

Compulsory Conciliation under the Law of the Sea Convention: rich pickings in the Decision on Objections to Competence of the Timor-Leste/Australia Conciliation Commission

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Decision commented on: Conciliation Commission, Between the Democratic Republic of Timor-Leste and the Commonwealth of Australia: [Decision on Australia's Objections to Competence](#), 19 September 2016 (Registry, the Permanent Court of Arbitration).

Background

Part XV of the [Law of the Sea Convention](#) (LOSC or Convention) provides, *inter alia*, for “compulsory conciliation” with respect to disputes concerning the interpretation or application of the Convention in a number of instances. This particular dispute concerns Articles 74, 83 and 298 of the Convention. Articles 74 and 83 are the well-known provisions dealing with the delimitation of the exclusive economic zone and the continental shelf where there are overlapping entitlements as between adjacent or opposite states. Timor-Leste and Australia are opposite states separated by the Timor Sea which is approximately 300 NM wide. On the same day that Timor-Leste regained its independence (20 May 2002) the two states concluded the [Timor Sea Treaty](#) which established a Joint Petroleum Development Area pending delimitation of the boundary. Further negotiations between the two states led to the adoption (2006) of the Treaty on Certain Maritime Arrangements in the Timor Sea ([CMATS](#)). In [separate arbitral proceedings](#) Timor-Leste is contesting the validity of CMATS. The two states have yet to agree on a permanent maritime boundary.

Article 298 is the “optional exceptions” provision of section 3, of Part XV of LOSC. Article 298 allows a party to opt out of compulsory and binding dispute settlement under Part XV, section 2 with respect to certain types of enumerated disputes if it deposits an appropriate declaration upon “signing, ratifying or acceding to the Convention or at any time thereafter”. Article 298(1)(a)(i) permits such a declaration with respect to “disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles”. Australia has made such a declaration (at para. 69 of the Commission’s Decision) taking full advantage of the scope of the exception. However, this exclusion of “compulsory and binding” dispute resolution is subject to a proviso that where the parties are unable to reach an agreement “within a reasonable period of time” following negotiations a party must accept “submission of the matter to conciliation under Annex V, section 2” at the request of the other party. Article 11(2) of Annex V complements this and indicates that a party properly notified under Part XV, section 3 “shall be obliged to submit to such proceedings.” Thus, conciliation in these circumstances is compulsory.

Article 298(1)(a)(ii) goes on to provide that the Conciliation Commission shall provide a report with reasons and that the parties shall then “negotiate an agreement on the basis of that report”. If the parties are still unable to reach an agreement the paragraph further enjoins them to “submit the question” for binding dispute resolution

under Part XV, section 2 but only “by mutual consent”. Hence, a party can still avoid *binding* dispute resolution under section 2 since the procedure for triggering section 2 is not compulsory.

This conciliation was initiated by Timor-Leste on 11 April 2016 by way of a “Notification Instituting Conciliation Under Section 2 of Annex V of UNCLOS” addressed to Australia. The notification is not posted on the PCA’s website but the Commission’s Decision notes (at paras 2, 13 & 98) that “Timor-Leste seeks compulsory conciliation with respect to “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.”

The procedure contemplated by Annex V is that the originating notification shall include the appointment of two conciliators “preferably chosen” from the list established under Article 2 of Annex V and comprising up to four conciliators appointed by each State Party and being persons “enjoying the highest reputation for fairness, competence and integrity.” In this case, Timor-Leste nominated Judge Abdul G. Koroma (Sierra Leone), and Judge Rüdiger Wolfrum (Germany). Judge Koroma was a judge of the International Court of Justice from 1994 – 2012. Judge Wolfrum is a sitting member of the International Tribunal for the Law of the Sea (ITLOS) and a frequent appointee to Annex VII tribunals, including the tribunals for the [Chagos Award](#), the [South China Sea Award](#) and the [Bangladesh\India Bay of Bengal Award](#). Australia in turn appointed Dr. Rosalie Balkin (Australia), and Professor Donald McRae (Canada and New Zealand). Article 3(b) of Annex V expressly allows each party to appoint as one of its nominees its own national (Dr. Balkin). Professor McRae has extensive experience as an arbitrator in investment treaty arbitrations and as counsel in law of the sea matters and is coming to the end of a ten year term as a member of the International Law Commission. [Dr. Balkin](#) is the former Director of Legal Affairs and External Relations at the International Maritime Organization (IMO) and has also served as counsel within the office of Attorney General (Australia). The party-appointed conciliators appointed Ambassador Peter Taksøe-Jensen (at para. 33) to serve as chair, drawing his name from a shortlist of candidates acceptable to both Parties. [Ambassador Taksøe-Jensen](#) has held various positions within the Danish Ministry of Foreign Affairs and also served as Assistant Secretary-General for Legal Affairs at the United Nations between 2008-2010. It is interesting to observe that none of the party appointees, nor Ambassador Peter Taksøe-Jensen, were drawn from the [Article 2 list](#). Had the party-appointed conciliators been unable to reach agreement on the appointment of chair, the Secretary General of the United Nations would have been asked to make the appointment in which case the appointment has to be made from the Article 2 list (Annex V, Article 3(e)).

Annex V of LOSC, entitled “Conciliation”, is divided into two sections. Section 1 addresses conciliation pursuant to section 1 of Part XV, specifically Article 284. The characteristic of this form of conciliation is that it is conciliation by agreement of the parties. For that reason one would not expect there to be disputes as to the jurisdiction of competence of the conciliation commission. Section 2 deals with “compulsory submission to conciliation” pursuant to section 3 of Part XV and it is thus reasonable to consider that while Article 298(1) requires that a party “must accept” conciliation (or in the words of Article 11, “shall be obliged to submit to the proceedings”) that there might be, as in this present case, disputes as to the competence (jurisdiction) of the Commission. Article 13 admits of this possibility. Finally, while Annex V deals separately with conciliation by agreement and compulsory conciliation, section 2 on compulsory conciliation (Article 14) incorporates the procedural provisions of section 1, “subject to this section”.

Australia voiced six objections to the competence of the Commission: (1) Article 4 of the CMATS Treaty, the moratorium provision, precludes resort to compulsory conciliation under LOSC; (2) the CMATS Treaty including

the moratorium was incorporated into LOSC as a provisional measure and was not displaced by LOSC; (3) an exchange of letters between the parties (on its own or together with CMATS) was an agreement within the meaning of Article 281 of LOSC to pursue settlement of this dispute by negotiations; (4) the dispute between the parties arose in 2002 and not subsequent to the entry into force of LOSC; (5) the parties had not engaged in negotiations over delimitation and thus compulsory conciliation under Article 298 could not be triggered; and (6) the dispute is inadmissible because seizing the Commission with this dispute is in breach of Timor-Leste's obligations under CMATS.

The subsequent sections follow the Commission's treatment of these issues. It should be noted that the Commission in its reasons seems to have collapsed issues (1) and (2) together. It also added two issues: the scope of the conciliation and the running of time. The Commission's decision is unanimous.

(1) and (2): Did Article 4 of the CMATS Treaty preclude resort to compulsory conciliation under LOSC and was the CMATS Treaty moratorium incorporated into LOSC as a provisional measure that was not displaced by LOSC?

Article 4 of the CMATS treaty, entitled "moratorium", provides in part as follows:

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. 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.
3. 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.
4. 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.
5. The Parties shall not be under an obligation to negotiate permanent maritime boundaries for the period of this Treaty.

In light of this provision, Australia took the view that Timor-Leste was precluded by CMATS from commencing the conciliation proceedings. The Commission did not share this view on the basis that any analysis of competence must start with LOSC and not with CMATS. Furthermore, as LOSC is a later treaty as between the parties (at para. 45), CMATS could only be relevant to competence to the extent that LOSC permitted it to have that effect. The LOSC provisions most likely to have that effect were the provisions of section one of Part XV which apply equally to the binding procedures of section 2 and to the compulsory conciliation procedures referenced in section 3 of Part XV (at para. 46). This led the Commission to next examine Australia's objections to competence based on Article 281.

(3) Was the exchange of letters between the parties (either on its own or together with CMATS) an agreement within the meaning of Article 281 of LOSC to pursue settlement of the dispute over delimitation by negotiations?

Article 281 of LOSC provides that:

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.

Australia relied on two instruments which together constituted an agreement within the meaning of Article 281. The first was an exchange of letters between the parties and the second was CMATS.

The exchange of letters between the parties dealt with the question of when the parties might seek to commence negotiations on a delimitation agreement following the conclusion and implementation of the Timor Sea Treaty and the international unitization arrangement for the Greater Sunrise Oilfield. Australia suggested that the exchange, albeit not a binding agreement in international law, was an agreement within the meaning of Article 281 to resolve delimitation through negotiations. The Commission rejected that argument on the grounds that while Article 281 does not expressly require a legally binding agreement, this qualification must be incorporated into the Article. In addition to referring to the *South China Sea Award* (which also required that any agreement relied upon for Article 281 be a legally binding agreement), the Commission gave two reasons for its conclusion. The first (at para. 56) was that as matter of text (“context” might have been more apposite) Article 281 stands next to Article 282 which has a parallel structure and clearly contemplates formal binding agreements. The two provisions should be interpreted in parallel, or, as the Commission put it (at para. 256):

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.

Second, the Commission considered (at para. 57) that it would be inconsistent with the structure of Part XV to allow a non-binding agreement to permit parties to opt out of the provisions of a binding agreement.

But CMATS was clearly a binding agreement (at para. 62). The difficulty with CMATS is that CMATS, and in particular Article 4 quoted above, could not be read (at para. 62) as an agreement “to seek settlement of the dispute by a peaceful means of [the Parties’] own choice.” In point of fact (*id*), “CMATS is an agreement *not* to seek settlement of the Parties’ dispute over maritime boundaries for the duration of the moratorium.” The Commission went on to refer to Article 279 of LOSC before concluding (at para. 64) that “an agreement *not* to pursue any means of dispute settlement [cannot] reasonably be considered a dispute settlement means of the Parties’ own choice.”

(4) Did the dispute between the parties which arose in 2002 arise “subsequent to the entry into force” of LOSC?

Article 298 of LOSC provides that compulsory conciliation is only available with respect to disputes “subsequent to the entry into force of this Convention”. Australia contended that this should be read as when the Convention entered into force for the two parties *inter se* (2013) and that since the dispute as to delimitation arose in 2002 when Timor-Leste obtained independence, the Commission could have no competence (at para. 73). The Commission however agreed with Timor-Leste that in several places the Convention made a distinction between

the entry into force of the Convention generally (1984) and entry into force for the parties (at para. 74). In Article 298 the drafters used the more general reference to the entry into force of the Convention. Both the plain meaning of the Article (at para. 74) and the negotiating history of the Convention (at para. 75) favored Timor-Leste. The Commission does not seem to have relied on Timor-Leste's reference to the personal commentary of persons involved in the negotiations, and it certainly cannot have given much, if any, weight to Australia's reference to the principle\rule of non-retroactivity of treaties (at para. 76).

(5) Had negotiations failed to settle the dispute within a reasonable period of time?

The language of Article 298(1)(a)(i) suggests that there is an additional jurisdictional hurdle to triggering compulsory conciliation which is that a party may only seek conciliation "where no agreement within a reasonable period of time is reached in negotiations between the parties". The Commission however took a more limited view of the import of this provision noting that the text did not on its face require negotiations; it merely required that *if* such negotiations had occurred, there could be no reference to conciliation if those negotiations had resulted in an agreement. The Commission justified this strict textual interpretation on the basis that an interpretation that required negotiations would allow one party to thwart access to compulsory conciliation by the simple expedient of refusing to enter into negotiations. The Commission went on to observe that there had in fact been negotiations and that these negotiations had resulted in CMATS. However, CMATS was not (at para. 78) "an agreement resolving the 'dispute concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations'".

(6) Should the Commission treat Timor-Leste's application as inadmissible on the grounds that in bringing the application Timor-Leste was breaching its obligations under CMATS?

Australia sought two alternative forms of relief under this head: either dismissal of the application as being inadmissible, or a decision by the Commission to order a stay of proceedings pending resolution of the arbitration between Timor-Leste and Australia in which Timor-Leste is seeking a declaration as to the validity of CMATS. The Commission gave two reasons for rejecting this request. First, it took the view that there was no basis for the request since there was no possibility of inconsistent holdings as between the Commission and the arbitral panel. This was because in the conciliation proceedings Timor-Leste was not seeking to contest the validity of CMATS and neither was it seeking a ruling as to the compatibility of CMATS with LOSC. Secondly, even if CMATS were presumed to be valid that (at para. 89) "would not affect the Commission's competence or the 'admissibility' of the dispute." The mere allegation by Australia that Timor-Leste's application was in breach of CMATS when Timor-Leste was contesting the validity of CMATS in other proceedings could not be enough to cause the Commission to treat the application as inadmissible – the doctrine of clean hands (at para. 92) does not run this far.

(7) The Scope of the Conciliation

During the course of the hearing on competence it became clear that the parties had different views as to the scope of the conciliation. Timor-Leste described its vision of the scope of the proceedings as three-fold (at para. 93):

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.

Australia objected to this statement of scope on the grounds that it went beyond the statement of scope as submitted by Timor-Leste in its originating notice (and as quoted above). But the Commission pointed out (at para. 98) that Timor-Leste's statement was inclusive and furthermore that it was unlikely that any such statement could serve to define the scope of proceedings. Clearly the Commission considered that the language of the Convention (especially Articles 74 and 83) was much more significant. The Commission quoted the articles and then observed as follows (para. 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).

(8) The running of time

Article 7 of Annex V provides in mandatory terms that “[t]he commission shall report within 12 months of its constitution.” Article 7 is part of section 1 of Annex V, which, as noted above, applies to the voluntary conciliation procedures under LOSC. However, Article 14 also makes Articles 2 – 10 of section 1 applicable to compulsory conciliations but “subject to this section”. The question for present purposes was whether the 12 months should run from the time that the Commission was properly constituted (25 June 2016) or whether it should run from the date of this decision *i.e.*, the date upon which the Commission determined that it had the competence to proceed? The parties had different views. Timor-Leste preferred the foreshortened time frame, and Australia the longer. The Commission adopted Australia's approach. The Commission noted that the deadline was important and that the purpose of the deadline (at para. 107) is “to fix an end to the procedure and to ensure that a party is not compelled to continue endlessly a conciliation process that, in its view, has no hope of success.” However, it is also important to recognize that no party should be subjected to compulsory conciliation with a commission that lacks competence and it is for this reason that Article 13 provides an opportunity to give (at para. 109) “serious attention to any disagreements regarding competence.” The key to resolving these competing tensions is the “subject to” language of Article 14 (at para. 109):

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.

Comments

I have two concluding comments. The first acknowledges the importance of the decision in the context of the widespread availability of compulsory conciliation in a range of different instruments. The second makes the point (perhaps counter intuitive and surprising), that conciliation proceedings may be an important source of interpretive jurisprudence in relation to both the Convention and other instruments.

The availability of compulsory conciliation

This is the first conciliation to be launched under LOSC and the first decision on competence. The report on the merits will be eagerly awaited for its additional guidance. Additionally, both this preliminary decision and any subsequent report should attract a broad readership beyond the law of the sea community. This should be the case because of the widespread availability of compulsory conciliation in multilateral environmental agreements (MEAs) such as the [Convention on Biological Diversity](#) (Article 27(4) and Part 2 of Annex II), the [Rotterdam Convention](#) on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Article 20(6)), the [Stockholm Convention on Persistent Organic Pollutants](#) (Article 18(6) and Annex G, Part II), and the [Vienna Convention for the Protection of the Ozone Layer](#) (Article 11(4) & (5)). Compulsory conciliation also features in the [Vienna Convention on the Law of Treaties](#) (Part V, esp. Article 66, and the Annex to the Convention).

The “jurisprudence” of conciliation

While it is clear that a report of a Conciliation Commission (with reasons) on the merits is not binding on the parties, decisions of the Commission on matters of competence are binding on the parties in the sense that a state party is obliged (at para. 95) to participate in a properly constituted conciliation. Since a Conciliation Commission is properly vested with the authority to determine its own competence (Annex V, Article 13) the failure to participate once the Commission has ruled on competence will itself engage the responsibility of the non-participating state. It is notable that the Convention treats the failure of a party to participate in a competent conciliation in exactly the same way as non-appearance in Annex VII arbitral proceedings or proceedings before ITLOS, that is to say, it “shall not constitute a bar to the proceedings” (see Annex V, Article 12; Annex VII, Article 9; and Annex VI, Article 28).

Given this, there is good reason to think that a Decision on Competence of a Conciliation Commission should be accorded a normatively persuasive status similar to that of the decisions of Annex VII tribunals or of an international court. Thus, while such a decision is clearly not binding on a subsequent tribunal it is entitled to respectful consideration based on the quality of the supporting reasons.

As we have seen, this Commission has made a series of important rulings on the interpretation of Part XV, Annex V and other provisions of the Convention in the course of making its decision on competence. It reached these interpretations following argument from eminent counsel and it did so in light of the jurisprudence of the International Court of Justice (see *e.g.* reference in footnote 80), ITLOS (see references in footnote 56), and Annex VII tribunals (see references in footnotes 35 & 44). It is therefore appropriate to conclude this post by summarizing the various rulings of the Commission on points of law (the “rich pickings” of my title).

1. The starting point for any analysis of the competence of the Commission must be the Convention itself and not any other agreement between the parties. See para. 44.

2. Timor-Leste acceded to LOSC with effect from 7 February 2013; CMATS was concluded between Australia and Timor-Leste on 12 January 2006. LOSC is therefore the later (most recent) treaty between the Parties. See paras 1, 10, 45 & 84.
3. Section 1 of Part XV serves a jurisdictional function for the entirety of Part XV and applies equally to compulsory conciliation under section 3 as it does to compulsory and binding dispute resolution under section 2. See paras 46 & 50.
4. Article 281 is only triggered where there is a legally binding agreement between the States Parties to the dispute. See paras 55 – 57 and following the *South China Sea Award*.
5. An agreement *not* to pursue any means of dispute settlement is not an agreement to seek settlement of a dispute settlement by a means of the Parties' own choice within the meaning of Article 281. See paras 62 – 64.
6. A logical corollary of opting out of compulsory and binding dispute resolution in relation to Articles 15, 74 and 83 and in relation to disputes involving historic bays or titles is the acceptance in advance of compulsory conciliation. See at para. 68 (reciting Australia's acceptance of this proposition), and at para. 95.
7. The reference in Article 298 to a dispute that has arisen after the entry into force of the Convention is a reference to the entry into force of the Convention as a whole (1994) and not to the entry into force of the Convention as between the parties to the particular dispute. See paras 73 – 76.
8. An objection based on the date upon which a dispute arises under Article 298(1)(a)(i) must invoke a dispute which concerns the interpretation or application of the Convention as distinct from a dispute which invokes pre-existing rights and obligations from other sources. See para. 70.
9. Article 298(1)(a)(i) does not expressly require that prior negotiations between the parties to the dispute actually take place since such a requirement would effectively grant a party the right to veto any recourse to compulsory conciliation by refusing to negotiate. The provision merely requires that no agreement be reached within a reasonable period of time in any such negotiations (should there be any negotiations). See para. 78.
10. As a later treaty which does not derogate from LOSC (and for which no notification had been given under Article 311(4)) the relationship between CMATS and LOSC is governed by Article 281 and 282 (at least for the purposes of dispute resolution) and CMATS did not meet the requirements of these articles. See para. 85.
11. The clean hands 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. See para. 92.
12. The scope of the conciliation is to be determined not only in light of the originating notification but also by Article 298 and by the scope of the declaration made by the State excluding the procedures under section 2. See paras 68, 95, 97, 98 and proposition #6 above.
13. In the case of a compulsory conciliation under Annex V, Section 2, the 12-month reporting rule of Article 7(1) of Annex V, Section 1, runs from the date of the Commission's decision on its competence in a case where one of the parties contests the Commission's competence under Article 13 of Annex V.

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