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# Concept Paper on the Creation of a Permanent 'Asia-Pacific Regional Mediation Organization' for State-to-State (Economy-to-Economy) Disputes

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# New Initiative

## CONCEPT PAPER ON THE CREATION OF A PERMANENT “ASIA-PACIFIC REGIONAL MEDIATION ORGANIZATION” FOR STATE-TO- STATE (ECONOMY-TO-ECONOMY) DISPUTES

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### ABSTRACT

*There are many permanent regional dispute settlement mechanisms (DSM) in other regions. But in the Asia-Pacific region, there has not be a permanent DSM to resolve their regional disputes. We consider that the Asia-Pacific region is uniquely positioned to take global leadership in providing non-*

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*adjudicated solutions to some of the most pressing global and regional issues. We argue that the region has the capacity to offer an alternative, less rights-and-power-based approach to peaceful co-existence. We thus propose to create a new, permanent DSM of the Asia-Pacific Regional Mediation Organization (ARMO) for the mediated resolution of State-to-State (Economy-to-Economy) disputes in the Asia-Pacific region.*

**KEYWORDS:** *Asia-Pacific region, Asia-Pacific Regional Mediation Organization (ARMO), bilateral investment treaty (BIT), dispute settlement mechanism (DSM), free trade agreement (FTA), peaceful co-existence, State-to-State dispute*

In this concept paper, we propose to create a new, permanent dispute settlement mechanism (hereinafter “DSM”) of the Asia-Pacific Regional Mediation Organization (hereinafter “ARMO”) for the mediated resolution of State-to-State (Economy-to-Economy) disputes in the Asia-Pacific region. We set out the rationale and structure for this proposed DSM and also try to address and reply to some issues that may be raised.

## **I. THE ASIA-PACIFIC’S STATUS AS AN INTIMATE AND VIBRANT REGION AND THE IMPORTANCE OF FRIENDLIER SOLUTIONS TO ITS DISPUTES**

The Asia-Pacific region<sup>1</sup> is geographically large and diverse, comprising the majority of the world’s population, and serving as the world’s economic powerhouse. The region is particularly notable for its diversity and long history of members’ relationships, many of which have been up-and-down during different periods of time due to occasional incidents.

However, partly because of the Asia-Pacific’s vibrant societies and outward-going activities and partly because of its geographic intimacy, its members cannot avoid constantly and heavily engaging in economic and other interactions with each other. Differences and even disputes unceasingly arise because of members’ currently active and wide-ranged interactions and historical problems. In order to maintain healthy relationships, a friendlier, swifter and more peaceful solution to members’ problems should be of top priority to all of them whether or not their people are generally liking or disliking each other in order to maintain the Asia-Pacific’s common prosperity.

## **II. REASONS WHY CURRENT DSMs ARE INSUFFICIENT TO HANDLE STATE-TO-STATE DISPUTES**

Currently there are a number of State-to-State DSMs under different international and regional frameworks. For instance, there is the International Court of Justice (hereinafter “ICJ”), which exercises its jurisdiction on contentious issues based on the consent of the disputing parties. Although the ICJ can handle any type of State-to-State dispute, the number of cases being heard by the court is limited mainly because of States’ reluctance to bring such contentious litigation for various reasons.<sup>2</sup> Also,

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<sup>1</sup> In this paper, the term Asia-Pacific refers to the region defined by the United Nations as the Asia-Pacific, which includes fifty-five states spreading from Lebanon to Kiribati. *See United Nations Regional Groups of Member States*, DEP’T FOR GENERAL ASSEMBLY & CONF. MGMT., <http://www.un.org/depts/DGACM/RegionalGroups.shtml> (last visited Nov. 20, 2017). However, *see also* Section VI of this paper, below.

<sup>2</sup> *Unit VI. International Implementation, Monitoring, and Enforcement*, HUM. RTS. IN U.S. & INT’L

some Asian countries prefer not to have their regional disputes internationalized and handled on the multilateral level. This is another reason why Asia-Pacific countries have limited their reliance on the ICJ.

Further, under the World Trade Organization (hereinafter “WTO”), there is the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter “DSU”). The DSU creates the panel and the Appellate Body (hereinafter “AB”) procedures to assist the Dispute Settlement Body (hereinafter “DSB”) in handling trade disputes. Through the process of the panel and the AB issuing their reports, the parties are expected to implement recommendations or rulings based on the reports adopted by DSB. However, the DSU only addresses disputes arising from the agreements under the WTO. It does not cover disputes arising from a Free Trade Agreement (hereinafter “FTA”) (if such disputes happen to be beyond the coverage of the WTO), an investment agreement, or any other treaty. Neither does it handle disputes which are not covered by any existing treaties. This does not imply that WTO’s DSM is not effective. It only indicates that the WTO’s DSM can only handle some limited types of cases.

Regionally, there have been many DSMs created by regional or bilateral treaties. In some regions, there are certain court-style DSMs, such as the Court of Justice of European Union, the main tasks of which are to interpret and enforce EU law. However, the Asia-Pacific region lacks a regional, court-style DSM to handle the regional disputes. This does not mean that in the Asia-Pacific there are no regional DSMs for countries or economies to rely on to resolve their disputes. In fact, there are quite many DSMs for the region. For instance, there are DSMs created under regional or bilateral FTAs to which Asia-Pacific countries or economies are parties. For instance, the ASEAN states have an extensive dispute settlement mechanism that largely replicates that of the World Trade Organization. However, these regional mechanisms tend not to be extensively used, for a variety of reasons. First, the subject matter coverages of such DSMs are limited. A DSM under an FTA can only handle dispute arising from the operation of that particular FTA. For instance, a DSM under an FTA will not be able to handle disputes concerning territories, territorial waters, as well as non-trade-related issue of fisheries, tax, environment and public health. Second, the panel or tribunal created under the DSM of an FTA is basically *ad hoc* in nature; on the contrary, the WTO’s DSB and AB are permanent and can build and accumulate their credibility, professionalism and trustworthiness, as time goes by. Yet another reason could be that the disputing parties engaging in a legal proceeding under an FTA could be required to bear the respective costs. Finally, there is a sense among many countries in the region that an

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COMMUNITY, [http://webcache.googleusercontent.com/search?q=cache:http://unlhumanrights.org/01/0106/0106\\_07.htm&gws\\_rd=cr&ei=5KIUWYv6PMG70gSX2YGABA](http://webcache.googleusercontent.com/search?q=cache:http://unlhumanrights.org/01/0106/0106_07.htm&gws_rd=cr&ei=5KIUWYv6PMG70gSX2YGABA) (last visited Nov. 20, 2017).

adversarial, arbitration-style process is less appealing as a mechanism for dealing with sensitive subject matter, and that conciliatory processes are preferable. Hence, trade disputes occurred in this region are rarely submitted to such regional DSMs.

Overall, the current multilateral and regional DSMs are not sufficient to address possible disputes occurring in the Asia-Pacific region for various practical reasons.

### III. FEATURES OF THE ASIA-PACIFIC REGIONAL MEDIATION ORGANIZATION

The ARMO will be 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.<sup>3</sup> The ARMO is designed to resolve disputes exclusively through mediation, focusing on mutually-beneficial rather than exclusively “rule-based” process. States would voluntarily submit to the jurisdiction of the ARMO. This means that the “substantive rules” governing a dispute (such as an international treaty in the field of the dispute) will not serve as the sole basis for the resolution of the dispute. The most important task for the ARMO to conduct its duty is to help the disputing parties find a mutually acceptable or advantageous solution to resolve their dispute. Of course, if a dispute involves an underlying rule which needs to be followed by the disputing countries, taking such rule into consideration in the mediation procedure would be appropriate and desirable. To avoid confusion, the idea of not conducting a rule-based procedure is referred to the “substantive rules”. It does not mean that there will be no procedural rules for the mediators and the parties to conduct their procedures. If the ARMO is created, there will be mediation rules created under the organization to be based upon for conducting the procedures. But the procedures should be flexible and simple enough so as to avoid possible complicated technical legal issues in the procedure and to better serve the need of the parties.

The ARMO can provide different levels of services. The ARMO can provide a “good offices” service of getting the parties to sit down together and offering logistic support to help their discussions. The mediator under the ARMO can also actually participate in the discussions and negotiations between the disputing parties. If the disputing parties agree, a mediator under

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<sup>3</sup> The author of this concept paper published a separate paper on the idea of a permanent regional mediation organization. See generally Chang-fa Lo, *On the Establishment of a Regional Permanent Mediation Mechanism for Disputes Among East and Southeast Asian Countries*, in LEGAL THOUGHTS BETWEEN THE EAST AND THE WEST IN THE MULTILEVEL LEGAL ORDER: A LIBER AMICORUM IN HONOUR OF PROFESSOR HERBERT HAN-PAO MA 335 (Chang-fa Lo et al. eds., 2016).

the ARMO can also play a more active role in helping the parties to find or hammer out a mutually acceptable solution for their dispute or even [to]provide possible solutions for the parties to consider. In any event, the task of the ARMO and its mediator are to facilitate the discussions between the disputing parties in various ways agreed upon by the disputing parties.

Additionally, since the ARMO is created for State-to-State (or Economy-to-Economy) disputes, commercial disputes between private parties are not included in the scope of its services. It must be noted that depending on the actual operation of the ARMO and on the actual demand from the Asia-Pacific's countries or economies, the scope of services can be expanded to investor-State disputes.

#### IV. WHY TRUST THE ARMO?

Credibility, impartiality, professionalism and trustworthiness are some of the key factors which would greatly affect the potential users' decisions in relying on the mechanism. The goals of creating such a regional organization are to ensure that the operation of the ARMO and the services provided by it will be made in a professional and reliable way. In order to enhance the credibility, the procedure that refers the dispute to the ARMO must be consensual, based on the voluntary agreement between the disputing parties. The procedures must also be relatively flexible so as to accommodate the needs of different sets of disputing parties and the nature of their disputes. Some pairs of users<sup>4</sup> of the ARMO facilities might expect the ARMO and its mediators to be more active in helping them to formulate the possible options. Some others might have a lower expectation of the expertise provided by the ARMO and its mediators. They could merely hope that the ARMO provides opportunities for the parties to sit together and talk. Hence, the flexibility of the mediation rules is paramount to accommodate the disputing parties' different needs of different sets of disputing parties.

Having said the above, it is still important to invite experienced mediators mainly from the Asia-Pacific region to participate in the ARMO operation and to engage in real cases to assist disputing parties. Although the ARMO will be an inter-governmental organization for the friendly settlement of State-to-State (Economy-to-Economy) disputes, its operation should be conducted in a professional manner and the intervention from the members of the agreement establishing the ARMO should be kept at a minimal level.

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<sup>4</sup> A dispute would involve two or more disputing parties. The paper uses the term "set of disputing parties" and "pair of users" to indicate that it is these two or more parties in a dispute. Their mutual needs and expectations concerning the procedural arrangements should be respected.

## **V. WHY ONLY INCLUDE STATE-TO-STATE (ECONOMY-TO-ECONOMY) AND POSSIBLY INVESTOR-STATE DISPUTE, BUT NOT COMMERCIAL DISPUTES?**

There have been a number of mediation centers in the Asia-Pacific region created in recent years to handle domestic and/or international commercial disputes. Examples include the Singapore International Mediation Center created in 2014,<sup>5</sup> the Hong Kong Mediation Center (created in 1999),<sup>6</sup> the Malaysian Mediation Center (established in 1999),<sup>7</sup> and the Chinese Arbitration Association (CAA) Mediation Center.<sup>8</sup> Many of them are working well in providing mediation services for commercial disputes.

There is no need to have an inter-governmental mediation organization also handling commercial disputes, because providing services for commercial mediation would not add much value to the ARMO for Asia-Pacific countries. In fact, it could undermine the justification of creating such a regional organization.

Nevertheless, it is still worthwhile to explore whether to include non-State interested parties (such as industry organization representatives which have substantial interests in the case at hand) in the procedure so that the disputing States and the respective interested parties will be able to have direct communications to resolve the whole dispute, by doing so covering both stages of the two-level game.

## **VI. WHAT IS THE “ASIA-PACIFIC” REGION FOR THE PURPOSE OF THE ARMO?**

There is no strict definition of the Asia-Pacific region for the purpose of the creation and operation of the ARMO. The core geographic coverage should include those countries or economies located in East Asia, Southeast Asia, and South Asia as well as Australia, New Zealand, and other countries in Oceania.

The concept of the ARMO is based on the idea of inclusiveness. Hence, if a country or economy considers the usefulness of the ARMO and is interested in participating in the operation and services of the ARMO, it should not be excluded merely because its geographical location is at the

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<sup>5</sup> *Homepage*, SINGAPORE INT’L MEDIATION CENTRE (SIMC), <http://simc.com.sg/> (last visited Nov. 20, 2017).

<sup>6</sup> *Homepage*, HONG KONG MEDIATION CENTRE, <http://www.mediationcentre.org.hk/en/home/home.php> (last visited Nov. 20, 2017).

<sup>7</sup> *Malaysian Mediation Centre*, ASIAN MEDIATION ASS’N, <http://www.asianmediationassociation.org/malaysian-mediation-centre/> (last visited Nov. 20, 2017).

<sup>8</sup> *Mediation*, CHINESE ARB. ASS’N, TAIPEI, <http://www.arbitration.org.tw/english/mediation.htm> (last visited Nov. 20, 2017).

borderline of the outer contour of the Asia-Pacific.

## VII. WHY “ASIA-PACIFIC” REGION?

In other regions, there have already been permanent regional DSMs for various types of disputes. For instance, there are the European Court of Human Rights<sup>9</sup> and the Court of Justice of the European Union<sup>10</sup> in Europe. There are the Inter-American Court of Human Rights<sup>11</sup> and the Central American Court of Justice<sup>12</sup> in America. But there has not been a permanent regional DSM in the Asia-Pacific region.

The fact that there is no permanent DSM in the Asia-Pacific region does not mean that there is no dispute in the region or there is no need to have a permanent DSM established for this region. There have been disputes occurring in the region and there will definitely and continuously be many more disputes in the future. It should be desirable to have a permanent DSM that offers professional assistance to countries or economies.

## VIII. IS THERE AN “ASIA-PACIFIC WAY”?

One of the key ideas of creating the ARMO is to emphasize the reliance on a friendlier way of settling the disputes between countries or economies in the Asia-Pacific region. Mediation, as opposed to an arbitration or court proceeding, is basically considered to be a friendlier way, because the entry into a mediation procedure would depend on the parties’ agreement and any ultimate solution of the dispute would also be subject to the parties’ mutual decision to hammer out their outcome or to accept the suggestion made by the mediator.

There had been discussions about whether there is a distinctive “Asian way”, “Chinese way” or “ASEAN way” of handling disputes. There is actually a general idea of using a softer way of dispute resolution, prioritizing the maintenance of harmonious relations or avoiding litigious proceeding so as to keep oneself away from mishaps in certain societies in Asia. But the idea of creating the ARMO is not to promote or argue the supremacy or the usefulness of such Asian, Chinese and ASEAN ways. Rather, the ARMO is to provide an additional/alternative dispute resolution forum for Asia-Pacific countries/economies to consider. Hence, whether an Asia-pacific country/economy is to accept the ARMO and to participate in the mechanism

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<sup>9</sup> EUR. CT. H.R., <http://www.echr.coe.int/Pages/home.aspx?p=home> (last visited Nov. 20, 2017).

<sup>10</sup> *Court of Justice of the European Union (CJEU)*, EU, [https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en) (last visited Nov. 20, 2017).

<sup>11</sup> INTER-AM. CT. HUM. RTS., <http://www.corteidh.or.cr/index.php/en> (last visited Nov. 20, 2017).

<sup>12</sup> *Central American Court of Justice*, INT’L JUST. RESOURCE CTR., <http://www.ijrcenter.org/regional-communities/central-american-court-of-justice/> (last visited Nov. 20, 2017).

should not depend on whether it believes that there is such Asian way, Chinese way or ASEAN way of handling dispute. It should depend on whether such additional or alternative mechanism could help resolve disputes with their neighboring countries.

### **IX. PROLONGING AND DELAYING THE DISPUTE SETTLEMENT PROCEDURES?**

One concern of creating or engaging in a mediation proceeding is the possibility of prolonging and delaying the whole dispute settlement procedure. For some, their experiences indicate that since mediation does not lead to any binding decision issued by the neutral third party, the disputing parties might not be serious in engaging in the proceeding. Hence a mediation proceeding could be just a useless stage and become a waste of time for the ultimate resolution of disputes.

One possible reason why mediations considered a waste of time is because it is not conducted by a professional and trustworthy organization. If the ARMO is created, it should be comprised of professional and experienced individuals. If the mediation is serious and the procedure is conducted in a high-quality manner, it should not be considered as a waste of time.

Another possible reason of mediation being not successful could be the way of conducting the mediation and the expectation from it. Mediation can be expected to resolve the whole dispute. If the disputing parties so expect or if the mediator so suggests, a mediation procedure can also have the function of clarifying and limiting the scope of the issues so that the parties can mutually decide to avoid litigating on unnecessary issues and focus on the key issues which they are not able to agree on during the mediation proceeding.

Also, it must be noted that entering into a mediation procedure is based on the voluntary decision of the disputing parties. Any one of the disputing parties can suspend the mediation at any time. Hence, if both disputing parties consider that there is a possibility of resolving their dispute in a friendly manner, they can choose a professional organization to help them. If one of the parties considers that the procedure has become a waste of time, it can decide to discontinue the procedure at any point. Hence, wasting of time should not be a real issue. Even if there is an FTA which requires its parties to conduct a mediation before entering into a rule-based panel procedure and even if the parties decide to have their mediation conducted under the ARMO, the requirement of engaging in mediation is by this FTA, not by the ARMO. Hence, even if the mediation procedure is considered as a waste of time, it is not because of the ARMO itself. It must be because of the FTA's provision in the above example.

## **X. WHY RELYING ON “NON-BINDING” MECHANISM, NOT A COURT-STYLE DSM?**

It was mentioned above that the so-call “Asian way”, the “Chinese way” or the “ASEAN way” of handling disputes should not be the basis of emphasizing the non-binding mediation to be conducted by the ARMO. The main point here is that the Asia-pacific region does not have a permanent DSM. Creating a permanent dispute settlement organization is a logical first step for us to consider.

As to the selection between non-binding DSM on the one hand and binding or court-style DSM on the other hand, the considerations should be whether Asia-Pacific countries/economies are ready for a binding or court-style DSM and whether there are the substantive norms to serve as the basis for the court to issue a binding decision.

This paper argues that Asian countries or economies might not be ready for a permanent biding DSM, especially a court style mechanism for the reasons that some countries are not ready to totally give away their control of the outcome of the disputes and that some countries might still have the concern that they are not able to predict the outcome of the decision by the court-style DSM.

Another reason why Asia-Pacific countries or economies are unable to rely on a binding or court-style DSM is the lack of norms which generally govern the behaviors of the countries or economies. A court makes its decision based on the governing norms. Hence, if there will be a rule-based court-style DSM in the Asia-Pacific region to make decision to resolve disputes, there must be some kind of Asia-Pacific substantive rules of binding nature governing their disputes to be based upon by the court. Although there have already been agreements (such as FTAs) between some countries or economies in the Asia-Pacific region to be based upon by a binding decision specifically for such FTA matters and although there are international norms (such the WTO agreements and many international human rights treaties) which need to be followed by Asia-Pacific countries, there is no general norm created by the countries/economies in the Asia-Pacific region (similar to the European Union treaties created by the EU countries) to govern their activities and relations. It would not make much sense to have an Asia-Pacific regional court of general jurisdiction to decide the disputes occurred in this region without a regional Asia-Pacific treaty to govern the relations in this region.

## **XI. ENFORCEMENT ISSUE?**

Basically, a decision issued by a binding or court-style DSM could involve enforcement or monitoring the implementation of the decision. A

possible issue in this regard is whether there will be enforcement or implementation issue and how should the ARMO ensure that the result of mediation will be faithfully implemented.

In the area of mediation for commercial disputes, currently there is no enforcement mechanism to ensure that implementation of the result of mediation (i.e., the mediated settlement agreement). In recent years, there are discussions and initiatives promoting the idea of having an international convention for the cross-border enforcement of mediated settlement agreements.<sup>13</sup>

In the area of State-to-State (Economy-to-Economy) mediation for the disputes in international relations, there is no enforcement mechanism either. This paper argues that there is no need to have a mechanism for the possible enforcement of mediated result under the ARMO. First, the ARMO mediation is different from commercial mediation in that the former involves sovereign power which is difficult to be subject to an enforcement mechanism, whereas the latter basically involves private parties which could be subject to an enforcement mechanism. Second, since mediation is voluntary and non-binding in nature, the implementation of the mediated result should still be subject to voluntary implantation so as to be in line with the voluntary nature. Third, if a mediated result will be subject to a mandatory enforcement mechanism, it could discourage countries from participating in this voluntary and friendly DSU.

## **XII. WHICH SUBSTANTIVE LAW TO BE APPLIED BY THE ARMO?**

The ARMO is not designed to be a court-style DSM. Any solution under the ARMO will have to be based on the mutual agreement of the disputing parties. Since it is not a rule-based procedure, the substantive law to govern the dispute is not critical to the ultimate solution of a dispute.

It must be reiterated that there could be binding rules between Asia-Pacific countries or economies governing the specific aspects of their relations. For instance, there could be an FTA between two Asia-Pacific countries to govern the disputes arising from the interpretation and application of this FTA. If there is a human rights dispute between two Asia-Pacific countries, it can also be governed by a particular international human rights treaty. In the situation where there is a substantive norm to govern a specific relation between two Asia-Pacific countries concerning a particular dispute, such norm should be one of the considerations for the mediator and for the disputing parties to formulate their solutions and settlements.

In short, substantive law is of less importance in the mediation procedure

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<sup>13</sup> See, e.g., Chang-fa Lo & Winnie Jo-Mei Ma, *Draft “Convention on Cross-Border Enforcement of International Mediated Settlement Agreements”*, 7(2) CONTEMP. ASIA ARB. J. 389 (2014).

conducted by the ARMO. But if there is a substantive law to govern the rights and obligations of the disputing parties and if they still intend to submit their disputes to the ARMO for a friendly resolution, the mediator under the ARMO as well as the disputing parties might still intend to take such substantive law into consideration when hammering out their settlement.

### **XIII. RELATIONS WITH THE DSMS IN FTAs, BITs AND OTHER AGREEMENTS WHICH HAVE FRIENDLY DSM PROVISIONS?**

There are DSMs under essentially all FTAs, bilateral investment treaties (BITs) and other agreements. In many such agreements, mediation (sometimes the term of which is used together with the terms “conciliation” and “good offices”) is an option for the disputing parties to use. Sometimes the DSM can even be more loosely designed. For instance, Article 24.3 of the Japan-Taiwan Tax Agreement provides that the competent authorities of the parties shall endeavor to resolve any disputes arising from the interpretation of the agreement peacefully. An issue which relates to the ARMO is whether there is any relation between the mediation provisions (or peaceful resolution provision) in these agreements and the ARMO.

Basically, the mediation provisions (and the peaceful resolution provision) in these agreements do not create any permanent mediation organizations. Neither do they refer to any existing mediation facilities. In other words, if the disputing parties to any one of these agreements mutually decide to choose the mediation track to pursue a friendly settlement of their dispute as expected by the agreement, they can decide either to have some kind of *ad hoc* mediation conducted by a designated mediator or to have their dispute being mediated by the ARMO. Hence, it can be understood that the ARMO and the DSMs under the FTAs, BITs and other agreements which have mediation or other peaceful resolution provisions are mutually supportive and supplementary. The ARMO can help parties to an FTA, a BIT, a tax treaty, a fishery agreement to conduct their mediation or to engage in “peaceful resolution”.

### **XIV. RELATIONS WITH WTO DSM?**

The WTO DSU has mediation provisions in Article 5. The procedure is an option that can be mutually selected by the disputing parties. But the DSU does not have detailed mediation rules. Neither does it permanently and mandatorily designate any organization or individual to serve as good offices, conciliator or mediator. The DSU only provides in Article 5.6 that “The Director-General [of the WTO] may, acting in an *ex officio capacity*, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.”

Since the DSU only provides that the Director-General of the WTO may offer good offices, conciliation or mediation, it does not rule out the possibility that good offices, conciliation or mediation for a WTO dispute is offered by the ARMO, if the disputing parties so agree. Hence, 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.

Additional interactions between the DSU and the ARMO could include the following: If the disputing parties so agree, they may decide to appoint an ARMO mediator as the chair of the panel under the DSU, or appoint two of them as panelists, in order to facilitate the fact-finding process conducted under the DSU. Also, if the disputing parties do not consider their discussions during the ARMO mediation being confidential and if they do not disagree on releasing certain information (not concerning their settlement offers), it is possible for the ARMO or for its mediators to provide such information to the panel in accordance with DSU Article 13.

### **XV. ENCOURAGING FORUM SHOPPING?**

There is a possible concern about whether the creation of the ARMO would lead to an undesirable increase of forum shopping. The concern seems to be unnecessary. The purpose of creating the ARMO is to expect that it will be fully utilized. Hence if the result of “forum shopping” leads to a more constant use of the ARMO, it is in line with the purpose of creating the organization and hopefully could help resolving more disputes in a friendlier manner.

Also, as mentioned above, the ARMO is basically to support the existing regional (and even multilateral) DSMs. It is not created to “exclude” the jurisdiction of any existing DSM. Hence, the selection of the ARMO cannot be considered as an undesirable exercise of “forum shopping”, which is a practice to choose one forum so as to exclude the jurisdiction of other forums. The paper argues that although there is still some kind of “forum competition”, such competition should be healthy and desirable mainly due to its “non-exclusive nature” and its supportiveness to many other DSMs.

### **XVI. SMALLER COUNTRIES BEING OVERWHELMED BY BIGGER COUNTRIES IN THE MEDIATION?**

The diversity of country size, economic power, development and political influence is a hallmark of the Asia-Pacific region. A possible concern could be that the politically more influential countries might use their influences to take advantages from smaller and weaker countries in the mediation process.

In this regard, it should be noted that such possible “uneven” political

situation is a matter of reality and is not created by the ARMO. Also any one of the parties can unilaterally decide not to continue the mediation proceeding, in case it considers that the mediation is not useful or is against its national interest. Furthermore, the ARMO helps the implementation of mediation provisions in many agreements (such as many FTAs and BITs). If there is any expectation on the disputing parties under any rules to enter into a mediation proceeding, it is those agreements which have mediation provisions expecting the parties to enter into mediation proceedings. The ARMO rules can only hope that the mediation procedure will be utilized. They cannot require or expect disputing parties to engage in mediation proceedings.

In a way, the ARMO will help address the “uneven” political situation among states in the Asia-Pacific region through a trustworthy, reliable and independent DSM. The ARMO is to be composed of respected professionals whose observations and views can ensure objectivity and neutrality. It is important for the ARMO to be operated in a professional and impartial manner because even if its mediation does not contain or follow strict procedural rules, its entire procedure is based on rule of law, therefore its outcome is still professionally and fairly drafted and agreed upon by the parties. In this regard, the ARMO mediators will be trained in international best practice, which includes being able to redress power imbalances wherever possible.

## **XVII. WORSENING THE FRAGMENTATION OF INTERNATIONAL LAW?**

Fragmentation is considered by many people as a problem of international law. But the fragmentation of substantive international law rules is an inevitable trend because there are more and more issues in different fields of international law (such as the international health law and international environmental law) that need to be addressed through the conclusion of new treaties. The conclusion of many treaties in recent year is not only inevitable, but also desirable so that new issues can be properly and effectively dealt with. Of course, the resulting problem of conflicts among these new treaties is an issue that also needs to be properly addressed through treaty interpretation.

The ARMO rules should be flexible and voluntary in nature, hence there should neither be a concern of its rules contributing to the fragmentation of procedural rules for international disputes, nor a possible “fragmentation of DSMs”. Currently, there is no one international DSM which is universally and constantly relied upon for the resolution of “all” kinds of international, regional and bilateral disputes. If the creation of a DSM can help resolve dispute, the ultimate outcome of solving problems is very positive, even though there might be a “conceptual issue” of fragmentation. The flexible

jurisdiction of the ARMO offers unique opportunities for fragmented issues to be drawn into one forum for a more integrated discussion, reflecting the interplay of diverse legal issues in their everyday context.

### **XVIII. ECONOMY OF SCALE OF THE ORGANIZATION AND FINANCIAL SOURCES**

The ARMO needs support from as many Asia-Pacific countries or economies as possible so that its function can be properly generated. Although the ARMO is not expected to be a big regional inter-governmental organization, it still needs sufficient amount of financial support from its members.

Careful allocation of financial supports from its members is of high importance. The financial contribution should not be trivial so as not to be able to support the operation of the organization. It should not be overly burdensome either as it might discourage disadvantaged countries or economies from participating. In addition to these considerations, some extent of user-pay idea can be integrated into the financial arrangement. The ultimate goal should be that the ARMO should have sufficient financial supports to enable its operation in an economy of scale manner, but should not be too onerous so as to prevent Asia-Pacific countries or economies from participating in the ARMO.

### **XIX. INTERNATIONAL LEADERSHIP**

In proposing the AMRO, we believe that the Asia-Pacific region is uniquely positioned to take global leadership in providing non-adjudicated solutions to some of the most pressing global and regional issues. While the adjudicative mechanisms currently in existence have their purpose, we believe the region has the capacity to offer an alternative, less rights-and-power-based approach to peaceful co-existence. We see the AMRO as providing a new standard of principled dispute resolution, reflecting the broader concerns of states and their populations, as well as balancing economic and non-economic imperatives.

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