

PCA Case N° 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

RULES OF PROCEDURE

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

22 August 2016

WHEREAS the Democratic Republic of Timor-Leste and the Commonwealth of Australia are parties to the United Nations Convention on the Law of the Sea (the “**Convention**”).

WHEREAS Article 298(1) of the Convention provides that “[w]hen 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 . . . disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, . . .”;

WHEREAS Article 298(1) further provides 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”;

WHEREAS Article 11(1) of Annex V to the Convention provides that “[a]ny party to a dispute which, in accordance with Part XV, section 3, may be submitted to conciliation under this section, may institute the proceedings by written notification addressed to the other party or parties to the dispute”;

WHEREAS on 22 March 2002, Australia issued a declaration stating, inter alia, “that it does not accept any of the procedures provided for in section 2 of Part XV . . . 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”;

WHEREAS Timor-Leste has invoked Article 298 and Annex V to the Convention with respect to 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,” as set out in Timor-Leste’s Notification Instituting Conciliation under Section 2 of Annex V of UNCLOS dated 11 April 2016;

WHEREAS in accordance with Article 3 of Annex V to the Convention, on 25 June 2016, the Conciliation Commission composed of H.E. Mr. Peter Taksøe-Jensen (Chairman), Dr Rosalie Balkin, Judge Abdul G. Koroma, Professor Donald McRae, and Judge Rüdiger Wolfrum was constituted (the “**Commission**”);

WHEREAS Article 4 of Annex V to the Convention provides that “[t]he conciliation commission shall, unless the parties otherwise agree, determine its own procedure”;

WHEREAS the Commission met with the Parties regarding the organization of these proceedings at the headquarters of the Permanent Court of Arbitration at the Peace Palace in The Hague, the Netherlands on 28 July 2016;

THE CONCILIATION COMMISSION, after having sought the views of the Parties, adopts the following Rules of Procedure. These Rules of Procedure supplement those contained in Annex V to the Convention.

SECTION I. INTRODUCTION

Scope of Application

Article 1

1. The Commission shall function in accordance with these Rules, subject to Annex V to the Convention and other relevant provisions of the Convention. The Commission shall have the power to interpret the provisions of Annex V to the Convention and other relevant provisions of the Convention insofar as necessary.
2. In accordance with Articles 4 and 10 of Annex V to the Convention, the Parties may agree to exclude or vary any of these Rules, or to modify any provision of Annex V, at any time. These Rules are also subject to such modifications or additions as the Commission may find appropriate after seeking the views of the Parties.
3. To the extent that any issue arising is not expressly governed by these Rules or by Annex V or other relevant provisions of the Convention, and the Parties have not otherwise agreed, the issue shall be determined by the Commission, in consultation with the Parties.

Notice, Calculation of Periods of Time

Article 2

1. A notice, including a notification, communication, or proposal, may be transmitted by any means of communication that provides or allows for a record of its transmission.
2. If an address has been designated by a Party specifically for this purpose, any notice shall be delivered to that Party at that address, and if so delivered shall be deemed to have been received. Delivery by electronic means such as facsimile or e-mail may only be made to an address so designated.
3. A notice shall be deemed to have been received on the day it is delivered in accordance with paragraph 2. A notice transmitted by electronic means is deemed to have been received on the day it is sent.
4. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is received. If the last day of such period is an official holiday or a non-business day in the State of the Party concerned, the period is extended until the first business day that follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.
5. Unless otherwise provided, all time limits expire at midnight in The Hague on the relevant date.

Representation and Assistance

Article 3

1. Each Party shall appoint an agent and, if it so decides, one or more deputy agents or co-agents. Each Party may also be assisted by persons of their choice.
2. The names and addresses of agents, Party representatives, and other persons assisting the Parties, as well as any change by a Party of its agents or other representatives or of the contact details of any of its agents or other representatives, shall be communicated promptly to all Parties, to the

Commission, and to the International Bureau of the Permanent Court of Arbitration. Such communication shall specify whether the appointment is being made for purposes of representation or assistance.

Administration

Article 4

The International Bureau of the Permanent Court of Arbitration at The Hague shall serve as the Registry for the proceedings (the “**Registry**”). In order to facilitate the conduct of the conciliation proceedings, the Registry will provide administrative assistance and registry services as directed by the Commission.

SECTION II. COMPOSITION OF THE CONCILIATION COMMISSION

Number and Appointment of Conciliators

Article 5

The Commission consists of five Conciliators appointed in accordance with Article 3 of Annex V to the Convention.

Challenge of a Conciliator

Article 6

A Conciliator, once appointed or chosen, shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence unless the Parties have previously been informed by him or her of these circumstances.

Article 7

1. Any Conciliator may be challenged if circumstances exist that give rise to justifiable doubts as to the Conciliator’s impartiality or independence.
2. A Party may challenge the Conciliator appointed by it only for reasons of which it becomes aware after the appointment has been made.
3. In the event that a Conciliator fails to act or in the event of the *de jure* or *de facto* impossibility of his or her performing his or her functions, the procedure in respect of the challenge of a Conciliator as provided in Article 8 shall apply.

Article 8

1. A Party that intends to challenge a Conciliator shall send notice of its challenge within 30 days after the appointment of the challenged Conciliator has been notified to the challenging party or within 30 days after the circumstances mentioned in Articles 6 and 7 became known to that Party.
2. The notice of challenge shall be communicated to the other Party, to the Conciliator who is challenged, to the other Conciliators, and to the Registry. The notice of challenge shall be in writing and shall state the reasons for the challenge.

3. When a Conciliator has been challenged by a Party, the other Party may agree to the challenge. The Conciliator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.
4. In the event that the Party making the challenge elects to pursue it, the Commission may order that the proceedings be suspended during the pendency of the challenge.
5. If, within 15 days from the date of the notice of challenge, the Parties do not agree to the challenge or the challenged arbitrator does not withdraw, the decision on the challenge will be made by the Secretary-General of the Permanent Court of Arbitration.

Replacement of a Conciliator

Article 9

1. If a challenge to the appointment of a Conciliator is sustained, or in any other event where a Conciliator has to be replaced during the course of the proceedings, a substitute Conciliator shall be appointed in the manner prescribed for the initial appointment. In all cases, the procedure provided in Article 3 of Annex V to the Convention shall be used in full for the appointment of the substitute Conciliator even if during the process of appointing the Conciliator to be replaced a Party had failed to exercise his or her right to appoint or to participate in the appointment.
2. In such an event, the Commission shall decide, after consulting with the Parties, whether to revisit any aspect of the conciliation proceedings conducted previously.

SECTION III. THE PROCEEDINGS

General Provisions

Article 10

1. Subject to these Rules, Annex V or other relevant provisions of the Convention, and any agreement between the Parties, the Commission may conduct the conciliation in such manner as it considers appropriate, taking into account the circumstances of the case and the wishes the Parties may express.
2. The Parties will in good faith co-operate with the Commission and, in particular, will endeavour to comply with requests by the Commission to submit written materials, provide evidence or documents, and attend meetings.
3. The Parties shall refrain during the conciliation proceedings from any measure which might aggravate or widen the dispute. They shall, in particular, refrain from any measures which might have an adverse effect on proposals which are or may reasonably be made by the Commission, so long as those proposals have not been explicitly rejected by either of the Parties.

Decisions

Article 11

Decisions of the Commission regarding procedural matters (including competence), the report and recommendations shall be made by a majority vote of its members, except that questions of administration or routine procedure may be decided by the Chairman alone, subject to revision, if any, by the full Commission.

Communications

Article 12

1. Written communication between the Parties and the Commission shall take place in accordance with paragraph 6 of the Commission's Terms of Appointment as supplemented by these Rules.
2. The Commission may invite the Parties to meet with it or may communicate with them orally or in writing. The Commission or any of its members may meet or communicate with the Parties together, or with each of them separately in accordance with Article 18.

Written Submissions

Article 13

1. The Commission may invite the Parties to make written submissions setting out their position with respect to one or more aspects of the Parties' dispute.
2. The Commission will determine the scope and timing of any written submissions in consultation with the Parties. At the request of either Party, and after having sought the views of the other Party, the Commission may extend the time for such written submissions.
3. Where the Parties are called upon to make written submissions, such submissions shall be accompanied by copies of any documentary or other evidence or legal authorities cited in their submissions. Submissions shall be transmitted in the following manner:
 - (a) The submitting Party shall transmit an electronic copy of its submission by e-mail, with accompanying documentary evidence and legal authorities to the other Party and the Registry, for onward transmission to the Commission.
 - (b) On the same day, the submitting party shall dispatch by courier to the opposing Party and the Registry, for onward transmission to the Commission, hard copies of the same materials sent electronically, together with hard copies of any accompanying documentary exhibits. Legal authorities shall not ordinarily be provided in hard copy unless specifically requested by the Commission.
 - (c) The submitting party shall dispatch two copies of its submission to the opposing Party and seven copies to the Registry.
 - (d) Along with every hard-copy submission, the submitting party shall dispatch a complete electronic copy (including accompanying documents and legal authorities) on USB flash drive or other electronic device, if possible in searchable Adobe PDF.
4. Documents and legal authorities appended to any written submissions shall be organised as follows:
 - (a) Documents submitted to the Commission shall be numbered consecutively throughout the conciliation and shall clearly distinguish between different types of documents (e.g., exhibits, witness statements, expert reports, legal authorities). The parties shall agree on a method of numbering and labelling of documents that is consistent between them.
 - (b) Hard copies of documents shall be submitted in an appropriate order in files or volumes.

- (c) Written submissions shall be accompanied by a detailed table of contents describing all documents appended to them by exhibit number, date, type of document, and author or recipient, if and as applicable.

Location of Meetings

Article 14

1. The Commission shall determine the location of any hearings or meetings between the Commission and the Parties on a case-by-case basis, in consultation with the Parties.
2. The Commission shall determine the location of any meetings between the Commission and any Party separately on a case-by-case basis, in consultation with one or both Parties as appropriate.
3. The Commission may meet at any location it considers appropriate for deliberations or any other purpose.

Language of the Proceedings

Article 15

1. The language of the conciliation shall be English.
2. Any document submitted to the Commission that is written in a language other than English shall be accompanied by a translation into English. Informal translations will be acceptable unless either the Commission or the other Party request a certified translation.

Transparency and Confidentiality

Article 16

1. The existence of this conciliation shall be public. The Registry shall identify on its website the names of the Parties, the Commission, and the agents and counsel for the Parties, and will publish such further information and documents as provided in these Rules or as may be directed by the Commission.
2. The Commission may, in consultation with the Parties, designate any hearing, or any portion thereof, as a public hearing or meeting. The Registry shall make appropriate arrangements for any public hearing or meeting as directed by the Commission.
3. The Commission may, from time to time, at its own initiative or upon request of a Party, direct the Registry to issue press releases concerning the status of the proceedings. The Commission may, in its discretion and in consultation with the Parties, attach summaries or statements made by the Parties, transcripts of proceedings, and other documents forming part of the record of the proceedings to press releases issued by the Registry. In deciding when and whether to make public information or documents concerning the proceedings, the Commission shall bear in mind the purpose of the proceedings to assist the Parties in reaching an amicable settlement.
4. Any decision of the Commission on whether it has competence shall be made public.
5. The Commission shall decide, in consultation with the Parties, whether to make the Commission's Report or any portion thereof public.

6. Either Party may designate certain information or materials it submits to the Commission as confidential. Information or materials so designated shall not be made public or referred to in press releases issued by the Registry or in any other documents made public by the Commission except with the agreement of the Parties. Insofar as necessary, the Commission shall make appropriate arrangements in consultation with the Parties for the redaction of confidential information from any document made public.
7. Except as otherwise provided in this Article or agreed by the Parties, or except to the extent that the disclosure is required in connection with arbitral or judicial proceedings pursuant to Article 23 hereof, the Commission, the Registry, and the Parties shall keep confidential all matters relating to the conciliation proceedings.

Objections to Competence

Article 17

1. The Commission shall have the power to rule on any disagreement as to whether the Commission has competence under Section 2 of Annex V to the Convention.
2. Any objection that the Commission lacks competence shall be raised no later than in the Parties' first written submission to the Commission. A Party is not precluded from raising such an objection by the fact that it has appointed, or participated in the constitution of the Commission. Any objection that the Commission is exceeding the scope of its competence shall be raised as soon as the matter alleged to be beyond the scope of its competence is raised during the conciliation proceedings. The Commission may, in either case, admit a later plea if it considers the delay justified.
3. Where an objection to the competence of the Commission is raised, the Commission shall decide whether or not to rule on its competence as a preliminary question or in conjunction with the proceedings on the substance of the Parties' dispute. The decision whether or not to rule on its competence as a preliminary question need not contain reasons.
4. If at an appropriate stage of the proceedings any Party so requests, the Commission shall hold hearings on the question of its competence. In the absence of such a request, the Commission shall decide whether to hold such hearings or whether its decision on competence will be made on the basis of documents and other materials.
5. Any ruling by the Commission on its competence shall be accompanied by reasons.

Conciliation Proceedings on the Substance of the Dispute

Article 18

1. The procedure set out in this Article shall apply to all matters relevant to the conciliation, with the exception of disagreements as to whether a Commission has competence under Section 2 of Annex V to the Convention which shall be addressed in accordance with the other provisions of these Rules.
2. The Commission shall hear the parties, examine their claims and objections, make proposals to the Parties, and otherwise assist the Parties in an independent and impartial manner with a view to reaching an amicable settlement. The Commission will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the Parties and the circumstances surrounding the dispute, including any previous practices between the Parties.

3. The Commission may, at any stage of the proceedings, draw to the attention of the Parties any measure which the Commission considers might facilitate an amicable settlement of the dispute. In particular, when it appears to the Commission that there exist elements of a settlement which would be acceptable to the Parties, the Commission may formulate the terms of a possible settlement and submit them to the Parties for their observations. Each Party may also, on its own initiative or at the invitation of the Commission, submit to the Commission suggestions for the settlement of the dispute.
4. The Commission may meet or communicate with the Parties together or with each of them separately, whether orally or in writing. The Commission may request each Party to make such written submissions as it deems appropriate in accordance with Article 13.
5. Separate meetings with either Party may be conducted in conjunction with a joint meeting between the Commission and the Parties or as a distinct phase of the proceedings. The Commission may also, for reasons of efficiency, authorize the Chairman with or without any of the other members of the Commission to meet separately with either Party at any appropriate point in the conciliation process. In such event, the Chairman shall keep the Commission regularly informed with respect to the content and prospects of any separate meetings with either Party.
6. When a Party gives any information or documents to the Commission subject to a specific condition that it not be disclosed to the other Party, the Commission shall not disclose such information or documents to the other Party.

Termination of Conciliation Proceedings

Article 19

The conciliation proceedings are terminated:

- (a) when a settlement has been reached;
- (b) when the parties have accepted or one party has rejected the recommendations of the report by written notification addressed to the Secretary-General of the United Nations;
- (c) when a period of three months has expired from the date of transmission of the report to the Parties; or
- (d) by a written declaration signed by both Parties addressed to the Commission to the effect that the conciliation proceedings are terminated as of the date of the declaration or any other date specified in the declaration.

SECTION IV. THE REPORT

Form and Effect of the Report

Article 20

1. The Commission shall, during the course of the conciliation phase, at its discretion, discuss with each Party and with the Parties jointly the appropriate scope and form of the Report.
2. The Commission, at its discretion, may supplement its Report to the Parties with confidential reports to each Party separately recommending to each Party steps that the Commission recommends might usefully be taken by the Party in question.

3. The Commission, at its discretion, may issue a confidential draft Report to the Parties prior to finalising its Report for the purposes of discussions with the Parties or information.
4. The Commission may, with the agreement of both Parties, extend the timeframe for completion of the report as set out in Article 7 of Annex V to the Convention.
5. The Commission may undertake a limited post-Report consultation with the Parties during the period prior to the termination of the proceedings.

SECTION V. COSTS

Costs

Article 21

1. Upon termination of the conciliation proceedings, the Commission shall fix the costs of the conciliation and give written notice thereof to the Parties. The term 'costs' includes only:
 - (a) The fees of the Commission in accordance with the Commission's Terms of Appointment;
 - (b) The travel and other expenses of the Commission in accordance with the Commission's Terms of Appointment;
 - (c) The costs of any expert advice requested by the Commission with the consent of the Parties;
 - (d) The fees and expenses of the Registry appointed pursuant to Article 4 of these Rules.
 - (e) The costs of any services of the PCA Secretary-General and the Bureau.
2. The fees and expenses of the Commission shall be reasonable in amount, taking into account the complexity of the subject-matter, the time spent by the Conciliators, and any other relevant circumstances of the case.
3. Unless the Parties otherwise agree, the costs of the proceedings, including the fees and expenses of the Commission, shall be borne by the Parties in equal shares.

Deposit for Costs

Article 22

1. The Registry may request each Party to deposit an equal amount as an advance for the costs referred to in Article 21.
2. During the course of the proceedings, the Registry may request supplementary deposits from the Parties.
3. If the requested deposits are not paid in full within 30 days after the receipt of the request, the Commission shall so inform the Parties in order that one of them may make the required payment. If such payment is not made, the Commission may order the suspension or termination of the proceedings.
4. Upon termination of the conciliation proceedings, the Registry shall render an accounting to the Parties of the deposits received and return any unexpended balance to the Parties in proportion to the amounts received from each Party.

SECTION VI. MISCELLANEOUS PROVISIONS

Resort to Arbitral or Judicial Proceedings

Article 23

The Parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a Party may initiate arbitral or judicial proceedings where, in its opinion, such proceedings are necessary for preserving its rights.

Other Relevant Proceedings

Article 24

The Parties shall keep the Commission informed of the status and developments in any other proceedings involving the Parties which may be relevant to the dispute that is the subject of the conciliation proceedings.

Role of Commission in Other Proceedings

Article 25

The Parties and the Commission undertake that, unless the Parties agree otherwise, none of the members of the Commission shall act as an arbitrator or as a representative or counsel of a Party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The Parties also undertake that they will not present any Conciliator as a witness in any such proceedings.

Preservation of the Legal Position of the Parties

Article 26

1. The Parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings:
 - (a) Views expressed or suggestions made by the other Party in respect of a possible settlement of the dispute;
 - (b) Admissions made by the other Party in the course of the conciliation proceedings;
 - (c) Proposals made by the Commission or individual Conciliators;
 - (d) The fact that the other Party had indicated its willingness to accept a proposal for settlement made by the Conciliators;
 - (e) Any information or materials designated as confidential by either Party in accordance with Article 16; or
 - (f) Any information or materials relating to the conciliation proceedings which have not been made public by the Commission in accordance with Article 16.

2. Acceptance by a party of recommendations submitted by the commission in no way implies any admission by it of the considerations of law or of fact which may have inspired the recommendations.