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PHILIPPINE MARITIME TERRITORIES AND JURISDICTIONS Part III: Baselines and the Future of the Philippines

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Philippine Commitment to UNCLOS Implementation

The Philippines has long been committed to the implementation of UNCLOS. It was the 11th country to ratify UNCLOS through Batasan Resolution No. 121 enacted in 1984. In 1988, in response to an Australian protest against the Philippines' continued treatment of the limits in Treaty of Paris, Treaty of Washington, and the US-UK Convention as national borders, the Philippines sent a diplomatic note assuring Australia and the international community that it will harmonize its legislation with the terms and provisions of UNCLOS. This is a binding international obligation from which there is no turning back.

Under international law, treating those international treaty limits as our maritime borders are regarded as merely unilateral acts, and have been rejected and protested repeatedly by other States, including the United States which negotiated them. Some have expressly pointed out that continued assertion of those limits is a violation of the duties and obligations to which the Philippines already committed. They are simply not compatible with the system of maritime zones under international law. While the former establishes territorial boundaries completely in the water, UNCLOS requires the baselines along the coast to be the starting point of all territorial and jurisdictional zones. The internal waters, territorial sea, contiguous zone, EEZ, and conti-

mental shelf are all measured from those baselines. Every maritime territorial and jurisdictional entitlement recognized by the international community depends on compliance with UNCLOS.

The Baselines Options

For decades, the National Mapping and Resource Information Authority (NAMRIA), legal and technical agencies, and the academe have been awaiting a clear answer from Philippine policymakers to the question of where to draw the baselines from which the maritime zones will be defined. Due to the configuration of our archipelago, there are several choices in the drawing of the country's maritime zones. The technical work has been done by NAMRIA, and they have already looked at many different possibilities, all of which are in conformity with UNCLOS. The difficulty arises because of the foreign policy implications of each configuration. Some options will be more acceptable to the international community than others; some will create more problems for the country, while others may help avoid them. These were developed as early as the 1990s, and presented by NAMRIA for policymakers to decide as to which option best pursues the country's national interests, consolidates our sovereignty and jurisdiction over our maritime space, and allows us to move forward with the management and use of our seas. The

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choice is not just technical, it is primarily political and diplomatic. And, they transcend political parties and presidential administrations.

The main question is how to treat the KIG, a group of very small islands west of Palawan, and Scarborough Shoal, a lone rocky outcrop west of Masinloc, Zambales which in old Spanish maps was called Isla Baja de Masinloc. Whether we enclose one or both of them in one system of archipelagic baselines, or allow them to remain as separate islands, may result in the significant expansion of our maritime zones and our access to the resources they contain. But these expansions are dependent on acceptance by the international community, particularly our neighboring countries and the maritime powers.

The option originally selected by the House of Representatives (Rep. Cuenco's HB 3216) is the maximalist option. It encloses both the KIG and Scarborough Shoal in archipelagic baselines (Map A). It expands the maritime zones of the country immensely, almost up to the coast of Vietnam, and more than twice the size of our land area. It will surely be protested. Our neighbors will certainly not give up their claims, nor allow their own prospective maritime zones to diminish, and may attempt to expand their own zones in response. Meanwhile, the maritime powers will not take sides nor permit any expansion that tends to limit their freedom of navigation. So those baselines and the maritime zones they generate may not be recognized internationally. But nationally, legislating such baselines knowing that we will be unable to enforce such a law will be an exercise in futility. Moreover, government will be legally bound to not consider any form of compromise with other States because any other position would be contrary to law. Politically, it is easy to expand the national territory by legislation; will it be as easy to reduce afterward? As far as sovereignty is concerned, the Philippines will not only engage in an ineffective and unnecessary exercise, but will also tie itself to a hard-line position that incapacitates its ability to pursue any settlement.

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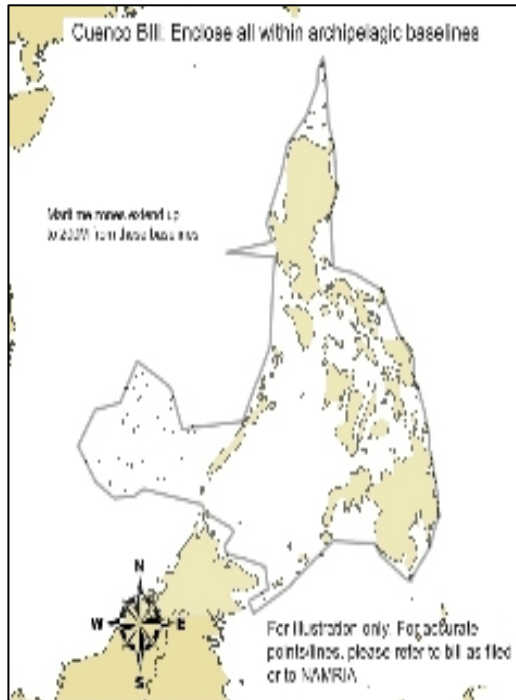
the South China Sea, an agreement that the Philippines itself spearheaded in order to prevent further incidents like what happened in Mischief Reef. In order to implement HB 3216, therefore, the Philippines must break its own

commitments and destroy the relative stability it worked hard to establish in the first place. This runs the risk of starting a new round of reef-grabbing and structure-building, which will only complicate and aggravate the issues even further, not help resolve them.

Scarborough Shoal is located over a hundred kilometers from Zambales, with some rocks always above water. For decades, it was a gunnery range for the US forces in Subic, and the Philippines had maintained a lighthouse on it because it was a published waypoint for approaching the port of Manila. The

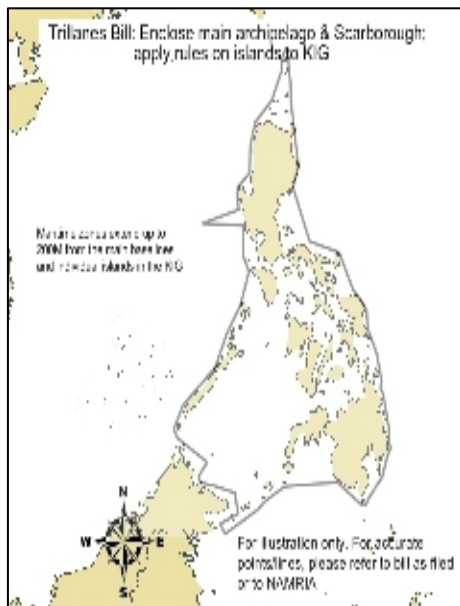
lighthouse has long since been destroyed by typhoons and not repaired. Some years ago, there were fears that the Chinese were attempting to build a structure there, which alarmed the Philippines due to the incident with Mischief Reef.

Enclosing only Scarborough Shoal, and not the KIG, in archipelagic baselines is done by Sen. Trillanes' SB1467 (Map B). The problem that this presents is that it may not be considered to be in conformity with "the general configuration of the archipelago" as required by UNCLOS.



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When Sen. Tolentino's team negotiated the provisions of UNCLOS, they had with them RA 3046, later RA 5446, which enclosed the main archipelago in straight baselines. This described the "general

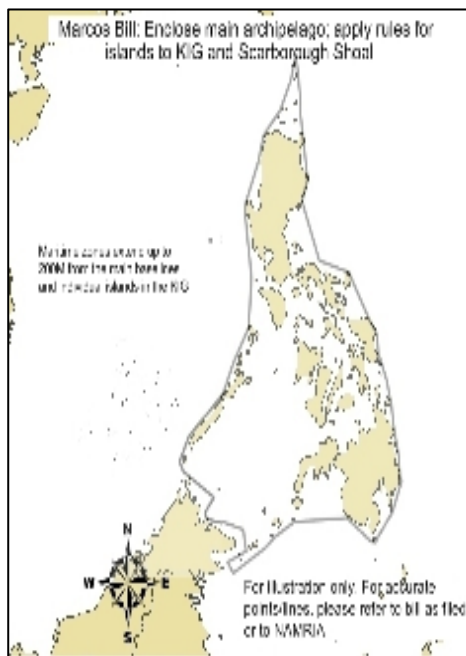
configuration" that the UNCLOS now refers to. The "needle" that Scarborough Shoal creates may be challenged by other States as not complying with the requirement. It also pushes the Philippine maritime zone deep into areas in the northwest that we have never previously claimed. It may not have the same impact as enclosing the KIG, but remains a legally risky move unless its effect is somehow mitigated.

The administration's position encloses only the main archipelago in archipelagic baselines (similar to RA5446) and applies the "regime of islands" to the KIG and Scarborough Shoal. (Map C) This now appears in Rep. Marcos' version. Under UNCLOS, an archipelagic state may be composed of "one or more archipelagoes and may include other islands." The regime of islands refers to a separate set of rules in UNCLOS which permit the drawing of all the maritime zones for islands (i.e. territorial sea, contiguous zone, exclusive economic zone, and continental shelf), except for "rocks which cannot sustain human habitation or economic life of their own." In the case of such rocks, they are not entitled to their own EEZ or continental shelf.

The KIG is comprised of an assortment of islands, rocks, and reefs. The islands are the most important because they can still generate the

complete set of maritime zones. Despite being a minimalist option, as far as extending the maritime zones are concerned, this version can still generate an EEZ and continental shelf almost to the same extent as the Cuenco bill. But as separate islands, they signal a willingness to continue to explore settlement of the territorial issues with our neighbors, and give the Philippines more flexibility when it pursues a peaceful settlement of the territorial disputes. The international community would have no reason to protest, since their freedom of navigation is not affected. The main archipelago can remain safely integrated because its baselines would not be affected even if our neighbors protest over the KIG. The biggest difference is whether the waters between the islands of the KIG, and between the KIG and Palawan, will be enclosed as archipelagic waters subject to Philippine sovereignty. But even without being covered by archipelagic waters, the most important areas and resources would still be within the Philippine EEZ and continental shelf.

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islands in an internationally legal manner. At the same time, it keeps the door open for the Philippines to pursue a negotiated settlement to the competing claims in the South China Sea.

This is the reason why this option has a better chance of acceptance in international law. But, it also demands a sense of national self-restraint in exchange.

The Way Forward

Sovereignty is such a magical term. Lately it has been used like a sacred spell to exorcise demons and bless the speaker in the light of truth. The heated controversy over the JMSU, the KIG, and UNCLOS has exposed not only a potential foreign policy debacle, but deep-seated insecurities amplified by misinformation and mistaken assumptions about sovereignty and maritime territories and jurisdictions. The underlying and long-term implications have been muddled up and confused by mistrust and suspicion between political groups. Many in government, regardless of political affiliation, honestly believe that their intentions are to protect Philippine sovereignty, but are unaware that they may be doing exactly the opposite.

The difficult question at this point is not one of losing or gaining sovereignty, but whether the Philippines will choose to assert a maritime area that other countries will either consider invalid or agree with. It is regardless of whether one is allied or opposed to the administration, whether at present or in the future. This issue should be treated above party politics, because only other countries can benefit from political bickering and disunity.

From an international law perspective, the key issue for the country is not how much maritime area will be enclosed, but which action is more likely to be considered valid. Maritime sovereignty and jurisdiction are not created by simply drawing on a map; they must also be recognized and accepted by other States, in addition to conforming to the rules and principles that have already been agreed upon in UNCLOS. If not, then they will be continually challenged and will never be settled. We shall never get any support for them, and much of what we think we can do may be nothing more than illusions. If we are to act in ways that affect other members of the international community, or if we want them to support our actions and strengthen our hand in the face of stronger competitors, we simply cannot continue merely asserting things without finding acceptance from the rest of the world.

But this is more than a question of international law. What makes it most challenging for us is that the fact that our use and implementation of UNCLOS have unavoidable impacts on the maritime zones of all our neighboring countries, and have definite implications on the navigational interests of the rest of the world. There is no question as to the sovereignty over our land. It is the sovereignty and jurisdiction over the seas around it that is problematic. This is an essential aspect of our strategic location at the gateway between the Pacific and the South China Sea. For more than a century, we have never used that location to our advantage, whether on a regional or a global scale, because we have allowed ourselves to be restrained by the relics of our colonial past that live on as insecurities about our neighbors and misconceptions about how international law works. We have been unable to use our archipelagic setting to chart an independent maritime foreign policy because of our refusal to recognize the stark differences between governance on land and at sea, the challenges and opportunities they present to us as a developing country, and the extensive skill, flexibility, and adaptability needed to pursue our national maritime interests.

Enacting a new baselines law, whatever the final configuration, will shape the geopolitics of the Southeast Asian region for years to come, but not necessarily change the status of Philippine sovereignty over the KIG or Scarborough Shoal. Whether a new law perpetuates or aggravates the regional issues to spur further contestation, or opens the door for cooperation and settlement, is the international responsibility that attaches to its enactment. We can choose to be a leader or a troublemaker; what happens in the region has impacts on the rest of the world. This is the broader national interest involved, and the true gravity of the act of establishing our baselines. It is nothing less than deciding upon our country's future. -END-



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