

SAARC ARBITRATION COUNCIL: A REGIONAL ARBITRAL CENTRE

*Bharatendu Agarwal**

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** Bharatendu Agarwal, Assistant Director, SARCO; LL.M. (Intl. Comm. Arb. Law), Stockholm University; B.B.A. LL.B. (Intl. Law Hons.), National Law University, Jodhpur*

1. ARBITRATION – THE UNIVERSALLY ACCEPTED ADR METHOD

Disputes and disagreements are common in all spheres of life. The manifestation of any dispute depends directly on its nature which, in turn, dictates the mechanism required to resolve it. From primitive and unstructured methods of solving grievances, such as violence, to more reasonable options, such as involving an elder or a third party, the eco-system for resolving civil, criminal and commercial disputes between private individuals and entities has come a long way. Particularly in the context of commercial disputes, government institutions such as judicial system and national courts no longer hold monopoly. Rather there is an increased urgency, all across the globe, to promote alternative methods of dispute resolution at the policy level and in practice.

Same holds true for inter-state disputes. The conventional approach of resorting to war or engaging in armed conflict is no longer considered appropriate for settling differences. The United Nations Charter encapsulates this by stating that states shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.¹ The Charter goes on to suggest peaceful means of dispute resolution such as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or resorting to regional agencies or arrangements.² Ever since the enshrinement of these mechanisms in the Charter, each mechanism, having received considerable attention, has undergone tremendous evolution. However, mediation³ and arbitration have emerged as front runners.

Arbitration, despite being an adjudicative form of dispute settlement, due to its flexible nature and ability to provide a final and binding solution, is consistently being used to resolve disputes between private individuals/entities, between sovereign states and even between sovereign states and private individuals/entities. From the Peace Treaties of Westphalia (1648) to the Jay Treaty (1794) and Alabama (1871) arbitrations to the convening of Hague Peace Conferences (1899 and 1907) to the Golden Age of the Permanent Court of Arbitration (hereinafter referred to as the 'PCA') to the signing of the United Nations Charter (1945), the New York Convention (1959), the European Convention (1961), the ICSID Convention (1966), the Panama Convention (1975)⁴ to the preparation of the UNCITRAL Model Law (1985) and all the way to the proliferation of arbitral institutes such as AIAC, CAS, DIS, HKIAC, ICC, LCIA, SAARC Arbitration Council (hereinafter

¹ United Nations Charter, Article 2 (3)

² *Ibid*, Article 33

³ On 20 December 2018, the United Nations General Assembly adopted the United Nations Convention on International Settlement Agreements Resulting from Mediation (commonly referred to as the 'Singapore Convention on Mediation' or simply the 'Singapore Convention'). The Convention opened for signature on 07 August 2019 and as of 10 February 2020 has been signed by 52 States.

⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), European Convention on International Commercial Arbitration (European Convention), Convention on the Settlement of Investment disputes between States and Nationals of other States (ICSID Convention), Inter-American Convention on International Commercial Arbitration (Panama Convention).

referred to as ‘SARCO’), SCC, SIAC, WIPO Centre, VIAC, etc.,⁵ arbitration has covered a long and successful journey.

One of the main components of this journey has been positioning institutional arbitration above ad hoc arbitration because of its ability to eradicate some serious obstacles of the latter, thereby striking the perfect balance between permanence and flexibility. Today the most commonly recognized benefits of institutional arbitration include - administrative support in conducting arbitral proceedings, availability of comprehensive set of rules to govern the conduct of the arbitration, possibility of choosing an arbitrator from the panel / roster, assistance in appointment and challenge of arbitrators and effective handling of fee and costs related matters.

Due to the manifest benefits of institutional arbitration a variety of arbitral institutions were set up all across the world. This renaissance also brought with it diversity amongst arbitral institutions in terms of constitution and mandate. International institutions were established collectively by sovereign states (e.g. ICSID, PCA, WIPO Centre), national/domestic arbitration institutions were set-up independently by countries (e.g. BADRC, DIAC, MIAC)⁶ and private arbitral institutes were established by commercial groups. Some institutions were established to cater to a specific sector or industry (e.g. ICSID for investment disputes, WIPO Centre for intellectual property disputes, CAS for sports-related disputes, EMAC and ICEA for energy-related disputes⁷), others were set-up on geographical basis to address regional concerns (e.g. CRCICA, KLRCA, RCICAL, SARCO and TRAC)⁸ while the rest were established purely to resolve commercial disputes.

⁵ Asian International Arbitration Centre (AIAC), Court of Arbitration for Sport (CAS), German Arbitration Institute (DIS), Hong Kong International Arbitration Centre (HKIAC), International Chamber of Commerce’s International Court of Arbitration (ICC), London Court of International Arbitration (LCIA), Stockholm Chamber of Commerce (SCC), Singapore International Arbitration Centre (SIAC), WIPO Arbitration and Mediation Center (WIPO Centre), Vienna International Arbitration (VIAC).

⁶ Bhutan Alternative Dispute Resolution Centre (BADRC), Delhi International Arbitration Centre (DIAC), Maldives International Arbitration Centre (MIAC).

⁷ Emirates Maritime Arbitration Centre (EMAC), International Centre for Energy Arbitration (ICEA).

⁸ Cairo Regional Centre for International Commercial Arbitration (CRCICA), Kuala Lumpur Regional Centre for Arbitration (KLRCA), Regional Centre for International Commercial Arbitration Lagos (RCICAL), Tehran Regional Arbitration Centre (TRAC).

2. DEVELOPMENTS LEADING TO THE ESTABLISHMENT OF SARCO

Arbitration, by the nineteen-hundreds, had gained moderate acceptability and was recognized as a reliable form of adjudicative dispute settlement - a mechanism which provided a final and binding decision following the principles of due process and natural justice through an impartial and independent tribunal. The practice of arbitration, however, was largely of ad hoc nature and limited to inter-state disputes. The establishment of the PCA altered this and paved way for gradual movement towards institutionalized arbitration and disputes involving private parties. The pace of this movement witnessed acceleration in the past two decades with the establishment of several modern arbitral institutions, like SARCO, which provide effective institutionalized mechanisms to resolve sovereign disputes and domestic / international commercial disputes.

By the advent of the twenty-first century arbitration was widely recognized as a reliable alternative mechanism to resolve disputes. The widespread acceptance and practical utility of arbitration was also recognized by South Asian nations particularly in the backdrop of ever-increasing judicial backlog. This led the twenty-fourth session of the SAARC Council of Ministers to set up an Inter-Governmental Expert Group (IGEG) to consider the matter of establishing a South Asian arbitration institution.⁹

In its first meeting the IGEG¹⁰ formed two separate Sub-Groups, one on Investment and Arbitration; and the other on Avoidance of Double Taxation. Each Sub-Group was to have its own Chairperson. Accordingly, Mr. Narinder Singh, Joint Secretary (L&T), Ministry of External Affairs, Government of India was elected Chairperson of the Sub-Group on Investment and Arbitration (hereinafter referred to as the ‘**Sub-Group**’). In the meeting a representative of the SAARC Chamber of Commerce and Industry (SAARC CCI),¹¹ Mr. G.K. Kwatra, Executive Director, Indian Council of Arbitration (ICA)¹² presented on why a SAARC arbitral body was required. For kickstarting the Sub-Group meetings, it was agreed that the Indian delegation would prepare drafts for establishing and governing the arbitral body.

The Sub-Group in its first meeting¹³ considered the idea of establishing a SAARC arbitral body. The meeting deliberated upon two drafts circulated by the Indian delegation, one titled ‘Draft Agreement on Establishment of a SAARC Arbitration Centre’, which contained provisions for

⁹ 24th Session of the SAARC Council of Ministers – 02-03 January 2004 – Islamabad, Pakistan

¹⁰ 1st Meeting of the Inter-Governmental Expert Group – 23-24 March 2004 – New Delhi, India

¹¹ SAARC Chamber of Commerce and Industry (SAARC CCI) is an apex body of SAARC consisting of the eight national Federation Chambers of Commerce and Industry of the eight SAARC member states. The rationale behind creation of SAARC CCI was to promote trade and industry in the region.

¹² The Indian Council of Arbitration (ICA) was established in 1965 as a specialized arbitral body at the national level under the initiatives of the government of India. Based in New Delhi, the main objective of ICA is to promote amicable, quick and inexpensive settlement of commercial disputes by means of arbitration, conciliation, regardless of location.

¹³ 1st Meeting of the Sub-Group on Investment and Arbitration – 29 September-01 October 2004 – Kathmandu, Nepal

establishing a regional arbitral institution, and the other titled ‘Draft SAARC Arbitration Rules’, which contained procedural rules for conducting the arbitral proceedings and was based on the UNCITRAL Rules. The Sub-Group in its second meeting¹⁴ furthered the discussions and came to an agreement, in principle, on both the drafts. However, with a view to harmonizing the provisions, the Sub-Group sought inputs from the SAARC Secretariat before proceeding to finalizing the drafts. In the midst of the Sub-Group meetings, the Fourth Meeting of SAARC Commerce Ministers¹⁵ took place which emphasized the need to conclude the negotiations on the two drafts because in its third meeting¹⁶ the Sub-Group could only finalize the draft for establishing the center. In the fourth¹⁷ and fifth¹⁸ meetings, discussion on the draft arbitration rules continued and the issue of incorporating conciliation rules also found way into the deliberations. While discussions on the arbitration and conciliation rules remained pending the Agreement for Establishment of SAARC Arbitration Council¹⁹ (hereinafter referred to as the ‘**Agreement**’) was signed during the Thirteenth SAARC Summit in Dhaka on 12-13 November 2005. It was only in the sixth meeting²⁰ that the Sub-Group was able to finalize and adopt the SAARC Arbitration Rules and the SAARC Conciliation Rules.

As per Article I of the Agreement, SARCO stood established, however as per Article V, the Agreement itself would only come into force after being ratified by all Member States and upon issue of notification thereof by the SAARC Secretariat. Accordingly, the Member States ratified the Agreement – India on 28 December 2005, Bangladesh on 25 January 2006, Sri Lanka on 03 February 2006, Pakistan on 05 January 2007, Nepal on 20 March 2007, Maldives on 01 April 2007 and Bhutan on 28 June 2007. Afghanistan, on the other hand, signed all SAARC instruments in force upon joining SAARC in 2007. Thus, the Agreement entered into force on 2 July 2007 completing most of the legal and procedural formalities and paving way for actually setting SARCO up.

Since the Hague Peace Conferences took place in the background of armed conflict their primary purpose was to identify methods of resolving disputes through means other than war which, ultimately, led to the establishment of the PCA. After two World Wars and establishment of the United Nations, however, instances of traditional warfare had reduced. With the advent of globalization and increased focus on commerce, the attention of countries shifted from territorial occupation towards economic superiority. Increase in trade both, domestically and globally, led to proliferation of trade agreements, investment treaties and economic unions. As cooperation between states grew and public international law strengthened, states started joining forces, they

¹⁴ 2nd Meeting of the Sub-Group on Investment and Arbitration – 18-20 November 2004 – Kathmandu, Nepal

¹⁵ 4th Meeting of SAARC Commerce Ministers – 22-23 November 2004 – Islamabad, Pakistan

¹⁶ 3rd Meeting of the Sub-Group on Investment and Arbitration – 12-13 December 2004 – Islamabad, Pakistan

¹⁷ 4th Meeting of the Sub-Group on Investment and Arbitration – 02-03 August 2005 – Kathmandu, Nepal

¹⁸ 5th Meeting of the Sub-Group on Investment and Arbitration – 06-07 October 2005 – Kathmandu, Nepal

¹⁹ Available at – http://saarc-sec.org/digital_library/detail_menu/agreement-for-establishment-of-saarc-arbitration-council

²⁰ 6th Meeting of the Sub-Group on Investment and Arbitration – 19-20 September 2006 – Kathmandu, Nepal

forged regional co-operations and set up inter-governmental organizations for the purpose of achieving common goals. While the specific purpose of each regional co-operation and inter-governmental organization varied, the main theme, in one way or the other, revolved around improving international relations, promoting international cooperation and bringing about social and economic development. With similar intentions²¹ South Asian countries formed SAARC, which in turn, among other Specialized Bodies and Regional Centers, created SARCO.

By the early 2000s, in jurisdictions where commercial markets were flourishing, arbitration had become a norm. Other jurisdictions were slowly catching on because they acknowledged that arbitration, besides being an effective dispute resolution method, could assist in shouldering the ever increasing case-load of traditional courts. Constituted by members belonging to the latter category, it is perhaps for this reason that SARCO's Preamble simply stated that member states were desirous of establishing a regional forum for settlement of commercial disputes and creating favorable conditions for fostering greater investment by investors of one state in the territory of another. Thus, with the signing of the Agreement, for the first time a permanent regional inter-governmental dispute resolution institution for South Asia was established.²²

²¹ The objectives of SAARC as outlined in Article 1 of the SAARC Charter are: *to promote the welfare of the peoples of South Asia and to improve their quality of life; to accelerate economic growth, social progress and cultural development in the region and to provide all individuals the opportunity to live in dignity and to realize their full potentials; to promote and strengthen collective self-reliance among the countries of South Asia; to contribute to mutual trust, understanding and appreciation of one another's problems; to promote active collaboration and mutual assistance in the economic, social, cultural, technical and scientific fields; to strengthen cooperation with other developing countries; to strengthen cooperation among themselves in international forums on matters of common interests; and to cooperate with international and regional organizations with similar aims and purposes.*

²² The very first 'regional' arbitration center in the world, Kuala Lumpur Regional Centre for Arbitration (KLRCA), was established in 1978 under the auspices of Asian-African Legal Consultative Organization (AALCO). In 2018, KLRCA was rebranded as the Asian International Arbitration Centre (AIAC).

3. ORGANIZATIONAL STRUCTURE OF SARCO

To commence functions practically, organizations require a defined structure. Any organizational structure, generally speaking, is divided on the basis of decision makers and decision executers. Same applies in the case of arbitration institutions. The body which executes the decision and takes care of the day-to-day functions of the institute is normally addressed as the ‘Secretariat’. Role of the secretariat primarily is to administer the arbitration, assist the tribunal in its management and contribute to their overall efficiency of the proceedings. On the other hand, the body which oversees the work of the secretariat and makes financial, policy and other management level decisions is ordinarily referred to as the ‘board’. Depending on the nature of the arbitral institute’s constitution, reference to secretariat and board varies.

SARCO also has a two-part organizational structure and consists of a Governing Board and Secretariat. The Governing Board oversees SARCO’s policies and budgets whereas the Secretariat, as the name suggests, performs the role of the secretariat of an arbitral institution. SARCO’s budget is provided by Member States, the amount of which is based on SAARC’s formula of apportioning resources.

SARCO Secretariat

Article III of the Agreement for Establishment of SARCO talks about SARCO’s organizational set-up. It mandates the Director General to function as the chief executive officer under the supervision of the Governing Board. Each Director General’s tenure is limited to a non-renewable period of three years²³ and post of Director General is rotated once in every three years on the principle of alphabetical rotation among SAARC Member States.²⁴ The Director General²⁵ is assisted by professional staff²⁶ recruited from the SAARC region and general services staff recruited from the Host Country.²⁷

Governing Board

²³ Article III (5) (2) of the Agreement goes on to state that “...however, the tenure of the first Director-General will be for a period of four years.”

²⁴ Article III (5) (1) (b) of the Agreement clarifies that the process of appointment of the Director General will commence “...from the Member State hosting the Council...”

²⁵ The post of Director General has, till date, rotated thrice. In accordance with the rules, the first Director General hailed from Pakistan (Mr. Syed Sultan Ahmed (September 2010 to October 2014)) whereas the second Director General belonged to Sri Lanka (Mr. Thusantha Wijemanna (October 2014 to October 2017)). The incumbent Director General (Mr. Zahidullah Jalali) hails from Afghanistan.

²⁶ Presently, in addition to the Director General, SARCO has approved posts for two Professional Staff, i.e. Deputy Director and Assistant Director (Law). The incumbent Deputy Director is Mr. Faazaan Mirza (Pakistani national) whereas the incumbent Assistant Director (Law) is Mr. Bharatendu Agrawal (Indian national).

²⁷ SAARC Arbitration Council (SARCO) is headquartered in Islamabad, Pakistan and hence the General Services Staff is recruited locally from within Pakistan.

The Agreement for Establishment of SARCO itself does not contain particulars regarding the Governing Board, rather Article III (5) (5) states that the ‘...*matters not covered in this Agreement, including the Service Rules, Provisions relating to Financial and Administrative Matters, Financial Regulations, Financial Rules and Procedures and Rules of Procedures for Governing Boards applicable to the SAARC Regional Centres under the Harmonized Rules will be applicable, mutatis-mutandis...*’

Accordingly, as per the *Rules of Procedure for the Governing Board of SARCO*, the Governing Board, which acts as the program planning body and is responsible to monitor and coordinate activities of SARCO,²⁸ consists of one representative from each SAARC Member State, a representative of the SAARC Secretary General and a representative from the Ministry of Foreign Affairs of the Host Country.²⁹ The Governing Board meets at least once a year³⁰ to lay down the policy guidelines, to approve the program of activities and the budget of the Council.³¹ The Chairperson presides³² over the Governing Board meetings³³ in which all decisions are made unanimously.³⁴ The Director General reports annually to the Board on SARCO’s budget and expenditure, which after deliberations recommends the same for approval to the Programming Committee³⁵ and Standing Committee.³⁶

SARCO’s Governing Board requires representation from countries which have signed the respective conventions for establishment of the institutes. This representation has to be in the form of government officials of individual states serving in the capacity of diplomats or otherwise. Representation from ministry of foreign affairs of the country in which the institute is headquartered carries particular significance, and, the main duty of the Governing Board is to oversee the overall functioning, financial and policy matters, of the SARCO Secretariat

²⁸ Rules of Procedure for the Governing Board of SARCO, Rule 7 (i) and Rule 7 (iii)

²⁹ *Ibid*, Rule 1 (i) and Rule 2 (iii)

³⁰ *Ibid*, Rule 2 (i)

³¹ *Ibid*, Rule 5 (iii)

³² *Ibid*, Rule 6 (i)

³³ Till date there have been ten meetings of SARCO’s Governing Board. First meeting (7-8 January, 2009) in Nepal. Second (20-21 December, 2011), Third (21-22 November, 2012), Fourth (13-14 January, 2014), Fifth (30-31 October, 2014), Sixth (19-20 September, 2015) and Tenth (30-31 October, 2019) meeting in Pakistan. Seventh meeting (22-23 September, 2016) in India, Eighth meeting (21-22 September, 2017) in Sri Lanka and Ninth meeting (30-31 October, 2018) in Maldives.

³⁴ *Supra* note 28, Rule 6 (ii)

³⁵ The Programming Committee comprises of the Heads (JS/DG/Director) of SAARC Divisions of Member States and assists the Standing Committee. The Programming Committee considers the Calendar of Activities, Administrative and Financial Matters of the Secretariat and Regional Centers, Technical Committees, Working Groups, and Specialized Bodies.

³⁶ The Standing Committee comprises of the Foreign Secretaries of the SAARC Member States and is mandated to take decisions relating to - overall monitoring and coordination of program of cooperation under different areas; approval of projects and programs, including modalities of their financing; determination of inter-sectoral priorities; mobilization of regional and external resources; and identification of new areas of cooperation based on appropriate studies. The Committee reports to the Council of Ministers.

respectively. Further, the head of the SARCO Secretariat, i.e. Director General, is appointed by, or through, the Governing Board.

SARCO's budget is funded entirely by state parties to the SAARC Charter based on a formula agreed.³⁷ Additionally, SARCO, i.e. the organization itself, and all the staff members working in the organizations enjoy certain privileges and immunities. As per the Agreement for Establishment of SARCO states that SARCO, its Director General and staff shall enjoy such immunities and privileges as specified in SARCO's Headquarters Agreement.³⁸

³⁷ As per the SAARC's financial regulations, expenses of each center are bifurcated into capital cost, institutional cost and programming cost. The capital cost is provided entirely by the country in which the center is located along with 40% of the institutional cost. The remaining 60% of the institutional cost is divided into two parts i.e. 76% of 60% (45.60%) and 24% of 60% (14.40%). This 14.40% is shared equally (i.e. 1.80% per head) whereas the 45.60% is divided among the SAARC member states based on assessed figures (i.e. figures agreed upon taking into consideration the economic state and gross domestic product of each member). Similarly, for the programming cost, each member is first obliged to share equally 24% of total program expenses (i.e. 3% per head) and then the remainder of the 76% expenses is divided among the SAARC member states based on assessed figures. Accordingly, for SARCO the institutional cost incurred by member states is as follows: Afghanistan – 3%, Bangladesh – 6.43%, Bhutan – 3%, India – 18.20%, Maldives – 3%, Nepal – 6.43%, Pakistan -53.51% and Sri Lanka – 6.43%. Whereas, the programming cost incurred is as follows: Afghanistan – 5%, Bangladesh – 10.72%, Bhutan – 5%, India – 30.32%, Maldives – 5%, Nepal – 10.72%, Pakistan – 22.52% and Sri Lanka – 10.72%.

³⁸Refer Article III (6) of the Agreement for Establishment of SARCO; SARCO's Headquarters Agreement was executed between the Secretary General of SAARC (on behalf of SARCO) and the Foreign Secretary of the Ministry of Foreign Affairs of Pakistan on 21 May 2018.

4. SERVICES OF SARCO

The core mandate of SARCO is to assist in settlement of disputes. Article II (3) (a) of the Agreement for Establishment of SARCO lists, amongst others, providing a legal framework for fair and efficient settlement of disputes through conciliation and arbitration as one of SARCO primary objectives.

Arbitration

As the name of the institution suggests, SARCO's primary function is to provide fair, inexpensive and expeditious arbitration in the SAARC region.³⁹ SARCO's jurisdiction, however, is not limited to South Asia and it can administer disputes anywhere from the world i.e. wherever the parties to a contract agree to arbitrate under the auspices of SARCO.⁴⁰ Further, SARCO's jurisdiction extends to every conceivable area of commercial, investment and trade disputes.⁴¹

The original set of arbitration rules that SARCO adopted, in its first governing board meeting,⁴² were the ones finalized by the sixth meeting of the sub-group on investment and arbitration.⁴³ In 2016, however, SARCO released amended arbitration rules⁴⁴ modelled around the 2013 UNCITRAL Arbitration Rules.⁴⁵

For the purpose of enabling parties to choose reliable arbitrators, SARCO maintains a 'Panel of Arbitrators',⁴⁶ the authority for which flows from Article II (3) (j) (ii) of the Agreement for Establishment of SARCO. Individuals are nominated to the Panel by SAARC Member States.⁴⁷

³⁹ *Supra* note 19, Article II (3) (c)

⁴⁰ *Infra* note 44, Article 1 (1)

⁴¹ *Supra* note 19, Article II (3) (a)

⁴² *Supra* note 33

⁴³ *Supra* note 20

⁴⁴ 2016 SAARC Arbitration Rules, available at – <http://sarco.org.pk/wp-content/uploads/2019/01/SARCO-Rules-of-Procedure-for-Arbitration.pdf>

⁴⁵ SARCO Secretariat presented the amended arbitration rules for consideration to its 6th Governing Board Meeting (19-20 September, 2015). The Meeting suggested that the proposed amendments be circulated to Member States for inputs. Accordingly, the amended arbitration rules, incorporating the suggestions made by Member States and approved by the Programming Committee, were adopted in SARCO's 7th Governing Board Meeting (22-23 September, 2016).

⁴⁶ List of Panel of Arbitrators, available at – <https://sarco.org.pk/arbitrator-panelists/>

⁴⁷ The SARCO Secretariat sought approval to maintain a parallel list of arbitrators, in which professionals, instead of being nominated by Member States, would be chosen by SARCO and would also include professionals from outside the SAARC region (i.e. would not be restricted only to professionals from South Asia) from its 10th Governing Board Meeting (30-31 October, 2019). The Meeting recommended the proposal and it was approved by the 57th Programming Committee (19-20 December, 2019).

Each State is entitled to nominate to the Panel, for a term of three years,⁴⁸ five to ten persons.⁴⁹ The disputing parties, however, are free to choose arbitrators not on the Panel.⁵⁰

Similar to the Panel of Arbitrators, SARCO is also authorized to maintain a ‘Panel of Expert Witnesses’,⁵¹ the process for which has been recently initiated.⁵²

Conciliation

SARCO also provides conciliation services. The latest version⁵³ of SARCO’s Conciliation Rules⁵⁴ are based on the UNCITRAL Conciliation Rules. SARCO’s Panel of Arbitrators is authorized to be treated as a Panel of Conciliators for the purpose of conciliations.⁵⁵

Policy Mandate

SARCO’s mandate goes beyond the functioning of a traditional arbitral institute. In addition to providing arbitration and conciliation services, SARCO has been tasked with carrying out policy related work such as:

- promoting international conciliation and arbitration;⁵⁶
- acting as a coordinating agency in the SAARC dispute resolution system;⁵⁷
- promoting the growth and effective functioning of national arbitration institutions within the SAARC region;

⁴⁸ As recommended by the 4th Governing Board Meeting (13-14 January, 2014); Nominations to the Panel of Arbitrators remain valid, even after expiry of the term of three years, until fresh nominations are sent by respective Members States.

⁴⁹ As recommended by the 3th Governing Board Meeting (21-22 November, 2012)

⁵⁰ *Ibid*; Reiterated by the 5th Governing Board Meeting (30-31 October, 2014)

⁵¹ *Supra* note 19, Article II (3) (j) (ii)

⁵² Formal approvals to maintain a Panel of Expert Witnesses, which would include nominations from Member States as well as selections by SARCO, have been granted by the 10th Governing Board Meeting (30-31 October, 2019) and 57th Programming Committee (19-20 December, 2019).

⁵³ The original set of conciliation rules that SARCO adopted, in its 1st Governing Board Meeting, were the ones finalized by the 6th Meeting of the Sub-Group on Investment and Arbitration. The SARCO Secretariat, however, presented a proposal to amend the conciliation rules to its 7th Governing Board Meeting (22-23 September, 2016). The Meeting suggested that the proposed amendments be circulated to Member States for inputs. Accordingly, the amended conciliation rules, incorporating the suggestions made by Member States were presented to the 8th Governing Board Meeting (21-22 September, 2017). The Meeting recommended that the revised rules be adopted after approval by the 54th Programming Committee. The same was granted in December 2017.

⁵⁴ Available at – <https://sarco.org.pk/wp-content/uploads/2019/01/SARCO-Rules-of-Procedure-for-Conciliation.pdf>

⁵⁵ *Supra* note 49

⁵⁶ SARCO does this by conducting regular seminar and workshops throughout the SAARC region.

⁵⁷ SARCO’s dispute resolution clause has already been included in SAARC instruments such as the SAARC Development Fund Charter (Article 11), South Asian University Act (Article 30) and the SAARC Energy Co-operation Agreement (Electricity) (Article 16).

- coordinating the activities of and assisting existing institutions concerned with arbitration, particularly those in the SAARC region;⁵⁸ and
- assisting in the enforcement of arbitral awards.⁵⁹

⁵⁸ SARCO conducts regular activities in collaboration with arbitral institutions within the SAARC region. SARCO has so far collaborated with Afghanistan Centre for Dispute Resolution (ACDR) in 2019, International Chamber of Commerce Afghanistan (ICC-Afg) in 2017, Bangladesh International Arbitration Centre (BIAC) in 2016, Indian Council of Arbitration (ICA) in 2018 & 2015, Maldives International Arbitration Centre (MIAC) in 2015, Nepal Council of Arbitration (NEPCA) in 2018 & 2016, Sri Lanka National Arbitration Center (SLNAC) in 2018 and International Chamber of Commerce Sri Lanka (ICC SL) in 2016

⁵⁹ *Supra* note 19, Article II (3)

5. ROAD AHEAD FOR SARCO

The Hague Peace Conference of 1899 proposed the idea of, and subsequently, established the Permanent Court of Arbitration with the purpose of resolving disputes through means other than war. SAARC Member States on the other hand, established SARCO for the purpose of strengthening trade and commerce among one another. While the ends for establishing each institution were different, the means to achieve those ends were same i.e., through alternative dispute resolution methods, particularly arbitration. Hence, the road ahead for SARCO would be to develop itself in such a way that it can become the Permanent Court of Arbitration of South Asia.

The fact that SARCO has the potential to become such a powerful institution can be evidenced by ascertaining whether the disputes brought to the Permanent Court of Arbitration by SAARC Member States (*Bay of Bengal Maritime Boundary Arbitration* and *Indus Waters Kishenganga Arbitration*) or their entities/nationals (*Indian Potash Limited (India) v. Agriculture Inputs Company Limited (Nepal)*) could have been potentially administered by SARCO or not.

BAY OF BENGAL MARITIME BOUNDARY ARBITRATION⁶⁰

Bangladesh, upon declaring independence from Pakistan in 1971, inherited the territorial boundaries of former East Bengal.⁶¹ Differences arose, however, between India and Bangladesh regarding the delimitation of common maritime boundary in the Bay of Bengal in 1974. After several years of failed negotiations⁶² Bangladesh initiated arbitration against India under Article 287⁶³ and Annexure VII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

Annexure VII of UNCLOS contains general arbitral procedure that applies in cases of disputes emanating from Part XV. Article 5 of Annexure VII goes on to say that the arbitral tribunal shall, unless the parties to the dispute agree otherwise, determine its own procedure. Accordingly, the tribunal⁶⁴ in its first procedural meeting adopted its Rules of Procedure,⁶⁵ in which the parties

⁶⁰ The arbitration commenced with Bangladesh's Notification and Statement of Claim dated 8 October 2009 and ended with the passing of a final award by the tribunal on 07 July 2014.

⁶¹ Which were decided as per the report (also known as the Radcliffe Award) of the Bengal Boundary Commission (also known as Sir Cyril Radcliffe Commission) formed pursuant to the Indian Independence Act, 1947.

⁶² Throughout the negotiations, India insisted on equidistance as the basis for delimitation, whereas, Bangladesh maintained that a solution based on equidistance formula would not be equitable as envisaged in UNCLOS.

⁶³ Article 287 (1) of the UNCLOS enumerates four forums/means for the settlement of disputes, i.e. International Tribunal for the Law of the Sea, International Court of Justice, arbitral tribunal constituted in accordance with Annex VII and a special arbitral tribunal constituted in accordance with Annex VIII. Article 287 (5) further goes on to state that 'if the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.'

⁶⁴ For details regarding constitution of the tribunal refer *The Bay of Bengal Maritime Boundary Arbitration, Bangladesh v. India*, PCA Case No. 2010-16, Award, 07 July 2014, Chapter I (B), available at – <https://pcacases.com/web/sendAttach/383>

⁶⁵ Available at – <https://pcacases.com/web/sendAttach/375>

agreed, among other things, that the PCA would act as registry in this case.⁶⁶ There is, however, nothing in Annexure VII of UNCLOS, the Rules of Procedure adopted by the parties and the role assigned to the registry within the Rules of Procedure to indicate that the parties could not have, for the sake of argument, chosen SARCO as the Registry. Thus, SARCO could very well have administered the Bay of Bengal Maritime Boundary arbitration.

Additionally, on the matter of expenses and cost, Article 19 (2) of the Rules of Procedure laid out that “*the expenses of the Arbitral Tribunal shall be reasonable in amount, taking into account the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case*” (emphasis added). While the total expense incurred by parties on the arbitration proceedings is not available in the public domain, it can be reasonably assumed that having a fixed fee schedule (such as SARCO’s Schedule of Fee)⁶⁷ as against PCA’s no fixed fee schedule approach would have been more cost effective.

INDUS WATERS KISHENGANGA ARBITRATION⁶⁸

India and Pakistan signed the Indus Waters Treaty⁶⁹ on 19 September 1960.⁷⁰ Article IX (5) (a) of the Treaty provided a system for the settlement of disputes stating that ‘*a Court of Arbitration shall be established to resolve the dispute in the manner provided by Annexure G.*’ Annexure G contained several negotiated provisions which the parties had settled on to be applicable in case of an arbitration.⁷¹

Accordingly, when a dispute arose, the government of Pakistan initiated a request for arbitration pursuant to Article IX and Annexure G, which subsequently led to the establishment of the ‘Court of Arbitration’.⁷² It is important to note that the Treaty itself did not provide for the PCA to administer the arbitration, rather clause 15 (a) of Annexure G merely stated that at its first meeting

⁶⁶ Annexure VII of UNCLOS does not list PCA, or any other arbitral institute, as the default registry/secretariat.

⁶⁷ 2016 SAARC Arbitration Rules - Schedule of Fee, available at – <https://sarco.org.pk/wp-content/uploads/2019/01/Fee-Schedule-for-Arbitration-at-SARCO.pdf>

⁶⁸ The arbitration commenced with a request for arbitration filed by Pakistan on 17 May 2010 and ended with the passing of a final award by the tribunal on 20 December 2013.

⁶⁹ The Treaty sets out the rights and obligations of both countries over six rivers in the Indus basin. India has the right of unrestricted use on the Eastern Rivers (Sutlej, Ravi, and Beas) and Pakistan has the right of unrestricted use on the Western Rivers (Chenab, Jhelum, and Indus). However, the Treaty allows India to use the Western Rivers in upstream areas under its control for, amongst other things, generation of hydro-electric power under limited circumstances. Available at – <https://treaties.un.org/doc/Publication/UNTs/Volume%20419/volume-419-I-6032-English.pdf>

⁷⁰ Instruments of ratification were exchanged between the parties on 12 January 1961, however the Treaty entered into force with retroactive effect as of 1 April 1960 (as per Article XII (2)).

⁷¹ These provisions related to – initiation of arbitration, number and appointment of arbitrators, conduct of proceedings, privileges and immunities, fee and costs, issuance of award and clarifications, interim measures and applicable law.

⁷² For details regarding constitution of the Court of Arbitration refer *The Indus Waters Kishenganga Arbitration, Pakistan v. India*, PCA Case No. 2011-01, Order on Interim Measures, 23 September 2011, Section I (B), available at – <https://pcacases.com/web/sendAttach/1682>

the Court of Arbitration shall ‘*establish its secretariat and appoint a Treasurer*’. Based on this clause, the Court, with the consent of the parties, appointed the PCA as its secretariat and Deputy Secretary General of PCA as its Treasurer. Hypothetically speaking, the parties could have, in accordance with Annexure G Clause 15 (a), even agreed to have SARCO as their secretariat.

Further, analysis of Article IX and Annexure G reveal no provision that would technically or procedurally bar the possibility of SARCO administering the arbitration. Study of the role played by PCA in the proceedings, as reflected in the Order on Interim Measures, Partial⁷³ and Final Award,⁷⁴ also do not present any such handicap. Therefore, it can be said that SARCO could have successfully administered the Indus Waters Kishenganga arbitration. Further, not only could have SARCO administered the arbitration, doing so would have been significantly cost effective.

Clauses 15 (b), 24 and 26 of Annexure G dealt with the matters of fee and costs. Clause 24, particularly, stated that – “*The salaries and allowances of the arbitrators appointed pursuant to Paragraph 6 shall be determined and, in the first instance, borne by their Governments ; those of the umpires shall be agreed upon with them by the Parties or by the persons appointing them, and (subject to Paragraph 13) shall be paid, in the first instance, by the Treasurer. The salaries and allowances of the secretariat of the Court shall be determined by the Court and paid, in the first instance, by the Treasurer*” (emphasis added). If SARCO would have administered the dispute, then one possibility could have been the application of SARCO’s Schedule of Fee in entirety, i.e. for the arbitrators, umpires and the secretariat, instead of Clause 24. Alternatively, as per Note No. 4 of SARCO’s Schedule of Fee, the secretariat’s fee could have been decided by the Schedule of Fee, whereas that of the arbitrators and umpires as per the provisions of Clause 24. Irrespective of the option, it can be said that the overall expenses incurred in proceedings would have been significantly lower.⁷⁵

INDIAN POTASH LIMITED (INDIA) V. AGRICULTURE INPUTS COMPANY LIMITED (NEPAL)⁷⁶

The Claimant, a limited company incorporated in India and the Respondent, a public corporation incorporated in Nepal, entered into a contract for supply and delivery of chemical fertilizers. Clause 15 of the contract contained a dispute resolution clause which stated that “*all disputes arising out of or in connection with the present contract shall be finally settled under UNCITRAL Arbitration Rules as at present in force.*” Accordingly, when a dispute arose, arbitrators were

⁷³ *The Indus Waters Kishenganga Arbitration*, Pakistan v. India, PCA Case No. 2011-01, Partial Award, 18 February 2013, available at – <https://pcacases.com/web/sendAttach/1681>

⁷⁴ *The Indus Waters Kishenganga Arbitration*, Pakistan v. India, PCA Case No. 2011-01, Final Award, 20 December 2013, available at – <https://pcacases.com/web/sendAttach/48>

⁷⁵ The matter of costs was dealt by the tribunal in Section V (F) of the Partial Award (refer *supra* note 73) and Section IV of the Final Award (refer *supra* note 74). However, the total expense incurred by parties on the arbitration proceedings is not mentioned in either of the Awards and is also not available in the public domain.

⁷⁶ The arbitration commenced with a request for arbitration filed on 31 January 2013 and ended with the passing of a final award by the tribunal on 02 December 2016.

appointed and a tribunal was formed pursuant to the 2010 UNCITRAL Rules. Similar to the situations discussed above, PCA was not chosen as registry by default, rather it was agreed upon by the parties in the first procedural meeting. Once again, indicating that the parties could have decided to opt for SARCO instead.

ANALYSIS

The above case studies establish that the disputes could have potentially been administered by SARCO if the parties would have chosen SARCO as the registry/secretariat. Accordingly, it can be safely said that for disputes that fall squarely between the SAARC Member States or their citizens, SARCO can be considered as PCA's complete substitute.

Not only this, choosing SARCO over PCA, particularly in such disputes, would be more advantageous for the following reasons:

- Fairly accurate estimation of costs – The ability to estimate potential expenses if a dispute is referred to arbitration has become a norm in modern arbitration practice. The PCA Rules, however, state that the costs of arbitration shall be 'reasonable' taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any experts appointed by the arbitral tribunal. This approach, while workable in certain situations, offers unwarranted flexibility in fixing the remuneration of the arbitrators and secretariat. SARCO overcomes this handicap by providing for, in line with the international best practices, a fixed Schedule of Fee⁷⁷ which has been prepared after taking into consideration the fee schedules of other reputed arbitral institutions in the region.
- Freedom to choose arbitrators from the SAARC Region – Unlike PCA's Members of Court,⁷⁸ SARCO's Panel of Arbitrators has arbitrators belonging to each of the eight SAARC countries. This facilitates the process of choosing arbitrators familiar with domestic legal procedures.
- Relatable Secretariat – PCA's International Bureau consists of staff from various nationalities across the globe, whereas, SARCO's Secretariat, can only consist of individuals belonging to SAARC countries. By having south-Asian staff SARCO ensures adherence to cultural sensitivities thereby making parties comfortable and strengthening their confidence in the institution.

For all the reasons stated above, supplemented with the fact that one of SARCO's objectives is to act as a coordinating agency in the SAARC dispute resolution system, the road ahead for SARCO would be to administer all disputes arising out of:

⁷⁷ *Supra* note 67

⁷⁸ PCA's Members of Court currently has arbitrators only from Bangladesh, India and Sri Lanka.

- India Afghanistan Preferential Trading Agreement (IAPTA);
- India Sri Lanka Free Trade Agreement (ISFTA);
- Pakistan Sri Lanka Free Trade Agreement (PSFTA);
- Afghanistan Pakistan Transit Trade Agreement (APTTA);
- India Nepal Treaty Concerning the Integrated Development of the Mahakali River including Sarada Barrage, Tanakpur Barrage and Pancheshwar Project;
- BBIN (Bangladesh-Bhutan-India-Nepal) Motor Vehicles Agreement (MVA) for Regulation of Passenger, Personal and Cargo Vehicular Traffic;
- Annexure VII or VIII of the UNCLOS (involving SAARC Member States as parties);
- Any other bilateral agreements or multilateral treaties executed (or proposed)⁷⁹ among SAARC Member States; and
- Any contracts executed (or proposed) among entities/nationals of SAARC.⁸⁰

⁷⁹ Such as - SAARC Motor Vehicles Agreement, SAARC Railways Agreement, SAARC Air Services Agreement, SAARC Agreement on Trade in Services (SATIS) and SAARC Agreement on Promotion and Protection of Investments (SAPPI).

⁸⁰ The particular advantage that SARCO offers to private parties/entities of SAARC countries is the ability to resolve disputes, instead of being subject to the local jurisdiction of another state, through an independent arbitral institution endorsed by all SAARC governments.