ENHANCING MEDIATION IN THE ASIA-PACIFIC: THE INTERACTION OF THE ARMO REGIME WITH EXISTING DISPUTE SETTLEMENT MECHANISMS

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ABSTRACT

The intense economic, physical and social interconnectedness of many parts of the Asia-Pacific, as well as the complex historical political context in which many of the modern state boundaries involved, makes it is unsurprising that the region is also home to some of the world's most complex and difficult international disputes. The Asia-Pacific is well-served by international legal mechanisms for the resolution of these disputes. However, at the same time, there is increasing awareness of the importance of non-determinative dispute settlement processes, especially mediation, and a growing tide of attention paid by international organisations to broader and more effective use of mediation to address the full range of international law disputes.

The treaty initiative for the creation of the proposed Asia-Pacific Regional Mediation Organization (ARMO) is therefore as timely as it is significant. This article examines the interaction of the Agreement on the Establishment of the Asia-Pacific Regional Mediation Organization and the Rules of Procedure for Mediation Conducted under the Asia-Pacific Regional Mediation Organization with existing treaty regimes and dispute settlement mechanisms presently available to the region.

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KEYWORDS: *international dispute settlement, ASEAN, WTO, International Court of Justice, mediation, adjudication*

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I. INTRODUCTION

It is well-acknowledged that the Asia-Pacific Region is one of the most economically dynamic, culturally diverse and historically-complex regions in the world. While the precise limits of the Asia-Pacific Region tend to defy strict classification, it includes an immense range of political structures—from the world's largest countries—such as India and China with populations exceeding 1.3 billion, to the smallest—tiny micro-states such as Tuvalu and Nauru, with populations of around 10,000 people.[1] The region simultaneously includes both extremes of economic development and poverty, as home to the top three economies by GDP, to the smallest three economies by GDP, and to states with a vast variation in their progress towards the Millennium Development Goals.[2] Despite this diversity, and despite the absence of a European-style integration, global supply chains have made the region one of the world's most economically interconnected areas.

The intense economic, physical and social interconnectedness of many parts of the Asia-Pacific, as well as the complex historical political context in which many of the modern state boundaries involved, makes it is unsurprising that the region is also home to some of the world's most complex and difficult international disputes. Some territorial disputes tend to receive broad global attention, such as the numerous territorial disputes over maritime and land boundaries, due to the protracted nature of the dispute, the entrenched positions, and the security risk that regional destabilisation would cause. However, there are great number of other disputes that also impact the region—ranging from environmental disputes about water, pollution, and climate change-induced problems, to disputes over cultural heritage, disputes about the enforcement of criminal law in relation to matters such as trafficking of humans and drugs, and trade-related disputes based on the World Trade Organization (hereinafter "WTO") Agreements.

The Asia-Pacific is well-served by international legal mechanisms for the resolution of these disputes. International law provides a variety of dispute settlement mechanisms—courts, tribunals and commissions—and there are a range of global, regional and bilateral fora available for the countries of the region. At the present time, most countries in the region are not active users of international dispute settlement, with only a handful in the region making any use of existing dispute settlement bodies. For those

[1] *World Population Prospects: The 2017 Revision*, U.N. DATA, http://data.un.org (last visited Mar. 14, 2018).
[2] *National Accounts Data*, WORLD BANK, https://data.worldbank.org/ (last visited Mar. 2, 2018); *National Accounts Data Files*, OECD, http://www.oecd.org/sdd/na/ (last visited Mar. 2, 2018).

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that do engage with international dispute settlement, the majority of formal processes that are used by states are adjudicatory in nature—meaning that where states are subject to (or submit to) the jurisdiction of these processes, the judge, arbitrator, panel member or other appointed expert will issue a decision that is then binding on the parties. However, at the same time, there is increasing awareness of the importance of non-determinative dispute settlement processes, especially mediation, and a growing tide of attention paid by international organisations to broader and more effective use of mediation to address the full range of international law disputes.

The treaty initiative for the creation of the proposed Asia-Pacific Regional Mediation Organization (hereinafter "ARMO") is therefore as timely as it is significant. While not changing the substantive rules of international law, it offers a completely neutral, expert forum for parties to bring their dispute, and to seek a resolution that is not binding upon them until they wish it to be.[3]

This article examines the interaction of the Draft "Agreement on the Establishment of the Asia-Pacific Regional Mediation Organization" (hereinafter "ARMO Agreement") and the Draft "Rules of Procedure for Mediation Conducted under the Asia-Pacific Regional Mediation Organization" (hereinafter "ARMO Rules of Procedure") with existing treaty regimes and dispute settlement mechanisms presently available to the region. However, dispute settlement mechanisms can arise out of a wide range of sources — they can be out of international, multilateral or plurilateral regimes, such as the Dispute Settlement Understanding (hereinafter "DSU") of the WTO, from regional treaties such as those comprising the obligations of the The Association of South East Asian Nations (hereinafter "ASEAN"), and, to a lesser extent, from bilateral treaty arrangements. A large proportion of settlement processes occur in an *ad hoc* fashion, without a fixed treaty framework and procedural structures are created as a particular issue arises for negotiation or mediation.

Given this complex procedural matrix in which the ARMO will also operate, there is a need to explore the proposed interaction between the ARMO and the existing web of procedural and substantive rules.

The article firstly offers an overview of the design of the ARMO Agreement and Rules, focussing on the intended interaction between them and existing mechanisms. The article will then examine the interaction between the ARMO architecture and four different types of existing process of particular importance in the Asia-Pacific region—interaction

[3] Draft "Agreement on the Establishment of the Asia-Pacific Regional Mediation Organization" [hereinafter ARMO Agreement], art. 22 (stating "[a]ny settlement agreement duly concluded between disputing parties is binding upon them and shall be performed by them in good faith."). The text of this document is published at this same issue of Asian Journal of WTO & International Health Law and Policy (AJWH).

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with *ad hoc* mediation options, relevance and potential benefits for newly-regulated international areas of concern, interaction with well-established, strongly adjudicative regimes such as the WTO dispute settlement system, and finally the ARMO's interaction with multi-focussed regional institutions such as ASEAN.

II. INTENDED INTERACTION BETWEEN THE ARMO AND EXISTING MECHANISMS: THE ARMO AGREEMENT AND THE RULES

There are several dozen international courts and tribunals that are established in international law to hear particular types of disputes. These Tribunals show great diversity in the scope of their jurisdiction, ranging from the International Court of Justice, which has the most broad jurisdiction, to specialised tribunals such as the International Tribunal for the Law of the Sea (ITLOS) and the Dispute Settlement System of the World Trade Organization, and tribunals created out of specific disputes, such as the Iran–United States Claims Tribunal or the International Criminal Tribunal for Rwanda, and a vast range of commissions and fact-finding bodies attached to organizations such as the International Labour Organization.

Alongside these formal mechanisms are a range of dispute resolution mechanisms that can be used in an ad hoc fashion or are often incorporated within particular treaty regimes. The most common of these is mediation, which is often referred to alongside its sibling (but not identical) processes such as good offices and conciliation. Again, these are specifically recognised in Article 33 of the *United Nations Charter*, which states that where a dispute is likely to threaten international peace and security, then it should first be addressed through negotiation, mediation or other peaceful means.[4] Mediation is a well-established mechanism for the settlement of international disputes, and appeared in international law at least as early as the 1899 Hague Convention I. Title II Article 2 of that Convention requires that "before an appeal to arms" that the parties should "have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly powers."[5]

At the outset, it is important to understand that the Asian Regional Mediation Organization does not seek to replace any of the rules-making aspects of any international or regional organisations. It exists solely as a forum for the resolution of disputes, and the substantive rights that inform those disputes may arise from any principle of law that may arise from a

[4] U.N. Charter art. 33.

[5] Convention for the Pacific Settlement of International Disputes art. 2, July 29, 1899, 1 Bevans 230.

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bilateral, regional, or multilateral agreement. This is clearly set out in Article 2.2 of ARMO Agreement, which states:

> 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, whether or not arising from or relating to any rule of public international law or any bilateral, regional or multilateral treaty/agreement to which they are parties.

The drafting of this article, in particular the use of the terms "legal and factual", as well as the expansive range of "disputes, disagreement, or issues of concern", was selected by the drafters with the intention of allowing a forum for the broadest-possible range of disputes, including those that may not be justiciable in fora such as the International Court of Justice. In the history of the International Court of Justice, there have been thirteen instances in which the court has declined jurisdiction, with the first in 1973 being the case of *The Nuclear Tests Case (Australia v. France)*.[6] Another, more recent, case in which jurisdiction has been declined was *Aerial Incident of 10 August 1999 (Pakistan v. India)*, in which the presenting issue was Indian air force shooting down of a Pakistani naval aircraft, and subsequent taking by India of parts of the wreckage. The International Court of Justice was forced to decline jurisdiction, finding that neither the Charter nor any other agreements between the parties empowered the court to hear the dispute. The broad language of the ARMO Agreement would have obviated this particular jurisdictional issue, and mediation may have proven more palatable to India and the control over the outcome may increase the likelihood of consent to engaging in the process.

The reference to "issues of concern" may also be understood as reinforcing the importance of preventative diplomacy and peace mediation. This is particularly relevant in the Asia-Pacific context as it resonates strongly with the "ASEAN Way", or consensus-based approach to disputes amongst the ASEAN states[7]—and some would argue amongst Asian states more broadly as an "Eastphalian" approach to dispute settlement.[8]

The second aspect of the ARMO's interaction with other treaty regimes is contained in Article 3 of the ARMO Agreement, which states:

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[6] The Nuclear Tests Case (Austl. v. Fr.), Judgment, 1974 I.C.J. 253, ¶ 62 (Dec. 20).

[7] *ASEAN Regional Forum Concept and Principles of Preventive Diplomacy*, ASEAN REGIONAL FORUM (July 25, 2001), http://aseanregionalforum.asean.org/library/arf-chairmans-statements-and-reports/159.html.

[8] On the concept of Eastphalia, see generally Sung Won Kim et al., *Eastphalia Rising? Asian Influence and the Fate of Human Security*, 26(2) WORLD POL'Y J. 53 (2009).

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> *Relations with Other Dispute Settlement Mechanisms*
> 1. The Members may agree to the use of ARMO mediation independently of, or based upon, any mediation or conciliation provisions in any international agreement or organization of which they are contracting parties or members.
> 2. Mediation 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.

The impact of Article 3 is simply to emphasise that recourse to mediation under the ARMO rules does not undermine any other process that may be available to the parties—in other words, that there is no question of an estoppel or other procedural bar merely from having attempted mediation. This position is reinforced by Article 1.2 of the ARMO Rules of Procedure, which provides that concurrently applicable rules (such as those of the WTO) will generally prevail over the ARMO's rules. This preserves the primacy of the substantive rules, while allowing the procedural rules of the ARMO to prevail in procedural matters such as the appointment of mediators.

III. INTERACTION WITH *AD HOC* MEDIATION

As indicated in the introduction above, a large number of mediations in the international law space are undertaken as *ad hoc* mediations, meaning that they are undertaken according to rules created for the specific issue, at the time the issue arises. The parties have complete flexibility as to the rules (or absence of rules) that will govern the process, the identity of the mediator and the acceptable boundaries of the mediator's role.

While the primary benefit of ad hoc mediation is its flexibility, this is equally a potential weakness of using an *ad hoc* process. It requires, for example, that the parties are sufficiently cooperative to reach consensus on who the mediator might be, and the boundaries of the process, such as the use of testimony and other evidence, the duration of the mediation, its location, who may be present in the room, and so on. The ARMO Rules would assist in this regard by offering a default position for these logistic issues. A further advantage to ARMO-auspiced mediation is the presence of a secretariat to facilitate the logistic aspects of the mediation.

The use of the ARMO Rules also puts different types of dispute onto a more equal procedural footing. In the current system, certain disputes between states have the advantage of having dispute settlement mechanisms established, usually in a treaty regime. Other disputes, typically lacking an extensive treaty regime, then lack a procedural mechanism despite the need for parties to address grievances.

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In a similar vein, water disputes are considered by the United Nations (hereinafter "U.N.") to be one of the greatest challenges to global security,[9] and yet the emergence of robust treaty regimes have been many years in the making, and are still under negotiation. Water treaties are one of the largest single category of treaty, with the United Nations University estimating that over 3,500 such treaties were signed since AD805[10] but they are patchwork in nature. While great progress has been made on access to water in international law, including U.N. recognition of access to safe, clean drinking water as a human right, the remaining challenges are immense. In relation to international obligations, the U.N. itself notes that (despite the huge number of treaties in place), "two-thirds of the world's transboundary rivers do not have a cooperative management framework", even though issues of water scarcity (impacting 40% of the world's population) and contamination of water sources with waste water are inherently inter-state issues where water sources cross international boundaries.[11] As the causes of water disputes are multifactorial, and touch on a range of potential treaties, jurisdiction quickly becomes unclear and deeply controversial. Where ad hoc mediation is proposed, parties may be suspicious of the motive of the offering body. For example, in the long-standing ongoing dispute between India and Pakistan over the water rights of the Indus, a renewed offer of *ad hoc* mediation by the World Bank has been met with criticism in some quarters about the motivation for its involvement.[12] While not pretending that the resolution of this dispute would be simple, the ability of parties to select an independent institution such as the ARMO has the power to overcome these concerns and shift focus towards moving the dispute forward. The jurisdictional approach taken by the ARMO would also allow it to address issues regardless of the treaty in which they arise, and both parties could be confident that they would only be required to accept a resolution of which they approved. In this way, they maintain a large degree of control over the dispute, and they avoid the possibility of "losing" a case through an adverse finding, allowing disputing states to save face.

[9] *Global Issues Overview*, U.N., http://www.un.org/en/section/issues-depth/global-issurs-overview/ (last visited Mar. 5, 2018).
[10] Rafal Morek, *Mediation in Water Disputes—One More Drop*, KLUWER MEDIATION BLOG (Nov. 18, 2016), http://mediationblog.kluwerarbitration.com/2016/11/18/mediation-water-disputes-one-drop/.
[11] *Water*, U.N., http://www.un.org/en/sections/issues-depth/water/index.html (last visited Mar. 5, 2018).
[12] Bimal N. Patel, *Why Does World Bank Want to Broker Indus Water Talks Between India and Pakistan*, INDIAN EXPRESS (Sept. 16, 2017, 3:49PM), http://indianexpress.com/article/opnion/why-does-world-bank-want-to-broker-indus-water-treaty-talks-between-india-and-pakistan-846306/.

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IV. NEWLY-REGULATED INTERNATIONAL AREAS OF CONCERN

One of the primary benefits of mediation is the presence of the intermediary and the manner in which they can operate due to their neutrality in the dispute. Specifically, the mediator has a more objective viewpoint than the parties, who may also be bound by political or strategic constraints from making concession that it might otherwise identify as mutually beneficial. As Princen observes, this gives the mediator the ability to perform three important roles: the ability to reconfigure a bargain; the ability to make a nonstrategic proposal, and the ability to pool information.[13] This dynamic becomes particularly important where an issue previously considered domestic has become recently regulated as a matter of concern for public international law. In this situation, the challenges of implementation and enforcement may be immense, and at the same time, available (typically adjudicative) options untested and therefore lacking in trust.

Third party intervention through mediation can be particularly useful when there are thorny and complex issues to be resolved, many of which may have a complex cultural, political and socioeconomic basis. For example, the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*, [14] contain obligations of arbitration and ultimately recourse to the International Court of Justice (provided that the parties accept its jurisdiction) if there is a dispute over steps taken by signatories to punish people traffickers and repatriate victims. However, in situations where a state is not complying with the obligation, it would seldom be due to a lack of willingness to comply, but rather due to complexities in law reform, political dynamics, or a lack of resources. In such cases, arbitration and adjudication can only point to the shortcoming of the delinquent state in meeting its obligations, but does nothing to work on directly improving the situation. While it is true that sometimes the decision of an international body can spur a government into action, in this type of case it is very seldom a lack of willpower that is at issue. On the other hand, cross-border cooperation, technical assistance, information sharing and shared political goals can all be identified and facilitated through a mediated process.

V. INTERACTION WITH STRONGLY ADJUDICATIVE REGIMES

One of the most likely areas of interaction between the ARMO and other international dispute settlement systems are with those treaty regimes

[13] THOMAS PRINCEN, INTERMEDIARIES IN INTERNATIONAL CONFLICT 44 (2014).
[14] G.A. Res. 55/25, at 2 (Nov. 15, 2000).

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that have a well-established and strongly adjudicative procedural focus—such as global and regional systems for the resolution of trade disputes.

The WTO is the archetypal strong adjudicative regime, and its robust system of adjudication is considered one of the organization's great successes. Ten years after the establishment of the WTO, the Sutherland Report commented that "[b]y most accounts, and most measures, the operation of the dispute settlement system in the WTO has been a remarkable success", and cited as its primary piece of evidence the very high rates of use of the dispute settlement processes.[15] Bacchus observes that within only seven years of the WTO's establishment, its dispute settlement mechanism had become "the busiest international system for resolving international disputes in the history of the world."[16] Approaching 25 years since its inception, well over 500 disputes have been submitted for determination.

There is an uneven pattern of use of the WTO dispute settlement system amongst the states of the Asia Pacific. The United States has filed an average of five disputes per year since the WTO was established in 1995, now 115 complaints in total, making it the most litigious member of the WTO. In contrast, the forum is virtually unused by Least Developed Countries, with the exception of just one case brought by Bangladesh against India, a dispute that was settled with a negotiated solution.[17] Secondly, the Asian states appear particularly reluctant to use the dispute settlement system, particularly for disputes between themselves. Even China, which is the largest trade partner for many countries of the region, has initiated only fifteen disputes since its accession to the WTO in 2001, of which two-thirds are brought against the United States, and the remainder against European members.[18] And, despite the predicted landslide of disputes against it, has been a respondent in thirty-nine disputes, of which only two have come from within the Asian region (both with Japan as claimant). In terms of intra-regional disputes, Japan has been amongst the most prolific user of the system, bringing eight of its twenty-three complaints against states in the region (eighteen of twenty-three including Canada and the United States as respondents). There are few examples of disputes being brought by Asian WTO Members against another Asian member other than by Japan, with many, such as *Pakistan* —

[15] Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges of the New Milennium*, ¶¶ 221-25, WTO Doc. (2004).
[16] James Bacchus, *Groping Toward Grotius: The WTO and the International Rule of Law*, 44(2) HARV. INT'L L.J. 533, 540 (2003).
[17] Notification of Mutually Satisfactory Solution, *India — Anti-Dumping Measures on Batteries from Bangladesh*, WTO Doc. WT/DS306/3, G/L/669/Add.1, G/ADP/D52/2 (Feb. 23, 2006) [hereinafter *India — Anti-Dumping Measures* Notification].
[18] See further, Lisa Toohey, *China and the World Trade Organization: The First Decade*, 60 INT'L & COMP. L. Q. 788, 795 (2011).

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Anti-Dumping and Countervailing Duty Investigations on Certain Paper Products from Indonesia[19] and *India — Anti-Dumping Duties on USB Flash Drives from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, never proceeding to the establishment of a panel, and *India — Anti-Dumping Measure on Batteries from Bangladesh*, referred to above, and which was settled by negotiation between the parties.[20] The outlier case is *Indonesia — Safeguard on Certain Iron or Steel Products*, currently on appeal and cross-appeal to the Appellate Body.[21]

By the same token, neither have the WTO Members availed themselves of mediation in the WTO. The DSU contains several provisions that clearly foresee a role for mediation and other "mutually agreed solutions"—a term that is defined in Article 5 of the DSU to include good offices, conciliation and mediation, as well as negotiation, and the facilitated processes can be either requested by the disputing parties, or be offered on the initiative of the Director-General. Article 3(7) states that a non-adjudicated solution should be preferred to the panel process, provided it is consistent with the provisions of the WTO Agreements—and therefore cannot represent an agreement between the disputants to bypass the WTO's rules. Despite the fact that mediation features strongly in the WTO DSU, and the creation of procedural rules by the WTO to supported mediated settlements, it remains a surprisingly unused feature, with only one mediation officially occurring since the establishment of the WTO in 1995, between Thailand, the Philippines, and what is now referred to as the European Union.[22]

One possible reason for the non-use of the mediation procedures in the WTO is its rather formal structure. Whether intentionally or unintentionally, it has only been contemplated that the Director General (or at times in the past, a delegate) would mediate disputes. This is most clearly illustrated in the Background Note provided in 2001 by the Secretary General to promote the use of the WTO DSU's mutually agreed solutions:

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[19] Request for Consultations, *Pakistan — Anti-Dumping and Countervailing Duty Investigations on Certain Paper Products from Indonesia*, WTO Doc. WT/DS470/2 (Nov. 27, 2013).
[20] *India — Anti-Dumping Measures* Notification, *supra* note 17.
[21] Panel Report, *Indonesia — Safeguard on Certain Iron or Steel Products*, WTO Doc. WT/DS490/R, WT/DS496/R (circulated Aug. 18, 2017).
[22] *See* General Council, *Request for Mediation by the Philippines, Thailand, and the European Communities*, WTO Doc. WT/GC/66 (Oct. 16, 2002); General Council, *Request for Mediation by the Philippines, Thailand, and the European Communities: Addendum*, WTO Doc. WT/GC/66/Add.1 (Dec. 23, 2002); General Council, *Request for Mediation by the Philippines, Thailand, and the European Communities: Joint Communication from European Communities, Thailand and Philippines*, WTO Doc. WT/GC/71 (Aug. 1, 2003).

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> Members should be afforded every opportunity to settle their disputes through negotiations whenever possible. Article 5 of the DSU provides for the use of good offices, conciliation and mediation, but this Article has not been used since the inception of the WTO. In light of that, I would like to call Members attention to the fact that I am ready and willing to assist them as is contemplated in Article 5.6. It is time to make this provision operational.[23]

The Director-General is of the view that Members should attempt to settle disputes as often as possible without resort to panel and Appellate Body procedures.[24] In this regard, he wishes Members to be aware of his willingness to actively support attempts to settle their disputes through use of good offices, conciliation and mediation. [25]

It is quite possibly the formality of the WTO-annexed process that presents the biggest barrier to the use of mediation in WTO disputes. As Parlin has observed of the dispute resolution context generally, while the WTO system is an improvement for less powerful countries over the previous GATT architecture, there is nonetheless a deterrent against parties commencing proceedings, and it "still takes political will to commence a dispute, because the power of developed countries to dissuade developing countries from requesting WTO consultations remains great."[26]

There is a symbolic value to filing a request with the WTO, regardless of whether the mediation requests come before the official request for consultations. In addition, there is the expectation that the mediation will still take place in Geneva, which poses additional resource strains—time, cost, and personnel—for Asian countries, most of whom have (at most) a small delegation based in-country, often attending to several international organisations. Finally, the fact that the mediation occurs within the confines of the WTO suggests that the process is likewise very WTO-centric. At a minimum, some country representatives question the true neutrality of mediation by the Director-General, expressing concern that the "free-trade orientation" of the Secretariat compromises its neutrality.[27]

In the case of a mediation under the ARMO, there is greater flexibility for the parties to select the place for mediation, offering potential cost and time savings, and possibly bringing a greater sense of connectedness

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[23] Director-General, *Article 5 of the Dispute Settlement Understanding*, WTO Doc. WT/DSB/25, at 1 (July 17, 2001).
[24] *Id.*
[25] *Id.*
[26] C. Christopher Parlin, *WTO Dispute Settlement: Are Sufficient Resources Being Devoted to Enable the System to Function Effectively?*, 32 INT'L L. 863, 868 (1998).
[27] Hansel T. Pham, *Developing Countries and The WTO: The Need for More Mediation in the DSU*, 8 HARV. NEGOT. L. REV. 331, 383 (2004).

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between the subject matter of the dispute and its broader context. While there is nothing in the ARMO's rules to require that mediators be nationals of the region, there is no shortage of outstanding potential mediators with extensive qualifications across the breadth of public international law, and the expectation of the organisation is that there be greater diversity of nationality than is currently found in the WTO dispute settlement system.

Any settlement reached under the ARMO process is still obliged to be consistent with the rules of the WTO Agreements, including the DSU, which in Article 23 the self-contained nature of the WTO dispute settlement system, and the priority of the dispute settlement process is to ensure consistency with the covered agreements for all members. This means that states cannot privately agree to deviate from the application of the rules, an obligation that can easily be accommodated within the ARMO process. Finally, Article 3 of the DSU (General Provisions) requires in Article 3(6) that where a dispute has been commenced under the consultation procedure, that any mutually-agreed upon solution must be formally notified to the appropriate WTO body, so that other Members have the chance to raise any concerns. Once again, however, this is a relatively easy requirement with which to comply.

In summary, the ARMO process would be well-suited to the WTO context, for the reasons set out above. Similar reasoning would also support the use of mediation as an alternative to other strongly adjudicative bodies, such as the International Court of Justice.

VI. INTERACTION WITH ASEAN DISPUTE SETTLEMENT

The final category of interaction to be considered is the interaction with the treaties signed by the ASEAN members. ASEAN is the most significant, and longest-standing regional grouping in the Asia Pacific Region. Originally consisting of five members at its establishment in 1967, ASEAN was originally a five-member organization consisting of Indonesia, Malaysia, Thailand, Singapore and the Philippines. Membership increased substantially in the 1990s, and now includes Brunei Darussalam, Viet Nam, Laos, Myanmar, and Cambodia.

ASEAN's emphasis is reflected in its founding document, the *ASEAN Declaration*, which states the purposes of the organization to being to enhance "regional solidarity and cooperation", "promote regional peace and stability through abiding respect for justice and the rule of law", provide mutual technical assistance and collaboration, and to secure "for posterity the blessings of peace, freedom and prosperity." [28] Modern ASEAN describes itself a multi-focus community based on the "three

[28] The ASEAN Declaration (Bangkok Declaration) Bangkok, Aug. 8, 1967, 6 I.L.M. 1233.

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pillars" — including a Political-Security Community, a Socio-Cultural Community, and an Economic Community, but as Leifer has observed, the fundamental concern of ASEAN's founders was regional security, and the organisation was created primarily to reduce the risk of internal security threats destabilising the region.[29] As the organisation has matured, it has created a number of dispute settlement instruments, including the and the 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (hereinafter "the 2010 Protocol").[30]

As I have argued elsewhere, there is limited likelihood that the ASEAN dispute mechanisms, whether in territorial, trade, or other domains, will be used regularly, if ever, by ASEAN Members.[31] Firstly, the ASEAN states actively prefer quiet self-resolution or if that fails, external adjudication outside of ASEAN where self-resolution has been unsuccessful. This approach applies equally to territorial as trade disputes. For example, the long-standing dispute between ASEAN Members over the Temple of Preah Vihear, known also as the Prasat Phra Wihan, has been the only fatal intra-ASEAN conflict since that organisation was created, and has economic and trade dimensions (trade discrimination and issues at the border, property damage of businesses and embassies) as well as the presenting territorial conflict. However, even given the availability of ASEAN dispute settlement mechanisms, Thailand and Cambodia preferred instead to go to the International Court of Justice. This is understandable, as although ASEAN has three pillars of activity, it remains first and foremost a security community, with the economic dimension building slowly over time. As the 2010 Protocol acknowledges in its preamble, "having credible dispute settlement mechanisms would help ASEAN prevent festering conflicts and confrontation among the Member States, preserving the cooperative atmosphere for concerted efforts towards building a peaceful and prosperous ASEAN Community." However, there is a real risk perceived by the Members that having any dispute within the ASEAN forum might challenge the cooperative atmosphere that is so highly valued. Finally, ASEAN is increasingly acting as a bloc within the Asia-Pacific Region, and bringing a dispute within the organisation risks affecting the integrity of the ASEAN members as a cohesive unit.

It is here that the possibility of the ARMO offers an approach that is genuinely consistent with the needs and interests of the ASEAN members. Firstly, ARMO mediation is consensus-based, in the sense that all

[29] MICHAEL LEIFER, ASEAN AND THE SECURITY OF SOUTH-EAST ASIA 2, 3 (1989).
[30] Ass'n of Southeast Asian Nations [ASEAN], *Protocol to the ASEAN Charter on Dispute Settlement Mechanisms* (Apr. 8, 2010).
[31] *See generally* Lisa Toohey, *When "Failure" Indicates Success: Understanding Trade Disputes Between ASEAN Members*, *in* EAST ASIAN ECONOMIC INTEGRATION: LAW, TRADE AND FINANCE 150 (Ross P. Buckley et al. eds., 2011).

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disputants must agree to any proposed settlement. Secondly, it is based upon discussion and the step-by-step ventilating of concerns and development of options for resolution, again consistent with the "ASEAN Way". Finally, it avoids the risk of dispute settlement taking place within ASEAN, paying respect to the practice that has emerged of ASEAN as a place for productive negotiation rather than dispute settlement.

VII. CONCLUSION

This article has provided an overview of how the ARMO may interact with the main types of architecture currently present within, and impacting upon, the Asia Pacific Region.

Public International Law is clear in the obligation that it places upon states to peacefully resolve the disputes that inevitably arise as part of the daily interactions of a globalised world. The current courts and tribunals, developed mainly since in the Post-World War era, have served the international community well in terms of building respect for international law. However challenges arise in the present era due to the broad range of contemporary disputes, rapidly proliferating fora,[32] and greatly enhanced global interconnectivity.

In summary, there are lacunae in the current architecture that can be helpfully filled by the ARMO, and there appear no significant obstacles for states to choose mediation as a preferred dispute settlement option. Bringing all of the benefits of mediation, coupled with a sophisticated institutional architecture and secretariat-supported forum for mediation should considerably enhance the attractiveness of mediation for the states of the region. Selecting facilitative processes such as mediation in preference to determinative processes such as adjudication has a range of benefits, as outlined above, that include greater party autonomy in relation to outcomes and process, the ability to craft innovative solutions that are consistent with substantive legal requirements, and the perception of a truly neutral third party. The successful launch of the ARMO would represent the first regional, mediation-focussed treaty body of its kind, and thus a major global initiative, as well as an important step towards maintaining harmony and peace in the Asia-Pacific region.

[32] *See, e.g.*, Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals A Systemic Problem*, 31 N.Y.U. J. INT'L L. & POL. 679 (1999); Lucy Reed, *Great Expectations: Where Does the Proliferation of International Dispute Resolution Tribunals Leave International Law?*, 96 PROC. ANN. MEETING AM. SOC'Y INT'L L. 219 (2002).

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