



PRESS RELEASE

Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia

THE HAGUE, 26 September 2016

Conciliation Commission Publishes Decision on Competence

On 19 September 2016, the Conciliation Commission issued its Decision on Competence in the compulsory conciliation initiated between the Democratic Republic of Timor-Leste (“**Timor-Leste**”) and the Commonwealth of Australia (“**Australia**”) under [Annex V](#) of the United Nations Convention on the Law of the Sea (the “**Convention**”). In its Decision, the Commission held that it was competent to continue with the conciliation process.

These compulsory conciliation proceedings concern the maritime boundary between Timor-Leste and Australia and were initiated by Timor-Leste by way of a Notice addressed to Australia pursuant to Article 298 and Annex V of the Convention. The conciliation is being conducted under the auspices of the Permanent Court of Arbitration (the “**PCA**”).

Australia’s Objections to Competence and Timor-Leste’s Response

Pursuant to the Convention, a compulsory conciliation may be initiated where a party has exercised its right to exclude disputes relating to sea boundary delimitation from compulsory arbitration and judicial settlement. Australia exercised this right by way of a declaration made on 22 March 2002. When a dispute falling within such a declaration arises, a compulsory conciliation may be initiated at the request of one of the parties to the dispute. The conclusions and recommendations of the Conciliation Commission, however, are not binding on the parties.

From the outset of these proceedings, Australia had indicated its intention to contest the competence of the Commission and did so on 27 June 2016, immediately following the constitution of the Commission. 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.” From 29 to 31 August 2016, the Commission convened a Hearing on Competence at the Peace Palace, the headquarters of the PCA in The Hague, the Netherlands. In its Decision of 19 September 2016, the Commission considered and decided on the objections raised by Australia.

In its objections, Australia argued that compulsory conciliation was precluded by the Treaty on Certain Maritime Arrangements in the Timor Sea (“**CMATS**”), which includes an article providing for a “moratorium” on dispute settlement procedures. Australia also argued that Timor-Leste had not met the preconditions in the Convention to submit a dispute to compulsory conciliation. In response, Timor-Leste argued that the Commission should consider its competence by reference to the Convention and should only consider other treaties to the extent provided for in the Convention. Timor-Leste considered that CMATS was not an agreement that would preclude compulsory conciliation under the Convention and, in any event, that CMATS is null and void. Timor-Leste also argued that it had met the preconditions to submit a dispute to compulsory conciliation.

Summary of the Commission's Decision on Competence

In its Decision, the Commission held that it must approach the question of its competence from the perspective of the Convention. Other 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. The Commission considered that two provisions of the Convention bear on its competence.

First, Article 281 of the Convention provides that a dispute may not be submitted to compulsory settlement where the parties have agreed on another means of settlement and that agreement excludes further procedures. Australia contended that the Parties had agreed, through an exchange of letters in 2003 to resolve their dispute over maritime boundaries through negotiation. According to Australia, CMATS then supplemented the exchange of letters with an agreement to exclude further procedures.

In its Decision, the Commission held that the exchange of letters did not constitute an agreement for the purposes of Article 281 because the exchange was not a legally binding agreement. Although Article 281 does not expressly refer to legally binding agreements, the Commission held that this was a necessary implication of the terms used in the Convention and that any other interpretation would be unreasonable in that it would permit a nonbinding agreement to displace the provisions of a legally binding treaty. The Commission also held that, although CMATS is a legally binding treaty, it is not an agreement for the purposes of Article 281 because CMATS does not provide any alternative means of resolving disputes over maritime boundaries; rather, CMATS is an agreement not to resolve such disputes.

Second, Article 298 of the Convention includes two preconditions to compulsory conciliation. A dispute must arise "subsequent to the entry into force of this Convention" and no agreement must have been reached in negotiations between the parties "within a reasonable period of time." The Commission reviewed the negotiating history of the Convention and concluded that the relevant date was the entry into force of the Convention generally on 16 November 1994 (rather than the date in 2013 on which the Convention entered into force as between Timor-Leste and Australia). The "entry into force of the Convention" was thus prior to the independence of Timor-Leste in 2002, and the Commission concluded that the Parties' dispute therefore arose after the relevant date. The Commission also noted that there had been negotiations between the Parties in 2003 to 2006 and that negotiations regarding CMATS appear to have taken place in 2014 to 2015, without an agreement on boundaries having been reached, and that Timor-Leste had sought further negotiations. Accordingly, the Commission found the requirements of Article 298 to have been met.

Next, the Commission also considered Australia's objection to the "admissibility" of the proceedings on the grounds that Timor-Leste had violated the moratorium in CMATS by initiating these proceedings. The Commission held that the possible breach of CMATS was not a matter the Commission could decide and was something for the Parties to address in another forum. The Commission therefore held that there was no issue of admissibility that would prevent it from proceeding with the conciliation.

Finally, the Commission interpreted Annex V to the Convention and concluded that the one-year time frame for the conciliation process should run from the date of the Decision on Competence.

Next Steps

The Commission will proceed to hold consultations with the Parties on the future conduct of the conciliation and intends to convene a series of meetings with the Parties over the course of the next year. The Commission anticipates that future meetings will be conducted largely in a confidential setting in order to provide an environment conducive to facilitating the eventual success of the conciliation.

Background on the Conciliation Process

The Commission was constituted on 25 June 2016 pursuant to the procedure set out in Annex V of the Convention. The five-member Commission is chaired by H.E. Ambassador Peter Taksøe-Jensen (Denmark). The other members of the Commission are Dr. Rosalie Balkin (Australia), Judge Abdul G. Koroma (Sierra Leone), Professor Donald McRae (Canada and New Zealand), and Judge Rüdiger Wolfrum (Germany). With the agreement of the Parties, the Permanent Court of Arbitration acts as Registry in the proceedings.

These conciliation proceedings were 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.

On 2 May 2016, Australia submitted “Australia’s Response to the Notice of Conciliation”.

On 28 July 2016, the Conciliation Commission held a procedural meeting with the Parties at the Peace Palace in The Hague, the Netherlands.

On 12 and 25 August 2016, the Parties provided the Commission with written submissions on the question of the Commission’s competence.

On 29, 30, and 31 August, the Commission convened the Opening Session of the Conciliation and a Hearing on Competence at the Peace Palace in The Hague, the Netherlands.

On 31 August 2016 and on 9 and 13 September 2016, the Parties provided the Commission with supplemental written answers to questions posed by the Commission during the hearing.

Further information about the case may be found at www.pcacases.com/web/view/132, including the full text of the Commission’s Decision on Competence, earlier Press Releases, a video recording and transcript of the Opening Session, and the presentations of the Parties.

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Background on the Permanent Court of Arbitration

The Permanent Court of Arbitration is an intergovernmental organization established by the 1899 Hague Convention on the Pacific Settlement of International Disputes. The PCA has 121 Member States. Headquartered at the Peace Palace in The Hague, the Netherlands, the PCA facilitates arbitration, conciliation, fact-finding, and other dispute resolution proceedings among various combinations of States, State entities, intergovernmental organizations, and private parties. The PCA’s International Bureau is currently administering 8 interstate disputes, 75 investor-State arbitrations, and 34 cases arising under contracts involving a State or other public entity. More information about the PCA can be found at www.pca-cpa.org.

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