Discussions of "Draft Agreement" & "Draft Rules of Procedure"

A NEW APPROACH FOR THE SETTLEMENT OF REGIONAL DISPUTES TO MAINTAIN DYNAMIC STABILITY—A SELECTIVE ELABORATION OF THE DRAFT AGREEMENT ON THE ESTABLISHMENT OF THE ASIA-PACIFIC REGIONAL MEDIATION ORGANIZATION

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ABSTRACT

The Draft "Agreement on the Establishment of the Asia-Pacific Regional Mediation Organization" (hereinafter "ARMO Agreement") and its supplementary Draft "Rules of Procedure for Mediation Conducted under the Asia-Pacific Regional Mediation Organization" coauthored by eleven Asia-Pacific like-minded colleagues have been released. This paper aims to provide some background information and elaborate on the essential features of the ARMO Agreement. It discusses the following elements and principles embedded in the text: the expectation of achieving a dynamic and prosperous stability in the region; the encouragement mechanism for countries to participate in the organization; the broad scope of its jurisdiction; the maintenance of ultimate control

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by the parties in entering into the procedure and concluding the settlement agreement; its additional complementary functions to support other international agreements; the elements of impartiality, efficiency, flexibility and quality assurance underlying the Asia-Pacific Regional Mediation Organization (hereinafter "ARMO") mechanism; and the minimalism in its institutional and financial arrangements. The paper concludes that the new ARMO mechanism is in line with the traditionally non-litigious attitude of most Asian countries in their international relations and should be practical and useful for the Asia-Pacific community to resolve their disputes.

KEYWORDS: ad hoc *mediation, ARMO, Asia-Pacific region, institutional mediation, mediation, State-to-State dispute settlement*

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I. THE ORIGINS OF ARMO

This paper analyses salient points of the Draft "Agreement on the Establishment of the Asia-Pacific Regional Mediation Organization" (hereinafter "ARMO Agreement") together with the supplementary Draft "Rules of Procedure for Mediation Conducted under the Asia-Pacific Regional Mediation Organization" (hereinafter "ARMO Rules of Procedure"), which were coauthored by eleven Asia-Pacific like-minded colleagues[1] and have just been released.[2] The authors wish to provide some background information and to elaborate on the essential features of the ARMO Agreement so that it can be properly assessed and appreciated by the potential users of the draft documents.

A. Inception of the ARMO Concept

The origins of Asia-Pacific Regional Mediation Organization (hereinafter "ARMO"), and the concept of a permanent regional mediation mechanism for Asian countries can be traced to suggestions made in two early book chapters[3] by one of the authors of this paper. In these book chapters, it was observed that a number of regional courts having specific or general jurisdictions existed in other areas of the globe, while in contrast, in Asia, there is a lack of a regional dispute settlement mechanism for members of the region to rely on to resolve their disputes. The author observed that Asian countries have accepted detailed rule-based dispute settlement mechanisms mainly under trade agreements, but not many of them are in support of such dispute settlement mechanisms in other fields of international relations. He argued that since some Asian countries do not intend to internationalize their disputes by submitting their regional disputes to a multilateral dispute settlement mechanism, there is a need to create a permanent regional mechanism for the purpose of resolving regional disputes. It was further suggested that such mechanism should not force Asian countries to change their general non-litigious practices toward the settlement of disputes, but should provide efficient and professional solutions for intra-Asia disputes.

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[1] The coauthors of these documents include Chang-fa Lo, Junji Nakagawa, Rajesh Sharma, Tsai-yu Lin, Lisa Toohey, Joseph Koesnaidi, Jaemin Lee, Tomohiko Kobayashi, R.V. Anuradha, Julien Chaisse, and R. Rajesh Babu.

[2] The texts of these documents are published at this same issue of Asian Journal of WTO & International Health Law and Policy (AJWH).

[3] Chang-fa Lo, *On the Establishment of a Regional Permanent Mediation Mechanism for Disputes Among East and Southeast Asian Countries*, *in* LEGAL THOUGHTS BETWEEN THE EAST AND THE WEST IN THE MULTILEVEL LEGAL ORDER: A LIBER AMICORUM IN HONOR OF PROFESSOR HERBERT HAN-PAO MA 335 (Chang-fa Lo et al. eds., 2016); Chang-fa Lo, *Establishing Permanent Regional Good Offices for Trade Disputes in Asia*, *in* ESTABLISHING JUDICIAL AUTHORITY IN INTERNATIONAL ECONOMIC LAW 78 (Joanna Jemielniak et al. eds., 2016).

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The author further observed that a rule-based mechanism has been very effective in certain Western regions. However, from an Asian approach, a friendlier mechanism is more practical for the purpose of maintaining harmonious relations. He thus proposed to establish a permanent mediation mechanism under a new regional treaty to facilitate the voluntary resolution of Asian regional disputes.

B. Initial Work on the ARMO and the Formation of the ARMO Working Group

The idea of creating a regional permanent mediation organization for Asia-Pacific States/Economies to resolve their disputes in a peaceful and friendly manner was proposed during the 2017 annual meeting of the Asia WTO Research Network (hereinafter "AWRN"),[4] which is a platform for Asian World Trade Organization (hereinafter "WTO") and international economic law scholars and experts to exchange their views and cooperate on related issues for its Members to consider. The AWRN later decided to establish the ARMO Working Group (hereinafter "Working Group") to conduct further research and to decide whether and how to promote the idea.

The Working Group decided to launch the ARMO initiative. In November 2017, the Working Group members jointly published the "Concept Paper on the Creation of a Permanent 'Asia-Pacific Regional Mediation Organization' for State-to-State (Economy-to-Economy) Disputes" (hereinafter "Concept Paper").[5] In this Concept Paper, they explained why the current dispute settlement mechanisms are insufficient to handle State-to-State disputes for Asia-Pacific countries. They also proposed certain features of the ARMO based on their initial design and provided reasons for Asia-Pacific countries to trust the ARMO. They addressed some potential questions which may be raised by stakeholders interested in the proper resolution of disputes for the region. These potential questions include: what is considered as the "Asia-Pacific" region for the purpose of the ARMO; what are the reasons for the initiative to only include the "Asia-Pacific" region; whether there is an "Asia-Pacific way" of dispute resolution; whether the ARMO mediation would merely prolong or delay the dispute settlement procedures; what are the reasons why

[4] The Asia World Trade Organization Research Network [hereinafter AWRN] was created in 1995. It has 52 members from 17 jurisdictions of Asia-Pacific region. Its official website is http://www.awrn.asia/index.php. The 2017 annual meeting was held on June 5 and 6, 2017 in Taiwan, cohosted by AWRN and the Asian Center for WTO & International Health Law and Policy (ACWH), National Taiwan University College of Law.

[5] *See generally* Chang-fa Lo et al., *Concept Paper on the Creation of a Permanent "Asia-Pacific Regional Mediation Organization" for State-to-State (Economy-to-Economy) Disputes*, 10(2) CONTEMP. ASIA ARB. J. 321 (2017).

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Asia-Pacific countries continue to only rely on non-binding mechanisms, and not court-style dispute settlement mechanisms; whether an enforcement of the mediated settlement agreement could be an issue; whether there is any substantive law to be applied by the ARMO; what would be the ARMO's relationship with existing or future dispute settlement mechanisms in free trade agreements, bilateral investment agreements and other agreements which have friendly dispute settlement provisions; what would be the ARMO's relationship with the dispute settlement mechanism under the WTO; whether the ARMO mechanism would encourage forum shopping; whether smaller countries would be overwhelmed by bigger countries in the mediation; whether the ARMO mechanism would worsen the fragmentation of international law; what would be the economies of scale and financial resources of the ARMO; and whether the Asia-Pacific region should take global leadership in providing non-adjudicated solutions to some of the pressing global and regional issues.

After the Concept Paper was published, members of the Working Group circulated it and presented the ideas of the ARMO at different forums in the region. Having received positive and encouraging feedbacks, the members of the Working Group commenced with the preparation of working documents to generate more discussion on and support for the ARMO, with the goal of eventually seeing the concept and objectives of the ARMO materialized. The members discussed the detailed features of the ARMO in the Working Group and jointly produced the abovementioned ARMO Agreement and the ARMO Rules of Procedure.

II. THE NECESSITY OF THE "NEW APPROACH" TO THE SETTLEMENT OF REGIONAL DISPUTES

The ARMO is a permanent platform/facility for the parties to use. This is different from the traditional situation in Asia-Pacific region where there is no such readily available standing mechanism for countries in the region to rely on. Although there are mediation provisions in some trade agreements concluded between Asia-Pacific countries, such mediations can usually only be conducted under ad hoc mediation, not by institutional mediation, and are often not considered as effective.

The ARMO approach is also different from the so-called traditional approaches used by Asia-Pacific countries to resolve their disputes. Although there is no uniform method of addressing disputes arising from this region, there is likewise no regional court or court-style dispute settlement mechanism covering Asia or Asia-Pacific region. While Asia-Pacific countries are not hesitant to engage in adjudicative (or semi-adjudicative) methods of dispute settlement for trade matters, such as

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the dispute settlement procedure under the WTO, in other fields of international disputes, they do not have the consistent practice or culture of relying on rule-based binding procedures. However, this is not to say that there cannot be, or should not be, a rule-based binding dispute settlement mechanism for this region in the long run.

There are a number of good reasons for Asia-Pacific countries to support such an approach. First, and perhaps the most obvious reason, is that there have been many disputes (including a number of boundary disputes) which have occurred in the past between States/Economies in the Asia-Pacific region and there may be many more occurring in the future. Allowing a dispute to remain unresolved simply because the relevant parties insist on their respective positions and cannot agree on the method of resolution would not serve their best interests. However, it is also true that some parties are not yet ready to accept any clear-cut answer to sensitive issues through an adjudicative proceeding, which could leave little or no leeway for them to make different or additional claims in the future. It is thus desirable to have a mechanism which is efficient enough to deal with respective issues, but flexible enough to allow the disputing parties to create a win-win situation and to engage in practical cooperation without sacrificing their core interests.

The ARMO provides services to help the parties to come to their own conclusion to resolve their disputes. It will not take any legal or political position in relation to the particular issue submitted to it for resolution. This feature could overcome some Asian countries' hesitation in submitting their dispute to an international forum and hopefully could change their practices and policies towards international dispute settlement and hence encourage the practical solution for their disputes.

The ARMO helps the parties find a win-win solution for their disputes. This is different from the traditional situations where some countries might want to decide to take the case to an international adjudicative body, but have received no cooperation from their counterparts; and where some other countries might decide to take the issue in their own hands to resolve it using their own political and economic strength, but have instead generated concern and distrust from other countries.

An ARMO mediation does not require mediators to always refrain from playing an active/positive role to help parties move forward and find their mutually acceptable solutions. If the parties so wish, the ARMO mediator should/could provide a proposal for the parties to consider. This is different from the traditional situation in the Asia-Pacific region where no single mechanism is providing the role of actively helping the disputing parties.

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III. THE NECESSITY OF DYNAMIC STABILITY

The main purpose of the ARMO is to assist disputing parties in resolving their dispute in a swift and peaceful manner,[6] to ensure that peace and stability of the region can be maintained. However, rather than countries refraining from initiating proceedings so as to maintain an illusive image of regional "stability", the ARMO provides active assistance to actually resolve their problems with the objective that differences or concerns within the region will not adversely affect peace and stability. In order to achieve this, there must be a proper mechanism to peacefully address the problem.

A win-win solution, as mentioned above, is somewhat different from the status arising from a strictly rule-based biding dispute settlement mechanism. Often, a rule-based mechanism is not able to attract all members in the region to participate. Hence, even if there could be a final decision rendered under such mechanism, some countries might not be willing to accept its jurisdiction over the issue. Thus, any stability arising from such rule-based dispute resolution mechanism might not be concrete and permanent.

If there is to be a win-win solution in terms of peaceful dispute resolution, the stability should not be merely static, but must be very dynamic. For instance, if a mediated settlement agreement between the relevant countries concerning a maritime dispute can be reached, the disputing parties would be able to set aside their difficult sovereignty and national boundary issues and focus on cooperation for the development of resources. This example of a win-win situation could form the basis of a new positive stability for the region.

IV. A CLOSED SYSTEM WITH SEMI-AUTOMATIC ACCESSION

There are certain principles and features that can be identified from the ARMO Agreement. The first principle/feature is that the ARMO mechanism is a closed system, but accession is semi-automatic.

The ARMO is a closed system in the sense that it only provides services for its Members and the Members are limited to the countries/economies from the Asia-Pacific region. Asia-Pacific countries which do not participate in the organization are not eligible to use ARMO mediation. Non-Asia-Pacific countries are not eligible to participate in the ARMO and hence are prevented from using its services. However, there is no provision in the ARMO Agreement as to the definition of "Asia-Pacific

[6] *See* Draft "Agreement on the Establishment of the Asia-Pacific Regional Mediation Organization", pmbl., ¶ 4 [hereinafter ARMO Agreement].

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region". As long as a country or economy can be considered in the broadly understood concept of Asian countries (economies), Pacific countries (economies), or Asia-Pacific countries (economies), it should be eligible and welcome to join the ARMO.

Moreover, it must be noted that the ARMO Agreement has a semi-automatic accession provision to allow and encourage Asia-Pacific countries and economies to participate in the mechanism. Article 28 of the ARMO Agreement thus provides: "This Agreement is open to accession by any Asia-Pacific State or Economy that is willing to comply with the provisions in this Agreement, following the approval in accordance with the applicable constitutional and/or legal procedures of the acceding State or Economy." An acceding party is not required to conduct complicated accession negotiations for the purpose of joining the organization. The purpose is to have more countries to be part of the ARMO so as to expand its positive influence and to achieve a wider prosperous and dynamic stability in the region.

V. ALL-INCLUSIVENESS CONCERNING THE KINDS OF DISPUTES COVERED

Article 2.2 of the ARMO Agreement provides in part that: "The jurisdiction of the ARMO shall extend to all kinds of legal and factual disputes, disagreements or any issues of concern (hereinafter together referred to as "disputes") between two or more Members . . . ." Thus, there is no restriction as to the type of dispute which may be covered under the ARMO Agreement. The cases could potentially include disputes involving trade, investment, financial agreements, the environment, fishery/maritime, and boundary issues, among others. As long as a dispute is between two or more ARMO Members, it can be submitted to the ARMO for proper resolution under its rules. Hence it should be a State-to-State (or an Economy-to-Economy) dispute. If a disputing party is not a sovereign State or an Economy (such as Hong Kong), the dispute cannot be handled under the ARMO. The ARMO is not designed to handle international commercial disputes or investor-State disputes, as there are already existing mediation institutions for international commercial disputes in the region, and there is the International Center for Settlement of Investment Disputes (hereinafter "ICSID") already providing conciliation services for investor-State disputes.[7]

The concept of "dispute" should be broadly understood. It is possible that a "dispute" has not been fully "formed" or "arisen" or a difference has

[7] *Overview of Conciliation Under the ICSID Convention*, ICSID, https://icsid.worldbank.org/en/Pages/process/ICSID-Convention-Conciliation.aspx (last visited Mar. 14, 2018).

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not yet been formally characterized as such by the relevant parties, but they have already started arguing on certain concrete (not abstract) issues. The ARMO could be requested to engage in such "dispute" at an early stage so as to even prevent a formal dispute from occurring. Hence, Article 2.2 uses the term "disputes", "disagreement", and "any issues of concern" to indicate the idea and desirability of an earlier engagement of the ARMO to address the disagreement, at a stage prior to when a formal dispute has already developed. However, the disagreement or issue of concern should be concrete and should not be merely an abstract or hypothetical issue.

Further, the nature of the dispute covered is not limited. It can be a mere legal dispute between the disputing parties (such as a dispute about the proper interpretation or application of a treaty provision) or factual dispute (such as whether a maritime boundary has been crossed by a fishing vessel). Hence Article 2.2 extends to all kinds of "legal and factual disputes". In most cases, disputes could involve both legal and factual aspects.

It must be noted again that the ARMO mechanism is not a rule-based dispute settlement mechanism. Hence, the mediator is not tasked to "find the fact" and "apply and interpret the applicable norm" in order to decide the case. The mediator is tasked with helping the parties resolve their dispute in a mutually acceptable manner. Only when the mediator is expected by the parties to make a suggestion for the parties to consider, then the mediator may include his opinion concerning the fact and the legal issue as an element in the suggestion.

VI. VOLUNTARY PARTICIPATION BY THE PARTIES

A very important principle of the ARMO mechanism is the voluntariness in the whole process. First, participation is wholly voluntary—Asia-Pacific countries can decide whether the ARMO mechanism is useful to their interests and whether to participate as a Member.

Second, even after having become an ARMO Member, a country can still separately decide whether to engage in a mediation proceeding for a specific dispute with its counterpart. Hence, the first sentence of Article 2.3 of the ARMO Agreement states that "[m]ediation is undertaken only when the parties to a dispute . . . so agree." The disputing parties must conclude an agreement to mutually decide to submit their dispute to the ARMO.

Third, after the parties have agreed on submitting their dispute to the ARMO, they can still decide whether to continue the proceeding and when to stop it. Hence the second sentence of Article 2.3 of the ARMO Agreement states that "[m]ediation may be requested at any time by any party to a dispute with the consent from the other party, and may be

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terminated at any time by any party."

VII. A Separate and Independent Dispute Settlement Mechanism with Complementary Functions

The ARMO is a separate international organization[8] and has a separate international legal personality.[9] It is not attached to or created under any existing international/regional agreement or organization. Hence, the disputing parties can mutually decide to have a dispute occurring under or in connection with any international agreement submitted to the ARMO. They can also use the ARMO facility to handle a dispute which occurs independently of any international agreement. Article 3.1 of the ARMO Agreement thus provides in part that "[t]he Members may agree to the use of ARMO mediation independently of . . . any mediation or conciliation provisions in any international agreement or organization of which they are contracting parties or members."

Although the ARMO is an independent dispute settlement mechanism, there is a need to coordinate with another international agreement when a dispute occurs under or in relation to such agreement. The relations can be characterized as "complementary to" and "fulfilling" the mechanisms in other international agreements.

First, it is possible in the future that a regional trade, investment or other agreement specifically cites the ARMO mechanism to be part of its dispute settlement mechanism. It is similar to the situation where ICSID arbitration or mediation is cited in an investment agreement as a mechanism for the settlement of investor-State dispute arising from the agreement.

Second, it is also possible that an international agreement does not mention the ARMO mechanism, but it includes a mediation mechanism as one of the dispute settlement mechanism under its text. If a dispute occurs and if the parties agree to resort to mediation, they can decide to have some kind of ad hoc mediation conducted under this international agreement. However, if the parties agree, they can also have their dispute under such international agreement submitted to the ARMO for resolution. The above two situations are covered by Article 3.1 of the ARMO Agreement which provides in part that "[t]he Members may agree to the use of ARMO mediation . . . based upon . . . any mediation or conciliation provisions in any international agreement or organization of which they are contracting parties or members." The term "mediation or conciliation provisions" includes the kind of provisions where the ARMO is specifically mentioned

[8] ARMO Agreement, *supra* note 6, art. 1 ("The Asia-Pacific Regional Mediation Organization (hereinafter referred to as the "ARMO") is hereby established.").
[9] *Id.* art. 18 ("The ARMO shall have full international legal personality. . . .").

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and the kind of provisions where no specific institutional mediation mechanism is cited.

Third, if two parties decide to resort to ARMO mediation, they are still entitled to the dispute settlement mechanism provided in their respective international agreements. For instance, even if two parties have already started ARMO mediation for a trade dispute, they can still decide to resort to the WTO dispute settlement mechanism (such as the panel and Appellate Body procedures) or the dispute settlement mechanism in their bilateral free trade agreement (such as the panel or arbitration procedure). Hence, Article 3.2 of the ARMO Agreement provides that "[m]ediation conducted under the ARMO is without prejudice to the rights of the parties to resolve their dispute under any other dispute settlement mechanism that is available to them.".

From the above explanation, it is clear that the ARMO has an important function in relation to other dispute settlement mechanisms. It helps complement and fulfill the dispute settlement mechanisms in other international agreements. Although ARMO Members should be expected to constantly rely on the ARMO mechanism to resolve disputes, the mechanism is not created to exclude its Members from resorting to any other international dispute settlement mechanism.

VIII. IMPARTIALITY, EFFICIENCY, FLEXIBILITY AND QUALITY ASSURANCE

A. Impartiality

It is important for the ARMO to be trusted and constantly used by its Members. There are a number of features in the ARMO Agreement to ensure the trust in the mechanism by its Members. First, although a mediator under the ARMO is not supposed to "decide" the dispute, it is still critical that the mediator conduct the procedure in an impartial manner. Any appearance of partiality could undermine the fundamental premise of the organization and jeopardize its operation.

Article 21.2 of the ARMO Agreement thus provides in part that: "The Rules of Procedure shall ensure the impartiality . . . of the mediation process . . . ." Although the wording of this provision seems to show that it is to guide the drafting and adoption of the "Rules of Procedure of Mediation Conducted under the Asia-Pacific Regional Mediation Organization",[10] it clearly also guides the actual operation of the ARMO mediation. A very important mechanism to ensure impartiality is to require avoidance of any conflict of interest and the observation of rules of ethics.

[10] *See id.* art. 21.2.

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In this regard, the Rules of Procedure have more detailed requirements about the ways of avoiding conflict of interest and observing rules of ethics by a mediator.[11]

Impartiality is also reflected in Article 7.1 of the ARMO Agreement which provides in part that "the Administrative Council shall not intervene in any ongoing mediation proceeding conducted under this Agreement and its rules of procedure. Nor shall it intervene in the conclusion of any settlement agreement by the parties."

B. Efficiency

Efficiency is also a very important element in order to earn and maintain the trust of the ARMO Members. Article 21 of the ARMO Agreement provides in part that: "The Rules of Procedure shall ensure the . . . efficiency of the mediation process . . . ." The efficiency principle is reflected in a number of provisions in the ARMO Rules of Procedure. For instance, the following provisions in the ARMO Rules of Procedure are designed to support the efficiency principle: Article 3.2(1) sets forth a time limit of 10 days for the disputing parties to agree on the selection of a sole mediator; Article 9.2 requires a mediator to be available at all times for the dispute for which is or she is appointed and to conduct the mediation with due diligence and make best efforts to ensure that the proceeding is conducted efficiently; Article 10 requires the mediator to prepare a schedule to include the specific dates for each party to submit relevant documents including a mediation plan and timeline for meetings; Article 13 sets forth a ten-day time limit for the parties to provide written submissions; and Article 16 sets forth a six-month period (with possible extensions) for the mediator to complete mediation.

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[11] Draft "Rules of Procedure for Mediation Conducted Under the Asia-Pacific Regional Mediation Organization" art. 5 reads:

> 1. A person who is approached by any party or by the Chairperson of the Administrative Council in connection with his or her proposed appointment as mediator must decline if such appointment may give rise to any conflict of interest or possible violation of the rules of ethics adopted by the Administrative Council.
> 2. If a proposed mediator considers that there is no conflict of interest and intends to accept the appointment, he or she must still disclose any circumstance likely to give rise to a reasonable doubt as to his or her independence or impartiality.
> 3. An appointed mediator must resign if a conflict of interest arises after the appointment. He or she shall also, from the time of appointment and throughout continuance of the mediation proceedings, without delay, disclose to the parties any circumstance referred to in the preceding paragraph.
> 4. Any proposal to disqualify a mediator for conflict of interest or any other justifiable cause shall be decided by the Chairperson of the Administrative Council in consultation with the parties. If the decision of disqualification is made, the vacancy shall be filled in accordance with the provisions of Article 3 of these Rules.

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C. Flexibility

Flexibility is a key principle to make the ARMO mechanism different from other rule-based dispute settlement mechanisms. This principle in the ARMO Agreement could reduce the hesitation of the parties, as it avoids engaging in a clear-cut adjudication process for issues involving their core interests. This principle also has the function of tailoring the specific process so as to suit the specific situation of the case and the needs of the parties.

Hence Article 21.2 provides in part that:

> They (i.e., the Rules of Procedure) shall also be *flexible enough* so as to assist the disputing parties to resolve their disputes in a mutually satisfactory manner. To that end, the Rules of Procedure shall allow the mediators to merely facilitate the negotiation between the parties, to assess the dispute for the parties if the mediators consider appropriate, or to draft settlement proposals of terms and conditions for the parties to consider if they so request (emphasis added).

The flexibility principle is particularly reflected in the following provisions in the ARMO Rules of Procedure: Article 9.4 requires a mediator to attempt to facilitate voluntary resolution of the dispute by the parties and endeavor to bring about settlement agreement between them upon mutually acceptable terms; Article 9.5 allows a mediator to flexibly assess and/or evaluate the dispute for the parties if he or she considers appropriate or if the parties so request; and Article 9.6 allows a mediator to help generate options or draft a settlement proposal, including specific terms and conditions, on the mediator's own initiative, or on the request of parties, at any stage of the proceedings and from time to time, for the consideration of the parties.

D. Quality Assurance

Quality assurance is another important principle embedded in the ARMO Agreement. Since the final outcome of the mediation should be ultimately decided by the disputing parties, it is not for the ARMO Agreement to suggest any kind of settlement agreement to be of higher quality. Quality assurance is reflected in the above-mentioned provisions on efficiency and impartiality. More importantly, it is also reflected in the quality of mediators. The ARMO Agreement requires the establishment of two kinds of Lists of Mediators, the Chairperson's List and the Members'

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List.[12] Mediators are generally appointed from these Lists.

Article 13 of the ARMO Agreement provides: "The Lists of Mediators shall be maintained by the Secretariat. The Lists shall consist of qualified persons, designated as hereinafter provided, who are willing to serve thereon." Article 15.1 further requires persons designated to a List of Mediator to "be of high moral character and recognized competence and experience in the fields of public international law, international trade or investment law, international dispute settlement and any other fields that the appointing Member or the Chairperson considers appropriate." Article 15.3 requires the Secretariat to "hold workshops for persons in the Lists from time to time to exchange their mediation experiences, to enrich their understanding of the spirit and essence of the ARMO, to be familiar with the rules of procedure of the mediation and the related rules of ethics under the ARMO, to enhance collegiality of the group and to improve their skills in conducting mediation."

IX. BINDING OBLIGATION UNDER THE SETTLEMENT AGREEMENT

As indicated above, the disputing parties can voluntarily decide whether to enter into a mediation proceeding for a specific dispute, whether and when to stop the proceeding, and whether and when to conclude a mediated settlement agreement. However, if they have concluded a settlement agreement, such agreement will be in the nature of a bilateral treaty, i.e., it should bind the parties. Article 22 of the ARMO Agreement provides: "Any settlement agreement duly concluded between disputing parties is binding upon them and shall be performed by them in good faith." Hence, the obligation of the parties to a settlement agreement is to perform the requirement provided in the agreement in an honest, fair and sympathetic manner.

The ARMO does not have a mechanism to enforce the mediated settlement agreement. It is theoretically true that such settlement agreement is of the nature of international treaty and should be subject to the enforcement mechanisms under international treaty law, including the Vienna Convention on the Law of Treaties. But the enforcement of a treaty obligation under general international law is not always effective. Hence, it would largely depend upon the parties' understanding of the desirability of complying with the settlement agreement.

However, for the following reasons, the authors are optimistic about the parties' performance of the settlement agreement. First, since the settlement agreement is voluntarily decided and agreed upon by the parties, the chances of the parties reneging on their obligations and not performing

[12] ARMO Agreement, *supra* note 6, art. 13.

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according to the agreed terms and conditions is limited. Second, the contents of the settlement agreement are usually mutually beneficial. It would serve the interest of the both parties to perform. Third, if an ARMO mediation is conducted also based on a mediation provision in a separate agreement (such as a free trade agreement), it is possible that the settlement agreement could be brought under the free trade agreement for purposes of implementation and enforcement.

X. MINIMALISM IN THE ARMO'S INSTITUTIONAL STRUCTURE AND FINANCIAL ARRANGEMENT

The drafters of the ARMO Agreement had "minimalism" in mind when designing the institutional aspect of the organization. Although the ARMO should be given international legal personality[13] as other international organizations, the ARMO's organizational structure is flat and its scale is relatively small.

A. ARMO Headquarters and Branch Offices

The draft ARMO Agreement provides for ARMO headquarters, whose location should be jointly decided by the Members. Thus, the ARMO Agreement leaves blank the location of its headquarters to be filled in by negotiators.[14] Very importantly, in order to enhance the provision of services by ARMO, the possibility of establishing branch offices is incorporated in the ARMO Agreement. In this regard, Article 4.2 provides:

> The Administrative Council may also decide to establish branch offices in different Members by a majority of two-thirds of the representatives either separately or in cooperation with existing inter-governmental organizations or not-for-profit non-governmental organizations. The Administrative Council shall establish guidelines for the cooperation with other organizations in establishing branch offices so as to make the criteria and selection process fair and transparent.

[13] *Id*. art. 18 ("The ARMO shall have full international legal personality and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions . . . .").

[14] *Id*. art. 4.1 ("The Headquarter of the ARMO shall be in **[ ]**. It may be moved to another place by decision of the Administrative Council adopted by a majority of two-thirds of the representatives designated under Article 5 of this Agreement.").

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B. ARMO Organizational Structure

The institutional framework of the ARMO is comprised of the Administrative Council, the Secretariat (with the Secretary-General and Deputy Secretaries-General) and the Lists of Mediators.

The Administrative Council, composed of representatives of all ARMO Members,[15] is responsible for decision-making. It has "the authority to adopt decisions on all matters under and related to this Agreement",[16] including adopting "any administrative, financial and auditing regulations of the ARMO", adopting "rules of procedure for mediation in addition to those provided in this Agreement", adopting "rules of ethics for mediators in addition to those provided in this Agreement and in the rules of procedure for mediation", determining "the conditions of service of the Secretary-General and of any Deputy Secretary-General", adopting "the annual budget of revenue and expenditures of the ARMO prepared by the Secretariat", approving "the annual report on the operation of the ARMO prepared by the Secretariat", deciding "any other matters related to this Agreement",[17] creating "such committees as it considers necessary",[18] and exercising other authorities and performing other functions as it determines to be necessary for the implementation of this Agreement.[19]

According to Article 8 of the ARMO Agreement, the Administrative Council shall hold an annual meeting and such other meetings as may be determined by the Administrative Council, or convened by the Chairperson, or convened by the Secretary-General at the request of not less than five representatives. It is expected that the Administrative Council will make decisions based on consensus. Hence Article 6.6 of the ARMO Agreement provides:

> Each Member has one vote in the Administrative Council, exercised by its representative. The representatives shall make efforts to adopt decisions of the Administrative Council by consensus. However, if consensus cannot be reached, the decisions shall be made by a majority of the representatives present and voting, except otherwise provided in this Agreement.

The drafters also expect the Administrative Council's meetings be convened in an efficient way. Article 6.7 of the ARMO Agreement thus

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[15] *Id.* art. 6.1.
[16] *Id.* art. 7.1.
[17] *Id.* art. 7.2.
[18] *Id.* art. 7.3.
[19] *Id.* art. 7.4.

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provides:

> The Administrative Council may establish, by a majority of two-thirds of the representatives, a procedure whereby a representative may join the discussion and cast his/her vote through video conference or other electronic means in a meeting of the Administrative Council, and additional procedures to facilitate the discussion of matters and adoption of decisions through virtual meeting.

The Secretariat consists of a Secretary-General, one or more Deputy Secretaries-General and staff.[20] Article 11.1 of the ARMO Agreement requires the Secretary-General and any Deputy Secretary-General to "be elected by the Administrative Council by a majority of two-thirds of representatives upon the nomination of the Chairperson for a four-year term of service" and not to be eligible for re-election. It is expected that these are fulltime positions. As such, Article 11.2 provides that "The Secretary-General and Deputy Secretary-General shall not hold any other employment nor engage in any other occupation except as approved by the Administrative Council." Institutionally, the Secretary-General is ARMO's legal representative; administratively, he or she is ARMO's principal officer; functionally, he or she is the registrar of ARMO mediation cases. Hence Article 12 provides that "The Secretary-General shall be the legal representative and the principal officer of the ARMO and shall be responsible for its administration, including the appointment of staff, in accordance with the provisions of this Agreement and for the implementation of rules adopted by the Administrative Council" and that he or she "shall also perform the function of registrar and shall have the power to authenticate settlement agreement concluded by the parties pursuant to this Agreement."

C. List of Mediators

The ARMO Secretariat will also maintain Lists of Mediators.[21] Each Member is entitled to designate to the Members' List of Mediators up to four persons who may but need not be its nationals.[22] The Chairperson of the Administrative Council is entitled to designate up to ten persons to the Chairperson's List of Mediators with different nationality/citizenship.[23]

In order to accumulate experience, there is no limit to the renewal of

[20] *Id.* art. 10.
[21] *Id.* art. 13.
[22] *Id.* art. 14.1.
[23] *Id.* art. 14.2.

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designations of qualified persons in the Lists. Article 16.1 provides in this regard that:

> Persons designated to a List shall serve for renewable periods of six years. However, the term for two of the four persons designated by a Member and for five of the ten persons designated by the Chairperson of the Administrative Council immediately after the entry into force of this Agreement shall serve for a period of three years, to be determined by the designating Member or the Chairperson respectively. If they are re-designated after the expiration of their terms, they shall serve for renewable periods of six years.

D. Financial Arrangements

Financially, the ARMO is also designed to follow the idea of minimalism. Donation is encouraged and expenditure is expected to be kept at a minimum level. These are reflected in Article 17 of the ARMO Agreement. It reads:

> 1. Each Member shall contribute to the ARMO its share in accordance with the financial regulations adopted by the Administrative Council. Additionally, Members are encouraged to donate in-kind support such as office facilities and to provide other financial support to the ARMO to enable its operation.
> 2. The expenditure of the ARMO should be kept at a reasonably minimum level so that the Members' contribution would not become an excessive burden to them. When adopting the financial regulations, the Administrative Council shall take the respective levels of economic development and the scales of the economies of the Members into consideration.

In these provisions, the economic circumstances of the Members are taken into account so as not to discourage less financially capable countries from participating in the organization. It is hoped that those countries which are more financially capable will be able to voluntarily contribute more. Such greater but voluntary contribution should be a very positive element in the operation of the ARMO.

XI. SOME CONCLUDING REMARKS

The ARMO is a new mechanism for the Asia-Pacific community to resolve their disputes. Although it is new, the idea is in line with the

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traditional non-litigious attitude of most Asian countries in their international relations. The authors trust there are reasons for Asia-Pacific members to consider adopting the ARMO mechanism due to the following elements and principles embedded in the text: the expectation of achieving a dynamic and prosperous stability in the region; the encouragement mechanism for countries to participate in the organization; the broad scope of its jurisdiction; the maintenance of ultimate control by the parties in entering into the procedure and concluding the settlement agreement; its additional complementary functions to support other international agreements; the elements of impartiality, efficiency, flexibility and quality assurance underlying the ARMO mechanism; and the minimalism in its institutional and financial arrangements.

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