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Liz Buxton, External Relations & Marketing Manager, IBRU,
Department of Geography, Durham University DH1 3LE, UK

Tel: +44 191 334 1965 ♦ Fax: +44 191 334 1962 ♦ Email: e.a.buxton@durham.ac.uk

Thank you.





**FOLEY
HOAG** LLP

Framework for Dispute Settlement; Mediation and Conciliation

Peter Tzeng

14 November 2022



- 1. Framework for Dispute Settlement**
- 2. Mediation**
- 3. Conciliation**



- 1. Framework for Dispute Settlement**
- 2. Mediation**
- 3. Conciliation**

1. Framework

□ Article 33 of the UN Charter

UN Charter, Article 33

“The parties to any dispute ... shall, first of all, seek a solution by **negotiation**, enquiry, **mediation**, **conciliation**, **arbitration**, **judicial settlement**, resort to regional agencies or arrangements, or other peaceful means of their own choice.”

NEGOTIATION

MEDIATION

CONCILIATION

ARBITRATION

JUDICIAL SETTLEMENT

1. Framework

- Article 33 of the UN Charter



NEGOTIATION

MEDIATION

CONCILIATION

ARBITRATION

JUDICIAL SETTLEMENT

1. Framework

- Article 33 of the UN Charter



NEGOTIATION

MEDIATION

CONCILIATION

ARBITRATION

JUDICIAL SETTLEMENT

1. Framework

- Article 33 of the UN Charter



NEGOTIATION

MEDIATION

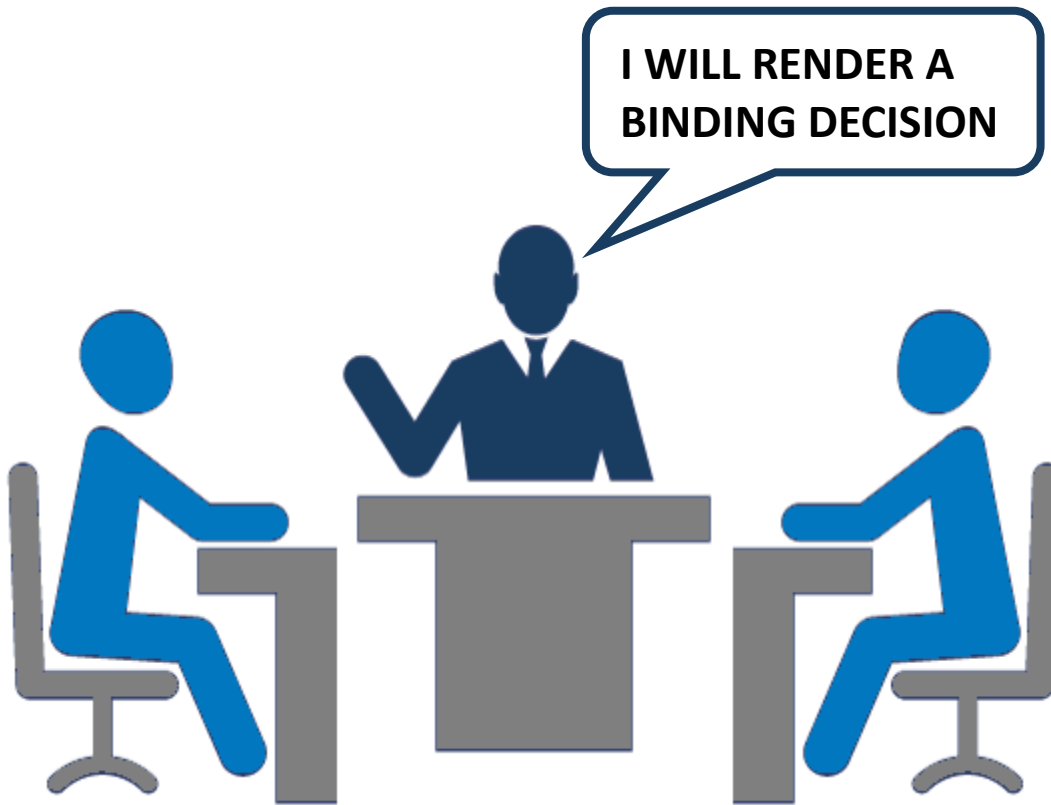
CONCILIATION

ARBITRATION

JUDICIAL SETTLEMENT

1. Framework

- Article 33 of the UN Charter



NEGOTIATION

MEDIATION

CONCILIATION

ARBITRATION

JUDICIAL SETTLEMENT

1. Framework

□ Article 33 of the UN Charter



NEGOTIATION

MEDIATION

CONCILIATION

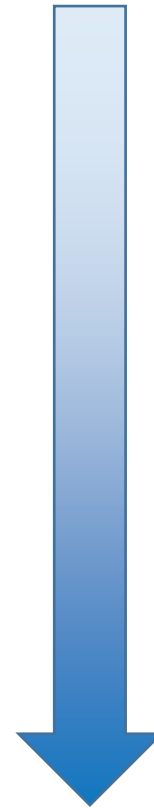
ARBITRATION

JUDICIAL SETTLEMENT

1. Framework

- ❑ Article 33 of the UN Charter
- ❑ Principle of Consent

**LEVEL OF
CONTROL**



NEGOTIATION

MEDIATION

CONCILIATION

ARBITRATION

JUDICIAL SETTLEMENT

1. Framework

- ❑ Article 33 of the UN Charter
- ❑ Principle of Consent
- ❑ Part XV of UNCLOS

UNCLOS, Article 283(1)

“When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by **negotiation** or other peaceful means. ...”

NEGOTIATION

MEDIATION

CONCILIATION

ARBITRATION

JUDICIAL SETTLEMENT

1. Framework

- ❑ Article 33 of the UN Charter
- ❑ Principle of Consent
- ❑ Part XV of UNCLOS

UNCLOS, Article 284(1)

“A State Party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to **conciliation**”

NEGOTIATION

MEDIATION

CONCILIATION

ARBITRATION

JUDICIAL SETTLEMENT

1. Framework

- ❑ Article 33 of the UN Charter
- ❑ Principle of Consent
- ❑ Part XV of UNCLOS

UNCLOS, Article 286

“[A]ny dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the **court or tribunal** having jurisdiction under this section.”

NEGOTIATION

MEDIATION

CONCILIATION

ARBITRATION

JUDICIAL SETTLEMENT

1. Framework

- ❑ Article 33 of the UN Charter
- ❑ Principle of Consent
- ❑ Part XV of UNCLOS

UNCLOS, Article 287

“1. [A] State shall be free to choose ... the following means for the settlement of disputes ... :

- (a) the **International Tribunal for the Law of the Sea** ...;
- (b) the **International Court of Justice**;
- (c) an **arbitral tribunal** [under] Annex VII;
- (d) a special **arbitral tribunal** [under] Annex VIII”

NEGOTIATION

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JUDICIAL SETTLEMENT

1. Framework

- ❑ Article 33 of the UN Charter
- ❑ Principle of Consent
- ❑ Part XV of UNCLOS

UNCLOS, Article 287

“3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted **arbitration** [under] Annex VII. ...

5. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute it may be submitted only to **arbitration** in accordance with Article VII.”

NEGOTIATION

MEDIATION

CONCILIATION

ARBITRATION

JUDICIAL SETTLEMENT

1. Framework

- ❑ Article 33 of the UN Charter
- ❑ Principle of Consent
- ❑ Part XV of UNCLOS

UNCLOS, Article 298(1)(a)(i)

“[A] State may ... declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to ... **disputes ... relating to sea boundary delimitations** ..., provided that a State having made such a declaration **shall ... accept ... conciliation**”

NEGOTIATION

MEDIATION

CONCILIATION

ARBITRATION

JUDICIAL SETTLEMENT

1. Framework

1. Algeria
2. Angola
3. Argentina
4. Australia
5. Belarus
6. Benin
7. Canada
8. Chile
9. China
10. Congo (in part)
11. Cuba (in part)
12. DRC
13. Denmark (in part)
14. Ecuador
15. Egypt
16. Equatorial Guinea
17. France
18. Gabon
19. Greece
20. Guinea-Bissau (in part)
21. Iceland (in part)
22. Italy
23. Kenya
24. Malaysia
25. Mexico
26. Montenegro
27. Nicaragua (in part)
28. Norway (in part)
29. Palau
30. Republic of Korea
31. Russian Federation
32. Saudi Arabia
33. Singapore
34. Slovenia (in part)
35. Spain
36. Thailand
37. Trinidad and Tobago
38. Tunisia
39. Ukraine
40. United Kingdom

1. Framework

- ❑ Article 33 of the UN Charter
- ❑ Principle of Consent
- ❑ Part XV of UNCLOS

UNCLOS, Article 298(1)(a)(ii)

“After the conciliation commission has presented its report ..., the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to **one of the procedures provided for in section 2**, unless the parties otherwise agree”

NEGOTIATION

MEDIATION

CONCILIATION

ARBITRATION

JUDICIAL SETTLEMENT

1. Framework

- Article 33 of the UN Charter
- Principle of Consent
- Part XV of UNCLOS

NEGOTIATION

MEDIATION

1

1

CONCILIATION

16

23

ARBITRATION

9

2

JUDICIAL SETTLEMENT

**CASES PROCEEDED
UNDER UNCLOS***

**CASES FILED
UNDER UNCLOS***

*not including prompt release, provisional measures, or advisory cases

1. Framework

- ❑ Article 33 of the UN Charter
- ❑ Principle of Consent
- ❑ Part XV of UNCLOS

NEGOTIATION

MEDIATION

1 **2** **CONCILIATION**

6 **19** **ARBITRATION**

0 **34** **JUDICIAL SETTLEMENT**

**BOUNDARY CASES FILED
IN LAST 50 YEARS
UNDER UNCLOS**

**BOUNDARY CASES FILED
IN LAST 50 YEARS**



1. Framework for Dispute Settlement
2. Mediation
3. Conciliation

2. Mediation



2. Mediation



2. Mediation



BAHRAIN

1983 Framework, Principle 3

“The Parties shall undertake not to present the dispute to any international organization.”

SAUDI ARABIA

QATAR

2. Mediation



BAHRAIN

1990 Meeting Minutes

“The following was agreed: ... to continue the good offices of the Custodian of the Two Holy Mosques, King Fahd Ben Abdul Aziz, between the two countries till the month of Shawwal, 1411 H, Corresponding to May of the next year 1991. After the end of this period, **the parties may submit the matter to the International Court of Justice**”

SAUDI ARABIA

2. Mediation



2. Mediation



ISRAEL

1982 Agreement

“Egypt and Israel agree on the following procedure for resolving the remaining technical questions concerning the international boundary, ... which they have been unable to resolve through negotiations. ...

Representatives of the United States Government will participate in the negotiations concerning the procedural arrangements which will lead to the resolution of matters of the demarcation of the International Boundary between Mandated Palestine and Egypt in accordance with the Treaty of Peace, **if requested to do so by the Parties.**”

2. Mediation





Malawi Government

July 10, 2017 · 🌐

PRESS STATEMENT

STATUS OF THE MEDIATION PROCESS OVER THE LAKE MALAWI BOUNDARY DISPUTE

The Government of Malawi wishes to inform the general public that the Mediation process on Lake Malawi between the Republic of Malawi and the Republic of Tanzania, in Pretoria, South Africa, scheduled to take place on 8th to 9th May, 2017, was postponed at the last minute by the Government of the Republic of Tanzania and the Government of the Republic of Malawi expressed its concern over the postponement, as it affects the timing of the conclusion of the mediation process.

“The Malawi Government wishes to assure the general public that it will do everything possible not to give up even a single inch of its territory.”

The meeting scheduled for this week has been convened by the High Level Mediation Team (HLMT) which is led by His Excellency Joaquim Chissano, former President of the Republic of Mozambique. Other members of the team include His Excellency Thabo Mbeki, former President of South Africa, and His Excellency Festus

2. Mediation



2. Mediation

A satellite-style map of the northern coast of South America, showing the border between Venezuela and Guyana. The word 'VENEZUELA' is written in a white box over the Venezuelan territory, and 'GUYANA' is written in a white box over the Guyanese territory. A yellow text box is overlaid on the map, containing text about the 1966 Geneva Agreement.

VENEZUELA

GUYANA

1966 Geneva Agreement, Article I

“A Mixed Commission shall be established with the task of seeking satisfactory solutions for the practical settlement of the controversy between Venezuela and the United Kingdom”

2. Mediation

1966 Geneva Agreement, Article IV

“If, within a period of four years ..., the Mixed Commission should not have arrived at a full agreement ... [the] Governments shall without delay choose one of the means of peaceful settlement provided in **Article 33 of the Charter of the United Nations**.

If ... the Government of Guyana and the Government of Venezuela should not have reached agreement regarding ... the means of settlement ..., they shall **refer the decision ... to the Secretary-General of the United Nations**. If the means so chosen do not lead to a solution of the controversy, ... the Secretary-General shall choose **another of the means stipulated in Article 33** ... and so on until the controversy has been resolved.”

2. Mediation



**EQUATORIAL
GUINEA**

A satellite-style map of the Gulf of Guinea region in West Africa. The map shows the coastline of Equatorial Guinea and Gabon. The land is depicted in shades of green, and the ocean is dark blue. A white outline traces the borders of both countries. A white rectangular box with a dark blue border is positioned over the northern part of Equatorial Guinea, containing the text 'EQUATORIAL GUINEA'. Another white rectangular box with a dark blue border is positioned over the central part of Gabon, containing the text 'GABON'.

GABON

2. Mediation



2. Mediation



2. Mediation



2. Mediation

- Why **mediation** instead of **negotiation**?
 - Absence of diplomatic relations (Israel/Lebanon; Armenia/Azerbaijan)
 - Antagonistic relations (Egypt/Israel; Israel/Lebanon; Armenia/Azerbaijan)
 - Regionalization of dispute (Bahrain/Qatar; Malawi/Tanzania; Armenia/Azerbaijan)
 - Internationalization of dispute (Egypt/Israel; Israel/Lebanon; Guyana/Venezuela; Equatorial Guinea/Gabon; Armenia/Azerbaijan)

2. Mediation

- Why **mediation** instead of **arbitration** or **judicial settlement**?
 - No binding decision
 - Consideration of non-legal factors
 - Flexibility of solution
 - Maintenance of good relations
 - More than two States

2. Mediation

- ❑ Why not **mediation**?
 - No guarantee of settlement (Bahrain/Qatar; Egypt/Israel; Malawi/Tanzania; Guyana/Venezuela; Equatorial Guinea/Gabon)
 - Consideration of non-legal factors
 - Could take a long time (Bahrain/Qatar; Malawi/Tanzania; Guyana/Venezuela)

2. Mediation

- Strategic considerations for **mediation**
 - Selection of the mediator(s)
 - Making legal and non-legal arguments
 - Mediation as a path to **arbitration** (Egypt/Israel) or **judicial settlement** (Bahrain/Qatar; Guyana/Venezuela; Equatorial Guinea/Gabon)



1. Framework for Dispute Settlement
2. Mediation
3. Conciliation

3. Conciliation



3. Conciliation

1946 Settlement Agreement, Article 3

“France and Siam shall set up ... a conciliation commission composed of two representatives of the parties and three neutrals in accordance with the **General Act of Geneva** of 26 September 1928, ... which regulates the constitution and functioning of the Commission. ... It shall be charged with examining the ethnic geographical and economic arguments of the parties”

1928 General Act, Article 4

“[T]he Conciliation Commission shall be constituted as follows: ... The Commission shall be composed of five members. The parties shall each nominate one commissioner, who may be chosen from among their respective nationals. The three other commissioners shall be appointed by agreement from among the nationals of third Powers.”

3. Conciliation



1928 General Act, Article 15

“1. The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of enquiry or otherwise, and to endeavor to bring the parties to an agreement. It may, after the case has been examined, **inform the parties of the terms of settlement which seem suitable to it**

3. The proceedings of the Commission must, unless the parties otherwise agree, be terminated **within six months**”

3. Conciliation



1947 Commission Report, page 438

“On 12 May, the Siamese agent formally filed his petition The agent of the French government replied by a memorandum of 22 May to which the agent of the Siamese Government replied on 29 May. To this reply, the agent of the French Government opposed his own dated 7 June. The Commission heard oral explanations from the agents of both governments It also heard the presentations made before it by the experts of both parties in various ethnic, geographical and economic matters”

3. Conciliation



1947 Commission Report, page 439

[T]he agent of the Siamese Government ... argued that **from a “racial” point of view**, the inhabitants of the territories claimed by his Government are of the **same origin** as those on the right bank of the Mekong, that these territories form **a geographical unit** ..., and that the interdependence between these two groups of territories form the point of view of the production and distribution of the main commodities makes them **an economic unit**.

3. Conciliation



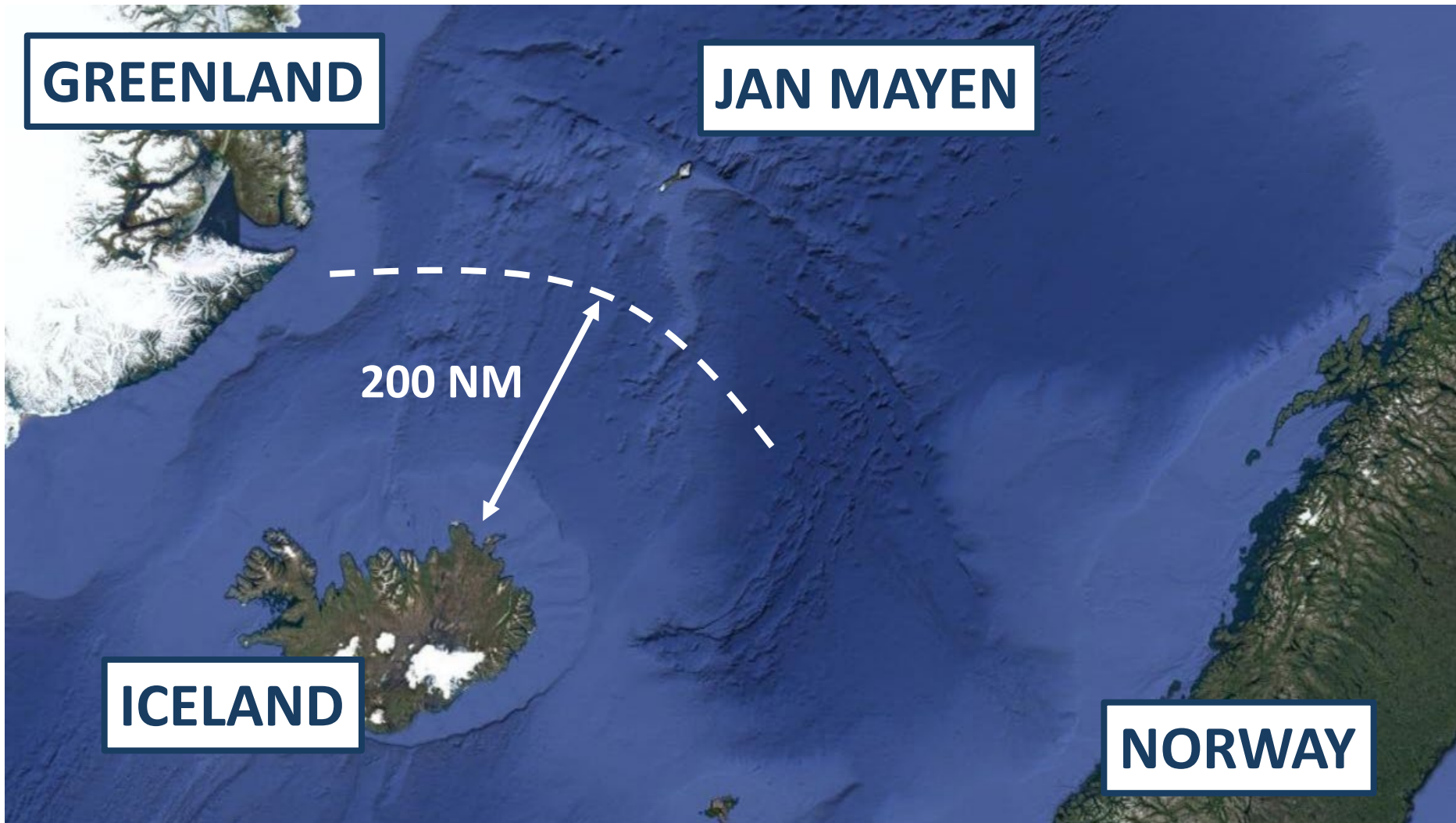
1947 Commission Report, pages 448-449

- “1. The Commission **does not support** the Siamese claims to Luang Prabang right bank (Lanchang)
2. The Commission **does not support** the Siamese claims to the territories on the left bank of the Mekong
4. The Commission **does not support** the Siamese claims to territory of the Bassac rive droite (Champasak)”

3. Conciliation



3. Conciliation



3. Conciliation



GREENLAND

JAN MAYEN

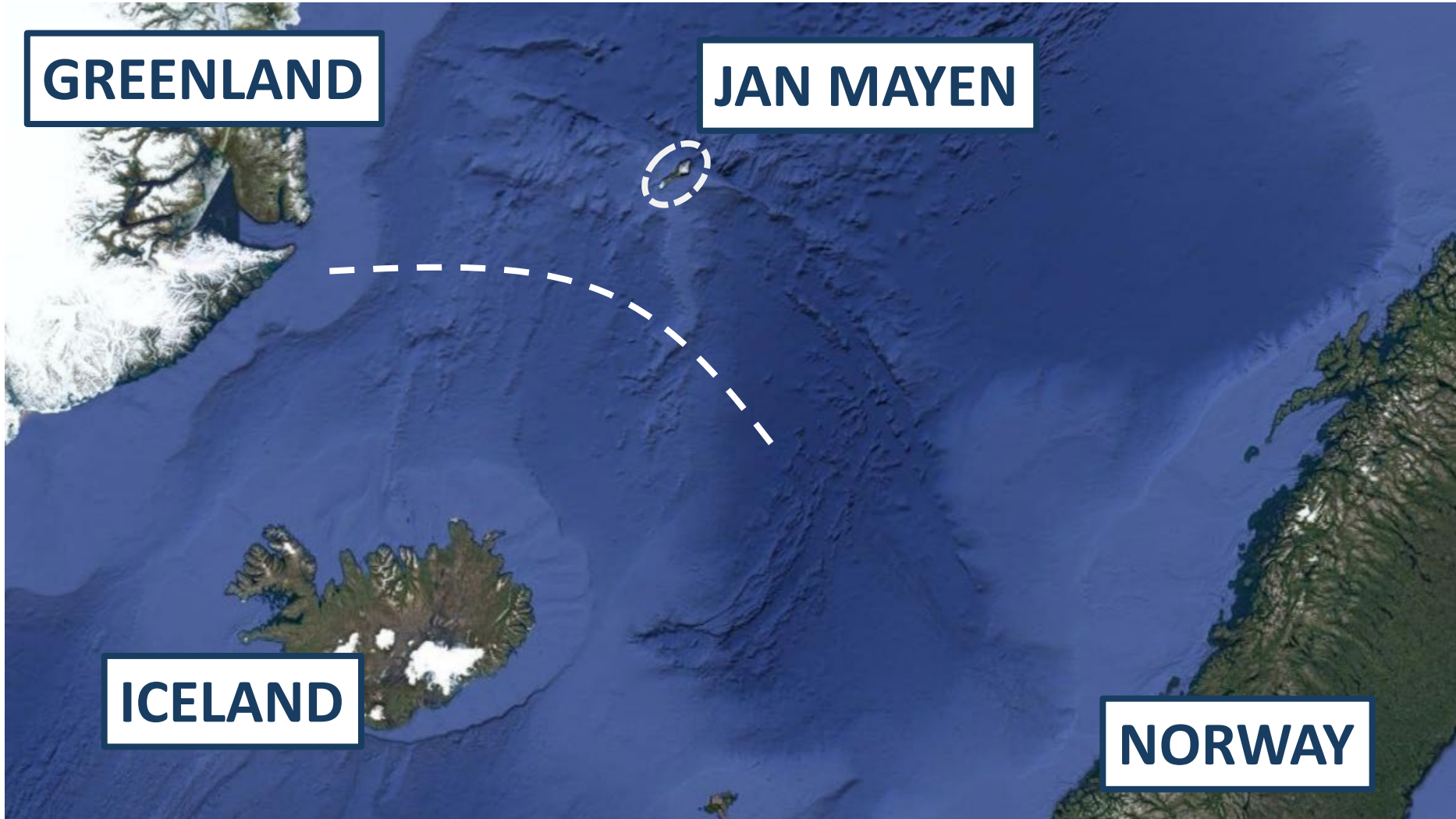
UNCLOS, Article 121(3)

“Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”

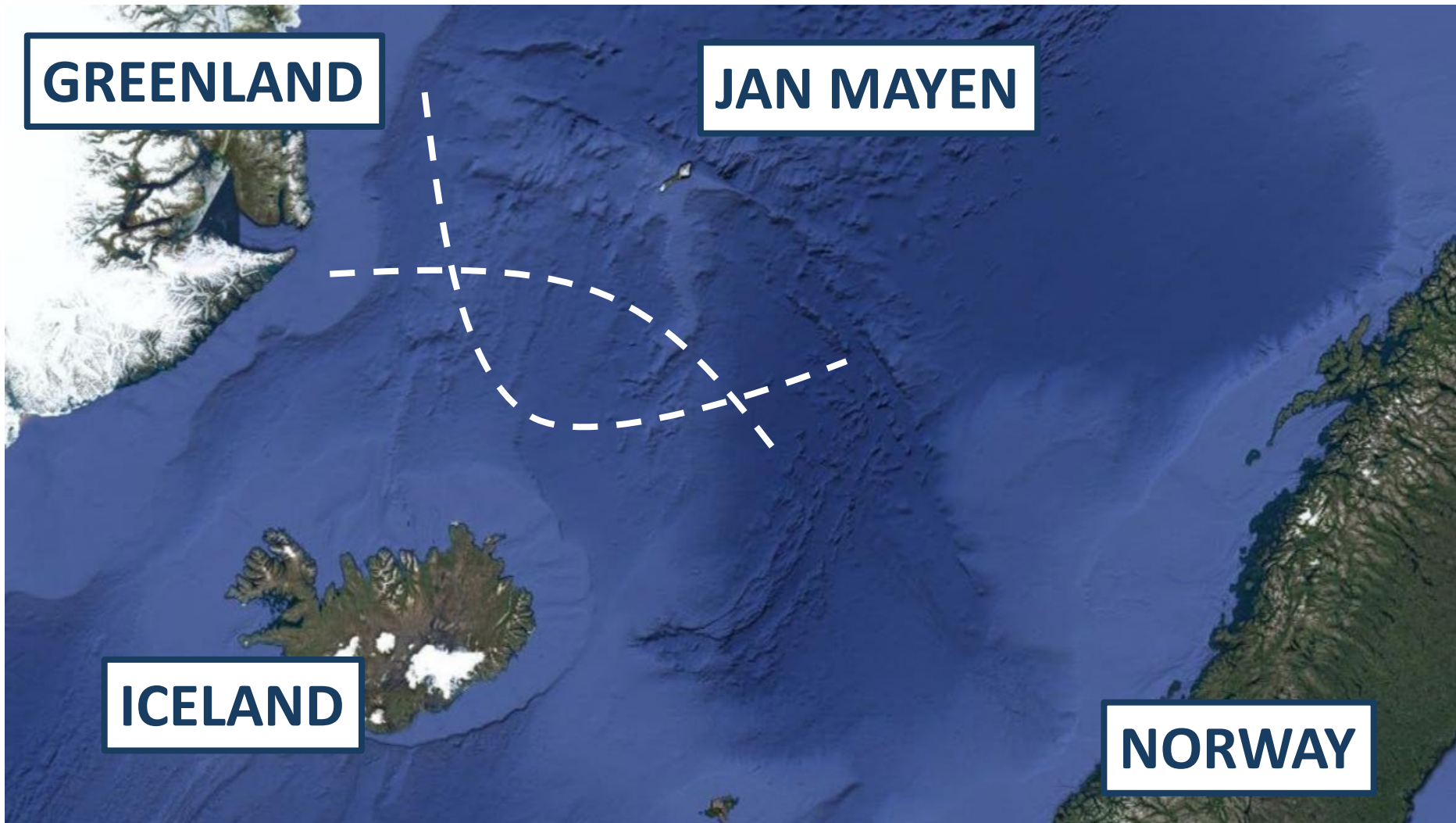
ICELAND

NORWAY

3. Conciliation



3. Conciliation



3. Conciliation



1980 Agreement, Article 9

“[T]he Parties agree to appoint ... a Conciliation Commission composed of three members, of which each Party appoints one national member. The Chairman of the Commission shall be appointed by the Parties jointly.”

3. Conciliation



1980 Agreement, Article 9

“The Commission shall have as its mandate the **submission of recommendations** with regard to the dividing line for the shelf area between Iceland and Jan Mayen. ... The parties envisage the presentation of the recommendations **within five months** of the appointment of the Commission. These recommendations are **not binding** on the Parties; but during their further negotiations the Parties will **pay reasonable regard** to them.”

3. Conciliation



1980 Agreement, Article 9

“In preparing such recommendations the Commission shall take into account Iceland’s **strong economic interests** in these sea areas, the existing **geographical and geological factors** and other **special circumstances.**”

3. Conciliation



August 1980 – Informal Meeting of Commission

October 1980 – Meeting of Commission

December 1980 – Meeting with Geologists & Geophysicists

February 1981 – Meeting of National Conciliators

February 1981 – Meeting of Commission

March 1981 – Meeting of Commission

June 1981 – Report & Recommendations of Commission

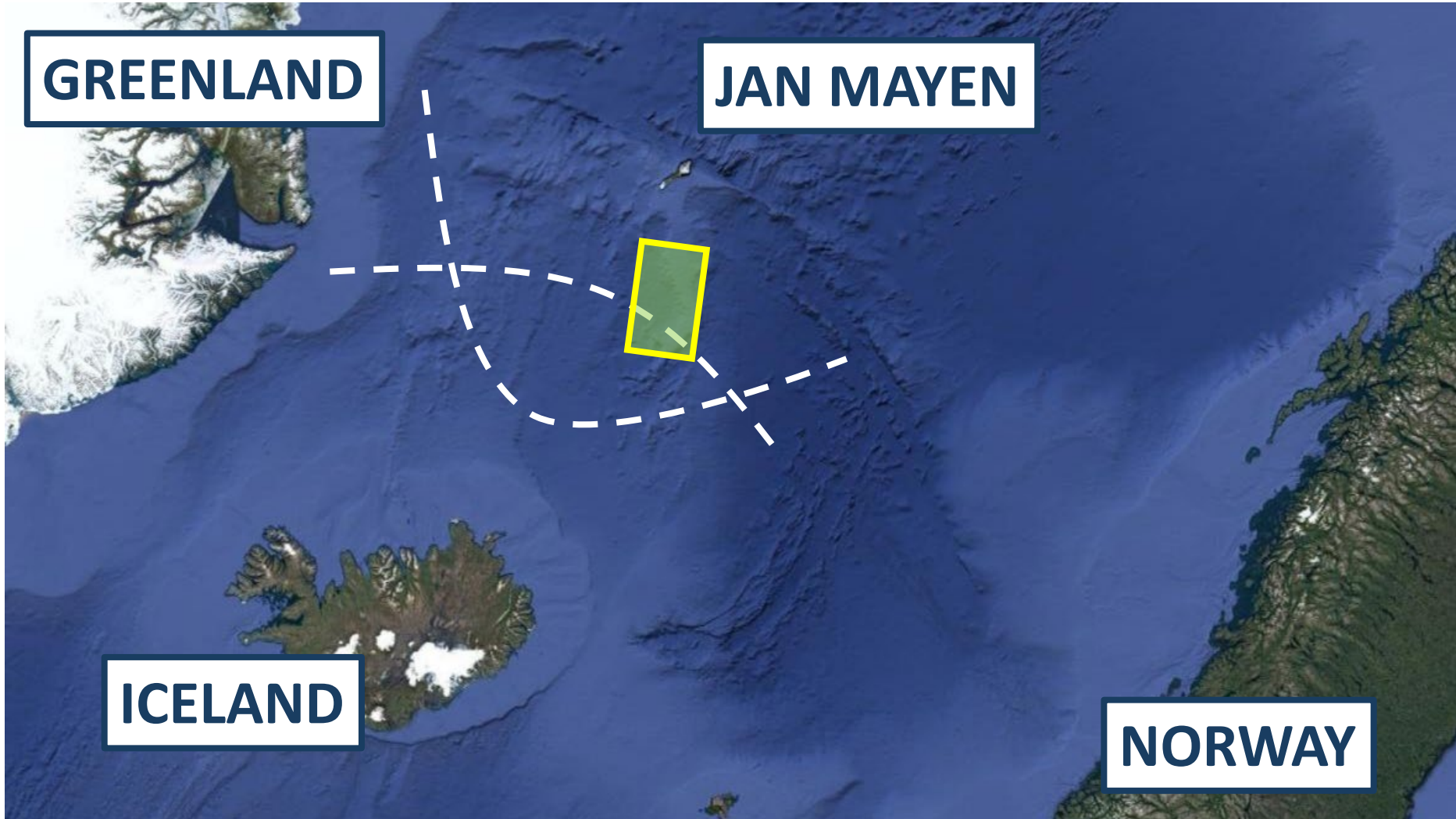
3. Conciliation



1981 Report & Recommendations, page 9

“[T]he Commission decided that ... since the two national members had participated in all previous diplomatic negotiations, **it would not serve a useful purpose to request written and/or oral pleadings from the two parties.**”

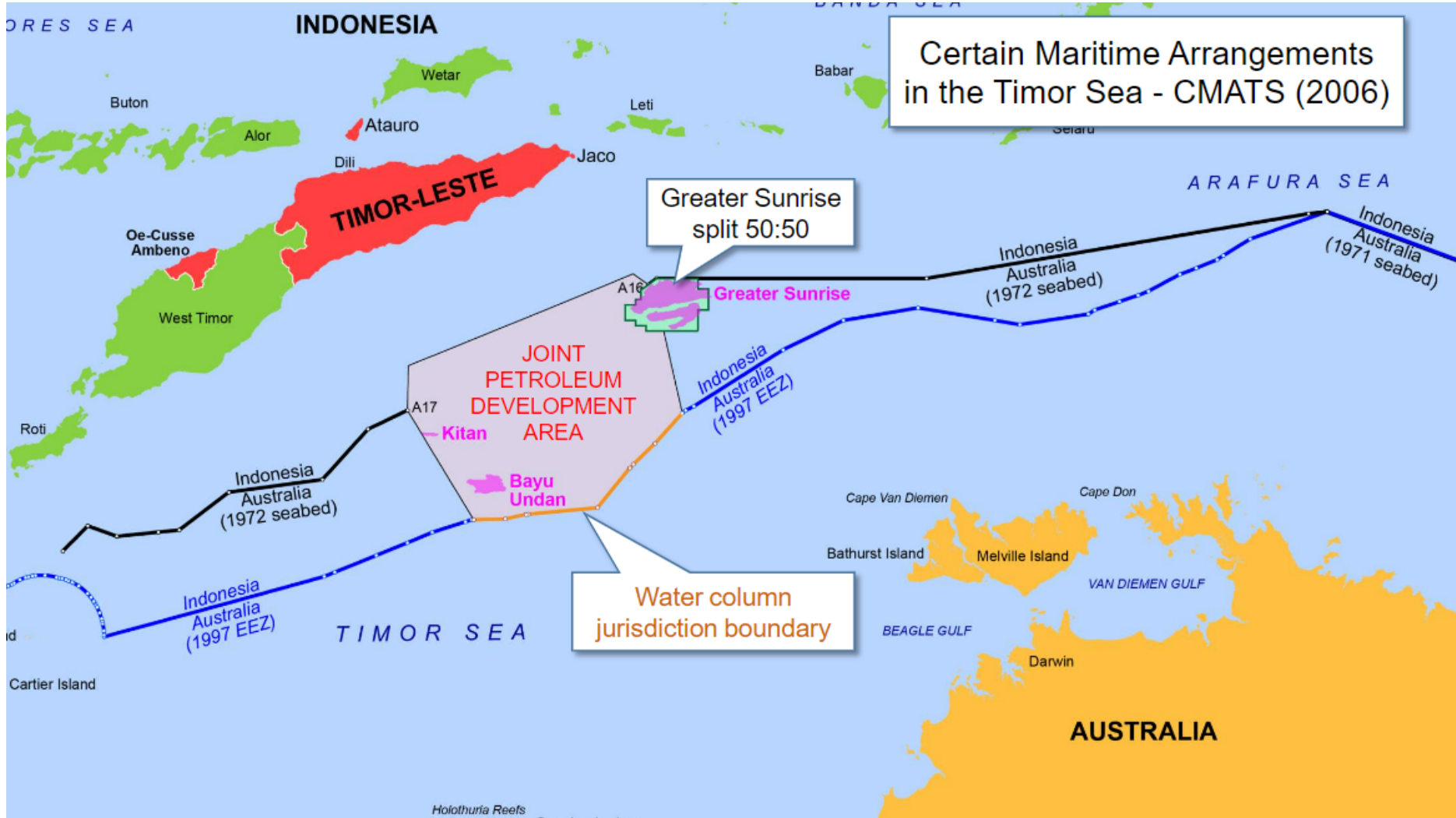
3. Conciliation



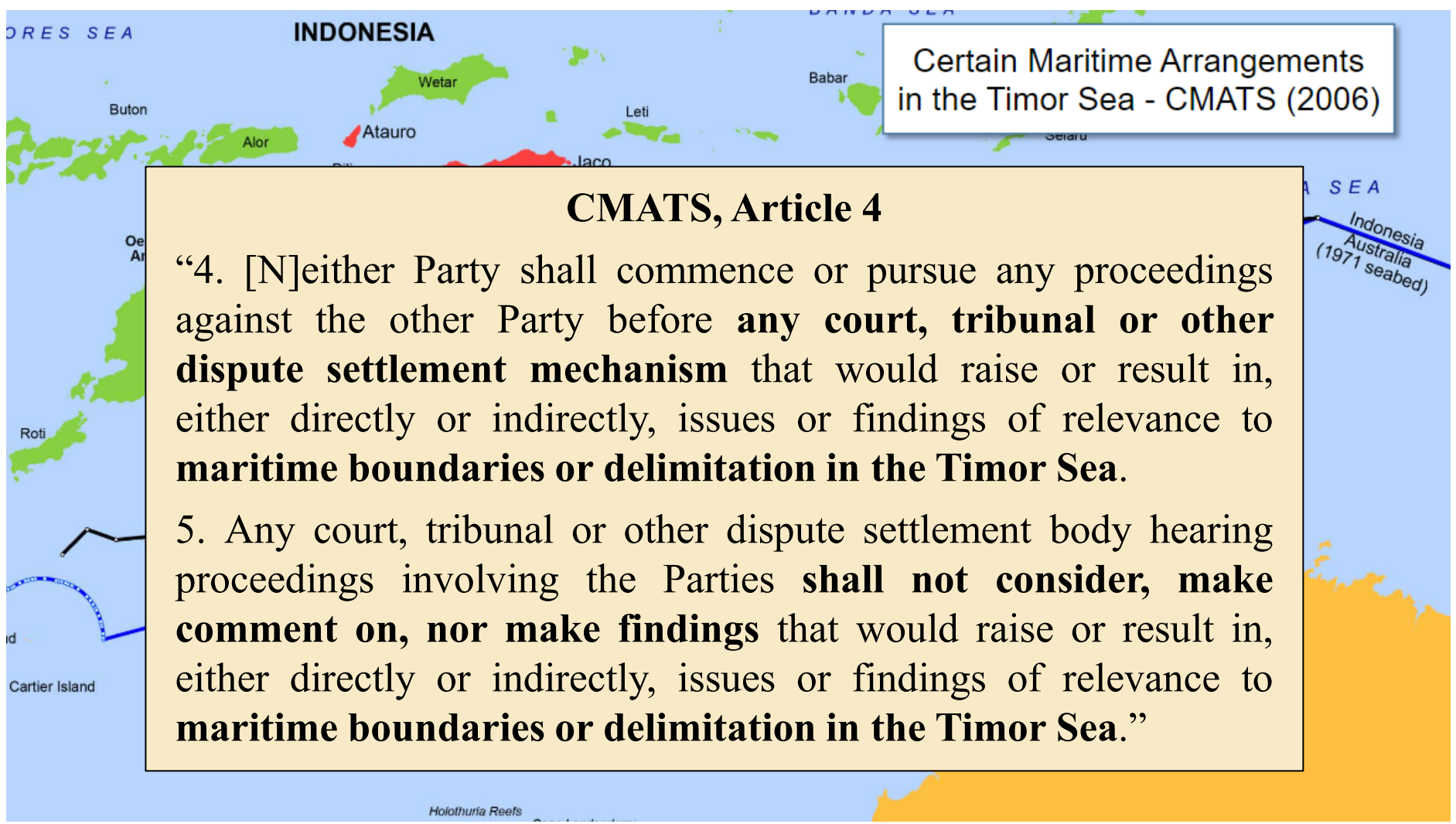
3. Conciliation



3. Conciliation



3. Conciliation



Certain Maritime Arrangements
in the Timor Sea - CMATS (2006)

CMATS, Article 4

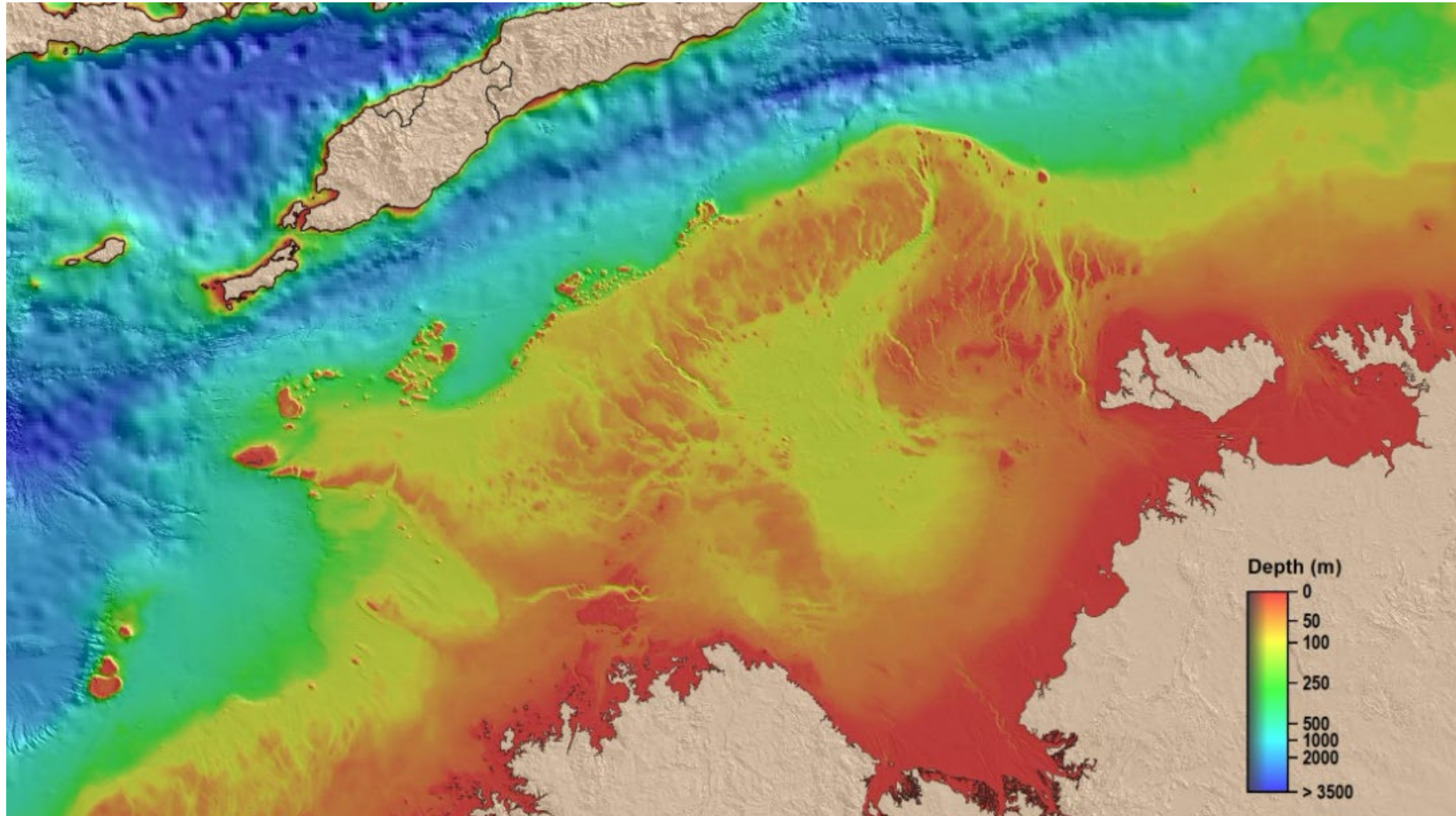
“4. [N]either Party shall commence or pursue any proceedings against the other Party before **any court, tribunal or other dispute settlement mechanism** that would raise or result in, either directly or indirectly, issues or findings of relevance to **maritime boundaries or delimitation in the Timor Sea.**”

5. 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.**”

3. Conciliation



3. Conciliation



3. Conciliation



3. Conciliation



3. Conciliation

- | | | |
|-----------------------|-----------------------------|-------------------------|
| 1. Algeria | 15. Egypt | 29. Palau |
| 2. Angola | 16. Equatorial Guinea | 30. Republic of Korea |
| 3. Argentina | 17. France | 31. Russian Federation |
| 4. Australia | 18. Gabon | 32. Saudi Arabia |
| 5. Belarus | 19. Greece | 33. Singapore |
| 6. Benin | 20. Guinea-Bissau (in part) | 34. Slovenia (in part) |
| 7. Canada | 21. Iceland (in part) | 35. Spain |
| 8. Chile | 22. Italy | 36. Thailand |
| 9. China | 23. Kenya | 37. Trinidad and Tobago |
| 10. Congo (in part) | 24. Malaysia | 38. Tunisia |
| 11. Cuba (in part) | 25. Mexico | 39. Ukraine |
| 12. DRC | 26. Montenegro | 40. United Kingdom |
| 13. Denmark (in part) | 27. Nicaragua (in part) | |
| 14. Ecuador | 28. Norway (in part) | |

3. Conciliation



UNCLOS, Annex V, Article 3

“[T]he party instituting the proceedings shall appoint two conciliators The other party to the dispute shall appoint two conciliators Within 30 days after all four conciliators have been appointed, they shall appoint a fifth conciliator ..., who shall be the chairman.”

3. Conciliation



UNCLOS, Annex V, Articles 6-7

“The commission shall hear the parties, examine their claims and objections, and make proposals ... with a view to reaching an amicable settlement. ... The commission shall report within 12 months of its constitution. Its report shall record any agreements reached and, failing agreement, its conclusions ... and ... recommendations. ... The report of the commission ... shall not be binding upon the parties.”

3. Conciliation



3. Conciliation



3. Conciliation



11 April 2016 – Timor-Leste sends Notification of Conciliation.

2 May 2016 – Australia submits Response to Notification.

25 June 2016 – Commission is constituted.

12 August 2016 – Australia submits its Objections to Competence.

25 August 2016 – Timor-Leste submits its Response.

29-31 August 2016 – Commission holds Hearing on Competence.

19 September 2016 – Commission renders Decision on Competence.

3. Conciliation



2016 Decision on Competence, para. 111

“The Commission is competent with respect to the compulsory conciliation of the matters set out in Timor-Leste’s Notification

....

The 12-month period in Article 7 of Annex V of the Convention shall run from the date of this Decision.”

3. Conciliation



30 August 2017 – Parties reach Agreement on Comprehensive Package of Measures. Parties agree to time-limit extension.

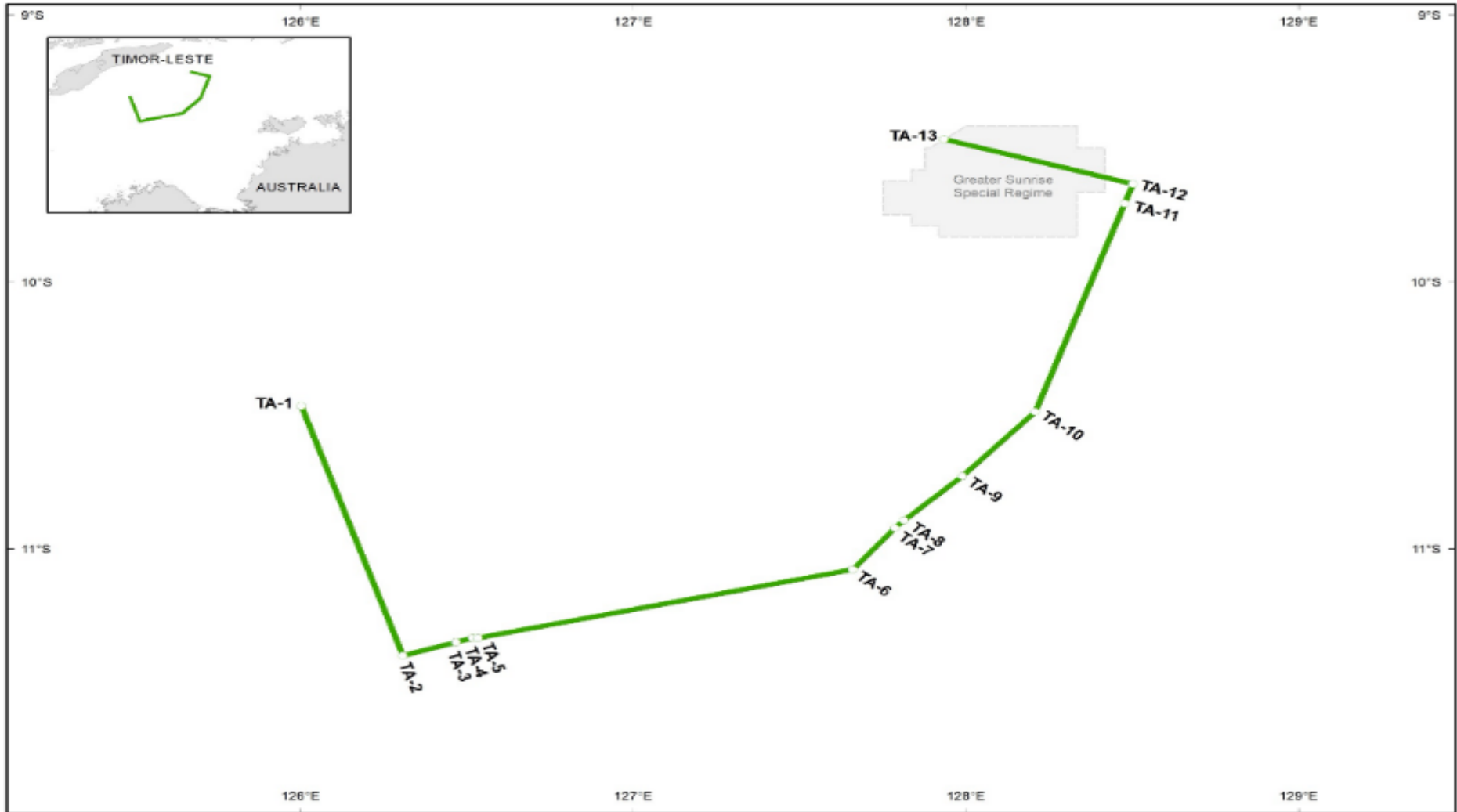
October 2017 – Parties reach Agreement on Text of Draft Treaty.

6 March 2018 – Parties sign Treaty.

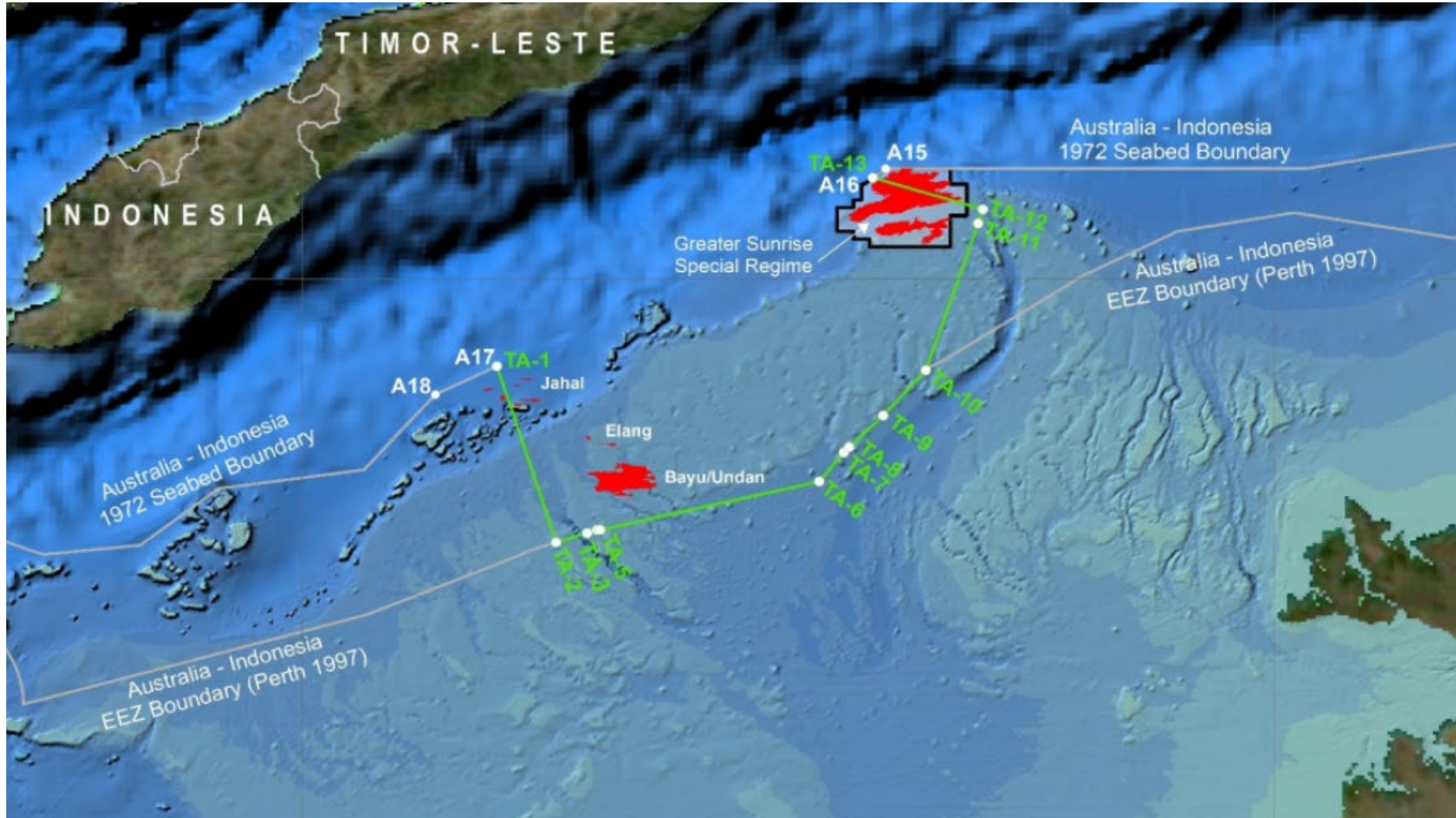
9 May 2018 – Commission issues Report and Recommendations.

July 2019 – Parties ratify Treaty.

3. Conciliation



3. Conciliation



3. Conciliation

- Why **conciliation** instead of **negotiation** or **mediation**?
 - Third-party recommendations (France/Siam; Iceland/Norway; Australia/Timor-Leste)
 - Formal presentation of legal and factual arguments (France/Siam; Australia/Timor-Leste)
 - Efficient proceedings with time-limit (France/Siam; Australia/Timor-Leste)

3. Conciliation

- Why **conciliation** instead of **arbitration** or **judicial settlement**?
 - No binding decision (France/Siam)
 - Consideration of non-legal factors (France/Siam; Iceland/Norway; Australia/Timor-Leste)
 - Flexibility of procedure (Iceland/Norway)
 - Flexibility of solution (Iceland/Norway; Australia/Timor-Leste)
 - Maintenance of good relations (Iceland/Norway; Australia/Timor-Leste)
 - Efficient proceedings with time-limit (France/Siam; Australia/Timor-Leste)

3. Conciliation

- Why not **conciliation**?
 - No guarantee of settlement (France/Siam)
 - Consideration of non-legal factors (France/Siam; Iceland/Norway; Australia/Timor-Leste)

3. Conciliation

- Strategic considerations for **conciliation**
 - Selection of conciliation commission
 - Making legal and non-legal arguments
 - Setting time-limits

Thank you for your attention!

Questions?

ptzeng@foleyhoag.com

- 1. Framework for Dispute Settlement**
- 2. Mediation**
- 3. Conciliation**