IF YOU BUILD IT, THEY WILL COME: ON THE INSTITUTIONAL ARRANGEMENTS OF THE ARMO

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ABSTRACT

For the Asia-Pacific Regional Mediation Organization (hereinafter "ARMO") to function effectively, administration of internal affairs is of utmost importance. This paper casts light on potential legal issues of systemic concern in the administration of the ARMO. It focuses on two procedural factors, namely decision-making and representation, which is necessary to ensure orderly functioning of ARMO's internal organs and instruments.

There is room for improvement in the current draft Agreement, such as uncertain role of consensus as well as the difficulty of continuous appointment of government officials. By sophisticating provisions to address these issues, the ARMO could be a viable alternative to solve international disputes in trade and investment in the Asia-Pacific region.

KEYWORDS: *international organization, decision-making, consensus, alternative dispute resolution (ADR), WTO, ACWL*

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I. INTRODUCTION: WHY WE NEED TO TALK ABOUT ORGANIZATIONAL ISSUES

Those who propose to establish another international organization in order to settle the international trade and investment disputes bear the risk of redundancy. It is true that there are already a handful of schemes to address these issues, including commercial arbitration, investor-state dispute settlement, and the dispute settlement mechanism under the World Trade Organization (hereinafter "WTO"). For the Asia-Pacific Regional Mediation Organization (hereinafter "ARMO") to function effectively, the administration of internal affairs is of utmost importance, along with a convincing demonstration of its potentialities.

This paper casts light on potential legal issues of systemic concern in the administration of the ARMO, with special focus on the procedural factors that ensure its internal organs and instruments to function orderly. For other issues such as external relationships with other schemes and jurisdictional issues, see other articles under the special issue on ARMO of this volume. Section II focuses on issues involving (i) the decision-making process as compared with other organizations such as the WTO, and (ii) the appointment of the representatives of the Administrative Council, which is followed by a brief concluding section.

II. SYSTEMIC ISSUES INVOLVING INSTITUTIONAL ARRANGEMENTS

A. Design of the Decision-Making Process

1. What Is the Role of Consensus? — There are a number of explicit provisions in the Draft "Agreement on the Establishment of the Asia-Pacific Regional Mediation Organization" (hereinafter "ARMO Agreement") with regard to collective decision-making procedures inside the Administrative Council, apart from the decisions attributed to individual officers such as the Chairperson and the Secretary-General. More specifically, the current ARMO Agreement encourages its members (hereinafter "Members") to "make efforts to adopt decisions of the Administrative Council by consensus" (Article 6.6, Paragraph 2 of the ARMO Agreement). Alternatively, Members can also make decisions by majority of votes (Article 6.6, Paragraph 3 of the ARMO Agreement), while a special majority is required for certain issues. Thus, it is fair to say that consensus is desirable but not normative.

Apparently, these provisions might generate concern that the ARMO weakened the role of consensus building, if compared to the WTO[1] and to

[1] The Marrakesh Agreement Establishing the World Trade Organization art. IX.1, Apr. 15, 1994,

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the Association of South East Asian Nations (hereinafter "ASEAN"), which have long been deeply relying on decision-making by consensus.[2] However, considering that a significant number of ARMO Members are supposed to be Members of the WTO and/or of the ASEAN, it would be premature to anticipate a substantial detachment from the tradition of consensus building in the actual operation of the ARMO.

On the other hand, alleviating the pressure for consensus building might allow more flexibility in the functioning of the organization. In fact, there have been decade-long discussions on the benefits and drawbacks of the consensus principle in the WTO,[3] and recently even in the ASEAN.[4]However, making decisions by voting might make the losing Members feel less heard and represented, thereby impairing the legitimacy of those decisions.[5]

2. Are Thresholds Set Properly? — Making decisions is an everyday problem for decision-makers. The ARMO Agreement includes three types of decision-making methods. Firstly, consensus or alternatively simple majority is explicitly required for collective decision-making in the following cases: the election of the Chairperson of the Administrative Council (Article 6.4); the adoption of subsidiary rules and regulations (Article 7.2); the creation of committees (Article 7.3); the holding of the meetings (Article 8); the approval of concurrent employment or occupation held by the Secretary-General (Article 11.2); the determination of the seniority of Deputy Secretary-Generals (Article 11.3); the selection of short-term mediators (Article 16.1); the enactment of financial regulations (Article 17.1); and the consideration of draft rules (Article 26.1).

Secondly, a special majority is required in the following cases: the

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1867 U.N.T.S. 154 [hereinafter WTO Agreement] sets forth that: "[t]he WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting." (footnote omitted).

[2] Article 20.1 of the Charter of the Association of South East Asian Nations sets forth that: "[a]s a basic principle, decision-making in ASEAN shall be based on consultation and consensus," followed by article 20.2 that sets forth that: "[w]here consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made." Charter of the Association of South East Asian Nations art. 20.1, 20.2, Nov. 20, 2007, 2624 U.N.T.S. 223.

[3] CONSULTATIVE BOARD, THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM 61 (2004), http://archive.ipu.org/splz-e/wto-symp05/future_WTO.pdf.

[4] On the need to "supplement" the consensus principle in the ASEAN, see Hong Hiep Le, *Vietnam, ASEAN and the "Consensus Dilemma"*, ISEAS - YUSOF ISHAK INSTITUTE (Aug. 31, 2016), https://www.iseas.edu.sg/medias/commentaries/item/3867-vietnam-asean-and-the-consensus-dilemma-a-commentary-by-le-hong-hiep. *See also*, Lim Yan Liang, *ASEAN Solidarity Essential to a Peaceful, Prosperous Asia Pacific: Vietnam President Tran Dai Quang*, STRAIT TIMES: SINGAPORE (Aug. 30, 2016, 1:56 PM), http://www.straitstimes.com/singapore/asean-solidarity-essential-to-a-peaceful-prosperous-asia-pacific-vietnam-president-tran.

[5] As an organization of similar size, the Advisory Centre on World Trade Organization Law [hereinafter ACWL] uses consensus as the governing principle, supplemented by four-fifths majority as an alternative. *See infra* Section II.B.

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choice of the venue of the headquarter (Article 4.1); the establishment of branch offices (Article 4.2); the procedure for teleconferencing and remote voting (Article 6.7); the election of the Secretary General (Article 11.1); amendments (Article 24.1); and the coercion to accept amendments (Article 24.2).[6]

An efficient layout must then be designed for each type of threshold mentioned above. For example, is two-third majority really needed to determine the procedures for teleconferencing and remote voting (Article 6.7)?[7] On the other hand, is it inappropriate to require a special majority for the enactment of subsidiary rules and procedures, which currently just require a majority vote (Article 7.2)? Why is the Chairperson of the Administrative Council not selected by rotation (Article 6.4), following the alphabetical order like in the case of the United Nations (U.N.) Security Council, rather than a majority vote?

Nevertheless, if voting is considered necessary, then absolute majority would be preferable to simple majority for the purpose of ensuring the legitimacy of the Chairperson. There is also the need to be prepared, in case a decision cannot be reached by consensus or voting, and to learn from other systems that are available within organizations of similar size.[8] In any case, the possible outcome that a candidate fails to win a majority vote because of fellow representatives would be embarrassing, and it should be avoided as far as possible.

B. Appointment of Representatives to the Administrative Council

The ARMO enjoys international legal personality to make contracts or real property transactions (Article 18). However, not surprisingly, the ARMO must be a Member-driven organization. Its nerve center must be in the Administrative Council, which consists of representatives of the governments of the Member States, although the ARMO Agreement stipulates that it is the Secretary-General, and not the Chairperson of the Administrative Council, that represents the ARMO (Article 12.1).

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[6] This provision resembles to the WTO Agreement, *supra* note 1, art. X, ¶ 3. In the Draft "Agreement on the Establishment of the Asia-Pacific Regional Mediation Organization", a three-fourth majority is required only for this purpose. The text of this document is published at this same issue of Asian Journal of WTO & International Health Law and Policy (AJWH).

[7] Another potential issue is the use of teleconferencing in the mediation process. If the Administrative Council can make important decisions through teleconferencing, isn't it possible to use teleconferencing as part of mediation process? Assuming that mediation requires flexibility and seamless communications, parties would need more frequent meetings compared to judicial and arbitral proceedings. Allowing opportunities of virtual "face time" at least as part of the process might help parties to discuss issues casually and cultivate the spirit of mutual interest.

[8] *See, e.g.*, ACWL, RULES OF PROCEDURE OF THE MANAGEMENT BOARD OF THE ADVISORY CENTRE OF WTO LAW r. 30 (2001), http://www.acwl.ch/download/basic_documents/management_board_docs/ACWL-GA-2001-2_ and_ACWL-MB-2001-1.pdf.

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Therefore, an active and consistent representation of the governments of the Member States is indispensable to its proper functioning.

In this context, the interests of single Members may bring tensions, which would hamper the effective decision-making of the organization. It is true that Article 6.3 of the ARMO Agreement sets forth that a "failure of designating representatives by any Member shall not affect the functions of the Administrative Council." Moreover, the Administrative Council makes decisions by consensus or by the majority of its representatives present and voting, measured against the quorum of the majority of Members. Therefore, the absence of a small number of representatives would not cause problems in fulfilling the mandate of the Council, as long as the quorum is satisfied. However, in reality, any Member can boycott the nomination of its representatives, to undermine the legitimacy of the activities of the organization.

In addition, especially in Asian countries, appointees of Vice Minister and of senior officials rotate more frequently, within two to three years on average, or even less. In this case, blaming those governments that delay the nomination of their representatives is not the answer. What is needed is to strike a right balance between client satisfaction and the need to maintain an objective scheme for mediation.

III. CONCLUSIONS

In conclusion, the ARMO Agreement is only a starting point. Its institutional arrangement leaves, almost intentionally, significant room for scrutiny and improvement.

In any case, many scholars and practitioners in Asia are aware of the growing frustration among governments and industries with the limitations of legalized (and sometimes legalistic) dispute settlement mechanisms, including the WTO dispute settlement procedures and the Investor-to-State Dispute Settlement arbitrations. A viable option is needed to phase out disagreement in trade and investment and to move forward. To this purpose, the ARMO is a project worth pursuing, as long as a voice can be heard whispering "if you build it, they will come."

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REFERENCES

Treaties

Charter of the Association of South East Asian Nations, November 20, 2007, 2624 U.N.T.S. 223.

Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, 1867 U.N.T.S. 154.

Internet Sources

ADVISORY CENTRE ON WTO LAW (2001), RULES OF PROCEDURE OF THE MANAGEMENT BOARD OF THE ADVISORY CENTRE OF WTO LAW, http://www.acwl.ch/download/basic_documents/management_board_docs/ACWL-GA-2001-2_ and_ACWL-MB-2001-1.pdf.

CONSULTATIVE BOARD (2004), THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM, http://archive.ipu.org/splz-e/wto-symp05/future_WTO.pdf.

Le, Hong Hiep, *Vietnam, ASEAN and the "Consensus Dilemma"*, ISEAS – YUSOF ISHAK INSTITUTE (August 31, 2016), https://www.iseas.edu.sg/medias/commentaries/item/3867-vietnam-asean-and-the-consensus-dilemma-a-commentary-by-le-hong-hiep.

Liang, Lim Yan, *ASEAN Solidarity Essential to a Peaceful, Prosperous Asia Pacific: Vietnam President Tran Dai Quang*, THE STRAIT TIMES: SINGAPORE (August 30, 2016, 1:56 PM), http://www.straitstimes.com/singapore/asean-solidarity-essential-to-a-peaceful-prosperous-asia-pacific-vietnam-president-tran.

Other Source

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

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