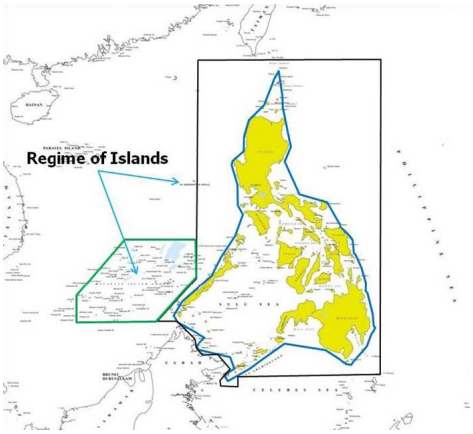
The Philippines recently passed a 2009 Baselines Law that, it was hoped, would finally confront its long-standing dilemma on whether to abandon its 1898 “treaty lines” altogether and adopt the modern rules on the Law of the Sea. That hope did not come to pass.

The law has been impugned before the Supreme Court of the Philippines in *Magallona v. Executive Secretary*
(G.R No. 187167, August 16, 2011). The Court has decided – though the judgment is not yet final and is currently on review – that the Baselines Law constituted the domestic implementing legislation for the Law of the Sea Convention but it did not categorically junk the treaty lines.



This paper discusses the juridical debate between the two positions, labeled for this purposes as, on one hand, the nationalist position vis-à-vis the modernist position. The *nationalist* position would adhere to the expansive claim over maritime zones created by the 1898 Treaty of Peace whereby Spain, the erstwhile colonizing power, ceded the Philippine archipelago to the United States. The
modernist
position would adhere to the calibrated but widely accepted maritime zones as defined in the Law of the Sea Convention. Both positions are based on treaties binding on the Philippines, the first by succession, the second by ratification.

It explores the persistence of the nationalist position and why the modernist argument has not overwhelmed it despite the recent Baselines Law, as demonstrated by the Supreme Court's recent decision. The Court could have categorically stated that with the passing of the new Baselines Law, the Philippines had officially cast off the 1898 treaty lines which have been obsolesced by the radically new approach using baselines. In other words, far from being the triumph of the modernist view, the *Magallona v. Executive Secretary* ruling actually demonstrates the rhetorical and symbolic power of the nationalist position.

1898 Treaty of Peace between Spain and the United States

The most authoritative document setting the metes and bounds of Philippine land and maritime territory is the 1898 treaty that ended the Spanish-American War, wherein Spain ceded Cuba, Puerto Rico, Guam and the Philippines to the United States. The transfer of the Philippines, in exchange for $20,000,000, is worded thus:

Spain cedes to the United States the *archipelago* known as the Philippine Islands, and *compr ehending the islands lying within the following line* : (1898 Treaty of Paris, art. 3)

Note at the outset that the Treaty recognizes the archipelagic unity of the Philippine Islands but at the same time refers to "the islands lying within the [Treaty] line[s]" and, as the modernists point out, does not expressly mention the waters. In *Magallona v. Executive Secretary,* the petitioners – who I would identify with nationalist view – challenged the 2009 Baselines Law on *inter alia* the ground that "what Spain ceded to the United States under the Treaty of Paris were the islands and *all the waters* found within the boundaries of the rectangular area drawn under the Treaty."

Yet the Supreme Court avoided this issue in interpreting the 2009 Baselines Law.

Even under petitioners' theory that the Philippine territory embraces the islands and *all the waters*
within the rectangular area delimited in the Treaty of Paris, the baselines of the Philippines would still have to be drawn in accordance with [the 2009 Baselines Law] because this is the only way to draw the baselines in conformity with UNCLOS III. The baselines cannot be drawn from the boundaries or other portions of the rectangular area delineated in the Treaty of Paris, but from the "outermost islands and drying reefs of the archipelago." (
Magallona v. Executive Secretary
,
supra
)

In other words, the Court limited its conclusion solely to the drawing of the baselines, which is obviously relevant only to the UNCLOS and not to the 1898 treaty. As it stands, this is in fact the strongest statement emanating from the Court that can be read as disavowing the 1898 treaty lines, that is to say, the Court did not nullify the treaty but merely said that it was irrelevant to the exercise of drawing baselines because it was drawn without any regard to the then non-existent baselines.

This treaty definition of Philippine territory has been domestically implemented in various legal instruments. The old 1961 Baselines Law, Republic Act 3046 as amended by Republic Act 5446 – in the words of the *Magallona* ruling – “demarcat[es] the maritime baselines of the Philippines as an archipelagic State.”

WHEREAS, the [1935] Constitution of the Philippines describes the national territory as comprising all the territory ceded to the United States by the Treaty of Paris concluded between the United States and Spain on December 10, 1898, 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 on November 7, 1900, and in the treaty concluded between the United States and Great Britain on January 2, 1930, and all the territory over which the Government of the Philippine Islands exercised jurisdiction at the time of the adoption of the [1935] Constitution;

WHEREAS, *all the waters within the limits set forth in the above-mentioned treaties* have always been regarded as part of the territory of the Philippine Islands; …. (emphasis supplied)

It incorporates –

all the waters around, between and connecting the various islands of the Philippine archipelago, irrespective of their width or dimension [are] necessary appurtenances of the land territory, forming part of the inland or *internal waters* of the Philippines [and that]

all the waters beyond the outermost islands of the archipelago *but within the limits of the [1898 Treaty]* comprise the *terr itorial sea* of the Philippines. (emphases supplied)

A parallel formulation is found in the 1987 Constitution:

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 supplied)

Critics of these “treaty lines” have caricatured these characterizations as way out of touch with modern developments in international law that would lead to absurd results, e.g., where there would hypothetically lie a territorial sea that goes way beyond the 12-mile limit and even larger than the Exclusive Economic Zone. This position has been described by some Filipino commentators as “almost universally contested”, “irreconcilable” with the Philippines’ own subsequent treaty commitments under the Law of the Sea Convention, and “embarrassing” to the Philippines.

Despite these detractors, the Philippines has been hesitant to categorically disown the treaty lines. A more sympathetic view should appreciate that the Treaty of Peace is a full-fledged international treaty, signed by the global powers of its day, and elaborated and clarified in subsequent treaties by the United States, Spain and Great Britain as well. Critics completely

ignore the principle of *uti possidetis,* which preserves territorial frontiers inherited following decolonization. *Uti possidetis* has been recognized by the International Court of Justice as an imperative to international peace and security, despite countervailing grounds to redraft inherited boundaries. Indeed, in the Philippines' case, the *uti possidetis* demarcation was not protested for more than half a century following the signing of the 1898 treaty.

Moreover, it appeals to the notion that the national interest lies in keeping the largest possible scope of maritime territory, and that to demote full sovereignty over those waters to a mere exclusive jurisdiction over the economic uses is tantamount to surrendering a part of that sovereignty. Indeed, that was admitted during the parliamentary debates during the ratification of the Law of the Sea Convention by its main sponsor, who nonetheless endorsed the treaty by saying that the Philippines would thereby gain access to more resources.

> The exclusive economic zone of the Philippines measures about 395,400 square nautical miles. The area that we have been claiming as our historic territorial sea [under] the Treaty of Paris measures 263,300 square nautical miles. … The Philippines will be entitled to all the resources … in this vast additional area of the seas around the archipelago. (*Sponsorship Speech of Minister of State Arturo Tolentino*, Proceedings of the Batasang Pambansa on Resolution No. 633 re Concurring in the U.N. Convention on the Law of the Sea, 6th Regular Session, 1984).

Finally, that treaty has been authoritatively applied in the landmark ruling *Island of Las Palmas/Miangas (United States/Netherlands)* (Max Huber, arbitrator, 1928), where it was held that Spain derived original title from discovery of the Philippine islands and validly ceded title to the United States through the 1898 Treaty of Paris. In other words, it is not as if the 1898 Treaty was a legal instrument of dubious validity. Rather, its validity was affirmed in a judicial decision that has been cited and applied in subsequent adjudication, and elaborated in subsequent treaties (see Preamble, Republic Act 3046 as amended by Republic Act 5446).

Concededly, one can impugn the characterization of the maritime zones within the 1898 treaty lines without attacking the validity of *Las Palmas/Miangas.* Moreover, one can distinguish the boundary lines drawn by the treaty from the characterization of the maritime zones within those treaty lines. Finally, the modernist advocates of the 2009 Baselines Law can even argue that

the 1898 treaty lines have been superseded by both the 1984 ratification of another treaty, the UNCLOS, under the *pacta sunt servanda* principle (Vienna Convention on the Law of Treaties, Article 26), coupled with the inter-temporal doctrine laid down rather ironically in *Las Palmas/Miangas*.

But that case must be made by the modernist camp. It is not enough to argue merely that a claim of territorial title that has legally vested in an authoritative legal instrument can be set aside merely because other states do not accept it. The modernist view, far from affirming the supremacy of law itself, in fact subordinates the normative power of law to the vote of other states.

(continuing)

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