



Maritime Dispute Resolution and the Future of the Asian Order



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Mandatory Counseling: Why the *Timor-Leste v. Australia* Conciliation Court Case Matters for Maritime Dispute Resolution

Lyle J. Morris

What if instead of issuing binding judgements, compulsory mechanisms of international law could compel two parties of a maritime dispute to sit down at the negotiating table to work through their differences? And suppose instead of issuing awards with outcomes favorable to one party over another, a committee of judges could mediate and attempt to find common ground between two parties of a dispute? Such is the result of a landmark agreement between Timor-Leste and Australia, [announced earlier this month](#), which saw the two countries reach consensus on the central elements of a maritime boundary delimitation in the Timor Sea. What made the agreement so notable

was that Australia was, in essence, forced to negotiate with Timor-Leste under unilateral proceedings it brought before Australia under a little-known clause within Annex V of the United Nations Convention Law of the Sea (UNCLOS) under the auspices of the Permanent Court of Arbitration (PCA).

Had the two countries not reached an agreement on delimitation, they would have been obliged to negotiate an agreement on the basis of the commission's report on how Timor-Leste and Australia may have amicably resolved their maritime boundary dispute. However, the report would have been non-binding in nature and simply a road-map for

Lyle J. Morris is a senior policy analyst at the RAND Corporation, where he focuses on security developments in East and Southeast Asia. He has over ten years of experience researching and leading projects on Asia-Pacific security issues and has published recently on the rise of coast guards in East and Southeast Asia, maritime security in the Asia-Pacific, Chinese military modernization, and Chinese engagement in Africa.

equitable resolution. In this case, however, the two parties reached agreement on maritime delimitation before the report was published, which is due out later this year.

These conciliation proceedings were initiated by Timor-Leste on 11 April 2016 with their [“Notification Instituting Conciliation under Section 2 of Annex V of UNCLOS”](#) to Australia. A commission of five judges was then constituted on 25 June 2016 with the PCA acting as registry of the proceedings. Australia responded by challenging the competence of the Conciliation Commission, claiming compulsory conciliation under the Convention was “precluded by other treaties entered into between the Parties.” Yet the commission [ruled against Australia’s claims](#) and in favor of Timor-Leste in September 2016. Thus, the case proceeded to the negotiation phase over a 12-month period starting in September 2016.

The case is remarkable because it represents the first time that a member of UNCLOS invoked compulsory conciliation, not arbitration, under the Convention’s dispute resolution mechanisms. Compulsory conciliation is legalese for a process in which a panel of judges initiates a series of closed-door meditations with two parties to a dispute in an effort to resolve differences and forge consensus in a manner equitable to both countries. Delegations from both countries met three times between 2016 and 2017—in Singapore, Washington, D.C. and Copenhagen—before agreeing to terms of a settlement.

The conciliation proceedings are distinct from other arbitration proceedings under UNCLOS, such as the Bay of Bengal judgement between Bangladesh and Myanmar of 2012 and the award in the South China Sea case between the Philippines and China in 2016. Those two cases were decided by a commission of judges on the merits of the arguments and were final and binding upon all parties. This proceeding, on the other hand, simply offered structured mediation for maritime delimitation based on the principles of UNCLOS, taking into account the interests and positions of both sides derived while overseeing negotiations. Think of it as

counseling for claimants to maritime disputes under jurisprudential guidance, with the onus of ultimate settlement of the dispute on the parties themselves, not a panel of judges appointed by the PCA.

The technical explanation of the proceeding is that Timor-Leste sought conciliation concerning a dispute over “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.” Under Article 298 of UNCLOS, members may make a formal declaration of exclusion from the compulsory and binding arbitration or adjudication procedures under UNCLOS any disputes concerning the interpretation or application of Articles 15, 74, or 83 relating to maritime boundary delimitation, among other issues. Australia and China, for example, are two states who signed the Article 298 exception from compulsory dispute resolutions. However, a little known “exemption within an exemption” exists under Annex V, Section 2 of the Convention that allows certain disputes treatment to compulsory non-binding conciliation procedures, on the two conditions that the disputes in question arose “subsequent to the entry into force of this Convention” and the parties could not negotiate an agreement “within a reasonable period of time.” The commission judged in its September 2016 decision that there were no issues of admissibility, as Australia had argued, that precluded the commission from continuing the proceedings.

The dispute is as much about oil rights—specifically over rights to the Greater Sunrise Field (GSF), worth an estimated \$40 billion in oil and natural gas deposits—as it is about maritime boundary delimitations. The two countries agreed to a Joint Petroleum Development Area (JPDA) the day Timor-Leste achieved independence, on 20 May 2002, the terms of which stipulated Timor-Leste to receive 90 percent of revenues and Australia 10 percent. However, only approximately 20 percent of the GSF lies

within the JPDA. A separate agreement, in 2006, called the Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS), was later signed to evenly divide revenues from GSF. CMATS also stipulated a 50-year freeze on both countries from negotiating a permanent maritime boundary and instead focus on joint development. However, in 2013, the government in Dili accused Canberra of espionage during CMATS negotiations, which Timor-Leste authorities believed invalidated the spirit of the CMAT arrangement and prompted the Timorese government to pursue compulsory conciliation with Australia. It was widely believed that the ultimate goal of Timor-Leste in bringing forth the proceedings was to negotiate a permanent maritime boundary based on an equidistance line with Australia, thereby giving Timor-Lest exclusive rights to GSF. While the details of the two countries' landmark agreement remain confidential, Timor-Leste almost certainly received an equitable share to the GSF.

The case has several important implications for other states currently confronting maritime disputes in Asia and elsewhere. First, the positive result may open the door to compulsory conciliation between other claimants to maritime disputes, even if the state in question has made an Article 298 declaration and concluded a treaty foreclosing avenues to resolve the disputes, as was explicitly stated in CMATS. Of course, political will also provided the key ingredient leading to an amicable agreement in the case of Australia and Timor-Leste. After all, failure to reach consensus might have reinforced suspicions among some countries that a larger, more powerful country like Australia was more interested in oil profits than in working with its smaller neighbors like Timor-Leste. Second, compulsory conciliation offers smaller states a less contentious and non-binding mechanism to compel larger states to sit down at the negotiating table and seek equitable solutions to maritime disputes. If a resolution is not achieved within the 12-month time frame of negotiation, the Conciliation Commission report still provides a roadmap for delimitation under international law that both parties can pursue if desired.



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