TIMOR SEA CONCILIATION: A HARBINGER OF DISPUTE SETTLEMENT UNDER UNCLOS?

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Timor Sea Conciliation:

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1. Introduction

For the peaceful settlement of inter-State disputes, States are obliged to 'seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'.[1] The same obligation is imposed on States in relation to disputes that concern the interpretation or application of the United Nations Convention on the Law of the Sea (UNCLOS) and thereby encompasses a significant range of dispute settlement options relating to ocean use.[2] Across the spectrum, these methods involve changing degrees of third-party involvement and reflect an increasingly legal orientation to the method and outcome of dispute settlement.

Within this spectrum, conciliation anticipates third-party involvement and typically a structured process requiring each disputant to submit views on questions of fact and law to a third party for their consideration. The conciliators will normally produce a report with their findings, but only make recommendations for the parties to facilitate resolution of the dispute. Conciliation may thus produce many of the formalities associated with adjudication or arbitration but different legal consequences in that the views of the third party are not legally binding. This result permits the parties more flexibility in the aftermath of the process, potentially still allowing for non-legal matters to influence the final resolution.

These features of conciliation reflect both its strengths and its weaknesses. Its intermediary status[3] between negotiations at one end and adjudication at the other end of the dispute settlement spectrum allows States to contemplate its inclusion in multilateral treaties as an acceptable form of dispute settlement, but also explains why it is then rarely used. It is an acceptable compromise in the context of treaty negotiations as between States agitating for either negotiations or adjudication. Yet subsequently, when States are in dispute, they either do not wish to engage in the formalities of conciliation, preferring negotiation, or if they are to go to the effort that conciliation requires, may prefer a legally binding outcome for the result of those efforts.

Until very recently, this dynamic associated with conciliation could explain its inclusion but lack of use within UNCLOS, and its dispute settlement regime. UNCLOS is one of the few multilateral treaties that allows for States to resort to arbitration or adjudication for disputes concerning the interpretation or application of the treaty on a compulsory basis. That is, no further consent is required for a State to turn to compulsory procedures entailing binding procedures,[4] provided various preliminary

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[1] *Charter of the United Nations*, Art 33.

[2] *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994), Art 280 ('UNCLOS').

[3] Cot refers to conciliation as a 'half-breed' method of dispute settlement. Jean-Pierre Cot, 'Conciliation', *Max Planck Encyclopedia of Public International Law* (Oxford University Press), para. 3. See also Sienho Yee, 'Conciliation and the 1982 UN Convention on the Law of the Sea' (2013) 44 *Ocean Development and International Law* 315, 316 ('It may offer the flexibility and ultimate control over a dispute that the parties seem to have in a political settlement process as well as the pomp and formality of judicial or arbitral proceedings.').

[4] UNCLOS, Art 286.

requirements are met,[5] and the dispute does not concern a matter that has been excluded either within the text of UNCLOS[6] or at the option of a State party for certain specified disputes.[7] The State parties in dispute may agree to use conciliation under Annex V of UNCLOS,[8] or there are particular instances where States may require engagement in conciliation if arbitration or adjudication is not otherwise available. It is this form of compulsory conciliation that seemed to reflect a useful alternative during the drafting of UNCLOS. Conciliation was an acceptable alternative for dispute settlement where States could not otherwise agree on the availability of arbitration or adjudication because of the perceived sovereign interests at stake.[9] Compulsory conciliation is available in relation to particular marine scientific research disputes,[10] specified fisheries disputes in the Exclusive Economic Zone (EEZ),[11] and potentially for maritime boundary disputes.[12]

The first instance of a State turning to compulsory conciliation under UNCLOS was in 2016 when Timor-Leste instituted conciliation in relation to its maritime boundary dispute with Australia. That process concluded with the release of the Conciliation Commission's Report and Recommendations in May 2018.[13] The use of this mechanism prompts the question as to whether this is a harbinger for resort to conciliation to resolve other outstanding maritime boundary disputes, or indeed for the use of conciliation more generally for other disputes. Or are the circumstances so unique that we cannot expect a flurry of conciliation proceedings in the near future? This paper seeks to explore these questions. In the second section, I provide a brief background to the boundary dispute between Timor-Leste and Australia to indicate how the parties arrived at the conciliation process. Third, I explain the features of conciliation and how it has previously been used in international dispute settlement. In this respect, I assess what dispute settlement techniques had previously been attempted as between Timor-Leste and Australia. Fourth, I examine more particularly the requirements for conciliation under UNCLOS in relation to maritime boundary disputes and how well the dispute between Timor-Leste and Australia met these requirements. Australia unsuccessfully challenged the jurisdiction and competence of the conciliation commission.[14] Fifth, I set out the process and achievements of the conciliation commission in resolving the Timor-Leste / Australia maritime boundary dispute and what is anticipated under UNCLOS in the follow-up to a conciliation of a maritime boundary dispute. Finally, and in light of the preceding discussion, I consider the answer to the central question: is the *Timor-Leste Conciliation* a harbinger for dispute settlement under UNCLOS? A nuanced response is of course essential.

2. Background to Timor-Leste and Australia's Maritime Boundary Dispute

[5] These are set out in Section 1 of Part XV of UNCLOS, and include exchanging views as to the dispute settlement method or utilizing other dispute settlement processes that may be required.
[6] UNCLOS, Art 297.
[7] UNCLOS, Art 298.
[8] UNCLOS, Art 284.
[9] Cot, above n 3, para. 17; Rudiger Wolfrum, 'Conciliation under the UN Convention on the Law of the Sea' in Christian Tomuschat, Riccardo Pisillo Mazzeschi and Daniel Thürer (eds), *Conciliation in International Law: The OSCE Court of Conciliation and Arbitration* (Brill, 2017) 171, 186.
[10] UNCLOS, Art 297(2)(b).
[11] UNCLOS, Art 297(3)b).
[12] UNCLOS, Art 298(1)(a)(i).
[13] *In the Matter of the Maritime Boundary between Timor-Leste and Australia (The "Timor Sea Conciliation"), Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea*, PCA Case No. 2016-10, 9 May 2018, available at: https://pcacases.com/web/sendAttach/2327 (hereinafter *Timor Sea Conciliation - Report*). The name of this matter was reconfigured in this final report as compared to the earlier nomenclature.
[14] *A Conciliation Commission Constituted under Annex V to the 1982 United Nations Convention on the Law of the Sea between the Democratic Republic of Timor-Leste and the Commonwealth of Australia, Decision on Australia's Objections to Competence*, PCA Case No. 2016-10, 19 September 2016, available at http://www.pcacases.com/web/sendAttach/1921 (hereinafter *Timor Sea Conciliation - Competence*).

The maritime boundary between Australia and Timor-Leste has been an issue of concern between the countries since Timor-Leste gained its independence in 2002. Timor-Leste had been a Portuguese colony from the 1500s until the early 1970s. The decolonisation of Timor-Leste was controversial, with some forces within the island seeking independence whereas other groups sought integration with Indonesia.[15] Timor-Leste was administered as a province of Indonesia from 1975 but voted in favour of independence in 1999. A temporary administration was undertaken by the United Nations Transitional Administration in East Timor (UNTAET) until Timor-Leste became a fully independent State in 2002.

From Australia's perspective, there was an interest in resolving the maritime boundary in the Timor Sea that lay between Timor-Leste and Australia as Australia had established continental shelf boundaries with Indonesia on either side of Timor-Leste in 1972,[16] leaving what became known as the 'Timor Gap'.[17] With Indonesia's integration (or invasion) of Timor-Leste, Australia commenced negotiations with Indonesia on the continental shelf maritime boundary,[18] concluding the Timor Gap Treaty in 1989, with its entry into force in 1991.[19] This treaty established a Zone of Cooperation in which Indonesia and Australia were each allocated an area to administer and a central area was placed under joint administration. This arrangement remained largely in place until Timor-Leste's independence.[20]

Australia also negotiated an EEZ boundary with Indonesia throughout the Timor Sea, concluding an agreement in 1997.[21] Unlike the earlier continental shelf treaty, this delimitation generally followed the median line between the two countries. As a consequence, there are areas where Australian rights

[15] There are different accounts of the political dynamics and outside influences within Timor-Leste during 1974-1976. For discussion, see T D Grant, 'East Timor, The U.N. System, and Enforcing Non-Recognition in International Law' (2000) 33 *Vanderbilt Journal of Transnational Law* 273; P Gorjão, 'The End of a Cycle: Australian and Portuguese Foreign Policies and the Fate of East Timor' (2001) 23 *Contemporary Southeast Asia* 101; J Ramos-Horta, 'Self-Determination for East Timor: Implications for the Region' (1997) 51 *Australian Journal of International Affairs* 97. For an Indonesian perspective, see *Facts on East Timor*, House of Representatives of the Republic of Indonesia, 1990; 'East Timor: De-Bunking the Myths Around a Process of Decolonization', Remarks by H.E. Ali Alatas, Minister for Foreign Affairs of Indonesia, before Members of the National Press Club, Washington D.C., 20 February 1992 (on file with author).

[16] *Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, supplementary to the Agreement of 18 May 1971*, 9 October 1972, 974 UNTS 319.

[17] See discussion in Gorjão, above n 17, 108; S B Kaye, 'Australia and East Timor during the Howard Years: An International Law Perspective' (2008) 27 *Australian Year Book of International Law* 69; N Klein, 'Litigation over Marine Resources: Lessons for Law of the Sea, International Dispute Settlement and International Environmental Law' (2009) 28 *Australian Year Book of International Law* 131, 142-143.

[18] Australia gave *de facto* recognition to East Timor being part of Indonesia in 1978 when it was announced the negotiations over the seabed boundary in the Timor Gap would commence; *de jure* recognition followed with the start of formal negotiations in 1979. See *Timor Sea Conciliation – Report*, paras 24-26.

[19] *Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia* (11 December 1989), 1991 ATS 9.

[20] Portugal challenged the validity of the Timor Gap Treaty in proceedings instituted against Australia at the International Court of Justice. *East Timor (Portugal v. Australia)* [1995] ICJ Rep 90. However, the challenge was unsuccessful because the dispute was inadmissible in the absence of Indonesia before the Court. Ibid, para. 28. During UNTAET, Australia had a provisional agreement as to operations in the joint area. See *Exchange of Notes constituting an Agreement between the Government of Australia and the United Nations Transitional Administration in East Timor (UNTAET) concerning the continued Operation of the Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia of 11 December 1989* (10 February 2000), [2000] ATS 9.

[21] *Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries*, 14 March 1997, [1997] Australian Treaties Not in Force 4; 36 ILM 1053.

over the seabed are overlapped by Indonesia's rights to the adjacent water column.[22] This 1997 treaty was never ratified by Indonesia but has been observed in practice by both States.[23]

Following Timor-Leste's independence in 2002, it entered into a series of bilateral agreements with Australia to allow for resource-sharing: the Timor Sea Treaty,[24] the Agreement relating to the Unitisation of the Sunrise and Troubadour Fields,[25] and the Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS Treaty).[26] The Timor Sea Treaty provided for the joint exploration and exploitation of a Joint Petroleum Development Area (JPDA).[27] Under the Timor Sea Treaty, Timor-Leste received 90% of petroleum production whereas Australia was allocated 10%. The Unitisation Agreement specifically addressed the arrangements for the exploitation of two petroleum and gas fields.[28] The CMATS Treaty had two important purposes. The first was to allow for a 50-50 revenue-sharing regime in relation to the Greater Sunrise oil and gas field, which straddled the eastern side of the JPDA and Australia's continental shelf. Second, it established a moratorium in relation to the fixing of a permanent maritime boundary as between the two countries for a period of fifty years, or five years after exploitation of the Greater Sunrise gas field ceased, whichever occurred earlier.[29]

The oil and gas resources said to be at stake in this part of the Timor Sea are valued up to AUD$10 billion.[30] The financial stakes for Timor-Leste are significant, as it is estimated that 90% of its state budget has been derived from offshore revenues from the JPDA.[31] Australia and Timor-Leste made progress on resource development, but differences emerged. One commentator has noted in this regard: 'Timor-Leste favours an export pipeline to its south coast to enable its ambitious petroleum industrialisation plans. In contrast, Australia supported the decision of the licensee consortium, headed by Woodside, that the export pipeline was not the best commercial option'.[32] Further differences arose between Timor-Leste and Australia, which led to Timor-Leste instituting arbitration proceedings against Australia, which are discussed in the following section. For present purposes, it is important to recall the political background between the two States, the legal framework that has been established through the bilateral treaties, and the economic incentives for each side, including the contrasting relevance of those financial implications for each State. These factors inevitably influence the methods and the potential outcomes for dispute settlement in delimiting this maritime boundary.

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[22] *Timor Sea Conciliation – Report,* para. 30.

[23] Ibid.

[24] *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, signed 20 May 2002, 2258 UNTS 3 (entered into force 2 April 2003) ('Timor Sea Treaty').

[25] *Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise Troubadour Fields*, signed 6 March 2003, 2483 UNTS 317 (entered into force 23 February 2007).

[26] *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*, signed 12 January 2006, [2007] ATS 12 (entered into force 23 February 2007) 12 ('CMATS Treaty').

[27] Timor Sea Treaty, Art 3(a).

[28] This agreement placed 20.1% of Greater Sunrise in the JPDA and 79.9% within Australia's jurisdiction. Rebecca Strating, 'What's Behind Timor-Leste terminating its maritime treaty with Australia', *The Conversation*, 10 January 2017, available at http://theconversation.com/whats-behind-timor-leste-terminating-its-maritime-treaty-with-australia-71002 ('Strating, *The Conversation*')

[29] CMATS Treaty, Art 12.

[30] Stephen Tully, 'Timor Gap Conciliation Set to Proceed' (December, 2016) 29 *LSJ: Law Society of NSW Journal*, 76-77. Another estimate places a value of AUD$40 billion on the value of the oil and gas deposit in the Greater Sunrise fields. Strating, *The Conversation*, above n 28..

[31] See Bec Strating, 'Timor-Leste runs the risk of a pyrrhic victory', *The Interpreter*, 11 January 2017, available at https://www.lowyinstitute.org/the-interpreter/timor-leste-runs-risk-pyrrhic-victory ('Strating, *The Interpreter*').

[32] Strating, *The Conversation*, above n 28.

3. Conciliation as a Dispute Settlement Process

Conciliation is a dispute settlement process that allows a third party to assess independently a range of factors and devise possible solutions for the States in dispute. The Institut de droit international defined conciliation as follows:

> …a method for the settlement of international disputes of any nature according to which a Commission set up by the Parties… proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them, or of affording the Parties, with a view to its settlement, such aid as they may have requested.[33]

The key elements of conciliation encapsulated in this definition, which multilateral and regional treaties also reflect,[34] are investigating and clarifying issues in dispute (facts and / or law) and seeking to bring the parties to agreement through recommendations of mutually acceptable solutions.[35] Conciliation as a dispute settlement process emerged from a combination of mediation and commissions of inquiry.[36]

States may initiate conciliation on an agreed basis (voluntary conciliation), or one State may compel the other State to submit to conciliation as required under the dispute settlement procedures laid out in a particular multilateral treaty (compulsory conciliation).[37] The parties will typically each select one or two conciliators, with a neutral chair appointed. The commission, often in consultation with the parties, will decide on its rules of procedure, including the timing and method of work.[38] A treaty that provides for conciliation as the preferred dispute settlement method may define aspects of the competence of the commission as well as procedural requirements.

Conciliation may be an appealing form of dispute settlement to States if they wish to gain a better understanding of each other's position through an objective evaluation of the relevant facts and law.[39] Merrills notes, '[t]he task of the commission is to encourage and structure the parties' dialogue, while providing them with whatever assistance may be necessary to bring it to a successful conclusion'.[40] The outcome of a conciliation may provide a non-judicial assessment of each side's claims and facilitate the parties' efforts to reach an agreed resolution.[41] A conciliation commission may devise creative solutions to the parties' dispute, depending on the latitude provided by those parties in

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[33] Resolution, International Conciliation, 49(II) *Annuaire de l'Institut de droit international* (1961), 386, Article 1, cited in Yee, above n 3, 315. See also 'United Nations Model Rules for the Conciliation of Disputes between States', UN General Assembly Resolution of 11 December 1995, UN Doc. A/RES/50/50.

[34] See eg 1949 Revised Geneva General Act for the Pacific Settlement of International Disputes, which provided in Article 15: 'The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of enquiry or otherwise, and to endeavor to bring the parties to an agreement. It may, after the case has been examined, inform the parties of the terms of settlement which seem suitable to it, and lay down the period within which they are to make their decision.'

[35] See United Nations, *Handbook on the Peaceful Settlement of Disputes* (1992) 47 ('UN Handbook'). See also JG Merrills, *International Dispute Settlement* (5th ed, Cambridge University Press, 2011) 65.

[36] The background to conciliation was noted briefly in the *Timor Sea Conciliation*. See *Timor Sea Conciliation – Report*, note 33.

[37] See discussion on the evolution between voluntary and compulsory conciliation in Cot, above n 3, para. 13-18.

[38] The UN and the PCA have each adopted model rules for conciliation. See 'United Nations Model Rules for the Conciliation of Disputes between States', UN General Assembly Resolution of 11 December 1995, UN Doc. A/RES/50/50; Permanent Court of Arbitration, 'Optional Conciliation Rules', available at https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Permanent-Court-of-Arbitration-Optional-Conciliation-Rules.pdf.

[39] UN Handbook, above n 35, 45.

[40] Merrills, above n 35, 65.

[41] UN Handbook, above n 35, 45.

agreeing to conciliation.[42] Many of these elements were ultimately brought to bear in the *Timor Sea Conciliation*.

States have not used conciliation on many occasions,[43] even though they have agreed to its inclusion in a number of multilateral treaties.[44] Examples of conciliation involving maritime disputes include a dispute between Belize and Guatemala, which had a maritime component, and was conducted under the auspices of the Organization of American States.[45] This conciliation process did not produce a successful outcome, however, and there is now a process in place to refer the matter to the International Court of Justice (ICJ).[46] Most notably, the conciliation between Iceland and Norway in relation to the maritime boundary off Jan Mayen resulted in the parties agreeing to a continental shelf boundary as well as a joint development zone following the recommendations of the commission.[47]

For Australia and Timor-Leste, conciliation was not the first mode of dispute settlement attempted, but their bilateral history reflects a variety of dispute settlement procedures to resolve their differences. They relied on negotiations to reach agreement on each of the key maritime treaties,[48] but these negotiations were not sufficient to lead to an agreement on their maritime boundary.[49] Disputes have arisen in relation to the exploitation of maritime resources and Timor-Leste commenced arbitration pursuant to the Timor Sea Treaty disputing Australia's exclusive right to tax the pipeline to Darwin from the Bayu Undan gas field in the JPDA.[50] More controversial was the revelation in 2012 that Australia had spied on Timor-Leste during the negotiations of the CMATS

[42] Merrills, above n 35, 65.

[43] Merrills has noted approximately 20 conciliations as of 2011. Ibid, 79.

[44] See Cot, above n 3, paras 8-10; Merrills, above n 35, 70-74. Merrills writes: 'When one bears in mind the more than 200 bilateral treaties and the various multilateral instruments with similar provisions, it is clear that conciliation has failed to become the routine procedure that its promoters expected.' Merrills, above n 35, 79-80.

[45] See 'Report on the Situation of the Belize and Guatemala Territorial Dispute: January-October, 2010' available at https://www.oas.org/sap/peacefund/VirtualLibrary/Inter-StateDisputes/Belize-Guatemala/Reports/ReportSitutationBelizeGuatemala.pdf. See also Yee, at 327. The role of the Holy See in mediating a dispute between Argentina and Chile, including a maritime boundary dispute, was functionally similar to conciliation because it involved formal proposals and suggestions being produced for the parties to consider in negotiating a treaty. See 'Argentina—Chile: Negotiation and Conclusion of Border Dispute Agreement' (1985) 24 *International Legal Materials* 1, 1-2.

[46] 'Report on the Situation of the Belize and Guatemala Territorial Dispute: January-October, 2010' available at https://www.oas.org/sap/peacefund/VirtualLibrary/Inter-StateDisputes/Belize-Guatemala/Reports/ReportSitutationBelizeGuatemala.pdf. This outcome had not eventuated at time of writing but is pending a referendum being conducted in Belize. A referendum in Guatemala in April 2018 strongly approved referring the dispute to the ICJ for resolution. 'Guatemala votes to send territory dispute with Belize to ICJ', 16 April 2018, available at http://www.dw.com/en/guatemala-votes-to-send-territory-dispute-with-belize-to-icj/a-43400550.

[47] See Elliott L. Richardson, 'Jan Mayen in Perspective' (1988) 82 *American Journal of Internaitonal Law* 443. See also Yee, above n 3, 327.

[48] See notes 24-26 above.

[49] Anton has noted that there were several failed efforts to agree on a maritime boundary prior to the conclusion of the CMATS Treaty. See Donald A. Anton, 'Compulsory Conciliation of the Long-Running Timor Sea Boundary Dispute between Timor-Leste and Australia' (November 27, 2016) Griffith University Law School Research Paper No. 16-19, available at SSRN: https://ssrn.com/abstract=2876382

[50] *Arbitration under the Timor Sea Treaty Concerning the Meaning of Article 8(B) (Timor-Leste v Australia) (Rules of Procedure)* (Permanent Court of Arbitration, Case No 2015-42, 9 September 2016). See also 'Timor-Leste arbitration', 25 September 2015, available at http://foreignminister.gov.au/releases/Pages/2015/jb_mr_150925.aspx?w=tb1CaGpkPX%2FlS0K%2Bg9ZKEg%3D%3D

Treaty.[51] As a result, Timor-Leste commenced arbitration seeking the nullification of the CMATS Treaty on the basis that it was null and void because of Australia's espionage.[52]

On the eve of arbitration hearings, the Australian Security Intelligence Organisation executed a search warrant at the offices of a lawyer for the Timorese government, and removed documents and data considered intelligence related to security matters.[53] Timor-Leste initiated adjudication against Australia at the ICJ, and sought provisional measures demanding the return of the documents.[54] Australia provided assurances to the Court that the documents would be kept in a secured location and not accessed.[55] The ICJ did not require the return of the documents but ordered that the documents be kept under seal and not be used in any way to the disadvantage of Timor-Leste.[56] Timor-Leste withdrew its claims from the ICJ after Australia returned the documents.[57]

While Timor-Leste and Australia thus have a history of engaging in formal and binding dispute settlement proceedings, the key issue for Timor-Leste has been the permanent maritime boundary and this dispute could not be referred to arbitration or adjudication for two principal reasons. First, under the CMATS Treaty, Article 4 set out a comprehensive moratorium on discussing and settling the maritime boundary in any forum. Second, shortly prior to Timor-Leste's independence, Australia issued declarations modifying its acceptance of the ICJ's jurisdiction under Article 36(2) of the Court's Statute to exclude maritime boundary disputes, including disputes relating to exploitation of contested maritime areas,[58] as well as excluding maritime boundary disputes from compulsory procedures entailing binding procedures under UNCLOS through reliance on Article 298 of UNCLOS.[59] In these circumstances, the only avenue open to Timor-Leste to utilise a third party for delimiting the maritime boundary in the Timor Sea was compulsory conciliation under UNCLOS. By resorting to conciliation, Timor-Leste was able to compel Australia to change its position on leaving the permanent maritime boundary in abeyance.[60]

4. Conciliation of Maritime Boundary Disputes under UNCLOS

Article 298(1)(a) of UNCLOS anticipates that parties that have excluded maritime boundary disputes from compulsory procedures entailing binding decisions are to resort to conciliation instead. Conciliation is compulsory in this situation inasmuch as a party to UNCLOS may institute conciliation proceedings against another party that has issued a declaration under Article 298(1)(a) without any

[51] For discussion, see Donald K. Anton, 'The Timor Sea Treaty Arbitration: Timor-Leste Challenges Australian Espionage and Seizure of Documents' *ASIL Insight,* 26 February 2014, available at https://www.asil.org/insights/volume/18/issue/6/timor-sea-treaty-arbitration-timor-leste-challenges-australian-espionage.

[52] *Arbitration under the Timor Sea Treaty (Timor-Leste v Australia) (Procedural Order No 1)* (Permanent Court of Arbitration, Case No 2013-16, 6 December 2013) 1.

[53] Tom Allard, 'ASIO Raids Office of Lawyer Bernard Collaery over East Timor Spy Claim, *Sydney Morning Herald*, 3 March 2012, available at: http://www.smh.com.au/federal-politics/political-news/asio-raids-office-of-lawyer-bernard-collaery-over-east-timor-spy-claim-20131203-2yoxq.html.

[54] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) (Provisional Measures)* [2014] ICJ Rep 147.

[55] Ibid, para. 50.

[56] Ibid, para. 55.

[57] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) (Order of 11 June 2015)*, International Court of Justice, General List No 156, 11 June 2015.

[58] See 'Declarations recognizing the jurisdiction of the Court as compulsory: Australia (22 March 2002)', available at http://www.icj-cij.org/en/declarations/au.

[59] *United Nations Convention on the Law of the Sea* (10 June 2017) United Nations Treaty Collection <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en> ('*UN Treaty Collection, Status of UNCLOS*').

[60] See Strating, *The Interpreter*, above n 31 (noting that the threat to withdraw from the CMATS Treaty also compelled this position).

further act of consent. There are still limitations to the availability of this process and these are examined in the first section below. The *Timor Sea Conciliation* Commission was unanimous in its determination in favour of its competence despite the agreement set out in the CMATS Treaty that *prima facie* excluded resort to any third-party resolution of the maritime boundary.

Annex V of UNCLOS sets out details on the conciliation procedure, including on the constitution of the conciliation commission and allowing the commission to determine its own procedure.[61] The functions of the commission are to 'hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement'.[62] The procedure is to run relatively quickly,[63] with the commission to issue a report within 12 months of its constitution.[64] The report is to 'record any agreements reached and, failing agreement, its conclusion on all questions of fact or law relevant to the matter in dispute', as well as any recommendations considered appropriate for an amicable settlement.[65] These elements of the *Timor Sea Conciliation* are explored in the second section below. The Report provides detailed insights into the conciliation procedure and the approach of the Commission in bringing about the resolution of this dispute.

a. Competence to Undertake the Conciliation

In the context of compulsory conciliation under Article 298(1)(a), there are a number of preconditions that must be satisfied for the proceedings to occur. If the parties disagree as to the competence of the conciliation commission, the commission is to resolve this question.[66] The conditions to be met for compulsory conciliation in relation to a maritime boundary dispute include that the dispute has arisen subsequent to the entry into force of UNCLOS; no agreement is reached in negotiations within a reasonable period of time; the dispute does not involve the concurrent consideration of unsettled territorial disputes.[67] Further, compulsory conciliation is not available for 'any sea boundary dispute finally settlement by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties'.[68] Finally, the provisions set out in Section 1 of Part XV still bind State parties as a general matter,[69] and States are therefore obliged to utilise alternative dispute settlement procedures as stipulated in Articles 281 and 282 where the requirements of those provisions are met, as well as required to exchange views in accordance with Article 283.[70] Australia argued that Timor-Leste had not satisfied several of these

[61] UNCLOS Annex V, Arts 3 and 4, which apply to compulsory conciliation by virtue of UNCLOS Annex V, Art 14.
[62] UNCLOS Annex V, Art 6. Under Article 5 of Annex V, the commission 'may draw the attention of the parties to any measures which might facilitate an amicable settlement of the dispute'.
[63] The timing is relative to the length of time that may be typically taken for an arbitration or adjudication, which usually span several years. By contrast, Yee considers the 12-month timeframe as 'lengthy' but attributes this timing to the 'complexity of law of the sea disputes'. Yee, above n 3, 320.
[64] UNCLOS Annex V, Art 7(1).
[65] UNCLOS Annex V, Art 7(1).
[66] UNCLOS Annex V Art 13.
[67] UNCLOS, Art 298(1)(a)(i).
[68] UNCLOS, Art 298(1)(a)(iii).
[69] It could be argued that compulsory conciliation under Section 3 of Part XV is not subject to the requirements of Section 1 on the basis that Article 286 only refers to the requirements in Section 1 being met for the purposes of pursuing compulsory proceedings under Section 2 (that is, arbitration or adjudication). However, as Section 1 is entitled 'General Provisions', the better understanding would be that Section 1 of Part XV obligations apply as a general matter, without Article 286 limiting its application. The Commission considered that Section 3's reference to Section 2 ('Limitations and Exceptions to the Applicability of Section 2') and the reference to Section 1 in Article 286, which is in Section 2, also resulted in the obligations of Section 1 being applicable to any proceedings arising under Section 3. See *Timor Sea Conciliation - Competence*, para. 46. In any event, Article 281 refers to the procedures provided for in Part XV and would also thus constitute a limitation to compulsory conciliation under Section 3 of Part XV. See *Timor Sea Conciliation - Competence*, para. 50.
[70] Wolfrum, above n 9, 184.

requirements and that the conciliation commission therefore lacked jurisdiction and the matter was inadmissible. The Commission considered that doubts on competence were to be promptly resolved and to do so was essential for 'establishing trust for successful discussions with the Parties'.[71]

In challenging the competence of the Commission, Australia submitted that the dispute had in fact arisen prior to the entry into force of UNCLOS for the parties. Australia argued that as Timor-Leste did not become a party to UNCLOS until 2013, UNCLOS only entered into force as between Australia and Timor-Leste at that time. By then, the dispute concerning the maritime boundary in the Timor Sea had already crystallised as between the parties. The Commission considered that the relevant date was the entry into force of UNCLOS more generally, which was 1994, as the 'ordinary meaning of the unqualified phrase'.[72] Any presumption in favour of the non-retroactivity of treaties that would normally have operated was seemingly over-ridden in light of the perceived plain meaning of the phrase.[73]

There are two important consequences as a result of the Commission's decision on this point. First, setting the date at 1994 will mean any new State, such as Timor-Leste, or perhaps Palestine, coming into existence subsequent to that date and only acceding to UNCLOS after 1994 will also be more likely to have disputes that emerged after 1994. There is thus a greater potential for relatively more recent maritime boundary disputes to be addressed through the compulsory conciliation process among these new States. Second, where States did not formally declare their EEZ until after UNCLOS entered into force,[74] as the EEZ was formally a creation of UNCLOS, it is more likely that a maritime boundary dispute relating to overlapping EEZs could be subjected to compulsory conciliation as compared to continental shelf disputes. States' rights to continental shelves were already recognized prior to the UNCLOS negotiations and it is therefore more likely that disputes as to overlapping entitlements to continental shelves would have emerged at an earlier date. It may still be the case, however, that disputes relating to overlapping continental shelves only emerged with the change in definition to the breadth of the continental shelf under UNCLOS. Arguably, on this approach overlapping entitlements to outer continental shelves could fall within compulsory conciliation without a bar caused by the entry into force dates.

In relation to other barriers to compulsory conciliation, Australia could not rely on the precondition to compulsory conciliation that the dispute concerned a 'sea boundary dispute finally settled by an arrangement', as the Timor Sea Treaty explicitly references the arrangement as falling within Article 83(3) of UNCLOS, as a 'provisional arrangement[] of a practical nature pending agreement on the final delimitation'.[75] It must, though, be generally expected that States that have concluded agreements incorporating provisional arrangements pending the delimitation of their maritime boundaries could not rely on this provision to preclude resort to compulsory conciliation. The provision would rather be directed at preventing States from re-opening maritime boundary agreements or arrangements that were already in place. This policy would be consistent with the temporal limitation concerning the entry into force of UNCLOS, which is also underlined by a desire not to jeopardise pre-existing maritime boundary agreements. A preference for stability and continuity in maritime boundaries is discernible from this provision and from the requirements limiting third-party engagement enshrined therein.

[71] *Timor-Leste Conciliation – Report*, para. 66.
[72] *Timor-Leste Conciliation – Competence*, para. 74.
[73] Ibid, para. 76.
[74] States may well have declared extended fisheries zones or the like prior to the adoption of UNCLOS given the customary law status of the EEZ. It would be a case-by-case assessment to determine when a State adopted legislation claiming an EEZ consistent with UNCLOS and whether that was before or after 1994.
[75] Timor Sea Treaty, Art 2.

Australia did dispute whether another precondition to conciliation was met, arguing that the parties had not negotiated for a reasonable period of time prior to the institution of the conciliation, and the requirement could not in any event be fulfilled because of the requirements of Article 4 of the CMATS Treaty.[76] The Commission noted that there is no express requirement for negotiations but rather that no agreement is reached within a reasonable period of time in the event that there are negotiations.[77] As a question of fact, the parties did undertake negotiations between 2003 and 2006, prior to the adoption of the CMATS Treaty.[78] Those discussions may have produced the CMATS Treaty, but they did not produce an agreement on the actual sea boundary delimitation. Moreover, Timor-Leste had attempted to raise the question of the boundary with Australia subsequent to the adoption of the CMATS Treaty, which the Commission considered to be permissible in light of various provisions within that Treaty.[79] Consequently, no agreement was reached in negotiations within a reasonable period of time as to the interpretation or application of Articles 74 and 83 of UNCLOS, which concern delimitation of overlapping EEZs and continental shelves, respectively.[80]

A central argument for Australia was the effect that the CMATS Treaty would have on any third-party consideration of the maritime boundary in the Timor Sea. In particular, the parties agreed in Article 4 of CMATS:

> 1. Neither Australia nor Timor-Leste shall assert, pursue or further by any means in relation to the other party its claims to sovereign rights and jurisdiction and maritime boundaries for the period of this Treaty.
>
> …
>
> 4. Notwithstanding any other bilateral or multilateral agreement binding on the Parties, or any declaration made by either Party pursuant to any such agreement, neither Party shall commence or pursue any proceedings against the other Party before any court, tribunal or other dispute settlement mechanism that would raise or result in, either directly or indirectly, issues or findings of relevance to maritime boundaries or delimitation in the Timor Sea.
>
> 5. Any court, tribunal or other dispute settlement body hearing proceedings involving the Parties shall not consider, make comment on, nor make findings that would raise or result in, either directly or indirectly, issues or findings of relevance to maritime boundaries or delimitation in the Timor Sea. Any such comment or finding shall be of no effect, and shall not be relied upon, or cited, by the Parties at any time.

In addition to the moratorium established under Article 4, a separate article addressed dispute settlement. In this regard, Article 11 of the CMATS Treaty provided: 'Any disputes about the interpretation or application of this Treaty shall be settled by consultation or negotiation.' The agreement in the CMATS Treaty thus reflected a firm decision by the parties that the maritime boundary would not be subject to discussion or review by third parties and that the parties would directly settle any dispute through consultations or negotiations. In instituting compulsory conciliation, Timor-Leste could be seen as acting in violation of these commitments.

In its challenge to jurisdiction, Australia submitted that both a 2003 Exchange of Letters and the CMATS Treaty triggered the operation of Article 281(1), which provides:

[76] *Timor Sea Conciliation – Competence*, para. 77.
[77] Ibid, para. 78.
[78] Ibid, para. 79.
[79] Ibid, para. 81.
[80] Ibid, para. 82.

> If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

The Commission determined that the Exchange of Letters did not engage Article 281 because the latter provision only anticipated a relevant role for binding, rather than non-binding, agreements.[81] Further, the Commission considered whether the CMATS Treaty constituted an agreement under Article 281 'to seek settlement of the dispute by a peaceful means of their own choice'.[82] The Commission characterized the CMATS Treaty as 'an agreement *not* to seek settlement of the Parties' dispute over maritime boundaries for the duration of the moratorium'.[83] As such, an agreement not to pursue dispute settlement for the stated period of time, according to the Commission, was not a dispute settlement means of the parties own choice. There is no explanation as to why a bilateral agreement choosing very explicitly to resolve the maritime boundary dispute at a later point in time was not a valid choice of dispute settlement for the purposes of Article 281.[84] It should have been accepted as such. Nor was there any discussion of the dispute settlement choice that the parties had instead selected in Article 11 of the CMATS Treaty.

Arguably, the CMATS Treaty also constituted a binding bilateral agreement that settled the dispute in accordance with the terms of that agreement. The CMATS Treaty thus fell within the terms of Article 298(1)(a)(iii) as well, even if Timor-Leste was no longer happy with the terms of the particular binding bilateral agreement. On the information available, Australia does not seem to have pursued this argument and the Commission therefore did not address the question. Nonetheless, if 'the dispute' was to be understood as only the maritime boundary delimitation rather than the management and exploitation of the maritime resources then the CMATS Treaty would not have met this requirement because it did not definitively set out the maritime boundary. Again, the Commission would have been unlikely to countenance the view that an agreement to delimit the boundary at a later point in time 'settled' the dispute.

A consequence of the Commission's decision that it had jurisdiction was that the engagement of the parties in the conciliation process under UNCLOS seemingly placed them in violation of commitments under the CMATS Treaty.[85] Timor-Leste argued that Article 4(4) of CMATS was not applicable because UNCLOS conciliation could not be viewed as a 'dispute settlement mechanism' as it cannot settle the dispute.[86] If conciliation cannot settle a dispute then what is its point? In any event, the Commission was of the view that this international law violation had to be addressed elsewhere,[87] as it did not fall to the Commission to consider or decide.[88] Australia's objections to competence based on a 'clean hands' argument were thereby rejected.[89] Instead, Timor-Leste opted to withdraw from the CMATS Treaty and the parties reached agreement on the resulting arrangements as a consequence of the

[81] Ibid, para. 56.
[82] Ibid, para. 61.
[83] Ibid, para. 62 (emphasis in original).
[84] See Natalie Klein, 'The Vicissitudes of Dispute Settlement under the Law of the Sea Convention' (2017) 32 *International Journal of Marine and Coastal Law* 332, 340. See also Peter Tzeng, 'The Peaceful Non-Settlement of Disputes: Article 4 of CMATS in Timor-Leste v. Australia' (2017) 18 *Melbourne Journal of International Law* 349, 363.
[85] Timor-Leste disputed such an assertion by Australia. *Timor Sea Conciliation – Competence*, para. 87.
[86] Ibid, para. 23.
[87] Ibid, para. 92.
[88] Ibid, para. 91.
[89] See ibid, paras 90-92. See also discussion in Tzeng, above n 84, 367-368.

termination of that treaty.[90] This step was necessary as Australia seemingly considered itself limited in its ability to negotiate a maritime boundary while the CMATS Treaty was in operation.[91]

The Decision on Competence by the Commission is consistent with an ongoing trend in case law under UNCLOS to adopt an expansive approach to jurisdiction and admissibility.[92] In each instance, the Commission opted for an interpretation that would permit, rather than limit, the exercise of its competence. In this regard, it may be argued that the Commission has situated its jurisprudence within a broader body of judicial interpretations of UNCLOS. While the treatment of the CMATS Treaty remains questionable,[93] this approach is appropriate to the extent it promotes coherency in what may be perceived as a growing body of 'UNCLOS law', which should in turn promote stability in the legal order of the oceans. Moreover, a conciliation commission must decide on its competence under Article 13 of Annex V of UNCLOS and this decision is binding, unlike the recommendations that are produced in the Commission's report addressing the maritime boundary delimitation.

It is notable that the Commission also resolved a question on the scope of its competence in light of submissions by Timor-Leste that sought the Commission's consideration not only of the sea boundary but also of transitional arrangements.[94] The Commission endorsed Timor-Leste's position on the basis that Articles 74 and 83 both address provisional arrangements of a practical nature and so its work would not have to be restricted to the delimitation itself.[95] Ultimately, the Commission's work proceeded well beyond the maritime boundary in the Timor Sea itself, and also addressed a special regime for the development, exploitation and management of Greater Sunrise.[96]

b. The Conciliation Process between Timor-Leste and Australia

Despite the one-year timeframe envisaged in Annex V of UNCLOS for compulsory conciliation, the Commission's work lasted two years, from the time Timor-Leste instituted proceedings in April 2016 until the issuance of its report in May 2018. The Commission noted that the one-year period served the purpose of motivating the parties and providing a firm endpoint if the process did not progress.[97] However, in the *Timor Sea Conciliation*, the parties were willing to extend the mandate of the Commission so as to reach a complete settlement in light of the progress that was made throughout the time period.[98]

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[90] See Permanent Court of Arbitration, 'Joint Statement by the Governments of Timor-Leste and Australia and the Conciliation Commission constituted pursuant to Annex V of the United Nations Convention on the Law of the Sea' (24 January 2017) ('Joint Statement of January 24'). See also *Timor Sea Conciliation – Report*, paras. 95-109 (outlining the steps taken by the Commission and each of the parties to reach this point).

[91] See *Timor Sea Conciliation – Report*, para. 95 (requiring Australia to confirm its obligation to negotiate without the operation of Article 4(5) of the CMATS Treaty in place); ibid, para. 99 (referring to Australia having the necessary mandate to negotiate the permanent maritime boundary).

[92] See generally Klein, 'Vicissitudes', above n 84; Stephan Talmon, 'The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals' (2016) 65 *International and Comparative Law Quarterly* 927.

[93] Although it can be acknowledged that even if the CMATS Treaty had prevented the conciliation from proceeding, Timor-Leste could still have moved to terminate the treaty and then reinstitute the conciliation process.

[94] *Timor Sea Conciliation – Competence*, para. 93.

[95] Ibid, para. 97.

[96] Both elements were part of the 'comprehensive package of measures' agreed between the parties on 30 August 2017. *Timor Sea Conciliation – Report*, para. 3.

[97] '[T]he Commission considers that the 12-month period set out in Annex V should be understood not as the timeframe in which a successful conciliation can likely be concluded, but rather as a safeguard to ensure than an unproductive conciliation is not unduly prolonged.' Ibid, para. 68.

[98] Ibid, para. 4. See also ibid, para. 146.

The Commission initially held several meetings with Timor-Leste and Australia, which were described as 'part of an ongoing, structured dialogue in the context of conciliation'.[99] The process thus appeared to comprise of the formalities of a conciliation but also a mediation, where a third party directs and / or manages the negotiations between the parties.[100] Such an active role may be contemplated by virtue of the Commission's authority to 'draw the attention of the parties to any measures which might facilitate an amicable settlement of the dispute',[101] and was a role fully embraced by the Commission.[102] The Commission considered this broad authority anticipated in Annex V of UNCLOS to be 'emblematic of the flexible pragmatism that lies at the heart of conciliation'.[103]

The Report notes that the Commission frequently met with the Parties separately,[104] and those meetings extended to different levels of government.[105] Further, the full membership of the Commission was not required at every meeting, but a delegation or the Chair could meet with the parties and report back.[106] Other hallmarks of the process was the emphasis on confidentiality,[107] as well as a number of steps taken to preserve the legal position of each State so that they would not be prejudiced in the event the conciliation did not resolve the dispute.[108]

In the context of the conciliation proceedings, the parties first agreed on a package of confidence-building measures.[109] The Commission considered such steps as vital to remove obstacles to progress and to enhance trust between the parties.[110] These measures included Timor-Leste's withdrawal of its claims in the two arbitrations commenced under the Timor Sea Treaty,[111] and its termination of the CMATS Treaty, with agreement between the parties on the legal consequences as a result of that termination for the stakeholders involved.[112]

On 1 September 2017, the Commission issued a press release stating:

> Through a series of confidential meetings with the Conciliation Commission in Copenhagen this past week, Timor-Leste and Australia have reached agreement on the central elements of a maritime boundary delimitation between them in the Timor Sea. The Parties'

[99] Joint Statement of January 24, above n 90. In commencing its work, the Commission identified its objectives as: '(a) to map out and understand the Parties' objectives and interests, as well as their formal positions; (b) to manage the process for all stakeholders in the Timor Sea…; (c) to provide for a suitable interim arrangement…' and (d) to advance a proposal capable of achieving agreement… on all elements of their dispute….' *Timor Sea Conciliation – Report*, para. 90.

[100] 'Mediation is a method of peaceful settlement of an international dispute where a third party intervenes to reconcile the claims of the contending parties and to advance his own proposals aimed at a mutually acceptable compromise solution.' UN Handbook, above n 35, 40.

[101] UNCLOS Annex V, Art 5. See also Yee, above n 3, 320; Wolfrum, above n 9, 185.

[102] *Timor Sea Conciliation – Report*, paras 62-63.

[103] Ibid, para. 62.

[104] 'In practice, most of the Commission's meetings with the Parties were held separately, and the Commission considers that its most important discussions with each Party would not have occurred in a joint setting.' Ibid, para. 57.

[105] See, eg, Ibid, para. 152 (referring to meetings with Timor-Leste leaders); ibid para. 286 (referring to 'sustained, informal contacts with the Parties' representatives and counsel at a variety of different levels').

[106] Ibid, para. 58.

[107] See ibid, para. 60.

[108] See ibid, para. 59 (describing the mechanisms put in place in this regard).

[109] Joint Statement of January 24, above n 90.

[110] *Timor Sea Conciliation – Report*, para. 95.

[111] Ibid (noting letter written on 20 January, 2017).

[112] Ibid; 'Joint Statement by the Governments of Timor-Leste and Australia and the Conciliation Commission Constituted Pursuant to Annex V of the United Nations Convention on the Law of the Sea', 9 January 2017, available at https://foreignminister.gov.au/releases/Pages/2017/jb_mr_170109.aspx ('Joint Statement of January 9).

> agreement constitutes a package and, in addition to boundaries, addresses the legal status of the Greater Sunrise gas field, the establishment of a Special Regime for Greater Sunrise, a pathway to the development of the resource, and the sharing of the resulting revenue.[113]

To reach agreement on the maritime boundary in the Timor Sea, the Commission had to consider how to move the parties beyond positions considered 'diametrically opposed' and to which the parties were 'already strongly committed'.[114] For Australia, this position appeared to be adherence to the use of natural prolongation to determine the continental shelf boundary and that a single maritime boundary was not required or preferred,[115] whereas Timor-Leste insisted on the use of the median line without adjustment for relevant circumstances.[116] Although the Commission's Report notes that a wide range of issues associated with maritime boundary delimitation was explored,[117] the Commission did not consider it 'beneficial … to express a definite opinion on certain issues of the law … on which the Parties had divergent—and deeply held—views'.[118]

Particularly contentious was the location of the eastern seabed boundary, because of the location of the Greater Sunrise gas field. If this gas field did not fall within the exclusive jurisdiction of one State,[119] at play were the legal status of the seabed within any special regime established for that area, the allocation of revenue and broader economic benefits to be accrued as a result of the development of the resource.[120] The Commission proposed a Non-Paper for discussion that anticipated a comprehensive agreement of a single maritime boundary with a shared regime for Greater Sunrise and agreement on the development of the resource.[121] This paper was 'intended to – and did – provoke strong reactions from both Parties'.[122] In doing so, the Commission was able to indicate that it did not accept the core position of either Australia or Timor-Leste and that dividing Greater Sunrise so neither party had exclusive control over it was potentially equitable and consistent with UNCLOS.[123]

The Commission was thus able to focus the parties' attention on the arrangements for a resource governance regime in relation to Greater Sunrise.[124] As part of the revenue sharing arrangements, 'the shares of upstream revenue allocated to each of the Parties will differ depending on downstream benefits associated with the different development concepts for the Greater Sunrise gas field'.[125] This arrangement was necessitated because of ongoing disagreement as to where the LNG plant for the field was located,[126] and differing economic analyses of the benefits from developing Greater

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[113] 'Timor-Leste and Australia Achieve Breakthrough in Maritime Boundary Conciliation Proceedings', Press Release, 1 September 2017, https://pcacases.com/web/sendAttach/2230 ('1 September 2017 Press Release').
[114] *Timor Sea Conciliation – Report*, para. 119.
[115] Ibid, para. 234-235.
[116] Ibid, para. 231-233.
[117] Ibid, para. 236.
[118] Ibid, para. 237.
[119] As Timor-Leste had advocated for in the competence hearing. See 'Presentation for Timor-Leste's Opening Statement', 29 August 2016, TL-21, *Timor Sea Conciliation,* available at https://pcacases.com/web/sendAttach/1887. Also, the Commission moved the parties away from a position of thinking either would be fully entitled to this area. See *Timor Sea Conciliation – Report*, paras 239-240.
[120] *Timor Sea Conciliation – Report*,, para. 145.
[121] Ibid, para. 124. The Commission Non-Paper is Annex 19 to the Report.
[122] Ibid, para. 237.
[123] Ibid, para. 240.
[124] See ibid, para. 241.
[125] 'Timor-Leste and Australia continue engagement with Greater Sunrise Joint Venture and agree timeframe for signature of maritime boundary treaty', Press Release, 26 December 2017, available at https://pca-cpa.org/wp-content/uploads/sites/175/2017/12/20171226-Press-Release-No-12-EN.pdf ('26 December 2017 Press Release').
[126] See eg *Timor Sea Conciliation – Report*, para. 198-200 (outlining the topics of discussion with the Greater Sunrise Joint Venture).

Sunrise.[127] The parties subsequently undertook discussions with the Greater Sunrise Joint Venture (the current license holder) and also prevailed upon the Commission to engage directly with both parties and the Joint Venture to resolve 'certain outstanding matters'.[128] The Commission appointed an independent expert in oil and gas development planning to facilitate a decision on the development concept.[129] The development concept was not finally resolved at the time the Commission issued its Report, but it included a paper on 'Comparative Development Benefits of Timor LNG and Darwin LNG', as well as 'a condensed analysis of the comparative economics of the two concepts'.[130]

The Report reflects the Commission's high level of engagement in producing papers for discussion, reviewing materials from Australia and Timor-Leste, the varied and creative means undertaken to narrow issues of ongoing disagreement, as well as a variety of meetings to encourage flexibility and find common ground between the parties. The impression created is of an extremely active and politically sensitive undertaking by the Commission, well beyond the formal process that might have been put in place as part of a conciliation as a slightly modified form of litigation with detailed findings of a non-binding nature for the parties to use in their own bilateral negotiations. Many dimensions of the process in the *Timor Sea Conciliation* are resonant with the mediation and commission of inquiry roots identified by the Commission.[131]

The Report and Recommendations of the Commission were ultimately issued after the signing of the maritime boundary treaty. This approach was consistent with Article 7 of Annex V whereby the report is to 'record any agreements reached and, failing agreement, its conclusions on all questions of fact or law relevant to the matter in dispute and such recommendations as the commission may deem appropriate for an amicable settlement'. In light of the progress of the parties in reaching agreement on the maritime boundary and continuing discussions on a development plan, the Report was able to capture both elements. In this regard, the Report serves more as a record of, and reflection on, the process. It noted, 'the Commission considers that the purpose of this Report is to provide background and context to the process through which the Parties' agreement was reached'.[132]

The Commission was required to transmit the report to the UN Secretary-General in accordance with Annex V of UNCLOS.[133] There is no explicit requirement within UNCLOS that the report is made public.[134] In the *Timor Sea Conciliation*, the absence of such an express requirement allowed the Commission to defer a decision on whether its report would be public at the point that the Rules of Procedure were adopted.[135] Instead, this was agreed with Australia and Timor-Leste during the course of the proceedings.[136]

5. Expected Outcomes for Conciliation of Maritime Boundary Disputes under UNCLOS

In the context of the *Timor Sea Conciliation,* the conciliation process did not just draw a maritime boundary but resulted in initial confidence-building measures, a 'comprehensive package' that included an action plan for the development of the Greater Sunrise gas field and produced a signed

[127] Ibid, para. 248-252.
[128] 26 December 2017 Press Release, above n 125. See also *Timor Sea Conciliation – Report*, para. 201.
[129] *Timor Sea Conciliation – Report*, para. 202.
[130] Ibid, para. 216. These are included in Annex 28 to the Report. The Commission also proposed framework agreements for the parties, but these were not included in the published Report. Ibid.
[131] See above n 36.
[132] *Timor Sea Conciliation – Report*, para. 6. The Commission also noted the benefits for the wider audience of the report, in relation to the peoples of Timor-Leste and Australia as well as their governments. Ibid.
[133] UNCLOS Annex V, Art 7(1).
[134] Confidentiality is typically assumed for optional conciliation, but the multilateral interest in compulsory conciliation under a treaty may augur in favour of publication. See Cot, above n 3, paras 32-33.
[135] *Timor Sea Conciliation – Report*, para. 61. The Rules of Procedure contemplated the issuance of supplemental reports where those might be confidential for each side, in addition to an official report. Ibid.
[136] Ibid.

agreement between Timor-Leste and Australia delimiting the maritime boundary. The engagement of the Commission thus produced a draft boundary agreement as well as key elements of the joint exploitation regime for Greater Sunrise.

The parties signed the Treaty on Maritime Boundaries at the United Nations on 6 March 2018. The boundary had to account for issues relating to endpoints of maritime boundaries with Indonesia and their placement once the Greater Sunrise resource was depleted. The resulting boundary is complicated given its tailoring for the economic interests of each party and the position of Indonesia. The features of the maritime boundary include:

- A single maritime boundary to the south that mostly, but does not entirely, follow the median line;
- A continental shelf boundary in the west that allocates particular oil fields to each party;
- A continental shelf boundary in the east, which ultimately runs through Greater Sunrise and meets the 1972 Seabed Boundary;
- Provisional endpoints for the eastern and western boundaries subject to adjustment upon depletion of resources and the conclusion of a continental shelf boundary between Timor-Leste and Indonesia.[137]

[Possible to include the map?]

The key elements agreed through the conciliation process for the Greater Sunrise regime include:

- Joint rights as coastal States pursuant to Article 77 of UNCLOS;
- Upstream revenue divided depending on the development of the field through a Timorese or Darwin (Australian) location;
- For resources in what was previously the JPDA and now within Timor-Leste's jurisdiction, all future revenue would go to Timor-Leste but the governance and regulatory arrangements in place would remain (an implication of this arrangement being that Australia did not have to compensate Timor for revenue it had previously received from the JPDA).[138]

These matters were agreed between the parties and reflected in the Report as well as in the Treaty on Maritime Boundaries. The only recommendation included in the Report was 'that the Parties continue their discussions regarding the development of Greater Sunrise with a view to reaching agreement on a concept for the development of the resource'.[139] In doing so, the work of the Commission was completed with only this matter left to be resolved between the parties on a bilateral basis.

A success of the *Timor Sea Conciliation* has been that a maritime boundary treaty was concluded in the context of the process. Otherwise, the Commission might have proceeded to issue a report with recommendations to be used in direct negotiations between the parties. This latter structure is anticipated under UNCLOS, which provides that the report adopted by the conciliation commission is non-binding, and the parties are to negotiate in good faith based on that report.[140] This requirement normally returns the parties to the substantive obligations found under Articles 74 and 83 of UNCLOS to the extent their maritime boundary concerns overlapping entitlements to the EEZ and continental shelf. The parties' obligations in this setting are limited to negotiating in good faith, but no actual obligation to agree to a maritime boundary.

In terms of any further dispute settlement procedure if the parties' negotiations based on the conciliation report are unsuccessful, the parties are to resort to one of the other available procedures

[137] Ibid, para. 261-264.
[138] Ibid, para. 265-266.
[139] Ibid, para. 306.
[140] UNCLOS, Art 298(1)(a)(ii).

for a binding decision, but must do so 'by mutual consent'.[141] The difficulty with this provision is that there appears to be a mandatory obligation to resort to binding procedures, but this obligation is negated by the need for 'mutual consent'. There will no doubt be jurisdictional arguments in the future on this difficult provision but the intention to respect a party's preference not to resolve maritime boundary disputes relating to Articles 15, 74 and 83 through adjudication or arbitration – as the key purpose of Article 298(1)(a) – should be considered as reinforced by reference to 'mutual consent'. That is, a State must still consent post-conciliation for the maritime boundary dispute to be resolved through arbitration or adjudication.[142] Moreover, UNCLOS anticipates the maritime boundaries may not be resolved for a period of time through the obligations imposed in relation to provisional arrangements under Articles 74(3) and 83(3).[143] As the maritime boundary between Australia and Timor-Leste is now established by treaty and the commission extended its mandate at the request of the parties to deal with the development and exploitation of the area, it would seem that any remaining dispute over the outstanding issue of the development concept falls beyond the scope of this subsequent procedure anticipated under Article 298(1)(a).

The prospect of not resolving a permanent maritime boundary, and the ongoing instability that may consequently arise, may prove dissuasive for States in engaging in conciliation in the first instance.[144] When this outcome is coupled with the assortment of hurdles that must be met for conciliation to proceed, the disincentives for conciliation may outweigh the benefits. The next part therefore considers in what circumstances conciliation of maritime boundary disputes under UNCLOS may prove successful and whether such proceedings might be anticipated on an increasing basis in the future.

6. A Harbinger for Resolving Maritime Boundary Disputes?

The *Timor Sea Conciliation* serves as a strong reminder to States that a formal third-party process for the resolution of maritime boundaries exists under UNCLOS even if a declaration under Article 298 excludes arbitration or adjudication. The multifaceted issues addressed in the *Timor Sea Conciliation* beyond the delimitation of the actual maritime boundary indicates that a maritime boundary conciliation under UNCLOS may resemble more closely a mediation. Consequently, it may be quite removed from the formalities that have more typically been expected in a conciliation, which would have placed it closer to an arbitration or adjudication albeit with a non-binding outcome. This more interactive, facilitative approach as between the Commission and the parties may signal a distinct mode of dispute settlement for maritime boundary disputes that sits more centrally along a spectrum between negotiations and litigation rather than veering more towards the latter. Yee has noted that the very existence of a conciliation process being available 'may help to deter provocative behaviour on the part of states that are bent on pushing the limits of acceptable conduct'.[145] It remains to be seen whether this active approach to conciliation is welcomed or feared by other States.

Nonetheless, the value of this mechanism as a deterrent or modifier of State conduct is diminished when recalling the many limits relating to its availability. It must be recalled that States with

[141] UNCLOS, Art 298(1)(a)(ii).

[142] Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005) 260; Yee, above n 3, 321.

[143] Article 74(3) provides: Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation'. The same obligations are found in relation to the continental shelf in Article 83(3).

[144] See Ryan Cable, 'In Search of Permanent Maritime Boundaries: Timor-Leste Commences First Ever Compulsory Conciliation under UNCLOS' *Kluwer Arbitration Blog*, 4 October 2016, available at http://arbitrationblog.kluwerarbitration.com/2016/10/04/in-search-of-permanent-maritime-boundaries-timor-leste-commences-first-ever-compulsory-conciliation-under-unclos-2/.

[145] Yee, above n 3, 317.

unresolved maritime boundaries, including Turkey, Venezuela and North Korea, are not parties to UNCLOS and hence not subject to its dispute settlement regime at all. For those States with unresolved maritime boundaries that are parties to UNCLOS, a key difficulty has been ongoing disputed territorial claims.[146] These maritime boundary disputes will clearly fall outside the scope of compulsory conciliation under Article 298(1)(a). The other preconditions to compulsory conciliation, discussed in Part 4 above, may further limit potential resort to this mode of dispute settlement.

If these jurisdictional hurdles are all met, in what circumstances can we predict that compulsory conciliation of a maritime boundary dispute will be successful and warrant the effort? The success of the *Jan Mayen Conciliation* was partly attributed to the existing strong relationship between Iceland and Norway.[147] Further factors included the key security role Iceland played in NATO at the time of the dispute and the linkage of allocating seabed resources along with fisheries.[148] Iceland and Norway favoured conciliation as the dispute settlement method given that the international law of maritime zones and maritime boundary delimitation was still in a state of flux at the time and the non-binding result ensured that no precedent could be created.[149] Ambassador Richardson, who chaired the *Jan Mayen Commission*, noted: 'The strength of the Jan Mayen Agreement derives from the careful assessment of the parties' interests by the conciliation commission, its practical approach to surveying the disputed area, and its formulation of a framework for mutual cooperation.'[150]

For the *Timor Sea Conciliation*, the relationship between the parties was critical.[151] One commentator speculated, '[u]ltimately, the process may have more use as part of Timor-Leste's ongoing efforts to maintain political pressure on Australia than as an effective method of dispute resolution.'[152] Yet conciliation cannot entirely eradicate the power imbalance that exists between the two countries,[153] and there was concern that Timor-Leste would end up worse off than the arrangements under the CMATS Treaty.[154] For Timor-Leste and Australia, one commentator has recently noted:

> Ultimately, Timor-Leste requires a deal that provides material and symbolic gains in order to justify its risky decision to abandon CMATS. For Australia, the agreement needs to mitigate the

[146] See eg, South Korea and Japan in relation to Dokdo/Takeshima; Japan and China in relation to Senkaku/Diaoyu Islands.
[147] Yee, above n 3, 327; Ulf Linderfalk, 'The Jan Mayen Case (Iceland/Norway): An Example of Successful Conciliation' in Christian Tomuschat, Riccardo Pisillo Mazzeschi and Daniel Thürer (eds), *Conciliation in International Law: The OSCE Court of Conciliation and Arbitration* (Brill, 2017) 193, 206-207.
[148] Linderfalk, above n 147, 203-206.
[149] Ibid, 208 and 209.
[150] Richardson, above n 47, 457.
[151] As Linderfalk has remarked on the relationship of the parties, '[t]he conditions for conciliation would seem to be much more favourable when disputing states already have a history of generally good relations and they are equally anxious that those good relations be maintained'. Linderfalk, above n 147, 210-211.
[152] Cable, above n 144.
[153] Daniel Flitton, 'Australia rejects jurisdiction of East Timor's bid to broker maritime dispute', *Sydney Morning Herald,* 29 August 2016, available at http://www.smh.com.au/federal-politics/political-news/australia-rejects-jurisdiction-of-east-timors-bid-to-broker-maritime-dispute-20160829-gr3w9z.html (citing academic commentator Bec Strating).
[154] See Parliament of Australia Joint Standing Committee on Treaties, 'Consequences of termination of the Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea', Hearings of 14 March 2017, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/CMATS/Report_168_-_Certain_Maritime_Arrangements_-_Timor-Leste/section?id=committees%2Freportjnt%2F024051%2F24472, paras 2.47-2.56.

> reputational harms that have come from its *realpolitik* approach to the issue over four decades…[155]

During the conciliation process, Australia acknowledged 'the stability and prosperity of its regional neighbours as matters of high importance and very much in Australia's interest'.[156] Although Australia did not come to the proceedings willingly, the Commission observed that 'Australia has come to see these proceedings as an opportunity to establish its partnership with Timor-Leste on a new footing'.[157]

Given that the nature of the conciliation proceedings under Article 298(1)(a) entails one party compelling another to submit to a third-party engagement in the resolution of the maritime boundary dispute, it must be expected that the State so compelled may be resistant even to a non-binding process. It was apparent that in the *Timor Sea Conciliation*, the parties came to the conciliation process with high levels of distrust towards each other in relation to resources and maritime boundaries, and this barrier had to be addressed at the outset of the conciliation to ensure positive and forward momentum.[158] While the impasse was successfully broken in this instance,[159] resistance may be stronger in other factual settings.

Both countries of course shared an interest in protecting their respective rights to natural resources, but this factor was not of equal importance. There were high stakes for Timor-Leste in undertaking this approach to dispute settlement. The small country is highly dependent economically on the seabed resources of the Timor Sea. Prior to the conciliation, it was speculated that for Timor-Leste's economic plans to be realised, it would be counting on nearly all of Greater Sunrise to fall within its jurisdiction.[160] Even if that had been achieved, it was suggested that Timor-Leste would still need a developer willing to take the economic and political risk of running a pipeline across the Timor Trough and establishing the necessary infrastructure for exploitation within Timor-Leste.[161] The revenue sharing arrangements may have gone some way to meeting these concerns,[162] and may not require a pipeline into Timor-Leste for it to meet its economic goals. As previously noted, the precise development plan remains to be resolved. Australia's economic interests were seemingly still met because it retained two oil fields in the west; it does not have to pay any compensation for the exploitation of non-renewable resources in an area now agreed to belong to Timor-Leste; and it retains rights in relation to Greater Sunrise rather than being excluded entirely.

Commentators have observed that conciliations are more likely to be successful when there are legal disputes for resolution, but the parties support an equitable compromise.[163] In the *Timor Sea Conciliation*, the parties had to overcome core differences as to their legal position on the drawing of

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[155] Bec Strating, 'Timor Sea dispute: progress and prospects as a deal emerges', *The Interpreter*, 22 November 2017, available at https://www.lowyinstitute.org/the-interpreter/timor-sea-dispute-progress-and-prospects-deal-emerges.

[156] *Timor Sea Conciliation – Report*, para. 50. See also 'Opening Session Transcript' 29 August 2016, *Timor Sea Conciliation*, available at: https://pcacases.com/web/sendAttach/1889.

[157] *Timor Sea Conciliation – Report*, para. 50.

[158] See ibid, paras 287-289 (describing the lack of trust and steps taken by the Commission in response).

[159] 'In the Commission's view, these proceedings truly became productive at the point at which both Parties became convinced that the Commission's objective was not to push them to abandon long-held positions, but rather to understand and assist the Parties to identify a solution they had been unable to reach themselves'. Ibid, para. 290.

[160] Strating, *The Conversation*, above n 28.

[161] Ben Doherty, 'Timor-Leste drops espionage claims against Australia in maritime border dispute' 24 January 2017, *The Guardian*, available at https://www.theguardian.com/world/2017/jan/24/timor-leste-drops-espionage-claims-against-australia-in-maritime-border-dispute (citing Father Frank Brennan). The Commission noted the importance of this position in its Report. *Timor Sea Conciliation – Report*, para. 243.

[162] 26 December 2017 Press Release, above n 125.

[163] Merrills, above n 35, 81; J Collier & A V Lowe, *The Settlement of Disputes in International Law* (Oxford University Press, 1999), 29.

a maritime boundary between them.[164] The Commission was mindful of the need to operate within international law, consistent with the requirements of Articles 74 and 83 of UNCLOS, but did not need to reach definitive rulings on these positions for the purposes of achieving an amicable settlement.[165] Indeed, such an approach would have been antithetical to conciliation.

Moreover, for the proposals arising from conciliation to be acceptable, the parties would expect that those proposals align with views that were already agreed or at least proposed by one party, rather than deviating in a significant way.[166] In advocating for a continued joint arrangement in relation to Greater Sunrise, the Commission was drawing on a history of joint endeavour, as manifested in the Timor Sea Treaty, the Unitisation Agreement and the CMATS Treaty. The Commission noted that the dispute was 'ripe for resolution' and the parties sought 'a positive outcome' rather than 'identifying a "winner"'.[167]

A challenge for the conciliation process may be the extent that any third party's interests can be taken into account. An outstanding issue from the conciliation between Timor-Leste and Australia is the trilateral juncture of the maritime boundary with Indonesia. This issue was apparent in light of Timor-Leste's initial presentation to the Commission that indicated a significant encroachment on the maritime boundaries already agreed as between Indonesia and Australia.[168] Managing the trilateral junction points among the three States was thus an important issue to resolve, along with the actual boundary between Australia and Timor-Leste.[169] There does not appear to have been any Indonesian involvement in any of the discussions but the agreed boundary builds in the possibility of shifting the line following the entry into force of a maritime delimitation agreement between Timor-Leste and Indonesia.[170]

The Greater Sunrise license holder as well as other resource companies would also have an interest in the finalisation of the maritime boundary and in plans for development of the resources in the area. Australia had noted that Timor-Leste's initial threats to terminate the CMATS Treaty would prove detrimental to the investment environment in the Timor Sea and harm Timor-Leste's reputation if it was not willing to adhere to existing treaty commitments.[171] In Joint Statements issued during the course of the conciliation, the parties acknowledged the importance of providing stability and certainty for the petroleum companies that hold existing rights in the Timor Sea.[172] To this end, the arrangements under the Timor Sea Treaty were affirmed pending the conciliation process.[173]

As Timor-Leste and Australia moved forward to finalize arrangements agreed during the conciliation process, they committed to engaging with the other stakeholders in the Timor Sea, including those with interests in the Greater Sunrise resources, with respect to 'the implications of their

[164] See above notes 114-124 and accompanying text. See also *Timor Sea Conciliation – Report*, para. 285 ('The Commission recalls that the Parties came to these proceedings deeply entrenched in their legal positions, something which had frustrated previous efforts to achieve a settlement through negotiation.')
[165] *Timor Sea Conciliation – Report*, paras 69-70. See also ibid, para. 292 ('For the Commission, however, the ability to calibrate the proceedings to address the elements necessary for an amicable settlement, even where those extend beyond purely legal considerations, is a hallmark advantage of conciliation as compared to adjudication.').
[166] Linderfalk, above n 147, 212-213; Merrills, above n 35, 81.
[167] *Timor Sea Conciliation – Report*, para. 285.
[168] See 'Presentation for Timor-Leste's Opening Statement', 29 August 2016, TL-21, *Timor Sea Conciliation,* available at https://pcacases.com/web/sendAttach/1887.
[169] See Donald R Rothwell, 'Australia and Timor-Leste: the Timor Sea conciliation', *The Strategist* (10 February 2017), available at https://www.aspistrategist.org.au/australia-timor-leste-timor-sea-conciliation/.
[170] See *Timor Sea Conciliation – Report*, para. 264.
[171] Cited in Cable, above n 144.
[172] Joint Statement of January 24, above n 90.
[173] Joint Statement of January 9, above n 112.

agreement'.[174] As noted, the Commission ultimately directly engaged with the Greater Sunrise Joint Venture to facilitate the resolution of some outstanding development issues.[175] This type of mediation certainly goes beyond the participation of non-State parties normally countenanced in formal inter-State adjudication and indicates that greater flexibility in access to UNCLOS dispute settlement processes may be anticipated in an UNCLOS conciliation.

Linderfalk has observed that factors that support resort to conciliation may include the genuine interest of both parties in resolving the dispute; support for the notion of the appropriateness of conciliation as the means to do so; and, the acceptability of the conciliation commission's proposals.[176] Arguably, Australia's initial position did not align with the first two of these factors, but it did come to accept the process as well as the proposals, consistent with its commitment to a rules-based order. A further influence in bringing Australia to the point that it was willing to engage with the conciliation process to resolve this boundary dispute could have been the authority of the conciliators and respect they commanded from the parties, which is another factor identified as essential to enhance the likely acceptance of the proposals.[177] The significant diplomatic experience of several of the commissioners could well have facilitated progress at several critical junctures. As observed by the Commission, 'effective conciliation requires that a careful mix of diplomatic and legal skills, backgrounds, and approaches be deployed in varying combinations at different stages of the process'.[178]

7. Concluding Remarks

In sum, it is important to recognise that there are a number of barriers for a State party to be able to pursue compulsory conciliation of maritime boundary disputes under UNCLOS. Whether the States in question are party to UNCLOS and whether the unresolved maritime boundary also concerns an unresolved dispute over territorial sovereignty may be significant hurdles. As discussed, Article 298(1)(a) identifies a number of conditions that must be met for the parties to proceed with compulsory conciliation for their maritime boundary disputes. The *Timor Sea Conciliation* has lowered the barriers in relation to those conditions for compulsory conciliation in its initial decision on competence and admissibility. Setting the entry into force date as 1994 the Commission was able to reduce a barrier, by allowing for an earlier date to determine when a dispute has arisen irrespective of one (or both) of those States only becoming parties to UNCLOS after 1994. The negotiation requirement could not be viewed as onerous. This decision aligns with the jurisprudence on the exchange of view requirements under Article 283, which also present little difficulties in being met.[179] It would also seem from the competence decision in *Timor Sea Conciliation* that separate agreements addressing issues related to maritime boundaries are unlikely to prevent a conciliation from proceeding, even despite the very explicit terms of Article 4 of the CMATS Treaty.[180]

[174] 1 September 2017 Press Release, above n 113.
[175] 26 December 2017 Press Release, above n 93.
[176] Linderfalk, above n 147, 194.
[177] Ibid, 213.
[178] *Timor Sea Conciliation – Report*, para. 294.
[179] This low threshold was especially evident in the *Arctic Sunrise* arbitration. See Robin Churchill, 'Dispute Settlement in the Law of the Sea: Survey for 2015, Part II and 2016' (2017) 32 *International Journal of Marine and Coastal Law* 379, 404-405.
[180] It can only be speculated as to whether the Commission was influenced in its decisions relating to the CMATS Treaty by the knowledge that Timor-Leste was challenging the validity of that treaty in a separate arbitration and that Timor-Leste was on the brink of terminating the bilateral agreement in any event. As noted previously, if the Commission had considered the CMATS Treaty as preventing the compulsory conciliation, Timor-Leste would have just needed to continue the process of termination and then recommence its efforts for conciliation. See above n 93. It would then potentially require addressing the applicability of any *res judicata* argument.

Conciliation has had limited impact on the resolution of inter-State disputes to date.[181] As a process, it lacks the political and legal influence that is otherwise derived from a binding outcome through adjudication or arbitration, and it has typically been perceived as lacking the informalities and political flexibility permitted in direct negotiations between the parties.[182] This latter perception may well be called into doubt when considering the facilitative approach of the Commission in the *Timor Sea Conciliation* and the resulting signature of a maritime boundary treaty.

Moreover, despite the disadvantages and lack of appeal associated with conciliation, Yee has concluded 'when there is no better alternative, conciliation may offer the only ray of hope and may be worth a try'.[183] So much was true for Timor-Leste and other States may consider themselves to be in a like position. One commentator has noted that the conciliation between Timor-Leste and Australia denotes another instance, along with the *South China Sea* arbitration, where States have followed a creative path to resolve what otherwise appears to be an intractable maritime boundary dispute.[184] The Commission certainly affirmed an inspired and persistent approach in its mediating role between the parties.

As discussed, the political conditions that exist between the States concerned may ultimately prove decisive in the likely success of any conciliation process under UNCLOS. International dispute settlement remains an undeniably complex process with many factors to assess and a variety of predictions to be made about the likely outcome of any one procedure. Fortunately for Timor-Leste, its efforts at pursuing this option finally brought Australia to the negotiating table rather than forestall the permanent resolution of the maritime boundary as anticipated under the CMATS Treaty. Given the final commitment on a maritime boundary and new arrangements in relation to Greater Sunrise, it would seem that Timor-Leste will have finally achieved the sovereignty it has long sought over both its land and maritime space.

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[181] Cot, above n 3, para. 12. The 2014 Annual Report of the Permanent Court of Arbitration reports on two conciliations held under its auspices, which involved at least one private party. See Permanent Court of Arbitration, *Annual Report 2014*, available at: https://pca-cpa.org/wp-content/uploads/sites/175/2015/12/PCA-Annual-Report-2014.pdf , p.6. See also Permanent Court of Arbitration, *Annual Report 2015*, available at: https://pca-cpa.org/wp-content/uploads/sites/175/2016/10/PCA-annual-report-2015.pdf, p.8 (noting another conciliation involving a private party, but it is unclear if it is a continuation of the matter from the previous year). Wolfrum has noted that the PCA has been involved in five conciliations. Wolfrum, above n 9, 189, n. 40.

[182] Yee, above n 3, 327. In a similar vein, Treves has commented:

> 'Against what may be perceived as the main advantage of conciliation, the fact that its outcome is not binding, States will have to consider that proceedings before a conciliation commission are technically almost as complex and politically burdensome as those before a court or tribunal and that such proceedings entail, at the end the further political hurdle of deciding whether to follow the recommendations of the commission. In certain cases States may prefer not to have to make this choice, and rather be bound by the decisions taken by a judge or arbitrator.'

Tullio Treves, 'What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards Maritime Delimitation Disputes?' in Rainer Lagoni and Daniel Vignes (eds) *Maritime Delimitation* (Brill 2006) 63, 75.

[183] Yee, above n 3, 328. See also Cot, above n 3, para. 22.

[184] Cable, above n 144.