MINISTER OF STATE AND PRESIDENCY OF COUNCIL OF MINISTERS

AGIO PEREIRA

SPEECH

DEALING WITH ISSUES OF JURISDICTION AND ADMISSIBILITY: LESSONS FROM THE CONCILIATION (AND OTHER CASES)

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Thank you Ambassador Soares.

Good afternoon distinguished guests, ladies and gentlemen.

I thoroughly enjoyed our session this morning. I think it gave a good account of the conciliation between Timor-Leste and Australia, and the lessons we can all learn from its success.

This session allows us to take a deep-dive into one important aspect of the conciliation and dispute resolution more generally: that is the issue of jurisdiction and admissibility.

I am delighted to again be joined by a very learned and qualified panel, Mr. James Larsen and Ms. Tara Davenport. I may have to leave the more technical and legalistic points to my fellow panellists, but hopefully I can give you some insight from the Timor-Leste perspective on the issues of jurisdiction, particularly arising from the conciliation. I am sure throughout our discussion we will take lessons from other cases in the region as well.

We all know and can appreciate one of the fundamental concepts of international law is the sovereignty of States. This takes on many forms, but it includes jurisdictional sovereignty over lands and under UNCLOS, it includes an obligation to delimit sovereign rights at sea. Through the conciliation, Timor-Leste and Australia were able to delimit our sovereign maritime rights on a bilateral basis in the Timor Sea.

A somewhat more nuanced and complicated norm of international law that the conciliation also demonstrated, is State consent. Professor James Crawford explains of consent:

> *"… the jurisdiction of international tribunals depends on the consent of the parties; membership of international organizations is not obligatory; and the powers of the organs of such organizations to determine their own competence, to take decisions by majority vote, and to enforce decisions depend ultimately on the consent of member states".*

It is a bit crude to say, but effectively States pick and choose those aspects of the international system, or international dispute bodies, they wish to recognise. Liberalism provides the ideological basis incentivising States to consent to the jurisdiction of international courts and tribunals because collectively, it serves the interests of all States to operate in a open and rules-based order.

Timor-Leste, as a small and developing State has a unique history interacting with the international law system. Our faith in the collective liberal order means we accept the jurisdiction of the major international courts and tribunals, because just and rules-based interactions between States is in our critical national interest.

Yet, amongst the complexity of State disputes and State interactions there are challenges to this liberal ideal. Not all States accept the jurisdiction of the main international courts and tribunals like the International Court of Justice or the International Tribunal for the Law of the Sea. Furthermore, there is a common practice to dispute jurisdiction of the relevant dispute body in a particular dispute setting.

In the realm of private international arbitrations, the respondent party frequently disputes the jurisdiction of the arbitral tribunal. This tactic is commonly used as the means to most quickly and efficiently make a claim 'go away'. I can appreciate the reasons behind this in a commercial and private setting, whether it is between a State and an investor or between two investors of equal sophistication. However I think we can distinguish between private and public international law disputes in this regard.

Disputes between States take on a greater degree of solemnity, pride and symbolism. States are sovereign entities and when a peer seeks to hold it to account in the international system, the perceived subjugation of that State to a 'greater power' becomes a sensitive diplomatic issue. We see this in all manner of State disputes.

Accordingly, like in the private system, disputes in the public international law system are often subject to jurisdictional and competency arguments at the outset, where the respondent State seeks to have the matter dismissed on jurisdictional grounds rather than on substantive merits.

I accept in certain circumstances this is of course warranted. For instance in the case of a vexatious litigation. Equally though, as I think the conciliation showed, there are benefits to overcoming jurisdictional arguments and getting into the merits of the dispute. States should see the commencement of a dispute as an opportunity rather than a challenge to its supremacy in the international system.

Unlike private disputes which are necessarily confined to matters of commerce and business, the resolution of a State-based dispute opens the door for broader diplomatic rewards. That is, States have the capacity to bring about greater benefits from the resolution of their dispute than purely private entities. After all, States interact in a number of broad and complex fields, and not just on a contractual basis.

I think the conciliation is a perfect case study of this notion.

In August 2016, Timor-Leste and Australia went before the Conciliation Commission for one day of an open hearing followed by two days of closed hearings on jurisdictional arguments.

As came to be released by the Commission, Australia's main challenge to the jurisdiction of the Commission was based on the so-called CMATS moratorium provision, which sought to

postpone discussions on permanent maritime boundaries. Australia also argued a number of other technical points, including that the dispute did not arise prior to the entry into force of UNCLOS as Timor-Leste had only ratified UNCLOS in 2013.

In September 2016, the Commission released its competence decision. It was a remarkable result. On all six arguments, all five of the Commission members decided unanimously in Timor-Leste's favour. I am reliably informed just how rare such a result is.

To Australia's credit though, despite its initial position on jurisdiction, once the Commission decided against Australia, they resolved to participate in good faith as we moved to a substantive phase.

Let us however consider for one moment, if Australia was successful in its arguments that the Conciliation Commission was not competent. That is to say, the conciliation would have never proceeded.

In this context, Timor-Leste would have been forced to consider whether to accept the provisional resource sharing treaties or to consider other legal options, such as exercising a right within CMATS to unilaterally terminate that treaty, seek an ICJ advisory opinion or even seek to raise the matter at the United Nations directly. I do not think this would have been in either States' interests and certainly it would not have provided the investment certainty for the oil and gas companies with interests in the Timor Sea. The conciliation managed to address these matters upfront in well-under two years.

In another scenario, we could imagine if Australia decided not to dispute the competence of the Commission and instead proceed straight to the substance of the dispute. This would have sent an early positive message to the Commission and Timor-Leste that Australia wished to resolve the dispute and begin to break-down the impasse. As we know though, Australia did dispute the competence of the Commission. Indeed, it would have been a surprise if Australia did not dispute competence given its long-standing policy that the provisional resource sharing treaties were in accordance with UNCLOS.

We saw in the conciliation though the benefits of engagement in the merits phase. Today, the broader diplomatic benefits the conciliation process has brought to our relationship are evident. Since the conciliation, we have welcomed two of Australia's Foreign Ministers and the Prime Minister himself to Dili; such senior Ministerial visits had not occurred since around 2012. Beyond these official visits, our States are now depending and broadening our cooperation in a range of areas. Now, we focus on the future rather than the past. This broader cooperation would not have occurred if the conciliation did not proceed. I do not wish to contemplate how our relationship would be today if we were unable to resolve our dispute. Clearly, any further

protraction of the dispute would certainly have not been in the interests of the oil and gas companies operating in the Timor Sea.

State to State dispute resolution bears different hallmarks to that of the private dispute resolution field. While both are international in character, when discussing delicate issues of sovereignty, I consider that States should be more inclined to consent to participation, rather than automatically seek for the dispute to 'go away'. The peaceful resolution of disputes between States is something that should be celebrated rather than avoided.

As the conciliation showed, there are significant benefits to engagement, to good faith participation and in seizing the opportunity to resolve disputes for longer term benefit. This is consistent with the liberal international order.

Thank you Ambassador Soares and thank you to my fellow panellists.