

INTERNATIONAL DISPUTE SETTLEMENT MECHANISM; WITH SPECIAL EMPHASIS ON SAARC

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The geo-political and strategic location of SAARC territory is of great importance. The whole region and the waters surrounding it is an arena of big power games and movements which has in the last six decades, after British withdrawal, witnessed a shift towards “globalism”. Besides, the Pacific region, East Africa and a huge part of Middle East have been influenced through increasing movements in the Indian Ocean. Also, the countries of the sub-continent, each with its own quality of relationship with the super powers outside the region, influence deeply the SAARC process; while the internal relationship on every possible development sector of member nations determines the very structure of SAARC as a forum of regional cooperation. The increasing number of external powers as observers is indicative of this new trend.

The existing international economic order has been operating against the basic interests of the poor countries due to the growing protectionist tendencies in the rich countries.² In the international market the share of products of poor countries were dwindling at substantial rate and that of the rich countries were increasing at higher rates. The poor countries were left with only one option i.e., to promote mutual economic relations in order to solve their economic problems and to achieve collective self-reliance.³ The South Asian Association for Regional Cooperation (SAARC) is an indication of regional cooperation among the countries of the region.

The idea of regional cooperation in South Asia was first initiated by late President Zia-Ur-Rehman of Bangladesh, who visited Nepal, India, Pakistan and Sri Lanka during the period 1977-78 to explore the possibilities of regional economic cooperation among the SAARC countries. In May 1980, he issued a formal call for SAARC regional cooperation. His call received a positive response from all the SAARC countries. These preliminary exchanges

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² Ahmed, S.S Kalegma and E Ghani ‘*Promoting Economic Cooperation in South Asia: Beyond SAFTA*’ Sage Publications, New Delhi 2010.

³ Salahuddin Aminuzzaman, ‘*A Regional Overview Report on National Integrity Systems in South Asia*’ Transparency International South Asia Regional Workshop on National Integrity System Karachi, Pakistan December 28-20 2004.

clearly brought out that regional cooperation should on the one hand, reflect the spirit of mutual trust, understanding and sympathetic appreciation of the political inspiration existing among the countries of the region, and on the other hand, such cooperation should be based in respect of the principles of sovereign equality, territorial integrity, non-interference in the internal affairs of other nations and mutual benefit.⁴

In the first meeting of foreign secretaries of these countries in April 1981, five broad areas for regional cooperation have been identified. These include Agriculture, Rural Development, Telecommunication, Meteorology, Health and Population activities. Subsequently three other meetings were held at Foreign Secretary level at Kathmandu (1981), Islamabad (August 1982) and Dhaka (March 1983). These meetings covered considerable ground in defining the objectives of the regional cooperation, identifying select areas for possible cooperation and recommending suitable programs of action.⁵ The four additional areas were identified for regional cooperation. These were postal services, transport, science and technology, and sports, art and culture.

Further a meeting was proposed to be held in Delhi to speed up such regional cooperation. Accordingly, the first meeting of the seven Foreign Ministers was held in New Delhi in August 1983, which officially launched South Asian Regional Cooperation (SARC). This meeting adopted a declaration to strengthen the collective self-reliance and to accelerate economic development through regional cooperation. It formally launched the Integrated Programme of Action (IPA) in the nine identified areas of regional cooperation. With the inclusion of Afghanistan in 2007, the first physical enlargement of the forum took place. However thrust was given to promote welfare economics, collective self-reliance and to accelerate socio-cultural cooperation.

INTEGRATION ARISING FROM COMMONALITIES

One of the major factors for the South Asian nations to come together to form a regional group is due to the multitude of commonalities that are existing among the member states. The confidence for achieving larger economic prosperity is also in the wake of commonality

⁴ M.R Aggarwal, *Regional Economic Cooperation in South Asia*, New Delhi 1984: 1-7.

⁵ Bimal Prasad, *Regional Cooperation in South Asia*, New Delhi, Vikas Publishing House (P) Ltd., 1989: 63.

in the problems faced by the SAARC nations. The major commonalities are discussed hereunder:

COMMON TERRITORIALITY WITH NATURAL FRONTIERS

Natural frontiers of a territory play a pivotal role in the interaction of people, evolution of cultures and multi-dimensional relations amongst human groups and organizations. The countries of this vast region have been sharing common territorial frontiers and the region is largely viewed as a single land mass with the exception of Sri Lanka and Maldives. The region also have common climatic factor more particularly the South west monsoon and the north east monsoon influencing the states of the region to a greater extend. The development of transportation and communication has shortened distances between the nations considerably and therefore they can largely be regarded as one territory. Any corner of the region is easily accessible from any other parts through diverse means of transportation. Maldives was an exception until recently but the development in transport technology makes it even easier by air and water to access this island country. The vicinity and possibility of regular visits of South Asian people to different areas within the region provides for the better comprehension and relations. The experience of people whose knowledge dates back to centuries also contributes to the integration of the region.

COMMON ASSETS OF CIVILIZATION AN ADDED ADVANTAGE FOR INTEGRATION

The region is always regarded as one of the most important cradles of human civilization. There are hardly any history of arts, culture, sciences, religions, philosophies and literature which fails in taking into account the contributions made by people and cultures of SAARC region. The people of this region carry some common imprints of the great civilizations which flourished in this part of the world. All ancient and major religions of humanity had its roots in this region. The prominent among them are the Vedic Sanata Dharma, Buddhism, Jainism and Sikhism. Some of the world religions, which originated in other parts of the earth but which came to be practiced by the people of this region, entered the sub-continent much before than in many other parts. The town planning and other infrastructural developments have their origin in Indus Valley Civilization. The region is also rich in art and architecture

which no other region has ever possessed. The modern art forms that are practiced in other parts of the world today are largely attributed to this region.

COMMON LINGUISTICS ENABLING EASY ACCESS

The Indian sub-continent displays an incredible number of languages and dialects which no other region has. The diversity and the commonality in the scripts enable easy access to the society which is different in all other aspects. The common civilizational asset has made a small number of languages which has virtually become the part of the cultural heritage of many. Sanskrit and Pali are two classical languages which are part of the cultural heritage of the Hindus, Buddhist and Jains and that are predominant in this region. Tibetan is a quasi-classical language for the Buddhist in Himalayas; i.e., Kashmir, Ladakh, Nepal, Bhutan and other parts in the North-West and North-East. The same can be said about Tamil, Kannada and Malayalam which are interrelated among themselves and have links with Sanskrit though they are not distinctly of Sanskrit origin; they have a strong role in the literary and philosophical traditions in the Southern part of the Indian sub-continent. The commonality in the languages enables people from move and settles form one region to that of the other without any difficulty. Better trade relationship can be achieved among the nations of this region.

ENVIRONMENTAL INTERDEPENDENCE A DRIVING FACTOR FOR CLOSER RELATIONSHIP

The natural resources of the region are unevenly spread and distributed. It is being understood increasingly that the resources should be commonly managed for an equitable distribution. The rivers flowing from the Himalayas are of importance for India and Bangladesh. The monsoons blowing from the Bangladeshi and East Indian waters causes rain in most of the northern plain and Nepal. The topography and climatic conditions of one region may be conducive for the growth of particular vegetation whereas another region may have predominance of other vegetation. Similarly, the raw materials for industries may be available at a subsistence rate form one part whereas other region may have all facilities for setting up of the industries. Owing to the economic complementarities the states are highly dependent on the other. Not only for the economic prosperity but also the environmental

unbalances as a result of severe droughts, floods and energy outage can be avoided through sharing of common responsibilities. Cooperative management of the natural resources, energy potentials, tourism, mineral and forest products can foster the relationship among the member nations.

COMMON ECONOMIC PROBLEMS ENABLING TO FIND COMMON SOLUTIONS

The countries of the region are similar in their economic status as most of them are in their take of stage of development. Low per capita income, low level of GDP and snowballing social problems such as poverty, unemployment, health issues and lower living standards of the people are a common feature of this region. The common economic hardship brings them together to look forward for solutions. Their common problems are not so much in tune with higher industrial growth or economic prosperity but the need to uplift the vast majority of people from the level of misery and clutches of poverty. All countries of the region are heavily dependent on foreign aid has serious problems with the uplift of down trodden masses. Therefore, the search for an alternative model of development, attempt for the reduction of foreign aid and improvement in living conditions of masses are those issues which may unite the intellectual, political, administrative and economic efforts of all the countries; thus providing a common platform for addressing these issues.

The relationship among the SAARC nations was bitter from the inception of those states. When majority was formed by the fractioning of Indian mainland, a cordial relationship was quite unthinkable. The emergence and growth of a regional organization has not blunted the raw edges of historic irritants between members nor ameliorate the high level of suspicion and distrust among the neighbors. Many of the conflicts are the remnants of colonial era. However scrupulous policies of the subsequent aggravated the situation rather than resolving them. These conflicts ranged from strategic and boundary disputes, water resource management and migration issues, trade and transit questions to ethno nationalist tensions. Conflicts in South-Asia or for that matter in most of the other parts of the world can be broadly put in four categories, namely:

- a) Those imposed and escalated by the global political, strategic and developmental dynamics, including the role of great powers;

- b) Those inherited and strategically induced in inter-state engagements
- c) Those precipitated and nurtured by the internal political turbulence, socio-cultural fault lines and developmental distortions.
- a) Those that are caused and covered by the non-state actors⁶

The lack of trust among member states has often manifested itself in the ineffective administration of several of the initiatives taken by the SAARC. A prime example is that of the SAFTA. Though the seven signatory nations of SAFTA implemented the first tariff reduction from July 1, 2006, Pakistan and India have not yet allowed each other to be facilitated under this agreement. In July 2006, India called for an urgent meeting of SAFTA Ministerial Council (this council comprises of Commerce/trade ministers of the SAARC countries and is responsible for the administration and implementation of the SAFTA agreement). Under the SAFTA agreement, the 'free trade area' operates on the basis of the 'sensitive list'. In this emergency meeting, India accused Pakistan of backing away from its commitment under the multilateral SAFTA agreement. However, this is not the only example of the two countries adopting confrontational postures towards each other at the SAARC platform. The anti-dumping duties imposed by India on lead acid batteries imported from Bangladesh were a serious dispute which negatively affected the trade relations between the member states.⁷ There have been several such occasions with both countries debating contentious issues and delaying the actual implementation of very important regional instruments for peace and economic integration.

The major territorial conflict existing among the SAARC nations are:

- a) India-Pakistan: Deadlock on issues of Siachen glacier, Kargil and Sir Creek, Kashmir issue which has given rise to two major wars.
- b) Afghanistan-Pakistan : Durand line issues
- c) India-Nepal: Land grabs issues in Kalapani and other areas

Article 20 of the SAPTA provides for peaceful settlement of disputes in the event of a dispute between the Contracting states.⁸ When the amicable settlement of dispute has gone futile the parties could submit the matter to the Committee of Participants (COP), which might take

⁶ S D Muni; *Conflicts in South Asia: Causes, Consequences , Prospects* ISAS Working Paper March 2013

⁷ M A Taslim, '*Dispute Settlement in the WTO and the Least Developed Countries: The case of India's Anti-dumping Duties on Lead Acid Battery Import from Bangladesh*, ICTSD January 2006.

⁸ Article 20 of SAPTA (mandating amicable settlement without reference to negotiation, mediation or other specific means of dispute resolution).

120 days from the date of submission of the request to review the dispute and provide for an appropriate solution.⁹ However the agreement has left open larger room for the Committee of Participants to adopt its own mechanism for the review of disputes submitted to it.¹⁰ The SAPTA agreement does not have any detailed discussion on the constituent members, their qualification, functions or working of the mechanism. Thus SAPTA proved to be ineffective in handling trade-related disputes. The member states were also very much hesitant to adopt a rule based institutional and legal mechanisms for dispute settlement. Instead the countries preferred to settle the disputes through bilateral negotiations. Only as a last resort the member countries approached the COP which was neither time bound nor legally binding as the procedures and rules followed by the COP were on a case by case basis.¹¹

SAFTA which came into existence on 1st January 2006, proved to be more effective in trade liberalization. It has a well-defined approach towards economic integration and dispute settlement. SAFTA concedes more than SAPTA on trade related dispute settlement. However SAFTA's dispute settlement is substantively related to the SAPTA dispute resolution mechanism. However there are additional tiers involved in the new mechanism and continue to devise independent procedures on a case by case basis.

Following the SAPTA, Article 10 of the SAFTA agreement provides for a dispute resolution framework by establishing a Committee of Experts (COE) as the primary dispute settlement body.¹² The agreement also provides for a SAFTA Ministerial Council (SMC), which is regarded as the highest administrative body for the implementation of the agreement.¹³ The institutional arrangement of SAFTA is given under Article 10 of the Agreement. The SAFTA Ministerial Council shall be regarded as the highest decision making body of SAFTA and shall be responsible for the administration and implementation of the Agreement and all decisions and arrangements are made within its legal framework. The body shall meet at least once in every year and the chair shall be in rotation according to the alphabetical order.

The member countries of the SAARC have diverse socio cultural and economic background on the one hand and also are involved in diverse problems ranging from political differences to trade disputes. The political and economic reasons along with the deficiency in an all-

⁹ *Id*

¹⁰ Article 20 of SAPTA.

¹¹ Shaheen Rafi Khan '*Regional Trade Integration and Conflict Resolution*'.

¹² SAFTA Agreement Article 10(5).

¹³ SAFTA Agreement Article 10(5) stipulating that the Ministers of Commerce or Trade from each member country shall act as the SMC.

encompassing dispute settlement mechanism are one of the prime reasons for the regional arrangements inability to attain the take off stage. SAARC as a regional body has been for years grappled with inter-state, intra state and regional conflicts. Thus it has always been criticized for its failure to establish its own identity in the region.¹⁴

The inability to deal with inter-state conflicts has always resulted in bilateral conflict and nationalistic interest of the member state. SAARC member states portray lack of trust and weak inter-state relationship toward equitable participation in policy making for member states.¹⁵ When two countries are involved in some contentious issue, the whole implementation process gets affected. Cooperative policies of SAARC are influenced by the fear among some of smaller state that interdependence will lead to the erosion of their political autonomies and therefore undermine their advantages of securing 'honorable' settlement of bilateral issues.¹⁶

It is an undoubted fact that one of the motivating factors of majority of member states was the blind faith that this platform will provide it with opportunities to voice its most important concerns. Nepal was looking forward for a multilateral cooperation instead of a bilateral negotiation in its water-related conflicts. On similar lines Bangladesh had serious concerns over the issues of sharing water with India and therefore was looking forward to resolve it through SAARC platform. Sri Lanka's snowballing internal conflicts compelled the country to join the group for seeking multilateral cooperation. However none of these expectations were satisfied by this regional arrangement.

The SAARC Arbitration Council facilitates resolution of merely investment and commercial matters.¹⁷ No emphasis has been given for other addressing bilateral issues such as sharing of natural resources, border disputes and political differences. Apart from this the dispute settlement mechanism which is provided under Article 20 of the SAFTA addresses only those issues which are relating to trade and those which falls within the purview of SAFTA Agreement. It has been provided that:

'Notwithstanding the measures as set out in this Agreement, its provisions shall not apply in relation to preferences already granted or to be granted by nay Contracting state to other

¹⁴ Z S Ahmed- Stuti Bhatnagar, 'Interstate Conflict and Regionalism in South Asia'.

¹⁵ Atiur Rahman, 'SAARC Not Yet a Community' Asia Pacific Center for Security Studies, Honolulu 2004.

¹⁶ Smruti Pattanaik 'Making Sense of regional Cooperation: SAARC at Twenty' Strategic Analysis Volume 30 No. 1 2006.

¹⁷ Article II (3) of Agreement for Establishing SAARC Arbitration Council.

*contracting states outside the framework of this agreement and to third countries through bilateral, multilateral or plurilateral arrangements and similar arrangements.*¹⁸

Further the SAARC Charter which has given in its objectives that ‘the member countries are desirous of promoting peace, stability, amity and progress in the region through strict adherence to the principles of UN Charter and Non-alignment, particularly respect for the principles of non-interference, territorial integrity and peaceful settlement of all disputes’ has nullified these objectives in its later provision. It is given that ‘bilateral issues and contentious issues shall be excluded from the deliberations’¹⁹. Thus it can be concluded that SAARC Charter or the Agreements entered into by the member countries neither provides for any provision which denotes the disputes that can be discussed before the SAARC nor provide for any mechanism to resolve the dispute. Instead it has ousted the jurisdiction of SAARC from taking up those matters which are of urgent importance to attain economic integration.²⁰

The growth and development of South Nations was at a very alarming rate in recent years. The vast population and rich resources of this region along with social and cultural complementarities provides a suitable condition to evolve as the best regional group. However it has been observed that the members of the region are involved in multitudes of territorial, resource sharing, investment and trade disputes. These irritants have hindered the growth of this region to a greater extend. It is however to be understood that there are no regional groupings in the world where the member countries are not involved in any dispute. The ability to tackle those disputes without affecting the cordial relationship among the member states has always taken them to the stage of economic prosperity and more deepened relationship. This is largely achieved through an efficient dispute settlement mechanism.

Majority of the regional groups have a structured dispute settlement mechanism with appellate review procedure. Such a system enables the investors to move across the borders, governments to enter into more bilateral ties and human resources to move from their home country to that of the other. In case of any dispute between the stake holders, the parties are assured of a resort wherein they can present their matter without any prejudices of bias or corruption. The constituent members of the body are chosen from among the best intellectuals of diverse fields and who are not acting as agents of any government. Moreover

¹⁸ Article 13 of the SAFTA Agreement.

¹⁹ Article X of the SAARC Charter.

²⁰ Amal Nath ‘*The SAFTA Dispute Settlement Mechanism: An attempt to Resolve or merely Perpetuate Conflict in the South Asian Region*’ American University, International Law Review Vol 22 Issue 2 (2007).

in case of any dissatisfaction with the original ruling there is always a provision for appellate review mechanism which shall revisit the preliminary ruling and reassess the matter. And finally the decisions of the settlement body cannot be overturned unless all the member countries reject them. Such stringent rule makes it incumbent upon the losing party to comply with the orders of the authority thereby providing finality to the dispute

One of the major trends in dispute settlement that has been observed over the years was the more dependence on non-institutional and negotiation based dispute resolution by the developing countries more specifically Asian and African countries, and on the other hand the developed countries depending place heavy reliance on institutional and rule based dispute settlement mechanism. The SAARC nations proves the former mechanism to be ineffective in promoting the growth in the region as the negotiations take place for years with no finality thereby resulting in sluggish economic growth and tension in the region.

The SAARC dispute settlement mechanism proved to be in effective in contributing towards the economic prosperity of the regional group. Primarily, the region does not have a dispute settlement body that addresses all the issues of the region. The dispute settlement body which is envisaged in the SFATA Agreement entertains only trade related matters. The only resort therefore available to the SAARC nations is the International Court of Justice. It is an admitted fact that majority of the SAARC nations do not consider the International Court a preferred mechanism for dispute settlement as it largely constitutes judges' form the west and with different values and principles applied in the settlement process.

Apart from this the constitution, selection and qualification of the members of COE, are often subjected to challenge as they are government representatives where likelihood of corruption and bias persist. Also, the SAARC dispute settlement mechanism do not have an appellate review mechanism which leave the contesting parties with no option even when there is a scope for a different ruling. It is also a prominent feature of the SAFTA dispute settlement mechanism that there is no option for invoking concurrent jurisdiction of any other dispute settlement body. The objectives and functioning of the SAARC Arbitration council also proves to be ineffective as the body has seldom facilitated any arbitration. Instead it is involved in other administration related functions such as budget preparation. The Council largely remains dormant when it comes to the settlement of disputes.

Thus it has become imperative for the SAARC nations to press for an efficient dispute settlement body which could contribute towards the economic development of the region.

Such a system should be based on rule-based approach as followed by the WTO. The body shall constitute experts from all SAARC nations from diverse fields and shall adopt a quasi-judicial method for dispute resolution. This means that the body should have the authoritativeness of the court with strict procedural rules compiled according to the convenience of all SAARC nations. The body should also be in a position to entertain matters relating to border dispute, investment dispute, resource sharing dispute and trade disputes. The ruling of the body should be made available to the public for its perusal. The region should also provide for an appellate review body in case the parties are dissatisfied the preliminary rulings. The whole process of dispute settlement shall be completed within a stipulated period without any delay.

Even if the establishment of a new dispute settlement body seems to be a utopian idea, it is not to be ignored that the regional group cannot achieve its objective without settling the disputes between its member states. As long as the tension fills the air and the nations do not trust each other, it becomes difficult to utilize the prospects of development to its fullest. Thus if not a new body, it's high time that the governments of the regional body give more emphasis on revamping the existing body or find any other alternative before SAARC sees the grave.