

# CPBD *Notes*

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## Demystifying RP's Delimitation Dilemma

The past few months have witnessed heightened debates in both chambers of Congress as to whether or not to enact a new baselines law that is compliant with the United Nations Convention on the Law of the Sea (UNCLOS). With the impending deadline for extended continental shelf applications set in May 2009, it seems

that the Philippines is faced with a Hobson's choice. Yet the country already has an existing baselines law, namely, RA 3046 as amended by RA 5446 which is deemed not to be UNCLOS compliant. But is it in the national interest to pass a new baselines law in compliance with the UNCLOS?



Cong. Antonio Cuenco (left) and Cong. Rufus Rodriguez (right) listens as Dean Merlin Magallona delivers his lecture (inset).

Dean Merlin M. Magallona<sup>1</sup> sheds light on the various issues surrounding the amendment of the present baselines law through House Bill 3216 in order to comply with the UNCLOS. Beyond the disputes on the boundaries and territorial waters, he raises concerns about the compatibility of such decision with our national laws. His discussion is divided into three parts: the question on the Philippine boundaries, the concerns

*(Continued on page 2)*

### What's Inside

Archipelagic statehood and Philippine sovereignty:  
When the ineffable becomes inevitable.....p. 7

The options in a nutshell..... p. 18

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## ***Demystifying...*** (Continued from page 1)

regarding the country's territorial waters and the application of the UNCLOS in the Philippine context. He furthers the debates on this issue by laying out the possible repercussions of implementing the UNCLOS in the Philippine context. It is hoped that through the ensuing discussion, our legislators would be in a better position to evaluate the options available to maximize the national interest.

### **The question of boundaries**

A discussion on the boundaries of the Philippines would have to begin with a review of international treaties which define the country's territorial limits. The international treaty limits (ITL) represent the political boundary of the Philippines. The Treaty of Paris (S. 1898), which provides for the cession of the Philippine archipelago to the United States, is the instrument from which all other instruments describing the Philippine national territory is derived from. It states that 'Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within the following line: (technical description omitted)'

This treaty has two companion treaties, namely, (1) the Treaty of between the United States and Spain (S. 1900), which includes the islands of Cagayan, Sulu and Sibutu and (2) the United States-United Kingdom Convention (S. 1930), demarcating the line between North Borneo and the Philippine archipelago and declaring that the Turtle Islands and Mangsee Islands are 'comprised within the Philippine Archipelago'.

It should be noted that the boundary lines established by the US-UK Treaty is connected to the international treaty limits. Said treaty has repeatedly referred to the Treaty of Paris as

***'The argument therefore, that the limits as defined by the Treaty of Paris are not boundaries does not seem valid as the US-UK Treaty has referred to the international treaty limits as such.'***

establishing the country's boundaries. The argument therefore, that the limits as defined by the Treaty of Paris are not boundaries does not seem valid as the US-UK Treaty has referred to the international treaty limits as such.

During the colonial administration of the United States, towards the promulgation of the 1935 Philippine Constitution, right up to the present Constitution, the following documents refer to the boundaries of the Philippines as those described by the Treaty of Paris:

1. Jones Law of 1916, which establishes the Philippines and its boundaries as recognized by the United States;
2. Administrative Code of 1916, which signifies the scope of jurisdiction and administration of the Philippine government, including the territorial scope of the exercise of its sovereignty;
3. Philippine Independence Act of 1934 (Tydings-McDuffie Law), which provides the preparatory framework for the Commonwealth Government of the Philippines and the promulgation of the 1935 Constitution;
4. Report of the Committee on Territorial Delimitation, Constitutional Convention of 1934;
5. The Constitution of 1935 (Article I – National Territory);
6. The Constitution of 1973 (Article I – The National Territory); and
7. The Present Constitution (1987)

(Continued on page 3)

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## ***Demystifying...*** (Continued from page 2)

With the ITL as the basis for delimiting the Philippine territorial boundaries so deeply ingrained in our municipal laws, it would be difficult to do away with it by enacting a new baselines law in the form of HB 3216 in order to comply with the UNCLOS. Besides, the

***‘With the ITL as the basis for delimiting the Philippine territorial boundaries so deeply ingrained in our municipal laws, it would be difficult to do away with it by enacting a new baselines law in the form of HB 3216 in order to comply with the UNCLOS.’***

Philippines already has an existing baselines law even before the UNCLOS came into force, namely RA 3046 (S. 1961) as amended by RA 5446 (S. 1968), which also refers to the ITL in establishing the boundaries of the Philippine territory. Said law is substantially UNCLOS compliant, with one exception, namely, that the line across the Gulf of Moro exceeds the permitted maximum of 125 nautical miles by 15 nm. Otherwise, the present baselines are in conformity with Article 47 of the UNCLOS.

### **The Philippine boundaries as stipulated in the Constitution**

It is worth investigating how the Philippine Constitution provides for the country's boundaries, beginning from the Commonwealth Government up to the present.

The 1935 Constitution established the territorial base of the Philippine State. It states that:

‘The Philippines comprises all the territory ceded to the United States by the Treaty of Paris... *the limits of which are set*

*forth in Article III of said treaty, together with all the islands embraced in the treaty concluded at Washington, between the United States and Spain...and in the treaty concluded between the United States and Great Britain...and all territory over which the present Government of the Philippine Islands exercises jurisdiction.’ (emphasis added)*

The reference of the 1935 Constitution to the international treaty limits as bases for delimiting the national territory demonstrates the deep foundations of the Philippines' boundaries. As quoted above, it is apparent that the 1935 Constitution and its language may only be understood upon review of the documents listed in the previous section, which are derivatives of the Treaty of Paris.

Therefore, when the 1973 Constitution speaks of the Philippine archipelago, we are speaking of the same archipelago as derived from Article III of the Treaty of Paris together with its limits or boundaries:

‘The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all the other territories belonging to the Philippines by *historic right or legal title* including the territorial sea, the air space, the subsoil, the seabed, the insular shelves, and other submarine areas over which the Philippines has sovereignty or jurisdiction. The waters around, between, and connecting the islands of the archipelago, irrespective of their breadth and dimensions, form part of the internal waters of the Philippines.’ (emphasis added)

At this point, it would be good to examine if the Philippine archipelago as described in the 1987 Constitution may derive their meaning from the 1935 Constitution. Article I describes

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## ***Demystifying...*** (Continued from page 3)

the national territory in the following manner:

*‘The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all other territories over which the Philippines has sovereignty or jurisdiction, consisting of its terrestrial, fluvial, and aerial domains, including its territorial sea, the seabed, the subsoil, the insular shelves, and other submarine areas. The waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines.’* (emphasis added)

As stated above, the national territory under Article I of the 1987 Constitution consists of two components: (1) the main component, namely, ‘the Philippine archipelago with all the islands and waters embraced therein’, which is

### ***‘...the national territory under Article I of the 1987 Constitution consists of two components...’***

the same islands and waters enclosed by the international treaty limits and (2) the part consisting of ‘all other territories over which the Philippines has sovereignty or jurisdiction...’ The ‘all other territories...’ clause of the 1987 Constitution would refer to territories other than the Philippine archipelago which form part of the national territory by definite legislative enactments, i.e., PD 1596 (S. 1978), which declares the Kalayaan Island Group (KIG) as part of the Philippine territory and Section 2 of RA 3046 as amended by RA 5446 with respect to Sabah. The ‘all other territories’ clause of the Constitution, therefore, has confirmed and has firmed up what is stated as ‘other territories’ in these legislative enactments.

## **The question of territorial waters or sea**

The present baselines law defines the baselines of the Philippines based on the Treaty of Paris. The preambular paragraph of RA 3046 explains the character of our territorial waters outside of the baselines and the waters enclosed by the baselines. Under RA 3046, the vast expanse of water beginning from the baselines established by this law, up to the international treaty limits are all territorial sea. The other implication made explicit by the present baselines law is that all the waters enclosed by the baselines are internal waters. Thus is the character of the internal waters as preserved in the present Constitution.

The character of the waters as described in the present baselines law may be traced to the first Fisheries Act of 1932 under the regime of the Philippine Commission, which is the civil government under the American colonial regime. It states that:

“Philippine waters, or territorial waters of the Philippines”, includes all waters pertaining to the Philippine Archipelago, as defined in the treaties between the United States and Spain, dated respectively the tenth of December, eighteen hundred and ninety-eight, and the seventh of November, nineteen hundred.’

The present baselines law, therefore would appear to trace itself, again, to the formulation of the Treaty of Paris. On the same formulation, and in further explicit reference to the international treaty limits, the Philippines, in its 1955 Note Verbale, has declared to the international community that:

‘All waters around, between and connecting different islands belonging to

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## ***Demystifying...*** (Continued from page 4)

the Philippine Archipelago [the waters within the present baselines, and as described in the 1987 Constitution], irrespective of their width or dimension, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines. All other water areas embraced within the lines described in the Treaty of Paris of 10 December 1898, the Treaty concluded at Washington, D.C., between the United States and Spain on 7 November 1900, the Agreement between the United States and the United Kingdom of 2 January 1930, and the Convention of 6 July 1932 between the United States and Great Britain, as reproduced in Section 6 of Commonwealth Act No. 4003 and article 1... of the Philippine Constitution, are considered as maritime territorial waters of the Philippines...'

This is the first statement by the Philippines addressed to the international community affirming the Treaty of Paris formulation on our national territory. This formulation was repeated in the 1960 Law of the Sea Conference in the statement delivered by Senator Arturo Tolentino. In this statement, Senator Tolentino reiterates our position that the Philippine situation is unique, in that it

***'...the Philippine situation is unique... it cannot be subject to the 12-nautical mile limit for territorial sea.'***

cannot be subject to the 12-nautical mile limit for territorial sea. The Philippine position, as a matter of fact, has a formulation that would make the waters within the baseline and the international treaty limits as legal and historic waters, which would create the possibility that

***'...it might be worth examining, as a compromise, whether the vast expanse of territorial sea according to the ITL may instead of being designated as territorial sea as a zone of sovereignty, be considered as historic waters...'***

the Philippines may declare the vast expanse of territorial waters as historic waters instead. In other words, it might be worth examining, as a compromise, whether the vast expanse of territorial sea according to the ITL may, instead of being designated as territorial sea as a zone of sovereignty, be considered as historic waters which is a more elaborate concept in international law.

The US, however, filed an opposition with regard to the reach of our territorial sea. It has expressed its attitude that the Treaty of Paris was not intended to draw boundary lines, that it recognizes a 3-mile territorial sea for the Philippines, and that the Treaty of Paris text should not be interpreted as to include the waters; claiming that only the land was ceded by Spain to the US, to wit:

'The United States' attitude with reference to the position of the Philippine Government... was that the lines referred to in bilateral treaties between the United States and the United Kingdom and Spain merely delimited the area within which the land areas belong to the Philippines and that they were not intended as boundary lines. The United States, in 1958, stated that it recognized only a 3-mile territorial sea for each island.'

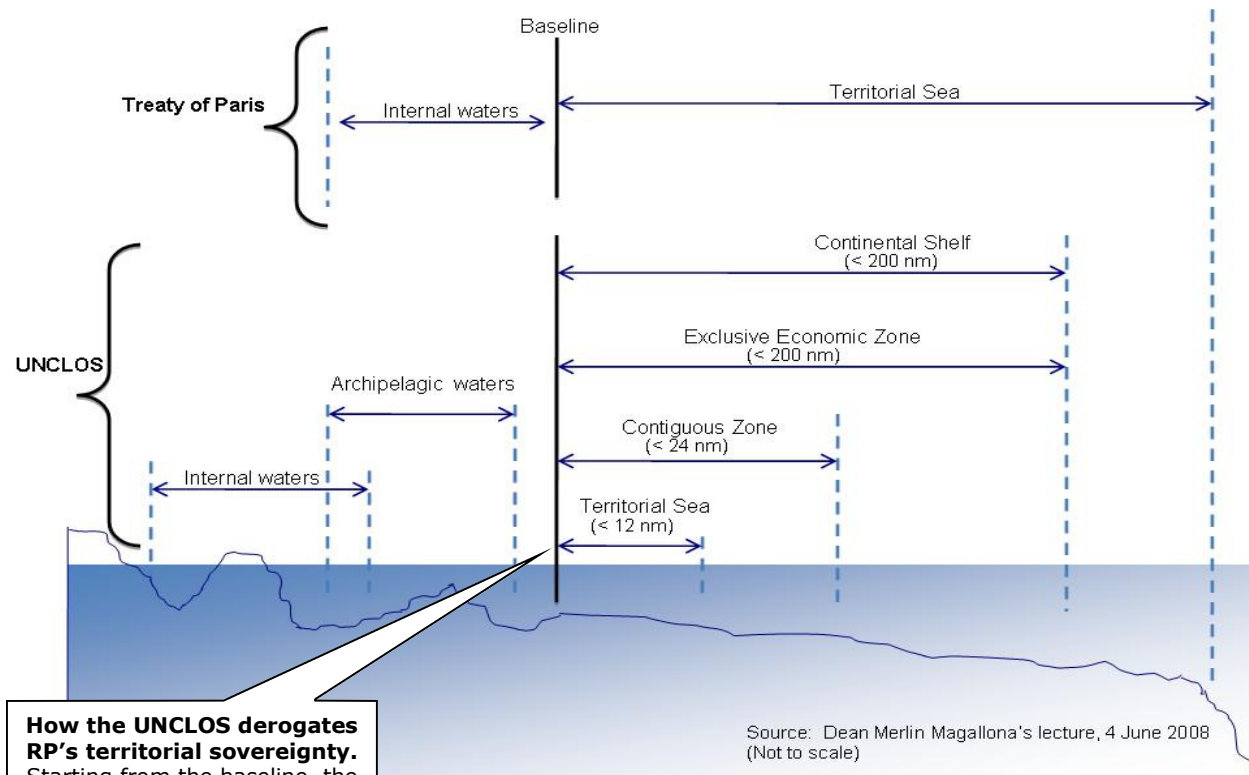
Furthermore, the US claimed that never did the treaties confer upon the Philippines greater rights surrounding the waters of the Philippine

(Continued on page 6)



**Figure 1**

Maritime delimitations according to the Treaty of Paris and UNCLOS



**How the UNCLOS derogates RP's territorial sovereignty.**

Starting from the baseline, the territorial sea shrinks from the limits set by the Treaty of Paris to the 12-nm limit set by the UNCLOS. Also, RP's internal waters are pushed landward under the UNCLOS.

speak of 'boundary' and 'boundary lines', the limits of which refer to the territorial scope of the Treaty of Paris. The US formulation quoted above never appeared in the Jones Law, the Administrative Code of 1916, and in the Tydings-McDuffie Act.

**Demystifying...** (Continued from page 5)

islands than otherwise recognized in customary international law (referring to the 3-mile limit breadth of the territorial sea)<sup>2</sup>. But then again, upon careful consideration, this kind of formulation would seem unreasonable. Considering that the Treaty of Paris specifically describes the Philippines as an 'archipelago', it would be absurd to think of an archipelago to consist of only the land without the waters. Also, the legislative enactments by the US Congress pertaining to the Philippine territory

<sup>2</sup> It was only recently that the US agreed to the 12-nm rule for the territorial sea of the UNCLOS, when it became evident that the international community has shifted to it from the 3-nm cannon shot limit for the territorial sea.

**The National Territory under the United Nations Convention on the Law of the Sea (UNCLOS)**

Figure 1 shows the legal regime under the UNCLOS in relation to the legal regime of the Treaty of Paris. In the Treaty of Paris, the vast expanse of water between the baseline and the international treaty limits represents the territorial sea. However under the UNCLOS, the vast expanse of territorial sea is divided into

(Continued on page 7)

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## Archipelagic statehood and Philippine sovereignty

### When the ineffable becomes inevitable

**T**he concept of archipelagic statehood merits serious consideration before it forms part of the Philippine laws. The UNCLOS definition of archipelagic states adversely impacts the sovereignty of a state on its territorial waters. This is mainly due to the inherent features of an archipelago and its corresponding straight archipelagic baselines system as provided for in the UNCLOS.

Under the UNCLOS, an archipelagic state's waters are labeled 'archipelagic waters' and consequently become subject to the right of innocent passage. This does not seem to present much problem unless the attributes that comprise an archipelago are taken into account. Article 46 of the UNCLOS defines an 'archipelago' as

'a group of islands, including parts of

islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.'

According to this definition, the water and land attributes of an archipelago are treated as a single unit—one cannot do without the other. However, the UNCLOS straight archipelagic baselines system, when applied to an archipelago, becomes useless as a defining mechanism for the exercise of jurisdiction over its waters. Magallona argues,

'When [straight archipelagic baselines]... are drawn across bodies of water, they

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### ***Demystifying...*** *(Continued from page 6)*

maritime zones: the territorial sea, the contiguous zone, the exclusive economic zone (EEZ) and the continental shelf which is coextensive with the EEZ, except that the extended continental shelf (if permitted) may reach the absolute limit of 350 nautical miles.

Under the Treaty of Paris, the internal waters of the Philippine archipelago, in addition to bays, rivers and lakes, includes the vast expanse of waters connecting the islands of the archipelago. But this vast expanse of internal waters disappears under the UNCLOS as they become archipelagic waters. The waters within the baselines under the Treaty of Paris would be characterized as internal waters, as described by the 1987 Constitution. As archipelagic

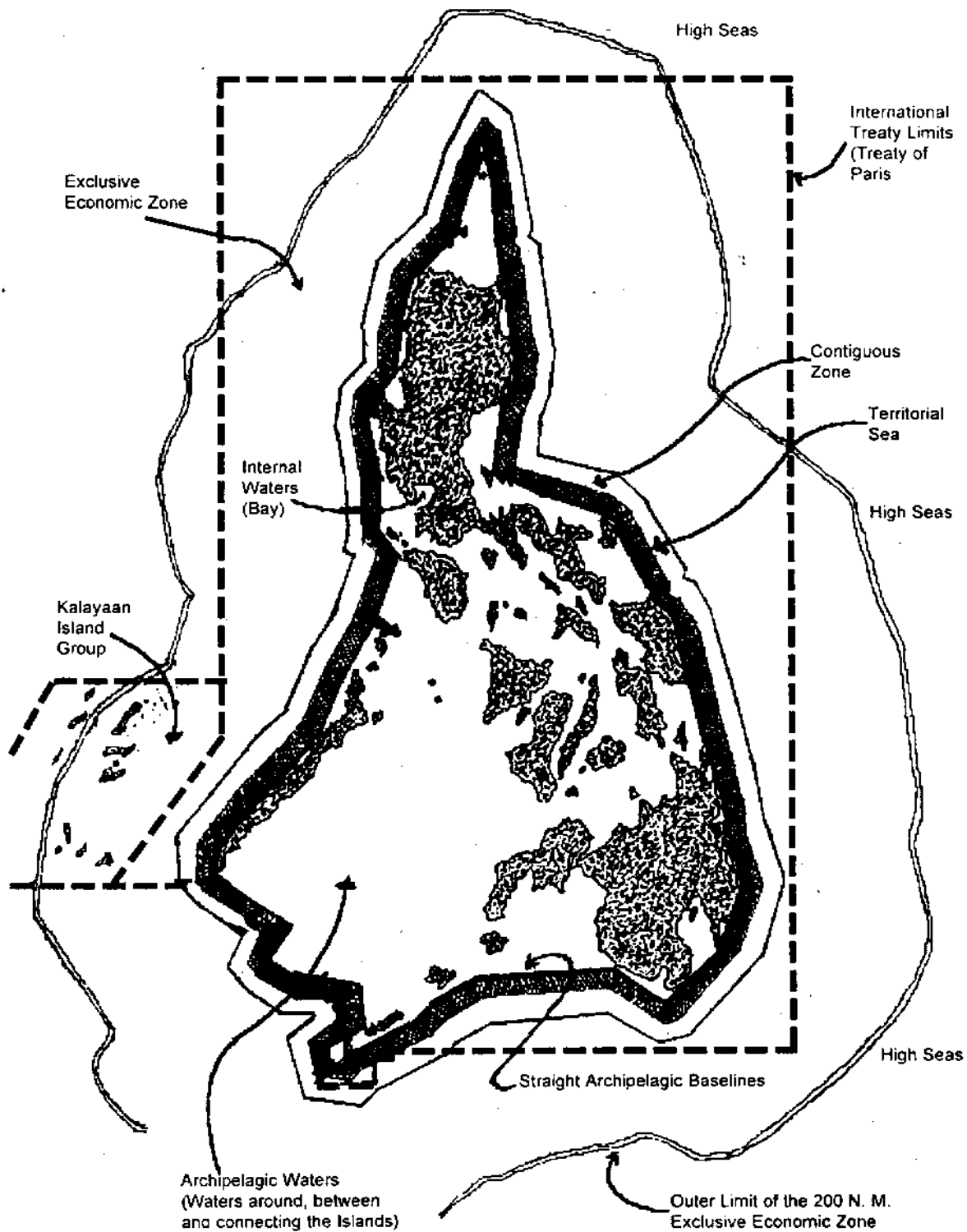
waters, however, these waters are now subject to right of innocent passage, the same right of innocent passage limited to the territorial sea (please see related article, *Archipelagic Statehood and Philippine Sovereignty* in this issue). Therefore, under the UNCLOS, the internal waters of the Philippines would collapse and would end up being limited to waters in bays, deltas of rivers and lakes.

### **The international treaty limits (ITL)**

Figure 2 illustrates the ITL and UNCLOS regimes as applied to the Philippine situation. The broken lines forming a semi-rectangle around the Philippine archipelago represents the ITL under Article III of the Treaty of Paris. The vast expanse of water of the territorial sea can be seen. On the northeast of Northern

*(Continued on page 9)*

Figure 2. The ITL and UNCLOS regimes as applied to the Philippines



Source: Magallona, M 1997, *A Primer on the Law of the Sea*, Quezon City.



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## ***Demystifying...*** (Continued from page 7)

Luzon the breadth of the territorial sea is set at 285 nautical miles. This is the breadth of the territorial sea under the Treaty of Paris as reaffirmed in the present baselines law.

### **The territorial sea**

The inner line surrounding the islands is the baseline from which the maritime zones are delimited. The heavy line is the delimitation of the territorial sea at 12 nm. The edge of this heavy line is the outer limit of the territorial sea. Since the territorial sea is the frontier of sovereignty, under the UNCLOS therefore, the extent of Philippine sovereignty ends at the outer limit of the territorial sea. But under the Treaty of Paris, on the same characterization of the territorial sea, the powers of sovereignty of the Philippines would be as extensive as the territorial sea according to the international treaty limits. The implementation of the UNCLOS in the Philippine context would thus have these implications on the country's sovereignty.

### **The contiguous zone**

The area that extends up to 24 nm seaward from the baseline represents the contiguous zone. The contiguous zone has assumed importance under the regime of international environmental law as it is the seat of jurisdictional rights for the enforcement of sanitation, regulation and environmental laws. It is not appurtenant to the coastal state but has to be established in order for the state to exercise its rights over it. But it is not clear whether the Philippines has established a contiguous zone.

### **The exclusive economic zone**

The exclusive economic zone is the area that extends up to a maximum of 200 nm from the

baselines from which the territorial sea is measured. In this area, the country is granted sovereign rights to explore, exploit, conserve and manage the marine resources. It is also given jurisdictional rights over artificial islands, environmental protection and marine scientific research in this zone.

The EEZ gives the coastal state sovereign rights principally over the living resources and jurisdictional rights. It has nothing to do with acquisition of territory. Its superjacent waters are governed by the freedom of the sea principle in which the international community maintains the right of navigation. It is to be differentiated from the territorial sea over which the coastal state exercises sovereignty, subject only to the right of innocent passage.

### **The Kalayaan Island Group (KIG)**

PD 1596 organizes the Kalayaan Island Group (KIG) as one political unit. Section 1 states that 'Such area is hereby constituted as a distinct and separate municipality of the Province of Palawan and shall be known as

***'Subjecting KIG to the islands regime would mean its maritime zones will have to follow, thereby losing its internal waters connecting the constituent islands.'***

"Kalayaan". According to PD 1596 therefore, KIG should be treated collectively—as a local government unit—and not as individual islands.

There is a significant difference between treating the KIG as a political unit as against subjecting it to Article 121 of the UNCLOS. Designating KIG as 'regime of islands' ends up reorganizing it into individual islands which is inconsistent with PD 1596. Subjecting KIG to the islands regime would mean its maritime zones will have to follow, thereby losing its

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## ***Demystifying...*** (Continued from page 9)

internal waters connecting the constituent islands. Each island will have its own territorial sea, exclusive economic zone and continental shelf. However, organized and structured as a political unit, and conferred legal status as such, the maritime zones will be appurtenant to the KIG as a political unit. Inevitably, there will be internal waters between the islands, which spells much difference; as internal waters are zones of sovereignty in and between the islands. Hence, when the composition and character of the KIG is changed, each individual island will have exclusive economic zone and all the maritime zones without the internal waters.

### ***‘The Philippines has already declared sovereignty over KIG per PD 1596.’***

The KIG has a history of its own. Note that PD 1596 defines the boundaries of the KIG as a group of islands.

The Philippines has already declared sovereignty over KIG per PD 1596. It would be difficult to amend or do away with it because the Constitution provides for two components of the national territory: the main archipelago and ‘all other territories’. Hence the KIG is part of the Philippine territory and is so declared by Philippine law. Since Article 46 of the UNCLOS defines an ‘archipelago’ as:

‘A group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which *historically have been regarded as such*’ (emphasis added),

the KIG may fall under ‘other islands’. It does

not qualify as an archipelago, as under the UNCLOS, an archipelago consists of more waters than land. Therefore, the legal question on our claim over the KIG has already been settled as far as our municipal law is concerned. The fact that other claimants occupy the KIG does not distort our sovereignty over it.

### **The Scarborough Shoal (Bajo de Masinloc)**

Scarborough was the name of the British ship that was grounded on this West part of Zambales. Historically however, it has been referred to as *Bajo de Masinloc* (lower *Masinloc*) in relation to the *Masinloc* town in Zambales (higher *Masinloc*), one of the biggest towns during the Spanish period. Villagers have always been dependent on fishing from *Bajo de Masinloc*.

House Bill 3216 has a formulation on *Bajo de Masinloc* with respect to the baseline. It would carve westward so that it would encompass *Bajo de Masinloc* and return to the basic baseline. However, this would produce effects that would be incompatible with the UNCLOS since this would contravene the formula in Article 47 that the baselines shall not depart from the general configuration of the coast. Besides, if we are going to encompass *Bajo de Masinloc* as part of the baseline of the Philippine archipelago, it would have the effect of acquiring a new territory by merely drawing the baseline. This is impermissible in the regime of territorial sovereignty under public international law. The alternative is to treat it as an island in relation to which the Philippines has acquired *Bajo de Masinloc* by effective occupation. As an island, it would therefore have its own territorial sea, EEZ and continental shelf. It deserves these appurtenances considering that it is an island under Article 121 of the UNCLOS.

Until now, there have been verbal claims expressed with respect to *Bajo de Masinloc* but

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## ***Demystifying...*** (Continued from page 10)

there has been no formal proclamation of its acquisition by effective occupation. The Philippines may as well declare by formal legislative enactment or through Executive Order by authority of Congress that *Bajo de Masinloc* has been acquired by effective occupation and that Philippine sovereignty and jurisdiction have been exercised over *Bajo de Masinloc*. Historically, there has been a long process by which the Philippines has exercised administrative and political acts amounting to title of sovereignty over *Bajo de Masinloc*.

As an expression of sovereignty over *Bajo de Masinloc*, the government may develop accessory mechanism relative to the development of the area, such as artificial islands and security zones. It has been recommended in 2002 that *Bajo de Masinloc* be considered as an administrative unit under the Office of the President but to date, nothing has been heard about this recommendation.

From the viewpoint of geomorphology, *Bajo de Masinloc* is a submarine ridge that is connected to our continental shelf. This submarine ridge of which *Bajo de Masinloc* is a part is in the process of building itself into the coast of Zambales. In other words, it is physically strengthening its character as a prolongation of submarine land mass along the Zambales coastline.

*Bajo de Masinloc* is around 123 nautical miles from the Philippines and 458 nm away from China. The islands claimed by both Vietnam

***‘What is problematical about the resolatory part...is the clause that appears to be a condition...If this is considered as a condition, can a conditional concurrence be considered valid?’***

and China, the Paracel & Macclessfield Bank are 265 nm and 202 nm away respectively. *Bajo de Masinloc* as well as the Spratlys are, from China’s viewpoint, under the administrative management of the government of Hainan.

### **The Batasan Pambansa concurrence with UNCLOS**

At the time the UNCLOS was concurred in by the Batasang Pambansa under martial rule, there was not much discussion as to what the UNCLOS is all about and its serious implication on the national territory. It appears, however, that the Philippines’ concurrence in the UNCLOS is conditional. The concurrence resolution would have a vital way of defining the legitimacy of the UNCLOS. While we are engaged in the implementation of the UNCLOS, we have to ask the question: Has it been concurred by the legislative authority? The resolatory part of the said resolution may shed some light:

*‘Resolved by the Batasang Pambansa, To concur, as it hereby concurs, in the United Nations Convention on the Law of the Sea entered into and signed by the Representative of the Republic of the Philippines on December 10, 1982 at Montego Bay, Jamaica, with the understanding embodied in the Declaration filed on behalf of the Republic of the Philippines by the head of the Philippine delegation when he signed the said Convention, copy of which is attached as “Annex A”’.*(emphasis added)

Since the Declaration is attached to this resolution as Annex A, it has consequently become an integral part of the resolution. What is problematical about the resolatory part quoted above is the clause that appears to be a condition: ‘with the understanding embodied in the Declaration...’. If this is considered as a condition, can a conditional concurrence be

(Continued on page 12)

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## ***Demystifying...*** (Continued from page 11)

considered valid? Another issue relates to the meaning of the conditions.

### **What does the Declaration say?**

A review of the Declaration would be helpful. In particular, items 1, 2 and 4 deserve closer attention:

- ‘1. The signing of the Convention by the Government of the Republic of the Philippines 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;’

If the Declaration is considered as constituting an important part of the concurrence resolution, then the concurrence resolution must be read according to the conditions stated in the Declaration. Which means that based on item number 1, the concurrence must ensure that the Convention does not impair or prejudice the sovereign rights of the Republic.

Take note, however, that this Declaration, when it spoke of the Constitution, had in mind the 1973 Constitution. But when it entered into force, the one that we had was an entirely different Constitution--the 1987 Constitution. The fact alone that the 1987 Constitution was promulgated after the UNCLOS would have several implications as to how to interpret the UNCLOS in relation to the subsequent constitutional order.

- ‘2. 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

***‘If the Declaration is considered as constituting an important part of the concurrence resolution, then the concurrence resolution must be read according to the conditions stated in the Declaration...the concurrence must ensure that the Convention does not impair or prejudice the sovereign rights of the Republic.’***

and the United States of America of December 10, 1898, and the Treaty of Washington between the United States of America and Great Britain of January 2, 1930;’

This point shall not be understood from the viewpoint of the United States but from the viewpoint of the Philippines; in particular, by considering the definition of the national territory in the 1935 Constitution, which states that ‘the limits of which are set forth in Article III of said treaty [Treaty of Paris].’

- ‘4. The Convention shall not be construed as amending in any manner any pertinent laws and Presidential Decrees or Proclamations of the Republic of the Philippines; the Government of the Republic of the Philippines maintains and reserves the right and authority to make any amendments to such laws, decrees or proclamations pursuant to the provisions of the Philippine Constitution.’

House Bill 3216 may be considered in the light of this item; it intends to amend the law to adjust to the demands of the UNCLOS. As item 4 suggests, the Philippines seems to be reserving its power to amend the laws at the time, *pursuant to the Philippine Constitution* and not

(Continued on page 13)

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## ***Demystifying...*** (Continued from page 12)

pursuant to the UNCLOS.

It is worth noting that in the 1987 Constitution, the vast bodies of water in, between and separating the islands of the archipelago are internal waters. Whereas under the UNCLOS, they are transformed into archipelagic waters. Is there any derogation of sovereignty? If there is, then the condition set forth in the Declaration as an integral part of the concurrence resolution might not have been met. As a matter of fact, these items should be considered as parts of the concurrence resolution and should be read as such. Which one shall prevail in case of conflict between UNCLOS and the 1987 Constitution? Under this Declaration it is the Constitution that shall

***‘The Convention cannot be read as though it is over and above or exercising supremacy over the Constitution.’***

prevail. The Convention cannot be read as though it is over and above or exercising supremacy over the Constitution.

### **Applying for an extended continental shelf**

If the Philippines wishes to push through with its application for an extended continental shelf with the UN Commission on the Limits of the Continental Shelf (CLCS), it has to take some factors into account to meet the May 2009 deadline. Time constraint poses one huge problem. It took other countries like Russia and Australia three years to organize their technical and scientific data for their application. Russia needed a couple of years more when it was required by the CLCS to make adjustments on their supporting data.

Also, applying for extension necessitates that we determine the extent of our continental

shelf. Perhaps our continental shelf may be narrower than 200 nautical miles; in which case, there would be no room for extensions. At the moment, however, there is no technical data to respond to this question.

Should we succeed to organize our scientific and technical data to back up our application, it is expected that the Commission may meet an impasse due to overlapping claims. This is because China and Vietnam may apply for the same area of the continental shelf. Under the rules of Commission, overlapping claims cannot be approved to the prejudice of any of the applicants.

### **Is it in the national interest to enact HB 3216?**

Whether to enact HB 3216 or not is not a theoretical or a legal choice. It is a choice dictated by how much maritime resources we can exploit and develop. Would we have enlarged maritime zones if we separate the KIG from the baselines or not? Perhaps this can be confirmed or belied by a ground survey or verification. We would therefore have to decide based on the technical data available to us at NAMRIA.

It is also worth noting that at the western coast of Palawan lies along the international navigation route. Drawing baselines around the KIG will enclose part of the international navigation route within its baseline because it cuts across a transit passage. Transit passage is not well-known to us but it is a peculiar right on the part of ships of all states. It covers the right of navigation coupled with overflight established on the international navigation route. Navigation in the transit passage cannot even be suspended by the coastal state. We therefore have to take into account the consequences of enclosing a part of the

(Continued on page 14)



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## *Demystifying...* (Continued from page 13)

international transit passage as we enclose it in the baselines. Nevertheless, we have to consider that the moment we enact a new baselines law based on the UNCLOS, we are enacting a law that is based on Article 47, paragraph 1 of the Convention. Beginning with the straight archipelagic baseline<sup>3</sup>, we are already enacting one component of the archipelagic state. Doing so consequently brings the Philippines into the entire concept of an archipelagic state. This implies that we also have to enact laws that will adopt the other components of the archipelagic state, in particular, the archipelagic waters.

The concept of archipelagic waters cannot be found anywhere except under the archipelagic state concept of the UNCLOS. Archipelagic waters are waters enclosed or within the baseline and which are subject to the right of innocent passage. Complying with the UNCLOS in this regard, however, clashes with the Constitution because the Constitution states these are internal waters. We have to prevent the collapse of internal waters as envisaged by the Constitution because, as earlier stated, internal waters are zones of sovereignty.

### **Is it in the national interest to implement the UNCLOS?**

In other words, enacting a new baselines law means adopting almost the entire concept of the archipelagic state under the UNCLOS into Philippine law. This has implications with respect to the application of the UNCLOS over the entire national territory. The result would be a shifting of the basis of the national territory from the Treaty of Paris to the UNCLOS. In particular, the Philippine condition from the

regime of the Treaty of Paris will be radically altered; and the extensive territorial sea under the said Treaty would be eliminated. We are confronted with a deep dilemma of how to reconcile the Treaty of Paris and the UNCLOS and how to adjust the UNCLOS into Philippine interest.

Hence, we would have to study all the features of the UNCLOS and from then on, perhaps make some principled compromises. For example, is it possible to return to the original position of the Philippine delegation with respect to historic waters which would have the legal status different from territorial sea? This was the situation originally presented by the Philippine delegation from which they retreated, until they came to the extreme position of the archipelagic state.

### **Is there a need to pass a new baselines law?**

It appears therefore, that the Philippines would have to seriously study its decision to pass a new baselines law through HB 3216. First, the present baselines law, RA 3046, is substantially compliant with the UNCLOS. It could adequately serve the purpose in case the Philippines decides to pursue its application for an extended continental shelf. Second, a new baselines law that attempts to fit the national situation to conform with the UNCLOS does not seem compatible with our national law, in particular, the constitutional foundations of the national territory. Finally, amending RA 3046 according to the UNCLOS poses serious impact on territorial sovereignty. ● *Glenn Dale J. Cornelio*

**'Sovereignty connotes both legal and political dimensions...Any concession is seen as appeasement, with adverse implications both for domestic politics and foreign relations.'**

– Christopher Joyner, 1998, 'The Spratly Islands Dispute: Rethinking the interplay of law, diplomacy and geopolitics in the South China Sea', *International Journal of Marine and Coastal Law*, vol. 13, no. 2, p. 212.

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<sup>3</sup>Take note that the phraseology of the UNCLOS is permissive: 'An archipelagic State may draw straight archipelagic baselines...' Which raises the question, therefore, if an archipelagic state may draw baseline other than the straight baseline under the rules of Article 47 of the UNCLOS.

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## ***Archipelagic statehood ...***

*(Continued from page 7)*

***‘When [straight archipelagic baselines]... are drawn across bodies of water, they cease to be boundary lines between internal waters and the territorial sea. Rather, they become boundary lines between archipelagic waters and the territorial sea. In this case, they lose much of their legal significance because both archipelagic waters and the territorial sea are subject to right of innocent passage.’***

cease to be boundary lines between internal waters and the territorial sea. Rather, they become boundary lines between archipelagic waters and the territorial sea. In this case, they lose much of their legal significance because both archipelagic waters and the territorial sea are subject to right of innocent passage. As a result, the baseline radically departs from a basic function, *i.e.*, to mark the distinction between the internal waters of a State landward and its territorial sea seaward or the distinction between territorial waters restricted by right of innocent passage and waters of territorial sovereignty.’

-Magallona 1997, p. 75

The straight archipelagic baselines system consequently limits our internal waters to mouths of rivers, bays, lakes, gulfs and ports (Articles 9, 10, 11 and 50 cited in Magallona 1997, p. 76). Hence, an archipelago such as the Philippines, when designated as an archipelagic state, loses much control over its waters as the UNCLOS requires both its territorial sea and archipelagic waters to

accommodate innocent passage of foreign ships (Magallona 1997, p. 76).

### **Internal waters as defined in the Philippines**

It is important to note that the Philippine concept of ‘internal waters’ differs from that of the UNCLOS. Our 1987 Constitution states:

‘The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all other territories over which the Philippines has sovereignty or jurisdiction, consisting of its terrestrial, fluvial, and aerial domains, including its territorial sea, the seabed, the subsoil, the insular shelves, and other submarine areas. The waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, *form part of the internal waters of the Philippines* (Article 1, Section 1).’

The above provision states that the internal waters over which the Philippines exercises supreme authority extends to the waters that connect the islands of the archipelago. When these waters become reclassified as archipelagic waters, the Philippines would have to accommodate entry of foreign ships within these waters. Coastal states do not have this obligation (San Pablo-Baviera 1992 cited in Aquino 2001, p. 33).

It has been argued that since 1955, the Philippines’ representation with the United Nations is that of being an archipelagic state<sup>1</sup> in reference to our Note Verbale sent to the Secretary General of the UN (IILS & FSI 1995, pp. 272-273). In actuality however, the Philippines still ‘requires prior authorization for

*(Continued on page 16)*

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<sup>1</sup>Per lecture of Department of Foreign Affairs Ocean Concerns Office Executive Director Atty. Leo Tito L. Ausan, Jr. (Integrated Bar of the Philippines Lecture Series, 29 May 2008).

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## ***Archipelagic statehood ...***

*(Continued from page 15)*

overflight and passage of foreign warships and nuclear warships' for entry. (Kwiatkowska & Agoes 1991, pp. 17, 25 cited in Garcia 2005, p. 72). Other nations have always respected this practice.<sup>2</sup> As a matter of fact, general international law has long recognized our sovereignty over our internal waters (Magallona 1997, p. 75).

### **The right of innocent passage: Implications on the Philippines**

The right of innocent passage that accompanies the status of being an archipelagic state presents serious repercussions on the Philippines in terms of security and environmental control. Since the country's internal waters would become subject to right of innocent passage, it follows that foreign ships would be free to navigate along our inland seas. Furthermore, this right of innocent passage is coupled with overflight.

This is aggravated by the fact that the final decision on the designation of sea lanes that would traverse the Philippine territory is in the hands of the international community. If the Philippines chooses not to designate sealanes, the consequence would be more international navigation routes than what may be advantageous for the country (Magallona 1997, p. 82). These routes are depicted in Figure 3. However, should we decide to specify such sealanes, our authority is limited to submitting proposals subject to the approval of the International Maritime Organization (IMO) (Magallona 1997, p. 80). As Magallona laments,

‘The requirement of IMO approval, together with the consequences arising from failure to obtain it, does not appear to be compatible with the basic

concept that the “sovereignty of the archipelagic State extends to the... archipelagic waters”. Even as Article 49 (1) of the UNCLOS underscores the sovereign status of archipelagic waters, it undermines it by providing that this sovereignty is exercised subject to restrictions...[under Article 49 paragraph 3]. In the case of the Philippines, restriction to sovereignty becomes much more onerous as they are imposed on its extensive internal waters under the Constitution.’

- (1997, pp. 80-81)

Hence, the UNCLOS provisions on archipelagic states potentially leaves the Philippine territory more vulnerable to foreign intrusion. This runs contrary to the original intent of the UNCLOS which is to allow a more equitable regime of the seas across all states. As ‘all archipelagos are not archipelagic states’<sup>2</sup>, the Philippines, therefore, need not feel compelled at this point to place itself in this position. ● **Glenn Dale J. Cornelio**

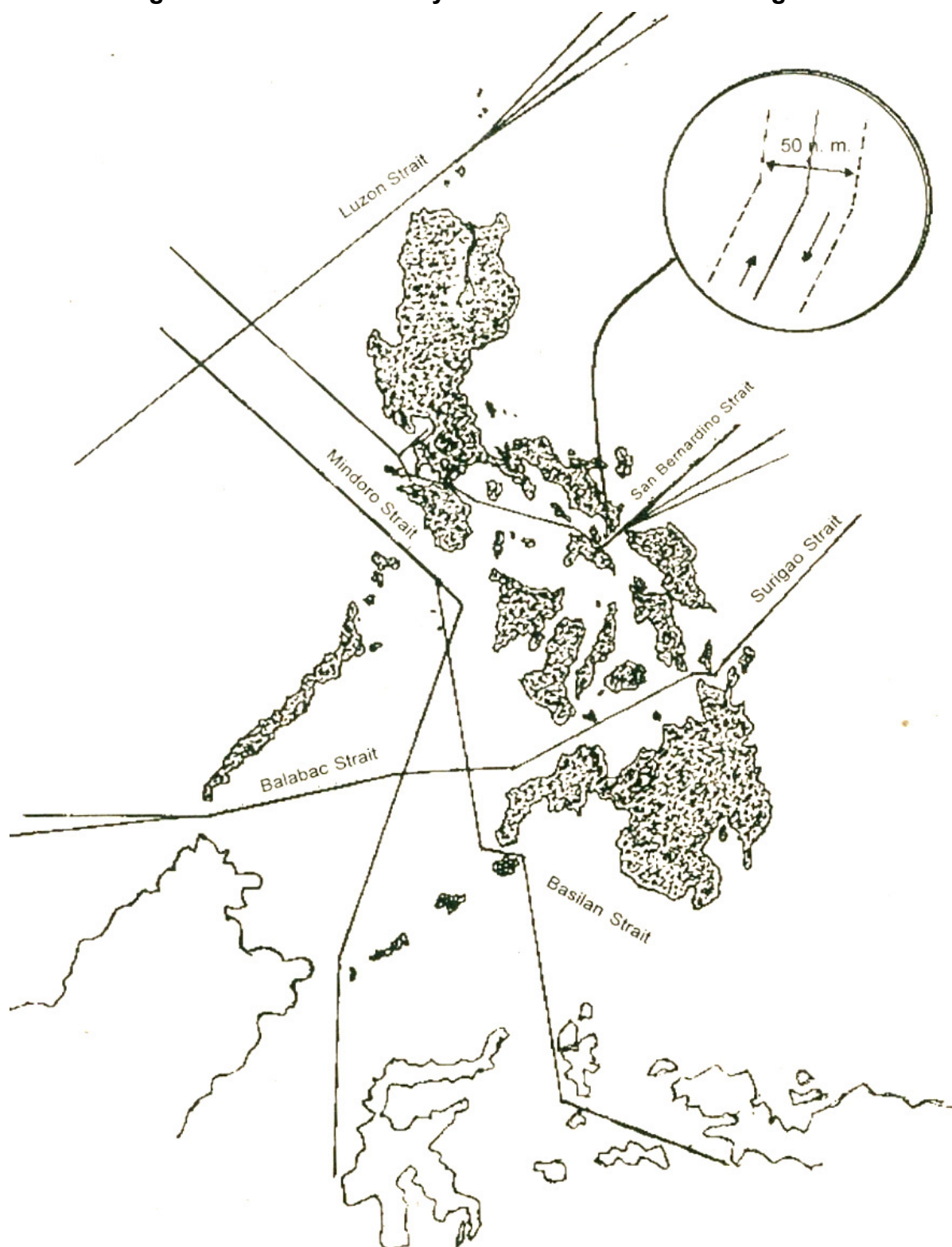
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<sup>2</sup>Interview with Dean Merlin Magallona, 15 May 2008.

**Figure 3. Routes normally used for international navigation**



*Source: Magallona, M 1997, A Primer on the Law of the Sea, Quezon City.*

## The options in a nutshell

The purpose of the pending bills in Congress has been to amend the existing baselines law, RA 3046 as amended by RA 5446. The contention against this baselines law has been its incoherence with the UNCLOS as one of its long baselines is in excess of the Treaty's 100-nautical mile limit. The premise is that in order to qualify for application for extended continental shelf, the basis for drawing the extensions must not violate any of the UNCLOS provisions. Various options have been proposed to possibly resolve this issue, but none has earned unassailable position for the Philippines to pursue. These options are concisely described below.

### Option 1: Enclose Main Archipelago and Scarborough Shoal and designate KIG as regime of islands

This position has been advanced by Senator Antonio Trillanes IV. His rationale for this formulation is its potential to generate a larger EEZ without violating the UNCLOS. He argues that since Scarborough Shoal is, in essence, a rock, it qualifies as a basepoint which could extend our claims further seaward West of Luzon. Including it within the baselines would therefore gain for the Philippines an additional 14,500 square nautical miles of EEZ and

*(Continued on page 19)*

**Table 1. The Baseline Options**

FEATURES	OPTION 1 (SB 1467)	OPTION 2 (Malacañang)	OPTION 3	OPTION 4 (HB 3216)	RA 5446
Baseline enclosure	Main Archipelago and Scarborough	Main Archipelago only	Main Archipelago & KIG	Main Archipelago, Scarborough & KIG	Main Archipelago only
No. of baselines	135	101	134	135	80
No. of long baseline (100-125nm)	4	3	4	4	1>125nm
No. of basepoints occupied by other claimants	0	0	7	7	0
Area of archipelagic waters	172,109 sq nm	171,146 sq nm	212,181 sq nm	210,443sq nm	166,858 sq nm
Area from baselines to EEZ limit	498,870 sq nm	485,310 sq nm	468,250 sq nm	468,250 sq nm	413,080 sq nm
Total area of archi waters and EEZ	670,979 sq nm	656,456 sq nm	680,428 sq nm	691,233 sq nm	579,938 sq nm
Area under regime of islands	KIG	KIG & Scarborough	Scarborough	None	None
Add'l requirement	Designation of sealanes	Designation of sealanes	Designation of sealanes & construction of lighthouse at Sabina Shoal	Designation of sealanes & construction of lighthouse at Sabina Shoal	

*Source: NAMRIA in Trillanes, n.d. 'The Baseline Issue: A position paper'.*



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## *The options...* (Continued from page 18)

continental shelf (Trillanes, n.d.).

Meanwhile, he lays claim on Kalayaan Island Group (KIG) by classifying it as regime of islands. KIG's physical location inhibits drawing of baselines without violating the UNCLOS provisions. He thus contends that subjecting the KIG to the islands regime is the only viable way of asserting sovereignty over it without contravening the UNCLOS. Senator Trillanes thinks that designating the KIG as regime of islands would allow it to be treated as any other land territory.

This formulation is flawed, though<sup>1</sup>. It would be hard to justify enclosing Scarborough Shoal in the baselines as it is not even included within our international treaty limits. Designating it as a basepoint would have the effect of acquiring for the Philippines an additional territory which is unacceptable in international law. It would also create a protruding curve westward which clearly violates the UNCLOS. Article 47, Section 3 in stipulating for archipelagic baselines, states that 'The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.' The dagger-like effect produced by including Scarborough Shoal in the baselines will clearly deviate from the main archipelago's general configuration.

On the other hand, classifying KIG as regime of islands would create maritime zones for each individual island and would therefore deprive it of its internal waters. It is also contrary to the KIG's identity as a political unit under the Province of Palawan.

### **Option 2: Enclose Main Archipelago and designate Scarborough Shoal and KIG as regime of islands**

This is the formulation that has been endorsed by the Executive. It stems from the Philippines' avoidance of any activity that may set off a conflict with the other claimant-states. It therefore declines from expressing sovereignty over the contested areas by choosing to enclose only the main archipelago while classifying Scarborough Shoal and KIG as regime of islands.

This viewpoint maintains that the Philippines is constrained from including the KIG in the baselines by virtue of its concurrence with such international codes of conduct as the 1992 ASEAN Declaration of the South China Sea (Manila) and the Philippines' bilateral agreement with Vietnam in 1995. Under such agreements, parties agreed to exercise self-restraint and avoid any activity that might cause tension in the parties' relations (Song 2000).

Moreover, this formulation adheres to the Philippines' archipelagic statehood, based on its representations with the United Nations since 1955. In compliance with Article 47, Section 3 of the UNCLOS, it avoids enclosing Scarborough Shoal within the baselines so as not to depart from the usual distinctive features of the archipelago.

This position, however, ignores the fact that the Philippines' claim over these contested areas is well-founded. Our acquisition of the KIG has already been integrated into the 1987 Constitution. On the other hand, it may be feasible to classify Scarborough Shoal as regime of islands. It may be hard to justify its inclusion in the baselines since it is not even included in our international treaty limits. However, it may be argued that Scarborough Shoal has always been a part of the Philippine territory. It has been known as *Bajo de Masinloc* (Lower Masinloc) where Masinloc inhabitants have fished for a living since the time of the Spaniards (please see

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<sup>1</sup>Per separate lectures of Department of Foreign Affairs Ocean Concerns Office Executive Director Atty. Leo Tito L. Ausan, Jr. (Integrated Bar of the Philippines Lecture Series, 29 May 2008) and Dean Merlin M. Magallona (House of Representatives Congressional Planning and Budget Department Lecture Series, 4 June 2008).

(Continued on page 20)

## *The options...* (Continued from page 19)

headline article in this issue, *Demystifying RP's Delimitation Dilemma*).

### **Option 3: Enclose Main Archipelago and KIG in the baselines and designate Scarborough Shoal as regime of islands**

This main problem with regard to this position is its designated basepoints even as it includes the KIG in the baselines. This is explained further under Option 4.

### **Option 4: Enclose Main Archipelago, Scarborough Shoal and KIG in the baselines**

House Bill 3216, also known as the Cuenco Bill from its primary proponent, Congressman Antonio Cuenco, embodies this formulation. It seeks to obtain a maximum position for the Philippines by enclosing the main archipelago as well as the contested areas within the baselines.

The main critique about this formulation is its designation of basepoints. Some of its basepoints are considered low-tide elevations and would not be UNCLOS-compliant unless a lighthouse or a similar structure is installed on it. However, any construction activities on contested areas will be considered acts of aggression in violation of the South China Sea Code of Conduct (Trillanes, n.d.). Hence, the Bill defeats its purpose of passing an UNCLOS-compliant baselines law as its provisions violate Article 47 of the UNCLOS.

Another critique on this position is its enclosing of Scarborough Shoal, which, as explained earlier, may not be feasible under public international law.

### **Option 5: Enclose Main Archipelago in the baselines**

The argument of this position is that there is no need to amend the present baselines law (RA 3046 as amended by RA 5446). The Philippines

has already asserted sovereignty over the KIG by virtue of PD 1596 which was integrated into the 1987 Constitution through its 'all other territories...' clause. It must be noted though, that the existing baselines law is substantially UNCLOS compliant<sup>2</sup> except for the technicality that one of its baselines is longer than what is allowed by the UNCLOS (see Table 1). However, the minimum requirement to apply for extended continental shelf is to establish the basepoints from which extensions can be reckoned. On this premise, it seems that RA 3046 as amended is sufficient for this purpose.

The acquisition of Scarborough Shoal, however, may need to be expressed through legislation. Therefore, it appears that on the aspect of asserting sovereignty over the contested areas, Scarborough Shoal is the one that merits urgent attention. • **Glenndale J. Cornelio**

<sup>2</sup>Per separate lectures of Prof. Harry Roque (*Integrated Bar of the Philippines Lecture Series, 29 May 2008*) and Dean Merlin M. Magallona (*House of Representatives Congressional Planning and Budget Department Lecture Series, 4 June 2008*).

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