INVIGORATING SOUTH ASIAN COOPERATION THROUGH EFFECTIVE DISPUTE SETTLEMENT MECHANISM

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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.[1] 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.[2] 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

[1]Ahmed, S.S Kalegma and E Ghani '*Promoting Economic Cooperation in South Asia: Beyond SAFTA'* Sage Publications, New Delhi 2010.

[2] 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.

response from all the SAARC countries. These preliminary exchanges 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.[3]

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 in the problems faced by the SAARC nations. 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-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.[4]

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.[5] When to 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.[6]

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

[3] M.R Aggarwal, *Regional Economic Cooperation in South Asia*, New Delhi 1984: 1-7.
[4] Z S Ahmed- Stuti Bhatnagar,*'Interstate Conflict and Regionalism in South Asia'*.
[5] Atiur Rahman, '*SAARC Not Yet a Community'* Asia Pacific Center for Security Studies, Honolou 2004.
[6] Smruti Pattanaik '*Making Sense of regional Cooperation: SAARC at Twenty'* Strategic Analysis Volume 30 No. 1 2006.

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.[7] 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 contracting states outside the framework of this agreement and to third countries through bilateral, multilateral or plurilateral arrangements and similar arrangements.'*[8]

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'[9]. 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.[10]

[7] Article II (3) of Agreement for Establishing SAARC Arbitration Council.
[8] Article 13 of the SAFTA Agreement.
[9] Article X of the SAARC Charter.
[10] 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).

The SAFTA Agreement provides that in the event that the Contracting states failed to settle the disputes amicably by consultation and other mechanism, a reference shall be made to the COE which acts as the primary dispute settlement body.[11] The SAFTA agreement does not provide any guidelines for the appointment of the members in COE in terms of their qualifications, age, years of experience and expertise in the field of law, trade, financial or economic matters at international or domestic arena.[12] These mandates have been specifically given in other dispute settlement mechanism for ensuring the efficiency of the system. This non-specificity in the qualification and other requirements for appointing to the post of COE shall impede the ability of the body to function independently and effectively. The situation may be even worse when it comes to South Asian nations as majority of them are often caught in the clutches of corruption.[13]

It is also a matter of concern that the members of COE are political appointees and therefore shall always be subjected to political and economic pressures which results in comprising on their independency and unbiased attitude while addressing vital trade matters.[14] The agreement merely provides that they shall be 'senior economic officials'. However it is silent as to whether the members are expected to act in their individual capacity or governmental capacity. On the other hand, ASEAN Protocol provides that the panelists should serve in their individual capacities and not as governmental representatives or representing any organization in order to avoid any political or other undue influence.[15] The mandate of minimum requirement of experience in the field of law, civil service or trade related departments can impart considerable faith in the character of the person and his impartiality in concerned field and can also exclude the possibility of corruption.[16]

SAFTA agreement has also excluded experts from the non-governmental, private sector including academicians, scholars and private practitioners form providing their expertise in a dispute between their contracting states. The inclusion of such members in the body shall not only

[11] Article 10(7), Article 20(2)-(7) of SAFTA Agreement.

[12] Article 10(5) of SAFTA Agreement.

[13] 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.

[15] ASEAN Protocol Article II(1).

[16] ASEAN Protocol Article II(1) (establishing specific selection criteria relating to the independence of the members, a sufficiently diverse background and a wide spectrum of experience).

exclude the possibility of bias and corruption, but also increase the efficiency of the system in specific disputes.[17] Despite the provision of seeking the assistance of specialist for peer review, the Agreement is again silent on the selection procedure, qualification and other requirements of these individuals.[18] Therefore the apprehension of an unbiased decision still remains unresolved.

The ASEAN Protocol on the other hand has elaborate and detailed criteria for the composition of the panels, their qualifications and other details for safeguarding the sanctity of the system from fear of bias or inability of the panelist to render effective decisions. The protocol also mandates publications and research in other fields than in trade, law and other related fields. When given opportunity to interact with such wide array of expertise from diverse fields, the members may be able to take decision without any delay and with higher credibility. Such a system is unseen in SAARC arrangement and results in taking corruption from national level to international front.

SAFTA agreement does not provide any guidelines regarding the procedures, rules and nature of the deliberations which take place at COE level.[19] Without any guidance, the agreement allows the COE to have discretion to utilize any processes or methods which it deem fir for the resolution of dispute and make recommendations. Thus the body frames rule on a case by case basis.[20] The absence of specific rules for the conduct of proceeding can impair the effective functioning of the body.

SAFTA Agreement does not provide for any procedure or format for the disputing parties to present evidence to the COE, particularly whether the evidence would be oral or written, the admission of expert witnesses and the procedure for rebuttal of the allegations.[21] On the contrary, the ASEAN Protocol explains in detail, the manner in which the panel receives oral and written statements from disputing parties and also from the interested third parties.[22] It is also given in the protocol that all statements, rebuttals and other details submitted to the panel are also available to

[17] David Livshiz *'Public Participation in Disputes under Regional Trade Agreements: How much is too much- the case for a limited right of intervention* 61 NYU ANN SURV. AM.L529 (2005).
[18] Article 20(8) SAFTA Agreement.
[19] Article 20(7) SAFTA Agreement.
[20] Article 10(10) of SAFTA Agreement (providing that the COE is free to use its own rules of procedure).
[21] Article 10(10) and Article 20(7) of the SAFTA Agreement.
[22] ASEAN Protocol App II(II) 4-6.

other parties and public.[23] If such procedures where introduce in the SAFTA Agreement, the contracting states may be capable of entering into more meaningful deliberations by the COE and can ensure fairness within the proceedings. It is a welcome step that the SAFTA Agreement provides for participation of a 'specialist' in decision making but the nature and extend of the involvement of these individuals largely remain unaddressed.

As the qualification of the members of COE largely remains unclear, the involvement and opinion of the specialists will be of utmost importance for addressing complicated trade related issues.[24] On the contrary, ASEAN Protocol acknowledges that panels could benefit from expert opinions and therefore facilitates obtaining opinion from any outside sources for an authoritative opinion.[25] SAFTA Agreement however narrows down the scope for obtaining opinion from multiple sources by including only 'a single specialist' for consultation with unclear qualifications and role. This would substantially undermine the effectiveness of 'peer review' processes.

SAFTA agreement does not provide for objective assessment of disputes. Instead paves way for subjective assessment with wide discretion exercised by the COE when addressing individual cases.[26] Objective assessment provides for an examination of the facts of the case and the applicability of and conformity with the selection of the agreement or any covered agreements. The subjective interpretation is time consuming as rules for each case shall be framed as and when required. Moreover such wide discretion again paves way for corruption and biased judgments. The rules will be formulated according to the whims and fancies of the COE and to suit the interest of the supreme parties. ASEAN Protocol on the other hand emphasizes on objective assessment of the disputes under the AFTA Agreement. When it is required that the COE impartially examine a dispute at a minimum may diminish the concerns of bias in COE's recommendations.[27] It is also pertinent that some level of discretion be conferred upon the COE. But it is always safe to impose some restrictions and regulations to mitigate the risk of leaving all the procedures to the discretion of COE.

[23] ASEAN Protocol App II(II) 3.

[25] ASEAN Protocol Article 8(4).

[26] SAFTA Agreement Article 10(10).

[27] Sree Kumar *Policy Issues and Formation of ASEAN Free Trade Area in AFTA'*.

A transparent and effective appellate body for reviewing the decisions rendered by the lower authority is the backbone of any dispute settlement mechanism.[28] The Appellate Review mechanism under SAFTA agreement only provides for a skeletal framework for reviewing the recommendations of the COE.[29] The review of factual matters, legal substance and the conduct of proceedings are done at bare minimum level at SAARC front. [30] It has been given that the SMC will be free to adopt its own rules of procedure without providing any other information regarding the scope and nature of the SMC's review of the recommendation or nay term of reference of its functioning. There is high likelihood for the process to be vulnerable to internal biases and political differences as the review is conducted by the SMC at Ministerial level. The high confidentiality maintained at this level also provides opportunities for misuse and bias.

It always understood that the higher authority reviewing the decisions of the lower bodies should be more efficient in terms of qualification and experience in the related fields. However as far as the SAFTA Agreement is concerned, the expertise and experience of the members of COE itself is unclear, and furthermore Article 10 of SAFTA Agreement provides that the members of SMC are largely Ministers of Commerce of each member states. In this background it is highly doubtful that the ministers from the developing countries of South Asia possess any acumen to deal with international issues involving complex economic and trade aspects.

On the contrary, ASEAN Protocol provides a far more detailed and satisfactory mechanism for the review of the recommendations rendered by the panel.[31] ASEAN Protocol vests the AEM with the responsibility of establishing an appellate review panel that is comprised of highly competent and experienced individuals with specific qualifications.[32] The lacuna that is present in the SAFTA Agreement with regard to the scope of the review has also rendered the body spineless. ASEAN Protocol on the other hand had made it very clear that only legal issues involved in the recommendation report of the panel are subjected to appeal.[33] It is also being given that although only disputing parties involved may go for an appeal, the provision also enables interested third

[28] Nubuo Kiriyama, *'Institutional Evolution in Economic Integration: A Contribution to comparative Institutional analysis for Intrenational Economic Organisation.* INT'L ECON.L 53 1998.
[29] Article 20(9) SAFTA Agreement.
[30] Article 10(10) of SAFTA Agreement.
[31] Article 12 ASEAN Protocol.
[32] ASEAN Protocol Article 12.
[33] ASEAN Protocol Article 12(1).

parties to present their views at the appeal stage.[34] Thus it is doubtful that whether objectives of a dispute settlement mechanism can be secured by the institution under the SAFTA with its lack of clarity in scope, jurisdiction and more particularly review mechanism.

One of the primary concerns involved in the SAFTA Dispute Settlement mechanism was whether the arrangement under the Agreement be the sole and exclusive mechanism for remedying violations of the agreement or whether the contracting parties can simultaneously approach other dispute settlement bodies of WTO or other international organizations. It has however been provided that the disputing parties should initiate the consultation process without reference to simultaneous proceedings in other forum.[35] The agreement does not deal with instances of violation of SAFTA Agreement and its contracting states obligations under the WTO which provides for multiple claims under both the mechanisms.[36] SAFTA Agreement fails to provide clarity on whether unilateral actions based on a countries internal assessment are acceptable and the obligation on parties to seek assistance solely through its mechanism.[37]

ASEAN Protocol on the contrary provides jurisdictional flexibility in the dispute settlement method.[38] It is noteworthy that the ASEAN Protocol had clearly stipulated that prior to initiating formal measures under the Protocol its member countries can use any other dispute settlement forum which may be considered appropriate by the parties.[39]Accordingly it allows parties to use either the WTO or other forums of dispute settlement and simultaneously putting forward request for consultation with fellow countries or use good offices or other alternate dispute settlement mechanism. Such an arrangement would help the small nations in the SAARC region from exploitation in the hands of mighty powers. Moreover owing to the political, socio-economic, cultural and religious differences the member states should be given recourse to other dispute settlement mechanisms such as good offices, mediation etc. By leaving the contracting parties at the early stages of the dispute, SAFTA agreement merely perpetuates the mistakes which already existed in the SAPTA.

[34] ASEAN Article 12(4).
[35] Article 20(1) SAFTA Agreement.
[36] Kyung Kwak and Gabriel Marceau, *'Overlap and Conflicts of jurisdiction between the WTO and other RTAs'* 14 UCLA PAC BASIN L J 147 (1996).
[37] The case of 'lead acid battery' between India and Bangaldesh.
[38] Article 12 (1) ASEAN Protocol.
[39] Article 12(1)(3).

The international community needs a peaceful South Asia; it is therefore in their interests to make some productive efforts in resolving conflicts and for ensuring cooperation in South Asia. The SAARC as a body needs some reforms too, so to efficiently deal with any issue of regional or global concern; and greater seriousness is demanded in terms of moving this regional framework over any deadlocks. Zahangir Kabir from the SAARC Human Resource Development Centre concludes his paper on SAARC with following powerful words, 'In its third decade, SAARC should substantially be brought out of five star hotels and be placed to the closer of the teeming millions of the region for their welfare. The Association must get rid of the accusation that the organization has become for "talk shops" and only organizing the numerous meetings without generating any meaningful result'.[40] The SAARC has to get deeply rooted into the lives of the people of South Asia and become a living body feeling the sentiments of people in all of its member states; and this can be achieved by permitting civil society's presence in the SAARC platform. This will nevertheless add more life into this regional body and hopefully will enhance the process of regional cooperation in South Asia.

SAFTA Agreement does not provide for a concurrent mechanism under which the parties can also approach other Dispute settlement mechanisms. This is a serious lacuna in the effective functioning of the system. Thus SAFTA Agreement can follow the example of the ASEAN Protocol which provides for a flexible system wherein the parties have greater autonomy in choosing an appropriate forum for settling their disputes. Accordingly, the disputing members can approach any externally available forum for settling the dispute prior to the initiations under the SAFTA mechanism.

A wide range of mechanism can be made available by the parties depending on the nature of the dispute. For procedural references WTO Dispute Settlement Understanding (DSU) can be referred to as international trade largely depends on the stability of the systems and the subsystems. The regional dispute settlement mechanism should be facilitating this need and shall complement larger dispute settlement bodies such As WTO. An immediate access to the higher forum rather than

[40] Zahangir Kabir, Challenges of SAARC in its Third Decade, SAARC Human Resource Development Centre, Islamabad, 2005, pg. 11.

approaching multiple forums would reduce the risk of unpredictability and divergent judgments. [41]

It is also pertinent to note that the parties could also encompass the use of less formal alternatives such as mediation, Conciliation or good offices mechanism for complementing the existing consultation proceedings available to the parties. Similar provisions are existing in the ASEAN Protocol allowing the parties to utilize the service of mediation, conciliation and good offices by keeping in mind the attributes of the agreement and shall be settled within a stipulated time frame.[42] It is noteworthy that SAARC Arbitration Council has been established to facilitate peaceful dispute settlement. However the very fact that the Council got a new head only after five years of its establishment shows the ineffectiveness of the body and the vigor with which it functions. The objectives, composition and the functions of the SAARC Arbitration Council are not conducive for facilitating regional settlement of disputes. A well-established regional arbitration center is the need of the hour.

There is an increasing interest among the SAARC member states in adopting arbitration as a viable means of dispute settlement as there are a number of problems faced by them primarily because, the existing procedures be governed by different international Conventions and the different SAARC nations have ratified different conventions. This pauses a serious difficulty in taking up a matter before the already existing international Arbitration Centre. One of the most obvious advantages of having an Arbitration Centre of such a nature shall be that the focus of the proceedings and the process shall be totally in tune with the policy, regulatory and legal dimensions of the dispute.

The Rules of international arbitration of various International Conventions of those including those of ICC, ICSID, Model Law and the Rules made by the UNCITRAL, IACAC Rules along with a mechanism for appellate scrutiny of the awards shall be formulated. Such a mechanism should also reduce the problems associated with the international arbitration such as those of venue, costs and suitable legal representatives. The panelists of the Centre shall regularly be updating the latest

[41] Sydne M Cone, III, *The Promotion of Free Trade Areas Viewed in Terms of Most Fovoured Nation Treatment and Imperial Preferances* 26 MICH. J.INT'L L. 563 (2005).
[42] Article 4 of the SAFTA Agreement.

legal and arbitral techniques by having a continuous interaction with the law persons of SAARC nations, so that the system can be made use by other developing countries as well. Such a legitimate move shall be made for facilitating the expansion of intra-regional trade, investment and technology flows.

SAFTA Agreements needs urgent renovation in the provisions concerning the qualification of the members of the COE.[43] The present members are largely government nominees and therefore the independence and unbiased attitude of these personals are viewed with suspicion. It is also a matter of concern that the SAFTA Agreement does not provide for any sort of expertise that are required by the members who hold the offices of COE. The SAFTA Agreement shall be amended to include certain non-governmental individuals with strong credentials and demonstrated expertise in the field of economics, international trade, law and other diverse fields in order to provide a wide array of expertise to interpret the provisions of the agreement. In order to ensure the neutrality of the body, the Agreement shall provide for an explicit provision wherein it will be stated that the members shall not act as the agents of any of the governments of the SAARC nations but to act in their independent capacity. Such measures will be vital to eliminate the concerns of corruption and bias. This can easily pave way for an efficient and unbiased dispute settlement mechanism.

The SAFTA Agreement does not provide for any guidance to the COE regarding the examination of a dispute or the manner in which its recommendations are to be rendered.[44] This could be gathered from the provision that the members of COE are given wide discretion to frame the procedural laws and can vary from case to case. This wide discretion without any operational framework has paved way for greater ambiguity most of the times. The Body should permit in the first instance, to submit both written documents and oral testimony and shall also indicate the mechanism for review by the COE. The review should be an objective assessment of the dispute.

As in the lines of ASEAN Protocol, interested third parties and more particularly other Contracting states should also be allowed to participate in the dispute settlement discussions and

[43] SAFTA Article 10(5).
[44] Article 10(10) of SAFTA Agreement.

can also give their valuable suggestion and provide insight to the members of COE to appreciate the matter in a better way. By incorporating this mechanism, the third parties can also safeguard their interests which will be otherwise jeopardized, as a result of the recommendations by the COE. The transparency of the mechanism can be greatly enhanced by providing opportunity to the parties to disclose information about the dispute to the public, including important documentations and the recommendations of the COE once the dispute is resolved. Such a practice would enable interested actors, including private citizens, non-governmental organization and academicians to evaluate appreciate or criticize the functioning of the system and pave way for more debates and discussions for enhancing the efficiency of the system.

The SAFTA Agreement does not provide for a satisfactory appellate review process. It provides only minimal substantive guidance regarding nature, scope and procedure of the appellate review process available to the Contracting parties.[45] Other regional organizations such as ASEAN provides for an elaborate Appellate Review process which could ensure the reliability of the review. The SAFTA agreement should explicitly address those instances which can be brought before the appellate body for review and shall exclude form its preview entertaining substantive matters and shall only appreciate legal issues brought before it. The members of the appellate review body shall be drawn from among the academicians, legal experts and those who have established their niche in their respective fields. Those who acts as the agents of the SAARC members or those affiliated to the government of the SAARC members shall be considered to this post to exclude the concern of bias and corruption. The recommendations of the appellate review body shall be made available to the public for its scrutiny.

One of the major lacunas of the SAARC dispute settlement mechanism is the absence of an all-encompassing dispute settlement mechanism. Apart from the bilateral dispute resolution mechanism such as negotiation and mediation there are no institutional set up for resolving the dispute among the SAARC nations. Apart from this SAFTA Agreement provides only for trade discussing and resolving trade related issues. In this background considering the socio-political and economic differences that exist among the SAARC members it's high time that a dispute resolution mechanism in the European Union Model be adopted wherein matters pertaining to

[45] Article 20(9) of SAFTA Agreement.

resource sharing, investment disputes, border disputes, those relating to the problems of trafficking and migrants, smuggling and all other disputes involving one or more SAARC nations can be resolved with binding effect.

It is also pertinent to note that none of the SAARC nations are satisfied the existing mechanism available at international level.[46] Although ICJ forms an integral part of the International Court of Justice consent to its jurisdiction shall not be implicit for the member country as those who are not members of the UN can also submit to its jurisdiction. The court is entitled to entertain the matter only if the parties by a previously entered agreement have expressly provided for submitting to its jurisdiction. Understandably, this can limit the capacity of all states including the developing states of SAARC to approach the world court even when no resort is available. Thus only 33% of the cases that are brought to the World Court are from developing economies.[47] Thus a regional dispute settlement before which unilateral actions can be bought without any prior agreement, has become the need of the hour.

The SAARC nations' criticism about ICJ has been aimed at two interrelated issue namely, the composition of the bench which is predominantly western European and the law and principles upheld by it.[48] Considering the vast majority of the population belonging to the South Asia, this under representation has become a reason for dwindling faith in International Court. Also, the developed countries have generally construed international judicial bodies as instruments to effect corrective justice, sanctioning violation of law by compensations and thereby striking a fair balance between the legitimate claims of the competing parties. Developing countries on the other hand have looked at international bodies principally as agents of distributive justice for equally distributing the benefits and burden

Apart from the existing international forum requires greater expertise and knowledge. Majority of the developing nations do not have in house lawyers to represent the cases of their state and therefore the countries have to hire lawyers from other developed nations who comes at

[46] Eric A Posner and Miguel *Is the International Court of Justice biased?* The University of Chicago, Journal of Legal Studies Chicago Vol. 34 June (2005).
[47] UN Doc. A /44/PV.43(1989).
[48] A S Muller, D Raic *'The International Court of Justice: Its future Role After fifty Years'* (The Hague, Nijhoff, 1997).

ridiculously expensive rates. Moreover there are certain instances wherein the countries do not want to disclose and debate sensitive issues at the international level. Thus the SAARC nations largely lack the capacity to utilize the dispute settlement mechanism available at international level. There may be political, historical, cultural and domestic political reasons for a state to favor or disregard a judicial body to settle the disputes.[49]

A rule based dispute settlement mechanism provides for a level playing field for all the member countries. On the other hand, in a negotiation based mechanism, it is undoubted that the powerful nations reap the benefits. Despite the existence of various similarities SAARC nations varies in their bargaining power, owing to the size, economic strength, political stability and long historical background. Thus in this situation it is quite difficult to press for negotiation based dispute settlement mechanism. The rule-based system of WTO dispute settlement shall be adopted by the SAARC nations. On similar lines whenever a matter is brought before the dispute settlement body, the decision of the panel should not be overturned unless all contracting member voted for its rejection. An appellate body to check the decision of the panel shall provide an opportunity to appeal rather than shying away from responsibilities.

The decision of the appellate body shall be rendered within a stipulated period and the whole process shall be wound up within sixteen to twenty years. This can exclude the concerns regarding negotiations which last for years and finally and with multitude of challenges put forward and lack of authority to ensure the compliance than unilateral restrictions or sanctions by the parties. The possibility of decentralized enforcement can be excluded in a rule based system. The state shall have the authority to enforce sanctions only when it is authorized by the dispute settlement body or SAARC. When a defendant government fails to comply with a panel ruling the parties the compensation shall be as equivalent to the original injury. If the parties fail to reach at a consensus regarding the compensation, the matter shall be referred to an arbitration tribunal and the same shall decide on the compensation to be given. The contracting parties shall be put on a stricter timeline and authorizing specific levels of sanctions.

[49] CESARE P R ROMANO *'International Justice and Developing Countries: A qualitative Analysis'* The Law Practice of International Courts and Tribunals (2002).

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 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.

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