents or objects that constitute that constitute vital evidence in substantiation of the applicant’s

IP industry lobbies have frequently criticised the high cost and delays in obtaining common law *ex parte* Anton Piller order in South Africa. They claim that to obtain an Anton Piller order, the right holder is required to provide a detailed affidavit signed by a current employee of the target with direct information about the infringement. According to the IIPA, "... 'whistle blowers' are reluctant to provide signed statements, making it difficult for the right holder to satisfy the evidentiary threshold for a civil order".¹⁴⁸ The IIPA also puts the costs of obtaining Anton Piller orders at about \$20, 000.¹⁴⁹ However, under the Counterfeit Goods Act of 1997 statutory Anton Pillar orders are now possible, but only in respect of offences under the Act.

The TRIPS agreement leaves members free to decide the method of implementation in their domestic laws¹⁵⁰, which suggests that in a common law jurisdiction, such protection may be in common law. However, it is argued that the "effectiveness" requirement in the agreement can also be understood to mean that the obligation on members to give their judicial authorities certain powers arguably refers to statutory powers rather than powers merely existing in common law or in the inherent jurisdiction of the courts.¹⁵¹

In separate complaints against Sweden¹⁵² and Argentina¹⁵³, the United States alleged that both countries violated the TRIPS Agreement by not authorising their courts to grant provisional measures. The complaints were settled during consultations. However, Sweden later introduced an amendment to several IP laws authorising the judicial authorities to grant provisional measures, including *ex parte*.¹⁵⁴ Argentina also agreed to introduce amendments to confer statutory powers on its courts to order provisional measures. These cases show that the failure to grant explicit statutory

cause of action; and (c) there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner spirited before discovery or by the time the case comes to trial (Ibid).

¹⁴⁸ See IIPA 2002 Special 301 Report on South Africa.

¹⁴⁹ Ibid

¹⁵⁰ Article 1.1, but see the Appellate Body ruling in the *India-Mail box* case

¹⁵¹ The TRIPS Agreements clearly imposes the enforcement obligations in considerable detail. It tells states when injunctions are to be made available in IP cases; what the scope of a state's discovery and appellate review procedures should be; what action to criminalise, and how customs agents should treat cultural and manufactured goods at the point of entry to a country (Reichman, 1998, p586). These obligations, it is argued, are not to be based primarily on judge-made laws; but rather are to be provided primarily in statutes, even though there is no guarantee that the courts or judges will use the powers or authority.

¹⁵² See WT/DS86/1 of 2 June 1997

¹⁵³ See WT/DS196 of 30 May 2000

¹⁵⁴ See WT/DS86/2 of 11 December 1998

authority to courts and judges may be deemed to be violations of the relevant provisions of the TRIPS Agreements.

Special Requirements Related to Border Measures

Articles 51 to 60 of TRIPS create a whole range of obligations with respect to border measures. Essentially, the obligations require members to enable a right holder with valid grounds to suspect that the importation of counterfeit trademark or pirated copyright goods may take place to apply to the competent authorities for the suspension of release of such goods. In South Africa, section.15 of the Counterfeit Goods Act No 37 of 1997 deals specifically with the suspension of release of imported counterfeit goods.

The Commissioner of Customs and Excise is the competent authority with respect to border measures. He is required to respond promptly upon receiving a written application for suspension of release of suspected counterfeit goods being imported into the country and must give valid reasons for refusing such applications (s.15(3)&(5)). The Commissioner is empowered to act on his own initiative (i.e. *ex officio*) in relation to any act or conduct believed or suspected to be an act of dealing in counterfeit goods.

However, South African law requires security from the applicant only for the purposes of indemnifying the customs authorities and their members against any liability (s.15(7)). No specific indemnification is conferred upon the importer and owner of goods, which have been wrongfully suspended, contrary to Article 56 of TRIPS. Furthermore, public authorities and officials are exempted from liability for their actions unless they have been “grossly negligent” or acted in bad faith. Article 58 (c) of TRIPS requires that public authorities should only be exempted from liability where actions are “taken or intended in good faith”. The threshold of “grossly negligent” is arguably higher than the standard in Article 58(c). Equally, it may be argued that proving good faith is easier than establishing bad faith.

The basic approach of the Counterfeit Goods Act appears to be to reduce as far as possible the potential liability of public authorities and officials with respect to seizure or detention of counterfeit goods. The risk of action being taken against a public

officer for unjustified seizure and detention of goods is reduced, while the complainant or applicant is made to bear the full responsibility for the action taken in the seizure and detention of goods.¹⁵⁵

Criminal Procedures

Article 61 of TRIPS requires members to provide for criminal procedures and penalties at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available must include imprisonment and/or monetary fines “sufficient to provide a deterrent”. In appropriate cases remedies available must also include seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence.

In South Africa, counterfeiting of trademarks has historically been dealt with by different Merchandise Marks Acts¹⁵⁶, while s.27 of the Copyright Act of 1978 provides for criminal sanctions in the case of copyright piracy. However, the Counterfeit Goods Act of 1997 provides far more elaborate provisions for the enforcement of IPRs. The Act was introduced to provide for “streamlined and effective enforcement measures” and to bring South Africa’s enforcement laws into compliance with the enforcement provisions of the TRIPS Agreement.¹⁵⁷ Indeed, it has been described as “the manual for dealing with the problem of counterfeit goods” in South Africa.¹⁵⁸ The Act creates a principal offence known as “dealing in counterfeit goods” (s.2).

The penalties for counterfeiting offences range from R5000 to R10, 000 for each item to which the offence relates or a maximum jail term of 5 years or both fine and

¹⁵⁵ Dean (1997) argues that this approach should dispel the reluctance of laws enforcement agents to take effective action in IP enforcement matters, while at the same time inhibiting right holders from acting irresponsibly in enforcing their rights or perceived rights. However, in terms of Article 58(c) of TRIPS, it may be argued that this amounts to effectively exempting public authorities and officials from liability for improper or reckless action.

¹⁵⁶ The Merchandise Marks Act 12 of 1888; Merchandise Marks Law of 1888; Merchandise Marks Ordinance 47 of 1903. These were replaced by the Merchandise Marks Act 17 of 1941, which is, partly still in force.

¹⁵⁷ South Africa’s response to a checklist on issues on enforcement, see WTO document:

¹⁵⁸ See Dean (1997). However, the provisions of the Act apply only to trademarks and copyrights and not to patents and designs. Thus, it appears that there are no criminal sanctions for infringements of patents and designs.

imprisonment. A person convicted of a subordinate offence, such as failure to comply with an order given by an inspector or giving misleading information, is liable to a fine of up to R1000 or to imprisonment for a period of up to 6 months (s.19(2)). In addition, the Act gives the courts the authority to make a number of orders, including ordering the accused or the defendant to disclose the source from which counterfeit goods have been obtained as well as the identity of third persons involved in committing the infringing act (s.10(1)).

As mentioned earlier, such an order to disclose the identity of a third person is unlikely to be given in a civil context. The Act, however, creates a criminal basis for it. The Courts also have the powers to order the destruction of counterfeit goods and their packaging and, where applicable, any tools used by the convicted person (see Article 61 of TRIPS). However, as an alternative to destruction, the courts may declare the counterfeit goods in question to be forfeited to the state (s.20(1)).¹⁵⁹

By far the strongest evidence of the intention of South Africa to create a strong (criminal) enforcement regime, at least *de jure* if not *de facto*, is the provision in the Counterfeit Goods Act, which rewards a person who purchased counterfeit goods and later assisted in a conviction being obtained against the seller of the goods. The court is obliged to issue an order making a monetary reward in favour of such individuals known as “aggrieved persons”. The reward consists of a sum of money three times the amount of the price paid by the buyer for the counterfeit goods. The seller will be ordered to make the payment of the reward to the aggrieved person, in addition to any conventional fine imposed on him by the court (s.20(2)).¹⁶⁰

¹⁵⁹ The requirement to destroy the infringing goods under Article 61 of TRIPS is qualified with the phrase “in appropriate cases”, which suggests that a domestic court has the discretion to determine those appropriate cases. Therefore, the powers of the South African courts to forfeit infringing goods to the state rather than destroying them may be accommodated within the flexible provisions of Article 61, although it raises a different issue if, as the copyright industry groups have alleged, the infringing goods are later released by state officials to the infringers or into free circulation.

¹⁶⁰ According to Dean (1997), this reward system can make ‘bounty hunters’ out of members of the public and it can be a very effective anti-counterfeiting measure. Ample incentive is provided to members of the public to seek out and purchase counterfeit goods and then to collaborate with the police or inspectors to secure a conviction for dealing in counterfeit goods and in return obtain a generous reward.

Parts of the Counterfeit Goods Act have, however, been criticised by the Supreme Court of Appeal. In a recent case¹⁶¹, the Court noted that some provisions of the Act went beyond what was required by the TRIPS Agreement. In defining trademark counterfeiting, the Act in Section 1 refers, *inter alia*, to an infringing act “calculated to be confused with” the protected goods. Quoting copiously from the TRIPS Agreement, Mr Justice Harms said that the definition in the Act appeared to equate trademark infringement with counterfeiting, “something contrary to TRIPS and something completely unnecessary”.¹⁶² According to the judge, “the minimum requirement of TRIPS art 61 is the criminalisation of wilful counterfeiting. South Africa went further and criminalized negligent counterfeiting”.¹⁶³ The Court held that being a penal statute, the Counterfeit Goods Act “must be interpreted restrictively without doing violence to the wording”.¹⁶⁴

Table 4: A synopsis of South Africa’s compliance with TRIPS enforcement obligations

TRIPS Obligations	Compliance status	Comments
Civil/administrative procedures and measures <ul style="list-style-type: none"> • Art. 42 • Art. 43 • Art. 44 • Art. 45 • Art. 45.2 • Art. 46 • Art. 47 • Art. 48 	<ul style="list-style-type: none"> √ X √ √ X X X X 	Right holders have access to the courts; no requirements regarding mandatory personal appearance No provisions giving courts the power to order a party to produce evidence in his possession, but courts have inherent powers Courts have statutory powers to grant injunctions etc Courts have statutory authority to order the infringer to pay damages to the rights owners. Courts have no statutory authority to order recovery of profits/damages by an innocent infringer No statutory powers given to courts to order the destruction of infringing goods Courts have no statutory powers to order an infringer to identify third persons Courts have no statutory powers to order a party or public authorities to indemnify a party wrongfully restrained
Provisional measures <ul style="list-style-type: none"> • Art. 50 	<ul style="list-style-type: none"> √ 	Courts have statutory power to grant Anton Piller order in cases of trademark counterfeiting and copyright piracy, but only common law Anton Pillar in other IP cases.
Border measures <ul style="list-style-type: none"> • Arts. 51 to 61 	<ul style="list-style-type: none"> √ 	South Africa's laws conform to the provisions on border measures, but there is no provision on the indemnification of the importer (Art. 56) and general exception of liability for public authorities and officials (Art 58.b)
Criminal procedures <ul style="list-style-type: none"> • Art. 61 	<ul style="list-style-type: none"> √ 	South Africa's law conforms to the provisions on criminal procedures. Remedies for counterfeiting and piracy offences are stringent and arguably “sufficient to provide a deterrent”.

¹⁶¹ *A M Moola Group Limited and Another v. The GAP, Inc and Another*, 2004 (3), SCA

¹⁶² *Ibid* (para 7).

¹⁶³ See speech at WIPO, document WIPO/ACE/2/4 Rev. at p. 5, n. 34

¹⁶⁴ *Ibid*, para 11.

In sum, South Africa's compliance with the enforcement obligations of the TRIPS Agreement, like its compliance with the substantive obligations, presents a mixed picture (see table 4). In the civil context, where TRIPS requires members to give the authority to their courts to do certain things, many of such powers only exist in the inherent jurisdiction of the courts and not statutorily, thus leaving the required measures at the discretion of courts and judges. For instance, South African law does not provide for judicial review of at least the legal aspects of initial judicial decisions on the merits of a case, as required under Article 41.4 of TRIPS; it does not empower its courts to order an innocent infringer to pay damages to the rights owner, as encouraged under Article 45.2 of TRIPS, or to order an infringer to identify a third person, as provided under Article 47.

Furthermore, there is a tendency to give public authorities broad exemptions from liability for inappropriate actions taken in enforcing IP rights, and there are no statutory provisions with respect to the indemnification of a party wrongly enjoined or restrained (Article 48). The legislation on border measures and criminal procedures is, however, very strong; in some respects even arguably TRIPS plus. The remaining part of this chapter examines the compliance record of Nigeria, using the same analytical structure as in the foregoing part on South Africa.

Nigeria's Implementation Experience

A brief Overview of IP Regime in Nigeria: Situation pre-TRIPS

Prior to the entry into force of the TRIPS Agreement in 1995, Nigeria was generally believed to have a relatively comprehensive and strong IP regime.¹⁶⁵ For instance, according to the Fraser Institute survey referred to earlier, Nigeria's rating for 1970, 1990 and 1995 was 3.05 point for each year.¹⁶⁶ It had the 19th highest scores of the 120 countries surveyed, and was only beaten in Africa by South Africa at 3.37, 3.57

¹⁶⁵ Apart from the WTO (TRIPS), Nigeria is member of several WIPO treaties, including the Paris Convention (Libson text), the Berne Convention, and the Rome Convention. Nigeria became a member of the Patent Cooperation Treaty (PCT) in May 2005, and acceded to the Patent Law Treaty in April 2005. Nigeria is also a signatory to the Universal Copyright Convention (UCC).

¹⁶⁶ The index of patent rights ranges from 0 to 5, with higher numbers reflecting stronger protection levels. The value of the index is obtained (per country, per time period) by aggregating scores in the five equally weighted categories. The score in each category ranges from 0 to 1 and reflects the extent of legal features in that category available in a particular country at a particular time. See http://oldfraser.lexi.net/publications/forum/1999/03/patent_protection.html (date accessed: 13/07/2005).

and 3.57 for 1970, 1990 and 1995 respectively and Zambia, with the rating of 3.52 for each of the three years.

However, that was before the introduction of the TRIPS Agreement, which, with new and strengthened IP obligations, leaves Nigeria's IP regime inadequate in many respects. To be fully TRIPS-compliant, Nigeria, like most other developing countries, needed to make significant changes in its IP laws and regulations. The next sections examine Nigeria's efforts, if any, in introducing these changes, beginning with the procedural obligations.

Compliance with TRIPS Procedural Obligations: Notifications and Review

Nigeria notified its existing IP legislation to the TRIPS Council in September 2000, as required under Article 63.2 of the TRIPS Agreement.¹⁶⁷ This was clearly a delayed notification given that Nigeria was obliged to implement provisions of the TRIPS Agreement on 1 January 2000.¹⁶⁸ The notification of its responses to the Checklist of Issues on Enforcement was also delayed. The review of Nigeria's legislation took place at the March 2002 meeting of the TRIPS Council, but replies to questions posed remained for over two years, while some answers given appeared to be conflicting and incomplete.

The Geneva-Capital coordination was very weak, and sometimes the Geneva-based delegates provided sketchy answers, while "still liaising with the relevant government agency". As pressure for responses increased, the answers became perfunctory. At the Council meeting of June 2003, the representative of Nigeria said that responses to outstanding questions would be provided "by the following week"¹⁶⁹; by the meeting of November 2003, the answer was "shortly"¹⁷⁰; however, by the meeting of March 2004, the response had become "in the near future".¹⁷¹ Nigeria's regular review, which began in March 2002, was not deleted from the

¹⁶⁷ For laws and regulations notified by Nigeria under Article 63.2 of the TRIPS Agreement, see WTO documents IP/N/1/NGA/1 and 2; IP/N/1/NGA/C/1 to 5; IP/N/1/NGA/D/1; IP/N/1/NGA/I/1 to 3; IP/N/1/NGA/P/1; IP/N/1/NGA/T/1 and 2.

¹⁶⁸ With the exception of patent protection for pharmaceutical and agricultural products, which it was not required to grant until 1 January 2005.

¹⁶⁹ See document IP/C/M/40 of 22 August 2003 at p. 3.

¹⁷⁰ See document IP/C/M/42 of 4 February 2004, at p. 4.

¹⁷¹ See document IP/C/M/43 of 7 May 2004 at p.3

TRIPS Council agenda until September 2004,¹⁷² when responses to all outstanding questions were eventually provided.

Compliance with TRIPS Substantive Obligations

This section examines Nigeria's compliance with the substantive obligations set out in the main areas of IP covered by the TRIPS Agreement. The purpose is not to examine Nigeria's IP laws *per se*, but to concentrate on the TRIPS compatibility of these laws and the changes that Nigeria has made or not made since it came under a legal obligation to apply the TRIPS provisions. These substantive obligations are set out in Table 1 above.

Copyright and Related Rights

The main TRIPS obligations on copyright and related rights are found in Section 1, Articles 9 to 14 of TRIPS. Nigeria's pre-existing copyright law, the Copyright Act of 1990¹⁷³, is in substantial conformity with the TRIPS Agreement. Nigeria adheres to the Paris text of the Berne Convention, as required under Article 9 of TRIPS. Computer programmes and compilations of data are protected as literary works¹⁷⁴ (Article 10). The Act also provides for rental rights¹⁷⁵ (Article 11). Literary, musical and artistic works (other than photographs) are protected for 70 years after the end of the year in which the authors dies or, in the case of a body corporate, 70 years after the end of the year the work was first published.¹⁷⁶ This term of protection is higher than the 50 years required under Article 12 of the TRIPS.

The Act protects related or neighbouring rights, including performances, sound recordings and broadcasts¹⁷⁷, as required under Article 14 of TRIPS. Owners of copyright in sound recordings and broadcasts have the exclusive rights, *inter alia*, to prevent the direct or indirect reproduction, broadcasting and re-broadcasting or

¹⁷² See document IP/C/M45

¹⁷³ The Act was originally promulgated as the Copyright Decree of 1988, and was later amended through the Copyright (Amendment) Decrees 1992 and 1999. Nigeria joined the Berne Convention in September 1993, the Rome Convention (Performers, Producers of Phonograms and Broadcasting Organisations) in October 1993, and has been a member of the Universal Copyright Convention (ICC) since November 1961.

¹⁷⁴ See s.39 of the Copyright Act.

¹⁷⁵ S. 37 (4). See also the Copyright (Video Rental) Regulations of 1999.

¹⁷⁶ See First Schedule of the Act

¹⁷⁷ See Part II of the Copyright Act

communicating to the public of their works¹⁷⁸(Article 14.1). And Cinematograph films and photographs, sound recordings, and broadcasts are each protected for fifty years¹⁷⁹ (Article 14.5). In the case of broadcasts, the minimum term of protection required by TRIPS is 20 years.

In terms of retroactive protection of copyrighted works, which is required under Article 18 of the Berne Convention and under Article 14.6 of the TRIPS Agreement, the Nigerian Copyright law is in full compliance. Paragraph 1 of the Fifth Schedule of the Copyright Act provides that the Act applies “in relation to works made before the commencement of this Act as it applies in relation to works made after the commencement of this Act”. Furthermore, s. 12 of the Copyright Act protects the *droit de suite* provided for in Article 14^{ter} of the Berne Convention, while s. 35 establishes a Berne-compatible presumption of subsistence and ownership of copyright.¹⁸⁰ It thus appears that the Nigerian copyright law satisfies the essential provisions of Articles 9 to 14 of the TRIPS Agreement.

However, the Act provides for broad exceptions and limitations to the exclusive rights conferred by copyrights¹⁸¹ and provides for broad conditions for the grant of compulsory licences in translations and reproduction of certain works.¹⁸² These broad exceptions and the provisions that allow compulsory licenses to be granted in a wide range of circumstances are arguably inconsistent with Article 13 of TRIPS, which provides that members “shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holders”.¹⁸³ Thus, while the Nigerian Copyright Act is technically consistent with the letter of Articles 9

¹⁷⁸ See sections 6 and 7 of the Act

¹⁷⁹ See First Schedule of the Act

¹⁸⁰ According to s. 35, in any action for an infringement of copyright in a work, the following, *inter alia*, shall be presumed in the absence of any evidence to the contrary: that copyright subsists in a work which is the subject matter of an alleged infringement; that the plaintiff is the owner of copyright in the work; and that the name appearing in a work purporting to be the name of the author is the name of such author

¹⁸¹ See the Second and Third Schedules of the Copyright Act.

¹⁸² See the Fourth Schedule of the Act

¹⁸³ The panel in *US-Section 110(5) of the Copyright Act*, WT/DS160/R decided that these conditions run cumulatively.

to 14 of TRIPS¹⁸⁴, the broad exceptions to copyright protection and the provisions for compulsory licences are arguably inconsistent with the spirit of these articles.

Trademarks

The obligations to protect trademarks are established in Section 2, Articles 15 to 21, of the TRIPS Agreement (See Table 1 above). Nigeria's pre-TRIPS trademark law is the Trade Marks Act of 1990, which conforms to the TRIPS Agreement in some respects. For instance, trademarks are registered initially for a period of seven years and are renewable indefinitely, in accordance with Article 19.1. Furthermore, the trademark law grants the trademark owner exclusive right to prevent unauthorised users from infringing a registered trademark.¹⁸⁵ Nigerian law also reflects the flexibility in Article 16.1 of TRIPS by recognising existing prior rights.¹⁸⁶

The Nigerian trademark law is nevertheless TRIPS incompatible in some areas. With respect to the scope of protection, the Trademark Act does not allow combination of colours to be registered as trademarks, contrary to Article 15 of TRIPS. There are no provisions for protection of collective marks or of service marks, as required under Article 15.4 of the TRIPS Agreement. Furthermore, Nigeria does not currently protect well-known service marks or well-known marks and, thus, does not conform to Article 6*bis* of the Paris Convention (1967), incorporated by reference in Article 16.2 of TRIPS.

Although article 15.4 also requires trademark to be published promptly, this publication requirement is not met in Nigerian domestic law and practice. The Trade Marks Journal is rarely published and there is no statutory provision to ensure its regular publication. The registration of trademarks or the issuance of Trade Marks Certificates depends on the publication of the Trade Marks Journal. The infrequent

¹⁸⁴ According to Adebambo Adewopo, the Director-General of the Nigerian Copyright Commission, "Nigeria's law on copyright is noted to be one of the best in the world in grant of rights to copyright owners", paper delivered at a seminar organised by the US Consulate in Nigeria, May 16, 2005.

¹⁸⁵ Nigerian courts have generally given protection to trademark owners, where the plaintiff is able to establish that the action of the defendant infringes or threatens to infringe the right. See, e.g. *Seven-Up Co and Seven-up Bottling Co. Ltd v Warri Bottling Co. Ltd* [1984] F.H.C.L.R 183, where the defendant named its soft drink "Thump-UP", and the court held that this could be confused with Seven-Up. The courts will, however, also protect the right of a prior user before registration, see, e.g. *American Cyanamid Co v Vitality Pharmaceutical Ltd* [1991] 2 N.W.L.R

¹⁸⁶ See S. 7 of the Trademarks Act. A Nigerian Supreme Court decision has also given judicial validity to this provision. See *American Cyanamid Co. v. Vitality Pharmaceuticals Ltd* (1991) 2 N.W.L.R

publication, coupled with other institutional factors, results in a situation whereby “it takes over ten years to obtain trademarks in Nigeria”.¹⁸⁷

Nigeria's trademark law is also ambiguous on the conditions for cancellation of trademark for non-use. Article 19 of TRIPS requires that valid reasons for non-use must be accepted, including, circumstances that arise independently of the will of the owner of the trademark which constitute an obstacle to use of the trademark, such as import restrictions on or other government requirements for goods or services protected by the trademark. However, although the Trade Mark Act provides for five-year period of continuous non-use, it only allows for "special circumstances in the trade".¹⁸⁸ It is not clear whether these "special circumstances" include those induced by government measures as envisaged in Article 19 of the TRIPS Agreement.¹⁸⁹

Geographical indications

Article 22 of TRIPS requires members to provide legal means for protecting geographical indications, as defined in Article 22.1. Article 23 requires members to provide additional protection for geographical indications for wines and spirits. Geographical names are not registrable under Nigeria's Trademark law.¹⁹⁰ However, section 43 of the Trade Marks Act provides for the registration of certification trademarks, which refer to “a mark adapted in relation to any goods to distinguish in the course of trade goods certified by any person in respect of origin ... from goods not so certified”. As noted earlier in the case of South Africa, this would not amount to full compliance with Articles 22 and 23 of TRIPS. In fact, Nigeria confirmed during the review of its legislation that its existing laws did not protect geographical indications or provide special protection for wines and spirits.¹⁹¹ Compliance with the TRIPS provisions on industrial designs is considered next.

¹⁸⁷ Oladele Jegede, a former Registrar of Trade Marks, Patents and Designs in Sodipo and Fagbemi (1995). The situation has not changed as interviews with Nigerian IP lawyers have shown.

¹⁸⁸ S. 31 of the Trade Mark Act.

¹⁸⁹ Given the Appellate Body's strict textual interpretation of the TRIPS Agreement, any ambiguity in national law may be deemed inconsistent with the relevant TRIPS provisions. See the *India – Mailbox* case (WT/DS50/AB/R) for an example of how the AB adheres to the text of the TRIPS Agreement.

¹⁹⁰ See section 9 of the Trade Marks Act of 1990.

¹⁹¹ See documents IP/Q-Qs 2,3,4/NGA/1 of 8 June 2004

Industrial Designs

Articles 25 and 26 of the TRIPS Agreement establish substantive obligations with respect to the protection of industrial designs. Article 25 requires members to protect independently created industrial designs that are new or original. Article 26 requires members to grant the owner of a protected design the right to prevent unauthorised third parties from performing certain infringing act. While members may provide for limited exceptions to protection, these must not unreasonably conflict the normal exploitation of the protected design and must not unreasonably prejudice the legitimate interests of the owner of third parties. Article 26.3 requires members to protect industrial designs for at least 10 years.

In Nigeria, industrial designs are protected under the Patents and Designs Act of 1990. An industrial design is registrable if it is new and is not contrary to public order or morality.¹⁹² The rights conferred on owner of a registered industrial design are similar to those required under Article 26 of TRIPS.¹⁹³ However, industrial designs are subject to the exhaustion of rights, such that the rights conferred in the Act would not extend to acts done in respect of a product incorporating a registered design after the product has been lawfully sold in Nigeria.¹⁹⁴ As for duration and renewal of registration, protection is provided in the first instance for five years, and, on payment of the prescribed fee, renewable for two further consecutive periods of five years, totalling a period of 15 years.¹⁹⁵ This is more than the minimum period of 10 years required under Article 26(3) of the TRIPS.

Patents

The Patents and Designs Act of 1990 conforms to the provisions of Section 5 of the TRIPS Agreement in some areas. For instance, patents are granted for both products and processes¹⁹⁶ (Article 27 of TRIPS). Although plants and animals and essentially biological processes are not patentable, “microbiological processes and their products” are¹⁹⁷ (Article 27.3(b)). The rights conferred on the patentee in s.6 of the Act conform to those set out in Article 28 of the TRIPS Agreement. The provisions on

¹⁹² See s. 13 of the Patents and Designs Act.

¹⁹³ See s. 19 of the Act.

¹⁹⁴ See s. 19 (2)(b) of the Patents and Designs Act.

¹⁹⁵ See s. 20(1) of the Patents and Designs Act.

¹⁹⁶ See s. 3(3) of the Patents and Designs Act.

¹⁹⁷ See s. 1(4)(a) of the Act.

dependent patents in paragraph 2 of the First Schedule of the Act also broadly accord with Article 31(l) of the TRIPS. Patents are protected for 20 years¹⁹⁸, as required under Article 33 of TRIPS. Section 25(3) provides for a reversal of burden of proof in process patent in accordance with Article 34 of TRIPS.

Nigerian patents law also reflects many of the flexibilities inherent in the substantive provisions of the TRIPS Agreement. For instance, s.3 (b) of the Act provides for parallel importation based on the doctrine of national exhaustion of rights. The section states that the rights under a patent shall not extend to acts done in respect of a patented product "after the product has been lawfully sold in Nigeria". This is different from international exhaustion of rights, which covers lawful sale anywhere in the world. The Act also provides for an early working or "Bolar exception", as well as "prior use" exception (s.6(4)).

However, while the pre-TRIPS patents law reflects some of the provisions of the TRIPS Agreement and many of its flexibilities, there exist a number of discrepancies. First, Nigeria does not provide for patent protection "in all fields of technology", as required under Article 27.1 of TRIPS. In particular, pharmaceutical products are not patentable.¹⁹⁹ Furthermore, plant varieties are not protected either through patent or a *sui generis* system. Compulsory licence can be granted on the ground of non-working in Nigeria or where the degree of working does not meet on reasonable terms the demands for the product or where local working is hindered or prevented by importation.²⁰⁰ Although compulsory licenses granted at the request of third parties are governed by conditions, which appear broadly to meet the requirements of Article 31 of TRIPS,²⁰¹ the situation is different with respect to use by government.

¹⁹⁸ See s. 7 of the Act.

¹⁹⁹ The law neither expressly includes pharmaceutical products in the list of patentable inventions nor expressly includes them in the list of non-patentable inventions. As a result, according to Nigeria's former Registrar of Trade Marks, Patents & Designs, the "patentability of pharmaceutical inventions in Nigeria is still an open issue" (see: Jegede in Sodipo and Fagbemi (eds), 1994). However, some argue that unless an invention is specifically mentioned as unpatentable, it should be patentable (see Sodipo and Fagbemi (eds), 1994, at p119). There is clearly lack of clarity in the law.

²⁰⁰ See paragraph 1(a-d) of the First Schedule of the Patents and Designs Act.

²⁰¹ For instance, paragraph 6 of the First Schedule requires prior negotiations between the parties and the payment of adequate compensation. The court will be involved in the process to mediate between the parties and can fix terms, which will be binding on them. Furthermore, the licence granted is non-exclusive, and the licensee is prevented from importing the product under a compulsory license and from granting further license.

Any minister can grant compulsory licenses on any product or process patent if the products or processes are declared to be of vital importance for the defence of the economy of Nigeria or for public health, and may also permit importation.²⁰² Furthermore, any minister may, on public interest grounds, grant a compulsory licence to a third party for the service of a government agency.²⁰³ This can be done without the authorisation of or consultation with the rights holder. When a minister grants a compulsory licence for the service of a government agency, the government or any person so authorised to use the licence is exempted from “liability to make any payment to the patentee by way of royalty or otherwise”.²⁰⁴ This is clearly a violation of TRIPS provisions regarding judicial review and adequate remuneration.

Article 31 (b) of the TRIPS Agreement allows WTO members to grant compulsory licences and, particularly, to waive prior negotiations with the patentee in certain circumstances. The Doha Declaration on TRIPS and Public Health goes even further and gives each member “the right to determine what constitutes a national emergency or other circumstances of extreme urgency”. However, neither the waiver of prior negotiations nor the Doha Declaration appears to extinguish the requirement that adequate compensation in the circumstance be paid to the patentee²⁰⁵ or the requirement that the legal validity of *any* decision relating to the grant of compulsory licenses and to the remuneration provided in respect of such a grant “shall be subject to judicial review or other independent review by a distinct higher authority”.²⁰⁶

In sum, although Nigeria’s patent law conforms to some of the provisions of TRIPS. It remains deficient with respect to some key obligations. Nigeria has to date not introduced any amended Patents Act even though the existing legalisation is inconsistent in some important areas with the TRIPS obligations. The law has not been formally changed or clarified, for instance, to grant patent protection for pharmaceutical products.

²⁰² paragraph 13 of the First Schedule. This effectively allows the Nigerian government to import cheap generic drugs from other countries. This placed Nigeria in violation of Article 31(f) of TRIPS before the August 2003 Declaration of the WTO Ministerial Council, which allows this practice, subject to strict conditions.

²⁰³ paragraph 15 and 16 of the First Schedule

²⁰⁴ paragraph 17 of the First Schedule.

²⁰⁵ Article 31 (h) of TRIPS. See also UNCTAD-ICSTD, 2005, p.472.

²⁰⁶ Article 31i&j of TRIPS

*Layout-Designs of Integrated Circuits*²⁰⁷

Articles 35 to 38 of the TRIPS establish compliance obligations in respect of layout-designs. However, no law in Nigeria currently protects this area of intellectual property. Nigeria confirmed in its response to question on this during its TRIPS Council review exercise that its legislation did not protect topographies. To date, no implementing legislation has been passed.

Protection of Undisclosed Information

No statute in Nigeria protects undisclosed information. The protection of know-how or trade secrets is still based on the common law of confidence, although it would appear that Article 39 of TRIPS requires some form of statutory protection. The Drugs and Related Products (Registration etc) Act of 1979 provides for protection of test data regarding pharmaceutical products submitted to the government in order to obtain marketing approval in Nigeria, but it is not clear whether this protection covers agricultural chemical products and whether the data are protected against “unfair commercial use” as required under Article 39.3 of the TRIPS Agreement.

Control of Anti-competitive Practices

Nigeria currently has no competition law.²⁰⁸ However, contractual licences in patents or designs are regulated so that any clause in such contracts that imposes restrictions which do not derive from the relevant patent or industrial design or that are unnecessary to safeguard those rights will be null and void.²⁰⁹ Furthermore, the National Office of Technology Acquisition and Promotion (NOTAP) Act of 1983 empowers the NOTAP to register commercial contracts and agreements dealing with transfer of foreign technology.²¹⁰ Such registration targets anti-competitive practices.

²⁰⁷ This is not one of the classical or traditional IP areas with which most developing countries are familiar, and therefore could pose greater implementation challenges. See report of the meeting of African Trade Ministers: document MM/LIB/WS3/ES of 15 November 2000.

²⁰⁸ Although there is a draft competition bill, it has remained un-enacted for several years.

²⁰⁹ See s. 23 of the Patents and Designs Act.

²¹⁰ Every such contract is registrable if its purpose or intent is in the opinion of the National Office wholly or partially for or in connection with any of the following purposes: the use of trademarks, the right to use patented inventions, the supply of technical expertise or any form of technical assistance, the supply of basic or complex engineering, and the provision of operating staff or management assistance and the training of personnel. However, in addition to the above, NOTAP is shifting emphasis to the promotion of local research and development (R&D) invention. With the assistance from WIPO, NOTAP has established a patent information and documentation centre for the dissemination of technology to end-users.

Table 5: A synopsis of Nigeria's compliance with TRIPS substantive obligations

TRIPS obligations	Compliance status	Comments
Copyright <ul style="list-style-type: none"> • Art. 9: • Art. 10 • Art. 11 • Art. 12 • Art. 13 • Art. 14.1 • Art. 14.2 • Art. 14.6 	<ul style="list-style-type: none"> √ √ √ √ ? √ √ √ 	<p>Nigeria adheres to the Paris text of the Berne Convention</p> <p>Computer programmes and databases protected as literary works</p> <p>Rental rights provided in computer programs</p> <p>Copyrights protected for at least 50 years</p> <p>Broad limitations to protection, including compulsory licensing of works</p> <p>Performances, sound recordings and broadcasts are protected</p> <p>Term of protection for broadcasts is at least 50 years</p> <p>Rights of performers etc protected retroactively. Berne compatible presumption.</p>
Trademarks <ul style="list-style-type: none"> • Art. 15 • Art. 15.4 • Art. 16 • Art. 16.2 • Art. 18 • Art. 19 	<ul style="list-style-type: none"> X X √ X √ ? 	<p>No protection for combination of colours, collective or service marks</p> <p>Trademarks not published promptly</p> <p>Exclusive rights granted to owners of trademarks</p> <p>Well-known trademarks not protected.</p> <p>Protection for 7 years and renewable indefinitely</p> <p>No TRIPS compliant provision. Lack of clarity about compliance</p>
Geographical Indications <ul style="list-style-type: none"> • Art. 22 • Art. 23 	<ul style="list-style-type: none"> X X 	<p>May be protected as certification mark, but not in the context of Art.22.</p> <p>No special protection for wines and spirits.</p>
Industrial Designs <ul style="list-style-type: none"> • Art. 25 • Art. 26 	<ul style="list-style-type: none"> √ √ 	<p>Protected provided for industrial designs. Textiles can be protected as aesthetic designs</p> <p>Rights owners granted TRIPS compliant rights; however there are broad compulsory licence conditions. Protection for 15 years</p>
Patents <ul style="list-style-type: none"> • Art. 27 • Art. 27.1 • Art. 27.3b • Art. 28 • Art.29 • Art.30 • Art. 31 • Art. 33 • Art. 34 	<ul style="list-style-type: none"> X X X √ √ ? X √ √ 	<p>No protection "in all fields of technology", i.e. pharmaceutical products not patentable in current law, but patent products and processes are.</p> <p>Lack of clarity regarding local working conditions</p> <p>Plant varieties are not protected, but microorganisms may be protected.</p> <p>Exclusive rights granted to patentee</p> <p>Provisions compatible with TRIPS</p> <p>TRIPS flexibilities reflected, but lack of clarity remains</p> <p>Provisions on compulsory licensing largely inconsistent with TRIPS.</p> <p>Term of protection (20 years) TRIPS compliant</p> <p>Burden of proof in process patents reversed</p>
Layout Designs <ul style="list-style-type: none"> • Art. 35 -38 	<ul style="list-style-type: none"> X 	<p>Layout-designs are not currently protected</p>
Undisclosed Information <ul style="list-style-type: none"> • Art. 39.2 • Art. 39.3 	<ul style="list-style-type: none"> X ? 	<p>No statutory protection for confidential information; only common law</p> <p>Test data protected in respect of pharmaceutical products but not for agricultural chemical products. Protection may not cover unfair commercial use.</p>
Competition measures <ul style="list-style-type: none"> • Article 40 	<ul style="list-style-type: none"> ? 	<p>The conditions on repatriation of royalty may be deemed to go beyond the provision of Article 40</p>

In sum, Nigeria's compliance record (see table 5) with respect to the substantive obligations of the TRIPS Agreement shows that although some of its pre-TRIPS IP laws conform to certain provisions of the agreement, there still exist many discrepancies, and Nigeria has passed no legislation to ensure that its laws are full

compliance with the TRIPS Agreement. The failure, to date, to take any legislative step in this regard means that intellectual property rights in non-traditional areas of IP, such as geographical indications, plant varieties, layout designs of integrated circuits, and undisclosed information, are not protected at all. Even in respect of traditional IP areas, such as patents and trademarks, Nigerian laws fall short of the obligations established by the TRIPS Agreement, although it is observed that the copyright regime is substantially TRIPS compatible. The focus now shifts to the enforcement obligations.

Compliance with the TRIPS Enforcement Obligations

The purpose of this section is to examine the implementation of the TRIPS enforcement obligations by Nigeria. The section follows the same descriptive and analytic structure as that on South Africa, and focuses on the following broad heads of obligations: civil and administrative procedures and remedies; provisional measures; special requirements relating to border measures; and criminal procedures (table 3).

Civil and Administrative Procedures and Remedies

The main obligations under Section 2, Part III of TRIPS, relate to: standing and protection of confidential information (Article 42), the court's authority to order parties to produce evidence (Article 43), injunctions (Article 44), payment of damages, including by an innocent infringer (Article 45), other remedies, such as destruction of infringing goods (Article 46), the court's authority to order an infringer to identify third persons (Article 47), liability against abuse of procedures and of public authorities and officials who did not act in good faith (Article 48), and administrative measures (Article 49).

In Nigeria, intellectual property right owners, such as copyright owners, patentees and registered proprietors of trademarks, as well as licensees, have standing to assert their IPRs. There is no requirement for mandatory personal appearance before the courts, although the courts have the power to order the attendance of any person for the purpose of being examined or to produce any document.²¹¹ The courts have the power to order the production by any party, upon oath, of any documents in his possession or

²¹¹ See Order 41 Rule 14 of the Federal High Court (Civil Procedure) Rules: [http://www.nigeria-law.org/Federal High Court \(Civil%20Procedure\) Rules 2000-Order 4](http://www.nigeria-law.org/Federal%20Procedure).

power relating to any matter in question in any action.²¹² There is no specific provision that protects confidential information or evidence given in court. According to Order 41(31) of the Civil Procedure Rules states that, “all evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter”.²¹³

All the main IP laws provide for remedies in cases of IP infringement. The relief available is usually by way of “damages, injunction, accounts or otherwise”²¹⁴ The Copyright Act empowers the court to award additional damages in appropriate circumstances, particularly having regard to the “flagrancy of the infringement”.²¹⁵ The plaintiff in an infringement action is not entitled to any damages against the “innocent infringer”, but is entitled to account for profits in respect of the infringement.²¹⁶ Other remedies include consequential orders for the destruction or delivery-up of any infringing copyright material. The Act also creates conversion rights in favour of the copyright owner.²¹⁷

There is, however, no provision requiring the court to order an infringer to inform the right owner of the identity of third persons involved in the infringing acts, although such an order can be made within the inherent jurisdiction of the court. Furthermore, there is no provision relating to the indemnification of defendants wrongfully enjoined; again, such powers would be available at the discretion of the court.²¹⁸ In Nigeria, public authorities and officials are generally immune from liability for any legitimate action taken in the discharge of their official responsibilities.²¹⁹ This is contrary to the provision of Article 48.2 of TRIPS, which require that public authorities and officials be subject to appropriate remedial measures where, although they act legitimately, their actions are not taken or intended in good faith.

²¹² Order 33 Rule 13.

²¹³ Order 41 Rule 31. This may, however, not satisfy the requirement of Article 42 of TRIPS, since there are no explicit provisions protecting any confidential evidence.

²¹⁴ See, for example, section 15 of the Copyright Act. The same applies in the case of patent or design infringement. The court may at its discretion order the plaintiff or the defendant to give such security for the plaintiffs costs or the defendant’s costs of any action as it thinks just (CPR Order 52 Rule 1). The court also has the discretion to order cost between party and party (CPR Order 52 Rule 3).

²¹⁵ Section 15 (4).

²¹⁶ See s. 15.3 of the Copyright Act.

²¹⁷ See s. 16 (1) of the Copyright Act.

²¹⁸ See Nigeria’s responses to the checklist of issues on enforcement; document IP/N/6/NGA/1 of 28 November 2001.

²¹⁹ *Ibid*, at p. 9.

Provisional Measures

Article 50 of TRIPS requires WTO members to grant their judicial authorities the authority to order “prompt and effective provisional measures” to prevent an infringement and to preserve relevant evidence in regard to the alleged infringement. Where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed, the provisional measures must be adopted *inaudita altera parte*. Under the laws of Nigeria, there is the general remedy of interlocutory or interim injunction, which serves to preserve the subject matter of an action. Injunctions and common law Anton Piller (search and seize) orders are available to the right holders in all IPR cases. However, the Copyright Act makes provisions for statutory Anton Piller orders. Interlocutory orders may be made *inaudita altera parte*, where the court is convinced about the extreme urgency of the matter.²²⁰

Special Requirements Related to Border Measures

Article 51 of TRIPS requires members to establish in their laws special requirements that allow the suspension of the release of imported counterfeit trademarks or pirated copyright goods. There are general powers under the s149 of Customs and Excise Management Act of 1990 conferred on the Nigerian Customs Service to impound goods that they reasonably suspect to be in contravention of the Act. Furthermore, under s.36 of the Copyright Act, the owner of copyright in any published literary, artistic or musical work or sound recording can give notice in writing to the Department of Customs requesting the Department during a period specified in the notice to treat as prohibited goods, copies of such works. The scope of this provision appears to be limited to pirated copyright goods, and, thus, excludes counterfeit trademark goods, as defined in the footnote to Article 51 of TRIPS.

The Act does not authorise the competent authorities to act on their own initiative. Indeed, customs officers who identify pirated imports are not allowed to impound the offending materials unless the copyright owner has filed a complaint against a

²²⁰ See CPR Order 34. In the case of real emergency an application may be made *ex parte* on affidavit. The Supreme Court of Nigeria in *Nathaniel Kotoye* states that a “self-induced emergency”, i.e. where the applicant should have acted promptly but failed to do so, would not warrant the granting of an application *ex parte*. (see *Nathaniel Adedamola Kotoye v. Central Bank of Nigeria & Others*, 1989, SC. 118/1988).

particular shipment, which happens rarely.²²¹ Customs authorities have no statutory power to order any remedies.²²² For instance, there are no provisions giving the relevant authorities the authority to order the applicant to pay the importer, the consignee and the owners of goods compensation for any injury caused to them through the wrongful detention of goods, as required under Article 56 of TRIPS.

Furthermore, in respect of any request to restrict the importation of pirated copyright goods, the Department of Customs and its officers are exempted from liability for “any act or omission”²²³. Section 149(3) of the Customs and Excise Management Act states that, “[n]o officer ... shall be liable to any prosecution or action at law on account of any stoppage or search in accordance with the provisions of this section”. These provisions are contrary to that of Article 58 (c) of TRIPS, which provides that members must not exempt their public authorities from liability for actions not taken or intended in good faith. In sum, Nigeria is not currently applying TRIPS compliant border measures.

Criminal Procedures

Article 61 of TRIPS obliges members to provide for criminal procedures and penalties in respect of wilful trademark counterfeiting or copyright piracy when undertaken on a commercial scale. The remedies available must include imprisonment and/or monetary fines “sufficient to provide a deterrent”. Furthermore, the courts and judges must have the power to order, in appropriate cases, the seizure, forfeiture and destruction of the infringing goods and the materials used in producing them.

In Nigeria, the Federal and State High Courts, as well as Magistrates Courts, have jurisdiction over criminal offences arising from infringements of patents, designs and trademarks, all classified as industrial property. However, only the Federal High Court has exclusive jurisdiction on criminal trials relating to copyright and related rights. Nigerian IP enforcement laws create different criminal remedies for different areas of IP. For instance, the main provision for criminal enforcement in the case of

²²¹ See US Department of State 2005 Report on the investment climate in Nigeria

²²² WTO document IP/N/6/NGA/1, 28 November 2001.

²²³ See s. 36(4) of the Copyright Act.

trademark counterfeiting is the Merchandise Marks Act of 1990. S. 3(1)(a) states, that “every person who forges any trademark ...shall be guilty of an offence”.

Criminal prosecution is, however, rare under the Act. This is partly due to the various defences in the Act (e.g. intent to defraud is required), as well as the meagre penalty provided by the law.²²⁴ For instance, on conviction before a High Court, the penalty is an imprisonment for two years or fine or both, while a summary conviction before a Magistrate would attract a penalty of imprisonment for six months or a fine of N100 (less than US\$1). There are no criminal provisions dealing with patents and designs, as s. 3 of the Merchandise Marks Act refers only to trademarks.

Copyright and related rights are, however, treated differently. The Copyright Act imposes relatively higher penalties for copyright infringement offences. For instance, a person who commits a primary offence, which involves, *inter alia*, making any infringing copy of a protected copyright, is liable on conviction to a maximum of N1000 for every copy of an infringing goods dealt with or to a maximum jail term of five years or both.²²⁵ A person who commits a secondary offence, such as selling or distributing infringing goods is liable on conviction to a fine of N100 for every infringing copy or to a maximum jail term of two years.²²⁶

In 1999, the Copyright (Amendment) Decree No 42 of 1999 was introduced to amend the Copyright Act so as to strengthen the anti-piracy law, given the rampant nature of piracy in Nigeria. The decree inserted a new s. 18A in the Copyright Act, which imposes heavy penalties for anti-piracy offences, including a maximum fine of N500, 000 or a term of imprisonment for up to 5 years, or both (s. 18.A (3)). The decree also introduced a criminal liability in respect of infringement of folklore. A convicted individual can be fined up to a maximum of N100, 000 or sent to jail for up to 12 months or to both such fine and imprisonment. In the case of a body corporate, the penalty is a fine of N500, 000. Clearly, the copyright enforcement law is the strongest IP enforcement legislation in Nigeria, especially with respect the special treatment it gives to anti-piracy measures and the protection of folklore.

²²⁴ Kayode in Sodipo and Fagbemi (1996).

²²⁵ See s. 18 of the Copyright Act of 1990

²²⁶ Ibid.

Table 6: A synopsis of Nigeria's compliance with TRIPS enforcement obligations

TRIPS Obligations	Compliance status	Comments
Civil/administrative procedures and measures <ul style="list-style-type: none"> • Art. 42 • Art. 43 • Art. 44 • Art. 45 • Art. 45.2 • Art. 46 • Art. 47 • Art. 48 	√ X √ √ √ √ X X	Right holders have access to courts; no requirements for mandatory personal appearance No provisions giving courts the power to order a party to produce evidence in his possession, but courts have inherent powers Courts have statutory powers to grant injunctions etc Courts have statutory authority to order the infringer to pay damages, but award of costs is discretionary. Courts have statutory authority to order recovery of profits by an innocent infringer, but not order to pay pre-established damages Courts have statutory powers to order the destruction of infringing goods Courts have no statutory powers to order an infringer to identify third persons Courts have no statutory powers to order a party or public authorities to indemnify a party wrongfully restrained
Provisional measures <ul style="list-style-type: none"> • Art. 50 	√	Courts have inherent powers to grant common law Anton Pillar order. Statutory orders available in the Copyright Act
Border measures <ul style="list-style-type: none"> • Arts. 51 to 61 	X	Existing law is broadly incompatible with the provisions of TRIPS
Criminal procedures <ul style="list-style-type: none"> • Art. 61 	?	Remedies for infringements other than in respect of piracy and folklore paltry, and may not be deemed to be sufficient to provide a deterrent.

In sum, although the Nigerian enforcement laws examined above conform to some of TRIPS provisions, there are clear deficiencies. All the laws, apart from the anti-piracy provisions introduced in 1999, predate the TRIPS Agreement. Furthermore, Nigeria creates differential treatment in respect of criminal remedies for IP infringements. Enforcement is weak in the patent and trademark areas. As a result, few companies have secured trademark and patent protection in Nigeria.²²⁷

Conclusion

The most obvious difference in the experiences of South Africa and Nigeria, as the foregoing study has shown, is that while South Africa has made significant changes in its IP laws and regulations since the TRIPS Agreement entered into force, Nigeria has introduced no post-TRIPS changes to date, other than the 1999 amendment to the Copyright Act, designed to strengthen the anti-piracy law and the rules against the infringement of folklore. However, while Nigeria’s case is one of non-compliance, South Africa’s can only be described as one of partial or incomplete compliance. Despite the significant legal changes, there are areas of obvious non-compliance, as well as areas where compliance is unclear.

²²⁷ USTR (2004).

The overall compliance behaviour of South Africa and Nigeria will be explained in chapter 7, the general explanatory chapter. However, for completeness, and in order to have a broader picture of the compliance records of both countries, it is necessary to go beyond the two main case studies already examined. Thus, the next chapter is devoted to a general case study of these countries' implementation of and compliance with a few other WTO agreements.

CHAPTER 6

Compliance with WTO Rules on Trade Remedies and NTBs

The purpose of this chapter is to complement the more detailed case studies examined in the previous chapters. This is necessary for completeness and to provide a more comprehensive picture of the compliance behaviour of South Africa and Nigeria across a range of WTO agreements. The chapter should also confirm the patterns of compliance behaviour identified in the previous case studies. Given the number of agreements considered in this chapter, what is provided is only a snapshot of the compliance records of the two countries in respect of the agreements.

The chapter is divided into two parts. Part one covers the implementation record of South Africa and part two focuses on Nigeria. Each part consists of two sections. Section 1 discusses compliance with the rules on non-tariff measures, and specifically focuses on quantitative restrictions and import licensing, state trading enterprises, the SPS and TBT agreements, the agreement on trade-related investment measures (TRIMs) and the General Agreement on Trade in Services (GATS). Section 2 examines compliance with the trade remedy and safeguard rules, namely the anti-dumping agreement, the agreement on subsidies and countervailing measures (SCM), and the agreement on safeguards. The case studies examine whether, and to what extent, both countries have implemented and complied with the substantive and procedural obligations of these agreements.

South Africa's Implementation Experience

Non-tariff Measures

Non-tariff barriers cover a wide range of non-tariff-related measures that restrict international trade. A number of WTO rules and disciplines apply to these non-tariff measures, aiming to limit their trade restrictiveness.¹ The main rules discussed in this section are those relating to quantitative restrictions (QRs), import licensing, state

¹ The WTO maintains an Inventory of Non-Tariffs Measures, developed from over thousands of notifications (see WTO document TN/MA/S5 of 11 September 2002). Furthermore, the Doha Declaration (paragraph 6) mandates negotiations on NTMs in the context of the Doha Round. These negotiations take place under the ambit of the Negotiating Group on Market Access, NGMA, (see WTO document TN/MA/35) Although the mandate provides virtually no guidance as to what negotiators should be considering as NTMs, a number of non-tariff barriers have been proposed for negotiations in the NGMA (see WTO document Job (05)/85/Rev.1).

trading, standards and technical regulations, investment measures, and trade in services.

Quantitative Restrictions and import licensing

The GATT expresses a general preference for tariffs over quotas among forms of border protection.² Article XI.1 of GATT 1994 prohibits the use of QRs to restrict either imports or exports, but Articles XII and XVIII:B allow their temporary use to safeguard balance of payments (BOP). The Understanding on BOP has, however, clarified these provisions. Members are to refrain from introducing or maintaining QRs but rather to give preference to “price-based measures”³ and phase out existing BOP measures. Further, Members using QRs for BOP reasons have to meet stringent notification and documentation requirements⁴, and are required to submit themselves to reviews by the Committee on Balance-of-Payments Restrictions⁵.

The scope of Article XI:1 also includes “import or export licences”⁶, although it is the Agreement on Import Licensing Procedures⁷ that specifically regulates the administrative procedures used for the operation of import licensing regimes. The Agreement does not prohibit licensing *per se* but regulates their application and administration.⁸ Article 1(2) states that licensing procedures must prevent trade distortions. Article 1(3) provides that the rules and other procedures must be neutral in application and administered in a fair and equitable manner, while Article 1(4) requires licensing rules and list of products subject to import licensing to be published

² According to the Panel on *Turkey-Textiles*, “(t)he prohibition on the use of quantitative restrictions forms one of the cornerstones of the GATT system. A basic principle of the GATT system is that tariffs are the preferred and acceptable form of protection ...” See *Panel Report, Turkey – Restriction on Imports of Textiles and Clothing Products*, WT/DS34/R, adopted 19 November 1999

³ These include import surcharges, import deposit requirements or other equivalent trade measures with an impact on the price of imported goods.

⁴ See paragraphs 9 to 12 of the BOP Understanding.

⁵ See paragraphs 5 to 8 of the BOP Understanding.

⁶ See the Panel on *India-Quantitative Restrictions*, which confirms the broad scope and coverage of Article XI:1 (Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, adopted 22 September 1999, as upheld by the Appellate Body Report, WT/DS90/AB/R, DSR 1999:V.

⁷ The Agreement has its origins in the Tokyo Round Code on Import Licensing,

⁸ See the *EC – Bananas III* case in which Appellate Body held that the focus of the Licensing Agreement was on the application and administration of import licensing procedures rather than the introduction of licensing *per se* (Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, DSR 1997:II, adopted 25 September 1997.

and notified to the Committee on Import Licensing. In the context and spirit of these obligations, how compatible is South Africa's import regime?

South Africa imposes export controls and import prohibitions for a number of reasons, although not for balance of payments.⁹ In 1995 the Committee on Balance-of-Payments Restrictions (BOP Committee) had consultations with the new South African government on its surcharge on imports and exchange controls introduced for balance of payments reasons.¹⁰ The surcharge was subsequently abolished, as South Africa had promised to do during the consultations, while the exchange controls were later relaxed. However, export controls, import prohibitions and licensing existed under the 1963 Import and Export Control Act.

Although the International Trade Administration Act (ITAA) of 2002 has repealed the 1963 Act, South Africa continues to operate an import-licensing regime for import and export controls. Under the new Act, the International Trade Administration Commission (ITAC) is charged with considering all applications for import and export permits.¹¹ However, the Minister of Trade and Industry, to whom ITAC reports, has broad discretion under the Act to regulate the imports and exports of goods.¹² Furthermore, a permit issued under the ITAA can be subject to the conditions set out in section 27.2 (a) to (g), as well as to "any other related conditions" under s.27.2 (h). S.29 grants ITAC powers to suspend or cancel a permit issued under the Act.

The Panel on *India – Quantitative Restrictions*¹³ held that "(t)he scope of the term 'restriction' (in Article XI.1) is broad, as seen in its ordinary meaning, which is 'a limitation on action, a limiting condition or regulation'. The Panel on *EC – Poultry*¹⁴

⁹ Several developing countries invoked Article XVIII:B since their accession to the GATT and a number of them, including Bangladesh, Nigeria, Pakistan and Sri Lanka, were still consulting in the WTO BOP Committee as at the first five years of the WTO (Roessler, 1998).

¹⁰ See WTO document WT/BOP/R/1BOP/R/224 of 15 June 1995.

¹¹ See sections 26 (1)(a) and 27 of ITAC Act.

¹² Ibid.

¹³ Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, adopted 22 September 1999, as upheld by the Appellate Body Report, WT/DS90/AB/R, DSR 1999:V.

¹⁴ See Panel Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/R, adopted 23 July 1998, as modified by the Appellate Body Report, WT/DS69/AB/R, DSR, 1998:V.

also found that licensing procedures should be viewed in the light of the preamble to the Licensing Agreement and Articles 1.2 and 3.2, which stress that the object of the agreement is to prevent licensing procedures that could have trade restrictive effects. In the light of these rulings, it is arguable that the South African licensing procedures and conditions, as described above, could have such trade restrictive effects.¹⁵ Indeed, the US has said that its companies have frequently cited import permits as one of the barriers to trade in South Africa¹⁶

There appear to be general difficulties with monitoring compliance with the agreement. This is because of the failure of most WTO members to provide annual responses to the Questionnaire on import licensing procedures. According to the WTO, “(t)his unsatisfactory situation with respect to compliance with the notification obligations of the Agreement has seriously undermined the ability of the Committee on Import Licensing to carry out its main function of reviewing Members’ implementation of this Agreement”.¹⁷ South Africa itself has fallen behind in providing annual replies to the Questionnaire.¹⁸

State Trading Enterprises

The attention given to state trading enterprises in the GATT qualifies the subject to be included in this section. For instance, while government procurement was not addressed in the GATT and remains, even in the WTO, a plurilateral agreement, disciplines were included in the GATT 1947 to deal with state trading enterprises (STEs) from the start. Article XVII of the GATT requires that STEs act in a manner consistent with the general principles of non-discrimination in respect of governmental measures affecting imports or exports by private traders. Further, STEs are required to make purchases or sales solely in accordance with commercial considerations.¹⁹

¹⁵ Article 2 of the Agreement on Import Licensing Procedures specifically provides that licensing procedures should not result in “trade distortions that may arise from an inappropriate operation of (the) procedures”.

¹⁶ See USTR 2005 Report on Foreign Trade Barriers.

¹⁷ WTO (2005)

¹⁸ For instance, South Africa’s last notification regarding import licensing was in 2002. Updates on South Africa’s notifications are available at: http://www.wto.org/english/thewto_e/countries_south_africa_e.htm.

¹⁹ Throughout Articles XI, XII, XIII, XIV and XVIII, the terms “import restrictions” or “export restrictions” include restrictions made effective through state-trading operations.

The GATT 1947 did not, however, define “state trading”. This omission was addressed by the Understanding on the Interpretation of Article XVII of GATT 1994.²⁰ The Understanding also introduced certain transparency requirements, including notifications of STEs to the Council for Trade in Goods, which is required to review such notifications through a Working Party. Each Member is obliged to ensure the maximum transparency possible in its notifications, and any Member that has reason to believe that another Member fails to make adequate notification may make a counter-notification to the Council after first raising the matter, unsuccessfully, with the member concerned.²¹

Prior to the entry into force of the WTO Agreement, South Africa operated an elaborate system of Control Boards, originally set up under the Marketing Act of 1937, as well as allied legislation for specific industries. The aim was to protect these industries against foreign competition and to ensure income parity with the urban economy.²² As a result, the marketing of most agricultural products was regulated by statute largely under the 22 marketing schemes introduced under the Marketing Act.²³

South Africa’s notification to the Council for Trade in Goods in 1995²⁴ enumerated these STEs²⁵ and stated the “reason and purpose for maintaining” them. However, in response to questions by the United States²⁶ and Canada²⁷, South Africa promised changes to the nature and functions of the STEs. In July 1997, it notified the Working Party on State Trading Enterprises of new legislation, the Marketing of Agricultural Products Act of 1996, introduced to implement reform in the agricultural marketing sector. Furthermore, it gave several estimated dates in 1997 for the termination of the functions of the marketing boards.²⁸

²⁰ Article 1 of the Understanding defines STEs as “Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports”

²¹ Paragraph 4 of the Understanding.

²² Kirsten (2006).

²³ Ibid.

²⁴ See WTO document G/STR/N/1/ZAF

²⁵ The marketing boards included the Milk Board, the Fruit Board, the Egg Board, the Maize Board, the Oilseeds Board, the Tobacco Board, the Wheat Board, the Wool Board, the Cotton Board, and Sorghum Board (Ibid)

²⁶ See WTO document G/STR/Q1/ZAF/3.

²⁷ See WTO document G/STR/Q1/ZAF/1

²⁸ See WTO document G/STR/N/3/ZAF of 6 August 1997.

In November 2000, South Africa notified the Working Party that it “does not maintain any state trading enterprises”, adding that “(a)ll the state trading enterprises (earlier notified) have been completely abolished”.²⁹ In subsequent notifications³⁰, South Africa has affirmed that it maintains no STEs within the meaning of the working definition in paragraph 1 of the Understanding on the Interpretation of Article XVII.³¹

South Africa’s compliance behaviour in respect of the STE agreement has its roots partly in the country’s unilateral domestic reform agenda. The deregulation and liberalisation of the agricultural sector began in the 1980s and were intensified in the 1990s. These reforms were informed by the desire to open up the highly protected agricultural sector and enhance its international competitiveness. South Africa’s Uruguay Round commitment was designed to lock-in the domestic reforms, particularly in agricultural sector. For instance, as a result of its Uruguay Round undertaking in agriculture, existing quantitative restrictions, specific duties, price controls, import and export permits, and other regulations were replaced by tariffs.³² The dismantling of the STEs was inspired by these domestic reforms, but also by South Africa’s obligations under Article XVII of GATT and the STE Understanding.

*Sanitary Measures and Technical Regulations*³³

The WTO agreement on application of sanitary and phytosanitary measures (SPS) and the agreement on technical barriers to trade (TBT) aim to ensure, respectively, that sanitary measures and technical regulations and standards, when applied, do not create unnecessary barriers to international trade. Thus, while the SPS agreement allows the use of SPS measures to protect human, animal or plant life or health, it requires that such measures be based, *inter alia*, on scientific principles and evidence

²⁹ See WTO document G/STR/N/4-6/ZAF of 14 November 2000.

³⁰ See, for example, WTO documents G/STR/N/7/ZAF of 3 August 2001 and G/STR/N/8/ZAR of 18 March 2002

³¹ STEs are, however, different from state-owned enterprises (SOEs), which continue to play a significant role in South Africa’s economy. The authorities see the SOEs as a vehicle for strengthening infrastructure and public service delivery. Therefore, rather than increasing the pace of privatisation, the government has indeed de-emphasised the role of privatisation as a way of enhancing efficiency, focusing instead on the operational restructuring of large enterprises, together with the sale of the non-core assets (IMF, 2005)

³² Kirsten (2006)

³³ The treatment of the SPS and TBT agreements is not meant to be detailed or extensive, but rather to give a general feel about South Africa’s compliance with some of the substantive and procedural obligations in the agreements.

(Article 2:2) and on existing international standards, guidelines or recommendations (Article 3).

The Appellate Body held in the *EC-Hormones* case³⁴ that the repeated references in the SPS agreement to the relevant international standardising organisations meant that SPS measures, in order to be GATT consistent, must be “based on” relevant international standards (Article 3.1).³⁵ In the *Australia – Salmon* case³⁶, the Appellate Body also emphasised the importance of basing an SPS measure on scientific evidence (Article 2:2) and on risk assessment (Articles 5:1). In addition to these substantive obligations, the agreement also imposes a number of transparency requirements, including publication and notification requirements, as well as the establishment of enquiry points (Article 7).

The TBT agreement focuses on technical regulations and standards. While such regulations, which include packaging, labelling and certification requirements, may be adopted and applied to achieve legitimate objectives³⁷, the agreement requires that they are not more trade-restrictive than necessary to fulfil any legitimate objective, and must not discriminate against imported products. Consequently, technical regulations are to be based on relevant international standards (Article 2:4). In the *EC-Sardines* case³⁸, the Appellate Body stressed the importance of basing technical regulation on relevant international standards.

In that case, the EC, in a 1989 Regulation, provided that one species of fish, *Sardina pilchardus*, could have the word “sardines” as part of the name on the container, while another, *Sardinops sagax*, could not, notwithstanding that the Codex Alimentarius Commission has adopted a standard, Codex Stan 94, which listed *Sardinops sagax*

³⁴ See: Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones) – Complaint by the United States*, WT/DS26/AB/R, adopted 13 February 1998.

³⁵ A member is, however given the right to set its own standard at a level that is higher than the existing international one, provided the higher level of SPS protection is based on a scientific justification or introduced following a risk assessment in accordance with the provisions of Article 5. See the *Hormones* case.

³⁶ Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1999, DSR 1999:VIII.

³⁷ Such as national security regulation, the prevention of deceptive practices, protection of human or safety, animal or plant life or animal, or the environment (Article 2:2 of the Agreement).

³⁸ Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 26 September 2002

among sardines or sardine-type products. The Appellate Body upheld the Panel's finding that Codex Stan 94 is a "relevant international standard" under TBT Agreement Article 2:4. It held further that since Codex Stan 94 was not used "as a basis for" the EC Regulation in question, it was inconsistent with Article 2:4. It is evident from these cases that international standards will play a central role in SPS and TBT cases.

How, then, has South Africa fared with respect to these obligations? South Africa has made several notifications to the Committee on Sanitary and Phytosanitary Measures, suggesting compliance with the notification obligations, under which SPS measures are to be notified promptly.³⁹ It also suggests that South Africa frequently adopts SPS measures, but this does not amount to a violation provided the measures are consistent with the harmonisation or evidentiary obligations of the SPS Agreement.

In this respect, the evidence suggests that South Africa's SPS measures generally follow internationally recognised scientific (CODEX) guidelines. The Directorate of Food Control of the Department of Health is South Africa's national notification authority, its national enquiry point, and its representative at the Codex Alimentarius Commission. Furthermore, SPS regulations and other measures are frequently published in the Government Gazette. However, notwithstanding the general compliance with international standards, as well as compliance with the SPS Agreement's transparency obligations, South Africa's trading partners still complain about "various South African phytosanitary barriers" and "unnecessary SPS requirements".⁴⁰

With respect to the TBT Agreement, South Africa also appears to be applying a large number of standards and technical regulations for a variety of purposes. The South African Bureau of Standards (SABS), established in 1945, develops standards at the request of interested parties. The use of SABS standards is normally voluntary but can be made obligatory if a government department so declares. In 2002, there were 6,980

³⁹ Article 7 and Annex B of the Agreement.

⁴⁰ See USTR 2005 Report on Foreign Trade barriers. These complaints do not indicate that South Africa has violated WTO law but that in trade policy, rather than trade law terms, the measures are market access barriers.

standards, with 72 declared obligatory.⁴¹ As the *EC-Sardine* case has shown, however, the key test is whether these standards are based on international norms. The evidence suggests this to be generally the case.⁴²

Investment Measures

Investment measures, to the extent that they restrict importation or exportation or impose certain mandatory requirements, are often regarded as non-tariff barriers to trade. The GATT 1947 was not explicit enough on the conformity or otherwise of some of these measures. However, the agreement on trade-related investment measures (TRIMs) clearly reaffirms that GATT disciplines apply to investment policies in so far as they directly affect trade flows. The Agreement establishes in Article 2(1) that “no member shall apply any TRIM that is inconsistent with the provisions of Article III (national treatment) or Article XI (prohibition of QRs) of GATT 1994”.

Article 2 (2) refers to Annex 1 to the Agreement, which contain “(a)n illustrative list of TRIMs that are inconsistent with the obligation of national treatment ... and the obligation of general elimination of quantitative restrictions ...”. With respect to NT, Annex 1 prohibits, *inter alia*, local content or sourcing requirements, as well as trade balancing requirements. As in the case of QRs, the Annex prohibits restrictions on importation to the value or volume of local production exported or for foreign exchange purposes. The Panel on *Indonesia-Autos*⁴³ held that local content requirements or other requirements that favour the use of domestic products over imported products are necessarily trade-related, and, therefore, inconsistent with the TRIMs agreement.

In addition to the substantive obligations, the TRIMs agreement imposes transparency requirements. For instance, Article 5 requires members to notify, within 90 days of the date of entry into force of the WTO Agreement, all their TRIMs, which were not in conformity with the provisions of the TRIMs Agreement, and to eliminate such TRIMs within two years of the entry into force of the WTO Agreement (Article

⁴¹ Trade Policy Review of South Africa, WTO (2003).

⁴² *Ibid*

⁴³ Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, adopted 23 July 1988, DSR 1998:VI.

5:2).⁴⁴ Article 6 commits members to the obligations on transparency and notification in Article X of GATT 1994 and requires each member to notify the WTO Secretariat of the publication in which TRIMs may be found, “including those applied by regional and local government authorities within their territories”.

South Africa does not have a specific investment law, although various bilateral trade agreements contain investment protection clauses, while sector-specific acts establish the conditions for foreign and domestic investment.⁴⁵ In 1995 South Africa notified the Council for Trade in Goods of all its measures that were not in conformity with the provisions of the TRIMs Agreement, as required under Article 5.1. However, although these notified TRIMs were to be eliminated by 1997 under Article 5.2 of the agreement, the WTO noted in its 1998 trade policy review that some of them were still extant.⁴⁶ In 2001, South Africa informed the WTO that the TRIMs notified in 1995 had been phased out.⁴⁷ It is evident, however, that local-content requirements of various kinds still apply.⁴⁸ The existence of local-content or sourcing requirements thus suggests lack of full compliance with the TRIMs obligations.

Trade in Services

Trade in services was excluded from the legal framework of the world trading system until 1995. This was due to the fact that services were viewed as non-tradable because of their supposed intangibility or invisibility, as well as their non-durable or transitory nature.⁴⁹ However, recognition that international trade in services, in fact, accounted for at least 20% of recorded world trade, coupled with pressure from developed countries with comparative advantage in this form of trade, forced trade in services on the negotiating agenda during the Uruguay Round. The result was the General Agreement on Trade in Services (GATS).

⁴⁴ Developing countries were given five years within which to do this, while the least-developed countries and a transition period of seven years.

⁴⁵ Trade Policy Review (WTO, 2003)

⁴⁶ WTO (1998).

⁴⁷ See WTO document G/TRIMS/N/2/Rev.9 of 28 September 2001.

⁴⁸ South Africa operates a number of local content schemes. For instance, exporters qualify for credit facilities by using a minimum of 70% of South African products and services. Also, local-content considerations are taken into account when comparing tenders for government procurement purposes. Minimum local-content requirements are established for TV and sound broadcasters and a South African company and other business entity that is 75% or more foreign-owned is subject to local borrowing restrictions (WTO, 2003).

⁴⁹ ITC/Commonwealth Secretariat, 2000.

The GATS general obligations and disciplines are modelled in large part on those under the GATT, except that while GATT obligations are extended only to goods being exported or imported, GATS obligations are extended to both the services and service suppliers. The general obligations apply to all Members on any measures⁵⁰ affecting trade in services. These obligations include: the Most-Favoured-Nation Treatment (art. II), Transparency⁵¹ (art. III), Domestic Regulation⁵² (art. VI), General Exceptions (art. XIV) and Security Exceptions (art. XIV *bis*).

Each Member is expected to make specific liberalisation commitments through a process called ‘scheduling’, whereby a member first identifies the services sectors in which it is willing to make commitments. Under the GATS ‘positive list’ approach, if a Member *does not* elect to submit a schedule of commitments for a particular services sector⁵³, then it is not bound by any GATS obligation in the excluded sector, except for the transparency obligation in Article III. At the second level of the scheduling process, each Member that has submitted a schedule of commitments for any services sector is expected to specify in its Schedule the terms, limitations and conditions that it intends to impose in that sector with respect to market access and National Treatment commitments concerning the four modes of supply.⁵⁴

Unlike the GATT, there is no general obligation under the GATS for members to extend either market access or national treatment to other members. These obligations are negotiated on a sector-by-sector basis and are inscribed in the Member’s Schedule

⁵⁰ Measures affecting trade in services are defined broadly. The Panel on *EC-Bananas III* states that “[n]o measures are excluded a priori from the scope of the GATS ... The scope encompasses any measure ... to the extent that it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other measures but nevertheless affects trade in services”. (Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R, adopted 25 September 1997, para. 7.285). Generally, however, measures include laws, regulations, rules, procedures, decisions, and administrative actions.

⁵¹ All laws affecting service provision must be publicly available.

⁵² Domestic regulations must be reasonable, objective, impartial and not more burdensome than necessary.

⁵³ The WTO Secretariat has divided services into the following 12 areas: business (including professional and computer services); communications; construction and engineering; distribution; education; environment; fiancé (including insurance and banking); health; tourism and travel; recreation, cultural and sporting services; transportation; and other services not included elsewhere. These 12 areas are, however, further subdivided into 155 sub-sectors (ITC/Commonwealth Secretariat, 2000, pp 163 -169). Importantly, however, binding commitments exist only for those sectors selected by each member for Scheduling.

⁵⁴ Article I of the GATS provides for 4 modes of supply of services, namely: cross-border supply (Mode 1), consumption abroad (Mode 2), commercial presence in the territory of any other Member (Mode 3) and presence of natural persons of a Member in the territory of any other member (Mode 4).

of Commitments. However, with respect to the terms, limitations, conditions and qualifications on market access and national treatment, the 'negative list' rule applies. As a result, no market access or national treatment restriction is deemed to exist in respect of any mode of supply for any scheduled or listed service sector unless such restrictions are specifically inscribed in the Member's Schedule.⁵⁵ So, what are the nature of South Africa's GATS commitments and the extent of its compliance to date?

South Africa scheduled commitments in nine of the twelve service areas, excluding education, health and recreation, cultural and sporting services, where it made no commitments. When broken down into the 155 sub-sectors, South Africa made commitments in 91 of these sub-sectors.⁵⁶ Furthermore, South Africa is a signatory to the Agreement on Basic Telecommunications Services (the Fourth Protocol) and has adopted the Reference Paper for basic telecommunications on pro-competitive and transparency practices. It also took part in the WTO GATS negotiations on financial services, and accepted the GATS Fifth Protocol.⁵⁷

South Africa is, however, arguably in breach of many of its GATS commitments. The two areas often highlighted are the health and telecommunications sectors, where certain domestic laws and regulations appear to put South Africa in violation of the market access and national treatment obligations of the GATS. The situation with the health sector is particularly curious because South Africa did not make any scheduled commitment in the health services sector, and South Africa's trade officials have consistently denied that the country's health services are covered under the GATS.⁵⁸

However, although South Africa made no commitments in the health sector, its commitments under the professional services sub-sector, in the business category, bring a large swath of its health services under the GATS. For instance, under professional services, South Africa made market access and national treatment commitments in respect of medical and dental services, services provided by midwives and nurses, as well as services provided by physiotherapists and

⁵⁵ See Articles XVI and XVII of the GATS.

⁵⁶ WTO (2005).

⁵⁷ WTO (2003).

⁵⁸ Sinclair (2005).

paramedical personnel. As Sinclair argues, “almost all human health services delivered outside of hospitals by doctors, dentists, nurses, midwives and other health professionals are covered by South Africa’s GATS commitments”.⁵⁹ South Africa clearly omitted to impose limitations on these commitments during the Uruguay Round, and, as a result, given the negative list approach, no limitations are legally assumed to exist.

In 2003, however, South Africa enacted the National Health Act, designed to combat the country’s public health crisis.⁶⁰ Certain provisions of this Act are, however, apparently in conflict with the GATS market access and national treatment rules. Section 36 (i)(a-d) of Chapter 6 of the Act introduces the requirement for “certificates of needs”.⁶¹ The Act requires every health establishment in South Africa to obtain within two years a certificate of needs in order to operate. This is a policy instrument designed to regulate the entry of service suppliers based on an assessment of the needs of certain areas or populations. However, this measure appears to be in conflict with the market access provision of Article XVI.2(a) of the GATS, which prohibits “limitations on the number of service suppliers whether in the form of ...the requirements of an economic needs test”.

The Act contains other provisions, which appear to be in conflict with other GATS market access obligations. For instance, the Act gives the Director-General of the Department of Health broad discretion to use the certificate of needs to limit the growth in health establishments, types of medical procedures, licensing of equipment and other services in certain areas until more needy areas or populations are better served.⁶² These provisions appear to conflict with those of Articles XVI.2 (c), (d) and (e) of the GATS, which prohibits limitations of different sorts, including quantitative restrictions and local incorporation requirements, unless such limitations have specifically been listed in a Member’s Schedule.

⁵⁹ Ibid, p.20.

⁶⁰ The Act became effective in July 2004.

⁶¹ The National Health Act, 2003, is available at: <http://www.info.gov.za/gazette/acts/2003/a61-03.pdf>.

⁶² S.36(3)(a-m) of the Act list several “needs” that the D-G must take into account before issuing or renewing a certificate of need.

Furthermore, the provisions of the Broad-Based Black Economic Empowerment Act of 2003 and of the draft Charter for the health sector⁶³, which sets ambitious targets for black ownership in the health sector, are likely to conflict with the GATS national treatment rules. Article XVII (1) of GATS provides that, in its Scheduled or listed sectors, “each Member shall accord to service and *service suppliers* of any other Member ...treatment no less favourable than that it accords to its own like services and *service suppliers* [italics added]. The *Panel on EC-Bananas III* held that “to the extent that entities provide like services, they are like service suppliers”.⁶⁴

South Africa is also believed to be in breach of some of its obligations under the GATS Basic Agreement on Telecommunications (or the Fourth Protocol) and the Reference Paper on Regulatory Principles (RP). These are post-Uruguay Round GATS commitments undertaken by South Africa. The Fourth Protocol is designed to liberalise trade in basic telecommunications. Parties to the Protocol undertook to dismantle, over varying time frames, the state monopoly provision of basic telecommunications and satellite services, open entry to foreign suppliers, and adopt pro-competitive and independent regulation in the sector. The Regulatory Reference Paper sets out safeguards for market access and foreign investment in domestic law.

However, although South Africa is a signatory to both the Protocol and the Reference Paper, there is “apparent inertia” with respect to its compliance with the obligations and principles of these GATS annexes.⁶⁵ Under the Protocol, South Africa agreed, *inter alia*, to break the monopoly of Telkom, its publicly owned telecommunications parastatal, on all facilities and basic voice services by December 2003. However, Telkom continues to enjoy monopoly powers over basic public switched telecommunications services with licensees and private value-added network services (VANS) suppliers being required to use Telkom’s infrastructure.⁶⁶

⁶³ The draft charter on July 11 2005 set an immediate target of “at least 26% ownership or control by black people”, rising to 35% by 2010 and 51% by 2014. See “The Charter of the Public and Private Health Sectors of the Republic of South Africa, Draft”, South African Department of Health, July 2005, para 3.4.1 to 3.4.3.

⁶⁴ See: Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R, adopted 25 September 1997, para. 7.322.

⁶⁵ Cohen (2001).

⁶⁶ WTO (2003).

Articles VIII and IX of the GATS prohibit a state monopoly firm from generally abusing its monopoly position or engaging in any anti-competitive practices. However, Telkom, which enjoys some exclusivity, under the Telecommunications Act, was often accused of anti-competitive behaviour. In 2000, the US threatened a WTO action against South Africa following Telkom's refusal to provide facilities to AT&T Global Networks, an American telecommunications company and VANS license holder.⁶⁷

The US claimed that Telkom's refusal was contrary to South Africa's WTO obligations to provide market access and national treatment for VANS. The USTR later withdrew the threat of WTO action as out-of-court negotiations between the parties resulted in Telkom agreeing to restore AT&T's access to its network.⁶⁸ South Africa was also in breach of the competitive safeguards under the Reference Paper.⁶⁹ The foregoing suggests that South Africa has not fully complied with its obligations under the GATS. Attention now shifts to other WTO agreements.

Trade Remedy and Safeguard Rules

The policy justification for trade remedies is the discouragement of unfair competition in the forms of injurious dumping and subsidies. Article VI.1 of the GATT 1994 recognises "dumping" as a practice that "is to be condemned if it causes or threatens material injury to an established industry ... or materially retards the establishment of a domestic industry". GATT law thus permits the imposition of an anti-dumping duty to offset or prevent such injurious dumping (Article VI:2). The same article permits the imposition of a countervailing duty where a subsidy causes or threatens injury (Article VI:3)

The WTO Anti-Dumping Agreement (ADA), however, interprets, elaborates, and provides procedures for the application of Article VI of the GATT with respect to anti-dumping measures, while the Agreement on Subsidies and Countervailing Measures (ASC) does the same with respect to subsidies. There are certain provisions

⁶⁷ The Act granted the Minister of Communications discretionary powers to grant or refuse the grant of licences.

⁶⁸ *AT&T Global Network Services SA (Pty) Ltd et al, v Telkom SA Ltd*, Unreported Case No 2763409, 28 October 1999. South Africa telecommunications regime was also placed under review by the USTR.

⁶⁹ Cohen (2001, p.738).

that are common to both the ADA and the ASC. These include: conditions of injury determination and causality (a causal link), the definition of domestic industry; procedures for initiation and conducting investigations; the application of the anti-dumping and countervailing duties; the condition of a sunset clause; provisions for due process and judicial review; as well as the notification requirements.⁷⁰ There are, however, some differences in the detail of both agreements, which relate, *inter alia*, to the nature of obligations that can be imposed or must be satisfied by a member, as well as the factors that the investigating authorities should consider in determining injury.⁷¹

Article XIX of the GATT 1994 and the Agreement on Safeguards (AoS) both make provisions for situations where increased imports, rather than dumped or subsidised imports, cause dislocation to domestic industries. Unlike the GATT provisions on dumping and subsidisation, Article XIX and the AoS concern imports that come in legitimately and fairly, but which nevertheless, because they enter in increased quantities, cause or threaten serious injury to domestic producers.⁷² In such circumstances, members are permitted, in respect of the affected product, “to suspend (their) obligation in whole or in part or to withdraw or modify (their) concession”.⁷³

The Agreement on Safeguards clarifies and strengthens Article XIX by requiring that members can only apply a safeguard measure following investigations and due process. The Appellate Body in the *US-Wheat Gluten* case stresses the “central role” of the interested parties in the investigation, as required under Article 3 of the

⁷⁰ The importance of these requirements has been stressed by WTO panels and the Appellate Body. For instance, the Appellate Body held in *Thailand – H-Beams* that failure to comply with the overarching substantive obligation in Article 3:1 of the AD Agreement regarding injury determination will undermine the validity of an injury determination (See Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/Ab/R, adopted 5 April 2001). In *Guatemala – Cement II*, the Panel emphasised the important of due process, and access to information by all interested parties (see Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000)

⁷¹ See Qureshi (2000, p20, note 4).

⁷² Unlike in the cases of dumping and subsidisation, where the test is “material injury”, the test with regard to safeguard measures is “serious injury”. In *US-Lamb*, the Appellate Body states that “the word ‘serious’ connotes a much higher standard of injury than the word ‘material’” (Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000)

⁷³ Article XIX:1.

Agreement.⁷⁴ Injury and causality must also be established, and the application of safeguard measure must conform to certain conditions.⁷⁵ In addition, members must satisfy a number of notification, transparency and consultation requirements.⁷⁶ What is South Africa's implementation record with respect to the trade remedy and safeguard rules?

South Africa's Anti-Dumping and Subsidy Countervailing Laws and Regulations

In 1996, South Africa notified the WTO of its existing anti-dumping and subsidy countervailing laws and procedures, but admitted that they did not fully reflect the rules of the WTO Anti-Dumping Agreement and Subsidies and Countervailing Measures Agreement.⁷⁷ South Africa was not a signatory to the 1979 Tokyo Round Anti-Dumping and Subsidies codes, and the first time it introduced a definition of "dumping" and "subsidised export" in its laws was when it amended the Board of Tariff and Trade (BTT) Act in 1992.

In 1994, the National Economic Forum (NEF) recommended that South Africa should have national legislation on anti-dumping and countervailing measures, and establish an anti-dumping authority.⁷⁸ This led to further amendment of the 1992 Act in 1995 to bring the definition of dumping more in line with Article VI of the GATT and the AD Agreement by introducing for the first time a definition of "normal value" and "export price".

However, these were small amendments and several deficiencies remained. The Act did not provide for WTO compatible procedural framework or regulation for conducting anti-dumping investigations. For example, while Article 6.2 of the AD Agreement states that "there shall be no obligation on any party to attend a meeting", s.12 of the BTT Amendment Act 1995 allowed the authorities to summon a party, with possibility of a penalty for non-appearance. The provision of s. 17 of the act on confidential information did not conform to that of Article 6.5 of the AD Agreement. There was no provision in the law for the prompt termination of investigations in

⁷⁴ See Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001.

⁷⁵ See Articles 5 to 8.

⁷⁶ Article 12.

⁷⁷ See WTO documents G/ADP/W/395 and G/SCM/W/405 of 4 June 1996.

⁷⁸ Joubert in Gallagher *et al* eds (2005)

circumstances of insufficient evidence.⁷⁹ The BTT Act did not provide for review and sunset provisions, contrary to the requirements of Article 11.3 of the AD Agreement and Article 21 of the SCM Agreement.

Furthermore, there were no provisions requiring the refund of provisional duties in the event of no finding of injury.⁸⁰ Also, the BTT Act contained no provisions on price undertakings⁸¹, and there was no automatic review or appeal of substantive issues of anti-dumping or countervailing measure investigations.⁸² In responses to questions posed by several WTO members⁸³ on the notifications of its trade remedy laws and regulations, South Africa indicated that the BTT Act would “be restructured to ensure full compliance with the WTO Agreements”.⁸⁴ Indeed, in 1996, the Trade Minister appointed “an international trade lawyer” to lead the restructuring of the anti-dumping and countervailing system “in accordance with the requirements of the WTO”.⁸⁵

The restructuring process, however, took several years, and the legal transformation of the trade remedy and safeguard regimes of South Africa did not take place until the enactment of the International Trade Administration Act of 2002, the introduction of the accompanying Anti-Dumping Regulations in 2003, the Safeguards Regulations of 2004, and the amendment of the Customs and Excise Act of 1964. These laws and regulations, South Africa’s main trade legislation, were notified to the WTO in January 2004.⁸⁶

There are two possible approaches to implementing the WTO trade remedies agreements. A member could simply incorporate through an enabling domestic legislation the relevant provisions of the agreements or, alternatively, draft the legislation *de novo*.⁸⁷ Furthermore, a member would need to decide whether or not to

⁷⁹ Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement.

⁸⁰ Article 10.4 of the AD Agreement and Article 20.4 of the SCM Agreement.

⁸¹ Article 8.2, 8.4 and 8.5 of the AD Agreement and Article 18.2, 18.4 and 18.5 of the SCM Agreement.

⁸² Article 13 of AD Agreement and Article 23 of the SCM Agreement.

⁸³ Questions were posed by Argentina, Australia, the European Community, Hong Kong, India and the United States.

⁸⁴ See WTO documents G/ADP/W/395 and G/SCM/W/405 of 4 June 1996.

⁸⁵ See Government Gazette of 15 March 1996.

⁸⁶ See WTO documents G/ADP/N/1/ZAF/2 and G/SCM/N/ZAF/2 of 20 January 2004.

⁸⁷ Qureshi (2000). As the author points out, however, while drafting legislation afresh arguably allows the adaptation of the ADA to national circumstances and policy inculcation, “the range of national policy options is considerably limited by the ADA” (p.20). A national implementing legislation that

combine in a single legislation both the anti-dumping and countervailing measures.⁸⁸ With respect to these issues, South Africa adopted a *de novo* approach, and combined both antidumping and countervailing measures in a single legislation.⁸⁹

The South African authorities claim that the ADA was used as a model for drafting the Anti-Dumping Regulations, and that the International Trade Administration Commission (ITAC) looked at the anti-dumping regimes of the EU, the US, New Zealand and Australia as examples in drafting the regulations, in addition to receiving inputs from several lawyers from these countries, as well as from local lawyers and academics.⁹⁰ However, to what extent do the provisions of these domestic implementing laws conform to the provisions of the relevant WTO agreements?

As noted earlier, the ITAA is the Main Act; however, detailed provisions on the operation of the anti-dumping regime are to be found in the Anti-Dumping Regulations of 2003. Chapter 4, sections 26 to 47, of the Main Act contains provisions on investigations, evaluation and adjudication procedures for applications by firms for the imposition of anti-dumping, countervailing or safeguard duties, or for the imposition of safeguard measures other than a customs duty. The International Trade Administration Commission (ITAC), established under the Act, is required to “evaluate the merits” of every application⁹¹ and make recommendation to the Tariff Board.⁹²

does not conform to the ADA would amount to a breach of the compliance obligation of the WTO Agreement.

⁸⁸ Ibid.

⁸⁹ However, the Anti-Dumping Regulations of 2003, which cover investigations and related issues, deal only with anti-dumping measures, with no separate references to countervailing measures. This integrationist approach does not appear to give adequate attention to many of the differences between the two agreements, such as those relating to the nature of evidence required (Art. 5.2 of ADA and Art 11.2 of ASC), different rules for the application and maximum duration of provisional measures (art 7 ADA and art 17 ASC), differences in factors to be considered in examining the impact on domestic industry (art 15.4 ASC and art. 3.4 ADA), different rules on retroactive application (art. 20 ASC and art. 10 ADA). These differences are likely to be taken into account in the interpretation of the agreements (see Qureshi, 2000).

⁹⁰ Joubert (2005), citing interview with Professor Colin McCarthy, acting head of ITAC.

⁹¹ Section 2.

⁹² Institutionally, ITAC is responsible for administering the entire trade remedies system. Unlike the old BTT, ITAC is independent of the Department of Trade and Industry, and reports directly to the Minister.

With respect to the consideration of alleged dumping and subsidised exports, section 32 provides definitions of terms that are broadly consistent with those provided in the AD and SCM agreements. The definition of domestic industry reflects the fact that South Africa is part of the Southern African Customs Union (SACU); thus a “SACU industry” is the equivalent of a domestic industry.⁹³

Section 33 establishes the right of informants to claim confidentiality and a specific provision on breach of confidence is contained in section 50. Final determination as to whether any information is confidential lies to the Supreme Court of Appeal.⁹⁴ The role given to the courts in the anti-dumping and countervailing system is one of the key features of the new legal framework. Section 46 provides that any party may apply to a High Court for a review of a determination, recommendation or decision, while section 47 provides that appeals against a High Court decision in terms of section 46 lies to the Supreme Court of Appeal or the Constitutional Court.

The Customs and Excise Act, as amended, compliments the ITAA. Chapter VI (sections 55-57A) deals with anti-dumping, countervailing and safeguard duties. Such duties can only be imposed by the Minister of Finance, through the Commissioner of Customs, at the request of the Minister of Trade and Industry under the provisions of the ITAA.⁹⁵ Far more detailed provisions on the administration of the anti-dumping system are, however, contained in the Anti-Dumping Regulations.

The Regulations contain 68 sections, and deal with virtually all the relevant rules in the AD agreement and many of the provisions of this agreement are inserted almost *verbatim* in the Regulations. More importantly, the discrepancies in the BTT Act have largely been addressed. Thus, for example, with respect to summoning of parties, section 6.10 now provides that “(t)here shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party’s case”.⁹⁶

⁹³ See Part A (1) of the Regulations. This conforms to the provision of Article 4.3 of the ADA and Article 16.4 of the ASC, both of which allow industries in a customs union to be taken as a domestic industry.

⁹⁴ Section 36.3

⁹⁵ Section 56 of the Customs and Excise Act.

⁹⁶ This repeats *verbatim* the provision of Article 6.2 of the A-D Agreement

Confidential information is protected, provided such information is so indicated, and provided a non-confidential version is made available.⁹⁷

In the circumstances of insufficient evidence, the investigating authority is required to terminate investigations, either initiated *ex officio* or upon a written application by an industry. The substantive obligations regarding the determination of injury and causality, as set out in the AD agreement, are also reflected in the Regulations. For instance, section 14 states that “a determination of threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility”.⁹⁸ Furthermore, the Regulations, unlike the BTT Act, now make explicit provisions for a sunset clause⁹⁹, interim and sunset reviews¹⁰⁰, price undertakings¹⁰¹, as well as judicial reviews¹⁰² and refunds.¹⁰³

With respect to the choice between imposing a full or lesser duty as provided for in Article 9 of the ADA, South Africa adopts the lesser duty rule, provided both the corresponding importer and exporter have cooperated fully with the Commission.¹⁰⁴ The ADA also offers members a choice between a prospective and retrospective duty assessment under certain circumstances.¹⁰⁵ South Africa opts for the retrospective approach. Section 32(2) of the Regulations allows the authorities to impose definitive anti-dumping duties with retroactive effect.¹⁰⁶

⁹⁷ This is in accordance with Article 6.5.1 of the A-D Agreement, which states that “(t)he authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof”.

⁹⁸ This section inserts verbatim the provisions of Article 3.7 of the A-D Agreement. Sections 13 to 16 of the Regulations deal with the determination of injury and causality.

⁹⁹ Section 38 provides that definitive anti-dumping duties will remain in place for a period of five years.

¹⁰⁰ Sections 41 and 53

¹⁰¹ Section 39

¹⁰² Section 64. Paragraph of 3 of section 64 also specifically states that “(a)ny Commission decision may be varied to give effect to a ruling of a Dispute Panel or the Appellate Body under the WTO Dispute Settlement Mechanism”, which further suggests that the domestic legal reform is undertaken with compliance with WTO law in focus.

¹⁰³ Section 65 of the Regulations

¹⁰⁴ Section 17 of the Regulations

¹⁰⁵ See Article 9 of the ADA allows retroactive assessment in the case of a violation of an undertaking. Article 10.2 also allows definitive anti-dumping duties to be levied retroactively to substitute for provisional measures, where a final determination of injury is made.

¹⁰⁶ See also s. 57A of the Customs and Excise act, 1964, as amended.

The above rather comprehensive legal changes broadly conform to the provisions of the Anti-Dumping Agreement. There are few areas of ambiguities or flexibilities in the agreement. Some of the obligations are qualified with the phrase “whenever practicable”, a sort of constructive ambiguity, providing for institutional flexibilities. South Africa’s anti-dumping regulations reflect these flexibilities. For instance, with respect to the requirement to provide relevant information or documentation to all interested parties, particularly, exporters, the Regulations appear to make this dependent on “when practicable”.¹⁰⁷

However, there are specific areas where compliance is not clear. Article 6.2 of the AD Agreement provides that all interested parties must have a full opportunity for the defence of their interests, and, in particular, requires the authorities to provide, on request, opportunities for all interested parties to meet those parties with adverse interests or to present information orally. However, the anti-dumping regulations allow the Commission to refuse a request for an oral hearing or for an adverse party meeting if granting such requests may result in undue delays.¹⁰⁸

Another possible area of discrepancy in the implementing regulations is with respect to the treatment of countervailing measures. Although the ITAA allows the authorities to impose countervailing duties, there are no specific provisions in the Regulations dealing with the investigative process with respect to countervailing measures. This is important given that, as stated earlier, there are some differences in the detail of the ADA and SCM. For instance, an application for a countervailing measure investigation must include “sufficient evidence” of the existence of a subsidy, injury and causality.¹⁰⁹ Also, there is a requirement for pre-initiation consultations.¹¹⁰

Safeguard Measures

With respect to safeguards, the Safeguard Regulations of 2004 cover procedures for investigation and application of safeguard measures. These procedures are broadly in

¹⁰⁷ Section 28.4 states that “(a)ll interested parties shall be deemed to have received notice of the investigation once it has been duly initiated (i.e. published in the Government Gazette”. Section 28.5 provides that all relevant documentation would be made available “unless the number of interested parties makes it impracticable”.

¹⁰⁸ Sections 5 and 6.

¹⁰⁹ Art. 11.2 SCM *contra* Art. 5.2 ADA

¹¹⁰ Article 13 SCM.

conformity with the provisions of the Agreement on Safeguards (AoS), particularly with respect to determination of injury, causality, application, and duration. The power of the Commission to refuse a request for oral hearing¹¹¹ may, however, limit the role of the interested parties in the investigation.

Article 3 of the AoS requires that the investigations must include “public hearings or other appropriate means” for the interested parties to present evidence and their views. The Appellate Body in *US-Wheat Gluten*¹¹² affirms this by stating that the interested parties must play a central role in the investigation and should be a primary source of information for the competent authority. It does not appear from the Regulations that such centrality is accorded to interested parties.

South Africa’s trade remedies laws and regulations were reviewed at the Committee on Anti-Dumping Practices, with questions posed by the EC, the US, Venezuela and Turkey on various aspects of the legislation and regulations. South Africa responded with explanations addressing the concerns expressed by these countries.¹¹³ The interest shown by some WTO members in South Africa’s trade remedy regime is not surprising given its reputation as one of the leading initiators of anti-dumping actions.¹¹⁴ Indeed, South Africa has been a subject of two requests for consultations, regarding its antidumping practices.¹¹⁵

In sum, South Africa’s record of implementing the WTO agreements examined in this chapter shows that although WTO law has largely shaped government policies, South Africa’s compliance has been partial or incomplete. But what is the implementation experience of Nigeria? This is the focus of the next part of this chapter.

¹¹¹ Section 5.1 of the Safeguard Regulations.

¹¹² Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001.

¹¹³ For detailed questions and answers during the review, see WTO documents: G/ADP/Q1/ZAF/1-5.

¹¹⁴ For instance, as of 2004, South Africa was the fifth biggest user of antidumping measures after India, the US, the EC, and Argentina (see WTO, 2005). http://www.wto.org/english/tratop_e/adp_e/adp_statab7_e.xls.

¹¹⁵ See *South Africa – Anti-Dumping Duties on Certain Pharmaceutical Products from India*, Request for Consultation by India, WT/DS168/1, April 1 1999, and *South Africa – Definitive Anti-Dumping Measures on Blanketing from Turkey*, Request for Consultations by Turkey, WT/DS288/1, April 9 2003. In both cases, no panel was established and no settlement was notified.

Nigeria's Implementation Experience

Non-Tariff Measures

As with the part on South Africa above, this section focuses on the following non-tariff measures: quantitative restrictions and import licensing and prohibitions; state trading; sanitary measures and technical regulations; investment measures; and trade in services. To what extent has Nigeria complied with these WTO obligations?

Quantitative restrictions and import licensing

From the mid-1970s onwards, Nigeria's main trade policy instruments shifted markedly away from tariffs to quantitative import restrictions, particularly import prohibitions and import licensing.¹¹⁶ Nigeria continues to apply import prohibitions to protect domestic industries¹¹⁷; to achieve economic development objectives¹¹⁸; and for security, health, or moral concerns. Nigeria is among a few developing countries that have invoked article XVIII:B (for balance of payments reasons) since their accession to the GATT.¹¹⁹ However, in the BOP Consultation with Nigeria in February 1996, the Committee on BOP Restrictions declared Nigeria's import restrictions to be inconsistent with WTO rules.¹²⁰

Although Nigeria was requested to remove the restrictions "without further delays"¹²¹, it merely notified the Committee on BOP Restriction in February 1998 of a "five-year time schedule" for their elimination.¹²² In another consultation in April 1998, the Committee told Nigeria that it was in breach of its WTO obligations as long as it maintained import restrictions.¹²³ Nigeria responded with another notification in

¹¹⁶ Oyejide et al (2005).

¹¹⁷ For instance, the almost permanent ban on the importation of textile and clothing since the late 1970s can be explained primarily in terms of protecting local industries (Oyejide *et al*, 2005). In late 2004, Nigeria banned imports of cocoa powder and cake in order to encourage the use of locally processed cocoa (IMF, 2005). Indeed, most import bans are introduced at the behest of local manufacturing interests, and, therefore, serve defensive protectionist purposes.

¹¹⁸ The import prohibition of gypsum, kaolin, bentonites and barites reflects attempt to promote local sourcing of raw materials (Oyejide et al, 2005). Also, to encourage rice production, Nigeria introduced an import ban on rice starting in January 2004 and introduced an import ban on recharge cards in order to ensure a larger domestic share of value added in the booming cellular phone industry (IMF, 2005).

¹¹⁹ Others include Bangladesh, Pakistan, Sri Lanka, and Tunisia (see Roessler in Krueger ed. 1998).

¹²⁰ WTO document WT/BOP/R/13

¹²¹ WTO document WT/BOP/R/13

¹²² Ibid

¹²³ See WTO document WT/BOP/N/32.

December 1998, stating that the proposed time schedule had been revised from five to three years.¹²⁴

In that notification, Nigeria averred that “(t)he revised three-year time schedule is a sign of flexibility and a demonstration of the Government’s commitment to fulfil Nigeria’s obligations in the WTO”.¹²⁵ Nigeria also submitted to the General Council a schedule for the elimination of restrictive trade measures maintained for BOP reasons¹²⁶, and later notified the Committee of the removal of these measures.¹²⁷

While the foregoing might suggest that sustained pressure by WTO institutions, such as the councils and committees, could help induce compliance, it also demonstrates the tension that could be produced between international obligations and domestic policy objectives.¹²⁸ Nigeria’s response did not amount to full compliance, because, although it no longer imposed import restrictions for BOP reasons¹²⁹, import bans are still widely used to protect domestic industries.

According to the WTO, “since 1998, there has been a 10-fold increase in products covered by import bans”.¹³⁰ Indeed, the Nigerian President told the media in 2003: “we are certainly going to ban more products. The idea is to protect our local industries and boost our manufacturing capacity substantially”.¹³¹ However, according to the EU, “Nigeria’s import ban was not compatible with, and indeed, forbidden by, WTO rules”.¹³²

¹²⁴ See WTO document WT/BOP/N/44 of 10 March 1999

¹²⁵ *Ibid.*

¹²⁶ WTO document, WT/BOP/N/45, 11 March 1999.

¹²⁷ WTO document WT/TPR/S/147.

¹²⁸ The pressure on Nigeria to remove the import restrictions under Article XVIII:B of the GATT was particularly strong. The BOP Committee suspended consultations four times in a two-year period to allow Nigeria to bring its measures into conformity with WTO rules. The EC indicated that it gave “high priority to the correct application of the WTO BOP provisions”, adding that “the full respect of GATT Articles XII and XVIII and the UR Understanding is of great importance”, and urged Nigeria to “bring this element of its trade policy into conformity with WTO rules” (WTO document WT/TPR/M/39/Add.1).

¹²⁹ This is difficult to establish. For instance, although Nigeria notified the WTO in 1999 that certain import bans imposed for BOP reasons would be lifted in 2000, the bans were still in effect as of end-2004 (IMF, 2005). Oyejide *et al* (2005) argue that Nigeria’s proposal to remove all import prohibitions was undermined by the upsurge in the use of import prohibitions during 2001-2004. Nigeria’s failure to make regular notifications makes its trade regime particularly opaque.

¹³⁰ WTO document, WT/TPR/M/147 of 14 June 2005.

¹³¹ *The Guardian* newspaper, Nigeria, December 18, 2003.

¹³² Claude Maerten, *Guardian* newspaper, 21 July 2001, pp 1-3.

With respect to import licensing, Nigeria abolished the general import licensing system in 1986, as part of the structural adjustment programme. Both in its notifications¹³³ to the WTO and its replies to the questionnaire¹³⁴ on import licensing procedures, Nigeria stated that it no longer maintained import licensing procedures as a general trade policy instrument. However, specific licensing requirements remain in place for a number of restricted products. Nigeria has, however, made no notifications since 1998, although the questionnaire is required to be completed annually¹³⁵. This is a clear violation of its procedural obligations under the agreement.

State Trading Enterprises

As part of its structural adjustment programme (SAP), launched in 1986, Nigeria abolished commodity marketing boards, privatised some public enterprises, and put others on a commercial footing. Consequently, in February 1998, Nigeria notified the Working Party on State Trading Enterprises that it “no longer maintains any State Trading Entity”.¹³⁶ In November 2002, Nigeria notified the WTO again, stating that it did not maintain any STEs and that “the situation has not changed since its new and full notification was made in 1998”.¹³⁷ No counter-notification has been made by any WTO member, as is possible under Paragraph 4 of the Understanding.

There are 1,500 state-owned enterprises in Nigeria, accounting for about 50 percent of GDP. The share of public consumption in GDP increased from 10% in 1997 to almost 30% in 2003, whereas the share of private consumption declined from 70% to around 40%.¹³⁸ Although state-owned enterprises (SOEs) are not prohibited under Article XVII of the GATT and the STE Understanding, Nigeria would arguably be in breach of WTO rules if any of the state-owned enterprises were to enjoy privileges, which enable them to “influence through their purchase or sales the level or direction of imports or exports”.¹³⁹

¹³³ See, for example, WTO documents G/LIC/N/2/NGA/1 of 25 July 1996 and G/LIC/N/3/NGA/2 of 18 February 1998.

¹³⁴ WTO documents G/LIC/N/3/NGA/1 of 25 July 1996

¹³⁵ Article 7 of the Agreement on Import Licensing Procedures states: “Members undertake to complete the annual questionnaire on import licensing procedures promptly and in full”

¹³⁶ See WTO document G/STR/N/3/NGA of 19 February 1998.

¹³⁷ See WTO document G/STR/N/8/NGA of 19 November 2002.

¹³⁸ WTO (2005)

¹³⁹ Paragraph 1 of the Understanding on the Interpretation of Article XVII.

The Panel on *Korea – Various Measures on Beef* made it clear that “a conclusion that a decision to purchase or sell was not based on a ‘commercial considerations’, would suffice to show a violation of Article XVII”.¹⁴⁰ Given that Nigeria uses differential exchange rates to value “official” and private sector imports, and some of the SOEs benefit from this preferential treatment¹⁴¹, it is argued that Nigeria is not in full compliance with the provisions of Article XVII of the GATT.

Sanitary Measures and Technical Regulations

Nigeria actively controls and regulates food, drugs, cosmetics etc. The Standards Organisation of Nigeria (SON) and the National Agency for Food and Drug Administration and Control (NAFDAC) are responsible for standard setting, control and regulation. Nigeria’s rules concerning sanitary and phytosanitary standards are well-defined.¹⁴² However, according to the WTO, “in the absence of established Nigerian standards, international standards are adopted, such as those set by the Codex Alimentarius Commission”.¹⁴³

The preference for “established Nigerian standards” over available international standards is arguably inconsistent with the harmonisation obligations.¹⁴⁴ Nigeria’s trading partners have also claimed that NAFDAC “has occasionally challenged legitimate food imports” as a result of “an occasionally heavy-handed or arbitrary approach to regulatory enforcement”.¹⁴⁵ Furthermore, despite the prevalence of SPS regulations, Nigeria has made no notification under the SPS Agreement since 1998. The transparency of SPS regulations is stressed in Annex B of the SPS Agreement, which sets out the notification obligations. The failure to notify the SPS measures is a clear violation of the SPS transparency obligations.

¹⁴⁰ Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by the Appellate Body Report, WT/DS161/AB/R.

¹⁴¹ Trade Policy Review of Nigeria, WTO (1998)

¹⁴² USTR (2005).

¹⁴³ WTO (2005)

¹⁴⁴ Developing countries are not granted exemption from the harmonisation obligations, which is why they are encouraged to participate actively in the relevant international standardising organisations. The developed countries are enjoined to assist them in this regard (Article 10.4 of the SPS Agreement). However, a developing country may, upon request, be granted “specified, time limited exceptions from the SPS obligations by the SPS Committee (Article 10.3).

¹⁴⁵ USTR (2005). Nigeria’s agricultural exports have also been rejected in foreign markets due to failure to meet certain SPS requirements. Several export consignments were refused between July 2001 and May 2002 (WTO, 2005).

With respect to the TBT Agreement, Nigeria has established a wide range of standards, covering several products. All the standards and technical regulations are mandatory. Nigeria suspended its membership of the International Standardisation Organisation (ISO) in the 1980s and early 1990s, but is currently a member of the organisation. The Standards Organisation of Nigeria (SON) is the sole statutory body responsible for standardising and regulating the quality of all products in Nigeria.

In the absence of established Nigerian standards, international standards, set by ISO and the International Electrotechnical Commission (IEC) are adopted. The TBT Agreement aims to allow the preservation of indigenous technology and technologies appropriate to developing countries' development needs. Thus, Article 12.4 provides that developing country members "should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs".

However, this flexibility does not seem to exempt developing countries from the general obligation not to use standards for protectionist purposes, and may be interpreted narrowly by a WTO panel or the Appellate Body.¹⁴⁶ In this regard, the tendency to give preference to "Nigerian established standards" over international standards could be found to be inconsistent with the provision of Article 2.4 of the TBT agreement.¹⁴⁷ With respect to the transparency requirements of the TBT Agreement, Nigeria has made no notification since 1998.¹⁴⁸

Investment Measures

In 1996, pursuant to Article 5.1 of the TRIMs Agreement, Nigeria notified the Committee on TRIMs that it had no local content laws or regulations, but added that "there exist some incentives for the use of local raw materials, on a non-discriminatory basis, under the Industrial Policy of Nigeria".¹⁴⁹ No further notification has been made in this regard since 1996. However, local-content requirements have

¹⁴⁶ Roessler in Krueger ed (1998)

¹⁴⁷ See the Appellate Body ruling in the *EC-Sardines* case.

¹⁴⁸ In 1996, Nigeria notified the WTO of the process of preparation and adoption of technical regulations and standards, as well as details of its enquiry point (see WTO document G/TBT/2/Add.20 of 2 August 1996.

¹⁴⁹ See WTO document G/TRIMS/N/NGA/1 of 31 July 1996.

assumed increasing role in Nigeria's industrial policy.¹⁵⁰ For instance, a tax credit of 20% is granted for five years to industries that use certain minimum level of local raw material.¹⁵¹ Foreign oil companies are under "significant pressure" to increase procurement from indigenous firms.¹⁵² The government also requires local bread producers to use a flour mix containing 10% cassava. Local-content or sourcing conditions are an integral part of Nigeria's industrial policy framework. This appears to place Nigeria in conflict with some of the TRIMs obligations.

Trade in Services

Nigeria made scheduled commitments in 32 out of the 155 sub-sectors recognised by the WTO.¹⁵³ The sectors are financial services (banking and other financial services), telecommunications services, tourism and travel services, and transport services. In the post-Uruguay Round financial services negotiations, Nigeria made additional commitments covering insurance services and transactions in securities. It also signed the Fifth Protocol to the GATS. Telecommunications and financial services have, indeed, been the subject of ambitious liberalisation commitments under the GATS.¹⁵⁴

However, with respect to telecommunications, the National Carrier, NITEL, has monopoly of all public switched and international services, and has the responsibility for network infrastructure expansion. The National Insurance Corporation of Nigeria (NICON) also enjoys monopoly over the insurance of government properties. Nigeria schedule provides that "Guarantees and commitments are subject to regulations,"¹⁵⁵ and several of the commitments are unbound. Clearly, with commitments in 32 out of possible 155 services sub-sectors¹⁵⁶, Nigeria's services sector, like its industrial and agricultural sectors, is highly protected. Foreign involvement in Nigeria's services

¹⁵⁰ To be sure, developing countries generally have tended to use performance requirements in their economic policy making, which is why many of these countries, led by India and including Nigeria, opposed the extension of GATT disciplines to investment measures during the Uruguay Round. Indeed, a significant number of developing country members of the WTO did not notify their TRIMs-inconsistent measures within the transition period, and many still maintained local content and trade balancing requirements after this period (see Footer, 2001 at p. 80).

¹⁵¹ The minimum levels of local raw materials are, by sector: agric-allied (70%); engineering (60%); chemicals (60%); and petrochemicals (70%).

¹⁵² USTR (2005).

¹⁵³ In contrast, South Africa has 91 GATS services sector with commitments (WTO, 2005).

¹⁵⁴ See WTO document GATS/SC/65/Suppl.1 of 26 February 1998 for Nigeria's Schedule of Commitments.

¹⁵⁵ Ibid.

¹⁵⁶ This compares less favourably to South Africa, which made commitments in 91 sub-sectors.

sector is also very limited. As a result, compliance with the GATS obligations has not been an important issue.

Trade Remedy and Safeguard Rules

Nigeria's Anti-Dumping and Subsidy Countervailing Rules and Regulations

Under the Nigerian Customs and Excise Management Act and the Customs Duties (Dumped and Subsidised Goods) Act of 1958, the power to impose quantitative restrictive trade measures or vary duties on imports is vested in the President. By giving the President unfettered powers to impose trade remedy and safeguard measures, these laws are inconsistent with the relevant provisions of the WTO Agreements, which, *inter alia*, provide for investigative procedures, the establishment of injury and causality, sunset clauses, and judicial review.

At its Trade Policy Review in 1998, Nigeria admitted that its trade remedy laws were inconsistent with WTO rules but also pointed out that it did not have the institutional and regulatory capacity to investigate anti-dumping issues.¹⁵⁷ As a result, Nigeria has not imposed any anti-dumping duty since the last one was introduced in 1998. However, all the previous anti-dumping duties on certain products were incorporated into the customs duty on these products and applied on an MFN basis.¹⁵⁸ Given that these previous anti-dumping duties were imposed in the first place without investigations into dumping, injury and their causal relations, incorporating them into customs duty amounted to a violation of Nigeria's WTO obligations.¹⁵⁹

Safeguard Measures

Although Nigeria has not applied any trade remedy measure since 1998, it has continued to resort to the use of safeguard measures, even though it has no formal legislative procedures on safeguard actions. Article 11 of the AoS provides that a Member must not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994, unless such action conforms to the

¹⁵⁷ See WTO document WT/TPR/M/39/Add.1, 12 November 1998.

¹⁵⁸ This issue was taken up by some WTO members during Nigeria's Trade Policy Review meeting. Its response was that this was done as a general review of its tariff structure and that there was "no expressed purpose to incorporate anti-dumping duties into the customs duty" (Ibid).

¹⁵⁹ Article 10.4 of the Anti-Dumping Agreement provides for a refund in the event of a finding of no injury, while Article 11 provides for a sunset clause under which an anti-dumping duty should be terminated after five years unless dumping and injury are likely to continue or recur.

provisions of the Agreement. The WTO members with substantial export interests in Nigeria, notably the EU¹⁶⁰ and the US¹⁶¹, have constantly challenged the WTO compatibility of Nigeria's use of import prohibitions for safeguard reasons.

For instance, several communications were exchanged between Nigeria and the United States on this issue, with the latter questioning Nigeria's adoption of safeguard measures in the absence of a formal WTO-compatible legislative framework.¹⁶² At its Trade Policy Review in 1998, Nigeria told the Trade Policy Review Body (TPRB) that no new safeguard measures would be taken "until an appropriate domestic legislation is enacted".¹⁶³ Notwithstanding this promise, in 2004, Nigeria imposed import bans on over 40 products mainly for safeguard reasons.¹⁶⁴

Nigeria's traditional practice of banning imports to protect domestic industries has only marginally been tempered by its WTO obligations, and has, indeed, become more prevalent in recent years, with major expansions in the list of prohibited products taking place in 2001, 2003, and 2004.¹⁶⁵ At its Trade Policy Review in June 2005, Nigeria told the TPRB that there were draft Bills, "prepared with assistance from relevant international organisations", and which "have fully taken into account Nigeria's rights and obligations in the WTO".¹⁶⁶ However, these bills have gestated for several years, since 2001, with no apparent urgency to pass them into law.

In sum, Nigeria's record of implementing its WTO obligations, as examined above, is evidently very poor. There is a remarkable divergence between Nigeria's policy

¹⁶⁰ The EU accounted for 33% of Nigeria's imports in 2003. Nigeria's imports from the EU in 2003 consisted mainly of embroidered textile fabrics (28.4%); frozen fish (17.2%); milk and cream products (9.5%); tobacco and tobacco products (5.6%); malt extract and food preparations (4.5%); and electricity generating sets and rotary converters (4.0%).

¹⁶¹ The US accounted for 16% of Nigeria's imports in 2003. Nigeria's main imports from the US in 2003 consisted mainly of agricultural products (32.6%), transportation equipment (28.7%), electronic products (13.4%), machinery (9.5%), and chemical and related products (6%).

¹⁶² See, for example, WTO document G/SG/Q2/NGA/3 of 8 April 1998, which contains a summary of the communications between the US and Nigeria on the latter's safeguard actions.

¹⁶³ See WTO documents G/SG/Q2/NGA/4, 10 November 1998 and WT/TPR/M/39/Add.1, 12 November 1998.

¹⁶⁴ WTO (2005); IMF (2005).

¹⁶⁵ Ibid. Nigeria uses import prohibitions rather than price-based measures, because import bans are considered to be administratively easier to monitor, since the presence of banned products on local markets is, in principle, sufficient for enforcement (Oyejide et al, 2005).

¹⁶⁶ See WTO document, WT/TPR/M/147 of 14 June 2005. There is little evidence that Nigeria's bureaucrats and legislators attach any priority to passing the bills into law.

statements and actions. Promises made during its 1998 Trade Policy Review¹⁶⁷ were not kept, and quotas, import bans and licensing restrictions have, in fact, increased since 1998, in violation of WTO law. Furthermore, several notifications remain outstanding since that year. This can only suggest that WTO law is having only marginal impact on Nigeria's trade governance.

Table 1: Trade remedy and NTM rules: Compliance records of South Africa and Nigeria

	South Africa	Nigeria
Non-Tariff Measures		
• Quantitative restrictions and import licensing	Laws largely conform but ministers have wide discretionary powers	QRs still widely used for BOP and other reasons
• State trading	Full compliance. STEs abolished	No STEs, but SOEs still enjoy preferential treatment
• SPS and TBT	Largely compatible	Largely compatible, but tendency to prefer domestic standards to available international standards
• TRIMs	Incomplete compliance: still imposes local content requirements	Incompatible: wide use local content requirements
• GATS	Concerns about compliance: various domestic laws appear to breach market access and national treatment obligations	Largely irrelevant because of insignificant commitments
Trade Remedies		
• Anti-dumping agreement • Agreement on subsidies	Several laws enacted or revised to bring trade remedy regime into compliance, but due process provisions of the WTO agreements may not be strictly adhered to	No WTO-compatible trade remedies rules to date
Safeguards		
• The Agreement on safeguards	Safeguard regulations broadly in conformity, but due process obligations may not fully complied with	No WTO-compatible safeguards law or regulation, but Nigeria widely and frequently imposes safeguard measures
Procedural Obligations		
• Notifications	Notifications largely made, but some still outstanding	Most notifications last made in 1998. Several still outstanding.

Conclusion

This chapter concludes the case studies on the implementation of WTO obligations by South Africa and Nigeria. Its main purpose was to complement the earlier more detailed case studies. The chapter shows a consistent pattern of behaviour by both countries. For instance, considering the raft of legislation introduced to date by South Africa, it is clear that the country has made significant efforts to comply with WTO rules on non-tariff measures and trade remedies. Yet, its compliance record is mixed. This is particularly so with respect to the GATS, where there is evidence of non-compliance or where compliance is not clear. This mixed picture, characterised by

¹⁶⁷ Nigeria's trade policy is reviewed by the WTO every seven years.

substantial yet incomplete compliance, is consistent with the findings in the earlier more detailed case studies on the customs valuation and TRIPS agreements.

This chapter also confirms the earlier trends established in the case of Nigeria. Ten years since WTO law entered into force, Nigeria has introduced no WTO compatible trade remedy and safeguard laws and regulations. However, it continues increasingly to introduce import bans for safeguard reasons. Nigeria is also in breach of the transparency obligations, having made no notification since 1998. Both in terms of substantive and procedural obligations, Nigeria's compliance record is significantly poor across all the WTO agreements examined in this chapter and in the previous case studies. There is thus a consistent pattern of substantial non-compliance.

Chapters 4, 5 and 6 have now examined the implementation and compliance records of South Africa and Nigeria in different areas of WTO obligations. The remaining task now is to explain the behaviours of these countries in the light of their underlying motivations and determinants. This explanatory task is taken up in the next chapter.

PART III: EXPLANATIONS AND CONCLUSIONS

CHAPTER 7

Explaining the Compliance Behaviour of South Africa and Nigeria

At the heart of this thesis are two empirical questions: how and to what extent have South Africa and Nigeria implemented their WTO treaty obligations to date, and what factors have influenced their behaviour? The first question was explored extensively through the case studies in chapters 4, 5 and 6, which, respectively, examined the implementation by these countries of the WTO Customs Valuation Agreement, the TRIPS Agreement, and WTO rules on trade remedies and non-tariff measures. These were essentially legal analyses, which focused on the formal implementation of these agreements by South Africa and Nigeria, as well as on the conformity of the national implementing legislation with the substantive obligations of the various agreements.

The focus of the present chapter is an attempt to answer the second question, by using socio-legal analysis systematically to explain the compliance behaviour of the two countries. The chapter begins with a brief summary of the findings of the case studies. Section 2 briefly revisits the theoretical argument and explanatory theory. Section 3 then attempts to explain the experiences of these countries in the light of the explanatory variables developed in chapter 2 and the indicators discussed in chapter 3 about the social, economic, political and institutional contexts of trade governance in the two countries. As mentioned previously, both chapters 2 and 3 provide an essential backdrop and context for a proper understanding of the analysis and explanations in the present chapter. Section 4 summarises and concludes.

Impact of WTO law on Trade Governance: A Brief Overview of the Findings

Tables 1 and 2 show broadly the compliance records of South Africa and Nigeria with respect to the WTO agreements examined in this thesis. The findings show that South Africa has introduced a raft of new and amended laws since 1997 to bring its trade and trade-related regimes into compliance with WTO obligations. This demonstrates the seriousness with which South Africa has approached WTO implementation

efforts, and suggests, *prima facie*, that WTO law has had significant impact on trade law reforms in South Africa.

Table 1: Compliance with WTO trade and customs rules

Agreement	SOUTH AFRICA		NIGERIA	
	Pre-WTO	Post-WTO	Pre-WTO	Post-WTO
Import Licensing	<ul style="list-style-type: none"> I&ECA, 1963 	<ul style="list-style-type: none"> ITAA, 2002 	<ul style="list-style-type: none"> CEMA, 1990 	X
Anti-Dumping	<ul style="list-style-type: none"> BTT, 1992 C&EA, 1964 	<ul style="list-style-type: none"> ITAA, 2002 A-DR, 2003 C&EA, 2003 	<ul style="list-style-type: none"> CEMA, 1990 CD(D&SG), 1958 	X
Subsidies and countervailing Measures	<ul style="list-style-type: none"> BTT, 1992 C&EA, 1964 	<ul style="list-style-type: none"> ITAA, 2002 A-DR, 2003 C&EA, 2003 	<ul style="list-style-type: none"> CEMA, 1990 CD(D&SG), 1958 	X
Safeguards	<ul style="list-style-type: none"> BTT, 1992 	<ul style="list-style-type: none"> ITAC, 2002 	<ul style="list-style-type: none"> CEMA, 1990 CD(D&SG), 1958 	X
Customs Valuation	<ul style="list-style-type: none"> C&EA, 1964 C&E Rules 	<ul style="list-style-type: none"> C&EA (a) C&E R (a) VG, 2003 	<ul style="list-style-type: none"> CEMA, 1990 CD(D&SG), 1958 PSI Decree, 1996 	C&EMAA, 2003 (not yet in force).

Keys: I&ECA: Import & Export Control Act; BTT: Board of Tariff & Trade Act; C&EA: Customs and Excise Act; ITAC: International Trade Administration Act; A-DR: Anti-Dumping Regulations; VG: Valuation Guide; CEMA: Customs & Excise management Act; CD(D&SG): Customs Duties (Dumped & Subsidised Goods) Act; PSI: Pre-shipment Inspection Decree; C&EMAA: Customs & Excise Management (Amendment) Act.

Table 2: Compliance with the TRIPS Agreement

IP Area	SOUTH AFRICA		NIGERIA	
	Pre-TRIPS	Post-TRIPS	Pre-TRIPS	Post-TRIPS
Copyright	<ul style="list-style-type: none"> CA, 1979 PPA, 1967 	<ul style="list-style-type: none"> IPLAA, 1997 CAA, 2002 PPAA, 2002 	<ul style="list-style-type: none"> CA, 1990 	<ul style="list-style-type: none"> CAD, 1990
Trademarks	<ul style="list-style-type: none"> TA, 1993 	<ul style="list-style-type: none"> IPLAA, 1997 	<ul style="list-style-type: none"> TA, 1990 	X
Geographical Indications	<ul style="list-style-type: none"> TA, 1993 MMA, 1941 LPA, 1989 	X	<ul style="list-style-type: none"> TA, 1990 (collective mark) 	
Industrial Designs	<ul style="list-style-type: none"> DA, 1993 	<ul style="list-style-type: none"> IPLAA, 1997 	<ul style="list-style-type: none"> P&DA, 1990 	X
Patents	<ul style="list-style-type: none"> PA, 1978 PBRA, 1976 	<ul style="list-style-type: none"> IPLAA, 1997 PBRA, 1996 M&RSA, 2002 	<ul style="list-style-type: none"> P&DA, 1990 	
Layout-Designs	<ul style="list-style-type: none"> DA, 1993 	<ul style="list-style-type: none"> IPLAA, 1997 	X	X
Undisclosed Information	<ul style="list-style-type: none"> 1965 and 1946 acts 	X	X	X
Control of Anti-competitive Practices	<ul style="list-style-type: none"> PA, 1978 MPCA, 1976 	CA, 1998	<ul style="list-style-type: none"> P&DA, 1990 NOIPA, 1992 	X
Enforcement	<ul style="list-style-type: none"> MMA, 1941 CA, 1978 	CGA, 1997	<ul style="list-style-type: none"> MMA, 1990 CA, 1990 	<ul style="list-style-type: none"> CAD, 1990

Keys: CA: Copyright Act; PPA: Performers' Protection Act; MMA: Merchandise Marks Act; LPA: Liquor Products Act; PBRA: Plants Breeders' Rights Act; IPLAAA: Intellectual Property Laws Amendment Act; CGA: Counterfeit Goods Act; P&DA: Patents and Design Act; CAD: Copyright Amendment Decree.

However, as the case studies have also shown, the substantial legal changes do not necessarily mean that South Africa's trade laws are *fully* in conformity with the WTO obligations in the agreements covered. There are still areas of non-compliance or areas where compliance is not clear. For instance, the lack of post-TRIPS laws on the protection of geographical indications and undisclosed information, and the non-

protection of computer programmes as literary works, would amount to non-compliance. Equally, the ambiguity about the civil enforcement procedures and remedies, where most powers only exist in the inherent jurisdiction of the courts, also suggests lack of full compliance. Furthermore, some provisions of the National Health Act of 2003 appear to be at odds with South Africa's legally binding commitments under the GATS. The conclusion, therefore, is that WTO law has had significant impact on trade governance in South Africa; however, compliance is mixed or partial.

With respect to Nigeria, the findings show significant non-compliance. As tables 1 and 2 show, Nigeria has made virtually no post-WTO changes in its laws. First, as made clear in chapter 3, Nigeria has not ratified the WTO treaty, even though, as a dualist state, no treaty is effective in its domestic law unless ratified by Parliament. This casts doubt on the status of the WTO Agreement and its annexes in Nigeria's domestic law.

Secondly, Nigeria's existing trade remedy and safeguard laws are completely incompatible with the WTO agreements on anti-dumping, subsidy and countervailing measures, and safeguards. Nigeria's customs valuation rules are also inconsistent with WTO law. New valuation legislation was passed in 2003, but has not been brought into effect or notified to the WTO. The amendment Act itself is inconsistent with the ACV in some important respects, including the lack of appeal procedures.

In the case of TRIPS, Nigeria's copyright laws conform substantially to the provisions of the TRIPS agreement, and the legislation was furthered strengthened with changes introduced in the copyright amendment decree of 1999. However, in the other IP areas covered by the TRIPS agreement, there are significant discrepancies in Nigeria's existing laws. The mere absence of any post-WTO implementing legislation suggests that, unlike South Africa, Nigeria has approached WTO implementation efforts with no degree of seriousness. The conclusion, on the basis of these findings, is that WTO law has had no significant impact on trade law reform in Nigeria.

Revisiting the Theoretical Argument and Explanatory Variables

As set out in chapter 1, the main hypothesis of this thesis is that notwithstanding the fundamental principles of *pacta sunt servanda* and good faith fulfilment, international

trade law has no independent compliance pull: its impact or effectiveness is a function of a complex interplay of legal and non-legal factors. Thus, compliance is not unconditional. The foregoing findings support this thesis. While South Africa has substantially complied, its behaviour still represents partial, rather than full, compliance. Nigeria, on the other hand, has virtually ignored its WTO obligations.

The task in this chapter is to explain South Africa's significant, yet partial, compliance and Nigeria's virtual non-compliance. Significant reliance is placed on official government statements, interviews with senior government officials, trade diplomats and non-governmental actors, as well as news accounts, reports and data from international organisations and independent research institutes.

Determinants of the Compliance Behaviour of South Africa and Nigeria

Table 3 highlights the key legal and non-legal explanatory variables, derived from the literature survey in chapter 2. Table 3 also contain some indicators, discussed in chapter 3, about the domestic structures of trade governance in the two countries. These variables and indicators are used to explain the behaviour of the two countries.

Legal Determinants:

Compliance under the "shadow of WTO law"

Neither South Africa nor Nigeria has been a subject of full dispute settlement procedures in the WTO. However, this is not to say that certain actions of these countries have not been taken in the shadow of WTO law, that is, as a result of concerns about litigation and legal sanctions. For instance, in 1996, the US made series of complaints at the TRIPS Council meetings against some developing countries regarding the implementation of Articles 70.8 and 70.9 of the TRIPS Agreement. The US put enormous pressure on these countries¹ and eventually requested consultations with Pakistan² and India.³

¹ The countries listed by the US were Guatemala, India, Kuwait, Madagascar, Morocco, Myanmar, Nicaragua, Pakistan, Qatar, Tunisia, Zambia and Zimbabwe.

² See *Pakistan – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Consultation Request by the United States, WT/DS36/1, 30 April 1996

³ See *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Consultation Request by the United States, WT/DS50/1, 2 July 1996

Table 3: Variables, selected indicators and sources

Variables	South Africa	Nigeria	Source
Legal Variables:			
1. "Shadow of the law" variables			
• Requests for consultations	2	-	WTO
• Requests for panel	-	-	WTO
• Panel and Appellate Body rulings	-	-	WTO
• Trade Policy review	2	3	WTO
• Normative pressures by WTO bodies			WTO councils and committees
2 Reputational factors			Perception-based; interviews; news account
• Concern about loss of reputation			
3. Endogenous preference:			
• <i>Ex ante</i> preference, perception of fairness, legitimacy, ownership etc			Perception-based; interviews; Uruguay round positions
4. Normative commitment			
• (value of the regime argument)			Perception-based; interviews
5. The "new sovereignty" variable			
• Desire to be credible actor in the process			Perception-based; interviews; news accounts etc
• Concern for rule abidance			
6. Regime type variable:	0.32	-1.41	Kaufman et al (-2.5 to 2.5) Perception-based; interviews
• Domestic rule of law and legality			
7. Autopoiesis ⁴ :			
• conflicts of legal norms/culture			Perception-based; interviews; Reports; case law etc.
Non-legal Variables			
1. Domestic circumstances: economic factors:			
• Index of economic freedom (overall)	"mostly free"	"repressed"	Heritage (2006)
• Trade openness	"mostly free"	"repressed"	Heritage (2006)
• Trade and Development Index	41/110	109/110	UNCTAD, 2005
2. Regime linkages:			
• Donor conditionality			IMF, World Bank, WIPO,
• Concerns about globalisation, market forces, trading partners, investors etc			WCO, Paris Club, interviews, news accounts etc
3. Institutional variables:			
• Government effectiveness	0.74	-1.02	Kaufmann et al (2004)
• Bureaucratic quality	2	1	UNCTAD (0-4), 2005
• Executive constraints	7/10	5/10	Polity IV
• Government intervention	"mostly free"	"repressed"	Heritage, 2006
• Regulation	"mostly un-free"	"repressed"	Heritage, 2006
4. Interest group variables:			
• Societal constraints	2/10	2/10	Polity IV
• Compliance constituency/institutional supporters			Interviews, news accounts etc.

Although Nigeria was not mentioned among the non-compliant members, its delegation promptly notified the TRIPS Council of the government agency in charge of receiving patent applications for inventions in the field of pharmaceutical and

⁴ This suggests that a legal system is operationally closed to other systems. While it may become open as a result of structural coupling, there are likely to be internal constraints that make mutual constitution incomplete. See chapter 2 for the theoretical overview.

agricultural chemical products.⁵ At the Council meeting of 18 September 1996, the US "thanked" Nigeria but suggested that but for the legal pressure, Nigeria would probably not have voluntarily complied with the TRIPS provisions.⁶ Given Nigeria's customary lethargic attitude to its WTO obligations, it is evident that the threat of legal action may have contributed to its compliance in this case.

There is, however, little evidence that concerns about litigation and sanctions have played any significant role in shaping Nigeria's overall compliance behaviour, as evident from its virtual non-compliance with the substantive, and, indeed, much of the procedural, obligations. Although there have been several criticisms of Nigeria's non-compliant behaviour at various WTO bodies⁷, no WTO member has, so far, considered it worthwhile to invoke the dispute settlement procedures against the country.⁸ Nigeria clearly has no expectation of being subjected to the enforcement procedures, and this may have led, in part, to the seeming impunity with which it treats WTO implementation efforts. On the other hand, South Africa has approached such efforts with some seriousness. What role have the "in the shadow of the law" variables played in this?

South Africa has been a subject of two requests for consultations under the DSU⁹. It was also threatened with WTO litigation by the US during the Medicines Act saga, as well as for alleged violation of its market access and national treatment obligations under the GATS. Given the levels of foreign involvement in its economy, which is far more sophisticated and diversified than that of Nigeria, South Africa is more prone to threats of legal action and possibility of sanctions than Nigeria. As a result, there is far greater awareness of international trade law considerations by South Africa than Nigeria. This is evident from the attitude of South Africa's trade officials.

⁵ See document IP/N/1/NGA/1 of 17 September 1996.

⁶ See document IP/C/M/9 of 30 October 1996 at p.7

⁷ See, in particular, reports of Nigeria's Trade Policy Review.

⁸ A Member has broad discretion in deciding to bring a case against another Member under the DSU. Indeed, article 3.7 DSU states that "[b]efore bringing a case, a member shall exercise its judgment as to whether action under these procedures would be fruitful". The term "fruitful" would arguably include "worthwhile".

⁹ These were pursuant to the Anti-Dumping Agreement. See: WT/DS168 and WT/DS288. However, Nigeria was a Third Party in the *Shrimp Turtle* case, Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November, 1998, DSR 1998: VII, 2755.

For instance, when asked why there is a reasonable level of compliance with the customs valuation agreement, senior valuation officials said, “we have to play by the international rules”.¹⁰ Virtually every customs officer has the “Valuation Guide”, which contains the provisions of the WTO agreement, as well as corresponding provisions in the Customs and Excise Act and Rules. Most of the trade laws introduced since 1997 were explicitly designed to implement South Africa’s WTO obligations.

The attitude of government officials is that notwithstanding the implementation challenges, South Africa is “obliged” to meet its WTO obligations, because “if we don’t we can be challenged”.¹¹ Alan Hirsch, a senior economic adviser to the government, noted that South Africa stopped its subsidy programme partly because “it was more likely that we would be punished by one of our major trading partners using the anti-dumping or countervailing-duty measures”.¹² Indeed, officials confirm that a number of disputes have been resolved bilaterally.¹³

The enforcement or shadow of the law variables are not limited to direct enforcement through litigation and legal sanctions, but also include indirect means such as monitoring and reviews.¹⁴ What role has the review process played?¹⁵ There is evidence that the WTO review mechanisms have played some, albeit limited, role in inducing compliance. For example, the review process at the TRIPS Council had an impact on the behaviour of South Africa and Nigeria, particularly with respect to the procedural obligations. The practice of keeping a country's review on the agenda until that country has satisfactorily responded to *all* outstanding questions served as a "name and shame" strategy that helped to induce compliance with the procedural obligations, although this was clearly helped by the Council's flexibility with respect to deadlines.¹⁶

¹⁰ Interview, Pretoria, 2003

¹¹ Ibid.

¹² Hirsch in Krueger ed (1998, p.392)

¹³ Interview, Pretoria, 2003.

¹⁴ Chayes and Chayes (1995); Victor, Raustiala and Skolnikoff eds. (1998).

¹⁵ Qureshi (1995/1999) argues, for instance, that the WTO Trade Policy Review Mechanism (TPRM) is an instrument of enforcement, with capacity to influence the course of state behaviour.

¹⁶ The reviews of both Nigeria and South Africa were on the agenda for nearly three years.

The peer review and pressure at the Committees on Safeguards, Anti-Dumping Practices, and Subsidies and Countervailing Measures clearly also increased awareness about WTO legality of the domestic laws of these countries, and, in particular, played a major role in ensuring that South Africa took greater care in drafting its trade remedies legislation.¹⁷ The consultations at the Balance of Payments Committee forced Nigeria to undertake to stop imposing import bans for balance of payment reasons, although Nigeria rarely fully honoured promises made at the WTO. This is evident from the fact that several notifications are still outstanding, and no post-WTO legislation has so far been passed despite several promises.

Nigeria has, to date, been the subject of three Trade Policy Reviews – respectively, in 1991, 1998 and 2005. Each highlighted the GATT/WTO incompatibility of several trade measures, yet little attempt has, so far, been made to bring these measures into conformity with WTO rules. In the 2005 Trade Policy Review, the WTO noted that “Nigeria’s trade laws have remained unchanged and the trade policy has become even more restrictive”.¹⁸ With respect to the TRIPS Agreement, the WTO said: “since the last TPR of Nigeria, legislation on intellectual property rights has remained unchanged”.¹⁹

In sum: with respect to Nigeria, the role of the “shadow of the law” variables, whether defined narrowly in terms of direct enforcement or broadly in terms of surveillance and implementation reviews, is negligible. Nigeria has not acted with any significant awareness of WTO law considerations or concerns about possible WTO litigation or sanctions. On the other hand, South Africa appears to have acted more in the shadow of WTO law. However, while concerns about litigation and finding of violation may have contributed to South Africa’s compliance behaviour, they are not the decisive

¹⁷ In 1996, South Africa’s pre-WTO trade remedies laws were subjected to close scrutiny by other WTO members at the Committee on Anti-Dumping Practices. Several discrepancies were highlighted, and South Africa promised to make relevant changes in its laws (see WTO documents G/ADP/W/395 and G/SCM/W/405 of June 1996). The knowledge that the amendment legislation would still be the subject of detailed review also appeared to have led South Africa’s legal drafters to take the efforts to use the AD and SCM agreements as a model and in looking at the trade remedy regimes of some major WTO members (see Joubert, 2005).

¹⁸ See document WT/TPR/S/147

¹⁹ Ibid, at p. 45.

determinant. This leads to another variable: reputational factors²⁰, which have often been given a theoretical centrality as an extremely important variable in the compliance literature.²¹

The Reputational Impact of WTO law

To the extent that reputation refers to desire for being seen as a reliable and credible partner, this variable has played virtually no role in shaping Nigeria's behaviour in respect of WTO law. The evidence bears this out: Nigeria has introduced no post-WTO legislation to date, and did not pay its financial contributions to the WTO for five years, between 2000 and 2005. This was so despite the "social opprobrium" that it faced in the organisation.²² Nigeria only paid up after enormous pressure and when it became clear that it was going to be denied some organisational benefits.²³

Nigeria's behaviour in the WTO is largely characterised by rhetoric and "cheap talk", that is, saying what others want to hear.²⁴ Frequently, Nigeria's delegates speak one way in Geneva, while its trade officials act another at home. Oyejide *et al* note that "there is a divergence between policy statements and policy action in Nigeria", and cite examples of promises made to WTO bodies that were not kept.²⁵ This is not the behaviour of a country that craves a reputation for reliability and consistent international behaviour.

Yet, this does not mean that Nigeria has no reputational concerns in international law generally. For instance, it is a very active member of the Organisation of Petroleum Exporting Countries (OPEC) and appears to value its relationship with the IMF and

²⁰ Unlike sanctions or retaliation, which can be an immediate response to defection, reputational expectation concerns how others see an actor in relation to the future. Reputation affects an actor's image and perception about its reliability. For a discussion of the role of reputation in rule compliance, see, e.g., Keohane (1984)

²¹ Downs and Jones (2002).

²² One WTO official remarked that "no one likes Nigeria here". A Nigerian is one of the Divisional Directors in the WTO. He applied to become a Deputy Director-General under the Mr Pascal Lamy, the new DG, but lost to a Rwanda's WTO ambassador. It was generally believed that Nigeria's attitude to the WTO did little to help his candidature.

²³ The Nigerian Trade Minister was appointed as the Vice-Chairman of the Hong Kong Ministerial Conference, but it was made clear to him that if Nigeria did not pay up its dues, he would be stripped of the position.

²⁴ See Goldsmith and Posner (2002) and Posner (2002) for a discussion of the problem of "cheap talk" in international relations.

²⁵ Oyejide *et al* (2005).

the World Bank.²⁶ This supports the view that a country may maintain different reputations in different areas for different reasons.²⁷ Nigeria's multiple reputations are clearly driven by cost-benefit calculations. While the benefits of a good reputation within the OPEC and the international financial institutions appear to be high²⁸, there is a sense that the costs of compliance with WTO rules are higher than the benefits.²⁹

Reputation matters to South Africa generally. In a recent study by Judith Kelley³⁰, the author shows how South Africa refused to yield to pressure from the United States to sign a bilateral Article 98 Agreement, which would effectively undermine the Rome Treaty establishing the International Criminal Court.³¹ South Africa's argument was, *inter alia*, that "(t)o sign ... would be going against the obligations of South Africa to fully cooperate with the ICC as contained in Article 86 of the ICC Statute ..."³² On the other hand, Nigeria, although a signatory to the ICC treaty, signed the same bilateral agreement.³³

South Africa generally has the same attitude to its WTO obligations. According to Dot Keet, South Africa's approach to the WTO is generally driven by a desire not to destabilise the rules-based system and to project itself as a responsible and reasonable partner.³⁴ This attitude is largely driven by calculation of interests. As will be shown later, the desire to send the right signals to its trading partners and the international

²⁶ For instance, in July 2001, Nigeria was placed on the Financial Action Task Force's (FATF) list of non-cooperating states because of substantial non-compliance with the global anti-money laundering rules. The Nigerian government became exceedingly concerned about the damaging effects of this listing on its reputation in its global financial world, particularly on its ability to receive debt relief and attract foreign investors. As a result, the government went to great lengths to pass the required legislation and create the required institutional framework to ensure that Nigeria was de-listed. When Nigeria was eventually de-listed in June 2006, the President was described as "elated" and quoted as saying that "Nigeria is now free of encumbrances that have the capacity to stifle the flow of investment and economic growth" (see Press Release: "Nigeria Removed from International Financial Black-list, Obasanjo Elated" available at http://www.nigeria.gov.ng/Aso%20Rock%20News_RemovedFrom/FBlacklist.aspx (date accessed: 26/6/2006).

²⁷ See Downs and Jones (2002) for a discussion of the concept of "multiple reputations".

²⁸ For instance, Nigeria's economy is nearly entirely dependent on oil exports, as the world's sixth largest oil producer. Its active membership of the OPEC is thus linked to its interest as a major oil trader. In the same vein, Nigeria's debt situation meant that it relied on the IMF and the World Bank to support its desire for debt rescheduling. Recently, through the support of these institutions, Nigeria was able to pay off all its sovereign debt.

²⁹ See chapter 3 for a discussion of Nigeria's attitude towards the WTO.

³⁰ Judith Kelley, 2004

³¹ Kelly (2004).

³² The South African Foreign Minister, as reported in *ICC Monitor* (February 2003) and cited in Kelley, 2004

³³ Kelly (2004)

³⁴ Keet (2005, p.11).

markets means that South Africa is often concerned about the international effect of its domestic legal and regulatory environment.

In sum: reputational concerns appear to have played a significant role in inducing South Africa's substantial level of compliance, but insignificant role in moving Nigeria towards compliance with WTO law. The underlying motivation in both cases appears to be the calculation of costs and benefits. Yet, while the logic of consequences may underpin compliance, one cannot discount the logic of obligation and normative commitment.

Compliance induced by normative commitment

A country may generally adhere to the principle of *pacta sunt servanda* because of shared beliefs in the values and norms that a treaty regime embodies. The value attached to a regime may thus engender a sense of obligation. Evidently, Nigeria has no strong normative commitment to the WTO. There is little evidence from official statements that Nigeria feels the necessity or a sense of obligation to fully uphold WTO rules and disciplines; rather there is general antipathy to the WTO among the policy, bureaucratic, political and even business elite in Nigeria.³⁵

Nigeria is less a multilateralist than South Africa. In March 2006, Nigeria withdrew from over 40 international organisations, claiming that it was deriving little benefits from membership of those organisations, while it was faced with heavy outstanding membership dues.³⁶ Indeed, it appeared from the ministerial statement that Nigeria felt that it had to remain in the WTO only for political and diplomatic reasons.³⁷ Prominent politicians and law-makers have often asked the government to withdraw from the WTO.³⁸

³⁵ The Nigerian official government website mentions OPEC, IMF, World Bank, the UN, the African Union, the Commonwealth and ECOWAS as the international organisations that Nigeria "belongs to and plays active role in", but leaves out the WTO. Further, it provides links to many of these other organisations but none to the WTO. See <http://www.nigeria.gov.ng/foreignrelations.aspx> (date accessed: 25/6/2006).

³⁶ See: "Nigeria withdraws from 43 International Organisations", *This Day* newspaper of 23/03/2006.

³⁷ *Ibid.*

³⁸ For instance, in 2003, the then national chairman of the Peoples Democratic Party, Nigeria's ruling party, declared that "membership of the WTO is not helping matter", and convened meetings to call for reconsideration of Nigeria's WTO membership (This day, "Nigeria to Review WTO membership, Says Ogheh", 21 October 2003).

As for South Africa, although its attitude to the WTO is largely driven by self-interest, there is a normative dimension too: it has a normative commitment to the WTO system. South Africa is an advocate of multilateralism and a rule-governed international trading system, and therefore has a stake in the effectiveness of the system. Statements of government officials and ministers support the “value of the regime” argument. As one senior official put it, “we are struggling to meet our obligations to show that we are committed to the system”.³⁹

The general attitude is that, despite its imperfections, membership of and active participation in the WTO is in South Africa’s vital national interest and that it is appropriate to support the multilateral system.⁴⁰ Thus, while normative commitment appears to have played a role in the compliance behaviour of South Africa, the absence of such commitment seems to have played a major role in Nigeria’s non-compliant behaviour. However, an important variable that cannot be ignored is endogenous or *ex ante* preference.

Compliance as a function of Endogenous Preference

The position taken by a state during original negotiations is a good indicator of its initial preferences. As discussed in chapter 3, South Africa and Nigeria took different negotiating positions during the Uruguay Round and viewed the outcomes differently. While the South African trade minister argued that the Uruguay Round agreement would “stand South Africa in good stead”⁴¹, his Nigerian counterpart complained that Nigeria was being required to “make contributions inconsistent with our level of development”.⁴²

It is evident that South Africa’s offer during the Uruguay Round was endogenous, arising from self-selection.⁴³ As one senior trade official explains: “[a]ll the WTO

³⁹ DTI official, Interview, June 2003. Officials frequently also cite former President Mandela’s speech at the 50th Anniversary of the GATT/WTO multilateral trading system in Geneva in 1998 to illustrate the country’s attitude to WTO law.

⁴⁰ In persuading other developing countries to support the launch of the Doha Round in 2001, South Africa invoked the argument that developing countries could not afford to be bystanders in the multilateral system (see *Business Day*, Editorial, Johannesburg, 7/03/2002).

⁴¹ See GATT document MTN.TNC/MIN(94)/ST/99.

⁴² See GATT document MTN.TNC/MIN(90)ST/34.

⁴³ Although the ANC was not in power at the time of the Uruguay Round negotiations, it was formally involved in the major government decisions through the Transitional Executive Council since

obligations that we assumed were those that as a result of our own understanding needed to be done internally, and that we were going to do. So, in effect, what we did was that we locked in what we thought we needed to do as a country at that point".⁴⁴

Even with respect to the TRIPS Agreement, South Africa negotiated against the background of its long history of IP protection and enforcement⁴⁵ and the belief that the country had a sophisticated legal system to deal with IP issues.⁴⁶ As a result, it was willing to take on developed-country level of obligations, which required it to bring its IP legislation in line with the TRIPS Agreement within one year, i.e. by 1 January 1996. Although it did not, in fact, introduce the necessary legislation until 1998, there was a strong sense of obligation, flowing in part from ownership of the agreement.⁴⁷

With respect to customs valuation, South Africa was one of the few developing countries that acceded to the Tokyo Round Valuation Code. However, South Africa did not accede to the Tokyo Round Anti-Dumping and Subsidies Codes. The contrasts in its implementation of the Valuation Agreement and the trade remedy rules are interesting. While South Africa has had relatively little difficulty in implementing and adhering to the provisions of the Customs Valuation agreement, it did not implement the trade remedy agreements until 2003, and has a reputation as one of the big users of anti-dumping measures.⁴⁸ South Africa's initial willingness to accept the Tokyo Round Valuation Code and unwillingness to accept the anti-dumping and subsidies codes, and the variation in its subsequent compliance behaviour in respect of these agreements, appear to confirm the hypothesis that *ex ante* preference induces better *ex post* compliance, and vice versa.

December 1993 and had its allies, COSATU, in the National Executive Forum, where South Africa's negotiating positions were discussed.

⁴⁴ DTI official, Interview, June 2003.

⁴⁵ South Africa's first Patent Act was enacted in 1860, and the first reported instance of copyright infringement injunction was in 1861: *Dickens v. Eastern Province Herald* (1861) 4 Searle 33; while the first trademark case was in 1863: *Mills v Salmon* (1863) 4 Searle 230. Edison-Bell sued for patent infringement in South Africa as early as 1899: *Edison-Bell Phonographic Co v. Garlick* (1899) 16 SC 543.

⁴⁶ Representative of PMA, Interview, June 2003.

⁴⁷ However, post-Uruguay Round, due to the outbreak of the HIV/AIDS pandemic, South Africa became less enthusiastic about the TRIPS Agreement, and has called for its re-negotiation.

⁴⁸ South Africa was a very early and prolific user of anti-dumping measures. By 1958, there were a total of 37 anti-dumping decrees in force across all GATT member countries, 22 of them in South Africa (GATT 1958, p.14 cited in Finger ed. 1993, p.26). In 2004, South Africa was the fifth biggest user of antidumping measures among WTO members (WTO, 2005).

Nigeria was unhappy with virtually all the WTO agreements. With respect to TRIPS, it stated during the Uruguay Round that, “no regime of protection and enforcement of intellectual property rights should impose an unbearable burden on us and stifle our aspirations towards access to technology”.⁴⁹ It also felt, as pointed out in chapter 3, that the negotiations on customs valuation and pre-shipment inspection were not in its national interest.⁵⁰ That Nigeria is giving no priority to implementing any of the WTO agreements is thus largely due to the lack of endogenous preference for them.

In sum: the endogenous preference and ownership variable has a strong explanatory power.⁵¹ It has played a major role in explaining South Africa’s significant compliance and Nigeria’s significant non-compliance. However, there are important legal variables derived from the nature of the domestic regime rather than of WTO law itself. These are considered below.

Domestic Legalism and the Rule of Law

Table 3 above shows that on the key indicators of rule of law and legality, South Africa has better scores than Nigeria. According to the US State Department, “the use of the courts (in Nigeria) does not automatically imply fair and impartial judgements”.⁵² Furthermore, although section 287(3) of the Nigerian Constitution requires state authorities to obey and enforce court orders, the Chief Justice of Nigeria’s Supreme Court lamented in 2006 “the disposition of the Executive to wanton disobedience of and non-compliance with the orders of the court”.⁵³ This suggests that Nigeria is not a strong rule-of-law state.

The absence of strong commitment to the rule of law at home appears to translate into how Nigeria treats its international commitments. There is generally no great awareness of international law considerations among government officials, especially with respect to treaties that Nigeria does not attach any significant importance or

⁴⁹ Ibid, section on Nigeria

⁵⁰ Ibid.

⁵¹ The explanatory power of the endogenous preference variable is also demonstrated by Kusumadara (2002) who found that “the reluctant and bitter acceptance of the TRIPS Agreement without a genuine intention to give better intellectual property protection within the country could explain why the TRIPS Agreement has largely failed to improve IP protection in Indonesia” (p. 186).

⁵² See US Department of State 2005 Investment Climate Statement on Nigeria: <http://www.state.gov/e/eb/afd/2005/43036.htm>.

⁵³ Guardian Newspapers, Nigeria, June 01, 2006.

value. Despite frequently affirming its “commitment to the WTO principles and objectives”⁵⁴, Nigeria has not given recognition to the WTO in its domestic law more than ten years since the treaty entered into force. This can only suggest lack of respect for its treaty obligations.

This general lack of respect for treaty obligations is not limited to the WTO. For instance, although Nigeria has signed many bilateral trade agreements, most of these are simply not being implemented.⁵⁵ Some of Nigeria’s regional partners have also complained about its violation of the ECOWAS treaty, particularly with respect to import prohibitions.⁵⁶ With respect to environmental treaties, Emeseh points out that although Nigeria has several environmental laws, “there has been no enforcement whatsoever”.⁵⁷ All of this supports the view that Nigeria’s poor rule-of-law and legality credentials affect its attitude to international law.

By contrast, South Africa is a constitutional state, with a relatively strong commitment to the rule of law. The constitution provides for an elaborate Bill of Rights, and for “just administrative action”.⁵⁸ The domestic pressure for international rule compliance comes from the constitution, the active and increasingly litigious and rights-conscious civil society actors,⁵⁹ and a judiciary that is largely independent from executive influence. One of the reasons that South Africa gave for not signing an Article 98 Agreement with the US, despite enormous pressure, was “domestic legal concerns”.⁶⁰

The courts are willing to hold the government to account in respect of its international and constitutional obligations under the doctrine of legality.⁶¹ This creates a

⁵⁴ As Nigeria did during its 2005 trade policy review, see WTO document WT/TPR/M/147 of 14 June 2005

⁵⁵ Interview with a senior official of the Ministry of Commerce, December 2003.

⁵⁶ See: Oyejide *et al* (2005), where the authors cite Ivory Coast’s complaint about Nigeria’s ban on textiles.

⁵⁷ Emeseh (2004).

⁵⁸ See section 33 of the Constitution.

⁵⁹ For instance, in 2001, the Treatment Action Campaign (TAC) challenged on constitutional grounds the government’s HIV/AIDS treatment policy and secured a court judgement ordering the government to make anti-retroviral drugs available to all pregnant women.

⁶⁰ Kelley (2004), p. 39

⁶¹ The Court has declared this principle as central to the conception of the constitutional order (see Pharmaceutical Manufacturers Association of SA: *In re Ex parte* President of the RSA 2000 (3) BCLR 241; 2000 (2) SA 674 CC) para. 50.

consciousness or general awareness about constitutional and legal rights among government officials. For example, the fear of losing cases in courts is partly responsible for the general willingness of South Africa's valuation officers to accept on face value the declarations made by importers.⁶²

In sum, while commitment to domestic rule of law and legality appears to be significant in shaping South Africa's compliance behaviour, the general lack of strong commitment to the rule of law in Nigeria can be said to have contributed to that country's poor response to its WTO commitments as with many of its other treaty obligations

However, as the case studies have made clear, South Africa is not in full compliance with its WTO commitments. This is consistent with the view in the literature that there is no such thing as *full* compliance with international law.⁶³ Consequently, some scholars refer to "acceptable level of compliance"⁶⁴ or "equilibrium behaviour".⁶⁵ While South Africa is close to this threshold, Nigeria, by enacting no implementing laws to date, is clearly far away from it. Yet it is important to explain South Africa incomplete compliance. The last legal variables, namely autopoiesis and treaty ambiguity, may provide some explanations.

The Clash of Legal Cultures and Institutions

The notion of autopoiesis suggests that even a rule-of-law state may, in some cases, construct images of an international legal system through its own distorting lens, i.e. its own established legal culture or tradition. Most rule-of-law states appear to be in this situation.⁶⁶ South Africa's compliance with the TRIPS Agreement appears to be limited in some respects by constitutional constraints, the role of the courts, and legal

⁶² As one officer explains: "we actually have lost cases even before we go to court as our legal section gets legal advice from a state attorney, saying 'you don't have a case here, you have to withdraw that determination'" (interview, Pretoria, 2003). A number of cases that went to court were actually lost. See, e.g. *The Commissioner for the South African Revenue Service v. Delta Motor Corporation (Proprietary) Limited* 2002 SA 292 (SCA).

⁶³ See Chayes and Chayes (1993), Simmons (2000) and Bednar (2005).

⁶⁴ Chayes and Chayes (1993)

⁶⁵ Bednar (2005).

⁶⁶ For instance, the United Kingdom has refused to ratify the United Nations Convention on Contracts for International Sale of Goods (CISG) because it believes that its own Sale of Goods Act of 1979 is a better instrument, even though many commercial law scholars argue that there are "overwhelming advantages" in ratifying the convention (see Goode, 1995, p. 926)

tradition. For instance, for constitutional reasons the Government is unwilling to give its courts the authority to grant certain orders in civil proceedings such as asking an innocent infringer to pay damages to the rights owner, or ordering an infringer to identify a third person.

Even if these powers were to be given, it is not certain that the courts will use them, considering their conservative attitude to granting common law *ex parte* Anton Piller orders. In the criminal context, the role of the court is vital too, as the *A M Moolla* case has shown.⁶⁷ The court will interpret penal statutes, such as the Counterfeit Goods Act, narrowly in the light of constitutional guarantees and the Bill of Rights. Attachment to certain legal principles can also explain South Africa's reluctance to make certain TRIPS compliant changes, such as granting retroactivity in copyright or protecting computer programmes as literary works.⁶⁸

This is not to suggest that South African courts would deliberately depart from the country's international obligations in their rulings. Actual practice shows that South African judges generally enforce intellectual property rights in accordance with the country's international obligations. As Mr Justice Louis Harms, Judge of Appeal, Supreme Court of South Africa, puts it: "The South African judiciary has been able and willing to give effect to IP rights and the country's international obligations".⁶⁹ Yet the courts are likely to adhere to some long-held tradition and legal values, which may not necessarily support the objective of full compliance with a particular international law obligation.

Treaty Ambiguity

Ambiguities in the WTO Agreements, particularly the TRIPS agreement, appear also to have led to a situation where compliance is not clear. South Africa's trade officials claim to have implemented "most of our obligations"⁷⁰, and put any dispute down to differences in interpretation. The ambiguities in most of the agreements make it difficult to distinguish between genuine differences in interpretation and self-serving

⁶⁷ See chapter 5 for a discussion of the case.

⁶⁸ Ibid.

⁶⁹ See speech to the Second Session of the Advisory Committee on Enforcement, June 28 to 30, 20004: document WIPO/ACE/2/4 Rev.

⁷⁰ Interview, Pretoria, 2003

interpretations. Cohen argued that the ambiguity and vagueness of the GATS Reference Paper was partly responsible for South Africa's apparent non-compliance with the principles.⁷¹

Autopoiesis and treaty ambiguity are not relevant in explaining Nigeria's compliance behaviour, given the near-absence of the rule of law⁷² and the substantial non-compliance. What is clear from the foregoing is that legal considerations, broadly defined, play major roles in influencing state compliance behaviour. As the following section shows, however, non-legal factors can also have significant explanatory powers.

Non-Legal Determinants

Domestic Circumstances and Policy Responses

Policy makers' perception and assessment of their actual domestic conditions and circumstances and the appropriate policy responses to them play a major role in determining how they respond to external legal constraints. For instance, perception of the national interest and the calculation of costs and benefits may either lead a country to adhere to or defect from international agreements.⁷³ The growing concern about the lack of "policy space" suggests that some states want to be able to use a range of policy instruments to deal with domestic issues without the limitation imposed by the behavioural constraints of international economic law.⁷⁴

Domestic circumstances have played a role both in influencing South Africa's substantial compliance with its WTO obligations, as well as Nigeria's substantial non-compliance. They can also partly explain South Africa's incomplete compliance. The Economic Freedom Index (see Table 3) shows that South Africa is classified, both overall and in terms of trade policy, as "mostly free", while Nigeria is described as "repressed", which is the worst category.

⁷¹ Cohen (2001).

⁷² It is difficult to talk of legal cultures or tradition in absence of strong commitment to the rule of law and legality.

⁷³ For instance, Kusumadara (2002) found that the TRIPS Agreement was not being implemented in Indonesia because "it is inconsistent with Indonesia's social, economic and cultural situation and does not confer any clear benefit to most Indonesian people" (p. 245)

⁷⁴ See UNCTAD, 2005.

Since 1994 South Africa has pursued increasingly liberalised outward investment and trade policies, with export orientation a key aspect of its growth strategy.⁷⁵ During the Uruguay Round, South Africa agreed to a twelve-year phase-down of duties on textiles and apparels; however, it actually unilaterally moved to a seven-year phase-down process.⁷⁶ By contrast, Nigeria is still stuck in the import-substitution industrialisation policy framework, with the main policy thrusts being: protection of local industries, reduction of the perceived dependence on imports, and promotion of local sourcing of raw materials.⁷⁷

South Africa generally looks to WTO law as a market access mechanism and as a tool for economic efficiency. Its domestic circumstances and perception of the national interest, therefore, dictate a policy choice that favours more positive engagement with the WTO system. Nigeria, on the other hand, does not appear to see such benefits flowing from adherence to WTO rules and disciplines, given the weak performance and structure of its economy and external trade.⁷⁸ The “there is little (if anything) in it for us” feeling is thus strong.

The general observation about the role of domestic circumstances and policy objectives applies in varying degrees to the specific agreements examined here. For instance, 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 % in 1990, falling marginally to 17% in 1998, in South Africa, tariff revenue fell significantly from 9% in 1990 to 4.2% in 1998, and fell further to 3.5% of total revenue in 2002.⁷⁹ In the case of Nigeria, customs duties accounted for 21% of total federal government revenue in 1995, coming second after petroleum profit tax, which accounted for 46%.⁸⁰ Thus, customs duties assume greater relevance in Nigeria’s fiscal policy than in South Africa’s.

⁷⁵ Wakeford (2005).

⁷⁶ IMF (2005).

⁷⁷ See Oyejide *et al* (2005).

⁷⁸ Other policy and institutional differences between South Africa and Nigeria include the fact that South Africa enjoys greater political and macro-economic stability and has far more sophisticated hard and soft infrastructure.

⁷⁹ IMF, OECD, 2004.

⁸⁰ Central Bank of Nigeria, Annual Reports, 2003.

The Nigerian customs administration is tasked annually to collect a substantial amount of revenue in accordance with targets set by the Ministry of Finance. Given the level of fraud among Nigeria's importers and the role of customs duties in Nigeria's fiscal policy, it is apparent that concerns about revenue loss and the capacity of customs to deal with valuation malpractices are at the heart of Nigeria's reluctance to implement the Customs Valuation Agreement. On the other hand, South Africa is able to implement the agreement relatively smoothly partly because customs duties no longer play any major role in its fiscal policy. Also, nearly 25% of South Africa's products are excluded from the ambit of the Customs Valuation Agreement, as these products are subject to non-*ad valorem* duties.⁸¹

Domestic circumstances have also played significant role in the implementation of the TRIPS agreement. In the case of South Africa, while the government has introduced substantial legal reforms since 1997 to implement the TRIPS Agreement, there appears to be less enthusiasm to make certain TRIPS compliant changes. For instance, South Africa is defensive and sensitive on the issue of protection of geographical indications for wines and spirits. This appears to be dictated by its domestic circumstances. As one senior South African IP official put it, "we have to do what is in the best interest of our economy".⁸²

South Africa currently has 100200 hectares under vines for wine production. It harvested about 593.1 million of litres in 2005, down from 696.80 million litres in 2004, and is the ninth largest wine producer in the world.⁸³ The wine industry employs some 257,000 people.⁸⁴ The gross output value of wine industry related firms

⁸¹ For instance, section 71(2) of the Customs and Excise Act provides that the transaction value method may not be applied to motor vehicles imported for personal use. By keeping 25 percent of its tariff lines, mostly sensitive products, outside the scope of the Customs Valuation Agreement, South Africa is able to adhere to WTO valuation rules without much feeling of revenue loss. Indeed, South Africa's authorities claim that the Customs valuation 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" (see the Customs and Excise Valuation Guide, February 2002, p.1). This, however, supports the domestic circumstances and endogenous preference arguments.

⁸² Interview (2003) with a senior official of the Company and Intellectual Property Registration Office, CIPRO, South Africa's administering body for intellectual property.

⁸³ See Wines of South Africa: <http://www.wosa.co.za/SA>

⁸⁴ Ibid

is put at R14.6 billion, and there has been an explosion of wineries and wines produced, with over 100 new wineries established between 1999 and 2001.⁸⁵

The wine producers in South Africa are mainly white migrants from Europe, who consequently have used European-sounding brand names. Providing special protection for geographical indications for wines and spirits would threaten the use of some of South African wines brands. It was precisely these concerns that led to South Africa's unwillingness to accept EU demands on the protection of geographical indications for wine and spirits, which would require South Africa to rename many of its established wine brands. As a result, negotiations on the EU-S Trade, Development and Cooperation Agreement (TDCA) took seven years and almost broke down.

In the end, South Africa accepted EU demands largely because of incentives and side-payments. In return for agreeing to phase out several brand names⁸⁶, South Africa was granted an annual duty-free quota of 42 million litres. In addition, the EU gave South Africa €15 million "to establish a programme on the restructuring of the wine and spirits sector and to ensure the marketing and distribution of South African wines and spirits".⁸⁷ The deal was very controversial and was criticised by South Africa's wine producer groups.⁸⁸ However, the specific compensation and incentives were sufficient to induce South Africa to accept, albeit grudgingly, the EU demands. South Africa is, however, unwilling to provide such special protection in a multilateral, MFN-based, setting that may threaten its wine brands without explicit trade offs or concessions.

Domestic circumstances and perception of the national interest also play a major role in shaping South Africa's attitude to the protection of pharmaceutical patents. As noted earlier, South Africa retains, at least in the statute book, fairly broad scope for issuing compulsory licences, including a modified local working requirement and an apparent discrimination between imported and locally produced drugs. This has led

⁸⁵ See South Africa's Wines and Spirits Board: <http://www.wsb.za.co>.

⁸⁶ Under separate wine and spirits protocols of the Trade, Development and Cooperation Agreement (TDCA) South Africa agreed to phase out the use of wine names "port" and "sherry", and for spirits, names "grappa", "ouzo" etc, and to protect them as EU geographical indications.

⁸⁷ See <http://europa.eu.int/scadplus/leg/en/lvb/r12201.htm>

⁸⁸ The South African Port Producers Association (SAPPA) and the association of generic wine producers, Wines of South Africa (WOSA) were particularly critical of the deal. (see article entitled "Cape © Copyright Wars" in <http://www.wine.co.za>)

the pharmaceutical industry to question the TRIPS compatibility of South Africa's patent regime.

In 2003, PhRMA, the US lobby group, in its trade submission to the US Trade Department, expressed concerns about "inadequate intellectual property protection for pharmaceuticals in South Africa".⁸⁹ Although relations with the government have improved since the Pharmaceutical Manufacturers Association (PMA) of South Africa withdrew their court action in 2001, the PMA stills raises concerns about the regulatory environment in the country. Despite South Africa's willingness to implement its TRIPS obligations, domestic circumstances and political difficulties have made full compliance difficult to achieve.

Section 27(1) of the Bill of Rights provides that everyone has the right to have access to health care services, and that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. However, the situation in South Africa, perpetuated by decades of apartheid rule, was such that while many in the 'first' economy had access to medical insurance and were mainly using the private sector, the uninsured, i.e. those without medical cover, accounted for 95% of public health facilities.⁹⁰

This put enormous pressure on the public health sector even before the outbreak of the HIV/AIDS pandemic. Given the government's belief that patent protection and particularly importation of patented drugs created affordability and access problems, its policy response was to promote local working of patented inventions and to put downward pressure on the prices of medicines. For instance, the objectives of the National Drug Policy of 1996 were *inter alia*, "to promote the availability of safe and effective drugs at the lowest possible cost" and "to support the development of the local pharmaceutical industry and the local production of essential drugs".⁹¹

Yet, since 1997, the domestic production of pharmaceutical products has been declining. For instance, in 1996 South African pharmaceutical manufacturing catered

⁸⁹ See PhRMA 2003 Annual 301 Report to the USTR

⁹⁰ Pharmaceutical Manufacturers' Association of South Africa, Annual Report, may 2001 – April 2002.

⁹¹ See "National Drug Policy for South Africa", 1995, p. 4

for over 70% of local pharmaceutical demand, but by 2000 this had fallen to 57%, with imports accounting for 43%.⁹² This situation made government officials uneasy about importation of drugs, which is linked to their "excessive" prices.⁹³ Since that the public sector caters for the indigent and government's resources are limited, high prices of medicines became associated with a denial of the right of access to health care.

Government's legislative responses, through several amendments to the Medicine and Related Substances Act and subsequent regulations, were designed to facilitate access to medicine and by extension access to health care. However, aspects of the legislation and regulation were criticised by industry groups for their perceived TRIPS incompatibility. For instance, the PMA argued that the regulations excluded the safeguards and due process requirements of Article 31 of the TRIPS Agreement by failing, *inter alia*, to provide for payment of compensation and for an appeal mechanism for challenging the grant of an authorised use of a patent.⁹⁴

The dominance of the pharmaceutical sector by foreign patent holders is arguably another factor affecting government's attitude to patent protection. Government officials believe that, despite the consistent increase in research and development (R&D) spending⁹⁵, there is an underproduction of local patents, with South Africa's annual patent rate estimated to be only 2.5 patents per million people.⁹⁶ The majority of the pharmaceutical firms in South Africa are subsidiaries of foreign companies, which have no listings on the Johannesburg Stock Exchange.⁹⁷

⁹² See *The Status of South African Pharmaceutical Manufacturing: A PMA Perspective*, a paper by the Pharmaceutical Manufacturers Association of South Africa, 2003

⁹³ The Minister of Health made it clear that the establishment of the Pricing Committee was to send a message to the pharmaceutical companies that the government would not tolerate "excessive" prices. See "Fair pricing, drugs safety form basis of Act", *The Star* newspaper, 8/5/2003.

⁹⁴ See Annual Report, May 2001 – April 2002

⁹⁵ R&D spending in South Africa increased from 0.76% of GDP in 2002 to 0.81% in 2004, with the target being 1% of GDP in 2008. See Media briefing by the Economic, Investment and Employment Cluster, 27 June 2005: <http://www.info.gov.za/speeches/2005/05062716151001.htm>.

⁹⁶ According to the chief operating officer of the department of science and technology, Adi Paterson, the low patent rate is due to lack of skills at tertiary institutions, insufficient incentives and the absence of a solid regulatory framework. See "South Africa patently failing to cash in on research", *Business day*, 09/09/2004.

⁹⁷ See *The Status of South African Pharmaceutical Manufacturing: A PMA Perspective*, a paper by the Pharmaceutical Manufacturers Association of South Africa, 2003

According to WIPO figures, out of 90,655 patent applications in 2002, 90,471 were by non-residents, while only 184 were by residents⁹⁸. The estimated static rent transfer from TRIPS-induced strengthening of patent for South Africa is put at a net loss of \$168 million.⁹⁹ The predominant foreign ownership of patents, coupled with perception of excessive prices of essential drugs in the face of the HIV/AIDS pandemic, has not generated domestic support or political pressure for strong patent protection, although, as will be shown later, the government has been careful not to lurch into direct violation of patent rights.

Domestic policy preference is also at the heart of the Patents Amendment Act of 2005, which requires every patent applicant to furnish information relating to any role played by an indigenous biological resource, a genetic resource or traditional knowledge or use.¹⁰⁰ The aim of this statute is to introduce in patents the three requirements of disclosure, informed prior consent and benefit sharing.¹⁰¹

According to one activist, who lobbied for the relaxation of the level of patent protection in South Africa, the Act “puts domestic need first and the interests of private enterprise subject to that need”.¹⁰² The Copyright Act already contains strong provisions on the protection of folklore. Thus, in implementing the TRIPS Agreement, South Africa is not only reflecting the flexibilities inherent in the agreement, but also giving strong protection in its national IP laws in areas where it has offensive interests but in which there are currently no consensus in the WTO to offer protection through the multilateral system.

Perceptions of the national interest are driving some of these changes. In general, the policy preference in South Africa is to offer only minimum protection to IPRs, where

⁹⁸ See WIPO website: <http://www.wipo.int>.

⁹⁹ See Maskus, 2000 at p.184.

¹⁰⁰ The Act is available at: <http://www.info.gov.za/gazette/acts/2005/a20-05.pdf>.

¹⁰¹ The issue of the relationship between TRIPS and the Convention on Biological Diversity (CBD) has formed part of the main discussions at the TRIPS Council for many years. While most developing countries, notably India, want such conditions as evidence of prior informed consent and benefit-sharing and disclosure in patents to be incorporated in the TRIPS Agreement, the developed countries, notably the US, argued that bio-diversity conditions should not form part of the patent system but that national systems, independent from the patent system, should be adopted to regulate the issues. See, for example, WTO documents IP/C/M/36/Add.1 and IP/C/W/420/Add.1 for some of the arguments on the subject.

¹⁰² Jonathan Berger, head of the Law and Treatment Access Unit, AIDS Law Project, article in *Business day*, 01/9/2005.

important domestic issues such as those with social and health implications are concerned. For example, as Mr Justice Harms of the Supreme Court of Appeal, who has delivered judgments in many IP cases, put it, while final injunctions are likely to be granted as a matter of course in many IP cases in South Africa, the situation is likely to be different in pharmaceutical patent cases, where the rights holder may only be awarded damages instead of a final injunction.¹⁰³

The policy goal of redressing historical economic and social injustices of apartheid is the motivation behind domestic laws such as the Telecommunications Act of 1996, the National Health Act of 2003, the Broad-Based Black Economic Empowerment Act of 2003 and the various BBEE charters, even though some provisions of these laws and regulations appear to be in conflict with South Africa's market access and national treatment obligations under the GATS and the TRIMS Agreement.¹⁰⁴

The situation described above is not different in Nigeria, where there is inadequate appreciation of the benefits of IPR protection among regulatory officials and among the general public.¹⁰⁵ As a Nigerian delegation to a WIPO meeting put it, "the repeated assertion that IP could be used for the creation of wealth" meant nothing to vast majority of Nigerians, whose preoccupation was "not with wealth creation, but the struggle for survival from one day to the next".¹⁰⁶

Nigeria's view on patent protection is, perhaps, reflected in the statement of the chief analyst in NOTAP to a WIPO conference in 2001:

"... we should not fail to see the problems that developing countries will face in the future with the stringent protection of IPR. This is likely to create marginalisation and vulnerability

¹⁰³ See speech to WIPO's Advisory Committee on Enforcement: document WIPO/ACE/2/4 Rev. of May 19, 2004. Indeed, in the criminal context, according to the Pharmaceutical manufacturers' Association (PMA) of South Africa, there had only been one successful conviction involving pharmaceutical crime (theft and counterfeiting) in nearly 10 years, and in that case, the *Adlam* case, the prosecution failed to complete the case but entered into a plea-bargain agreement with the accused. See PMA, Annual Report, May 2001 – April 2002.

¹⁰⁴ See chapter 6 for a discussion of South Africa's compliance with these agreements.

¹⁰⁵ A senior official of the National Office for Technology Acquisition and Promotion (NOTAP) noted in a speech at a WIPO-organised conference in 2001, that "the pace of awareness on IP protection is still very low compared with the rapid global changes taking place in respect of the subject matter". He blamed inadequate "financial resources to embark on awareness building programme". See document WIPO/ECTK/SOF/01/2.7 of May 2001.

¹⁰⁶ See WIPO document PCIPD/4/3 Pro.2 at p.45.

of developing countries to the dictates of the owners of IPR, who most times are not ready to transfer their technology at affordable prices. Most developing countries have a very low bargaining power and technology capacities and the exorbitant prices of the new areas of high technology which have profound implications for basic human needs like food, security and health”.¹⁰⁷

The above view, perhaps, further shows why Nigeria has so far been reluctant to bring its IP laws into conformity with the TRIPS Agreement. Yet, Nigeria has strengthened the IP regime in areas in which there is a strong perception of the national interest. For instance, the criminal liability in respect of infringement of folklore is the highest under Nigerian IP laws after the penalties for piracy.

In sum: there is strong evidence that domestic circumstances, policy considerations, and cost-benefit calculations are impacting on whether and to what extent these countries adjust to certain international legal constraints, such as the WTO obligations. Clearly, to a large extent, international legal obligations would be viewed through the prism of the policy objectives that governments believe it is in their national interest to pursue. If there is a major clash between domestic policy objectives and a country's international obligations, compliance is unlikely to be routine, voluntary or complete. However, the perception of the national interest may be shaped by exogenous factors.

Exogenous Factors: Regime Linkages, Globalisation and Market Forces

Enforcement of international law can occur through perturbations¹⁰⁸ and linkages. External events, caused by globalisation and market forces, can induce better compliance in states that need to send the right signals to foreign investors and international markets. Policy recommendations, conditionalities, and technical assistance from international economic institutions such as the IMF, the World Bank, the World Customs Organisation (WCO), and the World Intellectual Property Organisation (WIPO) can work complementarily to induce better compliance with WTO law by countries over which these organisations have economic leverage. Further, an economically powerful state may seek to pursue improved levels of

¹⁰⁷ See document WIPO/ECTK/SOF/01/2.7 at p. 6

¹⁰⁸ Or, as Teubner (1992) prefers, “productive misreading”; where responsiveness of one discourse to another occurs not only because of perturbation but because one system productively misreads the other as a source of norm production. (p.1447).

compliance in weak countries through its own unilateral decision, which may include the use of diplomatic and economic pressure, rather than through the WTO system.¹⁰⁹

These essentially non-legal phenomena – economic exigencies, power pressures and market expectations and trust relations – can serve as perturbing events and linkage institutions that connect otherwise operationally closed governments more tightly to international legal norms and make them more responsive to those norms. In these instances, international law plays no direct or independent binding role, but provides the normative underpinning for the non-legal pressures. How do all these play out in respect of rule compliance by South Africa and Nigeria?

In the case of South Africa, the influence of the international markets and of the EU and the US, its largest trading partners, are strong in shaping the foreign economic and trade policies of the government. The argument that globalisation constrains the policy choices of governments is taken more seriously in South Africa than in Nigeria, given the former's relatively higher level of integration into the global economy,¹¹⁰ although Nigeria's desire to attract foreign investment has meant that its policies have increasingly been shaped by concerns about investor confidence.¹¹¹

Having suffered a currency crash twice and a wave of disinvestments in the mid-1990s, which some foreign investors blamed on the unfavourable legislative and regulatory climate, the South African government is generally concerned about the signalling effect of its policies and regulations on foreign and local investors, as well as on its major trading partners. For instance, the Pharmaceutical Manufacturers Association (PMA) of South Africa believes that the government has not granted a compulsory licence or allowed parallel importation, despite providing for these measures in its law and despite frequent threats by ministers, and pressure from

¹⁰⁹ See Ierley (2002)

¹¹⁰ It has also been argued that given South Africa's considerable distance from its main trading partners (the EU, the US and Japan), this lack of proximity makes South Africa particularly vulnerable in the global economy, and needs to compensate for this by being sensitive to the needs of its trading partners and international markets (see Wakeford, 2005).

¹¹¹ A typical example is how Nigeria responded to its blacklisting by the Financial Action Task Force (FATF) over its inadequate anti-money laundering rules. See note 26 above.

activists, to use them, because it is concerned about the possible adverse reactions from foreign investors and of its main trading partners, the EU and the US.¹¹²

The EU is South Africa's largest trading partner and the main source of its foreign direct investment (FDI), while approximately 90% of South Africa's exports to the US enter duty free under the Generalised System of Preference (GSP) and the AGOA. Most of the pharmaceutical firms in South Africa are subsidiaries of EU and US companies. Thus, IPRs are a key offensive market access interest for both the US and the EU, and the EU is particularly a strong *demandeur* on protection of geographical indications. Clearly, it is difficult for South Africa to blithely ignore the interests of its major trading partners with respect to IPR protection.

In 1998, the USTR placed South Africa on the Special 301 Watch List because of problems in the patent system. Some eighteen months later, South Africa and the US came to a written "understanding" regarding the importance of IPR protection, with South Africa re-affirming its commitment to comply with the TRIPS Agreement. The IPR section of the EU-SA Trade, Development and Cooperation Agreement (TDCA), notes that "it is essential to ensure adequate protection of intellectual property", and makes provisions for "urgent consultations where necessary, as well as technical assistance for South Africa".¹¹³ Thus, while South Africa may be tempted, for purely domestic reasons to limit the enjoyment of exclusive rights by patent owners, concerns about the likely responses of international investors and its major trading partners are powerful restraining forces.

Despite the huge challenges posed by the HIV/AIDS pandemic and the government's constitutional responsibility to address the health needs, South Africa has stopped short of using TRIPS flexibilities, such as producing or importing cheaper copies of patented medicines.¹¹⁴ The government rejected, in March 2001, the request by CIPLA, the Indian generic manufacturer, for a compulsory licence to produce an antiretroviral drug, and turned down Thailand's offer of cheap generic drugs to reduce

¹¹² Representatives of the PMA, Interview, June 2003.

¹¹³ See <http://europa.eu.int/scadplus/leg/en/lvb/rl2201.htm> for the TDCA.

¹¹⁴ Some commentators argue that the government approach of tackling retail pharmacists and their pricing strategies is a "cop out" for its failure to introduce generic competition, which is capable of bringing down drug prices considerably (see Tayob 2006).

the prices for HIV/AIDS medicine. A Thailand government official was reported as saying “there is a lack of political will in South Africa”.¹¹⁵ Most of the antiretroviral drugs are currently under patent in South Africa, and the government is aware that patent holders would view compulsory licensing, parallel importing or even importation of generic drugs as a violation of their rights.

With respect to the implementation of the customs valuation agreement, it seems also that regime linkages have played a role. For instance, Mr Pravin Gordhan, the Commissioner for the South African Revenue Services, (SARS), which controls customs matters, has been the Chairman of the World Customs Organisation (WCO) since 2000. Although the Commissioner is widely known to be revenue-conscious and for shifting the orientation of Customs towards revenue generation, his chairmanship of the WCO is believed to have led him to focus increasingly on trade facilitation. As one customs officer put it, “since he became the WCO chairman, we have been getting a lot of support from him”.¹¹⁶

What role have regime and issue linkages played in shaping the compliance behaviour of Nigeria? Given Nigeria’s debt burden, both the IMF and the World Bank have some leverage over its economic policy. Both have frequently offered technical and policy advice.¹¹⁷ In particular, the World Bank has given Nigeria loans to promote trade liberalisation.¹¹⁸ However, despite the role of these institutions, Nigeria has displayed poor commitment to trade and trade-related reforms.¹¹⁹ The linkage-variable has been weak arguably because both the IMF and the World Bank have not used their economic leverage to impose on Nigeria conditionalities explicitly supportive and consistent with the WTO obligations.¹²⁰

¹¹⁵ See: “South African Government refuses Thailand’s offer of cheap drugs”, <http://www.actupny.org/reports/thaigenerics.html>.

¹¹⁶ Interview, 2003.

¹¹⁷ For the World Bank’s policies towards trade and trade policy reforms, see Krueger and Rajapatirana (1999).

¹¹⁸ Oyejide *et al* (2005).

¹¹⁹ Castillo (1993) cited in Oyejide, *et al* (2005).

¹²⁰ Article III.5 of the WTO Agreement calls for greater economic coherence in global economic policy-making between the WTO, the IMF and the World Bank, and to this effect, Agreements have been signed by the WTO with the IMF and the World Bank, see Annex 1 to WTO document WT/L/195 for the WTO-IMF Agreement, and Annex II to WT/L/195 for the WTO-World Bank Agreement. Generally, however, policy coherence and coordination have not been fully achieved between these organisations, even though both the IMF and the World Bank have mandates to promote trade (see, e.g. Sutherland *et al*, 2004).

Both WIPO, on intellectual property, and the WCO, on customs matters, have been involved in technical assistance and capacity-building efforts in Nigeria. Indeed, Nigeria states that its draft IP bills and draft customs valuation bills were produced with support from WIPO and the WCO respectively, in addition, in both cases, to technical assistance from the WTO.¹²¹ But, apparently, none of these efforts have yielded any tangible results, given that, to date, Nigeria has enacted no WTO-compatible laws. As WIPO has noted, although it could offer legal and technical assistance relating to the TRIPS Agreement, “sovereign member states make the final decisions”.¹²² Evidently, despite technical support from these organisations, Nigeria has not shown the political will to pass the bills into law, which clearly shows that lack of political will can limit the impact of technical assistance.

Unilateral external measures and self-help appear, however, to have had some impact. With respect to intellectual property, the strongest foreign influence on Nigeria is the United States, which is Nigeria's main trading partner, the largest purchaser of its oil. However, the US's IP principal interest in Nigeria is mainly in the area of copyright and related rights. Unlike in the case of South Africa, external interest in other IP areas in Nigeria appears to be limited.

In nearly 30 years, between 1972 and 2000, only 12, 707 trademarks were registered in Nigeria, of which 8, 874 were foreign, while 3, 843 were domestic. During the same period, 6,099 patents were registered, out of which 5, 752 were foreign and 347 were local.¹²³ These figures are so insignificant considering that in South Africa there were nearly 100,000 patent applications in 2002 alone. It probably explains why foreign interest and pressure on patent and trademark protection in Nigeria are not that strong.

However, the US has a strong interest in the protection of copyright, given the prevalence of copyright piracy in the country. Nigeria is believed to be the largest African market for pirated products. According to the International Intellectual

¹²¹ See, for example, WTO document IP/Q1-4/NGA/1 at p.2.

¹²² See <http://www.wipo.int/cfediplaw/en/trips/index.htm>.

¹²³ See paper delivered by the assistant chief analyst for the National Office for Technology Acquisition and Promotion (NOTAP) at the WIPO Conference of May 2001. See document WIPO/ECTK/SOF/01/2.7.

Property Alliance, the US-based copyright industry lobby, sound recording piracy is at a level of approximately 85% in Nigeria. The IIPA also claims that "pirates have completely overrun the book market", and "there has been a proliferation of optical disc manufacturing plants".¹²⁴ The pressure on the government to reform the copyright regime has thus come partly from the US and its corporate actors, including Microsoft, which has been actively involved in stemming the tide of software piracy.¹²⁵

The Copyright Act of 1990, which is largely TRIPS compliant, was based on US copyright law. The US's role is, however, not only limited to putting pressure on Nigeria for reform but also in providing technical assistance, through its Commercial Law Development Programme (CLDP), run by the Department of Commerce and the US Agency for International Development (USAID). As will be shown later, however, the indigenous copyright industry has also been at the forefront of the campaign. What this shows is that the combination of sustained external and domestic pressures can lead to an improved protection of IPRs.

In sum, in the case of South Africa, external factors and linkages play a major role, but less so in the case of Nigeria, where external pressure, driven mainly by the US, appears to be limited to the protection of copyrights. South Africa's economy is so tied to the global economy that it cannot ignore global market forces and the powerful influence of its major trading partners. One of the strategic goals of the ANC government since 1994 is the "global repositioning of South Africa", particularly with respect to the country's foreign economic relations. The emphasis is on tapping "trade and investment potential for South Africa across a range of markets".¹²⁶ As a result, the government recognises that the appropriate and inevitable response to the challenges posed by globalisation is to comply with existing international rules.

As the Minister of Trade and Industry puts, it, "whatever you do domestically, you have to make sure that it is in keeping with the rules that govern the global trade

¹²⁴ See: <http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf> (Accessed 16/11/2005)

¹²⁵ For instance, several raids into business and private premises have been carried out at the instigation of Microsoft Nigeria, which is very concerned about software piracy.

¹²⁶ Parliamentary Briefing by the Minister of Trade and Industry on 12 February 1998.

environment".¹²⁷ This attitude is not shared by Nigeria, which has a reputation in Africa for showing "how a country can put its interests first and damn the consequences".¹²⁸ This is partly because external factors and linkages are not playing a significant shaping role, given the limited and oil-dominated international involvement in Nigeria's economy. Yet, one cannot ignore institutional factors relating to capacity and government effectiveness.

Capability and Institutional Quality

Capacity and institutional deficits are relevant in explaining South Africa's significant, yet partial, compliance, as well as Nigeria's significant non-compliance. Both South Africa and Nigeria have capacity problems, although, as Table 3 shows, South Africa performs better than Nigeria on the different components of government effectiveness. As discussed in chapter 3, there are serious problems of government ineffectiveness, poor bureaucratic quality and legislative inefficiency in Nigeria. That Nigeria needed the help of WIPO to draft its IP laws and the WCO its customs laws clearly shows the depth of the capacity problems.

Yet, even with the technical assistance, draft bills for various IP areas either still remain with the Ministry of Justice or are held up in the Parliament for several years. Bureaucratic politics assumes a great role in public governance in Nigeria. Senior bureaucrats opposed to proposed reforms in a bill can effectively kill it off or delay its approval.¹²⁹ Furthermore, legislators give little priority to passing into law essential bills unless arm-twisted by the Executive or even paid bribes by ministers.¹³⁰

In South Africa, although the situation is not as acute as that of Nigeria, there are capacity problems in the civil service, particularly at the middle level cadre, and policy implementation is problematic at the local government level. To an extent, this

¹²⁷ See "SA Trade Minister warns that globalisation can hurt" <http://www.tralac.org/scripts/content.php?id=2925> (accessed 26/10/2005).

¹²⁸ See "Ex-Trade Minister Lauds Nigeria's Ban" <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=91081> (accessed 26/10/2005)

¹²⁹ In an interview with a senior Nigerian trade diplomat in Geneva, he said that a trade policy document formulated in 2001 is being replaced because of disagreements among the relevant ministries as to the appropriate policies.

¹³⁰ In 2004, some senators demanded and received money from the Minister of Education to approve the ministry budget. When this became known, the President sacked the minister and the Senate President was forced to resign.

has affected South Africa's implementation of some of its WTO obligations. For instance, South Africa undertook to implement the TRIPS agreement within a year, given its developed-country status, but eventually took three years to introduce the implementing legislation in 1998; and its review at the TRIPS Council took over three years, from 1996 to 1999. Furthermore, South Africa did not introduce its new trade remedy regulations until 2004 even though it started the process of restructuring its anti-dumping and countervailing system in 1996.¹³¹

Senior South African officials attribute these delays to "problems of coordination and capacity"¹³² and generally difficulties of "an institutional nature".¹³³ Capacity constraints, therefore, play a role in explaining South Africa's incomplete compliance, but it is not a significant role. There was always the political will, and the legislative process works far better in South Africa than in Nigeria, with hundreds of bills passed into law since 1994. Government officials have far greater awareness of international trade law considerations and are better institutional supporters of compliance than in Nigeria, where only few officials and legislators have even read the WTO agreements.¹³⁴ The focus now shifts to the role of domestic interests.

Compliance Constituency, Resister Group, and Government Officials

In South Africa, global pharmaceutical, software and recorded entertainment industries and their local subsidiaries are the compliance constituencies, with great commercial interests in compliance with the TRIPS Agreement. These global corporate actors¹³⁵, which were the *demandeurs* for the TRIPS Agreement, have, as Duncan Matthew puts it, "re-invented themselves as guardians of TRIPS implementation".¹³⁶ The resister groups, opposed to strict compliance with the TRIPS Agreement, however, consist of international and local NGOs, especially those involved in the HIV/AIDS campaigns.

¹³¹ See WTO document G/ADP/W/395 and G/SCM/W/405 of 4 June 1996.

¹³² DTI official, Interview, June 2003.

¹³³ South Africa's response at a TRIPS Council meeting, see WTO document IP/C/M/18 at p.4.

¹³⁴ When interviewed in 2003, a member of Commerce Committee of the Nigerian House of Representatives said: "we are still studying the WTO agreements".

¹³⁵ The International Trademark Association (INTA), the Intellectual Property Committee (IPC) and the Pharmaceutical Research and Manufacturing of America (PhRMA), both of which represent proprietary pharmaceutical industries, as well as the International Intellectual Property Alliance (IIPA), an industry group for copyright and related rights, are the key US-based interest groups active in monitoring compliance with the TRIPS Agreement.

¹³⁶ See Matthews (2002).

The conflicting pressures from these groups are often mediated constitutionally through the courts.¹³⁷ However, the court's general attitude, as mentioned earlier, has been in favour of defending the constitutional guarantee of property rights and for this purpose they treat intellectual property rights like any other property.¹³⁸ Frequently, too, the battle has been taken to the political arena, and this is where the role of government officials in ensuring compliance with the TRIPS Agreement can be important.

For several years, the pharmaceutical firms in South Africa fought hard to try to prevent the Government from introducing laws and regulations on compulsory licenses, parallel importation, generic substitution, price control, and price minimisation. However, they were unable to prevent the introduction of these laws, although they succeeded, through a court injunction, in preventing the coming into force of the legislation for three years. The industry's failure to stop the introduction of the laws stemmed from the government's belief that they were necessary to achieve its policy objectives. As the Minister of Health put it:

“When all is said and done, our basic motivation for this legislation (the Medicine Control Amendment Act) is: to bring down the cost of medication and to make health care more affordable in both private and public sector; to protect the public by ensuring the safety, quality and effectiveness of drugs; to further protect the public by creating conditions for good pharmaceutical practices. We have consistently taken the position that we can fulfil all of these objectives and still adhere to our international obligations in terms of IPRs”¹³⁹

Having taken this strong policy position, the government effectively neutralised the pressure from the domestic industry lobby groups and their foreign backers. However, despite the equally strong pressure from the AIDS campaigners, it is also evident that these laws were not introduced at the behest of the NGOs. The attitude of the government to the some of the NGOs is reflected in the statement of the Minister of

¹³⁷ On a number of occasions, NGOs such as the Treatment Action Campaign (TAC) have sought through the courts or the Competition Commission to force the government to grant compulsory licenses or have joined court actions involving the government and pharmaceutical sector as *amicus curiae*.

¹³⁸ See, for example, *Laugh It Off Promotions CC v. South African Breweries International (Finance) B V T/A Sabmark International*, 2004, SCA, 242.

¹³⁹ Parliamentary Briefing, 13 September 2001: <http://www.info.gov.za/speeches/2001/010913252p1001.htm>.

Health, who argues that, "some interest groups will always put their narrow interests before the common good"¹⁴⁰.

Although South Africa has a well-developed capacity to manufacture generic drugs¹⁴¹, the pressure on the government to issue compulsory licenses does not, surprisingly, come from this sector. Indeed, the view of the generic sector is not different from that of proprietary drugs manufacturers, namely that today's patents are tomorrow's generics; therefore, the government should protect the patent system, which would act as a conduit to bring about imitative competition in the form of generics.¹⁴² The pressure on government to issue compulsory licences has come mainly from AIDS campaigners.

However, government officials have rebuffed and denied access opportunities to these NGOs¹⁴³, and have instead assured the pharmaceutical companies that the laws would not be used to grant compulsory licenses. After the furore surrounding the enactment of these laws and the subsequent court action by the pharmaceutical companies, the government has reached out, through series of consultations and dialogue, to the drugs firms. As the PMA noted in its 2002 Annual Report, the "government largely honoured its post court-case undertakings, particularly in limiting application of Section 15C of (the Medicines Act) to parallel importation rather than a broader use of compulsory licensing"¹⁴⁴.

The government's rhetoric has also changed. For instance, although the Minister of Health still insists that "Government will not be distracted from pursuing its goal of improving access to affordable, quality medicines for all South Africans", she also adds: "We are also very much conscious of the fact that access to medicine is

¹⁴⁰ See *The Star* newspaper, 8/5/2003.

¹⁴¹ South Africa's total generic market (by value) is among the largest in the world, accounting in 2001 for 38% of total manufacturing market, compared to the US (8%), Japan (8%), Germany (27%) and the UK (21%).

¹⁴² See PMA, Annual Report, May 2001 – April 2002. According to Stavros Nicolau, the head of strategic trade for Aspen Pharmacare, South Africa's biggest generic drug company, "compulsory licences are not practical (and) will scare off foreign investors ("Continent urged to respect patents", *Business Day*, 3/6/2005).

¹⁴³ As one puts it, "we are seen as enemy. There is an incredible hostility to the pressure groups. They don't listen to us" (An AIDS activist, Interview, June 2003). According to a news item in *Business day* of 25/3/2003, "key actors are excluded from official discussion of AIDS because they are not sufficiently loyal to the African National Congress, ANC".

¹⁴⁴ PMA, Annual Report, May 2001 – April 2002, p. 4.

dependent on a viable manufacturing and retail pharmacy industry to deliver the medicine to our people”¹⁴⁵

The relationship between the government and the pharmaceutical companies has become less antagonistic, although deep suspicion remains. One factor that seems to have influenced the government’s attitude is the role of the courts, which have shown a willingness to strike down any measure that 'unreasonably' undermines patent rights. For instance, in the *Pharmaceutical Society of South Africa* case¹⁴⁶, the Supreme Court of Appeal heavily criticised s. 22 G of the Medicine Act and declared as "invalid and of no force and effect" the regulation which sought to set a "single exit price" for all drugs sold in South Africa even by retail pharmacists.

Another factor forcing the government not to use the TRIPS flexibilities, including parallel importation even though the law provides for such measures, is the fear of foreign investors and South Africa’s major trading partners. The government claims that as a result of its successful macroeconomic policies “business confidence has escalated” and that the economic performance “has boosted foreign investor confidence”.¹⁴⁷ Government officials are aware that this confidence could be destroyed if South Africa were to grant a compulsory licence or permit parallel importation.

Thus, while business interests have not captured the government’s legislative and regulatory agenda with regard to pharmaceutical patent protection, the government has been reluctant to enforce compulsory licenses or permit parallel importation, despite the HIV/AIDS pandemic, for fear of jeopardising investment and trade preferences from wealthy nations.

In other areas of intellectual property, such as copyright, foreign and local business groups have consistently put the South African government under pressure to comply with its TRIPS obligations. For instance, the International Intellectual Property

¹⁴⁵ Parliamentary Briefing, 18 February 2005: <http://www.info.gov.za/speeches/2005/050218151001.htm>.

¹⁴⁶ See: *Pharmaceutical Society of South Africa and Others and the Minister of Health and Another*, 2004, SA 543 (SCA).

¹⁴⁷ Media Briefing by the Economic, Investment and Employment Cluster, 7 September 2005. See <http://www.info.gov.za/speeches/2005/05090716451001.htm>.

Alliance (IIPA) has, in its annual Section 301 report, constantly asked the US government to withdraw trade preferences from South Africa because of "weak" copyright protection.¹⁴⁸

A local body, known as Southern African Federation Against Copyright Theft, headed by James Lennox, former chief executive of South African Chamber of Business (SACOB), is also active in lobbying the government to improve copyright protection and enforcement in South Africa. Equally active in lobbying the government are local musicians, many of whom, as the media put it, "live and die in poverty despite their success".¹⁴⁹ These lobby groups were the instigators of many of the amendments made in 2002 to the Copyright Act and the Performers' Protection Act.

In the case of Nigeria, there is little evidence of interest group pressure, domestic or external, with regard to IP protection outside the copyright sector, although given the rise of HIV/AIDS in Nigeria, new NGOs have sprung up, putting pressure on the government to use the TRIPS flexibility allowing parallel importation of patented drugs.¹⁵⁰ However, it is in the area of copyright protection that international and local business groups have actively lobbied the government. For instance, the indigenous copyright industry has been an active lobby group since the early 1980s when piracy grew to such scales that the business of publishers and other copyright holders such as musicians were being jeopardised.¹⁵¹

Nigeria has produced world-renowned writers, such as Chinua Achebe and Wole Soyinka, the first black Nobel-prize winner in literature. The Nigerian film industry is ranked among the fourth largest in the world. The music industry is also vibrant. Nigerians are also venturing into the software industry at some rapid pace.¹⁵² Thus, Nigeria has very active indigenous lobby groups to push for strong copyright

¹⁴⁸ The International Intellectual Property Alliance has constantly called on the US government to withdraw trade preferences from South Africa, arguing that South Africa could not continue to enjoy such preferences while it failed adequately to protect US IPR interests.

¹⁴⁹ See "State steps in to protect musicians", *Business Day*, 20/09/2001.

¹⁵⁰ Some of these NGOs are Journalists Against AIDS (JAAIDS) and the Centre for the Right to Health.

¹⁵¹ See Sodipo and Fagbemi, 1995.

¹⁵² According to a senior official of NOTAP, business methods and software obtained from developed countries are being restructured to suit local operations and new ones are being developed locally, especially in the banking sectors, hotels, manufacturing etc See document WIPO/ECK/SOF/01/2.7 at p.6

protection. Indeed, it was pressure from these groups and their US counterparts that led to the enactment of the Copyright Decree of 1988, later renamed Copyright Act of 1990. Domestic interest groups were also behind the new stringent provisions in the Act on protection of expressions of folklore. Government officials and government policies have merely tracked these domestic realities rather than driving them.

There is little evidence that interest groups play any role in the implementation of the customs valuation agreement in South Africa. Customs-business relations are particularly poor in South Africa due to the low levels of compliance with customs laws. However, rather than use the valuation system to “clean up the ‘Customs Industry’ of all misconduct and fraudulent activities that are associated with it”¹⁵³, South Africa’s customs uses other policy instruments.¹⁵⁴ In the case of Nigeria, revenue concerns and customs’ mistrust of importers are at the heart of the reluctance to implement the customs valuation agreement.

In sum, in the interaction between the three key actors identified earlier, it can be said that there is strong compliance constituency for TRIPS in South Africa, and an equally strong resister group, but government officials and domestic institutions largely mediate in favour of the former. In the case of Nigeria, there is lack of strong compliance constituency outside the copyright sector; there is also lack of strong resister groups. Non-compliance has, thus, been due to lack of institutional supporters within government.

On customs valuation, while interest groups have no significant impact on South Africa’s implementation of the agreement, customs’ mistrust of business interests has been one of the major reasons for Nigeria’s reluctance to embrace and implement the agreement. In both countries, there is evidence of interest group influence with respect to trade remedy and safeguard measures, although this is extremely strong in the case of Nigeria, where vested interests built around the use of import prohibition as a trade policy instrument have acquired tremendous powers with no effective counterweights.

¹⁵³ See the SARS “leaflet on the Accreditation Scheme, available at: <http://www.sars.gov.za>.

¹⁵⁴ These include the accreditation and penalty regimes, which many businesses consider to be onerous.

Conclusion

This chapter set out to explain why South Africa and Nigeria have behaved the way they have with respect to the implementation of their WTO obligations. In doing so, both legal and non-legal variables were considered. It is evident (see table 4) that while the “shadow of the law” variables have had a significant impact on the behaviour of South Africa, they have not led to compliance on the part of Nigeria. Lack of ownership of the WTO Agreement plays a strong role in influencing Nigeria’s behaviour, as is the domestic regime type. Lack of ownership does not feature as a strong factor influencing compliance in South Africa, largely because most of the agreements represent its *ex ante* preferences.

Table 4: Relative Roles of Variables in Explaining the Behaviour of South Africa and Nigeria.

Variable	South Africa	Nigeria
Legal Variables:		
Shadow of the law	significant	insignificant
Reputational concerns	significant	insignificant
Normative commitment	significant	Lack of commitment significant in explaining non-compliance
Endogenous Preference e.g. ownership of rules	Very significant in explaining compliance	Lack of ownership is very significant in explaining non-compliance
Domestic Rule of Law	significant	Significant in explaining non-compliance
Legal Autopoiesis/treaty ambiguity	Significant in explaining partial compliance with TRIPS and GATS	insignificant
Non-legal variables		
Domestic circumstances and policy preference	Very significant in explaining both compliance and incomplete compliance	Very significant in explaining non-compliance
External factors and linkages	Very significant in explaining compliance	Insignificant in explaining compliance but plays some role with respect to TRIPS
Capacity and Government Effectiveness	Significant in explaining partial compliance	Very significant in explaining non-compliance
Special interests	Largely insignificant but plays a role in compliance with TRIPS	Largely insignificant but relevant in explaining the strong copyright regime, and plays a role in non-compliance with trade remedy and safeguard rules

Domestic rule of law and legality came up as a strong force for compliance in South Africa. However, legal autopoiesis or conflict of norms and treaty ambiguity appear to have played a role in limiting full compliance by South Africa. With respect to the non-legal factors, domestic circumstances and policy objectives play a significant role in different ways in explaining the behaviour of South Africa and Nigeria. However, external factors and linkages have greater influence on South Africa’s compliance

behaviour than that of Nigeria. There are far greater pressures, domestic and international, on South Africa to comply with its obligations than there have been on Nigeria. In dealing with the conflicting pressures for compliance and non-compliance, the role of government officials has been pivotal in the case of South Africa, as state officials broadly favour and push for compatible measures. There are clearly few institutional supporters of compliance in Nigeria. The concluding chapter of this thesis, chapter 8, attempts to highlight the lessons learned from the case studies and the implications for international trade law rule- making and implementation.

CHAPTER 8

CONCLUSION:

Understanding WTO Law Compliance - Lessons from the Study

This thesis has examined empirically national compliance with international trade law, with the central purpose of establishing whether and to what extent some states have implemented, to date, their WTO treaty obligations, and to identify the factors that have shaped their compliance behaviour. The aim of this last chapter is to pull together the main insights and conclusions from the previous chapters, and to draw out the key lessons and implications of the study for theoretical and empirical understandings of WTO law compliance.

The chapter has three sections. The first section reviews and sums up the argument. Section 2 discusses the key propositions flowing from the findings, and particularly their implications for the WTO. Section 3 examines and draws out the lessons of the thesis for the future of international economic law scholarship.

Overview of the Thesis

Following the introduction of the thesis in chapter 1, chapter 2 focused on the historical development of international trade law and on the theories as to the effectiveness of international law. It was noted that, with the conclusion of the Uruguay Round, international trade regulation has become bound up with law and lawmaking, with the trend being towards imposing binding negative and positive obligations on state actors in the world trading system. However, it was argued that notwithstanding the move to law, national compliance cannot be fully understood from a legal purely perspective: it will be shaped not only by legal considerations but also by a variety of non-legal factors.

Chapter 3 then went on to examine the domestic structures of trade governance in South Africa and Nigeria, focusing on the social, economic, political, and cultural contexts. The aim of the chapter was to identify the underlying policy assumptions and objectives, as well as the institutional frameworks, of the trade regimes of two countries. The chapter was based on the premise that to understand a state's legal and

regulatory responses to WTO law, it is necessary, first, to understand the political economy, culture and institutional environment of that state.

The analyses showed that while South Africa and Nigeria nearly converged on macro-economic policies and management¹, their trade policies were underpinned by different motivations and policy objectives: South Africa is largely a trade liberaliser, Nigeria a protectionist. Equally, South Africa has stronger external links, in terms of integration into the global economy, than Nigeria, and, therefore, greater market and market access considerations. There were also clear differences in their institutional structures, with South Africa having better scores on key indicators, such as rule of law and government effectiveness.

These differences in their domestic structures, it was argued, would lead to some divergences in these countries' regulatory responses to the WTO obligations. The contents of chapter 2, which surveyed the literature on compliance, and of chapter 3, which examined the political economy, institutional and normative structures of trade governance in South Africa and Nigeria, foreshadowed the analysis and explanation in chapter 7 as to the determinants of the behaviour of these countries.

Chapters 4, 5 and 6 examined respectively three sets of case studies: the first looked at the implementation of the Customs Valuation Agreement; the second examined compliance with the TRIPS Agreement, and the third, a general case-study, focused on the implementation of the WTO rules on trade remedies and some non-tariff measures. The aim of this last case study was to complement the earlier more detailed ones and to provide a rather complete and comprehensive picture of the compliance behaviour of the two countries. In each of these cases, it was shown that South Africa went to some lengths to adjust to its WTO obligations, while Nigeria did virtually nothing to implement the agreements.

The conclusion drawn from the findings was that, in general, WTO law had significant impact on trade governance in South Africa, while its impact on the behaviour of Nigeria had been negligible. Yet, it was also shown that compliance by

¹ Macroeconomic reforms in South Africa are, however, far more consolidated than those in Nigeria, which are more recent and yet to be underpinned by firm legislative and institutional structures.

South Africa had been partial rather than full or complete. For instance, with respect to the TRIPS Agreement and the GATS, there were areas of obvious non-compliance and areas where compliance was not clear. South Africa's partial compliance thus needed to be explained.

Chapter 7 took on the task of explaining the overall compliance behaviour of both countries. Here, a socio-legal methodology was adopted, focusing on assessing the relative roles played by legal and non-legal variables in shaping the compliance behaviour of these countries. The findings confirm the central theoretical argument of this thesis, namely that states' compliance with WTO law is likely to be shaped by a complex interplay of legal and non-legal considerations.

The chapter showed that no single factor can explain the compliance behaviour of any of the two countries. However, legal considerations played significant roles in differing ways in shaping the behaviour of the countries. South Africa acted more under "the shadow of WTO law" than Nigeria. It demonstrated greater awareness of the need for WTO compatibility of its trade laws and regulations, and appeared to have a higher level of loyalty and support for the WTO than Nigeria. However, legal qualities, such as perceptions of legitimacy and ownership played a very significant role in influencing the responses of Nigeria, as the country appeared to be more concerned about issues of legitimacy, fairness and equity.

Domestic rule of law and legality also played a major role in South Africa's substantial compliance, while lack of strong commitment to the rule of law and legality appeared to have played a major role in Nigeria's significant non-compliance. There is, however, evidence that legal autopoiesis (conflict of legal cultures, traditions and institutions) and treaty ambiguities were partly responsible for South Africa's incomplete compliance with some of the agreements, particularly the TRIPS Agreement, where there appeared to be less willingness to introduce certain TRIPS-compliant provisions in the domestic IP laws or to comply fully with the GATS.

Non-legal factors, however, also came up strongly in explaining the behaviour of these countries. Here, rational choice considerations, based on the calculation of interests, have strong explanatory power. For South Africa, domestic circumstances

and policy objectives coupled, with exogenous factors, such as concerns about market forces and investor perception, helped to induce better compliance. Globalisation as a variable played a significant role.

Yet, perception of the national interest also led to non-compliance or partial compliance with some agreements, particularly aspects of the TRIPS Agreement. Indeed, with respect to the GATS, where South Africa appeared to be in breach of many of the market access and national treatment commitments, this had been driven by domestic circumstances and policy imperatives.

Nigeria's attitude to the WTO and to the implementation of the WTO agreements had more to do with perceptions of the costs and benefits of implementation than with external concerns. There was relatively little pressure from foreign economic actors and international organisations, including the WTO itself, to force Nigeria towards compliance with its WTO obligations. And government officials are less persuaded that it is in the country's best interest to give any priority to the implementation of WTO agreements. It is more the case of "there is little in it for us". These cost-benefit considerations are coupled with institutional deficits of significant proportions.

In sum, chapter 7 concluded that the behaviour of these countries was shaped by complex interplay between legal and non-legal factors. In the case of South Africa, enforcement and reputational concerns, endogenous preference, normative commitment, domestic rule of law, economic trust relations, and the exigencies of rational economic calculation came up as strong factors that induced compliance, while, with respect to agreements such as TRIPS and the GATS, legal autopoiesis and treaty ambiguity, but, more significantly, domestic circumstances and competing policy goals were strong factors that hindered full compliance.

In the case of Nigeria, the key determinants were: the absence of endogenous preference for, or ownership of, the WTO agreements, lack of strong normative commitment to WTO principles, absence of enforcement and reputational concerns, lack of sustained external pressure, the near-absence of domestic rule of law and legality, as well as institutional factors, such as weak governance structures.

The findings showed that where there was compliance, as with South Africa in most cases, this was not influenced solely by the imperatives of WTO law but also by complementary forces, such as concerns about investor perception and likely responses of trading partners. Where there was no compliance, as with Nigeria in virtually all cases, WTO law did not matter at all. Politics and other non-legal phenomena prevailed over legal imperatives. So, then, what are the main propositions flowing from these findings, and what are their implications for the WTO?

Implications for future of rule making and implementation in the WTO

To understand the systemic challenges of lawmaking and implementation in the WTO one has to recognise the three fundamental shifts that the Uruguay Round brought about and implanted in the WTO system. First, the breadth and depth of the substantive legal rules have been substantially increased, with more detailed, elaborate and specific commitments, many of which are of a positive and institutional nature. Secondly, the concept of single undertaking effectively creates a one-size-fits-all straitjacket for all WTO members, with few exit options. Thirdly, public international trade law has become more legally binding, at least in the formal sense, with compulsory and automatic dispute settlement procedures, and the possibility of trade sanctions in the event of non-compliance.

If the objective of this fundamental shift away from the flexible, “soft law” approach of the old GATT system to the rigid, “hard law” approach of the WTO system is to constrain the behaviour of states with respect to their external trade policy and cause them to bring their trade and trade-related policies, laws and practices into conformity with international trade rules, this thesis has shown that this objective or predicted effect 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 states appear not to be implementing many of the agreements at all.

For instance, Nigeria’s trade policy and regulatory framework has hardly changed from what it was before the WTO agreements entered into force. More than ten years since the WTO was established in January 1995, Nigeria has introduced virtually no law to implement its WTO obligations. Nigeria is not alone in this non-compliant

situation. It was pointed out in chapter 4 that, as of December 2005, nearly 50 developing countries had not notified their national implementing legislation on the Customs Valuation agreement to the WTO, a possible indication that they were not implementing the agreement.

Even among the major developing countries, such as India, Brazil and Mexico, there is evidence of some self-serving interpretations of the agreement. Also, while China has enacted or revised over 1000 laws and regulations to help bring its trading system into compliance with WTO rules, the view, at least from the perspectives of the EU and the US, is that its compliance record is profoundly mixed, with the persistence of rampant infringement of IPRs and the growth of regulatory barriers.²

Chapter 5 showed that developing countries generally had problems with implementing the TRIPS Agreement. Most of these countries found it quite challenging to comply with the basic procedural obligations, such as notifications and participation in the review of their national legislation. Kusumadara states starkly that “[t]he TRIPS Agreement has failed and will continue to fail to be implemented in Indonesia” because the government considered the IP law reform required by the TRIPS Agreement to be less important than other domestic reforms.³

In October 2005, Zambia, on behalf of the Least-Developed Country Members of the WTO submitted a proposal requesting an extension of the transitional period under Article 66.1 of the TRIPS Agreement for “a further 15 years”, i.e. up to 2020, citing “serious economic, financial and administrative constraints”.⁴ After much deliberation, the TRIPS Council agreed to extend the implementation period⁵, by a further seven and a half years to 1 July 2013, a decision described by the LDC group as a “painful compromise”.⁶

² See “Chinese voices that oppose reform grow louder”, article by Susan Schwab, the US Trade Representative (*Financial Times*, December 11 2-006 at p.19). See also “Slow Chinese reform ‘is straining US ties’” (FT, 11 December, 2006, p. 6).

³ Kusumadara (2002, p245).

⁴ See WTO document IP/C/W/457 of 21 October 2005.

⁵ See http://www.wto.org/english/news_e/pres05_e/pr424_e.htm for the text of the decision.

⁶ See http://www.ip-watch.org/weblog/index.php?p=157&print=1024_ff&print=1 (accessed 30/11/2005)

The foregoing reflects the compliance and implementation costs of the WTO agreements. Evidently, some developing countries have not been prioritising the issue of compliance with the WTO obligations or adhering to the international law principles of *pacta sunt servanda* and good faith fulfilment. Any notion of a smooth transition from existing domestic trade governance structures to new ones through a process instigated by WTO law has proved to be unrealistic. International trade law alone has not been producing substantial compliance results, at least in many developing countries.

Lukashuk argues that while there is a fairly high level of compliance with the norms of international law in general, international law “has proven to be insufficiently reliable” to induce consistent behaviour when states are safeguarding such paramount values as peace and security.⁷ This thesis has shown that such “unreliability” extends beyond the high politics of security to the low politics of trade. Close to security concerns on the sensitivity radar of states are trade and trade-related issues, given their distributional consequences⁸ and their linkages with other domestic values, including the perception of national interest and sovereignty.⁹

Thus, states’ compliance with international trade rules is unlikely to be routine or even voluntary if such rules clash with more powerful national policy objectives. States are unlikely robotically to implement international trade rules that they perceive to be inconsistent with their national priorities and needs. Perceptions that international trade rules are unfair and inequitable will continue to dampen the enthusiasm to comply. Without the “internal point of view”, as HLA Hart put it¹⁰, a state is unlikely to feel a compelling sense of obligation to comply with its international law commitments. The value that states place on the outcomes of international negotiations and on the legal processes that produce the outcomes can play a significant role in shaping their compliance behaviour.

⁷ Lukashuk (1989, p. 513).

⁸ Trade liberalisation is not painless; it creates winners and losers, and can, at least in the short-term, result in real and social dislocation that causes severe hardship to individuals and groups (see Rodrik, 1997; OECD, 1998, Kapstein, 2000; Fasan, 2001)

⁹ Barfield (2001); Rabkin (1999).

¹⁰ Hart (1961)

To be sure, enforcement mechanisms can, to some extent, help induce compliance, but as Chayes and Chayes have pointed out, sanctioning authority “is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used”.¹¹ For instance, although sanctioning authority exists in the WTO, it has never been invoked against some developing countries, such as Nigeria, notwithstanding the high levels of non-compliance by these countries. In effect, although the WTO treaty is often regarded as a hard law instrument, it is, with respect to some developing countries, a rigid law with lax enforcement, as, evidently, many of these countries can get away with doing nothing.

In practice, trade concerns rather than legal criteria are central to the surveillance and enforcement mechanisms in the WTO. In other words, the trade effect of non-compliance is viewed with greater concern than a breach of obligation *per se*.¹² A persistent rule-violator may continue to do so for as long as its trading partners consider its behaviour to be commercially insignificant to warrant a legal action or serious threat of one. This is because, as Fukunaga argues, the primary purpose of the WTO dispute settlement system is not to secure compliance *in abstracto*¹³; its compliance function is exerted only when the dispute settlement procedures have been invoked by a complainant.¹⁴

Although the purpose of the Trade Policy Review Mechanism (TPRM) is, *inter alia*, to contribute to “improved adherence” to WTO law by *all* Members, and “to the

¹¹ Chayes and Chayes (1995, pp. 32 and 33).

¹² The situation is different, however, when a case actually goes before a WTO Panel or Appellate Body. In many cases, the precise effect of a breach of obligations need not be known; what is required is a demonstration that there is a *de jure* violation of a WTO provision. This is in consonance with Article 3.8 of the DSU, which provides that there is a presumption that benefits are nullified or impaired – i.e., there is a presumption of “harm” – where a provision of a WTO agreement has been violated (see Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001). The quantification of trade effects may, however, be necessary in subsidy cases or in calculating the actual loss resulting from a WTO inconsistent measure (WTO, 2005).

¹³ Fukunaga (2006).

¹⁴ The concept of “nullification and impairment of benefits” means that only individual members can invoke the WTO dispute settlement mechanism against another member. There is no mechanism for the WTO Secretariat to compel a state to comply with their WTO obligations, although normative pressure can and is often exerted by the political bodies of the WTO. The present system appears to see non-compliance or violation mainly as a “breach of contract” between a member concerned and any other member (s) affected rather than as a systemic issue, with implications for the multilateral trading system and the integrity of international trade rules. A systemic approach would require a more active role by the Secretariat, such as through a trade ombudsman, and the possibility of denial of benefits and privileges of membership to persistent non-compliant member.

smoother functioning of the multilateral trading system”¹⁵, it is also more concerned about the impact of national trade practices on the multilateral trading system than on rule adherence *per se*. As Qureshi puts it, the TPRM is more concerned about the *de facto* multilateral trading system than the “multilateral juridical trading system”.¹⁶

The foregoing shows that neither the WTO enforcement mechanism nor its surveillance or monitoring system is designed to induce rule compliance by a persistent rule violator whose behaviour nevertheless causes no serious concern to any other member or to the multilateral trading system. From legal and systemic perspectives, however, non-compliance and lack of effective compliance mechanisms undermine the integrity of the WTO legal order because the effectiveness of international law depends on whether states routinely observe its rules and principles.

To be sure, some scholars view the problems of non-compliance less in terms of weak enforcement and surveillance mechanisms but more as a result of inadequate state capacity.¹⁷ Thus, to these scholars, the solution lies in enhanced technical and financial assistance and support for capacity building. Yet, even with respect to technical assistance, the fact is that the WTO is not in any effective position to facilitate the implementation of the agreements. For instance, no aid for meeting implementation costs has, to date, been channelled through the WTO.¹⁸

Although there have been some multilateral initiatives, these are limited to legislative drafting and training on WTO agreements; they do not address the acute institutional deficits in many developing countries. Indeed, some multilateral donors, such as the World Bank, do not view the implementation and adjustment costs generated by WTO obligations as directly related to development because these obligations “arise from a trade negotiation, not from a country-based assessment of priorities”.¹⁹ As for bilateral initiatives, these are too often donor-driven, and are viewed with suspicion

¹⁵ See Paragraph A (i) of the TPRM

¹⁶ Qureshi (1999,p.323).

¹⁷ See, e.g. VanDeveer and Dabelko (2001)

¹⁸ Phillips et al (2005).

¹⁹ Cali *et al* (2006).

by many developing countries as attempts to force them to implement WTO or “WTO-plus” obligations intended to benefit the donors.²⁰

In December 2005, at the Ministerial Conference in Hong Kong, WTO members adopted a Declaration with Paragraph 57 on “Aid for Trade”, aimed, *inter alia*, to assist developing countries “to implement and benefits from WTO Agreements”²¹, and subsequently, in February 2006, the WTO Director-General established the task force on Aid for Trade. However, like most of the Special and Differential Treatment provisions in the WTO agreements, the Aid for Trade initiative is likely to be based on best endeavours, and not legally binding. In the Uruguay round, “developing countries took on *bound* commitments to implement in exchange for *unbound* commitments for assistance”.²² The Aid for Trade initiative could become a similar unbound commitment for assistance in exchange for bound commitments to accept and implement new obligations emanating from the Doha Round.

Notwithstanding the foregoing, it is argued that, in the final analysis, compliance by sovereign states cannot rest solely on enforcement and surveillance mechanisms, including sanctions or threat of sanctions, or, indeed, on technical assistance²³, but rather on a sense of obligation, which arises from a state’s respect for the legitimacy of the international law in question, its ownership of the law, and its perception that the rules are fair, equitable and just, and that they track its developmental objectives, priorities and needs.

The principle of *pacta sunt servanda* requires good faith fulfilment of peremptory international norms by states, including a duty to refrain from acts that prevent full implementation of international legal commitments, even when contrary to their immediate, short term interests. However, in reality, the effectiveness of this principle depends on its interaction with other principles of international law, including

²⁰ Ibid.

²¹ See WTO Hong Kong Ministerial Document: JOB(05)/298/Rev.1, paragraph 57.

²² Finger and Schuler (2000, p.514).

²³ For instance, even though Nigeria received some technical assistance with respect to the drafting of WTO compatible IP and customs valuation laws, it has not demonstrated the willingness to pass the relevant bills into law. Technical assistance is insufficient without the political will or support in implementing an international commitment in the national context.

consent, justice and fairness, as well as on the existence of some non-legal, yet complementary, factors, including, crucially, cost-benefit considerations.

These propositions have far-reaching implications for the WTO system. Perhaps the most obvious is that one-size-fits-all blueprints cannot be ideal in a hugely asymmetrical organisation such as the WTO.²⁴ The Single Undertaking principle departs from the well-established treaty doctrine of reservations.²⁵ It has created 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 during the Uruguay Round negotiations. Several commentators have highlighted this anomaly in the international trade law-making process²⁶, and the Consultative Board set up by former Director-General of the WTO, Dr Supachai Panitchpakdi, has recommended what it described as “variable geometry” in WTO commitments or a multi-speed WTO.²⁷

Differentiation in WTO law will allow genuine state consent and ownership of agreed-upon rules, which is essential for faithful implementation. It will also address the present situation, whereby developing countries with poor records of implementing existing rules are in a position, under the consensus rule, to block negotiations or progress on new commitments that are favoured by the developed countries. Those unwilling to assume greater commitments are preventing those willing from doing so, precisely because the latter group insists on such commitments being equally mandatory and binding on the former. There is clearly a strong argument in favour of not forcing all countries to sign up to the same agreement at the same time, but only when they are able and willing to assume legally binding obligations.

²⁴ 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 actual reality of economic asymmetry that characterises WTO membership.

²⁵ On the one hand, WTO law is similar to a contract because it creates rights and obligations as between members. On the other hand, it can be analogised to a charter or a constitution because of the limited exit options and one-size-fits all blueprints.

²⁶ See, e.g. Hindley (2002) and Abbott and Snidal (2002).

²⁷ See Sutherland et al (2005)

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. Endogenous or *ex ante* preference is, thus, essential to ensure better *ex post* compliance. The single package idea removes the exit options that are normally part of public international law.

The best model for the future, it is contended, is 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 “the *extent* and *timing* of entering into commitments shall be related to the implementation capacities of developing and least-developed members” [italics added].²⁸ This will not prevent the agreement from containing institutionally demanding substantive obligations or commitments (for those who are willing and able to assume such commitments) but for developing countries that lack necessary capacity, and where support for capacity building and technical assistance is not forthcoming, “implementation will not be required”.²⁹

Essentially, the modalities allow developing countries to accede to parts of the future WTO trade facilitation agreement only when they are able to do so, i.e. when they have the necessary capacity to implement it.³⁰ Unlike the customs valuation and TRIPS agreements, which merely allowed for the traditional transition periods for implementation, the modalities for negotiating a WTO trade facilitation agreement are based on genuine differentiation and a multi-speed approach.

This rather flexible, bottom-up, approach is likely to reduce the costs associated with negotiating highly legalised agreements, that is, agreements that are too precise, rigid and legally binding. These costs often arise from the extreme care that states normally

²⁸ http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm.

²⁹ Ibid.

³⁰ Another model of the bottom-up approach being suggested here is the GATS’ ‘positive listing’ principle, which allows members to ‘opt in’ to substantive market access and national treatment GATS commitments only when they feel ready and able to do. The GATS, however, makes the transparency obligations mandatory and binding on all WTO members.

exercise in negotiating and accepting such agreements because of implementation concerns as well as concerns about the potential impact of such agreements for their economies and policy autonomy.³¹

To preserve the integrity of international trade law and ensure that the legal commitments that governments make are as dependable as their binding legal form would suggest, it is essential that some elements of voluntarism is embedded in the international trade law making process. In the absence of genuine consensus, substantive international economic law rules that require positive harmonisation and institutional transformation by national governments cannot always be achieved through legal diktat, such as binding WTO law. Such an approach can, indeed, provoke dissatisfaction or create a backlash at the domestic level.

This is not an argument for turning WTO law into non-binding instruments or for subordinating WTO law to the constructs of political reality. Clearly, WTO rules should have an economic basis or an economising orientation, and need to reflect core principles such as non-discrimination and transparency³². Furthermore, given that trade agreements are more prone to defection and opportunism, trade commitments must have legal value and be backed by a strong, independent dispute settlement mechanism.

The argument is, however, for voluntarism.³³ Countries should be able to belong to the WTO and participate in its negotiations without having to accept all the obligations at the same time.³⁴ While this may be seen as a soft law approach; it is, in

³¹ This is why little progress has been made in negotiating post Uruguay Round commitments in the WTO. Trade facilitation is the only one of the four so-called Singapore issues to survive the collapse of the WTO ministerial conference in Cancun in 2003, and that is after the modalities were watered down considerably. The other Singapore issues are investment, competition and transparency in government procurement.

³² Every member must at a minimum accept the basic procedural obligations, such as transparency (including publication and notification of national laws and regulations), due process and access to remedies at the domestic level on a non-discriminatory basis.

³³ This is a contractarian approach or, in law and economics terminology, methodological individualism. It suggests that each state is a rational evaluator of its preferences and should have the individual choice as to when to enter or agree to an arrangement that imposes constraints. See Dunoff and Trachtman (1999) and Trachtman (2002) for a discussion of this law and economics approach.

³⁴ The EU Maastricht Treaty, perhaps, provide a model for this approach. The UK was part of the negotiations *ab initio* but opted out of the single currency obligation while accepting other aspects of the treaty. The UK has also opted out of a few other EU treaty obligations and yet remains an active member of the Union.

fact, a different element of soft law.³⁵ The kind advocated here differs from hard law only in terms of its mandatory nature.³⁶

It is argued that although this approach suggests some party autonomy, rule and policy convergence would eventually be attained through non-legal factors, such as economic realities, market forces, and positive network externalities³⁷. The seeming autonomy is likely, with time, to yield to inevitable externalisation through a process induced by perturbations³⁸, socialisation and experience. While international law provides a common reference point and sets the boundaries of acceptable or permissible national behaviour, it is non-legal phenomena such as economic interests, market forces and network externalities that are likely to serve as more powerful forces for compliance or convergence.

For instance, as more and more developing countries come to realise that high transaction costs of cross-border trade are hurting their trade and economic development, deterring foreign investors, and creating friction with their major trading partners, they are likely to reorder their domestic priorities and pay more attention to trade facilitation measures that conform to the requirements of the agreement. The same applies to other aspects of trade and trade-related policies. In a spontaneous order system, actors constantly adapt to changes in their immediate and external environment, including, for instance, market changes and the actions of others with whom they have to deal.

³⁵ For a discussion of the different elements of soft law, as well as the advantages and disadvantages of international soft law instruments, see: Snyder (1990), Gold (1993/1996), Abott and Snidal (2000), Mistelis in Fletcher et al (2001), and Kirton and Trebilcock (eds) (2004).

³⁶ The substantive rules should be negotiated and agreed by all the parties, but with freedom to defer accession to such agreements. However, once a country makes an effective choice of accepting the substantive rules in its national context, the “hardness” kicks in; and the law becomes legally binding. In the private law context, many commercial laws remain “soft law” until specifically incorporated into commercial agreements.

³⁷ A positive network externality occurs when a critical mass of users adopt a policy or rule, thus increasing its attractiveness to others. The gold standard became so widely used in the 19th century largely because of such attractiveness (see Eichengreen, 1996)

³⁸ External shocks, which led to financial and economic crises in developing countries in the 1970s and 1980s led to the unilateral financial and economic liberalisation in many of these countries. The collapse of the Soviet Union and of communism also led to a sea change in economic thinking by many developing countries and engendered their outward orientation. Without these perturbing events, no single economic treaty could have independently achieved the same results. The ‘crisis’ explanation is popular in political economy literature (see, e.g. Williamson, 1994 and Rodrik, 1996).

Thus, while WTO law provides the normative pressure for such a convergence, the real determinants will be economic interests and globalisation constraints. As a result, what began as soft law because of its non-mandatory nature could eventually develop into hard law, as countries voluntarily accept binding obligations in specific issue areas. Willing consent, inspired by domestic and external realities, is more likely to induce better state compliance with binding international law than perceptions that such binding obligations are imposed, inappropriate, unfair and unjust, as many developing countries and commentators are wont to describe some of the Uruguay Round agreements.

One of the contributions of this thesis is to offer an empirical support for the theoretical argument that the ultimate reasons that impel states to uphold the observance of international law cannot be explained by a strictly legal analysis. It has done this by highlighting the legal and non-legal factors that can affect a state's compliance behaviour. This is not a proposition that international trade law is ineffective, but rather that its compliance pull depends on complementary legal and non-legal factors. It is the interplay and linkages among these factors that induce better compliance or limit compliance. As shown above, these propositions have implications for the WTO system, but they also have implications for interdisciplinary scholarship and research in international economic law.

Implications for International Economic Law Scholarship

There is general acceptance among international economic law scholars that international economic law is an interdisciplinary, even multidisciplinary, field. Professor Jackson argues that, "there is necessarily a strong component of multidisciplinary research and thinking required for those who work on international economic law projects".³⁹ He also notes that "[w]ork on international economic law matters often seems to necessitate more empirical study than some other international law subjects".⁴⁰ For Petersmann, "international economic law and practice cannot be

³⁹ Jackson (1998, p.10). He lists among the core disciplines, "economics, political science (and its intersection with economics found generally in the 'public choice' literature), and many other disciplines, such as cultural history and anthropology, geography, etc".

⁴⁰ Ibid

understood without a good knowledge of economic theory and without taking into account the political processes from which they result”.⁴¹

Despite this wide acceptance, however, international economic law scholarship is still insufficiently interdisciplinary, to the extent that the economic or political economy dimensions are less evident in the literature.⁴² There are arguably two flaws. First, trade lawyers all too often discuss the effects of WTO law in language and arguments that are based on unsupported empirical assumptions. For instance, on the one hand, there is the claim that because more countries are acceding to the WTO, “a habit of obedience to the WTO system is developing”.⁴³ On the other hand, according to some legal scholars, the WTO lacks “a high enough level of loyalty and support”.⁴⁴

These are causal arguments relating to the impact or effects of the WTO system on state behaviour. However, they can only be verified through observational evidence and positive or negative correlation between *cause* (WTO law) and *effect* (state behaviour). An empirical analysis of the actual behaviour of targeted WTO members and of the factors and circumstances shaping their behaviour is, therefore, often necessary. This study has adopted an empirical approach in assessing the effects of WTO law on the behaviour of certain states. It is suggested that legal impact studies, based on empirical methods, rather than mere conceptual theories, are necessary to understand the nature and impact of international economic law.⁴⁵

The second flaw in international economic law scholarship is the seeming bifurcation between law and other social science disciplines.⁴⁶ The Uruguay Round result is widely seen as a victory for trade legalists over trade pragmatists.⁴⁷ Legalists or constitutionalists represent significant and influential segments of the international

⁴¹ Petersmann (1991, p. XXVII).

⁴² Some scholars have, however, focused on the economic and political economy dimensions of international law. For works on the economic dimensions of international law, see: Bhandari and Sykes (eds) (1998); Cass, R A (1998) in Bhandari and Sykes (1998), Dunloff (1999), Dunloff and Trachtman (1999), Trachtman (2002). For political economy dimensions, see Kennedy and Southwick eds (2002)

⁴³ Cass (2005, p.54)

⁴⁴ Pauwelyn (2005, p. 339).

⁴⁵ Empiricism, in legal philosophy, is an approach to legal theory that rejects all judgements of value and regards only those statements which can be objectively verifiable as being true propositions about the nature of law.

⁴⁶ But see footnote 35 on current law and economics literature.

⁴⁷ See, e.g. Goldstein *et al* 2000.

economic law scholarship.⁴⁸ As legal positivists, they tend to stress the need for formal, precise and detailed rules, and assume that law can cover everything and that every issue is justiciable.⁴⁹ They also share the view that as the global economic system becomes more complex the rules governing it must necessarily be centralised and complex,⁵⁰ although this goes against Richard Epstein's injunction of "simple rules for a complex world."⁵¹

Qureshi argues that "it is not for lawyers to define what, in the end, is not their discipline, that is, the economic terrain".⁵² However, law necessarily entails a normative dimension, and, as Dunoff argues, "international trade is an economic, political and legal phenomenon".⁵³ Given the increasing interaction between international trade and international law, international trade law scholars will need to incorporate insights from the economics and political economy disciplines.

For instance, the economic approach can give valuable insights into the behavioural impact of the law, that is, how states and individuals are likely to react to it, as well the costs involved in different legal approaches and, indeed, the value of non-legal alternatives. This *ex ante* cost-benefit approach contrasts with the pure legal analysis, in which all too often lawyers discuss economic law in language that implies that costs are irrelevant or that a goal can be achieved at no cost and with no sacrifice of other goals.⁵⁴

Another flaw of the efficiency approach to law is that it focuses exclusively on efficiency of outcomes, and assumes that the processes by which they are achieved are not valued by individuals. The law is treated as a factor of production, which maximises economic efficiency, and thus legal processes and intangible factors such

⁴⁸ See Cass (2005) for an in-depth discussion and critique of these institutional forms.

⁴⁹ Wild (1938).

⁵⁰ For instance, Cottier (1997) argues that "the world trade system is bound to develop constitutional doctrines in structures and in case law in order to cope with the complexities of interfacing different policies". The dependency assumption, which derives from the market-based or efficiency approach to law, is that international economic relations, like commercial transactions, are greatly dependent on and governed by legal forms and rules (see Williamson in Burrows and Veljanovski, 1981, p.40)

⁵¹ See Epstein (1995); see also Zywicki (1998).

⁵² Qureshi (1999, p.14).

⁵³ Dunoff (1999, p.736)

⁵⁴ Burrows and Veljanovski, (1981, p.15)

as justice, equity and fairness are subsumed within the efficiency calculation.⁵⁵ Yet, as Oran Young argues, a purely legal approach to international law may generate perverse substantive outcomes.⁵⁶ It thus follows that the value people or states place on the legal processes and on the substantive outcomes is likely to play a crucial role in shaping their compliance behaviour, as the experiences of Nigeria and many other developing countries have, indeed, shown.

Finally, the legalist or constitutionalist approach is not truly interdisciplinary in that it tends to ignore many non-legal influences on a nation's purposive behaviour, including domestic level structures and processes, distributional and political concerns,⁵⁷ rational choice considerations⁵⁸ and the strategic behaviour of states. Understanding these non-legal influences is essential to having a better understanding of the pre-conditions for the effectiveness of international economic law.

One lesson from this study is that international economic law scholarship can benefit from economic analysis, whose central tenet and most important operative principle is to ask of every move (i) how much will it cost; (ii), who pays; and (iii) who ought to decide both questions.⁵⁹ At the heart of this economic approach are the need to choose and the costs and benefits of alternative choices.⁶⁰ In *Lonrho Exports*, an English case, the court held that, "when negotiating a treaty the State must represent the national interest and take account of the widest range of considerations".⁶¹ While, in economic

⁵⁵ Ibid; Shams (2004).

⁵⁶ Young ed (1999).

⁵⁷ Traditional legal scholarship tends to ignore the role of non-legal factors. For example, Professor Jackson referred to "traditional and historical meaning of general international law obligation" in justifying his view about the binding nature of WTO rulings (Jackson, 1997; cf. Hippler Bello, 1996, who adopted a "law-and-politics" approach). Indeed, with respect to compliance with WTO rulings, only legal considerations, and not extraneous matters relating to domestic economic and political factors, will normally be taken into account by arbitrators in deciding on the reasonable time to comply (see *Canada – Patent Protection of Pharmaceutical Products*, Award of the Arbitrator, WT/DS114/13).

⁵⁸ For instance, Goldsmith and Posner (2002) argue that international lawyers fail to use rational choice methodologies because of the belief that rational choice explanations, which largely focus on non-legal factors, denigrate the significance of international law. See also Dunloff and Trachtman (1999).

⁵⁹ Leff (1974) cited in Burrows and Veljanovski eds. (1981).

⁶⁰ Burrows and Veljanovski eds. (1981).

⁶¹ *Lonrho Exports Ltd v Export Credits Guarantee Department* [1996] 4 All ER 673 at 688.

treaty making, such national interest considerations should be driven by efficiency concerns, they cannot automatically exclude non-economic goals or values.⁶²

This thesis has also shown that there are merits in adopting a more nuanced understanding of international trade law and regulation and acceptance of the limits of legal rules. An alternative to the nirvana approach of the efficiency theory of law is the transaction cost approach. According to this view, rather than adopt a single or predominant type of governance structure in all situations, regulations should be matched to transaction cost problems in a discriminatory way.⁶³ The nature of the transaction cost problem, the exchange relations and the contracting purposes to be served should dictate the governance structure, legal and otherwise, required.

In policy terms, this means, for instance, that if some developing countries pose lower levels of systemic risk or derive insignificant gains from the world trade regime or the global economy, it is not optimal to subject them and the developed countries to the same set of one-size-fits-all straitjacket of substantive rules. Given the reality of economic asymmetry, shaped by different distribution of income, wealth and resources between developed and developing countries, a single or predominant type of legal structure is unlikely to produce socially efficient outcomes. The transaction cost approach allows the matching of legal rules to the initial position of actors.

This transaction-specific approach also relates to the question of institutional choice or subsidiarity⁶⁴, that is, whether some trade measures are better regulated nationally, bilaterally, internationally, or, indeed, left to the discipline of the market place.⁶⁵ The literature on global legal pluralism⁶⁶ offers a useful insight here. It posits that the global economy is governed by “a multiplicity of institutional, normative, and

⁶² Dunoff and Trachtman (1999, p8). The authors argue that the law and economics methodologies do not have a “bias” against government regulation and/or in favour of the market. This is in response to the criticism of the efficiency theory of law that elevates the market.

⁶³ See Williamson (1981) for a discussion of transaction cost approach to law.

⁶⁴ The *Sutherland Report* argues that “the concept of subsidiarity is worth holding onto even in the area of international trade”. However, the test, according to the authors, is “whether the balance between some loss of ‘policy space’ at the national level and the advantages of cooperation and the rule of law at the multilateral level is positive or negative” (Sutherland *et al*, 2005, p. 34).

⁶⁵ Yarbrough and Yarbrough (1987), Dunoff and Trachtman (1999) and Trachtman (2002)

⁶⁶ See, e.g. Teubner (1992) and Snyder (1999),

processual sites throughout the world”.⁶⁷ In the context of multilevel governance, it is necessary to see the WTO not solely in its own terms, but with respect to the relative institutional competencies and capacities of other institutional alternatives.

In sum, this thesis has shown that WTO law does not induce the same level of compliance in all member states. While some states, such as Nigeria, have barely adjusted to WTO rules and disciplines, others, such as South Africa, have substantially adjusted to the rules, but, nevertheless, have failed to achieve full compliance. The behaviour of these countries thus shows the limits of WTO law. If many WTO members behave like Nigeria, then the findings of this study have far-reaching implications for rule making and rule implementation in the WTO. It is absolutely important, for the integrity of WTO law and legal system, that the conditions exist that can enhance the compliance pull of international trade rules.

One of the “bottom-line” conclusions of this study is that any regulatory approach that focuses exclusively on rule-making or regulatory design without paying sufficient attention *ex ante* to questions of how the contracting parties are likely to respond to the rules as well as the implementation and compliance costs involved is flawed. As this study has shown, the WTO agreements that developing countries are not fully complying with, and which some even appear to be ignoring, are those that did not represent the initial preferences and interests of these countries during the Uruguay Round negotiations. These findings, thus, support the proposition that *ex ante* preference for an agreement induces better *ex post* compliance with it, and vice versa.

The findings also pose challenges for the study of the interface between commitment and compliance in international economic law scholarship. There is certainly a need for further research into how to promote genuine interdisciplinary scholarship in international economic law in order to ensure that the law and economics (and political economy) dimensions of the discipline are fully complementary to one another. This will ensure that legal policy recommendations are based on economically justifiable and politically realistic assumptions.

⁶⁷ Snyder (1999, p.371)

Although the findings of this study are representative of the likely compliance behaviour of a large number of developing countries, further in-depth research into how some other developing countries and, indeed, the developed countries, give effect to the WTO treaty obligations in their domestic contexts and why they behave as they do will help increase understanding of the real effect of WTO law and the pre-conditions for its effectiveness in shaping domestic reform of trade and trade-related laws and institutions. After all, the main level of analysis with respect to international rule compliance is the domestic level.

Appendix: Interviews

Interviews with government officials, academics, trade lawyers, diplomats and practitioners, representatives of private enterprises, and civil society actors

SOUTH AFRICA:

Peter Draper
Research Fellow,
South African Institute of International Affairs (SAIIA)
26. 06. 2003, 1hr. 30mins
Johannesburg

Stephen Gelb
Executive Director,
The Edge Institute
4. 07. 2003, 1hr.
Johannesburg

Mr Edward Little,
Executive Director,
South African Association of Freight Forwarders (SAFF)
8. 07. 2003: 1hr.
Johannesburg

Mr Reg Rumney,
Executive Director,
Business Map
9. 07. 2003: 1hr.
Johannesburg

Mr Rod Lichkus,
Chairman, International Trade Committee,
South African Chamber of Business (SACOB)
10. 07. 2003: 1hr. 20mins
Johannesburg

Dr Maureen Kirkman
Head of Regulatory Affairs
The Pharmaceutical Manufacturers of South Africa, PMA
10. 07.2003: 1hr. 30mins
Johannesburg

George G Djolor
Chief Economist, PMA
10.07.2003
Johannesburg

Professor J.J van Wyk
Chief Operating Officer, PMA,
10.07.2003
Johannesburg

Mr Andre Erasmus
Senior Manager
Deloitte
11.07. 2003: 1hr.
Johannesburg

Francois Dubbelman
Trade and Investment Solutions
Deloitte
11.07.2003: 30mins
Johannesburg

Mr Jonathan Berger
Centre for Applied Legal Studies,
University of Wits
11. 07. 2003: 1hr.
Johannesburg

Dr Rashad Casim
Director, Department of Economics,
University of Wits
11. 07. 2003: 1hr.
Johannesburg

Mr Richard Linnell,
RJ Linnell Associates
15.07. 2003: 1hr. 30mins
Johannesburg

Mr Alan Hirsch
Chief Director,
Economic Sector Policy Coordination and Advisory Services,
Office of the President
21. 07. 2003: 1hr.
Pretoria

Mr Xavier Carim
Chief Director,
Multilateral Trade Negotiations/ former Head of Delegation to the WTO
Department of Trade and Industry
21. 07. 2003: 1hr.
Pretoria

Mr J.P.M (Bobby) Cronje

Deputy Director, Valuation
South African Revenue Service (SARS)
22. 07. 2003: 1hr. 30mins
Pretoria

Mr T D (Tommy) Cremore
Assistant Director, Valuation
SARS,
22.07.2003
Pretoria

Ms Patricia Jones
Policy Analyst, SARS
22.07.2003
Pretoria

Mr Rajesh Mohanlall
Policy and Legal Adviser,
SARS
22.07.2003: 30mins
Pretoria

Mr Stoffer Van Rensburc
Trade Policy Analyst,
SARS
22.07.2003: 30mins
Pretoria

Mr Erich Kieck
Senior Manager
Strategy and Planning, SARS
22. 07. 2003
Pretoria

Ms Elena M Zdravkova
Assistant Registrar, Trademarks
Companies and Intellectual Property Office (CIPRO)
24. 07. 2003: 1hr.
Pretoria

Mr Siyabulela Tsengiwe
Director, Customs Tariff Investigation,
International Trade Administration Commission, ITAC
25. 07. 2003: 1hr.

Brendan Vickers,
Deputy Director
Office of the President,
25. 07. 2003: 1hr.
Pretoria

Mr Francis Moloi,
Director, Trade Negotiations/WTO,
Department of Trade and Industry,
31.07.2003: 1hr.
Pretoria

Mr Dirk van Seventer,
Senior Economist,
Trade and Industrial Policy Strategies (TIPS)
8. 8. 2003: 1hr.
Johannesburg

Dr Garth le Pere
Executive Director,
Institute for Global Dialogue (IGD)
6.08.2003: 1hr. 30mins
Johannesburg

NIGERIA:

Mr Goodie M Ibru
Principal Partner
G.M Ibru & Co. Legal Practitionaers
3. 12. 2003: 1hr
Abuja

Mr D Taunu
Principal Assistant Registrar, Trademarks
Commercial Law Department, Federal Ministry of Commerce
4. 12. 2003: 1hrs
Abuja

Mr T. A. Ogunfemi
Deputy Director,
Bilateral Trade Relations Division,
External Trade Department, Federal Ministry of Commerce
5. 12. 2003: 1hr
Abuja

Dr F Obafemi
Deputy Director
Multilateral Trade Division
Federal Ministry of Commerce
5.12.2003: 1hr.
Abuja

Dr S E Udo
Comptroller of Customs
Nigerian Customs Service
8. 12. 2003: 1hr, Abuja

Mr A .I Ogilo
Deputy Comptroller General
Economic Regulations, Research and Planning,
Nigerian Customs Service
8. 12. 2003: 1hr
Abuja

Dr J Nwaiwu
Deputy Comptroller-General,
Tariff and Trade Division, Nigerian Customs Service
9.12. 2003: 1hr.
Abuja

Mr B. A Adeniyi
Public Relations Officer,
Nigerian Customs Service
9.12.2003: 1hr.

Mr Bayo Aiyegbusi
Deputy Director
Nigerian Copyright Commission
10.12. 2003: 1hr.
Abuja

Mr Sani Badamosi
Area Manager,
The Nigerian Stock Exchange
10.12.2003: 1hr.
Abuja

Dr Bankole Sodipo
Senior Partner,
G. O Sodipo & Co
Barristers and Solicitors
16.12.2003
Lagos

Mr Y F Agah
Nigerian Ambassador to the WTO
24.10.2005: 1hr
Geneva

Mr S. A Audu
Senior Counsellor
Nigerian Permanent Mission to the WTO
25.10.2005
Abuja

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