THE ASSESSMENT OF ASIA-PACIFIC REGIONAL MEDIATION ORGANIZATION (ARMO): FROM THE PERSPECTIVE OF INDONESIA

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ABSTRACT

The main purposes of the Asia-Pacific Regional Mediation Organization (hereinafter "ARMO") is to support and improve the existing dispute settlement system by providing an alternative for countries to resolve State-to-State dispute through mediation with ARMO as an international mediation organization. The central point of this paper is how Indonesia can use ARMO as the platform to resolves disputes in the future since it is more suitable for Asian cultures which prefer to settle disputes in friendlier and more amicable manner in order to maintain long-term relationship between neighbors, friends or trading partners.

KEYWORDS: *Asia-Pacific Regional Mediation Organization (ARMO), mediation, Indonesia, international dispute settlement system*

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I. INTRODUCTION

Conflicts as a result of interaction between neighbors, friends or trading partners are unavoidable. This also applies to international relationship among states. Indonesia has her firsthand experience on such conflicts relating to trade, investment, territory, human rights, environments, forest fires, fisheries, and many other issues as a result of our international commitments or sometimes even the absence of any international regulations. Soft diplomacy or harsh litigation would be the options at the moment to resolve these international issues. However, Indonesia like many other Asian countries prefers to settle differences or disputes in friendlier manner as compared to formal litigation process. Thus, the existence of an international mediation organization that could facilitate State-to-State disputes in a friendly, swift and peaceful manner might be a good solution. An international mediation organization will be a complimentary to the existing dispute settlement mechanisms in different organizations and agreements or many free trade agreements and investment treaties to support and implement the existing mediation mechanisms already provided in such organizations or agreements.

Indonesia is part of many international organizations or operations, namely Asia-Pacific Economic Cooperation (hereinafter "APEC"), Association of Southeast Asian Nations (hereinafter "ASEAN"), International Labor Organization (ILO), International Monetary Fund (IMF), United Nations (U.N.), United Nations Conference on Trade and Development (UNCTAD), United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Industrial Development Organization (UNIDO), United Nations Interim Force in Lebanon (UNIFIL), United Nations Interim Security Force for Abyei (UNISFA), United Nations Mission in Liberia (UNMIL), World Tourism Organization (UNWTO), World Health Organization (WHO), World Intellectual Property Organization (WIPO), World Meteorological Organization (WMO), World Trade Organization (hereinafter "WTO"), and many other international organizations.[1] Not only participating in the international organizations, Indonesia also has an important position in ASEAN, APEC, the East Asia Summit (EAS), the Group of 20 (G20)[2] and G33 (developing countries). To enhance her international trade, Indonesia has not only been active in the multilateral level under the WTO, but also in concluding free trade agreements (hereinafter "FTAs"). Up to 2016,

[1] *East and Southeast Asia: Indonesia*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/id.html (last visited Jan. 22, 2018).
[2] Beginda Pakpahan, *The Role of Indonesia in ASEAN, in Asia Summit and in G20*, JAKARTA POST (Oct. 4, 2011, 5:00 AM), http://www.thejakartapost.com/news/2011/10/04/the-role-indonesia-asean-east-asia-summit-and-g20.html.

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Indonesia has already had nine FTAs in effect, comprising seven regional agreements[3] and two bilateral agreements.[4] As to the ongoing trade deal, Indonesia involves in at least seven FTAs.[5] Potential conflicts arising from Indonesia's membership in various international organizations as well as its bilateral and regional commitments are foreseeable and therefore most of them have their own dispute settlement systems.

Indonesia as the fourth largest country in the world by population[6] has around 266 million people[7] and shares its border with ten neighboring

[3] Association of Southeast Asian Nations [hereinafter ASEAN] Free Trade Agreements (AFTA), Jan. 28, 1992, http://www.worldtradelaw.net/fta/agreements/afta.pdf.download; Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA), Feb. 27, 2009, http://dfat.gov.au/trade/agreements/aanzfta/official-documents/Pages/agreement-establishing-the-asean-australia-new-zealand-free-trade-area-aanzfta.aspx; Framework Agreement on Comprehensive Economic Cooperation Between the Association of South East Asian Nations and the People's Republic of China, Nov. 4, 2002, http://asean.org/?static_post=framework-agreement-on-comprehensive-economic-co-operation-between-asean-and-the-people-s-republic-of-china-phnom-penh-4-november-2002-4; Framework Agreement on Comprehensive Economic Cooperation Between the Republic of India and the Association of South East Asian Nations, Oct. 8, 2003–Aug. 13, 2009, http://asean.org/?static_post=framework-agreement-on-comprehensive-economic-cooperation-between-the-republic-of-india-and-the-association-of-southeast-asian-nations-2; Agreement on Comprehensive Economic Partnership Among Japan and Member States of the Association of Southeast Asian Nations, Apr. 14, 2005–Apr. 14, 2008, http://www.mofa.go.jp/policy/economy/fta/asean/agreement.html; Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of South East Asian Nations and the Republic of Korea, Aug. 24, 2006, http://asean.org/?static_post=framework-agreement-on-comprehensive-economic-cooperation-among-the-governments-of-the-member-countries-of-the-association-of-southeast-asian-nations-and-the-republic-of-korea-kuala-lumpur-13-december; Preferential Trade Agreement Among D-8 Member States, May 13, 2006, http://www.tas.gov.eg/English/Trade%20Agreements/agreements/d8.

[4] Agreement Between Japan and the Republic of Indonesia for an Economic Partnership, Japan–Indon., Aug. 20, 2007, http://www.mofa.go.jp/region/asia-paci/indonesia/epa0708/index.html; Preferential Trade Agreement Between the Government of the Islamic Republic of Pakistan and the Government of the Republic of Indonesia, Pak.–Indon., Feb. 3, 2012, https://www.tdap.gov.pk/pdf/Indonesia-Pakistan%20PTA%20(IP-PTA).pdf.

[5] *See, e.g.*, *Regional Comprehensive Economic Partnership (RCEP)*, ASS'N SOUTHEAST ASIAN NATIONS, http://asean.org/?static_post=rcep-regional-comprehensive-economic-partnership; Framework Agreement on Comprehensive Partnership and Cooperation Between the European Community and its Member States, of the One Part and the Republic of Indonesia of the Other Part, Eur.–Indon., Sept. 11, 2009, https://www.gov.uk/government/publications/framework-agreement-on-comprehensive-partnership-and-cooperation-between-the-ec-and-indonesia; *Indonesia–Australia Comprehensive Economic Partnership Agreement*, AUSTRALIAN GOV'T, http://dfat.gov.au/trade/agreements/iacepa/Pages/indonesia-australia-comprehensive-economic-partnership-agreement.aspx; Indonesia–Chile Comprehensive Economic Partnership Agreement, Indon.–Chile, Dec. 15, 2017, https://www.kemlu.go.id/en/berita/berita-perwakilan/Pages/Indonesia-Chile-Signed-a-Compr ehensive-Trade-Agreement.aspx; ASEAN–Hong Kong, China Free Trade Agreement, Nov. 12, 2017, http://asean.org/the-signing-of-the-asean-hongkong-china-free-trade-agreement-and-asean-hongkong-china-investment-agreement/; *India–Indonesia Comprehensive Economic Cooperation Agreement*, GOV'T INDIA, http://commerce.gov.in/international_nextDetail_WTO.aspx?LinkID=32&idwto=41 (last visited Mar. 17, 2018); *Korea–Indonesia Free Trade Agreement*, ASIA REGIONAL INTEGRATION CTR., https://aric.adb.org/fta/korea-indonesia-free-trade-agreement (last visited Mar. 17, 2018).

[6] *The World Population and the Top Ten Countries with the Highest Population*, INTERNET WORLD STATS, https://www.internetworldstats.com/stats8.htm (last visited Mar. 12, 2018).

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countries including Malaysia, Singapore, Thailand, Vietnam, the Philippines, Australia, Papua New Guinea, Timor Leste, and India. Border or territorial disputes often arises between neighboring countries such as with Malaysia concerning land and maritime boundary dispute (Sipadan and Ligitan islands and ambalat),[8] with Australia (Timor gap),[9] with Singapore (Nipa island)[10], with the Philipinnes (Miangas island)[11], with Timor Leste and many others. Some of these disputes were settled in the international court like the International Court of Justice but some were settled through diplomacy. The existence of an international mediation organization that can resolve border or territorial disputes by providing legal facilities and professional and impartial services in a friendly, swift and peaceful manner might be a good idea to bring peace and harmony in the region.

Indonesia is not a new player in the global market. Her export and import performance is already acknowledged in the global market and as a developing country Indonesia relies most of its economy on agricultural products such as rubber and its derivative products, palm oil, cocoa, forest products, shrimp, and coffee.[12] Nevertheless, at the time Indonesia also actively exports manufacturing industrial products such as automotive, electronics and footwear which become top ten commodities in Indonesia.[13] Meanwhile, Indonesia also becomes an attractive market for imports destination of many countries especially for People's Republic of China, Japan, Singapore, Thailand and United States, which are the main active countries that exporting their products to Indonesia.[14] Such a big country also has a big economy, considering Indonesia is the world's 10th largest economy in terms of purchasing power parity[15] which makes Indonesia a popular country for foreign investment and one of the central players in the

[7] *Id.* As of December 2017.
[8] *International Court Finds That Sovereignty over Islands of Ligitan and Sipadan Belongs to Malaysia*, U.N. (Dec. 17, 2002), https://www.un.org/press/en/2002/ICJ605.doc.htm.
[9] Anne Baker, *Australian and East Timor Maritime Agreement Could "Unravel" Borders with Indonesia*, ABC NEWS (Mar. 7, 2018, 9:07 AM), http://www.abc.net.au/news/2018-03-06/australia-east-timor-deal-could-unravel-border-with-indonesia/9515874.
[10] Saifulbahri Ismail, *Indonesia Moves Closer to Ratifying Maritime Border Treaty with Singapore*, CHANNEL NEWS ASIA (Oct. 7, 2016, 4:34 PM), https://www.channelnewsasia.com/news/asiapacific/indonesia-moves-closer-to-ratifying-maritime-border-treaty-with--8196248.
[11] Edwin Espejo, *Miangas: Flashpoint Island Between RP and Indonesia*, ASIAN CORRESPONDENT (Sept. 2, 2010), https://asiancorrespondent.com/2010/09/miangas-flashpoint-island-between-rp-and-indonesia/#3C51FB8TWkLDR2JZ.97.
[12] *10 Main and Potential Commodities*, MINISTRY TRADE REPUBLIC INDON., http://www.kemendag.go.id/en/economic-profile/10-main-and-potential-commodities (last visited Jan. 22, 2018).
[13] *Id.*
[14] *Growth of Non-Oil and Gas Imports (Origin Countries) Period: 2012-2017*, MINISTRY TRADE REPUBLIC INDON., http://www.kemendag.go.id/en/economic-profile/indonesia-export-import/growth-of-non-oil-and-gas-import-origins-country (last visited Jan. 23, 2018).
[15] *The World Bank in Indonesia: Overview*, WORLD BANK, http://www.worldbank.org/en/country/indonesia/overview (last visited Jan. 23, 2018).

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world trading system.[16] The country's GDP per capita has steadily risen from $857 in the year 2000 to $3603 in 2016.[17] Singapore, Japan, China, the United States and South Korea are the biggest investors in Indonesia.[18] Until 2017 there has been twenty-five cases at the world trade organization involving Indonesia either as complainants or respondents concerning international trade disputes[19] and eight cases at the International Centre for Settlement of Investment Dispute (ICSID) or Permanent Court of Arbitration (PCA) concerning investment disputes.[20]

Other than its agricultural products and manufacturing products, Indonesia is also known as the second biggest producer of capture fisheries in the world after China considering that Indonesia has more than 17,000 islands and 2.7 million km^2 of marine water (world's sixth largest EEZ).[21] Issues like IUU fishing resulting in 380 foreign boats from various countries being scuttled and destroyed by the Indonesian government as punishment could potentially create conflicts with other countries.[22]

Forest fires in Indonesia causing air pollution across the region has also been a controversy for neighboring countries, such as Singapore. Singapore has issued Transboundary Haze Pollution Act, a 2014 law that authorizes

[16] In terms of the GDP growth, Indonesia is one of the top ASEAN countries, with 5% growth in average. *Indonesia: Economy*, ASIAN DEV. BANK, http://www.adb.org/countries/indonesia/economy (last visited Mar. 11, 2017); *GDP of 4 ASEAN Nations to Exceed $1 Trillion by 2030*, JAKARTA POST (Apr. 14, 2016, 5:29 PM), http://www.thejakartapost.com/seasia/2016/04/14/gdp-of-4-asean-nations-to-exceed-1-trillion-by-2030.html. In ASEAN, Indonesia is the largest economy, representing about 36% of the region's GDP and has the largest population (approximately 250 million inhabitants). Indonesia is seen to be expanding 5.2%, while Malaysia with 4.4% growth, and Thailand growing moderate with 3.3% growth. Beside GDP growth, Indonesia also has a good trading performance. In 2017, Indonesia's exports climbed 16.22% (y/y) to USD $168.728 millions, slightly exceeding expectations and touching the highest export earnings of the past 24 months. Meanwhile, imports climbed 15.66% (y/y) to USD $156.893 million, again slightly surpassing expectations. *Total Balance of Trade of Indonesia*, MINISTRY TRADE REPUBLIC INDON., http://www.kemendag.go.id/en/economic-profile/indonesia-export-import/indonesia-trade-balance (last visited Jan. 23, 2018). In other word, Indonesia is a potential market for international trade with big demand and huge population. Indonesia also has an important position in Asia-Pacific Economic Cooperation (APEC), the East Asia Summit (EAS), the Group of 20 (G20) and G33 (developing countries). Pakpahan, *supra* note 2.

[17] *The World Bank In Indonesia: Overview*, *supra* note 15.

[18] *Singapore Remains Largest Investor in Indonesia: BKPM*, TEMPO.CO (July 26, 2017, 2:20 PM), https://en.tempo.co/read/news/2017/07/26/056894568/Singapore-Remains-Largest-Investor-in-Indonesia-BKPM.

[19] *Disputes by Member*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited Mar. 2, 2018).

[20] *International Centre for Settlement of Investment Dispute*, ICSID, https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx (last visited Mar. 2, 2018) (searching in Respondent search bar for "Republic of Indonesia"); *Cases*, PERMANENT CT. ARB., https://pca-cpa.org/en/cases/ (last visited Mar. 2, 2018) (searching in case database search bar for "Republic of Indonesia").

[21] INDONESIA FISHERIES: 2015 REVIEW, CAL. ENVTL. ASSOCS. 1, 16 (2016), https://www.packard.org/wp-content/uploads/2016/09/Indonesia-Fisheries-2015-Review.pdf.

[22] *Susi Insists on Continuing Her Ship-sinking Policy*, JAKARTA POST (Jan. 10, 2018, 1:56 PM), http://www.thejakartapost.com/news/2018/01/10/susi-insists-on-continuing-her-ship-sinking-policy.html.

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the city-state to fine companies up to 2 million Singapore dollars ($1.4 million) for polluting its air, and Singaporean government has also taken legal action against certain Indonesian companies to prevent the unintentional forest fire.[23] This issue has harmed the relationship between Indonesia and Singapore.

Again friendly mediation provided by professional international organization for these types of State-to-State disputes could provide "fresh air" to maintain good relationship between countries, trading partners, neighbors and friends.

II. WHAT IS ARMO?

Asia-Pacific Regional Mediation Organization (hereinafter "ARMO") is an inter-governmental organization created specifically to provide mediation facilities for Asia-Pacific countries or economies to help handle their State-to-State (or Economy-to-Economy) disputes in a friendlier manner which is a preferable way for Asian countries. There is a saying which goes, "an ounce of mediation is worth a pound of arbitration and a ton of litigation."[24] The ARMO is designed to resolve disputes exclusively through mediation, focusing on mutual benefit rather than exclusively "rule-based" process. The most important task for ARMO is to conduct its duty to help the disputing parties find a mutually acceptable or advantageous solution to resolve their disputes.[25]

Unlike other existing mediation centres in the Asia-Pacific region, which handle domestic and/or international commercial disputes, the ARMO is created for State-to-State disputes. The jurisdiction of the ARMO extends to any legal and factual dispute between two or more Members, no matter arising from or relating to any bilateral, regional or multilateral agreement to which they are parties. It should be noted that ARMO is created to support the existing regional and even multilateral Dispute Settlement Mechanisms (DSMs) and is not a "competitor" that would lead to an undesirable increase of "forum shopping". For example, the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "DSU") has mediation provision in Article 5, which is an option that can be mutually selected by the disputing parties. However, the DSU does not have detailed mediation rules since it only provides that the Director-General of the WTO may offer good offices,

[23] Philip Jacobson, *Singapore Takes Legal Action Against 5 Indonesian Companies over Haze*, MONGABAY (Oct. 1, 2015), https://news.mongabay.com/2015/10/singapore-takes-legal-action-against-5-indonesian-companies-over-haze/.
[24] Quotation from Joseph Grynbaum.
[25] 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, 325 (2017).

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conciliation or mediation. Therefore, the ARMO can also support the operation of DSU Article 5 concerning the use of good offices, conciliation and mediation to resolve a WTO dispute, if the disputing parties so agree.[26]

III. WHY INDONESIA WOULD NEED ARMO?

Settling differences or disagreements through "musyawarah" (compromises or negotiations) is a preferred way in Indonesia. Mediation centres in Indonesia and in the region do not settle State-to-State disputes. ARMO can be a "solution" to Indonesia's current and future disputes because ARMO is designed to resolve disputes by finding a mutually acceptable or advantageous solution.

For example, at the WTO concerning trade matters, Indonesia has been very active in its dispute settlement proceedings. Up to 2017, Indonesia has been a complainant in eleven cases, a respondent in fourteen cases and a third party in twenty-two cases.[27] In the WTO dispute settlement proceedings, before a country could resort to the panel proceedings, there is a mandatory obligation to hold a consultation first to settle disputes. Based on Indonesia experiences, there have been two successful instances where disputes could be settled amicably though consultation and did not proceed to the panel proceeding.[28] In general, out of 539 standard DSU complaints involving 406 standard DSU matters brought to the WTO, there have been only 384 panel requests and 182 panel reports.

These figures show that many of the disputes were settled outside the litigation process. Consultations in the WTO dispute settlement context are just a way to settle disputes between the disputing countries without any involvement of WTO secretariat officials or any third independent party. The role of the WTO secretariat is usually only to provide venue in its headquarter as a neutral zone to facilitate the consultation between the disputing parties. However, this is not a mandatory as the disputing parties are free to decide where to hold such consultations. In the WTO dispute settlement system, alternative dispute settlement mechanisms are also available in the form of good offices, conciliation and mediation[29] or even

[26] *Id.* at 332-33.
[27] *Disputes by Member*, *supra* note 19.
[28] *Current Status of Disputes*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm (last visited Mar. 2, 2018). *South Africa — Anti-Dumping Measures on Uncoated Woodfree Paper*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds374_e.htm (last visited Mar. 12, 2018); *Indonesia — Recourse to Article 22.2 of the DSU in the US — Clove Cigarettes Dispute*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds481_e.htm (last visited Mar. 12, 2018).
[29] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

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arbitration.[30] However, up to now, WTO Members have resorted only once to arbitration under Article 25 of the DSU[31] and made no use of good offices, conciliation and mediation under Article 5 of the DSU.[32]

Lack of experience, confidence, rules and procedures, experts, or other issues maybe the reasons for the low utilization of mediation. The idea of having an international organization for mediation which can facilitate international dispute covering wide range of international issues is not only positive but also ideal especially for Asian cultures which prefer to settle disputes in friendlier and more amicable manner. Win-win solution rather than win-lose solution would be desirable for long term relationship between neighbors, friends or trading partners.

Nevertheless, if more than half of WTO disputes do not end up in the issuance of panel reports, it means that most of WTO disputes were settled amicably between the disputing parties. This fact is very "eye-opening" due to the skeptical view of some people who believe that disputes can only be resolved in a binding adjudication which results in a win-lose situations. This percentage could even be higher if there is a professional third party acting as mediators to facilitate the disputing parties to find a mutually acceptable or advantageous solution to resolve their dispute. There is a saying which goes, "[t]he courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried."[33]

Back to trade disputes involving Indonesia at the WTO, ARMO as a mediator for State-to-State disputes could play its role in mediating a win-win solution for the disputing parties. Again, resorting to ARMO does not prejudice the disputing parties' rights to later resort to the WTO panel proceeding. As per Article 5 of DSU, mediation may be requested, begin and be terminated at any time by any party to the dispute even continue while the panel process proceeds. WTO does not exclude mediation process outside WTO. However, the WTO Director General may, acting in an ex-officio capacity, offer mediation with the view to assisting WTO Members to settle a dispute.

Therefore, in the future, Indonesia can request ARMO as a mediator for State-to-State disputes not only for trade matters but also other types of disputes such as investment, territory, human rights, environments, forest

[30] *Id.* art. 25. There are other types of arbitration under Article 21.3(c) and Article 22.6 of DSU relating to the determination of the reasonable period of time for implementation and the appropriate level of retaliation. However, these arbitration procedures only concern specific issues that may arise in the context of a dispute.
[31] PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 187 n.130 (2017).
[32] *Id.* at 188 n.136.
[33] Quotes by Sandra Day O'Connor.

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fires, fisheries, and many other issues. With ARMO platform, it can minimize any negative effects for Indonesia that occurred in litigation platform because ARMO puts forward win-win solution with a binding agreement between the disputes parties.

IV. CONCLUSION

ARMO as a mediation platform for State-to-State disputes will support and improve the existing dispute settlement system, in particular for disputes that arise from bilateral, regional or multilateral agreements as well as other disputes that have no platform to resolve. Thus, ARMO can be a "vessel" to guide moving on in such disputes. Moreover, from the Indonesia's perspective, ARMO is a preferable and friendlier way for Indonesia to resolve a dispute rather than litigation platform.

Considering Indonesia's current situation that has been quite active in some State-to-State disputes, Indonesia can use ARMO as the platform to resolves disputes in the future since it is more suitable for Asian cultures which prefer to settle disputes in friendlier and more amicable manner in order to maintain long term relationship between neighbors, friends or trading partners.

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