



Sponsored by

Asia WTO Research Network (AWRN)  
<http://www.awrn.asia/index.php>



Asian Center for WTO and International Health Law and  
Policy (ACWH)

National Taiwan University College of Law  
<http://www.ntu.law.acwh.tw>



Asia-Pacific Regional Mediation Organization (ARMO)  
Working Group  
<https://www.armomediation.com/working-group>

---

# **THE ASIA-PACIFIC REGIONAL MEDIATION ORGANIZATION (ARMO) INITIATIVE**

---

## **CONTENTS**

- 1 Preface
- 2 Background and Essence of the ARMO Initiative
- 4 The Working Group
- 5 The Concept Paper

## **THE ARMO DOCUMENTS**

- 15 The Draft Agreement
- 25 The Draft Rules of Procedure

## **PREFACE**

The Asia-Pacific Regional Mediation Organization (ARMO) Initiative was created in 2017 by a group of leading Asia-Pacific scholars and practicing lawyers. The goal of ARMO is the creation of a regional intergovernmental organization for the amicable resolution, through mediation, of disputes between states of the Asia-Pacific Region, one that is capable of resolving any and all disputes arising between states, and not being limited to one treaty subject-matter but covering the full range of international issues.

This booklet exists to introduce readers to the rationale for the creation of ARMO, the draft Agreement for its creation, and the proposed Rules of Procedure for the ARMO.

We appreciate your interest in the concept of a permanent mediation mechanism for resolving disputes between the states and economies of the region. We sincerely hope for broad regional support for the idea of friendly and win-win resolution of regional differences to enhance mutual peace and prosperity. If you would like to receive regular updates about ARMO's progress, we invite you to join our mailing list.

# BACKGROUND AND ESSENCE OF THE ARMO INITIATIVE

Throughout the world, many regions have established permanent regional dispute settlement mechanisms (DSMs). However, the Asia-Pacific region is yet to establish either a permanent DSM to resolve their regional disputes, or a court-style mechanism for States/Economies to seek resolution of their regional disputes.

We argue that the current dispute settlement mechanisms are insufficient to handle State-to-State (Economy-to-Economy) disputes for the Asia-Pacific region for the following reasons:

1. Some States are reluctant to bring contentious litigation (for example an ICJ case) so as not to have their sovereignty subject to an international mechanism that imposes an adjudicated solution.
2. Some States prefer not to internationalize their regional disputes. Hence they are not interested in submitting their disputes to a multilateral dispute settlement mechanism.
3. Although the WTO dispute settlement mechanism is highly effective, it can only address WTO disputes, not other overlapping or additional disputes outside its area of jurisdiction.
4. Regional dispute settlement mechanisms (such as those provided in FTAs) have limited jurisdiction (being only able to handle the specific FTA disputes, not other disputes).

The proposed ARMO has the following features:

1. It is a regional inter-governmental organization.
2. It provides neutral mediation facilities for Asia-Pacific States (Economies) to help handle their State-to-State (or Economy-to-Economy) disputes in a friendly, consent-based manner.
3. The ARMO facility focuses on mutually-beneficial outcomes, rather than an exclusively “rule-based” process, thus recognizing the inherent interconnectedness of the issues in a dispute.
4. ARMO is based entirely on consent — a dispute can only be mediated where the disputing parties expressly agree to the mediation process, and any mediated resolution will become binding only when the disputing parties agree to the terms of the settlement agreement.
5. The “substantive rules” governing a dispute (such as an international treaty in the field of the dispute) will not serve as the exclusive basis for the resolution of the dispute. The most important task for the ARMO is to help the disputing parties find a mutually acceptable or advantageous solution to resolve their dispute.
6. ARMO’s procedural rules are designed to be flexible to avoid technical procedural issues and to allow the disputing parties to be the focus of the dispute resolution process, with the help of experienced mediators.
7. ARMO services can be used by Asia-Pacific States (Economies) independently of any international agreement. For instance, WTO or FTA Members can seek mediation of their dispute by ARMO, and have their agreed settlement implemented in the WTO or under the relevant FTA.

ARMO is designed to hold the trust of Asia-Pacific States and Economies due to the credibility, impartiality, professionalism and trustworthiness built into the mechanism:

1. The ARMO mediation is designed to be impartial in handling the disputes. The organization only provides services. It does not have a power to dictate the substantive outcome of the dispute.
2. The ARMO process is designed to be consensual, based on voluntary agreement between the disputing parties. No party can be forced to enter into the process, nor forced to accept any suggestion during the mediation. There is thus no risk in mediating a dispute, as there is no possibility of an adverse decision.
3. The procedure offers flexibility so as to accommodate the needs of different disputing parties, depending on the nature of their disputes. Mediators can be more active or less

active, depending upon the mutual expectations of the parties.

4. The ARMO offers a panel of experienced mediators who are trained to professionally and efficiently assist in the resolution of complex international disputes.
5. ARMO mediation is designed to offer parties a substantial return on investment. Even where mediation cannot resolve all of the issues in dispute, it will still clarify and limit the scope of the dispute, so that parties can proceed more efficiently and economically to resolve the dispute through other fora.

In sum, we consider 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. We argue that the region has the capacity to offer an alternative, less rights-and-power-based approach to peaceful co-existence. The creation of a new, permanent mediation mechanism will ultimately support the peace and prosperity of this unique and vital region.

## **THE WORKING GROUP**

The ARMO Working Group was created in 2017 in the context of the Asia WTO Research Network (AWRN). The goal of the Working Group is to promote State-to-State (Economy-to-Economy) mediation for the Asia-Pacific region and to ultimately persuade States/Economies in this region to establish an intergovernmental organization of the ARMO to provide such service. The Working Group members include scholars and practicing lawyers from this region. They are Professor Chang-fa Lo, Professor Junji Nakagawa, Professor Julien Chaisse, Professor Rajesh Sharma, Professor Lisa Toohey, Professor Jaemin Lee, Mr. Joseph Wira Koesnaldi, Professor Tsai-yu Lin, Professor Tomohiko Kobayashi, Ms. Anuradha R.V., and Professor Rajesh Babu.

# THE CONCEPT PAPER

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

### 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-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*

---

\* This article is originally published in Contemporary Asia Arbitration Journal, Vol. 10, No. 2, pp. 321-36 (Dec. 2017).

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, 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

---

<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 THE US & THE INT’L COMMUNITY, [http://www.unhumanrights.org/01/0106/0106\\_01.htm](http://www.unhumanrights.org/01/0106/0106_01.htm) (last visited Nov. 20, 2017).



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 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 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

---

<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).

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.

#### **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.

---

<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.

<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).

## **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 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 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

---

<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).

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 binding 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 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

---

<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).

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.



# **The Draft Agreement and the Draft Rules of Procedure**

## **DRAFT “AGREEMENT ON THE ESTABLISHMENT OF THE ASIA-PACIFIC REGIONAL MEDIATION ORGANIZATION”\***

---

\* This article is originally published in Asian Journal of WTO & International Health Law and Policy, Vol. 13, No. 1, pp. 5-16 (Mar. 2018).

## **PREAMBLE**

*Members to this Agreement,*

*Recognizing* that the Asia-Pacific Region is geographically large and diverse, comprising the majority of the world's population, serving as the world's economic powerhouse and being particularly notable for its diversity,

*Recognizing* the numerous significant commonalities of the region and a long history of close and deep-rooted relationships,

*Recognizing* the inevitability of legal or factual disputes, disagreements or any issues of concern arising from time to time due to the volume and wide range of interactions within the region,

*Mindful* that maintaining friendly relationships and ensuring swift and peaceful resolution to the disputes between Members should be their top priority,

*Considering* the desirability of a permanent regional inter-governmental mediation organization to assist in the resolution of disputes in a friendly, swift and peaceful manner,

*Noting* the importance of this agreement working in conjunction with existing international organizations and agreements that include mediation provisions,

*Agree* as follows:

## **PART I ESTABLISHMENT AND ORGANIZATION**

### ***Article 1***

#### *Establishment of the ARMO*

The Asia-Pacific Regional Mediation Organization (hereinafter referred to as the “ARMO”) is hereby established.

### ***Article 2***

#### *Purpose, Jurisdiction and Voluntariness*

1. The purpose of the ARMO shall be to provide legal facilities for mediation of Member-to-Member disputes in accordance with this Agreement.
2. The jurisdiction of the ARMO shall extend to all kinds of legal and factual disputes, disagreements or any issues of concern (hereinafter together referred to as “disputes”) between two or more Members, whether or not arising from or relating to any rule of public international law or any bilateral, regional or multilateral treaty/agreement to which they are parties.
3. Mediation is undertaken only when the parties to a dispute (hereinafter referred to as “parties”) so agree. Mediation may be requested at any time by any party to a dispute with the consent from the other party, and may be terminated at any time by any party.

### ***Article 3***

#### *Relations with Other Dispute Settlement Mechanisms*

1. The Members may agree to the use of ARMO mediation independently of, or based upon, any mediation or conciliation provisions in any international agreement or organization of which they are contracting parties or members.
2. Mediation conducted under the ARMO is without prejudice to the rights of the parties to resolve their dispute under any other dispute settlement mechanism that is available to them.

### ***Article 4***

#### *Headquarter and Branches*

1. The Headquarter of the ARMO shall be in [        ]. It may be moved to another place by decision of the Administrative Council adopted by a majority of two-thirds of the representatives designated under Article 5 of this Agreement.
2. The Administrative Council may also decide to establish branch offices in different Members by a majority of two-thirds of the representatives either separately or in cooperation with existing inter-governmental organizations or not-for-profit non-governmental organizations. The Administrative Council shall establish guidelines for the cooperation with other organizations in establishing branch offices so as to make the criteria and selection process fair and transparent.

### ***Article 5***

#### *Institutional Arrangement*

The ARMO shall have an Administrative Council and a Secretariat and shall maintain the Lists of Mediators, including a List of Mediators Nominated by the Members (hereinafter referred to as “Members’ List of Mediators”) and a List of Mediators Nominated by the Chairperson of the Administrative Council (hereinafter referred to as “Chairperson’s List of Mediators”).

## **PART II THE ADMINISTRATIVE COUNCIL**

### ***Article 6***

#### *Composition of the Administrative Council and Decision-Making*

1. The Administrative Council shall be composed of representatives of all Members.
2. Each Member shall designate one representative and may designate an alternative representative to act when the designed representative is unable to perform his/her duties for any reason. Members shall designate government officials at the deputy ministerial level as representatives and those at the senior government official level as alternative representatives.
3. A failure by any Member to designate a representative shall not affect the functions of the Administrative Council.
4. The Administrative Council shall elect its Chairperson every two years. The Chairperson may not be consecutively reelected.
5. A quorum for any meeting of the Administrative Council shall be a majority of the designated representatives.
6. Each Member has one vote in the Administrative Council, exercised by its representative. The representatives shall make efforts to adopt decisions of the Administrative Council by consensus. However, if consensus cannot be reached, the decisions shall be made by a majority of the representatives present and voting, except otherwise provided in this Agreement.
7. The Administrative Council may establish, by a majority of two-thirds of the representatives, a procedure whereby a representative may join the discussion and cast his/her vote through video conference or other electronic means in a meeting of the Administration Council, and additional procedures to facilitate the discussion of matters and adoption of decisions through virtual meeting.

### ***Article 7***

#### *Functions of the Administrative Council*

1. The Administrative Council shall carry out the functions of the ARMO and take actions necessary to this effect. It shall have the authority to adopt decisions on all matters under and related to this Agreement. However, the Administrative Council shall not intervene in any ongoing mediation proceeding conducted under this Agreement and its rules of procedure. Nor shall it intervene in the conclusion of any settlement agreement by the parties.
2. Without prejudice to the authorities and functions vested in it by other provisions of this Agreement, the Administrative Council shall:
  - (1) adopt any administrative, financial and auditing regulations of the ARMO;
  - (2) adopt rules of procedure for mediation in addition to those provided in this Agreement;
  - (3) adopt rules of ethics for mediators in addition to those provided in this Agreement and in the rules of procedure for mediation;
  - (4) determine the conditions of service of the Secretary-General and of any Deputy Secretary-General;
  - (5) adopt the annual budget of revenue and expenditures of the ARMO prepared by the Secretariat;
  - (6) approve the annual report on the operation of the ARMO prepared by the Secretariat;  
and
  - (7) decide any other matters related to this Agreement.

3. The Administrative Council may create such committees as it considers necessary.
4. The Administrative Council shall also exercise other authorities and perform other functions as it determines to be necessary for the implementation of this Agreement.

#### ***Article 8***

##### *Annual Meeting and Other Meetings*

The Administrative Council shall hold an annual meeting and such other meetings as may be determined by the Administrative Council, or convened by the Chairperson, or convened by the Secretary-General at the request of not less than five representatives.

#### ***Article 9***

##### *Without Remuneration*

Representatives and the Chairperson of the Administrative Council shall serve without remuneration from the ARMO.

### **PART III THE SECRETARIAT**

#### ***Article 10***

##### *Composition of the Secretariat*

The Secretariat shall consist of a Secretary-General, one or more Deputy Secretaries-General and staff.

#### ***Article 11***

##### *Secretary-General and Deputy Secretaries-General*

1. The Secretary-General and any Deputy Secretary-General shall be elected by the Administrative Council by a majority of two-thirds of representatives upon the nomination of the Chairperson for a four-year term of service and shall not be eligible for re-election. After consulting the representatives, the Chairperson shall propose one or more candidates for each such position.
2. The Secretary-General and Deputy Secretary-General shall not hold any other employment nor engage in any other occupation except as approved by the Administrative Council.
3. During the Secretary-General's absence or inability to act, and during any vacancy of the position of Secretary-General, the Deputy Secretary-General shall act as Secretary-General. If there shall be more than one Deputy Secretary-General, the most senior Deputy Secretary-General in accordance with the date of appointment shall act as Secretary-General. If they are of same seniority, the Administrative Council shall determine which Deputy Secretary-General shall act as Secretary-General.

#### ***Article 12***

##### *Functions of the Secretary-General*

1. The Secretary-General shall be the legal representative and the principal officer of the ARMO and shall be responsible for its administration, including the appointment of staff, in accordance with the provisions of this Agreement and for the implementation of rules adopted by the Administrative Council.
2. The Secretary-General shall also perform the function of registrar and shall have the power to authenticate settlement agreement concluded by the parties pursuant to this Agreement.

## **PART IV THE LISTS OF MEDIATORS**

### ***Article 13***

#### ***Maintenance of Lists of Mediators***

The Lists of Mediators shall be maintained by the Secretariat. The Lists shall consist of qualified persons, designated as hereinafter provided, who are willing to serve thereon.

### ***Article 14***

#### ***Designation of Persons to the Lists***

1. Each Member may designate to the Members' List of Mediators up to four persons who may but need not be its nationals.
2. The Chairperson of the Administrative Council may designate up to ten persons to the Chairperson's List of Mediators. The persons so designated to the List shall each have a different nationality/citizenship. When a person may claim more than one nationality, his current active nationality shall be that taken into account for the purpose of this paragraph.
3. Persons designated to any List provided in the preceding two paragraphs need not be nationals or citizens of any Member.

### ***Article 15***

#### ***Qualification for Persons Designated to a List***

1. Persons designated to a List of Mediators shall be of high moral character and recognized competence and experience in the fields of public international law, international trade or investment law, international dispute settlement and any other fields that the appointing Member or the Chairperson considers appropriate.
2. The Chairperson of the Administrative Council, in designating persons to the Chairperson's List of Mediators, shall in addition pay due regard to the importance of assuring representation of the principal legal systems among the Members.
3. The Secretariat shall hold workshops for persons in the Lists from time to time to exchange their mediation experiences, to enrich their understanding of the spirit and essence of the ARMO, to be familiar with the rules of procedure of the mediation and the related rules of ethics under the ARMO, to enhance collegiality of the group and to improve their skills in conducting mediation.

### ***Article 16***

#### ***Term of Service for Persons in a List***

1. Persons designated to a List shall serve for renewable periods of six years. However, the term for two of the four persons designated by a Member and for five of the ten persons designated by the Chairperson of the Administrative Council immediately after the entry into force of this Agreement shall serve for a period of three years, to be determined by the designating Member or the Chairperson respectively. If they are re-designated after the expiration of their terms, they shall serve for renewable periods of six years.
2. In case of death or resignation of a person in a List, the authority that designated the person shall have the right to designate another person to serve for the remainder of the term.

## **PART V FINANCING THE ARMO**

### ***Article 17***

#### *Contribution and Expenditure*

1. Each Member shall contribute to the ARMO its share in accordance with the financial regulations adopted by the Administrative Council. Additionally, Members are encouraged to donate in-kind support such as office facilities and to provide other financial support to the ARMO to enable its operation.
2. The expenditure of the ARMO should be kept at a reasonably minimum level so that the Members' contribution would not become an excessive burden to them. When adopting the financial regulations, the Administrative Council shall take the respective levels of economic development and the scales of the economies of the Members into consideration.

## **PART VI STATUS, IMMUNITIES AND PRIVILEGES**

### ***Article 18***

#### *International Legal Personality*

The ARMO shall have full international legal personality and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions, including, but not limited to, the capacity:

- (1) to contract;
- (2) to acquire and dispose of movable and immovable property; and
- (3) to institute legal proceedings.

### ***Article 19***

#### *Immunities and Privileges*

1. The ARMO shall be accorded by each of its Members such privileges and immunities as are necessary for the exercise of its functions.
2. The ARMO, its property and assets shall enjoy immunity from all legal proceedings, except when the ARMO waives this immunity.
3. The Chairperson, the representatives in the Administrative Council, persons acting as mediators, Secretary-General, any Deputy Secretary-General, and staff of the Secretariat shall similarly be accorded by each Member such privileges and immunities as are necessary for the independent exercise of their functions in connection with the ARMO.
4. The privileges and immunities to be accorded by a Member as provided in the preceding paragraphs in this Article shall be similar to the privileges and immunities stipulated in the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947.

### ***Article 20***

#### *Treatment to Archives and Communications*

1. The archives of the ARMO shall be inviolable, wherever they may be.
2. With regard to its official communications, the ARMO shall be accorded by each Member treatment no less favourable than that accorded to other international organizations.

## **PART VII RULES OF PROCEDURE AND SETTLEMENT AGREEMENT**

### ***Article 21***

#### ***Adoption of the Rules of Procedure of Mediation***

1. The ARMO shall adopt Rules of Procedure of Mediation Conducted under the Asia-Pacific Regional Mediation Organization (hereinafter referred to “Rules of Procedure”) in accordance with Article 7.2 of this Agreement.
2. The Rules of Procedure shall ensure the impartiality and efficiency of the mediation process. They shall also be flexible enough so as to assist the disputing parties to resolve their disputes in a mutually satisfactory manner. To that end, the Rules of Procedure shall allow the mediators to merely facilitate the negotiation between the parties, to assess the dispute for the parties if the mediators consider appropriate, or to draft settlement proposals of terms and conditions for the parties to consider if they so request.

### ***Article 22***

#### ***Binding Effect of the Settlement Agreement***

Any settlement agreement duly concluded between disputing parties is binding upon them and shall be performed by them in good faith.

## **PART VIII AMENDMENT**

### ***Article 23***

#### ***Amendment Proposed by a Member***

1. Any Member may propose amendment of this Agreement.
2. The text of a proposed amendment shall be communicated to the Secretary-General not less than 90 days prior to the meeting of the Administrative Council at which such amendment is to be considered and shall forthwith be transmitted by him/her to all the representatives in the Administrative Council.

### ***Article 24***

#### ***Amendment Decided by the Council***

1. If the Administrative Council shall so decide by a majority of two-thirds of the representatives, the proposed amendment shall be circulated to all Members for ratification, acceptance or approval.
2. Amendments to provisions of this Agreement shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it. The Administrative Council may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Administrative Council in each case shall be free to withdraw from the ARMO or to remain a Member with the consent of the Administrative Council.

## **PART IX FINAL PROVISIONS**

### ***Article 25***

#### ***Open for Signature***

This Agreement shall be open for signature on behalf of the negotiating States or Economies.



**Article 26**  
*Preparatory Committee*

1. There shall be a Preparatory Committee established by the signatories before the entry into force of this Agreement to seek financial support and other resources for the initial operation of the ARMO, to identify physical location and develop facilities for the ARMO Secretariat, to draft any additional rules or procedures for submission to the Administrative Council; and to undertake any other preparations required for the creation of the ARMO.
2. The Preparatory Committee shall cease operation upon the entry into force of this Agreement.

**Article 27**  
*Entry into Force*

1. This Agreement shall be subject to ratification, acceptance or approval by the signatory States and Economies in accordance with their respective constitutional and/or legal procedures.
2. This Agreement shall enter into force 30 days after the date of deposit of the fifth instrument of ratification, acceptance or approval. It shall enter into force for each State or Economy that subsequently deposits its instrument of ratification, acceptance or approval 30 days after the date of such deposit.
3. Once this Agreement enters into force, the ARMO shall continue in operation, unless the number of Members becomes less than three or all Members decide to dissolve the ARMO.

**Article 28**  
*Accession*

This Agreement is open to accession by any Asia-Pacific State or Economy that is willing to comply with the provisions in this Agreement, following the approval in accordance with the applicable constitutional and/or legal procedures of the acceding State or Economy.



**DRAFT “RULES OF PROCEDURE FOR MEDIATION  
CONDUCTED UNDER THE ASIA-PACIFIC REGIONAL  
MEDIATION ORGANIZATION”\***

---

\* This article is originally published in Asian Journal of WTO & International Health Law and Policy, Vol. 13, No. 1, pp. 17-26 (Mar. 2018).

These Rules were adopted by the Administrative Council of the Asia-Pacific Regional Organization on [        ].

**Article 1**  
*Governing Rules*

Mediation shall be conducted in accordance with the provisions of the Agreement on the Establishment of the Asia-Pacific Regional Mediation Organization (hereinafter referred to as “the ARMO Agreement”) and these Rules.

3. The parties to a dispute (hereinafter referred to as “parties”) may agree on additional rules to be followed by the mediator or mediators (hereinafter together referred to as “mediator”).
4. If a mediation conducted under the ARMO Agreement and these Rules is concurrently based on the mediation provisions of a separate international agreement or organization, such as a free trade agreement or the World Trade Organization, to which the parties are contracting parties or members, those mediation provisions shall also govern the mediation proceeding under the ARMO, to the extent that they do not conflict with the ARMO Agreement or the Rules.
5. If any issue of procedure arises and if it is neither addressed by the ARMO Agreement, nor these Rules, nor any additional rules agreed upon by the parties as provided in paragraph two of this article, the mediator shall decide the issue.

**Article 2**  
*Request for Mediation and Merger of Concurrent Mediations*

1. Any Member wishing to institute mediation proceedings shall address a request (hereinafter referred to as “Mediation Request”) to that effect in writing to the Secretary-General, who shall send a copy of the Mediation Request to the other party or parties.
2. Two or more Members may jointly institute mediation proceedings for a dispute, disagreement or issue of concern (hereinafter together referred to as “dispute”) between themselves or for a dispute with one or more responding parties in accordance with the preceding paragraph.
3. The Mediation Request shall contain information concerning the nature of the issues in dispute, the parties involved, and their consent to mediation.
4. The Secretary-General shall register the request and shall forthwith notify the parties of registration.
5. Parties in two or more separate mediation proceedings may agree on the merger of concurrent mediation proceedings.
6. Mediation proceeding shall be deemed to be commenced from the date when the Secretary-General registers the request for mediation.

**Article 3**  
*Appointment of Mediators*

1. The mediator shall be appointed as soon as possible but no later than 14 days after registration of the Mediation Request in accordance with the provisions in the preceding article.
2. The parties may mutually decide either one or three mediators to conduct mediation for their dispute. If they decide to have –
  - (1) a sole mediator to mediate their dispute, the mediator should be agreed by the parties from the Chairperson’s List of Mediators. In the absence of agreement between the parties within 10 days of the registration of the Mediation Request, the Chairman of the

Administrative Council shall appoint a mediator from the Chairperson's List of Mediators;

- (2) three mediators, one of them will be appointed by each party from the Members' List of Mediators and the third, who shall be the chair of the mediation, shall be appointed by the Chairperson of the Administrative Council from the Chairpersons' List of Mediators. The mediators shall cooperate with each other faithfully to perform their duties.
3. If two or more parties in two or more closely related disputes agree to have common proceeding to resolve their disputes, or if the parties in separate mediations agree on the merger of their mediations, they shall mutually decide the method of appointment of up to three mediators to conduct mediation for their dispute(s).
4. Where the parties do not agree on the number of mediators for any dispute including merged disputes, there shall be a sole mediator appointed by the Chairperson of the Administrative Council from the Chairperson's List of Mediators to conduct mediation for them.
5. If a party is entitled to appoint a mediator, but fails to do so within 14 days after the registration of the Mediation Request, the Chairperson of the Administrative Council shall appoint a mediator for it from the Members' List of Mediators.
6. Any party that is entitled to appoint a mediator may appoint a mediator from the Chairperson's List of Mediators instead of the Members' List of Mediators, or from the List of Mediators of any other party.

#### **Article 4**

##### *Replacement of a Mediator*

1. After a mediator is appointed, the appointment shall remain unchanged; provided, however, that if a mediator should die, become incapacitated, or resign, the resulting vacancy shall be filled in accordance with the provisions of Article 3 of these Rules.
2. A mediator shall continue to serve in that capacity notwithstanding that he or she shall have ceased to be in any List of Mediators.

#### **Article 5**

##### *Conflict of Interest and Disqualification of a Mediator*

1. A person who is approached by any party or by the Chairperson of the Administrative Council in connection with his or her proposed appointment as mediator must decline if such appointment may give rise to any conflict of interest or possible violation of the rules of ethics adopted by the Administrative Council.
2. If a proposed mediator considers that there is no conflict of interest and intends to accept the appointment, he or she must still disclose any circumstance likely to give rise to a reasonable doubt as to his or her independence or impartiality.
3. An appointed mediator must resign if a conflict of interest arises after the appointment. He or she shall also, from the time of appointment and throughout continuance of the mediation proceedings, without delay, disclose to the parties any circumstance referred to in the preceding paragraph.
4. Any proposal to disqualify a mediator for conflict of interest or any other justifiable cause shall be decided by the Chairperson of the Administrative Council in consultation with the parties. If the decision of disqualification is made, the vacancy shall be filled in accordance with the provisions of Article 3 of these Rules.

**Article 6**

*Presumption of Competence of the Mediator*

1. The mediator shall be presumed to have competence to conduct the mediation for which they are appointed.
2. In case there is any objection by a party that matter is not within the jurisdiction of the ARMO or within the competence of the mediator, the mediator shall discuss the issues with the parties to resolve them. If the objecting party still maintains its objection, it should be considered as not agreeing to continue the proceeding for the entire case or for the objected part of the case and hence the mediator shall terminate the mediation proceeding for the entire case or for the objected part of the case.

**Article 7**

*Venue of Mediation*

1. Mediation proceedings shall be held at the Headquarters of the ARMO except as hereinafter provided.
2. Mediation proceeding may be held, if the parties so agree,
  - (1) at the seat of any other appropriate institution, whether private or public, with which the ARMO may make arrangements for that purpose; or
  - (2) at any other place approved by the mediator after consulting with the Secretary-General and after considering all circumstances related to the case and the parties.

**Article 8**

*Representation and Assistance of Parties*

A party may be represented and assisted by government officials or any duly authorized persons, including but not limited to lawyers, in the proceedings. The names of person representing or assisting a party must be notified to the mediator and the other party in advance by that party.

**Article 9**

*Mediator's Role and Duties*

1. A mediator shall be impartial and independent from any influence in conducting a mediation and shall uphold the integrity and fairness of the mediation.
2. The mediator shall be available at all times for the dispute for which he or she is appointed. He or she shall also conduct the mediation with due diligence and make best efforts to ensure that the proceeding is conducted efficiently.
3. Except otherwise provided in these Rules concerning confidential information, the mediator shall ensure that the parties are fairly informed and have an adequate understanding of the procedural aspects of the process.
4. The mediator shall recognize that the mediation under these Rules is based on the principle of self-determination by the parties and attempt to facilitate voluntary resolution of the dispute by the parties and endeavor to bring about settlement agreement between them upon mutually acceptable terms. To that end, the mediator shall assist the parties:
  - (1) to communicate the view of one party to the other;
  - (2) to identify existing and potential issues and clarifying them;
  - (3) to reduce or eliminate any misunderstanding between the parties; and
  - (4) to explore areas of compromise.

5. The mediator may assess and/or evaluate the dispute for the parties if he or she considers appropriate or if the parties so request. However, the mediator shall advise the parties that the mediator's assessment/evaluation is neither legal advice, not a binding determination, nor a confirmation of the facts in dispute.
6. The mediator may, of the mediator's own initiative, or on the request of parties, at any stage of the proceedings and from time to time, and for the consideration of the parties, help generate options or draft a settlement proposal, including specific terms and conditions. However, the mediator must advise the parties that the any options or proposals do not constitute legal advice, a binding determination, nor confirmation of facts.
7. A mediator must not impose upon the parties any decision about terms or conditions of settlement.

#### ***Article 10***

##### ***Mediation Schedule and Meetings***

1. The mediator must prepare, in consultation with the parties, a schedule to include the specific dates for each party to submit relevant documents including a mediation plan and timeline for meetings (hereinafter referred to as "Mediation Schedule"). The Mediation Schedule must be prepared in consideration of the time reasonably needed by the parties to prepare and submit documents and a mediation plan.
2. The mediator may conduct joint or separate meetings with the parties.
3. The parties must be present at the scheduled mediation meetings.
4. The mediator must provide the Mediation Schedule to the Secretariat.

#### ***Article 11***

##### ***Parties' Participation and Cooperation***

1. The parties must participate in the mediation proceedings and cooperate with the mediator in good faith with the intention to settle the dispute.
2. The parties must also give genuine consideration to any settlement proposal provided in Article 9.6 of these Rules and any other settlement proposal by the other party.

#### ***Article 12***

##### ***Parties' Opportunity to Make Statements and to Present Evidence***

The mediator shall allow the parties to make both written and/or oral statement in the mediation meetings and to submit their evidence, witness, expert witness and other information which they consider necessary or useful to resolve the dispute. The mediator may seek information and technical advice from the parties or any individual or body which it deems appropriate.

#### ***Article 13***

##### ***Parties' Written Submissions***

1. Each party must provide to the mediator, ten days prior to the meeting or within a different time period decided by the mediator, a submission that sets out the issues that need to be resolved, its position in respect to those issues, and the information or documents reasonably required for the mediator to understand the issue.
2. The parties must mutually exchange their respective submissions including their mediation plan according to the schedule provided in Article 10.
3. The length of a written submission including a mediation plan by a party shall not exceed certain pages as guided by the mediator, who shall consult the parties and take the nature and

complexity of the dispute into consideration when setting forth the maximum length for a written submission and a mediation plan.

4. Each party shall further provide such other information or documents as may be required by the mediator in connection with the issues to be resolved.

**Article 14**  
*Offer of Settlement*

1. Any party may propose a settlement to the other party or parties at any stage of the proceedings, with or without conditions, either at the mediation meeting or otherwise.
2. The offer must also be communicated to the mediator if it is made outside a mediation meeting.

**Article 15**  
*Confidentiality of the Information and Proceedings*

1. In principle, all information and documents presented to the mediator by a party must also be provided to the other party or parties. However, if a party gives information or any document to the mediator subject to a specific condition that it is kept confidential, the mediator must only disclose the non-confidential part of that information or document to the other party or parties.
2. Subject to Article 19 below, the mediator must not disclose to non-parties any information or documents received in connection with the mediation.
3. A party must not disclose to a non-party, nor introduce into any other proceedings:
  - (1) positions taken, views expressed, settlement proposals submitted or admission made by a party during the mediation proceedings;
  - (2) documents or information obtained during the mediation which were expressly required to be treated as confidential; or
  - (3) proposals made or views expressed by the mediator during the mediation proceedings.
4. The mediation meetings shall be conducted in private. Persons other than those representing or assisting the parties or the mediator may attend only with the consent of the parties and with the permission of the mediator.
5. Except as otherwise provided in these Rules, parties may mutually decide whether, to whom, to what extent, or which part of the dispute, proceeding or information can be disclosed.
6. There shall be no audio or video recording of any part of the mediation proceedings.

**Article 16**  
*Time Limit for Completion of Mediation*

1. The mediator shall endeavor to complete mediation within six months from the date of commencement. This may be extended for a reasonable time period by the mediator if he or she considers that the extension is necessary or useful to resolve the dispute.
2. The parties may also agree on any temporary suspension of the proceeding.
3. Upon the expiration of the time period in the preceding two paragraphs, the mediator shall conclude or terminate the mediation irrespective of the final resolution of any or all disputes.



**Article 17**  
*Settlement Agreement*

1. If agreement is reached between the parties in regard to the dispute, they may decide to put in writing to be signed by their respective authorized persons and authenticated by the Secretary-General based on Articles 11.1 and 11.2 of the Agreement.
2. The agreement is binding upon the parties and must be performed by them in good faith.

**Article 18**  
*Fee of Mediator and Costs*

1. At the time of appointing the mediator for a dispute, the Secretary-General of the ARMO shall decide the fee payable to him or her. A non-refundable filing fee of [       ] shall be charged for every request of mediation.
2. The expenses of the mediation, including the fees of the mediator, the administrative costs of the Secretariat, and any other expenses, shall be borne equally by the parties or as may be otherwise mutually decided by the parties.
3. The fee of a party appointed mediator may be agreed between the mediator and that party separately.
4. Each party shall bear its own costs in relation to its witness, experts and documents.
5. The Secretary-General may, before the first mediation meeting, request the parties to deposit with the Secretariat equal sums as an advance towards expenses of the mediation. Any remaining amount to be paid to the Secretariat shall be deposited with the Secretariat after the mediator has concluded the mediation proceeding. Without the full payment of expenses, neither the mediation report nor the settlement agreement shall be issued to the parties.

**Article 19**  
*Conclusion of the Proceedings*

1. If the parties reach a settlement agreement, the mediator shall close the mediation proceeding and provide a report to the Administrative Council noting the issues in dispute and recording the fact that the parties have reached agreement. However, the mediator shall not include the contents of the settlement agreement in the report unless the parties specifically agree on such inclusion.
2. If, at any stage of the proceedings, it appears that there is no likelihood of agreement between the parties, the mediator shall close the proceedings and draw up a report to the Administrative Council noting the issues in dispute and recording that no agreement has been concluded.
3. If a party fails to appear or participate in the proceedings, the mediator shall also close the proceedings and draw up a report to the Administrative Council noting that party's failure to appear or participate.
4. If the mediation is conducted concurrently based on mediation provisions of a separate agreement or organization as provided in Article 1.2 of these Rules, the above report shall also be provided to the Secretariat of that agreement or organization as requested by any party as well as to the Administrative Council of ARMO for the record.

# **THE ASIA-PACIFIC REGIONAL MEDIATION ORGANIZATION (ARMO) INITIATIVE**

**Asia-Pacific Regional Mediation Organization (ARMO) Working Group**

<https://www.armomediation.com/working-group>

*Sponsored by*

**Asia WTO Research Network (AWRN)**

<http://www.awrn.asia/index.php>

**&**

**Asian Center for WTO and International Health Law and Policy (ACWH),  
National Taiwan University College of Law**

<http://www.ntu.law.acwh.tw>

## **Members:**

Chang-fa Lo

Joseph Wira Koesnaldi

Junji Nakagawa

Tsai-yu Lin

Julien Chaisse

Tomohiko Kobayashi

Rajesh Sharma

Anuradha R.V.

Lisa Toohey

Rajesh Babu

Jaemin Lee