CHAPTER 7

A Foundational Experiment: The Timor Leste-Australia Conciliation

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1 Introduction

Most professors of international law who have been tasked with introducing the different methods for the peaceful settlement of international disputes to an audience of students or, occasionally, to a party seeking their advice, will likely have faced the dearth of contemporary examples of successful conciliation processes. It is certainly possible to refer to one or more existing mechanisms, dive into the possible operation of rules guiding the process, and emit an opinion on the pros and cons of conciliation as compared to bare negotiation or to the more adversarial arbitral or judicial dispute settlement. But, until recently, we were lacking a truly foundational experiment in which a conciliation process had managed to successfully settle a complex dispute between two distrustful parties on a major question, maritime delimitation.

The Timor-Leste/Australia conciliation process conducted under the rules of the UN Convention on the Law of the Sea has provided such an experiment and, in doing so, it has drawn attention more generally to conciliation as a realistic means of international dispute settlement. Moreover, the Conciliation Commission established to conduct the conciliation process skilfully developed and used a number of practices which will likely set a precedent for future conciliation processes, whether under the UNCLOS or in other contexts.

This chapter analyses this foundational experiment, first by looking at the broader context of conciliation procedures, then examining the context of the dispute between Timor-Leste and Australia, and finally analysing certain salient points of the conciliation process itself. Our conclusion is stated in the title of the chapter. The Timor-Leste/Australia is indeed a foundational experiment which illustrates in great detail the potential of conciliation to settle highly complex disputes in contemporary international law.

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II Conciliation in International Dispute Settlement

1 *The Origins of Conciliation*

Conciliation represents a classical method of settlement of international disputes,[1] characterized by an eclectic nature[2] and rooted in more than a century-long legal history.[3] In July 1899, at the first International Peace Conference in The Hague, a 'Convention for the Pacific Settlement of International Disputes' was adopted,[4] which established a global institution for international dispute resolution, namely the Permanent Court of Arbitration ('PCA'). This Convention was later superseded and expanded to other signatories – particularly from Latin-America – in 1907 at the second Hague Convention.[5] The Hague Conventions did not specifically provide for conciliation but for 'commissions of inquiry'. Yet, the two types of processes have much in common, as suggested by the operation of the commission established to settle the 1905 Dogger Bank incident between Russia and Great Britain. The commission of inquiry, set up under Article 9 of the 1899 Hague Convention, made in fact recommendations and ultimately acted as a conciliation commission.[6] This was a voluntary

1 See, on the topic, Y. Tanaka, *The Peaceful Settlement of International Disputes* (Cambridge: CUP, 2018) 65–72; Christian Tomuschat, Riccardo Pisillo Mazzeschi and Daniel Thürer (eds.), *Conciliation in International Law. The OSCE Court of Conciliation and Arbitration* (Leiden/Boston: Brill Nijhoff, 2017); J.G. Merrills, *International Dispute Settlement,* 5th ed. (Cambridge, CUP, 2011) 58–83; Lucius Caflisch, 'Cent ans de Règlement pacifique des différends interétatiques', 288 (2002) *Recueil des cours de l'Académie de Droit international de la Haye* (RdC) 282.

2 Merrills (fn. 1) 58.

3 See J. Efremoff, 'La conciliation internationale', 18 (1927) *RdC* 5, and 'L'organisation de la conciliation comme moyen de prévenir les guerres', 59 (1937) *RdC* 103. See also C. C. Hyde, 'The place of commissions of inquiry and conciliation treaties in the peaceful settlement of disputes', 10 (1929) *BYBIL* 96.

4 Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1799 [hereinafter the 'Hague Convention'].

5 During the second Hague Peace Conference, held in 1907, the Convention for the Pacific Settlement of International Disputes of 1899 that established the Permanent Court of Arbitration (PCA) was expanded and opened to a greater number of signatories, including Latin American states, see the Hague Convention for the Pacific Settlement of International Disputes of 1907, 1 Bevans 577. The latter replaced the earlier Convention and is in force for States that were not signatories to the Convention for the Pacific Settlement of International Disputes of 1899. For an analysis, see S. Rosenne (ed.), *The Hague Peace Conferences of 1899 and 1907 and International Arbitration: Reports and Documents* (The Hague: T.M.C. Asser Press, 2001); C. Howard-Ellis, *The Origin, Structure & Working of the League of Nations* (Boston: Houghton Mifflin Company, 1929) 290.

6 See C. Howard-Ellis (fn. 5) 290.

dispute settlement procedure and the commission considered questions of fact and law as well as diplomatic concerns.

The first treaty to provide for conciliation as such was instead concluded between Sweden and Chile in 1921[7] and various others of the time dealt with conciliation, giving it a more or less prominent place.[8] The PCA was only authorised in the 1930s to use its facilities for conciliation, and for the arbitration of international disputes between States and private parties.[9] The League of Nations further promoted conciliation as a mode of dispute resolution in 1922,[10] and the 1945 UN Charter, in its Article 33, expressly included conciliation among the list of mechanisms for the peaceful settlement of disputes.[11] Conciliation was increasingly included in multilateral treaties from 1945 onwards.[12]

A central feature of a conciliation commission is that it has no power to specifically decide on the terms of the settlement, though it makes recommendations and its position may persuade the parties to accept the settlement.[13] Developments of the method are to be found in initiatives adopting conciliation taken by the Organization for Security and Co-operation in Europe (OSCE), originally called 'Conference for Security and Co-operation in Europe'. The OSCE has, since its inception, focused on the peaceful settlement

7 Treaty of Conciliation (Chile – Sweden), 1921.

8 The 1925 treaty between France and Switzerland set the specific functions of permanent conciliation commissions, becoming the model for later treaties, see M. Habicht, *Post War Treaties for the Pacific Settlement of International Disputes* (Cambridge, MA, 1931) 226. For an overview, see Merrills (fn. 1) 59–60.

9 The question arose in relation with the arbitration between the Chinese Government and Radio Corporation of America (RCA), *RCA v China*, PCA, Award 13 April 1935. In February 1962, the International Bureau of the PCA elaborated its 'Rules of Arbitration and Conciliation for settlement of international disputes between two parties of which only one is a State'. Concerning the background of these Rules, see Circular Note of the Secretary General, March 3, 1960, 54 (1960) *A.J.I.L.* 933, 937.

10 League of Nations, 'Resolutions and Recommendations Adopted on the Reports of the First Committee', 9 (1922) *League of Nations Official Journal, Special Supplement* 9, 9–11; See ch. 1, 1928 General Act (adopted 26 September 1928), 93 *LNTS* 343.

11 Charter of the United Nations, 24 October 1945, 1 *UNTS* XVI.

12 See, for instance, Article 66, United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *UNTS* 331; UN General Assembly, 'Peaceful Settlement of Disputes Between States', Resolution 37/10, 15 November 1982, Annex: Manila Declaration on the Peaceful Settlement of International Disputes, para 5.

13 See, in particular, Art. 7: Regulations on the Procedure of International Conciliation, International Law Institute, ii (1961) *Annual Report* 232; see Thürer, '*Peaceful Settlement of International Disputes: About the Essence and Role of Conciliation*', in: Tomuschat, Pisillo Mazzeschi and Thürer (fn. 1) 41–43.

of international disputes. If the CSCE had first created the CSCE Dispute Settlement Mechanism involving a combination of mediation and conciliation,[14] complemented by the Valletta Procedure, at the Stockholm Meeting of the Council of the CSCE in 1992, the participating States decided to also add a formal conciliation procedure.[15] Importantly, the States parties concluded the Convention on Conciliation and Arbitration within the OSCE ('Stockholm Convention'),[16] which referred to Arts. 2(3) and 33 of the Charter and stressed States' commitment to settle their disputes through peaceful means and to develop mechanisms to settle disputes, without impairing other existing institutions or mechanisms. The Convention set an important contribution for the functioning of conciliation. It provided for the creation of a panel of conciliators and arbitrators, the 'Court of Conciliation and Arbitration', and for conciliation for cases which are referred either by agreement or unilaterally by a State party. A commission is appointed for each case and its function is 'to assist the parties to the dispute in finding a settlement in accordance with international law and their CSCE commitments' (Article 24). In case the dispute is not decided during the proceedings, the Commission prepares a report containing its recommendations, which the parties can accept or reject. In the latter case, the report is forwarded to the OSCE Council. Importantly, being a party to the Convention entails a commitment to conciliation by the State.[17]

This brief survey of the origins of conciliation procedures provides the basic background to understand the significance of the *Timor-Leste/Australia* case for the operation of conciliation, particularly when, as in the OSCE or – as discussed next – in the UNCLOS, such procedures are compulsory in certain cases.

14 See K. Oellers-Frahm, 'The mandatory component in the CSCE dispute settlement system', in M.W. Janis (ed.), *International Courts for the Twenty-First Century* (Dordrecht: Martinus Nijhoff Publishers, 1992) 195. The text of the CSCE Procedure for Peaceful Settlement of Disputes can be found *ibid*., 206, and in 30 (1991) *ILM* 390.

15 See Annex 1–3 to the Council's Decision on Peaceful Settlement of Disputes, text in 32 (1993) *ILM* 551, 556–568; Helmut Steinberger, 'The Conciliation Procedure Established by the Convention on Conciliation and Arbitration within the OSCE', in: Lucius Caflisch (ed.,), *The Peaceful Settlement of Disputes between States: Universal and European Perspectives* (The Hague *et al*.: Kluwer Law International, 1998) 67 *et seq*; see also Thürer (fn. 13) 44–46; Merrills (fn. 1) 76–77.

16 Text in 32 (1993) *ILM* 557. The Convention forms Annex 2 to the CSCE Council's 1992 Decision on Peaceful Settlement of Disputes. See Jean-Pierre Cot, entry 'Conciliation', in: Rüdiger Wolfrum (ed.), *Encyclopedia of Public International Law*, Vol. ii (Oxford: OUP, 2012) 576–582.

17 Merrills (fn. 1) 77.

2 *The Institutionalisation of Conciliation Procedures*

In general terms, two main types of conciliation must be distinguished: voluntary and compulsory conciliation. The former can be established ad hoc by States Parties to an international dispute on the basis of a treaty between them.[18] The latter, instead, is set on the basis of a unilateral request by a party to a dispute, through an independent compulsory procedure.[19] Both forms of conciliation exercise two main functions: first to investigate the factual issues, and, second, to facilitate the settlement of disputes by suggesting solutions acceptable to the parties.[20] In particular, in order to ensure the effectiveness of conciliation, three conditions must be fulfilled: independence and impartiality of the conciliation commission,[21] confidentiality[22] and non-aggravation of the situation.[23]

Normally a conciliation commission is composed of three or five members[24] and each party to a dispute normally appoints either one of the three conciliators or two of the five conciliators. The third or the fifth conciliator is then appointed either through a common decision of the two parties to the dispute or of the two or the four conciliators already chosen. The composition of a conciliation commission largely remains in the hands of the parties, whereas the rules to be followed in the process, in most treaties, are set by the commission itself.[25] A conciliation commission is expected to issue its recommendations within a

18 Article 2(3) of the PCA Optional Conciliation Rules, IC-AR 017 (1996), [hereafter 'PCA Optional Conciliation Rules'].

19 See, Article 66(b), 1969 Vienna Convention on the Law of Treaties ('VCLT'), 23 May 1969; see also the compulsory conciliation set out in the United Nations Convention on Law of the Sea ('UNCLOS'), 10 December 1982.

20 See Article 15(1) of the Revised Geneva General Act for the Pacific Settlement of International Disputes, 28 April 1949; *United Nations Handbook on the Peaceful Settlement of Disputes between States* (United Nations, 1992) 46 – 7, paras. 144–5; see also Tanaka (fn. 1) 72.

21 Article 7, United Nations Model Rules for the Conciliation of Disputes between States, General Assembly Resolution 50/50, 11 December 1995 [hereinafter 'the 1995 UN Model Rules]; Article 7(1) of the PCA Optional Conciliation Rules.

22 Article 25(1), 1995 UN Model Rules, which however also recognize in Article 26(2) that, on the basis of an agreement, the parties may make available to the public or authorize the publication of all or some documents; Section XII of the 1992 Provisions for a Conference on Security and Cooperation Europe (CSCE) Conciliation Commission, 15 December 1992.

23 Article 16, American Treaty on Pacific Settlement ('Pact of Bogotá'), 30 April 1948, OAS, Treaty Series, No. 17 and 61; see also Article 27 of the 1995 UN Model Rules.

24 A dispute can be also referred to a sole conciliator, see V. Umbricht, 'Principle of International Mediation: The Case of the East African Community', 187 (1984) *RdC* 307 – 89.

25 See Article 8 of the UN Model Rules, Article 4 of Annex V of UNCLOS. See also *United Nations Handbook* (fn. 20) 51 – 2, paras. 156 – 8.

reasonable time, which in recent multilateral treaties is set to a twelve-month period.[26] The report of the conciliation commission is not binding upon the parties in dispute;[27] however, it has normative force.[28]

As of today, although some 200 bilateral treaties include clauses on conciliation procedures, the number of the conciliation processes actually undertaken remains overall low,[29] and it declined since 1945, due to various legal and political factors.[30] If conciliation has rather fallen out of favour in bilateral treaty practice, multilateral treaties present a different trend.[31] Various regional agreements, such as those in the Americas, Europe and Southeast Asia, include conciliation as a method of dispute settlement.[32]

A particularly important example, both because of its relevance for the *Timor-Leste/Australia* dispute and because of its sophistication, is found in the 1982 UNCLOS. UNCLOS provides two forms of conciliation, namely voluntary and compulsory procedures.[33] The difference in the nature of the conciliation lies in how a State party can invoke and terminate the conciliation, but it has wider implications, which we shall examine later in this chapter.

Voluntary conciliation is set out in Section 1 of Part XV and according to Article 284(1) of the UNCLOS, a State Party which is a party to a dispute concerning

26 *United Nations Handbook* (fn. 20) 52, para. 159. See Annex to the VCLT, para 6, first sentence reads: 'The Commission shall report within twelve months of its constitution'.

27 See Article 7(2) UNCLOS, Annex V establishing Conciliation, Article. 6; the 1969 VCLT; and Preamble of the Regulations on the Procedure of International Conciliation adopted by the Institut de droit international.

28 See, for instance, Article 33(3) of the 1949 Revised General Act, 71 UNTS 102, 20 September 1950. Some treaties also require the parties to consider the commission's recommendations in good faith, see for instance, Article 11(5) of the 1985 Vienna Convention for the Protection of the Ozone Layer, 1513 UNTS 324, 22 September 1988; Article 14(6) of the 1992 Framework Convention on Climate Change, 1771 UNTS 165, 21 March 1994. See also Article 21 of the UN Model Rules. The States Parties may also decide to accept recommendations of conciliation as binding, see, for example, Section XIV of the Provisions for a CSCE Conciliation Commission.

29 See Tanaka (fn. 1) 69–70.

30 See Alain Pellet, 'Peaceful Settlement of International Disputes', in: Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law,* Vol. 8 (Oxford: OUP, 2012) 201, at 220, para 69; N. Butler, 'Arbitration and Conciliation Treaties', *ibid*., Vol. 1 (2012) 549, at 559, para. 9.

31 See Merrills (fn. 1) 69–74.

32 See American Treaty on Pacific Settlement (Pact of Bogota) (signed 30 April 1948, entered into force 6 May 1949) 30 *UNTS* 55; European Convention of the Peaceful Settlement of Disputes (signed 29 April 1957, entered into force 30 April 1958) *European Treaty Series* No 23; ASEAN Protocol on Dispute Settlement Mechanisms (adopted 8 April 2010).

33 See S. Yee, ' Conciliation and the 1982 UN Convention on the Law of the Sea', 44 (2013) *ODIL* 315 – 34.

the interpretation or application of the Convention may invite the other party or parties to submit the dispute to conciliation in accordance with the procedure under Annex V, Section 1, or another conciliation procedure. Voluntary conciliation cannot be unilaterally triggered. It is thus purely voluntary also in that the conciliation cannot proceed if the parties do not agree upon the procedures for the conciliation. The conciliation commission examines the claims and the objections by the parties and subsequently advances proposals to the parties for a possible amicable settlement. Its report is required within twelve months of its constitution and must include any agreements reached and, failing agreement, its conclusions on all questions of fact or law relevant to the matter in dispute and recommendations appropriate for an amicable settlement. The report of the commission is not binding upon the parties. It follows that a dispute is still unsettled if one of the disputing parties does not accept the recommendations in the conciliation report. In this case, the dispute is to be moved to the compulsory procedures for the settlement of disputes.[34]

When compared to voluntary conciliation, one of the main distinctive features of compulsory conciliation is that it can be unilaterally triggered by a State against another. The disputes subject to compulsory conciliation are those carved out from compulsory judicial settlement by Articles 297 and 298 of UNCLOS. Once compulsory conciliation is initiated, it follows the procedures stipulated in Annex V, except if the parties agree otherwise. The process is termed 'compulsory', because the parties are bound to participate in the conciliation, until the commission adopts its report or one of the parties refuses the recommendations in the report by written notification. Despite the compulsory character of the procedure, conciliation does not result in a binding decision but only in a non-binding report containing recommendations, that the commission is required to issue after twelve months. This is procedure that was followed in the *Timor-Leste/Australia* dispute.

III The Timor-Leste/Australia Conciliation

1 *The Dispute*

On 11 April 2016, Timor-Leste instituted the first of its kind compulsory conciliation proceedings under Article 298 and Annex V of UNCLOS to resolve its maritime boundary dispute with Australia. For an understanding of the

34 Section 2 of Annex V of UNCLOS establishes the compulsory submission to a conciliation procedure pursuant to Section 3 of Part XV.

implications and importance of this foundational conciliation experiment under UNCLOS, it is necessary to clarify the origins and historical background of the dispute, the challenges and evolving stalemate confronting the concerned parties, and their failure to reach an agreement to delimit the disputed area. These factors prompted the initiation of the conciliation proceedings.

Timor-Leste and Australia are neighbouring States divided by the Timor Sea, at a distance of approximately 300 nautical miles. Timor-Leste (formerly known as East Timor) was a Portuguese colony from the 16th century until 1975. On 28 November 1975, the people of Timor-Leste declared their independence from Portugal. Only nine days later, Indonesia occupied Timor-Leste and shortly thereafter declared it as its 27th province. In 1999, as suggested by then President BJ Habibie of the Republic of Indonesia, the United Nations (UN) supervised a referendum, in which the people of Timor-Leste voted overwhelmingly for independence. From 1999 to 2002, the territory was administered by the United Nations Transitional Administration in East Timor and, on 20 May 2002, Timor-Leste emerged as an independent State.

The maritime boundary dispute in the Timor Sea was initially drawn before the declaration of independence of Timor-Leste. In 1945, the United States affirmed rights over its continental shelf in the famous Truman Proclamation, which was followed by several other claims by different States. In the 1950s, Portugal, which had been occupying Timor-Leste since 1515 and since 1769 had set a local colonial government, and Australia claimed rights over the seabed of the Timor Sea.[35] During the 1960s and the 1970s, Australia and Portugal gave their approval to requests by different oil and gas companies for petroleum exploration in the Timor Sea. The explorations undertaken during this time revealed the Timor Sea to be a potentially important source of oil and gas. The concessions granted by Australia extended up to the Timor Trough, which lies over 200 NM from its coast and approximately 50 NM from the southern coast of Timor-Leste. Portugal had approved concessions up to the median line between the coasts of the two States.[36] Arguing that the Timor

35 Commonwealth of Australia, 'Proclamations by His Excellency the Governor General in and over the Commonwealth of Australia', *Commonwealth of Australia Gazette* (No 56, 11 September 1953) <www.legislation.gov.au/content/HistoricGazettes1953 >; *United Nations Legislative Series*, 'Portugal: Act No 2080 Relating to the Continental Shelf, 21 March 1956' *Supplement to Laws and Regulations on the Regime of the High Seas* (Volumes I and II) and *Laws Concerning the Nationality of Ships* (United Nations Publications 59 v 2, 1959) < http://legal.un.org/legislativeseries/documents/untlegs0008.pdf >.

36 In 1962, Australia granted permits to a consortium consisting of Arco Australia Ltd, Australian Aquitaine Pty Ltd and Esso, and one year later to another consortium of Woodside Petroleum, Burmah Oil Company and the Anglo-Dutch Shell Oil Company. In

Trough was a break separating 'two distinct shelves' between Australia and Timor-Leste, Australia and Portugal favoured distinct criteria to the division of the continental shelf between them, the former relying on the natural prolongation principle and the latter on the median line principle. Australia declined the request by Portugal to negotiate to delimit their maritime boundary and rather chose to pursue negotiations with Indonesia, before entering into negotiations with Portugal.[37] On 9 October 1972, Australia and Indonesia signed an agreement on the seabed (1972 Seabed Agreement), establishing a continental shelf boundary in the Timor Sea favourable to Australia's preferred approach, following the southern edge of the Timor Trough.[38] The 1972 Seabed Agreement did not consider the maritime boundary between Australia and Portuguese Timor, thus creating an area known as the 'Timor Gap'.[39] Subsequently, in response to a diplomatic note sent by Australia to Portugal proposing negotiations to close the Timor Gap, Portugal, denied such proposal until the conclusion of the third UN Law of the Sea Conference, due to start in 1973.

Following the occupation and subsequent annexation of Timor-Leste by Indonesia in 1975/76, Australia focused on this diplomatic route. A controversial step in this context was the conclusion on 9 December 1989 of the so-called 'Timor Gap Treaty' between Australia and Indonesia,[40] which organised the joint development of petroleum resources of the Timor Gap in three zones allocated between the two countries, thereby excluding Portugal and the East-Timorese people. The treaty entered into force in February 1991 and, within weeks, Portugal instituted proceedings before the International Court of Justice by reference to the right of the Timorese people to self-determination and

1974, Portugal granted permits to Petrotimor, a consortium led by the United States company Oceanic Exploration. See Paul Hallwood, *Economics of the Oceans: Rights, Rents, and Resources* (Abingdon, NY: Routledge, 2014) 78–79.

37 Robert J King, 'The Timor Gap 1972–2017' Submission to the Parliament of Australia, Certain Maritime Arrangements Timor-Leste, Submission 27 (March 2017).

38 Agreement Between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Sea-Bed Boundaries in the Area of the Timor and Arafura Seas, Supplementary to the Agreement of 18 May 1971 (signed 9 October 1972, entered into force 8 November 1973) 974 *UNTS* 319 (1975) (1972 Seabed Agreement).

39 Article 3 of the 1972 Seabed Agreement (fn. 12) provides that the two States shall consult to adjust certain points of their seabed boundary, following the conclusion of further delimitation agreement between the concerned states in the Timor Sea.

40 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, 9 December 1989, 29 (1990) *ILM* 469.

Portugal's situation as the administering power.[41] The Court declined to hear the claim on the grounds that Indonesia was a necessary party to the dispute and it had not consented to the jurisdiction of the Court.[42] It noted, however, that Portugal's assertion that the right to self-determination generated obligations *erga omnes* (thus also for Australia and Indonesia) was 'irreproachable'.[43] The principle and right to self-determination was called to play a major role in subsequent years for the redefinition of the entitlements of Timor-Leste in the disputed area.

On 20 May 2002, immediately after Timor-Leste formally declared independence, it signed the 2002 Timor Sea Treaty with Australia,[44] which largely followed the terms of a previous arrangement concluded in 2001 with the UN transitional administration and replaced the Timor Gap Treaty. Like the Timor Gap Treaty, the 2002 Treaty did not settle the maritime boundary; it only organised the joint development of the resources, this time in a single area, with an allocation of 90% to Timor-Leste and 10% to Australia. As a follow up to the Timor Sea Treaty, on 6 March 2003, Australia and Timor-Leste concluded an agreement on the unitisation of the Greater Sunrise natural gas field ('2003 Unitisation Agreement').[45] After the 2003 Unitisation Agreement, bilateral discussions started on a development plan for the Greater Sunrise area. One of the key issues under discussion was the direction of a potential petroleum pipeline from Greater Sunrise. After several rounds of negotiations, on 12 January 2006, the two States signed another agreement on 'Certain Maritime Arrangements in the Timor Sea' (2006 CMATS).[46] The 2006 CMATS left open the questions of maritime delimitation and focussed on the allocation (50/50) of the revenues from the Greater Sunrise field.

41 Application instituting proceedings, 22 February 1991, < https://www.icj-cij.org/files/case-related/84/6809.pdf>.

42 *East Timor* (*Portugal v. Australia*), Judgment, I. C.J. Reports 1995, p. 90 [East Timor case].

43 *East Timor case*, para. 29.

44 Timor Sea Treaty Between the Government of East Timor and the Government of Australia (signed 20 May 2002, entered into force 2 April 2003) 2258 UNTS 3 (2005) (2002 Timor Sea Treaty).

45 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, entered into force on 23 February 2007) 2483 *UNTS* 317 (2007) (2003 Unitisation Agreement).

46 Treaty Between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (signed 12 January 2006, entered into force 27 June 2006) 2483 *UNTS* 359 (2007) (2006 CMATS).

Timor-Leste soon requested that negotiations on maritime boundaries be resumed, after understanding that no development plans under the 2003 Unitisation Agreement and the 2006 CMATS could be agreed upon in light of diverging views. After Australia declined, on the basis of the moratorium provided in the 2006 CMATS, Timor-Leste initiated various proceedings against Australia. On 23 April 2013, Timor-Leste instituted arbitral proceedings under the 2002 Timor Sea Treaty against Australia, demanding to have the 2006 CMATS declared invalid and affirming that Australia, by engaging in espionage, had not acted in good faith during the 2006 CMATS negotiations.[47] On 21 October 2013, the Arbitral Tribunal was constituted. On 3 December 2013, two days before the Arbitral Tribunal was about to start its procedural meeting with the parties, the Australian office of Timor-Leste's legal counsel in the arbitration was raided by the Australian Security Intelligence Organisation and documents related to the case were seized.[48] Timor-Leste requested the return of documents, but Australia failed to comply, claiming that the raid had been carried out to protect its national interest and security, as the documents seized 'contained intelligence related to security matters'.[49]

As a result, on 17 December 2013, Timor-Leste, requested the ICJ to order provisional measures in connection with the seizure and detention by Australia of Timor-Leste's documents.[50] On 3 March 2014, the ICJ made a first order requesting Australia to keep under seal the seized documents and ensure that the content of the seized materials would not be used to the disadvantage of Timor-Leste,[51] while, on 22 April 2015, the Court made a second order, authorizing the return of all seized documents and data by Australia to Timor-Leste.[52]

47 See Donald Anton, 'The Timor Sea Treaty Arbitration: Timor-Leste Challenges Australian Espionage and Seizure of. Documents', 18 *ASIL Insights* www.asil.org/insights/volume/18/issue/6/timor-sea-treaty-arbitration-timor-leste-challenges-australian-espionage.

48 Peter Lloyd, 'ASIO Raided Office of Lawyer Representing East Timor in Spying Case', *ABC News* (4 December 2013) < www.abc.net.au/news/2013-12-03/asio-raided-lawyer-representing-east-timor-in-spying-case/5132486 >.

49 'Australian PM Defends 'National Security' Raids in Timor Spying Case', *Straits Times* (4 December 2013) < www.straitstimes.com/world/australian-pm-defends-national-security-raids-in-timor-spying-case >.

50 *Questions Relating to the Seizure and Detention of Certain Documents and Data* (*Timor-Leste v Australia*), Application Instituting Proceedings (17 December 2013) < www.icj-cij.org/files/case-related/156/17962.pdf >.

51 *Questions Relating to the Seizure and Detention of Certain Documents and Data* (*Timor-Leste v Australia*) *Provisional Measures*, Order of 3 March 2014, ICJ Reports 2014 < www.icj-cij.org/files/case-related/156/156-20140303-ORD-01-00-EN.pdf >.

52 *Questions Relating to the Seizure and Detention of Certain Documents and Data* (*Timor-Leste v Australia*), *Request for the Modification of the Order Indicating Provisional Measures*

On 15 May 2015, the two parties wrote to the ICJ confirming the return of the seized documents and data.[53] On 2 June 2015, Timor-Leste informed the ICJ that it had 'successfully achieved the purpose of its Application to the Court' and requested the discontinuance of the proceedings.[54] On 11 June 2015, the ICJ ordered the removal of the case from its list.[55]

Nearly two months later, on 30 July 2015 Timor-Leste wrote to the Arbitral Tribunal, which had already been constituted under the 2002 Timor Sea Treaty, to request the resumption of the arbitral proceedings, as the 'attempts to negotiate an amicable settlement of the case have not been successful'.[56] On 24 September 2015, Timor-Leste initiated another arbitration proceeding against Australia under the 2002 Timor Sea Treaty,[57] related to a dispute between the two countries concerning the interpretation of Article 8(b) of the Treaty. Australia claimed it would participate in the proceedings to defend its position.[58]

The above proceedings did not concern the issue of maritime delimitation, which was still an essential priority for Timor-Leste. Australia continued to rely on the moratorium in the 2006 CMATS to decline Timor-Leste's request for the establishment of permanent maritime boundaries. Meanwhile, Australia had already made a declaration under Article 298 of UNCLOS to exclude maritime boundary disputes from compulsory procedures entailing binding decisions and amended its acceptance of the ICJ compulsory jurisdiction, excluding:

> any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the EEZ 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.[59]

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of 3 March 2014, Order of 22 April 2015, ICJ Reports 2015 < www.icj-cij.org/files/case-related/156/156-20150422-ORD-01-00-EN.pdf >.

53 *Questions Relating to the Seizure and Detention of Certain Documents and Data* (*Timor-Leste v Australia*), (Order of 11 June 2015) ICJ Reports 2015, 572 < www.icj-cij.org/files/case-related/156/156-20150611-ORD-01-00-EN.pdf > accessed 9 August 2018, 573.

54 *Ibid*. 6.

55 *Ibid*.

56 *Arbitration Under the Timor Sea Treaty* (*Timor-Leste v Australia*), Termination Order (20 March 2007) PCA 2013–16 < https://pcacases.com/web/sendAttach/2110 >.

57 Minister of State and of the Presidency of the Council of Ministers and Official Spokesperson for the Government of Timor-Leste, 'Timor-Leste Initiates Arbitration Proceedings Under the Timor Sea Treaty' (24 September 2015) < http://timor-leste.gov.tl/?p=13421&lang=en >.

58 Minister for Foreign Affairs, 'Timor-Leste Arbitration' (24 September 2015).

59 ICJ, Declarations Recognizing the Jurisdiction of the Court as Compulsory, Australia (22 March 2002) < www.icj-cij.org/en/declarations/au >.

Such is the context of the dispute within which Timor-Leste decided to resort to compulsory conciliation under the UNCLOS. Given the highly tense atmosphere, mired with allegations of espionage and interference, and the many stakeholders involved, including powerful private actors with a stake in the exploitation of the resources from the disputed area, the success of the conciliation process is all the more remarkable.

2 *The Conciliation Process*

2.1 Overview

On 11 April 2016, Timor-Leste unilaterally triggered the compulsory maritime boundary conciliation proceedings under UNCLOS to possibly resolve the maritime dispute, ultimately develop its economy[60] and to conclude its struggle for full 'sovereignty' over land and sea.[61] In particular, Timor-Leste stated that the decision to initiate compulsory conciliation was due to the refusal by Australia to either negotiate a permanent maritime boundary delimitation agreement or settle the dispute through other peaceful means.[62]

Unlike prior proceedings, the dispute submitted for conciliation related to the interpretation and application of Articles 74 and 83 of UNCLOS for the delimitation of the EEZ and continental shelf between the two States.[63] Beyond the specific dispute between Timor-Leste and Australia, the case is significant, because it constitutes the first conciliation proceeding under UNCLOS and the first State-to-State compulsory conciliation proceeding under a multilateral treaty.

Both Australia and Timor-Leste are parties to the UNCLOS. Australia ratified UNCLOS on 5 October 1994, and Timor-Leste on 8 January 2013, while the Convention entered into force between Australia and Timor-Leste on 2 February 2013.[64] On 25 June 2016, nearly two months after the initiation by Timor-Leste of the conciliation proceedings, the Conciliation Commission was constituted. On 19 September 2016, in response to Australia's objection to its competence, the Commission unanimously decided that it had competence to hear the

60 Conciliation Between the Democratic Republic of Timor-Leste and the Commonwealth of Australia, Transcript of Opening Session (29 August 2016), PCA 2016-10, 10 < https://pcacases.com/web/sendAttach/1889 >.

61 *Ibid*., 21.

62 Conciliation Between the Democratic Republic of Timor-Leste and the Commonwealth of Australia, Annex 3 to Report Notice of Conciliation (11 April 2016) PCA 2016-10, para. 3.

63 *Ibid*., para. 5.

64 See *United Nations Treaties Collection, Status of Treaties*, Chapter XXI: Law of the Sea < http://treaties.un.org/pages/ParticipationStatus.aspx >.

dispute.[65] Subsequently, thanks to the facilitation efforts of the Commission, Australia and Timor-Leste agreed a maritime boundary treaty and signed it on 6 March 2018.[66] The report of the Commission was released on 9 May 2018.

2.2 Analysis

Unlike the decision of a court of law, the analysis of a conciliation process cannot be limited or even focus on the report issued by the conciliation commission and its reasoning. It is the process, its peculiarities and the management of the many complexities arising over time that call for attention. Moreover, given the foundational nature of the Timor-Leste/Australia conciliation, it seems useful to compare it with other mechanisms. In this section, we analyse these aspects, paying attention both to the underlying legal framework and to the more practical aspects of the process.

One relevant feature is the *composition* of the conciliation commission. According to Article 3 of Annex V of UNCLOS, unless the parties agree otherwise, the commission shall consist of five conciliators. Each party appoints two conciliators and the four party-appointed conciliators subsequently appoint the fifth conciliator, who serves as the chairperson. In particular, the two conciliators appointed by each party should be chosen 'preferably from the [UNCLOS] list'.[67] The fifth conciliator should ultimately be chosen from the UNCLOS list of conciliators. Timor-Leste and Australia followed the rules set forth in Article 3 in appointing their conciliators, but, importantly, none of the chosen and appointed four conciliators were drawn from the list of conciliators. The Commission Report affirms that the Chairman, Ambassador Peter Taksøe-Jensen of Denmark, who was not included in the list of conciliators, was appointed by the four party-appointed conciliators from a shortlist of candidates that both parties agreed upon after they had consulted the parties.[68]

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65 Decision on Competence, 19 September 2016, < https://pcacases.com/web/sendAttach/1921>.

66 Maritime Boundary Treaty signed by the Parties on 6 March 2018, Annex 28 to the Commission Report, *infra* fn. 68.

67 UNCLOS Annex V, Article 3. Article 2 of Annex V states that each party to 1982 UNCLOS is entitled to nominate four conciliators.

68 *Conciliation Between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, Report and Recommendations of the Compulsory Conciliation Commission Between Timor-Leste and Australia on the Timor Sea (9 May 2018) PCA 2016-10 <https://pcacases.com/web/sendAttach/2327> (Commission Report), para 75; *Conciliation Between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, Decision on Australia's Objections to Competence (19 September 2016) PCA 2016-10 <https://pcacases.com/web/sendAttach/1921>.

Article 3 reads that the procedure is to be followed 'unless the parties otherwise agree'. The fact that the Chairman was appointed by the four party-appointed conciliators after consultation with the parties could be expected, considering that it had to be someone both parties were comfortable with. In practice, it is indeed essential that all the conciliators can cooperate well and speak with a unified voice with the disputing parties. In fact, this could be one of the reasons that led to the success of the conciliation process in the case.[69]

Once constituted, a commission can determine, by majority vote, the *procedures* to be followed in the conciliation, such as its meetings and how to conduct hearings, if any.[70] At least three features of Annex V procedures were fundamental in facilitating the resolution of the maritime boundary delimitation between Timor-Leste/Australia.

First and foremost, these procedures can be tailored to better suit the specific dispute. Under this perspective, the Rules of Procedure adopted by the Commission were laudable under many aspects. They were designed to facilitate dialogue between the parties and to allow the Commission to be proactive and control the process. The Commission requested Timor-Leste and Australia to draft comprehensive written statements, which also helped in clarifying their internal positions.[71] After receiving both parties' statements, the Commission then engaged them in open-ended discussions. The main aim was to 'sought to confirm its understanding by providing the Parties, first separately and then jointly, with Issues Papers'. These Issues Papers defined 'the elements of the dispute and the Parties' respective views'.[72] Thus, the Commission, by scheduling separate meetings with the parties and, through their written statements, was able to understand their positions and the related reasons for them. This built confidence in the Commission but also a path towards a solution of the dispute. The Rules of Procedure also ensured that the process was flexible and informal, enabling the Commission members to consult with parties inside and outside the scheduled meetings. Furthermore, another essential characteristic of the Rules of Procedure was the provisions on confidentiality and without prejudice. The Commission guaranteed that the parties could communicate and submit information in confidence, and that any documents or declarations made during the

69 See Annex III for the full list of members of the Conciliation Commission and the parties.
70 UNCLOS, Annex V, Article 4.
71 Commission Report (fn. 68) para. 290.
72 *Ibid.*

proceedings were not going to be used against them in any subsequent legal proceedings. The Commission, with the support of the PCA, was able to deal with the press releases related to the case by informing the general public but avoiding exposing any details that could have hindered the conciliation process. Lastly, the Rules of Procedure also allowed the Commission to extend the deadline with the consent of the parties. Without this extension, the parties would not have been able to reach an agreement on a permanent maritime boundary.

Secondly, the procedures allowed the Commission to expand the issues at stake beyond the maritime boundary and to consider the parties' underlying interests. The Commission noted that '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'.[73] The Commission thus addressed discussions not only on delimitation of the maritime boundary, but also on the modalities of the joint management of petroleum resources and on the economic effects of seabed gas deposits.[74]

Thirdly, Annex V procedures favoured the adoption of confidence-building measures, which turned to be significant for the final success of the conciliation process. The Commission was aware of the possible conflict between building confidence and ensuring that the parties' discussions were 'without prejudice'. The Report reads:

> Inasmuch as the Rules of Procedure sought to enable the Parties to engage without prejudice to their respective legal positions, the Commission's confidence-building measures required the opposite: i.e., that the Parties abandon certain stances which constituted an obstacle to moving forward with the conciliation and were intended to preserve leverage against the other for the possibility that the conciliation might fail to produce an agreed outcome.[75]

Pursuant to Article 6 of Annex V, the conciliation commission must 'hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement'. In particular, the commission, in exercising these tasks, may 'draw the attention of the parties to any measures which might facilitate an amicable settlement of the

73 *Ibid.*, para. 292.
74 *Ibid.,* para. 293.
75 *Ibid.*, para. 289.

dispute'.[76] In the case under analysis, these confidence building measures required the parties to renounce all the pending cases and a range of information and material that would not be allowed to feature in subsequent proceedings. Both parties accepted to be '*all-in*'. To the extent that the commission took a high risk, leaving very little room for adjudication in the way it organised the conciliation, that risk ultimately paid out.

Therefore, in light of the three features above, it seems clear that the Rules of Procedure issued by the Commission, in consultation with the parties, demonstrate the Commission's acute understanding, from the very start, of what were the ingredients for a successful conciliation of this dispute.

Another relevant advantage of conciliation is that the conciliation commission can consider more than just *law*. International law, politics, economics, or, for example, key issues related to natural resources, extraction or exploitation may have a relevant role, while sometimes they are not fully taken into account by approaches adopted in other contexts. In particular, in the case under analysis, the conciliation commission was led by the context of the dispute to consider principles of international law. The Rules of Procedure did not limit the extent to which the Commission could engage with the parties on questions of international law with respect to the delimitation of maritime boundaries. In its Report, the Commission noted that it would not be inappropriate for it to do so.[77] However, the Commission never lost sight of the fact that its function was to assist the parties to reach an amicable settlement, not to make pronouncements on questions of international law.[78] It concluded that '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 doing so will likely facilitate the achievement of an amicable settlement'.[79] This was an important decision, because both Timor-Leste and Australia had very different positions on how Articles 74 and 83 of UNCLOS could have been applied to the delimitation of their maritime boundary – and this was also a deeply rooted source of mistrust between them.

A further advantage of conciliation is that it can involve a wider range of *actors*. It is indeed characterised by an openness that marks an important difference with judicial dispute settlement. In particular, in the *Timor-Leste/Australia* conciliation, the participation of the Joint Venture set up for petroleum

76 UNCLOS, Annex V, Article 5.
77 Commission Report (fn. 68) para. 70.
78 *Ibid.*
79 *Ibid.*

exploration purposes in discussions with parties, the direct engagement of the Commission with the Joint Venture, and the engagement by the Commission of an independent expert was not covered by the Rules of Procedure. However, these developments occurred on the basis of a decision taken by the Commission in agreement with the parties. This is a feature that may however carry along also negative effects. Indeed, in the specific case under examination, the conciliation process also included the joined ventures extracting oil and gas. Negotiation with the joint ventures were surprisingly more difficult than between the parties and the Chairperson of the Commission had to engage with them much in the same way as he would have with the parties.

As a last consideration, despite some similarities with mediation, one of the main differences between the latter and compulsory conciliation lies in the idea of *competence*, which possesses a procedural nature and a very much legalised dimension in the initial phase of the conciliation proceedings. Under international law in general and under UNCLOS, the question whether a conciliation commission, tribunal or court has competence or jurisdiction to consider a dispute is not for a state party to the dispute to decide. It is a decision that belongs to the commission, tribunal or court. In contrast to the remainder of the conciliation proceedings, the commission's decision on competence is characterised by a binding effect. In the case under analysis, in response to Timor-Leste's Notice of Conciliation of 11 April 2016, Australia indicated that it would engage in the process in good faith, but upon the constitution of the Commission it would make an immediate challenge to the competence of the Commission. The Commission was constituted on 25 June 2016, pursuant to Article 13 of Annex V of UNCLOS, and it rendered its decision on competence on 19 September 2016. After having convened a hearing on competence from 29 to 31 August 2016, the Commission decided unanimously that it was competent with respect to the compulsory conciliation of the matters set out in Timor-Leste's notification of 11 April 2016. It also concluded that there were no issues of admissibility or comity that could prevent the Commission from continuing these proceedings and that the twelve-month period, in Article 7 of Annex V of UNCLOS, was to start on 19 September 2016. In its subsequent Report, the Commission recorded its view 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'.[80]

Under this perspective, several aspects are indeed relevant in the case. It is noteworthy that the decision of the Conciliation Commission was unanimous,

80 *Ibid.*, para. 287.

considering that two conciliators, appointed by Australia, expressed agreement with the majority. Moreover, Australia's decided to abide by the final decision and continue to participate in the conciliation, engaging in good faith. In addition, the entire competence proceedings were conducted in a speedy, smooth, efficient and transparent manner. It took less than three months for the Commission to render its decision and only nineteen days after the hearing on competence. Lastly, the decision of the Commission may also have implications for future UNCLOS dispute settlement. Under UNCLOS, disputes related to maritime boundary delimitation that arise subsequent to the date of entry into force of UNCLOS, i.e. 16 November 1994, would be subject to compulsory conciliation if one of the parties to the dispute issues a declaration in accordance with Article 298 of UNCLOS, exempting the dispute from the system of compulsory dispute settlement. In the light of the Commission's analysis of Australia's objections, compulsory conciliation would remain applicable as long as the parties to a dispute have not agreed 'to seek settlement of the dispute by a peaceful means' of their choice. A clause that excludes third-party settlement (without defining the preferred means of settlement) would not be enough to prevent resort to conciliation (nor, possibly, to other means) under Article 281(1) of the UNCLOS.

IV An Assessment

The Timor-Leste/Australia conciliation showed the advantages of using conciliation as a dispute settlement method for maritime boundary disputes. As the Conciliation Commission observed, 'the Parties came to these proceedings deeply entrenched in their legal positions, something which had frustrated previous efforts to achieve a settlement through negotiation', and 'the Parties were frank with the Commission regarding the extent that each distrusted the other'.[81] However, within twelve months, the parties successfully negotiated the delimitation of their maritime boundary, which was concluded on 6 March 2018 by the signing of the Maritime Boundaries Treaty. Several aspects of the Timor-Leste/Australia conciliation are worth noting.

According to the Commission, a positive outcome was facilitated by four fundamental factors, namely: *in primis*, efforts to build the parties' trust in each other, in the Commission, and in the process; the flexibility of expanding the scope of proceedings beyond delimitation to encompass other necessary elements; the Commission's proactive efforts to advance ideas and direct the course of the proceedings; and sustained, informal contacts with the parties'

81 Commission Report (fn. 68) para. 284.

representatives and counsel at a variety of different levels.[82] These four aspects would not have been possible to achieve in an adjudicative forum.

Other features of conciliation are favourable to the parties engaged in conciliation proceedings. The discretion, confidentiality and the non-adversarial nature of conciliation favours preserving the goodwill between them, which may instead be more difficult to maintain in an adversarial process. In the words of Ambassador Tommy Koh, the former President of the Third UN Conference on the Law of the Sea, the Timor-Leste-Australia conciliation is an important case for 'countries which have disputes about their sea boundaries or have competing claims about territorial sovereignty', who should therefore 'seriously consider using conciliation to solve their disputes'.[83] He also noted that it is also important that parties choose 'wisely' the conciliators, in order to make sure they work together harmoniously, and that there is political will 'on both sides to find a just and durable compromise'.[84]

However, an unexpected aspect of conciliation would merit further reflection. One key element of conciliation, as well as of commercial mediation, is confidentiality. Thus, when a neutral third person – the conciliator or mediator – facilitates the resolution of a dispute, communication and disclosure of crucial issues of the case to the third person are essential. This happens in the context of bilateral exchanges between each party and the conciliation commission. The condition for such exchanges to be open and build a relationship of trust between each party and the conciliation commission is the confidentiality of such bilateral exchanges. It is therefore unsurprising that confidentiality and assurance of no subsequent use of certain materials presented in the conciliation process were explicitly stated in the rules of procedure of the Timor-Leste/Australia case.

Yet, such confidentiality could be tactically misused to create an additional layer of protection for documents that a party wishes to exclude from featuring in litigation. Of course, documents that are in the public domain or otherwise retrievable by a counterparty could not be protected on the basis of a confidentiality requirement owed by a body (the Conciliation Commission) in a previous dispute settlement attempt. But it would possibly shield certain documents from 'discovery' or document production requests in subsequent

82 *Ibid*., para. 286.

83 Tommy Koh, 'Maritime Boundary Conciliation Between Timor-Leste and Australia: A Success Story', Tembusu College (19 September 2017). <http://tembusu.nus.edu.sg/news/2017/by-prof-tommy-koh-maritime-boundary-conciliation-between-timor-leste-and-australia-a-success-story>.

84 *Ibid*.

litigation proceedings or, at the very least, represent a possible objection to the admissibility of documents made available to the commission, under the seal of confidentiality on the basis of the good faith owed by the other party to the earlier conciliation process, now seeking to introduce the document. Moreover, such possibility calls for clear rules of conflict of interest with respect to the ability of conciliators to subsequently act as counsel/advisor for one of the parties or even as adjudicator. These problems could arise particularly in dispute settlement mechanisms which combine conciliation and adjudication, as they may arise in commercial practice based on so-called 'med/arb' (mediation/arbitration) clauses. The problems they present are not without solution, but they must be kept in mind because conciliation is not likely to be always successful.

This aspect is not spelt out in the report of the Conciliation Commission, which limits itself to mentioning that confidentiality and flexibility were major factors in the success of the conciliation. In light of the above analysis and assessment, the latter proposition of the commission can hardly be denied. However, it is only true if we accept that conciliation is but one approach to the settlement of the dispute, which may not always be successful. Otherwise, we would be placing a potentially important part of the record outside of the hands of a subsequent adjudicator, under the seal of confidentiality. The lack of adequate safeguards on such tactical uses of conciliation would risk an increase in resort to it, but for the wrong reasons.

That being said, the Timor-Leste/Australia conciliation experiment must certainly be celebrated as a major achievement. In the words of UN Secretary-General António Guterres, the process was marked by 'constructive engagement and relentless efforts to achieve an outcome [that is] agreeable to both States', and is an example to 'inspire other States to consider conciliation as a viable alternative for dispute settlement' under UNCLOS.[85] There are indeed many good considerations that support a positive scenario of future uses of conciliation to solve disputes. The successful outcome has placed compulsory conciliation among the palette of realistic legal-diplomatic choices, which is encouraging in light of the fact that several multilateral environmental

85 António Guterres, Remarks at Signing Ceremony of a New Maritime Boundary Agreement Between Australia and Timor Leste (6 March 2018) < www.un.org/sg/en/content/sg/speeches/2018-03-06/maritime-boundary-agreement-between-australiaand-timor-leste-remarks >. See also the positive assessment by Anais Kedgley Laidlaw and Hao Duy Phan, 'Inter-State Compulsory Conciliation Procedures and the Maritime Boundary Dispute between Timor-Leste and Australia', 10 (2019) *Journal of International Dispute Settlement* 126–159.

agreements include compulsory conciliation clauses that have never been used.[86]

Moreover, the conciliation process, as implemented by the cooperative parties, who participated constructively and with good faith, and carried on by a proactive Commission, whose 'great dedication and professionalism in helping forge an agreement' was recognized by both Timor-Leste and Australia,[87] has shown to be able to facilitate solutions beyond strict legal determinations favourable to a positive ending of the process.

In conclusion, the Timor-Leste/Australia conciliation process provides good grounds to consider with cautious optimism the future of conciliation in dispute settlement. Of course, contextual factors will inevitably play a distinct role in each case, but the Timor-Leste/Australia process can be seen as a foundational experiment which illustrates in great detail the potential of conciliation to settle highly complex disputes in contemporary international law.

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86 See, for instance, the Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, 1513 *UNTS* 293; the Convention on Biological Diversity, 5 June 1992, 1760 *UNTS* 79,; the United Nations Framework Convention on Climate Change, 9 May 1992, 1771 *UNTS* 107;; the 2001 Stockholm Convention on Persistent Organic Pollutants, 22 May 2001, 2256 *UNTS* 119.

87 Joint Media Release by the Hon Julie Bishop MP (Minister for Foreign Affairs Australia), HE Agio Pereira (Minister in the Office of the Prime Minister for Delimitation of Borders and Agent of the Conciliation Process, Democratic Republic of Timor-Leste), and HE Kay Rala Xanana Gusmao (Chief Negotiator for the Council for the final delimitation of maritime boundaries, Democratic Republic of Timor-Leste), 'Australia and Timor-Leste Sign Historic Maritime Boundary Treaty' (6 March 2018) < http://timor-leste.gov.tl/?p=19577&lang=en >.