PCA Case Nº 2016-10

IN THE MATTER OF A CONCILIATION

- before -

A 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

DECISION ON AUSTRALIA'S OBJECTIONS TO COMPETENCE

CONCILIATION COMMISSION:

H.E. Ambassador Peter Taksøe-Jensen (Chairman)
Dr. Rosalie Balkin
Judge Abdul G. Koroma
Professor Donald McRae
Judge Rüdiger Wolfrum

REGISTRY:

Permanent Court of Arbitration

19 September 2016

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REPRESENTATIVES OF THE PARTIES

DEMOCRATIC REPUBLIC OF TIMOR-LESTE

AGENT

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Minister of State and of the Presidency of the Council of Ministers

DEPUTY AGENT

Ms. Elisabeth Exposto
Chief Executive Officer
Maritime Boundary Office

REPRESENTATIVES

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Minister of Planning and Strategic Investment
Chief Negotiator for Maritime Boundaries

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Ambassador to the Court of St. James

H.E. Abel Guterres
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GLOSSARY OF DEFINED TERMS

Term	Definition
Australia	The Commonwealth of Australia
CMATS	Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea, 12 January 2006, 2438 UNTS 359
Commission	The Conciliation Commission constituted in the present matter, composed of H.E. Ambassador Peter Taksøe-Jensen (Chairman), Dr. Rosalie Balkin, Judge Abdul G. Koroma, Professor Donald McRae, and Judge Rüdiger Wolfrum
Convention	United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3
JPDA	The Joint Petroleum Development Area established pursuant to the Timor Sea Treaty
Parties	Timor-Leste and Australia
PCA	The Permanent Court of Arbitration
Third UN Conference	Third United Nations Conference on the Law of the Sea
Timor Sea Treaty	Timor Sea Treaty between the Government of East Timor and the Government of Australia, 20 May 2002, 2258 UNTS 3
Timor-Leste	The Democratic Republic of Timor-Leste
UNCLOS	United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3
Unitisation Agreement	Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise and Troubadour Fields, 6 March 2003, 2483 UNTS 317

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I. INTRODUCTION

1. The Parties to these conciliation proceedings are the Democratic Republic of Timor-Leste ("**Timor-Leste**") and the Commonwealth of Australia ("**Australia**") (together, the "**Parties**"). Both States are parties to the 1982 United Nations Convention on the Law of the Sea (the "**Convention**") ("**UNCLOS**"),[1] Australia having ratified the Convention with effect from 16 November 1994, and Timor-Leste having acceded to the Convention with effect from 7 February 2013.

2. Timor-Leste and Australia are neighbouring States, separated by the Timor Sea at a distance of approximately 300 nautical miles. In these proceedings, Timor-Leste seeks compulsory conciliation, pursuant to Article 298(1)(a)(i) and Annex V, section 2 of the Convention, of a dispute concerning "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".[2]

3. Australia objects to the competence of the Conciliation Commission in this matter on the grounds that, *inter alia*, compulsory conciliation pursuant to the Convention is precluded by other treaties entered into between the Parties. However, Australia has made clear that its objections to competence do not have implications for its participation in any further stage of the proceedings; indeed, Australia has committed that it "will abide by the Commission's finding as to whether it has jurisdiction to hear matters on maritime boundaries"[3] and that "if the decision is against us, [Australia] will engage in the conciliation in good faith."[4]

4. The present Decision sets out the Commission's reasoning on the question of its competence pursuant to the Convention. Nothing herein should be understood to prejudge the substance of the Parties' dispute.

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1 United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3.

2 Notification Instituting Conciliation under Section 2 of Annex V of UNCLOS, para. 5.

3 Joint media release: Minister for Foreign Affairs, The Hon Julie Bishop MP; Leader of the Government in the Senate, Senator the Hon George Brandis QC (29 August 2016), *available at* <foreignminister.gov.au/releases/Pages/2016/jb_mr_160829c.aspx?w=tb1CaGpkPX%2FlS0K%2Bg9ZKEg%3D%3D>.

4 Procedural Meeting Tr. 125:5-6.

A. BACKGROUND TO THE PARTIES' DISPUTE

5. For the purpose of giving necessary context to this Decision on Competence, the Commission considers it useful to set out, briefly, its understanding of the history of the Parties' dispute and to recall the various international instruments that, in addition to the Convention, bear on the legal relationship between the Parties.

6. Although inhabited for thousands of years, the eastern half of the island of Timor entered the modern era as a colony of Portugal. During the colonial period, the remaining portion of Timor (*i.e.*, the western half of the island), as well as other neighbouring islands, formed part of the Dutch East Indies and, upon independence, became part of the Republic of Indonesia.

7. In 1975, the people of Timor-Leste declared their independence from Portugal, but promptly came under the control of Indonesia, which administered Timor-Leste as a province of Indonesia until 1999. During the period of Indonesian control, Australia entered into certain arrangements with Indonesia with respect to the allocation of seabed resources in the Timor Sea, but did not establish any permanent maritime boundary adjacent to the coast of what later became Timor-Leste.

8. In 1999, in a referendum supervised by the United Nations, the people of Timor-Leste voted in favour of independence from Indonesia. Following a period of temporary administration by the United Nations Transitional Administration in East Timor (UNTAET), Timor-Leste became an independent State on 20 May 2002.

9. On the same day that Timor-Leste regained its independence, Timor-Leste and Australia concluded the *Timor Sea Treaty between the Government of East Timor and the Government of Australia* (the "**Timor Sea Treaty**").[5] In broad terms, the Timor Sea Treaty provided for the creation and management of a Joint Petroleum Development Area (the "**JPDA**") in the Timor Sea between Timor-Leste and Australia, pending the ultimate delimitation of a maritime boundary between them. Within the JPDA, 90 percent of the petroleum production belongs to Timor-Leste and 10 percent to Australia.

10. Thereafter, in 2003, Timor-Leste and Australia began negotiations on the establishment of a permanent maritime boundary. The focus of these negotiations changed, however, leading to the conclusion on 12 January 2006 of the *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea* ("**CMATS**").[6] In broad terms,

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5 Timor Sea Treaty between the Government of East Timor and the Government of Australia, 20 May 2002, 2258 UNTS 3.

6 Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea, 12 January 2006, 2438 UNTS 359.

CMATS (a) extended the life of the Timor Sea Treaty until 50 years after the entry into force of CMATS; (b) provided for Timor-Leste to exercise jurisdiction over the water column in the JPDA; and (c) provided that revenues derived directly from the production of petroleum from the Greater Sunrise Field, an oil and gas field which straddles the eastern limit of the JPDA, would be shared equally between the two States. CMATS also includes in Article 4 a "moratorium" that addresses the issue of permanent maritime boundaries and the availability of dispute resolution with respect to maritime boundaries.

11. In parallel with the negotiation of CMATS, Timor-Leste and Australia also concluded an Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise and Troubadour Fields (the "**Unitisation Agreement**"),[7] with respect to the Greater Sunrise Field. The Unitisation Agreement was signed on 6 March 2003, but entered into force in parallel with CMATS on 23 February 2007. CMATS and the Unitisation Agreement thus predate the entry into force of the Convention as between the Parties, which occurred with Timor-Leste's accession on 7 February 2013.

12. The Commission notes that exploitation of the Greater Sunrise Field has not yet commenced.

B. AUSTRALIA'S OBJECTIONS TO COMPETENCE AND THE SCOPE OF THIS DECISION

13. As noted in paragraph 2 above, Timor-Leste has requested compulsory conciliation of a dispute concerning "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".[8]

14. Australia objects to the competence of the Commission on six distinct grounds.

15. First, Australia submits that "Article 4 of the CMATS Treaty precludes either Party . . . from initiating compulsory conciliation under Article 298 and Annex V of UNCLOS and . . . from engaging in the substantive matters in dispute in such proceedings."[9]

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7 Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise and Troubadour Fields, 6 March 2003, 2483 UNTS 317.

8 Notification Instituting Conciliation under Section 2 of Annex V of UNCLOS, para. 5.

9 Competence Hearing Tr. (Final) 140:21 to 141:1.

16. Secondly, Australia argues that "the CMATS Treaty is something specifically envisaged by Articles 74 and 83 of UNCLOS, so it is specifically brought into the UNCLOS regime by Articles 74 and 83."[10] Because CMATS is a provisional arrangement of a practical nature contemplated by the Convention, Australia considers that the moratorium in CMATS was not displaced by the entry into force of the Convention.[11]

17. Thirdly, Australia contends that:

> in 2003, the Parties agreed on a mechanism for resolution of that dispute which was negotiation. Australia's case is then that the CMATS Treaty built upon that agreement of the Parties, confirmed that negotiation was to be the method of dispute resolution, and added a time stipulation which was the negotiation was not to occur until a period in the future . . . .[12]

Accordingly, Australia considers that the Commission's competence is precluded by Article 281 of the Convention, which "recognises the CMATS agreement as a relevant choice by the Parties that that is the way their dispute is to be determined."[13]

18. Fourthly, Australia submits that that the Parties' dispute over maritime boundaries dates to 2002, prior to the entry into force of the Convention as between the Parties.[14] Australia therefore contends that the first condition of Article 298—that the dispute arise "subsequent to the entry into force of this Convention"—is not met.[15]

19. Fifthly, Australia further contends that "[t]here have not been negotiations on the maritime line, which Article 298 contemplates will be necessary before one can resort to its provisions. The reason for that is that the Parties have observed the CMATS Treaty."[16] Accordingly, Australia considers that the second condition of Article 298 is not met.

20. Finally, Australia submits that the Parties dispute is "inadmissible" because Timor-Leste is seeking to "seize the Commission in breach of its treaty commitments to Australia."[17] Australia further submits that principles of comity compel the Commission to "at the very least stay the

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10 Competence Hearing Tr. (Final) 183:8-11.

11 Competence Hearing Tr. (Final) 203:10 to 210:7.

12 Competence Hearing Tr. (Final) 244:19 to 245:2.

13 Competence Hearing Tr. (Final) 245:3-6.

14 Australia's Objection to Competence, para. 153.

15 Australia's Objection to Competence, para. 148.

16 Competence Hearing Tr. (Final) 258:5-9.

17 Competence Hearing Tr. (Final) 264:4-6; Australia's Objection to Competence, para. 173.

conciliation proceedings until the Tribunal constituted to hear [a related arbitration concerning the validity of CMATS] has reached a decision."[18]

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21. For its part, Timor-Leste contests each of Australia's objections and submits that the Commission is competent to proceed with the conciliation. More generally, Timor-Leste rejects the dichotomy Australia presents between dispute resolution under the Convention and CMATS. According to Timor-Leste:

> A conciliation commission is a creature of UNCLOS: its competence is determined by UNCLOS, not by other treaties, unless they are incorporated by reference. Even if the institution of conciliation proceedings was a breach of some other commitment, under a separate treaty, for example, that would not deprive the UNCLOS Commission of its competence.[19]

22. Moreover, Timor-Leste does not "accept that the kind of considerations that constrain the exercise of the judicial function can be transported into conciliation"[20] and "do[es] not think that these proceedings should be conducted as if they are international litigation at all."[21] In responding to Australia's specific objections, Timor-Leste maintains as follows.

23. First, Timor-Leste disagrees with Australia regarding the scope and content of Article 4 of CMATS. 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."[22] Furthermore, Timor-Leste does not "accept that Article 4(4) can bar the Parties from resort to the mechanisms to Part XV of UNCLOS" and "does not regard the UNCLOS conciliation procedure as a 'dispute settlement mechanism' within the meaning of Article 4(4) because this Commission cannot settle the dispute."[23]

24. Secondly, Timor-Leste submits that the mere fact that CMATS includes a provisional arrangement of a practical nature does not make it *per se* compatible with the Convention.[24] Timor-Leste considers CMATS, as interpreted by Australia, to be incompatible with the

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18 Australia's Objection to Competence, para. 184.

19 Competence Hearing Tr. (Final) 446:16-23.

20 Competence Hearing Tr. (Final) 348:8-10.

21 Competence Hearing Tr. (Final) 349:10-12.

22 Competence Hearing Tr. (Final) 435:14-18.

23 Competence Hearing Tr. (Final) 436:5-15.

24 Competence Hearing Tr. (Final) 345:21 to 347:1.

Convention under the terms of Article 311, which concerns the relationship between the Convention and other instruments.[25]

25. Thirdly, with respect to Article 281, Timor-Leste submits that the Convention requires a binding agreement,[26] that the 2003 exchange of letters did not constitute a binding agreement,[27] and that:

> CMATS is not an agreement within the meaning of Article 281. It is not an agreement to settle the maritime boundary dispute by a means that excludes a further procedure. On the contrary, it purports to freeze the maritime dispute for 50 years.[28]

26. Fourthly, relying on the negotiating record of the Convention, Timor-Leste considers that the cut-off date for disputes that can be submitted to conciliation under Article 298(1)(a)(i) "is the entry into force of this Convention, which . . . means 16 November 1994."[29]

27. Fifthly, with respect to the condition of prior negotiation in Article 298(1)(a)(i), Timor-Leste submits that "it is well established that a requirement such as this for a reasonable period of time to elapse before proceedings are initiated does not require a party to wait when there is no prospect of negotiations. . . . If one side refuses to negotiate, that cannot be a bar to the operation of Article 298(1)(a)(i)."[30]

28. Finally, regarding Australia's objection on "admissibility", Timor-Leste emphasizes the non-binding nature of these conciliation proceedings and submits that the Commission will not therefore trespass onto matters that are properly before other fora, including an arbitration tribunal presently considering the validity of CMATS.[31] Timor-Leste also indicates that, if necessary, it will soon terminate CMATS, such that CMATS would no longer be in place by the time the Commission is asked to render any report.[32]

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29. Article 13 of Annex V to the Convention provides that "[a] disagreement as to whether a conciliation commission acting under this section has competence shall be decided by the commission." The Parties likewise agree that the Commission is competent to evaluate and

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25 Competence Hearing Tr. (Final) 345:21 to 346:6; 436:1-10.

26 Competence Hearing Tr. (Final) 354:8-17.

27 Competence Hearing Tr. (Final) 355:2 to 356:3.

28 Competence Hearing Tr. (Final) 356:10-15.

29 Competence Hearing Tr. (Final) 358:8-10.

30 Competence Hearing Tr. (Final) 370:11 to 371:4.

31 Competence Hearing Tr. (Final) 349:1-9.

32 Competence Hearing Tr. (Final) 35:11-18.

decide on its own competence.[33] Accordingly, in this Decision, the Commission will set out the issues that it considers to bear on its competence under the Convention, addressing Australia's objections and Timor-Leste's responses.

II. PROCEDURAL HISTORY

30. On 11 April 2016, Timor-Leste commenced these conciliation proceedings by way of a *Notification Instituting Conciliation under Section 2 of Annex V of UNCLOS*. In its Notification, Timor-Leste appointed Judge Abdul G. Koroma and Judge Rüdiger Wolfrum as Timor-Leste's party-appointed conciliators.

31. On 2 May 2016, Australia submitted a *Response to the Notice of Conciliation*. In its Response, Australia appointed Dr. Rosalie Balkin and Professor Donald McRae as Australia's party-appointed conciliators.

32. On 11 May 2016, the Parties wrote jointly to the Permanent Court of Arbitration (the "**PCA**"), requesting that it act as the Registry for these conciliation proceedings.

33. On 25 June 2016, after consulting with the Parties, the party-appointed conciliators appointed H.E. Ambassador Peter Taksøe-Jensen to serve as Chairman of the Conciliation Commission (the "**Commission**"). Ambassador Taksøe-Jensen was selected from a shortlist of candidates acceptable to both Parties. The Commission was accordingly constituted with effect from 25 June 2016.

34. On 27 June 2016, Australia submitted an *Application for Bifurcation of the Proceedings*, briefly setting out Australia's challenge to the competence of the Commission and requesting the Commission to "bifurcate the conciliation to enable Australia's challenge to the competence of the Commission to be decided as a separate preliminary matter."

35. On 18 July 2016, Timor-Leste submitted its *Comments on Australia's Application for Bifurcation of the Proceedings*, requesting that the Commission "not accede to Australia's request for bifurcation."

36. On 28 July 2016, the Commission convened a procedural meeting with the Parties at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands. During the course of the procedural meeting, the Commission and the Parties concluded terms of appointment, discussed the rules of procedure and the organization of the proceedings, and agreed that,

[33] Australia's Objection to Competence, para. 52; Timor-Leste's Written Submission in Response to Australia's Objections to Competence, para. 5.

following written submissions on competence from the Parties, the Commission would convene a hearing on competence from 29 to 31 August 2016 at which the Parties would address both the question of the Commission's competence and whether the Commission should decide on its competence as a preliminary matter. The Parties also agreed that there would be a public opening session, prior to the hearing on competence, in which the Parties would address the background to the dispute.

37. On 12 August 2016, Australia submitted its *Objection to Competence*.

38. On 25 August 2016, Timor-Leste submitted its Written Submission in Response to Australia's Objection to Competence.

39. From 29 to 31 August 2016, the Commission convened a hearing on the issue of competence with the Parties at the Peace Palace in The Hague, the Netherlands. As agreed with the Parties, the hearing was preceded by an opening session on the background to the dispute, which was webcast live on the website of the PCA. The following participated in the opening session and the hearing on competence:

Commissioners

H.E. Mr. Peter Taksøe-Jensen (Chairman)
Dr. Rosalie Balkin
Judge Abdul G. Koroma
Professor Donald McRae
Judge Rüdiger Wolfrum

Timor-Leste	**Australia**
H.E. Minister Kay Rala Xanana Gusmão	Mr. John Reid
H.E. Minister Hermenegildo Pereira	Ms. Katrina Cooper
Ms. Elisabeth Exposto	Solicitor-General Justin Gleeson SC
H.E. Ambassador Joaquim da Fonseca	Sir Daniel Bethlehem KCMG QC
H.E. Ambassador Abel Guterres	Mr. Bill Campbell QC
H.E. Ambassador Milena Pires	Professor Chester Brown
Ms. Elizabeth Baptista	Mr. Gary Quinlan AO
Mr. Simon Fenby	H.E. Ambassador Brett Mason
Ms. Sadhie Abayasekara	Ms. Amelia Telec
Ms. Helena Araujo	Mr. Benjamin Huntley
Ms. Ermelinda Maria Calapes Da Costa	Ms. Anna Rangott
Professor Vaughan Lowe QC	Mr. Justin Whyatt
Sir Michael Wood KCMG	Mr. Todd Quinn
Mr. Eran Sthoeger	Mr. Mark Alcock
Mr. Robin Cleverly	Ms. Angela Robinson
Ms. Janet Legrand	Ms. Indra McCormick
Mr. Stephen Webb	Ms. Christina Hey-Nguyen
Ms. Gitanjali Bajaj	
Ms. Harriet Foster	
Ms. Amber Day	
Mr. Olavio Mendes Ferreira Lopes	

Registry

Mr. Garth Schofield
Mr. Martin Doe
Ms. Pem Chhoden Tshering

Permanent Court of Arbitration

Court Reporter

Ms. Diana Burden

40. During the opening session and hearing on competence, H.E. Minister Kay Rala Xanana Gusmão; H.E. Minister Hermenegildo Pereira, Agent for Timor-Leste; Ms. Elisabeth Exposto, Deputy Agent for Timor-Leste; Professor Vaughan Lowe QC; and Sir Michael Wood KCMG made oral presentations for Timor-Leste. Mr. John Reid, Agent for Australia; Mr. Justin Gleeson SC, Solicitor General of Australia; Sir Daniel Bethlehem KCMG QC; Mr. Bill Campbell QC; Professor Chester Brown; and Mr. Gary Quinlan AO made oral presentations for Australia.

41. On 31 August and 9 September 2016, the Parties wrote to the Commission, providing supplemental written answers to questions posed by the Commission during the hearing. Additionally, on 13 September 2016, Australia provided a further supplemental answer to a question from the Commission concerning Article 9 of CMATS.

III. THE COMMISSION'S ANALYSIS

42. In this dispute, the Conciliation Commission was instituted pursuant to Article 298(1)(a)(i) of the Convention, which provides for compulsory conciliation where a State elects to exclude sea boundary delimitation from arbitral or judicial settlement. Annex V to the Convention provides the basis for the formation and procedure of the Commission itself.

43. Following the initiation of these conciliation proceedings, Australia has objected to the competence of the Commission, principally on the basis of CMATS, a bilateral agreement that, according to Australia, precludes access to the dispute resolution mechanisms of the Convention.

44. Australia begins its objections stating that Article 4 of CMATS precludes compulsory conciliation under the Convention. The Commission does not share this point of departure. In its view, the starting point for the Commission's analysis is not CMATS, but rather the Convention itself. The conciliation procedure was established pursuant to Article 298 and accordingly the competence of the Commission derives from the Convention and its Annex V. Agreements such as CMATS

are relevant to the question of the Commission's competence, but only within the framework and from the perspective of the Convention itself.

45. Furthermore, the Convention is a later treaty as between the Parties. Thus, CMATS could only affect the Commission's competence to the extent that such effect is provided for in the Convention.

46. Within the Convention, provisions for the resolution of disputes among the States Parties are concentrated in Part XV. Compulsory conciliation in respect of sea boundary delimitation arises from Article 298, which falls within Section 3 of Part XV, entitled "Limitations and Exceptions to Applicability of Section 2." Section 2, in turn, is concerned with "Compulsory Procedures Entailing Binding Decisions" and begins with Article 286, which limits access to a court or tribunal under Section 2 to situations "where no settlement has been reached by recourse to section 1." Thus, under the Convention, and in particular its Part XV, a party seeking to make use of the dispute resolution provisions of the Convention must first meet the requirements of Section 1 of Part XV to enable access to the binding procedures of Section 2 or the compulsory conciliation procedures provided in Section 3.

47. Article 281 in Section 1 of Part XV is relevant to the present proceedings, and it is to that provision that the Commission now turns. Thereafter, the Commission will address the conditions for compulsory conciliation to be invoked, as set out in Article 298.

A. ARTICLE 281 OF THE CONVENTION

48. Article 281 of the Convention provides as follows:

> 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.
>
> 2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

49. This article forms part of a compromise on dispute settlement that was carefully negotiated at the Third United Nations Conference on the Law of the Sea (the "**Third UN Conference**"), where some States favoured recourse to the compulsory settlement of disputes while others sought to exclude it entirely from the Convention.[34] As adopted, the Convention provides for the

[34] "Summary Records of Meetings of the Second Committee, 57th Meeting", UN Doc. A/CONF.62/C.2/SR.57, paras. 38-45 (24 April 1979), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume XI (Summary Records, Plenary, General Committee, First,*

compulsory settlement of disputes and restricts States Parties from entering reservations beyond those expressly provided for in the Convention. At the same time, the Convention makes its own procedures for dispute settlement subject to other procedures on which the parties may have agreed, providing that such other procedures will prevail over the mechanisms created by the Convention.

50. Article 281 has been considered as a potential bar to the jurisdiction of courts and tribunals acting under Part XV of the Convention.[35] On its own terms, Article 281 provides that "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."[36] Article 281 thus extends to any procedure under Part XV of the Convention and is a precondition to the competence of a conciliation commission established pursuant to Article 298(1)(a)(i).

51. Australia has invoked two instruments that it considers together constitute an agreement within the meaning of Article 281. The first is an exchange of letters between the Prime Ministers of Timor-Leste and Australia in 2003, and the second is CMATS itself. The Commission will address each in turn.

1. The 2003 Exchange of Letters

52. On 4 March 2003, the then–Prime Minister of Timor-Leste, Mr. Mari Alkatiri, wrote to the then–Prime Minister of Australia, Mr. John Howard, in the following terms:

> I refer to our correspondence of late last year regarding permanent maritime boundary discussions between our two countries.
>
> As you know, a very large amount of work and effort has been dedicated by our respective Governments to the conclusion and implementation of the Timor Sea Treaty, and the conclusion of an International Unitisation Agreement for the Greater Sunrise field in the Timor Sea (IUA). I am particularly pleased that your Government is now in a position to ratify the Treaty, and I am pleased to report that I am submitting the IUA immediately to my Council of Ministers for its approval.

Second and Third Committees, as well as Documents of the Conference, Eighth Session), p. 60. *See also* "Summary records of meetings of the Plenary, 112th Plenary Meeting", UN Doc. A/CONF.62/SR.112, paras. 17-51 (25 April 1979), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume XI (Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Eighth Session)*, pp. 11-14.

35 *See, e.g.*, *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280 at p. 294-295, paras. 56-60. The point was also discussed in *South China Sea Arbitration (Philippines v. China)*, Award on Jurisdiction of 29 October 2015, paras. 193-291.

36 Emphasis added.

> In your letter of 3 November last year, you indicated your view that Australia is willing to commence discussions on permanent maritime boundaries once the Treaty is in force and the IUA has been completed. Since those days are fast approaching, I would very much welcome your early indication of a date on which those discussions might begin and a date by which you consider those discussions might result in a permanent boundary delimitation.[37]

53. On 25 July 2003, Prime Minister Howard responded as follows:

> Thank you for your letter of 4 March 2003 seeking agreement on the commencement of maritime boundary discussions between our two countries. I apologise for the delay in responding.
>
> Australia's first priorities have been finalising the implementation of the Timor Sea Treaty (TST) and the International Unitisation Agreement (IUA) for the Greater Sunrise field in the Timor Sea, and establishing the Designated Authority of the Joint Petroleum Development Area (JPDA). Australia looks forward to working together with East Timor under the TST and IUA to develop jointly the resources of the JPDA for the benefit of both our countries.
>
> With the TST now in force, Australia is better placed to commence maritime boundary delimitation negotiations with East Timor through the formation of a joint maritime body. While the resources Australia can devote to the establishment of this body will initially be limited by our focus on completing the process of bringing the IUA into force, Australia considers that in time such a body should provide our two countries with a forum to consider not only maritime boundary delimitation, but also the range of other maritime issues facing us.
>
> Given the complexity of the internal processes I imagine both our governments will need to undertake prior to these negotiations, I propose our governments aim to have a first formal meeting to discuss the formation of the joint body before the end of this year.
>
> Australia's experience of concluding delimitation agreements with other countries is that the process can be prolonged. Therefore I do not feel able to nominate a date by which the negotiations should be concluded. However, I confirm Australia's willingness to proceed in good faith towards the objective of delimiting our maritime boundaries.
>
> I would like to take this opportunity to reaffirm Australia's commitment to promoting the peaceful and prosperous development of East Timor.[38]

54. Australia accepts that this exchange of letters did not constitute a binding agreement,[39] but considers that a binding agreement is not required for the purposes of Article 281.[40] In Australia's view, the exchange of letters was nonetheless an "agreement" to pursue the delimitation of the maritime boundary between Timor-Leste and Australia through negotiation. This agreement was, according to Australia, then supplemented by CMATS, which added an exclusion on further

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37 Letter from Prime Minister Alkatiri to Prime Minister Howard dated 4 March 2003 (**Annex AU-006**).

38 Letter from Prime Minister Howard to Prime Minister Alkatiri dated 25 July 2003 (**Annex AU-007**).

39 Australia's Response to the Commission's Questions to the Parties, para. A21 (31 August 2016)

40 Competence Hearing Tr. (Final) 244:19 to 245:2; 412:3-15.

procedures for the duration of that treaty.[41] However, Timor-Leste argues that only a legally binding agreement would be relevant for the purposes of Article 281.[42]

55. Article 281 has been considered on a number of previous occasions by courts and tribunals acting pursuant to Part XV of the Convention. As Timor-Leste noted, the tribunal in the *South China Sea Arbitration* applied Article 281 on the basis that a legally binding agreement was required and analysed various instruments relevant to those proceedings in such terms.[43] As Australia observed, Article 281 was discussed (although that provision was not raised as a jurisdictional objection by either party) by the tribunal in *Barbados v. Trinidad and Tobago* in reference to what it described as a "*de facto* agreement" that was "agreed in practice, although not by any formal agreement," to settle the dispute through negotiations, before concluding that the parties' *de facto* agreement did not, in any event, exclude further procedures.[44] It is unclear, however, whether by a "*de facto* agreement", the tribunal in *Barbados v. Trinidad and Tobago* contemplated a non-binding agreement. Article 281 was also considered by the International Tribunal for the Law of the Sea in its provisional measures order in *Land Reclamation in and around the Straits of Johor*, when it considered Singapore's contention that "a consensual process of negotiation had commenced and, as a legal consequence, both States had embarked upon a course of negotiation under article 281."[45] The parties had, in any event, agreed that their discussions were without prejudice to the possibility of arbitration under the Convention, such that the International Tribunal for the Law of the Sea found Article 281 not to be applicable under those circumstances.[46] Finally, the tribunal in the *Southern Bluefin Tuna Arbitration* applied Article 281 to the Convention for the Conservation of Southern Bluefin Tuna, which was unequivocally a legally binding agreement.[47]

56. Although Article 281 does not expressly state that an "agreement" must be legally binding for the article to apply, the Commission nevertheless considers that Article 281 requires a legally binding

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41 Competence Hearing Tr. (Final) 244:19 to 245:2; 412:3-15.

42 Competence Hearing Tr. (Final) 354:8-17.

43 *South China Sea Arbitration (Philippines v. China)*, Award on Jurisdiction of 29 October 2015, paras. 193-291.

44 *Barbados v. Trinidad and Tobago*, Award of 11 April 2006, RIAA Vol. XXVII, p.147 at pp. 205-206, para. 200(ii).

45 *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10 at p. 20, para. 53.

46 *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10 at p. 21, paras. 55-57.

47 *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Award of 4 August 2000, RIAA Vol. XXIII p. 1.

agreement. As a matter of the text of the Convention, Article 281 stands adjacent to Article 282, which contemplates formal, binding agreements when it refers to 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." The two provisions use the same terminology of "have agreed" and "agreement", and the Commission does not consider that the text of the Convention would support significantly different meanings to the same terms appearing in two parallel articles.

57. Equally importantly, the Commission does not consider that a reading of Article 281 that would permit a non-binding agreement to preclude the application of the compulsory dispute settlement provisions of Part XV would be consistent with the fact that Part XV of the Convention is itself a binding agreement.

58. On the basis of the foregoing considerations, the Commission concludes that the 2003 exchange of letters between Prime Ministers Alkatiri and Howard did not constitute an agreement that would have legal effect pursuant to Article 281 of the Convention. Australia does not contend, of course, that the exchange of letters was intended to "exclude any further procedure." That element of Article 281 arises only with respect to CMATS, to which the Commission now turns.

2. The 2006 Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS)

59. The second instrument that, Australia submits, forms part of the Parties' agreement for the purposes of Article 281 is CMATS itself, Article 4 of which provides as follows:

> *Article 4*
> *Moratorium*
>
> 1. Neither Australia nor Timor-Leste shall assert, pursue or further by any means in relation to the other Party its claims to sovereign rights and jurisdiction and maritime boundaries for the period of this Treaty.
>
> 2. Paragraph 1 of this Article does not prevent a Party from continuing activities (including the regulation and authorisation of existing and new activities) in areas in which its domestic legislation on 19 May 2002 authorised the granting of permission for conducting activities in relation to petroleum or other resources of the seabed and subsoil.
>
> 3. Notwithstanding paragraph 2 of this Article, the JPDA will continue to be governed by the terms of the Timor Sea Treaty and associated instruments.
>
> 4. Notwithstanding any other bilateral or multilateral agreement binding on the Parties, or any declaration made by either Party pursuant to any such agreement, neither Party shall commence or pursue any proceedings against the other Party before any court, tribunal or other dispute settlement mechanism that would raise or result in, either directly or indirectly, issues or findings of relevance to maritime boundaries or delimitation in the Timor Sea.

> 5. Any court, tribunal or other dispute settlement body hearing proceedings involving the Parties shall not consider, make comment on, nor make findings that would raise or result in, either directly or indirectly, issues or findings of relevance to maritime boundaries or delimitation in the Timor Sea. Any such comment or finding shall be of no effect, and shall not be relied upon, or cited, by the Parties at any time.
>
> 6. Neither Party shall raise or pursue in any international organisation matters that are, directly or indirectly, relevant to maritime boundaries or delimitation in the Timor Sea.
>
> 7. The Parties shall not be under an obligation to negotiate permanent maritime boundaries for the period of this Treaty.

60. It is Australia's contention that Article 4 of CMATS, when read together with the exchange of letters discussed above, jointly constitute an agreement pursuant to Article 281, displacing the competence of the Commission. In Australia's view, the exchange of letters constitutes an agreement to settle permanent maritime boundaries between the Parties through negotiations. According to Australia, CMATS adds to that an exclusion of further procedures and, although separated in time, the two agreements together fulfil the requirements of Article 281. Timor-Leste, for its part, submits that CMATS is void for reasons being considered in parallel proceedings by the tribunal in the *Timor Sea Treaty Arbitration*[48] and, in any event, that CMATS does not provide for dispute settlement.[49]

61. Because Australia's Article 281 objections depend on both the exchange of letters and CMATS, the Commission's finding that the exchange of letters does not constitute an agreement within the meaning of Article 281 would be sufficient to dispense with this objection in its entirety. Nevertheless, the Commission considers it appropriate to examine whether CMATS alone would constitute an agreement within the meaning of Article 281.

62. Unlike the exchange of letters, CMATS is a binding treaty between the Parties. Article 4(4) of CMATS also appears to have been intended to exclude recourse to dispute resolution mechanisms, including those of the Convention. In the Commission's view, what CMATS is not—and what Article 281 requires—is an agreement "to seek settlement of the dispute by a peaceful means of [the Parties'] own choice." CMATS is an agreement *not* to seek settlement of the Parties' dispute over maritime boundaries for the duration of the moratorium.

63. Article 279 of the Convention calls on the Parties to "seek a solution by the means indicated in Article 33, paragraph 1, of the Charter" of the United Nations, which include negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, and resort to regional agencies or arrangements. Article 33 of the Charter and Article 280 of the Convention both make clear that

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48 Competence Hearing Tr. (Final) 333:12-14.

49 Competence Hearing Tr. (Final) 356:10-19.

this list is not exhaustive, and that States may settle their disputes through any other "peaceful means of their own choice." There is, in short, a great deal of flexibility in the range of approaches to dispute settlement that the Convention will recognize and respect. Nowhere in CMATS, however, is there any procedure intended to provide for the settlement of maritime boundaries. On the contrary, CMATS forecloses all possible avenues for the resolution of disputes relating to maritime boundaries, negating, in Article 4(7), the Parties' "obligation to negotiate permanent maritime boundaries for the period of this Treaty." Indeed, even if the Parties had concluded a binding agreement in 2003 to settle their maritime boundary through negotiation, CMATS on its own terms would negate, rather than confirm, such an obligation.

64. Nothing in CMATS constitutes an agreement "to seek settlement of the dispute by a peaceful means of [the Parties'] own choice." Nor does the Commission consider that an agreement *not* to pursue any means of dispute settlement can reasonably be considered a dispute settlement means of the Parties' own choice. Accordingly, the Commission concludes that CMATS is not an agreement pursuant to Article 281 that would preclude recourse to compulsory conciliation pursuant to Article 298 and Annex V.

B. ARTICLE 298 OF THE CONVENTION

65. Article 298 provides in relevant part as follows:

> *Optional exceptions to applicability of section 2*
>
> 1. When 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;

66. As with the provisions of the Convention discussed in paragraph 49 above, Article 298 embodies a compromise on dispute settlement following extensive negotiations between those States which favoured compulsory and binding dispute settlement procedures and other States which sought to exclude even non-binding dispute settlement procedures. Article 298(1)(a)(i) establishes the limits of what a party to the Convention can unilaterally exclude from compulsory settlement of

disputes and, in particular, from compulsory conciliation under Annex V, section 2 of the Convention. At the same time, Article 298(1)(a)(i) establishes certain preconditions to invoking compulsory conciliation—namely the exclusion of pre-existing disputes and the absence of a negotiated agreement—which limit the competence of a compulsory conciliation commission under Annex V and form the basis of Australia's objections.

67. On 22 March 2002, Australia made the following declaration under Article 298(1)(a)(i):

> The Government of Australia further declares, under paragraph 1 (a) of article 298 of the United Nations Convention on the Law of the Sea done at Montego Bay on the tenth day of December one thousand nine hundred and eighty-two, that it does not accept any of the procedures provided for in section 2 of Part XV (including the procedures referred to in paragraphs (a) and (b) of this declaration) with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations as well as those involving historic bays or titles.[50]

68. Australia accepts that, as a logical consequence of this declaration, it has consented to "submission of the matter to conciliation under Annex V, section 2." Australia, however, argues that the conditions attached to such consent have not been fulfilled, namely that it applies only in cases where "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."[51] According to Australia, Timor-Leste has submitted to conciliation a pre-existing dispute, which has not previously been submitted to negotiation.[52] In particular, Australia relies upon the 2003 exchange of letters between Prime Minister Mari Alkatiri and Prime Minister John Howard as evidence of a pre-existing dispute that pre-dates the 2013 entry into force of the Convention for Timor-Leste.[53] To the extent that this dispute is not a pre-existing dispute dating back to at least 2003, and has only arisen after 2013, Australia submits that it has yet to be the subject of negotiations between the Parties since the moratorium in Article 4 of CMATS has precluded such negotiations.[54]

1. Whether the Parties' dispute has arisen "subsequent to the entry into force of this Convention"

69. Before attempting to apply Article 298(1)(a)(i), a preliminary question arises, namely, what is the dispute envisaged under Article 298(1)(a)(i) to which any requirements set forth in that article

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50 Australia, Declaration under Articles 287 and 298, 22 March 2002, 2177 UNTS 307.

51 Competence Hearing Tr. (Final) 256:9 to 258:15.

52 Competence Hearing Tr. (Final) 256:9 to 258:15.

53 Australia's Objection to Competence, para. 153.

54 Australia's Objection to Competence, para. 155.

would apply? As Timor-Leste has noted, its Notification tracks the language of Australia's declaration and thus purports to cover exactly what Australia's declaration does.[55] Australia, for its part, has made clear that its declaration intended to exclude from dispute resolution under section 2 of Part XV of the Convention exactly the maximum scope of disputes that may be excluded under Article 298, *i.e.*, all "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations."

70. Australia's declaration raises the further question of what constitutes a dispute "concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations." The Commission will return to this matter below in connection with certain matters that Australia argues are to be excluded from the scope of the Commission's competence, even if it concludes that it has competence to proceed with the conciliation. For present purposes, however, it suffices to note that an objection under Article 298(1)(a)(i) must clearly invoke a dispute which concerns the interpretation or application of the Convention, which is in principle distinct from a dispute which invokes pre-existing rights and obligations from other sources.[56]

71. Thus, as stated by the Chairman at the 28th meeting of Negotiating Group 7 during the Third UN Conference, when considering the text of what would become Article 298:

> As to the question of a distinction between "future" and "past" disputes, it should be borne in mind that the provisions of Part XV of the [Informal Composite Negotiating Text] deal with disputes "relating to the interpretation and application of the . . . Convention". If it were clear enough that disputes which have arisen before the entry into force of the Convention, never belong to that category and thus are not governed by the provisions of Part XV, including Article 297 [later Article 298], an express distinction between old and new disputes would not appear necessary.[57]

72. The Commission does not deny the possibility that there might be an overlap between rights and obligations under the Convention and rights and obligations under customary international law or other instruments and that such overlapping rights and obligations might form the subject matter of a dispute that straddles the entry into force of the Convention. Australia has, for instance, drawn attention to the express reference to Articles 74 and 83 in the preamble to CMATS,[58] which

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55 Competence Hearing Tr. (Final) 306:4 to 307:3.

56 *See MOX Plant Case (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 89 at p. 105-106, paras. 45-52; *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280 at p. 294, para. 51.

57 "Statement by the Chairman", Document NG7/26 (26 March 1979) *reproduced in* Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents, Vol. XI*, p. 435 (1987).

58 *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*, Preamble, para. 3, 12 January 2006, 2438 UNTS 359 ("TAKING INTO ACCOUNT the United Nations Convention on the Law of the Sea done at Montego Bay on 10 December 1982 and, in

it asserts to be the product of negotiations over disputed maritime boundaries between 2003 and 2006. Yet, this does not necessarily render a pre-existing dispute over maritime boundaries the same as a dispute concerning the interpretation and application of Articles 74 and 83 of the Convention. Therefore, even adopting Australia's characterization of the dispute, there would, at the very least, still remain matters which fall within the scope of these provisions of the Convention, but beyond the scope of the alleged pre-existing dispute between the Parties which was addressed in CMATS.

73. In any event, Australia at most invokes only a dispute dating back to Timor-Leste's independence in 2002,[59] prior to the entry into force of the Convention *as between the Parties in 2013*, but not prior to the entry into force of the Convention *in general in 1994*. The key question is thus whether the unqualified reference to "entry into force of this Convention" within the requirement that "such a dispute arises subsequent to the entry into force of this Convention" refers to the entry into force of the Convention as a whole on 16 November 1994 or to the entry into force of the Convention as between Australia and Timor-Leste on 7 February 2013.

74. For the Commission, the ordinary meaning of the unqualified phrase favours the former interpretation regarding entry into force of the Convention as a whole, especially when taking into account that the Convention contains various provisions where the phrase "entry into force" is expressly qualified to indicate that it refers to the entry into force as between the relevant parties.[60] While the Convention is not always consistent in its use of terminology, it does appear to be so in this respect.

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particular, Articles 74 and 83 which provide that the delimitation of the exclusive economic zone and continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law in order to achieve an equitable solution"). *See also Timor Sea Treaty between the Government of East Timor and the Government of Australia*, Article 2(a), 20 May 2002, 2258 UNTS 3 ("This Treaty gives effect to international law as reflected in the United Nations Convention on the Law of the Sea done at Montego Bay on 10 December 1982 which under Article 83 requires States with opposite or adjacent coasts to make every effort to enter into provisional arrangements of a practical nature pending agreement on the final delimitation of the continental shelf between them in a manner consistent with international law. This Treaty is intended to adhere to such obligation.").

59 Australia's Objection to Competence, paras. 153-154.

60 *See, e.g.*, Annex II, Article 4 of the Convention, which refers to "the entry into force of this Convention for that State", and Annex IV, Article 11(3)(d)(i) of the Convention, which refers to actions to be taken "within 60 days after the entry into force of this Convention, or within 30 days after the deposit of its instrument of ratification or accession." *See also* Articles 154, 308(3), 312(1), Annex II, Article 2(2), Annex III, Articles 6(1) and 7(1), and Annex VI, Article 4(3) of the Convention, all of which use the phrase "entry into force of this Convention" without qualification in circumstances which appear to refer necessarily to the entry into force of the Convention as a whole, rather than for specific parties.

75. Nevertheless, to the extent that ambiguity remains, the negotiating history is decisive. In the course of the negotiations at the Third UN Conference on the text of what would become Article 298, the delegation of Israel explicitly proposed that Negotiating Group 7 include additional language to specify the exclusion of disputes arising prior to the entry into force of the Convention "as between all the parties to the dispute."[61] This proposal was then repeated in the Second Committee,[62] but was not taken up by either the Negotiating Group or the Second Committee, despite the adoption of various other elements of the Israeli delegation's proposals.[63]

76. Timor-Leste considers it significant that a number of former members of diplomatic delegations at the Third UN Conference[64] simply assume in later works that the phrase refers to the 1994 entry into force of the Convention as a whole.[65] According to Timor-Leste, these works are evidence that past participants in the Conference consider the meaning of the phrase to be plain, whether on its own or in conjunction with the provision's context and negotiating history. In contrast, Australia submits that the phrase refers to the entry into force of the Convention as between the parties to the particular dispute, invoking the presumption of the non-retroactivity of treaties.[66]

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61 "Informal Working Paper by Israel [6 February 1979]", Document NG7/30 (2 April 1979) *reproduced in* Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents, Vol. XI*, p. 451 (1987). Mexico had also made a proposal incorporating the same additional language. *See* "Mexico Informal Proposal", Document NG7/29 (30 March 1979) *reproduced in* Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents, Vol. XI*, p. 448 (1987).

62 "Summary Records of Meetings of the Second Committee, 57th Meeting", UN Doc. A/CONF.62/C.2/SR.57, paras. 50, 54-55 (24 April 1979), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume XI (Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Eighth Session)*, p. 61.

63 "Summary Records of Meetings of the Second Committee, 57th Meeting", UN Doc. A/CONF.62/C.2/SR.57, para. 41 (24 April 1979), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume XI (Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Eighth Session)*, p. 60; "Report of the Chairman on the work of Negotiating Group 7", Document NG7/39 (20 April 1979) *reproduced in* Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents, Vol. XI*, p. 462 (1987). *See also* "Summary records of meetings of the Plenary, 112th Plenary Meeting", UN Doc. A/CONF.62/SR.112, paras. 25-26 (25 April 1979), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume XI (Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Eighth Session)*, p. 11.

64 *See, e.g.*, S. Rosenne, *Essays on International Law and Practice*, p. 507 (2007); J.A. de Yturriaga, *The International Regime of Fisheries: From UNCLOS 1982 to the Presential Sea*, p. 152 (1997); P.S. Rao, "The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility" 15 *Chinese Journal of International Law*, para. 17 (2016), *advance access, available at* <chinesejil.oxfordjournals.org/content/early/2016/06/21/chinesejil.jmw019.full.pdf+html>.

65 Timor-Leste's Written Submission in Response to Australia's Objections to Competence, para. 31.

66 Australia's Objection to Competence, paras. 149-151; Competence Hearing Tr. (Final) 400:9-16; Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, p. 258 (2005).

Ultimately, for the reasons set out in this section, the Commission agrees with the interpretation put forward by Timor-Leste.

2. Whether any "agreement within a reasonable period of time [was] reached in negotiations between the parties"

77. With respect to the second requirement under Article 298(1)(a)(i), Australia asserts that the provision requires that the Parties negotiate for a "reasonable period of time" before submitting a dispute to compulsory conciliation, and that this requirement has not been fulfilled since no negotiations have taken place on maritime boundaries due to the moratorium in Article 4 of CMATS.[67]

78. The requirement under Article 298(1)(a)(i), however, is that "no agreement within a reasonable period of time is reached in negotiations between the parties." It does not expressly require that prior negotiations between the parties to the dispute actually take place. Such a requirement would effectively grant a party the right to veto any recourse to compulsory conciliation by refusing to negotiate, contrary to the intention of Article 298. According to the text, the provision merely requires that no agreement be reached within a reasonable period of time in any such negotiations. Furthermore, the "agreement" envisaged by the provision is an agreement resolving the "dispute concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations" in the sense described above.

79. In fact, negotiations on maritime boundaries did take place between 2003 and 2006 in the lead up to CMATS. While CMATS is an agreement resulting from those negotiations, it does not purport to resolve the dispute over permanent maritime boundaries. It is at most a provisional arrangement of the kind contemplated under Articles 74(3) and 83(3). Thus, to the extent that there was a pre-existing dispute over maritime boundaries dating back to 2002, this dispute has been the subject of prior negotiations between the Parties which did not produce an agreement on sea boundary delimitation.

80. Even if the relevant dispute is taken only to have arisen in 2013, after the entry into force of the Convention for Timor-Leste, it is clear that Timor-Leste has repeatedly sought to engage in negotiations with Australia over permanent maritime boundaries since then. Despite Australia's unwillingness to engage in such negotiations on account of Article 4 of CMATS, this does not preclude the fact that "no agreement within a reasonable period of time [has been] reached in negotiations between the parties." Moreover, negotiations do appear to have taken place between

67 Australia's Objection to Competence, para. 162.

the Parties regarding CMATS between September 2014 and March 2015 in the context of attempts to resolve the matter before the tribunal in the *Timor Sea Treaty Arbitration*, also without success.[68]

81. The Commission does not in any event interpret CMATS Article 4(1) to preclude any and all possible negotiations between the Parties. The paragraph provides that neither Party "shall assert, pursue or further by any means in relation to the other Party its claims to sovereign rights and jurisdiction and maritime boundaries." When read in context, that paragraph seems only to proscribe acts by the Parties that attempt to advance or improve their legal positions or prejudice the other Party's legal position in respect of the Parties' respective maritime claims vis-à-vis each other. Similarly, whether or not the present conciliation proceedings fall within the scope of Article 4(4) and 4(5) of CMATS, those paragraphs do not exclude bilateral negotiations between the Parties of the kind envisaged under Article 298(1)(a)(i) of the Convention. Finally, Article 4(7) suspends the obligation to negotiate permanent maritime boundaries, but does not prohibit such negotiations. Moreover, nothing in CMATS precludes negotiations regarding CMATS itself and the provisional arrangements established thereunder, as is evident from Article 11 of CMATS. Such discussions are in fact expressly foreseen within the context of the Timor-Leste/Australia Maritime Commission under Article 9 of CMATS.[69]

82. The Commission therefore concludes that the present dispute between the Parties concerning the interpretation or application of Articles 74 and 83 of the Convention has arisen after the entry into force of the Convention and that no agreement has been reached in negotiations between the Parties within a reasonable period of time, thereby satisfying the requirements of Article 298(1)(a)(i) regarding the competence of the Commission.

C. ARTICLE 311 AND THE RELATIONSHIP BETWEEN THE CONVENTION AND CMATS

83. The Parties also disagree with respect to the effect of CMATS in relation to Article 311 of the Convention. Article 311 addresses generally the relationship between the Convention and other treaty instruments and provides as follows:

> *Relation to other conventions and international agreements*
>
> 1. This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958.
>
> 2. This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the

[68] Australia's Objection to Competence, paras. 165-167.

[69] Competence Hearing Tr. (Final) 228:16 to 232:17, 405:22 to 406:1.

> enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.
>
> 3. Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.
>
> 4. States Parties intending to conclude an agreement referred to in paragraph 3 shall notify the other States Parties through the depositary of this Convention of their intention to conclude the agreement and of the modification or suspension for which it provides.
>
> 5. This article does not affect international agreements expressly permitted or preserved by other articles of this Convention.
>
> 6. States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be party to any agreement in derogation thereof.

84. In the Commission's view, however, it is not necessary to enter into an examination of CMATS in terms of Article 311. CMATS does not derogate from the terms of the Convention. The Convention is the later treaty between the Parties, and the governments of Timor-Leste and Australia have not notified the States Parties to the Convention of any modification or suspension of its terms, as required by Article 311(4). Nor does CMATS describe the moratorium provisions in its Article 4 as modifying or suspending any obligation under the Convention.

85. Where another agreement between States Parties to the Convention bears on dispute resolution, the relationship between that agreement and the dispute resolution provisions of the Convention is addressed in Part XV, and specifically in Articles 281 and 282 of the Convention. Having already concluded that CMATS is not, for the purposes of Article 281, an agreement "to seek settlement of the dispute by a peaceful means of [the Parties'] own choice" of which the Convention will take cognizance, the Commission need not engage in any further analysis of whether or not CMATS is more generally compatible with the Convention within the terms of Article 311. Nor does this analysis depend upon whether or not CMATS is properly considered to be a "practical arrangement of a provisional nature" within the meaning of Articles 74 and 83. The application of Article 281 and of Part XV does not depend upon the substantive content of the agreement between the Parties that is alleged to bear on the availability of dispute resolution under the Convention. Rather, Article 281 depends upon the alternative arrangements for the settlement of disputes that such an agreement makes available.

D. COMPETENCE AND AUSTRALIA'S OBJECTION TO THE "ADMISSIBILITY" OF THE PROCEEDINGS

86. The preceding analysis brings the Commission to Australia's final objection, namely that the Commission should decline to exercise its competence because Timor-Leste has commenced these proceedings in breach of CMATS.

87. Competence, according to Australia, "embrace[s] what might otherwise be considered to be both jurisdiction and admissibility, and it intrinsically entails an exercise of discretion, and that it is open to you to consider and determine all of our objections on admissibility, propriety and abuse of right."[70] Because Australia considers Timor-Leste to have breached CMATS, it argues that the Commission must decline to proceed, lest compulsory conciliation become "a mechanism to reopen every treaty commitment merely because one State has changed its mind or reassessed the bargain."[71] For Timor-Leste, "[i]t is not obvious that the notion of admissibility, which seems to relate mainly to judicial propriety, has a role to play in conciliation."[72] Timor-Leste also considers that it has not breached CMATS[73] and that CMATS is void as a treaty between the Parties.[74]

88. Australia's "admissibility" objection takes two forms. First, Australia argues that CMATS is presumptively valid and must be treated as such unless and until the tribunal in the *Timor Sea Treaty Arbitration* finds it null and void as alleged by Timor-Leste.[75] Second, Australia requests that the Commission dismiss the present conciliation proceedings, or at least order a stay until the *Timor Sea Treaty Arbitration* tribunal has rendered its award.[76] This is, in Australia's view, necessary so that the status of CMATS can be clarified prior to the Commission's decision on its competence and in order to avoid the potential for contradictory results as between the two proceedings.[77]

89. Neither a dismissal nor a stay is warranted in the Commission's view, however, since there is no material overlap between the matters on which this Commission is asked to decide and those before the *Timor Sea Treaty Arbitration* tribunal. The Parties are agreed that this Commission

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70 Competence Hearing Tr. (Final) 385:11-17.

71 Competence Hearing Tr. (Final) 388:18-20.

72 Competence Hearing Tr. (Final) 318:2-5.

73 Timor-Leste's Written Responses to the Commission's Questions, Q13.

74 Competence Hearing Tr. (Final) 333:13-14.

75 Australia's Objection to Competence, para. 186; Competence Hearing Tr. (Final) 134:21-135:4.

76 Australia's Objection to Competence, paras. 183-184.

77 Competence Hearing Tr. (Final) 136:17-25.

should not decide the question of the validity of CMATS.[78] Further, in answer to a question from the Commission at the hearing on competence as to whether the issue of compatibility between CMATS and the Convention arose in the *Timor Sea Treaty Arbitration*, Timor-Leste confirmed that it does not "seek[] a determination from the [*Timor Sea Treaty Arbitration*] Tribunal on the compatibility of CMATS with the Convention."[79] Consequently, there is no question on which the two proceedings could come to contradictory results. Moreover, the Commission has ultimately decided to uphold its competence for reasons that do not require any inquiry into the compatibility of CMATS and the Convention. Even if CMATS were presumed to be valid, it would not affect the Commission's competence or the "admissibility" of the dispute.

90. A subsidiary objection remains: that it would be improper for the Commission to proceed with the conciliation when that would allegedly allow Timor-Leste to benefit from its breach of CMATS. This raises the question of the significance for dispute resolution under the Convention of the alleged breach of another treaty, the existence of which breach is contested as between the Parties. This amounts to a variation of the clean hands doctrine enunciated by the Permanent Court of International Justice in its decision in *Diversion of Water from the Meuse*, where it declined to support a contention by the Netherlands that Belgium had acted in contravention of a treaty regulating the taking of water from the Meuse River where the Netherlands had engaged in the same conduct.[80] Here however, Australia asks the Commission to find a breach of another instrument (CMATS) in the overall legal relationship between the Parties and to give that breach decisive effect with respect to the Commission's competence under the Convention.

91. The alleged breach of CMATS, however, is not something that properly falls to the Commission to consider or decide. Timor-Leste contests Australia's allegation and argues in any event that CMATS is invalid and without legal effect. The Parties agree that the validity of CMATS is presently before the tribunal in the *Timor Sea Treaty Arbitration* and therefore not a matter that the Commission is competent to address.[81] In any event, the Commission could not address one aspect of CMATS (its alleged breach) without also addressing Timor-Leste's defence regarding the validity of the treaty.

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78 Australia's Objection to Competence, para. 184; Timor-Leste's Comments on Bifurcation, para. 22.

79 Timor-Leste's Written Responses to the Commission's Questions, Q11.

80 *Case Concerning the Diversion of Water from the River Meuse (Netherlands v. Belgium), Judgment of 28 June 1937, PCIJ Series A/B, No. 70*, p. 4 at p. 25.

81 Timor-Leste's Written Responses to the Commission's Questions, Q10; Competence Hearing Tr. (Final) 394:5-15.

92. For the purposes of these proceedings, it suffices that CMATS is not an agreement that meets the requirements of the Convention to preclude dispute resolution under Part XV. The alleged breach of CMATS is not an established fact, and the clean hand doctrine does not extend so far as to make the possible breach of some other agreement, such as CMATS, a bar to dispute resolution proceedings. The effect of these proceedings on CMATS, like the question of the validity of CMATS, is a matter for the Parties to consider in another forum.

E. THE SCOPE OF THE MATTERS SUBMITTED TO CONCILIATION

93. During the course of the hearing on competence, a further disagreement concerning the competence of the Commission emerged between the Parties. In its opening statement, Timor-Leste set out the matters with which it hoped the Commission would assist the Parties as follows:

> First, we hope that the Commission can assist the Parties to reach an agreement on the delimitation of permanent maritime boundaries . . . .
>
> . . .
>
> In addition to the issue of permanent maritime boundaries, a second task for the Commission is to assist Australia and Timor-Leste to agree on appropriate transitional arrangements in the disputed maritime areas, to bring the Parties from their current temporary arrangements to the full implementation of their newly agreed permanent maritime boundary.
>
> Finally, a third task for the Commission, and one related to the issue of transitional arrangements, concerns the post-CMATS arrangements. With the expected termination of CMATS, and with it the Timor Sea Treaty, the Parties will benefit from the assistance of the Commission in finding the optimal way to come to a mutual position on dissolving the joint institutions and arrangements found in those provisional arrangements, and moving on.[82]

94. Australia objected that this amounted to an attempt to expand the competence of the Commission to include issues that are, in Australia's view, "outside the notification by Timor-Leste which commenced the proceedings" and "outside Article 298 of UNCLOS, because they do not concern the matters in that article."[83] Although not couched as a formal objection to the Commission's competence generally, the Commission considers it appropriate at this juncture also to address this aspect of the Parties' disagreement over its competence.

95. Article 298, on its own terms, requires Australia to accept submission of "the matter" to conciliation under Annex V. The matter in question, again in the terms of Article 298 itself, is a "dispute[] concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations." Turning to those articles, the Commission recalls that Article 74 provides with respect to the exclusive economic zone as follows:

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82 Competence Hearing Tr. (Final) 48:3 to 49:18.

83 Competence Hearing Tr. (Final) 70:10-13.

Delimitation of the exclusive economic zone
between States with opposite or adjacent coasts

1. The delimitation of the exclusive economic zone 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.

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.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.

96. Article 83 is the near mirror image of Article 74 with respect to the continental shelf:

Delimitation of the continental shelf
between States with opposite or adjacent coasts

1. The delimitation of the 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.

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.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.

97. It is apparent from an examination of these articles of the Convention that they address not only the actual delimitation of the sea boundary between States with opposite or adjacent coasts, but also the question of the transitional period pending a final delimitation and the provisional arrangements of a practical nature that the Parties are called on to apply pending delimitation. The Commission does not, therefore, see that Timor-Leste's request that the Commission also consider transitional arrangements, or the arrangements that the Parties may enter into following the termination of CMATS, lies outside the scope of Articles 74 and 83 or, correspondingly, of Article 298(1)(a)(i).

98. The Commission likewise notes that paragraph 5 of Timor-Leste's notification initiating these proceedings calls for the Commission to address "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."[84] Even if the notification were considered to strictly define the matters that could be discussed in the course of conciliation—a position that the Commission doubts—Timor-Leste's notification was plainly not limited to the establishment of permanent maritime boundaries.

99. The Commission thus does not consider that the matters raised by Timor-Leste during the hearing fall beyond the scope of either its notification or of Article 298.

F. ARTICLE 7 OF ANNEX V AND THE APPLICATION OF THE 12-MONTH PERIOD

100. Having concluded that it has competence to conciliate the matters raised in Timor-Leste's notification of 11 April 2016, the Commission now turns to one final issue that, although not a part of Australia's objections, bears on the Commission's competence. This issue concerns the duration of the proceedings and the effect of the time limit for conciliation in Annex V to the Convention.

101. Article 7(1) of Annex V provides in mandatory terms that "[t]he commission shall report within 12 months of its constitution." The Parties are, of course, free to modify or extend this deadline, a power expressly noted in Article 10 of Annex V, but they must do so by agreement.

102. In the course of the procedural meeting on 28 July 2016, the Commission questioned the Parties concerning the interpretation of this provision and the relevant date on which the 12-month period would begin to run in the case of a compulsory conciliation.

103. Timor-Leste takes the view that the 12-month period in Article 7 runs from 25 June 2016 (the date on which the formation of the Commission was completed) and that it is "not expecting to extend the time scheme." According to Timor-Leste, "[t]he Government took the decision to initiate a 12-month process under UNCLOS and a 12-month process it is."[85]

104. Australia, in contrast, emphasizes that Annex V is divided into two sections, the first—including the 12-month deadline—devoted to voluntary conciliation and the second to compulsory conciliation. According to Australia:

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84 Notification, para. 5.

85 Procedural Meeting Tr. 100:16-21.

> Section II . . . deals with initiation of proceedings and competence and then some reconciliation provisions. It deals with a challenge in Article 13. Section II does not address modalities/rules/scope of the conciliation. Article 13, which is in Section II, contemplates a competence challenge. Article 14, which is in Section II, makes Section I subject to Section II. Articles 2-10 of Section I of this Annex apply subject to this Section [II].[86]

Therefore, Australia concludes, "a decision on competence is required under Section II before we get into the Section I conciliation phase, and therefore the 12 months which is addressed in Article 7 of Section I only begins to run from the point that we get into the conciliation phase."[87]

105. Article 13 of Annex V provides that the Commission shall decide any disagreement with respect to its competence. If follows that it is for the Commission to resolve this disagreement also and, as necessary, to interpret the terms of Annex V. This point was, indeed, put to both Parties in the course of the procedural meeting on 28 July 2016[88] and not disputed by either side.

106. Although these proceedings arise by way of a compulsory conciliation, Annex V itself is not principally concerned with compulsory proceedings. Article 284 of the Convention makes available voluntary conciliation within the general provisions described in Section 1 of Part XV. Section 1 of Annex V, which makes up the majority of the Annex, falls under the heading "Conciliation Procedure Pursuant to Section 1 of Part XV," and it is in this Section of Annex V that Article 7 and its 12-month deadline are to be found. Compulsory conciliation, in contrast, is structurally separated into the brief Section 2 of the Annex that provides for the resolution of disagreements over competence and further that procedures of Section 1 apply to a compulsory conciliation "subject to this section."

107. A strict application of the 12-month deadline to the conciliation process as a whole may come into conflict with the need to give appropriate consideration to disagreements concerning competence in the case of compulsory conciliation. The deadline in Article 7 is unquestionably important to the conciliation process. It serves to fix an end to the procedure and ensure that a party is not compelled to continue endlessly a conciliation process that, in its view, has no hope of success. This is particularly significant given that Article 284 of the Convention and Article 8 of Annex V permit the termination of even a voluntary conciliation only by agreement, by settlement, or following a report from the conciliation commission. In other words, once conciliation has begun, the Parties are required continue the process for 12 months and may extend it thereafter, but only by agreement.

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86 Procedural Meeting Tr. 118:4-14.

87 Procedural Meeting Tr. 118:18-23.

88 Procedural Meeting Tr. 129:8-13.

108. On the other hand, the resolution of disagreements over competence can be a central aspect of compulsory conciliation. Indeed, Article 13 is one of only four Articles that make up Section 2 of Annex V, the only portion of the Annex devoted to compulsory conciliation. While the results of such a proceeding are non-binding, it remains the case that an Article 298 procedure is a compulsory process, and one of the parties may be participating against its will. It is neither appropriate that a State be subjected to compulsory conciliation before a commission that lacks competence over the matter, nor is such a conciliation process likely to be effective. As a method for the resolution of disputes, conciliation depends ultimately on the parties' acceptance of the process and willingness to seek agreement and give serious consideration to the recommendations of the commission.

109. Article 13 thus calls for serious attention to any disagreements regarding competence. Article 7 is fixed at the minimum period of time in which a conciliation process could realistically be expected to bear fruit, ensuring that only a productive process will be continued, by agreement, beyond that point. In the Commission's view, the tension between these provisions is resolved by Article 14 of Annex V, which provides that Section 1 of the Annex applies subject to Section 2. The deadline in Article 7 must therefore give way to the time needed to consider and decide objections to competence and is thus properly understood to run only after a Commission has addressed any objections that may be made. Any other approach would run the risk of a commission failing to give proper consideration to a justified objection to competence or, alternatively, of giving such objections appropriate attention only to find that too much time had elapsed for the parties to fairly evaluate whether the conciliation process was likely to prove effective and worthy of extension by agreement.

110. Accordingly, the Commission concludes that, in this compulsory conciliation process, the 12-month period in Article 7 of Annex will begin to run as of the date of this Decision.

* * *

IV. DECISION

111. For the reasons set out in this Decision, the Commission unanimously decides as follows:

A. The Commission is competent with respect to the compulsory conciliation of the matters set out in Timor-Leste's *Notification Instituting Conciliation under Section 2 of Annex V of UNCLOS* of 11 April 2016.

B. There are no issues of admissibility or comity that preclude the Commission from continuing these proceedings.

C. The 12-month period in Article 7 of Annex V of the Convention shall run from the date of this Decision.

* * *

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Done this 19th day of September 2016,

Dr. Rosalie Balkin

Judge Abdul G. Koroma

Professor Donald McRae

Judge Rüdiger Wolfrum

H.E. Ambassador Peter Taksøe-Jensen
Chairman

Mr. Garth Schofield
Registrar