THE PERMANENT MARITIME BOUNDARY TREATY: A PATHWAY TO THE RIGHT TO DEVELOPMENT FOR TIMOR-LESTE AND ITS PEOPLE

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Abstract

In 2018, Australia and the Democratic Republic of Timor-Leste signed a treaty establishing their maritime boundaries in the Timor Sea (2018 Treaty). This research aims to investigate whether the provisions outlined in the 2018 Treaty will contribute to the realisation of the Right to Development (RtD) of Timor-Leste and its people. To achieve this aim, the study adopts a doctrinal approach and a socio-legal methodology to conduct a comprehensive examination and analysis of the previous and the current Joint Development Agreements in the Timor Sea through the lens of the RtD – something that has not previously been attempted.

The thesis reveals that, while the primary objective of the 2018 Treaty may not have been to achieve the elements of RtD, it incorporates the essential criteria for realising the RtD within Timor-Leste and, thus, has the potential to contribute to the realisation of the RtD of Timor-Leste and its people. The potential solutions offered by this research are: investing in human capital, creating and investing in new institutions, improving community engagement through public participation, involving indigenous peoples in decision-making, improving private sector engagement, and formulating a local content law. These are incremental measures that can be undertaken to address the challenges and barriers outlined in this thesis. It is important to acknowledge that the potential solutions proposed in this study do not comprehensively address the broader economic, social, and political challenges faced by Timor-Leste. Nonetheless, they represent small but significant steps that can be taken to address specific barriers and obstacles identified. It is recommended that further research be conducted in this field to explore additional potential

avenues for realising the RtD of Timor-Leste and its people, considering the evolving nature of international agreements.

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List of Abbreviations

ABS	Access and Benefit Sharing
ACHPR	African Charter on Human Rights and Peoples' Rights
ANPM	National Authority of Petroleum and Minerals
ASEAN	Association of Southeast Asian Nations
BITs	Bilateral Investment Treaties
CBD	Convention on Biological Diversity
CDD	Community Driven Development
CERDS	Charter of Economic Rights and Duties of States
CIL	Customary International Law
CMATS	Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea
CPI	Corruption Perception Index
EEZ	Exclusive Economic Zone
EIA	Environment Impact Assessment
EITI	Extractive Industries Transparency Initiative
ESI	Estimated Sustainable Income
FDI	Foreign Direct Investment
FPIC	Free, Prior, Informed Consent
GA	General Assembly
GNI	Gross National Income
HDI	Human Development Index
ICCRP	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IDT	Inpres Desa Tertinggal
IUA	International Unitisation Agreement
JDA	Joint Development Agreement
JPDA	Joint Development Petroleum Area
LDC	Least Developed Country
LNG	Liquefied Natural Gas
MDGs	Millennium Development Goals
MNC	Multinational Corporation
MoU	Memorandum of Understanding
NAM	Non-Aligned Movement
NDP	National Development Policy
NGO	Non-Governmental Organisation
NIEO	New International Economic Order
OECD	Organization for Economic Cooperation and Development
PCA	Permanent Court of Arbitration
PNDS	National Programme for Village Development
PSNR	Permanent Sovereignty over Natural Resources
RES	Resolution
RtD	Right to Development

RWSS	Rural Water Supply and Sanitation
SAII	Subsídio de Apoio a Idosos e Inválidos (Pension for Older Persons and People with Disabilities)
SDGs	Sustainable Development Goals
SDP	Strategic Development Plan
SRI	Social Responsible Investment
SSN	Social Safety Net
TGT	Timor Gap Treaty
TST	Timor Sea Treaty
TVET	Technical and Vocational Education and Training
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Program
UNDRtD	United Nations Declaration on the Right to Development
UNEP	United Nations Environment Program
UNGA	United Nations General Assembly
UNTAET	United Nations Transitional Administration in East Timor
US	United States
WCED	World Commission on Environment and Development
WESP	World Economic Situation and Prospects
WTO	World Trade Organisation
ZoC	Zone of Cooperation

Chapter 1: INTRODUCTION

1.1 Introduction

The United Nations (UN) Charter,[1] designed to establish an international organisation to promote peace, security, and cooperation among States – the United Nations Charter – was created in 1945 in response to the devastation caused by World War II. One of the Charter's purposes is to 'achieve international cooperation in solving international problems of economic, social, cultural or humanitarian character […].'[2] It is one of the first legal foundations of the notion of development as a human right, its Article 55 calling on the UN to promote, inter alia, 'higher standards of living, full employment, and conditions of economic and social progress and development'. In the following years, many States gained their independence from colonial powers, leading to the formation of new nations and the reconstruction of existing ones.

The process of decolonisation was often accompanied by conflict and violence, but it also represented significant progress in the search for self-determination for all States. In the 1970s, as the economic expansion of developed States accelerated rapidly while developing States continued to suffer from poverty, malnutrition, and unemployment, there was growing recognition of the need for greater global cooperation to address issues such as poverty, inequality, and environmental degradation.[3] As a result of the imbalance of economic and political power between

[1] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI [Hereinafter UN Charter] Art 55.
[2] Ibid Art 1 (3).
[3] Karin Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1997) 16 (2) Wis Int'l L J 353, 375.

developed and developing States, newly independent States called for a New International Economic Order (NIEO),[4] demanding economic justice and national self-determination through, among others, permanent sovereignty over natural resources and the right to development (RtD).[5] Third World countries[6] proposed the concept of the RtD to request the international redistribution of resources (for instance, financial, technological, and knowledge) in their favour.[7] The RtD was initially seen by developing States as the solution to reduce global inequities, such as ending developing States' debts, creating rules for fair trade institutions and transferring technology from the developed States.[8] It was only in 1986 that the notion of development as a human right was clarified and developed in the United Nations Declaration of the Right to Development (UNDRtD) adopted by the United General Assembly (UNGA).[9]

According to the UNDRtD, the RtD is the right of every human person and peoples or communities to enjoy not only economic but also social, cultural, and political rights

[4] Stokke Olave, *The UN and Development: From Aid to Cooperation* (Indiana University Press 2009) 7–10.

[5] Sumudu Atapattu and Carmen G. Gonzalez, 'The North–South Divide in International Environmental Law: Framing the Issues' in Alam et al., (eds) *International Environmental Law and the Global South* (Cambridge University Press 2015) 7.

[6] The concept of Third World countries is used interchangeable with other terms such as 'less-developed', 'developing', or 'underdeveloped' countries and 'the South', or as a form of social movement: an international protest of the weak against the strong, or the poor against the rich. Third World countries are the countries that have a distinctive voice in attempting to make heard a common set of concerns. See: Mickelson (n 3) 354-357.

[7] Mickelson (n 3) 375.

[8] Karin Arts and Atabongawung Tamo, 'The Right to Development in International Law: New Momentum Thirty Years Down the Line?' (2016) 63 (3) NILR 221, 224.

[9] United Nations Declaration on the Right to Development, UNGA Res A/41/128 (4 December 1986) [Hereinafter UNDRtD] Art 1 (1).

where their fundamental freedoms can be fully realised.[10] To achieve this, States have the duty to facilitate development by creating national development policies that aim at the continuous improvement of the well-being of its entire population[11] (explained further in Chapter 2, section 2.2.1). This assertion leads to the identification that the RtD provides a framework for States to attain development, whether in relation to their communities (intra-State relationship) or between different States (inter-State relationship).

Accordingly, the RtD is particularly important for developing States such as Timor-Leste. Due to its low income and facing several structural obstacles to sustainable development,[12] the UN placed Timor-Leste on the Least Developed Country (LDC)[13] list in December 2020.[14] Despite gaining independence in 2002[15] and its richness in oil and gas, the State continues to be confronted with deepening poverty and a socio-economic crisis. One of the root causes of this crisis is that, for many years, Timor-

[10] Ibid, Preamble and Art 1 (1).
[11] Ibid Art 2 (3).
[12] United Nations Department of Economic and Social Affairs Economic Analysis, 'Least Developed Countries' (*United Nations,* NY) https://www.un.org/development/desa/dpad/least-developed-country-category.html accessed 26 December 2020.
[13] The criteria used for countries included in the LDCs: Gross National Income per Capita of $1,018 or below, Human Assets Index at 60 or below, and Economic Vulnerability Index at 36 or above. See: United Nations Department of Economics and Social Affairs: Economic Analysis, 'Inclusion in the LCD category' (*United Nations,* NY) https://www.un.org/development/desa/dpad/least-developed-country-category/ldc-inclusion.html accessed 02 February 2022.
[14]United Nations Committee for Development Policy, 'List of Least Developed Countries: as of 19 December 2024' (United Nations 2020).
[15] Office of the Historian, 'A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: Timor-Leste' (*Office of the Historian,* https://history.state.gov/countries/timor-leste#:~:text=The%20United%20States%20recognized%20Timor,sovereignty%20from%201976%20to%201999 accessed 02 February 2022.

Leste could not fully access its natural resources. In other words, Timor-Leste could not enjoy its RtD, especially its participation with non-discrimination, Permanent Sovereignty over Natural Resources (PSNR) and fair distribution of benefits in its maritime areas because it was not recognised as the owner and, thus, unable to obtain any revenue from the exploited oil and gas.

As a result, securing maritime boundaries was viewed as crucial to realising Timor-Leste's full self-determination and sovereignty. The State spent many years involved in disputes over the delimitation of the maritime boundaries,[16] and, finally, in March 2018, it signed a permanent maritime boundary treaty with Australia.[17] It is hoped that the new Treaty is one of the solutions to support Timor-Leste's development and contribute to its RtD. By no means is this thesis asserting that the 2018 Treaty will solve all the problems Timor-Leste is facing, but it would at least help improve Timor-Leste's development through the revenue that its natural resources will bring. Therefore, this thesis examines the extent to which the 2018 Treaty's legal provisions contribute to or are supportive of the realisation of the RtD of Timor-Leste and its people.

[16] Don Greenlees, 'Downer Rules East Timor Seabed Border Changes Out of Bounds' (Sydney, 25 May 2002) The Australian 1

[17] Treaty Between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea (adopted 6 March 2018) [Hereinafter 2018 Treaty]. Also see: Stephanie March and Stephen Dziedzic, 'Australia, East Timor Sign Deal on Maritime Border, Agree to Share Revenue from Greater Sunrise Oil and Gas' *ABC News* (Australia 7 March 2018) http://www.abc.net.au/news/2018-03-07/australia,-east-timor-sign-deal-on-maritime-boRTDer/9522902 accessed 20 July 2018.

Five reasons can be adduced to justify the choice of Timor-Leste for this study. First, Timor-Leste's economy is heavily dependent on oil and gas[18] as its revenues from these natural resources account for more than 70 per cent of all government revenue.[19] Second, as previously stated, even after gaining revenues from its oil and gas resources following independence in 2002, Timor-Leste still faces increasing poverty and a socio-economic crisis that continues to impact its development.

Third, Australia and Timor-Leste's case is considered one of the most successful conciliation proceedings under the United Nations Convention on the Law of the Sea (UNCLOS)[20] and it has a long-standing history of a JDA; fourth, the outcome of this case represents 'complete' sovereignty, in the sense that Timor-Leste exercises sovereignty over its natural resources, both on its lands and sea, which can be seen as a victory for Timorese people whose hope is to develop as a Nation and enjoy its RtD. Finally, fifth, using Timor-Leste as a case study can provide a blueprint for other developing countries on how to embed the RtD in their treaty negotiations. This is because the 2018 Treaty contains elements (identified in Chapter 2, section 2.5) that are international principles enshrined in various international and regional human rights instruments. For instance, through participation, non-discrimination and duty of cooperation, the Parties involved in the treaty can benefit from enhanced cooperation. The elements of participation and cooperation not only foster inter-State cooperation among the Parties but also promote intra-State cooperation

[18] Volunteer Service Abroad, 'VSA in Timor Leste' (vsa, 2019) <https://vsa.org.nz/what-we-do/countryregion/timor-leste/> accessed 19 September 2019.

[19] Heritage, 'Economic Freedom Country Profile: Timor-Leste' (2024) 356

[20] United Nations Convention on the Law of the Sea (adopted on 10 December 1982, entered into force on 16 November 1994) 1833 UNTS 397 [Hereinafter UNCLOS 1982]

between the State and its communities, facilitating development and eliminating obstacles to development.[21] Promoting non-discrimination ensures that all Parties, including developing States and the most vulnerable groups within society, can be included and fulfil their roles as development agents.[22] Furthermore, ensuring a fair distribution of benefits derived from natural resources promotes equity among the Parties and the State and its communities. [23] Finally, upholding PSNR guarantees self-determination and a safe environment for all Parties by granting States the right to utilise their natural resources while imposing a responsibility to protect their environments. It empowers people to exercise their sovereignty toward national development and their well-being.[24] Therefore, since the 2018 Treaty incorporates the elements of the RtD, it could act as a blueprint for other developing States aiming to effectively manage their natural resources and related revenues while realising their RtD and that of their people.

Consequently, this thesis identifies the RtD discourse as key to assessing the 'Treaty between Australia and the Democratic Republic of Timor-Leste Establishing Their Maritime Boundaries in the Timor Sea' (2018 Treaty).[25] Given that Timor-Leste is highly dependent on the revenues from its oil and gas resources for development,

[21] UNDRtD (n9) Art 3 (3).
[22] Arts and Tamo (n8) 238.
[23] UNCLOS (1982) (n20) Art 82 (4).
[24] Permanent Sovereignty over Natural Resources, UNGA Res 1803 (XVII) (17 December 1973) Para 4: 'Considering that any measure in this respect must be based on the recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of States '.
[25] 2018 Treaty (n17).

the RtD provides a comprehensive framework for States to foster that development (this will be explained further in Chapter 2, section 2.1).

Therefore, the RtD will be employed as a conceptual framework to investigate not only the 2018 Treaty but also the previous Joint Development Agreements (JDAs) for hydrocarbon management in Timor-Leste. This analysis seeks to achieve a fine-grained understanding by looking at the evolution of these Treaties and identifying whether the 2018 Treaty incorporates the elements of the RtD and, if so, whether they will contribute to the realisation of the RtD of Timor-Leste and its people.

This chapter first outlines the aims and objectives of the study and then provides some background information on the subject. This is followed by an explanation of the methodology and methods used for this research. It continues by presenting a detailed literature review on the JDAs in the Timor Sea, [26] maritime disputes, and the RtD, thus ascertaining the current State of academic publications in these areas and

[26] Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia (adopted 11 December 1989, entered into force 9 February 1991, AustTS No 9 1991) [Hereinafter Timor Gap Treaty/TGT (1989)]. See Also: Australian Parliament, Senate, Foreign Affairs, Defence and Trade References Committee, *East Timor: Final Report of the Senate Foreign Affairs, Defence and Trade References Committee* (National Library of Australia 2000); Timor Sea Treaty between the Government of East Timor and the Government of Australia (adopted 20 May 2002, entered into force 12 April 2003), 2258 UNTS 3 [Hereinafter Timor Sea Treaty/TST (2002)]. See Also: Gillian Triggs, 'The Timor Sea Treaty and the International Unitisation Agreement for Greater Sunrise: Practical Solutions in the Timor Sea' (2004) 23 Aust YBIL 161; Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (adopted 12 January 2006, came into force 23 February 2007) 2483 UNTS 359 [Hereinafter CMATS 2006] and; 2018 Treaty (n17). Also see: March and Dziedzic (n17).

highlighting the originality of this study. The chapter finishes by providing an overview of the structure of this thesis.

1.2 Aims and Objectives of the Study

This research aims to study whether the 2018 Treaty's provisions will contribute to the realisation of the RtD of Timor-Leste and its people. To achieve this aim, the primary research question asks: 'Will the 2018 Treaty contribute to the realisation of the RtD of Timor-Leste and its people?'. To answer this question, four distinct, albeit interrelated, objectives have been established.

The principal objective is to examine the legal content of the 2018 Treaty in order to assess whether its provisions will contribute to the realisation of the RtD of Timor-Leste and its people. The second objective is to investigate previous JDAs for hydrocarbon management in Timor-Leste with a view to identifying how they affected the realisation of the RtD of Timor-Leste and its people in the past and what lessons have been learned from them. The third objective is to identify whether there are development policies and laws in Timor-Leste that can help in the realisation of the RtD of Timor-Leste and its people. Finally, the fourth and final objective is to assess whether the 2018 Treaty, with a focus on the RtD, can be used as a template or blueprint for other developing States that have similar situations or pending maritime boundary disputes regarding how to embed RtD in their treaty negotiations.

To help achieve these objectives, this thesis has set up five subsidiary questions. These are:

1. How have previous JPDAs affected the realisation of the RtD of Timor-Leste and its people? In other words, to what extent did these previous treaties impact the RtD of Timor-Leste and its people, and what lessons can be learned from them?
2. How will the 2018 Treaty affect the RtD of Timor-Leste and its people?
3. How effective are national development policies and laws in implementing the RtD in Timor-Leste?
4. How can the 2018 Treaty help create national and international conditions favourable to the realisation of the RtD of Timor-Leste and its people?
5. Can other developing States that have similar disputes use the 2018 Treaty as a template or blueprint?

1.3 Background to the study

The Democratic Republic of Timor-Leste, also known as simply Timor-Leste, is a State in Maritime Southeast Asia and comprises the eastern half of the island of Timor, the islands of Ataúro and Jaco, and Oecusse, an enclave on the north western side of the island, enclosed within Indonesian West Timor.[27] The State is about 15,410 square kilometres and has a population of about 1.268 million.[28] Based on a 2018 United Nations Development Programme (UNDP) Human Development Report,[29] the youth

[27] David Robie, 'La'o Hamutuk and Timor-Leste's Development Challenges: A Case Study in Human Rights and Collaborative Journalism' (2015) 42 (3-4) Media Asia 209

[28] World Bank, 'Population, Total' (*World Bank,* 2019) <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=TL&view=chart> accessed 19 September 2019.

[29] United Nations Development Programme Human Development Reports, 'Timor Leste: Human Development Indicators' (*UNDP,* 2018) <http://hdr.undp.org/en/countries/profiles/TLS accessed 19 September 2019.

unemployment rate in Timor-Leste remains the highest in Asia at 11.6 per cent, and the Human Development Index (HDI)[30] was 0.607 points in 2021, placing it at 140 out of 191 States published.[31] In 2014, almost half of its population lived below the national poverty line, and about 50 per cent of the population was illiterate.[32] In 2016, only 63.4 per cent of the population had access to electricity.[33] In 2021, 22.6 per cent of the proportion of the employed population lived on less than US$1.90 a day.[34] As a consequence, Timor-Leste was placed on the LDC list in 2020.[35] LDCs are defined by the United Nations Department of Economic and Social Affairs as low-income States that face severe structural barriers to sustainable development. They are highly vulnerable to economic and environmental issues and have low levels of human assets.[36]

[30] HDI is an average measure of basic human development achievements in a country such as a long and healthy life, being knowledgeable and have a decent standard of living. Also see: United Nations Development Programme Human Development Reports, 'Human Development Index' (*UNDP,* 2019) http://hdr.undp.org/en/content/human-development-index-hdi> accessed 23 September 2019.

[31] United Nations Development Programme Human Development Reports, 'Access and explore human development data for 191 countries and territories worldwide' (*UNDP,* 2022) https://hdr.undp.org/data-center/country-insights#/ranks accessed 16 March 2023.

[32] Asian Development Bank, 'Poverty in Timor Leste' (*ADB*, 2019) <https://www.adb.org/countries/timor-leste/poverty> accessed 23 September 2019

[33] Ibid.

[34] Ibid

[35] United Nations Committee for Development Policy, 'List of Least Developed Countries: as of December 2020' (*United Nations,* 2020) https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf accessed 16 December 2020.

[36] United Nations Department of Economic and Social Affairs, 'Least Developed Countries' (*United Nations,* NY) https://www.un.org/development/desa/dpad/least-developed-country-category.html accessed 19 September 2019.

Timor-Leste was a Portuguese colony between 1702 and 1975.[37] On 28 November 1975, Portugal withdrew from the country, and the State proclaimed its independence. However, ten days later, on 7 December 1975, Indonesia invaded the territory and annexed it as its 27th province, a move not recognised by the UN.[38] In its first resolution on Timor-Leste, the UN Security Council recognised:

> […] the inalienable right of the people of East Timor to self-determination and independence in accordance with the principles of the Charter of the United Nations and the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in the General Assembly (GA) Resolution 1514 (XV) of 14 December 1960.[39]

Although the UNGA adopted a further resolution in the following year,[40] reaffirming the previous resolution[41] by stressing the right of the Timorese people to self-determination and calling for the withdrawal of Indonesian forces, Japan and the US abstained, signalling their alliance with the strategically positioned Indonesia. It was only in 1999 that the UN Security Council addressed the issue of Timor-Leste again,

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[37] Adam Broinowski, *Cultural Responses to Occupation in Japan: The Performing Body During and After the Cold War* (Bloomsbury Publishing 2016).

[38] This move was not recognised by the United Nations (UN) see: BBC News, 'East Timor Profile- Timeline' *BBC News* (Asia 26 February 2018) <https://www.bbc.co.uk/news/world-asia-pacific-14952883> accessed 06 August 2019; Occupation of Indonesia in Timor Leste received de jure recognition by Australia in 1978. International law draws a distinction between de jure and de facto recognition of states. De jure means 'based on, or according to the law', whereas de jure recognition means a government accepts the validity of another government's title. See: McGrath K, 'Australia's Recognition of the Indonesian Annexation of East Timor: The Timor Sea Boundary Negotiation Nexus (1976-1978)' in S. Smith et al., (eds.) *Timor-Leste: The Local the Regional and the Global, vol 1* (Politics and International Relations 2016) 296.

[39] UNSC Res 384 (1975) (22 December 1975).

[40] UNSC Res 389 (1976) (22 April 1976).

[41] Ibid.

after 24 years of Indonesian rule, costing the lives of more than 200,000[42] Timorese who suffered some of the worst atrocities in their fight for self-determination. Determined efforts at the UN level and by the Timorese resistance resulted in an independence referendum held in 1999.[43] Consequently, in 2002, Timor-Leste restored peace, and the State regained its independence as the Democratic Republic of Timor-Leste; in the same year, Timor-Leste became a UN Member State. Although Timor-Leste regained its independence, it has faced significant challenges in its efforts to rebuild and develop.[44] Many development obstacles still impact Timor-Leste people's living conditions, most notably the lack of proper access to healthcare, water, nutrition, education, and unemployment.[45] Therefore, by gaining control over its natural resources in its sea, Timor-Leste can utilise the revenue from its exploitation to address and overcome obstacles to its development. However, Timor-Leste needs to make sure that this revenue is spent wisely. Otherwise, it may face a fate similar to that of other States aflicted by the 'resource curse'[46] caused by dependence on the petroleum sector.

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[42] United States Institute of Peace, 'Truth Commission: Timor-Leste (East Timor)' (*USIP,* 2002) <https://www.usip.org/publications/2002/02/truth-commission-timor-leste-east-timor> accessed 27 August 2019.

[43] International Republican Institute, 'The Power of the Vote: Timor Leste's Election History' (*IRI,* 2007) <https://www.iri.org/news/the-power-of-the-vote-timor-lestes-election-history/> accessed 27 August 2019.

[44] Charles Scheiner, 'East Timor Hits Potholes on the Road to Independence' (2007) 12 (1) The East Timor & Indonesia Estafeta: Voice of the East Timor & Indonesian Action Network (*ETAN*, 2007)) https://etan.org/estafeta/07/winter/1timor.htm accessed 20 August 2024.

[45] Amartya Kumar Sen, *Development as Freedom* (1st edn Knopf 1999) 13-14.

[46] The concept of the resource curse is frequently used to describe the negative consequences, such as social, political, and economic issues, that arise from relying too heavily on petroleum. This is partly due to the temptation posed by easy money, as well as the government's misguided policies in attempting to address these problems. See: Natural Resource Governance Institute, 'The Resource Curse: The

Since having gained its sovereignty over its maritime resources in 2018, Timor-Leste hopes that this will contribute to the RtD of its people and as a State. Thus, this thesis uses the RtD as a conceptual framework to find out whether its elements (participation, non-discrimination, fair distribution of benefits, the principle of PSNR and duty of cooperation) were implemented by the Contracting Parties in the 2018 Treaty's provisions. If so, then the Treaty is highly likely to contribute to the realisation of the RtD of Timor-Leste and its people. To do this, the thesis uses the elements of the RtD (as outlined in section 2.5) of the UNDRtD as they are critical for evaluating Timor-Leste's progress, especially concerning human rights and development. According to the UNDRtD, development is defined as a human right which ensures that every human person and peoples or communities are involved in decision-making processes that impact their lives and promote participation without discrimination. The RtD also advocates for the fair distribution of benefits, imposes obligations on States to prevent activities under their jurisdiction from harming the environment of their individuals and people, and encourages States to cooperate with one another to promote development. Thus, the RtD is the most appropriate approach to use in this thesis, as Timor-Leste relies heavily on its oil and gas revenues for its development (this will be further discussed in Chapter 2, Section 2.1). In addition, the RtD offers a multidimensional framework that extends beyond traditional economic metrics, highlighting the importance of development as a human right. It underscores the necessity of integrating economic, social, cultural,

Political and Economic Challenges of Natural Resource Wealth' (2015) NRGI Reader 1.

and political processes within this framework. [47] However, effective implementation is crucial for these elements to fulfil their intended purpose fully. Therefore, to understand better the aim of this study, it is imperative to provide background information on previous JDAs and the 2018 Treaty.

1.3.1 TGT (1989)

In 1972, while Timor-Leste was still under Portuguese rule, Australia and Indonesia signed an agreement delimiting their seabed boundaries in the Timor Sea.[48] Nevertheless, a 'gap' was left between the eastern and western parts of the Australia-Indonesia seabed boundary in the area to the south of Timor-Leste.[49] This gap is an area rich in petroleum resources and, therefore, has great economic significance to both States;[50] however, it became unspecified as Australia and Indonesia could not define it.[51] The reason for this is that Portugal refused to participate in the negotiations,[52] as they were waiting for the conclusion of the negotiations that led to the 1982 UNCLOS in order to determine appropriate guidelines.

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[47] UNDRtD (n9) Preambular, Para 2

[48] Agreement Between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, Supplementary to the Agreement of 18 May 1971 (adopted on 9 October 1972 entered into force on 8 November 1973) [Hereinafter Treaty 1972].

[49] Robert J King, 'Certain Maritime Arrangements in the Timor Sea, the Timor Sea Treaty and the Timor Gap, 1972-2007: Submission to the Australian Parliament's Joint Standing Committee on Treaties' (2007) 1, 2.

[50] Paul Cleary, *Shakedown: Australia's Grab for Timor Oil* (Allen & Unwin 2007) 4-8.

[51] Anthony Bergin, 'The Australian-Indonesia Timor Gap Maritime Boundary Agreement' (1990) 5 (1-4) International Journal of Estuarine and Coastal 383, 384

[52] Rebecca Strating, 'Maritime Territorialization, UNCLOS and the Timor Sea Dispute' (2018) 40 (1) Contemporary Southeast Asia: A Journal of International and Strategic Affairs 101, 103.

The problem was that the Australian government had already developed its position on maritime boundaries by then. Since 1953 (i.e., before the negotiations), Australia had placed a formal claim, strongly opposed by Portugal,[53] to its entire continental shelf.[54] Australia argued that the boundary should be determined in accordance with the concept of 'natural prolongation'.[55] At that time, this view was supported by the International Court of Justice (ICJ), which had found, in its Judgment in the 1969 North Sea Continental Shelf cases, that the natural prolongation should be a key consideration in delimiting the continental shelf.[56]

[53] Portugal's view was that there was one continental shelf which should be delimited on the basis of equidistance. Portugal used the UNCLOS (1982) (n20), Article 57, 76 and 82 which confirmed median line boundaries as the chosen solution for disputes when opposing coastlines are fewer than 200 nautical miles apart. Also see: John Robert Victor Prescott, 'The Australian-Indonesian Continental Shelf Agreements' (1972) 82 Australia's Neighbours 1,1-2.

[54] Australia's claim is informed by the 1958 Convention on the Continental Shelf, Art 2 (1) and confirmed by the UNCLOS (1982) (n20), Art. 77 which also grants coastal states such as Australia the right to claim an EEZ extending up to 200 nautical miles from the baseline of their territorial seas. Also see: Robert J. King, 'Inquiry into Australia's Relationship with Timor-Leste: Submission no.13' Joint Standing Committee on Foreign Affairs, Defence and Trade Foreign Affairs Sub-Committee.

[55] The term is in the legal definition of the continental shelf set out in Article 76 (1) of UNCLOS: 'the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory.' International courts and tribunals have referred to natural prolongation in dealing with continental shelf disputes. See: *Case Concerning the Continental Shelf Case (Tunisia v. Libyan Arab Jamahiriya)* (Judgement) [1982] ICJ Rep 46 Para 43; *Case Concerning the Continental Shelf (Libyan Arab Jamahiria/Malta)* (Judgement) [1985] ICJ Rep 55, Para 77.

[56] The ICJ ruled that: 'delimitation is to be effected . . . in such a way as to leave as much as possible to each party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of another state', see: *North Sea Continental Shelf Cases (Federal Republic of German/Denmark; Federal Republic of Germany Netherlands)* (Judgement) [1969] ICJ Rep 3.

While Indonesia did not share the Australian claim,[57] it supported the median line claims propounded by Portugal. Therefore, both parties welcomed the 1972 agreement.[58] In addition, part of the 1972 settlement included the establishment of a joint development zone. Under Article 7 of this agreement,[59] the two governments were to consult and seek:

> […] to reach agreement on the manner in which the accumulation or deposit shall be most effectively exploited and in the equitable sharing of the benefits arising from such exploitation' where a 'single accumulation of liquid hydrocarbons or natural gas, or if any other mineral deposit' extends across any of the [border] lines.

Consequently, years after trying to reach an agreement to deal with the gap left between the eastern and western parts of the Australia-Indonesia seabed boundary, a JD, officially known as the 'Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia' or, the Timor Gap Treaty (TGT), was signed in December 1989 and came into effect in February 1991.[60]

The TGT was signed while Timor-Leste was under Indonesian occupation. Thus, this agreement was meant to deal provisionally with the gap in the seabed area not covered by the 1972 Seabed Agreement between Australia and Indonesia. The TGT established a Zone of Cooperation comprised of three zones of jurisdiction: Areas A,

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[57] Peter Hastings, 'Whose Riches Under the Sea?' *The Sydney Morning Herald* (3 June 1972).

[58]Agreement Between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia (n48); Also see: King (n49) 11-12; Hastings (n57)

[59] Treaty (1972) (n48).

[60] TGT (1989); See Also: Australian Parliament, Senate, Foreign Affairs, Defence and Trade References Committee (n26).

B and C. Area A was the largest area and lay in the centre of the Zone. The rights and responsibilities of Australia and Indonesia in relation to this area were exercised by a Ministerial Council and a Joint Authority responsible to the Ministerial Council.[61] Area B, situated at the southern end of the Zone, was administered by Australia, and Area C, situated at the northern end of the Zone, was administered by Indonesia.

However, this agreement raises several issues. It was claimed by the former Indonesian Justice Minister, Professor Mochtar Kusumaatmadja, in 1976[62] that the signing of this agreement was made in return for recognition of Indonesia's sovereignty over Timor-Leste. In addition, it is claimed by Triggs and Bialek that Indonesia feared bringing the matter before an international arbiter, as this would draw attention to its illegal occupation of Timor-Leste.[63] Authors such as Clark asserted that the Australian government had acted in breach of its international obligations by entering into the TGT with Indonesia.[64] He believed that the TGT was void and null under international law as it contravened the 1970 Declaration on

[61] See: King (n49) 7.

[62] Professor Mochtar Kusumaatmadja had been a senior member of the Indonesian team which had negotiated the the Australia-Indonesia seabed boundaries in 1971 and 1972, See: R J King, 'Certain Maritime Arrangements - Timor-Leste Submission 27' (Lao Hamutuk, March 2017).

[63] Gillian Triggs and Dean Bialek, 'The New Timor Sea Treaty and Interim Arrangements for Joint Development of Petroleum Resources of the Timor Gap' (2002) 3 MJIL 322, 327.

[64] Roger S Clark, 'The Timor Gap: The Legality of the "Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia"' (1992) 4 (1) Pace Int'l L Rev 69, 70.

Principles of International Law Concerning Friendly Relations and Cooperation Among States[65] and the 1974 Resolution on the Definition of Aggression.[66]

As a consequence, Portugal criticised Australia for signing this agreement as it had not been involved in the TGT negotiations. Eventually, in 1991, Portugal, which had left Timor-Leste in 1975 but acted as its administering power in accordance with Chapter XI of the UN Charter,[67] instituted proceedings against Australia at the ICJ.[68] By negotiating, signing, and implementing the TGT, Portugal alleged that Australia had infringed the rights not only of the people of Timor-Leste to self-determination and permanent sovereignty over its natural resources but also of Portugal as the administering power.[69] However, the ICJ ruled that it could not decide the dispute as it would also be required to assess the lawfulness of Indonesia's annexation of Timor-Leste, and this could not have been undertaken without Indonesia's consent.[70]

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[65] Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) UN Doc. A/8018 (1970) Preamble, Para 28: 'The territory of a state shall not be the object of acquisition by another state resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.'

[66] UNGA Res 3314 (XXIX) UN Doc A/9631 (14 December 1974) Art 5, Para 3: 'No territorial acquisition or special advantage resulting from aggression shall be recognized as lawful.'

[67] UN Charter (n1) Art 73.

[68] *East Timor (Portugal v. Australia)* (Judgement) [1995] ICJ Rep 92; Also see: Christine M. Chinkin, 'Symposium: The East Timor Case before the International Court of Justice, East Timor Moves into the World Court' (1993) 4(2) EJIL 206

[69] *East Timor (Portugal v. Australia)* (n68) Para 19.

[70] *East Timor (Portugal v. Australia)* (n68) Para 35; Also see: The only two who were against the decision were Judge Weeramantry and Judge Skubiszewski, who stated that 'recognition of annexation erodes self-determination.' See: *East Timor (Portugal v. Australia)* (n66) Para 38.

1.3.2 TST (2002)

After Timor-Leste's independence in 2002, Timor-Leste aimed to negotiate a permanent maritime boundary based on equidistance or a median line. The previous JDA, the TGT, was invalid after independence and, as a result of different interpretations on how to delimitate the boundary between Timor-Leste and Australia, the Timor Sea Treaty (TST), officially known as the 'Timor Sea Treaty between the Government of East Timor and the Government of Australia,' which is identical in scope, was signed.[71] This Treaty also fails to provide a permanent maritime border within the meaning of Article 83 UNCLOS[72] between Timor-Leste and Australia, and states in Article 22: 'This Treaty shall be in force until there is a permanent seabed delimitation between East Timor and Australia'.[73] The TST provides a legal and administrative framework for the JD of petroleum resources in an area referred to as the Joint Petroleum Development Area (JPDA). This treaty only creates one JPDA, which splits petroleum revenues under a 90:10 ratio in favour of Timor-Leste[74] (see Table 3, Chapter 3, Section 3.3).

The treaty also established that the reservoirs of the Greater Sunrise, the wealthiest known petroleum deposits in the Timor Sea, be unitised on the basis that 20.1 per cent lies within the JPDA and that the balance of the deposit, 79.9 per cent, lies to the east of the JPDA, which is within Australia's jurisdiction.[75] Thus, this treaty left Timor-Leste with an approximately 18 per cent share of the Greater Sunrise

[71] TST (2002) (n26); Also see: Triggs and Bialek (n63).
[72] TST (2002) (n26) Preamble and Art 2.
[73] Ibid Art 22.
[74] Ibid Art 4(a).
[75] Ibid Annex E under Article 9 (b): Unitisation of Greater Sunrise.

revenue,[76] as 90 per cent belongs to Timor-Leste and only 10 per cent belongs to Australia. As for the TGT, the regulatory authority over the JPDA was exercised by a Joint Commission, though this time, it consisted of two representatives from Timor-Leste and one from Australia.[77] In addition, the application of domestic laws in the JPDA was the same as in the TGT.[78]

However, despite the bigger share, members of the Timor-Leste leadership maintained that Timor-Leste was entitled under international law to more of the Greater Sunrise fields than the area indicated by Annex E[79] of the TST. Thus, the reasons for the disputes over the delimitation of the maritime boundaries between Timor-Leste and Australia centred around whether the delimitation of the boundary should be based on the distance between Timor-Leste and Australia or on the principle of continental shelves.[80] Consequently, Timor-Leste's leadership continued to demand formal negotiations with Australia towards the establishment of permanent maritime boundaries.

1.3.3 CMATS (2006)

In 2004, Timor-Leste started fresh negotiations with Australia about the border. In 2006, the 'Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea' (CMATS 2006)[81] was signed, though

[76] Eighteen percent from twenty per cent within JPDA; See: Charles Scheiner, 'The Timor-Leste-Australia Maritime Boundary Treaty' (21 March 2018) La'o Hamutuk, 1, 2

[77] TST (2002) (n26) Art 6: Regulatory Bodies.

[78] Ibid Art 14 (b) and (c).

[79] Ibid Annex E under Article 9 (b): Unitisation of Greater Sunrise.

[80] Mats Lundahl & Fredrik Sjöholm, 'The Oil Resources of Timor-Leste: Curse or Blessing?' (2008) 21 (1) The Pacific Review 67.

[81] CMATS (2006) (n26).

no permanent border was set. This treaty included a provision specifying that the treaty would remain in force for 50 years (until 2057), which in practice meant that no permanent maritime boundary would be concluded during the operational lifetime of any Timor Sea oil and gas field.[82]

This treaty also required that the Greater Sunrise oil and gas field's revenue be split evenly between the two States.[83] Therefore, instead of 18 per cent left for Timor-Leste, the revenue of the Greater Sunrise would be split fifty-fifty. This treaty was designed to enable the joint exploitation of the Greater Sunrise field. Nevertheless, on 10 January 2017, Timor-Leste unilaterally terminated CMATS (2006)[84] following an agreement between Australia and Timor-Leste to negotiate permanent maritime boundaries in the Timor Sea.

1.3.4 2018 Treaty

Finally, sixteen years after the independence of Timor-Leste and years of disputes over the delimitation of the maritime boundaries,[85] Australia and Timor-Leste agreed on a permanent maritime boundary for the first time. In March 2018, the two States signed the 'Treaty Between Australia and the Democratic Republic of Timor-Leste

[82] Ibid Art 12: Period of this Treaty.
[83] Ibid Art 5: Division of Revenues from the Unit Area.
[84] Parliament of Australia, 'Certain Maritime Arrangements- Timor Leste' (*Aph,* 2017) https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/CMATS/Report_168_-_Certain_Maritime_Arrangements_-_Timor-Leste/section?id=committees%2Freportjnt%2F024051%2F24472 accessed 06 August 2019; Also see: Rebecca Strating, 'What's behind Timor-Leste's 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 accessed 25 September 2019.
[85] Greenlees (n16).

Establishing Their Maritime Boundaries in the Timor Sea' (2018 Treaty),[86] which entered into force by an exchange of notes between the countries' Prime Ministers in Dili on 30 August 2019.[87]

This treaty was achieved through the first Conciliation undertaken by parties to UNCLOS. The conclusion of this treaty was no doubt an important symbolic step as Timor-Leste finally gained its full independence, i.e., permanent sovereignty over its natural resources in its maritime areas.

The 2018 Treaty creates a Greater Sunrise Regime for the JD, exploitation and management of the Greater Sunrise gas fields. In this Regime, the two States agree to share the upstream revenue on a 70:30 basis in favour of Timor-Leste, provided the pipelines go to Timor-Leste.[88] In the event that the oil and gas are piped to and processed in Australia, Timor-Leste will receive 80 per cent of the revenues and Australia 20 per cent. Previously, revenue was split evenly between the States in 2006.[89] The reason why Timor-Leste's negotiators favoured the development of a pipeline and an onshore facility in Timor-Leste was to help develop the State's

[86] 2018 Treaty (n17); Also see: March and Dziedzic (n17).

[87] Government of Timor Leste and Government of Australia, 'Signing of Memorandum of Understanding and Cooperation Agreement between Timor-Leste and Australia' (*Lao Hamutuk,* 2019) https://www.laohamutuk.org/Oil/Boundary/2019/Treaty/GovPRSigningMOU28Aug2019en.pdf accessed 10 July 2020

[88] 2018 Treaty (n17), Annex B: Greater Sunrise Special Regime, Art 2 (2). Also see: Clive Schofield and Bec Strating, 'What's Next for Timor-Leste's Greater Sunrise?' *The Diplomat* (3 April 2018) https://thediplomat.com/2018/04/whats-next-for-timor-lestes-greater-sunrise/ accessed 02 August 2018.

[89] CMATS (2006) (n26), Art 5 (1). Also see: BBC News, 'Australia and East Timor Sign Historic Maritime Border Deal' *BBC News* (Australia 7 March 2018) https://www.bbc.co.uk/news/world-australia-43296488 accessed 06 July 2018 accessed 20 August 2019.

industrialisation and create employment in the country.[90] On the other hand, although Australia maintains it was neutral, it seems to have favoured the processing of gas in Darwin,[91] possibly because Darwin has existing infrastructure, such as pipelines and processing plants, that can be utilised for gas processing. On the other hand, Timor-Leste lacks the necessary infrastructure and would need to invest heavily in building new facilities. In addition, processing gas in Darwin allows Australia to reap the economic benefits of its investments in developing the gas industry in the Northern Territory.[92] The fact that Australia favoured gas processing in its territory reveals the power dynamics between developed and developing States in the global economy. Developed States had always held a strong dominance of economic and political power.[93] This can be seen as a continuation of this trend and highlights the ongoing challenges of economic development and inequality in the global economy.

However, the 2018 Treaty emphasises that the two States are '[c]onscious of the importance of promoting Timor-Leste's economic development'.[94] Indeed, the Treaty requires the new Greater Sunrise regime to set out its local content[95] to support Timor-Leste's economic development by providing new opportunities for income and promoting commercial and industrial development through the

[90] Anne-Marie Schleich, 'The Historic 2018 Maritime Boundary Treaty between Timor-Leste and Australia' (2018) 573 ISPSW Strategy Series: Focus on Defence and International Security 1, 5.
[91] Ibid.
[92] Our Territory Our Strategy, 'Investors' (*Territory Gas,* NY) https://territorygas.nt.gov.au/information-for/investors accessed on 20 February 2024.
[93] Balakrishnan Rajagopal cited in Arts & Tamo (n8) 224.
[94] 2018 Treaty (n17) Preambular, Para 9.
[95] 2018 Treaty (n17) Annex B, Art. 14.

transfer of knowledge, technology, and research capability.[96] Therefore, processing gas in Timor-Leste would help promote Timor-Leste's economic development, and Australia should take this into consideration.

The drawback of this new Treaty is that Timor-Leste was barred from claiming compensation from Australia for previous oil and gas revenues that Australia had gained in Timor-Leste territory, as Article 10 stipulates that neither Party shall have a compensation claim.[97] As for Australia, Article 10 reduces the risk of future legal challenges. Yet, it is a drawback for Timor-Leste because it is estimated that Australia has received more than US$2.2bn in tax from Laminaria-Corallina since 1999 and received another US$2.4bn in revenue from other fields.[98] Kim McGrath, an adviser to the Timor-Leste government, claims that Australia owes Timor-Leste billions.[99] On the one hand, Timor-Leste may have decided not to ask for compensation because it felt that Australia had been generous with the country during challenging times.[100] On the other hand, it may also be that asking for compensation could influence the negotiations in a way that would not be beneficial for Timor-Leste. For instance, the

[96] 2018 Treaty (n17) Annex B, Art 14 (2) C.

[97] 2018 Treaty (n17) Article 10; Also see: Helen Davidson and Christopher Knaus, 'Treaty Confirms Australia Profited from Timor-Leste Oil and Gas, Rights Groups Say' *The Guardian* (Timor-Leste 7 March 2018) <https://www.theguardian.com/world/2018/mar/07/treaty-confirms-australia-profited-from-timor-leste-oil-and-gas-rights-groups-say> accessed 11 September 2019.

[98] La'o Hamutuk, 'How much oil money has Australia already stolen from Timor-Leste? A look at Laminaria-Corallina' (*Lao Hamutuk,* March 2018) < https://www.laohamutuk.org/Oil/Boundary/laminaria_revenues.htm> accessed 21 September 2019.

[99] Davidson and Knaus (n97).

[100] Ibid.

resolution of the dispute may take longer, resulting in the depletion of the oil and gas resources in the contested area.

Therefore, it can be claimed that the treaty negotiations were not conducted on equal footing, as Timor-Leste lacked sufficient bargaining power in its dealings with Australia, which underscores the power imbalance between the two States. As a result, the 2018 Treaty reflects this unequal bargaining power. Consequently, negotiations over conflicting maritime boundary claims are more likely to be successful when the powerful State is willing to cooperate in resolving the dispute.

Furthermore, some may contend that the Timorese national advisors lacked the requisite skills or expertise in negotiating maritime boundaries, especially considering that Australia's maritime capabilities have been developed significantly longer than those of Timor-Leste. It is worth noting that in the negotiations, Timor-Leste employed not only national negotiators for the 2018 Treaty but also engaged foreign negotiators with the appropriate experience and expertise in maritime negotiations.[101] For instance, the Counsel and Advocates in the Conciliation are foreign nationals, while the representatives and advisors involved in the Conciliation (Timor-Leste v Australia) include nationals and foreign nationals.[102] These national advisors represent the people of Timor-Leste, and their presence cannot be

[101] The legal representatives were foreign nationals. See: Permanent Court of Arbitration, 'Timor-Sea Conciliation (Timor-Leste v. Australia)' (*PCA,* NY) < https://pca-cpa.org/cn/cases/132/> accessed 19 December 2024.

[102] *Timor Sea Conciliation (Timor-Leste v. Australia)* Annex 1 to Report- The Parties' Representatives, PCA Case No. 2016-10 (PCA, 2016), 09 May 2018, Permanent Court of Arbitration [PCA]

disregarded despite their limited expertise in maritime dispute negotiations. They possess a deep understanding of their country's interests, priorities, and legal positions, ensuring that these concerns and needs are adequately represented in the negotiations. Although the power differences in the negotiations may not be entirely eliminated, they can be addressed more equitably by involving independent foreign negotiators with expertise in maritime negotiations and by investing in training and capacity-building for the negotiating team of the less powerful Party to enhance their skills and expertise in this area. Moreover, diplomatic efforts to facilitate dialogue between parties, and international laws and agreements can address power imbalances by providing a strong or robust legal framework for the Parties involved in the dispute.

Consequently, this thesis will not in any way attempt to explore any possible compensation owed by Australia to Timor-Leste. On the contrary, it will look to the future to see whether the current 2018 Treaty's provisions will contribute to the RtD of Timor-Leste and its people. Therefore, to understand the area of this study, it is important to outline the research methodology and methods in the next section.

1.4 Methodology and Methods

This study uses a socio-legal research methodology, integrating a doctrinal method alongside desk-based research.

1.4.1 Socio-legal Methodology

Henn *et al.* define 'methodology' as the research strategy as a whole. It is the rationale for the research approach and the lens through which the analysis

occurs.[103] The recognition that the law operates in a wider social context has led to the development of the socio-legal methodology as a framework for conducting legal research**.**

There is no generally accepted definition of socio-legal research.[104] Jolly defines socio-legal research as a strategy that investigates law in action and goes beyond the absolute doctrinal analysis of authoritative legal texts.[105] However, Harris argues that law can only be understood well if it is studied from a social and political perspective.[106] It can be argued that socio-legal methodology is, thus, an interdisciplinary approach to analysing the law, legal phenomena, and relationships between these notions and the wider society. Unlike the doctrinal methodology, which is unable to relate what the law enacts to what happens in practice,[95] the main advantage of the socio-legal methodology is that it reveals the real impact of the law and how reality impacts the application of the law.

This methodology is the most appropriate for the current research project because it will not only enable the identification of the impact of JPDAs on the Government, Timorese people/community, the oil and gas sector, and the aspects that affect the RtD to be realised in Timor-Leste but also lead to an improved understanding of the

[103] Matt Henn et al, *A Critical Introduction to Social Research* (2nd edn, Sage 2009) 10.

[104] Sarah Blandy, 'Socio-legal Approaches to Property Law Research' (2014) 3 (3) Property Law Review 166.

[105] Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson 2007) 245.

[106] Phil Harris, 'Curriculum Development in Legal Students' (1986) 20 Law Teacher 110.

JPDAs as social phenomena. To some extent, this methodology is interdisciplinary[107] as it takes into account other disciplines such as economics, politics, history, and cultural studies. It moves away from solely looking at legal instruments to build a more contextual analysis that incorporates causal, structural, and functional connections between JPDAs and social, historical, and economic factors.

In sum, this methodology will help fulfil the aim of this research, namely, whether the 2018 Treaty's provisions will contribute to the realisation of the RtD of Timor-Leste and its people. More precisely, this methodology will appraise how the previous treaties of JD hydrocarbon management affected the realisation of the RtD of Timor-Leste and its people in the past,[108] identify whether the key elements of the RtD can contribute to the realisation of the RtD of Timor-Leste and its people in terms of improving their living conditions;[109] assess whether the new treaty can be used as an example for other developing States that have similar situations or pending maritime disputes;[110] and suggest potential solutions with a view to strengthening Timor-Leste's national laws and international instruments that deal with offshore hydrocarbon management.[111] In addition, this methodology also helps answer the subsidiary questions set out as research objectives in section 1.2.

[107] Reza Banakar & Max Travers, 'Introduction to Theory and Method in Socio-Legal Research' in Reza Banakar ans Max Tavares (eds) Theory *and Method in Socio-Legal Research* (Hart 2005) x.
[108] Chapter 3 and 4.
[109] Chapter 4 (intra-State Relationship)
[110] Chapter 5, section 5.5.
[111] Chapter 5, section 5.4.

1.4.2 Methods

Henn *et al.* describe the 'method' as the range of techniques available to researchers to collect evidence about the social world.[112] A doctrinal method will be employed to conduct the analysis for this study. A doctrinal method is concerned with the analysis of the legal doctrine and how it has been developed and applied.[113] In order to do so, primary sources will be used to analyse the legal content of the previously mentioned treaties, international instruments, statutes, and court decisions. These sources will be supplemented by secondary resources in the fields of law, politics, economics, and anthropology, such as books, journal articles, conference papers, working papers, reports of international and local NGOs, Australian and Timorese government reports, and newspapers.

This method is the most appropriate for this research because it will facilitate the analysis of the primary sources mentioned earlier and integrates well with the socio-legal methodology. Without its co-application with the socio-legal methodology, the doctrinal analysis could be considered irrelevant because it is often conducted without due consideration of the social, economic, and political significance of the legal process. Law does not operate independently; it operates within and affects society. Thus, it is pertinent to gain a better understanding of how other disciplines understand legal phenomena and the effects of the law on society.

Using socio-legal methodology and a doctrinal method in international law means applying the rules relating to treaty interpretation under Articles 31 to 33 of the

[112] Henn et. al. (n103) 10.

[113] Vijay M Gawas, 'Doctrinal Legal Research Method a Guiding Principle in Reforming the Law and Legal System towards the Research Development' (2017) 3 (5) International Journal of Law 128.

Vienna Convention on the Law of Treaties (VCLT 1969).[114] When analysing the JDAs, this thesis will thus use these legal provisions as they are recognised tools of treaty interpretation in the VCLT (1969) and customary international law.[115] Article 31 VCLT (1969) provides the general rule of interpretation, and treaty provisions must be interpreted according to their ordinary meaning, context, object, and purpose. In this light, this thesis assesses each JDA, looking for legal provisions that refer to the elements of the RtD, such as participation, non-discrimination, PSNR, fair distribution of benefits and duty of cooperation. This search for words also includes similar concepts that can be understood to be linked to those elements. The legal provisions that include these words are then interpreted using textual, contextual, and object-and-purpose interpretation. In addition, this thesis also takes into account that the interpretation of treaties changes over time as the interpretation of the treaties is in light of the present situation.

Article 32 VCLT (1969) offers supplementary means of interpretation, including the *travaux préparatoires*, i.e., the official record of negotiations of the Treaties and the circumstances of the conclusion of the treaty. Unfortunately, in spite of the author's best endeavours to locate all essential documents, notably relating to the negotiations (by, for example, contacting the Maritime Boundary Office in Timor-Leste), it has not always been possible to obtain them as they are highly confidential. This means that the *travaux préparatoires* cannot be used. Thus, the interpretation and analysis of these Treaties will be supported by information gathered on official

[114] Vienna Convention on the Law of Treaties (adopted May 23 1969 and, entered into force on 27 January 1980) 1155 UNTS 331 [Hereinafter VCLT 1969].
[115] Carlo Focarelli, *International Law* (Edward Elgar 2019) 174-175.

websites, in official records such as the Exchange of Letters[116] and the National Interest Analysis of the Treaties, cases, and in scholarly articles generated during and after the negotiations. Relatedly, the lack of prior research on the subject or on JPDAs related to the RtD is a limitation that ought to be highlighted.

Article 33 of the VCLT (1969) also mandates that treaty interpretation takes into account all authenticated linguistic versions of the treaty. Fortunately, the JDAs in the Timor Sea are published in one language, English, thus not requiring examining other treaty versions.

Therefore, by combining a socio-legal methodology with a doctrinal method based on Artiles 31 to 33 of the VCLT (1969), this thesis contributes to gaining a better understanding of these legal instruments.

1.5 Literature Review

This vital stage of the research process involves evaluating previous research in the subject area and identifying which work may be relevant to the research objectives. This helps to establish academic opinion in the relevant area and expose gaps in previous research, thus highlighting the originality of the study undertaken. The literature review is divided according to the relevant topics for this thesis. Therefore, the main areas for examination are the JDAs, maritime disputes, and the RtD.

[116] The Exchange of Letters serves as an illustration of an 'agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty' within the meaning of Art 31 (2) (a) of the VCTL (1969). It is therefore part of the context for interpreting the treaty. In order to provide legal certainty, Article 23 (2) under Annex B, envisages that the Parties will signify their joint understanding of this by an exchange of notes. VCTL (1969) (n114).

1.5.1 Joint Development Agreements (JDAs)

The concept of JDAs has received much attention from legal writers in environmental law and the law of the sea. Despite the plethora of publications on JDAs, there is no generally accepted definition for the concept. Each author reports their own definition, though they all seem to include the same basic features.

A JDA is essentially a means to avoid settling a maritime dispute which may take many years to resolve,[117] as well as a means for both States involved to explore and exploit their resources[118] before they are depleted.[119] For example, Marshall[120] claims that the concept of JDA has become increasingly accepted as a constructive means of settling difficult disputes involving international maritime boundary claims, i.e., disputes relating to the demarcation of the different maritime zones between or among states.[121] States enter into disputes with neighbouring States, each of them laying sovereignty claims over islands and maritime zones. As the world economy is increasingly dependent on ocean-based resources, many coastal States are

[117] Thomas A Mensah, 'Joint Development as an Alternative Legal Arrangement in Offshore Maritime Disputes' in Rainer Lagoni & Daniel Vignes (eds), *Maritime Dispute* (Brill 2006) 146; David H Anderson, 'Strategies for Dispute Resolution: Negotiating Joint Agreements' in Gerard Blake et al. (eds)., *Boundaries and Energy: Problems and Prospect* (Kluwer 1998) 475.

[118] Ibid 146; Mashiro Miyoshi, 'The Basic Concept of Joint Development of Hydrocarbon Resources on the Continental Shelf' (1988) 3 IJECL 1, 5

[119] Ibrahim FI Shihata & William T Onorato, 'Joint Development of International Petroleum Resources in Undefined and Disputed Areas' (1996) 11 (2) Foreign Investment Law Journal 299, 300; Triggs and Bialek (n63) 322; Junaidu Bello Marshall, 'Joint Development of Offshore Oil and Gas in the Gulf of Guinea: A Case of Energy Security for Nigeria and Cameroon' (2014) 32 Journal of Law, Policy and Globalization 138, 141.

[120] Marshall (n119) 141.

[121] Monjur Hasan et al., 'Protracted Maritime Boundary Disputes and Maritime Laws' (2018) 2 (2) Journal of International Maritime Safety, Environmental Affairs and Shipping 89.

increasingly becoming concerned about marine resources.[122] Often, negotiations, the classic first step to settle a dispute, fail to arrive at a solution.

In fact, Miyoshi,[123] Shihata and Onarata[124] claim that a JDA is usually applied where boundary delimitation has been put to one side or delayed without prejudice to the validity of the conflicting claims. Thus, a JDA is a mechanism whereby the interested States agree to jointly explore and exploit and share any hydrocarbons found in the area subject to overlapping claims without settling the maritime boundary dispute.[125] In other words, a JDA is often considered a useful temporary solution, as was the case for Timor-Leste, because the agreements allowed for the joint exploitation of petroleum resources in a designated area of the Timor Sea pending a final delimitation.[126]

Authors such as Churchill[127] acknowledge that a JDA may play an important role in facilitating a solution to the dispute and unblocking otherwise deadlocked negotiations over a boundary. Nevertheless, Miyoshi and Valencia[128] maintain that a JDA is clearly neither the best nor the permanent solution to unresolved boundaries,

[122] Ibid 90.
[123] Miyoshi (n118) 5.
[124] Shihata & Onorato (n119) 299, 300.
[125] Ian Townsend Gault, 'Joint Development of Offshore Mineral Resources-Progress and Prospects for the Future' (1988) 12(3) Nat Res Forum 275, 286.
[126] Zhiguo Gao, 'The Legal Concept and Aspects of Joint Development in International Law' (1998) 13 (1) Ocean Yearbook Online 107, 112.
[127] Robin R Churchill, 'Joint Development Zones: International Legal Issues' in Hazel Fox (ed), *Joint Development of Offshore Oil and Gas* (British Institute of International and Comparative Law, 1990) 55, 57.
[128] Mark J Valencia and Mashiro Miyoshi, 'Southeast Asian Seas: Joint Development of Hydrocarbons in Overlapping Claim Areas' (1986) 16 (3) Ocean Development International Law 211, 247.

but, in some situations, it may be the only alternative to a moratorium or confrontation and conflict.

Okafor[129] concludes that controversies surrounding the concept of JD make it difficult to accept the concept as a necessary legal approach. However, based on how many JDAs have been settled, it can be argued that JD is now mandated under customary international law, and there is 'a legal obligation for cooperation to avoid unilateral exploitation and a legal obligation to negotiate in good faith towards positive cooperation for joint development.'[130] Consequently, this thesis adopts the definition of a JDA as a temporary solution for the purpose of joint exploration of hydrocarbon resources pending a final delimitation.

1.5.2 JDAs in Timor-Leste

After reviewing the secondary literature on JDAs and concluding that a JDA is a temporary solution for both contracting parties pending final delimitation, this section provides an overview of the opinions of legal scholars on each JDA in the Timor Sea. It can be asserted that the JDAs relating to the Timor Sea also fall within the above definition in terms of purpose, scope, and limitations. This section will now review the JDAs in Timor-Leste while under Indonesian occupation until the current date.

[129] Chidinma Bernadine Okafor, 'Joint Development: An Alternative Legal Approach to Oil and Gas Exploitation in the Nigeria-Cameroon Maritime Boundary Dispute?' (2006) 21 (4) International Journal of Marine and Coastal Law 489, 517.
[130] Ibid.

1.5.2.1 TGT (1989)

The TGT (1989) faced criticism on many levels. Clark[131] and Sforza[132] believed that the Australian government had acted in breach of its international obligations by entering into the TGT with Indonesia (see section 1.3.1). The desire to exploit oil fields was the main economic rationale for Indonesia's annexation of Timor-Leste and Australia's tacit approval of gross violations of human rights, as argued by Aditjondro.[133] Furthermore, Hendrapati[134] claimed that the TGT (1989) was arranged by the States to avoid conflict as a result of the controversial issue of oil and gas exploration. This is in line with the definition provided by legal scholars (section 1.5.1) on JDAs, which state that a JDA is usually arranged by the States to avoid settling a maritime dispute, which may take many years to resolve.[135]

On the other hand, the TGT was identified by Churchill as an alternative to a boundary[136] and referred to by Kaye[137] as a 'triumph of compromise' and that it could be used as an example to other States.[138] It is argued that the TGT (1989) did facilitate oil and gas exploration within the Zone of Cooperation[139] and was accordingly

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[131] Clark (n64) 74.
[132] Julie M Sforza, 'The Timor Gap Dispute: The Validity of the Timor Gap Treaty, Self-Determination, and Decolonization' (1999) 22 Suffolk Transnat'l L Rev 481.
[133] George J Aditjondro, *'Is Oil Thicker than Blood? A Study of Oil Companies' Interests and Western Complicity in Indonesia's Annex of East Timor* (Nova Science Publishers 1999) 107-115.
[134] Marcel Hendrapati, 'Maritime Expansion and Delimitation after the Timor Gap Treaty' (2015) 5 (1) Indonesian Law Review 69.
[135] Mensah (n117) 475.
[136] Churchill (n127) 57.
[137] Stuart Kaye, 'The Timor Gap Treaty: Creative Solutions and International Conflict' (1994) 16 Sydney L Rev 72, 75.
[138] Stuart Kaye, 'The Timor Gap Treaty' (1999) 14 Nat Resources & Environmental 92
[139] Gillian Triggs, 'Legal and Commercial Risks of Investments in the Timor Gap' (2000) 1 MJIL 1, 4–5.

described as 'an imaginative approach to breaking the deadlock in boundary negotiations',[140] though Miyoshi[141] described it as the most detailed and complex offshore JD arrangement in the world.[142]

1.5.2.2 TST (2002)

As pointed out by Heiser, the ratification of the TST (2002) was not without controversy, as the Australian government was accused of pressuring Timor-Leste's Government.[143] Likewise, King[144] also pointed out that, at the time of signing this Treaty, there was concern among civil rights groups and some members of parliament that the agreement had been pushed through too quickly and secretly. According to Cleary,[145] the TST (2002) did not establish the extent of Timor-Leste's maritime jurisdiction and rights. As a result, Timor-Leste's leaders considered the Treaty to be a temporary arrangement.[146]

However, the TST (2002) was seen as a great step forward, entitling Timor-Leste to continue to push for maritime boundary negotiations with Australia, should it wish to do so.[147] Similarly, Triggs and Bialek[148] concluded that the TST (2002) ensured the

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[140] Lian A Mito, 'The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands' (1997) 13 Am U Int'l L Rev 727, 757.
[141] Masahiro Miyoshi, 'The Joint Development of Offshore Oil and Gas in Relation to Maritime Boundary Delimitation' in Clive Schofield (ed) *Basic Legal Issues of Joint Development of Offshore Oil and Gas in Relation to the Maritime Boundary Delimitation* (International Boundaries Research Unit, 1999).
[142] John Holmes, 'End the Moratorium: The Timor Gap Treaty as a Model for the Complete Resolution of the Western Gap in the Gulf of Mexico' (2002) 35 Vand J Transnat'l L 924.
[143] Anthony Heiser, 'East Timor and the Joint Petroleum Development Area' (2003) 17 Austl & NZ Mar L Journal 54.
[144] King (n49) 46.
[145] Cleary (n50) 60-61.
[146] Ibid.
[147] Heiser (n143) 54.
[148] Triggs and Bialek (n63) 322.

continuation of development plans and the strengthening of a cooperative environment that may, in time, prove to be a 'useful prelude' to a final delimitation agreement in the Timor Sea.

1.5.2.3 CMATS (2006)

Schofield[149] stated that, like the TGT (1989) and the TST (2002), CMATS (2006) did not define a maritime boundary; instead, it provided for the equal sharing of revenues deriving from the development of a specific complex of oil and gas fields in the central Timor Sea. Yet, Schofield regarded CMATS (2006) as the best deal available to Timor-Leste as there were no alternative options and claimed that, while the agreements under CMATS (2006) are, on balance, somewhat more favourable to Australia than to Timor-Leste, they can still be viewed as beneficial to both parties.[150] However, whether CMATS (2006) constitutes an equitable agreement is a matter of interpretation.[151]

Smith[152] points out that CMATS (2006) failed to accommodate Timor-Leste's claims in relation to jurisdiction over disputed resources lying beyond the former JPDA, nor did CMATS (2006) make provision for Australia's past exploitation of such fields or address downstream activities, both of which were of considerable importance to Timor-Leste, as claimed by Cleary.[153] This agreement was also described by La'o

[149] Clive Schofield, 'Minding the Gap: The Australia–East Timor Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS)' (2007) 22 (2) International Journal of Marine and Coastal Law 189, 190.
[150] Ibid.
[151] Ibid 212.
[152] Madeleine J Smith, 'Australian Claims to the Timor Sea's Petroleum Resources: Clever, Cunning, or Criminal' (2011) 37 Mon LR 42, 71.
[153] Cleary (n50) 183-6, 209, 236-239.

Hamutuk[154] as 'an unbalanced negotiation [that] resulted in an unjust agreement for Timor-Leste.' Furthermore, Schofield argues that this agreement was signed by Australia to relieve the Australian government from an embarrassing dispute in which it was seen by some observers to be treating a small, struggling developing State unfairly.[155] Therefore, the author also stated that it would be a future challenge for CMATS (2006) to deliver sustainable development to Timor-Leste's people who are desperate for rapid change.[156]

1.5.2.4 2018 Treaty

A few articles have been written on this treaty, which was signed in March 2018. Xuexia[157] states that the 2018 Treaty was instrumental in developing the peaceful and friendly relationship between Australia and Timor-Leste. Also, inasmuch as the Treaty creates permanent maritime boundaries and maritime boundary delineation, Strating[158] argues that this was viewed as 'essential to realising Timor-Leste's sovereignty'. Furthermore, Leach[159] contends that the creation of a maritime boundary with Australia for the first time and a major increase in future revenues would be seen as a substantial victory in Dili (the capital of Timor-Leste). In contrast, the 2018 Treaty was described by Collaery,[160] a lawyer closely involved in the case,

[154] La'o Hamutuk (Walking Together in English) is an independent social justice and development communication non-government organization established in Timor-Leste in 2000 by Timorese and international human rights activists and campaigners involved in the country's struggle for independence. See: Robie (n25) 209–224
[155] Schofield (n147) 204.
[156] Ibid 218.
[157] Liao Xuexia, 'The Timor Sea Conciliation under Article 298 and Annex V of UNCLOS: A Critique' (2019) Chinese JIL 281, 322.
[158] Strating (n52).
[159] Michael Leach, 'Timor Leste' (2018) 30 (2) The Contemporary Pacific 539.
[160] Davidson & Knaus (n97).

as 'more of the same' and said a median line boundary was 'no victory at all'. It was something Timor-Leste had already been entitled to under UNCLOS since Australia signed it.

This thesis espouses the views of scholars who maintain that the 2018 Treaty is instrumental in developing the peaceful and friendly relationship between Australia and Timor-Leste. Moreover, this thesis supports the idea that the increase in future revenues will be a substantial victory for the Timorese people as it will contribute to its development in the future.[161]

1.5.3 Maritime Dispute Settlement

As JDAs are often seen as a means to avoid settling a dispute, though not always, it is important to carry out a literature review on maritime disputes, focusing on Timor-Leste more specifically.

As argued by Hasan et al.,[162] a maritime boundary dispute is a dispute relating to the delimitation of different maritime zones between or among States. It is a result of coastal states overlapping claims over the maritime zones.[163] Therefore, the prime international instrument that deals with the procedures of maritime boundary delimitation is UNCLOS. To achieve an equitable solution, UNCLOS offers two types of dispute settlement procedures. Section 1 of Part XV lists the non-compulsory procedures, which are negotiations, mediation, and Conciliation, and Section 2 of Part XV deals with the compulsory settlement procedure, which includes the International Tribunal for the Law of the Sea under Annex VI, the ICJ and the Arbitral

[161] See: Section 1.1 in this Chapter.
[162] Hasan et. al. (n121) 89.
[163] Ibid.

Tribunal created under Annex VII, and the creation of a special Arbitral Tribunal formed as a panel of experts.[164] Thus, UNCLOS provides both non-compulsory and compulsory mechanisms for dispute settlements. The maritime boundary dispute between Timor-Leste and Australia was submitted to the compulsory conciliation procedure under UNCLOS, which led to the successful settlement of the long-standing deadlock between the parties.

The Timor Sea Conciliation was initiated by Timor-Leste pursuant to Article 298 and Annex V, Section 2 of UNCLOS. The dispute submitted by Timor-Leste concerned

> […] the interpretation and application of Articles 74 and 83 of UNCLOS for the delimitation of the exclusive economic Zone and the continental shelf between Timor-Leste and Australia, including the establishment of the permanent maritime boundaries between the two States.[165]

As this was the first time this conciliation mechanism under Annex V of the 1982 UNCLOS[166] was used, it was extensively commented upon by academics. For instance, Gao[167] articulates the view that it is plausible that this case will influence future

[164] UNCLOS (1982) (n20).

[165] UNCLOS (1982) (n20), In the Dispute Concerning Maritime Delimitation Between the Democratic Republic of Timor Leste and the Commonwealth of Australia in the Timor Sea, Annex 3 Notification of Conciliation, Notification Instituting Conciliation under Section 2 of Annex V of UNCLOS (11 April 2016) Para 5, available here: https://pcacases.com/web/sendAttach/2331 accessed 20 September 2019; *Timor Sea Conciliation (Timor-Leste v. Australia)* Opening Session Transcript, PCA Case No. 2016-10 (PCA, 2016), 22 August 2016 Permanent Court of Arbitration [PCA] 19, Lines 4-18, 2, 286 29 August 2016.

[166] Permanent Court of Arbitration Press (PCA) Release, 'Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia' (Washington, 3 April 2017).

[167] Jianjun Gao, 'The Timor Sea Conciliation (Timor-Leste v. Australia): A Note on the Commission's Decision on Competence' (2018) 49 (3) Ocean Development & International Law 208.

conciliation activities regarding maritime boundaries. Through this achievement, the Timor Sea conciliation can be seen as a role model for the settlement of other maritime disputes and sovereignty issues.[168] Similarly, as highlighted by Strating,[169] the conciliation process, in this case, highlighted the usefulness of the non-binding UN Compulsory Conciliation process as a dispute resolution process, which would have implications for other maritime disputes in East Asia. The crucial role of the Commission in bringing Timor-Leste and Australia to agree on a solution was also acknowledged by the head of Timor-Leste's delegation, former President Xanana Gusmão and Australian Foreign Minister Julia Bishop.[170] Most authors[171] agree that the Timor Sea Conciliation and the signature of the resulting Maritime Boundary Treaty and associated Greater Sunrise Special Regime represent a significant achievement. This is because the Conciliation has provided important lessons[172] for other State parties to UNCLOS with unresolved maritime boundary disputes.

There is no doubt that the Timor Sea Conciliation was successful in bringing about the 2018 Treaty between Timor-Leste and Australia; however, as Xuexia[173] stated, the implications of the Timor Sea Conciliation for each Party, especially viewed from

[168] Schleich (n90) 1.
[169] Strating (n52) 119.
[170] PCA Press Release (n166).
[171] Natalie Klein, 'The Timor Sea Conciliation and Lessons for Northeast Asia in Resolving Maritime Boundary disputes' (2018) 6 (1) Journal of Territorial and Maritime Studies 30; 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; Anais Kedgley Laidlaw and Hao Duy Phan, 'Inter-State Compulsory Conciliation Procedures and the Maritime Boundary Dispute Between Timor-Leste and Australia' (2019) 10 (1) JIDS 126; Dai Tamada, 'The Timor Sea Conciliation: The Unique Mechanism of Dispute Settlement' (2020) 31 (1) EJIL 321, 321-322; Hasan et. al. (n121) 89
[172] Klein (n171) 38.
[173] Xuexia (n157) 281–325.

a long-term perspective, may differ, as the development concept of Greater Sunrise remains to be determined (whether to bring the pipelines to Timor-Leste's coasts or Australia's).

1.5.4 The Right to Development (RtD)

In order to examine the extent to which the 2018 Treaty's provisions will contribute to the RtD of Timor-Leste and its people, it is crucial to conduct a comprehensive literature review on the RtD. This will allow for the evaluation of diverse perspectives from other scholars and authors.

Although the majority of scholars and authors view the RtD as the cornerstone of the entire human rights system, serious questions about its validity and usefulness remain. While the very concept of a RtD holds legal and moral gravitas, there is uncertainty about the exact content and implications of the right.

The RtD was adopted by the UNGA under the UNDRtD in 1986.[174] It is a non-legally binding resolution that has been at the centre of intense debate among scholars and practitioners from the North and Global South.[175] Most of the literature surrounding the RtD focuses on the controversies between the Global North and the Global South, whether there is a possibility of the RtD becoming a legally binding norm, and how this right can be implemented.

[174] UNDRtD (n9).

[175] Global North are developed States; Global South are developing States. Also See: Felix Kirchmeier, *The Right to Development – Where Do We Stand? State of the Debate on the Right to Development* (Friedrich Ebert Stiftung 2006).

Several scholars[176] consider RtD to be a valuable human right. The view of development as a human right was first articulated in the public arena in 1972 by Kéba M'baye[177] during an inaugural address at the International Institute for Human Rights in Strasbourg (France), suggesting that development should be viewed as a human right. This view is also accepted by other scholars[178] and has evolved since its adoption, but as this right is contained in the UNDRtD, a non-legally binding instrument, its legal value has remained controversial. Bedjaoui[179] asserts that the RtD is seen as the most important human right or 'the necessary condition for the achievement of all other human rights',[180] a view also shared by Shue,[181] who described the RtD as the 'basic right' and Sengupta,[182] who defines it as a process of development which leads to the realisation of each human right. This right, as

[176] Bedjaoui M, 'The Difficult Advance of Human Rights Towards' in *Universality in a Pluralistic World: Proceedings at the Colloquium Organised by the Council of Europe in Co-operation with the International Institute of Human Rights* (Council of Europe, International Institute of Human Rights 1989) 32; Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Poli*cy (2nd ed, Princeton University Press 1996) Ch. 1; Arjun Sengupta A, 'On the Theory and Practice of the Right to Development' (2002) 24 Hum Rts Q 837; Subrata Roy Chowdhury & Paul De Waart, 'Significance of the Right to Development in International Law: An Introductory View' in Subrata Roy Chowdbury, Erik Denters & Paul De Waart (eds), *The Right to Development in International Law* (British Yearbook of International Law 1992).

[177] Kéba M'Baye, 'Le Droit au Développement Comme un Droit de L'Homme [The Right to Development as a Human Right], Leçon inaugurale de la Troisième Session d'enseignement de l'Institut International des droits de l'Homme [Inaugural Address of the Third Teaching Session of the International Institute of Human Rights] (1972) 5 Revue des Droits de L'homme 503.

[178] See: Sen (n45) 13-14; Shadrack Gutto, 'Responsibility and Accountability of States, Transnational Corporations, and Individuals in the Field of Human Rights to Social Development: A critique' (1984) 3 Third World Legal StudIes 175; Sengupta A (n176).

[179] Bedjaoui (n176) 32.

[180] Ibid.

[181] Shue (n176) 18-20.

[182] Sengupta (n176) 837.

claimed by Roy Chowdhury and De Waart,[183] is identified as a human right in international law. However, some commentators also characterised the concept as absurd[184] and 'catastrophic'.[185] This is because the RtD is interpreted by some as creating an international legal obligation on the part of developed States/Global North to provide development assistance to developing States/Global South. According to some legal scholars,[186] the UNDRtD was a bad law: unclear, contradictory, duplicating other already codified rights, and lacking clear obligations. Donnelly,[187] for example, considered the RtD as a 'search for the unicorn' and maintained that there is no way to claim a legal or moral right to development. The reason for the controversy, as identified by Piron,[188] is mainly caused by the absence of consensus on its status, content, and nature, which is a 'major contentious issue of the international political economy of development,' as described by Iqbal.[189]

[183] Chowdhury & De Waart (n176) 10.

[184] For example: Jack Donnelly, 'In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development' (1985) 15 Cal W Int'l L J 473,477-479.

[185] Peter Uvin, 'From the Right to Development to the Rights-Based Approach: How 'Human Rights' Entered Development' (2007) 17 (4-5) Development in Practice 597, 598.

[186] Peter Slinn, 'The International Law of Development: A Millennium Subject or a Relic of the Twentieth Century?' in Wolfgang Benedek, Hubert Isak & Renate Kicker (eds), *Development and Developing International and European Law* (Peter Lang 1999) 299–318; Allan Rosas, 'The Right to Development' in Asbjorn Eide, Catarina Krause & Allan Rosas (eds), *Economic, Social and Cultural Rights* (Martinus Nijhoff 1995) 247–256; Obiora L A, 'Beyond the Rhetoric of a Right to Development' (1996) 18 Law and Policy 355.

[187] Donnelly (184) 477-479.

[188] Laure-Hélène Piron, 'The Right to Development: A Review of the Current State of the Debate for the Department for International Development' (2002) Right to Development Report (Odi Global 2002).

[189] Khurshid Iqbal, 'The Declaration on the Right to Development and Implementation' (2007) 1 (10) Political Perspectives 1, 1-2.

Indeed, the status of the RtD in international law remains purely of a soft law nature. Yet, scholars such as Tieya[190] and Akerhurst[191] profess that the wide acceptance of the UNDRtD by the UNGA will lay a strong foundation for the establishment of the RtD as a norm of customary nature. In their view, even though the UNDRtD is not a legally binding instrument, it reflects the existence of an *opinio juris,* which may, in turn, generate customary international law.

Irrespective of its non-binding legal status, Schrijver,[192] a former member of the UN High-Level Task Force on the implementation of RtD, points out that the UNDRtD enjoys significant support at the UN. He also claims that declarations are sometimes more effective in generating agreement and then compliance and argues that the implementation of the RtD may be assisted more by guidelines that could also address intergovernmental organisations and private actors more directly than by going for a treaty-making process. Authors, such as Arts and Tamo,[193] have adopted a pragmatic approach, which is to revitalise the RtD through existing provisions of international law instead of creating an additional normative framework. To do that, these authors suggest three concrete means of implementation: international cooperation for development, accountability of both rights-holders and duty-bearers and monitoring mechanisms, and regional and inter-regional instruments and

[190] Wang Tieya, 'The Third World and International Law' in Ronald St J MacDonald & Douglas M Johnston (eds), *The Structure and Process of International Law* (Martinus Nijhoff 1986) 964.

[191] Michael Akehurst, 'Custom as a Source of International Law' (1977) 47 British Yearbook of International Law 1, 8.

[192] Nico Schrijver, 'Many Roads Lead to Rome. How to Arrive at a Legally Binding Instrument on the Right to Development?' in Stephen P Marks (eds), *Implementing the Right to Development: The Role of International Law* (Harvard School of Public Health 2008) 127–129.

[193] Arts & Tamo (n8) 221–249.

procedures. In addition, Scheinin argues that there might be an option to work towards achieving the RtD under current human rights treaties and their monitoring systems, as long as these treaties are interpreted in a way that considers their connection to development.[194]

However, the need to provide a clearly defined content and scope of the entitlement of the RtD under existing human rights treaties is important, as this can otherwise raise issues relating to its enforcement.[195] It can be asserted that these authors have similar arguments, which are agreed in this thesis, to invigorate the RtD through existing provisions of international law instead of creating a new treaty.

1.6 Gaps in Knowledge and Significance of the Study

The literature review shows that:

- JDAs are temporary solutions for the purpose of joint exploration of hydrocarbon resources pending a final delimitation;
- JDAs in the Timor Sea fall into the same definition as above;
- The Timor Sea Compulsory Conciliation represents a significant achievement because it has provided important lessons for other State parties to UNCLOS with unresolved maritime boundary disputes;
- Most authors assert that the RtD should be strengthened through existing provisions of international law instead of creating a new treaty.

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[194] Martin Scheinin, 'Advocating the Right to Development through Complaint Procedures under Human Rights Treaties' in Bard A Andreassen & Stephen Marks (eds), *Development as a Human Right: Legal, Political and Economic Dimension* (Intersentia 2010) 339.

[195] See*:* Zelalem Shiferaw Woldemichael, 'The Right to Development under the Constitution of the Federal Democratic Republic of Ethiopia: Some Reflections' (1991) Prolaw Student Journal of Rule of Law 1, 3.

Therefore, this study will offer an advanced understanding of the 2018 Treaty and will make an original contribution to scholarly research. Since no permanent maritime boundary agreement between Australia and Timor-Leste existed until 2018, there is hardly any rigorous research on this treaty. Furthermore, by studying the 2018 treaty through the lens of the RtD, this thesis offers an original understanding of maritime boundary treaties and their capacity to not only settle maritime disputes but also to support the development of States such as Timor-Leste and its population. Therefore, the absence of past research on the permanent boundary treaty linking to the RtD provides an ideal context for future analysis of the implications of this treaty and, by extrapolation, of other similar situations.

This research will also contribute to the academic literature on the significant impacts of the new treaty and serve as a direction for other researchers investigating JD offshore management. Once completed, it is hoped that the outcomes of this research will be applied on a much broader level, encouraging not just Timor-Leste but other developing States that have similar situations and/or ongoing maritime boundary disputes.

Such an instance is the South China Sea dispute between, on the one hand, the People's Republic of China and, on the other, Taiwan, the Philippines, Vietnam, Malaysia, and Brunei. Most importantly, the research will contribute to Timor-Leste's policy development in the sense that it will suggest potential solutions with a view to strengthening Timor-Leste's national laws and international instruments that deal with offshore hydrocarbon management. Now that the gaps and findings have been identified, the next section outlines the structure of this thesis.

1.7 Structure of the Thesis

This thesis will be divided into five chapters. Chapter II examines the conceptual framework of the RtD, describing its evolution, legal nature, scope, and elements.

Chapter 3 analyses whether the key elements of the RtD are incorporated in previous hydrocarbon agreements and the 2018 Treaty from an inter-State relationship (between States) perspective. This chapter also scrutinises the evolution of the key elements of RtD, such as participation and non-discrimination, fair distribution of benefits, the PSNR, and the duty of cooperation through the lens of JDAs from an inter-State perspective. This is to gain an understanding of how these treaties have progressed through the years and to determine whether the treaties are indeed a tool for achieving the RtD at an inter-State level. This chapter maps with subsidiary questions 1 and 2.

Similar to Chapter 3, Chapter 4 analyses the evolution of the key elements of RtD through the lens of JDAs but from an intra-State relationship (State-Community) perspective. It also assesses the effectiveness of national laws in Timor-Leste and whether the 2018 Treaty can help create national and international conditions favourable to the realisation of the RtD of Timor-Leste and its people. This chapter maps with subsidiary questions 3 and 4.

Chapter 5 will outline key findings and provide recommendations on the way forward for Timor-Leste to protect the RtD of its people and how to successfully manage the exploration and exploitation of its oil and gas. It will also suggest potential solutions with a view to strengthening Timor-Leste's national laws and international instruments that deal with offshore hydrocarbon management. In addition, it will assess whether the 2018 Treaty can be used as an example for other developing

States that have similar situations or ongoing maritime boundary disputes. This chapter maps with subsidiary question 5.

Finally, Chapter 6 draws the conclusion for this thesis.

Chapter 2: CONCEPTUAL FRAMEWORK - THE RIGHT TO DEVELOPMENT

2.1 Introduction

Development as a concept first entered the human rights edifice through the debate on the 'right to development'. The idea was launched by the Senegalese jurist M'Baye in 1972 during a period of radical debate about the New International Economic Order (NIEO).[1] During the first half of the 1970s, Third World countries used their numerical majority in the United Nations to try to negotiate reforms in the global political economy of trade, finance, investment, aid, and information flows as they felt there was a wide gap between them and the developed States. Dissatisfied with the existing global economic system, which they deemed unfair and biased, they believed that developed States were responsible for their lack of development because of the long period of colonial domination during which their economies were exploited and resources used for such States' benefit. Therefore, they wanted to increase their control over their own natural resources and ensure that they received a fair share of the benefits of global trade and investment. To achieve this, RtD became a key concept in the efforts of third-world countries.

For several decades, it was the subject of much discussion within the field of human rights. The discussion was intensified after the adoption of the UNDRtD in 1986,[2] which stemmed from a desire of developing States to create equal emphasis on all

[1] Karin Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1997) 16 (2) Wis Int'l L J 353, 375.

[2] United Nations Declaration on the Right to Development, UNGA Res A/41/128 (4 December 1986) [Hereinafter UNDRtD].

rights.[3] The Declaration recognised the RtD not only as a human right but also as a right that embodies all human rights and provides joint action by States as a means to implement the RtD.[4]

This study uses the RtD as a conceptual framework to realise its primary objective, i.e., to assess whether the 2018 Treaty (see Chapter 1, section 1.3.4) will contribute to the RtD of Timor-Leste and its people.

While there are other conceptual frameworks available to analyse the JDAs, including the Sustainable Development Goals (SDGs) framework,[5] the RtD is particularly well-suited for this thesis. Several reasons support the assertion that the RtD framework is the most appropriate approach. First, there is a Declaration, which, although not a binding legal instrument, serves as a robust legal instrument that defines development as a human right and places the human person at the core of development efforts. Second, the RtD is recognised in multiple legal instruments and is considered an emerging form of international customary law (section 2.3.1.2). Third, the RtD focuses on the rights of the human person and peoples or communities, thus, it focuses both individuals and collectives' rights, which aligns with the focus of this thesis. Finally, fourth, the RtD has been categorised as composite rights (section 2.3.2.2), which indicates that all rights are interconnected. Therefore, the RtD can only be achieved when each right is enhanced and none

[3] Siddiqur Rahman Osmani, 'An Essay on the Human Rights Approach to Development', in Arjun Sengupta et al (eds), *Reflections on the Right to Development* (Sage 2005) 110-126.

[4] UNDRtD (n2) Arts 1 and 4.

[5] United Nations Development Program (UNDP), 'Sustainable Development Goals' *(UNDP,* NY) https://www.undp.org/sustainable-development-goals accessed 20 August 2024 [Hereinafter UNDP SDGs].

violated.[6] Thus, for a JDA or a treaty to be successful or contribute to the RtD of a State and its people, the JDA or a treaty must incorporate all the elements of the RtD (outlined in Section 2.5) and achieve both at an individual and collective level. Furthermore, consistently applying all the elements of the RtD in Chapters 3 (inter-State relationship) and 4 (intra-State relationship) to assess the progress of the JDAs will yield significant insights into whether the 2018 Treaty contributes to the RtD of Timor-Leste and its people. This is because these elements of the RtD are included in the UNDRtD and are international principles enshrined in various international and regional legal instruments.[7]

In contrast, the Sustainable Development Goals (SDGs) do not provide the best framework to analyse the JDAs in the Timor Sea. First, they have a set of 17 global goals adopted by United Nations member states as part of the 2030 Agenda for Sustainable Development to end poverty and protect the planet.[8] They are not specifically related to the legal, economic, and contextual factors that influence JDAs. Second, unlike the UNDRtD, the SDGs are not legally binding; they are primarily voluntary, relying on countries to report their progress through voluntary national reviews and follow-up with global assessments.[9] Whereas the UNDRtD, although not legally binding, has its accountability mechanisms anchored in international human rights frameworks. In fact, the SDGs are specific plans of action rather than rights and

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[6] Arjun Sengupta, 'The Human Right to Development' (2004) 32 (2) Oxford Development Studies 179, 183.

[7] See section 2.3.1.1.

[8] UNDP SDGs (n5).

[9] UNHROHC, 'Voluntary National Reviews: OHCHR and the 2030 Agenda for Sustainable Development' (*OHCHR,* NY). <https://www.ohchr.org/en/sdgs/voluntary-national-reviews> accessed 20 August 2024.

principles under international human rights instruments. Third, the SDGs focus more on three dimensions: social, environmental, and economic.[10] By focusing on these three dimensions, the interconnections and interdependencies between human rights and development may be overlooked. The UNDRtD emphasises development as a comprehensive human right, integrating various aspects of life and asserting that social, economic, cultural, and political development are interrelated.[11]

Fourth, the UNDRtD serves as the foundational framework for the SDGs, acting as a base or core element upon which the SDGs are built. In other words, the UNDRtD informs[12] the SDGs, which subsequently operationalise the RtD in implementing its goals.[13] This means that, by using the RtD as the framework, this thesis is indirectly engaging with the SDGs whilst offering a more robust legal framework.

Consequently, this chapter will provide a description of the conceptual framework of the RtD by outlining its evolution (2.2); and its legal nature (2.3) to understand whether the RtD was established by or founded upon law and which legal instruments refer to the RtD expressly or impliedly or contain elements of the RtD; its challenges (2.4) and its elements (2.5). The overall purpose of this chapter is to demonstrate that the RtD is the appropriate conceptual framework to analyse the JDAs.

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[10] UNGA Res 70/1 (21 October 2015), Preamble [Hereinafter UNGA Res 70/1].
[11] UNDRtD (n2), Preamble, Art 1.
[12] UNDRtD (n2) Art 4(1): 'take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development'.
[13] Mihir Kanade, 'The Right to Development and the 2030 Agenda for Sustainable Development', in Kanade and Puvimanasinghe (eds), *Operationalizing the Right to Development for Implementation of the Sustainable Development Goals* (United Nations and UPEACE 2018).

2.2 Evolution of the Right to Development (RtD)

This section examines how the concept of development has evolved as a right in order to understand the current tensions in its interpretation. With this in mind, it first explains what development means and how development is defined in this thesis and briefly examines whether there is progress from development to sustainable development. This section also examines how development emerged as a right.

2.2.1 Definition of Development

Development, in general, means the process of developing or being developed, i.e., 'someone or something grows or changes and becomes more advanced'.[14] Its interpretation, however, varies slightly depending on to whom it is applied. States are, according to their level of development, classified by the World Economic Situation and Prospects (WESP) in three broad categories[15] intended to reflect basic economic conditions: developed economies, economies in transition, and developing economies. To classify a State's level of development, a State's per capita[16] gross national income (GNI) is measured. The threshold levels of GNI per capita are

[14] Meaning of development in English (Cambridge Dictionary, NY) https://dictionary.cambridge.org/dictionary/english/development accessed 20 October 2019.

[15] WESP is the United Nations' report on the state of the world economy. See: United Nations Department of Economic and Social Affairs of the United Nations Secretariat, *World Economic Situation and Prospects 2014* (United Nations, 2014) 152

[16] Per capita income is a measure of the amount of money earned per person in a nation or geographic region and is calculated by dividing the country's national income by its population. See: Will Kenton, Michael Boyle and David Rubin, 'What is Per Capita Income? Uses, Limitations, and Examples' (*Investopedia,* 2024) https://www.investopedia.com/terms/i/income-per-capita.asp accessed 14 February 2022.

established by the World Bank, and States are then grouped as high-income, upper-middle income, lower-middle income, and low-income.

According to this classification, Timor-Leste is placed as a lower-middle-income State[17] as its GNI per capita for 2021 was US $1,880.[18] Low-income, lower-middle-income and upper-middle-income States are classed as developing States, while high-income States are classed as developed States.[19] Economies in transition, on the other hand, can be classed as either developing or developed States.[20] Based on this classification, Timor-Leste is considered to be a developing State.

In contrast, to understand human development, the most appropriate set of criteria used is the Human Development Index (HDI).[21] This index is based on the human development approach, developed by Mahbub ul Haq,[22] anchored in Amartya Sen's work on human capabilities, which observes that development is not only about economic growth but also the realisation of human development.[23] For 2018, the HDI value for Timor-Leste was 0.626, putting the country in the medium human

[17] States with between US $1,036 and US $4,085 GNI per capita are lower middle-income States. See: United Nations Department of Economic and Social Affairs of the United Nations Secretariat (n15)

[18] Macrotrends, 'Timor-Leste GNI Per Capita 2002-2022' (*Macrotrends,* NY) https://www.macrotrends.net/countries/TLS/timor-leste/gni-per-capita accessed 14 February 2022.

[19] United Nations, 'Country Classification' (United Nations, 2014) 144.

[20] Ibid.

[21] United Nations Development Programme, *Overview Human Development Report 2019: Beyond Income, Beyond Averages, Beyond Today: Inequalities in Human Development in the 21st Century* (Timor-Leste, UNDP 2020)

[22] See: Mahbub ul Haq, *Reflections on Human Development* (1st edn, Oxford University Press 1995).

[23] Amartya Kumar Sen, *Development as Freedom* (Knopf 2000) 13-14; Daniel Egiegba Agbiboa, 'Between Corruption and Development: The Political Economy of State Robbery in Nigeria' (2012) 108 (3) Journal of Business Ethics 325, 329.

development category, 131st out of 189 countries and territories.[24] Therefore, Timor-Leste is a developing State in the medium human development category. This means that the country has made some progress in improving the health, education, and standard of living of its people but still faces a range of development challenges, including poverty, inequality, weak governance, and limited access to resources and services (this will be examined further in Chapter 3).[25]

Amartya also offers a definition of development in his work on human capabilities. Sen defines development as the process of expanding human freedom that allows people to lead fulfilling lives. In other words, development is about allowing and encouraging every human person to meet their aspirations to lead lives to their full potential.[26] Conversely, famine, lack of access to healthcare, water, and nutrition, unemployment, and denial of civil liberties can hinder this development. Although this concept is well-defined, this thesis aims to broaden the definition of development to include every human person and peoples or communities. Therefore, this thesis uses the definition of development as articulated under the United Nations UNDRtD.[27] The definition can be extracted from the Preamble and Article 1 (1) and (2), which state that development is:

> '…is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population

[24] United Nations Development Programme (n21)
[25] See Chapter 1, section 1.1
[26] Sen (n23) 13-14
[27] UNDRtD (n2) Art 1 (1). This thesis uses 'human person' interchangeably with 'individuals, people or communities.

and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom,'.

This means that development encompasses a wide range of factors and dimensions that interact with each other. For instance, development involves economic growth to improve living standards, as well as social processes that enhance the quality of life for individuals and people (e.g., education and healthcare). Development also involves cultural processes that recognise the importance of cultural identity, values and practices. It acknowledges that development should respect and incorporate local cultures and traditions, rather than impose external values. Finally, development includes political processes related to governance, political stability, and the rule of law.

Thus, development cannot be understood as merely economic growth; rather, it is a holistic process that integrates economic, social, cultural, and political dimensions. Each of these aspects is interconnected, and progress in one area can often influence the others.

Furthermore, Article 1 of UNDRtD defines development as:

1. '…an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.' [28]

[28] UNDRtD (n2) Art 1 (1)

This definition emphasises that development is an inherent human right that cannot be taken away or transferred. In particular, this definition stresses the following points

- ‘every human person and all peoples are entitled to’: This indicates that the right applies to each individual (human person), people or community, regardless of their background, nationality, or status;
- ‘participate in’: this means that every human person has the right to be involved in all stages of economic, social, cultural and political development, including having a voice in decisions that affect their lives;
- ‘contribute to’: this means that not only can every human person partake in development, but they are also encouraged to contribute to it and benefit from the economic, social, cultural and political development;
- ‘in which all human rights and fundamental freedoms can be fully realized.’: This highlights that development is not solely about growth or progress; it must also ensure that all human rights and fundamental freedoms are respected and upheld.

2. ‘The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of

their inalienable right to full sovereignty over all their natural wealth and resources.'[29]

Article 1 (2) suggests that the human right to development includes the right of people to self-determination, meaning they can freely determine their political status and pursue their economic, social, and cultural development. It emphasizes that people should have control over their natural wealth and resources without interference from external forces, as this right is inherent and cannot be taken away.

It can be argued that the human person is at the core of development efforts and should play a pivotal role in such initiatives. Thus, it is essential to place people at the centre of development initiatives, ensuring that their rights, needs, and well-being are prioritised and upheld. As stated in Article 2 (1) of UNDRtD: 'The human person is the central subject of development and should be the active participant and beneficiary of the right to development.'

In order to support this, the UNDRtD places the duty on States to 'formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.'[30] On the one hand, as stated in Article 8 of the UNDRtD, States can achieve greater inclusion, health, opportunity, justice, freedom, and fairness[31] if they are able to do so. On the contrary, if a State

[29] UNDRtD (n2) Art 1 (2).
[30] UNDRtD (n2), Art 2 (3).
[31] Ibid Art 8: 'States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of

is not capable of formulating appropriate national development policies or is not successful in implementing these national development policies, it faces development challenges as a result of evolution not taking place. Therefore, these States will experience slow growth, increasing inequality, and high rates of poverty which, in turn, decrease the quality of people's lives. Thus, these national development policies can be regarded as the steps States take to 'eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights.'[32]

It can be contended that development is a human right in which every human person and peoples or communities, are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development. This implies that the human person and peoples or communities have the inherent right to control their natural wealth and resources without external interference. To achieve this, States have the duty to take steps to remove barriers to development by formulating national development policies aimed at the constant improvement of the well-being of the entire population and all of human person based on their active, free, and meaningful participation in development and the equitable distribution of its benefits. Thus, the RtD is a right of the human person and peoples or communities and it provides a framework for States as the duty-bearers to achieve its nation and peoples' development.

opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income.'

[32] UNDRtD (n2) Art 6 (3).

Having explored the notion of development for both the State and the human person and ascertained that Timor-Leste is a developing State in a medium development category, the next section examines whether there is progress from development to sustainable development, i.e., whether there is a strategy to achieve development in a sustainable manner.

2.2.2 Progress from Development to Sustainable Development

As part of global goals to improve living conditions and promote infrastructure, innovation, and foreign investment in a State, strategies have been developed (e.g. the 2015 Sustainable Development Goals).[33] These strategies aim to achieve development, but in a sustainable manner, which is defined in line with the most frequently used definition of sustainable development propounded in the report Our Common Future,[34] also known as the Brundtland Report (1987): 'Sustainable development is a development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.

This report, which followed the 1983 World Commission on Environment and Development (WCED),[35] also highlighted three important components of sustainable

[33] UNGA Res 70/1 (n10).

[34] United Nations, 'Our Common Future, Chapter 2: Towards Sustainable Development' UN Doc A/42/427 (*United Nations,* NY) http://www.un-documents.net/ocf-02.htm accessed 20 August 2019.

[35] Also known as the Brundtland Commission, it was convened by the United Nations in 1983 to address growing concern 'about the accelerating deterioration of the human environment and natural resources and the consequences of that deterioration for economic and social development'. See: World Commission for Environment and Development, *Our Common Future* (Oxford University Press 1987) ('Brundtland Report') 41.

development: environmental protection, economic growth, and social equity.[36] To achieve sustainable development, those three components need to be balanced. For this, the focus must be on finding strategies to promote economic and social advancement in ways that avoid environmental degradation and over-exploitation or pollution. This is because the development and well-being of all individuals depend on the health of the natural environment. In other words, natural resources, which are the resources available in the natural environment, are essential to sustaining individuals' livelihoods,[37] both in developed and developing States, as they significantly contribute to their economic activity.[38] As Timor-Leste's economy is heavily dependent on its natural resources (i.e., oil and gas),[39] finding a balance between these components which will lead to sustainable development is crucial to the country. This will help it to develop and protect important natural resources for its present and future generations.

Since 1992, the UN has been working on strategies to further the sustainable development of this planet.[40] Sustainability is the foundation for the 2030 Agenda for Sustainable Development and its Sustainable Development Goals (SDGs),[41] a global framework for international cooperation. These goals were set by the UNGA

[36] Ibid.
[37] Shawkat Alam et al, 'Principles and Practices' in Shawkat Alam, Jahid Hossain Bhuiyan and Jona Razzaque (eds), *International Natural Resources Law, Investment and Sustainability* (Routledge 2017) 13.
[38] United Nations (n34).
[39] Heritage, 'Economic Freedom Country Profile: Timor-Leste' (2024) 356.
[40] Rio Declaration on Environment and Development, UN Doc A/CONF.151/26 (vol. I), 31 ILM 874 [Hereinafter Rio Declaration].
[41] International Institute for Sustainable Development, 'Sustainable Development' (*IISD*, NY) https://www.iisd.org/about-iisd/sustainable-development accessed 27 August 2019.

and adopted by all UN Member States in 2015.[42] The SDGs replace the Millennium Development Goals (MDGs), which started a global effort in 2000 to tackle the indignity of poverty.[43] Thus, SDGs 2030 is a collection of seventeen global goals to end poverty by the year 2030.[44] Its Agenda pays tribute to its foundations in the RtD, thus providing a framework that is committed to realising, for all the world's people, the goals of the RtD. For instance, characteristics such as participatory (see section 2.3.2.1), State as primary duty bearer (see section 2.3.4.2) and elements such as participation and non-discrimination (see section 2.5) are interacted with the 2030 Agenda and reinforced in SDGs 1-16.[45]

In addition, this Agenda is not only grounded in the Universal Declaration of Human Rights (UDHR)[46] but also informed by other instruments, such as the UNDRtD.[47] Like the UNDRtD, the 2030 Agenda also addresses the systemic obstructions that disadvantage the poor, among them distorted trade frameworks and weak international governance over powerful transnational actors.[48]

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[42] United Nations, 'Department of Economic and Social Affairs: Sustainable Development', (*Sdgs,* NY) https://sdgs.un.org/goals#:~:text=The%202030%20Agenda%20for%20Sustainable,now%20and%20into%20the%20future accessed 27 August 2019

[43] UNDP SDGs (n5).

[44] UNGA (19th Session) 'Report of the Working Group on the Right to Development' (23 to 26 April 2018) UN Doc A/HRC/39/56. Also see: UNDP SDGs (n5).

[45] UNHROHC, 'The Right to Development and the Sustainable Development Goals' (*OHCHR,* NY) Introduction_RtD_SDGs.ppt (live.com) accessed 20 December 2023

[46] UNGA Res 217 A (III) (10 December 1948) [Hereinafter UDHR).

[47] UNGA Res 70/1 (n10) Para 10; Also see: United Nations Human Rights Office of the High Commissioner, 'Sustainable Development Goals: Human Rights Table' (*OHCHR,* NY) https://www.ohchr.org/Documents/Issues/MDGs/Post2015/SDG_HR_Table.pdf accessed 28 October 2019.

[48] United Nations Human Rights Office of the High Commissioner, 'Message from the High Commissioner' (*OHCHR,* NY) https://www.ohchr.org/EN/Issues/Development/Pages/AnniversaryMessage.aspx accessed 27 August 2019.

Although this Agenda aims to end poverty by 2030, the key findings in the Sustainable Development Report 2019[49] demonstrated that progress had been made, but it was insufficient to achieve the goals.[50] For instance, progress can be seen through the fact that the number of people living in poverty has decreased, the under-5 mortality rate has decreased almost by half between 2000 and 2017, millions of lives have been saved by immunisations, and the vast majority of the world's population now has access to electricity.[51] However, some areas need urgent collective attention, such as the protection of the natural environment, the efforts to end human suffering and extreme poverty, and the creation of opportunity for all by 2030.[52] While international cooperation between states has progressed, a collective effort is still needed to address the aforementioned areas. For instance, after a prolonged decline, global hunger has been on the rise again.[53] In addition, the report also identifies that poverty, hunger, and disease continue to be concentrated in the poorest and most vulnerable groups of people and States. Therefore, it can be argued that the efforts made to achieve these sustainable goals seem very few. Yet, there is some evidence that, even though the adoption of the RtD was a controversial issue between the Global South and the Global North, some developed States are strongly

[49] United Nations, 'The Sustainable Development Report 2019' (United Nations 2019) 1

[50] Sustainable Development Report, 'Chapters of the Sustainable Development Report 2023' (*Sustainable Development Goals,* NY) https://dashboards.sdgindex.org/chapters accessed 27 December 2023.

[51] Ibid.

[52] United Nations (n42).

[53] Ibid.

committed to achieving sustainable development, eradicating poverty, and promoting human rights.[54]

Based on the experiences of the predecessors to the SDGs (e.g., the MDGs), such Goals can generate enormous momentum and result in implementation efforts being prioritised and intensified, in spite of their soft law nature.[55] Therefore, although the move to sustainable development is slow, there is some progress in the move from development to sustainable development. It can be argued that the successful implementation of SDGs can contribute to the realisation of the RtD.[56]

With regard to Timor-Leste, it adopted the 2030 Agenda and SDGs on 23 September 2015.[57] Progress has been made in health and education, especially in child and maternal health, and the number of children attending school has increased with gender parity. Nevertheless, health and education disparities between municipalities, better quality of education, and increased inclusion of vulnerable women and individuals with disabilities need special effort.[58]

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[54] UNGA (19th Session) 'Report of the Working Group on the Right to Development' (23 to 26 April 2018) UN Doc A/HRC/39/56.

[55] Karin Arts & Atabongawung Tamo, 'The Right to Development in International Law: New Momentum Thirty Years Down the Line?' (2016) 63 (3) NILR 221, 228-229.

[56] Ibid 228; Also see: Busani Sibindi, 'Right to Development: First Regional Consultation for the African Group' (OHCHR 2018) 4.

[57] Government of Timor-Leste, 'Timor Leste's: Roadmap for the Implementation of the 2030 Agenda and the SDGs' (2017) Government of Timor-Leste.

[58] United Nations Timor Leste, 'Our Work on the Sustainable Development Goals in Timor-Leste' (*Timor-Leste UN,* NY) https://timorleste.un.org/en/sdgs#:~:text=Our%20Work%20on%20the%20Sustainable%20Development%20Goals%20in%20Timor%2DLeste,-How%20the%20UN&text=More%20effort%20is%20now%20required,disabilities%20are%20not%20left%20behind accessed on 22 June 2023; Also see: Chapter 4, Section 4.2.5.

Therefore, it can be argued that there is a shift towards sustainable development pathways globally, and there is progress from development to sustainable development in Timor-Leste.

2.2.3 Emergence of Development as a (Human) Right

This section moves on to describe how development emerged as a human right. To do so, one needs to go back to the period immediately following the decolonisation process in the 1950s and early 1960s. The international community[59] debated the ideas behind the RtD quite extensively for several decades before reaching an agreement. In the mid-1960s, the awareness of development problems, needs, and priorities began to evolve towards a concept of development that was far broader than just economic growth.[60]

Resolution 2027 (XX) in 1965[61] illustrates the recognition of the need to dedicate special attention, on both the national and international level, to the promotion of and respect for human rights within the context of the Development Decade.[62] Particularly at the beginning of the 1970s, the economic and productive capacity of the developed States had accelerated immensely. In contrast, the economic expansion of developing States was not sufficient enough to meet the needs of their

[59] The international community includes States and United Nations Systems.
[60] United Nations Human Rights Office of the High Commissioner, *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (United Nations Publications 2013).
[61] UNGA Res 2027 (XX) (18 November 1965).
[62] Development Decade is an 'accepted principle of international solidarity and burden-sharing in development co-operation' that was launched by former US President Kennedy in January 1961; See: D John Shaw, 'First UN Decade of Development' in D John Shaw (ed), *Sir Hans Singer: The Life and Work of a Development Economist* (Palgrave Macmillan 2002) 103.

growing populations or overcome the problems of mass poverty, malnutrition, and unemployment.[63] As a result, many developing States continued to face difficulties in participating in the globalisation process, as they were marginalised and excluded from its benefits.[64]

As a consequence of the imbalance of economic and political power between the Global North and the South in the post-colonial era, developing States began to question the very concept of sovereign equality.[65] Thereafter, between the 1960s and 1970s, under the auspices of the Non-Aligned Movement (NAM),[66] developing States called for a New International Economic Order (NIEO).[67] The NIEO was a set of proposals put forward by developing States during the 1970s and adopted by the UNGA in 1974 at the close of the UN Conference on Trade and Development (UNCTAD) to promote their interests. The NIEO demanded economic justice and national self-determination through legal doctrines, such as permanent sovereignty over natural resources (PSNR), the RtD, and the common heritage of mankind

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[63] M Rafiqul Islam, 'History of the North-South Divide in International Law: Colonial Discourse, Sovereignty, and Self Determination' in hawkat Alam et *al* (eds), *International Environmental Law and the Global South* (Cambridge University Press 2015) 23-49.

[64] UNGA Res/56/150 (8 February 2002).

[65] 'Final Act and Report of the First United Nations Conference on Trade and Development*' (23 March- 16 June 1964)* UN Doc E/CONF.46/141, Vol I, Preambular, Para 5.

[66] Hence, Third World Cooperation/developing States. The term 'non-alignment' is commonly used to describe newly independent states of Asia and Africa which were concerned with maintaining their independence and protecting their separate identities in the era of the Cold War. The most dynamic members of the NAM in the Working Group on the RtD are known as the 'Like-Minded Group' which was comprised of Algeria, Bangladesh, Bhutan, China, Cuba, Egypt, India, Indonesia, Iran, Malaysia, Myanmar, Nepal, Pakistan, the Philippines, Sri Lanka, Sudan and Vietnam, also see: UNGA Res 56/150 (n64).

[67] Stokke Olave, *The UN and Development: From Aid to Cooperation* (Indiana University Press 2009) 7–10.

principle.[68] Thus, the Global South used the NIEO not only to justify these demands, such as economic justice and self-determination, and obtain debt relief and preferential treatment from the Global North[69] but also to bring the concept of the RtD to the forefront of the international agenda.[70] Therefore, developing States, acting as their principal promoters and intended beneficiaries, demanded that development be seen as a right. However, despite discussions about the NIEO, which persisted for years and caused controversies, no concrete results were visible.

The first formal reference to the RtD appeared in 1977 in Resolution 4 (XXXIII), adopted by the Commission on Human Rights.[71] In this Resolution, the Commission explained that 'the concepts contained in the present resolution will guide its future work on this item and, accordingly, […] pay special attention to the consideration of the obstacles hindering the full realization of economic, social and cultural rights, particularly in the developing countries'.[72] Thus, the RtD was still seen as a concept, and its focus was to remove obstacles to development in developing States. The debates leading to the adoption of the Resolution revealed that the Global South's economies would grow if the RtD were to be declared as a human right, which would bind the Global North to give assistance to the Global South.[73] In other words, the

[68] Sumudu Atapattu and Carmen G Gonzalez, 'The North–South Divide in International Environmental Law: Framing the Issues' in Alam et al. *International Environmental Law and the Global South* (Cambridge University Press 2015) 7

[69] Ibid; This preferential treatment is usually provided by World Trade Organisation to developing States to have special rights and to allow other members to treat them more favourable. This organisation deals with the global rules of trade between Nations.

[70] Mickelson (n1) 375.

[71] UNCHR, 'Report on the Thirty-Third Session' (1977) UN Doc E/5927-E/CN.4/1977/1257. Resolution 4 (XXXIII) (3) 75.

[72] Ibid.

[73] Osmani (n3) 110-126.

RtD as a human right creates the notion that developed States are under the obligation to provide development assistance to developing States. For instance, under paragraph 40 of the debate leading up to the adoption of this resolution, '[s]everal representatives stressed that, in their view, assistance for the economic and social development of developing countries was a moral and legal obligation of the international community, in particular of the industrialized countries'.[74] These representatives expected that the RtD as a human right would address the economic imbalance between the developed and the developing States by integrating human rights, on the one hand, and economic and social development issues, on the other, with the help of the international community.

Thus, after several discussions and reports,[75] in 1986, the UNDRtD, a soft law instrument, finally recognised that development was a human right. The Declaration recognises development as 'a comprehensive economic, social and political process which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free, and meaningful participation in development and in the fair distribution of benefits resulting therefrom'.[76] In addition, the Declaration clearly asserts that the RtD is an inalienable human right that belongs to all human persons and peoples and communities.[77] The UNDRtD not only establishes that the RtD is a human right but also recognises it as a process

[74] UNCHR 'Report of the Secretary General' (1977) UN Doc E/CN.4/1977/1257; UNCHR, 'Report on the Thirty-Third Session' (1977) UN Doc E/5927-E/CN.4/1977/1257.

[75] See: Surya P. Subedi, 'Declaration on the Right to Development' (2021) United Nations Audiovisual Library of International Law.

[76] UNDRtD (n2), Preambular, Para 2.

[77] UNDRtD (n2), Art 1.

where people are given the opportunity to contribute and pursue their own improvement by exercising their rights to the fullest.[78] For Piron,[79] the Declaration puts 'the human person […] at the centre of development', stressing that all human rights should be respected in the process of development. Piron also asserts that States have the primary responsibility for realising the RtD at a national level, albeit through appropriate policies and international cooperation.

However, the idea of this right was rejected by the Global North as they were not keen on enshrining it as a human right since this would legally bind them to provide assistance to developing States. The North, which included the United States (US), voted against the adoption of the UNDRtD, while eight other developed States abstained[80] , and 146 voted in favour, mostly developing States or the Global South.[81] Therefore, until now, the RtD remains a soft law which gives no obligation to developed States to provide assistance to developing States. It can be argued that the RtD is seen as a moral obligation by developed States, not a right.

[78] Margot E Salomon & Arjun Sengupta, 'The Right to Development: Obligations of States and the Rights of Minorities and Indigenous Peoples' (Minority Rights Group International 2003) 1, 4.

[79] Laure-Hélène Piron, 'The Right to Development: A Review of the Current State of the Debate for the Department for International Development' (2002) Right to Development Report 7, 10.

[80] The opposing vote came from the United States of America, while Denmark, the Federal Republic of Germany, Finland, Iceland, Israel, Japan, Sweden and the UK abstained. Also see Khurshid Iqbal, 'The Declaration on the Right to Development and Implementation' (2007) 1 (10) Political Perspectives 2.

[81] UNGA (41st Session), 'Provisional Verbatim Record of the Ninety- Seventh Meeting' (11 December 1986) UN Doc A/41/PV.97 64.

2.3 Legal Nature of the Right to Development

After a preliminary analysis of the evolution of the RtD, which seems to indicate that the RtD was not conceived as a right leading to obligations, its legal nature needs to be fully investigated. To do so, this section first identifies the status of the RtD by examining the legal instruments that refer to it expressly or impliedly or contain elements of the RtD. This helps ascertain whether the RtD is actually just a soft law or legally binding, either via treaty or customary law.

2.3.1 Status of the Right to Development

This subsection examines whether, based on the 1945 UN Charter,[82] the UDHR,[83] the ICCPR, and the ICESCR 1966,[84] it is possible to claim that the RtD is a human right under Treaty Law and/or Customary International Law (CIL). This analysis will make it easier to understand the challenges regarding its implementation (further identified in Chapter 2, section 2.4).

2.3.1.1 The Right to Development as a Human Right under Treaty Law

A treaty is any legally binding agreement between States or international organisations,[85] whereas CIL consists of rules that come from a general practice

[82] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI [Hereinafter UN Charter].
[83] UNGA Res 217 A (III) (n46).
[84] These instruments form the International Bill of Human Rights include: the UDHR (n46), the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 [Hereinafter ICCPR] with its two Optional Protocols; and the International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 03 March 1976) 993 UNTS 3 [Hereinafter ICESCR].
[85] Vienna Convention on the Law of Treaties (adopted on 22 May 1969**,** entered into force on 27 January 1980); Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Signed on 21 March 1986, Not yet in force).

accepted as law.[86] In order to identify whether the RtD is a human right under Treaty Law, this subsection has two aims. First, it investigates whether the elements of the RtD, i.e., participation, non-discrimination, fair distribution of benefits PSNR, and duty of cooperation (see section 2.5), are found in international and regional instruments and, if so, whether these elements are binding. Second, it investigates whether the RtD as such is found in international and regional instruments. Doing so will demonstrate how the RtD is shaped and improve our understanding of the behaviour of the Global South and the Global North towards implementing the RtD.

The participation and non-discrimination elements of the RtD are incorporated in the UDHR. Remarkably, the UDHR contains several elements that became central to the international community's understanding of the RtD. It includes, for instance, the promotion of social progress and better standards of life[87] and the recognition of the right to non-discrimination[88] and the right to participate in public affairs.[89] Furthermore, the participation and non-discrimination elements of the RtD are enshrined under ICCPR and ICESCR. Article 25 of ICCPR guarantees every citizen the right to take part in the conduct of public affairs, including the right to vote and to be elected. This right is applied to all citizens without distinction of any kind. In contrast, under ICESCR, Article 13 recognises everyone's right to participate in cultural life and enjoy the benefits of scientific progress and its applications. Based on this, it can also

[86] Statute of the International Court of Justice (18th April 1946) 33 UNTS 993, Chapter II, Art 38 (1) (b); Also see: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14, Para 186.

[87] UDHR (n46) Preambular, Para 4.

[88] Ibid Art 7.

[89] Ibid Arts 21 and 27.

be asserted that the participation and non-discrimination elements of the RtD are enshrined in treaties.

Fair distribution of benefits derived from natural resources is also cited under the ICESCR as Article 1 (2) not only recognises the right of all peoples to freely dispose of their natural wealth and resources but also emphasises that the benefits derived from these resources should be used to promote the well-being and development of the people. It can be argued that the fair distribution of benefits element of the RtD is also enshrined in treaties.

Furthermore, the right to PSNR is stipulated under the ICCPR and the ICESCR. Article 1 of both Covenants enounces that '[all] peoples have the right of self-determination, to freely determine their political status and freely pursue their economic, social and cultural development'[90] and 'freely dispose of their natural wealth and resources'.[91] This language is similar to that used in the UNDRtD, which recalls the right of peoples to self-determination, as well as the right to determine their political status and to pursue their economic, social, and cultural development.[92] It also states that human RtD implies the 'exercise of their inalienable right to full sovereignty over all their natural wealth and resources'.[93] Thus, the PSNR element of the RtD is also enshrined in treaties.

Finally, the duty to cooperate expressly features in the UN Charter, which is binding on all members. For instance, Article 1 of the UN Charter states that one of the purposes of the organisation is to 'promote international cooperation in solving

[90] ICCPR (n84); ICESCR (n84).
[91] ICCPR (n84); ICESCR (n84) Art 1 (2).
[92] UNDRtD (n2) Preambular, Para 6.
[93] Ibid Art 1 (2).

international problems of an economic, social, cultural, or humanitarian character'.[94] Additionally, Article 55(a) requires the UN to promote 'higher standards of living, full employment, and conditions of economic and social progress and development',[95] which can only be achieved through international cooperation. Thus, although the UN Charter makes no express reference to an RtD, the duty to cooperate or international cooperation, which is an integral aspect of the RtD, features quite prominently. Although it is not an obligation for States to cooperate with other States, it is an obligation for the UN to adopt steps to support the duty of cooperation. In other words, the UN has to take measures to support the duty of cooperation.

Another international instrument that contains the duty of cooperation element of the RtD is the UDHR. Under Article 22, '[e]veryone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality'.[96] Although the UDHR itself is not a legally binding document as it takes the form of a resolution by the UNGA to member States and such resolutions are not legally binding, reference should be made to it because it has inspired human rights instruments such as the ICCPR and ICESCR 1966, two universal human rights treaties.[97] The duty of cooperation is also enshrined in

[94] UN Charter (n82) Art 1 (3).
[95] Ibid Art 55 (a).
[96] UDHR (n46) Art 22.
[97] This evolution shows that a non-legally binding instrument can produce legally binding instruments all the more if its provisions are deemed to be of customary nature. Many of its provisions have become incorporated into customary

the ICESCR.[98] Thus, it can be argued that the duty of cooperation element of the RtD is enshrined in treaties.

To summarise, the key elements of the RtD, i.e., the principle of participation (UDHR, ICCPR, and ICESCR),[99] the principle of non-discrimination (UDHR, ICCPR, and ICESCR),[100] fair distribution of benefits (ICESCR),[101] the principle of PSNR (ICCPR and ICESCR),[102] and the duty of cooperation (UN Charter,[103] UDHR,[104] and ICESCR),[105] are recognised in established legally binding instruments such as treaties.

The strongest claim that the RtD is a human right recognised by treaty is that it is enshrined in several regional human rights instruments. For example, the RtD is recognised in Article 2 of the African Charter on Human Rights and Peoples' Rights (ACHPR 1981), a binding instrument at a regional level, which reads: '[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind'. It further provides that 'States shall have the duty, individually or collectively, to ensure the exercise of the right to development.'[106] As cited by Arts,

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international law, which is binding on all states, e.g. ICCPR (n84) and ICESCR (n84); See: Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995) 25 (1-2) Ga J Int'l & Comp Law 287, 289.

[98] Arts 2 (1) and 11 (2).

[99] UDHR (n46), Arts 21 and 27.

[100] Ibid Art 7.

[101] ICESCR (n84) Art 1 (2).

[102] Art 1 (1) and (2).

[103] UN Charter (n82) Art 55.

[104] UDHR (n46), Art 22.

[105] ICESCR (n84), Art 2 (1).

[106] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) AB/LEG/67/3 rev 5, 21 ILM 58, [Hereinafter ACHPR] Art 22 provides: 'States shall have the duty, individually or collectively, to ensure the exercise of the right to development'.

the African Commission has dealt with at least seven complaint cases relevant to Article 22,[107] all addressing pertinent economic, social, and cultural aspects of development. Consequently, they can be considered to either explicitly involve the RtD or be strongly relevant to it.[108] The Endorois case[109] is of particular relevance here as the decision represents a new path for marginalised and vulnerable communities across Africa to claim their rights.[110] The Endorois people are a minority ethnic group in Kenya who have been traditionally dependent on the Lake Bogoria region for their livelihood and cultural practices.[111] The Endorois Welfare Council[112] and other complainants argued that the Respondent State (Kenya) had breached their RtD under Article 22 of the ACHPR because it had failed to adequately involve the Endorois in the development process and ensure the continued improvement of the Endorois community's well-being. In this decision, the first-ever ruling on the RtD, the Commission found that the eviction of the Endorois community, with minimal compensation, violated their right as an indigenous people to property, health, culture, religion, and natural resources. Therefore, the Commission ordered Kenya

[107] Arts & Tamo (n55) 244.
[108] Ibid.
[109] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya [276/2003] African Commission on Human Rights and people's Rights* [Hereinafter Endorois Case).
[110] Elizabeth Ashamu, 'Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya: A Landmark Decision from the African Commission' 2011 (55) 2 J Afr L 300.
[111] International Service for Human Rights, 'NGO Forum | Implementation of the African Commission's decision on the rights of the Endorois indigenous people of Kenya' (*ISHR,* 2021) https://ishr.ch/latest-updates/ngo-forum-implementation-of-the-african-commissions-decision-on-the-rights-of-the-endorois-indigenous-people-of-kenya/ accessed 03 February 2024.
[112] Assisted by fellow ESCR-Net members, Minority Rights Group International and the Centre for Minority Rights Development.

to restore the Endorois to their historic land and to compensate them.[113] The Endorois case is significant not only in the African context but also in a global context as it highlights the ongoing struggle of indigenous communities for their land rights and the recognition of their cultural practices and identity. In addition, this case is significant as it is the first time ever that a specific RtD has been decided by a legal authority.[114] The case was mentioned as a landmark decision in international human rights law[115] , and it can be used as a guide for the recognition of indigenous peoples' rights to land, culture, and participation in development.

Another regional human rights instrument that expressly refers to the RtD as such is the Arab Charter on Human Rights[116] , whose Article 37 provides that '[t]he right to development is a fundamental human right and all States are required to establish the development policies and to take the measures needed to guarantee this right'.[117]

It is interesting to note that, in contrast to the ICCPR and the ICESCR, these two regional legal instruments expressly refer to the RtD as such. Undoubtedly, the RtD has progressed since the adoption of the ICCPR and the ICESCR in 1966, as the ACHPR and the Arab Charter on Human Rights were adopted in 1981 and 2004, respectively.

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[113] Endorois Case (n109).

[114] Gabrielle Lynch, 'Becoming Indigenous in the Pursuit of Justice: The African Commission on Human and Peoples' Rights and the Endorois' (2012) 111 (442) African Affairs 24.

[115] Among others: ACHPR (n106), United Nations Declaration on the Rights of Indigenous Peoples (adopted by the General Assembly on 13 September 2007) UNGA Res 61/295 [Hereinafter UNDRIP]; ICCPR (n84) and ICESCR (n84).

[116] Arab Charter on Human Rights (2004) (adopted on 15 September 1994, entered into force on 16 March 2008) [Hereinafter Arab Charter].

[117] Ibid Art 37 also affirms the duty of states to give effect to the values of solidarity and cooperation.

In ‘older’ international instruments, the individual elements of the RtD are found, while the RtD itself is mentioned under ‘newer’ regional instruments. This means that the RtD is being recognised. This might be because when the ‘older’ instruments were first composed (i.e., the UDHR, UN Charter, ICCPR and ICESCR), the RtD was not yet ‘known’. The RtD was only ‘known’ after the period of radical debate about the NIEO by Third World countries in the 1970s and after the adoption of the UNDRtD. This explains why regional instruments such as the ACHPR and the Arab Charter on Human Rights expressly refer to the RtD.

In this light, it can be argued that the RtD finds its roots in a variety of universal and regional legal instruments relating to human rights and that it is increasingly acknowledged as a human right. Therefore, it also gives hope that the RtD can be recognised as a right in a legally binding instrument at a universal level in the future. Indeed, the possibility of elaborating a draft legally binding instrument on the RtD was one of the items mentioned in the 20th session of the Working Group on the RtD in 2019.[118] In particular, the report included discussions on the content and scope of the future instrument. Whilst the need for a legally binding instrument may reveal that the RtD is not yet considered a human right under treaty law, it shows, nonetheless, that there is a growing consensus around such a right to be considered as a right in a legally binding instrument at a universal level.

[118] UNHROHC, ‘The Twentieth Session of the Working Group on the Right to Development’ (*OHCHR,* NY) https://www.ohchr.org/EN/Issues/Development/Pages/20thSession.aspx accessed 29 August 2019.

2.3.1.2 The Right to Development as a Human Right under Customary International Law (CIL)

Whilst it can be argued that the need for a legally binding instrument reveals that the RtD is not yet considered a right, at least under treaty law, it might be possible that the RtD is recognised in another primary source of international law, CIL. Consequently, this subsection examines whether the RtD is a customary norm; if so, it must be demonstrated that it fulfils the two elements of CIL: state practice and *opinio juris*.[119]

State practice can take diverse forms, including diplomatic acts, conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference, and conduct in connection with treaties.[120] In contrast, the *opinio juris* is fulfilled when a practice is accepted as sufficient to create legal obligations.[121] The next paragraphs examine whether the RtD fulfils these two elements.

Conclusion 12 (1) of the Draft Conclusions on Identification of Customary International Law states that 'a resolution adopted by an international organisation or at an intergovernmental conference cannot, of itself, create a rule of customary international law'.[122] Therefore, it can be argued that, although the UNDRtD cannot

[119] Statute of the International Court of Justice (n86), Art 38 (1) (b).
[120] 'Draft Conclusions on the Identification of Customary International Law' (adopted by the International Law Commission at its seventieth session in 2018) UN Doc A/RES/73/203 [Hereinafter Draft Conclusions on CIL] Conclusion 6 (2); Also see: Ian Brownlie, *Principles of International Law* (Clarendon Press 1990) 7-9.
[121] Draft Conclusions on CIL (n120), Conclusion 2: 'Two Constituents Elements' 121.
[122] Ibid Conclusion 12 (1).

be used as such to create a rule of CIL, it can be used as an element of State practice or an element of *opinio juris*, as asserted in Conclusion 12.[123]

As an element of State Practice, the adoption of the UNDRtD provides evidence that can help determine the existence and content of a rule of CIL or contribute to its development. However, other evidence is required to show whether the alleged rule is observed in the practice of States since the UNDRtD cannot be used alone as conclusive evidence of CIL.[124] In other words, these acts (e.g. the adoption of the UNDRtD and implementation of the RtD) need to be widely supported by subsequent practice.[125]

An example of States' acts towards the RtD can be identified through international cooperation between developed and developing States. For instance, the MDGs included a commitment among world leaders to 'develop a global partnership for development' that aims to 'address the special needs of the least developed countries' in the areas of international trade, external debt, health, and technology.[126] In addition, other preferential treatment[127] given to developing States

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[123] Ibid Conclusion 12 (2).

[124] Ibid Conclusion 12, Commentary Para 8

[125] Christian Dahlman, 'The Function of Opinio Juris in Customary International Law' (2012) 81(3) Nord J Int'l L 327, 335.

[126] Millennium Development Goals, Goal 8, Target 8b; See: UN, Millennium Development Goals: Goal 8 Develop a Global Partnership for Development' (*United Nations,* NY) https://www.un.org/millenniumgoals/global.shtml accessed 30 October 2019

[127] WTO Agreements contain provisions which give developing States special rights and allow other members to treat them more favourably. These are known as special and differential treatment in General Agreement on Tariffs and Trade 1994 (established on 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, 33 ILM 1153 (1994) (Article XVIII) (GATT) and General Agreement on Trade in Services (established on 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization), Annex 1B, 1869 UNTS 183, 33 ILM 1167 (1994) (Article VI) (GATS).

under the auspices of the World Trade Organisation (WTO) shows that they have practised the RtD through international cooperation. This States' act is generally accepted, which is one of the requirements for an act to be classed as a State Practice.[128] It must also be sufficiently widespread and representative, as well as consistent.[129] Again, evidence of State practice in this regard can be found in some human rights treaties,[130] in agreements that give trade concessions,[131] in the provisions of the UNCLOS giving certain benefits to developing States,[132] and in the practice of providing development assistance.[133]

Furthermore, there is no exact number of States that are required to be widely supported, only which States participate in the practice. From this perspective, the ICJ in the North Sea Continental Shelf Cases suggested that the practice must 'include that of States whose interests are especially affected'.[134] This means that if 'specially

[128] States practice stands for general acceptance, See: Dahlman (n125) 335.

[129] Draft Conclusions on CIL (n120) Conclusion 8; Also see: *Case Concerning Military And Paramilitary Activities In And Against Nicaragua (Nicaragua V. United States Of America)* (Judgement) [1984] ICJ Reports 392.

[130] For instance, the ICESCR (n84) recognises the special circumstances of developing States and considers their 'available resources' in determining compliance with the Covenant. ICESCR (n84), Art 2 (1).

[131] Such as WTO; See: Bernard Hoekman et al., 'Special and Differential Treatment of Developing Countries in the WTO: Moving Forward After Cancún' (2004) 27 (4) The World Economy 481.

[132] For instance, United Nations Convention on the Law of the Sea (adopted on 10 December 1982, entered into force on 16 November 1994) 1833 UNTS 397 [Hereinafter UNCLOS 1982] Art 62 and (Annex III, Art 5(3) (e)).

[133] For instance, the United Nations Development Programme (UNDP), the widespread participation and engagement of States in the UNDP demonstrates the State practice of seeking and accepting development assistance through international cooperation.

[134] *North Sea Continental Shelf Cases (Federal Republic of German/Denmark; Federal Republic of Germany Netherlands)* (Judgement) [1969] ICJ Rep 43 Para 74.

affected States' do not accept the practice, it cannot become a rule of CIL.[135] In regard to the adoption of the UNDRtD, the States that voted against and abstained were mostly developed States, which would be classed as 'especially affected States'. These are the States that do not want to be bound or are sceptical to accept being bound to provide assistance to the Global South[136] through international cooperation. However, they still assist developing States when their population is in distress due to conflict, famine, or natural disaster.[137]

To sum up, although there are pieces of evidence of States' practice, this practice cannot become a rule of CIL because it needs to be accepted as sufficient to create legal obligations (*opinio juris*)[138] to become a customary norm. That being said, it seems that there is, on the other hand, an *opinio juris*.[139] As indicated earlier, the RtD is reaffirmed in various international documents, and States include the RtD in the treaties and ratify them, which means that they have accepted the obligation. Although some of these international documents are soft law instruments or might only be applicable at a regional level and, thus, carry less weight, when taken in conjunction, they show a tendency to view the RtD as a norm of a customary nature. Moreover, several key principles of the RtD, such as non-discrimination and PSNR, are also part of CIL, which is binding on all States (see section 2.5.).

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[135] Paragraph 5 of the Commentary to Conclusion 12 stresses that 'negative votes, abstentions or disassociations from a consensus, along with general statements and explanations of positions, may be evidence that there is no acceptance as law.' See: Draft Conclusions on CIL (n120) Commentary to Conclusion 12, Para 5.

[136] Piron (n79) 5.

[137] Noel G Villaroman, 'Rescuing a Troubled Concept: An Alternative View of the Right to Development' (2011) 29 (1) NQHR 13, 51.

[138] Statute of the International Court of Justice (n86), Art.38 (1) (b).

[139] *North Sea Continental Shelf Cases* (n134) Para 77.

Thus, it might be possible to contend that the States have formed the belief that they are bound to act in accordance with the RtD. Scholars still remain divided as to whether the RtD is part of CIL and whether, as argued above, it is an emerging norm of a customary nature. It is important to note that the practice of the RtD is in soft law instruments, the UNDRtD; the practice and *opinio juris* is in regional documents such as the ACHPR,[140] which is in regions of developing States, not developed States; and all elements of the RtD are enshrined under Treaty Law (section 2.3.1.1). Therefore, it can be argued that there are emerging practices and emerging *opinio juris*. As Sengupta[141] states, the RtD is a 'legal human right, grounded in moral norms but reaffirmed as a legal right in international law- though the extent to which it constrains states is still evolving'. However, Bunn[142] argues that the UNDRtD has not been established under CIL as a result of the lack of evidence for both state practice and *opinio juris*. Her opinion is based on the fact that it is difficult to imagine a convincing demonstration of State practice, given that the demands of the RtD are vague and complex.

On the other hand, according to Okafor,[143] even though the UNDRtD is not a legally binding instrument, it reflects the existence of *opinio juris*, which may, in turn,

[140] ACHPR (n106) Art 2.

[141] Arjun Sengupta, 'The Human Right to Development' in Bård A Andreassen & Stephen P Marks (eds), *Development as a Human Right: Legal, Political and Economic Dimensions* (Harvard School of Public Health, François-Xavier Bagnoud Center for Health and Human Rights, 2006) 9 at 23; See Also: Arjun Sengupta, 'On the Theory and Practice of the Right to Development' (2002) 24 HRQ 837.

[142] Isabella D Bunn, *The Right to Development and International Economic Law: Legal and Moral Dimensions* (Hart 2012) 134.

[143] Obiora Chinedu Okafor, 'The Status and Effect of The Right to Development in Contemporary International Law: Towards A South-North "Entente"' (1995) 7 AJICL 865.

generate CIL. Piron[144] is cautious about this, maintaining that, although the RtD 'has met the procedural requirements to become a new internationally recognised human right,' a review of legal sources shows that it 'is not legally binding under international law and that States … cannot be held legally accountable for its implementation.'[145]

Ultimately, the evidence shows that the RtD is not yet a customary international norm, but an emerging rule of customary nature or emerging customary law norm: there is emerging State practice and emerging *opinio juris*.

Consequently, to obtain a better understanding of the status of the RtD, the next section evaluates the characteristics of a human right in order to identify whether these characteristics are present in the RtD.

2.3.2 Characteristics of a Human Right

A brief analysis of human rights in general will help understand how the RtD can be recognised as a human right. Human rights are rights inherent to all human beings; they are universal and inalienable, indivisible, interdependent, and interrelated.[146] They are 'universal' because every individual, regardless of where they live, their gender or race, or their religious, cultural, or ethnic background, has the same rights, 'inalienable' as individuals' rights cannot be taken away, 'indivisible' and 'interdependent' because all rights, including political, civil, social, cultural, and

[144] Piron (n79) 14. Piron does hold that the right to development is binding on parties to the African Charter on Human and Peoples' Rights and does not deny the 'moral or political force' of the UNDRtD.
[145] Ibid.
[146] United Nations Population Fund, 'Human Rights Principles' (*Unfpa,* 2005) https://www.unfpa.org/resources/human-rights-principles accessed 13 March 2023

economic, are equal in importance and none can be fully enjoyed without the others.[147] Thus, traditionally, human rights include the right to life and liberty,[148] freedom from slavery[149] and torture,[150] freedom of opinion and expression,[151] the right to work[152] and education,[153] to name but a few, which are enshrined in the UDHR and in various other human rights legal instruments, such as ICCPR and ICESCR. For the full development of human beings, human rights are essential as they guarantee individuals the means necessary to satisfy their basic needs.

Under international law, there are three obligations and duties that States must guarantee; these are to respect, protect, and fulfil human rights. The obligation to respect[154] means that States must refrain from interfering with the enjoyment of human rights, to protect[155] means States are required to protect human persons and peoples or comunities against human rights abuses, and to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights,[156] whereas the human person has the right to claim their civil, political, social, and economic rights, for instance. Thus, the responsibility to ensure that human persons and groups realise their human rights is placed on States that must create

[147] UNHROHC, 'What are Human Rights?' (*OHCHR,* NY) https://www.ohchr.org/en/what-are-human-rights accessed 13 March 2023.
[148] UDHR (n46) Art 3; ICCPR (n84) Arts 6 and 9.
[149] UDHR (n46) Art 4; ICCPR (n84), Art 8.
[150] UDHR (n46) Art 5; ICCPR (n84), Art 8.
[151] UDHR (n46) Art 19; ICCPR (n84), Art 19.
[152] UDHR (n46) Art 23; ICESCR (n84), Art 6.
[153] UDHR (n46) Art 26; ICESCR (n84), Art 13.
[154] UDHR (n46), Arts 26 and 29.
[155] UDHR (n46), Art 7.
[156] UNHROHC, 'What are Human Rights?' (n147).

mechanisms to ensure that rights are granted to individuals.[157] Therefore, human rights 'empower the weak and vulnerable, protecting them from abuse of their rights to a life of dignity and freedom'.[158]

As mentioned earlier, for States to protect, respect, and fulfil human rights, they are responsible internationally for complying with human rights law either via treaty law or customary international law. They are also responsible for ensuring human rights in their territory by having appropriate laws, policies, institutions, and mechanisms of redress to secure human rights. However, not all States have such laws and those which have them sometimes fail to follow them. Thus, these States might have different standards and may be unwilling to change their behaviour to follow internationally accepted norms. Nevertheless, States that commit serious violations of international human rights may be condemned by other States, international organisations, and human rights groups.

Now that a brief description of the characteristics of human rights has been provided, the following subsection evaluates the characteristics of the RtD to identify whether some of these characteristics are present in human rights.

[157] Felix Kirchmeir, *The Right to Development-Where Do We Stand?: State of the Debate on the Right to Development* (Friedrich-Ebert-Stiftung 2006) 12.
[158] Sakiko Parr-Fukuda, 'Human Rights and Politics in Development' in Michael Goodhart (ed), *Human Rights Politics and Practice* (Oxford University Press 2013) 199.

2.3.2.1 Characteristics of the Right to Development (RtD)

As the RtD is recognised in the UNDRtD as a human right, this subsection identifies its characteristics. According to Article 1 of the UNDRtD,[159] three of the main characteristics of the RtD are: inalienable, participatory, and composite.

RtD is inalienable, the same as a human right, as the right is not subject to be taken away or given away for any reason, including the lack of development.[160] RtD is participatory as Article 1 of the UNDRtD spells out that 'every human person and people are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development…'. Participation is the foundation of development. Thus, all human prson should be part of the process of development and are both shapers and beneficiaries.

Furthermore, the RtD encompasses the basic rights mentioned earlier, such as the right to life and liberty, freedom of opinion and expression, and the right to work and education, which are essential to guarantee individuals the means necessary to satisfy their basic needs.[161] This is because in order to realise the RtD, those rights also need to be realised. In this way, the RtD can be understood to derive from these rights as a composite right in which all rights are realised together (further discussed in the next section, 2.3.2.2). In other words, economic, social, and cultural rights, as well as civil and political rights, are constituents of the RtD. To understand this, the

[159] UNDRtD (n2), Article 1 (1): '1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.'

[160] United Nations Human Rights Office of the High Commissioner (n147).

[161] These rights are listed in the UDHR (n46).

next section further examines how the RtD could be classed as a derivative and composite right.

2.3.2.2 Derived, Stand-alone and Composite Right

As a derived right,[162] the RtD embraces a wide range of civil, political, and socio-economic factors which necessarily incorporate other rights, such as the right to participate, the right not to be discriminated against on any grounds, the right to self-determination, full sovereignty over natural resources, the right to education, the right to an adequate and healthy environment, and the right to health.

However, according to Sengupta,[163] the RtD is a process that leads not merely to the realisation of human rights individually but also to the realisation of all rights, which has to be carried out using a rights-based approach. In Sengupta's view, the RtD as a human right is a 'vector'.[164] In other words, it is a composite right in which all rights are realised together, being both interdependent and combined. This is a characteristic of human rights since human rights are indivisible and interdependent. All rights are equal in importance, and none can be fully enjoyed without others.[165] It can be argued that the RtD can only improve when at least one right is improved,

[162] Sengupta, 'On the Theory and Practice of the Right to Development' (n141) 184; Rajeev Malhotra, 'Right to Development: Where Are We Today?' in Arjun Sengupta *et al.* (eds), *Reflections on the Right to Development* (Sage Publications 2005) 132-133; Faisal Saeed, 'The Right to Development as a Human Right: A Critique with Reference to UNGA Resolution 41/120' https://www.academia.edu/1415512/THE_RIGHT_TO_DEVELOPMENT_AS_A_HUMAN_RIGHT_a_critique_with_reference_to_GA_Resolution_41_120 accessed 13 march 2023.

[163] Sengupta, 'On the Theory and Practice of the Right to Development' (n141) 184.

[164] Ibid.

[165] UNHROHC, 'What are Human Rights?' (n147).

and none of the rights are violated. Indeed, if any right is violated, the entire RtD is violated.[166]

The RtD can also be classed as a stand-alone human right. In this case, the RtD contains specific entitlements, including the right 'to participate in, contribute to, and enjoy economic, social, cultural and political development'.[167] The UNDRtD sets out the constituent elements (discussed in section 2.5) of this right, as well as the means for realising it for the constant improvement of human well-being through national and international development policies[168] that ensure an enabling environment for development in which all human rights and fundamental freedoms can be fully realised.[169]

Unfortunately, as a result of being a stand-alone human right, a derived and a composite human right encompassing all other rights, including its elements (identified in section 2.5), which this thesis posits, the RtD has led critics to refer to it as a 'right to everything', which is unclear.[170]

More concretely, for developing States such as Timor-Leste, the RtD as a stand-alone right provides Timor-Leste with a broader framework to address all dimensions of development, including economic, social, cultural, and political aspects. Being a derived and a composite right, the focus may primarily be on fulfilling the underlying rights that give rise to development, such as education and healthcare.

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[166] Sengupta, 'On the Theory and Practice of the Right to Development' (n141) 183.
[167] UNDRtD (n2), Art 1.
[168] Ibid Arts 2 (3), 3 (1), 4 (1).
[169] Ibid Art 1 (1).
[170] Kirchmeir (n157) 12.

As a result, discussions have centred on trying to classify RtD into one or several human rights generations. Now that the RtD is identified as a stand-alone right, a derived and composite right, the next section describes where the RtD is positioned in generations of human rights.

2.3.3 Generations of Human Rights

According to a classification suggested by Karel Vašák in 1977, there are three generations of human rights.[171] However, the concept has since been developed and expanded upon by various scholars and organisations,[172] and it is now claimed that there is a fourth generation[173] of human rights encompassing emerging rights related to issues such as environmental protection, intergenerational justice, and sustainable development (not dealt with in this thesis).

The first and second generations of human rights are the rights enshrined under the UDHR, the ICCPR, and the ICESCR and belong to individuals; they are individual rights (discussed in the next section, section 2.3.3.1). In contrast, a third-generation human right, also classed as a solidarity right, is categorised as a right that belongs to people; it is a collective right[174] (also discussed in the next section, section 2.3.3.1).

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[171] Vasak K, 'A Thirty Year Struggle- The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights' in René Caloz (ed) *Southern Africa at grips with Racism* (UNESCO Courier 1997) 1, 29.

[172] Including: Christopher D Stone, *Should Tress Have Standing: Law, Morality and the Environment* (3rd ed., Oxford University Press, 2010); David R Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press, 2010) and organisations like the World Future Council.

[173] This fourth generation of human rights is not as widely recognised or agreed upon as the first three generations. It is still evolving and not universally accepted.

[174] Mickelson (n1) 376.

The first generation of human rights is fundamentally civil and political in nature. It was codified in the UDHR in 1948 and then later in the ICCPR *in* 1966. These rights have been grouped as the first generation of human rights because they are regarded as negative rights[175] and deal with liberty and participation in political life.[176]

On the other hand, the second generation of human rights is regarded as positive rights[177] and is fundamentally social and economic. Such rights, some of which are enumerated in the UDHR, were later codified under the *ICESCR* 1966.[178] The distinction between these two Covenants lies in the parties' obligations stemming from the respective Article 2.1. The ICCPR provision requires States to 'respect and ensure' the rights listed in the Covenant, whereas the ICESCR binds States only to 'take steps' aiming at the fulfilment of the Covenant's provisions.[179] As an enabling right, the RtD is derived from these two generations of human rights.

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[175] Vasak (n171).

[176] The first generation of human rights guarantees individual freedoms with which governments may not interfere. These rights include the right to life, the right to property, the right to take part in government, the right to freedom of belief and religion, the right to participate and the right to be protected against slavery, amongst other things.

[177] Vasak (n171).

[178] The second generation of human rights was shaped as a result of the rapid nineteenth century industrialisation and accompanying social and economic inequalities. It includes the right to just and favourable conditions of work and equal work and pay, the right to education and the right to privacy at home.

[179] ICCPR (n84), Art 2 (1): 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals' and ICESCR (n84), Art 2 (1): 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

A third-generation human right is categorised as a right that belongs to people or is a collective in contrast to an individual right.[180] If the RtD is classed as a stand-alone right, it is then positioned[181] as a third-generation right. The rights under this generation of human rights are also known as solidarity rights,[182] which have remained soft law until now.[183] Their implementation is essentially based on international action and cooperation.[184] This generation of human rights demands responsibility that lies beyond a State as its realisation relies on the behaviour of more than one State. Consequently, the third generation of human rights covers concerns such as development, environment, humanitarian assistance, peace, communication, and common heritage.[185] This generation of human rights is mentioned in the Stockholm Declaration,[186] the Rio Declaration,[187] and other international documents of a declaratory character. The rights in these declarations include the right to self-determination, economic and social development, a healthy environment, natural resources, and participation in cultural heritage.[188] As a stand-

[180] Vasak (n171).
[181] Ibid; Also see: Bunn (n142) 81.
[182] Henry J Steiner et al., *International Human Rights in Context Law Politics Morals* (3rd edn, Oxford University Press 2007) 1442.
[183] Vasak (n171) 29-32; Also see: Stephen P Marks, 'Emerging Human Rights: A New Generation for the 1980's?' (1980-1981) 33 Rutgers L Rev 435; Stephen Marks, 'The Human Right to Development: Between Rhetoric and Reality' (2004) 17 Harvard Human Rights Journal 137, 138.
[184] Bunn (n142) 81.
[185] Vasak (n171); Also see: Stephen P Marks, 'Emerging Human Rights: A New Generation for the 1980's?' (n183) 435; Stephen P Marks, 'The Human Right to Development: Between Rhetoric and Reality' (n183).
[186] Declaration of the United Nations Conference on the Human Environment UNGA Res 2994 (XXVII) (15 December 1972) [Hereinafter Stockholm Declaration].
[187] UNCHR, 'Human Rights and the Environment,' (24 February 1995) UN Doc E/CN.4/RES/1995/14.
[188] Vasak (n171).

alone human right, the RtD was reaffirmed in various international and regional documents, as mentioned earlier.[189]

For being considered as a stand-alone right, this generation of human rights has faced criticism for being seen as desirable goals rather than rights. It has been seen as a distraction moving away from real human rights issues in order to achieve non-concrete claims.[190] Donnelly, who is against the idea of the RtD being a human right, argues that 'any rights that might arise would be quite different kinds of rights [than those of the first or second generation]; even if we allow that solidarity gave rise to rights, they would not be human rights'.[191] This argument is based on the fact that human rights, in their traditional meaning, apply to individuals and not to groups or collectives. However, the RtD can also be categorised as a right that is derived from the ICCPR and ICESCR 1966 and categorised as a third generation of human rights or solidarity rights, as some authors have viewed it.[192] In other words, it can be argued that the RtD as a stand-alone right is a third-generation human right or solidarity right and, as a derived or enabling right, it is derived from first and second generations of human rights.

Whilst this three generations' doctrine is useful to some extent, it is not without flaws. This classification of human rights by Vašák was criticised by Alston,[193] who

[189] Ibid; Stockholm Declaration.
[190] Thio Li-ann, 'The Universal Declaration of Human Rights at 60' (2019) 21 Singapore Academy of Law Journal 293, 305.
[191] Jack Donnelly, 'In Search of the Unicorn: The Jurisprudence of the Right to Development' (1985) 15 (3) Cal W Int'l L J 492-493.
[192] See: Stephen P Marks, 'The Human Right to Development: Between Rhetoric and Reality' (n183); Steiner et. al. (n182) 1442.
[193] Philip Alston, 'A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?' (1982) 3 NILR 307.

questioned whether the translation of the needs into specific legal norms at a relevant legislative forum was met and whether there was a practical blurring of all three stages.[194] It was also criticised by Marks,[195] who stated that this classification is misleading and that the basic aspirations at the origin of the claims of all three 'generations' are not historically determined. Indeed, the UDHR has recognised that both first and second generations are equally important. The second generation of human rights enjoys equal status to the first generation of human rights. However, as the RtD as a third generation of human rights is derived from the first and second generations of human rights, it can be argued that it is equally important as both the first and second generations of human rights. Consequently, the next subsection briefly discusses collective and individual rights to help understand better the legal nature of the RtD.

2.3.3.1 Collective and Individual Rights

Despite its flaws, the three generations' doctrine identified in section 2.3.3 enables an understanding of the interrelationship between human rights as a pyramid: first, individuals need their civil and political rights (first generation) in order to realise their economic and social rights (second generation) and then their third-generation human rights, collective rights. However, these generations of human rights are

[194] These three stages are such as, 'Step 1: Perception of a particular problem and the formulation of the relevant needs or aspirations. Step 2: The translation of some of these needs into specific legal norms through recognition by the relevant legislative forum. Step 3: The identification and elaboration of means by which to promote realization of the legal norm.' See: Alston (n193) 315-316.

[195] Stephen P Marks, 'The Human Right to Development: Between Rhetoric and Reality' (n183) 138.

interdependent, and each is equally important to ensure that all individuals and people can live a life of freedom and dignity.

The UNDRtD presents the RtD as both a collective and individual right, and this has been rather controversial. On the one hand, collective rights are classified as third-generation human rights, which remain non-binding by law. Classing this right as a collective right goes against the traditional meaning of human rights, which applies only to individuals, not to groups or collectives. On the other hand, if the RtD is considered an individual right, then this right does reflect the traditional meaning of human rights, which belongs to the individual. Nevertheless, in line with Sengupta,[196] Espiell[197] claims that the RtD as a human right is 'the synthesis of all human rights' and all human rights are 'interdependent and each one conditions the remaining'. Therefore, it might be contended that the RtD is an individual right that needs a collective right in its application.[198]

This may, to some extent, explain why the Global South considers it mostly a collective right and a right of states,[199] which includes the obligation of developed states to give assistance to developing states to contribute to their development. Bedjaoui[200] argues that only a collective and community approach to the RtD as a

[196] UNCHR, 'Report of the Independent Expert on the Right to Development' (2002) UN Doc E/CN.4/2002/WG.18/6, Para 26; Arjun Sengupta *et al*, 'Reflections on the Right to Development' in Arjun Sengupta *et al.* (eds), *Reflections on the Right to Development* (Sage Publications 2005) 132-133.
[197] Héctor Gros Espiell, 'The Right to Development as a Human Right' (1981) 16 (2) Tex Int'l L J 189, 205.
[198] Ibid 196.
[199] Piron (n79) 16.
[200] Mohammed Bedjaoui, 'Some Unorthodox Reflections on the 'Right to Development'' in Frederick Snyder & P. Slinn (eds), *International Law of Development: Comparative Perspectives* (Abingdon: Professional Books, 1987) 99.

collective right of States at an international level will facilitate the identification of the real nature of the development problem and the appropriate solutions to be applied to the international problem of underdevelopment.[201]

2.3.4 Scope of Right to Development

Despite its legal status being somewhat recognised (section 2.2) and one of the characteristics of the RtD (as a stand-alone right) being similar to a human right, the RtD remains a controversial issue between the Global North and the Global South, especially because its scope does not seem to be properly delineated. Amongst the prominent controversies are who the right-holders and duty-bearers are. Consequently, this subsection analyses the scope of the RtD by identifying the rights-holders and the duty-bearers.

2.3.4.1 Rights-Holders

In the context of human rights law,[202] the human person is the right-holder of civil, political, social, and economic rights. At first sight, the UNDRtD seems to fit into this framework as its Article 2 (1) stipulates that the 'human person is the central subject of development and should be the active participant and beneficiary of the right to development'.[203]

Thus, this Declaration makes the human person the right-holders of the RtD,[204] who can then make claims against other individual and collective agents, including States, which are duty-bearers who can be held responsible for not meeting their

[201] Ibid.
[202] International Bill of Human Rights: UDHR (n46), ICESCR (n84) and the ICCPR (n84).
[203] UNDRtD (n2), Art 2 (1); See Also: Sengupta, 'On the Theory and Practice of the Right to Development' (2002) 24 HRQ 846.
[204] UNDRtD (n2), Art 2 (1).

obligations. In this respect, Vandenbogaerde[205] uses the right to food as an example to explain what Donnelly[206] means when he states that 'all human rights aim to prevent particular denials of human dignity'. Vandenbogaerde clarifies that the right to adequate food is considered the right to feed oneself, not the right to be fed. The author also argues that the realisation of such rights is one's own responsibility or moral obligation and that individuals need to realise their own human rights. Indeed, the right to food does not imply that States have an obligation to hand out free food to individuals who want it or a right to be fed, but if individuals are deprived of access to food for reasons beyond their control, the right to food requires the State to provide food to these individuals.

Contrary to classic views in human rights law, the UNDRtD also refers to 'peoples' as right-holders.[207] In fact, Bedjaoui[208] considers the RtD to be a right of people and of states rather than of individuals. Additionally, Turk and Waart view the RtD as a human right with respect to individuals and as a principle of international law aiming to strengthen the duty of States to cooperate in the field of human rights to realise economic, social, and cultural rights.[209] Consequently, the term 'peoples', which is not defined in the UNDRtD, has led to various interpretations. In fact, during the decolonisation period, there was much confusion as to the exact definition of 'peoples'. Cited by Lone, in 1951, Kelsen defined 'people' by equating people to

[205] Arne Vandenbogaerde, 'The Right to Development in International Human Rights Law: A Call for its Dissolution' (2013) 31 (2) NQHR 187, 196.
[206] Jack Donnelly, *International Human Rights* (Westview Press 1993) 485.
[207] UNDRtD (n2), Art 1 (1).
[208] Bedjaoui cited in Khurshid Iqbal, *The Right to Development in International Law: The Case of Pakistan* (Routledge 2009) 56.
[209] Danilo Türk & Paul JIM de Waart, 'The Right to Development, from Lege Ferenda to Lex Lata' (SIM Newsletter 1985) no. 10, 14.

'State' and concluded that peoples in Article 1 (2) of the UN Charter meant States.[210] Lone, however, also explained that the *travaux préparatoires* to the UN Charter reveal that drafters never intended the term 'peoples' to represent States. In addition, Lone stated that the committee of the UN Charter expressly made it clear that Article 1(2) 'extends to States, nations and peoples'.[211] The Global Consultation on the RtD[212] specified that the 'peoples' as the right-holders of RtD was different from the 'peoples' in the context of the right to self-determination.[213] Nevertheless, the Consultation claimed that the term 'peoples' should include groups within the State, such as indigenous peoples and minorities.[214] Therefore, the word 'peoples' remains unclear under the RtD; the UN Commission on Human Rights, the General Assembly and the Independent Expert on the RtD have so far not been able to impart a solid explanation of the word.[215] Such a lack of definition leads Donnelly to argue that the RtD confuses rights with moral claims as no specific rights-holders and duty-bearers can be identified.[216]

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[210] Hans Kelsen, 'The Law of the United Nations: A Critical Analysis of its Fundamental Problems' (London Stevens, 1951) 52 cited in Fozia N Lone, 'The Creation Story of Kashmiri People: The Right to Self-Determination' (2009) 21 (1) Denning LJ 1, 14.
[211] Ibid; UN Charter (n82).
[212] This global consultation involves representatives of the United Nations system and its specialised agencies, regional inter-governmental organisations and interested non-governmental organisations to focus on fundamental problems posed by the implementation of the UNDRtD. Also see: Russel Lawrence Barsh, 'The Right to Development as a Human Right: Results of the Global Consultation' (1991) 13 (3) HRQ, 322, 323.
[213] UNCHR, 'Report of the Global Consultation on the Right to Development' (1989) Res 1989/45, Para 8.
[214] Ibid.
[215] See: Philip Alston, 'Peoples' Rights: Their Rise and Fall' in Philip Alston (ed), *The Rights of Peoples* (Oxford University Press 2001) 259, 285-286.
[216] Donnelly (n206) 475.

Adding to the confusion, Article 2 (3) of the UNDRtD claims that States are also right-holders as they have the right to formulate appropriate national development policies. Therefore, it can be argued that the UNDRtD suggests that States have human rights claims against other States and possibly against other actors, such as international organisations or Multinational Corporations (MNCs).[217] In this respect, this seemingly goes against the conception of who can be the subject of a human right, as a State cannot, by definition, be the subject of a human right. Yet, it is reasonable that the UNDRtD claims that States are also right-holders, as they have the right to formulate appropriate national development policies that provide favourable conditions for the realisation of the RtD.

2.3.4.2 Duty-Bearers

Duty-bearers are usually the actors with a particular responsibility to respect, protect, promote, and fulfil human rights and to abstain from human rights violations.[218] Thus, the primary duty-bearer of international human rights is the State. It is also clearly shown under the UNDRtD, which indicates that all human beings 'have a responsibility for development',[219] and States 'have the right and duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals.'[220] Therefore, the UNDRtD makes it clear that the primary duty-bearer is the State.[221]

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[217] Anne Orford, 'Globalisation and the Right to Development', in Philip Alston (ed), *People's Rights* (Oxford University Press 2001) 127.
[218] For instance: States, international organisations and MNCs.
[219] UNDRtD (n2), Art 2 (2).
[220] Ibid Art 2 (3).
[221] Ibid Arts 2 (3) and 3 (1) and (3); Also see: Daniel Aguirre, *Human Right to Development in a Globalised World* (Ashgate 2008) 68.

In other words, States shall provide an enabling environment for an individual as the right-holder to be able to live in dignity.

In addition, under the UNDRtD, States have responsibilities individually to meet their human rights obligations and collectively, in association with other States.[222] The UNDRtD does not specifically mention whether the word 'States' only includes developed States. Thus, it can be argued that the term includes developed and developing States. Accordingly, these States have a primary duty to respect, protect, and fulfil the RtD, not only with each other but also within themselves, to improve the well-being of their populations and individuals.

Marks describes the duty to respect and protect[223] as a perfect obligation. The obligation to respect means that a State 'must not deny the enjoyment of a right and must punish its agents for acts of commission and omission', whereas the obligation to protect refers to the obligation of States to prevent private actors from violating a right and punish them for the prohibited acts. Contrastingly, the author describes the obligation to promote and the obligation to fulfil or provide as imperfect obligations. The obligation to promote refers to the obligation of a State to carry out campaigns to change the attitudes and behaviour of its population, whereas the obligation to fulfil refers to the allocation of resources to enable individuals to enjoy the right. This obligation refers to, among others, the national budget, the effectiveness of service delivery, and the provision of emergency assistance to the needy.[224]

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[222] UNDRtD (n2), Art 4 (1).

[223] Stephen Marks, *The Human Rights Framework for Development: Seven Approaches in Reflection on the Right to Development* (Sage 2005) 45.

[224] Stephen P Marks, 'The Human Right to Development: Between Rhetoric and Reality' (n183) 46.

To meet these obligations, States have the responsibility to create 'national and international conditions favourable' to the realisation of the RtD.[225] At the national level, States have the right and the duty to 'formulate appropriate national development policies',[226] 'should undertake, at the national level, all necessary measures for the realization of the right to development',[227] and 'should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights'.[228] Moreover, States are required to 'take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic social and cultural rights'.[229] These articles indicate that States are the main duty-bearers in relation to the RtD as policy- and law-making bodies.

At the international level, the UNDRtD highlights the importance of the duty of cooperation in Article 3 (3): 'States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development' and 'to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States'.[230] An example of cooperation for development between States can be seen through the creation of international independent agencies and programmes by the UN, such as the United Nations Development Programme (UNDP), which works with 170 States to eradicate poverty

[225] UNDRtD (n2), Art 3 (1).
[226] Ibid Art 2 (3).
[227] Ibid Art 8 (1).
[228] Ibid Art (2).
[229] Ibid Art 6 (3).
[230] Ibid Art 3 (3).

and reduce inequality.[231] Indeed, the UNDRtD does not explicitly mention who the duty bearer is between developed and developing States. However, this thesis argues that, between States (Australia and Timor-Leste), the duty bearer is a developed State. In this case, Australia is a duty-bearer who needs to 'take the lead' or take positive actions to create an enabling environment for development in assisting developing States, such as Timor-Leste, to achieve the RtD. Indeed, developing States also have a duty to work towards the realisation of the RtD, such as making efforts to improve the living conditions of their population, eradicate poverty, provide access to education, healthcare, and other essential services, and promote economic and social development. Developing States are able to do this with the help of the international community (e.g., intergovernmental bodies and agencies, international organisations, and Private Actors) and developed States to ensure development and eliminate obstacles to development.[232] With this in mind, Timor-Leste, as a developing State, is a right-holder and Australia, as a developed State, is a duty-bearer. However, they both have a duty to cooperate with each other to ensure development and eliminate obstacles to development.

Thus, applying this to the Timor-Leste and Australia case, the right-holders are:

- human person (including people or communities and minorities) of Timor Leste;
- Timor-Leste; and

[231] United Nations Development Programme (UNDP), 'About Us', (*UNDP,* NY) https://www.undp.org/about-us accessed 20 September 2022.

[232] Developed States (individually or collectively) and the international community as a whole usually are specified as the principal duty-bearers of the RtD. See: Donnelly (n206) 482.

- Australia.

and the duty-bearers are:

- Timor-Leste itself within its nation;
- Australia (between Australia and Timor-Leste, as Timor-Leste is a developing State that can claim the RtD from developed States such as Australia.)

This supports the view that the RtD is both a collective and an individual right (discussed in section 2.3.3.1). Given the controversy surrounding the nature and scope of the RtD, there are challenges in its realisation. The next section highlights the North-South divide and the specific challenges concerning the realisation of the RtD.

2.4 Challenges

The nature and scope of the RtD as a human right is highly controversial not only from an academic perspective but also in practice. In fact, the controversies around the RtD as a human right highlight a sharp North-South divide. After the RtD was adopted as a UNGA resolution in 1986 and viewed as a stand-alone human right and a third generation of human rights, the Global North, especially the US, was reluctant to accept the idea of the RtD being a human right. Thus, this section highlights the challenges between the North and South divide and the challenges of the realisation of the RtD.

2.4.1 North-South Divide

The Global North claims that the RtD is only a right of individuals, not a collective right or a right of States. This is because developed States refuse interpretations of

the RtD that legally require them to provide development assistance to developing States because they do not consider economic, social, and cultural rights as fundamental human rights. The US, in particular, has argued that the UNDRtD should not be used to revive the NIEO.[463] The US and some other developed States, including Japan, Denmark, and Australia, have also argued that assistance is a matter of the sovereign decision of donor countries and cannot be subject to a binding rule.[233]

Furthermore, in 2003, the Commission on Human Rights[234] decided to request its Sub-Commission on the Promotion and Protection of Human Rights to prepare a document that establishes ways to implement the RtD, including the international legal standard of binding nature and guidelines on the implementation of the RtD, based on the UNDRtD. Forty-seven States voted in favour of this resolution, and only three States, including the US, Australia, and Japan, voted against it.[235]

By moving on to creating several bodies and several works to achieve consensus, the Global South expected that it would address the economic imbalance between them and the Global North. However, the North ensured that the right was non-binding, that it carried no resource-transfer obligations, and that it could never be interpreted as a greater priority than political and civil rights.[236] As Marks observes, the US does not view the realisation of economic, social, and cultural rights as entitlements that require related legal duties and obligations.[237] Therefore, based on this argument,

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[233] Stephen P Marks, 'The Human Right to Development: Between Rhetoric and Reality' (n183) 143.
[234] UNCHR Res 83 (2003) UN Doc E/CN.4/RES/2003/83.
[235] Ibid.
[236] Peter Uvin, *Human Rights and Development* (Kumarian Press 2004) 598.
[237] United States Government, 'Statement at the UN Commission on Human Rights, 59th Sess., Comment on the Working Group on the Right to Development (Feb. 10,

there is no obligation on States to provide guarantees for the implementation of any purported 'right to development'.[238] Reflecting on the obstacles to the realisation of the RtD and its compatibility with US foreign policy, Marks[239] argues that the US voted against the Resolution of the RtD as a result of five concerns shared by each US Administration. Among these concerns are the political economy and the relation of the RtD to economic, social, and cultural rights.[240]

The concern related to political economy is probably best understood by referring to the arguments made by the US representative to the UN Human Rights Commission,[241] who claimed that the US experience is that of a State built 'on self-reliance', on their own power and resources rather than on those of others. In other words, the US did not receive any assistance from other States or claim the RtD. This argument shows that the US representative to the UN Human Rights Commission did not take into account the past relation between the Global North and the Global South, particularly in the period of colonialism or the period of Global North conquest of the Global South States, which is one of the causes of the current economic and social inequality between them and the South. It can be posited that this view fails to understand that, after the colonisation era, the global economic order benefited

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2003),' cited in Stephen P Marks, 'The Human Right to Development: Between Rhetoric and Reality' (n183) 147.

[238] Ibid 137.

[239] Stephen P Marks, 'The Human Right to Development: Between Rhetoric and Reality' (n183) 143.

[240] Ibid.

[241] Statement by Dr. Michael Novak, US Representative to the UNCHR, Res 36, UN ESCOR, 37th Sess., Supp. No. 5, at 237, UNCHR Res 1475 (ES-IV) (1981) UN Doc E/CN.4/RES/1981/1475.
cited by Stephen P Marks, 'The Human Right to Development: Between Rhetoric and Reality' (n183) 143-144.

the rich States more, whilst it marginalised the poor and so led to extreme poverty in the global South.[242] As for the relation of the RtD to economic, social, and cultural rights, Danies of the US delegation explained that the RtD was not viewed by them as a 'fundamental', 'basic', or 'essential' human right.[243] This is the same reason why the US has never ratified the ICESCR 1966.[244] In contrast, for many States of the Global South,[245] economic, social, and cultural rights are fundamental rights, essential in enabling individuals to lead dignified lives.

The US representative stated that 'the realization of economic, social, and cultural rights is progressive and aspirational. We do not view them as entitlements that require correlated legal duties and obligations.[246] In other words, this representative was arguing that States aspiring to development should take responsibility for themselves rather than impose legally binding obligations on others. Danies also explains that the US voted against the Resolution[247] because the resolution continued to show a lack of an internationally accepted definition of the RtD.[248] These arguments reveal that, even though several debates on the RtD as a human

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[242] Islam (n63) 30.

[243] Statement by Joel Danies, US Representative to the UN Commission on Human Rights, Fifty-Ninth Session, Comment on the Working Group on the Right to Development (2003) cited Stephen P Marks, 'The Human Right to Development: Between Rhetoric and Reality' (n183) 147.

[244] UNHROHC, International Covenant on Economic, Social and Cultural Rights, (*OHCHR,* 2019) https://indicators.ohchr.org/ accessed 21 October 2019.

[245] Ibid. Most of the Global South States have ratified the ICESCR including Timor Leste.

[246] UNDP (n231) 147.

[247] UNCHR Res 83 (2003) UN Doc E/CN.4/RES/2003/83.

[248] Statement by Joel Danies, US Representative to the UN Commission on Human Rights, Fifty-Ninth Session, Comment on the Working Group on the Right to Development (2003) cited by Stephen P Marks, 'The Human Right to Development: Between Rhetoric and Reality' (n183) 148.

right have moved to a higher level since the adoption of the UNDRtD in 1986, the controversies of the RtD still exist.[249] These controversies have resulted in challenges to the realisation of the RtD, as identified in the following section.

2.4.2 Challenges to the Realisation of the RtD

The RtD is not only challenged from a legal perspective but also with regard to its practical realisation. Undoubtedly, one of the challenges identified since the adoption of the UNDRtD has been its acceptance as a right at the political level.[250] The proliferation of working groups on the RtD[251] and Independent Experts on the RtD[252] under the auspices of the UN is proof that, since its adoption, the focus has been on discussing its content rather than on implementing it. The following challenges can be identified.

First, the Special Rapporteur[253] on the RtD in 2017 argued that, since the adoption of the UNDRtD over thirty years ago, views among States are still divided on the nature of the duties of States to realise the RtD.[254] The European Union asked for further clarity, specifically on the duties of States to realise the RtD and that 'the national dimension of State obligations needs to be stressed as compared to obligations of

[249] Arts and Tamo (n55) 221.
[250] Stephen Marks, 'Obstacles to the Right to Development' (2003) Working Paper No 17, page 2.
[251] United Nations Human Rights Office of the High Commissioner, 'Working Group on the Right to Development' (*ohchr,* NY) https://www.ohchr.org/en/hrc-subsidiaries/iwg-on-development accessed 20 May 2021
[252] For instance, Saad Alfarargi, Special Rapporteur on the Right to Development (*ohchr,* NY) https://www.ohchr.org/EN/Issues/Development/SRDevelopment/Pages/SaadAlfarargi.aspx accessed 04 November 2019.
[253] Ibid.
[254] UNCHR, 'Report of the Special Rapporteur on the Right to Development' (2 August 2017) UN Doc A/HRC/36/49.

international cooperation'.[255] It can be argued that this is one of the consequences of a lack of empirical knowledge, identified by Marks[256] as a challenge to the realisation of the RtD. To overcome this challenge, Marks[257] recognises that there is a need to develop a knowledge base of the actual and potential application of the RtD in the concrete settings of developing States.

Second, the Special Rapporteur identified the lack of engagement as a further challenge to the realisation of the RtD.[258] The Rapporteur argued that, as a result of the political divide, UN agencies and civil society did not really engage in promoting, protecting, and fulfilling the RtD. Although there has been some progress in the evolution of the concept of the RtD and its insertion in some international and regional instruments, general awareness and engagement with its implementation, particularly for people in Africa, remains low. Thus, progress in development has been uneven.[259]

Third, as Marks[260] identified, the absence of practice of the RtD is another challenge. This challenge has resulted from the absence of policies at national and international levels that set priorities and allocate resources based on the RtD. Therefore, it is difficult to expect States to practise this right if it has not been applied in their policies in order to move from commitment to practice. Therefore, to apply the RtD in policies

[255] Ibid.
[256] Stephen P Marks, 'The Human Right to Development: Between Rhetoric and Reality' (n183) 435–52.
[257] Ibid.
[258] UNCHR, 'Report of the Special Rapporteur on the Right to Development' (n254).
[259] Ibid.
[260] Stephen P Marks, 'The Human Right to Development: Between Rhetoric and Reality' (n183) 435.

at a national and international level, States should engage particularly with intergovernmental organisations such as UN agencies and civil society.

The fourth challenge is adverse global trends,[261] which are, among others, the global financial and economic crisis, the energy and climate crisis, the increasing number of natural disasters, corruption, illicit financial flows, the privatisation of public services, austerity, and other measures.[262] All these challenges have made it problematic to implement the RtD as there is no sufficient global focus on its realisation. Therefore, the Special Rapporteur[263] affirmed that addressing these challenges will require the concerted effort of all relevant actors, both at national and international levels. The Special Rapporteur also stressed that to address these challenges, a three-prong approach was required. It was imperative first to facilitate cooperation among stakeholders and build the relationships between initiatives and stakeholders, political and geographic caucuses, and States and continents, with a view to creating platforms for the exchange of goods, practices, and lessons learned.[264] The second aspect is to identify and work towards removing structural obstacles to the implementation of the RtD by assessing national and international development policies and providing recommendations on fostering effective international cooperation, including in relation to financing for development. The third and final aspect is to explore practical measures and provide recommendations for the realisation of the RtD at national and international levels.[265]

[261] UNCHR, 'Report of the Special Rapporteur on the Right to Development' (n254).
[262] Ibid.
[263] Ibid.
[264] Ibid.
[265] Ibid.

These challenges might further explain why the UNDRtD is still not a legally binding instrument, and the RtD is not yet considered a right under treaty law. As such, for the investigation in the Timor-Leste context, this means that Australia is not responsible/bound for/by the realisation of the RtD of Timor-Leste, even though the analysis in section 2.3 shows that Australia as a developed State is a duty-bearer of the RtD. Therefore, this thesis argues that Timor-Leste is responsible for the RtD of itself and its own people.

Despite the controversies, it can be contended that there is an emerging human RtD. As the contours of the RtD are not very well defined, the following section identifies the different elements of the RtD to help understand what it is composed of.

2.5 Elements of the Right to Development

This section examines the key elements of the RtD, which will then be used to analyse the 2018 Treaty and, more specifically, to ascertain whether the 2018 Treaty incorporates these elements.

The key elements of the RtD that this thesis examines are the principles of participation, non-discrimination, fair distribution of benefits, PSNR, and duty of cooperation. These key elements are also classed as principles of international human rights that were incorporated in the 2018 Treaty for the RtD to be realised for Timor-Leste and its people.

2.5.1 Participation

Participation is a key element of the RtD. It has an important place in various legal instruments, such as the UDHR,[266] the ICCPR,[267] and the ICESCR.[268] The human person affected by development must be included in formulating national development policies that States have the responsibility and duty to frame.

The human person is the right-holder of civil, political, social, economic, and cultural rights. They can also be supported or represented by other actors such as NGOs, civil society, or leaders of the State who were elected by the population. The UNDRtD stresses that all human person and all peoples[269] are 'the central subject of development and should be the active participant and beneficiary of the right to development'. The UNDRtD sees every human person as not just a beneficiary but also a participant in a comprehensive process that aims to improve their well-being, i.e., their human development.

In point of fact, participation has been described as 'the right through which all other rights in the Declaration on the Right to Development are exercised and protected'.[270] The Declaration clearly emphasises that the human person is essential for the process of development. To achieve this, the participation of every human person is crucial, and such participation must be 'active, free and meaningful' and [271] encouraged by States.[272]

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[266] UDHR (n46) Arts 21 and 27.
[267] ICCPR (n84) Art 25.
[268] ICESCR (n84) Art 8.
[269] UNDRtD (n2) Art 1 (1).
[270] UNCHR, 'Global Consultation on the Realization of the Right to Development as a Human Right,' (1990) (46th Session, Agenda Item 8) UN Doc. EJCN.4/1990/9, Rev. I, Para. 177.
[271] UNDRtD (n2) Preambular Para 2.
[272] Ibid Art 8 (2): States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

Therefore, the human person should be involved in all stages, including the implementation, monitoring, and evaluation of development policies at the national level. States must formulate appropriate national development policies[273] that require consultation and cooperation with the people affected by development in order to obtain their free, prior, and informed consent (FPIC). The application of the principle of FPIC means that the consultation process should be free of coercion, intimidation, or manipulation, prior consent should be required in advance before starting any activity, and information on aspects, such as its nature and scale, and its environment, social and economic impacts, should be provided to every human person and peoples or communities to keep them informed.[274] Additionally, the option to withhold consent must be part of the process of consultation,[275] while these individuals and peoples can be represented by States.

FPIC is widely recognised in several international legal instruments, particularly those concerning the rights of indigenous peoples and their involvement in decisions affecting their lands, resources, and livelihoods. For instance, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) acknowledges the right of indigenous peoples to withhold their FPIC before any project affecting their lands and resources is initiated.[276] The International Labour Organisation No. 169 (ILO 169) emphasizes the importance of consulting with indigenous peoples and obtaining

[273] Ibid Art 2 (3).
[274] United Nations, Department of Economic and Social Affairs, 'Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples' (17 February 2005) UN Doc E/C.19/2005/3.
[275] Ibid.
[276] UNDRIP (n115) Art 32.

their FPIC for any activities affecting their land and resources.[277] Although the Convention on Biological Diversity (CBD) does not specifically use the term FPIC, it acknowledges the rights of indigenous peoples and local communities to participate in decision-making processes regarding the use of biodiversity and genetic resources, implying the need to seek their consent. Similarly, regional legal instruments, such as the African Union's African Charter on Human and Peoples' Rights[278] and the American Declaration on the Rights of Indigenous Peoples,[279] recognise the importance of FPIC in fostering respect for the rights of Indigenous peoples and ensuring their active participation in decision-making processes that affect them.

For instance, Timor-Leste voted in favour of the UNDRIP in 2007,[280] acceded to the CBD in the same year, 2007,[281] and became the ILO's 177th Member State in 2003.[282] It can be asserted that Timor-Leste has signed onto the pertinent international instruments that recognize the right to participate, particularly the principle of FPIC. However, the national laws of Timor-Leste do not support the principles of FPIC.

To address this gap, Timor-Leste should incorporate relevant provisions concerning FPIC into its national laws, policies and regulatory framework, making it a formal

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[277] International Labour Organisation (ILO) Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989, 28 ILM 1382 [Hereinafter ILO 169] Art 15(2) and 6.

[278] ACHPR (n106).

[279] American Declaration on the Rights of Indigenous Peoples, AG/Res 2888 (XLVI-O/16) adopted at 3rd plenary session (15 June 2016) [Hereinafter ADRIP].

[280] UNDRIP (115).

[281] Convention on Biological Diversity, 'List of Parties' (*CBD,* NY) <https://www.cbd.int/information/parties.shtml> accessed on 10 October 2024.

[282] International Labour Organisation, 'Country Profile' (*ILO,* NY) <https://normlex.ilo.org/dyn/normlex/en/f?p=1000:11003> accessed on 10 October 2024.

requirement for the approval of specific projects, particularly those related to extractive industries and land use.

Nevertheless, the Constitution of Timor-Leste upholds the principle of participation. It allows its citizens to engage in the political life and public affairs of the country. [283] The citizens or individuals have the right to request involvement from local governments in addressing community issues and promoting local development without undermining the role of the State in these processes.[284] However, whether to implement FPIC depends on the Government of Timor-Leste, as there are no national laws or constitutional provisions that reference the principles of FPIC.

Regarding the inter-State (between States) aspect of participation, for instance, this element deals with the participation of the States and their representatives affected by development in formulating an agreement or treaty. This is evident in the negotiations of bilateral treaties, where negotiators represent their State to draft and sign such treaties. However, it is also essential for individuals and peoples or communities to participate through the State, which acts as an intermediary.

In the context of intra-State relationships (between the State and the community), participation means involving the right-holders of the RtD, such as States, the human person and peoples or communities to participate actively in the creation and implementation of policies that affect their well-being. This includes participation in public affairs and in the justice system in order to have equal access to justice.

[283] Constitution of the Democratic Republic of Timor-Leste (entered into force on 20 May 2002), Title II, Section 46, and Part III, section 63 (Part III).
[284] Ibid, Part III, Article 72.

Participation must include FPIC.[285] This way, all the human peron and peoples or communities affected by development can influence the decisions and actions relating to both the process and the outcome of development. Thus, public participation is important for the process of development. Public participation is one of the three pillars of the Aarhus Convention;[286] it requires Parties to guarantee rights of access to information, public participation in decision-making, and access to justice in environmental matters.[287] The Aarhus Convention on Public Participation emphasises that individuals have the right to participate in the decision-making process related to the environment. Individuals shall also have the opportunity to express their opinions, ask questions, and have their voices heard before any decisions are made. The Convention is not the only international legally binding instrument giving the public broad and concrete rights of participation in decision-making and access to information and justice regarding the environment. In the context of Latin America and the Caribbean, for example, there is a regional legal binding treaty, i.e., the Escazu Convention for Latin American States,[288] on access to justice, public participation, and justice in environmental matters.

[285] FPIC is a specific right that applies to indigenous peoples and is recognised in the UNDRIP which is endorsed by Timor Leste. UNDRIP (n115).
[286] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (opened for signature on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447 [Hereinafter Aarhus Convention].
[287] Aarhus Convention, Art 1.
[288] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted on 4 March 2018, entered into force 22 April 2021) [Hereinafter Ezcazu Agreement].

Although participation is cited in Timor-Leste's Constitution,[289] Timor-Leste is not a signatory of the Aarhus Convention;[290] indeed, the Aarhus Convention targets European States, but any States of the world (including Timor-Leste) can be a party.[291] However, it can be assumed that it is unlikely that developing States such as Timor-Leste would want to be a party as the Convention includes stringent provisions. Nevertheless, Timor-Leste can follow the 2010 UNEP Guidelines[292] on public participation to develop its national laws. This is something that the Government of Timor-Leste should consider in order to have a positive effect on its domestic laws regarding public participation related to the environment.

2.5.2 Non-Discrimination

The non-discrimination element of the RtD is interconnected and goes alongside participation: i.e., participation must be carried out without discrimination. When the UNGA adopted the UNDRtD, one of the fundamental principles that it affirmed, and which is articulated in the UN Charter[293] and the UDHR,[294] was the right to a social and international order in which the rights and freedoms proclaimed in the Universal Declaration can be fully realised for all people everywhere without discrimination.

[289] Constitution of the Democratic Republic of Timor-Leste (n283).
[290] ICESCR (n84).
[291] Aarhus Convention (n287), Art 19 (3).
[292] Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (adopted in February 2010 by United Nations Environment Programme).
[293] UN Charter (n82) Arts 1(3), 13(1)(b), 55(c), 76(c).
[294] UDHR (n46) Arts 2 and 7.

Article 5 of the UNDRtD states that 'States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.'[295]

The objective of this element is to enable developing States and the most vulnerable groups within society, who are often affected by the lack of development, such as minorities, women, children, and people with disabilities, to be included and to play their role as agents of development.[296] It could be argued that, in this context, the participation of all States, including developing States and vulnerable groups, is important in creating international development policies.

With regard to the inter-State aspect of the non-discrimination element, the participation of developing States in formulating an agreement or treaty is important if they are affected by development. In contrast, from an intra-State perspective, the participation of all human person and peoples or communitites (including minorities, women, children, and people with disabilities) is paramount in the creation and implementation of national policies that affect their well-being.

[295] UNDRtD (n2).
[296] Arts & Tamo (n55) 238.

2.5.3 Fair Distribution of Benefits

The fair distribution of benefits element is interconnected with the participation element because participation is a way to ensure that decisions are made in a fair and inclusive manner and that the benefits and burdens of those decisions are shared fairly among the human person and peoples or communities,

The concept of fair distribution of benefits identifies normative elements shared amongst international laws that refer to benefit-sharing. The roots of benefit-sharing are linked to the strengthening of the (political and economic) sovereignty of newly independent States.[297] By being implied in different areas of international law, it makes its status difficult to determine.

Nevertheless, a growing number of international legal instruments refer to benefit-sharing with regard to the use of natural resources.[298] The principle that benefits from the use of natural resources should be shared can be identified in the earliest

[297] Nico J Schrijver, 'Fifty Years Permanent Sovereignty over Natural Resources: The 1962 UN Declaration as the Opinio Iuris Communis', in Marc Bungenberg & Stephan Hobe (eds), *Permanent Sovereignty over Natural Resources* (Springer 2015) 16-17; Also see: Nico J Schrijver, 'Natural Resources, Permanent Sovereignty over' in R Wolfrum, The Max Planck Encyclopedia of Public International Law (Oxford University Press 2012) Para 1.; Elisa Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' (2016) 27 (2) EJIL 353, 354; Bram De Jonge, 'What Is Fair and Equitable Benefit-Sharing?' (2011) 24 (2) Journal of Agricultural and Environmental Ethics 127-146; Doris Schroeder, 'Benefit-Sharing: It's Time for a Definition' (2007) 33 Journal of Medical Ethics 205; Convention on Biological Diversity (adopted on 5 June 1992, entered into force 29 December 1993), 31 ILM 822 [Hereinafter Convention on Biological Diversity/CBD]; Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity (adopted on 29 October 2010, entered into force 12 October 2014) CBD Decision X/1 [Hereinafter Nagoya Protocol] Annex I, Art 5.; ILO 169 (n277) Art 15(2); Inter-American Commission on Human Rights *Case of the Saramaka People v Suriname* (28 November 2007) (Judgement) Para 129; UNCLOS 1982 (n132) Art 140; Nagoya Protocol (n297), Art. 10.

[298] Morgera (n297) 354.

manifestations of the principle of PSNR.[299] This principle recognises the right of all States, and developing States in particular, to have a greater share in the benefits derived from natural resources on an equitable basis, with due regard for the development needs and objectives of the peoples concerned and to mutually acceptable contractual practices.[300] Furthermore, the origins of benefit-sharing also come from the field of the RtD.[301] Indeed, benefit-sharing, or distribution of benefits, is mentioned twice in the UNDRtD.[302]

2.5.3.1 Fair and Equitable

Although the term 'fair and equitable' is not defined in international treaties, fair and equitable benefit-sharing is one of the objectives of the UN Convention on Biological Diversity (CBD).[303] This objective holds that States and communities granting access to their genetic resources (and traditional knowledge) should receive a share of the benefits that users derive from these resources.[304] The CBD does not impart a definition of fair and equitable terms. However, the emergence of benefit-sharing

[299] Schrijver, 'Natural Resources, Permanent Sovereignty over' (n297) Para 5.
[300] UNGA Res 2158 (XXI) (25 November 1966) Para 5.
[301] UNDRtD (n2), Art 2 (3).
[302] Ibid Preambular, Para 2 and Art 2.
[303] Convention on Biological Diversity (n297).
[304] De Jonge (n297) 127.

obligations in international law is largely seen as the engagement of fairness and equity,[305] which refers to the use of natural resources.[306]

Consequently, the word 'fair' in the context of benefit-sharing is defined in this thesis as when two parties voluntarily, after negotiating, have reached an agreement on managing natural resources, and each feels that the agreement will be beneficial to them. The word 'equitable', on the other hand, using the 1982 UNCLOS definition, is the goal to secure justice in any delimitation process.[307] This would imply the use of the principle of Equidistance/Relevant Circumstances to delimit maritime boundaries, which has been reflected in the decisions of relevant cases.[308]

Furthermore, De Jonge[309] claims that fair and equitable benefit-sharing is not merely about the process of an ethical distribution or exchange of benefits. Two prerequisites need to be satisfied if a fair and equitable benefit-sharing is being properly developed or having a chance to develop properly. First, it relates to the

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[305] UNGA 'Report of the UN Special Rapporteur on Indigenous Peoples Rights' (19 July 2010) UN Doc A/HRC/15/37 Para 78; UN Committee on the Elimination of Racial Discrimination: Concluding Observations on Ecuador (2003) UN Doc CERD/C/62/CO/2 Para 16; UNPFII 'Report of the International Workshop on Methodologies Regarding Free, Prior Informed Consent and Indigenous Peoples' (2005) UN Doc E/C.19/2005/3 Para 46 (i).

[306] *Case of the Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Commission on Human Rights (28 November 2007) Para 138.

[307] UNCLOS (1982) (n132) Arts 74 and 83.

[308] See discussion in Chapter 3, section 3.2.3; *Maritime Delimitation in the Area between Greenland and* Jan Mayen (*Denmark v*. *Norway*) (Judgement) [1993] ICJ Rep 38; *Maritime Delimitation and Territorial Questions Between* Qatar *and* Bahrain *(Qatar v. Bahrain) (Judgement)* [2001] ICJ Rep 40; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* (Judgement) [2002] ICJ Rep 303; *Case Concerning the Arbitral Award (Guyana v. Suriname)* Award of the Arbitral Tribunal, PCA Case No. 2004-04 (PCA, 2004), 24 February 2004 Permanent Court of Arbitration [PCA] 108; *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (Judgment) [2009] ICJ Rep 61.

[309] De Jonge (n297)143-144.

socio-political power differences between the various stakeholders in Access and Benefit Sharing (ABS) negotiations at both national and international levels. There must be an emphasis on fair and accurate processes and equal participation of different stakeholders. To enable this, the relationships of stakeholders regarding their rights over specific resources must be carefully analysed. Second, the benefit-sharing needs to be established by setting clear standards for the valuation of resources and contributions. It can be argued that fair and equitable benefit-sharing in natural resources refers to the management of natural resources in ways that encourage and reward sustainable practices.

There are two types of benefits-sharing discussed in the next section: one is applied between States (inter-State benefit-sharing), and the other is applied between States and their communities (intra-State benefit-sharing).

2.5.3.2 Inter-State Benefit-Sharing

Benefit-sharing holds the promise of facilitating an agreement upon specific forms of cooperation since different parties are motivated by their perception of the benefits that derive from it.[310] Inter-state benefit-sharing occurs when States receive rewards through inter-state exchanges, such as payments, information-sharing, financial solidarity, technology transfer, and capacity building[311] through multilateral and bilateral agreements.

The other most widely recognised applications of the concept of benefit-sharing associated with natural resources can be found in international biodiversity law,

[310] Morgera (n297)356; See Also: Claudia Sadoff & David Grey, 'Cooperation on International Rivers: A Continuum for Securing and Sharing Benefits' (2005) 30 (4) Water International 420.
[311] Morgera (n297) 368.

which builds on the principle of PSNR in its primary instruments: the 1992 Convention on Biological Diversity (CBD)[312] and the 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Resulting from their Utilization (Nagoya Protocol on Access and Benefit Sharing [ABS]).[313] The main objectives of the CBD are to use and conserve biological diversity in a sustainable way and to share fairly and equitably the benefits from the use of genetic resources.[314]

In addition, benefit-sharing is also found in Article 82 (4) of the UNCLOS, which states that '[t]he payments or contributions shall be made through the Authority, which shall distribute them to States Parties to this Convention, on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them'.[315] These payments or contributions are the benefits shared amongst States. Generally, these benefits can be classed as monetary, including the payment of royalties, joint ventures, and up-front payments, and non-monetary benefits, including the sharing of research and development results, technology transfer, and capacity building.[316]

2.5.3.3 Intra-State Benefit-Sharing

The concept of intra-State benefit-sharing, as explored by Morgera,[317] applies to relations between a State and its community within its territory. The national

[312] Convention on Biological Diversity (n297).
[313] Nagoya Protocol (n297).
[314] Convention on Biological Diversity, 'The Convention' (*Biodiv,* NY) http://www.biodiv.be/convention accessed 07 September 2018.
[315] UNCLOS (1982) (n132) Art 82 (4).
[316] Louisa Parks & Elisa Morgera, 'The Need for an Interdisciplinary Approach to Norm Diffusion: The Case of Fair and Equitable Benefit-sharing' (2015) 24 (3) RECIEL 353, 353, 368.
[317] Morgera (n297)355.

development policies mentioned under Article 2 (3) of the UNDRtD could be used to share benefits through either direct payments or support from the State to its communities.[318]

Moreover, the national development policies created by States must ensure, inter alia, 'equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income'.[319] Here, benefit-sharing[320] also applies to private companies that may be protected by international investment law. This means that States must ensure that national development policies place obligations on private companies so that they respect human rights,[321] work conditions, and the environment of its individuals and peoples, where their interest is adversely affected. Thus, some forms of benefits to be shared may serve to empower and share authority with communities to protect the environment. Consequently, States must ensure that companies comply with the national laws relating to the protection of the environment, as well as the management of its natural resources and development.

2.5.4 Permanent Sovereignty over Natural Resources (PSNR)

The PSNR element is a concept that refers to a State's right to exercise control and make decisions concerning its own natural resources. This element is linked to a fair distribution of benefits because it asserts that the benefits derived from these resources should be distributed fairly and equitably among the population of the

[318] UNDRtD (n2), Art 2 (3).
[319] Ibid Art 8.
[320] Morgera (n297) 355.
[321] Permanent Sovereignty over Natural Resources, UNGA Res 1803 (XVII) (17 December 1973), Part I.

State. Thus, States have the right to freely determine how their natural resources[322] are to be used and the terms on which they may be exploited. The beneficiary of the principle of PSNR is viewed by some as solely to the State or solely to people.[323] The view that the principle of PSNR applies exclusively to States is bolstered by several resolutions on permanent sovereignty, such as the Charter of Economic Rights and Duties of States (CERDS),[324] which designate States as the exclusive holders of the right to permanent sovereignty. This view aligns with the traditional understanding of international law, which regards only States as subjects of the law and, therefore, the only actors capable of possessing rights, as argued by Chekera and Nmehielle.[325] This is due to the relationships between Multinational Corporations (MNCs) engaged in resource extraction and their host States.[326] Consequently, the interpretation that States have the right to legislate for the public good concerning natural resources has become the most prevalent view.

Another view, nevertheless, holds that the principle of PSNR only benefits individuals. This interpretation aligns with the *travaux préparatoires* of the ICESCR

[322] Drawing from international treaties, natural resources consist of natural occurrences of nature, such as oil, gas, minerals, fresh water, oceans, seas, air, forests, soils, genetic material and other biotic components of ecosystems with actual or potential use or value for humanity. *See:* CBD (n297) Art 2, UNCLOS (1982) (n132) Art 77(4).

[323] Emeka Durigbo, 'Permanent Sovereignty Over Natural Resources and People's Ownership of Natural Resoyrces in International Law' (2016) 38 George Washington Internatioal Law Review 43.

[324] Charter of Economic Rights and Duties of States, UNGA Res 3082 (XXVIII) (6 December 1973) [Hereinafter CERDS].

[325] Yolanda T. Chekera and Vincent O. Nmehielle, 'The International Law Principle of Permanent Sovereignty over Natural Resources as an Instrument for Development: The Case of Zimbabwean Diamonds' (2013) 6 African Journal of Legal Studies 69, 77

[326] Ndiva Kofele-Kale, 'Patrimonicide: the international economic crime of indigenous spoliation' (1995) 28 Vanderbilt Journal of Transnational Law 45, 92.

and ICCPR,[327] which indicate that representatives consistently referred to the rights of peoples regarding their natural resources, [328] and it is indicated in Article 1 (2) of both ICESCR and ICCPR,[329] which states that: 'is not merely an affirmation of the right of every state over its natural resources; it clearly provides that the right over natural wealth belongs to peoples.'[330]

Although certain elements of permanent sovereignty can only be exercised by the State, it is believed that the right to PSNR primarily belongs to both States and their peoples. As Res 1803[331] grants permanent sovereignty to both peoples and States, it attributes to both the duty to exercise their sovereignty in the interest of national development and for the well-being of the people. Therefore, understanding the evolution of the PSNR principle since its inception is essential to comprehend this. The principle of PSNR made its first appearance in international law in 1952 in two UNGA resolutions, 523 (VI) and 626(VIII).[332] During the first phase, Resolution

[327] ICESCR and ICCPR (n84).

[328] James Crawford, 'The rights of peoples: "peoples" or "governments"?' (1985) 9 Bulletin of the Australian Society of Legal Philosophy 136, 142.

[329] Article 1 (2) of ICCPR and ICESCR (n84): 'All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.'

[330] Antonio Cassese, 'The self-determination of "peoples"', in L. Henkin (ed.), The International Bill of Human Rights: The Covenant on Civil and Political Rights (Columbia University Press 1981) 94.

[331] UNGA Res 1803 (n321) Para 1; Also see: Schrijver (n282).

[332] UNGA Res 523 (VI) (12 January 1952) and UNGA Res 626 (VII) (21 December 1952) Para 20; UNGA Res 1803 (n321). The General Assembly adopted Resolution 1803 (XVII) on the 'Permanent Sovereignty over Natural Resources' on 14 December 1962 by 87 votes in favour to 2 against, with 12 abstentions.

523 (VI)[333] recognised the right of developing States to 'determine freely the use of their natural resources for the purposes of national development'.[334]

Then, in 1958, the UN General Assembly Resolution 1314 (XIII) accepted the principle of PSNR as a basic constituent of the right to self-determination.[335] Developing States were convinced that if they achieved their political self-determination and effective control over their natural resources, their independence would be complete and effective. They considered the principle of PSNR as a way to gain control over their natural resources as it clearly ascertained that natural resources belong to the peoples of the territory in which they are situated. It can be argued that the principle of PSNR gives developing States the right to use and exploit their natural resources.[336] This position has led to numerous debates in (including resolutions of) the General Assembly on the promotion and financing of economic development in developing States.[337]

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[333] UNGA Res 523 (VI) (n332).

[334] Ibid Para 20; Also see: UNGA Res 626 (VII) (n332); UNGA Res 837 (IX) 21 (14 December 1954).

[335] UNGA Res 1314 (XIII) (12 December 1958) Para 1: 'Noting that the right of peoples and nations to self-determination as affirmed in the two drafts Covenants completed by the Commission of Human Rights includes "permanent sovereignty over their natural wealth and resources"'; Also see: Chekera & Nmehielle (n325); Nico Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997) 368.

[336] UNGA Res 626 (VII) (n332): '*Bearing in mind* the need for encouraging the under-developed countries in the proper use and exploitation of their natural wealth and resources', '*Remembering* that the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty and is in accordance with the Purposes and Principles of the Charter of the United Nations[.]'

[337] This debate resulted in the adoption of General Assembly resolutions 523 (VI) and 625 (VIII) (n332). Another debate in the General Assembly was in connection with its work on the preparation of the draft international covenants on human rights, notably under UNGA Res 421 D (V) (4 December 1950).

In the second phase,[338] this right was reaffirmed in Resolution 1803 (XVII), adopted in December 1962 by the UNGA.[339] This Resolution explains that the principle of PSNR must be exercised in the interest of not only each State's national development but also the well-being of the people of the State concerned. This right was also explored for inclusion in the drafting of the ICCPR and ICESCR 1966.[340]

The third phase[341] led to the adoption of the CERDS[342] on 12 December 1974. This Charter, as the name suggests, highlights the rights and duties of states, including to 'regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities'.[343] In the same year, the Declaration on the NIEO also reinforced this principle by stating that the principle of PSNR includes the right to 'restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories and peoples'[344] in case of a violation.

Consequently, it can be argued that, at the heart of the principle of PSNR, the inalienable right of all peoples and States to freely dispose of their natural resources

[338] See: UNGA Res 1803 (n321); UNGA Res 2386 (XXIII) (19 November 1968), Para 24; Permanent Sovereignty Over Natural Resources of Developing Countries and Expansion of Domestic Sources of Accumulation for Economic Development, UNGA Res 2692 (XXV) (11 December 1970); Charter of The Economic Rights and Duties of States, UNGA Res 3037 (XXVII) (19 December 1972); CERDS (n324).
[339] UNGA Res 1803 (n321).
[340] ICCPR and ICESCR (n84) Art 1 (2).
[341] UNGA Res 3201 (S-VI) (1 May 1974).
[342] CERDS (n324).
[343] Ibid Art 2.2 (a).
[344] UNGA Res 1803 (n321).

stands.[345] It also includes the right to explore and exploit natural resources freely,[346] the right to use natural resources for development,[347] the right to regulate foreign investment,[348] and the right to settle disputes on the basis of national law.[349] This shows that although the State can utilise and exploit its natural resources or grant an individual or company the right to exploit its natural resources, this has to be undertaken for the purposes of national development.[350] For this, its activities related to development are subject to the State's national laws and must be carried out in accordance with international law. Consequently, a State is free to create an environment that encourages foreign and domestic investment when it chooses to enter into international or national contracts (e.g. through regional and multilateral trade agreements or Bilateral Investment Treaties [BITs]) granting other entities access to its natural resources. While encouraging investment, a State also needs to achieve sustainable development, which is to find a balance between environmental protection, economic growth, and social equity.[351] By doing so, States will be able to provide equitable benefits to all stakeholders in a holistic manner by ensuring economic development, social inclusion, and environmental sustainability.[352]

[345] UNGA Res 1803 (n321) Preambular, Para 4: 'Considering that any measure in this respect must be based on the recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests'; Also appears under ICCPR and ICESCR (n84) Art 1(2).
[346] UNGA Res 1803 (n321) Section 5.
[347] Ibid Section 1.
[348] Ibid Section 2.
[349] Ibid Section 4.
[350] UNGA Res 1803 (n321).
[351] Brundtland Report (n35) 41.
[352] Alam et al (n37) 37.

It can be argued that the principle of PSNR could be used as a vehicle for development.[353] This principle, reflected under Article 1 of the UNDRtD, affirms that 'the human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources'.[354] In this Article, the UNDRtD reminds that full sovereignty over natural resources is a right to which people are entitled, which is subject to the relevant provisions of both the ICCPR and the ICESCR 1966.[355] Furthermore, it also appears under Article 2 (3) of the UNDRtD, which indicates that States have the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free, and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.[356]

Thus, in its inter-State aspect, the principle of PSNR gives States the right to use and exploit their natural resources, whereas, in the context of the intra-State relationship, this principle places a duty on States to ensure that activities within their jurisdiction and control do not cause damage to the environment of their community, with the aim of improving the well-being of their people. It also grants permanent

[353] Kofele-Kale (n326) 72.
[354] UNDRtD (n2).
[355] ICCPR and ICESCR (n84) Art 1 (2): 'All peoples may, for their own ends, freely dispose of their natural wealth and resources [.]'.
[356] UNDRtD (n2), Art 2 (3).

sovereignty to people and attributes to them the duty to exercise their sovereignty in the interest of national development and for the well-being of the people.[357]

2.5.5 Duty of Cooperation

While States have the right to exercise control over their own resources, they also have the responsibility to cooperate with other States to ensure the sustainable and equitable management of these resources. However, in the context of this thesis, the duty of cooperation element of the RtD refers to the duty of States to cooperate with each other to ensure the development and the elimination of obstacles to development.[358]

The duty to cooperate in development efforts was one of the package ideas that formed the proposals for an NIEO[359] to bring development to the forefront of the international agenda. This is one of the reasons why the duty of cooperation is the most controversial element of the RtD, which was seen by some as giving rise to an obligation of developed States and international organisations to provide development assistance to developing States. In the context of inter-State relationships, the UNDRtD places a duty on States to cooperate with each other to ensure the development and the elimination of obstacles to the development,[360] including those resulting from failure to observe civil and political, as well as

[357] UNGA Res 1803 (n321) Para 4: 'Considering that any measure in this respect must be based on the recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests'; Also appears under ICCPR and ICESCR (n84) Art 1(2).
[358] UNDRtD (n2) Art 3 (3).
[359] Mickelson (n1) 375.
[360] UNDRtD (n2), Art 3 (3).

economic, social, and cultural rights.[361] Thus, the Declaration requires States to act collectively to ensure development. The Declaration also places a duty on States to take 'sustained action to promote the more rapid development of developing countries'[362] and asserts that 'effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development'.[363]

It can be argued that the UNDRtD emphasises the special status of developing States, and the 'sustained action' and 'appropriate means and facilities' in this Declaration refer to development assistance, either through financial or technical aid[364] to developing States. This development assistance can be provided through the transfer of technology, debt forgiveness, and assistance to states in overcoming financial crises and other emergencies.[365] This can also be achieved by States collectively through agencies and international organisations, such as International Financial Institutions,[366] the World Bank,[367] and the WTO.[368] In addition, the use of trade

[361] Ibid, Art 6 (3).
[362] Ibid Art 4 (2).
[363] Ibid Art 4 (2).
[364] Jenny Wells, 'Foreign Aid and its Importance in Relieving Poverty' (2015) 28 (3) Government Relations Coordinator, Oxfam Australia 3-8.
[365] Arts & Tamo (n55) 224.
[366] For instance, the International Monetary Fund provides capacity-building, short-term financing, and technical assistance in fiscal and monetary matters. See: International Monetary Fund, 'IMF Support for Low-Income Countries: How Does the IMF Support Low-income Countries?' (*IMF,* NY) <https://www.imf.org/en/About/Factsheets/IMF-Support-for-Low-Income-Countries> accessed on 02 February 2024.
[367] The World Bank, 'What We Do' (*World Bank,* NY) https://www.worldbank.org/en/about/what-we-do.print#:~:text=We%20provide%20low%2Dinterest%20loans,environmental%20and%20natural%20resource%20management accessed 02 February 2024.
[368] See section 2.3.1.2 (n127).

liberalisation by agencies and international organisations can also provide incentives to increase investment flows in developing States.

Therefore, the duty of cooperation, as understood in an inter-State relationship, is defined in this thesis as sustained actions to ensure development and eliminate obstacles to development. Whereas, in the context of intra-State relationships (i.e., between States and their community),[369] States have the 'primary responsibility for the creation of national and international conditions favourable to the realization of the right to development'.[370] At the national level, States are also required to take 'all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income'.[371] These measures are taken, for instance, by formulating development policies at the national level that yield benefits to its people to alleviate poverty and help them to achieve development.

Therefore, it can be argued that these key elements of the RtD, which are also norms, standards, and principles of international human rights, are essential elements to be included in policies and processes of development for the realisation of the RtD. With these key elements now identified, it will be simpler to analyse the 2018 Treaty using the RtD.

[369] Community in this thesis is defined as a group sharing a common understanding, the same language, law, manners, and/or tradition.
[370] UNDRtD (n2), Art 3 (1).
[371] Ibid Art 8.

2.6 Conclusion

To conclude, this chapter has shown that the RtD is known as a right of developing States because they were its principal promoters. This right was adopted and declared a human right in the Declaration of the Right to Development 1986, the UNDRtD. The Declaration has remained a soft law until now, which gives no obligation to States to implement the right, particularly the obligation to provide development assistance from the Global North to the Global South. This has caused controversies, one of them being attributed to its collective nature. Despite the controversies between the Global North and the Global South, the RtD has been reaffirmed in several international instruments. Therefore, there is some hope that the RtD will be recognised as a right in a legally binding instrument. Furthermore, although some scholars[372] agree that the RtD is a human right and that the elements of the RtD have been incorporated into legally binding documents, as mentioned before, there are differing views on whether this right is of a customary nature. At a minimum, it is agreed that the RtD is an emerging customary international law.

[372] See: Sen (n23); Shadrack Gutto, 'Responsibility and Accountability of States, Transnational Corporations, and Individuals in the Field of Human Rights to Social Development: A Critique' (1984) 3 Third World Legal Stud 12; Mohammed Bedjaoui, 'The Difficult Advance of Human Rights Towards' in *Universality in a Pluralistic World: Proceedings at the Colloquium Organised by the Council of Europe in Co-operation with the International Institute of Human Rights* (Council of Europe, International Institute of Human Rights 1989) 32; V Dimitrievic, 'Is there a Right to Development?' paper presented at the annual convention of the International Studies Association, Cincinnati, March 1982; Henry Shue, *Basic Rights* (Princeton University Press 1980) 19-20; Sengupta, 'On the Theory and Practice of the Right to Development' (n141) 837-889; Subrata Roy Chowdhury & Paul De Waart, 'Significance of the Right to Development in International Law: An Introductory View' in Subrata Roy Chowdbury, Eric Denters & Paul De Waart (eds), *The Right to Development in International Law* (Martinus Nijhoff 1992) 10.

Despite the RtD's controversies and the fact that its contours are not very well defined, this chapter has identified the key elements of the RtD: the principles of participation, non-discrimination, fair distribution of benefits, PSNR, and the duty of cooperation. Thus, this study will assess whether these elements are incorporated in the 2018 Treaty, with a view to finding out whether the treaty contributes to the realisation of the RtD of Timor-Leste and its people.

The next chapter, Chapter 3, will use the RtD as a human right to analyse whether the key elements of the RtD are incorporated in previous JDAs and the 2018 Treaty from an inter-State perspective.

CHAPTER 3: JOINT DEVELOPMENT OF HYDROCARBON MANAGEMENT IN TIMOR-LESTE: ELEMENTS OF THE RIGHT TO DEVELOPMENT FROM AN INTER-STATE PERSPECTIVE

3.1 Introduction

This chapter seeks to assess whether the key elements of the Right to Development (RtD) identified in Chapter 2[1] have been incorporated in previous hydrocarbon agreements and the 2018 Treaty from an inter-State perspective (between States). The ultimate aim is to find out whether the 2018 Treaty contributes to the realisation of the RtD of Timor-Leste and its people. This chapter also evaluates the evolution of these key elements of the RtD through the lens of joint hydrocarbon agreements from an inter-State perspective (between States), with a view to understanding how these treaties have progressed through the years and determine whether they are indeed a tool for achieving the RtD at an inter-State level.

The interpretation and analysis of these treaties will be supported by information gathered from official websites, in official records such as the Exchange of Letters[2] and the National Interest Analysis of the Treaties, cases, and scholarly articles generated during and after the negotiations. However, it should be noted that, despite the author's best endeavours to locate all essential documents, notably those

[1] Section 2.5.

[2] The Exchange of Letters is an example of an 'agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty' within the meaning of art 31 (2) (a) of the Vienna Convention on the Law of Treaties (adopted 22 May 1969, in force 27 January 1980) 1155 UNTS 331. It is therefore part of the context for interpreting the treaty. In order to provide legal certainty, Article 23(2) under Annex B, envisages that the Parties will signify their joint understanding of this by an exchange of notes.

relating to the negotiations (by, for example, contacting the Maritime Boundary Office in Timor-Leste), it has not always been possible to obtain them as they are highly confidential. Therefore, the analysis will be conducted in light of the available evidence.

Consequently, this chapter is divided into six sections. The first section examines whether the elements of the RtD such as participation, non-discrimination, permanent sovereignty over natural resources (PSNR), fair distribution of benefits, and duty of cooperation are incorporated in the Timor Gap Treaty (TGT) (1989).[3] Similar to the first section, the next three sections will analyse whether these elements of the RtD are incorporated in the Timor Sea Treaty (TST) (2002),[4] Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (CMATS) (2006),[5] and the 2018 Treaty.[6] The fifth section will analyse the evolution of the elements of the RtD in order to understand how and whether they have progressed through the years. Finally, the last section will provide a conclusion on whether these elements are incorporated under each Joint Development Agreements (JDAs).

[3] Treaty between Australia and the Republic of Indonesia on the zone of cooperation in an area between the Indonesian province of East Timor and Northern Australia (adopted 11 December 1989, entered into force 9 February 1991, Aust.T.S. No.9 1991) [Hereinafter Timor Gap Treaty/TGT 1989].

[4] Timor Sea Treaty between the Government of East Timor and the Government of Australia (adopted 20 May 2002, entered into force 12 April 2003), 2258 UNTS 3 [Hereinafter Timor Sea Treaty/TST 2002].

[5] Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (adopted 12 January 2006, entered into force 23 February 2007) 2483 UNTS 359 [Hereinafter CMATS 2006].

[6] Treaty Between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea (adopted 6 March 2018, entered into force 30 August 2019 [Hereinafter 2018 Treaty].

3.2 Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia (TGT 1989)

The TGT was signed in December 1989 and came into effect in February 1991. This Treaty was to deal provisionally with the seabed area not covered by the 1972 Seabed Agreement between Australia and Indonesia. The primary objectives of the TGT (1989) were, thus, to protect the respective sovereign interests of Indonesia and Australia, while at the same time creating an international legal framework that enables the sharing of the benefits of petroleum offshore exploration[7] in areas subject to competing claims by both States. The TGT (1989) was signed by the Commonwealth of Australia and the Republic of Indonesia.[8] Timor-Leste was not a Party because it was under Indonesian occupation at the time.[9]

Although Timor-Leste was not a party to any of the negotiations, and the investigation focuses on Australia and Indonesia as the relevant entities, the investigation nonetheless highlights certain key factors that feed into the RtD discourse. Specifically, elements of the RtD may have benefited Indonesia which then may, in turn, have benefited Timor-Leste. Additionally, at the time of negotiating

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[7] Gillian Triggs, 'Timor Gap Treaty between Australia-Indonesia: Straddle Deposits Expose Legal Issues (199) Lawasia Journal 117.

[8] Timor Gap Treaty (1989) (n3); Also see: Agreements, Treaties and Negotiated Settlement Project, 'Timor Gap Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia' (*ATNS,* 2004) <https://www.atns.net.au/agreement.asp?EntityID=710&SubjectMatter=36> accessed 20 February 2020.

[9] Timor-Leste was known as Timor-Timur, the 27th province of Indonesia.

and signing this Treaty, Portugal, the administering Power[10] of Timor-Leste (Indonesia's occupation was not recognised), refused to participate in the negotiations.[11] This illustrates the complexity of the situation of TGT (1989).

Moreover, the TGT is quite a substantial and complex document,[12] covering 129 pages, with eight parts containing 34 articles and four Annexes. The primary purpose of the TGT (1989) was to establish a Zone of Cooperation (ZoC) in the Timor Gap (currently designated as a Joint Petroleum Development Agreement [JPDA]) for the joint exploration and exploitation of vast quantities of natural resources within the region.[13] As stated by Ong, the TGT (1989) was probably one of the most sophisticated joint development regimes agreed to that date, as both the geographical division and institutional design were complex.[14] The Treaty describes itself as a 'provisional' solution to the problem.[15] The first Article of Part I of TGT (1989) provides definitions and establishes the ZoC, whereas Article 2 of Part I divides the Timor Gap into three areas, labelled A, B, and C.[16]

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[10] Government of Timor-Leste, 'Administrative Division' (*Government of Timor-Leste* NY) https://timor-leste.gov.tl/?p=91&lang=en accessed September 2024; Also see: Zélia Pereira, 'Reality Overlapping Principles? Portugal and the Self-Determination of Timor-Leste (1976-91) (2023) Cornell University Press 11, 14.

[11] Rebecca Strating, 'Maritime Territorialization, UNCLOS and the Timor Sea Dispute' (2018) 40 (1) Contemporary Southeast Asia: A Journal of International and Strategic Affairs 101, 103.

[12] Anthony Bergin, 'The Australian-Indonesian Timor Gap Maritime Boundary Agreement' (1990) 5 (1-4) Int'l J Estuarine & Coastal L 383, 385.

[13] Ibid.

[14] David M Ong, 'The Legal Status of the 1989 Australia-Indonesia Timor Gap Treaty Following the End of Indonesia Rule in East Timor' (2001) 31 NYIL 67,71.

[15] TGT (1989) (n3) Preambular, Para 1 and Art 33. 'Provisional' in this case means a minimum of 40 years, subject to renewal for 20-year periods.

[16] TGT (1989) (n3) Art 2.

The next section analyses whether the key elements[17] of the RtD previously mentioned are incorporated in TGT (1989).

3.2.1 Participation

In the context of inter-State relations (between States), participation is described in this thesis as the participation of the Contracting States and their representatives to formulate the agreements/treaties.[18] In this case, the Contracting Parties are Australia and Indonesia, and both contracting parties were involved in the negotiations and formulation of the terms of the TGT (1989). The participation element is mentioned in the TGT's provisions, such as the rights and responsibilities of Australia and Indonesia in relation to area A, which were exercised by a Ministerial Council and a Joint Authority of both Contracting States. As stated in Article 5(2),[19] there shall be an equal number of Ministers designated by each Contracting State in the Ministerial Council for the zone and all Council decisions are adopted by consensus.[20] Moreover, this Treaty also required that the number of employees be equal, subject to the requirement of good oilfield practice.[21] Therefore, it can be argued that, to enable the development and implementation of the TGT (1989), participation of both Australia and Indonesia was required.

[17] See Chapter 2, section 2.5.
[18] United Nations Declaration on the Right to Development, UNGA Res A/41/128 (4 December 1986) [Hereinafter UNDRtD] Art 2 (3).
[19] TGT (1989) (n3) Part III, Art 5 (2).
[20] Ibid Part III, Arts 5 (5) and 7 (4); Also see: Stuart Kaye, 'The Timor Gap Treaty' (1999) 14 (2) Nat Resources & Env't. 92, 92; Stuart Kaye, 'The Timor Gap Treaty: Creative Solutions and International Conflict' (1994) 79 (16) 1 Syd L R 72, 75.
[21] TGT (1989) (n3) Part VI, Art 24 (1).

In contrast, there was no participation by Timor-Leste at the time of the negotiation and formulation of the TGT (1989). Portugal, as the administering power of Timor-Leste at that time, was excluded in the negotiation and brought a case to International Court of Justice (ICJ) against Australia.[22] Despite the condemnation by the UN of the incorporation of Timor-Leste as a province of Indonesia,[23] Australia recognised it *de facto* in 1978. Additionally, when the negotiations for the delimitation of the continental shelf started in 1979, Australia recognised *de jure* the incorporation of Timor-Leste by Indonesia.[24]

As mentioned by Judge Weeramantry in his dissenting opinion in East Timor (Portugal v Australia)[25] there were several resolutions[26] expressly recognising the status of Portugal as the administering Power and none of them recognised the legal status of Indonesian occupation in Timor-Leste. Although it did not recognise the legal status of Indonesian occupation in Timor-Leste, both Contracting Parties such as Australia and Indonesia agreed and formulated the terms of the TGT (1989). Thus, the participation element of the RtD is incorporated under the TGT (1989).

[22] *East Timor (Portugal v. Australia)* (Application Instituting Proceeding) General List No. 84 [1991] ICJ 1.
[23] This can be seen in two resolutions: UNSC Res 384 (22 December 1975) UN Doc S/Res/384. and UNSC Res 389 (22 April 1976) UN Doc S/Res/389.
[24] *Case Concerning East Timor (Portugal v Australia)* (Judgement) [1995] ICJ Rep 90
[25] *East Timor (Portugal v Australia)* (Dissenting Opinion of Judge Weeramantry) [1995] ICJ Rep 139.
[26] For instance, the UNGA Res 3485 (XXX) (11 December 1975); UNGA Res 34/40 (21 November 1979); UNGA Res 35/27 (11 November 1980) and UNGA Res 37/30 (23 November 1982).

3.2.2 Non-Discrimination

The non-discrimination element is closely interconnected with and goes alongside participation. Although it was not fulfilled, this element of the RtD was incorporated in the TGT (1989) provisions. Certainly, the TGT (1989) provisions refer to the principle of non-discrimination, as, for example, Article 24 Part VI of the TGT (1989) requires an equal number of employments from both Australia and Indonesia.[27] However, the objective of the non-discrimination element, as understood in this thesis, is one that enables developing States and the vulnerable groups within society that are often affected by lack of development to be included and to play their role as agents of development.[28] In this light, this element did not apply to Timor-Leste or its representative at the time, Portugal. Therefore, Timor-Leste was discriminated against in the negotiation of the TGT (1989); the people of Timor-Leste never at any stage, either directly or through any duly constituted legal representative, gave their consent to the TGT (1989). Therefore, by not including Portugal in the negotiation of the TGT (1989), it can be argued that Timor-Leste was discriminated against by Australia and Indonesia. Consequently, the non-discrimination element of the RtD was not fulfilled under the TGT (1989).

3.2.3 Fair Distribution of Benefits

Like the participation and non-discrimination elements of the RtD, fair distribution of benefits is incorporated under the TGT (1989) provisions. The TGT indeed makes references to inter-State benefit-sharing (benefits sharing between States) in its

[27] TGT (1989) (n3) Art 24 (4), Part 4.
[28] Karin Arts & Atabongawung Tamo, 'The Right to Development in International Law: New Momentum Thirty Years Down the Line?' (2016) 63 (3) NILR 221.

Article 2.2 (a), which states: '[…] equal sharing between the two Contracting States of the benefits of the exploitation of petroleum resources', Australia and Indonesia having title to a 50:50 share of revenue from petroleum exploration and exploitation activities.[29] Therefore, it can be argued that the fair distribution of benefits element of the RtD is incorporated under the TGT; however, it is neither fair nor equitable.

As mentioned in Chapter 2 (section 2.5.3), the fair distribution of benefits or benefit-sharing element applies to relations between States, and between States and their community, which are known as inter-State and intra-State benefit-sharing. However, this section only deals with inter-State benefit-sharing as intra-State benefit-sharing is examined in the next chapter (Chapter 4).

Although the fair distribution of benefits is incorporated under the TGT (1989) provisions, this element was not met. As aforementioned, this is due to the complexity of the situation in Timor-Leste. The provisions did not identify either Portugal or Timor-Leste as the beneficiaries of the benefits shared under the TGT (1989); instead, the benefits were shared between Australia and Indonesia, excluding Timor-Leste. Thus, one can contend that, although the distribution of benefits element is incorporated under the TGT (1989) provisions, the distribution of benefits is not fair because the representatives of Timor-Leste were not a Party to this Treaty.

As explained in Chapter 2, section 2.5.3.1, the word 'fair' in the context of benefit-sharing is defined in this thesis as a situation where two parties voluntarily, after negotiating, reach an agreement on managing natural resources and both parties feel

[29] Australian Parliament, Senate, Foreign Affairs, Defence and Trade References Committee, *East Timor: Final Report of the Senate Foreign Affairs, Defence and Trade References Committee* (National Library of Australia 2000) 72.

that the agreement is beneficial to them. In terms of fairness, Indonesia, as a Contracting Party to this Treaty, did not consider it beneficial because it disagreed with Australia's claim regarding how the maritime boundary should be delineated. Although they had different claims, both States signed the agreement. For instance, Australia argued it was entitled to the full natural prolongation of its shelf to the edge of the margin, a claim made before signing the 1972 agreement,[30] which carried on with the TGT (1989). In contrast, Indonesia contended that, since it was not possible to accommodate a full 200-mile shelf for both Timor-Leste and Australia, the median line of the shelf should serve as the boundary. Despite their disagreements,[31] 'both parties welcomed the agreement as a tribute to the spirit of reasonableness and good neighbourliness which had marked the negotiations'.[32]

Furthermore, Indonesia signed the TGT (1989) as it recognised the need for a mutually beneficial agreement to address the issues of maritime boundaries in the Timor Sea. Furthermore, there is a socio-political power difference between stakeholders in negotiations; in this case, the Contracting Parties, Australia (a developed State) and Indonesia (a developing State). As pointed out by King,[33] one reason for Indonesia accepting Australia's claims was the pressure felt by the

[30] Agreement Between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, Supplementary to the Agreement of 18 May 1971 (signed on 9 October 1972, entered into force on 8 November 1973) [Hereinafter Timor and Arafura Seas Treaty].

[31] Peter Hastings, 'Whose Riches Under The Sea?' *The Sydney Morning Herald* (3 June 1972).

[32] Robert J King, 'Certain Maritime Arrangements in the Timor Sea, the Timor Sea Treaty and the Timor Gap, 1972-2007: Submission to the Australian Parliament's Joint Standing Committee on Treaties' (2007) 7.

[33] Ibid 8.

government to reciprocate Australia's gestures of goodwill, such as foreign aid provided by Australia and efforts to grant Indonesia the status of 'most favoured nation' under the terms of their trade agreement, which would facilitate mutual trade. In addition, in 2004, Hassan Wirajuda, a former Indonesian Foreign Minister (between 2001 and 2009), claimed that Indonesia accepted Australia's claims in 1972 due to its political weakness at that time and its inability to produce sufficient evidence to support its claim of the median line, as noted by a Senior Indonesian diplomat Hashim Djalal.[34]

Therefore, it can be asserted that, although both States signed the TGT (1989), there were opposing claims between Australia and Indonesia. As a result, the distribution of benefits outlined in the TGT (1989) is neither fair nor equitable. It is not equitable because the Equidistance/Relevant Circumstances[35] approach, which was reflected in the decisions of relevant cases,[36] was not used for delimiting the maritime boundary in the TGT (1989).

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[34] Rowan Callick, 'Tiny Timor Treads Warily among Giants', *Australian Financial Review* (31 May 2004).

[35] See Chapter 2, section 2.5.3.1.

[36] *Sovereignty and Maritime Delimitation in the Red Sea (Eritrea / Yemen),* PCA Case No. 1996-04 (PCA 1996), 1996, Permanent Court of Arbitration [PCA] 5; *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)* (Merits) [2001] ICJ Rep 40; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (Judgement) [2002] ICJ Rep 303; *Case Concerning the Arbitral Award (Barbados v. Trinidad and Tobago*) Award of the Arbitral Tribunal, PCA Case No. 2004-02 (PCA, 2004), 16 February 2004 Permanent Court of Arbitration [PCA] 93; *Case Concerning the Arbitral Award (Guyana v. Suriname)* Award of the Arbitral Tribunal, PCA Case No. 2004-04 (PCA, 2004), 24 February 2004 Permanent Court of Arbitration [PCA] 108; *Maritime Delimitation (Romania v Ukraine)* (Judgment) [2009] ICJ Rep 61.

Additionally, if considering De Jonge's[37] two prerequisites[38] that need to be satisfied if a fair and equitable benefit-sharing is being properly developed or having a chance to properly be developed, the distribution of benefits or benefits-sharing in the TGT (1989) would need to be both fair and equitable. Thus, the TGT (1989) does not meet one of De Jonge's prerequisites. Consequently, it can be argued that the fair distribution of benefits or benefit-sharing element was incorporated under the TGT, but the distribution was neither 'fair' nor 'equitable'.

3.2.4 Permanent Sovereignty over Natural Resources (PSNR)

It is clear that the PSNR element for the realisation of the RtD is not incorporated under the TGT (1989). The principle of PSNR grants permanent sovereignty to both peoples and States, and attributes to both the duty to exercise their sovereignty in the interest of national development and for the well-being of the people.[39] Thus, at the heart of the principle of PSNR stands the inalienable right of all peoples and States to freely dispose of their natural resources.[40] It includes the right to explore

[37] Bram De Jonge, 'What Is Fair and Equitable Benefit-Sharing?' (2011) 24 (2) Journal of Agricultural and Environmental Ethics 127; Doris Schroeder, 'Benefit-Sharing: It's Time for a Definition' (2007) 33 Journal of Medical Ethics 127, 205-209.
[38] Described in Chapter 2, section 2.5.3.1.
[39] UNGA Res 1803 (XVII) (14 December 1962) Para 1; Also see: Nico J Schrijver, 'Fifty Years Permanent Sovereignty over Natural Resources: The 1962 UN Declaration as the Opinio Iuris Communis', in Marc Bungenberg & Stephan Hobe (eds), *Permanent Sovereignty over Natural Resources* (Springer 2015) 16-17.
[40] Ibid UNGA Res 1803 Preambular, Para 4: 'Considering that any measure in this respect must be based on the recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests,'; Also appears under International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 [Hereinafter ICCPR 1966] and the International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 03 March 1976) 993 UNTS 3 [Hereinafter ICESCR 1966].

and exploit natural resources freely,[41] the right to use natural resources for development,[42] the right to regulate foreign investment,[43] and the right to settle disputes on the basis of national law.[44]

Thus, it can be argued that by creating and signing the TGT (1989), both States, Indonesia and Australia, have infringed the principle of PSNR. Australia and Indonesia violated the right of the people of Timor-Leste to self-determination, thus violating the principle of PSNR of Timor-Leste. As Portugal claimed in the East Timor case before the ICJ, Australia 'failed to observe . . . the obligation to respect the duties and powers of [Portugal as] the administering Power [of East Timor] . . . and . . . the right of the people of East Timor to self-determination and the related rights'.[45]

Portugal maintained that Australia had acted unlawfully, infringing the rights of the people of Timor-Leste to self-determination and PSNR and breaching the rights of Portugal as the administering Power. However, as Indonesia did not accept the ICJ's jurisdiction, it was not a party to this case. Therefore, the Court concluded that it could not exercise its jurisdiction as a result of the declarations made by the Parties under Article 36, paragraph 2, of its Statute because, in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent.[46]

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[41] UNGA Res 1803 (n39) Section 5.
[42] Ibid, Section 1.
[43] Ibid, Section 2.
[44] Ibid, Section 4.
[45] *Case Concerning East Timor* (n24) Para 1; Indonesia was not a party to this case because it did not accept the ICJ's compulsory jurisdiction.
[46] Ibid Para 35; Australia invoked the *Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)* (Preliminary Question) ([1954] ICJ Rep 19, as a central

Therefore, it can be argued that Australia did not recognise the right to self-determination and the PSNR of Timor-Leste.[47] Additionally, the 'exploration, development and disposition' of natural resources in the Timor Sea were not 'in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable'.[48] This discrepancy arises from the fact that the people of Timor-Leste or their representatives were not involved in the negotiations of this Treaty and did not take part in its drafting and implementation. Consequently, they were excluded from decisions regarding the exploration, development and management of their natural resources. As the rights over 'natural wealth and resources' of Timor-Leste had been violated by signing the TGT (1989), Australia and Indonesia had acted 'contrary to the spirit and principles of the Charter of the United Nations and hinder[ed] the development of international co-operation and the maintenance of peace'.[49] Thus, the PSNR of Timor-Leste and its people, as laid out in this Charter, were denied.

3.2.5 Duty of Cooperation

The duty of cooperation element is not incorporated in the TGT (1989). As mentioned in Chapter 2 (section 2.5.5), the duty of cooperation is the most controversial element of the RtD because it was seen by some[50] as giving rise to an obligation of

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authority on which it rests its contention that the Court lacked jurisdiction to entertain Portugal's claim.

[47] *East Timor (Portugal v Australia)* (Dissenting Opinion of Judge Weeramantry) (n25)

[48] UNGA Res 1803 (n39) Para 2.

[49] Ibid Para 7.

[50] See: Laure-Hélène Piron, 'The Right to Development: A Review of the Current State of the Debate for the Department for International Development' (2002) Right to Development Report 1, 7-10.

developed States and international organisations to provide development assistance to developing States. It is the duty of States to take 'sustained action to promote more rapid development of developing countries'.[51] This sustained action refers to development assistance, either through financial or technical aid,[52] that is usually provided to developing States.

Cooperation between the Contracting Parties is essential to draft, develop, and implement this Treaty. The TGT (1989) provisions make specific references to cooperation between Australia and Indonesia. For example, Article 2 of TGT (1989) establishes the ZoC between the two States. It also refers to the joint control, which requires cooperation between Australia and Indonesia to enable the exploration and exploitation of the petroleum resources: 'there shall be *joint control* by the contracting States of the exploration for and exploitation of petroleum resources'.[53] Therefore, both States would jointly administer Area A, where they would agree in sharing control on decisions about the relevant activities that require unanimous consent.

The TGT (1989) also required Australia and Indonesia to cooperate by creating an organisational structure that comprised a Ministerial Council with overall policy responsibility and a Joint Authority with responsibility for the day-to-day management of resource activities, established under Articles 5, 6, 7, 8, and 9.[54] Additionally, Article 18 asserts that: 'the Contracting States *shall cooperate* to

[51] UNDRtD (n18) Art 4 (2).
[52] Jenny Wells, 'Foreign Aid and its Importance in Relieving Poverty' (2015) 28 (3) Government Relations Coordinator, Oxfam Australia (Oxfam, 2 July 2015) 5.
[53] TGT (1989) (n3) Art 2 (Emphasis Added).
[54] TGT (1989) (n3) Arts 5-9.

prevent and minimize pollution of the marine environment arising from the exploration for and exploitation of petroleum in Area A'.[55] In addition, 'where pollution of the marine environment occurring in Area A spreads beyond Area A, the Contracting States *shall cooperate* in taking action to prevent, mitigate and eliminate such pollution'.[56] Therefore, the two Contracting Parties are bound to cooperate to protect the marine environment of the JPDA. In other words, cooperation is a key element for Australia and Indonesia to develop, manage, and implement this Treaty. Despite the TGT (1989) provisions referring to cooperation, this type of cooperation does not fall within the definition of duty of cooperation as outlined in this thesis. The duty of cooperation in this thesis pertains to the sustained actions that States must undertake to promote a more rapid development of developing States, including development assistance, whether through financial support or technical aid.[57]

Although this element is not incorporated in the TGT (1989), Australia, as a developed State, had already been providing such sustained actions to Indonesia, a developing State, since 1966, i.e. prior to the signing of the TGT in 1989. Through a Defence Co-operation Programme set up in June 1972, Australia contributed AU$20 million to Indonesia between 1972 and 1975.[58] Australia also provided civilian and military aid.[59] Furthermore, during the enforcement of the TGT (1989), between 1995-96,

[55] Ibid Part IV, Art 18: Protection of the Marine Environment (Emphasis Added)
[56] Ibid Part IV, Art 18 (b) (Emphasis Added).
[57] Wells (n52) 5.
[58] Robert J King, 'Submission 13: Inquiry into Australia's Relationship with Timor-Leste'(2013) Joint Standing Committee on Foreign Affairs, Defence and Trade Foreign Affairs Sub-Committee 1, 8-9.
[59] Ibid.

Indonesia received various forms of development assistance totalling AU$129 million, thus becoming the second largest recipient of Australian aid.[60] As Timor-Leste was under Indonesian occupation during this period, any benefits Timor-Leste received from these development assistance programmes depended on Indonesia's national development policies. This will be discussed further in Chapter 4, section 4.2.5, which explores whether any development occurred in Timor-Leste during the enforcement of this Treaty. The benefits from these sustained actions were left for Indonesia to utilise within its territory, including Timor-Leste. However, this development assistance from Australia is not directly related to the TGT (1989) as such or issues covered by the Treaty. In other words, it is not derived from the TGT (1989), as the duty of cooperation is not enshrined in the Treaty.

This section indicates that the TGT (1989) incorporates the participation, non-discrimination, and fair distribution of benefits elements of the RtD. However, it does not include the PSNR and the duty of cooperation.[61] It can be argued that, although Timor-Leste was not a party to the TGT (1989) and the RTD was not specifically aimed at Timor-Leste, its elements may have indirectly benefited the country. In contrast, the PSNR and the duty of cooperation were not incorporated in this Treaty because Australia and Indonesia violated the right of the people of Timor-Leste to self-determination, thus breaching the principle of PSNR of Timor-Leste.

[60] Parliament of Australia, 'The Australian-Indonesian Security Agreement - Issues and Implications' (Gary Brown, Frank Frost and Stephen Sherlock, 1995-96) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9596/96rp25> accessed 18 August 2020.

[61] There is also no reference to the duty of cooperation under the TGT (1989) (n3).

Table 1: Key elements of the RtD under the TGT (1989)

Key elements of the RtD under TGT (1989)	Status	Articles
Participation	Incorporated	Arts 5 (2); 5 (5); 7 (4); 24 (1)
Non-discrimination	Incorporated	Art Part VI: 24 (4)
Fair distribution of benefits	Incorporated	Art 2.2 (a) Not fair, not equitable
PSNR	Not incorporated	N/A
Duty of cooperation	Not incorporated	N/A

Table 1 shows whether the key elements of the RtD are incorporated under the TGT (1989).

3.3 Timor Sea Treaty between the Government of East Timor and the Government of Australia (2002) (Timor Sea Treaty/TST 2002)

In August 1999, the population of Timor-Leste voted for independence in an UN-organised referendum[62] and became an independent State in May 2002. Timor-Leste was, thus, in a position to begin negotiations with Australia. Nevertheless, before the Timor-Leste government took over, the UN Security Council established an interim administration, namely the United Nations Transitional Administration in East Timor (UNTAET).[63] The Transitional Administration intended to provide temporary governance and help facilitate the transition from a previous political system or a

[62] The UN-sponsored referendum on Timor Leste's future took place on 30 August 1999.
[63] UNSC Res 1272 (25 October 1999) UN Doc S/Res/1272.

regime to a new one. It was aimed at maintaining stability, promoting reconciliation, and establishing the foundations for democratic governance.

For this reason, UNTAET signed an Exchange of Notes[64] in 2000 on behalf of Timor-Leste. This was an interim arrangement to enable the Joint Authority to continue to regulate petroleum activities in the area in order to secure current investments and to encourage further exploration. In the following year, in 2001, UNTAET[65] and Australia concluded a Memorandum of Understanding (MoU) that put in place the Timor Sea Arrangement.[66] The contracting parties had agreed to share the management and revenue from oil and gas production in the JPDA, which was delimited along the same boundaries as ZoC set out in the TGT (1989), Area A. In contrast, Areas B and C[67] were no longer subject to joint development. This is because Area B was transferred to Timor-Leste and Area C was dissolved and divided between Timor-Leste and Australia.

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[64] Exchange of Notes Constituting an Agreement between the Government of Australia and the UNTAET Concerning the Continued Operation of the Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia of 11 December 1989, [2000] ATS No 9 (adopted on 25 October 1999, entered into force 10 February 2000).

[65] UNTAET was established by the UN Security Council on 25 October 1999 to administer the territory of Timor Leste until 2002, towards independence in the wake of its violent separation from Indonesia.

[66] Memorandum of Understanding (MoU) of Timor Sea Arrangement concluded between Australia and UNTAET, signed 5 July 2001 available http://www.austlii.edu.au/au/other/dfat/special/MOUTSA.html accessed 20 January 2020.
The Arrangement provides the basis for the Timor Sea Treaty in determining the administrative mechanisms for the JPDA and that: 'Of the petroleum produced in the JPDA, 90 percent shall belong to Timor Leste and 10 percent shall belong to Australia', (Art 4(a)). The MoU set out much of the text that was later adopted under the Timor Sea Treaty.

[67] Area B is situated at the southern end of the Zone, was administered by Australia, and Area C, situated at the northern end of the Zone, was administered by Indonesia

An important difference to note is that, in terms of the petroleum produced in the JPDA, 90 percent belonged to Timor-Leste and 10 percent belonged to Australia,[68] instead of sharing it equally, as under the TGT (1989) between Australia and Indonesia. In other words, the MoU had the effect of continuing the joint petroleum sharing arrangements asserted under the TGT (1989),[69] but it gave Timor-Leste a greater share of JPDA.[70]

Subsequently, the TST (2002) was formally signed between Australia and Timor-Leste on its Independence Day,[71] following an exchange of diplomatic notes, on 3 April 2003 and was backdated to 20 May 2002. The TST (2002) represented a temporary and practical solution as its dispositions neither prejudice a final determination of the seabed boundaries delimitation between the parties nor should be interpreted as prejudicing Timor-Leste's or Australia's position on the rights relating to seabed delimitation.[72]

The TST (2002) is composed of twenty-five Articles and seven annexes. The Treaty provided a comprehensive regulatory framework covering matters such as

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[68] Agreements, Treaties, and Negotiated Settlements Projects, 'Timor Sea Arrangement' (*ATNS,* NY) http://www.atns.net.au/agreement.asp?EntityID=2438 accessed November, 20 February 2020; TST (2002) (n4) Art 4 (a).

[69] UNTAET and Australia agreed to continue the terms of the TGT (1989) (n3).

[70] See: *Timor Sea Conciliation (Timor-Leste v. Australia)* Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, PCA Case No. 2016-10 (PCA, 2016), 9 May 2018 Permanent Court of Arbitration [PCA] 12

[71] TST (2002) (n4); Also see: Gillian Triggs, 'The Timor Sea Treaty and the International Unitisation Agreement for Greater Sunrise: Practical Solutions in the Timor Sea' (2004) 23 Aust YBIL 161.

[72] TST (2002) (n4) Art 2 (b): 'Nothing contained in this Treaty and no acts taking place while this Treaty is in force shall be interpreted as prejudicing or affecting East Timor's or Australia's position on or rights relating to a seabed delimitation or their respective seabed entitlements.'

development and production, the marine environment, employment, health and safety of workers, surveillance, security, search and rescue, and air traffic services, as well as the application of taxation and criminal law. The parties have agreed to negotiate, expeditiously and in good faith, an international unitisation agreement for the exploration of the natural resources in the Greater Sunrise gas field, out of the JDPA, as regulated in the Annex E of the TST (2002).[73]

Similar to the previous section, the following section analyses whether the key elements of the RtD, such as duty of cooperation, participation, non-discrimination, PSNR, and fair distribution of benefits are incorporated in the TST (2002).

3.3.1 Participation

Based on the following analysis, it is argued that the participation element is incorporated under the TST (2002). First, this Treaty was signed by both States, Australia and Timor-Leste. The signatories of the treaty were then Australian Prime Minister John Howard and Timor-Leste's counterpart at that time, Mari Alkatiri, which means that the representatives of Timor-Leste were involved in the signing of the TST (2002).

Second, the TST (2002) provided for the joint control, management, exploration, development, and exploitation of the petroleum resources in the designated JPDA.[74] In addition, the TST (2002) also established a three-tiered joint administrative structure comprising a Designated Authority Joint Commission and Ministerial Council.[75] The Joint Commission would have to consist of commissioners appointed

[73] This agreement became later the Sunrise and Troubadour Unitisation Agreement.
[74] TST (2002) (n4) Art 3 (b).
[75] Ibid, Art 6 (a).

by both Parties, Timor-Leste and Australia,[76] and would have to establish policies and regulations relating to petroleum activities in the JPDA and oversee the work of the Designated Authority. Additionally, the Ministerial Council would have to consist of an equal number of ministers from Timor-Leste and Australia.[77] Moreover, the TST (2002) provided that the two Parties would have to negotiate an agreed Petroleum Mining Code,[78] which would have to govern the exploration, development, and exploitation of petroleum within the JPDA, as well as the export of petroleum from the JPDA.[79] This shows that both States had equal responsibilities to implement and enforce the TST (2002). Thus, the participation element of the RtD was incorporated under the TST (2002).

3.3.2 Non-Discrimination

It is contended that the non-discrimination element for the RtD is also incorporated under the TST (2002). In fact, it can even be claimed that there was positive discrimination. In this case, positive discrimination is the process of giving preferences or treating a certain ethnic group or individuals of one State (here, Timor-Leste) more favourably. These special measures can be identified under Article 11 of TST (2002), which states that both Parties shall 'take appropriate measures with due regard to occupational health and safety requirements to ensure that preference is given in employment in the JPDA to nationals or permanent residents of East

[76] Ibid, Art 6 (c).
[77] Ibid, Art 6 (d) i.
[78] National Authority of Petroleum and Mineral Timor-Leste, 'Petroleum Mining Code for the Joint Petroleum Development Area' (2004) ANPM 1.
[79] TST (2002) (n4) Art 7 (a).

Timor'; and 'facilitate, as a matter of priority, training and employment opportunities for East Timorese nationals and permanent residents'.[80]

Additionally, the Joint Commission established under the TST (2002) would have to consist of commissioners appointed by both States, but there would have to be one more commissioner appointed by Timor-Leste than by Australia.[81] Thus, special measures or preferences are granted to Timor-Leste. Nevertheless, it can also be argued that the reason why the TST (2002) required more commissioners appointed by Timor-Leste is because Timor-Leste owned a larger share of the JPD area (90% in contrast to the 10% of Australia). Consequently, the non-discrimination element of the RtD is incorporated under the TST (2002).

3.3.3 Fair Distribution of Benefits

Based on the analysis below, it is argued that the fair distribution of benefits element of the RtD is partially incorporated under the TST (2002): although the distribution of benefits was 'fair', it was not 'equitable'.

Certainly, several TST (2002) articles refer to the inter-State distribution of benefits. Article 3 of TST (2002) establishes the exact location of the JPDA, which is described in detail in Annex A and recognises that 'Australia and Timor-Leste shall *jointly control*, manage and facilitate the exploration, development and exploitation of the petroleum resources of the JPDA, for *the benefit of the peoples* of East Timor and

[80] TST (2002) (n4) Art 11 (a) and (b).
[81] Ibid Art 6 (c).

Australia'.[82] This Article replaces Article 2.2 (a)[83] of the TGT (1989). Area A in the ZoC under the TGT (1989) is the JPDA in the TST (2002).

Article 3 (b) of the TST (2002) uses the expressions 'jointly control' and '*for the benefit of the peoples* of East Timor and Australia'[84] rather than 'equal sharing' as stated in Article 2.2 (a) of the TGT (1989). This distinction arises because the JPDA was previously shared equally (50:50) between Australia and Indonesia under the TGT (1989). In contrast, the TST (2002) created one JPDA that splits petroleum revenues under a 90:10 ratio in favour of Timor-Leste.[85] The wording in Article 3(b) of the TST (2002) gives emphasis to the people of both Contracting Parties, 'for the benefit of the peoples of East Timor and Australia'. Thus, this treaty shifts the focus on the people of both States, reflecting progress from the TGT (1989).

Under the TST (2002), the parties have agreed in Article 9(b) to 'work expeditiously and in good faith to reach an agreement on the manner in which the deposit will be most effectively exploited and on the *equitable sharing of the benefits* arising from such exploitation'[86] . This Article emphasises finding a fair way to share the benefits from the exploitation of the deposit in the JPDA. The JPDA in this Treaty was shared under a 90:10 ratio[87] in favour of Timor-Leste. However, the JPDA only held 20.1 percent of the reservoirs of the Greater Sunrise, the richest known petroleum

[82] TST (2002) (n4) Art 3 (b) (Emphasis Added).
[83] TGT (1989) (n3) Art 2.2 (a): '[…] jointly control the exploration and exploitation of petroleum resources and *equal sharing* between the two Contracting States of the benefits of the exploitation of petroleum resources, as provided for in this Treaty' [Emphasis Added].
[84] Emphasis Added.
[85] TST (2002) (n4) Art 4.
[86] Ibid Art 9 (b) (Emphasis Added].
[87] Ibid Art 4.

deposits in the Timor Sea, while the remaining 79.9 percent of the reservoir was not included in the JPDA and was, thus, attributed to Australia.[88]

Like the TGT (1989), although Timor-Leste did not agree with Australia's claim regarding the delimitation of the maritime boundary, both Contracting Parties signed the agreement, which suggests that they found it mutually beneficial. Therefore, it can be argued that the distribution of benefits or benefits-sharing was fair. That being said, it is maintained that it was not equitable. First, Australia continued to assert a formal claim to its natural prolongation, which was already developed before the 1972 Treaty.[89] Indeed, this claim was a powerful and persuasive argument. The ICJ stated in 1969 in the North Sea Continental Shelf cases[90] that the natural prolongation should be a key consideration in delimiting the boundaries of the continental shelf. In addition, this view was supported by the 1958 Geneva Convention on the Continental Shelf.[91]

However, the United Nations Convention on the Law of the Sea (UNCLOS 1982)[92] introduced new concepts and principles, including the 200 nautical mile Exclusive

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[88] Ibid Annex E under Art 9 (b); Also see: Kim McGrath, *Crossing the Line: Australia's Secret History in the Timor Sea* (Redback Quarterly 2017) 168.

[89] Timor and Arafura Seas Treaty (n30).

[90] *North Sea Continental Shelf Cases (Federal Republic of German/Denmark; Federal Republic of Germany Netherlands)* (Judgement) [1969] ICJ Rep 3; The ICJ ruled that: 'delimitation is to be effected . . . in such a way as to leave as much as possible to each party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other'.

[91] Convention on the Continental Shelf (Signed on 29 April 1958, entered into force on 10 June 1964) 499 UNTS 311**,** Art 2(1). [Hereinafter Convention on Continental Shelf].

[92] United Nations Convention on the Law of the Sea (adopted on 10 December 1982, entered into force on 16 November 1994) 1833 UNTS 397 [Hereinafter UNCLOS 1982].

Economic Zone (EEZ)[93] and the equitable delimitation of overlapping claims to an EEZ and continental shelf.[94] The UNCLOS (1982) formalised the distance-based approach to maritime boundary delimitation and significantly restricted the role of the natural prolongation principle. Although, the UNCLOS (1982) did not indicate a preferred method of delimitation, it called for agreement to be reached on the basis of international law 'in order to achieve an equitable solution'.[95]

The definition of 'equitable solution' was left for international courts and tribunals to determine. Consequently, the ICJ and the International Tribunal for the Law of the Sea (ITLOS) interpreted and applied the relevant provisions of UNCLOS (1982) and developed an approach for delimiting boundaries between two States, known as 'Equidistance/Relevant Circumstances', which has since been increasingly used, notably in the cases of Libya v Malta (1985),[96] Norway v Denmark (Jan Mayen) (1993),[97] Eritrea/Yemen (1999), Qatar/Bahrain (2001),[98] Cameroon/Nigeria (2002),[99] Guyana/Suriname (2007),[100] and Romania v Ukraine (2009).[101]

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[93] Ibid Art 57: 'The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.'

[94] Ibid Arts 74 and 83.

[95] Ibid.

[96] *Case Concerning the Continental Shelf (Libyan Arab Jamahiria/Malta*) (Judgement) [1985] ICJ Rep. 13.

[97] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)* (Judgement) [1993] ICJ Rep 38.

[98] *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)* (Judgement) [2001] ICJ Rep 40.

[99] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (Judgement) [2002] ICJ Rep 303.

[100] *Case Concerning the Arbitral Award (Guyana v. Suriname)* Award of the Arbitral Tribunal, PCA Case No. 2004-04 (PCA, 2004), 24 February 2004 Permanent Court of Arbitration [PCA] 108.

[101] *Maritime Delimitation (Romania v. Ukraine)* (Judgment) [2009] ICJ Rep 61.

In 2009, the ICJ delivered its judgement in the Black Sea Case (Romania v Ukraine),[102] which has become the authoritative statement of modern international law on this issue. The Court confirmed the three-stage[103] Equidistance/Relevant Circumstances approach for delimiting overlapping exclusive economic zones and continental shelves. Importantly, the Court confirmed that this three-stage approach is focused on achieving an 'equitable solution',[104] which is the main principle guiding any maritime delimitation, as established in Articles 74 and 83 of UNCLOS. The judgement in the Black Sea Case was a concise summary of prior case law and delimitation approaches that had evolved as international law before and after UNCLOS.[105]

The 'Relevant Circumstances' approach is defined by the ICJ in the Tunisia/Libya case as: 'all the circumstances of fact and law that a tribunal considered capable of having any kind of influence on the drawing of a line of delimitation'.[106] In this case, the

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[102] *Maritime Delimitation in the Black Sea (Romania v Ukraine)* (Judgment) [2009] ICJ Rep 61.

[103] '1- Draw a provisional 'equidistance line' (also known as a 'median line') half-way between neighbouring coasts (whether opposite or adjacent), using appropriate physical base points along the low-water line of the coasts; 2- Make adjustments for 'relevant circumstances' which may otherwise have a distortionary effect, such as the presence of islands (less significant islands are generally given a lesser weighting), or the concavity of the coasts (so that the concavity does not 'pinch' or 'cut off' a State's maritime area); and 3- Apply a 'non-disproportionality' test to ensure an equitable solution has been reached. This involves checking the ratio between the respective delimited maritime areas and the length of each State's coastline'. See: Maritime Delimitation (Romania v Ukraine) (n101).

[104] Maritime Delimitation (Romania v Ukraine) (n101).

[105] For instance: *Case Concerning the Continental Shelf (Libyan Arab Jamahiria/Malta*) (n96); *Case concerning the Arbitral Award (Guyana v. Suriname) (n100)*; *Maritime Delimitation in the Area between Greenland and Jan Mayen (*n97); *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)* (n98).

[106] *Case Concerning the Continental Shelf case (Tunisia v. Libyan Arab Jamahiriya)* (Judgement) [1982] ICJ Rep 18 Para 72; Also see: Kolb R, *Case Law on Equitable Maritime Delimitation: Digest and Commentaries, Introduction* (The Hague: Nijhoff 2003) 460.

Court noted that geological or geophysical factors in the delimitation of coasts within 400 nautical miles of each other were outdated. As a result, the Court rejected these factors for States in close proximity, as is the case with Australia and Indonesia.

The two-step approach[107] in the Equidistance/Relevant Circumstances principle is also relevant to delimit a single maritime boundary and achieve an equitable result. This two-step approach was used in the Guyana/Suriname Case.[108] For the delimitation of the single maritime boundary regarding the continental shelf and the EEZ, the Tribunal applied Articles 74 and 83 of the UNCLOS (1982). The two steps were first to draw an equidistance line in the short middle and western segments of the boundary, consistent with the requirement of an equitable solution, as embodied in Articles 74 and 83 of the UNCLOS (1982),[109] and second, to change the equidistant line towards the east to take into account the relevant circumstances, as considered by the Tribunal.[110]

The jurisprudence of the Black Sea Case (Romania v Ukraine)[111] demonstrates that Timor-Leste's claim of using the Equidistance/Relevant Circumstances approach could have resulted in a more equitable distribution of benefits. Instead of getting 90 percent of the revenue, as determined in the TST (2002), Timor-Leste would have

[107] This approach was developed in *Maritime Delimitation in the Area between Greenland and Jan Mayen* (*n97)* and *Case Concerning the Arbitral Award (Barbados v. Trinidad and Tobago)* Award of the Arbitral Tribunal, PCA Case No. 2004-02 (PCA, 2004), 16 February 2004 Permanent Court of Arbitration [PCA] 93.
[108] *Case concerning the Arbitral Award (Guyana v. Suriname)* (n100).
[109] *Case concerning the Arbitral Award (Barbados v Trinidad and Tobago)* (n107) Paras 231-241.
[110] *Case concerning the Arbitral Award (Guyana v. Suriname)* (n100) Para 335.
[111] *Maritime Delimitation (Romania v. Ukraine*) (n101).

received 100 percent[112] of the existing oil and gas fields that were part of the 2002 JPDA.

This might be the reason why then Prime Minister Mari Alkatiri rejected the 20 percent/80 percent share of the deposit,[113] arguing that, under the current principles of international law, the Greater Sunrise fields should lie entirely within the seabed jurisdiction of Timor-Leste.[114] The representatives of Timor-Leste still maintained that the TST (2002) was not equitable, a position unchanged despite changes in governments. Consequently, since Timor-Leste's independence in 2002, Australia and Timor-Leste have not been able to reach an agreement on a permanent maritime boundary through negotiations.[115] Thus, in 2002, Timor-Leste argued that the 1972 Seabed Agreement between Australia and Indonesia[116] and the coordinates of the JPDA were inconsistent with international law, and that the seabed boundary should have been based on the principle of equidistance instead of taking into consideration the nature of the continental slope or natura prolongation.[117] Timor-Leste has consistently favoured the equidistance or median line principle under the 'Equidistance/ Relevant Circumstances' formula, established under Article 6 of the

[112] Stephen Grenville, 'East Timor Maritime Boundary: The 'Equidistance' Principle' (*Lowyinstitute,* 2016) https://www.lowyinstitute.org/the-interpreter/east-timor-maritime-boundary-equidistance-principle accessed 17 March 2023.
[113] TST (2002) (n4) Annex E under Art 9 (b): Unitisation of Greater Sunrise.
[114] Donald Greenlees, 'Leaders Hint at Legal Push for Bigger Share of Seabed Riches' (Sydney, 21 May 2002) The Australian 1, 6.
[115] Charles Scheiner, 'The Timor-Leste- Australia Maritime Boundary Treaty' (21 March 2018 La'o Hamutuk 1.
[116] Timor and Arafura Seas Treaty (n30).
[117] Clive Schofield, 'Minding the Gap: The Australia–East Timor Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS)' (2007) 22 (2) International Journal of Marine and Coastal Law 189- 234.

1958 Convention on the Continental Shelf,[118] and as reiterated in a series of judgements.[119]

Based on the discussion above, it can be asserted that the distribution of benefits element was incorporated and was fair, but not equitable. It was fair because both States, Australia and Timor-Leste, negotiated and voluntarily signed the TST in 2002. However, the TST (2002) provision was not equitable because Australia refused to negotiate a permanent boundary on a bilateral basis with Timor-Leste, as set under Articles 74 and 83 of UNCLOS (1982). Australia maintained its position that it was no longer practical. If the principle of equidistance had been used, it would have seen the sea border drawn significantly closer to Australia than Timor-Leste, and the majority of gas and oil reserves in the disputed territory would have fallen within Timor-Leste's maritime boundary.

3.3.4 Permanent Sovereignty over Natural Resources (PSNR)

The PSNR element for the realisation of the RtD is not incorporated under the TST (2002). While this Treaty was signed, Australia and Timor-Leste had competing claims to the resources of the seabed of the Timor Sea. The TST (2002) enabled Australia and Timor-Leste to jointly develop major oil and gas deposits in the Timor Sea, pending a delimitation of the seabed in accordance with Article 83 of the UNCLOS (1982). Therefore, it can be argued that there was an issue between Australia and Timor-Leste regarding the principle of PSNR. The Chief Negotiator for the Maritime

[118] Convention on the Continental Shelf (n91).
[119] Ibid (n36).

Boundaries of Timor-Leste[120] claimed that Timor-Leste had consistently requested Australia to discuss the maritime boundary issue in the Timor Sea, but Australia showed no interest.[121]

Australia also refused to negotiate a permanent maritime boundary with Timor-Leste based on an equidistance or median line, which Timor-Leste advocated for. They argued e that such a delimitation would be consistent with the international law of the sea, as established in the UNCLOS (1982).[122] Australia rejected this, arguing that it was entitled to the full natural prolongation of its shelf to the edge of the margin, a claim already made before signing the 1972 agreement[123] and later used in the TGT (1989). However, this principle of natural prolongation was restricted when new concepts and principles were introduced by UNCLOS (1982), which required agreements to be reached based on international law 'in order to achieve an equitable solution'.[124] Consequently, by refusing to negotiate a permanent maritime boundary in which Timor-Leste's claims could be accepted under UNCLOS (1982), Australia is said to have deprived Timor-Leste of its right to determine freely how its natural resources were to be used and the terms on which they could be exploited. In addition, Australia violated Article 1 (2) of the ICCPR (1966)[125] which states that 'in no case may the people be deprived of its own means to subsistence'. Australia had

[120] Kay Rala Xanana Gusmao, also former President of Timor-Leste serving from 2002-2007, former Prime Minister of Timor-Leste serving from 2007- 2015, also current Prime Minister of Timor-Leste 2023-2028.
[121] *Timor Sea Conciliation (Timor-Leste v. Australia)* Opening Session Transcript, PCA Case No. 2016-10 (PCA, 2016), 22 August 2016 Permanent Court of Arbitration [PCA] 19, Lines 4-18.
[122] UNCLOS (1982) (n92) Art 15.
[123] Timor and Arafura Seas Treaty (n30).
[124] UNCLOS (1982) (n92) Arts 74 (1) and 83; Also see section 3.2.3.
[125] ICCPR (n40).

thereby infringed upon the fundamental right of individuals and people to access the resources and means necessary for their survival and well-being.

Furthermore, one might argue that the exploration and development of the TST (2002) was not 'in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable'.[126] Indeed, the representatives of Timor-Leste were involved in the negotiation and implementation of the TST (2002); however, it was not what Timor-Leste desired. The signing of the TST (2002) was only to ensure continuity for existing exploration activities in what had been the TGT (1989). Timor-Leste was under pressure from both oil companies and international donors to make an agreement allowing oil and gas funds to flow, which meant that Timor-Leste could not afford to wait as its economy was heavily dependent on these revenues.[127] Consequently, if Timor-Leste had no Petroleum Wealth Fund and no oil revenues coming in from the JPDA area, its capacity to provide health, education, and infrastructure and to support the livelihoods of its people would have been significantly eroded.

Moreover, by refusing to negotiate a permanent boundary with Timor-Leste, a developing State, Australia failed to cooperate, as established in Paragraph 6 of UNGA Res. 1803 (XVII), and seek further development of Timor-Leste based on 'respect for their sovereignty over their natural wealth and resources'.[128] Australia had, thus, infringed the principle of PSNR of Timor-Leste. Therefore, it is clear that the PSNR element is not incorporated under the TST.

[126] UNGA Res 1803 (n39) Para 2.
[127] Heritage, 'Economic Freedom Country Profile: Timor-Leste' (2024) 356.
[128] UNGA Res 1803 (n39) Para 6.

3.3.5 Duty of Cooperation

The duty of cooperation element of the RtD was incorporated under the TST (2002). Indeed, the TST (2002) makes references to the cooperation between both Parties. For example, the word 'co-operate' appears in Article 10, which asserts that both States shall cooperate to protect the marine environment of the JPDA,[129] shall cooperate to enforce criminal law,[130] shall cooperate to conduct hydrographic and seismic surveys,[131] shall cooperate on and coordinate any surveillance activities,[132] cooperate on search and rescue,[133] and cooperate in relation to the operation of air services.[134] However, such type of co-operation does not fall within the meaning of a duty of cooperation, as used in this thesis.

The duty of cooperation, as mentioned previously,[135] is a duty of States 'to take sustained action to promote more rapid development of developing countries'.[136] This sustained action refers to development assistance that is required from developed States, either through financial or technical aid,[137] to developing States. As mentioned in Chapter 2 section 2.5.5, this development assistance can be provided through transfer of technology, debt forgiveness, and assisting States to meet financial crises and other emergencies.[138]This specific interpretation of the element can be identified under Article 11 of the TST (2002), which provides, with

[129] TST (2002) (n4) Art 10.
[130] Ibid Art 14.
[131] Ibid Art 16.
[132] Ibid Art 18.
[133] Ibid Art 20.
[134] Ibid Art 21.
[135] See Chapter 2, section 2.5.5.
[136] UNDRtD (n18) Art 4 (2).
[137] Wells (n52) 5.
[138] Arts & Tamo (n28) 224.

due regard to occupational health and safety requirements, for preference in employment to be given to Timorese nationals and permanent residents of Timor-Leste.[139] This means that Australia is to facilitate training and employment opportunities for nationals and permanent residents of Timor-Leste. One can contend that this might be equated to 'appropriate means and facilities' mentioned under the UNDRtD.[140]

In addition, the sustained action required from the duty of cooperation element can be seen through the development assistance that Australia has been giving to Timor-Leste. Australia has been Timor-Leste's largest aid donor since 1999 after Timor-Leste voted for independence, contributing over US$1 billion in humanitarian and development aid.[141] Based on the Australian Agency for International Development to the Joint Standing Committee on Foreign Affairs, Defence and Trade Foreign Affairs Sub-Committee,[142] Australia has been providing aid to Timor-Leste in the form of food security, water and sanitation, health, education, and governance. The Australian aid programme's contribution to improving the lives of poor Timorese has been significant. It is claimed that the Australian aid programme is aligned with the development priorities of the Timorese Government.[143] This shows how a developed State such as Australia is cooperating with a developing State such as Timor-Leste, providing a sustained action to promote more rapid development required by the

[139] TST (2002) (n4) Art 11.
[140] UNDRtD (n18) Art 4 (2).
[141] AusAid, 'Submission 22: Inquiry into Australia's Relationship with Timor-Leste' (NY) Joint Standing Committee on Foreign Affairs, Defence and Trade Foreign Affairs Sub-Committee 1, 8.
[142] Ibid.
[143] Ibid, 7.

UNDRtD.[144] However, it can be argued that, although this development assistance given by Australia to Timor-Leste since 1999 refesr to the duty of cooperation, this aid is not referred to in the TST (2002) provisions. Overall, as the duty of cooperation that is mentioned in the TST (2002) provisions is the 'appropriate means and facilities' for training and employment to Timorese people, it can be maintained that this element of the RtD is actually incorporated under the TST (2002).

This section has demonstrated that the TST (2002) incorporates all elements of the RtD, such as participation, non-discrimination, fair distribution of benefits, and duty of cooperation, except the PSNR. Both Contracting Parties (Australia and Timor-Leste) signed the TST (2002) which includes provisions for the joint control, management, exploration, development, and exploitation of the petroleum resources in the JPDA. The treaty provides positive discrimination in favour of Timor-Leste by giving preference to it . Although the fair distribution of benefits element of the RtD is addressed under the TST (2002), the distribution of benefits was deemed 'fair' but not 'equitable', as Australia refused to negotiate a permanent boundary with Timor-Leste on a bilateral basis . With regard to the duty of cooperation element of the RtD, it is incorporated under the TST (2002). For instance, there is a provision that gives preference in employment to Timorese nationals and permanent residents of Timor-Leste. This aligns with the idea of providing 'appropriate means and facilities', as mentioned under the UNDRtD,[145] and emphasises the need 'to take sustained action to promote more rapid development of developing countries.'[146]

[144] UNDRtD (n18) Art 4 (2).
[145] Ibid.
[146] Ibid.

While these elements of the RtD are present in the TST (2002), the PSNR element of the RtD is not included because, at the time, Australia and Timor-Leste had competing claims over the resources of the seabed of the Timor Sea, and Australia refused to negotiate a permanent maritime boundary.[147] Thus, it can be argued that the TST (2002) represents progress compared to the TGT (1989), particularly since it recognised the duty of cooperation element of the RtD.

Table 2: Key elements of the RtD under TST (2002)

Key elements of the RtD under TST (2002)	Status	Articles
Participation	Incorporated	Arts 3 (b); 6 (a) (c) (d) 7 (a)
Non-discrimination	Incorporated	Art.11 (Positive Discrimination)
Fair distribution of benefits	Incorporated	Arts. 3 (b); 9 (b); Annex D Fair but not equitable
PSNR	Not incorporated	N/A
Duty of Cooperation	Incorporated	Art. 11

Table showing whether the key elements of the RtD are incorporated under the TST (2002).

3.4 Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (CMATS 2006)

Based on the premise that Timor-Leste and Australia had not yet delimited their maritime boundaries and recognising the need to 'make every effort in a spirit of understanding and cooperation to enter into provisional arrangements of practical

[147] UNCLOS (1982) (n92) Art 15.

nature',[148] Australia and Timor-Leste agreed to sign the CMATS[149] in 2006. This treaty was needed to enable the joint exploitation of the Greater Sunrise field and to reduce tensions between both States in relation to the delimitation of their maritime boundary. This agreement placed a 50-year moratorium on negotiating definitive maritime boundaries so that joint development could get underway. The Treaty was signed by Australian Foreign Affairs Minister, Alexander Downer, and by Timorese Senior Minister and Minister for Foreign Affairs and Cooperation, José Ramos-Horta. This Treaty entered into force on 23 February 2007, after a formal exchange of notes which covered both the CMATS (2006) and the Sunrise International Unitisation Agreement (IUA).[150]

The aim of the Sunrise IUA, finalised in March 2003, was to enable the exploitation of the Greater Sunrise field. Under the TST (2002), 20 percent of the Greater Sunrise was located in the JPDA, while 80 percent fell within Australia's jurisdiction. of the revenue generated from the JPDA, Timor-Leste would receive 90 percent and Australia would receive 10 percent.[151] Australia would also receive an additional 80 percent of the revenue from the Greater Sunrise located within its jurisdiction. This meant Timor-Leste would only receive 18 percent of the total revenue from the whole Greater Sunrise field (see table below) under the TST (2002).

[148] UNCLOS (1982) (n92) Arts 74 and 83.
[149] CMATS (2006) (n5).
[150] Agreement Between the Government of Australia and the Government of the Democratic Republic of Timor Leste Relating to the Unitisation of the Sunrise and Troubar Fields (entry into force 23 February 2007).
[151] TST (2002) (n4) Art 4.

CMATS (2006) would now give an equal share (50:50) of the Greater Sunrise field instead of 20 percent as it was in the TST.[152] The CMATS (2006) was then unilaterally terminated by Timor-Leste in 2017[153] after proceedings[154] initiated against Australia by Timor-Leste and following an agreement between both States to negotiate permanent maritime boundaries in the Timor Sea.

Table 3: Comparison of revenue from the Greater Sunrise field

	TST (2002)		CMATS (2006)	
Sea zone	Timor-Leste	Australia	Timor-Leste	Australia
JPDA (20%)	90%	10%	90%	10%
Greater Sunrise Field	18%	82% (2% within JPDA + 80% within Australia's jurisdiction/outside JPDA)	50%	50%

Table 3 shows comparison of revenue from the Greater Sunrise field between TST (2002) and CMATS (2006.

CMATS (2006) contains thirteen Articles, two Annexes, and an exchange of side letters concerning Article 4 (2). The Treaty clearly states that the obligations and rights that govern the exploration and exploitation of petroleum resources during

[152] CMATS (2006) (n5) Art 5: Division of Revenues from the Unit Area

[153] Parliament of Australia, 'Certain Maritime Arrangements- Timor Leste' (*APH,* 2017) https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/CMATS/Report_168_-_Certain_Maritime_Arrangements_-_Timor-Leste/section?id=committees%2Freportjnt%2F024051%2F24472 accessed 06 August 2019; Also see: Rebecca Strating, 'What's behind Timor-Leste's 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 accessed 25 September 2019.

[154] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)* (Request for the Indication of Provisional Measures) [2014] ICJ Rep 147.

the period of CMATS (2006) are those contained in the same Treaty, the TST (2002), the Sunrise IUA and any future agreement between Australia and Timor-Leste.[155] Therefore, those Articles establishing the rights and obligations of both Contracting Parties are the same as in previous JPDA Treaties. For this reason, an analysis of the participation, non-discrimination, and duty of cooperation elements of the RtD are not carried out in this section, as the previous conclusions are still valid. This section will only analyse whether the remaining key elements of the RtD (i.e., PSNR and fair distribution of benefits) are incorporated under this Treaty.

3.4.1 Fair Distribution of Benefits

The fair distribution of benefits element of the RtD is incorporated under the CMATS (2006). However, the distribution of benefits was neither fair nor equitable. The distribution of benefits is considered not fair because during the negotiations of the CMATS (2006), as Timor-Leste claimed, Australia engaged in espionage in the course of negotiating the treaty,[156] which represents a breach of trust. In addition, the seizing of documents concerning the arbitration of Timor-Leste's lawyers by Australia while the arbitration was ongoing,[157] which violated attorney-client privilege,[158] only favoured Australia.

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[155] CMATS (2006) (n5) Art 7.

[156] *Timor Sea Conciliation (Timor-Leste v. Australia)* Opening Session Transcript, PCA Case No. 2016-10 (PCA, 2016), 29 August 2016 Permanent Court of Arbitration [PCA] 57, Line 5; *Case Concerning Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (Verbatim Record) [2014] ICJ 12.

[157] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor Leste v Australia)* (Request for the Indication of Provisional Measures) [2014] ICJ Rep 147.

[158] Ibid ICJ Rep 147-8 [1], 152 [24].

The distribution of benefits or benefit-sharing was not equitable either because this Treaty was signed, though no permanent border was set. Australia still avoided negotiating permanent maritime boundaries with Timor-Leste using the Equidistance/Relevant Circumstances approach under Article 6 of the 1958 Convention on the Continental Shelf[159] and as reiterated in a series of judgments mentioned before.[160]

3.4.2 Permanent Sovereignty over Natural Resources (PSNR)

The PSNR element is still not incorporated under the CMATS (2006) as no permanent border was set. Certainly, the CMATS (2006) ruled that the revenue from the Greater Sunrise oil and gas field would be split evenly between the two States.[161] This means that Timor-Leste would be given more revenue share compared to TST (2002). Nevertheless, Australia still refused to negotiate a permanent boundary with Timor-Leste based on an equidistance or median line, thereby depriving Timor-Leste's right to exploit its natural resources in the 'interest of their national development and of the well-being of their people'[162] and failing to cooperate with Timor-Leste, as a developing State, as specified under paragraph 6 of UNGA Res 1803 (XVII).[163]

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[159] Convention on the Continental Shelf (n91).

[160] *Maritime Delimitation in the Area between Greenland and Jan Mayen* (n97)**;** Maritime Delimitation (n101); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (Judgement) [2002] ICJ Rep 303; *Sovereignty and Maritime Delimitation in the Red Sea (Eritrea / Yemen),* PCA Case No. 1996-04 (PCA 1996), 1996, Permanent Court of Arbitration [PCA] 5; *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v Bahrain)* (n98).

[161] CMATS (2006) (n5) Art5: Division of Revenues from the Unit Area.

[162] UNGA Res 1803 (n39) Para 1.

[163] Ibid Para 6: 'International co-operation for the economic development of developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance, or exchange of scientific

In addition, the CMATS (2006) included a provision specifying that the treaty would remain in force for 50 years. This, in practice, meant that no permanent maritime boundary would be concluded during the operational lifetime of any Timor Sea oil and gas field.[164] Mr Justin Gleeson, Australia's Solicitor-General, stated that the reason for the 50-year moratorium was 'to provide certainty to investors about the legal and regulatory regime so that they could make their decisions expeditiously and allow the resource to be developed so revenues could also flow to the two States'.[165] Nevertheless, there is also a provision in the CMATS (2006)[166] that states that the CMATS (2006) could be terminated unilaterally by either State if the Greater Sunrise's development plan had not been approved within six years after the CMATS (2006) had entered into force.

In addition, Article 4(1) of the CMATS (2006) states that the parties shall not 'assert, pursue or further by any means [….] claims to sovereign rights and jurisdiction and maritime boundaries' while the TST (2002) and the CMATS (2006) are in force. This includes the prohibition to commence any proceeding before the court, tribunal, or any other dispute settlement mechanism directly or indirectly connected to maritime boundaries or delimitations in the Timor Sea (Article 4(4)) or raise this issue in any international organisation (Article 4(5)). Instead, disputes about the interpretation or application of the Treaty are to be determined by consultation or negotiation.[167]

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information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources.'

[164] CMATS (2006) (n5) Art 12: Period of this Treaty.

[165] *Timor Sea Conciliation (Timor-Leste v. Australia)* (n156) 83 Paras 17-21.

[166] CMATS (2006) (n5) Art 12 (2); This means that the deadline would be 24 February 2013, thus either State could terminate the CMATS.

[167] Ibid Art 11.

Therefore, the CMATS (2006) prevents the use of courts or other mechanisms for resolving disputes. The CMATS (2006) gives no choice to Timor-Leste to push for a negotiation of a permanent maritime boundary. This clearly shows that Timor-Leste's right to exploit their natural resources in the 'interest of their national development and of the well-being of their people'[168] was on hold for fifty years, as established in the Treaty.

However, in April 2016, Timor-Leste instituted conciliation proceedings against Australia under Article 298 and Annex V, section 2 of the UNCLOS.[169] It is the first experience with the compulsory conciliation under Annex V of the 1982 UNCLOS.[170] Australia made declarations before signing the TST (2002) with Timor-Leste 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 conciliation.[171]

In addition, Australia raised multiple objections to the Conciliation Commission's competence on the basis of Article 4 of the CMATS (2006),[172] which states that: 'Neither Australia nor Timor-Leste shall assert, pursue or further by any means in

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[168] UNGA Res 1803 (n39) Para 1.
[169] UNCLOS (1982) (n92)
[170] See: Permanent Court of Arbitration, 'United Nations Convention on the Law of the Sea' https://pca-cpa.org/en/services/arbitration-services/unclos/ accessed 15 March 2023.
[171] UNCLOS (n92) Art 298(1)(a)(i); Also see: United Nations Convention on the Law of the Sea (10 June 2017) United Nations Treaty Collection, archived at ('UN Treaty Collection, Status of UNCLOS') available at https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en accessed 02 January 2023.
[172] *Timor Sea Conciliation (Timor-Leste v. Australia)* (n156) 70.

relation to the other Party its claims to sovereign rights and jurisdiction and maritime boundaries for the period of this Treaty'. Thus, by instituting conciliation proceedings against Australia under UNCLOS, Timor-Leste had breached Article 4 of the CMATS (2006).[173]

Timor-Leste chose to initiate conciliation proceedings for two reasons. First, Timor-Leste had learnt that the Australian Secret Intelligence Service had wired internal discussions of Timor-Leste's delegation during the negotiation of the treaty.[174] This led Timor-Leste to start arbitration proceedings before the Permanent Court of Arbitration against Australia under the TST (2002), claiming that Australia's espionage made the CMATS (2006) invalid.[175] Second, after Timor-Leste had discovered that the Australian Secret Intelligence Organisation seized documents concerning the arbitration at the offices of one of Timor-Leste's lawyers while the arbitration was ongoing,[176] Timor-Leste began proceedings against Australia before the ICJ in December 2013, claiming that the seizure had violated attorney-client privilege.[177] However, this case was withdrawn because Australia returned the documents ordered by the ICJ.[178]

Australia had infringed the principle of PSNR of Timor-Leste during the CMATS (2006) because it still refused to negotiate a permanent boundary with Timor-Leste, a

[173] Discussed further in section 3.4.
[174] *Case Concerning Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (Verbatim Record) (n156) 18.
[175] *Arbitration under the Timor Sea Treaty (Timor-Leste v. Australia)* Procedural Order No 1 (Rules of Procedure), PCA Case No. 2013-2016 (PCA, 2013), 06 December 2013 Permanent Court of Arbitration [PCA]
[176] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor Leste v Australia)* (n157) 147, 147–8 [1], 153 [27].
[177] Ibid ICJ Rep 147-8 [1], 152 [24].
[178] Ibid ICJ Rep 147, 160–1 [55].

developing State, and failed to cooperate, as established in paragraph 6 of UNGA Res. 1803 (XVII), and seek further development of Timor-Leste based on 'respect for their sovereignty over their natural wealth and resources'.[179] Thus, it can be argued that, although Australia and Timor-Leste signed the CMATS (2006) to enable the joint exploitation of the Greater Sunrise field and to reduce tensions between both States in relation to the delimitation of their maritime boundary, the CMATS (2006) did not meet the evolution towards the RtD.

Table 4: Key elements of the RtD under CMATS (2006)

Key elements of the RtD under CMATS (2006)	Status	Articles
Participation	Incorporated	Arts 3 (b); 6 (a) (c) (d) 7 (a)
Non-discrimination	Incorporated	Art 11 (Positive Discrimination)
Fair distribution of benefits	Incorporated	Art 5 Not fair, not equitable
PSNR	Not Incorporated	N/A
Duty of Cooperation	Incorporated	Art 11

Table 4 shows whether the key elements of the RtD are incorporated under the CMATS (2006).

3.5 Treaty between Australia and the Democratic Republic of Timor-Leste Establishing Their Maritime Boundaries in the Timor Sea (2018 Treaty)

Similar to previous sections, this section analyses whether the key elements of the RtD established in Chapter 2 (section 2.5) are incorporated under the 2018 Treaty. Before doing this, this section will first examine how the 2018 Treaty was reached.

[179] UNGA Res (n39) Para 6.

Prior to agreeing on a permanent boundary delimitation, Timor-Leste initiated a compulsory conciliation proceeding against Australia on 11 April 2016, pursuant to Article 298(1)(a)(i)[180] UNCLOS to file a 'Notification Instituting Conciliation'. It was the first time that the conciliation procedure under the UNCLOS (1982) was triggered.[181] As one of the bases of compulsory conciliation, Article 298(1) of UNCLOS provides that: '[w]hen signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

> (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission.

[180] UNCLOS (1982) (n92) Part XV: Settlement of Disputes, Section 3, Article 298: Optional exceptions to applicability of section 2; Also see: *Timor Sea Conciliation (Timor-Leste v. Australia)* Opening Session Transcript, PCACase No. 2016-10 (PCA, 2016), 22 August 2016 Permanent Court of Arbitration [PCA].

[181] Anais Kedgley Laidlaw & Hao Duy Phan, 'Inter-State Compulsory Conciliation Procedures and the Maritime Boundary Dispute Between Timor-Leste and Australia' (2019) 10 JIDS 126; Also see: Donald K Anton, 'The Timor Sea Treaty Arbitration: Timor-Leste Challenges Australian Espionage and Seizure of Documents' 18(6) (*ASIL Insight,* 2014) < https://www.asil.org/insights/volume/18/issue/6/timor-sea-treaty-arbitration-timor-leste-challenges-australian-espionage> accessed 20 August 2024.

This provision enables the Parties to automatically establish the basis for conciliation,[182] which has the function of assisting the parties reach a settlement.[183] The dispute submitted by Timor-Leste concerned 'the interpretation and application of Articles 74 and 83 of UNCLOS for the delimitation of the exclusive economic zone and the continental shelf between Timor-Leste and Australia including the establishment of the permanent maritime boundaries between the two States'.[184] However, Australia declared under Article 298(1)(a)(i)1 of UNCLOS that it did not accept any of the procedures provided for in section 2 of Part XV with respect to disputes concerning the interpretation or application of Articles 74 and 83.[185] Australia objected to this on six distinct grounds, including that Article 4 of CMATS (2006) prevented either Party from initiating a compulsory conciliation under Article 298 and Annex V of UNCLOS; that CMATS (2006) was envisaged by Articles 74 and 83 of UNCLOS (1982); and that the Parties had already agreed on a mechanism for resolution in 2003, which were the negotiations that resulted in CMATS (2006).[186] Timor-Leste contested each of Australia's objections and submitted that the Commission was competent to proceed with the conciliation.

[182] UNCLOS (1982) (n92) Art 11, Annex V.
[183] Government of Timor-Leste, *Timor-Leste's Conciliation with Australia on Maritime Boundaries* (Maritime Boundary Office 2016).
[184] UNCLOS (1982) (n92), In the Dispute Concerning Maritime Delimitation Between the Democratic Republic of Timor Leste and the Commonwealth of Australia in the Timor Sea, Annex 3 Notification of Conciliation, Notification Instituting Conciliation under Section 2 of Annex V of UNCLOS (11 April 2016).
[185] *Timor Sea Conciliation (Timor-Leste v. Australia)* Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, PCA Case No. 2016-10 (PCA, 2016), 9 May 2018 Permanent Court of Arbitration [PCA] 3-4, Paras 15, 16 and 17.
[186] Ibid, Para 17.

Regarding Article 4 of CMATS (2006), Timor-Leste 'does not consider that Article 4 (1) was intended to or does oblige the Parties not to discuss, and if that is any different, negotiate with each other, on the issue of permanent maritime boundaries'.[187] Timor-Leste presented that the fact that CMATS (2006) included a provisional arrangement of a practical nature did not make it per se compatible with the Convention.[188] Based on the third ground objected by Australia, Timor-Leste asserted that CMATS (2006) was not a binding agreement within the meaning of Article 281[189] and it was neither an agreement to settle the maritime boundary dispute that excludes a further procedure.[190]

Furthermore, in regard to Australia's objection to the Conciliation Commission's competence on the basis of Article 4 of CMATS (2006),[191] was rejected by the Commission.[192] The Commission, by upholding its competence, refused to enforce Article 4 of CMATS (2006),[193] arguing that '[e]ven if CMATS (2006) were presumed to be valid, it would not affect the Commission's competence or the "admissibility" of the dispute'.[194] Having set aside this question, the Commission arranged for a series of confidential meetings to terminate the CMATS (2006) and, as a result of the

[187] Ibid, Para 23.
[188] UNCLOS (1982) (n92).
[189] Ibid Part XV, Section 1, Art. 281: 'Procedure where no settlement has been reached by the parties'.
[190] *Conciliation Commission Constituted under Annex V to the 1982 United Nations Convention on the Law of the Sea between the Democratic Republic of Timor-Leste and the Commonwealth of Australia (Timor-Leste v. Australia)* (n185).
[191] Ibid Paras 15, 17, 20.
[192] Ibid 31 Para 111.
[193] Ibid.
[194] *Conciliation Commission Constituted under Annex V to the 1982 United Nations Convention on the Law of the Sea between the Democratic Republic of Timor-Leste and the Commonwealth of Australia (Timor-Leste v. Australia)* (n185) Para 89.

conciliation proceedings and after an exhaustive set of hearings,[195] Australia and Timor-Leste agreed to terminate the CMATS (2006) Treaty in January 2017[196] and also to terminate Article 12(4) of the CMATS (2006) Treaty, which gave continuing effect to several provisions that would reactivate the whole Treaty if the Greater Sunrise resource in the Timor Sea were to be developed in the future.[197] In addition, as part of the conciliation, Australia and Timor-Leste agreed that the TST (2002) would remain in force in its original form prior to its 2006 amendment by the CMATS Treaty. Furthermore, both States also agreed to negotiate permanent maritime boundaries in the Timor Sea.

In March 2018, Australia and Timor-Leste finally signed the 2018 Treaty. The Treaty was signed by the former Minister of Timor-Leste, Agio Pereira, and the Australian former Minister of Foreign Affairs, Julie Bishop.[198] For the first time, the maritime treaty establishes each State's entitlement and ownership of the rich oil and gas reserves in the Timor Sea.

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[195] There were 15 week-long meetings between the Commission and the parties in total between July 2016 and February 2018.

[196] Parliament of Australia, 'Certain Maritime Arrangements- Timor Leste' (*Aph,* 2017) https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/CMATS/Report_168_-_Certain_Maritime_Arrangements_-_Timor-Leste/section?id=committees%2Freportjnt%2F024051%2F24472 accessed 6 January 2020; Also see: Strating (n153).

[197] Parliament of the Commonwealth of Australia, *Report 168: Certain Maritime Arrangements - Timor-Leste* (Joint Committee on Treaties 2017) 1. Also see: Permanent Court of Arbitration Press Release, 'Timor-Leste and Australia Reach Agreement on Treaty Text Reflecting 20 August Comprehensive Package Agreement' (15 October 2017) Permanent Court of Arbitration.

[198] Maritime Boundary Office, 'New Frontiers: Timor-Leste's Historic Conciliation on Maritime Boundaries in the Timor Sea' (Maritime Boundary Office 2018).

The 2018 Treaty establishes permanent maritime boundaries between Australia and Timor-Leste in the Timor Sea and the Greater Sunrise Special Regime for the joint development, exploitation, and management of the Greater Sunrise petroleum deposits. Subsequently, a lengthy ratification process ensued, notably because it involved an engagement with production-sharing contractors in the Timor Sea to transition those fields from either exclusive Australian jurisdiction to Timor-Leste jurisdiction, or from the JPDA to exclusive Timor-Leste jurisdiction.[199] With that transitional process concluding alongside the domestic ratification process in both States,[200] Prime Minister Scott Morrison and Prime Minister Taur Matan Ruak exchanged notes in Dili, bringing into effect the 2018 Treaty on 30 August 2019, 20 years to the day since Timor-Leste's vote for independence. The following sections will analyse whether the elements of the RtD are incorporated under the 2018 Treaty.

3.5.1 Participation

From an inter-State perspective, the participation element is incorporated under the 2018 Treaty as both Australia and Timor-Leste were part of this negotiation and both States were able to influence the terms of the Treaty. Furthermore, in order to

[199] Parliament of Australia, 'Timor Sea Maritime Boundaries Treaty Consequential Amendments Bill (*Aph,* NY) 2019' https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6337 accessed 10 February 2020; See Also: Oki Raimundos, 'Timor-Leste Parliament Approves Sea Border Treaty with Australia' *The Diplomat* (Oceania 24 July 2019) https://thediplomat.com/2019/07/timor-leste-parliament-approves-sea-border-treaty-with-australia/ accessed 2025 February 2020.

[200] Melanie Burton, 'Australia Ratifies Maritime Boundaries with East Timor' (*Reuters*, 29 July 219) https://www.reuters.com/article/us-australia-timor-treaty/australia-ratifies-maritime-boundaries-with-east-timor-idUSKCN1UO0Y8 accessed 01 March 2020.

manage, implement, and enforce the 2018 Treaty, both Australia and Timor-Leste need to cooperate with each other. This is clearly asserted in Articles 7, 8, 15, and 16 and Annex B: Article 7. For example, Article 7(2)[201] asserts that Australia and Timor-Leste shall jointly exercise their rights as coastal states pursuant to Article 77 UNCLOS[202] until the Special Regime ceases to be in force.

Correspondingly, for the development of the Greater Sunrise regime, Timor-Leste and Australia have agreed to employ the Joint Authority model with two levels of authority, namely the Governance Board and the Designated Authority.[203] The Governance Board is the representative authority of both States whose function is to oversee the development of the Greater Sunrise Regime, whereas the Designated Authority is the operating representative of the two States assigned to Timor-Leste statutory authority. Thus, Article 7(1) of Annex B requires representatives appointed by both Australia and Timor-Leste[204] under the Governance Board to oversee the development of the Greater Sunrise Regime. These representatives will exercise oversight over strategic matters, with decisions agreed upon by consensus. Thus, this shows mutual participation is required by both States to manage, implement, and enforce the 2018 Treaty. The role of the Governance Board is to provide a 'strategic oversight over the Greater Sunrise Special Regime',[205] to 'establish[] and oversee[] an assurance and audit framework for revenue verification and offshore petroleum

[201] 2018 Treaty (n6) Art 7 (2): 'Within the Special Regime Area, the Parties shall jointly exercise their rights as coastal States pursuant to Article 77 of the Convention.'
[202] UNCLOS (1982) (n92) Art 77(1): 'The coastal State exercises over the continental shelf sovereign rights for the purposes of exploring it and exploiting its natural resources.'
[203] 2018 Treaty (n6) Annex B, Art 5.
[204] Ibid Art 7.
[205] Ibid Art 7.2 (a).

regulation and administration',[206] to make decisions,[207] approve amendments,[208] and approve the final Petroleum Mining Code and any regulations thereunder.[209]

Given these points, it can be argued that the Governance Board is endowed with great powers and functions to implement the 2018 Treaty. It is also safe to say that more control is given to Timor-Leste as the Governance Board is comprised of one representative appointed by Australia and two representatives appointed by Timor-Leste.[210] However, all decisions of the governance board shall be made by consensus,[211] which shows that, from an inter-State perspective, participation is achieved. This also indicates that there is a participation element of the RtD in this Treaty, albeit limited to States.

3.5.2 Non-Discrimination

The non-discrimination element of the RtD is incorporated under the 2018 Treaty. Similar to the TST (2002), there is positive discrimination, since under Article 7 of Annex B establishes the number of representatives of both States on the Governance Board and specifies that it is comprised of one representative appointed by Australia and two representatives appointed by Timor-Leste. These representatives will exercise oversight over strategic matters, with decisions to be made by consensus. It can be argued that this is one of the measures both States agreed to adopt to correct

[206] Ibid Art 7.2 (b).
[207] Ibid Art 7.2 (c).
[208] Ibid Art 7.2 (d).
[209] Ibid Art 7.2 (e).
[210] Ibid Art 7.1.
[211] Ibid Art 7.6.

historical injustices that Timor-Leste endured while under Indonesian occupation and to ensure these individuals are treated fairly.

3.5.3 Fair Distribution of Benefits

The distribution of benefits or benefit-sharing is incorporated under the 2018 Treaty; it is both fair and equitable. In the context of inter-state relations, the distribution of benefits between both States is established in Article 2 of Annex B.[212] There are two options that both Parties can agree on: one, the two States agree to share the upstream revenue or the Greater Sunrise field on a 70:30 basis in favour of Timor-Leste, provided the pipelines go to Timor-Leste;[213] two, Timor-Leste would receive 80 percent of the revenues in the event of the oil and gas being piped to and processed in Australia, with Australia receiving 20 percent.

Therefore, the revenue from the Greater Sunrise Regime is dependent on the terms of the development concept that is to be agreed between Australia, Timor-Leste, and the Greater Sunrise Joint Venture (Conoco Phillips, Woodside, and Osaka Gas) for the development of the Greater Sunrise fields.[214] The decision is left to the investing Joint Venture and subject to the approval of the Designated Authority, established under the 2018 Treaty.[215]

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[212] Ibid Annex B, Art 2: Title to Petroleum and Revenue Sharing.

[213] Ibid Annex B: Greater Sunrise Special Regime, Art 2 (2). See Also: Clive Schofield & Bec Strating, 'What's next for Timor Leste's Greater Sunrise?' (*The Diplomat*, 3 April 2018) https://thediplomat.com/2018/04/whats-next-for-Timor Lestes-greater-sunrise/ accessed 02 December 2019.

[214] Parliament of Australia, 'Timor Sea Maritime Boundaries Treaty Consequential Amendments Bill 2019' (*Aph,* NY) https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6337 accessed 19 February 2020.

[215] 2018 Treaty (n6) Art 6 of Annex B.

Similar to other treaties in the Timor Sea, the 2018 Treaty was also voluntarily signed by both Contracting Parties, which would suggest that they felt it was beneficial. Therefore, it can be argued that the distribution of benefits or benefits-sharing was fair. The distribution of benefits or benefit-sharing is also equitable as the 2018 Treaty drew a median line between Australia and Timor-Leste with two connecting lateral lines, which run north of the old 1972 Australian-Indonesian continental shelf boundary.[216] Thus, the determination of the sea boundary is a single maritime boundary that has annexed the EEZ and continental shelf, such as the decision determined by the ICJ in resolving the Black Sea case.[217] The use of the Equidistance/Relevant Circumstances approach had led to a more equitable solution and, thus, to an equitable distribution of benefits or benefits-sharing.

Furthermore, the preamble of the 2018 Treaty unmistakably emphasises that the two States agreed that promoting Timor-Leste's economic development is important.[218] By having a permanent boundary and more revenue share in this Treaty, the Treaty will support Timor-Leste's economic development by providing additional revenue streams from resource development in the Timor Sea.

Undoubtedly, for Timor-Leste, the pursuit of maritime boundaries is not only a critical matter of sovereignty, but it is also vital for the State's development and its path to prosperity. This explains why Timor-Leste's negotiators favoured the development of

[216] Donald Rothwell, 'Australia and Timor-Leste: the 2018 Timor Sea Treaty' (*Australian Strategic Policy Institute,* 2018) https://www.aspistrategist.org.au/australia-timor-leste-2018-timor-sea-treaty/ accessed 14 January 2020.
[217] Maritime Delimitation (Romania v Ukraine) (n101).
[218] 2018 Treaty (n6) Preambular, Para 9.

a pipeline and an onshore facility in Timor-Leste to help develop the State's industrialisation and boost employment in the country.

Timor-Leste seeks to use natural gas from the Greater Sunrise to help establish an industrial zone in the country. If implemented effectively and in the right context, this industrial zone could serve as a powerful tool to promote industrialisation by attracting foreign investment, boosting exports, fostering industrial growth,[219] help alleviate large-scale unemployment and support the national economy. In 2021, the net inflows[220] (in percentage of Gross Domestic Product) of foreign direct investment (FDI) in Timor-Leste were 2.4 percent, a decline from 6.6 percent in 2009. This trend indicates a reduction in the value of inward direct investments made by foreign investors in the country.[221] In 2020, as a result of the global health and economic crisis sparked by the COVID-19 pandemic, the foreign direct investment flows to Timor-Leste decreased by 3 percent, dropping from US$75 million to US$72 million in 2019.[222]

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[219] United States Department of State, '2022 Investment Climate Statements: Timor Leste' (State, NY) https://www.state.gov/reports/2022-investment-climate-statements/timor-leste/ accessed 05 March 2023; Also see: Standbic, 'East Timor: Investing' (*Tradeclub,* 2023) https://www.tradeclub.stanbicbank.com/portal/en/market-potential/east-timor/investing accessed 05 March 2023.

[220] Worlds Bank, 'What is the Difference between Foreign Direct Investment (FDI) Net Inflows and Net Outflows?' (*World Bank,* NY) https://datahelpdesk.worldbank.org/knowledgebase/articles/114954-what-is-the-difference-between-foreign-direct-inve#:~:text=FDI%20net%20inflows%20are%20the,reporting%20economy%20to%20external%20economies accessed 15 February 2023. Net inflows is '[t]he value of inward direct investment made by non-resident investors in the reporting economy The World Bank'.

[221] Ibid.

[222] United Nations Conference on Trade and Development, 'Regional Trends' in Caroline Lambert (ed) *World Investment Report 2021: Investing in Sustainable Recovery* (United Nations Publications 2021) ch 2, 96.

Timor-Leste is hopeful that establishing a permanent boundary and bringing the pipelines to its coasts will attract FDI. In Timor-Leste, the main sector attracting FDI is the oil and gas sector.[223] Regarding hydrocarbon resources, FDI plays an important role in supporting the host State to grow capital inflows, introduce modern technologies, provide experts, and facilitate accessibility to international markets.[224] Indeed, foreign investment is vital for supporting the development prospects of Timor-Leste, which relies heavily on oil and gas production for its income. Therefore, it must be stressed that the new Treaty provides certainty and stability for businesses and investors.[225]

Additionally, the 2018 Treaty will support Timor-Leste's economic development by providing new opportunities for commercial and industrial development. Permanent maritime boundaries will expand Timor-Leste's areas of exclusive maritime jurisdiction, which will lead to additional income for the country as further resources are developed. Timor-Leste will receive all future income revenue from the Bayu-Undan gas and condensate field, which will be transferred into its jurisdiction.[226] Consequently, in order to support Timor-Leste's development plan which aims to

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[223] Standbic (n219). The main investing countries are Indonesia, the United States and Australia.

[224] Gaber Gawad & Venkata Muramalla, cited in Melkiades Laot, 'Laot M, 'The Implementation of the Joint Development of Greater Sunrise Special Regime under the 2018 Timor Sea Maritime Boundaries Treaty between Timor-Leste and Australia' (M.Sc. World Maritime University 2019) 42.

[225] Australia Government, 'Australia's Maritime Arrangements with Timor Leste' (*DFAT,* NY) https://dfat.gov.au/geo/Timor Leste/Pages/australias-maritime-arrangements-with-Timor Leste.aspx accessed 05 January 2020; Also see: Australian Treaty National Interest Analysis (ATNIA), 'Treaty between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea' (ATNIA 2018).

[226] ATNIA (n225).

bring a pipeline to the country, the Government took a concrete measure by purchasing the shares of two foreign companies that would carry out exploitation activities in the Greater Sunrise: Conoco Phillips (30 percent) and Shell Australia (26.56 percent).[227] The shares will be relocated to the Timor Gap in order to participate in Sunrise Joint Ventures to develop the Greater Sunrise fields. Therefore, the total shares owned by Timor-Leste in the Joint Ventures is 56.56 percent, together with Woodside (33.44 percent), and Osaka Gas (10 percent).[228]

Although the idea of bringing the pipeline to Timor-Leste seems beneficial to Timor-Leste's development, Woodside Energy- an Australian company- has argued for many years that building an offshore pipeline across the Timor Trench is not economically viable nor is the construction of a new onshore Liquefied Natural Gas (LNG) facility in Timor-Leste.[229] Instead, Woodside Energy has maintained that a pipeline to Australia is the only commercially viable option. However,[230] Ramos Horta[231] has suggested that Timor-Leste could approach China to build a pipeline to

[227] Presidency of the Council of Ministers Press Release, 'Timor-Leste Completes the Purchase of Interests in the Greater Sunrise Fields' (16 April 2019) Government of Timor-Leste.

[228] Ibid.

[229]Parliament of the Commonwealth of Australia, *Report 168: Certain Maritime Arrangements - Timor-Leste* (Joint Committee on Treaties 2017) 1, 8, Para 2.15; Upstream Energy Explored, 'Woodside Softens its Stance on Sunrise and has Multiple Routes to Growth' (*Russell Searancke,* 2022) https://www.upstreamonline.com/field-development/woodside-softens-its-stance-on-sunrise-and-has-multiple-routes-to-growth/2-1-1366522 accessed 01 March 2023.

[230] Emma Connors, 'East Timor Plays the China Card in Sunrise Gas Battle' (*Afr,* 2022) https://www.afr.com/world/asia/east-timor-plays-the-china-card-in-sunrise-gas-battle-20220819-p5bb8g accessed 4 January 2023.

[231] Serving as President of Timor Leste since May 2022.

transfer gas extracted from the Greater Sunrise.[232] Surprisingly, an Australian Financial Review in 2022 stated that the updated costing, shown in a confidential report prepared for the Government of Timor-Leste, contrasts Woodside Energy's insistence that bringing the pipelines to and building the LNG processing plant in Australia is the only commercially viable option. The confidential report shows that the Greater Sunrise gas project can be built and run at a similar cost in Timor-Leste.[233] Furthermore, this has been confirmed by the state-owned Timor Gap President Antonio de Sousa, who stated that its independent studies demonstrated the technical and economic viability of the pipeline to be built in the south coast of Timor-Leste. As bringing the pipelines to Timor-Leste is 'the only acceptable option for the people of Timor-Leste'[234] in order to support the development of the country. In the same year, Woodside Energy's chief executive Meg O'Neill stated that the company is reconsidering the potential development of Greater Sunrise via an onshore LNG export terminal in Timor-Leste.[235] This shows a significant reversal of the previous report carried out by Woodside Energy.

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[232] Energy Voice, 'East Timor President Finds no Progress with Australia on Gas Project' (*Energy Voice,* 2022) https://www.energyvoice.com/oilandgas/asia/468085/east-timor-president-finds-no-progress-with-australia-on-gas-project/ accessed 4 January 2023;
John Kehoe, 'Leaked Report Backs East Timor for Woodside's Sunrise Gas Project' (*Afr,* 2022) https://www.afr.com/companies/energy/leaked-report-backs-east-timor-for-woodside-s-sunrise-gas-project-20220731-p5b605 accessed 15 February 2023.

[234] Sonali Paul, 'Timorese Push Case to Pipe Greater Sunrise Gas to East Timor' (*Reuters,* 2022) https://www.reuters.com/business/energy/timorese-push-case-pipe-greater-sunrise-gas-east-timor-2022-09-01/ accessed 4 January 2023.

[235] Reuters, 'Woodside Open to Considering LNG Plant in Timor for Sunrise Gas' (*Reuters,* 2022) https://www.reuters.com/article/woodside-ltd-timor-gas-idUSL4N32R1DA accessed 15 February 2023; LNG Prime, 'Australia's Woodside to Consider Sending Sunrise Gas to LNG Plant in East Timor' (*lngprime,* 2022).

The project of building pipelines in the south coast is known as the Tasi Mane Project, which plans to build three industrial clusters, involving the development of petroleum infrastructure.[236] Jornal da Republica,[237] which published Timor Gap annual report and accounts for 2019, claimed that the Tasi Mane Project aims to establish a national petroleum industry and associated supporting infrastructures, skills development, and service capability, becoming a major contributor to the economy of Timor-Leste.

Consequently, the 2018 Treaty is deemed by both governments to be fair and equitable[238] and an 'equitable and balanced solution that benefits both Timor-Leste and Australia'.[239] Therefore, it can be argued that the distribution of benefits or benefit-sharing is incorporated under the 2018 Treaty; it is both fair and equitable.

https://lngprime.com/australia-and-oceania/australias-woodside-to-consider-sending-sunrise-gas-to-lng-plant-in-east-timor/67741/ accessed 15 February 2023.

[236] Timor Gap, 'FAQS' (*Timor Gap,* NY) https://www.timorgap.com/about-us/overview/faqs/ accessed 15 March 2023.

[237] The government newspaper of Timor Leste. The Journal is published by the Ministry of Justice.

[238] Helen Davidson, 'Oil and Gas Had Hidden Role in Australia's Response to Indonesian Invasion of Timor Leste' *The Guardian* (Australia 7 May 2018) https://www.theguardian.com/australia-news/2018/may/07/oil-and-gas-had-hidden-role-in-australias-response-to-indonesian-invasion-of-Timor_Leste accessed 30 January 2020.

[239] Stated by the Chairman of the Conciliation Commission, see: Conciliation Commission in a confidential meeting as part of a structured dialogue in the context of the conciliation between Timor-Leste and Australia in Copenhagen in 2017. Pursuant to the UNCLOS and under the auspices of the Permanent Court of Arbitration. Also See: Permanent Court of Arbitration Press Release, 'Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia' (Copenhagen, 1 September 2017) Permanent Court of Arbitration

3.5.4 Permanent Sovereignty over Natural Resources (PSNR)

The PSNR element of the RtD is finally incorporated under the 2018 Treaty. In 2018, Timor-Leste was given the right to exploit its natural resources in the 'interest of their national development and of the well-being of their people and national development'[240] and that the exploration and development of the Greater Sunrise field will be 'in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable'.[241] Article 14 of Annex B regarding the local content commitments[242] is an example of a duty given to States to exercise their sovereignty in the interest of national development and for the well-being of the people.[243] This article lays out commitments, such as to 'improve Timor-Leste's workforce and skills development and promote employment opportunities and career progression for Timor-Leste nationals through capacity-building initiatives, training of Timor-Leste nationals and a preference for the employment of Timor-Leste nationals'; to 'improve Timor-Leste's supplier and capability development by seeking the procurement of goods and service…'; and to 'improve and promote Timor-Leste's commercial and industrial capacity through the transfer of knowledge, technology and research capability'. This is in line with first, paragraph 1 of the UNGA Resolution 1803 XVII on PSNR, which states that '[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned', and, second, Article 2(3) of the UNDRtD, which

[240] UNGA Res 1803 (n39) Para 1.
[241] Ibid Para 2; Also see: Chapter 2, section 2.5.4.
[242] This will be discussed further in Chapter 4 (intra-State relationship).
[243] UNGA Res 1803 (n39) Para 1; Also see: Nico J Schrijver (n39) 16-17.

indicates that States have the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals.

In addition, the principle of PSNR can be found under Article 2 of Annex B on how the revenue of the Greater Sunrise fields is shared. The 2018 Treaty explicitly allows Timor-Leste to flow gas into its coasts, rather than be processed in Australia.[244] This shows that Timor-Leste now has the right to explore and exploit natural resources freely. Furthermore, by reaching an agreement with Australia, Timor-Leste was given the final step to realise its sovereignty as an independent State, as claimed by the former Prime Minister, Rui Maria De Araujo, who expressed a widely held sentiment in Timor-Leste.[245] The assumption is that the flow of gas into Timor-Leste's coasts will allow the nation to develop a petroleum processing industry, creating valuable national infrastructure and employment opportunities,[246] which will, in turn, contribute to the well-being of the people of Timor-Leste.

Additionally, the exploitation and development of the Greater Sunrise fields will be finally 'in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable'.[247] The 2018 Treaty allows Timor-Leste

[244] 2018 Treaty (n6) Annex B: Art 2 (2).

[245] Minister of State and of the Presidency of the Council of Ministers and Official Spokesperson for the Government of Timor-Leste, 'Timor-Leste launches United Nations Compulsory Conciliation Proceedings on Maritime Boundaries with Australia' (Timor-Leste Government, 11 April 2016) http://timor-leste.gov.tl/?p=14978&lang=en accessed 27 January 2020.

[246] Democratic Republic of Timor Leste, 'Timor Leste Strategic Development Plan 2011-2030' (2011) Part 4, Page 136. Also see: Rebecca Strating, 'Timor-Leste's Foreign Policy Approach to the Timor Sea Disputes: Pipeline or Pipe Dream?' (2017) 71 (3) Aust J Int'l Aff 259.

[247] UNGA Res 1803 (n39) Para 2.

to choose how the oil and gas in the Greater Sunrise fields are to be developed. The revenue received from the Greater Sunrise fields will be shared in the ratio of 30 percent to Australia and 70 percent to Timor-Leste in the event that they are developed by means of bringing the pipeline to Timor-Leste; or in the ratio of 20 percent to Australia and 80 percent to Timor-Leste in the event that they are developed by means of bringing the pipeline to Australia.[248]

The concept of sovereign rights also grants every State the right to exercise jurisdiction within its territory. While the Greater Sunrise regime is still in force, these two States are required to cooperate in order to exercise their rights within the Greater Sunrise fields,[249] and will individually exercise their right as a coastal State after the Special Regime ceases to be in force.[250] This Treaty recognises that both Australia and Timor-Leste shall exercise sovereign rights in respect of the Greater Sunrise Special Regime area encompassing the gas fields. Additionally, this Treaty does not prejudice negotiations between Timor-Leste and Indonesia on their maritime boundaries in the Timor Sea. It explicitly protects the rights and freedoms of other states under UNCLOS.[251]

Lastly, the delineation of the maritime border is important in the eyes of Timor-Leste for two reasons. First, Timorese representatives linked the Timor Sea dispute with the country's struggle for independence under Indonesian occupation. Thus, the signing of this Treaty was a story of sovereignty. Second, Timor-Leste specifically tied its maritime sovereignty to that of its land-based sovereignty. As Gusmão stated, 'For

[248] 2018 Treaty (n6) Annex B: Art 2.
[249] Ibid, Art 7 (2).
[250] Ibid, Art 7 (5).
[251] Ibid, Art 6; Also see: ATNIA (n225).

the people of Timor-Leste, it does not matter if there are only crabs and crocodiles in the Timor Sea- for us this is a matter of principle and sovereignty'.[252] Thus, signing this Treaty is seen as a second independence by the representatives of Timor-Leste.

3.5.5 Duty of Cooperation

The duty of cooperation element of the RtD can be identified through the finalising of the permanent maritime boundaries which marks a new chapter in Australia and Timor-Leste's bilateral relationship, strengthening their cooperation. This shows that Australia, as a developed State, was willing to cooperate with a developing State, Timor-Leste, to reach a final decision and to establish the joint development, exploitation, and management of petroleum in the Greater Sunrise Field.[253] The 2018 Treaty is 'CONSCIOUS of the importance of promoting Timor-Leste's economic development'.[254]

The 2018 Treaty makes references[255] to the cooperation between both Parties (i.e., Australia and Timor-Leste). For example, Article 7(2)[256] asserts that, until the Special Regime ceases to be in force, Australia and Timor-Leste shall jointly exercise their rights as coastal states pursuant to Article 77 UNCLOS.[257] In addition, Article 8 of the 2018 Treaty states that: '[…] the Parties shall work expeditiously and in good faith to

[252] Xanana Gusmão, *Timor-Leste's Maritime Boundaries* (Maritime Boundary Office 2016) 3.
[253] 2018 Treaty (n6) Annex B, Art 1.
[254] Ibid Preamble.
[255] Ibid Arts 7 and 8; Annex B: Arts 15 and 16.
[256] Ibid Art 7 (2): 'Within the Special Regime Area, the Parties shall jointly exercise their rights as coastal States pursuant to Article 77 of the Convention.'
[257] UNCLOS (1982) (n92) Art 77(1): 'The coastal State exercises over the continental shelf sovereign rights for the purposes of exploring it and exploiting its natural resources.'

reach agreement as to the manner in which [straddling deposits are] to be most effectively exploited and equitably shared.' These references, however, do not fall within the meaning of a duty of cooperation, as used in this thesis.[258]

Nevertheless, as understood in this thesis, the duty of cooperation element of the RtD can be identified under the 2018 Treaty and notably Article 14 of Annex B, which describes the local contents during the development of the Greater Sunrise fields. The same Article states that the local content plan shall contain clear, among others, commitments including to 'improve and promote Timor-Leste's commercial and industrial capacity through the transfer of knowledge, technology and research capability'.[259] This article reflects both Australia and Timor-Leste's commitments to ensure substantial benefits flow to Timor-Leste from the development of the Greater Sunrise fields. It can be asserted that this is a duty of cooperation element of the RtD. In addition, the cooperation between Australia and Timor-Leste to reach an agreement and sign the 2018 Treaty falls within the meaning of the duty of cooperation under the UNDRtD.[260] It can be argued that, by having accepted to negotiate and eventually agree on the terms of this Treaty with Timor-Leste, Australia as a developed State is recognising its duty to ensure development and eliminate obstacles to development,[261] as well as its duty to take 'sustained action to promote more rapid development of developing countries',[262] such as Timor-Leste.

[258] See Chapter 2, section 2.5.5.
[259] 2018 Treaty (n6) Annex B, Art 14 (2) c; See Chapter 2, section 2.5.5.
[260] UNDRtD (n18) Arts 3 (3) and 4 (2).
[261] Ibid Art 3 (3).
[262] Ibid Art 4 (2).

It can be concluded that the 2018 Treaty is the only JDA that meets the evolution towards the RtD as it incorporates all the elements of the RtD.

Table 5: Key elements of the RtD under 2018 Treaty

Key elements of the RtD under the 2018 Treaty	Status	Articles
Participation	Incorporated	Arts 7, 8, 15 and 16
Non-discrimination	Incorporated	Art 7 Annex B (Positive discrimination)
Fair distribution of benefits	Incorporated	Annex B: Art 2; Annex B: Art 14 Fair and equitable
PSNR	Incorporated	Annex B: Art 14
Duty of Cooperation	Incorporated	Annex B: Art 14

Table 5 shows whether the key elements of the RtD are incorporated under the 2018 Treaty.

3.6 Evolution of the Elements of the RtD

The TGT was signed between Australia and Indonesia in 1989 while Timor-Leste was under Indonesian occupation. However, after its independence, Timor-Leste entered into JDAs with Australia (the first on the same day as it restored independence):[263] the Timor Sea Treaty (TST 2002),[264] the Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS 2006),[265] and the 2018 Treaty, which finally established

[263] See Robert J King, 'Submission No 13: Inquiry into Australia's Relationship with Timor-Leste' (27 March 2013) Joint Standing Committee on Foreign Affairs, Defence and Trade, Foreign Affairs Sub-Committee 1. See Also: Alexander Munton, 'A Study of the Offshore Petroleum Negotiations between Australia, the U.N. and East Timor' (Ph.D thesis, Australian National University 2006) 1.
[264] TST (2002) (n4).
[265] CMATS (2006) (n5).

permanent maritime boundaries between Australia and Timor-Leste in the Timor Sea.

Thus, this section summarises the evolution of these key elements of the RtD through these Treaties/JPDAs and concludes that these elements have indeed progressed within the Treaty provisions since the TGT (1989). The 2018 Treaty has fully incorporated all elements of the RtD.

3.6.1 Participation

The participation element is incorporated under the TGT (1989). Both Australia and Indonesia participated in the negotiation and the drafting of this Treaty and the provisions of the TGT (1989) contained the element of participation of both Contracting States. The provisions refer to the number of Ministers designated by each Contracting State in the Ministerial council for the zone,[266] the number of employments,[267] and that all Council decisions must be arrived at by consensus.[268] Although this element of the RtD is incorporated in this Treaty, Timor-Leste did not participate in its negotiation and implementation as the country was then a province of Indonesia and not a contracting State.

Unlike the TGT (1989), Timor-Leste's representatives were finally involved in signing the TST (2002) and, therefore, able to influence this Treaty. Thus, the participation element of the RtD was incorporated under the TST (2002). First, this participation is evident in the fact that the Treaty was signed by the representatives of both States, Australia and Timor-Leste. Second, the TST (2002) provides for the joint control,

[266] TGT (1989) (n3) Part III, Art 5 (2).
[267] Ibid Part VI, Art 24 (1).
[268] Ibid Part III, Art 5 (5) and Art 7 (4); Also see: Kaye (n20) 92.

management, exploration, development, and exploitation of the petroleum resources in the designated JPDA.[269] This shows that both States have equal responsibilities to implement and enforce the TST (2002). Thus, it is clear that the element of participation was effectively incorporated in the TST (2002).

In terms of the CMATS (2006) Treaty, as the rights and obligations of both Contracting Parties are the same as in previous JPDA Treaties, the analysis of the participation element of the RtD in CMATS (2006) remains the same as in the TST (2002).

As for the 2018 Treaty, both Australia and Timor-Leste were part of its negotiation and were able to influence its terms. In addition, the participation element is established in Articles 7, 8, 15, and 16 and Annex B: Article 7. Under these circumstances, both States shall participate in exercising their rights until the end of the Special Regime. In addition, Timor-Leste has more control in this Treaty, as the governance board is comprised of one representative appointed by Australia and two representatives appointed by Timor-Leste.[270] Although Timor-Leste comprises more representatives, all decisions of the governance board shall be made by consensus.[271] This indicates that there is a participation element of the RtD in this Treaty, albeit limited to States.

Certainly, the participation element of the RtD has been present since the TGT (1989). However, it can be argued that this element is more prominent in the Treaties/JPDAs that were signed after Timor-Leste's independence because Timor-Leste participated in its own negotiations and implementation.

[269] TST (2002) (n4) Art 3 (b).
[270] 2018 Treaty (n6) Art 7.1
[271] Ibid, Art 7.6.

3.6.2 Non-Discrimination

The non-discrimination element is incorporated under the TGT (1989). References made to this element can be seen under Article 24 Part VI of the TGT (1989), which requires equal numbers of employment from both Australia and Indonesia.[272] Although Timor-Leste was not part of this Treaty as a State, the TGT (1989) incorporated the non-discrimination element of the RtD between its Contracting Parties, Australia and Indonesia.

Similar to the TGT (1989), the non-discrimination element for the RtD was incorporated under the TST (2002). In fact, there was actually positive discrimination. This can be identified under Article 11 of TST (2002) regarding employment in the JPDA. In this case, preference was given in employment in the JPDA 'to nationals or permanent residents of East Timor'; and 'facilitate[s], as a matter of priority, training and employment opportunities for East Timorese nationals and permanent residents'.[273]

In terms of the CMATS (2006) Treaty, as the rights and obligations of both Contracting Parties are the same as in previous JPDA Treaties, the analysis of the non-discrimination element of the RtD in CMATS (2006) remains the same as in the TST (2002).

The non-discrimination element for the RtD is also incorporated under the 2018 Treaty. Similar to the TST (2002), there is positive discrimination in this Treaty as the Board of Governance is comprised of one more representative appointed by Timor-

[272] TGT (1989) (n3) Art 24 (4), Part VI.
[273] TST (2002) (n4) Art 11 (a) and (b).

Leste than by Australia and it exercises oversight over strategic matters, with decisions adopted by consensus.

3.6.3 Fair Distribution of Benefits

The distribution of benefits was incorporated under the TGT (1989). While the distribution or benefit-sharing was fair, it was not equitable. This inequity arose because Australia refused Indonesia's claim regarding the maritime boundary, which should have been determined using the median line as provided under Article 6 of the 1958 Convention on the Continental Shelf.[274] As a result, the share of revenues could have been different or better for Indonesia. In addition, although Indonesia received these revenues generated from the exploitation of petroleum resources, they brought little improvement to the social conditions in Timor-Leste.[275]

Concerning the TST (2002), the distribution of benefits element was incorporated under the TST (2002).[276] Similar to the TGT (1989), the distribution of benefits was fair but not equitable. Although Timor-Leste could then use its petroleum resources for the benefit of its own people and to gain a 90 percent share within the JPDA, Australia refused to negotiate a permanent boundary based on equidistance or a median line, which was established under UNCLOS (1982) to provide an equitable solution.[277]

Similar to the TST (2002), the distribution of benefits in CMATS (2006) was incorporated under the Treaty, and it was fair but still not equitable. However, this

[274] Convention on the Continental Shelf (n91).
[275] Discussed in Chapter 4, under inter-State relationship.
[276] TST (2002) (n4) Art 4; Annex E under Art 9 (b).
[277] UNCLOS (1982) (n92) Arts 74 and 83.

Treaty had progressed from TST (2002) regarding benefit-sharing of petroleum resources. Instead of 18 percent for Timor-Leste, the revenue of the Greater Sunrise would be split 50:50.[278] Nevertheless, this benefit-sharing was still seen as not equitable for Timor-Leste. Timor-Leste had consistently argued in favour of the equidistance or a median line approach[279] in delimiting their maritime boundary, which Australia did not want to recognise. In addition, this Treaty included a provision specifying that the Treaty would remain in force for 50 years.[280]

After agreeing to sign the 2018 Treaty and giving the choice to Timor-Leste to bring the pipelines to its coasts, one might argue that the distribution of benefits is both fair and equitable. The fair distribution of benefits element of the RtD is incorporated under the 2018 Treaty. References to this element of the RtD can be identified under Article 2 of Annex B,[281] where the two States agree to share the upstream revenue of the Greater Sunrise Field.

3.6.4 Permanent Sovereignty over Natural Resources

Regarding the PSNR element of the RtD, it is clear that it was not incorporated in the TGT (1989). The principle of PSNR grants permanent sovereignty to both peoples and States, and attributes to both the duty to exercise their sovereignty in the interest of national development and for the well-being of the people.[282] Not only is it not incorporated under the TGT (1989), but by creating and signing the TGT (1989) with Indonesia, Australia and Indonesia infringed the principle of PSNR. The

[278] CMATS (2006) (n5) Art 5.
[279] UNCLOS (1982) (n92) Art 15.
[280] CMATS (2006) (n5) Art 12: Period of this Treaty.
[281] 2018 Treaty (n6) Annex B, Art 2: Title to Petroleum and Revenue Sharing.
[282] UNGA Res 1803 (n39) Para 1; Also see: Nico J Schrijver (n39) 16-17.

representatives of Timor-Leste were neither involved in the negotiations nor in the implementation of this Treaty and, thus, could not take part in the decisions on how its own natural resources were to be explored, developed, and disposed of.

Although Timor-Leste gained its independence in 2002 and, thus, was finally given the right to self-determination and the right to determine freely how its natural resources[283] were to be used, the PSNR element for the realisation of the RtD was not incorporated under the TST (2002). It can also be argued that the principle of PSNR of Timor-Leste was violated as Australia refused to negotiate a permanent maritime boundary based on equidistance or a median line with Timor-Leste on the basis that would be consistent with UNCLOS (1982).[284] As a result of refusing to enter into negotiations, Timor-Leste was not able to fully use its right to determine freely how its natural resources were to be explored, developed, and disposed of.

The analysis shows that the PSNR element was still not incorporated under the CMATS (2006) because Australia still denied Timor-Leste and its people certain rights laid out in the UNGA Resolution 1803 (XVII) on PSNR. This denial stemmed from Australia's refusal to negotiate a permanent boundary on the basis of the Equidistance/Relevant Circumstances approach, which would have provided an equitable solution. Still, even years after Timor-Leste's independence, Timor-Leste was prevented from exercising its duty of PSNR.

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[283] Drawing from international treaties, natural resources consist of natural occurrences of nature, such as oil, gas, minerals, fresh water, oceans, seas, air, forests, soils, genetic material and other biotic components of ecosystems with actual or potential use or value for humanity. See: Convention on Biological Diversity (adopted on 5 June 1992, entered into force 29 December 1993), 31 ILM 822, [Hereinafter Convention on Biological Diversity/CBD] Art 2; and UNCLOS (1989) (n92)

[284] UNCLOS (1982) (n92) Art 15.

Finally, in 2018, Timor-Leste could fully exercise its right of PSNR over its maritime area. In that year, Australia finally agreed to negotiate and sign a permanent boundary Treaty, known as the 2018 Treaty, but that treaty also made references to the principle of PSNR in its Article 14 of Annex B and Article 2 of Annex B, which allows Timor-Leste to decide freely on how its natural resources are to be exploited for the purposes of its national development and the well-being of its people.

3.6.5 Duty of Cooperation

In the TGT (1989), of which Timor-Leste was not a Party as it was under Indonesian occupation, the analysis shows that the duty of cooperation element was not incorporated. In this thesis, the duty of cooperation is a duty of States to take 'sustained action to promote more rapid development of developing countries'.[285] Although Australia had provided foreign aid to Indonesia since 1966, before the signing of the TGT (1989), this development assistance was not related to the TGT (1989) or issues covered by the Treaty. These sustained actions, such as development assistance either through financial or technical aid, were not mentioned or incorporated in the TGT (1989).

The TST (2002) applied the same provisions as the TGT (1989). Based on the analysis, it can be asserted that the duty of cooperation element progressed in the TST (2002). Indeed, during the TST (2002), Australia was providing aid to Timor-Leste in the form of food security, water and sanitation, health, education, and governance, which made Australia the largest aid donor of Timor-Leste since 1999, after Timor-Leste's referendum. Although this development assistance is not referred to in the TST

[285] UNDRtD (n18) Art 4 (2).

(2002) provisions, the TST (2002) establishes the duty of cooperation element of the RtD under its Article 11. This Article provides for preference in employment to be given to Timorese nationals and permanent residents of Timor-Leste.[286] This can be classed as the 'appropriate means and facilities' and 'sustained action to promote a more rapid development of developing State' mentioned under the UNDRtD.[287]

Regarding the CMATS (2006) Treaty, as the rights and obligations of both Contracting Parties are the same as in previous JPDAs, the analysis of the duty of cooperation element of the RtD remains the same.

Similar to the TST (2002), the 2018 Treaty incorporated the duty of cooperation as a key element of the RtD. The 2018 Treaty was signed after the successful conclusion of the first compulsory Conciliation under UNCLOS. Reaching a final decision and signing a permanent boundary treaty between Australia and Timor-Leste after a long decade of dispute shows that Australia was willing to cooperate with Timor-Leste. This act also indicates that, on paper, Australia has finally recognised its duty to ensure development and eliminate obstacles to development[288] in Timor-Leste, as well as its duty to take 'sustained action to promote more rapid development of developing countries',[289] such as Timor-Leste. The 2018 Treaty provides a provision that sets out the local content[290] commitments during the development and operation of the Greater Sunrise, which shows the duty of cooperation between

[286] TST (2002) (n4) Art 11.
[287] UNDRtD (n18) Art 4 (2).
[288] Ibid Art 3 (3).
[289] Ibid Art 4 (2).
[290] 2018 Treaty (n6) Art 14.

Australia and Timor-Leste. Thus, it demonstrates that the 2018 Treaty indeed incorporated the duty of cooperation element of the RtD in its provisions.

3.7 Conclusion

Using the RtD framework, this chapter has assessed whether the key elements of the RtD identified in Chapter 2, section 2.5 are incorporated in previous hydrocarbon agreements and the 2018 Treaty. This section concludes that, in the TGT (1989), only three out of the five elements of the RtD are incorporated: participation, non-discrimination, and fair distribution of benefits. In addition, the analysis of these elements only applied to the Contracting Parties, Australia and Indonesia, as Timor-Leste was under Indonesian occupation at the time. Thus, whether the elements of the RtD had an impact on Timor-Leste during the enforcement of TGT (1989), it would have been carried out through Indonesia.[291]

In addition to these elements present in the TGT (1989), the duty of cooperation element of the RtD was also incorporated under the TST (2002) and the CMATS (2006), whereas the 2018 Treaty incorporates all the elements of the RtD described under Chapter 2, section 2.5. This indicates an evolution of JDAs in the Timor Sea and a progressive incorporation of the elements of the RtD.

Nonetheless, under the TGT (1989), although the distribution of benefits element of the RtD was incorporated and it was fair but not equitable. This is similar to the TST (2002) and the CMATS (2006) (fair but not equitable distribution of benefits). This is because in the TGT (1989), the TST (2002), and the CMATS (2006), the Contracting Parties (Australia-Indonesia in the TGT (1989); Australia-Timor-Leste in the TST

[291] Discussed in Chapter 4, under intra-State relationship.

(2002) and the CMATS (2006) had different claims and Australia refused to negotiate a permanent boundary on a bilateral basis with Timor-Leste, as set under Articles 74 and 83 of UNCLOS (1982). Australia consistently rejected to use the principle of the median line provided under Article 6 of the 1958 Convention on the Continental Shelf[292] to delimit the boundary. In contrast, the 2018 Treaty incorporates the distribution of benefits element of the RtD in a manner that is both fair and equitable. Regarding the PSNR element of the RtD, neither the TGT (1989), the TST (2002) nor the CMATS (2006) incorporate this element. There is no reference in these agreements to the duty of both contracting parties to exercise their sovereignty in the interest of national development and for the well-being of their people. Contrastingly, the 2018 Treaty does incorporate this element. Article 14 of Annex B of this Treaty shows that there is an interest in national development and the well-being of their people. In addition, Article 2 of Annex B grants Timor-Leste the right to determine how it wants to exploit its natural resources, including decisions on pipeline placement and revenue-sharing from the Greater Sunrise fields.

Finally, regarding the duty of cooperation element of the RtD, the analysis shows that this element has progressed through the Treaties. In other words, the duty of cooperation element is incorporated under the TST (2002), the CMATS (2006), and the 2018 Treaty. While the distribution of benefits is fair but not equitable under the TST (2002) and the CMATS (2006), it is both fair and equitable under the 2018 Treaty. In conclusion, based on this chapter's analysis, it can be argued that the 2018 Treaty incorporates all the elements of the RtD studied in this thesis. However, it remains

[292] Convention on the Continental Shelf (n91).

to be seen whether the 2018 Treaty will contribute to the RtD of Timor-Leste and its people. The analysis of the key elements of the RtD in the context of the intra-State relationship is essential to establish this and, thus, forms the focus of the next chapter, Chapter 4.

CHAPTER 4: JOINT DEVELOPMENT OF HYDROCARBON MANAGEMENT IN TIMOR-LESTE: ELEMENTS OF THE RIGHT TO DEVELOPMENT FROM AN INTRA-STATE PERSPECTIVE

4.1 Introduction

Development is a human right that entitles every human person and peoples or communities, to participate in, contribute to, and benefit from economic, social, cultural and political development. This implies the full realisation of the right of people to have control over their natural wealth and resources without external interference, as this right is inherent and inviolable.[1] In order to fully realise the RtD, States have the duty to respect, protect, and fulfil human rights, and to abstain from human rights violations. For instance, a State fulfils human rights when it allocates resources to enable individuals on their territory and under their jurisdiction to enjoy their rights.

Similar to Chapter 3, this chapter analyses whether the key elements of the Right to Development (RtD) identified in Chapter 2 are incorporated in previous hydrocarbon agreements and the 2018 Treaty[2] but at the intra-State level (between the State and its community). In other words, this chapter analyses whether the Contracting Parties are actively working towards the implementation and the realisation of the RtD of Timor-Leste and its people. To be precise, this chapter also evaluates the evolution

[1] United Nations Declaration on the Right to Development (Adopted 4 December 1986 UNGA Res A/Res/41/128) [Hereinafter UNDRtD] Arts 1 (1) and (2).
[2] Treaty Between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea (signed 6 March 2018, entered into force 30 August 2019) [Hereinafter 2018 Treaty].

of these key elements of RtD through the lens of joint hydrocarbon agreements from an intra-State level and determines whether they are indeed tools for achieving the RtD at an intra-State level.

Consequently, this Chapter is divided into six sections. The first section examines whether the elements of RtD (see Chapter 2) are incorporated in the Timor Gap Treaty (TGT) (1989). [3] In a similar vein, the following three sections will analyse whether these elements of the RtD are incorporated in the Timor Sea Treaty (TST) (2002)[4] and the 2018 Treaty.[5] The CMATS (2006)[6] Treaty will not be analysed as the provisions are the same as in the TST (2002). In addition, if these elements are incorporated in the Joint Development Agreements (JDAs), each section will identify whether there are national development policies that support or are favourable to the implementation of the Treaty provisions and pinpoint any evidence that the Treaty provisions are being implemented. The fifth section summarises the evolution of the elements of the RtD with a view to understanding how these elements have changed over time. Finally, the sixth section will act as a conclusion to this chapter.

[3] Treaty between Australia and the Republic of Indonesia on the zone of cooperation in an area between the Indonesian province of East Timor and Northern Australia (signed 11 December 1989, entered into force 9 February 1991, Aust.T.S. No 9 1991) [Hereinafter Timor Gap Treaty/TGT 1989].

[4] Timor Sea Treaty between the Government of East Timor and the Government of Australia (signed 20 May 2002, entered into force 12 April 2003), 2258 UNTS 3 [Hereinafter Timor Sea Treaty/TST 2002)].

[5] 2018 Treaty (n2).

[6] Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (adopted 12 January 2006, entered into force 23 February 2007) 2483 UNTS 359 [Hereinafter CMATS 2006].

4.2 Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia (TGT 1989)

The TGT (1989) was signed while Timor-Leste was under Indonesian occupation and became invalid when Timor-Leste obtained its independence in 2002. Thus, the analysis of this section covers the period between when the TGT (1989) came into force in 1991 and the signing of the TST in 2002.

During the occupation of Indonesia in Timor-Leste, Indonesia was led by Haji Muhammad Soeharto (or Suharto) from 1967 to 1998. During this ruling, Suharto introduced a new regime, a policy known as the 'New Order'.[7] This New Order regime led to economic growth, which influenced the education, healthcare, and employment sectors, as well as the overall economy of Indonesia. This indeed impacted the realisation of the RtD of the individuals and people of Indonesia.

4.2.1 Participation

The participation element of the RtD was not incorporated under the TGT (1989) in the context of an intra-State relationship. Participation in an intra-State relationship is described in Chapter 2, section 2.5.1 as the participation of every human person in the creation and implementation of policies that States have the responsibility and duty to frame[8] which affect their well-being. Participation and consultation processes

[7] Directorate of Intelligence, 'Weekly Summary Special Report: The new Order in Indonesia' (Central Intelligence Agency 2005) 1.

[8] UNDRtD (n1) Art 2: ''[t]he human person is the central subject of development and should be the active participant and beneficiary of the right to development… States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and

should include free, prior, and informed consent (FPIC), as this enables every human person affected by development to influence or participate in the decisions and actions relating to both the process and the outcome of development.

4.2.1.1 Effective Consultation and FPIC

There was no provision under the TGT (1989) referring to the participation element of the RtD or consultation of human person (individuals and peoples or communities) of Indonesia (including the entire population of Indonesia and people of Timor-Leste) in formulating the TGT (1989) or the creation and implementation of policies that Indonesia has the responsibility and duty to frame. As required by Article 2 of the United Nations Declaration on the Right to Development (UNDRtD),[9] the participation of human person and the entire population should be included when States formulate national development policies that affect their well-being. The participation element of the RtD was not only missing in the TGT (1989), but it was also not applied during Suharto's regime, let alone ensuring FPIC in consultation processes. The New Order regime (developmental regime) was very much top-down, as Suharto's regime was characterised by authoritarian rule in which the Armed Forces played a dominant part.[10] In 1992, the United Nations Human Rights Commission asserted that the Indonesian government had violated the fundamental rights of its people, including, among others, the right to life and the

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of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom'.

[9] UNDRtD (n1).

[10] Richard W Baker, 'Indonesia in Crisis' (1998) 36 (36) Analysis from the East-West Centre 1, 2.

right to freedom of expression.[11] These violations encompassed arrests, murders, detentions, torture, and rape, extending to regions such as Timor-Leste, Aceh, Papua, and the Moluccan islands.[12] His regime was also characterised as corrupt, with people not having a voice.[13] For instance, student activists who protested against corruption in the 1970s and 1980s were either imprisoned or killed.[14] In addition, people were not allowed to criticise the domestic policies of the New Order regime or express their political opinions.[15] Thus, there was no active, free, and meaningful participation of the human person of Indonesia, as required under Article 2 of UNDRtD. Additionally, a review of related literature and the legal database does not show evidence of any national development policies and laws that incorporate the participation element of the RtD. Therefore, there is no reference to the participation of human person and peoples or communities of Indonesia, much less any reference to the participation or consultation of human person and peoples or communities of Timor-Leste, such as the leaders or representatives of the country who opposed the Indonesian occupation and the drafting of this Treaty. Whilst it might be argued that the establishment of the Ministerial Council

[11] Human Rights Watch, 'Human Rights World Report 1992- Indonesia and East Timor' (*Human Rights Watch,* NY*)* https://www.hrw.org/reports/1992/WR92/ASW-08.htm#P584_223150 accessed 9 February 2023.

[12] Human Rights Watch, 'Indonesia: Suharto's Death a Chance for Victims to Find Justice' (*Human Rights Watch,* 2008) https://www.hrw.org/news/2008/01/27/indonesia-suhartos-death-chance-victims-find-justice accessed 9 February 2023.

[13] Ibid.

[14] Eric Beerkens, 'The Student Movement and the Rise and Fall of Suharto' (*University World News,* 2018) < https://www.universityworldnews.com/post.php?story=20080117160839331> accessed 10 November 2022.

[15] Ibid.

enabled participation under the TGT (1989), it should be stressed that this was not participation as understood under the Universal Declaration of Human Rights (UDHR),[16] the International Covenant on Civil and Political Rights (ICCPR)[17] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[18] as it was not about the participation of the people of Indonesia in formulating the TGT (1989) or national development policies.

4.2.2 Non-Discrimination

In the context of an intra-State relationship, the non-discrimination element was not incorporated under the TGT (1989). For the purposes of this chapter, the non-discrimination element means including the most vulnerable groups (e.g. women, elderly people, people with disabilities, and Indigenous People) within the society of Indonesia, who are often affected by development, to play their role as agents of development.

4.2.2.1 Vulnerable Groups of Indonesia (Including every Human Person and Peoples or Communities of Timor-Leste)

Article 28i (2) of the Indonesian Constitution states that everyone in Indonesia shall have the right to be free from discrimination based on any grounds[19] and that the

[16] UNGA Res 217 A (III) (10 December 1948) [Hereinafter UDHR] Arts 21 and 27.
[17] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art 25 [Hereinafter ICCPR 1966]
[18] International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 03 March 1976) 993 UNTS 3 , Art 8 [Hereinafter ICESCR 1966].
[19] The 1945 Constitution of the Republic of Indonesia, Reinstated in 1959, with Amendments through 2002 [Hereinafter Constitution of Indonesia] Art 28i (2).

cultural identities and rights of traditional communities shall be respected.[20] Articles 28i (2) and (3) of the Constitution of Indonesia refer to 'every person', which includes vulnerable people and Indigenous People.

However, while Suharto was the President of Indonesia, his New Order regime was applied to all human person and peoples or communities of Indonesia. Despite the Constitution of Indonesia referring to the principle of non-discrimination, the New Order did not incorporate this principle into the relevant laws and policies regime. Again, a review of relevant literature and the legal database does not show evidence of any national development policies and laws that incorporate the non-discrimination element of the RtD.

Moreover, as explained earlier, this authoritarian regime not only excluded the human person from participation but also disproportionately marginalised and discriminated against vulnerable people. This was particularly the case for student activists, individuals who opposed Suharto's regime, and members of the Chinese-Indonesian community[21] (considered as minorities in Indonesia during Suharto's regime). Thus, not only were Timor-Leste's people subjected to discrimination, but also Indonesian nationals were subjected to discrimination. The people of Timor-Leste can be classed as vulnerable people during the Indonesian occupation as a

[20] Ibid.

[21] Reports show a widespread rape of Chinese women in May 1998 in Indonesia; See: Winarnita M S, 'Commemoration and its Limitations: The Mass Rapes of Chinese Indonesian Women May 1998' in Antonia Marika Vicziany, Robert Cribb (eds) *Proceedings of the 17th Biennial Conference of the Asian Studies Association of Australia* (Monash Asia Institute 1998).

result of being subjected to routine and systematic torture, massacres,[22] sexual slavery,[23] and deliberate starvation.[24] The majority of the people of Timor-Leste fled to the forest to reorganise into an armed resistance force.[25] When some of them were allowed to return to their home villages, they continued to live under restriction.[26] As they resisted Indonesian occupation, they were excluded from taking part in any development policy.

Therefore, although the non-discrimination element of the RtD was enshrined in the Constitution of Indonesia, it was not incorporated in the TGT (1989), and there is plenty of evidence to show that discrimination was, in fact, a major problem in Indonesia during the TGT (1989).

4.2.3 Fair Distribution of Benefits

In the context of an intra-State relationship, the fair distribution of benefits element of the RtD was incorporated under the TGT (1989).

The preamble of the TGT (1989) cites that Australia and the Republic of Indonesia are:

> DETERMINED to cooperate further for the mutual benefit of their peoples in the development of the resources of the area of the continental shelf yet to be the subject of permanent continental shelf delimitation between their two countries.[27]

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[22] International Commission of Jurists, 'Blaming the Victims: The 12 November 1991 Massacre in Dili, East Timor, and the Response of the Indonesian Government' (1992) International Commission of Jurists 1

[23] Rebecca Winters, *Buibere: Voice of East Timorese Women* (East Timor International Support Center, 1999) 11-12.

[24] Sian Powell, 'UN Verdict on East Timor' *The Australian* (19 January 2006)

[25] Commission for Reception, Truth and Reconciliation in East Timor (CAVR), *Chega!* (Commission for Reception, Truth and Reconciliation in East Timor (CAVR) 2005) pt 5

[26] Ibid.

[27] TGT (1989) (n3).

The subject of 'mutual benefit' is only mentioned in the preamble of the TGT (1989) and there is no national law that implements the TGT (1989) in Indonesia, whereas in Australia, the TGT (1989) was given effect in the Petroleum (Australia-Indonesia Zone of Co-operation) Act 1990, No. 36 and the Petroleum (Australia-Indonesia Zone of Co-operation) (Consequential Provisions) Act 1990, No 37.[28] The schedule of these domestic laws includes the full text of TGT (1989), including the reference to mutual benefit.

From an intra-State relationship, as mentioned under Chapter 2, section 2.5.3.3, the national development policies could be used to share benefits through direct payments or support from the State to its communities.[29] Thus, in order to understand whether the benefits were fairly distributed, the next subsection will analyse whether the existing policies (while the TGT 1989 was in place) were used to share the benefits resulting from the exploitation of natural resources, particularly in Indonesia's communities' access to basic resources such as education and healthcare.

4.2.3.1 Education and Healthcare

During the TGT (1989), sound basic economic policies[30] and a windfall in oil not only supported economic growth but also resulted in sharp increases in overall enrolments in education and improvements in the healthcare sector. For instance, in 1973, portions of oil revenue were set aside by Suharto's order for the construction

[28] Petroleum (Australia-Indonesia Zone of Co-Operation) Act 1990 No 36- Schedule, Section 5, also available at http://classic.austlii.edu.au/au/legis/cth/num_act/pzoca1990506/sch1.html accessed 20 March 2023.
[29] UNDRtD (n1) Art 2 (3).
[30] Baker (n10) 2.

of new primary schools, which resulted in the construction or repair of nearly 40,000 primary school facilities by the late 1980s and an improvement in literacy rates nationwide.[31] This was possible with development programmes such as Sekolah Dasar INPRES,[32] implemented by the Indonesian government to redistribute oil revenues across Indonesian regions. Thus, since the 1970s, under Suharto's regime, progress toward the goal of universal education was visible. The economic growth influenced the education and healthcare sectors in the Indonesian province of Timor-Leste. Although the Constitution gave priority to education in Indonesia[33] and the economic growth influenced Timor-Leste, Timor-Leste remained one of the poorest provinces of Indonesia after it was annexed. Poverty was more widespread in Timor-Leste than anywhere else in Indonesia, and the illiteracy rate was the highest in the country.[34] This also might be due to the poor implementation of national development policies, which unfortunately did not distribute income equally to all communities in Indonesia. For example, although Suharto's healthcare regime focused on the provision of healthcare services to the poor,[35] Timor-Leste, as a

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[31] Facts and Details, 'Education in Indonesia' (*Facts and Details,* NY) https://factsanddetails.com/indonesia/Education_Health_Energy_Transportation/sub6_6a/entry-4072.html accessed 16 January 2023.

[32] Lucia Breierova and Esther Duflo, 'The Impact of Education on Fertility and Child Mortality: Do Fathers Really Matter Less than Mothers?' (2003) OECD Development Centre 1, 6; Also see: Esther Duflo, 'Schooling and Labor Market Consequences of School Construction in Indonesia: Evidence from an Unusual Policy Experiment' (2001) 91 (4) The American Economic Review 795, 797.

[33] Constitution of Indonesia (n19) Chapter XIII, Art 31 (4).

[34] Mats Lundahl & Fredrik Sjoholm, *Country Economic Report 2005*: 3*: Poverty and Development in Timor- Leste* (Swedish International Development Cooperation Agency 2005) 6.

[35] Celine George Harjani, 'Accessing the Era of Healthcare Privatization in Indonesia' (*Medium,* 2019) https://medium.com/@celinegh/assessing-the-era-of-healthcare-privatization-in-indonesia-a06c5f85faa9#:~:text=The%20Suharto%20government%20encouraged%20investm

province of Indonesia, had poor access to healthcare during the 1990s. In addition, during the Asian financial crisis (1997), the poorest families were affected the most, as expenditures on education were cut.[36] As a matter of fact, Suharto's government has been criticised for having allowed the windfall in oil to aggravate economic and social disparities and for having failed to use the windfall more effectively for the alleviation of poverty.[37] Certainly, it can be argued that poor people remained poor. Thus, it can be asserted that the fair distribution of benefits element of the RtD was not incorporated under the TGT (1989). In other words, the TGT (1989) did not prescribe how the benefits arising from oil and gas would be distributed.

4.2.4 Permanent Sovereignty over Natural Resources

The PSNR element for the realisation of the RtD was incorporated under the TGT (1989). In the context of an intra-State relationship, the principle of PSNR places a duty on States to ensure that activities within their jurisdiction and control do not cause damage to the environment of its people but rather improve their well-being.[38] Thus, States must exploit their natural resources for the national development and well-being of its people, including its Indigenous Peoples. In this case, it can be argued

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ent,were%20relatively%20successful%2C%20comparatively%20speaking accessed 16 January 2023.

[36] Facts and Details, 'Education in Indonesia' (*Facts and Details,* NY) https://factsanddetails.com/indonesia/Education_Health_Energy_Transportation/sub6_6a/entry-4072.html accessed 16 January 2023.

[37] Anne Booth & RM Sundrum, 'Income Distribution' in Anne Booth & Peter McCawley (eds), *The Indonesian Economy during the Soeharto Era* (Oxford University Press 1981) 94.

[38] UNGA Res 1803 (XVII) (14 December 1962) [Hereinafter UNGA Res 1803] UNGA Preamble, para 4: 'Considering that any measure in this respect must be based on the recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests'; Also appears under ICCPR (n17) and ICESCR (n18), Art 1(2); UNGA Res 1803 (n38), Art 1.

that States must ensure they have an environmental management plan consisting of a set of mitigation and monitoring measures to be taken during the implementation and operation of their activities to reduce or eliminate adverse environmental and social impacts[39] on its people. Thus, the next subsections identify whether there were provisions under the TGT (1989) that protected the environment and the people and whether there were national laws in Indonesia that were conducive to the provisions and pinpoint any evidence that the Treaty provisions were being implemented.

4.2.4.1 Environmental Protection

The requirements for environmental protection can be identified, among others,[40] in Article 8 (a) and (j) of Part IV: The Joint Authority. Whilst Article 8 (a) requires the Joint Authority to carry out environmental investigations prior to contract areas being advertised, Article 8 (j) enjoins the Joint Authority to issue regulations and give directions on all matters, including, among others, environmental protection and assessments. In other words, Article 8(a) and (j) are provisions that relate to environmental impact assessments (EIA), 'a process, a systematic process that examines the environmental consequences of development actions, in advance'.[41] Indonesia included EIA in its environmental management system in 1982 through the provision of Act 4/1982 on the Basic Provision on Environmental Management on the

[39] The World Bank, 'OP 4.01, Annex C- Environmental Management Plan' (World Bank, 1999) http://web.worldbank.org/archive/website01541/WEB/0__-1139.HTM accessed 31 January 2023.
[40] TGT (1989) (n3) Annex B, Art 11 (2) regarding considerations of application and Annex, Art 37 (1) (i) regarding regulations and directions.
[41] John Glasson, Riki Therivel & Andrew Chadwick, *Introduction to Environmental Impact Assessment* (4th ed Routledge 2013) 4 .

Living Environment[42] (later amended by Act 23/1997).[43] Article 16 of Act 4/1982[44] states that an analysis of the environmental impact must come with 'every plan which is considered likely to have a significant impact on the environment'. This provision refers to the EIA, which must include the impacts on the environment that any activity may cause.

An EIA regulation in the TGT (1989) at the time was Indonesian Government Regulation 51 of 1993. Regulation 51 of 1993 defines an EIA as 'the process of studying the significant impact of a proposed business or activity on the environment, which is required as part of the decision-making process'.[45] For instance, an EIA system[46] that was implemented during the TGT (1989) is the Elang (Eagle) Oil Development Project by Broken Hill Proprietary Petroleum Ltd in 1996. The company's final environmental assessment report summary concluded that construction activities at the site were likely to be minimal.[47] This environmental assessment report was submitted to the relevant authorities in Indonesia and Australia in early 1996. Yet, a study conducted in 2004 by Dadang Purnama[48] discussing the complexity of transboundary EIA asserts that the overall

[42] Act Nº. 4 of 1982 Concerning Basic Provision for the Management of the Living Environment (Republic of Indonesia).
[43] Ibid.
[44] Ibid, Section IV: Protection of the Living Environment.
[45] Indonesian Government Regulation 51/1993 on Environmental Impact Assessment, [Hereinafter Indonesian Government Regulation 51/1009] Art 1 (2).
[46] It is noted that the term for the EIA report is Environmental Impact Statement according to Administrative Guideline 90/5 for Petroleum Operations, but the proponents called it an EAR (environmental assessment report). See: Dadang Purnama, 'Review of Transboundary Environmental Impact Assessment: A Case Study from the Timor Gap' (2004) Impact Assessment and Project Appraisal 22 (1) 17, 26.
[47] Ibid.
[48] Ibid.

implementation of the transboundary EIA in the Timor Gap was inadequate as its effectiveness was reduced by many factors which affected the application of the transboundary EIA. For instance, political and economic interests heavily influenced the nature of the EIA application, and there was no formal EIA review conducted by the Joint Authority, which should have been undertaken. The author advised that new environmental regulations should be formulated for Timor-Leste. This is because, in general, environmental regulations help prevent or minimise pollution and ensure that industries and individuals adhere to safe practices and limit exposure to harmful substances. In addition, environmental regulations promote sustainability and conservation. This shows a lack of political will by the Indonesian government and policymakers to protect the environment. Although the TGT (1989) provided a provision that required environmental protection, and there was a national law that was conducive to the provision, the implementation was weak.

4.2.4.2 To Monitor the Environmental Protection of Private Actors

Section 5.2 on the Rights and Obligations of the Parties in the TGT (1989)[49] states that the contractor or corporation shall develop an environmental management plan to prevent pollution of the marine environment and pay to clean up any pollution from any petroleum operations. This requirement is supported by Article 20 of Act 4/1982,[50] which states that anyone who damages or pollutes the living environment is responsible for payment of compensation to affected victims whose rights have been violated. The review of relevant literature and the legal database reveals no

[49] TGT (1989) (n3), Section 5.2.

[50] Act N°. 4 of 1982 Concerning Basic Provision for the Management of the Living Environment, Section IV: Protection of the Living Environment, Art 20 (1) of Section VI: Compensation and Restoration (Republic of Indonesia).

evidence of any environmental damage caused by a contractor/corporation in Timor-Leste during this period. This indicates that the national law during the TGT (1989) period facilitated the implementation of the Treaty provision. It is, however, unclear whether the provision relating to compensation was ever implemented.

4.2.4.3 Indigenous Peoples

It is also important to note that the rights of Indigenous Peoples in Indonesia were abused during Suharto's New Order regime. For instance, during this regime, it was argued that Indonesia was a nation with no Indigenous People or that all Indonesians were equally indigenous.[51] The government expropriated the ancestral lands of Indigenous Peoples, converting them into mining and forestry concessions as part of the development policies of the New Order regime.[52] Often, these Indigenous People were left without adequate compensation, and when they refused to give up their lands, they were put under extreme pressure and experienced violence.[53] It can be argued that Indigenous People's rights were, thus, not recognised during this regime, and the principle of PSNR was, therefore, clearly abused in Indonesia during the TGT (1989).

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[51] Sarwono Kusumaatmadja, Minister of State for the Environment, addressing a Non-Governmental Organisation forum, cited in Tania Murray Li, 'Articulating Indigenous Identity in Indonesia: Resource Politics and the Tribal Slot' (2000) Berkeley Workshop on Environmental Politics 1; Also see: Sukri Tama and Timo Duile, 'Indigeneity and the State in Indonesia: The Local Turn in the Dialectic of Recognition' (2020) 39 (2) Journal of Current Southeast Asian Affairs 270.

[52] Yance Arizona and Erasmus Cahyadi, 'The Revival of Indigenous Peoples: Contestations over a Special Legislation on Masyarakat Adat' in Brigitta Hauser-Schäublin (ed), *Adat and Indigeneity in Indonesia: Culture and Entitlements between Heteronomy and Self-Ascription* (Göttingen University Press 2013) 43-44.

[53] Ibid 48.

While the Indigenous Peoples of Timor-Leste during Indonesia's occupation were classed as being of Malayo-Polynesian and Papuan origin,[54] it is important to note that the majority of the people of Timor-Leste are Indigenous People.[55] Nonetheless, not many people in the country use this terminology, as the word 'indigenous' was used in colonial times to negatively describe people.[56] Thus, the people of Timor-Leste do not self-identify as Indigenous People despite having the same characteristics.

As the majority of the people of Timor-Leste are Indigenous Peoples, their culture is largely based on the relationship among humans as well as between human and non-human beings. This cultural framework is deeply rooted in their beliefs about the sky and its components, sea, earth, and natural resources, as well as Indigenous People's inhabitants.[57] Consequently, Timor-Leste has a traditional/customary law known as Tara Bandu, which governs the management of natural resources. Tara Bandu prohibits access to certain areas, restricts or bans fishing in specific locations, regulates or bans hunting for particular species, and forbids cutting down certain

[54] Cultural Survival, 'Observations on the State of Indigenous Human Rights in Timor-Leste, Prepared for: The 26th Session of the United Nations Human Rights Council Universal Periodic Review' (March 2016) Cultural Survival 2; United Nations Human Rights Council (UNHRC), 'Report of the Special Rapporteur on the rights of Indigenous Peoples' Human Rights Council' (2 August 2019) 42nd session, A/HRC/42/37/Add.2.

[55] They are original inhabitants of the area well before pre-colonial times and the continuation of customary laws and traditions.

[56] Asian Development Bank, 'Timor-Leste: Water Supply and Sanitation Investment Project: Same City' (2021) Asian Development Bank 1, 12-13.

[57] Justina Aurea da Costa Belo, 'A Summary of some of the Indigenous Knowledge in Timor-Leste and its Relevance for Climate Action' (*US Boell,* 2021) https://us.boell.org/en/2021/10/22/summary-some-indigenous-knowledge-timor-leste-and-its-relevance-climate-action accessed 18 January 2023.

trees or damaging anything declared sacred or 'lulik' in Tetum.[58] This customary law was prohibited under Indonesian occupation.[59] By banning this customary law, Indonesia did not recognise the right of Indigenous people to be different and maintain such differences, thus discriminating against Indigenous People's beliefs, traditions, and culture. Therefore, it can also be argued here that the principle of PSNR was violated during the TGT (1989).

To summarise, this section first shows that the PSNR-related provision (Article 8 (a) and (j) regarding EIA) was incorporated under the TGT (1989) and was given effect in national legislation, such as Act 4/1982 on the Basic Provision for the Management of the Living Environment, and on the EIA, such as Indonesian Government Regulation 51/1993.[60] These national legislations were conducive to the TGT (1989) provision. However, although the TGT (1989) provisions were implemented, the implementation of the transboundary EIA was weak. Second, this section shows that the TGT (1989) required contractors or corporations to develop an environmental management plan to prevent environmental damage caused by petroleum operations under Section 5.2 of TGT (1989). This provision was supported by Article

[58] Bikash Kumar Bhattacharya, 'Timor-Leste: Maubere Tribes Revive Customary Law to Protect the Ocean' (*Mongaby News,* 2018) https://news.mongabay.com/2018/10/timor-leste-maubere-tribes-revive-customary-law-to-protect-the-ocean/ accessed 31 January 2023.

[59] Bikash Kumar Bhattacharya, 'Timor Leste: With Sacrifice and Ceremony, Tribes Sets Eco Rules' *Mongabay News* (Asia 8 November 2018) https://news.mongabay.com/2018/11/timor-leste-with-sacrifice-and-ceremony-tribe-sets-eco-rules/#:~:text=With%20sacrifices%20of%20a%20goat,lasted%20from%201975%20until%201999 accessed 20 January 2023.

[60] Indonesian Government 51/1993 (n45).

20 of Act 4/1982.[61] Third, the obligation to exercise sovereignty in relation to the PSNR in the interest of national development and for the well-being of the people[62] was breached during the TGT (1989), especially in relation to the rights of Indigenous Peoples. Neither the Indigenous Peoples of Indonesia nor the Indigenous People of Timor-Leste's rights were recognised. This raises important concerns and questions about the true fulfilment of the PSNR criterion. By disregarding or violating the rights of Indigenous People, Indonesia undermined the principle of PSNR, as it went against the principle of inclusivity, sustainability, and respect for cultural diversity.

4.2.5 Duty of Cooperation

The analysis shows that the duty of cooperation element was not incorporated under the TGT (1989). There is no reference in the TGT (1989) to the duty of cooperation element of the RtD between the State and its community or Australia/Indonesia and their respective communities. Neither did the TGT (1989) provide the commitments of its Contracting Parties (Australia and Indonesia) in its articles on how each State can help achieve development at a national level.

Although the duty of cooperation element of the RtD was not incorporated under this Treaty, this section also investigates how the RtD has made progress or how the national legal regime in the period of this Treaty contributed to the RtD of the human person and peoples or communities of Indonesia (including the individuals and peoples of Timor-Leste). In order to do so, an evaluation of the education, healthcare,

[61] Act N°. 4 of 1982 Concerning Basic Provision for the Management of the Living Environment [Hereinafter Act 4/1982], Section VI Compensation and Restoration, Art 20 (1) (Republic of Indonesia).
[62] UNGA Res (n38) Preamble, Para 4; ICCPR (n17), and ICESCR, (n18), Art 1(2).

and employment sectors (including food and housing) during Suharto's regime is provided in this section.

4.2.5.1 Education

Article 31 of Chapter XIII[63] of the Constitution of Indonesia of 1945, which was reinstated in 1959 (with amendments through to 2002), provides for free compulsory education. Thus, guided by the Constitution, Indonesia enacted Law No. 2/1989 Education Act,[64] which sets the foundation for one national education system that is universally implemented. This law, which was passed under Suharto's regime and aimed to 'generate abilities and to increase the standard of living and dignity of the Indonesian people in order to achieve the national development objectives',[65] led (since the 1970s) to the construction of thousands of elementary schools in almost all villages[66] and brought widespread literacy[67] to Indonesia.

For instance, Indonesian economic growth during the New Order regime was, according to the Asian Development Bank, substantially higher than the average growth rate for all developing States.[68] This contributed to a better education system in Timor-Leste. While Timor-Leste was under Portuguese colonial rule, the education system in the country remained restricted and exclusive to an elite over a long period. By 1972, when the total population of Timor-Leste was approximately 600,000, there

[63] Constitution of Indonesia (n19), Chapter XIII: Education, Art 31.
[64] Act N°. 12 of 1989 on Education System (Republic of Indonesia).
[65] Ibid.
[66] Facts and Details, 'Education in Indonesia' (*Facts and Details,* NY) https://factsanddetails.com/indonesia/Education_Health_Energy_Transportation/sub6_6a/entry-4072.html accessed 16 January 2023.
[67] Peter Lowenberg, 'Writing and Literacy in Indonesia' (2000) 30 (1) Studies in Linguistic Sciences 135.
[68] Arsenio M Balisacan et al., 'Revisiting Growth and Poverty Reduction in Indonesia: What Do Subnational Data Show?' (2002) Asian Development Bank 1.

were only 6,000 students in primary schools. Thus, when the Portuguese left Timor-Leste in 1975, less than 10 per cent of the population identified as literate.[69] Moreover, in 1975, Timor-Leste counted only two secondary schools, one technical-vocational school, a teacher training college, and two training colleges.[70]

Thus, when Indonesia annexed Timor-Leste into its territory in 1975, the illiteracy rate in the country was estimated to be around 90 per cent.[71] However, between 1976 and 1998, enrolment in primary education increased from 13,500 to 165,000 students. By the mid-1990s, primary education was available in most villages. Over the same period, junior secondary education enrolment grew from 315 to 32,000 students, and senior secondary education enrolment grew from 64 to 14,600 students.[72]

While the figures show an increase in enrolment in education related to Indonesian economic growth prior to the Asian financial crisis in 1997, Timor-Leste remained one of the poorest provinces of Indonesia.[73] As shown in a report prepared by Lundahl and Sjöholm in 2005 providing, among others, details of the education and healthcare sectors in Timor-Leste during the Indonesian occupation, gross and net

[69] Jude Butcher, 'Timor-Leste: An Educational Overview' in Jude Butcher et al (eds), *Timor-Leste: Transforming Education Through Partnership in a Small Post-Conflict State, Comparative and International Education: Diversity of Voices* (Brill 2015) 23.
[70] GDS, UNICEF and UNFPA, 'Analytical Report on Education: Timor-Leste Population and Housing Census 2015' (*UNICEF,* 2018) 4, https://www.unicef.org/timorleste/reports/timor-leste-population-and-housing-census-2015 accessed 14 December 2024.
[71] Ministry of Education of Timor-Leste, 'Timor Leste National Era 2015 Review' (Government of Timor-Leste 2015) 4.
[72] The World Bank, 'Timor-Leste: Education Since Independence From Reconstruction to Sustainable Improvement: Report No. 29784-TP' (Human Development Sector Unit East Asia and Pacific Region, December 2004) 4.
[73] Lundahl & Sjoholm (n34) 6.

enrolment rates in primary, junior secondary, and senior secondary education in the country were well below those in Indonesia.[74] The disparities between urban and rural areas in Timor-Leste were significantly more pronounced than in Indonesia, and these differences grew larger at higher levels of education.[75] Furthermore, the figures show that, in 1995, there was a significant disparity in school attendance between urban and rural households in Timor-Leste compared to other regions of Indonesia. This difference can be attributed to the higher levels of poverty in Timor-Leste, which typically resulted in lower school attendance for poor households compared to wealthier households.[76] Overall, although Timor-Leste's rate of poverty was higher than in other parts of Indonesia, there was a tendency for better education compared to when the country was under Portuguese colonial rule.

4.2.5.2 Health

Economic growth during Suharto's New Order regime also influenced the healthcare sector in Indonesia. Founded upon Article 28h (1) of the Constitution of Indonesia,[77] many healthcare programmes were introduced and implemented, such as the Puskesmas (Community Health Centres) programme, which provided some healthcare services for the rural poor and affordable healthcare services to everyone.[78] However, there was one healthcare centre available per 30,000 people.[79]

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[74] Ibid 19.
[75] The World Bank (n72) 5.
[76] Lundahl & Sjoholm (n34) 9.
[77] Constitution of Indonesia (n19) Art 28 H (1): 'Every person shall have the right to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment and shall have the right to obtain medical care.'
[78] Stein Kristiansen & Purwo Santoso, 'Surviving Decentralization?: Impacts of Regional Autonomy on Health Service Provision in Indonesia' (2006) 77 (3) Health Policy 247, 248.
[79] Ibid.

This was criticised by Eunsook Jung[80] as, despite being important for the rural poor, the quality of health centres was inadequate, and there were not enough health centres for everyone.

In relation to healthcare in Timor-Leste, as a province of Indonesia, the healthcare sector did make some improvements in comparison with the situation during Portuguese colonisation when the health of the population was poor. This was despite the fact that the Portuguese had set up medical centres and provided free medical treatment to the rural population and to the urban poor.[81] In contrast, during the Indonesian occupation, eleven modern hospitals were established in district capitals, as well as 60 health centres, many in major villages. In 1997, there were 398 doctors in Timor-Leste,[82] which showed a good sign. However, the healthcare sector was still poorer than the rest of Indonesia.[83] The heavy burden of disease in Timor-Leste was due largely to the prevalence of transmissible diseases such as malaria, tuberculosis, respiratory tract infections, and childhood infections.[84] The life expectancy was only 49 years, which can be compared to 67 years in Indonesia and an average of 65 years in other developing countries.[85] Moreover, the population

[80] Eunsook Jung, 'Campaigning for All Indonesians: The Politics of Healthcare in Indonesia' (2016) 38 (3) Contemporary Southeast Asia 476, 482.
[81] Lundahl & Sjoholm (n34) 25.
[82] George Povey & Mary Anne Mercer, 'East Timor in Transition: Health and Health Care' (2002) 32 (3) International Journal of Health Services 607.
[83] Lundahl & Sjoholm (n34) 24.
[84] Ministry of Health of Timor-Leste, 'Health Profile: Democratic Republic of Timor-Leste'.
(*Office of the Ministry of Health,* October 2002) 3 https://cdn.who.int/media/docs/default-source/searo/timor-leste/health-information-tls-health-profile-rdtl.pdf?sfvrsn=f941afd0_2 accessed 20 November 2024.
[85] Lundahl & Sjöholm (n34) 15.

suffered from roughly the same diseases as they did during Portuguese colonisation. The under-five and maternal mortality rates were particularly high.[86] This shows that, although Indonesia improved its healthcare sector, there was still a widened healthcare gap between communities in urban and rural areas in the country.

4.2.5.3 Poverty Reduction

In terms of facilitating its community or people to have equal opportunity to access basic resources, employment, housing and food, and the fair distribution of income, Indonesia introduced programmes to alleviate poverty of its community or people, such as the Development for Remote Villages/Backyard Village Programme, or Inpres Desa Tertinggal (IDT) in 1994,[87] the Social Safety Net (SSN) in 1998,[88] and, also in 1998, the Community Driven Development (CDD)[89] approach to alleviate poverty in rural areas. These poverty alleviation programmes are examples of the duty of cooperation, measures taken by the State to eliminate obstacles that can prevent its community or people from having, among others, equal opportunity to access education, health services, employment, and food.

For instance, the IDT programme aimed to improve the income of the poor; the SSN provided temporary job opportunities, distributed food, offered education scholarships and provided health insurance for the poor. Meanwhile the CDD

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[86] Ibid.

[87] Sutiyo Sutiyo & Keshav Lall Maharjan, 'Rural Poverty Alleviation in Indonesia: Programs and the Implementation Gap' (2011) 18(1) Journal of International Development and Cooperation 13, 22.

[88] SSN intended to help the poor cope with the negative impact of the Asian financial crisis. See: Asep Suryahadi et.al., 'Review of Government's Poverty Reduction Strategies, Policies, and Programs in Indonesia' (2010) (Lembaga Penelitian SMERU Research Institute 1, 3.

[89] The main idea of CDD was to give community the control of development decisions and resources. Also see: Sutiyo & Maharjan (n87) 18.

emerged as the primary approach of poverty alleviation programmes focusing on increasing rural infrastructure and developing local capacity in Indonesia by involving people in the local development process.[90] Nevertheless, related studies reviewed by Sutiyo and Maharjan indicate that poverty alleviation programmes aimed to decrease the number of poor people in Indonesia failed to achieve their expected goals because of an implementation gap[91] caused by local 'incapable bureaucrats'[92] who delivered them without the active participation of local communities. Additionally, the programmes only benefited the local elites and the wealthy rather than the poor, and they suffered from a weak targeting mechanism.[93]

Prior to the 1997 Asian financial crisis,[94] poverty incidence in Indonesia fell from 28 per cent in the mid-1980s to about 8 per cent in the mid-1990s.[95] This reduction in poverty incidence was possible because Suharto's government contributed to a stable political and economic framework, sound basic economic policies, and a willingness to make politically difficult decisions.[96] It can be assumed that economic growth in Indonesia also influenced the Indonesian province, Timor-Leste.

Economic growth in Indonesia was hit hard by the Asian financial crisis in 1997,[97] which was further worsened by domestic political instability. As a result, poverty levels increased sharply. For instance, the percentage of people living in poverty rose

[90] Ibid 18.
[91] Ibid 13.
[92] Ibid.
[93] Ibid.
[94] IMF Staff, 'The Asian Crisis: Causes and Remedies' 35 (2) Finance and Development (*IMF,* 1998) https://www.imf.org/external/pubs/ft/fandd/1998/06/imfstaff.htm accessed 14 December 2024.
[95] Balisacan et. al. (n68) 1.
[96] Baker (n10) 2.
[97] Ibid.

from 17.7 per cent in 1996 to 24.2 per cent in 1998.[98] In response to this situation, poverty reduction became a major policy initiative in Indonesia from this period onwards: health services and social assistance programmes for the poor (for instance, the SSN and the CDD) were introduced and expanded to help alleviate the effects of economic hardship.[99]

It can be asserted that, although the duty of cooperation element of the RtD was not incorporated under the TGT (1989), Indonesia indeed took measures to eliminate obstacles to prevent its community or people from having equal opportunity to access basic resources, such as education, health services, food, housing, employment, and the fair distribution of income during its occupation of Timor-Leste. Although Indonesia adopted measures to eliminate obstacles to equal opportunity of access, challenges in implementing these poverty alleviation programmes remained both in Indonesia and Timor-Leste.

[98] Balisacan et. al. (n68) 1.

[99] Eunsook Jung, 'Campaigning for All Indonesians: The Politics of Healthcare in Indonesia' (2016) 38 Contemporary Southeast Asia 482.

Table 1: Key elements of the RtD under the TGT (1989)

Key elements of the RtD	Does TGT (1989) incorporate the elements of RtD?
Duty of Cooperation	Not incorporated
Participation	Not incorporated
Non-discrimination	Not incorporated
PSNR (Article 8 (a) and (j); Section 5.2	Incorporated (expressly) National Laws: Act 4/1982 on the Basic Provision of Environmental Management on the Living Environment (later amended by Act 23/1997) Indonesian Government Regulation 51/1993
Fair distribution of benefits (Preamble)	Incorporated (expressly) National Laws: None

Table 1 shows that the only elements of the RtD that were incorporated under the TGT (1989) are PSNR and fair distribution of benefits. Both elements are expressed in the Treaty. Regarding the PSNR, there were national laws that were conducive to the provisions under the TST but not for the element of fair distribution of benefits. It can, thus, be argued that this Treaty does not explicitly recognise or address cooperation between the State and its communities, nor the participation or non-discrimination element of the RtD.

4.3 Timor Sea Treaty between the Government of East Timor and the Government of Australia (2002) (Timor Sea Treaty/TST)

Officially known as the 'Timor Sea Treaty between the Government of East Timor and the Government of Australia', the TST was signed in 2002[100] after Timor-Leste's independence. Therefore, the analysis of this section covers the period between the TST in 2002 and the signing of the 2018 Treaty. The analysis will identify how Timor-Leste cooperated with its communities by taking measures for the realisation of the RtD and to ensure 'inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income'.[101] In order to do so, an evaluation of the education, healthcare, and employment sectors (including food and housing) is provided in this section, similar to the previous section 4.3.3.

4.3.1 Participation

The participation element of the RtD is not incorporated under the TST (2002) as the TST (2002) does not mention the participation of the people of Timor-Leste in formulating the Treaty or national development policies. Although the participation element of the RtD is not incorporated in this Treaty, this section still evaluates whether effective consultation and the use of FPIC were involved in consultations in Timor-Leste. This is to identify whether the participation of human person and

[100] TST (2002) (n4); See Also: Gillian Triggs, 'The Timor Sea Treaty and the International Unitisation Agreement for Greater Sunrise: Practical Solutions in the Timor Sea' (2004) 23 Aust YBIL 161.
[101] UNDRtD (n1), Art 8.

peoples or communities in the creation and implementation of other policies that Timor-Leste had the responsibility and duty to frame was taken into account.

4.3.1.1 Effective Consultation and FPIC

An example that can be used to identify whether there was an effective consultation and FPIC in Timor-Leste during the TST (2002) is the drafting of Timor-Leste's National Development Policy of 2002 (NDP). One should bear in mind, however, that this example is outside of the legal obligations under the TST (2002).

It is written in the NDP that the NDP is the result of a participative process involving individuals in every sector of the economy to identify solutions to the problems they face. In order to draft this policy, a Countrywide Consultation[102] was carried out in every district, which covered more than 38,000 people in Timor-Leste. A twenty-year vision (to the year 2020) was captured, as well as the priorities, initiatives the people can take, and how they think civil society and the government can address their concerns.[103] Thus, many people across Timor-Leste participated in surveys and meetings to help shape a 'national vision' for the new State. This vision was captured in the NDP's document, with the participation of people in every district.[104] It can be argued that this is in line with the UNDRtD, as this Declaration stipulates that each human person is essential for the process of development. For this purpose, the

[102] Countrywide consultation undertaken by the Consultative Commission for Civil Society on Development (CCCS); See: International Monetary Fund, *East Timor: National Development Plan* (International Monetary Fund 2002) Country Report No. 2005/247.

[103] International Monetary Fund, *Democratic Republic of Timor-Leste: Poverty Reduction Strategy Paper—National Development Plan, Road Map for Implementation of National Development Plan, Overview of Sector Investment Programs—Strategies and Priorities for the Medium Term*' (International Monetary Fund 2005) 15.

[104] International Monetary Fund (n102) 1.

participation of every human person is crucial; participation must be 'active, free, and meaningful'[105] and should involve FPIC.[106] On this basis, it could be argued that the participation of human person and peoples or communities in drafting the Timor-Leste NDP had been 'active, free and meaningful'.[107] Yet, in practice, there is no evidence that shows that the principle of FPIC was implemented in drafting the NDP.

An illustration of this is the transitional land law, which was released for public consultation in 2009[108] and was considered one of the most consultative legislative processes since the independence of Timor-Leste in 2002. However, the process was, in fact, severely flawed. For example, information such as copies of the law was handed to the community at the last minute, leaving them little time to read and understand its implications.[109] This indicates that the community was not informed before the consultation, which is essential to the FPIC principle.[110] In addition, most of the participants in the consultation were local elites, including village leaders, district government staff, and local-level non-government organisations (rather than the general public), while the participation of women was particularly low in all consultation meetings.[111]

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[105] UNDRtD (n1), Preamble, Para 2.
[106] Ibid, Art 2 (3).
[107] Ibid, Preamble, Para 2.
[108] La'o Hamutuk, 'Transitional Land Law' (*Lao Hamutuk,* 2010) https://www.laohamutuk.org/Agri/land/10TransitionalLandLawEn.htm accessed 20 March 2023.
[109] Ibid.
[110] United Nations Economic and Social Council, 'Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples' (17-19 January 2005) UN Doc E/C.19/2005/3.
[111] Meabh Cryan, 'The Long Haul: Citizen Participation in Timor-Leste Land Policy SSGM Discussion Paper 2015/13 (2015) Australian National University 1, 5.

This can also be identified in findings presented by the Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz,[112] who stated that, during the land registration process in 2009,[113] there was little or no information provided to people. As a result, people did not fully understand the impact and implications it would have on their customs and traditions and were not adequately informed or consulted before or during the implementation. Moreover, no measures were taken regarding the specific needs of vulnerable people.[114]

Another example is the Public Consultation Process during the preparation of the Petroleum Act[115] of Timor-Leste. In 2004, La'o Hamutuk,[116] the independent social justice and development communication Non-Governmental Organisation (NGO) in Timor-Leste, submitted to the Timor Sea Office and the Timor Sea Designated Authority Democratic Republic of Timor-Leste regarding the Proposed Petroleum Regime for Timor-Leste. In this submission, La'o Hamutuk discussed the Public Consultation Process during the preparation of the Petroleum Act[117] of Timor-Leste. This non-governmental organisation was concerned as the proposed timetable for adopting this legislation was too quick. There was only a three-day Public Consultation session in Dili on 23-25 August 2004, which was not long enough for

[112] UNHRC, 'Report of the Special Rapporteur on the rights of Indigenous Peoples' Human Rights Council' (n54) 1.
[113] Government of Timor-Leste, 'Ministry of Justice Launch Public Consultation on the Draft Land Law, Government of Timor-Leste' (Ministry of Justice, 12 June 2009).
[114] Ibid.
[115] Democratic Republic of Timor-Leste, Law N°. 13/2005 on Petroleum Activities [Hereinafter Law N°. 13/2005 on Petroleum Activities].
[116] La'o Hamutuk (Walking Together in English) is a Timor-Leste non-governmental organisation that monitors, analyses, and reports on the principal international.
[117] Law N°. 13/2005 on Petroleum Activities (n115).

people to analyse the bills nor for the drafters to fully consider all suggestions and to correct significant oversight and misjudgements in the current draft.[118]

Additionally, the Special Rapporteur[119] commented on the Tasi Mane project,[120] stating that she had received many complaints regarding insufficient information, consultation, and participation in the decision-making and planning stages of this project. The Special Rapporteur also mentioned that there was no adequate compensation for affected communities that were displaced by this project.[121] Moreover, local communities also expressed concerns that the Tasi Mane project would affect water and land resources, impacting human health and biodiversity. This was also criticised by La'o Hamutuk.[122] La'o Hamutuk attended the public consultation of the Tasi Mane project and stated that it should not be considered a

[118] La'o Hamutuk, 'Submission to the Timor Sea Office and the Timor Sea Designated Authority Democratic Republic of Timor-Leste from La'o Hamutuk regarding the Proposed Petroleum Regime for Timor-Leste' (*Lao Hamutuk,* 2004) https://www.laohamutuk.org/OilWeb/LegalDoc/PetrolRegime/LH%20sub1En.htm#Public_Consultation_ accessed 18 January 2023.

[119] UNHRC, 'Report of the Special Rapporteur on the rights of Indigenous Peoples' Human Rights Council' (n54).

[120] The Tasi Mane (Male Sea) Project involves the development of an integrated petroleum infrastructure in the coastal zone from Suai to Beaço. The plan includes the construction of the Suai Supply Base cluster, the Betano Refinery and Petrochemical Industry cluster, and the Beaço Liquefied Natural Gas (LNG)-Plant cluster; See: Mong Palatino, 'Timor -Leste's Tasi Mane Project: Timor-Leste's Tasi Mane Development Project has Upset an Non-Governmental Organisation over of its Focus on Petroleum. Is it Right?' *The Diplomat* (17 October 2011) https://thediplomat.com/2011/10/timor-lestes-tasi-mane-project/ accessed 18 January 2023.

[121] UNHRC, 'Report of the Special Rapporteur on the rights of Indigenous Peoples' Human Rights Council' (n54).

[122] La'o Hamutuk, Environmental Assessment for Betano Refinery' (*Lao Hamutuk,* 2016) https://www.laohamutuk.org/Oil/TasiMane/Betano/EIA/16RefineryEIA.htm accessed 7 February 2023 (Hereinafter La'o Hamutuk Environmental Assessment).

proper public consultation as required by the Environmental Licensing Law[123] because it gave less priority to environmental considerations, lacked information provided in advance or at the consultation, provided minimal discussion of environmental concerns, and experienced poor attendance.[124]

Therefore, it can be argued that the participation element of the RtD was neither incorporated under the TST (2002) nor adequately implemented in Timor-Leste. Although the Constitution and national laws included the participation element, the participation of human person in consultations to draft these laws and projects was not properly applied, and there is no evidence that the FPIC principle was applied during the consultations. This section, thus, shows that the participation element was not cited in the TST (2002), and the process of participation in consultations was, in fact, severely flawed.

4.3.2 Non-Discrimination

The non-discrimination element was not incorporated under the TST (2002), and there is no reference to the non-discrimination of vulnerable groups. Since Timor-Leste is now an independent State, vulnerable groups within its society are defined as women, veterans, elderly people, and Indigenous People.

Although this element of the RtD was not incorporated under the TST (2002), the non-discrimination element of the RtD was enshrined in Timor-Leste's Constitution, Articles 16 (2)[125] and 17. Article 16 states that no one should be discriminated and

[123] Democratic Republic of Timor-Leste, Decree Law N$^{o.}$ 5/2011 on Environmental Licencing [Hereinafter Decree Law N$^{o.}$ 5/2011].
[124] La'o Hamutuk Environmental Assessment (n122).
[125] Constitution of the Democratic Republic of Timor-Leste 2002, Art 16 (2): No one shall be discriminated against on grounds of colour, race, marital status, gender,

Article 17 states that 'Women and men have the same rights and duties in all areas of political, economic, social, cultural and family life'. Therefore, the following subsection evaluates whether vulnerable groups of Timor-Leste's rights of non-discrimination are respected.

4.3.2.1 Vulnerable Groups of Timor-Leste

Certainly, Timor-Leste has undertaken legal obligations to respect, protect, and fulfil the human rights of women in the country. For instance, this can be seen in the 2006 Law on the Elections of the National Parliament (as amended in 2011).[126] Article 12 (3) of the 2006 Law on the Elections of the National Parliament (as amended in 2011)[127] stipulates that one out of every group of three candidates must be a woman. This law had a positive impact in 2018, as 38 per cent[128] of the total seats, or 25 out of 65 total seats, were held by women. This is the highest rate of female parliamentarians in the world and the highest in the Asia-Pacific region.[129]

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ethnical origin, language, social or economic status, political or ideological convictions, religion, education and physical or mental condition. [Hereinafter Constitution of Timor-Leste].

[126] Democratic Republic of Timor-Leste, Law Nº 7/2011 of 22 June Second Amendment to Law no 6/2006 of 28 December (Law on the Election of the National Parliament).

[127] Ibid.

[128] The World Bank, 'Proportions of Seats Held by Women in National Parliaments (%) Timor-Leste' (*World Bank,* NY) https://data.worldbank.org/indicator/SG.GEN.PARL.ZS?locations=TL accessed 01 November 2022.

[129] UN Women Asia and Pacific, 'UN Women Timor-Leste' (*Asia Pacific,* NY) https://asiapacific.unwomen.org/en/countries/timor-leste#:~:text=A%20recent%20amendment%20to%20the,in%20the%20Asia%20Pacific%20region accessed 01 November 2022.

Law 2/2004[130] on Suco elections is another illustration of how the participation of women and young people is strengthened in traditional local governance systems. Article 3 of this Law[131] states that a Village (Suco) council shall be comprised of the Suco chief, the chief of villages comprising the Suco and two female members, one young person from each gender group, and an elder from the Suco.[132] Furthermore, the Village (Suco) Law 9/2016,[133] which was promulgated in July 2016, requires there to be at least one woman per Suco standing for the elections as Suco Chiefs.[134] This led to 319 women standing for the highest position at the village level, compared to 66 in 2004.[135] As a result, in November 2016, 21 women were elected, representing 4.5 per cent of all Suco Chiefs.[136]

However, in 2015, the Committee on the Elimination of Discrimination Against Women (on concluding observations on the combined second and third periodic reports of Timor-Leste)[137] expressed some concerns regarding the participation of

[130] Democratic Republic of Timor-Leste, Law Nº 2/2004 on the Election of Suco Chiefs and Suco Councils.
[131] Ibid.
[132] Ibid.
[133] Democratic Republic of Timor-Leste, Law Nº 9/2016 Establishing Rules for the Organization, Competence and Functioning of the Sucos.
[134] Ibid.
[135] International Women's Development Agency, 'Timor-Leste Doubles the Number of Women Village Chiefs in Recent Elections' (*Iwda,* 2016) https://iwda.org.au/timor-doubles-the-number-of-women-village-chiefs-in-recent-elections/ accessed 18 January 2023.
[136] United Nations Women, 'Timor-Leste Affirms Ending Gender Discrimination an Ongoing Priority in Commitment to the SDGs and Beijing Platform for Action (updated)' (*UN Women*, NY) https://www.unwomen.org/en/get-involved/step-it-up/commitments/timor-leste accessed 29 January 2023.
[137] United Nations Convention on the Elimination of all Forms of Discrimination against Women, 'Committee on the Elimination of Discrimination against Women: Concluding Observations on the Combined Second and Third Periodic Reports of Timor-Leste' (24 November 2015) CEDAW/C/TLS/CO/2-3 Para 28 (B and C).

women. One of these areas of concern was participation in political and public life. The Committee is concerned that women in Timor-Leste still face persistent barriers to gaining access to decision-making positions, including discrimination in recruitment, discriminatory stereotypes, and attitudes towards women's participation in political and public life. It also expressed concerns about support from political parties and families and the low levels of confidence that women have in Timor-Leste. It also stated that women's representation in government decision-making positions and the number of female village chiefs were extremely low.[138]

The Decree Law 3/2016 on Municipality Administration to institutionalise the integration of gender issues at a municipal level was approved on 16 March 2016. It places a duty on the Municipal Administrator to ensure that targets to reduce gender inequality through gender mainstreaming, target interventions, and affirmative actions are included in the Municipal plans and in Human Resources.[139] Furthermore, Timor-Leste has several policies on inclusion, equity, and social protection.[140] For instance, the 2017 Inclusive Education Policy[141] focuses on students and individuals with special education needs who face challenges in accessing education, such as those who live in poverty and remote areas, pregnant girls and young mothers, and working children. Additionally, the Decree-Law on General Regime for Public Officers

[138]Ibid.

[139] UN Women Asia and Pacific (n129).

[140] Law Nº 14/2008 on Education System Framework (Democratic Republic of Timor-Leste); the 2010 Organic Law of the Ministry of Education and the 2011-2030 National Education Strategy Plan.

[141] UNESCO, 'Timor-Leste: Inclusion' (*UNESCO,* NY) https://education-profiles.org/eastern-and-south-eastern-asia/timor-leste/~inclusion accessed 02 October 2022.

Career Promotion[142] gives preferences for women to obtain employment when women and men receive equal scores during the recruitment process. This Law aims to increase women's participation in the public sector, especially at the decision-making level.

These laws show that the increased creation of policy and equality initiatives have marked a positive improvement in Timor-Leste. However, although the country has taken steps to fulfil the human rights of women, the implementation of these laws has proven poor. For instance, according to the Secretary of State's report in 2008 on the promotion of equality in Timor-Leste, women participate less in the workforce and are usually at the lower ranks of the hierarchies with lower salaries, fewer benefits, and fewer possibilities to advance in their professional careers.[143] However, a report published in 2014 by the Asian Development Bank highlights that Timor-Leste's gender gap has narrowed in education, employment, and political influence.[144] Nevertheless, challenges remain in achieving gender equality. For instance, an example of where the participation of women in Timor-Leste has been discriminated can be seen from empirical research in 2012 done in Maubara regarding rural water supply and sanitation (RWSS).[145] This research shows that most

[142] Democratic Republic of Timor-Leste, Decree Law Nº 24/2016 of 29 of June, 2nd amendment of Decree-Law No. 27/2008, 11 of August (Regime Geral Das Carreiras Da Administração Pública).

[143] SEPI (Timor-Leste Secretary of State For Promotion of Equality) (2007) Relatorio Inicial (Initial Report) – Convenção sobre a Eliminação de todas as formas de discriminação contra as mulheres (CEDAW) (Convention on the Elimination of All Forms of Discrimination Against Women) (*Ministry of Justice,* NY) http://www.mj.gov.tl/jornal/?q=node/1825 accessed 09 June 2021.

[144] Asian Development Bank, 'Timor-Leste: Country Gender Assessment' (*Asian Development Bank*, 2014).

[145] Therese Nguyen Thi Phuong Tam, 'Participation of Women in Rural Water Supply and Sanitation Projects: Visible or Invisible Actors? The Case of the Sub-District of

women in the villages of Maubara were not given the opportunity to participate in the planning phase, which is considered the most important phase of the project because it involves decision-making power and the power to choose.[146] Unfortunately, women in these villages stated that either they were not invited to participate and had no information on the planning phase of the project, or they did participate but had no power to decide due to the consensus of the majority of men.[147] When people are consulted, it is generally the male head of the household who has the most involvement in projects, and women are often powerless.[148] Additionally, Tam[149] argues that, since Timor-Leste became independent from Indonesia in 2002, the government has not taken gender into serious account in its development initiatives, especially in the area of water and sanitation. Usually, women's participation is important in this area because they are principally responsible for the well-being of their family as a whole.

It is suggested that the issue of discrimination against women in Timor-Leste might be attributed to a patriarchal system of society[150] in which men have absolute authority over the family group and hold primary power and predominant roles of political leadership. Men are still seen to be responsible for making decisions in the

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Maubara (Liquica, Timor Leste)' (2012) 2 (4) International Journal of Multidisciplinary Thought 149, 151.

[146] Ibid 163.

[147] Ibid 163-164.

[148] Project Management Unit of the Ministry of Public Works, Transport and Communications, Government of Timor-Leste for the Asian Development Bank, 'Consultation and Participation Plan, TIM: Dili to Baucau Highway Project' (Asian Development Bank, 2016).

[149] Tam (n145) 149–170.

[150] Asian Development Bank, 'Timor-Leste: Country Gender Assessment' (Asian Development Bank, 2014).

household and acting as the breadwinners of the family, while women are primarily responsible for domestic work and childcare.[151] This has contributed to women's limited access to health, education, and employment, especially in villages.

Therefore, this section has shown that, although the non-discrimination element of the RtD was not incorporated under the TST (2002), Timor-Leste has made some progress in women's representation in National Parliament and decision-making positions. This element of the RtD is enshrined in the Constitution of Timor-Leste and national laws. However, the progress and implementation of national laws come with flaws, as Timor-Leste's patriarchal society still affects the way women participate in decision-making.

4.3.3 Fair Distribution of Benefits

The fair distribution of benefits element of the RtD in the context of an intra-State relationship was incorporated under the TST (2002). As stated in Chapter 2, section 2.5.3.3, the fair distribution of benefits element of the RtD in the context of intra-State benefits are direct payments made by States, such as through local trust funds;[152] through national development policies that ensure, inter alia, 'equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income'[153]; and through policies created by States to place obligations on private companies to respect human rights.

[151] USAID, 'The Local Health System Sustainability Project (LHSS) under the USAID Integrated Health Systems IDIQ: Timor-Leste FY2022 Quarter 1 Progress Report' (Abt Associates 2022) 1.
[152] Elisa Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' (2016) 27 (2) EJIL 366.
[153] UNDRtD (n1), Art 8.

Therefore, this section will identify whether States made fair distribution through policies and national laws that require private companies to respect human rights and fair distribution through policies and national laws in the education and healthcare sectors.

4.3.3.1 Fair Distribution through Policies and National Laws that Require Private Companies to Respect Human Rights

States are required to formulate policies or national laws to place obligations on private companies[154] to respect human rights.[155] Therefore, if private companies, including state-owned, Multi-National Corporations (MNCs), and joint ventures infringe on human rights, the human person and peoples or communities in the territory affected must receive compensation in accordance with development policies and national laws[156] where the public interest is adversely affected. Thus, fair distribution of benefits through development policies that place obligations on private companies to respect human rights can be found under the TST (2002) in Annex D, Section 2. This provision gives references to this element of the RtD:

> The Joint Commission shall exercise its powers and functions for the benefit of the peoples of East Timor and Australia' [emphasis added] having regard to good oilfield, processing, transport and environmental practice.[157]

[154] In Timor-Leste, both the State-owned petroleum company and the MNCs are involved in the exploration and development of Timor-Leste's petroleum resources and provide downstream petroleum services.
[155] UNGA Res 1803 (n38) Part I, Section 4.
[156] Ibid.
[157] TST (2002) (n4), Annex D, section 2.

This provision gives references to the purpose of the Joint Commission's powers and functions, which should be exercised with the intention of serving and promoting the interests and well-being of the people of Timor-Leste and Australia. In other words, the Joint Commission should prioritise the needs and aspirations of the people of Timor-Leste and Australia, ensuring that their rights and development are at the forefront of the Commission's activities while considering and adhering to good practices for oilfield operations, processing, transport, and environmental practice.

This also means that Timor-Leste and Australia shall establish policies and regulations for petroleum activities in the TST (2002). It can be contended that these policies also refer to development policies or national laws, such as environmental laws that place obligations on private companies to respect the human rights of the people of Timor-Leste and Australia. This is because the extraction and processing of oil and gas can affect people's human rights, such as the right to life, health, water, and property, as human rights cannot be enjoyed without a safe, clean, and healthy environment.[158] In addition, petroleum operations also require a change in land use, so petroleum operations involve oil and gas companies acquiring land. Consequently, when land acquisition is improperly negotiated or compensation is inadequate, human rights violations can occur.

Article 10 (d) of the TST (2002) exemplifies a provision that not only incorporates the PSNR element but also the fair distribution of benefits element. As mentioned in section 2.5.4, this article requires contractors to be liable for damages or expenses

[158] United Nations Environment Programme, 'What are Environmental Rights?' (*UNEP,* NY) https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what accessed 02 February 2023.

caused by pollution of the marine environment resulting from petroleum activities. Thus, this provision refers to compensation that contractors are liable to pay as a result of pollution. Consequently, it can be argued that the fair distribution of benefits was incorporated under the TST (2002). While this element was incorporated under the TST (2002), Article 63 (2) of Section II on Judicial Oversight under the Decree Law 26/2012 on Environment[159] gave support to this provision. Article 63 (2) under Decree Law 26/2012 states that anyone whose rights are threatened or have been abused is legally entitled to seek the court's intervention to stop the threatening and harmful conduct and request compensation. This article empowers people who believe that their rights have been violated to bring the case before the courts to stop harmful conduct and to obtain compensation. In addition, Article 60 (1) of this law requires compensation '[w]henever an actor has damaged the environment…irrespective of guilt'. Not only does the Decree Law 26/2012 on Environment[160] provide these provisions, but Law No. 13/2005 on Petroleum Activities also places liability on any Authorised Person to pay compensation to the owner of any immovable property if petroleum operations cause impacts or damage to it.[161] Furthermore, with regard to environmental damage, Law No. 13/2005 on Petroleum Activities[162] places duties on the Ministry's competencies and functions to ensure that petroleum exploitation minimises environmental damage, 'is economically sustainable, promotes further investment and contributes to the long-

[159] Decree Law No. 26/2012 of 4 July 2012 on Environment Basic Law (Democratic Republic of Timor-Leste) [Hereinafter Timor-Leste Decree Law no. 26/2012 on Environment].
[160]Ibid.
[161] Law No. 13/2005 on Petroleum Activities (n115) Art 17.
[162] Ibid, Art 10 (c).

term development of Timor-Leste'.[163] Therefore, these laws are aligned with the TST (2002) provisions related to the environment and the protection of the rights of the people of Timor-Leste, aiming for the benefit of the people of Timor-Leste.[164] However, whether these national laws were conducive to the implementation of the TST (2002) provision can be illustrated through the Tasi Mane project. As mentioned in section 4.3.2.1, no adequate compensation was offered to the affected communities displaced by this project.[165] The affected community members continue to demand fair compensation for relinquishing their ancestral lands for the project. Until today, the affected community has not received adequate compensation from the government.[166] This obviously has had a negative impact on Indigenous Peoples in Timor-Leste, whose beliefs are based on their close relationship with the land they traditionally use and occupy and are critical to their physical, cultural, and spiritual life. This situation highlights that merely having national laws is not enough; implementing regulations must be in place. Thus, this section has investigated fair distribution through policies and national laws that require private companies to respect human rights. The next section will investigate how the revenues of oil and gas are managed to understand the fair distribution of benefits element resulting from revenues or benefits obtained from the exploitation of natural resources.

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[163] Ibid, Art 16.
[164] TST (2002) (n4), Annex D, section 2.
[165] UNHRC, 'Report of the Special Rapporteur on the rights of Indigenous Peoples' Human Rights Council' (n54) 9.
[166] Fundasaun Mahein, 'Tasi Mane Project: Implications of the Refinery and Petrochemical Plant for Women' (*Fundasaun Mahein,* 2021) https://www.fundasaunmahein.org/2021/01/07/tasi-mane-project-implications-of-the-refinery-and-petrochemical-plant-for-women/ accessed 16 February 2024.

4.3.3.2 Petroleum Fund

Article 139 of Timor-Leste's Constitution requires the exploitation of the State's natural resources to 'lend themselves to the establishment of mandatory financial reserves.'[167] This Article also establishes that the State owns the natural resources, including petroleum, so that they may be used 'in a fair and equitable manner' and that a fund shall be created to manage finances from them.[168]

In accordance with this provision, the Government of Timor-Leste set up a sovereign wealth fund in 2005, the Petroleum Fund of Timor-Leste,[169] so that the revenues from oil and gas in the country were deposited to the Petroleum Fund.[170] Timor-Leste's Petroleum Fund is a saving fund as it establishes a mechanism[171] by which the government can potentially ensure revenue is shared equitably between current and future generations.[172] This is similar to the Norwegian Fund,[173] otherwise known as the Government Pension Fund Global, which aims to ensure responsible and long-term management of revenue from Norway's oil and gas resources so that it benefits

[167] Constitution of Timor-Leste (n125) Part IV, Art 139.
[168] Ibid.
[169] International Forum of Sovereign Wealth Funds, 'Timor-Leste Petroleum Fund' (*Ifswf,* NY) https://www.ifswf.org/members/timor-leste accessed 12 October 2022. The Petroleum Fund was created under the provision of the Petroleum Fund Law No.9/2005 (3 August 2005) as amended by Law No.12/2011 (28 September 2011).
[170] Ibid.
[171] This mechanism is known as estimated sustainable income (ESI) and it has the function of stabilising the flow of petroleum revenue. See: Jennifer Drysdale, 'Five Principles for the Management of Natural Resource Revenue: The Case of Timor-Leste's Petroleum Revenue' (2008) 26 (1) Journal of Energy & Natural Resources Law 151, 152.
[172] Drysdale (n171) 151.
[173] Norges Bank Investment Management, 'The Fund's Market Value' (*NBIM,* NY) https://www.nbim.no/ accessed 03 November 2023.

both current and future generations.[174] The difference between Norway's and Timor-Leste's Petroleum Fund lies in their investment strategies and purposes. Norway's Petroleum Fund primarily invests in global financial markets to generate returns, which are, in turn, used to support public pensions and other government expenses.[175] In contrast, Timor-Leste's Petroleum Fund was set up to support Timor-Leste's development through investments in a diversified portfolio, both locally and internationally.[176] Other differences include the size, investment strategies, and governance structures. Norway's Petroleum Fund is one of the largest sovereign wealth funds in the world, while Timor-Leste's fund is relatively smaller. Furthermore, Norway's fund functions with a high level of independence, transparency and accountability, whereas Timor-Leste's fund operates under its own legal framework and government oversight.[177]

Timor-Leste's Petroleum Fund Law requires all petroleum income to initially enter the Fund before transfers are made to the State budget.[178] In Timor-Leste's economy,

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[174] Camilla Bakken Øvald & Bent Sofus Tranøy, 'Negotiating Dilemmas of the Norwegian Sovereign Wealth Fund' in Caroline de la Porte et al., (eds) *Successful Public Policy in the Nordic Countries* (Oxford University Press 2001) 211; Heidi Rapp Nilsen et al., 'The Norwegian Government Pension Fund Global: Risk Based Versus Ethical Investments' (2019) 88 (1) Vierteljahrshefte zur Wirtschaftsforschung 65; Anand Bhopal, 'The Norwegian Oil Fund in a Warming World: What are the Interests of Future Generations?' (2023) 26 (1) Ethics, Policy & Environment 106.

[175] Norges Bank Investment Management, 'About the Fund' (*NBIM,* NY) https://www.nbim.no/en/the-fund/about-the-fund/ accessed 09 March 2024; Bhopal (n174) 106.

[176] International Forum of Sovereign Wealth Funds, 'Timor-Leste Petroleum Fund' (*Ifswf,* NY) https://www.ifswf.org/members/timor-leste accessed 12 October 2022.

[177] The Government of Timor-Leste created the Petroleum Fund in 2005, under the provision of the Petroleum Fund Law No 9/2005 (3 August 2005) as amended by the Law No 12/2011 (28 September 2011).

[178] Petroleum Fund Administration Unit, 'Annual Report 2018*:* Timor-Leste Petroleum Fund' (Ministry of Finance of Democratic Republic of Timor-Leste, 2019).

the petroleum sector is the dominant sector[179] and the greatest source of the State's revenue. Thus, development needs such as infrastructure, healthcare, education, and security for the people of Timor-Leste are financed by the revenue from petroleum.[180] There is no mechanism for subnational revenue allocations in Timor-Leste. Therefore, the government uses the Petroleum Fund to finance its annual spending when domestic revenues are insufficient, with approval from Parliament.[181] Since its establishment, the Petroleum Fund has been instrumental in the overall management of petroleum revenues, its fiscal policy and public finance management, and Timor-Leste's overall social and economic development.[182] This petroleum fund is considered by some[183] as best practice for good governance, economic prudence, transparency, and accountability, serving as a strong example

[179] The petroleum sector accounts for approximately 70% of Timor Leste's gross domestic product (GDP) and more than 90% of the total exports, as well as more than 80% of the state's annual revenue. See: Extractive Industries Transparency Initiative, 'Overview and Role of EITI' (*Eiti,* NY) https://eiti.org/countries/timor-leste#:~:text=All%20of%20Timor%2DLeste's%20oil%20and%20gas%20revenues%20are%20deposited,3%25%20of%20total%20petroleum%20wealth accessed 17 October 2022; TL-EITI is administered by the Timor-Leste Multi-Stakeholder Group (MSG) which was formed in 2007.

[180] Democratic Republic of Timor-Leste, *Timor-Leste Strategic Development Plan 2011-2030* (Asian Development Bank 2011) [Hereinafter Timor-Leste Strategic Development Plan] 1, 109.

[181] The government is also required by law to justify any withdrawals. In 2009, for the first time after the approval of the Republican Constitution, Law Nº. 13/2009 of 21 October 2009 introduced the legal regime applicable to Budget and Financial Management in the legal system of Timor Leste. This Law applies to the Government Budget and sets out rules and procedures on how to execute the budget. See: Law Nº. 13/2009 of October 2021 on Budget and Financial Management (Democratic Republic of Timor-Leste).

[182] See: Guteriano Neves, 'Timor Leste's Petroleum Revenues: The Challenges of Managing 'Easy Money''(*Boell,* 2022) https://th.boell.org/en/2022/03/21/timor-leste-petroleum-fund accessed 19 October 2022.

[183] Drysdale (n171); Also see: Alastair McKechnie, *Managing Natural Resource Revenues: The Timor-Leste Petroleum Fund* (Overseas Development Institute 2013).

of a sovereign wealth fund in a fragile or post-conflict context, such as that of Timor-Leste.

McKechnie[184] identified the advantages of the Petroleum Fund, including the establishment of a transparent and accountable mechanism for managing the State's petroleum revenues. This approach reduces the likelihood of funds being utilised in a manner contrary to public interest. Additionally, parliamentary approval through the budget law is required if a proportion of petroleum wealth or spending revenues is outside the annual budget.[185] This fund is also considered sustainable as, when managing petroleum wealth, it takes into account future generations. For this, Timor-Leste's Petroleum Fund can use examples from the Social Responsible Investment (SRI) practices[186] of the Norwegian Fund. The SRI's practices of the Norwegian Fund include the Management Mandate[187] and the Guidelines for Observation and Exclusion.[188] The Management Mandate[189] requires the Norges Bank Investment

[184] McKechnie (n183) 5.

[185] ESI can be used by the Government of Timor Leste to ensure revenue is shared equitably between current and future generations. This is an important feature of the Petroleum Fund Act. The limit for ESI should not exceed 3 percent annually of the estimated petroleum wealth. Also see: McKechnie (n183) 5.

[186] In addition to the financial returns from an investment, the SRI is a strategy that also considers the impact of investments on environmental, ethical or social change. See: CFI team, 'Socially Responsible Investment (SRI)' (*Corporate Finance Institute,* NY) https://corporatefinanceinstitute.com/resources/esg/socially-responsible-investment-sri/ accessed 02 February 2023.

[187] Norges Bank Investment Management, 'Management mandate for the Government Pension Fund Global as of 27 February 2023' (Norges Bank Investment Management, 2023); Also see: Nilsen et al., (n174) 65-78; Sjåfjell Beate et al, 'Investing in Sustainability or Feeding on Stranded Assets? The Norwegian Government Pension Fund Global' (2017) University of Oslo Faculty of Law Legal Studies Research Paper Series 949, 959-960.

[188] This set of ethically motivated guidelines for observation and exclusion from the fund were issued by the Norwegian Ministry of Finance**.** See: Norges Bank Investment Management (n187).

[189] Ibid.

Management (which manages the Norwegian Fund) to achieve the 'highest possible return' from the investment portfolio,[190] which assumes, in the long run, development that is economically, environmentally, and socially sustainable.[191] This means that the mandate of the Norwegian Fund integrates sustainability into the framework of the management of its investment portfolio. The Guidelines for Observation and Exclusion[192] from the Norwegian Fund, on the other hand, are guidelines that contain principles for the exclusion of companies based on their products or on their conduct. The purpose of these guidelines is to prevent the Norwegian Fund from being invested in companies that cause or contribute to serious violations of fundamental ethical norms, as set out in these guidelines.[193] This is why the Norwegian Fund is well known for its ethical profile.

The Petroleum Fund of Timor-Leste also comes with its challenges. For instance, some of these challenges, as mentioned by McKechnie,[194] include:

- Flexibility for the Petroleum Fund Law: the Petroleum Fund Law can be amended. For instance, the Petroleum Fund law can be amended to allow money to be transferred to the budget above the Estimated Sustainable

[190] Ibid, Section 1-2.
[191] Ibid.
[192] See: Norges Bank Investment Management 'Guidelines for Observation and Exclusion from the Government Pension Fund Global: Translation from the Norwegian Version' (Regjeringen 2023) https://www.regjeringen.no/globalassets/upload/fin/statens-pensjonsfond/guidelines-for-observation-and-exclusion-14-april-2015.pdf accessed on 09 March 2024.
[193] See: Norges Bank Investment Management (n187) Sections 2 and 3.
[194] McKechnie (n183) 5.

Income (ESI) limit.[195] This can increase the risk of an occurrence of Dutch Disease[196] and;

- Uncertainty: Transfers from the petroleum fund as inflows to the fund are uncertain; the ESI depends on future international oil prices and the level of petroleum production in Timor-Leste[197]

Thus, Petroleum Fund Laws must be transparent, effective, and accountable. Despite Timor-Leste having its own Petroleum Fund, which finances development needs such as education, healthcare, infrastructure, and security for the people of Timor-Leste,[198] poverty is still rife as a result of, among others, poor governance in implementing measures to alleviate poverty. This situation may be a manifestation of the 'resource curse',[199] which posits that States with abundant reserves of natural resources often perform worse in terms of economic growth, social development, and good governance compared to those with fewer resources. Although oil and gas reserves can create significant wealth for some human person and peoples or

[195] Above 3 percent.
[196] Dutch Disease refers to an economic phenomenon in which the rapid growth of one sector (usually natural resources) in a country leads to a decrease in the competitiveness of other sectors. See: CFI team, 'Dutch Disease' (*Corporate Finance Institute*, 2022) https://corporatefinanceinstitute.com/resources/economics/dutch-disease/ accessed 02 February 2023; Also see: John Page & Finn Tarp, 'Implications for Public Policy' in John Page and Finn Tarp (eds), Mining for Change: Natural Resources and Industry in Africa (Oxford University Press 2020) 463.
[197] McKechnie (n183) 5.
[198] Timor-Leste Strategic Development Plan (n180) 109.
[199] Macartan Humphreys, Jeffrey D Sachs & Joseph E Stiglitz, 'What Is the Problem with Natural Resource Wealth?' in Macartan Humphreys, Jeffrey D Sachs & Joseph E. Stiglitz (eds), *Escaping the Resource Curse* (Columbia University Press 2005) 1-21; Terry L Karl, 'Understanding the Resource Curse' in Svetlana Tsalik & Anya Schiffrin (eds), *Covering Oil: A Reporter's Guide to Energy and Development* (Open Society Institute 2005) 21-7.

communities, and companies that extract and sell oil and gas, in many States,[200] this wealth does not benefit the broader population. Instead, the development of petroleum resources can cause more harm than good. This is especially true for States whose economies are not diversified and remain heavily dependent on a few extractive industries.[201]

Unfortunately, Timor-Leste is such an example, the resource curse is increasingly impacting Timor-Leste's development. For instance, Timor-Leste's economy is not diversified as it relies heavily on its oil and gas. The State lacks a well-established government with a long-standing history and commitment to maintaining a highly skilled and competent civil service and holding officials accountable. Poverty remains high, there is continuing problems in education and the healthcare sector in Timor-Leste (discussed further in section 4.3.5). Additionally, the State inherited a complicated bureaucratic legacy from its colonisers, Portugal and Indonesia, which included corruption and brutality.[202] Therefore, the money from the Petroleum Fund enriches a small number of individuals and leads to misguided or unsustainable economic policies, fostering corruption in the process.[203] However, Timor-Leste has

[200] Including Venezuela, Nigeria, Algeria. See: Benjamin K Sovacool, 'The Political Economy of Oil and Gas in Southeast Asia: Heading towards the Natural Resource Curse?' (2010) 23 (2) The Pacific Review 225, 256; John L Hammond, 'The Resource Curse and Oil Revenues in Angola and Venezuela' (2011) 75 (3) Science & Society 348

[201] A reason behind this is the price fluctuation of the few commodities that a State owns. See: Ibid.

[202] A study indicated that the resource curse is present in Timor-Leste at different levels. See: Samuel John et al, 'Is there a Resource Curse in Timor-Leste? A Critical Review of Recent Evidence' (2020) 7 (1) Development Studies Research 141.

[203] Seyyed Mohsen Azimi Dokht Shooroki, 'Explaining and Investigating the Relationship between the Abundance of Natural Resources and the Extent of Economic Corruption with an Emphasis on Oil and Gas Resources' (2022) 12 (45) A New Approach to the Resource Curse Phenomenon 95.

the potential to avert the resource curse and mitigate its effects on development. One promising approach is to diversify its economy, particularly by expanding sectors such as tourism and agriculture.

4.3.3.3 Fair Distribution through Policies and National Laws in the Education and Healthcare Sectors

After Timor-Leste's independence in 2002, poverty reduction was a priority matter on the country's policy agenda. To reduce poverty in Timor-Leste, it focused its development policies on the education and healthcare sectors.

4.3.3.3.1 Education and Healthcare

In terms of education, for instance, a Trust Fund for Timor-Leste of US$27.8 million[204] (over three years) to fund the renovation of damaged schools and the construction of new schools was established in 2001. In the three years between the Indonesian retreat in 1999 and full independence in May 2002 (during the conflict), not only did a huge number of foreign teachers leave the country, but 90 per cent of schools themselves were destroyed in the struggle. Thus, Timor-Leste had to rebuild its

[204] Managed by the World Bank and the Asian Development Bank and funded by Australia, Finland, Ireland, Japan, New Zealand, Norway, Portugal, the United Kingdom, the United States, the European Commission and the World Bank; two Grant Agreements of US$13.9 million each. See: The World Bank, 'Update No. 13: Trust Fund for East Timor' (October 2001) World Bank 3.

schools.[205] With support from the Trust Fund, within a few months, many schools were rebuilt, and teachers were recruited.[206]

It is also important to note that Article 59(1) of Timor-Leste's Constitution[207] states that the people of Timor-Leste have the right to education and culture and that basic education is compulsory and free of charge. This is also reflected in Law No. 14/2008 on Education System Framework Law,[208] promulgated in October 2008, which establishes a legal framework for the educational system.[209] This can be used as an example of fair distribution through national development policies that ensure, inter alia, 'equality of opportunity for all in their access to education'.[210] However, each year, the Government of Timor-Leste's expenditure on education varies. This is a problem because several potential consequences can occur, including unequal access to quality education, limited educational opportunities, and social and economic inequality. It is crucial to prioritise adequate and equitable expenditure in education as education is one of the main components of development. For instance, Timor-Leste's Government expenditure on education went from 13 percent in 2004 to 25 percent in 2010. However, it declined significantly to about 11 per cent in

[205] See: The Borgen Project, '8 Facts about Education in Timor-Leste' (*Borgen Project,* NY) https://borgenproject.org/8-facts-about-education-in-timor-leste/ accessed 18 October 2022.
[206] Patricia Justino, Marinella Leone &Paola Salardi, 'Short- and Long-Term Impact of Violence on Education: The Case of Timor Leste' (2013) The World Bank Economic Review 320, 324.
[207] Constitution of Timor-Leste (n125) Article 59 (1) on Education and Culture.
[208] Law No 14/2008 on Education System Framework Law (n140).
[209] Ibid.
[210] UNDRTD (n1) Art 8.

2014.[211] Timor-Leste has focused most of its efforts towards primary or basic education and has achieved some progress. In 2000, the number of primary school students was 190,000. This increased to 229,974 students in 2010. The number of primary students, on the other hand, was 21,810 in 2000 and 60,481 in 2010.[212]

The reconstruction of the school system in Timor-Leste faced numerous challenges due to the shortage of teachers and schools.[213] In 2007, most of the Timorese population continued to have little or no education.[214] Fast forward to 2015, there were 106 secondary schools, 61 being public and 45 private. This is a substantial increase compared to when Timor-Leste was under Indonesian occupation. However, there is still a significant difference between the percentage of those who finished primary school education in rural and urban areas: the percentage is more than two times higher in urban areas. Regarding literacy rates, between 2015 and 2017, 94.3 per cent of youth in urban areas were able to read and write, compared to 78.5 per cent in rural areas.[215]

In terms of the healthcare sector, the Constitution of Timor-Leste states that everyone has the right to health and medical care[216] , and this shall be free of charge. In 2003, healthcare spending in Timor-Leste was 2.84 per cent of Gross Domestic Product, whereas, in 2013, it was 8.53 per cent of Gross Domestic Product, which is

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[211] Harry A Patrinos & Lucinda Ramos, 'Timor-Leste: Starting an Education Revolution' (*World Bank,* 2015) https://blogs.worldbank.org/education/timor-leste-starting-education-revolution accessed 12 October 2022.

[212] Timor-Leste Strategic Development Plan (n180) 17.

[213] United Nations Development Programme, 'Timor-Leste Human Development Report: The Path out of Poverty' (UNDP 2006) 1.

[214] Justino et al. (n206) 325.

[215] GDS, UNICEF and UNFPA (n70) 4.

[216] Constitution of Timor-Leste 2002 (n125) Section 57 (Health) Section 1.

the highest spending in healthcare up to 2019.[217] Since independence, investments in health infrastructure and the deployment of health staff have resulted in a functioning health system, with 193 health posts, 66 Community Health Centres, five referral hospitals, and one national hospital now operating across the nation. However, this is not sufficient to deliver adequate health services as many health facilities do not have reliable water and electricity supplies, making it difficult for them to function properly.[218]

Additionally, access to health services poses a major concern as 70 per cent of the population lives in rural areas in small, dispersed villages isolated by mountainous terrain and poor road conditions. Between 2011 and 2014, the government health budget in absolute terms increased from US$38.19 million to US$67.2 million. However, government expenditure on health as a percentage of total government expenditure has remained just above 5 per cent, which is below the World Health Organisation South-East Asia Region average of 8.7 per cent in 2011.[219] Regrettably, the Health Equity and Financial Protection Indicators report shows that government spending on hospital care is found to be pro-rich. [220] Healthcare utilisation in Timor-Leste is concentrated among rich people, while ill health is concentrated among poor people.[221] Furthermore, despite public healthcare being free in Timor-Leste,

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[217] Macrotrends, 'Timor-Leste Healthcare Spending 2003-2023' (*Macrotrends,* NY) https://www.macrotrends.net/countries/TLS/timor-leste/healthcare-spending accessed 03 February 2023; Also see: Alexander Edmonds et. al., 'Health Service Delivery and Utilization in Timor-Leste: A Qualitative Study' (World Bank 2005).

[219] World Health Organisation, *World Health Statistics 2014* (World Health Organisation 2014) 150.

[220] The World Bank, 'Health Equity and Financial Protection Report: Timor-Leste' (*World Bank,* 2014) 5.

[221] Ibid 5.

wealthier patients access hospital care at nearly twice the rate of poorer patients. One of the reasons for this is that more than half of the Timorese population live in rural areas, and there is a lack of patient transport, as well as a lack of out-of-pocket expenses for hospital visits, accommodation and food for the patient and family members.[222]

Thus, to address these development challenges, the Government of Timor-Leste set out a Strategic Development Plan 2011-2030 (SDP) to spend its resource wealth to bring about equitable development for all Timorese people. This SDP outlines development goals in key areas, including health, education, water, and sanitation. It also sets out plans to foster economic growth. Between 2010 and 2018, Timor-Leste's government spent about US$3.8 billion on capital and development initiatives. These expenditures included the development of infrastructure and other development activities that are seen as vital for long-term growth.[223] Hopefully, this SDP can achieve its development goals, as the distribution of benefits seems unequal, especially between urban and rural communities or poor and rich people in Timor-Leste.

Therefore, this section demonstrates that, between 2002 and 2018, despite the national laws aligned with the TST (2002) provisions, the implementation of these policies and national laws remained weak. In addition, although Timor-Leste increased its expenditure on education and health, the progression of education and

[222] Jennifer A Price et al., 'I Go I Die, I Stay I Die, Better to Stay and Die in my House': Understanding the Barriers to Accessing Health Care in Timor-Leste' (2016) BMC Health Services Research 1, 4.

[223] Joao Da Cruz Cardoso, 'Can Timor-Leste Achieve a Balanced Development' *The Diplomat* (8 January 2020) <https://thediplomat.com/2020/01/can-timor-leste-achieve-a-balanced-development/> accessed 27 May 2021.

health was slow, with persistently high poverty rates, low levels of education, and ongoing challenges in the healthcare sector.[224] This could be attributed to Timor-Leste's dependence on oil and gas revenue in its State Budget, coupled with the absence of a natural resource revenue-sharing system that specifically allocated revenues from natural resources to the community, distinct from other fiscal revenues.[225]

4.3.4 Permanent Sovereignty over Natural Resources

The PSNR element for the realisation of the RtD was incorporated under the TST (2002). In the context of an intra-State relationship, as described in section 2.5.4, this principle of PSNR declares that States have sovereignty rights over their natural resources but should not cause damage to the environment. This principle places a duty on States to ensure that activities within its jurisdiction and control do not cause damage to the environment of its people. As shown in section 4.2.4, this implies that States formulate national laws that have an environmental management plan consisting of a set of mitigation and monitoring measures to be taken during implementation and operation to reduce or eliminate adverse environmental and social impacts.[226]

[224] Lundahl & Sjöholm (n34) 15.
[225] Fiscal revenues: taxes, fees, products and exploitation, are revenue collected by the State to finance the activities of the public sector.
[226] The World Bank, 'OP 4.01, Annex C- Environmental Management Plan' (*World Bank,* 1999) http://web.worldbank.org/archive/website01541/WEB/0__-1139.HTM accessed 31 January 2023.

4.3.4.1 Environmental Protection

Article 10 (c) on the Marine Environment under the TST (2002)[227] is an illustration of a requirement for environmental protection and assessments of Contracting Parties of this Treaty. This article states that regulations to protect the marine environment shall be issued by the Designated Authority, such as a contingency plan to fight pollution from petroleum activities. Additionally, Annex C under Article 6 (b) (v) of This Treaty[228], paragraph (h) also states that the powers and functions of the Designated Authority shall include issuing regulations and giving instructions on the supervision and control of petroleum activities, including, among others, environmental protection and assessments. Thus, it can be contended that these articles refer to regulations or environmental laws that require environmental assessment and EIAs. Timor-Leste has national laws that require EIAs, which are conducive to these provisions under the TST (2002). These laws are Decree Law 5/2011 on Environmental Licensing[229] and the Decree Law 26/2012 on Environment.[230]

Decree-Law 5/2011 defines EIA as a technique used for deciding the 'environmental feasibility of executing certain projects based on the environmental assessment and management tools defined'. This technique is required in Articles 8, 9, 14, 16, and 28 of Chapter IV, under Decree Law 5/2011 on Environmental Licensing.[231] In addition,

[227] TST (2002) (n4) Art 10 (c).
[228] Ibid, Powers and Functions of the Designated Authority.
[229] Decree Law No. 5/2011 (n123) Chapter IV: Procedure for The Environmental Impact Assessment And For Granting The Environmental License, Arts 8, 9, 14, 16, 28, 4 (Democratic Republic of Timor-Leste).
[230] Decree Law No. 26/2012 on Environment (n159) Arts 13, 16 (translated into English).
[231] Decree Law No. 5/2011 (n123).

Article 13 on Decree Law No. 26/2012 on Environment[232] requires a strategic environmental assessment[233] to identify, describe, and assess any significant effects on the environment.

For instance, in 2011, Timor-Leste awarded a US$1.1 million contract to the Australian engineering company Worley Parsons to prepare an EIA and Environment Management Plans for the first three components of the Tasi Mane projects, such as Suai, Beacu, and Betano.[234] However, Worley Parsons could only prepare a Strategic EIA (a baseline study and general descriptions of types of impacts) for Betano. Moreover, according to La'o Hamutuk, the information provided did not provide concrete information about the environmental impacts of this particular project.[235]

4.3.4.2 To Monitor Environmental Protection of Private Actors

In the context of the petroleum industry, States must have national laws and development policies on the environment to ensure that corporations carrying out activities within a host State's jurisdiction do not cause damage to the environment of its people. Conducting activities in such manners that uphold the rights of the host State's population, including Indigenous Peoples, is of particular importance.

An example of the duty of States to ensure that activities within its jurisdiction and control do not cause damage to the environment of its community can be identified

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[232] Decree Law No. 26/2012 on Environment (n159), Arts 13, 16.

[233] Strategic environmental assessment is 'the preventative instrument of environmental policy, based on studies, consultations and environmental management and assessment instruments, whose goal is to aid decision making on the environmental viability and implementation of certain projects'. See: Decree Law No. 26/2012 on Environment (n159) Art 1 (translated into English).

[234] Villages and cities in Timor-Leste.

[235] La'o Hamutuk, Environmental Assessment for Betano Refinery' (*Lao Hamutuk,* 2016) https://www.laohamutuk.org/Oil/TasiMane/Betano/EIA/16RefineryEIA.htm accessed 31 January 2023.

under Article 10 of the TST (2002). Article 10 (a) states that both Contracting Parties should cooperate to protect the marine environment of the JPDA, both States shall cooperate to prevent, mitigate, and eliminate pollution of the marine environment, and the Designated Authority shall issue regulations to protect the marine environment in the JPDA.[236] Specifically, Article 10 (d) requires limited liability corporations or limited liability entities to be 'liable for damage or expenses incurred as a result of pollution of the marine environment arising out of petroleum activities within the JPDA'.

Therefore, it can be asserted that the TST (2002) took into account the principle of PSNR of the Contracting Parties. Corporations carrying out activities in each contracting Parties' jurisdiction had to do so in accordance with their contract, license, or permit pursuant to the TST (2002) and in accordance with the law of the jurisdiction. These corporations were liable for environmental degradation committed in the host State.

For instance, Timor-Leste has its own law on petroleum activities: Law No. 13/2005 on Petroleum Activities. Article 10 (c) of this Law asserts that to be eligible to enter into a Petroleum Contract, a Person must be 'a limited liability corporation or entity with limited liability'[237] and a 'Person who engages in Petroleum Operations other than pursuant to an Authorisation' shall 'clean-up pollution resulting from such Petroleum Operations, or reimburse the costs of clean-up to Timor-Leste'.[238] Furthermore, Article 35 of Law No. 13/2005 on Petroleum Activities[239] asserts that

[236] TST (2002) (n4) Art 10.
[237] Law No. 13/2005 on Petroleum Activities (n115) Art 10 (c).
[238] Ibid, Art 16 (1c).
[239] Ibid, Art 10 (c).

whoever seriously endangers the environment shall be punished with years in prison or a fine.[240] Thus, these national laws place liability on corporations to pay if they have endangered the environment in Timor-Leste.

Decree Law 26/2012 on Environment[241] also outlines the liability for environmental damage of any actors or corporations that carry out activities in Timor-Leste. Consequently, Timor-Leste has shown that it has its own national laws that enable the implementation of the TST's (2002) Article 10. Corporations or any person conducting activities are liable for pollution resulting from petroleum operations. This indicates a notable improvement in Timor-Leste compared to when it was under Indonesian occupation, a developing State that values its environment. Failure to promote stringent environmental regulations can lead to excessive levels of pollution and environmental degradation.[242]

Nevertheless, having these laws was not enough; there should have been regulations in place for effective implementation. This was apparent with the Tasi Mane project, which received many complaints. As mentioned in section 4.3.2.1, no comprehensive impact assessment was taken in this project. The Special Rapporteur, Victoria Tauli-Corpuz, received complaints from local communities, particularly about the lack of compensation or relocation plans for displaced communities.[243] Overall, although Timor-Leste adopted all these national laws and regulations to protect its environment, their implementation and enforcement were weak.

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[240] Ibid, Art 15 (a and b) s.

[241] Decree Law No. 26/2012 on Environment (n159) Arts 46 (1a), 60, 62.

[242] OECD, 'Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development' (1999) OECD 1.

[243] UNHRC, 'Report of the Special Rapporteur on the rights of Indigenous Peoples' Human Rights Council' (n54) 9.

4.3.4.3 Indigenous People

Regarding the principle of PSNR granting permanent sovereignty to people, including Indigenous People,[244] evidence shows an improvement since Timor-Leste gained independence. During the Indonesian occupation of Timor-Leste, the customary law known as Tara Bandu (which governs how people interact with the environment) was prohibited.[245] However, after Timor-Leste's independence in 2002, the indigenous communities[246] across the country started bringing Tara Bandu back to life as a way to guide a more sustainable use of their local natural resources. A census in 2010 revealed that 90 per cent of the population uses the Indigenous Tetum language.[247] Therefore, almost everyone in Timor-Leste is indigenous and shares indigenous values and spiritual beliefs, which are reflected in strong, among others, customary justice.[248] Tara Bandu is incorporated in national laws such as Decree-Law No. 26/2012 on Environment,[249] as Article 8 (1) of this law states that:

[244] UNGA Res (n38) Preamble, Para. 4; ICCPR (n17) and ICESCR (n18) Art 1(2).
[245] Bikash Kumar Bhattacharya, 'Timor-Leste: Maubere tribes revive customary law to protect the ocean' *Mongabay News* (Asia 26 October 2018) https://news.mongabay.com/2018/10/timor-leste-maubere-tribes-revive-customary-law-to-protect-the-ocean/ accessed 18 January 2023.
[246] The Tetum comprise the largest Malayo-Polynesian group at around 100,000 and then Mumbai at about 80,000. See: Cultural Survival (n54) 2; UNHROHC (n54) 2; Timor Leste is composed of many indigenous groups, each with its own language and cultural practices. See: Timor Leste, 'People and Culture' (*Timor-Leste People and Culture,* NY) https://www.timorleste.tl/east-timor/about/people-culture/ accessed 20 January 2023.
[247] Cultural Survival (n54) 5.
[248] UNHRC, 'Report of the Special Rapporteur on the rights of Indigenous Peoples' Human Rights Council' (n54) Para 57.
[249] Decree Law No. 26/2012 on Environment (n159).

> The State recognises the Importance of Tara Bandu as an Integral custom of Timor-Leste culture and as a traditional mechanism for regulating the relationship between man and his environment.

It can be argued that recognising this Tara Bandu, which is linked to the environment, is important to protect these Indigenous Peoples' cultural, social, economic, and political characteristics. It safeguards not just the Indigenous community but also the environment, as Indigenous Peoples hold unique knowledge and practices crucial for the sustainable management of natural resources. Involving Indigenous people is therefore crucial to environmental protection, and since Timor-Leste has signed onto pertinent international treaties[250] that recognise the right to participate, especially the principle of FPIC, it is crucial that Timor-Leste incorporate these into its national laws, policies, and regulatory framework, making it a formal requirement for the approval of specific development, especially those that may have an impact on the environment.

Therefore, this section shows that the PSNR-related provision was incorporated in the TST (2002), and there were national laws conducive to the TST (2002) provisions. However, although the TST (2002) provisions were implemented, the

[250] United Nations Declaration on the Rights of Indigenous Peoples (adopted by the General Assembly on 13 September 2007) UNGA Res 61/295 [Hereinafter UNDRIP]; Convention on Biological Diversity (adopted on 5 June 1992, entered into force 29 December 1993), 31 ILM 822 [Hereinafter Convention on Biological Diversity/CBD]; Also see: Convention on Biological Diversity, 'List of Parties' (*CBD,* NY) <https://www.cbd.int/information/parties.shtml> accessed on 10 October 2024; International Labour Organisation (ILO) Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989, 28 ILM 1382 [Hereinafter ILO 169]; Also see: International Labour Organisation, 'Country Profile' (*ILO,* NY) <https://normlex.ilo.org/dyn/normlex/en/f?p=1000:11003> accessed on 10 October 2024.

implementation of the EIA was still weak. The principle of granting permanent sovereignty to people, including Indigenous People,[251] was finally considered after Timor-Leste's independence and the signing of the TST (2002). In addition, national laws that protect the environment did exist, but these laws needed to be implemented adequately.

4.3.5 Duty of Cooperation

The duty of cooperation element of the RtD in the context of an intra-State relationship was not incorporated under the TST (2002), nor did the TST (2002) specify how the Treaty could help achieve development at the national level. Although the TST (2002) does not refer to this element of the RtD, in the same year that this Treaty was signed (i.e., in 2002), the Government of Timor-Leste launched the first NDP focusing on two development goals: to reduce poverty in all sectors and regions of the nation and to promote economic growth that is equitable and sustainable, thus improving the health, education, and well-being of everyone in Timor-Leste.[252]

States have a responsibility to create national conditions that are favourable to the realisation of the RtD[253] to ensure their population, individuals and peoples or communities have equal opportunity to access basic resources, education, health services, food, housing, employment and the fair distribution of income.[254] With this in mind, Timor-Leste's Development Strategy, as described in this plan, was to design

[251] UNGA Res (n38) Preamble, Para 4; ICCPR (n17) and ICESCR (n18) Art 1(2).
[252] International Monetary Fund (n102) 1.
[253] UNDRtD (n1) Art 3 (1).
[254] Ibid Art 8.

programmes and pursue initiatives that systematically addressed its main development goals.[255] Thus, the strategy included a host of policies to achieve these goals, ranging from the increased participation of the poor in the political decision-making process and in the modern economy to the provision of basic social services. In 2010, Timor-Leste released its SDP for the years 2011-2030, which was built on the foundations laid down in 2002.[256] This plan is an integrated package of strategic policies to be implemented in the short-term (one to five years), in the medium-term (five to ten years), and in the long-term (ten to 20 years). Thus, the SDP sets out what needs to be done to achieve the collective vision of the Timorese people for a peaceful and prosperous nation in 2030.

Timor-Leste's Constitution stipulates that the people of Timor-Leste have the right to education and health services that are universal and free of charge.[257] Thus, free education and health services have been provided to the people of Timor-Leste since its independence in 2002.[258] In addition, the Government of Timor-Leste also launched a range of programmes with the aim of alleviating poverty in the country.

4.3.5.1 Education

The Government of Timor-Leste launched a school feeding programme in 2005 through close cooperation with the United Nations Food Programme.[259] Then, in

[255] International Monetary Fund (n102) 1.
[256] Constitution of Timor-Leste (n125) Art 59 (1).
[257] Ibid.
[258] Ibid Art 57 (2).
[259] World Food Programme, 'The Government and WFP Join Forces to Boost School Feeding in Timor-Leste' (*World Food Programme,* 2022) https://www.wfp.org/news/government-and-wfp-join-forces-boost-school-feeding-timor-leste accessed 25 January 2023.

2011, the Ministry of Education, Youth, and Sports took over the responsibility for the programme, turning it into the National School Feeding Programme, managed by the National Directorate of School Social Action.[260] The Government of Timor-Leste took full responsibility for the School Feeding Programme in 2012, with rice and funding of US$ 0.15 per student per day per meal distributed to all basic education schools,[261] including secondary schools.[262] Furthermore, in 2015, the program was expanded to pre-schools and private schools, and its implementation was decentralised to the municipal level in 2017.[263] The first objective of the School Feeding Programme is to '[i]mprove nutrition conditions for school-aged children and decrease the number of dropouts'.[264] However, during the first trimester period, this programme did not achieve its objective due to the late promulgation of the State Budget.[265] The programme also experienced problems due to delays in the programme's reporting system.[266]

Another example of measures taken by Timor-Leste to facilitate equal opportunity for everyone to access education can be seen through Timor-Leste's fee-free education initiative. The government launched the school grants policy in 2004/05,

[260] Ibid.
[261] Between 6-11 years.
[262] Between 12-14 years; See: Care International & Julie Imron, 'School Feeding Program Study Report: Timor-Leste' (2020) (United States Department of Agriculture Foreign Agricultural Services 1
[263] Ibid 10.
[264] Ibid 11.
[265] Government of Timor Leste, '2017 General State Budget Approved Unanimously in Final Vote' (the Government of Timor-Leste, 2016) http://timor-leste.gov.tl/?p=16926&lang=en accessed 7 February 2023; Also see: Charles Scheiner, 'Timor-Leste Economic Survey: The End of Petroleum Income' (2021) Asia and the Pacific Policy Studies 253, 254.
[266] Care International & Imron (n262) 11.

which applied to public and private schools at primary, secondary, and technical/professional levels.[267] However, implementation of this policy posed a challenge due to delays in the distribution of grants. These delays led to disruptions in the teaching and learning process, making it challenging for teachers to proceed with planned activities and examinations.[268]

4.3.5.2 Health

In terms of the healthcare sector, more than 70 per cent of Timor-Leste's health facilities were destroyed in the violence and conflict that followed the referendum on independence from Indonesia in 1999. Since gaining independence, the healthcare sector in Timor-Leste has made significant strides in reinstating the provision of basic services and reconstructing facilities that were damaged during the post-referendum violence.[269] In the first year of independence, the Council of Ministers in Timor-Leste approved the Health Policy Framework, which committed to providing free essential services to the people of Timor-Leste.[270] Since independence in 2002, infant and maternal mortality rates have fallen rapidly, vaccination rates have improved, and the incidence of malaria has fallen by 95 per cent.[271] In 2010, the fertility rate fell to 5.7, a decrease from 7.8 in 2003. Changes in health indicators between 2002 and 2010 show positive signs of progress: 78 per cent of children were treated for basic illnesses; 86 per cent of mothers received some

[267] United Nations Educational, Scientific and Cultural Organisation, 'Improving School Financing: The Use and Usefulness of School Grants, Lessons from Timor-Leste' (International Institute for Educational Planning Research Brief 2017) 1.
[268] Ibid.
[269] Edmonds et al. (n217) 3.
[270] Price et al. (n222) 2.
[271] The Government of Timor-Leste, 'Timor Leste's: Roadmap for the Implementation of the 2030 Agenda and the SDGs' (The Government of Timor-Leste 2017) 5.

degree of antenatal care; and the incidence of malnourished women has decreased by 29 per cent in the past decade.[272]

Yet, Indigenous People living in rural parts of Timor-Leste face a major barrier to accessing healthcare systems due to low levels of transport infrastructure, patient transport, hospital coverage, and geographic inaccessibility.[273] As a result, rural households and Indigenous People are less likely to go to hospital than urban households. A report in 2014 analysing equity and financial protection in the healthcare sector of Timor-Leste[274] asserted that, in general, ill health is concentrated among the poor, while healthcare utilisation is concentrated among the rich.

4.3.5.3 Poverty Reduction

The Government of Timor-Leste launched the National Programme for Village Development (PNDS) in 2012. This can be seen as a measure taken by Timor-Leste to facilitate access to employment for its people or community, which can then reduce poverty. The PNDS aimed to empower communities to participate in community decision-making, thus improving inclusiveness and providing training and jobs.[275]

Concerning access to food, the Government of Timor-Leste adopted the National Food Security Policy[276] in 2005, which reaffirms the right to food[277] for all people of Timor-Leste. In terms of housing, for instance, Timor-Leste's Millenium Development

[272] Ibid 33.
[273] Price et al. (n222) 7.
[274] Ibid.
[275] Democratic Republic of Timor Leste, 'National Food and Nutrition Security Policy' (2014) Democratic Republic of Timor Leste 10.
[276] Ibid.
[277] UDHR (n16) Art 25; Convention on the Rights of the Child (Adopted 20 November 1989, entry into force 2 September 1990) UNGA Res. 44/25, Art 27.

Goals (MDGs) Suco Program was launched prior to 2015, which aimed to build houses for vulnerable people. Under this programme, five houses would be built in each of the 2,228 villages every year, resulting in more than 55,000 houses by 2015.[278] However, by 2018, only 5,000 houses had been built nationwide for social housing, and there was a low occupancy rate as a result of poor access to water and sanitation, as well as the unclear status of landowners.[279]

A further example of a poverty alleviation programme can be identified in 2008 when the Government of Timor-Leste introduced a set of cash transfer schemes aimed at attending to the needs of the most vulnerable. The first of these schemes was the Pension for Older Persons and People with Disabilities (Subsídio de Apoio a Idosos e Inválidos [SAII]),[280] which is a universal pension for persons with disabilities and for those above the age of 60.[281] In the same year, other programmes were created, including benefits for veterans of the independence struggle and Bolsa da Mãe (to support poor and vulnerable households with children).[282] In its first year, the cash

[278] Timor-Leste Strategic Development Plan (n180) 109.

[279] Pyone Myat Thu, 'Revisiting the MDG Housing Program in Timor Leste' (*Devpolicy,* 2018) https://devpolicy.org/revisiting-mdg-housing-program-timor-leste-20181011/#:~:text=Aligned%20with%20the%20broader%20United,most%20disadvantaged%20members%20of%20society accessed 01 November 2022.

[280] One of the steps taken to address economic insecurity and poverty in older age and to ensure the right to an adequate standard of living for older persons; Democratic Republic of Timor-Leste, Decree-Law No. 19/2008 altered by Decree-Law No. 31/2021.

[281] International Labour Office, 'Universal Old-age and disability Pensions' (*Social-protection,* 2016) https://www.social-protection.org/gimi/gess/RessourcePDF.action?ressource.ressourceId=54034 accessed 16 January 2023.

[282] Partnership for Social Protection, 'Investing in Timor-Leste's Children through the Bolsa da Mae- Jerasaun Foun Cash Transfer Program' (*P4sp,* NY) https://p4sp.org/documents/3/P4SP_Poster_Series_-_Timor_Leste.pdf?download=True#:~:text=The%20Government%20of%20Timor%2

transfer scheme programme covered more than 80 per cent of older persons, and by 2016, it covered 94,287 individuals.[283]

It should be stressed that all these programmes are part of the National Strategy Social Protection to reduce poverty and social vulnerability[284] and are fundamentally based on the Constitution of Timor-Leste. Social protection is a right under Article 56,[285] which provides that 'every citizen is entitled to social assistance and security in accordance with the law'. This is also reinforced in Articles 20 and 21, which enshrine the right of protection of older persons and people with disabilities, respectively. It is noteworthy that these social protection programmes are financed by the State Budget, mostly composed of revenues from the exploitation of oil and gas.[286]

It can be asserted that, after Timor-Leste's independence in 2002 and the signing of its own JDA with Australia, progress did take place. However, poverty remained high, while education remained low, and there were continuing problems in the healthcare sector.[287] It is important to consider that after the referendum on Timor-Leste's independence from Indonesia, the majority of places in Timor-Leste were burned down and destroyed by anti-Independence Timorese militias (organised by the

DLeste,and%20vulnerable%20households%20with%20children accessed 16 January 2023.

[283] International Labour Office (n281).

[284] International Labour Organisation, 'Timor-Leste Develops a National Strategy for Social Protection' (*ILO,* 2021) https://www.ilo.org/jakarta/info/public/pr/WCMS_819711/lang--en/index.htm accessed 6 January 2023.

[285] Constitution of Timor-Leste (n125) Art 56.

[286] Organização Internacional do Trabalho, 'Extensão da Proteção Social em Timor-Leste' (*Social-protection,* 2018) (International Labour Organisation, 'Extension of Social Protection in Timor-Leste') (International Labour Organisation (ILO), ILO Social Protection Department, July 2018).

[287] Lundahl & Sjöholm (n34) 15.

Indonesian military). For instance, 95 per cent of schools were damaged, four out of five schools were destroyed, and almost all non-Timorese teachers left the State, resulting in the collapse of the education system.[288] Nonetheless, during the transition, within two short years, many schools were rehabilitated, new teachers were hired, and the education system became operational again. The net enrolment rate for primary school rose from 65 per cent in 2001 to 92 per cent in 2013.[289] In 2015, the youth literacy rate (15-24 years) stood at 85 per cent.[290]

Despite these changes, people who lived in rural areas, including Indigenous People, had lower attendance rates at pre-primary, pre-secondary, and secondary levels in 2010.[291] For instance, the number of secondary school students was 30,111 in urban areas, compared to 18,464 in rural areas,[292] and secondary school attendance was much higher in urban than in rural areas. In 2015, there was still a clear difference between urban and rural areas, as stated in section 4.3.3.3.

Consequently, in spite of providing poverty alleviation programmes and displaying positive signs of progress in education, the healthcare sector, access to food, and housing, Timor-Leste still faced significant challenges to improving the living standard of its human person and peoples or communities. There was a big gap in

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[288] The World Bank, 'Education Since Independence from Reconstruction to Sustainable Improvement: Report No. 29784-TP' (2004) Human Development Sector Unit East Asia and Pacific Region 4.

[289] The Government of Timor-Leste (n271) 5, 'Timor Leste's: Roadmap for the Implementation of the 2030 Agenda and the SDGs' 5.

[290] The World Bank, 'Literacy Rate, Youth Total (% of people ages 15-24)' (*World Bank,* 2022) https://data.worldbank.org/indicator/SE.ADT.1524.LT.ZS accessed 20 March 2023.

[291] Democratic Republic of Timor-Leste, 'Timor-Leste 2010 Population and Housing Census: Analytical Report on Education' (2012) 9 National Statistics Directorate and United Nations Population Fund 1.

[292] Ibid.

widespread poverty between urban and rural areas. As Drysdale[293] argues, institutional legacies, both the formal and informal rules that regulate the exercise of power in a political regime, were left by the Portuguese and Indonesians. For instance, Drysdale[294] identified institutional, social, and cultural connections that confirm Timor-Leste's strong links to Portugal and Indonesia. These strong links with Portugal can be identified through Timor-Leste's official language and its Constitution, whereas links with Indonesia include the lack of justice for the crimes committed during Suharto's regime, corruption, the lack of human capital/skills, and the trauma and tension that was left after atrocities during Indonesian occupation, which resulted in conflicts following Timor-Leste's independence.[295] Corruption, in particular, is still visible in Timor-Leste at the current time. In 1999, Indonesia ranked 97 out of 99 States in Transparency International's Corruption Perception Index. After Timor-Leste's independence in 2006, the Corruption Perception Index score[296] for Timor-Leste was 2.6 (i.e., 10 highly clean and 0 highly corrupt) and ranked 111 out of 163 States.[297] In 2014, Timor-Leste obtained a score of 28 out of 100, ranked 133 out of 175 States.[298] Furthermore, the lack of human capital and skills,[299] which resulted from the occupation of Indonesia in the country, was also visible after Timor-

[293] Drysdale (n171).
[294] Ibid.
[295] Ibid.
[296] CPI Score relates to perceptions of the degree of corruption as seen by business people and country analysts, and ranges between 10 (highly clean) and 0 (highly corrupt). See: Transparency International the Global Coalition against Corruption Press Release, '2006 Corruption Perceptions Index reinforces link between poverty and corruption: Shows the machinery corruption remains well-oiled, despite improved legislation' (6 November 2006).
[297] Ibid.
[298] 28 on a scale from 0 (highly corrupt) to 100 (very clean). Also see: Bosso (n295).
[299] Drysdale (n169) 155.

Leste's independence. It is important to note that, during the Indonesian occupation of Timor-Leste, most of the senior positions in the government were held by Indonesians. Thus, Timor-Leste had few people with the skills to run the government, which also influenced how the poverty alleviation programmes were implemented. Thus, this section shows that the duty of cooperation was not cited in the TST (2002), yet Timor-Leste indeed took measures to eliminate obstacles that could prevent its community or people from having equal opportunity to access basic resources, education, health services, food, housing, employment, and the fair distribution of income. Although measures were taken by the State, many factors affected how poverty alleviation strategies were implemented.

Table 2: Key elements of the RtD under the TST (2002)

Key elements of the RtD	Does TST (2002) incorporate the elements of RtD?
Duty of Cooperation	Not incorporated
Participation	Not incorporated
Non-discrimination	Not incorporated
PSNR (Article 10 (c) on the Marine Environment; Annex C under Article 6 (b) (v); Article 10 (a)	Incorporated (expressly) National Laws: Decree-Law 5/2011 on Environmental Licensing Decree Law 26/2012 on Environment Law No 13/2005 on Petroleum Activities
Fair distribution of benefits (Annex D, Section 2; Article 10 (d))	Incorporated (expressly) National Laws: Law No 13/2005 on Petroleum Activities Decree Law 26/2012 on Environment Law No 13/2005 on Petroleum Activities

Table 2 shows whether the key elements of the RtD are incorporated under the TST (2002).

Similar to the TGT (1989), Table 2 shows that the only elements of the RtD incorporated under the TST (2002) were the PSNR and the fair distribution of benefits. Both elements are expressed in the Treaty. As mentioned in Chapter 1, section 1.3.2, the TST (2002) is identical in scope to the TGT (1989). The difference is that, in this Treaty, there were national laws that were conducive to both elements of the RtD compared to the TGT (1989). It can be concluded that, although this Treaty did not explicitly recognise or address cooperation between the State and its communities, nor the participation or non-discrimination element of the RtD, Timor-Leste made progress by formulating its national laws conducive to the element of the RtD, such as fair distribution of benefits.

4.4 Treaty between Australia and the Democratic Republic of Timor-Leste Establishing Their Maritime Boundaries in the Timor Sea (2018 Treaty)

In March 2018, Australia and Timor-Leste signed the 'Treaty Between Australia and the Democratic Republic of Timor-Leste Establishing Their Maritime Boundaries in the Timor Sea' (2018 Treaty).[300] Thus, the analysis of this section covers the period between 2018 and the current date.

4.4.1 Participation

The participation element of the RtD is not incorporated under this Treaty. The 2018 Treaty does not refer to the participation of human person and peoples or communities in creating and implementing policies that affect their well-being,

[300] 2018 Treaty (n2); See also: Stephanie March & Stephen Dziedzic, 'Australia, East Timor Sign Deal on Maritime Border, Agree to Share Revenue from Greater Sunrise Oil and Gas' *ABC News* (7 March 2018) http://www.abc.net.au/news/2018-03-07/australia,-east-timor-sign-deal-on-maritime-boRTDer/9522902 accessed 20 July 2018.

including the 2018 Treaty itself. As stated in Chapter 2, section 2.5.1, participation is defined as the participation of the human person and peoples or communities in the creation and implementation of policies that States have the responsibility and duty to frame,[301] which affect their well-being. Moreover, the participation of the human person and peoples or communities in consultation processes should include FPIC.[302] Although the participation element of the RtD is not incorporated under this Treaty, effective consultation and the use of FPIC in consultation will be evaluated.

4.4.1.1 Effective Consultation and FPIC

As stated in Chapter 2, section 2.5.1, the participation element is stipulated under Timor-Leste's Constitution[303] and Timor-Leste's Decree Law No. 26/2012 on Environment;[304] however, neither of them directly refers to the FPIC principle. It is also shown in section 4.3.1.1 that the participation of the human person and peoples or communities in consultations to draft national laws and projects is not properly applied, and there is no evidence that FPIC was applied during consultations.

This can also be identified in 2017 when the Government of Timor-Leste proceeded with consultation on a law to regulate onshore petroleum operations, which

[301] UNDRtD (n1) Art 2: '[t]he human person is the central subject of development and should be the active participant and beneficiary of the right to development… States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom'.
[302] Ibid Art 2 (3).
[303] Constitution of Timor-Leste (n125) Arts 20, 72 and Part III, Section 63 (1).
[304] Decree Law No. 26/2012 on Environment (n159).

concluded in the enactment of Decree Law 18/2020 in May 2020.[305] The National Petroleum and Minerals Authority (ANPM) did not listen to the critiques[306] and suggestions of consulted parties, such as the local community, much less the vulnerable people in Timor-Leste, including women, the elderly, and people with disabilities. However, the participation of women (as vulnerable people in Timor-Leste) in the National Parliament of Timor-Leste is seen as positive. According to the World Bank, in 2020, 38 per cent of the seats in the National Parliament were held by women, which is above the Asian region's average (19 per cent) and the world average (26 per cent) in 2020.[307] Additionally, in the Parliamentary Election, the number of female voters increased from 308,288 in 2018 to 322,482 in 2022. This means that women are increasingly engaged in voting for presidential elections. Additionally, Timor-Leste represented the highest number of women running for president, as 4 out of 16 were female candidates.[308]

Furthermore, the participation of elderly people (also classed as vulnerable people in Timor-Leste) is supported by the Constitution of Timor-Leste. Timor-Leste's Constitution 2002 contains an article that references old-age citizens. It states that:

> 2. The old age policy entails measures of an economic, social and cultural nature designed to provide the elderly with opportunities for

[305] Decree Law No. 18/2020 on Onshore Petroleum Operations (Democratic Republic of Timor-Leste) [Hereinafter Decree Law No. 18/2020].
[306] See section 4.3.1.1 of this Chapter.
[307] The World Bank, 'The Proportion of seats by women in national parliaments (%)-Timor-Leste' (*World Bank,* NY) https://data.worldbank.org/indicator/SG.GEN.PARL.ZS?locations=TL accessed 24 January 2023.
[308] United Nations Development Plant, 'UN Women and UNDP Joint Effort for Women's Leadership and Participation in the Elections 2021-2025' (UNDP, 2022) https://www.undp.org/timor-leste/press-releases/un-women-and-undp-joint-effort-womens-leadership-and-participation-elections-2021-2025 accessed 20 March 2023.

> personal achievement through active and signifying participation in the community.[309]

The Constitution, thus, shows support for the elderly by emphasising the importance of their participation in the community for their personal achievement. Yet, such concerns were not adequately taken into account when the consultation was carried out.

Moreover, in 2019, the former Minister for Legislative Reform and Parliamentary Affairs, Fidelis Manuel Leite Magalhães, announced two national public consultation processes.[310] One aimed to strengthen access to justice, while the other sought to recognise traditional justice, known as Tara Bandu.

As of today, considerable challenges remain regarding access to justice in Timor-Leste, particularly in terms of capacity, awareness, and socio-economic barriers. Key factors include the legal framework, institutional capacity, cultural aspects, and socio-economic conditions. For instance, the judicial system has faced several challenges,[311] including a shortage of judges and legal professionals, which leads to delays in legal proceedings. Many individuals and people still lack sufficient knowledge about how to navigate the system.[312] Cultural barriers also influence access to justice, as many prefer to resolve disputes through customary practices rather than going to court. Furthermore, poverty, economic constraints, and lack of

[309] Constitution of Timor-Leste (n125) Art 20 (2).
[310] Timor-Leste Government, 'Government to launch national consultations on conciliation and traditional justice' (*Timor-Leste Government*, 2019) http://timor-leste.gov.tl/?p=21614&n=1&lang=en 23 January 2023.
[311] Megan Hirst and Eurosia de Almeida, 'Justisa Legal iha Timor-Leste: Barreira sira ba asesu iha nivel komunidade' (The Asia Foundation 2023) 1 [Legal Justice in Timor-Leste: Barriers to Access at the Community Level] 1.
[312] Ibid.

education can also hinder individuals' and people's ability to access legal services and understanding of their rights. Thus, a public consultation aimed at strengthening access to justice should focus on informing every human person that the judicial system is available to them, should they need it.

Consequently, the objective of public consultation to recognise Tara Bandu (as part of customary law) is to listen to communities across the State and study conflict resolution processes according to the rules of Timorese communities' culture.[313] However, in this customary law, women do not have a strong position because of their sociocultural aspects and power within traditional marriage in a patriarchal context.[314]

Thus, this section has shown that the participation element of the RtD is not incorporated under the 2018 Treaty. It is worth noting that although Timorese national development policies and laws have been strengthened through the use of participation/consultation mechanisms as specified under the UNDRtD,[315] there is no evidence that the FPIC principle was applied during consultation processes. Thus, many challenges remain and much has yet to be achieved to guarantee that every human person participate in creating and implementing policies that affect their well-being.

[313] Ibid 7.

[314] AD Costa et al., 'Women's Position in Tara Bandu Customary Law: Case Study on Violence against Women in Suco Tibar, Liquiçá Municipality, Timor-Leste' in Isbandi Rukminto Adi & Rochman Achwan (eds), *Competition and Cooperation in Social and Political Sciences* (Routledge 2017) 251.

[315] Being 'active, free and meaningful'.

4.4.2 Non-Discrimination

The non-discrimination element of the RtD is incorporated under the 2018 Treaty. Again, the non-discrimination element in this chapter means ensuring that the most vulnerable groups within society, who are often affected by development, play their role as agents of development. As mentioned in sections 4.2.2.1 and 4.3.2.1, vulnerable groups within the society of Timor-Leste are women, veterans, elderly people, and Indigenous People.

It can be asserted that, although the words 'vulnerable group' are not mentioned in the 2018 Treaty, there is positive discrimination. As identified in Chapter 3 (section 3.2.2), positive discrimination is the process of giving preferences or treating a certain ethnic group or individuals of one State (here, Timor-Leste) more favourably. This can be found in the same Article 14 (a) of Annex B under the 2018 Treaty, which requires '(a) …training of Timor-Leste nationals and a preference for the employment of Timor-Leste nationals'.

Similar language was adopted in Law of 13/2005 of the Petroleum Act, Article 13 (3a) (iii) and (iv), which refers to 'training of, and giving preference in employment in the Petroleum Operations to, nationals of Timor-Leste'. In fact, in operating Bayu-Undan,[316] companies such as ConocoPhillips and Santos seek to give preference to the employment of Timor-Leste nationals and permanent residents. Not only the Law of 13/2005 of the Petroleum Act but also the Decree-Law No**.** 18/2020 of 13 May on

[316] NSEnergy, 'Bayu-Udan' (*Nsenergy Business,* NY) https://www.nsenergybusiness.com/projects/bayu-undan-field/ accessed 20 March 2023.

Onshore Petroleum Operation, which is the second amendment to Law of 13/2005 of the Petroleum Act, Production Sharing Contract model and Private Investment Law No. 15/2017, require contractors to give preference in employment to nationals of Timor-Leste. Therefore, the Government of Timor-Leste encourages businesses to provide training and preferential employment for Timor-Leste nationals.

Since gaining independence, the Government of Timor-Leste has adopted legal instruments to promote the inclusion, representation, and participation of women, young people, and senior citizens. For instance, in 2019, the Government of Timor-Leste, represented by the Ministry of Social Solidarity and Inclusion and the Secretary of State for Equality and Inclusion, signed an agreement with the Government of Australia concerning the 'Nabilan' programme. The aim of this programme is to ensure that women and children are safe from violence and can enjoy their rights. This programme's partners offer services, including judicial assistance, medical examinations, counselling, and temporary accommodation during emergency situations for victims of violence.

Therefore, the non-discrimination element of the RtD is incorporated under the 2018 Treaty. National laws mentioned in this section are conducive to the provision of the 2018 Treaty.

4.4.3 Fair Distribution of Benefits

The fair distribution of benefits element of the RtD is incorporated under the 2018 Treaty. Specifically, it can be found in Article 14 of Annex B,[317] which requires the new Greater Sunrise regime to set out its local content. In this Treaty, it is classed

[317] 2018 Treaty (n2) Annex B, Art 14 (2).

not only as a duty of cooperation but also as a fair distribution of benefits element of the RtD. Local content is the added value or benefits that result from the activities of the oil and gas industry to a host State,[318] i.e., the benefits that the activities of oil and gas industries will bring to Timor-Leste. Therefore, this article reflects the commitments of both Australia and Timor-Leste to ensure that the benefits from the oil and gas industry in the Greater Sunrise fields flow to Timor-Leste. The local content commitments can help distribute the benefits through support from the State to its communities[319] by involving local workers and the use of local products in the petroleum industry.

These benefits, cited in Article 14 of Annex B, include improving workforce and skills development, career progression, job creation, building supplier and capability development, and improving and promoting Timor-Leste's commercial and industrial capacity. This provision requires contracting Parties to give priority to nationals, domestic companies, and locally produced materials in obtaining goods and services used for oil and gas operations. Thus, it can be argued that this local content is utilised to generate broader economic benefits for the local economy beyond fiscal benefits. This shows that the fair distribution of benefits element of the RtD is incorporated under the 2018 Treaty, which is the only treaty that sets out how communities can benefit from the exploitation of oil and gas resources. In terms of whether the distribution of benefits as incorporated in the 2018 Treaty promotes fairness, the analysis indicates that the oil and gas revenues have not been fairly

[318] IPIECA, *Local Content: A Guidance Document For The Oil And Gas Industry* (2nd ed., IPIECA 2016) 3.
[319] UNDRtD (n1) Art 2 (3).

distributed between urban and rural communities in Timor-Leste despite the progress made in education and healthcare.

A public consultation on Guidelines for Timor-Leste Content in oil and gas contracting was conducted in 2007 by Timor-Leste's Ministry of Natural Resources, Minerals and Energy Policy. The preamble of the draft[320] of this law defined local content as a 'mechanism introduced to stimulate the development of local suppliers of goods and services and the Timor-Leste economy'. While public consultations were carried out, these guidelines have never been completed to date. Thus, Timor-Leste has no specific Local Content law.

However, other national laws in Timor-Leste show that it is possible to implement this treaty provision. National laws that support the local content commitment in the 2018 treaty are: Decree-Law No. 18/2020 of 13 May on Onshore Petroleum Operation,[321] which is the second amendment to Law of 13/2005 of the Petroleum Act, Production Sharing Contract model, and Private Investment Law No. 15/2017. These national laws aim to provide a legal framework for petroleum corporations or contractors to develop petroleum resources that bring benefits to Timor-Leste and its people. These laws require contractors to give preference in employment to nationals of Timor-Leste, to promote their professional training, and to obtain goods and services from supplier companies based in Timor-Leste. This can be seen in the 2019 annual

[320] Draft of Decree Law /2007 on Policy and Guidelines for Administration and Monitoring of Timor-Leste Content (Democratic Republic of Timor-Leste).

[321] The new statute applies to all petroleum operations carried out in respect of onshore resources under the Petroleum Activities Law No. 13/2005 (n115).

Timor-Leste Local Content Performance[322] within the Timor-Leste jurisdiction area. It shows significant local participation in the supply chain of goods and services in petroleum sectors, as well as employment and training opportunities for Timor-Leste nationals and permanent residents. This is done while ensuring occupational health and safety requirements for petroleum activities.[323] In its own annual report,[324] the National Authority of Petroleum and Minerals (ANPM) disclosed that, during 2019, there was an overall increase of thirteen Timor-Leste nationals' full-time employment positions as a result of the successful implementation of training and career progression highlights in the Bayu-Undan Consolidated Local Content Plan.[325] Evidence provided in the ANPM annual report strongly suggests that some JPDA workers were residents of Timor-Leste. In addition, various training and competency development programmes were offered to Timor-Leste nationals, as well as engagement with local suppliers.[326] Thus, it can be concluded that the fair distribution of benefits element of the RtD is incorporated under the 2018 Treaty, and national laws support this provision.

4.4.4 Permanent Sovereignty over Natural Resources

The PSNR element of the RtD is incorporated under this Treaty. This subsection also evaluates the environmental protection that States are required to provide.

[322] Autoridade Nacional do Petroleo e Minerais Timor-Leste (English: National Petroleum and Minerals Authority) 'Annual Report' (Autoridade Nacional do Petroleo e Minerais 2019) 44.
[323] Ibid 44.
[324] Ibid 50.
[325] Ibid 50-57.
[326] Ibid.

4.4.4.1 Environmental Protection

It is important to note that the 2018 Treaty considers the environment of the Contracting Parties of this Treaty. This can be identified in Article 6 (3n) of the 2018 Treaty,[327] which states that the Designated Authority shall have the power and function to issue regulations and have a contingency plan to fight against pollution to protect the marine environment in the Special Regime Area. It can be argued that this article refers to regulations or environmental laws that require environmental monitoring and assessments, such as EIAs. As already mentioned in section 4.2.4.1, Timor-Leste has national laws that are conducive to the environmental monitoring and assessments required in the TST (2002) and this Treaty.

For instance, Decree Law 5/2011 on Environmental Licensing,[328] Decree Law 26/2012 on Environment,[329] and Law No. 13/2005 on Petroleum Activities are laws that require environmental monitoring and assessment, as well as compensation for environmental damage. In 2019, the National Parliament of Timor-Leste approved a second amendment to the Petroleum Act[330] (Law No. 13/2005 on Petroleum Activities), which added provisions to the 2018 Treaty that superseded the TST (2002), as well as provisions on the Decree Law on Offshore Petroleum Operations, and the draft Decree Law on Onshore Petroleum Operations. This Decree Law 18/2020[331] on Onshore Petroleum Operations was enacted in May 2020. Its objective is 'to regulate Petroleum Operations in respect of Onshore Petroleum resources

[327] 2018 Treaty (n2), Art 6 (3n).
[328] Decree Law No. 5/2011 (n123).
[329] Decree Law No. 26/2012 on Environment (n159) Arts 13, 16.
[330] Democratic Republic of Timor-Leste Law No. 1/2019 on Petroleum Activities.
[331] Decree Law No. 18/2020 (n305).

pursuant to Article 31 of the Petroleum Activities Law'.[332] Articles 140, 141, and 142 of Decree Law 18/2020[333] also cite EIAs that are required for petroleum operations. However, the EIA that took place in 2021 in Ainaro near the Manufahi municipality in Timor-Leste was criticised by La'o Hamutuk, who highlighted various concerns. They stated that the EIA and Environmental Management Plan consultations were rushed and lacked the time for a thorough analysis of 800 pages of documents. Furthermore, they did not include FPIC. The organisation also noted that the environmental consultant, the project proponents, and regulators lacked experience with oil drilling on land. Moreover, the assessment should have encompassed the entire project cycle and not just the impacts of the test. Additionally, many environmental and social impacts were not comprehensively analysed, while conflicts of interest existed between the regulators and project proponents, such as Timor resources.[334] These criticisms from La'o Hamutuk show that Timor-Leste still lacks an adequate, experienced workforce, and the implementation of EIA still requires improvement.

Consequently, this section indicates that the PSNR-related provision is indeed incorporated in the 2018 Treaty, and there are national laws that are conducive to the 2018 Treaty provisions. Although the 2018 Treaty's provisions have been implemented, the implementation of the EIA, which ensures that activities within

[332] Ibid.

[333] Ibid.

[334] La'o Hamutuk, 'La'o Hamutuk submission to the National Petroleum and Minerals Authority (ANPM) regarding the Environmental Impact Statement and Environment Management Plan for exploratory oil drilling in PSC area TL-OT-17-09' *(Lao Hamutuk,* 2021) LHSubANPMEnvLicenseRusaWell13Sep2021enFinal (laohamutuk.org) accessed 01 February 2023.

Timor-Leste's jurisdiction and control do not cause damage to the environment of its people, is still weak.

4.4.5 Duty of Cooperation

The duty of cooperation element of the RtD in the context of an intra-State relationship is finally incorporated under the 2018 Treaty. It can be argued that this Treaty does cite activities that aim to reduce poverty, reduce inequalities, implement fundamental rights, and promote sustainable development. In other words, this Treaty takes into account the measures that the Contracting States can undertake to offer benefits aimed at alleviating the poverty of the people of Timor-Leste and helping them to achieve development, including human and economic development. These measures are the incorporation of a local content plan under Annex B: Article 14[335] and poverty alleviation programmes.

4.4.5.1 Local Content Plan

Annex B, Article 14 of the 2018 Treaty[336] requires the Greater Sunrise contractor to set out its local content plan to be included as part of the development plan and decommissioning plan.[337] This local content plan shall contain local commitments such as the following:

> (a) improve Timor-Leste's workforce and skills development and promote employment opportunities and career progression for Timor-Leste nationals through capacity-building initiatives, training of Timor-Leste nationals, and a preference for the employment of Timor-Leste nationals;
> (b) improve Timor-Leste's supplier and capability development by seeking the procurement of goods and services (including engineering, fabrication, and maintenance services) from Timor-Leste in the first instance and

[335] 2018 Treaty (n2) Annex B: Art 14.
[336] Ibid.
[337] Ibid.

(c) improve and promote Timor-Leste's commercial and industrial capacity through the transfer of knowledge, technology, and research capability.

The objective of the local content plan in the oil and gas industry is to maximise the oil and gas value chain through employment, technology transfer, and acquisition of knowledge. This includes employing nationals, using goods and services locally, improving local skills, and improving local technological capabilities.[338] Thus, having a local content plan is a way of delivering benefits beyond the payment of royalties and taxes. All of these are measures taken by contracting States to provide benefits to their people and help them achieve development. However, to achieve the local content's objectives, existing national laws and regulations must support these objectives.

For instance, Law of 13/2005 of the Petroleum Act, Article 13 (3a) (iii) and (iv) support this local content's commitment. This law requires employment and training to be given to nationals of Timor-Leste,[339] while the procurement of goods and services are to be from suppliers based in Timor-Leste.[340] In fact, oil companies operating in the Timor Sea[341] seek to give preference to the employment of Timor-Leste nationals and permanent residents. For instance, in 2007, around US$60.000/year of contracts were awarded to second-tier suppliers based in Timor-Leste for the Bayu-Undan gas recycle project in the Timor Sea.[342]

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[338] IPIECA (n318).
[339] Law No. 13/2005 (n115) Art 13 (3a) iii.
[340] Ibid Art 13 (3a) iv.
[341] NSEnergy, 'Bayu-Udan' (*Nsenergy Business,* NY) https://www.nsenergybusiness.com/projects/bayu-undan-field/ accessed 20 March 2023.
[342] Michael Warner et. al., 'Learning from AMEC's Oil and Gas Asset Support Operations in the Asia Pacific Region with case-study of the Bayu-Undan Gas Recycle Project, Timor-Leste' (2007) (Overseas Development Institute) IX.

Timor-Leste also uses its Production Sharing Contract model[343] as a basis because, until now, it has no specific law to regulate local content in petroleum activities and other activities. Article 12.1 (a) of the Production Sharing Contract model[344] states that all Contractors must pay attention to the supplier companies based in Timor-Leste regarding their opportunities for the supply of goods and services in all petroleum operations. It can be contended that this is the only JDA that contains references to local content commitments that can help the people of Timor-Leste receive benefits from the oil and gas industry. By doing so, it contributes to alleviating poverty as it helps reduce rates of unemployment in the country.

4.4.5.2 Poverty Reduction

Other measures adopted by the State to provide benefits to its people[345] are poverty alleviation programmes supported by the Government of Timor-Leste, such as the School Meals Coalition Declaration: Nutrition, Health, and Education for all children.[346] The commitment within this Declaration involves the expansion of the national school feeding programme, presently supporting around 290,000 students across Timor-Leste. This is an illustration of a measure taken by a State to eliminate obstacles that can prevent its community or people from having equal opportunities to access food. However, in 2022, the Deputy Minister of State Administration, Lino

[343] Democratic Republic of Timor-Leste, Model Production Sharing Contract under the Petroleum Act, Art 12 (12.1).
[344] Ibid.
[345] People, in this section, refers to both individuals and Indigenous People in Timor Leste.
[346] See: Timor Leste, 'Signing Ceremony of the School Meals Coalition Declaration: Nutrition, Health and Education for all children' (*Timor-Leste,* 2021) http://timor-leste.gov.tl/?p=28864&lang=en&n=1 accessed 20 March 2023; Also see: Care International and Imron (n261).

Torrezao, stated that 'the Government of Timor-Leste has allocated US$15 million in the State Revenue and Expenditure Budget for the school feeding programme, but the amount has not yet met the target'.[347] This was evident in 2019 when the School Feeding Programme was not fully funded (covering 100 days out of 196 effective days), thus highlighting disparities across communities and schools.[348]

Another poverty alleviation programme or measure taken by Timor-Leste to eliminate obstacles for its people to have equal opportunity to access to fair distribution of income is the Pilot Cash Transfer Bolsa da Mae Programme, which was launched by the Ministry of Social and Inclusion in 2021. This programme is for universal coverage targeting pregnant women, children up to 6 years, and children with disabilities.[349] Other measures taken by Timor-Leste to eliminate those obstacles are, for instance, waiving utility bills; providing social security contributions for low-income households for three months; and a cash transfer programme, providing US$100 a month for two months to almost 300,000 households, all during the COVID-19 pandemic.[350]

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[347] Tatoli, 'CITL and Government Discuss the Progress of Implementing the School Feeding Program' *Tatoli* (Dili 14 July 2022) https://en.tatoli.tl/2022/07/14/citl-and-government-discuss-the-progress-of-implementing-the-school-feeding-program/05/#:~:text=Director%20of%20CARE%20International%20Timor,value%20of%20US%24%2026%20million accessed 25 January 2023.

[348] Care International and Imron (n261) 11.

[349] International Labour Organisation, 'Results Achieved: A Social Protection Scheme to Extend Coverage, Enhance Comprehensiveness and/or Increase Adequacy of Benefits Has Been Adopted or Reformed (Step 2)' (*ILO,* 2021) https://www.social-protection.org/gimi/ResultAchieved.action?id=964 accessed 23 January 2023.

[350] International Labour Organisation, 'Timor-Leste' (*ILO,* NY) https://www.social-protection.org/gimi/ShowCountryProfile.action;jsessionid=kr6KJuq-mkzbzLu6MeyH71QjjQh2xvoSBM4L4P08N5EPh5uV8MjL!539423187?iso=TL#:~:text=Government%20priorities,reduction%20of%20poverty%20and%20vulnerability accessed 23 January 2023.

Table 3: Key elements of the RtD under the 2018 Treaty

Key elements of the RtD	Does the 2018 Treaty incorporate the elements of RtD?
Duty of Cooperation (Annex B: Article 14)	Incorporated (expressly) National Laws: Law No. 13/2005 on Petroleum Activities Production Sharing Contract Model
Participation	Not incorporated
Non-discrimination (Annex B: Article 14)	Incorporated (expressly) National Laws: Law No. 13/2005 on Petroleum Activities Decree-Law No. 18/2020 of 13 May on Onshore Petroleum Operations Production Sharing Contract Model Private Investment Law No. 15/2017
PSNR (Article 6 (3n))	Incorporated (expressly) National Laws: Decree-Law 5/2011 on Environmental Licensing Law No. 13/2005 on Petroleum Activities Decree Law 26/2012 on Environment Law 1/2019 on Petroleum Activities Decree-Law No. 18/2020 of 13 May on Onshore Petroleum Operations
Fair distribution of benefits (Article 14 of Annex B)	Incorporated (expressly) National Laws: Decree-Law No. 18/2020 of 13 May on Onshore Petroleum Operations Production Sharing Contract Model Private Investment Law No. 15/2017.

Table 3 shows whether the key elements of the RtD are incorporated under the 2018 Treaty.

Table 4: Evolution of Key elements of the RtD under JDAs in Timor Sea

Key elements of the RtD	TGT (1989)	TST	CMATS	2018 TREATY
Duty of Cooperation (UNDRtD, Article 3 (3); 4 (2))				
Participation (UNDRtD, Article 1 (1); Preamble (para. 2))				
Non-discrimination (UNDRtD, Article 5)				
PSNR (UNDRtD, Article 1; Article 2 (3))				
Fair distribution of benefits (UNDRtD, Preamble (Para. 2); Article 2 (3))				

Table 4 shows the evolution of key elements of the RtD under JDAs in the Timor Sea.

The green boxes show the incorporation of the elements of the RtD in each JDAs.

Table 3 shows that not only are all elements of the RtD only incorporated under the 2018 Treaty but they are also supported by national laws in Timor-Leste. It can be concluded that the 2018 Treaty does explicitly recognise or address the RtD; thus, this demonstrates significant progress by Timor-Leste in incorporating all the elements of the RtD into this Treaty.

4.5 Evolution of the Elements of the RtD in the Joint Development Agreements in Timor-Leste

Based on the analysis of the elements of the RtD under the intra-State relationship in previous sections, this section summarises how the elements of the RtD described in Chapter 2, section 2.5, are incorporated under these JDAs and how they have progressed through each treaty.

4.5.1 Participation

Measures adopted under the participation element of the RtD identified in this chapter are to promote effective consultation and to ensure FPIC.

4.5.1.1 Measures to Promote Effective Consultation

The participation element of the RtD was not incorporated under the TGT (1989) in the context of an intra-State relationship. The TGT (1989) lacked references to the participation of the human person and peoples or communities (comprising the entire population of Indonesia and the people of Timor-Leste) in the consultation process for formulating the TGT (1989) or in the creation and implementation of policies for which Indonesia held responsibility and duty. During Suharto's regime, the concept of participation was viewed as a threat. Thus, there is no evidence of national development policies or laws that incorporate this element of the RtD.

Likewise, the TST (2002) did not contain any provision acknowledging the participation of the people of Timor-Leste in the formulation of the Treaty. However, the participation element is present in Timor-Leste's Constitution, its National Development Plan, and Timor-Leste's Decree Law No. 26/2012 on Environment. Furthermore, the 2018 Treaty also fails to refer to the participation of the human person and peoples or communities in formulating the 2018 Treaty or national development policies. Nevertheless, there is a participation element embedded in the consultation process for the legislation regulating onshore petroleum operations, which resulted in the enactment of Decree-Law 18/2020 in May 2020. Although there was participation in drafting this law, the consultation process of this decree-law was criticised by La'o Hamutuk, who argued that people were not adequately informed in advance and the local community's concerns were not sufficiently addressed.

4.5.1.2 Measures to Ensure FPIC

There was no provision under the TGT (1989) regarding the participation element of the RtD or the consultation of the human person and peoples or communities of Indonesia (including people of Timor-Leste) in formulating the TGT (1989). After the signing of the TST in 2002, national laws did not specifically refer to FPIC. This suggests that these national laws were inadequate for enabling the implementation of the participation element of the RtD. Evidence indicates that the process of public consultations carried out in Timor-Leste during TST (2002) was, in fact, severely flawed.

Similarly, evidence shows that FPIC was not applied during the formulation of the 2018 Treaty. This illustrates that, despite the existence of national development policies and laws designed to facilitate the implementation of the participation

element, the actual implementation of this element appears to be inadequate, mirroring the shortcomings observed during the TST (2002). Thus, the absence of the participation element of the RtD in any of the Treaties represents a serious flaw. This situation raises significant concerns, as it undermines the principle of self-determination, denying the human person and peoples or communities the right to participate in decisions that affect them. Without their consent, their voices and perspectives may be ignored or dismissed, leading to decisions that do not adequately address their needs or concerns.

Consequently, the participation element of the RtD has not progressed through the Treaties. This ongoing situation may be attributed to the historical context of Timor-Leste, which has experienced colonisation, political instability, and conflict. These challenges have led to a prioritisation of other concerns, such as economic development, rather than emphasising participatory decision-making.

4.5.2 Non-Discrimination

Measures adopted under the non-discrimination element of the RtD identified in this chapter are the promotion of equal rights and the promotion of positive actions to increase the participation of the people of Timor-Leste.

4.5.2.1 Promotion of Equal Rights

In the context of intra-State relationships, the non-discrimination element was not incorporated under the TGT (1989). As stated in section 4.2.2, at the time of this Treaty, Suharto was the President of Indonesia, leading an authoritarian regime. Although the Constitution of Indonesia enshrined the non-discrimination element, Suharto's regime violated the human rights of many individuals, peoples or

communities of Indonesia, including those in Timor-Leste. These individuals, peoples or communities, especially the vulnerable and minority groups, were subjected to discrimination. Regarding the TST (2002), it can also be asserted that the non-discrimination element was not incorporated. However, this element is referenced in Timor-Leste's Constitution, stipulating that women and men have the same rights and duties in all areas of political, economic, social, cultural, and family life. Laws such as Law on the Elections of the National Parliament, Law 2/2004 on Suco elections, the Village (Suco) Law 9/2016, Decree Law 3/2016 on Municipality Administration, and Decree-Law on General Regime for Public Officers Career Promotion show that the increased creation of policy and equality initiatives have represented a positive improvement in Timor-Leste. However, although these laws exist, their implementation has proven inadequate. In the 2018 Treaty, the non-discrimination element of the RtD is finally incorporated. In addition, the national laws mentioned in section 4.3.3 support the relevant provisions of the 2018 Treaty.

4.5.2.2 Promotion of Positive Actions

Timor-Leste has legal obligations to respect, protect, and fulfil the human rights of its women. To support this commitment, several national laws have been passed: the 2006 Law on the Elections of the National Parliament (as amended in 2011), Law 2/2004 on Suco elections, Village (Suco) Law 9/2016, Decree Law 3/2016 on Municipality Administration, 2017 Inclusive Education Policy, and Decree-Law on General Regime for Public Officers Career Promotion. Despite the increased creation of policy and equality initiatives that have brought some positive improvement in Timor-Leste, the implementation of these laws remains poor.

This is the only treaty that incorporates the non-discrimination element of the RtD. Positive discrimination is addressed in Article 14 (a) of Annex B under the 2018 Treaty, which gives preferences for the employment of people of Timor-Leste. It can be contended that the national laws and policies are strong enough to enable the implementation of Article 14 (a) of Annex B under the 2018 Treaty.

Although the participation element of the RtD has not evolved through the Treaties and the non-discrimination element of the RtD was not expressed under the TGT (1989), the TST (2002) or CMATS (2006), the non-discrimination element is incorporated under the 2018 Treaty. Furthermore, there is positive discrimination in the 2018 Treaty and supported by national laws such as Law No. 13/2005 on Petroleum Activities, Decree-Law No. 18/2020 of 13 May on Onshore Petroleum Operations, Production Sharing Contract Model, and Private Investment Law No. 15/2017.

4.5.3 Fair Distribution of Benefits

The fair distribution of benefits element of the RtD was incorporated under the TGT (1989), the TST (2002), CMATS (2006) and the 2018 Treaty. Measures adopted under this element of the RtD identified in this chapter were to ensure revenue sharing and to monitor human rights obligations of the private sector (for instance, MNCs, State-owned oil companies, and Joint Venture).

4.5.3.1 To Ensure Revenue Sharing

During the period of the TGT (1989), economic growth contributed to a more equitable distribution of benefits, as Suharto set aside a portion of oil revenue for the construction of new schools and focused on the provision of healthcare services

to the poor. Although the revenue from oil and gas helped economic growth in Indonesia, poverty was more widespread in Timor-Leste than in any other province of Indonesia. In other words, although there were national programmes to redistribute oil revenues across Indonesian regions, their implementation was inadequate. In contrast, during the TST (2002), revenues from oil and gas were distributed for the development of the human person and peoples or communities of Timor-Leste through the Petroleum Fund. Nonetheless, poverty levels remained high, educational attainment was low, and the health sector continued to face challenges.

Regarding the 2018 Treaty, Article 14 of Annex B[351] requires the new Greater Sunrise regime to set out its local content, which can help ensure a more equitable distribution of the benefits through State support for local communities. Although Timor-Leste does not have a Local Content Law, other national laws in Timor-Leste indicate that it is possible to implement this Treaty provision. These are Decree-Law No. 18/2020 of 13 May on Onshore Petroleum Operation,[352] which is the second amendment to Law of 13/2005 of the Petroleum Act, Production Sharing Contract model[353] and Private Investment Law No. 15/2017. These provisions do strongly incorporate the fair distribution of benefits element of the RtD, and these national laws are strong enough to facilitate the implementation of these Treaty provisions. The analysis also shows that the implementation of these laws is clear and is working.

[351] 2018 Treaty (n2) Annex B, Art 14.

[352] The new statute applies to all petroleum operations carried out in respect of onshore resources under the Petroleum Activities Law 13/2005 (n115).

[353] Model Production Sharing Contract under the Petroleum Act (n343) Art 12 (12.1).

4.5.3.2 To Monitor Human Rights Obligations of Private Sectors

In the TGT (1989), the fair distribution of benefits element of the RtD was incorporated into the Treaty. However, there were no national laws conducive to this provision. The provisions that incorporate the obligation of the private sector to monitor human rights in the TST (2002) can be found in Annex D, Section 2 and Article 10 (d) of the TST (2002). These provisions placed obligations on private companies/contractors to respect the human rights of individuals and peoples or communities. Decree-Law 5/2011 on Environmental Licensing,[354] Decree Law 26/2012 on Environment,[355] and Law No. 13/2005 on Petroleum Activities were conducive to these Treaty provisions. This shows that Timor-Leste had strong national laws that could enable the implementation of those Treaty provisions. However, evidence indicates that their implementation was ineffective. The 2018 Treaty also incorporates an obligation on private sectors to monitor human rights, such as Article 6 of the 2018 Treaty.[356] Decree-Law 5/2011 on Environmental Licensing,[357] Decree Law 26/2012 on Environment,[358] and Law No. 13/2005 on Petroleum Activities are conducive to the 2018 Treaty's provision, yet the implementation of these laws is still weak.

The TST (2002), the CMATS (2006), and the 2018 Treaty incorporate the element of fair distribution of benefits, which is supported by national laws in Timor-Leste such

[354] Decree Law No. 5/2011 (n123), Chapter V: Protection of Traditional Customs And Rights, Art 15(2).
[355] Decree Law No. 26/2012 on Environment (n159) Arts 6 (5), 60 (1), 62 (3 and 4) and 63 (2).
[356] 2018 Treaty (n2) Art 6.
[357] Decree Law No. 5/2011 (n123).
[358] Decree Law No. 26/2012 on Environment (n159) Arts 13 and 16.

as Law No. 13/2005 on Petroleum Activities, Decree Law 26/2012 on Environment, Law No. 13/2005 on Petroleum Activities, Decree-Law No. 18/2020 of 13 May on Onshore Petroleum Operations, Production Sharing Contract Model, and Private Investment Law No. 15/2017.

4.5.4 Permanent Sovereignty over Natural Resources

There is indeed evidence to show that the PSNR element of the RtD is implemented in JDAs at an intra-State level.

4.5.4.1 Implementation of the PSNR Element at intra-State Level

The PSNR element for the realisation of the RtD was incorporated under the TGT (1989) in Article 8 (paragraphs a and j) regarding the functions of the Joint Authority and section 5.2 on Rights and Obligations of the Parties of TGT (1989). For Article 8, national laws, such as Act 4/1982 on the Basic Provision for the Management of the Living Environment, and on the EIA, such as Indonesian Government Regulation 51/1993, were conducive to these TGT (1989) provisions. Section 5.2 on Rights and Obligations of the Parties of TGT (1989), which stipulates that contractors have an obligation to pay for the costs associated with pollution, and Act 4/1982 on the Basic Provision for the Management of the Living Environment were conducive to the TGT (1989) provision. Therefore, these provisions strongly incorporated the PSNR element of the RtD on EIAs and compensations. It can be asserted that the national laws were strong enough to enable the implementation of these Treaty provisions. However, evidence shows that the implementation of these national laws was weak. Similar to the TGT (1989), the TST (2002) incorporated the PSNR element of the RtD. Article 10 on the Marine Environment and Annex C under Article 6 of TST were in line

with this principle of PSNR. These provisions strongly incorporated the PSNR element of the RtD. In addition, the Decree Law 5/2011 on Environmental Licensing[359] and the Decree Law 26/2012 on Environment[360] were conducive to these provisions, and they were strong enough to enable the implementation of the Treaty provisions. However, evidence demonstrates that the implementation of these national policies and laws was ineffective.

The principle of PSNR is incorporated in Article 6 (3n) of the 2018 Treaty. The Decree Law 5/2011 on Environmental Licensing,[361] the Decree Law 26/2012 on Environment,[362] and Law No. 13/2005 on Petroleum Activities are laws that require environmental monitoring and assessment, as well as compensation for environmental damage. In addition, Decree-Law 18/2020 on Onshore Petroleum Operations,[363] which is the second amendment to the Petroleum Act,[364] is conducive to Article 6 of this Treaty. Consequently, this Treaty provision robustly incorporates the PSNR element of the RtD, and these national laws are strong enough to facilitate the implementation of the Treaty provision. However, evidence shows that the implementation of EIA is still weak.

The principle of PSNR has always been incorporated under the TGT (1989), the TST (2002), CMATS (2006), and in the latest treaty, the 2018 Treaty. This element is also supported by national laws in Timor-Leste.

[359] Decree Law No. 5/2011 (n123).
[360] Decree Law No. 26/2012 on Environment (n159) Arts 13 and 16.
[361] Decree Law No. 5/2011 (n123).
[362] Decree Law No. 26/2012 on Environment (n159) Article 13 and 16.
[363] Decree-Law No. 18/2020 (n305).
[364] Law No. 1/2019 on Petroleum Activities (n330).

4.5.5 Duty of Cooperation

In this thesis, the duty of cooperation from an intra-State perspective is defined as measures taken by the State to eliminate obstacles that can prevent its community from having equal opportunity to access basic resources, education, health services, food, housing, employment, and the fair distribution of income. Measures adopted under this element of the RtD identified in this chapter include the formulation of national policies on education, healthcare, and poverty alleviation; the formulation of national development policies (NDP and SD of Timor-Leste since the TST in 2002), and the promotion of Local Content Plans (2018).

4.5.5.1 Formulation of National Policies on Education

Although the duty of cooperation of the RtD was not incorporated in the TGT (1989), during the TGT (1989), Indonesia offered free compulsory education and, in 1989, the Government of Indonesia enacted Law No. 2/1989 Education Act, which aimed, among others, to increase the standard of living of the Indonesian people. Similar to the TGT (1989), the duty of cooperation element of the RtD was not incorporated under the TST (2002). However, Timor-Leste has also provided free education and healthcare services since its independence in 2002, which is cited under Timor-Leste's Constitution, Article 57 (2) and Article 59 (1).

4.5.5.2 Formulation of National Policies on Poverty Alleviation

During the time of the TGT (1989), the Suharto regime launched poverty alleviation programmes aiming to improve the income of the poor, provided temporary job opportunities, and distributed food, education scholarships, health insurance and affordable healthcare services for the poor. However, these programmes did not

speed up poverty reduction in Indonesia as there was an implementation gap due to the programmes being advantageous only to rich rather than poor people. Indeed, comparing Timor-Leste under Portuguese colonial rule to Timor-Leste under Indonesian occupation, the country improved its education and healthcare sectors while under Indonesian occupation. Nevertheless, Timor-Leste was classed as one of the poorest provinces of Indonesia; there was a big gap between poverty in the country and other parts of Indonesia. It can be contended that, although there were national development policies, laws, and poverty alleviation programmes during the TGT (1989) to facilitate Timor-Leste's people and community to have equal opportunity to access basic resources, education, health services, food, housing, employment, and the fair distribution of income, the problem was the implementation of these policies, laws, and poverty alleviation programmes, which failed to reduce poverty or increase people's living standards.

Following Timor-Leste's independence in 2002 and the signing of the TST (2002), the Timor-Leste government initiated various programmes and policies aimed at alleviating poverty. For instance, among others, the School Feeding Programme, cash transfer schemes for older people and people with disabilities, benefits for veterans of the independence struggle and Bolsa da Mãe, the National Food Security Policy, National Programme for Village Development, school grants policy, the Health Policy Framework, and MDGs Suco Programme. Despite the provision of free education[365] and healthcare in Timor-Leste's Constitution[366] and all these programmes, poverty remained high. Low levels of education and problems in the healthcare sector, such

[365] Constitution of Timor-Leste (n125) Art 59 (1).
[366] Ibid Art 57 (2).

as the low levels of transport infrastructure, patient transport, hospital coverage, and geographic inaccessibility, posed particular challenges. There were also continuing gaps between urban and rural areas in terms of access to education and healthcare. The problem lies in the implementation of these national policies/laws and programmes.

4.5.5.3 Formulation of National Development Policies

After Timor-Leste's independence, in the same year the TST was signed, the Government of Timor-Leste launched its first NDP.[367] Then, in 2010, Timor-Leste released its SDP, built on the foundations laid down in 2002. The NDP aimed to reduce poverty in all sectors and regions of the nation, as well as to promote economic growth.[368] In addition, the SDP spanning from 2011 to 2030 contains strategic policies designed to achieve the collective vision of the Timorese people for a peaceful and prosperous nation by 2030.

Finally, the 2018 Treaty is the only JDA in Timor-Leste that incorporates the duty of cooperation under an intra-State relationship. The Treaty cites activities that show cooperation between the State and its communities in Article 14 of Annex B. This article requires contractors to employ Timor-Leste nationals, use goods and services locally, and improve local skills and the local technological capabilities of Timor-Leste. This demonstrates how the country is cooperating with its communities. It can also be argued that this is the only treaty that strongly incorporates the duty of cooperation element of the RtD. In addition, the Law of 13/2005 of the Petroleum

[367] International Monetary Fund (n102).
[368] Ibid 1.

Act and the Production Sharing Contract model are strong enough to enable the implementation of Article 14 of Annex B.

Thus, it can be argued that the duty of cooperation element of the RtD has evolved through the bilateral maritime boundary treaties. This element of the RtD was not incorporated under the TGT (1989), the TST (2002) and CMATS (2006). However, it is expressly incorporated under the 2018 Treaty and is supported by national laws in Timor-Leste, such as Law of 13/2005 of the Petroleum Act and the Production Sharing Contract model.

4.6 Conclusion

This chapter concludes that the elements of the RtD have indeed progressed through these joint development treaties, and the 2018 Treaty has incorporated nearly all those elements of the RtD, with the exception of participation. Thus, it can be argued that the 2018 Treaty has successfully integrated most elements of the RtD. The analysis also suggests that previous JDAs have not consistently applied the elements of RtD. One can argue that these JDAs would have been more effective in contributing to the RtD of the Timorese people if all elements of the RtD had been applied in the treaties. Thus, lessons have been learnt from previous JDAs.

Furthermore, the people of Timor-Leste would be more actively involved if the participation element of the RtD were incorporated into the JDAs and if national policies and laws were effectively implemented. Consequently, participation should be inclusive and without discrimination, meaning that all human person/individuals, peoples or communities or communities including minorities, women, children,

people with disabilities, and Indigenous People, should be involved in the creation and implementation of national policies that affect their well-being.

By applying the fair distribution of benefits element of the RtD, Timor-Leste could fairly distribute the benefits or revenues obtained from the exploitation of oil and gas to improve its entire population's well-being. This analysis indicates that the revenues of oil and gas have not been fairly allocated between urban and rural communities. Despite the progress made in education and healthcare since the signing of the TST in 2002, improvement has been slow. However, as the 2018 Treaty is the only treaty that incorporates this element of the RtD, it is hoped that progress can be accelerated.

Previous and recent JDAs have included the principle of PSNR, which is a positive indication of Timor-Leste's commitment to environmental protection. Timor-Leste has a duty to ensure that activities within its jurisdiction and control do not cause damage to the environment of its community, with the aim of improving the well-being of its people. Indeed, progress has been made since the signing of the TST (2002), and the Government of Timor-Leste is constantly reviewing its progress. Timor-Leste has made significant progress in education and the healthcare sectors since the signing of the TST (2002) compared to the period when the TGT (1989) was in force. As an independent State, Timor-Leste can finally manage its own natural resources and allocate its revenues from oil and gas to support its own development.

In regard to the duty of cooperation element of the RtD, applying this element of the RtD would help Timor-Leste create national development policies that ensure equal opportunity to access basic resources, such as education, health services, food,

housing, employment, and fair distribution of income. While there are national development policies in place, progress remains slow.

Although some elements of the RtD were not incorporated under the Treaties in some cases, the Government of Indonesia (during the TGT (1989)) and the Government of Timor-Leste (since the inception of the TST in 2002) have formulated their own development policies. That being said, the slow progress could suggest that these development policies suffered from weak implementation and a lack of political will, with governments prioritising other concerns over the RtD of their people. Consequently, the 2018 Treaty is an exemplary Treaty which has included the elements of the RtD and, thus, can serve as a template for crafting other policies at a national level with a focus on development. Furthermore, emphasising effective implementation is crucial.

With this in mind, the next chapter, Chapter 5, will provide recommendations and a roadmap for Timor-Leste to protect the RtD of its people and how to manage the exploration and exploitation of its oil and gas successfully. It will also suggest how national laws and future international instruments should be developed or strengthened. In addition, this chapter will assess whether the 2018 Treaty can be used as an example for other developing States facing similar situations or ongoing maritime boundary disputes, such as the South China Sea dispute between, on the one hand, the People's Republic of China and, on the other, Taiwan, the Philippines, Vietnam, Malaysia, and Brunei.

CHAPTER 5: RECOMMENDATIONS AND THE WAY FORWARD

5. Introduction

This chapter provides recommendations and the way forward for Timor-Leste on how the 2018 Treaty[1] can be used to support the realisation of the Right to Development (RtD) of Timor-Leste and its people. To achieve this, this chapter will first identify the key findings of Chapters 3 and 4; outline the successes and challenges of the 2018 Treaty for inter- and intra-State relationships, highlight the benefits and barriers of Timor-Leste's national legal regime; and provide potential solutions for Timor-Leste to overcome the challenges and barriers identified in this thesis. Finally, it will assess whether the 2018 Treaty, with a focus on the RtD, can serve as a blueprint for other developing States facing similar challenges or grappling with unresolved maritime boundary disputes.

This thesis has evaluated whether the 2018 Treaty's legal provisions contribute to the realisation of the RtD of Timor-Leste and its people. By analysing the previous Joint Development Agreements (JDAs) alongside the 2018 Treaty, this thesis argues that the primary aim of the 2018 Treaty is to foster the development of Timor-Leste, with a lesser focus on achieving the key elements of RtD for the people of Timor-Leste. While the 2018 Treaty incidentally incorporates the elements of the RtD,[2] it serves as an example of how the RtD criteria can be fulfilled within Timor-Leste in

[1] Treaty Between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea (adopted 6 March 2018) [Hereinafter 2018 Treaty].

[2] See Chapter 2, section 2.5.

alignment with the 2018 Treaty. Therefore, even though the primary aim of the 2018 Treaty may not have been primarily designed to attain the elements of the RtD, it can still be used to achieve the RtD.

With this in mind, Chapters 3 and 4 demonstrated that the 2018 Treaty generally supports the realisation of the RtD of Timor-Leste and its people, and the Treaty provisions are supported by national development policies and laws. However, the implementation of these national development policies and laws remains insufficient. As stated in Chapter 1, section 1.1., by no means does this thesis assert that the 2018 Treaty will solve all the problems that Timor-Leste is facing, but it will at least help improve Timor-Leste's development through the revenue generated from its natural resources, such as oil and gas.

5.1 Findings

Using the RtD as the conceptual framework, this research assessed whether the elements of the RtD are incorporated in the 2018 Treaty. Thus, this section provides the key findings of the analysis from Chapter 3 (inter-State relationship) and Chapter 4 (intra-State relationship).

5.1.1 Inter-State: Key Findings from Chapter 3

The analysis of the inter-State relationship shows that the 2018 Treaty is the only treaty that incorporates all elements of the RtD, which means that it can help to ensure that future national laws and policies consider the RtD of Timor-Leste and its people. Regarding the participation element of the RtD, both Australia and Timor-Leste were part of this negotiation, and both States were able to influence the terms of the Treaty. Nevertheless, participation in the negotiation of this Treaty did not

occur on a level playing field, given that Australia, as a developed State, possesses greater economic and political power, access to resources, and a more advanced infrastructure compared to Timor-Leste, a State with relatively limited economic and political power, lacking in human resources. It can be claimed that Australia demonstrated a genuine willingness to engage in dialogue and negotiations. Australia and Timor-Leste followed legal principles that govern the determination of maritime boundaries, such as the UNCLOS (1982).[3] Additionally, the involvement of independent foreign negotiators with expertise in maritime negotiations, along with national negotiators and advisors who had a deep understanding of their State's interests, priorities, and legal positions, seems to have played a significant role in the negotiation process.[4]

Furthermore, the participation element can be identified in Articles 7, 8, 15 and 16, and Annex B: Article 7 under the 2018 Treaty. These provisions show that the participation of both States is essential for the exploitation of oil and gas in the Timor Sea and place a duty on both States to participate in exercising their rights until the end of the Special Regime and ensure that all decisions of the governance board are made by consensus.[5] This indicates that there is a participation element of the RtD in this Treaty, although limited to States. The 2018 Treaty includes provisions for positive discrimination, allowing a more significant number of representatives from

[3] United Nations Convention on the Law of the Sea (adopted on 10 December 1982, entered into force on 16 November 1994) 1833 UNTS 397 (Hereinafter UNCLOS 1982).

[4] The legal representatives were foreign nationals. See: Permanent Court of Arbitration, 'Timor-Sea Conciliation (Timor-Leste v Australia)' (*PCA,* NY) < https://pca-cpa.org/cn/cases/132/> accessed 19 December 2024.

[5] 2018 Treaty (n1) Art 7 (6).

Timor-Leste compared to Australia. This arrangement aims to ensure effective oversight over strategic matters and to facilitate consensus-based decision-making. It can also be argued that the reason for including a higher number of representatives from Timor-Leste than from Australia is justified by the fact that Timor-Leste currently holds a larger share of the Greater Sunrise than Australia. Thus, the non-discrimination element of the RtD is incorporated under the 2018 Treaty.

The principle of fair distribution of benefits is also incorporated under the 2018 Treaty as both States agree to share the upstream revenue or the Greater Sunrise field on a 70:30 basis in favour of Timor-Leste, provided the pipelines go to Timor-Leste,[6] or 80:20 in the event of the oil and gas being piped to and processed in Australia. The distribution of benefits is fair as both States voluntarily signed the 2018 Treaty and equitable as both States negotiated the permanent maritime boundary based on the Equidistance/Relevant Circumstances approach, which is emphasised under Articles 57, 76, and 82 of the UNCLOS 1982,[7] , an approach that should have been used between Australia and Indonesia under the Timor Gap Treaty (TGT 1989).[8] In addition, incorporating Article 14 of Annex B under the 2018 Treaty, which allows Timor-Leste to decide freely on how its natural resources are to be exploited for the purposes of its national development and the well-being of its people, shows that the right to Permanent Sovereignty over Natural Resources (PSNR) of Timor-Leste is

[6] Ibid Annex B: Greater Sunrise Special Regime, Art 2 (2). See also: Clive Schofield and Bec Strating, 'What's next for Timor-Leste's Greater Sunrise?' (*The Diplomat,* 3 April 2018) https://thediplomat.com/2018/04/whats-next-for-Timor-Lestes-greater-sunrise/ accessed 02 December 2019.
[7] UNCLOS (1982) (n3).
[8] See Chapter 3, section 3.2.

recognised. This is an element that was not incorporated into previous joint development treaties. The concept of PSNR is rooted in the principle of State sovereignty, which asserts a nation's independence and right to self-determination. By exercising control over its resources, Timor-Leste can independently make decisions that serve its best interest, free from any undue external influence. This enables Timor-Leste to effectively control and manage its oil and gas reserves and harness the economic benefit for the well-being of its people. Moreover, having PSNR allows Timor-Leste, as a sovereign State, to develop its economy by generating revenue from its natural resources, creating employment opportunities, and contributing to economic growth.

Furthermore, as stated earlier, signing the 2018 Treaty indicated that Australia was willing to cooperate with Timor-Leste after a long decade of dispute. Both States showed their duty to cooperate with each other and foster a relationship based on mutual respect, as well as a willingness to collaborate to exploit oil and gas in the Timor Sea. Australia, as a developed State, has finally recognised its duty to ensure development and eliminate obstacles to development[9] in Timor-Leste, as well as its duty to take 'sustained action to promote more rapid development of developing countries',[10] such as Timor-Leste. Signing this Treaty not only reveals both States' duty of cooperation but also Timor-Leste's commitment and willingness (through the development and operation of the Greater Sunrise, as provided by Article 14 of

[9] United Nations Declaration on the Right to Development (Adopted 4 December 1986 UNGA Res A/Res/41/128) [Hereinafter UNDRtD] Art 3 (3).
[10] Ibid Art 4 (2).

Annex B) to take responsibility as a sovereign and developing State and to cooperate and bring benefits to its communities.

5.1.2 Intra-State: Key Findings from Chapter 4

While the analysis of the inter-State relationship shows that the 2018 Treaty incorporates all elements of the RtD, the analysis of the intra-State relationship shows that the 2018 Treaty incorporates most elements of the RtD, except for the principle of participation. The participation element of the RtD is not incorporated under the 2018 Treaty, nor was it in any previous JDAs on the Timor Sea. Although the participation of individuals and people in consultation is recognised in Timor-Leste, for instance, in the formulation of Decree-Law 18/2020 in May 2020 and other national development policies, there is no reference to participation in the drafting of the 2018 Treaty. However, such participation was carried out without Free, Prior, and Informed Consent (FPIC) (although the examples given were outside of the legal obligations under the Timor Sea Treaty/TST (2002)).[11] This implies that individuals and communities were not provided with adequate prior information. Consequently, it becomes evident that while the participation element is emerging in Timor-Leste, there is a need to enhance its implementation. It would have been better to incorporate this element (i.e. participation with FPIC) in the 2018 Treaty. For instance, consulting the Timorese people to gather their opinions and perspectives on the 2018 Treaty would have been beneficial.

[11] Timor Sea Treaty between the Government of East Timor and the Government of Australia (adopted 20 May 2002, entered into force 12 April 2003), 2258 UNTS 3 [Hereinafter Timor Sea Treaty/TST 2002].

The non-discrimination element of the RtD is incorporated under the 2018 Treaty, which is unique in this aspect. Positive discrimination is indeed found in Article 14 (a) of Annex B under the 2018 Treaty, which gives preference to the employment of people of Timor-Leste. National laws and policies also appear to be solid enough to enable the implementation of Article 14 (a) of Annex B under the 2018 Treaty.

In terms of the fair distribution of benefits element of the RtD, this element is incorporated under Article 14 of Annex B of the 2018 Treaty,[12] which requires the new Greater Sunrise regime[13] to set out its local content, which can help distribute the benefits through support from the State to its communities. Although Timor-Leste does not have a Local Content Law, other national laws in the country show that it is possible to implement this Treaty provision. For instance, Decree-Law No 18/2020 of 13 May on Onshore Petroleum Operation,[14] the second amendment to Law 13/2005 of the Petroleum Act,[15] the Production Sharing Contract model,[16] and Private Investment Law No 15/2017[17] are conducive to the 2018 Treaty provision. Thus, Article 14 of Annex B strongly incorporates the fair distribution of benefits element of the RtD, and these national laws are strong enough to enable the implementation of

[12] 2018 Treaty (n1) Annex B, Art 14.

[13] TST (2002) (n11), Annex E under Art 9 (b): Unitisation of Greater Sunrise.

[14] The new statute applies to all petroleum operations carried out in respect of onshore resources under Law N$^{o.}$ 13/2005 on Petroleum Activities (Democratic Republic of Timor-Leste) [Hereinafter Law No. 13/2005 on Petroleum Activities].

[15] Ibid.

[16] Model Production Sharing Contract under the Petroleum Act (Democratic Republic of Timor-Leste).

[17] Law No. 15/2017 on Private Investment Article 23 (2c) Chapter IV: Duties of Investors (Democratic Republic of Timor-Leste) [Hereinafter Law No. 15/2017 on Private Investment]

these treaty provisions. The analysis shows that the implementation of these laws is clear and is working.

The principle of PSNR can be found under Article 6 (3n) of the 2018 Treaty and the Decree Law 5/2011 on Environmental Licensing,[18] Decree Law 26/2012 on Environment,[19] Law No 13/2005 on Petroleum Activities, and Decree-Law 18/2020 on Onshore Petroleum Operations,[20] which is the second amendment to the Petroleum Act.[21] This principle imposes a duty on States to ensure that activities within their jurisdiction and control do not cause damage to the environment of their community, with the aim of improving the well-being of their people. It can be argued that individuals and peoples or communities in Timor-Leste can claim their rights from the State when their environment and well-being are negatively affected and that these aforementioned national laws are conducive to the 2018 Treaty provision. Furthermore, Article 6 (3n) of the 2018 Treaty strongly incorporates the PSNR element of the RtD and implies that the national laws are strong enough to enable the implementation of the Treaty provision. However, evidence shows that the implementation of these national laws is weak.

By incorporating Article 14 of Annex B, the 2018 Treaty is the only JDA in Timor-Leste that incorporates the duty of cooperation. The Treaty cites activities that show cooperation between the State and its communities (intra-State relationship) in

[18] Decree Law Nº. 5/2011 on Environmental Licencing [Hereinafter Decree Law Nº. 5/2011].

[19] Decree Law Nº. 26/2012 of 4 July 2012 on Environment Basic Law, Arts 13 and 16 Democratic Republic of Timor-Leste) [Hereinafter Timor-Leste Decree Law No 26/2012 on Environment]

[20] Decree Law Nº. 18/2020 on Onshore Petroleum Operations (Democratic Republic of Timor-Leste) [Hereinafter Decree Law No 18/2020].

[21] Law Nº. 1/2019 on Petroleum Activities (Democratic Republic of Timor-Leste)

Article 14 of Annex B. This provision requires contractors to employ Timor-Leste nationals, using goods and services locally, thereby improving local skills and the local technological capabilities of the country. Furthermore, Article 14 of Annex B is supported by Timor-Leste's Law 13/2005 of the Petroleum Act and the Production Sharing Contract model, which are strong enough to enable the implementation of Article 14 of Annex B.[22]

Indeed, under the intra-State relationship, the analysis shows that all the elements of the RtD that are incorporated under the 2018 Treaty are supported by national development policies and laws. However, the critical issue is that the implementation of these national development policies and laws is ineffective. To understand these challenges, the next section will identify the successes and challenges of the 2018 Treaty under inter- and intra-State relationships.

5.2 Successes and Challenges of the 2018 Treaty

This section will identify the successes and challenges encountered under inter-State and intra-State relationships in the context of the 2018 Treaty. The aim is to determine whether the Treaty can be implemented as intended and promote Timor-Leste's economic development through its local content commitments.[23] Assessing the challenges faced by the 2018 Treaty will provide an opportunity to gain insights from past experiences and identify areas for improvement, thus helping to explore potential solutions.

[22] See Chapter 4, section 4.4.5.1.
[23] 2018 Treaty (n1) Annex B, Art 14.

5.2.1 Inter-State (Chapter 3)

Chapter 3 analysed whether the key elements of the RtD are incorporated in the 2018 Treaty under an inter-State relationship. Hence, the fundamental question is whether it is the role of the 2018 Treaty to foster the realisation of the RtD at the international level. It can be argued that the 2018 Treaty does have a role in facilitating the realisation of the RtD at the international level, and it contributes significantly to the realisation of the RtD of Timor-Leste and its people. This is because one of the requirements of the 2018 Treaty is cooperation between Contracting Parties and the fact that both Contracting Parties are 'CONSCIOUS of the importance of promoting Timor-Leste's economic development'.[24] Therefore, it is important to identify the successes and address the challenges of the 2018 Treaty.

5.2.1.1 Successes

The 2018 Treaty, if implemented in good faith by Australia and Timor-Leste, can foster security, stability, and mutual economic benefits.

First, the 2018 Treaty promotes the rule of (international) law and is testimony to the success of a peaceful settlement of disputes leading to international cooperation between the two States. Indeed, both States have made considerable progress in resolving their outstanding long-running dispute and establishing international cooperation arrangements over their oil and gas resources. It can be argued that the UNCLOS conciliation process,[25] which resulted in the 2018 Treaty, is a positive

[24] 2018 Treaty (n1) Preamble.

[25] UNCLOS (1982) (n3); In the Dispute Concerning Maritime Delimitation Between the Democratic Republic of Timor Leste and the Commonwealth of Australia in the Timor Sea, Annex 3 Notification of Conciliation, Notification Instituting Conciliation under Section 2 of Annex V of UNCLOS (11 April 2016) Para 5.

example for the international community because it was able to resolve a decade-long and highly complex dispute in such an efficient manner.

Second, the 2018 Treaty provides certainty and stability for businesses and investors; it paves the way for joint development of the Greater Sunrise gas fields, ensuring equitable sharing of benefits. Moreover, it supports Timor-Leste's economic development by offering new opportunities for income and commercial and industrial development set out in its local content's commitment.[26]

Third, the 2018 Treaty is the only treaty that incorporates all the elements of the RtD. Thus, there is hope that this Treaty can contribute to the RtD of Timor-Leste and its people. Additionally, formulating and signing the 2018 Treaty shows that Australia has implicitly accepted cooperating with Timor-Leste to ensure the development and the elimination of obstacles to development[27] and has taken 'sustained action to promote more rapid development of developing countries',[28] such as Timor-Leste. As discussed in Chapter 2, section 2.5, the North (developed States) is reluctant to accept the idea of the RtD being a human right. Therefore, this shows that Australia, as a developed State that voted in favour of the UNGA Resolution on 'Right to Development',[29] acknowledges the RtD as a human right. It is hoped that more States will follow this step by adopting this approach in similar treaties regulating maritime boundaries.

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https://pcacases.com/web/sendAttach/2331 accessed 20 September 2019; Also see: Chapter 1, Section 1.5.3.

[26] 2018 Treaty (n1) Annex B, Art 14.

[27] UNDRtD (n9), Art 3 (3).

[28] UNDRtD (n9), Art 4 (2).

[29] UNGA, 'Provisional verbatim record of the 97th meeting (4 December 1986, 41st session).

Fourth, the 2018 Treaty can be deemed a success story of Timor-Leste's sovereignty. For instance, Timor-Leste can finally enjoy its sovereignty over the natural resources in its maritime territory and choose where to flow its oil and gas. Granting Timor-Leste, the freedom to determine the destination of its gas and oil resources signifies that the country now has the right to exploit its natural resources for its national development and the well-being of its people. Moreover, the JDA finally incorporates the commitments to ensure substantial benefits flow to Timor-Leste from the development of the Greater Sunrise fields. Furthermore, active involvement in the negotiations of the 2018 Treaty, the ability to shape its terms, and the shared commitments of both States to administer, implement, and enforce the 2018 Treaty can also be regarded as a success.

Fifth, the 2018 Treaty is also successful as it is fair and equitable. It is fair because it was voluntarily signed by both States, and it is equitable because the delimitation of the maritime boundary is based on the use of the Equidistance/Relevant Circumstances approach established in Articles 74 and 83 of UNCLOS.[30]

Despite being a successful treaty, the 2018 Treaty also comes with its challenges. Therefore, the following subsection will identify the challenges that the 2018 Treaty encounters.

5.2.1.2 Challenges

The challenges identified under an inter-State relationship include technical viability, such as where to flow the Liquefied Natural Gas (LNG) from the Greater Sunrise oil

[30] UNCLOS (1982) (n3) Arts 74 and 83.

and gas fields, and economic viability, such as the cost of building the Tasi Mane project.

5.2.1.2.1 Technical Viability

Article 2 of Annex B stipulates how the revenue of the Greater Sunrise fields is shared. The 2018 Treaty explicitly allows Timor-Leste to flow gas into its coasts rather than be processed in Australia. Although it has been six years since the signing of the 2018 Treaty, the decision on where to bring the pipelines depends on the new concept study. Indeed, the idea of bringing the pipeline to Timor-Leste seems beneficial to Timor-Leste's development, but it also represents a challenge to the country. Prior to 2018, an independent analysis conducted by Woodside Energy suggested that the pipeline to Timor-Leste was a very risky prospect and that there was not a proper cost-benefit analysis conducted or provided by the Timorese government.[31] Despite this, the government leaders of Timor-Leste maintain that a pipeline to Timor-Leste is the only option acceptable to the people of Timor-Leste. Bringing the pipelines to Timor-Leste serves as a crucial catalyst for both economic growth and the development of the State. In addition, Timor GAP's[32] President Antonio de Sousa stated that the viability of the pipeline to be built on the south coast of Timor-Leste is being considered because independent studies have confirmed that it is viable. This contrasts with Woodside Energy's insistence that bringing the pipelines to and building the LNG processing plant in Australia is the only commercially viable option. However, in September 2023, the Minister of Petroleum,

[31] Parliament of the Commonwealth of Australia, 'Certain Maritime Arrangements - Timor-Leste: Report 168' (Parliament of Commonwealth Australia, 2017) Para 2.15.
[32] Timor-Leste national oil company, Timor GAP.

Francisco da Costa Monteiro, said that there will be a new concept study for the development of Greater Sunrise, which he hopes will be carried out by June 2024.[33]

5.2.1.2.2 Economic Viability

Bringing the LNG from the Greater Sunrise oil and gas fields and its technical viability are not the only challenges. The cost of building the Tasi Mane project and its economic viability also pose challenges, given that no private sector investor has shown interest as of now. By insisting that bringing the pipelines to and building the LNG processing plant in Australia was the only commercially viable option, Woodside Energy showed no interest in the investment. Consequently, Ramos Horta, serving as President of Timor-Leste since May 2022, suggested that Timor-Leste could approach Chinese investors to build a pipeline to transport gas extracted from the Greater Sunrise.[34] Timor-Leste is in a hurry because, as stated by Ramos Horta in 2022, the country 'would be on a financial cliff if Greater Sunrise is not operating within the next 10 years'.[35] In the same year, the Australian company Woodside Energy made a significant reversal of the previous report it carried out. Woodside Energy's chief executive, Meg O'Neill, announced that the company was

[33] Filomeno Martins, 'Gov't and Woodside Discuss New Study Concept for Greater Sunrise Project' *Tatoli* (18 September 2023) https://en.tatoli.tl/2023/09/18/govt-and-woodside-discuss-new-study-concept-for-greater-sunrise-project/10/ accessed 15 October 2023

[34] Energy Voice, 'East Timor President Finds no Progress with Australia on Gas Project' (*Energyvoice,* 2022) https://www.energyvoice.com/oilandgas/asia/468085/east-timor-president-finds-no-progress-with-australia-on-gas-project/ accessed 4 January 2023; Also see: Christopher Knaus, 'Timor-Leste Warns it will Work with China if Australia Insists on Pumping Timor Sea gas to Darwin' *The Guardian* (Timor-Leste 18 August 2022) https://www.theguardian.com/world/2022/aug/19/timor-leste-warns-it-will-work-with-china-if-australia-insists-on-pumping-timor-sea-gas-to-darwin accessed 4 January 2023.

[35] Ibid Knaus.

reconsidering the potential development of Greater Sunrise via an onshore LNG export terminal in Timor-Leste.[36] It is hoped that the decision will be made rapidly as the Petroleum Fund could be exhausted by 2038[37] , and Timor Leste needs to operate the Greater Sunrise field soon before other oil-producing fields[38] are depleted. Although this shows that Woodside Energy is hesitant to invest in Timor-Leste's Greater Sunrise due to reasons such as regulatory uncertainties, geopolitical concerns, and economic viability, it also highlights the power disparity between Australia and Timor-Leste. Australia often has greater bargaining power and, thus, can exert influence on decision-making processes. Consequently, the following subsection will identify the 2018 Treaty's successes and challenges under the intra-State relationship.

5.2.2 Intra-State (Chapter 4)

Similar to Chapter 3, Chapter 4 analysed whether the key elements of the RtD are incorporated in the 2018 Treaty but under an intra-State relationship. Therefore, the same fundamental question raised in section 5.2.1 is applied to this section but at

[36] Reuters, 'Woodside Open to Considering LNG Plant in Timor for Sunrise Gas' (*Reuters,* 2022) https://www.reuters.com/article/woodside-ltd-timor-gas-idUSL4N32R1DA accessed 15 February 2023; Also see: LNG, 'Australia's Woodside to Consider Sending Sunrise Gas to LNG Plant in East Timor' (*Ingprime,* 2022). https://lngprime.com/australia-and-oceania/australias-woodside-to-consider-sending-sunrise-gas-to-lng-plant-in-east-timor/67741/ accessed 15 February 2023.

[37] International Monetary Fund Asia and Pacific Dept, 'Democratic Republic of Timor-Leste: Staff Report for the 2022 Article IV Consultation- Debt Sustainability Analysis, 2022' (*International Monetary Fund,* 2022) https://www.elibrary.imf.org/view/journals/002/2022/307/article-A003-en.xml#:~:text=Staff%20projects%20that%20the%20Petroleum,the%20twenty%2Dyear%20projection%20horizon accessed 02 March 2023.

[38] Bayu-Undan, Elang-Kakatua, Buffalo and Laminaria-Corallina.

the national level. As to whether it is the role of the 2018 Treaty to foster the realisation of the RtD at a national level. One could argue that the 2018 Treaty does have a role in facilitating the realisation of the RtD both at the international and national level. This is because the 2018 Treaty can create legally binding commitments on both a national and international level. For instance, on the national level, the 2018 Treaty contains a provision that requires the Greater Sunrise contractor to set out its local content plan, which shall contain local commitments.[39] In addition, as this Treaty was ratified in 2019[40] and included an enforcement mechanism, such as a dispute resolution process[41] in the 2018 Treaty, Timor-Leste is obliged to take necessary measures to implement this Treaty's provisions within its domestic legal framework. This, for instance, involves enacting appropriate legislation, regulations, or administrative measures to give effect to the Treaty's obligations. Therefore, it can be argued that the 2018 Treaty does have a role in facilitating the realisation of the RtD at a national level, and it contributes significantly to the realisation of the RtD of Timor-Leste and its people. Consequently, it is important to identify the successes and address the challenges of the 2018 Treaty.

5.2.2.1 Successes

Similar to the inter-State relationship, the 2018 Treaty has incorporated all elements of the RtD except for the principle of participation. This shows that the 2018 Treaty

[39] 2018 Treaty (n1) Annex B, Art 14.
[40] Government of Timor-Leste, 'Maritime Borders for the Ratification of the Treaty Legislature Approved by the National Parliament' (*Government of Timor-Leste,* July 2019) http://timor-leste.gov.tl/?p=22510&lang=en accessed 20 January 2020.
[41] 2018 Treaty (n1), Arts 12 (1) and (3).

has adopted the RtD by integrating the principles of international human rights into its provisions.

First, by doing so, it can be argued that the 2018 Treaty emphasises the process of human development founded on international human rights standards, aiming to promote and protect the human rights of the people of Timor-Leste. In addition, by incorporating these elements of the RtD, the Treaty empowers individuals and the people of Timor-Leste to understand and assert their rights against duty bearers, such as State and non-State actors, intergovernmental bodies, international organisations and private actors (Multi-National Corporations or MNCs). This not only empowers individuals but also holds individuals and institutions accountable for respecting, protecting, and fulfilling these rights.[42] Thus making right-holders aware that their rights are enforceable.

The non-discrimination element of the RtD is incorporated under the 2018 Treaty as it establishes that individuals and people of Timor-Leste have the right to be free from discrimination. In addition, Timorese individuals and people have specific preferences regarding training and employment opportunities related to the Greater Sunrise Project.[43]

Furthermore, the local content provision within the 2018 Treaty[44] grants the individuals and people of Timor-Leste the right to demand fair distribution of benefits derived from the oil and gas in the Greater Sunrise fields. The Government of Timor-Leste can fulfil this by supporting the employment of local workers, using local

[42] UNGA Res 217 A (III) (10 December 1948) Arts 7, 26 and 29 [Hereinafter UDHR].
[43] UNDRtD (n9), Annex B, Art 14 (a).
[44] Ibid.

products in the petroleum industry, and ensuring the equitable distribution of oil and gas d between urban and rural areas. This includes a strong emphasis on developing infrastructures, education, and healthcare. Additionally, the 2018 Treaty grants individuals and the people of Timor Leste the right to demand regulations and contingency plans to tackle pollution and protect the marine environment in the Special Regime Area. These examples illustrate how the 2018 Treaty informs right-holders of their enforceable rights and establishes obligations for duty-bearers to respect, protect, and fulfil those rights.

However, there is an urgent need for the 2018 Treaty to be effectively implemented and promoted, as there is currently a lack of public awareness about their rights in Timor-Leste. Several measures can be taken, such as awareness campaigns, workshops, and educational programmes that disseminate information on human rights in general and on the Right to Development as a Human Right in particular. In addition, widespread dissemination of the 2018 Treaty is essential for the Government, policymakers, the private sector, international organisations in Timor-Leste, and most importantly, the people of Timor-Leste. For instance, individuals and people should be informed about their right to demand a fair distribution of benefits derived from the oil and gas in the Greater Sunrise fields.

Second, the 2018 Treaty contains provisions related to the elements of the RtD and these provisions are supported by national development policies and laws in Timor-Leste, which are conducive to the 2018 Treaty provisions. For instance, the 2018 Treaty includes measures contracting States can take to provide benefits aimed at

alleviating poverty and fostering development among the people of Timor Leste.[45] Thus, one of its biggest successes is the article on local content commitments, which requires the Greater Sunrise contractor to set out its local content plan to be included as part of the development and decommissioning plans.[46] This local content plan in the oil and gas industry has the objective of maximising the oil and gas value chain through employment, technology transfer, and acquisition of knowledge.

Third, the 2018 Treaty contains a provision that mandates environmental protection in the Special Regime Area. Thus, the 2018 Treaty requires[47] the Designated Authority to issue regulations and have a contingency plan to fight against pollution and protect the marine environment in the Special Regime Area. This shows that the 2018 Treaty aligns with UNCLOS (1982).[48]

Fourth, although Timor-Leste has no specific law on local content, the Treaty provision on local content can be supported by other national laws, such as the Decree-Law No 18/2020 of 13 May on Onshore Petroleum Operation,[49] which is the second amendment to Law 13/2005 of the Petroleum Act,[50] the Production Sharing Contract model,[51] and Private Investment Law No 15/2017.[52] Although most of these laws pre-date the signing of the 2018 Treaty, it can be argued that there are national development policies or laws that support or are favourable to the implementation

[45] 2018 Treaty (n1) Annex B, Art 14
[46] Ibid.
[47] Ibid Art 6 (3).
[48] UNCLOS (1982) (n3), Arts 192 and 194 (Section 1) Part XII
[49] The new statute applies to all petroleum operations carried out in respect of onshore resources under the Law No. 13/2005 on Petroleum Activities (n14)
[50] Law of 13/2005 on Petroleum Activities (n14)
[51] Model Production Sharing Contract under the Petroleum Act (n16) Art 12 (12.1)
[52] Law No. 15/2017 on Private Investment (n17) Art 23 (2c) Chapter IV: Duties of Investors.

of the 2018 Treaty provisions. Now that the successes have been highlighted, the next section will address the challenges of the 2018 Treaty.

5.2.2.2 Challenges

While the 2018 Treaty can be regarded as a successful treaty, it also comes with its challenges. The challenges identified under an intra-State relationship include: the missing 'participation' element of the RtD; the absence of onshore environmental protection requirements; and the weak implementation of national laws.

5.2.2.2.1 Missing Element of the RtD: Participation

The missing element, participation, is one of the most important elements of the RtD. The United Nations Declaration on the Right to Development (UNDRtD)[53] stresses that all human persons and all peoples[54] are 'the central subject of development and should be the active participant and beneficiary of the right to development'. Thus, participation is essential for the process of development. In the context of the intra-State relationship, participation means involving the holders of the RtD to participate actively in the creation and implementation of policies that affect their well-being. Participation must be FPIC.[55] Undoubtedly, participation should have been considered while formulating the 2018 Treaty because, through active participation, different perspectives and viewpoints can be considered, ensuring that individuals feel represented and are more inclined to support and abide by the Treaty terms. This, in turn, enhances the Treaty's effectiveness and the likelihood of successful implementation.

[53] UNDRtD (n9).
[54] UNDRtD (n9), Art. 1 (1).
[55] Timor-Leste has not included FPIC in their national laws.

5.2.2.2.2 Lack of Onshore Environmental Protection

Another challenge is that there is a lack of onshore environmental protection requirements in the 2018 Treaty. This is because environmental unsustainability is one of the adverse effects of petroleum dependency in countries such as Timor-Leste. This was also mentioned by external analysts of civil society groups in the country.[56] Onshore environmental protection is important in Timor-Leste, as over 75 per cent of the population depends on land for food production.[57] Accordingly, the requirement for onshore environmental protection under the 2018 Treaty is crucial because petroleum operations also affect individuals and peoples of Timor-Leste's lands, rice fields, plantations, and crops. An example of this impact can be identified in the Suai Supply Base project,[58] which is one of the Tasi Mane Projects. The importance of land for food consumption does not appear to have been considered in detail by the government in the Suai Supply Base planning process. As highlighted

[56] See: Meabh Cryan, 'Cryan M, 'Dispossession and Impoverishment in Timor-Leste: Potential Impacts of the Suai Supply Base SSGM discussion papers 2015/15' (2015) Australian National University 1-16; Democratic Republic of Timor-Leste, UNDP & the Embassy of Finland in Jakarta, 'Suai Supply Base: Development or Threat: Mahein's Report No. 57' (2013) Fundasaun Mahein 1.

[57] WorldFish, 'Timor-Leste' (*Worldfishcentre,* NY) https://worldfishcenter.org/where-we-work/pacific/timor-leste accessed 22 March 2023; Also see: Oxfam International, 'Timor-Leste (East Timor)' (*Oxfam,* NY) https://www.oxfam.org/en/what-we-do/countries/timor-leste-east-timor accessed 22 March 2023.

[58] The main project in Suai will be a port (breakwater and jetties), storage yard, warehouses, offices, fuel tank farm, helipad and future industrial park in Kamanasa Suco, Covalima District; See: La'o Hamutuk, 'The Suai Supply Base part of the Tasi Mane South Coast Petroleum Infrastructure Project' (*Lao Hamutuk,* 2019) https://www.Lao Hamutuk.org/Oil/TasiMane/13SSBen.htm#What accessed 22 March 2023.

by Meabh Cryan in 2015,[59] there is a lack of information regarding the implementation processes to monitor food insecurity.

5.2.2.2.3 Weak Implementation of National Laws

Another challenge under the intra-State relationship is the weak implementation of national laws, which, in the specific context of Timor-Leste, includes a lack of public awareness and engagement, lack of political will, lack of resources, corruption, and capacity and training gaps.

A significant problem in Timor Leste is the lack of public awareness and engagement with the laws and regulations. Effective implementation of these laws depends on both the public and officials being well-informed and understanding their content. The lack of awareness and understanding of these laws and regulations can lead to non-compliance or improper implementation. This issue is complex and rooted in historical, socio-economic, institutional, and cultural factors. Historically, for example, Timor-Leste was subjected to colonisation by both Portugal and Indonesia. During these periods, the local populations were frequently marginalised, leading to their disconnection from the decision-making processes.[60] The socio-economic challenges, including poverty, unemployment, and limited access to education, can further hinder public awareness and engagement. Thus, it is crucial to enhance public awareness and engagement regarding the legal and judicial systems. This can be achieved through various strategies and initiatives. Public education campaigns can provide clear, accessible information about legal rights, duties, and available services through various media channels. Workshops, seminars, and community forums can

[59] Cryan (n56) 5-6
[60] See Chapter 4, section 4.2.2.1

be organised to explain and clarify legal concepts, processes, and the importance of civil engagement (often, individuals prioritise survival over civic participation when struggling to meet basic needs). Therefore, encouraging civic engagement by informing citizens about their role in the legal system, such as participation in public consultations, voting, and engaging with representatives, is essential. Additionally, training for public officials and law enforcement on the importance of community engagement is vital, as well as integrating legal education into school curricula to teach young people about their rights and responsibilities as they enter adulthood. By strengthening education and fostering inclusive participation, it is possible to overcome the barriers to public awareness and engagement.

Lack of political will is also a major problem in Timor-Leste. In Timor-Leste, presidential and parliamentary elections are held every five (5) years. The President appoints the Prime Minister, typically the leader of the majority party or coalition in parliament. The Prime Minister oversees the cabinet, while the President serves as the head of state and holds veto power over legislation.[61] According to Timor-Leste's Constitution, the government is responsible both before the president and the

[61] Library of Congress, 'Collection: Timor-Leste Elections Web Archive' (*Library of Congress,* NY) https://www.loc.gov/collections/timor-leste-elections-web-archive/about-this-collection/#:~:text=Presidential%20and%20parliamentary%20elections%20occur,when%20it%20comes%20to%20legislation accessed 20 November 2024.

assembly (section 107)[62] but, in practice, holds exclusive executive power. [63] Thus, every five years, the ruling party or coalition, which is determined by the votes, establishes a new government. This new government brings its own structure, including the selection of Ministers, Vice Ministers, Deputies, and other staff members who will work within the Cabinet or within each Minister. Often, many of these appointees lack the specific skills and qualifications necessary to serve the government effectively. Moreover, the new government often has different priorities from those of its predecessors, which can lead to a lack of emphasis on enforcing the laws and, consequently, weak implementation.

Another challenge to the implementation of national laws is the lack of resources. Especially in Timor-Leste, inadequate infrastructure[64] and insufficient funding hinder the effective implementation of laws. This is primarily due to the shortage of experienced and skilled personnel within law enforcement agencies, judicial bodies,

[62] Constitution of the Democratic Republic of Timor-Leste 2002 [Hereinafter Constitution of Timor-Leste]; 'Timor-Leste is the only semi-presidential Republic in Southeast Asia. Robert Elgie's definition: "Semi-presidentialism is where there is a directly elected president and a Prime Minister and cabinet that are collectively responsible to the legislature."' See: Rui Graça Feijó, 'Elections in Timor-Leste, 2022-2023' in Gabriel Facal (ed), *Current Electoral Processes in Southeast Asia. Regional Learnings* (Research Institute on Contemporary Southeast Asia 2023) 29.

[63] Ibid 30.

[64] International Labour Organisation (ILO) and the Government of Democratic Republic of Timor-Leste, 'Decent Work Country Programme Timor-Leste: 2022-2025' (*Ilo,* 2022) 32-33. Also see: US Department of State, '2023 Investment Climate Statements: Timor-Leste' *(State,* NY) Timor-Leste - United States Department of State accessed 10 August 2023.

and other institutions responsible for implementing national laws.[65] Corruption,[66] for instance, can significantly hamper the implementation of national laws in Timor-Leste due to distorted priorities, lack of accountability, and weakened institutional capacity. For instance, corruption often diverts resources away from essential public services, such as healthcare, education, access to clean water, sanitation, and housing,[67] for personal gain. When public officials prioritise their own interests over the effective implementation of laws, it can lead to neglect and inefficiency in enforcing and upholding national regulations. In addition, corruption also undermines accountability mechanisms and weakens the rule of law.[68] If individuals responsible for implementing and enforcing laws are involved in corrupt practices, they are less likely to face consequences for their actions. This lack of accountability erodes public trust in the legal system and discourages compliance with laws.

Furthermore, corruption can also weaken institutional capacity.[69] For instance, when law enforcement agencies and regulatory bodies are compromised, they may lack the necessary resources, skills, and independence to effectively implement and enforce laws. The 2022 Corruption Perception Index (CPI), prepared by Transparency

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[65] Silas Everett, 'Law and Justice in Timor-Leste: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice 2008' (The Asia Foundation, 2009) 1, 11. See: Ibid ILO 32-33.

[66] US Department of State, '2023 Investment Climate Statements: Timor-Leste' (*State,* NY) Timor-Leste - United States Department of State accessed 10 August 2023.

[67] United Nations, 'Corruption and the Sustainable Development Goals Urgent global commitment needed to safeguard sustainable development from corruption' (*Unis,* December 2023), also available at FACTSHEET: Corruption and the Sustainable Development Goals (unvienna.org) accessed 04 March 2024.

[68] Ibid.

[69] Global Resource for Anti-Corruption Education and Youth Empowerment, 'Knowledge Tools for Academics and Professionals: Module Series on Anti-Corruption' (United Nations Office on Drugs and Crime 2017).

International, a reputable non-governmental organisation (NGO),[70] shows that Timor-Leste continued its recent trend in the fight against corruption by climbing to the 77th position out of 100 and achieving a score of 42 out of 100. This indicates a moderate level of corruption perception in Timor-Leste. Thus, there may be room for improvement in terms of transparency, accountability, and anti-corruption measures. While Timor-Leste has an anti-corruption law, Law 7/2020,[71] which establishes the necessary mechanisms for an effective fight against corruption, its effectiveness depends on its enforcement mechanism and the overall commitment and capacity of institutions responsible for implementing and enforcing this law. Thus, simply having this law is not sufficient.

Additionally, capacity gaps and lack of training can also significantly hinder the effective implementation of national laws in Timor-Leste. For instance, without proper training,[72] law enforcement officials and other relevant people may lack the requisite knowledge and skills to understand and apply complex legal provisions.[73] This can result in misinterpretation, misapplication, or inconsistent enforcement of laws, thereby weakening their effectiveness.

[70] 0 means highly corrupt and 100 means very clean. Transparency International, 'Corruptions Perception Index' (*Transparency,* NY) https://www.transparency.org/en/cpi/2022/index/tls accessed 08 October 2023.

[71] Law No. 7/2020 on Measures to Prevent and Combat Corruption (Democratic Republic of Timor-Leste).

[72] Judicial System Monitoring Programme, 'Report and Recommendations for civil law litigation reform in Timor-Leste' (Judicial System Monitoring Programme 2019).

[73] Everett (n65) 11; ILO (n64) 32-33.

5.3 National Legal Regime

The analysis highlights that the 2018 Treaty is much more challenging in terms of the intra-State relationship. However, it can be argued that the root of these challenges lies not with the 2018 Treaty itself but rather within Timor-Leste. To understand the underlying factors behind these issues, this section identifies the benefits and barriers of the national legal regime in Timor-Leste.

5.3.1 Benefits

One of the benefits of the national legal regime in Timor-Leste is that there are national development policies and laws that can support the 2018 Treaty's provisions, as mentioned in section 5.1.2. Although these national development policies and laws existed before the 2018 Treaty, they can still be used to enforce the requirements set out within the Treaty. Furthermore, the missing element of participation under the 2018 Treaty (intra-State relationship) is still supported by Timor-Leste's national regime.

Consequently, the national legal regime that supports the elements of the RtD is as follows:

The participation element of the RtD is stipulated under Timor-Leste's Constitution[74] and Timor-Leste's Decree Law 26/2012 on Environment.[75] For instance, several articles under the Decree Law 26/2012 on Environment highlight the importance of the participation of the people of Timor-Leste in environmental decision-making

[74] Constitution of Timor-Leste (n62) Arts 20, 72 and Part III, Section 63 (1).
[75] Decree Law No. 26/2012 on Environment (n19).

mechanisms and processes.[76] It can be argued that although the participation element of the RtD is not incorporated under the 2018 Treaty, Timor-Leste has enacted laws that require the participation of the people of its country in consultation processes.

The non-discrimination element of the RtD is identified under Article 14 (a) of Annex B, which requires preference in giving employment to Timor-Leste's nationals. This provision is supported by Law 13/2005 of the Petroleum Act, Article 13 (3a) iii and iv support, as described above. Other national laws that support this provision include Decree-Law No. 18/2020 of 13 May on Onshore Petroleum Operation,[77] which is the second amendment to Law 13/2005 of the Petroleum Act,[78] Production Sharing Contract model,[79] and Private Investment Law No. 15/2017.[80] These national laws require contractors to give preference in employment to nationals of Timor-Leste. This shows that Timor-Leste's national legal regime is conducive to the 2018 Treaty's provisions on the non-discrimination element of the RtD.

Article 14 of Annex B can also be identified as the fair distribution of benefits element of the RtD under the 2018 Treaty. Commitments described in this article can be

[76] Ibid Art 5, for example, refers to the participatory principle: that everyone in different social groups shall be involved in the environmental decision-making process and in the formulation and implementation of environmental policy and laws. In addition, Article 6 of the same law stipulates that the people of Timor-Leste are entitled to participate in the conservation and protection of the environment. Article 7 of the same law also stipulates that all people of Timor-Leste are 'obliged' to participate in decision-making mechanisms and processes regarding the environment.

[77] The new statute applies to all petroleum operations carried out in respect of onshore resources under Law No. 13/2005 on Petroleum Activities (n14).

[78] Law of 13/2005 on Petroleum Activities (n14).

[79] Model Production Sharing Contract under the Petroleum Act (n16) Article 12 (12.1)

[80] Law No. 15/2017 on Private Investment (n17), Art 23 (2c) Chapter IV: Duties of Investors.

classed as the benefits that the activities of the oil and gas industry will bring to Timor-Leste. As stated above, this provision is supported by Decree-Law No. 18/2020 of 13 May on Onshore Petroleum Operation,[81] which is the second amendment to Law 13/2005 of the Petroleum Act,[82] Production Sharing Contract model,[83] and Private Investment Law No. 15/2017.[84]

In terms of the PSNR element of the RtD, Article 6 (3n) of the 2018 Treaty requires regulations and a contingency plan to fight against pollution and protect the marine environment in the Special Regime Area; in other words, environmental protection. This provision is supported by Decree Law 5/2011 on Environmental Licensing,[85] Basic Environmental Decree Law 26/2012,[86] Law No. 13/2005 on Petroleum Activities, and Decree-Law 18/2020[87] on Onshore Petroleum Operations. These are laws that require environmental monitoring assessment and compensation for environmental damage.

Furthermore, poverty alleviation programmes launched by the Government of Timor-Leste, such as the School Meals Coalition Declaration: Nutrition, Health, and

[81] The new statute applies to all petroleum operations carried out in respect of onshore resources under Law No. 13/2005 on Petroleum Activities (n14); Decree Law No. 18/2020 (n20).
[82] Law Nº. 13/2005 on Petroleum Activities (n14)
[83] Model Production Sharing Contract under the Petroleum Act (n16) Art 12 (12.1)
[84] Law Nº. 15/2017 on Private Investment (n17) Art 23 (2c) Chapter IV: Duties of Investors.
[85] Decree Law Nº. 5/2011 (n18).
[86] Decree Law Nº. 26/2012 on Environment (n19) Art 13, 16.
[87] Decree Law Nº. 18/2020 (n20).

Education for All Children[88] and Pilot Cash Transfer Bolsa da Mae Programme,[89] offer support by waiving utility bills, providing social security contributions for low-income households over a period of three months, and establishing a cash transfer programme throughout the COVID-19 pandemic.[90] All of these measures were taken by the Government of Timor-Leste to engage with its community as part of fulfilling the duty of cooperation element of the RtD. Therefore, it can be argued that Timor-Leste's national legal regime is conducive to the 2018 Treaty's provisions on the duty of cooperation element of the RtD.

Thus, the existence of these national laws in Timor-Leste demonstrates that it is feasible to implement this Treaty provision. It can be asserted that Timor-Leste's national legal framework is conducive to realising all elements of the RtD mentioned in Chapter 2, section 2.5. These national legal regimes play a significant role in facilitating the implementation of these provisions.

Although these national legal regimes are conducive to the 2018 Treaty's provisions, most of the evidence in Chapter 4 shows that implementation is ineffective and weak. Therefore, the following section will identify barriers that affect how the 2018

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[88] See: Timor Leste, 'Signing Ceremony of the School Meals Coalition Declaration: Nutrition, Health and Education for all children' (*Timor-Leste,* 2021) http://timor-leste.gov.tl/?p=28864&lang=en&n=1 accessed 20 march 2023; Also see: Hatutan Program, 'School Feeding Program Study Report: Timor-Leste' (Care International 2019).

[89] International Labour Organisation (ILO), 'Timor-Leste: Social Protection Situation' (*Social-protection,* NY) https://www.social-protection.org/gimi/ShowCountryProfile.action;jsessionid=kr6KJuq-mkzbzLu6MeyH71QjjQh2xvoSBM4L4P08N5EPh5uV8MjL!539423187?iso=TL#:~:text=Government%20priorities,reduction%20of%20poverty%20and%20vulnerability accessed 23 January 2023.

[90] Ibid.

Treaty's provisions can contribute to the realisation of the RtD for the people of Timor-Leste.

5.3.2 Barriers

Examples of ineffective implementation encompass various areas, such as poverty alleviation initiatives (including the school feeding programme), environmental monitoring and assessments (such as EIAs), compensation for displaced individuals and people, consultation processes related to EIA, and the Environmental Management Plan. These barriers can be explored in more detail within the subsequent sections, which will outline the overarching political, social, and economic challenges that are directly relevant to this thesis.

5.3.2.1 Political Challenges

The political challenges that are directly relevant to this thesis are the lack of local content law, lack of political will, lack of weak institutions' capability and economic challenges. These challenges represent barriers to implementing the national legal regime in Timor-Leste.

5.3.2.1.1 Lack of Local Content Law

One of the challenges that represents a barrier to implementing the national legal regime in Timor-Leste is political, in terms of not having a specific local content law that has clear implementation and monitoring mechanisms to ensure the effective implementation of the 2018 Treaty's provision. There is no specific law to regulate local content in the petroleum activities in Timor-Leste. Indeed, there are other

national laws[91] that regulate local content in petroleum activities in Timor-Leste. However, having a specific local content law on petroleum activities would be more beneficial to Timor-Leste as it would have specific provisions and benefits aimed at promoting local participation, economic development, capacity building, and other important considerations. For instance, Law 13/2005 of the Petroleum Act[92] does not include the obligations of service suppliers to use local infrastructure and price preferences to domestic bidders in public procurement.

In some cases, when the local content law is not enacted, private sector contractors tend to avoid offering employment opportunities to local communities and imposing stringent criteria that exceed the capabilities of local communities to meet. It can be argued that there is a lack of political will to formulate a specific local content law. This was identified when the Ministry of Natural Resources, Minerals, and Energy Policy conducted a public consultation on Guidelines for Timor-Leste Content in oil and gas contracting in 2007.[93] These guidelines have never been completed to date. There is a valid argument that this is due to the different policy priorities, changes in the political regime, or the focus was more on attracting Financial Direct Investments (FDIs).

Furthermore, when drafting a local content law, a factor policymakers need to take into account is the industrial capacity of Timor-Leste. For instance, one of the local

[91] Law N$^{o.}$ 13/2005 on Petroleum Activities (n14), Art 13 (3a) iii and iv; and Model Production Sharing Contract under the Petroleum Act (n16) Art 12 (12.1).
[92] Law N$^{o.}$ 13/2005 of the Petroleum Act (n14), Art 13 (3a) iii and iv.
[93] La'o Hamutuk, 'Public Consultation regarding Local Content Guidelines for Timor-Leste' (*Lao Hamutuk,* 2007) https://www.laohamutuk.org/Oil/PetRegime/07LocalContent.htm accessed 01 March 2023.

content commitments in the 2018 Treaty requires contractors to use domestically produced goods or services.[94] Thus, Timor-Leste's national and local service companies must have high levels of technology, and the State's national industries must be able to meet the standards that international extraction companies require. This also represents a barrier because Timor-Leste still lacks a high level of technology and industrial base.

Consequently, to ensure that petroleum activities benefit the local economy and help decrease poverty, Timor-Leste must create mechanisms to ensure that its people's interests are protected and that the individuals and people of Timor-Leste receive benefits from their own resources. In addition, measures should be taken to improve transparency and avoid conflicts of interest. The Government of Timor-Leste should also create a local development fund for the oil and gas industry, sponsored by the oil and gas companies through their upstream contract, in accordance with Timor-Leste's local content law. This type of fund can be identified in Nigeria,[95] where it is used to train Nigerians to qualify as graduates, professionals, technicians, and craftsmen in the fields of Engineering, Geology, Science, and Management in the petroleum sector.

[94] 2018 Treaty (n1) Annex B, Art 14.

[95] Petroleum Technology Development Fund, 'About PTDF' (*PTDF,* NY) https://ptdf.gov.ng/about-ptdf/ accessed on 2 February 2024; Nigeria Attractive Industries Transparency Initiative, 'Petroleum Technology Development Fund' *(*PTDF 2019) 4.

5.3.2.1.1 Lack of Political Will

As shown under section 5.2.2.2.3, another challenge that represents a barrier to implementing the national legal regime in Timor-Leste is the lack of political will. The absence of political determination can hinder the implementation or enforcement of certain policies or actions. The lack of political will can also obstruct efforts to implement effective policies and programmes to address these issues.

An example of a lack of political will in Timor-Leste regarding anti-corruption efforts is the delayed establishment of the Anti-Corruption Commission (CAC)[96] , which, although established by law in 2009, did not become fully operational until 2016.[97]

In addition, this lack of political will can undermine public trust and confidence in the government's commitment to tackling corruption. When leaders fail to take decisive action against corrupt practices or fail to prioritise anti-corruption measures, it sends a message to the public that such behaviour is tolerated or even accepted. This perception can foster a sense of disillusionment among individuals and people, who may feel that their concerns about corruption are being disregarded.

5.3.2.1.2 Institutions' Capability

Another barrier to implementing the national legal regime in Timor-Leste is the need to ensure that institutions have the capability to execute institutional plans and actions. Although Timor-Leste is a peaceful and democratic State, it is still faced with

[96] Government of Timor-Leste, 'Anti-Corruption – ACC' (*Government of Timor-Leste,* March 2010) http://timor-leste.gov.tl/?p=60&lang=en&n=1 accessed 2 September 2023.

[97] La'o Hamutuk, 'Draft Anti-Corruption Law discussed, sleeps, discussed again' (*Lao Hamutuk,* August 2020), also available at https://www.laohamutuk.org/econ/corruption/11AnticorruptionLaw.htm accessed 2 September 2023.

the task of rebuilding public infrastructure, including roads, ports and airports, water and sanitation systems, government facilities, and institutional frameworks. While Timor-Leste has made significant progress since independence, the State continues to struggle with the legacies of past colonial powers, such as Portugal and Indonesian occupation. As mentioned in Chapter 4, section 4.3.3.2, the Portuguese and Indonesians left institutional legacies, both formal and informal, rules that regulate the exercise of power in the political regime.[98] For instance, a deficiency in both human capability and expertise led to a 'cut and paste'[99] Constitution of Timor-Leste, which is based on the 1898 version of the Portuguese Constitution (modified to an extent by the 1990 Mozambican Constitution).[100] While the limited time available to the Assembly members in Timor-Leste for drafting the Constitution is a contributing factor, the primary issue lay in their lack of experience and capability when it came to completing this task.[101] This is attributed to the fact that, during the transition period from 1999 to 2002, the people of Timor-Leste were ill-prepared for self-governance, despite the establishment of the United Nations Transitional Administration in East Timor (UNTAET)[102] to oversee the administration of Timor-Leste.[103] As most senior government positions during the Indonesian occupation of

[98] Jennifer Drysdale, 'Five Principles for the Management of Natural Resource Revenue: The Case of Timor-Leste's Petroleum Revenue' (2008) 26 (1) Journal of Energy & Natural Resources Law 151, 152

[99] Joanne E Wallis, ''Cut and Paste' Constitution-Making in Timor-Leste' (2019) 7 (2) Chinese Journal of Comparative Law 333, 358.

[100] Constitution of Mozambique (came into force on 30 November 1990).

[101] Wallis (n99) 333, 358.

[102] UNSC Res 1272 (16 October 1999) UN Doc S/Res/1272.

[103] Peacekeeping, 'United Nations Transitional Administration in East Timor: UNTAET' (*Peacekeeping* 2001) https://peacekeeping.un.org/sites/default/files/past/etimor/etimor.htm accessed 06 April 2023.

Timor-Leste were held by Indonesians, the individuals and the people of Timor-Leste lacked the necessary expertise, capability, and skills to draft the Constitution.

The lack of capability and expertise is also visible in various institutions in Timor-Leste, especially in public institutions. The State's institutional capability, as defined by the United Nations Development Programme (UNDP), is the ability of an institution to set and achieve social and economic goals through knowledge, skills, systems, and institutions concerning the implementation of existing laws and regulations remains deficient. To some extent, this relates to the people who established such institutions and are employed in them, as very few have had the benefit of previous experience working in official institutions.[104] This has, no doubt, affected the development of strong formal institutions in the State. Existing institutions are weak and have very low capability, which is also a barrier to implementing the national legal regime in Timor-Leste. For instance, insufficient knowledge of the implementation context can be seen when the Government of Timor-Leste proceeded with a consultation on a law to regulate onshore petroleum operations, which concluded in the enactment of Decree-Law 18/2020. The National Petroleum and Minerals Authority (ANPM) did not listen to the critiques[105] and suggestions of consulted parties, such as the local community. Thus, it can be argued that this deficiency stems from a lack of capability, skills, and an understanding of the implementation context.

[104] International Labour Organisation (ILO), 'Working within Institutions in Fragile Settings: Strengthening National Leadership through the Embedded Approach in Timor-Leste' (ILO, 2016) 15.

[105] See Chapter 4, section 4.4.1.1.

Another illustration of the lack of institutions' capability can be identified in the public consultation held by the ANPM in 2021 on the Environmental Impact Statement and Environmental Management Plan in Ainaro near Manufahi.[106] This consultation was also criticised by La'o Hamutuk, who stated that neither the environmental consultants, the project proponents (Timor Resources and TimorGap), nor the regulators (ANPM) had any experience with oil drilling on land.[107] Therefore, due to a lack of capability and institutional limitations, people had insufficient knowledge of how to implement the national legal regime effectively. As a result, despite the national development policies and laws enacted in Timor-Leste, their effective implementation was hindered by a lack of experience, leading to weak implementation. That being said, one of Timor-Leste's Strategic Development Plan 2011–2030 strategies is to continue to build the foundations of, among others, institutional effectiveness.[108]

5.3.2.1.3 Economic Challenges

Another challenge that represents a barrier to implementing the national legal regime in Timor-Leste is economic. Since its independence, Timor-Leste has made several economic gains, but significant challenges remain. Revenues from oil and gas are declining, and money in the petroleum fund might only last for another

[106] La'o Hamutuk, 'La'o Hamutuk submission to the National Petroleum and Minerals Authority (ANPM) regarding the Environmental Impact Statement and Environment Management Plan for exploratory oil drilling in PSC area TL-OT-17-09' *(Lao Hamutuk,* 2021) LHSubANPMEnvLicenseRusaWell13Sep2021enFinal (laohamutuk.org) accessed 01 February 2023.

[107] Ibid.

[108] Democratic Republic of Timor-Leste, 'Timor-Leste Strategic Development Plan 2011-2030' (Asian Development Bank, 2011) 1, 181.

decade.[109] There are high rates of unemployment, high rates of poverty, poor infrastructure, lack of skilled labour, and lack of government facilities and institutional frameworks. Timor-Leste still faces the huge task of satisfying basic needs and diversifying its economy, as its economic growth is reliant on revenues from oil and gas and government spending.[110] Therefore, focusing on the 2018 Treaty is important as the source of revenue of the Greater Sunrise Regime is extremely important to launch the economy of Timor-Leste. This revenue is also important for diversifying the country's economy. Diversifying Timor-Leste's economy is not only a necessity but also a path forward, as stated by Charles Scheiner,[111] a researcher at La'o Hamutuk.

It can be argued that although the Greater Sunrise resources sharing agreement in the 2018 Treaty is likely to provide the Government of Timor-Leste with significant future revenue, it is unlikely to last more than a generation.[112] This stands in contrast to the objective of the Petroleum Fund in managing petroleum resources 'for the

[109] The Petroleum Fund will be exhausted by 2030; See: La'o Hamutuk, 'South Coast Petroleum Infrastructure Project' (*Lao Hamutuk,* 2019) https://www.laohamutuk.org/Oil/TasiMane/11TasiMane.htm#2013 accessed 01 March; La'o Hamutuk, 'Timor-Leste's Oil and Gas Are Going Fast' (*Lao Hamutuk,* 2015) http://laohamutuk.blogspot.co.uk/2015/04/timor-lestes-oil-and-gas-are-going-fast.html accessed 07 March 2023; La'o Hamutuk, 'The Timor-Leste-Australia Maritime Boundary Treaty' (*Lao Hamutuk,* 2018) The Timor-Leste-Australia Maritime Boundary Treaty (laohamutuk.org) accessed 20 March 2023.

[110] The World Bank, 'The World Bank in Timor-Leste' (*Worldbank,* 2022) https://www.worldbank.org/en/country/timor-leste/overview accessed 07 March 2023.

[111] Charles Scheiner, 'Timor-Leste Economic Survey: The end of petroleum income' (Asia and the Pacific Policy Studies 2021) 253–279.

[112] La'o Hamutuk, 'The Timor-Leste-Australia Maritime Boundary Treaty' (*Lao Hamutuk,* 2018) The Timor-Leste-Australia Maritime Boundary Treaty (laohamutuk.org) accessed 20 March 2023.

benefit of both current and future generations, in a fair and equitable manner...'.[113] Thus, in order not to rely on the Petroleum Fund, Timor-Leste should diversify its economy by, for example, focusing on agriculture and tourism. This is currently a problem in Timor-Leste because little has been done to strengthen these sectors in the country.[114] The EITI Report in 2018 mentions that government expenditures are focused on infrastructure rather than on sectors that will help diversify the economy.[115] However, the revenue from oil and gas could also boost those two sectors.

A case in point is the results of the 2019 Agricultural Census, cited in Trade Invest,[116] which shows that 141,141 Timorese families' lives depend on agriculture, which is equivalent to 66 per cent of the 213,417 total households in the country. This statistic shows that there is potential for sizable growth, diversification, transformation, and investment. There are opportunities for investment in agricultural development and processing for the local market in a number of primary products. In addition, Timor-Leste's agricultural potential can be seen in its current coffee production and export. Coffee is a profitable investment area, performing well in domestic and international markets, and it is Timor-Leste's primary non-oil export.[117] In contrast, for tourism,

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[113] Petroleum Fund Law No.9/2005 (3 August 2005) as amended by Law No.12/2011 (28 September 2011) (Democratic Republic of Timor-Leste). Also see: Alastair McKechnie, 'Managing Natural Resource Revenues: The Timor-Leste Petroleum Fund' (Overseas Development Institute, 2013) 1.

[114] Scheiner (n111) 254.

[115] Extractive Industries Transparency Initiative, 'Timor-Leste: Consistent Decline in Oil Revenues' (*Eiti,* 2018) https://eiti.org/news/timor-leste#:~:text=The%20EITI%20Report%20states%20that,total%20amount%20of%20the%20fund accessed 30 March 2023.

[116] Trade Invest Timor-Leste, 'Timor-Leste Exporter Guide "Go Live" 2022' (*Tradeinvest,* NY) https://www.tradeinvest.tl/node/22 accessed 25 March 2023.

[117] Ibid.

the government's goal is to attract 200,000 international tourists annually by 2030, which would generate US$150 million and add 15,000 local jobs.[118] Timor-Leste has the potential to develop cultural, nature-based ecotourism and adventure tourism.[119] A wide range of opportunities for tourism investment include Dili waterfront developments, the development of popular landmarks, holiday resorts, cultural site tours, military site tours, and religious site tours.[120] Indeed, the Government of Timor-Leste's tourism policy recognises the importance of the sector to the future prosperity of the nation.[121] However, the Government has not yet dedicated sufficient resources to develop these sectors, such as agriculture and tourism.[122] The investments in these sectors are negatively impacted by relying on revenues from oil and gas, which are declining because there is less money to invest in them.

The following section will look at social challenges such as lack of human capital, lack of participation and lack of institutions.

[118] The Borgen Project, 'The Growing Importance of the Tourism Sector in Timor-Leste' (*Borgenproject,* 2019) https://borgenproject.org/tourism-sector-in-timor-leste/#:~:text=Benefits%20of%20Tourism%20Industry%20Investments&text=The%20government's%20goal%20is%20to,was%20%24300%20million%20in%202017 Accessed 30 March 2023.

[119] Trade Invest Timor-Leste (n116).

[120] Ibid.

[121] Democratic Republic of Timor-Leste, 'Growing Tourism to 2030: Enhancing a National Identity' (Democratic Republic of Timor-Leste 2017) 8-9.

[122] Democratic Republic of Timor-Leste, 'Government Decides Six Priorities and a US$ 1.5 Billion Budget Ceiling for the GSB 2022' (*The Government of Timor-Leste,* 2021) http://timor-leste.gov.tl/?p=28806&print=1&lang=en accessed 30 March 2023.

5.3.2.2 Social Challenges

In addition to economic challenges, social challenges also represent a barrier to implementing the national legal regime in Timor-Leste. While progress has been made, significant challenges remain, namely: a scarcity of human capital, limited participation of individuals and people in formulating national development policies and laws, and a deficiency of dedicated institutions aimed at informing individuals and people about their rights and facilitating informed decision-making.

5.3.2.2.1 Lack of Human Capital

The lack of human capital is a barrier to implementing the national legal regime, as implementing a legal regime requires individuals with specialised expertise and knowledge in the relevant field. The knowledge and skills that people invest in and accumulate throughout their lives, enabling them to realise their potential as productive members of society, are examples of human capital.[123] Thus, investment in human capital is essential in a developing State, such as Timor-Leste, as it is connected to future growth and productivity. The World Bank has warned that Timor-Leste currently faces a crisis of human capital and needs to improve the efficiency, equity, and sustainability of its investments, especially in education and child nutrition, to avoid the situation worsening still further.[124] Investing in human capital not only contributes to economic growth but also to reducing poverty.

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[123] The World Bank, 'The Human Capital Project: Frequently Asked Questions' (*Worldbank,* 2019) https://www.worldbank.org/en/publication/human-capital/brief/the-human-capital-project-frequently-asked-questions#:~:text=Human%20capital%20consists%20of%20the,as%20productive%20members%20of%20society accessed 8 March 2023.

[124] Andrews et al., *Seizing Opportunities of a Lifetime: The Timor-Leste Human Capital Review* (World Bank 2023) 3

Lack of human capital can lead to, among other things, inefficiencies in implementing the national legal regime and financial loss. This can be seen through the bids invited by the National Procurement Commission of Timor-Leste to conduct EIA and develop an Environmental Management Plan for eleven components of the Tasi Mane project.[125] However, the National Environment Directorate staff responsible for administering Decree-Law 5/2011 on Environmental License were not aware that the EIA should be conducted based on this law until La'o Hamutuk brought it to their attention.[126] In addition, the bidding documents were inconsistent with the decree law and provided insufficient information to prepare a proper EIA. This illustrates the interconnectedness of human capital and institutional expertise and underscores their importance in preventing inefficiencies when implementing the national legal regime in Timor-Leste.

Other examples of lack of human capital that led to inefficiencies in implementing the national legal regime and financial loss can be identified in the project's EIA awarded to the Australian engineering company WorleyParsons[127] in 2012 for US$1.1m. According to La'o Humutuk, WorleyParson did not receive sufficient project-specific information to analyse its environmental impacts, particularly outside of the Suai Supply Base. At the time, the Base was incomplete; the formal approval process did not begin until mid-2012.[128] Moreover, Timor-Leste awarded a US$1.3 million contract to PT Virama Karya for the preliminary design and EIA of the

[125] La'o Hamutuk, 'South Coast Petroleum Infrastructure Project' (*Lao Hamutuk,* 2019) https://www.laohamutuk.org/Oil/TasiMane/11TasiMane.htm accessed 9 March 2023.
[126] Ibid.
[127] Engineering company which was conducting the EIA.
[128] La'o Hamutuk (n106).

highway stretching from Suai to Beacu. Only in June 2013 did SEMA issue an environmental license for the Suai Supply Base, although many planning and legal requirements were apparently not met.[129] This is another example of financial loss resulting from a lack of human capital. It shows that nearly all the money spent on the Tasi Mane project went to foreign companies because Timor-Leste did not have its own institutions that could provide these services. Although one of Timor-Leste's Strategic Development Plan (SDP) 2011-2030 targets is to invest in human capital through improved access to and quality of health, education, and skills development while protecting the vulnerable,[130] this has not been the case to date.

5.3.2.2.2 Lack of Participation

Another barrier is the lack of participation in consultation of the people of Timor-Leste in formulating development policies and laws. By not involving the people of Timor-Leste in formulating national development policies and laws, policymakers are not able to obtain a full understanding of issues important to these people. The critiques written by La'o Hamutuk on consultation mostly centre on how people are not consulted properly. The consultation usually takes place over a short period of time, and people are not informed in advance; thus, most or all public consultations carried out in Timor-Leste do not include FPIC.[131] FPIC enables people to negotiate the conditions under which a project will be designed, implemented, monitored, and evaluated, as well as give consent. Although Timor-Leste endorsed the UNDRIP in 2007, this right was not implemented, and consequently, the customary rights,

[129] Ibid.
[130] Democratic Republic of Timor-Leste, 'Timor-Leste Strategic Development Plan 2011-2030' (n108) 181.
[131] See Chapter 4, sections 4.2.2.1 and 4.3.1.1.

vision, and values of indigenous people in Timor-Leste failed to be recognised. Undoubtedly, not applying the FPIC principle has impacted the implementation of national development policies and rights because these policies do not reflect their views or the issues relevant to them.

5.3.2.2.3 Lack of Institutions

Lack of institutions refers to the absence of established organisations or systems that are crucial for the effective functioning of a society. Timor-Leste lacks dedicated institutions for the purpose of educating individuals and people about their rights and providing support to make informed decisions. For instance, legal institutions, such as courts and legal aid services, can play a vital role in offering individuals information about their legal rights and assisting them in navigating the legal system. This can be done by offering legal advice, representation and resources to ensure individuals understand their rights and can make informed decisions.[132] Furthermore, there should be human rights institutions in Timor-Leste, such as human rights commissions or ombudsman offices, which are responsible for promoting and protecting human rights. They can educate individuals about their rights, investigate human rights violations, and provide support and guidance to those who have experienced rights abuses.[133] In Timor-Leste, there is currently one Human Rights institution in the form of an ombudsman for Human Rights and Justice

[132] LegaMart, 'Legal Assistance and Barriers to Accessing Legal Services Worldwide' (*Legamart,* 2023) https://legamart.com/articles/legal-assistance/ accessed 20 January 2024.

[133] Paulo Sergio Pinheiro and David Carlos Baluarte, 'National Strategies — Human Rights Commissions, Ombudsmen, And National Action Plans' (Human Development Report 2000) 1, 2-3.

(Provedor for Human Rights and Justice of Timor-Leste),[134] which is independent and has a mandate to cover matters relating to human rights and good governance. The Office of the Provedor deals with cases of human rights violations, complaints, education and promotion, monitoring, and generally integrating human rights into legislation and practices of Timor-Leste.[135] However, this Ombudsman faces several challenges that affect its capacity to fulfil its mandate,[136] most notably a weak judicial system which relies on the Government of Timor-Leste for its financial needs.[137]

To summarise, it can be argued that although there are benefits in implementing a national regime, barriers of a political, economic, and social nature interfere with the effective implementation of the national legal regime in Timor-Leste. Therefore, the next section will provide some potential solutions to tackle the abovementioned challenges and barriers.

5.4 Potential Solutions

This section identifies some potential solutions that are interconnected and mutually supportive. However, it is important to note that, given the remit of this thesis, the suggested solutions are limited to actions that can be undertaken to improve in relation to the challenges and barriers specifically mentioned in this thesis and do

[134] Provedor for Human Rights and Justice of Timor-Leste, 'Timor-Leste' (*Asiapacificforum,* NY) https://www.asiapacificforum.net/members/timor-leste/ accessed 10 October 2023.
[135] Ibid.
[136] Guteriano Nicolau, 'Ombudsman for Human Rights: The Case of Timor-Leste' (*Hurights,* 2007) https://www.hurights.or.jp/archives/focus/section2/2007/03/ombudsman-for-human-rights-the-case-of-timor-leste.html accessed 10 October 2023.
[137] Ibid.

not aim at tackling more general economic, social, and political issues that plague Timor-Leste's development.

5.4.1 Investing in Human Capital/Capacity-Building

Based on the above analysis, it can be argued that Timor-Leste is facing a human capital crisis, which presents a significant challenge.[138] Investing in human capital is crucial for economic growth, particularly as human capital involves the knowledge, skills, health, and other personal characteristics that enable individuals to be productive.[139] These are known as aspirations,[140] which must be nurtured to achieve development. Aspirations empower individuals and people to participate in, contribute to, and enjoy economic, social, cultural and political development.

To tackle these challenges related to human capital, the government and institutions should invest in the human capital of its individuals and people. Such investments would enhance productivity and innovation, ultimately contributing to economic growth and poverty reduction goals. Most importantly, in relation to the RtD, improving human capital would lead to higher individual incomes, decreased poverty, reduced inequality, greater social participation, and increased trust[141]

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[138] World Bank Group, 'Timor-Leste Economic Report: Investing in the Next Generation' (*World Bank,* 2022) https://openknowledge.worldbank.org/server/api/core/bitstreams/16b9a123-7ab9-5fb3-9469-e8dc0ff4f17f/content accessed 27 March 2023.

[139] OECD, 'Productivity, Human Capital and Educational Policies' (*OECD,* NY) https://www.oecd.org/economy/human-capital/ accessed 27 March 2023.

[140] Mentioned in Chapter 2, section 2.2.1. Amartya Kumar Sen, *Development as Freedom* (1st edn Knopf 1999) 1, 13-14; Daniel Egiegba Agbiboa, 'Between Corruption and Development: The Political Economy of State Robbery in Nigeria' (2012) 108 (3) Journal of Business Ethics 325, 329.

[141] Jim Yong Kim, 'The Human Capital Gap: Getting Governments to Invest in People' (2018) 97 (4) Foreign Affairs 92,101.

between the government, institutions, and the individuals and people of Timor-Leste.

The 2022 bi-annual World Bank report on Timor-Leste's economy[142] expressly mentions that the human capital challenges that the country is facing include poor learning outcomes due to low levels of education, service delivery, and quality. Delivering high levels of education and providing appropriate training would not only help increase the capability and skills of individuals and the people of Timor-Leste but also strengthen people's trust in the government and institutions, which is an important element of social and economic progress and the RtD. Consequently, by investing in human capital, Timor-Leste will be able to strengthen its government and its institutions.

5.4.1.1 Government

The 2018 EITI report[143] stated that the Government of Timor-Leste is giving less attention to education to diversify its economy. It is, thus, essential that the Government focuses on investing in human capital as there will otherwise be a (widening) gap between the human capital requirements of institutions, organisations, and corporations and the existing human capital of its workforce. Therefore, some of the steps that the Government of Timor-Leste could take to prevent this widening disparity include offering vocational training which focuses on developing specific skills required for a particular trade or profession, training

[142] World Bank Group (n138).

[143] Extractive Industries Transparency Initiative, 'Timor-Leste: Consistent Decline in Oil Revenues' (*Eiti,* 2018) https://eiti.org/news/timor-leste#:~:text=The%20EITI%20Report%20states%20that,total%20amount%20of%20the%20fund accessed 30 March 2023.

and development opportunities, promotion of continuous learning, regular skills assessments, embracing of technology, and strategic recruitment and retention of talent.[144]

5.4.1.2 Institutions

It is essential to address the deficiency of institutions capable of enforcing and monitoring national laws and policies to ensure successful implementation. This issue is inherently linked to insufficient investment in human capital and skills, which contributes to enhancing the capabilities of these institutions' workforce. Nevertheless, it presents a unique set of challenges.

To secure the effective implementation of national laws and policies, including the 2018 Treaty, specialised institutions need to possess a deep knowledge and understanding of these national laws and policies, as well as the ability to implement and monitor them efficiently. For instance, by having the relevant and proper knowledge and skills, these institutions can ensure that the actors involved in petroleum operations, such as the Government of Timor-Leste and corporations, satisfy local content requirements. Specifically, they would ensure that local content requirements, such as the employment of nationals, the use of local goods and services, the improvement of local skills, and the improvement of local technological capabilities, are being met. Additionally, institutions that monitor the implementation of other national laws could ensure that actors in petroleum

[144] The World Bank, 'Human Capital Project: A Project for the World' (*World Bank,* NY) https://www.worldbank.org/en/publication/human-capital accessed 2 March 2024.

operations comply with national policies and laws, for instance, by carrying out effective consultations before any petroleum activities commence.

One particular government entity worthy of attention is the ANPM. Established through Decree Law No 1/2016 of 9 February, the 1st amendment of Decree-Law No 20/2008 of 19 June, ANPM serves as Timor-Leste's regulatory authority overseeing activities both offshore and onshore, as well as within the JPDA.[145] Its main tasks are to regulate and supervise petroleum natural gas and mining activities in the Timor-Leste area.[146] However, the evidence provided in this thesis[147] suggests that this institution lacks sufficient knowledge of the context of implementation.

To ensure that the personnel of institutions and the government possess the necessary skills, greater emphasis should be placed on education and investment in human capital. In Timor-Leste, for example, the government pays attention to technical and vocational education and training (TVET)[148] to help reduce the shortage of mid-level skills. TVET in Timor-Leste[149] has been designed to formalise vocational training and education, regulate a nonformal TVET system, and offer its individuals various career options. This is a positive approach that the government

[145] Extractive Industries Transparency Initiatives, *EITI Timor-Leste: 2020 Reconciliation Report,* EITI 2020).
[146] Ibid.
[147] See Chapter section 5.3.2.1.3.
[148] United Nations Educational, Scientific and Cultural Organisation, 'TVET Country Profile: Timor-Leste' (UNESCO, 2020).
[149] Leonel Casimiro Araujo, Geraldo Sarmento Ximenes, 'Vocational Education and Training in Timor-Leste' in Lorraine Pe Symaco and Martin Hayden (eds) *International Handbook on Education in South East Asia* (Springer International Handbooks of Education 2022) 1-29.

can continue to use to strengthen the knowledge and skills of individuals who work in the government and institutions of Timor-Leste.

5.4.2 Participation

As explained above, participation in the consultation can achieve sustainable outcomes and equitable decision-making processes and develop relationships and trust between the government, corporations, and communities. Thus, it is crucial to emphasise not only community engagement but also acknowledge the significance of private-sector engagement and the recognition of Indigenous people.

5.4.2.1 Public Participation and Community Engagement

Public participation and community engagement are ineffective in Timor-Leste, as seen in consultations to draft various national laws, policies, and development programmes. Some of the reasons for ineffective public participation include a lack of capability and skills of the government and institutions in Timor-Leste in involving communities in consultations and a lack of knowledge and understanding of how important the engagement or participation of individuals and people of Timor-Leste is. Thus, investing in human capital is also important in ensuring effective public participation and community engagement. In addition, for effective public participation and community engagement, consultations should be made widely accessible, and there should be effective and continuous feedback. This can be achieved by allowing communities to see how ideas have developed during the various stages and ensuring that everyone is aware of the progress made.[150] As it is

[150] The World Bank, 'Tools for Community Participation' (*urban-regeneration*, 2009) https://urban-regeneration.worldbank.org/node/88 accessed 27 March 2023.

stated under the UNDRtD, the participation of every human person is crucial. Participation must be 'active, free and meaningful'[151] , and it should involve FPIC.[152] However, there is no evidence that FPIC was applied during consultations in Timor-Leste.[153] Applying FPIC ensures that the participation of individuals and people occurs without pressure and intimidation (free), is performed before the activity that affects the community is undertaken (prior), with the possession of full and accurate knowledge about the activity and its impact on the community (informed), so that the community can either provide or withhold its permission over the activity (consent).[154] Thus, it can be argued that to ensure effective public participation and community engagement, it is essential not only to include participation but also to ensure that participation in the consultation is based on the free, prior, informed consent principle.

Community engagement can be defined as public participation, which involves ongoing communication between communities. This can be done by educating and involving the community through public meetings, public exhibitions, and media campaigns[155] at national, district, and subdistrict levels. For instance, community engagement can be empowered by international agreements such as the Aarhus

[151] UNDRtD (n9) Preamble, Para 2.
[152] Ibid Art 2 (3).
[153] See Chapter 4, sections 4.2.2.1 and 4.3.1.1.
[154] Cristina Mittermeier, 'Free, Prior and Informed Consent in Context: Respecting Indigenous People's Rights is essential to supporting our mission of helping societies to responsibly and sustainably care for nature' (*Conservation,* NY) https://www.conservation.org/projects/free-prior-and-informed-consent-in-context#:~:text=The%20principle%20of%20Free%2C%20Prior,given%20under%20force%20or%20threat accessed 27 March 2023.
[155] Jiman Chado and Foziah Bte Johar, 'Public Participation Efficiency in Traditional Cities of Developing Countries: A Perspective of Urban Development in Bida, Nigeria' (2016) 219 Procedia - Social and Behavioural Sciences 185, 192.

Convention.[156] This Convention empowers individuals and communities to make informed decisions and participate effectively in environmental decision-making processes. For instance, by having public participation, the government and corporations or stakeholders in extractive industries can understand the concerns and expectations of communities and identify the potential impacts of oil and gas projects. This will achieve sustainable outcomes and equitable decision-making processes, as well as develop relationships and trust between stakeholders such as government, corporations, and communities.[157] In addition, involving public participation empowers local communities and increases their self-reliance, self-awareness, and confidence in self-examination of problems and seeking solutions for them.[158] However, although any UN member state can be a party to the Aarhus Convention, Timor-Leste is not a signatory of this convention.[159] Nonetheless, the UN Environment Programme (UNEP) has developed guidelines[160] aimed at States that are willing to collaborate with communities. These guidelines, although voluntary,

[156] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (opened for signature on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447, 38 ILM 517 [Hereinafter Aarhus Convention].

[157] The Granicus, 'What is Community Engagement' (*Granicus,* NY) https://granicus.com/blog/what-is-community-engagement/ accessed 20 March 2024.

[158] Similar example can be found in Latin America Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted on 4 March 2018, entered into force 22 April 2021) [Hereinafter Escazu Agreement].

[159] Aarhus Convention (n156) Art 19 (3).

[160] Bali Guidelines for the Development of National Legislation on Access to information, Public Participation and Access to Justice in Environmental Matters (adopted in February 2010 by United Nations Environment Program)

can offer useful guidance to developing States such as Timor-Leste. Thus, Timor-Leste can abide by these guidelines and engage with UNEP on the matter.

5.4.2.2 Private Sector Engagement

Active participation of the private sector in the extractive industry, such as in Timor-Leste, is also important as it helps to expand the private sector's relationship base among the government and among the communities in which they operate.[161] By doing so, the private sectors are able to obtain a clear vision of local communities and demonstrate their commitment to the long-term development of Timor-Leste. Engaging the private sector in the extractive industry will also have a positive impact on the private sector's ability to boost local skills development and job creation. Furthermore, such engagement increases their commitment to addressing social and environmental challenges through their core business operations while complying with legal, ethical, and environmental standards.[162] It can be argued that private sectors engage more with local communities than they used to in the past and have developed their own corporate codes of conduct, which outline their values, principles, and guidelines in a variety of areas.[163] In other words, these codes of conduct refer to a set of values, rules, and *p*olicy statements which define ethical

[161] Holly Wise and Sokol Shtylla, *The Role of the Extractive Sector in Expanding Economic Opportunity* (Economic Opportunity Series, The Fellows of Harvard College, 2007) 1, 37.

[162] Organisation for Economic Co-Operation and Development (OECD), 'Corporate Responsibility Private Initiatives and Public Goals' (OECD, 2001); OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD Publishing 2023) 10-11, 24.

[163] For instance, the codes address a variety of issues such as general public environmental management, labour standard, consumer protection, bribery, corruption, etc. Also see: OECD (n162)

standards for their conduct.[164] These codes of conduct are also contained in corporate responsibility initiatives, such as Corporate Social Responsibility (CSR).[165] CSR contains voluntary commitments rather than legally binding frameworks,[166] and it helps private sectors to be socially accountable to themselves, their stakeholders and the public. It is a way through which a private sector achieves a balance of economic, environmental, and social imperatives while at the same time addressing the expectations of shareholders and stakeholders.[167]

One of the advantages of non-binding or voluntary commitments is their flexibility. For instance, private sectors have the flexibility to implement and evaluate codes of conduct based on their own discretion.[168] However, one of the disadvantages of non-binding commitments within CSR is that there is an absence of legal accountability

[164] Valamis, 'Human Resources: Code of Conduct' (*Valamis,* 2022) https://www.valamis.com/hub/code-of-conduct#what-is-code-of-conduct accessed 02 April 2023.

[165] Jedrzej George Frynas, 'The false developmental promise of Corporate Social Responsibility: evidence from multinational oil companies' (2005) 81 (3) International Affairs 581-598.

[166] For instance, these voluntary commitments are: Ten Principles of UN Global Compact. See: United Nations Global Compact, 'The Ten Principles of the UN Global Compact' (*Unglobalcompact,* NY) available at Https://Unglobalcompact.Org/What-Is-Gc/Mission/Principles accessed 02 February 2024; the OECD, see: OECD (n161); the EITI, see: EITI, 'Guide to implementing the EITI Standard' (*EITI,* NY) https://eiti.org/guide-implementing-eiti-standard accessed 12 March 2024.

[167] United Nations Industrial Development Organisation, 'Corporate Social Responsibility' (*Unido,* 2023) https://www.unido.org/our-focus/advancing-economic-competitiveness/competitive-trade-capacities-and-corporate-responsibility/corporate-social-responsibility-market-integration/what-csr accessed 02 April 2023.

[168] Krista Bondy et al., 'Multinational corporation codes of conduct: Governance tools for corporate social responsibility? (2008) 16 (4) Corporate Governance: An International Review 301-303.

for the non-performance of social obligations by private sectors.[169] This is because, in the absence of a legal mandate, private sectors, for instance, may be more inclined to prioritise their self-interest or withdraw from the commitment if it becomes inconvenient or conflicts with their objectives. Therefore, there are codes to which private sectors can readily subscribe; for instance, the OECD Guidelines,[170] the UN Global Compact[171] and the Extractive Industries Transparency Initiative (EITI).[172]

Within the extractive industry, EITI is an example of a global standard that ensures transparency and accountability in how a state's natural resources are managed.[173] One of EITI's requirements includes an effective multi-stakeholder oversight group that involves, among other things, government engagement, company engagement, and civil society engagement.[174] Whilst some have found that EITI has been the 'most successful in reaching its institutional goals, notably by becoming a recognized brand and consolidating transparency as a global norm',[175] others[176] have found that EITI States do not tend to perform better during EITI compliance than before the global

[169] Mallika Tamvada, 'Corporate social responsibility and accountability: a new theoretical foundation for regulating CSR' (2020) 5 (2) International Journal of Corporate Social Responsibility 1, 2.
[170] The OECD Guidelines (n162).
[171] United Nations Global Compact, 'The Ten Principles of the UN Global Compact' (*Unglobalcompact,* NY) available at https://unglobalcompact.org/what-is-gc/mission/principles accessed 02 February 2024.
[172] Extractive Industries Transparency Initiatives, 'What is EITI?' (*ukeiti,* NY) https://www.ukeiti.org/what-eiti accessed 30 March 2023.
[173] Ibid; Also see: Siri Aas Rustad et al., 'Has the Extractive Industries Transparency Initiative been a success? Identifying and evaluating EITI goals' (2017) 51 Resources Policy 151-162.
[174] Extractive Industries Transparency Initiatives (n172).
[175] Ibid Rustad et al.
[176] Benjamin K. Sovacool et al., 'Energy Governance, Transnational Rules, and the Resource Curse: Exploring the Effectiveness of the Extractive Industries Transparency Initiative (EITI)' 2016 (83) World Development 179-192.

standard was introduced, and they do not tend to outperform other States. This is because of the EITI's voluntary nature, limited mandate, stakeholder resistance, and dependence on a strong civil society.[177]

Timor-Leste has demonstrated satisfactory progress in improving engagement in company and civil society participation in the EITI.[178] EITI contributes to strengthening transparency and accountability in implementing States by producing data on the extractive sector and making it more accessible. It increases participation and awareness of the extractive sector's activities and revenues.[179] Thus, ensuring the private sector's engagement or participation is important in order to bring benefits to a State, especially in developing its communities.

It is important that private sectors that self-regulate or have their own codes of conduct can effectively demonstrate their commitment to ethical practices, sustainability, and social responsibility. In addition, to ensure accountability and transparency, there should be a combination of internal and external audits. For instance, internal audits ensure that operations are efficient, effective, and in line with laws and policy objectives.[180] It protects governments from, among others,

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[177] Ibid.

[178] Extractive Industries Transparency Initiatives (n145).

[179] Extractive Industries Transparency Initiatives, 'Evaluating the EITI' (Eiti, 2023)https://eiti.org/blog-post/evaluating-eiti#:~:text=The%20study%20found%20that%20the,also%20identified%20as%20significant%20impacts accessed 02 April 2023.

[180] OECD, 'Internal Audit' (OECD, NY) https://www.oecd.org/governance/ethics/internalaudit.htm#:~:text=Internal%20control%20is%20about%20ensuring,with%20laws%20and%20policy%20objectives.&text=External%20audit%20functions%2C%20or%20Supreme,for%2Dmoney%20and%20systemic%20risks accessed 20 March 2024.

fraud and corruption.[181] In comparison, external audits hold governments accountable for how they spend money.[182] Internal and external audits are significant monitoring mechanisms for ensuring efficacy and efficiency not only in the private sector but also in public sector expenditures in their own right.[183]

5.4.2.3 Indigenous Peoples

Victoria Tauli-Corpuz, Special Rapporteur on the Rights of Indigenous Peoples, stressed that a failure to recognise Indigenous peoples as such denied them their rights enshrined in international human rights law.[184] In Timor-Leste, indigenous people are recognised in national laws, such as Decree-Law no 26/2012 on Environment.[185] Timor-Leste recognises the significance of the traditional and customary laws of its indigenous people regulating the relationship between humans and their environment. Indigenous people hold unique knowledge and practices for the sustainable management of natural resources. They have retained social, cultural, economic, and political characteristics that are distinct from those of the dominant societies in which they live.[186] Thus, recognising Indigenous peoples' customary law is important as it shows that Timor-Leste is protecting these

[181] Ibid.
[182] Ibid.
[183] Jenny Goodwin, 'A Comparison of Internal Audit in the Private and Public Sectors' (2004) 19 (5) Managerial Auditing Journal 640-650.
[184] UN Meeting Coverage and Press Releases, 'Consent, Participation of Indigenous Peoples in Decisions Affecting Them Vital to Advancing Their Rights, Special Rapporteur Tells Third Committee: 72nd Session, 16th & 17th Meetings (Am & Pm)' (United Nations Press Releases 2017).
[185] Decree Law Nº. 26/2012 on Environment (n19).
[186] United Nations Department of Economic and Social Affairs Indigenous People, 'Indigenous People at the United Nations' (*United Nations,* NY) https://www.un.org/development/desa/indigenouspeoples/about-us.html accessed 27 March 2023.

indigenous peoples' cultural, social, economic, and political characteristics. This can also be seen when Timor-Leste voted in favour of the UN Declaration on the Rights of Indigenous People in 2007.[187]

Now that Timor-Leste, as a least developed State,[188] has started onshore oil drilling and developing an integrated petroleum infrastructure in its coastal zone, recognising and including the participation of indigenous peoples in petroleum activities is even more crucial. This is because Timor-Leste's indigenous peoples' culture is based on beliefs in the sky and its components (e.g. sea, earth, and natural resources), including the earth's inhabitants.[189] They are guided by their beliefs to protect the environment and ensure the balance of the environment in which they live. Therefore, indigenous peoples' contributions are essential. As the Special Rapporteur stresses, without them, sustainable development cannot be achieved.[190] However, it is important to note that, although Timor-Leste recognises the Indigenous peoples' customary law and their rights, the participation of indigenous peoples in the creation of national laws and policies or in oil and gas projects in Timor-Leste to date has been ineffective.[191] As a result, they have not only been

[187] United Nations Digital Library, 'United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly' (*Digitallibrary,* 2007) available at https://digitallibrary.un.org/record/609197?ln=en accessed 14 March 2024.

[188] United Nations Conference on Trade and Development, 'The low-carbon transition and its daunting implications for structural transformation' (UNCTAD, 2022).

[189] Justina Aurea da Costa Belo, 'A Summary of some of the Indigenous knowledge in Timor-Leste and its relevance for climate action' (Boell, 2021) A summary of some of the Indigenous knowledge in Timor-Leste and its relevance for climate action | Heinrich Böll Stiftung | Washington, DC Office - USA, Canada, Global Dialogue (boell.org) accessed 18 January 2023.

[190] UN Meeting Coverage and Press Releases (n184).

[191] See chapter 4, section 4.3.3.1.

deprived of the effective exercise of their rights, but this can also have adverse effects on the environment. Timor-Leste can learn from other States that have experienced environmental degradation[192] resulting from oil extraction activities in order to avoid such damage as destroyed forests, vegetation, fishing industries, polluted soil, air, and drinking water, which has led to severe health problems. Thus, Timor-Leste must ensure the participation of indigenous peoples, which is important for achieving sustainable development in the country.

5.4.3 National Legal Regime

This section describes another potential solution that can be undertaken to improve in relation to the challenges and barriers specifically mentioned in this thesis. This potential solution is creating a specific local content law.

5.4.3.1 Local Content Law

As stated in Chapter 4 (section 4.3.5.1), the objective of the local content plan in the oil and gas industry is to maximise the oil and gas value chain through employment, technology transfer, and acquisition of knowledge. This includes employment of nationals, using local goods and services, improving local skills, and improving local technological capabilities.[193] In Timor-Leste, whilst national laws and regulations support the objectives of the local content plan, no specific local content law has

[192] For example, the Keystone Pipeline which leaked 383,000 Gallons of Oil in North Dakota, see: Emily S Rueb and Niraj Chokshi, ' Keystone Pipeline Leaks 383,000 Gallons of Oil in North Dakota' *The New York Times* (31 October 2019) https://www.nytimes.com/2019/10/31/us/keystone-pipeline-leak.html#:~:text=The%20Keystone%20pipeline%20system%2C%20an,wetland%2C%20state%20environmental%20regulators%20said accessed 20 September 2023.

[193] IPIECA, *Local Content: A guidance document for the oil and gas industry* (2nd ed., IPIECA 2016).

been implemented yet. Having a carefully planned local content law can help to diversify Timor-Leste's economy and keep it away from dependency on petroleum revenues. Local content law can bring short- and long-term benefits to the country, for instance, developing a skilled workforce, improving domestic suppliers, and improving local technology capabilities. Thus, local content law should reflect Timor-Leste's development goals and define its short- and long-term policy goals and desired impact.

While creating or formulating a local content law is important, the effective implementation of this law is increasingly paramount. Public and private institutions should have the ability to respond to opportunities and challenges created by this law. It is argued that, in order to monitor the implementation of local content law, coordination should be maintained between the public sector, the local private sector, and international investors. This is essential to bridge the gap between current standards and the standards demanded by the MNCs.[194] In addition, different institutions should be established. First, a government institution to act as a broker between the MNCs and domestic firms; second, an independent institution to negotiate and manage local participation.[195] Thus, if Timor-Leste decides to formulate its own local content law, it must also ensure that specific institutions are created to monitor the implementation with a view to ensuring that petroleum activities bring benefits to the State. The following section will give recommendations on how other developing States can use the 2018 Treaty as a template.

[194] John Page and Finn Tarp, 'Implications for Public Policy' in John Page and Finn Tarp (eds), *Mining for Change: Natural Resources and Industry in Africa* (Oxford University Press 2020) 460.
[195] Ibid 461.

5.5 2018 Treaty as a Template for Other Developing States

This last section of the chapter assesses whether the 2018 Treaty, with a focus on the RtD, can serve as an example for other States facing similar situations or pending maritime boundary disputes. While numerous maritime disputes remain unresolved around the world, it is argued that several key factors need to be present for the 2018 Treaty template to be successful elsewhere and by a process of elimination, it seems that the South China Sea dispute is the most likely to benefit from a 2018 Treaty template. First, the dispute must be between a developing and a developed State. As a result, the 2018 Treaty cannot be used as a template for the Aegean Sea Continental Shelf case between Greece and Turkey,[196] the Maritime Dispute between Peru and Chile,[197] and the Maritime Delimitation in the Black Sea between Romania and Ukraine.[198]

Second, the two parties must have established some form of relationship. This relationship can be fostered through initiatives like international development aid. For instance, Australia is a major provider of international development aid to Timor-Leste,[199] which suggests a strong basis for collaboration and its capability and

[196] *Aegean Sea Continental Shelf case* (*Greece v.Turkey*) (Judgement) [1978] ICJ Rep 3.
[197] *Maritime Dispute (Peru v. Chile)* (Judgement) [2014] ICJ Rep 3.
[198] *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (Judgement) [2009] ICJ Rep 61.
[199] Australian Government Department of Foreign Affairs and Trade, 'Development Assistance in Timor-Leste: Australia's Development Partnership with Timor-Leste' (*DFAT,* NY) https://www.dfat.gov.au/geo/timor-leste/development-assistance/development-partnership-with-timor-leste#:~:text=Australia%20and%20Timor%2DLeste%20are,Timor%2DLeste's%20largest%20development%20partner accessed 20 December 2024.

readiness to assist developing States like Timor-Leste. The relationship between the States involved in the aforementioned case does not fit this profile.

In light of these factors, this section focuses on the South China Sea dispute, which involves the People's Republic of China on the one hand and Taiwan, the Philippines, Vietnam, Malaysia, and Brunei on the other. Despite the fact that China self-identifies as a developing State,[200] it should be considered a developed State in light of being the world's second largest economy after the United States.[201] Parties on the other side of the dispute are all developing countries located in Southeast Asia, and thus, they are in a similar position to Timor-Leste. Moreover, while China may not be the leading provider of international aid to all countries in the South China Sea case, it is a significant source of assistance for certain States. China has also provided development assistance to several countries in the South China Sea region, including Vietnam, the Philippines, Malaysia and Brunei. This includes infrastructure projects

[200] Permanent Mission of China to the WTO, 'China in the WTO: Past, Present and Future' (WTO 2011), also available at https://www.wto.org/english/thewto_e/acc_e/s7lu_e.pdf accessed 20 January 2025. Also see: Clara Weinhardt and Johannes Petry, 'Contesting China's Developing Country Status: Geoeconomics and the Public- Private Divide in Global Economic Governance' (2024) 17 (1) The Chinese Journal of International Politics 48.

[201] World Bank, 'GDP by Country' (2023) https://www.worldometers.info/gdp/gdp-by-country/ accessed 20 January 2025

such as roads, bridges, ports, and energy infrastructure.[202] It is contended that the 2018 Treaty can be used as a template for those developing States in the South China Sea because it reinforces the full sovereignty of the States in dispute, it contains local content plans, it incorporates the RtD, and it was the product of a successful conciliation, the first compulsory conciliation under Annex V of the 1982 UNCLOS.

5.5.1 South China Sea Dispute

To assess whether the 2018 Treaty, with a focus on the RtD, can serve as a relevant example for the States mentioned, this section will provide a brief overview of the South China Dispute.

The South China Sea dispute is maritime and island claims between sovereign States in the region (China, Brunei, Taiwan, the Philippines, Vietnam, and Malaysia). China claims nearly all of the South China Sea, including the Paracel Islands.[203] However, Taiwan, the Philippines, Vietnam, Malaysia, and Brunei also claim parts of the region.

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[202] For instance, through China's Belt and Road Initiative (BRI) See: Le Hong Hiep, 'The Belt and Road Initiative in Vietnam' in Le Hong Hiep (ed) The Belt and Road Initiative in Vietnam: Challenges and Prospects (ISEAS-Yusof Ishak Institute 2018) 75-87; Huaxia, 'China, Vietnam Discuss Strategic Transport Infrastructure Cooperation' (*Xinhua,* June 2024) https://english.news.cn/20240627/1e2c6ac25ab64f9d9ed6c845c2582367/c.html; for the Philippines see: Marco Antonio Luisito V Sardillo III et al., 'Navigating Philippine-China Relations: Insights from Beijing's Role as a Top Lender' (*Aiddata,* August 2024) https://www.aiddata.org/blog/navigating-philippine-china-relations-insights-from-beijings-role-as-a-top-lender accessed 3 December 2025; for Malaysia see: Cheng-Chwee Kuik, 'Tilting Toward Beijing? Malaysia's Relations with China after Li Qiang's Visit' (Carnegie China, August 2024) https://carnegieendowment.org/research/2024/08/tilting-toward-beijing-malaysias-relations-with-china-after-li-qiangs-visit?lang=en&center=china accessed 3 December 2025.

[203] Benjamin J. Sacks, 'The Political Geography of the South China Sea Disputes: A RAND Research' (Primer, 2022) 1, 2.

This dispute has evolved considerably over the past few years.[204] Claimants in the South China dispute are interested in retaining or acquiring the rights to the exploration and potential exploitation of crude oil and natural gas, as well as the rights to secure fish stocks in the seabed of various parts of the South China Sea.[205] The conflicting claims have led to tensions and occasional confrontations between States in the region. Efforts to resolve the disputes have involved legal arbitration[206] and regional initiatives such as the Association of Southeast Asian Nations (ASEAN).[207] Each State's claims are based on historical, legal, and geographical factors, resulting in complex and overlapping territorial disputes.[208]

The South China Sea Dispute is used in this thesis because of its similarities with the Australia/Timor-Leste maritime dispute. These similarities include overlapping claims, resource exploitation, and legal disputes. Although there are similarities, there are also significant differences between the two disputes, as illustrated below.

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[204] Ian Storey, 'Disputes in the South China Sea: Southeast Asia's Troubled Waters' (2014) 3 Politique Etrangère 1, 5.

[205] Christine Elizabeth Macaraig and Adam James Fenton, 'Analyzing the Causes and Effects of the South China Sea Dispute' (2021) 8 (2) The Journal of Territorial and Maritime Studies 42, 44-46.

[206] *The South China Sea Arbitration* (*The Republic of Philippines v. The People's Republic of China)* Award, PCA Case No. 2013-19, ICGJ 495 (PCA 2016), 12 July 2016, Permanent Court of Arbitration [PCA].

[207] Vietnam, Malaysia, the Philippines and Brunei are members of ASEAN, Also see*:* Asean, 'ASEAN Member States' (*ASEAN,* NY) <https://asean.org/member-states/> accessed 12 March 2024; For instance, one of the regional initiatives is the issuance of the Declaration on the Conduct of Parties in the South China Sea in 2002. See: Association of Southeast Asian Nations, 'Priority Areas of Corporation' (*ASEAN,* NY) <https://asean.org/our-communities/asean-political-security-community/peaceful-secure-and-stable-region/situation-in-the-south-china-sea/priority-areas-of-cooperation/> accessed 12 March 2024.

[208] Sacks (n201).

In both cases, there are overlapping maritime claims between the countries involved. Multiple parties claim sovereignty over certain islands, reefs, and waters, leading to disputes regarding the extent of their Exclusive Economic Zones (EEZs) and rights to exploit natural resources. Additionally, in both cases, disputes involve concerns about the exploration and exploitation of natural resources, such as oil and gas reserves, as sources of disputes.[209] The potential economic benefits associated with these resources make the disputes more complex and contentious. Finally, in both cases, legal mechanisms have been utilised to resolve the disputes. The Philippines pursued an arbitration case against China in the South China Sea dispute, resulting in a landmark ruling by the Permanent Court of Arbitration (PCA) in 2016.[210] In the Australia/Timor-Leste dispute, the two States engaged in legal proceedings at the International Court of Justice[211] and the PCA.[212]

However, there are also differences between the two disputes. For instance, the South China Sea dispute involves major powers like China and the United States, leading to geopolitical complexities and regional tensions. In contrast, the

[209] Nico Schrijver, S*overeignty Over Natural Resource: Balancing Rights and Duties* (Cambridge University Press 1997) 166.

[210] *The South China Sea Arbitration* (n206); Also see: Caitlin Campbell and Nargiza Salidjanova, 'South China Sea Arbitration Ruling: What Happened and What's Next?' (2016) US- China Economic and Security Review Commission 1

[211] *Questions relating to the Seizure and Detention of Certain Documents and Data* (*Timor-Leste v. Australia)* (Application Instituting Proceedings) [2013] ICJ General List No. 156.

[212] *Arbitration under the Timor Sea Treaty (Timor-Leste v. Australia)* Procedural Order No 1 (Rules of Procedure), PCA Case No. 2013-2016 (PCA, 2013), 06 December 2013 Permanent Court of Arbitration [PCA]; *Timor Sea Conciliation (Timor-Leste v. Australia)* Report and Recommendations of the Compulsory Conciliation Commission Between Timor-Leste and Australia on the Timor Sea, PCA Case No. 2016-10 (PCA, 2016) 9 May 2018 Permanent Court of Arbitration [PCA] (Hereinafter Timor Sea Conciliation).

Australia/Timor-Leste dispute is relatively less influenced by major powers. In addition, the historical context of the South China Sea dispute and the reasons behind the disputes differ. The South China Sea Dispute has deep historical roots, involving historical claims, colonial legacies, and geopolitical interests. The Australia/Timor-Leste dispute primarily revolves around the delimitation of maritime boundaries following Timor-Leste's independence from Indonesia. While similarities exist, it is important to recognise the unique characteristics and complexities of each dispute, as they involve different States, interests, and historical contexts.

The following section explains why the 2018 Treaty can be used as a template for States in the South China Sea Dispute.

5.5.2 Independence and Full Sovereignty

As described above, the 2018 Treaty can be used as a template for the South China Sea Dispute because it is about independence and reinforcing the full sovereignty of these States in dispute. This is because 'the sovereignty of a State extends, beyond its land territory and its internal waters…'[213] and the RtD implies the full realisation of the right of peoples to self-determination, including the 'exercise of their inalienable right to full sovereignty over all their natural wealth and resources'.[214] Consequently, it is known that most of the claims or maritime disputes are motivated by material factors involving seabeds containing significant quantities of hydrocarbon resources. However, as stated by Strating, these claims are also motivated by ideational factors such as full sovereignty, national identity, status, and

[213] Convention on the Territorial Sea and the Contiguous Zone (adopted on 28 April 1958, entered into force on 10 September 1964) UN Doc A/CONF.13/L.52.
[214] UNDRTD (n9) Art 1 (2).

prestige in the defence of maritime possessions.[215] Thus, sovereignty claims have developed from being about material resources to the beliefs that link maritime spaces to national identity and position 'sea territory' as necessary for completing sovereignty and independence,[216] particularly in cases involving post-colonial States. As mentioned in Chapter 1, section 1.1, the outcome of the Australia/Timor-Leste dispute represents 'complete' or 'full' sovereignty for Timor-Leste, in the sense that this time, Timor-Leste exercises full sovereignty over its natural resources, both on its lands and sea. As Schrijver argues, full sovereignty implies having the power to govern and manage all economic activities and the overall wealth generated in that area.[217] For Timor-Leste, the dispute on the Timor Sea with Australia is not merely about defining maritime boundaries between them; it is also an important symbolic step for Timor-Leste in gaining full independence in its maritime territory. The struggle persisted since the time that Timor-Leste was under Portuguese colonisation, through the period of Indonesian occupation, and even after gaining independence from Indonesia in 2002. Therefore, the narratives employed by Timor-Leste in its disputes with Australia concerning maritime boundaries and hydrocarbon resources in the Timor Sea emphasised the importance of territorial control for achieving independence and asserting sovereignty in the Timor Sea.

Thus, by signing a permanent boundary treaty with Australia in 2018, Timor-Leste has finally gained its full independence or full sovereignty. Therefore, the 2018 Treaty

[215] Rebecca Strating, 'Maritime Territorialization, UNCLOS and the Timor Sea Dispute' (2018) 40 (1) Contemporary Southeast Asia: A Journal of International and Strategic Affairs 101, 103.
[216] Ibid 102.
[217] Schrijver (n209).

can be a model for other developing States which are struggling for full sovereignty over their natural resources.

5.5.3 Successful Conciliation

The 2018 Treaty can also be used as a template for the South China Sea Dispute using similar conciliation.[218] The 2018 Treaty was achieved after a successful conciliation initiated by Timor-Leste pursuant to Article 298 and Annex V, Section 2 of the UNCLOS (1982).[219] This is the first compulsory conciliation under Annex V of the 1982 UNCLOS[220] and, as such, it can be seen as a blueprint for the settlement of other maritime disputes and sovereignty issues,[221] particularly in States such as China, Vietnam, the Philippines, Malaysia, and Brunei, except Taiwan, who have all ratified UNCLOS 1982.[222] The Timor Sea conciliation also led to an amicable resolution between Timor-Leste and Australia in delimiting a permanent maritime boundary. It has provided important lessons for States seeking to resolve their maritime boundary

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[218] Gemmo Bautista Fernand, 'The Timor Sea Dispute: A Note On The Process, Resolution, And Application In The West Philippine Sea' (2020) 93 Phil LJ 29-55.
[219] UNCLOS (1982) (n3), Art. 140; See: Chapter 1, section 1.5.3.
[220] *Timor Sea Conciliation* (n212); Also see: Dai Tamada, 'The Timor Sea Conciliation: The Unique Mechanism of Dispute Settlement' (2020) The European Journal of International Law 31 (1) 321, 321-322.
[221] Anne-Marie Schleich, 'The Historic 2018 Maritime Boundary Treaty between Timor-Leste and Australia' (2018) The Institute for Strategic, Political, Security and Economic Consultancy Strategy Series: Focus on Defence and International Security 1-9; Hao Duy Phan et al., *The Timor-Leste/Australia Conciliation: A Victory and Peaceful Settlement of Disputes* (World Scientific 2019) 26.
[222] United Nations Treaty Collection, '6. United Nations Convention On The Law Of The Sea' (United Nations Treaties, NY) https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en accessed 29 March 2023; Also see: Natalie Klein, 'The Timor Sea Conciliation and Lessons for Northeast Asia in Resolving Maritime Boundary disputes' (2018) 6 (1) Journal of Territorial and Maritime Studies 30-50.

disputes.[223] According to the Conciliation Commission in the conciliation between Timor-Leste and Australia, a positive result was facilitated by four main factors: 1) efforts to foster mutual trust among the parties involved in the Commission and throughout the process; 2) the willingness to broaden the scope of the proceedings beyond mere delimitation to include other essential aspects; 3) the Commission's proactive initiatives to promote ideas and direct the progression of the proceedings; and 4) ongoing, informal communications with the representatives and legal counsel of the parties at various levels.[224]

It is contended that other States party to UNCLOS can learn from the benefits and limitations of the Timor Sea dispute settlement process with Australia in relation to their own unresolved maritime boundaries.[225] The former President of the Third UN Conference on the Law of the Sea, Professor Koh, emphasised that States with disputes over maritime boundaries or competing claims to territorial sovereignty should seriously consider conciliation as a means of resolving their conflicts, as it is a non-adversarial approach that leads to a consensual and mutually beneficial outcome. He also argued that the selection of conciliation should be made thoughtfully, and the 12-month deadline for the Commission to deliver a report worked to apply pressure on all parties involved. Furthermore, Professor Koh contended that both countries were exceptionally well represented. Timor-Leste's Chief negotiator was Xanana Gusmão, the father of the nation, along with his capable and knowledgeable agent, Agio Pereira. Additionally, the Conciliation Commission

[223] Ibid.
[224] *Timor Sea Conciliation* (n212) Para 286.
[225] Phan et al (n221) 27.

features experts in the field of international law and are independent of the parties,[226] and finally, both parties demonstrated a political will to reach a fair and lasting compromise.[227]

Examining the South China Sea case, for instance, China, Taiwan, the Philippines, Vietnam, Malaysia, and Brunei all lay claim to overlapping territories,[228] similar to Australia and Timor-Leste's case. Indeed, the South China dispute is more complex as it involves more parties. Compared to other States in the South China Sea, China has the power to accept conciliation. However, China has excluded the possibility of arbitration or adjudication for maritime boundary delimitation under UNCLOS[229] and is generally reluctant to engage in any form of dispute settlement mechanism. It is a long-standing dispute, and traditional dispute settlement approaches have failed to resolve it.[230] It does not only impact bilateral relations and the Association of Southeast Asian Nations (ASEAN)[231] but also directly affects the United States (US).

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[226] Government of Timor-Leste Media Release, 'Conciliation Commission established with the appointment of its Chair' (*Government of Timor-Leste,* 29 June 2016) https://timor-leste.gov.tl/?p=15696&lang=en accessed 30 July 2024

[227] Phan et al (n221) 27-28

[228] Kei Koga, 'Four Phases of South China Sea Disputes 1990–2020' in: Managing Great Power Politics. Global Political Transitions (Palgrave Macmillan 2022) 43-160.

[229] China has 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' at (*United Nations,* NY) https://www.un.org/depts/los/convention_agreements/convention_declarations.htm accessed 12 March 2024; See: Klein (n222) 30-50.

[230] Constantinos Yiallourides, *Maritime Disputes and International Law: Disputed Waters and Seabed Resources in Asia and Europe* (Routledge, 1st ed, 2019) 92.

[231] Vietnam, Malaysia, the Philippines and Brunei are members of ASEAN. See: Asean, 'ASEAN Member States' (*ASEAN,* NY) *available at* https://asean.org/member-states/ accessed 12 March 2024; For instance, one of the regional initiatives is the issuance of the Declaration on the Conduct of Parties in the South China Sea in 2002, see: Association of Southeast Asian Nations, 'Priority Areas of Corporation' (*ASEAN,* NY) available at https://asean.org/our-communities/asean-political-security-

This is because the US is allied with several of the States bordering the South China Sea, such as the Philippines and Vietnam, and it has wide-ranging security commitments in East Asia. Therefore, any dispute among them will directly affect the US. As a consequence, Australia and the US can further pressure China to cooperate in the South China Sea dispute. States in dispute can still refer the dispute to a conciliation commission constituted under Annex V of UNCLOS, which was the same approach used by Timor-Leste to resolve its differences with Australia. Perhaps the claimants in the South China Sea can agree to find a middle path: limit their claim to the areas of 200 nautical miles of the Special Economic Zone following the UNCLOS and/or allow a neutral party to adjudicate based on the UNCLOS or any other relevant international laws.

Therefore, although the use of the procedure to negotiate a treaty can be beneficial and encourage States to come to the negotiation table, some States refuse to be pulled into any form of negotiation mechanism. In particular, China, like Australia, refuses to recognise the jurisdiction of the international court responsible for resolving disputes related to the delimitation of maritime zones. China's reluctance to submit the dispute to international proceedings puts into question the use of conciliation to resolve the dispute.[232] Thus, the procedure may only work for States that are generally inclined towards negotiation and compliant with international law. Most importantly, it would require a willingness from China, as the more powerful

community/peaceful-secure-and-stable-region/situation-in-the-south-china-sea/priority-areas-of-cooperation/ accessed 12 March 2024.

[232] Gemmo Bautista Fernand, 'The Timor Sea Dispute: A Note on the Process, Resolution, and Application in the West Philippine Sea' (2020) 93 Phil LJ 29.

State to cooperate in resolving the dispute, similar to the situation between Australia and Timor-Leste (see discussion in Chapter 1, section 1.3.4 and Chapter 5, section 5.1.1).

However, Taiwan, the Philippines, Vietnam, Malaysia, and Brunei can try engaging in diplomatic efforts to facilitate dialogue with China, emphasising the importance of peaceful resolution and adherence to international legal frameworks such as UNCLOS (1982). Similar to the conciliation between Timor-Leste and Australia, political will is the most crucial factor. All the States involved in the South China Sea dispute must be willing to compromise and cooperate to achieve constructive outcomes.[233]

5.5.4 Local Content Plans

The 2018 Treaty can also serve as a template for countries bordering the South China Sea by integrating local content plans into their maritime boundary treaties. Indeed, it is recognised here that the South China Sea disputes need to be addressed first.

The local commitments set out in Annex B, Article 14 of the 2018 Treaty,[234] which has an objective to maximise the oil and gas value chain through employment, technology transfer, and acquisition of knowledge, is a way of delivering benefits beyond the payment of royalties and taxes. Furthermore, if successful, a policy to increase local content can lead to job creation, boost the domestic private sector, facilitate technology transfer, and build a competitive local workforce. Indeed, UNCLOS does not offer detailed guidance on the content of a maritime boundary

[233] Phan et al. (n221) 28
[234] 2018 Treaty (n1) Annex B, Art 14

treaty dealing with hydrocarbon resources,[235] but the parties have the discretion to incorporate such local content plan in the treaty.

As can be seen through the treaties signed in the Timor Sea before the 2018 Treaty, these local content plans were not included. Thus, it can be contended that this is the result of evolution. At first, Australia was hesitant to commit to signing a permanent maritime boundary treaty; nevertheless, Timor-Leste persisted in its efforts to persuade Australia. Eventually, Australia agreed to conciliate to end the decades-long dispute with Timor-Leste and recognise the sovereign rights of coastal states. In addition, the permanent boundary treaty between Australia and Timor-Leste (2018 Treaty) contains a joint development plan as part of the joint development of the area for the benefit of both Contracting Parties.[236]

Some maritime treaties do not include local content policy, such as the Philippines, which has a maritime border agreement with Indonesia.[237] This treaty was signed after 20 years of negotiations in 2014 in accordance with the principles of the UNCLOS.[238] This treaty does not contain local content commitments as in the 2018

[235] United Nations, *Handbook on the Delimitation of Maritime Boundaries* (Uinted Nations Publications, 2000) 38

[236] 2018 Treaty (n1) Annex B, Art 1

[237] Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of the Philippines concerning the delimitation of the exclusive economic zone boundary (signed on 23 May 2014, entered into force 15 February 2017).

[238] United Nations Treaty Collection, 'Agreement between the Government of the Republic of Indonesia and the Government of the Republic of the Philippines concerning the delimitation of the exclusive economic zone boundary' (*United Nations,* NY) https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280562a05&clang=_en accessed 20 September 2023.

Treaty. Thus, to ensure that oil and gas delivers benefits beyond the payment of royalties and taxes, maritime treaties should include local content commitments.

5.6 Conclusion and Recommendations

This thesis demonstrates that the 2018 Treaty has adopted the RtD. However, the analysis reveals that the 2018 Treaty is weak in addressing the intra-State relationship. While national laws and policies in Timor-Leste align with the 2018 Treaty provisions, challenges persist, the most significant being the inadequate implementation of these laws and policies. Timor-Leste faces various political, economic, and social barriers that hinder the effective implementation of these national laws and policies.

In this context, this thesis suggests several potential solutions, such as investing in human capital, creating and funding new institutions, improving community engagement through public participation, involving Indigenous peoples in decision-making, improving private sector engagement, and formulating a local content policy. These incremental measures can be undertaken to address the challenges and barriers outlined in this thesis.

In addition, to utilise the 2018 Treaty as a blueprint for other developing States facing similar situations or pending maritime boundary disputes, especially in the South China Sea case, States should engage in diplomatic efforts to facilitate dialogue between parties and convince China to cooperate in resolving the dispute. In addition, the parties in the South China Sea case should consider employing a conciliation mechanism similar to that used in the Timor-Leste and Australia case and select conciliation strategically to exert pressure on all parties involved. This process

should be represented by a highly capable, knowledgeable, and respected legal team. However, one of the most important factors for resolving the South China Sea case is that all States must demonstrate genuine political will.

Furthermore, to utilise the 2018 Treaty as a blueprint, State parties must incorporate the RtD when drafting their own permanent maritime boundary treaty. This approach ensures that the treaty integrates the principles of the international human rights framework into the plans, policies, and processes of development.[239] Similar to the 2018 Treaty, such a treaty must include all elements of the RtD under the inter and intra-State relationship, including participation. Furthermore, prior to drafting a permanent maritime boundary treaty, it is essential to consider the active involvement of individuals and people and encourage their participation in the consultation process. Moreover, to safeguard the environment, the engagement of indigenous peoples, which includes FPIC, is of utmost importance.

This thesis concludes that the 2018 Treaty serves as a tool for the realisation of the RtD of Timor-Leste and its people. The 2018 Treaty's provisions will contribute to the realisation of the RtD of Timor-Leste and its people. It is also important to note that the potential solutions offered in this thesis will not comprehensively enhance the general economic, social, and political situation in Timor-Leste. Nevertheless, they do represent small yet meaningful steps that can be undertaken to address the particular challenges and barriers highlighted in this thesis.

[239] UNDP, 'Indicators for Human Rights Based Approaches to Development in UNDP Programming: A User's Guide' (UNDP March 2006) 1

Chapter 6: CONCLUSION

This research aimed to investigate whether the 'Treaty Between Australia and the Democratic Republic of Timor-Leste Establishing Their Maritime Boundaries in the Timor Sea' (2018 Treaty)[1] would contribute to the realisation of the RtD of Timor-Leste and its people. Based on a comprehensive examination and analysis of the previous and current Joint Development Agreements in the Timor Sea, this thesis concludes that the 2018 Treaty is indeed a tool for the realisation of the RtD of Timor-Leste and its people.

In reflecting on the study and its findings, this thesis draws several salient conclusions.

First, using the socio-legal methodology and a doctrinal approach to analyse the maritime Treaties reveals the real impact of the law and how reality impacts the application of the law. This approach has led to an improved understanding of the JPDAs as social phenomena and their broader societal implications. The socio-legal methodology was supplemented by secondary resources not only in law but also across diverse fields, including politics, economics, and anthropology, such as books, journal articles, conference papers, working papers, reports of international and local NGOs, Australian and Timorese government reports, and newspapers. Furthermore, in order to enhance the understanding of the maritime treaties, this thesis utilised

[1] Treaty Between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea (adopted 6 March 2018) [Hereinafter 2018 Treaty]. See: Stephanie March and Stephen Dziedzic, 'Australia, East Timor Sign Deal on Maritime Border, Agree to Share Revenue from Greater Sunrise Oil and Gas' *ABC News* (Australia 7 March 2018) <http://www.abc.net.au/news/2018-03-07/australia,-east-timor-sign-deal-on-maritime-boRTDer/9522902> Accessed 20 July 2018.

Articles 31 to 33 of the VCLT (1969) as guidelines for interpreting treaty provisions based on their ordinary meaning, context, and intended object and purpose; and taking into account the circumstances of the conclusion of the treaty.

Therefore, this methodology and method helped the researcher to assess whether the outcomes of JDAs (i.e. especially the revenue shares) align with the ideals of the RtD and how these JDAs affect the development of the people and the nation itself, particularly regarding development indicators such as health, education, and economic opportunities.

Second, the thesis discovered that the status of the JDAs or maritime Treaties yields various outcomes on the revenue share of natural resources and that a permanent maritime boundary treaty is undoubtedly the most effective. For instance, a JDA serves as a temporary solution for the purpose of joint exploration of hydrocarbon resources pending a final delimitation, whereas a permanent maritime boundary offers conclusive legal demarcations that provide legal and long-term certainty and clarity as well as security in maritime relations. This clarity prevents disputes and conflicts over resources, navigation rights, and jurisdictional matters between Australia and Timor-Leste. Most importantly, as stated by Strating,[2] the people of Timor-Leste view the 2018 Treaty as essential to realising their nation's sovereignty, marking a significant victory, with a major increase in future revenues from the oil and gas shared in the Greater Sunrise regime. This thesis contends that the 2018

[2] Rebecca Strating, 'Maritime Territorialization, UNCLOS and the Timor Sea Dispute' (2018) 40 (1) Contemporary Southeast Asia: A Journal of International and Strategic Affairs 101, 103.

Treaty represents a reaffirmation of Timor-Leste's sovereignty, possessing both symbolic and economic importance for the following reasons:

One, the 2018 Treaty reaffirms Timor-Leste's right to self-determination; two, the signing of the 2018 Treaty is pivotal for Timor-Leste's people's national identity and pride, showcasing the capacity of a small State to take Australia, a developed State, to a compulsory conciliation mechanism under UNCLOS and solve the long-standing deadlock. Three, the conciliation mechanisms provided by UNCLOS (1982) have been successful and effective. This success has enabled both Australia and Timor-Leste, which are involved in the JDA, to accurately delineate their maritime boundaries using the appropriate approach and fairly share the revenues from oil and gas. It can also be argued that the conciliation mechanism used in this case can serve as a blueprint for the settlement of other maritime disputes and sovereignty issues.[3] Four, the 2018 Treaty has the potential to foster trade and investment opportunities, thereby enhancing Timor-Leste's economic development and stability. The economic benefits derived from the 2018 Treaty could lead to improved living standards and infrastructure development. Five, the signing of the 2018 Treaty illustrates compliance with the Resolution of PSNR (1803), which states '…the importance of encouraging international cooperation in the economic development of developing countries,'[4] 'Considering that it is desirable to promote international cooperation for the economic development of developing countries…',[5] '…the question of promoting

[3] Anne-Marie Schleich, 'The Historic 2018 Maritime Boundary Treaty between Timor-Leste and Australia' (2018) The Institute for Strategic, Political, Security and Economic Consultancy Strategy Series: Focus on Defence and International Security 1.
[4] UNGA Res 1803 (XVII) (17 December 1973) Preamble, Para 2.
[5] Ibid Preamble, Para 7.

the economic development of developing countries and securing their economic independence'[6] and '…in the interest of their national development and of the well-being of the people of the State concerned.'[7] Indeed, the signing of the 2018 Treaty has demonstrated international collaboration aimed at the economic development of developing countries, specifically Timor-Leste and its people.

Third, for the purposes of this thesis, development was defined as:

> a human right, in which every human person and peoples or communitites, are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, which implies the full realisation of the right to peoples to have control over their natural wealth and resources without external interference, as this right is innate and inviolable.[8]

Therefore, in this thesis, the RtD is classed as a stand-alone human right (where economic, social, and cultural rights, as well as civil and political rights, are constituents of the RtD) and a composite human right in which all rights are realised together, thus supporting the fulfilments of other rights. It is also posited that the UNDRtD presents the RtD as both a collective and individual right. The right-holders of the RtD are human person and peoples or communities and States (both developed and developing States under inter-State relationship). Whereas the duty-

[6] Ibid Preamble, Para 10.

[7] Ibid Art 1; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art 25 [Hereinafter ICCPR 1966] and International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 03 March 1976) 993 UNTS 3 , Art 8 [Hereinafter ICESCR 1966] Art 1 (2).

[8] United Nations Declaration on the Right to Development (Adopted 4 December 1986 UNGA Res A/Res/41/128) Art. 1 (1) (Hereinafter UNDRtD); Also see: Chapter 2, section 2.2.1.

bearers of the RtD are the States themselves, between States (inter-State relationship), and developed States as the duty-bearers towards developing States (intra-State relationship) (discussed in section 2.3.4). The RtD is a right belonging to the human person and peoples or communities, aimed at their benefit and, a right belonging to States to exercise their sovereignty in the interest of national development and for the well-being of the people.[9] Therefore, this thesis asserts that the RtD serves as a framework to assist States in facilitating development.

Consequently, this thesis initially assumed that the previous JDAs affected the realisation of the RtD of Timor-Leste and its people. This assumption is outlined in subsidiary question 1, Chapter 1, section 1.2, which was designed to help achieve the objectives articulated at the beginning of this thesis.

In response to this first question:

'How have previous Joint Petroleum Development Agreements (JPDAs) affected the realisation of the RtD of Timor-Leste and its people? In other words, to what extent did these previous treaties impact the RtD of Timor-Leste and its people, and what lessons can be learned from them?'

Findings indicate that the previous JPDAs did not affect or support the realisation of the RtD of Timor-Leste and its people because they did not prioritise this right or its elements. Instead, they incorporated elements of the RtD in a more incidental manner. It is telling that during the TGT (1989), national laws, in fact, supported the elements of the RtD missing under the TGT (1989). The treaties are also symptomatic

[9] UNGA (n4) Para. 1.

of a time when the State parties had different priorities. During the TGT (1989), Suharto's New Regime was characterised by authoritarian rule and was known for its corrupt government, so Indonesia had other priorities.

During the TST (2002) and the CMATS (2007), Timor-Leste faced numerous challenges and thus gave priority to other activities, such as fulfilling the population's basic needs and, since independence, rebuilding facilities destroyed in the post-referendum violence[10] and reducing mortality rates.[11] This lack of prioritisation of the RtD might also be explained by the fact that when the TGT (1989), the TST (2002), and the CMATS (2007) were signed, the RtD was not yet fully recognised. Indeed, the RtD has been controversial since its inception, and its Declaration remains a non-legally binding instrument. Despite this, the RtD has not only been reaffirmed in several international instruments, but a draft convention on the RtD has also been proposed.[12] Additionally, the elements of the RtD, as identified in section 2.5, are found in legally binding instruments. This suggests that the RtD could be recognised as a right in a legally binding instrument. At a minimum, it is acknowledged that the RtD is an emerging norm of customary international law. Furthermore, the SDGs are informed by the UNDRtD in their pursuit of realising the goals of the RtD and its elements that interacted with the 2030 Agenda and are reinforced in SDG 16. Thus,

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[10] International Monetary Fund, *East Timor: National Development Plan* (International Monetary Fund 2002) Country Report No. 2005/247.

[11] See Chapter 4, section 4.2.5.2.

[12] UNHRC, 'The Right to Development' (5 October 2018) UN Doc A/HRC/Res 39/9; Also see: United Nations Human Rights Office of the High Commissioner (UNHROHC) 'New Treaty would codify Right to Development' (11 May 2023) https://www.ohchr.org/en/stories/2023/05/new-treaty-would-codify-right-development accessed August 2024; Cetim, 'The Convention on the Right to Development' (*Cetim,* 31 May 2023) https://www.cetim.ch/24th-session-of-the-wg-on-the-right-to-development/ accessed August 2024.

even though the adoption of the RtD remains a controversial issue between the Global South and the Global North, many developed States are now strongly committed to achieving sustainable development, eradicating poverty, and promoting human rights.[13] Therefore, the successful implementation of the SDGs can further contribute to the realisation of the RtD.[14]

Fourth, in Chapter 3, which focuses on inter-State relationships, the thesis identifies that while the elements of the RtD were inadvertently included in the JDAs, the incorporation of these elements within the JDAs has evolved over time. For example, while the principles of PSNR and the duty of cooperation were not incorporated in the TGT (1989), these elements of the RtD were ultimately incorporated in the 2018 Treaty, as illustrated in the table below.

During the TGT (1989) and TST (2002), one could, therefore, argue that both JDAs were not in accordance with UNGA Res 1803; they were not in the interest of the welfare of the people of Timor-Leste and did not recognise the significance of fostering and advancing international cooperation for economic development and securing economic independence of Timor-Leste.

The 2018 Treaty is the only agreement that incorporates all elements of the RtD. This suggests that the RtD has gained significant recognition recently, with developed States increasingly committed to achieving sustainable development, alleviating poverty, and advancing human rights. This is a positive development, as it indicates

[13] UNGA (19th Session) 'Report of the Working Group on the Right to Development' (29 June 2018) UN Doc A/HRC/39/56.

[14] Busani Sibindi, 'Right to Development: First Regional Consultation for the African Group' (*OHCHR,* 2018) 4.

a growing awareness of the interconnectedness between economic growth and human rights. It also demonstrates that developed States are willing to support the efforts of developing States in overcoming challenges related to these crucial issues.

Table 1: Key elements of the RtD under the JDAs (Inter-State Relationship)

Key elements of the RtD	TGT (1989) Status and Articles	TST (2002) Status and Articles	CMATS (2006) Status and Articles	2018 Treaty Status and Articles
Participation	Incorporated Arts 5 (2); 5 (5); 7 (4); 24 (1)	Incorporated Arts 3 (b); 6 (a) (c) (d) 7 (a)	Incorporated Arts 3 (b); 6 (a) (c) (d) 7 (a)	Incorporated Arts 7, 8, 15 and 16
Non-discrimination	Incorporated Art Part VI: 24 (4)	Incorporated Art 11 (Positive discrimination)	Incorporated Art 11 (Positive discrimination)	Incorporated Annex B: Art 7 (Positive discrimination)
Fair distribution of benefits	Incorporated Art 2.2 (a) Not fair, not equitable	Incorporated Arts 3 (b); 9 (b); Annex D Fair but not equitable	Incorporated Art 5 Not fair, not equitable	Incorporated Annex B: Art 2; 14 Fair and equitable
PSNR	Not incorporated N/A	Not Incorporated N/A	Not Incorporated N/A	Incorporated Annex B: Art 14
Duty of cooperation	Not incorporated N/A	Incorporated Art 11	Incorporated Art 11	Incorporated Annex B: Art 14

Fifth, Chapter 4, which discusses the intra-State relationship, identified that the 2018 Treaty incorporates all the elements of the RtD identified in Chapter 2, section 2.5, except for the participation element (as illustrated in the table below). This means that the drafting of the 2018 Treaty did not take into account the participation of human person and peoples or communities of Timor-Leste in the intra-State relationship. The drafting process overlooked the views and opinions of the Timorese people; for instance, there is no evidence to suggest that any questionnaires or interviews were conducted to gather their input on what should be included in the Treaty. While the participation element of the RtD is not incorporated, the 2018 Treaty encompasses all other elements outlined in section 2.5. Furthermore, it is worth noting that the duty of cooperation element was absent from the TGT (1989),

the TST (2002) and the CMATS (2006) until it was finally incorporated into the 2018 Treaty under intra-Sate relationship. This inclusion is linked to the fact that the UNCLOS Conciliation mechanism successfully delimited the maritime boundaries between Australia and Timor-Leste and provided a duty of cooperation through Annex B, Article 14 of the 2018 Treaty.

Moreover, in Chapter 4, this thesis has revealed that while JDAs acknowledge the principle of fair distribution of benefits, in practice, the actual distribution may be neither fair nor equitable. This observation arises from an examination of how a government allocates benefits—whether monetary or non-monetary—derived from its natural resources can reflect significant disparities. The analysis highlights that certain communities or people may receive a disproportionate share of the benefits, while others may be left marginalised, suggesting that the Treaties' intentions regarding equitable distribution are not fully realised in the actions of the State. Thus, although the 2018 Treaty incorporates the fair distribution of benefits element and it is fair and equitable, the Government of Timor-Leste needs to allocate the benefits received from its oil and gas fairly and equally. The Government of Timor-Leste needs to create national development policies and reform mechanisms that govern how benefits from natural resources are shared among all stakeholders to ensure that they align with the ideals of fairness and equity espoused in the Treaties. A similar comment can be made with regard to the other elements of the RtD. While they are included within the JDAs, it is crucial for the Contracting Parties to create national development policies and laws or undertake reforms of the existing ones to monitor their implementation closely. Such actions are essential to ensure that the integration of the RtD elements is not merely superficial but genuinely aligns with

the core ideals inherent in each component of the RtD. By actively engaging in this process, the Contracting Parties, especially Timor-Leste, can foster a more coherent and effective application of the RtD principles, ensuring that they contribute meaningfully to the development objectives intended by the agreements. This involves a commitment to continuous evaluation and adaptation of strategies to promote genuine equity and shared benefits among all stakeholders involved. This answered the second subsidiary question in Chapter 1, section 1.2, which asks:

'How will the 2018 Treaty affect the RtD of Timor-Leste and its people?'

It is revealed that the 2018 Treaty will affect the RtD of Timor-Leste and its people through the creation of national development policies and laws that align with its provisions and are vigorously implemented. Finally, in Chapter 4, this thesis concludes that the 2018 Treaty is exemplary because, despite not incorporating the participation element of the RtD, it includes all other elements.

Table 2: Key elements of the RtD under the JDAs (Intra-State Relationship)

Key elements of the RtD	TGT (1989) Status and Articles	TST (2002) Status and Articles	CMATS (2006) Status and Articles	2018 Treaty Status and Articles
Participation	Not Incorporated	Not Incorporated	Like TST	Not incorporated
Non-discrimination	Not Incorporated	Not Incorporated	Similar to TST	Incorporated (Annex B: Art 14) (expressly) National Laws: Law No 13/2005 on Petroleum Activities Decree-Law No 18/2020 of 13 May on Onshore Petroleum Operations Production Sharing Contract Model

	(Art 8 (a) and (j); Section 5.2 (expressly) National Laws: Act 4/1982 on the Basic Provision of Environmental Management on the Living Environment (later amended by Act 23/1997) Indonesian Government Regulation 51/1993	(Art 10 (c) on the Marine Environment; Annex C: Art 6 (b) (v); Art 10 (a)		National Laws: Decree-Law 5/2011 on Environmental Licensing Law No 13/2005 on Petroleum Activities Decree Law 26/2012 on Environment Law 1/2019 on Petroleum Activities Decree-Law No 18/2020 of 13 May on Onshore Petroleum Operations
Duty of cooperation	Not incorporated N/A	Not Incorporated	Similar to TST	Incorporated (Annex B: Art 14) (expressly) Law No 13/2005 on Petroleum Activities

				Private Investment Law No 15/2017
Fair distribution of benefits	Incorporated Preamble (expressly) Neither fair nor equitable National Laws: None	Incorporated (Annex D: Section 2; Art 10 (d)) (expressly) Neither fair nor equitable National Laws: Law No 13/2005 on Petroleum Activities Decree Law 26/2012 on Environment Law No 13/2005 on Petroleum Activities	Similar to TST	Incorporated (Annex B: Art 14) (expressly) Fair, whether it is equitable will depend on how the government allocates its revenue. Decree-Law No 18/2020 of 13 May on Onshore Petroleum Operations Production Sharing Contract Model Private Investment Law No 15/2017.
PSNR	Incorporated (expressly)	Incorporated (expressly)	Similar to TST	Incorporated (Art 6 (3n)) (expressly)

				Production Sharing Contract Model

Sixth, Chapter 5 presented the successes of the 2018 Treaty under the inter-State relationship, notably the conciliation process, as the 2018 Treaty promotes the rule of (international) law and is a testimony to the success of a peaceful settlement of disputes leading to international cooperation between the two States. The Chapter also highlights that the 2018 Treaty provides certainty and stability for businesses and investors. It is unique as it incorporates all the elements of the RtD (under an inter-State relationship, with the exception of the participation element under an intra-State relationship), can be deemed a success story of Timor-Leste's sovereignty, and is fair and equitable.

Chapter 5 also revealed the successes of the 2018 Treaty under the intra-State relationship, which include: its focus on the process of human development grounded in international human rights standards; empowering every human person of Timor-Leste to understand and claim their rights from duty bearers; holding accountable individuals and institutions for respecting, protecting, and fulfilling these rights; including provisions related to the elements of the RtD and which are supported by national development policies and laws in Timor-Leste which are conducive to the 2018 Treaty provisions; and incorporating a requirement for environmental protection in the Special Regime Area. In addition, although Timor-Leste lacks specific laws on local content, the Treaty provision on local content can be backed up by other national laws.

Furthermore, Chapter 5 also unearthed the challenges of the 2018 Treaty under the inter- and intra-State relationships. The challenges identified under an inter-State relationship include technical viability, such as where to channel the Liquefied Natural Gas (LNG) from the Greater Sunrise oil and gas fields, and economic viability,

such as the cost of building the Tasi Mane project. In contrast, under an intra-State relationship, the challenges include the missing 'participation' element of the RtD, the absence of onshore environmental protection requirements, and the weak implementation of national laws. These findings address the third subsidiary question in Chapter 1, section 1.2, which asks:

'How effective are national development policies and laws in order to implement the RtD in Timor-Leste?'

The answer to this question is that national development policies and national laws are weak or ineffective in implementing the RtD in Timor-Leste. As analysed in Chapter 4, under the intra-State relationship, there are national laws that are conducive to the provision of the 2018 Treaty, but their implementation is inadequate.

Therefore, there is a need for Timor-Leste to address weaknesses in law implementation and to incorporate international instruments[15] into its national laws, policies, and regulatory framework to establish standards, principles, and guidelines that govern international relations, human rights, and sustainable use of natural

[15] For instance, these international treaties include, among others: the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (hereinafter UDHR); UNDRtD(n8); United Nations General Assembly Resolution 1803 (XVII): Permanent Sovereignty over Natural Resources, (17 December 1973) UN Doc. A/3171; Rio Declaration on Environment and Development (adopted on 14 June 1992, entered into force 29 December 1993), UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992); United Nations Declaration on the Rights of Indigenous Peoples (adopted by the General Assembly on 13 September 2007) UNGA Res 61/295 [Hereinafter UNDRIP]; Convention on Biological Diversity (adopted on 5 June 1992, entered into force 29 December 1993), 31 ILM 822 [Hereinafter Convention on Biological Diversity/CBD]; International Labour Organisation (ILO) Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989, 28 ILM 1382 [Hereinafter ILO 169].

resources. Through these international instruments, Timor-Leste can adhere to, particularly in areas such as human rights and environmental protection. By doing so, several positive outcomes can occur. These include fostering goodwill and enhancing diplomatic relations; benefiting from protections provided by treaties such as human rights conventions, which can safeguard human person and peoples or communities' rights, including the rights of indigenous people; contributing to a stable international environment; improving their domestic legal systems and governance, leading to better protection of individual rights, and to achieve sustainable development. All of these are at the core of the discourse of the RtD as well as the 2018 Treaty.

When considering the fourth question, in chapter 1, section 1.2, which asks:

'How can the 2018 Treaty help create national and international conditions favourable to the realisation of the RtD of Timor-Leste and its people?'

It can be stated that, at the national level (intra-State relationship), the 2018 Treaty serves as an exemplary model that can be used as a template for crafting other national policies with a focus on development and an emphasis on effective implementation. For instance, the 2018 Treaty mandates environmental protection in the Special Regime Area[16] and requires the Greater Sunrise contractor to set out its local content plan, which should contain local commitments.[17] These provisions can lead Timor-Leste to formulate new development policies and laws that can create national conditions favourable to the realisation of the RtD of Timor-Leste and

[16] 2018 Treaty (n1) Annex B, Art. 6 (3).
[17] Ibid, Article 14 Annex B.

its people. However, to ensure the effective implementation of these development policies and laws, the Government of Timor-Leste should establish mechanisms for implementation and monitoring. In addition, there should be public and private institutions capable of responding to the opportunities and challenges generated by these development policies and laws.

At the international level (inter-State relationship), on the other hand, the 2018 Treaty can help create international conditions favourable to the realisation of the RtD because Australia, as a developed State, can cooperate with Timor-Leste to ensure the development and eliminate any obstacles,[18] including those arising from the failure to observe the civil and political, as well as economic, social, and cultural rights,[19] of Timor-Leste. This can also be undertaken by assisting Timor-Leste in achieving the RtD through development assistance and transfer of knowledge and technology.

Lastly, both conventional and aspirational interpretations of the JDAs highlight that the 2018 Treaty can indeed be used as a template or provide a blueprint for other developing States in the South China Sea, as discussed in Chapter 5, section 5.5. This answers the fifth subsidiary question in Chapter 1, section 1.2, which asks:

'Can other developing States that have similar disputes use the 2018 Treaty as a template?'

While the compulsory conciliation mechanism used in the Timor Sea case serves as a valuable reference for the South China Sea situation, its effectiveness depends on

[18] UNDRtD (n8), Art. 3 (3).
[19] Ibid. Art 6 (3).

various factors, including legal, geopolitical, and diplomatic considerations. For instance, the parties involved in the South China Sea dispute should recognise the jurisdiction under the UNCLOS, as the South China Sea dispute involves not only territorial claims but also national security concerns, geopolitical interests, and historical contexts. Therefore, a similar conciliation mechanism may adequately address these complexities if there is a political will from all the countries involved in the South China Sea to reach a fair and lasting compromise. Engaging in diplomatic initiatives to facilitate dialogue between parties, being open to talks, and adhering to international law can be the first step in this process.

As a major power, China plays a significant role in influencing the outcome of the negotiations. If China were to accept international arbitration or conciliation under UNCLOS, it could foster trust and enhance diplomatic relations with other parties. Thus, using the compulsory conciliation mechanism in the South China Sea situation could offer potential benefits in facilitating a peaceful resolution and ensuring adherence to international law, particularly under UNCLOS.

Moreover, if China and the other parties involved in the South China Sea dispute are able to resolve their maritime boundary negotiations, they could establish a permanent maritime boundary treaty similar to the Treaty of 2018. The drafting process should consider incorporating the RtD. This can be done by integrating all elements of the RtD into their maritime Treaty, both under the inter- and intra-State relationship, including participation. Active involvement of human person and peoples and communitites, including Indigenous people, in the consultation process for the treaty is important. Moreover, to safeguard the environment, the treaty should include a provision that recognises the indigenous people's rights to access

and respect their traditional practices and livelihoods. Indigenous peoples typically possess valuable knowledge regarding sustainable resource management, and incorporating their views can enhance environmental stewardship and promote more sustainable practices in maritime regions.

Based on these findings, this thesis offers some potential solutions, such as:

- Investing in human capital;
- Creating and investing in new institutions;
- Improving community engagement through public participation;
- Involving Indigenous peoples in decision-making;
- Improving private sector engagement and;
- Formulating a local content law.

These are incremental measures that can be taken to address the challenges and barriers outlined in this thesis.

For instance, investing in human capital, as discussed in section 5.4.1, can significantly impact economic growth. A skilled and educated workforce drives innovation and productivity, empowering human person and people or communities through education and training, which, in turn, improves their quality of life and reduces poverty and inequality.

Creating and investing in new institutions can serve as a foundation for improvement. It can foster transparency, accountability, and good governance, which are essential for effective public administration, an area where Timor-Leste currently faces challenges. Transparent institutions can ensure that decision-making processes are open and visible to the public, helping to build trust between the government and its citizens. Fostering accountability with well-defined systems and regulations can lead

to greater responsibility among public officials, reducing the likelihood of corruption and misuse of resources.

Enhancing community engagement, as discussed in section 5.4.2.1, through public participation empowers human person and peoples or communities in decision-making processes. This approach can lead to better decisions that truly reflect the needs and priorities of the human person and people, resulting in more effective and sustainable solutions.

Involving Indigenous peoples, as discussed in section 5.4.2.3, in the decision-making process can help provide valuable insights into sustainable practices and resource management. The Indigenous peoples' customary law in Timor-Leste, Tara Bandu, plays crucial role in creating inclusive societies that acknowledge and value Indigenous peoples' contributions. It is vital to foster justice, respect human rights, preserve Timor-Leste's cultural heritage, and promote sustainable development in Timor-Leste.

Improving private sector engagement, as discussed in section 5.4.2.2, is crucial for economic development and job creation. It can also encourage more responsible business practices that benefit society.

Finally, formulating a local content law in Timor-Leste, as discussed in section 5.4.3.1, helps promote the use of local resources and labour while encouraging the transfer of skills and technology to human person and peoples or communities of Timor-Leste. However, it is important that the local content law includes both short- and long-term goals, as well as specific institutions to monitor its implementation.

Overall, this thesis concludes that the 2018 Treaty is a tool for the realisation of the RtD of Timor-Leste and its people. Although the primary aim of the 2018 Treaty may not have been the realisation of the RtD, its provisions clearly contribute to it. This thesis contends that the research conducted has successfully achieved its objectives, even though it is important to note that the potential solutions offered will not comprehensively enhance the general economic, social, and political landscape in Timor-Leste. Nevertheless, these proposals do represent small steps that can be undertaken to address the particular challenges and barriers highlighted in this thesis. Further research is recommended to explore additional potential avenues for realising the RtD of Timor-Leste and its people, especially considering the evolving nature of international agreements.

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