SETTLING INTERNATIONAL DISPUTES THROUGH MEDIATION—ESTABLISHING A NEW INTERNATIONAL ORGANIZATION IN ASIA PACIFIC AND JURISDICTIONAL ISSUES

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ABSTRACT

Merits and demerits of conventional Dispute Settlement Mechanisms (DSMs) with legally binding force and strict confinement of governing law, followed by stringent penalties and retaliation, have prompted states to realize the benefit of flexible and non-binding dispute settlement proceedings in settling international disputes. Against this backdrop, the Asia-Pacific Regional Mediation Organization (hereinafter "ARMO") Agreement is now being contemplated to administer mediation proceedings to the Asia-Pacific region. Introduction of mediation through a regional international organization also requires interested states to look into a wide range of associated legal issues, most notably issues relating to the jurisdiction of the organization and/or mediation panels. All these jurisdictional issues require careful consideration and analyses. An initial study indicates that with careful consideration and proper preparation jurisdictional issues can be addressed properly in a way that sets the tone for a successful launch of the

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ARMO.

KEYWORDS: *mediation, conciliation, international organization, dispute settlement mechanism, personal jurisdiction, subject matter jurisdiction*

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I. INTRODUCTION

Over the years, international dispute settlement proceedings have contributed to the maintenance of international peace and security in many different fields. They have also contributed to the development of international law by interpreting treaties and clarifying customary international law. Such being the case, dispute settlement mechanisms (hereinafter "DSMs") have become a core element of important treaties in enforcing and clarifying relevant provisions of such treaties. As much as their importance increases over time, efforts to improve DSMs have also taken the center stage in recent discussions at various fora in the international community. These efforts mainly represent further judicialization, i.e., inserting more procedural rules to and elaborating detailed provisions in existing DSMs of various treaties.[1] Through these efforts, DSMs have been improving in many respects.

In principle, states are not obliged to settle their disputes no matter how serious or complex they are.[2] The only obligation in this respect is to settle their disputes in a peaceful manner.[3] Likewise, in the case of a threat to international peace and security where the United Nations (hereinafter "U.N.") Security Council decides to intervene and impose specific measures to settle a dispute at issue, all U.N. members are obligated to follow such decisions.[4] Except in these instances, states are not obligated to settle their disputes, let alone resolve them, through or using a specific means of dispute settlement. So, arguably, it is important to introduce and maintain dispute settlement proceedings that are responsive to the needs and demands of sovereign states. Otherwise, states may as well shun particular dispute settlement proceedings or choose one over the other.

With this in mind, in settling "international" disputes, meaning State-to-State disputes, various means are indeed available. These means can be categorized into two groups:

1. non-binding dispute settlement proceedings, and

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[1] For instance, with respect to the WTO's dispute settlement proceeding, negotiations have been underway for many years to amend the existing system codified in the Understanding on Rules and Procedures Governing the Settlement of Disputes. Negotiations have focused on fixing structural problems identified through the application of the DSU since 1995 and introducing more detailed and coherent provisions in the DSU so as to enhance the rule of law. *See* World Trade Organization, Ministerial Declarations of 14 November 2001, ¶¶ 30, 47, WTO Doc. WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002); *Decision on the Application and Review of the Understanding on Rules and Procedure Governing the Settlements of Disputes*, WTO, https://www.wto.org/english/docs_e/legal_e/53-ddsu_e.htm (last visited Feb. 18, 2018). *See Dispute Settlement*, WTO, https://www.wto.org/eng lish/tratop_e/dispu_e/dispu_e.htm#negotiations (last visited Feb. 8, 2018).

[2] *See* MALCOLM N. SHAW, INTERNATIONAL LAW 1012 (6th ed. 2008).

[3] *See* U.N. Charter art. 2, ¶ 6, arts. 33-38.

[4] *See id.* art. 25.

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2. legally binding dispute settlement proceedings.

The first category includes inquiry, good offices, mediation and conciliation, while the second category includes arbitration and judicial settlement.[5] Apparently, the focus of international dispute settlement proceedings in the past several decades has been placed on the development and improvement of the second category of legally binding proceedings. There has been significant achievement through this effort. At the same time, it has also been proven that from the perspective of states there are demerits and downsides of legally binding proceedings. Having realized the merits and demerits of legally binding dispute settlement proceedings, a new tendency is emerging where renewed attention is being paid to non-legally binding dispute settlement proceedings to facilitate more amicable resolution of State-to-State disputes.

All in all, it seems increasingly the case that states realize the efficiency and effectiveness of non-binding dispute settlement proceedings. A state seems more willing to accommodate the views of the other party or a compromise proposal from a third party, if a decision is taken from non-judicial, non-binding proceedings where they can keep a low-profile posture. Needless to say, some disputes do require legally binding proceedings by nature, and those disputes can only be resolved through such proceedings. On the other hand, some disputes are more prone to candid discussion and amicable interaction to reach a resolution. Non-binding dispute settlement proceedings are perhaps more suitable to these disputes.

Having realized this new phenomenon, some recent treaties purport to establish and galvanize non-binding disputing settlement proceedings by including non-binding DSMs in their treaties in addition to, or in tandem with, legally binding DSMs. A variety of different names and methods are adopted in this regard, examples of which include mediation, conciliation, or joint committee deliberations. Whatever their specific titles or names are, these non-binding DSMs are now becoming more important and effective given the nature of disputes being raised recently and pre-determined characteristics of conventional, legally binding DSMs.

It is against this backdrop that the idea of the Asia-Pacific Regional Mediation Organization (hereinafter "ARMO") has surfaced. This is a regional international organization to facilitate mediation between or among states in the Asia-Pacific region. A draft treaty to establish the international organization (Draft "Agreement on the Establishment of the Asia-Pacific Regional Mediation Organization" (hereinafter "ARMO Agreement")) and rules of procedures (Draft "Rules of Procedure for Mediation Conducted Under the Asia-Pacific Regional Mediation

[5] *See id.* art. 33.

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Organization" (hereinafter "ARMO Rules of Procedure")) are being contemplated and finalized at present.[6] It is hoped that the ARMO Agreement and ARMO Rules of Procedure will be adopted by many states[7] and put into force in the near future. The global community has yet to see the first mediation-focused international organization, so the creation and establishment of the ARMO appear to pose a set of novel issues. One of such issues is the jurisdiction of the new organization or the new agreement. Who is eligible to utilize the mediation under the ARMO, what types of disputes can be heard in this new proceedings of the ARMO, and when they can be heard are those that are directly related to jurisdictional questions.

With this in mind, Section II of the article provides an overview of mediation including a new trend of systematization and elaboration. Section III analyzes specific issues on jurisdiction of the new international organization (ARMO) and mediation proceedings under it. Section IV looks into additional issues relating to jurisdiction. The Conclusion then follows in Section V.

II. STATE-TO-STATE MEDIATION—OVERVIEW AND A NEW TREND FOR SYSTEMATIZATION

Unlike a formal judicial settlement proceeding, mediation or conciliation is rather a political or diplomatic proceeding for the peaceful settlement of inter-state disputes. In particular, mediation is a distinct method which involves an active participation of a third party mediator to find facts and propose solutions to the disputing parties.[8] According to one scholar, mediation is defined as "efforts by third parties to prevent the eruption or escalation of destructive conflict behavior and to facilitate a

[6] Please note that Draft "Agreement on the Establishment of the Asia-Pacific Regional Mediation Organization" [hereinafter ARMO Agreement] and Draft "Rules of Procedure for Mediation Conducted Under the Asia-Pacific Regional Mediation Organization" [hereinafter ARMO Rules of Procedure] are still being formulated and finalized as of this writing. For the purpose of this article, the two instruments' versions as of Feb. 28, 2018 as prepared by Professor Chang-fa Lo and other colleagues of Asian WTO Research Network are being cited and referred to. The texts of these documents are published at this same issue of Asian Journal of WTO & International Health Law and Policy (AJWH).

[7] The term "state" may implicate political controversy and sensitivity due to different views among some states on the statehood of certain states. The term "state" as used in this article neither supports nor refutes any views of any state in this regard. It is intended to convey a generic meaning to describe entities that are subjects of State-to-State disputes and parties to prospective mediation.

[8] *See* J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 26 (5th ed. 2011); Francisco Orrego Vicuña, *Mediation*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW [hereinafter MPEPIL] ¶ 1 (last updated Dec. 2010), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e61?rskey=qVpOTz&result=1&prd=OPIL.

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settlement that makes renewed destructive behavior unlikely."[9] In fact, the objective opinions of a mediator could considerably facilitate compromises between the disputing parties rather than in direct bilateral negotiations.[10] The process is under a strict confidentiality requirement and the proposals of concessions or the final outcome are not binding.[11] Conciliation is much similar to mediation in terms of the process, except that this mechanism tends to involve more formalistic features such as more formal composition of a panel and more procedural rules.[12] That said, even in conciliation procedural rules and the panel's terms of reference are flexible compared to legally binding proceedings.[13] Sometimes, the terms conciliation and mediation are used interchangeably, but many distinguish the two proceedings by nature, noting that mediation usually involves more pressure for a peaceful solution of an on-going dispute, while conciliation presupposes suspension of hostilities and proceeds under a stronger will for a settlement between the two parties, thus taking a more formalistic approach.[14]

Mediation was frequently utilized in the 19th century in various international disputes.[15] Recent examples of successful mediation includes the one mediated by Algeria in the hostage crisis between Iran and the United States in 1980.[16] From time to time, mediation can also be conducted by an international organization. By way of example, the Organization of American States (OAS) mediated a dispute between El Salvador and Honduras in 1969, regional conflicts involving the situations in Belize in 2002, and similar situations in Honduras in 2009.[17]

A. Renewed Attention—Incentives and Benefits of Non-Binding DSMs

The case number at the World Trade Organization (hereinafter "WTO") DSM docket has now reached 539 just in 23 years since its inception in 1995.[18] Arguably, the high utilization rate vouches for the reliance and

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[9] Kjell Skejelsbaek & Gunner Fermann, *The UN Secretary General and the Mediation of International Disputes*, *in* RESOLVING INTERNATIONAL CONFLICT: THE THEORY AND PRACTICE OF MEDIATION 76, 76 (Jacob Bercovitch ed., 1996).
[10] *Id.*
[11] *Id.*
[12] *See* MERRILLS, *supra* note 8, at 58.
[13] *See generally* ARMO Agreement; ARMO Rules of Procedure.
[14] Jean Pierre Cot, *Conciliation*, MPEPIL (last updated Apr. 2006), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e20.
[15] Vicuña, *supra* note 8, ¶ 22.
[16] *Id.* ¶ 25.
[17] *Id.*
[18] *See Chronological List of Dispute Cases*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Feb. 18, 2018).

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trust of member states toward the WTO's DSM. Despite its ups and downs, the DSM has been widely regarded as one of the signature achievements of the WTO, while there exist some areas and issues in the Dispute Settlement Understanding (hereinafter "DSU")[19] that require further adjustment and improvement. On balance, it would be fair to state, therefore, that the WTO's DSM has its own strengths and limitations despite its notable success. In particular, the WTO's DSM operating under the strict bounds of stipulated texts of the WTO Agreements and under judicialized proceedings has also evidenced its inherent confinements: for instance, any recommendation and ruling by a dispute settlement panel applies only in a *prospective* manner; in addition, the DSM adopts a system of so-called "self-contained regime" which means a panel is not necessarily permitted to turn to other international treaties or agreements for governing law; moreover, it takes a lengthy amount of time for the completion of the entire proceeding; and finally and more importantly it may not be able to sufficiently take into account various policy dimensions of the governmental measure at issue within the confined boxes of treaty texts.

It should be noted that, even equipped with a strong DSM, the WTO also permits and in fact underscores alternative dispute settlement proceedings under its own umbrella, which has an important implication in this respect. According to Article 5 of the WTO's DSU, disputing parties in the WTO system can voluntarily engage in good offices, conciliation or mediation procedures.[20] The article sets forth rather detailed provisions for

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[19] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

[20] *Id.* art. 5 provides that:

> Good Offices, Conciliation and Mediation
> 1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.
> 2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.
> 3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.
> 4. When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.

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non-binding, alternative dispute settlement proceedings. The initiation and the completion of these proceedings can be at any time.[21] The only timeframe provided within the provisions is that the disputing parties should allow sixty days of lapse from the receipt of a request for consultation before requesting an establishment of a panel.[22] When the disputing parties agree, the panel procedure and alternative dispute settlement proceeding can continue simultaneously.[23] But if the alternative dispute settlement proceeding fails to settle the dispute within the sixty-day period after the receipt of a request for consultation, the establishment of a panel can be requested promptly.[24] These alternative dispute settlement proceedings should be strictly confidential and information submitted or obtained during the proceedings should not serve as a basis for any later proceedings.[25] Lastly, Article 5.6 stipulates that the WTO Director-General may offer these alternative dispute proceedings to assist Members to settle a dispute.[26]

In retrospect, good offices first appeared in the *General Agreement on Tariffs and Trade* (hereinafter "GATT") in paragraphs 1-3 of Decision of 5 April 1966 on Procedures under Article XXIII. It was to mainly provide balance in the rights and obligations between less-developed and developed parties at that time. In the event that a less-developed party felt difficulties in mutually agreeing with a developed party concerning a particular issue, the less-developed complaining party was allowed to make a request for a good offices procedure to the Director-General. Afterwards, mediation came into the picture through the 1989 Decision on Improvements to the GATT Dispute Settlement Rules and Procedures. The 1989 Improvements further articulated procedures of good offices, conciliation and mediation. It was later incorporated into the WTO's DSU as Article 5, with some modifications.

While the DSU offers a viable example of the long-held interest in the non-binding DSMs in trade disputes, the situation is not merely confined to trade disputes. Although in varying degrees, states have contemplated these proceedings in other types of disputes arising from various treaties between and among states as well. The total number might well exceed well-known

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5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.
6. The Director-General may, acting in an ex officio capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

[21] *See id.* art. 5.3.
[22] *See id.* art. 5.4.
[23] *See id.* art. 5.5.
[24] *See id.* art. 5.4.
[25] *See id.* art. 5.2.
[26] *See id.* art. 5.6.

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alternative dispute settlement cases because often times they have taken place confidentially. Such being the case, an argument can be made that the international community might want to seek an alternative route of dispute settlement to deal with political sensitivities and legal complexities associated with various international disputes among them. If anything, a non-binding mechanism seems to offer a viable solution to a difficult dispute wherein complex legal and factual issues are all intertwined. Sometimes, arguably mediation or conciliation would serve the interest of the disputing parties much more efficiently.

B. Mediation Experiments in Recent Treaties

As a matter of fact, seeking to settle an important State-to-State dispute through a non-binding dispute settlement proceeding is not just a new invention but has been included in important treaties for a significant amount of time.[27] In the light of this, mediation has been one of the common fixtures of many trade agreements. Trade agreements usually include general Alternative Dispute Resolution (hereinafter "ADR") provisions in their dispute settlement chapters. For example, Article 19.7 of the Korea–New Zealand FTA reads:

> Article 19.7 Goods Offices, Conciliation or Mediation
> 1. The Parties may at any time agree to good offices, conciliation or mediation. They may begin at any time and be terminated at any time.
> 2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the Parties during these proceedings, shall be confidential and without prejudice to the rights of either Party in any further proceedings.

This provision sets forth a general possibility (note the term "may") that parties decide to choose non-binding proceedings. Similar provisions are also found in the Korea–Vietnam FTA and the Korea–Colombia FTA.[28]

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[27] See, for example, Agreement Between Japan and the Republic of Korea Concerning the Settlement of Problems in Regard to Property and Claims and Economic Cooperation, Japan–S. Kor., art. III, June 22, 1965, 583 U.N.T.S. 258, which provides:

> Article III
> 1 Any dispute between the High Contracting Parties concerning the interpretation or the implementation of this Agreement shall be settled primarily through diplomatic channels.
> 2 Any dispute which cannot be settled under the provision of paragraph 1 above shall be submitted for decision to an arbitral commission of three arbitrators . . . .

[28] *See* Korea–Vietnam Free Trade Agreement, S. Kor.–Viet., art. 15.5, May 5, 2015; Free Trade

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FTAs between Japan and Singapore, and Japan and Thailand have similar provisions as well.[29] The Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) also have similar provisions on mediation.[30] In these schemes, state parties preserve almost complete control over ADR proceedings, including mediation: the parties may at any time agree to initiate mediation, and terminate it. A party can withdraw from a mediation proceeding at any time. Any person can be appointed as mediator through any selection procedure, because there is specific provision regulating this in these trade agreements. Mediation proceedings are confidential and do not infringe on the rights of the parties in pursuing other avenues of dispute settlement. In short, complete discretion and full voluntariness with no pre-determined structure are the key traits of these general mediation provisions in trade agreements.

C. A New Trend—More Structured and Systematized Mediation

At the same time, a new trend is emerging where mediation takes on more structuralized and systematized features. In these schemes, provisions do not simply recommend mediation in abstract but offer it in a serious manner with detailed requirements. Compared to the "full voluntariness" model above, this new model presents more procedural and substantive rules so that state parties can turn to mediation more stably and reliably. For instance, Korea–E.U. Free Trade Agreement (hereinafter "Korea–E.U. FTA") and Korea–China Free Trade Agreement (hereinafter "Korea–China FTA") have adopted a non-binding "mediation" mechanism to deal with disputes concerning Non-Tariff Barriers (hereinafter "NTBs").[31] This new

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Agreement Between the Republic of Colombia and the Republic of Korea, Colom.–S. Kor., art. 20.6, Feb. 21, 2013.

[29] *See* Agreement Between Japan and the Republic of Singapore for a New-Age Economic Partnership, Japan–Sing., art. 141, Jan. 13, 2002; Agreement Between Japan and the Kingdom of Thailand for an Economic Partnership, Japan–Thai., art. 161, Apr. 3, 2007; Agreement Between Japan and the Socialist Republic of Viet Nam for an Economic Partnership, Japan–Viet., art. 118, Dec. 25, 2008; Agreement on Free Trade and Economic Partnership Between Japan and the Swiss Confederation, Japan–Switz., art. 140, Feb. 19, 2009; Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Islamic Republic of Pakistan, China–Pak., art. 61, Nov. 24, 2006; Free Trade Agreement Between the Government of the People's Republic of China and the Government of New Zealand, China–N.Z., art. 187, Apr. 7, 2008; Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China, Austl.–China, art. 15.6, Jan. 15, 2015.

[30] *See* Trans-Pacific Partnership [TPP] art. 28.6; Transatlantic Trade and Investment Partnership Government-Government Dispute Settlement Chapter, TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP [TTIP], art. 4 (2015), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153032.pdf.

[31] The South Korea–Eurpoean Union Free Trade Agreement, S. Kor.–E.U., Annex 14-A, Oct. 15, 2009 [hereinafter Korea–E.U. FTA]; Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Korea, China–S. Kor., art. 20.5, ¶ 4, June 1, 2015 [hereinafter Korea–China FTA].

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dispute settlement mechanism is a reflection of the fact that NTBs have become one of the most controversial and complex issues in recent trade agreements: after the conclusion of a trade agreement, navigating through the web of laws and regulations, both written and unwritten, of the parties of trade agreements is sometimes like walking down the labyrinthine streets of an old city. Quite often, unpredictable exercise of discretion and invisible regulatory restriction couched in vague terms unfortunately neutralize the benefits from the tariff elimination of the trade agreements. Identification and elimination of NTBs have thus become critical. Having realized the inherent limitations of the existing DSMs in trade agreements in dealing with disputes of NTBs, this new scheme of mediation has been introduced as a "flexible" alternative wherein parties are expected to be more willing to accept and implement a decision of a third party mediator.

In Korea–E.U. FTA, Annex 14-A sets forth rules for a mediation mechanism especially for NTBs. Given the time-consuming nature of a formal dispute settlement procedure, the two states agreed on a more "comprehensive and expeditious procedure" helped by a mediator on market access issues relating to NTBs.[32] One of the notable characteristics of this procedure is the stipulated timeline. Consent for the initiation of mediation should be given within fifteen days of request by another party[33] and the appointment of the mediator should be completed within thirty days.[34] The mediation process is encouraged to be concluded within sixty days of the date of the appointment of the mediator.[35] In other words, the whole process is designed to be completed in approximately 100 days. Compared to the lengthy, legally binding dispute settlement proceeding, mediation if successful could prove to be an efficient and less costly alternative to address the disputes relating to NTBs. In Article 5 of the Annex, the rules of the mediation proceeding set forth the authority of the mediator in conducting specific mediation[36] and in proposing his or her opinion (mediation result) based on the facts and legal understanding wherein strict legal consistency or elaboration is not necessarily expected or required.[37] A wide latitude of discretion accorded to the mediator is not understood to cause serious concerns because the mediation result proposed by the mediator is not legally binding.[38] Moreover, this mediation proceeding is established as an independent option separate from the formal dispute settlement proceeding: the parties can turn to the formal dispute

[32] *See* Korea–E.U. FTA, *supra* note 31, annex 14-A, art. 1.
[33] *See id.* art. 3.2.
[34] *See id.* art. 4.1.
[35] *See id.* art. 5.3.
[36] *See id.* art. 5.2.
[37] *See id.* art. 5.3.
[38] *See id.* art. 5.5.

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settlement proceeding as regards issues that have been already referred to mediation.[39] Submissions and statements made in the course of mediation, however, cannot be brought up or relied upon at the official, legally binding dispute settlement proceedings.[40] It is not clear whether these submissions and statements can still be relied upon or otherwise utilized in other dispute settlement proceedings outside the dispute settlement proceedings of the Korea–E.U. FTA. This is something that should be clarified once mediation becomes a popular option in the future.

Article 20.5 of the Korea–China FTA also adopts a similar mechanism. It reflects the two states' intention to promote utilization of non-binding mediation mechanisms regarding NTBs.[41] Basic principles of mediation stipulated in this provision include expeditious resolution of disputes,[42] good faith implementation of mediation results,[43] and preservation of confidentiality.[44] In many respects, the Korea–China FTA's NTB mediation proceeding follows the basic features of the Korea–E.U. FTA, except that it does not include rules on specific timeframe of the proceeding, on the appointment of a mediator, or on how to terminate and conclude mediation.

Other examples in this respect include Article 6 of the 2004 Economic Partnership Agreement between the EU and Japan and Article 19.5 of the Korea–Chile Free Trade Agreement.[45] For instance, Article 6 of the E.U.–Japan Economic Partnership Agreement Chapter 21 (Dispute Settlement) provides that:

> Article 6
> Mediation
> 1. A Party may request the other Party at any time to enter into a mediation procedure with respect to any matter falling within the scope of this Chapter as referred to in Article [2] (Scope), where the matter concerns a measure that adversely affects trade or investment between the Parties.
> 2. The mediation procedure may begin at any time by agreement of the Parties. It shall be initiated, conducted and terminated in accordance with the Mediation Procedure, adopted by the Joint Committee pursuant to subparagraph [X] of paragraph [Y] of

[39] *See id.* art. 7.2.
[40] *See id.* art. 7.1.
[41] *See id.* art. 20.5, ¶ 4.
[42] *See id.* art. 20.5, ¶ 5.
[43] *Id.*
[44] *See id.* art. 20.5, ¶ 6.
[45] *See* Agreement Between Japan and the European Union for an Economic Partnership, Japan–E.U., art. 6, Dec. 7, 2017; Free Trade Agreement Between the Government of the Republic of Korea and the Government of the Republic of Chile, S. Kor.–Chile, art. 19.5, Feb. 15, 2003.

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> Article [Z] (Joint Committee) of Chapter [XX] (General/Institutional Provisions).
> 3. If the Parties agree, the mediation procedure may continue while procedures of the panel provided for in this Chapter are in progress.

While these mediation proceedings do not contain as detailed provisions as the ones in Korea–E.U. FTA or Korea–China FTA, they arguably contain provisions more elaborated than the previous mediation provisions of "full voluntariness" written in abstract.

Views from this perspective, the proposed ARMO is the most recent effort to introduce mediation in a systematized and structured manner so that states can utilize the mechanism in a more systematic fashion.[46] This is to assist states in the Asia-Pacific region in settling their various disputes through mediation as well as through conventional DSMs.[47] The purpose of ARMO mediation is not to replace traditional DSMs with mediation but to support and supplement traditional DSMs with the introduction of an alternative route of mediation, but with more elaboration, structuralization and systematization.[48] It is expected that a regional convention will be able to be adopted among like-minded Asia-Pacific states and implemented by them, so that important State-to-State disputes have another reliable, less costly and truncated DSM through the ARMO.[49]

III. SPECIFIC ISSUES OF JURISDICTION

Arguably, the formality and sensitivity associated with legally binding DSMs have prompted states and their decision makers to look to other types of DSMs where flexibility and a low-key stance could be preserved for their legal disputes. In addition, the growing cost and logistical burden of international litigation through traditional DSMs—be it International Court of Justice (hereinafter "ICJ") proceedings or WTO dispute settlement proceedings—have also caused concerns on the part of states.[50] The

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[46] *See* ARMO Agreement, *supra* note 13, pmbl. ("Considering the desirability of a permanent regional inter-governmental mediation organization to assist in the resolution of disputes in a friendly, swift and peaceful manner . . . .").
[47] *See id.*
[48] *See id.*; *see also* ARMO Agreement, *supra* note 13, art. 3.2 ("Mediation conducted under 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.").
[49] *See* ARMO Agreement, *supra* note 13, art. 1 ("The Asia-Pacific Regional Mediation Organization (hereinafter referred to as the "ARMO") is hereby established.").
[50] *See, e.g.*, Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Ronald Saborio Soto*, at 8, 72, WTO Doc. TN/DS/26 (Jan. 30, 2015); Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Ronald Saborio Soto*, at 11, WTO Doc. TN/DS/27 (Aug. 6, 2015) [hereinafter Report by the Chairman TN/DS/27].

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concerns may be further underscored in the case of developing and/or least developed states.[51] Furthermore, some of the traditional DSMs with legally binding force fail to settle disputes due to the structural loopholes. In the case of the WTO's DSM, a final outcome requires a lengthy proceeding and any remedy is only prospective in nature.[52] So, states have seen the inherent limitation of the traditional DSMs and have started to consider something more flexible and malleable wherein an equitable solution can be ensured. At the same time, the states intend to have a proceeding that has some core elements of systematization with a third party appointed who hears from the parties and provides an objective assessment to the disputing states. Mediation is being increasingly favored in this process. The ARMO is apparently an entity that aims to cater to the wishes and desires of the states for this 1.5 track to settle their own disputes.[53] The ARMO stands to provide a good experimental opportunity to devise and implement, although in a small scale with territorial confinement, this new route of dispute settlement under international law.[54]

In materializing the idea of systematized mediation in general and ARMO proceeding in particular, the first thing that requires willing states' attention is the jurisdiction of the new organization or jurisdiction of a mediation panel. As this is a novel attempt, several issues arise for the attention of these stake holders, each of which is addressed below.

A. Compatibility with Obligations Arising Under Other Treaties

Any mediation is to be feasible only when it is not prohibited by provisions of other treaties and agreements which are legally binding on the states that are parties to the ARMO. It is one thing to underscore the benefits of mediation and quite another to be in violation of other treaties and agreements, which would then make mediating states vulnerable to legally binding DSMs established by these other treaties. Consider, for instance, the WTO Agreements. All possible ARMO member states are members of the WTO and they are supposed to abide by the provisions of the WTO Agreements. It is critical, therefore, to confirm in advance that there are no specific provisions that bar WTO members from proceeding to mediation. As seen in the above discussion, at least with respect to the WTO Agreements, there does not exist such a provision. Similar analyses are needed for future members of the ARMO as regards other treaties and agreements in force. As discussions in Section II prove, most of the trade

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[51] *See* Jaemin Lee, *A More Widely Available Public Good: Proposed DSU Reform and Its Implication for Developing Members*, 51(6) J. WORLD TRADE 987, 995-96 (2017).
[52] *See* DSU, *supra* note 19, arts. 19, 20.
[53] *See* ARMO Agreement, *supra* note 13, art. 2.1.
[54] *See id.* arts. 1, 2.1.

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agreements in force not only permit but also encourage resolution of disputes through non-legally binding means such as mediation.[55] It is believed that other treaties in non-trade sectors also take a similar stance. In this respect, it should be borne in mind that absence of reference or provisions relating to mediation in a particular treaty could, and in fact should, be interpreted to permit states to explore the option when they wish to. What has not been specifically carved out in a particular treaty which is otherwise available to a state under customary international law should be regarded as remaining available to the state.[56]

Since this question raises a threshold issue, a careful perusal of all major treaties should be conducted by respective states in advance of joining the ARMO. Pending such examination, existing treaties and agreements hardly limit, let alone prohibit, states' voluntary pursuit of settling their disputes through mediation. It can be said, therefore, that major legal hurdles do not stand in the way for the creation and operation of the ARMO.

B. Personal Jurisdiction

Contemplation of a new international organization hearing international legal disputes prompts states to consider personal jurisdiction of the organization or a mediation panel. In the specific context of the ARMO, the question asks who is eligible to initiate the newly introduced mediation through the new organization.

1. Standing Accorded to States Only — Mediation is utilized by many entities and individuals.[57] The type of mediation that is the focus of this new exercise is the one between or among sovereign states.[58] Mediation has long been adopted as one of the means to settle states' disputes with other states.[59] The proposed mediation proceeding through the ARMO is designed to cover and facilitate this particular type of mediation between states.[60] Thus, disputes initiated by non-state entities of a state or directed at non-state entities of another states are not eligible to proceed to the ARMO.[61] Instead, disputes involving states and their governments can be

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[55] *See, e.g.*, DSU, *supra* note 19, art. 5; Korea–E.U. FTA, *supra* note 31, annex 14-A; Korea–China FTA, *supra* note 31, art. 20.5.

[56] *See* S.S. Lotus (Fr. v. Turk.), Judgement, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7, 1927).

[57] *See* United Nations Commission on International Trade Law, *Settlement of Commercial Disputes—International Commercial Mediation: Preparation of Instruments on Enforcement of International Commercial Settlement Agreements Resulting from Mediation*, U.N. Doc. A/CN.9/WG.II/WP.205 (Nov. 23, 2017).

[58] *See* ARMO Agreement, *supra* note 13, pmbl.

[59] *See* Vicuña, *supra* note 8, ¶ 22.

[60] *See* ARMO Agreement, *supra* note 13, art. 2.1 ("The purpose of the ARMO shall be to provide legal facilities for mediation of Member-to-Member disputes in accordance with this Agreement.").

[61] *See id.*

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brought to the new mediation proceeding.

More specifically, in principle states that have acceded to the ARMO Agreement—that is, the members—are eligible to utilize the mediation facility of the agreement.[62] They are responsible for shouldering the logistical and financial burden arising from the administration and operation of the ARMO.[63] That said, the proceeding may be open to non-members that come to the ARMO voluntarily based on an *ad hoc* agreement between disputing parties and who are willing to abide by the terms of the agreement: to the extent facilitation of mediation is one of the major objectives of the agreement, spreading the mediation proceeding among non-members would help achieve the cause.[64] Non-members may also be required to cover the expenses of the proceedings.[65]

2. States in the Asia-Pacific Region — On a different note, in the specific context of the ARMO, as the name itself indicates, this facility is available only to the states in the Asia-Pacific region.[66] Members may also consider accommodating disputes involving states outside this region (i.e., either both parties are from other regions or one of them is from another region), but a concern may arise that doing so would undermine the benefit of the Asia-oriented experiment of mediation of the ARMO. What is being pursued by the ARMO is not necessarily a global organization offering a mediation facility: rather, an Asia-Pacific-centered organization with a specific mandate to help settle disputes between and/or among Asia-Pacific states.[67] Having said that, if all the parties agree to submit a dispute involving a non-Asia-Pacific party or parties and agree to abide by the terms of the ARMO Agreement, then the ARMO may extend its jurisdiction over such a dispute.[68]

In this respect, the regional scope—what states should be regarded as "Asian" or "Pacific" ones—can be determined first and set forth for the sake of clarity. By way of comparison, the ARMO's regional scope may be

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[62] *See id*.

[63] *See id.* art. 17.1 ("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 supports to the ARMO to enable its operation.").

[64] *See id.* art. 2.1.

[65] *See id.* art. 17.1.

[66] *See id.* art. 28 ("This Agreement is open to accession by any Asia-Pacific State or Economy which 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.").

[67] *See id.* pmbl., art. 28.

[68] *See, e.g.*, *id.* art. 2.3. But, there are no directly supporting provisions on this statement in ARMO Materials.

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equivalent to that of APEC which covers not only Asia but also the Pacific region.[69]

3. Multi-Party Mediation — Given the fact that sometimes a dispute involve multiple parties and that conventional DSMs make efforts to introduce provisions to regulate multi-party disputes, mediation may also involve multiple parties in the same proceeding.[70] If all or some of the multiple parties are not members of the ARMO, then prior agreement by these non-members committing themselves to abide by the terms of the ARMO Agreement should be required.[71] As discussed in the above section, if a multi-party dispute involves a non-Asian state(s), then the ARMO does not have jurisdiction unless all parties agree to the submission of the dispute to the ARMO proceeding.[72]

4. Consent to Mediate in Writing — Another question is whether a prospective mediation should adopt a so-called "double consent" system. In the case of the ARMO specifically, the issue is whether membership of the ARMO alone would give a member the power to initiate mediation against another member or whether two members should agree to bring the matter to mediation before the ARMO. Considering that

(a) under international law there is no obligation to conduct mediation,

(b) mediation is not a legally binding process, and

(c) the core characteristic of mediation is the consensual nature of the disputing parties, not only the membership but also consent for specific mediation should preferably be required.

Given the importance of mediation between two states, such consent should be provided in writing. Consent in writing should be presented to the mediator(s) upon referral of the matter. The ARMO Agreement also envisages such a "double consent" mechanism.[73] Similarly, consent in writing is also to be required for non-members submitting their disputes to ARMO mediation.[74]

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[69] *See About APEC*, ASIA-PACIFIC ECON. COOPERATION, https://www.apec.org/About-Us/About-APEC (last visited Feb. 20, 2018).

[70] *See* ARMO Agreement, *supra* note 13, art. 2.2; ARMO Rules of Procedure, *supra* note 13, art. 2.2.

[71] As it currently stands, the ARMO Agreement and Rules do not have specific provisions addressing this situation.

[72] *See* ARMO Agreement, *supra* note 13, art. 2.3.

[73] *See id.*; ARMO Rules of Procedure, *supra* note 13, art. 2.1 ("Any Member wishing to institute mediation proceedings shall address a request (hereinafter referred to as Mediation Request) to that effect in writing to the Secretary-General, who shall send a copy of the Mediation Request to the other party or parties."); *see also* Korea–E.U. FTA, *supra* note 31, annex 14-A, art. 3.1.

[74] *See id*.

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C. Subject Matter Jurisdiction

The next question is what type of issues or matters can be submitted to mediation. States encounter a wide variety of disputes—be it economic, cultural, security, historical, territorial or maritime ones. Each dispute tends to involve a plethora of complex factual and legal components. So, the question is whether all of these disputes can be submitted to ARMO mediation or whether there should be some sort of threshold limitation.

1. Nature of Disputes: Legal Disputes — Mediation's core value indeed lies in its flexibility.[75] As such, upon states' consent, any sort of dispute may be submitted to mediation. That said, practical aspects of managing mediation also require attention. The practical aspects would become more acute if an international organization is created and states are invited to accede assuming their own shares of the financial and logistical responsibility. At the same time, a set of skills administered by an international organization may not be able to cover the full extent of areas where disputes arise. These practical considerations would stand for the proposition that efficiency does matter for the successful operation of mediation and an international organization. These considerations should preferably guide the establishment and operation of the ARMO.

Viewed from that perspective, it seems desirable to stipulate, at least at the initial stage of the ARMO, that it is "legal" disputes that fall under the jurisdiction of the mediation through the organization—"legal" disputes in the sense that the resolution of the disputes requires a decision maker(s) to look into the relevant sources of law, whether treaties or customary international law.[76] Article 38 of the ICJ Statute may provide a useful reference point for this matter.[77]

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[75] *See* ARMO Agreement, *supra* note 13, art. 21.2 ("The Rules of Procedure shall ensure the impartiality and efficiency of the mediation procedure. They shall also be flexible enough so as to assist the disputing parties to resolve their disputes in a mutually satisfactory manner . . . .").

[76] In this respect, see compare, *id.* art. 2.2 ("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.") (emphasis added). In the authors' reading, the term "factual disputes" in this paragraph is understood to mean "legal disputes with factual issues," which should still fall under the jurisdiction of the ARMO.

[77] Statute of the International Court of Justice, art. 38.1, June 26, 1945, 59 Stat. 1031 [hereinafter ICJ Statute] provides that:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;

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Arguably, it would not be prudent to open the mediation procedure to all types of disputes. For instance, disputes relating to purely factual, political or diplomatic issues, important though they may be, may not be appropriate for review and assessment by the ARMO. In other words, the ARMO might not want to function as if it were a regional version of the U.N. Security Council where important international disputes are handled.[78] Two reasons can draw the attention of the states in this respect. Firstly, mediation's relationship with the traditional DSMs needs to be considered. Mediation is now being contemplated, in FTAs and others, in lieu of or in substitute for legally binding DSMs whose jurisdiction is for legal issues arising from respective treaties. An argument can be made, therefore, that legal issues should remain as adequate candidates for review by a mediation organization. Mediation is being discussed in the context of pursuing a new alternative to existing DSMs, so that new alternative should presumably aim to address the issues being referred to conventional DSMs—i.e., legal issues. Secondly, should a mediation organization review non-legal issues, its decision may run the risk of not garnering the necessary support from disputing states and other entities. This is so because non-legal disputes can be better addressed by a political or diplomatic entity such as the U.N. Security Council or a diplomatic channel and because there is another procedure that deals with purely factual matters if that is the nature of a dispute, namely an "inquiry".[79] Profiles of those who are contemplated as possible mediators also indicate that their expertise lies in the legal issues as opposed to other non-legal issues. Based on the consideration of these aspects, the prospective mediation procedure might wish to focus on legal disputes for the purpose of its subject matter jurisdiction.

Having said that, it should be noted that many of these political or diplomatic disputes involve a layer of legal issues. This means that these disputes can come to mediation because they are indeed legal disputes. If a dispute involves only factual issues, a situation which would be quite rare, then it does not fall under the jurisdiction of ARMO mediation. Thus, as a matter of fact, most of the disputes that come to the international horizon would be covered by the ARMO jurisdiction even if a "legal" dispute standard is adopted.[80]

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d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[78] *See* U.N. Charter art. 39.
[79] *See* MERRILLS, *supra* note 8, at 41.
[80] *See* ARMO Agreement, *supra* note 13, art. 2.2.

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Even if mediation is confined to legal disputes, that does not necessarily mean that a strict concept of sources of law or governing law should be followed in settling a dispute. For the purpose of taking advantage of the unique traits of mediation, flexibility can be permitted to mediators, so that they can look to various sources of international law in order to achieve the most equitable outcome in a given dispute. Mediation would not have to be treated as a self-contained regime where decision makers can only look at a particular set of legal norms as governing law.[81] Rather, the procedure can be understood as a forum where mediators take into consideration all legal norms applicable to the parties and appropriate under the circumstances, and then come up with the most suitable outcome for the parties. Upon coming to the mediation procedure of the ARMO, the parties may be understood to have agreed to this authority of the mediators. In a sense, this is similar to what is envisaged in Article 38.2 of the ICJ Statute.[82]

2. Issues to Be Addressed in a Dispute: Legal and Factual Issues — For the sake of clarity, the notion that only legal disputes fall under the jurisdiction of mediation does not mean that only "legal issues" should be presented to mediation. As evidenced by many disputes, factual issues constitute a core component of a legal dispute and disposition of a legal dispute require clarification and determination of factual issues. Thus, any legal dispute will necessarily entail discussions and arguments concerning factual issues and mediators will have to make a decision on factual issues. It is critical that factual issues are properly assessed by a decision maker in any dispute settlement proceeding. Mediation is no exception in this respect. So, even in the universe of "legal disputes", mediation proceedings and mediators will have to assess and evaluate factual issues for the successful resolution of the dispute. What is not proper, on the other hand, is to bring a purely factual issue—such as confirmation of a factual situation—to the mediation proceeding. Those issues could be more properly handled by another proceeding under international law, including an "inquiry".

3. Post-Mediation Disputes — In addition, mediation-related disputes can also be brought to the mediation procedure. These disputes are those arising from mediation proceedings. For instance, disqualification of mediators due to alleged conflict of interest or misconduct in the course of mediation,[83] interpretation of the mediation result, or enforcement of the completed mediation[84] can themselves be brought to the mediation

[81] *See* DSU, *supra* note 19, arts. 3.2, 19.2.
[82] ICJ Statute, *supra* note 77, art. 38.2 provides: "This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."
[83] *See* ARMO Rules of Procedure, *supra* note 13, art. 5.
[84] *See* Korea–E.U. FTA, *supra* note 31, annex 14-A, art. 6.

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procedure as well. What is not clear, however, is whether separate agreement is required between parties to initiate these mediation-related disputes. Presumably, one could argue that the agreement in writing at the start of mediation, unless otherwise stipulated, may be interpreted to cover all the incidental matters relating to the dispute, in which case separate consent is not necessarily required for these subsequent disputes.

D. Temporal Jurisdiction

According to the Vienna Convention on the Law of Treaties (hereinafter "VCLT"),[85] barring specific agreement otherwise, the ARMO Agreement applies to disputes that come into existence after the entry into force of the agreement.[86] Under this framework, there is a temporal limitation for matters that can be brought to mediation. It is questionable whether disputing parties can agree to bring a dispute that is outside the scope of this temporal limitation, such as a dispute that predates the entry into force of the agreement. It is to be determined by the specific wording of the prospective agreement. In the case of mediation in abstract, separate from or independent of any agreement or standing organization, parties' agreement may prevail. In the context of implementation of specific international convention, as in the case of the ARMO Agreement, mere agreement between disputing parties may not be sufficient to broaden the temporal scope of the agreement. Temporal scope is an issue that affects the interest of all members of the ARMO, and it may not be appropriate to permit two of them to deviate from the agreed terms with their own decision. Of course, if the agreement includes a particular provision to accept this kind of situation, then the ARMO can hear the dispute.

IV. OTHER OUTSTANDING ISSUES RELATING TO JURISDICTION

At the same time, there are other outstanding issues that relate to jurisdiction of mediation conducted by an international organization such as the new ARMO. Needless to say, these issues are not exhaustive: there will be a variety of issues as the plan materializes and the organization is established. With that caveat, in the early stage of discussing the

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[85] Vienna Convention on the Law of Treaties art. 4, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]:

> Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

[86] *See id.*; ARMO Agreement, *supra* note 13, art. 27.3.

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formulation of the ARMO and ARMO Agreement, careful consideration of the following issues is needed.

A. Enforcement of Mediation Results

When it comes to mediation, enforcement of the results is not entirely clear. Mediation is not a legally binding procedure, so its outcome is not legally binding either. Consequently, one would posit, the subject of enforcement may not be amenable to mediation. Arguably, if the parties were serious about enforcement, they would choose other legally binding options —such as arbitration or court proceedings. So, in the minds of the parties to mediation, enforcement may not be at the top of the list. If anything, enforcement of the results and implementation by the (losing) parties are basically subject to the discretion of the parties. The parties may implement the outcome or they may not. In particular, a losing party may not be so enthusiastic about implementation.

On the other hand, one would also argue that for mediation to be effective and for states to take the procedure more seriously, at least there is a certain level of guarantee that the outcome will be implemented. Oftentimes, mediation results in reciprocal obligations between disputing parties and the success of mediation is hinged upon the parties' willingness to abide by the terms.[87] As with any other similar proceedings, participants' failure to abide by the outcome of mediation may trigger and increase frustration over the proceeding and render it as another theoretical experiment. In particular, in the context of a more systematized mediation proceeding as envisaged in the ARMO, enforcement may deserve more enhanced attention. After all, after having mobilized significant financial and logistical resources, other members as well as disputing parties may rightly expect some tangible outcome, which is the implementation of the mediator's decision and the ultimate resolution of a dispute. Mediation through an institution may further enhance such expectation.

On the surface, enforcement may sound contradictory to the very notion of mediation as a dispute settlement mechanism which is not legally binding in the first place. Indeed, rendering any outcome of mediation legally enforceable may change the very nature of mediation, a situation where the distinction between State-to-State arbitration and State-to-State mediation is now blurred. If mediation were to be differentiated from arbitration, there would have to be elements that still preserve the traits of mediation—the voluntariness of the parties at every step of the proceeding.[88] So, states may face a dilemmatic situation: on the one hand,

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[87] *See* MERRILLS, *supra* note 8, at 37.

[88] See ARMO Agreement, *supra* note 13, art. 2.3 ("Mediation is undertaken only when the parties

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enforcement is important even for mediation, but on the other hand enforcement should not be self-imposing.

One way to address this dilemmatic situation is to secure separate agreement and/or consent for the implementation of mediation results. The ARMO Agreement itself stipulates that parties agree to implement the outcome of mediation to which they are parties.[89] This is an important provision; the mediation itself is non-binding, but the parties to the Agreement are now obligated to implement the mediation outcome because of the obligation as parties to the Agreement which is legally binding. Similar agreement and consent may also be required when states submit their disputes to mediation on an *ad hoc* basis. In terms of policy, this prior consent requirement would make sense because the disputing parties stand to utilize the system established and financed by the entire membership. The entire membership and the organization have legitimate interest in the proceeding at issue and thus may require consent to implement the results of the mediation through the ARMO. The same logic would also apply to *ad hoc* disputants. Depending on how specific terms are used and phrased, this prior agreement may be elevated to the level of a "treaty" within the meaning of Article 2 of the VCLT,[90] in which case the content of the document is subject to implementation on its own accord, even if the said mediation itself is not legally binding and voluntary.

B. Relationship with Other DSMs

As states have already committed themselves to various DSMs of multiple treaties,[91] it is critical to clarify in the ARMO Agreement and

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to a dispute (hereinafter referred to as "parties") so agree. Mediation may be requested at any time by any party to a dispute with the consent from the other party, and may be terminated at any time by any party.").

[89] *See id.* art. 22 ("Any settlement agreement duly concluded between disputing parties is binding upon them and shall be performed by them in good faith."); ARMO Rules of Procedure, *supra* note 13, art. 17.

[90] *See* VCLT, *supra* note 85, art. 2.

[91] By way of example, 164 members have acceded to the WTO Agreements wherein members have to consent to the mandatory jurisdiction of its dispute settlement proceedings. Of course some of the members of the WTO are not sovereign states but economies such as Hong Kong or Macau, but most of them are sovereign states under international law. *See* DSU, *supra* note 19, art. 23; *The WTO*, WTO, https://www.wto.org/english/thewto_e/thewto_e.htm (last visited Feb. 18, 2018). Likewise, there are 3,324 International Investment Agreements (IIAs) as of the end of 2016 one of whose main features is a binding and mandatory dispute settlement proceeding between an aggrieved foreign investor and a host state government as well as State-to-State dispute settlement agreement. *See* U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT 2017, at 111-18, U.N. Sales No. E.17.II.D.3 (2017). At the International Court of Justice [hereinafter ICJ], 73 states have accepted the compulsory jurisdiction, though on a reciprocal basis, of the court as of February 2018. *See Declarations Recognizing the Jurisdiction of the Courts as Compulsory*, ICJ, http://www.icj-cij.org/en/declaration s (last visited Feb. 18, 2018).

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Rules the relationship with other DSMs. Reflecting this realization, the relationship is now carefully contemplated and laid out in the documents.[92] In particular, the ARMO Agreement stipulates that the ARMO mediation does not "prejudice the rights of parties to resolve their dispute under any other dispute settlement mechanism which is available to them."[93] This is an appropriate and important clarification. That said, in order to further clarify, in the long run, the relationship between ARMO mediation and various DSMs that are emerging in multiple treaties, the parties may consider including a provision with a broader reference, such as "the provisions of the ARMO Agreement is without prejudice to rights and obligations of parties that may arise from any other treaty with respect to dispute settlement proceedings of the said treaty." This is to confirm that the ARMO Agreement does not affect the rights and *obligations* of parties in terms of their existing rights and obligations in DSMs of other international instruments. With this kind of provision, parties may have a better understanding that in the case of conflict other treaties' DSMs will prevail over the provisions of the ARMO Agreement. Providing automatic superiority in hierarchy to other treaties should be carefully contemplated due to a possible concern that it may characterize the ARMO as playing a subsidiary role. The flexibility stemming from such clarification may arguably underscore the popularity of the ARMO mediation and alleviate the confusion of states in the initial stage of the new organization. In this respect, as the ARMO Agreement comes into force and applies, following issues can be further clarified in the ARMO Agreement and Rules based on accumulating experience. In other words, these issues do not have to be set forth in the ARMO Agreement or Rules at this stage, but can be left for future discussions and adjustments.

1. Utilization of Mediation Materials in Other DSM Proceedings — One of the practical issues arising from State-to-State mediation is the treatment of statements and materials submitted during the mediation proceeding in future proceedings of other DSMs. In order to facilitate candid discussion and robust pursuit of the middle ground, recent mediation proceedings stipulate that all the statements and submissions remain confidential and are not to be submitted or referred to in future proceedings, most notably legally binding DSMs.[94] Likewise admission to some facts or a proposal for settlement cannot be introduced in subsequent DSM proceedings.[95] Present ARMO Agreement and Rules do not contain similar provisions at this stage. Based on future development and

[92] *See* ARMO Agreement, *supra* note 13, art. 3.
[93] *Id.* art. 3.2.
[94] *See* Korea–E.U. FTA, *supra* note 31, annex 14-A, art. 7.1; Korea–China FTA, *supra* note 31, art. 20.5, ¶ 6.
[95] *See id.*

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experience, parties may contemplate including such provisions in these instruments. At this stage, only confidentiality requirements are provided for in these instruments.[96]

In the prospective discussion, parties might wish to clarify the extent to which parties, after they have failed to settle their disputes through ARMO mediation, can submit statements and documents in a new submission; in other words, they are not permitted to submit the same submission (i.e., re-cycling) in future DSMs, but they can and should be permitted to submit a new submission that contains core elements of law and facts that have been previously submitted in mediation proceedings. Thus, the boundary between re-cycling or re-submission which are prohibited and new submission which should be permitted should be carefully and clearly drawn. In practice, a distinction between the two may be far from easy as oftentimes the same documents and arguments are implicated for the same governmental measures at issue.

2. Another Layer in Proceeding to Binding DSMs — One possible downside of the mediation proceeding could be that it can be simply another additional procedure before a dispute proceeds to official DSMs. An example can be found in the consultation proceedings of the WTO's DSM.[97] As it currently stands, the WTO DSU's consultation procedure has largely become an additional and ceremonial proceeding that eats up important time and cost for the disputants, and has now turned into a subject of important discussion about how to efficiently and promptly carry out consultation in future DSU proceedings.[98] Knowing the experience at the WTO, parties to the ARMO might wish to consider, in their future deliberations, ways that could avert the occurrence of similar situations for mediation in the future.[99] The objective can only be achieved when the mediation proceedings have their own benefits on their own accord and states become cognizant of them, independent of existing, conventional DSMs.

3. Post-DSM Mediation Proceeding — At the same time, it is not entirely clear whether the parties, after having completed their dispute settlement proceedings in other treaties, such as the WTO DSM, can come to the mediation proceeding under the ARMO.[100] If parties want to pursue such an option for whatever reason, they may agree to come to mediation after an unsuccessful or unsatisfactory outcome at other DSMs: for instance consider the situation of absence of remand at the WTO's DSM and its

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[96] *See* ARMO Agreement, *supra* note 13, art. 20; ARMO Rules of Procedure, *supra* note 13, art. 15.
[97] *See* DSU, *supra* note 19, art. 4.
[98] *See* Report by the Chairman TN/DS/27, *supra* note 50, art. 3.1.
[99] *See* ARMO Agreement, *supra* note 13, art. 3.2.
[100] *See id.*

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resulting consequence.[101] Given the increasing dissatisfaction with the current DSMs, it is possible that parties may have continuing disputes after the conclusion of the DSM proceedings under other treaties. They may decide to agree to ARMO mediation. Present ARMO Agreement and Rules do not include a provision that addresses this situation.[102]

The problem is whether other treaties may permit the states to pursue such an option. It is one thing that the parties can choose mediation instead of an official DSM proceeding in other treaties before they proceed to that official DSM proceeding. It is another whether the parties can proceed to mediation *after* the completion of the DSM proceedings of another treaty due to their dissatisfaction with a decision from the proceeding. At present, parties cannot move on to other DSMs once they succeed in settling the dispute through ARMO mediation and conclude a settlement agreement.[103] But whether the party can proceed the other way around is not entirely clear.

C. Procedural Due Process

Given the flexibility of mediation proceedings, mediation is arguably not necessarily amenable to procedural due process, at least not at the level of court proceedings or arbitration.[104] For instance, mediation rules do not necessarily prohibit *ex parte* communication or rules of evidence.[105] However, as much importance is now being attached to the proceeding, a guarantee of procedural due process apparently becomes more critical. That is particularly the situation with respect to the structured and systematized mediation as is envisaged by the ARMO Agreement.[106] The present ARMO Rules of Procedure contain provisions that aim to regulate the specific conduct of mediation proceedings. These provisions address parties' making oral statements[107] and submitting written submissions.[108]

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[101] See DSU, *supra* note 19, art. 17.13, where the Appellate Body can only uphold, modify or reverse the findings and conclusions of a panel. This reference is underscored because it means the absence of a "remand" in the appellate proceedings of the WTO's Dispute Settlement Mechanism [hereinafter DSM].

[102] Only general recognition of parties' right to DSMs in other treaties is mentioned, see ARMO Agreement, *supra* note 13, art. 3.

[103] *See id.* art. 3.2.

[104] *See* ARMO Rules of Procedure, *supra* note 13, arts. 9.5-9.7, where the mediator is supposed to intervene in the discussion of the parties more directly, as opposed to a neutral decision maker.

[105] For instance, the mediation proceedings of Korea–E.U. FTA and Korea–China FTA do not have provisions to regulate these issues in mediation proceedings.

[106] *See* ARMO Agreement, *supra* note 13, art. 7.2(2) ("Without prejudice to the authorities and functions vested in it by other provisions of this Agreement, the Administrative Council shall: (2) adopt the rules of procedure for mediation in addition to those provided in this Agreement;"); *see also* ARMO Rules of Procedure, *supra* note 13, arts. 8-9, 12-13, 16 (setting forth detailed procedural rules for mediation, similar to those of arbitration).

[107] *See* ARMO Rules of Procedure, *supra* note 13, art. 12.

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Conflict of interest is also dealt with by the Rules.[109] These provisions, however, set forth basic principles in abstract terms and apparently do not present detailed rules for mediating proceedings. The assumption seems to be that future development and experience may guide the parties to elaborate these procedural rules. Again, in an *ad hoc* mediation, such consideration may not be necessary or proper, but in a structured mediation under the auspice of an international organization, procedural due process seems to be an inevitable direction. In that respect, the mediator's more direct intervention in the process, something that is not to be seen in arbitration or court proceedings, should also be contemplated in fine-tuning procedural due process issue in the future.[110] How procedural due process can be assured in future mediation of the ARMO is an open question.

D. Uniformity in Mediation Rules

With the spread of mediation, it would help that general guidelines for State-to-State mediation proceedings are adopted or offered.[111] The experiment of the ARMO may provide such guidance to other states in other regions and other international organizations. Likewise, the ARMO may also learn from other mediation organizations and their experiments and adjust its own proceedings. That way, mediation proceedings can still maintain their unique characteristics to reflect the specific circumstances of the parties, and still prove to be a viable mechanism of dispute settlement in the global community. Thus, an important future task is to utilize the ARMO as a seed for more active future discussions for this issue in the global community at large.

V. CONCLUSION

Some scholars view mediation as a future structure of decision-making processes for international issues.[112] They note that in the decentralized international regime the voluntary nature of mediation will lead to an increase in compliance and a decrease in the free rider problem. They claim that the problem-solving techniques associated with mediation get to the heart of issues, which ensures more reasonable agreements and boosts compliance. In addition, robust two-way communication attendant to

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[108] *See id.* art. 13.
[109] *See id.* arts. 5, 9.
[110] *See id.* arts. 9.5-9.7.
[111] *See generally* ARMO Rules of Procedure, *supra* note 13.
[112] *See* Carrie Menkel-Meadow, *Case for Mediation: The Things that Mediators Should Be Learning and Doing*, 82(1) INT'L J. ARB., MEDIATION & DISP. MGMT. 22, 33 (2016); John S. Dryzek & Susan Hunter, *Environmental Mediation for International Problems*, 31(1) INT'L STUD. Q. 87, 100 (1987).

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mediation so as to find the common ground over an issue in dispute helps ensure not only the settlement of the immediate dispute at hand, but also the cultivation of a long-term relationship, which may in turn reduce disputes in the future. Finally, mediation as an international decision-making regime would provide a solution to deal with multiple DSMs with sometimes conflicting provisions, and would also alleviate the political sensitivity associated with the submission of an important national claim to legally binding DSMs."[113]

It has been traditionally the case that Asian countries have tended to shun official, legal disputes as much as possible.[114] As a famous adage goes, "a person who can live without law" has been one of the best praises for a person in the region. Some of this cultural traits may reflect the old Confucian teaching. Under these circumstances, amicable resolution of a dispute has always been treasured by Asian countries. In many respects, Asian countries have a different understanding of and approach to official legal proceedings as a mechanism to resolve outstanding disputes between them. This understanding is clearly contrasted to that of countries from other regions, particularly those from the western countries where legal disputes are understood to be one of the tools for "business as usual."

More generally, the merits and demerits of conventional DSMs with legally binding force and strict confinement of governing law, followed by stringent penalties and retaliation, have prompted states to realize the benefit of flexible and non-binding dispute settlement proceedings in settling international disputes. As such, states have started to view these non-binding proceedings from a new perspective. These non-legally binding dispute settlement proceedings sometimes help states settle their disputes more effectively and efficiently, and they in fact supplement existing, conventional DSMs. In this respect, the mediation proceeding is now drawing renewed attention and has recently galvanized meaningful interest among states. As a result, a variety of mediation proceedings have started to appear in various treaties in tandem with existing legally binding DSMs.

Against this backdrop, the ARMO Agreement is now being contemplated to administer mediation proceedings to the Asia-Pacific region. This instrument aims to facilitate the experiment, development and spread of mediation in the Asia-Pacific region by creating an international organization for this matter. Consensus is being confirmed that mediation

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[113] Christina Simokat, *Environmental Mediation Clauses in International Legal Mechanisms*, MEDIATE.COM (Jan. 2008), https://www.mediate.com/articles/simokatC1.cfm.

[114] *See, e.g.*, Yujun Feng, *Legal Culture in China: A Comparison to Western Law*, 16 REVUE JURIDIQUE POLYNESIENNE 115, 116, 120 (2010). In case of the low rate of litigation rate in Japan in the 1990s, see Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant?: An Empirical Analysis of Japan's Turn to Litigation*, 35(1) J.L. STUD. 31 (2006).

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arguably offers a viable alternative to conventional DSMs in settling disputes between and/or among states in this region. The experiment and experience of ARMO may also provide useful guidance to other states and international organizations that are contemplating their own mediation proceedings.

Introduction of mediation through a regional international organization also requires interested states to look into a wide range of associated legal issues, most notably those relating to the jurisdiction of the organization and/or mediation panels. What type of disputes can be brought by whom is a threshold question for the establishment and operation of an international organization of this sort. In particular, proposed mediation proceedings of ARMO may well overlap with existing DSMs of other treaties and agreements to which most of Asia-Pacific states are already parties. All these jurisdictional issues require careful consideration and analyses. An initial study indicates that with careful consideration and proper preparation these jurisdictional issues can be addressed properly in a way that sets the tone for a successful launch of the ARMO and its agreement.

臺灣大學學術期刊資料庫

REFERENCES

Books

MERRILLS, J.G. (2011), INTERNATIONAL DISPUTE SETTLEMENT, 5th ed.
SHAW, MALCOLM N. (2008), INTERNATIONAL LAW, 6th ed.

Articles

Dryzek, John S. & Susan Hunter (1987), *Environmental Mediation for International Problems*, 31(1) INTERNATIONAL STUDIES QUARTERLY 87.

Feng, Yujun (2010), *Legal Culture in China: A Comparison to Western Law*, 16 REVUE JURIDIQUE POLYNESIENNE 115.

Ginsburg, Tom & Glenn Hoetker (2006), *The Unreluctant Litigant?: An Empirical Analysis of Japan's Turn to Litigation*, 35(1) THE JOURNAL OF LEGAL STUDIES 31.

Lee, Jaemin (2017), *A More Widely Available Public Good: Proposed DSU Reform and Its Implication for Developing Members*, 51(6) JOURNAL OF WORLD TRADE 987.

Menkel-Meadow, Carrie (2016), *Case for Mediation: The Things that Mediators Should Be Learning and Doing*, 82(1) INTERNATIONAL JOURNAL OF ARBITRATION, MEDIATION & DISPUTE MANAGEMENT 22.

Skejelsbaek, Kjell & Gunner Fermann (1996), *The UN Secretary General and the Mediation of International Disputes*, *in* RESOLVING INTERNATIONAL CONFLICT: THE THEORY AND PRACTICE OF MEDIATION 76 (Jacob Bercovitch ed.).

Treaties

Agreement Between Japan and the European Union for an Economic Partnership, Japan–European Union, December 7, 2017.

Agreement Between Japan and the Kingdom of Thailand for an Economic Partnership, Japan–Thailand, April 3, 2007.

Agreement Between Japan and the Republic of Korea Concerning the Settlement of Problems in Regard to Property and Claims and Economic Cooperation, Japan–South Korea, June 22, 1965, 583 U.N.T.S. 258.

Agreement Between Japan and the Republic of Singapore for a New-Age Economic Partnership, Japan–Singapore, January 13, 2002.

Agreement Between Japan and the Socialist Republic of Viet Nam for an Economic Partnership, Japan–Vietnam, December 25, 2008.

Agreement on Free Trade and Economic Partnership Between Japan and the Swiss Confederation, Japan–Switzerland, February 19, 2009.

Charter of the United Nations.

臺灣大學學術期刊資料庫

Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China, Australia–China, January 15, 2015.

Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Islamic Republic of Pakistan, China–Pakistan, November 24, 2006.

Free Trade Agreement Between the Government of the People's Republic of China and the Government of New Zealand, China–New Zealand, April 7, 2008.

Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Korea, China–South Korea, June 1, 2015.

Free Trade Agreement Between the Government of the Republic of Korea and the Government of the Republic of Chile, South Korea–Chile, February 15, 2003.

Free Trade Agreement Between the Republic of Colombia and the Republic of Korea, Colombia–South Korea, February 21, 2013.

Korea–Vietnam Free Trade Agreement, South Korea–Vietnam, May 5, 2015.

The South Korea–Eurpoean Union Free Trade Agreement, South Korea–European Union, October 15, 2009.

Trans-Pacific Partnership.

Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 401.

Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

U.N./WTO-related Documents

Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Ronald Saborio Soto*, WTO Doc. TN/DS/26 (January 30, 2015).

Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Ronald Saborio Soto*, WTO Doc. TN/DS/27 (August 6, 2015).

United Nations Commission on International Trade Law, *Settlement of Commercial Disputes — International Commercial Mediation: Preparation of Instruments on Enforcement of International Commercial Settlement Agreements Resulting from Mediation*, U.N. Doc. A/CN.9/WG.II/WP.205 (November 23, 2017).

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (2017), WORLD INVESTMENT REPORT 2017, U.N. Sales No. E.17.II.D.3.

臺灣大學學術期刊資料庫

World Trade Organization, Ministerial Declarations of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

Internet Sources

About APEC, ASIA-PACIFIC ECONOMIC COOPERATION, https://www.apec.org/About-Us/About-APEC.

Chronological List of Dispute Cases, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

Cot, Jean Pierre, *Conciliation*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (last updated April 2006), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e20.

Decision on the Application and Review of the Understanding on Rules and Procedure Governing the Settlements of Disputes, WORLD TRADE ORGANIZATION, https://www.wto.org/english/docs_e/legal_e/53-ddsu_e.htm.

Declarations Recognizing the Jurisdiction of the Courts as Compulsory, INTERNATIONAL COURT OF JUSTICE, http://www.icj-cij.org/en/declarations.

Dispute Settlement, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#negotiations.

Simokat, Christina, *Environmental Mediation Clauses in International Legal Mechanisms*, MEDIATE.COM (January 2008), https://www.mediate.com/articles/simokatC1.cfm.

The WTO, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/thewto_e.htm.

Transatlantic Trade and Investment Partnership Government-Government Dispute Settlement Chapter, TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (2015), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153032.pdf.

Vicuña, Francisco Orrego, *Mediation*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (last updated December 2010), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e6 1?rskey=qVpOTz&resu lt=1&prd=OPIL.

Other Sources

Draft “Agreement on the Establishment of the Asia-Pacific Regional Mediation Organization”.

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

S.S. Lotus (France v. Turkey), Judgement, 1927 P.C.I.J. (ser. A) No. 10 (September 7, 1927).

Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031.

臺灣大學學術期刊資料庫