DISPUTE SETTLEMENT MECHANISMS IN REGIONAL TRADE AGREEMENTS: THE EU-SA PERSPECTIVE.

SHAUN PRESTON HANGONE

PRESENTED IN (PARTIAL) FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE MAGISTER LEGUM IN THE FACULTY OF LAW OF THE UNIVERSITY OF THE WESTERN CAPE

SUPERVISOR : PROFESSOR X.J. PHILIPPE

NOVEMBER 2001

DECLARATION

I declare that Dispute Settlement Mechanisms in Regional Dispute Settlement in Regional Trade Agreements : The EU-SA Perspective is my work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated , and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

NAME: SHAUN PRESTON HANGONE

DATE : MARCH 2002

SIGNED: _____

ACKNOWLEDGEMENTS

I would like to thank Prof. X.Philippe, and the French Embassy in South Africa for awarding the Scholarship towards this LLM in International and Human Rights Law. Without Prof. X. Philippe guidance this paper would not be possible.

A further thanks to Prof. T.V. Reenen, for his unflagging efforts to ensure this paper was submitted timeously.

&

A final thanks to Delphine and Preston (Mom and Dad)

Thank-you

CONTENTS

DISPUTE SETTLEMENT MECHANISMS IN REGIONAL TRADE AGREEMENTS: THE EU-SA PERSPECTIVE.

Introduction

This paper shall attempt to define and explain the various forms of dispute settlement in regional trade agreements. Trade Agreements from various continents as well as the World Trade Organisation will be scrutinised. The paper shall analyse these various mechanisms and systems and conclude with a detailed analysis of the Trade Development and Co-operation Agreement (TDCA) [1] signed between the European Union (EU) and South Africa (SA). The agreement's dispute settlements procedure in Article 104 and the practical implications on the private individual.

The TDCA will be used as a case study, against the backdrop of the various options available in dispute settlement. I will comment on the suitability of these various forms and finally if the TDCA has created a successful dispute settlement mechanism. Is Article 104 the solution or should disputes be subject to some other form of dispute settlement ?

To introduce the concept of dispute settlement, a brief outline of which options are available and acceptable in international law shall follow.

[1] The bilateral agreement on Trade, Development and Co-operation Agreement (TDCA) signed between South Africa and the European Union, became a reality in January 2000 after a process of negotiations,

PART I

[1] Dispute Settlement

The settlement of disputes in a quick, efficient manner, which is fair and just to the parties involved, has always been an aim of international law. The body of law containing the rules and procedures has developed partly via custom or practice and partly due to a number of important conventions. These conventions include the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes and the United Nations Charter drawn up at San Francisco in 1945.

The United Nations in Chapter VI of the Charter, which deals with the powers of the Security Council and the General Assembly in the Pacific Settlement of Disputes, stated in Article 33;

1. *The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first seek a solution by* ***negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements,*** *or other peaceful means of their own choice.*
2. *The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.*

The General Assembly of the United Nations repeated these sentiments in the Declaration of the Principles of International Law concerning Friendly Relations and Co-operation between States of 24 October 1970[2] and with the Manila Declaration on the Peaceful Settlement of International Disputes of 15 November 1982.[3]

---

which began in 1994.
[2] GA Res.2625 (xxv)
[3] GA Res.37/10

The methods of dispute settlement refereed to in Article 33(1) shall be used as a basis for discussion.[4]

Diplomacy is a form of international dispute settlement that attempts to reconcile parties to a disagreement by use of negotiation, mediation, or enquiry.[5] Diplomacy contains three distinct methods of dispute settlement refereed to in Article 33(1). If we examining the components of diplomacy starting with negotiation.

Negotiation[6]

Negotiation refers to a process of reaching an agreement by discussion or conferring. In the ***Mavrommatis Palestine Concessions case*** **(1924)** the Permanent Court stated that "*before a dispute can be made the subject of an action at law, its subject-matter should have been defined by diplomatic negotiation.*"[7]

Negotiation is one of the simplest methods of dispute settlement, and is the option most commonly relied upon. The fundamental character of this form of dispute settlement is the total absence of a third party, either in the form of a State or an International Institution. This allows the solution to be entirely in the hands of the parties concerned without interference from outside parties. Negotiation is used to solve disputes, prevent them arising and it forms the first step in other dispute settlement proceedings.

[4] For a full discussion see J Collier & V Lowe, The Settlement of Disputes in International Law (Oxford 1999), p20
[5] R August, Public International Law (Prentice Hall),p443
[6] Negotiation : From Latin negotiari : to carry on business
[7] PCIJ,Ser.A,No.2,11-15,

Mediation[8]

An apt definition of mediation can be found in Article 4 of the Hague Convention, which states *"reconciling the opposing claims and appeasing the feelings of resentment, which may have arisen between the states at variance."*

In certain disputes the degree of animosity between the parties is so great that direct negotiations are unlikely to be successful. Dispute settlement is achieved via the intervention of a third party. Mediation involves the use of a third party who transmits and interprets the proposals of the principal parties and sometimes, advances independent proposals.[9]

Enquiry[10]

This process is used to determine the facts in dispute. The mediation procedure attempts to resolve the entire dispute, whereas an inquiry focuses only on a particular incident. An impartial third party shall make an investigation to determine the facts underlying a dispute without attempting to resolve the dispute itself.

Conciliation[11]

Conciliation is a process which attempts to overcome hostility in a placid manner. This is achieved by making friendly overtones. The parties attempt to reconcile the problem. This form of dispute resolution is found predominantly in the South African labour law.

[8] Mediation : From Latin mediare :to be in the middle
[9] R August bis.p444
[10] Inquiry: From Latin Inquirere: to seek after or to search for.
[11] Conciliation: From Latin Conciliare: to bring together from concilium-council, gathering, meeting

Arbitration[12]

Arbitration is the name given to the determination of differences between States (or between a State and a non-State entity) through a legal decision of one or more arbitrators and an umpire, or of a tribunal other than the International Court of Justice or other permanent tribunal.[13]

The various forms of dispute resolution have their shortcomings. Each possesses advantages and disadvantages depending on the needs of the parties concerned. The contracting parties usually tailor the dispute settlement mechanism to suit their specific needs. These traditional methods of dispute resolution have seen yet another variation in the form of regional trade agreements. Disputes are generally dealt with via properly constituted courts of law of a country. The traditional method is insufficient to resolve complex disputes in the realms of regional trade.

Regional trade agreements may be based on a combination of various legal systems, for example common law and civil law. The disputes have to be administered with due consideration for the various systems. The contracting states, which subscribe to the regional agreement, have to accept a certain limits on their sovereignty and also accept that a foreign legal system or method may be better suited for the region's needs. The differences vary from the very basic linguistic difference, procedural rules, the role of the court, evidence and even the presiding officer's role may vary from accusatorial to inquisitorial.[14] When drafting a suitable dispute settlement clause, an attempt must be made to marry the various dispute settlement mechanisms and reach a workable compromise.

[12] Arbitration: From Latin Arbitrium: decision of arbitrater, judgement, mastery control,deceptor
[13] See Collier footnote 4 supra
[14] Heydon Evidence: Cases and materials 1975 p3 "The principles of the Anglo-American law of evidence stem from the traditional system of **accusatorial (adversary) trials** before a lay jury as opposed to the Continental **inquisitorial trials** by professional judges adjudicating without the assistance of a jury." (own emphasis)

Judicial Settlement –Litigation

Litigation is the act or process of bringing or contesting a lawsuit. It involves judicial proceedings. These proceedings would take place in a court. Law is divided into substantive law and adjective law. Substantive law generally contains legal norms, which bind and regulate society. Adjective law in contrast to the rules of substantive law determines how such rights and duties are enforced. Rules of adjective law relate to criminal and civil procedure. Litigation is a process, which links these two components of law. Rights embodied in substantive law are enforced using adjective law via courts through litigious proceedings.

The final part of Article 33 describes Regional agencies or other arrangements, as effective forms of dispute resolution. The second part of the paper examines specific regional trade agreements. Regional trade agreements include their own mechanisms to solve disputes. I shall examine various regional trade agreements and compare and contrast their respective dispute settlement mechanisms.

PART II

[2] Regional Trade Agreements

Regional trade agreements are designed to facilitate regional integration this can be via the establishment of a free trade area, customs union or common market[15]. A need for economic survival has drawn states to conclude regional arrangements or agreements. The formation of trade blocs is an attempt by the members to enhance their countries export potential and simultaneously protect their weaker industries. The negotiations which proceeded the signing of the agreements are a lengthy process as each state attempts to reach a compromise which ensures maximum benefit for it state.[16]

[15] Found in GATT Article XXIV.

[16] The TDCA agreement signed between EU and SA was negotiated from June 1995 when the European

The regional trade agreement members all have solid legal basis and developed judicial systems of dispute settlement. The level of co-operation is different between in every regional trade agreements. The sizes of the various regions concerned are diverse.[17] These factors dictate that every agreement is fundamentally different. The competence of each regional institutions dispute settlement mechanism thus varies accordingly.

A few regional trade agreements from various continents shall be discussed and their respective dispute settlement agreements analysed. The historical, political and economic realities of the various continents are mirrored in these agreements.

Americas

The American continent contains one of the largest economic powers in the United States of America (USA). Economic policy on this continent is largely dependent and dictated by the USA. The largest regional trade agreement on this continent is the North American Free Trade Agreement (NAFTA). The NAFTA treaty was signed on 11 and 17 December 1992.

North American Free Trade Agreement (NAFTA) -Dispute Resolution

NAFTA established a free trade agreement between the USA, Canada and Mexico. The treaty entered into force in 1994. Article 102 of the agreement conveys the objects of the agreement, including the elimination of barriers to trade in goods and services, promotion of fair competition, investment and the protection of intellectual property rights in the member states.

Commission was granted its first mandate until January 2000 when the agreement finally entered into force.

[17] If we compare selected western hemisphere regional trade agreements population size to illustrate the diversity of the size of these regions :- North American Free Trade Agreement (NAFTA) Population : 376.,3 million, Caribbean Common Market (CARICOM) Population : 5,79 million, Andean Pact Population : 96,33 million and Central American Common Market (CACM) Population : 28,5 million.(Source Business America Dec 1994, Vol. 115 Issue 12, p17)

NAFTA has various distinct procedures for dispute settlement. The main agreement has side agreements on labour and environmental issues which have their own separate dispute mechanisms. The main agreement's dispute procedures are fairly complex and just a brief outline of the main provisions will follow.

General Dispute Settlement Chapter 20:

The main inter-state dispute settlement provisions are contained in this chapter. A Free Trade Commission, with a representative from each member state oversees the implementation of the agreement. The commission resolves disputes concerning the interpretation and application of the agreement.[18] As a general rule Article 2005(1) permits a complaining Party to choose between NAFTA and WTO procedures to settle disputes that arise under both NAFTA and the WTO.

Dispute Settlement under Chapter 20 involves three stages. First the complaining party requests consultations via Article 2006. Secondly, where consultations fail to resolve the dispute within 30 days of such request, either party may request that the Free Trade Commission convene to attempt to resolve the dispute. Third, if Commission fails to resolve the dispute within 30 days after convening either party may request the establishment by the commission of a five-person Arbitral panel.[19] An initial report of the panel is required within 90 days, and the final report within a further 30 days. The final report of the panel shall be published within 15 days after it has been transmitted to the Commission.[20]

Article 2018(1) requires the disputing Parties to agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations of the panel. On failure of the parties to agree on a mutually satisfactory resolution within 30 days of receiving the panel's final report, the complaining Party may suspend NAFTA benefits in accordance with Article

[18] See 1992 NAFTA Treaty, Article 2001.
[19] Article 2008
[20] The Commission may decide not to publish the report as per Article 2017

2019.

The Chapter 20 provisions incorporate three distinct methods of dispute settlement Consultation, the creation of a Commission and Arbitration. A dispute thus progresses though these various stages in an attempt to resolve it.

Chapter 19:- Disputes Involving anti-dumping and Countervailing Duties

NAFTA parties under Chapter 19 may file claims based upon antidumping and countervailing[21] duty determinations made by national administrative authorities. Binational panels are established via Article 1904, which are empowered to determine final antidumping and countervailing duties. The Binational panels replace the judicial review powers of the national courts of the member states. The Binational panel's establishment is significant in regard to the relationship with national courts. The US has challenged this position of nullifying the inherent jurisdiction of national courts[22].

Chapter 19 replaces judicial remedies like litigation via the Binational panels. This illustrates the manner in which specific problems between parties are identified and procedures for dispute settlement established to anticipate and resolve such disputes.

[21] Anti-dumping and Countervailing, To understand these concepts dumping must be defined ,it is the introduction of goods into the commerce of a common customs area at an export price which is less than the normal value of the goods. This can be achieved via subsidies by the exporting state. Anti-dumping and Countervailing are methods to prevent and counter the practice. See further Anti-Dumping Law and Practice in South Africa Leora Blumberg

[22] A Constitutional challenge was raised by the American Coalition for Competitive Trade Inc. The Court of Appeals for the District of Columbia found that applicants lacked locus standi and had not satisfied the

Chapter 11 :- Arbitration of Investment Disputes Involving an Investor and Host State.

NAFTA has provisions on Arbitration of investor-state disputes an innovation unseen in other agreements. NAFTA is the first multilateral trade or investment agreement to grant private persons standing to sue governments directly for monetary damages. Article 1122(1) allows for this innovative form of arbitration. The arbitration is normally submitted under the ICSID Convention, under the Additional Facility Rules of ICSID or under the UNCITRAL arbitration rules[23].

Europe

The European Union represents a regional economic unit, which evolved successfully into a political unit. The Treaty of Maastricht established the European Union in 1992. The Treaty added to the European Community proper (i.e. the integrated version of the European Economic Community, the European Coal and Steel Community and Euratom) two further pillars in which Member states co-operate over, respectively common foreign and Security Policy, and Justice and Home Affairs. No other regional organisation has achieved this level of integration and cooperation. The judicial power in the EU is shared between the European Court of Justice (ECJ), the Court of First Instance (TPI) and the National Courts which have to review the implementation of EC Law.[24]

European Union- Dispute Resolution

jurisdictional requirements of NAFTA Implementation Act.

[23] For detailed discussion of these rules and conventions see Part II: Arbitration

[24] See European Union Law, LLB Course 1999, Prof. X.J. Philippe- Lecture Notes no.6

The European Court of Justice

The European Court of Justice[25] is the judicial body, which serves the EU. The court has fifteen judges, one is nominated from each member state and must hold the highest judicial office in that respective member state. The judges are appointed for six years. The judges elect one other their brothers to act as President. The Court may sit with all fifteen judges when Member states are parties to disputes. The court also has various chambers where three or five judges will preside.

Nine Advocate Generals, who present independent and impartial opinions to the court prior to the courts decision to represent public interest, assist the Court. These opinions are not binding on the court yet are usually echoed in the court decisions.

The Court of First Instance (TPI)

The Court was established by the Single European Act (SEA) of 1985, in an attempt to lessen the workload of the ECJ. The goal was to handle those cases, which had less political or constitutional significance, this aim was not really achieved. The Court is structured akin to the ECJ and is also staffed with 15 Judges.

The Jurisdiction of the EU is divided between the ECJ and the TPI, with the national courts playing a limited role. European Treaties grant the ECJ limited jurisdiction yet the court may be referred to for judgments and advisory opinions. The principle of redirecting actions begun in national courts to the ECJ via Preliminary rulings and is fundamental in developing EC law. Article 234 deals specifically with Preliminary Rulings.

Preliminary Rulings – European Court of Justice

[25] See Articles 220 to 224 EC Treaty

Article 234 (ex Article 177)

The court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this treaty;

(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;

(c) the interpretation of the statues of bodies established by an act of the council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member state, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a member state against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Actions begun in a national court are redirected to the ECJ via Preliminary Rulings, which are of fundamental importance from a practical point of view. The ECJ is the only competent court in this regard. There are three kinds of actions begun in national courts namely - the interpretation of a provision of EC Law, effect of such a provision in the national legal system and validity of a measure passed by the EC.[26]

The ECJ is asked to make a decision via a Preliminary Ruling. The aim of a Preliminary Ruling only is to answer the question referred. The process is slow and staggered. What we must realise is that with each decision an attempt can be made to push the boundaries of the question by a wide interpretation or conversely give a very narrow restrictive interpretation. The point we must note is that the ECJ hands are tied to a certain degree in Preliminary Rulings yet the leeway does exist if it wishes to promote a certain interpretation by leaning its judgement in a certain direction.

[26] See European Union Law, LLB Course 1999, Prof.X.J. Philippe- Lecture notes no.6

Preliminary Rulings allow a superior court the opportunity to make an interpretative decision on a point of law. The court which referred the problem is given the opportunity to implement the interpretation on the merits of the specific case. The Advocate Generals also offer a variation to the conventional judicial systems, which we are accustomed to. The concept of Preliminary Rulings and the Office of the Advocate General illustrate adaptations to accepted methods of judicial adjudication.

For regionalism to work the respective parties must sacrifice a certain degree of State Sovereignty. In the area of dispute settlement the States must relinquish their National court jurisdiction and have confidence in the regional dispute settlement mechanism. The EU with the concept of Preliminary Rulings has attempted to find a workable compromise, which allows the respective National Courts to maintain a role in dispute settlement. The Regional body is not swamped with all the union's problems yet it maintains sufficient control to keep uniformity in the interpretation of the EU treaty.

The EU is by far the most sophisticated and complex international regional organisation. The Dispute settlement mechanism in the ECJ bears testimony to the Regional strength and Cooperation, which exists, between member states of the EU.

Asia

The Association of South East Asian Nations (ASEAN) was established in Thailand, by the foreign ministers of Indonesia, Malaysia, Singapore, Thailand and the Philippines, after signing the Bangkok Declaration on 8 August 1967.

Economic cooperation especially cooperation in trade, in the ASEAN region has been a long expected objective of the ASEAN member countries[27]. In 1977 the ASEAN Preferential Trading Arrangement (PTA) was introduced. The aim was the liberalisation of trade and enhancement of intra-regional trading activities. The development and regional cooperation was slow as member states attempted to protect their domestic markets. Granting a margin of preference of 50% of the existing import tariff rate to member states was a difficult requirement to maintain when domestic industries suffered. This tentative step towards regional cooperation continued well into the 1980's with the successful industrialization of many member states. The rise of regional economic units during the 1990's like the EU and NAFTA, prompted the ASEAN states to proclaim the AFTA plan.

Asian Free Trade Agreement, (AFTA) which is coupled to Common Effective Preferential Tariff (CEPT) adopted in October 1990 seeks to liberalise trade in three stages, namely

[1] Influence Intra-regional trade and related activities,

[2] Promotion of foreign direct investment and Intra-regional investment

[3] Development of ASEAN countries as Competitive production bases.

AFTA represents the Asian model of co-operation. The Dispute settlement clauses attempt to ensure that the objectives of AFTA are achieved. The three stages of CEPT are interdependent beginning with first ensuring regional cooperation. Once regional cooperation is achieved inter-regional and foreign investment is sought. The establishment of ASEAN countries as competitive production bases completes the three-stage process.

[27] The Association in 1997 consisted on nine members the five founding members namely Indonesia, Malaysia, Singapore, Thailand and the Philippines with additional members Brunei Darusssalam (1984), Vietnam (1985) Laos and Myanmar (July 1997) – the ambition is "Asean 10" by the incorporation of Cambodia.

AFTA (ASEAN Free Trade Area)- Dispute Resolution

The ASEAN Economic Ministers signed the Protocol on Dispute Settlement Mechanism in order to ensure transparency and accountability in the AFTA system. The Asian agreement is based on the World Trade Organization (WTO) system. The protocol was signed by the various contracting states as a commitment to this process. The system revolves on dispute settlement via mediation.

The system may be modelled on the WTO Dispute Settlement System yet it is not as judicialised as the WTO. The three main mechanisms as set out in the ASEAN's Agreement on the Dispute Settlement, are as follows: Article 2 Consultations, Article 3 Conciliation or Mediation and Article 4 Panel procedures.

The close link between the AFTA system and the WTO, can be seen in Article 4. Article 4 provides for the establishment of a panel or a special body after the consultations have failed. This procedure is identical to the WTO. The Dispute Settlement Mechanism is set out in AFTA, but ASEAN countries have shown their preference for amicable settlement or a kind of mediation procedure. The preference of Asian countries for a mediation system has lead to various reports[28] which suggest the establishment of a Dispute Mediation System (DMS).

In AFTA a Protocol was designed specifically for dispute resolution yet members have sort alternative methods to resolve disputes. The ability of member states to aid transformation enables the region to progress. This progression addresses the current needs of the region assisting it in adapting to the prevailing political climate.

[28] See Eminent Persons Group Report on the Settlement of Disputes in APEC.

Africa

Africa is a region with a profound influence from various European Legal systems. African countries live in the shadow of their ex-colonial rulers.[29] The colonial rulers of the past are the principal partners of the European Union. The frequent change of political leadership, armed conflict and the reality of the developing status of most African states contribute to the type of regional agreements established on the continent.

The Economic Community of West African States (ECOWAS)- Dispute Settlement

ECOWAS was created by the Lagos Treaty (Nigeria) of the 28 May 1975 and was revised in Cotonou (Benin) on the 24 July 1993. ECOWAS has sixteen Member States.[30]

ECOWAS illustrates the challenge of diversity, which face drafters and negotiators of regional trade agreements. The various problems associated with these sorts of agreements were compounded by the reality of having various contracting African states with diverse languages including English, French and Portuguese.

The ECOWAS Court of Justice has been established by Article 15 of the ECOWAS Treaty. The rules of the organisation, competence and role as well as the proceeding before it have been set up by a Protocol of 1991 on the Community Court. The community court of Justice awaits the realization of trade commitments in a stagnant economic area. The dispute settlement mechanism is in place yet without the physical implementation of the main agreement it remains a dormant institution.

[29] Branches of South African law illustrate the legacy of colonial legal systems on the colonized states, which are governed by Roman Dutch principles. The South African law of evidence illustrates how the influence of different colonial rulers can impact on the development of the law. In Van Vreden v Bourhill 1913 TPD 67 it was stated that the South African law of evidence is not based upon the Roman Dutch authority but rather the English law of evidence serves as the common law of the South African law of evidence. Where other bodies of SA law have Roman-Dutch law as a root source.

[30] Benin, Burkina Faso, Cape Verde, Cote d' Ivoire, Gambia, Ghana, Guinea, Guinea- Bissau, Liberia,

The Court is composed of seven independent judges, two may be nationals of the same member state. Unlike the EU not all the Members States are represented on the ECOWAS court. The selection of the Judges is similar to that of the International Court of Justice and the European Court of Justice.

Article 9 of the Protocol defines the competence of the Court. The Court must ensure the observance of law and of principles of equity in the implementation and application of the provisions of the ECOWAS treaty.

Article 56 allows the Court to deal with disputes referred to it in by Member States. Disputes arise between the Member States or between one or more Member States and the Institutions of the Community on the interpretation or application of the provisions of the treaty. Protocol 9 allows a Member state to act on behalf of its nationals, institute proceedings against another Member state or Institution of the Community relating to interpretation and application of the treaty.

In the 1991 Court Protocol, the power was granted to the court to render advisory opinions on "questions of the Treaty". This presumably refers to the interpretation and application of the treaty provisions. This function resembles the provisions of Preliminary rulings under the ECJ supra.

ECOWAS has established a sound system of dispute settlement in theory. Once the parties start utilising the trade concessions, disputes shall inevitable arise and a better assessment of the Community Court may be made with reference to practical scenarios.

Mali, Mauritania, Nigeria, Niger, Senegal, Sierra Leone and Togo.

Regional Trade Dispute Settlement Systems

Various types of economic co-operation in different regions have been illustrated. In the regional agreements are the substantial rules of co-operation the same? If not, do common rules at least exist?

The answer to this question is not a simple one. By focusing on the regional agreement dispute settlement mechanisms a spectrum of methods for settling disputes has come to the fore. The traditional methods of dispute settlement have been included and adopted in the regional trade agreements to suit the needs of specific contracting parties. As illustrated each regional agreement opts for a unique solution for basically similar problems. In Africa, ECOWAS opts for a judicial set up which could easily be mistaken for an African government's judiciary. The rigid judicial system is far removed from what is found in AFTA. The Asian dispute settlement agreement is based on the World Trade Organization (WTO) system. A further variation presents itself in NAFTA, by far the most developed trade dispute settlement system analyzed. NAFTA has different dispute settlement methods for various types of trade disputes. The EU with the ECJ Court is undoubtedly the most sophisticated system for general dispute settlement on a regional level.

The dispute settlement mechanism can be seen as a direct reflection of the economic stability or success of the economic unit. An effective dispute settlement mechanism is born from regional trade partners whose relationship is mutually beneficial. If disputes are effectively and timeously resolved then trade can flow effectively. With an effective free flow of trade between states, revenue can be directed towards investments. This would be in the best interest of all the parties concerned. The reality is that the negotiation of the trade agreement supercedes the drafting of the dispute settlement clause.

The dispute settlement clause in most agreements is given little attention as the parties negotiate tariff reductions, tax concessions, reciprocity etc. The result is that the dispute settlement provision is drafted in a theoretical manner.[31] The practical implementation of these provisions is ignored until the main agreement is concluded. It may be argued that the dispute settlement clause is as important as the main agreement concerning tariff concessions and alike.

Theoretically states can conclude an agreement, which is legally sound and which benefits all the participants equally. The problem of this perfect agreement like all contracts is the question of enforceability. I submit that the issue of enforceability must be negotiated as one of the main clauses in a regional trade agreement. The question of enforceability should be coupled to the competence of the dispute settlement body. If the parties recognise the jurisdiction of the dispute settlement body in regards to the powers of enforceability, then the agreement takes on a much deeper effect.

Without the enforceability aspect, a competence I contend which belongs to the dispute settlement body, the agreement is not worth the paper it is written on. To illustrate this point imagine that states X, Y, and Z conclude a regional trade agreement which covers substantially all trade between the states. X being a state with a large oil export and very small and vulnerable agricultural sector. State Y with a large agricultural based economy and State Z with large textile and mechanical industries.

The three states are dependent on each other as X exports its oil to Y and Z. X in return imports foodstuffs from Y and clothing from Z. State Y exports foodstuffs to X and Z. Y imports the oil from X and the machinery for its agricultural sector from Z. State Z completes the circle by importing oil from X and foodstuffs from Y and supplies clothing and machinery to both states.

[31] The TDCA agreement between EU-SA dispute settlement clause in Article 104 illustrates this point. An analysis of

The problem arises when say state X submits that the agreement does not apply to say its agricultural sector and is not covered by the term substantially all trade in the agreement. It thus continues to protect this sector of its economy and refuses to allow concessions to state Y. State Y and Z take the opposing view and in retaliation to state X `s interpretation stops giving preference to state X products in other sectors. State X then reacts defensively and soon the regional trade agreement folds.

If the dispute settlement clause invoked creates a competent and effective tribunal or granted jurisdiction to a specific court, the dispute could be quickly resolved via a competent verdict. The decision must be taken timeously with enforceability being paramount.

Essentially two problems have been identified, the poor design of dispute settlement mechanisms and secondly the question of enforceability. These two problems harbour themselves in every dispute settlement mechanism in some form.

The legal debate on the form of construction of these clauses and the role in the body of international law is intriguing yet the pressure for economic success placed on regional agreements must not be overlooked. The agreements have a huge social and economic value. For the developing world a successful regional agreement holds the promise of job creation, lucrative export markets and foreign imports of good value in sectors sorely lacking in the country.

The creation of a successful agreement is in the best interest of the parties. The solution I propose would be for the creation of simpler regional trade agreements which concentrate on one or two sectors of the respective states. The positive aspects of this approach include, states can recognise specific sectors for inclusion, the drafting period of the agreement is greatly reduced and the monitoring aspect is increased. States could conclude several of these agreements in different sectors with different partners.

Article 104 with follow in Part III.

By concentrating on specific sectors of the various economies the creation and drafting becomes easier. The parties may concentrate on drafting an effective dispute settlement clause. This dispute settlement clause must create a competent independent body, which swiftly resolves disputes and grants enforceable decisions.

The symbiotic nature of the regional agreement must be stressed to its participants. The simplification of the trade agreement shall possibly solve the first problem identified. The problem of enforceability may be solved via the deposit of a specified amount of revenue in a mutual fund. The amount deposited by each state must be of such a nature that it would be in the states best interest to ensure the trade agreements success.

The developing states greatly need the creation of effective regional trade agreements. The states that so sorely need effective trade cannot afford the retainer I propose. Foreign debt, internal strives and the constant change of government relegates my proposal to the realms of a dusty library with no practical value. The solution proposed could work if the states appreciate the hidden potential of successful regionalism.

PART III

[3] World Trade Organization (WTO)

The General Agreement on Tariffs and Trade (GATT)[32], was replaced by the WTO. The original GATT established fundamental principles of non-discrimination and the Most Favoured Nation

[32] GATT was adopted as part of the International Trade Organisation in 1947, and has applied on a provisional basis since then.

Principle[33] treatment between the Contracting Parties. In time this would become a norm of international trade law. These basic obligations were supplemented over time with provisions on subsidies, dumping, non-tariff barriers to trade etc. The Uruguay Round of Negotiations, which concluded in 1994, established the World Trade Organisation as the successor to the GATT.

WTO System- Dispute Settlement

The WTO offers its members a competent dispute settlement mechanism. The Uruguay Round of Negotiations saw the adoption, as part of the WTO agreement detailed arrangements in respect of dispute settlement.

The rules are contained in the dispute settlement understanding (DSU) attached to the WTO agreement as annexure 2. The mechanism is the product of the GATT 1947, it embodies the developments of the old system and attempts to improve the system making it more effective and legally binding. It adds important aspects to the original dispute settlement including :-

(1) Customary rules or implied rules

(2) A compulsory system of dispute settlement for WTO members either via Diplomatic or legal solution in the event of deadlock.

The principal institution of dispute settlement became known as the Dispute Settlement Body, commonly refereed to as the DSB.

[33] Most-Favored-Nation obligation is a basic principal of the WTO. The principle is one of equal treatment it calls each contracting party to grant to every other contracting party the most favorable treatment that it grants to any country with respect to imports and exports of products. See further Jackson Chapter 6 page 157.

The WTO dispute system works better than GATT 1947. The system is not competent enough to resolve all international trade disputes. The co-existence of other dispute settlement mechanisms is the current position. The fundamental question is how do these systems exist side by side? On the one hand you have regional specific agreements which contain dispute settlement provisions and the other the WTO's, DSB.

Does a hierarchy exist between the systems? Two contracting parties who are members of the WTO enter into a regional trade agreement. This agreement includes a competent dispute settlement mechanism. When a dispute arises and one of the parties invokes the dispute settlement clause does it nullify the option of approaching the WTO's, DSB? Conversely can a contracting party opt to use the WTO's, DSB over the agreed regional arrangement?

The various regional agreements have been explained and a synopsis of the WTO has been given. No clear answer presents itself to the problem raised above. The question essentially revolves around the issue of jurisdiction. No inherent jurisdiction exists in international trade law. The closest thing to an international governing body is the WTO, but the ability of members to contract out of the system makes even its authority questionable.

The nature of trade disputes can cost a country millions in lost revenue by a reluctant trading partner. The trading partner can easily play the two systems against each other, which can cause huge time delays. Example, trade in agriculture is dependent on the seasons, having fruit in storage while a dispute is resolved is unacceptable. For argument's sake lets imagine the dispute concerning apples is resolved within six months. By the time trade is allowed the fruit would have rotted and the season closed. The reluctant party even with a judgment against it would have frustrated the process to such an extent that it would have achieved its goal.

Its domestic product would have enjoyed the market free from foreign competition. Its government simply refers the issue of interpretation of a certain provision to its regional body and then simply appeals to the WTO's, DSB. The action taken by the state is completely legal. Its underlying intention is tainted yet its actions are justifiable.

Until a system is developed which prescribes, firstly which dispute settlement mechanism takes preference and secondly ensures enforceability of the decisions taken by the body these problems shall persist. International trade dispute settlement shall remain clouded leaving the ideal of legal certainty sorely lacking. The sense of legal certainty concerning dispute settlement ensures fair impartial adjudication; enforceable decisions coupled with swift and effective action. Without these components attracting foreign investment shall be extremely difficult. With developing countries competing to attract investment this vital component must be resolved. The solution I propose to resolve the problem of competing and inept dispute settlement mechanisms include: -

(1) The WTO must establish a competence test. The test should require impartial adjudication, binding decisions and effective appeal procedures. Each dispute settlement mechanism must be subjected to the test.

(2) The WTO's, DSB would always take preference[34], unless the wording of the "in house" agreement specifically grants the regional trade agreements dispute settlement mechanism preference. The regional agreement must comply with the competence test described above.

(3) Consensus between the parties may determine which option either WTO, or their own mechanism. This option applies if their dispute mechanism has complied with the competence test. Once a decision has been taken on a specific system it would apply throughout the dispute nullifying appeal and competence of the other system.

[34] This is the present situation as the WTO,DSB.

(4) The competence test should be administered every five years to ensure that the dispute mechanism body is still compatible.

(5) The presumption should be that the WTO's,DSB always applies unless the contrary intention can be shown.

The first part of the paper was to illustrate the present position of dispute settlement in regional trade agreements and within the WTO system. The various regional trade agreements serve to illustrate the various methods adopted by states to develop an amicable solution. The WTO is presented as a body, which exists concurrently with regional agreements which contain their own procedures. The problem of these two systems sharing the same bed was illustrated. The second part of the paper takes this foundation and looks to the EU-SA , TDCA and its dispute settlement mechanism.

PART IV

[4] EU – SA AGREEMENT

TRADE DEVELOPMENT AND CO-OPERATION AGREEMENT (TDCA)

The bilateral trade agreement (TDCA) became a reality in January 2000. The TDCA establishes a developmental free trade agreement (FTA). The TDCA will also cover the following areas of co-operation including development co-operation, trade related issues, political dialogue, social and cultural co-operation, financial assistance and economic co-operation.

The TDCA between EU and SA was signed 11 October 1999 in Pretoria. South Africa's Trade and Industry Minister, Alec Erwin signed the agreement on behalf of the South African government. On behalf of the European Union, the agreement was signed by European Commissioner Paul Nielson, secretary of state, Jukka Valkisaari of the ministry of foreign affairs of Finland representing the current European Union presidency as well as the ambassadors of all fifthteen EU member states.

Purpose

The TDCA is unique as it establishes a free trade area between the two parties over the next 12 years, liberalising over 90% of trade during this time and opening up innumerable opportunities for trade and cooperation for both sides[35].

EU-SA TDCA- Dispute Settlement

The agreement reflects a negotiated settlement. The mechanism for the settlement of disputes is contained in Article 104 Dispute Settlement.

[35] The agreement is beneficial for South Africa as it forges a strategic long-term relationship with the EU. Trade links with SA most important trading partner especially in industrial products which form the basis of future South African growth is reinforced. Economic and Technological links are forged and Development programmes are adapted for SA's needs. The TDCA is beneficial for the EU as it strengthens an already close relationship with its most important political and economic partner in Africa. It secures the EU's position on a political, trade and investment level in SA. EU exporters will benefit from benefiting from SA tariff reductions. EU also is seen to help provide support to emerging markets, which will provide positive stimulus to the ACP / EU post 2000 negotiating process. See European Union News Volume 14- Mar/Apr. 1999 Pretoria p.6

I Article 104 Dispute Settlement

Article 104(1) Each party may refer to the Cooperation Council any dispute relating to the application or interpretation of this Agreement.

Article 104(2) The Cooperation Council may settle any dispute by means of a decision.

Article 104(3) Each Party shall be bound to take the measures involved in carrying out the decisions referred to in paragraph 2.

Article 104 refers to a Cooperation Council. The establishment of this council is contained in Title VIII: Final Provisions. Article 97 deals with the creation of the council.

Article 97: Institutional set-up

1 The Parties agree on the establishment of a Cooperation Council which will perform the following functions:

a to ensure the proper functioning and implementation of the agreement and the dialogue between the Parties.

b to study the development of trade and cooperation between the parties;

c to seek appropriate methods of forestalling problems which might arise in areas covered by the agreement;

d to exchange opinions and make decisions suggestions on any issue of mutual interest relating to trade and cooperation, including future action and the resources available to carry it out.

In Article 97(1) the agreement refers to "*The Parties*", it seems that this Cooperation Council would be established via consultation between South African government and the EU. This body must monitor the agreement and establishment it's central to Article 104, dispute settlement.

Article 104 explains the procedure for the settlement of disputes arising from the interpretation and implementation of the agreement. Article 104 represents yet another internal dispute settlement mechanism.[36] The EU-SA agreement establishes its own system in Article 104.

In Article 97 supra the parties agree on the establishment of a Cooperation Council. In Article 97(1) the broad functions of this body are described. The functions include ensuring the proper functioning and implementation of the agreement, stimulating dialogue between parties, avoiding problems, the study of trade patterns and alike. *(See Article 97(1) supra)*

In Article 97(2) the composition, frequency and venue of the Cooperation Council meetings are granted to the parties to determine. In Article 97(3) the council is granted the power to make decisions in respect to all matters covered by the agreement. Article 97(4) and (5) calls for interaction between various states parliaments and for interaction with relevant national institutions for example Economic and Social Committee of the European Community and National Economic Development and Labour Council (Nedlac) of South Africa.

Article 104 read in conjunction with Article 97 grants the contracting parties the power to assembly this Co-operation council. The Cooperation Council's composition, membership and agenda are in the contracting parties' hands. Article 97(1) is general in its description of functions yet article 97(3) allows it the power to make decisions on all matters covered by the agreement. This power is not qualified or quantified. If a dispute arises and it is refereed to the Co-operation Council, via the treaty the council is granted the capacity to make decisions, which are binding, on both parties.

[36] ECOWAS and the EU is judicial based, ASEAN modeled on WTO and NAFTA has various methods of dispute settlement.

Questions are raised concerning whether a right to appeal exists or even more basic who will be on this council. Will a panel of Judges chosen from the respective countries head the council? Will decisions be based on legal interpretation? The problem is compounded by the diverse nature of the Cooperation Council duties. Its primarily function is not exclusively dispute settlement. The Cooperation Council's duties include ensuring the proper functioning and implementation of the agreement, studying development of trade, pre-empting problems and exchanging opinions[37]. The core functions are so diverse that a team would be required to handle every specific function. For example *Article 97(1)(b) to study development of trade and cooperation between the Parties*. To study the development of trade would require statisticians, economists, political scientists, accountants to name but a few research disciplines which would have to be engaged.

The body described in Article 104 leans towards a judicial like body. The present wording of the respective articles shoulders too much responsibility on this ambitious Cooperation Council. I propose that a better solution would be to create within the ambit of Article 104 a separate body designed solely for dispute resolution. This body should have various levels of competence from private individuals complaints to the highest level of interstate disputes.

The initial commentary served to introduce Article 104. Article 104, contains provisions referring to arbitration.

Article 104(4) In the event of it not being possible to settle disputes in accordance with para (2)[38] *- either party may notify the other of an appointment of an Arbitrator.*

[37] See Article 97 (1)(a)-(d)
[38] Paragraph 2 (supra) refers to the Cooperation Council ability to settle any dispute by means of a decision

Article 104(4) allows either party to opt for arbitration in the event of the Cooperation Council being at a deadlock. Essentially this means that the dispute settlement body cannot solve the problem. Practically if a party wishes to invoke Article 104(4), must the Cooperation Council, issue a statement that it cannot find a solution? Hypothetically if the Cooperation Council could establish a dispute settlement body composed of a panel of five adjudicators, then a deadlock situation would be avoided and a decision would always be achieved. Article 104(4) would never have to be invoked. The rules in Article 104(4) concerning arbitration as a form of dispute settlement is only an option once the Cooperation Council has failed to reach a decision. I argue that if the Cooperation Council is properly composed, a decision should be forthcoming from every sitting thus the rules established in Article 104(4)-(9) concerning arbitration become redundant.

Article 104(4)-(9) Arbitration should not be relegated to an option in deadlock situations. I submit it could be utilized as a separate procedure. I propose that the entail Cooperation Council make a preliminary ruling either in favour of party A or B. At this stage two types of rulings can be made. [1] If the decision is sufficiently clear it must be final as contemplated in Article 104(2) supra. [2] If the Cooperation Council interprets the treaty to benefit both parties, then it should make a ruling of interpretation on the issues at hand. The Cooperation Council should then refer the enforcement and implementation of their interpretation to the provisions of Article 104(4)-(9). Arbitration will then become a mechanism of enforcement based on a ruling of interpretation by the Cooperation Council.

The system proposed is similar to the European Court of Justice system of preliminary rulings[39]. Municipal courts refer issues of interpretation to the ECJ, which makes a preliminary ruling and transfers the case back to the municipal court for settlement and enforcement.

[39] See Discussion on ECJ supra and Preliminary rulings.

The concept of referral I propose calls for the central body making a preliminary decision. It the council feels a more amicable solution can be achieved then it refers the implementation to arbitration. The rights and obligations of each party must be clearly stated. The parties are then allowed to negotiate the most feasible solution. Clear violations of the treaty can be handled by binding decisions, delicate matters could be decided by this referral system.

The referral system should be time barred if the parties can not settle the dispute in a specific time period after referral for implementation then the council must make a ruling as contemplated in Article 104(2).

Disgruntled parties should be allowed appeals. No case law should be used and each case should be interpreted on the facts and provisions of the treaty. Independent decisions with no system of judicial precedent, insure that bad interpretations and decisions are not repeated. The task of having to reargue accepted legal principals might be time consuming yet the advantage of avoiding bad precedent is alluring. Previous decisions may serve as a reference point at most. Procedural rules in Article 104(4)-(9) can be retained, in this revised system of dispute settlement.

The EU-SA agreement creates excellent opportunities for both the European and South African businessman. The various dispute settlement mechanisms of other regional trade agreements have been analised and compared. Article 104 supra, of the EU-SA agreement creates the Cooperation Council an attempt to facilitate and resolve disputes.

The TDCA calls for the parties to the agreement to refer any dispute to the Article 104 procedure. A Public International law based system is created. Article 104 is sufficiently constructed to handle any such disputes of a Public international nature i.e. disputes between the contracting parties. The problem arises when Private individuals of both contracting parties have a dispute concerning the TDCA.

The TDCA agreement does offer some concern when we look at the practical implications of dispute settlement for the European citizen and his South African counterpart. Article 104 clearly refers to "Each Party " namely the EU and SA. No mention is made of private individuals. On a strict interpretation of the TDCA, a private individual does not have the *locus standi* to invoke Article 104.

The universal and accepted international law of dispute settlement is centrally divided into two distinct areas, of Public and Private international law. These spheres of law create their own separate legal systems with common and unique rules. An Examination of three hypothetical scenarios will illustrate the problem facing private individuals.

Problem 1

X (Italian) citizen has a dispute with the South African government concerning the import of Cheese. X alleges that Tariff reductions as per the agreement, have not been properly implemented by the SA government and their refusal to adjust such tariffs is a material breach of the TDCA agreement.

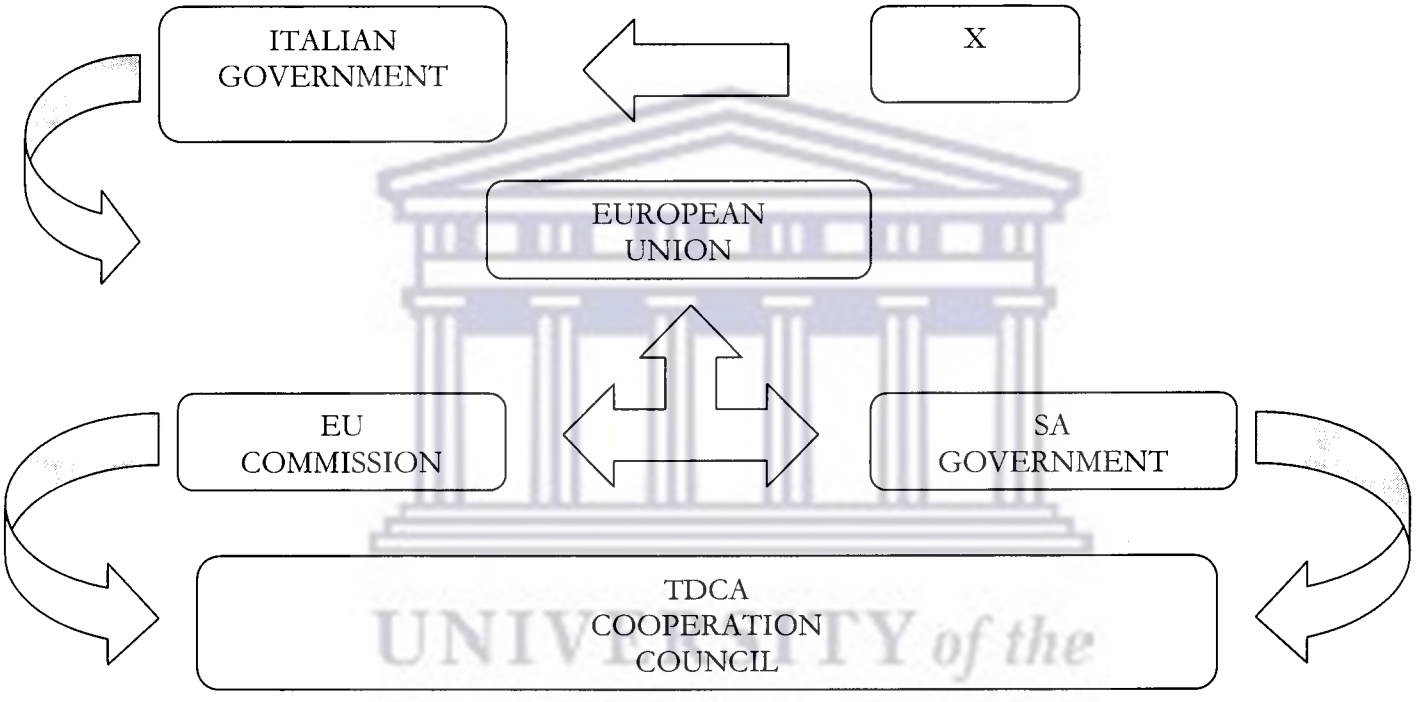
What are the legal options available for X to resolve this dispute? The possible solution, which presents itself in the TDCA, is Article 104.

Solution 1. TDCA - Article 104

Naturally recourse to the TDCA agreement would be the obvious first step. The procedure would require X approaching the Italian Government. The Italian Government would then in turn approach the EU. The EU would enable the European Commission to act on citizen X's behalf.

The European Commission would approach the EU delegation in South Africa. The dispute would then be resolved via the Cooperation Council. This recourse would be in line with the TDCA requirements.

The problem with this solution is in the various steps a citizen would have to take to reach a decision.



Mathematics has taught us that the shortest distance between two points is a straight line. This theory is discarded in the TDCA, which opts for resolution of disputes via numerous agencies in a laborious process. Factors like time constraints and cost implications must be factored into the equation. Invoking National government to resolve minor trade disputes is impractical. The Cooperation Council runs the risk of becoming a forum flooded with petty disputes. This could never have been the intended purpose of the Co-operation Council. From interpretation of the TDCA agreement it is the official method prescribe for resolving trade disputes.

Possible Solution

A simple panel headed by a registrar or administrator could be established which is designed specifically for trade related disputes. The panel could be established in the respective country where the problem arises. Persons who could serve on these panels should be experts in their respective fields. Persons should be identified in government departments, universities, companies, NGO etc. The panel should be given the mandate to efficiently and effectively resolve the dispute and have the necessary enforcement capabilities. An administrator could assemble these ad hoc panels. The administrator could serve as a permanent office to resolve minor disputes. If the administrator believes that the dispute is of a serious nature then a panel of experts should be invoked.

The disputes should be resolved within 6 weeks from the time of application to the final decision. The decisions are final and are not appealable. The decisions do not create legal precedent nor are authoritative on the interpretation of the TDCA. The purpose of these panels should be to ensure that trade is allowed to flow with the least amount of disruption.

Problem 2

A dispute arises concerning EU citizens in the Mediterranean region where a sensitive agricultural sector exists. The dispute concerns the tariff reduction allowed for the agricultural sector. A SA citizen farming in the Free State has a similar tariff reduction dispute. Both parties claim the TDCA is not being implemented properly. Do the respective municipal courts have jurisdiction in these matters? E.g. Italian, Greek Supreme Courts, Free State High Court.

Solution 2.1 Public International Law

EU Citizen

The Enforcement of rights in municipal courts via the principle of Direct effect

The concept of Direct Effect comes from European Union Law. The European Court of Justice has interpreted EU Law to be directly applicable and enforceable by EU citizens before their municipal courts[40]. Once the EU has entered into an agreement it is enforceable without the need for national regulations. The EU citizen can rely on an agreement or treaty concluded by the EU and any foreign state. In our scenario the EU citizen can approach the municipal courts based on the principle of direct effect.

South African Citizen

Direct Effect and Section 231 of the Constitution Act 108 of 1996

The South African citizen does not have the luxury of the principle of direct effect in South African Law. The legislation of significance is Section 231 of the Constitution Act 108 of 1996. Section 231[41] deals with International Agreements. This section is open to interpretation and

[40] Case 6/64, Flaminio Costa v. Enel [1964] ECR 585,CMLR 425 Case 2/74, Reyners v. Belguim [1974] ECR 631, [1974] 2 CMLR 305 - discussion on direct effect of EU law, Cases 21-24, International Fruit Company v. Produktschap voor Groenten en Fruit [1972] ECR 1219, [1975] 2 CMLR 1 – discussion on International Agreements and EC Law Conditions for Binding effect.

[41] *International agreements*

Section 231(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

S231(2) An International agreement binds the republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

S231(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the

does not convey any clear legal principles.

The provisions in S231 contain the requirements to be adhered to before an international agreement can become binding on the Republic and its citizens. S231(2) of the Constitution states that an International agreement only binds the Republic after approval by a resolution by National Assembly and National Council of Provinces. The section calls for Parliamentary approval. The first part of S231(4) requires for any international agreement to become law then it must be enacted by national legislation.

From these two sub-sections we have the following requirements:-

(1) Parliamentary approval

(2) Incorporation into Municipal Legislation

These requirements seem sufficiently clearly for an individual who seeks to invoke the protection of rights via an international agreement. A constitutional test is created. The problem arises when we look at the latter part of both these sections. Section 231(2) allows an exception to its requirements, if an agreement falls within the ambit of Section 231(3). Section 231(3) Allows an International agreement of a technical, administrative or executive nature, or an agreement, which does not require either ratification or accession, entered with by the National executive to bind the republic. The republic is thus bound without Parliamentary approval as long as it is tabled in the National Assembly and National Council of Provinces within a reasonable time.

Republic without the approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

S231(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation, but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

This exception allows the national executive, namely the President[42] the ability to bind the republic without the approval of Parliament. This executive power is further clouded in that the words "technical, administrative or executive in nature" are so broad in definition that it in essence it could refer to any agreement. The section thus creates a form of "executive authority".

The problem is further compounded by the second part of S231(4) which allows "self-executing provisions" of an agreement if approved by Parliament is the law unless inconsistent with the Constitution or an Act of Parliament.

For an International agreement to have effect at municipal level two-requirement need to be complied with namely parliamentary approval and municipal incorporation. The second part of S231(4) allows a self-executing provision once it has received Parliamentary approval to become part of our law and thus the aspect of municipal incorporation is negated. The procedure involved in implementing International agreements calls for Parliamentary approval as the first step. If the agreement in question can satisfy the "self executing" proviso then it becomes part of municipal law despite not being incorporated into municipal law.

The term "self executing" provision has not been defined by our courts nor have the terms "technical, administrative, or executive". The South African citizen has this poorly constructed section concerning international agreements. The enforcement of rights by a South African citizen will be extremely difficult as the inquiry will not necessarily begin with the question of enforcement but the primary question of whether the right relied upon even exists. The situation is unacceptable and seriously prejudices the South African citizen.

[42] See Chapter 5 The President and National Executive -Constitution of SA Act 108 of 1996, S85

The EU citizen on the other hand does not have this problem as the principle of Direct Effect of EU law is quite clear. The EU citizen could thus theoretically invoke a remedy via his municipal courts an option not available to the SA citizen.

Solution 2.2. Private International Law

The options available in the field of Public International Law have been exhausted. The disputes envisaged would be of a commercial nature. The field of Private International Law may offer a solution. The EU and SA businessman who have problems with the host government may refer the dispute to the traditional commercial methods of dispute settlement. The traditional methods of Arbitration and Litigation exist.

The options under International Arbitration include, International Centre for the Settlement of Investment Disputes (ICSID), London Treaty, United Nationals Commission on International Trade Law (UNITRAL) etc.[43]

In 1993 to facilitate commercial litigation, a Commercial Court was established in the Witwatersrand Local Division (WLD). If both parties agree, cases over which the WLD has jurisdiction may be refereed to this court. The South African courts have shown a willingness to give judgements in foreign currency where the loss was incurred in a foreign currency. This is promising for EU businessmen as the South African Rand is not as sort after as hard currency such as the US Dollar, Germany Mark or British Pound. Factors like the Enforcement of Foreign Civil Judgements Act, No. 32 of 1988 compound the issue as the Act lays down cumbersome requirements for persons attempting to enforce foreign judgements in South Africa. The South African Dispute settlement procedures have advantages yet contain as many disadvantages.

[43] See International Arbitration

Litigation

The SA citizen may resolve respective disputes via litigation. The principle of Direct Effect of EU law may be invoked within the foreign forum. The SA citizen on continental Europe may attempt to hold a member state of the EU liable before ECJ based on the principle of Direct Effect.

The same remedy is not available for an EU citizen in SA. Reciprocity for the EU citizen does not exist as the principle of Direct Effect is not accepted as part of SA law. The option of holding the SA government liable in municipal courts seems improbable. The procedure would most probably convene at the Witwatersrand Local Division or the Transvaal Provincial Division of the High Court. These courts will have jurisdiction as the agreement was signed in Pretoria. Civil Procedure prescribes that any action against the Government will be filed in the court having Jurisdiction over Pretoria.

The EU business would have to employ SA counsel, an Attorney and Advocate afay with SA law. The applicant would be at the mercy of the SA judicial system. The courts suffer from a serious backlog and getting a date for hearing would be difficult let alone an expedient decision, which is almost impossible. Practically filing an action against the government could take months or even years to resolve if municipal courts are invoked. Financial implications could result in small to medium businesses in Europe facing bankruptcy if their product sits in a Durban or Cape Town warehouses pending a court decision. South African Courts do not recognize the awarding of Punitive damages, thus even if the applicant succeeds against the SA Revenue service for non-implication of the TDCA it could have little real effect. The amount of time, legal costs, loss of clients for malperformance of contractual duties, and other expenses could never be satisfied by a court order.

I submit that the option of litigation via SA High Courts or ECJ is not a viable solution, these two forum should not be burdened with these types of actions. The time constraints, legal costs, language problems, enforcement possibilities all weigh heavily against the use of litigation.

The possibility of relying on a civil judgement granted in a foreign country?

As illustrated above the EU citizen relying on SA national courts would be costly and impractical. The option of relying on a foreign civil courts judgement and only relying on SA courts for the execution of the order seems an option.

Enforcement of foreign Civil Judgements Act 32 of 1988.

This act as the preamble states was created "*To provide that civil judgements in designated countries may be enforced in magistrates courts in the Republic..*"

The definition section of the act, indicates in which context the act finds application defining **court, designated country judgement, judgement creditor, judgement debtor ectera** [44],

[44]'court', in relation to the court of a designated country, means the Supreme or High Court or any magistrate's court (including a regional court) of that country and, in relation to a court in the Republic, means the magistrate's court of the district where-

(a) the person against whom a judgment in question was given-

(i) resides, carries on business or is employed; or

(ii) owns any movable or immovable property;

(b) any juristic person against which the judgment was given has its registered office, or its principal place of business;

(c) any partnership against which the judgment was given has its business premises or any member thereof resides;

'designated country' means a country designated under section 2 (1);

The broad definition allows any jurisdiction issue to be resolved with criteria establishing such jurisdiction clearly stated. Courts in the Republic can rely on a host of factors to find jurisdiction against individuals, juristic persons and partnerships.[45]

A foreign businessman could establish jurisdiction and enforce a judgement against a judgement debtor under the act without the cumbersome requirements of establishing jurisdiction.[46]

The act lays down certain principles in national legislation on how judgement creditors can enforce foreign civil judgements. The definition of judgement creditor and judgement debtor

---

'judgment' means any final judgment or order for the payment of money, given or made before or after the commencement of this Act by any court in any civil proceedings which is enforceable by execution in the country in which it was given or made, but does not include any judgment or order given or made by any court on appeal from a judgment or order of a court other than a court as defined in this Act, or for the payment of any tax or charge of a like nature or of any fine or other penalty, or for the periodical payment of sums of money towards the maintenance of any person;

[Definition of 'judgment' substituted by s. 36 of Act 75 of 1996.]

'judgment creditor' means the person in favour of whom the judgment was given, including any other person in whom rights under the judgment have become vested;

'judgment debtor' means the person against whom a judgment was given in the court of a designated country, including any person against whom such judgment is enforceable under the law of the designated country;

'Minister' means the Minister of Justice;

'proceedings' means the proceedings in which the judgment was given.

2 Application of Act

(1) This Act shall apply in respect of judgments given in any country outside the Republic which the Minister has for the purposes of this Act designated by notice in the Gazette.

(2) The Minister may at any time by subsequent notice in the Gazette withdraw any notice under subsection (1), and thereupon any country referred to in such last-mentioned notice shall cease to be a designated country for the purposes of this Act.

[45] Act 32 of 1988 S1(a)-(c)
[46] Act 32 of 1944 Rule 57 describes that an application must be brought with supporting affidavit to confirm jurisdiction

makes no distinction between SA citizens and foreigners who may be either a debtor or creditor. Theoretically two foreigners can use our courts for execution purposes if a competent decision is obtained in a designated country. The rules which distinguish between an incola[47] and peregrinus[48] of a court are redundant. The respective consequences[49] are equally inapplicable.

The civil process to be followed is methodically laid down in the Act in Sections 3,4 and 5.[50] Section 7 contains a host of legal presumptions and Section 8 prohibits the removal of assets giving a notice issued under section 3(2) the effect of an interdict. A judgement debtor cannot remove or dispose of assets which would prejudice the execution of the judgement.

Section 4(2) allows after an expiration of 21 days after service of the notice contemplated in Section 3(2), that a judgement in terms of Section 3 becomes executable. The procedure is relatively inexpensive and expedient.

Act 32 of 1988 has huge potential as it offers an effective alternative to resolve disputes. Foreign judgements become enforceable in SA, which would benefit especially EU citizens.

Problem

The Act 32 of 1988 has a number of aspects, which hinder its application. As stated above the preamble clearly states it applies to civil judgements given in designated countries, which may be enforced in magistrate courts. This contains two separate problems, designated countries and magistrate courts.

[47] incola – either domicile or residence or residence within the court's area of jurisdiction will make a litigant an incola

[48] peregrinus – is a person who is neither resident nor domiciled in the area.

[49] The concept has four important aspects (a) arrests *suspectus tamquam de fuga* (b) whether a court has jurisdiction over a defendant based on the rule *actor sequitur forum rei* (c) a peregrine plaintiff is bound to give security for costs; and (d) only an incola plaintiff will be entitled to an order of attachment or arrest to confirm jurisdiction.

[50] S3 Registration of Judgements given in designated countries, S4 Effect of registration of judgements, and

[1] Magistrate Courts

The Magistrate Court has the advantage of keeping the costs low due to the tariffs. The disadvantage is the jurisdictional question as only claims below or equal to R100000 may be heard. The districts areas are smaller, thus determining which magisterial court to issue the recognition of order, have the potential frustration of the defendant moving to another magisterial district. The High Court does not labour under these impediments, as its jurisdiction area is substantially larger. To illustrate the vast difference, the Cape Provincial Division of the High Court of South Africa has jurisdiction over the greater Cape Town area. This area has eleven Magisterial Districts including Wynberg, Mitchell's Plain, Cape Town, Strand, Kuilsriver, Bellville, Goodwood, Somerset West, Stellenbosch, Simonstown and Wellington.

[2] Designated countries

These countries are determined in accordance with section 2(1) of the Act.

Section 2(1) This Act shall apply in respect of judgements given in any country outside the Republic which the Minister has for the purposes of this act designated by notice in the Gazette.

The creation of designated countries is in the hands of the Minister. Presently only the so-called TCVB states, namely Transkei, Ciski, Venda, Bophuthatswana where indicated as designated countries for purposes of the act. These previous homelands have been incorporated to a certain extent into South Africa. The government gazette notice recognising these designated countries is redundant, as these states no longer exist.

---

execution S5 Setting aside of registered judgment.

The analysis of this Act serves to illustrate the hidden potential in legislation to resolve the issue of dispute settlement in South African Trade law. A similar act should be drafted for use in the High Court, for various reasons including higher financial jurisdictional requirement[51], larger physical jurisdiction.

In the High Court applicants have attempted to enforce foreign judgements under the common law via the provisional sentence procedure. The Enforceability of foreign judgments was discussed in **Jones v Krog 1995 (1) SA 677 (A).**

As was stated by Corbett CJ in **Jones v Krog 1995 (1) SA 677 (A) at 685B-E**, the present position in South Africa is that a foreign judgment is not directly enforceable but constitutes a cause of action and will be enforced by our Courts provided:

'(i) That the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts (sometimes referred to as "international jurisdiction or competence"); (ii) that the judgment is final and conclusive in its effect and has not become superannuated; (iii) that the recognition and enforcement of the judgment by our Courts would not be contrary to public policy; (iv) that the judgment was not obtained by fraudulent means; (v) that the judgment does not involve the enforcement of a penal or revenue law of the foreign State; and (vi) that enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978, as amended'.

[51] Magistrate Court jurisdictional threshold is R100 000, unless certain special requirements are met like consent by parties.

The requirements to be adhered to by an applicant were clearly stated and noted with approval in subsequent cases.[52] An aspect of concern raised in this case is yet another legislative hurdle in the Protection of Business Act 99 of 1978.

In **Chinatex Oriental Co v Erskine 1998 (4) SA 1087(C)** Judge Chetty's judgement deals with an application dealing with Act 99 of 1978 an extract of the judgement is reproduced.

P1096

The alleged non-compliance with the Protection of Businesses Act 99 of 1978

It was submitted on behalf of the defendant that in as much as the judgment in the English Court relied upon was for payment due under contracts of sale in terms of which manufactured garments were exported from China and imported into the UK, such manufactured garments are included in the expression 'any matter or material of whatever nature' in s 1(3) of the Protection of Businesses Act (supra). Consequently the plaintiff is precluded from enforcing the judgment in the absence of the Minister's permission referred to in s 1(1) of the Act. It is common cause that the Ministerial permission envisaged by s 1(1) has not been sought. Section 1(1) of the Act provides that, except with the permission of the minister, no judgment, order or arbitration award delivered, given, issued or emanating from outside the Republic and arising from any act or transaction contemplated in ss (3) shall be enforced in the Republic.

*In **Tradex Ocean Transportation SA v M V Silvergate (or Astyanax) and Others 1994 (4) SA 119 (D) Howard JP at I 121A--D** held that in the context of s 1 of the Act the words 'any matter or material' mean 'raw materials or substances from which physical things are made and not a manufactured thing such as a ship', and that the words 'of whatever nature' did not 'justify an extension of the ordinary meaning of "matter and material". The contention advanced on behalf*

[52] 1999(1) SA 806(W) p688H-689A, 1998 (4) SA 1087(C) p685

of the defendant is that the Tradex matter was wrongly decided. Howard JP in Tradex (supra) found that the expression 'any matter or material' means 'raw materials or substances' for two reasons:

(i) it was supported by the dictionary definitions of the words 'matter' and 'material' and

(ii) the Legislature pertinently in s 1(3) referred to a transaction connected with the mining, production, importation, exportation and refinement of any matter or material but did not refer to manufacture.

In my view the above reasoning is convincing and the matter correctly decided. The wording of the section evinces a clear indication that the Legislature intended to refer to raw materials or substances and not manufactured goods such as garments. Consequently the plaintiff is not precluded by the provisions of the Protection of Businesses Act supra from seeking to enforce the judgment of the English Court.

In conclusion therefore I am satisfied that the plaintiff is entitled to an order of provisional sentence against the defendant with costs in the following terms: Provisional sentence is entered against the defendant for payment to the plaintiff of $2 332 167,02 together with interest in the sum of $401 771,67 from the date that this sum became due until judgment or the Sterling equivalent and costs to be taxed or the South African equivalent of the amounts as aforesaid.

Plaintiff's Attorneys: Silberbauers. Defendant's Attorneys: Marais Müller.

An extract of the Chinatex judgment is reproduced to illustrate the problem, which the Protection of Business Act 99 of 1978 can cause in attempting to rely on the Provisional Sentence Procedure. In this case the application succeeded yet the case illustrates that attorneys had to argue compliance with Act 99 of 1978. The Act requires ministerial consent a burdensome and laborious task. This problem will be expanded upon in the discussion on Arbitration.

The position is as follows, SA citizen can use litigation in Europe, the EU citizen using litigation in South Africa has a host of problems supra. The current option is Provisional Sentence Procedure via a High Court Application. The requirements as stated in the **Jones vs Krog** case contain further difficulties especially the requirement referring to Act 99 of 1978. The solution may lie in legislative intervention in amending Act 99 of 1978 and promulgating an act similar to Act 32 of 1988 for use in the High Court. The question of Arbitration.

Arbitration

International Arbitration has a variety of options. This private process, thus closed to the public has seen a variety of institutions established to facilitate the dispute resolution. An overview of the international options includes: -

[1] Permanent Court of Arbitration

The headquarters of the court is in The Hague in the Netherlands. The panel from which the Arbitrators are chosen is not a permanent body. There is no court but only a secretariat. When disputes do arise ad-hoc panels are established to facilitate the arbitration process.

[2] International Center for Settlement of Investment Disputes (ICSID)

The signing of the Washington Convention formed ICSID. This World Bank initiative makes use of both Conciliation and Arbitration to resolve disputes. Essentially three requirements have to be met before ICSID can be invoked: -

(a) Parties must agree to submit disputes to ICSID

(b) The Parties to the dispute must include a Contracting State and a National from another State, which is also a signatory to the convention.

(c) The Legal disputes arising from investments.

The Convention and not National laws govern the disputes. Decisions are binding on the parties. States agree to recognise awards and enforce them in their territory without possibility of review under the law of the state. The problem of enforcement is solved without infringing on States' rights to self-determination and State sovereignty.

SA is currently not a member of ICSID and the use of National Litigation as advocated. In the 1970's to accommodate non-signatories to the convention the Additional Facility mechanism was introduced. The Additional Facility is used to administer disputes via arbitration or conciliation. The parties to such disputes are states and nationals of other states who fall outside the parameters of the convention. The distinguishing factor is the enforcement aspect; the award can only be enforced via the national laws of the respective parties. The aspect of State Sovereignty is maintained which could possibly hinder enforcement entirely.

International Court of Arbitration of International Chambers of Commerce (ICC)

The headquarters is located in Paris. This is the most widely used international arbitration system. The advantage of this form of arbitration is the ability to convene anywhere in the world. Arbitrators of any nationality may be used and the choice of language is at the discretion of the parties. Parties determine the arbitrators for these ad hoc arbitrations. The parties have the right to choose the rules governing the proceedings. The entire process is overseen by the ICC, which monitors the terms of reference and calls for decisions to be given within six months after the closing of the hearing. This limit of 6 months speeds up the process considerably. This framework has facilitated arbitration globally and formed a universal standard, lending to its popularity.

United Nations Commission on International Trade Law (UNCITRAL)

The commission has no established institution and does not perform any administrative functions. UNCITRAL has created a model law, which can be adopted in national arbitration legislation. The aim of this model law is to harmonize and liberalize commercial arbitration with an emphasis on party autonomy. The model calls for less intervention from national courts by creating basic rules to ensure fairness and assist the enforcement of awards. The Arbitration Rules, which govern the arbitration proceedings, can be used in any ad hoc arbitration for example London Court of Arbitration.

UNCITRAL created a model law to aid countries arbitration. If all countries adopt this, as national law then international arbitration law will be harmonised. The jurisdiction of national courts is limited, which illuminates the problem state sovereignty. The basic rules ensure that arbitrations run smoothly procedurally. The model has shortcomings in that it has no formal institution to assist with the administration process.

London Court of Arbitration (LCA)

This system can arrange arbitrations anywhere in the world under any system of law. Its own rules can be used or it could adopt for example the UNCITRAL rules. Any type of transaction can be adjudicated under the convention. Arbitrators constitute the Court with different nationalities under rules, powers and duties predetermined by the convention. The Convention unlike the ICC has no time limit on the handing down of decisions.

The SA citizen

The SA citizen can rely on the various International Arbitration Forums stated above. The form of arbitration opted for is largely dependant on which treaties the contracting states have ratified. The New York Convention creates international obligations to recognise and enforce arbitration agreements. In 1999 the convention had 123 signatories either fully ratifying the convention or signing under certain reservations. The Additional facility of ICSID offers the SA citizen competent rules to administer arbitrations. The additional facility does lack an effective enforcement mechanism but can be resolved via reference to the New York Convention. International Arbitration for a South African Citizen is an attractive form of dispute resolution based on the various conventions regulating dispute resolutions.

The EU citizen in SA

The position of the EU citizen in SA is not as promising. There are major problems in the South African Arbitration Law[53]. The Arbitration Act 42 of 1965 makes no reference to International Arbitration and the excessive powers of intervention of courts. The act was created for internal use without due regard for the reality for the need for foreign parties utilising arbitration. The declaratory orders which our courts have the power to make results in the possible abuse of the system. Arbitrations can be dragged out with constant referral for a declaratory order. The SA system is not geared for international arbitration. The problem is compounded when we look at the enforcement aspect.

53

Bradlow D "Legal Aspects of Foreign Investment in South Africa"
Butler D "A New Domestic Arbitration Act for South Africa: "What happens after the adoption of the UNICTRAL model law for International Arbitration."
Steyn J "Arbitration Bringing South Africa in from the Cold " (1997) De Rebus Alternative Dispute Resolution page 197-198 March 1997

The problems of Enforcement.

SA is a member of New York Convention and is thus obliged to recognise and enforce foreign awards of all other signatory states.[54] US signed convention conditionally, whereas SA signed unconditionally. Thus SA is obliged to recognise and enforce all other states' awards.

The manner in which SA implements legislation to fulfil International Obligations has been illustrated with reference to Section 231 of the Constitution supra. The enabling legislation in this regard was The Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977. This act implements the New York Convention's obligations. The manner in which the act is worded creates problems especially the definition of "foreign arbitral awards."

The convention defines the recognition of foreign arbitral awards quite clearly whereas our legislation makes no mention of arbitral awards. The Act refers to "awards made outside the Republic" with no reference to an arbitration clause or agreement.

The convention states that " Foreign arbitral awards shall..." The SA legislation states " Foreign arbitral awards may be made order of Court." The act creates a form of discretion, which is not reassuring for an investor who wishes to enforce a foreign arbitral award.

The problem is compounded by the Protection of Business Act 99 of 1978 which states:-

" no judgments or arbitral award made outside of South Africa shall be enforced without the consent of Minister of Trade and Industry if it arose from an act or transaction connected with mining , production, importation, exportation, refinement, possession, use or sale of a ownership to any matter or material of whatever nature whether within ,outside, into or from South Africa."

[54] UN Convention 1958- Purpose to ensure the recognition of awards.

The section is so ambiguous that it could cover most sectors of the economy. This act forces an applicant to apply for Ministerial consent before attempting to enforce a foreign judgment or award.

The SA Law Commission in December 1996, issued a discussion paper, which addressed the problems, raised above. The project committee included Prof.David Butler, Prof Dick Christie QC, Jeremy Gauntlett SC and Judge Shenaz Meer. Three main proposals were forwarded.

[1] The Application of the United Nations Commission on International Trade Law (UNCITRAL) Model Law.

[2] The repeal of Act 40 of 1977 and its replacement by legislation corresponding to the New York Convention.

[3] The accession by South Africa to the Washington Convention on the Settlement of Investment Disputes between states and nationals of other states (ICSID).

The SA citizen can use Arbitration to solve problems concerning interpretation and enforcement. The EU citizen in SA cannot rely of Arbitration for the reasons stated supra.

PART V

How does the TDCA measure up against other Regional trade agreement?

James M. Smith[55] paper The Politics of Dispute Settlement Design: Explaining Legalism in

[55] Published : International Organization p150 The IQ Foundation and the M Institute of Technology 2000

Regional Trade Pacts. The paper gives an overview of Regional Dispute systems. A scientific study compares various regional trade agreements in tabular form. The composition and weaknesses of the various regional dispute agreements are compared and contrasted. Smith presents data on page 156 in *Table 3. Levels of Legalism* which contains the following headings:- Pact, Third Party Review, Third Party Ruling, Judges, Standing, Remedy and Level of Legalism.

The table 3 breaks down various agreements into components, and rates them accordingly, granting each a rating, which is called the level of legalism. Thirty treaties were examined. I have opted to reproduce selected sections of the table[56]. Five agreements' of interest whose ranking , illustrates the full spectrum from no rating, low, medium, high and very high level of legalism include:-

TREATY PROVISION

PACT	THIRD PARTY REVIEW	THIRD PARTY RULING	JUDGES	STANDING	REMEDY	LEVEL OF LEGALISM
SACU	None					**NONE**
NAFTA	Yes automatic (except in side accords, where two of three states must approve review	Binding Chapter 20 : General disputes Chapter 19 : Unfair trade law Chapter 11 : Investment	Ad hoc - roster	Chap 20: States only Chapter 11: Individuals only Chapter 19 & side accords	Chapter .20 : Sanctions Chapter 11 & Chapter 19: direct effect Side accords: fines except direct effect Canada	**MEDIUM**

[56] The full table p156-157

		Investment disputes		states and individuals		
ECOWAS	Yes automatic	Binding	Standing Tribunal	State & Treaty Organs	Sanctions (imposed by heads of states)	**HIGH**
COMESA	Yes automatic	Binding	Standing Tribunal	State & Treaty Organs & Individuals	Sanctions (imposed by tribunal)	**VERY HIGH**
EC	Yes automatic	Binding	Standing Tribunal	State & Treaty Organs & Individuals	Direct Effect	**VERY HIGH**

I tend to agree with the analysis made by Smith. The table relies on the legal principles as created by the respective treaty provisions. The table comments on the physical construction of the dispute settlement procedures. SACU is granted the lowest ranking. It illustrates the poor construction of its dispute settlement provisions. NAFTA is rated as *"medium"* yet Smith explains at page 158 NAFTA has various levels of dispute settlement due to the nature of the agreement. A proper rating of NAFTA cannot be made do to this fact.

ECOWAS is rated as having a "*high level*" of legalism. The components of ECOWAS are discussed supra. A reason for its rating is related to the fact that it awaits the realization of trade commitments in a largely dormant economic area, yet has a competent structure for dispute settlement even though it is inactive. COMESA and EC where granted the rating "very high" level of legalism. The components of the EC are described supra.

The components of those agreements, which received the rating of *"very high level of legalism"*, should be noted. The treaty provisions of those agreements include, automatic third-party review, binding third party rulings, standing tribunals, locus standi for states, treaty organs, individuals and remedies which have direct effect.

If this model is used, how would the EU-SA agreement compare? The EU-SA agreement is technically strong as it is WTO compatible.[57] But does its Dispute settlement provisions follow suit?

I would argue that the Article 104 provisions of the TDCA would receive a very low rating if the Smith table is used. The treaty allows the Cooperation Council to create the rules, procedures and determine the competence of the Dispute settlement body.

The essential components, which allow a high rating, are - (1). automatic third-party review, (2) binding third party rulings, (3) standing tribunals, (4) locus standi for states, treaty organs and individuals and (5) remedies which have direct effect.

The Cooperation Council in creating the dispute settlement body should follow this recipe. If the Cooperation Council does not opt for these guidelines, a low level of legalism as well as a serious problem in the enforcement of agreements will arise. To ensure that a system runs effectively Dispute settlement is central to ensuring economic success!

[57] The requirements relayed in Article XXIV GATT 1994 are as follows, (1) must cover substantially all trade 90%, (2) no significant sector excluded and (3) ten-year transition period are complied with. The EU-SA agreement satisfies these requirements.

CONCLUSION

The paper serves to illustrate the problems in regional dispute settlement mechanisms. The EU-SA, TDCA agreement will be frustrated if the concerns I raised are not addressed. The task is at hand for the drafters of the TDCA to heed these concerns and create a suitable mechanism to solve disputes. The TDCA is the doorway to successful regionalism and an effective dispute settlement mechanism will grease the hinges to open this door.

BIBLIOGRAPHY

BOOKS

August, R. (2000) Public International Business 3rd ed. Prentice Hall, New Jersey.

Bertelsmann-Scot, T. Mills, G. and E Sidiropoulos (2000) The EU-SA Agreement , South Africa Southern Africa and the European Union SAIIA Print Inc.

Bethlehem, D. (1995). Regionalism and the World Trading System, World Trade Organisation, Geneva.

Collier J & Lowe V. (2000) The Settlement of Disputes in International Law, Oxford University Press.

De Waart P. (1973) The element of Negotiation in the Pacific Settlement of Disputes Between States,Martinus Nijoff The Hague

Folsom,Gordon & Spanogle.,(1995) International Business Transactions, 4th Edition (Nutshell Series) West Publ Co, Minnesota.

Forsyth, C.F.,(1990) Private International Law The modern Roman-Dutch Law Including the Jurisdiction of the Supreme Court, 2nd Edition Juta

Jackson, J.H., (1997). The World Trading System - Law and Policy of International Economic relations, MIT press, Cambridge, Massachusetts.

Nantwi, E.K. (1967) The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law,2nd Edition A.W.Sijtoff-Leydon

Sornarajah, M.(1994) The International Law of Foreign Investment, Cambridge University Press

Swan & Murphy (1991) Cases and Materials on the Regulation of International Business and Economic Relations, Matthew Bender, New York.

ARTICLES

Bradlow D "Legal Aspects of Foreign Investment in South Africa" document can be found p346 International Business Law lecture notes, UWC 1998.

Butler D "A New Domestic Arbitration Act for South Africa: "What happens after the adoption of the UNICTRAL model law for International Arbitration",Die Stellenbosse Regstydskrif (STELL LR 1 p 3-20) 1998.

Eiselen, S " Adoption of the Vienna Convention for the International Sale of Goods (ICSID) in South Africa" SALJ Vol 116 pp 323-370,1999.

Foroutan,F "Does membership in a Regional Preferential Trade Arrangement make a country more or less Protectionst?" 1998 Blackwell Publishers USA.

Hugo,C "The United Nations Convention on the International Sale of Goods: Its Scope of Application from a South African Perspective" SA Merc LJ 1999 11 pp1-27.

Laird S "Regional Trade Agreements Dangerous Liaisons?", Blackwell Publications Ltd 108 Cowley Road,Oxford, 1999.

Lottering, P. "Implications of the TDCA with specific reference to the justiciability of economic rights in a municipal framework : the SA and EU position." University of the Western Cape, Unpublished paper 2000.

Page, S. (et al.), "SADC-EU Trade relations in a Post Lome World." Overseas Development Institute Special Report London. 1999.

Philippe X "The dispute resolution mechanism of the World trade Trade Organisation five years after its implementation" Law,Democracy & Development, Butterworths page 69-87, 1999.

Smith JM "Dispute Settlement Design" Published : International Organization p150 The IQ Foundation and the M Institute of Technology 2000.

Steyn J "Arbitration Bringing South Africa in from the Cold", De Rebus Alternative Dispute Resolution page 197-198 March 1997.

South Africa Business and the European Union in the context of the New trade and Development Agreement 18 June 1999 Rand University Johannesburg Konrad Adnauer Stiftung.

Steytler, N.C.,"Global Governance and National Sovereignty: Participating in the World trade Organisation with South Africa's New constitutional framework." Law Democracy and Development Butterworths 1999 p89-104.

Thomas, R.H., "Guide to Gatt Law and Practice Volume 2 Articles XXII-XXXVIII, World Trade Organisation",1995 Geneva.

Thomas, RH., "Regional Arrangements and the World Trade Organisation (WTO): The case of the Southern African Development Community (SADC)", Paper submitted Cairo Egypt 2-5 Sep.1996.

Thomas, RH "Comments on the EU-SA Negotiations Mandate South Africa's Position on a TDA with the EU", World Trade Organisation, 1995 Geneva.

Thomas RH., "The WTO and trade Co-operation between the ACP and the EU Assessing the Option", World Trade Organisation, 1995 Geneva.

Veneziano, A "Non Conformity of Goods in International Sales" No.1 pp 39- 65 IBLJ 1997.

INTERNATIONAL TREATIES,

AGREEMENTS, RESOLUTIONS & INSTRUMENTS

Bangkok Declaration 1967

EU-SA Trade Development and Co-operation Agreement 1999

General Agreement on Tariffs and Trade 1947

Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes

Lagos Treaty 1975

Manila Declaration, Nov. 1982, Peaceful Settlement of International Disputes of GA Res. 37/10.

North American Free Trade Agreement December 1982

Single European Act 1985

Treaty of Maastricht 1992

United Nations Charter 1945, San Francisco

United Nations Declaration of the Principles of International Law concerning Friendly Relations and Co-operation between States of 24 October 1970 GA Res.2625

SOUTH AFRICAN LEGISLATION

Arbitration Act 42 of 1965

Constitution of Republic of South Africa Act 108 of 1996

Enforcement of Foreign Civil Judgements Act 32 of 1988

Protection of Business Act 99 of 1978

Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977

SOUTH AFRICAN CASE LAW

Chinatex Oriental Co. v Erskine 1998 (4) SA 1087 (C)

Jones v Krog 1995 (1) SA 677 (A)

Tradex Ocean Transportation SA v M V Silvergate (or Astyanax) and Others 1994 (4) SA119 (D)

WEBSITES

http:/www.worldbank.org

http:/www.iccwbo.org

http:/www.unitral.org

http:/www.oecd.org