THE LEGAL STATUS OF THE PHILIPPINE TERRITORIAL WATERS CLAIM IN INTERNATIONAL LAW

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Abstract

This paper will analyze the legal status of the Philippine territorial waters claim in international law. The paper will be of two parts. In the first part, the international law of territorial waters will be discussed to provide the theoretical and conceptual background to the issue. This part will elaborate on the breadth of the territorial sea as both a conventional and customary rule of international law and will analyze State practice in terms of territorial sea claims. In the second part, the legal status of the Philippine territorial waters claim will be examined vis-à-vis the customary and conventional international legal obligations of the Philippines as well as in relation to treaty interpretation and acquiescence of the international community.

Keywords: Philippine Territorial Waters Claim, Treaty Limits, Territorial Sea, Law of the Sea, International Law

I. Introduction

The Philippines claims a polygonal territorial sea[1] of irregular width at some

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[1] It was at the Conference for the Codification of International Law, held at the Hague, Mar. 13–Apr. 12, 1930, that the Second Committee (Committee on Territorial Waters) chose the term "territorial sea" in preference to the more commonly used term "territorial waters." In 1952, at its fourth session, the International Law Commission decided, in accordance with a suggestion of the Special Rapporteur, Mr. J.P.A. François, to use the term "territorial sea" in lieu of "territorial waters". *See Report of the International Law Commission to the General Assembly*, [1956] 2 Y.B. INT'L L. COMM'N, U.N. Doc. A/2163, ¶ 37. The UN General Assembly, however, in its relevant resolutions, continued using the term "territorial waters" in the title of the topic. As noted by Professor Nordquist: "The terms "territorial sea" and "territorial waters" are used interchangeably

points exceeding twelve nautical miles in width.[2] The critical issue that needs to be addressed is this: is the Philippine territorial waters claim valid in international law?[3] In order to answer this question the international law on the territorial sea must be examined and its rules on the maximum breadth of the territorial sea analyzed.[4]

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in State practice (including treaties and legislation), judicial decisions and arbitral awards and in literature. There is no substantial difference between these two terms, although there may be a subtle distinction in that territorial "waters" sometimes encompass internal waters." UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY 55-56 (Myron Nordquist, ed., 1985). In this paper, the terms "territorial sea" and "territorial waters" will be used interchangeably. The words "breadth," "extent," and "limit" are all used in the same sense and also used interchangeably.

[2] Three colonial treaties define the territorial boundaries of the Philippines: (1) *Treaty of Peace between the United States of America and the Kingdom of Spain,* U.S.-Spain, Dec. 10, 1898, T.S. No. 343 [Hereinafter referred to as *Treaty of Paris*]; (2) *Treaty between the Kingdom of Spain and the United States of America for Cession of Outlying Islands of the Philippines*, U.S.-Spain, Nov. 7, 1900, T.S. No. 345; (3) *Convention Between the United States of America and Great Britain Delimiting the Boundary Between the Philippine Archipelago and the State of North Borneo*, U.S.-U.K., Jan. 2, 1930, T.S. No. 856. For academic material on the Treaty of Paris limits, *please see* LOWELL BAUTISTA, THE PHILIPPINE TREATY LIMITS: HISTORICAL CONTEXT AND LEGAL BASIS IN INTERNATIONAL LAW (2015); Lowell Bautista, *The Legal Status of the Philippine Treaty Limits in International Law*, 1 AEGEAN REV. L. SEA & MAR. L., 111-139 (2010); Lowell B. Bautista, *The Historical Context and Legal Basis of the Philippine Treaty Limits*, 10 ASIAN PACIFIC L. & POL'Y J., 1-31 (2008); Lowell Bautista, *The Historical Background, Geographical Extent and Legal Bases of the Philippine Territorial Water Claim*, 8 J. COMP. ASIAN DEV., 365-395 (2009); *But see* Magallona v. Ermita 655 SCRA 477 (2011), where the Philippine Supreme Court rejected the argument that the Treaty of Paris lines should be the baselines of the Philippines from where to measure its maritime zones.

[3] *See generally*, Joseph W. Dellapenna, *The Philippines Territorial Water Claim in International Law* 5 J. L. & ECON. DEV. 45 (1970-1971). *See also*, Lowell Bautista, *Philippine Boundaries: Internal Tensions, Colonial Baggage, Ambivalent Conformity*, 16 J. SOUTHEAST ASIAN STUD. 35 (2011); Lowell Bautista, *The Legal Status of the Philippine Treaty Limits in International Law*,' 1 AEGEAN REV. L. SEA & MARITIME L. 111 (2010); Lowell Bautista, *The Philippine Treaty Limits and Territorial Water Claim in International Law,* 5 SOC. SCI. DILIMAN 107 (2009).

[4] Henry M. Arruda, *The Extension of the United States Territorial Sea: Reasons and Effects* 4 CONNECTICUT J. INT'L L. 697 (1989); Loftus Becker, *The Breadth of the Territorial Sea and Fisheries Jurisdiction,* 40 Dep't St. Bull. 369 (1959); H. S. K. Kent, *Historical Origins of the Three-Mile Limit* 48 AM. J. INT'L L. 537 (1954); H. Gary Knight, *The 1971 United States Proposals on the Breadth of Territorial Sea and Passage through International Straits,* 51 OREGON L. REV. 759 (197); Geoffrey Marston, *The Evolution of the Concept of the Sovereignty over the Bed and the Subsoil of the Territorial Sea,* 48 BRITISH Y.B. INT'L L. 321 (1977); D. P. O'Connel, *The Juridical Nature of the Territorial Sea,* 45 BRITISH Y.B. INT'L L. 303 (1971); Shigeru Oda, *The Extent of the Territorial Sea -*

The question, although theoretical in nature, actually presents a host of practical issues. For instance, even proceeding from the premise that the maximum breadth of the territorial sea allowed under contemporary international law is twelve nautical miles, it must be asked, does this permit of exceptions? In what cases does the rule not apply? If there is such an exception, does the Philippine case fall within the exception? Is a coastal State entitled to extend its territorial sea to more than twelve nautical miles from the baseline? Is a territorial sea extension of more than twelve nautical miles violative of conventional and/or customary international law? These questions will be addressed in this paper.

II. The International Law of Territorial Waters

The historical development of the issue on the delimitation of the outer limit of the territorial sea has been one of the most divisive issues in the law of the sea.[5] It has been particularly contentious for two reasons: first, because of its impacts on passage through straits used for international navigation;[6] and second, because the freedom of navigation in some parts of the high seas would be subject to the limited right of innocent passage.[7]

Some Analysis of the Geneva Conferences and Recent Developments, 6 JAPANESE ANN. INT'L L.7 (1962).

[5] UNCLOS I and UNCLOS II, as well as the previous 1930 Codification of International Law efforts, all failed to reach an agreement on the maximum breadth of the territorial sea. This is the reason why Article 3 of the LOSC is widely regarded as "one of the major achievements of UNCLOS III." NORDQUIST, *supra* note 1, at 77.

[6] H. Gary Knight, *The 1971 United States Proposals on the Breadth of Territorial Sea and Passage through International Straits,* 51 OREGON L. REV. 759 (1971-1972); Frank Nolta, *Passage through International Straits: Free or Innocent—The Interests at Stake,* 11 SAN DIEGO L. REV. 815 (1974); *but see* Horace B. Jr. Robertson, *Passage through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea,* 20 VIRGINIA J. INTL'L. 801 (1979).

[7] William L. Jr. Schachte & J. Peter A. Bernhardt, *International Straits and Navigational Freedoms* 33 VIRGINIA J. INT'L L. 527 (1993). Please note that this also affects aircraft which do not have the right of innocent passage over the territorial sea. DAVID JOHN HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 353–354 (1991); MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 177 (1992).

The heated debates mirrored the centuries-old conflicting theories of free seas (*mare liberum*) versus closed seas (*mare clausum*).[8] The opposing sides come from two conflicting interests: on the one hand, the interests of the maritime States; and on the other, the interests of the coastal States. The maritime States claim the free usage of the seas while the coastal States assert their exclusive sovereignty over maritime areas adjacent to their coastlines.[9]

The interests of the coastal States in the extension of their jurisdiction over the sea area along their coastlines can be summed up into three: first, the protection of their security; second, the furtherance of their economic interests; and third, the protection of the marine environment.[10] The maritime powers, for their part, sought to preserve and protect freedom of these same areas for navigation, overflight, and the utilisation of the resources therein.[11] The law of the sea in general, and the *United Nations Convention on Law of the Sea* (LOSC)[12] in particular, developed to strike a balance between these interests.[13]

In order to trace the origin and development of the territorial sea concept, it is not necessary for the limited purposes of this paper, to give a detailed explanation of its foundations in Roman law,[14] through the maritime account of the Middle Ages,[15] to the comments of Hugo Grotius, and beyond through

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[8] Mónica Brito Vieira, *Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden's Debate on Dominion over the Seas,* 64 J. HISTORY IDEAS 361 (2003).

[9] In the words of E.D. Brown, "the history of the modern international law of the sea can perhaps be best understood by perceiving it as a continual conflict between two opposing, yet complementary, fundamental principles — territorial sovereignty and the freedom of the seas". E.D. Brown, *Maritime Zones: A Survey of Claims,* in 3 NEW DIRECTIONS IN THE LAW OF THE SEA: DOCUMENTS 157 (Robin Churchill, Myron H. Nordquist and S. Houston Lay eds., 1973).

[10] C. JOHN COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 87 (1967).

[11] Farhad Talaie, *Analysis of the Rules of the International Law of the Sea Governing the Delimitation of Maritime Areas under National Sovereignty,* 35 (PhD Thesis, University of Wollongong, 1998) (on file with the University of Wollongong Library system).

[12] *United Nations Convention on the Law of the Sea*, opened for signature Dec. 10, 1982, 1833 UNTS 3 (entered into force Nov. 16, 1994). Hereinafter, LOSC.

[13] Rudiger Wolfrum, *The Legal Order for the Seas and Oceans,* in ENTRY INTO FORCE OF THE LAW OF THE SEA CONVENTION 162 (Myron H. Nordquist & John Norton Moore eds., 1995).

[14] Percy Thomas Jr. Fenn, *Origins of the Theory of Territorial Waters,* 20 AM. J. INT'L L. 465 (1926).

[15] THOMAS W. FULTON, THE SOVEREIGNTY OF THE SEA: AN HISTORICAL ACCOUNT OF THE CLAIMS OF ENGLAND TO THE DOMINION OF THE BRITISH SEAS, AND OF THE EVOLUTION OF THE TERRITORIAL WATERS, WITH SPECIAL REFERENCE TO THE RIGHTS OF FISHING AND THE NAVAL SALUTE 3-6 (1911); PITMAN B. POTTER, THE FREEDOM OF THE SEAS IN HISTORY, LAW, AND POLITICS 36-56 (1924).

Bynkershoek,[16] State practice in the eighteenth and nineteenth centuries,[17] the wide Latin American claims, to the three Law of the Sea Conferences,[18] and finally into the LOSC and modern State practice.[19] This paper assumes a basic familiarity with the concept of the territorial sea and will go directly into a discussion on the issue of the breadth of the territorial sea in international law.

A. The Breadth of the Territorial Sea as a Rule of International Law

The right of a coastal State to a territorial sea[20] is automatic and inherent in sovereignty over the land.[21] In effect, its possession is "not optional, not dependent upon the will of the State, but compulsory."[22] The sovereignty of a coastal State

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[16] Wyndham L. Walker, *Territorial Waters: The Cannon Shot Rule,* 22 BRITISH Y.B. INT'L L. 210 (1945); Bernard G. Heinzen, *The Three-Mile Limit: Preserving the Freedom of the Seas*, 11 STANFORD L. REV. 597 (1958-1959) CORNELIS VAN BIJNKERSHOEK, DE DOMINIO MARIS DISSERTATIO 41 (1923).

[17] Thomas Baty, *The Three-Mile Limit,* 22 AM. J. INT'L L. 503 (1928); Heinzen, *supra* note 16, at 597; H. S. K. Kent, *Historical Origins of the Three-Mile Limit*, 48 AM. J. INT'L L. 537 (1954).

[18] Arthur H. Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas,* 54 AM. J. INT'L L. 751 (1960); Myres S. McDougal & William T. Burke, *Community Interest in a Narrow Territorial Sea Inclusive Versus Exclusive Competence Over the Oceans,* 45 CORNELL L. Q. 171 (1960); Oda, *supra* note 4, at 7.

[19] JOHN ROBERT VICTOR PRESCOTT & CLIVE SCHOFIELD, THE MARITIME POLITICAL BOUNDARIES OF THE WORLD (2005); J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS (1996).

[20] *See e.g.*, 1972 Santo Domingo Declaration U.N. Doc. A/AC.138/80 approved by the Specialized Conference of the Caribbean Countries on Problems of the Sea, which formulated the following principle under the heading "territorial sea": "The sovereignty of a State extends, beyond its land territory and its internal waters, to an area of the sea adjacent to its coast, designated as the territorial sea, including the superjacent air space as well as the subjacent seabed and subsoil."

[21] "[T]he consequence of being a coastal State is that it possesses a territorial sea." REBECCA M. WALLACE, INTERNATIONAL LAW 148 (2005),

[22] This emerges clearly from the words of Lord McNair in the Anglo-Norwegian Fisheries Case: "To every State whose land territory is at any place washed by the sea, international law attaches a corresponding portion of maritime territory consisting of what the law calls territorial waters. International law does not say to a State: "You are entitled to claim territorial waters if you want them." No maritime State can refuse them. International law imposes upon a maritime State certain obligations and confers upon it certain rights arising out of the sovereignty which it exercises over its maritime territory. The possession of this territory is not optional, not dependent upon the will of the State, but compulsory." Anglo-Norwegian Fisheries (UK v. Norway), Judgment, 1951 I.C.J. Rep. 116 (Jan. 18) (McNair, J., dissenting).

over its territorial sea is well-settled in contemporary international law.[23] It is both a customary and a conventional rule of international law.[24]

The status of the maximum breadth of the territorial sea of twelve mile nautical miles is not as straightforward. While it is almost taken for granted by many modern international law commentators that the breadth of the territorial sea stands at twelve nautical miles, it has not always been the case.[25] In fact, throughout most of the twentieth century the issue remained unresolved.[26] The sovereignty of the coastal State over a maritime belt adjacent to its coast has been recognized in international law even before the codification of the law of the sea in the LOSC.[27] However, the contentious twin issues of its permissible extent and its method of delimitation have persisted.[28] A cursory survey of the historical development of the extent of the territorial sea will be instructive in understanding the current state of the law.[29]

Throughout history, maritime claims over territorial seas have been all but uniform and consistent.[30] The claims varied in width, dimension, and the rights claimed over such waters. In the sixteenth and seventeenth centuries, the "range of visibility" criterion determined the extent of the waters over which the coastal

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[23] In the words of Marston, writing before the LOSC: "That States have sovereignty over the bed and subsoil of their territorial seas is now an uncontroverted rule of customary international law, quite apart from the provisions of Article 2 of the Convention on the Territorial Sea ad the Contiguous Zone, 1958." Marston, *supra* note 4, at 332.

[24] MARK EUGEN VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 3363 (1985); VLADIMIR DURO DEGAN, SOURCES OF INTERNATIONAL LAW 206 (1997) citing the Judgment of the ICJ in Nicar. v. U.S., 1986 I.C.J. Rep. 111, ¶ 212.

[25] In 1958, when UNCLOS II was convened, "it faced an almost staggering range of claims" that "varied between three and two hundred miles." SAYRE A. SWARZTRAUBER, THE THREE-MILE LIMIT OF TERRITORIAL SEAS (1972) at 209.

[26] Churchill and Lowe even notes that "[D]oubts concerning the juridical nature of the territorial sea survived into the present century." ROBIN R. CHURCHILL & VAUGHAN LOWE, THE LAW OF THE SEA 73 (1999).

[27] *But see* comment by Churchill and Lowe who opine that to declare: "[A]lthough the legislation of several States, … declares that the State's sovereignty 'extends and has always extended to its territorial sea,' such statements are historically incorrect: the true picture of the development of the concept is rather more complex. *Id.* at 71.

[28] S. Whittemore Boggs, *Delimitation of the Territorial Sea*, 24 AM. J. INT'L L. 541 (1930).

[29] O'Connel, *supra* note 4, at 303; Shigeru Oda, *Territorial Sea and Natural Resources,* 4 INT'L. COMP. L. Q. 415 (1955).

[30] WALLACE, *supra* note 21, at 149.

State can claim jurisdiction.[31] Later, jurists like Grotius and Bynkershoek promoted the first physical method for the determination of the territorial sea limit: the cannon-shot rule.[32] In the eighteenth century, the range of the cannon was approximately equivalent to a marine league or three nautical miles.[33]

It was the Italian jurist Galiani in 1782 who suggested that fixing three miles along the coast as a limit beyond which no cannon could possibly reach would be reasonable rather than determining the range of a cannon particularly positioned along any coast.[34] In 1793, the United States adopted, for the purposes of neutrality, the first zone of uniform breadth along its coast of three miles.[35] The three-mile limit soon gained rapid and widespread acceptance largely due to the adherence

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[31] This is also called the "line-of-sight doctrine" with State claims varying from three miles to as wide as fifty miles. SWARZTRAUBER, *supra* note 25, at 36 – 49

[32] CHURCHILL AND LOWE, *supra* note 26, at 77. *But see* Walker, *supra* note 16, at 210. Walker actually challenges the generally-accepted notion that the three-mile limit of the territorial sea originated from the cannon shot rule. In Walker's words: "it seems not altogether improbable that the two rules never had any real historical connection, they may well have been wholly distinct rules having their roots in different parts of Europe." *Id* at 213. *See also*, Heinzen, *supra* note 16, at 602. This is also argued by Daniel Wilkes who argues that the following statement is a myth: "The concept of the territorial sea originated from the distance a cannon could shoot from land. Thus, with increased capabilities of military control, we have an increased territorial sea." *See* Daniel Wilkes, *The Use of World Resources without Conflict: Myths about the Territorial Sea,* 14 WAYNE L. REV. 441, 443 (1967-1968). He traces it instead to Hugo de Groot's famous 1609 work, *Mare Liberum*.

[33] Heinzen, *supra* note 16, at 604-605, also disputes the connection between the cannon-shot rule and the three-mile territorial sea limit, in this wise: "Finally, the cannon-shot rule could not have applied to a distance of three miles from shore because an examination of gunnery tables shows that no cannon had a range of as much as three miles during the eighteenth century. Indeed, during this period, most coastal cannons had an accurate range of no more than one mile, while a few mortars unsuited for use as coastal artillery, had a maximum range of no more than two and a half miles."

[34] Heinzen, *supra* note 16 at 616. CHURCHILL AND LOWE, *supra* note 26, at 78.

[35] SWARZTRAUBER, *supra* note 25, at 58.

to it by the major maritime States.[36] The three-mile limit was however, "never unanimously accepted" according to Churchill and Lowe.[37]

It was not until the 1930 Hague Codification Conference that doubts over the juridical status of the territorial sea were finally dispelled.[38] The 1930 Hague Codification Conference formally enshrined the principle of the coastal State's sovereignty over the territorial sea, which to this day remains unchallenged.[39] Corollary to this, sovereignty over the superjacent air space,[40] and eventually over the bed of the territorial sea,[41] became firm principles of international law.[42] But

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[36] Great Britain, which was the greatest power in the early nineteenth century, was the champion of the three-mile limit and chiefly responsible for its rise to status as a rule of international law. Other major powers soon commenced to follow suit: France, Canada, Austria, Prussia, Russia; the lesser powers of Europe: Belgium, Netherlands, Greece, Italy, Egypt; the Orient: Japan and Hawaii; and in the Western hemisphere: Chile, Ecuador, El Salvador, Argentina, Honduras and the United States. *See* SWARZTRAUBER, *supra* note 25, at 64–72.

[37] CHURCHILL & LOWE, *supra* note 26, at 78; *See also*, FRANCIS NGANTCHA, THE RIGHT OF INNOCENT PASSAGE AND THE EVOLUTION OF THE INTERNATIONAL LAW OF THE SEA: THE CURRENT REGIME OF "FREE" NAVIGATION IN COASTAL WATERS OF THIRD STATES 15 (1990), who states that "the threemile rule was not universally accepted as the limit of the territorial waters in international law."

[38] CHURCHILL & LOWE, *supra* note 26, at 74.

[39] It must be emphasized though that the consolidation of the sovereignty theory over in respect of the waters is distinct from the claim over sovereignty over the superjacent air space and seabed in the same maritime zone, which developed independently. Convention for the Regulation of Aerial Navigation, art. 1, Oct. 13, 1919, 11 LNTS 173 provides: "The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory. For the purpose of the present Convention, the territory of a State shall be understood as including the national territory…and the territorial waters adjacent thereto." Churchill and Lowe observes that: "[T]his Convention was also a significant step towards the general recognition of sovereignty over the territorial sea itself.

[40] *See e.g.*, Convention on International Civil Aviation, art. 2, Dec. 7, 1994, 15 U.N.T.S. 295; Convention on the Territorial Sea and the Contiguous Zone, art. 2, Apr. 29, 1958, 516 UNTS 205; LOSC art. 2(2), *supra* note 12.

[41] Art. 2, LOSC, *supra* note 12, establishes that the coastal State [and an archipelagic State] exercises sovereignty over their territorial sea, including the air space above the territorial sea and its bed and subsoil. Nordquist, opines that this Article evolved from Articles 1 and 2 of the Convention on the Territorial Sea and the Contiguous Zone. *See* NORDQUIST, *supra* note 1, Vol. 1 at 66.

[42] In the words of Marston: "the rule for the bed and subsoil of the territorial sea was conceived later than the corresponding rule for the superjacent waters and later even than that for the superjacent airspace, although the subsequent crystallization process resulted in a unitary customary rule and three separate rules." Marston, *supra* note 4, at 332.

certainly, the notion of the territorial sea preceded the 1930 Hague Codification Conference.[43]

The 1930 Hague Conference failed to reach an agreement on the maximum width of the territorial sea.[44] This merely reflected the divergence of State practice at that time. For instance, there were claims of four nautical miles by Scandinavian countries such as Finland, Iceland, Norway and Sweden;[45] claims of six nautical miles by such countries as Italy, Greece, Portugal and Spain;[46] and the three nautical mile claims of the United States, Great Britain, Belgium, Canada, Denmark, Germany and Japan.[47] In 1900, twenty of the twenty-one States which claimed or acknowledged a territorial sea had positively adopted or acknowledged as law the three-mile or one-league limit.[48] State practice in the nineteenth century shows that there was no claim of less than three nautical miles. Therefore, even at

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[43] In 1926, a draft code produced by the German Society of International Law mentioned: "The sovereignty of the coastal State extends over the territorial sea, subject to the generally recognized rules of international law, or a treaty providing for exceptions." In the same year, the American Institute of International Law also produced a draft Project on the National Domain, Article I of which read: "Every nation exercises sovereignty in an area of land and water within definite boundaries and in the space above the said area." The Japanese Association of International Law, also writing in 1926, produced a Code which stated that "every State has the right of sovereignty over its littoral waters." In 1928, the *Institut de Droit International* produced a new draft which used the term "sovereignty" abandoning the previously used "a right of sovereignty" in the 1894 draft. The 1929 Harvard Law School draft also used the term "sovereignty" with the Commentary stating that: "the sovereignty of the State is in all respects like its sovereignty over land territory and subject to the same limitations," and that "the enjoyment of sovereignty over the marginal sea is so dependent upon the State's sovereignty over its land territory that perhaps the conception of marginal seas should be treated as an independent conception." *See*, O'Connel, *supra* note 4, at 348. Eventually, the Second Committee on Mar. 20, 1930 adopted the following text: "Article 1. The territory of a State includes a belt of sea described in this Convention as the territorial sea. Sovereignty over this belt is exercised subject to the conditions prescribed by the present Convention and the other rules of international law."

[44] SHIGERU ODA, INTERNATIONAL CONTROL OF SEA RESOURCES 36 (1989).

[45] Boggs, *supra* note 28, at 542.

[46] Talaie, *supra* note 11, at 278.

[47] CHURCHILL & LOWE, *supra* note 26, at 78; Shigeru Oda, *International Control of Sea Resources* (1989) at 14.

[48] Heinzen, *supra* note 16, at 632. The twenty States claiming a territorial sea with a maximum breadth of one league were Argentina, Austria-Hungary, Belgium, Brazil, Chile, Denmark, Ecuador, El Salvador, France, Germany, Great Britain, Greece, Honduras, Italy, Netherlands, Norway, Russia, Sweden, Turkey, and the United States. *Id* at 632–634, citations omitted

that time, whilst the minimum breadth of the territorial sea was not in dispute, the maximum breadth was a raging controversy.[49]

In a study on the attempts to establish a uniform rule concerning the extent of the territorial sea, Shigeru Oda, writing in 1955, came to the conclusion that "not only is there no uniform rule, but also it is very difficult, if not impossible, to enact generally acceptable international legislation on the breadth of the territorial sea."[50] Truly, "it is meaningless to speak of a single limit for territorial sea claims at any one time."[51] Subsequent attempts at arriving at a global consensus on the breadth of the territorial sea through the First Conference on the Law of the Sea (UNCLOS I) in 1958, and in the Second Conference on the Law of the Sea (UNCLOS II) in 1960, likewise failed.[52] At both UNCLOS I and UNCLOS II, as it was in the 1930 Codification Conference, no article on the breadth of the territorial sea was adopted.[53] It was not until the Third Conference on the Law of the Sea (UNCLOS III) that the breadth of the territorial sea was finally codified in the LOSC.[54]

1. Conventional Rule of International Law

The codification of the maximum permissible breadth of the territorial sea at twelve nautical miles is one of the major achievements of the LOSC.[55] The wording of the LOSC on the maximum breadth of the territorial sea is clear and unambiguous in Article 3: "Every State has the right to establish the breadth of its

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[49] Talaie, *supra* note 11, at 278.

[50] Shigeru Oda, *Territorial Sea and Natural Resources, 4 INT'L COMP L. Q.* 417 (1955).

[51] CHURCHILL & LOWE, *supra* note 26, at 78 - 79.

[52] *See,* Convention on the Territorial Sea and Contiguous Zone, *supra* note 40; Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 311, which came out of UNCLOS II contain no provision on the breadth of the territorial sea since no proposal during the 1958 Conference received the required majority.

[53] For a discussion at UNCLOS I, *see* Report of the First Committee, A/CONF.13/L.28 Rev.1 (1958), paras. 3–25, UNCLOS I, II Off. Rec. 115; and further discussions at the 14th and 15th plenary meetings, II Off. Rec. 35–47. At UNCLOS II, the only substantive agenda was "Consideration of the questions of the breadth of the territorial sea and fishery limits in accordance with resolution 1307 (XIII) adopted by the General Assembly on 10 December 1958" (see Volume I of this series, at 159). For a summary of the discussion in the Committee of the Whole see A/CONF.19/L.4 (1960), UNCLOS II, Off. Rec. 169. The verbatim record of the general debate in the Committee of the Whole is reproduced in A/CONF.19/9, UNCLOS II, Off. Rec. (U.N. Sales No. 1962.V3 (1962)).

[54] DONALD R ROTHWELL AND TIM STEPHENS, THE INTERNATIONAL LAW OF THE SEA 71-73 (2010).

[55] NORDQUIST, *supra* note 1, at 77.

territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention."[56]

The LOSC in Article 2 declares that "the sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.[57] This provision imposes two restrictions on the right of the coastal State over its territorial sea: a special limitation (subject to this Convention); and a general limitation (other rules of international law). This affirms that the LOSC constraints are not exhaustive that it is necessary to refer also to other rules of international law.[58] The Hague Codification Commission, which first considered the draft article on this matter, explains the limitation:

> Obviously, sovereignty over the territorial sea, like sovereignty over the domain on land, can only be exercised subject to the conditions laid down by international law. As the limitations which international law imposes on the power of the State in respect of the latter's sovereignty over the territorial sea are greater than those it imposes in respect of the domain on land, it has not been thought superfluous to make special mention of these limitations in the text of the article itself.[59]

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[56] LOSC art. 3, *supra* note 12. This provision substantially reproduced Article I of the 1958 Convention on the Territorial Sea and the Contiguous Zone, which was based on Article 1 of the draft of the International Law Commission.

[57] LOSC art. 2(3), *supra* note 12. According to Professor Jesse Reeves, the reference to the "other rules of international law" in the wording of the final draft article "indicate that the draft did not include or enumerate all of the limitations which might exist upon the sovereign exercise of power by the littoral State, and suggest at least the possibility of additional limitations." Further, he mentioned that the wording "seems to emphasize the reluctance which the Commission had to recognize sovereignty over the territorial sea in any absolute or unqualified sense." Jesse S. Reeves, *The Codification of the Law of Territorial Waters,* 24 AM. J. INT'L L. 486, 489 (1930).

[58] In the words of the 1930 Hague Codification Commission: "These limitations are to be sought in the first place in the present Convention; as, however, the Convention cannot hope to exhaust the matter, it has been thought necessary to refer also to other rules of international law. LON Doc. C.230.M.117.1930.V, p.6; Final Act of the Conference for the Codification of International Law, Doc. C.251.M.145.1930.V, p.126, as cited in NGANTCHA, *supra* note 37, at 7. *See also, Report of the International law Commission to the General Assembly,* [1956] 2 Y.B. INT'L L. COMM'N 253, at 265, U.N. Doc. A/CN.4/SER.A/1956/Add.l

[59] NORDQUIST, *supra* note 1, Volume III, at 467.

The International Law Commission (ILC), in its commentary on draft Article 1 which covers this matter intimated that there could be rights already existing under treaty or customary law which are "in excess of the rights recognised in the present draft" which are not limited by the present draft. In the words of the ILC:

> It may happen that, by reason of some special relationship, geographical or other, between two States, rights in the territorial sea of one of them are granted to the other in excess of the rights recognised in the present draft. It is not the Commission's intention to limit in any way any more extensive right of passage or other right enjoyed by States by custom or treaty.[60]

While it is arguable that the Philippine territorial sea claim can potentially though tenuously fall in both exceptions, i.e., as a special case covered by treaty law and/or custom, still the special limitation applies: the maximum breadth of twelve nm imposed by the LOSC. Moreover, the twin-limitations operate conjunctively, following basic rules of statutory construction.[61]

The text of the LOSC is always the starting point for its interpretation. In the words of Reisman: "[s]ince UNCLOS will produce a complex convention, an essentially textual approach to construction, as conceived by the Vienna Convention on the Law of Treaties, would appear required because of the Vienna Convention's directives, and ineluctable owing to the absence of a formal record of the *travaux*. The alternative hardly recommends itself."[62] Nevertheless, if a strictly textual analysis left any ambiguity, recourse may be had to supplementary means of interpretation according to the Vienna Convention.[63] Statutory interpretation, in this case, does not seem necessary since the wording of the ILC draft, from which the present provision of the LOSC traces its origin, is equally clear and unambiguous: "[T]he Commission considers that international law does

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[60] *Report of the International Law Commission to the General Assembly*, *supra* note 58, at 265.

[61] MYRES S. MCDOUGAL, JAMES C. MILLER & HAROLD D. LASSWELL, THE INTERPRETATION OF INTERNATIONAL AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE 337-339 (1994).

[62] W. Michael Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking,* 74 AM. J. INT'L. L. 55-56 (1980).

[63] Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331.

not permit an extension of the territorial sea beyond twelve miles.[64] The ILC Commentary on the same article is categorical: "international law did not justify an extension of the territorial sea beyond twelve miles" for in its opinion, "such an extension infringed the principle of the freedom of the seas, and was therefore contrary to international law."[65]

Thus, even when the regime of the territorial sea was at its incipient stages, the breadth of the territorial sea contemplated in international law was at a maximum of twelve nautical miles.[66] It is safe to assume, and clearly indicated by the Commentary, that a territorial sea extension in excess of 12 nm is a breach of international law. So, what is the status of a claim of more than twelve nautical miles? In the words of Dupuy:

> In the system of the LOS Convention the maximum limit of the territorial sea, and therefore of the sovereignty of the coastal State, is 12 nautical miles. A claim for, for example, a 200-mile territorial sea would accordingly not be valid and would consequently not transform the area in question into "territorial sea" for the purposes

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[64] *Report of the International Law Commission to the General Assembly*, *supra* note 58, at 265.

[65] *Report of the International Law Commission to the General Assembly*, *supra* note 58, at 265. The Commission it took no decision as to the breadth of the territorial sea up to the limit of twelve miles although it did not succeed in reaching agreement on any other limit. The Commentary mentions that although the following view was not supported by the majority of the Commission: "Some members held that as the rule fixing the breadth at three miles had been widely applied in the past and was still maintained by a number of important maritime States, it should, in the absence of any other rule of equal authority, be regarded as recognized by international law and binding on all States." And further: "The extension by a State of its territorial sea to a breadth of between three and twelve miles was not characterized by the Commission as a breach of international law. Such an extension would be valid for any other State which did not object to it, and *a fortiori* for any State which recognized it tacitly or by treaty or was a party to a judicial or arbitral decision recognizing the extension. A claim to a territorial sea not exceeding twelve miles in breadth could be sustained *erga omnes* by any State, if based on historic rights. But, subject to such cases, the Commission by a small majority declined to question the right of other States not to recognize an extension of the territorial sea beyond the three-mile limit." International Law Commission, ILC Yearbook 1956, Vol. 2, at 266.

[66] *Report of the International Law Commission to the General Assembly*, *supra* note 58, at 266. The Commentary states: "The Commission noted that the right to fix the limit of the territorial sea at three miles was not disputed. It states that international law does not permit that limit to be extended beyond twelve miles."

> of the Convention. This again means that the area must be considered as an exclusive economic zone under Article 55 — as "an area beyond and adjacent to the territorial sea". And this again means that the "rights and jurisdiction of the coastal State and the rights and freedoms of other State are governed by the relevant provisions of this Convention". There is no basis for declaring the coastal State's exercise of jurisdiction in the extended zone as null and void in its entirety.[67]

In international law, a legal norm can be binding upon States as a conventional or as a customary rule of international, or both. It is not uncommon for a treaty provision to be declaratory of, or to pass into customary international law.[68] The International Court of Justice in the *North Sea Continental Shelf* Cases noted that a conventional rule can pass into and be accepted by the *opinio juris* into the general corpus of international law and thus "become binding even for countries which had never, and do not, become parties to the Convention"; and added that such "constitutes indeed one of the recognized methods by which new rules of customary rules of international law may be formed".[69] In fact, a customary rule of international law can emerge even when the agreement upon which it is based has not even been ratified.[70]

Treaties impact upon customary international law in three ways: a treaty may restate customary international law, it may crystallize customary international law, or it may serve as a step for the development of customary international law.[71] Short of this, the 1969 Vienna Convention on the Law of Treaties in Article 38 provides that "nothing … precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law,

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[67] A HANDBOOK ON THE NEW LAW OF THE SEA 1050 (Rene Jean Dupuy & Daniel Vignes eds., 1991).

[68] MARK EUGEN VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES (1997)

[69] North Sea Continental Shelf (Federal Republic of Germany v. Denmark v. Netherlands), Judgment, 1969 I.C.J. Rep. 3 at 41 (Feb. 20).

[70] In the words of Professor Sohn: "If a sufficient number of States having a special interest in the application of a new rule start acting in accordance with it, and no States object to it, there is a clear presumption that the rule agreed on at the conference, although the agreement has not yet been ratified, has become an accepted rule of customary international law." Louis B. Sohn, *Law of the Sea: Customary International Law Developments,* 34 AM. U. L. R. 279 (1984-1985).

[71] G. M. DANILENKO, *Law-Making in the International Community* (1993) at 147.

recognized as such," and Article 43 of the same Convention acknowledges the duty of a State to fulfil any treaty obligation "to which it would be subject under international law independently of the treaty."[72] The next section will discuss the breadth of the territorial sea as a customary rule of international law.

2. *Customary Rule of International Law*

While conventional or treaty-based international law cannot constitute universal international law, customary law binds all States except those who have specifically objected to the creation of a particular rule.[73] The relationship between treaties and custom in the law of the sea not being a novel subject, has attracted a fair amount of scholarship.[74] The position of the vast majority of scholars who have written on this subject is that the LOSC generally codifies existing customary international law which may therefore be invoked by non-States parties as a source of rights as well as obligations.[75] In the words of Boyle and Chinkin:

> Whatever the position may have been when it was adopted, the 1982 Convention on the Law of the Sea has become accepted, in most respects, as a statement of contemporary international law on nearly all matters related to the oceans. Most of its provisions, including those that were new or emerging law in 1982, are not only treaty law

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[72] Vienna Convention on the Law of Treaties art. 38 & 43, *supra* note 63.

[73] ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1968). *See also*, MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES (2000); CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW (2005); ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW (2006).

[74] John King Jr. Gamble & Maria Frankowska, *Observations, a Framework, and a Warning: The 1982 Convention and Customary Law of the Sea,* 21 SAN DIEGO LAW REV. 491 (1984); Lawrence A. Howard, *The Third United Nations Conference on the Law of the Sea and the Treaty/Custom Dichotomy,* 16 TEXAS INT'L L. J. 321 (1981); Luke T. Lee, *The Law of the Sea Convention and Third States,* 77 AM. J. INT'L L. 541 (1983); Leslie M. MacRae, *Customary International Law and the United Nations' Law of the Sea Treaty,* 13 CAL. WES. INT'L L. J. 181 (1983). *See also,* R.R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRITISH Y.B. INT'L L. 275 (1965) (an excellent discussion of the traditional relationship between treaties and custom).

[75] Wolfrum, *supra* note 13; W.E. Butler, *Custom, Treaty, State Practice and the 1982* Convention, 12 MAR. POL'Y 182 (1988); A. L. Kolodkin, V. V. Andrianov and V. A. Kiselev, *Legal Implications of Participation or Non-Participation in the 1982 Convention,* 12 MAR. POL'Y 187 (1988); Luke T. Lee, *The Law of the Sea Convention and Third States,* 77 AM J. INT'L L 541 (1983).

> for the large number of States parties, but customary law for all or nearly all States.[76]

Thus, it is clear that there are provisions of the LOSC which codify existing customary international law.[77] The basic legal concept of State sovereignty in customary international law, expressed in, *inter alia*, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory.[78] There is little debate about the customary legal right of coastal States unilaterally to claim a territorial sea to the maximum extent of twelve nautical miles.[79] The question presents itself, then: is the twelve-mile limit customary international law? As one commentator remarked: "As UNCLOS has attained near-universality and has become binding upon important maritime States, it can be said that the breadth of a territorial sea has been stabilized and, as such, is considered declaratory of customary international law."[80]

It can be asserted that a 12 nautical mile territorial sea is established under customary international law.[81] The crystallisation of certain provisions of the LOSC into customary international law has been declared by the International Court of Justice. For instance, in the *Nicaragua v. Colombia I* case, with respect to the breadth of the territorial sea, the Court stated that "[w]hatever the position might have been in the past, international law today sets the breadth of the territorial sea which the coastal State has the right to establish at 12 nautical miles. Article 3 of UNCLOS reflects the current state of customary international law on this point."[82]

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[76] Alan Boyle and Christine Chinkin, *UNCLOS III and the Process of International Law Making,* in LAW OF THE SEA, ENVIRONMENTAL LAW, AND SETTLEMENT OF DISPUTES: LIBER AMICORUM JUDGE THOMAS A. MENSAH 376 (Thomas A. Mensah and Tafsir Malick Ndiaye eds., 2007).

[77] MALCOLM N. SHAW, INTERNATIONAL LAW 492-493 (2003), who states that "[M]any of the provisions in the 1982 Convention … have since become customary rules" which *prima facie* bind all States.

[78] Nicar. v. U.S., Merits, 1986 I.C.J. at 14

[79] DOUGLAS M. JOHNSTON & PHILLIP M. SAUNDERS, OCEAN BOUNDARY MAKING: REGIONAL ISSUES AND DEVELOPMENTS 17-18 (1988).

[80] HUI-GWON PAK, THE LAW OF THE SEA AND NORTHEAST ASIA: A CHALLENGE FOR COOPERATION 30 (2000) at 30.

[81] William T. Burke, *Submerged Passage through Straits: Interpretations of the Proposed Law of the Sea Treaty Text,* 52 WASHINGTON L. REV. 194 (1976-1977).

[82] Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, 2012 I.C.J. Rep. 624, at 690,

The best evidence of customary international law is State practice.[83] International law is created when there is consistent practice by a substantial number of States over a period of time.[84] In the case of the LOSC, as of 31 December 2019, there are 168 States parties to the Convention.[85] The import of this is clear in the following words of Louis Sohn: "Once a convention is signed by a vast majority of the international community, its stature as customary international law is thereby strengthened, as such signatures are a clear evidence of an *opinio juris* that the convention contains generally acceptable principles."[86]

The State practice of territorial sea claims has become stable and in line with the customary international law reflected in the LOSC.[87] The next section will discuss the current State practice of territorial sea claims.

B. Territorial Sea Claims

The consensus reached at UNCLOS III on the maximum breadth of the territorial sea steadily aligned national legislation with Article 3 of the Convention.[88] The adoption of the LOSC has significantly influenced State practice. Prior to 1982, there were as many as 25 States claiming a territorial sea broader than 12 nautical miles; while 30 States, including the United States, claimed a territorial sea of less than 12 nautical miles.[89] After the LOSC was opened for signature in, notes Roach and Smith, "State practice in asserting territorial sea

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¶ 177 (Nov. 19). The concept of the exclusive economic zone (EEZ) is another example in point. *See*, Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. Rep. 13, at 33, ¶ 34 (June 3). See also, Maritime Delimitation and Territorial Questions (Qatar v. Bahrain), Merits, 2001 I.C.J. Rep. 40, at 91, ¶ 167 (Mar. 16).

[83] MARK EUGEN VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4 (1985) at 4.

[84] MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL Law 16 -18 (1992) at 16-18.

[85] United Nations Division for Ocean Affairs and the Law of the Sea (UN DOALOS), *Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements,* https://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm (May 29, 2021).

[86] Louis B. Sohn, *Law of the Sea: Customary International Law Devel*opments, 34 AM. UNIV. L. REV. 279 (1985).

[87] J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS 148 (1996).

[88] ROBERT W. SMITH, EXCLUSIVE ECONOMIC ZONE CLAIMS: AN ANALYSIS AND PRIMARY DOCUMENTS 6-8 (1986).

[89] ROACH & SMITH, *supra* note 87, at 540.

claims has largely coalesced around the 12 mile maximum breadth set by the LOSC."[90] This trend is clearly discernible from an analysis of territorial sea claims from a historical perspective.[91]

As of 31 December 2019, 140 States claim a territorial sea of 12 nautical miles or less.[92] Out this number, one State claims a territorial sea of three nautical miles: Jordan, and two States claim a territorial sea of six nautical miles: Greece and Turkey.[93] There are only seven States which claim a territorial sea in excess of 12 nautical miles, with five States claiming 200 nautical miles: Benin, Ecuador, El Salvador, Somalia and Peru; one State claiming 30 nautical miles: Togo; and the Philippines claiming a territorial sea of variable width defined by coordinates.[94] There are only a few States which still claim a territorial sea in excess of twelve nautical miles. In fact, Roach and Smith note that there is "a definite trend for

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[90] *Id.*

[91] *Id.* at 149.

[92] *See* United Nations Division for Ocean Affairs and the Law of the Sea (UN DOALOS), *United Nations Division for Ocean Affairs and the Law of the Sea, Table of Claims to Maritime Jurisdiction* https://www.un.org/depts/los/LEGISLATIONANDTREATIES/claims.htm (Dec. 31, 2019). The following States claim a territorial sea of 12 miles or less: Albania, Algeria, Angola, Antigua and Barbuda, Argentina, Australia, Bahamas, Bahrain, Bangladesh, Barbados, Belgium, Belize, Brazil, Brunei, Bulgaria, Cambodia, Cameroon, Canada, Cape Verde, Chile, People's Republic of China, Republic of China, Colombia, Comoros, Cook Islands, Costa Rica, Cote d'Ivoire, Croatia, Cuba, Cyprus, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Egypt, Equatorial Guinea, Eritrea, Estonia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Kenya, Kiribati, Kuwait, Latvia, Lebanon, Libya, Lithuania, Madagascar, Malaysia, Maldives, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia, Monaco, Morocco, Mozambique, Myanmar, Namibia, Nauru, Netherlands, New Zealand, Nicaragua, Nigeria, Niue, Norway, Oman, Pakistan, Panama, Papua New Guinea, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, São Tomé and Príncipe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, Sudan, Suriname, Sweden, Syria, Thailand, Timor-Leste, Tonga, Trinidad and Tobago, Tunisia, Turkey (in the Black sea and Mediterranean), Tuvalu, Ukraine, United Arab Emirates, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Vanuatu, Venezuela, Vietnam, Yemen.

[93] *Ibid*. Please note that Turkey claims a territorial sea of six nautical miles in the Aegean Sea, and 12 nautical miles in the Black Sea.

[94] *Ibid.*

States to reduce excessive territorial sea claims to the norm of 12 miles set forth in the LOSC."[95] The United States, which operates a Freedom of Navigation Program, has challenged territorial claims on the world's oceans and airspace that it considers excessive using diplomatic protests and/or by interference.[96] Although the United States has yet to ratify the LOSC,[97] and despite its longstanding claim of a three-mile territorial sea,[98] insists that all States must obey the international law of the sea as embodied in the LOSC.[99]

The next section will discuss and analyze the Philippine territorial sea claim in international law.

II. The Philippine Territorial Water Claim in International Law

The Philippine historic claim to its extensive territorial waters first came to the attention of the world in 1955 through a *Note Verbale* to the United Nations[100] which claimed exclusive rights over the waters within the coordinates of the Treaty of Paris of 1898 and other treaties which ceded the Philippines from Spain

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[95] J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS 153 (1996).

[96] *Ibid*. at 153–161.

[97] *See* David A. Colson, *United States Accession to the United Nations Convention on the Law of the Sea* 7 GEORGETOWN INT'L ENV'L L. REV. 651 (1995); *Message from the President of the United States and Commentary Accompanying the United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of the Part XI upon Their Transmittal to the United States Senate for Its Advice and Consent*, 7 GEORGETOWN INT'L ENV'L L. REV. 77 (1994); John A. Duff, *A Note on the United States and the Law of the Sea: Looking Back and Moving Forward,* 35 OCEAN DEV. & INT'L. L. 195 (2004); ANN L. HOLLICK, U.S. FOREIGN POLICY AND THE LAW OF THE SEA (1981) (for a discussion on the issues with respect to the accession of the United States to the LOSC).

[98] Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988). Since 1988, the United States has claimed a 12 nautical mile territorial sea. Since the President's Ocean Policy Statement of Mar. 10, 1983, the United States has recognized territorial sea claims of other States up to a maximum breadth of 12 nautical miles. *See* Bruce E. Alexander, *The Territorial Sea of the United States: Is It Twelve Miles or Not,* 20 J. MAR. L. & COM. 449 (1989); Arruda, *supra* note 4; John E. Noyes, *United States of America Presidential Proclamation No. 5928: A 12-Mile U.S. Territorial Sea,* 4 I.J.M.C.L. 142 (1989).

[99] Duff, *supra* note 97, at 199.

[100] *Report of the International Law Commission Covering the Work of its Seventh Session*, [1955] 2 Y.B. Int'l L. Comm'n 52-53, U.N. Doc. A/CN.4/94.

to the United States.[101] The Philippine view is that the cession involved the cession of both maritime as well as land territory.[102]

The validity of the Philippine territorial waters claim in international law can be judiciously argued both ways. The first position is that the Philippine territorial water claim is valid in international law on the following grounds: recognition by treaty, devolution of treaty rights, and historic rights.[103] The second position is that the Philippine territorial water claim is not valid in international law on the following grounds: first, the Philippine claim does not conform with the LOSC; second, it breaches customary international law; third, it proceeds from a flawed treaty interpretation; and lastly, the acquiescence required for the claim to be valid in international law will not be met due principally to the protests by the United States.

The issue on the breadth of the Philippine territorial sea claim which exceeds 12 nautical miles can also be viewed from two perspectives: from a conventional international law and from a customary international law point of view. In analyzing the issue, one can also take a strictly literal or narrow view, i.e., conventional and customary international law prescribes a maximum limit of 12 nautical miles and the Philippine territorial sea claim exceeds this limit; therefore, it is not valid in international law. Or a more relaxed and practical view, i.e., the maximum breadth of the territorial sea in international law allows of exceptions and the Philippine territorial sea claim can fall within this exception; thus, it is valid in international law. These can be in the form of historic title and as persistent objector, which are valid exceptions in international law.[104]

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[101] Arturo Tolentino, *The Philippine Territorial Sea,* 3 PHIL. Y.B. INT'L L. 46 (1974); Arturo M. Tolentino, *The Philippine Archipelago and the Law of the Sea,* 7 PHIL. L. GAZETTE 1 (1983); ARTURO M. TOLENTINO, THE PHILIPPINES AND THE LAW OF THE SEA: A COLLECTION OF ARTICLES, STATEMENTS AND SPEECHES (1982).

[102] Tommy T. B. Koh, *The Territorial Sea, Contiguous Zone, Straits and Archipelagoes under the 1982 Convention on the Law of the Sea*, 29 MALAYA L. R. 190 (1987).

[103] These legal bases were extensively discussed in detail in Bautista, *supra* note 2.

[104] *See* L.F.E. Goldie, *Historic Bays in International Law: An Impressionistic Overview*, 11 SYRACUSE J. INT'L L. & COM. 211 (1984); D. H. N. Johnson, *Consolidation as a Root of Title in International Law*, 1955 C. L. J. 215; Alexander A. Murphy, *Historical Justifications for Territorial Claims,* 80 ANNALS ASS'N AM. GEOGPRAPHERS 531 (1990); Donat Pharand, *Historic Waters in International Law with Special Reference to the Arctic*, 21 U. TORONTO L.J. 1 (1971). ; YEHUDA Z. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW (1965) (for discussion on historic waters in international law). For academic literature on the concept of the persistent objector in international law, *See* Jonathan I. Charney,

Whilst the Philippine territorial water claim is ostensibly divergent from the rules of the breadth of the territorial sea under conventional and customary international law, it could still be internationally recognized.[105] This is not necessarily only a legal issue. Further, it must be noted that Article 15 of the LOSC makes reference to historic title in the delimitation of the territorial sea between two States.[106] The reference to historic title in the second sentence of this article impliedly recognized the existence, if not the exceptional character, of a territorial sea held under historic title.[107]

The starting point of the inquiry can be simply stated: is there an existing rule of international law that limits the maximum breadth of the territorial sea? This is the crucial question and the answer no doubt settles the international legal status of the Philippine territorial water claim. If such a positive rule of international law does exists, is it possible and on what grounds can the Philippines argue that the same rule does not apply in the case at hand?

The Persistent Objector Rule and the Development of Customary International Law, 56 BRITISH Y.B. INT'L L. 1 (1985); David A. Colson, *How Persistent Must the Persistent Objector Be,* 61 WASHINGTON L. REV. 957 (1986); Holning Lau, *Rethinking the Persistent Objector Doctrine in International Human Rights Law,* 6 CHINESE J. INT'L L. 495 (2006) ; Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework,* 2 U. CALIFORNIA DAVIS L. REV. 147 (1996); Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law,* 26 HARVARD INT'L L. J. 457 (1985).

[105] R. Douglas Brubaker, *The Legal Status of the Russian Baselines in the Arctic,* 30 OCEAN DEV. INT'L L. 207 (1999). Brubaker, who made a study on the legal status of the Russian baselines in the arctic observes that: "…while initially the straight baselines established at variance with the criteria noted may have been legally invalid under international conventional and customary law, most appear to be on the way to being internationally recognized." He adds though that "[T]his is, however, except with respect to the United States, which has consistently objected, and the smattering of other objecting States.

[106] LOSC art. 15, *supra* note 12, reads: "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith."

[107] CLIVE R. SYMMONS, HISTORIC WATERS IN THE LAW OF THE SEA: A MODERN RE-Appraisal 25 -26, 36 (2008).

A. The Philippine Claim and the LOSC

In international law, a treaty becomes binding and in force for its parties.[108] The only way for a State which enters into a treaty to limit the range of application of a treaty with respect to itself, is to make a reservation.[109] However, this is possible only if the treaty explicitly permits States to make reservations.[110] The *Vienna Convention on the Law of Treaties* in Article 19 provides that a State may make a reservation save in the following instances:

> (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.[111]

Many major multilateral treaties contain specific provisions specifying the type of reservations which are permissible, and those which are not.[112] In the case of the LOSC, Article 309 is clear that "[n]o reservations or exceptions may be made to this Convention unless expressly permitted by other articles of the Convention." The prohibition being clear, the State party making the reservation must prove that such is specifically permitted by a provision in the Convention.[113] If the

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[108] ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 131 (2000) at 131.

[109] Vienna Convention on the Law of Treaties art. 2, *supra* note 63, describes a reservation as: "[A] unilateral statement, however phrased or named, made by a country, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."

[110] AUST, *supra* note 108, at 105-116.

[111] Vienna Convention on the Law of Treaties art. 19, *supra* note 63.63.

[112] *See e.g.,* D. W. Bowett, *Reservations to Non-Restricted Multilateral Treaties*, 48 BRITISH Y.B. INT'L L. 67 (1976); John King Jr. Gamble, *Reservations to Multilateral Treaties: a Macroscopic View of State Practice,* 74 AM. J. INT'L L. 372 (1980); Laurence R. Helfer, *Not Fully Committed - Reservations, Risk, and Treaty Design*, 31 YALE J. INT'L L. 367 (2006); William A. Schabas, *Reservations to the Convention on the Rights of the Child,* 18 HUM. RTS. Q. 472 (1996).

[113] S. K. N. Blay, R. W. Piotowicz and B. M. Tsamenyi, *Problems with the Implementation of the Third United Nations Law of the Sea Convention: The Question of Reservations and Declarations,* 11 AUSTRALIAN Y.B. INT'L L. 67 (1984-1987). In their words: "Since none of the articles permit reservations, it follows that no party to the LOSC may lawfully make a reservation. This prohibition was considered appropriate by the framers of the LOSC because it was thought that

Convention does not state that a particular provision allows a reservation, then, it is implied that a reservation is not permitted.[114]

The LOSC provision on the breadth of the territorial sea in Article 3 of the Convention does not state that a reservation is allowed.[115] This means that the extent of the territorial sea cannot be subject of a reservation by a State party to the Convention. Moreover, taking due regard to the "package deal" nature of the Convention,[116] a reservation made to Article 3 being "incompatible with the object and purpose of the LOSC is also not permitted by the Vienna Convention on the Law of Treaties.[117]

> Any general convention relating to the territorial sea will necessarily take into account existing treaty and other arrangements, and existing situations in "historic waters." These arrangements and situations are believed to affect only the landward base-line from which the territorial waters are delimited.[118]

The LOSC is a product of political compromise among various groups of competing interests and, because of this, it contains many provisions which are vague, ambiguous, and subject to multiple interpretations. But the rule on the

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reservations were inconsistent with the consensus approach adopted at the Third Law of the Sea Conference."

[114] However, the LOSC in Articles 287, 298, and 310, allow States to make declarations or statements regarding application and interpretation of the Convention at the time of signature, ratification, accession, or succession, or at any time thereafter, but these must not purport to exclude or modify the legal effect of the provisions of the Convention. *See* L.D. M. Nelson, *Declarations, Statements and 'Disguised Reservations' with respect to the Convention on the Law of the Sea,* 50 INT'L COMP. L. Q. 767-786 (2001); Yann-huei Song, *Survey of Declarations or Statements Made by the Parties to the Law of the Sea Convention: 30 Years after Adoption*, 28 INT'L J. MAR. COASTAL L. 5-59 (2013).

[115] LOSC art. 3, *supra* note 12, reads in full: "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention."

[116] Barry Buzan, *Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea,* 75 AM. J. INT'L L. 324 (1981); Hugo Caminos and Michael R. Molitor, *Progressive Development of International Law and the Package Deal,* 79 AM. J. INT'L L. 871 (1985).

[117] Vienna Convention on the Law of Treaties art. 19(c), *supra* note 63.

[118] Boggs, *supra* note 28, at 543.

breadth of the territorial sea does not appear to be one of these provisions. The fact that the LOSC was conceived, negotiated, and eventually offered for signature and ratification as a "package deal" and the very wording of the treaty itself did not permit reservations indicates the legal obligation upon States parties to embrace the treaty in its entirety. States cannot selectively choose provisions of the Convention it does not wish to comply with.

The signature and ratification of the Philippines of the LOSC carries the reasonable and logical expectation that it will act in conformity with, and not frustrate, the object of the Convention and State practice consistent with it. Further, it is naturally expected that the Philippines has to amend its domestic laws and regulations which are not in conformity with the LOSC. In the words of ITLOS President Wolfrum, "National legislation of States Parties has to conform to the restrictions established by the LOS Convention as far as the extension of areas under national sovereignty or jurisdiction is concerned." [119]

On 10 December 1982, when the Philippines signed the LOSC, it submitted a Declaration which it confirmed upon ratification on 8 May 1984, which among others contained the following:

> Such signing shall not in any manner affect the sovereign rights of the Republic of the Philippines as successor of the United States of America, under and arising out of the Treaty of Paris between Spain and the United States of America of 10 December 1898, and the Treaty of Washington between the United States of America and Great Britain of 2 January 1930.[120]

Further, the Philippines declared in the same instrument that the signing of the LOSC "shall not in any manner impair or prejudice the sovereign rights of the Republic of the Philippines under and arising from the Constitution of the Philippines"[121] and "over any territory over which it exercises sovereign authority … and the waters appurtenant thereto."[122] The Philippine Declaration was

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[119] Wolfrum, *supra* note 13.

[120] *See,* RAPHAEL PERPETUO M. LOTILLA, THE PHILIPPINE NATIONAL TERRITORY: A COLLECTION OF RELATED DOCUMENTS 509-510 (1995). Philippine Declaration made upon signature (10 December 1982) and confirmed upon ratification (8 May 1984) of the LOSC.

[121] *Id.* ¶ 1.

[122] *Id.* ¶ 4.

protested by several nations including Australia, Bulgaria, Byelorussia, Czechoslovakia, the Ukraine and USSR.[123] The Philippine Declaration has been criticized for amounting to a prohibited reservation under the LOSC.[124]

On 26 October 1988, in response to the objection made by Australia,[125] the Government of the Philippines submitted a Declaration which signified its intent to "harmonize its domestic legislation with the provisions of the Convention" including an assurance that "the Philippines will abide by the provisions of the said Convention."[126] In its proper historical context, it must be remembered that the limits of the Philippine territorial sea were established under laws that were enacted prior to the LOSC. The baselines of the territorial Sea of the Philippines were defined by Republic Act No. 3046, approved on 17 June 1961, which was amended by Republic Act No. 5446, approved on 18 September 1968.[127] These legislation treated the waters enclosed by Treaty Limits as territorial sea, and the waters landward of the straight baselines as internal waters.[128] On 12 March 2009, the Philippines enacted a new archipelagic baselines law, Republic Act No. 9522, which amended Republic Act No. 3046 and Republic Act No. 5446.[129] Republic Act No. 9522 complies with the technical requirements of the LOSC pertaining to archipelagos, and part of the Philippine Government's efforts to align the national legal and policy frameworks on the various maritime jurisdictional zones with the

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[123] *See*, LOTILLA, *supra* note 120, at 541-547.

[124] Nelson, *supra* note 114, at 780-781.

[125] LOTILLA, *supra* note 120, at 547. The Australian protest submitted on Aug. 3, 1988, read in part: "Australia considers that [the] declaration made by the Republic of the Philippines is not consistent with article 309 of the Law of the Sea Convention, which prohibits the making of reservations, nor with article 310 which permits declarations to be made "provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of this Convention in their application to that State."

[126] *Id.* at 548.

[127] An Act Define the Baselines of the Territorial Sea of the Philippines, Rep. Act No. 3046, § 1 (June 17, 1961), *amended by* Rep. Act No. 5446 (1968).

[128] Rep. Act No. 3046, pmbl. ¶ 4.

[129] An Act to Amend Certain Provisions of Republic Act No. 3046, As Amended By Rep. Act No. 5446, to Define The Archipelagic Baselines Of The Philippines, and for Other Purposes, Rep. Act No. 9522, (Mar. 10, 2009). On Apr. 1, 2009, the Philippines deposited with the UN Secretary-General the list of geographical coordinates of points under RA 9522, pursuant to Article 47, paragraph 9 of the LOSC. The list of geographical coordinates of points is referenced to the World Geodetic System of 1984 (WGS84) and is available from the website of the UN Division on the Law of the Sea.

LOSC.[130] On 16 August 2011, the Philippine Supreme Court upheld the constitutionality of Republic Act No. 9522 in the case of *Magallona vs. Ermita.*[131]

B. The Philippine Claim and Customary International Law

There are commentators who opine that the rule prescribing the extent of the territorial sea is a customary rule of international law.[132] Some even argue that the twelve nautical mile limit in the LOSC has already attained the status of a customary norm of international law even before the LOSC came into being.[133] This proceed from the view that the LOSC is a codification of existing customary law on the breadth of the territorial sea. In this sense, Article 3 is regarded as declaratory of customary law.[134] Without a doubt, treaty provisions can reflect customary international law.[135] In fact, some treaties not only represent the codification of pre-existing customary rules,[136] they are also instrumental in the progressive development of international law.[137] It is actually possible that a treaty

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[130] Lowell B. Bautista, *International legal implications of the Philippine Treaty Limits on navigational rights in Philippine waters*, 1 AUSTL. J. MARIT. OCEAN AFF. 91 (2009).

[131] Magallona v. Ermita 655 S.C.R.A. 477, (Aug. 16, 2011) (Phil.).

[132] *But see*, S. K. VERMA, AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 297 (1998), who states that "Under customary international law, the breadth of the territorial sea has remained a thorny issue."

[133] Talaie, *supra* note 11, at 288.

[134] *Id.*

[135] SHAW, *supra* note 77, at 90-92.

[136] *See e.g.*, Geneva Convention on the High Seas, preamble, Apr. 29, 1958, 450 UNTS 11, states: "The States Parties to this Convention…adopted the following provisions as generally declaratory of established principles of international law.".

[137] The Vienna Convention on the Law of Treaties is an excellent example. As the International Law Commission noted when it submitted its final draft article on the law of treaties: "The Commission's work on the law of treaties constitutes both codification and progressive development of international law…" *Report of the International Law Commission to the General Assembly*, [1996] 2 Y.B. INT'L L. COMM'N 169, 177, U.N. Doc. A/CN.4/SER.A/1966/Add.1. The International Court of Justice has noted the customary status of provisions of the Vienna Convention. For example, Article 62 on the termination of a treaty by a fundamental change of circumstance in the Fisheries Jurisdiction (U.K. v. Iceland), Jurisdiction of the Court, 1973 I.C.J. Rep. 3, 18 (Feb. 2); and Article 60 on the termination of a treaty due to a material breach in Legal Consequences for States of the Continued Presence of South Africa in Namibia, Order, 1971 I.C.J Rep. 6, 47 (Jan. 26).

which has not yet come into force contains provisions which are declaratory of or a codification of existing customary international law.[138]

1. Historic Title

In international law, "a right contrary to the general rule on be subject may acquired by a particular State through the process of prescription."[139] This exceptional right, called historic right, is established on the basis of consistent and effective practice carried out for a sufficiently long period of time made not only in the presence of the explicit consent of other States, but also in the lack of objection of other States.[140] Specifically, the waters of a coastal State can be considered as historic waters under certain conditions in international law.[141] Historic waters usually refer to "the waters over which the coastal State, contrary to the generally applicable rule in international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States."[142] In order to sustain a historic waters claim, three conditions must be fulfilled: (1) the exercise of the authority over the area; (2) the continuity over time of this exercise of authority; and (3) the acquiescence of foreign States to the claim.[143]

These are the hurdles that the Philippines must prove in order to establish its legal title over the territorial sea it claims on the basis of, among others, historic title. There are a few maritime territorial claims in international law based on

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[138] *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion 1971 I.C.J Rep. 16, 47 (June 21). Although the Convention on the Law of Treaties which came into force only in 1980, the International Court of Justice already declared in 1971 that the rules laid down in that convention "concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject.

[139] YUCEL ACER, THE AEGEAN MARITIME DISPUTES AND INTERNATIONAL LAW 115 (2003).

[140] *Id.*

[141] Secretariat of the International Law Commission, *Juridical Regime of Historic Waters Including Historic Bays,* [1962] 2 Y.B. INT'L L. CMM'N 1.

[142] L. J. BOUCHEZ, THE REGIME OF BAYS IN INTERNATIONAL LAW (1964) at 281.

[143] *See*, Lowell B. Bautista, *The South China Sea Arbitration and Historic Rights in the Law of the Sea*, 17 PHIL. Y.B. INT'L L 3-13 (2018) (discussion of historic rights in the law of the sea).

historic title, but none similar to the *sui generis* Philippine claim to its territorial sea.[144]

2. Persistent Objector

Since the doctrine of opposability effectively applies to historic maritime title, the Philippines could invoke the principle of the persistent objector which applies to "a State that has persistently objected to a rule of customary international law during the course of the rule's emergence is not bound by the rule."[145] The Philippine position, after all, predated all the Law of the Sea Conferences and all of the 1958 Geneva Conventions[146] and most certainly the LOSC, which codified the rule on the maximum breadth of the territorial sea at

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[144] *See e.g.*, Yehuda Z. Blum, *The Gulf of Sidra Incident,* 80 AM. J. INT'L L. 668 (1986); R. Douglas Brubaker, *Straits in the Russian Arctic,* 32 OCEAN DEV INT'L L. 263 (2001); Goodwin Cooke, *Historic Bays of the Mediterranean —A Conference Sponsored by Syracuse University and the University of Pisa,* 11 SYRACUSE J. INT'L L COM. 205 (1984); Francesco Francioni, *Status of the Gulf of Sirte in International Law,* 11 SYRACUSE J. INT'L L COM. 311 (1984); V. Kenneth Johnston, *Canada's Title to Hudson Bay and Hudson Strait*, 15 BRITISH Y.B. INT'L L 1 (1934); Zou Keyuan, *Maritime Boundary Delimitation in the Gulf of Tonkin*, 30 OCEAN DEV INT'L L. 235 (1999); Natalino Ronzitti, *Is the Gulf of Taranto an Historic Bay* 11 SYRACUSE J. INT'L L COM. 275 (1984); Gayl S. Westerman, *The Juridical Status of the Gulf of Taranto: A Brief Reply*, 11 SYRACUSE J. INT'L L. COM. 297 (1984).

[145] Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law,* 26 HARVARD INT'L L. J. 457 (1985). The International Court has recognized in several cases that a State which has consistently opposed from the beginning an emerging rule of customary law, that rule, although generally applicable, does not apply to the protesting State. *See*, U.K. v. Norway 1951 I.C.J. 116, where the ICJ held that the United Kingdom could not invoke against Norway the 10-mile limit on straight lines closing bays to foreign fishing that was included in the 1882 North Sea Fisheries Convention because Norway has consistently objected to the rule. *Id.* at 131, 139. In the *Asylum Case* (Colombia v. Peru), Judgment, 1950 I.C.J. 266, (Nov. 20) the Court applied this principle to a regional rule of customary international law and decided that the regional rule could not be invoked against Peru, which had repudiated it by refraining from ratifying the conventions that were the basis for that rule. *Id.* at 277-278. And most notably, the ICJ confirmed this principle in the North Sea Continental Shelf (Federal Republic of Germany v. Denmark v. Netherlands) 1969 I.C.J. 3 (Feb. 20), where the Court noted that the delimitation rule in the 1958 Convention on the Continental Shelf was not binding on the Federal Republic of Germany as customary international law because it clearly reserved its position on the subject as soon as that rule was applied in North Sea delimitations. *Id.* at 18-19, 27.

[146] *Convention on the High Seas*, 450 U.N.T.S. 11; C*onvention on the Territorial Sea and the Contiguous Zone*, 516 U.N.T.S. 205; *Convention on the Continental Shelf*, 499 U.N.T.S. 311; and the *Convention on Fishing and Conservation of the Living Resources of the High Seas*, 559 U.N.T.S. 285

twelve nautical miles. In international law, persistent objection is a valid defense against the application of customary international law unless that rule has attained the rare status of a peremptory norm or one of *jus cogens* character.[147] But it has been rarely invoked by States and even rarely has it reached international judicial adjudication.[148]

There are two conditions for a State to invoke this rule and opt out of a customary rule. First, the State must object to the rule at its nascent stage and continue to object afterwards.[149] Secondly, the objection must be consistent.[150] In order to rebut the presumption of acceptance, the objection of the State must be clear and not merely silence or failure to object, which will be interpreted as consent.[151] The first step in the inquiry on whether a State may validly invoke the persistent objector doctrine is to ask whether there is a treaty or convention applicable thereby removing the need to decide the issue on the basis of customary international law. The import of a State being party to a treaty is serious:

> If the objecting State has signed a treaty which covers the issue (even if they have signed and later withdraw) they are no longer a persistent objector. They have consented, at least for a time, and should be bound by the norm if it has status of international custom.[152]

In this regard, the signature and ratification of the Philippines of the LOSC preclude the invocation of the doctrine of persistent objector. Moreover, the overwhelming number of territorial sea claims of twelve nautical miles can be

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[147] Holning Lau, *Rethinking the Persistent Objector Doctrine in International Human Rights Law,* 6 CHINESE J. INT'L L. 495 (2006).

[148] Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law,* 26 HARVARD INT'L L. J. 459 (1985). The International Court of Justice only had the opportunity to discuss the matter on two cases: Colombia v. Peru 1950 I.C.J. 266 and in the Anglo-Norwegian Fisheries case (United Kingdom v. Norway), Judgment, 1951 I.C.J. Reports 116.

[149] MARK EUGEN VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 16 (1985) at 16.

[150] Jonathan I. Charney, *Universal International Law,* 87 AM. J. INT'L L. 539 (1993).

[151] Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework,* 2 UNIV. CAL. DAVIS L. REV. 151 (1996).

[152] *Id.*, at 163.

taken as sufficient evidence of custom,[153] and as such, binding upon the Philippines. It is not necessary to characterise the obligation as a norm of customary international law since there is a clear treaty provision in the LOSC which the Philippines as State party is bound to observe.

3. The Philippine Claim and Treaty Interpretation

The interpretation of treaties is resorted in instances when the wording or the language of a treaty is not clear, ambiguous or its meaning is not immediately apparent.[154] The *Vienna Convention on the Law of Treaties* states that treaties are to be interpreted "in good faith" according to the "ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose."[155] Disputes over treaty interpretations are often submitted to international courts and tribunals for resolution.[156] In order to establish the meaning in context, these judicial bodies may review the preparatory work (*trauvaux préparatoires*) from the negotiation and drafting of the treaty as well as the text of the final, signed treaty itself.[157] In approaching the interpretation of the treaties here in dispute, the rules prescribed for the interpretation of treaties in the 1969 *Vienna Convention on the Law of Treaties*, which in this respect has been acknowledged by the ICJ as declaratory of customary international law and so is applicable even to earlier

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[153] *See,* ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971). Customary international law is normally said to have two elements. First, there is an objective element consisting of sufficient State practice; and second, there is a subjective element requiring that the practice be accepted as law or followed from a sense of legal obligation, a requirement known as the *opinio juris* requirement.

[154] MALCOLM N. SHAW, INTERNATIONAL LAW 838-844 (2003); MYRES S. MCDOUGAL, JAMES C. MILLER AND HAROLD D. LASSWELL, THE INTERPRETATION OF INTERNATIONAL AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE (1994).

[155] Each of these elements guides the interpreter in establishing what the Parties actually intended, or their "common will," as Lord McNair put it in the *Palena* award. *See*, Argentina-Chile Frontier Case, 38 I.L.R. 10, at p. 89 (R.I.A.A. 1969).

[156] Gerald G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Other Treaty Points,* 28 BRITISH Y.B. INT'L L. 1 (1951).

[157] Vienna Convention on the Law of Treaties art. 32, *supra* note 63; ARNOLD DUNCAN MCNAIR, THE LAW OF TREATIES 411 (1961). *But see*, Jan Klabbers, *International Legal Histories: the Declining Importance of Travaux Preparatoires in Treaty Interpretation?,* 50 NETHERLANDS INT'L L. REV. 267 (2003).

treaties.[158] The relevant provision is Article 31(1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[159]

The title of the Philippines to its territory is supported, in the first instance, by three treaties: the Treaty of Peace concluded at Paris on 10 December 1898,[160] Treaty signed at Washington on 7 November 1900,[161] and the Convention of 2 January 1930 between the United States and Great Britain delimiting the boundary between the Philippine Archipelago and the State of North Borneo.[162] All of these treaties are valid and binding. The definition of the boundary in the first of these treaties establishes that the territory demarcated by its defined boundary lines belongs to the Philippines.[163] The identification of the same boundary lines in the 1900 and 1930 treaties inescapably indicate that the territory identified belongs to the Philippines. The territory of the Philippines thus defined corresponds to the territory of the Philippines.

The meaning of the treaties from which the Philippines bases its title over its territorial sea is thus a central feature of this dispute. The 1898 Treaty of Paris is not only a treaty of cession of Spanish territory to the United States; it is also a

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[158] *See,* Kasikili/Sedudu Island (Botswana v. Namibia), Judgment, 1999 I.C.J. Rep. 1045 (Dec. 13), both contending parties, non-parties to the Vienna Convention, considered the Vienna Convention's rules to be applicable 'inasmuch as it reflects customary international law'. Judgment of Dec. 13, 1999, ¶. 18., where the ICJ declared: "The Court has itself already had occasion in the past to hold that customary international law found expression in Article 31 of the Vienna Convention." *See also,* Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, 2001 I.C.J. Rep. 575 (Dec. 17), the ICJ could only apply the Vienna Convention's rules by treating them as customary international law, as Indonesia is not a party to the Vienna Convention on the Law of Treaties. Even so, the Court felt the need to emphasise that Indonesia did 'not dispute that these are the applicable rules' (para. 37).

[159] Vienna Convention on the Law of Treaties art. 31 (1), *supra* note 63.

[160] LOTILLA, *supra* note 120, at 32-37. (Full text of Treaty of Peace between the United States of America and the Kingdom of Spain, Signed in Paris, Dec. 10, 1898.)

[161] LOTILLA, *supra* note 120, at 38. Treaty between the Kingdom Spain and the United States of America for the Cession of Outlying Islands of the Philippines (1900) Concluded Nov. 7, 1900; ratification advised by U.S. Senate 22 January 1901; ratified by the U.S. President Jan. 30, 1901; ratifications exchanged Mar. 23, 1901; proclaimed Mar. 23, 1901.

[162] Convention between the United States of America and Great Britain Delimiting the Boundary between the Philippine Archipelago and the State of Borneo (1930). See full text in: LOTILLA, *supra* note 120, at 134.

[163] Article III, Treaty of Paris of Dec. 10, 1898.

boundary treaty. The Philippines thus contends that the 1898 Treaty of Cession by which Spain ceded to the United States the territory known as the Philippine archipelago comprises the terrestrial and maritime domains. The rule is particularly clear and incontrovertible in the case of international boundaries established by treaty. In the *Libya/Chad* case,[164] where the International Court of Justice concluded that the relevant Franco-Libyan Treaty of 1955 determined a permanent frontier (*inter alia* as between colonial Chad and Libya) stated in clear terms that: "[T]he establishment of this boundary is a fact which, from the outset, had had a legal life of its own, independently of the fate of the 1955 Treaty. Once agreed, the boundary stands."[165] The boundary stands irrespective of the nature and status of the treaty itself. The Court further emphasized, "a boundary established by a treaty thus achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary." [166]

This is also supported by the relevant application of the principle of *rebus sic stantibus*, according to which the rule relating to the termination of a treaty on the grounds of a fundamental change of circumstances does not apply where the treaty establishes a boundary.[167] It is also confirmed by Article 11 of the *Vienna Convention on Succession of States in Respect of International Treaties* 1978, which provides that "a succession of States does not as such affect: (a) a boundary established by a treaty..."[168]

The continuance of an international boundary after the independence of the entity territorially defined in whole or in part by such boundary applies even when the boundary has become established otherwise than by treaty, for example by way of recognition or acquiescence. As the International Court made clear in the *Burkina Faso/Mali* case,[169] "there is no doubt that the obligation to respect pre-

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[164] Territorial Dispute, (Libya v. Chad), Judgment, 1994 I.C.J. Rep. 7.

[165] *Ibid.*, at ¶ 72-73.

[166] *Ibid.*

[167] *See* Vienna Convention on the Law of Treaties art. 62, *supra* note 63; Malcolm N. Shaw, *The Heritage of States: The Principle of Uti Possidetis Today*, 67 BRIT. Y.B. INT'L. L. 75 at 88 *et seq*. (1996).

[168] *Ibid,* at 89 *et seq*. *See also,* Contintental Shelf (Tunisia v. Libya), Judgment 1982 I.C.J. Rep. 18 (Feb. 24), at 66; the Frontier Dispute (Burkina Faso v. Mali) 1986 I.C.J. Rep. 556, ¶ 17 (Dec. 22) and Territorial Dispute (Libya v. Chad), Judge Ajibola's Separate Opinion, 1994 I.C.J. 7, ¶ 53. *See also*, Yugoslavia Peace Conference Opinion No 3 (1992) 92 I.L.R. 167, at 171.

[169] Burkina Faso v. Mali, 1986 I.C.J. Rep. 554, at 566.

existing international boundaries in the event of a state succession derives from a general rule of international law".[170]

The title of the United States and, since independence, of the Philippines is also sustained by considerations of customary international law. The Philippines acquired title to the territory of Spain and the United States by occupation beyond the limits of the colonial Treaties of 1898, 1900, and 1930 since the acquisition of independence by the Philippines in 1898 and in 1946.[171] Thus, there is basis for the Philippines to validly invoke the doctrine of *uti possidetis juris* in support of its claim.[172] The Philippines has occupied, possessed and administered this territory. In the period from 1898 to 1946, the Philippines consolidated its title to its territory by a process of historical consolidation of title or of acquisitive prescription both of which are fully recognised in international law.[173]

A party to a treaty cannot impose its particular interpretation of the treaty upon the other parties. However, consent may be implied, if the other parties fail to explicitly disavow that initially unilateral interpretation, particularly if that State has acted upon its view of the treaty without complaint.[174] The role of the subsequent practice or conduct of the Parties also plays a major part in the arguments of both sides.[175] The function of such practice is not relevant exclusively to treaty interpretation. It is possible that practice or conduct may affect the legal relations of the parties even though it cannot be said to be practice in the application of the Treaty or to constitute an agreement between them. As the Permanent Court of International Justice said in relation to loan agreements which, for present purposes, are analogous to treaties: "If the subsequent conduct

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[170] *See also,* Tunisia v. Libya, 1982 I.C.J. Rep. 18, at 65-66.

[171] June 12, 1898 from Spanish colonial rule and July 4, 1946 from American colonial rule.

[172] Tomas Bartos, *Uti Possidetis. Quo Vadis?,* 18 AUSTRALIAN Y.B. INT'L L. 37 (1997); Marcelo G. Kohen, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis*, 98 AM. J. INT'L L. 379 (2004); Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Border of New States* 90 AM. J. INT'L L. 590 (1996).

[173] D. H. N. Johnson, *Consolidation as a Root of Title in International Law,* 1955 CAMBRIDGE L. J. 215 (1955); Alexander A. Murphy, *Historical Justifications for Territorial Claims,* 80 ANNALS OF THE ASSOCIATION OF AMERICAN GEOGRAPHERS 531 (1990); YEHUDA Z. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW (1965).

[174] Vienna Convention on the Law of Treaties art. 31 (2), *supra* note 63.

[175] Vienna Convention on the Law of Treaties art. 31 (3)(b), *supra* note 63.

of the Parties is to be considered, it must be not to ascertain the terms of the loans, but whether the Parties by their conduct have altered or impaired their rights."[176]

The United States has both actively and passively acquiesced in and accepted the Philippines' title during the period prior to the independence of the Philippines. The Philippines had dealings with the United States in relation to the same territory of the Philippines which could only have taken place on the basis of Philippine title.[177] Until relatively recently, the United States did not protest against the Philippine title.

The right of the Philippines to its territory is also supported by the principle of self-determination, a well-established norm of modern international law. The people of the Philippines are entitled to determine their future, and they did so at the time of independence in 1898, and in 1946. Their right to do so was recognised by the members of the United Nations and the Philippines was admitted as a member State of the United Nations with full knowledge of the Philippines' territorial sea claims. Other than the United States, no other State has vigorously contested the Philippine claim.

The title of the Philippines extends not only to the islands and islets lying off the mainland archipelago but to the maritime domain delimited by the above treaties. The right of the Philippines to the maritime area delimited by its international treaty limits flows from its title to the entirety of the archipelago as an indivisible whole to which the islands and the waters are appurtenant as well as from Spanish and American occupation over the same territory.

4. The Philippine Claim and the Acquiescence of the International Community

It is recognised in international law that State acts or measures which would otherwise be illegal as contrary to existing international law may in time, by reason of the failure of other States to lodge an effective protest may develop and consolidate as valid legal rights.[178] This is through the process of acquiescence.[179] In

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[176] Payment of Various Serbian Loans Issued in France (Fr. v. Yugo.), 1929 P.C.I.J. (ser. A) No. 20 (July 12), ¶ 79.

[177] TOLENTINO, *supra* note 101, at 16.

[178] Phil C. W. Chan, *Acquiesence/Estoppel in International Boundaries: Temple of Preah Vihear Revisited* 3 CHINESE J. INT'L L. 421 (2004) at 422.

[179] *Please see especially*, I. C. MacGibbon, *The Scope of Acquiescence in International Law,* 31 *BRITISH*

view of its potency in the creation of rules of customary international law and in the determination of title to territory and the delimitation of boundaries, acquiescence is, according to Kaiyan Kaikobad, "not to be lightly presumed"[180] and must "be interpreted strictly" maintains Prof. I.C. MacGibbon.[181]

In the case at hand, the Philippine archipelago as a distinct and cohesive entity was a notorious fact, the existence of which cannot be easily denied. The earliest maps depicting the archipelago reflect the current configuration of the Philippine territory. This was the same territory that was under Spanish colony for over three centuries, during which time no other foreign power contested said territorial boundaries. This is the same territory which passed from Spanish sovereignty to that of the United States in 1898 as embodied in the Treaty of Paris.[182]

This same territory, purposely delimited in metes and bounds, was further confirmed in subsequent treaties entered into by the United States with Spain in 1900,[183] and with Great Britain in 1930.[184] This same territory was administered by the United States as its colony for almost half a century until 1946, when the Philippines declared its independence.[185] The absence of any protest over a long period of time is incontrovertible. There was no protest subsequent or simultaneous to the ratification of the Treaty of Paris as with respect to the

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Y.B. INT'L L. 143 (1954); I.C. MacGibbon, *Customary International law and Acquiescence* 33 BRITISH Y.B. INT'L L. 115 (1957).

[180] Kaiyan Homi Kaikobad, *Some Observations on the Doctrine of Continuity and Finality of Boundaries*, 54 BRITISH Y.B. INT'L L. 126 (1983).

[181] MacGibbon, *supra* note 179, at 168-169.

[182] LOTILLA, *supra* note 120, at 32-37. (Provides full text of Treaty of Peace Between the United States of America and the Kingdom of Spain, Signed in Paris, Dec. 10, 1898.)

[183] LOTILLA, *supra* note 120, at 38. (Provides full text of Treaty between the Kingdom Spain and the United States of America for the Cession of Outlying Islands of the Philippines (1900) Concluded Nov. 7, 1900; ratification advised by U.S. Senate Jan. 22, 1901; ratified by the U.S. President Jan. 30, 1901; ratifications exchanged Mar. 23, 1901; proclaimed Mar. 23, 1901.)

[184] LOTILLA, *supra* note 120, at 134. (Provides full text of Convention between the United States of America and Great Britain Delimiting the Boundary Between the Philippine Archipelago and the State of Borneo (1930).

[185] *See e.g.*, KAREN WELLS BORDEN, PERSUASIVE APPEALS OF IMPERIALIST AND ANTI-IMPERIALIST CONGRESSMEN IN THE DEBATES ON PHILIPPINE INDEPENDENCE, 1912-1934 (1973); BERNARDITA REYES CHURCHILL, THE PHILIPPINE INDEPENDENCE MISSIONS TO THE UNITED STATES, 1919-1934 (1983); Raul P. De Guzman, *The Formulation and Implementation of the Philippine Independence Policy of the United States, 1929-1946* (Phd Thesis, University of Michigan, 1957).

exercise of sovereignty by the United States over all the land and sea territory embraced in that treaty. Neither was there any protest after the Philippines gained independence when it exercised sovereignty and jurisdiction over the same territory.[186] Never during the course of this long period did the United States, or any other foreign power for that matter, protested against the extent of the Philippine national territory.

When the Philippines tendered a *note verbale* to the Secretary General of the United Nations on 20 January 1956, it stated in clear terms the limits of its territorial seas, as follows:

> The Philippine Government considers the limitation of its territorial sea as referring to those waters *within the recognized treaty limits*, and for this reason it takes the view that the breadth of the territorial sea *may extend beyond twelve miles*. It may therefore be necessary to make exceptions, upon historical grounds, by means of treaties or conventions between States… (emphasis added)[187]

The Philippines also sent diplomatic notes of the same tenor to various States regarding the extent of its internal wares and territorial sea. Again, no protests were raised except that of the United States. The silence of these States can be taken as a tacit recognition of the Philippine claim.[188] As emphasised in the *Temple of Preah Vihear* case, "a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation."[189] This doctrine, called estoppel, precludes a party from putting forth claims or allegations inconsistent with its previous conduct.[190] The rationale behind this principle is to prevent a State from benefitting from its own

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[186] Miriam Defensor Santiago, *The Archipelago Concept in the Law of the Sea: Problems and Perspectives*, 49 PHIL. L. J. 363 (1974).

[187] *See* Whiteman, Digest of International Law, Vol. 4, pp. 282-283. See text of statements in 46 Phil. L. J. 628 (1971); 3 PHIL. Y.B. INT'L L. 28, 31 and 46 (1974).

[188] Defensor Santiago, *supra* note 186, at 363.

[189] Temple of Preah Vihear (Cambodia v. Thailand), Separate Opinion of Vice President Alfaro, 1962 I.C.J. Rep. 6, at 39.

[190] *See,* Nuno Sergio Marques Antunes, *Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement,* 2 BOUNDARY & TERRITORY BRIEFING (2000); D. W. Bowett, *Estoppel before International Tribunals and its Relation to Acquiescence,* 35 BRITISH Y. B. INT'L L. 176 (1957); Chan, *supra* note 178, at 421 (literature on estoppel in international law).

inconsistencies to the prejudice of another State.[191] The pronouncement of the PCIJ in the *Legal Status of Eastern Greenland* case on the import of the renunciations in favour of Denmark made by Norway in respect of Greenland is instructive on this point: "[I]n accepting these bilateral and multilateral agreements as binding upon herself, Norway reaffirmed that she recognised the whole of Greenland as Danish; and thereby she debarred herself from contesting Danish sovereignty over the whole of Greenland, and in consequence, from proceeding to occupy any part of it."[192]

In the same manner, the colonial treaties that the United States entered into which confirm the territorial limits of the Philippines should bar her from contesting the Philippine claim and claiming a position inconsistent with its previous acts. Moreover, the notoriety of the facts of the Philippine claim, the general tolerance of the international community coupled with the interest of the United States on the matter and her prolonged abstention would in any case warrant the enforcement of the Philippine position against the United States.[193]

An examination of international jurisprudence which deal with the related issues of acquiescence, recognition and estoppel, and their role in the settlement of boundary and territorial disputes will reveal that the probative or evidentiary value of specific acts depend largely on the interpretation of factual circumstances which are assessed subjectively, thereby obscuring any generalization.[194] This is the same situation at the case at hand.

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[191] BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 141-142 (1987).

[192] Legal Status of Eastern Greenland (Denmark v. Norway), Judgment, 1933 P.C.I.J. (ser. A/B) No. 53, p. 22 at 68 (Sept. 5)

[193] These are the very yardsticks used by the ICJ in the Fisheries Case to declare the Norwegian practice to be not contrary to international law. In the words of the ICJ: "[t]he notoriety of the facts of the Philippine claim, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom." United Kingdom v. Norway, 1951 I.C.J. at 139. In the Arbitral Award Case, the ICJ noted that after failing "to raise any question with regard to the validity of the Award for several years," Nicaragua was no longer in position to challenge its validity — only after a period of a little more than five years. Arbitral Award Made by the King of Spain on (Honduras v. Nicaragua), Judgment, 1960 I.C.J. Rep. 192, at 213-214 (Nov. 18).

[194] Antunes, *supra* note 190.

IV. Conclusion

The object of this paper was to determine the legal status of the Philippine territorial sea claim in international law. The Philippine territorial sea claim, however, much like most international territorial disputes, is both a legal and a political issue. As insightfully noted by Victor Prescott, "disputes based solely on legal arguments … are comparatively rare," and the truth is, the "largest number of territorial disputes lack any significant legal component."[195] Ultimately, the validity or invalidity of the Philippine claim may never actually rest upon a judicial adjudication at all.

A summary of the general and specific principles of international law drawn out from the discussions in this paper is in order. First, the juridical nature and the maximum breadth of the territorial sea was not absolute.[196] Contrary to prevailing opinion, the twelve nautical mile limit of the territorial sea, throughout most of history, was not generally considered a settled rule of customary international law, but one in *statu nascendi*.[197] Second, the positive rule on the maximum breadth of the territorial sea of twelve nautical miles was only codified as a conventional rule of international law in the LOSC which only came into force in 1994.[198] Third, the historical existence of the Philippines as a polity or nation State can be traced in antiquity.[199] The 1898 Treaty of Paris upon which the Philippine territorial waters claim is premised, is more than a century old. Fourth, there is adequate legal basis

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[195] JOHN ROBERT VICTOR PRESCOTT, POLITICAL FRONTIERS AND BOUNDARIES 107 (1987).

[196] As noted by Prof O'Connel, it was only "[A]fter 1900 [that] the controversy about the juridical nature of the territorial sea waned and scarcely any author took issue with the notion that the territorial sea is subject to sovereignty. O'Connel, *supra* note 4, at 343.

[197] "*In statu nascendi*" a Latin phrase which means in the state of inception, at the moment of emergence. Even the position of the United States was never absolute, which in the incipient stages of the development of the law on the territorial was both unsure "as to the extent of the space subject to the territorial supremacy of a State in its coast waters, or as to the nature and purport of that supremacy." *See,* Marston, *supra* note 4, at 324 *citing* H.A. SMITH, GREAT BRITAIN AND THE LAW OF NATIONS 202 (1935).

[198] LOSC art. 2, *supra* note 12.

[199] R. B. Fox, *The Philippines During the First Millennium B.C.* in EARLY SOUTH EAST ASIA: ESSAYS IN ARCHAEOLOGY, HISTORY AND HISTORICAL GEOGRAPHY 227 (Ralph Bernard Smith and William Watson eds., 1979); W. G. SOLHEIM, PHILIPPINE PREHISTORY in THE PEOPLES AND ARTS OF THE PHILIPPINES 16 (Casal et al. ed., 1981); THE FILIPINO NATION: A CONCISE HISTORY OF THE PHILIPPINES (Helen R. Tubangui et al eds., 1982); F. LANDA JOCANO, PHILIPPINE PREHISTORY: AN ANTHROPOLOGICAL OVERVIEW OF THE BEGINNINGS OF FILIPINO SOCIETY AND CULTURE (1975).

to argue the validity of the Philippine territorial sea claim under international law on the grounds of recognition by treaty, devolution of treaty rights, historic rights, acquiescence, and estoppel. Nonetheless, the contrary position is equally tenable.

The present weight of opinion considers the territorial sea as an integral part of the coastal State.[200] It is part of the territory of the State over which it exercises supreme authority.[201] Current international law recognises that "[a]s far as the territorial sea proper is concerned, its maximum breadth of 12 nautical miles is accepted almost globally."[202] It is hardly necessary to belabor this point since the twelve nautical mile limit on the breadth of the territorial sea is clearly embodied in a positive rule of conventional international law, i.e., the LOSC, to which the Philippines is a State party.[203]

A State's domestic policy falls within its exclusive jurisdiction, provided, that it does not violate any obligation of international law.[204] It is indisputable that the exercise of sovereignty is limited by the rules of international law. International law must be allowed to fulfil its function of regulating the interests of the community of States through the institution of mutually acceptable restraints. From time to time, these restraints may even be contrary to the national interests of States. The arguments in support of the Philippine claim to a territorial sea greater than twelve nautical miles in breadth may be logical and persuasive but such cannot be effectively maintained with the disagreement of the majority of States and against the letter and spirit of a treaty which the Philippines is a State

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[200] PHILIP C. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION XXIV (1927).

[201] In the words of Oppenheim: "Sovereignty is supreme authority, an authority which is independent of any other earthly authority." L. OPPENHEIM, INTERNATIONAL LAW, VOL.1, PEACE: A TREATISE 118-119 (1963). Of course, needless to state, coastal States exercise complete and absolute sovereignty over its internal waters as defined in Article 8(1), LOSC as they exercise over their land territory which by definition, quite interestingly, excludes archipelagic waters.

[202] NGANTCHA, *supra* note 37, at 195.

[203] The Philippines signed the LOSC on Dec. 10, 1982 and ratified the LOSC on May 8, 1984. The fundamental principle of the law of treaties rests on the proposition that treaties are binding upon the parties to them and must be performed in good faith. This is embodied in one of the oldest principle of international law, *pacta sunt servanda.* On the nature of this obligation in international law, *see*: Josef L. Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda,* 39 AM. J. INT'L L. 180 (1945); I. I. Lukashuk, *The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law,* 83 AM. J. INT'L L.513 (1989); Hans Wehberg, *Pacta Sunt Servanda,* 53 AM. J. INT'L L. 775 (1959).

[204] Military and Paramilitary Activities (Nicaragua/United States of America), Merits, 1986 I.C.J. Rep. at 131.

party. A State cannot adopt a selective approach to the norms of international law. The LOSC is not a fruit basket from which it can pick only those that it fancies. The Convention is a single and indivisible instrument and a package of closely interrelated compromise solutions.[205] In the community of nations, the respect for and observance of the rule of law are paramount. Territorial claims, as well as domestic maritime legislation and policies, which are legally defensible, internationally accepted, and consistent with the country's international legal obligations, safeguard, advance, and serve Philippine national interests.

[205] It is well to remember that the LOSC was adopted by a strict process of consensus, underpinned by the idea that the instrument constitutes a "package deal." *See* Buzan, *supra* note 116.