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## Cooperation for Norminal Development or Politics for Actual Survival? South Asia in the Making of International Law

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## Cooperation for Norminal Development or Politics for Actual Survival? South Asia in the Making of International Law

### Cover Page Footnote

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# COOPERATION FOR NOMINAL DEVELOPMENT OR POLITICS FOR ACTUAL SURVIVAL? SOUTH ASIA IN THE MAKING OF INTERNATIONAL LAW

S.N. AL HABS<sup>y</sup>\* & KISHOR UPRETY<sup>\*\*</sup>

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## I. BACKGROUND &amp; INTRODUCTION

A. *Geopolitics*

In many senses, South Asia sits at a crossroads.<sup>1</sup> "It is a place where millions of people, from hundreds of language groups and ethnicities, have lived side by side for millennia. All of the world's great religions are represented in the region."<sup>2</sup> From a geographical standpoint, Southeast Asia holds both a strategically and commercially important place in the world. "Throughout history, the great trade routes between east and west have crossed the region, both on land and on sea, which still remains the case today."<sup>3</sup>

The population of South Asia (more than one-fifth of the world total) is growing rapidly. At the same time, and despite rapid economic growth during the 1990s, the region has among the lowest per capita incomes in the world. During 2000, the regional economic growth was also slow, but it was still ranked as the fastest growing developing country region.<sup>4</sup> India is by far the largest South Asian country in terms of population, gross domestic product ("GDP") and land area. It alone accounts for over three-fourths of the population and GDP of the South Asia region. After India, Pakistan and Bangladesh are the next largest South Asian countries in these categories, followed by Nepal, Sri Lanka, Bhutan and the Maldives.<sup>5</sup>

With more than one-sixth of the world's total population, India is the second most populous country in the world, after China. In area, it ranks as the seventh largest country in the world, covering 3,287,590 square kilometers,<sup>6</sup> which is slightly more than two percent of the earth's total land surface. India's frontier, bordered by six countries, is about 28,000 kilometers long, of which more

1. Thomas R. Pickering, U.S. Policy in South Asia: The Road Ahead, Remarks at the Foreign Policy Institute, South Asia Program of the Paul H. Nitze School of Advanced International Studies of the Johns Hopkins University 2 (April 27, 2000), at <http://www.nyu.edu/globalbeat/southasia/Pickering042700.html> (last visited Oct. 21, 2002).

2. *Id.*

3. *Id.* For a brief discussion, see generally GHULAM UMAR, SOUTH ASIAN ASSOCIATION FOR REGIONAL COOPERATION ("SAARC") ANALYTICAL SURVEY 14-47 (Pakistan Institute of International Affairs, 1988). W.H. Morris-Jones, *South Asia, in STATES IN A CHANGING WORLD: A CONTEMPORARY ANALYSIS* 157-76 (Robert H. Jackson & Alan James eds. 1993).

4. REGIONAL PERSPECTIVES, WORLD BANK ANNUAL REPORT (2001).

5. "The seven very unequal states constitute the most imperialized of all region—only Nepal and Bhutan are partial exceptions—and it was the first decolonized region in the modern period, its common experience of a single imperial domination was long and far from superficial." Morris-Jones, *supra* note 3, at 157.

6. THE WORLD FACTBOOK, CENTRAL INTELLIGENCE AGENCY 218 (1998).

than 10,000 kilometers is coastline.<sup>7</sup> Neighboring countries of particular concern to India are Pakistan to the northwest and China to the north, both of which have intractable border disputes with India and Bangladesh, which is surrounded on three sides by Indian territory. The other nations on India's frontier with perhaps a lesser concern are Nepal and Bhutan to the north, situated between India and China, which is also surrounded on three sides by India, and Myanmar (Burma) to the northeast.

The second largest country in the region is the Islamic Republic of Pakistan. Pakistan was brought into being at the time of the Partition of British India in 1947, in order to create a separate homeland for India's Muslims. Pakistan was a response to the demands of Islamic nationalists articulated by the All India Muslim League, under the leadership of Q. I. Azam Mohammed Ali Jinnah.<sup>8</sup> From independence in 1947 until 1971, Pakistan consisted of two regions: West Pakistan, in the Indus River basin, and East Pakistan, located more than 1,000 miles away in the Ganges River delta. In 1971, following serious internal political problems, an independent state of Bangladesh was proclaimed in East Pakistan.<sup>9</sup>

The People's Republic of Bangladesh is located in south-central Asia in the delta of the Ganges and Brahmaputra (called Jamuna) Rivers.<sup>10</sup> A riverine country, its land area of 143,998 square kilometers is bounded by the Indian states of West Bengal to the west and north, Assam to the north, Meghalaya to the north and northeast, Tripura and Mizoram to the east, Myanmar (Burma) to the southeast, and by the Bay of Bengal to the south.<sup>11</sup>

The kingdom of Nepal, which has historically distanced itself from the grip of all colonial powers, is situated between India in the East, West and South and by China in the North.<sup>12</sup> With 141,000 square km, it is a landlocked country with access to the sea only through India.<sup>13</sup> Thus, Nepal remains fragile in terms of its geopolitics. Equally fragile geopolitics is that of Bhutan, another landlocked and old kingdom, which, along with a total area of about 47,000 square kilometers, lies in the eastern Himalayas, between China to the north, the Indian territories of Assam and West Bengal to the south and east, and Sikkim to the west.<sup>14</sup>

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7. *Id.*

8. See 25 THE NEW ENCYCLOPEDIA BRITANNICA 393 (15th ed.).

9. *See id.*

10. See 1 THE NEW ENCYCLOPEDIA BRITANNICA 866-67 (15th ed.).

11. *Id.*

12. 8 THE NEW ENCYCLOPEDIA BRITANNICA 599 (15th ed.).

13. *Id.*

14. 2 THE NEW ENCYCLOPEDIA BRITANNICA 190 (15th ed.).

After the two landlocked countries, come the two island nations, the Maldives and Sri Lanka. A group of atolls in the Indian Ocean, south-southwest of India, the Maldives, with a total area of 300 square kilometers,<sup>15</sup> were long a sultanate, first under Dutch and then under British protection. The Maldives became a republic in 1968, three years after independence.<sup>16</sup> On the other hand, the Democratic Socialist Republic of Sri Lanka (formerly Ceylon), by a process of peaceful constitutional evolution won its independence from the British Empire in 1948 and became a sovereign republic on May 22, 1972.<sup>17</sup> It is one of the largest islands in the Indian Ocean and lies to the southeast of the southernmost tip of India from which it is only separated by the narrow, twenty-mile long Palk Strait.<sup>18</sup>

Table<sup>19</sup>

Economic and Demographic Indicators For South Asian Countries			
	GDP Growth per capita (%) (2000)	GNP per capita (1999) in US Dollars	Population 1999 in Millions
Bangladesh	5.9	370	130.2
Bhutan	6.1	510	0.675
India	5.2	440	1002.1
Maldives	5.6	1200	0.269
Nepal	5.8	220	22.9
Pakistan	4.4	470	137.5
Sri Lanka	6.0	820	19.3

As is discernible from the table above, as a region, the countries in South Asia, present a very low growth rate and per capita income. Of the seven countries, four countries: Bangladesh,

15. 7 THE NEW ENCYCLOPEDIA BRITANNICA 731 (15th ed.).

16. *Id.* at 732.

17. 28 THE NEW ENCYCLOPEDIA BRITANNICA 179-80 (15th ed.).

18. *Id.* at 167.

19. Growth and Change in Asia and the Pacific, Key Indicators 2001 (Asian Development Bank, 2001).

Bhutan, Maldives and Nepal are also least developed countries ("LDCs").<sup>20</sup> Occupying regional slow growth "has evident implications for national political stability, and is a factor, which can in turn, further aggravate regional tensions."<sup>21</sup> Not surprisingly, economic growth has been in their development agenda for decades. Since the mid-twentieth century, all of these countries have "striven to achieve greater material prosperity and to spread it more widely among their people."<sup>22</sup> Success has been varied. If many instances of failure, which have been recorded, there have also been triumphs in many sectors. At the same time, the region had to confront several economic, social and political problems, including three wars between India and Pakistan, making this region particularly vulnerable in terms of comparative stability.<sup>23</sup>

### *B. History of International Law Making*

Although some of the literature tends to ignore the participation of Asian and African states in the formulation of the norms of international law, "the origins and development of international law should, by no means, be dependent solely on or restricted to Western European nations."<sup>24</sup>

The South Asian region . . . has long been significant in world affairs. For 5000 years, it has been one of the main centres of civilization, continually enriching societies beyond its borders and, in turn, being enriched from outside. Over the past 2000 years, there has flourished the high Sanskrit civilization of the classical Hindu age and the Persianate civilization of the Mughal Empire. Since the eighteenth century, the region has been the focus of the longest and deepest encounter between an Asian

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20. As designated by the United Nations. Presently, 49 countries in the world fall into the category of Least Developed Country ("LDC").

21. Praveen Bhalla, *Regional Groupings in Asia: Should SAARC Follow the ASEAN Model?*, 2 J. INT'L DEV. 285, 301 (July 1990).

22. Vijay Shukla, *Role of SAARC in the Context of Regional Cooperation in South Asia*, 13 ASIAN J. ECON. & S. STUDIES 313 (1994). Economic liberalization in the South Asian countries first started with the initiative of Sri Lanka followed by Pakistan and Bangladesh between 1975-77. Nepal started the process during 1980s and India in the early 1990s. BISHWAMBHER PYAKURYAL, *IMPACT OF ECONOMIC LIBERALIZATION IN NEPAL* 34 (Santosh K. Nair 1995).

23. *Id.*

24. YILMA MAKONNEN, *INTERNATIONAL LAW AND THE NEW STATES OF AFRICA: A STUDY OF INTERNATIONAL LEGAL PROBLEMS OF STATE SUCCESSION IN THE NEWLY INDEPENDENT STATES OF EASTERN AFRICA* 4 (Interprint Ltd. 1983).

civilization and the West, which came to be entwined with the political struggle between South Asian nationalism and British imperialism.<sup>25</sup>

Influenced, and no less refined by the different exogenous, as well as endogenous elements overtime, including fine-tuning resulting from the Hindu, Buddhist, Islam and Christian religions, the history of international law-making in the South Asian region is sufficiently developed. There is enough evidence that prior to the Christian era, "there were in existence separate political units sufficiently independent of each other and each possessing an organ capable of conducting intercourse with others."<sup>26</sup> Illustrating the characteristics of universality, the region had sophisticated laws regarding warfare, diplomatic and consular relations. The region recognized the notion of immunity for diplomatic agents, and the subjects of inter-state law were political entities varying not only in their internal structure, but also with regard to the exercise of internal sovereignty.<sup>27</sup> The supremacy of law and sanctity of treaties<sup>28</sup> were fully recognized notions, and "concepts of inter-state law such as self-preservation, just war, independence, sovereignty, jurisdiction, legal equality and justifiable intervention" were highly respected.<sup>29</sup> Similarly, the concept of human rights, greatly cherished by modern international lawyers, was in a highly advanced stage in the ancient South Asia, albeit more so in substance, rather than in form.<sup>30</sup>

25. Shukla, *Role of SAARC*, *supra* note 22, at 313.

26. Nagendra Singh, *History of the Law of Nations Regional Developments: South and South-East Asia*, in II ENCYCLOPEDIA OF PUB. INT'L LAW 824-825 (Rudolf Bernhardt, et al., 1995) (quoted in C.F. Amerasinghe, *South Asian Antecedents of International Law*, in INT'L LAW: THEORY AND PRACTICE. ESSAYS IN HONOR OF ERIC SUY 3 (Karel Wellens & Martinus Nijhoof ed. 1998)); *see generally* WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INT'L LAW* 309-11 (Columbia Univ. Press 1964).

27. Amerasinghe, *supra* note 26, at 3-7.

28. Although treaties were valued, "the prime use made of treaties in interstate relations in ancient India was for the purpose of registering interstate transactions particularly connected with territorial disputes. Thus by the very nature of the purpose for which treaties were concluded, they were bilateral in character . . . [a] typical treaty . . . was an agreement between two kings for mutual surrender or exchange of territories, money and army (Arthashastra VIII) . . . [m]ultilateral conventions or treaties of the law-making type were unknown in ancient India." Singh, *supra* note 26, at 829. *See* FRIEDMANN, *supra* note 26, at 306-309, for a brief introduction on Islamic legal values and international law.

29. Amerasinghe, *supra* note 26, at 3-9.

30. *See* LAL DEOSA RAI, *HUMAN RIGHTS IN THE HINDU-BUDDHIST TRADITION* (Nirala 1995) for a detailed discussion. *See also* Surya P. Subedi, *Are the Principles of Human Rights "Western" Ideas? An Analysis of the Claim of the "Asian" Concept of Human Rights From the Perspective of Hinduism*, 30 CAL. W. INT'L L. J. 45-69 (1999), for a detailed analysis. *See also* Matthew A. Ritter, *Human Rights: The Universalist Controversy*, 30 CAL. W. INT'L L. J. 71 (1999) (a response to Dr. Surya P. Subedi, *Are the Principles of Human Rights "Western"*



If universality in ancient history has been predominant in modern history, the focus has been on regionalism.<sup>31</sup> Although each of the countries, as either a member of the United Nations and other intergovernmental agencies, or as an independent member of international movements such as the Non-aligned movement, has participated in international law-making, South Asian countries, as a group, have also started to show interest in the making of international law for the benefit of the region in proper.<sup>32</sup> In this context, it is noteworthy that several sporadic attempts in creating some forms of organization to derive political or economic advantages in the fifties and the sixties, failed due to lack of political consensus or economic and social justifications.<sup>33</sup> However, these countries continued effort, which led to the finalization of a mechanism for cooperation and development, at a regional level in the eighties. Focusing on a variety of social, economic and political issues, it transpired into the establishment of an organization termed South Asian Association for Regional Cooperation ("SAARC").<sup>34</sup>

### C. Scope of the Study

This study, which has a modest objective, briefly explores the attempts made by the countries in South Asia to establish and institutionalize the SAARC framework, and the role of these countries in making international law, through the framework provided by SAARC. The study is divided into three main parts.

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*Ideas? An Analysis of the Claim of the "Asian" Concept of Human Rights from the Perspectives of Hinduism*, 30 CAL. W. INT'L L. J. 45 (1999)).

31. See generally Singh, *supra* note 26, at 824, 829, 833, & 835.

32. *Id.*

33. Different attempts for regionalism in South Asia, in fact, were made as early as 1947, but mostly had failed. For a brief history, see Saman Kelegama, *South Asia and Other Regional Economic Groupings*, Paper Presented at the Conference on South Asia 2010: Challenges and Opportunities, Organized by Coalition for Action on South Asian Cooperation (CASAC) at [http://cacaconline.com/South\\_asia\\_and\\_other\\_regional\\_ec.htm](http://cacaconline.com/South_asia_and_other_regional_ec.htm) (last visited Mar. 23, 2001); see also Kishore C. Dash, *The Political Economy of Regional Cooperation in South Asia*, 69 PACIFIC AFFAIRS 1-2 (Summer 1996); Padmaja Murthy, *Relevance of SAARC*, Institute for Defense Studies and Analyses (New Delhi), available at <http://www.idsa-india.org/an-jan00-9.html> (last visited Nov. 10, 2002).

One relatively successful example is that of the Asian Clearing Union ("ACU") which had been in operation since November 1975. "[I]t was set up in September 1974 at the initiative of the ESCAP, [and] has its member central banks were predominantly drawn from SAARC member countries. The original signatories to the [ACU] Agreement were Bangladesh, India, Iran, Nepal, Pakistan and Sri Lanka. A seventh member Burma was admitted in 1977." I.N. Mocher, *Prospects and Possibilities of a Payments Union Covering SAARC-ASEAN Trade*, in SAARC ASEAN PROSPECTS AND PROBLEMS OF INTER-REGIONAL COOPERATION 239 (Bhabani Sen. Gupta ed.). See *id.* at 239-50 for detailed discussions on the ACU.

34. *Id.*

The first part provides a general introduction to the organizational structure of SAARC. In this context, after a brief review of the historical aspects of the organization, it deals with the decision-making organs, the different layers involved, the scope as well as the financing of the institution.

The second part, which is the central focus of this study, deals with the aspects of formalization of development and cooperation among countries in the region. It reviews the different instruments that have been developed and implemented in the region with the view of promoting cooperation, in economic as well as social areas. For purposes of simplicity, this part is divided into three sections based on the categories of instruments adopted by the organization to serve specific purposes. The overall division reflects the formalization of mechanisms to regulate common economic, social, moral, as well as, specific security interests. More precisely, the study reviews the instruments designed to provide food security in the region, and to enhance trade, to combating social evils such as flesh trade, to promoting child welfare, and to defending specific security concerns of these countries in a more effective fashion.

Finally the last part provides a brief conclusion along with an attempt to analyze the prospects for the future for the region.

## II. THE INSTITUTION

### A. *Genesis Of South Asian Regionalism*

"The most conspicuous development in international organizations, since the second world war has been the proliferation on all continents of regional groupings bearing long and often awkward names which the initiated commonly reduce to criptical initials."<sup>35</sup> Not surprisingly, during the Cold War era, "[r]egional economic groupings emerged primarily as a credible mechanism to support and sustain military alliances and to rebuild, coordinate and integrate markets and economies of the allies and dependable neighbors."<sup>36</sup> On the other hand, "in the post-Cold War era, although factors such as geographical proximity and socio-cultural links have played an important role, global economic forces have been the key factor in the formation of regional groupings."<sup>37</sup> Contemporary South Asian regionalism is also an example of a

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35. INTERNATIONAL REGIONAL ORGANIZATIONS, CONSTITUTIONAL FOUNDATIONS v (Ruth C. Lawson ed. 1962).

36. Kelegama, *supra* note 33, at 1.

37. *Id.*

grouping formed to cope with the vagaries of global economic, and to a certain extent, political forces.<sup>38</sup>

The regional cooperation initiative, which this study attempts to discuss, was a consequence of three important aspects of change that occurred in global and regional contexts.<sup>39</sup> The first aspect "was the deteriorating international economic environment for South Asia resulting from the breakdown of the North-South negotiations and worsening prospects for the South Asian economies."<sup>40</sup> This naturally compelled the leaders of South Asia to think of ways to cope with these economic challenges.<sup>41</sup> The second aspect, occurred in the eighties, which was "the emergence of like-minded western-oriented regimes in South Asia" that "opened the prospects of greater regional interaction in various fields" in which South Asian leaders started to explore.<sup>42</sup> Finally, the third aspect was the strategic fall-out of developments like the "sour-revolution" in Afghanistan in 1978, which was followed by the Soviet military intervention in that country.<sup>43</sup> "This prompted the leaders of South Asian countries to unite to prevent Great Power intervention and rivalry [in their region], and [to] promote a regional forum to understand each other better and to have economic, social, cultural and scientific cooperation."<sup>44</sup> "Regional approaches can contribute constructively to international economic relations by allowing smaller groupings of economies to establish more significant levels of cooperation than is permitted by a broad multilateral agreement," and is also useful in enacting rules that respond to specific regional needs.<sup>45</sup>

The idea of regional cooperation for developing trade and investments in South Asia, through an intergovernmental organization, emerged in the early eighties.<sup>46</sup> After some initial and informal consultations, the Foreign Secretaries of the seven South Asian countries — Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka — met formally for the first time in

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38. See generally *id.* at 1.

39. Vijay Shukla, *New Frontiers of SAARC*, LII INDIA QUARTERLY J. INT'L AFFAIRS 87 (1996).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*; see generally Padmaja Murthy, *Role of Smaller Members in the SAARC Forum*, Institute for Defense Studies and Analyses (New Delhi), available at <http://idsa-india.org/annov8-5.html> at 1-5; see also Bhalla, *supra* note 21, at 289-90.

45. John H. Jackson, *Perspectives on Regionalism in Trade Relations*, 27 LAW & POL'Y INT'L BUS. 873, 874 (1996).

46. Murthy, *Relevance of SAARC*, *supra* note 33, at 1.

Colombo in April 1981.<sup>47</sup> A few months later, a meeting of the Committee of the Whole identified five broad areas for regional cooperation. At their first meeting in New Delhi in August, 1983, the Foreign Ministers adopted a Declaration on South Asian Regional Cooperation ("SARC") and formally launched an Integrated Program of Action in five areas of cooperation: agriculture; rural development; telecommunications; meteorology; and health and population activities.<sup>48</sup> Later, the following were added to the program of action: transport; postal services; science and technology; sports; and arts and culture.<sup>49</sup> Finally, at the first SARC summit held in Dhaka on December 7-8, 1985, the Heads of State formally adopted a Charter establishing the South Asian Association for Regional Cooperation ("SAARC").<sup>50</sup> Thus, SAARC, which is comprised of seven countries of South Asia, is a manifestation of the determination of the governments and people of this region to work together towards finding solutions to common problems in a spirit of friendship, trust and understanding, as well as, towards creating an order based on mutual respect, equity and shared benefits.<sup>51</sup>

### B. Juridical Character and Decision-Making

The SAARC operates with a set of objectives and general principles, which is identified in its Charter. Bestowed with the responsibility of accelerating the process of economic and social development through collective actions, it primarily aims at promoting the welfare of the people of South Asia, improving their quality of life, accelerating their economic growth, social progress and cultural development, and providing all individuals with the

47. SAARC Profile, ch. 1 (Introduction) at <http://www.saarc-sec.org/profile/ch1.htm> (last visited Nov. 10, 2002). See also V. Kanesalingam, *General Overview of SAARC's Achievements*, 12 MARGA QUARTERLY J. 1 (Marga Inst. 1991).

48. SAARC Profile, *supra* note 47, at ch. 1.

49. See Arif A. Waquif, *Carrying The SAARC Flag: Moving Towards Regional Economic Co-operation*, at 1 (Consumer Unity and Trust Society, Briefing Paper No. 10, rev. 1998). See also Aabha Dixit, *SAARC: Toward Greater Cooperation*, Institute for Defense Studies and Analyses (New Delhi), available at <http://www.idsa-india.org/an-jul-5.html> at 1-3 (last visited Mar. 21, 2001), for a brief history of SAARC.

50. For the text of the Charter Establishing the South Asian Association for Regional Cooperation, see 26 INDIAN J. INT'L LAW 323-326, available at <http://www.saarcnet.org/newsaaarcnet/index.htm> (last visited Nov. 10, 2002) [hereinafter "SAARC Charter"]. The SAARC Charter is also available at <http://www.saarc-sec.org/charter.htm> (last visited Nov. 10, 2002). For discussions see also Waquif, *Carrying The SAARC Flag*, *supra* note 49, at 1.

51. SAARC, para. 2 (Dhaka 1985), available at <http://www.saarcnet.org/newsaaarcnet/saarcdocuments/1ss-decl.htm> (last visited Nov. 10, 2002). For the text of the Declaration, see 26 INDIAN J. INT'L LAW 321-322. See also Pramod Kumar Mishra, *Dhaka to New Delhi: One Decade of SAARC*, LII INDIA QUARTERLY J. OF INT'L AFFAIRS 73-86 (1996) for a general discussion on the evolution of SAARC.

opportunity to live in dignity and to realize their full potential.<sup>52</sup> It further aims at promoting and strengthening collective self-reliance, active collaboration and mutual assistance in the economic, social, cultural, technical and scientific fields, and in strengthening cooperation, on matters of common interest, with countries and international organizations.<sup>53</sup>

It has been noted that, by creating SAARC, "the seven countries, whose differences are more striking than their commonality seek to build on what they had in common."<sup>54</sup> Although linked by history and culture, these countries have different political systems, and the diversity in their economic and military power has been a major cause of mutual suspicion and distrust among them.<sup>55</sup> Hence, to remedy this heterogeneity-specific problem, they had to devise a common, risk-free approach to meet the objectives. In these attempts, SAARC Member States agreed to adhere to some basic principles.<sup>56</sup> First and foremost, "cooperation within the framework of SAARC is to be based on respect for the principles of sovereign equality, territorial integrity, political independence, and non-interference in the internal affairs of other States and mutual benefit."<sup>57</sup> Second, "such cooperation [is to complement and] shall not be a substitute, bilateral or multilateral cooperation, and is to be consistent with bilateral and multilateral obligations of member states."<sup>58</sup> Third, the decisions, at all levels, in SAARC are to be taken on the basis of unanimity.<sup>59</sup> Finally and most importantly, bilateral and contentious issues are to be excluded from its deliberations.<sup>60</sup> "SAARC has intentionally stressed the 'core issues' and avoided more divisive political issues, although political dialogue is often conducted on the margins of SAARC meetings."<sup>61</sup> In fact, SAARC has adopted the Nordic model of cooperation, wherein the political sovereignty of cooperating states is not disturbed in the process of integration.<sup>62</sup> It has sought to be a

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52. SAARC Charter, *supra* note 50, art. I.

53. *Id.*

54. Kanesalingam, *supra* note 47, at 1.

55. *Id.*

56. *Id.* art. II.

57. *Id.*

58. *Id.*

59. *Id.* art. X.

60. *Id.* art. X.

61. See Foreign relations of India, available at [http://www.wikipedia.org/wiki/Foreign\\_relations\\_of\\_India](http://www.wikipedia.org/wiki/Foreign_relations_of_India) (last visited Nov. 11, 2002). See Kanesalingam, *supra* note 47, at 2 for a brief discussion.

62. Shrikant Paranje, *From State-centrism to Transnationalism: SAARC, SAPTA and SAFTA*, LII INDIA QUARTERLY J. OF INT'L AFFAIRS 95, 97 (1996).

platform for the establishment of cooperative relationship.<sup>63</sup> Given the political antagonisms in the region, it has adopted an incrementalist approach of keeping contentious politico-security issues outside its scope and focusing on economic, cultural, and social areas.<sup>64</sup>

### C. Organizational & Operational Set-Up

Although some scholarly writings and discussions in the different fora have advocated the expansion of SAARC to include other countries in the region, the SAARC Charter, as yet, "provides for a close membership of the seven founding members."<sup>65</sup> From an organizational standpoint, the SAARC comprises a series of political decision-making, policy-making, and technical level groupings, and the Charter reflects that character of the organization.<sup>66</sup>

The highest authority of the SAARC rests with the Heads of State who meet annually at the Summit level.<sup>67</sup> At this level, all issues requiring high-level interventions may be sorted out, formally or informally.<sup>68</sup> Interestingly, the Heads of State, during the Ninth SAARC Summit, confirmed that a process of informal political consultations would prove useful in promoting peace,

63. *Id.*

64. *Id.* Also, because the areas identified for cooperation are the least controversial and minimal, this approach has been termed as the "functional approach" by some. Murthy, *Relevance of SAARC*, *supra* note 33, at 2. Indeed, "the functionalist strategy urges the development of piecemeal non-political cooperative organization, which are established most effectively in the economic technical, scientific, social and cultural sectors" (referred to as functional sectors). The functionalism has been presented as an operative philosophy that gradually leads to a peaceful, unified and cooperative world. See THEODORE A. COULOMBIS & JAMES H. WOLFE, *INTRODUCTION TO INTERNATIONAL RELATIONS: POWER AND JUSTICE* 292 (Prentice-Hall 2d ed. 1978) for a detailed explanation.

65. Shukla, *Role of SAARC*, *supra* note 22, at 318. The Organization in fact had to face a difficulty pertaining to this. During the fourth Summit in Islamabad, India came up with a proposal supporting Afghanistan's entry into SAARC (which then was ruled by a communist government). The proposal was resisted by Pakistan (which was involved in the resistance effort). A compromise then was effected, which was reflected in the summit declaration. Admission for another country into SAARC was to be governed by the principle of unanimity. This compromise has stalled SAARC's expansion since then. See Dixit, *supra* note 49, at 4; see also Summit Declaration, para. 4 (Islamabad, 1988). Recently, China has reportedly expressed a desire to join SAARC, with support from Bangladesh. See Anil Nauriya, *SAARC: Inside and Outside*, THE HINDU, Aug. 7, 2001.

66. *Id.*

67. SAARC Charter, *supra* note 50, art. III. To date, ten Meetings of the Heads of State or Government have been held in Dhaka (1985), Bangalore (1986), Kathmandu (1987), Islamabad (1988), Malé (1990), Colombo (1991), Dhaka (1993) New Delhi (1995), Malé (1997), and Colombo (1998), respectively. The Eleventh SAARC Summit which was to be held in Nepal (1999) was, due to political problems in the region, delayed and could only take place in January 2002. The twelfth Summit is to be held in 2003, in Pakistan.

68. SAARC 9th Summit, para. 8 (Male, 1997).

stability, amity and accelerated socio-economic cooperation in the region.<sup>69</sup>

Below the Summit level is the Council of Ministers. Comprised of the Foreign Ministers of Member States, the Council is responsible for formulating policies, reviewing progress, deciding on new areas of cooperation, establishing additional mechanisms as deemed necessary, and deciding on other matters of general interest to the organization.<sup>70</sup>

The Council meets a minimum of twice a year but, by agreement of Member States, can also meet in extraordinary sessions.<sup>71</sup> It has held twenty regular sessions until December 1998.<sup>72</sup> The Twenty-first Session of the Council was held in Colombo in March 1999.<sup>73</sup> In addition, a Commemorative Session of the Council, was held at New Delhi on December 18, 1995, to mark the First Decade of SAARC, during the Sixteenth Session of the Council of Ministers.<sup>74</sup>

Below the Council of Minister is the Standing Committee. Comprised of the Foreign Secretaries of Member States, the Standing Committee is entrusted with the task of the overall monitoring and coordinating of programs and modalities of financing, determining inter-sectoral priorities, mobilizing regional and external resources, and identifying new areas of cooperation.<sup>75</sup> It can meet as often, as deemed necessary, but in practice it meets twice a year and submits its reports to the Council of Ministers.<sup>76</sup> The Standing Committee is assisted by a Programming Committee, an *ad hoc* body comprised of senior officials from all Member States, which is responsible for scrutinizing the Secretariat's budget, finalizing the calendar of activities, considering the reports of the Technical Committees and the SAARC Regional Centers, and taking up any other matter assigned by the Standing Committee.<sup>77</sup> The Standing Committee can also set up Action Committees comprised of Member States concerned with implementation of projects involving more than two but not all Member States.<sup>78</sup> Presumably, in this context, the provision regarding action committees has been inserted in light of "the possibility that the

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69. *Id.*

70. SAARC Charter, *supra* note 50, art. IV.

71. *Id.*

72. *Id.*

73. *Id.* ch. 2.

74. *Id.*

75. *Id.* art. I (a-e).

76. *Id.* art. V(2). As of January 2001, the Committee had held twenty-seven regular sessions and two special sessions.

77. *Id.* ch. 2. Twenty-one sessions of the Programming Committee had been held through December 2001.

78. *Id.* art. VII.

SAARC might become relevant to surface or river water transport projects involving more than two states but not all [of the Member States].<sup>79</sup> At the same time, by placing the power to set up Action Committees in the hands of the Standing Committee, the principle of unanimity has been extended to them.<sup>80</sup>

It is clear that "[w]ithin SAARC, cooperation is still to a considerable extent, 'controlled,' as it is conducted through the meetings of heads of State or governments and foreign ministers, and as all decisions still require their approval."<sup>81</sup> This reflects, according to some scholars, the continuing lack of trust and confidence between parties, which may impede cooperation in substantive areas.<sup>82</sup>

Next in the SAARC hierarchy are the Technical Committees, considered the backbone of the process of regional cooperation.<sup>83</sup> Composed of representatives from all member countries,<sup>84</sup> these committees formulate programs and prepare projects in their respective areas of cooperation, which make up the Integrated Program of Action under SAARC.<sup>85</sup> They are responsible for coordinating and monitoring the implementation of such activities and submitting their periodic reports to the Standing Committee through the Programming Committee.<sup>86</sup> Along with relatively broad terms of reference, they are involved in the determination of the potential and the scope of regional cooperation in agreed areas, the formulation of programs and preparation of projects, the determination of financial implications of sectoral programs, the formulation of recommendations regarding apportionment of costs, the implementation and coordination of sectoral programs, as well as the monitoring of progress in implementation.<sup>87</sup>

The Technical Committees can also use other forms, methods or modalities for deliberation, if and when considered necessary, including meetings between heads of national technical agencies, meetings between experts in specific fields, or contact among recognized centers of excellence in the region.<sup>88</sup> It may be

79. See Fran Chopra, *SAARC and ASEAN: Comparative Analysis of Structure And Aims*, in *SAARC ASEAN PROSPECTS AND PROBLEMS OF INTER-REGIONAL COOPERATION* 14 (Bhabani Sen Gupta ed. South Asian 1988).

80. *Id.*

81. Bhalla, *supra* note 21, at 297.

82. *See id.*

83. SAARC Charter, *supra* note 50, art. VI.

84. *Id.* The Chair of the Technical Committees normally rotates among Member States in alphabetical order every two years.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*



appropriate to note that since the establishment of the SAARC, a number of ministerial level meetings have taken place in specific contexts, which have focused on areas of common concern and have become an integral part of the consultative structure.<sup>89</sup>

“Clearly, top structures as well as the operational structures at lower levels, have been firmly delineated in the SAARC Charter.”<sup>90</sup> It provides for Summit Meetings to occur at least once a year.<sup>91</sup> It also provides for the Council of Ministers’ meetings to occur at least once a year, which, in effect, means at least twice a year because the foreign ministers inevitably have to assemble at the time of the annual Summit.<sup>92</sup> The standing committee is required to meet at least once a year or as often as deemed necessary.<sup>93</sup> This, in effect, has meant at least three times a year, because they also have to meet at the time of the Summit, as well as the Council.<sup>94</sup>

Finally, in the SAARC hierarchy, in order to coordinate and monitor the implementation of activities, to service the meetings of the organization and to serve as the channel of communication with other international organizations, a Secretariat exists, which was established in Katmandu on 16 January 1987.<sup>95</sup> By being the

89. Six Meetings of Planners have been held so far, starting from one in 1983, and five annually from 1987 to 1991. These meetings initiated cooperation in important areas such as Trade, Manufactures and Services, Basic Needs, Human Resource Development, Database on socio-economic indicators, Energy Modeling Techniques, Plan Modeling Techniques and Poverty Alleviation Strategies. Similarly, ministerial-level meetings have been regularly held to address different issues. For instance, the Islamabad meeting (1986) discussed the international economic issues, the New Delhi (1986), Colombo (1992) and Rawalpindi (1996) meetings discussed children’s issues, the Shillong (1986), Islamabad (1990), Kathmandu (1993), and Dhaka (1995) meetings discussed Women’s issues, the New Delhi meetings (1992 & 1997), and the Male (1997) and Colombo (1998) meetings discussed the Environment issues, the Islamabad (1993) meeting discussed the issues related to Disabled persons, the Male (1994) meeting discussed the issues related to Youth, the Dhaka (1994) and the New Delhi (1996) meetings discussed the issues related to poverty. Similarly, the Colombo (1996) meeting discussed the issues of Housing, and the Islamabad (1996) meeting discussed Agriculture. In the same vein, if Commerce was the focus of discussion in the meetings in New Delhi (1996), Islamabad (1998), and Dhaka (1999), and Tourism was the focus in Colombo (1997), the issues related to Information became prominent in the Dhaka (1998) meeting, and Communications became prominent in the Colombo (1998) meeting. See *A Brief on SAARC*, available at <http://www.saarc-sec.org/brief.htm> (last visited Oct. 22, 2002). It should also be noted that the Ninth SAARC Summit decided that the Environment Ministers Meeting will be held annually. See Ninth Summit Declaration, para. 40 (Male, 1997).

90. Chopra, *supra* note 79, at 12-13.

91. *Id.*

92. *Id.* at 12.

93. *Id.*

94. *Id.*

95. A Memorandum of Understanding on the establishment of the SAARC was signed by foreign ministers of the SAARC countries at the Bangalore Summit. Also a Bangladeshi diplomat, H.E. Abul Ahsan was chosen the first Secretary General. See Joint Press Release ¶¶ 2-3 (2d SAARC Summit, Bangladesh 1986).

headquarters of the organization, the Secretariat, has been increasingly utilized as the venue for various SAARC meetings.<sup>96</sup>

The Secretariat is comprised of a Secretary-General, seven Directors and a number of general services staff.<sup>97</sup> The Secretary-General is appointed by the Council of Ministers upon nomination by a Member State on the principle of rotation in alphabetical order.<sup>98</sup> Initially, the Secretary General held position for a period of two years, but the Ninth SAARC Summit (Male, May 1997) decided to change the tenure to three years.<sup>99</sup> Directors are appointed by the Secretary-General upon nomination by member countries for a period of three years, which, in special circumstances, may be extended for a period not exceeding an additional three years.<sup>100</sup> In this context, it may be worth noting that "[t]he creation of a permanent Secretariat in Kathmandu may have brought an element of continuity, but its ability to steer an independent course of action was severely hampered by the impact of the political state of affairs between Member States, as well as the relatively small size of the Secretariat."<sup>101</sup>

#### D. Financial Arrangements

The financial arrangements under the SAARC system are straightforward. Member states make provisions in their national budgets for financing activities and programs under the SAARC framework, which include contributions to the budgets of the Secretariat and to those of the regional institutions.<sup>102</sup> The financial provision, thus made is, announced annually, at the meeting of the Standing Committee.<sup>103</sup>

"The annual budget of the Secretariat, both for capital as well as recurrent expenditure, is shared by member states on the basis of an agreed formula."<sup>104</sup> A minimum of forty percent of the institutional cost of regional institutions is born by the respective host governments, and the balance is shared by all member states

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96. *Id.*

97. See Ninth SAARC Summit Declaration, para. 5 (Male, 1997).

98. *Id.*

99. *Id.*

100. *Id.*

101. Dixit, *supra* note 49, at 3-4.

102. The SAARC Secretariat, available at <http://www.saarc-sec.org/profile/ch13.htm> (last visited Oct. 22, 2002).

103. *Id.*

104. *Id.* The initial cost of the main building of the Secretariat, together with all facilities and equipment, as well as that of the annex building completed in 1993 has been met by the Government of Nepal.

on the basis of an agreed formula.<sup>105</sup> Capital expenditures of regional institutions, which include physical infrastructures, furnishings, machines, equipment and, so forth, are normally born by the respective host governments.<sup>106</sup> Program expenditures of regional institutions are also shared by Member States, according to the agreed formula.<sup>107</sup> In the case of activities under the approved calendar, local expenses including hospitality are born by the host government, and the cost of travel is met by each sending government.<sup>108</sup>

The contribution of each Member State towards financing of the activities of SAARC is voluntary.<sup>109</sup> Each Technical Committee makes recommendations for the apportionment of the costs of implementing the programs proposed by it.<sup>110</sup> In case sufficient financial resources cannot be mobilized within the region for funding activities of the organization, external financing from appropriate sources may be mobilized with the approval of or by the Standing Committee.<sup>111</sup>

### III. INSTRUMENTS FOR INTERNATIONAL COOPERATION

Since its establishment, SAARC has approached the issue of development-cooperation at essentially five fronts. The attempts have not focused so much on directly tackling the frequently thorny political issues, but they have been made towards establishing mechanisms for managing food insecurity, containing social evils perverting the society, promoting social welfare, protecting specific security interests, and invigorating trade amongst member countries. Several instruments for the implementation of the mechanisms of cooperation have been included in the form of international agreements or conventions, which includes the following: an agreement on food security, an agreement to establish a regime for preferential trading, two conventions to address the twin problems of children and women trafficking, as well as, to guarantee the promotion of child welfare, and two conventions to combat the evils of terrorism and drug trafficking and abuse.

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105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*; SAARC Charter, *supra* note 50, art. IX.

110. SAARC Charter, *supra* note 50, art. IX.

111. *Id.*

### A. *Regulating Common Economic Interests*

Two main instruments are discussed in this sub-section. The first concerns the issue of food security and the efforts of the countries to create a mechanism to share food grains in emergency situations. This mechanism, despite the clamor of success in the beginning, has failed to derive expected benefits. Nevertheless, in understanding the evolutionary feature of SAARC, it is important to review this mechanism, albeit very succinctly.

The second instrument concerns a framework for the enhancement of trade. In this context, this subsection reviews the efforts of the countries to liberalize international trade and to stimulate competition. In so doing, it also attempts to provide the context in which efforts and measures were possible and to consider the significance and impact of the various decisions made by these countries as a single and united trading bloc. In addition to reviewing the mechanism for enhancing trade, this subsection also discusses a few practical problems encountered in the implementation of decisions, while in parallel, surveying the prospects for liberalized international trade in the South Asia region.

#### 1. *Guaranteeing Food Security*

During the third SAARC Summit held in Katmandu in November 1987, an Agreement establishing a Food Security Reserve was entered into among SAARC nations.<sup>112</sup> This Agreement, signed by the foreign ministers of member countries, came into force on August 12, 1988.<sup>113</sup>

##### (a) *Establishment and Maintenance of a Reserve*

The main purpose of the Food Security Agreement is to establish a reserve of food grains for dealing with emergencies in member countries and to provide a much-needed cushion against food shortages and scarcity situations in the region.<sup>114</sup> In recognition of the importance of regional and sub-regional collective

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112. Agreement on Establishing the SAARC Food Security Reserve, Nov. 4, 1987 (Kathmandu) [hereinafter "Food Security Agreement"]. See also W.M. Karunadasa, *SAARC and Regional Conventions*, SUNDAY OBSERVER (Colombo) June 21, 1998, available at <http://www.rediff.com/news/2001/feb/14gp.htm> (last visited Nov. 10, 2002).

113. Karunadasa, *supra* note 112. An interesting feature of the Food Security Agreement, *supra* note 112, is that it would enter into force on a date to be determined by the Council of Ministers provided that the member countries have collectively earmarked at least one hundred and twenty-five thousand metric tons of food grains on that date for the purpose of the Food Security Agreement. See Food Security Agreement, *supra* note 112, art. X.

114. Food Security Agreement, *supra* note 112, art. X.

self-reliance, with respect to food security as a means of combating the adverse effects of natural and man-made calamities, the idea of establishment of the food security reserve by member countries received prominence.<sup>115</sup>

The Food Security Agreement generally deals with the formation of the food security reserve ("the Reserve"), the procedures for releasing food grains, and the administrative aspect of the Reserve.<sup>116</sup> The Reserve consists of wheat, rice or a combination of both (food grains), earmarked by member countries to withdraw in an emergency.<sup>117</sup> A schedule, included in the Food Security Agreement, prescribes the share that should be reserved to each country, which forms the Reserve.<sup>118</sup> The Reserve for the entire region is to be maintained at a minimum level of 200,000 tons, starting from as high as 153,000 tons share requirement for India to as low as 20 tons for the Maldives (see Table).<sup>119</sup> The member countries keep the Schedule under review and can amend it in light of operating experience.<sup>120</sup>

Table<sup>121</sup>

<u>Countries</u>	<u>Share of the Reserve (in m/tons)</u>
Bangladesh	21,100
Bhutan	180
Maldives	20
India	153,200
Nepal	3,600
Pakistan	19,100
Sri Lanka	<u>2,800</u>
TOTAL	<u>200,000</u>

Each member country undertakes to earmark its share of food grains allocated to it from the Reserve.<sup>122</sup> The food grains, which form part of the Reserve remains "the property of the member country that has earmarked them and shall be in addition to any

115. *Id.* pmb1.

116. *Id.*

117. *Id.* art. II, ¶ 1.

118. *Id.* art. II, ¶ 1.

119. *See id.* schedule to Food Security Agreement.

120. Food Security Agreement, *supra* note 112, art. II, ¶ 3.

121. Karunadasa, *supra* note 112, at 51.

122. Food Security Agreement, *supra* note 112, art. II, ¶ 4.

national reserve that may be maintained by that member country.<sup>123</sup> A member country can, at any time, voluntarily earmark additional food grains.<sup>124</sup> In such a case the member country concerned, may only withdraw, the amount in excess of its allocation by giving six months' advance written notice to the Food Security Board ("the Board").<sup>125</sup> Also, it should be noted that the quality of all food grains earmarked by the member countries should be at least of "fair average quality," or comply with any other quality standards set by the Board.<sup>126</sup>

The obligations of member countries do not end there. They are also required "to provide adequate storage facilities for the food grains that they have earmarked, to inspect the food grains periodically and to apply appropriate quality control measures, including turnover of the food grains, if necessary."<sup>127</sup> They must do so with a view to ensure that at all times the food grains satisfy the minimum required quality standards and replace any food grains that do not satisfy such standards.<sup>128</sup> In addition, they need to make every effort to comply with any guidelines on storage methods or quality control measures adopted by the Board.<sup>129</sup>

In accordance with the agreed procedures, each member country is entitled to draw on food grains, which form part of the Reserve in the event of an emergency.<sup>130</sup> For example, a member country can withdraw, if having suffered a severe and unexpected natural or man-made calamity, it is unable to cope by using its national reserve and is unable to procure the food grains it requires through normal trading transactions on account of balance of payments constraints.<sup>131</sup> Such withdrawal of food grains will come from the country's own share of the Reserve.<sup>132</sup> In doing so, a country must inform the member countries and the Board of such withdrawal.<sup>133</sup> It also has to replace any food grains as soon as practicable, and in any event, no later than two calendar years following the date on which the release of the food grains took place.<sup>134</sup> In addition, "a

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123. *Id.* art. II, ¶ 5.

124. *Id.* In this context, it is noteworthy that Pakistan was the first country to voluntarily increase its quota of contribution, almost doubling its quota. See BISHWA PRADHAN, SAARC AND ITS FUTURE 55 (1989).

125. Food Security Agreement, *supra* note 112, art. II, ¶ 4.

126. *Id.* art. II, ¶ 5.

127. *Id.* art. II, ¶ 6.

128. *Id.*

129. *Id.*

130. *Id.* art. III.

131. *Id.*

132. *Id.* art. VI, ¶ 1.

133. *Id.*

134. *Id.* art. V, ¶ 1.

member country shall notify the Board of the release, of the terms and conditions on which it was effected, and the date on which the food grains that had been released were replaced.”<sup>135</sup>

In requesting the release from the reserve, “the member country in need shall directly notify the other member countries of the emergency it is facing and the amount of food grains required.”<sup>136</sup> The other member countries then take immediate steps to make necessary arrangements to ensure the immediate and speedy release of the required food grains, subject to the availability of the combination requested.<sup>137</sup> The prices, terms and conditions of payment in kind, or otherwise with respect to the food grains released are directly negotiated between the member countries concerned.<sup>138</sup> However, the requesting member country also has a duty to inform the Board about its request.<sup>139</sup>

*(b) Food Security Board*

For purposes of coordination, the Food Security Agreement provides for a SAARC Food Security Reserve Board (“the Board”) comprised of representatives from each member country.<sup>140</sup> The main functions of the Board are to undertake “a periodic review and assessment of the food situation and to assess the prospects in the region, including factors such as production, consumption, trade, prices, quality and stocks of food grains.”<sup>141</sup> It can also examine “immediate, short term and long term policy actions as may be considered necessary to ensure adequate supplies of basic food commodities in the region.”<sup>142</sup> Also, the Board can “submit on the basis of such examination, recommendations for appropriate action to the Council of Ministers.”<sup>143</sup> Similarly, the Board is responsible for “reviewing the implementation of the provisions of the Food Security Agreement, call[ing] for such information from member countries as may be necessary for the effective administration of the Reserve and issu[ing] guidelines of technical matters such as maintenance of stocks, storage conditions and quality control.”<sup>144</sup>

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135. *Id.* art. V, ¶ 2.

136. *Id.* art. IV, ¶ 1.

137. *Id.* art. II, ¶ 6.

138. *Id.* art. IV, ¶ 3.

139. *Id.* art. IV, ¶ 4.

140. *Id.* art. VII, ¶ 1.

141. *Id.* art. VIII, ¶ 1.

142. *Id.* art. VIII, ¶ 2.

143. *Id.*

144. *Id.* art. VIII, ¶ 3.

The periodic assessment reports are disseminated to all member countries.<sup>145</sup>

The decisions of the Board must be unanimous.<sup>146</sup> The Board elects a Chairman and Vice-Chairman based upon the principle of rotation among member countries for two year periods.<sup>147</sup> The Rules of Procedure for the meetings of the board are the same as for other SAARC meetings.<sup>148</sup> The Board meets at the same place and time as the Standing Committee, which precedes the annual Summit.<sup>149</sup> The SAARC Secretariat assists the Board in monitoring all matters relating to the release of food grains from the Reserve, and in convening and servicing meetings of the Board.<sup>150</sup>

(c) *Implementation Problem*

“South Asia is home to more food insecure people than any other region in the world. About 294 million people are classified by the Food and Agriculture Organisation as undernourished—more than one-third of the world’s population.”<sup>151</sup> Also, as noted by World Food Programme (“WFP”), “[a]lthough hunger simply means an absence of food, food security goes further, embracing multiple dimensions of availability, access and utilization on one hand and vulnerability on the other. These four dimensions of food security affect children, women and conflict affected people.”<sup>152</sup> In this context, devising a mechanism for ensuring food security in the region is certainly welcome. Under the alarming situation of food shortage that South Asia is regularly confronted with, the SAARC Reserve was to help mitigate sufferings by member countries’ populations.<sup>153</sup> However, as noted by a diplomat from India, Muchkend Dubey, the Reserve has some inherent defects.<sup>154</sup> It is too small to be of any efficient and practical use.<sup>155</sup> If it is to serve in an emergency situation, “the Reserve will have to be revamped. First, its size will have to be increased to 1.5 million tons against the present size of 200,000 tons. Second, the composition of the food grains kept in the Reserve

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145. *Id.* art. VIII, ¶ 1.

146. *Id.* art. VII, ¶ 2.

147. *Id.* art. VII, ¶ 3.

148. *Id.*

149. *Id.* art. VII, ¶ 4.

150. *Id.* art. IX.

151. WFP’s Sri Lanka Representative, Dr. Suresh Sharma, introducing the publication “Enabling Development: Food Assistance in South Asia, available at [http://www.priu.gov.lk/News %20Update/current%20affairs/ca200105/20010502WFP\\_food\\_security\\_in\\_South\\_Asia.htm](http://www.priu.gov.lk/News%20Update/current%20affairs/ca200105/20010502WFP_food_security_in_South_Asia.htm) (last visited Nov. 9, 2002).

152. *Id.*

153. See PRADHAN, *supra* note 124, at 55.

154. *Id.*

155. *Id.*



would have to be changed to include a much larger proportion of rice.<sup>156</sup> And third, stocks would have to be maintained at most of the key points near deficient and disaster prone areas in member countries.<sup>157</sup>

In spite of the relatively straightforward legal framework, as well as, the nobility of the objectives, the facilities provided under the Reserve have never been utilized even though member countries have suffered from acute food shortages from time to time.<sup>158</sup> In addition, "proposed food security became only notional since there was no central granary to implement it."<sup>159</sup> Hence, it was decided to lessen the focus on it.<sup>160</sup>

## 2. *Enhancing Trade Through Preferential Regime*

Since its establishment in 1985, SAARC has taken significant steps to expand cooperation among member countries in core economic areas.<sup>161</sup> In 1991, it completed a Regional Study on Trade, Manufactures and Services ("TMS").<sup>162</sup> This study was the first important step, which paved the way for SAARC to move forward in strengthening cooperation in this field.<sup>163</sup> The TMS Study outlined a number of recommendations for promoting regional cooperation in core economic areas.<sup>164</sup> As a result, a high-level Committee on Economic Cooperation ("CEC") comprised of the Commerce Secretaries of all the Member States, was established in July 1991, to act as a forum to address economic and trade issues.<sup>165</sup> The CEC was also made responsible for generally monitoring the progress in the implementation of decisions relating to trade and economic cooperation within the SAARC framework.<sup>166</sup> In this

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156. *Ex-Indian Diplomat Applauds Leadership of Bangladesh*, PM DAILY STAR, Oct. 24, 1998.

157. *Id.*

158. M. Ismeth, *Experts Give Low Marks to SAARC: Eminent group hands over report to CBK*, THE SUNDAY TIMES, Aug. 2, 1998, at 3, at <http://www.lacnet.org/suntimes/980802/frontm.html> (last visited Nov. 4, 2002).

159. Interview, Nihal Rodrigo, Secretary General of SAARC, *SAARC Itself Caught Up In Rhetoric*, THE INDEPENDENT (Nepal), June 21-27, 2000, at <http://www.nepalnews.com.np/contents/englishweek/independent/11-01/business.htm> (last visited Sept. 16, 2002).

160. *Id.*

161. SAARC Charter, *supra* note 50, ch. 4.

162. *Id.*

163. *Id.*

164. See Arif A. Waquif, *SAPTA: A Step Toward Economic Regionalization In South Asia*, 35 ASIAN ECON. REV. 162 (1993). This study itself evolved from the recommendations of the expert group of planners of SAARC countries. It was based on seven country studies commissioned by the SAARC secretariat during 1989-90, following the recommendations of the SAARC leaders that exploratory studies in economic cooperation need to be undertaken.

165. SAARC Charter, *supra* note 50, ch. 4.

166. *Id.*

context, it was given the responsibility to review progress in the carrying out of decisions of meetings of SAARC Commerce Ministers, to coordinate the works of different expert groups on customs, investments, and standardization established under the aegis of SAARC, and most importantly, to consider the report of the Inter-Governmental Group on Trade Liberalization.<sup>167</sup>

The Inter-Governmental Group on Trade Liberalization, established during the Colombo Summit in December 1991, was mandated to "seek agreement on an institutional framework under which specific measures for trade liberalisation among SAARC member states could be furthered."<sup>168</sup> It prepared a draft agreement on SAARC Preferential Trading Arrangement ("SAPTA").<sup>169</sup> Upon the recommendation of CEC, the draft agreement was signed by the Council of Ministers in Dhaka on April 11, 1993, during the seventh SAARC Summit.<sup>170</sup> The New Delhi Summit held from May 2-4, 1995, formally approved the proposals for preferential trade.<sup>171</sup> Upon completion of all the procedural formalities by member countries, and subsequent to a notification issued by the Secretariat to this effect, the Agreement on SAPTA came into effect on December 7, 1995.<sup>172</sup>

The notably rapid accomplishment related to SAPTA clearly brings out two distinct conclusions. First, the SAARC countries have managed to enter into "the politico-economically sensitive area of trade liberalisation in a cautious and mutually acceptable manner."<sup>173</sup> While ensuring a "cautious and sensitive approach," they have still succeeded in commencing the implementation of SAPTA in December 1995, two years ahead of the time schedule envisioned initially.<sup>174</sup> Second, the SAARC countries did not approach "the liberalisation of intra-regional trade as an end in itself, but as a means toward improving the economic welfare of the

167. *Id.*

168. Sixth SAARC Summit, Colombo Declaration ¶ 21 (Dec. 21, 1991). For discussions on a general trend of trade until the end of eighties, see Masroor Ahmad Beg, *Intra-SAARC Trade: A Dwindling Feature*, XLVI INDIA QUARTERLY J. INT'L AFFAIRS 47-89 (1990).

169. Sixth SAARC Summit, Colombo Declaration ¶ 21 [hereinafter "SAPTA"].

170. Seventh SAARC Summit, Dhaka Declaration.

171. Eighth SAARC Summit, New Delhi Declaration.

172. SAPTA provided for entry into force on the thirtieth day after the notification issued by the SAARC Secretariat regarding completion of the formalities by all Contracting States. SAPTA, *supra* note 169, art. 22. Interestingly, it did not permit signature to be accompanied by reservations. Similarly, reservations were also not admitted at the time of notification to the SAARC Secretariat of the completion of formalities. *Id.* art. 23.

173. Waquif, *Carrying The SAARC Flag*, *supra* note 49, at 2.

174. *Id.*

people of South Asia.<sup>175</sup> This approach comes distinctly from the declaratory provisions of SAPTA.<sup>176</sup>

The preamble of SAPTA broadly refers to the purpose of the arrangement, which is to establish and promote a regional preferential trade arrangement.<sup>177</sup> “[T]he expansion of trade could act as a powerful stimulus to the development of the[] national economies, by expanding investment and production, thus providing greater opportunities of employment and help securing higher living standards for their population[s].”<sup>178</sup> The creators, aware of the urgency to promote “the intraregional trade which presently constitutes a negligible share in the total volume of the South Asian trade.”<sup>179</sup> In addition, to strengthen economic cooperation and development, they also agreed that the regional cooperation will be carried out in “a spirit of mutual accommodation, with full respect for the principles of sovereign equality, independence and territorial integrity of all States.”<sup>180</sup>

The need for identifying specific areas for economic cooperation, including trade liberalization, was already acknowledged by the fourth SAARC Summit meeting held in Islamabad in December 1988.<sup>181</sup> Following that Summit, trade liberalization was included in the agenda of several successive summits. The preamble of SAPTA recalls several historic decisions made by the member countries on trade liberalization.<sup>182</sup> For instance, acknowledging the commitment made by the countries at the sixth SAARC Summit held in Colombo to the “liberalisation of trade in the region through a step by step approach in such a manner that countries in the region share the benefits of trade expansion equitably.”<sup>183</sup> The preamble also stresses “the mandate given by the Colombo Summit to formulate and seek agreement on an institutional framework under which specific measures for trade liberalization . . . could be furthered.”<sup>184</sup> In addition, it stresses the examination of a proposal by Sri Lanka in favor of the establishment of a preferential trading arrangement for the countries in South Asia.<sup>185</sup>

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175. *Id.*

176. *See* SAPTA, *supra* note 169, pmb1.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

(a) *Principles and Components*

With this background, the SAARC Preferential Trading Arrangement ("SAPTA"), which emerged as an internal component of the SAARC mandate for development through cooperation, was established to promote and sustain mutual trade and the economic cooperation among Contracting States," through the exchange of concessions.<sup>186</sup> The countries agreed to partially bring down tariffs toward each other's goods. It is important to remember that tariffs still continue to exist in trade among them, which was to give preference to the goods of member countries as compared to the rest of the world.<sup>187</sup> In parallel to preferential concessions, SAPTA also includes provisions favoring special treatment to the least developed countries ("LDCs") in the SAARC region.<sup>188</sup>

SAPTA is governed by a set of principles. The application of rights and obligations under it are to be based on "the principles of overall reciprocity and mutuality of advantages in such a way as to benefit all Contracting States" equitably.<sup>189</sup> All actions under the Agreement would need to take "into account their respective levels of economic and industrial development [in the countries], the pattern of their external trade, trade and tariff policies and systems."<sup>190</sup> The concessions should occur in "step by step" negotiations and should be "improved and extended in successive stages with periodic reviews."<sup>191</sup> All actions must recognize the special needs of the Least Developed Contracting States ("LDCs") and agree upon concrete preferential measures in their favor.<sup>192</sup> The concessions can relate to manufactured products and commodities in their raw, semi-processed and processed forms.<sup>193</sup>

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186. *Id.* art. 2.

187. Scholars have made a distinction between two different types of preferential trade arrangements ("PTAs"). "First, there are PTAs among non-hegemonic countries (chiefly the developing countries), such as MERCOSUR, which contains Argentina, Brazil, Uruguay, and Paraguay, and the Association of Southeast Asian Nations ("ASEAN"). Second, there are PTAs that include hegemonic countries of the Triad, such as NAFTA and its proposed extensions, the proposed transformation of the Asia-Pacific Economic Cooperation ("APEC") into a PTA, the proposed Trans-Atlantic Free Trade Agreement ("TAFTA") (which would have a mix of hegemonic and non-hegemonic members), the EU, and the EU's association agreements with other countries." Jagdish Bhagwati, *Preferential Trade Agreements: The Wrong Road*, 27 LAW & POLY INT'L BUS. 866-868 (1996). See also Anne O. Krueger, *Are Preferential Trading Arrangements Trade-Liberalizing or Protectionist?* 13 J. ECON. PERSPECTIVES 110-111 (1999).

188. SAPTA, *supra* note 169, art. 10.

189. *Id.* art. 3.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

Governed by the above principles, SAPTA consists of four components:<sup>194</sup> arrangements relating to tariffs (customs duties included in the national tariff schedules of the Contracting States), paratariffs,<sup>195</sup> nontariff measures,<sup>196</sup> or direct trade measures.<sup>197</sup> The Contracting States are free to conduct their negotiations "for trade liberalisation in accordance with any [single] or combination of the following approaches and procedures."<sup>198</sup> The negotiations can be made on a product-by-product basis, [a]cross the board tariff reductions, sectoral basis, or can simply direct trade measures.<sup>199</sup> However, for an initial period, the Contracting States agreed to negotiate tariff preferences on a product-by-product basis.<sup>200</sup>

In the same vein, the Contracting States also agreed to consider "the adoption of trade facilitation and other measures to support and complement SAPTA . . . [for] mutual benefit."<sup>201</sup> In this context, special consideration is also given "to requests from Least Developed Contracting States for technical assistance . . . [in addition to] cooperation arrangements designed to assist them in expanding their trade with other Contracting States and in taking advantage of the potential benefits of SAPTA."<sup>202</sup> "The tariff,

194. *Id.* art. 4.

195. *Id.* art. I(9).

"Paratariffs" means border charges and fees other than "tariffs", on foreign trade transactions of a tarifflike effect which are levied solely on imports, but not those indirect taxes and charges, which are levied in the same manner on like domestic products. Import charges corresponding to specific services rendered are not considered as paratariff measures.

*Id.*

196. "Nontariffs" means any measure, regulation, or practice, other than 'tariffs' and 'paratariffs,' the effect of which is to restrict imports, or to significantly distort trade." *Id.* art. I(10).

197. "Direct trade measures" means measures conducive to promoting mutual trade of Contracting States such as long and mediumterm contracts containing import and supply commitments in respect of specific products, buyback arrangements, state trading operations, and government and public procurement." *Id.* art. I(7).

198. *Id.* art. 5.

199. *Id.* Negotiations on sectoral basis pertains to the removal or reduction of tariff, nontariff and paratariff barriers as well as other trade promotion or cooperative measures for specified products or groups of products closely related in end use or in production.

200. *Id.*

201. *Id.* art. 6.

202. *Id.* The possible areas for such technical assistance and cooperation are listed in Annex I to the SAPTA Agreement.

The following are the additional measures in favor of least developed contracting states:

- (a) the identification, preparation and establishment of industrial and agricultural projects in the territories of Least Developed Contracting States which could provide the production base for the expansion of exports of Least Developed Contracting States to other Contracting States, possibly linked to cooperative financing and buyback arrangements;

paratariff, and nontariff concessions negotiated and exchanged amongst Contracting States shall be incorporated in the National Schedules of Concessions.<sup>203</sup> Such concessions, except those made exclusively to the LDCs, are extended unconditionally to all Contracting States.<sup>204</sup> It may be useful to note that some initial concessions were also agreed to by the Contracting States at the time of the finalization of the international agreements.<sup>205</sup>

(b) *Exceptions and Safeguards*

Liberalization always creates a risk of uncontrolled import growth, thus threatening domestic jobs. In cases where imported products could cause serious difficulties in certain industries the Agreement provides safeguard clauses. These clauses are based on existing GATT rules which envisage the possibility of introducing trade-limiting measures in

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(b) the setting up of manufacturing and other facilities in Least Developed Contracting States to meet intra-regional demand under cooperative arrangements;

(c) the formulation of export promotion policies and the establishment of training facilities in the field of trade to assist Least Developed Contracting States in expanding their exports and in maximizing their benefits from SAPTA;

(d) the provision of support to export marketing of products of Least Developed Contracting States by enabling these countries to share existing facilities (for example, with respect to export credit insurance, access to market information) and by institutional and other positive measures to facilitate imports from Least Developed Contracting States into their own markets;

(e) bringing together of enterprises in other Contracting States with project sponsors in the Least Developed Contracting States (both public and private) with a view to promoting joint ventures in projects designed to lead to the expansion of trade; and

(f) the provision of special facilities and rates in respect to shipping.

*Id.* annex I.

203. *Id.* art. 7.

204. *Id.* art. 8. "SAPTA as it exists today does not rely on a clearly defined common external tariff. A proxy of such a tariff, however, originates in the bilateral treaties between SAPTA member states. Consequently it is quite possible to find existence of trade creation and/or diversion as effects of PTA among the SAARC countries." Harvard Univ., *Report: South Asian Preferential Trading Arrangement 4*, available at <http://www2.cid.harvard.edu/cidtrade/Issues/SAPTA.pd> (last visited Nov. 9, 2002) [hereinafter "Harvard Report"]. "Also, most of the SAARC countries trade substantially with the developed countries of EU, NAFTA and APEC. Therefore, it is possible that with the formation of preferential trading arrangement some diversion of trade takes place from low cost supplier of non-member country to high cost supplier of member country for at least some products." *Id.* at 4-5.

205. SAPTA, *supra* note 169, annex II. See also Vijay Shukla, *New Frontiers of SAARC*, LII INDIA QUARTERLY J. OF INT'L AFFAIRS 92 (1996).

justified cases. The aim of including these clauses into the Agreement has been to give both sides the possibility to reintroduce some import-limiting measures or even to introduce new barriers to trade, but only in carefully defined situations.<sup>206</sup>

With regard to the concessions granted under the SAPTA, there are also situations where exceptions can be found.<sup>207</sup> Four principal types of situations are foreseen by SAPTA for an exception to be triggered. For instance, the provisions of SAPTA are not applicable “in relation to preferences already granted or to be granted by any Contracting State to other Contracting States outside the framework of this Agreement, and to third countries through bilateral, plurilateral and multilateral trade agreements.”<sup>208</sup> Similarly, the Contracting States are also not obligated “to grant preferences which impair the concession extended under those agreements.”<sup>209</sup> Moreover, “any Contracting State facing serious economic problems including balance of payments difficulties may suspend provisionally the concessions as to the quantity and value of merchandise permitted that would be imported under the Agreement.”<sup>210</sup> In the same manner, in any time of critical economic circumstances, i.e. when there is emergence of an exceptional situation where massive preferential imports cause or threaten to cause serious injury difficult to repair and which calls for immediate action, countries can suspend preferential treatments.<sup>211</sup>

When a decision to suspend takes place, the Contracting State, which initiates such action, is required to simultaneously notify the other Contracting States and the Committee of Participants.<sup>212</sup> In addition, any Contracting State that decides to call for such exceptions is required to afford adequate opportunities for consultations, upon request from any other Contracting State, which preserves the stability of the concessions negotiated under SAPTA.<sup>213</sup> If no satisfactory adjustment can be effected between the

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206. INSTITUTE FOR EAST WEST STUDIES, FROM ASSOCIATION TO ACCESSION: THE IMPACT OF THE ASSOCIATION AGREEMENTS ON CENTRAL EUROPE'S TRADE AND INTEGRATION WITH THE EUROPEAN UNION 21 (Kalan Mizsei & Andrzej Rudka eds. 1995). See also *Safeguards Against Trade Diversions via SAPTA*, BUSINESS LINE FINANCIAL DAILY (The Hindu Group), Nov. 21, 2000.

207. SAPTA, *supra* note 169, art. 11.

208. *Id.*

209. *Id.*

210. *Id.* art. 13, ¶ 1.

211. *Id.* art. 14.

212. *Id.*

213. *Id.*

concerned Contracting States within ninety days of such notification, the matter may then be referred to the Committee of Participants for review.<sup>214</sup>

The safeguard measures are dealt with in Article 14 of the Agreement.<sup>215</sup> If any manufactured products and commodities in their raw, semi-processed and processed forms, which are subject of concessions with respect to preference under SAPTA, "is imported into . . . a Contracting State in a manner or in such quantities as to cause or threaten to cause serious injury," such importing Contracting State, can suspend the concession accorded under the Agreement, except in critical circumstances.<sup>216</sup> However, such suspension should be provisional and without any discrimination.<sup>217</sup> "When such action has taken place, the Contracting State which initiates such action shall simultaneously notify the other [concerned] Contracting State(s)" and the Committee of Participants.<sup>218</sup> The Committee of Participants then enters into consultation with the concerned Contracting State in an attempt to reach mutual agreement for remedying the situation.<sup>219</sup> In the event of failure of the Contracting States to resolve the issue within ninety days of receipt of the original notification, then the Committee of Participants must meet within thirty days to review the situation and try to amicably settle the issue.<sup>220</sup> In case the consultation in the Committee of Participants fails to resolve the issue within sixty days, "the parties affected by such action reserve the right to withdraw equivalent concession(s) or other obligation(s), which the Committee of Participants does not

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214. *Id.*

215. *Id.*

216. *Id.*

Serious injury means significant damage to domestic producers, of like or similar products resulting from a substantial increase of preferential imports in situations which cause substantial losses in terms of earnings, production or employment unsustainable in the short term. The examination of the impact on the domestic industry concerned also includes an evaluation of other relevant economic factors and indices having a bearing on the state of the domestic industry of that product. Threat of serious injury pertains to a situation in which a substantial increase of preferential imports is of a nature to cause "serious injury" to domestic producers, and that such injury, although not yet existing, is clearly imminent. A determination of threat of serious injury is based on facts and not on mere allegation, conjecture, or remote or hypothetical possibility.

*Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*



disapprove.<sup>221</sup> It is important to note that any of the concessions agreed upon under the SAPTA “shall not be diminished or nullified, by the application of any measures restricting trade by the Contracting States.”<sup>222</sup> The products that are included in the National Schedules of Concessions remain eligible for preferential treatment so long as they satisfy the Rules of Origin, including special Rules of Origin with respect to the Least Developed Contracting States.<sup>223</sup>

At this juncture, it is appropriate to note that SAPTA calls for special treatment of the Least Developed Contracting States.<sup>224</sup> All Contracting States are required “to provide, wherever possible, special and more favourable treatment exclusively to the Least Developed Contracting States.”<sup>225</sup> This type of treatment may include duty-free access, exclusive tariff preferences, or deeper tariff preferences for the export products, the removal of nontariff barriers, and where appropriate, of paratariff barriers.<sup>226</sup> Such favorable treatment may also include the negotiations of long-term contracts with a view to assisting Least Developed Contracting States in achieving reasonable levels of sustainable exports of their products, special consideration of exports from Least Developed Contracting States in the application of safeguard measures, greater flexibility in the introduction and continuance of quantitative or other restrictions provisionally and without discrimination in critical circumstances by the Least Developed Contracting States on imports from other Contracting States.<sup>227</sup> Similarly, the favorable treatment may also include measures to promote exports by expanding production bases by setting up joint ventures, buy-back arrangements, and other cooperative arrangements.<sup>228</sup>

The special and more favorable treatment provided exclusively for the LDCs is to assist them in deriving equitable benefits from the Agreement,<sup>229</sup> and particularly in saving them from being marginalized.<sup>230</sup> Interestingly in South Asia, due to four countries

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221. *Id.*

222. *Id.* art. 15.

223. *Id.* art. 16. The rules are set out in Annex III of the Agreement.

224. *Id.* art. 10.

225. *Id.*

226. *Id.* art. 10, ¶¶ a-c.

227. *Id.* art. 10, ¶ d-f.

228. *Id.* annex I.

229. Because of this, some authors have termed it as the “equity approach” of SAPTA. Waquif, *SAPTA*, *supra* note 164, at 162.

230. It is noteworthy that this notion of special treatment of LDC is *grosso modo* similar to the comprehensive and integrated plan of Action for LDCs adopted by the World Trade Organization (“WTO”) in 1996. See for comparison *Comprehensive and Integrated WTO Plan*

out of seven being LDCs, more countries are eligible for special treatment than those that are not eligible.

(c) *Enforcing Rules of Origin*

When a product is the result of material and labor from two or more countries, the need for Rules of Origin arises.<sup>231</sup> “A Rule of Origin is a criterion that is used to determine the nationality of a product or a producer.”<sup>232</sup> “Rules of origin are necessary in controlling imports on a discriminatory basis.”<sup>233</sup> Provisions to ensure the application of the Rules of Origin, which have the substantive and procedural functions, are made in SAPTA.<sup>234</sup> The substantive function relates to the requirements that must be satisfied in order for a product to be considered as originating from a particular country.<sup>235</sup> The “procedural function relates to the formalities and certifications furnished to verify satisfaction of the substantive Rule of Origin.”<sup>236</sup>

Products covered by preferential trading arrangements within SAPTA framework, which are imported into one Contracting State from another, are eligible for preferential concessions, if they conform to the origin requirement.<sup>237</sup> For that purpose, products are classified into two categories: those that are wholly produced or obtained in the exporting Contracting State, and those that are not wholly produced or obtained in the exporting Contracting State.<sup>238</sup>

Rule 2 of Annex III to the SAPTA attempts to define products that are wholly produced or obtained in the exporting Contracting

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of Action for the Least-Developed Countries Adopted on 13 Dec. 1996, available at [http://www.wto.org/english/tratop\\_e/devel\\_e/action\\_plan.htm](http://www.wto.org/english/tratop_e/devel_e/action_plan.htm) (last visited Nov. 9, 2002).

231. Aly K. Abu-Akeel, *Definition of Trade in Services under the GATS: Legal Implications*, 32 GEO. WASH. J. INT'L L. & ECON. 201 (1999).

232. *Id.*; Bernard M. Hoekman, TRADE LAWS & INSTITUTIONS 32, World Bank Discussion Paper, (World Bank, 1995).

233. *Id.* It may be appropriate to note that a “multilateral convention dealing with rules of origin . . . the International Convention on the Simplification and Harmonization of Customs Procedures (also known as the Kyoto Convention)” was negotiated in 1974, and is “administered by the Brussels-based Customs Cooperation Council.” However, “despite the flexibility regarding the choice of origin system provided by the Convention,” only few countries have signed it. *Id.* From amongst the SAPTA countries, only India, Pakistan and Sri Lanka are parties to the Convention. The Convention entered into force for India in 1977, for Pakistan in 1981, and for Sri Lanka in 1984. Kyoto Convention Annex A.1, available at <http://www.unece.org/cefact/rec/kyoto/ky-01-e0.htm> (last visited Nov. 9, 2002).

234. Abu-Akeel, *supra* note 231, at 201.

235. *Id.*

236. *Id.*

237. SAPTA, *supra* note 169, annex III, rule 1.

238. *Id.*

State.<sup>239</sup> Raw or mineral products, which are extracted from the soil, water or seabed of the Contracting State,<sup>240</sup> are included in defined products under Rule 2.<sup>241</sup> Also, agricultural products harvested in the Contracting State and animals born and raised the Contracting State in addition to products obtained from these animals, whether obtained through hunting or fishing.<sup>242</sup> Additionally, products of sea fishing and other marine products taken from the high seas by the vessels of the Contracting State,<sup>243</sup> and products exclusively processed onboard factory ships<sup>244</sup> of the Contracting State exclusively fall under Rule 2.<sup>245</sup> Furthermore, used articles, which are fit for recovery of raw materials, waste and scrap manufactured in the Contracting State or good produced exclusively from such materials in the Contracting State all fall into the first category.<sup>246</sup>

Products that are not wholly produced or obtained in the exporting state are also eligible for preferential concession so long as they fulfill certain conditions, which are dealt with in Rule 3.<sup>247</sup> Products worked on or processed, which result in a total value of less than sixty percent of materials, parts or produce originating from non-Contracting States (or of undetermined origin) and which the f.o.b. value of the products produced or obtained in the final manufactured process is performed within the territory of the exporting Contracting State, then it falls into this category.<sup>248</sup> By

239. *Id.* annex III, rule 2.

240. *Id.* Including mineral fuels, lubricants and related materials as well as mineral of metal ores.

241. *Id.*

242. *Id.*

243. *Id.* annex III, rule 2, n.3.

Vessels refer to fishing vessels engaged in commercial fishing, registered in a Contracting State's country and operated by a citizen or citizens and/or governments of Contracting States, or partnership, corporation or association, duly registered in such Contracting State's country, at cost 60 per cent of equity of which is owned by a citizen or citizens and/or government of such Contracting States, or 75 percent by citizens and/or governments of the Contracting States. However, the products from vessels engaged in commercial fishing under bilateral agreements, which provide for chartering or leasing of such vessels and/or sharing of catch between Contracting States are also eligible for preferential concessions.

*Id.* annex III, Rule 2(f), n.3.

244. In respect of vessels or factory ships operated by government agencies the requirement of flying the flag of a Contracting State does not apply. *Id.* annex III, rule 10(4).

245. *Id.* annex III, rule 2, n.3.

246. *Id.*

247. *Id.* annex III, rule 10(4).

248. *Id.* annex III, rule 3; Originally 50%, an amendment approved by the SAARC Council of Ministers at its Twenty-first Session held in Nuwara Eliya, Sri Lanka, on 18-19 March 1999, (the 1999 Amendment) changed it to 60%. See generally K.R. Srivats & Hema Ramakrishnan, *Government accepts origin norm change for goods under SAPTA pact*,

the same token, products that are subject to sectoral agreements also fall into this category.<sup>249</sup> In this context, the value of the non-originating materials, parts or produce is "the c.i.f. value at the time of importation of materials parts or produce where this can be proven or the earliest ascertainable price paid for the materials, parts or produce of undetermined origin in the territory of the Contracting State where the working or processing takes place."<sup>250</sup>

Rules of Origin are considered to be inherently arbitrary despite the extensive codification that accompanies them.<sup>251</sup> In order to properly enforce the rules, or at least to minimize the arbitrariness caused by the rules, clear provisions regarding the mechanism used to deal with products, which also contain inputs from countries other than the exporting countries, become necessary.<sup>252</sup> SAPTA also attempts to address the issue of such cumulative Rules of Origin.<sup>253</sup> Those products, "which comply with origin requirements . . . and which are used by a Contracting State as input for a finished product . . . eligible for preferential treatment by another Contracting State shall be considered as a product originating in the territory of the Contracting State where working or processing of the finished product has taken place provided that the aggregate content originating in the territory of the Contracting State is not less than 50 percent of its f.o.b. value."<sup>254</sup> Partial cumulation means that only products, which have acquired originating status in the territory of one Contracting State may be taken into account when used as inputs for a finished product eligible for preferential treatment in the territory of another Contracting State.<sup>255</sup>

Another clarification necessary for an unambiguous implementation of the Rule of Origin concerns the consignment of goods, which needs to be direct.<sup>256</sup> SAPTA attempts to address it.<sup>257</sup>

BUSINESS LINE FINANCIAL DAILY (The Hindu Group), Nov. 24, 2000, at 1.

249. SAPTA, *supra* note 169, annex III, n.6. "In respect of products traded within the framework of sectoral agreements negotiated under SAPTA, provisions may need to be made for special criteria to apply. Consideration may be given to these criteria as and when the sectoral agreements are negotiated."

250. *Id.* annex III, rule 3(c).

251. Bhagwati, *supra* note 187, at 866. Interestingly, however, "the nature of rules of origin is also considered to be an important determinant of the degree to which regional trading arrangement discriminate against non-member countries. The more restrictive such rules become, the more regional arrangements may be deemed to yield results that are inimical to multilateralism." Hoekman, *supra* note 232, at 54.

252. SAPTA, *supra* note 169, annex III, rule 4.

253. *Id.*

254. *Id.* Originally 60%, but the 1999 Amendment changed it to 50%.

255. *Id.*

256. *Id.* annex III, rule 5.

257. *Id.*

Goods are “considered as directly consigned from the exporting Contracting State to the importing Contracting State,” if the products are transported without traversing over territory of any non-Contracting State; if the transportation of a product involves transit through one or more intermediate non-Contracting States regardless of transshipment or temporary storage in such countries, it will be considered as directly consigned in only the following three situations.<sup>258</sup> First, the transit entry should be justified for geographical reason or by considerations related exclusively to transport requirements.<sup>259</sup> Second, the products should not have entered into trade or consumption by the transit country.<sup>260</sup> Third, the products should not have undergone any operation in the transit country other than for the unloading and reloading or any other operation, which is required for maintaining them in good condition.<sup>261</sup> It is important to note that while packing may be treated separately if the national legislation so requires, it is still considered to be an important element of verifying the Rule of Origin of the product.<sup>262</sup> Furthermore, when determining the origin of products, “packing is considered as forming a whole with the product it contains.”<sup>263</sup>

Finally, in order to pass the crucial tests pertaining to the Rule of Origin, products eligible for preferential concessions need to be supported by a Certificate of Origin<sup>264</sup> that an authority who is chosen by the government of the exporting Contracting State has issued and where the importing Contracting State has been notified in accordance with the Certification Procedures.<sup>265</sup> Otherwise, the

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258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* annex III, rule 6.

263. *Id.*

264. *Id.* annex III, Certificate of Origin.

I. General considerations to qualify for preference, products must (a) fall within a description of products eligible for preference in the schedule of concessions of SAPTA country of destination; (b) comply with SAPTA Rules of Origin. Each article in a consignment must qualify separately in its own right; and c) comply with the consignment conditions specified by the SAPTA Rules of Origin. In general, products must be consigned directly . . . from the country of exportation to the country of destination.

II. Entries to be made in . . . [p]reference products must be wholly produced or obtained in the exporting Contracting State in accordance with Rule 2 of the SAPTA Rules of Origin, or where not wholly produced or obtained in the exporting Contracting States must be eligible under Rule 3 or Rule 4.

*Id.*

265. *Id.* annex III, rule 7.

product may be declared ineligible.<sup>266</sup> In the same vein, a Contracting State can also “prohibit importation of products containing any input originating from States with which it does not have economic and commercial relations.”<sup>267</sup>

It is clear from the above that the Rule of Origin has been treated as an important element by SAPTA, and Contracting States are in agreement that best efforts must be made towards cooperation where origin of inputs are specified in the Certificate of Origin.<sup>268</sup> In this context, it is worth noting that with regard to the LDCs, Rule 10 provides for a special criteria percentage.<sup>269</sup> According to Rule 10, “products originating in Least Developed Contracting States can be allowed a favourable ten percentage points applied to the percentage established” by the Agreement.<sup>270</sup> Thus, regarding products that are not wholly produced or obtained in the exporting State (Rule 3), the percentage would not exceed seventy percent, and regarding cumulative rule of origin (Rule 4), the percentage would not be less than forty percent.<sup>271</sup>

#### *(d) Modification or Withdrawal of Concessions*

The provisions regarding change of status of concessions made under SAPTA are relatively clear.<sup>272</sup> Two types of procedural formalities are relevant: change of status of concession vis-à-vis countries, which are still members of SAPTA, and change of status of concession vis-à-vis countries that have ceased to be members.<sup>273</sup>

“Any Contracting State may, after a period of three years from the day the concession was extended, notify the Committee of its intention to modify or withdraw any concession included in its appropriate schedule.”<sup>274</sup> “The Contracting State intending to withdraw or modify a concession shall enter into consultation and/or negotiations,” in an attempt to agree on any necessary and appropriate compensation with any Contracting States with whom the concession was initially negotiated and any Contracting State that has a substantial supplying interest.<sup>275</sup> In case agreement

266. *Id.*

267. *Id.* annex III, rule 8.

268. *Id.*

269. *Id.* annex III, rule 10.

270. *Id.*

271. *Id.* Originally 60% (for Rule 3) and 50% (for Rule 4), but the 1999 Amendment changed it to 70% and 40%.

272. *Id.* art. 17.

273. *Id.* art. 18.

274. *Id.* art. 17, ¶ 1.

275. *Id.* art. 17, ¶ 2. The Committee of Participants determines which Contracting States has a substantial supplying interest.

cannot be reached within six months of the receipt of notification between the Contracting States concerned, and where “the notifying Contracting State proceeds with its modification or withdrawal of such concessions, the affected Contracting States...may withdraw or modify equivalent concessions in their appropriate schedules.”<sup>276</sup> Any such modification or withdrawal needs to be notified to the Committee.<sup>277</sup>

On the other hand, a Contracting State is always “free to withhold or to withdraw, in whole or in part any item in its schedule of concessions” with respect to that it determines “was initially negotiated with a State, which has ceased to be[come]” a member of SAPTA.<sup>278</sup> Yet, a country taking such action is first required to notify the Committee of Participants, and then upon request, to consult with the Contracting States that have a substantial interest in the product concerned.<sup>279</sup> It is obvious that consultations among countries have paramount importance under SAPTA Agreement.<sup>280</sup> Perhaps, under the Agreement,

each Contracting State is required to accord sympathetic consideration by affording adequate opportunity for consultations regarding such representations as may be made by another Contracting State with respect to any matter affecting the operation of [this preferential trading arrangement]. The Committee of Participants can, at the request of a Contracting State, consult with any Contracting State in respect of any matter for which it has not been possible to find a satisfactory solution through such consultation.<sup>281</sup>

#### *(e) General Oversight & Dispute Settlement*

For the purpose of providing general oversight, reviewing the progress made in the implementation of the SAPTA, and ensuring that “benefits of trade expansion emanating from this agreement accrue to all Contracting States equitably,” the SAPTA has provided for the establishment of a monitoring and coordinating body, known as the Committee of Participants.<sup>282</sup> This Committee, with

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276. *Id.* ¶ 3.

277. *Id.*

278. *Id.* art. 18.

279. *Id.*

280. *Id.* art. 19.

281. *Id.*

282. *Id.* art. 9.

overarching responsibility, consists of representatives of all Contracting States.<sup>283</sup> It generally meets at least once a year.<sup>284</sup> In addition to these regular annual meetings, it also accords "adequate opportunities for consultation on representations made by any Contracting State with respect to any matter affecting the implementation of the Agreement."<sup>285</sup> To carry out its responsibilities for settling such representations, the Committee devises its own rules of procedures.<sup>286</sup>

The Committee is also vested with the responsibility of managing the process of withdrawal of a country from SAPTA.<sup>287</sup> "Any Contracting State may withdraw from [the SAPTA] Agreement" any time after its entry.<sup>288</sup> "Such withdrawal shall be effective six months from the day on which written notice" is given and is received by the SAARC Secretariat, who is the depositary of this Agreement.<sup>289</sup> The Contracting State is also required to simultaneously inform the Committee of the action it has taken.<sup>290</sup> "The rights and obligations of a Contracting State, which has withdrawn from this Agreement shall cease to apply as of [the] effective date."<sup>291</sup> "Following the withdrawal by any Contracting State, the Committee needs to meet within 30 days to consider action subsequent to withdrawal."<sup>292</sup>

Finally, the responsibility of the Committee also stretches to situations of disputes. Any disputes that arise among

the Contracting States regarding the interpretation and application of the provisions of the [SAPTA] Agreement or any instrument adopted within its framework are to be amicably settled by agreement between the parties concerned. In the event of [a] failure to settle a dispute, it may be referred to the Committee by a party to the dispute . . . [The Committee reviews] the matter and makes [a] recommendation . . . thereon within 120 days from the date on which the dispute was submitted to it.<sup>293</sup>

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283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.* art. 21.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* ¶ 2.

292. *Id.* ¶ 3.

293. *Id.* art. 20.



With regard to dispute settlement, the provisions in SAPTA are too short, if not incomplete.<sup>294</sup> Detailed rules of procedures need to be devised, in order to clarify the mechanism for resolution of the disputes that are within the purview of the Committee. The spectrum of dispute resolution, whether they are direct negotiations or third party adjudications, is not clear. A third party approach, if intended, would also require clarifying the number, term and method of selecting arbitrators. Moreover, clarification regarding the available remedies appears to be needed. In short, one can note two distinct stages in dispute resolution.<sup>295</sup> First, there is the consultation stage.<sup>296</sup> Second, if consultation is unsuccessful, there is the stage in which the Committee makes findings of facts and/or legal determinations regarding the solution.<sup>297</sup>

(f) *Trade Enhancement Problems and Prospects*

The fact that, in a relatively short span of time, SAARC has taken remarkable strides favoring trade liberalization, most notably in institutionalizing SAPTA, is important.<sup>298</sup> But all that glitters is not gold. There are also a number of unsolved issues, problems, apprehensions and dissatisfactions.

(i) *Political Versus Trade Problem*

In spite of the achievements discussed earlier, and although there have been significant talk about trade, today, trade within South Asia stands at an abysmally low level.<sup>299</sup> Except in a few countries, the majority of trade is still outside of the South Asian region, although quite paradoxically, many of the items that are imported today are capable of being produced within the region itself.<sup>300</sup> Moreover, although SAPTA is "being talked about in

294. See, e.g., *id.* art. 20.

295. *Id.* art. 20.

296. *Id.* art. 19.

297. *Id.* art. 20.

298. SAPTA has been hailed as the most significant achievements of the SAARC. Indra Nath Mukherji, *The South Asian Preferential Trading Arrangement. Identifying Products in India's Regional Trade*, 5 ASIA-PACIFIC DEVELOPMENT J. 37 (UNITED NATION ECONOMIC & SOCIAL COMMISSION FOR ASIA AND THE PACIFIC, June 1998).

299. Rajesh Nair, *Forget SAARC, Create a "South Asian Union,"* FIN. DAILY (THE HINDU), Jan. 11, 2001, at 13; Dixit, *supra* note 49, at 4-5; Harvard Report, *supra* note 204, at 35. "Clearly economic integration in the form of SAPTA has not led to increase intra-regional trade." See also Rajat Sharma, *SAPTA to SAFTA: Some Observations*, KATHMANDU POST, Oct. 2, 1999, at 2. This lack of increase in intra-regional trade is interesting and peculiar to South Asian region. Indeed, in other regions, as noted by a scholar, there is considerable evidence that preferential trade agreements have increased intra-regional trade among their members. Krueger, *supra* note 187, at 120.

300. Nair, *supra* note 299, at 13.

glowing terms [publicly], many of the countries in the region have been hesitant [about enhancing] the list of free-tradeables (sic) within the region.<sup>301</sup> No doubt, the general move, thus far, has been towards the direction of free trade, and on the balance, freer trade should benefit all South Asian economies in the long run.<sup>302</sup> Yet much remains to be done as freer trade implies greater competitiveness, and requires South Asian countries to adjust to new specialization in which they are willing to give up old lines of production that are inefficient.<sup>303</sup>

SAPTA, which was designed to provide a regional framework for expanding trade relations through preferential concessions, is currently in its fourth round of negotiations. The total number of commodities granted tariff concessions under the first two rounds of negotiations were 2,239.<sup>304</sup> The third round further expanded this list with the addition of another 1,000 commodities. Despite the relatively large coverage of products under SAPTA, there is no evidence of a positive impact on intra-SAARC trade except for Nepalese and Bhutanese trade with India where separate bilateral free-trade agreements are in place.<sup>305</sup> This is further complicated by the complete lack of any authoritative monitoring of items being traded under SAPTA, which is currently only carried out only by the SAARC Secretariat and relies heavily on inputs received by the member countries that are often sparse. The SAARC Secretariat monitoring shows (for SAPTA I and II during 1996-97): while India offered 1,017 commodities for tariff concessions under SAPTA, only 34 were actually being traded by India; out of 291 commodities being offered for SAPTA concessions by Nepal, only 7 were being actually traded; out of 25 commodities being offered by the Maldives, only 7 were being traded; out of 421 commodities being offered by Pakistan, only 13 were being traded; and out of 143 commodities being offered by Sri Lanka, only 79 were actually being

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301. *Id.*

302. *See id.*

303. *See id.*

304. Sadaf Abdullah, *SAARC Intra-Regional Trade: An Assessment* (on file with author). India was the first one to set the pace "by offering the highest number of items (106) for tariff concessions, followed by Pakistan (35), Sri Lanka (31), the Maldives (17), Nepal (14), Bangladesh (12) and Bhutan (11)." *SAPTA, The First Step*, BUSINESS LINE (THE HINDU) (Editorial) Dec. 14, 1995, at 1.

305. *Id.* Trade liberalization under SAPTA is a gradual and controlled process. Member countries negotiate initially tariff preferences on a product by product basis. Under this approach products, which are negotiated for preferential imports (that is those provided tariff concessions) are initially exchanged with all the members on the basis of requests and offer lists made by the members.

traded. Five years later, the situation has not improved significantly.<sup>306</sup>

Despite various approaches to trade liberalization allowed by SAPTA, such as product-by-product, across-the-board tariff reductions, sectoral approaches and direct trade measures, only the product-by-product approach has made any progress.<sup>307</sup> Even then, the tariff reduction has not been effective, as the trade volume of products falling in the concession items category has been very low.<sup>308</sup> In other words, member countries have provided product-by-product tariff concessions only on those items, which have negligible trade value.<sup>309</sup>

One reason for this low volume could be the model of trade liberalization itself: the product-by-product approach. This approach is not effective in enhancing intra-regional trade [because] it has limitations both in terms of [the] weight of . . . scheduled products in the tradable and the depth of tariff cuts. The non-deployment of other agreed arrangements like paratariffs, nontariff measures and direct trade measures has made it more ineffective. Moreover, many of the products offered with concessions are not imported from within the region, and thus do not result in greater intra-regional trade creation. This issue is partly compounded by the fact that the countries in the region have offered each other concessions under other preferential arrangements and bilateral agreements.<sup>310</sup>

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306. See generally Harvard Report, *supra* note 204. For a brief discussion, see Dushni Weerakoon, *Does SAFTA Have a Future?*, 34 *ECON & POLITICAL WEEKLY* 3214-16 (India), Aug. 25-31, 2001.

307. Waquif, *Carrying The SAARC Flag*, *supra* note 49, at 3.

308. See generally Damakant Jayshi, *SAARC Ministers' Meet: Trade not making much headway*, Kathmandu, Aug. 16, 2002.

309. *From SAPTA to SAFTA*, Editorial, KATHMANDU POST, May 15, 1997 (on file with author).

310. Waquif, *Carrying The SAARC Flag*, *supra* note 49, at 3; Under the product-by-product approach, the products to be negotiated for preferential imports are initially exchanged bilaterally with all contracting states on the basis of request and offer lists. Once agreed upon, the list of products offered concessions are consolidated into a single national list of concessions and multilateralized. Mukherji, *supra* note 298, at 40; see also Minam Jafri, *SAPTA: Can They Evolve A Community Of Compromise*, XIII *PAKISTAN & GULF ECON.* 43 (May 28-June 3, 1994);

A product-by-product approach can be, however, an effective instrument for trade liberalization, if a trade-coverage rather than a product coverage approach is adopted in negotiations and provided that the non-tariff

Clearly, the SAPTA concessions have not made any significant difference so far to the volume and value of imports within SAARC.<sup>311</sup> Also, the inter-governmental negotiations under SAPTA have so far proved to be inadequate for mobilizing the private sector in South Asia to optimize gains from regional trade.<sup>312</sup>

Trade within the South Asian region has also been limited by a host of economic and political factors. Although there is substantial informal trading, official trade amongst SAARC countries today accounts for less than four percent of their total trade volumes. The region's principal export destinations are the United States, the European Union, and Japan. On the political side, the main obstacle to greater trade integration has been the tension between India and Pakistan, India and Sri Lanka, or Bhutan and Nepal, and to a lesser degree, distrust of India by its smaller neighbors [the proverbial mistrust syndrome].<sup>313</sup>

Indeed, "the fear psychosis of dominance by the neighboring country [read big country] acts as a trade diversion force."<sup>314</sup>

On the economic side, perhaps the main inhibiting factor has been a lack of complementarities in the countries' exports. The four major South Asian nations export a similar basket of commodities, and often compete directly in third markets especially for textiles. Furthermore, India's economic preponderance and comparative advantage in a

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measures are reduced or eliminated along with reduction or elimination of customs tariffs. In practice, however, this approach generally turns out to be a protracted and time-consuming process.

Mukherji, *supra* note 298, at 46. As to inter-regional trade creation, see Shukla, *New Frontiers*, *supra* note 39, at 90.

311. "In 1997, the share of intra-regional trade in SAARC countries global trade was 3.7 percent. In the same year, Bangladesh had an intra-regional trade of 8.6 percent, India 2 percent, Maldives 16.4 percent, Nepal 8.3 percent, Pakistan 1.5 percent, and Sri Lanka 6.4 percent." Waquif, *Carrying The SAARC Flag*, *supra* note 49, at 2.

312. *Id.* at 3.

313. *Regional Trade Integration: Modest Progress*, 9 S. ASIA MONITOR, May 1, 1999, at 2; For a discussion of the effects of informal trade see Mukherji, *supra* note 298, at 55. It should be noted that although economic and other activities between Japan and South Asia have increased, the SAARC nations, compared to Japan's engagement with other parts of Asia, do not appear to hold the same attraction. Purendra C. Jain, *Japan's Relations with South Asia*, 37 ASIAN SURVEY 342-348 (1997).

314. Beg, *supra* note 168, at 88.

range of products has resulted in asymmetric trade relations with her neighbors, hindering regional integration. Regional trade has also perhaps not taken off, because all the countries in the region had been pursuing, until the late eighties, import-substitution policies aimed at promoting and thus protecting domestic industries. Last, low growth and demand within the region itself, and historical trade links with the developed countries, have resulted in extra-regional patterns of trade.<sup>315</sup>

(ii) *Whither Freer Trade*

Following the ratification of SAPTA by all of the Member States, and its entering into force much earlier than envisioned, SAPTA Member Countries became more ambitious and determined. Comforted by their achievement in the institutionalization of preferential trade at the sixteenth Session of the Council of Ministers (New Delhi, December 1995), they agreed to strive further for the realization of a South Asian Free Trade Area ("SAFTA").<sup>316</sup> The CEC formed an Inter-Governmental Expert Group ("IGEG") during the transition to SAFTA comprised of experts from the Member Countries, which was an *ad hoc* body, focused on identifying the necessary steps towards moving into a free trade area.<sup>317</sup> The IGEG held a series of discussions and agreed on draft terms of reference for itself.<sup>318</sup> IGEG also drafted a broad framework of the Action Plan for achieving SAFTA.<sup>319</sup> In parallel, in order to give impetus to intra-SAARC trade under SAPTA and to promote economic cooperation in the region, the Commerce

315. *Regional Trade Integration: Modest Progress*, 9 S. ASIA MONITOR, May 1, 1999, at 2. For a brief discussion on the reasons for the shrinkage of international trade see Beg, *supra* note 168, at 87-88; One should however note that

[t]he emergence of SAARC in 1985 coincided with the winds of economic liberalization blowing over the Indian subcontinent. Sri Lanka had liberalized its economy in 1977, partial liberalization of the Indian economy began in 1985, and the late 1980s saw the initiation of economic liberalization both in Bangladesh (1987) and Pakistan (1988). With open economies in the four major countries in SAARC there was a need to explore the benefits of economic cooperation and thus in 1991 the first report on the benefits of economic cooperation was produced for consideration of South Asian nations.

Kelegama, *supra* note 33. For reasons prompting trade reforms in South Asia see also Arvind Panagariya, *Trade Policy in South Asia: Recent Liberalization and Future Agenda*, 22 WORLD ECON. 353 (May 1999); see also generally Weerakoon, *supra* note 306, at 3214-15.

316. Waquif, *Carrying the SAARC Flag*, *supra* note 49, at 2.

317. See, e.g., *id.* at 1-2.

318. *Id.*

319. *Id.*

Ministers of SAARC countries met in New Delhi in January 1996 and have since continued to meet annually.<sup>320</sup>

At the ninth SAARC Summit in Male, the Heads of State, recognized the need to achieve “a free trade area by the year 2001 A.D., and reiterated that steps towards trade liberalisation must take into account the special needs of the smaller Least Developed Countries and that benefits must accrue equitably.”<sup>321</sup> Also during the Summit, a “Group of Eminent Persons” (“GEP”) was constituted to review the functioning of SAARC.<sup>322</sup> This Group identified and recommended a substantive agenda for achieving economic integration in three phases: “(1) negotiation of a Treaty for South Asian Free Trade Area (SAFTA) by 1999, with implementation”<sup>323</sup> commencing in 2000 (achievement of SAFTA by 2008, stretching to 2010 for LDCs); (2) achievement of a “SAARC Custom Union with harmonisation of external tariffs by 2015; and (3) . . . [achievement of] a SAARC Economic Union with harmonisation of monetary and fiscal policies by 2020.”<sup>324</sup>

One year later, the tenth SAARC Summit decided to set up a Committee of Experts with specific terms of reference to guide them in drafting a comprehensive treaty regime that creates a free trade area and emphasizes the importance of the finalization of the framework text by 2001.<sup>325</sup> While discussions are still ongoing, some delays have already started to occur, in light of several complexities.<sup>326</sup>

An important dimension contributing to the complexity in trade liberalization is related to the changed perception of free trade.

[I]ndustry leaders today are moving beyond the narrow definition of trade in goods and commodities, to trade in specialized services, information technology, financial and capital instruments, energy and gas reserves, hydro-electricity, and building business partnerships for trade beyond the regional bloc. A South Asian Free-Trade Agreement . . . [originally] visualized for the year 2001—reflects a desire to build business linkages in these newer

320. *Supra* note 89, and accompanying text. It should be noted that SAARC also convenes meetings at ministerial level on specialized subject-specific themes.

321. Ninth SAARC Summit, Male, ¶ 14.

322. Male Declaration (1997), ¶ 4.

323. Shri Sahib Singh, *Perspective Plan for SAARC Countries*, available at <http://www.meadev.nic.in/govt/parl-qa/loksabha/q6788.htm> (last visited Nov. 9, 2002).

324. *Id.*

325. Tenth SAARC Summit, Colombo Declaration (1998).

326. *Id.* ¶ 23.

areas where smaller countries like Bhutan and Nepal can provide hydro-electricity to the region, Bangladesh can provide natural gas to India, and India can import power and electricity from Pakistan where it is in surplus. India would be looking at exporting information technology and specialized services to its smaller neighbours, which will help to develop their economic performance and growth. By bringing positive economic gains to all members, a South Asian free trade area would be a good starting point towards the ambitious SAARC Economic Union and SAARC Monetary Union, by the year 2008.<sup>327</sup>

Nonetheless, in order to materialize all of the potential benefits, an atmosphere of trust among nations followed by liberal trade practices will be needed. Moreover, the transition to the SOUTH ASIAN FREE-TRADE AGREEMENT should equally be complemented by measures implemented to simultaneously correct and harmonize the existing South Asian regimes where trade legislation is highly discriminatory,<sup>328</sup> and where the inflows, particularly of foreign direct investment, continue to be bureaucratic, highly regulated, and are coupled with low labor market flexibility.<sup>329</sup>

In addition, economic production patterns in most countries in the region are outdated.<sup>330</sup> They need to respond to new opportunities and the withering away of industries, which are regionally and globally inefficient. Regional free trade could make a useful contribution towards South Asian economic advancement in the next few decades. This will only be achieved if such cooperation is attempted with a vision of a different South Asia, a dynamic, competitive and efficient group of nations. While regional trade liberalization could be a force towards the development of this dynamism, each South Asian nation must put its own house in order, build its economic and social infrastructure to enable such a development, and modernize its production patterns.

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327. Indeed, technological developments now make "it possible to use services to link and control the various stages of a geographically diversified production process." Bernard Hoekman & Pierre Sauve, *LIBERALIZING TRADE IN SERVICES* 73, World Bank Discussion Paper (World Bank, 1994); Poonam Barua, *CBM's and Non State Actors and Institutions. What Role for the Private Sector*, Stimson Center (July 1999).

328. Wolfgang-Peter Zingel, *On the Economics and Regional Cooperation in South Asia*, Paper Presented at the 15th European Conference on Modern South Asian Studies, Prague (Sept. 8-12, 1998).

329. See Shukla, *New Frontiers*, *supra* note 39, at 93.

330. See Panagariya, *supra* note 315 (describing barriers and issues in South Asian trade).

The idea of a "proposed trading bloc for the region, the South Asian Free Trade Area ("SAFTA")," has also been recently perceived as "an idealistic and perhaps an unrealistic goal."<sup>331</sup> To begin, the goals set for the creation of SAFTA were unrealistic as they were proposed at a time "when relations between India and Pakistan were excellent."<sup>332</sup> Currently, the situation is completely opposite due to tension between these two countries, which are the largest in the region.<sup>333</sup> Also, the time frame that was set out to be in place by 2001 was too optimistic, if not unrealistic.<sup>334</sup> It is now getting down to ground realities as the change in the political equation has resulted in postponement of decision-making and in holding up progress on SAFTA.<sup>335</sup> As a result, the eleventh Summit held in Kathmandu, again reiterated the importance of achieving a free-trade area and directed the Council of Ministers to "finalize the text of the draft treaty by the end of 2002."<sup>336</sup>

### B. Regulating Common Social & Moral Interests

"The evil of trafficking in women and children for the purpose of prostitution is incompatible with the dignity and honor of human beings and is a violation of basic human rights."<sup>337</sup> South Asian countries, which have long suffered from this problem, have talked about the need for controlling the trafficking of women and children.<sup>338</sup> In parallel, in order to provide "assistance and protection [for children] to secure and fully enjoy their rights, and to develop their full potential and lead a responsible life in family

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331. JAIME DE MELO & ARVIND PANAGARIYA, *THE NEW REGIONALISM IN TRADE POLICY: AN INTERPRETATIVE SUMMARY OF A CONFERENCE 5* (World Bank & Centre for Economic Policy Research, 1992). Whilst the "general agreement" is "that complete free trade is the most desirable goal" for all countries, to arrive at complete free trade from the different stages of trading regime, many possibilities exist for countries, one of which is forming a trading bloc. *Id.* Also, "whether trading blocs are good or bad is one of the most controversial issues." *Id.* For a brief discussion about trading blocs in contrast with full multilateralism, see *id.* According to Panagariya, "a fragmentation of the world into a handful of preferential trade blocs is a bad omen for the region." Panagariya, *supra* note 315, at 373. For discussions on economic analyses of regionalism, see generally Edward D. Mansfield & Helen V. Mulner, *The New Wave of Regionalism*, 53 INT'L ORG. 592-595 (1999).

332. Interview, Nihal Rodrigo, *supra* note 159.

333. *Id.*

334. *Id.*

335. *Id.*

336. Pact on Free Trade pledged at Summit, DAWN (Jan. 7, 2002). See also Eleventh SAARC Summit, Kathmandu Declaration, art. III, ¶ 7, (Kathmandu 2002) at <http://www.saarcnet.org/newsaacnet/saarcdocuments/saarc11summit.html> (last visited Nov. 9, 2002) [hereinafter "Kathmandu Declaration"].

337. SAARC Convention On Preventing And Combating Trafficking In Women And Children For Prostitution, Jan. 5, 2002 [hereinafter "Human Trafficking Convention"].

338. *Id.*



and society," they have shown concern for the promotion of child welfare in the region.<sup>339</sup> Although the problems were extensively discussed since the inception of the SAARC, it took several years to finalize international instruments in these areas.

### 1. Preventing Flesh Trade

Concerned with "the increasing exploitation by traffickers of women and children" and the use of South Asian countries as the "sending, receiving and transit points," these countries were keen to ensure effective regional cooperation in the prevention of trafficking and prosecution "of those responsible for such trafficking."<sup>340</sup> On January 5, 2002, at the inauguration of the Eleventh Summit, a Convention was signed "to promote cooperation among Member States . . . [to] effectively deal with the various aspects of prevention, interdiction and suppression of trafficking women and children," as well as "the repatriation and rehabilitation of victims."<sup>341</sup>

Under the Human Trafficking Convention, Member States agree to "take effective measures to ensure that [under their respective criminal laws], trafficking, in any form," becomes "an offence punishable by appropriate penalties."<sup>342</sup> Such offences are considered "particularly grave" if the offender belongs to a national or international organised criminal group, or if the offender uses violence or arms.<sup>343</sup> Other factors considered in deciding the particular gravity of the offense include: whether the offender holds a public office and the offense is committed by misuse of that office, whether the offender commits an offense in an educational institution or social facility or whether the offense has been previously convicted.<sup>344</sup>

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339. SAARC Convention on Regional Arrangements For The Promotion Of Child Welfare In South Asia, Jan. 5, 2002 [hereinafter "Child Welfare Convention"]. "[T]rafficking in people, primarily women and children . . . has increased markedly throughout the 1990s. An estimated four million people throughout the world are trafficked each year." A. Yasmine Rassam, *Contemporary Forms Of Slavery And The Evolution Of The Prohibition Of Slavery And The Slave Trade Under Customary International Law*, 39 VA. J. INT'L L. 322, 323 (1999).

340. Human Trafficking Conventions, *supra* note 337, pmb1.

341. *Id.* art. II.

342. *Id.* art. III; Enforcement of laws is crucial. Indeed, in countries like India, Nepal, and Pakistan, "there are impressive sounding laws . . . on the books, but they are rarely enforced." Rassam, *supra* note 339, at 325.

343. Human Trafficking Convention, *supra* note 337, art. IV(a-c).

344. *Id.* art. IV(d-g).

*(a) Judicial Proceedings & Mutual Legal Assistance*

In trying offences under the Human Trafficking Convention, judicial authorities are obligated to maintain confidentiality of victims and to ensure "that they are provided appropriate counseling and legal assistance."<sup>345</sup> "Widest measure[s] of mutual legal assistance [with] respect [to] investigations, inquiries, trials or other proceedings" are prescribed.<sup>346</sup> Such assistance includes collecting evidence and obtaining statements of people, providing information, documents, criminal and judicial records about the "location of persons and objects including their identification," search and seizures, delivering property that include lending of exhibits, availing detained persons to give evidence, assisting in investigations, or servicing documents.<sup>347</sup> The requests for assistance should be "executed promptly in accordance with their national laws."<sup>348</sup> If the "Requested State is not able to comply . . . with a request . . . or decides to postpone its execution," the Requesting State has to be informed promptly.<sup>349</sup>

As such, the offences covered by the Human Trafficking Convention are extraditable under any extradition treaty between any Member States.<sup>350</sup> If a country, which "makes extradition conditional on the existence of a treaty, receives a request for extradition from another . . . [country] with which it has no extradition treaty," it can consider the Human Trafficking Convention "as the basis for extradition," which would be granted in accordance with its domestic laws.<sup>351</sup> In contrast, if a country "in whose territory the alleged offender is present" decides not to extradite, it has to submit, "without exception . . . the case to its competent authorities for prosecution."<sup>352</sup>

*(b) Measures Against Trafficking & Treatment of Victims*

To enable countries "to effectively conduct inquiries, investigations and prosecution of offences," the Human Trafficking Convention also envisions capacity building assistance to the member countries' governmental agencies.<sup>353</sup> It also strives to sensitize "their law enforcement agencies and the judiciary in

345. *Id.* art. V.

346. *Id.* art. VI.

347. *Id.* art. VI, ¶ 1.

348. *Id.* art. VI, ¶ 2.

349. *Id.*

350. *Id.* art. VII, ¶ 1.

351. *Id.* art. VII, ¶¶ 2-3.

352. *Id.* art. VII, ¶ 4.

353. *Id.* art. VIII, ¶ 1.

respect of offences . . . and other related factors that encourage trafficking in women and children” as a commitment made by member countries.<sup>354</sup> A Regional Task Force consisting of officials of the Member States is to be established in order “to facilitate the implementation” of the Human Trafficking Convention and “to undertake periodic reviews.”<sup>355</sup> This does not preclude the ability of countries to establish, “by mutual agreement . . . [other] bilateral mechanisms to effectively implement the provisions of the Convention, including appropriate mechanisms for cooperation to interdict trafficking in women and children for prostitution.”<sup>356</sup> In addition, regular exchange of information regarding agencies, institutions and individuals that are involved in trafficking in the region and the methods and routes used by traffickers, is encouraged.<sup>357</sup> The information furnished “shall include information of the offenders, their fingerprints, photographs, methods of operation, police records and records of conviction.”<sup>358</sup>

The Human Trafficking Convention requires the “modalities for repatriation of the victims” of cross-border trafficking to the Country of Origin to be worked out as soon as possible.<sup>359</sup> Pending such arrangements, suitable provisions for the care and maintenance of victims, which include the provision of legal advice, health care, counseling, training, and establishment of protective homes or shelters for their rehabilitation should be made.<sup>360</sup>

In many of the countries in the region, trafficking in women and children are often carried out under the guise of recruitment through employment agencies.<sup>361</sup> In order to prevent this from happening, the Convention requires countries to appropriately supervise the employment agencies,<sup>362</sup> to focus on preventive as well as developmental efforts on areas that are known to be source areas for trafficking,<sup>363</sup> and to promote awareness about the problem of trafficking in person as well as its underlying causes.<sup>364</sup>

The countries will need to take several “legislative and other necessary measures to ensure the implementation of the [Human Trafficking] Convention,”<sup>365</sup> which is expected “to enter into force on

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354. *Id.* art. VIII, ¶ 2.

355. *Id.* art. VIII, ¶ 3.

356. *Id.* art. VIII, ¶ 4.

357. *Id.* art. VIII, ¶ 5.

358. *Id.*

359. *Id.* art. IX, ¶ 1.

360. *Id.* art. IX, ¶¶ 3-5.

361. *Id.* art. VIII, ¶ 6.

362. *Id.*

363. *Id.* art. VIII, ¶ 7.

364. *Id.* art. VIII, ¶ 8.

365. *Id.* art. X.

the fifteenth day following the day of the deposit of the seventh Instrument of Ratification with the Secretary General” of SAARC.<sup>366</sup>

## 2. Promoting Child Welfare

A quarter of the world's children live in South Asia. . . . [P]arents or legal guardians . . . have the primary responsibility for the upbringing and development of the child. . . . [T]he family, as the fundamental unit of society and also as the ideal nurturing environment for the growth and well-being of children, should be afforded the necessary protection and assistance so it can fully assume and fulfill responsibility for its children and community. . . . [Thus], recognising the efforts of SAARC towards building a regional consensus on priorities, strategies and approaches to meet the changing needs of children, [a Convention has been concluded].<sup>367</sup>

### (a) Guiding Principles

The main purpose of the Child Welfare Convention is “to facilitate and help in the development and protection of the full potential of the South Asian child,” to promote “understanding [and awareness] of rights, duties and responsibilities,” and to set up appropriate regional arrangements to assist the Member States in facilitating, fulfilling and protecting the rights of the Child, taking into account the changing needs.”<sup>368</sup>

In that spirit, the Child Welfare Convention is governed by a number of guiding principles.<sup>369</sup> First, the “survival, protection, development and participatory rights of the child” are considered vital pre-requisites for “accelerating the process of their people’s realization of human rights and fundamental freedoms, and achieving economic and social development in South Asia.”<sup>370</sup> Second, the child should be able “to enjoy all rights and freedoms guaranteed by the national laws and regionally and internationally binding instruments.”<sup>371</sup> In this context, commitment to implement the UN Convention on the Rights of the Child<sup>372</sup> and to “uphold ‘the

366. *Id.* art. XIII.

367. Child Welfare Convention, *supra* note 339, pmb1.

368. *Id.* art. II, ¶¶ 2-3.

369. *Id.* art. III.

370. *Id.* art. III, ¶ 1.

371. *Id.* art. III, ¶ 2.

372. *Id.* art. III, ¶ 3.

best interests of the child' as a principle of paramount importance" is made.<sup>373</sup> Third, "while recognizing that the primary responsibility . . . [for] the well-being of the child rests with the parents and family," the authority of States to ensure the protection of the best interests of the child also upheld.<sup>374</sup> Finally, "gender justice and equality [are considered] . . . key aspirations for children, the realization of which, collectively by the governments, would be conducive to the progress of South Asia."<sup>375</sup>

(b) *Regional Priorities and Arrangements*

"Without prejudice to the indivisibility of the rights enshrined in the UN Convention on the Rights of the Child and other international and national instruments," South Asian countries place special emphasis on bilateral and regional cooperation for child development.<sup>376</sup> "[B]asic services such as education [and] health care . . . [are recognized] as the cornerstone of child survival and development, [and each Member Country has agreed to] pursue a policy of development and a National Programme of Action that facilitate the development of the child. The policy shall focus on accelerating the progressive universalization of the child's access to the basic services and conditions."<sup>377</sup>

The Child Welfare Convention also guarantees "appropriate legal and administrative mechanisms and social safety nets . . . [to] protect the child from any form of discrimination, abuse, neglect, exploitation, torture or degrading treatment, trafficking and violence . . . [and to] discourage entry of children into hazardous labor."<sup>378</sup> In this context, "a multi-pronged strategy including opportunities at the primary level and supportive social safety nets for families that tend to provide child labourers," will be adopted.<sup>379</sup> Similarly, to

[a]dminister juvenile justice in a manner consistent with the promotion of the child's sense of dignity and worth, and with the primary objective of promoting the child's reintegration in the family and society...

373. *Id.* art. III, ¶ 4.

374. *Id.* art. III, ¶ 5.

375. *Id.* art. III, ¶ 7.

376. *Id.* art. IV, ¶ 1.

377. *Id.* art. IV, ¶ 2.

378. *Id.* art. IV, ¶ 3(a-b). In this context, it should be noted that the Ninth SAARC Summit called to eliminate the evil of child labor from the region by year 2010, and called for stringent measures to protect children from all forms of exploitation. Declaration of the Ninth Summit (Male 1997), ¶ 29.

379. Child Welfare Convention, *supra* note 339, art. IV, ¶ 3(b).

[countries] shall provide special care and treatment to children in a country other than the country of domicile and expectant women and mothers . . . [and would promote alternative measures to institutional correction].<sup>380</sup>

In addition, they would provide children with opportunities to express views, provide access to information, in all matters affecting them, and "participate fully and without hindrance or discrimination in the school, family and community life."<sup>381</sup>

"To ensure consistent focus on and pursuance of the regional priorities," the Member States agree to "promote solidarity, cooperation and collective action."<sup>382</sup> Cooperation is viewed "as mutually reinforcing and capable of enhancing the quality and impact of their national efforts to create the enabling conditions and environment for full realisation of child rights and the attainment of the highest possible standard of child well being."<sup>383</sup> Member States agree to facilitate in the

sharing of information, experience and expertise, [to] facilitate human resource development through planned . . . Training Programmes on Child Rights and Development, [to] make special arrangements for speedy completion and disposal . . . of any judicial or administrative inquiry or proceeding involving a child who is a national of [another Member Country], and for the transfer of children . . . accused of infringing the penal code, back to their country of legal residence for trial and treatment, provided that the alleged offence has not imperiled the national security of the country where it has been allegedly committed.<sup>384</sup>

Similarly, "strengthen[ing] the relevant SAARC bodies dealing with issues of child welfare to formulate and implement regional strategies and measures for prevention of inter-country abuse and exploitation of the child" remains a priority of the Convention.<sup>385</sup>

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380. *Id.* art. IV, ¶ 3(c).

381. *Id.* art. IV, ¶ 4(a-c).

382. *Id.* art. V.

383. *Id.*

384. *Id.* art. V(a-c).

385. *Id.* art. V(d).

(c) *Transnational Cooperation*

In order to meet the priorities under the Child Welfare Convention, bilateral and multilateral agreements and co-operation that would positively impact regional and national efforts in facilitating, fulfilling and protecting the rights and well-being of a child are encouraged.<sup>386</sup> Also encouraged are co-operation with the United Nations and other international agencies, and participation of non-governmental bodies.<sup>387</sup> In this vein, the countries agree to take, "in accordance with their respective Constitutions, the legislative and other measures necessary to ensure the implementation of the Convention," without disrupting any provision contained in existing national laws or international agreements, which are more favorable toward the realization of the rights of a South Asian child.<sup>388</sup> They also agree to take all political measures to fulfill the objectives of the Convention, which includes legislative and policy reform, "trained manpower, adequately equipped institutions and adequate allocation of human and financial resources."<sup>389</sup>

The Child Welfare Convention is set to become effective "on the fifteenth day following the date of deposit of the Seventh Instrument of Ratification with the Secretary General" of the SAARC.<sup>390</sup>

C. *Regulating Specific Security Interests*

International terrorism and the illicit trafficking of drugs have both been serious problems for most countries of the region, even prior to the establishment of SAARC. After its creation, the problem was given a regional dimension and put on the agenda of the SAARC meetings. Consequently, a few years later, Member States succeeded in finalizing legal instruments to that effect.

1. *Preventing Terrorism*

Terrorism is the cancer of the modern world. No state is immune to it. It is a dynamic organism, which attacks the healthy flesh of the surrounding society.<sup>391</sup>

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386. *Id.* art. II, ¶ 3.

387. *Id.* arts. VIII & IX.

388. *Id.* art. VII.

389. *Id.* art. X.

390. *Id.* art. XII.

391. Emanuel Gross, *Legal Aspects Of Tackling Terrorism: The Balance Between The Right Of A Democracy To Defend Itself And The Protection Of Human Rights*, 6 UCLA J. INT'L L. & FOR. AFF. 89 (2001) (citing P. Johnson, *The Cancer of Terrorism*, in *TERRORISM: HOW THE*

Developed states have sought to reinforce traditional law holding states responsible for acts of terrorism originating in their territory; they have sought universal agreements of co-operation against aerial and related forms of terrorism. But, while all governments recognize their own vulnerability to terrorism, and almost all join in decrying it, international law to deal with it has been [relatively] slow in coming.<sup>392</sup>

At the first SAARC Summit held in Dhaka, terrorism was identified as a serious problem, which affected the security and stability of the entire South Asian region.<sup>393</sup> Also “[a]t the Bangalore Summit (1986) . . . the problem of terrorism was discussed in greater detail where the SAARC countries agreed that co-operation among SAARC States is vital in preventing and eliminating terrorism and its root causes.”<sup>394</sup> As a result, during the Third Summit in November of 1987, a regional Convention was signed,<sup>395</sup> which came into force on August 22, 1988. Briefly stated, the Convention provides a regional focus to many of the well-established principles of international law with respect to preventing terrorism.<sup>396</sup> Under its provisions, Member States are committed to extradite or prosecute alleged terrorists thereby preventing them from enjoying safe havens.<sup>397</sup> Moreover, regional cooperation is envisioned in preventive action to combat terrorism through the “exchange of information, intelligence and expertise” identified as necessary for mutual cooperation.<sup>398</sup>

In the Final Declaration issued at the end of the Kathmandu Summit, the Heads of State, while expressing their satisfaction with the Terrorism Convention, recognized that the signing of this convention was “a historic step towards the prevention and

WEST CAN WIN 31 (Benjamin Netanyahu ed. 1986)).

392. LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS & VALUES* 292 (Martinus Nijhoff 1995).

393. Karunadasa, *supra* note 112. The Dhaka Summit directed the Standing Committee to “set up a study group to examine the problem of terrorism . . . [and] directed the Council of Ministers to consider the report . . . and submit recommendations.” PRADHAN, *supra* note 124, at 127.

394. Karunadasa, *supra* note 112. See also highlights of the recommendations of the SAARC Expert Group, in UMAR, *supra* note 3, at 102-103.

395. SAARC Regional Convention on Suppression of Terrorism, Nov. 4, 1987 [hereinafter “Terrorism Convention”]. For a brief introduction, and the climate during which the Convention was entered into see PRADHAN, *supra* note 124, at 53-55.

396. Terrorism Convention, *supra* note 395, art. I.

397. *Id.* art. III.

398. *Id.* art. VIII.



elimination of terrorism from the region.”<sup>399</sup> In this regard, they further “reiterated their unequivocal condemnation of all acts, methods and practices (sic) of terrorism as criminal.”<sup>400</sup>

(a) *Objectives and Scope*

In addition to the preamble, the Terrorism Convention includes eleven articles. The preamble, while making reference to the understandings reached at the Dhaka and Bangalore Summits, further recognizes “the importance of the principles laid down in UN Resolution 2625 (XXV) which among others require[s] that each state should refrain from organizing, instigating, assisting or participating in acts of civil strife.”<sup>401</sup> The awareness of “the danger posed by the spread of terrorism and its harmful effect on peace, cooperation, friendship and good neighbourly relations” is identified as the main reason leading to the conclusion of the Convention.<sup>402</sup> Thus, the main objective of the Terrorism Convention is “to take effective measures to ensure that perpetrators of terrorist acts do not escape prosecution and punishment by providing for their extradition and prosecution.”<sup>403</sup>

The Convention sets out a broad definition of terrorism, which was designed to bring SAARC nations into line with European and other international treaties governing the subject.<sup>404</sup> Under the Convention, terrorism can include any action that endangers life, involves serious violence against a person or serious damage to property, or creates a serious risk to the health or safety of the public.<sup>405</sup> The use or threat of such action becomes terrorism when it is designed to influence government, to intimidate the public or a section of the public and is made for the purpose of advancing a political, religious or ideological cause.<sup>406</sup> Action that involves the use of firearms or explosives is terrorism whether serious damage is actually caused or not.<sup>407</sup>

While defining conduct, which constitutes terrorism, the Convention draws from definitions provided by other relevant international conventions.<sup>408</sup> In this context, it brings within its

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399. Kathmandu Declaration, *supra* note 336, ¶ 18.

400. *Id.* ¶ 18.

401. Terrorism Convention, *supra* note 395, pmb1.

402. *Id.*

403. *Id.*

404. *Id.* art. I.

405. *Id.* art. I(e).

406. Gross, *supra* note 391, at 97-101 (detailing several approaches towards defining who or what is a terrorist).

407. Terrorism Convention, *supra* note 395, art. I(e).

408. For a detailed examination of what is terrorism and who is terrorist, see Gross, *supra*

purview all of the offenses that are within the scope of the following: the Convention for the Suppression of Unlawful Seizure of Aircraft, (the Hague, December 16, 1970), the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, (Montreal, September 23, 1971), the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, (New York, December 14, 1973), and any other "convention to which SAARC Member States concerned are parties and which obliges the parties to prosecute or grant extradition."<sup>409</sup>

In addition, "murder, manslaughter, assault causing bodily harm, kidnapping, hostage-taking and offences relating to firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or serious damage to property" are all offences condemnable under the Terrorism Convention.<sup>410</sup> Also condemnable are "an attempt or conspiracy to commit an offence,...aiding, abetting or counseling the commission of such an offence or participating as an accomplice in the offence."<sup>411</sup> Following the global trend first established by the European Convention on the Suppression of Terrorism (1977),<sup>412</sup> the SAARC Terrorism Convention makes it mandatory to treat certain actions as criminal, irrespective of political or other ideologies behind the action.<sup>413</sup>

The attempt of the Convention to have as broad a coverage as possible is obvious since "any two or more Contracting States" may, by agreement, decide to bring within its purview, "any other serious offence involving violence," which is not "regarded as a political offence, connected with a political offence, or an offence inspired by political motives."<sup>414</sup> The issue of foreign terrorists using the territory of a Contracting State as a safe haven is dealt with in the Convention by expressly stipulating that it takes on terrorist actions committed outside such territory directed against governments, persons or property situated outside such territory.<sup>415</sup>

note 391, at 97-100.

409. Terrorism Convention, *supra* note 395, art. I.

410. *Id.* art. I(e).

411. *Id.* art. I(f).

412. European Council, European Convention on the Suppression of Terrorism, Europ. T.S. No. 90 (Jan. 27, 1977), available at <http://conventions.coe.int> (§ 2 of Explanatory Report directly supports proposition) (last visited Nov. 10, 2002) [hereinafter "European Convention on Terrorism"].

413. *Id.* art. I.

414. *Id.* art. II.

415. *Id.* arts. IV-VI.

This extraterritorial effect of the Convention is important. The question remains whether there is a hierarchical approach toward giving extraterritorial effect to its rights, the extent of which is equally important.

*(b) Duty to Extradite or Prosecute*

The extradition provisions of the Terrorism Convention affects “[the] provisions of all extradition treaties and arrangements applicable between Contracting States . . . to the extent that they are incompatible” with it.<sup>416</sup> To the extent that any offence covered by the Terrorism Convention “is not listed as an extraditable offence in any extradition treaty,” it is deemed to be included as such therein.<sup>417</sup> Consequently, if a Contracting State, which requires a treaty to extradite, “receives a request for extradition from another Contracting State with which it has no extradition treaty, the requested State may, at its own option . . . consider [the Terrorism Convention] as the basis for extradition.”<sup>418</sup> On the other hand, a Contracting State, which does not require a treaty is obligated to “recognize the offences set forth” in the Terrorism Convention “as extraditable offences.”<sup>419</sup>

If a suspect is found in the territory of a Contracting State, and such a State receives a request for extradition, it has two alternatives. First, it can decide to extradite that person, in which it takes all appropriate measures to extradite.<sup>420</sup> Second, instead of extraditing, it can submit the case to competent authorities to be handled under its domestic law.<sup>421</sup> In addition, the requested State can also refuse to extradite if the case is of trivial nature, if the request for the return of a fugitive offender “is not being made in good faith or in the interests of justice or for any other reason it is unjust or inexpedient to surrender or return the fugitive offender.”<sup>422</sup> Therefore, one can argue that with this type of broadly crafted proviso or exception, “securing the extradition of terrorists, may be virtually ruled out impossible.”<sup>423</sup>

Some other problems of substance may also be noted in the Convention. For instance, it is not clear how the states will protect

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416. *Id.* art. III, ¶ 1. For the discussions on the issue of extradition, PRADHAN, *supra* note 124, at 54.

417. Terrorism Convention, *supra* note 395, art. III, ¶ 2.

418. *Id.* art. III, ¶ 4.

419. *Id.* art. III, ¶ 5.

420. *Id.* art. VI.

421. *Id.* art. IV.

422. *Id.* art. VII.

423. Gopalaswami Parthasarathy, *Time to look beyond the subcontinent*, at <http://www.rediff.com/news/2001/feb/14gp.htm> (last visited Nov. 9, 2002).

the fundamental rights of defendants when an extradition takes place. “[T]hough terrorism might be an existential problem to a democratic state, human rights should be preserved, nonetheless.”<sup>424</sup> It is also not clear whether the safeguards specific to the conditions of the requesting state will be adequately replaced by the extraterritorial effect of the Terrorism Convention when it comes to an issue such as the defendant’s fundamental rights (including the right to a fair trial). Moreover, lack of common minimum standards in areas such as bail, detention, legal aid, treatment in detention, interviewing procedures, legal representation and interpretation services, may be cause for apprehension of countries.

The issue of dual criminality is another element in the Terrorism Convention which remains unclear. This issue becomes particularly crucial since the Terrorism Convention has to deal with some countries with less than satisfactory legal systems and where the laws are still littered with absurd offenses that hardly have any place in modern democracies. Moreover, the dual criminality policy may differ among states. Thus, it is important to deal with this issue, whether with a blanket removal of the dual criminality principle or some other techniques. The ambiguity should also be removed by tackling the issue of specialty at the same time. It may be noted that, as a rule of customary international law, specialty is one of the core protections for defendants. It is designed to ensure against breach of trust by the requesting state to the requested state and to avoid prosecutorial abuse against the defendant after the requesting state has obtained *in personam* jurisdiction over the defendant. The Terrorism Convention fails to prevent people from being extradited for one crime and then being tried for another, even for ones that they could not have been extradited. While the reliance on a political offense is increasingly rare in extradition proceedings, it nevertheless provides an important deterrent to countries who might seek extradition for the wrong reasons.<sup>425</sup>

### (c) *Regional Cooperation*

The series of declarations, emanating from the several meetings, make it clear that the Member States are committed to “afford one another the greatest measure of mutual assistance in connection with proceedings brought in respect of the offences . . . [covered by

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424. Gross, *supra* note 391, at 90.

425. Also noteworthy is that it remains a mandatory exception under the UN Model Treaty. Model Treaty on Extradition, UNGA45/116, A/Res/45/116, 68th Plenary Meeting, 14 Dec. 1990, art. 3.

the Terrorism Convention], including the supply of all evidence at their disposal necessary for proceedings.<sup>426</sup> The Agreement requires the Member States to “cooperate among themselves . . . through consultations between appropriate agencies, exchange of information, intelligence and expertise and such other cooperative measures as may be appropriate, with a view to[ward] prevention [of] terrorist activities through precautionary measures.”<sup>427</sup>

In this context, it is noteworthy that a SAARC Terrorist Offenses Monitoring Desk (“STOMD”) has been established in Colombo to collate, analyze and disseminate information on terrorist incidents.<sup>428</sup> Its special purpose is to “analyze, [sic] and disseminate information relating to incidence [sic], methods, tactics and strategies adopted by terrorists.”<sup>429</sup> In terms of the Terrorism Convention, “co-operation among Liaison Officers (anti-Terrorist Law Enforcement Officers) is” also being promoted “through the holding of various international meetings, at regular intervals, with a view to monitoring, updating, evaluating and improving counter-terrorism tactics.”<sup>430</sup>

Clearly, the initial purpose of the Terrorism Convention, as evidenced from its provisions, was to avoid miscarriages of justice. While the actual proscription of terrorist groups only remains an expression of government intention, the provisions of the Terrorism Convention are noteworthy as an example of the multifaceted approach, which is necessary in dealing with modern globalized terrorism. Indeed, “[t]errorism today is a complex and global problem—not necessarily only a localized domestic one. Thus, the challenge of fighting terrorism has slowly become global. . . . The growing mobility of terrorism illustrates the critical need for uniformity and for an integral approach to international cooperation.”<sup>431</sup> However, optimism can only be limited since [e]very cause which different terrorist groups claim to represent . . . has evoked some governmental support or condonation. . . . Some governments [will] continue to resist outlawing those who terrorize under the banner of ‘self-determination,’ ‘people’s liberation,’ or some other slogans of ‘new political order.’<sup>432</sup>

In any event, a Convention alone is not an end in itself. Perhaps because of this understanding, terrorism continued to be a constant concern of SAARC Summits held subsequent to the

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426. Terrorism Convention, *supra* note 395, art. VIII, ¶ 1.

427. *Id.* art. VIII, ¶ 2.

428. Karunadasa, *supra* note 112.

429. *Id.*

430. *Id.*

431. Gross, *supra* note 391, at 154.

432. HENKIN, *supra* note 392, at 292.

Kathmandu Summit (1987). For instance, the Eighth New Delhi Summit, held in May 1995, had “expressed serious concern on the spread of terrorism in and outside the region and [had] reiterated their unequivocal condemnation of all [types of terrorist] methods, acts and practices.”<sup>433</sup> Further, it “emphasized that [the] highest priority should be accorded to the enactment of enabling legislation at the national level to give effect to the SAARC Regional Convention on Suppression of Terrorism.”<sup>434</sup> Similarly, at the ninth SAARC Summit held in Male (1997) and also at the successive Colombo and Kathmandu Summits, terrorism appeared as an issue which posed serious threat to regional security and stability. The Summits reiterated their firm commitment toward combating terrorism.

Despite the legal framework and different declarations in its favor, according to a 1998 report prepared by the Group of Eminent Persons,<sup>435</sup> this Convention has not been able to create any real impact on controlling terrorism through regional cooperation.<sup>436</sup> Member States may need to continue to refine their approach in tackling the issue.

## 2. Curbing Drug Abuse

“The effects of drug trafficking on Member States are tantamount to an attack on the government itself. Drug crimes drain the economy, degrade governmental legitimacy and cause increased levels of corruption by government officials.”<sup>437</sup>

“Drug trafficking had first been identified as a key issue at the Fourth SAARC Summit held in Islamabad in 1988.”<sup>438</sup> “The Heads of States . . . in their Final Declaration expressed [their] grave

433. Eighth SAARC Summit, New Delhi Declaration, ¶ 37.

434. Eighth SAARC Summit, New Delhi Declaration, ¶ 38. Even now, some countries are still to enacting the necessary domestic legislation to give effect to the Convention. Sri Lanka was the first country in South Asia to enact domestic legislation to give effect to the SAARC Convention by passing its own Suppression of Terrorism Act-No.70 of 1988. Except for Pakistan and Bangladesh, all other member countries have enacted domestic legislation. *India to Push through terror convention at SAARC summit*, HINDUSTAN TIMES, Dec. 26, 2001, at 1, available at <http://www.nrlinks.com/nrnews/TI1838.htm> (last visited Sept. 16, 2002).

435. An Experts' group constituted during the 1997 Male Summit, to review the functioning of SAARC. See 9th SAARC Summit, *supra* note 378, ¶ 4.

436. Ismeth, *supra* note 158.

437. CarrieLyn Donigan Guymon, *International Legal Mechanisms For Combating Transnational Organized Crime: The Need For A Multilateral Convention*, 18 BERKELEY J. INT'L L. 53, 64 (2000); “Illegal drugs are one of the world’s largest trade sectors, with the global market estimated at \$400-\$500 billion a year, nearly 10% of total world trade and larger than the global automobile market.” Kal Raustiala, *Law, Liberalization & International Narcotics Trafficking*, 32 N.Y.U. J. INT'L L. & POL. 89, 90 (1999).

438. Karunadasa, *supra* note 112, at 51. For highlights of the Meetings of Foreign Secretaries, held on November 13 1986, see UMAR, *supra* note 3, at 103.

concern over the growing magnitude and serious effects of drug abuse, particularly among" youth.<sup>439</sup> Accordingly, "they recognised the need for urgent and effective measures to eradicate this evil a[n]d decided to declare the year 1989 as the 'SAARC Year for Combating Drug Abuse and Drug Trafficking.'<sup>440</sup> In parallel, "[t]hey agreed to launch a concerted campaign . . . to significantly augment SAARC efforts to eliminate drug abuse and drug trafficking," which includes the "closer cooperation in creating a greater awareness of the hazards of drug abuse, [the] exchange of expertise, [the] sharing of intelligence information, [the development of] stringent measures to stop trafficking in drugs and introduction of effective laws."<sup>441</sup> In addition, "[t]hey directed . . . that the Technical Committee concerned . . . [to] examine the possibility of a Regional Convention" for this purpose.<sup>442</sup>

As a consequence, in November 1990, the SAARC Convention on Narcotic Drugs and Psychotropic Substances was signed.<sup>443</sup> "It came into force on 15 September 1993 following ratification by all Member States."<sup>444</sup> This Convention, which was the third international instrument signed by SAARC countries after its formation,<sup>445</sup> seeks to reinforce and supplement the relevant international conventions and promote cooperation among member states in both law enforcement, and supply and demand reduction at the regional level.<sup>446</sup> Incorporating the generally accepted principles of extradition or prosecution, which are consistent with the respective national legislative regimes, the Narcotics Convention envisions the broadest measures for mutual legal assistance among Member States in investigation, prosecution and judicial proceedings with respect to drug offenses.<sup>447</sup> Thus, it is a

439. Fourth SAARC Summit, Islamabad Declaration, ¶9. For a detailed account of the situation of illicit drug trafficking in some countries in the region, see generally Pascal Perez, ETAT DES DROGUES, DROGUES DES ETATS: OBSERVATOIRE GEOPOLITIQUE DES DROGUES [State of Drugs, Drugs of State: Geopolitical Observations of Drugs], Collection Pluriel (1994).

440. Declaration of the Fourth SAARC Summit, para. 9 (Islamabad 1988), at <http://saarcnet.org.inewsararcnet/saarcdocuments/4ss-decl.htm> (last visited Sept. 14, 2002).

441. *Id.*

442. *Id.*

443. SAARC Convention on Narcotic Drugs and Psychotropic Substances, Nov. 23, 1990 [hereinafter "Narcotics Convention"].

444. Karunadasa, *supra* note 112, at 51.

445. *Id.* at 51.

446. See Narcotics Convention, *supra* note 443. The global drug regime comprises a series of major treaties and UN institutions, as well as bilateral efforts between consumer and producer states. The major UN Conventions are the 1961 Single Convention on Narcotics Drugs 1961, (the single convention), its 1972 Protocol, the 1971 Convention on Psychotropic substances, and the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. See *id.* at 1. For a brief introduction about the several conventions, see Raustiala, *supra* note 437, at 103-110.

447. See Narcotics Convention, *supra* note 443.

'step forward' in augmenting the efforts of South Asian countries to eliminate the root cause of drug abuse and the enormous profits deriving from illicit traffic.<sup>448</sup>

Briefly stated, the Narcotics Convention essentially purports to promote cooperation among Member States to "address more effectively the various aspects of prevention and control of drug abuse and the suppression of illicit traffic[king] in narcotic drugs and psychotropic substances."<sup>449</sup> Member States agree to take all of the necessary legislative, regulatory and administrative measures to carry out their obligations "in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States."<sup>450</sup> Thus, the eighteen articles in the SAARC Narcotics Convention deal at length with many aspects pertaining to drug offenses, sanctions, jurisdictions, prosecutions, extradition, and legal assistance.<sup>451</sup>

#### (a) *Offences & Sanctions*

The Convention brings within its purview a broad range of offences.<sup>452</sup> For instance, "the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic or psychotropic drug contrary to the provisions of the 1961 Convention . . . or the 1971 Convention" are prohibited.<sup>453</sup> Similarly,

the cultivation of opium poppy, coca bush or cannabis plant for the production of narcotic drugs contrary to the provisions of the 1961 Convention . . . the possession or purchase of any [such] narcotic drug or psychotropic substance . . . [and] the manufacture, transport or distribution of equipment or materials, or of substances listed in [the] 1988 U.N. Convention [are prohibited].<sup>454</sup>

These substances are specifically prohibited when it is known that they are being used or are to be used for illicit cultivation,

448. *Id.* pmb1.

449. *Id.* art. 2, ¶ 1.

450. *Id.* art. 2, ¶¶ 2-3.

451. *See id.*

452. *Id.* art. 3.

453. *Id.* art. 3(a).

454. *Id.* art. 3(b-d).



production or manufacture of any narcotic or psychotropic drugs.<sup>455</sup> Furthermore, the following activities are also prohibited, which include:

the organisation, management or financing [of any drug offence]; the conversion or transfer of property, knowing that such property is derived from the proceeds from any [drug-related] offence . . . or from an act of participation in such offence . . . for the purpose of concealing or disguising the illicit origin of [t]he proper[t]y or of assisting any person who is involved in the commission of such an offence to evade the legal consequences of his actions [are also prohibited].<sup>456</sup>

Similarly, “the concealment . . . of the true nature, source, location, disposition, movement, rights with respect to ownership of property, knowing that such property is derive from an offence or from an act of participation in such an offence” is prohibited.<sup>457</sup> “[T]he acquisition, possession or use of property, knowing . . . that such property is derived from an offence, or from an act of participation in such offence” is also prohibited.<sup>458</sup> “[T]he possession of equipment or materials, or of substances . . . knowing that they are being or are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances” is prohibited.<sup>459</sup> Public incitement or inducement of others to commit any offense or to use narcotic or psychotropic substances drugs is prohibited.<sup>460</sup> Finally, “participation in . . . conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any such offence” are also prohibited.<sup>461</sup>

If the offences are captured in detail, so are the sanctions.<sup>462</sup> All Member States ensure to make the commission of the offenses punishable by appropriate penalties.<sup>463</sup> In minor cases, they may provide measures such as education, rehabilitation or social re-integration as alternatives to convictions or punishments.<sup>464</sup>

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455. *Id.*

456. *Id.* art. 3(f).

457. *Id.* art. 3(g).

458. *Id.* art. 3(h).

459. *Id.* art. 3(i).

460. *Id.* art. 3(j).

461. *Id.* art. 3(k).

462. *Id.* art. 4.

463. *Id.* art. 4, ¶ 1.

464. *Id.* art. 4, ¶ 2.

When the offender is a drug abuser, then treatment and aftercare may be provided.<sup>465</sup> "The courts and other competent authorities [in these countries] can take into account factual circumstances" in deciding on the particularly serious nature of the offence.<sup>466</sup> Such circumstances may include the involvement in the offence of an organized criminal group<sup>467</sup> or the use of violence or arms by the offender.<sup>468</sup> Additional factors to take into account in the consideration of the severity of the offense or in the consideration of early release of parole of convicted persons include:

the fact that the offender holds a public office . . . ; the victimisation or use of minors; the fact [t]hat the offence is committed in a penal or an educational institution or social service facility . . . or in other places to which school children and students resort for educational, sports and social activities; [or] prior conviction . . . whether foreign or domestic.<sup>469</sup>

In parallel to courts, Member States agree to mandate their competent agencies to confiscate proceeds derived from the commission of the offense, the use of materials, equipment or other instrumentalities, or the identification, trace, or freezing of seized proceeds, property or instrumentalities.<sup>470</sup>

*(b) Jurisdictional Cooperation*

Under the Convention, each Member State has to establish jurisdiction over offences "committed in its territory, [or] on board a vessel flying its flag or an aircraft, which is registered under its laws, [or] when committed by one of its nationals or by a person who" resides in its territory.<sup>471</sup> Jurisdiction should also be established over acts of participation, association, or conspiracy to commit an offence, or over the act of aiding, abetting, facilitating and counseling the commission of any offense outside its territory, "with a view to commission, within its territory."<sup>472</sup> If a country does not want to extradite an offender who is present in its territory, provisions should also be made to submit the case to

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465. *Id.* art. 4, ¶ 3.

466. *Id.* art. 4, ¶ 4.

467. *Id.* art. 4, ¶ 4(a-c).

468. *Id.* art. 4, ¶ 4(d).

469. *Id.* art. 4, ¶ 4(e-h).

470. *Id.* art. 10.

471. *Id.* art. 5, ¶ 1(a-c).

472. *Id.* art. 5, ¶ 1(d).

competent authorities for prosecution through proceedings.<sup>473</sup> Such an offense “shall not be regarded as fiscal or political offences or as offences connected with a political offence or as offences inspired by political motives.”<sup>474</sup>

(c) *Attacking Supply-Demand*

Generally, drug laws and policies are intended to address the problem with a combination of demand-side, supply-side and harm-reduction strategies.<sup>475</sup> The Narcotics Convention focuses on attacking supply and demand for drugs, with some provisions to help reduce the harmful effects of drugs.<sup>476</sup> Each Member State takes appropriate measures in preventing illicit cultivation in addition to eradicating plants containing narcotic or psychotropic substances, and adopting “appropriate measures aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances.”<sup>477</sup> This is done with a view towards reducing and eliminating financial incentives for illicit traffic,<sup>478</sup> as well as, “measures for early destruction or lawful disposal of the narcotic drugs, psychotropic substances . . . which have been seized or confiscated.”<sup>479</sup> Towards this end, each Member State also facilitates the exchange of scientific and technical information and research.<sup>480</sup>

Close cooperation among Member States, “consistent with their respective domestic legal and administrative systems, with a view to[ward] enhancing the effectiveness of law enforcement action to suppress [t]he commission of offences” is also another understanding reached under the Convention.<sup>481</sup> In this context, priority is given to “establish[ing] and maintain[ing] channels of communication between their competent agencies to facilitate the secure and rapid exchange of information concerning all aspects of such offences.”<sup>482</sup> In addition, it allows for “the appropriate use or controlled delivery on the basis of bilateral agreements with a view to[wards] identifying persons involved in offences . . . and taking legal action against them.”<sup>483</sup>

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473. *Id.* art. 7.

474. *Id.* art. 9.

475. Raustiala, *supra* note 437, at 99.

476. Narcotics Convention, *supra* note 443, art. 12.

477. *Id.* art. 12, ¶¶ 1-3.

478. *Id.* art. 12, ¶ 3.

479. *Id.* art. 12, ¶ 4.

480. *Id.* art. 12, ¶ 2.

481. *Id.* art. 13, ¶ 1.

482. *Id.* art. 13, ¶ 1.

483. *Id.* art. 13, ¶ 2.

*(d) Mutual Legal Assistance & Information Sharing*

The Narcotics Convention envisions the broadest measures for “mutual legal assistance” between Member States in the investigation, prosecution, and judicial proceedings with respect to drug offenses.<sup>484</sup> Accordingly, Article 14 requires Member States to furnish information to each other and to the Secretary General of SAARC about the implementation of the Narcotics Convention in their territories and in the texts of legislations promulgated to give effect to it.<sup>485</sup> The exchange of information includes particulars of cases involving illicit trafficking within their jurisdiction in which they consider, “the quantities involved, the sources from which the substances are obtained or the method employed by persons so engaged.”<sup>486</sup>

Measures of legal assistance include:

taking evidence or statements from persons; effective service of judicial documents, executing searches and seizures; examining objects a[n]d sites, providing information and evidentiary items; providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records; identifying or tracing proceeds, property, instrumentalities or other items for evidentiary purposes.<sup>487</sup>

In this context, the Convention is clear: mutual legal assistance cannot be declined on the ground of bank secrecy.<sup>488</sup>

*(i) Execution of the Request*

An authority, to be responsible for executing requests for mutual legal assistance, is designated by each country.<sup>489</sup> All other countries and the Secretary General of SAARC are notified of the designation.<sup>490</sup> “Transmission or requests for mutual legal assistance and any communication related” are to be effected through such designated authorities.<sup>491</sup> However, this requirement is “without prejudice to the right of a State to require that such

484. *Id.* art. 11, ¶ 1.

485. *Id.* art. 14(a).

486. *Id.* art. 1(b).

487. *Id.* art. 11, ¶ 2(a-g).

488. *Id.* art. 11, ¶ 5.

489. *Id.* art. 11, ¶ 7.

490. *Id.*

491. *Id.*

requests and communications be addressed to it through diplomatic channels and, in urgent circumstances . . . through the International Criminal Police Organization.<sup>492</sup>

A request is executed in accordance with the domestic law of the requested State.<sup>493</sup> The requesting State has an obligation to neither transmit, “nor use information . . . or evidence furnished by the requested State for investigations, prosecutions or proceedings” for purposes other than those stated in the request.<sup>494</sup> Normally, requests for mutual legal assistance are made in writing, except in urgent circumstances where oral requests may be permitted, but need to be later confirmed in writing.<sup>495</sup> Such requests should include:

[t]he identity of the authority making the request; [t]he subject matter and nature of the investigation, prosecution or proceeding to which the request relates and the name and the function of the authority conducting such investigation, prosecution or proceeding; a summary of the relevant facts except in respect of requests for the purpose of service of judicial documents; [and a] description of the assistance sought and details of any particular procedure the requesting State wishes to [b]e followed; [w]here possible, the identity, location and nationality of the person concerned, [and] the purpose for which the evidence, information or action are sought [should also be included in the request].<sup>496</sup>

Also, there are situations where legal assistance can be refused or postponed. For instance, legal assistance may be refused if the request is not made in conformity with the Narcotics Convention, “if the requested State considers that execution of the request is likely to prejudice its sovereignty, security, public order (*ordre public*), or other essential interest,” or if it would be contrary to domestic law.<sup>497</sup> However, the state refusing to comply with the request, has to provide reasons for refusal.<sup>498</sup>

Along the same lines, legal assistance can be postponed “on the ground that it interferes with an ongoing investigation, prosecution

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492. *Id.*

493. Narcotics Convention, *supra* note 443, art. 11, ¶ 11.

494. *Id.* art. 11, ¶ 12.

495. *Id.* art. 11, ¶ 8.

496. *Id.* art. 11, ¶ 8(a-f).

497. *Id.* art. 11, ¶ 14(a-c).

498. *Id.* art. 11, ¶ 15.

or proceeding.<sup>499</sup> In these cases, both the requested and the requesting States should consult with each other to determine a course of action defining the terms and conditions needed to still respond to the request.<sup>500</sup>

The ordinary costs of executing a request are to be borne by the requested State.<sup>501</sup> "If expenses of a substantial or extraordinary nature are . . . required to fulfill the request, the States shall consult [with one another] to determine the terms and conditions under which the request will be executed as well as the manner in which the costs will be borne."<sup>502</sup>

### (ii) *Immunity*

A witness, expert or other person who consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State, shall not be prosecuted, detained, punished or subjected to any other restriction of his personal liberty in that territory in respect of acts, omissions or convictions prior to his departure from the territory of the requested State. [However,] [s]uch safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days, or...for any period agreed upon by the States, from the date on which he has been officially informed that his presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory or, having left it, has returned of his own free will.<sup>503</sup>

### (iii) *Information Exchange*

For the purpose of ensuring mutual legal assistance, information becomes important, within the context of the Narcotics Convention in either of two forms. It may either be related to a specific case or may be made for general cooperation purposes.

If a Member State has reason to believe that an alleged offender has fled from its territory after committing an offence, it has to "communicate to all other concerned States all the pertinent facts

499. *Id.* art. 11, ¶ 16.

500. *Id.*

501. Narcotics Convention, *supra* note 443, art. 11, ¶ 18.

502. *Id.*

503. Narcotics Convention, *supra* note 443, art. 11, ¶ 17.

regarding the offence committed and all available information regarding the identity of the alleged offender."<sup>504</sup> If the circumstances "so warrant, the Member State in whose territory the alleged offender is present shall take appropriate measures under its domestic law so as to ensure the offender's presence for the purpose of prosecution or extradition."<sup>505</sup> The State where the offense was committed and the State, in which the alleged offender is a national or in whose territory the offender permanently resides, needs to be notified of such actions.<sup>506</sup>

"The effectiveness of the international legal regime for drug control is generally considered low in relation to the scope of the problem."<sup>507</sup> It is therefore important to provide extra-care in the enforcement as well as other relevant aspects of the regime to optimize effectiveness. In this context, it is noteworthy that a SAARC Drug Offences Monitoring Desk ("SDOMD") has been established in Colombo to collate, analyze and disseminate information on drug related offences in member countries.<sup>508</sup> The implementation of the Narcotics Convention is monitored by the Technical Committee on the Prevention of Drug Trafficking and Drug Abuse, during its annual meetings.

#### IV. CONCLUSION

SAARC is only seventeen years old. To expect the "adolescent" to keep up with more mature organizations such as the European Union, which has been around for much longer, is quite unrealistic. Nevertheless, an objective conclusion should be attempted.

In 1985, when SAARC was set up to promote the welfare of the peoples of South Asia, its leaders pledged to expand economic, scientific, social, cultural and technical co-operation, and to work together in international fora on issues of common interest.<sup>509</sup> Today after a decade and a half, and after eleven summits of SAARC leaders and scores of other lower level meetings, little has been achieved in promoting economic co-operation, and in jointly implementing agreements on issues ranging from combating terrorism and drugs, tackling food insecurity, to expanding trade, investment and industrial ties. Nonetheless, the achievement is still praiseworthy in light of the fact that South Asia has always been a geographic region, which is strangely full of discrepancies

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504. *Id.* art. 6, ¶ 1.

505. *Id.* art. 6, ¶ 2.

506. *Id.* art. 6, ¶ 2(a-b).

507. Raustiala, *supra* note 437, at 113.

508. Parthasarathy, *supra* note 423, at 41.

509. Mishra, *supra* note 51, at 74.

between the eagerness for regional cooperation on the one hand and open hostilities on the other hand.

### A. Widened Efforts

Institutional dynamism seemed omnipresent in the beginning. SAARC focused primarily on technical cooperation with the aim of creating a common ground. The eleven technical committees<sup>510</sup> drew “up an Annual Calendar of activities for [the] exchange of information, [the] formulation of programmes and [the] preparation of projects in their respective fields,” which are not the exclusive areas of cooperation.<sup>511</sup>

SAARC activities and meetings [also] take place on specific subjects of common interest . . . when required. Four . . . Regional Centres have also been set up on Agricultural Information (Dhaka [1988]), Tuberculosis Prevention (Kathmandu [1992]), Meteorological Research (Dhaka [1995]), and on Documentation of SAARC interest [India, 1994]. A fifth Regional Centre on Human Resource Development is proposed to be established in Islamabad, Pakistan.<sup>512</sup>

Around 1990, “the second stage of cooperation within SAARC” started with an emphasis on social agenda.<sup>513</sup> Major initiatives were taken on “social issues such as [the] eradication of poverty, [the] promotion of literacy, and [the] development of women and children. [Also,] [i]t was decided that the decade [of] 2001-2010 would be designated as the ‘SAARC Decade of the Rights of the Child.’”<sup>514</sup> The persistent problem of poverty in the region was also emphasized when the Heads of State of the Member States “committed themselves to the eradication of poverty in South Asia by the year 2002.”<sup>515</sup> A three-tier institutional structure to evolve cooperation within this field, compromised of “the group of Secretaries to Governments dealing with poverty eradication and

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510. Parthasarthy, *supra* note 423, at 39. Agriculture; Communications; Education; Culture & Sports; Environment & Meteorology; Health & Population Activities; Prevention of Drug Trafficking & Abuse; Rural Development; Science & Technology; Tourism; Transport; and Women's Development.

511. *Id.*

512. *Id.*

513. *Id.*

514. *Id.*

515. *Id.*



social development, the group of Finance/Planning Secretaries . . . and Finance/Planning Ministers," was set up.<sup>516</sup> "This mechanism acts as a forum for [the] exchange of information on poverty eradication . . . strategies and technologies [programs]."<sup>517</sup>

### *B. Limited Achievements*

Indeed, wide-ranging activities have been initiated and carried out and agreements have been concluded, "but taken together, [with few minor exceptions, they have] . . . not helped to build a more cohesive economic grouping of South Asian countries or [to] instill enough confidence among its leaders and people at large, to fully realise the benefits of cooperation."<sup>518</sup> Particularly frustrating is the proliferation of conventions and treaties, which have not had much to do with economic development *per se*. "The long-term goal of building a single South Asian market and developing complementarities [with]in, and creating synergies of, their respective economies was not attempted under the SAARC auspices."<sup>519</sup>

Attempts are definitely genuine, but the areas covered are not of much use. Arguably, many conventions were simply entered into for aesthetic purposes, which at most, would help introduce the institution beyond the borders. For instance, the Food Security Agreement has almost become theoretical. Terrorism, as well as, the Narcotics conventions, have not succeeded in significantly reducing terrorist activities or drug abuse. The Conventions addressing the issues of trafficking in persons or promoting the welfare of children are too recent to be evaluated but many years may still lapse before either become effective. Nevertheless, all the conventions and agreements have created a relatively satisfactory framework for the exchange of intelligence information and other data, and have created a mechanism for cross-border legal assistance based on mutuality and reciprocity. Moreover, these international instruments have attempted to lay the foundation for the minimization of violence and the maximization of social and economic welfare, and the maximization of participation of all Member States in the decision-making process has been realized.

On the other hand, on the trade front, moderate success can be noted. Attempts have been made at the regional level to liberalize international trade.<sup>520</sup> Countries have taken steps by removing the

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516. *Id.*

517. *Id.*

518. Dixit, *supra* note 49, at 3.

519. *Id.* at 1.

520. See generally Panagariya, *supra* note 315, at 353.

many visible and the less visible barriers to international trade. However, achievement still remains less than glorious. Based on the experience dominated by behavioral and attitudinal heterogeneity of the countries in the region, it is safe to conclude that more political understandings will be needed before one can assess the trade arrangements the South Asian region has devised for itself as a highly satisfactory one.

Political stability within, and good relations among, Member States always plays an important role in expediting economic cooperation. Although bilateral relations are not discussed within the SAARC framework, it is important for member countries to solve their internal and bilateral problems.<sup>521</sup> At the 18th SAARC Ministerial Council meeting agreement was reached to use preferential trade agreements between member states as a vehicle for attaining the goals of free trade in South Asia. The unanimity between foreign ministers that free trade is of greater relevance than preferential trading arrangements is a milestone in the progress towards boundary-less trading in the region. However, before the South Asian Free-Trade Agreement materializes, several issues need to be clarified. Among them are, *inter alia*, issues pertaining to special relations, like those between India and Bhutan, India and Nepal or the free trade ties between India and Sri Lanka. It is important to find ways to integrate them into the South Asian Free-Trade Agreement. It is also important to look "at issues where broader cooperation is possible, for instance, energy, where the hydropower of Nepal and Bhutan can be tied up with gas from Bangladesh and technology from India and the U.S."<sup>522</sup> Indeed, "taking one step at a time [and] insulating these issues from . . . political factor[s]" become a major difficulty, but remains crucial for long-term success.<sup>523</sup>

The most contentious aspect of the South Asian Free-Trade Agreement is the issue of Rules of Origin.<sup>524</sup> Tension over the

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521. It should be noted that the revision of SAARC Charter to permit discussions of contentious political issues has come out in the past and has gained momentum, but due to lack of consensus amongst top leadership, is not yet reality. For more details see Mishra, *supra* note 51, at 86.

522. Interview, Nihal Rodrigo, *supra* note 159, at 1.

523. *Id.*

524. Indeed, although

SAPTA was broadly aimed at providing tariff concessions among all member states, [it] was also formed to enable for the smaller SAARC members to enter the vast Indian markets. But a clause in rules of origin insisting that only products having 50 per cent manufacturing base in their respective countries were eligible for tariff concessions became an irritant as most of these countries do not have much of production facilities. These countries thus want origin of production clause to be

domestic content requirements under the Rules of Origin has been present throughout, and several countries want this tension substantially reduced.<sup>525</sup> This is followed by issues concerning “the status of Least Developed Countries (“LDCs”) in SAFTA, [where] the new equation will come into effect once the special relationships change, the loss of revenue for countries when tariff barriers are lowered and a time frame for the entire exercise.”<sup>526</sup> Sri Lanka issues, which “Sri Lanka would like to be considered in a separate category as a small economy” will surface, since Sri Lanka is “not a[n] LDC and has a strong economy” but is limited to growth is due to its small size.<sup>527</sup> “Similarly, the loss of revenue through the lowering of tariff barriers is important for Sri Lanka, since it has already lower rates than, [for instance], India.”<sup>528</sup>

By securing consensus on many unresolved issues and providing that smaller problems are solved in time, the South Asian Free-Trade Agreement could lead the region into robust growth within the next thirty years, and in this sense, although not completely immune from criticisms, the South Asian Free-Trade Agreement appears very promising.<sup>529</sup> However, free trade, from a practical standpoint, has to first become a reality,<sup>530</sup> and all the countries of the region have to make their political will as ostensive as possible, so as to facilitate further enhancement of the applicable legal framework.

### C. Optimism for Prospects

In view of the relatively slow pace of achievements, as well as the continual tension among some countries, there are also scholars who propose the expansion of SAARC.<sup>531</sup> Such ideas for broadening SAARC, which have been around for a few years, suggest that countries look beyond the narrow confines of the subcontinent, shed some earlier inhibitions on projects of sub-regional cooperation, and

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reduced to 25 per cent.

K.J.M. Varma, *SAARC Members Sore Over Poor SAPTA Progress*, INDIAN EXPRESS NEWSPAPERS (Bombay), July 27, 1998, at 1-2.

525. *Id.* at 1.

526. Interview, Nihal Rodrigo, *supra* note 159, at 1-2

527. *Id.* at 2.

528. *Id.*

529. However, the South Asian Free-Trade Agreement, according to some economists, is almost certain to be a largely “trade diverting” and hence efficiency-reducing union. See Panagariya, *supra* note 520, at 373.

530. See *Regional Trade Integration: Modest Progress*, SOUTH ASIA MONITOR, May 1, 1999, at 2, available at <http://www.csis.org/saprog/sam9.html> (particularly discussions on why the regional trade is low and the implication for SAPTA) (last visited Nov. 9, 2002).

531. See *supra* text accompanying note 65. See also Nitish Sengupta & Arindam Banik, *Regional Trade & Investment: Case of SAARC*, ECON & POL. WEEKLY 2930-31 (Nov. 15, 1997).

develop new links and strands of cooperation bilaterally, sub-regionally and regionally across the entire Indian Ocean region.<sup>532</sup> Indeed, the proposal has some merit. However, SAARC “cannot be exclusively driven by a defensive response to the pressures of globalization but must rediscover for itself the compelling logic underlining a process of constructive regionalism.”<sup>533</sup> If SAARC has not been successful in systematically changing the behavior of Member States on all issues, it has, on some issues, no doubt, been a vehicle for implementing instruments of national policies. Again, one should bear in mind, as suggested by a commentator, that “SAARC is a marriage of convenience rather than love.”<sup>534</sup> Indeed, SAARC provides an alternative, if not an accompanying structure, within which relations can be conducted among Member States, and provides a significant, alternative structure in which smaller states may get a sense of equality and a distinct identity with regard to larger countries on issues concerning the region. In this sense, SAARC has become significant for the political survival of states as distinct and sovereign entities.

In addition, purely from an international law standpoint, the regular declarations, in the course of the one and a half-decade of SAARC’s existence, have frequently adopted hortatory statements of principle, covering many issues and reaffirming the goal of economic growth, as well as social and behavioral changes. This, no doubt, remains a prominent normative activity of SAARC - its role in the making of international law, which cannot and should not be ignored, *in toto*.

Therefore, providing a final conclusion about SAARC is a challenging task, particularly in view of its less than noteworthy achievements. However, there is no reason to take a cynical view and emphasize dramatic rhetoric about SAARC’s seeming inability to deal with vital problems of the region. Also, there is no reason to be idealistic and envisage, through SAARC, global solutions to all the major problems facing South Asia, without recognition of the constraints imposed by state sovereignty, and the disparate needs, choices, priorities and agendas of Member States. No doubt, the approach should be a cautious one, one of the middle-road, neither of total rejection nor of total acceptance in entirety; an approach which will lead all Member States, large and small, to a situation where tension will be contained, sovereignty will be respected, and

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532. See Parthasarathy, *supra* note 423; see, e.g., K.K. Katyal, *Free trade still a long way off*, THE HINDU, Jan. 10, 2002, available at <http://www.hinduonnet.com/thehindu/2002/01/10/stories/2002011001521200.htm> (last visited Nov. 9, 2002).

533. Ismeth, *supra* note 158, at 2.

534. Zingel, *supra* note 328, at 1.

positive developmental actions will continue to thrive. In this sense, the future is more important than the present.

