

**THE PEACEFUL NON-SETTLEMENT OF DISPUTES:
ARTICLE 4 OF CMATS IN *TIMOR-LESTE v AUSTRALIA***

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Articles 2(3) and 33(1) of the Charter of the United Nations ('Charter') recognise the importance of the peaceful settlement of disputes. But what about the peaceful non-settlement of disputes? Arguably, in order to achieve the goals set forth in the Charter such as international peace and prosperity, certain legal disputes are best left unsettled, at least for a certain period of time. This is particularly the case if two states expressly agree by treaty to peacefully not settle their dispute. Nevertheless, in its Decision on Competence of 19 September 2016, the Conciliation Commission in Timor-Leste v Australia failed to enforce an agreement to peacefully not settle a dispute. This article critiques the Commission's decision not only from a legal perspective, but also from a policy perspective.

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I INTRODUCTION

Articles 2(3) and 33(1) of the *Charter of the United Nations* ('*Charter*') recognise the importance of the peaceful settlement of disputes.¹ But what about the peaceful non-settlement of disputes? Arguably, in order to achieve the goals set forth in the *Charter* such as international peace and prosperity,² certain legal disputes are best left unsettled, at least for a certain period of time. Examples abound around the globe. Not settling the Antarctic sovereignty dispute has permitted states to cooperate in using the continent for scientific purposes. Not settling the Taiwanese independence dispute has permitted China and Taiwan to strengthen their economic relations. And not settling the Lake Constance delimitation dispute has permitted Austria, Germany and Switzerland to make use of the waters without significant conflict. While the peaceful settlement of disputes is often preferable, the peaceful non-settlement of disputes is also acceptable.

This is particularly the case if two states expressly agree by treaty to peacefully not settle their dispute. The very fact that they reached such an agreement indicates that not settling the dispute would further not only their own interests, but also the

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¹ *Charter of the United Nations* arts 2(3), 33(1).

² *Ibid* art 1.

friendly relations between them. Therefore, such agreements should be respected and enforced by international dispute settlement bodies. States should not be obligated to peacefully settle a dispute when they prefer to peacefully not settle the dispute.

Not everyone agrees, however. In its Decision on Competence of 19 September 2016, the Conciliation Commission ('the Commission') in *Conciliation between Timor-Leste v Australia* ('*Timor-Leste v Australia*') failed to enforce an agreement to peacefully not settle a dispute.³ Timor-Leste and Australia had agreed by treaty to not institute dispute settlement proceedings against each other over their maritime delimitation dispute in the Timor Sea for a certain period of time.⁴ Nevertheless, after Timor-Leste instituted proceedings against Australia over the delimitation, the Commission decided that it was competent to exercise jurisdiction over the dispute.⁵ This article critiques the Commission's decision not only from a legal perspective, but also from a policy perspective.

The remainder of the article is organised as follows. Part II provides the factual background of the Timor Sea dispute between Timor-Leste and Australia. Part III critiques the Commission's decision from a legal perspective. Part IV then critiques the decision from a policy perspective. Finally, Part V concludes the article with a few concrete recommendations.

II THE TIMOR SEA DISPUTE

The Timor Sea is the body of water lying between Timor-Leste and Australia. Endowed with significant hydrocarbon reserves, the sea has yet to be delimited between the two states. On the day of Timor-Leste's independence in May 2002, Timor-Leste and Australia signed the *Timor Sea Treaty between the Government of East Timor and the Government of Australia* ('*TST*').⁶ The *TST* established a Joint Petroleum Development Area ('*JPDA*') over an area within the Timor Sea claimed by both states.⁷ The *JPDA* is located on Timor-Leste's side of the

³ *Conciliation between Timor-Leste and Australia (Timor-Leste v Australia) (Competence)* (Permanent Court of Arbitration, Case No 2016–10, 19 September 2016) ('*Timor-Leste v Australia Conciliation (Competence)*').

⁴ *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*, signed 12 January 2006, 2483 UNTS 359 (entered into force 23 February 2007) art 4 ('*CMATS*'). Note that the United Nations Treaty Series states that the treaty entered into force on 27 June 2006: at 359. Nevertheless, all other sources state or suggest that it entered into force on 23 February 2007. See, eg, *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*, signed 12 January 2006, [2007] ATS 12 (entered into force 23 February 2007) 12; *Timor-Leste v Australia Conciliation (Competence)* (Permanent Court of Arbitration, Case No 2016–10, 19 September 2016) [11]; Opening Session, *Timor-Leste v Australia Conciliation (Timor-Leste v Australia)*, Permanent Court of Arbitration, Case No 2016–10, 29 August 2016, 30 ('*Timor-Leste v Australia Conciliation (Opening Session Transcript)*'); 'Memorial of the Democratic Republic of Timor-Leste', *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, International Court of Justice, General List No 156, 28 April 2014, [2.33].

⁵ *Timor-Leste v Australia Conciliation (Competence)* (Permanent Court of Arbitration, Case No 2016–10, 19 September 2016) [111].

⁶ *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, signed 20 May 2002, 2258 UNTS 3 (entered into force 2 April 2003) ('*Timor Sea Treaty*').

⁷ *Ibid* art 3(a).

equidistant line,⁸ but only Australia's geologic continental shelf extends into the area.⁹ The *TST* provides that 90 per cent of the petroleum produced from the JPDA belongs to Timor-Leste, and 10 per cent to Australia.¹⁰ The *TST* furthermore provides that it shall remain in force until there is a permanent seabed delimitation between the two states, or for 30 years — whichever is sooner.¹¹

Timor-Leste and Australia subsequently concluded two treaties concerning the Greater Sunrise Oil and Gas Field ('GSOGF'), 20 per cent of which lies within the JPDA and 80 per cent of which lies within Australia's exclusive jurisdiction.¹² Although the treaties were signed at different times, they both came into force in February 2007.¹³ The earlier treaty is the *Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise Troubadour*,¹⁴ which apportions 20.1 per cent of the production of petroleum in the GSOGF to the JPDA, and 79.9 per cent to Australia.¹⁵ The later treaty is the *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea* ('*CMATS*'),¹⁶ a treaty that is no longer in force but is nonetheless the focus of this article.¹⁷ *CMATS* provided that Timor-Leste and Australia shall share equally the revenue derived from the production of petroleum in the GSOGF,¹⁸ and furthermore extended the duration of the *TST* to the same duration of *CMATS* — 50 years after its entry into force.¹⁹

Most importantly for this article, *CMATS* also contained a provision on the settlement (or rather the non-settlement) of the maritime delimitation dispute in the Timor Sea. Article 4 of *CMATS* provided in relevant part:

(1) Neither Australia nor Timor-Leste shall assert, pursue or further by any means in relation to the other Party its claims to sovereign rights and jurisdiction and maritime boundaries for the period of this Treaty.

...

(4) Notwithstanding any other bilateral or multilateral agreement binding on the Parties, or any declaration made by either Party pursuant to any such agreement,

⁸ 'Presentation for Timor-Leste's Opening Statement', *Timor-Leste v Australia Conciliation*, Permanent Court of Arbitration, Case No 2016–10, 29 August 2016, 16.

⁹ 'Presentation for Australia's Opening Statement', *Timor-Leste v Australia Conciliation*, Permanent Court of Arbitration, Case No 2016–10, 29 August 2016, 3.

¹⁰ *Timor Sea Treaty* art 4(a).

¹¹ *Ibid* art 22.

¹² *Timor-Leste v Australia Conciliation (Opening Session Transcript)* (Permanent Court of Arbitration, Case No 2016–10, 29 August 2016) 77.

¹³ On the conflict over the date of entry into force of *CMATS*, see above n 4.

¹⁴ *Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise Troubadour Fields*, signed 6 March 2003, 2483 UNTS 317 (entered into force 23 February 2007).

¹⁵ *Ibid* art 7.

¹⁶ See above n 4; *CMATS*.

¹⁷ '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*', *Timor-Leste v Australia Conciliation* (Permanent Court of Arbitration, Case No 2016-10, 24 January 2017) ('Permanent Court of Arbitration Joint Statement').

¹⁸ *CMATS* art 5(1).

¹⁹ *Ibid* arts 3, 12.

neither Party shall commence or pursue any proceedings against the other Party before any court, tribunal or other dispute settlement mechanism that would raise or result in, either directly or indirectly, issues or findings of relevance to maritime boundaries or delimitation in the Timor Sea.

(5) Any court, tribunal or other dispute settlement body hearing proceedings involving the Parties shall not consider, make comment on, nor make findings that would raise or result in, either directly or indirectly, issues or findings of relevance to maritime boundaries or delimitation in the Timor Sea. Any such comment or finding shall be of no effect, and shall not be relied upon, or cited, by the Parties at any time.²⁰

Several years after the conclusion of *CMATS*, Timor-Leste learned that the Australian Secret Intelligence Service had bugged internal discussions of Timor-Leste's delegation during the negotiation of the treaty.²¹ What followed was four publicly known international dispute settlement proceedings initiated by Timor-Leste against Australia. In April 2013, Timor-Leste instituted arbitration proceedings against Australia under the *TST*, claiming that Australia's espionage rendered *CMATS* void.²² While this arbitration was ongoing, the Australian Secret Intelligence Organisation seized documents concerning the arbitration at the offices of one of Timor-Leste's lawyers.²³ In response, in December 2013, Timor-Leste instituted proceedings against Australia before the International Court of Justice ('ICJ'), claiming, inter alia, that the seizure violated attorney-client privilege.²⁴ The ICJ ordered provisional measures,²⁵ but Australia ultimately returned the documents, leading Timor-Leste to withdraw the case.²⁶ Then in September 2015, Timor-Leste instituted a second arbitration against Australia under the *TST*, claiming that Australia did not have the right to tax a pipeline transporting gas from another field in the JPDA.²⁷

Finally, in April 2016, Timor-Leste instituted conciliation proceedings against Australia under art 298(1)(a)(i) of the *United Nations Convention on the Law of*

²⁰ Ibid art 4.

²¹ *Timor-Leste v Australia Conciliation (Opening Session Transcript)* (Permanent Court of Arbitration, Case No 2016–10, 29 August 2016) 32; 'Verbatim Record', *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) (Provisional Measures)*, International Court of Justice, General List No 156, 20 January 2014, 18.

²² *Arbitration under the Timor Sea Treaty (Timor-Leste v Australia) (Procedural Order No 1)* (Permanent Court of Arbitration, Case No 2013–16, 6 December 2013) 1.

²³ *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) (Provisional Measures, Order of 3 March 2014)* [2014] ICJ Rep 147, 147–8 [1], 153 [27].

²⁴ Ibid 147–8 [1], 152 [24].

²⁵ Ibid 160–1 [55].

²⁶ *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) (Order of 11 June 2015)*, International Court of Justice, General List No 156, 11 June 2015.

²⁷ Permanent Court of Arbitration, *Case View: Arbitration under the Timor Sea Treaty (Timor-Leste v Australia)* <<https://www.pccases.com/web/view/141>>, archived at <<https://perma.cc/J6TD-DH66>>; Sebastian Perry, 'East Timor Pipeline Claim Gets Underway', *Global Arbitration Review* (online), 19 October 2016 <<http://globalarbitrationreview.com/article/1069593/east-timor-pipeline-claim-gets-underway>>.

the Sea ('UNCLOS')²⁸ concerning the delimitation of their maritime boundary in the Timor Sea.²⁹ Article 298(1)(a)(i) provides in relevant part:

[A] State may, ... declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to ... disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations ... provided that a State having made such a declaration shall, ... at the request of any party to the dispute, accept submission of the matter to conciliation³⁰

Australia had indeed made such a declaration two months before signing the *TST* with Timor-Leste,³¹ so, according to Timor-Leste, Australia was obliged to accept submission of the matter to conciliation. Nevertheless, Australia raised multiple objections to the Conciliation Commission's competence on the basis of art 4 of *CMATS*.³² As a matter of terminology, *UNCLOS* employs the word 'competence' rather than 'jurisdiction' or 'admissibility' for conciliation proceedings.³³ Although one can debate the exact meaning of 'competence', the Commission understood it to encompass both jurisdiction and admissibility,³⁴ so this article will use it in the same fashion.

In September 2016, the Commission rendered its Decision on Competence, rejecting all of Australia's objections.³⁵ At first glance, the decision appears to be *sui generis*, as Timor-Leste was simultaneously challenging the validity of the treaty on which Australia's objections were principally based (*CMATS*) in a separate arbitration proceeding. Nevertheless, the Commission made clear that '[e]ven if *CMATS* were presumed to be valid, it would not affect the Commission's competence or the "admissibility" of the dispute'.³⁶ Therefore, the Commission, by upholding its competence, effectively refused to enforce art 4 of *CMATS*.

Following the Commission's Decision on Competence, Timor-Leste and Australia participated in a series of meetings convened by the Commission. In January 2017, as part of an 'integrated package of confidence-building measures',³⁷ Timor-Leste terminated *CMATS* in accordance with the treaty's

²⁸ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 298(1)(a)(i) ('UNCLOS').

²⁹ *Timor-Leste v Australia Conciliation (Competence)* (Permanent Court of Arbitration, Case No 2016–10, 19 September 2016) [30].

³⁰ *UNCLOS* art 298(1)(a)(i).

³¹ *United Nations Convention on the Law of the Sea* (10 June 2017) United Nations Treaty Collection <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en>, archived at <<https://perma.cc/D2YN-HJX5>> ('UN Treaty Collection, Status of UNCLOS').

³² *Timor-Leste v Australia Conciliation (Competence)* (Permanent Court of Arbitration, Case No 2016–10, 19 September 2016) [15], [17], [20].

³³ *UNCLOS* annex V, art 13.

³⁴ See, eg, *Timor-Leste v Australia Conciliation (Competence)* (Permanent Court of Arbitration, Case No 2016–10, 19 September 2016) [58]–[64] (using 'competence' in the sense of 'jurisdiction'), [86]–[92] (using 'competence' in the sense of 'admissibility').

³⁵ *Ibid* [111].

³⁶ *Ibid* [89].

³⁷ *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) Australian Government: Department of Foreign Affairs and Trade <<http://dfat.gov.au/news/media/Pages/joint-statement-by-the-governments-of-timor-leste-and-australia-and-the-conciliation-commission.aspx>>, archived at <<https://perma.cc/7WF5-L5TF>>.

terms, and withdrew the two arbitrations it had initiated under the *TST*.³⁸ Then in October 2017, through a series of confidential meetings with the Commission, Timor-Leste and Australia reached agreement on the complete text of a draft treaty that, *inter alia*, delimits the maritime boundary between them in the Timor Sea.³⁹ As of the writing of this article, the details of the draft treaty remain confidential.

III LEGAL CRITIQUES OF THE DECISION

As noted above, Australia raised multiple objections to the Conciliation Commission's competence on the basis of art 4 of *CMATS*.⁴⁰ Australia's dilemma, however, was as follows. It seemed clear that art 4 prohibited Timor-Leste from instituting the conciliation proceedings before the Commission. But it was not so clear whether art 4 actually deprived the Commission of its competence. After all, one could imagine a situation where Timor-Leste violated the prohibition, but the Commission nonetheless exercised its competence over the dispute. Australia also did not have any precedent to rely on because provisions like art 4 — that is, provisions that expressly prohibit states from instituting certain dispute settlement proceedings — are quite rare in public international law.⁴¹ Australia thus needed to develop a legal theory to explain why art 4 actually rendered the Commission incompetent.

One can imagine four such theories, each of which is discussed in this Part. First, art 4 could *directly* render the Commission incompetent simply by virtue of the fact that it contains a prohibition on the institution of the conciliation proceedings (Part III(A)). Secondly, art 4 could *indirectly* render the Commission incompetent through art 281(1) of *UNCLOS* (Part III(B)). Thirdly, art 4 could prevail over the dispute settlement provisions of *UNCLOS* as a matter of treaty conflict, thereby depriving the Commission of competence (Part III(C)). And fourthly, the Commission could be incompetent under the clean hands doctrine since Timor-Leste instituted the proceedings in violation of art 4 (Part III(D)).

The Commission ultimately upheld its competence,⁴² rejecting all four of these theories. As a matter of *lex lata*, the Commission was not necessarily incorrect in doing so. After all, in light of the rarity of provisions like art 4, none of the theories have ever been applied in the context of provisions like art 4 to deprive a dispute settlement body of competence. Rather, all four theories raise questions that lie at the frontiers of international law. Nevertheless, this article argues that the Commission could have at the very least provided more explanation as to why it rejected these four theories. Below, the article examines the four theories in turn, critiquing the Commission's treatment of each one of them. In doing so, the article aims to provide a stronger case for enforcing provisions like art 4 of *CMATS* in future cases where the same issues may arise.

³⁸ *Ibid.*

³⁹ Permanent Court of Arbitration, 'Timor-Leste and Australia Reach Agreement on Treaty Text Reflecting 20 August Comprehensive Package Agreement' (Press Release, 15 October 2017) <<https://pcacases.com/web/sendAttach/2240>>, archived at <<https://perma.cc/END7-PAZS>>.

⁴⁰ *Timor-Leste v Australia Conciliation (Competence)* (Permanent Court of Arbitration, Case No 2016–10, 19 September 2016) [15], [17], [20].

⁴¹ For examples of other provisions that prohibit states from instituting certain dispute settlement proceedings, see below nn 49–55 and accompanying text.

⁴² *Timor-Leste v Australia Conciliation (Competence)* (Permanent Court of Arbitration, Case No 2016–10, 19 September 2016) [111(A)].

A Direct Effect

Under the first theory, art 4 *directly* renders the Conciliation Commission incompetent simply by virtue of the fact that it contains a prohibition on the institution of the conciliation proceedings. Australia adopted this theory in its first argument against the Commission's competence, as the argument solely relied on the fact that art 4 'precludes either Party ... from initiating compulsory conciliation ... and ... from engaging in the substantive matters in dispute in such proceedings'.⁴³ The Commission, however, dismissed this theory in one short paragraph:

Australia begins its objections stating that Article 4 of *CMATS* precludes compulsory conciliation under [*UNCLOS*]. The Commission does not share this point of departure. In its view, the starting point for the Commission's analysis is not *CMATS*, but rather [*UNCLOS*] itself. The conciliation procedure was established pursuant to Article 298 and accordingly the competence of the Commission derives from [*UNCLOS*] and its Annex V. Agreements such as *CMATS* are relevant to the question of the Commission's competence, but only within the framework and from the perspective of [*UNCLOS*] itself.⁴⁴

In essence, the Commission made a distinction between the *direct* and *indirect* effects of art 4. It held that art 4 could not have a *direct* effect on its competence because its 'starting point' was *UNCLOS*, not *CMATS*. In other words, it could not even consider the applicability of art 4, let alone hold, as Australia had asked it to, that art 4 deprived it of competence. Nevertheless, it held that art 4 could have an *indirect* effect on its competence through a provision of *UNCLOS*, that is, if a provision of *UNCLOS* enabled art 4 to have such an effect. In this respect, the Commission noted that art 281(1) of *UNCLOS* was 'relevant'⁴⁵ and proceeded to consider whether art 281(1) enabled art 4 to affect its competence,⁴⁶ as discussed in Part III(B) below.

The Commission's refusal to consider the *direct* applicability of art 4 however, deserves closer scrutiny. The Commission was presented with a general question of international dispute settlement that can be stated as follows: if a dispute settlement body is seized of a dispute under a compromissory clause of one treaty, should it consider the applicability of a provision in a second treaty allegedly prohibiting the institution of such proceedings?

The Commission answered this question in the negative. As mentioned above, the Commission's only explanation was that the 'starting point' for its analysis was the first treaty (*UNCLOS*), not the second treaty (*CMATS*). One could perhaps further justify this position by arguing that, by virtue of the compromissory clause, the dispute settlement body only has jurisdiction over the interpretation and application of the first treaty (*UNCLOS*), not the second treaty (*CMATS*).

Nevertheless, this explanation is not satisfactory. One may argue that the first treaty should be evaluated in the context of other rules of international law, such that the dispute settlement body should consider the applicability of the provision of the second treaty. After all, if that provision does indeed deprive the dispute

⁴³ Ibid [15].

⁴⁴ Ibid [44].

⁴⁵ Ibid [47].

⁴⁶ Ibid [48]–[64].

settlement body of jurisdiction, then the body's exercise of jurisdiction would violate the principle of consent, and the institution of the proceedings would constitute an internationally wrongful act, the reparation for which under art 35 of the *Articles on Responsibility of States for Internationally Wrongful Acts* would be the effective nullification of the arbitration.⁴⁷

As far as the present author is aware, no commentator has directly opined on this question. The reason is that, as mentioned above, provisions like art 4 of *CMATS* that expressly prohibit states from instituting certain dispute settlement proceedings are not very common in public international law. In a slightly different context, however, in the case of *Mavrommatis Palestine Concessions (Greece v United Kingdom)* ('*Mavrommatis Palestine Concessions*'), the Permanent Court of International Justice ('PCIJ') held:

If a State has recourse to the Court under a clause establishing the latter's compulsory jurisdiction, it must be prepared for the contingency that the other Party may cite agreements entered into between the opposing Parties which may prevent the exercise of the Court's jurisdiction. ... [These agreements] must be examined by the Court ... as a body of rules which might limit its jurisdiction⁴⁸

The *Mavrommatis Palestine Concessions* judgment thus suggests an affirmative answer to the question. That is, a dispute settlement body seized of a dispute under a compromissory clause of one treaty should indeed consider the applicability of a provision in a second treaty allegedly prohibiting the institution of such proceedings.

Although provisions like art 4 of *CMATS* expressly prohibiting states from instituting certain dispute settlement proceedings are rare, they do exist in public international law. They appear most often in two types of treaties. The first type is regional integration treaties that contain an exclusive jurisdiction clause. A prominent example of a provision expressly prohibiting the institution of certain dispute settlement proceedings in a regional integration treaty is art 344 of the *Treaty on the Functioning of the European Union* ('*TFEU*')⁴⁹ (formerly art 292 of the *Treaty Establishing the European Community*).⁵⁰ Article 344 of the *TFEU* provides:

Member States undertake not to submit a dispute concerning the interpretation or application of the [*TFEU* or the *Treaty on European Union*] to any method of settlement other than those provided for therein.⁵¹

Another example is art 42 of the *Treaty Creating the Court of Justice of the Andean Community*, which provides:

Member Countries shall not submit any dispute that may arise from the application of provisions comprising the legal system of the Andean Community to any court,

⁴⁷ See *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th sess, 85th plen mtg, Agenda Item 162, Supp No 49, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex, art 35.

⁴⁸ *Mavrommatis Palestine Concessions (Greece v United Kingdom) (Jurisdiction)* [1924] PCIJ (ser A) No 2, 29–31 ('*Mavrommatis Palestine Concessions*').

⁴⁹ *Consolidated Version of the Treaty on the Functioning of the European Union* [2012] OJ C 326/47, art 344 ('*TFEU*').

⁵⁰ *Consolidated Version of the Treaty Establishing the European Community* [1997] OJ C 340/173, art 292.

⁵¹ *TFEU* art 344.

arbitration system or proceeding whatsoever except for those stipulated in this Treaty.⁵²

Other regional integration treaties contain an exclusive jurisdiction clause that, at least arguably, impliedly prohibits states from instituting certain dispute settlement proceedings.⁵³ It should be noted, however, that the prohibitions contained in all the aforementioned regional integration treaties differ from art 4 of *CMATS* in that the former prohibit certain dispute settlement proceedings only for disputes that already have an applicable method of settlement. Still, the critical aspect is that all these treaties prohibit states from instituting certain dispute settlement proceedings.

The second type of treaty where provisions expressly prohibiting states from instituting certain dispute settlement proceedings often appear is settlement agreements. For example, the settlement agreement concluded by Ecuador and Colombia to settle the *Aerial Herbicide Spraying (Ecuador v Colombia)* dispute before the ICJ provides:

The authorities of Ecuador and Colombia shall refrain from instituting international proceedings with respect to the same facts that gave rise to the present Agreement.⁵⁴

As another example, the settlement agreement concluded by Nauru and Australia to settle the *Certain Phosphate Lands in Nauru (Nauru v Australia)* case before the ICJ provides:

The Republic of Nauru agrees that it shall make no claim whatsoever, whether in the International Court of Justice or otherwise, against all or any of Australia, the United Kingdom of Great Britain and Northern Ireland and New Zealand, their

⁵² *Treaty Creating the Court of Justice of the Andean Community*, signed 26 May 1969, 18 ILM 1203 (entered into force 16 October 1969), as amended by *Protocol of Cochabamba Amending the Treaty Creating the Court of Justice* (entered into force 28 May 1996) art 42.

⁵³ See, eg, *Agreement Establishing the Caribbean Court of Justice*, opened for signature 14 February 2001, 2255 UNTS 319 (entered into force 23 July 2002) art XII(1); *South African Development Community Protocol on Tribunal and the Rules of Procedure Thereof*, signed 7 August 2000 (entered into force 14 August 2001) arts 17–19. In addition, the *European Convention on Human Rights* provides for exclusive jurisdiction, with the exception of ‘special agreement[s]’: *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) art 55. And at least two World Trade Organization dispute settlement bodies have found art 23(1) of the Dispute Settlement Understanding to provide for exclusive jurisdiction: *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2, art 23(1); Appellate Body Report, *United States — Import Measures on Certain Products from the European Communities*, WTO Doc WT/DS165/AB/R (11 December 2000) [111]; Panel Report, *United States — Sections 301–310 of the Trade Act of 1974*, WTO Doc WT/DS152/R (22 December 1999) [7.35], [7.43]. In the international investment law context, see *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) art 26.

⁵⁴ *Acuerdo entre la República del Ecuador y la República de Colombia para la Solución de la Controversia Existente en la Corte Internacional de Justicia, Relativa a la Erradicación Aérea por Colombia de los Cultivos Ilícitos cerca de la Frontera con Ecuador* [Agreement between the Republic of Ecuador and the Republic of Colombia for the Solution of the Existing Controversy before the International Court of Justice concerning the Aerial Eradication by Colombia of the Illicit Crops around the Border with Ecuador], signed 9 September 2013 (entered into force 9 September 2013) [11] [author’s trans] (*‘Ecuador–Colombia Settlement Agreement’*).

servants or agents arising out of or concerning the administration of Nauru during the period of the Mandate or Trusteeship or the termination of that administration, as well as any matter pertaining to phosphate mining, including matters pertaining to the British Phosphate Commissioners, their assets or the winding up thereof.⁵⁵

The fact that these provisions, although rare, do indeed exist suggests that dispute settlement bodies, though operating in different contexts, may have directly answered the central question posed above — that is, whether a dispute settlement body seized of a dispute under a compromissory clause of one treaty should consider the applicability of a provision in a second treaty allegedly prohibiting the institution of such proceedings. As far as the present author is aware, the question has not arisen with respect to settlement agreements; it appears that states do not attempt to re-litigate disputes when doing so is prohibited by past settlement agreements. Nevertheless, the question has arisen with respect to the prohibition in one of the regional integration treaties: art 344 of the *TFEU*.

The question first arose in the *MOX Plant (Ireland v United Kingdom) UNCLOS* arbitration (*‘MOX Plant’*).⁵⁶ In this case, Ireland instituted proceedings against the UK before an *UNCLOS* Annex VII Tribunal, claiming that the UK had breached its environmental obligations under *UNCLOS* in authorising the operation of a mixed oxide fuel plant.⁵⁷ Two weeks later, Ireland submitted a request for provisional measures to the International Tribunal for the Law of the Sea (*‘ITLOS’*) with respect to the case.⁵⁸ Before both the Annex VII Tribunal and ITLOS, the UK argued that certain aspects of the dispute fell within the competence of the European Community, such that they should be excluded from the Annex VII Tribunal’s jurisdiction under art 344 of the *TFEU*.⁵⁹ ITLOS and the Annex VII Tribunal thus had to decide whether they should consider the applicability of art 344 in determining the Annex VII Tribunal’s jurisdiction.

ITLOS did not provide a clear answer. As ITLOS was only asked to order provisional measures, it only had to determine whether the Annex VII Tribunal

⁵⁵ *Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice concerning Certain Phosphate Lands in Nauru*, signed 10 August 1993, 1770 UNTS 379 (entered into force 20 August 1993) art 3 (*‘Nauru–Australia Settlement Agreement’*).

⁵⁶ *MOX Plant (Ireland v United Kingdom) (Procedural Order No 3)* (Permanent Court of Arbitration, Case No 2002–01, 24 June 2003) (*‘MOX Plant (Annex VII) (Procedural Order No 3)’*). This case should not be confused with the arbitration arising from the same facts but instituted under the *Convention for the Protection of the Marine Environment of the North-East Atlantic (‘OSPAR Convention’)*. *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v United Kingdom) (Final Award)* (Permanent Court of Arbitration, Case No 2001–03, 2 July 2003).

⁵⁷ *MOX Plant (Annex VII) (Procedural Order No 3)* (Permanent Court of Arbitration, Case No 2002–01, 24 June 2003) [1].

⁵⁸ *MOX Plant (Ireland v United Kingdom) (Provisional Measures)* (International Tribunal for the Law of the Sea, Case No 10, 3 December 2001) [2] (*‘MOX Plant (ITLOS) (Provisional Measures)’*).

⁵⁹ *MOX Plant (Annex VII) (Procedural Order No 3)* (Permanent Court of Arbitration, Case No 2002–01, 24 June 2003) [16], [20]–[22]; *MOX Plant (ITLOS) (Provisional Measures)* (International Tribunal for the Law of the Sea, Case No 10, 3 December 2001) [41]. Indeed, years later, the European Court of Justice held that the environmental provisions under *UNCLOS* fell within the exclusive competence of the European Community, such that the dispute would be excluded from the Annex VII Tribunal under art 344 of the *TFEU*. *Commission of the European Communities v Ireland* (C-459/03) [2006] ECR I-04635, [120], [127], [139].

would have jurisdiction *prima facie* over the dispute.⁶⁰ As a result, in its order on provisional measures, it merely repeated the argument of the UK without engaging in the debate over whether it should consider the applicability of art 344.⁶¹ ITLOS ultimately concluded that the Annex VII tribunal had jurisdiction *prima facie* over the dispute.⁶²

Unlike ITLOS, the Annex VII Tribunal had to ‘satisfy itself that it ha[d] jurisdiction in a definitive sense’,⁶³ so it was required to directly answer the question. It did so in the affirmative, but with a caveat. On the one hand, it indeed considered the applicability of art 344 of the *TFEU*,⁶⁴ and even suspended the proceedings⁶⁵ because it recognised that the dispute could possibly fall within the exclusive jurisdiction of the European Court of Justice (‘ECJ’).⁶⁶ On the other hand, the Annex VII Tribunal noted that if the dispute indeed fell within the ECJ’s exclusive jurisdiction, then this ‘would preclude the jurisdiction of the present Tribunal entirely, *by virtue of article 282 of [UNCLOS]*’.⁶⁷ Article 282 of *UNCLOS* provides:

If the States Parties ... have agreed, through a general, regional or bilateral agreement or otherwise, that [the] dispute shall ... be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the [*UNCLOS*] procedures⁶⁸

Like art 281(1), art 282 enables a provision like art 344 of the *TFEU* to preclude the jurisdiction of an *UNCLOS* tribunal. So it is not clear whether the Annex VII Tribunal considered that art 344 of the *TFEU* should *directly* affect its jurisdiction, or only *indirectly* affect its jurisdiction by virtue of art 282.

The same question with respect to art 344 was also addressed by the arbitral tribunal in *Iron Rhine Railway (Belgium v Netherlands)* (‘*Iron Rhine Railway*’).⁶⁹ In this case, Belgium and the Netherlands concluded an arbitration agreement to submit their dispute concerning reactivation of the Iron Rhine Railway to an arbitral tribunal.⁷⁰ In their pleadings, however, the parties referred to various provisions of European Community law.⁷¹ The Annex VII Tribunal thus had to determine whether it should consider the applicability of art 344 of the *TFEU*. Like the *MOX Plant* Annex VII Tribunal, the *Iron Rhine Railway* tribunal answered this question in the affirmative, but with a caveat.

On the one hand, the tribunal clearly held that it should consider the applicability of art 344. It held:

⁶⁰ *MOX Plant (ITLOS) (Provisional Measures)* (International Tribunal for the Law of the Sea, Case No 10, 3 December 2001) [35].

⁶¹ *Ibid* [41].

⁶² *Ibid* [62].

⁶³ *MOX Plant (Annex VII) (Procedural Order No 3)* (Permanent Court of Arbitration, Case No 2002–01, 24 June 2003) [15].

⁶⁴ *Ibid* [20]–[21].

⁶⁵ *Ibid* [29].

⁶⁶ *Ibid* [20]–[21].

⁶⁷ *Ibid* [22] (emphasis added).

⁶⁸ *UNCLOS* art 282.

⁶⁹ *Iron Rhine Railway (Belgium v Netherlands) (Award)* (Permanent Court of Arbitration, Case No 2003–02, 24 May 2005).

⁷⁰ *Ibid* [2].

⁷¹ *Ibid* [106].

[I]f the Tribunal arrived at the conclusion that it could not decide the case brought before it without engaging in the interpretation of rules of [European Community] law which constitute neither *actes clairs* nor *actes éclairés*, the Parties' obligations under [art 344] would be triggered in the sense that the relevant questions of [European Community] law would need to be submitted to the European Court of Justice.⁷²

On the other hand, the parties had, in their arbitration agreement, expressly requested the tribunal to 'render its decision on the basis of international law, including European law if necessary, *while taking into account the Parties' obligations under [art 344 of the TFEU]*'.⁷³ Indeed, in its award, the tribunal expressly stated that it reached the above conclusion 'with regard to the determination of the limits drawn to its jurisdiction *by the reference to [art 344 of the TFEU] in the Arbitral Agreement*'.⁷⁴ As such, it is not clear whether the tribunal considered that art 344 of the TFEU should *directly* affect its jurisdiction, or only *indirectly* affect its jurisdiction by virtue of the express reference to art 344 in the arbitration agreement.

In addition to the *MOX Plant Annex VII Tribunal* and the *Iron Rhine Railway tribunal*, the question posed above with respect to art 344 of the TFEU has also been addressed, explicitly or impliedly, by at least eight investor-state arbitral tribunals constituted under international investment agreements ('IIAs') between member states of the European Union.⁷⁵ In each case, the respondent state and/or the European Commission argued,⁷⁶ *inter alia*, that art 344 deprived the tribunals of jurisdiction. The tribunals thus had to determine whether they should consider the applicability of art 344.

In answering the question, two of the tribunals, like the Conciliation Commission, expressly took the underlying IIA as the 'starting point' for their

⁷² Ibid [103].

⁷³ Ibid [4] (emphasis added).

⁷⁴ Ibid [103] (emphasis added).

⁷⁵ *Blusun SA, Jean-Pierre Lecorcier and Michael Stein v Italian Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/14/3, 27 December 2016) ('*Blusun v Italy*') [288]–[289]; *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Kingdom of Spain (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/13/30, 6 June 2016) ('*RREEF v Spain*') [78]–[80]; *Charanne BV, Construction Investments SARL v El Reino de España (Final Award)* (Stockholm Chamber of Commerce, Case No 062/2012, 21 January 2016) ('*Charanne v Spain*'); *Electrabel SA v Hungary (Jurisdiction, Applicable Law and Liability)* (ICSID Arbitral Tribunal, Case No ARB/07/19, 30 November 2012) ('*Electrabel v Hungary*') [4.147], [4.151], [4.155]; *European American Investment Bank AG v Slovakia (Jurisdiction)* (Permanent Court of Arbitration, Case No 2010–07, 22 October 2012) ('*EURAM v Slovakia*') [178], [209], [276]; *Eureko BV v Slovakia (Jurisdiction, Arbitrability and Suspension)* (Permanent Court of Arbitration, Case No 2008–13, 26 October 2010) ('*Eureko v Slovakia*'); *Binder v Czech Republic (Jurisdiction)* (UNCITRAL Arbitral Tribunal, 6 June 2007) ('*Binder v Czech Republic*'); *Eastern Sugar BV v The Czech Republic (Partial Award)* (Stockholm Chamber of Commerce, Case No 088/2004, 27 March 2007) ('*Eastern Sugar v Czech Republic*').

⁷⁶ The European Commission intervened in several of these arbitrations. See, eg, *Blusun v Italy* (ICSID Arbitral Tribunal, Case No ARB/14/3, 27 December 2016) [288]; *Eastern Sugar v Czech Republic* (Stockholm Chamber of Commerce, Case No 088/2004, 27 March 2007) [119]; *Eureko v Slovakia* (Permanent Court of Arbitration, Case No 2008–13, 26 October 2010) [193]; *EURAM v Slovakia* (Permanent Court of Arbitration, Case No 2010–07, 22 October 2012) [243].

analysis of jurisdiction.⁷⁷ As the *Electrabel v Hungary* tribunal held: ‘[t]he necessary starting-point for this arbitration is that the Tribunal has been seized as an international tribunal ... under the [IIA] and the ICSID Convention’.⁷⁸ Nevertheless, unlike the Conciliation Commission, all eight tribunals held that they should consider the applicability of art 344.⁷⁹ As noted by the *Eureko v Slovakia* tribunal, its jurisdiction, though deriving from the *Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic* (‘BIT’),⁸⁰ ‘might be circumscribed not only by the terms of the BIT itself but also both by international law applicable to the BIT and by provisions of German law incorporating EU law’.⁸¹ After considering the applicability of art 344, all eight tribunals eventually held that the provision did not deprive them of jurisdiction because it applies only to disputes between EU member states, not to investor-state disputes.⁸²

In conclusion, one cannot say with certainty that the Conciliation Commission’s refusal to consider the direct applicability of art 4 of CMATS was incorrect. However, it is safe to say that its refusal to do so runs contrary to some case law, even though the context in each case can be distinguished from *Timor-Leste v Australia* on some minor grounds.

⁷⁷ See, eg, *Electrabel v Hungary* (ICSID Arbitral Tribunal, Case No ARB/07/19, 30 November 2012) [4.111]; *Eureko v Slovakia* (Permanent Court of Arbitration, Case No 2008–13, 26 October 2010) [220]–[225].

⁷⁸ *Electrabel v Hungary* (ICSID Arbitral Tribunal, Case No ARB/07/19, 30 November 2012) [4.111].

⁷⁹ See, eg, *Blusun v Italy* (ICSID Arbitral Tribunal, Case No ARB/14/3, 27 December 2016) [277]–[278], [289]; *RREEF v Spain* (ICSID Arbitral Tribunal, Case No ARB/13/30, 6 June 2016) [71]–[77]; *Charanne v Spain* (Stockholm Chamber of Commerce, Case No 062/2012, 21 January 2016) [441]–[445]; *Electrabel v Hungary* (ICSID Arbitral Tribunal, Case No ARB/07/19, 30 November 2012) [4.112], [4.126]; *EURAM v Slovakia* (Permanent Court of Arbitration, Case No 2010–07, 22 October 2012) [247]; *Eureko v Slovakia* (Permanent Court of Arbitration, Case No 2008–13, 26 October 2010) [226].

⁸⁰ *Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic*, signed 29 April 1991, 2242 UNTS 205 (entered into force 1 October 1992).

⁸¹ *Eureko v Slovakia* (Permanent Court of Arbitration, Case No 2008–13, 26 October 2010) [226], [229].

⁸² *Blusun v Italy* (ICSID Arbitral Tribunal, Case No ARB/14/3, 27 December 2016) [289]; *Charanne v Spain* (Stockholm Chamber of Commerce, Case No 062/2012, 21 January 2016) [441]; *Electrabel v Hungary* (ICSID Arbitral Tribunal, Case No ARB/07/19, 30 November 2012) [4.151]; *EURAM v Slovakia* (Permanent Court of Arbitration, Case No 2010–07, 22 October 2012) [255], [257]; *Eureko v Slovakia* (Permanent Court of Arbitration, Case No 2008–13, 26 October 2010) [276]; *Binder v Czech Republic* (UNCITRAL Arbitral Tribunal, 6 June 2007) [44]. See *RREEF v Spain* (ICSID Arbitral Tribunal, Case No ARB/13/30, 6 June 2016) [79]; *Eastern Sugar v Czech Republic* (Stockholm Chamber of Commerce, Case No 088/2004, 27 March 2007) [180], [186]. Some tribunals provided additional reasons for why art 344 did not deprive them of jurisdiction. The *Electrabel v Hungary* and *Binder v Czech Republic* tribunals noted that the dispute did not concern EU law and thus did not fall within the European Court of Justice’s jurisdiction: *Electrabel v Hungary* (ICSID Arbitral Tribunal, Case No ARB/07/19, 30 November 2012) [4.157]; *Binder v Czech Republic* (UNCITRAL Arbitral Tribunal, 6 June 2007) [44]. And the *EURAM v Slovakia* tribunal held that Slovakia did not ‘submit’ a dispute as is prohibited under art 344, but rather only defended its position in a dispute submitted against it: *EURAM v Slovakia* (Permanent Court of Arbitration, Case No 2010–07, 22 October 2012) [258].

B Indirect Effect

Although the Conciliation Commission did not consider the direct applicability of art 4 of *CMATS*, the Commission was willing to consider art 4 of *CMATS* ‘within the framework and from the perspective of [*UNCLOS*] itself’.⁸³ This corresponds to the second theory, according to which art 4 *indirectly* renders the Commission incompetent within the framework of art 281(1) of *UNCLOS*. Article 281(1) provides:

If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.⁸⁴

In applying this provision, the Commission thus had to determine whether art 4 of *CMATS* could constitute an ‘agreement’ within the meaning of art 281(1).⁸⁵ The Commission answered this question in the negative:

In the Commission’s view, what *CMATS* is not — and what Article 281 requires — is an agreement ‘to seek settlement of the dispute by a peaceful means of [the Parties’] own choice’. *CMATS* is an agreement *not* to seek settlement of the Parties’ dispute over maritime boundaries for the duration of the moratorium.⁸⁶

It is easy to agree with the Commission’s analysis here. Nevertheless, the Commission could have and perhaps should have considered one counter-argument, which goes as follows. Article 4 of *CMATS* does not impose a permanent prohibition; it only prohibits Australia and Timor-Leste from seeking settlement of the dispute ‘for the period of [the] Treaty’,⁸⁷ which, if one is to simplify, is 50 years from the date of the treaty’s entry into force.⁸⁸ As a result, one could view art 4, in the context of the dispute settlement provisions of *UNCLOS*, not necessarily as ‘an agreement *not* to seek settlement of the Parties’ dispute’,⁸⁹ but rather as an agreement to seek settlement of the dispute by a certain method, that is, by first waiting for 50 years. In this sense, art 4 could be invoked under art 281(1) of *UNCLOS* to deprive the Commission of competence.

This argument might seem like a stretch, but it carries more weight if one accepts the notion that the underlying rationale behind art 281(1) (as well as art 282) of *UNCLOS* is to give state parties the right to agree on their own methods of settling their disputes. Indeed, there is no reason why such a method cannot be one that requires the parties to first wait 50 years.

⁸³ *Timor-Leste v Australia Conciliation (Competence)* (Permanent Court of Arbitration, Case No 2016–10, 19 September 2016) [44].

⁸⁴ *UNCLOS* art 281(1).

⁸⁵ *Timor-Leste v Australia Conciliation (Competence)* (Permanent Court of Arbitration, Case No 2016–10, 19 September 2016) [61].

⁸⁶ *Ibid* [62] (emphasis in original).

⁸⁷ *CMATS* art 4(1).

⁸⁸ *Ibid* art 12.

⁸⁹ *Timor-Leste v Australia Conciliation (Competence)* (Permanent Court of Arbitration, Case No 2016–10, 19 September 2016) [62] (emphasis in original).

C Treaty Conflict

Under the third theory, art 4 prevails over the dispute settlement provisions of *UNCLOS* as a matter of treaty conflict, thereby depriving the Conciliation Commission of competence. The Commission, however, rejected this theory by pithily stating in one short paragraph:

[*UNCLOS*] is a later treaty as between the Parties. Thus, *CMATS* could only affect the Commission's competence to the extent that such effect is provided for in [*UNCLOS*].⁹⁰

This explanation is insufficient, to say the least. In order to resolve any conflict between treaties, one must first examine whether there are specific provisions in the treaties regulating such conflict. In this case, both *CMATS* and *UNCLOS* have such provisions, though, for organisational purposes, they will be examined after first discussing general principles of treaty conflict. Indeed, the Commission in the short paragraph quoted above did not cite to those provisions, but instead impliedly relied on the general principle of *lex posterior*. The *lex posterior* principle is codified in art 30(3) of the *Vienna Convention on the Law of Treaties* ('*VCLT*'),⁹¹ which provides in relevant part:

When all the parties to the earlier treaty are parties also to the later treaty ... the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.⁹²

There are two problems with the Commission's application of the *lex posterior* principle. First, it is not clear that *CMATS* is the earlier treaty and *UNCLOS* is the later treaty. Secondly, it ignores the *lex specialis* principle.

As for the first problem, the relevant dates are as follows. *CMATS* was signed by both parties on 12 January 2006 and entered into force for both parties on 23 February 2007.⁹³ *UNCLOS* was adopted, opened for signature, and signed by Australia on 10 December 1982, and entered into force for Australia on 5 October 1994.⁹⁴ Timor-Leste, on the other hand, never signed *UNCLOS*, but acceded to *UNCLOS* (and *UNCLOS* thus entered into force for Timor-Leste) on 8 January 2013.⁹⁵ The Conciliation Commission did not indicate which date it considered to be the critical date for determining which treaty is earlier and which treaty is later. But since the Commission stated that *UNCLOS* was the later treaty, it must have considered the critical date of each treaty to be the earliest date on which the treaty was in force for both parties, which would be 23 February 2007 for *CMATS* and 8 January 2013 for *UNCLOS*.

Nevertheless, it is not obvious that the critical date for the purposes of art 30(3) should be the earliest date on which the treaty is in force for both parties. The *VCLT* itself does not define 'earlier treaty' or 'later treaty'. Articles 30(5) and 59(1) of the *VCLT* suggest that the critical date is the date of 'conclusion' of the

⁹⁰ Ibid [45]; see also at [84].

⁹¹ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 30(3) ('*VCLT*').

⁹² Ibid.

⁹³ See above n 4; *CMATS*.

⁹⁴ *UN Treaty Collection, Status of UNCLOS*, above n 31.

⁹⁵ Ibid.

treaty,⁹⁶ but the *VCLT* also does not define the term ‘conclusion’.⁹⁷ Although commentators have not reached a consensus on determining the critical date,⁹⁸ there is a strong argument to be made that the critical date is the date of adoption of the text of the treaty, as opposed to the date of the treaty’s entry into force. At the UN Conference on the Law of Treaties, Sir Humphrey Waldock, the last Special Rapporteur of the International Law Commission (‘ILC’) for the law of treaties and the Expert Consultant at the Conference, opined that ‘for purposes of determining which of two treaties was the later one, the relevant date should be that of the adoption of the treaty and not that of its entry into force’.⁹⁹ And Sir Ian Sinclair, a representative of the UK at the Conference, writes in his authoritative book on the *VCLT* that ‘it seems clear that, in determining which treaty is the “earlier” and which the “later”, the relevant date is that of the adoption of the text and not that of its entry into force’.¹⁰⁰ There is thus strong support for the notion that the critical date is the date of adoption. Assuming that such is the case, *UNCLOS* would be the earlier treaty and *CMATS* would be the later treaty.

But this analysis still oversimplifies the situation. After all, Timor-Leste did not take part in the negotiation or adoption of *UNCLOS*, as it only formally became a state in 2002. So it is debatable whether the date of adoption could be the relevant critical date for *UNCLOS* with respect to Timor-Leste. Rather than strictly applying the *lex posterior* principle then, it might make more sense to apply the reasoning that underlies the principle. As Sir Humphrey noted at the Conference:

The notion behind [the principle] was that, when the second treaty was adopted, there was a new legislative intention; that intention, as expressed in the later instrument, should therefore be taken as intended to prevail over the intention expressed in the earlier instrument.¹⁰¹

So the principal question is as follows: did Timor-Leste and Australia have, upon their signing of *CMATS*, ‘a new legislative intention’ for art 4 to prevail over the dispute settlement provisions of *UNCLOS*? Or did they have, upon Timor-Leste’s accession to *UNCLOS*, ‘a new legislative intention’ for the dispute settlement provisions of *UNCLOS* to prevail over art 4? There is no clear answer to this question, but the former seems much more likely than the latter. This is particularly because it would be very hard to argue, absent other evidence, that Australia had a new legislative intention when Timor-Leste acceded to *UNCLOS*, as Timor-Leste’s act of accession did not involve Australia. Therefore, it appears

⁹⁶ See *VCLT* arts 30(5), 59(1).

⁹⁷ See E W Vierdag, ‘The Time of the “Conclusion” of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions’ (1989) 59 *British Yearbook of International Law* 75, 75.

⁹⁸ *Ibid*; see Alexander Orakhelashvili, ‘Article 30’ in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (Oxford University Press, 2011) vol 1, 764 [58].

⁹⁹ *UN Conference on the Law of Treaties, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, 2nd sess, 92nd mtg, UN Doc A/CONF.39/11/Add.1 (16 April 1969) 253 (‘*UN Conference on the Law of Treaties, Summary Records*’).

¹⁰⁰ Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 2nd ed, 1984) 98.

¹⁰¹ *UN Conference on the Law of Treaties, Summary Records*, UN Doc A/CONF.39/11/Add.1, 253.

that an application of the *lex posterior* principle should actually render art 4 of *CMATS* applicable, contrary to the Commission's decision.

There is a second problem with the Commission's analysis that militates in favour of the application of art 4: the *lex specialis* principle. Although the principle is not codified in the *VCLT*, an ILC study group in its report entitled *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of Study Group of the International Law Commission* noted that the *lex specialis* principle 'is a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts'.¹⁰² As the study group explained, 'if a matter is being regulated by a general standard as well as a more specific rule, then the latter should take precedence over the former'.¹⁰³

Where both the *lex posterior* and *lex specialis* principles favour one treaty over another, it is not difficult to conclude that the more recent and special treaty should prevail.¹⁰⁴ Where, however, the application of the two principles lead to different conclusions, the result is 'uncertain'.¹⁰⁵ As the ILC study group explains:

[I]t cannot be automatically excluded that when two States conclude a generally worded treaty, ... they thereby wish to abolish a prior, more specific treaty. In such cases, *lex specialis* may have some value as an indication of party will: the *lex posterior* will not abrogate a prior treaty obligation if the speciality of that prior obligation may be taken as indication that the parties did not envisage this outcome.¹⁰⁶

In *Timor-Leste v Australia*, *CMATS* is arguably the *lex specialis*, as it is geographically limited to the Timor Sea, whereas *UNCLOS* is arguably the *lex generalis*, as it deals with the entire world's oceans. In light of the previous discussion on the *lex posterior* principle, *CMATS* is arguably both the *lex posterior* and the *lex specialis* when compared to *UNCLOS*, in which case art 4 should be applicable. Even if the Conciliation Commission were correct that *UNCLOS* is the *lex posterior*, the fact that *CMATS* is the *lex specialis* at least justifies further explanation as to why the *lex posterior* principle trumps the *lex specialis* principle in this case. Unfortunately, the Commission did not provide any such explanation.

In addition to these general principles of treaty conflict, one should also pay attention to provisions in the treaties themselves regulating situations of conflict between treaties. Article 4 of *CMATS* contains such a provision, though the Commission failed to give it any attention. The fourth paragraph of art 4 provides:

Notwithstanding any other bilateral or multilateral agreement binding on the Parties, or any declaration made by either Party pursuant to any such agreement, neither Party shall commence or pursue any proceedings against the other Party before any court, tribunal or other dispute settlement mechanism that would raise

¹⁰² International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of Study Group of the International Law Commission*, 58th sess, UN Doc A/CN.4/L.682 (13 April 2006) [56] ('*ILC, Fragmentation of International Law*').

¹⁰³ *Ibid.*

¹⁰⁴ See, eg, *Mavrommatis Palestine Concessions* [1924] PCIJ (ser A) No 2, 31.

¹⁰⁵ See ILC, *Fragmentation of International Law*, UN Doc A/CN.4/L.682, [58], [114], [233].

¹⁰⁶ *Ibid* [114].

or result in, either directly or indirectly, issues or findings of relevance to maritime boundaries or delimitation in the Timor Sea.¹⁰⁷

UNCLOS, on the other hand, contains an entire article on the relationship between *UNCLOS* and other treaties: art 311. Its most relevant paragraph, also its fourth paragraph, provides:

States Parties intending to conclude an agreement [modifying or suspending the operation of provisions of this *Convention*] shall notify the other States Parties through the depositary of this Convention of their intention to conclude the agreement and of the modification or suspension for which it provides.¹⁰⁸

The Commission did, perhaps selectively, cite to art 311(4). In a later part of its Decision on Competence, the Commission held:

CMATS does not derogate from the terms of the *Convention*. The *Convention* is the later treaty between the Parties, and the governments of Timor-Leste and Australia have not notified the States Parties to the *Convention* of any modification or suspension of its terms, as required by Article 311(4). Nor does *CMATS* describe the moratorium provisions in its Article 4 as modifying or suspending any obligation under the *Convention*.¹⁰⁹

The Commission's analysis, however, is unsatisfactory for many reasons. First, it ignores the 'notwithstanding' clause of art 4(4) of *CMATS*, which makes clear that the prohibition contained in that paragraph applies despite 'any other bilateral or multilateral agreement binding on the Parties' such as *UNCLOS*. Secondly, the Commission's reasoning appears contradictory when it says that *UNCLOS* is the 'later treaty' yet Timor-Leste and Australia should have made a notification under art 311(4), as art 311(4) could only reasonably apply to treaties that come after *UNCLOS*. Thirdly, even if *UNCLOS* were considered the 'earlier treaty', it still would have made no sense for Timor-Leste and Australia to make such a notification for *CMATS* because Timor-Leste was not a party to *UNCLOS* at the time of the signature and entry into force of *CMATS*. Fourthly, it is not clear that *CMATS* is actually a modification or suspension of the operation of provisions of *UNCLOS*. Rather, a treaty conflict only arises with respect to the institution of proceedings on maritime delimitation in the Timor Sea.

For all these reasons, whether one focuses on the general principles of treaty conflict or the specific provisions contained in *CMATS* and *UNCLOS* on treaty conflict, it appears that the Commission's reasoning has major weaknesses.

D *Clean Hands*

Under the fourth and final theory, the Conciliation Commission is incompetent under the clean hands doctrine since Timor-Leste instituted the proceedings in violation of art 4. In line with this theory, Australia argued that the dispute was inadmissible because Timor-Leste was seeking to seize 'the Commission in breach of its treaty commitments to Australia'.¹¹⁰

¹⁰⁷ *CMATS* art 4(4) (emphasis added).

¹⁰⁸ *UNCLOS* art 311(4).

¹⁰⁹ *Timor-Leste v Australia Conciliation (Competence)* (Permanent Court of Arbitration, Case No 2016-10, 19 September 2016) [84].

¹¹⁰ *Ibid* [20].

The Commission, however, rejected this argument. It explained that the clean hands doctrine, as enunciated by the PCIJ in *Diversion of Water from the Meuse (Netherlands v Belgium)* ('*Diversion of Water from the Meuse*'),¹¹¹ applies only where the two states have allegedly breached the same treaty,¹¹² whereas in the present case 'Australia asks the Commission to find a breach of another instrument (CMATS) in the overall legal relationship between the Parties'.¹¹³

The Commission's decision to reject this theory is understandable. There is no question that the existence or at least the scope of the clean hands doctrine in public international law is unclear. The ICJ, for example, has either expressly or impliedly refused to recognise the doctrine in every case where it has been invoked.¹¹⁴ As the *Delimitation of the Maritime Boundary (Guyana v Suriname)* tribunal stated, '[n]o generally accepted definition of the clean hands doctrine has been elaborated in international law'.¹¹⁵ Moreover, the most often cited statement on the doctrine in public international law, Judge Anzilotti's dissenting opinion in *Diversion of Water from the Meuse*,¹¹⁶ equates the doctrine to the principle *inadimplenti non est adimplendum*, which generally applies only in cases where the two parties are allegedly breaching reciprocal obligations in a single instrument.¹¹⁷ Therefore, it certainly appears that the doctrine should not apply to *Timor-Leste v Australia*.

Nevertheless, it should be noted that among the many cases where a state has invoked the doctrine, none of them have been situations where the very act of instituting and pursuing the proceedings violated international law. In such a case, a strong argument could be made that the doctrine of clean hands should apply. Indeed, the original formulation of the clean hands doctrine does not impose the requirement that both parties must have violated reciprocal obligations in a single instrument. As the maxim goes: 'He who seeks equity must come with clean hands'. If a state's institution and pursuit of the proceedings in and of themselves are in violation of international law, the state's hands before the dispute settlement body could not be any less clean.

As with the first three theories, one cannot definitively conclude that the Commission was incorrect in dismissing this theory. After all, its holding conformed to the general understanding of the clean hands doctrine, which itself is not even a clearly established principle of international law. Nevertheless, the

¹¹¹ Ibid [90], citing *Diversion of Water from the Meuse (Netherlands v Belgium) (Judgment)* [1937] PCIJ (ser A/B) No 70, 25 ('*Diversion of Water from the Meuse*').

¹¹² *Timor-Leste v Australia Conciliation (Competence)* (Permanent Court of Arbitration, Case No 2016-10, 19 September 2016) [92].

¹¹³ Ibid [90].

¹¹⁴ See, eg, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 163-4 [63]-[64]; *Oil Platforms (Iran v United States of America) (Judgment)* [2003] ICJ Rep 161, 177-8 [28]-[30]; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 16 [35]; *The Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7, 76 [133]; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 134-5 [268].

¹¹⁵ *Delimitation of the Maritime Boundary (Guyana v Suriname) (Award)* (2007) 30 RIAA 1, [418].

¹¹⁶ *Diversion of Water from the Meuse* [1937] PCIJ (ser A/B) No 70, 50 (Judge Anzilotti).

¹¹⁷ Bruno Simma and Christian J Tams, 'Article 60' in Oliver Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (Oxford University Press, 2011) vol 2, 1353 [3].

Commission could have, and perhaps should have, further justified its rejection of the clean hands doctrine in light of the fact that this particular application of the doctrine has never before been addressed by an international dispute settlement body.

IV POLICY CRITIQUES OF THE DECISION

Regardless of whether the Conciliation Commission's Decision on Competence was legally correct or not, the practical consequence is clear: art 4 of *CMATS* was not enforced. There is little doubt that Timor-Leste and Australia had intended art 4 to prohibit the institution of proceedings like the ones before the Commission, but in light of the Commission's Decision on Competence, the two states were compelled to continue the proceedings.

The non-enforcement of art 4 can be viewed positively. That is, if the international community embraces a public policy in favour of aggressively settling disputes, then the non-enforcement of art 4 is a positive development. It means that the international community will not let states contract out of their obligation — enshrined in arts 2(3) and 33(1) of the *Charter* and bolstered by art 103 of the *Charter* — to peacefully settle their disputes. This mandatory rule might make sense if one wishes to avoid the situation where a powerful state takes advantage of a less powerful state by pressuring it to conclude a treaty that prohibits the institution of certain dispute settlement proceedings. From this perspective, agreements to peacefully not settle a dispute should not be enforceable.

This article, however, asserts that this is not the optimal public policy of the international legal order. Rather, as suggested in the introduction, not settling certain disputes, at least for a certain period of time, can contribute to the goals set forth in the *Charter*. And where states have expressly agreed by treaty to peacefully not settle their dispute, the agreement should be respected. This is because the conclusion of such agreements, as well as their enforcement, can actively contribute to international peace and prosperity. A few examples are worth examining here.

Among the three examples of peaceful non-settlement mentioned in the introduction — Antarctica, Taiwan and Lake Constance — the example of Antarctica is the only one where a formal agreement is connected with the non-settlement of the dispute. In the years leading up to the signing of *The Antarctic Treaty*,¹¹⁸ many states had competing and conflicting claims to various parts of Antarctica. Instead of settling this complicated territorial dispute, *The Antarctic Treaty* proposed to freeze the conflict. Article IV provides:

1. Nothing contained in the present Treaty shall be interpreted as:
 - (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;

¹¹⁸ *The Antarctic Treaty*, signed 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961) art IV(2).

(b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;

(c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.

2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.¹¹⁹

To be precise, the *Antarctic Treaty* did not actually constitute an agreement to not settle the underlying dispute, but it was most certainly an attempt to move things forward without settling the dispute. As James Crawford and Donald R Rothwell have summarised:

The *Treaty* is an agreement between claimant and non-claimant States, and it seeks not to resolve but to displace the various claims, counter-claims and rejections of claims. In particular Article IV of the *Treaty* provides that the implementation of the Treaty is without prejudice to the legal position of the various parties, and that acts done during the currency of the *Treaty* neither strengthen nor weaken existing claims. With Article IV in place, the parties have been able to pursue scientific research and the exploitation of some marine living resources without the sovereign rights that some of them claim being technically infringed.¹²⁰

As Crawford and Rothwell note, not settling the territorial sovereignty dispute has enabled the parties to make use of Antarctica for scientific research and resource exploitation. It would not be difficult to thus conclude that the peaceful non-settlement of this dispute contributed to international peace and prosperity.

Settlement agreements also reveal how not settling disputes can contribute to international peace and prosperity. This might at first seem like a paradox. How can a settlement agreement be an agreement to not settle a dispute? The truth is that settlement agreements, contrary to their name in English, sometimes do not actually 'settle' the underlying legal dispute, at least not as an international dispute settlement body would. Rather, in settlement agreements, parties often use alternative means of appeasing each other to avoid settling the underlying legal dispute. For this reason, the French term for settlement agreements, '*arrangement amiable*' ('friendly arrangement'), is perhaps more appropriate. The two examples of settlement agreements invoked in Part III(A) demonstrate how these agreements may contribute to international peace and prosperity.

In *Aerial Herbicide Spraying*, the settlement agreement between Ecuador and Colombia did not actually settle the principal legal issue in dispute. Ecuador had asked for, inter alia, a declaration that Colombia's aerial herbicide spraying violated its obligations under international law towards Ecuador,¹²¹ and Colombia

¹¹⁹ Ibid art IV.

¹²⁰ James Crawford and Donald R Rothwell, 'Legal Issues Confronting Australia's Antarctica' (1990–1991) 13 *Australian Year Book of International Law* 53, 54.

¹²¹ 'Reply of Ecuador', *Aerial Herbicide Spraying (Ecuador v Colombia)*, International Court of Justice, General List No 138, 31 January 2011, vol 1, 551.

had asked for, inter alia, a declaration rejecting this claim.¹²² In the settlement agreement, however, they did not decide whether Colombia's spraying constituted a violation of international law. Rather, they agreed that Colombia would establish an 'exclusion zone' where it would not engage in aerial spraying,¹²³ and Colombia would pay Ecuador \$15 million to be invested into areas affected by the spraying.¹²⁴ And, as mentioned in Part III(A), they agreed that they 'shall refrain from instituting international proceedings with respect to the same facts that gave rise to the present Agreement'.¹²⁵ Although avoiding the settlement of the actual legal dispute, the result satisfied both Ecuador and Colombia, as they agreed to the terms of the settlement agreement.¹²⁶

In *Certain Phosphate Lands in Nauru*, once again, the settlement agreement between Nauru and Australia did not actually settle the principal legal issue in dispute. Nauru had asked for, inter alia, a declaration that Australia had breached its obligations under the *Trusteeship Agreement for Nauru*,¹²⁷ and Australia had asked for, inter alia, a declaration that it had not breached any such obligation.¹²⁸ In their settlement agreement, there was no determination of whether there had been a breach of the *Trusteeship Agreement*. Rather, Australia simply agreed to pay Nauru a large sum of money 'without prejudice to Australia's long-standing position that it bears no responsibility for the rehabilitation of the phosphate lands'.¹²⁹ And, as mentioned above, Nauru agreed that it would not seek a settlement of the legal dispute.¹³⁰ Once again, the result was a win-win situation.

For a final example of how agreements to not settle a dispute can contribute to international peace and prosperity, we can turn to the underlying case of this article: *Timor-Leste v Australia*. In the Timor Sea, Australia and Timor-Leste had for many years struggled to reach an agreement on maritime delimitation. Due to this failure to agree, neither state was able to peacefully exploit the natural resources in the continental shelf. This was particularly damaging for Timor-Leste, which has a very weak economy that could make significant use of those resources.¹³¹ In this context, *CMATS* was a boon. It enabled Timor-Leste (as well as Australia) to finally engage in exploitation of the resources.¹³² It of course did not come at no cost; Timor-Leste had to agree in return to not assert its claims on maritime delimitation. Still, although neither party got everything that it wanted, it was a win-win situation. If Timor-Leste did not have the possibility to agree to

¹²² 'Rejoinder of Colombia', *Aerial Herbicide Spraying (Ecuador v Colombia)*, International Court of Justice, General List No 138, 1 February 2012, vol 1, 499.

¹²³ *Ecuador-Colombia Settlement Agreement* [4].

¹²⁴ *Ibid* [9].

¹²⁵ *Ibid* [11].

¹²⁶ See *Aerial Herbicide Spraying (Ecuador v Colombia) (Order of 13 September 2013 - Removal from List)* [2013] ICJ Rep 278, 279.

¹²⁷ 'Memorial of the Republic of Nauru', *Certain Phosphate Lands in Nauru (Nauru v Australia)*, International Court of Justice, General List No 80, 20 March 1990, 250.

¹²⁸ 'Counter-Memorial of the Government of Australia', *Certain Phosphate Lands in Nauru (Nauru v Australia)*, International Court of Justice, General List No 80, 29 March 1993, 227.

¹²⁹ *Nauru-Australia Settlement Agreement* art 1.

¹³⁰ *Ibid* art 3.

¹³¹ See *Timor-Leste v Australia Conciliation (Opening Session Transcript)* (Permanent Court of Arbitration, Case No 2016-10, 29 August 2016) 11.

¹³² See *ibid* 18.

not seek settlement of the delimitation dispute, then perhaps no exploitation would have begun at all.

All these examples show the importance of the peaceful non-settlement of disputes, in particular how agreements to peacefully not settle disputes can actually contribute to international peace and prosperity. If, however, these agreements are not consistently enforceable, as the Commission appeared to hold, then states will be less willing to conclude and comply with such agreements, thereby undermining the benefits that these agreements bring to the table.

Therefore, this article contends that, even if the Conciliation Commission's decision was legally correct, from a policy standpoint, it was not conducive to international peace and prosperity. Rather, international law must recognise and enforce agreements to peacefully not settle disputes.

V CONCLUSION

The thesis of this article is not that the Conciliation Commission was necessarily wrong. Rather, the article merely intends to critique the Commission's decision from both a legal and a policy perspective. In any case, it is always easier to critique than to provide constructive recommendations, yet the latter is arguably more useful than the former. So to conclude this article, this Part provides some concrete recommendations concerning the peaceful non-settlement of disputes.

First, dispute settlement bodies should consider the direct applicability of provisions allegedly prohibiting the institution of the proceedings before them, even if such provisions are located in treaties that fall outside their jurisdiction *ratione materiae*. Doing so respects not only the principle of consent, but also protects the dispute settlement body from being implicated in an internationally wrongful act (that is, the institution of the proceedings).

Secondly, international legislators should recognise the importance of agreements to peacefully not settle certain disputes. Specifically, in future treaties, if the dispute settlement mechanism excludes disputes that the parties have agreed to settle by another peaceful method (such as arts 281(1) and 282 of *UNCLOS*), it should also exclude disputes that the parties have agreed to not settle for a certain period of time. This would enable provisions prohibiting the institution of certain dispute settlement proceedings to have an indirect impact on the jurisdiction of dispute settlement bodies seized of such disputes. The bottom line is that states should have flexibility in choosing to settle their dispute or not settle their dispute however they like.

Thirdly, international legislators, when drafting provisions prohibiting the institution of certain dispute settlement proceedings, should include express provisions in the underlying treaty on how the prohibition should interact with both past and future dispute settlement mechanisms in other treaties. This way, the intentions of the parties would be crystal clear to future dispute settlement bodies confronted with these provisions.

Fourthly, states should, if unable to peacefully settle a dispute, also attempt to agree to peacefully not settle the dispute if doing so would contribute to international peace and prosperity. And if they do conclude such agreements, states should fully respect these agreements.

Through the implementation of these four recommendations, it is the hope of the present author that the international community will eventually recognise the

importance of the peaceful non-settlement of disputes as much as it recognises the importance of the peaceful settlement of disputes. Only by doing so can it hope to bring international peace and prosperity to this world.