THE TIMOR SEA DISPUTE: A NOTE ON THE PROCESS, RESOLUTION, AND APPLICATION IN THE WEST PHILIPPINE SEA*

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ABSTRACT

In order to avoid conflicts arising from competing claims, states have endeavored to conclude maritime delimitation agreements. This, however, is a long and arduous process. Thus, in the interregnum, many have resorted to provisional agreements to benefit from the resources derived from contested areas. In cases where states fail to settle disputes through bilateral negotiations, resort has been made to procedures entailing binding decisions, such as arbitration or litigation. Nevertheless, recourse to these modes of settling disputes is not always available to the parties in maritime boundary disputes. For one, states have often excepted themselves from dispute settlement systems. In this regard, conciliation offers a viable method for resolution along with enquiry and mediation. This article submits that the use of provisional agreements and the conciliation procedure arguably contributed to settling the competing claims of Timor-Leste and Australia as to the Timor Sea and may thus offer a solution to similar disputes. This article details the process and outcome of the resolution of the Timor Sea dispute and questions whether the same may be done in the West Philippine Sea.

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I. INTRODUCTION

No subject "strikes so profoundly at the heart of a nation's sovereignty" as issues regarding its territory and non-renewable resources.[1] The difficulty encountered in the delimitation of maritime zones demonstrates this view. Notably, the number of disputes concerning the delimitation of boundaries has risen over the years.[2] This may be due to the desire of states to assert their respective claims, often competing, and the desire to explore and exploit resources in maritime areas.[3] It has been noted that resources frequently lie in maritime areas over which two or more states claim rights or sovereignty over.[4] Further, the continental shelves and exclusive economic zones are theorized to contain majority of the world's undiscovered petroleum reserves.[5]

To avoid conflicts arising from competing claims over the resources derived from these areas, states have endeavored to conclude maritime delimitation agreements.[6] For instance, Australia has had some success in

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[1] Gillian Triggs & Dean Bialek, *The New Timor Sea Treaty and Interim Agreements for Joint Development of Petroleum Resource of the Timor Gap*, 3 MELB. J. INT'L L. 322, 323 (2002).

[2] Malcolm Evans, *Maritime Boundary Delimitation: Where Do We Go from Here?, in* 2006 THE LAW OF THE SEA: PROGRESS AND PROSPECTS 282 *citing* PROSPER WEIL, THE LAW OF MARITIME DELIMITATION — REFLECTIONS (1989); *See e.g.* North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), Judgement, 1969 I.C.J. 1 (Apr. 26); Continental Shelf (Tunis v. Lib.), Judgement, 1982 I.C.J. 18 (Feb. 24); Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), Judgement, 1984 I.C.J. 246 (Oct. 12); Continental Shelf (Lib. v. Malta), Judgement, 1985 I.C.J. 13 (June 3); Greenland/Jan Mayen Maritime Delimitation (Den. v. Nor.), Judgement, 1993 I.C.J. 38 (June 14); Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), Judgement, 2001 I.C.J. 40 (Mar. 16); Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening), Judgement, 2002 I.C.J. 303 (Oct. 10); Anglo-French Channel Arbitration, Decision, 18 I.L.M. 397 (June 30, 1979); Delimitation of the Maritime Boundary Between Guinea and Guinea-Bissau, Decision, 25 I.L.M. 251 (Feb. 14, 1985); Delimitation of Maritime Areas Between Canada and France (St. Pierre and Miquelon), Decision, 31 I.L.M. 1149 (June 10, 1992); Maritime Delimitation between Eritrea and Yemen, Decision, 119 I.L.R. 417 (Dec. 17, 1999).

[3] Constantinos Yiallourides, *Oil and Gas Development in Disputed Waters under UNCLOS*, 5 UCL J. L. & JURIS. 59, 59 (2016) *citing* Jan Paulsson, *Boundary Disputes Into The Twenty-First Century: Why, How... And Who? in* 95 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 122, 123 (2001); YOSHIFUMI TANAKA, PREDICTABILITY AND FLEXIBILITY IN THE LAW OF MARITIME DELIMITATION 129-30 (2006).

[4] *Id.*

[5] Mohammad Yusuf, *The Role of the 1982 UNCLOS in the Resolution of Maritime Boundary Dispute*, 7 INT'L ENERGY L. REV. 285, 285 (2011) *citing* R. R. CHURCHILL AND A.V. LOWE, THE LAW OF THE SEA 141 (1999).

[6] *Id.*

delimiting its maritime boundaries with neighboring states.[7] For one, it has concluded multiple agreements with Indonesia covering seabed boundaries and exclusive economic zones.[8] It was likewise able to reach an agreement with Papua New Guinea as to the Torres Strait,[9] and with New Zealand as to its maritime borders.[10] Recently, it was also able to delimit the Timor Sea Gap with Timor-Leste.[11]

However, reaching an agreement is a long and arduous process.[12] Factors contributing to this process range from "political, legal, economic, or technical reasons."[13] In cases where states fail to settle disputes through bilateral negotiations, resort has been made to procedures entailing binding decisions, such as arbitration or litigation.[14] Nevertheless, recourse to these modes of settling disputes is not always available to the parties of maritime boundary disputes. For instance, the dispute settlement system of the United

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[7] Clive Schofield, *A "Fair Go" for East Timor? Sharing the Resources of the Timor Sea*, 27 CONT. SE ASIA 255, 262 (2005).

[8] *Id., citing* Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing Certain Seabed Boundaries, May 18, 1971, Austl.-Indon., 974 UNTS 307; Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, Oct. 9, 1972, Austl.-Indon., 974 UNTS 319; Treaty between Australia and the Republic of Indonesia on Zone of Co-operation in an Area between the Indonesian Province of East Timor and Northern Australia, Dec. 11, 1989, Austl.-Indon., 1654 UNTS 105; Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, Mar. 14, 1997, Austl.-Indon., *available at* https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS-IDN1997EEZ.pdf.

[9] Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters, Dec. 18, 1978, Austl.-Papua N.G., 1429 UNTS 207.

[10] Treaty between the Government of Australia and the Government of New Zealand establishing Certain Exclusive Economic Zone and Continental Shelf Boundaries, July 25, 2004, Austl.-N.Z., 2441 UNTS 235.

[11] Treaty between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea, Mar. 6, 2018, Austl.-Timor-Leste, *available at* https://www.dfat.gov.au/sites/default/files/treaty-maritime-arrangements-australia-timor-leste.pdf.

[12] Yusuf, *supra* note 5, at 285.

[13] *Id., citing* Jonathan Charney, *Introduction* in JONATHAN CHARNEY & LEWIS ALEXANDER, 1 INTERNATIONAL MARITIME BOUNDARIES XXVII (1993); Gerald Blake & Richard Swarbrick, *Hydrocarbons and International Boundaries: A Global Overview*, *in* BOUNDARIES AND ENERGY: PROBLEMS AND PROSPECTS 11 (Gerald Blake et al. eds., 1998).

[14] Kyriaki Noussia, *On International Arbitrations for the Settlement of Boundary Maritime Delimitation Disputes and Disputes from Joint Development Agreements for the Exploitation of Offshore Natural Resources*, 25 INT'L J. OF MARINE & COASTAL L. 63, 68 (2010).

Nations Convention on the Law of the Sea ("Convention") allows states parties to reserve some matters from litigation such as sovereignty and exclusive rights over maritime zones.[15] Thus, in some cases, a state does not have the option to litigate because of the other party's exception to the dispute settlement system. This system was crafted to avoid reservations to the Convention and "at the same time to make it possible for as many states as possible to become parties to the Convention."[16] However, as a compromise, some of these excepted matters are allowed to be submitted to compulsory conciliation.[17]

Conciliation is one of the methods for resolving disputes through non-binding resolutions, along with enquiry and mediation.[18] It is a mode of conflict settlement that has been "utilized in state practice and provided for in many treaties."[19] The procedure "tend[s] to discourage unreasonable claims and in practice has proved particularly useful for disputes [...] where the main issues are legal, but the parties are seeking an equitable compromise."[20] Further, it "offers a procedure adaptable to a variety of needs and shows the advantage to be gained from a structured involvement of outsiders in the settlement of international disputes."[21] This degree of flexibility "has been used to introduce an element of obligation and of gentle pressure so as to invite the parties to resort to the procedure and to accept the result as binding."[22]

The aforementioned strategies were arguably instrumental in settling the competing claims of Timor-Leste and Australia as to the Timor Sea—an issue that had been left unsettled since Portugal's occupation of Timor-Leste ended. This article details the provisional agreements entered concerning the Timor Sea, the process and outcome of the conciliation procedure initiated

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[15] Sienho Yee, *Conciliation and the 1982 UN Convention on the Law of the Sea*, OCEAN DEV. & INT'L L. 315, 321 (2013); United Nations Convention on the Law of the Sea [hereinafter "UNCLOS"], Part XV, Dec. 10, 1982, 1833 UNTS 3.

[16] *Id.*

[17] *Id.;* John Merills, *The Means of Dispute Settlement* in INTERNATIONAL LAW (Malcolm Evans ed., 4th ed. 2010), 571; *See* JOHN MERILLS, INTERNATIONAL DISPUTE SETTLEMENT (5th ed., 2011).

[18] Noussia, *supra* note 14, at 68.

[19] Yee, *supra* note 15, at 315, *citing* 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, 311 (Shabtai Rosenne et al. eds., 1989).

[20] Merills, *The Means of Dispute Settlement*, *supra* note 17, at 571.

[21] *Id.*

[22] Jean-Pierre Cot, *International Conciliation* (1972), ¶¶ 3, 8, 15; SVEN MICHAEL GEORGE KOOPMANS, DIPLOMATIC DISPUTE SETTLEMENT: THE USE OF INTER-STATE CONCILIATION (2008); MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT, *supra* note 17, at 58-82.

by Timor-Leste under Part XV and Annex V of the Convention, and whether these are applicable in the West Philippine Sea dispute. Part II sets out the history of the dispute as to the Timor Sea. Part III provides an overview of the conciliation process and the report of the Conciliation Commission ("Commission"). Part IV analyzes the norms and institutions that contributed to the resolution of the dispute, namely: the emergence of the practice of entering into joint development agreements and the resort to conciliation in resolving disputes among states. Finally, Part V questions the applicability of the use of provisional agreements and conciliation in resolving the West Philippine Sea dispute.

II. THE TIMOR SEA DISPUTE AND PROVISIONAL AGREEMENTS

The long-standing dispute traces its origins in the colonial history of the island of Timor.[23] Australia and Portugal were never able to agree on the delimitation of the continental shelf between them.[24] Australia claims that under the principle of "natural prolongation" the maritime boundary should extend to the edge of its continental shelf.[25] This principle "found favor in the 1958 Convention of the Continental Shelf and subsequent decisions of the International Court of Justice" (ICJ).[26] However, "reliance upon that principle would have seen the Australian continental shelf extend far into the Timor Sea, ending as close as 50 nautical miles from Timor."[27] Portugal rebuffed this position due to the developments taking place in the Convention negotiations.[28] It submitted, which Timor-Leste would later argue, that the boundary should be drawn at the median line between the coast of the two states.[29] The submission thus forwards that Australia's position "is flawed and relies on outdated concepts" of the law of the sea.[30]

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[23] Nigel Bankes, *Settling the Maritime Boundaries between Timor-Leste and Australia in the Timor Sea,* 11 J. WORLD ENERGY L. & BUS. 387, 389 (2018).

[24] *Id.* at 390 *citing* Keith Suter, *Timor Gap Treaty: The Continuing Controversy*, MARINE POLICY 294, 295 (1993); Gillian Triggs, *Legal and Commercial Risks of Investments in the Timor Gap*, 1 MELB. J. INT'L L. 1, 4–5 (2000).

[25] Rebecca Strating, *Maritime Territorialisation, UNCLOS, and the Timor Sea Dispute*, 40 J. INT'L & STRAT. AFF. 101, 108 (2018); Natalie Bugalski, *Beneath the Sea: Determining a Maritime Boundary between Australia and East Timor*, ALT. L.J. 289, 291 (2004).

[26] Donald Rothwell, *2018 Timor Sea Treaty: A New Dawn in Relations between Australia and Timor-Leste?*, 44 LEG. STUD. J. 70, 70 (2018).

[27] *Id.*

[28] *Id.*

[29] Bugalski, *supra* note 25, at 291; Schofield, *supra* note 7, at 264.

[30] Schofield, *supra* note 7, at 264; *See Continental Shelf*, *supra* note 2, ¶ 36; Strating, *supra* note 25, at 108.

Portugal's own "internal political unrest eventually saw it abandon Timor in 1975."[31] Indonesia subsequently occupied Timor-Leste and was more willing to negotiate as "Australia would need to recognize Indonesian sovereignty" over Timor-Leste.[32] By 1989, Indonesia and Australia adopted the "conceptually innovative Timor Gap Treaty under which a jointly regulated resource exploitation could go forward without prejudice to the legal positions of either state."[33] By the time these negotiations commenced in the early 1980s, "there was a much better appreciation of the potential oil and gas reserves in the seabed which inevitably made both sides reluctant to agree upon a permanent maritime boundary because of the potential loss of access to resources revenue."[34] The Timor Gap Treaty "provided for an innovative joint development zone that shared oil and gas revenue on a 50/50 basis in a central area, and a 90/10 revenue split in favor of Indonesia to the north and Australia to the south of the central area."[35]

While the treaty facilitated petroleum activities in the area, "the unavoidable fact remained that the agreement was founded on Indonesia's illegal annexation."[36] Portugal protested against the treaty but the challenge was ultimately unsuccessful.[37] The Timor Gap Treaty was followed by another agreement between Australia and Indonesia delimiting the exclusive economic zone between the two states. However, this treaty "never entered into force largely because of the subsequent events leading to the independence of Timor-Leste."[38]

Indonesia's control over Timor-Leste ended in 1999 after its people voted for independence.[39] Upon independence, Timor-Leste declared that it was not bound by any of the agreements related to its territory entered into

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[31] Rothwell, *supra* note 26, at 70.

[32] *Id.*; Schofield, *supra* note 7, at 263.

[33] Triggs & Bialek, *supra* note 1, at 327, 334.

[34] Rothwell, *supra* note 26, at 70.

[35] *Id.*; Bankes, *supra* note 23, at 390.

[36] Triggs & Bialek, *supra* note 1, at 327; Triggs, *supra* note 24, at 100.

[37] Gillian Triggs, *The Oceanic Litigation: a "Judicial No-Man's Land" in the Timor Gap,* INT'L ENERGY L. & TAX REV. 140, 142 (2004); *See* East Timor (Port v. Austl.), 1995 I.C.J. 90, ¶ 29; Jessica Howard, *Invoking State Responsibility for Aiding the Commission of International Crimes – Australia, the United States and the Question of East Timor,* 2 MELB. J. INT'L. L. 1, 13-14 (2001), *citing* DIONISIO ANZILOTTI, TEORIA GENERALE DELLA RESPONSIBILITÀ DELLO STATO 88-89 (1902); JAMES CRAWFORD, STATE RESPONSIBILITY: GENERAL PART 377(2013); Bankes, *supra* note 23, at 391.

[38] Bankes, *supra* note 23, at 391; Prescott, *Report Number 6-2(6), Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, in* 4 INTERNATIONAL MARITIME BOUNDARIES 2697, 2704 (Jonathan Charney & Robert Smith eds., 2002).

[39] Bankes *supra* note 23, at 391; Triggs & Bialek, *supra* note 1, at 328.

by Indonesia.[40] Nevertheless, an interim agreement, the Timor Sea Treaty, was agreed upon in 2002.[41] The treaty put certain areas under the exclusive jurisdiction of each state in contrast with the Timor Gap Treaty. It continued the joint petroleum development area ("JPDA") but changed the sharing scheme from 50/50 to 90/10 in favor of Timor-Leste. The treaty also addressed the unitization and the proceeds of the Sunrise and Troubadour deposits.[42]

Notwithstanding these developments, the situation was not without controversy. Three months before the independence of Timor-Leste, Australia issued a declaration excluding matters relating to maritime boundary delimitation from the compulsory jurisdictions of the Court and the International Tribunal of the Law of the Sea ("ITLOS").[43] Of course, Australia was fully within its rights to make this declaration and prefer negotiation over litigation.[44] However, this reluctance has been taken by Timor-Leste "to indicate that Australia has not been negotiating in good faith" because it believes that international tribunals would be likely to reject Australia's position.[45]

Australia "refused to ratify the Timor Sea Treaty unless Timor-Leste agreed to ratify a unitization of the [Sunrise area] located mostly outside of the JPDA."[46] The Sunrise International Unitization Agreement was finalized in March 2003 with the agreement that 20.1% of the Greater Sunrise area was located in the JPDA.[47] Subsequently, the two states concluded another treaty concerning the Greater Sunrise Oil and Gas Field ("GSOGF"). The latter treaty, known as the Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea

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[40] Schofield, *supra* note 7, at 263.

[41] Timor Sea Treaty between the Government of East Timor and the Government of Australia, Apr. 20, 2002, East Timor-Austl., *available at* http://timor-leste.gov.tl/wp-content/uploads/2010/03/R_2003_2-Timor-Treaty.pdf.

[42] Bankes, *supra* note 23, at 399; Triggs & Bialek, *supra* note 1, at 332; *See* Peter Tzeng, *The Peaceful Non-Settlement of Disputes: Article 4 of CMATS in Timor-Leste v Australia*, 18 MELB. J. INT'L L. 349 (2017).

[43] Strating, *supra* note 25, at 108; Triggs & Bialek, *supra* note 1, at 331; *See* Gillian Triggs & Dean Bialek, *Australia's Withdrawal of Maritime Disputes from the Jurisdiction of the International Court of Justice and the International Tribunal for the Law of the Sea*, 17 INT'L. J. MARINE & COASTAL L. 79 (2002).

[44] *Id.* at 260; Schofield, *supra* note 7, at 269.

[45] *Id.* at 270.

[46] Rebecca Strating, *Timor-Leste's Foreign Policy Approach to the Timor Sea Disputes: Pipeline or Pipe Dream?*, 71 AUS. J. INT'L AFF. 259, 262 (2017).

[47] *Id.*; Triggs, *supra* note 37, at 142; 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, Mar. 6, 2003, Austl.-Timor-Leste, 2483 UNTS 317.

("CMATS"), provided that "Timor-Leste and Australia shall share equally the revenue derived from the production of petroleum in the GSOGF" and, furthermore, "extended the duration of the [Timor Sea Treaty] to the same duration of CMATS—50 years after its entry into force."[48]

Similarly, the treaty added that the states shall not "assert, pursue, or further by any means in relation to the other party its claims to sovereign rights and jurisdiction and maritime boundaries for the period of [the] treaty."[49] Moreover, both states "committed not to commence proceedings against each other with respect to maritime boundaries or delimitation of the Timor Sea and agreed that they were not under an obligation to negotiate permanent maritime boundaries for the period of the treaty."[50]

Timor-Leste's "dissatisfaction with these arrangements became apparent in subsequent years when it launched a series of proceedings against Australia,"[51] The first proceeding that it resorted to was an arbitration that "concerned the circumstances under which CMATS was concluded and correspondingly, the validity of that treaty, including its extension of the life of the Timor Sea Treaty."[52] Timor-Leste claimed that the CMATS was void due to the surveillance on the internal discussions conducted by Australia during the negotiation. [53] Subsequently, it initiated another proceeding, alleging that "Australia had seized and detained documents from the offices of one of Timor-Leste's Australian counsel pertaining to the Timor Sea arbitration." [54] Timor-Leste "discontinued these proceedings on 11 June 2015."[55] Still, a third proceeding was submitted by Timor-Leste concerning the Timor Sea Treaty and the question of whether its provision "giving Australia jurisdiction over any pipeline landing in Australia should be understood as conveying exclusive jurisdiction and precluding the exercise of

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[48] Tzeng, *supra* note 42, Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea, Jan. 12, 2006, Austl.-Timor-Leste, 2483 UNTS 359.

[49] Bankes, *supra* note 23, at 393.

[50] *Id.*; Donald Anton, *Negotiating the Settlement of the Timor Sea Boundary Dispute between Australia and Timor-Leste,* 2 ASIA-PACIFIC J. OCEAN L. & POL. 187, 188 (2017).

[51] Bankes, *supra* note 23, at 393; Rothwell, *supra* note 26, at 71.

[52] *Id.*, *citing* Timor Sea Conciliation (Timor-Leste v. Austl.) [hereinafter "Timor Sea Conciliation"], Report and Recommendations of the Compulsory Conciliation Commission, PCA Case No 2016-10 (Perm Ct. Arb., 2018); *See* Arbitration under the Timor Sea Treaty (Timor-Leste v. Australia) PCA 2013-16 (Perm. Ct. Arb. 2013)

[53] Tzeng, *supra* note 42.

[54] Bankes, *supra* note 23, at 393; Tzeng, *supra* note 42.

[55] *Id.*

jurisdiction by Timor-Leste over portions of the pipeline lying within the JPDA."[56]

III. THE CONCILIATION PROCEEDINGS AND THE COMMISSION REPORT

In April 2016, Timor-Leste initiated conciliation proceedings under Article 284 and Annex V of the Convention.[57] This was the first time that such a mechanism for dispute resolution was employed.[58] Such method was the one available to Timor-Leste given Australia's declaration in 2002 "excluding maritime delimitation disputes from the compulsory procedures entailing binding decisions provided for in Section 2 of Part XV."[59] Under the Convention, "maritime delimitation disputes may be exempted from the compulsory procedure provided for in Section 2 of Part XV in accordance with Article 298(1)(a)(i)."[60] Where no agreement is reached in negotiations between the parties, "they are subject to the compulsory conciliation under Section 2 of Annex V."[61]

On the basis of the report of the Conciliation Commission ("Commission"), the parties shall negotiate an agreement. If these negotiations do not result in an agreement, "the parties shall, by mutual consent, submit the question to one of the procedures provided for in Section 2, unless the parties otherwise agree in accordance with article 298(1)(a)(ii)."[62] Annex V states that the conciliators shall "hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement."[63]

Australia submitted objections to the competence of the Commission and invoked Article 4 of the CMATS and Articles 281 and 298 of the Convention.[64] According to Australia, both states agreed to settle the dispute

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[56] *Id.*; *See* Arbitration under the Timor Sea Treaty (Timor-Leste v. Austl.) PCA 2015-42 (Perm. Ct. Arb. 2015).

[57] *Id.*

[58] Jianjun Gao, *The Timor Sea Conciliation (Timor-Leste v. Australia): A Note on the Commission's Decision on Competence*, 49 OCEAN DEV. & INT'L L. 208, 210 (2018).

[59] *Id.*, 210.

[60] Yoshifumi Tanaka, *Delimitation of the Exclusive Economic Zone between States with Opposite or Adjacent Coasts* in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 578 (Alexander Proelss ed., 2018).

[61] *Id.*

[62] *Id.*

[63] UNCLOS, *supra* note 15, at Annex V, art 6.

[64] Gao, *supra* note 58, at 209.

through negotiations, which Article 281 privileges, as evinced by Article 4 of the CMATS and the "exchange of letters between the prime ministers of the two states in 2003."[65] Further, it argued that the "preconditions for compulsory conciliation in paragraph 1(a)(i) of [Article 298] were not met."[66] Also, it alleged that the "conciliation was inadmissible 'because Timor-Leste has commenced these proceedings in breach of CMATS.'"[67] The Commission ultimately rejected the submissions of Australia and decided that it was "competent with respect to the compulsory conciliation of the matters" submitted by Timor-Leste.[68]

The Commission's Report ("Report") was issued pursuant to the Commission's mandate under Annex V of the Convention to "record any agreements reached and, failing agreement, its conclusions on all questions of fact or law relevant to the matter in dispute and such recommendations as the Commission may deem appropriate for an amicable settlement."[69] However, as Australia and Timor-Leste were able to reach a "comprehensive agreement regarding their maritime boundaries in the Timor Sea," the Commission considered that it was no longer required to provide the two states recommendations as to the resolution of its dispute.[70] The aim of the Commission, then, in issuing the Report is to "provide background and context to the process" through which the agreement between Australia and Timor-Leste was reached.[71] This is in view of the fact that this is the "first time on which the conciliation provisions of the Convention has been invoked."[72]

For instance, the Report highlights the Commission's approach in maintaining a level of flexibility and informality to enable it to lead the parties to an amicable settlement.[73] Particularly, it stresses that its rules allowed it to meet with the parties separately and that important discussions may not have occurred in a joint setting.[74] It emphasizes the measures that were put in place to enable open discussions such as, but not limited to, maintaining confidentiality and preventing disclosures,[75] keeping stakeholders informed of

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[65] *Id.* at 214.

[66] *Id.*

[67] *Id.*

[68] Conciliation between Timor-Leste and Australia (Timor-Leste v. Austl.), Decision on Australia's Objections to Competence, PCA Case No. 2016-10, ¶ 111 (Perm. Ct. Arb. 2016).

[69] UNCLOS, *supra* note 15, at Annex V, art 7.

[70] *Timor Sea Conciliation, supra* note 52, ¶ 111.

[71] *Id.*

[72] *Id.*, ¶ 7

[73] *Id.*, ¶ 57.

[74] *Id.*

[75] *Id.*, ¶¶ 59-60.

the progress of the proceedings,[76] and setting the expectations of the parties.[77] The Commission notes that it "[engaged] with these matters to the extent that so doing will likely facilitate the achievement of an amicable settlement."[78]

The Report also details the confidence-building measures conducted, including the same method of meeting with the parties separately to explore avenues for settlement.[79] The Commission details its actions in exploring the parties' position concerning the maritime boundaries. In particular, it emphasizes its requests for written submissions and confidential issues paper from both parties.[80] This enables the Commission to identify its intended approach for the subsequent meetings with the parties and outline to the parties the options for a possible comprehensive agreement on maritime boundaries.[81] The Report also details the consultations that it conducted with the parties which were done on multiple levels including informal consultations at a political level.[82] Further, it also narrates the discussions made regarding the Greater Sunrise gas field including resource sharing, economic benefits, and governance.[83]

The Commission also set out, for clarity, the principal issues separating the parties. Two primary issues may be noted. The first concerned maritime delimitation. In this respect, it noted that "it was not convinced that either party's opening legal position was entirely correct."[84] For one, "Timor-Leste's maritime entitlements could not be constrained by the boundaries of the [Joint Petroleum Development Area ("JPDA")] or the 1972 Seabed Treaty boundary between Australia and Indonesia."[85] Notably, "there were relevant circumstances that would require the median line to be adjusted to achieve an equitable result; [the possibility of] an adjustment of the eastern portion of the median line could lead to a seabed boundary running through Greater Sunrise [may not be excluded]."[86] Finally, "a seabed boundary dividing Greater Sunrise would not be inequitable or inconsistent with the Convention."[87]

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[76] *Id.*, ¶ 61.
[77] *Id.*, ¶ 64.
[78] *Id.*, ¶ 70.
[79] *Id.*, ¶ 94.
[80] *Id.*, ¶¶ 112, 117.
[81] *Id.*, ¶¶ 119, 124.
[82] *Id.*, ¶ 127.
[83] *Id.*, ¶ 134.
[84] *Id.*, ¶ 240.
[85] *Id.*
[86] *Id.*
[87] *Id.*

The second issue pertained to the resource governance and revenue issues with respect to the Greater Sunrise area. As to this issue, the Commission notes that the parties have recognized "the need for a special regime [with] greater clarity on the allocation of jurisdiction and a dispute-resolution procedure for issues that could not be resolved through consensus at the inter-governmental level—both areas in which the governance structure of the JPDA had proved lacking."[88] The question of the development of the Greater Sunrise in the context of a potential special regime was also discussed. As to this matter, a particular point of disagreement was the question of the location of the pipeline and the use of infrastructures.

To aid the parties, the Commission provided a non-paper "setting out the elements of a regime where it believed an agreement could be easily reached."[89] In this respect, the Commission notes that "it was unlikely to be able to meaningfully facilitate an agreement on the development concept without expert assistance with respect to the technical and financial aspects of the two development concepts."[90] Thus, at the close of the agreed deadline, the Commission "provided the parties with a paper on the comparative benefits of the two concepts and a condensed comparative economic analysis of the two concepts undertaken by the Commission's expert."[91]

The report also contains the reflections of the Commission. In the conduct of the proceedings, the Commission notes that it considered that the "parties had clearly elaborated their positions and that further engagement in this respect was likely to further entrench their positions on issues where the two parties were diametrically opposed and already strongly committed."[92] Thus, what it sought is to attempt to move the parties "away from seeking to reinforce their legal positions and towards a search for a potential settlement."[93] Essentially, the Commission points out the value in resorting to conciliation which includes "the ability to calibrate the proceedings to address the elements necessary for an amicable settlement, even where those extend beyond purely legal considerations."[94]

Finally, as there had been a "comprehensive agreement regarding their maritime boundaries in the Timor Sea," the Commission considered that its mandate no longer requires it to provide the two states recommendations

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[88] *Id.*, ¶ 242.
[89] *Id.*, ¶ 245.
[90] *Id.*, ¶ 276.
[91] *Id.*, ¶ 280.
[92] *Id.*, ¶ 119.
[93] *Id.*
[94] *Id.*, ¶ 292.

as to the resolution of its dispute.[95] Instead, what the Report does is note that the agreements of Australia and Timor-Leste are both in accord with international law and urge the parties to reach an agreement with regard to the development of the Greater Sunrise area.[96]

IV. THE USE OF PROVISIONAL AGREEMENTS AND CONCILIATION COMMISSIONS

The methods employed by the Commission and the openness of the two parties certainly played a major role in the outcome of the proceedings. Much ink may be spilt in detailing the numerous norms and institutions of international law and law of the sea that influenced the emergence of the dispute, the process of its settlement, and its successful conclusion. For instance, the relative flexibility and uncertainty of the rules on the delimitation of maritime boundaries definitely affected both the emergence of the dispute and its resolution.[97] Further, the duty to negotiate in good faith certainly guided the conduct of the parties in dealing with each other and the Commission. Without such duty, it would have been difficult for the Commission to find a compromise between the two parties. [98] A comprehensive examination of these factors would require a detailed analysis of each and would be beyond the scope the present work. Accordingly, the article will focus on two primary factors: the use of provisional agreements in delimiting maritime boundaries and, as emphasized by the Commission, the utility of the resort to conciliation in resolving maritime disputes.

A. Use of Provisional Agreements

Notwithstanding the increase in the use of dispute settlement methods, "maritime boundary disputes have proven particularly difficult to

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[95] *Id.*, ¶ 111.

[96] *Id.*, ¶¶ 305-6.

[97] *See* Strating, *supra* note 25, at 108; Yusuf, *supra* note 5, at 286, *citing* Kenneth Beauchamp, *The Management Function of Ocean Boundaries*, 23 SAN DIEGO L. REV. 623 (1986).

[98] Robert Beckman et al., *Moving Forward on Joint Development in the South China Sea*, *in* BEYOND TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA 315 (Robert Beckman et al. eds., 2013); Luis Rodriguez-Rivera, *Joint Development Zones and other Cooperative Management Efforts Related to Transboundary Maritime Resources: A Caribbean and Latin American Model for Peaceful Resolution of Maritime Boundary Disputes* 7 ISSUES IN LEGAL SCHOLARSHIP 19, 22 (2008) *citing* David Ong, *Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?*, 93 AM. J. INT'L L. 771, 776 (1999); Strating, *supra* note 25, at 108, 116-7; Yiallourides, *supra* note 3, at 70.

be resolved due to their complex nature."[99] One of the innovations provided by the Convention in addressing disputes regarding maritime boundaries is the obligation imposed on states to "make every effort to enter into provisional arrangements of a practical nature pending a permanent maritime boundary settlement."[100] Tribunals have viewed these agreements as "important tools in achieving the objectives of the Convention, and it is for this reason that the Convention imposes an obligation on parties to a dispute to [strive] to reach such arrangements."[101] The novel provision implicitly acknowledges "the importance of avoiding suspension of economic development in a disputed maritime area, as long as such activities do not affect the reaching of a final agreement."[102]

Several approaches have been adopted with regard to this kind of agreement. Some arrangements consist of "provisional boundaries which remain in place until such time as a permanent boundary delimitation has been settled."[103] Other arrangements come in the nature of joint development regimes for "an area subject to overlapping claims and where the relevant states wish to ensure that their actions are 'sovereignty-neutral.'"[104] Examples falling under the latter category include the Japan/South Korea Joint

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[99] Mohammad Yusuf, *Is Joint Development a Panacea for Maritime Boundary Disputes and for the Exploitation of Offshore Transboundary Petroleum Deposits?*, 4 INT'L ENERGY L. REV. 130, 130 (2009) *citing* Ana Elizabeth Bastida et al., *Cross-Border Unitization and Joint Development Agreements: An International Law Perspective*, 29 HOUSTON J. INT'L L. 371 (2007).

[100] Donald Rothwell & Tim Stephens, INTERNATIONAL LAW OF THE SEA 442 (2nd ed., 2016) *citing* UNCLOS, *supra* note 15, arts 74(3), 83(3); Natalie Klein, *Provisional Measures and Provisional Arrangements in Maritime Boundary Disputes*, 21 INT'L J. OF MARINE & COASTAL L. 423 (2006); Rainer Lagoni, *Interim Measures Pending Maritime Delimitation Agreements*, 78 AM. J. INT'L L. 345 (1984).

[101] Tanaka, *supra* note 60, at 577, *citing* Arbitration between Guyana and Suriname (Guyana v. Suriname), 30 RIAA 1, 131, ¶ 464 (Perm. Ct. Arb. 2007); North Sea Continental Shelf Cases, *supra* note 2, ¶ 99; Masahiro Miyoshi, THE JOINT DEVELOPMENT OF OFFSHORE OIL AND GAS IN RELATION TO MARITIME BOUNDARY DELIMITATION (1999).

[102] Rothwell & Stephens, *supra* note 100, 442; Deniz Tas, *Oil and Gas in the East China Sea: Maritime Boundaries, Joint Development, and the Rule of Capture*, 2 INT'L ENERGY L. REV. 48, 57 (2011); Robert Beckman, *Legal Regimes for Cooperation in the South China Sea, in* SECURITY AND INTERNATIONAL POLITICS IN THE SOUTH CHINA SEA: TOWARDS A COOPERATIVE MANAGEMENT REGIME 233 (Sam Bateman & Ralf Emmers eds., 2009).

[103] *Id.*, at 443 *citing* Mark Valencia, *Taming Troubled Waters: Joint Development of Oil and Mineral Resources in Overlapping Claim Areas,* SAN DIEGO L. REV. 661 (1986); Gao Jianjun, *Joint Development in the East China Sea: Not an Easier Challenge than Delimitation,* 23 INT'L J. OF MARINE & COASTAL L. 39 (2008); Agreement on the Continental Shelf between Iceland and Jan Mayen, Oct. 22, 1981, Ice.-Nor., 20 I.L.M 797; Sovereignty and Maritime Delimitation in the Red Sea (Eri v. Yemen), Award in the Second Stage, 119 ILR 1, ¶ 86 (Perm. Ct. Arb. 1999); HAZEL FOX ET AL., JOINT DEVELOPMENT OF OFF-SHORE OIL AND GAS: A MODEL AGREEMENT FOR STATE FOR JOINT DEVELOPMENT WITH EXPLANATORY COMMENTARY (1989).

[104] *Id.*

Development Zone and the Australia/Timor-Leste arrangement concerning the Timor Sea Gap.[105] Regardless of the nature of the arrangement, these agreements are endeavored to be provisional and do not affect the final delimitation.[106]

State practice suggests that there is an increasing recourse to "complex joint development or other agreements in order to facilitate economic activity.[107] Pending the delimitation of boundaries, states have engaged '"in productive negotiations towards achieving an understanding of the co-operative development of common resources found in disputed maritime areas while exercising and encouraging self-restraint."[108] States have commonly agreed on "some form of unitization to enable exploitation of a petroleum deposit over which they both have sovereignty."[109] In other cases, it has been used where the deposit lies "in an area subject to competing or overlapping sovereignty claims."[110]

From the aforementioned, the "fulfilment by states of their duties may seriously contribute towards the successful de-escalation and prevention of the continuance of conflicts regarding mineral resources found in areas of overlapping claims or that straddle a maritime boundary."[111] In turn, such arrangements have allowed states to "engage in meaningful negotiations and eventually consider the possibility of joint development."[112] In setting aside or postponing contentious maritime boundary disputes, the arrangements have allowed states to benefit "from the economic activity that could result from the joint development of the non-living maritime resources located in the disputed areas."[113]

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[105] Tanaka, *supra* note 60, at 577, *citing* II UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 815 (Myron Nordquist et al. eds, 1993); Klein, *supra* note 100, at 432.

[106] *Id.*, *citing* Lagoni, *supra* note 100, at 359.

[107] Malcolm Evans, *Maritime Boundary Delimitation*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 275 (Donald Rothwell et al. eds., 2015), *citing* Rothwell & Stephens, *supra* note 100, at 409-11; YOSHIFUMI TANAKA, THE INTERNATIONAL LAW OF THE SEA, 208-10 (2012).

[108] VASCO BECKER-WEINBERG, *JOINT DEVELOPMENT OF HYRDOCARBON IN THE LAW OF THE SEA* 205 (2014).

[109] Gillian Triggs, *Unitisation of the Greater Sunrise Oil and Gas Deposits in the Timor Sea: A Compromise for Australia and East Timor*, 7 INT'L ENERGY L. & TAX REV. 207, 209 (2003).

[110] *Id.*

[111] Becker-Weinberg, *supra* note 108, at 205; Ian Townsend-Gault, *Rationales for Zones of Co-operation*, in BEYOND TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA 130 (Robert Beckman et al. eds., 2013); Yusuf, *supra* note 99, at 134-35; Keyuan Zou, *The South China Sea*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 645 (Donald Rothwell et al. eds., 2015)

[112] *Id.*

[113] Rodriguez-Rivera, *supra* note 98, at 5.

Moreover, these arrangements also envision the possibility of eventually setting permanent maritime boundaries. Thus, "provisional arrangements and provisional measures should be considered as tools in the overall process of maritime boundary delimitation."[114] They "provide states with overlapping entitlements with additional legal avenues to promote peaceful resolution of their disputes as well as the orderly use of maritime resources."[115] The arrangements require that claimants take steps to "build confidence and trust among them."[116] This being the case, they foster the development of good faith "between states as a result of the co-management of shared maritime resources" and create a "positive environment in which to peacefully resolve sovereignty claims over disputed maritime areas."[117]

It could be argued that the provisional agreements between Australia and Timor-Leste contributed to the process of finally setting a permanent maritime boundary between the two states. The Sunrise Troubadour and CMATS agreements allowed for cooperation pending the delimitation of maritime frontiers and allowed the two states to benefit from the mineral deposits in the disputed area.[118] It is of course recognized that the actions of Australia during the negotiation process of the CMATS and its subsequent steadfast stance in repeatedly rejecting Timor-Leste's requests for negotiation contributed to the deterioration of the relation between the two states.[119] The CMATS was also a potential hindrance to submission of the dispute to compulsory conciliation.[120] Nevertheless, during the life of these agreements, the two parties were able to preliminarily thresh-out issues on sharing, development, and governance which were eventually considered during the compulsory conciliation proceedings.

B. Use of Conciliation

The method of settling the dispute definitively is one of the primary factors in its resolution. It has been noted that the "conciliation process has yielded a unique treaty and is the first of its type finalized under this

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[114] MARITIME BOUNDARY DELIMITATION: THE CASE LAW 144 (Alex Oude Elferink et al. eds., 2018).

[115] *Id.*

[116] Becker-Weinberg, *supra* note 108, at 312.

[117] Rodriguez-Rivera, *supra* note 98, at 5; Clive Schofield, *Blurring the lines: Maritime Joint Development and the Cooperative Management of Ocean Resources*, 8 ISSUES IN LEGAL SCHOLARSHIP 1, 5-6 (2009) *citing* Bahrain-Saudi Arabia Boundary Agreement, Feb. 22, 1958, Bahr.-Saudi Arabia, 1733 UNTS 3.

[118] Triggs, *supra* note 37, at 142; Bankes, *supra* note 23, at 391

[119] Rothwell, *supra* note 26, at 71.

[120] Gao, *supra* note 58, at 214.

mechanism which not only involved the two states but also, in the latter stages, the Greater Sunrise Joint Venture partners."[121] As previously observed, this method accorded the parties the "flexibility and ultimate control over the dispute" reserved in a political settlement process with some of the elements of formality in a "judicial or arbitral proceedings."[122] Through this method, the parties had access to an independent third party which allowed them to "break the maritime boundary impasse."[123]

The dispute "offers an insight into one of the key limitations of UNCLOS [which is] the legal ability of states to exclude themselves from certain clauses involving compulsory arbitration" and the resolution of disputes involving the application and interpretation of the Convention.[124] Australia's declaration in 2002 effectively forestalled any attempt on the part of Timor-Leste to take the former to an international tribunal as the "consent of the parties involved is a prerequisite for the [international] tribunals to hold jurisdiction."[125] Australia preferred to "negotiate maritime boundaries rather than submit them to binding international adjudication" finding the latter option unpredictable.[126] The provisions on compulsory conciliation of the Convention then addresses this issue by allowing excepted matters to be submitted for resolution.[127]

Moreover, the method allowed for a forum for effectively facilitating an agreement with a view of the complexity of the dispute. It would have been hard to see how a "tribunal would have been equipped to deal with the full range of issues addressed by the [Commission] and by the subsequent treaty."[128] In the delimitation based on legal rules, "tribunals have always interpreted the equitable criteria and factors applicable to maritime boundary delimitation as being directly relevant to the delimitation operation and therefore of a non-political or economic nature."[129] However, it appears that in this case, there was a need to take other interests into account as evinced by the positions of the parties at the start of the process.[130] The process then

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[121] Rothwell, *supra* note 26, at 72; Bankes, *supra* note 23, at 409.

[122] Yee, *supra* note 15, at 316.

[123] Rothwell, *supra* note 26, at 72.

[124] Strating, *supra* note 25, at 116.

[125] Schofield, *supra* note 7, at 269.

[126] *Id.*

[127] Yee, *supra* note 15, at 316; Merills, *The Means of Dispute Settlement*, *supra* note 17, at 571.

[128] Bankes, *supra* note 23, at 409.

[129] Noussia, *supra* note 14, at 69 *citing* United Nations Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *Handbook on the Delimitation of Maritime Boundaries* 15 (2000).

[130] Bankes, *supra* note 23, at 409.

served as an avenue for the settling of a "broader spectrum of factors including political and economic ones without limiting their horizon to only legal issues."[131] Indeed, "the consideration of certain factors or a certain legal position may entrench, aggravate, or engender animosity between the parties."[132]

At the same time, it would have also been difficult to bring the parties together given that before the process, the parties "were engaged in active litigation and locked into firmly held positions as to the justice or injustice of the existing maritime boundary arrangements."[133] Through the confidence-building measures, the parties were able to start negotiating in good faith.[134] The flexibility of the proceedings aided in breaking this deadlock. The parties and the Commission were also able to decide by agreement the procedural rules to their liking "in order to assure convenience, discretion, and confidentiality."[135] Thus, there was a space for the extensive and intensive engagement of the parties by the Commission; informal meetings with the parties jointly and collectively; techniques such as the provision of non-papers to both claimants; appointment of independent experts by the Commission; and the settlement of issues to be discussed by the claimants.

Further, by submitting to the proceedings, the parties "were to obtain an objective and impartial analysis of the relevant international law from a neutral source [which enhanced] their understanding of the relative strengths and merits of their respective [...] claims."[136] Lastly, the method assures autonomy in the resolution of the dispute. It creates a space for dialogue between the parties such that "there is no danger of it producing a result that takes parties completely by surprise, as sometimes happens in legal proceedings."[137] This reason is precisely one of the grounds for Australia's declaration of excluding maritime boundary delimitation from its participation in binding international adjudication.[138]

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[131] Yee, *supra* note 15, at 317; *See* Continental Shelf area between Iceland and Jan Mayen (Ice. v. Nor.), Report and Recommendations of the Conciliation Commission, 20 ILM 797, 823 (1981).

[132] *Id.*; *See* Chin Leng Lim, *The Uses of Pacific Settlement Techniques in Malaysia-Singapore Relations*, 6 MELB. J. INT'L L. 313, 329 (2005).

[133] Bankes, *supra* note 23, at 409.

[134] Strating, *supra* note 25, at 117.

[135] Yee, *supra* note 15, at 317.

[136] *See* Beckman et al., *supra* note 98, at 316.

[137] Yee, *supra* note 15, at 317.

[138] Merills, *supra* note 17, at 571.

V. QUESTION OF APPLICATION IN THE WEST PHILIPPINE SEA DISPUTE

Like the Timor Sea, the South China Sea, which includes the West Philippine Sea, is also rich in hydrocarbon deposits with a seabed estimated to hold up to 11 billion barrels of crude oil and 190 trillion cubic meters of natural gas.[139] This potential has led states to assert their respective exclusive rights to explore, exploit, and utilize them.[140] In the past, unilateral actions made by some of these states to develop or exploit the resources in the area have caused numerous incidents ranging from military or paramilitary vessels to diplomatic engagements.[141] This begs the question of whether steps employed toward the resolution of the Timor Sea dispute could be applied to the disputes in the South China Sea, particularly that of the West Philippine Sea.

With regard to the West Philippine Sea, the disagreement between China and the Philippines has resulted in the latter's resort to arbitration under Annex VII to the Convention over the validity of China's expansive claim, the "Nine-Dash line," the status of certain features in the region, and the legality of the actions of China in the West Philippine Sea.[142] While it has been a party to the Convention, China rejected the establishment of the tribunal and refused to appear before it.[143]

Nevertheless, in its 2015 award, the Tribunal ruled that is has jurisdiction over the dispute and that China's non-participation does not deprive it of jurisdiction. It also held, among others, that contrary to China's claim, the Philippines' commencement of the proceedings did not constitute an abuse of the dispute settlement provisions of the Convention;[144] the matters submitted to arbitration by the Philippines do not concern

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[139] Keyuan Zou, *Cooperative development of oil and gas resources in the South China Sea, in* SECURITY AND INTERNATIONAL POLITICS IN THE SOUTH CHINA SEA: TOWARDS A COOPERATIVE MANAGEMENT REGIME 84 (Sam Bateman & Ralf Emmers eds., 2009).; Nicholas Owen & Clive Schofield, *Disputed South China Sea Hydrocarbons in Perspective*, 36 MARINE POLICY 809 (2012).

[140] Julius Cesar Trajano, *Resource Sharing and Joint Development in the South China Sea: Exploring Avenues of Cooperation*, Mar. 2019, *available at* https://pdfs.semanticscholar.org/e320/05ec9249023eb402cf7985dad8abfe65a20a.pdf

[141] *Id.*; Ted McDorman, *The South China Sea Arbitration,* 20 AM. SOC'Y INT'L L. INSIGHTS (2016).

[142] South China Sea Arbitration (Phil. v. China), Jurisdiction and Admissibility, PCA Case No. 2013-19, 33 (Perm. Ct. Arb. 2015) *available at* http://www.pca-cpa.org/showpage.asp?pag_id=1529,

[143] *Id.*, at 45 *et seq.*

[144] *Id.*, at 39.

sovereignty;[145] the parties have not agreed to other means of dispute settlement pursuant to Articles 281 and 282 of the Convention;[146] and that the Philippines fulfilled its obligation to pursue negotiations before resorting to arbitration.[147]

Less than a year later, the Tribunal reached its decision on the merits of the case, ruling in favor of the Philippines in all but one of its submissions.[148] In essence, the Tribunal found that China's claim of historic rights to resources was incompatible with the allocation of rights and maritime zones in the Convention.[149] It further ruled that none of the disputed maritime features in their natural condition are to be considered as islands under the Convention, and are thus not entitled to a 200-mile exclusive economic zone or continental shelf.[150] Finally, it ruled that China's activities in the West Philippine Sea caused severe harm to the environment and interfered with the rights of the Philippines, thereby breaching the obligations set forth under the Convention.[151]

A. Feasibility of Provisional Agreements

Many have noted the utility of cooperating in the exploitation of resources in the South China Sea while allowing disputes over sovereignty to continue. It has been suggested that the "collaborative management of oil and gas resources could encourage cooperation on other contentious issues in the South China Sea dispute, including claimant countries' broader disagreement over political sovereignty."[152] These proposals are not new. As early as the 1980s, China has stated that parties to territorial disputes in China's adjacent seas should shelve the issue of sovereignty and pursue a joint development of the resources therein.[153] The same was done in 1990 when it stated that it "was ready to shelve the issue of sovereignty in favor of joint development in

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[145] *Id.*, at 140-41.

[146] *Id.*, at 76 *et seq.*

[147] *Id.*

[148] South China Sea Arbitration (Phil. v. China) [hereinafter "South China Sea Arbitration (Merits)"], Merits, PCA 2013-19, (Perm. Ct. Arb. 2016); *See* Yoshifumi Tanaka, *Reflections on Locus Standi in Response to a Breach of Obligations Erga Omnes Partes: A Comparative Analysis of the Whaling in the Antarctic and South China Sea Cases*, 17 L. & PRAC. OF INT'L CTS 527 (2018).

[149] *South China Sea Arbitration (Merits)*, *supra* note 148, at 116-17.

[150] *Id.*, at 174, 259.

[151] *Id.*, at 286, 297, 318, 397, 415, 435.

[152] Emily Meierding, *Joint Development in the South China Sea: Exploring the Prospects of Oil and Gas Cooperation Between Rivals*, 24 ENERGY RES. & SOC. SCI. 65, 65 (2017); *See* Zou, *supra* note 139; Owen & Schofield, *supra* note 139.

[153] Zou, *supra* note 141, at 85.

the semi-enclosed sea."[154] Subsequently, however, it made the offer less palatable to other claimant states by indicating that "it would only concede to joint cooperative activities if the other claimants first acknowledged Chinese sovereignty over the South China Sea."[155]

Since then, other efforts have been made towards cooperation and managing the dispute between claimant states. For instance, the 2002 Declaration on the Conduct of Parties in the South China Sea, adopted by ASEAN foreign ministers and China at the 8th ASEAN Summit, called for, among others, the peaceful resolution of the disputes in the area, conduct of self-restraint, development of confidence-building measures, and engagement in cooperative activities. Then in 2005, China, the Philippines, and Vietnam concluded a three-year Joint Marine Seismic Undertaking ("JMSU") meant to conduct surveys "to determine the size of the available hydrocarbon resources" which, had it succeeded, may have led to the negotiation of provisional agreements.[156] The agreement expired in 2008 but was never renewed by the three states. In the Philippine domestic plane, issues of corruption and constitutionality plagued the agreement which led to its shelving.[157]

Another failed attempt was made in 2011 by the Philippines when it proposed an ASEAN-China Zone of Peace, Freedom, and Friendship.[158] Under the proposal, the zone would be "created by segregating the non-disputed areas from the disputed" with a demilitarized enclave for a "cooperation area for development and conservation."[159] This was rejected by China "as the maritime areas claimed by the Philippines to be non-disputed" fell within the Nine-Dash line.[160] The most recent development, at least concerning the West Philippine Sea, was the Memorandum of Understanding on Cooperation on Oil and Gas Development signed by China and the Philippines in 2018. Under this agreement, both countries agreed to establish an "Inter-governmental Joint Steering Committee and Inter-entrepreneurial

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[154] Ralf Emmers, *China's Influence in the South China Sea and the Failure of Joint Development*, *in* RISING CHINA'S INFLUENCE IN DEVELOPING ASIA 158 (Evenlyn Goh ed., 2016).

[155] *Id., citing* ALLAN SHEPHARD, TESTING THE WATERS: CHINESE POLICY IN THE SOUTH CHINA SEA 5 (1996).

[156] *Id.*; Carlos Santamaria, *Sino-Philippine Joint Development in the South China Sea: Is Political Will Enough?*, 10 ASIAN POL. & POL'Y 322 (2018).

[157] *See* Aileen San Pablo-Baviera, *The Domestic Mediation of China's Influence in the Philippines, in* RISING CHINA'S INFLUENCE IN DEVELOPING ASIA (Evenlyn Goh ed., 2016).

[158] DONALD WEATHERBEE, INTERNATIONAL RELATIONS IN THE SOUTHEAST ASIA: THE STRUGGLE FOR AUTONOMY 185 (2014).

[159] *Id.*

[160] Emmers, *supra* note 154, at 161; Weatherbee, *supra* note 158, at 186.

Working Groups that will negotiate and pursue cooperation agreements for oil and gas development within one year."[161]

Whether the memorandum would result in a provisional agreement like that between Timor-Leste and Australia remains to be seen. It has been forwarded that for joint development agreements to succeed, at least three factors must be met: *first*, the degree of domestic resistance must be low; *second*, the agreement must be the most promising course of action; and *third*, both sides must be regarded as willing to uphold the terms of the agreement.[162] Arguably, the situation between the Philippines and China may not meet these factors.

First, the constitutionality of any joint development agreement concerning the resources of the Philippines would likely be questioned in domestic courts. The JMSU was challenged in this regard as it was viewed to have violated the constitutional requirement that the "exploration, development, and utilization of natural resources shall be under full control and supervision of the state."[163] The requirements concerning this provision have been made clear by the Philippine Supreme Court when it reiterated that the exploration, development, and utilization of natural resources may be directly undertaken by the State "or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens."[164]

Moreover, while the President may "enter into financial and technical assistance agreements with foreign-owned companies for the large-scale exploration, development, and utilization of minerals," such must be under the "full control" of the state.[165] It might be difficult to see how joint development agreements may pass these requirements.

Finally, the Philippine Constitution also requires the state to "protect the nation's marine wealth in its archipelagic waters, territorial sea, and

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[161] Trajano, *supra* note 140.

[162] Hendrik Schopmans, *Explaining (non-)cooperation on Disputed Maritime Resources: Joint Development Agreements, Disputed Territory, and Lessons from the Falkland Islands*, 10 AUS. J. MAR. & OCEAN AFF. 98, 100 (2018).

[163] Edu Punay, *SC Urged to Rule on 2008 Joint Exploration Petition*, PHIL. STAR, Nov. 22, 2008, *available at* https://www.philstar.com/headlines/2018/11/22/1870685/sc-urged-rule-2008-joint-exploration-petition.

[164] La Bugal-B'laan Tribal Assoc. Inc. v Sec'y of the DENR, G.R. No 127882, Dec. 1, 2004, *citing* CONST., art. XII, §2.

[165] *Id.*

exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens."[166] Thus, any agreement that appears to waive the state's claim, even over disputed areas, may run afoul of the Constitution.[167]

Second, it is also questionable whether joint development agreements in the West Philippine Sea may the best course of action. In the first place, for there to be any agreement, there will have to be a settlement on the areas which will be the subject of joint development, preferably following the provisions and principles set out under the UNCLOS. This remains to be a "complex and difficult challenge" in light of the "symmetry in power capabilities that exist" between the Philippines and China.[168] Furthermore, "despite its joint development proposals, China has failed to clarify its ambiguous claims in the South China Sea in conformity with UNCLOS" and has continued instead to rely on its Nine-Dash line.[169] Second, the Philippines' signing of a joint development agreement over the West Philippine Sea may have the effect of legitimizing and normalizing China's claims when these "are arguably weak in accordance with international law."[170] Of course, it is understood that a provisional agreement "does not constitute an acknowledgement of a claim nor does it affect the final delimitation of a maritime boundary."[171] Nevertheless, "through practical action and the joint exploitation of resources" with China, the Philippines may send a signal that China's stand is in accord with international law and risk nullifying the 2016 decision that rejected China's claim under historical rights.[172]

Third, the attitudes of the parties also play a role. Rivals, which may be used to describe the current relationship of the Philippines and China as to the West Philippine Sea, are "highly competitive and characterized by mutual mistrust."[173] They also "tend to view international cooperation as a zero-sum game, rather than an opportunity for joint benefits."[174] The result is that, out of the 45 development agreements created between 1958 and 2014, only five had been between "strategic rivals."[175] Thus, it could be said that it

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[166] CONST., art. XII, §2.

[167] *See* ANTONIO CARPIO, THE SOUTH CHINA SEA DISPUTE: PHILIPPINE SOVEREIGN RIGHTS AND JURISDICTION IN THE WEST PHILIPPINE SEA 224 (2017).

[168] Emmers, *supra* note 154, at 168.

[169] *Id.*

[170] *Id.* at 162; *See South China Sea Arbitration (Merits)*, *supra* note 148.

[171] Emmers, *supra* note 154, at 163.

[172] *Id.*; *See* Richard Heydarian, *The Perils of a Philippine-China Joint Development Agreement in the South China Sea*, ASIA MARITIME TRANSPARENCY INITIATIVE, Apr. 27, 2019 *available at* https://amti.csis.org/perils-philippine-china-joint-development-scs/.

[173] Meierding, *supra* note 152, at 67.

[174] *Id.*

[175] *Id.*

would be difficult to see how an agreement may be workable in the West Philippine Sea. Without "broader political reconciliation," an agreement on the joint utilization, development, and exploitation of resources may very well be an improbable course of action.[176]

B. Problems with Conciliation

Notably, while the Philippines has resorted to arbitration in the past, the dispute is far from settled. As earlier mentioned, the award in favor of the Philippines pertained, among other things, to the maritime entitlements of China based on historic rights, the status of some features, and the interference of China with regard to the Philippines' exercise of its rights on its exclusive economic zone. Nonetheless, the proceedings did not concern "any question of sovereignty over land territory and would not delimit any maritime boundary" between the Philippines and China.[177] Thus, this raises the question of whether conciliation may be of use in resolving the remaining issues at hand.

The problem is that conciliation requires cooperation between the parties for it to become successful. There must be willingness on their part to both undergo the process and, later on, faithfully comply with its results. Admittedly, it could be said that there was some initial hesitation on the part of Australia to take part in the proceedings, objecting at first to the competence of the Commission and arguing that both parties have agreed to settle the dispute through negotiations.[178] However, when these submissions were rejected by the Commission, Australia accepted the decision and underwent the conciliation proceedings with Timor-Leste.

This willingness is absent on China's part with regard to the West Philippine Sea dispute. For one, while it has been a long-standing party to the UNCLOS, it declined to participate in the establishment of the arbitral tribunal, much less actually appear before it.[179] Instead, China reiterated its position that it preferred to "settle the dispute through bilateral negotiations and friendly consultations,"[180] and that it ultimately rejected the tribunal's jurisdiction over the case. [181] China remained firm on this stance, notwithstanding the eventual finding of the tribunal that it indeed had

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[176] *Id.*, at 69.
[177] *See South China Sea Arbitration (Merits), supra* note 148.
[178] Gao, *supra* note 58, at 214.
[179] South China Sea Arbitration, *supra* note 148, at ¶ 29.
[180] *Id.*
[181] *Id.*, at ¶¶ 42, 51.

jurisdiction and that the claims of the Philippines were admissible.[182] Placed in contrast with Australia's attitude towards the conciliation procedure, it may then be apparent why conciliation may not succeed in resolving the West Philippine Sea dispute.

Aside from the attitude towards the proceedings, the general dispositions of the parties are also relevant in determining the success of the proceedings. As the Commission notes, good faith negotiations on the dispute and the continuation of confidence-building measures was important in arriving at a resolution.[183] It may be conceded, however, that there were some questionable actions on the part of Australia in the years preceding the conciliation proceedings, such as its declaration which excluded maritime boundary delimitations from the compulsory jurisdiction of the ICJ and ITLOS,[184] as well as its surveillance on the internal discussions during the negotiations for the CMATS.[185] Nevertheless, both parties were observed to have eventually reaffirmed their respective commitments to work in good faith towards resolving the dispute with a "great deal of hard work and goodwill on both sides."[186]

The situation in the West Philippine Sea dispute is different. China's determination "to apply force and coercion" to assert its territorial claims "undermines any prospect for fostering trust and more cooperation in resolving the differences between it and the Philippines.[187] Its '"heavy-handedness in enforcing its territorial claims over the South China Sea on its terms" has been evident and has "continued to demonstrate its ability and readiness to coerce" other states, including the Philippines.[188] Since 2010, "there has been an increase in the number of incidents all over the South China Sea involving the harassment of survey vessels, the cutting of cables, and the repeated arrest of fishermen."[189] Moreover, despite protests, China has not ceased its construction and militarization of artificial islands in the South China Sea.[190] These, along with China's growing naval presence in the South China Sea, greatly imperils confidence-building measures between itself

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[182] *Id.*, at ¶ 61.

[183] *Timor Sea Conciliation*, *supra* note 52, at ¶ 39.

[184] Strating, *supra* note 25, at 399.

[185] Bankes, *supra* note 23, at 393; Tzeng, *supra* note 42.

[186] *Id.*, at ¶¶ 39, 49.

[187] Renato De Castro, *Beware of China giving gifts: The risk of joint development of the South China Sea resources*, BUSINESS WORLD, Sept. 17, 2019 *available at* https://www.bworldonline.com/beware-of-china-giving-gifts-the-risk-of-joint-development-of-the-south-china-sea-resources.

[188] *Id.*; Emmers, *supra* note 154, at 157.

[189] *Id.*, at 170.

[190] Meierding, *supra* note 152, at 65.

and the Philippines over the West Philippine Sea.[191] In turn, the state of affairs inspires "gloomy prognoses over a potential escalation" of the dispute instead of its resolution.[192]

VI. CONCLUSION

The unique process in resolving the Timor Sea dispute produced an equally unique outcome in the form of a treaty which created permanent maritime delimitations between Australia and Timor-Leste. To begin with, the parties made use of provisional agreements to benefit from the resources derived from the contested areas. While far from being final, these allowed for cooperation pending the delimitation of maritime frontiers. Of course, it is recognized that there had also been conflicts during the effectivity of these agreements which were not settled by means of negotiations. In the end, Timor-Leste, hindered by Australia's declaration of exclusion, had no other recourse but to submit the dispute to compulsory conciliation. However, while the process of initiating the proceedings was certainly arduous, it was able to bring the two parties together to negotiate in good faith. Being the first of its kind, the conciliation process would definitely aid future settlement of disputes.

It is worth highlighting that the dispute is far from settled. The Commission was not "successful in bringing the parties to an agreement on the selection of the most appropriate development option for the [Greater Sunrise area]."[193] Australia and Timor-Leste "still need to make a choice as to whether to tie in the project to existing facilities and thus land production in Australia, or whether the project should construct new facilities to land production in Timor-Leste."[194] However, with the assistance of the Commission and its independent experts, the parties were able to make "some progress on this issue including a provision in the Greater Sunrise Regime which varies the formula for revenue sharing depending upon where production is to be landed."[195] Nonetheless, it could be said that the proceedings made headway for both parties through previous agreements and a method of resolution involving flexible and novel procedures. As far as

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[191] De Castro, *supra* note 187.

[192] Schopmans, *supra* note 162, at 98; Adam Liff & G. John Ikenberry, *Racing Toward Tragedy?: China's Rise, Military Competition in the Asia Pacific, and the Security Dilemma*, 39 INT'L SEC. 52 (2014); ROBERT KAPLAN, ASIA'S CAULDRON: THE SOUTH CHINA SEA AND THE END OF A STABLE PACIFIC (2015).

[193] Bankes, *supra* note 23, at 395.

[194] *Id.*

[195] *Id.*

bringing the parties to finally settle their maritime boundaries and end multiple litigations, the process was ultimately successful.

Whether the same strategy could be applied in other disputes, such as between China and the Philippines over the West Philippine Sea, is a different matter. The high degree of domestic resistance in the Philippines, the question of whether a joint development agreement is the most promising course of action, and the appearance of lack of willingness in the parties to uphold the terms of such an agreement make the feasibility of a joint development agreement in the West Philippine Sea look bleak. Furthermore, the apparent absence of willingness on the part of China to submit the dispute to international proceedings in the first place puts into question the use of conciliation at all in order to resolve the dispute.

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