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In Search of Permanent Maritime Boundaries: Timor-Leste Commences First Ever Compulsory Conciliation under UNCLOS

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On 11 April 2016, the Democratic Republic of Timor-Leste ("Timor-Leste") commenced the first ever compulsory conciliation proceedings under Annex V, section 2 of the United Nations Convention on the Law of the Sea ("UNCLOS"). The proceedings concern the disputed maritime boundary between Timor-Leste and Australia in the Timor Sea. Australia objected to the conciliation on the grounds that it contravenes existing agreements between the two States not to pursue the delimitation of a permanent maritime boundary until 2057. On 19 September 2016, the conciliation commission unanimously held it is competent to hear the dispute, publishing its decision on 26 September 2016.

These proceedings are significant not only in that they mark the first time this particular non-binding State-State dispute resolution mechanism has been initiated but also because they, in the wake of the South China Sea arbitration, further demonstrate that States are becoming increasingly creative in seeking to have even the most intractable maritime boundary disputes resolved under the principles of international law and through third party means.

Annex V of UNCLOS provides little detail concerning the process to be followed in compulsory conciliation proceedings and, in particular, whether the commission's findings and report will be public. What is certain, however, is that if the parties cannot reach agreement during the conciliation, the commission's report will be non-binding but will form the basis upon which the parties will attempt to negotiate an amicable settlement. Ultimately, the process may have more use as part of Timor-Leste's ongoing efforts to maintain political pressure on Australia than as an effective method of dispute resolution.

The significance of these proceedings will not have been missed by resource companies, particularly those considering or already operating in production sharing areas or along disputed maritime boundaries, as they represent an attempt to set aside existing revenue sharing arrangements, the termination of which will leave the oil and gas rich Timor Sea with no structure for exploration or exploitation as well as no maritime boundaries, provisional or permanent.

Background

When Timor-Leste became independent in March 2002 following 24 years of Indonesian occupation, the revenue sharing arrangement entered into between Australia and Indonesia, the Timor Gap Treaty, became void. The newly independent Timor-Leste and Australia entered into several provisional revenue sharing agreements and treaties regarding the undefined water column and seabed in the Timor Sea.

The most recent of these agreements, Certain Maritime Arrangements in the Timor Sea ("CMATS") treaty, placed a moratorium on either party asserting, pursuing or furthering by any means in relation to the other party its claims to sovereign rights, jurisdiction and maritime boundaries until 2057: article 4.

In addition to the moratorium on dispute settlement attempts found in CMATS, Australia has also carved-out jurisdiction for the International Court of Justice or an arbitral tribunal hearing disputes brought against it concerning the delimitation of maritime boundaries. This jurisdictional carve-out, declared by Australia shortly before Timor-Leste's independence in May 2002, effectively precludes Timor-Leste from seeking a binding third party resolution of its maritime boundary dispute with Australia.

Significantly to those resources companies who entered into Production Sharing Contracts in the Joint Petroleum Development Area created by Australia and Timor-Leste in the Timor Sea, article 12 of CMATS provides both parties with a right to unilateral termination of the treaty if a development plan for the lucrative Greater Sunrise field or production of petroleum from that field have not occurred within a certain timeframe. That timeframe lapsed in February 2013, however, neither party has exercised its right to terminate the treaty.

In April 2013, Timor-Leste commenced confidential proceedings before the Permanent Court of Arbitration against Australia alleging that during the negotiation of CMATS, Australian intelligence operatives covertly listened in on Timor-Leste's negotiating team and that the treaty is therefore void. During the public opening session of the conciliation on 29 August 2016, Timor-Leste confirmed that it has commenced the conciliation without prejudice to its position in that arbitration.

If CMATS is rendered void, the provisions in article 12(3) of CMATS, which act to revive CMATS following termination if petroleum production takes place in Greater Sunrise prior to 2057, will fall away, a matter which both parties will clearly need to address if either side unilaterally terminate CMATS and a new arrangement in the Timor Sea is negotiated.

UNCLOS compulsory conciliation

UNCLOS provides a mechanism for signatory States to agree to submit a relevant dispute to conciliation. Significantly to the dispute between Timor-Leste and Australia in light of Australia's carve-out of binding dispute resolution mechanisms, article 298(1)(a)(i) of UNCLOS provides:

• in instances where a State declares that it does not accept any one or more of the dispute resolution procedures provided for in Annex V, section 2 of UNCLOS with respect to disputes concerning the interpretation or application of UNCLOS articles 15, 74 and 83 relating to sea bed boundary delimitations;
• when such a dispute arises subsequent to the entry into force of UNCLOS; and
• no agreement within a reasonable period of time is reached in negotiations;
any party to the dispute can request a State to accept submission of the matter to conciliation under Annex V, section 2.

Annex V, section 2 provides that a party notified in accordance with the above provisions *"shall be obliged to submit to such proceedings"* and that, similarly to the situation of China's non-involvement in the South China Sea arbitration, a failure of a party or parties to reply to a notification of institution of proceedings or submit to such proceedings *"shall not constitute a bar to the proceedings"*.

Relevantly to third parties such as resource companies and States in similar disputes, one of the greatest unknowns is the procedure for and publicity of compulsory conciliation under UNCLOS. Annex V, section 2, article 4 states that, unless the parties agree otherwise, the five-member conciliation commission shall determine its own procedure by a majority vote. The commission is also required to produce a report within 12 months of its constitution recording any agreements reached and, failing agreement between the parties, its *"conclusions on all questions of fact or law relevant to the matter in dispute and such recommendations as the commission may deem appropriate for an amicable settlement."* The commission's finding on competence dated 19 September 2016, which was publicly released on 26 September 2016, noted that the 12-month period for the producing of the commission's report commenced on 19 September. It will be interesting to see whether the commission takes the same position regarding publication of its final report.

Compulsory but by no means binding

Article 298(1)(a)(ii) provides that the parties shall negotiate an agreement on the basis of the conciliation commission's report and, if those negotiations do not result in an agreement being reached, the parties shall, *"by mutual consent"*, submit the question to one of the binding dispute resolution procedures provided for within UNCLOS, unless otherwise agreed. As state above, it remains to be seen whether the conciliation commission will publish its final report. The release of the report may prove helpful to relevant resource companies in understanding and preparing for any negotiated agreement reached between the parties.

Ultimately, the requisite conditions for initiating compulsory conciliation arguably demonstrate why this process has not previously been commenced. The process can only be commenced against a State which has excluded binding dispute resolution procedures. Moreover, the non-binding nature of the report produced by the commission and the requirement that the parties simply engage in negotiations with no ability to enforce the commission's findings or compel the entry into a binding resolution process likely explains the absence of its use in maritime boundary disputes prior to now.

"CMATS is going": finding a smooth transition

Australia's objection to the competence of the conciliation commission centred on the moratorium on maritime boundary claims as agreed to by the parties in CMATS. Australia has consistently said that it stands by the existing treaties, which it claims are *"fair and consistent with international law"*.

Termination of CMATS would effectively dissolve the existing provisional arrangements and lift the moratorium on pursuing permanent maritime boundaries, however, it would not overcome Australia's carve-out of binding dispute resolution mechanisms nor the revival provisions should petroleum production take place in the Greater Sunrise field prior to the year 2057.

In the public opening session of the compulsory conciliation, both States made clear their understanding of the impact upon the petroleum industry. Timor-Leste's Agent for the proceedings, Minister Agio Pereira, stated that the *"current provisional regime is near its end"* and that *"CMATS is going"*. In response, Australia claimed that Timor-Leste's proposal to terminate CMATS *"would undermine the reputation of the parties for providing a stable and secure investment environment in the Timor Sea"* and that *"[s]ignificant reputational harm would be caused by disregarding the treaties"*.

Undoubtedly, resource companies operating in the Timor Sea and in other provisional production sharing zones will eagerly await any further publication of these proceedings to see whether a likely seismic shift in the status quo flowing from the termination of an existing treaty can be managed to the benefit of the parties and resources companies alike.

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