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.

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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.

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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.

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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.

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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

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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.

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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).

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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

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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

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		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.

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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.

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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.

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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.

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