MAKING IT A TREATY OBLIGATION: ENFORCEMENT OF MEDIATED SETTLEMENT AGREEMENTS UNDER THE ARMO

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ABSTRACT

The successful conclusion of a settlement agreement by the disputing parties is considered as the core of a mediation. Under the Asia-Pacific Regional Mediation Organization (hereinafter "ARMO"), it is provided that the settlement agreements are binding upon the disputing parties, and shall be carried out in good faith. This is an indication that non-compliance with the settlement agreement will constitute a violation of the ARMO Agreement and trigger a state responsibility. This provision is an exclusive feature of the ARMO. It might also have importance in deterring a state's non-compliance in the future, and thus enhance the legal security of the outcome reached in ARMO mediation.

There is no specific enforcement mechanism for the ARMO facilitated settlement agreements. In order to further elaborate the particularities of the ARMO, and to clarify what distinguishes it from other dispute settlement mechanisms in enforcement, this paper will discuss the ARMO enforcement issue, and provide a comparative review of the enforcement mechanism of investment arbitral awards under the International Centre for Settlement of Investment Disputes (ICSID) and issues on cross-border enforcement of mediated settlement agreements in commercial disputes.

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I. INTRODUCTION

Unlike arbitration and judicial-style procedures, mediation provides a party-driven and voluntary approach to dispute resolution. Its importance has been in increasing recognition internationally. The establishment of the Asia-Pacific Regional Mediation Organization (hereinafter "ARMO") purports to provide institutional mediation for Asia-Pacific countries or economies to deal with their inter-state disputes.[1] It is hoped that through the assistance of mediations conducted under the ARMO, disputing states in the Asia-Pacific Region will be able to find an amicable solution to their disputes while maintaining a close and friendly relationship between them.[2]

From the perspective of dispute settlement, the successful conclusion of a settlement agreement by the disputing parties can be considered as the core of a mediation. Under the ARMO, importantly, it is provided that the settlement agreements as such are binding upon the disputing parties, and shall be carried out in good faith.[3] By emphasizing the binding nature of the mediated settlement agreement, the ARMO contemplates that disputing parties are obliged to comply with the resulting settlement agreement. Furthermore, for the first time on the treaty level, carrying out a mediated settlement agreement in good faith has been clearly stipulated as part of the treaty obligation of states under the ARMO. The disputing parties are bound to faithfully implement the settlement agreement under ARMO mediation. Consequently, a failure to fulfill the mediated settlement agreements might trigger a state responsibility under the ARMO and general international law.

There is no specific enforcement mechanism for the ARMO facilitated settlement agreements. In order to further elaborate the particularities of the ARMO, and to clarify what distinguishes it from other dispute settlement mechanisms in enforcement, this paper will discuss the ARMO enforcement issue, and provide a comparative and general review on the enforcement mechanism of investment arbitral awards under the International Centre for Settlement of Investment Disputes (hereinafter

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[1] Draft "Agreement on the Establishment of the Asia-Pacific Regional Mediation Organization" art. 2.1 [hereinafter ARMO Agreement] provides that "[t]he purpose of the ARMO shall be to provide legal facilities for mediation of Member-to-Member disputes in accordance with this Agreement." The text of this document is published at this same issue of Asian Journal of WTO & International Health Law and Policy (AJWH). Concerning the rationale and features of the ARMO, see generally Chang-fa Lo et al., *Concept Paper on the Creation of a Permanent "Asia-Pacific Regional Mediation Organization" for State-to-State (Economy-to-Economy) Disputes*, 10(2) CONTEMP. ASIA ARB. J. 321 (2017).

[2] ARMO Agreement, *supra* note 1, preamble states "*Recognizing* the numerous significant commonalities of the region and a long history of close and deep-rooted relationships . . . *Mindful* that maintaining friendly relationships and ensuring swift and peaceful resolution to the disputes between Members should be their top priority . . . .".

[3] See relevant discussions below of this paper.

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"ICSID")[4] and issues of cross-border enforcement of mediated settlement agreements in commercial disputes.[5]

II. ENFORCEMENT OF ICSID ARBITRAL AWARDS

Most investor-state dispute settlement clauses contained in investment treaties provide an option for a foreign investor to bring its claim against the host state through international arbitration. Among the venues listed in those clauses, the ICSID has been the most widely used institution for resolving investor-state investment disputes.

It is generally recognized that ICSID arbitral awards have good compliance practice supported by Contracting States. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter "ICSID Convention") has a robust enforcement system for arbitral awards rendered pursuant to its arbitration rules. Article 53 of the ICSID Convention states that:

> The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

As such, Article 53 clearly contemplates the award's binding nature on the parties. It also establishes a treaty obligation for the disputing parties to comply with the outcome of ICSID arbitration proceeding. In other words, not being subject to any further external review procedure, the disputing parties are bound to comply with the terms of the resulting award.[6] Given this, non-compliance with an ICSID award would constitute a violation of an international treaty obligation.

In cases where the losing state fails to comply with the ICSID award, the investor, as the award creditor, is able to use the mechanism for recognition and enforcement provided in Article 54 of the ICSID Convention. Article 54(1) states that "Each Contracting State shall

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[4] The International Centre for Settlement of Investment Disputes [hereinafter ICSID] for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, see Convention on the Settlement of Investment Disputes Between States and Nationals of other States art. 1, *opened for signature* Mar. 18, 1965, 4 I.L.M. 524 [hereinafter ICSID Convention].

[5] *See, e.g.*, Chang-fa Lo & Winnie Jo-Mei Ma, *Draft "Convention on Cross-Border Enforcement of International Mediated Settlement Agreements"*, 7(2) CONTEMP. ASIA ARB. J. 387, 389 (2014).

[6] The remedies provided for within the ICSID Convention include rectification, interpretation, revision and annulment.

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recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State . . . ." According to this provision, each ICSID Contracting State has an obligation to collaborate in the recognition and enforcement of awards.[7] More specifically, each Contracting State is obliged to enforce the monetary obligations in the ICSID award, treating them as final judgments of a court in that State.[8] An investor can seek recognition and enforcement of the monetary obligation in the award in the court of the losing State or any Contracting State. In practice**,** an investor can identify recognition and enforcement of the award in the Contracting State where the losing State has attachable assets (not subject to any immunity) and seek to have the award recognized and enforced in the court of that State. As of today, only a few ICSID awards have been reportedly challenged through judicial enforcement proceedings.[9]

The ICSID Convention additionally provides for alternative recourse for failure to comply with ICSID awards in its Article 27 and Article 64. Article 27(1) of the ICSID Convention reads:

> No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

According to this provision, in case where a losing State has failed to honor an ICSID award, the investor's home State can, through the exercise of diplomatic protection or other means of peaceful settlement, act to secure the host State's fulfillment of the award and to seek reparation for additional damage caused by its failure.[10]

Article 64 states that "Any dispute arising between Contacting States concerning the interpretation or application of this Convention which is not settled by negotiation[s] shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement." This provision offers the

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[7] Victorino J. Tejera Pérez, *Diplomatic Protection Revival for Failure to Comply with Investment Arbitration Awards*, 3(2) J. INT'L DISP. SETTLEMENT 445, 451 (2012).

[8] Tsai-yu Lin, *Systemic Reflections on Argentina's Non-Compliance with ICSID Arbitral Awards: A New Role of the Annulment Committee at Enforcement?*, 5(1) CONTEMP. ASIA ARB. J. 1, 5-6 (2012).

[9] LOUKAS A. MISTELIS, CONCISE INTERNATIONAL ARBITRATION 145 (2010).

[10] Tejera Pérez, *supra* note 7, at 455.

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basis of state consent to the jurisdiction of the International Court of Justice (hereinafter "ICJ") regarding interpretation or application of the ICSID Convention that is not settled by negotiations and which the parties do not agree to settle the dispute by other methods. Given this, a dispute over a state's non-compliance with an award would fall under the concept of a dispute concerning the interpretation or application of the ICSID Convention under Article 64. Accordingly, the dispute as such can be referred to the adjudication of the ICJ. As a consequence, in the case of non-compliance, an ICJ judgment may indicate that the host State has committed a violation of Article 53 of the ICSID Convention.[11] Notably, there is no case to date on the application or interpretation of the ICSID Convention before the ICJ.

III. CROSS-BORDER ENFORCEMENT OF INTERNATIONAL MEDIATED SETTLEMENT AGREEMENTS IN COMMERCIAL DISPUTES: NEW INITIATIVES FOR A MEDIATION CONVENTION

The benefits of the use of mediation in commercial disputes have been generally recognized by the business community. However, there is currently no efficient cross-border enforcement mechanism for settlement agreements resulting from mediation. Such an absence has been considered as a disincentive for business to regularly use mediation for its international disputes.[12] Although the United Nations Commission on International Trade Law (hereinafter "UNCITRAL") Model Law on Conciliation is in support of promoting "easy and fast enforcement of settlement agreements," it also points out that achieving an expedited enforcement by way of harmonized legislation would be difficult. Dealing with enforcement of a settlement agreement will be left to domestic procedural law, where each state is free to choose its own enforcement instrument.[13]

With the growth of the use of mediation in commercial practices in

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[11] *Id.* at 468-69.

[12] Edna Sussman, *A Path Forward: A Convention for the Enforcement of Mediated Settlement Agreements*, 12(6) TRANSNAT'L DISP. MGMT. 1 (2015), https://www.transnational-dispute-management.com/article.asp?key=2295.

[13] G.A. Res. 57/18, art. 14 (Enforceability of settlement agreement) states: "If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable . . . [*the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement*]." The "Guide to Enactment" of the Conciliation Model Law further states: "In the preparation of the Model Law, the Commission was generally in agreement with the general policy that easy and fast enforcement of settlement agreements should be promoted . . . .". *See* U.N. COMM'N ON INT'L TRADE L., UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION WITH GUIDE TO ENACTMENT AND USE 2002, at 55, ¶ 88, U.N. Sales No. E.05.V.4 (2004). Cross-border enforcement is also supported by Directive 2008/52/EC, of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 2008 O.J. (L 136) 3.

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recent years, discussions on the need to have an international legal framework for making cross-border mediated settlement agreements readily enforceable have revived. In 2014, the United States made a proposal to UNCITRAL to develop an instrument for an enforcement of mediated settlements reflected in international commercial mediation.[14] A UNCITRAL Working Group is considering the means of dealing with such an enforcement issue. The main idea suggested by the United States is to develop a multilateral convention, which is modelled on the international enforcement mechanisms that apply to arbitral awards under the 1958 U.N. Convention on Recognition and Enforcement of Arbitral Awards (hereinafter "New York Convention").[15] That is, similarly to New York Convention's approach for arbitral awards, mediated settlement agreements could be recognized and enforced in all Contracting States of the Convention. Under this approach, one of the major challenges to be addressed is the current wide variation within national enforcement systems for mediated settlements. For instance, many countries treat a mediation settlement as having no fundamental difference from an ordinary contract, whose enforcement relies on a suit filed in court. In some jurisdictions, although arbitral tribunals are allowed to turn mediated settlement agreements into agreed arbitral awards, this procedure is not applicable to stand-alone mediations. Moreover, reliance on an arbitration procedure to obtain enforcement is not a feasible option for many parties in mediation.[16]

There remains considerable work to be done before the form and enforcement procedures are ultimately agreed by UNCITRAL.[17] In the view of the author, having a multilateral convention as such could not only carry greater weight in promoting mediation as an international independent dispute resolution method, but also make mediated settlement agreements enforceable worldwide. Under a new legal framework, Contracting Parties will need to cooperate in recognition and enforcement of mediated settlement agreements made elsewhere. In the relevant texts,

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[14] U.N. Secretariat-General, *Planned and Possible Future Work - Part III, Proposal by the Government of the United States of America: Future Work for Working Group II*, at 3, U.N. Doc. A/CN.9/822 (June 2, 2014).

[15] *Id.* (In June 2014, the U.S. delegates made a proposal to the UNCITRAL to develop a convention on the enforceability of mediated international commercial settlement agreements.); Rep. of the U.N. Comm'n on Int'l L. on Its Forty-Seventh Session, July 7-18, 2014, ¶¶ 123-25, 129, U.N. Doc. A/69/17 (2014) (At its 47th session in July 2014, UNCITRAL Working Group II started to consider this issue and make a report.). Andreas Hacke, *Enforcement of International Mediation Settlement Agreements*, 2 DISP. RESOL. 10, 10 (2015), http://www.disputeresolution-magazin.de//wp-content/uploads/2015/06/Seite-10-12_hacke_DisputeResolution_02-2015.pdf.

[16] Chang-fa Lo, *Desirability of a New International Legal Framework for Cross-Border Enforcement of Certain Mediated Settlement Agreements*, 7(1) CONTEMP. ASIA ARB. J. 119, 128 (2014).

[17] For instance, issues to be discussed including the coverage and nature of agreements, definition of international commercial mediation/conciliation, form and substance requirements for international mediated settlement agreements. Sussman, *supra* note 12, at 9-10.

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the Draft "Convention on Cross-Border Enforcement of International Mediated Settlement Agreements" (hereinafter the "Draft") proposed by an academic group led by Professor Chang-fa Lo could be a useful reference. For instance, Article 3 of the Draft states that "Each Contracting State shall recognize iMSAs [international mediated settlement agreements] as binding and enforce them in accordance with this Convention."[18] In light of this provision, each Contracting State is obliged to recognize international mediated settlement agreements as having binding effect between the parties. The Contracting State also has imposed on it a treaty obligation to enforce such international mediated settlement agreements in its territory. Regarding methods of enforcement, Article 5 of the Draft provides that:

> 1. An iMSA [international mediated settlement agreement] meeting the requirements prescribed in Article 4 shall become enforceable by a court or other competent authority in a judgment, decision, or authentic instrument in accordance with the law of the Enforcing State. 2. Each Contracting State shall decide the proper methods of enforcing the iMSA [international mediated settlement agreement] under its legal system. (citation omitted)[19]

Based on the Draft, it is required that international mediated settlement agreements shall be enforceable by a court or other competent authority in a judgment or decision or authentic instrument subject to the law of the enforcing State. In addition, without engagement in the harmonization of specific enforcement procedures, each Contracting State is left with full discretion to set forth its own methods of enforcement of international mediated settlement agreements under its domestic legal system. In sum, following this convention approach, international mediated settlement agreements in commercial disputes could be recognized and enforced in third jurisdictions according to the specific procedures applied in those states. As to the possible defenses for states to refuse enforcement, Article 6 of the Draft also provides a good reference.[20]

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[18] Lo & Ma, *supra* note 5, at 395.
[19] *Id.* at 397.
[20] For instance, Article 6.2 of the Draft states that:

> Enforcement of iMSA [international mediated settlement agreement] may also be refused if the competent authority in the Enforcing State finds that: (a) The subject matter of the dispute is not capable of settlement by mediation under the law of the Enforcing State; or (b) The enforcement of the iMSA [international mediated settlement agreement] would be contrary to the public policy of the Enforcing State.

Id. at 398.

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VI. ENFORCEMENT OF ARMO MEDIATED SETTLEMENT AGREEMENTS

The ARMO's creation is aimed to assist state members in resolving their disputes through mediation. The fundamentals of mediation undertaken at the ARMO is built on the voluntariness[21] and party self-determination.[22] That is, parties are free to agree on whether or not to subject their disputes to a mediation process conducted under the ARMO. Meanwhile, the parties are free to formulate and consent the substantive terms and conditions in a settlement agreement to resolve their dispute after mediation.

Several provisions relevant to settlement agreements are provided in the Draft ARMO instruments, which include 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"). Examples are as follows:

> The mediator shall recognize that the mediation under these Rules is based on the principle of self-determination by the parties and attempt to facilitate voluntary resolution of the dispute by the parties and endeavor to bring about settlement agreement between them upon mutually acceptable terms. (Article 9.4 of the ARMO Rules of Procedure)
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> . . . the Rules of Procedure shall allow the mediators to merely facilitate the negotiation between the parties, to assess the dispute for the parties if the mediators consider appropriate, or to draft settlement proposals of terms and conditions for the parties to consider if they so request. (Article 21.2 of the ARMO Agreement)
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> The mediator may, of the mediator's own initiative, or on the

[21] ARMO Agreement, *supra* note 1, art. 2.3 provides that: "[m]ediation is undertaken only when the parties 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.".

[22] Draft "Rules of Procedure for Mediation Conducted Under the Asia-Pacific Regional Mediation Organization" [hereinafter the ARMO Rules of Procedure] art. 9.4 provides that "[t]he mediator shall recognize that the mediation under these Rules is based on the principle of self-determination by the parties and attempt to facilitate voluntary resolution of the dispute by the parties and endeavor to bring about settlement agreement between them upon mutually acceptable terms . . . .". The text of this document is published at this same issue of Asian Journal of WTO & International Health Law and Policy (AJWH).

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request of parties, at any stage of the proceedings and from time to time, and for the consideration of the parties, help generate options or draft a settlement proposal, including specific terms and conditions. However, the mediator must advise the parties that the any options or proposals do not constitute legal advice, a binding determination, nor confirmation of facts. (Article 9.6 of the ARMO Rules of Procedure)

Any party may propose a settlement to the other party or parties at any stage of the proceedings, with or without conditions, either at the mediation meeting or otherwise. (Article 14.1 of the ARMO Rules of Procedure)

The parties must also give genuine consideration to any settlement proposal provided in Article 9.6 of these Rules and any other settlement proposal by the other party. (Article 11.2 of the ARMO Rules of Procedure)

. . . the Administrative Council shall not intervene in any ongoing mediation proceeding conducted under this Agreement and its rules of procedure. Nor shall it intervene in the conclusion of any settlement agreement by the parties. (Article 7 of the ARMO Agreement)

The Secretary-General shall also perform the function of registrar and shall have the power to authenticate settlement agreement concluded by the parties pursuant to this Agreement. (Article 12.2 of the ARMO Agreement)

If agreement is reached between the parties in regard to the dispute, they may decide to put in writing to be signed by their respective authorized persons and authenticated by the Secretary-General based on Articles 11.1 and 11.2 of the Agreement. (Article 17.1 of the ARMO Rules of Procedure)

Any settlement agreement duly concluded between disputing parties is binding upon them and shall be performed by them in good faith. (Article 22 of the ARMO Agreement)

The agreement is binding upon the parties and must be performed by them in good faith. (Article 17.2 of the ARMO Rules of Procedure)

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> If the parties reach a settlement agreement, the mediator shall close the mediation proceeding and provide a report to the Administrative Council noting the issues in dispute and recording the fact that the parties have reached agreement. However, the mediator shall not include the contents of the settlement agreement into the report unless the parties specifically agree on such inclusion. (Article 19.1 of the ARMO Rules of Procedure)

In light of the above, it is clear that assisting disputing parties to settle a dispute by entering into a settlement agreement is the core of the ARMO mediation. Under the ARMO, the mediator is guided to "attempt to facilitate voluntary resolution of the dispute by the parties and endeavor to bring about settlement agreement between them upon mutually acceptable terms." He/she may draft a settlement proposal specifying terms and conditions for the parties to consider. The parties are required to give genuine consideration to any settlement proposal drafted by the mediator and any other settlement proposal by the other party. To emphasize parties' self-determination, settlement proposals recommended by the mediator do not constitute legal advice or a determination binding on the parties. Neither can the Administrative Council of the ARMO intervene in the conclusion of a settlement agreement by the parties. Regarding the form, the written settlement agreement should be signed by the parties and authenticated by the Secretary-General of the ARMO. In effect, the settlement agreement reached in mediation can serve as the legal basis for the mediator to terminate the mediation proceeding as a result.

For the purpose of this paper, how the settlement agreements should be honored by the parties is of high importance. As stated in Article 22 of the ARMO Agreement and Article 17.2 of the ARMO Rules of Procedure, a settlement agreement is binding upon the parties and shall be performed in good faith. The ARMO emphasizes the binding character of the mediated settlement agreement. It further provides that each Member is obligated to enforce such a settlement agreement in good faith. In view of this, a failure to comply with the specific terms of a settlement agreement will not only constitute a violation by a state of its obligation to the other party under general international law, but also a breach of the state's international treaty obligations under the ARMO. Therefore, a state's non-compliance with a settlement agreement could trigger its state responsibility under the ARMO and general international law.[23] However, there is no specific enforcement mechanism for mediated settlement agreements being provided under the

[23] For instance, Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 provides that: "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.".

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ARMO. Some policy reasons might justify such an arrangement.[24] On the one hand, unlike arbitral awards, a mediator's suggestion or proposal is of a non-binding nature. It is for the parties to voluntarily agree a settlement agreement to resolve the dispute. On the other hand, unlike private commercial settlement agreements, ARMO facilitated settlement agreements are concluded between states. The addition of establishing a stronger enforcement mechanism under the ARMO would not only be impractical, but also complicate current multi-layers of international dispute settlement mechanisms.[25] It is particularly the case that the settlement agreement might involve non-monetary obligation and need a specific performance from a state.[26] Obligation as such might not be suitable to be directly enforced through national judicial systems such as those applied under the ICSID or the New York Convention. In addition, mediation relies on states' voluntary participation and features as settling disputes in a friendly and amicable manner. Neither would the retaliatory counter-measures be appropriate for the ARMO purpose.

In the view of the author, the unavailability of an enforcement mechanism under the ARMO might not cause a genuinely serious problem. As provided in Article 9.4 of the ARMO Rules of Procedure, the mediation process operates under "the principle of self-determination by the parties" and facilitates "voluntary" resolution of the dispute by the parties. The substantive contents reflected in settlement agreements result from "mutually acceptable terms" by the parties. Perceivably, the parties might be more capable and willing to perform the agreed outcome after mediation. Hence, although the possibility of a state's non-compliance will always exist, it might be lesser in the case of mediated settlement agreements. In addition, as provided in Article 22 of the ARMO Agreement, faithfully carrying out mediated settlement agreements has become an international treaty obligation for states to abide by. This provision might be helpful to deter possible non-compliance. In practice, it seems likely that the non-complying state would easily be confronted with peer pressures from other states within the ARMO. Notably, when the mediation is terminated as a result of a settlement agreement reached by the parties, other states through the operation of the Administrative Council will be notified as to the disputant issues and the fact that the parties have reached agreement.[27] A state's non-compliance as such would not only negatively influence the overall relationship between the disputing states, but also undermine the reputation of the non-complying state within the

[24] *See* Lo et al., *supra* note 1, at 330-31.
[25] For instance, the WTO and various free trade agreements have contained detailed dispute settlement procedures in place.
[26] For instance, a cessation, revocation or revision, improvement of certain measures or actions.
[27] *See* ARMO Rules of Procedure, *supra* note 22, art. 19.1.

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ARMO and the international community.

The possibility for minimizing the procedural enforcement issues can be found in other alternative means. For instance, the parties might consider including specific methods of dealing with disagreements arising from or related to enforcement in their settlement agreements. By this means, the parties will be able to refer enforcement issues to a specific procedure for good-faith compliance. In this regard, return to negotiation, mediation or recourse to the ICJ are all options that the parties can consider. Additionally, in the view of the author, in order to enhance good governance of the ARMO, it seems worth further discussion as to whether the Administrative Council should play a more facilitative role in assisting states to settle their enforcement issue in due course. In this regard, several provisions of the ARMO Agreement might provide such a possibility. For instance, Article 7.1 of the ARMO Agreement provides that "[t]he Administrative Council shall not intervene in any ongoing mediation proceeding conducted under this Agreement and its rules of procedure. Nor shall it intervene in the conclusion of any settlement agreement by the parties." In light of this norm, it seems that the Administrative Council is afforded some room to involve individual mediation matters other than issues on "ongoing mediation proceeding" and "the conclusion of any settlement agreement by the parties." Moreover, Article 7.2(7) of the ARMO Agreement states that "the Administrative Council shall decide *any other matters related to this Agreement*" (emphasis added). Article 7.4 of the ARMO Agreement states that "The Administrative Council shall also exercise other authorities and *perform other functions as it determines to be necessary for the implementation of this Agreement*" (emphasis added). It is clear that the Administrative Council has the authority to decide other ARMO matters, including implementation matters. A state's non-compliance with the settlement agreement should be found as a violation of the ARMO provision, which falls within the scope of the "implementation" of the ARMO Agreement. Given this, where appropriate, the Administrative Council may discuss any questions or any matters relating to non-compliance with the settlement agreements, and may, if it deems necessary, make recommendations.

V. CONCLUSION

The establishment of the ARMO might increase the importance and status of State-to-State mediation in resolving international disputes. The ARMO mediation begins with the voluntariness and self-determination of the participations of state members. A mediation will come to an end when a settlement agreement has been concluded by the disputing parties. Given the party-driven nature of mediation, it can be perceived that the possibility

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of non-compliance by the state with the settlement agreement is slim. Unlike the case for ICSID arbitral awards or cross-border mediated settlement agreements in commercial mediation, the mediated settlement agreement will not be subject to any firm enforcement mechanism under the ARMO.

In the context of the ARMO, an obligation is imposed on the parties to perform the settlement agreement concluded in good faith. This is an indication that non-compliance with the settlement agreement will constitute a violation of the ARMO Agreement and trigger a state responsibility. The provision is an exclusive feature of the ARMO, which carries treaty implications for fulfilling the settlement agreements by states. It might also have importance in deterring a state's non-compliance in the future, and thus enhance the legal security of the outcome reached in ARMO mediation.

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