The European Journal of International Law Vol. 31 no. 1

The Timor Sea Conciliation: The Unique Mechanism of Dispute Settlement

Dai Tamada*

Abstract

The maritime boundary dispute between Timor-Leste and Australia was submitted to the compulsory conciliation procedure under the United Nations Convention on the Law of the Sea (UNCLOS). This is the first instance of conciliation, whether voluntary or compulsory, under UNCLOS. The Timor Sea conciliation led to the successful settlement of the long-standing deadlock between the parties that had hitherto not been settled by negotiation and had no possibility of being settled by litigation (within, for example, International Tribunal for the Law of the Sea or International Court of Justice proceedings) or arbitration (within the context of an UNCLOS Annex VII tribunal). This article aims to elucidate the unique mechanism of conciliation and, to this end, analyses both the procedural particularities of conciliation under UNCLOS and the substantive considerations in conciliation proceedings. The author places emphasis, in particular, on the fundamental importance of the economic factor in the Timor Sea maritime delimitation – namely, the sharing ratio of the natural resources in the Greater Sunrise gas fields. Being a definitive factor for the success of this conciliation, it was the economics of this dispute that incentivized the parties to compromise and settle. Furthermore, given that conciliation is a most elucidating piece in the rather complicated puzzle that is the UNCLOS dispute settlement mechanism, the Timor Sea conciliation offers valuable insights into this mechanism.

1 Introduction

The maritime boundary dispute between Timor-Leste and Australia was submitted to the compulsory conciliation procedure under the United Nations Convention on the Law of the Sea (UNCLOS).[1] During the proceedings, on 6 March 2018, the

* Professor of Public International Law, Kobe University, Japan. Email: tamada@port.kobe-u.ac.jp. This work was supported by Japan Society for the Promotion of Science (JSPS) KAKENHI Grant Numbers 18KK0364, 19K01313.

[1] Convention on the Law of the Sea (UNCLOS) 1982, 1833 UNTS 3.

parties signed the Treaty on the Timor Sea Maritime Boundary (2018 Treaty).[2] After the completion of the conciliation procedure, the Timor Sea Conciliation Report (TSCR)[3] was exceptionally made public by the Conciliation Commission on 9 May 2018, which includes the final result of delimitation achieved by the 2018 Treaty. This case is worthy of analysis. First, it is the first instance of conciliation, whether voluntary or compulsory, under UNCLOS.[4] In the rather complicated puzzle that is the UNCLOS dispute settlement mechanism (DSM), conciliation is a most elucidating piece. The Timor Sea conciliation thus enables a greater grasp of the UNCLOS DSM. Second, the Timor Sea conciliation led to the successful settlement of the long-standing deadlock between the parties, which had not been settled by negotiation, litigation (under the International Tribunal for the Law of the Sea [ITLOS] or the International Court of Justice [ICJ]) or arbitration (under an UNCLOS Annex VII tribunal). Third, contrary to the tradition of confidentiality in the conciliation process, the TSCR was, fortunately for our purposes, published with the parties' consent, and this provides us with much information as to the conciliation process and the background to the dispute.[5]

Further to the above, this article clarifies, first, the procedural aspects of conciliation (Part 2) and, second, the actual process of conciliation proceedings (Part 3), before identifying the success factors in this conciliation (Part 4) and analysing the issue of compatibility of the 2018 Treaty to UNCLOS (Part 5).

2 Procedural Aspects of Conciliation

UNCLOS contains two types of conciliation: voluntary conciliation (that is, Article 284 and section 1 of Annex V) and compulsory conciliation (that is, Articles 297(2)(b), 297(3)(b) and 298(1)(a)(i) and section 2 of Annex V). Where conciliation is compulsory, the establishment of the commission's jurisdiction is automatic in the sense that any party is entitled to initiate the conciliation procedure without the consent of

[2] The Treaty between Australia and the Democratic Republic of Timor-Leste Establishing Their Maritime Boundaries in the Timor Sea, 6 March 2018, appended to the conciliation report as Annex 28.

[3] *In the Matter of the Marine Boundary between Timor-Leste and Australia* (*Timor Sea* conciliation), PCA Case no. 2016-10, before 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. The Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea (TSCR), 9 May 2018, available at https://pcacases.com/web/view/132.

[4] Given the confidentiality principle in conciliation, several cases of conciliation have conceivably already been submitted and settled, without their subject matter and outcome being known more widely. A. Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* (2017), at 1841 (Article 284 of UNCLOS by Andrew Serdy).

[5] In addition to the TSCR, *supra* note 3, the Decision on Competence, 19 September 2016, was also made public. PCA Case no. 2016-10, In the Matter of a Conciliation before 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, 19 September 2016, available at https://pcacases.com/web/sendAttach/10052.

the other party.[6] That said, as the conciliation report is of no binding force, the compulsory conciliation may be called compulsory non-binding conciliation.[7]

A *Legal Basis of Compulsory Conciliation*

As one of the bases of compulsory conciliation, Article 298(1) of UNCLOS provides that:

> [w]hen signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:
> (a) (i) *disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations*, or those involving historic bays or titles, *provided that a State having made such a declaration shall*, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, *accept submission of the matter to conciliation under Annex V, section 2*; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission. (Emphasis added)

This provision, enabling the parties to automatically establish the basis for conciliation,[8] makes clear that compulsory conciliation is designed as an alternative and/or supplemental means to ITLOS, the ICJ and an Annex VII tribunal[9] as well as for the purpose of providing an alternative to compulsory jurisdiction of Annex VII arbitration.[10] As Australia's declaration under Article 298(1)(a)(i)[11] of 22 March 2002 excepted maritime delimitation disputes from the jurisdiction of litigation and arbitration, there was no other means open to Timor-Leste than conciliation, as was manifested in its Notice of Conciliation:

> Timor-Leste's exercise of its sovereign rights within its maritime boundaries in the Timor Sea is frustrated by Australia's continuing refusals either to negotiate a permanent maritime delimitation agreement or to settle the dispute through other peaceful means such as arbitration or judicial

[6] Subject, however, to objections as to competence and the examination of any such objections by the conciliation commission, as we shall see below.

[7] Treves, '"Compulsory" Conciliation in the U.N. Law of the Sea Convention', in C. Philippe (ed.), *Liber amicorum Günther Jaenicke* (1998) 611, at 611.

[8] UNCLOS, *supra* note 1, Art. 11 of Annex V.

[9] Treves, *supra* note 7, at 619.

[10] Generally, conciliation is regarded as an alternative means of dispute resolution to arbitral and judicial settlement. For example, when the Institut de droit international emphasized the importance of conciliation, it '*[a]cknowledg[es]* that nevertheless a certain number of disputes have remained unsettled in the course of recent years, the Parties having neglected or refused to judicial settlement or arbitration'. Institut de droit international, Regulations on the Procedure of International Conciliation (Institut de droit international Regulations), Thirtieth Commission, Rapporteur Henri Roulin (1961), available at www.idi-iil.org/app/uploads/2017/06/1961_salz_02_en.pdf.

[11] Australia's declaration under UNCLOS, *supra* note 1, Art. 298(1)(a)(i): 'The Government of Australia further declares, under paragraph 1 (a) of article 298 ... that it does not accept any of the procedures provided for in section 2 of Part XV ... with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations as well as those involving historic bays or titles.'

> settlement. Hence Timor-Leste has initiated compulsory conciliation *as the only procedure available to it* for the settlement of the dispute over its permanent maritime boundaries with Australia.[12]

As is clear from this quotation, Timor-Leste had to rely on compulsory conciliation as the last means of dispute settlement (TSCR, para. 290). It should be recalled that the *Jan Mayen* conciliation between Iceland and Norway[13] had been decided on the basis of prior agreement between the disputants,[14] and, thus, it pertains to an ad hoc conciliation that is different from compulsory conciliation under UNCLOS.[15]

B Rules of Procedure

Annex V of UNCLOS contains merely 14 articles concerning conciliation; 10 for voluntary conciliation (section 1) and four for compulsory conciliation (section 2). Even though the former provisions are applicable *mutatis mutandis* to the latter,[16] gaps that arise are to be covered by ad hoc rules of procedure, adopted by the Conciliation Commission in each case 'with the consent of the parties to the dispute'.[17] In the *Timor Sea* case, the commission adopted the Rules of Procedure, composed of 26 articles (TSCR, paras 56 and 80),[18] which were flexibly drafted and operated. In preparing the Rules of Procedure, the commission and the parties sought to maintain a 'flexible and informal approach' to enable the proceedings to lead to an amicable settlement (TSCR, para. 57). For instance, the commission may meet with the parties separately rather than meeting jointly (TSCR, para. 57).

Reflecting the principle of party autonomy in conciliation, the parties by agreement may modify the Rules of Procedure, insofar as the commission finds appropriate,[19] and even the provisions of Annex V.[20] This means that, insofar as the parties agree, there can be no breach of an applicable procedural rule by the commission. Crucially, however, the disputing parties cannot derogate from UNCLOS itself.[21]

C Constitution of the Conciliation Commission

The composition of the commission is pivotal to making the conciliation proceedings effective and successful. First, since the proceedings are significantly influenced by the interaction between the commission and the parties, the success of

[12] Notice Instituting Conciliation under Section 2 of Annex V of UNCLOS by Timor-Leste, 11 April 2016, para. 4 (emphasis added).

[13] Conciliation Commission on the Continental Shelf area between Iceland and Jan Mayen, Report and recommendations to the governments of Iceland and Norway, decision of June 1981, reprinted in UNRIAA, vol. 27, 1.

[14] Agreement between Norway and Iceland on fishery and continental shelf questions, 28 May 1980, 2124 UNTS 225.

[15] UNCLOS, adopted in 1982, was not yet applicable to the *Jan Mayen* conciliation case, *supra* note 13, which was initiated by the 1980 agreement between the two countries concerned.

[16] UNCLOS, *supra* note 1, Art. 14 of Annex V.

[17] *Ibid.*, Art. 4 of Annex V.

[18] Rules of Procedure, 22 August 2016, available at https://pcacases.com/web/sendAttach/2357. TSCR, *supra* note 3, Annex 8.

[19] Rules of Procedure, *supra* note 18, Art. 1(2).

[20] UNCLOS, *supra* note 1, Art. 10 of Annex V.

[21] *Ibid.*, Art. 309. There still remains the possibility of modification or suspension of articles by agreements between two or more states Parties, pursuant to UNCLOS, Art. 311(3).

conciliation conceivably depends on the confidence disputants have towards the conciliators involved and, therefore, on the credibility of the latter. For this, the Rules of Procedure provide for a special procedure pertaining to the 'challenge of a conciliator' for maintaining the credibility, impartiality and independence of the conciliators.[22] Second, conciliators are required to be skilled lawyers and negotiators. As the commission points out, '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' (TSCR, para. 294; emphasis added).

On 25 June 2016, the Conciliation Commission was constituted as follows:

> His Excellence, Ambassador Peter Taksøe-Jensen (Chairman; Danish), who had been Assistant Secretary-General for Legal Affairs at the United Nations between 2008 and 2010 and Danish Ambassador to the United States between 2010 and 2015; Dr Rosalie Balkin (Australian), Assistant Secretary-General at the International Maritime Organisation (IMO); Judge Abdul G. Koroma (Sierra Leonean) who had been Judge of the ICJ between 1994 and 2012; Professor Donald McRae (Canadian and New Zealand), who is currently Hyman Soloway Chair and Emeritus professor at University of Ottawa, and a member of the ILC since 2006; and Judge Rüdiger Wolfrum (German), professor of international law at the Heidelberg University Faculty of Law, director emeritus of the Heidelberg Max Planck Institute for Comparative Public Law and International Law, and Judge of ITLOS between 1996 and 2017, and its President between 2005 and 2008.

Judges Abdul Koroma and Rüdiger Wolfrum were appointed by Timor-Leste (TSCR, para. 72).[23] Rosalie Balkin and Donald McRae were appointed by Australia (TSCR, para. 73).[24] Ambassador Peter Taksøe-Jensen was appointed chairman, by the above four conciliators (TSCR, para. 75).[25]

D Basic Mandate and Function of the Commission

Before analysing the particular rules of conciliation, it may be useful to briefly discuss the basic aspects of conciliation, particularly its mandate and function. First, the main purpose of conciliation is to lead the parties to reach an amicable settlement of their dispute. More precisely, '[t]he commission shall hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement'.[26] Here, its function is not to settle a dispute by applying law per se, but rather to bring the Parties to an agreement by way of negotiation and compromise,[27]

[22] Rules of Procedure, *supra* note 18, Art. 7(1).

[23] Notice of Conciliation (Timor-Leste, 11 April 2016), para. 9; see also UNCLOS, *supra* note 1, Art. 3(b) of Annex V.

[24] Response to the Notice of Conciliation (Australia, 2 May 2016), para. 1; see also UNCLOS, *supra* note 1, Art. 3(c).

[25] UNCLOS, *supra* note 1, Art. 3(d).

[26] *Ibid.*, Art. 6 of Annex V.

[27] It is thus correct to say that '[t]he task of the commission is therefore not to publish an opinion that it considers correct in light of the Convention [UNCLOS] but to propose a solution that is acceptable for the disputing Parties'. Proelss, *supra* note 4, at 2322 (Article 6 of Annex V by Shotaro Hamamoto).

as was emphasised by the commission itself (TSCR, para. 296).[28] To facilitate this particular function, the disputing parties are not merely in an adversarial relationship in the conciliation. Unlike adjudication, which presupposes the adversarial relationship between applicant and respondent,[29] the disputing parties in conciliation are referred to in arguably more neutral terms, including 'the party instituting the proceedings and the other party to the dispute'[30] or 'the submitting Party and the opposing Party'.[31] Second, there are two types of involvement of the commission in the conciliation proceedings (TSCR, note 40):[32] namely, the commission may concentrate on making recommendations, leaving the parties to reach an agreement after the proceedings,[33] or the commission may also assist the parties to reach an agreement during the conciliation process (TSCR, paras 63–64). In the *Timor Sea* case, the parties agreed to opt for the latter option (TSCR, para. 64). Third, in the conciliation proceedings, the disputing parties are afforded greater initiative in the process. The commission is empowered only to recommend 'any measures which might facilitate an amicable settlement of the dispute'.[34] In adjudication, including litigation and arbitration, the deliberation and determination/decision is monopolized by judges and arbitrators, excluding the parties. In conciliation, however, there is greater interaction and collaboration between the commission and the parties through 'discussion' on the report,[35] 'suggestions' by the parties[36] and many occasions of meetings.[37] Thus, the proceedings and the final result of the conciliation are perfectly transparent to the disputing parties. In other words, there is no surprising or unexpected result in the conciliation report, which is not necessarily the case with outcomes of adjudication.

E Competence of the Conciliation Commission

Under UNCLOS, the scope of jurisdiction *ratione materiae* of adjudication – namely litigation and arbitration – is fixed in principle on a 'dispute concerning the interpretation or application of this Convention [UNCLOS]',[38] and the same applies to voluntary conciliation.[39] The scope of compulsory conciliation is further limited to marine scientific

[28] This is why the conciliators should have 'a careful mix of diplomatic and legal skills' (TSCR, *supra* note 3, para. 294).

[29] Where a case is submitted to court or tribunal by *compromis* (special agreement), there is no difference between the applicant and the respondent.

[30] UNCLOS, *supra* note 1, Arts 3(a) and 3(c) of Annex V.

[31] Rules of Procedure, *supra* note 18, Arts 13(1)(a) and 13(1)(b).

[32] UNCLOS, *supra* note 1, Art. 7 of Annex V.

[33] In the *Jan Mayen* case, *supra* note 13, the parties concluded Agreement between Norway and Iceland on the continental shelf between Iceland and Jan Mayen, 22 October 1981, 2124 UNTS 247, after receiving the report and recommendations of the conciliation commission in that case in June 1981.

[34] UNCLOS, *supra* note 1, Art. 5 of Annex V.

[35] Rules of Procedure, *supra* note 18, Art. 20(1): 'The Commission shall, during the course of the conciliation phase, at its discretion, discuss with each Party and with the Parties jointly the appropriate scope and form of the Report.'

[36] *Ibid.*, Art. 18(3).

[37] *Ibid.*, Art. 18(4) and 18(5).

[38] UNCLOS, *supra* note 1, Arts 287(1) and 288(1).

[39] *Ibid.*, Art. 284(1).

research,[40] fisheries[41] or 'disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations or those involving historic bays or titles'.[42] It is on the last category that the commission's jurisdiction was founded in the *Timor Sea* case.[43] It should be recalled that, even in compulsory conciliation, the competence is not automatically established since a party may raise objections to competence. The *Timor Sea* case is illustrative of such an occurrence, as Australia had initially raised preliminary questions on the competence of the commission.

1 Framework of Competence

First, the term 'competence' covers both the existence of jurisdiction (that is, jurisdiction *stricto sensu*) and the exercise of jurisdiction (that is, admissibility). In fact, in the *Timor Sea* case, Australia had raised objections to jurisdiction and to the admissibility of the dispute,[44] both of which were rejected by the commission. Second, although Article 298(1)(a)(i) enlists the terms 'dispute' and 'matter',[45] there is no substantive difference between the terms.[46] Third, against a party's objection to the commission's jurisdiction, UNCLOS stipulates merely the principle of competence-competence – namely, it defers the disagreement to the commission itself to resolve.[47] The Rules of Procedure further provide for the procedure of 'objections to competence'.[48] In the *Timor Sea* case, Australia had made clear, at the beginning of the procedure, its intention to make 'an immediate challenge to the competence of the Commission on a number of grounds, including on the basis that such competence is precluded by a bilateral treaty [the Certain Maritime Arrangements in the Timor Sea (CMATS)]' (TSCR, para. 65)[49] and submitted its objections to competence on six grounds.[50] Fourth, in the *Timor Sea* case, the commission was empowered to rule on its competence 'as a preliminary question or in

40 *Ibid.*, Art. 297(2)(b).

41 *Ibid.*, Art. 297(3)(b).

42 *Ibid.*, Art. 298(1)(a)(i).

43 The dispute, formulated by Timor-Leste, was that concerning 'the interpretation and application of Articles 74 and 83 of UNCLOS for the delimitation of the exclusive economic zone and the continental shelf between Timor-Leste and Australia including the establishment of the permanent maritime boundaries between the two States'. Notification Instituting Conciliation under Section 2 of Annex V, 11 April 2011, para. 5.

44 Decision on Competence, *supra* note 5, para. 92. It is not clear, however, whether the commission treated this objection as that to 'admissibility' or not.

45 UNCLOS, *supra* note 1, Art. 298(1)(a)(i): '[A] State having made such a declaration shall … accept submission of *the matter* to conciliation under Annex V, section 2' (emphasis added). Corresponding to this, Art. 7(1) of Annex V provides that '[t]he commission shall report … its conclusions on all questions of fact or law relevant to *the matter in dispute*' (emphasis added).

46 Decision on Competence, *supra* note 5, para. 95.

47 UNCLOS, *supra* note 1, Art. 13 of Annex V.

48 Rules of Procedure, *supra* note 18, Art. 17, which corresponds to the preliminary objection procedure before the ICJ.

49 Response to the Notice of Conciliation (Australia, 2 May 2016), para. 3. Treaty between Australia and the Democratic Republic of Timor-Leste on certain maritime arrangements in the Timor Sea (with annexes and exchange of letters) (CMATS), 12 January 2006, 2483 UNTS 359.

50 Decision on Competence, *supra* note 5, paras 15–20.

conjunction with the proceedings on the substance of the Parties' dispute'.[51] The commission chose the first option as 'doubts as to the competence of a commission [should] be promptly resolved' (TSCR, para. 66).[52] Fifth, it may not be necessary to discuss fully the jurisdiction *ratione materiae* of compulsory conciliation, given that the conciliation report is not legally binding on the parties.[53] However, as the commission points out, the jurisdiction is the basic requirement for the appropriate and effective management of conciliation proceedings.[54] Sixth, the scope of the commission's competence is not limited to the maritime delimitation *stricto sensu*. Pursuant to Article 298(1)(a)(i) and, correspondingly, to Articles 74(3) and 83(3), the commission is also competent to deal with the question of the transitional period pending a final delimitation and the provisional arrangements of a practical nature that the parties are called on to apply pending delimitation.[55]

2 Requirement under Articles 281 and 298(1)(a)(i)

The *Timor Sea* case further demonstrated the precise requirements for the commission's competence. In its decision on competence, the commission made clear that, according to Article 286, a party seeking to make use of the dispute resolution provisions of UNCLOS must first meet the requirements of section 1 of Part XV, including Article 281 in particular.[56] The commission stated that this provision requires that a 'legally binding agreement' be in place in order to preclude the application of the compulsory dispute settlement[57] and that the CMATS does not satisfy the requirement of Article 281 since, though being a binding treaty, it is 'an agreement *not* to seek settlement of the Parties' dispute over maritime boundaries'.[58]

Article 298(1)(a)(i) stipulates several further requirements of competence: (i) that a dispute submitted to conciliation must arise 'subsequent to the entry into force' of UNCLOS – the commission made clear that the 'entry into force' means that of

[51] Rules of Procedure, *supra* note 18, Art. 17(3).

[52] With regard to such an early resolution of competence, the commission stated that 'the early resolution of Australia's objections to the competence of the Commission proved essential to allowing Australia to engage effectively in the conciliation process thereafter'. TSCR, *supra* note 3, para. 287.

[53] Where a decision is legally binding, the scope of jurisdiction must be discussed for identifying the excess of power, on the basis of which a party may deny the legal effect of a decision. Insofar as the conciliation report is not legally binding, it is less urgent to discuss the possibility of excess of power by the conciliation commission.

[54] The commission states that '[i]t is neither appropriate that a State be subjected to compulsory conciliation before a commission that lacks competence over the matter, nor is such a conciliation process likely to be effective'. Decision on Competence, *supra* note 5, para. 108.

[55] *Ibid.*, para. 97.

[56] *Ibid.*, paras 46 and 50.

[57] *Ibid.*, para. 56.

[58] *Ibid.*, para. 62. The commission correctly interpreted UNCLOS, *supra* note 1, Art. 281 as requiring, for excluding the Part XV procedures, an agreement 'to *seek* settlement of the dispute by a peaceful means' (emphasis added) and the CMATS, *supra* note 49, Art. 4(4), excluding all the possibility of dispute settlement mechanism, does not satisfy the requirement of Article 281. As the title of Art. 4 of the CMATS ('Moratorium') suggests, it does not purport to settle maritime boundaries or delimitation issue between the parties.

the convention as a whole – that is, on 16 November 1994;[59] (ii) that compulsory conciliation may only take place 'where no agreement within a reasonable period of time is reached in negotiations between the parties'; and (iii) that, according to Article 298(1)(a)(i), 'any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission [of conciliation]' – this requirement was not disputed by the parties in the present case.

F Confidentiality

In contrast to judicial proceedings,[60] conciliation proceedings are in principle confidential[61] and not public.[62] The confidentiality rule is not provided for in Annex V of UNCLOS but, rather, in the Rules of Procedure agreed between the parties, which were discussed earlier. Save for several parts of proceedings that may be made public in consultation with the parties,[63] the Conciliation Commission, the Registry and the parties 'shall keep confidential all matters relating to the conciliation proceedings'.[64] Confidentiality is an essential requirement of conciliation, stemming from the need to safeguard party autonomy and to not prejudice the legal positions of the parties.[65] In order to ensure the latter, some further rules are adopted with regard to conciliator involvement in other proceedings, be they adjudicative or otherwise.[66] That said, the publication of the conciliation report is not prohibited should the parties agree to this.[67] In the *Timor Sea* case, although the publication of the report had not been stipulated in the Rules of Procedure (TSCR, para. 61), the commission attempted to balance the need to respect the confidentiality of the proceedings with the need to make known to other states the implications for maritime delimitation that this settlement

[59] Decision on Competence, *supra* note 5, para. 74.

[60] UNCLOS, *supra* note 1, Arts 26(2) and 30(4) of Annex VI. However, UNCLOS does not stipulate the openness or confidentiality of arbitral proceedings, which is to be decided in each case by the tribunal through its Rules of Procedure. In the *South China Sea* case, for example, the Annex VII tribunal decided in favour of the publication of all relevant information. PCA Case no. 2013-19, In the Matter of an Arbitration before an Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People's Republic of China, Rules of Procedure, 27 August 2013, available at https://pcacases.com/web/sendAttach/233, Art. 16(1).

[61] Cot, 'Expectations Attached to Conciliation Reconsidered', in C. Tomuschat *et al.* (eds), *Conciliation in International Law: The OSCE Court of Conciliation and Arbitration* (2017), at 9; see also United Nations Model Rules for the Conciliation of Dispute between States (UN Model Rules), UN Doc. A/RES/50/50, 29 January 1996, Arts 25 and 26, available at www.un.org/ga/search/view_doc.asp?symbol=a/res/50/50.

[62] According to Wolfrum, 'it is quite relevant that this [conciliation] report is kept secret'. Wolfrum, 'Conciliation under the UN Convention on the Law of the Sea', in Christian Tomuschat *et al.* (eds), *Conciliation in International Law: The OSCE Court of Conciliation and Arbitration* (2017), at 185.

[63] Rules of Procedure, *supra* note 18, Art. 16(1)–(5). Art. 16(5): 'The Commission shall decide, in consultation with the Parties, whether to make the Commission's Report or any portion thereof public.'

[64] Rules of Procedure, *supra* note 18, Art. 16(7).

[65] J.-P. Cot, 'Conciliation', in *Max Planck Encyclopedia of Public International Law* (2006), para. 29.

[66] Rules of Procedure, *supra* note 18, Arts 25 and 26.

[67] Institut de droit international Regulations, *supra* note 10, Art 8 provides that '[i]f the Parties accept the proposed settlement, a *procès-verbal* will be drawn up setting forth its terms'. This article is reflected in UN Model Rules, *supra* note 61, Art. 20(3).

presents (TSCR, para. 60). Consequently, the parties 'made clear their expectation that the Report would be made public' (TSCR, note 38).

G Conciliation Report

1 Bindingness of the Conciliation Report

While any 'decision' – that is to say, a judgment of ITLOS[68] or the ICJ and an award of an Annex VII tribunal[69] – 'shall be final and shall be complied with by all the parties to the dispute',[70] the report of the Conciliation Commission, including its conclusions or recommendations, 'shall not be binding upon the parties'.[71] It should be noted, however, that the commission's decision on competence (discussed earlier) was described by the commission itself as having 'binding legal effect' (TSCR, para. 66), in contrast to non-binding recommendations.[72]

2 Uncertainty of the Obligation to State Reasons

The content of a conciliation report is different to that of an adjudication decision or award. An ITLOS judgment or an Annex VII arbitral tribunal award 'shall state the reasons on which it is based',[73] in addition to its conclusion (that is, operative part or *dispositif*). In contrast, there is uncertainty and controversy as to whether the conciliation report must state reasons. According to UNCLOS, 'after the conciliation commission has presented its report, *which shall state the reasons on which it is based*, the parties shall negotiate an agreement on the basis of that report'.[74] This provision, applicable to cases where the parties did not reach agreement during conciliation, suggests that the reasons must be always stated in the report.[75] However, according to Annex V, the report 'shall record any *agreement* 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'.[76] This article does not require the commission to state the reasons on which it is based,[77] even when an agreement was not reached between the parties.

68 UNCLOS, *supra* note 1, Art. 33(1) and (2) of Annex VI.

69 *Ibid.*, Art. 11 of Annex VII.

70 *Ibid.*, Art. 296.

71 *Ibid.*, Art. 7(2) of Annex V.

72 There is no article that admits, whether expressly or implicitly, the legally binding effect of the Decision on Competence, *supra* note 5. It should be assumed, however, that the binding effect stems from the exercise of the commission's power on the basis of the *compétence-compétence* doctrine.

73 Statute of the International Tribunal for the Law of the Sea 1982, 1833 UNTS 561, Art. 30(1); UNCLOS, *supra* note 1, Art. 10 of Annex VII.

74 UNCLOS, *supra* note 1, Art. 298(1)(a)(ii) (emphasis added).

75 However, it is not clear in this article whether the commission shall state the reasons with regard to its conclusions and its recommendations or with regard to both. Lavalle, 'Conciliation under the United Nations Convention on the Law of the Sea: A Critical Overview', 2(1) *Austrian Review of International and European Law* (1997) 25, at 29.

76 UNCLOS, *supra* note 1, Art. 7(1) of Annex V (emphasis added).

77 Proelss, *supra* note 4, at 2324 (Article 7 of Annex V by Shotaro Hamamoto).

3 Details of Conciliation Proceedings

Even though the TSCR provides detailed and informative material of conciliation and valuable insights into conciliation proceedings, it is simply excessive in content. First, the TSCR records the 2018 Treaty and, furthermore, its recommendations. As the parties in the *Timor Sea* case reached an agreement during the proceedings, the commission was required only to record this agreement without referring to its conclusion or recommendations. Additionally, the TSCR describes the details of the actual conciliation proceedings. According to the commission, the TSCR has as its objective more than to record the agreement – namely, to 'provide background and context to the process through which the Parties' agreement was reached' (TSCR, para. 6) and, furthermore, to 'set out what, in its view, constituted the key elements of its engagement with the Parties that made possible the achievement of an agreement on maritime boundaries' (TSCR, para. 7). The commission intended to trace almost all of the conciliation process, leading to the 2018 Treaty. As it is composed of the reasoning and the conclusions, which are the fundamental components of judicial decisions, the TSCR may be equated, to this extent, to the judicial decisions of ITLOS, the ICJ and Annex VII tribunals.[78]

H Interim Conclusions

In its essence, conciliation encompasses processes from various dispute settlement means. Historically, it has been characterized as a mixture of diplomatic methods – such as negotiation, good offices or mediation – and arbitral or judicial methods.[79] Similarly, the *Timor Sea* Conciliation Commission understood that, '[p]rocedurally, conciliation seeks to combine the function of a *mediator* with the more active and objective role of a commission of *inquiry*' (TSCR, para. 52, note 33; emphasis added). The conciliation is likely to have contributed to the eventual settlement of this dispute as it provided a flexible, yet structured, basis within which disputing parties were able to negotiate, deliberate, compromise and reach settlement, as shall be discussed in the next part of the article.

3 Substantive Aspects of Conciliation

In order to shed more light on the mechanism of conciliation, it is necessary to analyse the substantive aspects of this conciliation. The key issue for the disputing parties was the delimitation method for their respective continental shelves where several sizeable oil and gas fields, including the Greater Sunrise oil fields, are located.

[78] According to Merrills, UNCLOS, Art. 7 of Annex V, which requires the commission to record its conclusions on all questions of fact or law relevant to the matter in dispute, intends to underline the 'judicial element' in the commission's work. J.G. Merrills, *International Dispute Settlement* (6th edn, 2017), at 186.

[79] Cot, *supra* note 65, para. 3.

A Factors for Consideration

A sensitive issue in conciliation is the question of applicable rules or factors that the commission must consider in the proceedings. Historically, Conciliation Commissions do not strictly apply law, and this applies equally to conciliation under UNCLOS.[80] The Conciliation Commission, in general, considers not only the legal factors but also a wide range of factors including 'political considerations'[81] and 'political and economic [factors] without limiting their horizon to only legal issues'.[82] In order to bring about an amicable settlement, the commission is required to lead the parties to agree on 'the package deal incorporating elements of equity, *contra legem* if necessary'.[83]

Even where the choice of applicable rules of conciliation normally depends on a case-by-case basis of each treaty,[84] the relevant provisions of UNCLOS seem to allow the consideration of non-UNCLOS and non-legal factors. First, while ITLOS and Annex VII tribunals 'shall apply this Convention [UNCLOS] and other rules of international law not incompatible with this Convention', this does not apply to conciliation.[85] Second, the commission has to record its conclusions on 'all questions of fact or law'.[86] Third, according to the Rules of Procedure in the *Timor Sea* case, '[t]he Commission will be guided by *principles of objectivity, fairness and justice*, giving consideration to, among other things, *the rights and obligations* of the parties and the circumstances surrounding the dispute, including any previous practices between the parties'.[87] The principle of 'objectivity, fairness and justice' may contain wider factors that are not limited to the strict application of legal rules.

The flexibility on the applicable rules, however, has provoked controversy and uncertainty concerning the range of factors that may be taken into consideration, and, in fact, the applicability of international law was one such factor discussed by the parties (TSCR, para. 69). In relation to this, the commission was somewhat ambiguous: on the one hand, the commission implicitly saw the strict application of international law as undesirable, by quoting Article 20(1) of the United Nations Model Rules for Conciliation (UN Model Rules) (TSCR, at 25, note 43),[88] while, on the other hand, the commission made clear its intention not to depart

[80] Proelss, *supra* note 4, at 1841 (Article 284 of UNCLOS by Andrew Serdy).

[81] According to Jean-Pierre Cot, 'the commission was to examine all the aspects of the dispute: the facts, but also the law and *political considerations*'. Cot, *supra* note 61, at 9 (emphasis added).

[82] Yee, 'Conciliation and the 1982 UN Convention on the Law of the Sea', 44 *Ocean Development and International Law* (2013) 315, at 317.

[83] Cot, *supra* note 65, para. 27; Lavalle, *supra* note 75, at 29.

[84] Lavalle, *supra* note 75, at 29.

[85] UNCLOS, *supra* note 1, Art. 293(1): 'A court or tribunal having jurisdiction *under this section [section 2]* shall apply this Convention and other rules of international law not incompatible with this Convention' (emphasis added). As conciliation is stipulated in section 3, it is not required to apply UNCLOS nor international law *per se*.

[86] UNCLOS, *supra* note 1, Art. 7(1) of Annex V.

[87] Rules of Procedure, *supra* note 18, Art. 18(2) (emphasis added).

[88] UN Model Rules, *supra* note 61, Art. 20(1) is a misquotation by the commission. Rather, Art. 20(2) provides that 'the commission shall refrain from presenting in its report any final conclusions with regard to facts or from *ruling formally on issues of law*, unless the Parties have jointly asked it to do so' (emphasis added). See also Institut de droit international Regulations, *supra* note 10, Art. 7.

from UNCLOS but, rather, to consider legal arguments insofar as this facilitates an amicable settlement (TSCR, para. 70).[89]

B Relevant Treaties and Facts

It is useful to summarize the relevant facts of the *Timor Sea* case taken into consideration by the commission in the conciliation proceedings.

- The Seabed Treaty (1972): Agreement between Australia and Indonesia establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas,[90] which delimits the seabed between Australia and Indonesia along a line generally following the southern edge of the Timor Trough, except the seabed adjacent to Timor-Leste (TSCR, para. 20);
- the occupation of Timor-Leste (1975–1999): after the declaration of independence of Timor-Leste from Portugal (November 1975), it was occupied by Indonesia until 1999 (TSCR, paras 23 and 31);
- the Timor Gap Treaty (1989): Treaty between Australia and Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia, 11 December 1989,[91] which establishes Area A in which Australia and Indonesia exercised joint control over petroleum operations through a joint authority and share the resulting revenue equally (TSCR, para. 27);
- the Perth Treaty (1997): Treaty between Australia and Indonesia establishing an EEZ Boundary and Certain Seabed Boundaries, 14 March 1997 (not in force),[92] which delimits the water column in the Timor Sea;
- the Timor Sea Arrangement (2001): the Memorandum of Understanding of Timor Sea Arrangement, concluded between Australia and UN Transitional Administration in East Timor, 5 July 2001,[93] which establishes a 'Joint Petroleum Development Area' (JPDA) with boundaries that correspond to Area A of the Timor Gap Treaty and provides for a 90 to 10 division of petroleum revenue from within the JPDA in favour of Timor-Leste (TSCR, para. 34);
- the re-emergence of Timor-Leste on 20 May 2002;
- the Timor Sea Treaty (2002): Timor Sea Treaty between East Timor and Australia, 20 May 2002,[94] which provides for the formal application as between Timor-Leste and Australia of the Timor-Sea Arrangement, including the division of petroleum

[89] According to the commission, 'a conciliation commission need not as a matter of course engage with the parties on their legal positions, but may engage with these matters to the extent that so doing will likely facilitate the achievement of an amicable settlement'.

[90] Agreement establishing certain seabed boundaries in the area of the Timor and Arafura seas, supplementary to the Agreement of 18 May 1971 (with chart), 9 October 1972, 974 UNTS 319.

[91] Treaty on the zone of cooperation in an area between the Indonesian province of East Timor and Northern Australia (with annexes), 11 December 1989, 1654 UNTS 105.

[92] 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, reproduced in 36 I.L.M. 1053.

[93] Memorandum of Understanding of Timor Sea Arrangement, 5 July 2001, available at www.austlii.edu.au/au/other/dfat/special/MOUTSA.html.

[94] Timor Sea Treaty between the Government of East Timor and the Government of Australia (with annexes), 20 May 2002, 2258 UNTS 3.

revenue on a 90 to 10 basis, pending the delimitation of a permanent maritime boundary (TSCR, para. 35). In Annex E, the production from Greater Sunrise is distributed on the ratio of 20.1 per cent (JPDA) and 79.9 per cent (Australia) (TSCR, para. 36);

- the Unitisation Agreement (2003): Agreement between Australia and Timor-Leste relating to the Unitisation of the Sunrise and Troubadour Fields, 6 March 2003,[95] which is based on the same division – namely, 20.1 per cent (JPDA) and 79.9 per cent (Australia) and recorded that two countries made maritime claims in an area of the Timor Sea where Greater Sunrise lies (TSCR, para. 36);
- the CMATS (2006): the Treaty between Australia and Timor-Leste on Certain Maritime Arrangements in the Timor Sea, on 12 January 2006,[96] which (i) extended the life of the Timor Sea Treaty; (ii) provided for Timor-Leste to exercise jurisdiction over the water column within the JPDA; (iii) provided that revenue from Greater Sunrise would be shared equally between the two countries; and (iv) includes a moratorium on the settlement of permanent maritime boundaries (TSCR, para. 37);
- the Timor Sea Treaty arbitration: on 23 April 2013, Timor-Leste initiated arbitration proceedings against Australia pursuant to dispute resolution provisions of the Timor Sea Treaty,[97] with regard to the circumstances under which the CMATS was concluded and the validity of that treaty (TSCR, para. 45).[98] The proceedings were terminated;[99]
- the Article 8(b) arbitration: on 15 September 2015, Timor-Leste initiated arbitration proceedings against Australia pursuant to the dispute resolution provisions of the Timor Sea Treaty with regard to jurisdiction over pipeline (TSCR, para. 47).[100] Proceedings were terminated.[101]
- the 30 August Agreement (2017): the Comprehensive Package Agreement reached between the parties in Copenhagen on 30 August 2017;[102]
- the Final Draft Treaty (2017): the draft treaty agreed by the parties, initialled by the agents of the parties at the Peace Palace in The Hague, the Netherlands, on 13 October 2017; and
- the 2018 Treaty (2018): Treaty between Australia and Timor-Leste establishing Their Maritime Boundaries in the Timor Sea, signed on 6 March 2018.[103]

[95] 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 (with annexes), 6 March 2003, 2483 UNTS 317.

[96] CMATS, *supra* note 49.

[97] The Timor Sea Treaty (2002), Annex B under Article 23, para. (b).

[98] Arbitrators were Tullio Treves (chairman), Lord Collins of Mapesbury PC, FBA and W. Michael Reisman.

[99] PCA, *In the Matter of the Arbitration under the Timor Sea Treaty of 20 May 2002 between Timor-Leste and Australia*, PCA Case no. 2013–16, Termination Order, 20 March 2017.

[100] Arbitrators were His Excellence, Judge Abdulqawi Ahmed Yusuf (chairman), Sean D. Murphy and Professor Ivan Shearer AM.

[101] PCA, *In the Matter of the Arbitration under the Timor Sea Treaty of 20 May 2002 between Timor-Leste and Australia*, PCA Case no. 2015–42, Case Concerning the Meaning of Article 8(b).

[102] Comprehensive Package Agreement, 30 August 2017, available at https://pcacases.com/web/sendAttach/2349.

[103] 2018 Treaty, *supra* note 2.

C Conciliation Proceedings

The TSCR records the content of conciliation proceedings in great detail. This is because this case constitutes the first case of compulsory conciliation under UNCLOS and, therefore, would have 'potential relevance' for future cases (TSCR, para. 81). Although the actual proceedings were composed of many elements, the most important aspects can be summarized according to the following subparts.

1 Confidence-building Measures

As one of the procedures of conciliation, the commission took 'confidence-building measures'. In the Commission Proposal on Confidence-Building Measures, the commission proposed that the parties (i) terminate the CMATS, which was regarded as an obstacle to the progress of conciliation; (ii) maintain, instead, the Timor Sea Treaty; and (iii) suspend and terminate the proceedings of the two arbitral cases (TSCR, para. 95). All three proposals were accepted by the parties. In a letter to the parties, the commission referred to these measures as 'flexible and open-minded', in which the parties are not bound to 'litigation-style positions and statements' (TSCR, para. 90). This process was essential at the initial phase of conciliation, as it set the tone and fostered cooperation for the subsequent stages of conciliation (TSCR, para. 288).

2 The Negotiation Process

The commission engaged actively in the exchange of opinions of the parties for clarifying the basic positions of the parties and finding a path to an amicable settlement between them. This process, which was quite complicated overall, is similar to the diplomatic negotiations leading to bilateral treaties, which can be summarized as follows: (i) an issues paper of the commission was submitted on 6 February 2017 in which the commission sets out the issues and concerns to be considered by the parties (TSCR, para. 117); (ii) a commission non-paper was submitted on March 2017 in which the commission sets out options and ideas for a possible comprehensive agreement on maritime boundaries, including the proposal of a single maritime boundary and a shared regime for Greater Sunrise (TSCR, para. 124); (iii) informal consultations at the political level were undertaken, including the ministers of both parties (TSCR, paras 127–133) and the president and prime minister of Timor-Leste (TSCR, para. 152); and (iv) the commission's Inter-Session Guidance was released that touches chiefly on the subject of a special regime for the Greater Sunrise gas field (TSCR, para. 137).

3 Treaty Drafting

On the basis of the foregoing, the conciliation process moved on to the next stage – namely, that of treaty drafting. The parties confirmed their agreement to the elements of the 30 August 2017 package in the form of the agreement on 30 August 2017 (TSCR, paras 164–166). Following this, the commission initiated engagement with the joint venture in order to exchange information between the parties and the joint venture. On 25 September 2017, the parties sent to the commission the consolidated draft treaty (TSCR, para. 175). On 12 October 2017, the parties reached

complete agreement on the text of the final draft treaty (TSCR, para. 183). In the process of finalizing the draft treaty, the outstanding issue before the commission was how to arrange the development concept – namely, the choice of pipeline between the Darwin Liquified Natural Gas (LNG) plant and the Timor LNG plant. This discussion needed the involvement of the joint venture (TSCR, paras 197–200). By adopting the Supplemental Action Plan, the commission appointed an independent expert to advise it on the development concepts (TSCR, para. 202). As it was not possible for the parties to reach agreement on the development concepts, this issue remained unsettled (TSCR, para. 217). Finally, on 6 March 2018, leaving aside the unsolved issue of the development concepts, the parties signed the 2018 Treaty (TSCR, para. 219).

D Conclusions and Recommendations of the Conciliation Commission

The main part of the commission's conclusion reads as follows:

> the Commission therefore records that the Parties have reached agreement on the delimitation of a maritime boundary between them in the Timor Sea, as set out in the Treaty signed on 6 March 2018 … (TSCR, para. 304).
> The Commission further records that the Parties' agreements are consistent with the UN Convention on the Law of the Sea and other provisions of international law and recommends that the Parties implement the agreements reached in the course of these conciliation proceedings, including the transitional arrangements pertaining thereto (TSCR, para. 305).
> The Commission also recommends 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 (TSCR, para. 306).

As discussed earlier, Article 7 of Annex V requires the commission only to record the Parties' agreement or, alternatively, to record its conclusions and recommendations.[104] In the *Timor Sea* case, therefore, the commission was required merely to record the 2018 Treaty – the agreement of the parties concluded during the conciliation proceedings. Were one to take into account the transitional and provisional nature of the 2018 Treaty[105] and the unsettled nature of the development concepts issue,[106] however, it would seem too strict to insist that the commission refrain from recording its recommendations (TSCR, paras. 305–306).

4 Success Factors in Conciliation

A Successful Settlement of the Timor Sea Dispute

By way of the 2018 Treaty, the parties agreed to permanent maritime boundaries – save for several provisional points subject to future adjustment – and to the special

[104] The conciliation report 'shall 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' (emphasis added).

[105] 2018 Treaty, *supra* note 3, Arts 2(2) and 3 provide that some points of delimitation line are 'provisional', which will be adjusted subject to a future agreement between Timor-Leste and Indonesia.

[106] *Ibid.*, Art. 2(2) of Annex B.

regime for resource sharing in the Greater Sunrise gas fields, subject to future modification depending on the choice of development concept. Insofar as the main purpose of conciliation had been to lead the parties to reach 'amicable settlement',[107] this was perfectly achieved by the 2018 Treaty, which was concluded during and as a consequence of conciliation proceedings. Irrefutably, the Timor Sea conciliation, as a successful example of conciliation, demonstrates the potential of conciliation as an effective and useful means of dispute resolution.[108]

B The Cooperation of Parties

Since the conciliation procedure was predominantly consensual and non-compulsory, its success largely depends on the friendly and cooperative attitude of the parties.[109] This applies to the Timor Sea conciliation, the success of which was largely dependent on the cooperative attitude of the parties, the presence of good faith and collaboration with the commission. First, Australia had historically firmly rejected the settlement of the Timor Sea dispute by UNCLOS dispute settlement mechanism[110] and by the ICJ.[111] Once its initial objection to the competence of the Conciliation Commission was rejected (by the commission), it was no longer possible for Australia to challenge the legality or suspend the procedure,[112] and it then turned towards committing itself to the conciliation proceedings.[113] At this stage, Australia demonstrated cooperation by seeing the conciliation 'as an opportunity to establish its partnership with Timor-Leste on a new footing [and] the achievement of agreement on maritime boundaries may provide a foundation for a strong and effective partnership for the future' (TSCR, para. 50). This more amenable approach on the part of Australia potentially paved the way for an important compromise in the choice of development concepts with regard to the location of a pipeline from the Greater

[107] UNCLOS, *supra* note 1, Art. 6 of Annex V. 'Amicable settlement' means simply the dispute settlement by agreement between the disputing parties. Proelss, *supra* note 4, at 2320 (Article 5 of Annex V by Shotaro Hamamoto).

[108] The commission itself refers to the 'successful outcome of these conciliation proceedings' (TSCR, *supra* note 3, para. 304).

[109] It is correctly said that '[t]he friendly relations between Iceland and Norway may be the most important factor that made the [Jan Mayen] conciliation a success'. Yee, *supra* note 82, at 327.

[110] Optional exceptions declaration of Australia pursuant to UNCLOS, *supra* note 1, Art. 298(1)(a)(i). See note 10 above.

[111] On 22 March 2002 – namely, three months before the re-emergence of Timor-Leste (20 May 2002) – Australia attached a new reservation to its optional clause declaration, as to exclude: '(b) any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation'. By this, Australia intended to exclude, from the ICJ's jurisdiction, any dispute of maritime delimitation and exploitation which would occur with Timor-Leste.

[112] With regard to the non-appearance before the conciliation proceedings, UNCLOS, *supra* note 1, Art. 12 of Annex V provides that '[t]he failure of a party or parties to the dispute to reply to notification of institution of proceedings or to submit to such proceedings shall not constitute a bar to the proceedings'.

[113] Australia was making clear that if the decision on competence was against it, it would 'engage in the conciliation in good faith'. See Decision on Competence, *supra* note 5, para. 3.

Sunrise gas fields,[114] which, though it was a small compromise, was indispensable to the success of conciliation.

Second, also decisive for the success of conciliation was Timor-Leste's cooperation during the 'confidence-building measures' that involved the termination of the CMATS and of the two arbitration cases. What was important was that those actions on the part of Timor-Leste were not predicated on expectations of reciprocity at that stage, and this went some way towards demonstrating to Australia 'a genuine commitment [of Timor-Leste] to the success of the conciliation process' (TSCR, para. 289). By building trust and confidence between the disputing parties, it removed obstacles and barriers. Insofar as it changed the dynamic of the proceedings, Timor-Leste's cooperative approach to the process was also decisive in the success of the conciliation proceedings (TSCR, para. 288).

C Setting Aside Legal Considerations in Maritime Delimitation

The disputing parties are described as having been 'deeply entrenched in their legal positions' (TSCR, para. 285) since their legal positions on maritime delimitation had been entirely at variance and conflicting. On the one hand, Timor-Leste claimed the median line, relying on the distance approach widely accepted by international courts and tribunals (TSCR, paras 231). On the other hand, Australia, based on the natural prolongation approach, was taking a position that, in continental shelf delimitation, the unique configuration of the seabed constituted by the Timor Trough ought to be taken into consideration and, consequently, the delimitation of the continental shelf should be separated from that of the exclusive economic zone (TSCR, paras. 234–235). Conceivably, were the commission to insist on legal arguments, it would likely have been fanning the flames.[115]

Faced with such conflicting positions, the commission adopted a strategy not to express a definitive legal opinion on maritime boundary[116] and sought merely to advise the parties on the points on which their positions are not compatible with an amicable settlement (TSCR, para. 237). In other words, for leading the parties to compromise, the commission diverted the parties' minds away from legal considerations alone and towards their economic interests in settling and bringing certainty to their endeavours to exploit the resources in those maritime areas, especially in the Greater Sunrise gas fields. As shall be discussed below, this diversion successfully led to a compromise on the special regime for the Greater Sunrise. This means that, even when the legal positions of the parties were deeply entrenched, the commission was still able to find ground for the parties 'to envisage a mutually beneficial result meeting both sides' essential interests' (TSCR, para. 285).

From the foregoing, it is possible to draw the following conclusions on conciliation. First, it reminds us of the fact that compromise means a 'waiver of some or all of the legal rights of both or one of the parties'.[117] If the parties, or at least one of the parties,

[114] According to Australia, the development concepts were the most controversial issue between the parties, and, due to it, the parties had failed to conclude an agreement (TSCR, *supra* note 3, para. 256).

[115] Lavalle, *supra* note 75, at 30.

[116] In the *Jan Mayen* conciliation, *supra* note 13, at 22, on the contrary, the commission expressed its opinion on legal issues more directly, as follows: 'it [commission] is of the view that the concept of natural prolongation would not form a suitable basis for the solution of the outstanding issues.'

[117] Lavalle, *supra* note 75, at 29.

insist on their own legal positions, there can be no possibility of compromise. Second, the strategy of setting aside the parties' legal arguments constitutes an advantageous feature of conciliation, which cannot be adopted in means of dispute settlement such as litigation and arbitration. This advantage is reiterated by the commission as follows: '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' (TSCR, para. 292; emphasis added).

Further to the above, one may sympathize with the commission, which went so far as to state that conciliation is 'preferable to a resolution of the dispute consisting merely of identifying a "winner"' (TSCR, para. 285). In so far as the Timor Sea conciliation is concerned, the strategy of setting aside the parties' legal arguments significantly influenced the success of the outcome as it led the parties to make compromises by focusing on additional factors, including economic considerations. It seems exaggerated, however, to state that conciliation is 'preferable' to adjudication, given that non-legal factors are not absent in the latter nor absent from the choice of legal argumentation on the part of the disputants.[118]

D Resource Management and Revenue Sharing in the Greater Sunrise Gas Fields

While setting aside the legal approach in the maritime delimitation, the commission sought to find acceptable compromises in the management of natural resources, particularly in revenue sharing. In other words, before drawing the delimitation line itself, the commission led the parties to reach an agreement on the special regime for the Greater Sunrise gas fields.

1 Delimitation Based on the Revenue-sharing Ratio

It is important to note that the delimitation line within the Greater Sunrise area was proposed by the commission on the basis of the revenue-sharing ratio between the parties. In fact, the Comprehensive Package Agreement of 30 August 2017, which sets out a provisional boundary of the continental shelf, clarifies that Segment E in the Eastern Boundary (that is, the boundary within the special regime area) was decided 'in a proportion that is *roughly congruent with the division of revenue* from the resource' (emphasis added).[119] As is clear here, the delimitation line, proposed by the commission and subsequently accepted by the parties, was not based on the distance from the parties' coasts nor on the median line but, rather, on purely economic considerations of revenue sharing in the Greater Sunrise oil fields. The delimitation line was chosen to express the sharing ratio of 20 to 80 or 30 to 70. Even though this ratio is the core element of the compromise between the parties, the background to its decision has not been disclosed in the TSCR.

[118] Aloupi, 'Les motifs non-juridiques en droit de la mer', in F. Couveinhes Matsumoto and R. Nollez-Goldbach (sous la direction de), *Les motifs non-juridiques des jugements internationaux* (2016) 97.

[119] This line (Segment E) is indicated as the line between A16 and TA-5 in Annex A (Sketch Map), attached to the Comprehensive Package Agreement of 30 August 2017, available at https://pcacases.com/web/sendAttach/2349.

2 Choice of the Development Concept

Another difficult issue was the location of the pipeline: the Darwin LNG concept (in favour of Australia) or the Timor LNG concept (in favour of Timor-Leste). Timor-Leste insisted on the importance of its economic development, which would be better served through the Timor LNG (TSCR, para. 243).[120] The commission proposed that this be decided by Timor-Leste in agreement with the joint venture (TSCR, para. 245), and it took the position that Timor-Leste must be afforded the space to take a decision on a matter of great importance to its national development 'in accordance with its own national interest' (TSCR, para. 257). For its part, Australia did not insist on the Darwin LNG concept and agreed to leave the issue to be decided by Timor-Leste (TSCR, para. 244). Even if this compromise was a small part of the conciliation, it may have provided a favourable balance of interests between the parties, which contributed to the conclusion of the 2018 Treaty. The issue of development concepts was not definitively settled by the 2018 Treaty, which leaves the issue to be settled in future negotiations between the parties (TSCR, paras 284 and 297).[121]

3 Order of Discussion

The above process of conciliation highlights the importance of the order of discussion. In the normal course of maritime delimitation before an adjudicatory body, economic factors relating to natural resources are taken into consideration, only partially or marginally, as one of relevant circumstances. In many cases, however, the disputing parties' interests exist not in the drawing of the delimitation line itself but, rather, in the distribution of the seabed natural resources[122] and the living resources within those maritime areas. In the *Timor Sea* case, the parties were able first to reach agreement on the benefit sharing in the special regime and, then, to accept the maritime delimitation line that reflects this sharing ratio. In other words, the parties prioritized the resources sharing before deciding the location of the seabed boundary (TSCR, para. 246). This means that in this instance the order of discussion was decisive in leading the parties to conclude a package agreement.

One of the preconditions of the above method was that the parties and the commission were aware of the existence of natural resources in the Greater Sunrise oil fields and that the exploitation had not yet commenced.[123] This situation was entirely different from that

[120] Timor-Leste stated that 'the mid- and long-term economic consequences for the national economy were decisive' (TSCR, *supra* note 3, para. 275). Although its implication is not clear, Timor-Leste seems to have expected that the Timor-LNG concept, if adopted, would increase the use of local content, workforce and technology transfer in its territory. This is suggested by 2018 Treaty, *supra* note 3, Art. 14(2) of Annex B.

[121] 2018 Treaty, *supra* note 3, Art. 2 (Title to Petroleum and Revenue Sharing) of Annex B (Greater Sunrise Special Regime). (a) Split on an 80:20 basis in favour of Timor-Leste with a Darwin LNG concept or (b) split on a 70:30 basis in favour of Timor-Leste with a Timor LNG concept (TSCR, *supra* note 3, para. 265). At the moment of the publication of TSCR, the Parties had not yet agreed on the development concept (para. 281).

[122] The commission points out that 'both Parties' views on the location of the boundary were – understandably – influenced by the effect of the boundary on prominent seabed resources, in particular Greater Sunrise' (TSCR, *supra* note 3, para. 291).

[123] See the Decision on Competence, *supra* note 5, para. 12.

in the *Jan Mayen* case in which the existence of the oil field was not certain at the moment of conciliation,[124] and, consequently, the commission could not discuss precisely the revenue sharing of hydrocarbons in the disputed area. In contrast, the Timor Sea conciliation could engage directly in the discussion on the revenue sharing in the Greater Sunrise area, given that there was sufficient information concerning the natural resources.

5 Compatibility with UNCLOS

A Legal Basis of the Special Regime for the Greater Sunrise Gas Fields

As we saw in the forgoing subpart, the commission was faced with an ambivalence between the consideration of non-legal factors in the maritime delimitation and its intention not to depart from UNCLOS. This ambivalence has become rather apparent in the process of conciliation since the maritime delimitation line, including the special regime of the Greater Sunrise area, proposed by the commission and agreed thereafter by the parties, has been based on 'non-legal interests' *per se* – namely, the sharing ratio of natural resources (TSCR, para. 291).[125] Although the commission's flexible consideration of non-legal factors constitutes the very essence of conciliation, it potentially gives rise to questions as to whether the conciliation was conducted within the parameters of UNCLOS and, more crucially, whether the 2018 Treaty is compatible with UNCLOS.[126] On this point, the commission reiterated on various occasions in the TSCR that its own proposals and the draft treaty are compatible with UNCLOS. According to it, for example, the Non-Paper on a Comprehensive Package Agreement, which outlined the elements of the package, is 'compatible with the Convention's requirement that the delimitation of the maritime boundaries achieve an equitable solution' (TSCR, para. 162). The commission purports that this also applies to the comprehensive package (TSCR, para. 258) and to the discussions in the conciliation proceedings in general (TSCR, para. 70). Also in the conclusions, the commission repeated its understanding that 'the Parties' agreements are consistent with the UNCLOS' (TSCR, para. 305). The commission's stance was followed by the parties in the 2018 Treaty, which refers to Articles 74(1) and 83(1) of UNCLOS,[127] to the final settlement of maritime boundaries 'in order to achieve an equitable solution'[128] and, lastly, to the 'compatibility of this [2018] Treaty with the Convention [UNCLOS]'.[129]

[124] The Report of Geologists, which was submitted to the Conciliation Commission, with regard to estimated volumes of hydrocarbons, concludes that, 'considered in comparison with known oil-producing areas worldwide, the overall potential cannot be considered good, based on the existing fragmentary data. We emphasize that detailed further exploration could change this assessment'. Report of Geologists, 16 December 1980, reprinted in UNRIAA, vol. 27, at 22.

[125] The commission states that its mandate 'extended to the consideration of the Parties' broader, *non-legal interests* to the extent necessary for an amicable settlement' (emphasis added).

[126] Strictly, there can be no normative conflict between the TSCR and UCNLOS since the former is not legally binding *per se*.

[127] 2018 Treaty, *supra* note 3, preamble paragraph 3.

[128] *Ibid.*, preamble para. 11.

[129] *Ibid.*, preamble para. 13.

The TSCR does not clarify whether the special regime for the Greater Sunrise area was established pursuant to particular provisions of UNCLOS. Rather, it merely states that, in the regime area, 'the Parties would jointly exercise their rights as coastal States pursuant to Article 77 of the Convention' (TSCR, para. 265).[130] As a result, there may be two interpretations regarding the legal basis of the special regime. On the one hand, there is room to understand that the special regime was established as a 'provisional arrangement of a practical nature' pursuant to Articles 74(3) and 83(3). This understanding is supported by Timor-Leste's opening statement that referred, in the context of the commission's task, to 'transitional arrangements'.[131] The commission admitted this stance, based on Article 298(1)(a)(i) and, correspondingly, on Articles 74(3) and 83(3).[132] On the other hand, this understanding was modified in the conciliation process and was eventually abandoned by the parties. In fact, the 2018 Treaty refers only to Articles 74(1) and 83(1),[133] excluding Articles 74(3) and 83(3), and refers to the delimitation of 'permanent maritime boundaries'[134] rather than to a provisional arrangement. Furthermore, in the 2018 Treaty, the two elements – namely, the special regime and the maritime delimitation – are inseparably connected to each other.[135] Therefore, the special regime has been integrated into the delimitation of sea boundaries under Articles 74(1) and 83(1).

B Mechanism of Integrating Non-Legal Factors into Maritime Delimitation

As discussed earlier, interestingly, the legal grounds for justifying the compatibility of the special regime with UNCLOS were gradually changed during the conciliation proceedings. First, at the initial phase, the issue of natural resources in the Greater Sunrise gas fields was discussed in connection to the commission's competence or mandate and was found to fall within the 'scope of matters' submitted to the commission in accordance with Articles 74(3) and 83(3).[136] Second, the economic interests in the Greater Sunrise area were widely discussed in the conciliation proceedings, given that non-legal factors were not excluded from being considered during conciliation. Nevertheless, the commission

[130] This is reflected in *ibid.*, Art. 7(2). Art. 7(4) provides further that '[e]xcept as provided in this [2018] Treaty, the rights and obligations of the Parties in the Special Regime Area are governed by the Convention [UNCLOS]'. *Ibid.*, Art. 16(1) of Annex B refers to UNCLOS, *supra* note 1, Art. 77 in the same sense.

[131] Competence Hearing, Opening Session, 29 August 2016, 48:3 to 49:18.

[132] The competence of the commission expands not only to the actual delimitation of the continental shelf but also to the provisional arrangements of a practical nature under UNCLOS, *supra* note 1, Arts 74(3) and 83(3). See Decision on Competence, *supra* note 5, para. 97.

[133] 2018 Treaty, *supra* note 3, preamble para. 3.

[134] *Ibid.*, preamble para. 7. This 'permanent' nature of maritime boundaries is clarified in Art. 7(5), which provides that '[w]hen the Greater Sunrise Special Regime ceases to be in force, the Parties shall individually exercise their rights as coastal States pursuant to Article 77 of the Convention on the basis of the continental shelf boundary as delimited by this Treaty'. Therefore, the delimitation line shall continue permanently, even after the eventual depletion of natural resources in the special regime area.

[135] *Ibid.*, preamble para. 8 provides that 'there exists *an inextricable link* between the delimitation of the maritime boundaries and the establishment of the special regime for the Greater Sunrise Fields and that both elements are *integral* to the agreement of the Parties to this Treaty' (emphasis added).

[136] Decision on Competence, *supra* note 5, para. 99.

felt the need to further justify its consideration of such factors by stating that 'the proceedings could be expanded, with the Parties' agreement, to encompass issues beyond the strict delimitation of the maritime boundary' (TSCR, para. 291). Third, it became gradually apparent, during the proceedings, that the parties would reach an agreement on the permanent maritime delimitation, including the special regime of the Greater Sunrise gas fields, under Articles 74(1) and 83(1). This agreement – namely, the 2018 Treaty – finally exempted the commission and the parties from relying on Articles 74(3) and 83(3). To summarize, the commission's consideration of non-legal factors such as the economic interests of the parties was finally integrated into the parties' agreement on the maritime delimitation concluded under Articles 74(1) and 83(1).

UNCLOS contains the legal basis to support the above mechanism of integration. First, Articles 74(1) and 83(1), requiring the parties to reach an 'equitable solution' in maritime delimitation, are so broad as to potentially allow the parties to consider a wide range of factors, including purely economic interests and the allocation of natural resources, in their agreement on maritime delimitation. In the international jurisprudence on the equitable principles in maritime delimitation, the resource allocation has been taken into consideration as 'relevant circumstances'.[137] Second, even when a maritime delimitation agreement is not an 'equitable solution' and is consequently incompatible with UNCLOS, the two parties of UNCLOS 'may conclude agreements modifying or suspending the operation of provisions of this Convention [UNCLOS], applicable solely to the relations between them'.[138] This derogation could well be applicable to the maritime delimitation agreement.[139] Third, the conciliation procedure contains a peculiar mechanism of separating the reasons from the conclusions of conciliation. Article 26(2) of the Rules of Procedure provides that, '*[a]cceptance* by a party of recommendations submitted by the commission in no way implies any *admission* by it of the considerations of law or of fact which may have inspired the recommendations' (emphasis added). This provision incorporates Article 28(2) of the 1996 UN Model Rules (TSCR, para. 59), which originally incorporated the Regulations on the Procedure of International Conciliation, adopted by the Institut de droit international in 1961.[140] This separation between the commission's recommendations (that is, the conclusions) and the background considerations (that is, the reasons) is characteristic of conciliation. In adjudication, the reasons constitute the grounds that justify the conclusion of a

[137] T. Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* (2015), at 559–563. The author observes, however, that 'unlike other principles [of maritime delimitation], standards related to the location of resources have not developed much beyond abstract statements in case law'. *Ibid.*, at 560. On this point, see, e.g., *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, 24 February 1982, ICJ Reports (1982) 18, at 78, para. 107.

[138] UNCLOS, *supra* note 1, Art. 311(3).

[139] However, the Conciliation Commission does not refer to Art. 311 and thus implies that the 2018 Treaty, as such, is compatible with UNCLOS.

[140] Institut de droit international Regulations, *supra* note 10, preamble: 'Declares that no admission or proposal formulated during the course of the conciliation procedure, either by one of the Parties or by the Commission, can be considered as prejudicing or affecting in any manner the rights or the contentions of either Party in the event of the failure of the procedure; and, similarly, the acceptance by one Party of a proposal of settlement in no way implies any admission by it of the considerations of law or of fact which may have inspired the proposal of settlement.'

decision/award. In conciliation, in contrast, the reasons and the conclusions are disconnected, and, consequently, the disputing parties may accept the commission's recommendations without giving rise to prejudice of their interests by appearing to accept the reasons/considerations behind those recommendations or conclusions. In this sense, the legal positions of the parties are preserved in the conciliation procedure.[141] This mechanism enables the parties to find an agreeable point, notwithstanding their respective legal stances that are normally in conflict.

6 Conclusions

The Timor Sea conciliation demonstrates the merits and comparative advantages of conciliation, applicable to other disputes beyond the case-specific context, which can be summarized as follows. First, the conciliation is an entirely consent-based procedure in the sense that an unwilling party is by no means forced to accept the applicable rules of the procedure, to engage in each phase of the conciliation proceedings or to accept the recommendations of the commission. In this sense, the conciliation is a foreseeable procedure and constitutes a 'low-risk option' for the disputing parties.[142] Second, difficult disputes, deadlocked by the parties' incompatible legal interests and positions, may nevertheless be settled by conciliation. The disputing parties are often divided into two legal positions on maritime delimitation – namely, the distance approach *vis-à-vis* the natural prolongation approach, as had been the case with Timor-Leste and Australia, respectively, in the present dispute. Insofar as the former will more likely be accepted in adjudication, the party adopting the latter position would tend to be reluctant towards adjudication. Even in such difficult cases, the Conciliation Commission may find some common ground, by setting aside the legal arguments of the parties and introducing non-legal considerations to the negotiations – considerations including economic factors that may provide the ground for compromise between the parties. More concretely, the Conciliation Commission can neglect the well-established jurisprudence of the three-step approach in such disputes and lead, instead, the parties to negotiate on how to address their economic interests. Third, the conciliation procedure is suitable to maritime delimitation disputes, given its flexibility in taking into account a breadth of factors that involve the applicable substantive law, which requires only that an 'equitable solution' in the maritime delimitation be reached in conciliation. In other words, the applicable law leaves wide discretion for the Conciliation Commission, as well as for the disputing parties, to take into consideration non-legal factors. In this sense, conciliation, whether voluntary or compulsory, is generally amenable to the settlement of maritime delimitation disputes.

[141] It should be noted that the title of the chapter that includes UN Model Rules, *supra* note 61, Art. 28(2) is '[p]reservation of the legal position of the Parties'.

[142] It is said that '[c]onciliation is thus a relatively low-risk option for States in dispute, in that they maintain considerably more control over the proceedings than in litigation or arbitration and remain free to reject its result, although to do so may incur a political cost'. Proelss, *supra* note 4, at 1841 (Article 284 of UNCLOS by Andrew Serdy).