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PHILIPPINE MARITIME TERRITORIES AND JURISDICTIONS

Part II: The Kalayaan Islands and the JMSU: Exploring the Legal Issues

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Why Are Islands Important?

Out at sea, sovereignty is faced with more difficult and practical obstacles. No one can put a fence in the sea, and it is progressively more difficult and expensive to maintain a constant presence the farther one is from shore. Living resources (e.g. fisheries, corals and other aquatic flora and fauna) move without regard to any human-imagined boundaries, while non-living resources (oil, gas and other minerals) remain largely inaccessible without high technology. Without land to stand on, one's actual control of the seas can rapidly disappear. This is one reason why islands have become such a contentious item in international politics.

The Kalayaan Island Group

The KIG is not within the Treaty of Paris limits. In drawing the limits described in the Treaty of Paris, the US and Spain avoided encompassing the islands west of Palawan which were then unoccupied and contested between France (the colonial power over Vietnam at the time), Japan, China, and Great Britain. Contrary to what some have stated, our sovereignty over the KIG does not depend on the Treaty of Paris.

In 1956, Tomas Cloma, who owned a maritime school and a fishing fleet, made a public announcement stating that he had discovered a chain of islands west of Palawan and established his own State there called Freedomland. He made it his own private capacity and not on behalf of the Philippine government. The Quirino Administration did not support Cloma when Taiwan and Viet Nam took steps to prevent his return, and only issued pacifying and equivocal statements to the protesting countries. With all due respect to Cloma's efforts, though, his action is not a valid starting point for Philippine sovereignty over the KIG. The private actions of citizens do not bind their respective States under international law.

In 1971, the Marcos Administration secretly sent troops to occupy 7 of the biggest islands west of Palawan beyond the Treaty of Paris limits. The occupation was announced a year later, and began a cycle of island-grabbing (and much later, reef-grabbing) in the South China Sea by Vietnam, Malaysia, Brunei, and China. Seven years later, President Marcos issued PD 1596 that formalized the Philippines' position regarding the status of the islands. PD1596 declared Philippine sovereignty over a huge area of the waters and islands of the South China Sea, and called it Kalayaan, the new municipality of Palawan. It does not cover the entire Spratly Island group, and not Spratly Island itself.

Just because the official action of the Philippines came late in the day does not mean that it is not entitled to sovereignty over the KIG. International law recognizes several means of acquiring island territories, among them effective occupation and administration. The late Haydee Yorac, in a study written in 1986,

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pointed out that despite being the latest claimant, the Philippines had the strongest legal position because we applied these principles of effective occupation and administration to the islands of the KIG. As long as we manage and govern them just like any other part of the country, we are doing this.

Sovereignty over the KIG

It is extremely important to stress here that the UNCLOS cannot be used to justify, or as some say, "strengthen our claim" to the KIG. The maritime zones over which States can exercise certain rights flow from the land, not the other way around. The territorial sea, contiguous zone, EEZ, and continental shelf of any country are extensions of sovereignty over land territory; they cannot impart sovereignty over any islands, or to any part of the seabed that is always under water. Entirely different principles in international law apply to sovereignty over the islands in the KIG, while UNCLOS separately determines the maritime zones around them.

Implementing the UNCLOS is not like getting a Torrens Title. The act of enclosing islands like the KIG in archipelagic baselines together with the main Philippine archipelago does not change the status of sovereignty over them. No rule in law requires absolute contiguity of land territories separated by the sea. For example, New Zealand does not enclose all of its islands, while the US does not enclose Hawaii, within a single set of baselines. Yet they remain indubitable parts of their respective national territories.

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Some have argued that nonetheless, we should draw our baselines to enclose the KIG and then let the UN decide. This is reckless and self-contradictory. Sovereignty demands that a State should not allow itself to be controlled by any other State or other entity. To say that the Philippines should let the UN decide the consequences of its actions is nothing less than abdicating its fate to some unknown States. Besides, the UN is not a court, nor is it a third-party adjudicator. Even the International Court of Justice cannot act unless the disputing States agree to submit to its jurisdiction and agree to have the case resolved; afterwards they then also have to decide to comply with the judgment. No State can be "hailed to court" in the same way that a person can be summoned to the Regional Trial Court.

For government officials to even say that we have a weak claim to KIG is in itself dangerous. By virtue of its uninterrupted, actual occupation and continuous, effective administration by the Philippines since the 1970s, the KIG is undeniably part of the Philippine national territory, a municipality of Palawan. To call it a "claim" that needs "strengthening" is an implied admission against interest that our sovereignty over the area is not yet absolute. Government officials, whether administration or opposition, national or local, must take note of this. In the *Nuclear Test Cases*, the International Court of Justice enunciated the principle that unilateral acts or public statements by a competent public official of a State concerning legal or factual situations may give rise to international obligations in certain instances. Since our main strength over the KIG is our legal position (as opposed to, say, military superiority or economic capabilities), the greatest threat to Philippine sovereignty over the entire KIG may be careless statements from officials in government that tend to denigrate its legal status. Prudence is required.

The Joint Marine Seismic Undertaking

The JMSU, through which the Philippines, China, and Vietnamese national oil companies jointly engage in seismic surveys within the KIG, has been portrayed as a diminution of sovereignty. Seismic surveys use reflected waves of sound to create a very rough picture of the layers of rock beneath the seabed. They do not reveal exactly where petroleum is located, but they give a better idea of where to look for it. The only way to know for sure is through exploratory drilling, which is no longer part of the seismic work. An exploratory well costs at least 10 Million Dollars to drill on land (several times more at sea), and has only 10% chance of actually striking petroleum. Due to this, petroleum exploration cannot be random, thus the need for seismic surveys.

It has been argued that the conduct of

seismic surveys, and impliedly other similar surveillance work with foreign participation, is in itself a threat to national sovereignty because it may be used for the purpose of future exploitation. But since the early 1900s, surveys have been conducted all over the country by private, public, and academic sectors, both local and foreign. The US National Geophysical Data Center makes publicly available not only seismic, but also hydrographic, magnetic, gravimetric, and many other types of information from over 100 surveys in the waters around the country. The DOE holds confidential the records of hundreds of seismic surveys, many by foreigners, and recently has contracted even more, on much of our land and water areas. Anyone can download a complete set of satellite photographs of the Philippines showing every forest, river, coral reef, and mangrove all over the country. Any of these surveillance activities may be used for future exploitation of resources. That they *might* be used is not what constitutes a derogation of sovereignty. Rather, it is whether the country cannot control what is actually done by anyone using the information they reveal. Sovereignty is about controlling real actions, not fearful speculations.

"Sovereignty is about controlling real actions, not fearful speculations"

What appears to make some people nervous about the JMSU is China, who claims the entire South China Sea, up to several nautical miles close to our shores, on historical grounds as part of its national territory. The allegation that China's participation may be in exchange for certain corrupt deals such as the NBN-ZTE project aggravates the suspicion. However, China's claim to complete sovereignty over the entire South China Sea can never stand in international law. No country can place the seas under its sovereignty except in accordance with the rules now embodied in UNCLOS. The structure on Mischief Reef, and others like it, can never legally impart sovereignty because the reef is perpetually submerged and therefore part of the sea.

Some have argued that the JMSU either strengthens China's position on its claim or weakens the Philippines' sovereignty to the KIG. But all parties have stated officially that the JMSU is not intended to undermine their respective positions on the South China Sea. Unlike national law where the legal effect of statements in a document is determined by law, in international law the official statements and positions declared by the State parties to any issue have significant and oftentimes controlling weight. As long as the parties consistently say that the JMSU does not prejudice their respective positions, then that is the legal effect of the agreement. That is the impact of the principles of state sovereignty and consent.

One problem with the JMSU is that it departed from the long-standing policy of the Philippines to treat the competing claims in the South China Sea as a multi-lateral issue. Philippine foreign policy has worked long and hard for a multi-lateral approach vis-à-vis China in moving toward some future negotiated settlement. Vietnam was a very close ally in this effort. That was greatly undermined by suddenly entering into a bilateral agreement with China; so Vietnam had very good reason to protest against such a move until it was invited to be part of the agreement. Vietnam claims the entire island group west of Palawan, including the KIG, and previously tried to attract its own petroleum exploration in the area.

Another problem seems to be that the original RP-China agreement was negotiated primarily by the Speaker of the House. It does not appear that he was sent specifically to initiate negotiations about this complex issue. Due care and diligence requires that the negotiation of international agreements be very well-planned and consistent with previous and existing foreign policy. These requirements cannot be met when negotiations are handled by a legislator whose duties are entirely different.

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The biggest problem for the public is the cloak of secrecy thrown over the agreement. While confidentiality is a standard practice in the commercial oil industry, contracts invested with public interest must be transparent in accordance with the normal demands of public accountability. Besides, the confidentiality with respect to the specific data and findings may remain; it is the general agreement that

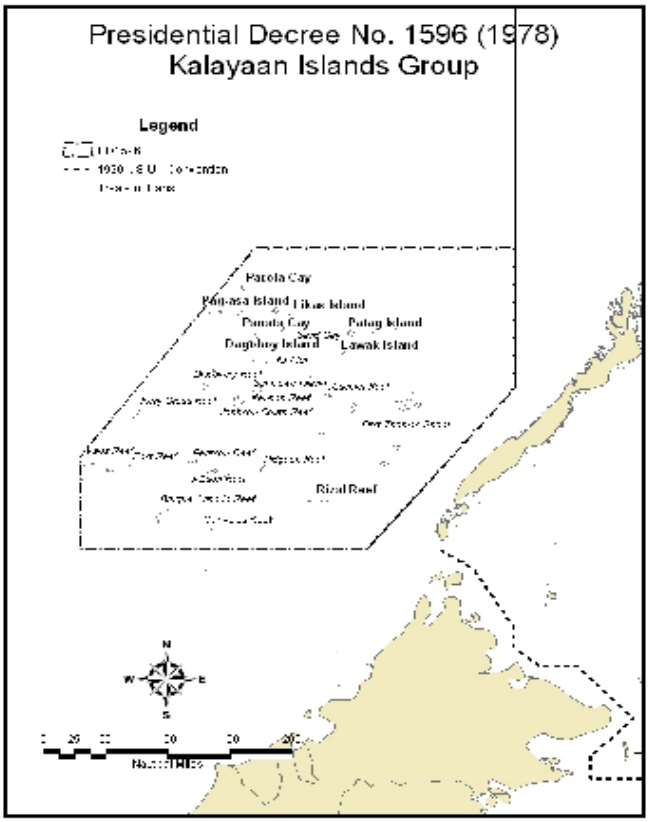
is a valid public concern. Secrecy, especially on sensitive matters, only fuels distrust and speculation.

These problems are not unsolvable. The JMSU is only for a limited time, and its scope is only seismic survey work. Assuming that the terms of the agreement as released by Sen. Lacson's office and the tripartite agreement are the same, any action after the survey work is completed is subject to new negotiations. Unlike the usual petroleum service contracts issued by the DOE, it is not directly convertible into exploratory drilling, development, and production contracts. There is no commitment to do anything further. After the agreement lapses, the Philippines thereafter is free to continue pursuing petroleum exploration and development, as it has been doing in the same area for the past several decades. But these are assumptions; they are best proven only by revelation of the agreement's contents.

The remaining issue then is the constitutionality of a JMSU where the Philippines has a co-equal share with China and Vietnam, instead of a 60%-40% share. Whether the Supreme Court will declare it unconstitutional depends on whether it will use the same reasoning as in its ruling in the case of *La Bugal B'laan vs. Ramos*, which permits up to 100% foreign-ownership of mineral exploration and production permits. Its nature as an international commercial agreement between the national oil companies of three countries adds only more complications.

Given the apparent lack of careful consideration about the JMSU, the legal complications it introduces, and how it affects the situation in the South China Sea, a more prudent course of action at this point would seem to be to reveal its contents and allow it to lapse. The results of the cooperation then have to be carefully reviewed. If indeed there have been promising findings, any further action involving resource exploitation must be very deliberately considered and coordinated. Until the government comes up with clear policies and long-term plans to govern all related initiatives, it is better to act with utmost caution and transparency. Ultimately, joint development of the South China Sea is probably the only peaceful way out of the territorial disputes, but such cooperation should be the result of careful preparation and strategy, not improvisation.

---TO BE CONCLUDED in Part 3: Baselines and the Future of the Philippines



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