

COMPULSORY CONCILIATION UNDER UNCLOS: PROSPECTS FOR FUTURE USE

Dr. Tara Davenport

Assistant Professor, National University of Singapore (NUS)

Senior Research Fellow, Centre for International Law (CIL)

INTRODUCTION



CENTRE FOR INTERNATIONAL LAW
National University of Singapore

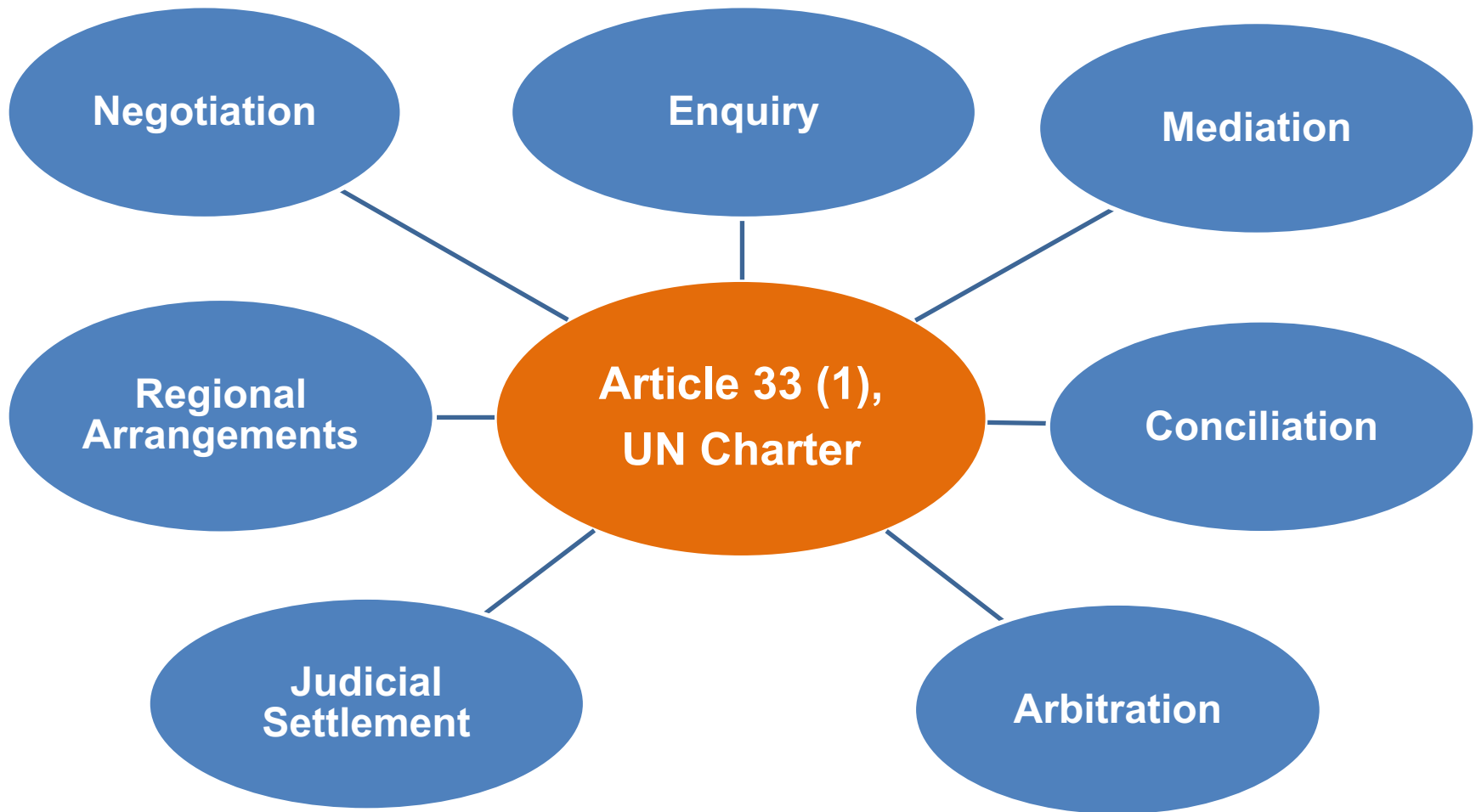
1. Conciliation as a Dispute Settlement Mechanism

2. Compulsory Conciliation under UNCLOS

3. Prospects for Future Use of Conciliation

1. CONCILIATION AS A DISPUTE SETTLEMENT MECHANISM

DISPUTE SETTLEMENT MECHANISMS UNDER INTERNATIONAL LAW



“Conciliation is a method for the settlement of international disputes of any nature according to which a Commission set up by the Parties...proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them or or affording the Parties, with a view to its settlement, such aid as they may have requested

Article 1 of the 1961 Session of the Institut de Droit International

USE OF CONCILIATION IN TREATIES

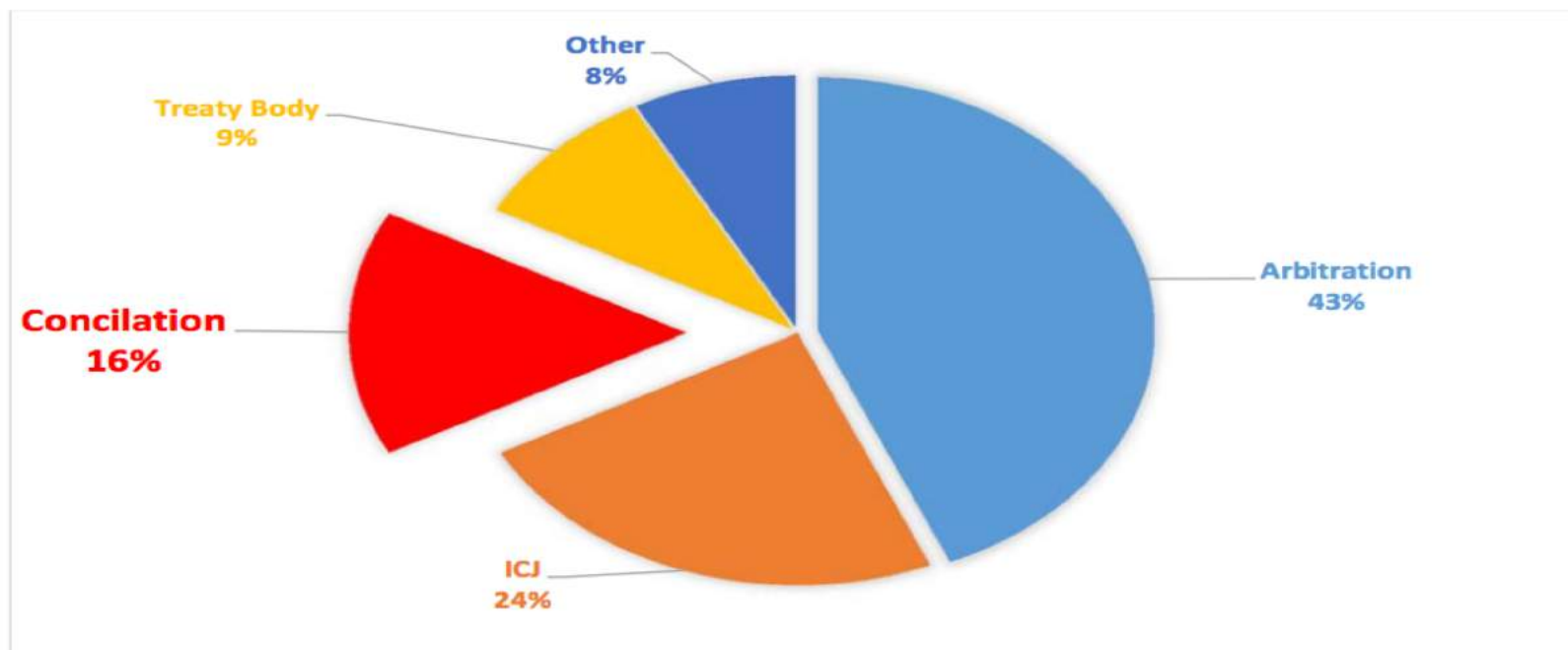


Chart 1: This chart presents a breakdown of the types of third-party fora provided in a survey of 140 treaties containing compulsory third-party dispute settlement methods.

Source: CIL Conciliation Background Paper, 2017

TYPE OF TREATIES WHICH USE CONCILIATION

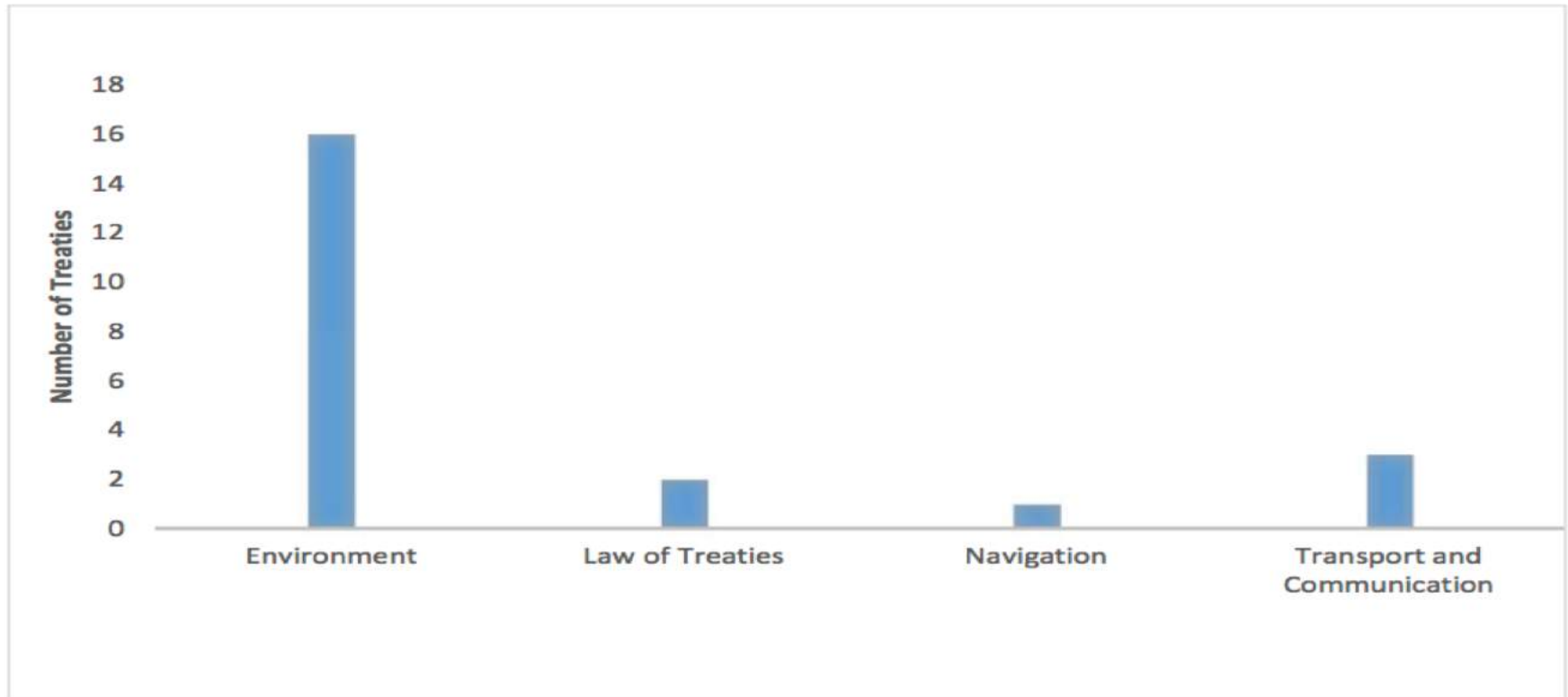


Chart 2: This chart presents a breakdown of the types of treaties with compulsory conciliation.

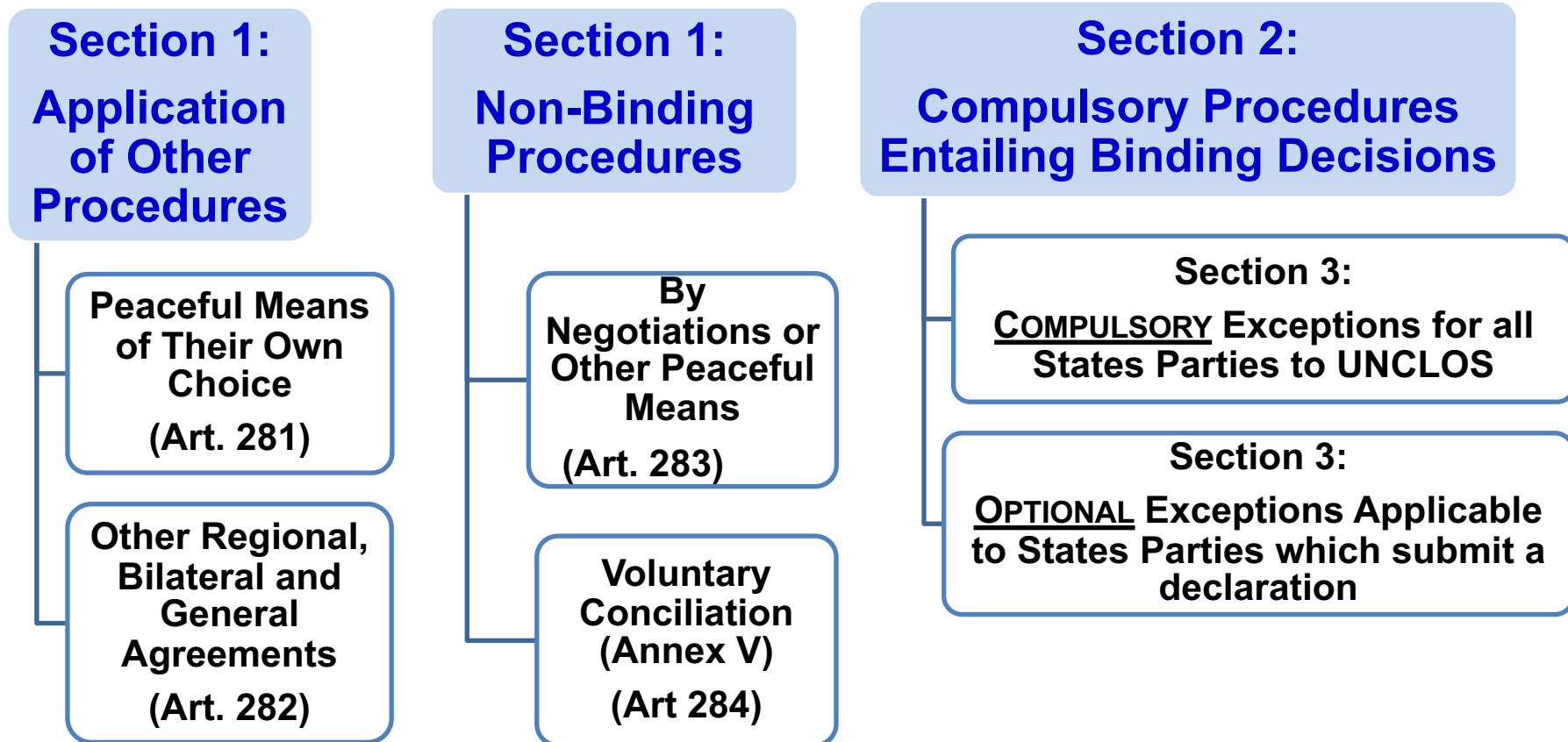
Source: CIL Conciliation Background Paper, 2017

State-to-State Conciliation

1. 1988 Jan Mayen Conciliation (Norway and Iceland)
2. 2001 Belize and Guatemala
3. 2018 Timor-Leste and Australia Conciliation

2. COMPULSORY CONCILIATION UNDER UNCLOS

STRUCTURE OF PART XV



SECTION 1: APPLICATION OF OTHER PROCEDURES

Article 281 Procedure where No Settlement has been Reached by the Parties

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.**

Article 282 Obligations under General, Regional or Bilateral Agreements

If the States Parties which are **parties to a dispute concerning the interpretation or application of this Convention have agreed**, through a **general, regional or bilateral agreement** or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, **that procedure shall apply in lieu of the procedures provided for in this Part**, unless the parties to the dispute otherwise agree.

COMPULSORY PROCEDURES (SECTION 2)

Article 286: Application of Procedures under Section 2

Subject to Section 3, any dispute concerning the interpretation or application of UNCLOS, 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.

1. Must be a dispute concerning the interpretation or application of UNCLOS
2. No settlement has been reached by recourse to Section 1
3. No other dispute settlement mechanisms applicable in other agreements
4. Court/tribunal must have jurisdiction over the dispute

CHOICE OF BINDING PROCEDURES

Article 287: Choice of Procedures

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 UNCLOS



**ITLOS,
Annex VI**

ICJ

**Annex VII
Arbitral
Tribunal**

**Special
Arbitral
Tribunal,
Annex VIII***



**Default Procedure:
Annex VII Arbitral Tribunal (see Articles 287 (3) and (5))**

EXCEPTIONS TO COMPULSORY JURISDICTION (SECTION 3)



Compulsory Exception
Applicable for All State
Parties to UNCLOS
(Article 297)



Optional Exceptions
Applicable to State
Parties who Submit A
Declaration
(Article 298)

Disputes Subject to Compulsory Conciliation

Optional Exceptions

Article 298:
**Disputes Relating to
Maritime Delimitation or
those involving Historic
Bays or Titles**

Compulsory Exceptions

Article 297:
**Disputes Relating to a
specific Marine
Scientific Research
Project**

Article 297:
Dispute relating to:

- i) Coastal State's alleged failure to ensure proper conservation of living resources
- ii) Coastal State's alleged arbitrary decision on allowable catches
- iii) Coastal State's alleged arbitrary refusal to allocate any surplus

OPTIONAL EXCEPTIONS (ARTICLE 298)

Article 298: Optional Exceptions to CPBD

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

1. The interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles
2. Disputes concerning military activities
3. Disputes concerning law enforcement activities relating to rights and jurisdiction of coastal States over resources in EEZ
4. Matters over which the Security Council is exercising functions assigned to it by UN Charter

COMPULSORY CONCILIATION FOR MARITIME DELIMITATION DISPUTES

CIL

CENTRE FOR INTERNATIONAL LAW
National University of Singapore

If a State has opted out of CPBD for “disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles”



No agreement within a reasonable period of time is reached &
Dispute must have arisen after the entry of force of Convention



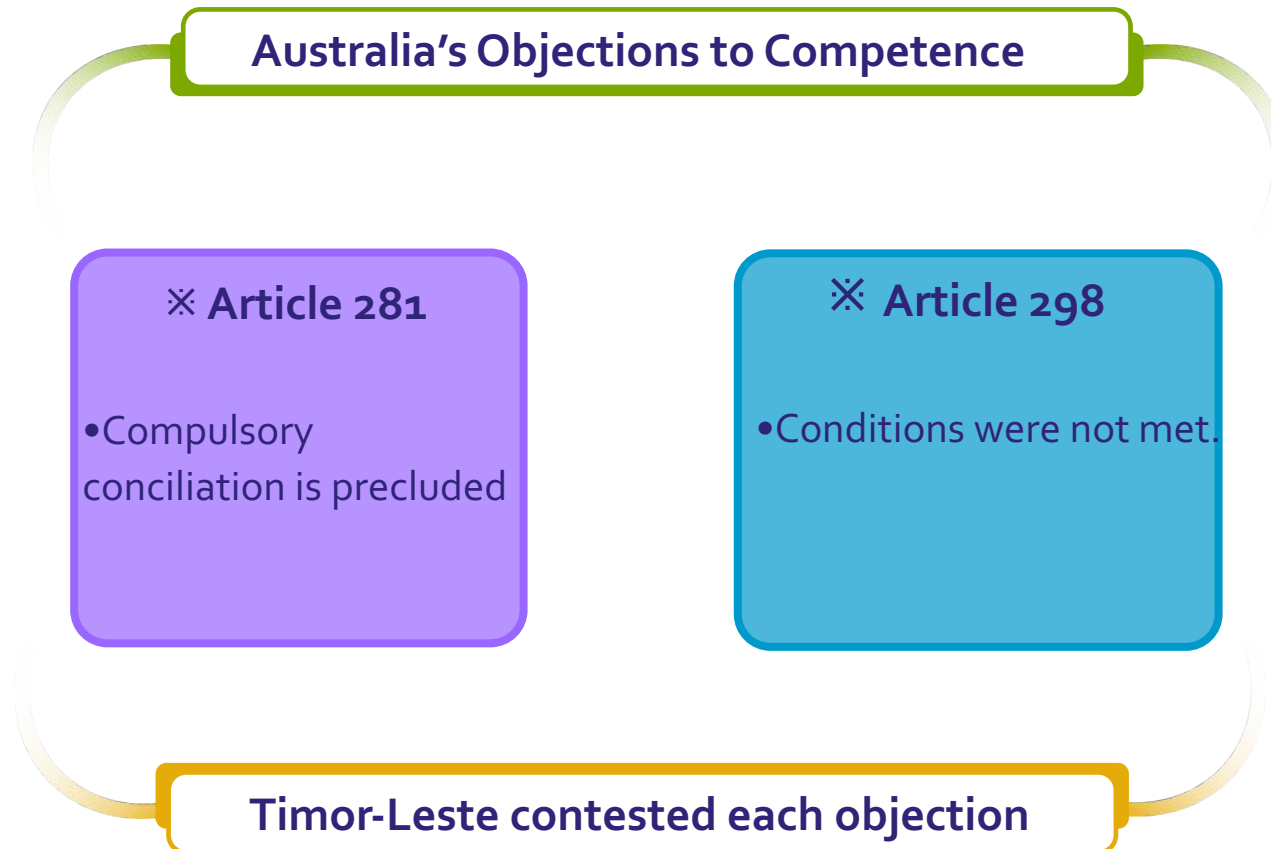
Dispute can be referred by one party to Compulsory Conciliation under Annex V, Section 2 of UNCLOS

BUT Compulsory Conciliation is NOT available for disputes that necessarily involve the concurrent consideration of:

- (1) the consideration of any unsettled dispute concerning sovereignty; or
- (2) other rights over continental or insular land territory

Parties shall negotiate an agreement on basis of Report of Conciliation Commission, failing which, the parties shall, by mutual consent, submit the question to Compulsory Procedures Entailing Binding Decisions in Section 2

TIMOR-LESTE AND AUSTRALIA DECISION ON COMPETENCE



TIMOR-LESTE AND AUSTRALIA DECISION ON COMPETENCE

Article 281: UNCLOS procedures will not apply if (i) the parties “**have agreed to [settle the dispute] by a peaceful means of their own choice**”; (ii) “**the agreement**” between the parties excludes further procedure; and (iii) the parties are able to reach settlement by the means that they have agreed.

Australia: (i) CMATS imposes a moratorium; (ii) parties agreed in 2003 by an exchange of letters to settle the dispute by negotiation.



Commission: CMATS does not provide any means to settle the dispute as required by Article 281. It merely exclude all means of dispute settlement.

Commission: 2003 letters do not constitute a binding agreements.

TIMOR-LESTE AND AUSTRALIA DECISION ON COMPETENCE

Article 298: Compulsory conciliation can only be initiated if (i) the dispute “**arises subsequent to the entry into force of this Convention**” and (ii) “no agreement within a reasonable period of time is reached in negotiations between the parties”.

Australia: (i) dispute arose in 2002 before the 2013 entry into force of the Convention between Australia and Timor-Leste; (ii) there was no negotiation between the 2 parties as required by Article 298.



Commission: “Entry into force of this Convention” means the 1994 entry into force of the Convention, as opposed to the 2013 entry into force as between the two parties.

Commission: Negotiations did take place. In any case, Article 298 does not expressly require prior negotiation. Such a requirement would effectively grant a party the right to veto any recourse to compulsory procedures, contrary to the intention of Article 298.

CONDITION FOR THE JURISDICTION OF A CONCILIATION COMMISSION

Exclusion of Maritime Boundary Delimitation Disputes under Article 298

Article 281 and 282 must be satisfied i.e. no other dispute settlement mechanisms

Dispute must have arisen after the entry into force of the Convention i.e. 16 Nov 1994

No agreement within a reasonable period of time

Dispute cannot concern the consideration of any unsettled dispute concerning sovereignty and other rights over continental or insular land territory ??

3. PROSPECTS FOR THE USE OF COMPULSORY CONCILIATION FOR OTHER DISPUTES



South China Sea

Gulf of Thailand

Gulf of Tonkin

**Straits of Malacca and
Singapore**

Celebes Sea

Sulu Sea

Arafura Sea

Eastern Andaman Sea

Timor Sea

- Southeast Asia has a complex maritime geography
 - Nearly all Southeast Asian waters enclosed as territorial seas, EEZs or archipelagic waters
 - Coastal configurations complicated with gulfs that penetrate deeply in the mainland
 - Multitude of large and small islands, some of which are subject to sovereignty disputes

CHALLENGES TO MARITIME DELIMITATION

MARITIME BOUNDARY ARRANGEMENTS IN SOUTHEAST ASIA

44 Boundary Arrangements (1969 to 2019)

**32 Delimitation
Agreements**

**12 Provisional
Arrangements**

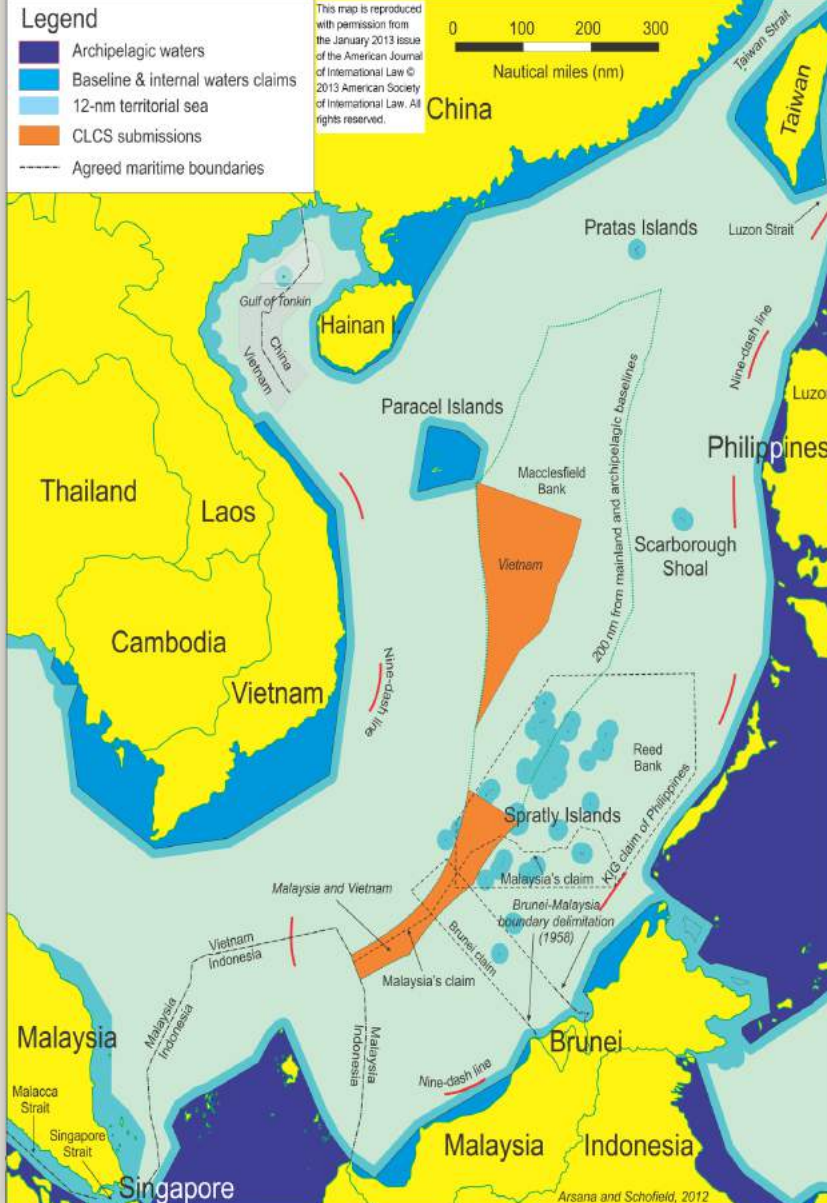
**Joint
Development
Arrangements**

**Joint Seismic
Undertaking**

**Conflict
Management
Arrangements**

Country	Article 298 Declaration Excluding Maritime Boundary Delimitation Disputes	Date
Brunei	X	
Cambodia	Not Applicable	
Indonesia	X	
Laos	X	
Malaysia		26 Aug 2019
Myanmar	X	
Philippines	X	
Singapore		12 Dec 2018
Thailand		?
Vietnam	X	
Timor Leste	X	
China		25 Aug 2006
Korea		18 April 2006
Japan	X	

South China Sea



Compulsory Conciliation Conditions

Exclusion of Maritime Boundary Disputes under Art 298

Art. 281 and 282 satisfied

Dispute has arisen after the entry of force of UNCLOS (1994)

No agreement within a reasonable period of time

Dispute cannot concern unsettled sovereignty or other rights over continental and insular territory [?]

?

?

?

?

- Compulsory conciliation under UNCLOS has proved to be a valuable form of dispute settlement of maritime boundaries with its emphasis on non-legal outcomes
- Opportunities for compulsory conciliation to resolve maritime disputes may be limited in Southeast Asia by the presence of sovereignty disputes and the requirement that dispute arise after 1994
- BUT that should not detract from the value of conciliation as a dispute settlement process
 - ⇒ Voluntary Conciliation under Article 284 and Annex V of UNCLOS

THANK YOU

Dr. Tara Davenport
Senior Research Fellow
Centre for International Law
National University of Singapore
lawtmd@nus.edu.sg