

# CIL Working Conference on Conciliation

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## Conciliation under the 1982 UN Convention on the Law of the Sea

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# Part 1

## UNCLOS and its Dispute Settlement Regime

# Importance of 1982 UNCLOS

- **Negotiations for 9 years to attempt to draft convention that would be universally accepted and cover all uses of the oceans**
- **Universally accepted - 168 Parties**
- **Only major power that is not a party is USA, but in practice the USA 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 1982 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**

# Dispute Settlement Regime in Part XV

- UNCLOS has most complex dispute settlement procedures ever included in an international treaty
- Consists of 21 articles and 4 Annexes
- General principle is that **any dispute** between parties over the interpretation or application of a provision of the Convention is subject to the system of **compulsory binding dispute settlement in Section 2**

# Rationale for compulsory procedures entailing binding decisions

- Maritime powers believed that it was essential because they feared that “creeping jurisdiction” by coastal States would limit their right to exercise freedoms of the seas
- Agreement by negotiators to make DS Regime part of the “package deal”, together with the provision prohibiting “reservations” to the treaty
- When a State becomes a party to UNCLOS by depositing an instrument of Ratification or Accession, it consents to the compulsory dispute settlement procedures in Part XV

## Part 2

# Non-binding Procedures Part XV, Section 1

## Article 279. Peaceful Means

- States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2 (3) of the UN Charter
- To this end, parties to the shall seek a solution by the means indicated in Article 33(1) of the UN Charter :
  - (1) negotiation, (2) enquiry, (3) mediation, (4) conciliation,
  - (5) arbitration, (6) judicial settlement , or
  - (7) other peaceful means of their choice



## Article 283. Obligation to Exchange Views

- 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.

## Article 284. Conciliation

- 1. A party to a dispute may invite the other party or parties to submit the dispute to conciliation in accordance with the procedure under Annex V, section 1, or another conciliation procedure.
- 2. If the invitation is accepted and if the parties agree upon the conciliation procedure to be applied, any party may submit the dispute to that procedure.
- 3. If the invitation is not accepted or the parties do not agree upon the procedure, the conciliation proceedings shall be deemed to be terminated.
- 4. Unless the parties otherwise agree, when a dispute has been submitted to conciliation, the proceedings may be terminated only in accordance with the agreed conciliation procedure.

## Part 3

# Compulsory Procedures entailing Binding Decisions

## Part XV, Section 2

## Section 2, Article 286

### COMPULSORY PROCEDURES ENTAILING BINDING DECISIONS

#### Article 286. Application of procedures under this section

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

## Article 287. Choice of Procedure

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

- (a) the INTERNATIONAL TRIBUNAL FOR LAW OF THE SEA established in accordance with Annex VI;
- (b) the INTERNATIONAL COURT OF JUSTICE
- (c) an ARBITRAL TRIBUNAL constituted under Annex VII;
- (d) a SPECIAL ARBITRAL TRIBUNAL constituted in under Annex VIII

# Default procedure

## Article 287 (5):

If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to **ARBITRATION** in accordance with Annex VII, unless the parties otherwise agree.

## Dispute on Jurisdiction, Article 288

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 referred to compulsory DSM in Section 2 of Part XV

- 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 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



## Part 4

# Limitations & Exceptions to Compulsory Binding Procedures

## Part XV, Section 3

## Exclusions to Compulsory DSM

- **Article 279 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 State to fish in their EEZ**

# Optional Exceptions to Compulsory DSM

- Article 298 permits States to “opt out” of certain categories of disputes by making a formal declaration to the UN Secretary-General. The two most important categories:
  - disputes on military activities
  - disputes concerning the interpretation or application of the provisions of the convention relating to **sea boundary delimitations**

# Compulsory Conciliation for certain disputes on maritime boundaries

- Disputes on interpretation or application of the provisions on **maritime boundary delimitation** may be referred **by either party** to **conciliation** provided that:
  1. It arose after the entry into force of UNCLOS (16 Nov 94)
  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**

## Conciliation Procedures for maritime boundary disputes under Art 298

- (ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, 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: The “*procedures provided in section 2*” are the compulsory procedures entailing binding decisions

## Part 5

# Background to Boundary Delimitation Dispute between Timor Leste and Australia

# Australia – Indonesia Agreement on Continental Shelf Boundary

- In 1969 North Sea Continental Shelf Cases the ICJ emphasized the concept that the continental shelf was the “natural prolongation” of the land territory of a State
- In 1972 Indonesia and Australia Seabed Boundary Agreement established the continental shelf boundary in the Timor Sea
  - was based on natural prolongation principle
  - Australia given shelf up to the “Timor Gap”

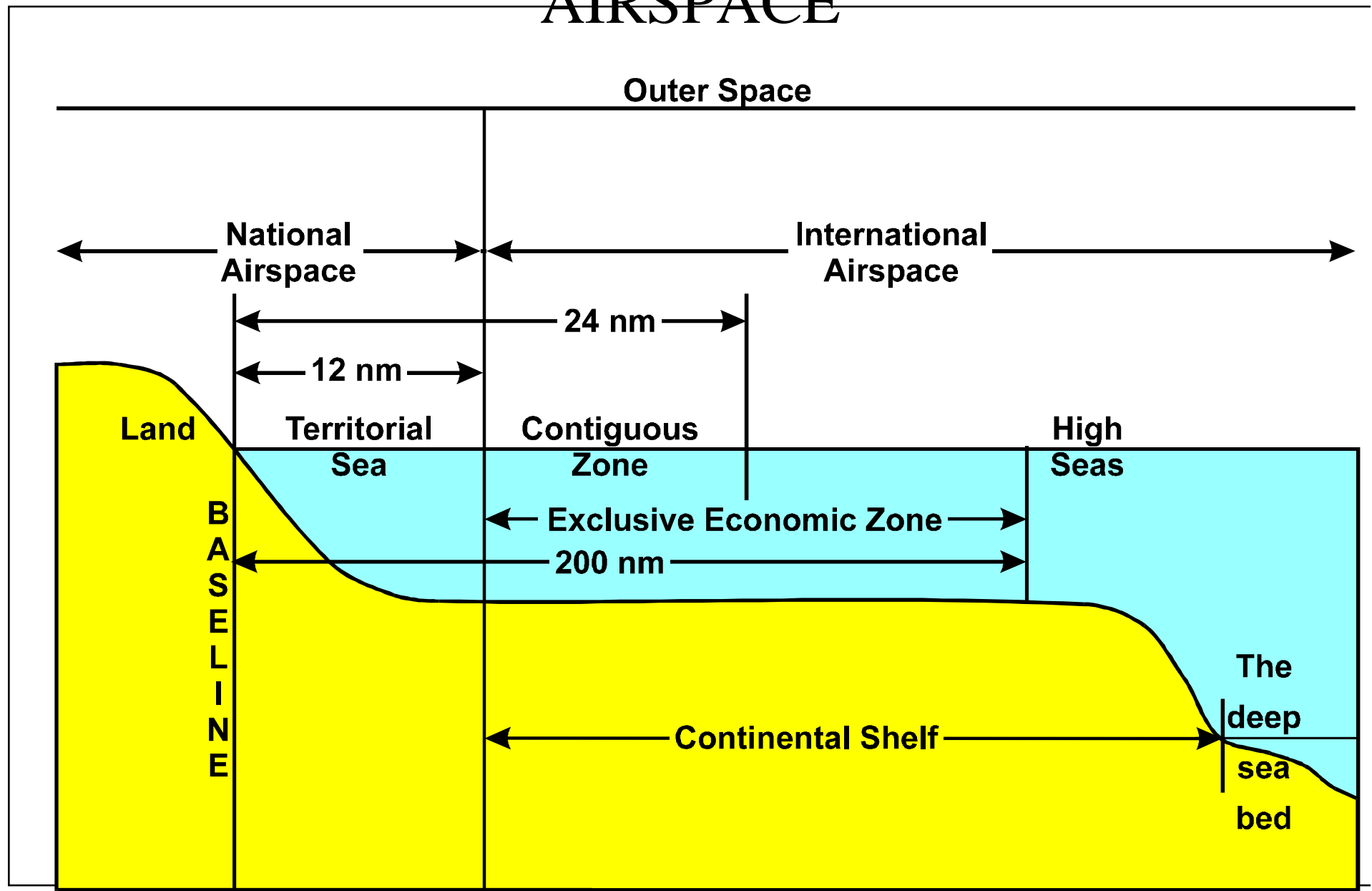




# 1982 UNCLOS Maritime Zones

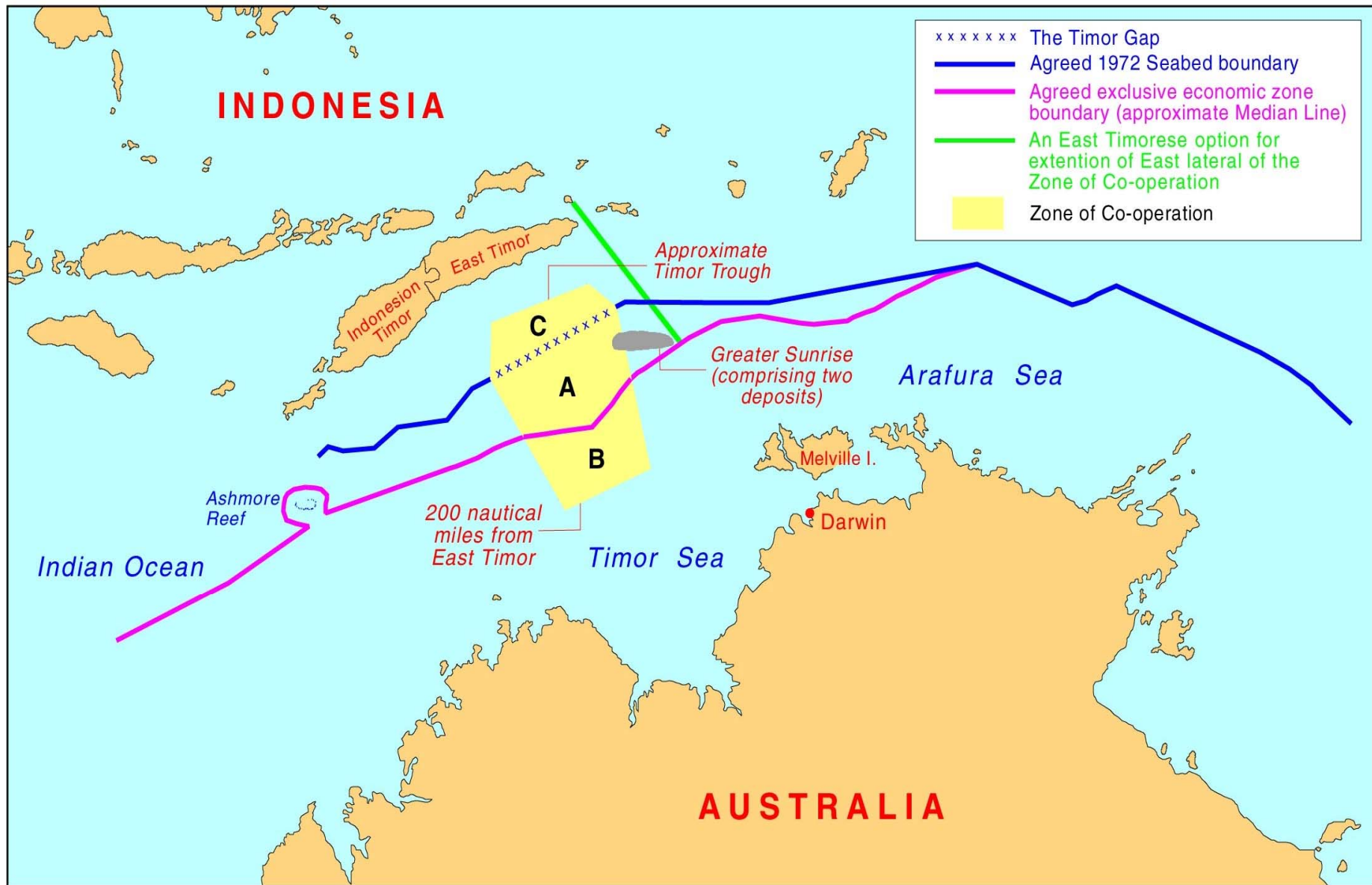
- **Exclusive Economic Zone (EEZ) gives coastal State “sovereign rights” for the purpose of exploring and exploiting the living resources in the water as well as the natural resources of the seabed and subsoil to a distance of 200 nm from the baselines from which the territorial sea is measured**
- **Definition 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**

# LEGAL REGIMES OF THE OCEANS AND AIRSPACE



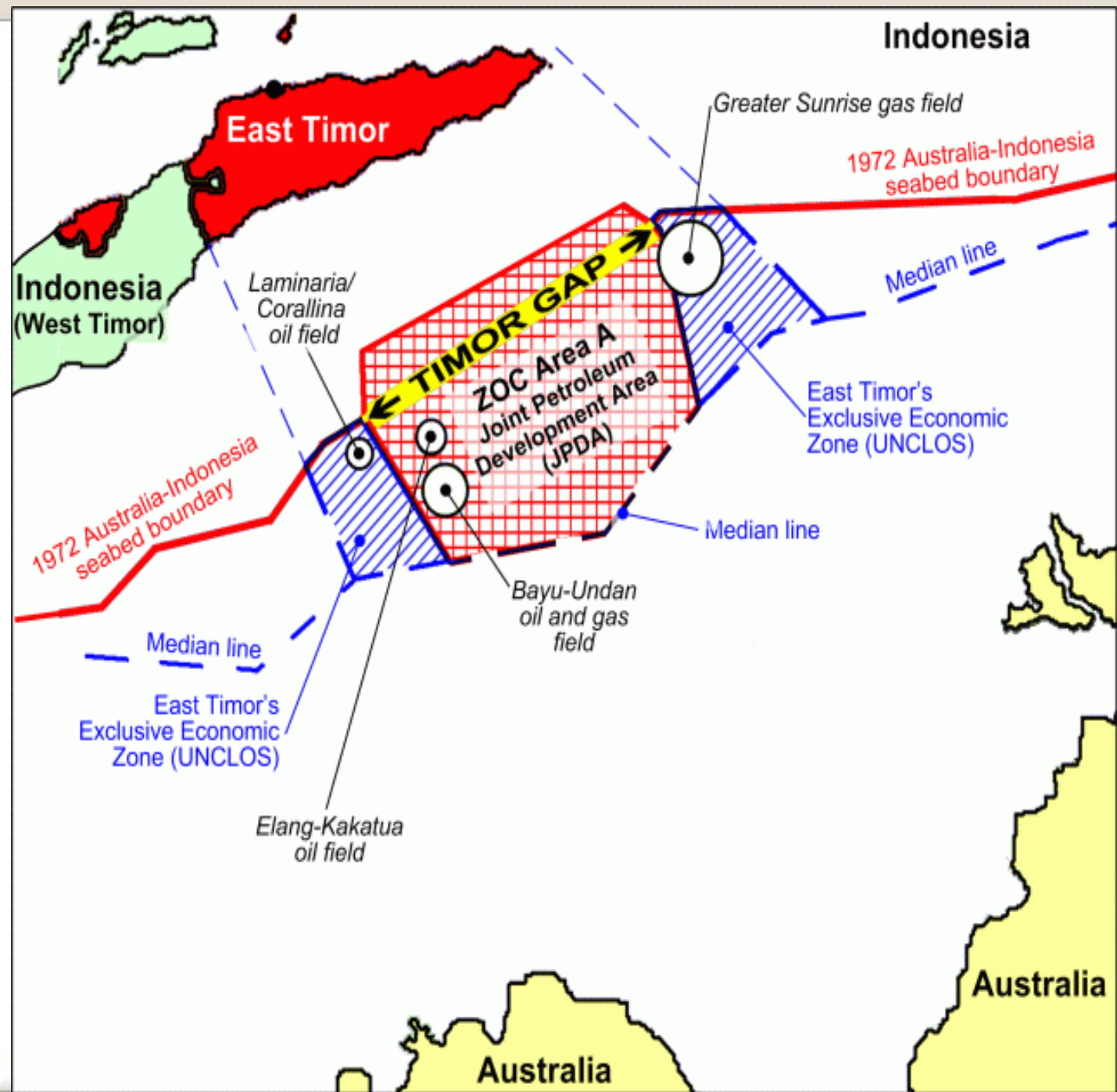
## Article 74 & 83. Delimitation of EEZ and Continental Shelf

- 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 the Statute of the International Court of Justice, 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.



# Independence of Timor Leste in 2002

- On 20 May 2002, Timor Leste officially became independent
- On 22 March 2002, Australia submitted a declaration to the UN Secretary General under Article 298 of UNCLOS excluding from the compulsory procedures under Section 2 of Part XV:
  - all disputes concerning the interpretation and application of articles 15, 74 and 83 on sea boundary delimitations
- 2002 Timor Sea Treaty between Australia and Timor Leste established Joint Petroleum Development area
- 2003 Unitization Agreement
- 2006 Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS)



## Part 6

# Compulsory Conciliation in Boundary Delimitation Dispute between Timor Leste and Australia

# Timor institutes compulsory conciliation proceedings

- On 11 April 2016, Timor-Leste initiated compulsory conciliation procedures against Australia pursuant to Article 298 and Annex V of UNCLOS
- The Permanent Court of Arbitration at The Hague is the administering institution



# Compulsory Conciliation for certain disputes on maritime boundaries

- Disputes on interpretation or application of the provisions on **maritime boundary delimitation** may be referred **by either party** to **conciliation** provided that:
  1. It arose after the entry into force of UNCLOS (16 Nov 94)
  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**

# Conciliation Commission

- **Conciliators selected by Timor-Leste on 11 April 2016:**
  - ITLOS Judge Rudiger Wolfrum of Germany
  - Former ICJ Judge Abdul Koroma of Sierra Leone
- **Conciliators selected by Australia on 2 May 2016:**
  - Dr Rosalie Balkin of Australia
  - Professor Donald McRae of Canada
- **Chairman appointed by the 4 conciliators 25 June 2016:**
  - H.E. Ambassador Peter Taksoe-Jensen of Denmark

## Key Dates in 2016

- 11 April Timor Notice instituting Conciliation
- 2 May Response to Notice of Conciliation
- 25 June Appointment of Chairman
- 27 June Australia Application for Bifurcation of Proceedings
- 18 July Timor Comments on Application for Bifurcation
- 28 July Procedural meeting – Commission & Parties
- 12 Aug Australia objection to Competence
- 25 Aug Timor Written Submission
- 29-31 Aug Hearing on Competence
- 19 Sep Decision on Competence

# One Year Time Limit

- **11 April 2016 - Commencement of Proceedings**
- **25 June 2016 – Commission formed**
  - Issue was the effect of the challenge to competence on the one year time period
  - Commission decided that 12 month period would begin to run from date of its decision on competence
- **19 September 2016 – decision on competence**
- **18 September 2017 – deadline for conclusion of conciliation**

# It ain't Over 'til it's Over

- Article 298(1)(a)(ii):
  - After issuance of 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.
- If a dispute arises on the interpretation or application of Article 298, that dispute is subject to the compulsory binding procedures in section 2 of Part XV

# Future for Conciliation in Maritime Boundary Disputes ?

1. Conciliators can convince parties to change their historic positions
2. Gives parties face-saving reason to change their historic positions
3. Conciliators propose solution that takes non-legal factors such as location of natural resources into account and could include joint development arrangements
4. Is not binding, so parties do not surrender control like in adjudication or arbitration
5. Can redress imbalance between large & small States
6. One year time Limit encourages compromise solution
7. Pressure to reach agreement because of risk of having to resort to one of binding procedures if no agreement

# Future of Conciliation in Disputes on excluded by Article 297 of UNCLOS

1. **Compulsory Conciliation 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**

# Part 7

## Conciliation under Annex V



# Request for Conciliation

## Voluntary Conciliation

### *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

### *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

# Compulsory Conciliation under Section 3 of Part XV (Article 298)

## *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.

## *Article 13. Competence*

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

# Timor Leste / Australia

## Decision on Competence

- Article 298 of the Convention requires that the dispute must arise “subsequent to the entry into force of this Convention”.
- The Commission reviewed the negotiating history of the Convention and concluded that the relevant date was the entry into force of the Convention generally on 16 November 1994 (rather than the date in 2013 on which the Convention entered into force as between Timor-Leste and Australia).
- The “entry into force of the Convention” was thus prior to the independence of Timor-Leste in 2002, and the dispute arose after the relevant date.

# Timor Leste / Australia

## Decision on Competence

- Article 298 of the Convention also requires that no agreement must have been reached in negotiations between the parties “within a reasonable period of time.”
- The Commission noted that there had been negotiations between the Parties in 2003 to 2006 and that negotiations regarding CMATS appear to have taken place in 2014 to 2015, without an agreement on boundaries having been reached, and that Timor-Leste had sought further negotiations.
- It found the requirements of Article 298 were met.

# 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.

# 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.

# 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.

# Commission's Report

## *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.
- The report shall be deposited with the Secretary-General of the United Nations and shall immediately be transmitted by him to the parties to the dispute.
- 2. The report of the commission, including its conclusions or recommendations, shall not be binding upon the parties.



# Termination

## *Article 8. Termination*

- The conciliation proceedings are terminated
  - when a settlement has been reached,
  - when the parties have accepted or one party has rejected the recommendations of the report by written notification addressed to the Secretary-General of the United Nations, or
  - when a period of three months has expired from the date of transmission of the report to the parties.

## Conciliation under Annex V

- Conciliation proceedings are terminated when:
  1. Settlement has been reached
  2. When the parties have accepted the recommendations
  3. When one party has rejected the recommendations by written notification to the UN SG
  4. 3 months after the date of transmission of the report to the parties
- Fees and expenses of the commission shall be borne by the parties to the dispute

**Thanks for Your Attention!**

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