



EXPERT REPORT

Study to Develop a Template for a Dispute Settlement Mechanism between SAARC Member States regarding the Interpretation and Implementation of the SAARC Framework Agreement for Energy Cooperation (Electricity)

**Prepared for the SAARC Energy Center and
SAARC Arbitration Council, Islamabad by**

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FOREWORD

The South Asian Association for Regional Cooperation Framework Agreement for Energy Cooperation (Electricity) provides an important step towards energy security in the South Asian region. It is an ambitious project, but it is nonetheless important for the future and development of the region. A factor of particular importance in the Framework Agreement is the necessity for there to be an effective and viable dispute settlement mechanism for potential disputes arising out of the interpretation and implementation of the agreement. This would allow disputes arising across the various aspects of cross-border electricity trade to be resolved quickly and expeditiously, in a manner that is neutral and fair, and in a way that minimizes any disruption caused to cross-border electricity trade and cooperation in the region.

Studying and reviewing the Framework Agreement alongside international best practices drawn from other inter-State dispute mechanisms allows for a dispute settlement mechanism to be created that is unique to the SAARC Framework Agreement and to SAARC Member States. In this way, SAARC Member States will be able to benefit from the utilisation of an inter-State dispute settlement regime that is tailored to their specific needs, and to their regional preferences. Such a template for the settlement of disputes between SAARC Member States while having in mind the specific context of the SAARC Framework Agreement, may also be adapted more generally for other subject matters and international obligations relating to the region.

This dispute settlement mechanism provides yet another important building block in materialising the vision of the SAARC Member States for the creation of the SAARC Energy Ring and for its operational efficiency. I commend the efforts and initiative of the SAARC Energy Centre and SAARC Arbitration Council in commissioning this important Study, and wish them the very best in their mission to mitigate energy disputes within the region through the implementation of an inter-State dispute settlement mechanism for SAARC Member States.

ACKNOWLEDGEMENTS

The author would like to express his sincere thanks to the SAARC Energy Centre and SAARC Arbitration Council for giving him the opportunity to undertake the important task of designing a first ever inter-State dispute settlement mechanism for the SAARC Member States. This Study was conducted at their initiative, and is both an important and meaningful endeavour for developing energy security within the South Asia region.

The author is grateful for the valuable information, data, and guidance provided by all the stakeholders from the SAARC Member States, the SAARC Energy Centre and the SAARC Arbitration Council. Various individuals spent time with the author and answered questions that were essential for obtaining a better understanding of the goal and vision of SAARC, as well as the requirements of what the envisioned SAARC inter-State dispute settlement mechanism should endeavour to fulfil.

Of particular mention was the technical and administrative support, as well as sector expertise from staff members of the SAARC Energy Centre and SAARC Arbitration Council. Comments from the staff of both organisations were well informed and particularly insightful as regards their respective fields of expertise. It was a pleasure to cooperate closely in conceptualising and formulating the scope of the project since the author's very first contact with individuals from both organisations. The views expressed in the Report are, of course, those of the author's and do not necessarily reflect those of any other person or organisation.

TABLE OF ABBREVIATIONS

Annex VII Arbitration	Arbitration pursuant to Annex VII of the United Nations Convention on the Law of the Sea
CBET	Cross-border electricity trade
CRIE	Regional Electrical Interconnection Commission
DSM	Dispute settlement mechanism
ECOWAS	Economic Community of West African States
ECT	Energy Charter Treaty
EU	European Union
Framework Agreement	SAARC Framework Agreement for Energy Cooperation (Electricity)
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ITLOS	International Tribunal for the Law of the Sea
LCIA	London Centre of International Arbitration
New York Convention	1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
PCA	Permanent Court of Arbitration
SAARC	South Asian Association for Regional Cooperation
SAME	SAARC Market for Electricity
SAPP	Southern Africa Power Pool
SARCO	SAARC Arbitration Council
SARCO Agreement	Agreement for Establishment of SAARC Arbitration Council
SCC	Stockholm Chamber of Commerce
SEC	SAARC Energy Centre
SIAC	Singapore International Arbitration Centre

SIEPAC	Central America Transmission and Regional Market
WAPP	West African Power Pool
WTO	World Trade Organization
UNCLOS	United Nations Convention on the Law of the Sea
UN	United Nations

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EXECUTIVE SUMMARY

This Study was envisioned by the SAARC Energy Centre and SAARC Arbitration Council in light of the conclusion of the SAARC Framework Agreement, the region's vision for a SAARC energy ring, and the creation of a SAARC Market for Electricity. Astutely, both organisations noted the profound importance of a dispute settlement mechanism for resolving disputes arising out of the Framework Agreement and more generally within the region, as well as the contributions that each SAARC Member State's arbitration regime would make for the efficient resolution of disputes arising out of the full spectrum of cross-border electricity trading activity.

Accordingly, this Study was set in motion by the SAARC Energy Centre and SAARC Arbitration Council for a two-fold purpose. First, a key objective of this Study was to review the dispute settlement obligation in Article 16 of the SAARC Framework Agreement, and develop and design a dispute settlement template for the resolution of disputes arising out of the interpretation and implementation of the Agreement. Second, as a subsidiary goal, part of the objective of this Study was also to review the domestic arbitration regimes of SAARC Member States to ensure that they are in line with prevailing international best practices currently being applied and used in international arbitration. In achieving these objectives, a comprehensive review of existing literature, and research in specialised areas of dispute settlement was conducted over the course of this Study, an executive summary of which is set out in the paragraphs that follow.

Chapters 1 to 3 of this Study set out, in an easy to follow format, the scope of the Study that was conducted, an overview of the kinds of disputes that may arise in cross-border electricity trade, as well as a comprehensive summary of the various existing techniques and methods for the settlement of international disputes. These chapters were drafted with end-users in mind, and thus, were designed to cover the material in a manner that would give readers a foundational understanding of the subject matter, in a user-friendly approach. Accordingly, the different kinds of disputes that are likely to arise across the range of cross-border electricity trading activity, and how they might link with the different kinds of international agreements and contracts that exist, are described in Chapter 2. This allows readers to understand how the various components of energy disputes interlink and work together. In addition, the different kinds of dispute settlement methods that are available for the settlement of such disputes are described and set out in Chapter 3. In doing so, the various aspects and key stages of each kind of dispute settlement method are explained (negotiation, mediation, conciliation, litigation, international courts and tribunals, and arbitration), with the objective of giving readers a clear framework of the different dispute resolutions techniques that are commonly utilised where cross-border and international disputes are concerned. Particular attention was given to the different forms of international arbitration, as this would likely arise and be utilised in CBET.

In Chapter 4, a review of each SAARC Member State's arbitration regime was conducted, comparing each country's national arbitration legislation with a variety of international best practices that are applied globally. While certain States have adopted arbitration legislation that was relatively comprehensive, the general assessment is that many SAARC Member States have existing legislation that requires some amendment to be in line with updated practices. These amendments, broadly speaking, relate to (a) entering into the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which sets out a global regime for enforcement of arbitral awards, (b) ensuring that their legislation is in line with the UNCITRAL Model Law on arbitration legislation, and (c) ensuring that their legislation caters comprehensively for the different kinds of issues that could arise in the State that is the seat of the arbitration. Chapter 4 sets out a full list of these recommendations. It addresses each SAARC Member State's legislation one by one, identifying issues, and setting out specific recommendations that each State may choose to adopt, consider further, or put on its agenda for review in future.

Chapter 5 conducts a similar review process for the arbitration and conciliation rules of the SAARC Arbitration Council. In this regard, it is very commendable that the rules of procedure that have been developed specifically by the SAARC Arbitration Council for arbitration and conciliation are modern, and relatively complete. Nonetheless, a shortlist of recommendations have been set out which, in the author's opinion, could help to improve the rules of procedure further. It is hoped that these suggestions would optimise the rules of procedure developed by SARCO, and provide a positive contribution for greater application to the kinds of disputes that may arise in the area of cross-border electricity trade, and in particular, investment treaty disputes arising out of that context.

Chapters 6 to 8 form the main part of this Study dealing with the objective of developing a template dispute settlement mechanism for the SAARC Framework Agreement. A comprehensive and detailed review of existing inter-State dispute settlement mechanisms was undertaken, as part of the ground work for developing the structure and language adopted in the SAARC DSM template. In this regard, it was concluded that the various forms of dispute settlement obligations adopted in other energy trading treaties (e.g. the SIEPAC, SAPP, WAPP, ECT) were not appropriate for utilisation for disputes arising out of the SAARC Framework Agreement, as they were either too brief, too complicated, out-dated, or indeed, in one treaty, had failed. Instead, a close study of other more general inter-State dispute settlement mechanisms revealed that these international best practices provided a better model that could be adapted and optimised for the SAARC context. Accordingly, the structure of the SAARC template DSM, as well as some of its contents, have been partly adapted from existing inter-State mechanisms that have proved to be successful in the global arena.

In Chapter 7, the text of the DSM template was set out, as well as a description of its features. In addition, Chapter 7 contains an article-by-article review of the language, concepts, and basis behind each provision of the template DSM, as well as an explanation of how the

template DSM works. Finally, Chapter 8 addresses the strategy for the adoption of the template DSM. A variety of forms exist for the adoption of the template DSM, ranging from instruments that are binding in nature, to policy documents that can be adopted by SAARC or SEC, to *ad hoc* arrangements that can be utilised by SARCO. It nonetheless remains the opinion of the author that the best form for the adoption of the template DSM is by concluding an Additional Protocol to the SAARC Framework Agreement specifically dealing with the issue of dispute settlement. This method of adopting the template DSM has the benefit of turning it into a set of binding legal obligations between the SAARC Member States, which would greatly promote legal certainty as regards disputes arising out of the implementation and interpretation of the SAARC Framework Agreement.

I. CHAPTER 1: INTRODUCTION

A. BACKGROUND

1. South Asia as a region has shared a common struggle in energy security. With the total population in South Asia at an estimated 1.766 billion,¹ coupled with economic growth and urbanization, energy demand in South Asia has risen sharply over the last 50 years.² The supply of electricity has not, however, kept up with the growth in energy demand. South Asia's demand for energy has grown at a rate of over 6% a year—a pace far in excess of the region's ability to meet it.³
2. In 2004, aiming to address the energy deficit within the region, the Member States of the South Asian Association for Regional Cooperation (“SAARC”) jointly proposed the establishment of a South Asian Energy Ring. Under that vision, an energy ring would be created connecting the grids of the SAARC Member States and beyond. The establishment of the energy ring would allow South Asian countries to improve their energy situation by purchasing energy from each other, and by collectively importing energy from outside the region. In 2014, in furtherance of that vision, the SAARC Framework Agreement for Energy Cooperation (Electricity)⁴ (“Framework Agreement”) was concluded between the SAARC Member States. This provided an inter-governmental legal framework for the facilitation of cross-border electricity trade (“CBET”), with the ultimate objective being the establishment of a SAARC Market for Electricity (“SAME”).⁵
3. While the development of a common market for CBET in SAARC Member States is undoubtedly a positive step for easing the energy crisis in South Asia, the chances of disputes arising out of CBET-related activity, and more specifically, from Parties' obligations under the Framework Agreement, are relatively high. The fact that electricity tends to be a natural monopoly means that States play a pivotal role both in facilitating CBET, and in creating the regulatory environment for such trade. Given the cross-border nature of such activities, complicated and sensitive disputes can and do arise in various configurations between States and private parties in their interactions *inter se*, all with potentially serious implications for each State's domestic policy and interests. Such disputes can significantly delay—or indeed, even derail—the vision of the SAARC Energy Ring and the establishment of the SAME.
4. To prevent and mitigate any potential disruptions caused by such disputes, a proactive stance on dispute planning and management needs to be adopted. Clear, expedient,

¹ <http://data.worldbank.org/region/south-asia> (accessed on 19 July 2017)

² CK Ebinger, *Energy and Security in South Asia: Cooperation or Conflict?* (2011, Brookings Institution Press) at p. 6.

³ <http://www.wrsc.org/story/energy-ring-best-option-solve-regional-needs>

⁴ http://www.moen.gov.np/pdf_files/SAARC-Framework-Agreement.pdf

⁵ <http://theoslotimes.com/article/we-are-looking-to-create-a-saarc-market-for-electricity%3A-ihsanullah-marwat%2Csaarc-energy-centre-program-coordinator-tells-the-oslo-times>

and detailed dispute settlement mechanisms (“DSM”) are necessary to ensure that disputes are resolved quickly, transparently and fairly. The prevailing dispute resolution and arbitration regimes in South Asia, however, tend to lack the necessary clarity and sophistication for disputes arising out of the CBET context. It is with this in mind that the present Study is undertaken, with the goal of developing and strengthening the existing arbitration frameworks applicable to CBET disputes in South Asia, and more specifically, to design a comprehensive DSM for inter-State disputes between SAARC Member States potentially arising under the SAARC Framework Agreement.

B. THE SAARC ENERGY CENTRE (SEC)

5. The SAARC Energy Centre (“SEC”) was established in 2006 in Islamabad as a regional institution for the promotion, facilitation, initiation and coordination of the energy sector of the SAARC Member States. Recognising the important role of energy in the development of their respective States, the SEC came into existence following the approval of the Heads of State of the SAARC Member States during the 13th SAARC Summit held in Dhaka in 2005.
6. The SEC’s mission is to accelerate the integration of energy strategies within SAARC Member States, and its goals are to:⁶
 - a. Strengthen South Asia’s capacity to collectively address global and regional energy issues;
 - b. Facilitate energy trade within the SAARC region, through the establishment of a regional electricity grid and natural gas pipelines;
 - c. Promote more efficient use of energy within the SAARC region;
 - d. Enhance cooperation in the use of new and renewable energy sources in the region, thereby contributing towards more sustainable development in the SAARC member countries;
 - e. Serve as a focal point for providing reliable energy data for the individual member countries and the South Asian region;
 - f. Enhance SAARC expertise in energy development and management;
 - g. Promote private sector investment and participation in energy activities in the region; and
 - h. Undertake programs to achieve the goals mentioned above.

⁶ <http://www.saarcenergy.org/vision-mission/>

7. In light of its mandate, the SEC has played a critical role in both the preparation and undertaking of this Study. To facilitate implementation of the SAARC Framework Agreement, the SEC has commissioned the present Study examining the development of a template for dispute settlement mechanisms between the SAARC Member States. The present expert is thus assisting the SEC in formulating a dispute management strategy for disputes potentially arising out of the CBET context, and under the Framework Agreement.
8. Input in the preparation of this Report has been received from a substantial number of well-informed persons from the SEC. They were unanimous in their view that the SEC should undertake high-quality analyses on important energy issues in South Asia, in particular those that could affect the progress, development and success of the vision for a SAARC Energy Ring and the SAME. The issue of how to manage and resolve energy disputes therefore rightfully came within the purview of the SEC, and the SEC has taken a meaningful initiative in seeking to identify and plug gaps in the present dispute resolution frameworks in South Asia.

C. THE SAARC ARBITRATION COUNCIL (SARCO)

9. The SAARC Arbitration Council (“SARCO”) is one of the Specialized Bodies of SAARC. It is an inter-governmental institution with a mandate to support the fair and efficient settlement of disputes. As the premier arbitration and conciliation institution in South Asia, SARCO has as its mandate the following objectives and functions:⁷
 - a. To provide a legal framework within the region for fair and efficient settlement through conciliation and arbitration of commercial, investment and such other disputes as may be referred to the Council by agreement;
 - b. To promote the growth and effective functioning of national arbitration institutions within the region;
 - c. To provide fair, inexpensive and expeditious arbitration in the region;
 - d. To promote international conciliation and arbitration in the region;
 - e. To provide facilities for conciliation and arbitration;
 - f. To act as a coordinating agency in the SAARC dispute resolution system;
 - g. To coordinate the activities of and assist existing institutions concerned with arbitration, particularly those in the region;

⁷ <http://sarco.org.pk/about.html>

- h. To render assistance in the conduct of *ad hoc* arbitration proceedings;
 - i. To assist in the enforcement of arbitral awards;
 - j. To carry out such other activities as are conducive or incidental to its functions.
10. To achieve its objectives, SARCO has developed its own rules of arbitration and conciliation for parties that wish to utilise their dispute resolution services. The rules of procedure for Arbitration and Conciliation of SARCO are based on the UNCITRAL Model Law and are updated regularly. The Rules of procedure for Arbitration and Conciliation have been updated in 2016 and 2017, respectively. SARCO also maintains a primary roster of arbitrators who are legal experts from South Asia and who are nominated by the SAARC Member States. In addition, SARCO also has a secondary roster of arbitrators who are not nominated by SAARC Member States, but whose names are drawn from the professional bodies in the region (e.g. Federations of Chambers of Commerce and Industries, Bar Associations, and professional engineering and accounting bodies). It is also presently undertaking a process for establishing a similar roster of distinguished conciliators.
11. SARCO's work as a dispute resolution institution is relevant to the present Study in several respects. First and foremost, while the main provisions of the Framework Agreement are primarily concerned with creating a framework for CBET, Article 16 of the SAARC Framework Agreement allows SAARC Member States to refer any disputes "arising out of [the] interpretation and/or implementation" of the Framework Agreement to SARCO. The design task contemplated by this Study therefore uniquely straddles both the mandate of the SEC in investigating and building capacity in issues relating to CBET, as well as the mandate of SARCO as being the designated institution for administering the dispute resolution procedure for State-to-State disputes arising out of the Framework Agreement.
12. Additionally, even outside the State-to-State dispute resolution context envisioned under the Framework Agreement, SARCO remains an important resource for the region as a dispute resolution institution for other kinds of CBET-related disputes (e.g. those developing out of a commercial or investment context). Consequently, the SARCO arbitration and conciliation rules constitute an important part of the present Study. Finally, given the expertise of SARCO's legal team and their familiarity with South Asian preferences for dispute resolution, the input from the SARCO legal team was invaluable in providing practical acumen, and in understanding what kind of dispute resolution procedures would or would not work in the region.

D. RATIONALE AND PURPOSE OF THE STUDY

13. The issue of potential disagreements is very often one of the last items on the list when an agreement or contract is being negotiated. No party to an agreement wishes to question or doubt the other's commitment in fulfilling its obligations, especially in the early stages of the relationship when an agreement is being discussed with a view to formalizing a potentially longstanding partnership or arrangement.
14. This issue is fraught with even more complexity where States are concerned—a binding dispute settlement obligation makes a State vulnerable to having its sovereignty questioned and, indeed, adversely impacted, by a third-party adjudicator's decision. It is thus often the case, particularly at the inter-State level, that agreements are concluded with either no dispute settlement provision in place, with a compromise clause that is put together only in passing, or with a clause that bears a dispute settlement commitment but is vaguely worded.
15. The problem however is that, if left unresolved, disputes can often be costly and disruptive for parties where large-scale projects and agreements are concerned. This is especially so where parties disagree on the interpretation of the agreement or their respective obligations in its implementation, resulting in a deadlock in the relationship. An effective dispute resolution mechanism is thus not only a key ingredient for promoting legal certainty between parties to an agreement, but also a critical determinant of how expediently the agreement is interpreted, applied and enforced, all so that parties can return to and continue in a viable business and trading relationship.
16. In the CBET context, disputes arising from regional electricity trade often raise complex and technical issues, and carry consequences that profoundly impact issues of social concern and national policies of States. Indeed, energy itself is often considered a matter of national interest by States, and particularly so in South Asia, where energy security is a going concern. An effective DSM thus acts as a necessary safeguard in two respects. First, it ensures that disputes that arise are resolved as expediently as possible, such that the larger goal of energy security and regional energy trade is not disrupted, and bilateral or trilateral disputes do not spark a larger regional deadlock. Second, it ensures that the SAARC Member States involved in the CBET framework are able to protect their interests through the dispute settlement process where disagreements have arisen. Consequently, the rationale and purpose of this Study is to conduct a review of the existing dispute settlement frameworks relating to CBET and the SAARC Framework Agreement, and to assess if they provide the appropriate level of effectiveness in resolving disputes arising from those contexts.

E. OBJECTIVE OF THE STUDY

17. The objective of the present Study was set by the SAARC Energy Centre in its Terms of Reference. Acknowledging that a dispute settlement procedure is an integral part of a bilateral or multilateral agreement, the primary objective of this Study is to develop a comprehensive DSM for the smooth implementation of the SAARC Framework

Agreement, with a view to achieving consensus among SAARC Member States for the adoption of such a dispute settlement mechanism.

18. More generally, and as a secondary objective, this Study will also involve a review of the SAARC Member States' arbitration regimes, in order to assess their currency with international best practices, and to pinpoint any possible modifications that may help to strengthen and improve the various domestic arbitration regimes.

F. SCOPE OF THE STUDY

19. The scope of the Study was set by the SAARC Energy Centre in its Terms of Reference, and was intended to cover the following:
 - a. A brief description of:
 - i. Common disputes in CBET;
 - ii. Planning of disputes management in projects / agreements / contracts;
 - iii. Overview of dispute settlement techniques in the world;
 - iv. Current best practices in dispute settlement in the world;
 - v. The existing legal framework for regional level arbitration in different parts of the world;
 - vi. The procedure for appointment of arbitrators, selection of council, the time and cost of arbitration, relevant authorities, and responsibilities of the parties involved.
 - b. A review of existing arbitration laws, policies and regulations of SAARC Member States relevant to CBET;
 - c. A review of SARCO's existing documents relevant to CBET;
 - d. A review of existing international arbitration laws, policies and regulations relevant to CBET;
 - e. Proposal of amendments to existing relevant laws and regulations of SARCO and each SAARC Member State and the identification of new rules and policy documents to be formulated to facilitate regional CBET;
 - f. Design a template for a DSM for SAARC Member States regarding the interpretation and implementation of the SAARC Framework Agreement. The template shall highlight:
 - i. The roles and responsibilities of SARCO, concerned parties and other

channels involved in dispute settlement; and

- ii. Details of any relevant authority, venue, time/schedule, appointment of arbitrator, selection of council, and cost of arbitration.
- g. Development of a detailed interactive process flow chart for a DSM in CBET;
- h. Drafting of clauses for a DSM between SAARC Member States for incorporation in future agreements; and
- i. Conclusions and recommendations for future.

G. METHODOLOGY AND LIMITATIONS

20. The Study was conducted on the basis of extensive research in relation to international dispute settlement proceedings as well as dispute settlement procedures relating to energy disputes. This research was conducted in the following phases:
- a. Identifying the common disputes arising in cross-border electricity trade, and more generally, in energy trade, as well as a review of how they were resolved, through which kinds of DSMs, and to what degree of success;
 - b. Reviewing the existing national arbitration laws, policies and legislation of SAARC Member States, identifying gaps, deficiencies, and possible improvements, as well as potential avenues for developing regional standards and best practices;
 - c. Identifying any particular ways in which the design of the SAARC DSM can incorporate regional and cultural preferences of SAARC Member States;
 - d. Collating international best practices relating to international dispute settlement, with a view to putting together a list of benchmark standards for designing the SAARC DSM;
 - e. Identifying particular features of arbitration that are specially tailored for State-to-State disputes, and looking to implement them in the Design Template, as well as adapting them specifically for SAARC Member States;
 - f. Comparison of SARCO arbitration practices and procedures with international best practices, with a view to identifying any gaps, deficiencies, and possible improvements, paying particular attention to possible ways of adapting the present SARCO framework (which is intended for contractual disputes between private parties) for State-to-State electricity/energy disputes;
 - g. Production of a list of specific recommendations for SEC;

- h. Developing a design template in respect of a DSM for disputes arising out of the SAARC Framework Agreement; and
 - i. Developing next steps on implementing the design template, and in what form.
21. Given the extent of the review process described above, it was not possible to propose amendments to the dispute settlement procedures of SAARC Member States *in toto* or on general terms. Such a broad and untargeted approach would be ineffective for fulfilling the objectives of the present Study, and would fall outside its ambit. As such, only recommendations that could potentially have ramifications on CBET or on State-to-State forms of dispute settlement have been identified and discussed in this Report. The nature of the recommendations set out in this Report nonetheless benefits generally the dispute settlement frameworks adopted by SAARC Member States in their respective national arbitration legislations.

H. THE STRUCTURE OF THIS REPORT

22. This Report comprises eight Chapters. As seen from the preceding sections, Chapter I sets out an introduction, and provides the background details and overarching description of the present Study. It also outlines the Study's objectives, the scope of work, the methodology adopted and the structure of the Report.
23. Chapter II explains the different kinds of disputes that may arise in the CBET context. Chapter III provides a primer on international dispute settlement. It sets out an overview of various dispute settlement processes, how such processes are commenced by parties to a dispute, and the various stages and phases of each kind of DSM. It also briefly describes the various DSMs typically resorted to by parties in an international and/or cross-border dispute.
24. In Chapter IV, the arbitration regimes of each SAARC Member State are reviewed, with a view towards assessing their strengths and weaknesses, and identifying any possible amendments for improvement.
25. In Chapter V, the dispute settlement rules that are utilised by SARCO are analysed and reviewed, in alignment with international best practices. Specific recommendations are made for their improvement which are set out in detail in that Chapter.
26. Finally, Chapters VI to VIII are devoted to the issue of inter-State disputes between SAARC Member States arising under the Framework Agreement, to designing a viable DSM for purposes of Article 16 of the SAARC Framework Agreement, and the steps to be taken in moving towards its successful adoption and implementation.

II. CHAPTER 2: DISPUTES IN CROSS BORDER ELECTRICITY TRADE

27. Cross-border electricity trade is a subject matter that is exceedingly vast. This breadth and complexity of the energy industry stems from its international scope, the multiplicity of energy sources, transactions, actors and stakeholders involved in energy activities, as well as the scale and sheer size of energy-related projects. From a dispute resolution perspective, the fact that CBET spans across many large, complex and different kinds of projects that come together to create a viable regional CBET framework, means that it is often difficult to outline with exactitude the various kinds of disputes that could potentially arise in the CBET context. Nonetheless, this Chapter will introduce the general nature and organisation of the different kinds of disputes potentially arising in the CBET context.
28. In general, the kinds of disputes arising out of the CBET context are a function of two things. First, the nature, scope and nuance of a dispute is often shaped by and relate closely to the principal rules governing a cross-border electricity transaction or investment. Second, disputes also often arise out of the different kinds of activities that frequently take place within the CBET context. Sections A and B of this Chapter expound on the above, and broadly outline the various kinds of disputes falling within each of these two categories.

A. THE RULES GOVERNING CROSS BORDER ELECTRICITY TRADE

29. There are two principal sets of rules that govern a cross-border electricity transaction or investment, as well as the organisation of CBET at the regional level. These are (a) international agreements and (b) commercial contracts, which together form a loose and discrete network of legal rules, principles and frameworks governing the different parts and segments of CBET activity. These agreements and contracts and how they operate are explained briefly in the sections that follow.

1. Disputes arising out of international agreements

30. International agreements or intergovernmental treaties may take a variety of forms in the CBET context:
- a. *Multilateral Framework Agreements*: These agreements or treaties are concluded between States and concern the rights and obligations of the participating States for establishing an electricity trading market, as well as the rules for its operation. Examples of such agreements include the SIEPAC electricity market project,⁸ as well as the Southern Africa Power Pool⁹ and the

⁸ <https://www.oecd.org/aidfortrade/casestories/casestories-2017/CS-139-SIECA-Integración-Energética-La-experiencia-de-Centroamérica-en-el-diseño-e-implementación-del-Mercado-Eléctrico-Regional-English-Translation.pdf>

⁹ <http://www.sapp.co.zw>

West Africa Power Pool.¹⁰ The SAARC Framework Agreement that forms the foundation of the present Study is also such an agreement. These kinds of multilateral framework agreements provide the overarching framework and architecture for an electricity trading system, and envisages the conclusion of other underlying agreements and contracts between the users and participants of the trading system to particularise the rights and obligations associated with the many different aspects and parts of an electricity trading market.

- b. *Project-Specific International Agreements*: These agreements are concluded between States to provide the overriding rules and principles governing a specific project relating to cross-border trade. Such agreements can be bilateral or multilateral in nature, depending on the project concerned. An example of such an agreement is the Nabucco Treaty¹¹ entered into by Austria, Bulgaria, Hungary, Romania and Turkey, which governs the Nabucco Pipeline Project for the trading and transportation of natural gas in and across their respective territories. It is also noteworthy that Articles 2 and 7 of the SAARC Framework Agreement allow SAARC Member States to enter into bilateral, trilateral and/or mutual agreements for the purposes of enabling CBET and planning cross-border grid interconnections. In this context, such bilateral, trilateral or mutual agreements entered into by SAARC Member States for CBET purposes and in accordance with Articles 2 and 7 of the Framework Agreement can be considered to be Project-Specific International Agreements. Such Project-Specific International Agreements or treaties usually expound on the general terms of a Multilateral Framework Agreement and crystallise specific legal obligations for individual CBET projects. As such, Project-Specific International Agreements should generally be read in conjunction with the related Multilateral Framework Agreements where relevant.
- c. *Bilateral or Multilateral Investment Treaties*: These treaties are entered into by States for the protection and promotion of foreign investments. Under such treaties, foreign investments owned by a national of one State party to the treaty enjoy various rights and protection where the investor has made the investments in another State party to the treaty. Such agreements can be bilateral or multilateral in nature, and are relevant because a cross-border investment or transaction in the CBET context could potentially trigger the operation and benefits of the investment treaty, including recourse to international dispute settlement by an investor against a State. An example of such a treaty is the Energy Charter Treaty,¹² which covers issues such as foreign investment, transit access, non-interference, and trade barriers in connection with CBET. Further examples of how such disputes may arise in

¹⁰ <http://www.ecowapp.org>

¹¹ <http://tomweston.net/nabucco.pdf>

¹² <http://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/>

the course of CBET will be introduced later in this chapter.

31. Generally speaking, a dispute may arise out of any of these agreements, as long as there is a disagreement relating to the interpretation or implementation of any provision of each treaty. Where Multilateral Framework Agreements and Project-Specific International Agreements are concerned, the content of the obligations created under these treaties generally relate to the rights, duties, and obligations of the *State Parties* to the agreement *inter se*. These are agreements created and entered into by States, and not private entities. Consequently, disputes arising under these two kinds of agreements are predominantly State-to-State in character, and must be resolved as between the States involved.
32. In contrast, Investment Treaties (whether bilateral or multilateral in nature), tend to contain procedures for resolving two different kinds of disputes—State-to-State disputes and investor-State disputes. The main reason for this is the unique nature of Investment Treaties. On one hand, an investment treaty is an international agreement between States, and comes into existence by virtue of the consent and agreement of the various State parties to the treaty. Investment Treaties therefore create binding obligations between States *inter se*. On the other hand, however, investment treaties extend to investors that are nationals of the State Parties certain investment protection standards and assurances when they make a qualifying investment in another State Party. Thus, while the parties entering into the obligations under an investment treaty are States, the true beneficiary of the investment protection standards contained in the treaty is the investor rather than the State Parties to the investment treaty. Because of this unique nature, investment treaties tend to contemplate two different kinds of disputes which may arise in respect of the terms of an investment treaty: (a) State-to-State disputes arising out of the interpretation and implementation of the investment treaty; and (b) investor-State disputes where an investor can commence proceedings against a State for breaching the investment protection standards provided for under the treaty.

2. Disputes arising out of commercial contracts

33. Another category of rules relating to CBET are those contained in private commercial contracts between market participants, including governments, State companies, and private companies, as well as the various “Buying and Selling Entities” described in Article 1 of the SAARC Framework Agreement.¹³ These commercial contracts tend to relate to some aspect along the chain of CBET activity, and are concluded for the purposes of establishing the rights and obligations of each party in respect of the specific subject matter of the contract. Thus, common examples of such agreements

¹³ SAARC Framework Agreement, Article 1: “Buying and Selling Entities means any authorized public or private power producer, power utility, trading company, transmission utility, distribution company, or any other institution established and registered under the laws of any one of the Member States having permission of buying and selling of electricity within and outside the country in which it is registered.”

include, *inter alia*, power purchasing agreements, contractual agreements entered into between an investor and the host Government, joint venture agreements, contracts relating to the construction of an energy project, concession agreements, or project agreements in the form of a licence.

34. Disputes arising under commercial contracts can often be resolved by a variety of dispute settlement mechanisms depending on the terms of the particular contract. First and foremost, where the transaction contemplated under the contract relates to domestic activity within a State, or where the contract contains an appropriate forum clause, domestic litigation can often be commenced to resolve the contractual dispute. Where domestic litigation is resorted to for such disputes, the dispute will be decided by the local court of that jurisdiction in accordance with the relevant domestic or national laws that the local court deems applicable.
35. Second, such commercial contracts can often contain an arbitration clause. Where there is an arbitration clause in the contract, a party to the contract has the option of utilising international commercial arbitration instead of litigation to resolve the contractual dispute. This means that the dispute will be decided by an arbitrator or panel of arbitrators (of the parties' choosing) in a private dispute resolution process, rather than by the domestic judicial court of a State. The process and procedure of international arbitration will be set out in more detail in Chapter 3 of this Report.
36. Finally, certain kinds of contractual situations may allow a private party to invoke an investor-State treaty against a State, and resort to investment treaty arbitration to resolve a dispute. This tends to be the case where a State has, for example, terminated licences promised to foreign investors, or changed the legislative framework applicable to the investment or to power purchasing agreements associated with CBET. A State's failure to pay under a contract has also on occasion given rise to investment treaty arbitration based on a loss of investment under various investment treaties. In such instances, a foreign investor may be able to rely on an investment treaty to commence arbitration against the State for a breach of treaty, even though the contract (as opposed to the investment treaty) is the underlying commercial context of the dispute.

B. COMMON KINDS OF DISPUTES ARISING OUT OF CBET ACTIVITY

37. Section A of this Chapter dealt with the rules applicable to the CBET context and the various forms of disputes that could potentially arise under those rules. We now turn to analyse the different kinds of disputes in the CBET context from the focal point of the different kinds of *subject matter* that they may relate to. In this context, it is useful to note as a preliminary point that, where the subject matter of such disputes is concerned, disputes arising in CBET cannot always be neatly segregated.
38. CBET disputes can straddle and involve multiple areas and sources of law and subject

matters, from domestic energy legislation, to regional treaty obligations, to commercial contractual arrangements, and even investment treaty protections. Thus, different kinds of DSMs may apply not simply to different kinds of CBET disputes, but also to different parts of the same dispute. With this in mind, this section sets out a brief explanation of the kinds of subject matter involved for disputes arising out of CBET activity.

1. General Disputes

39. General disputes tend to be disputes concerning the interpretation or implementation of specific provisions of a treaty or contract, but which do not relate specifically to energy trade. By way of example, such disputes may concern, *inter alia*, general legal issues such as whether the conditions for withdrawal of a treaty have been satisfied by a State, or whether the domestic legislation of a State has been duly amended to keep in tandem with its international obligations under an energy-related treaty. Disputes of this nature are often disputes concerning legal interpretation for which the technical aspects of electricity trade are marginal or irrelevant, and for which CBET is merely the context in which the dispute has arisen, and does not take centre stage in the adjudication or dispute resolution process.
40. In the commercial contract context, certain kinds of disputes arising out of activities related to energy trading may also take on this kind of general nature. This is the case, for example, where there are construction or payment disputes arising out of delays in building a power station or the electricity distribution grid. Such disputes are only tangentially related to CBET, and instead take on the form of a general contractual or construction dispute in the dispute resolution process.

2. Trade Disputes

41. Trade disputes arise where there are obstacles imposed on the flow of energy products across borders. Such obstacles can take the form of governmental measures that restrict the exportation of energy (e.g. export duties and export quotas), or the importation of energy products (e.g. internal taxes and internal regulations).
42. Trade disputes may arise out of bilateral or multilateral treaties relating to the specific subject matter of energy trade, and indeed, the SAARC Framework Agreement is one such treaty relating specifically to CBET. They may also arise in relation to other more general treaties relating to the trade of goods and services—e.g. the General Agreement on Tariffs and Trade entered into by Member States of the World Trade Organisation.

3. Transit and Transmission Disputes

43. Transit Disputes arise where the State parties do not comply with treaty obligations on the transit of energy materials and products, which typically require that such transit

be consistent with the principle of freedom of transit and without distinction as to origin, destination or ownership of such energy materials and products. Such non-compliance can take the form of discrimination, or the imposition of unreasonable delays, restrictions or charges.

44. In this context, it is interesting to note that Article 12 of the SAARC Framework Agreement contains such an obligation, and provides that “Member States shall, for the purpose of cross-border trade, enable non-discriminatory access to the respective transmission grids as per the applicable laws, rules, regulations and applicable inter-governmental bilateral trade agreements”. Given the wording of Article 12, a State’s conduct may thus give rise to a transit or transmission dispute that relates to both the SAARC Framework Agreement and / or any underlying inter-governmental bilateral trade agreements.

4. Competition Disputes

45. Competition disputes can arise under a treaty relating to CBET where State Parties have included obligations relating to anti-competitive energy practices and legislation. The extent of those obligations, however, depends heavily on the specific provisions of the relevant treaty.
46. By way of example, the Energy Charter Treaty contains a commitment between each Member State to “ensure that within its jurisdiction it has and enforces such laws as are necessary and appropriate to address unilateral and concerted anti-competitive conduct in Economic Activity in the Energy Sector”.¹⁴ Article 6 further encourages cooperation between Contracting Parties in implementing and enforcing their competition rules, and in resolving antitrust and competition disputes between Contracting Parties in the energy sector.¹⁵
47. In contrast, the SAARC Framework Agreement contains a much softer obligation relating to competition, as Article 6 of the Framework Agreement merely states that “Member States shall encourage the process of opening up of electricity sector guided by respective national priorities with the aim of promoting competition”.

5. Disputes concerning Obligations to Cooperate and to Share Information

48. Given the regional scope of CBET, many treaties contain obligations requiring cooperation between State Parties for the implementation of the agreement, as well as for the sharing of research, knowledge and technical data relating to energy trade. While such obligations tend to be loosely phrased, they could potentially provide grounds for a breach of treaty where a State Party has refused to cooperate, especially where such cooperation is necessary in light of the geopolitical and inter-territorial

¹⁴ Energy Charter Treaty, Article 6(2).

¹⁵ Articles 6(3)-6(5), Energy Charter Treaty.

limitations of CBET.

49. In this regard, Articles 5 and 14 of the SAARC Framework Agreement contain an obligation that SAARC Member States may share and update technical data and information on the electricity sector, and participate in knowledge sharing and joint research in relation to *inter alia* power generation, transmission, distribution, energy efficiency, reduction of transmission and distribution losses, and development and grid integration of renewable energy resources.

6. Environmental Disputes

50. Environmental disputes can arise where the production, supply, trade, and consumption of energy have knock-on effects on the environment, particularly where pollution is concerned. Certain treaties contain obligations requiring State Parties to prevent or minimize adverse environmental impacts at various stages of the energy chain, or to take account of environmental considerations when formulating their energy policy. Such obligations may also require States to price energy at a level which reflects the environmental costs and benefits of its production. Where energy treaties provide for a dispute settlement framework, such environmental disputes may also be submitted to international dispute settlement.

C. ALLOCATION OF CBET DISPUTES TO A DISPUTE SETTLEMENT MECHANISM

51. In summary, as a result of the various rules applicable to CBET, disputes can arise at different parts of the energy chain and between different kinds of entities involved in CBET. These include disputes between two or more States, disputes between a private party or investor and a State, and disputes between two or more private parties. In addition, such disputes can arise out of the varying subject matters whether directly or tangentially related to the CBET context as described and detailed above.
52. What then are the dispute settlement mechanisms available to a party that finds itself in a CBET dispute? Parties to a treaty or contract are free to agree on how they want their disputes to be resolved. As such, the primary determinant of how disputes are allocated to the relevant dispute settlement procedures is the dispute resolution clause that has been agreed upon by parties, and it is the terms of the dispute resolution clause that determines the method, process, procedure, and scope of dispute settlement applicable to the dispute that has arisen.
53. Such dispute resolution clauses can and do provide for the application of a whole variety of different kinds of dispute settlement procedures. In some instances, parties may agree that all disputes, regardless of subject matter, will be resolved by litigation or arbitration. In other instances, parties may segregate the different kinds of disputes arising out of the treaty or contract, and agree that each of these different kinds of disputes will be allocated to different dispute settlement procedures (e.g. the Energy Charter Treaty). It is thus necessary to have a broad understanding of the different

DSMs that are commonly applied to CBET and State-related disputes. These international dispute settlement procedures will be explained in Chapter 3 of this Report.

III. CHAPTER 3: THE SETTLEMENT OF INTERNATIONAL DISPUTES

54. Over the past few decades, there has been a growing awareness regarding the importance of international dispute settlement. As the world becomes more globalised, the nature and complexity of disputes have grown in tandem to become more international, multilateral, and cross-border. A disputing party's ability to enforce its rights across boundaries, borders and territories has thus become closely related to the effectiveness of the dispute settlement mechanism that parties have chosen to govern their relationship and business arrangements.
55. This Chapter introduces the different kinds of international dispute settlement systems that are commonly utilised for the resolution of international disputes. This exposition serves a number of important purposes. First, it furnishes readers with a broad understanding of why dispute settlement obligations are concluded, how an international dispute settlement mechanism operates, and explains the role of a DSM in ensuring that disputes are resolved efficiently. Second, it provides an overview of the different kinds of international dispute settlement systems that can be agreed on between States, corporations, and trading partners to govern the wide variety of CBET activity. Finally, by explaining the different steps and procedures within each form of international dispute settlement system, it also provides an overview of the basic benchmark standards drawn from international best practices.

A. THE NEED FOR DISPUTE SETTLEMENT MECHANISMS IN INTERNATIONAL DISPUTES

56. Where domestic relationships are concerned, there is often less of a need for parties to conclude a dispute resolution clause to govern their dispute settlement obligations where a dispute arises. In such instances, since both parties are from the same country, and their business relations and commercial activities generally occur within that same State, any disputes that arise can usually be brought before the domestic courts of that country by commencing litigation. Hence, even without a specific dispute settlement clause in place, disputing parties will nonetheless have recourse to litigation for the enforcement of their rights and to avail themselves of a remedy for any acts in violation of law or in breach of contract.
57. This issue is much more complex where international disputes are concerned. As mentioned in Chapter 2, an international dispute is one that generally involves disputing parties that are from different countries, and whose business relationship may span globally, across borders, or involve international transactions or acts. In such situations, access to litigation in a domestic court is often not so clear-cut, as the issue of which court has jurisdiction over the subject matter of the dispute, or is the appropriate forum for deciding the dispute, is a complex one that is governed by the principles of private international law. Indeed, to add to that complexity, each country's rules of private international law are different, and thus the same issue of

whether a domestic court can or should exercise jurisdiction to decide a dispute is often treated differently in different countries. Consequently, the process of commencing litigation in respect of an international dispute is often a lengthy and complicated process spanning several years, involving parallel litigation in multiple courts and very substantial legal costs even in the preliminary phase of establishing the appropriate domestic forum for the litigation of the international dispute.

58. These problems are compounded in at least three ways where one or more of the disputing parties is a State. First and foremost, under most countries' rules of private international law, establishing the appropriate forum for litigation is a balancing and weighing exercise that involves an assessment of the facts and circumstances of the parties' relationship, the activity or transaction concerned, and the various connecting factors to a domestic jurisdiction, in order to appraise which is the most convenient forum for litigating the dispute. When approached on these criteria, however, there is often a substantial risk that the most convenient or appropriate forum for litigation is the court of the State of one of the disputing parties. This could lead the other disputing party to feel that there may be a lack of impartiality since the domestic court of a State may favour its own national or indeed, where one of the disputing parties is the State itself, that there is a real risk of bias if a State's court is the judge of the executive acts of its own State. Second, quite apart from issues of bias, under international law, States are generally immune from the jurisdiction of the national courts of other States. Thus, even where another State's domestic court is presiding over the litigation proceedings, there remains a real possibility that it would decline jurisdiction in light of the immunity of a State from foreign courts. Finally, where the dispute in concern is a State-to-State dispute, public international law provides that dispute settlement requires the consent of all State parties to the dispute. Thus, *unless* there is specific consent to dispute settlement by each State (whether through a dispute settlement clause or *ad hoc* consent), the State party that has suffered a violation of its rights under international law has no recourse to a dispute resolution process to seek a remedy.

59. In light of these complications, parties to an international dispute need more than just an avenue for domestic litigation. By concluding and agreeing on a dispute settlement obligation and/or a specific mechanism via which disputes can be resolved (e.g. arbitration, mediation etc.), parties to a contract or a treaty are able to resolve their disputes much more efficiently than would otherwise be the case. These specific benefits of a DSM for international disputes are further addressed in the next section.

B. THE UTILITY OF INTERNATIONAL DISPUTE RESOLUTION

60. International dispute settlement is a central pillar of any system of interactions involving legal relationships between multiple parties from different countries. Without a means of settling disputes that have arisen, any rules-based legal system would be ineffective because the rules would not be able to be enforced. Thus, an

effective dispute settlement mechanism underscores and supports the rule of law in important ways, which are detailed in the paragraphs that follow.

61. First, a DSM provides the various players within a system with legal certainty, thereby creating a sufficiently consistent and sound legal environment for their engagement in economic activities at the international level.¹⁶ Cross-border economic and trading activities are inherently risky activities that require the commitment of substantial resources. Having a DSM in place helps to reduce some of the investment and business risks by establishing clear and principled rules of the game that are applicable to the various economic and political players involved. In the same manner, the legal certainty provided by the DSM also results in an efficient allocation of direct costs where disagreements arise, and creates a stable and principled system for assessing dispute risks and apportionment of potential liability.
62. Second, on a practical level, an effective DSM helps to prevent disruption to existing relationships and trading activity where a dispute has arisen. By ensuring that disputes are dealt with efficiently, equitably, and in a mutually acceptable way, a DSM allows a dispute to be resolved before it becomes intractable. This minimizes the damage to parties' relationships that could otherwise threaten the business arrangements and/or trading systems that are already in place. It also allows the relationship between disputing parties to return to normality as soon as possible, or where possible, to allow disputes to be solved in parallel as business and trade relations continue unimpeded.
63. Third, an effective DSM helps to prevent further escalation of disputes. If the DSM is fair, neutral and transparent, parties are able to resolve their disputes at arm's length, and will be encouraged to use the DSM for settling disputes instead of taking action unilaterally, or retaliating in other unconnected but damaging arenas. This is particularly important where States are concerned, as governments have to interact in the international political arena across a very wide spectrum of issues. Having a DSM in place thus helps to contain the dispute to specific problem areas, rather than allow it to escalate further or spread to other areas. This minimizes contagion risks that could otherwise have large-scale impact at the international, regional or cross-border level.
64. Fourth, where a multilateral system is concerned, the process of resolving disputes via a DSM can help to uncover hidden costs within the system, increasing efficiency and certainty across all of the system's participants. Where a multilateral treaty contains a DSM, any State signatory to the treaty may utilise the DSM regardless of whether the dispute has arisen bilaterally or multilaterally. Where such disputes are resolved via adjudicative forms of international dispute settlement (i.e. international arbitration, or international courts), the decision of the adjudicator automatically provides guidance for all State participants to the system on their future conduct and behaviour in respect of the issues raised in the dispute, even if they were not directly involved in the

¹⁶ http://www.iadb.org/res/publications/pubfiles/pubB-2002E_6032.pdf at p. 91.

dispute itself. Even where non-adjudicative forms of international dispute settlement are utilised, such DSMs provide a forum for States to discuss and, if possible, agree on how a dispute should be resolved, or on recommendations and guidelines for their future conduct. In this way, the existence of a DSM helps to uncover “hidden” costs within the system, providing rules, guidelines, recommendations, and standards for all participants’ legal rights and obligations in respect of such issues, even where they may not have encountered such problems yet. The existence of a viable DSM can therefore have an incremental preventative effect, increasing legal certainty across the entire system in the long run, and helping to prevent further disputes of a similar nature from arising again.

65. Fifth, a viable DSM plays a very important role in mitigating politicization of a dispute and levelling power imbalances between disputing parties—this is particularly important where States are involved. Where a dispute has arisen between unequal parties, the power imbalances tend to disproportionately benefit the stronger party. In the international law context, a more powerful State may often disregard a weaker State’s rights even where such conduct could constitute a violation of international law. This is because adjudication of international law disputes is voluntary in nature, especially where States are concerned. Because of the principle of sovereign equality, without a DSM in place, States are in most cases able to do as they please without legal consequences or sanction. This often leaves the weaker disputing party without a viable remedy for the wrong that has been done to it. By creating a procedure for the adjudication of disputes and enforcement of rights, a DSM therefore greatly increases parties’ compliance with their substantive obligations under an agreement, regardless of the parties’ respective power imbalances. It does this by levelling the playing field and allowing parties to protect their interests fairly and equitably in a neutral forum by utilising the DSM to shift a dispute to be adjudicated by a neutral 3rd party, rather than allow the status quo to continue, or allow the dispute to be subject purely to the international politics at play between the different States or governments.
66. Finally, the existence of a DSM is also particularly useful in the State context, because it helps to shield States and governments from domestic protectionist pressure, making it easier for them to comply with their international obligations. The ability of a State to enter into international agreements (particularly in the trade context) and comply with their international obligations often depends on its ability to address pressure groups defending the status quo and whose interests will be affected by a change in policy. Indeed, confronting protectionist domestic pressure groups often comes at a great political cost for the incumbent government. Such pressure groups often utilise domestic political platforms to call into question the legitimacy of a government, its policy choices, and its actions in the regional and international sphere. The political risk of international action by a State or government can therefore have a destabilising effect on the incumbent government, which may not want to risk changing the status quo even where a change in policy could benefit the State in the long run. With a

DSM in place (especially those that are adjudicatory in nature), States and governments will often be able to rely on the dispute settlement outcome and/or the need to act in compliance with its international obligations as ordered by an adjudicator, as justification for its international acts. The existence of a DSM therefore operates to shift the political cost of a State's acts to the treaty or its international obligations, or to the dispute settlement method responsible for its application.

67. It is for the above reasons that having a viable and effective international dispute settlement system in place is often critical for the success of any system involving multilateral interactions, especially those in the field of international and regional trade. The next section of this Report focusses on providing a broad overview of common international dispute settlement mechanisms, with the aim of creating awareness of the various DSM options that are available to SAARC Member States and other trading partners and entities in the regional electricity trading framework, for purposes of governing the wide variety of CBET activity.

C. AN OVERVIEW OF COMMON INTERNATIONAL DISPUTE SETTLEMENT MECHANISMS

68. The conduct and resolution of international disputes has grown increasingly complex and specialised over the past few decades. On one hand, the development of international commerce and international law has seen a growth in the concept of what constitutes an “international” or “cross-border” dispute. Consequently, the notion of an “international dispute” now captures a wide variety of disputes ranging from those between private parties with an international or cross-border element, to disputes between foreign investors and host States, to public international law disputes between two or more sovereign States. In addition, the evolution of international legal procedure has seen a proliferation of different international tribunals, institutions and hybrid mechanisms to address these new and emerging kinds of international disputes, all of which have unique and specialist procedures of their own.
69. In light of this complexity, this Section sets out a primer on the different kinds of DSMs available for the resolution of international disputes of the nature described above. These are, by way of summary: (a) negotiation, (b) mediation, (c) conciliation, (d) domestic litigation, (e) international courts and tribunals, and (f) arbitration. While each of these mechanisms are discussed below, these forms of dispute settlement are by no means exhaustive. The author of this Report has chosen to set out briefly how each of these DSMs work, because they provide a fuller picture of the available DSMs, and a working knowledge of each of these forms of dispute settlement is necessary for understanding the connections between different kinds of DSMs and how they interact, and for appreciating the various options that might be adapted in respect of the SAARC Framework Agreement. In addition, this Chapter will also turn to discuss international arbitration in depth, as that particular form of dispute settlement constitutes the focus of the SAARC Framework Agreement.

70. In discussing the various forms of international dispute settlement, a number of important points should be noted at the outset. First, while many of these mechanisms are broadly applicable (e.g. negotiation, arbitration etc), and can be explained generally, there are instances in which significant differences in practices have developed according to the nature of the dispute involved. This is particularly the case where State-related disputes are concerned. For example, dispute resolution practices in the field of State-to-State arbitration, investor-State arbitration and commercial arbitration have taken on unique and specialised forms that are distinct to each species of arbitration. Thus while the general legal framework and principles of arbitration are by and large the same, each of these forms of dispute settlement have unique features of their own. A similar situation exists for negotiations and mediations, with notable unique features being applied where States or Governments are involved. These distinctions will be pointed out in this Chapter insofar as they are relevant.
71. Second, while each of these DSMs will be described separately, it should be noted that the various DSMs can actually take on a hybrid, mixed or multi-tiered nature. For example, it is not uncommon for a dispute settlement clause to contain a multi-tiered dispute settlement obligation. In such instances, disputing parties may have to utilise more than one form of dispute settlement in resolving their dispute. For example, and as will be dealt with in greater detail in the sections that follow, it is common for DSMs for disputes involving States to require disputing parties to enter into a phase of negotiations prior to triggering other forms of dispute settlement, such as arbitration. As such, the sections that follow in this Chapter should not be read with the assumption that the different DSMs are mutually exclusive and/or do not interact in practice. They can, and often do overlap, depending on the nature of the dispute settlement clause agreed upon by the parties.
72. Finally, a distinction should also be drawn between general DSMs and specialised DSMs. General DSMs are dispute settlement procedures that can be applied to all kinds of disputes falling within the dispute settlement agreement. An example of this is the International Court of Justice, which is a permanent international court that possesses the ability to deal with any kind of international law dispute between States, so long as there is an agreement establishing its jurisdiction. In contrast, specialised DSMs are often created by parties to deal with disputes relating to a specific subject matter and arising out of a specific treaty. An example of this is the United Nations Convention on the Law of the Sea, which contains a unique DSM specifically for State-to-State disputes arising out of the interpretation and implementation of that particular treaty. As such, each DSM should be approached on its own terms, as they tend to take on an *a la carte* nature, depending on how parties have worded the dispute settlement clause. It is with this context in mind, that we now turn to a discussion of the various DSMs that parties can utilise to resolve international disputes.

1. Negotiation

73. Negotiation is the most often utilised form of international dispute settlement. Only a small number of international disputes ever reach adjudicatory forms of international dispute settlement such as judicial or arbitral proceedings. This is particularly the case where States are concerned. Given the absence in general of compulsory dispute settlement mechanisms under international law, as well as the general immunity that States enjoy in respect of their official and sovereign acts, the diplomatic channel of negotiations remains the predominant tool by which States come together to resolve disputes, where both sides hope to reach a mutually satisfactory outcome that accords with their respective domestic and foreign policies. Indeed, States and governments may sometimes prefer to utilise diplomatic relations and channels to resolve a dispute, since that does not expose a State's acts to being held in breach of its international obligations by a court or tribunal.
74. Where private parties are concerned, negotiation nonetheless remains an important tool for dispute resolution, albeit for slightly different reasons. In the context of an international or cross-border commercial dispute, private parties often utilise negotiation as a first approach (even where there is no legal obligation to do so), simply because the alternative—resort to litigation or arbitration—can be extremely costly. In that context, since initiating negotiation usually does not deprive a disputing party from subsequently resorting to other forms of dispute settlement, coupled with the fact that it brings with it a prospect of resolving a dispute without incurring heavy costs, approaching the opposing party with the hope of negotiating a mutually satisfactory settlement is often both a matter of prudence and practicality. Moreover, a negotiation between disputing parties often allows each side to explore the other's settlement objectives and baselines. This allows both parties to have a better idea of what the other is seeking after in a settlement, and can be used for strategic purposes either for settling the dispute, or for strategic advantages when it subsequently resorts to litigation or arbitration.
75. As far as the character and conduct of negotiations are concerned, its main features can be briefly summarised as follows:
- a. *Persons involved:* There is no strict criteria for the persons to be involved in a negotiation process. It is up to each disputing party to decide on the person or persons that it would like to participate, and who it deems to be its representative in the negotiation process. Thus, negotiations between commercial entities often take place between both parties' legal counsel, Chief Executive Officers, and even designated shareholders. Similarly, in the State context, States have a free reign to designate its appropriate representative in a negotiation. Each side is also able to decide on the number of representatives it would like to send to a negotiation, and it is not uncommon for a disputing party to send a team of individuals with relevant skills so as to have the

appropriate expertise (business, financial, legal etc.) representing its interests in the negotiation covered. Complex negotiations can therefore involve large delegations or negotiation teams from both disputing parties.

- b. *Setting and formality*: A negotiation can take place in any setting and form, whether by electronic communications, exchange of memoranda, or face-to-face discussions. It can even occur without direct lines of communication between the parties where an interlocutor is utilised. Similarly, the level of formality is completely up to the parties involved, and negotiations can take place in formal settings with strict diplomatic protocols between large State delegations, or even in informal conversations over a meal.
- c. *Negotiation process and procedure*: There are usually several stages to a negotiation process. First, parties have to agree to negotiate. Without such an agreement, the negotiation cannot occur. Second, parties will usually have to agree on the negotiation agenda, as well as the procedure under which the negotiations will take place. This will often include the venue, format, and composition of representatives, the subject matter of the negotiation, as well as dates and times. Third, the actual negotiation will take place, with a view to a settlement. It is important to note that parties are not bound by any legal obligations in their negotiations, and are free to agree on a settlement that departs from any binding legal rules. In that same vein, negotiation is not binding, in the sense that each party is free to walk away from the negotiation process should it conclude that there is no room for a settlement. Finally, should parties reach an agreement, they will often also have to discuss and agree on the timeframe and modalities for implementing the settlement agreement and other related issues for moving forward.
- d. *Confidentiality*: Negotiation procedures, unless otherwise agreed upon by parties, almost always occur in private.
- e. *Relationship with other forms of dispute settlement*: Negotiations can often play an important role in other methods of dispute settlement. This is particularly the case with respect to State-to-State or investor-State disputes. Many inter-State dispute settlement obligations and investor-State arbitration clauses contain a mandatory consultations stage prior to initiating the adjudicative forms of dispute settlement provided for under the relevant treaty. An example of this is Article 3(3) of the World Trade Organisation Dispute Settlement Understanding, which provides that parties “shall enter into consultations in good faith within a period of no more than 30 days after the date of the receipt of the request”, failing which, a panel may be requested by a State for the adjudication of the dispute. Moreover, even where an adjudicatory dispute settlement mechanism has been triggered (e.g. international arbitration), there will often arise in the course of the dispute settlement

procedure various points that will need to be negotiated. These could include, *inter alia*, the seat of the arbitration, the process for appointing a presiding arbitrator, the confidentiality of the arbitration, or even the involvement of an arbitral institution. Negotiation is therefore often foundational to and of broad application even in the context of other forms of international dispute settlement.

2. Mediation

76. Mediation is another method of international dispute settlement that is used in both the commercial and State context. Where parties to an international dispute cannot resolve their disagreement through negotiations, the intervention of a third party mediator can often be explored as a potential method for breaking an impasse and arriving at an agreement. Mediation bears a number of similarities to negotiation, in the sense that parties' consent is required for mediation to take place, the proceedings are usually confidential in nature, and any mediated outcome can depart from any binding legal obligations that may otherwise be applicable. There are, however, a number of important differences between mediation and negotiation that will be pointed out in the discussion that follows.
77. A critical difference between mediation and negotiation is that it entails the participation of a mediator—a third party neutral whose role is to assist the party in furthering their negotiations on the basis of the suggestions and proposals advanced by the mediator. The mediator often seeks to identify and clarify parties' essential interests, based on the facts of the disputes, in order to propose to parties what he or she believes would represent a fair and neutral settlement of the dispute. In doing so, the mediator often utilises a combination of open “round table” discussions where both parties are present and involved, as well as private caucuses between the mediator and each party. These private caucuses play an important role, as it allows the mediator to test each parties' positions and to speak to each of them in a private setting, conveying information to that party which may otherwise be embarrassing or prejudicial to that party if conveyed in open session. Thus, through this combination of open and private sessions, the mediation process and the involvement of a neutral mediator often allows the disputing parties the possibility of making concessions to each other's views to or through the mediator, which is often not possible in direct negotiations. The suggestions and proposals of the mediator are not binding on the parties, and parties may reject them.
78. As regards the choice of mediators, the basic principle is that parties are free to agree on their mediator. In this regard, where States are involved in a dispute, it is not uncommon for a neutral third State, or the Head of State of another country, or even the Secretary-General of the United Nations to act as a mediator in the dispute, so long as the disputing parties are in agreement with such involvement. Where this is the case, such an initiative will usually only be acceptable to the disputing States if there

is no concern that the third State or Head of State has a conflict of interest in the matter.

79. It is also important to note that, in certain instances, mediation and negotiation may overlap or be undertaken in parallel by the disputing parties. A mediator may also decide to allow direct negotiations to take place between the parties during the mediation process, especially where such negotiations are helpful for finding resolution in respect of limited or targeted issues raised in the mediation. In such situations, the mediator may or may not be involved in the negotiation process, depending on parties' agreement. Where parties have agreed for the mediator to be involved, the mediator will usually provide the framework or agenda for the negotiations, but will not intervene directly. Mediation may thus be intertwined with negotiation as a dispute settlement method in a variety of ways.
80. Finally, it should also be noted that mediation can be utilised by parties in conjunction with adjudicatory forms of dispute settlement such as arbitration. For example, disputing parties have, on occasion, concluded hybrid "med-arb" dispute resolution clauses in which arbitral procedures are combined with mediation. While the exact nature of a "med-arb" process is up to the parties to define in detail, it usually involves parties undergoing a process of mediation with a neutral mediator as a first step in the dispute resolution process. Should that mediation process fail (i.e. parties do not arrive at a mediated settlement), the mediator will then take on the role of an arbitrator, and the dispute will be resolved through arbitration, where parties are bound by the arbitrator's award.

3. Conciliation

81. Conciliation is a method for the resolution of disputes whereby the parties set up a conciliation commission (either on a permanent or ad hoc basis) to deal with a dispute. The conciliation commission proceeds to conduct an impartial examination of the dispute and attempts to define the terms of a settlement that may be acceptable to the disputing parties. Classically, international conciliation addressed inter-State disputes. With the development of economic and trade law, however, international conciliation has also developed to deal with transnational issues, including disputes between States and private parties, as well as disputes between private parties *inter se*.
82. The conciliation commission is composed of independent individuals that are chosen by the parties or with their participation, and acts strictly within the mandate that has been conferred onto it by the parties. The conciliation procedure is flexible, in the sense that it is for parties to determine, but also relatively formal. During the course of the conciliation process, the commission will examine the facts and law applicable to the dispute, and draft a recommendation or settlement proposal that parties are then free to accept or reject. The proposed settlement may take into account legal aspects of the dispute but should not contain a strict legal application of the law and should not

prejudge an eventual arbitral or judicial decision. In this way, conciliation proceedings and their outcome are confidential and without prejudice, and does not affect the legal position of the parties should they choose to resort subsequently to adjudicative forms of dispute settlement.

83. While the process of conciliation may sound broadly similar to both mediation and arbitration, there are a number of differences that distinguish conciliation as a distinct dispute settlement mechanism. First, the role of the conciliation commission is different from that of an arbitrator or mediator. Unlike an arbitrator whose role is to decide a dispute purely on the basis of legal merit, a conciliator or conciliation commission is an impartial person or panel that seeks to identify a right that has been violated and searches to find the optimal solution in order to direct parties toward a satisfactory agreement. The scope of a commission's considerations is therefore not limited to parties' legal position. While this may sound similar to mediation, the role and the approach of a conciliation commission in resolving a dispute is actually very different from that of a mediator. A mediator maintains his or her neutrality at all times throughout the mediation process, working together with the disputing parties to facilitate their own discussion and to assist them in finding *their own* solution. A mediator is therefore more of a facilitator in the dispute resolution process. In contrast, in conciliation, the conciliator or panel is usually an authority figure that is responsible for finding the best solution for the disputing parties. It is thus the conciliator, rather than the parties, that generates, proposes, and develops the terms of a settlement.
84. Second, the outcome of conciliation is quite different from that of arbitration or mediation. In contrast with an arbitral award, which is a binding decision, a conciliator or commission's report takes the form of a set of proposals which is not binding on the disputing parties. Because the conciliation commission's proposals can be either accepted or rejected by the parties, the usual practice is for the commission to give the parties a specified period of a few months in which they can indicate their response. If its proposals are accepted, the commission draws up an agreement recording the fact of conciliation and setting out the terms of the settlement. If the proposed terms are rejected, the conciliation has failed and the parties are under no further obligation to continue the process. This stands in distinct contrast to arbitration, which requires an arbitral tribunal to produce an award binding on the parties, or mediation, where the failure of the mediation process usually lies in parties' inability to generate their own agreed outcome, rather than a failure to agree on a settlement proposed by the mediator.
85. Finally, it should be noted that while the broad mandate of the conciliation commission is to investigate the dispute and to suggest the terms of a possible settlement, the work of the commission and how it approaches its mandate depends on the terms of the conciliation clause or instrument, how parties present their dispute and their positions, and how the members of the commission view their role. As such,

while the practice of conciliation in general exhibits many common features, there are significant differences in approach depending on the abovementioned elements.

4. Domestic Litigation

86. Domestic litigation is a process whereby the national courts of a State decide a dispute that has been brought before it. The disputing parties involved can be domestic or international, as long as the court considers that it has jurisdiction over the dispute. In the context of international disputes, however, and as mentioned in Section A above, a claimant can sometimes be reluctant to resort to domestic litigation to resolve its dispute for reasons of lack of neutrality, immunities, and other impracticalities such as costs, delays, and length of preliminary proceedings. This is particularly the case where the respondent or defendant itself is the State whose courts will be deciding the dispute if litigation were to be commenced.

5. International Courts and Tribunals

87. Where State-to-State disputes are concerned, States parties to a dispute may seek a solution by submitting the dispute to an international court or tribunal composed of independent judges whose task is to settle claims on the basis of international law and render decisions which are binding on the parties. Examples of such courts and tribunal include the International Court of Justice (“ICJ”) seated in The Hague, The Netherlands, or the International Tribunal for the Law of the Sea (“ITLOS”) seated in Hamburg, Germany. Where trade disputes are concerned, Member States of the World Trade Organisation (“WTO”) may also submit their disputes to be resolved pursuant to the dispute settlement framework of the WTO.
88. Further examples of these types of courts and tribunals can also be found in a number of regional treaties establishing courts for the settlement of certain kinds of disputes. Hence, the European Court of Human Rights and the Inter-American Court of Human Rights are both international courts that are created by treaty and have subject matter jurisdiction specifically in respect of matters of human rights in connection with their respective treaties.
89. Like international arbitration, the settlement of international disputes by international courts is subject to the consent by the States concerned of the jurisdiction of the court over the dispute. This consent may be expressed in a variety of ways including (a) a special agreement between the States parties to a dispute conferring jurisdiction on a court in respect of a particular dispute that has already arisen; and (b) an agreement by States conferring jurisdiction on the court over potential disputes that may arise.
90. As regards the nature of the decision-making body, both judicial settlement and arbitration provide recourse to an independent adjudicative body to obtain binding decisions. Arbitral tribunals, however, are essentially of an *ad hoc* nature, and are composed of arbitrators selected by parties to a dispute who also determine the

procedural rules and the law applicable to the case concerned. In contrast, international courts and tribunals tend to be permanent institutions or judicial organs whose composition, jurisdictional competence and procedural rules are pre-determined by their constitutive treaties. Thus, the composition of judges of an international court or tribunal, as well as the criteria and selection procedure, is usually stated specifically in the treaty which constitutes it.

91. In respect of legal proceedings, the rules of procedure governing the proceedings for the judicial settlement of international disputes are found in the statute and rules of procedure of the international court or tribunal concerned. Like arbitration, proceedings usually take place in written and oral phases. Pleadings are filed and exchanged by the disputing parties within a time limit specified by the court, setting out each parties' legal position. These pleadings are generally confined to a statement of case, defence, and, where appropriate, a reply and rejoinder, as well as the relevant documentary evidence supporting parties' claims. At the end of the written proceedings, oral proceedings are held for the judges to hear parties' submissions made orally. Given that the rules of procedure for judicial settlement is specifically attuned to State-to-State disputes, a more detailed analysis of the rules and procedure of various international tribunals will be conducted in a later section of this Report, in identifying the possible best practices that may be adapted in respect of the SAARC Framework Agreement.

6. Arbitration

92. Arbitration is a consensual procedure for the final settlement of disputes on the basis of law by adjudicators of the parties' own choosing. It is a contractual method of resolving disputes, in the sense that by their agreement, the parties each agree to entrust the differences between them to the decision of an arbitrator or panel of arbitrators, to the exclusion of national courts, and they bind themselves to accept that decision, whether or not they think it is right, and whether or not they agree with it.
93. Arbitration resembles judicial proceedings in the sense that it involves the settlement of disputes through the application of legal principles by third parties that are empowered to render binding legal decisions. Unlike judicial proceedings which usually involves full-time judges presiding over a court, however, an arbitral tribunal is constituted to resolve a single dispute or a class of related disputes, and is staffed by arbitrators that are selected by or with the participation of the disputing parties. Thus, in arbitration, parties have a very substantial and direct capacity to decide on and influence the composition of the adjudicators that will hear and decide the dispute.
94. This flexibility in arbitration also applies to the rules of procedure that govern the arbitral proceedings. Parties are able to select and agree on the rules of arbitral procedure applicable to the dispute, as well as modify them as they so choose. In contrast, where judicial proceedings before international courts and tribunals are

concerned, disputing parties are not able to choose or modify the rules of procedure, which are constituted and applied by the court in question.

95. Arbitration can be applied for the resolution for any kind of dispute. Hence, it has been widely utilised in respect of disputes relating to international commercial transactions, disputes between investors and States in relation to a violation of investment treaties, as well as disputes between States relating to a violation of international law. That said, given the unique and important differences between these kinds of disputes and the different entities involved, arbitral practice has developed substantially in response to the varying needs of these 3 different fields. The next section of Chapter 3 sets out in detail the legal framework of international arbitration and explains the differences in practice between international commercial arbitration, investor-State arbitration and State-to-State arbitration.

D. A FOCUS ON INTERNATIONAL ARBITRATION

96. International arbitration provides an effective and efficient means of resolving international disputes across a variety of subject matters. This Section summarizes the legal framework for international arbitration and explains the general principles that are applicable in the process and procedure of arbitration. It also introduces and distinguishes between international commercial arbitration, investor-State arbitration, and State-to-State arbitration, identifying the different characteristics and nature of each of these species of arbitration.

1. General Principles

- a. *The Legal Framework for International Arbitration*

97. International arbitration is governed by a multi-tiered legal regime which includes (a) international arbitration conventions, (b) national arbitration legislation, (c) rules of arbitral procedure, and (d) arbitration agreements or clauses. While each of these will be explained in the sections that follow, a brief summary is useful for providing an understanding of the overarching architecture of international arbitration.
98. As a starting point, there have been a number of international agreements and conventions that have helped to establish the system of international arbitration that we know of today. Chief of these, and deserving of particular mention, is the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). The New York Convention is the most significant international convention relating to international commercial arbitration, and it was adopted by States to address the need of the international business community for a comprehensive and uniform legal regime for the international arbitration process which would allow arbitral awards to be enforceable across the world. By entering into the New York Convention, States parties agreed on a universal constitutive charter for the recognition and enforcement of foreign arbitral awards,

subject to a limit number of specified exceptions. Thus, by virtue of the New York Convention, States parties have an obligation to (a) require that their national courts recognise and enforce foreign arbitral awards; (b) require that their national courts recognise the validity of arbitration agreements; and (c) require national courts to refer disputing parties to arbitration where they have entered into a valid arbitration agreement. The New York Convention therefore forms the cornerstone of modern commercial arbitration, as it allows awards rendered by an arbitral tribunal to be enforced in all States parties to the Convention.

99. While international arbitration is, by definition, a private dispute resolution process distinct from litigation, national courts and national arbitration legislation nonetheless play an important role as part of the legal framework for international arbitration. National courts give effect to arbitration agreements and awards and assist in their enforcement. They also provide support for the arbitral process by referring parties to arbitration and by providing municipal oversight where an arbitral tribunal has yet to be constituted. In addition, the New York Convention has been implemented through national legislation in virtually all States parties to the Convention. The practical effect of this is effectively to shift the rules and principles of the New York Convention to national arbitration legislation, making such rules dependent on both the content of such national legislation and the interpretations given by national courts to the Convention and national implementing legislation.
100. Where the process and procedure of arbitration is concerned, these are detailed by the procedural rules that the parties have chosen. Parties have the freedom of deciding what rules they want to govern the arbitral procedure. As such, they may choose between procedural rules that are created and applied by arbitral institutions (e.g. the International Chamber of Commerce (“ICC”), SARCO, or Singapore International Arbitration Centre (“SIAC”) etc.), the UNCITRAL arbitration rules which were promulgated by the United Nations General Assembly, or they may even agree on their own *ad hoc* arbitration procedural rules for purposes of a specific dispute. It should also be noted that most procedural rules also provide for a general power of the arbitral tribunal to decide on any matters of procedure. Thus, procedural issues on which the arbitral rules are silent are usually submitted to and decided by the arbitral tribunal.
101. Finally, as international arbitration is a consensual process, the arbitration agreement and clause is particularly important as it sets out and determines the scope of the parties’ agreement. Consequently, issues relating to the nature and scope of disputes that can be submitted by parties to the tribunal, as well as the scope of the jurisdiction of the tribunal, have to be decided by reference to the terms of the arbitration agreement. The arbitration agreement also often contains information relating to the applicable arbitration procedure, such as the arbitral rules or administering institution that the parties have chosen, and where this is the case, the parties’ agreement should

be strictly followed.

b. The Arbitration Agreement

102. A foundational principle of arbitration is that it is a consensual process that requires the agreement of the parties. This agreement to arbitrate usually takes the form of an arbitration agreement or clause, which can be contained in a variety of instruments. Where commercial disputes are concerned, the arbitration agreement usually consists of a dispute settlement clause that is inserted into the contract between the contracting parties. In other kinds of disputes, however, particularly disputes involving States, the arbitration agreement can be contained in other instruments such as a treaty or protocol.
103. The point at which parties agree to arbitrate their dispute is up to the parties' discretion. Parties often plan for the settlement of disputes in advance. In such instances, an agreement to arbitrate that is inserted into a contract or treaty usually allows for the resolution of *prospective* disputes by arbitration. This allows for parties to conclude an agreement to arbitrate their disputes before such a dispute has even arisen. This agreement to arbitrate binds all parties to resolve their disputes by international arbitration, even where a party subsequently denies its consent to arbitrate after arbitration has been initiated.
104. Another way in which parties may agree to arbitrate is by concluding a "submission agreement" by which parties agree to submit to arbitration a specific *existing* dispute that has *already arisen* between the parties. When an existing dispute is submitted to arbitration, the submission agreement must define that dispute, and may also contain specific information regarding the arbitration procedure that has been chosen by parties. Submission agreements are much rarer since it is often difficult for parties to negotiate an arbitration agreement after a dispute has already arisen. As such, the majority of arbitration agreements take the form of provisions included in a contract or treaty, and relate to the resolution of prospective disputes that have not yet arisen.
105. Parties are largely free to draft their arbitration agreement in the terms that they wish. An arbitration agreement can therefore be extremely detailed or brief, depending on the parties' agreement. Nonetheless, it is common for arbitration agreements to address or express the following: (a) the agreement to arbitrate; (b) the scope of disputes that parties agree to submit to arbitration; (c) an agreement on the use of a particular arbitral institution for the administration of the proceedings; (d) the arbitration procedural rules selected by the parties; (e) the seat of the arbitration; (f) the procedure for the appointment of arbitrators; (g) the language of the arbitration; and (h) the law applicable to the substance of the dispute. In line with parties' general freedom to define the terms of their agreement to arbitrate, parties can also agree on multi-tiered or mixed dispute settlement clauses in which arbitration is merely one of the forms of dispute settlement that a disputing party may utilise.

106. Finally, since the arbitration agreement is the foundation of the parties' consent, it also delineates the scope of the tribunal's jurisdiction and competence to hear a dispute. While an arbitral tribunal has competence-competence—i.e. the power to decide whether it has jurisdiction—it must approach the issue of its own jurisdiction in accordance with the scope of the parties' consent as expressed by the terms of the arbitration agreement. Failure to do so could result in the arbitral award being set aside by the national court of the seat of the arbitration.

c. Ad Hoc and Institutional Arbitration

107. International arbitration may be either institutional or *ad hoc*, and there are important differences between the two. In institutional arbitration, the arbitral proceedings are administered by a specialised arbitral institution which assists the arbitral tribunal throughout the arbitration process. These arbitral institutions do not themselves play the role of the arbitrator or decide the merits of the dispute. Rather, the arbitral institution provides legal, case management and administrative support to the arbitrators to ensure that each case is arbitrated smoothly and efficiently, and that there are no technical defects that could result in the arbitral award being set aside.
108. Examples of well-known international arbitration institutions include the ICC, the Permanent Court of Arbitration (“PCA”), the SIAC, as well as SARCO. Most arbitral institutions have promulgated sets of arbitration procedural rules that apply where parties have agreed to arbitration pursuant to such rules, typically by incorporating such rules in their arbitration agreement. It should nonetheless be noted that many arbitral institutions are also willing and able to administer disputes according to the UNCITRAL arbitration rules, which is an independent and non-institutional set of arbitration rules which were promulgated by the United Nations General Assembly.
109. In contrast to institutional arbitration, *ad hoc* arbitrations are not conducted under the auspices of an arbitral institution. Instead, parties simply agree to arbitrate their dispute under the authority of the arbitral tribunal, without any institutional supervision over the arbitration. Parties usually also select a pre-existing set of procedural rules designed for *ad hoc* arbitration, which tends to be the UNCITRAL arbitration rules.
110. Both institutional and *ad hoc* arbitration have strengths and weaknesses. Since institutional arbitration is supervised by professional staff, this usually reduces the risks of procedural breakdowns and delays, as well as the likelihood of technical defects in the arbitral proceedings and award. The involvement of an arbitral institution can also be particularly constructive in respect of matters involving the arbitral tribunal, as they often also play the role of the appointing authority, and can deal with the appointment of arbitrators and challenges to arbitrators in that capacity. On the other hand, *ad hoc* arbitration is generally more flexible, as there is no obligation to abide by any institutional standards. It may also be more private and

confidential than institutional arbitration, as certain arbitral institutions have taken initiative in increasing the transparency of arbitration.

111. Finally, it should be noted that different arbitral institutions often have different specialisations in respect of the kind of arbitral disputes which they administer. Most arbitral institutions such as the London Centre of International Arbitration (“LCIA”), SIAC, ICC as well as the Stockholm Chamber of Commerce (“SCC”) tend to administer the vast majority of international commercial disputes. In contrast, investment treaty arbitrations are usually administered by the International Centre for Settlement of Investment Disputes in Washington (“ICSID”), or the PCA in The Hague. Finally, State-to-State arbitration is almost always either *ad hoc* in nature, or in the vast majority of cases, administered by the PCA which was itself created specifically for the purpose of administering arbitrations involving States or State-owned entities.

d. The Arbitral Tribunal

112. Another fundamental attribute of “arbitration” is that it involves the submission of disputes to a neutral non-governmental decision-maker selected by or for the parties—i.e. an arbitrator. Arbitrators are chosen by the parties themselves or, where parties are unable to agree, by an appointing authority that is chosen or designated by the parties. Thus, unlike national and international courts which have a permanent existence or standing, a new arbitral tribunal must be constituted by the disputing parties for each dispute that is submitted to arbitration.
113. Given that party autonomy is an important feature in arbitration, the New York Convention, national arbitration legislation as well as arbitration procedural rules allow parties a very wide discretion and freedom to select the arbitrators who will resolve their dispute, the number of arbitrators that form the tribunal, and to define the kind of expertise that is required as a criteria for selection of arbitrators. If parties are unable to agree on these issues, the arbitration procedural rules also provide for default rules and procedure pertaining to the number of arbitrators forming the tribunal, and often contains an appointing authority mechanism by which a designated appointing authority will appoint a suitable arbitrator where parties are unable to agree.
114. This party autonomy in the selection of the arbitral tribunal has a number of advantages. First, since parties are able to select arbitrators whom they deem to be appropriate for the resolution of their dispute, this increases the legitimacy of the arbitral award in the eyes of the parties. Second, the fact that parties are able to tailor the number of arbitrators hearing the dispute to their preference means that they are able to have at least some control on the arbitration costs of the dispute. They can therefore customise the size of the tribunal according to the complexity and the needs of each case. Third, parties are also able to select arbitrators with particular expertise in different subject matters depending on each specific case. Construction disputes,

contractual disputes and energy disputes are all vastly different, and may require specific expertise and experience depending on the technical knowledge required to resolve the dispute. With the autonomy to select the arbitral tribunal as well as define what kind of expertise is required, arbitration therefore offers disputing parties a more expert and experienced means of resolving disputes requiring deep sector knowledge than would otherwise be the case in litigation which tends to involve judges with general legal expertise.

115. As regards the procedure for appointment of arbitrators, this depends on the particular arbitration rules that parties have chosen to govern the arbitral proceedings. In general, however, it is common for the arbitration agreement or the arbitration rules to provide for a tribunal to be composed of three members, with each party nominating one co-arbitrator. By way of example, under Article 7 of the 1976 UNCITRAL rules, the disputing parties shall each appoint one co-arbitrator. The two co-arbitrators will then choose the third arbitrator who will act as the presiding arbitrator of the tribunal, and if the two co-arbitrators are unable to agree on a presiding arbitrator within thirty days, the presiding arbitrator will be appointed by the designated appointing authority. Depending on the applicable arbitration rules, certain rules may allow more or less party autonomy as regards the selection of the arbitral tribunal.
116. In terms of the qualifications of arbitrators, most arbitration rules and national arbitration legislation impose requirements of independence and impartiality on arbitrators. An arbitrator that has been appointed in spite of bias or conflict of interest is therefore open to challenge by the parties. In this regard, Article 12(1) of the UNCITRAL rules is representative of most arbitration rules, providing that “[a]ny arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.” Article 13 of the UNCITRAL rules further states that the challenge will be considered by the appointing authority (unless all parties agree on the challenge or the challenged arbitrator resigns). These provisions establish a largely stand-alone mechanism whereby objections to arbitrators may be resolved expeditiously by a contractually-agreed appointing authority, without recourse to national courts.
117. The arbitral tribunal decides the dispute in accordance with the legal merits of the parties’ respective position. Parties have limited grounds for attempting to set aside the arbitral award at the national court of the seat of the arbitration, and in most cases, an arbitral tribunal’s decision is final and binding on the parties.

e. Arbitration Procedural Rules

118. Parties’ agreement to arbitrate is premised on the objective that they are able to obtain and utilise fair, neutral and expedient procedures which are efficient and customised to their particular dispute, without reference to the procedural formalities that tend to apply in national courts. The principal means of pursuing these objectives in

arbitration is through the parties' ability to agree on the arbitral procedures that govern the proceedings.

119. Arbitration rules are a set of provisions for the conduct of arbitral proceedings. They can be prepared by arbitral institutions, as is the case for the ICC arbitration rules or the SARCO arbitration rules, or by non-institutional bodies such as UNCITRAL. These rules become effective when chosen by the parties, either expressly (e.g. in the arbitration agreement) or by reference to an arbitral institution. For example, the preamble of the 2014 LCIA arbitration rules provide that parties submitting a dispute to arbitration by the LCIA "shall be taken to have agreed...that any arbitration between them shall be conducted in accordance with the LCIA Rules".
120. Given the very large number of arbitration institutions in existence that have developed their own arbitral procedural rules, it is neither easy nor useful for the purposes of this Report to compile an index or inventory analysing all these rules. In general, however, a set of arbitration procedural rules will set out the rules and principles governing the entire process of arbitration, and will usually cover, *inter alia* (a) the criteria for submitting a dispute to arbitration by the claimant; (b) the time line for a respondent to submit a written response; (c) the mode of communications between parties and the tribunal; (d) the rules and procedure for selection of arbitrators, constitution of the tribunal, and challenges to the appointment of an arbitrator; (e) any requirements pertaining to the nationality of the arbitrators; (f) third party involvement in the proceedings; (g) appointment of emergency arbitrators and replacement of arbitrators; (h) timelines for parties to exchange written pleadings setting out their respective legal positions; (i) the procedure for fixing the seat of the arbitration; (j) the language of the arbitral proceedings; (k) the procedure for utilising documentary and/or witness evidence; (l) the confidentiality of the proceedings; and (m) the rules governing the arbitral award.
121. As regards the relationship between the applicable arbitration procedural rules and the national arbitration legislation of the seat of the arbitration, it is usually the case that where there are conflicting procedures specified by the two sets of rules, the specific arbitration procedural rules chosen by the parties will apply. If, however, the arbitration procedural rules do not promulgate any rules on a specific issue, one can then turn to the national arbitration legislation of the seat of the arbitration for guidance, or failing which, submit the issue to be decided by the arbitral tribunal which has a general procedural discretion to fill any procedural gaps and to determine the arbitral procedure in the absence of agreement by the parties.

f. The Seat of the Arbitration, the Role of National Courts and the Role of National Arbitration Laws

122. A concept of central importance to international arbitration is that of the seat or place of the arbitration. The location of the arbitral seat is to be distinguished from the venue

of the hearing. The venue for the hearing is merely the physical location of where the hearing will take place before the arbitral tribunal. This can be anywhere in the world, and often takes place in professional arbitration facilities or even in hotels and function rooms. In contrast, the “seat” of the arbitration is a legal construct that designates the State in which the arbitration has its legal domicile or juridical home. Thus, where parties agree on the seat of the arbitration, they are agreeing on the application of a particular State’s national arbitration legislation that will form part of the legal framework for the arbitration, and the involvement of that State’s national court in supporting the arbitral process. In addition, while the venue of the arbitration hearings can change—i.e. parties may prefer to hold jurisdictional hearings in one country, and the hearing on the merits in another, depending on convenience—the State that is chosen as the juridical seat of the arbitration stays the same throughout the arbitration process.

123. In this way, the national courts of the seat of the arbitration have a complementary relationship with the arbitral tribunal. Both bodies serve the common purpose of ensuring the efficacy of international arbitration, with the national court generally taking on a role in limited areas. These areas include, *inter alia* (a) the appointment of arbitrators in absence of an agreement between the parties, where such a role has been delegated to it by the relevant procedural rules or arbitration legislation; (b) ruling on the validity of the arbitration agreement; (c) referring parties to arbitration where there is a valid arbitration agreement; (d) ruling on challenges to arbitrators (depending on the applicable arbitration rules); (e) supporting the arbitration process by subpoenaing witnesses or compelling the discovery of documents; (f) supporting the arbitration process through emergency procedures; (g) deciding on whether an arbitral award should be recognised or set aside; and (h) enforcing arbitral awards.
124. The scope of the powers of a national court in supporting the arbitral process is contained in the national arbitration laws of that State. The national arbitration laws also provide for general default rules of arbitration that apply in the event that parties are unable to agree on the arbitration procedural rules (particularly where *ad hoc* arbitration is concerned), or where the procedural rules chosen by the parties are silent on a particular issue. While different countries are free to design their national arbitration laws as they deem fit, the majority of States have adopted or based their national arbitration legislation on the UNCITRAL Model Law on International Commercial Arbitration, which provides a model arbitration legislation that national governments can adopt as part of their domestic legislation on arbitration. This is not to be confused with the UNCITRAL arbitration rules, which is a set of rules which disputing parties may select to govern the conduct of an arbitration intended to resolve a dispute between themselves. In this regard, it is useful to note that not all SAARC Member States have adopted the UNCITRAL Model Law in their national arbitration regimes. Bangladesh, Bhutan, India, Maldives and Sri Lanka are Model Law countries, but Afghanistan, Nepal and Pakistan are not. The national arbitration

regimes of the SAARC Member States will be analysed in greater detail in Chapter 4 of this Report.

g. Major Procedural Steps in the International Arbitration Process

125. Most international arbitrations involve a number of common procedural steps, which are set out in summary form below. It should however be noted that each dispute is different, and consequently, there is a very wide spectrum in which the procedural stages of an arbitration has potential to be very simple or complicated, depending on the nature of the dispute and the parties' conduct. Nonetheless, the following description is intended to serve as a useful summary of the various procedural stages that often occur in the practice of international arbitration:

- a. *Notice of Arbitration:* The first procedural step is usually the filing of a notice of arbitration by the claimant. The main purpose of the notice of arbitration is to inform the respondent that the arbitral proceedings have been commenced, and to set out the basic premises and general context of the claim being asserted against him.
- b. *Involvement of an arbitral institution:* Where parties have agreed in the arbitration agreement on an arbitral institution for the administration of the proceedings, they must usually notify the arbitral institution of the commencement of the arbitration. If there is no such agreement, parties may nonetheless agree on the involvement of an arbitral institution subsequent to the dispute having arisen.
- c. *Response:* Most arbitration national legislation does not address the possibility of the submission of a response by the respondent to the claimant's notice of arbitration. Nonetheless, the applicable arbitration rules often do provide such a possibility, in which case the duration for such a response will also be specified. Alternatively, the arbitral tribunal may also utilise its procedural discretion to allow a response.
- d. *Constitution of the arbitral tribunal:* The process for constituting the arbitral tribunal usually takes approximately 3 months. The applicable mechanisms and timelines for the appointment of arbitrators is usually specified in the arbitration procedural rules. Either party may also challenge the appointment of an arbitrator, which is usually decided by the designated appointing authority.
- e. *First procedural hearing:* After the tribunal has been constituted, it is likely to convene a first procedural hearing with the parties and their counsel. The purpose of the hearing is to discuss and establish the legal and practical framework for the arbitration, including the procedural timetable, the rules for the arbitration, the seat of the arbitration, mode of communications, and any

other administrative matters relating to the arbitration.

- f. *Provisional or interim measures*: In certain circumstances, a party may seek provisional or interim measures before an arbitral tribunal pending the resolution of the dispute. Such an application is usually made by a party where the opposing party's conduct is prejudicial to the ongoing resolution of the dispute or has the potential to negate the benefit of the decision of the tribunal in respect of the dispute.
- g. *Discovery*: Discovery of documents is very different in arbitration as compared to litigation, and is usually much less extensive. There is no automatic right to disclosure in arbitration. Thus, parties must either agree on the extent of documentation and evidence to be exchanged (voluntarily), or seek leave from the arbitral tribunal to obtain procedural orders providing for disclosure.
- h. *Exchange of pleadings and evidence*: The arbitral tribunal will set a procedural timetable setting out the timelines for parties to prepare their case and exchange pleadings and evidence. This usually takes the form of the Claimant's memorial, Respondent's counter-memorial, Claimant's reply, and Respondent's response to the Claimant's reply. Further pleadings may also be exchanged if allowed by the arbitral tribunal, and it is not uncommon for post-hearing written submissions to be filed by the parties.
- i. *Bifurcation of proceedings*: The arbitration proceedings may be bifurcated or split depending on whether it is more efficient for certain issues to be decided before the full merits of the dispute are heard. Common examples of bifurcation are where the issues relating to the tribunal's jurisdiction is heard and decided first, before the hearing on the merits. The benefit of bifurcation is that the initial hearing has the potential to reduce the number of issues to be dealt with in the case, especially where the tribunal decides that it only has jurisdiction over a limited scope of issues, or over only one part of the dispute. If parties are not in agreement on bifurcation, the tribunal will be responsible for deciding whether or not to bifurcate the proceedings.
- j. *Jurisdictional hearing*: Where proceedings are bifurcated, a tribunal may hold an initial hearing that is specifically for deciding the scope of the tribunal's jurisdiction. Should the tribunal decide that it has no jurisdiction to hear the dispute, the arbitral proceedings will come to an end. If however, the tribunal decides that it has jurisdiction, the dispute will be heard in a subsequent hearing on the merits in respect of the issues on which the tribunal has jurisdiction.
- k. *Hearing on the merits*: This is a hearing in which the tribunal will decide the dispute on the basis of the substantive legal merits of parties' submissions.

Where there is no bifurcation of proceedings, the hearing on the merits will include both issues of jurisdiction and merits, which will be decided together.

- l. *Tribunal deliberations*: After the hearing on the merits, the tribunal will usually take some months to decide the case. This is done in private discussions and meetings between the arbitrators without the disputing parties, where the arbitrators will decide how they will rule.
 - m. *The arbitral award*: The arbitral tribunal publishes its decision to the parties in the form of a written arbitral award. This award is final and binding, save for the ability of a party to set it aside at the seat of the arbitration. Upon the production of the arbitral award to the parties, the arbitral tribunal is considered *functus officio*—i.e. that the tribunal’s authority and powers come to an end.
 - n. *Setting aside and enforcement of the award*: The losing party in an arbitration will usually try to set aside the arbitral award at the national courts of the seat of the arbitration. The grounds for setting aside tend to be limited to procedural irregularities. Conversely, the winning party in an arbitration will apply to enforce the award in a country in which the losing party has its assets.
126. This sets out briefly the different procedural stages in an arbitration from start to end. Nonetheless, it is to be reiterated that each arbitration is different, and the procedure in an arbitration is often the outcome of various factors including the complexity and nature of the dispute, parties’ strategic options, as well as the arbitrators and arbitral institutions involved in the resolution of the dispute.

h. The Arbitral Award

127. A defining characteristic of arbitration is that it produces a binding award. This making of an “award” refers to the tribunal’s rendering of its decision in a manner that satisfies the formal requirements of the arbitration legislation at the arbitral seat. Upon completion of the award, the tribunal’s mandate ceases. Thereafter, compliance with and enforcement of the award becomes a matter for the parties and the national courts.
128. In many cases, the losing party will voluntarily comply with the award. This reflects the parties’ contractual undertaking to arbitrate and comply with the resulting award. However, in circumstances where an arbitral award is not voluntarily complied with, either party may need to utilise the procedures available in the national courts. In this regard, there are four basic legal avenues that can be taken in the national courts in relation to the arbitral award.
129. First, the arbitral award may be “confirmed” in the national courts of the seat of the arbitration. The effect of this is the production of a national court judgment at the seat of the arbitration that incorporates the terms of the award. This judgment then

becomes capable of enforcement in that court or in foreign courts in the same manner as other judgments from that jurisdiction.

130. Second, the losing party may seek to set aside the award at the seat of the arbitration. An award that has been successfully set aside or annulled at the seat of the arbitration is rendered null and void at least at the place of annulment, and in most cases, in other foreign courts.
131. Third, an award may be “recognised” either at the seat of the arbitration or in countries outside the seat of arbitration. This gives the award the status of a national court judgment in the jurisdiction in which the award is recognised, and is generally required for an award to be enforced within that jurisdiction.
132. Finally, an award may be enforced at the seat of the arbitration or elsewhere. This allows the national court enforcing the award to exercise coercive State sanctions in respect of the award, such as the execution on assets, attachment, or garnishee proceedings.

i. Time and Cost of Arbitration

133. The duration and cost of international arbitration is generally very difficult to predict. There are indeed many variables on which the duration and costs of the arbitration depend, including *inter alia* (a) the complexity or novelty of the dispute; (b) the issues raised in the dispute; (c) the conduct of the parties; (d) whether proceedings were bifurcated, (e) the number of pleadings filed and exchanged between the parties; (f) the extent of evidence filed and exchanged by parties; and (g) the arbitral tribunal’s approach in deciding the dispute. The unpredictability of these factors does not therefore allow for a straightforward or clear-cut analysis of these issues. This section should therefore only be taken as providing a basic touchstone on the possible time and costs implications in respect of international arbitration.
134. Nonetheless, and by way only of a general estimation, it can take approximately 2-4 years for arbitration of a dispute to be completed. This is, of course, merely a generalised figure, and simple or complicated disputes can take both shorter and longer than that duration.
135. As far as costs of the arbitration are concerned, there are three main categories of costs associated with the arbitration of a dispute. These are explained and broken down as follows:
 - a. *Arbitration costs*: These usually include the costs of the tribunal, the costs of the arbitral institution, and the costs of the hearing venue. These costs are usually met through the payment of fees by parties in equal shares to the arbitral institution administering the dispute. The winning party may then seek to recover them from the other side towards the end of the dispute.

- b. *Legal costs*: These relate to the costs and disbursements of each party's lawyers, and the costs and reasonable expenses of expert witnesses and witnesses of fact, where applicable.
 - c. *Security for costs*: This may arise where there is a risk that Party A may be unable to fund the arbitration or unable to pay Party B's costs in the event that Party A loses the arbitration. In such a situation, Party B may try and make an application for Party A to deposit a sum of money to secure the payment of such costs.
136. In light of the above, it is common for the total costs relating to the arbitration of a dispute to run into millions of US dollars covering the spectrum of arbitration costs, legal costs and a potential security for costs order.
137. Quite apart from the quantum of costs incurred in the arbitration, an arbitral tribunal can apportion the costs in a variety of ways between the disputing parties. The various kinds of costs orders that a tribunal may make are as follows:
- a. *No shifting of costs*: Each Party will pay its own legal costs, and Parties will share the arbitration costs equally. The losing Party does not pay the winning Party's legal costs.
 - b. *Both legal costs and arbitration costs (all or part) shifted*: The losing Party pays for all or part of the winning Party's legal costs, as well as all or part of the winning Party's share of the arbitration costs, in addition to its own costs.
 - c. *Only arbitration costs (all or part) shifted to the losing Party*: The losing Party pays only for all or part of the winning Party's share of the arbitration costs. It does not pay for any of the winning Party's legal costs. The losing Party nonetheless remains responsible for paying its own share of the arbitration costs, and its own legal costs.
 - d. *Only legal costs (all or part) shifted to losing Party*: The losing Party pays for all or part of the winning Party's legal costs. It does not pay for any of the winning Party's share of the arbitration costs. The losing Party nonetheless remains responsible for paying its own share of the arbitration costs, and its own legal costs.
138. In practice, the shifting of costs by an arbitral tribunal is unpredictable. Historically, parties would each bear their own legal costs and 50% of the arbitration costs. In more recent years, however, tribunals have shown a tendency to shift part of the costs (both arbitration costs and legal costs) onto the losing party.

2. International Commercial Arbitration

139. Most international arbitrations involve commercial disputes between private entities. Indeed, even in the CBET context, the vast majority of disputes that are submitted to arbitration are likely to be general commercial, contractual, or construction disputes arising out of CBET-related activity, but for which technical energy and electricity trading knowledge and expertise will not form the core of the dispute. As such, the preceding discussion on the general principles of international arbitration have focussed principally on the legal framework for international commercial arbitration, as the conduct of international commercial arbitration constitutes an important resource and method for resolving disputes relating to the chain of commercial CBET activity arising out of the SAARC electricity market.
140. That being said, the principles of international commercial arbitration described above also form the basic framework for understanding the process and procedure of the arbitration of disputes in general. International commercial arbitration, however, is not the only form of arbitration in existence. International arbitration is also frequently used for the resolution of other kinds of disputes, such as investor-State disputes and inter-State disputes. As mentioned in Chapter 2, such disputes may also arise out of the CBET context and the SAARC Framework Agreement, and the arbitral process relating to these categories of disputes do depart in a number of ways from those of international commercial arbitration. The next two sections of this chapter therefore explain the arbitral process relating to these distinct categories of arbitration, and point out important areas in which investor-State and inter-State arbitration differ from that of international commercial arbitration.

3. Investor-State Arbitration

141. Cross-border investment flows is a major component of the world economy, and indeed, a major component of CBET. Such foreign investment often take on a wide range of forms, ranging from major infrastructure and industrial projects such as the construction of power stations and cross-border pipelines, to purchases of property, and even contractual and legal rights. As such, it is not difficult to see how the various foreign and cross-border investments arising out of CBET activity could potentially be a trigger point for investment disputes.
142. Cross-border investments face particular risks from host government interference. Foreign investments are subject to the domestic territorial sovereignty of the host State, and may suffer prejudice from the conduct of the host State such as interference with or outright expropriation of the investment property or other rights. Historically, there was very little that a foreign investor could do in such a situation. Under the traditional legal framework, a foreign investor would either have to seek the diplomatic protection of their home State or pursue litigation in the national courts of the host State. Both avenues for legal recourse were unsatisfactory. Diplomatic

protection by one's home State is discretionary; as such, States often decline to espouse the claims of its nationals or fail to pursue them in accordance with the investor's interest, in light of other diplomatic concerns unrelated to the substance of the investor's claim. Where domestic litigation in the host State's courts is concerned, seeking recourse through the national courts of the respondent State is often unlikely or unable to guarantee a neutral forum for the resolution of the dispute.

143. In order to address these issues and to provide a neutral and enforceable legal regime for foreign investment, parties involved in an investment often utilise a variety of mechanisms relating to the protection of the investment. First, States have established both bilateral and multilateral investment treaties providing for substantive standards of legal protection of foreign investments. These investment treaties typically contain a specialised dispute settlement provision that allows for the resolution of investment disputes through a variety of methods. While each treaty is different and needs to be assessed on a case-by-case basis, these methods usually include a choice for a party to submit its investment treaty dispute to (a) domestic litigation; (b) international arbitration under UNCITRAL arbitration rules; or (c) international arbitration under ICSID rules. Second, where an investment is made in a host State pursuant to a contract or agreement, parties often include in their contract an arbitration clause in respect of disputes relating to the investment and/or arising out of the contract. As such, the facts and circumstances relating to an investment dispute very often allow a party to resolve its dispute by a variety of options. Should a party decide to argue its case as a breach of the investment *contract*, it can commence *international commercial arbitration* by utilising the arbitration clause in the contract. In such instances, the dispute will be contractual in nature, and the general principles and legal framework for international commercial arbitration described above will apply. If however, a party decides instead to argue its case as a breach of the investment *treaty*, it will then have to choose one of the dispute settlement options listed in the particular treaty—this is usually domestic litigation, investment treaty arbitration pursuant to UNCITRAL rules, or investment treaty arbitration pursuant to ICSID rules. Since the principles of international commercial arbitration have already been explained in detail, this section will focus on the processes and procedures for investment treaty arbitration.
144. Where investment treaty arbitration is utilised for the resolution of investment disputes, the arbitral process and procedure can nonetheless resemble the process of international commercial arbitration. This is often the case where the claimant has decided to commence investment treaty arbitration under UNCITRAL arbitration rules, or where parties have agreed instead to utilise other general commercial arbitration rules such as the SCC or ICC arbitration rules. In such circumstances, the legal framework for international commercial arbitration is often utilised by the parties, with the New York Convention and national arbitration legislation being applicable to both the parties' arbitration agreement and the arbitral awards. In other

instances, however, investment disputes are subject to specialized and *sui generis* dispute resolution mechanisms. This occurs where the claimant has chosen to commence investment treaty arbitration pursuant to the ICSID arbitration rules, which provides a legal regime for international arbitration that has very significant differences from that of international commercial arbitrations. In each case, however, investment arbitrations are a distinctive category of disputes, involving the application of substantive international law protections to governmental actions and regulatory measures that are otherwise inapplicable to international commercial arbitration. It is also important to bear in mind that, unlike international commercial arbitration, an investment treaty is often more prescriptive than a contract in respect of the procedure for dispute settlement. As such, many investment treaties prescribe unique dispute settlement features that are distinct from international commercial arbitration.

145. These differences will be set out further in the rest of this section. It should, however, be noted that each investment treaty is worded differently, and a case-specific analytical approach needs to be adopted in assessing the procedural steps prescribed under an investment treaty. Consequently, this section is by no means intended to be an exhaustive presentation on investment treaty arbitration, and will focus instead on highlighting only the differences between investment treaty arbitration and international commercial arbitration that are more commonly found in practice.
 - a. *Parties*: Unlike international commercial arbitration where both parties tend to be private entities, an investment treaty arbitration almost always involves an investor on one side, and a State on the other. In such cases, it is usually an investor that is the claimant, and the State that is the respondent, with the dispute involving a breach of investment protection by the host State. It should however be noted that as investment treaties are agreements between States, many investment treaties also contain provisions relating to State-to-State dispute settlement. It is therefore possible (although it is very rare) for an investment treaty dispute to arise between parties that are both States.
 - b. *Subject matter of the dispute*: Most investment treaty claims relate to the substantive protections guaranteed under the investment treaty, and a claimant investor typically argues that a State has acted in breach of its obligations under the treaty. In contrast, international commercial arbitrations involve contractual claims relating to a breach of contract signed by the parties. The substantive legal issues raised in an investment treaty arbitration are therefore issues concerning the breach of public international law; whereas the legal issues raised in international commercial arbitration relate to a breach of contract as determined by the appropriate national law applicable to the contract.
 - c. *Policy implications*: Investor-State disputes frequently involve State interests and policies more directly than commercial disputes. By way of example, an

investor's claim that a State's legislation or regulatory measures is in violation of international law usually involves matters of national policy that are not implicated in commercial arbitrations.

- d. *Legal framework for investment treaty arbitration:* There are two major differences between the legal framework applicable to investment treaty arbitration and the legal framework for international commercial arbitration. First, the investment treaty itself often contains many provisions that affect the subject matter and procedure relating to the dispute. These provisions often set out special rules relating *inter alia* to issues such as (a) the parties' substantive rights and obligations; (b) the jurisdiction of the tribunal; (c) applicable law; (d) conditions under which an investor may invoke the dispute settlement mechanism in the treaty; (e) scope of disputes covered by the treaty; (f) specific rules and procedures relating to the arbitration; (g) designation of an appointing authority; and (h) pre-conditions to the commencement of arbitration. Consequently, even where a party has chosen to commence investment arbitration under UNCITRAL rules, it must nonetheless ensure that it is in compliance with both the substantive and procedural steps set out in the investment treaty which forms part of the legal framework for the investment arbitration. Second, the character of an investment arbitration is substantially different from international commercial arbitration where a claimant has chosen to initiate arbitration under the ICSID rules. The ICSID Convention is a specialised legal regime for investment treaty arbitration that is much more detached or autonomous from national arbitration legislation and national courts than in international commercial arbitration. Consequently, where parties have commenced arbitration under ICSID rules, there is a far smaller role for national courts and national arbitration legislation than would otherwise be applicable to international commercial arbitration. The ICSID regime will be described in more detail below.
- e. *Arbitration agreement:* There are three distinct differences between arbitration agreements in investment treaty arbitration and international commercial arbitration. First, where international commercial arbitration is concerned, an arbitration agreement is usually contained in a clause in a contract. In contrast, in investment treaty arbitration, the arbitration agreement is contained instead in a provision of the treaty. Second, arbitration clauses in commercial contracts tend to contain only an agreement to resort to arbitration for the settlement of disputes. In contrast, as mentioned above, investment treaties tend to set out a variety of different options for dispute resolution, at least one of which is a resort to international arbitration. Third, the nature of the arbitration agreement is distinctly different in each form of arbitration. An arbitration clause in a commercial contract constitutes a direct agreement between the parties at the moment the contract is concluded. In contrast, the dispute settlement provision

in an investment treaty is an agreement between the States parties to the treaty, for the benefit of foreign investors. Thus, conceptually, the dispute settlement agreement in a treaty is more of an offer to arbitrate that is unilaterally extended by the State parties to investors. This offer to arbitrate is then subsequently accepted by the investor at the time it triggers dispute settlement.

- f. *Ad hoc and institutional arbitration:* Like international commercial arbitration, the conceptual distinction between *ad hoc* and institutional arbitration applies in respect of investment treaty arbitration. Thus, where an investment treaty provides for an option to arbitrate the dispute under UNCITRAL rules, a disputing party may commence *ad hoc* arbitration. Similarly, institutional arbitration is also available to parties where it is provided for under the investment treaty, and it is common for treaties to give parties the option of commencing arbitration under ICSID rules or other arbitral institutions such as the ICC. Practically speaking, however, *ad hoc* arbitration is rare for investment treaty disputes. This is because even where a party has commenced arbitration pursuant to UNCITRAL rules, they almost always enter into a subsequent agreement for the arbitration to be administered by an institution. Consequently, the vast majority of investment treaty arbitrations under UNCITRAL rules are actually administered by the Permanent Court of Arbitration, which has specialised expertise dealing with State-related disputes.
- g. *The ICSID Convention:* Where a party decides to initiate ICSID arbitration under an investment treaty, it submits the investment dispute to a specialised arbitral regime that is very different from international commercial arbitration. The ICSID Convention creates a substantially autonomous regime for the resolution of investment treaty disputes which greatly reduces the role of national courts and national arbitration legislation. As such, the ICSID rules provide for (a) a specialised institutional arbitration authority (i.e. ICSID) with international financing and immunities; (b) a prohibition against an investor's recourse to other remedies, including national courts, for matters submitted to ICSID arbitration; (c) there is no role for national courts at the arbitral seat or elsewhere in constituting ICSID arbitral tribunals, which is instead the exclusive responsibility of the parties and ICSID; (d) exclusive competence of ICSID arbitral tribunals over jurisdictional disputes and provisional measures; (e) no setting aside or review of ICSID arbitral awards in national courts (whether at the seat of the arbitration or elsewhere). Instead, review of ICSID awards is the exclusive responsibility of an ICSID annulment committee; and (f) mandatory recognition of ICSID awards in national courts, with no judicial review, and mandatory enforcement of the pecuniary obligations of such awards.
- h. *Constitution of the arbitral tribunal:* The process for constitution of the arbitral

tribunal in investment arbitration is similar to international commercial arbitration. However, it should be specifically noted that parties often select arbitrators in investment treaty arbitrations that have subject matter expertise in international investment law or public international law. The advantage of this is that investment disputes are by and large decided by individuals with deep knowledge and expertise in the relevant field. The downside, however, is that, since there are only a small number of individuals with such subject matter expertise, the law that shapes investment treaty arbitrations tend to be created and affected by the decisions of a very small group of adjudicators.

- i. *Arbitration procedural rules*: While this has been dealt with in other parts of this section, it is useful simply to point out that the vast majority of investment treaty arbitration tend to proceed under ICSID or UNCITRAL rules. It is rare for an investment arbitration to be administered according to other institutional commercial arbitration rules (e.g. LCIA, ICC, SCC or SIAC), although the utilisation of these other arbitration rules appears to be on the increase.
- j. *The seat of the arbitration, the role of national courts, and the role of national arbitration laws*: An investment treaty arbitration proceeding under UNCITRAL rules utilises the same supporting functions and features of the seat of the arbitration, national courts and national arbitration legislation as that of international commercial arbitration. In contrast, investment treaty arbitration under ICSID rules utilises a regime that is specialised, autonomous and significantly different, with a greatly reduced role for national courts and national arbitration legislation.
- k. *Major procedural steps in investment treaty arbitration*: The main procedural steps in investment treaty arbitration are very similar to that of international commercial arbitration. It should, however, be noted that most investment treaties require parties to go through a “consultation” or “cooling off” period for a specified amount of time prior to the formal commencement of investment arbitration. This consultation or cooling off period takes the form of an attempt at negotiating the settlement of the dispute for a fixed duration stipulated under the treaty (usually 6 months), and its main purpose is to give parties an opportunity to explore the possibility of an amicable settlement before arbitration is formally commenced. A failure to comply with this consultation requirement can have serious consequences, and there have been cases where such a failure has resulted in the tribunal’s lack of jurisdiction to hear the dispute.
- l. *Jurisdictional requirements*: Investment arbitrations involve relatively unique jurisdictional issues that do not feature in international commercial arbitration. While the exact jurisdictional requirements is determined by the language of the investment treaty and whether the ICSID Convention is applicable, they

general relate to (a) whether there is an “investment” and “investor”; (b) nationality requirements; (c) compliance with the host State’s law in making the investment; (d) whether the “cooling off” obligation has been complied with; (e) whether the dispute settlement provision involves a “fork in the road” obligation (i.e. choosing a single avenue of relief that subsequently precludes all others); and (f) issues of intertemporal law, such as whether the investment was made before the material breach, or whether the investment was made only after the treaty had entered into force.

- m. *Applicable law*: Most investment arbitrations arise under an investment treaty. As such, the applicable law is generally the substantive legal standards set out in the provisions of the treaty and in public international law in general. This is different from international commercial arbitration where the applicable law of the contract is generally a domestic law that has been chosen by parties. In light of these differences, investment arbitrations frequently turn on issues of treaty interpretation (e.g., ICSID and/or BITs) and the application of international law. In contrast, commercial arbitrations frequently turn on issues of contractual interpretation and national law.
- n. *Confidentiality and transparency*: Investment treaty arbitration is often less confidential than international commercial arbitration. The revised ICSID rules mandate the publication of excerpts of the tribunal’s reasoning and ICSID awards and submissions are frequently made public. Another reason for greater transparency is that the arbitral award can often affect national policy, and may require disclosure in order for it to be implemented. This is not generally the case for international commercial arbitration.
- o. *The arbitral award*: An arbitral award in an investment arbitration is issued and treated similarly to an arbitral award in an international commercial arbitration.
- p. *Enforcement of the award*: Like international commercial arbitration, investment treaty arbitration awards have to be enforced in a jurisdiction by national courts, unless the losing party voluntarily complies with the decision.
- q. *Costs*: The different kinds of costs and the way in which costs are incurred are the same in international commercial arbitration and investment treaty arbitration. The quantum of costs involved in investment treaty arbitration is therefore similar to that of international commercial arbitration for disputes of comparable size and complexity. It should, however, be noted that since investment disputes tend to be extremely complex and can often involve disputes worth hundreds of millions of dollars, the costs involved should be benchmarked against the most complex of international commercial arbitration cases.

146. In summary, investment disputes can and often are resolved through a variety of dispute settlement mechanisms. These include (a) domestic litigation; (b) international commercial arbitration of contractual disputes between the investor and a State or State-owned entity; (c) investment treaty arbitration in accordance with *ad hoc* arbitration rules, most notably, the UNCITRAL arbitration rules; and/or (d) investment treaty arbitration in accordance with institutional rules, with the ICSID rules being frequently utilised. Where investment treaty arbitration is utilised (i.e. (c) and (d)), there are some similarities and differences between investment treaty arbitration and international commercial arbitration, with the differences being much more pronounced where ICSID arbitration rules are used.

4. Inter-State Arbitration

147. Inter-State or public international law arbitration involves the resolution of disputes between States by an arbitrator or panel of arbitrators of their own choice and on the basis of law. It is one of the oldest forms of international arbitration, and regimes for inter-State arbitration have existed since the 1794 Jay Treaty between the United Kingdom and the United States,¹⁷ as well as the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes¹⁸ which established the Permanent Court of Arbitration in The Hague for the administration of State-to-State arbitration.
148. Given that the disputing parties for this particular form of international arbitration are sovereign States, the disputes submitted to in inter-State arbitration usually concern issues of treaty obligations or public international law. Within the broad scope of international law, however, there is usually very little limitation on the nature and sensitivity of disputes that may be submitted to the arbitral tribunal. Disputes of the highest political sensitivity and international concern have been submitted to arbitration by States, covering the full range of international law issues such as territorial and maritime boundaries, sovereignty and immunities, the law of the sea, energy resources and even post-war matters.
149. The reasons for which States agree to arbitrate disputes are very different from that of international commercial arbitration or investment treaty arbitration. In international commercial arbitration or investment treaty arbitration, the main reason for which a claimant commences arbitration is for purposes of obtaining a remedy that is in their favour (usually in the form of a sum of damages) and enforcing the arbitral award in a

¹⁷ The Treaty of Amity, Commerce, and Navigation, Between His Britannic Majesty and the United States of America, commonly known as the Jay Treaty, and also as Jay's Treaty, was a 1794 treaty between the United States and Great Britain that averted war, resolved issues remaining since the Treaty of Paris of 1783 (which ended the American Revolutionary War),^[1] and facilitated ten years of peaceful trade between the United States and Britain in the midst of the French Revolutionary Wars, which began in 1792.

¹⁸ The Convention for the Pacific Settlement of International Disputes was one of three conventions signed at the conclusion of the first Hague Peace Conference in 1899. This convention established The Permanent Court of Arbitration (PCA), including good offices and mediation, international commissions of inquiry, and international arbitration. Although the 1899 Convention is still in force by more than 60 States, this instrument was replaced by the Hague Convention for the Pacific Settlement of Disputes of 1907.

national court to obtain the appropriate monetary compensation for the wrong that has been done. This is very different from that of inter-State arbitration, where the objective is usually of a political nature.

150. In the relationships between States, there are no central bodies which perform the tasks of a well-organised legal system (e.g. legislature, public administration and administration of justice). The core reason for this is the principle of sovereign equality under international law—i.e. that all States are sovereign and equal, and thus no State may subject other States to its political authority. Consequently, the traditional functions of government that exist within a State's national regime for public administration and adjudicating and enforcing legal standards do not exist in the same way in the international system. Instead, these functions of governance are decentralised and left to the members of the international community (i.e. States) and their political relations. Since there is no mandatory forum for pursuing legal sanctions in the international system, the predominant mode of political interactions between States in the international community is therefore negotiations, diplomatic relations and political agreement.
151. This unique nature of international politics has a number of important consequences for inter-State dispute settlement. First, as mentioned above and in earlier Chapters, because of this system of international governance, the primary mode through which states resolve their disputes is that of diplomacy and negotiations. Second, States usually agree to submit their disputes to binding adjudicative processes (i.e. international arbitration or international tribunals), *only* where the disputes are politically sensitive and therefore cannot readily be resolved through other diplomatic and political means. Third, adjudicative forms of dispute resolution, even where utilised by States, usually take place within the context of much wider political interactions and considerations. Disputes between States may involve many issues over a broad spectrum of areas that are unconnected or very loosely connected. Thus, States often carve out only certain aspects or issues of a dispute for arbitration or judicial adjudication, placing them in the hands of a neutral adjudicator, so that they can move forward on less sensitive issues through negotiations, and improve their overall relations. Fourth, it is often the case that adjudicative dispute settlement is initiated because it is the lesser evil. In certain instances, the only alternatives to arbitrating disputed issues may be a complete diplomatic impasse, political or trade pressure in multiple international arenas, or direct confrontation, making arbitration the least unattractive alternative. Fifth, because of the decentralised nature of international relations, it is often impossible to enforce an arbitral award through a national or international court. Instead, in most cases, awards and judgments in inter-State disputes have to be voluntarily complied with. Consequently, the neutrality, transparency, and sensitivity of the processes and procedures utilised in inter-State arbitration or judicial settlement are often highly important, as each of these factors plays a significant role in increasing the legitimacy of the decision, which in turn

increases the chances of securing compliance.

152. As regards the features of the arbitral process, State-to-State arbitrations bear some resemblance to the general framework for international commercial arbitration and investment treaty arbitration, but are subject to a fundamentally different legal regime and distinctly different arbitral procedures on certain points. Given the political nature of international law and inter-State disputes, a number of features of State-to-State arbitration are closely adapted from the processes and procedures for international judicial settlement (e.g. the International Court of Justice or other international courts and tribunals). The remaining paragraphs of this section are therefore devoted to providing a concise summary of the features of inter-State arbitration, highlighting the important differences and distinctions with the more general processes of international commercial arbitration and investment treaty arbitration.

- a. *Parties*: Unlike international commercial arbitration which tends to involve disputes between private parties, and investment treaty arbitration which tends to involve disputes between a foreign investor and a State, inter-State arbitration involves only sovereign States as disputing parties. Depending on the nature of the agreement, a treaty may establish bilateral or multilateral forms of dispute settlement. Thus, an inter-State dispute can involve more than two disputing States participants (where the dispute is multilateral in nature), although such occurrences have been rare in arbitration.
- b. *Subject matter of the dispute*: The subject matter of inter-State disputes tend to involve issues of treaty law and public international law. This does not mean that domestic or regional law is always irrelevant. Indeed, there have been cases in which the subject matter of the dispute have concerned whether a State's domestic law is in compliance with international legal standards. In that context, however, domestic law while relevant is not the main subject matter of the dispute, which concerns whether a State's conduct has violated international law.
- c. *Policy implications*: Inter-State disputes almost always involve issues that have large policy implications on both the international and domestic level. The way in which a dispute has been decided often requires a State to change its domestic or foreign policy, and / or amend its domestic laws or cease any international conduct which is considered by the adjudicator to be in violation of international law. More generally, legal decisions relating to inter-State disputes often also result in consequences and effects within the wider international community. By way of example, an arbitral award that finds that a State's navy has acted in violation of the law of the sea in international waters very often results in many other seafaring States amending their naval policies in line with the award, or risk being in breach of international law.

- d. *Legal framework for arbitration:* The legal framework for State-to-State arbitration bears a number of differences to international commercial arbitration and investment treaty arbitration. Like investment treaty arbitration, the core framework for inter-State arbitration is usually contained in a treaty or international agreement which tends to be prescriptive in respect of the procedure to be undertaken in the arbitration. This, however, is where the similarities usually end. First, States very rarely utilise “standard” arbitration procedural rules, instead preferring to customise their own arbitration procedure specifically for each dispute. Second, the entire network of legal rules relating to ICSID, national courts, and national arbitration frameworks (that is applicable in international commercial arbitration and investment treaty arbitration) is *not* applicable to inter-State arbitration. Finally, and as mentioned above, there is no formal system for enforcement of inter-State arbitral awards. Consequently, the system for inter-State arbitration depends primarily on voluntary compliance, failing which, the winning party may merely attempt to secure compliance by political channels.
- e. *Arbitration agreement:* An arbitration agreement in inter-State arbitration is unique in a variety of ways. First, like investment treaty arbitration, the arbitration agreement is usually contained in a treaty and not a contract. In most cases, the treaty contains both the substantive rules and obligations pertaining to the subject matter of the treaty, as well as the agreement to arbitrate. There have, however, also been instances where the dispute settlement agreement is contained in an additional protocol to the treaty, with the States parties that have signed on to the additional protocol being different from the States parties that have signed on to the treaty (i.e. only some of the States that had entered into the treaty are willing to conclude a further agreement to arbitrate disputes arising out of the treaty). In such circumstances, only States that have entered into the additional protocol / treaty are bound by the dispute settlement agreement. Second, an inter-State arbitration agreement can often be embedded in unique and complex DSMs that contemplate other forms of dispute settlement. By way of example, the dispute settlement mechanism in the United Nations Convention on the Law of the Sea (“UNCLOS”) allows States parties to choose one or more out of four methods of dispute settlement (ITLOS, ICJ, and two different kinds of arbitral mechanisms). States can declare their selection at the time of entering into the treaty or subsequently. Where a dispute arises, and parties had accepted the *same* procedure for the settlement of disputes under UNCLOS, the dispute may only be submitted to that procedure. If however, the parties to the dispute had *not* accepted the same dispute settlement procedure, or failed to select any procedure, the dispute may then only be submitted to arbitration in accordance with a specialised arbitral procedure set out in Annex VII of the UNCLOS. Third, the utilisation of submission agreements (i.e. parties conclude an

arbitration agreement only after the dispute has arisen) is less uncommon in inter-State disputes than in investment treaty arbitration or international commercial arbitration. That is not to say that submission agreements are a frequent occurrence, as the majority of inter-State arbitrations are still commenced under arbitration agreements contained in treaties.

- f. *Ad hoc arbitration, institutional arbitration and permanent tribunals:* The nature of inter-State arbitration can be very different from international commercial arbitration and investment treaty arbitrations. First, the majority of inter-State arbitrations start off as *ad hoc* arbitrations. This is because it is very rare for a dispute settlement agreement to stipulate an arbitration institution for the administration of the arbitration. Yet, in most cases, once the arbitration has been initiated, States parties almost always agree to utilise the Permanent Court of Arbitration as the administering institution. Thus, inter-State arbitrations are almost always “institutionalised” at an early stage in the proceedings, and it is rare for an inter-State arbitration to be administered by an arbitral institution other than the PCA. Second, it should be noted that States may also establish “permanent” or mixed arbitral tribunals for the resolution of disputes. One such example is the Iran-United States Claims Tribunal, which is a semi-permanent arbitral tribunal seated in The Hague. It was established to resolve claims arising out of the hostage crisis at the US Embassy in Tehran in 1981, and it applies a version of arbitration that is based on the UNCITRAL rules. The tribunal is “semi-permanent”, in the sense that it has a permanent location, and there is a fixed panel of arbitrators that hear the various disputes; it has been closed to new claims by private individuals since 1982, and its mandate will cease upon the resolution of all the relevant claims. It is also a “mixed” tribunal in the sense that it adjudicates both private claims brought by individuals as well as State-to-State claims. Such permanent arbitral tribunals are a hybrid and unique form of arbitration, and are distinct from the more conventional inter-State arbitration proceedings that are initiated for the resolution of specific disputes.
- g. *The Permanent Court of Arbitration:* The PCA was established by the Convention for the Pacific Settlement of International Disputes, concluded at The Hague in 1899 during the first Hague Peace Conference, for the specific purpose of administering State-to-State disputes. Its premises are in the Peace Palace in The Hague, alongside the International Court of Justice. It has been the institution of choice for inter-State arbitration, and a number of significant State-to-State disputes have recently been arbitrated under the auspices of the PCA. These have included arbitrations between Bangladesh and India over their maritime boundary, Pakistan and India over the Indus Water Treaty, Sudan and the Sudan People’s Liberation Movement/Army over the Abyei Area; Eritrea and Ethiopia over their boundary and post-war claims; as well as

Guyana and Suriname and Croatia and Slovenia over their maritime and/or land boundaries. Unlike the ICSID regime, the PCA does not provide an autonomous legal framework for arbitration. Rather, it functions primarily as an arbitral institution for assisting and supporting arbitral tribunals in the administration of international arbitration. It should be noted that while the PCA is “permanent” in the sense that it has a permanent location, it does not have a fixed tribunal for arbitrating disputes. Instead, States parties remain free to select their own arbitrators, and the principle that each tribunal is constituted for each specific dispute remains applicable at the PCA.

- a. *Constitution of the arbitral tribunal*: The process for constituting the arbitral tribunal is often contained in the dispute settlement provision. Most inter-State disputes have a larger tribunal of 5 arbitrators, due to the relative importance of the dispute. Individuals are often selected as arbitrators on the basis of their expertise in public international law. Consequently, it is not uncommon for a judge in an international court or international tribunal to be appointed as an arbitrator in an inter-State arbitration, particularly where the subject matter of the dispute falls within his or her area of specialisation or particular expertise.
- b. *Tribunal-appointed experts*: Inter-State arbitration can involve highly technical disputes. Maritime and water-related disputes often fall into this category. For example, the Indus Waters Treaty between India and Pakistan requires that arbitral tribunals include “[h]ighly qualified engineers”, as hydrological issues tend to require deep technical knowledge. Other tribunals are empowered to retain experts to assist them to handle technical disputes. For example, the treaty establishing the *Trail Smelter* arbitration involving damage that occurred in the United States from fumes discharged from a smelter in Canada provided that the United States and Canada “may each designate a scientist to assist the Tribunal”. As such, it is often necessary for the procedural rules of an inter-State DSM to contain a provision that allows parties or the tribunal to appoint a neutral technical expert.
- c. *Evidence*: The use of evidence in inter-State arbitration is often very different from investment and commercial arbitration. It is rare for States parties to utilise witness evidence, although that has been done on occasion. In addition, compulsory disclosure or discovery of documents is very limited, both because of customary practice and notions of State sovereignty and governmental secrecy. It is therefore very common for inter-State disputes to be decided purely on the basis of documentary evidence and legal submissions from each side, without any cross-examination and with very little exchange of documentary evidence taking place.
- d. *Arbitration procedural rules*: Arbitral procedures in inter-State arbitrations are broadly similar to those in general international arbitration. However, State

parties often prefer to utilise arbitral rules that are adopted specifically for the inter-State context, and as such, commercial arbitration rules are almost never used in the inter-State context. While the PCA has developed its own institutional rules specifically for inter-State arbitrations (e.g. the PCA Optional Rules for Arbitrating Disputes between Two States), these have also not been utilised frequently. Instead, disputing States have often preferred to customise a unique set of arbitral rules specifically for the particular dispute that is being arbitrated. While the terms of such customised rules will generally be in line with the broad principles of international arbitration, they also often contain certain provisions that have been modified or adapted to suit the specific dispute (e.g. unique confidentiality provisions depending on the sensitivity of the dispute or documentary material involved).

- e. *The seat of the arbitration, the role of national courts, and the role of national arbitration laws:* While it is nonetheless the practice for disputing States to select a seat of an inter-State arbitration (which in the vast majority of inter-State arbitrations is The Hague), this tends to be merely customary and does not usually serve any practical purpose. This is because the role of national courts and national arbitration laws that apply to the investment and commercial arbitration context are generally not applicable for inter-State arbitration. There is generally no basis under either international or national law to annul or set aside an award in a State-to-State arbitration on jurisdictional grounds, either at the arbitral seat or elsewhere. In contrast to international commercial and (some) investment arbitrations, State-to-State arbitrations generally do not satisfy the requirements of national arbitration legislation for “commercial” disputes. Even in states that have no “commercial” requirement in local arbitration legislation, it is very doubtful that annulment may properly be sought of an award in an inter-State arbitration, concluded under public international law, in national courts or that the involved states would be subject to the jurisdiction of local courts (given issues of state immunity). Similarly, it is also doubtful that national courts would grant applications to enforce inter-State arbitration agreements (as could occur with commercial arbitration agreements under the New York Convention or the UNCITRAL Model Law).
- f. *Major procedural steps in inter-State arbitration:* In general, the major procedural steps in State-to-State arbitrations broadly follow those in investment or commercial arbitrations. Parties make written submissions (often termed “Memorials”), attaching documentary evidence and (sometimes) written witness statements. Oral hearings are then conducted, in which counsel make legal submissions and witnesses may be examined. It should however be noted that States parties are usually required to go through a consultation or “exchange of views” stage prior to commencing international dispute

settlement. The purpose of this is similar to the “cooling off” period in investment treaty arbitration, and it gives disputing States an opportunity to explore diplomatic settlement before initiating formal dispute resolution proceedings.

- g. *Jurisdictional requirements*: Similar to investment and commercial arbitration, an inter-State tribunal has competence-competence to determine its own jurisdiction. Its jurisdiction is based primarily on the parties’ arbitration agreement and the terms of the treaty in which it is contained.
- h. *Applicable law*: The applicable law in inter-State arbitration is virtually always international law, unless the parties have exceptionally agreed that other legal rules should apply. However, a treaty may limit the scope of application of general international law by including a provision that requires substantive legal issues to be dealt with specifically by application of the treaty (especially if general international law contains rules and principles that may conflict with the terms of the treaty).
- i. *Confidentiality and transparency*: Unlike investment and commercial arbitration, inter-State arbitration tends to be relatively public in nature. Parties’ pleadings and legal submissions are frequently made public, with suitable redactions inserted to conceal information that is deemed by parties to be too sensitive for public disclosure. Indeed, there have even been arbitration where the proceedings were televised live on the internet. While the reason for the greater transparency of inter-State arbitrations tends to be the importance of the policy issues to each State’s domestic population, it should be noted that such arrangements are nonetheless subject to the consent of the States parties to the dispute.
- j. *The arbitral award*: Awards issued by State-to-State arbitral tribunals are generally final and binding and not properly subject to any form of subsequent review (unless the states that created the tribunal provide for a review mechanism in the arbitration agreement).
- k. *Enforcement of the award*: As mentioned above, there is no formal system for enforcement of inter-State arbitral awards. Consequently, the system for inter-State arbitration depends primarily on voluntary compliance, failing which, the winning party may merely attempt to secure compliance by political channels.
- l. *Costs*: The quantum of costs involved in inter-State arbitration are similar to that of investment arbitration. Traditionally, however, there is no shifting or reallocation of costs in inter-State arbitration. Consequently, each party bears its own legal costs as well as half of the arbitration costs.

153. While the general process of inter-State arbitration is similar to that of investment and

commercial arbitration, there nonetheless remain a variety of unique distinctions to be drawn, as has been done above. In setting out the general rules and principles applicable to inter-State arbitration, the core purpose of this section was to provide a broad understanding of the kinds of rules and principles that can be adapted for designing a DSM for the SAARC Framework Agreement. Yet, it should nonetheless be noted that apart from inter-State arbitration, State-to-State disputes are also often resolved by judicial forms of dispute settlement. The procedural rules relating to judicial dispute settlement therefore also provide useful information and benchmarks for purposes of this Study. The specific rules and procedure for inter-State arbitration and judicial settlement will therefore be analysed in more detail in Chapter 6 of this Report, with a view to drafting a template DSM for the SAARC Framework Agreement.

E. DISPUTE SETTLEMENT PLANNING AND MANAGEMENT

154. Balanced, impartial, efficient, and cost-effective dispute settlement procedures are fundamental to resolving such conflicts. They are, however, not the only factor in creating a stable dispute settlement framework and legal environment for international business and trade. Indeed, the existence of a viable and efficient DSM is redundant if parties do not formulate an agreement for its use, or if it is not implemented correctly. This final section of Chapter 3 therefore addresses the issue of dispute settlement planning and management, setting out a number of steps of general application for ensuring that individuals involved in the CBET process adopt a coordinated, consistent and effective approach to preventing and managing disputes. This ensures that disputes are resolved early and efficiently so that existing business relationships are not harmed.
155. ***Recommendation 1: Parties should discuss and conclude a dispute settlement agreement.*** Without a binding dispute settlement obligation in place, disputes that arise could potentially become intractable. Agreeing on the method of dispute settlement and entering into an agreed dispute settlement agreement is therefore one of the most important steps in dispute planning.
156. ***Recommendation 2: Identify potential areas in the business relationship that may give rise to a dispute.*** It is important that parties in a business relationship take a proactive stance to dispute management. This requires intentional effort that is best taken early on in the business relationship. Parties should discuss and identify all potential areas and subject matters in their relationship that may give rise to a dispute, and ensure that the dispute settlement agreement that has been agreed upon takes into account and is appropriate for these kinds of disputes.
157. ***Recommendation 3: Identify, raise and manage potential problems early.*** Internal procedures should be created for key personnel to raise potential issues and problems as soon as they are discovered. Potential problems can usually be resolved quickly if

they are raised between the parties at an early stage, and before there are damaging consequences. Identifying and managing such issues early therefore minimises the escalation of issues and problems into full-fledged disputes.

158. ***Recommendation 4: Foster a culture of open communication and active dispute management, including the utilisation of non-binding forms of dispute settlement.*** Formal and binding dispute settlement procedures such as arbitration or adjudication often results in a win-lose outcome where one party wins and the other loses. This can greatly affect the parties' relationship. By communicating openly and actively and attempting non-binding forms of dispute settlement as a first step to resolving disputes (e.g. negotiation, mediation and conciliation prior to arbitration or litigation), parties may be able to agree on a win-win outcome that is mutually beneficial to both parties.
159. ***Recommendation 5: Keep an organised record of information, documentation, and correspondence relating to the dispute.*** Disputes often evolve substantially over time, especially if there are events moving on the ground. An organised and accurate record of the information, documentation and correspondence relating to the dispute is therefore important for purposes of dispute management.

F. CONCLUSION

160. Disputes are part and parcel of any relationship. The nature of disputes, however, has changed rapidly over the past few decades. Globalisation and technological advancement have made it possible for connections traditionally spanning long distances to be made almost instantaneously. As a result, the nature and complexity of disputes have become more international, multilateral and cross-border.
161. This chapter has dealt primarily with providing readers with a concise but comprehensive understanding of the development of international dispute settlement on a global level. It has set out an overview of the different methods of international dispute settlement that are available and, indeed, frequently used in practice, for the resolution of cross-border, regional and international disputes.
162. Having dealt with the different international dispute settlement mechanisms from a general perspective, the remainder of this Report is devoted specifically to the context of potential disputes arising out of CBET in SAARC Member States. To this end, Chapter 4 of this Report considers how the domestic arbitration frameworks of each SAARC Member State can be optimised for dealing with potential CBET disputes that have been submitted to a form of arbitration that may require the support of the national courts and national arbitration legislation of the SAARC Member States. In Chapter 5, we assess SARCO's arbitration and conciliation rules and procedures, with a view to optimising these procedures for the administration of commercial CBET disputes. Finally, in Chapters 6, 7 and 8, we deal directly with State-to-State disputes potentially arising out of the SAARC Framework Agreement or other international

agreements relating to CBET. In this context, the detailed rules and procedures of inter-State arbitration and judicial settlement will be analysed, with a view to creating a DSM tailored specifically for SAARC Member States.

IV. CHAPTER 4: OPTIMIZING THE DOMESTIC ARBITRATION REGIMES OF THE SAARC MEMBER STATES

A. RELEVANCE OF SAARC MEMBER STATES' ARBITRATION REGIMES TO CBET DISPUTES

163. The domestic arbitration regimes of SAARC Member States has an important role to play in CBET disputes where disputing parties have commenced commercial or investment arbitration with a SAARC Member State as the juridical “seat” of the arbitration. As mentioned in earlier parts of this Report, the seat of the arbitration is the country whose national courts possess juridical oversight over the arbitration. Thus, where disputing parties have selected a SAARC Member State as the seat of the arbitration for a CBET dispute, it is that particular State’s arbitral regime that will form the legislative framework supporting the arbitral process.
164. A variety of CBET disputes may engage the national courts and arbitration legislation of SAARC Member States insofar as these States have been selected by disputing parties as the seat of the arbitration. Such disputes include:
 - a. CBET disputes submitted to domestic arbitration within a SAARC Member State;
 - b. CBET disputes submitted to international commercial arbitration where a SAARC Member State has been selected by disputing parties as the seat of the arbitration; and
 - c. CBET disputes submitted to investment treaty arbitration where a SAARC Member State has been selected by disputing parties as the seat of the arbitration.
165. In this regard, a distinction should be drawn between jurisdictions and national courts that adopt an arbitration-friendly approach, and jurisdictions and national courts that may view arbitration with relative suspicion. In the former, arbitration is seen as an important and independent dispute settlement mechanism that helps to reduce the caseload burden of the courts, allowing greater party autonomy in dispute settlement, thereby increasing the legitimacy of and compliance with legal decisions. In contrast, in some States, arbitration is viewed as an alternative to litigation that removes disputes from the overriding domestic jurisdiction of the national courts, and prevents such disputes from being otherwise resolved by national judges who were traditionally viewed as being the sole competent organ for resolving legal disputes.
166. Most jurisdictions currently recognise the former view as being the better approach. The more “arbitration-friendly” a national court is, the better it is for the overall efficiency of the national legal system in resolving disputes and increasing access to justice. Viewed in that context, arbitration is an important complementary tool to

litigation for the effective resolution of disputes, and resort to arbitration is to be encouraged and supported by national courts. Thus, it is important that national courts adopt an approach that supports recourse by disputing parties to arbitration and ensures that arbitration progresses efficiently, without being overly interventionist in disrupting the arbitral process. Over the long run, arbitration and litigation will, together, form a network of dispute resolution mechanisms through which CBET disputes will be able to be resolved fairly, neutrally and quickly.

167. It is this objective that constitutes the task of this Section. Chapter 4 reviews the national arbitration legislation and regimes of each SAARC Member State, analysing their current status in comparison with prevailing best practices in arbitration, with a view to identifying gaps and suggesting recommendations that may help to improve the status quo. Given that national arbitration frameworks have to be applicable to commercial arbitration as well as the possibility of investment treaty arbitration, this Section will also conduct due diligence and identify any amendments to ensure that the arbitration regimes of SAARC Member States will be appropriately formulated and developed in support of both commercial and investment arbitrations that may arise in the CBET context.

B. OVERVIEW OF SAARC MEMBER STATES' ARBITRATION REGIMES

168. While substantial information has been presented in earlier parts of this Report on the importance of national arbitration legislation and how it is a necessary tool for ensuring the efficiency of the arbitral process and enforcement of arbitral awards, the main objective of this part of the Report is to conduct a “stress-test” of sorts, to determine how suited the present arbitration frameworks of SAARC Member States are in supporting the arbitral process. With that objective in mind, this Section provides an overview of the prevailing arbitration regimes in each SAARC Member State, and serves as a starting point for further and more detailed analysis to be conducted in the remaining parts of this Chapter.

1. Afghanistan

169. Afghanistan has been a State party to the New York Convention on the Recognition and Enforcement of Arbitral Awards since 2004. It is, however, not a country that has officially adopted the UNCITRAL Model Law, which is a model text for national arbitration legislation. Afghanistan’s national arbitration legislation is contained in its Commercial Arbitration Law of 2007, a copy of which was provided to me for review by the SEC.
170. The main features of the Afghanistan arbitration regime may be briefly summarized as follows:

- a. The Afghanistan Commercial Arbitration Law of 2007 is the only legislative instrument relating to arbitration, and it regulates both international and domestic arbitration alike without any distinction between the arbitration regimes applicable between the two;
 - b. The Commercial Arbitration Law appears to be limited to certain kinds of disputes that have been submitted to arbitration;
 - c. While Afghanistan is not officially an UNCITRAL Model Law country, parts of the Commercial Arbitration Law appear to be very loosely based on the relevant provisions of the UNCITRAL Model Law, but with substantial amendment and modification; and
 - d. Given that Afghanistan is a New York Convention country, the courts of Afghanistan have an obligation to recognise and enforce arbitral awards rendered in other New York Convention countries.
171. Finally, it is to be noted that Afghanistan's 2007 Commercial Arbitration Law does not appear to contemplate the possibility of Afghanistan being selected as the seat of investment treaty arbitrations. As the terminology relating to investment arbitration is distinct from that of commercial arbitration (e.g. a "treaty" is different from a "contract"), the recommendations below include suggested amendments to certain terms to include the possibility of investment arbitrations being administered with Afghanistan as the seat of the arbitration.

2. Bangladesh

172. Bangladesh is a signatory to the New York Convention and is an UNCITRAL Model Law country. As such, the arbitration laws of Bangladesh broadly adopt the UNCITRAL Model Law scheme, which has been implemented domestically in the Arbitration Act of Bangladesh, as adopted in 2001, and as amended in subsequent years.
173. The main features of the Bangladesh arbitration regime can be briefly summarised as follows:
- a. The 2001 Bangladesh Arbitration Act repealed the earlier regime of the 1937 Arbitration (Protocol and Convention) Act and the 1940 Arbitration Act;
 - b. While the 2001 Arbitration Act is largely based on Model Law, it establishes a single unified regime for both domestic and international arbitration;
 - c. While the 2001 Arbitration Act adopts a unified regime, there are, however, different procedures and Courts involved in enforcing an arbitral award

depending on whether the award is domestic or foreign; and

- d. While the 2001 Arbitration Act broadly follows the Model Law approach, it also contains provisions dealing with matters on which the Model Law is silent. Hence, the 2001 Arbitration Act appears to be more comprehensive than the UNCITRAL Model Law.

174. The 2001 Arbitration Act represents an overhaul of the old Bangladesh arbitration regime (in the 1937 and 1940 legislation) that was archaic and outdated, updating Bangladesh's arbitration legislation in line with the international standards of the UNCITRAL Model Law. Reports state that since the change in the arbitration legislation, there has been "positive response" from both the business community and the Government of Bangladesh.

3. Bhutan

175. Bhutan is an UNCITRAL Model Law country, and the Model Law scheme has been implemented in its domestic legislation. Its national framework for arbitration was consolidated in its 2011 Alternative Dispute Resolution Bill of Bhutan, a copy of which was provided to me by the SEC. I have, however, based my observations and analyses on the final legislation of the 2013 Alternative Dispute Resolution Act, which was enacted by the Parliament of the Kingdom of Bhutan on 25 February 2013.
176. The main features of the Bhutan arbitration regime can be summarised as follows:
 - a. Given that Bhutan is a Model Law country, the broad scheme and text of the 2013 Alternative Dispute Resolution Act of Bhutan is, to a large extent, based on and mirrored after the text of the UNCITRAL Model Law;
 - b. The provisions based on UNCITRAL Model Law deal with matters relating to (a) general provisions, (b) composition of the arbitral tribunal, (c) jurisdiction of the arbitral tribunal, (d) conduct of proceedings, (e) interim measures, (f) the arbitral award, (g) termination of arbitral proceedings, (h) recourse against the arbitral award, and (i) recognition and enforcement of arbitral awards;
 - c. The 2013 Alternative Dispute Resolution Act deals with domestic and international arbitration alike;
 - d. The Act also establishes the Bhutan Alternative Dispute Resolution Centre, which is an independent body having a distinct legal personality, with certain administrative functions and responsibilities under the Act;
 - e. Apart from establishing a regime for arbitration, the 2013 Alternative Dispute Resolution Act also deals with "negotiated settlement", which expressly

encompasses conciliation, mediation and “similar” methods of dispute settlement;

- f. The 2013 Alternative Dispute Resolution Act also covers “[a]ny other matter connected with or incidental to arbitration and negotiated settlements”; and
- g. Bhutan acceded to the New York Convention in 2014, after the enactment of its 2013 arbitration legislation.

177. A review of Bhutan’s arbitration regime will be conducted, and the analysis is set out in the next section of this Chapter.

4. India

178. While India ratified the New York Convention in 1960 and has also been an UNCITRAL Model Law country since 1996, the arbitration regime of India has gone through various stages of development, most recently culminating in a series of substantial reforms that came into effect on 23 October 2015.

179. A brief description of India’s current arbitration legislation, as well as a concise summary of the new elements in its latest round of reforms are set out below:

- a. India’s arbitration legislation has gone through various stages of historical reforms. Before 2015, its most recent arbitration legislation was the 1996 Arbitration and Conciliation Act which superseded the 1937 Arbitration (Protocol and Convention) Act, the 1940 Indian Arbitration Act, and the 1961 Foreign Awards (Recognition and Enforcement) Act;
- b. The 1996 Arbitration and Conciliation Act was passed with optimism and was expected to bring an increase in the number of arbitrations seated in India. However, this did not come to pass. Based on research, the main problems were that the Indian courts took an overly interventionist approach to arbitration, and in addition, the conduct of arbitration in India was very slow, and was plagued by significant delays;
- c. Since 2010, however, the Indian courts have taken a pro-arbitration approach, which has been supportive of the development of arbitration;
- d. In furtherance of measures taken by the Indian government in support of the ‘ease of doing business in India’, and after two aborted attempts in 2001 and 2010 to amend the arbitration law; on October 23, 2015, the President of India promulgated the 2015 Arbitration and Conciliation (Amendment) Ordinance;
- e. Thereafter, on 17 December 2015 and 23 December 2015, the 2015 Arbitration

and Conciliation (Amendment) Bill was passed by the Lok Sabha and Rajya Sabha respectively, with minor additions to the amendments introduced by the Ordinance;

- f. On 31 December 2015, the President of India signed the Arbitration and Conciliation (Amendment) Bill and thereafter, gazette notification was published on 1 January 2016. Accordingly, the 2015 Arbitration and Conciliation (Amendment) Act came into effect from 23 October 2015. The Amendment Act is applicable prospectively to arbitral proceedings commenced after 23 October 2015;
- g. The 2015 Arbitration and Conciliation (Amendment) Act implemented changes relating to (a) the distinction between international commercial arbitration and domestic arbitration, (b) communications through electronic means, (c) the scheme for interim measures ordered by the Indian courts or the arbitral tribunal, (d) arbitrator fees, (e) independence and impartiality of arbitrators, (f) enforcement of awards, (g) time limits for completing the arbitral awards, (h) measures for expediting arbitration proceedings, and (i) the powers of the Indian courts.

180. With its most recent round of amendments to the arbitration regime, it is apparent that India has sought to overhaul its arbitration legislation to ensure that its courts would adopt an arbitration-friendly approach, and that the problem of delays in the arbitral process would be resolved. Commentators and practitioners are upbeat about the prospects for the growth of arbitration in India that the new amendments might bring.

5. Maldives

181. The Maldives is not a New York Convention country. It has, however, recently become an UNCITRAL Model Law country in 2013. Arbitration in Maldives is relatively new, and prior to 2013, there were no national laws or regulations concerning arbitration. The main features of the arbitration regime and institutional framework of the Maldives can be summarised as follows:

- a. The Maldives enacted its first ever Arbitration Act (Law No. 10/2013) in July 2013. Since the Maldives is a Model Law country, the provisions of its Arbitration Act are purportedly modelled after the UNCITRAL Model Law;
- b. The objectives of the 2013 Arbitration Act are described in Section 2 of the Act as follows:
 - i. To provide for legally valid and enforceable means of resolving commercial disputes without recourse to the courts or prior to the

commencement of court proceedings;

- ii. Introduce and give legislative sanction to arbitration as an alternative means of dispute resolution;
- iii. Introduce and give legislative sanction to the principle of settlement of commercial disputes by the mediation of an independent third party agreed upon by the parties to a dispute;
- iv. Provide for the role of the courts in arbitral proceedings and set out the relationship between the courts and arbitration;
- v. Provide for speedy resolution of commercial disputes without recourse to the courts, by means of a third party mediator possessing the knowledge and experience related to the dispute and who is appointed by consensus among the parties to the dispute;
- vi. Set out a local legal framework for arbitration in accordance with the United Nations Commission on International Trade Law (UNCITRAL) model rules.

c. The 2013 Arbitration Act also establishes the Maldives International Arbitration Centre; and

d. Although the Maldives is not a party to the New York Convention, foreign arbitral awards are enforced under Section 72 of its Arbitration Act.

182. An analysis of the new 2013 Maldives Arbitration Act has been conducted, based on the copy provided to me by SEC, and my evaluation and recommendations are set out in the next Section of this Chapter.

6. Nepal

183. Nepal is a New York Convention country but is not an UNCITRAL Model Law country. The main features of the arbitration regime and institutional framework of Nepal can be summarised as follows:

- a. Nepal first enacted arbitration legislation in its 1981 Arbitration Act;
- b. Due to substantial economic growth in the 1990s, as well as a growing demand to limit court intervention in the arbitration process, a new Arbitration Act was enacted in 1999, which implemented a revised arbitration legislation that was more in line with arbitration practices at that time;

- c. While Nepal is not an UNCITRAL Model Law country, its 1999 Arbitration Act appears to draw some inspiration from the Model Law scheme; and
 - d. Traditionally, Nepalese culture has always embraced a culture of mediation within the community. As such, the social acceptance of mediation has in turn given rise to the acceptability of arbitration processes.
184. Given that the most recent Nepalese arbitration legislation dates back to 1999, a review of Nepal's arbitration regime is both timely and necessary, in light of various modern developments in arbitration practices.

7. Pakistan

185. Pakistan became an independent State in 1947, adopting the British Legislated Arbitration Act of 1940, which remains applicable in Pakistan today. The purpose of the 1940 Arbitration Act was to consolidate previous enactments relating to arbitration, and to create an arbitration regime that would allow efficient resolution of disputes through arbitration. In 1958, Pakistan signed the New York Convention in 1958, but only subsequently ratified it in 2005. Pakistan is not an UNCITRAL Model Law country.
186. A summary of the main features of Pakistan's arbitration regime is set out as follows:
- a. The Arbitration Act was passed by the British Parliament in 1940, coming into force on 1 July of that same year. As per the scope of the 1940 Arbitration Act, all forms of arbitration are required to be conducted in accordance with the provisions of the Act, so long as the seat of the arbitration is Pakistan;
 - b. The 1940 Arbitration Act applies to all arbitration proceedings commenced after 1 July 1940;
 - c. Given that Pakistan is not an UNCITRAL Model Law country, and that the 1940 Arbitration Act was enacted before the creation of the UNCITRAL Model Law, the Act is significantly different from the scheme and text of the Model Law;
 - d. The 1940 Arbitration Act does not distinguish between domestic and international arbitration, and applies to all forms of arbitration alike;
 - e. In 2009, an Arbitration Bill was introduced in the Pakistan National Assembly which sought to amend the 1940 Arbitration Act and replace it with an arbitration regime that would implement the UNCITRAL Model Law scheme in Pakistan;

- f. In 2016, an Arbitration and Conciliation Bill was passed by the Senate of Pakistan. The Bill, however, has been subject to allegations that it is a copy of the 1996 Indian Arbitration and Conciliation Act with minor modifications. It has also been alleged that the Bill is constitutionally inappropriate because Pakistan’s parliament may not legislate on arbitration matters concerning the provinces;
 - g. The status of a change in Pakistan’s arbitration regime remains pending, and at present, the applicable arbitration regime continues to be that of the 1940 Arbitration Act; and
 - h. Pakistan’s obligations under the New York Convention are implemented in its Recognition and Enforcement Act of 2011.
187. In light of the state of play regarding the change in arbitration legislation in Pakistan, this Report will assess the arbitration legislation of Pakistan as set out in the 1940 Arbitration Act. Comments concerning the 2016 Arbitration and Conciliation Bill will only be introduced insofar as they suggest that an overhaul of the 1940 legislation has been the subject of serious consideration in Pakistan in the past decade.

8. Sri Lanka

188. Sri Lanka is both an UNCITRAL Model Law country and a signatory to the New York Convention. The Sri Lankan arbitration regime does not maintain a distinction between international and domestic arbitration, and the 1995 Arbitration Act states that it enacts a “comprehensive legal provision for the conduct of arbitration proceedings and the enforcement of awards made thereunder”.
189. The main features and developments of the Sri Lankan arbitration regime can be summarised as follows:
- a. Prior to 1995, Sri Lanka’s arbitration regime was primarily set out in three statutes—the Arbitration Ordinance No. 15 of 1856, the Civil Procedure Code No. 2 of 1889, and the Reciprocal Enforcement of Foreign Judgments Ordinance No. 41 of 1921;
 - b. The 1856 Arbitration Ordinance and the 1889 Civil Procedure Code provided for both compulsory Arbitration by order of court and voluntary arbitration by the consent of parties. Institutional Arbitration was very rare; and
 - c. In 1995, Sri Lanka enacted a new arbitration legislation that reformed their arbitration regime in light of the UNCITRAL Model Law scheme and the New York Convention.

190. As more than twenty years have passed since Sri Lanka last modernised its arbitration regime, an analysis of the 1995 Arbitration Act will be conducted to assess if further modifications should be made.

C. INTERNATIONAL BEST PRACTICES

191. A great deal of work has been accomplished by States in attempting to harmonise globally the regime for the implementation of international arbitration. Two such instruments are deserving of specific mention, and which presently form the corpus of international best practices on the kinds of national arbitration legislation that States should implement in their domestic legal system.
192. The first instrument is the UNCITRAL Model Law. The UNCITRAL Model Law was adopted by the United Nations Commission on International Trade Law on 21 June 1985, at the end of the eighteenth session of the Commission. In its resolution 40/72 of 11 December 1985, the United Nations General Assembly recommended that “all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice”.
193. The Model Law covers all stages of the arbitral process from the arbitration agreement to the setting aside and recognition and enforcement of arbitral awards, and “reflects a worldwide consensus” on the principles and important issues of international arbitration practice. Since its adoption by UNCITRAL, it has come to represent the accepted international legislative standard for modern arbitration laws. It has gained widespread approval by States, and a significant number of jurisdictions have enacted arbitration legislation based on the UNCITRAL Model Law. The Model Law was revised and improved in 2006, and it is the 2006 version that will form the basis of comparison and analysis in the subsequent Section of this Chapter.
194. The second important instrument is the New York Convention. The New York Convention was adopted at a United Nations conference in 1958, and entered into force in 1959. The Convention requires courts of contracting States to give effect to arbitration agreements, and to recognise and enforce arbitral awards made in other contracting States. As such, the New York Convention has become a critical tool in the practice of arbitration, as it goes a long way in ensuring that awards obtained from the arbitration of disputes can be enforced. It is an important foundational instrument for international arbitration, and forms a pillar of international arbitration legislation on matters such as the validity of the arbitration agreement and the grounds for setting aside an arbitral award.
195. Finally, there are several jurisdictions such as United Kingdom, Singapore, and Hong Kong that have gained an international reputation as popular seats of arbitration due to

the efficacy of their arbitration legislation and court system. The legislation of these countries have also been utilised as benchmarks for international best practices and for the analyses that follow.

D. GAP ANALYSIS AND RECOMMENDATIONS

196. An analysis of each SAARC Member State's arbitration regime was conducted, in order to identify existing gaps in comparison with international best practices, and to suggest recommendations and strategies for improving the present framework for arbitration in each SAARC Member State. These recommendations are set out below as concrete steps for each SAARC Member State, as well as more generally relating to the region. It should be noted that the recommendations listed below are not intended to be exhaustive. Instead, they are intended to serve as a good starting point for the consideration of action steps that each SAARC Member State can adopt, deliberate further on, or keep on its reform agenda for future implementation. This Section also concludes by setting out a number of recommendations that can be applied generally in SAARC Member States to promote and develop arbitration in the region.

1. Afghanistan

197. The Afghanistan arbitration regime has not been updated in a relatively long time. Consequently, there are a number of recommendations proposed in this Report which have been set out below.
198. ***Recommendation 1: To consider amending the nature of disputes that can be submitted to arbitration with Afghanistan as the seat of arbitration.*** At present, the 2007 Commercial Arbitration Law appears to contemplate only the arbitration of commercial and economic disputes. Article 1 states that the Commercial Arbitration Law was enacted to facilitate the resolution of "commercial and economic disputes". Similarly, Article 2 defines "arbitrator" and "arbitration" to relate to "commercial disputes" and "disputes under contracts for economic or commercial transactions". Such a description, however, may prevent certain kinds of CBET disputes from being submitted to arbitration. A CBET dispute concerning the issue of sovereignty over natural resources arguably falls outside the description of "commercial and economic disputes". Similarly, a CBET investor-State dispute concerning the violation of international law under an energy treaty may likewise be difficult to classify as a dispute arising out of an "economic or commercial transaction". Consequently, amendments should be considered to widen the description of disputes capable of being submitted to arbitration under the Commercial Arbitration Law, and to ensure that the full spectrum of CBET-related disputes is covered.

199. **Recommendation 2: To consider changing the references to a “contract” in the 2007 Commercial Arbitration Law (where relevant) to the word “agreement”.** By referring only to disputes arising out of “contract” or to arbitration agreements contained within a “contract” (e.g. see Articles 1 and 2 of Afghanistan’s Commercial Arbitration Law), it appears that the Afghan courts may not have authority under the Commercial Arbitration Law to perform a role as the seat of an arbitration in an investor-State treaty dispute arising from the CBET context. An investor-State dispute concerns the violation of a treaty or of general international law, and is not usually a “dispute under contract”. Similarly, the basis of the arbitration agreement in an investor-State dispute is usually the investment treaty rather than an arbitration clause in a contract. Consequently, the more general term “agreement” should be used in place of the word “contract”, at relevant parts of the legislation. This widens the scope of CBET-related disputes that may come under the purview of the Afghanistan courts as the seat of the arbitration, and clarifies the powers of the Afghan Courts for supporting the arbitration of investment treaty disputes.
200. **Recommendation 3: The reference to a “Court” should be deleted from the definition of “arbitration award” in Article 2 of the 2007 Commercial Arbitration Law.** An arbitration award is the decision made by the arbitral tribunal in respect of the dispute submitted to arbitration. While national courts may perform a variety of supporting roles in the context of arbitration (e.g. granting of interim measures, appointment of arbitrators etc), court decisions are not technically part of the arbitration award.
201. **Recommendation 4: Clarify the circumstances in which arbitration is international or domestic under Article 3 of the 2007 Commercial Arbitration Law.** At present, it is unclear whether the circumstances listed in Article 3 are separate limbs or whether they are elements that must be jointly fulfilled in order for an arbitration to be deemed to be “international”. It is also unclear as to why Article 3 makes reference to “international” and “domestic” arbitration, when there do not appear to be any differences in the arbitral regime applicable to these two categories (at least from a reading of the Commercial Arbitration Law of Afghanistan).
202. **Recommendation 5: Clarify whether Article 6 relates specifically to “electronic correspondence” or more generally to “written communication”.** While the description of the provision refers to “receiving electronic correspondence”, the text of Article 6 itself relates to “any written communication” and even includes “registered letter”. The inconsistency between the description of the provision and the actual text of the provision should be resolved.
203. **Recommendation 6: Resolve the inconsistency between Article 7 and 34 in respect of the commencement of arbitration proceedings.** Article 7 states that “arbitration shall commence on the day of hearing the case”. In contrast, Article 34 states that “the Arbitral proceedings...shall commence on the date on which a demand for Arbitration

is received by the respondent”. This inconsistency should be resolved to ensure clarity in the arbitral process.

204. **Recommendation 7: Amend Article 15 of the 2007 Commercial Arbitration Law.** Article 15 makes reference to a “paragraph 1”, however, there is no such paragraph 1 in that provision. In addition, Article 15 does not confer on the Afghan courts the power to find that an arbitration agreement is null and void, inoperative or incapable of being performed, which is a common power conferred to national courts under most arbitral legislation. Without such a power, it appears that on the face of the Commercial Arbitration Law, an Afghan court is obligated to refer a dispute to arbitration so long as the arbitration agreement fulfils the writing requirement in Article 13.
205. **Recommendation 8: Consider including a continuing obligation for arbitrators to disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence without delay.** Under the present wording of Article 20 of the 2007 Commercial Arbitration Law, an arbitrator is only obliged to disclose information “that will eliminate doubts as to his/her impartiality or independence”. This suggests that an arbitrator’s duty to disclose may only come into operation after such doubts have arisen. There is also no express obligation for an arbitrator to disclose the relevant information “without delay” or as soon as he or she is aware of the potential conflict of interest. This is distinctly different from international best practices which require arbitrators to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence without delay, from the time of their appointment, and continuing throughout the arbitral proceedings. The stricter standard implemented in international best practices helps to safeguard the neutrality of the arbitral tribunal, and it would be beneficial to amend Afghanistan’s Commercial Arbitration Law to include such an obligation.
206. **Recommendation 9: Amend Article 26 of the 2007 Commercial Arbitration Law concerning the jurisdiction of the arbitral tribunal.** The present wording of Article 26 does not fully encapsulate the nature of an arbitral tribunal’s jurisdiction in practice. It is recommended that Article 26 of the Commercial Arbitration Law be amended to adopt the wording of Article 16 of the UNCITRAL Model Law.
207. **Recommendation 10: Amend the incorrect references in Articles 27, 46, 47 and 52 of the 2007 Commercial Arbitration Law.** Article 27 appears to make an incorrect reference to Article 42; this should be a reference to Article 26 instead. Article 46 appears to make an incorrect reference to Article 48; this should be a reference to Article 47 instead. Article 47 appears to make an incorrect reference to Article 47; this should be a reference to Article 46 instead. Article 52 appears to make an incorrect reference to Article 48; this should be a reference to Article 47 instead.
208. **Recommendation 11: To consider whether the procedure and conditions for**

granting interim measures need to be given greater detail. While the Commercial Arbitration Law does state that the arbitral tribunal and the Afghan courts have the power to grant interim measures of protection, there do not appear to be any provisions relating to the specific procedure for making such an application before the tribunal or the court. In addition, Article 29 of the Commercial Arbitration Law does not specify the conditions for granting interim measures by the arbitral tribunal or by the court. As such, the procedure and requirements for interim measures could benefit from greater clarity, detail and legal certainty.

209. ***Recommendation 12: To consider implementing a role for ad hoc arbitration.*** Under Article 32 of the Commercial Arbitration Law, if parties do not specify or agree to an arbitral institution for the administration of the arbitration, the arbitral institution shall be selected by the Afghan courts, *unless* parties have agreed specifically to *ad hoc* arbitration. While such a clause is novel, the effect is to reverse the status quo in international practice. Under prevailing best practices, where parties have not specified an arbitral institution for the administration of the arbitration, the default position is that the dispute will be submitted to *ad hoc* arbitration, where parties have to agree on a set of *ad hoc* arbitration rules for that particular dispute. By making *ad hoc* arbitration contingent on parties' specific agreement, and allowing the court to appoint an arbitral institution as the default position, Article 32 reduces party autonomy in the arbitral process. This may turn parties away from selecting Afghanistan as the arbitral seat.

2. Bangladesh

210. The 2001 Bangladesh Arbitration Act is a very comprehensive overhaul of the old arbitration regime. While there were many areas under the old regime that were archaic or outdated, the 2001 Bangladesh Arbitration Act has done a good job of implementing a more modern arbitration framework.
211. The 2001 Bangladesh Arbitration Act is generally in step with international best practices, and indeed, in certain respects, provides even more detail for certain procedures in international arbitration. Consequently, it was not necessary to make any specific or substantive recommendations in respect of the present Bangladesh arbitration regime. However, it should nonetheless be noted that there were a number of typographical errors in the text of the 2001 Act, and it would be helpful if these were corrected.

3. Bhutan

212. Bhutan's arbitration regime in the text of its 2013 Alternative Dispute Resolution Act

follows very closely the language and scheme of the UNCITRAL Model Law. It also creates a substantial role for the Bhutan Alternative Dispute Resolution Centre in the administration of arbitration disputes as well as in acting as the appointing authority where parties are unable to agree on the appointment of arbitrators—the envisioned role of the Bhutan Alternative Dispute Resolution Centre will help to ensure the efficacy of the arbitral process. By and large, the 2013 Alternative Dispute Resolution Act is very comprehensive in nature, and is well drafted. That being the case, there are two recommendations that may help to give greater clarity in respect of Bhutan’s arbitration legislation.

213. ***Recommendation 1: Clarify the time limit for raising objections to the arbitral tribunal’s jurisdiction.*** At present, Article 81 of the 2013 Alternative Dispute Resolution Act states that “[a] plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the first pleading on the substance of the dispute”. This could cause some confusion regarding the time limit for filing jurisdictional objections for a number of reasons. In arbitration, jurisdictional objections are usually raised by the Respondent. However, in terms of arbitration procedure and the sequence of phases in arbitration, the “first pleading on the substance of the dispute” is actually the Claimant’s Statement of Claim. Consequently, on the strict wording of Article 81 as presently formulated, it appears that the time limit for filing jurisdictional objections would have expired even before the Respondent has a chance to file its written submissions. It is suggested that Article 81 of the 2013 Alternative Dispute Resolution Act be amended to read as follows “[a] plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the **Respondent’s** first pleading on the substance of the dispute” (emphasis added). This would preserve closely the current wording of the text, but would clarify the time limits for raising jurisdictional objections in line with Article 16(2) of the UNCITRAL Model Law.
214. ***Recommendation 2: Amend the 2013 Alternative Dispute Resolution Act to state expressly that the arbitral tribunal has the ability to decide on matters of jurisdiction as a preliminary question.*** Article 85 of the 2013 Alternative Dispute Resolution Act states that “[i]f the arbitral tribunal rules on a plea that it has jurisdiction, any party, within ten working days of receipt of decision, may appeal to the High court to decide the matter”. However, this does not state whether the tribunal is able to rule on a jurisdictional claim at any time during the arbitral proceedings, or whether a tribunal may bifurcate the arbitral proceedings to hear jurisdictional objections in a separate phase from the merits. In contrast, Article 16(3) of the UNCITRAL Model Law contains an explicit power for the tribunal to “rule on a [jurisdictional] plea...either as a preliminary question or in an award on the merits”. It is recommended that the power of the tribunal to rule on jurisdictional issues as a preliminary question be expressly included in Bhutan’s arbitration legislation. Giving the tribunal such an express power to decide on jurisdictional objections in a preliminary phase may help to reduce costs and increase efficiency in the arbitration process, especially where the

claimant has brought an unmeritorious claim in respect of the jurisdiction of the tribunal.

4. India

215. India's 1996 Arbitration and Conciliation Act followed very closely the UNCITRAL Model Law scheme, albeit with a number of modifications. That being said, there were still various lacunae in the 1996 legislation that gave rise to difficulties. Those problems, however, have largely been resolved by the 2015 amendments that have been put in place by India, and issues relating to electronic communications, and the scope and details relating to an application for interim measures before the arbitral tribunal have been dealt with.
216. A variety of amendments in the 2015 legislation also targeted a core problem plaguing arbitration in India—delays in arbitral proceedings. As such, the 2015 Arbitration and Conciliation (Amendment) Act has instituted various changes to ensure the efficiency and efficacy of the arbitral process, as well as the timely delivery of an arbitral award within 12 months after the conclusion of the arbitration proceedings.
217. The most recent round of amendments therefore, have seen important improvements in the text of India's arbitration legislation, and bode well for the future development of arbitration in India. Nonetheless, there are a number of recommendations and suggestions that could assist in clarifying several points of arbitral procedure, and for which greater clarity could be beneficial.
218. ***Recommendation 1: Reconsidering the default number of arbitrators where parties are unable to agree.*** Section 10 of the 1996 Arbitration and Conciliation Act states that "parties are free to determine the number of arbitrators...[failing which], the arbitral tribunal shall consist of a sole arbitrator". This provision was not amended or modified by the 2015 legislation. While this certainly gives disputing parties the option of agreeing on a larger number of arbitrators, the general practice in international commercial arbitrations is to have three arbitrators as the default number where parties do not agree otherwise. It may, therefore, be sensible for the Indian legislation to be amended to contemplate a different default number of arbitrators for domestic arbitration and international commercial arbitration (where parties are unable to agree)—with the default position being a sole arbitrator in domestic arbitrations, and three arbitrators in international commercial arbitrations. This may help to ensure that domestic arbitrations in India, which tend to involve smaller quantum and less complexity, and international commercial arbitrations, which tends to involve international parties and larger contracts, have a more suitable default number of arbitrators allocated for each particular kind of dispute.
219. ***Recommendation 2: Amend Indian legislation to clarify that the arbitral tribunal***

- has the discretion to decide on matters of jurisdiction whether as a preliminary question or in the final award.* Section 16(5) of the 1996 Arbitration and Conciliation Act (which has not been amended in the 2015 legislation) states that “[t]he arbitral tribunal shall decide on a [jurisdictional objection] plea...and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award”. The concern with this formulation is that it suggests that the arbitral tribunal has an obligation to decide on jurisdictional objections as a preliminary question—i.e. before making the final award. Interpreted in this way, it suggests that bifurcation of a dispute is automatically triggered once jurisdictional objections are raised, which could result in duplicitous hearings and inefficiency in the arbitral process. The better position is to allow the arbitral tribunal to have a clear discretion on when to rule on jurisdictional objections and on matters such as bifurcation. By way of example, Article 16(3) of the UNCITRAL Model Law contains an explicit power for the tribunal to “rule on a [jurisdictional] plea...either as a preliminary question or in an award on the merits”. It is recommended that the discretion of the tribunal to rule on jurisdictional issues, whether as a preliminary question or in an award on the merits, be expressly included in India’s arbitration legislation.
220. ***Recommendation 3: Clarifying the status of barristers in the Fifth and Seventh Schedules of the 2015 Arbitration and Conciliation (Amendment) Act.*** The 2015 Arbitration and Conciliation (Amendment) Act contains a number of very useful modifications to Section 12 of the 1996 Arbitration and Conciliation Act, concerning the grounds for challenging the appointment of an arbitrator. To this end, the Fifth and Seventh Schedules of the 2015 legislation lists the kinds of relationships which give rise to justifiable doubts as to the independence or impartiality of arbitrators. The status of barristers, and situations where opposing counsel or arbitrators in an arbitrator may belong to the same barristers chambers, have not been covered in the list. However, in arbitration practice, barristers from the same chambers are increasingly appointed as counsel or arbitrators in the same arbitration, and the rules of conflicts of interests applicable to such situations are not clear. It may therefore be useful for Section 12 to be further modified to clarify the status of barristers, and whether the rules of conflicts of interests for lawyers and law firms are equally applicable to barristers.
221. ***Further clarifications:*** There remains a “live” issue which does not have a clear answer under India’s arbitration regime. This relates to whether two Indian parties can choose a foreign seat of arbitration, and there are a number of conflicting court decisions on this matter (*Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd*, *Sasan Power Ltd v. North America Coal Corporation India Pvt. Ltd*, and *Atlas Exports Industries v. Kotak & Company*). Accordingly, it may be helpful for this issue to be clarified in legislation.

5. Maldives

222. While the Maldives 2013 Arbitration Act follows the Model Law scheme for international commercial arbitration, there are a number of areas in which the arbitration regime of the Maldives could benefit from greater consideration and clarification.
223. ***Recommendation 1: Clarification of reference to a “mediator” within the 2013 Arbitration Act.*** The 2013 Arbitration Act appears to utilise the term “mediator” in the context of the arbitration regime. For example, Section 7 defines “arbitration” as the “international principles under which a commercial dispute arising from legal relations between two or more parties is submitted to be decided in accordance with this act by a *third party mediator* agreed upon by both parties to the dispute, instead of taking the matter to the courts.” This reference to a “third party mediator” is repeated in Section 2(e). However, as described in Chapter 3 of this Report, mediation is a completely different dispute resolution method from arbitration, and indeed, the term “mediator” appears to be inaccurately or erroneously used in the context of the 2013 Arbitration Act. It is therefore recommended that the Maldives reconsider the use of this term in the 2013 legislation, and replace the references to a “mediator” with a reference to a “neutral” or “third party neutral”.
224. ***Recommendation 2: To clarify the reference to an “institution registered for the purpose of providing arbitration services” in Section 8 of the 2013 Arbitration Act.*** Section 8 of the 2013 Arbitration Act defines “arbitral tribunal” to include independent third parties appointed by the parties to decide the dispute, as well as “a permanent institution registered for the purpose of providing arbitration services”. The latter phrase appears to contemplate permanent arbitral tribunals that preside over a distinct series or set of disputes, such as the Iran-United States Claims Tribunal. However, the phrase is too broadly worded, and arguably includes within its meaning arbitral institutions (e.g. the ICC, SIAC, LCIA etc.) which merely provide arbitration support services and do not have any role to play in deciding the dispute. The text of Section 8 should therefore be amended to clarify its exact meaning.
225. ***Recommendation 3: To consider revising the definition of “arbitrator” in Section 9 of the 2013 Arbitration Act.*** Under Section 9 of the Act, “arbitrator” is defined as “the independent third party either designated or *proposed* to deliberate on and resolve a dispute”. Technically speaking, any individual who has been proposed as a possible arbitrator cannot be appointed as an arbitrator unless he or she has been accepted by the parties, or failing which, he or she is subsequently designated by the appointing authority as the arbitrator. As such, the language of Section 9 should be revised for greater clarity.

226. **Recommendation 4: To consider adding in a provision dealing with the rules concerning the receipt of written communication by the parties.** At present, this does not appear to be covered in the 2013 Arbitration Act. Such a provision is nonetheless useful for setting out clear rules as to when a party will be deemed to have received a document or written communication.
227. **Recommendation 5: To consider adding in a provision dealing with the waiver of a party's right to object.** While it may be suggested that such a rule will nonetheless be implicitly applied even without an express provision, it is better to state clear rules that a party who knows of any derogation or non-compliance with the arbitration rules but who proceeds with the arbitration without stating any objections shall be deemed to have waived his or her right to object.
228. **Recommendation 6: To consider if a provision expressly giving the national courts of the Maldives power to grant interim measures before the arbitral proceedings should be added to the 2013 Act.** At present, Section 45 of the 2013 Act gives the national court the power to grant interim measures. It is, however, unclear if Section 45 was intended to give the national court the power to grant interim measures only during the arbitral proceedings, or whether it also includes the power to grant interim measures before the arbitral proceedings but in support of the arbitration. Including an express provision providing for such a power (e.g. see Article 9 of the UNCITRAL Model Law) would help to clarify this issue.
229. **Recommendation 7: To consider amending the reference to "Chief Executive" of the arbitral tribunal in Section 21 of the 2013 Act, replacing it with the word "Chairman".** Section 21(c) states that the presiding arbitrator "shall serve the role of the Chief Executive of such a Tribunal". The phrase "Chief Executive", however, connotes a sense of hierarchy between individuals, whereas the arbitrators on a tribunal are technically of equal standing, with the presiding arbitrator merely assisting to chair the proceedings. Replacing the reference to "Chief Executive" with the word "Chairman" may thus be more appropriate, and would be in line with the use of terminology in the current practice of arbitration.
230. **Recommendation 8: To consider deleting the word "academic" in Sections 22(b) and 25(b) of the 2013 Act.** Section 22(b) states that the Arbitration Centre in appointing an arbitrator, shall have due regard to, *inter alia*, the "academic qualifications required in such an arbitrator". Similarly, Section 25(b) allows an arbitrator to be removed if he "does not possess the necessary academic qualifications". The problem with the phrase "academic qualifications" is that it is too narrow in scope. Parties often agree on requirements that relate to the technical qualifications or practical experience of arbitrators (e.g. practical experience in hydrology) as opposed to their "academic qualifications". In such situations, the language of Sections 22(b) and 25(b) of the 2013 Act could mean that the Arbitration Centre may ignore the parties' agreement on technical qualifications when appointing

an arbitrator, and a party would not be able to rely on Section 25(b) to have that arbitrator removed for lacking in non-academic qualifications that have been specified and agreed on by the parties. The word “academic” should therefore be deleted to clarify the text of Sections 22(b) and 25(b) in line with prevailing practice.

231. ***Recommendation 9: To consider deleting the phrase “he feels” in Section 23(a) of the 2013 Act.*** Section 23 of the Act sets out the conditions of impartiality and independence of arbitrators. Under the present text, a person approached in connection with his or her possible appointment as arbitrator shall disclose any circumstances “if he feels” that there are any justifiable circumstances affecting his impartiality or independence. The concern is that the phrase “he feels” implies that this is a subjective rather than an objective test, and arbitrators may therefore decide not to disclose significant information affecting their impartiality or independence so long as they “feel” that these are not “justifiable circumstances”.
232. ***Recommendation 10: To consider deleting Sections 25(c) and (d) of the 2013 Act.*** Section 25 sets out the circumstances in which an arbitrator may be removed from his or her position. Sections 25(c) and (d) list two such grounds, allowing for an arbitrator to be removed if he or she “displays unreasonable delays in carrying out his duties” or if he or she “is unable to carry out his duties to a reasonable standard”. The concern is that these two grounds may give parties too much leeway to challenge the appointment of an arbitrator and seek for his or her removal. This could potentially result in delays in the arbitration and/or abuses of process if parties were to file unwarranted challenges to seek to remove an arbitrator for tactical reasons.
233. ***Recommendation 11: To clarify the meaning of “governing law applicable to the arbitral proceedings” in Section 51(a) of the 2013 Arbitration Act.*** Section 51(a) refers to the “governing law applicable to the arbitral proceedings”. However, the rest of Section 51 appears to relate to the procedure for determining the law applicable to the substance of the dispute. As such, the meaning and import of Section 51(a) is unclear, and causes some confusion as to how to apply the rules set out in Section 51 to determine the law applicable to the substance of the dispute.

6. Nepal

234. Nepal’s 1999 Arbitration Act is disorganised, and based on current arbitration standards, it is difficult to implement in any given arbitration dispute, particularly those involving international parties. It appears that while Nepal has attempted to adopt certain parts of the UNCITRAL Model Law framework, it utilised a pick-and-choose approach, which results in a patchwork of provisions in its arbitration legislation that are relatively incoherent. The 1999 Arbitration Act weaves modified parts of the UNCITRAL Model Law with other kinds of provisions that do not

normally appear in arbitration legislation, without a comprehensive understanding of how the different parts of the Model Law scheme work together.

235. As such, it is the author's view that Nepal's arbitration legislation requires a systemic reconsideration and overhaul. Too many changes will have to be made in order to create a national arbitration regime that will be attractive to users of arbitration, and it is not recommended that Nepal merely modify its present regime. Instead, it is recommended that Nepal commission an in-depth study of its arbitration legislation, conducting market studies with business and commercial entities as regards the needs of the users of arbitration, with a view to enacting a new arbitration regime that is in step with prevailing international best practices.
236. That being the case, the subsequent paragraphs will set out some of the key problems, lacunae, and areas of concern that are presently in Nepal's 1999 Arbitration Act. These include but are not limited to the following:
- a. There is no provision dealing with when parties are deemed to have received written communications;
 - b. There is no provision dealing with the issue of waiver of a party's right to object;
 - c. Section 4 of the 1999 Arbitration Act confers on the Nepalese courts the power to cancel the "records of a suit" filed in respect of a dispute that has been brought to arbitration. However, it does not provide any power for the courts to refer a party to arbitration, or to order a party to comply with a valid arbitration clause;
 - d. While Section 21(1)(g) provides for the arbitral tribunal's power to grant interim measures, the text of this provision is very generic. It does not specify any criteria for when a tribunal may grant interim measures, neither does it set out any rules of procedure in respect of how a party may submit an interim measures application. Furthermore, quite apart from the arbitral tribunal's ability to grant interim measures, the 1999 Arbitration Act does not seem to confer on the Nepalese courts any power to grant interim measures in support of the arbitration;
 - e. Sections 6 and 26 of the 1999 Arbitration Act refer to the presiding arbitrator as the "chief arbitrator". As mentioned in other parts of this Report, this kind of terminology is inappropriate in arbitration because it connotes a hierarchy between different members of the tribunal who would technically have an equal standing. The term "President" or "Chairman" is more acceptable in modern arbitration parlance;
 - f. There are numerous typographical errors in the 1999 Arbitration Act which

affect the substantive meaning of the provisions. For example, Section 10 utilises the words “shall not be disqualified” when the provision was clearly intended to mean “shall be disqualified”;

- g. Section 12 appears to be based on an incorrect understanding of the place of the arbitration. Thus, this provision seems to have been adapted from the UNCITRAL Model Law concerning the “place of arbitration” which is a juridical and legal concept, but has been erroneously modified to refer to the “location of [the] office of the arbitrator”;
- h. Section 13 is unclear as to whether parties should determine the language of the arbitration “through mutual consultations” or whether it is the arbitral tribunal that shall determine the language of the arbitration;
- i. There does not appear to be a provision specifying the time at which the arbitration proceedings are deemed to have commenced. Consequently Section 17 of the 1999 Arbitration Act appears to confuse the commencement of arbitration proceedings with the holding of arbitration hearings;
- j. Section 14 requires the claimant to submit its claim (presumably, it means Statement of Claim) to the arbitrator “within three months from the date when a dispute requiring arbitration has arisen” (as opposed to within three months from the date of the commencement of the arbitration). This is impractical since a claimant is not bound to commence arbitration when a dispute arises, but is clearly within his or her rights to decide on the time at which he or she should bring the dispute to arbitration. Interpreted on its strict language, Section 14 would appear to introduce a three-month limitation period for arbitration from the “date when a dispute requiring arbitration has arisen”;
- k. Section 16 appears to trigger automatic bifurcation of a case in the event that any party raises a jurisdictional objection. This is highly unusual as the general position is that the arbitral tribunal has discretion as regards issues of bifurcation, and whether it will decide the issue of jurisdictional objections in a preliminary decision or in the award on the merits. Automatic bifurcation may also cause lengthy delays in the arbitral process especially where a party has filed jurisdictional objections even though it knows that its objections are unmeritorious or very weak;
- l. Section 17(7) appears to confuse arbitration with court proceedings, requiring the arbitral tribunal to “read out” its written decision to the parties. This is impractical where international parties are concerned, as it would require the tribunal to convene an additional meeting with the parties in order for the award to be read out, which incurs significant and unnecessary costs;
- m. Section 18 provides that Nepalese Law is the applicable law for the substance

of the dispute unless parties have agreed otherwise, rather than allowing the tribunal to decide upon the applicable law by application of conflicts of law rules, which is the usual position;

- n. Section 21 gives the tribunal the power to record witness statements and certify documents. This is unusual as the preparation of evidence and documents in a dispute is usually the responsibility of the parties' counsel;
 - o. Finally, Section 24 of the 1999 Arbitration Act states that the arbitral award "shall" be released within 120 days from the "date of submission of documents". This would be unrealistic in practice for various reasons. First, four months is too short a time limit for the award to be completed by the arbitral tribunal, especially in large cases. Second, it makes very little sense for the time limit to run from the date of submission of documents. At that point, hearings on the merits would not even have taken place, and exigencies may subsequently arise that could potentially delay the proceedings.
237. It is for the reasons above that an overhaul of the Nepalese arbitration legislation should be considered and explored, and further information needs to be gathered concerning the arbitration market in Nepal.

7. Pakistan

238. Pakistan's 1940 Arbitration Act adopts an arbitration regime that is very different from that of the UNCITRAL Model Law. While it nonetheless appears to cover the basic necessities of a workable arbitration framework, there remain several areas that can be further improved. That being said, it should be noted that the recommendations listed below may be rendered moot in the event that Pakistan officially enacts its 2016 Arbitration and Conciliation Bill as legislation (repealing the 1940 Arbitration Act), as the 2016 Bill is primarily based on the Model Law scheme.
239. ***Recommendation 1: To consider adding in a provision dealing with the rules concerning the receipt of written communication by the parties.*** At present, this does not appear to be covered in the 1940 Arbitration Act. Such a provision is nonetheless useful for setting out clear rules as to when a party will be deemed to have received a document or written communication.
240. ***Recommendation 2: To consider adding in a provision dealing with waiver of a party's right to object.*** While it may be suggested that such a rule will nonetheless be implicitly applied even without an express provision, it is better to state clear rules that a party who knows of any derogation or non-compliance with the arbitration rules but who proceeds with the arbitration without stating any objections shall be deemed to have waived his or her right to object.

241. **Recommendation 3: To consider setting out more details concerning the definition and form of an “arbitration agreement”.** Section 2(a) defines “arbitration agreement” as a “written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not”. There are, however, no details set out as to when an arbitration agreement is considered to be in writing, the status of electronic communications, or the manner in which an arbitration agreement can be concluded. These are usually dealt with in a comprehensive arbitration legislation, and helps to ensure certainty when parties conclude an arbitration agreement.
242. **Recommendation 4: To re-consider the grounds for which an arbitrator can be removed.** Section 11 allows the Pakistani courts to remove an arbitrator who “fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award” and who “has misconduct himself or the proceedings”. The concern, however, is that there do not appear to be any grounds for challenging or removing an arbitrator for reasons related to conflicts of interest, bias, or a lack of impartiality or independence, which are necessary to ensure the neutrality of the arbitral process and resolution of the dispute.
243. **Recommendation 5: To set out in more detail the powers of an arbitrator in Section 13 of the 1940 Arbitration Act.** Section 13 states only five powers of an arbitrator, and therefore seems to be incomplete in describing the scope of powers usually granted to arbitrators under national legislation. It is recommended that this provision either be deleted or given greater detail.
244. **Recommendation 6: To clarify the powers of the arbitral tribunal to grant interim measures of protection.** At present, the Second Schedule of the 1940 Arbitration Act confers on the Pakistani courts a general power to grant interim measures. There is, however, no equivalent provision expressly granting such a power to the arbitral tribunal. While Section 27 allows an arbitrator to make an “interim award”, it is unclear if this covers the ability to grant interim measures of protection. As such, this issue should be clarified in an amendment.
245. **Recommendation 7: To re-evaluate the grounds for setting aside an award under Section 30 of the 1940 Arbitration Act.** The current formulation of the grounds for setting aside an award are relatively narrow. It may be beneficial for promoting arbitration in Pakistan if the provision were to be amended in line with the international standards set out in the New York Convention and Article 34 of the UNCITRAL Model Law, as the grounds for setting aside an award in those international instruments have gained very widespread acceptance and are treated as necessary elements in the eyes of arbitration practitioners.
246. **Recommendation 8: To clarify the effect of and relationship between Sections 30, 32 and 33 of the 1940 Arbitration Act.** Section 32 appears to suggest that a party may not contest the existence, effect or validity of an arbitration agreement by suit, and given

the text of Section 30, that this is not a ground for setting aside the arbitral award. Yet, Section 33 appears to allow a party to contest the validity of an arbitration agreement or award by application to the national court. It is unclear how these provisions relate to one another, and whether this may allow an arbitral award to be set aside upon a successful challenge to the existence, effect, or validity of an arbitration agreement or award.

247. ***Recommendation 9: To reconsider the time limits for the completion of the arbitral award by the tribunal.*** Section 3 of the First schedule of the 1940 Arbitration Act states that the arbitrators “shall” make their award “within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow”. The default period of four months is unrealistic in practice. First, four months is too short a time limit for the completion of the award by the arbitral tribunal, and in most cases, would require a wastage of costs and time for parties to apply to the national courts for an extension of time. Second, it makes little sense for the time limit to run from the date of registration of the arbitration or the appointment of the arbitrator. At that point, parties’ memorials have not been exchanged, hearings would not even have taken place, and there could be numerous exigencies that could potentially delay the proceedings.
248. ***Recommendation 10: To consider adding a provision dealing with the methodology of determining the law applicable to the substance of the dispute.*** There is presently no such provision, and it is thus unclear as to what rules an arbitral tribunal should apply in deciding on the law applicable to the substance of the dispute.
249. ***Recommendation 11: To consider adding provisions to deal with equal treatment of parties and the language and seat of the arbitration.*** There are presently no such provisions, which makes it unclear as to how such issues will be dealt with in an arbitration seated in Pakistan.

8. Sri Lanka

250. As Sri Lanka’s 1995 Arbitration Act generally adopts the UNCITRAL Model Law scheme, albeit in a modified form, its arbitration legislation is relatively complete. There are nonetheless a few recommendations that Sri Lanka may want to take into account in assessing its arbitration legislation.
251. ***Recommendation 1: To reconsider and clarify the powers of the arbitral tribunal and the Sri Lankan courts to grant interim measures of protection.*** At present, Section 13 of the 1995 legislation allows the arbitral tribunal to grant interim measures. The provision, however, does not set out any detail as to the requirements for granting interim measures, nor the methodology of submitting such an application.

In addition, the 1995 legislation appears to be silent on whether the Sri Lankan national courts are able to grant interim measures in support of an arbitration seated in Sri Lanka. Section 13(2) gives the national courts the power to enforce interim measures granted by the arbitral tribunal, but it does not cover the courts' own ability to grant the same, which can be useful or necessary in an arbitration.

252. ***Recommendation 2: To consider adding an additional ground for challenging arbitrators for lack of qualifications.*** Section 10(2) of the 1995 Arbitration Act provide very narrow grounds for challenging an arbitrator which do not include failing to possess qualifications that have been agreed upon by the parties. Where parties have entered into a specific agreement as regards the qualifications of the arbitrator, the lack of such qualification is commonly relied upon as a ground for challenging the arbitrator's appointment.
253. ***Recommendation 3: To consider adding a provision that expressly allows a tribunal to appoint experts in deciding the dispute.*** Where large international arbitrations are concerned, especially those involving international parties, there are often technical and legal matters that require expert opinion. In such circumstances, it is not uncommon for tribunals to appoint their own neutral experts to assist in providing information useful for deciding the dispute. Adding an express provision into the 1995 Arbitration Act which grants the tribunal such a power would help to clarify whether a tribunal may indeed do so under the terms of the prevailing legislation.
254. ***Recommendation 4: Amend the 1995 Arbitration Act to state expressly that the arbitral tribunal has the ability to decide on matters of jurisdiction as a preliminary question.*** The Arbitration Act currently in force does not state clearly whether the tribunal is able to rule on a jurisdictional claim at any time during the arbitral proceedings, or whether a tribunal may bifurcate the arbitral proceedings to hear jurisdictional objections in a separate phase from the merits. In contrast, Article 16(3) of the UNCITRAL Model Law contains an explicit power for the tribunal to "rule on a [jurisdictional] plea...either as a preliminary question or in an award on the merits". It is recommended that the power of the tribunal to rule on jurisdictional issues as a preliminary question be expressly included in Bhutan's arbitration legislation.

9. Other General Recommendations for the Development of Arbitration in the South Asia Region

255. While specific recommendations have already been set out above dealing in detail with each SAARC Member State's national arbitration legislation, there are also a variety of recommendations of general applicability that could be useful for promoting arbitration within the region, and ensuring that the arbitration frameworks of SAARC Member States are appropriately formulated for CBET disputes and adequately fill the

needs of potential users of arbitration.

256. ***Recommendation 1: Commissioning a targeted study on the domestic arbitration regime and the needs of the users of arbitration in each SAARC Member State.*** While the basic legal framework for arbitration in each SAARC Member State generally covers the requisite procedures for arbitration, commissioning a targeted study is nonetheless useful for identifying any further gaps that need to be filled, or inconsistencies that need to be resolved. It will also help the various States to identify how their present arbitration frameworks can be further improved in a manner specific to the needs of the users of arbitration in each SAARC country.
257. ***Recommendation 2: In-depth assessments and surveys should be conducted with businesses and users of arbitration to identify specific concerns, diagnose problems, and obtain information on increasing the likelihood of submitting a dispute to arbitration in each SAARC Member State.*** This would yield valuable data for strategic planning, understanding the factors hindering the development of arbitration, and informing the decision-making process for reforms to the legal and institutional framework. This data can also be used by arbitration institutions to shape and market their services.
258. ***Recommendation 3: Events, conferences and publications should be utilised to raise awareness amongst potential users of arbitration in CBET-related sectors in SAARC Member States.*** This would help to educate potential users of arbitration in CBET sectors about the advantages and availability of arbitration to resolve any disputes which they may encounter.

V. CHAPTER 5: OPTIMIZING THE SARCO DISPUTE SETTLEMENT PROCEDURES

259. SARCO was jointly established by the SAARC Member States for providing a regional forum for settlement of disputes by conciliation and arbitration in South Asia and to promote the growth and effective functioning of national arbitration institutions in SAARC Member States. In this regard, SARCO performs a number of important roles relating to the administration and promotion of international dispute resolution within the region. These include:

- a. Administering and supporting arbitration and conciliation proceedings under the institutional aegis of SARCO. Such administrative services include, *inter alia*, supporting the arbitral tribunals and conciliation panels presiding over the dispute, managing the day-to-day progress of the case, ensuring that the rules of procedure are being correctly implemented in the administration of the dispute resolution proceedings, acting as a neutral interlocutor between the parties and the arbitral tribunal / conciliation panel, making arrangements for case hearings, and ensuring that any decisions are in compliance with formal requirements;
- b. SARCO has developed its own institutional rules for arbitration and conciliation, and parties are free to opt for such procedural rules for the resolution of their dispute;
- c. SARCO maintains various panels of arbitrators and conciliators, from which parties may draw or take reference from in considering individuals who may be suitable for appointment as arbitrator or conciliator in their dispute resolution proceedings; and
- d. In fulfilling its role of promoting the growth and utilisation of conciliation and arbitration in SAARC Member States, SARCO conducts a variety of dispute resolution workshops, courses, and promotional events, including high-level meetings with dignitaries, businesses and industries for the promotion of arbitration and conciliation within the region.

260. Given that the specific focus of this Report is to strengthen the dispute resolution mechanisms that may be utilised in the resolution of CBET disputes in SAARC Member States, this Chapter explains the role of SARCO in the administration of CBET disputes potentially arising in the region, and focuses on conducting a close review of the various SARCO dispute resolution instruments. The purpose of such a review is to determine if there may be any gaps to be filled in the dispute resolution framework currently applicable to the work of SARCO, and, to that end, suggest appropriate recommendations to ensure that CBET disputes submitted to SARCO will be resolved impartially, efficiently, and in a cost-effective manner.

A. RELEVANCE OF THE SARCO ARBITRATION AND CONCILIATION RULES TO CBET DISPUTES

261. Given the legal framework presently in place, and the mandate of SARCO described in the Agreement for Establishment of SAARC Arbitration Council (“SARCO Agreement”), there are several kinds of disputes that may potentially be submitted to SARCO by disputing parties. Indeed, Article II(3)(a) of the SARCO Agreement states clearly that SARCO’s mandate includes “conciliation and arbitration of commercial, investment and such other disputes as may be referred to [SARCO] by agreement”. Consequently, the kinds of CBET disputes that could potentially be submitted to SARCO include the following:
- a. Commercial disputes containing an arbitration or conciliation clause referring the dispute to SARCO;
 - b. Commercial disputes in which disputing parties have agreed *ad hoc* to refer the dispute to SARCO;
 - c. Disputes arising out of an investment treaty containing a provision that allows for disputes to be submitted to SARCO as one of the options for dispute resolution;
 - d. Disputes arising out of an investment treaty in which disputing parties have agreed *ad hoc* to refer the dispute to SARCO;
 - e. Any disputes arising out of an agreement referring such disputes to SARCO. This would include Article 16 of the Framework Agreement, which refers inter-States disputes arising out of the interpretation and / or implementation of the Agreement to SARCO; and
 - f. Any disputes in which disputing parties have agreed *ad hoc* to refer the dispute to SARCO.
262. Where disputes are submitted to SARCO for arbitration or conciliation, the arbitration and conciliation process has to be governed by rules of procedure. In this regard, SARCO has developed two in-house sets of procedural rules for its dispute resolution services—the SARCO Arbitration Rules, and the SARCO Conciliation Rules.
263. The SARCO Arbitration Rules and Conciliation Rules, however, are not suitable as rules of procedure for *every* kind of dispute. Indeed, as mentioned in Chapter 3 of this Report, State-to-State disputes are unique, and often utilise specialised rules or, very often, *ad hoc* rules that are specifically agreed upon by the disputing States themselves. As such, rules of procedure that are created to govern arbitration or

conciliation in the commercial or investment context, or for disputes involving private parties, are not usually utilised in practice for State-to-State disputes.

264. It is for this reason that dispute settlement institutions that frequently deal with State-related disputes, such as the Permanent Court of Arbitration, have processes that allow for disputing States to either opt for one of the specialised rules of procedure that they have developed for disputes involving States (e.g. the 1992 PCA Optional Rules for Arbitrating Disputes between Two States, or the 2012 PCA Arbitration Rules), or for States to develop *ad hoc* procedural rules of their own.
265. This distinction between the rules of procedure for commercial and investment disputes, and State-to-State disputes, goes to the purpose and focus of this Chapter. SARCO has developed two existing sets of procedural rules for arbitration and conciliation which contemplate and are targeted at commercial and investment disputes involving private parties. While it is certainly possible to amend these rules to cater for an inter-State context, it is this author's opinion that any recommended amendments to SARCO's arbitration or conciliation rules should be in line with the fact that these rules will primarily be utilised in the context of commercial or investment disputes. Since the prevailing practice in inter-State arbitration and conciliation disputes shows that States prefer to agree on their own *ad hoc* rules of procedure in the vast majority of cases, attempting to modify the SARCO arbitration and conciliation rules for an inter-State context is likely to reduce the utility of these rules of procedure for its primary dispute resolution users, without any certain benefits.
266. In light of this, this chapter focuses on conducting an analysis and review of the SARCO arbitration and conciliation rules to ensure that they are in compliance with international best practices for the *commercial and investment context*. SARCO's role as a dispute resolution institution in the inter-State context, and the relevant procedures pertaining to which it may implement a dispute settlement mechanism for inter-State disputes, are instead dealt with separately in Chapters 6 to 8 of this Report.

B. SARCO ARBITRATION RULES

267. The SARCO Arbitration Rules provides the rules of procedure governing the arbitral process administered by SARCO. These rules have been approved by the Governing Board of SARCO. The SARCO Arbitration Rules primarily adopts the 2013 version of the UNCITRAL Arbitration Rules, albeit with several modifications.
268. The SARCO Arbitration Rules cover all the main procedural issues potentially arising in an arbitration, including *inter alia* (a) notice and calculations of time, (b) the notice of arbitration, (c) the appointing authority, (d) the composition of the arbitral tribunal and appointment of arbitrators, (e) challenging the appointment of arbitrators, (f) the

arbitration proceedings, (g) the language and seat of the arbitration, (h) exchange of memorials, (i) jurisdiction of the tribunal, (j) interim measures of protection, (k) appointment of experts, and (l) the arbitral award. A model arbitration clause has also been provided in the SARCO Arbitration Rules that parties can insert into their contracts and agreements.

C. SARCO CONCILIATION RULES

269. The SARCO Conciliation Rules provides the rules of procedure applicable to conciliation proceedings administered by SARCO. The SARCO Conciliation Rules were finalised and adopted at the Fifth Meeting of the Sub-Group on Investment and Arbitration of the SAARC Secretariat on 7 October 2015. The SARCO Conciliation Rules primarily adopts the 1980 UNCITRAL Conciliation Rules, albeit with several modifications.
270. The scope of the SARCO Conciliation Rules covers *inter alia* (a) the commencement of conciliation proceedings, (b) constitution of the conciliation panel, (c) submission of statements to the conciliator, (d) the role of the conciliator, (e) disclosure of information, (f) settlement agreements, (g) confidentiality, (h) termination of the conciliation proceedings, (i) costs, and (j) the admissibility of evidence in other proceedings. As per the SARCO Arbitration Rules, a model conciliation clause has also been provided in the SARCO Conciliation Rules that parties can utilise in their contracts and agreements.

D. INTERNATIONAL BEST PRACTICES

271. A variety of documents make up the benchmarks for international best practices relating to arbitration and conciliation rules for commercial and investment disputes. Naturally, given that arbitration and conciliation are different in nature, one would look to different kinds of documents in ascertaining the international best practices for each of these two dispute settlement methods.
272. Nonetheless, these benchmarks of international best practices commonly adopt several basic elements for good dispute resolution practice. First, the rules of procedure should ensure, as far as possible, the neutrality of the dispute resolution process. This goes towards the impartiality and independence of the adjudicator, as well as the fairness of the dispute resolution proceedings. Second, the rules of procedure should be efficient. They should allow the dispute to be resolved without unnecessary delays and burdensome procedures. Third, there should be legal certainty in the rules of procedure. The rules should therefore be crafted with accuracy and precision, so that parties are not doubtful as to the process by which the dispute will be resolved. Fourth,

the rules of procedure should, as far as possible, maximise party autonomy. In this regard, parties should be given the possibility of agreeing on specific procedures or modifications to the rules of procedure where they desire to do so. Finally, the dispute resolution procedure should be cost-efficient. Costs should not be prohibitive, so as to increase access to justice.

273. As regards the rules of procedure for arbitration, two kinds of rules fall within the range of international best practices that are commonly applied in the commercial and investment dispute context. First, there are a variety of arbitration rules that have been created and utilised by arbitral institutions for both commercial and investment disputes, and are popular with disputing parties that have resorted to arbitration in the commercial and investment context. These include the 2014 LCIA Arbitration Rules, the 2016 SIAC Arbitration Rules, the 2017 ICC Rules of Arbitration, and the 2017 SCC Arbitration Rules. It should be noted that the 2013 UNCITRAL Arbitration Rules are also popular. However, given that the SARCO Arbitration Rules were adapted from those rules, comments regarding the 2013 UNCITRAL Arbitration Rules will be made only insofar as a provision in the 2013 UNCITRAL Arbitration Rules may be usefully re-introduced into the SARCO Arbitration Rules. Second, there are also arbitration rules that are specific to the investment arbitration context, and which are frequently utilised for investment arbitration disputes. The most popular of these is the 2006 ICSID Convention Arbitration Rules. The SIAC has also recently promulgated a specialist set of rules for investment arbitration which it is still in the process of finalising. These two sets of rules will be reviewed for purposes of identifying any specialist investment arbitration procedures that may be included in the SARCO Arbitration Rules, and which would not otherwise be disruptive in a commercial arbitration.
274. As regards the rules of procedure for conciliation, it should be noted that conciliation is not commonly used for the resolution of commercial and investment disputes, with arbitration being the much more popular dispute resolution method in these contexts. Nevertheless, several sets of conciliation rules stand out as appropriate benchmarks. These include the PCA Optional Conciliation Rules, and the ICSID Convention Conciliation Rules. In order to understand practices from the region, the 1996 ICADR Conciliation Rules will also be reviewed.

E. GAP ANALYSIS AND RECOMMENDATIONS

275. Both the SARCO Arbitration Rules and Conciliation Rules have been closely modelled after their UNCITRAL counterparts with some modifications. As the 2013 UNCITRAL Arbitration Rules and 1980 UNCITRAL Conciliation Rules already provide comprehensive rules of procedure in respect of the relevant dispute settlement methods to which they pertain, the present version of the SARCO Arbitration Rules

and Conciliation Rules, in like manner, both present workable and comprehensive procedural frameworks that can be applied in respect of the arbitration and/or conciliation of CBET disputes without further amendment.

276. That being said, there are nonetheless some areas of procedure in both sets of rules which could benefit from further clarity, detail and thought. Several of these areas relate specifically to the investment arbitration context, which is a specialised field that has seen significant development over the last decade. Consequently, the sections that follow set out recommendations and suggestions in respect of the SARCO Arbitration Rules and SARCO Conciliation Rules, with the objective of improving each of these sets of rules, and ensuring that they can be applied proficiently in respect of CBET disputes arising out of both the commercial and investment context.

1. SARCO Arbitration Rules

277. ***Recommendation 1: To consider amending the Model Arbitration Clause to encompass both commercial and investment disputes.*** The arbitration clause is the foundation of any arbitral process. It provides the scope of the tribunal’s jurisdiction, and delineates the extent of the parties’ consent and submission to arbitration. In this regard, the Model Arbitration Clause set out in the SARCO Arbitration Rules appears to adopt wording that is arguably too narrow to encompass the prospect of investment disputes being submitted to arbitration administered by SARCO. The Model Arbitration Clause provides that any dispute “...arising out of or relating to this contract, or the breach, termination or invalidity thereof...shall be settled by arbitration in accordance with the SAARC Arbitration Rules...”. The problem, however, is that investment disputes are not technically disputes arising out of or relating to a “contract”. They are instead usually disputes arising out of and relating to a “treaty”, which is an international agreement between States, and which is distinct from a “contract” between private parties. Consequently, it is recommended that the Model Arbitration Law be amended in a manner that adopts wording broad enough to encompass the investment dispute context. This can be done by amending the relevant portion of the Model Arbitration Clause as follows (a few other amendments have also been made to provide greater clarity):

“Any dispute, controversy or claim arising out of or relating to this agreement, or the breach, termination or invalidity thereof, between the parties shall be settled by arbitration in accordance with the SARCO Arbitration Rules presently in force, and the award made in pursuance thereof shall be binding on the parties...” (emphasis added)

278. ***Recommendation 2: To consider amending all references to a “contract” in the SARCO Arbitration Rules to suitable wording that would allow the rules to be applicable to investment disputes.*** As mentioned in the previous paragraph, the meaning of the word “contract” is too limited to encompass the meaning of a “treaty”

- in the investment dispute context. Consequently, it is recommended that, where relevant, all references to a “contract” in the SARCO Arbitration Rules should be amended to allow the rules to be applicable to investment disputes. One way of doing so is to use the word “agreement” in place of “contract”. Other arbitration rules like the 2017 SIAC Investment Arbitration Rules have also utilised the alternative phrase of “contract, treaty, or other instrument”.
279. **Recommendation 3: To consider adopting a broader definition of an “arbitral award”.** The definitions section of the SARCO Arbitration Rules simply states that an arbitral award “includes an interim award”. Expanding this definition to include an “interim, partial or final award” improves the clarity of the provision, as has been done in Article 2 of the 2017 ICC Rules.
280. **Recommendation 4: To consider adopting a broader definition of “arbitration”.** The definitions section of the SARCO Arbitration Rules defines “arbitration” to mean “an arbitration relating to disputes arising out of legal relationships considered to be referred to SAARC Arbitration Council for settlement and *where at least one of the parties is a national of the member states of SAARC*”. This definition is very narrow, and excludes the possibility of SARCO being the arbitration institution for administering disputes where both parties are not nationals of SAARC Member States. The concern is that CBET disputes arising in the SAARC region could involve numerous foreign parties, especially since companies operating primarily in a geographical region are often registered in a foreign country.
281. **Recommendation 5: To consider amending Articles 3(5) and 4(2) of the SARCO Arbitration Rules to include proposals on procedural matters.** Adding such a provision gives parties the option of setting out their positions on procedural matters (such as the arbitral seat, the language(s) of the arbitration, the number of arbitrators, their qualifications and identities) early on in the proceedings. Where utilised, this helps the parties and tribunal to narrow down and focus on key procedural issues by the time the tribunal convenes a first procedural meeting. Articles 1.1(iv) and 2.1(iv) of the 2014 LCIA Arbitration Rules has been worded to this effect, and may provide a suitable starting point for formulating such a provision.
282. **Recommendation 6: To consider amending Article 4(1) of the SARCO Arbitration Rules for improved clarity.** At present, Article 4 does not specify whether the response to the notice of arbitration needs to be a written document. It may therefore be useful to amend Article 4(1) as follows: “Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant and DG SARCO a written response to the notice of arbitration...”.
283. **Recommendation 7: To consider amending Article 12 of the SARCO Arbitration Rules to clarify that arbitrators have a continuing obligation to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or**

independence. The present wording of Article 12 does not appear to contain or specify that the Tribunal's duty of disclosure continues to apply throughout the arbitration. Indeed, the phrase "once appointed or chosen" in Article 12 suggests that the duty only arises at the time of the arbitrator's appointment. Prevailing best practice is to specify that the arbitrator assumes a "continuing duty" to disclose, as has been done in Article 5.5 of the 2014 LCIA Arbitration Rules, Article 11(3) of the 2017 ICC Arbitration Rules, Articles 13.5 and 13.6 of the 2016 SIAC Arbitration Rules, Article 11 of the 2013 UNCITRAL Arbitration Rules and Article 10.5 of the 2017 SIAC Investment Arbitration Rules.

284. **Recommendation 8: To consider adding a specific provision to allow the appointment of an emergency arbitrator.** Providing for the possibility of appointing an emergency arbitrator allows parties to obtain relief in respect of urgent matters requiring the decision of an arbitral tribunal, before the tribunal has been constituted in an arbitration. The present version of the SARCO Arbitration Rules does not provide for such a possibility. However, prevailing practice has seen a greater recognition of the usefulness of such a power, as it can take up to 3-4 months before a tribunal is constituted in some cases. As such, the 2014 LCIA Arbitration Rules, the 2017 ICC Arbitration Rules as well as the 2016 SIAC Arbitration Rules have set out extensive provisions allowing for such a possibility.
285. **Recommendation 9: To consider amending Article 14(3) for greater clarity in respect of parties' ability to agree on the removal of an arbitrator that has been challenged.** Article 14(3) states that "[w]hen an Arbitrator has been challenged by one party, the other party may agree to the challenge". However, this wording is unclear as to whether the arbitrator that has been challenged is to be automatically removed upon parties' agreement, or if it is the appointing authority that shall decide on the challenge. Amending the sentence as follows would provide greater clarity as to its meaning: "When an Arbitrator has been challenged by one party, the other party may agree to the challenge, and the appointing authority may remove the arbitrator if all parties agree to the challenge."
286. **Recommendation 10: To consider amending Article 17 for greater clarity.** It is suggested that Article 17 may be amended as follows: "If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his/her functions, unless the arbitral tribunal decides otherwise".
287. **Recommendation 11: To consider adding provisions to deal with the participation of non-disputing third parties.** Article 18(5) of the SARCO Arbitration Rules deals with the situation of third parties who may be joined in the arbitration "as a party". It therefore makes sense that in this situation, such third persons must be a "party to the arbitration agreement". The SARCO Arbitration Rules are, however, silent as regards the participation of non-disputing third parties who are not parties to the arbitration agreement, but who may desire to participate in the proceedings as *amicus curiae*.

This is increasingly common in investment arbitration, especially since the State party or regional body which concluded the treaty is not involved in an investor-State arbitration where its own national is the claimant. In such situations, the State party or regional body may desire to participate as *amicus curiae* in the proceedings. By way of example, the European Union (“EU”) or European Commission has intervened as *amicus curiae* in a substantial number of investment arbitrations under the Energy Charter Treaty (“ECT”), given that the ECT is an EU instrument, on the basis that its participation is in the public interest. SAARC may have a similar interest in participating in investment arbitration matters which may concern or relate in some way to the SAARC Framework Agreement. Consequently, SARCO should consider if provisions should be added to the SARCO Arbitration Rules to provide for the possibility of intervention by non-disputing parties, and to set out the scope of such participation or intervention. Similar provisions have been promulgated in Rule 37 of the 2006 ICSID Arbitration Rules and Article 29 of the 2017 SIAC Investment Arbitration Rules.

288. ***Recommendation 12: To consider amending Article 19 to clarify the terminology of the “seat” of arbitration.*** It is recommended that the word “held” in Article 19(1) be replaced with the word “seated”, and that the words “locale of” in Article 19(2), be replaced by the phrase “venue for”. This will help to distinguish between the “seat” of the arbitration as a juridical concept, and the venue for arbitration hearings which is a geographical location. Alternative phrasing has also been used in Article 18(2) of the 2013 UNCITRAL Arbitration Rules and Article 25(2) of the 2017 SCC Arbitration Rules.
289. ***Recommendation 13: To consider amending Article 20 to clarify the provisions relating to the language of the arbitration.*** At present, Article 20(1) refers to the “language to be used in the Rules of Procedure”. It appears that the phrase was actually intended to mean the “language to be used in the arbitration”, and should be amended to reflect this clarification.
290. ***Recommendation 14: To consider amending the time limit in Article 21(1) for the submission of the Statement of Claim.*** Article 21(1) states that the Statement of Claim must be submitted “within 15 days of the constitution of the arbitral tribunal”. First and foremost, such a time limit may be too short in large and complex cases, particularly in investment disputes. In addition, such a timeline may also be superfluous. Article 18(2) states that the arbitral tribunal shall establish the provisional timetable of the arbitration. In practice, this usually means that the tribunal will set out a schedule for the exchange of pleadings by the parties in any event. Consequently, the 15-day time limit in Article 21 may be amended to allow the Statement of Claim to be submitted “within a period of time to be determined by the arbitral tribunal”, as is the case in Article 20.2 of the 2016 SIAC Arbitration Rules, Article 20(1) of the 2013 UNCITRAL Arbitration Rules, Article 29(1) of the 2017 SCC Arbitration Rules and

Article 31 of the ICSID Arbitration Rules.

291. **Recommendation 15: To consider correcting the reference to the “scope of the arbitral tribunal” in Article 23(1).** The reference is incorrect, and the correct reference should be the “scope of the arbitration agreement”.
292. **Recommendation 16: To consider adding a provision in Article 23 concerning the filing of further submissions by the parties.** Drawing inspiration from Article 20.6 of the 2016 SIAC Arbitration Rules, such a provision could be phrased on the following terms: “The Tribunal shall decide which further submissions shall be required from the parties or may be presented by them. The Tribunal shall fix the periods of time for communicating such submissions.”
293. **Recommendation 17: To consider amending Article 24 to expressly include jurisdictional objections regarding the scope of the arbitration agreement.** Articles 24(1) and (2) state that the arbitral tribunal shall have the power to determine and rule on objections relating to the “existence or validity” of the arbitration agreement. That phrase, however, does not include a ruling on the “scope” of the arbitration agreement. As such, it would be appropriate to amend the phrase “existence or validity” in Articles 24(1) and (2), and replace it with the phrase “existence, validity or scope”.
294. **Recommendation 18: To reconsider the position expressed in Article 24 concerning the point of time at which jurisdictional objections should be dealt with by the tribunal.** Article 24(4) states that “in general, the arbitral tribunal should rule on a plea concerning its jurisdiction *as a preliminary question*” (emphasis added). While it goes on to give the tribunal the power to rule on jurisdictional objections in the final award, the default position may discourage parties from choosing the SARCO Arbitration Rules. It is recommended that this provision be amended to state that the arbitral tribunal may rule on jurisdictional objections as a preliminary question or in the final award, as has been formulated in Article 28.4 of the 2016 SIAC Arbitration Rules and Article 23.4 of the 2014 LCIA Arbitration Rules.
295. **Recommendation 19: To consider amending the provision on interim measures of protection in Article 30 of the SARCO Arbitration Rules.** Article 30(1) states that the arbitral tribunal may grant any interim measures it deems necessary “in respect of the subject-matter of the dispute”. The quoted phrase may be too limiting in practice. Requests for interim measures that are legitimate and necessary may relate to matters related to or incidental to the subject-matter of the dispute, without actually falling within the “subject-matter” of the dispute. By way of example, it may be legitimate for a party to request for interim measures in the form of the suspension of domestic legal proceedings that have an effect on the dispute (without actually being related to the subject-matter of the dispute). As such, it is recommended that the phrase “in respect of the subject-matter of the dispute” be deleted from Article 30(1), leaving the matter of interim measures at the discretion of the tribunal.

296. **Recommendation 20: To consider adding a provision to deal with security for costs.** One of the most debated areas of uncertainty in the UNCITRAL Arbitration Rules is the issue of whether a tribunal applying the UNCITRAL Arbitration Rules can award security for costs in an arbitration. This uncertainty has been carried forward into the SARCO Arbitration Rules, which adopts broadly the text of the UNCITRAL Arbitration Rules for the issue of costs and interim measures of protection. Certain arbitration rules such as the 2016 SIAC Arbitration Rules and the 2017 SCC Arbitration Rules, however, have dealt with this uncertainty by adopting express provisions allowing for the tribunal to grant orders concerning security for costs.
297. **Recommendation 46: To consider adopting a more comprehensive provision dealing with confidentiality.** At present, Article 46 only imposes an obligation of confidentiality on the “arbitrator and the parties”. There are, however, numerous other parties that could be involved in the arbitration, such as the tribunal secretary, the staff of the SARCO, the DG SARCO, and even experts appointed by the parties or the tribunal. Consequently, it is recommended that a more comprehensive confidentiality provision be drafted, as has been done in Article 39.1 of the 2016 SIAC Arbitration Rules and Article 3 of the 2016 SCC Arbitration Rules.

2. SARCO Conciliation Rules

298. **Recommendation 1: To consider adding provisions imposing disclosure obligations on the conciliation panel as regards justifiable doubts as to their impartiality and independence.** While such a provision is not usually included in conciliation rules, the success of conciliation is highly dependent on the legitimacy and fairness of the conciliation process. By adding in an obligation to disclose existing or potential conflicts of interests, this helps to increase the legitimacy and neutrality of the conciliation process, which may in turn translate into a higher chance that parties will be able to reach a settlement agreement with the assistance of the conciliator.
299. **Recommendation 2: To consider amending the Model Conciliation Clause to encompass both commercial and investment disputes.** The conciliation clause is the foundation of the conciliation process. It provides the scope of the conciliation panel’s jurisdiction, and delineates the extent of the parties’ consent and submission to conciliation. In this regard, the Model Conciliation Clause set out in the SARCO Conciliation Rules appears to adopt wording that may be too narrow to encompass the prospect of investment disputes being submitted to conciliation administered by SARCO. The Model Conciliation Clause provides for conciliation of any dispute “...arising out of or relating to this contract...”. The problem, however, is that investment disputes are not technically disputes arising out of or relating to a “contract”. They are instead usually disputes arising out of and relating to a “treaty”, which is an international agreement between States, and which is distinct from a

“contract” between private parties. Consequently, it is recommended that the Model Conciliation Clause be amended in a manner that adopts wording broad enough to encompass the investment dispute context. This can be done by amending the relevant portion of the Model Conciliation Clause as follows (a few other amendments have also been made to provide greater clarity):

“Where, in the event of a dispute arising out of or relating to this agreement, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the SARCO Conciliation Rules presently in force.” (emphasis added)

F. CONCLUSION

300. The SARCO Arbitration Rules and Conciliation Rules are comprehensive documents setting out very useful rules of procedure that parties may choose to apply in the arbitration or conciliation of disputes arising in the CBET context. This Report analyses these sets of rules and makes a number of recommendations that may improve them. It is this author’s hope that these recommendations and suggestions will assist in clarifying several procedural issues under both set of rules, thereby helping to increase legal certainty in the dispute resolution process.

VI. CHAPTER 6: DESIGNING A DISPUTE SETTLEMENT MECHANISM FOR STATE-TO-STATE DISPUTES UNDER THE SAARC FRAMEWORK AGREEMENT

A. DISPUTE SETTLEMENT UNDER THE SAARC FRAMEWORK AGREEMENT

301. The development of a dispute settlement mechanism for the SAARC Framework Agreement for Energy Cooperation is a design task quite unlike that for other sectors. The fact that electricity tends to be a natural monopoly means that States play a pivotal role both in facilitating trade, and in creating the regulatory environment for such activities. In addition, the cross-border nature of such trade means that complicated disputes can arise between States, with serious consequences for each State's domestic policy and regulations. Furthermore, given that the SAARC Framework Agreement is a multilateral instrument, such CBET disputes could also have consequences for the wider region and even for SAARC Member States who may not be party to a particular dispute.
302. In order for a viable and effective DSM to be created for the settlement of CBET disputes arising out of the Framework Agreement, two criteria are foundational and should be broadly incorporated. First, the DSM must be framed in terms that are accommodative of the sector uniqueness of cross-border electricity trade, the specific obligations of SAARC Member States under the Framework Agreement, and the kinds of disputes that are likely to arise. Second, the DSM must be specially tailored for the principal actors under the Framework Agreement—i.e. sovereign States from the SAARC region. A failure to do either runs the risk that the DSM would be inappropriately crafted for the disputes potentially arising under the Framework Agreement, or for its primary users. This could in turn mean that the DSM may not be utilised by SAARC Member States even where it could be applicable.
303. At present, the SAARC Framework Agreement contains only a single provision relating to the dispute settlement obligations of its States signatories—Article 16 of the Framework Agreement. A perusal of Article 16, however, reveals that the provision includes only a mere dispute settlement *obligation*, rather than a full-blown dispute settlement *mechanism*. Without the requisite detail setting out the appropriate rules, procedure and framework for the settlement of disputes, the likelihood is that disputes arising under the Framework Agreement would go unresolved, thereby affecting Member States' cooperation and relations, as well as hampering the expediency and volume of trading activity within the grid. Developing a viable design template for a DSM under the Framework Agreement is thus imperative to both the continued utilisation and growth of CBET between SAARC Member States.
304. It is with this goal in mind that the remainder of this Study turns to the task of designing a template DSM for State-to-State disputes arising under the SAARC Framework Agreement and more generally. Chapter 6 analyses Article 16 of the

Framework Agreement, explaining the need for the DSM and surveying the various factors that should be taken into account in designing the template. It also examines a variety of international standards for State-to-State disputes that have been applied globally and that can be drawn upon as starting points in designing the template DSM. In Chapter 7, a template DSM is proposed, with its specific text detailed both in this Report, as well as in two separately annexed documents. Specific guidelines will also be provided to explain the roles and duties of the various parties involved in the dispute settlement process. Finally, Chapter 8 of this Report sets out a number of recommendations for purposes of obtaining consensus on the proposed template DSM from the relevant stakeholders, with a view to its successful adoption.

B. THE DISPUTE SETTLEMENT OBLIGATION UNDER ARTICLE 16 OF THE SAARC FRAMEWORK AGREEMENT

305. The SAARC Framework Agreement contains a dispute settlement obligation in Article 16, which provides as follows:

“Any dispute arising out of interpretation and/or implementation of this Agreement shall be resolved amicably among the Member States. If unresolved, the Member States may choose to refer the dispute to SAARC Arbitration Council”.

306. Several observations of a preliminary nature are apposite as regards the scope and content of the dispute settlement obligation in Article 16. Setting out these points at the outset of this exercise is helpful for understanding the operation of the provision, identifying any gaps, and demarcating the additional aspects that should be covered by the template DSM.
307. First and foremost, based on the text, the broad scheme of Article 16 actually contemplates two phases in the dispute settlement obligation. In the initial phase, SAARC Member States have a binding obligation to resolve their disputes amicably. Consequently, the first sentence of Article 16 appears to contemplate a requirement that States enter into a negotiation or exchange of views concerning the dispute.
308. Article 16 then states in its second sentence that “[i]f unresolved, the Member States may choose to refer the dispute to SAARC Arbitration Council”. This allows a State to trigger a dispute settlement process in the event that the negotiation or exchange of views does not result in a favourable outcome. It should be noted, however, that the word “may” makes it clear that a State’s ability to trigger the dispute settlement procedure pursuant to the second sentence of Article 16 is not mandatory, but is merely exercisable at that State’s option. Such an approach is in line with prevailing practice in international law.

309. Second, Article 16 states that “[a]ny dispute arising out of [the] interpretation and/or implementation of this Agreement” shall be resolved amicably among the Member States. By the use of this formulation of words, Article 16 delimits the scope and kind of disputes that may be submitted to dispute settlement, and the jurisdiction of the adjudicative body potentially presiding over the dispute. Pursuant to the text of Article 16, only disputes arising out of the “*interpretation and/or implementation*” of the SAARC Framework Agreement can be referred to SARCO by reliance on Article 16. Other kinds of disputes more generally arising from the CBET context but which do not concern the “*interpretation and/or implementation*” of the Framework Agreement may not, as they do not fall within the scope of disputes contemplated by Article 16. Consequently, and by way of example, an inter-State electricity-pricing dispute that does not relate to the provisions of the Framework Agreement may not be referred to SARCO by reliance on Article 16, since such a dispute does not arise out of the interpretation or implementation of the Framework Agreement.
310. Third, while the language of Article 16 refers to the settlement of disputes arising out of the “*interpretation*” and/or “*implementation*” of the Framework Agreement, it should be noted that this does not require the promulgation of two different kinds of DSMs—*i.e.* one for disputes relating to the interpretation of the Agreement, and another for disputes relating to the implementation of the Agreement. As mentioned above, the phrase “*interpretation and/or implementation*” is merely intended to define the kind of disputes that fall within the dispute settlement obligation and which may be referred to SARCO, and the scope of the adjudicator’s jurisdiction and competence for the dispute settlement process. While it may certainly be possible to distinguish between disputes arising out of the “*interpretation*” of the Agreement and disputes arising out of the “*implementation*” of the Agreement, these distinctions do not actually relate to different or specialised categories of disputes. Indeed, it is in general the case that a dispute relating to a possible breach of an international agreement would, in almost all conceivable instances, be a dispute relating to *both* the interpretation and implementation of the agreement. As such, it would not warrant the creation of two different kinds of DSMs simply by virtue of the terminology used in Article 16. Thus, treaties such as the United Nations Convention of the Law of the Sea (Article 288) and Energy Charter Treaty (Article 27) which define a similar scope of disputes for dispute settlement (*i.e.* the “*interpretation or application*” of the treaty) provide for only one form of DSM to be utilised for all such disputes. It is the author’s view that this approach should also be applied in the context of a DSM for the SAARC Framework Agreement.
311. Fourth, the text of Article 16 specifies the institution that is placed in charge of administering the dispute, should the second sentence of Article 16 be triggered by a SAARC Member State. In this regard, the reference to SARCO in Article 16 evinces a clear intention by the SAARC Member States that SARCO, as a neutral body, is to be the administering institution in the dispute settlement process. Indeed, the text of

Article 16 makes no reference to any other dispute settlement institution. Thus, insofar as a State is relying on Article 16 as the source of the dispute settlement obligation, SARCO is the sole dispute settlement institution that has competence to administer the dispute, unless an alternative arrangement is subsequently agreed upon between the disputing State parties.

312. Finally, a preliminary assessment of the SAARC Framework Agreement reveals that there remain several gaps and uncertainties in the dispute settlement framework contemplated under Article 16. These issues, as far as possible, need to be addressed by the dispute settlement mechanism created in the template DSM in order to ensure a viable and efficient dispute settlement process. Given the economical wording of the text of Article 16, these gaps relate primarily to the lack of detail in the provision, and in the procedure that should be utilised for the resolution of disputes referred to SARCO under the Framework Agreement. These issues are described below.
- a. First, as mentioned earlier in this Report, Article 16 states that Member States have an obligation to attempt the amicable resolution of their disputes before resorting to dispute settlement proceedings administered by SARCO. However, the text of Article 16 is silent as regards the length of time for which Member States should undertake negotiation or exchange of views. This results in ambiguity concerning the timing of when a disputing SAARC Member State may refer a dispute to SARCO under Article 16. To avoid this ambiguity problem, it is, in general, common for international agreements containing a dispute settlement obligation to specify a length of time for such negotiations or exchange of views to take place before either disputing party may resort to a binding form of dispute settlement (e.g. “six months” or at least a “reasonable period of time”—see Article 27(2) of the Energy Charter Treaty). Adding language to this effect in the DSM allows for a greater clarity between disputing parties as to when the dispute may be referred to SARCO.
 - b. Second, Article 16 does not set out the applicable procedure or formal requirements for a State to refer the dispute to SARCO. Consequently, the DSM should formulate an appropriate procedure setting out the requirements of such a reference, whether in the form of a formal Notice of Dispute or an informal reference, and the means of communicating such a reference to SARCO and to the other disputing parties.
 - c. Third, while Article 16 of the Framework Agreement allows Member States to refer disputes to SARCO, it leaves open the question as to what kind of dispute settlement method SARCO should administer. At present, SARCO has the capacity and expertise to administer both arbitration and conciliation, and has promulgated its own institutional rules for such purposes. Consequently, Article 16 in effect allows disputing parties 2 different options for the resolution of their dispute—(a) conciliation administered by SARCO; or (b)

arbitration administered by SARCO. A third option appears to be for SARCO to administer other kinds of dispute settlement methods for the resolution of a dispute (e.g. neutral or expert evaluation), but this option is likely to be foreclosed by Article II of the Agreement for Establishment of SAARC Arbitration Council—a constitutive instrument that defines the limits of SARCO’s competence, and which appears to limit it to the provision of services relating to conciliation and arbitration. In light of this, the template DSM needs to provide a framework and process through which disputing parties are allowed or required to choose between the two dispute settlement methods, and failing which, the power to trigger one of those methods for the resolution of their dispute arising out of the SAARC Framework Agreement.

- d. Finally, the Framework Agreement is silent as regards a number of important procedural and substantive legal issues that frequently arise in inter-State dispute settlement. These include, *inter alia*, what is the law applicable to the substance of the dispute, the exact procedure to be undertaken in respect of the different phases in the dispute resolution proceedings, as well as the powers of the adjudicator(s). Consequently, these issues should be dealt with appropriately in the DSM template, and any gaps in procedure should, as far as possible, be filled.

313. On the whole, Article 16 of the Framework Agreement sets out a strong legal obligation for the resolution of disputes arising out of the Agreement. A variety of crucial information, however, is absent from the dispute settlement obligation in Article 16, and will consequently need to be filled in by the template DSM in an appropriate and comprehensive manner. Procedural detail aside, the DSM will also need to be formulated in such a way that it caters for specific regional preferences, and incorporates various other international elements and standards that are unique to and important for a State-to-State dispute resolution process. These other factors will be dealt with and explained in more detail in the sections that follow.

C. THE REGIONAL CONTEXT OF SOUTH ASIA AND THE SAARC MEMBER STATES

314. SAARC was established in December 1985, when the heads of State of Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan, and Sri Lanka met in Dhaka, Bangladesh and adopted the Dhaka Declaration. Since then, SAARC has established itself as a forum for cooperation and collaboration on a wide variety of issues pertinent to the region, with its agenda encompassing, most notably, the concern of energy security and cooperation within South Asia.
315. The problem, however, is that progress towards collaboration in South Asia faces a natural impediment in the form of the historical tension within the region. Over the

past few centuries, South Asia has been a region that has had to deal with substantial political and ideological differences that have threatened and resulted in instability, division and deep distrust within the region. This has, as artfully described by Charles K. Ebinger in his book on *Energy and Security in South Asia: Cooperation or Conflict?*, more often than not, arisen as a frequent barrier to regional cooperation on issues that matter:

“Despite the high hopes...progress toward collaboration has been limited, with tangible results proving elusive...for a host of proposals involving free or preferential trade agreements, construction of cross-border natural gas pipelines, and electricity transmission.

Predictably, historic bilateral rivalries are the predominant reason why regional initiatives have failed to gain traction. The acknowledgment of the need for increased regional cooperation is not a dismissal of these rivalries as insignificant. To the contrary, they are rooted in historical disputes over land, religion, caste, clan, politics, and culture. Overcoming them will require determination, sacrifice, and, above all, patience.

South Asia is rapidly growing more insecure, and overcoming the obstacles to regional cooperation will be critical for the region’s stability and growth. The more famous manifestations of this insecurity receive most of the media attention. They include devastating poverty; armed conflicts in Afghanistan and Pakistan; increasingly belligerent insurgencies in Pakistan, Nepal, and Bangladesh and large portions of rural India; the rise of religious extremists across the region; natural disasters (floods, earthquakes, and cyclones); and increasing water shortages as a result of, among other factors, global climate change....[A] relatively underreported issue—energy security—...if left unaddressed, may pose a greater challenge than all the other factors combined, as it tears South Asia asunder.”

316. Given the historical backdrop, the political cost of disputes arising between SAARC Member States is particularly high. Any dispute between SAARC Member States risks further complication in light of the underlying tensions, and risks igniting a larger, more complex regional conflict. Indeed, given the rivalries at play—many of which are bilateral in nature and occur across a whole host of unrelated or loosely related subject matters—disputes that are left unresolved have the ability to grow, evolve, and interlink with other issues that may prove to become intractable. This could derail the progress that has been made in energy cooperation and CBET, and that has arisen out of the SAARC Framework Agreement.
317. In such a regional context, having a DSM in place provides a number of avenues for the betterment of regional collaboration and cooperation. Most importantly, it allows

SAARC Member States to submit a dispute for resolution quickly, and before it has had the opportunity to get out of hand. Indeed, the benefits of a DSM have been seen in a variety of disputes between SAARC Member States concerning natural resources. Two such examples are prominent—the Indus Waters Kishenganga dispute between Pakistan and India, and the Bay of Bengal maritime delimitation dispute between Bangladesh and India. In both inter-State cases, the disputes, despite their highly sensitive nature, were submitted to the Permanent Court of Arbitration in The Hague. Upon conclusion of the dispute settlement proceedings and the issuance of arbitral awards by the respective tribunals, the SAARC Member States have recognised the validity and binding nature of the awards, and have acted in compliance with them. This certainly provides some form of proof that inter-State dispute settlement is a viable way for resolving disputes between SAARC Member States, and it is to these past examples that we look in determining the baselines for the creation of the template DSM.

318. Nonetheless, it is quickly surmised that, in order to gain the most out of the dispute settlement process, the DSM should incorporate regional preferences as much as possible. This would enhance the chances of the expedient and peaceful resolution of cross-border disputes, as well as increase the likelihood of compliance with any binding decision.

D. THE UTILITY OF A DSM TEMPLATE FOR SAARC MEMBER STATES

319. The creation of a template DSM for the settlement of disputes can be used and applied by SAARC Member States in a number of ways. First and foremost, such a template DSM could be applied by SAARC Member States for the settlement of disputes arising out of the Framework Agreement, and referred to SARCO under Article 16 of the SAARC Framework Agreement. In this context, the source of the dispute settlement obligation would be Article 16, but the procedural detail for each stage of the dispute settlement process would be furnished by and set out in the template DSM. The template DSM would therefore, upon adoption by SAARC Member States, constitute an international agreement as regards the dispute settlement procedure for disputes arising out of the interpretation and/or implementation of the SAARC Framework Agreement.
320. Second, the template DSM can be adopted and inserted into any other international agreement between SAARC Member States relating to CBET. These could include both bilateral and multilateral inter-State treaties concerning the implementation of various obligations arising out of the SAARC Framework Agreement, Project-Specific International Agreements, treaties relating to construction of the electricity grid, or even treaties relating to the sale and purchase of electricity. In such cases, the template DSM would form part of the provisions of the actual treaty, and would constitute a

binding mechanism from the moment the treaty is adopted by the relevant State signatories.

321. Third, the template DSM can be utilised more generally by SAARC Member States for any other kind of inter-State disputes concerning public international law issues which do not arise out of the CBET context. It may do so by inserting the template DSM into the treaty in concern, regardless of the nature of the subject matter arising out of the treaty. In that way, the template DSM becomes the default dispute settlement procedure for any disputes between SAARC Member States arising out of that particular treaty.
322. Fourth, the template DSM can be adopted by SAARC Member States as *ad hoc* dispute settlement rules for any inter-State disputes that have already arisen or that could potentially arise, regardless of whether it is a CBET or public international law dispute. As mentioned in earlier parts of this Report, States often adopt *ad hoc* rules of procedure where inter-State disputes are concerned. In such circumstances, the template DSM could in fact function as a complete set of dispute settlement rules that may be adopted and utilised by disputing States without any further amendment, similar to how the UNCITRAL Arbitration Rules are used in the commercial arbitration context.
323. Finally, the template DSM may be used as a basic starting point for SAARC Member States to negotiate a set of specialised *ad hoc* rules for a particular dispute. This can be done in two ways. First, disputing States may formulate specialised rules of procedure of their own by utilising the template DSM as a draft document on which they can make further amendments and adaptations for the particular dispute that is before them. Alternatively, it is often the case that the institution administering the dispute settlement proceedings will be responsible for preparing and circulating a first draft of the rules of procedure for disputing States to discuss and adopt. In such instances, the template DSM could function as a draft set of rules of procedure that SARCO may circulate to disputing State parties for adoption or amendment.
324. On the whole, a template DSM has the benefit of being very versatile in terms of its utility, and has a variety of uses insofar as disputes between SAARC Member States are concerned. Indeed, SAARC Member States may choose to adopt it as the rules of procedure in a variety of disputes and in a variety of ways. The remaining sections of this chapter will take a close look at the different factors that should be taken into account in designing such a template DSM, and discuss existing global standards that are often utilised in other kinds of international dispute settlement mechanisms.

E. FACTORS TAKEN INTO ACCOUNT IN DESIGNING THE DSM TEMPLATE

325. A number of general factors should be taken into account in designing a DSM for

inter-State disputes between SAARC Member States. These are (a) legal and procedural certainty; (b) regional preferences; (c) neutrality; (d) technical expertise; (e) party autonomy; (f) sensitivity; (g) multiplicity of disputants and involvement of third parties; and (h) efficiency in rendering the legal outcome. Each of these factors will be explained in detail.

326. ***Legal and Procedural Certainty:*** Cross-border economic and trading activities are inherently risky and complex activities that require the commitment of substantial resources. Hence, where energy disputes are concerned, the win-lose nature of the dispute resolution process means that the outcome of the process will invariably have a very large impact on the national policy and strategic interest of any single State participant. Moreover, since the DSM specifically contemplates disputes arising out of the SAARC Framework Agreement, each SAARC Member State will automatically look towards any arbitral decisions under the DSM as guidance for its understanding and approach to its international obligations under the SAARC Framework Agreement. Consequently, States will avoid a DSM that does not possess a sufficient degree of legal and procedural certainty, as the costs of such uncertainty are too high. Conversely, they would look to the DSM as the first port of call in settling any disputes that may arise, if the DSM would allow them to arrive at a legal outcome quickly and through a legal process that is efficient and certain. The template DSM must therefore be created with the main objective of providing a sufficiently consistent and sound legal environment for CBET at the international level. It should reduce the investment and business risks associated with CBET, by establishing clear and principled rules, for an efficient allocation of costs arising out of the dispute.
327. ***Regional preferences:*** By the very nature of cross-border electricity trade itself; electricity is traded over relatively short distances with neighbouring jurisdictions within an integrated electrical transmission grid. As such, the State participants to such trade tend to come from a particular region as opposed to disparate regions from around the world. Within the dispute settlement context, this means that the DSM should specifically cater for regional and cultural preferences relating to the method and process for dispute resolution. In South Asia, past examples suggest that SAARC Member States tend to prefer mediation/conciliation and arbitration for the settlement of their disputes, as both processes allow the participation of a neutral facilitator or decision-maker. To maximise the advantages of these two methods of dispute resolution, a strong framework that allows disputing State parties to agree on whether to resort to conciliation or arbitration could therefore play an important role in strengthening both the utilisation and the viability of the DSM.
328. ***Neutrality:*** Historically speaking, South Asia has been a region that has had to deal with substantial political and ideological differences. Hence, past disputes involving South Asian States that were submitted to international arbitration show a strong emphasis on international standing, neutrality, and transparency of proceedings. Two

cases in point would be the Indus Waters Kishenganga Arbitration between Pakistan and India and the Bay of Bengal Maritime Arbitration between Bangladesh and India, both of which were submitted to the Permanent Court of Arbitration in The Hague, and which involved arbitrators of international standing and global expertise. In addition, the fact that each disputing parties' legal submissions as well as the arbitral award were made public helped to preserve the transparency and neutrality of the decision-making process. The takeaway from this is that a close review of the rules of procedure relating to these disputes should be conducted, and the DSM under the SAARC Framework Agreement should aspire to match the level of detail, neutrality and transparency provided by the arbitral process in those disputes.

329. **Technical expertise:** Inter-State dispute often involve complex issues of public international law or technical knowledge, both of which may require expertise outside of the representatives of the disputing parties. The CBET context is no different, as electricity trading disputes may involve numerous complexities of a technical nature. The need to cater for technical expertise within a dispute settlement procedure features in a number of ways. First, in most inter-State disputes with a heavy technical component, both disputing parties often appoint experts of their own, and furnish expert reports supporting their legal submissions which are then submitted to the tribunal. The problem, however, is that since parties would only submit expert reports that favour their position, it can often be difficult for the decision-maker to get a neutral perspective of the technical information. Consequently, many inter-State rules of procedure allow the adjudicator to appoint a neutral technical expert for purposes of advising the tribunal, and such a power should be included in the template DSM. Second, it is often useful for the adjudicators themselves to have technical expertise as regards the subject matter of the dispute. Consequently, SARCO should consider coming up with a list of individuals that has particular subject matter expertise as regards CBET disputes (both legal and technical), and which in its view, would consist of appropriate persons to be appointed as conciliators or arbitrators in disputes arising out of the SAARC Framework Agreement. This would increase the legitimacy of the dispute resolution process, as well as improve the precision and accuracy of any decisions made by arbitrators or conciliators.
330. **Party Autonomy:** Party autonomy is often a very important factor where State-to-State disputes are concerned. Given that inter-State disputes often involve some of the most important national issues, States tend to prefer a wide berth of autonomy as regards the dispute resolution procedure in order to create specialised rules for a particular dispute that has arisen. The template DSM should therefore avoid being overly detailed, and should allow disputing States the ability to customise procedure where possible and insofar as legal certainty will allow.
331. **Sensitivity:** Energy tends to be considered by States to be a matter of national strategic interest. Accordingly, CBET disputes may involve issues, documents, and files that

are considered by States to be highly classified or secretive in nature. As such, the template DSM should, as a default principle, allow parties to agree on the appropriate level of confidentiality or transparency that they are comfortable with.

332. ***Multiplicity of Disputants and Involvement of Third Parties:*** Given the terms of the SAARC Framework Agreement and its multilateral nature, it is not inconceivable that a dispute may involve more than two SAARC Member States. As such, the template DSM should contemplate the possibility that a multiplicity of disputants could be involved, and should cater for such a process. In addition, even outside of the parties to the dispute, there could be a number of agencies and instrumentalities of SAARC (e.g. the SEC), or even SAARC itself, that could take an interest in participating in the dispute. In light of this possibility, the template DSM should contain provisions dealing with the involvement of third parties in the dispute, setting out a procedure to decide on the appropriate level of participation by such third parties.
333. ***Efficiency in rendering the Legal Outcome:*** Energy security remains a pressing need for South Asia. The existence of disputes would inevitably jeopardise the efficiency and utility of the CBET system under the SAARC Framework Agreement, and cause delays throughout the CBET network. Consequently, the template DSM should ensure that each stage of the dispute resolution process is as efficient as possible. In this regard, the insertion of appropriate time limits in the template DSM for the rendering of parties' submissions and/or the rendering of the legal decision would help to ensure that delays are minimised throughout the process.
334. This section sets out a variety of important general factors that should be considered, and which should be incorporated into the template DSM. In the next section, we turn to look at existing procedural mechanisms that have been applied globally and across a variety of State disputes. Together, these form a set of benchmark international standards that will constitute the basic framework for the creation of the template DSM.

F. INTERNATIONAL STANDARDS OF STATE-TO-STATE DISPUTE SETTLEMENT

335. This section constitutes a guide to and concise commentary on the various rules of procedure frequently applied in State-to-State dispute settlement. It approaches each set of rules from an analytical perspective, seeking to provide insight and draw out relevant lessons that may be applied or considered for application and adaptation in the creation of the template DSM. As such, an attempt will not be made to comment on every aspect of the relevant rules, and for such coverage, readers should direct their attention to specialised and dedicated commentaries.

1. Common Inter-State Dispute Settlement Mechanisms

a. *International Court of Justice*

336. The International Court of Justice (“ICJ”), which has its seat in The Hague, The Netherlands, was constituted as a permanent court for the settlement of disputes submitted to it by States. It is the principal judicial organ of the United Nations (“UN”), and it was set up in 1945 under the UN Charter. It has a general jurisdiction to decide any questions of international law submitted to it by States.
337. The main procedural and constitutive documents of the ICJ are the Statute of the ICJ, and the ICJ Rules of Court. The Statute of the ICJ elaborates certain general principles laid down in the UN Charter, and deal broadly with the constitution of the ICJ in five chapters: the organisation of the Court, the competence of the Court, procedure, advisory opinions and amendments. In pursuance of the powers conferred upon it by the Statute, the ICJ has formulated its own Rules of Court, which supplements the Statute of the ICJ in setting out the procedural rules applicable for disputes referred to the Court. The rules are intended to supplement the general rules set out in the Statute, and to make detailed provision for the steps to be taken in compliance with them.
338. The principal features of the constitution of the ICJ and its rules of procedure, are set out below. As it is not the focus of this paper to deliver a comprehensive analysis of the ICJ, only procedural mechanisms that may be useful for the development of the template DSM will be pointed out:
- a. The members of the Court are elected by the UN Member States and other States that are parties to the Statute of the ICJ on an *ad hoc* basis. There are 15 ICJ judges, who take up a term of office for 9 years;
 - b. Under Article 31, paragraphs 2 and 3, of the Statute, a party not having a judge of its nationality on the Bench may choose a person to sit as judge *ad hoc* in that specific case under the conditions laid down in Articles 35 to 37 of the Rules of Court;
 - c. Parties are at liberty to ask that a dispute be decided not by the full Court but by a special chamber composed of certain judges elected by the Court by secret ballot. These include the Chamber of Summary Procedure, any special chamber formed to deal with certain categories of cases, or any chamber formed to deal with a particular case;
 - d. Only States may be parties to cases before the Court, with UN organs and specialised agencies being limited to seeking advisory opinions. Accordingly, the vast majority of the Court’s caseload consists of inter-State disputes which have been submitted to the Court for decision;

- e. Parties to a case are represented by an agent of the respective State, who is assisted by counsel and advocates in respect of the legal work;
 - f. The respondent State has the ability to raise preliminary objections relating to issues of jurisdiction and admissibility. It is interesting to note that where this is done, the proceedings tend to be automatically bifurcated. This stands in contrast to inter-State arbitration, where the issue of bifurcation is usually a matter to be decided upon by the tribunal if parties are in disagreement;
 - g. The Statute also makes provision for cases where the respondent State does not appear before the Court, either because it totally rejects the Court's jurisdiction or for any other reason (Article 53). Hence, failure by one party to appear does not prevent proceedings in a case from taking their course, in keeping with the principle of the equality of the parties, which requires that neither party should be penalized through the attitude adopted by the other. However, the Court must nonetheless satisfy itself that it has jurisdiction, taking all relevant matters into account;
 - h. A State involved in a case before the ICJ may request the Court to prescribe provisional measures to protect its rights. The legal requirements for the Court to grant provisional measures are more structured than in arbitration, and the ICJ may only grant such an order where it finds that (a) it has prima facie jurisdiction, (b) the rights claimed by the applicant appear to be plausible, (c) there is a link between the rights whose protection is being sought and the measures requested, (d) there is a risk of irreparable prejudice, and (e) there is urgency. The Court can indicate measures different from those requested or grant provisional measures on its own initiative;
 - i. The Court may at any time direct that the proceedings in two or more cases be joined, or that a third State may intervene in the dispute;
 - j. The Court proceedings as well as the judgment of the Court is generally public in nature;
 - k. State parties may apply for interpretation and/or revision of the judgment respectively where there is a dispute between the parties as to the meaning or scope of the judgment, and where a matter comes to light of which the ICJ was previously unaware.
339. In general, the ICJ Statute and Rules of Court establishes a good basis for understanding the kind of dispute settlement processes that are acceptable to States. It provides a good idea of the detail required in the procedure, the kind of mechanisms that may be necessary for purposes of supporting State parties in an on going dispute, and the requisite administrative involvement that will be required of the institution and the parties.

340. That being said, it is nonetheless important to note that the procedural rules applicable in the ICJ are not appropriate for wholesale adoption as regards a template DSM for the SAARC Framework Agreement. As mentioned in other parts of this Report, the dispute settlement obligation in Article 16 of the Framework Agreement contemplates that parties settle their dispute under the aegis of SARCO, which is an institution for the administration of conciliation and arbitration. The very existence of an international arbitral tribunal or conciliation panel arises from the will of the parties. As such, it is those parties who necessarily have a large autonomy in the formulation of the rules of procedure for arbitration and conciliation, and who have a direct hand in deciding what kinds of procedural rules should apply to the resolution of the dispute. By contrast, the ICJ is established as a permanent court, and consequently, it has a predetermined body of rules that governs its proceedings, and a standing Court that is able to enforce it. The level of party autonomy contemplated in arbitration and conciliation is thus very different from that of an international court which has a formal procedure that, in most cases, cannot be amended by the parties. Consequently, the procedural rules of the ICJ should form only a basic starting point and framework for the template DSM, and where relevant for adoption, must be adapted appropriately.

b. United Nations Convention on the Law of the Sea

341. The UNCLOS is a treaty governing the rights and obligations of States in respect of the various parts of the ocean. It has been signed by the majority of States, and thus, is applicable as between most States *inter se* insofar as issues pertaining to the law of the sea are concerned.
342. Part XV of UNCLOS establishes a comprehensive system for the settlement of disputes that might arise with respect to the interpretation and application of UNCLOS. It requires States Parties to settle their disputes by the peaceful means indicated in the UN Charter. If parties to a dispute fail to reach a settlement by peaceful means of their own choice, they are obliged to resort to the compulsory dispute settlement procedures entailing binding decisions.
343. A summary of the key features of the dispute settlement mechanism under UNCLOS is as follows:
- a. By virtue of Article 284 of UNCLOS, parties have the option of resolving their dispute by conciliation where they agree to do so, failing which, they are obliged to resort to a unique compulsory dispute settlement procedure in Article 287;
 - b. Under Article 287 of UNCLOS, each party to UNCLOS is free to choose by means of a written declaration at the time of signing, ratifying or acceding to

the Convention or thereafter, one or more of the following means for the settlement of UNCLOS disputes: (i) the International Tribunal for the Law of the Sea, (ii) the International Court of Justice, (iii) ad hoc arbitration in accordance with Annex VII of UNCLOS (“Annex VII Arbitration”), or (iv) a “special arbitral tribunal” constituted in accordance with Annex VIII of UNCLOS. If the disputing parties have accepted the same procedure, that procedure applies unless agreed otherwise. If, however, the parties to the dispute have not accepted the same procedure, the default means for the settlement of the dispute is that of Annex VII Arbitration;

- c. Article 289 allows the court or tribunal presiding over the dispute to appoint scientific or technical experts in support of the proceedings;
- d. Article 290 contemplates two forms of provisional measures that a disputing party may apply for. First, where the dispute has already been submitted to a court or tribunal by operation of Article 287, and that court or tribunal is in a position to act, provisional measures may be granted to preserve the rights of a disputing party or to prevent serious harm to the marine environment, pending the court or tribunal’s final decision. Second, where the dispute has been submitted to arbitration, but the arbitral tribunal has yet to be constituted, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea, may grant provisional measures where it is of the view that it has *prima facie* jurisdiction and the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures;
- e. Article 294 allows a party to initiate preliminary proceedings where it alleges that a claim is an abuse of legal process or is otherwise not well founded;
- f. Annex VII of UNCLOS provides a basic framework of an arbitration procedure for the resolution of disputes arising out of UNCLOS. The procedure deals, *inter alia*, with the institution of proceedings, the constitution of the tribunal, the powers and functions of the tribunal, and the finality of the award.

344. The UNCLOS dispute settlement mechanism employs a variety of unique procedures in aid of the dispute settlement process. Interestingly, while Annex VII of UNCLOS does set out an arbitral framework, it does so in a fairly basic fashion. As such, disputing State parties that have submitted their UNCLOS dispute for resolution by Annex VII arbitration usually undergo further negotiations concerning the appropriate arbitral procedure with a view to agreeing upon specialised arbitral rules for each dispute. While this kind of approach may have been necessary due to the large number of State participants that had to agree on the terms of the UNCLOS, it may potentially

result in unnecessary delays where smaller groups of States are concerned. Accordingly, a measure of consideration should be given to the level of detail in Annex VII of UNCLOS, and the utilisation of the UNCLOS scheme should be tweaked in respect of the context of the Framework Agreement.

c. The Optional Rules of the Permanent Court of Arbitration

345. Established in 1899 during the first Hague Peace Conference, the Permanent Court of Arbitration is the oldest intergovernmental organisation dedicated to facilitating the peaceful resolution of international disputes. With the objective of “seeking the most effective means of ensuring to all peoples the benefits of a real and lasting peace, and above all, of limiting the progressive development of existing armaments”, the Conference resulted in the creation of the PCA—a permanent administrative institution which serves as the registry for the arbitration of State-related disputes.
346. At present, the PCA offers a wide range of services relating to the settlement of disputes involving States, State-controlled entities, international organisations, and, in certain instances, private parties. It is deserving of mention that the PCA has developed a specialised expertise in the administration of inter-State arbitration, with the majority of inter-State arbitration disputes being administered under the aegis of the PCA.
347. The PCA administers inter-State arbitration under a variety of rules. Most notably, the PCA has devised several *ad hoc* and specialised procedural regimes for arbitrations pursuant to Annex VII of the United Nations Convention on the Law of the Sea. In addition, the PCA has also designed a number of optional rules of procedure that may be applied by States in inter-State arbitration cases. These optional rules include the PCA Optional Rules for Arbitrating Disputes between Two States, and the 2012 PCA Arbitration Rules.
348. The principal features of the PCA Optional Rules for Arbitrating Disputes between Two States are as follows:
 - a. The rules provide freedom for the parties to choose to have an arbitral tribunal of one, three or five persons;
 - b. The choice of arbitrators is not limited to persons who are listed as Members of the Permanent Court of Arbitration;
 - c. In line with prevailing conventions in inter-State disputes, the rules provide for the place of arbitration to be The Hague, unless parties agree otherwise;
 - d. States have complete freedom to agree upon any individual or institution as

appointing authority. In order to provide a failsafe mechanism to prevent frustration of the arbitration, the Rules provide that the Secretary-General of the PCA will designate an appointing authority if the parties do not agree upon the authority, or if the authority they choose does not act; and

- e. A very comprehensive procedure is provided, dealing with every aspect of the arbitration.

349. The 2012 PCA Arbitration Rules were created to simplify the PCA's procedural offerings across the variety of its specialised options rules, and to consolidate the party-specific optional rules into a single set of rules that could apply to all the combinations of parties involved in PCA-administered proceedings. The principal features of the 2012 PCA Arbitration Rules are as follows:

- a. The 2012 rules are for use in arbitrating disputes involving at least one State, State-controlled entity, or intergovernmental organisation. Many of the provisions have been tailored to the needs of such parties;
- b. The rules are based on the 2010 UNCITRAL Arbitration Rules, with changes made in order to reflect the public international law elements that may arise in State-related disputes, indicate the role of the PCA, and emphasize party autonomy and flexibility;
- c. The rules utilise a default appointment procedure for five-member tribunals, which are common in inter-State arbitrations;
- d. The rules allow for arbitration of multi-party disputes involving a combination of States, State-controlled entities, and/or intergovernmental organisations, and private parties;
- e. The rules provide that in submitting disputes to arbitration under the rules, States and international organisations waive any immunity from jurisdiction they might otherwise enjoy;
- f. Where the parties have not agreed on the law applicable to the substance of the dispute, the rules provide for a different applicable law depending on the nature of the parties. Where inter-State disputes are concerned, the applicable law is based on the Statute of the International Court of Justice;
- g. The 2012 rules also provide for the representation of State parties by agents, which is a custom unique to inter-State disputes.

350. The rules promulgated by the PCA provide a very important touchstone for the formulation of the template DSM, as they deal comprehensively with every aspect of the arbitration procedure. They are, however, specifically attuned to disputes that are

international, rather than regional in nature. As such, many of the provisions included in these rules draw inspiration from the nature of proceedings in The Hague, perhaps overly so, and may not be entirely appropriate for a regional dispute involving SAARC Member States. In addition, while these rules make for a set of well-drafted rules of procedure for the arbitration, they are likely to be overly detailed, without giving sufficient room for the level of party autonomy usually preserved in an inter-State dispute settlement mechanism. Adapting the structure and text of these rules on slightly more generic terms could thus be beneficial for SAARC, as it allows some potential for regional distinctions to develop in respect of dispute settlement amongst SAARC Member States.

d. Past Arbitrations of State-to-State Disputes involving SAARC Member States

351. At present, it appears that SAARC Member States have been involved in three inter-State arbitrations in the past. These are the Indus Waters Kishenganga Arbitration between Pakistan and India, the Bay of Bengal Arbitration between Bangladesh and India, and the Enrica Lexie Arbitration between Italy and India.
352. An examination of these arbitrations provide us with some interesting information. The Bay of Bengal Arbitration and the Enrica Lexie Arbitration were both UNCLOS disputes. As such, the source of the dispute settlement obligation was Article 287 of UNCLOS. However, they concerned completely different subject matters and issues of international law. In the Bay of Bengal Arbitration,¹⁹ the issue before the arbitral tribunal was the delimitation of the contested maritime boundary between Bangladesh and India. In contrast, the Enrica Lexie Arbitration²⁰ concerned the issue of whether Italy or India could exercise criminal jurisdiction over an incident occurring in international waters, and to the exclusion of the other. The third inter-State dispute, the Indus Waters Kishenganga Arbitration,²¹ concerned a dispute between Pakistan and India arising out of the interpretation and application of the 1960 Indus Waters Treaty.
353. Yet, it is interesting to note that while all three disputes concerned vastly different issues, the procedural rules for the arbitration were surprisingly similar. In both the Bay of Bengal Arbitration and the Enrica Lexie Arbitration, the arbitral procedure created by the parties covered (a) the scope of application, (b) notice and calculations of period of time, (c) the composition of the arbitral tribunal, (d) replacement of arbitrators, (e) the place of meetings, hearings, and language of the arbitration, (f) procedures relating to pleadings and jurisdictional objections, (g) provisional

¹⁹ <https://www.asil.org/insights/volume/18/issue/20/annex-vii-arbitral-tribunal-delimits-maritime-boundary-between>

²⁰ <https://pcacases.com/web/view/117>

²¹ <https://www.pcacases.com/web/view/20>

measures, (h) evidence and hearings, (i) decisions of the arbitral tribunal, (j) the arbitral award, and (k) expenses and costs. Moreover, in the Indus Waters Kishenganga Arbitration, despite the fact that Annexure G of the 1960 Indus Water Treaty had already set out a dispute settlement procedure, Pakistan and India nonetheless proceeded to agree on “Supplemental Rules of Procedure” on terms broadly in line with the same criteria set out in the rules of procedure of the Bay of Bengal Arbitration and the Enrica Lexie Arbitration described above.

354. While there are a number of reasons for why the rules of procedure in all three cases were highly similar—mostly notably being the fact that the institution administering the dispute in all three cases was the Permanent Court of Arbitration, which in most instances, would provide parties with a formative draft for review—the rules of procedure in these three cases provide a very useful starting point for the template DSM, because it suggests that a procedural framework of that nature and of that level of detail would be generally acceptable to SAARC Member States. Accordingly, a close review of these rules of procedure has been undertaken, drawing out relevant points that may be adapted for the creation of the template DSM.

2. Inter-State Dispute Settlement Mechanisms specific to the CBET Context

355. Research on the electricity and energy sectors shows that there are, at present, a number of international instruments (regional or otherwise) that provide for energy cooperation and/or a framework for cross-border electricity trade. In most cases, these CBET agreements or treaties tend to contain dispute settlement obligations of varying degrees of detail, and of varying degrees of regionalisation.
356. A perusal of the treaties shows that there is a broad spectrum of possibilities as regards the kind of dispute settlement mechanism that are contemplated. Certain agreements such as the Energy Charter Treaty provide for a basic arbitration framework for inter-State disputes arising out of the interpretation and application of that agreement. Other agreements such as the Southern African Power Pool take the dispute settlement obligation a step further, requiring disputes to be adjudicated by a regional tribunal.
357. This section takes a close look at the disputes settlement mechanisms of choice in each of these treaties, assessing them for their competency, with a view to adapting useful provisions for the template DSM. A general limitation in respect of this research exercise, however, was that there was a dearth of information available publicly for some of these instruments, and indeed, many of the DSMs provided for in the instruments appear to have never been utilised (at least based on information publicly available). Nonetheless, efforts have been made to summarise, as far as possible, what is known about each instrument and its applicable dispute settlement mechanism.

a. The Energy Charter Treaty

358. The ECT provides a multilateral framework for energy cooperation. It is designed to promote energy security through the operation of open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over energy resources. The treaty lays down rules on trade in energy materials, transit flows, investment protection and international settlement of disputes. Its objective is to give energy companies legal certainty, establishing a basis of trust for investment and trade. The Energy Charter Treaty was signed in December 1994 and entered into legal force in April 1998. To date the Treaty has been signed or acceded to by fifty-two states, the European Union and Euratom.
359. Article 27 of the ECT sets out a dispute settlement mechanism for inter-State disputes concerning the “application or interpretation” of the treaty on the following terms:
- a. Under the ECT, contracting States have an obligation to attempt to settle their disputes through diplomatic channels. If the dispute has not been settled through such channels within a “reasonable period of time”, either party may then submit the dispute to an ad hoc arbitral tribunal;
 - b. Article 27 then sets out provisions relating to the constitution of the tribunal, the appointing authority, the applicable law, the expenses and costs of the tribunal, and the binding nature of the award.
360. A perusal of the ECT makes it very clear that Article 27 was not intended to be comprehensive in nature as regards the arbitral procedure, but was merely intended to set out the basic agreement between the ECT contracting States as regards dispute settlement, with the detailed procedural rules to be left out of the ECT. As such, Article 27(3)(f) expressly states that the UNCITRAL Arbitration Rules shall apply unless State parties to the dispute have agreed otherwise. Consequently, while the ECT indeed provides us with one perspective of how a dispute settlement mechanism can be formulated, it may not be particularly useful or sufficiently prescriptive for the purposes of drafting a template DSM for the SAARC Framework Agreement.

b. Central America Transmission and Regional Market (SIEPAC)

361. The SIEPAC project in Central America is part of a regional collaboration to create an electricity market and to promote involvement by the private sector in transmission infrastructure and generation capacity. Based on research information, it had two projects under its mandate. The first is the development of a regional electricity market which includes the creation of a regional regulator and a regional transmission operator. The second is the development and completion of an international transmission system to provide interconnection among the six countries in the region

to enable increased electricity trade (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama).

362. SIEPAC's initiative was developed and formalised in a framework agreement known as the Marco Treaty, which was signed in 1996, ratified in 1998, and entered into effect in 1999. According to the Marco Treaty, the six countries agree to the formation of a Regional Electricity Market, including a regional system and market operator and a regional regulatory agency. The Treaty also makes provision for dispute resolution, utilising a unique mechanism featured only in the Marco Treaty.

363. The features of the dispute settlement framework created under the Marco Treaty are as follows:

- a. Articles 18 to 24 of the Marco Treaty establishes a regional regulatory agency known as the Regional Electrical Interconnection Commission ("CRIE"), which has the power to "act judicially" and "enforce [the] Treaty and its protocols, regulations and other supplementary instruments";
- b. Articles 33 to 35 provide for a dispute settlement obligation, which is set out below:

"DISPUTE SETTLEMENT

Article 33

The market agents shall seek to reach agreement on the interpretation and application of this Treaty and shall make every effort to find a mutually satisfactory solution to any dispute that may affect their operations.

Article 34

Any dispute that may arise between market agents which is not settled through negotiation shall be referred to CRIE for definitive settlement.

Article 35

Any dispute that may arise between Governments with regard to the interpretation and implementation of the Treaty which is not settled through negotiation shall be referred for arbitration, at the request of either party to the dispute, to the Central American Court of Justice, or to another body agreed on by the Parties, for definitive settlement."

364. As is seen from the text above, the Marco Treaty actually contemplates two kinds of dispute resolution obligations in respect of different kinds of disputes. For disputes between agents operating in the market, the appropriate dispute settlement body is

CRIE. In contrast, where State-to-State disputes arise concerning the “interpretation and implementation” of the Marco Treaty, such disputes “shall be referred for arbitration, at the request of either party to the dispute, to the Central American Court of Justice, or to another body agreed on by the Parties...”

365. While the research suggests that the rules of the Regional Electricity Market sets out a procedure for arbitrations, the documents relating to the Regional Electricity Market were only available in Spanish. In any event, this would only provide a mechanism for disputes between market agents, and not State-to-State disputes.
366. As far as State-to-State disputes under the Marco Treaty are concerned, it does not appear that the Central American Court of Justice has formulated any rules of arbitration for disputes arising under the Marco Treaty, or have conducted arbitration of inter-State disputes before. Accordingly, the inter-State dispute settlement framework contemplated under the Marco Treaty suffers from a similar lack of clarity as the SAARC Framework Agreement, as it only sets out a dispute settlement obligation without actually providing a detailed mechanism. As such, it does not yield useful information for the formulation of the template DSM.

c. Southern Africa Power Pool (SAPP)

367. Until two decades ago, the interconnection of national electricity systems in South Africa mainly occurred through bilateral arrangements. In 1995, the Southern Africa Power Pool (“SAPP”) was formalised by signing an intergovernmental memorandum of understanding for the formation of a regional power pool, allowing for systematic electricity sector cooperation among the southern Africa development community.
368. SAPP has 12 member States, which comprise the Republic of Angola, the Republic of Botswana, the Democratic Republic of Congo, the Kingdom of Lesotho, the Republic of Malawi, the Republic of Mozambique, the Republic of Namibia, the Republic of South Africa, the Kingdom of Swaziland, the United Republic of Tanzania, the Republic of Zambia and the Republic of Zimbabwe. In 2006, the SAPP intergovernmental memorandum of understanding was revised to include the formulation of an agreement on dispute resolution that is specific to the electricity sector. This dispute resolution framework, however, has proven to be problematic.
369. Article 6 of the 2006 SAPP Revised Intergovernmental Memorandum of Understanding (“SAPP MOU”) provides as follows:

“ARTICLE 6

SETTLEMENT OF DISPUTES

1. Any dispute arising between two or more Parties from the interpretation or application of this Revised Memorandum of Understanding that cannot be settled amicably shall be referred to the SADC Tribunal for adjudication under Article 16 of the Treaty of SADC.

2. The decision of the Tribunal shall be final, binding and accepted by the Parties.”

370. Under Article 6, the settlement of disputes concerning the “interpretation or application” of the 2006 SAPP MOU is referred to the Southern African Development Community Tribunal for adjudication, which is a regional tribunal of general competence, and which has detailed rules and procedures of its own.
371. In 2010, however, after several judgment rulings against the Zimbabwean government, the SADC Tribunal was placed under review and suspended by its Member States at the 2010 SADC Summit. On 17 August 2012 in Maputo, Mozambique, the SADC Summit addressed the issue of the suspended SADC Tribunal, and resolved that a new Tribunal should be negotiated and established, with a mandate confined to the interpretation of the SADC Treaty and its Protocols relating to disputes between Member States. In 2014, nine States signed the revised Protocol on the SADC Tribunal, but the instrument has not received the ratifications needed for its entry into force, despite the urging of the SADC Summit.
372. In light of the above, the efficacy and viability of the dispute settlement obligation in Article 6 of the 2006 SAPP MOU is highly unclear, and has been rendered redundant by the fact that the tribunal to which disputes were intended to be referred to under the treaty is not presently operating. As such, it is not recommended that the dispute settlement framework contemplated by the SAPP MOU be implemented or adapted for use in the SAARC DSM template.

d. West African Power Pool (WAPP)

373. The West African Power Pool (“WAPP”) was established by the Economic Community of West African States (“ECOWAS”) in 1999 to promote regional energy integration. The main objectives of the WAPP are to facilitate the establishment of an institutional and regulatory framework conducive to investments, the development of generation and transmission infrastructures, and the establishment of a regional market for electricity. This was supplemented by the conclusion of the ECOWAS Energy Protocol in 2003, which established a legal framework to promote the long-term energy cooperation of ECOWAS States, and increase energy trade in the West Africa region.

374. Article 27 of the ECOWAS Energy Protocol sets out a dispute settlement procedure for inter-State disputes arising out of the application or interpretation of the Protocol. A close look at the provision reveals that it is materially identical to the dispute settlement framework in the Energy Charter Treaty. Consequently, the comments above in respect of the Energy Charter Treaty apply equally to the dispute settlement mechanism for inter-State disputes arising out of the ECOWAS Energy Protocol.

G. CONCLUSION

375. A survey of existing instruments shows that a wide range of dispute settlement mechanisms exists for the resolution of inter-State disputes. These mechanisms range from those that are focussed on arbitration as a dispute resolution method, to those that employ unique and *sui generis*²² mechanisms that involve the creation of dispute settlement bodies or that allow a dispute to be referred to a regional court or tribunal.
376. In addition, we also see a wide variation in the level of detail of these instruments, ranging from those that are very comprehensive in nature (e.g. inter-State arbitration rules of procedure), to those that are loosely drafted to allow further agreement by parties as regards the development of *ad hoc* and specialised rules of procedure tailored for a particular dispute. All of these provide useful information and basic starting points for the development of a DSM template that is to be applied in respect of the SAARC Framework Agreement. Having surveyed the relevant rules that are in place, the next section turns to the proposed DSM template.

²² *Sui generis* is a Latin phrase, meaning "one of a kind; unique".

VII. CHAPTER 7: PROPOSED TEMPLATE FOR AN INTER-STATE DISPUTE SETTLEMENT MECHANISM REGARDING CROSS BORDER ELECTRICITY TRADING IN THE SAARC REGION

A. DESCRIPTION OF THE DISPUTE SETTLEMENT MECHANISM TEMPLATE

377. The proposed template DSM for inter-State disputes arising out of the SAARC Framework Agreement aims to achieve a balance between party autonomy and legal certainty. On one hand, the present formulation of Article 16 of the Framework Agreement is simply too brief for practical use, and requires a more detailed dispute settlement mechanism that addresses and fills existing gaps. As such, a template that is basic and economically worded, such as some of those utilised in other CBET agreements, merely perpetuates the existing systemic problems, and would be inappropriate for the SAARC Framework Agreement.
378. That being said, on the other hand, a template DSM that is too detailed, or fashioned to a high level of specificity akin to a full set of arbitration rules, runs the risk of being overly prescriptive, and impinges on the distinctive preference for flexibility and party autonomy that is often seen in inter-State disputes. Consequently, the template DSM seeks to design a framework that sets out clear rules as to the different steps in the dispute settlement procedure, but is restrained and strategic in selecting the issues that it deals with. This involved creating detailed procedures up to the stage for which the arbitral tribunal would be formed, but also strategically leaving out certain issues that parties may desire only to deal with after direct negotiations with each other and/or in consultation with the arbitral tribunal.
379. In designing the proposed template, other DSMs that were examined in the previous chapter of this Report provided a very useful starting point for deciding how the template should be structured, and how its specific text should be phrased. In particular, the UNCLOS dispute settlement framework, being one of the most successful and frequently utilised DSMs in place, established a good gauge of the various issues that needed to be targeted and dealt with in the template.
380. In addition, the PCA rules of arbitration, apart from being one of the most up-to-date arbitration instruments specific to State-related disputes, provided a good benchmark of what kind of issues should be dealt with in greater detail by the arbitration procedural rules, and which could be strategically excluded from the template DSM to preserve party autonomy. Finally, the rules of procedure utilised in the Indus Waters Kishenganga Arbitration, the Bay of Bengal Arbitration, and the Enrica Lexie Arbitration provided important insight as to the kinds of provisions that would likely be acceptable to SAARC Member States, and which could therefore be adapted for use in the template DSM.
381. These samples were, however, merely basic documents for review and were not

suitable for wholesale or complete adoption in the template DSM. Indeed, one of the key issues which needed to be dealt with in the DSM (and which was not a feature of any other existing DSM) was how to particularise and structure the steps for which a SAARC Member State could move through the various stages contemplated in the dispute settlement obligation in Article 16 of the Framework Agreement, from (a) exploring the possibility of amicable resolution of the dispute, and failing which, (b) referring the dispute to SARCO, and finally, (c) deciding on what method of dispute settlement should be administered under the aegis of SARCO. Addressing these issues thus required drawing upon practice experience in inter-State arbitration, and thinking through what would be likely to work in accordance with the mechanics of inter-State dispute settlement.

382. The resulting template DSM, it is hoped, establishes a balanced, neutral, and indeed, practical procedure that can be applied for any dispute arising out of the SAARC Framework Agreement without further amendment. It takes into account the public international law nature of inter-State disputes, it is worded on general enough terms for it to be applied to the full spectrum of CBET disputes that could arise out of the SAARC Framework Agreement, and it is drafted to reflect broadly the kind of procedural mechanisms that have been successfully utilised by States—indeed, even SAARC Member States—in past cases.
383. As far as the utilisation and implementation of the template DSM is concerned, there are several ways in which the template may be used for full effect. First, the template DSM may be implemented as an Additional Protocol to the SAARC Framework Agreement concerning the settlement of disputes. While this requires the specific agreement of the SAARC Member States, it transforms the template DSM into a binding international agreement on the regime for implementing the dispute settlement obligation in Article 16 of the Framework Agreement. A copy of a draft Additional Protocol (utilising the template DSM) is attached to this Report as Annex 1, and forms the text of Section C of this chapter and which this Report explains in greater detail.
384. Second, a more generally worded version of the proposed DSM could serve as a template document that can be modified for inclusion into any SAARC agreement or treaty, and serve as the framework for inter-State dispute settlement for disputes arising out of that agreement or treaty, regardless of subject matter. In such instances, the template DSM would have to be suitably modified and incorporated as part of the treaty itself, as a specific section on settlement of disputes. A copy of this version of the template DSM has been attached to this Report as Annex 2.
385. Finally, the template DSM can be utilised by SARCO for any inter-State disputes between SAARC Member States as an *ad hoc* dispute settlement mechanism that can be applied to any inter-State dispute that has arisen. It should, however, be noted that the utilisation of the template DSM does not take the place of a fully fledged arbitration procedure, which must nonetheless be subsequently negotiated between the

parties after the tribunal has been constituted. However, having the template DSM in place in this context nonetheless allows for there to be a clear framework for the dispute resolution process to proceed smoothly (as opposed to there being no rules in place) until the tribunal is constituted, and until rules of procedure of greater specificity can be agreed between the disputing parties.

B. SALIENT FEATURES OF THE DISPUTE SETTLEMENT MECHANISM PROPOSED FOR CBET IN THE SAARC REGION

386. This section sets out and describes several salient features of the proposed DSM template. First, in light of the unique nature of inter-State disputes, a variety of provisions were included specifically to reflect the public international law elements that often arise in disputes involving States. Thus, parts of the template include provisions dealing with the agent of the State, consultations or exchange of views, and the applicability of international law to the dispute. These provisions allow for the template DSM to be uniquely targeted to the inter-State context, and to be in line with prevailing practice in that specialised area of dispute settlement.
387. Second, to avoid confusion amongst users of the template DSM, effort was made to clarify the relationship between Article 16 of the SAARC Framework Agreement, the template DSM, and SARCO. Accordingly, provisions were inserted to ensure the compatibility of Article 16 of the Framework Agreement and the template DSM, to set out the scope of the template DSM, and to explain the role of SARCO in the administration of the dispute. To this end, it is made clear under the template DSM that (a) Article 16 sets out the dispute settlement *obligation* for disputes arising out of the Framework Agreement; (b) the template DSM provides a *procedural regime* for giving effect to the dispute settlement obligation; and (c) that SARCO's role in the dispute settlement proceedings is that of providing *secretariat and registry services*, as opposed to performing the role of the arbitral tribunal.
388. Third, as alluded to in the previous section, part of the objective of the template DSM was to particularise a dispute settlement regime that would expound on the dispute settlement obligation under Article 16 of the Framework Agreement. To this end, various gaps in Article 16 of the Framework Agreement have been filled by the template DSM. Amongst other things, the template DSM includes various procedures to clarify *when* a dispute may be referred to SARCO, *how* such a referral can be made, and a procedure to determine *what* kind of dispute settlement method should be administered by SARCO for the resolution of the dispute.
389. Fourth, effort was made to give parties as much flexibility and party autonomy as possible without sacrificing legal certainty. Where possible, language was used to preserve the ability for parties to agree on deviations within the procedural regime

under the template DSM, or to prescribe a different procedural rule according to their preferences, should there be mutual agreement. As such, under the template DSM, parties may choose the number of arbitrators in the tribunal, with the choice of arbitrators being limited only by certain nationality considerations. Moreover, the option for parties to explore methods of dispute settlement other than conciliation and arbitration was also preserved. Various other options were also provided for parties to customise their procedural choices where appropriate.

390. Fifth, given the multilateral nature of the SAARC Framework Agreement, a conscious decision was made to accommodate the possibility of multi-party disputes being submitted to dispute resolution, as well as the possibility of intervention by third parties. As will be explained in the sections that follow, this included modifying the procedure for selection of arbitrators to include the possibility of multiple applicants and respondents, as well as the selective exclusion of a formal procedure for intervention by third parties but preferring instead a broad power for the arbitral tribunal to conduct the arbitration in an appropriate manner.
391. Finally, one of the features of the template DSM is that it is not intended to take the place of the full set of arbitration rules of procedure in an inter-State dispute. In this regard, a distinction should be drawn between a DSM and the rules of procedure for dispute settlement. The DSM forms the cornerstone for the implementation of the dispute settlement obligation, and provides the broad framework of the process for the settlement of the dispute. It is, however, in no way intended to be exhaustive in nature as regards the details of the dispute resolution procedure. Indeed, where inter-State arbitration is concerned, the detailed rules of procedure for the arbitration are usually only agreed upon between the parties *after* the arbitration has commenced and the tribunal is constituted. Often, when specialised rules of procedure are agreed at this stage and under the mandate of the arbitral tribunal, the arbitral tribunal is able to take into account the unique nature of each dispute in designing the procedural rules for the arbitration (e.g. multiple or no third party intervenors, possibility of a non-appearing party, or the time-sensitive nature of the dispute etc). To try and pre-empt all of those considerations and possibilities in the template DSM would result in a regime that may prove to be overly prescriptive and confusing, thereby reducing its effectiveness when being implemented. In light of this, a strategic choice was made for the template DSM to set out only the fundamental and core provisions for the dispute resolution process, establishing agreement on important aspects of the arbitration and avoiding detail that is overly prescriptive, so that the level of party autonomy and customisation that disputing States are used to expecting from an inter-State arbitration can be preserved.

**C. TEMPLATE FOR DISPUTE SETTLEMENT MECHANISM FOR INTERPRETATION AND
IMPLEMENTATION OF THE SAARC FRAMEWORK AGREEMENT FOR ENERGY
COOPERATION (ELECTRICITY)**

392. The full text of the template DSM has been set out below. As the primary task of this Report is to establish a template DSM specifically for disputes arising out of the SAARC Framework Agreement, and implementing it to that end, the version that I have set out below has been framed in the context of an Additional Protocol to the SAARC Framework Agreement, as I believe this to be the most appropriate method for its adoption.

**Additional Protocol to the SAARC Framework Agreement for Energy Cooperation
(Electricity) concerning the Settlement of Disputes**

The States Parties to the present Protocol and to the SAARC Framework Agreement for Energy Cooperation (Electricity), hereinafter referred to as the “Framework Agreement”, adopted by Member States of the South Asian Association for Regional Cooperation in Kathmandu, Nepal on 27 November 2014,

Expressing their wish to settle all disputes between them arising out of the interpretation or implementation of the Framework Agreement by peaceful means,

Have agreed as follows:

Article 1

Obligation to resolve disputes

States Parties shall settle any dispute between them arising out of the interpretation and/or implementation of the Framework Agreement in accordance with Article 16 of the Framework Agreement and the provisions of this Protocol.

Article 2

Amicable resolution of disputes

1. Disputes between States Parties arising out of the interpretation and/or implementation of the Framework Agreement shall, as far as possible, be resolved amicably.

2. If the dispute has not been resolved within a period of six months from the date on which either party to the dispute requested amicable settlement, either party to the dispute may, by written notice to all disputing parties and to the SAARC Arbitration Council, refer the dispute to the SAARC Arbitration Council.

*Article 3
Choice of procedure*

1. Where a dispute has been referred to the SAARC Arbitration Council in accordance with Article 2(2), the parties to the dispute shall proceed expeditiously to an exchange of views regarding the method of dispute settlement to be administered by the SAARC Arbitration Council.

2. If the parties to the dispute are unable to agree on the method of dispute settlement to be administered by the SAARC Arbitration Council within one month from the date on which the dispute was referred to the SAARC Arbitration Council in accordance with Article 2(2), either party may submit the dispute to arbitration in accordance with this Protocol.

3. Nothing in this Protocol impairs the right of any States Parties to agree at any time to settle a dispute between them arising out of the interpretation and/or implementation of the Framework Agreement by any peaceful means of their own choice.

*Article 4
Institution of arbitration proceedings*

Subject to the provisions of Article 3, any party to a dispute may submit the dispute to the arbitral procedure provided for in this Protocol by written notice of arbitration communicated to the other party or parties to the dispute and to the SAARC Arbitration Council. The notice of arbitration shall contain a brief statement of the claim and the grounds on which it is based.

*Article 5
SAARC Arbitration Council*

The SAARC Arbitration Council shall take charge of the archives of the arbitration proceedings. In addition, the SAARC Arbitration Council shall act as a channel of communication between the parties and the arbitral tribunal, provide secretariat services and/or serve as registry for the arbitration proceedings.

*Article 6
Representation and assistance*

Each State Party to the dispute shall appoint an agent. The parties may also be assisted by persons of their choice. The name and address of the agent shall be communicated in writing to the other party or parties to the dispute, to the SAARC Arbitration Council, and to the arbitral tribunal after it has been constituted.

*Article 7
Constitution of the arbitral tribunal*

1. Unless the parties to the dispute agree otherwise, the arbitral tribunal shall consist of three members.

2. The party instituting the arbitration proceedings shall appoint one member of the arbitral tribunal, who may be its national. The appointment shall be included in the notice of arbitration referred to in Article 4 of this Protocol.

3. The other party to the dispute shall, within 30 days of receipt of the notice of arbitration referred to in Article 4 of this Protocol, appoint one member of the arbitral tribunal, who may be its national. If the appointment is not made within that period, the party instituting the proceedings may, within 14 days of the expiration of that period, request that the appointment be made in accordance with paragraph 5 of this Article.

4. A third member of the arbitral tribunal, who may not be a national of a State Party to the dispute, shall be appointed by the parties to the dispute as the President of the arbitral tribunal. If, within 60 days of the receipt of the notice of arbitration referred to in Article 4 of this Protocol, the parties are unable to agree on the appointment of a third member of the arbitral tribunal, that appointment shall be made in accordance with paragraph 5 of this Article, at the request of a party to the dispute.

5. Unless the parties to the dispute agree otherwise, appointments made in accordance with this paragraph shall be made by the Director General of the SAARC Arbitration Council. If the Director General is unable to act under this paragraph or is a national of one of the parties to the dispute, the appointment shall be made by the next most senior member of staff of the SAARC Arbitration Council who is available and is not a national of one of the parties. The appointments referred to in this paragraph shall be made within a period of 30 days of the receipt of the request and in consultation with the parties. Subject to paragraph 3 of this Article, the members of the arbitral tribunal so appointed shall be of different nationalities and may not be in the service of, ordinarily resident in the territory of, or nationals of, any of the parties to the dispute.

6. Any vacancy in the arbitral tribunal shall be filled in the manner prescribed for the initial appointment.

7. Parties in the same interest shall appoint one member of the tribunal jointly by agreement.

8. In disputes involving more than two parties, the provisions of paragraph 1 to 6 of this Article shall apply to the maximum extent possible.

Article 8 *Challenge of arbitrators*

1. A prospective arbitrator shall disclose to those who approach him/her in connection with his/her possible appointment any circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him/her of these circumstances.

2. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

3. A party may challenge the arbitrator appointed by him/her only for reasons of which he/she becomes aware after the appointment has been made.

4. In the event that an arbitrator fails to act or in the event of the *de jure* or *de facto* impossibility of his or her performing his or her functions, the procedure in respect of the challenge of an arbitrator as provided in paragraphs 5 to 9 shall apply.

5. A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in paragraphs 1 to 4 became known to that party.

6. The notice of challenge shall be communicated to all other parties, to the arbitrator who is challenged, to the other arbitrators, and to the SAARC Arbitration Council. The notice of challenge shall state the reasons for the challenge.

7. When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.

8. If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the Director General of the SAARC Arbitration Council.

9. In rendering a decision on the challenge, the Director General of the SAARC Arbitration Council may indicate the reasons for the decision, unless the parties agree that no reasons shall be given.

Article 9

Jurisdiction of the arbitral tribunal

1. The arbitral tribunal shall have jurisdiction over any dispute arising out of the interpretation and/or implementation of the Framework Agreement which is submitted to it in accordance with this Protocol.

2. In the event of a dispute as to whether the arbitral tribunal has jurisdiction, the matter shall be settled by decision of the arbitral tribunal.

3. The arbitral tribunal may rule on a plea concerning its jurisdiction as a preliminary question or in its final award.

Article 10

Procedure

Unless the parties to the dispute otherwise agree, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties to the dispute are treated with equality and that at any stage of the proceedings each party is given a full opportunity to be heard and to present its case.

Article 11

Duties of the parties to a dispute

The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, in accordance with their law and using all means at their disposal, shall provide it with all relevant documents, facilities and information, and enable it when necessary to call witnesses or experts and receive their evidence and to visit the localities to which the case relates.

Article 12

Language

1. Unless otherwise agreed between the parties to the dispute, the language to be used in the arbitration proceedings shall be English. This shall apply to the parties' written pleadings and to any oral hearings that may take place.

2. The arbitral tribunal may order that any documents annexed to the parties' written pleadings, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into English, or into any other language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 13

Experts appointed by the arbitral tribunal

1. The arbitral tribunal may, at the request of a party or *proprio motu*, select in consultation with the parties one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The parties shall give the expert any relevant information or produce for his/her inspection any relevant documents or goods that he/she may request of them. Any dispute between a party and such expert as to the relevance and appropriateness of the required information or production shall be referred to the arbitral tribunal for decision.

3. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his/her report.

Article 14

Provisional Measures

1. The arbitral tribunal may, at the request of a party, prescribe any provisional measures it considers appropriate.

2. The party requesting provisional measures under paragraph 1 shall satisfy the

arbitral tribunal that:

- (a) the arbitral tribunal has *prima facie* jurisdiction;
- (b) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
- (c) there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

3. Any determination made by the arbitral tribunal in respect of paragraph 2 shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

4. The arbitral tribunal may modify, suspend, or terminate a provisional measure it has granted, upon the request of a party to the dispute and after the parties have been given an opportunity to be heard.

Article 15 *Decisions*

1. Decisions of the arbitral tribunal shall be taken by a majority vote of its members. In the event of an equality of votes, the President shall have a casting vote.

2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorises, the presiding arbitrator may decide on his/her own, subject to revision, if any, by the arbitral tribunal.

Article 16 *Applicable law*

1. The arbitral tribunal shall decide the issues in dispute in accordance with the rules and principles of international law.

2. This provision shall not prejudice the power of the arbitral tribunal to decide a case *ex aequo et bono*, if the parties agree thereto.

Article 17 *Default of appearance*

If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.

Article 18 *The arbitral award*

1. The arbitral tribunal may make separate awards on different issues at different times.

2. All awards shall be made in writing, and the arbitral tribunal shall state the reasons upon which the award is based.

3. The arbitral award shall contain the names of the members who have participated and the date of the award, and shall be signed by all members of the tribunal. Any member of the tribunal may attach a separate or dissenting opinion to the award.

*Article 19
Finality of the award*

The arbitral award shall be final and binding on the parties. The parties shall carry out all awards without delay.

*Article 20
Interpretation or implementation of the award*

Any controversy which may arise between the parties to the dispute as regards the interpretation or manner of implementation of the award may be submitted by either party for decision to the arbitral tribunal which made the award. For this purpose, any vacancy in the tribunal shall be filled in the manner provided for in the original appointments of the members of the tribunal.

*Article 21
Expenses*

Unless the arbitral tribunal decides otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares.

D. GUIDELINES, CLARIFICATIONS AND NOTES ON THE DESIGNED TEMPLATE

1. Articles 1 to 3: The Choice of Dispute Settlement Procedure

393. Articles 1 to 3 of the template DSM set out the procedural detail of how a SAARC Member State may pursue or pass through the various stages of dispute settlement contemplated under Article 16 of the SAARC Framework Agreement. Article 16 does not state (a) a time limit for the amicable resolution or diplomatic negotiations phase of the dispute, (b) when a disputing party may refer the dispute to SARCO, (c) how the dispute should be referred to SARCO and the form that such a reference should take, (d) the method of dispute settlement that SARCO should administer (noting that it may administer either conciliation or arbitration), and (e) a process by which

disputing SAARC Member States may arrive at an agreement as regards the method of dispute settlement to be administered by SARCO. These issues have now been addressed in Articles 1 to 3 of the DSM template.

394. Article 1 deals with the relationship between Article 16 of the SAARC Framework Agreement and the template DSM. In so doing, it establishes the compatibility of the two instruments, and makes it clear that the dispute settlement obligation in Article 16 of the Framework Agreement is not superseded by the Protocol. Instead, the Protocol merely supplements the dispute settlement obligation that States are bound by virtue of Article 16, and clarifies the regime for the settlement of disputes arising out of the interpretation and/or implementation of the Framework Agreement.
395. Article 2 of the template DSM performs a number of important roles. It re-states the dispute settlement obligation on the terms used in the Framework Agreement, in order to ensure that the same scope of disputes will be covered by the template DSM. Additionally, re-stating the dispute settlement obligation has the additional benefit of allowing the template DSM to be a self-standing instrument which can easily be modified for inclusion in other SAARC agreements or treaties unrelated to the Framework Agreement.
396. Article 2 also resolves a number of gaps in the first sentence of Article 16 of the Framework Agreement, and addresses how a disputing State may transition from its obligation to pursue amicable resolution of the dispute, to its right to refer the dispute to SARCO. Thus, Article 2 makes it clear that the first step for dispute settlement consists of an amicable resolution phase, in which States may explore the negotiation of a settlement through diplomatic channels. It also sets a clear time limit to this phase—a duration of 6 months. As such, should the diplomatic negotiations fail to result in an amicable settlement after 6 months, either disputing party may then proceed to refer the dispute to SARCO.
397. A number of points are note-worthy in relation to Article 2. First, the time limit of 6 months is not an arbitrary figure, but is instead a length of time that has been used in other international instruments dealing with State-related disputes. Accordingly, it has the benefit of familiarity of procedure. Second, it is to be noted that a State *may*, instead of *shall*, refer the dispute to SARCO. The word “may” was intentionally used to confer on disputing parties a choice as regards the steps it may take following the negotiation phase. By preserving party autonomy in this regard, States have the flexibility to extend the period for attempting amicable settlement (if that should prove desirable). They may also decide that the dispute is too minor to take forward in formal dispute settlement proceedings. This allows disputing States a certain berth of procedural leeway to decide how it wants to deal with the dispute, and to utilise the fora which it deems most advantageous at that point in time. Third, Article 2(2) clarifies *how* a State may refer the dispute to SARCO, and stipulates that this should be done in the form of a written notice to all disputing parties and to SARCO.

398. Should a disputing party decide to refer the dispute to SARCO, Article 3 comes into operation as it sets out a mechanism for States to decide on the method of dispute settlement to be administered by SARCO. Under Article 3 of the DSM template, disputing parties are to proceed to an exchange of views concerning the method of dispute settlement that SARCO should administer. It should be noted that this “exchange of views” is not intended to be a reconstitution of the negotiation on the subject matter of the dispute that parties had already completed in Article 2 of the DSM template. Instead, the exchange of views is intended to be a negotiation only on the means for dispute settlement that SARCO will administer, and if parties are unable to reach agreement within one month, the dispute may be submitted by either party to arbitration.
399. As regards the exact terms of language used in Article 3(1), several points bear mentioning. First, as noted previously, SARCO is able to administer both conciliation and arbitration. However, Article 16 merely provides for disputes to be referred to SARCO without stating what kind of dispute settlement method should be administered. Consequently, Article 3 fills the existing gap in Article 16 of the Framework Agreement by allowing parties a framework and a fixed period of time (one month) for agreeing on the dispute settlement method to be administered by SARCO for their dispute. This not only clarifies the procedural regime under Article 16, but also preserves party autonomy in the procedure.
400. Second, Article 3 was intentionally drafted to refer to the “method of dispute settlement to be administered by the SAARC Arbitration Council” on those broad terms. The reason for this is that, at present, the Agreement for Establishment of SAARC Arbitration Council appears to limit SARCO’s dispute resolution mandate to the provision of “conciliation and arbitration” services. This mandate may, however, change in future, and be expanded to include other dispute settlement methods such as mediation, expert evaluation, or inquiry. As such, the broad language used in Article 3(1) was intended to accommodate such future changes, as it allows SARCO to notify the disputing parties of the methods of dispute settlement that can be administered by SARCO, and from which parties may choose for the settlement of their dispute, at the time the dispute arises and on a case-by-case basis.
401. Third, in a manner similar to Article 2, Article 3 utilises the word “may” in giving parties the choice as to whether the dispute should be submitted to arbitration after the exchange of views. The reason for this is that, once arbitration is commenced, it can often be difficult to terminate proceedings. As such, parties should make a decision to commence arbitration with its consequences in mind, as opposed to being forced to arbitrate by default after the exchange of views stage.
402. Finally, Article 3(3) clarifies that in spite of the regime established by the DSM template, parties to the dispute may nonetheless undertake negotiations or other forms of dispute settlement in seeking to resolve the dispute. This recognises the primacy of

party autonomy by allowing parties to agree to other forms of dispute settlement by special agreement, or by undergoing negotiations through backchannels while the arbitration is on going. The freedom to do so is often of increased importance in an inter-State context, as the political interactions between States across a very wide spectrum of international issues on the global level may allow the possibilities and modalities for settlement to arise.

2. Articles 4 to 6: Institution of Arbitral Proceedings

403. Articles 4 to 6 of the template DSM clarify how the arbitration proceedings should be instituted, the role of SARCO in the administration of the dispute, as well as the appointment of a State agent as the representative of the State.
404. Article 4 provides for the institution of arbitration proceedings by communication of a written notice of arbitration. It also specifies broadly the content of the notice, which should contain a brief statement of the claim and the grounds on which the claim is based. This makes it clear as to how a party should commence the arbitration, should it choose to do so after the exchange of views stage. In recognition of SARCO's role, Article 4 also specifies that the notice of arbitration must be communicated not only to the parties to the dispute, but also to SARCO.
405. Article 5 sets out the general duties and role of the SARCO in respect of the administration of the arbitration. The provision includes the variety of services usually provided by an arbitration institution in cases that it administers. As registry, SARCO would maintain an archive for the arbitration proceedings. To facilitate SARCO's role, Articles 2(2) and 4 provides that written notice referring the dispute to SARCO as well as the notice of arbitration shall be sent to SARCO at the same time as to the other addressees. In addition, SARCO's role as secretariat also means that it may serve as the official channel of communication between the parties and the tribunal and provide services such as logistical and technical support for meetings and hearings, travel arrangements, translation, as well as general administrative support.
406. Article 6 provides that parties to an arbitration may be represented and assisted by persons of their choice. It states that States parties shall appoint an agent. This provision is based on prevailing practice in international proceedings, where it has become customary for States to appoint Agents of the State as their representative in an inter-State dispute. It also distinguishes between the "agent" of the State and other persons assisting in the dispute (*i.e.* legal counsel or ministry advisors), which preserves the historical distinctions and use of terminology in inter-State disputes.

3. Articles 7 to 8: Constitution of the Arbitral Tribunal

407. Article 7 supplies the rules regarding the number of arbitrators to be appointed to the tribunal in the absence of agreement by the parties, as well as the procedure for constitution of the tribunal.
408. Article 7(1) provides for a tribunal composed of three arbitrators as the default number, where parties have not agreed on a different number of arbitrators. A key issue in deciding the appropriate default number of arbitrators was the need to correctly anticipate the size and complexity of potential disputes that are likely to arise under the SAARC Framework Agreement, and balance it with the need for expedience and efficiency. In this regard, it should be noted that the usual number of arbitrators in an inter-State dispute is often five arbitrators. However, several reasons provided the basis for departing from that usual number of arbitrators, and selecting instead a default number of three arbitrators for the DSM template. While it is noted that the importance of the issues arising in inter-State disputes usually means that States are more comfortable with a larger panel of arbitrators deciding such disputes, this has to be balanced against a variety of other factors. First, practice experience suggests that in most cases, it takes much longer to constitute a panel of five arbitrators, as opposed to a panel of three arbitrators. Such delays could be unnecessary and disruptive where an expedient decision is required for the settlement of the dispute. In addition, a simple dispute may not justify the added time and expense of a five-member tribunal as opposed to a three-member tribunal.
409. Second, one needs to bear in mind that the SAARC Framework Agreement is a regional mechanism involving States that have long-standing bilateral tensions and rivalries. For purposes of neutrality of the proceedings and the arbitral award, the mechanism for appointing arbitrators requires that at least some of the arbitrators should be non-nationals of the disputing States parties. Should the default number of arbitrators be too large, this may result in the majority of tribunal members being non-SAARC nationals—which may allow regional concerns to be subjected to the decision-making authority of individuals who are completely divorced from the regional policies at issue—or indeed, may result in the majority of tribunal members being from various other SAARC States apart from the disputing State parties—which may allow bilateral and domestic politics, tensions and rivalries to affect the arbitration and decision-making process. A three-member tribunal mitigates these problems. Each party is likely to appoint one member of the tribunal that it feels would make a fair assessment of its interests in the arbitration, with a third member of the tribunal acting as the president or umpire. In contrast, with a five-member arbitral tribunal, while parties may still appoint one member of the tribunal each, they run the risk that the remaining members of the tribunal forming the majority could fall into the problems described above.
410. Third, it should be kept in mind that Article 7(1) merely states that the arbitral tribunal

shall consist of three members as a default number. Parties nonetheless remain free to depart from this by agreeing on a larger or smaller number of arbitrators where they feel it is appropriate for the demands of the particular case. As such, this minimizes any drawbacks of selecting three arbitrators as the default position for the DSM template.

411. Articles 7(1) to (8) set out the mechanism for the appointment of arbitrators, as well as the role of the Director General of the SARCO as the appointing authority. While much of the content of the provisions are self-evident, it bears noting that the provision accommodates the possibility of multiple disputing parties. In such a context, disputing parties in the same interest shall appoint only one member of the tribunal jointly by agreement. This broadly follows the regime applied in other inter-State mechanisms such as the UNCLOS, ITLOS and in the International Court of Justice (for *ad hoc* judges), and seeks to allow the participation of all disputing parties while preserving the integrity and fairness of the appointment process.
412. Finally, it should be noted that the Director General of SARCO is the appointing authority under Article 7. Noting, however, that the Director General of SARCO is invariably a national of a SAARC Member State, provisions have been made for the next most senior member of staff to act as the appointing authority where the Director General of SARCO happens to be a national of one of the disputing parties. It may therefore be useful for SARCO to conduct training sessions and produce internal guidelines for its staff in respect of the in-house procedure to be adopted when performing the role of the appointing authority under Article 7 of the template DSM.
413. Article 8 describes the disclosure obligations of arbitrators, and concomitantly, sets out the procedure and grounds for challenging arbitrators as well as the appointing authority's role in deciding such challenges. This closely follows the framework for challenges under the UNCITRAL Arbitration Rules.

4. Articles 9 to 11: Competence of the Arbitral Tribunal

414. Article 9 of the template DSM sets out the scope of the tribunal's jurisdiction on terms materially identical to that of Article 16 of the Framework Agreement. It establishes the competence-competence of the tribunal (*i.e.* the arbitral tribunal's ability to decide on issues relating to its own jurisdiction), and allows the tribunal to decide on jurisdictional issues as a preliminary question or in the final award. In doing so, the template DSM departs from the model of automatic bifurcation that has been implemented in the ICJ rules of procedure, and follows instead the practice in inter-State arbitration. This allows greater flexibility for the tribunal to decide on issues relating to the bifurcation of proceedings, and even the ability to hear only *some* jurisdictional issues first, and reserving other issues of jurisdiction to be heard during

the merits phase.

415. Article 10 sets out an overarching power of the arbitral tribunal to determine its own procedure and conduct the arbitration in such manner as it deems appropriate. A number of comments are relevant in this regard. First, it should be noted that nothing in the template DSM specifies the rules of arbitration that parties should apply in their inter-State dispute. This was intentionally done to preserve party autonomy, in light of the prevailing practice of States agreeing on specialised *ad hoc* rules of procedure only after the tribunal has been constituted. Thus, Article 10 provides the power for arbitral tribunal to decide on procedural matters, allowing it to put in place procedures specifically agreed upon by the States parties, or to set out and implement procedures in situations where the parties may not agree. This broad power allows the tribunal to take into account specific details of a case in creating the rules of procedure, rather than having to implement pre-determined default rules of procedure that are generic and are not customised for a particular case.
416. Second, the broad power in Article 10 allows the tribunal to deal with other unique issues such as the intervention of third parties, and customise specific rules for those issues. As will be seen, the present text of the template DSM does not deal specifically with issues relating to interventions by third parties. The reason for this is that such issues very rarely arise at the commencement of a case. Consequently, it is better for the arbitral tribunal to utilise its broad powers in Article 10 to deal with such issues later on in the proceedings, creating rules of procedure specific to how those issues present themselves in that particular case, as it would have more information about the dispute and the circumstances surrounding it at that stage.
417. Third, while Article 10 gives the tribunal the discretion to determine the arbitral procedure, it also includes fundamental safeguards of equality between the parties and each party's right to be heard.
418. Finally, in consequence of the arbitral tribunal's powers, Article 11 establishes an obligation for disputing parties to facilitate the work of the arbitral tribunal, especially with regard to matters that would allow the tribunal to decide the case fairly.

5. Article 12: Language of the Arbitration

419. Article 12 provides for the language of the arbitration to be English. However, it allows parties to agree upon a different language for the proceedings. Conduct of proceedings in a single language is preferable from the perspective of assessing the speed and cost of the arbitration.
420. Pursuant to Article 12(1), the language of the proceedings applies to all written pleadings and to the oral hearings. In practice, any communications between the

parties and the tribunal, as well as any orders and awards issued by the arbitral tribunal, will also be in the language of the arbitration.

6. Article 13: Tribunal-appointed Experts

421. Article 13 allows for the appointment of independent experts by the tribunal. While arbitrators are often appointed by parties for their expertise and knowledge, complex scientific, technical, or even legal issues may nevertheless arise in an arbitration that are not within the particular expertise of the arbitral tribunal. In such situations, the arbitral tribunal may benefit from receiving external assistance by subject-matter experts.
422. Indeed, arbitral tribunals in inter-State arbitrations have on occasion appointed experts not only to assist it with understanding the technical aspects of the dispute (e.g. cartography, hydrography etc), but also with articulating its award in technical terms. Where the arbitral tribunal does utilise experts, Article 13 sets out the guidelines for such an appointment, and establishes that both the expert's terms of reference as well as the expert's report shall be communicated to the parties.

7. Article 14: Provisional Measures

423. Articles 14 (1) and (2) sets out the scope of the arbitral tribunal's power to grant provisional measures, and the conditions for the granting of provisional measures. Article 14(3) provides that any determination of the arbitral tribunal in granting provisional measures shall not affect the discretion of the arbitration in making any subsequent determination. This provision confirms that the detail in Article 14(2) relating to the requirements for granting provisional measures is intended to provide guidance to the parties in arguing provisional measures applications and to the arbitral tribunal in deciding them, but does not fetter the tribunal's ultimate discretion on issues relating to the case. Article 14(4) also provides for the tribunal to modify, suspend or terminate a provisional measure upon the request of a party (e.g. where circumstances have changed).

8. Articles 15 to 21: The Arbitral Award

424. The remaining provisions of the template DSM deal with matters relating to the arbitral award. Article 15 applies the majority rule that is the prevailing practice in international arbitration. It therefore imports an obligation for the tribunal to deliberate upon and reach a majority decision on substantive matters, allowing the presiding

arbitrator some leeway to decide on procedural questions on authorisation of the full tribunal. This procedural leeway allows for decisions to be taken on minor procedural matters in urgent cases, or where the co-arbitrators cannot be reached in a timely manner.

425. Article 16(1) prescribes the applicable law for the dispute. In this regard, as the scope of disputes contemplated under the template DSM relates to disputes arising out of the SAARC Framework Agreement, the applicable law for deciding the dispute is necessarily the rules and principles of international law. Article 16(1) is therefore dedicated to the inter-State premise of the dispute settlement procedure. Nonetheless, Article 16(2) allows for parties to agree that the arbitral tribunal may decide the dispute *ex aequo et bono*, should they so desire.
426. Article 17 deals with situations where a State party fails in some way to participate in the arbitration proceedings. This has occurred, on occasion, in other inter-State arbitrations such as *Philippines v. China*²³ and *Netherlands v. Russia*.²⁴ In such situations, Article 17 allows the proceedings to continue unimpeded by the absence of a party. It also helps to safeguard the process by emphasising the tribunal's continued obligation to satisfy itself that it has jurisdiction over the dispute and that the claim is well founded in fact and law.
427. Articles 18 to 20 address the form, effect, binding nature, and finality of the arbitral award. These provisions follow the prevailing standards in international arbitration.
428. Finally, Article 21 deals with the issue of expenses, and states that the expenses and remuneration of the tribunal shall be borne by the parties in equal shares. This reflects the public international law nature of the dispute settlement proceedings. In commercial and investment arbitration, the prevailing practice is for the tribunal to allocate the cost of the proceedings in a manner reflecting the merits of each parties claim, as well as the manner in which parties have conducted themselves in the proceedings. This, however, does not apply in inter-State arbitration, where the historical rule has always been an equal split of costs between the parties, insofar as the expenses and remuneration of the tribunal are concerned.

E. ADAPTING THE TEMPLATE FOR GENERAL APPLICATION IN OTHER SAARC AGREEMENTS

429. While it would evident from Section C that the terms of the template DSM set out above have been specifically tailored to the dispute settlement obligation in the SAARC Framework Agreement, a number of changes may easily be made to adapt the

²³ <https://www.pcacases.com/web/view/7>

²⁴ <https://www.pcacases.com/web/view/21>

template DSM for general application in other treaties. Firstly, Article 1 of the template DSM should be deleted, as that provision is specific to the SAARC Framework Agreement. Secondly, the preamble of the template should also be deleted, as that is likewise unique to treaty language. Thirdly, references to “Framework Agreement” in the template DSM should be amended to “Agreement”, or to some other relevant abbreviated term for the treaty in which the template should be included. Finally, the references to the word “Protocol” should be replaced by the word “Section” or “Part” or some other suitable word depending on the terminology used when inserting the DSM template into the treaty. A modified version of the DSM template with these changes has been attached hereto as Annex 2 of this Report.

VIII. CHAPTER 8: RECOMMENDATIONS FOR ADOPTING THE PROPOSED DSM TEMPLATE

430. The template DSM represents an ambitious but necessary step for making the dispute settlement obligation in the SAARC Framework Agreement workable. By particularising the dispute settlement obligation in a practical and clear way, it provides a blueprint for developing a legal regime for disputes arising out of the interpretation and implementation of the SAARC Framework Agreement, as well as a template that can be applied in other SAARC treaties.
431. This, however, is only half the solution. In order for the template DSM to be implemented, it must be approved by the SAARC Member States, and in a shape or form that is acceptable to them. In this regard, international law and prevailing practice provides us with a variety of ways in which the template DSM can be implemented, whether as a binding treaty or a guiding policy document. As such, the final official form which the template DSM may take is not such a big hurdle to surmount. More important, however, is the process for gaining consensus on the terms of the proposed DSM template, as that provides the force, support, and political rapprochement and imprimatur for formalising the template DSM into a concrete document.

A. ROADMAP FOR CONSENSUS ON THE PROPOSED TEMPLATE

432. *Stage 1:* I envision that the roadmap for consensus should first start off as a process of getting feedback on the proposed template from the various stakeholders in SAARC, including the SEC, SARCO as well as, importantly, appropriate representatives of SAARC Member States. At this stage of the process, the focus here would not be to seek their direct approval of the template, but to get their feedback on whether the terms and content of the template DSM are acceptable to them or should be modified in ways that they might suggest. This would achieve two important purposes. First, this would provide a very useful channel of feedback on the DSM template, and would allow the template to be modified for its end-users. Second, by modifying the template in accordance with the feedback, this would be an implicit way of gaining their acceptance as regards the terms of the template. This stage may involve a recurring channel of communications with stakeholders with multiple drafts, until the template is suitably finalised.
433. *Stage 2:* Having gathered the feedback, a final draft of the DSM template should be formalised. The need to adopt the template should be raised at a SAARC meeting involving representatives of all SAARC Member States, and included in the agenda of issues that should be dealt with by SAARC. The final draft of the DSM template should be sent to the respective States as a working paper to be discussed at a

dedicated meeting that will be arranged.

434. **Stage 3:** A round-table meeting should be arranged between representatives of all SAARC Member States, the SEC, and SARCO. Presentations should be given on how the template DSM will function in respect of the SAARC Framework Agreement, the roles of the various parties and institutions involved in the dispute settlement process, as well as how the DSM can be used. Final feedback should be taken from the respective stakeholders, and the template DSM should be finalised, officialised and put into final form at the round-table meeting. The final step should simply be the adoption of the template DSM by each SAARC Member State.

B. STRATEGY FOR ADOPTION OF THE PROPOSED TEMPLATE FOR SETTLEMENT OF DISPUTES

435. There are a number of ways in which the DSM template may be adopted for the SAARC Framework Agreement. First, the DSM template can be adopted as an Additional Protocol to the SAARC Framework Agreement. This is the form that I am most in favour of. Under international law, the Additional Protocol would be a binding treaty between the SAARC Member States, and would therefore be a fully-fledged dispute settlement mechanism which the relevant States have specifically agreed to. In addition, the nomenclature of an “Additional Protocol” also makes it very clear that the document would be a related document to the SAARC Framework Agreement, and that the DSM created therein is intended to expound on the dispute settlement obligation in Article 16 of the Framework Agreement. This would therefore be the cleanest and clearest approach.
436. Second, if the SAARC Member States are not in favour of formalising the template DSM as an Additional Protocol or as a binding treaty, the next best option is for it to be adopted by SAARC as a policy document or an interpretive note in respect of the SAARC Framework Agreement. While the template DSM would not constitute a legally binding instrument if adopted in this form, it would nonetheless benefit from the strong consensus that would be evident of a policy document or interpretive note issued jointly by the SAARC Member States or the organisation itself. This would increase the likelihood that States would choose to implement the template DSM if a dispute should arise.
437. Third, the template DSM could also be issued jointly by the SEC and SARCO as a position paper or guiding document on the resolution of disputes arising under the SAARC Framework Agreement. Disputing States are likely to look to the SEC and SARCO for guidance when a dispute arises under the Framework Agreement. Thus, the position paper could become the formal procedure for such disputes if parties agree to adopt the position paper as the DSM / ad hoc procedure for the particular

dispute. This kind of agreement, however, would have to be procured from parties on a case-by-case basis.

438. Finally, the template DSM could be turned into a draft inter-State dispute settlement procedure that SARCO can use as a starting point during an inter-State arbitration. As mentioned earlier in this Report, parties in inter-State disputes usually seek to agree on rules of procedure only after the dispute has arisen. In this context, the template DSM can be used as an informal document on which States may modify and negotiate in order to produce their own specialised rules of procedure.

C. CONCLUSION

439. The objective of this Study has been two-fold. First, as its core and primary goal, this Study has focused on developing a design template for a DSM to resolve disputes arising between SAARC Member States under the Framework Agreement. Second, as a subsidiary goal, part of this Study was also devoted to reviewing the domestic arbitration regimes of SAARC Member States to ensure that they are in line with international best practices. It is hoped that with the recommendations that have been suggested in this Report, improvements in the regime for dispute settlement in the SAARC Framework Agreement as well as in the domestic arbitration regimes of SAARC Member States will be seen in future developments.

Kevin LEE
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**Additional Protocol to the SAARC Framework Agreement for Energy Cooperation
(Electricity) concerning the Settlement of Disputes**

The States Parties to the present Protocol and to the SAARC Framework Agreement for Energy Cooperation (Electricity), hereinafter referred to as the “Framework Agreement”, adopted by Member States of the South Asian Association for Regional Cooperation in Kathmandu, Nepal on 27 November 2014,

Expressing their wish to settle all disputes between them arising out of the interpretation or implementation of the Framework Agreement by peaceful means,

Have agreed as follows:

Article 1

Obligation to resolve disputes

States Parties shall settle any dispute between them arising out of the interpretation and/or implementation of the Framework Agreement in accordance with Article 16 of the Framework Agreement and the provisions of this Protocol.

Article 2

Amicable resolution of disputes

1. Disputes between States Parties arising out of the interpretation and/or implementation of the Framework Agreement shall, as far as possible, be resolved amicably.

2. If the dispute has not been resolved within a period of six months from the date on which either party to the dispute requested amicable settlement, either party to the dispute may, by written notice to all disputing parties and to the SAARC Arbitration Council, refer the dispute to the SAARC Arbitration Council.

Article 3

Choice of procedure

1. Where a dispute has been referred to the SAARC Arbitration Council in accordance with Article 2(2), the parties to the dispute shall proceed expeditiously to an exchange of views regarding the method of dispute settlement to be administered by the SAARC Arbitration Council.

2. If the parties to the dispute are unable to agree on the method of dispute settlement to be administered by the SAARC Arbitration Council within one month from the date on which the dispute was referred to the SAARC Arbitration Council in accordance with Article 2(2), either party may submit the dispute to arbitration in accordance with this Protocol.

3. Nothing in this Protocol impairs the right of any States Parties to agree at any time to settle a dispute between them arising out of the interpretation and/or implementation of the Framework Agreement by any peaceful means of their own choice.

Article 4

Institution of arbitration proceedings

Subject to the provisions of Article 3, any party to a dispute may submit the dispute to the arbitral procedure provided for in this Protocol by written notice of arbitration communicated to the other party or parties to the dispute and to the SAARC Arbitration Council. The notice of arbitration shall contain a brief statement of the claim and the grounds on which it is based.

Article 5

SAARC Arbitration Council

The SAARC Arbitration Council shall take charge of the archives of the arbitration proceedings. In addition, the SAARC Arbitration Council shall act as a channel of communication between the parties and the arbitral tribunal, provide secretariat services and/or serve as registry for the arbitration proceedings.

Article 6

Representation and assistance

Each State Party to the dispute shall appoint an agent. The parties may also be assisted by persons of their choice. The name and address of the agent shall be communicated in writing to the other party or parties to the dispute, to the SAARC Arbitration Council, and to the arbitral tribunal after it has been constituted.

Article 7

Constitution of the arbitral tribunal

1. Unless the parties to the dispute agree otherwise, the arbitral tribunal shall consist of three members.

2. The party instituting the arbitration proceedings shall appoint one member of the arbitral tribunal, who may be its national. The appointment shall be included in the notice of arbitration referred to in Article 4 of this Protocol.

3. The other party to the dispute shall, within 30 days of receipt of the notice of arbitration referred to in Article 4 of this Protocol, appoint one member of the arbitral tribunal, who may be its national. If the appointment is not made within that period, the party instituting the proceedings may, within 14 days of the expiration of that period, request that the appointment be made in accordance with paragraph 5 of this Article.

4. A third member of the arbitral tribunal, who may not be a national of a State Party to the dispute, shall be appointed by the parties to the dispute as the President of the arbitral tribunal. If, within 60 days of the receipt of the notice of arbitration referred to in Article 4 of this Protocol, the parties are unable to agree on the appointment of a third member of the arbitral tribunal, that appointment shall be made in accordance with paragraph 5 of this Article, at the request of a party to the dispute.

5. Unless the parties to the dispute agree otherwise, appointments made in accordance with this paragraph shall be made by the Director General of the SAARC Arbitration Council. If the Director General is unable to act under this paragraph or is a national of one of the parties to the dispute, the appointment shall be made by the next most senior member of staff of the SAARC Arbitration Council who is available and is not a national of one of the parties. The appointments referred to in this paragraph shall be made within a period of 30 days of the receipt of the request and in consultation with the parties. Subject to paragraph 3 of this Article, the members of the arbitral tribunal so appointed shall be of different nationalities and may not be in the service of, ordinarily resident in the territory of, or nationals of, any of the parties to the dispute.

6. Any vacancy in the arbitral tribunal shall be filled in the manner prescribed for the initial appointment.

7. Parties in the same interest shall appoint one member of the tribunal jointly by agreement.

8. In disputes involving more than two parties, the provisions of paragraph 1 to 6 of this Article shall apply to the maximum extent possible.

Article 8 *Challenge of arbitrators*

1. A prospective arbitrator shall disclose to those who approach him/her in connection with his/her possible appointment any circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him/her of these circumstances.

2. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

3. A party may challenge the arbitrator appointed by him/her only for reasons of which he/she becomes aware after the appointment has been made.

4. In the event that an arbitrator fails to act or in the event of the *de jure* or *de facto* impossibility of his or her performing his or her functions, the procedure in respect of the challenge of an arbitrator as provided in paragraphs 5 to 9 shall apply.

5. A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in paragraphs 1 to 4 became known to that party.

6. The notice of challenge shall be communicated to all other parties, to the arbitrator who is challenged, to the other arbitrators, and to the SAARC Arbitration Council. The notice of challenge shall state the reasons for the challenge.

7. When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.

8. If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the Director General of the SAARC Arbitration Council.

9. In rendering a decision on the challenge, the Director General of the SAARC Arbitration Council may indicate the reasons for the decision, unless the parties agree that no reasons shall be given.

Article 9

Jurisdiction of the arbitral tribunal

1. The arbitral tribunal shall have jurisdiction over any dispute arising out of the interpretation and/or implementation of the Framework Agreement which is submitted to it in accordance with this Protocol.

2. In the event of a dispute as to whether the arbitral tribunal has jurisdiction, the matter shall be settled by decision of the arbitral tribunal.

3. The arbitral tribunal may rule on a plea concerning its jurisdiction as a preliminary question or in its final award.

Article 10

Procedure

Unless the parties to the dispute otherwise agree, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties to the dispute are treated with equality and that at any stage of the proceedings each party is given a full opportunity to be heard and to present its case.

Article 11

Duties of the parties to a dispute

The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, in accordance with their law and using all means at their disposal, shall provide it with all relevant documents, facilities and information, and enable it when necessary to call witnesses or experts and receive their evidence and to visit the localities to which the case relates.

Article 12

Language

1. Unless otherwise agreed between the parties to the dispute, the language to be used in the arbitration proceedings shall be English. This shall apply to the parties' written pleadings and to any oral hearings that may take place.

2. The arbitral tribunal may order that any documents annexed to the parties' written pleadings, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into English, or into any other language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 13

Experts appointed by the arbitral tribunal

1. The arbitral tribunal may, at the request of a party or *proprio motu*, select in consultation with the parties one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The parties shall give the expert any relevant information or produce for his/her inspection any relevant documents or goods that he/she may request of them. Any dispute between a party and such expert as to the relevance and appropriateness of the required information or production shall be referred to the arbitral tribunal for decision.

3. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his/her report.

Article 14

Provisional Measures

1. The arbitral tribunal may, at the request of a party, prescribe any provisional measures it considers appropriate.

2. The party requesting provisional measures under paragraph 1 shall satisfy the arbitral tribunal that:

(a) the arbitral tribunal has *prima facie* jurisdiction;

(b) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(c) there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

3. Any determination made by the arbitral tribunal in respect of paragraph 2 shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

4. The arbitral tribunal may modify, suspend, or terminate a provisional measure it has granted, upon the request of a party to the dispute and after the parties have been given an opportunity to be heard.

Article 15

Decisions

1. Decisions of the arbitral tribunal shall be taken by a majority vote of its members. In the event of an equality of votes, the President shall have a casting vote.

2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorises, the presiding arbitrator may decide on his/her own, subject to revision, if any, by the arbitral tribunal.

Article 16

Applicable law

1. The arbitral tribunal shall decide the issues in dispute in accordance with the rules and principles of international law.

2. This provision shall not prejudice the power of the arbitral tribunal to decide a case *ex aequo et bono*, if the parties agree thereto.

Article 17

Default of appearance

If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.

Article 18

The arbitral award

1. The arbitral tribunal may make separate awards on different issues at different times.

2. All awards shall be made in writing, and the arbitral tribunal shall state the reasons upon which the award is based.

3. The arbitral award shall contain the names of the members who have participated and the date of the award, and shall be signed by all members of the tribunal. Any member of

the tribunal may attach a separate or dissenting opinion to the award.

Article 19
Finality of the award

The arbitral award shall be final and binding on the parties. The parties shall carry out all awards without delay.

Article 20
Interpretation or implementation of the award

Any controversy which may arise between the parties to the dispute as regards the interpretation or manner of implementation of the award may be submitted by either party for decision to the arbitral tribunal which made the award. For this purpose, any vacancy in the tribunal shall be filled in the manner provided for in the original appointments of the members of the tribunal.

Article 21
Expenses

Unless the arbitral tribunal decides otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares.

SAARC INTER-STATE DISPUTE SETTLEMENT MECHANISM TEMPLATE

** References to the “Agreement” will need to be modified in respect of the specific treaty in question, or suitably defined in a relevant provision.*

*** References to the “Section” will need to be modified to refer to the relevant Section or Part, as used within the treaty in question.*

SETTLEMENT OF DISPUTES

Article 1

Amicable resolution of disputes

1. Disputes between States Parties arising out of the interpretation and/or implementation of this Agreement shall, as far as possible, be resolved amicably.

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2. If the parties to the dispute are unable to agree on the method of dispute settlement to be administered by the SAARC Arbitration Council within one month from the date on which the dispute was referred to the SAARC Arbitration Council in accordance with Article 1(2), either party may submit the dispute to arbitration in accordance with the following provisions of this Section.

3. Nothing in this Section impairs the right of any States Parties to agree at any time to settle a dispute between them arising out of the interpretation and/or implementation of the Agreement by any peaceful means of their own choice.

Article 3

Institution of arbitration proceedings

Subject to the provisions of Article 2, any party to a dispute may submit the dispute to the arbitral procedure provided for in this Protocol by written notice of arbitration communicated to the other party or parties to the dispute and to the SAARC Arbitration Council. The notice of arbitration shall contain a brief statement of the claim and the grounds on which it is based.

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1. Decisions of the arbitral tribunal shall be taken by a majority vote of its members. In the event of an equality of votes, the President shall have a casting vote.

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Finality of the award

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Interpretation or implementation of the award

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interpretation or manner of implementation of the award may be submitted by either party for decision to the arbitral tribunal which made the award. For this purpose, any vacancy in the tribunal shall be filled in the manner provided for in the original appointments of the members of the tribunal.

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Unless the arbitral tribunal decides otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares.