APEC ODR Framework: Prospects and Challenges of Its Implementation in Indonesia

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ABSTRACT

The APEC ODR Framework is an ambitious project to support Indonesian MSMEs' strategic position and function in the Asia-Pacific economy. The Indonesian government aims to protect them from any impediment, including the impact of business disputes. Numerous professional forums have been held to assess the framework's performance, but they have primarily focused on the internal system component while ignoring some fundamental issues of the framework's external system. This article examines such issues as: first, why the recent assessment model would fail to support the future need for the framework's effective work; and second, what kind of law and policy scheme would adequately support the future need for the framework's effective work. Based on McDougal's contextual approach, the analysis has produced two conclusions: first, the recent assessment model has focused primarily on assessing the internal system. Some determining components of the external system have not been assessed, such as the state legal culture and the MSMEs' corporate culture; second, the formulation of the law and policy scheme for supporting the effective work of the framework shall cover the needs for shifting the state legal culture, particularly on recognition and execution of the foreign arbitral award, including the revision of Article 65 up to Article 69 of the Indonesian Act on Arbitration and ADR of 1999, and the needs for developing a new corporate culture on the ODR settlement of dispute for shifting the MSMEs legal culture form the court culture into ODR culture.

Keywords: *APEC; ODR; prospect, challenge, implementation*

1. INTRODUCTION

1.1 Research Background

A stable, peaceful, and trusted business atmosphere is a prerequisite for normal and better business performance. The APEC ODR Framework (APEC Collaborative Framework for Online Dispute Resolution of Cross-Border Business-to-Business Dispute) has been set for fulfilling such requirements.[1] The framework is an online dispute resolution framework set under the APEC initiatives for supporting global business, particularly the micro, small, and medium enterprises (MSMEs), especially the Indonesian MSMEs, on resolving their cross-border business to business (B to B) dispute to develop a more comfortable settlement of dispute procedure, low cost, simple, quick, and effective process and procedure on settlement of dispute. It is dedicated to creating a peaceful and trusted business atmosphere for a more stable position and role of the MSMEs in the Asia Pacific economy.[2] Some 77% of the total

[1] Nadja Alexander and Alvin Leu Jun Kang, APEC's New ODR Framework, *Asian Dispute Review*, Vol. 25, Issue 1, https://kluwerlawonline.com/Journals/Asian+Dispute+Review/702, p. 12

[2] Mark Walter, *The CISG and Cross-Border Access To Commercial Justice*, Journal of Law & Commerce, Vol. 38 (2019-2020), http://jlc.law.pitt.edu/, p. 156

99%[3] of the Indonesian MSMEs are active participants in the global economy, including Asia Pacific trade, which significantly drive the Asia Pacific economy into a giant region economy. They would benefit from the region but in equal would also threaten by them with a high-risk economy if the region does not support a proper settlement of dispute framework, which mostly equals an unaccountable cost and tend to drop the business into uncertainty and bankruptcy. One company's failure would transform the region's business confidence into business mistrust, reducing the region to an empty block. Therefore, a framework for resolving disputes is a prerequisite for a stable position and function of MSMEs in the Asia-Pacific economic region.

A series of academic and professional forums have been held by APEC and/or participating states in order to determine the most effective method for achieving the framework's most fundamental objective, effectiveness. Consequently, some working papers have been drafted and provided. However, the majority of them focused on the internal system of the ODR framework, such as an evaluation of the greater demand of global businesses for the existence of the ODR Framework, the APEC ODR Framework, or the other, as well as its structure and rules and procedures for informing the structure and future of the framework,[4] but none on its external system such as the question on the effect of the member state legal culture and SMEs corporate culture to the effectiveness of work of the framework which might simply drop them into similar upsetting stories of any existing arbitration and alternative dispute resolution (ADR) services providers, ignored by their market. In all business systems, assessing all external factors that determine and influence the system is as important as assessing the internal system's components. Components of the external system of business include all sets of determining factors that must be valued and evaluated as equally as the internal system's determining factors, such as the corporate culture of the business community, the government policy standing, and the existing legal framework of the participating state.[5] Hence, the real challenge of the effective work of the framework would lies more in the external system of the framework and its propect would also determined by the proper approach and policy setting for responding the challenge. All piecemeal approaches to such systemic issues would not be helpful in solving the problem of the effective work of the framework.

The other determining factor which would properly be assessed is the Indonesian state legal culture, including rules and regulations on the execution of foreign arbitration awards, which has caused Indonesia to be labelled as an "unfriendly state to foreign arbitral awards".[6] Articles 65 to 69 of the Indonesian Arbitration Act

[3] Term of Reference and Tentative Agenda Workshop Stakeholder Engagement and Capacity Building on the APEC Collaborative Framework on ODR to Improve Cross-Border Trade in Indonesia Date: 14-15 June 2023 Bali, Indonesia

[4] *See* Yoshihisa Hayakawa, *APEC ODR and More*, Professor of Law at Rikkyo University Representative from Japan for UNCITRAL, APEC & ISO Executive Director & Secretary General of Japan Int'l Dispute Resolution Center. *See also* Hong Kong, China, *APEC Collaborative Framework for Online Dispute Resolution of Cross-Border Business-to-Business Disputes-Endorsed*, Second Economic Committee Meeting, Puerto Varas, Chile, 26-27 August 2019.

[5] David P. Baron, *Business and Its Environment*, Fourth Edition, Prentice Hall, Upper Saddle River, New Jersey, 2003, h. 4

[6] Some cases as an example: Mutiara Hikmah, *The Refusal of international Arbitration Decision in the Case of Astro All Asia Network PLC (ASTRO)*, Jurnal Yudisial Vol. 5 No. 1, April 2012, p. 66;

Number 30 of 1999 firmly ask for the Court of Central Jakarta and Supreme Court fiat execution for any foreign arbitration ward. Article 65 says that recognition and execution of any foreign arbitration award shall be subject to the authority of the Court of Central Jakarta. Article 66 reaffirmed that a foreign arbitration award that is recognized and executable in Indonesia is only the award of a state bound by a bilateral or multilateral agreement on arbitration award recognition and execution with Indonesia, with some additional technical mandated requirements, such as: (1) it shall not be contrary to public order; (2) it has been supported by fiat of execution from the Court of Central Jakarta; and (3) in case Indonesia is the respondent, the award must be supported by fiat of execution from the Supreme Court of the Republic of Indonesia. These rules indicate the state's intervention through court jurisdiction in a private matter, which is contrary to the fundamental principle of human rights regarding private matters, which prohibits the state from intervening until the parties voluntarily submit their dispute or request such intervention.[7] These rules even contrary to the Constitution of the Republic of Indonesia 1945 and morally in conflict with the Presidential Decree Number 34 of 1981 concerning the Ratification of the New York Convention 1958 (Convention on the Recognition and Enforcement of Foreign Arbitration Awards), which under Article 3 of the Convention determine that: (a) each member State to the Convention shall recognize foreign arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon; and (b) it shall be imposed with no additional substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards. As the arbitration is qualified as an alternative dispute resolution component or a non-litigation procedure, bringing arbitration award into a court procedure under a state power is contrary to the basic concept and principle of arbitration as a non-litigation procedure, furthermore the fundamental principle of free choice and freedom of contract accepted worldwide as part of fundamental human right.[8]

Indonesia's long dark history and behavior in implementing the Convention has resulted in the country being labeled an "unfriendly country" to foreign arbitral awards by the international business community. As a result, some companies have redirected their business away from Indonesia to avoid dealing with the country's dispute resolution system. Due to the Article 65 to Article 69 of the Arbitration Act requirements, there is a lengthy backlog of foreign arbitration awards that have not yet been executed. Since 2000 and through 2014, the Court of Central Jakarta has registered approximately 81 foreign arbitration awards[9] . Hundreds of foreign arbitration awards have been questioned on their execution under the procedure of the Supreme Court of the Republic of Indonesia from the year 2000 to the year 2022, which strongly shifted locate Indonesia from a very questioned country of their commitment to joining the

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Tutojo, Eksekusi Putusan Arbitrase Internasional Dalam Sistem Hukum Indonesia, Jurnal Penelitian Hukum Legalitas, Vol. 9, No. 1, Januari 2015, p 16.

[7] Mosgan Situmorang, *The Power of Pacta Sunt Servanda Principle In Arbitration Agreement*, Jurnal Penelitian Hukum De Jure, Vo. 21, No. 4, 2021, http://dx.doi.org/10.30641/dejure.2021.V21.447-458, p. 449

[8] Atiyah, *An Introduction to The Law of Contract*, Clarendon Press, Oxford, 1981, p. 1

[9] Andi Julia Cakrawala, *Penerapan Konsep Hukum Arbitrase Online di Indonesia*, Rangkang Education, 2015, Yogyakarta, h. 216-217

spirit of developing good and peaceful business atmosphere, including the Asia Pacific regional economy. This question will also affect the effectiveness of the work of the APEC ODR Framework unless some basic questions are quick and structurally shorted.

1.2 Law Policy Issues

Based on the above facts, this research is focused on the assessment of several fundamental factors of the external system of the framework and the law and policy formulation for solving the issues, formalized as follows:

1. Why would the recent assessment model fail to support the future need for the effective work of the framework?
2. What kind of law and policy scheme would properly support the future effective work of the framework?

1.3 Research Targets

This research is expected to fulfill the following targets:

1. The formulation of the challenge: identifying the source of issues of the external system of the APEC ODR Framework, which could affect the effective work of the APEC ODR Framework; and
2. The formulation of the prospect: formulating the proper law and public policy scheme, which would properly support the future effective work of the APEC ODR Framework.

2 THEORETICAL BASIS AND RESEARCH METHOD

This research has been conducted under McDougal's contextual approach. According to McDougal, the law is part of an authoritative policy process where its content shall rely on, in conformity with, and absorb the expectation of its context. The context of policy is the whole community's expectation.[10] The community is the community target of the policy. The community expectation would involve the community social condition, including culture, as the basis of the community expectration. Hence, cultural approach would valuable on strengthening the contextual anlysis.

Under this approach, legal research is conducted in at least four steps: first, adopting an observation standpoint; second, creating a map of inquiry; third, postulating a comprehensive set of goals; fourth, identifying the whole range of intellectual tasks.[11] Those have been conducted under the whole steps. The first two steps have been performed at the time of drawing the problem identification, and the latter has been performed at the time of formulating issues and target research.

Based on such an approach, this research is simplified into two steps: *first*, identifying the law/policy issues by means of identifying the level of consistency

[10] Law a Process of Decision: *A Policy-Oriented Approach to Legal Study*, Yale Law School Legal Scholarship Repository, Paper 2464, 1956, p. 54

[11] Myres S. McDougal and W. Michael Reisman, *International Law in Policy-oriented Perspective*, in Macdonald Douglas and Johnston, *The Structure and Process of International Law: Essay in Legal Philosophy Doctrine and Theory*, Martinus Nijhoff Publishers, The Hague, 1983, p. 113-115

(relying on, conformity with, and absorption by) of the policy with the expectation of the context; *second*, formulizing substance of policy for shorting the problem.[12]

3 RESULT AND ANALYSIS

3.1 The Component of the External System of the APEC ODR Framework Which Could Affect the Effective Work of the Framework

(1) The State Legal Culture on the Recognition and Execution of Foreign Arbitral Award

The effective work of the framework would strongly influenced by the Indonesian state legal culture. Indonesian legal culture is a hybrid of the original legal culture of Indonesia (the customary/adat law legal culture) and the Civil Law legal culture. The legal culture of customary (adat) law is a traditional village legal culture, whereas the legal culture of Civil Law is a state legal culture inherited from Dutch or Netherlands legal culture. Under the development of the Indonesian National Law Development Program, the state legal culture has been enriched with international best practices, resulting in the legal culture becoming somewhat influenced by the legal culture of the United States, as is commonly observed in the Indonesian legislative culture. Indonesia does not implement the pure model of Civil Law legislation, typically expressed in a Code, but rather an organic model of legislation readily apparent in the Act and regulation models.[13]

The Indonesian state's legal culture on commercial matters is heavily influenced by the Indonesian psychological experience under Dutch colonialism, which caused Indonesia to be somewhat sensitive to state sovereignty issues and to prioritize state or public interest over private interest. This perspective has bolstered Indonesia's political standing in relation to any international legal instrument, including when Indonesia is a contracting party. Indonesia has decided to qualify as a dualistic state in which any international legal instrument will only be binding on and valid within the territory of Indonesia if the state has adopted it through state ratification.

This perspective has not stopped at this level. When Indonesia ratified the New York Convention 1958 in 1981, where Indonesia suppose to recognize and implement any foreign arbitral award from any country which is also party to the Convention directly,[14] Indonesian legal professionals were divided over whether foreign arbitral awards require Indonesian court review or can be directly executed by the parties since they fall under the scope of private law, the law of self-imposed obligation, which is widely accepted by civilized nations as a part of fundamental rights, and the state or public power is prohibited from intervening until the parties

[12] Lung-chu Chen, *An Introduction to Contemporary International Law*, Yale University Press, New Haven and London, 1989, p. 15-20.

[13] *Compare* Mary Ann Glendon et all, *Comparative Legal Traditions in A Nutshell*, Second Edition, West Group, St. Paul Minn, 1999, p 26 and p 150.

[14] This is fall under the concept of arbitration and ADR which is a non-litigation procedure and an alternative dispute resolution, other than court resolution. I Nyoman Sukandia and Ida Bagus Wyasa Putra, *Alternative Dispute Resolution: Konsep dan Teknik (Concept and Technique)*, Udayana University Press, 2021, p. 14-17. See also M. Ibnu Farabi and Nabila Oegroseno, *The Issue of Arbitral Award Enforcement in Indonesia*, Juris Gentium Law Review, May 2018, p 20

voluntarily submit their case to the court.[15] Therefore, in the 1990s, the Indonesian Supreme Court issued a regulation, the Supreme Court Regulation Number 1 of 1990 (PERMA No. 1/1990), stating that any foreign arbitral award adopted by any foreign arbitration in any state party to the Convention may be executed after being registered in the Court of Central Jakarta and receiving a fiat execution from the Supreme Court.[16] Finally, Article 66 of the Indonesian Act on Arbitration and ADR 1999 has more explicitly expressed that any foreign arbitral award may not be executed in the territory of the Republic of Indonesia until it has fulfilled the following requirements: (a) the award shall be adopted by any arbitration of any state which is the contracting parties to the Convention; (b) the subject of the award limited to trade or commercial matter; (c) it shall not be contrary to public order; (d) it has got fiat execution from the Court of Central Jakarta; and (e) in case Indonesia is the parties to the dispute, it has got fiat execution from the Indonesian Supreme Court.

The above fact shows that the prospect of foreign arbitral award, including any APEC ODR foreign arbitration award, may not easily reach its target the effective execution. However, it shall be subject to the Indonesia Court assessment, the Court of Central Jakarta, and sometimes the Supreme Court assessment.[17] The APEC ODR Framework's goal of a quick, simple, low-cost, and effective arbitration award appears to be a distant dream on the Indonesian legal culture's horizon if it ever becomes a reality. This demonstrates the need to recover the Indonesian law of arbitration, restoring it to its fundamental nature as a component of private law, the law of self-imposed obligation, at least under the regional law of APEC member states.

(2) The MSMEs Corporate Culture on the Settlement of Dispute

The practical living of the Indonesian trade community shows that the Indonesian trade community culture of settling disputes is a court-settling dispute culture.[18] They tend to keep their problem to themselves, and even if they have the opportunity to discuss it with their trade partner, they rarely attempt to resolve their problem or dispute, especially if the other party exhibits an uncomfortable feeling. They have a tendency to keep it, and when they lose interest, they simply go to court. Using an attorney or mediator also does not constitute membership in the Indonesian business community. In order for the APEC ODR framework to function properly, the Indonesian government will need to boost the trade community's knowledge of the ODR culture, including its strength, benefit, and its simple, quick, low-cost, or effective procedure, and then integrate this information into the trade community's mentality and culture.

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[15] Compare Derita Prapti Rahayu et all, *Law Enforcement in the Context of Legal Culture in Society*, Juris Gentium Law Review, vol. 16, no. 2, May 2018, https://doi.org/10.14710/lr.v16i2.33780, p. 277

[16] The Head of the Court of Central Jakarta within 14 days shall submit an application to the Supreme Court for fiat execution.

[17] See Sultan Fauzan Hanif and Rully Faradhila Ariani, *Fair Legal Certainty in The Implementation of International Arbitration Awards (A Socio Legal Study)*, Pattimura Law Journal, Volume 6 Issue 2, March 2022, https://doi.org/10.47268/palau.v6i2.947, p. 4

[18] Diagnosing corporate culture is part of external component assessment on setting any policy concerning MSMEs. Adriana Tidora, Cristian Gelmereanua, Paul Barua, Liviu Morara, *Diagnosing organizational culture for SME performance*, Procedia Economics and Finance 3 (2012), https://pdf.sciencedirectassets.com/282136, p. 714

Even though ADR, including the Arbitration culture, had been practiced under the Indonesian commercial tradition, such as in the Tobacco Bremen Case, and had been developed since the 1990s, resulting in the birth of the Indonesian Act on Arbitration and ADR in 1999, it has not caused a shift in the culture of the Indonesian business community from court culture to ADR culture. Even so, most modern businesses in Indonesia would feel more at ease with court proceedings than ADR procedures. This fact suggests that the majority of MSMEs are also more familiar with court culture. Therefore, expecting them to shift their culture from court culture to ADR culture would be a significant challenge for the state of Indonesia, necessitating a substantial amount of effort and greater stakeholder participation. Thus, adopting the Penta-helix concept would be the first step in harmonizing the existing and anticipated cultures.[19] The MSMEs corportate culture on the settlement of dispute, including ODR, would shift faster and more effective under the collaborative support fo the Penta-helix components, includes the government, NGOs, universities, MSMEs community's, and the press. The next step is adopting the corporate culture development policy, where the government may need to collaborate with the whole of the Penta-helix stakeholders on achieving the policy goals.

3.2 The Formulation of the Law and Policy Scheme for Supporting the Effective Work of the APEC ODR Framework

The above facts show that two fundamental needs should be a response by the government of the Republic of Indonesia to increase the possibility of the effectiveness of the APEC ODR Framework, both existed in the external APEC ODR Framework system, i.e.: (a) there is a need for a shift in the state's legal culture regarding the recognition and execution of foreign arbitral awards. The state's legal culture must return to its fundamental concept and legal principles of arbitration and ADR as a non-litigation procedure and be subject to private law, particularly the law of self-imposed obligation, where arbitration is a personal matter between the disputing parties. The only institution and procedure required to expedite the implementation of a foreign arbitral award is an administrative procedure for registering the award, as the ratification procedure of the 1958 New York Convention has addressed issues of state sovereignty. A low-cost or even no-cost legal aid is the additional technical institution required to increase MSMEs' capacity to utilize this framework. The government may cover this cost of legal counsel, a trade community institution in collaboration with the government, or an established business.; (b) the need for developing the corporate legal culture. As the Indonesian MSMEs' settlement of dispute culture is the court settlement of dispute culture and does not the ADR or even the ODR legal culture, the state will need an extra effort to shift the corporate settlement of dispute culture from court culture into ODR culture. It will need at least three basic steps: (a) the development of knowledge and understanding of ODR culture, including the work of the ODR Framework; (b) the assistance in managing, controlling, and solving the dispute potency; and (c) assistance at the time the MSMEs facing a dispute. This need may not solely be a response by the government, but the Penta-helix stakeholders, including the

[19] Nia Hoerniasih et all, *Pentahelix Based Entrepreneurship Management at PKBM Asholahiyah*, International Journal of Professional Business Review, Vol. 7, No. 3, https://doi.org/10.26668/businessreview/2022.v7i3.e616, p. 3-4.

universities[20] and business communities. In the sense of the business community, it may cover the MSMEs business community and the mature corporation business community.

The correct response to both needs, including its structure, procedure, and consistency, would significantly increase the likelihood of the APEC ODR Framework performing more effectively.

4 CONCLUSION

Recent assessment models have concentrated primarily on evaluating the internal system of the framework; consequently, future assessment outcomes may not be fully measurable. Some determining components of the external system, such as the state legal culture, including the state legal rules concerning the recognition and execution of foreign arbitral awards, and the MSMEs corporate culture, may also need to be assessed to obtain a more comprehensive assessment result for determining the future effectiveness of the APEC ODR Framework.

The formulation of law and policy scheme for supporting the effective work of the future framework shall directly respond to the two fundamental needs of the external system of the framework: (a) the need for shifting the state legal culture, particularly on recognition and execution of the foreign arbitral award, including the revision of Article 65 to Article 69 of the Indonesian Act on Arbitration and Alternative Dispute Resolution of 1999; and (b) the needs for developing a new corporate governance system. For this shift to be successful, the government would need to take three steps: (a) the development of knowledge and understanding of ODR culture, including the work of the ODR Framework; (b) the assistance in managing, controlling, and resolving dispute potential; and (c) the assistance when MSMEs face a dispute. The complete adoption of the Penta-helix strategy is required to effectuate this shift.

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[20] The Indonesian Universities may also face a problem for participating in the development of ODR culture as they lacks of literation capacity. Muhammad Arvin Wicaksono at all, *Penyelesaian Sengketa Transaksi Online Perdagangan Internasional* (Settlement of Online International Trade Transaction Dispute), Jurnal Kertha Semaya Vol. 10 No. 7 Tahun 2022, p. 1602.

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