



NEWSLETTER

5th Edition | Dec 2018



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H. E. Mr. Ahmed Saleem,
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and former Secretary General, SAARC
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MESSAGE FROM SARCO



Dear Readers,

With the successful release of this 5th issue of SAARC Arbitration Council (SARCO)'s Newsletter, I along with SARCO's team am happy to share our contribution towards Alternative Dispute Resolution (ADR) in general, and arbitration in particular, in the SAARC region.

Enhancing SARCO's regional status and presence through workshops, seminars, and co-operative agreements with local and regional institutions among several events, was the hallmark of 2018. SARCO engaged with various stakeholders across SAARC countries to further the cause of arbitration in the region.

Overwhelming and positive response from our readers drives us to push all boundaries and barriers to establish SARCO as a credible regional arbitration institution. In the issue, renowned experts have set forth their views on key issues. I thank all our contributors and readers for their interest in SARCO. I encourage our readers to continue sending us their invaluable feedback and ideas for further improvement.

Mehnaz Khurshid Gardezi

Marketing & Communications Consultant



INTERVIEW WITH HIS EXCELLENCY MR. AHMED SALEEM, AMBASSADOR OF THE REPUBLIC OF MALDIVES TO PAKISTAN AND FORMER SECRETARY GENERAL, SAARC

Q. Will you please enlighten our readers about SAARC?

Unquestionably, the creation of SAARC in 1985 marks the beginning of a new chapter in South Asia. SAARC brings together the eight countries to a common platform to promote regional collaboration. Though SAARC initially commenced with a few areas for regional cooperation as a confidence-building measure in the initial phase, it today encompasses almost every sphere of activity impacting upon the life and livelihood of the peoples in the region.

However, I must frankly admit that progress in SAARC is tardy. Though SAARC is active in terms of its activities and events that are taking place across the region, it currently lacks the political will. This is purely due to the non-convening of the Nineteenth SAARC Summit. Since the time the Nineteenth SAARC Summit was postponed, the Member States have not been able to agree on a new set of dates for the Summit. This is rather unfortunate. You see, meetings at the level of the Heads of State or Government provide renewed impetus to the SAARC process. Summits also provide opportunities for the leaders to meet on the sidelines. Given the prevailing political differences between India and Pakistan, the Nineteenth Summit will provide a welcome opportunity for their leaders to meet bilaterally. Such a meeting on the sidelines of the Summit might as well lead to sustained dialogue between the two countries.

Q: How do you view the role of the SAARC Arbitration Council in providing a legal framework within the region for fair and efficient settlement through Alternate Dispute Resolution methods including arbitration of commercial and investment disputes?

During the Thirteenth SAARC Summit in Dhaka in November 2005, our leaders signed the Agreement to Establish the SAARC Arbitration Council in

order to provide a regional legal framework for fair and efficient settlement of commercial, industrial, trade, banking, investment and other such disputes. Since its inception, the Council has very efficiently pursued its objectives. As a result, it has been able to create a viable working relationship among the national arbitral institutions and the apex trading bodies of the Member States. It has also organized and at times coordinated the Alternate Dispute Resolution activities in the Member States. More importantly, the Council has been able to establish itself as an efficient regional Alternate Dispute Resolution (ADR) mechanism, enabling the traders to resolve their disputes without having to go through a judicial process, which is both expensive and time-consuming.

Q. How can SARCO contribute to the region's goal of attracting foreign direct investment and retaining arbitral work to the SAARC region?

SAARC represents the largest geo-economic bloc of the world, as nearly one quarter of the world population lives in South Asia. Its combined average GDP growth is over 7% and consumer base is over 800 million people in the middle class bracket. South Asia, therefore, bears tremendous potential for regional and global economy.

In view of the rapidly growing economies of the countries in the region, it is crucially important to put in place an efficient mechanism for resolution of trade disputes. As we all know, efficient legal services for trade arbitration espouse greater trade and investment, both intra-regionally and globally, and also attract foreign direct investment.

Our region has a vast pool of arbitrators and young budding professionals working towards creating a modern and sustainable trading environment, including a system to efficiently resolve regional and international commercial disputes within the SAARC region. This potential can be harnessed to attract arbitral assignments to our region.

Q. What role can SARCO take in order to advance the regional integration process?

During the Eighteenth SAARC Summit in Kathmandu in November 2014, our leaders renewed their commitment to achieve the visionary goal of the South Asian Economic Union (SAEU) in a phased and planned manner through a Free Trade Area, a Customs Union, a Common Market, and a Common Economic and Monetary Union.

As a specialized regional arbitral mechanism, SARCO can facilitate the attainment of the vision of SAEU. Continuation of the provision of expert arbitral and conciliatory services; and engaging with the trading community of the region and enhancing collaboration among trading bodies, arbitral institutions and SAARC bodies will eventually facilitate realization of this vision.

Q. What message would you like to convey to the SAARC trading community through this publication?

I wish to call upon the South Asian traders to have faith in the SAARC Arbitration Council and its processes. As the only regionally mandated organization in the SAARC region, this Council has been created to minimize the time and cost for settling trade disputes.

Q. Last but not the least, based on your experience with SAARC, how do you envision the SAARC integration process in the future?

Obviously, SAARC has not realized its full and real potential. Regional integration depends entirely on the willingness of the member countries of SAARC. If the Member States work together in a spirit of amity and trust, SAARC can help achieve effective regional integration. They must vigorously pursue the objectives of greater economic cooperation and improved intra-regional connectivity to create the necessary climate of mutual trust and confidence that are indispensable for sustained peace and stability in the region.

SARCO Workshop in Bangladesh

SARCO plans to organize a themed workshop on the role and advantages of institutional arbitration within the SAARC. This workshop is due to be organized in Dhaka, Bangladesh during the year 2019.

SARCO Workshop in Bhutan

SARCO is endeavoring to organize an event on ADR and Arbitration procedures themed as an information and technical workshop in Thimphu. The Council, is engaging the relevant local institutions and authority to maximize the impact of this activity.

China-Pakistan-Afghanistan 4th Trilateral Dialogue

Director General, SARCO participated in the China-Pakistan-Afghanistan 4th Trilateral Dialogue organized by Pakistan-China Institute (PCI) on 12 November, 2018 in Islamabad. The event focused on the relationship between Pakistan, China and Afghanistan, especially in light of the China-Pakistan Economic Corridor (CPEC). Key participants included H.E. Yao Jing, Ambassador of China to Pakistan, H.E. Hazrat Dr. Omar Zakhilwal, the Ambassador of Afghanistan to Pakistan and Senator Mushahid Hussain Sayed, Chairman of PCI and Senate Foreign Affairs Committee.

ECO Day 2018

Director General, SARCO participated in the Economic Cooperation Organization Day function held in Islamabad. The theme of the event was 'Connectivity for Regional Prosperity'. Mr. Shah Mahmood Qureshi, Minister of Foreign Affairs delivered a special address.

ACTIVITIES OF SAARC ARBITRATION COUNCIL IN THE REGION



SARCO's Director General attended the SAARC Development Fund (SDF) Partnership Conclave organized on 2-3 July, 2018 in New Delhi, India on the invitation of SDF's CEO. Discussions in the Conclave revolved around thematic areas and opportunities in the fields of, among others, Energy, Transport, Environment, Agriculture, Trade and Commerce.



SAARC Arbitration Council (SARCO) held a Workshop on the "Importance of SARCO as Regional Arbitration Centre for Development of Trade & Investment & the Context of Arbitration in Sri Lanka" in collaboration with the Federation of Chambers of Commerce and Industry of Sri Lanka (FCCISL) and Sri Lanka National Arbitration Center (SLNAC) in Colombo, Sri Lanka on 3 August, 2018. Ms. Yasoja Gunasekara, Senior Director General of SAARC Division, Ministry of Foreign Affairs, Government of Sri Lanka graced the event as the Chief Guest.

SAARC Arbitration Council (SARCO) participated, as a supportive organization, in the Asia Africa Legal Cooperation Organization (AALCO) Annual Arbitration Forum hosted by the Asian International Arbitration Center (AIAC) in Kuala Lumpur, Malaysia on 21-22 July, 2018. The theme of the conference was "Connecting Asia and Africa, Connecting Investment and ADR: Opportunities and Challenges". The event brought together reputed institutions and professionals from around the globe.





Foreign Direct Investments in Sri Lanka and the Role of Arbitration Centres

By Dr. Dayanath Jayasuriya, President's Counsel (Sri Lanka), Arbitrator at the SAARC Arbitration Council (SARCO)

With the dawn of peace and access to geographical areas that were inaccessible for almost three decades, Sri Lanka is better positioned now to attract Foreign Direct Investments (FDIs). Arbitration is rapidly gaining popularity as a means of resolving commercial disputes. Competition law is seen as a priority area for law reform with the possible entry of major players targeting hitherto restricted services and products.

Foreign Direct Investments

In the 19th and the early part of the 20th century, the expansion of the tea plantations in Sri Lanka (then Ceylon) was a direct result of FDIs. However, when FDIs in the Asian region gathered momentum in the late 1960s and the 1970s, Sri Lanka was not able to reap the maximum benefit from the steady flow of investments.

Investors tend to have long and bitter memories about countries that have not provided a stable and conducive environment to foreign investments. The nationalisation of the petroleum industry and the restrictions on the operations of foreign insurance companies and multi-national drug companies, for instance, were perceived as dark spots on the country's foreign investment record.

In the late 1970s, when a policy decision was made to enact legislation to set up an institutional mechanism to encourage and regulate FDIs, a cautious approach had to be thus adopted. The Greater Colombo Economic Commission Law laid the foundation for attracting foreign investments. Neither that legislation nor the policies of the day were intended to be of a far-reaching nature, but it was understood that gradually more concessions would be offered and that the legal framework would be reinforced.

The lack of a comprehensive national policy statement on foreign investments has been a major constraint on the ability to attract long-term foreign investors with a commitment to use Sri Lanka as a regional hub. Occasional statements by minority

political parties condemning foreign investments have caused some degree of concern, particularly given the country's less than impressive attitude to foreign investments some three or four decades ago.

Foreign investors have a wide choice of locations for investments. Countries that realise the potential value of foreign investments go to extremes to offer comfort of seriousness and commitment. Bangladesh, for instance, is a classic example where even at the height of political turmoil and strikes, the immigration authorities operated a special counter at the Dacca Airport for 'Foreign Investors' and accorded fast track approval for visas.

In the case of Vietnam, the transition in the 1990s from a rigorously controlled centralised economy to a quasi-open economy involved a major paradigm shift. The significant social, economic and political measures have been the subject of analysis (see Jayasuriya, D. C. 1993 'Vietnam's Foreign Investment Law: Some Social, Economic and Political Aspects,' *The Company Lawyer* (U.K.), 1993, Vol. 14(5)).

Even though Vietnam does not yet offer the most perfect destination for investors, measures taken thus far have yielded a bumper crop of good results. In terms of cumulative investment, Singapore is the single largest foreign investor in Sri Lanka; Singapore's investment (stock) went up marginally from S\$ 0.2 billion in 1995 to S\$ 0.3 billion in 2005 (Abeysinghe and Jayawickrama, *Singapore's Direct Investment in Sri Lanka*, NUS Working Paper, 2008). During the same period, Singapore's investment in Vietnam went up from S\$0.4 billion to S\$ 1.7 billion. China has now emerged as the major foreign investor in Sri Lanka. India is likely to make major investments in the not too distant future.

In order to offer a stable and conducive investment climate, Sri Lanka needs to take several measures. The country must adopt a national policy on foreign investments—the policy statement must be developed

through a consultative process and endorsed by major political parties and trade chambers. It is important to revamp the Board of Investment– the deficiencies in the current legislation, institutions and reporting structures must be addressed.

Good governance and accountability systems must be instituted. Labour laws must be revisited. Sri Lanka’s embassies and trade missions must be more proactive in promoting the country’s potential for foreign investors. There must be short, medium and long term plans for infrastructure development.

Human resources that are needed for different sectors must be projected based on viable assumptions and appropriate vocation skills development projects must be initiated. Continuing education programmes for all professionals and skilled and semi-skilled personnel must become the norm rather than the exception.

Arbitration

Sri Lanka has lagged behind many countries in introducing reforms to facilitate and streamline business operations; payment of taxes and duties; and with regard to the conducting litigation. For the resolution of disputes, the worldwide trend is to move towards arbitration procedures in preference to the institution of proceedings in courts of law. Court proceedings are often perceived to be costly, tedious, time-consuming and offering too many opportunities for appeals. In Sri Lanka, an Arbitration Act was enacted in 1995 and there are two national arbitration centres. An International Arbitration Centre was ceremoniously opened by the Prime minister a few years ago but it has yet to become operational.

Most business entities now prefer conciliation and arbitration to court proceedings and this often becomes a prerequisite to the finalisation of the other clauses in the contract. When China opened its doors to foreign contractors and investors, much time and effort were spent on trying to understand the rationale for this approach in the Chinese context.

Provision for conciliation followed by arbitration is now the standard blueprint in most contracts involving one or more Chinese entities (for one of the earliest studies on the dynamics underlying the Chinese approach, see Jayasuriya, D.C. ‘Conciliation and Arbitration in China: The Interface of Culture and Tradition with Legal Policy,’ Business Law Review (U.K.), Vol. 11 (6), 1990). The drafting of arbitration clauses and their inclusion in contracts is

an art by itself.

Recognising the potential benefits of offering a neutral and convenient venue (in terms of access; ease of communication, etc.) for arbitration, some countries such as China, Singapore, India and Malaysia have set up facilities to host arbitration proceedings. With modern state-of-the-art facilities and infrastructure, such a centre could be a financially rewarding venture. Countries that do offer host facilities have developed a roster of lawyers and law firms whose services can be enlisted, if the need arises.

As SAARC countries now stand poised to enter into joint investment ventures with China as part of the One Belt One Road Initiative and other countries, there is a possibility of more and more aggrieved parties having recourse to arbitration for the speedy disposal of trade disputes. As part of the integration of SAARC countries, the SAARC Arbitration Council provides a unique forum under the aegis of which trade disputes involving countries in the region can be resolved.

Nomination to the Panel of Arbitrators

As per recommendation of the Governing Board and the approval of the Standing Committee, SAARC Member Countries have to nominate arbitrators to the panel of Arbitrators at SARCO every 3 years. Accordingly, new nominations to SARCO’s Panel of Arbitrators are being received. The nominations from Bangladesh, Bhutan, Maldives and Sri Lanka have been received.

8th National Judicial Conference, 2018

The 8th National Judicial Conference was held in Islamabad. Mr. Faazaan Mirza, Deputy Director, SARCO submitted an article titled ‘Investment Treaty Arbitration’ on behalf of this Council on the invitation of NJPMC of the Law & Justice Commission of Pakistan.

Activities of SAARC Arbitration Council in the Region



Ms. Aminath Sanny Naseer, FSTO (Foreign Service Trainee Officer) from the Ministry of Foreign Affairs of the Republic of Maldives visited SARCO's Headquarters on 24 October, 2018. She was appraised of SARCO's mandate and operations.



SAARC Arbitration Council (SARCO) conducted its 9th Governing Board meeting on 30-31 October, 2018 in Male, Maldives. Representatives from all SAARC Member Countries attended the meeting, assessed the progress of SARCO and recommended the future policy to the 56th Programming Committee meeting of SAARC.



HARMONIZING SAFTA AND SARCO'S EFFORTS: A SMALL STEP TOWARDS LARGER ECONOMIC INTEGRATION IN THE SAARC REGION



Mr. Bharatendu Agarwal from the Republic of India joined the SAARC Arbitration Council (SARCO) as Assistant Director (Law) in November, 2018. Mr. Agarwal pursued his LL.M. in International Commercial Arbitration Law (ICAL) from Stockholm University, Sweden. He has interned at the Singapore International Arbitration Centre (SIAC) and has previously worked in the Law Commission of India, Ministry of Law & Justice and with Justice R.C. Lahoti, Former Chief Justice of India.

INTRODUCTION

SAARC Member States keeping in mind the SAARC Charter¹ objective of promoting and strengthening collective self-reliance among the SAARC nations, signed on 11th April, 1993² the SAARC Preferential Trading Arrangement (SAPTA)³ in Dhaka, Bangladesh.

SAPTA's genesis traces back to the 4th SAARC Summit⁴ where feasible areas for economic cooperation were identified. This was followed up in the 6th SAARC Summit⁵ where consensus was reached on liberalizing the trade regime within the region in a gradual but strategic manner. SAPTA is guided on the principles of promoting regional co operation under the understanding that expansion of trade acts as a powerful stimulus for economic growth which not only provides greater employment opportunities but also secures higher living standards.⁶

SAPTA was merely a first step towards superior economic cooperation. It was a segue for something more substantive which manifested itself in the 12th SAARC Summit⁷ in the form of the Agreement on South Asian Free Trade Area (SAFTA).⁸ SAFTA, signed on 6th January, 2004,⁹ recognizes in its Preamble that the stage is set to '*move towards higher levels of trade and economic cooperation in the region*' and strengthen national and SAARC economic resilience.

SAFTA, shifting the emphasis from sustenance to enrichment, is naturally more comprehensive than SAPTA. It facilitates tariff concessions and removal of non-tariff barriers. It proposes a well-

defined approach to trade liberalization, specifying time-staggered tariff reductions for each member country. It directs focus, among other things, on issues of competition, trade and transport facilitation and macroeconomic consultations. Along with substantive policy related developments, improvements are there in the dispute resolution mechanism also.

DISPUTE SETTLEMENT MECHANISM IN SAPTA & SAFTA

Within SAPTA, dispute settlement is captured in Article 19 and Article 20. Article 19 provides for consultations stating that each Contracting State is expected to accord sympathetic consideration and adequate opportunity for consultations when any such representations is received. Article 20 goes on to state that disputes between Contracting States shall be amicably settled and in the event of failure to settle, the dispute may be referred to the Committee who shall review the matter and make a recommendation within 120 days.

The mechanism proposed in SAPTA required further improvement in addressing trade-related disputes.¹¹ This problem was recognized by SAFTA drafters and alterations were made in the dispute settlement mechanism. A mechanism which was earlier encapsulated in as less as 2 clauses is now elaborated upon in as many as 11 clauses. SAFTA, in Article 20, introduces something similar to a multi-tier dispute resolution clause.

SAFTA's Article 20, read with Article 10 (7), introduces a detailed mechanism under the auspices of a Council of Experts (COE) and SAFTA

Ministerial Council (SMC). The COE, as defined in Article 10 (5), is composed of one nominee from each Contracting State being a Senior Economic Official possessing expertise in trade matters. The SMC, on the other hand, consists of Ministers of Trade or Commerce of the Contracting States.¹²

Article 20 suggests that in case of dispute among the Contracting States relating to the SAFTA, or any instrument adopted within its framework, attempt is to be made to amicably settle the dispute through bilateral consultations.¹³ A request for consultation is to be made in writing stating the reasons for the request and its legal basis.¹⁴ A timeframe is set out wherein a reply to the request is expected within 15 days of its receipt. Within an additional period of 15 days, consultations in good faith shall begin with a view of reaching a mutually satisfactory solution.¹⁵ If this process fails¹⁶ or the timelines are not adhered to¹⁷, then the Contracting State requesting the consultations may request the COE to settle the dispute in accordance with working procedures drawn up by the COE.

The COE shall then investigate the matter and make recommendations within 60 days from date of referral.¹⁸ They may also take assistance from a specialist for peer review.¹⁹ Appeals against the COE's recommendations will lie with the SMC, which has ultimate authority to uphold, modify or reverse the recommendations²⁰ and may also suggest ways to implement the recommendations.²¹

INADEQUACIES IN SAFTA'S DISPUTE SETTLEMENT MECHANISM

There is no doubt that SAFTA's dispute settlement mechanism is a substantial upgrade over SAPTA. Despite this, however, there is still scope for improvement as the present mechanism has some gaps, thereby defeating the primary purpose of having an efficient and workable dispute resolution mechanism.

1. Undefined Procedural Rules

Article 20 (4) states that the COE is to settle the dispute in accordance with '*working procedures to be drawn up by the Committee*'. This is a problem area because the absence of any well-defined procedure to approach the dispute creates immense scope for discretion. Devising procedures on a case to case basis not only reduces certainty for the complainant but also provides possibility

for the COE to fault itself on critical procedural requirements. The situation is made more complex because this issue of lack of defined operational procedure also persists in case when the specialist has to peer review the COE's recommendation and when the SMC has to review an appeal against the COE's recommendation.

This essentially means that throughout the dispute resolution process, during each stage, the deciding authorities have no rules or guidelines to fall back upon and have complete liberty to decide as per their own notions. Such wide choice may not be in the interests of a process which is intended to be fair and efficient.

2. Undefined Nomination Procedure & Qualifications for COE

Lack of clarity on the point of how the COE's are to be nominated and what their qualifications should be is another lacuna. While Article 10 (5) mentions that the COE nominee should be a '*Senior Economic Official, with expertise in trade matters*', this standard is incomplete. There are no pointers on what grounds a person would be identified as a 'senior official' or what work would be considered as relevant 'expertise'. There are no references in terms of age, nature of experience and years of expertise. Absence of these fundamental requirements casts aspersions on the COE's ability to exercise their duties as per the high standards demanded by SAFTA.

3. Undefined Nomination Procedure & Qualifications for Specialists

Article 8 (4) states that the COE may request a specialist to peer review its recommendation. The Article also mentions that a panel of specialists is to be established by the COE. There is ambiguity in this clause also. Once again, similar to the case of COE, there are absolutely no details mentioned on who would qualify as a specialist or what the selection procedure is. Other questions include - composition of the panel, length of specialist's tenure, scope of review, authority to modify or reverse the COE recommendations, if yes to what extent.

4. Conflict of Interests

Since there are no defined guidelines for the selection and qualifications of the COEs, the

nominees, more often than not, comprise of government officials. Being political appointees, there is always the possibility of being susceptible to political pressure, which may prevent high-ranking government officials from rendering unbiased decisions involving vital trade matters.²² Additionally, the SMC consists of the Ministers of Trade and Commerce of the Contracting States. The SMC is also the appellate body, which is tasked to decide on appeals against the COE's recommendation. The nature of conflict of interest that would arise in situations of appeal is apparent. The SMC nominees of the disputing States would automatically tend to favor their country's stand.

Neutrality is the cornerstone of any dispute resolution process. The current arrangement, being in conflict with fundamental norms, warrants amendment. The composition of the COE and SMC make the mechanism vulnerable to bias, thereby defeating its purpose. This issue is magnified if related with the problem of lack of defined rules of procedures.

5. Lack of Time

Another issue is the availability of time required to resolve a dispute involving complex trade issues.

COE is primarily tasked with monitoring, reviewing and facilitating the implementation of SAFTA and undertaking any tasks assigned to it by the SMC.²³ Being already burdened with the significant task of submitting a progress report biannually and meeting at least once in every six months.²⁴ The SMC on the other hand, already consists of busy Ministers of Trade and Commerce. Can the COE or SMC, who is already overloaded with pressing issues, actually provide time and do justice to the exercise of resolving highly disputed trade matters involving complex dichotomies?

6. Weak Enforcement Mechanism

Throughout Article 20, the decision of the COE, and even the SMC, is referred to as 'recommendations'. The word suggests that the decisions are merely advisory in nature and States are not legally bound to abide by them. While Article 20 (11) suggests the consequence of non-compliance, it seems moderate, voluntary and not necessarily workable at the practical level.

7. Provision for only Bilateral Disputes

SAFTA's dispute settlement mechanism has

been devised factoring in bilateral disputes. The provisions only cater for 'bilateral consultations' and have no recourse in case of multilateral disputes, which is a definite possibility in multilateral agreements. Considering SAFTA's mandate, it is possible to have a dispute involving more than one complaining party or even responding party. It is also possible for one State to have multiple complaints on a single issue or multiple complaints on separate issues. The current mechanism does not provide any reference on how such situations would be addressed.

POSSIBLE EXPLANATION FOR INADEQUACIES

SAFTA's text was drafted against strict deadlines. SAFTA's final version took merely six meetings of the 'Committee of Experts on Drafting a Comprehensive Treaty Regime for a South Asian Free Trade Area'. Out of the six meetings, the Second, Third and Fourth Meeting happened in quick successions on 28-29 October 2002, 29-30 November 2002 and 27-29 December 2002, respectively.²⁵ Then the Fifth and Final meetings happened quickly on 14-17 October 2003 and 30 November-1 December 2003. This was because the drafting committee had to deliver a final version which could be signed in the 12th SAARC Summit scheduled in early January 2004.²⁶

Considering the strict timelines, it is possible that the dispute resolution clause, as is often the case, was included at the last moment. Such last moment ad-hoc arrangements are notoriously referred to by lawyers as midnight clauses. When drafters realize that they are short on time, they borrow boilerplate clauses from other agreements and not being able to devote the required time, end up providing inadequate and unworkable solutions.

Another plausible cause can be the inability of member nations to reach a consensus on the specifics of the dispute resolution mechanism. Drafters might have, in such a case, as a last resort purposely drafted a broad framework open to interpretation in order to reach a compromise,²⁷ with the hope of improving it in the times to come.

WAY AHEAD WITH THE SAARC ARBITRATION COUNCIL (SARCO)

Having enumerated the shortcomings in SAFTA's dispute resolution process, the automatic question that arises is what can be done to remedy it and

how. This is where the SAARC Arbitration Council (SARCO) can positively enhance this process of dispute resolution.

SARCO, conceptualized during the 13th SAARC Summit,²⁸ became functionally operational in 2014. As per the 'Agreement for Establishment of SAARC Arbitration Council',²⁹ SARCO's purpose, inter-alia, is to create conditions favorable for fostering greater investment by investors of one Member State in the territory of another Member State and also providing a regional forum for settlement of disputes. Article II of the Agreement, which lists objectives and functions, states that SARCO is also expected to act as a coordinating agency in the SAARC dispute resolution system.

Essentially, SARCO was set up for the primary purpose of serving as SAARC's dispute resolution arm. All SAARC's agreements or frameworks which require a chapter on conflict resolution, instead of proposing half-baked mechanisms should instead use the services of a specialized body, possessing formal mechanisms modelled particularly to resolve disputes. In such a scenario, the million-dollar question is whether reliance on SARCO would actually remedy the inadequacies in SAFTA's dispute resolution mechanism.

SARCO ADVANTAGES

1. The foremost advantage of inculcating SARCO in SAFTA's mechanism is opting for a completely independent, self-sufficient dispute resolution forum having expertise and well-defined rules of procedure. Similar to arbitral institutions of repute, SARCO has elaborate Arbitration Rules which are periodically updated.³⁰ These rules provide well-structured operating framework on how the dispute resolution process is to be conducted, thereby streamlining the process, reducing ambiguity and in turn solving the issue of excessive discretion in the hands of the decision-making authorities. The process instead, shifts this discretion in the hand of the disputing parties by allowing them to agree upon certain internal procedures, a feature commonly described as 'party-autonomy'.

2. The issue of the dispute being decided by authorities who may not be qualified to resolve disputes is also resolved. Instead of being obligated to the present in front of the COEs, each state would have the liberty of nominating arbitrators of choice or choosing from SARCO's existing panel.³¹

Nominating or choosing arbitrators completely eliminates the issue of lack of faith in the decision-maker's competence because parties automatically opt for an arbitrator who, according to them, would appropriately understand and adjudicate the dispute.

3. The above process also solves the problem of lack of time and perceived conflict of interest. Since the entire dispute resolution process is outsourced, the COE and the SMC can entirely focus on their primary responsibilities. Them not being involved automatically finishes any bias related aspersions or allegations of them being agents of their respective governments. As per SARCO's arbitration rules when an arbitrator is appointed, they are obligated to reveal any circumstances that may give rise to justifiable doubts regarding their impartiality or independence.³² Even then if at a later stage any reason surfaces which brings the arbitrators ability to decide independently into question, detailed procedure is available for challenge and subsequent replacement of the arbitrator.³³

4. SARCO's Arbitration Rules also elaborate on the process of nomination of experts.³⁴ The tribunal, after consultation with the parties, may appoint one or more experts to give determinations on specific issues. The expert would not only be required to present a statement of impartiality but may also be subject to interrogation at the request of either party. Detailed provisions counter SAFTA's lacunae of undefined nomination procedure and qualifications for specialists.

5. Every arbitration conducted under SARCO's Arbitration Rules is final and binding, parties are obligated to carry out the award without delay.³⁵ The decision to arbitrate automatically takes care of the problem of lack of enforcement and the possibility of non-compliance on two accounts - first, all SAARC member states have signed and ratified the Agreement for Establishment of SARCO, and second, SAARC member nations are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.³⁶

6. Arbitration mechanisms provide the option for joinder of parties and consolidation of issued. SARCO is currently exploring the possibility of developing institutional rules on these subjects. Once finalized, the issue of being restricted to bilateral process within the SAFTA process would also be remedied.

CONCLUSION

Any system to function efficiently requires support of a robust dispute resolution mechanism. The absence of such a machinery in SAFTA has been one of the main causes of slow implementation of SAFTA within the SAARC region. Adopting SARCO's mechanism, which is strong yet flexible, would not only facilitate resolution of disputes in an efficacious manner but would also ensure better implementation of SAFTA's provisions. It would further the cause of investors and smoothen cross-border trade. A comprehensive mechanism would help reduce political impediments to regional integration and encourage otherwise reluctant states to accept their responsibilities under SAFTA.³⁷

Arbitration is a well-recognized conflict resolution mechanism which has gained significant acceptance in the recent decade in South Asia. Arbitration has been chosen as the dispute settlement mechanism in several notable agreements such as the Free Trade Agreement between India and Sri Lanka, the Free Trade Agreement between Pakistan and Sri Lanka, the Preferential Trade Agreement

between India and Afghanistan, the Transit Trade Agreement between Pakistan and Afghanistan and the Framework Agreement on the Comprehensive Economic Cooperation between ASEAN and India. Being comfortable including arbitration clauses in bilateral agreements, there should be no hesitation in pushing for the same in important multilateral agreements like SAFTA or any other agreement signed under the auspices of SAARC.

SARCO was formed after SAFTA's framework was formalized. However, this does not mean that SAFTA cannot benefit from SARCO's mechanism. A combined reading of SAFTA's Article 3 (2) (a) and Article 4 (6) indicates that adoption of an additional instrument in the form of a protocol, as is common practice, would suffice. Hence, if SAARC intends to capitalize on SAFTA's benefits, it should be prepared to opt for a more reliable dispute settlement mechanism under the auspices of SARCO. A first step in this direction can be involving or calling upon SARCO as and when a conflict situation arises to explore the possibilities of harmonizing SAFTA and SARCO's efforts.

¹ SAARC Charter was signed in Dhaka, Bangladesh on 8 December, 1985

² SAPTA entered into force in December, 1995

³ Download SAPTA text here - http://saarc-sec.org/digital_library/detail_menu/agreement-on-saarc-preferential-trading-arrangement-sapta

⁴ Islamabad, Pakistan (29-31 December, 1988)

⁵ Colombo, Sri Lanka (21 December, 1991)

⁶ Preamble, SAPTA

⁷ Islamabad, Pakistan (4-6 January, 2004)

⁸ Download SAFTA text here - http://saarc-sec.org/digital_library/detail_menu/agreement-on-south-asian-free-trade-area-safta

⁹ SAFTA entered into force in January, 2006

¹⁰ Article 9, SAPTA defines the term 'Committee of Participants'

¹¹ Khan, S. R., Shaheen, F. H., Yusuf, M., & Tanveer, A, Regional Integration, Trade and Conflict in South Asia, Sustainable Development Policy Institute, Pakistan (2007), Page 18

¹² Article 10 (3), SAFTA

¹³ Article 20 (1), SAFTA

¹⁴ Article 20 (2), SAFTA

¹⁵ Article 20 (3), SAFTA

¹⁶ Article 20 (6), SAFTA

¹⁷ Article 20 (4), SAFTA

¹⁸ Article 20 (7), SAFTA

¹⁹ Article 20 (8), SAFTA

²⁰ Article 20 (9), SAFTA

²¹ Article 20 (10), SAFTA

²² Nath, Amala, The SAFTA Dispute Settlement Mechanism: An Attempt to

Resolve or Merely Perpetuate Conflict in the South Asian Region?, American University International Law Review 22, No. 2 (2007), Page 347

²³ Article 10 (6), SAFTA

²⁴ Article 10 (8), SAFTA

²⁵ Meeting of the Committee of Experts on Drafting a Comprehensive Treaty Regime for a South Asian Free Trade Area (SAFTA), SAARC Secretariat Kathmandu, South Asian Survey, Vol. 11, No. 1, Mar. 2004, Pages 124-145

²⁶ Islamabad, Pakistan (4-6 January, 2004)

²⁷ Nath, Amala, The SAFTA Dispute Settlement Mechanism: An Attempt to Resolve or Merely Perpetuate Conflict in the South Asian Region?, American University International Law Review 22, No. 2 (2007), Page 358

²⁸ Dhaka, Bangladesh (12-13 November, 2005)

²⁹ Download Agreement for Establishment of SARCO here - http://saarc-sec.org/digital_library/detail_menu/agreement-for-establishment-of-saarc-arbitration-council

³⁰ For the latest version of SARCO's rules please visit SARCO's website

³¹ Articles 7-11, SARCO Arbitration Rules, 2016

³² Article 12, SARCO Arbitration Rules, 2016

³³ Articles 13-17, SARCO Arbitration Rules, 2016

³⁴ Article 31, SARCO Arbitration Rules, 2016

³⁵ Article 36, SARCO Arbitration Rules, 2016

³⁶ The following countries are signatories to the New York Convention - Afghanistan, Bangladesh, Bhutan, India, Nepal, Pakistan and Sri Lanka

³⁷ Ahmed, A.M. & Ahmed, R.A., SAFTA: Progress, Challenges and Prospects in Next Steps to South Asian Economic Union - A Study on Regional Economic Integration (Phase II), Page 67



SARCO is a proud member of the Asia Pacific Regional Arbitration Group (APRAG). APRAG is a regional federation which aims to improve standards and knowledge of member institutions.

Activities of SAARC Arbitration Council in the Region



Ms. Mehnaz Khurshid Gardezi, Marketing & Communications Consultant represented SARCO at the 60th Anniversary Celebrations of Friedrich Naumann Foundation for Freedom in Islamabad



SAARC Arbitration Council (SARCO) held a Seminar on “Arbitration: An Effective Dispute Settlement Tool; Regional Experience and implications for Maldives” in collaboration with the Attorney General’s Office of the Republic Maldives in Male on 1 November, 2018. Mr. Ahmed Usham, Deputy Attorney General graced the event as the Chief Guest.



Dispute Resolution Center in Bhutan

The Royal Government of Bhutan has recently established the Bhutan Alternative Dispute Resolution Center (BADRC) in Thimphu. SARCO, as the only regionally mandated Arbitration Centre for the SAARC region, pledges to support the newly established Centre in its initiatives.

Meetings of SAARC Arbitration Council in the Region



SARCO delegation met Mr. Mohd. Anas, Counselor at the Sri Lankan High Commission in Islamabad



SARCO delegation met Mr. Md. Najmul Huda, Counselor (Political), High Commission for the People's Republic of Bangladesh in Islamabad



Delegation of SARCO led by the Director General met with Ms. Yasoja Gunasekera, Senior Director General of SAARC, Ministry of Foreign Affairs and Mr. Wijeratna, Director General Legal, Ministry of Foreign Affairs Colombo and Governing Board Member of SARCO



SARCO delegation met Ms. Samina Wadeer, Commercial Attache, Embassy of Islamic Republic of Afghanistan to Pakistan in Islamabad



Director General, SARCO met with H.E. Ms. Zahiya Zareer, Ambassador-at-Large, Ministry of Foreign Affairs, Maldives in Islamabad

Co-ordination Meeting at SAARC Secretariat

The Annual Co-ordination meeting between the heads of all SAARC bodies and the Secretary General of SAARC was held on the 10th December, 2018 on the sidelines of the 56th Session of Programming Committee of SAARC.

The new design of SARCO website has been launched. The website has been restructured to be more user-friendly and will be constantly updated.



SARCO in collaboration with the Ministry of Foreign Affairs, Pakistan and SAARC Energy Center (SEC) organized the 34th SAARC Charter Day celebrations at the Ministry of Foreign Affairs on 7 December, 2018. Foreign Secretary, H.E. Ms. Tehmina Janjua was the Chief Guest. Ambassadors and representatives of the Missions of Member and Observer States of SAARC, Heads and representatives of SAARC Bodies/Centers, officers of the Ministry of Foreign Affairs of Pakistan, and representatives of print and electronic media attended the ceremony.



The 56th Session of the Programming Committee Meeting of the SAARC was held in Kathmandu, Nepal on 11-12 December, 2018. The committee, besides determining inter-sectoral priority, is mandated to scrutinize budgets, and finalize annual calendar of activities.

Meeting with the Delegation of the European Union to Pakistan

SARCO's delegation met Mr. Franck-Olivier Roux, First Counsellor/Head of Political Trade Communication Section and Mr. Husnain A. Iftakhar, Senior Economist/Trade Officer of the Delegation of the European Union in Islamabad on 30 November, 2018. Possible co-operation between SARCO and the EU Delegation were discussed in light of the existing MoU between SAARC and the EU (then EC).



Professionals from SARCO met Mr. Gonzalo Varela, Senior Economist of World Bank Headquarters in Washington D.C. who was visiting Islamabad on 6 December, 2018. Possibilities of association with ICSID and the World Bank Group's South Asia team were discussed.

NOTABLE DEVELOPMENTS IN THE SAARC REGION

AFGHANISTAN

- 5 November, 2018 – Kabul – A conference on ‘Nuts & Bolts in Arbitration & ADR’ was organized by the ICC Young Arbitrators Forum and ICC Afghanistan at the Kardan University.

BANGLADESH

- Dhaka – A roundtable discussion on “ADR in managing the risk of non-performing bank loans” was organized by Bangladesh International Arbitration Centre (BIAC) and Dhaka Chamber of Commerce and Industry (DCCI).
- 27 October, 2018 – Dhaka– The Bangladesh International Arbitration Centre (BIAC) organized a session on proposed Arbitration (Amendment) Act 2018 to stress on the need of amendment to the existing Arbitration Act, 2001.

BHUTAN

- Thimphu – The Bhutan Alternative Dispute Resolution Centre was established.

INDIA

- New Delhi – The Union Cabinet of India approved the Arbitration and Conciliation (Amendment) Bill, 2018 for introduction in the Parliament.
- 08 September, 2018 – Mumbai – The 2nd ICC India Arbitration Day was organized by ICC International Court of Arbitration.
- 27 October, 2018 – New Delhi – The Permanent Court of Arbitration and the Indian Ministry of External Affairs, pursuant to the Host Country Agreement between the PCA and India, organized the 2nd PCA India Conference.
- 15 December, 2018 – New Delhi – The 2018 ICC India Arbitration Conference was organized by ICC International Court of Arbitration and ICC India.

PAKISTAN

- Islamabad – The Law and Justice Commission of Pakistan (LJCP) under the auspices of National Judicial (Policy Making) Committee organized a three-day Judicial Conference in which SARCO submitted a paper on Investment Treaty Arbitration.
- 21 November, 2018 – London – Honorable Mr. Mian Saqib Nisar, the Chief Justice of Pakistan delivered a lecture on ‘Future of Arbitration in Pakistan’ at Gray’s Inn in London.

SRI LANKA

- Colombo – The Moot Society of Sri Lanka Law College organized Sri Lanka’s first ever International Commercial Arbitration Moot Court Competition, titled the H.V. Perera QC Memorial Moot Court Competition, also known as the Victors Moot.
- Colombo – The Ceylon Chamber of Commerce (CCC), in partnership with the Institute for the Development of Commercial Law and Practice (ICLP), launched the CCC-ICLP Alternative Dispute Resolution (ADR) Centre. A three-day training for 12 newly hired CCC-ICLP arbitrators and seven arbitrators from the Afghan Center for Dispute Resolution (ACDR) was also held.



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