RECENT DEVELOPMENTS IN THE PHILIPPINE BASELINES LAW

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Summary

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 *comprehending 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.
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> 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;
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> 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]
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> all the waters beyond the outermost islands of the archipelago *but within the limits of the [1898 Treaty]* comprise the *territorial 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.

Law of the Sea Convention Characterization

The Philippines has bound itself to the UN Convention on the Law of the Sea under the treaty clause and the incorporation clauses of the 1987 Constitution. That treaty is thus "binding and effective" as part of Philippine law. It gives the country the option to consider itself an archipelagic state by enclosing its maritime zones into what are called archipelagic baselines.

> *Archipelagic baselines*. An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago …. (UNCLOS art. 47¶1)
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> The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago. (UNCLOS art. 47¶3).

In March 2009, the Philippine Congress passed Republic Act 9522 (*An Act to Amend Certain Provisions of Republic Act No. 3046, as amended by Republic Act No. 5446, to Define the Archipelagic Baselines of the Philippines, and for Other Purposes*, 10 March 2009).

> In March 2009, Congress amended RA 3046 [the 1961 Baselines Law] by enacting RA 9522 [the 2009 Baselines Law], the statute now under scrutiny. The change was prompted by the need to make RA 3046 compliant with the terms of the United Nations Convention on the Law of the Sea … which the Philippines

> ratified on 27 February 1984. Among others, UNCLOS III prescribes the water-land ratio, length, and contour of baselines of archipelagic States like the Philippines …. Complying with these requirements, RA 9522 shortened one baseline, optimized the location of some basepoints around the Philippine archipelago and classified adjacent territories, namely, the Kalayaan Island Group (KIG) and the Scarborough Shoal, as "regimes of islands" whose islands generate their own applicable maritime zones.

The new law adopted a mixed-formula for fixing the baselines. Relying on UNCLOS art. 121 ("regime of islands") and by authority of UNCLOS art. 14 which authorizes a "combination of methods for determining baselines … to suit different conditions", it adopted archipelagic baselines for the main islands of the Philippines and the regime of islands for the Kalayaan Islands Group in the Spratlys area and Scarborough Shoal. In other words, the 2009 law shunned the "package deal", so to speak, to encompass all the islands, including the KIG and Scarborough Shoal, within archipelagic baselines.

In *Magallona v. Executive Secretary*, the Supreme Court characterized the new Baselines Law as domestic legislation to implement those provisions by revising the old Baselines Law and making it compliant with the UNCLOS. The Court described the technical corrections made by the new law.

The petitioners challenged the law on several grounds. First, it "dismembers a large portion of the national territory" by discarding the pre-UNCLOS demarcation under the 1898 Treaty and related treaties as "successively encoded in the definition of national territory under the 1935, 1973 and 1987 Constitutions." The new Baselines Law thus "reduces Philippine maritime territory … the reach of the Philippine state's sovereign power [as secured under the 1987 Constitution and the Treaty of Paris and ancillary treaties."

Second, it "opens the country's waters … to maritime passage by all vessels and aircrafts, undermining Philippine sovereignty and national security, contravening the country's nuclear-free policy, and damaging marine resources, in violation of relevant constitutional provisions." In other words, the law "converts" internal waters into archipelagic waters, hence subjecting these waters to the right of innocent and sea lanes passage, including overflight. They further rgue that this will "expose Philippine internal waters to nuclear and maritime pollution hazards, in violation of the Constitution."

Third, it "weakens our territorial claim" over the KIG excluding the KIG from the archipelagic baselines and adopting a mixed regime.

The Court has held that there is no contradiction between the treaty lines and the UNCLOS. The Court held that the new Baselines Law merely implements the UNCLOS.

> [B]aselines laws are nothing but statutory mechanisms for UNCLOS III States parties to delimit with precision the extent of their maritime zones and continental shelves. In turn, this gives notice to the rest of the international community of the scope of the maritime space and submarine areas within which States parties exercise treaty-based rights ….

At the outset, the Court distinguished between the determination of maritime zones under the UNCLOS and the delineation of territorial claims over land. It held that RA 9522 is a merely a statutory tool to demarcate the Country's maritime zones and continental shelf under the UNCLOS. By adopting a regime of islands to determine the maritime zones of the KIG and the Scarborough Shoal, the law did not thereby relinquish any claim to land territory. In response to the argument that it still results in the loss of "about 15,000 square nautical miles of territorial waters", the Court held –

> [The 2009 Baselines Law] merely followed the basepoints mapped by [the 1961 law] save for at least nine basepoints that [new law] skipped to optimize the location of basepoints and adjust the length of one baseline (and thus comply with UNCLOS III's limitation on the maximum length of baselines). Under RA 3046, as under RA 9522, the KIG and the Scarborough Shoal lie outside of the baselines drawn around the Philippine archipelago. This undeniable cartographic fact takes the wind out of petitioners' argument branding RA 9522 as a statutory renunciation of the Philippines' claim over the KIG, assuming that baselines are relevant for this purpose.
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> Petitioners' assertion of loss of "about 15,000 square nautical miles of territorial waters" under RA 9522 is similarly unfounded both in fact and law. On the contrary, RA 9522, by optimizing the location of basepoints, *increased* the Philippines' total maritime space (covering its internal waters, territorial sea and exclusive economic zone) by 145,216 square nautical miles …. (emphasis in the original)

The Court explained that the mixed regime was in keeping with the UNCLOS rule that the "drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago" (UNCLOS 47.3) and that "the length of the baselines shall not exceed 100 nautical miles," save for three per cent (3%) of the total number of baselines which can reach up to 125 nautical miles (UNCLOS 47 (2). The Court noted that the KIG and Scarborough Shoal are "outlying areas [] located at an appreciable distance from the nearest shoreline of the Philippine archipelago, such that any straight baseline loped around them from the nearest basepoint will inevitably 'depart to an appreciable extent from the general configuration of the archipelago.'"

The Court conceded the Petitioners' point that the UNCLOS permissive language does not require but merely gives the Philippines the option to draw archipelagic baselines. However, the decision whether to exercise that option belonged to the political discretion belonging to the politically accountable branches of government.

> [T]he prerogative of choosing this option belongs to Congress, not to this Court. Moreover, the luxury of choosing this option comes at a very steep price. Absent an UNCLOS III compliant baselines law, an archipelagic State like the Philippines will find itself devoid of internationally acceptable baselines from where the breadth of its maritime zones and continental shelf is measured. This is recipe for a two-fronted disaster: *first*, it sends an open invitation to the seafaring powers to freely enter and exploit the resources in the waters and submarine areas around our archipelago; and *second*, it weakens the country's case in any

international dispute over Philippine maritime space. These are consequences Congress wisely avoided.

DISCUSSION

The issue involves a clash between two treaties, and between a treaty and the Philippine Constitution. The Philippines' adopts the principle of constitutional supremacy, under which the constitution prevails over all other legal issuances. The Philippines is bound by treaty and custom to respect the, which provides that a state "may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (Vienna Convention on the Law of Treaties, Article 27, *Internal law and observance of treaties*). The Philippine Constitution likewise adopts the incorporation theory, whereby it "adopts the generally accepted principles of international law as part of the law of the land" (CONST. art. II.2), including that principle codified into the VCLT. These issues remain unresolved despite the new Baselines Law.

Significantly, the Supreme Court in *Magallona v. Executive Secretary* did not squarely declare the 1898 Treaty and its subsequent statutory applications as superseded by the 2009 Baselines Law. Conversely, had it been minded to do so, going by practice and tradition, the Supreme Court could have struck down Philippine ratification of the UNCLOS altogether and upheld the entrenched and traditional interpretation of the reach of Philippine territory. We can thus say that the *Magallona v. Executive Secretary* ruling is most telling in what the Court deliberately did not say. The Court balked at discarding the 1898 Treaty altogether, an indication that despite the modernist critique, it remains entrenched not only in law but likewise in national policy.