

The Precedent-Setting Timor-Leste and Australia UNCLOS Case

A recent decision opens the door to compulsory “relationship counselling” between UNCLOS states parties.

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On April 11, 2016, Timor-Leste initiated compulsory non-binding conciliation proceedings against Australia under Annex V of the United Nations Convention on the Law of the Sea (UNCLOS). On September 26, 2016, the Conciliation Commission published its decision on competence. This is the first time the conciliation procedures in UNCLOS have been invoked. This article aims to provide the background necessary to understand the case and its significance.

Background

Timor-Leste and Australia are separated by the Timor Sea at a distance of approximately 300 nautical miles. Since Timor-Leste’s independence in 2002, Australia and Timor-Leste have signed a number of agreements on joint development of resources, including the 2002 Timor Sea Treaty, the 2003 Agreement relating to the Unitization of the Sunrise and Troubadour Fields, and the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS). The two states, however, have not been able to agree and establish a permanent maritime boundary.

UNCLOS entered into force as a multilateral treaty on November 16, 1994. Australia ratified UNCLOS on October 5, 1994, and Timor-Leste on January 8, 2013. The Convention entered into force between Australia and Timor-Leste on February 2, 2013.

Under Article 298 of the Convention, a state party may make a formal declaration excluding from the compulsory and binding arbitration or adjudication procedures in UNCLOS any disputes concerning the interpretation or application of Articles 15, 74, or 83 relating to maritime boundary delimitation. Such disputes may nevertheless be subject to the compulsory non-binding conciliation procedures in Annex V, on the two conditions that the disputes arose “subsequent to the entry into force of this Convention” and the parties could not negotiate an agreement “within a reasonable period of time.” Under Article 281 of the Convention, such compulsory conciliation may be barred if the state parties have agreed on another means of settlement.

Australia made an Article 298 declaration on March 22, 2002, stating that it does not accept arbitration or adjudication procedures with respect to maritime delimitation disputes.

On April 11, 2016, Timor-Leste initiated the compulsory non-binding conciliation proceedings with Australia by way of a “Notification Instituting Conciliation under Section 2 of Annex V of UNCLOS.” After Australia submitted its response on May 2, each state appointed two conciliators. Those four conciliators, in turn, appointed the chairman from a shortlist of candidates accepted by both states.

On June 25, the five-member Conciliation Commission was constituted: Commission Chairman H.E. Ambassador Peter Taksøe-Jensen (Denmark), Dr. Rosalie Balkin (Australia), Judge Abdul G. Koroma (Sierra Leone), Professor Donald McRae (Canada and New Zealand), and Judge Rüdiger Wolfrum (Germany).

By agreement of the states, the Permanent Court of Arbitration (which is an administrative body rather than a court) acts as Registry in the proceedings.

The Conciliation Commission’s Decision on Competence

Australia objected to the competence of the Conciliation Commission on three main grounds. Australia relied on Article 281 of UNCLOS to argue that compulsory conciliation under UNCLOS is precluded by Article 4 of CMATS between Australia and Timor-Leste, which imposes a moratorium on the utilization of dispute settlement mechanisms that “would raise or result in, either directly or indirectly, issues or findings of relevance to maritime boundaries or delimitation in the Timor Sea.”

Australia also submitted that the first condition of Article 298 of UNCLOS – that the relevant dispute must arise subsequent to the entry into force of UNCLOS – is not met because the maritime boundary dispute dates to 2002, which is prior to the 2013 entry into force of the Convention as between Australia and Timor-Leste. Nor, argued Australia, is the second Article 298 condition met, because there were not “negotiations on the maritime line” before Timor-Leste initiated compulsory conciliation. Timor-Leste contested each of Australia’s objections.

The Commission held a hearing from August 29-31. In less than a month, the Commission issued its unanimous Decision on Australia’s Objections to Competence on September 19, 2016 (embargoed until September 26).

In that decision, the Commission substantially agreed with Timor-Leste’s submissions. The Commission acknowledged that Article 4 of CMATS does establish a moratorium on claims to sovereign rights and jurisdiction and maritime boundaries for the period of that treaty, but found that CMATS is not an agreement “to seek settlement of the dispute by a peaceful means of [the Parties’] own choice” as required by Article 281 of UNCLOS. Therefore, Timor-Leste is not precluded from recourse to compulsory conciliation under Article 298 and Annex V.

The Commission also found that the requirements for competence under Article 298 are met. First, upon examining the language of UNCLOS and the negotiation history of the Convention, the Commission interpreted Article 298 to require only that a dispute arise after the initial entry into force of the Convention in 1994, as opposed to the 2013 entry into force as between

Australia and Timor-Leste. Second, the Commission found that the states had not reached an agreement on their maritime boundary dispute by negotiations within a reasonable period of time.

The decision of the Commission might have important implications for future UNCLOS dispute settlement as it opens the door to compulsory conciliation between UNCLOS states parties on their post-1994 maritime disputes, even if the concerned states have made an Article 298 declaration and concluded a treaty foreclosing all possible avenues to resolve the disputes.

Next Steps: Outcome of the Conciliation Proceedings and Its Significance

The Commission will next hear the states' positions on the maritime boundary, examine their claims, and make proposals to the states for an amicable settlement. If Timor-Leste and Australia can reach an amicable settlement, they can agree to terminate the conciliation proceedings.

Within 12 months of its decision on competence, or by September 19, 2017, the Commission is to issue a report recording any agreements reached by Australia and Timor-Leste or, failing an agreement, the Commission's conclusions on all questions of fact and law relevant to the dispute as well as appropriate recommendations for an amicable settlement.

This report of the Conciliation Commission, including its conclusions and recommendations, will not be binding on Timor-Leste and Australia. This distinguishes this UNCLOS proceeding from the Judgment of the International Tribunal for the Law of the Sea in the Bay of Bengal case between Bangladesh and Myanmar and the Award in the South China Sea case between the Philippines and China.

The two states, however, are obliged to attempt to negotiate an agreement on the basis of the Commission's report. If the negotiations fail, they "shall, by mutual consent," submit their maritime boundary dispute to binding adjudication or arbitration.

To conclude, although conciliation proceedings cannot result in legally binding decisions resolving maritime boundary disputes, the Conciliation Commission is assisting Australia and Timor-Leste to find a resolution, thereby contributing to promoting peace, cooperation, development, and the rule of law in the region.

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