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SPEECH

DISPUTE RESOLUTION AND THE LAW OF THE SEA: CONCILIATION UNDER UNCLOS

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Good morning ladies and gentlemen. It is an honour to be joined by our Chief Negotiator His Excellency Xanana Gusmão, Ambassador Gary Quinlan and Mr. Damos Agusman to name just a few. I would also like to acknowledge our co-chairs for this forum, Dr. Adina Kamarudin of Malaysia, Mr. James Larsen of Australia and Ambassador Jorge Camões of Timor-Leste.

To all our friends from the region, welcome to my home and our capital, Dili, Timor-Leste. I also spare a thought and our best wishes to Judge Abdul Koroma who was scheduled to be with us, but due to health reasons is unable to travel.

Ladies and gentlemen, few people are more qualified to talk about the compulsory conciliation proceedings between Timor-Leste than my fellow panellist, Ambassador Quinlan. Ambassador Quinlan was my opposing Agent in the proceedings. I would like to think we are now good friends through that hard-fought process, but perhaps let's wait to see what he has to say!

Perhaps I can be of most use today, by putting forward the Timor-Leste perspective on the conciliation. It is something Ambassador Quinlan and I have done before for our respective States, albeit in written form as part of a book authored by the Centre for International Law at the National University of Singapore. We are very pleased to be joined here by one of the editors of that publication, Ms. Tara Davenport.

As students of the region and of international diplomacy and international law, you will all be familiar, at least in passing, with the compulsory conciliation between Timor-Leste and Australia.

At a basic level, the conciliation was a 'first' – the first ever compulsory conciliation under UNCLOS. With the expertise of a Conciliation Commission, we managed to resolve our dispute even where one of the States is far larger and more powerful, and the other a developing and young State. We managed to do this, despite the process being voluntary in the sense that any recommendations of the Commission were non-binding. Our issues were resolved "bottom-up" by facilitators in suits, not "top-down" by judges in robes. The Commission chipped away at bottom lines. They educated themselves on our perspective; they listened; and they addressed the human elements in the dispute. They spoke to us, not at us. We collaborated rather than clashed – well, at least most of the time.

At a more complex level, the conciliation sat at the intersection of law and diplomacy, addressing fundamental norms of how States interact on delicate issues of sovereignty and consent. We live in an increasingly globalised world with disparate State and non-State actors, yet it is States, as represented by their Governments, that remain the dominant actors. There is a certain degree of symbolism and pride inherent in our interactions because of that fact. We therefore often require bespoke dispute resolution frameworks to resolve delicate issues between us.

Ladies and gentlemen, Timor-Leste and Australia share a long history. Our people fought side by side during the Second World War. The bonds of friendship and camaraderie between the Australian commandos based in Timor and everyday Timorese who helped them in the face of war, is still celebrated today. Despite this goodwill, our bilateral relationship faced significant challenges in the second half of the 20th century. Not only was our nation occupied for 24 years, but attempts were also made by our neighbors to secure sovereign rights in the resource rich Timor Sea.

Despite this, in 1999, Timorese voted for independence. This triggered another dark and violent chapter in our nation's history. Our friends in Australia led the UN peacekeeping efforts as our nation emerged from the 'ashes'. The restoration of our independence on 20 May 2002 was an emotional moment. As with many post-colonial nations, our independence was hard-won, although Timor-Leste absorbed more than its fair share of pain and suffering as we moved to independence.

The opportunities of new Statehood brought a sense of optimism to Dili and our surrounding districts. Most relevantly to the conciliation, we entered into a series of treaties with Australia. These three treaties resulted in a resource sharing arrangement in the Timor Sea, albeit these agreements did not delimit a permanent maritime boundary in the Timor Sea.

As we moved into a new decade, our two nations found ourselves embroiled in a number of disputes. While we were grateful for the assistance Australia afforded us in our darkest hour, the issue of maritime rights in the Timor Sea had emerged as a significant impediment to our overall diplomatic cooperation.

Accordingly, we became quite familiar with the Peace Palace at The Hague, which was the forum for no less than three separate disputes between 2013 and 2016. I shall leave to the lawyers to explain the details, but these disputes concerned the alleged case of espionage performed at the bequest of the Australian Government against Timor-Leste, the related proceedings at the ICJ concerning the seizure of various Timor-Leste documents by Australian authorities in Canberra and a lesser known case concerning the jurisdiction over the Bayu-Undan pipeline.

I think it is fair to say our diplomatic relationship was at a low point during this time. Indeed, only now with our Maritime Boundary Treaty in force and the conciliation a few years gone, do we have the 'clean air' — as us politicians might call it — to truly reflect on how low relations had sunk.

But my message today is one of optimism.

How did our two nations go from such a low point to the positive and productive relationship we have today? The major intervening event was of course the conciliation.

In 2016, our nation was in somewhat of a difficult spot. The delimitation of our maritime boundaries had become an issue of sovereignty for our nation. While we felt that the occupation of our lands had ceased, there was a sense that the occupation of our seas had not.

Our legal options to realise our goal of sovereignty were severely limited. We were unable to take Australia to an international court or tribunal concerning the maritime boundary owing to Australia's jurisdiction reservation (or 'carve out') as to maritime boundaries. This carve-out was put in place two months before our restoration of independence. Further, Australia refused to negotiate on maritime boundaries on a bilateral basis owing to the so-called moratorium clause contained in one of the provisional resource sharing treaties.

In considering our legal options, Timor-Leste was mindful not to colour our reputation with international oil companies and to provide a stable investment environment for those companies in the Timor Sea. Yet, more profoundly, we were driven by the realisation of our maritime rights under international law. Timorese of all political persuasions were united in one voice on this issue.

Before we made the decision to commence conciliation, both our States participated in a period of structured engagement as a way to resolve our differences. During this brief period we were able to engage directly with our Australian counterparts yet we were unsuccessful at broaching the topic of most importance: permanent maritime boundaries.

On 11 April 2016, our Ambassador at the time Abel Guterres walked into the RG Casey Building in Canberra to deliver a notice to the relevant Australian officials. I am reliably informed there was some degree of surprise upon them reading the notice that confirmed Timor-Leste would be commencing compulsory conciliation. It was a bold move on our part. The process had never been used before and we did not know how Australia would respond.

We shortly received notice from Australia that it would be disputing the jurisdiction of the Conciliation Commission to hear the matter. This is something we may discuss in our session on jurisdiction and admissibility tomorrow, but suffice to say, within a few short months we found ourselves opposite each other at the Peace Palace at The Hague.

Neither side held much back. Our Chief Negotiator explained that with Australia's jurisdictional reservation it had turned its back on the law. In my speech, I explained how Timor-Leste takes great comfort in the basic principles of equality and States and the fairness of the international law system. Australia responded in turn, accusing Timor-Leste of having ulterior motives in bringing the conciliation. Jurisdictional arguments followed behind closed doors.

In September 2016, the Commission found it did have jurisdiction. We had overcome the first hurdle. The conciliation was to proceed, yet a press release from Australia's Foreign Minister cautioned that the process was not legally binding. We still had some more work to do.

It was over the coming months that we began to realise the value of having an expert intermediary. Our sessions were all ex parte. The Commission took the time to educate themselves on our perspective, and I am sure on the Australian perspective as well.

Within a few short months of the opening hearings, the Commission was able to bring the parties together on a number of important issues. The aptly-named 'Integrated Package of Confidence Building Measures' did just that — it set forth the path required to a permanent delimitation of maritime boundaries but it equally addressed the human elements in the dispute. To build trust, Timor-Leste agreed to withdraw two of the related arbitrations, while Australia managed to procure a genuine mandate from its government to negotiate permanent maritime boundaries. It was a momentous occasion that overturned decades of policy from Canberra. We were now moving in the right direction.

Those hearings prior to the Confidence Building Measures and those after the Confidence Building Measures are rightly held confidential between the two States and the Commission. I am reminded of what one of Australia's advocates, Sir Daniel Bethlehem notes of the 'secret life of international law'. I can appreciate the frustration of many public observers who were merely rewarded with brief media releases synthesising week-long meetings, but such is the nature of how States interact. Confidence and confidentiality were indeed key elements in coming to agreement.

Ambassador Peter Taksøe-Jensen (or the 'Chair' as we knew him) and the Commission worked tirelessly over the months following the Confidence Building Measures. I am sure the Chair himself was very pleased when both sides managed to come to a comprehensive package agreement on the last day of August 2017. I profess that the Chair was very keen to call this agreement the 'Copenhagen accords', after his home town and the location of our agreement, yet I think '30 August Agreement' appears to have superseded the Chair's desire. No good deed goes unpunished, as they say.

Among other matters, the agreement set out the delimitation of a permanent maritime boundary in the Timor Sea and set a path for the development of the largest field in the Timor Sea, Greater Sunrise.

Following the comprehensive package agreement, the parties invited the Greater Sunrise Joint Venture to begin trilateral discussions over the development of the field. The lexicon of the conciliation moved from delicate matters of law and diplomacy, to discussions of 'return on investment', 'greenfield and brownfield', global LNG markets and other technical terms. In hindsight, it was perhaps too ambitious a task to seek agreement amongst two States and four international oil companies in just a few months.

Despite the need to continue discussions on Greater Sunrise, the treaty delimiting a permanent maritime boundary was signed in front of the UN Secretary General in March 2018 and ratified by both States following the transitional period. Just a short distance from here our Prime Ministers exchanged notes bringing into effect the treaty on 30 August 2019 — 20 years to the date since our vote for independence.

For anyone wishing to understand the significance of the conciliation to the people of Timor-Leste, you only need to see the photos of the Chief Negotiator's return to Dili following the signing of the comprehensive package agreement in September 2017. Thousands of well-wishers lined the road from the airport. The Chief Negotiator stopped his motorcade outside the Australian embassy gesturing in friendship at the very spot where, 18 months prior, more than 10,000 people had protested. It was a remarkable transformation in relations, but what are the lessons for other States?

The first reflection I would make is on the importance of a legal framework underpinning a dispute resolution process. Despite being non-binding in a legal sense, the conciliation was underpinned by UNCLOS. There was a legal obligation to participate in good faith. Legal arguments on maritime boundary delimitation and on other legal issues were argued by lawyers in front of international law experts. While the conciliation necessarily took on broader diplomatic matters, however we characterise it, international law was present in the resolution of our dispute. A comparable process was the so-called structured engagement we participated in with Australia in 2014/15. This process was essentially diplomacy in action. Each side could maintain their seemingly plausible arguments on the application of UNCLOS

and maritime boundary delimitation methodology. There was no impartial dispute resolution body to tell us otherwise.

The second reflection I would offer, and one I have emphasised throughout my remarks, is the human element in the dispute. A court or tribunal format is simply unable to address such matters. It focusses purely on law and generally in a western adversarial setting. Prior to the conciliation, we found ourselves in such adversarial settings with Australia. These court and tribunal formats were pushing us further apart, rather than bringing us closer together. Our disputes at the ICJ and Permanent Court of Arbitration broached delicate topics in sometimes public forums. These institutions have a vital place in resolving international disputes, yet we found that in our particular circumstance, a "bottom-up", facilitated approach in a confidential setting to be far more effective. I must profess that the conciliation was not just redemptive for the States as conceptual entities, but it was personally redemptive for those who participated in the process. On a personal level, it allowed me to go through a process of reconciliation and resolution, as I'm sure it did with many on the Timor-Leste side and the Australian side too.

The third comment I would make, and perhaps it is the lesson most relevant to all States, is on the efficacy of the international liberal order. John Ikenberry describes the liberal international order as a 'vision for an open and loosely rules based order' that creates an 'international space' for liberal democracy, reconciling the dilemmas of sovereignty and interdependence, seeking protections and preserving rights within and between states'. The conciliation celebrated those values — an openness to engage, within a rules-based framework of UNCLOS, determining matters of sovereignty, cooperation on a joint resource sharing area, yet preserving rights of both States as parties, and crucially, the rights of third States too.

An adherence to these liberal values brought our countries from an adversarial and somewhat tense relationship through a period of productive engagement and finally to agreement. Not all States will meet the criteria for compulsory conciliation, but all States can adhere to the values inherent in our process for their own advantage.

If we are here this week to consider emerging issues in dispute resolution in the region, the conciliation may be viewed as one such case study: on the merits of dialogue over obstruction, on an Asian-style consensus building approach rather than an automatic inclination to adversarial-ism, and ultimately on a combination of law and diplomacy, instead of just one in isolation of the other.

Of course courts and tribunals have a vital role in the future international dispute resolution architecture, as do bilateral negotiations, but sometimes, it is the right combination of law and diplomacy, facilitated by expert intermediaries and with no short part of goodwill on both sides, to resolve delicate issues of sovereignty and consent.

Ladies and Gentlemen, thank you for listening. I am very much looking forward to our panel discussion and the discussion over the days to come.

And finally, thank you again to our co-chairs and thank you again to my fellow panellists.