MEDIATION RULES OF THE ARMO FOR STATE-TO-STATE DISPUTES: EFFECTIVE, EFFICIENT AND PRACTICAL

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ABSTRACT

The purpose of the proposed Asia-Pacific Regional Mediation Organization (hereinafter "ARMO") is to promote mediation as a means of dispute resolution process for State-to-State or Economy-to-Economy disputes. As widely accepted in the Asian culture, it is believed that mediation is the best way to resolve such disputes. In this regard, the ARMO has proposed a set of effective, efficient and practical mediation rules, Draft "Rules of Procedure for Mediation Conducted Under the Asia-Pacific Regional Mediation Organization" (hereinafter "ARMO Rules of Procedure"). The ARMO Rules of Procedure are guided by the principle of maintaining friendly relationships as well as reaching a peaceful resolution of disputes between members of the ARMO. The main aim of these rules is to provide an alternative and not a competing forum of dispute resolution. This paper highlights the salient as well as the unique features of ARMO Rules of Procedure.

KEYWORDS: *State-to-State dispute, Economy-to-Economy dispute, mediation, Asia-Pacific Mediation Organization, mediation rules of Asia-Pacific Mediation Organization, dispute resolution*

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The Asia-Pacific Regional Mediation Organization (hereinafter "ARMO") has envisaged that all or any disputes between State-to-State or Economy-to-Economy should be resolved through mediation, and in this regard the ARMO has proposed a set of effective, efficient and practical mediation rules — Draft "Rules of Procedure for Mediation Conducted Under the Asia-Pacific Regional Mediation Organization" (hereinafter "ARMO Rules of Procedure"). The ARMO Rules of Procedure are guided by the principle of maintaining friendly relationships as well as reaching a peaceful resolution of disputes between members of the ARMO. In any event, the creation of the ARMO is based on the idea of providing an alternative forum of dispute resolution and certainly not a competing forum of dispute resolution for States and economies.

I. GOVERNING RULES

Any mediation under the auspices of the ARMO will be conducted by using these rules and in accordance with the provisions of the Draft "Agreement on the Establishment of the Asia-Pacific Regional Mediation Organization" (ARMO Agreement).[1] The ARMO Rules of Procedure provide flexibility to disputing parties (hereinafter "parties") in terms of agreeing to additional rules which may help to conduct mediation.[2] These rules also allow disputing parties to use other mediation rules to which they are party, insofar as those rules do not contradict the ARMO Rules of Procedure.[3] This particular provision of the ARMO Rules of Procedure indicates two things. First, any disputes arising under World Trade Organization (hereinafter "WTO") or Free Trade Agreements (hereinafter "FTAs") or any other organizations or agreements may also be resolved through the ARMO. Second, while resolving any disputes under the ARMO, the ARMO Rules of Procedure take precedence over other mediation rules. In this way, disputing parties get an alternative forum to resolve their dispute and at the same time the ARMO Rules of Procedure maintain their identity. In any event, the creation of the ARMO is based on the idea of providing an alternative forum of dispute resolution and certainly not a competing forum of dispute resolution for States and economies.

[1] Draft "Rules of Procedure for Mediation Conducted Under the Asia-Pacific Regional Mediation Organization" art. 1.1 [hereinafter ARMO Rules of Procedure]. The text of this document is published at this same issue of Asian Journal of WTO & International Health Law and Policy (AJWH).
[2] *Id.* art. 1.2.
[3] *Id.* art. 1.3.

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The ARMO Rules of Procedure have predicated a situation in which there is a mediation procedure which may not be covered under the ARMO Rules of Procedure or rules of other organizations or agreements or even under the additional rules agreed by the disputing parties. In such a situation the mediator has the power to decide the issue related to that mediation procedure.[4] The reason for placing this ultimate default power in the hands of the mediator is a practical one which helps the smooth and fair continuation of mediation. If such situations are left in the hands of disputing parties, at that stage of mediation, it may derail the process for the want of an agreement between those parties.

II. REQUEST FOR MEDIATION, COMMENCEMENT OF MEDIATION AND MERGER OF MEDIATION

A request for mediation (hereinafter "Mediation Request") under the ARMO is made in writing.[5] The Mediation Request should contain the issues in dispute, the parties involved and more importantly their consent to mediation.[6] A Mediation Request may also be made by two or more parties to resolve a dispute between themselves or against another party or parties.[7] In the situation where two parties make a Mediation Request to resolve a dispute between them, a joint Mediation Request may be considered as their consent to mediation.

The Mediation Request should be addressed to the Secretary-General of the ARMO who will register the dispute and notify the parties about the registration.[8] A copy of the Mediation Request is also sent by the Secretary General to the other party or parties if the Mediation Request is not filed jointly.[9] The registration of the dispute is the significant step as it sets off the process of commencement of mediation.[10] Any time limit, duties or obligations, in relation to mediation, are counted from the date of the commencement of the mediation, which coincides with the date of the registration of the dispute by the Secretary-General. Although there is a provision for a non-refundable filing fee with the Mediation Request,[11] any non-payment of that non-refundable filing fee, at the time of filing of the Mediation Request, may not delay the registration process.[12] As the ARMO

[4] *Id.* art. 1.4.
[5] *Id.* art. 2.1.
[6] *Id.* art. 2.3.
[7] *Id.* art. 2.2.
[8] *Id.* arts. 2.1, 2.4.
[9] *Id.* art. 2.1.
[10] *Id.* art. 2.6.
[11] *Id.* art. 18.1.
[12] Article 2 of the ARMO Rules of Procedure does not require filing fee to be paid at the time of making the Mediation Request. Moreover, Article 18.1 of the ARMO Rules of Procedure only indicates that "a non-refundable filing fee of [ ] shall be charged for every request of mediation"

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Rules of Procedure are practical and efficient, any such required fee may be collected later.

It is possible that in State-to-State dispute or Economy-to-Economy dispute there may exist multiple disputes or cross claims among parties. In order to avoid multiple disputes running concurrently and also to reach an amicable settlement for all disputes the ARMO Rules of Procedure allow parties to merge separate and concurrent mediation processes into one mediation process.[13] For the purpose of the merger of concurrent mediation processes, the parties' agreement is required. This provision of the ARMO Rules of Procedure reflects the efficiency of the Rules in dealing with multiple disputes.

III. APPOINTMENT OF MEDIATORS

The ARMO maintains two types of Lists of Mediators. One list contains the mediators nominated by members, which is called the "List of Mediators Nominated by the Members". The second list contains the mediators who are nominated by the Chairperson of the Administrative Council of the ARMO, which is referred to as the "List of Mediators Nominated by the Chairperson of the Administrative Council".

In any mediation, parties may first decide if they want to use a sole mediator or three mediators to resolve their dispute.[14] However, if parties do not agree on the number of mediators then as a default rule a sole mediator will be appointed by the Chairperson of the Administrative Council of the ARMO from the Chairperson's List of Mediators to conduct mediation. If parties decide to use a sole mediator then the parties must agree on a mediator from the Chairperson's List.[15] In general parties have a maximum of fourteen days from the date of registration of the dispute to appoint mediators; however in a situation of sole mediators parties must agree to appoint a mediator within ten days from the date of the registration of the dispute otherwise the Chairman of the Administrative Council may exercise its power to appoint one from the Chairperson's List.[16] Once again, the fewer number of days for the appointment of a mediator in a

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but it does not give indication as to the timing of this payment. Article 18.5 of the ARMO Rules of Procedure provides for the mechanism of advance payment as well as full payment of the remaining amount after the conclusion of the mediation and before the issuance of the mediation report or the settlement agreement. A cumulative reading of these articles leads to conclude that filing fee is not the condition precedence for the registration of the Mediation Request. In any event, such filing fee may be collected like any other expenses either as an advance before the first mediation meeting or as a part of remaining amount after the conclusion of the mediation but before the mediation report or the settlement agreement is issued. *Id.* arts. 2, 18.1, 18.5.

[13] *Id.* art. 2.5.

[14] *Id.* art. 3.2.

[15] *Id.* arts. 3.2(1), 3.4.

[16] *Id.* arts. 3.1, 3.2(1).

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situation of sole mediator shows the efficiency of the ARMO Rules of Procedure. It is anticipated that if parties could agree on a sole mediator then they should also be in agreement on the appointment of the sole mediator as soon as possible.[17]

If parties agree to have three mediators to resolve their dispute then each party may appoint a mediator from the Member's List of Mediators.[18] It is not necessary that a party must appoint a mediator from its own Member's List of Mediators. The ARMO Rules of Procedure allow parties to appoint a mediator from their own list or from another Member's List of Mediators.[19] It is also possible for a party to appoint its mediator from the Chairperson's List. Such flexibility in selection of a mediator gives wider choice to a party, which may be helpful in making the mediation process efficient and practical by selecting a mediator who is more suitable for a particular type of dispute and who is available for the mediation. If a party is entitled to appoint a mediator but tries to delay the appointment beyond the maximum period of fourteen days from the date of the registration of dispute then the Chairperson of the Administrative Council of the ARMO may exercise its power in default to appoint a mediator from the Member's List of Mediators on behalf of that party.[20]

The third mediator, who will be the chairman of the mediation, must be appointed by the Chairperson of the Administrative Council of the ARMO from the Chairpersons' List of mediators.[21]

As the ARMO Rules of Procedure allow a merger of concurrent mediation proceedings, these rules also allow those parties to mutually agree on the method of appointment of up to three mediators to conduct their mediation.[22] In a situation where parties do not agree on the number of mediators or the process of appointment then the Chairperson of the Administrative Council may appoint a sole mediator from the Chairman's List of Mediators as a default rule.[23] It is important that the mediation process to resolve a dispute must carry on and it must not be derailed or delayed due to parties' reluctance to perform their part of their obligations. Such default rules make the ARMO Rules of Procedure efficient, effective and practical.

[17] *Id.* art. 3.1.
[18] *Id.* art. 3.2(2). The fee payable to a party appointed mediator may be agreed between the mediator and the party appointing him or her separately. *Id.* art. 18.3.
[19] *Id.* art. 3.6.
[20] *Id.* art. 3.5.
[21] *Id.* art. 3.2(2).
[22] *Id.* art. 3.3.
[23] *Id.* arts. 3.4-3.5.

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IV. REPLACEMENT OF A MEDIATOR

The ARMO Rules of Procedure focus on continuity and stability of mediation, therefore they provide certainty about mediators once they are appointed. Once a mediator or mediators are appointed they are free from any political or governmental influence during the process of mediation. As the mediators are selected from the Member's List of Mediators which is recommended by Members, it may be possible that due to political reasons a mediator on the Mediator's List may be replaced or removed or renewed by a Member after his or her appointment as a mediator in a dispute. In order to avoid any complication related to this, the ARMO Rules of Procedure state that a mediator must continue in that capacity to serve and his or her appointment must remain unchanged notwithstanding that he or she ceases to be on any List of Mediators.[24] Only when a mediator dies, or becomes incapacitated or resigns is he or she replaced and any replacement or mediator follows the same process of appointment.[25]

V. CONFLICT OF INTERESTS AND DISQUALIFICATION OF A MEDIATOR

The ARMO Rules of Procedure mandate strict compliance with avoidance of conflict of interests and upholding the ARMO's ethical rules. Therefore, these rules require that a person who is approached for appointment as a mediator must decline any such offer of appointment which may give rise to any conflict of interest or possible violation of the ethical rules of the ARMO.[26] In a situation which does not create any conflict of interest, the person may accept the appointment as a mediator but must disclose any circumstances likely to give rise to a reasonable doubt as to his or her independence and impartiality.[27] The standard as adopted by the ARMO Rules of Procedure is the likelihood of "reasonable doubt". There is an ongoing obligation on the mediator during his or her appointment as mediator to disclose any circumstances which may be likely to give rise to a reasonable doubt, as soon as possible.[28] The simple recourse in the situation of a conflict of interest as recommended by the ARMO Rules of Procedure is that the conflicted mediator should resign.[29] If the conflicted mediator fails or refuses to resign then the complaining party may approach the Chairperson of the Administrative Council of the

[24] *Id.* art. 4.1.
[25] *Id.* art. 4.2.
[26] *Id.* art. 5.1.
[27] *Id.* art. 5.2.
[28] *Id.* art. 5.3.
[29] *Id.*

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ARMO to decide the issue. The Chairperson will make any decision on this issue with the consultation of the parties.[30] The involvement of the Chairperson of the Administrative Council is an important step for the fair resolution of such disputes to maintain the integrity of the process. If such a decision is left in the hands of the other two mediators (in the case of there being three mediators) then it may create a further complication. If a mediator is disqualified by the Chairperson due to a conflict of interest then he or she will be removed and the replacement procedure for the appointment of a mediator will commence following the rules relating to the appointment of a mediator.[31]

VI. PRESUMPTION OF COMPETENCE OF THE MEDIATOR

Under the ARMO Rules of Procedure there is a general presumption that a mediator is competent to conduct the mediation for which he or she has been appointed.[32] If any party has any objection in regards to the jurisdiction of the ARMO or any part of the dispute which is beyond the competence of the mediator, then such objections can be resolved through discussion between the mediator and the parties.[33] It is expected that such discussion will result in a possible agreement between the parties to bring those matters within the competence of the Mediator. However, if a party still insists on the objection then it would be considered that the parties do not agree to proceed with the mediation in its entirety and the mediation will be terminated.[34] If a certain part of the dispute is the bone of contention then it will be considered that the mediation proceeding for this part of the dispute has been terminated while the other aspects of the dispute will continue.[35] This rule, whilst respecting the parties' autonomy, ensures that it is highly unlikely that the whole mediation may be terminated for the reason of the lack of competency. This is because at the time of filing of Mediation Request, one of the requirements is to give evidence of consent to mediation. Once such consent is present it is generally or in practice not possible to terminate the whole mediation. However, it is possible to find that one or a few aspects of the dispute may not be within the competence of the mediator. This is possible only when such a part of dispute has been added later as compared to what was included in the Mediation Request. Therefore, this provision of the ARMO Rules of Procedure is mainly to cover this unforeseeable situation. In any

[30] *Id.* art. 5.4.
[31] *Id.*
[32] *Id.* art. 6.1.
[33] *Id.* art. 6.2.
[34] *Id.*
[35] *Id.*

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event, obtaining parties' consent could easily cure such a possible competence issue or jurisdictional issue and therefore the first port of call for resolving it is the discussion between the mediator and the parties.

VII. VENUE OF MEDIATION

As opposed to arbitration, the seat of mediation does not trigger the application of any domestic rules. Therefore, the ARMO Rules of Procedure use "venue" and not "seat" of mediation though the subject matter of dispute may involve a law or rules which are generally the matter of dispute in State-to-State or Economy-to-Economy disputes. As it is expected that the ARMO will have headquarters which will have an adequate facility for conducting mediation efficiently, the default venue of mediation is therefore at the Headquarters of the ARMO.[36] At the same time, it is also possible to conduct mediation at places other than at the Headquarters of the ARMO. In this regard, the ARMO has provisions to sign a co-operation arrangement with other existing institutions, whether public or private. If such agreements exist then parties may use those institutions for their mediation. Even in the absence of such agreement, parties may identify an appropriate institution and request that the ARMO makes the necessary arrangement with that institution, and if everything works out then mediation may be conducted at that institution.[37] In the situation where the parties have not identified such an institution, the mediator in consultation with the Secretary-General may decide a venue for mediation. However, which making such a decision it is imperative to consider all circumstances related to the case and the parties.[38] It is expected that a venue in this situation will be decided which will make the whole mediation process efficient, and practical.

VIII. REPRESENTATION AND ASSISTANCE OF PARTIES

The ARMO Rules of Procedure do not give any priority to lawyers nor exclude them from mediation. It is recognized and appreciated that there might be some legal issues involved in resolving disputes between States or economies on legal points. So if a party wants to include lawyers in mediation, it should not be a problem. However, it is also possible for government officials and other authorized persons to represent a party in the mediation. Government officials frequently represent their government in the WTO. So it is expected that the practice of government officials representing their government may also be useful in mediation, particularly

[36] *Id.* art. 7.1.
[37] *Id.* art. 7.2(1).
[38] *Id.* art. 7.2(2).

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when it will come to reach an amicable settlement. However, it is important that the name of any person who is participating in mediation must be forwarded to the mediator and the other party.[39] Such advance notice may help avoid any possible conflict of interest. It will also be helpful in avoiding any power play or unfairness in mediation. For example, if one party is represented by a lawyer while the other party is represented by a non-lawyer then the other party will have an opportunity to decide whether they should continue with the same team or whether they need to modify their team of representatives. During and after the mediation, these people will be identified and also be bound by the confidential obligations.

IX. THE MEDIATOR'S ROLE AND DUTIES

In general, any mediation rules provide for the role and duties of mediators in the mediation process or *vis-à-vis* parties. However, the ARMO Rules of Procedure require mediators (in the case of three mediators) to first co-operate with each other and faithfully to perform their duties.[40] This rule is somewhat unique and it should be appreciated. In a three-mediator situation, where two of them are appointed by the disputing parties, it is important that all mediators must co-operate and faithfully discharge their duties. It further requires that the mediator or mediators conduct mediation with due diligence and make their best efforts to ensure that the proceedings are conducted efficiently. In this regard a mediator or mediators must be available all the time before, during and after the mediation (if needed).[41]

It is the primary duty of a mediator to be impartial and independent from any influence and to uphold integrity and fairness in the mediation.[42] In State-to-State disputes, there is always a fear of State influence on a mediator, particularly a mediator from its own country. Therefore, it is important that a mediator must maintain impartiality and independence in mediation. Otherwise, the whole mediation process may lose its integrity.

In mediation, a mediator states and explains the process of mediation: nevertheless in the ARMO Rules of Procedure this has been set out as a duty of a mediator. This is because parties may come from different legal and cultural backgrounds and they may have different understandings about the mediation process. Therefore it is important for the mediator to explain the mediation process to the disputing parties so that parties will have a fair understanding of the process and also have adequate understanding of the

[39] *Id.* art. 8.
[40] *Id.* art. 3.2(2).
[41] *Id.* art. 9.2.
[42] *Id.* art. 9.1.

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mediation process used by the mediator.[43] As a principle, the ARMO Rules of Procedure do not support any particular type of mediation style. It is believed by the ARMO Rules of Procedure that finding an amicable solution which is acceptable by the parties is important and not the style of mediation as such. This belief is further fortified because the rules say "the mediator shall recognize that the mediation under these Rules is based on the principle of self-determination by the parties and attempt to facilitate voluntary resolution of the dispute by the parties and endeavor to bring about settlement between them upon mutually acceptable terms".[44] The use of word "self-determination" simply means (opposed to what it means in international law) that it is the parties and only the parties who will decide what is a proper resolution of their dispute. If the parties are happy with a particular solution, then it will be their decision and that should be respected.

In order to help parties to reach an amicable settlement, a mediator is required to assist parties in four ways. First, a mediator should communicate the view of one party to the other.[45] This will help to establish a communication bridge between disputing parties. Even if it is more like acting as a postman, in the early stage of mediation it helps a lot to bring disputing parties to the negotiation table. The second help a mediator can provide is to identify existing and potential issues and clarify them.[46] Sometimes Parties in the middle of a dispute may not see the real issue of dispute and a mediator will be the right person to bring the focus of the parties to the real issue in dispute. In the process of agenda setting a mediator may assist parties in this regard. Thirdly, a mediator can help parties to reduce or eliminate any misunderstanding between them.[47] This is very important help which a mediator can provide. Most of the disputes may be resolved if any misunderstanding between parties is eliminated. The fourth help a mediator can provide during mediation is to help parties to explore areas of compromise.[48] In this process, the mediator will nudge and guide the disputing parties to find a creative solution for their dispute.

In some mediation processes, the mediator is not supposed to provide any views or opinion on the dispute or solutions. However, in the ARMO Rules of Procedure, in order to help parties to find an amicable solution, the mediator either on his or her own initiative or upon the request of the parties may provide his or her assessment or evaluation of the dispute. At the same time it is clarified in the Rules that such assessment or advice by

[43] *Id.* art. 9.3.
[44] *Id.* art. 9.4.
[45] *Id.* art. 9.4(1).
[46] *Id.* art. 9.4(2).
[47] *Id.* art. 9.4(3).
[48] *Id.* art. 9.4(4).

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the mediator is not to be considered as legal advice or a binding determination or a confirmation of the facts in dispute.[49] Similarly, a mediator may help parties to generate options or propose a settlement including any specific terms and conditions. This can be done by a mediator on his or her own initiative or upon the request of the parties. Moreover, such a proposal can be made at any stage of the mediation process. Once again the ARMO Rules of Procedure emphasize that any such draft proposal should not be considered as legal advice, a binding determination or a confirmation of facts.[50] It is very important that a mediator, in no circumstances, imposes upon parties any decision about the terms or conditions of settlement. It is ultimately for the parties to agree on the settlement or its terms.[51] A party can even propose a settlement during or outside mediation. Such a settlement proposal may be made with or without conditions.[52] If such a settlement offer is made outside the mediation then it should be communicated to the mediator.[53] In any situation, the parties must also give genuine consideration to any draft settlement proposed by the mediator or by one of the parties.[54] One may argue that due to the action of a mediator to offer assessment or evaluation or options or a draft settlement may give the mediation process under the ARMO a style similar to conciliation (not a facilitative mediation). It is again important to recall that the ARMO Rules of Procedure do not endorse any particular style of mediation.

X. MEDIATION SCHEDULE AND MEETINGS

For an efficient mediation process, it is imperative that the parties and mediators follow a schedule. In this regard the ARMO Rules of Procedure require a mediator to prepare a schedule with specific dates within which parties need to submit relevant documents including a mediation plan (hereinafter "Mediation Schedule"). Such a Mediation Schedule can be prepared in consultation with the parties. The dates agreed for any such submissions must be reasonable depending on the circumstances and complexities of the case so that parties can prepare and submit their mediation plan and other documents adequately.[55] The mediator is also required to submit the Mediation Schedule to the Secretariat of the ARMO.[56] Parties to the dispute must be present in the scheduled mediation

[49] *Id.* art. 9.5.
[50] *Id.* art. 9.6.
[51] *Id.* art. 9.7.
[52] *Id.* art. 14.1.
[53] *Id.* art. 14.2.
[54] *Id.* art. 11.2.
[55] *Id.* art. 10.1.
[56] *Id.* art. 10.4.

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meetings.[57] The mediator is allowed to arrange joint or separate meetings with the parties.[58] In a mediation meeting, the parties are required to participate in the mediation proceeding and cooperate with the mediator in good faith with an intention to settle the dispute.[59]

XI. PARTIES' STATEMENT, SUBMISSIONS AND EVIDENCE

Parties are allowed to make either written or oral or both statements in mediation. Parties may also submit their evidence, witness, expert witness and other information which are relevant for or necessary for reaching a solution for their dispute.[60] In the same way, if a mediator needs any information from the parties or any technical assistance from an individual or body then he or she may seek such information.[61] In the written submissions a party must set out the issues that need to be resolved, its position in respect to those issues, and the information or documents reasonably required for the mediator to understand the issue. The written submission must be sent to the mediator ten days before the scheduled meeting or within a time frame as fixed earlier.[62] Parties are also required to exchange their written submissions including their mediation plans according to the Mediation Schedule.[63] The written submission and the mediation plan of the parties has a page limit and the page limit is fixed in consultation with the parties and taking into account the nature and complexities of the dispute.[64] The page limit has been imposed to make sure that the mediator is provided with the bundle of papers and also to prevent parties from any dilatory tactics in completing the mediation process. Even after the submission of the written statement by the parties, a mediator has power to ask the parties to submit any further information or documents which may be required by the mediator in connection with the dispute.[65]

XII. CONFIDENTIALITY OF THE INFORMATION AND PROCEEDINGS

As mediation is a confidential process, the ARMO Rules of Procedure require the mediator and the parties to keep all information obtained during

[57] *Id.* art. 10.3.
[58] *Id.* art. 10.2.
[59] *Id.* art. 11.1.
[60] Each party has to bear its own costs in relation to its witness, experts and documents. *Id.* art. 18.4.
[61] *Id.* art. 12.
[62] *Id.* art. 13.1.
[63] *Id.* art. 13.2.
[64] *Id.* art. 13.3.
[65] *Id.* art. 13.4.

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mediation confidential.[66] If a party submits a document to the mediator which is marked as confidential, then the mediator cannot share that information with the other party. However, the mediator can share the non-confidential part of the document. The obligation of confidentiality is on the mediator also and any information or documents given during mediation cannot be shared with non-parties.[67] A party also cannot disclose any information or documents to a non-party. Any document or information, including positions taken by a party, views expressed by a party, any settlement agreement proposed during mediation by a party, and any submission made by a party cannot be used as evidence against that party in any other proceedings.[68] Even any proposal made by a mediator cannot be used as evidence in any proceedings.[69] Similarly, any documents obtained during mediation which are expressly marked as confidential cannot be used in any other proceeding.[70] However, if parties decide whether, to whom, to what extent or which part of the dispute, proceeding or information can be disclosed then they may to that extent and subject to the ARMO Rules of Procedure disclose that information or documents.[71] Although there is a movement towards transparency particularly when a State is involved, the ARMO Rules of Procedure provide that traditional approach towards confidentiality, as some sensitive State secret types of information need to be kept confidential. At the same time if that confidential information brings a resolution to dispute in a mediation then that should be allowed to be used in mediation but must be kept back from the non-party. Every mediation meeting is private and no audio or video recording is allowed.[72] Only an authorized person may be allowed to attend the mediation meeting. A Non-Authorized person can attend only with the consent of the parties and with the permission of the mediator.[73]

XIII. SUSPENSION AND COMPLETION OF MEDIATION

A mediator must strive to conclude the mediation within six months from the date of commencement. However, the time period may be extended for a reasonable period of time by the mediator if he or she considers that such an extension may help resolving the dispute.[74] During the mediation if parties may agree they may request a temporary

[66] *Id.* art. 15.1.
[67] *Id.* art. 15.2.
[68] *Id.* art. 15.3.
[69] *Id.* art. 15.3(3).
[70] *Id.* art. 15.3(2).
[71] *Id.* art. 15.5.
[72] *Id.* arts. 15.4, 15.6.
[73] *Id.* art. 15.4.
[74] *Id.* art. 16.1.

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suspension of the mediation proceeding.[75] Once the period of suspension expires or the extended time period lapses, the mediator must conclude or terminate the mediation irrespective of the fact whether parties reach any resolution or not.[76]

The mediation proceeding is also be concluded when the parties reach a settlement agreement.[77] When a settlement agreement is reached it must be put in writing and signed by the parties or their authorized representative. The Secretary-General of the ARMO then must authenticate the settlement agreement.[78] At the time of conclusion, the mediator must report to the Administrative Council of the ARMO noting the issues in dispute and recording the fact that the parties have reached agreement. However, the mediator should not include the contents of the settlement agreement in his or her report unless the parties agree on such inclusion.

In the unfortunate circumstance where it appears that there is no likelihood of agreement between the parties, the mediator should close the mediation proceedings. In this situation the mediator also needs to submit a report to the Administrative Council noting the issues in dispute and recording simply that no agreement has been reached.[79]

The mediation proceeding will also come to an end if a party fails to appear or participate in the mediation proceedings. Unlike arbitration, mediation cannot proceed without the presence of both parties. In that situation, the mediator can declare the mediation terminated and draw up a report to the Administrative Council noting the parties' failure to appear or participate.[80]

If the mediation is conducted within the ARMO but based on the mediation provision of a separate agreement or organizations then the completion or termination report should also be submitted to the Secretariat of that agreement or organizations.[81] In that situation, this report will satisfy the condition that parties have attempted mediation of the issues in dispute and have reached or not reached any settlement. Some agreements and organizations may require parties to first attempt mediation before setting into motion any final determinative process.

[75] *Id.* art. 16.2.
[76] *Id.* art. 16.3.
[77] *Id.* art. 19.1.
[78] *Id.* art. 17.1.
[79] *Id.* art. 19.2.
[80] *Id.* art. 19.3.
[81] *Id.* art. 19.4. Unless the parties make the full payment of the expenses of mediation neither the mediation report nor the settlement agreement may be issued to the parties. *Id.* art. 19.5.

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XIV. FINALITY OF THE SETTLEMENT AGREEMENT

At the end of mediation or even during the mediation if the parties reach a settlement agreement then that agreement is binding upon the parties. The parties are required to implement the settlement agreement in good faith. Having noted the development in the field of cross border enforcement of international commercial mediation, the ARMO Rules of Procedure have adopted a "good faith" approach in relation to execution of the settlement agreement reached between States or economies. This is the best way forward in the absence of any convention or legal mechanism available with regards to enforcement of a settlement agreement between States or economies.

XV. CONCLUSION

Establishment of the ARMO is an innovative step which may help States and economy to resolve their disputes through mediation. The ARMO Rules of Procedure encompass situations which may arise when States and economies use mediation to resolve their dispute. The main aim of these rules is to provide an alternative and not a competing forum of dispute resolution. Considering the Asian culture, it is believed that mediation is the best way to resolve such disputes. In this regard the ARMO Rules of Procedure provide efficient, effective and practical sets of rules of mediation to resolve any or all disputes between State-to-State and Economy-to-Economy.

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REFERENCE

Other Source

Draft “Rules of Procedure for Mediation Conducted Under the Asia-Pacific Regional Mediation Organization”.

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