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The SAFTA Dispute Settlement Mechanism: An Attempt to Resolve or Merely Perpetuate Conflict in the South Asian Region?

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COMMENT

THE SAFTA DISPUTE SETTLEMENT MECHANISM: AN ATTEMPT TO RESOLVE OR MERELY PERPETUATE CONFLICT IN THE SOUTH ASIAN REGION?

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INTRODUCTION

On January 1, 2006, the South Asian Free Trade Area ("SAFTA") agreement, negotiated between the seven members of the South Asian Association for Regional Cooperation ("SAARC"), entered into force.[1] The treaty is extremely significant as it aims to promote economic cooperation by increasing intra-regional trade between the

1. *See* Agreement on South Asian Free Trade Area art. 22, Jan. 6, 2004, http://www.saarc-sec.org/data/agenda/economic/safta/SAFTA%20AGREEMENT.pdf [hereinafter SAFTA Agreement] (providing conditions for SAFTA's entry into force on January 1, 2006). The seven contracting member states are: "the People's Republic of Bangladesh, the Kingdom of Bhutan, the Republic of India, the Republic of Maldives, the Kingdom of Nepal, the Islamic Republic of Pakistan and the Democratic Socialist Republic of Sri Lanka." *Id.* pmbl. Among these, Nepal, Bangladesh, Bhutan, and the Maldives are designated "least developed countries." U.N. Conference on Trade and Development [UNCTAD], *The Least Developed Countries Report 2006: Developing Productive Capacities*, iii, U.N. Doc. UNCTAD/LDC/2006 (2006), *available at* http://www.unctad.org/en/docs/ldc2006_en.pdf (classifying least developed countries as such according to economic factors, health and literacy rates, and other development indicators). Designation as a "least developed country" entitles the country to receive "special and more favorable treatment" with respect to anti-dumping, countervailing duties, and quantitative and import restrictions. SAFTA Agreement, *supra*, arts. 1, 11.

member countries, and making the South Asian region more conducive to the receipt of foreign direct investment.[2] In addition, recognizing the long-standing border dispute between the two most prominent member countries, India and Pakistan, the treaty is a major effort toward facilitating improved socio-cultural and political relations in the subcontinent through improved economic ties.[3]

The precursor to the SAFTA agreement, the SAARC Preferential Trading Arrangement ("SAPTA"), entered into force on December 7, 1995.[4] The drafters of the SAPTA envisioned that it would not only provide a foundation to develop the SAFTA agreement, but that these instruments would ultimately result in the creation of other institutional forums, such as a "Customs Union" and "Common Market" and eventually a South Asian "Economic Union."[5] The

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2. *See* WORLD BANK GLOBAL ECONOMIC PROSPECTS 2005: TRADE, REGIONALISM AND DEVELOPMENT 42 (2005), *available at* http://siteresources.worldbank.org/INTGEP2005/Resources/gep2005.pdf [hereinafter WORLD BANK GLOBAL ECONOMIC PROSPECTS] (indicating that under SAFTA, approximately three-quarters of trade between the SAARC countries would occur on a "preferential basis"); *see also SAFTA to Help Attract More Investment to South Asia*, DAILY STAR (Bangl.), Jan. 9, 2004, at 17, *available at* http://www.thedailystar.net/2004/01/09/d40109050154.htm (emphasizing that SAFTA will facilitate economic cooperation, rather than competition, between the region's countries, promote domestic reform, and draw foreign direct investment to one of the world's highly populated and economically attractive markets).

3. *See* WORLD BANK GLOBAL ECONOMIC PROSPECTS, *supra* note 2, at 36–38 (explaining that regional trade agreements, such as the SAFTA agreement, could alleviate conflict between countries by creating institutional mechanisms and opportunities to discuss and resolve disputes); *see also* Afshan Subohi, *What Will SAFTA Mean to Pakistan?*, DAWN (Pak.), Mar. 21, 2004, Business, at 10, *available at* http://www.dawn.com/2004/03/21/ebr8.htm (asserting that the opportunities presented by the SAFTA agreement will continue to diminish Pakistan's concerns about "Indian economic supremacy" in the region, as Pakistanis are already beginning to retain their financial gains—rather than sending them abroad—demonstrating increasing confidence in their own economy).

4. Agreement on SAARC Preferential Trading Arrangement, April 11, 1993, http://www.saarc-sec.org/download.php?id=6 [hereinafter SAPTA]; SAFTA Agreement, *supra* note 1, art. 22(1) (stating that after its entry into force, the SAFTA agreement "shall supercede the [SAPTA]").

5. *See* South Asian Free Trade Area, http://www.saarc-sec.org/main.php?t=2.1.6 (last visited Nov. 4, 2006); *see also* M. Aftab, *Can SAFTA Lead to a South Asian Economic Union?*, DAWN (Pak.), Jan. 19, 2004, at 5, *available at* http://www.dawn.com/2004/01/19/ebr8.htm (discussing the benefits and drawbacks of SAFTA, which may result in the creation of an economic union in the South Asian region).

development of the SAFTA agreement is also consistent with the ideologies of other developing nations to further the notion of "south-south" trade cooperation, in an attempt to create a more prosperous and favorable position in the global economy.[6]

However, to capitalize on the benefits of free trade agreements, it is fundamental that all mechanisms under a treaty function effectively, especially the dispute settlement mechanism.[7] With the successful implementation of the SAFTA agreement, larger members like India and Pakistan certainly stand to benefit.[8] In addition, smaller countries, including Nepal and Bangladesh, also have an important economic and political stake from a freer trade regime.[9]

This article argues that without certain key modifications to the dispute settlement mechanism, the desired interests and benefits of the SAFTA agreement remain illusory.[10] Part I of this article

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6. *See Looking South, North or Both?*, ECONOMIST, Feb. 5, 2004, *available at* http://www.economist.com/world/la/displayStory.cfm?story_id=2409653&no_na_tran=1 (tracking the promotion of "south-south" trade by Brazil, India, and others as a means of boosting economic prosperity and moving closer to United Nations Security Council membership).

7. *See* Nisha Taneja, *Informal and Free Trade Arrangements*, S. ASIAN J., Apr.–June 2004, *available at* http://www.southasianmedia.net/Magazine/Journal/informal_freetrade.htm (explaining the importance of "institutional mechanisms" in formal trading systems, which enable information sharing and reduce the uncertainties of governmental and other regulatory policies and procedures).

8. *See Decks Cleared, SAFTA Rings In*, INDIAN EXPRESS, Dec. 2, 2005, *available at* http://www.indianexpress.com/full_story.php?content_id=83097 (analyzing the potential for Indian trade to "gain significantly" from SAFTA and forecasting the doubling of intra-regional trade between the SAARC countries); Mubarak Zeb Khan, *Shaukat Sounds Optimistic*, DAWN (Pak.), Mar. 21, 2004, *available at* http://www.dawn.com/2004/03/21/ebr9.htm (explaining SAFTA's potential to improve Pakistan's economic position in the region by attracting more foreign direct investment and reducing the volume of unofficial trade).

9. *See* Khadga Singh, *What After SAFTA?*, NEPALI TIMES, Feb. 6, 2004, at 8 (on file with author) (predicting widespread consumer benefits for Nepal while conditioning Nepal's commercial success on comprehensive identification of advantageous commodities). *But see Benefits From Regional Trade Liberalization Stressed*, INDEPENDENT (Bangl.), Dec. 10, 2004, *available at* http://independent-bangladesh.com/news/dec/10/10122004ts.htm (questioning whether the effect of trade diversion—the increase of trade with member states at the expense of trade with nonmember states—provided a net benefit or net loss to Bangladesh).

10. *See* discussion *infra* Part I; *see also* Myung Hoon Choo, *Dispute Settlement Mechanisms of Regional Economic Arrangements and Their Effects on the World Trade Organization*, 13 TEMP. INT'L & COMP. L.J. 253, 254 (1999) (arguing that

illustrates the lack of depth and specificity in the provisions of the SAFTA agreement's dispute settlement mechanism. In analyzing the mechanism, this article compares its provisions with those under the Association of Southeast Asian Nations ("ASEAN") Free Trade Area ("AFTA") and its various agreements ("AFTA agreements"),[11] including its most recent amendment, the Protocol on Enhanced Dispute Settlement Mechanism ("ASEAN Protocol").[12]

Part II provides a critical analysis of the SAFTA agreement's dispute settlement provisions by comparing and contrasting its scope and jurisdiction, panel selection, procedures utilized in deliberating and rendering recommendations, and the use of the appellate review process, with that of the ASEAN Protocol. Part III proposes certain recommendations in response to these lacunae, which, if incorporated, could strengthen the SAFTA agreement's efficacy and implementation in the coming years.[13] Finally, the article concludes that although the SAFTA agreement's dispute settlement provisions currently appear inadequate, they could nevertheless be amended to be more detailed and comprehensive, to assist in the realization of the Contracting States' objectives, while equally benefiting the business community engaged in cross-border trade.[14]

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the achievement of "diverse policy objectives, i.e., trade liberalization or environmental protection, as well as true harmonization among nations" is contingent upon the dispute settlement mechanisms available under the particular regional free trade agreement).

11. *See* Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA), Jan. 28, 1992, 31 I.L.M. 513, *amended by* Protocol to Amend the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA) for the Elimination of Import Duties, Jan. 31, 2003, *available at* http://www.aseansec.org/14184.htm; Framework Agreements on Enhancing ASEAN Economic Cooperation, Jan. 28, 1992, 31 I.L.M. 506 *amended by* Protocol to Amend the Framework Agreement on Enhancing ASEAN Economic Cooperation, Dec. 15, 1995, 35 I.L.M. 1081, *available at* http://www.aseansec.org/12374.htm [hereinafter AFTA Agreements].

12. ASEAN Protocol on Enhanced Dispute Settlement Mechanism, Nov. 29, 2004, http://www.aseansec.org/16754.htm [hereinafter ASEAN Protocol].

13. *See* discussion *infra* Part III (recommending clarification of the scope of the SAFTA agreement's dispute settlement mechanism by indicating specific qualifications and working procedures for the members of the Committee of Experts, and suggesting amendments to the appellate review process).

14. *See* Jeffrey A. Kaplan, *ASEAN'S Rubicon: A Dispute Settlement Mechanism for AFTA*, 14 UCLA PAC. BASIN L.J. 147, 173 (1996) (emphasizing

I. BACKGROUND

In analyzing the most effective types of dispute settlement mechanisms in multilateral and regional free trade agreements, scholars advocate different approaches.[15] Among these, the "negotiation-based settlement" and the "rule-based approach" are perhaps the two most commonly used methodologies.[16] Members of free trade area agreements usually strive toward the latter approach, as it provides a more impartial, fair, consistent, and unbiased platform to efficiently resolve disputes between countries.[17] The ASEAN Protocol follows a more "rule-based" tradition, while the SAFTA agreement's dispute settlement provisions require more depth and elaboration to move toward this effective rule-based system.[18]

A. THE SAPTA DISPUTE SETTLEMENT MECHANISM

Article 20 of the SAPTA provided for amicable resolution

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the importance of a "transparent, independent dispute resolution system" in the context of implementing the AFTA agreements so as to infuse confidence in the members of the private sector engaged in regional cross-border trade).

15. *See generally* Brett A. Albren, Note, *The Continued Need for a Narrowly-Tailored, Rule-Based Dispute Resolution Mechanism in Future Free Trade Agreements*, 20 SUFFOLK TRANSNAT'L L. REV. 85, 105–07 (1996) (comparing relative efficacies of "rule-based" and "negotiation-based" dispute resolution mechanisms).

16. *See id.* at 92 (explaining that the "negotiation-based settlement" approach permits parties to conduct deliberations and reach shared solutions, while the "rule-based" approach inherits much from the "arbitration/adjudication method of dispute resolution," which "emphasizes and emulates the modern judicial system of rules of law, precedent, and appeal procedures"). "Rule-based" approaches benefit most from "agreed-upon rules and case precedent," which support more stable and predictable dispute resolution. *Id.* at 105–06.

17. *See id.* at 105–06 (surveying dispute settlement mechanisms and arguing that "rule-based" systems prevent national power imbalances from consistently skewing the resolution of disputes in favor of the stronger state).

18. *See* Rodolfo C. Severino, Secretary-General, ASEAN, *The ASEAN Way and the Rule of Law*, Address at the International Law Conference on ASEAN Legal Systems and Regional Integration (Sept. 3, 2001) *available at* http://www.aseansec.org/newdata/asean_way.htm (stating that the ASEAN "rules-based" system of "binding legal foundations" will assist the ASEAN nations to achieve "economic integration" and improve their respective domestic legal regimes).

between the Contracting States in the event of a dispute.[19] If amicable dispute resolution failed to produce the desired outcome, either of the disputing parties could submit the matter to the Committee of Participants ("Committee"), which would have 120 days from the date of submission to review the dispute and recommend an appropriate solution.[20] However, the agreement did not delineate specific procedures for the Committee to follow in its review, leaving the review largely to the Committee's discretion.[21] Other ambiguous issues included the obligations of Contracting States to refer their respective trade disputes exclusively to the SAPTA, to conduct domestic independent investigations, or to seek remedies under multilateral institutions, such as the World Trade Organization ("WTO").[22] A recent dumping dispute between India and Bangladesh tested the broad scope of the SAPTA's jurisdiction, and illustrated the flaws of the mechanism.[23]

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19. SAPTA, *supra* note 4, art. 20 (mandating amicable resolution without reference to negotiation, mediation, or other specific means of settlement).

20. *Id.*

21. *See id.*

22. *See, e.g.*, Ranabir R. Choudhury, *Row Over Battery Imports*, HINDU BUSINESS LINE (India), Feb. 16, 2004, *available at* http://www.thehindubusinessline.com/2004/02/16/stories/2004021600080800.htm (discussing the hierarchy of dispute resolution mechanisms in disputes involving potential SAPTA and WTO obligations).

23. *See* Monjur Mahmud, *India Finally to Impose Anti-Dumping Duty*, DAILY STAR (Bangl.), Dec. 15, 2001, *available at* http://www.thedailystar.net/dailystarnews/200112/15/n1121501.htm#BODY4 (describing Bangladesh's surprise and confusion in reaction to Indian anti-dumping investigations and unilateral imposition of a new anti-dumping duty on Bangladeshi imports, without reference to WTO or SAPTA dispute resolution mechanisms). The dispute arose when Indian authorities imposed anti-dumping duties and rescinded preferential trading treatment to Bangladesh because the imports of lead acid batteries from Bangladesh into India were above the WTO's "*de minimis* level" and allegedly caused "material injury" to the Indian industry. Choudhury, *supra* note 22. To resolve the matter, the Bangladeshi Commerce Minister, Amir Khosru Mahmud Chowdhury first sought cooperation from the Indian government and urged Indian officials to utilize dispute settlement procedures under SAPTA. *Id.* The Commerce Secretary stated that "we were expecting some positive gestures from India but they have given a totally wrong signal" which compelled Bangladesh to approach the WTO to utilize its dispute resolution process. *Id.*

B. THE SAFTA AGREEMENT'S DISPUTE SETTLEMENT MECHANISM

Following the SAPTA, Article 10 of the SAFTA agreement provides the dispute resolution framework available to Contracting States by establishing a Committee of Experts ("COE") as its primary dispute settlement body.[24] Article 10 further establishes the SAFTA Ministerial Council ("SMC"), which is the highest administrative body concerned with implementation of the agreement.[25] Similar to the SAPTA, Article 20 of the SAFTA agreement stipulates the dispute settlement mechanism for disputes arising from the "interpretation or application" of the agreement and its related instruments.[26] In laying out the scope and framework for the adjudication of disputes, the SAFTA agreement includes provisions relating to consultations, timely COE review of a dispute, and the procedures for seeking appellate review of a decision by the SMC.[27]

C. THE AFTA AGREEMENTS' DISPUTE SETTLEMENT MECHANISMS

In the initial 1992 Framework Agreement establishing the AFTA, the dispute settlement provision in Article 9 provided for the amicable resolution of disputes between the parties.[28] It also

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24. SAFTA Agreement, *supra* note 1, art. 10(5)–(7) (requiring that the COE consist of one "Senior Economic Official" from each Contracting State with "expertise in trade matters," but not requiring specific qualifications or appointment procedures).

25. *See id.* art. 10(1)–(5) (stipulating that the "Ministers of Commerce/Trade" from each member country will act as the SMC).

26. *See id.* art. 20(1).

27. *See id.* art. 20 (providing timeframes for initiating consultations, conducting investigations, rendering recommendations, and seeking appellate review of decisions); *Mechanism to Settle Dispute Worked Out: SAFTA Treaty*, DAWN (PAK.), Jan. 7, 2004, *available at* http://www.dawn.com/2004/01/07/ebr3.htm (explaining the various substantive provisions available to parties under the SAFTA agreement, such as the procedures for requesting the COE to examine a dispute, and timelines for the COE to render its recommendations).

28. *See* AFTA Agreements, *supra* note 11, art. 9, 31 I.L.M. at 511; *cf.* Deborah A. Haas, Comment, *Out of Others' Shadows: ASEAN Moves Toward Greater Regional Cooperation in the Face of the EC and NAFTA*, 9 AM. U. J. INT'L L. & POL'Y 809, 838–40 (1994) (criticizing the lack of guidance in Article 9).

mentioned the possibility of setting up an ad hoc body to oversee the settlement of disputes, but did not address any other rules or procedures for dispute resolution.[29] A few years later, acknowledging the inadequacy of this provision, the ASEAN Ministers adopted a Protocol on Dispute Settlement Mechanism ("DSM") to implement the AFTA agreements.[30] Most recently at the 10th ASEAN Summit held in 2004, the ASEAN Protocol superseded the DSM and further detailed the dispute settlement mechanism available to parties under the AFTA and other agreements.[31]

Pursuant to the ASEAN Protocol, all disputes arising under the existing and future AFTA agreements are within the purview of the mechanism.[32] The Senior Economic Officials Meeting ("SEOM") and the ASEAN Secretariat are the primary bodies that oversee the dispute settlement process.[33] After exhausting alternative dispute settlement methods, namely consultations, good offices, conciliation, and mediation, the parties may refer their disputes to the SEOM to set up panels as well as review, implement, and monitor the decisions regarding the breach of a party's obligations under the agreement.[34] The ASEAN Protocol also provides more extensive provisions on the role and functioning of the panels, timelines for deliberation and rendering recommendations, a comprehensive appellate review process administered by the ASEAN Economic

29. *See* AFTA Agreements, *supra* note 11, art. 9 31 I.L.M. at 511(requiring, where possible, the amicable resolution of disputes before designation of an outside settlement body).

30. Protocol on Dispute Settlement Mechanism pmbl., Nov. 20, 1996, http://www.aseansec.org/16654.htm [hereinafter DSM].

31. *See* ASEAN Protocol, *supra* note 12, art. 21 (preserving the DSM for all disputes arising before November 29, 2004); *see also Prime Minister Lt-Gen Soe Win Attends 10th ASEAN Summits of Heads of State/Government of ASEAN and Japan, ROK, India and Australia-New Zealand*, NEW LIGHT OF MYANMAR (Myan.), Dec. 4, 2004, *available at* http://www.ibiblio.org/obl/docs/NLM2004-12-04.pdf (reporting the signing of the ASEAN Protocol by the Economic Ministers at the 10th ASEAN Summit).

32. *See* ASEAN Protocol, *supra* note 12, art. 1 (preserving the application of "special or additional rules" present in covered agreements).

33. *See id.* arts. 2, 19 (specifying the responsibility of the SEOM and the ASEAN Secretariat to monitor and assist with the implementation of the ASEAN Protocol).

34. *See id.* arts. 2–9.

Ministers ("AEM"), and procedures for compensation and suspension of concessions.[35]

II. ANALYSIS

Although the SAFTA agreement's dispute settlement mechanism is a significant improvement over the SAPTA, it is still too ambiguous and imprecise to meet the dispute resolution needs of the seven member states.[36] There are several lacunae not addressed by the mechanism.[37] One problem is the ambiguity in the scope and jurisdiction of the SAFTA agreement, which could be a major threshold issue in determining when and what disputes member countries could refer for resolution.[38] Another obstacle is the lack of procedures for the operation of the COE, as well as the largely undefined qualifications of its members.[39] In addition, the appellate review process is also deficient, namely in the lack of scope and the procedure for review of the legal versus substantive matters already examined by the COE.[40] Still more issues are left open-ended but are not within the scope of this article include: the enforcement of decisions, procedures for withdrawing and reinstating concessions, and the catch-all provision allowing Contracting States to opt-out of the SAFTA agreement at any time, without due cause or penalty.[41]

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35. *See id.* arts. 5–9, 12–16 (providing elaborate guidelines for the establishment of panels, the terms of reference, procedures for deliberation and rendering findings, as well as the composition and role of the appellate review body in examining panel reports).

36. *See* SAFTA Agreement, *supra* note 1, art. 20 (lacking depth and specificity on jurisdiction, working procedures for the COE, and other key areas).

37. *Compare id.* art. 20 (failing to provide specific measures for the settlement of disputes), *with* ASEAN Protocol, *supra* note 12, arts. 1–2, 5–9, 11–15 (detailing the mechanism's dispute settlement provisions to assure Member States the availability of a well drafted, comprehensive, and objective dispute settlement mechanism).

38. *See* discussion *supra* note 26 (outlining the jurisdiction of the SAFTA agreement's dispute settlement mechanism); discussion *infra* Part II.A.

39. *See* discussion *supra* note 24 (discussing the member composition of the COE); discussion *infra* Part II.B–C.

40. *See* SAFTA Agreement, *supra* note 1, art. 20(9) (failing to address the scope and extent of the SMC appellate review process); discussion *infra* Part II.D.

41. *See* SAFTA Agreement, *supra* note 1, art. 20(11) (providing for the withdrawal of concessions but not indicating any specific timeline for the withdrawal or possibilities of reinstatement at a later stage if the violating party remedies its behavior); *id.* art. 21 (allowing unilateral withdrawal and termination

In order for the SAFTA agreement's dispute settlement mechanism to move toward a more "rule-based" system with specific guidelines and procedures to adjudicate disputes, certain key areas of the mechanism require reassessment.[42] These areas include: the agreement's jurisdiction, the qualifications and selection of the COE members, the working procedures and terms of reference for the functioning of the COE, and finally, the appellate review process available to Contracting States under the agreement.[43] By amending these and other provisions, the Contracting States will benefit from a stronger, rule-based process while maintaining flexibility and discretion in the adjudication of disputes, thereby facilitating the achievement of the SAFTA agreement's desired objectives.

A. THE SAFTA AGREEMENT DOES NOT DELINEATE THE SCOPE AND JURISDICTION OF THE DISPUTE SETTLEMENT MECHANISM

A primary concern is whether the SAFTA agreement's dispute settlement mechanism will be the sole and exclusive basis for remedying violations of the agreement, or whether Contracting States can simultaneously approach multilateral organizations, such as the WTO, to resolve trade-related disputes, utilizing concurrent jurisdiction.[44] Additionally, the agreement does not discuss instances of violations of the SAFTA agreement and its Contracting States' obligations under the WTO, giving rise to multiple claims under both mechanisms.[45] Like disputes that arose under the SAPTA, the

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of all SAFTA obligations six months after written notice is provided to the SAARC Secretary-General). This broadly written provision permits Contracting States to opt out of the agreement without providing any reason, thereby shirking otherwise binding obligations, including those resulting from noncompliance with unfavorable COE/SMC decisions. *See id.* art. 21(2).

42. *See supra* notes 15–18 (discussing why "rule-based" systems are preferred for dispute settlement mechanisms); discussion *infra* Part II.A–D.

43. *See* discussion *infra* Part II.

44. *See* SAFTA Agreement, *supra* note 1, art. 20(1) (requiring disputing parties to initiate the consultation process without reference to simultaneous proceedings in other fora); *see also* Choudhury, *supra* note 22 (describing the debate over the need to exhaust SAPTA's dispute settlement mechanisms before resorting to WTO Dispute Settlement Understanding ("DSU") procedures).

45. *See, e.g.*, Kyung Kwak & Gabrielle Marceau, *Overlaps & Conflicts of Jurisdiction Between the WTO and RTAs*, 2–12 (Apr. 26, 2002), http://www.wto.org/english/tratop_e/region_e/sem_april02_e/marceau.pdf (explaining the potential for overlapping jurisdiction of WTO and regional trade

SAFTA agreement's mechanism also fails to provide clarity on the parties' obligation to seek assistance solely through its mechanism or whether unilateral action based on a country's internal assessment of a violation would be acceptable.[46]

Unlike the SAFTA agreement, the ASEAN Protocol provides jurisdictional flexibility in its dispute resolution mechanism.[47] Addressing the potential jurisdictional problems that may arise in the context of regional free trade agreements, the ASEAN Protocol clearly stipulates that prior to initiating formal measures under the ASEAN Protocol, its Member States can use any other dispute settlement forum that they consider appropriate.[48] The provision allows parties to use either the WTO or other forums for dispute settlement, while simultaneously being able to request consultations with fellow countries or use good offices, as well as other alternative dispute settlement procedures to resolve their disputes.[49] Allowing recourse to such an array of alternative mechanisms beyond the SAFTA agreement could be especially beneficial to the smaller member countries, such as Nepal, as it would avoid any unfair power dynamics and domination by the larger Contracting States like India and Pakistan.[50]

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agreement dispute mechanisms, and suggesting solutions drawn from doctrines of private international law); *see also* Jeffrey A. Kaplan, *ASEAN'S Rubicon: A Dispute Settlement Mechanism for AFTA*, 14 UCLA PAC. BASIN L.J. 147, 178–80 (1996) (encouraging states facing disputes concerning both WTO and AFTA obligations to utilize ATFA's "dispute avoidance" mechanism before resorting to the more drastic WTO dispute settlement mechanisms).

46. *See supra* notes 22–23 and accompanying text (discussing India's controversial retaliation against Bangladesh without resort to relevant WTO and SAPTA dispute mechanisms).

47. *See* ASEAN Protocol, *supra* note 12, art. 1(3).

48. *See id.* (allowing Member States to "resort to other fora at any stage before a party has made a request to . . . establish a panel").

49. *See id.* arts. 1(3), 3, 4 (permitting ASEAN Member States to use a variety of internal and external dispute settlement mechanisms as an alternative to formal panel-based proceedings).

50. *See Is SAFTA a Non-Starter?*, KATHMANDU POST (Nepal), Jan. 10, 2003, *available at* http://www.nepalnews.com/contents/englishdaily/ktmpost/2003/jan/jan10/features1.htm (arguing that just as there is a power imbalance between the North American Free Trade Area agreement member countries, Canada and Mexico compared to the United States, the same holds true in the South Asian context where the "relative economic strengths" of countries like India and Pakistan would enable them to assert

Further, given the political, socio-economic, cultural, and religious differences between the Contracting States, recourse to good offices, mediation, and other means involving non-South Asian countries could assist greatly in alleviating tensions and arriving at a neutral settlement.[51] However, despite the example of the ASEAN Protocol, the SAFTA agreement merely perpetuates the jurisdictional flaws that existed under the SAPTA.[52] In doing so, the SAFTA agreement leaves the Contracting States vulnerable in the early stages of a dispute.[53]

Another problematic issue is that the SAFTA agreement is silent about situations where the actions or domestic law of a particular Contracting State—while not violative of the SAFTA agreement—may nevertheless inadvertently contradict or nullify the purposes of the agreement.[54] Although allowing such disputes to fall under the SAFTA agreement could hamper the ability of individual governments to enact domestic legislation in accordance with their internal policy objectives, the burden still remains on the Contracting States to make a good faith effort to maintain the objectives of the SAFTA agreement.[55] Cognizant of this issue, the ASEAN Protocol

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authority over the smaller countries, such as the Maldives and Nepal).

51. *See* S. N. Al Habsy & Kishor Uprety, *Cooperation for Nominal Development or Politics for Actual Survival? South Asia in the Making of International Law*, 12 FLA. ST. J. TRANSNAT'L L. & POL'Y 19, 20–30 (2002) (studying the South Asian Association for Regional Cooperation ("SAARC") as a means of overcoming the threats to stability rooted in the region's "diversity in [their] economic and military power" and "mutual suspicion and distrust"); *see also* Nirvikar Singh, *The Idea of South Asia and the Role of the Middle Class* 1–5 (University of California Santa Cruz, Working Paper Series, Paper No. 597, 2005), http://econ.ucsc.edu/faculty/workingpapers/IdeaofSouthAsiaApril2005.pdf (arguing that the development of SAARC institutions reflects the region's evolution from colonial British roots to a new economic and social identity).

52. *See* Abid Qaiyum Suleri & Bhaskar Sharma, Op-Ed, *The SAFTA Mirage*, HIMAL SOUTHASIAN (Nepal), Feb. 2004, *available at* http://www.himalmag.com/2004/february/opinion_3.htm (critiquing the SAFTA agreement for not improving on other "gray areas," such as "rules of origin"). *Compare* SAPTA, *supra* note 4, art. 20, *and supra* Part I.A (analyzing SAPTA's dispute settlement mechanism), *with* SAFTA Agreement, *supra* note 1, art. 20, *and supra* Part II.A (analyzing SAFTA's dispute settlement mechanism).

53. *See* Suleri & Sharma, *supra* note 54.

54. *See* Kaplan, *supra* note 45, at 175–76 (emphasizing the importance of hearing "non-violation" claims addressing "actions not explicitly covered . . . but which severely undermine" intended trade regime benefits).

55. *See id.* (arguing that the acceptance of "non-violation" claims in dispute

stipulates that if a Member State adversely affects the rights of a fellow Member State under the AFTA and its covered agreements, the Member State can offer suggestions to the suspected violating state to change its detrimental action.[56]

B. THE QUALIFICATIONS OF THE MEMBERS OF THE COE ARE NOT ADEQUATELY SPECIFIED IN THE SAFTA AGREEMENT

Under the SAFTA agreement, in the event that Contracting States are unable to amicably resolve their disputes under the consultative and other mechanisms, the COE acts as the primary dispute settlement body.[57] As presently drafted, the SAFTA agreement does not provide any guidelines for the selection of the members of the COE in terms of their qualifications, age, or years of expertise in the area of trade law, policy, or economics either in the domestic or international arena.[58] The lack of specific expertise could impede the COE's ability to function independently and effectively since political appointments in the South Asian region are often fraught with corruption.[59] Further, the fact that the members of the COE are

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settlement mechanisms necessarily requires sacrifices in municipal governance). A model provision suggested for AFTA which could also be applicable to the SAFTA agreement is as follows:

> The dispute settlement procedures of this Agreement shall apply with respect to any dispute between persons, as defined in this Agreement, regarding the interpretation or application of an AFTA agreement or where a person considers that a measure of an AFTA signatory is or will be inconsistent with AFTA obligations or cause a nullification or impairment of a benefit created by AFTA.

Id. at 176.

56. *See* ASEAN Protocol, *supra* note 12, art. 3(2) (allowing Member States affected by violations of the act to make "representations or proposals" to other states, who must give the communications "due consideration").

57. *See* SAFTA Agreement, *supra* note 1, arts. 10(7), 20(2)–20(7) (requiring resort to the COE in cases where a request for consultation is ignored, or in cases where consultations take place, but both states recognize that they have failed).

58. *See id.* art. 10(5) (requiring only that COE members hold "Senior Economic Official" positions and have "expertise in trade matters").

59. *See id. See generally* Salahuddin Aminuzzaman, *A Regional Overview Report on National Integrity Systems in South Asia*, (*produced for* Transparency International South Asia Regional Workshop on National Integrity Systems, Karachi, Pakistan, Dec. 18–20, 2004), *available at* http://www.transparency.org/content/download/1718/8609 (discussing the "systemic corruption" that pervades most of the South Asian economies, and the

political appointees leaves them vulnerable to political or economic pressures, which have a tendency to prevent high-ranking government officials from rendering unbiased decisions involving vital trade matters.[60]

The use of specific qualifications such as a minimum number of years in the civil service, publication in the field of trade law, policy or related fields, and academic or consulting experience at a regional or international level could help diminish allegations of corruption among the COE's members.[61] An additional problem is that the SAFTA agreement excludes experts from the non-governmental or private sectors, namely scholars, academicians, and private practitioners engaged in cross-border transactions, from providing useful expertise in a dispute between the Contracting States.[62] Allowing the participation of such individuals would not only reduce fears of bias or pressures inherent in the political nature of the COE's appointees, but would also add valuable depth and knowledge to the interpretation and application of the SAFTA agreement in each specific dispute.[63]

Although the COE may solicit the assistance of a "specialist" from a Contracting State to provide "peer review of the matter referred to it," the SAFTA agreement is yet again silent on the qualifications or selection procedure for these individuals.[64] Therefore, the same

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general lack of skilled and adequately qualified personnel within the national administrative and political divisions).

60. *Compare* SAFTA Agreement, *supra* note 1, art. 10(5) (stating that the COE will be comprised of "Senior Economic Official[s]" but not indicating whether they would be expected to act in their governmental capacity or neutrally), *with* ASEAN Protocol, *supra* note 12, app. II(I)(9) (requiring panelists to "serve in their individual capacities and not as government representatives, nor as representatives of any organization" to avoid any political or other undue influence).

61. *See* ASEAN Protocol, *supra* note 12, app. II(I) (establishing specific selection criteria relating to "the independence of the members, a sufficiently diverse background and a wide spectrum of experience").

62. *See, e.g.*, SAFTA Agreement, *supra* note 1, art. 10(5) (allowing only government officials to be members of the COE).

63. *See, e.g.*, David Livshiz, Note, *Public Participation in Disputes Under Regional Trade Agreements: How Much is Too Much—The Case for a Limited Right of Intervention*, 61 N.Y.U. ANN. SURV. AM. L. 529, 550–51 (2005) (touting regional agreements like the U.S.-Chile Free Trade Agreement, that require specific qualifications of panelists and specialization in specific areas of law).

64. *See* SAFTA Agreement, *supra* note 1, art. 20(8) (permitting the COE to establish a panel of eligible specialists for "peer review" purposes).

concerns previously discussed pertaining to the COE members' qualifications and political bias also apply to the "specialist" in the adjudication of disputes.[65]

In comparison, the ASEAN Protocol has elaborate and detailed criteria for the composition of the panels, and these safeguards diminish fears of bias or inability of the individual panelists to effectively adjudicate disputes.[66] For instance, the ASEAN Protocol allows for the appointment of "non-governmental" personnel with specific experience either within the ASEAN institutional framework or within other reputable organizations, thereby adding diversity and depth to the panelists.[67] Moreover, it specifies other criteria such as publication, teaching, and professional experience, not only in international trade or law, but also in other fields encompassed by the AFTA agreements.[68] Having access to such a wide array of individuals allows Member States to take advantage of the specific knowledge and expertise required for the resolution of the parties' specific disputes.[69] Such detailed provisions ensure the neutral and

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65. *See id.* (remaining silent on the "specialist's" political affiliations or depth of expertise on a particular subject matter); *see, e.g.*, Livshiz, *supra* note 63, at 550–51 (noting that the use of panelists with expertise in labor, environment, and other specialized subject matters reduces the appearance of a trade regime's relative bias for commercial interests).

66. *Compare* SAFTA Agreement, *supra* note 1, art. 10(5) (discussing the establishment of the COE from "nominee[s]" of the Contracting States) *and* SAFTA Agreement, *supra* note 1, art. 20(8) (providing for the inclusion of a "specialist from a Contracting State not party to the [particular] dispute"), *with* ASEAN Protocol, *supra* note 12, art. 8(1) (noting that the panels have the independence to determine their own procedures, apart from following the prescribed guidelines in Appendix II) *and* ASEAN Protocol, *supra* note 12, app. II(I)(1)–(9) (detailing the qualifications, expertise, and background of the members of the panels under the ASEAN Protocol).

67. *See* ASEAN Protocol, *supra* note 12, app. II(I)(1) (allowing the panels to be comprised of those "who have served on or presented a case to a panel, served in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member State").

68. *See id.* app. II(I)(4) ("Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements."). The ASEAN Protocol additionally states that the lists of panelists "shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements." *Id.*

69. *See id.* app. II(I)(2) (noting that the selection of the panelists in accordance

effective functioning of the panels, and would be an invaluable addition to the SAFTA agreement's text.[70]

C. THE WORKING PROCEDURES FOR THE COE IN THE SAFTA AGREEMENT ARE LEFT LARGELY TO THE COE'S DISCRETION

While outlining the timeframe within which the COE must investigate a dispute and render its recommendations to the Contracting States involved, the SAFTA agreement is silent on the procedures, rules, and nature of such deliberations.[71] Accordingly, without further guidance, the SAFTA agreement would allow the COE broad discretion to utilize any processes or methods it deems fit to examine a dispute and make recommendations.[72] The lack of specific terms of reference could significantly hamper the ability of the COE to engage in fair and meaningful deliberations to arrive at its conclusions.[73]

For instance, the SAFTA agreement does not indicate the procedure or format for disputing parties to present evidence to the COE, namely whether the evidence would be oral or written, whether parties could bring in experts or witnesses to testify on their behalf, or whether parties could rebut allegations.[74] In contrast, the ASEAN Protocol details the manner in which the panel receives written and oral submissions from not only the disputing states but also from interested third parties.[75] Further, under the ASEAN Protocol, all statements, rebuttals, and other information presented before the

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with the procedures set forth in the ASEAN Protocol's appendix is aimed at "ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience").

70. *See id.*

71. *See* SAFTA Agreement, *supra* note 1, art. 20(7) (requiring the COE to conclude an investigation and make a recommendation within sixty days, but not establishing procedures for such investigation or deliberation).

72. *See id.* art. 10(10) (providing that the COE is free to use its "own rules of procedure" without giving any guidelines, framework, or terms of reference).

73. *See id.*

74. *See id.* arts. 10(10), 20(7).

75. *See* ASEAN Protocol, *supra* note 12, app. II(II) (4)–(6) (stipulating the procedures by which parties can present their written complaints including "the facts of the case and their arguments" and responses to allegations, as well as the manner in which third parties may attend and participate in the proceedings, provided that they have informed the SEOM of "their interest in the dispute").

panel are available to other parties and the public.[76] Specifying such procedures would allow the SAFTA agreement's Contracting States room to present a wide array of evidence supporting their positions, and facilitate more meaningful deliberation by the COE in making its recommendations, which is critical to ensuring fairness within the proceedings.[77]

Another related concern is that although the SAFTA agreement allows for the participation of a "specialist" in the decision-making process, it does not specify the nature and extent of this individual's involvement.[78] Given that the qualifications of the members of the COE are relatively unclear, the use of a "specialist" could be especially valuable to the COE in assessing complicated trade-related disputes that may arise under the SAFTA agreement.[79] In comparison, the ASEAN Protocol acknowledges that panels could benefit from expert opinions, and therefore allows its panels to obtain information or guidance from any outside source, which the panels can then consider in rendering decisions.[80] Although neither the ASEAN Protocol nor the SAFTA agreement provide guidance on the role expert suggestions should play in the panel's decision-making process, the ASEAN Protocol at least allows the panels to obtain advice from any source believed to assist the panel's determinations.[81] Narrowing the COE's ability to gain assistance only from a single "specialist," without further direction as to such an individual's qualifications or role, would not substantially add value to the proposed "peer review" process.

Moreover, unlike the ASEAN Protocol's emphasis on panels performing "objective assessment" of the parties' obligations under the AFTA agreements, the SAFTA agreement leaves room for the

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76. *See id.* app. II(II)(3), (11) (permitting a Member State to publicly disclose any information pertaining to its own involvement in a case as well as to request "non-confidential [summaries]" of positions of other parties, and allowing parties access to "presentations, rebuttals and statements").

77. *See id.* app. II(II).

78. *See* SAFTA Agreement, *supra* note 1, art. 20(8).

79. *See supra* notes 66–67 (discussing the lack of qualifications or selection criteria for the "specialist" in the SAFTA agreement).

80. *See* ASEAN Protocol, *supra* note 12, art. 8(4) (allowing a panel to obtain "information and technical advice from any individual or body" that it believes would be beneficial to the resolution of the dispute).

81. *See id.*

COE's subjective interpretations.[82] Requiring that the COE impartially examine a dispute, at a minimum, diminishes concerns of bias in the COE's recommendations.[83] Thus, although both the ASEAN Protocol and the SAFTA agreement give their respective decision-making bodies discretion to utilize their own procedures, the SAFTA agreement should embrace at least some of the ASEAN Protocol's guidelines to mitigate the risks of leaving all the procedures to the COE's discretion.

D. THE APPELLATE REVIEW PROCESS BY THE SMC UNDER THE SAFTA AGREEMENT IS PROCEDURALLY AND SUBSTANTIVELY UNSATISFACTORY

Having a transparent and effective appellate review process is critical to the functioning of any dispute settlement mechanism in a free trade agreement.[84] As with many of the other provisions discussed, the appellate review mechanism under the SAFTA agreement only provides a skeletal framework for the examination of the COE's recommendations.[85] The SAFTA agreement does little to discuss the scope of the "review" in terms of factual matters, legal

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82. *See* ASEAN Protocol, *supra* note 12, art. 7 (explaining that an "objective assessment" encompasses "an examination of the facts of the case and the applicability of and conformity with the sections of the Agreement or any covered agreements"). *Compare* SAFTA Agreement, *supra* note 1, art. 10(10) (leaving the determination of the procedures of the COE to its own discretion), *with* ASEAN Protocol, *supra* note 12, arts. 7, 8, app. II(II) (detailing the manner in which the panels should undertake their examination of a dispute).

83. *See generally* Sree Kumar, *Policy Issues and the Formation of the ASEAN Free Trade Area*, *in* AFTA: THE WAY AHEAD 71, 90–91 (Pearl Imada & Seiji Naya eds., 1992) (emphasizing the need for members of regional trade agreements to follow an "objective and unbiased" dispute settlement procedure without the interference of their respective governments to achieve the full desired benefits of free trade).

84. *See* Nobuo Kiriyama, *Institutional Evolution in Economic Integration: A Contribution to Comparative Institutional Analysis for International Economic Organization*, 19 U. PA. J. INT'L ECON. L. 53, 67–68 (1998) (emphasizing the role of effective appellate review processes in ensuring predictability and the confidence of the parties).

85. *See* SAFTA Agreement, *supra* note 1, art. 20(9) (providing that the SMC may "review" the COE's recommendations and either "uphold, modify or reverse" them as the SMC deems appropriate, without any further mention of the scope or basis of their reexamination of the dispute).

substance, or the rules and nature of its proceedings.[86] Moreover, the process is vulnerable to internal biases and political differences. The SMC, which is the body that conducts the review, is comprised only of the "Ministers of Commerce/Trade" of the SAFTA member countries, and its findings likely would remain confidential.[87]

In contrast, the ASEAN Protocol provides a far more detailed and satisfactory mechanism for the review of the recommendations rendered by the panels.[88] At the outset, the ASEAN Protocol departs from the largely inadequate model of its precursor, the DSM, in which the AEM was the body that conducted the appellate review.[89] Instead, the ASEAN Protocol vests the AEM with the responsibility of establishing an appellate review panel that is comprised of highly competent and experienced individuals with specific qualifications.[90] Furthermore, the ASEAN Protocol expressly states that only the legal issues involved in the panel's recommendation report are subject to appeal, thereby clarifying the scope of the review.[91] Although only the disputing parties involved may appeal a finding, interested third parties also have the opportunity to present their views.[92]

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86. *See id.* arts. 10(10), 20(9) (stating that the SMC would be free to "adopt [its] own rules of procedure" but not providing any other information regarding the scope and nature of the SMC's review of the recommendations, or any terms of reference for its functioning).

87. *See id.* art. 10(3), 20(9) (describing the composition of the SMC but not clarifying whether its findings during the appellate review process would remain confidential, or be available for public scrutiny).

88. *See* ASEAN Protocol, *supra* note 12, art. 12 (detailing the appellate review process available to the parties).

89. *See* Kiriyama, *supra* note 84, at 67–68 (noting potential for undesirable political intervention accompanying the use of the AEM as the "inter-governmental body" for appeals under the former ASEAN dispute settlement mechanism). *Compare* DSM, *supra* note 30, art. 8(1) (stating that the AEM is to conduct the appellate review process), *with* ASEAN Protocol, *supra* note 12, art. 12(1) (improving the DSM model, and mandating the establishment of an appellate three-person panel per case to review the panel's findings).

90. *See* ASEAN Protocol, *supra* note 12, art. 12(1)–(3) (enumerating the qualifications for the panel members, including that they are prohibited from having connections to a specific government, and cannot adjudicate a dispute where there might be a potential "direct or indirect conflict of interest").

91. *See id.* art. 12(6) (only permitting appeals on "issues of law covered in the panel report and legal interpretations developed by the panel").

92. *See id.* art. 12(4) (stipulating that third parties who "have notified the SEOM of a substantial interest in the matter" may present their views to the

Thus, because the SAFTA agreement's dispute settlement mechanism is still too imprecise to carry out its mission, modifications that would significantly enhance the mechanism's value, and infuse greater certainty into the dispute settlement process are required.

III. RECOMMENDATIONS

Recognizing certain key lacunae in the SAFTA agreement's dispute settlement mechanism, this section proposes ways to improve the mechanism's effectiveness. The suggestions include: clarifying the mechanism's scope and jurisdiction, specifying the qualifications and working procedures of the COE, and streamlining the appellate review process. The implementation of these and other recommendations could considerably strengthen the mechanism and benefit the Contracting States.

A. STIPULATE THE MECHANISM'S SCOPE AND JURISDICTION

In addition to disputes arising from the SAFTA agreement, the Contracting States should also allow parties to raise non-violation claims of apparent or indirect conflicts between their domestic laws and the SAFTA agreement.[93] Such a measure could strengthen the implementation of the SAFTA agreement, and also enable the Contracting States to reap the intended benefits of free trade under the agreement.[94] With regard to the jurisdiction of the dispute settlement mechanism, the drafters of the SAFTA agreement could follow the example of the ASEAN Protocol, which allows greater

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appellate body); *see also* Marc L. Busch & Eric Reinhardt, *Three's a Crowd: Third Parties and WTO Dispute Settlement* 14–18 (Jan. 2006), *available at* http://www.georgetown.edu/users/mlb66/Third%20Parties%20World%20Politics.pdf (assessing WTO disputes and proposing that the influence of third parties may not always be beneficial as their influence often reduces the amicable settlement of disputes at early stages).

93. *See* SAFTA Agreement, *supra* note 1, art. 1 (limiting the reach of the dispute settlement mechanism only to cases that may arise under the SAFTA agreement, but not providing for non-violation claims).

94. *See* Kaplan, *supra* note 45, at 175–76 (arguing that the ability to bring "nullification and impairment claims" ensures the full enforcement of trade benefits, and that the ability to bring "loss-of-benefits" claims deters more subtle attempts to undermine the trade regime).

flexibility to the parties in choosing an appropriate forum for dispute settlement.[95] In doing so, they could allow disputing Contracting States access to any externally available fora or means of dispute settlement prior to commencing formal proceedings under the SAFTA agreement.[96]

Depending on the nature of the dispute, such means could include access to the procedures available under the more advanced Dispute Settlement Understanding ("DSU") of the WTO.[97] It could also encompass the use of less formal alternatives such as mediation, conciliation, or good offices to complement the existing consultation proceedings available to parties under the SAFTA agreement.[98] Recently the Contracting States also signed an agreement to establish a SAFTA Arbitration Council in an effort to improve the existing dispute settlement framework.[99] While the details of the agreement

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95. *See* ASEAN Protocol, *supra* note 12, art. 1 (allowing parties the flexibility to use any dispute settlement mechanism outside the AFTA framework or to use the procedures available under ASEAN Protocol).

96. *See id.* art. 1(3) (stating that parties "can resort to other fora at any stage before a party has made a request" to begin formal panel proceedings).

97. *See* Choo, *supra* note 11, at 275–77 (explaining that, because international trade actors depend on the stability of subsystems within systems, regional dispute settlement mechanisms should be fluid and able to complement the dispute mechanisms of larger frameworks like the WTO). But while immediate access to WTO dispute settlement mechanisms might save regional mechanism resources, the ability to bring claims in multiple forums risks producing an unpredictable and divergent jurisprudence. *See* Sydney M. Cone, III, *The Promotion of Free-Trade Areas Viewed in Terms of Most-Favored-Nation Treatment and "Imperial Preference,"* 26 MICH. J. INT'L L. 563, 580–83 (2005) (analyzing the interaction of regional and WTO dispute settlement mechanisms, and predicting the emergence of abstention doctrines to address overlapping proceedings).

98. *See* ASEAN Protocol, *supra* note 12, art. 4 (permitting parties to utilize "good offices, conciliation or mediation" as alternatives to establishing panels under the ASEAN Protocol).

99. Agreement for Establishment of SAARC Arbitration Council, Nov. 13, 2005 *available at* http://www.mofa.gov.bd/13saarcsummit/Agreement%20on%20%20SAARC%20Arbitration%20Council%20final.pdf; *SAARC Pact on Avoidance of Double Taxation*, TRIBUNE (India), Nov. 13, 2005, *available at* http://www.tribuneindia.com/2005/20051114/world.htm#2 (reporting that the Indian Prime Minister called the arbitration agreement a "forward-looking document" to boost free trade). Recent criticisms of the negative effects of the AFTA agreements on local manufacturers in the ASEAN countries also prompted the establishment of the "ASEAN Consultation to Solve Trade and Investment Issues (ACT) and the ASEAN Compliance Board (ACB)" which, among other

have not been revealed, such a mechanism could be vital in supplementing the dispute settlement mechanism under the SAFTA agreement.[100]

B. IMPROVE THE QUALIFICATIONS AND COMPOSITION OF THE COE

Another key area that requires modification in the SAFTA agreement concerns the qualifications of the members of the COE.[101] In order to counteract the inherent political nature of the nominees, the SAARC countries should consider appointing certain non-governmental individuals with strong credentials and demonstrated expertise in international trade, economics, and related fields to provide a wide array of expertise to interpret the agreement's provisions.[102] Although the drafters of the SAFTA agreement most likely intended the members of the COE to act in their independent capacity and not as agents of their respective governments, the agreement should nevertheless explicitly state this requirement to ensure the fair and neutral functioning of the body.[103] Such measures would be vital to alleviate concerns of corruption among the COE, and ensure a fair and honest process for adjudicating disputes.[104]

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things, provide "web-based advisory mechanism[s]" for the settlement of disputes. Jessica B. Natad, *ASEAN Free Trade Seen to Hurt Local Makers*, SUN STAR (Phil.), Oct. 11, 2005, *available at* http://www.sunstar.com.ph/static/ceb/2005/10/11/bus/asean.free.trade.seen.to.hurt.local.makers..html. *Id.*

100. *See* Kaplan, *supra* note 45, at 182–87 (suggesting the importance of an "expeditious, reliable, and transparent" arbitration process in the AFTA context, and providing model provisions).

101. *See* SAFTA Agreement, *supra* note 1, art. 10(5); discussion *supra* Part II.B.

102. *See, e.g.*, Livshiz, *supra* note 63, at 551 (noting that institutionalized sophistication in panel membership tends to move systems away from the "flexible arbitration model" towards a more stable tribunal model with the capacity to develop interpretive expertise).

103. *See id.*; ASEAN Protocol, *supra* note 12, app. II(I)(2), (9) (mandating that panelists "serve in their individual capacities" and prohibiting Member State "instructions" or "influence").

104. *See generally* Siddharth Srivastava, *A Stinging Exposure of India's Corrupt*, ASIA TIMES ONLINE (H.K.), Dec. 23, 2005, http://www.atimes.com/atimes/South_Asia/GL23Df03.html (illustrating several recent instances of the scandals and corruption that pervade India's political and bureaucratic quarters). The South Asian plague of corruption, scams, and fraud

C. DEVELOP COMPREHENSIVE WORKING PROCEDURES FOR THE COE

The SAFTA agreement does not provide much guidance to the COE for examining a dispute or rendering its recommendations.[105] Following the example of the ASEAN Protocol, the SAFTA agreement should provide the COE with an operating framework to streamline the process and lessen ambiguity.[106] First, it should permit parties to submit both written documents and oral testimony, and indicate the manner in which the COE should objectively review the facts of the matter.[107] Second, interested third parties, namely other Contracting States, should have the right to participate in the proceedings and provide valuable insights and perspectives to assist the COE with its determination of the case, and to protect their own interests which might be affected by the outcome of the dispute.[108] Third, affording parties the opportunity to disclose information about the dispute to the public, including relevant documentation, or allowing publication of the COE's recommendations after the resolution of a dispute, would greatly enhance transparency.[109] Such measures would provide interested actors, including private citizens, academicians, and non-governmental organizations, with valuable

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makes the COE institution even more vulnerable to quid pro quo bribery and threats. *Id.*

105. *See* SAFTA Agreement, *supra* note 1, art. 10(10) (granting the SMC and COE complete discretion to establish procedural rules); discussion *supra* Part II.C.

106. *See* ASEAN Protocol, *supra* note 12, app. II(II) (providing a comprehensive framework within which panels should operate while reviewing a dispute).

107. *See id.* art. 7, app. II(II) (4)–(5) (requiring the "objective assessment" of disputes, and requiring the parties to submit documents and present their case before the panels).

108. *See* Livshiz, *supra* note 63, at 581–82 (advocating a limited right of participation for non-party stakeholders to be conditioned on the ability to protect the stakeholders' interests while not hindering the functioning of the adjudicating body). Legitimate interveners would be identified by evaluating "1) whether the intervener has an adequate interest in the dispute, 2) whether the stakeholder's interest is already adequately represented by the parties to the case and, 3) whether the intervener has the ability to provide new and valuable information to the tribunal." *Id.*

109. *See* ASEAN Protocol, *supra* note 12, app. II(II)(3) (allowing Member States to disclose information regarding the proceedings to the public in certain circumstances). This would ensure openness while not detrimentally affecting the rights of any of the parties involved in the dispute. *Id.*

access to important information about the proceedings, and allow for more meaningful debate and critique.[110]

D. REVISE THE APPELLATE REVIEW PROCESS

Finally, the appellate review process available to parties under the SAFTA agreement is unsatisfactory and requires revision.[111] By following the example of the ASEAN Protocol appellate review process, for instance, the Contracting States likely could ensure the reliability of the review, and benefit from fairly elaborate procedures regarding the scope and process of the review.[112] The SAFTA agreement should clearly indicate the scope of the review, preferably limiting it to legal issues rather than substantive factual reviews.[113] In addition, as with the members of the COE, it would be prudent to permit individuals from the non-governmental sector, including academicians, scholars, and other reputed professionals with specified credentials, to act as the appellate body and thereby dispel concerns of bias and unfairness.[114] Finally, the drafters also should consider making some form of the appellate body's decisions available for public scrutiny.

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110. *See also* Mustafa Zaman, *When Hope Runs High: Expectations and Realities from the Summit*, STAR WEEKEND MAGAZINE (Bangl.), Nov. 18, 2005, *available at* http://www.thedailystar.net/magazine/2005/11/02/cover.htm (reporting on the general skepticism of constituents about the relative effectiveness of the SAPTA and SAFTA agreements).

111. *See* SAFTA Agreement, *supra* note 1, art. 20(9)–(11) (providing minimal substantive guidance regarding the nature, scope, and procedure of the appellate review process available to Contracting States); discussion *supra* Part II.D.

112. *See* ASEAN Protocol, *supra* note 12, arts. 12–14 (discussing the fairly comprehensive appellate review process available under the ASEAN Protocol). The mechanism details the scope of the review as well as the composition and qualifications of the members of the appellate body established by the SEOM. *Id.* Further, the provisions specify communications and submissions allowed to the body, the nature and scope of the recommendations that the body may render, and the suggested manner of implementation. *Id.*

113. *See id.* art. 12(6) ("An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.").

114. *See id.* art. 12(3) (mandating that individuals serving on the Appellate Body should have highly regarded credentials, and should "be unaffiliated with any government").

CONCLUSION

Despite the long-standing differences between the SAARC countries, the SAFTA agreement demonstrates the commitment of these countries to improve economic and trade relations, thereby laying a foundation for increased cooperation in other areas as well.[115] But the agreement's framework is inadequate to realize its goals. The member countries crafted a broad dispute settlement mechanism with provisions subject to open interpretation, perhaps as a last resort to reach a compromise during the agreement's incipient phases.[116] The ambiguities of the dispute settlement mechanism may have caused some countries to hesitate in accepting their obligations under the agreement, as evidenced by some countries' delay in its ratification.[117]

To capitalize on the agreement's potential, the dispute settlement mechanism requires more detailed provisions, particularly in its scope, jurisdiction, appointment and working procedures of the bodies rendering recommendations, and in its appellate review

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115. *See* Alok Bansal, Strategic Comment, *Troubled Road to SAFTA*, INSTITUTE FOR DEFENSE STUDIES AND ANALYSES, Mar. 10, 2005, *available at* http://www.idsa.in/publications/stratcomments/alokbansal100305.htm (explaining SAFTA's role in overcoming otherwise hostile and rather delicate relations between the member countries); *see also* Bijan Lal Dev, Editorial, *The Future of Free Trade in South Asia*, DAILY STAR (Bangl.), Dec. 9, 2004, *available at* http://www.thedailystar.net/2004/12/09/d41209020429.htm (evaluating SAFTA in the context of both the ASEAN trade structure, as well as other regional free trade area agreements).

116. *See, e.g.*, C. Uday Bhaskar, Strategic Comment, *Dhaka SAARC Summit: Political Compulsions Blunt Economic Progress*, INSTITUTE FOR DEFENSE STUDIES AND ANALYSES, Dec. 8, 2005, *available at* http://www.idsa.in/publications/stratcomments/cudaybhaskar81205.htm (lamenting the "structural constraints," stunted political discourse, and socio-economic differences plaguing SAARC cooperative efforts); Badar Alam Iqbal, *South Asian Union: Distant Possibility, Urgent Necessity*, SARID JOURNAL, 2005, *available at* http://saridjournal.org/2005/iqbal.htm (suggesting independent bilateral trade agreements as solutions to the gaps caused by "a deficiency in political will, institutional weakness and the lack of a financial mechanism" within the SAARC framework).

117. *See SAFTA Comes Into Effect, Pak Yet to Ratify SAFTA*, DECCAN HERALD (India), Jan. 2, 2006, *available at* http://www.deccanherald.com/deccanherald/jan22006/national175458200611.asp (noting that Pakistan had not yet ratified the SAFTA agreement but that its officials have indicated they would do so soon).

process.[118] As one commentator notes, the SAFTA agreement at present is akin to "announcing a marriage but deferring consummation," since it lacks the defined dispute settlement and other related provisions necessary for meaningful enforcement.[119] It is therefore imperative for the Contracting States to strengthen the dispute settlement and other mechanisms under the SAFTA agreement by adding more detailed provisions or by adopting a separate protocol or other instrument to enforce compliance.[120]

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118. *See* discussion *infra* Parts II–III. *See generally* Choo, *supra* note 11, at 254 (noting the importance of strong dispute settlement mechanisms to effective free trade agreements).

119. *See* C. Raja Mohan, *SAARC Does Not Chime as Summits Do Not Strike the Right Time*, GULF NEWS (U.A.E.), Jul. 2, 2005, *available at* http://archive.gulfnews.com/articles/05/02/07/150891.html (criticizing SAARC members for not reaching agreement on complicated, yet key issues within the agreement such as "rules of origin, dispute settlement, and compensation for least developed countries").

120. *See* Abid Qaiyum Suleri & Bhaskar Sharma, *SAFTA: A Long Way to Turn Dreams Into Realities*, SUSTAINABLE DEVELOPMENT POLICY INSTITUTE RESEARCH & NEWS BULLETIN, Jan.–Feb. 2004, *available at* http://www.sdpi.org/help/research_and_news_bulletin/nbjanfeb04/articles/SAFTA.htm (identifying other SAFTA areas in need of reform such as "trade in services," "harmonization of custom(s) [and] banking," and "protection of investment"); *see also* M. Shamsur Rahman, *Implement SAFTA With Reciprocity for Benefit of All*, DAILY STAR (Bangl.), Aug. 21, 2004, *available at* http://www.thedailystar.net/2004/08/21/d4082101088.htm (reporting initiatives by the SAARC Chamber of Commerce and Industry and other professional organizations to develop arbitration as a mechanism to implement the sought-after benefits of the SAFTA agreement).