

CONCILIATION UNDER UNCLOS AND THE FUTURE OF CONCILIATION IN MARITIME BOUNDARY DISPUTES

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OUTLINE OF PRESENTATION

1. Importance of UNCLOS
2. Dispute Settlement Regime in Part XV
3. Limitations and Exceptions to Compulsory Binding Procedures in Section 2 of Part XV
4. Conciliation under Annex V
5. Future for Conciliation in Maritime Boundary Disputes

Part 1

Importance of UNCLOS

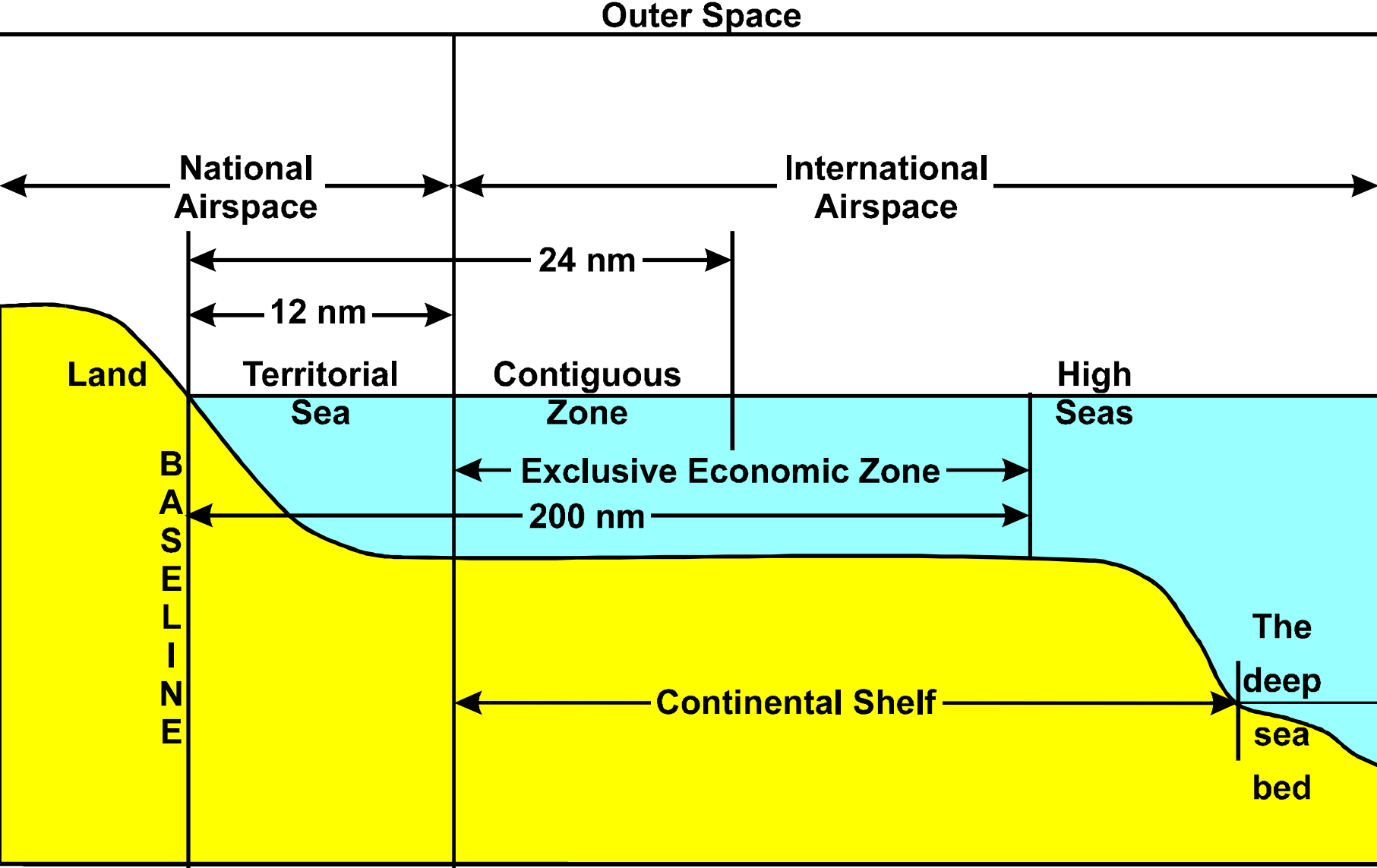
Importance of UNCLOS

- Negotiations for 9 years to attempt to draft convention that would be universally accepted and cover all uses of the oceans
- Adopted in 1982; Entered into Force in 1994
- Now universally accepted - 168 Parties
- Only major power that is not a party is the USA, but in practice it follows the provisions more strictly than most parties
- Only States in Southeast Asia and East Asia that are not parties are Cambodia and DPR Korea

Importance of UNCLOS

- Addresses highly controversial issues:
 - Maritime zones allocating natural resources
 - Passage rules balancing interests of coastal States & naval powers
- Negotiated as “package deal” that includes:
 - Dispute Settlement Regime
 - Obligations to protect the Marine Environment
- No reservations permitted

LEGAL REGIMES OF THE OCEANS AND AIRSPACE



UNCLOS Maritime Zones

- **Exclusive Economic Zone (EEZ)** gives a coastal State “sovereign rights” for the purpose of exploring and exploiting the living resources in the water as well as the natural resources of the seabed and subsoil **to a distance of 200 nm from the baselines** from which the territorial sea is measured
- **Definition of Continental Shelf** states that continental shelf extends throughout natural prolongation of land territory to the outer edge of the continental margin, **or to a distance of 200 nm from the baselines** where the continental margin does not extend to that distance

Delimitation of EEZ and Continental Shelf

Articles 74 & 83

1. The delimitation of the EEZ/ continental shelf between States with opposite or adjacent coasts **shall be effected by agreement on the basis of international law**, as referred to in Article 38 of ICJ Statute, in order to achieve an equitable solution.
2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort **to the procedures provided for in Part XV**. [Compulsory Binding Procedures in Sec 2 of Part XV]
3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into **provisional arrangements of a practical nature** and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

Delimitation of EEZ & Continental Shelf

Black Sea Case (Romania v. Ukraine), ICJ 2009 – 3 stage test to delimit maritime boundaries:

1. Identify provisional equidistance line
2. Adjust for relevant circumstances
3. Verify the line by applying the “disproportionality” test

Part 2

Dispute Settlement Regime in Part XV of UNCLOS

UNCLOS Compulsory Procedures entailing Binding Decisions

- UNCLOS Dispute Settlement Procedures provide that **any dispute on the interpretation or application of the provisions of the Convention** that cannot be resolved by negotiation is subject to the **compulsory procedures entailing binding decisions** in section 2 of Part XV at the unilateral request of **any party** to the dispute.
- States “consent” to these procedures when they become a party to UNCLOS
- Specific consent for a particular dispute is not required

Rationale for Compulsory Dispute Settlement Procedures in Part XV

- States negotiating UNCLOS recognized that a dispute settlement mechanism (DSM) must be part of “package deal”
- DSM necessary to have an effective method of peacefully resolving future disputes on interpretation or application of the provisions of the Convention
- DSM necessary to ensure that the agreed text of the Convention had stability, certainty and predictability
- DSM needed to protect the agreed package of compromises against destruction through unilateral interpretations

Court or Tribunal with Jurisdiction

Article 287 provides that States can declare in advance that they prefer to have their disputes resolved by:

1. ICJ
2. ITLOS
3. Arbitral Tribunal under Annex VII
4. Special Arbitral Tribunal under Annex VIII

If the parties to a dispute have not elected the same procedure, the dispute will go to an **Arbitral Tribunal under Annex VII**

Boundary Disputes resolved by compulsory procedures in section 2

- In 2009, Bangladesh invoked the compulsory procedures entailing binding decisions with regard to its maritime boundaries with both Myanmar and India
- Since none of the 3 States had elected a preferred procedure for the settlement of the dispute under Article 287, both disputes would have gone to Arbitration under Annex VII
- However, Bangladesh and Myanmar subsequently made Declarations under Article 287 accepting the jurisdiction of ITLOS for the dispute
- The dispute between Bangladesh and India was heard by an Arbitral Tribunal established under Annex VII

Pre-Conditions to Institution of Compulsory Procedures in Section 2 of Part XV

Obligation to Exchange Views (Article 283)

- 1. When a dispute arises, the parties shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
- 2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

Pre-Conditions to Institution of Compulsory Procedures in Section 2 of Part XV

Article 281. Agreement of Parties to Settle Dispute by Peaceful Means of Own Choice

1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention **have agreed to seek settlement of the dispute by a peaceful means of their own choice,**

the procedures provided for in this Part **apply only where no settlement has been reached by recourse to such means** and the **agreement between the parties does not exclude any further procedure.**

Philippines v China Arbitration Ruling on Article 281

In the **South China Sea Arbitration**, the Tribunal held that Article 281 does not apply to exclude the compulsory procedures in Part XV unless two conditions are satisfied:

1. The parties must agree to seek settlement of the dispute by a “peaceful means of their own choice” by entering into a **legally binding agreement**
2. The agreement establishing the peaceful means of their own choice in Part XV of UNCLOS **must expressly provide that the parties are “opting out” of the compulsory procedures in section 2 of Part XV of UNCLOS**

Part 3

Limitations and Exceptions to Compulsory Binding Procedures in Section 2 of Part XV

Limitations and Exceptions to Compulsory Binding Procedures

- Disputes on certain provisions in UNCLOS are so sensitive in certain States that if disputes on those provisions were subject to the compulsory procedures entailing binding decisions in Section 2, it could prevent those States from becoming parties to the Convention
- Therefore, the drafters had to strike a balance between the desire for a universally accepted Convention and the desire to have disputes on all the provisions subject to the compulsory procedures entailing binding decisions
- Compromise: **Limitations and Exceptions in Articles 297 and 298**

Article 297

Exclusions to Compulsory DSM

- Article 297 excludes from the Compulsory DS Procedures disputes on certain provisions concerning the “sovereign rights or jurisdiction” of coastal States in their 200 nm Exclusive Economic Zone (EEZ)
 - Disputes on the provisions providing that coastal States can refuse to give permission to other States to conduct Marine Scientific Research in their EEZ
 - Disputes relating to the sovereign rights of coastal States to the fisheries resources in their EEZ, including discretionary decisions to permit other States to fish in their EEZ

Article 298

Optional Exceptions to Compulsory DSM

States Parties have the option to formally declare that they do not accept Section 2 for following categories of disputes:

- the interpretation or application **of Articles 15, 74 and 83 relating to sea boundary delimitations**, or those involving historic bays or titles
- disputes concerning military activities and disputes concerning law enforcement activities relating to rights and jurisdiction of coastal States over fishing and marine scientific research in the EEZ
- Disputes in respect of which the UN Security Council is exercising the functions assigned to it by the UN Charter

Declarations Under Article 298 Excluding Disputes from Compulsory Procedures

1. **China** and **Korea** have made formal declarations under Article 298 excluding disputes on **all of the categories** listed in Article 298 from the compulsory procedures in Section 2 of Part XV
2. **Australia** made a formal declaration excluding all disputes in **one of the categories** – disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles

Dispute as to whether a Court or Tribunal has Jurisdiction

UNCLOS Article 288. Jurisdiction

4. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled **by decision of that court or tribunal.**

Maritime Boundary Disputes subject to Non-Binding Conciliation

- Even if a State Party has made an Article 298 declaration excluding disputes on maritime boundary delimitation from the compulsory binding procedures in Section 2 of Part XV, such disputes may nevertheless be subject to **compulsory non-binding conciliation** under Annex V of UNCLOS

Compulsory Conciliation for “new” maritime boundary disputes

- Disputes on interpretation or application of the provisions on **maritime boundary delimitation** may be referred **by either party** to **CONCILIATION** if :
 1. The dispute arose “**subsequent to the entry into force of this Convention**”
 2. No agreement within a reasonable time has been reached in negotiations between the parties
 3. The dispute **does not necessarily involve the concurrent consideration of any unsettled dispute concerning sovereignty over land territory**

It ain't Over 'til it's Over

Article 298(1)(a)(ii):

- After the conciliation commission has presented its report, the parties shall negotiate an agreement on the basis of that report;
- If these negotiations do not result in an agreement, the parties **shall, by mutual consent,** **submit the question to one of the procedures provided for in section 2,** unless the parties otherwise agree.

Note: If a dispute arises on the interpretation or application of this paragraph, that dispute is subject to the compulsory binding procedures in section 2 of Part XV

Summary on Disputes concerning Maritime Boundary Provisions

- **General Rule:** Either Party can invoke the Compulsory Binding Procedures in Part XV
- **Optional Exclusion:** States Parties can opt out of Compulsory Binding Procedures by making a Declaration under Article 298
- **Exception to Exclusion:** Either party can invoke Compulsory Nonbinding Conciliation under Annex V if :
 1. The dispute arose after 16 November 1994;
 2. The dispute does not necessarily involve the concurrent consideration of any unsettled dispute concerning sovereignty over land territory; and
 3. No agreement has been reached in negotiations between the parties within a reasonable time

Part 4

Conciliation under Annex V

Voluntary Conciliation

Annex V, Article 1. Institution of proceedings

- If the parties to a dispute have agreed, in accordance with article 284, to submit it to conciliation under this section, any such party may institute the proceedings by written notification addressed to the other party or parties to the dispute.

Compulsory Conciliation

Annex V, Article 11. Institution of proceedings

- 1. Any party to a dispute which, in accordance with Part XV, section 3, may be submitted to conciliation under this section, may institute the proceedings by written notification addressed to the other party or parties to the dispute.
- 2. Any party to the dispute, notified under paragraph 1, shall be obliged to submit to such proceedings

Constitution of Conciliation Commission



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Annex V, Article 3: The commission shall, *unless parties agree otherwise*, be constituted as follows:

- The conciliation commission shall consist of **five members**.
- The **party instituting the proceedings** shall appoint **two conciliators** [to be chosen preferably from UNCLOS List of Conciliators], one of whom may be its national, *unless the parties otherwise agree*.
- The **other party** to the dispute shall appoint **two conciliators** within 21 days of receipt of the notification.
- If the appointments are not made within that period, the party instituting the proceedings may, within one week of the expiration of that period, either terminate the proceedings or request the UNSG to make the appointments.

Constitution of Conciliation Commission



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- Within 30 days after all **four conciliators** have been appointed, **they shall appoint a fifth conciliator** chosen from the [UNCLOS List of Conciliators], who shall be **chairman**.
- If the appointment of the chairman is not made within that period, either party may, within one week of the expiration of that period, request the UNSG to make the appointment.
- Within 30 days of the receipt of a request, the UNSG shall make the necessary appointments from [UNCLOS List of Conciliators] in consultation with the parties to the dispute.

Non-Appearance and Non-Participation

Article 12. Failure to reply or to submit to conciliation

- The failure of a party or parties to the dispute to reply to notification of institution of proceedings or to submit to such proceedings shall not constitute a bar to the proceedings.

Dispute as to Competence of a Conciliation Commission

Annex V, Section 2. Compulsory Conciliation Procedure Pursuant to Section 3 of Part XV [Article 298]

Article 13. Competence

A disagreement as to whether a conciliation commission acting under this section has competence shall be decided by the Commission .

Procedural Rules

Article 4. Procedure

- The conciliation commission shall, *unless the parties otherwise agree*, determine its own procedure...
- Decisions of the commission regarding procedural matters, the report and recommendations shall be made by a majority vote of its members.

Participation of Third parties

Article 4. Procedure

- The commission may, with the consent of the parties to the dispute, invite **any State Party** to submit to it its views orally or in writing.

Functions of the Commission

Article 6. Functions of the commission

- The commission shall hear the parties, examine their claims and objections, and **make proposals to the parties with a view to reaching an amicable settlement.**

Article 5. Amicable settlement

- The commission may draw the attention of the parties to any **measures which might facilitate an amicable settlement** of the dispute.

Report of the Commission

Article 7. Report

1. The commission shall report **within 12 months of its constitution**. Its report shall record any agreements reached and, failing agreement, its **conclusions on all questions of fact or law** relevant to the matter in dispute and such **recommendations** as the commission may deem appropriate for an amicable settlement.
2. The report shall be **deposited with the UN Secretary-General** and shall immediately be transmitted by him **to the parties** to the dispute.
3. The report of the commission, including its conclusions or recommendations, **shall not be binding** upon the parties.

Termination of Conciliation

- Conciliation proceedings are terminated when:
 1. Settlement has been reached
 2. The parties have accepted the recommendations
 3. One party has rejected the recommendations by written notification to the UNSG
 4. Three months have passed from the date of transmission of the Report to the parties

Fees and Expenses of the Commission

- Fees and expenses of the commission shall be borne by the parties to the dispute

Could Timor Leste Refer the Dispute to ITLOS if the Conciliation Fails?

- Article 298 provides that if the Conciliation in the Timor Leste v Australia case is not successful, and the Commission issues a Report, the two parties will be under an obligation to negotiate in good faith to attempt to reach an agreement on the maritime boundary dispute on the basis of the Report
- If these negotiations fail, the parties **shall by mutual consent**, submit the question to one of the compulsory procedures in section 2 of part XV – ICJ, ITLOS or Annex VII Arbitration
- Australia has submitted a declaration advising that its preferred choice of forum under section 2 is either the ICJ or ITLOS
- If Timor Leste submits a declaration also accepting ITLOS, would the two parties have agreed to submit the dispute to ITLOS for a binding decision?

Part 5

Future for Conciliation in Maritime Boundary Disputes

Use of Conciliation in Disputes excluded by Article 297 of UNCLOS

1. Compulsory Conciliation is not likely to be used for disputes on matters excluded by Article 297 – Fisheries and Marine Scientific Research
2. Conciliation under those articles is limited to challenging discretionary decisions of coastal States
3. The other State concerned – Flag State – does not have enough at stake to pay the financial and political costs involved in a legal challenge

Advantages of Conciliation in Maritime Boundary Disputes

1. Solution is not limited to drawing a boundary line in accordance with international law on boundary delimitation
2. Solution can include economic factors such as exploitation of resources and can even include joint development arrangements
3. Parties do not lose control like they do in arbitration and adjudication
4. Conciliators can counsel parties if they are taking an unreasonable position
5. Conciliation can provide a face-saving way for the parties to depart from their historic positions
6. One-year time limit on Report encourages parties to reach a compromise solution

Future for Conciliation in Maritime Boundary Disputes ?

1. Disputes on how to delimit overlapping “extended continental shelf” claims could be subject to conciliation as they would arise after 1994
2. Compulsory Conciliation under 298 **cannot** be used for maritime boundary disputes that involve the concurrent consideration of any unsettled territorial sovereignty disputes, such as disputes over who has the better sovereignty claim to an offshore island that is entitled to an EEZ and continental shelf of its own
3. But if the unsettled territorial sovereignty dispute only concerns a “rock” entitled to a 12 nm territorial sea, a conciliation commission could consider the dispute on how to delimit the EEZ or continental shelf boundary without concurrently considering the sovereignty dispute over the rock



Future for Conciliation in Maritime Boundary Disputes ?

- If the Conciliation proceedings in the case between Timor Leste and Australia result in a settlement that is agreed to by both parties, that “precedent” is likely to trigger interest in the use of conciliation for maritime boundary disputes –
 - **compulsory conciliation** for maritime boundary disputes that have been excluded from the compulsory procedures by a declaration under Article 298
 - **voluntary conciliation** for other maritime boundary disputes

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