THE TIMOR SEA CONCILIATION AND LESSONS FOR NORTHEAST ASIA IN RESOLVING MARITIME BOUNDARY DISPUTES

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(2019) 6 *Journal of Territorial and Maritime Studies* 30
[2019] *UNSWLRS* 52

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The *Timor Sea Conciliation* and Lessons for Northeast Asia in Resolving Maritime Boundary Disputes

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This is the pre-publication version of 'The Timor Sea Conciliation and Lessons for East Asia in Resolving Maritime Boundary Disputes' (2019) 6 *Journal of Territorial and Maritime Studies* 30-50.

Key words: Maritime boundary disputes; conciliation; Korea; Timor-Leste; maritime boundary delimitation

Abstract:

The purpose of the article is to examine implications of the *Timor Sea Conciliation* for other maritime boundary disputes. The approach involves a textual analysis of the maritime boundary conciliation procedure in the UN Convention on the Law of the Sea; critical assessment of its application in the *Timor Sea Conciliation*; and, proposed application to maritime boundary disputes existing between Korea and Japan, and Korea and China. The *Timor Sea Conciliation* has provided important lessons for states seeking to resolve their maritime boundary disputes. However, there are diverse legal constraints as well as political issues to consider in deciding on whether conciliation is an appropriate dispute resolution technique to use.

Introduction

Timor-Leste instituted compulsory conciliation against Australia in 2016 to resolve what had become, at least for Timor-Leste, an intractable maritime boundary dispute between the two states in the Timor Sea.[1] The conciliation proceeded under the United Nations Convention on the Law of the Sea (UNCLOS or Convention),[2] which provides for this

process when maritime boundary disputes are otherwise excluded from the compulsory dispute settlement proceedings entailing binding decisions.[3] The *Timor Sea Conciliation* concluded with the release of the Conciliation Commission's Report and Recommendations in May 2018.[4] It provides an important opportunity for other states party to UNCLOS to learn from the benefits and limitations of this dispute settlement process in relation to their own unresolved maritime boundaries. Several such boundary disputes may be identified in East Asia and this article focuses on the undelimited China-Korea and Japan-Korea maritime boundaries by way of example.

Korea became a party to UNCLOS in 1996. In doing so, Korea not only accepted the obligations and gained the rights granted in that Convention, but also consented to compulsory arbitration or adjudication of disputes arising under UNCLOS. The dispute settlement regime set out in Part XV of UNCLOS is considered an integral part of the package deal agreed during the negotiations at the Third UN Conference on the Law of the Sea.[5] However, the recognised national importance of maritime boundaries allowed states the possibility of issuing a declaration excluding certain maritime boundary disputes from compulsory arbitration or adjudication.[6] Korea made such a declaration in 2006 thereby ensuring its maritime boundary disputes with Japan and China could not be referred to arbitration or adjudication.[7]

Korea has delimited parts of its maritime boundary, such as in the Korea Strait (also referred to as the Tsushima Strait), which has been split into an Eastern Channel and Western Channel by Tsushima Island, and is approximately 20 nautical miles wide at its narrowest point.[8] Both Japan and Korea have restricted their territorial waters to 3 nautical miles from their

respective baselines, to allow for high seas freedom of navigation in the rest of the waters.[9] Also, under the Agreement between Japan and the Republic of Korea concerning the Establishment of Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries,[10] the agreed continental shelf boundary based on a median line commences at the midpoint between Korea's Cheju Island and Japan's Goto Retto, and heads north towards the Korean coastline (as a result of the Japanese island, Tsushima, in the Korean Strait), and then veers back away from the Korean coastline as it continues north.[11]

However, Korea and Japan agreed in 1998 on two provisional fishing zones in disputed areas, which allow each country to have a 35 nautical mile zone from their coastline that is referred to as an Exclusive Economic Zone (EEZ).[12] Another joint development zone had been agreed on 30 January 1974 in the southern area of Korea and Japan's overlapping continental shelves.[13] Korea and China have also agreed on a transitional zone for five years after the entry into force of their Fisheries Agreement, as well as an ongoing provisional zone in the Yellow Sea.[14]

An undelimited boundary remains in the area extending from the northernmost point of the Korea Strait to the islands of Dokdo, because of the ongoing territorial sovereignty dispute between Korea and Japan concerning Dokdo.[15] While negotiations proceed slowly with China, the maritime boundary between Korea and Japan around Dokdo is unlikely to be determined so long as Japan continues to contest Korea's sovereignty to Dokdo.

The dispute settlement procedure under UNCLOS is thus open to Korea, Japan and China to assist in the delimitation of their maritime boundaries. Each state has preferred negotiations thus far, which has commonly been used to delimit maritime boundaries between neighbouring states. Negotiations allow diverse factors to be considered, sometimes beyond the legal requirements or considerations for maritime boundary delimitation. When maritime boundaries remain unresolved, conflicts between neighbouring states may occur. This tension has been particularly notable where fishing vessels of one state are barred or arrested by the other state. There may also be an economic imperative to delimit a maritime boundary so that concession areas may be offered to oil and gas companies to explore and exploit the natural resources of the continental shelf. An interim arrangement may be concluded between the states concerned, allowing for joint exploitation and management. Australia and Timor-Leste had proceeded down this path but Timor-Leste sought greater certainty and control over what it considers as its national resources. At present, Korea has also opted for provisional arrangements in relation to fishing with both China and Japan, and has also concluded an agreement with Japan in relation to their overlapping continental shelf areas, outside the region of Dokdo. But for how long should such provisional arrangements stay in place?

Where negotiations do not provide a satisfactory resolution, the imperative to settle maritime boundaries with finality becomes greater. It is in this context that turning to third-party dispute resolution may become a more attractive option for states. While it takes some control away from the states, third-party intervention may completely change the dynamics in settling maritime boundary disputes. To turn to arbitration or adjudication, the court or tribunal produces a legally-binding response to claims relating to the maritime boundary. Conciliation does not produce a legally-binding response but engages a commission in producing recommendations to facilitate maritime boundary delimitation.

While Korea (and China)[16] have excluded the possibility of arbitration or adjudication for maritime boundary delimitation under UNCLOS, there may still be an option for each state to refer the dispute to a conciliation commission constituted under Annex V of UNCLOS. As noted, Timor-Leste took this approach to resolve its differences against Australia. This article therefore considers if this experience holds any lessons for other states, notably Korea, China and Japan, in managing their own maritime boundary disputes.

To answer this question, the article first briefly explains the operation of the dispute settlement procedure under UNCLOS, and assesses in detail the compulsory conciliation option for maritime boundary disputes. It then examines the experience of the *Timor Sea Conciliation* and draws out lessons for Korea in relation to its unresolved maritime boundaries with Japan and China, respectively. The article concludes in finding that the UNCLOS dispute settlement procedures offer limited options, and perhaps unwanted or unexpected opportunities, when settling maritime boundaries in areas of overlapping Exclusive Economic Zones (EEZ) and continental shelves.

Resolution of Maritime Boundary Disputes under UNCLOS

Within Part XV of UNCLOS, Article 286 provides:

> Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

This provision establishes the core of the compulsory dispute settlement regime under UNCLOS and indicates when states may resort to mandatory arbitration or adjudication.

Alternative Means of Dispute Settlement

To compel another state to engage in either arbitration or adjudication under UNCLOS, Section 1 provides that states instituting proceedings must meet some conditions. Article 283 requires states to proceed to an exchange of views regarding dispute settlement procedure.[17] Consideration must further be given as to whether other dispute settlement procedures prevail over UNCLOS dispute settlement by virtue of either Article 281 or Article 282. These provisions anticipate that a state may refer its dispute to processes other than those under UNCLOS, but the circumstances in which these processes trump the UNCLOS dispute settlement regime are quite limited.[18]

Subject Matter Jurisdiction

Where no settlement is reached under Section 1, a state may choose to refer a dispute concerning the interpretation or application of UNCLOS to arbitration or adjudication. Recent arbitral awards under UNCLOS indicate that the subject matter jurisdiction of any court or tribunal constituted under the Convention is broad.[19] There has been debate as to whether territorial disputes may also fall within the scope of the UNCLOS dispute settlement regime, which is relevant to Japan's claims over Dokdo.[20] However, the *Chagos Archipelago* arbitration indicated that there was no such jurisdiction unless it was a minor question of territorial sovereignty incidental to the resolution of another dispute submitted under the Convention.[21]

Disputes Excluded from Compulsory Arbitration or Adjudication

As recognised in Article 286, a state's referral of a dispute to arbitration or adjudication under UNCLOS is subject to Section 3 of Part XV. This Section comprises of

Article 297, which has exceptions and limitations to the disputes that a state may submit to arbitration or adjudication, and Article 298, which allows state parties to exclude at their option particular categories of disputes. Article 297 primarily addresses disputes that may arise in relation to the coastal state's exercise of sovereign rights or jurisdiction in its EEZ. Most relevant for present purposes is Article 298, which allows states to exclude 'disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles'.[22] Articles 15, 74 and 83 concern the delimitation of overlapping entitlements to territorial sea, EEZ and continental shelf, respectively. As noted at the outset, Korea and China have both declared that compulsory procedures entailing binding decisions will not apply to the maritime boundary disputes listed in Article 298. Yet, this exclusion may still allow for the possibility of compulsory conciliation, which is examined immediately below.

Compulsory Conciliation of Maritime Boundary Disputes

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

> …a method for the settlement of international disputes of any nature according to which a Commission set up by the Parties… proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them, or of affording the Parties, with a view to its settlement, such aid as they may have requested.[23]

The key elements of conciliation encapsulated in this definition, which multilateral and regional treaties also reflect, are investigating and clarifying issues in dispute (facts and / or

law) and seeking to bring the parties to agreement through recommendations of mutually acceptable solutions.[24]

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

Nonetheless, for the purposes of compulsory conciliation under Article 298(1)(a), there are a number of requirements that must be satisfied. If the parties disagree as to the competence of the conciliation commission, particularly because one party alleges these requirements are not met, the commission is to resolve whether it has jurisdiction to proceed.[25] The conditions include that the dispute has arisen subsequent to the entry into force of UNCLOS; no agreement is reached in negotiations within a reasonable period of time; and the dispute does not involve the concurrent consideration of unsettled territorial disputes.[26] Further, compulsory conciliation is not available for 'any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties'.[27]

Annex V of UNCLOS sets out the conciliation procedure, including requirements for the constitution of the conciliation commission and allowing the commission to determine its own procedure.[28] The functions of the commission are to 'hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable

settlement'.[29] The procedure is to run relatively quickly,[30] with the commission to issue a report within 12 months of its constitution.[31] The report is to 'record any agreements reached and, failing agreement, its conclusion on all questions of fact or law relevant to the matter in dispute', as well as any recommendations considered appropriate for an amicable settlement.[32]

The parties are required to negotiate an agreement based on the commission's report.[33] Article 298(1)(a)(ii) provides that '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'. This wording may be understood to reinforce the paramountcy of state discretion in deciding how to settle maritime boundary disputes as well as the importance of a consensual resolution. It is therefore critical to take note that even if Korea, China or Japan was compelled to engage in a conciliation process, that state would not ultimately have to be bound by any outcome arising from that conciliation or ensuing negotiations. Consequently, if Korea, China or Japan initiated conciliation, a definitive resolution of a maritime boundary dispute is not guaranteed.

The *Timor Sea Conciliation* Experience

In light of the hurdles to engage in compulsory conciliation to resolve a maritime boundary dispute and the possibility of failing to resolve the dispute as an outcome, it is not unreasonable to consider why a state would opt for such a course of action. In this regard, it is useful to contemplate the motivation for Timor-Leste in instituting conciliation against Australia and the outcome achieved.

The maritime boundary between Australia and Timor-Leste had been an issue of concern between the countries since Timor-Leste gained its independence in 2002.[34] The undelimited area in the Timor Sea between Australia and Timor-Leste contains important oil and gas fields.[35] Following Timor-Leste's independence in 2002, the two states entered into a series of bilateral agreements to allow for joint exploitation; the two most relevant being the Timor Sea Treaty,[36] and the Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS Treaty).[37] The Timor Sea Treaty provided for the shared exploration and exploitation of a Joint Petroleum Development Area (JPDA).[38] Under the Timor Sea Treaty, Timor-Leste received 90% of petroleum production whereas Australia was allocated 10%. The CMATS Treaty had two important purposes. The first was to allow for a 50%-50% revenue-sharing regime in relation to the Greater Sunrise field, which straddled the eastern side of the JPDA and Australia's maritime area with roughly 20% of the field falling within the JPDA. Second, it established a moratorium in relation to the fixing of a permanent maritime boundary as between the two countries for a period of fifty years, or five years after exploitation of the Greater Sunrise field ceases, whichever occurs earlier.[39] Further, Article 4 of that treaty sought to prohibit any third-party engagement in relation to any aspect of the maritime boundary and resource exploitation.

In light of this moratorium in the CMATS Treaty, Australia objected to Timor-Leste instituting conciliation in violation of this bilateral agreement. However, the Commission considered that whether Timor-Leste was in violation of the CMATS Treaty or not was not a question it could resolve but it could only look to see if the conditions for the Commission to proceed were met.[40] Nor did the dispute settlement mechanism in the CMATS Treaty prevail over the dispute settlement procedures available under UNCLOS in the terms of Article 281.[41] Australia was equally unsuccessful in alleging the dispute arose after the entry into

force of UNCLOS for the parties (2013), as the Commission considered that the relevant date was the entry into force of UNCLOS more generally (1994).[42] The Commission also determined that the parties' negotiations were sufficient,[43] and that the provisional nature of the joint arrangement meant that none of the agreements between Timor-Leste and Australia constituted sea boundary disputes that had been 'finally settled'. All members of the Commission therefore agreed that they had competence to undertake the conciliation.

The Commission held initial meetings with Timor-Leste and Australia after its decision on competence and admissibility, which were described as 'part of an ongoing, structured dialogue in the context of conciliation'.[44] Considering Australia's challenge to proceeding with compulsory conciliation and the high levels of distrust that existed between the parties in relation to the resources and boundary issues between them,[45] the Commission emphasised that establishing trust was a critical first step.[46] It could be expected that in any contentious proceeding where one party is unwillingly brought before a third-party process that the commission (or even court or tribunal) would need to demonstrate that it can deal fairly and credibly with the dispute for the parties to engage properly in the process and accept the outcome of that process. Trust in the process is further a crucial element when the resolution of the dispute is set against a backdrop of contested positions between the parties over a lengthy period of time.

In the *Timor Sea Conciliation*, the parties first agreed on a package of confidence-building measures.[47] It is significant that one such measure was an indication from Australia that it would work towards 'creat[ing] the conditions conducive to the achievement of an agreement on permanent maritime boundaries in the Timor Sea'.[48] To signal willingness to contemplate

a permanent maritime boundary was a notable change in Australian policy as enshrined in the CMATS Treaty.[49] Further measures included Timor-Leste's withdrawal of its claims against Australia in two arbitrations commenced under the Timor Sea Treaty,[50] and the termination of the CMATS Treaty, with agreement between the parties on the legal consequences of that termination for relevant stakeholders.[51]

The Report of the Commission tracks through the variety of meetings held with the parties' representatives, noting that exchanges were conducted not only in person, but also via telephone and email and with varying degrees of formality.[52] To this end, the Commission had in place a delegation power so that a chair or delegation of the Commission could conduct meetings and report back to the other members of the Commission.[53] This approach would have allowed for more flexible scheduling than may have been possible in coordinating the schedules of five commissioners on every occasion. Members of the Commission predominantly met with the parties separately,[54] and all discussions were conducted on a 'without prejudice' basis in the event the process did not ultimately yield a resolution of the dispute.[55] Confidentiality was also a critical dimension in the Commission's procedures.[56] All these elements created an environment for fruitful discussions that allowed the Commission to determine each state's position as well as the reasons and motivations for their position.[57]

The parties submitted written papers to the Commission, but the Report of the Commission indicates that these position papers were not to be formal pleadings as might be understood in an arbitration or adjudication.[58] In addition, the Commission itself produced 'non-papers' and developed written proposals for the parties' consideration.[59] The process thus appears to

comprise of the formalities of a conciliation but also a mediation, where a third party directs and / or manages the negotiations between the parties.[60] Such an active role may be contemplated by virtue of the Commission's authority to 'draw the attention of the parties to any measures which might facilitate an amicable settlement of the dispute'.[61]

As a result of the tripartite efforts and cooperation under the conciliation procedure, Timor-Leste and Australia were able to agree on a permanent maritime boundary. The parties signed the Treaty on Maritime Boundaries at the United Nations on 6 March 2018,[62] and it is expected to be ratified by both states. It is a complicated delimitation because it had to account for the facts that Timor-Leste still must negotiate a continental shelf boundary with Indonesia and because the eastern lateral boundary runs through the Greater Sunrise field.[63] The exploitation of Greater Sunrise proved to be a significant obstacle in resolving the dispute between Timor-Leste and Australia. Timor-Leste had initially made a claim to a maritime boundary that would have put Greater Sunrise under its exclusive jurisdiction.[64] As noted previously, the existing maritime agreements resulted in this field being partly in the JPDA and partly under Australia's exclusive jurisdiction. The Commission, however, steered the parties towards maintaining a joint exploitation regime.[65] Under the Treaty on Maritime Boundaries, it was agreed that the revenue would be split whereby 'the shares of upstream revenue allocated to each of the Parties will differ depending on downstream benefits associated with the different development concepts for the Greater Sunrise gas field'.[66] The outstanding issue was the development concept associated with the exploitation of Greater Sunrise, which concerned whether the gas would be processed in Timor-Leste or in Darwin, Australia. The Commission produced a paper on 'Comparative Development Benefits of Timor LNG and Darwin LNG', as well as 'a condensed analysis of the comparative economics of the two concepts' to aid future discussions.[67] Consequently, the Report includes

one recommendation 'that the Parties continue their discussions regarding the development of Greater Sunrise with a view to reaching agreement on a concept for the development of the resource'.[68]

The *Timor Sea Conciliation* has therefore provided many important lessons for other state parties to UNCLOS with unresolved maritime boundary disputes. First, Australia's challenge to the competence of the Commission has highlighted that there are several conditions to be met for a compulsory maritime boundary conciliation to proceed. Meeting those conditions does not appear especially onerous considering the Commission's decision, however. Second, the conciliation process does not necessarily resemble adjudication or arbitration in terms of requiring formal pleadings and oral presentations. Further, whereas an assurance provided by a State in the context of an arbitration or adjudication proceeding might be viewed as formally binding that State, in the conciliation setting, any proposals could remain without prejudicing the legal position of the State. Third, the high engagement of the Commission in moderating the discussions between the parties resembled what may be more commonly described as mediation.[69] This approach may or may not be favoured by other States engaging in compulsory conciliation in the future. It did lead to an amicable resolution as between Timor-Leste and Australia in delimiting a permanent maritime boundary. Finally, the Commission's Report described the dispute between Timor-Leste and Australia as 'ripe for resolution' and, despite Australia's initial reluctance, both States perceived advantages in resolving this dispute.[70] Not every political setting of an unresolved maritime boundary will be similarly 'ripe for resolution'. In light of these lessons, the next two sections consider what certain maritime boundary disputes in Northeast Asia may learn from the *Timor Sea Conciliation* experience.

Maritime Boundary Dispute between Japan and Korea

As explained at the outset of this article, the remaining maritime boundary for Korea to resolve with Japan lies in the East Sea (or Japan Sea), and the East China Sea, except for the southern part of the continental shelf of the East Sea of Korea.[71] In this context, could we anticipate that their maritime boundary dispute would be resolved through compulsory conciliation under UNCLOS? The requirements for resort to compulsory conciliation prompt a number of challenges for either Korea or Japan to rely on this dispute settlement procedure.

First, there is an immediate point of contrast in the situation between Korea and Japan as compared to Timor-Leste and Australia. In the latter dispute, there was no contested territory between the parties. As indicated above, a dispute submitted for conciliation cannot involve 'concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory'.[72] For Korea and Japan, this clause limits the scope of a dispute and may prevent conciliation being used for the resolution of any maritime boundary dispute around Dokdo.

Professor Oxman has suggested, however, that if two States seeking to delimit their maritime boundary also dispute sovereignty over particular territory, the boundary could still be drawn to the extent that the disputed territory would not influence the delimitation.[73] In this regard, a maritime boundary could only be delimited if the presence of Dokdo does not influence what line is to be drawn.[74] However, Japan may not wish to resile from its position that Dokdo is entitled to its own EEZ and continental shelf as this precedent would be prejudicial to Japan's claims to island status over other features, such as Okinotorishima. If Dokdo was to generate an EEZ and continental shelf, it would be less likely that any delimitation in the

East Sea could be pursued because of the influence of those maritime zones on any potential boundary.

Second, a further condition for resort to conciliation is that the dispute must be one that has arisen subsequent to the entry into force of UNCLOS between the parties to the dispute.[75] This condition significantly reduces the number of continental shelf delimitations that could have been subject to the Convention's dispute settlement regime.[76] Notably, prior to the entry into force of the Convention, each state had challenged the other state's claim to sovereignty over Dokdo.[77] The conclusion of the bilateral continental shelf agreement in 1974 indicates that the disputed sovereignty over Dokdo was already considered prejudicial to the resolution of a continental shelf boundary at that time.

The same considerations may not hold true in relation to any dispute concerning the delimitation of the overlapping EEZs. Korea and Japan both declared an EEZ in 1996. As such, a dispute as to overlapping EEZs could only have arisen after UNCLOS had entered into force. Although Japan and Korea had concluded a fisheries agreement in 1965, this agreement did not address all the rights and duties ultimately incorporated into the EEZ regime under UNCLOS. On this basis, there may be an opportunity to pursue compulsory conciliation over the delimitation of the EEZ if states only declared these zones subsequent to the entry into force of UNCLOS. Such a tactic may be of interest where the coastal states concerned have a strong interest in the conservation and management of the marine living resources, as is the case with Korea and Japan.

A third precondition for compulsory conciliation considers whether any agreement has been reached within a reasonable period of time in negotiations between the parties. This assessment involves a factual determination as to the diplomatic exchanges between the parties. Korea and Japan have largely been stalemated in efforts to resolve the maritime boundary definitively because of the Dokdo dispute. Nonetheless, the obligation to undertake efforts to negotiate the maritime boundary was recognised in their 1998 fisheries agreement. Notably, Article 1 of Annex I, which is an integral part of the 1998 agreement,[78] provides for the two states to continue negotiating in good faith for a prompt delimitation of their EEZs.

This obligation in the Japan-Korea Fisheries Agreement further underlines a response to a fourth precondition for compulsory conciliation, namely that conciliation is not available where the sea boundary dispute has been 'finally settled by an arrangement between the parties'.[79] The Japan-Korea Fisheries Agreement clearly reflects a provisional, not final, arrangement between the parties and commentators consider it consistent with an obligation under Article 74(3) to enter into provisional arrangements of a practical nature pending the final resolution of a maritime boundary for overlapping EEZs.[80]

Fifth, compulsory conciliation is not available for any dispute that 'is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties'.[81] The Japan-Korea Fisheries Agreement has a detailed dispute settlement clause in Article XIII. This provision anticipates dispute settlement to involve consultations in first instance and then allows for the possibility of arbitration if mutually agreed. Implicit in this agreement is that if one state refuses to arbitrate then arbitration cannot proceed.[82]

In relation to the Japan-Korea Fisheries Agreement, the dispute settlement clause in this treaty is very similar to the dispute settlement clause in the Convention for the Conservation of Southern Bluefin Tuna.[83] In 1999, Australia and New Zealand instituted proceedings against Japan under UNCLOS, challenging the legality of Japan's experimental fishing program. The arbitral tribunal held that Australia and New Zealand were precluded from bringing claims against Japan because the Convention for the Conservation of Southern Bluefin Tuna had its own dispute settlement clause that fell within Article 281.[84] On this basis, disputes relating to matters that fall within the Japan-Korea Fisheries Agreement should also be resolved only through the dispute settlement regime in that bilateral treaty, and would not be subject to compulsory proceedings under UNCLOS. However, more recently, the *South China Sea* Tribunal took a contrary view and considered that 'the better view is that Article 281 requires some clear statement of exclusion of further procedures'.[85] The Tribunal remarks that this 'requires an "opting out" of Part XV procedures'.[86]

If the view of the *South China Sea* Tribunal is followed, the Japan-Korea Fisheries Agreement would be interpreted as not expressly excluding UNCLOS dispute settlement. The references to UNCLOS in the Preamble of the Japan-Korea Fisheries Agreement, including that the 'new fisheries order' is to be 'based on the UNCLOS', could be interpreted as signalling the inclusion of the UNCLOS dispute settlement regime.[87] At its highest, it is implicit in the Japan-Korea Fisheries Agreement that the dispute settlement regime in Article XIII was intended as the means to resolve disputes between the parties relating to the interpretation and application of that agreement. This point would be underlined by the deliberate decision to move away from compulsory arbitration as had been included in the 1965 agreement, indicating the parties' preference not to use compulsory procedures as the method to resolve their disputes. However, the failure in this agreement, adopted in 1998 and

hence well after the adoption and entry into force of UNCLOS, to exclude explicitly UNCLOS procedures may mean that Article 281 is not applicable to exclude jurisdiction if one follows the views of the *South China Sea* Tribunal. If Korea wished to prevent the exercise of UNCLOS jurisdiction in a case instituted by Japan, Korea would have the strategic advantage in the case in being able to use Japan's own arguments from the *Southern Bluefin Tuna* arbitration against it.

Nonetheless, it should also be noted that the Japan-Korea Fisheries Agreement sets out that 'No provision of this Agreement shall be deemed to prejudice the position of either Contracting State on questions of international law other than those relating to fisheries'.[88] It could then be argued that this Article limits the application of the Agreement only to questions relating to fisheries. As such, the Japan-Korea Fisheries Agreement, including its dispute settlement clause, does not cover disputes relating to other maritime activities, such as the delimitation of the maritime boundary. In sum, on the present status of the law, it is likely that a commission would consider that this precondition had been satisfied. On this analysis, compulsory conciliation could proceed in relation to the EEZ maritime boundary only to the extent that any maritime entitlements of Dokdo do not affect that boundary.

Ultimately, it should be borne in mind that even if the UNCLOS dispute settlement procedures are not available for delimiting a boundary between Korea and Japan, they might still be utilised to resolve other maritime disputes that may arise between the two states because of the contested sovereignty over Dokdo and the undelimited maritime area. For example, either state may challenge fishing or maritime scientific research activities of the other state in this area. Depending on the exact factual scenario, a fishing or research dispute may be excluded from compulsory arbitration or adjudication under Article 297 if it concerns

the exercise of coastal state rights in the EEZ. However, to determine if a claim of an UNCLOS violation may be substantiated, a court or tribunal under UNCLOS may consider that resolving the territorial sovereignty dispute over Dokdo is incidental to the dispute presented for resolution. This position might align with the holding in the *Chagos Archipelago* arbitration.[89] It remains unclear what a 'minor' issue of territorial sovereignty might be, although Professor Tanaka has suggested it would most likely concern a question over a low-tide elevation.[90] It seems unlikely that the Dokdo dispute would be considered minor when there is such national importance attached to each claim and the features themselves. Moreover, their near mid-sea location indicates the significance of any finding of territorial sovereignty for either of the claimant states.

If it was in their interest to do so, either Korea or Japan could seek a determination on the maritime entitlements of Dokdo under Article 121 of UNCLOS. The Philippines sought a determination in the *South China Sea* arbitration as to whether various features in the South China Sea were low-tide elevations, rocks or islands. Under Article 121(3) of UNCLOS, rocks that cannot sustain human habitation or an economic life of their own will not be accorded an EEZ or a continental shelf. States may only claim entitlements to such maritime zones from islands. Such a dispute would fall within jurisdiction of a court or tribunal constituted under UNCLOS in light of the *South China Sea* Tribunal's ruling that a determination of maritime entitlements is not part of a maritime boundary delimitation excluded under Article 298(1)(a).[91] If Dokdo was considered 'rocks', the contested sovereignty would have much less of an impact on the maritime area to be delimited and thus provide a conciliation commission with scope to function. In this situation, if there remained an undelimited area not influenced by the question of sovereignty over Dokdo, it is unlikely

that the other preconditions for compulsory conciliation would pose much of a barrier to consideration of the EEZ maritime boundary.

Resort to compulsory conciliation is therefore not straight-forward given the continued challenges to sovereignty over Dokdo and questions as to their status as 'rocks' or 'islands' under Article 121 of the Convention. It may only be in the interests of one of the states to seek this form of resolution if fisheries disputes have escalated between the parties and negotiations are unable to settle their differences.

Maritime Boundary Dispute between Korea and China

Like the situation between Korea and Japan, Korea and China have also sought to devise provisional arrangements rather than finally resolving their maritime boundary in the Yellow Sea. Final resolution has been difficult because 'the Yellow Sea is rich in natural resources, with the capacity for year-round fishing and an estimated oil reserve that may contain up to ten billion barrels of oil'.[92] At present, there are overlapping EEZs and continental shelves claimed by both states. Although the final boundary has not been determined, both states entered into a provisional maritime boundary arrangement by way of a 1998 Fisheries Agreement.[93] This agreement recognises coastal EEZ areas where each country can exercise exclusive sovereign rights, a joint fishing area where each state has equal rights, and transitional areas extending from the joint fishing area.[94]

Beyond the economic interests at stake, several legal challenges exist in resolving the maritime boundary between Korea and China. First, the system of straight baselines claimed

by China is disputed, with over half of the 48 segments claimed being in excess of 24 nautical miles in length, and three exceeding 100 nautical miles in length.[95] The use of straight baselines does not conform with the geographic coastline of China, which Professor Kim has described as essentially smooth, with no fringing islands, from the Shandong Peninsula to the area around Shanghai.[96] Similarly, China's coastline south of the Yangtze estuary has been described as deeply indented, whereas the coastline north of that point is more regular and inconsistent with the use of straight baselines.[97]

Second, China's claim of Bohai Bay as a historic bay has been controversial. The distance between the headlands is 55 nautical miles,[98] and the mouth is 45 nautical miles long,[99] and does not comply with the definition of a juridical bay in UNCLOS.[100] While China has argued that the small islands scattered across the mouth of the Bay strengthen its claim, Korea has never acknowledged the legitimacy of this claim and Japan has expressly raised reservations.[101]

Third, China's use of Dong-dao (described as a barren islet, approximately 70 nautical miles from the coast) as a base point for its baselines, arguably lacks conformity with UNCLOS.[102] Finally, the relevance of Ieodo, a submerged reef without any entitlement to maritime zones under Article 13 or Article 121 of UNCLOS, has proven tendentious between Korea and China.[103]

Each of these disputes could be resolved through arbitration or adjudication under UNCLOS because they concern the interpretation or application of provisions of the Convention other than Articles 15, 74 and 83. It is only delimitation under these provisions that is excluded

from compulsory procedures entailing binding decisions. Korea could therefore resort to a court or tribunal for resolution of these questions as a means of facilitating the overall discussion of the maritime boundary dispute.

Compared to the situation between Korea and Japan, satisfying the preconditions for compulsory conciliation as between Korea and China should be attainable. First, there are no outstanding territorial disputes between Korea and China. Although China has raised objections to Korea's actions around Ieodo, no sovereignty claim is sustainable over a submerged reef.[104] Second, although Korea and China disputed their continental shelf boundaries prior to 1994, when UNCLOS entered into force, Korea declared its EEZ in 1996 whereas China declared its EEZ in 1998.[105] As such, a dispute as to the delimitation of the EEZ arose subsequent to the entry into force of the Convention. Third, it must be asked whether any agreement has been reached within a reasonable period of time in negotiations between the parties. Negotiations have been ongoing since the fisheries agreement was concluded, and it would be open to one of the parties to conclude that no further progress was possible through negotiations.[106]

Fourth, Korea would need to show that conciliation is available because the sea boundary dispute has not been 'finally settled by an arrangement between the parties'.[107] The Korea-China Agreement is similar to the Japan-Korea Fisheries Agreement in that both are intended as provisional arrangements pending the final settlement of their maritime boundaries. Moreover, the Korea-China Agreement sets out that 'No provisions of the present Agreement may be deemed prejudicial to the position of either Contracting Party with regard to its maritime jurisdiction'.[108] The meaning of this provision is obtuse on its face. Given that the

Korea-China Agreement is intended to regulate fisheries activities pending resolution of the EEZ boundary, the implication must be that the claims to maritime areas that would typically be made as part of a delimitation are not to be prejudiced by the agreements reached on temporary zones within this bilateral agreement.

The final precondition is that compulsory conciliation of a maritime boundary dispute under the Convention is not available for any dispute that 'is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties'.[109] The Korea-China Agreement does not include a dispute settlement clause. At most, any dispute concerning the interpretation or application of the Korea-China Agreement could be raised before the Korea-China Joint Fisheries Commission established under Article 13, which has the task of '[s]tudy[ing] the implementation of the present Agreement and other issues relating to the Agreement'.[110] The representatives of both Korea and China must unanimously agree upon any recommendations or decisions of the Commission.[111] If disputes arose under that Agreement and those disputes fell within the interpretation or application of UNCLOS, the absence of a dispute settlement clause in the Korea-China Agreement would mean that Article 281 does not preclude jurisdiction.

Korea or China therefore has a clear legal option of referring the outstanding maritime boundary dispute in the Yellow Sea to compulsory conciliation under Article 298(1)(a)(i) of UNCLOS if desired.

Concluding Remarks

The analysis of the Japan-Korea and China-Korea maritime boundary disputes highlights the legal questions and requirements for any of these states to pursue compulsory conciliation under UNCLOS. There will also be political considerations at issue, particularly whether any of the states wishes to engage a third-party in seeking to resolve these disputes. A notable feature of the conciliation between Timor-Leste and Australia is that it was the preferred mechanism of the less powerful state in facing a more powerful state. A similar phenomenon may be seen in other cases instituted under UNCLOS, including the Philippines' arbitration against China, the challenge of Mauritius to the United Kingdom's actions in relation to the Chagos Archipelago, and even the Netherlands pursuit of claims against Russia for its actions against the Greenpeace vessel, the *Arctic Sunrise*.[112] This dynamic may be more pertinent to Korea instituting proceedings against China, as opposed to the relationship between Korea and Japan.

States will always weigh up a range of factors in determining how to resolve their boundary disputes, especially considering the national importance of defining the limits of a state's sovereignty and its sovereign rights over maritime areas. Ultimately, if negotiations are progressing poorly from one state's perspective, it may consider compulsory conciliation a preferred alternative that will advance discussions without being as confrontational or legally binding as arbitration or adjudication. The importance of Timor-Leste's actions in instituting conciliation is a strong reminder that another option might exist for states in contemplating what procedures or tactics to utilise in seeking the determination of their maritime boundaries.

There are two other important lessons from the *Timor Sea Conciliation* from a legal perspective. The first was the determination that compulsory conciliation is available for

maritime boundary disputes arising subsequent to the entry into force of UNCLOS—that is, 1994. For every state party that declared its EEZ after the entry into force of the Convention, their EEZ maritime boundaries may be subject to conciliation under Article 298(1)(a)(i) if otherwise excluded from arbitration or adjudication. This date applies even for those states, like Timor-Leste, that only became parties to UNCLOS after 1994.

The second important lesson is one that reaffirms an ongoing trend in compulsory dispute settlement under UNCLOS. Namely, the existence of another agreement between the parties purporting to address a particular maritime matter is unlikely to constitute any sort of barrier for one of the parties turning to UNCLOS dispute settlement instead. It is remarkable that the *Timor Sea Conciliation* Commission considered that it did not need to concern itself with the treaty violation perpetrated by Timor-Leste under the CMATS Treaty in instituting proceedings under UNCLOS against Australia in relation to the maritime boundary. While there may be a discernible trend to promote the international legal order of the oceans as enshrined in UNCLOS,[113] it is worth asking whether that legal order is truly supported when other maritime agreements between states are disregarded.

The *Timor Sea Conciliation* process has demonstrated the flexibility that may be afforded to the parties, as well as to a conciliation commission, in exploring diverse options so as to arrive at an amicable settlement.[114] Each of the parties in the *Timor Sea Conciliation* demonstrated a willingness to engage fully in the discussions and saw political advantages in resolving this dispute. For Timor-Leste, this process would ensure the long-sought establishment and recognition of Timor-Leste's independent and sovereign rights over both its land and maritime territory. For Australia, it acknowledged 'the stability and prosperity of

its regional neighbours as matters of high importance and very much in Australia's interest'.[115] In addition, the Commissioners also appeared to have the requisite skills to manage this process. As noted in the Report, 'effective conciliation requires that a careful mix of diplomatic and legal skills, backgrounds, and approaches be deployed in varying combinations at different stages of the process'.[116] It might be the case that extant conditions for the *Timor Sea Conciliation* may be too unique to expect replication in other settings. The full success of the *Timor Sea Conciliation* will only be realised when the Treaty on Maritime Boundaries is ratified by both states and there is a decision on the development concept for Greater Sunrise. At the very least, however, it is important for states to take options like compulsory conciliation more seriously now in devising strategies for the successful delimitation of their maritime areas.

End Notes

[1] *Timor-Leste* v. *Australia Conciliation*, Decision on Australia's Objections to Competence (19 September 2016), https://pcacases.com/web/view/132 (hereinafter *Timor Sea Conciliation - Competence*).
[2] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 396 (hereinafter UNCLOS).
[3] UNCLOS, Art 298(1)(a)(i).
[4] *In the Matter of the Maritime Boundary between Timor-Leste and Australia (The "Timor Sea Conciliation"), Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea*, PCA Case No. 2016-10, 9 May 2018, available at: https://pcacases.com/web/sendAttach/2327 (hereinafter *Timor Sea Conciliation - Report*).
[5] See, eg, Alan E. Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction," *International and Comparative Law Quarterly* 46 (1997) p. 38.
[6] The maritime boundary disputes that may be excluded concern the delimitation of the territorial sea under Article 15 of the Convention, the delimitation of overlapping Exclusive Economic Zones (EEZ) under Article 74 and the delimitation of overlapping continental shelves under Article 83.
[7] See "United Nations Convention on the Law of the Sea: Declarations made upon signature, ratification, accession or succession or anytime thereafter", http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#RepKorea after ratification. Disputes concerning the Northern Limit Line between North Korea and South Korea cannot be resolved under the UNCLOS dispute settlement regime because North Korea is not a party to UNCLOS.
[8] Weiqiang Zhang, "A Study on the Delimitation of the Sea of Japan," *China Oceans Law Review* (2015), p. 374.
[9] Ibid; Jon M Van Dyke, "The Republic of Korea's Maritime Boundaries," *International Journal of Marine and Coastal Law* 18 (2003), pp. 520-521.
[10] *Agreement between Japan and the Republic of Korea concerning the Establishment of Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries*, Japan-Republic of Korea, signed 30 January 1974, 1225 UNTS 104 (entered into force 22 June 1978).
[11] Van Dyke, above n 9, 523.
[12] *Agreement Between Japan and the Republic of Korea Concerning Fisheries*, Japan-Republic of Korea, signed 28 November 1998, 2731 UNTS 305 (entered into force 22 January 1999) Annex II (hereinafter Japan-Korea Fisheries Agreement).
[13] *Agreement between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries*, Japan-Republic of Korea, signed 30 January 1974, 1225 UNTS 114 (entered into force 22 June 1978).
[14] *Fisheries Agreement between the Government of the Republic of Korea and the Government of the People's Republic of China*, Korea-China, signed 3 August 2000, 2486 UNTS 233 (entered into force 30 June 2001) (hereinafter China-Korea Fisheries Agreement).
[15] Zhang, above n 8, p. 378; Van Dyke, above n 9, p. 523.
[16] Similar to Korea, China has also issued a declaration excluding maritime boundary disputes from compulsory procedures entailing a binding decision. See 'United Nations Convention on the Law of the Sea: Declarations made upon signature, ratification, accession or succession or anytime thereafter', http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China after ratification
[17] UNCLOS, Art 283.
[18] The meaning of Article 281 has already been analysed in arbitrations and most recently, narrowed in its application to increase the likelihood of arbitration or adjudication under UNCLOS. See *South China Sea Arbitration (The Republic of Philippines* v. *The People's Republic of China)*, Award on Jurisdiction and Admissibility (29 October 2015), PCA Case No. 2013-19, http://www.pcacases.com/web/view/7 (hereinafter "*South China Sea (Jurisdiction)*"), paras 223-224. See also Natalie Klein, "The Vicissitudes of Dispute Settlement under the Law of the Sea Convention," *International Journal of Marine and Coastal Law* 32 (2017), pp. 337-339.
[19] For example, the breadth of topics that could fall for consideration under UNCLOS is seen in the *South China Sea* Award. *South China Sea Arbitration (The Republic of Philippines* v. *The People's Republic of China)*, Award (12 July 2016), PCA Case No. 2013-19, available at http://www.pcacases.com/web/view/7 (hereinafter "*South China Sea (Final Award)*"). It addressed *inter alia* law-tide elevations, rocks, islands, artificial islands and installations, protection and preservation of the marine environment, fishing in the EEZ, traditional fishing, rights over the continental shelf, law enforcement, safety of navigation and historic rights.

[20] See, eg, Irina Buga, "Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals," *International Journal of Marine and Coastal Law* 27 (2012), p. 59.
[21] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, Award (18 March 2015), https://www.pcacases.com/web/view/11 (hereinafter "*Chagos Archipelago*").
[22] UNCLOS, Art 298(1)(a)(i).
[23] Resolution, International Conciliation, 49(II) *Annuaire de l'Institut de droit international* (1961), 386, Article 1, cited in Sienho Yee, "Conciliation and the 1982 UN Convention on the Law of the Sea," *Ocean Development and International Law* 44 (2013), p. 315.
[24] See JG Merrills, *International Dispute Settlement* (Cambridge: Cambridge University Press, 5th ed, 2011), p. 65.
[25] UNCLOS Annex V, Art 13.
[26] UNCLOS, Art 298(1)(a)(i).
[27] UNCLOS, Art 298(1)(a)(iii).
[28] UNCLOS Annex V, Art 3 and 4, which apply to compulsory conciliation by virtue of UNCLOS Annex V, Art 14.
[29] UNCLOS Annex V, Art 6.
[30] The timing is relative to the length of time that may be typically taken for an arbitration or adjudication, which usually span several years.
[31] UNCLOS Annex V, Art 7(1).
[32] Ibid.
[33] UNCLOS, Art 298(1)(a)(ii).
[34] For a discussion of the contentious relationship between Australia and Timor-Leste, see David Dixon, "Kangaroos and Crocodiles: The Timor Sea Treaty of 2018 (January 1, 2018)", *UNSW Law Research Paper No. 18-42*, available at SSRN: https://ssrn.com/abstract=3211714 or http://dx.doi.org/10.2139/ssrn.3211714.
[35] The Greater Sunrise fields in the Timor Sea have an estimated value of AUD$40 billion. See Rebecca Strating, "What's behind Timor-Leste terminating its maritime treaty with Australia," *The Conversation*, 10 January 2017, https://theconversation.com/whats-behind-timor-leste-terminating-its-maritime-treaty-with-australia-71002.
[36] Timor Sea Treaty between the Government of East Timor and the Government of Australia (Dili, 20 May 2002, in force 2 April 2003) [2003] *ATS* 13.
[37] Treaty on Certain Maritime Arrangements in the Timor Sea (Sydney, 12 January 2006, in force 23 February 2007) [2007] *ATS* 12 (hereinafter CMATS Treaty). For discussion of this treaty and its predecessors, see Warwick Gullett, 'Reconciliation in the Timor Sea: Progress by Australia and Timor Leste towards Amicable Development of Offshore Resources' (2016) 4 *Korean Journal of International and Comparative Law* 99, 103-107.
[38] Timor Sea Treaty, Art 3.
[39] CMATS Treaty, Art 4.
[40] *Timor Sea Conciliation – Competence*, paras 91-92.
[41] Ibid, para. 62. But see also Klein, above n 18, pp. 339-340 (questioning the logic of this finding); Peter Tzeng, 'The Peaceful Non-Settlement of Disputes: Article 4 of CMATS in Timor-Leste v. Australia' (2017) 18 *Melbourne Journal of International Law* 349, 363; Jianjun Gao, 'The Timor Sea Conciliation (Timor-Leste v Australia): A Note on the Commission's Decision on Competence' (2018) 49 *Ocean Development and International Law* 208, 218.
[42] *Timor Sea Conciliation – Competence*, para. 74.
[43] Ibid, para. 82.
[44] Joint Statement by the Governments of Timor-Leste and Australia and the Conciliation Commission Constituted Pursuant to Annex V of the United Nations Convention on the Law of the Sea, 24 January 2017, http://dfat.gov.au/news/media-releases/Pages/joint-statement-by-the-governments-of-timor-leste-and-australia-and-the-conciliation-commission.aspx (hereinafter Joint Statement of 24 January).
[45] See *Timor Sea Conciliation – Report*, paras 287-289 (describing the lack of trust and steps taken by the Commission in response).
[46] *Timor Sea Conciliation – Report*, para. 95.
[47] Joint Statement of 24 January.
[48] Ibid.
[49] Donald R Rothwell, "2018 Timor Sea Treaty: A new dawn in relations between Australia and Timor-Leste?" (2018) 44 *Law Society Journal*, May 2018, 70, 72.
[50] Ibid (noting letter written on 20 January 2017).

[51] Ibid, and Joint Statement by the Governments of Timor-Leste and Australia and the Conciliation Commission Constituted Pursuant to Annex V of the United Nations Convention on the Law of the Sea, 9 January 2017, http://foreignminister.gov.au/releases/Pages/2017/jb_mr_170109.aspx.
[52] *Timor Sea Conciliation – Report*, para. 286 (referring to 'sustained, informal contacts with the Parties' representatives and counsel at a variety of different levels').
[53] Ibid, para. 58.
[54] 'In practice, most of the Commission's meetings with the Parties were held separately, and the Commission considers that its most important discussions with each Party would not have occurred in a joint setting.' Ibid, para. 57.
[55] See ibid, para. 59 (describing the mechanisms put in place in this regard).
[56] See ibid, para. 60.
[57] 'In the Commission's view, these proceedings truly became productive at the point at which both Parties became convinced that the Commission's objective was not to push them to abandon long-held positions, but rather to understand and assist the Parties to identify a solution they had been unable to reach themselves'. Ibid, para. 290.
[58] Ibid, para. 90. It appears that some short written submissions were requested in relation to each sides' views on the maritime boundary. See ibid, para. 95 and 290. Written responses to the Commission's non-paper were also sought. Ibid, para. 117.
[59] See, eg, ibid, para. 124 and para. 216.
[60] Merrills, above n 24, p. 26.
[61] UNCLOS Annex V, Art 5. See also Yee, above n 23, p. 320.
[62] Treaty between Australia and the Democratic Republic of Timor-Leste establishing their Maritime Boundaries in the Timor Sea, signed 6 March 2018 [2018] ATNIF 4. For a detailed discussion of this Treaty, see Nigel Bankes, "Settling the maritime boundaries between Timor-Leste and Australia in the Timor Sea" (2018) 11 *Journal of World Energy Law and Business* 387, 395-405.
[63] See *Timor Sea Conciliation – Report*, paras 261-264. See further Rothwell, above n 49, 71-72.
[64] See 'Presentation for Timor-Leste's Opening Statement', 29 August 2016, TL-21, *Timor Sea Conciliation*, available at https://pcacases.com/web/sendAttach/1887.
[65] See *Timor Sea Conciliation – Report*, para. 241.
[66] 'Timor-Leste and Australia continue engagement with Greater Sunrise Joint Venture and agree timeframe for signature of maritime boundary treaty', Press Release, 26 December 2017, available at https://pca-cpa.org/wp-content/uploads/sites/175/2017/12/20171226-Press-Release-No-12-EN.pdf.
[67] *Timor Sea Conciliation – Report*, para. 216. These are included in Annex 28 to the Report. The Commission also proposed framework agreements for the parties, but these were not included in the published Report. Ibid.
[68] Ibid, para. 306.
[69] 'Mediation is a method of peaceful settlement of an international dispute where a third party intervenes to reconcile the claims of the contending parties and to advance his own proposals aimed at a mutually acceptable compromise solution.' United Nations, *Handbook on the Peaceful Settlement of Disputes* (1992) 40. Strating has commented, 'It appears that the single most important aspect in dispute resolution has been the conciliation process itself, the mentality of both parties to act in "good faith" and the role of the conciliators in mediating between the parties'. Rebecca Strating, "Maritime Territorialization, UNCLOS and the Timor Sea Dispute" (2018) 40 *Contemporary Southeast Asia* 101, 117-118.
[70] *Timor Sea Conciliation – Report*, para. 285.
[71] For discussion see Seokwoo Lee and Hee Eun Lee, *The Making of International Law in Korea: From Colony to Asian Power* (Leiden: Brill Nijhoff, 2016), pp. 252-253.
[72] UNCLOS, Art 298(1)(a)(i).
[73] See Bernard H. Oxman, "International Maritime Boundaries: Political, Strategic, and Historical Considerations," *University of Miami Inter-American Law Review* 26 (1994-95), p. 268.
[74] Japan and Korea's agreed continental shelf boundary currently stops at the point that Dokdo could influence any boundary line. See discussion in Van Dyke, above n 9, p. 523.
[75] Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge: Cambridge University Press, 2005), pp. 257-258.
[76] Eero J. Manner, "Settlement of Sea-Boundary Delimitation Disputes According to the Provisions of the 1982 Law of the Sea Convention" in Jerzy Makarczyk (ed), *Essays in International Law in Honour of Judge Manfred Lachs* (Leiden: Martinus Nijhoff, 1984), p. 642.
[77] It could be argued the dispute was sparked shortly after the adoption of the 1951 San Francisco Peace Treaty when Korea declared its maritime zones pursuant to the Rhee Line, which included maritime zones for Dokdo. Japan has suggested that the critical date for the sovereignty dispute would be 1954 when it sought to refer the dispute to the ICJ for resolution. However, Professor van Dyke has argued that the ICJ would be unlikely to

ignore events that occurred after that date and that the critical date could not be set with any certainty. Jon M. Van Dyke, "Legal Issues Related to Sovereignty over Dokdo and Its Maritime Boundary," *Ocean Development and International Law* 38 (2007), p. 164.
[78] Japan-Korea Fisheries Agreement, Art XIV.
[79] UNCLOS, Art 298(1)(a)(iii).
[80] See, eg, Sun Pyo Kim, "The UNCLOS Convention and New Fisheries Agreement in North East Asia," *Marine Policy* 27 (2003), p. 99.
[81] UNCLOS, Art 298(1)(a)(iii).
[82] This provision reflects a shift from the 1965 fisheries agreement between Korea and Japan, which did provide for compulsory arbitration. Agreement between Japan and the Republic of Korea on Fisheries, Japan-Korea, signed 22 June 1965, 583 UNTS 8472 (entered into force 18 December 1965), art IX.
[83] Convention for the Conservation of Southern Bluefin Tuna, signed 10 May 1993, 1819 UNTS 359 (entered into force 20 May 1994), Art 16
[84] *Southern Bluefin Tuna Cases – Australia and New Zealand v. Japan, Award on Jurisdiction and Admissibility, (Australia v Japan; New Zealand v Japan)* (Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea, Aug. 4, 2000) (2000) 39 ILM 1359.
[85] *South China Sea (Jurisdiction)*, para. 223.
[86] Ibid, para. 224.
[87] The Tribunal in *South China Sea* interpreted references to UNCLOS in this way in assessing different bilateral instruments. See *South China Sea (Jurisdiction)*, para. 246.
[88] Japan-Korea Fisheries Agreement, Art XV.
[89] *Chagos Archipelago*, para. 221.
[90] Yoshifumi Tanaka, "Reflections on the *Philippines/China* Arbitration: Award on Jurisdiction and Admissibility," *The Law and Practice of International Courts and Tribunals* 15 (2016), p. 319.
[91] *South China Sea (Jurisdiction)*, para. 156. But see Klein, above n 18, pp. 354-355.
[92] Lee & Lee, above n 69, p. 252.
[93] China-Korea Fisheries Agreement, above n 14.
[94] Ibid, Art 7 and Art 8.
[95] Suk Kyoon Kim, "Understanding Maritime Disputes in Northeast Asia: Issues and Nature," *International Journal of Marine and Coastal Law* 23 (2008), p. 216.
[96] Ibid, pp. 216-217.
[97] Van Dyke, above n 9, pp. 517-518.
[98] Ibid, p. 521.
[99] Kim, above n 93, p. 217.
[100] UNCLOS, Art 7.
[101] Van Dyke, above n 9, p. 521.
[102] Kim, above n 93, p. 217; Van Dyke, above n 9, p. 529.
[103] See, eg, Lily Kuo, "Will a Tiny, Submerged Rock Spark a New Crisis in the East China Sea?," *The Atlantic*, 9 December 2013, https://www.theatlantic.com/china/archive/2013/12/will-a-tiny-submerged-rock-spark-a-new-crisis-in-the-east-china-sea/282155/.
[104] Lee & Lee, above n 69, p. 231.
[105] Kim, above n 93, p. 223.
[106] See discussion in Suk Kyoon Kim, "Maritime Boundary Negotiations between China and Korea: The Factors at Stake," *International Journal of Marine and Coastal Law* 32 (2017), p. 69.
[107] UNCLOS, Art 298(1)(a)(iii).
[108] China-Korea Fisheries Agreement, Art 14.
[109] UNCLOS, Art 298(1)(a)(iii).
[110] China-Korea Fisheries Agreement, Art 13(2)(4).
[111] Ibid, Art 13(3).
[112] *Arctic Sunrise Arbitration (Netherlands* v. *Russia)*, Award on the Merits (14 August 2015), http://www.pcacases.com/web/view/21.
[113] Tanaka, above n 88, pp. 323-324.
[114] The Commission's Report referred to 'the flexible pragmatism that lies at the heart of conciliation'. *Timor Sea Conciliation – Report*, para. 62.
[115] Ibid, para. 50. See also 'Opening Session Transcript' 29 August 2016, *Timor Sea Conciliation*, available at: https://pcacases.com/web/sendAttach/1889.
[116] *Timor Sea Conciliation – Report*, para. 294.