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Models of Dispute Resolution Panel

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Thank you for the great introduction Professor Vasco, and thank you to my fellow panellists for being here, I look forward to hearing your insights as well in this session.

It has been a great workshop so far, hearing from experts from all over the region. This includes from lawyers, and decision makers and professors. We have heard at length about dispute resolution and the options that are available.

We also have in the room practitioners that are involved in maritime boundary negotiations and that might be exploring options to resolve their disputes.

We have also heard from our Chief Negotiator – and my boss - H.E. Xanana Gusmao; as well as Minister Agio, our Agent in the compulsory conciliation. It makes me reflect on what I could add after hearing from these two political giants of our nation.

So perhaps let me make some observations about my experience since I was appointed as the CEO of the Maritime Boundary Office – and how we looked at models of dispute resolution. That is, let me talk about the mechanisms of dispute resolution that were available to us.

Perhaps the first observation I will make – and please allow me to speak about the preliminary stages of dispute resolution – is that before you can resolve a dispute with another country, or before you can choose a dispute resolution mechanism – your own side must be united.

This may seem an obvious point – but we work in government and we all know that government can work in silos, that demarcation disputes are common and that people have different interests and priorities.

It is, of course, natural for resources people to be focused on where the resources are, and fisheries people to be focused on where the fish are, and Foreign Affairs people to be focused on bi-lateral relationships, the defence forces to be focused on security interests and finance people to be focused on money and the costs – and, of course, politicians to be focused on the politics. And these interests will not always align.

But maritime boundary delimitation is not like other public policy areas. It is a matter of the permanent sovereignty of your nation.

And so, the first step is to make sure you have a united approach. Before you consider the dispute resolution mechanisms you have available, you first need a united team that can come together and agree on a way forward.

That is why our office, the Maritime Boundary Office was established in 2015. It was to establish a single office to coordinate and support the government to achieve permanent maritime boundaries. We were fortunate to have such excellent leadership to forge unity not just within government but across the nation, between all political parties, civil society, and the people. This allowed us to speak with one voice – and this was critical to us.

Part of this involved our national elders as well. These are the people who have led our country and our people, and who have the respect of the nation. They are our former Presidents and Prime Ministers, our resistance leaders, our Parliamentary leaders. It was important that we brought all our leaders together – some of which are in this room today.

And so, we needed a unified front – in a complex environment.

The reason it was complex was because our situation with Australia was complex.

Because of this complexity – as you have already heard – we were not sure which path to take.

In fact, before we were able to select a dispute mechanism – or a path forward – we needed to know what our options were.

But we were not experts on the law of the sea – we know more about it now – but back then we needed expert advice on the mechanisms available to us. So we had to pull together a team. This is probably an easier task for some of the other countries represented here today.

For example, Indonesia has 10 maritime neighbours and decades of experience in the law of the sea, as well as being one of the leading nations in the development of UNCLOS. Compare this to Timor-Leste, a young country with limited human resources and, at the time, no standing capacity to manage maritime boundary disputes.

And so, our office began recruiting talented Timorese nationals while at the same time making sure we had expert advice available to us.

Then we sat down and looked at our options. It was important that we first exhausted our preferred mechanism of dispute resolution – which was dialogue and negotiation. Legal mechanisms should be a last resort.

We made representations to Australia at the highest level – indeed to multiple Australian Prime Ministers. In fact, sometimes we thought we might be getting a response from a different Prime Minister than the one we approached as at the time they seemed to changing on a frequent basis.

But it soon became clear to us that Australia's position was also united. They would not engage in maritime boundary negotiations to settle a maritime boundary with Timor-Leste.

So where did that leave us? What mechanisms were available to us to solve this dispute.

One option might have been diplomatic. We all know Australia has a firm commitment to the international rules-based order and that it advocates internationally for them. Australia is a model global citizen and it wants to be seen to be doing the right thing. However, this reputation was being put at risk by Australia's refusal to agree to maritime boundaries in the Timor Sea that were consistent with international law.

This meant that a diplomatic campaign was a plausible option. Of course, the Timorese have a long history with diplomatic campaigns. Tomorrow we will hear from one of the masters, H.E. Dr Jose Ramos-Horta.

However, the international community is fractured at the moment and different countries have their own interests and positions when it comes to the international law of the sea, so we could not be sure what support we would have been able to gain.

Plus, we are friend and neighbours with Australia. We did not want to embarrass Australia. In fact, we had just supported Australia for a position on the Security Council – a campaign that Gary Quinlan so successful won as Ambassador to the UN at the time.

So we did not consider this option. But I raise it just to note the complexity of international dispute resolution.

And so, we started to look at our legal options. Again they were limited. As you have heard, Timor-Leste is a big supporter of international law and the rules based international system. We would have been happy for an international court or tribunal to make a decision on our maritime boundary.

I know this would be a big step for other countries – to trigger a binding dispute resolution mechanism. There are lots of issues to take into account – not least that you lose control of the outcome.

It is common when deciding on a dispute mechanism to consider your BATNA. That is, the 'best alternative to a negotiated outcome'.

Simply, what is the best alternative mechanism to use if negotiations fail or an agreement cannot be reached?

Well, Timor-Leste did not have the option of a negotiated outcome so we had to explore the alternatives.

However, we also did not have the alternative of a binding legal mechanism. This is because, of course, Australia had "opted out" of the jurisdiction of the binding international mechanisms that we could have used to settle the dispute.

Coming to terms with these realities was the first step for us.

So we went back to look at UNCLOS. And might I say, the drafters of UNCLOS should be commended. Not only did they create the constitution of the oceans that has done so much to promote peace and cooperation – but they created a balanced and effective document.

The debates at the UNCLOS conventions are well documented. One key issue was whether or not there should be a binding option mechanism for all maritime boundary disputes. Of course, a number of countries objected to this. And so the drafters provided two options – a binding mechanism for those countries which were ok with that – and a non-binding option for countries that were not.

And it was one or the other. A country could not opt out of *both* mechanisms.

As was discussed in the previous session on jurisdiction, Australia was unable to opt out of the second mechanism, the non-binding mechanism – which as we all know was compulsory conciliation.

And so, we had one real mechanism available to us - but we were nervous.

- First and foremost, this mechanism had never been used before – we had no precedent to work with about how this model would operate.

- As we have heard in the previous sessions, there was a risk of a jurisdiction challenge (which of course happened).

- Finally, the risk that it would not provide a solution, as the process would not bind Australia.

That said, it was important to Timor-Leste that a report from the Commission would go to the UN Secretary General, we were prepared to negotiate based on that report – the outcome we got was the best case scenario.

But this was not all. One of the best things about this model was that it allowed us to explore dispute settlement means beyond the confinement of the legal framework.

In one sense, we got the best of both worlds. While the compulsory conciliation process was non-binding, there was also a stick attached – and the stick was the report to the Secretary-General.

During the process, we were, of course, conscious of these aspects of the conciliation mechanism. However, our leader in the negotiations, Chief Negotiator, His Excellency Xanana Gusmao, managed our approach well. He set our strategy and was a master – making sure we never lost sight of our principles and remained focussed on the result.

Key Reflections

Of course, this was Timor-Leste's experience. Every country will have different circumstances, different bi-lateral relationships, different historical contexts which will shape the mechanisms available to them and the strengths and weaknesses of each approach.

Timor-Leste would be pleased to share our experience with whoever may ask us – we want to help countries resolve their disputes. We are most familiar with the mechanism of compulsory conciliation and can speak to this well – but it may not be the right model for all countries, in fact, it may not be available to all countries. We also have Mana Philippa Venning to speak next who will be able to give a perspective from Australia – a country that has been very successful in settling its maritime boundaries with it neighbours.

I'm also pleased we have Pak Damos Agusman on this panel, as he has huge experience and knowledge in this area – across many jurisdictions, bi-lateral contexts and legal circumstances – so I look forward to hearing his insight on this issue, not least because we now look forward to negotiating our maritime boundary with Indonesia. So, any secrets you'd like to share with us, please do so!

Thank you for listening to another perspective from Timor-Leste about the mechanisms we have looked at and the paths we have taken in resolving our maritime disputes.