Asia Pacific Policy Bulletin

July 2008 Issue No. 01

PHILIPPINE MARITIME TERRITORIES AND JURISDICTIONS
Part I: Why the Law of the Sea is So Critical for the Philippines

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The recent controversy over the Joint Marine Seismic Undertaking or JMSU (the tripartite agreement between state oil companies of the Philippines, China and Vietnam to conduct pre-exploration surveys in the Kalayaan Islands) has sparked an open and heated discussion about the extent of the maritime territories and jurisdictions of the Philippines. It is a debate long overdue. Unfortunately, today it is not a sanguine debate, but an emotional one fought on the basis of assumptions, speculation, misinformation, and misunderstanding, aggravated by intense suspicion. To continue on the line of reasoning proposed by some of the prominent voices in this public debate actually leads to disaster, with potential results contrary to what they expect. Thus, it is important to clarify the main issues in this discussion so as to make well-informed decisions. This series presents an independent international maritime law perspective for consideration.

The International Law of the Sea

International law relies on the basic principle of state sovereignty and consent. What this means is that all States are equal and no State can be placed under the control of any other or others, and that in order to be bound by international law (whether in treaty or custom) they must first give their consent to be bound. This is not the same in national law, where citizens are bound by their country's laws, and have a government with executive, legislative, and judicial branches that can impose them. The United Nations is not a world government; the UN General Assembly is not a legislature. They cannot compel any State to do anything without its consent. The International Court of Justice is an arbitral tribunal, not a judiciary. It cannot adjudicate on any case unless the States involved mutually agree to submit the case for adjudication. None of these international bodies, and others like them, can compel any State to do anything. To do so would violate the principle of state sovereignty and consent. This is why recognition of a State's exercise of sovereignty by other States is very important. What makes States comply with international law is mainly the common expectation that in doing so, other States will reciprocate. It is also obvious that cooperation on equal terms and under a mutually-acceptable set of rules is preferable to conflict.

The present state of international law on maritime territories and jurisdictions is the product of hundreds of years of evolution, culminating most recently in the entry into force of the UN Convention on the Law of the Sea (UNCLOS). It was first debated by colonial powers like the British and the Dutch, who argued whether or not the seas should be subject to state sovereignty back in the 17th century. Since every colonial power depended on mobility through the seas, eventually the rule that prevailed was that the seas could not be placed under the sovereignty of any State. All States were entitled to the freedom of the high seas. The only exception was with respect to the coastal waters which were not considered to be included in the high seas, referred to as the territorial waters. This then became the focus of the debate: for the longest time, States abided by the so-called "cannon-shot rule," which meant that the State's sovereignty extended to the sea only as far as its can-

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nons could reach. This was originally assumed as 3 miles. Obviously, this rule could not hold for long as technology developed, but it was accepted by most states until well into the 20th century.

In 1946, the United States laid the first claim to exclusive resource rights and jurisdictions over the continental shelf (the underwater prolongation of land beyond the coastline), which had no definite boundaries. In a carefully-worded proclamation, it took care to limit its claim of jurisdiction to the non-living resources in the seabed (such as oil and gas), and reiterated that this did not amount to a claim to total sovereignty. In the years that followed, other countries followed suit, but in addition began claiming territorial waters of various widths, ranging from the 3 miles up recognized by the maritime powers, up to 300 miles claimed by some South American countries. The fact that there were so many varied claims to the extent of maritime territory and jurisdiction was one of the reasons why the negotiations for the UNCLOS were begun. Some of the main advocates of this international law-making exercise came from the developing States who were concerned about the uncontrolled appropriation of the seas. Many of its main opponents were the maritime powers who resisted any further seaward expansion of State rights and jurisdictions.

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It took 3 multi-lateral conferences and almost 30 years to negotiate the UNCLOS. To date, an overwhelming majority of coastal states, 155 out of the 193 members of the UN, have ratified the UNCLOS, and there can be no question that it is a definitive statement of international law and a delicate balance of State interests. Among many other things, States have agreed to a range of maritime zones of varied widths and over which they exercise either sovereignty or jurisdiction. This includes a territorial sea of 12 nautical miles, a contiguous zone of 24 nautical miles, an EEZ of 200 nautical miles, and a continental shelf of up to 350 nautical miles depending on certain conditions. Archipelagic States are additionally entitled to archipelagic waters. Two fundamental principles underlie this system of maritime zones: (1) they are extensions of the land territory of States to areas beyond the coastline, and (2) the farther one is from shore, the less the jurisdiction that the State can exercise. Complete state sovereignty is recognized only within the internal waters. In territorial waters and archipelagic waters, States allow all ships to simply pass through (if they do anything else while passing, they may be subject to State jurisdiction). Beyond that distance, States have steadily less than full sovereignty and only specific powers (especially access to natural resources), until the 200 nautical mile limit where the high seas begin. From there, the freedom to navigate and use the high seas remains, and the seas are the common heritage of humanity.

The International Treaty Limits

In official Philippine maps, the "International Treaty Limits" is the term used to refer to the traditional maritime boundaries of the Philippines as described by the 1935 Constitution. Its article on national territory refers to the *Treaty of Paris of 1898* and the *Treaty of Washington of 1900*, both between the US and Spain, and the *1930 Convention between the US and the UK*, as defining our borders (see map). It assumes that the US defined the territorial borders of the Philippines in these treaties of the colonial era.

When the Philippines responded to the call of the UN for the first conference on the Law of the Sea in 1958, it argued that the combined treaty limits comprised our maritime boundaries, and that all waters within these limits were its national or inland waters. It was a position that for the next two decades of negotiation, former Senator Arturo Tolentino and his delegation fought for valiantly. Ultimately, the international community rejected it.

The original party to these treaties, the United States, never conceded that the limits were territorial boundaries. Up to that time, it recognized only the 3-mile limit for its own territory as well as for other countries. The Philippines was no exception, and the US sent a diplomatic note that said so. This limit is even mentioned in the cases of *U.S. vs. Bull* and *U.S. vs. Wong Cheng*, which are still among the basic cases in Philippine criminal law today. Up to the signing of the UNCLOS, Tolentino tried to preserve the delegation's position. He entered into the record a declaration that, among others, the UNCLOS did not diminish the sovereign rights of the Philippines "as successor to the United States of America" arising from those 3 treaties. Since then, it has been expressly

objected to by Australia, Belarus, Bulgaria, China, Czech Republic, Russian Federation, Slovakia, Ukraine, and Vietnam. Other states such as Belgium, Denmark, Germany, Netherlands, and the UK have made statements that similarly contradict any possible effect of the declaration. Based on the records of the UN Secretary-General, the Philippine declaration is notable for having drawn the most number of objections from other states.

If one took the time to look carefully at those treaties and actually draw the limits they describe, one cannot help but raise doubts. The 1898 Treaty of Paris refers only to "the islands lying within" the treaty limits, not the waters, and excludes a number of indubitably Philippine islands in the north and southwest. This was why the 1900 Treaty of Washington came into being, to clarify that those islands outside of the Treaty of Paris limits were still part of the Philippines. But this second treaty does not define any boundaries. The 1935 Constitutional Convention delegates even proposed that the northern limits should be corrected and moved upwards (due to an ambiguity in the northern limit's location), which by then was certainly not an act by treaty. And the 1930 Convention between the US and UK speaks of "a line separating the islands" of the Philippine archipelago and Borneo, not a territorial boundary. Although they start and end at points described in the Treaty of Paris, they cannot be considered an amendment of the latter because they are between different parties. And, it was a moveable boundary depending on more accurate surveys.

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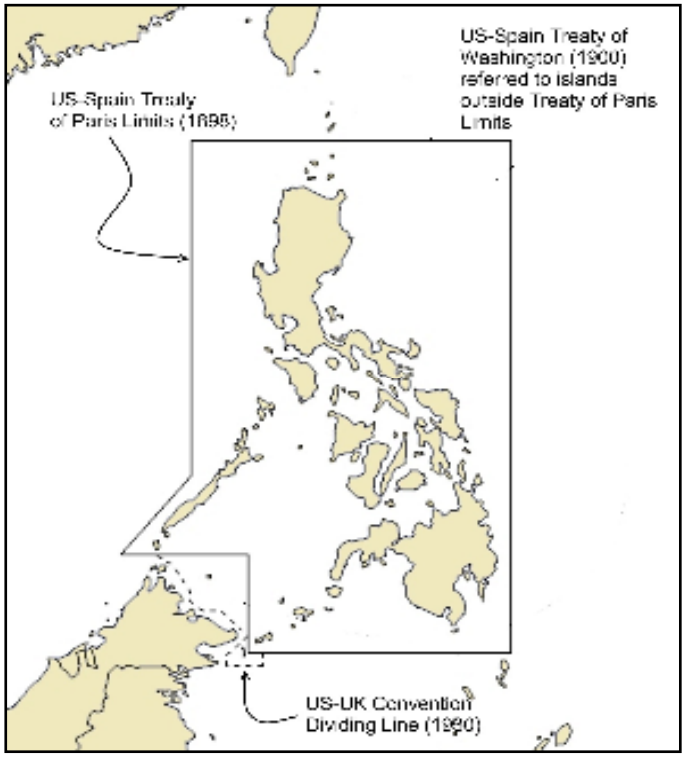

The fact that these treaties refer to islands, and do not expressly refer to territorial boundaries, is very significant because they are evidence of the official US position that under American rule, Philippine sovereignty did not extend beyond the 3-mile territorial waters. "The spring cannot rise higher than its source," as an ancient legal maxim says.

Maritime Loss or Gain?

What these tend to show is that the "International Treaty Limits" may not be an internationally-recognized boundary. As far as international law is concerned, they are unilateral declarations of the Philippines that certain fixed points in the sea define our national territory, first made through the 1935 Constitution. That position has been expressly objected to by other States as inconsistent with international law as currently embodied in UNCLOS.

Some are outraged at the suggestion that the International Treaty Limits are not our borders, and see it as a reduction of our national territory. But this assumes that the country is losing internationally-recognized maritime space. Maritime territories and jurisdictions are a matter of international law, not just national law. Whether or not the Philippines can legally exercise its sovereignty or jurisdiction over any activity conducted by another State 100 nautical miles away from Palawan, for example, depends not only on the existence of a domestic law, but also on that law's consistency with international law and acceptance of the affected States. The International Treaty Limits are not universally recognized as comprising the full extent of the Philippine national territory. As far as the world is concerned, our territorial waters end at 12 nautical miles from each island's shores. The US even stresses this point by regularly sending warships

through Philippine waters without notice under the US Navy's Freedom of Navigation Program. This has been going on for decades.

On the other hand, if we take a look at UNCLOS, what exists is an opportunity to expand beyond those island belts. Under UNCLOS, the Philippines can enclose even much larger bodies of water than within the treaty limits, and place them under internationally-recognized sovereign rights and jurisdictions. This includes sovereignty over archipelagic waters, which can extend farther than what non-archipelagic states are entitled to. For this, we need to define the baselines along our coast and then extend the maritime zones from them. We can enclose the Sulu Sea and all inter-island waters without question, even if beyond the 12 nautical miles from shore. Practically all of the important living and non-living resources and presently possible uses of the ocean, from fishing to petroleum exploitation, would fall within those maritime zones and our control over them would not be subject to question so long as we abide by UNCLOS. These maritime zones encompass a much greater area than was ever included in the International Treaty Limits.

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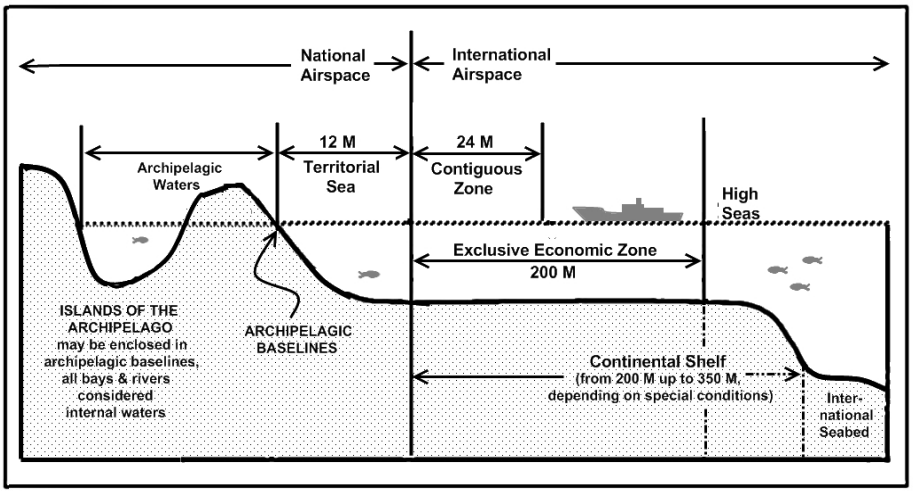
These advantages come at a price: we are to allow the passage of foreign vessels, including submarines, through those waters under certain conditions, but only as long as they are only passing through and not making a call to any port. If they do anything not connected with simply passing through, then we have the right to exercise our sovereignty and jurisdiction. UNCLOS does not impede our right to defend ourselves from threats to our national security. This is the price negotiated as part of UNCLOS. Some believe that this is an unacceptable derogation of sovereignty. But the question needs to be asked, has this not been happening ever since? The Philippine economy depends utterly on both domestic and international maritime transportation. We are one political unit, not scattered islands, precisely because of that maritime linkage. Malaysia, Turkey, and several other countries of the world have thousands of ships passing through their territorial waters every day, are they any less sovereign because of this? What exactly is this sovereignty that we fear losing?

--- TO BE CONTINUED in Part 2: The Kalayaan Island Group and the JMSU: Exploring the Legal Issues and Part 3: Baselines and the Future of the Philippines



UNCLOS Maritime Zones as applied to Archipelagic States
(Adapted from Schofield 2003)

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