AN ASSESSMENT OF ARMO FROM THE PERSPECTIVE OF TAIWAN

Ching-wen Hsueh[*] & Mao-wei Lo[**]

ABSTRACT

The Asia-Pacific region is notable for its diversity and the close interplay between the countries and economies of this area. As a member of this region, Taiwan has consistently participated in relevant bilateral or regional interactions related to both economic and noneconomic matters with other nations. As such, differences or disputes are often unavoidable. Therefore, an effective and peaceful dispute settlement mechanism is required to maintain amicable and mutually beneficial relations in this region. For that purpose, the international community should recognize the Asia-Pacific Regional Mediation Organization (hereinafter "ARMO") to initiate new international dispute resolution mechanisms.

This paper mainly assesses the possible influences of the ARMO from the perspective of Taiwan, and analyzes and compares the different mediation mechanisms at domestic and international levels. As the ARMO has a broad coverage regarding membership and jurisdiction, and would appoint impartial and professional mediators who provide a "friendly, swift and peaceful" forum platform for dispute resolution, the ARMO is a promising platform for Taiwan to settle a wide range of disputes. If the ARMO could achieve a balance between efficiency and the autonomy of parties with respect to the proceedings and the effect of the settlement, the

[*] Ching-wen Hsueh, Assistant professor, Depart of International Business, National Chengchi University, Dr. iur. University of Cologne. The author can be reached at: cwh@nccu.edu.tw

[**] Mao-wei Lo, LL.M., Division of International Law, College of Law, National Taiwan University. The author can be reached at: r01a21089@ntu.edu.tw.

臺灣大學學術期刊資料庫

ARMO could be achieved a higher standing in the Asia-Pacific region.

KEYWORDS: *ARMO, mediation, dispute settlement mechanism, Asia-Pacific region, Taiwan*

臺灣大學學術期刊資料庫

I. INTRODUCTION

Draft "Agreement on the Establishment of the Asia-Pacific Regional Mediation Organization" (hereinafter "ARMO Agreement") provides an additional option for governments in this region to solve their disputes in a more amicable way than the existing dispute resolution mechanisms. The idea of an intergovernmental organization specifically for mediation is novel, although the nonconfrontational method of dispute resolution is rooted in the traditional culture in Taiwan as well as many other Asian countries. Currently, local communities seem to pay less attention to mediation and other alternative dispute resolutions (hereinafter "ADRs") than on litigation. In total, 156,000 civil cases were initiated in district courts of Taiwan in 2016,[1] while the number of mediations concerning civil disputes was approximately 49,000.[2] However, more and more disputes are solved through mediation[3] and the types of disputes that are subject to mediation have increased. Furthermore, the Taiwanese government is willing to employ mediation as its primary dispute resolution mechanism for politically sensitive issues at international level. In general, the Taiwanese population is quite open-minded regarding mediation of any type. This paper firstly elaborates the on Taiwanese laws and Taiwan's practice of mediation in part II. After articulating the concerns for dispute resolution between Taiwan and the other states in part III, reflections on the ARMO are provided from Taiwan's perspective.

II. DOMESTIC LAWS AND PRACTICES OF MEDIATIONS IN TAIWAN

Domestic mediations in Taiwan are subject to extensive regulation, making them less flexible and thus confining the parties' autonomy. A substantial number of laws have established conditions for mediation, and specified the qualifications required of mediators in detail. The extensive regulation on mediation might came from, or lead to a stronger effect of the results of mediation. In most cases, the results of mediation are legally binding. In addition, mediations are integrated with other dispute resolution procedures, such as litigation and arbitration. The stand-alone mediation based on the agreement to mediate is apparently not the approach envisaged in the laws in Taiwan. For the purpose of this study, the term

[1] 105 Nian Sifa Yuan ji Suoshu Jiguan Yewu Tongji Jieguo Zhaiyao Fenxi [Statistic on the Works of Judicial Yuan and Its Affiliated Institutions in 2016], http://www.judicial.gov.tw/juds/jsi/home.htm#03b (last visited Feb. 20, 2018).

[2] Statistic available Neizheng Bu Tongji Zhoubao [Weekly Statistic Report of Ministry of the Interior] (May 6, 2016), https://www.moi.gov.tw/files/news_file/week10618.pdf [hereinafter Weekly Statistic Report].

[3] *Id.*

臺灣大學學術期刊資料庫

mediation is defined as "a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision-making." [4] According to the institutions under which the mediations are conducted, mediations in Taiwan can be divided in three groups: mediation before the courts, before competent authorities, and at a private institution.

A. Judicial Mediations

The first group of mediations is subject to the Taiwanese Code of Civil Procedure (hereinafter "Civil Procedure Code")[5] and conducted before the courts. The Judicial mediations are more extensively regulated and their results are more robust than those of the other two mediation groups.

1. Mandatory Mediations — The parties may request mediation before or during court proceedings.[6] For specific types of disputes, mediation is even required before the commencement of litigation.[7] It is heavily debated whether mediation, which is voluntary by nature, should be a compulsory condition for litigations.[8] Advocators of mandatory mediation argue that the parties might make a flawed decision in conflict resolution due to information asymmetries.[9] More importantly, no mediation can actually be concluded without the consent of all parties. The parties are compelled to undergo the entire mediation proceedings before either party initiates litigation. However, mediators must refer the case to court if the parties resist this form of conflict resolution. The autonomy of the parties is restricted to reduce the costs of the judicial system. Taiwan is one of few jurisdictions[10] that have adopted mandatory mediation before the courts. The disputes covered by mandatory mediation include those relating to the

---

[4] *See generally* John D. Feerick, *Standard of Conduct for Mediators*, 79 JUDICATURE 314 (1995-1996).

[5] Minshi Susong Fa [Taiwan Code of Civil Procedure] [hereinafter Civil Procedure Code], LAWS & REGS. DATABASE R.O.C., http://law.moj.gov.tw/LawClass/LawContent.aspx?PCODE=B0010001 (last visited Feb. 20, 2018).

[6] *Id.* arts. 404, 420-1.

[7] *Id.* art. 403.

[8] Klaus J. Hopt & Felix Steffek, *Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues*, *in* MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE 6, 25 (Klaus J. Hopt & Felix Steffek eds., 2012).

[9] *See id.*

[10] *Cf.* Reinhard Ellger, *Mediation in Canada: One Goal—Different Approaches to Mediation in a State with Federal and Provincial Jurisdictions*, *in* MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE 910, 932 (Klaus J. Hopt & Felix Steffek eds., 2012); Anneken Karl Sperr, *Mediation in Norway: "Faster, Cheaper and More Friendly"*, *in* MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE 1138, 1144 (Klaus J. Hopt & Felix Steffek eds., 2012); Rainer Kulms, *Mediation in the USA: Alternative Dispute Resolution Between Legalism and Self-Determination*, *in* MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE 1246, 1262-64 (Klaus J. Hopt & Felix Steffek eds., 2012).

臺灣大學學術期刊資料庫

usage of real estate, the boundaries of real estate, rents for real estate, medical malpractice, traffic accidents, employment contracts, the partnership agreements, disagreements among relatives regarding property, and other disputes under an approximate value of US$ 15,000.[11]

2. Active Role of the Court in Mediation Proceedings — The court plays an active role in mediations under the Civil Procedure Code, which grants the judiciary broad discretion at every stage of mediation. By contrast, parties have less flexibility in determining of how the mediation is conducted. Upon a party's request, the courts review whether the application is sufficient for mediation to commence. The application will be dismissed when any of the following occurs: a) the mediation is unfeasible, unnecessary, or likely to fail; b) the mediation was conducted by other competent authorities, but failed; c) the dispute relates to negotiable instruments; d) the dispute is raised due to a counterclaim; e) the notification of medication shall be served by a constructive notice or in a foreign country; f) an application was submitted by a financial institution for contract regarding loans or credit cards.[12] The court may appoint a judge as a mediator, a person agreed on by all parties, an accredited mediator from an authoritative list, or any appropriate person the court deems appropriate.[13] All the personnel involved, including the judge, court clerks, and mediators, are obliged to ensure all information provided such as trade secrets, or personal private information remains confidential.[14]

During the mediation process, the courts supervise and are closely involved in the proceedings, even if they designate non-judge mediators. The court designates the first session of mediation, and the meditators then decide on the format of subsequent sessions.[15] The court may close the mediation due to the absence of a party in the mediation sessions,[16] and a party's absence without justifiable grounds can result in sanctions.[17] Furthermore, the courts may, upon the parties' request, issue interim measures to preserve the status quo.[18] It is also necessary to obtain the court's permission to include a third party in the mediation.[19] However, the mediator, not the court, is responsible for how the mediation is conducted. The mediator can assist the parties in facts-finding, while the court may take evidence when necessary.[20] Regarding conclusions, the party's

[11] Civil Procedure Code, *supra* note 5, art. 403.
[12] *Id.* art. 403.
[13] *Id.* arts. 406-1, 406-2.
[14] *Id.* art. 426.
[15] *Id.* art. 407.
[16] *Id.* art. 420.
[17] *Id.* art. 409.
[18] *Id.* art. 409-1.
[19] *Id.* art. 412.
[20] *Id.* art. 414.

臺灣大學學術期刊資料庫

autonomy is the primary concern, which is ascribed greater respect in this stage than in the previous stages of mediation. The mediation is successfully concluded when the parties reach an agreement that is by their own imitative, proposed by a mediator, or when they do not explicitly object to the solutions proposed by the court.[21] The court considers all circumstances, especially the intents of the parties, to provide proposals for solutions only in cases where the parties are close to an agreement.[22]

3. Results of Mediation — The results of a successful mediation has the same effect as a settlement in litigation,[23] which is as final and binding as a definitive judgment. In other words, the results of a mediation are as enforceable as a judgement, without further procedural requirements. In addition, the complaining party in a successful mediation is refunded with two-thirds of their court fees if the parties involved in court proceedings voluntarily refer the case for mediation.[24] If the parties fail to reach an agreement or object to the court's solution, under certain conditions the unsuccessful mediation proceeds immediately to litigation proceedings.[25] The concessions made or proposals suggested in the failed mediation are not considered in the decision-making process of the subsequent litigation.[26]

The results of mediations before the courts are generally acceptable by all parties. The success rate of mediation has increased from 32% to 50% over the last 10 years, which is seven times higher than the success rate of conciliation.[27] Conciliation is least successful form of dispute resolution, probably because the proceedings are often conducted without the assistance of an independent third party. The high success rate of mediation indicates that consent to mediation might not always be essential, as many mediations are mandatory under the Civil Procedure Code.

B. Mediations Before Competent Committees

In addition to judicial mediations, parties may submit disputes to mediation committees established by administrative institutions. Each mediation committee is exclusively entrusted with resolving specific types of disputes, except for the Town Mediation Committee under the Township and County-Administered City Mediation Act (hereinafter "Town

[21] *Id.* arts. 415-1, 418.
[22] *Id.* art. 417.
[23] *Id.* art. 416.
[24] *Id.* art. 420-1.
[25] *Id.* art. 419.
[26] *Id.* art. 422.
[27] Minshi Diaojie ji Hejie Shijian Banli Qingxing [Mediations and Conciliations on Civil Cases], http://tph.judicial.gov.tw/stati/年報資料/臺灣司法統計專輯_103 年/2-06.pdf (last visited Feb. 25, 2018).

臺灣大學學術期刊資料庫

Mediation Act").[28] The Town Mediation Committee covers general civil disputes and the criminal cases indictable only upon complaint.[29] However, parties cannot resort to the Town Mediation Committee for disputes regarding to labor rights, copyright, consumer protection, government procurement, and cases of public nuisance. These disputes are exclusively subject to mediation procedures as provided by the relevant laws and regulations.

1. Non-Exclusive Mediation: Town Mediation — Each town mediation committee consists of seven to fifteen members[30] nominated by the mayor of the town and approved by the county.[31] The members of the mediation committee serve a four-year term, but can be re-elected an unlimited number of times.[32] The mediation procedure is initiated by the parties[33] or by the court's ruling to assign the litigation case to the mediation committee.[34] The parties cannot appoint a mediator; however, each party may name one to three persons to assist them in the mediation session.[35] At least three members are assigned to the parties, unless parties have agreed to accept only one member to conduct the proceedings.[36]In the course of mediation, the town mediators actively guide the proceedings. They may conduct the necessary investigations of the facts in disputes and may request assistance from competent authorities.[37] In addition, the mediators provide advice to the parties and propose the final solutions.[38]Furthermore, the mediators have the discretion to close the mediation proceedings in cases where either party fails to attend the mediation session without justifiable cause.[39] If the parties reach an agreement, the committee issue a written mediation agreement according to the requirements of the Town Mediation Act.[40] To be enforceable, the mediation agreement must be submitted to a court for approval.[41] If the approval is granted, the mediation agreement has the same effect as a definitive judgment, i.e., it is final, binding and enforceable. The parties are not permitted to file any case on the issues resolved in the mediation

[28] Xiangzhen Xianshi Diaojie Tiaoli [Township and County-Administered City Mediation Act], LAWS & REGS. DATABASE R.O.C., http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=I00 20003 (last visited Feb. 25, 2018).
[29] *Id.* art. 1.
[30] *Id.* art. 2.
[31] *Id.* art. 3.
[32] *Id.*
[33] *Id.* art. 10.
[34] *Id.* art. 12.
[35] *Id.* art. 17.
[36] *Id.* art. 7.
[37] *Id.* art. 21.
[38] *Id.* art. 22.
[39] *Id.* art. 20.
[40] *Id.* art. 25.
[41] *Id.* art. 27.

臺灣大學學術期刊資料庫

agreement. Furthermore, if a case was previously pending in court proceedings, it is then deemed to be closed.[42] In an unsuccessful mediation, the parties are supplied with a certification of failed mediation.[43] An application for the mediation of criminal cases, which failed eventually, is deemed as filing the complaint before prosecutors.[44]

In practice, the town mediation system is considerably advantageous in terms of caseloads and the success rate of mediations, which is 79% on average.[45] Town mediations perform more favorably for criminal cases indictable only upon complaints, was with 80,000 filed in 2016 and achieving a success rate of 83%.[46] Parties tend to prefer criminal mediations to civil mediations because in criminal mediations all parties have stronger motives to reach a compromise. Parties subject to criminal accusations are more willing to satisfy the requests of the counterparty in exchange for waiving criminal prosecution. Additionally, the party that seeks to recover losses caused by criminal offense can be spared the costs associated with litigation. In all cases, the success of a town mediation might be attributed to the mind-set of all meditators that the mediation is a forum for restoring social harmony, a concept consistent with the Confucian tradition.[47]

2. Exclusive Mediation — Government agencies, committees, and institutions have been established exclusively for mediating disputes concerning consumer protection,[48] government procurement,[49] labors,[50] public nuisance,[51] and intellectual property rights.[52] Although these entities might fall under the title of mediation, their services are similar to those provided by a town mediation committee. First, parties have little or no discretion regarding the appointment of the mediators; these are

---

[42] *Id.* art. 28.
[43] *Id.* art. 30.
[44] *Id.* art. 32.
[45] Weekly Statistic Report, *supra* note 2.
[46] *Id.*
[47] Yun Shien Diana Lin, *Civil Mediation in Taiwan: Legal Culture and the Process of Legal Modernization*, 6 UNIV. PA. EAST ASIA L. REV. 192, 207 (2011).
[48] Xiaofei Zhe Baohu Fa [Consumer Protection Act], art. 44, LAWS & REGS. DATABASE R.O.C., http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?PCODE=J0170001 (last visited Feb. 25, 2018).
[49] Zhengfu Caigou Fa [Government Procurement Act], art. 74, LAWS & REGS. DATABASE R.O.C., http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=A0030057 (last visited Feb. 25, 2018).
[50] Laozi Jiufen Chuli Fa [Act for Settlement of Labour-Manage Disputes] [hereinafter Labour Dispute Act], art. 11, LAWS & REGS. DATABASE R.O.C., http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=N0020007 (last visited Feb. 25, 2018).
[51] Gonghai Jiufen Chuli Fa [Public Nuisance Dispute Mediation Act], art. 14, LAWS & REGS. DATABASE R.O.C., http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=O0080001 (last visited on Feb. 25, 2018).
[52] Zhezuo Quan Fa [Copy Right Act], art. 82, LAWS & REGS. DATABASE R.O.C., http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=J0070017 (last visited Feb. 25, 2018).

臺灣大學學術期刊資料庫

nominated according to laws.[53] Second, to a certain extent, mediators are in control of fact-finding[54] and providing suggestions for solutions.[55]Third, the results of these mediations can be enforceable through the approval of courts.[56] Finally, mediators and the staff must ensure the content of the mediation procedure remains confidential.[57] Slight differences can be observed among these mediations.

In consumer disputes, consumers are required to undergo premediation procedures. They are obliged to first file the complaint with a consumer protection group, or the relevant trader. If no solution is reached, the consumer ombudspersons will step to provide the consumer with further assistance in the negotiations with the trader. The consumer dispute mediation provides another option for cases that are not solved in the previous two stages.[58] Similar premediation procedures also exist in the financial services-related consumer disputes,[59] which are subject to the mediation of the Finance Ombudsman Institution (hereinafter "FOI") established under public funding.[60] The consumer ombudsperson subcommittee under the FOI will conduct the mediation, only if the traders (i.e., the financial service providers) do not solve the consumer's complaints.[61] Compared with other consumer mediations, the subcommittee has stronger power over the results of the mediation. The traders are obligated to accept the results of the payment to the consumers, if they have consent in writing to subject to the proceedings provided in

---

[53] Consumer Protection Act, *supra* note 48, art. 45; Government Procurement Act, *supra* note 49, art. 86; Labour Dispute Act, *supra* note 50, art. 14; Public Nuisance Dispute Mediation Act, *supra* note 51, art.5; Labour Dispute Act, *supra* note 50, arts.11, 13; Copy Right Act, *supra* note 52, art. 83.

[54] Caigou Luyue Zhengyi Diaojie Guize [Regulation of the Mediation of the Disputes Regarding Performance of Government Procurement Contract] [hereinafter Regulation on GPC Mediation], arts. 13, 15, LAWS & REGS. DATABASE R.O.C., https://law.moj.gov.tw/Law/LawSearchResult.aspx?p=A&t=A1A2E1F1&k1=%E6%8E%A1%E8%B3%BC%E5%B1%A5%E7%B4%84%E7%88%AD%E8%AD%B0%E8%AA%BF%E8%A7%A3%E8%A6%8F%E5%89%87 (last visited Feb. 25, 2018); Labour Dispute Act, *supra* note 50, art. 16; Public Nuisance Dispute Mediation Act, *supra* note 51, art. 24; Labour Dispute Act, *supra* note 50, art. 16.

[55] Consumer Protection Act, *supra* note 48, art. 45-2; Government Procurement Act, *supra* note 49, art. 85-5; Public Nuisance Dispute Mediation Act, *supra* note 51, art. 27; Labour Dispute Act, *supra* note 50, art. 18.

[56] Consumer Protection Act, *supra* note 48, art. 46; Regulation on GPC Mediation, *supra* note 54, art. 22; Public Nuisance Dispute Mediation Act, *supra* note 51, art. 30; Copy Right Act, *supra* note 52, art. 82-2.

[57] Consumer Protection Act, *supra* note 48, art. 45-1; Zhezuo Quan Zhengyi Diaojie Chuli Banfa [Regulation of Copy Right Dispute Resolution], art. 11, LAWS & REGS. DATABASE R.O.C., http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=J0070020 (last visited Feb. 25, 2018).

[58] Consumer Protection Act, *supra* note 48, arts. 43, 44.

[59] Jinrong Xiaofei Zhe Baohu Fa [Financial Consumer Protection Act], art. 13, LAWS & REGS. DATABASE R.O.C., http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=G0380226 (last visited Feb. 25, 2018).

[60] *Id.* art. 14.

[61] *Id.* art. 13.

臺灣大學學術期刊資料庫

Financial Consumer Protection Act.[62] In other words, the consumers have more leverage in the mediation than traders, which seems to be contrary to the ideas of equality in mediation.

The idea of equal standing is also compromised in mediations between suppliers of govern procurement contracts and government entities. Government entities are obliged to participate in the mediation of the disputes concerning the fulfillment of a contract.[63] Regarding the results of mediation, suppliers are free to decide whether to accept the proposal, while the government entity's objection to the proposals is deemed as consent to arbitrate.[64] Nevertheless, not all the exclusive mediations are equipped with a strong effect of their results. One notable exception is the mediation of labor disputes. The successful result of such a mediation is simply a contract between the parties.[65] Notably, competent authority may *ex officio* initiate the mediation proceedings without the consent of the employers, after the employee files the application for mediation.[66] Although the parties' autonomy appears to be confined, the success rates of exclusive mediations are generally acceptable.[67]

C. Mediations at Private Institutions

The arbitration institution is the only private entity explicitly recognized by law that can conduct mediations.[68] Parties may use *ad hoc* mediation or mediations conducted by other institutions; however, the results of these mediations are not as binding as those of arbitration institutions. Decisions agreed upon in the mediation conducted by arbitration intuitions have the same effect as arbitration awards.[69]

The Mediation Center of Chinese Arbitration Association (hereinafter "CAA") appears to undertake the most, if not all, of the mediations at the private entities in Taiwan. Before the establishment of the Mediation Center, commercial mediation was almost nonexistent.[70] In contrast to the previous two groups of mediations discussed that adopt the evaluative

---

[62] *Id.* arts. 23, 29.
[63] Government Procurement Act, *supra* note 49, art. 85-1.
[64] *Id.*
[65] Labour Dispute Act, *supra* note 50, art. 23.
[66] *Id.* art. 9.
[67] *E.g.*, Annual Report of Financial Ombudsman Institution (2016), https://www.foi.org.tw/Att_FCK/file/評議中心 2016 年報.pdf (last visited Feb. 25, 2018); Laodong Tongji Tongbao [The Report on Statistics of Labour Disputes] (June 5, 2017), https://www.mol.gov.tw/media/3810876/105 年勞資爭議終結案件-以-調解方式-處理為主.pdf.
[68] Zhongcai Fa [Arbitration Act], art. 45, LAWS & REGS. DATABASE R.O.C., http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=I0020001 (last visited Feb. 25, 2018).
[69] *Id.*
[70] Carol Liew, *Recent Developments in Mediation in East Asia*, *in* ADR IN BUSINESS: PRACTICES AND ISSUES ACROSS COUNTRIES AND CULTURES II 515, 554 (Arnold Ingen-Housz ed., 2010).

臺灣大學學術期刊資料庫

model,[71] this mediation center promotes facilitative approach[72] and focus more on the consent of the parties. The mediation center provides a list of mediators at a party's disposal and the parties may override the mediation rules of CAA with their decisions.[73] The parties may also change the mediator's determinations regarding procedure, if they agree otherwise.[74] Nonetheless, the mediators of the CAA can actively lead the parties through the proceedings. Regarding fact-finding, the mediators shall encourage parties to submit evidence, conduct an onsite inspection, examine evidence, or submit a request for the assistance of competent authorities when necessary.[75] These mediators can conduct the session participated in jointly or separately by the parties, according to the given circumstances.[76] In terms of dispute resolution, agreement among parties agreements is preferable, mediators may provide recommendations upon parties' request or on their own initiative.[77] Along with the broad discretion on the proceedings and the results, duties and code of conducts are imposed upon mediators. The parties, mediators, staff, and witnesses have a duty of confidentiality.[78] The acts of mediators are subject to the review of the Mediator Ethic Committee by virtue of the rules of a mediator's professional responsibilities.[79]

Mediations in Taiwan are extensively regulated, which reduces the parties' autonomy and the flexibility of the procedures. Mediators are allowed to take measures without parties' consent, such as in judicial, town and exclusive mediations. In other words, mediators have more leverage to persuade parties to cooperate. Furthermore, they are encouraged to provide recommendations or proposals that are binding and enforceable with parties' consent and the court's approval. The relatively robust competence of mediators should exist alongside intensive legal requirements and duties for mediators. Otherwise, the mediations would comprise the objectives and values of the judicial system in Taiwan.[80] The design of the mediations in Taiwan is a combination of litigation proceedings and the typical mediation proceedings that are fully voluntary and relatively weak in terms of effect. It seems the mediations in Taiwan, except for those conducted by

---

[71] Jia Zhen Chang & Shu Ping Hong, *Taiwan Diaojie Zhidu Jianjie* [Introduction on the Mediations in Taiwan], 9 ZHONGCAI BAO [Arbitration News] 3 (2008).
[72] Liew, *supra* note 70.
[73] Mediation Rules of CAA, amended on Mar. 25, 2009, arts. 3, 14, http://www.arbitration.org.tw/rule04-en.php (last visited Feb. 20, 2018).
[74] *Id.* art. 15.
[75] *Id.* art. 17.
[76] *Id.* art. 18.
[77] *Id.* art. 25.
[78] *Id.* arts. 3, 14.
[79] *Id.* art. 28.
[80] Shi Min Chiang, *Diaojie Tiaochu Zhidu zhi Yanjiu* [A Study on the Mediation System], 246 YUE DAN FAXUE ZAZHI [The Taiwan Law Review] 84, 94 (2015).

臺灣大學學術期刊資料庫

the mediation center of the CAA, are perceived as the "semicourt" or as an amicable court that can effectively reduce the caseloads of actual courts.

III. INTERGOVERNMENTAL MEDIATIONS IN TAIWAN

At a domestic level, many mediations are expected to not only provide alternatives to, but also replace the litigations. With the help of the court or competent authorities, the disputes could switch among different procedures. In Taiwan, the case could commence as an amicable mediation with a binding effect, and proceed to a more confrontational stage, (e.g., the arbitration or the litigation), if tension between parties escalates. In this situation, mediation could be the most efficient procedure in terms of time and financial costs. However, such a close relationship between mediation and the litigation does not exist at an international level. Taiwan perceives the mediations between governments quite differently to mediation at a domestic level. In terms of international trade issues, Taiwan tends to be conservative regarding mediation, while it considers mediation as the first line mechanism for dispute resolution.

A. Mediation and Consultation Under the World Trade Organization

One of the primary reasons the World Trade Organization (hereinafter "WTO") is considered to be a successful paradigm in international affairs is that it is equipped with an effective dispute settlement mechanism. The Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter the "DSU") established the Dispute Settlement Body (hereinafter "DSB") to address members' disputes relating to WTO-covered agreements; and the DSB has responsibility for referring to a dispute for adjudication (namely, establishing a panel); adopting the reports; and in general, supervising the implementation of the reports.[81]

Before entering into penal proceedings, the DSU provides many ADRs for Members to utilize, which includes consultation, good office, mediation and arbitration. Article 4.2 of the DSU requires that parties first engage in consultation and attempt to reach a satisfactory solution.[82] The consultation procedure under the DSU is a critical phase in resolving disputes. According to the Offices of the Trade and Negotiation of Taiwan, before initiating consultation, the disputing parties first clarify relevant

[81] WTO, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM 17 (2004).

[82] Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter DSU] art. 4.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 ("Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.").

臺灣大學學術期刊資料庫

facts and issues regarding the case, and seek to settle the disputes in this stage.[83]

When Members fail to reach a settlement to resolve disputes, they can request that the DSB establish a panel. In addition, Article 5.3 of the DSU provides the right of the parties to utilize good offices, conciliation, or mediation to resolve disputes. When parties agree to do so, Article 5.6 of the DSU further provides that the Director-General of WTO may act in an *ex officio* capacity to offer good offices, conciliation, or mediation to assist parties in reaching a settlement agreed upon by both sides.[84] The good offices, conciliation and mediation may begin and be terminated at any time.[85] Once procedures for good offices, conciliation, or mediation are terminated, the complaining party may still proceed with a request for the establishment of a panel.

Apart from being a third party in particular cases, it seems that Taiwan has not frequently been involved in the dispute settlement mechanisms since acceding to the WTO. However, recently Taiwan has gradually begun to utilize the dispute settlement mechanism to defend its rights and benefits as a Member of the WTO. According to the WTO, Taiwan acted as a complainant six times: three of these cases were settled through consultation (DS274, DS318 and DS498), two were resolved through panel proceedings (DS377 and DS482), and one was appealed by the defendant (DS490).[86] Among these cases, neither Taiwan nor the defendants requested that the disputes be addressed through the mediation proceedings under the DSU.

A pertinent concern is why this mediation mechanism is not generally employed by Taiwan to resolve disputes. While the DSU provides parties with the right to request mediation to resolve their conflicts related to the WTO, the relevant provisions for conducting the mediation under the DSU are insufficient. This is also why the aforementioned ADRs are not desirable for parties to solve disputes. In addition, by clarifying and coordinating the legal and factual issues in the consultation stage, the disputing parties may decide whether the case shall proceed to requesting the establishment of a panel, or simply settle the dispute during this stage.[87]

---

[83] Interview with the colleagues of the Offices of the Trade and Negotiation of Taiwan, in Taipei, Taiwan (Feb. 5, 2018) (on file with author); *see also* Robert Alilovic, *Consultations Under the WTO's Dispute Settlement System*, 9 DALHOUSIE J. LEGAL STUD. 279, 290 (2000).

[84] DSU, *supra* note 82, art. 5.6 ("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.").

[85] *Id.* art. 5.3 ("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.").

[86] *Disputes by Member*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited Feb. 15, 2018.).

[87] Interview with the colleagues of the Offices of the Trade and Negotiation of Taiwan, in Taipei,

臺灣大學學術期刊資料庫

In other words, the consultation procedure is similar to the preliminary proceedings in the domestic court system, and this court-style proceedings are also more familiar to Taiwan's representatives in the WTO.[88] Moreover, because the representatives of the disputing parties are usually empowered in advance, they cannot commit to any matter beyond their mandate. Such restrictions also make mediation an impractical choice for addressing disputes.[89]

In the authors' perspective, while mediation under the DSU currently does not commonly utilize parties to solve their disputes, as the DSU does not preclude the possibility of other institutions or third parties serving as mediators if the parties so agree,[90] Members of the WTO, including Taiwan, should welcome having an alternative dispute settlement mechanism other than a panel or appellate body proceeding that is equally as effective.[91]

B. Mediation for Nontrade Disputes

Nontrade disputes, which include (but are not limited to) territorial claims, delimitation of maritime boundaries, concurrent jurisdictions, investment disputes, and other conflicts concerning sovereignty issues or the rights of states to regulate, are difficult to resolve. Unlike trade disputes, which can be adjudicated through the well-established and rule-based dispute settlement mechanism (such as the WTO DSB), nontrade disputes are usually intractable and difficult for international courts or tribunals to address because clear legal rights are often difficult to determine. Additionally, disputing parties usually view sovereignty disputes as a zero-sum game because considerable interests are at stake, which eventually hampers disputing parties from compromising with each other and reaching a mutually satisfactory consensus.

Regarding results, compared with trade disputes, the more amicable and flexible dispute settlement mechanism such as mediation—which is designed to pursue the mutually beneficial outcome—is more suitable for resolving nontrade disputes. During mediation proceedings, professional and trustworthy mediators can participate in negotiations and help parties devise mutually acceptable solutions. Additionally, they may propose

---

Taiwan (Feb. 5, 2018) (on file with author).

[88] *Id*.

[89] *Id*.

[90] 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, 333 (2017).

[91] The scholar also argued that the mediation should play more role in DSU. *See, e.g.*, Hansel T. Pham, *Developing Countries and the WTO: The Need for More Mediation in the DSU*, 9 HARV. NEGOT. L. REV. 331 (2004).

臺灣大學學術期刊資料庫

possible solutions. Therefore, although mediation settlements might not be legally enforceable, they might still be voluntarily accepted.

This paper further discusses several nontrade disputes between Taiwan and other Asia-Pacific states, evaluates the effectiveness of current dispute settlement mechanisms for addressing these disputes, and discusses whether utilizing the state-to-state (member-to-member) mediation mechanism is desirable for Taiwan.

1. The Case Relates to the Issue of Cross-Strait Deportations — In Apr. 4, 2016, a group of Taiwanese and Chinese citizens were suspected of telecommunications fraud and were arrested by the police authorities of Kenya. The court of Kenya judged that the Taiwanese and Chinese citizens all committed crimes, and the Kenya administration immediately decided to deport both Taiwanese and Chinese citizens to China.[92] This ruling was highly praised by the Chinese government;[93] by contrast, the Taiwanese immediately protested strongly that Kenya "seriously harmed the rights of the people involved". Furthermore, Taiwan's Ministry of Foreign Affairs claimed that Taiwan is an independent country and not part of China, thus requesting that Kenya repatriate Taiwanese citizens in prison based on the principle of nationality under international law.[94] Additionally, Taiwan's Mainland Affairs Council also condemned China for breaching the oral consensus reached in 2011 between both sides,[95] and urged China to send the Taiwanese citizens back to Taiwan according to the "Cross-Strait Agreement on Joint Crime-Fighting and Mutual Judicial Assistance".

Although China later agreed to commence talks with Taiwan, both sides could not reach further consensus and the official negotiations were suspended due to the ruling party's removal from power in Taiwan. Additionally, because at that time China required other countries (e.g., Cambodia, Malaysia, Spain, and Indonesia) to repatriate arrested Taiwanese citizens suspected of crimes to China and ignored Taiwan's consistent

---

[92] Austin Ramzy, *8 Taiwanese Are Deported to China After Trial in Kenya*, N.Y. TIMES (Apr. 11, 2016), https://www.nytimes.com/2016/04/12/world/asia/kenya-deport-taiwan-china.html.

[93] Duncan Miriri, *Kenya Defends Deportations to China; Taiwan Fumes*, REUTERS (Apr. 12, 2016), https://www.reuters.com/article/us-taiwan-china-kenya/kenya-defends-deportations-to-china-taiwan-fumes-idUSKCN0X90EX.

[94] *MOFA Strongly Protests Kenya's Deportation of ROC Citizens to Mainland China*, MINISTRY FOREIGN AFF. (R.O.C.), https://www.mofa.gov.tw/en/News_Content.aspx?n=1EADDCFD4C6EC567&s=2942A6367DFBED22 (last visited Feb. 22, 2018). For detail discussion of the legal issues of this case, see, for example, Huang-Chih Chiang, *Lun Kenya An Chi Xiangguan Guochi Fa Wenti —Yi Guanxia Chuan Ginhe Chi Chuli Wei Chunghsin Chi Tantao* [The Analysis of Relevant Issues for International Law in the "Kenya Case": Focusing on Addressing the issues of the Conflicts of Jurisdiction], 296 TAIWAN FAXUE ZAZHI [Taiwan Law Journal] 72 (2016).

[95] *MAC Sternly Protests Detention and Deportation of Taiwan National to Mainland China: The Government Absolutely Upholds the Rights and Interests of the People and Secured Immediate Return to Taiwan*, MAINLAND AFF. COUNCIL (Apr. 11, 2016), https://www.mac.gov.tw/en/News_Content.aspx?n=14271038DDC4104F&sms=E828F60C4AFBAF90&s=23C36390588CBE9A.

臺灣大學學術期刊資料庫

protests, gradually, the cross-strait relations become even worse.[96]

This dispute represents the inadequacy of dispute settlement provisions under the existing cross-strait agreements as they merely state that parties (namely Taiwan and China) shall solve disputes arising from the agreements through consultation.[97] A more functional mechanism for addressing cross-strait disputes is required.

2. The South China Sea Disputes — The South China Sea disputes involve both territorial and maritime-related claims among several claimants within this region, including China, Taiwan, the Philippines, Vietnam, Malaysia, Indonesia, and Brunei. The disputing parties claimed whole or part of islands, marine boundaries, and other economic interests in this region.[98] These disputes drew a considerable amount of attention from non-claimants outside this area, (i.e., the United States), arguing that the freedom of navigation shall be strictly maintained and observed under the United Nations Conventions on the Law of the Sea (hereinafter "UNCLOS").[99] All of these factors caused an extremely complicated situation in this region. However, in 2002, China and the countries of Association of Southeast Asian Nations (hereinafter "ASEAN") concluded the "Declaration on the Conduct of Parties in the South China Sea"[100], and at the time of writing, negotiations for the "Code of Conduct on the South China Sea" are also ongoing.[101] However, relations in this area are still tense and are potentially threatening to the stability of the Asia-Pacific region.

In July 2016, an arbitral tribunal constituted under Annex VII of the UNCLOS ruled against China's maritime claims, and stated that Taiping Island (also known as "Itu Aba") is merely a "rock", rather than an "island" under Article 121.1 of UNCLOS;[102] therefore, it could only generate twelve nautical miles of territorial sea.[103] However, China consistently

---

[96] Sheryn Lee, *Taiwan's Tsai Takes China and the KMT in Her Stride*, E. ASIA FORUM (Jan. 1, 2018), http://www.eastasiaforum.org/2018/01/01/taiwans-tsai-takes-china-and-the-kmt-in-her-stride/.

[97] *See, e.g.*, Cross-Strait Agreement on Joint Crime-Fighting and Mutual Judicial Assistance, art. 22 ("When the dispute occurs, Parties shall promptly solve it through consultation.").

[98] Robert Beckman, *The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea*, 107 AM. J. INT'L L. 142, 143-45 (2013).

[99] *Id*. at 146-47.

[100] *Declaration on the Conduct of Parties in the South China Sea*, ASS'N SE. ASIAN NATIONS, http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2 (last visited Feb. 25, 2018).

[101] James Pomfret & Neil Jerome Morales, *South China Sea Code of Conduct Talks to Be "Stabilizer" for Region: China Premier*, REUTERS (Nov. 14, 2017), https://www.reuters.com/article/us-asean-summit-southchinasea/south-china-sea-code-of-conduct-talks-to-be-stabilizer-for-region-china-premier-idUSKBN1DE05K.

[102] United Nations Convention on the Law of the Sea art. 121.1, 1833 U.N.T.S. 3, 21 I.L.M. 1261 (1982) ("An island is a naturally formed area of land, surrounded by water, which is above water at high tide.").

[103] South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Award, ¶ 632 (July 12,

臺灣大學學術期刊資料庫

declared that the award is "null and void", and the "territorial sovereignty and maritime rights and interests in the South China Sea shall under no circumstances be affected".[104] Similarly, Taiwan also contended that the arbitration was completely unacceptable and had no binding force because Taiwan was not invited to participate in the arbitration proceedings.[105] Interestingly, the government of the Philippines also altered their stance after the declaration even though the court ruled in favor of the Philippines without dissent. At the time of writing, these conflicts in this region remain unresolved.[106]

This case elucidated the weakness of the present dispute settlement mechanism for resolving disputes that occur within the Asia-Pacific region; as the result, an alternative approach is necessary that considers the unique situation of this region.

3. The Guang Da Xing No. 28 Incident Between Taiwan and the Philippines — The Guang Da Xing No. 28 incident occurred on May 9, 2013 because a Philippines Coast Guard patrol boat (Maritime Control Surveillance 3001) used gunfire and caused the death of a Taiwanese fisherman named Hung Shih-Cheng in the shared exclusive economic zone (hereinafter "EEZ") between Taiwan and the Philippines. While the government of the Philippines stated that this incident occurred due to the Taiwanese fishing boat crew resisting inspection and attempting to ram the Philippine Coast Guard vessel in the Philippines sea territory. The government of Taiwan immediately refuted this and condemned the Philippine Coast Guards' disproportional actions as disproportionate.[107] Subsequently, on May 11, President Ying-Jeou Ma issued a formal declaration, urging the government of the Philippines to complete the following requests in seventy-two hours: (1) Issue a formal apology; (2) Expedite the investigation into the fisherman's death, and punish the perpetrators; (3) Compensate the deceased fisherman's family; and (4) Commence talks over fishing rights in the overlapping EEZ.[108] However, the authorities of the Philippines only agreed to express "deep regret and

---

2016).

[104] *Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines*, S. CHINA SEA ISSUE (July 12, 2016), http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379492.htm.

[105] *ROC Position on the South China Sea Arbitration*, MINISTRY FOREIGN AFF. (R.O.C.) (July 12, 2016), https://www.mofa.gov.tw/en/News_Content.aspx?n=1EADDCFD4C6EC567&s=5B5A9134709EB875.

[106] Ankit Panda, *A Year Later, the South China Sea Award Stands as Evidence of China's Rule-Breaking Behavior*, DIPLOMAT (July 17, 2017), https://thediplomat.com/2017/07/a-year-later-the-south-china-sea-award-stands-as-evidence-of-chinas-rule-breaking-behavior/.

[107] *Balintang Channel Incident Report*, OFFICIAL GAZETTE GOV'T PHIL. (Aug. 7, 2013), http://www.officialgazette.gov.ph/2013/08/07/balintang-channel-incident-report/.

[108] *Ma Issues Ultimatum to Philippines on Boat Attack*, TAIWAN TODAY (May 13, 2013), https://taiwantoday.tw/news.php?unit=2,2,23,45&post=2970.

臺灣大學學術期刊資料庫

apology" Hung's family (not to government of Taiwan), and consistently argued that the Philippine Coast Guard used gunfire in self-defense, and thus did not violate any international provisions.[109]

Eventually, as the Taiwanese government considered that the government of the Philippines did not fulfill the aforementioned requests mentioned above, the Taiwanese authorities imposed a series of sanctions, including sending coastguard cutters and warships to the disputed area, issuing a red alert travel status to the Philippines for its citizens, and suspended various bilateral corporations.[110] This accident had a negative effect on relations between Taiwan and the Philippines, and also exposed the insufficiency of the dispute settlement channels between Taiwan and other neighboring states for resolving issues related to marine conflicts.

4. The Investment Disputes Between Taiwan and Vietnam in 2014 "Anti-China Riot" — In 2014, China constructed an ocean oil platform (Ocean Petroleum 981) and operated it in the disputed area of the South China Sea where Vietnam and China both claimed sovereignty. This activity triggered a series of anti-China protests that escalated to violent riots. Taiwanese businesses also suffered from the anti-China activities because their factories had Chinese-language signboards and were thus misidentified as Chinese companies. The Ministry of Economic Affairs of Taiwan estimated that at least 358 Taiwanese businesses were affected, resulting in approximate losses of US$150-500 million.[111] After the riots, the government of Vietnam instructed its chief envoy to apologize for harming Taiwanese businesses and promised to offer tax cuts and other forms of compensation to those enterprises. Thus, a critical issue was estimating the damages and deciding the amount of compensation to provide.

Originally, scholars discussed the possibility of initiating an investor-state arbitration mechanism under the Taiwan–Vietnam Bilateral Investment Agreement (hereinafter "Taiwan–Vietnam BIA") that concluded in 1993.[112] However, this approach was deemed unfeasible as Article 8.1 of the Taiwan–Vietnam BIA only has provisions for when negotiations fail, with investor-state disputes referred to the International Chamber of Commerce, which is too wide-ranging and vague for an enforcement to be

[109] *Philippines Admits to Killing Taiwan Fisherman, Assures Investigation*, GLOBAL TIMES (May 10, 2013), http://www.globaltimes.cn/content/780706.shtml.
[110] *ROC Unveils Further Sanctions Against Philippines*, TAIWAN TODAY (May 16, 2013), https://taiwantoday.tw/news.php?unit=2&post=2979.
[111] *More Taiwanese Factories Report Damage from Vietnam Riots: MOEA*, FOCUS TAIWAN (May 27, 2014), http://focustaiwan.tw/news/aeco/201405270011.aspx.
[112] Cheng-Yu Wang, *Tsung Yuehnan Paihua Baodong An Tan Xuangbien Totzu Baochang Xiading Chi Chochang Jichih* [Investment Claim under Bilateral Investment Treaty: Analyses of 513 Vietnam Riots], 12(2) CHANGHUA GUOCHI FA YU CHAO GUOCHIE FA PINLUN [Chinese (Taiwan) Review of International and Transnational Law] 271, 280-84 (2016).

臺灣大學學術期刊資料庫

exercised.[113] Additionally, as Taiwanese enterprises would most likely prefer to maintain their business relationships with Vietnam, they might desire that disputes are resolved in an amicable and peaceful manner, rather than directly challenging authorities. Thus, after intensive negotiations and discussions, the governments of Taiwan and Vietnam established the "Joint Commission on Mediation and Compensation" to resolve Taiwanese businesses' economic losses. Additionally, Vietnam set up the single channel to address Taiwanese companies' requests.[114] The mediation mechanism successfully addressed the investment disputes, and effectively eased tensions between Taiwan and Vietnam. This is an exemplary case of the successful utilization of mediation proceeding to resolve conflicts between nations in the of Asia-Pacific region.

Although various dispute settlement mechanisms exist for states to employ in different international or regional legal conflicts, they are still insufficient for addressing all types of disputes, especially regarding Taiwan's geopolitical situation. In addition to the fact that states are usually unwilling to solve certain types of politically sensitive disputes (i.e., territorial claims, sovereignty rights of regarding sea areas, and jurisdiction conflicts) through court-style proceedings, the unique political and legal status of Taiwan in international relations means it is unable to access certain dispute settlement mechanisms such as International Court of Justice or International Tribunal for the Law of the Sea. While Taiwan is the member of the WTO, the DSB (including the panel, appellate body and other ADRs) can only deal with disputes relating to agreements covered by the WTO; Taiwan is still limited in resolving other international nontrade disputes.

IV. REFLECTIONS AND ASSESSMENTS ON THE ARMO

It is acceptable for Taiwan that the results of mediations are legally binding and the parties' autonomy may sometimes be confined, if the mechanisms ensure the impartiality and fairness of proceedings. In Taiwan, these mediation-related concerns are resolved through extensive regulations regarding the conduct and qualifications of mediators and their review by the courts. However, not all of these conditions exist at international level. In other words, Taiwan might opt for more voluntary features in the proceedings or be reluctant to join the proceedings if the legal framework

[113] Agreement Between the Taipei Economic and Cultural Office in Hanoi and the Vietnam Economic and Cultural Office in Taipei on the Promotion and Protection of Investment, art. 8.1, https://www.dois.moea.gov.tw/file/pdf/%E8%B6%8A%E5%8D%97%E6%8A%95%E4%BF%9D%E5%8D%94%E5%AE%9A_%E8%8B%B1%E6%96%87.pdf (last visited Mar. 2, 2018).

[114] *Hanoi Mulling Single Window for Compensation for Taiwanese Firms*, FOCUS TAIWAN (May 24, 2014), http://focustaiwan.tw/news/aeco/201405240020.aspx.

臺灣大學學術期刊資料庫

cannot ensure impartiality and fairness. The ARMO, which endeavors to solve disputes "in a friendly, swift and peaceful manner",[115] in principle are consistent with the requirements of Taiwan in international mediations.

A. The Broad Coverage of Membership and Jurisdiction

The ARMO aspires to serve as a common platform for dispute resolution in the Asia-Pacific region. Instead of the "member states", the ARMO Agreement uses the term "Member"[116] to describe its membership base. The term "Member" implies not only sovereign states, but also other political entities of many kinds. The same approach has been adopted by the WTO and proven to be acceptable and efficient for expanding the coverage of the WTO agreement. The broad coverage of its membership can avoid the fruitless discussion on the legal status of Taiwan, as well as on whether regional organizations, such the ASEAN, can join the ARMO.

Additionally, the jurisdiction of the ARMO reflects its ambitions in dispute resolution. The ARMO extended its jurisdiction to all legal and factual disputes that relate to any public international laws.[117] The broad jurisdiction is considerably helpful in disputes concerning nontrade issues that are usually not provided with an appropriate channel for discussions conducted by an impartial third party. The ARMO could complement international agreements that lack efficient dispute resolution provisions or mechanism for compliance. For the disputes concurrently subject to other dispute settlement mechanisms, the mediation does not replace them or prejudice the rights of the parties' under other mechanisms.[118] Instead, the ARMO offers parties swift proceedings of six months in principle.[119] Furthermore, due to the jurisdiction on "factual" disputes,[120] the ARMO can become involved in the early stages of conflicts, even before the parties set forth specific and definite legal arguments. With the assistance of impartial mediators at early stage, the parties might avoid misunderstandings regarding facts and legal issues that might lead to confrontations at later stages. In short, the broad coverage of the ARMO, in terms of membership and jurisdiction, enables the possibility for all disputing parties to discuss any issues at any time.

---

[115] Draft "Agreement on Establishing of the Asia-Pacific Regional Mediation Organization" [hereinafter "ARMO Agreement"], pmbl., ¶ 5. The text of this document is published at this same issue of Asian Journal of WTO & International Health Law and Policy (AJWH).
[116] *Id.* art. 2.1.
[117] *Id.* art. 2.2.
[118] *Id.* art. 3.2.
[119] Draft "Rules of Procedure for Mediation Conducted under the Asia-Pacific Regional Mediation Organization" [hereinafter ARMO Rules of Procedure], art. 16. The text of this document is published at this same issue of Asian Journal of WTO & International Health Law and Policy (AJWH).
[120] ARMO Agreement, *supra* note 115, art. 2.1.

臺灣大學學術期刊資料庫

B. Designation and Appointment of Mediators

Impartiality and the ability of mediators are fundamental to successful mediation. Taiwan is accustomed to having a standing committee or an institution of mediators designated by the legislation or competent authorities, and these characteristics are consistent with the ARMO Agreement. A pertinent concern is whether the assigned mediators are trusted by the disputing parties. The ARMO has undertaken considerable efforts to achieve this. Both the members and the chairperson of the Administrative Council of the ARMO may designate persons to the list of mediators (i.e., the members' list and the chairperson's list). The chairperson's designations could assuage the political concerns regarding the members' designations. Furthermore, the nationality of the members is not a precondition for designation.[121] To effectively eliminate concerns regarding impartially, it might be desirable to exclude the persons with the government position from the designation of the mediators.

The ARMO can gain the trust of all parties through the appointment of mediators. The parties may perceive mediations more favourably if they are permitted to choose mediators as they wish. Currently, parties may appoint mediators from the members' list. However, sole mediators can only be chosen from the chairperson's list of mediators. The chairperson of the administrative council shall appoint the presiding mediator from the chairperson's list when three mediators are to be selected.[122] In the case of a delayed appointment, the chairperson can also appoint mediators on behalf of the parties.[123] The ARMO slightly confines the autonomy of the parties in the appointment of the mediators in exchange for increased impartiality and efficiency. Nevertheless, the parties' opinions should be taken into consideration, or they should be given the opportunity to object to chairperson-appointed mediators.

C. The Balance Between Efficiency and Parties' Autonomy

The ARMO adopts a facilitative approach to mediation that recognizes the principle of self-determination as the basis for the rules of mediation, with the exception that the mediator may assess and/or evaluate the dispute for the parties if he or she considers appropriate or if the parties so request.[124] The efficiency of the proceedings, in addition to the parties'

---

[121] *Id.* art. 14.
[122] ARMO Rules of Procedure, *supra* note 119, art. 3.2.
[123] *Id.* arts. 3.2(1), 3.5.
[124] ARMO Agreement, *supra* note 115, art. 21; ARMO Rules of Procedure, *supra* note 119, arts. 9.4-9.5.

臺灣大學學術期刊資料庫

autonomy, should be the key concerns of mediators.[125] The ARMO attempts to balance these concerns, such as by imposing time limits for the appointment of mediators[126] and the *ex officio* gathering of information and advices.[127] The parties' autonomy seems to be superior to the efficiency of proceedings, because the parties are permitted to design their own mediation rules.[128] In terms of efficiency, mediators should be aware of the fact that representatives of the parties must acquire their mandate from higher authorities. The representatives of Taiwan postpone their responses to the requests of the parties or mediators, whenever they have doubts regarding their negotiating mandate.[129] To ensure efficiency in mediation meetings, mediators should consider conducting preparatory proceedings, which is yet to be, included in the ARMO Mediation Rules.

D. The Effect of the Settlement Agreement

The ARMO Agreement explicitly recognizes the binding effect of the settlement agreement.[130] Failure to implement settlement agreements might be considered as non-compliance with the treaty obligations of the parties, and may involve adverse consequences regarding international relations.[131] The strong effect of the settlement is nothing new for Taiwan, given the results of the mediations at domestic level could have the effect same as the judgement. A settlement agreement with a strong effect can solve problems arising from the limited dispute resolution mechanisms available to Taiwan. This is crucial to the in disputes unrelated to trade or investment, where Taiwan has no access to the international dispute resolution mechanism of any kind.

V. CONCLUSION

The ARMO is a promising platform for settling a wide range of disputes, and is beneficial for Taiwan, while also contributing to the stability and prosperity of the Asian-Pacific region. The broad coverage of the ARMO, in terms of membership and jurisdiction, reflects the ambition

---

[125] ARMO Rules of Procedure, *supra* note 119, art. 9.2.
[126] *Id.* art. 3.2.
[127] *See id.* art. 12.
[128] *Id.* art. 1.2.
[129] *See supra* Section III.A.
[130] ARMO Agreement, *supra* note 115, art. 22 ("Any settlement agreement duly concluded between disputing parties is binding upon them and shall be performed by them in good faith.").
[131] Draft articles on Responsibility of States for Internationally Wrongful Acts, art. 12 ("There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."); Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, 1950 I.C.J. Rep. 228 (July 18).

臺灣大學學術期刊資料庫

of the ARMO ambition to invite all disputing parties to discuss any issues at any time. The parties should have the final decision on the appointment of a mediator. However, the autonomy of parties in the appointment of the mediators could be affected, because the ARMO seeks greater impartiality and efficiency. Notwithstanding these objectives, the authors of this paper suggest that the chairperson should consider the parties' opinions or allow them to reject or object to appointments made on their behalf. In general, the ARMO could achieve a balance between efficiency and the parties' autonomy. The ARMO should also consider the flexibility that parties require in term of proceedings. The ARMO is welcomed also because the parties are entitled to tailor-make their settlement agreement.

臺灣大學學術期刊資料庫

REFERENCES

Book

WORLD TRADE ORGANIZATION (2004), A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM.

Articles

Alilovic, Robert (2000), *Consultations Under the WTO's Dispute Settlement System*, 9 DALHOUSIE JOURNAL OF LEGAL STUDIES 279.

Beckman, Robert (2013), *The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 142.

Chang, Jia Zhen & Shu Ping Hong (2008), *Taiwan Diaojie Zhidu Jianjie* [Introduction on the Mediations in Taiwan], 9 ZHONGCAI BAO [Arbitration News] 3.

Chiang, Huang-Chih (2016), *Lun Kenya An Chi Xiangguan Guochi Fa Wenti—Yi Guanxia Chuan Ginhe Chi Chuli Wei Chunghsin Chi Tantao* [The Analysis of Relevant Issues for International Law in the "Kenya Case": Focusing on Addressing the issues of the Conflicts of Jurisdiction], 296 TAIWAN FAXUE ZAZHI [Taiwan Law Journal] 72.

Chiang, Shi Min (2015), *Diaojie Tiaochu Zhidu zhi Yanjiu* [A Study on the Mediation System], 246 YUE DAN FAXUE ZAZHI [The Taiwan Law Review] 84.

Ellger, Reinhard (2012), *Mediation in Canada: One Goal—Different Approaches to Mediation in a State with Federal and Provincial Jurisdictions*, *in* MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE 910 (Klaus J. Hopt & Felix Steffek eds.).

Feerick, John D. (1995-1996), *Standard of Conduct for Mediators*, 79 Judicature 314.

Hopt, Klaus J. & Felix Steffek (2012), *Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues*, *in* MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE 6 (Klaus J. Hopt & Felix Steffek eds.).

Kulms, Rainer (2012), *Mediation in the USA: Alternative Dispute Resolution Between Legalism and Self-Determination*, *in* MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE 1246 (Klaus J. Hopt & Felix Steffek eds., 2012).

Liew, Carol (2010), *Recent Developments in Mediation in East Asia, in* ADR IN BUSINESS: PRACTICES AND ISSUES ACROSS COUNTRIES AND CULTURES II 515 (Arnold Ingen-Housz ed.).

Lin, Yun Shien Diana (2011), *Civil Mediation in Taiwan: Legal Culture and the Process of Legal Modernization*, 6 UNIVERSITY OF PENNSYLVANIA

臺灣大學學術期刊資料庫

EAST ASIA LAW REVIEW 192.
Lo, Chang-fa et al. (2017), *Concept Paper on the Creation of a Permanent "Asia-Pacific Regional Mediation Organization" for State-to-State (Economy-to-Economy) Disputes*, 10(2) CONTEMPORARY ASIA ARBITRATION JOURNAL 321.
Pham, Hansel T. (2004), *Developing Countries and the WTO: The Need for More Mediation in the DSU*, 9 HARVARD NEGOTIATION LAW REVIEW 331.
Sperr, Anneken Karl (2012), *Mediation in Norway: "Faster, Cheaper and more Friendly"*, *in* MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE 1138 (Klaus J. Hopt & Felix Steffek eds.)
Wang, Cheng-Yu (2016), *Tsung Yuehnan Paihua Baodong An Tan Xuangbien Totzu Baochang Xiading Chi Chochang Jichih* [Investment Claim under Bilateral Investment Treaty: Analyses of 513 Vietnam Riots], 12(2) CHANGHUA GUOCHI FA YU CHAO GUOCHIE FA PINLUN [Chinese (Taiwan) Review of International and Transnational Law] 271.

Treaties

Cross-Strait Agreement on Joint Crime-Fighting and Mutual Judicial Assistance.
Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.
United Nations Convention on the Law of the Sea, 1833 U.N.T.S. 3, 21 I.L.M. 1261 (1982).

Cases

Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, 1950 I.C.J. Rep. (July 18).
South China Sea Arbitration (Philippine v. China), PCA Case No. 2013-19, Award (July 12, 2016).

Internet Sources

105 Nian Sifa Yuan ji Suoshu Jiguan Yewu Tongji Jieguo Zhaiyao Fenxi [Statistic on the works of Judicial Yaun and Its Affiliated Institutions in 2016], http://www.judicial.gov.tw/juds/jsi/home.htm#03b.
Agreement Between the Taipei Economic and Cultural Office in Hanoi and the Vietnam Economic and Cultural Office in Taipei on the Promotion and Protection of Investment, https://www.dois.moea.gov.tw/file/pdf/%E8%B6%8A%E5%8D%97%E6%8A%95%E4%BF%9D%E5%8D%94%E5%AE%9A_%E8%8B%B1%E6%96%87.pdf.
Annual Report of Financial Ombudsman Institution 2016, https://www.foi.org.tw/Att_FCK/file/評議中心 2016 年報.pdf.

臺灣大學學術期刊資料庫

Balintang Channel Incident Report, OFFICIAL GAZETTE OF THE GOVERNMENT OF PHILIPPINE (August 7, 2013), http://www.officialgazette.gov.ph/2013/08/07/balintang-channel-incident-report/.

Caigou Luyue Zhengyi Diaojie Guize [Regulation of the Mediation of the Disputes Regarding Performance of Government Procurement Contract], LAWS & REGULATIONS DATABASE OF THE REPUBLIC OF CHINA, https://law.moj.gov.tw/Law/LawSearchResult.aspx?p=A&t=A1A2E1F1&k1=%E6%8E%A1%E8%B3%BC%E5%B1%A5%E7%B4%84%E7%88%AD%E8%AD%B0%E8%AA%BF%E8%A7%A3%E8%A6%8F%E5%89%87.

Declaration on the Conduct of Parties in the South China Sea, http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2.

Disputes by Member, WORLD TRADE ORGANIZATION, https://www.wto.org/engish/tratop_e/dispu_e/dispu_by_country_e.htm.

Gonghai Jiufen Chuli Fa [Public Nuisance Dispute Mediation Act], LAWS & REGULATIONS DATABASE OF THE REPUBLIC OF CHINA, http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=O0080001.

Hanoi Mulling Single Window for Compensation for Taiwanese Firms, FOCUS TAIWAN (May 24, 2014), http://focustaiwan.tw/news/aeco/201405240020.aspx.

Jinrong Xiaofei Zhe Baohu Fa [Financial Consumer Protection Act], LAWS & REGULATIONS DATABASE OF THE REPUBLIC OF CHINA, http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=G0380226.

Laodong Tongji Tongbao [The Report on Statistics of Labour Disputes] (June 5, 2017), https://www.mol.gov.tw/media/3810876/105 年勞資爭議終結案件-以-調解方式-處理為主.pdf.

Laozi Jiufen Chuli Fa [Act for Settlement of Labour-Manage Disputes], LAWS & REGULATIONS DATABASE OF THE REPUBLIC OF CHINA, http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=N0020007.

Lee, Sheryn, *Taiwan's Tsai Takes China and the KMT in Her Stride*, EAST ASIA FORUM (January 1, 2018), http://www.eastasiaforum.org/2018/01/01/taiwans-tsai-takes-china-and-the-kmt-in-her-stride/.

Ma Issues Ultimatum to Philippines on Boat Attack, TAIWAN TODAY (May 13, 2013), https://taiwantoday.tw/news.php?unit=2,2,23,45&post=2970.

MAC Sternly Protests Detention and Deportation of Taiwan National to Mainland China: The Government Absolutely Upholds the Rights and Interests of the People and Secured Immediate Return to Taiwan, MAINLAND AFFAIRS COUNCIL (April 11, 2016), https://www.mac.gov.tw/en/News_Content.aspx?n=14271038DDC4104F&sms=E828F60C4AFBAF90&s=23C36390588CBE9A.

Mediation Rules of CAA, amended on March 25, 2009, http://www.arbitration.org.tw/rule04-en.php.

臺灣大學學術期刊資料庫

Minshi Diaojie ji Hejie Shijian Banli Qingxing [Mediations and Conciliations on Civil Cases], http://tph.judicial.gov.tw/stati/年報資料/臺灣司法統計專輯_103 年/2-06.pdf.

Minshi Susong Fa [Taiwan Code of Civil Procedure], LAWS & REGULATIONS DATABASE OF THE REPUBLIC OF CHINA, http://law.moj.gov.tw/LawClass/LawContent.aspx?PCODE=B0010001.

Miriri, Duncan, *Kenya Defends Deportations to China; Taiwan Fumes*, REUTERS (April 12, 2016), https://www.reuters.com/article/us-taiwan-china-kenya/kenya-defends-deportations-to-china-taiwan-fumes-idUSKCN0X90EX.

MOFA Strongly Protests Kenya's Deportation of ROC Citizens to Mainland China, MINISTRY OF FOREIGN AFFAIRS (R.O.C.), https://www.mofa.gov.tw/en/News_Content.aspx?n=1EADDCFD4C6EC567&s=2942A6367DFBED22.

More Taiwanese Factories Report Damage from Vietnam Riots: MOEA, FOCUS TAIWAN (May 27, 2014), http://focustaiwan.tw/news/aeco/201405270011.aspx.

Neizheng Bu Tongji Zhoubao [Weekly Statistic Report of Ministry of the Interior] (May 6, 2016), https://www.moi.gov.tw/files/news_file/week10618.pdf.

Panda, Ankit, *A Year Later, the South China Sea Award Stands as Evidence of China's Rule-Breaking Behavior*, THE DIPLOMAT (July 17, 2017), https://thediplomat.com/2017/07/a-year-later-the-south-china-sea-award-stands-as-evidence-of-chinas-rule-breaking-behavior/.

Philippines Admits to Killing Taiwan Fisherman, Assures Investigation, GLOBAL TIMES (May 10, 2013), http://www.globaltimes.cn/content/780706.shtml.

Pomfret, James & Neil Jerome Morales, *South China Sea Code of Conduct Talks to Be "Stabilizer" for Region: China Premier*, REUTERS (November 14, 2017), https://www.reuters.com/article/us-asean-summit-southchinasea/south-china-sea-code-of-conduct-talks-to-be-stabilizer-for-region-china-premier-idUSKBN1DE05K.

Ramzy, Austin, *8 Taiwanese Are Deported to China After Trial in Kenya*, THE NEW YORK TIMES (April 11, 2016), https://www.nytimes.com/2016/04/12/world/asia/kenya-deport-taiwan-china.html.

ROC Position on the South China Sea Arbitration, MINISTRY OF FOREIGN AFFAIRS (R.O.C.) (July 12, 2016), https://www.mofa.gov.tw/en/News_Content.aspx?n=1EADDCFD4C6EC567&s=5B5A9134709EB875.

ROC Unveils Further Sanctions Against Philippines, TAIWAN TODAY (May 16, 2013), https://taiwantoday.tw/news.php?unit=2&post=2979.

Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic

臺灣大學學術期刊資料庫

of the Philippines, THE SOUTH CHINA SEA ISSUE (July 12, 2016), http://ww w.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379492.htm.

Xiangzhen Xianshi Diaojie Tiaoli [Town Mediation Committee is subject to the Township and County-Administered City Mediation Act], LAWS & REGULATIONS DATABASE OF THE REPUBLIC OF CHINA, http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=I0020003.

Xiaofei Zhe Baohu Fa [Consumer Protection Act], LAWS & REGULATIONS DATABASE OF THE REPUBLIC OF CHINA, http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?PCODE=J0170001.

Zhezuo Quan Fa [Copy Right Act], LAWS & REGULATIONS DATABASE OF THE REPUBLIC OF CHINA, http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=J0070017.

Zhezuo Quan Zhengyi Diaojie Chuli Banfa [Regulation of Copy Right Dispute Resolution], LAWS & REGULATIONS DATABASE OF THE REPUBLIC OF CHINA, http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=J0070020.

Zhengfu Caigou Fa [Government Procurement Act], LAWS & REGULATIONS DATABASE OF THE REPUBLIC OF CHINA, http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=A0030057.

Zhongcai Fa [Arbitration Act], LAWS & REGULATIONS DATABASE OF THE REPUBLIC OF CHINA, http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=I0020001.

Other Sources

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

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

Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission, 56 U.N. General Assembly Official Record, Supp. No. 10, U.N. Doc. A/56/10 (2001).

Interview with the Colleagues of the Offices of the Trade and Negotiation of Taiwan, in Taipei, Taiwan (February 5, 2018) (on file with author).

臺灣大學學術期刊資料庫