**UNCLOS AND THE PHILIPPINE TERRITORIAL SEAS: PROBLEMS, PERSPECTIVES AND OPTIONS**

**JOSE VICTOR VILLARINO CHAN-GONZAGA**

**ABSTRACT**

The sea will be the center of world development in the third millennium. It is the last frontier for man’s expansion on earth. And the 1982 United Nations Convention on the Law of the Sea (UNCLOS III) embodies humanity’s solemn belief that it is indeed the common heritage of mankind. UNCLOS III creates a legal regime for the seas, which is substantially the consensus of the world as it crosses the threshold into the twenty-first century.

Veritably, UNCLOS III is a triumph for the Philippines in the light of the adoption of the archipelagic doctrine advanced by this country as early as 1955 and established in legislation. Briefly, the principle states that the “island, waters and other natural features of the archipelago form an intrinsic geographic, economic and political entity.”

This thesis studies the problem of the Philippines with respect to the twelve-mile breadth of the territorial seas provided for in the convention. UNCLOS III does not take into consideration the distinct configuration of the Philippine territorial seas. And the Philippines has consistently advanced the view that its territorial sea is measured by the metes and bounds delimited by the Treaty of Paris between the United States of America and Spain in 1898.

This thesis posits the view that there is a serious possibility of conflict with other States in the future. The Philippines cannot derive comfort from its declaration at Montego Bay that its signature does not affect its sovereign rights as successor of the United States under and arising from the Treaties of Paris and Washington. For it is considered to be a prohibited reservation which purports to exclude or to modify the legal effect of the provisions of UNCLOS III in their application to the Philippines.

In the end, this thesis warns of the possibility that the variance in UNCLOS III and the Philippine Constitution will be brought to the fore. In that event, it is strongly suggested that if a choice has to be made, it should be to bow to the sovereign will of the majority of the world.

To insist on the national sovereignty over the historic sea, is to cling to old dogmas inconsistent with the new law offering the greatest promise to the world of tomorrow. In addition, this thesis underscores the importance of UNCLOS III in the sense that to be a part of it is to be present in the “new, rich, still largely unknown world which will be the scene of the next adventure and expansion of mankind.”

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*J.D. Doctor 1997, with honors, Ateneo de Manila University School of Law; recipient, St. Thomas More Award (1997); recipient of the Ateneo de Manila University School of Law Best thesis Award.*
I. INTRODUCTION

"Together, we have illuminated the past, we explore the present, and we continue to push the border of the future into what is yet to be."

- National Geographic Society
  World Headquarters
  Washington, D.C.

The Philippines and the world stand at an important threshold in the history of humankind. Not only is another century coming to an end, but humankind is about to journey yet into another millennium.

A look at the world today reveals how different it has become from the world which began this century. It has started lifting the various barriers around nations, and for the very first time, there seems to be a consensus for greater political, social, and economic cooperation in order to establish a totally new world order. Concordedly, there are parts of the world which still experience the horrors of war and the ravages of disunity. But these are mere aberrations in an international system which has pledged another fifty years to the United Nations Organization (UN) and has negotiated possibly the most comprehensive trade agreement in history—the General Agreement on Tariffs and Trade (GATT-UR).

The third United Nations Convention on the Law of the Sea (UNCLOS III) is a monumental landmark in the cooperation and togetherness of the international community during some of the best years of humankind, in the century it is about to leave behind. In December of 1982, 119 States and organizations affixed their signatures to the Convention during the ceremonies at Montego Bay.

The UNCLOS III is especially important to the Philippines as it is an ocean or maritime State which is nestled on a strategic area of the Pacific, which ocean is dubbed to be the arena of the twenty-first century. And “as distribution of land has more or less been determined, we are now concerned with the apportioning of the seas.”

A. Background of the Study

The guns of Commodore George Dewey did something more than the obliteration of a Spanish fleet in the harbor of Manila. It began almost a half-century of American rule over the Philippine islands that culminated in the inauguration of a Philippine

from 1974 to 1982 to discuss the evolving issues of the modern world relating to the uses and conservation of the seas. Finally in 1982, the final Convention text of 320 articles and nine annexes was submitted to the nations of the world for their consideration and approval.

The traditional uses of the sea before World War II made that era of ocean politics relatively simple and straightforward. However, the new era of ocean politics has been rather complex.\(^4\)

The UNCLOS III is considered a giant leap towards a more systematic and efficient development of the seas. UNCLOS III is also some sort of an achievement for the Philippines. For the first time in Maritime Law and History, the world has recognized the concept of archipelagic States and waters. The Philippines was the first country in the world to advocate the concept as far back as March 7, 1955 in a note verbale to the UN Secretary-General.

The Convention confirmed legally the doctrine espoused by the Philippines and a number of other archipelagic States. But a view has been expressed that by “being an archipelagic State as defined under Part IV of the Convention with archipelagic baselines drawn along the outermost points of the outermost islands, the Philippines will lose about 230,000 square miles which is the area defined by the Treaty of Paris,” which area is supposedly embodied in the Constitutional definition of the national territory.

In an attempt to harmonize the provisions with the fundamental law, Minister Arturo Tolentino, then the head of the Philippine delegation to UNCLOS, “made a declaration under Article 310 of the Convention that the signing of the Convention by the Philippines should not in any manner impair or prejudice the sovereign rights of the Republic of the Philippines under and arising from the Constitution of which the Philippines… This declaration was objected to as being a reservation which is not allowed by Article 309 of the Convention.”\(^5\)

B. Significance of the Study

Today, the apparent conflict as discussed in the preceding section is unresolved. This paper is a humble attempt to sort through the technicalities, emotion and voluminous paperwork on the said issue. This attempt becomes more vital in light of the great possibility that a real constitutional crisis could ensue if no acceptable solution is achieved. Such a threat constitutes a danger to the relevance of the Philippines as the world seeks to establish the future of the last frontier - the ocean.

\(^{1}\) Phystat Tamogbulok, ASEAN AND THE LAW OF THE SEA 3 (1982).
\(^{3}\) Cited in id.
\(^{4}\) Objections were raised by Byelorussia, Ukraine, USSR, Australia, Bulgaria and Czechoslovakia.

C. Statement of the Problem

This thesis is an analysis of the apparent conflict between the Philippine ratification of the 1982 UNCLOS and the intent of the framers of the constitutional provision on the national territory. It also reviews the basis of the Philippines’ claim to the Treaty of Paris delimitation, under the principle of international law; and how this claim is affected by the Tolentino declaration during the signing of the convention. Specifically it seeks to answer the following questions:

1. What exactly did the Treaty of Paris intend by delimiting the territory of the Philippine archipelago on points out at sea?
2. What are the bases of the Philippine claim on the territory delimited by the Treaty of Paris?
3. Is the Philippine claim defendable under international law?
4. What is the legal implication of the Tolentino declaration?
5. If the declaration is invalid, what are the legal and constitutional implications of our signature and ratification?
6. If the claim has no bases, what are the foreign policy and legal options of the Philippine government?

D. Theoretical Framework

The theory underlying this thesis assumes that the characteristics of a State greatly influence the formulation of its foreign policy. The national attribute theory, as it is known, suggests that foreign policy behavior always has the State’s attributes as primary causes. Political scientists who utilize this approach would assume that a society’s “economic institutions, social structures, educational system, major value orientations... underlie the actions of its decision makers.”\(^6\) It is generally accepted, however, that national attributes are mere factors that cause certain behavior and that eventually the process of decision making will have to be completed by leaders.

National attributes are defined as characteristics that “describes (sic) the makeup of a nation, differentiating one State from another.”\(^7\) The common examples of these are size and economic or political structures.

The pre-theory of foreign policy espoused by James Rosenau has two factors that are considered at the national attribute level: the governmental and social variables. The governmental attributes are “those aspects of a government’s structures that limit or enhance the foreign policy choices made by decision makers.”\(^8\) Scholars of international relations have always considered the type of governance a major factor

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\(^7\) Michael Sullivan, INTERNATIONAL RELATIONS THEORIES AND EVIDENCE 103 (1976).
\(^8\) James Rosenau, Pre-Theories and Theories of Foreign Policy, APPROACHES TO COMPARATIVE AND INTERNATIONAL POLITICS 43 (Barry Farrell ed., 1966).
in foreign policy. There is a difference in policy formulations of democratic governments and dictatorial regimes. On the other hand, the societal variables are "those non-governmental aspects of a society which influence its external behavior." Among these are value orientations, unity and more importantly, the level of industrialization.

The national attribute theory is a very uncomplicated concept. It is easy to understand and draws the theoretical linkages from the said attributes to foreign policy behavior. Indeed, since population. GNP, domestic unrest and other attributes are difficult to change or control, foreign policy decisions are really rational and intelligent reactions to prevailing circumstances and situations.

E. Scope of the Study

The signature and ratification of UNCLOS III by the Philippines has given rise to a number of problems and questions involving numerous aspects of the convention. This is a study of the conflict between the Convention provisions on territorial seas delimitations and the Philippine claim on the historic Philippine seas.

The study thus focuses on the determination of the validity of the Philippine claim under the accepted principles of public international law. The Tolentino declaration will also be a subject of deep review and discussion.

In the end, the author will try to evolve a fusion of the constitutional policy and intent on the national territory with the complicated realities of foreign relations in the post-modern world in which the Philippines finds itself today.

F. Limitations of the Study

This research is immediately constrained by the date of one of the main documents under study - the 1898 Treaty of Paris. The treaty is as old as the Republic and there is a dearth of publications about it. There is also no authoritative work done on the negotiations which preceded the signing and approval of the said treaty.

The limited time for this research and the academic work that the author has to attend to will make it almost impossible for an in-depth, comprehensive review of the voluminous documents of the long process of negotiation before the UNCLOS of 1982 was signed by the respective signatories.

Finally, the author anticipates the overwhelming technical nature of some of the documents under study like the territorial delimitation provided for in the Treaty of Paris. Technical experts will definitely have to be consulted so as to make sense of some technicalities of the territorial delimitation and even the process of treaty interpretation.

G. Methodology

This thesis will make use of the data available at the different libraries which have collections on the topic. The Foreign Service Institute, the United Nations Information Center, and the University of the Philippines Law Center will prove to be important sources of inputs for this study. The technical information will be gathered from the National Archives, the Ateneo de Manila University Archives, the American Historical Collection Library and the United States Department of State. Research will also be conducted at the Main Reading Room of the United States Library of Congress.

Personal interviews might be invaluable in the analysis of the different technical, legal and constitutional aspects of the research because of the limited published works on the subject.

H. Organization of the Thesis

This thesis is divided into five chapters. Chapter One provides an introduction and overview of the study. Chapter Two discusses the history of the law of the sea and the important issues that the Philippines injected into its development, especially the issue of defining the status of archipelagic States. It also reviews the territorial sea as defined and delimited by the Constitution.

Chapter Three describes the Philippine claim over its so-called historic treaty waters as delimitated by the 1898 Treaty of Paris. It explains and examines the different bases invoked by the Philippines to support its contention. Particular focus is on the concept of treaty interpretation in international law and an attempt is made to find an answer to the question of the validity of the Philippine stand as to what was actually ceded by Spain through the Treaty of Paris.

Chapter Four is an analysis of the implications of UNCLOS on Philippine law. It reviews the apparent conflict between UNCLOS and the Treaty of Paris and it seeks to determine the validity and/or effect of the Philippine declaration at the signing of UNCLOS III.

Chapter Five contains the author's conclusions.
II. THE LAW OF THE SEAS

Like States elsewhere, the States of Southeast Asia look to the seas and oceans as the new frontiers of humankind.

- Lee Yong Leng
SEA and the Law of the Sea

On April 30, 1982, the United Nations Conference on the Law of the Sea overwhelmingly approved the 320 article (with nine annexes) text of the Convention to govern the legal regime of the sea in the twenty-first century. Subsequently, on December 10 of the same year, one hundred and nineteen (119) States and organizations signed the Convention at the Rose Hall International Hotel in Montego Bay, Jamaica.

A. Background of the Conference

The beginning of UNCLOS III can be traced to December 21, 1968 when the General Assembly passed Resolution Number 2340 establishing an ad hoc commission to study the use of the seabed in recognition of the fact that "resources of the deep sea are the common heritage of humankind." This commission became a preparatory committee (of the UNCLOS) which met from 1971-1973. The Philippines was a member of this commission.

The UNCLOS III formally organized itself in New York City in December of 1973, pursuant to another resolution of the General Assembly of the United Nations. Its first substantive meeting was held from June to August of 1974 in Caracas, Venezuela; and subsequently met once or twice a year for four to six weeks at a time either in the United States (New York) or in Switzerland (Geneva).

Including the three year tenure of the preparatory seabed committee, it took the Conference on the Law of the Sea eleven (11) years, from 1971-1982, to conclude an acceptable international agreement. But "like a ship that had been at sea for these many years, the Third United Nations Conference on the Law of the Sea finally reached its port of destination."17

B. Apportioning the Sea

Maritime boundaries are essential and necessary parts of the international State system, demarcating with some degree of precision the area of waters over which a State exercises effective sovereign control. Such boundary takes on a more crucial and important role in the international order when one considers the fact that it is in effect a boundary between the coastal State and of the interests of the rest of the world upon the high seas.18

In the Law of the Sea Zones in the Pacific Ocean, Professor Hanns J. Buchholz writes of the sea and its unlimited resources:

The politico-geographical distribution of land seemed to have been resolved and consolidated on a long-term basis after the colonial era. Except in a few instances (for example, Israel/Jordan), State borders have not been altered. Changes amounted to incorporation of the entire country with its former borders, or a change in the political system. BUT expansion beyond a border would only be possible by means of war because nowhere on land is there a totally uninhabited region that does not belong to anyone, and at the coast living space actually comes to an end at the shores.19

In the past, the sea was used as a waterway or for fishing, and it seemed endless and inexhaustible; everyone had sufficient space and fish.20 But in this time and age, there seems to be a crisis in the law of the sea, resulting from the obsolescence of tested concepts "which have to give way to the more intricate visions of a framework for the management of ocean space.21

The world regards the UNCLOS III as a triumph of the conscience of humankind in the field of international law. Its conclusion was impelled by a spirit of compromise and accommodation in the interest of ensuring the rule of law and international order in the seas and oceans of the world.22 Indeed, it is a historic milestone in the progressive development23 of the international law on the seas, a discussion of which should be prefaced with a historical perspective of the evolution. The proponent however, shall confine his discussion to two important issues which have direct implications on the study and at the same time, interest the rest of the world - the archipelago concept and the delimitation of territorial seas.

10 Id. at 108, citing Fulton, The Sovereignty of the Sea (1911).
12 Tolentino, supra note 17.
13 Tolentino, supra note 17.
14 The vote was 130 - 4 - 17.
16 Tolentino, supra note 4, at 83.
18 Id.
1. ARCHIPELAGO CONCEPT

On March 14, 1973, Fiji, Indonesia, Mauritius and the Philippines submitted to the Sea bed committee their basic principles of archipelagic States. On behalf of these States, Minister Arturo Tolentino of the Philippine delegation tendered the basic principles which read:24

1. An archipelagic State, whose component islands and other natural features form an intrinsic geographical, economic and political entity, and historically have or may have been regarded as such may draw straight baselines connecting the outermost points of the outermost islands and drying reeds of the archipelago from which the extent of the territorial sea of the State is or may be determined.

2. The waters within the baselines, regardless of their depth or distance from the coasts, the sea-bed and the subsoil thereof, and their adjacent airspace as well as the other resources, belong and are subject to the sovereignty of the archipelagic State.

3. Innocent passage of foreign vessels through the waters of archipelagic States shall be allowed in accordance with its national legislation, having regard to the existing rules of international law. Such passage shall be through sea lanes as may be designated for the purpose by the archipelagic State.

These very principles were first embodied in the Philippine Position Paper of March 7, 1955 which declared that “all waters around, between and connecting different islands belonging to the Philippine archipelago, irrespective of their breadth and dimension are necessary appurtenances of the land territory forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines.”25 The principle in the said diplomatic correspondence was later on enshrined in the Philippine Constitutions of 1973 and 1987.26

Indonesia had also taken the prior unilateral position in the Indonesian Declaration of December 13, 195727 and Act Number 4 of 196028 that the Republic is an archipelago and should therefore be treated as one unit where “all the waters surrounding, between and connecting the islands of the archipelago, regardless of breadth, are to be considered as internal waters.”

Prior to these declarations however, there have already been attempts in the international realm to settle the unique situation of the archipelagos. In its 1888

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24 III UNGA Records, 28th Sess. 21, at 1-2.
The problem of the archipelagos was again discussed in the second UN Conference on the Law of the Sea which met in Geneva from March 17 to April 27, 1960. But as in the 1958 Conference, the 1960 international conference likewise failed to resolve or adopt the archipelagic doctrine as espoused by the archipelagic States of the world, like Indonesia and the Philippines.

Professor Miriam Defensor-Santiago writes of the continuing lack of agreement on the issue, thus:

The conference, in fact, was concerned with seeing agreement among nations with different security, economic or fishing interests and hence the issue of straight baselines or the archipelago doctrine was set aside. But the Chairman of the United States delegation, in an article assessing the performance of the second Geneva Conference, managed to reiterate the American opposition to the doctrine, saying that “we do not recognize the validity of this extensive and unilateral archipelago doctrine.”

And such was how things were as regards the law of the seas and the archipelagic doctrine when the United Nations General Assembly called for what “is perhaps one of the most important conference of the 20th century and the longest in modern history” – the UNCLOS III. This brings the discussion full circle to the submission of March 14, 1973 of some of the most vocal archipelagic States in the maritime world.

2. TERRITORIAL SEA

Lawyers of the modern times have always been drilled of the Roman legal maxim that the seas are res communes. Indeed, a claim over territorial seas is a derogation of such legal principle but a necessary one in the context of a State’s political, economic, social and security requirements.

Yet not until the UNCLOS III did the nations of the world agree definitively on a uniform breadth of the territorial seas. The evolution of such monumental agreement was long and chaotic; so much “different from the Treaty of Tordesillas in 1494 when the Pope’s Line was drawn along the meridian 370 leagues west of the Cape Verde islands to divide the world into a Spanish and a Portuguese realm.”

The pendulum of thought in the modern times has generally swung between mare clausum and mare liberum. John Selden, a Briton, espoused the cause of mare clausum in 1635. Basically, this school of thought believed in the capability of States to appropriate and exclude others from the seas. At the other end of the spectrum was Hugo Grotius,

a jurist of the Netherlands, who argued passionately in his 1609 Mare Liberum that “the closing of the sea constituted a violation of customary international law. Grotius argued that the seas should be free of territorial sovereignty and, from this view, evolved the concept of the high seas to which all have free and equal access.”

However, as Professor Defensor-Santiago notes, “while the modern trend is towards the mare liberum, another movement has made clearer under international law certain exclusive rights of maritime States over waters (described as Territorial Sea) immediately adjacent to their coasts.” And “to this extent all maritime countries now possess a sovereignty of the sea.”

Throughout history, there have been arbitrary demarcations of the territorial seas of States. It was not until the 17th and 18th centuries when the territorial waters of a State became related to a natural basis which could be universally applied. The principle which became popular hence was “that the maritime dominion of a State ended where its power of asserting continuous possession ended.”

This particular principle first appeared in the Law of War and Peace by Grotius which conceded that a State may be able to exercise sovereignty over part of its waters, first in regard to persons by an armed fleet, and second in regard to territory as when those who sail on the coasts of a country may be compelled from the land, just as if they were on land.

Further, Professor Defensor-Santiago narrates in her treatise on territorial waters that, in the 17th century:

Loccennis wrote that a nation could not acquire universal dominion over the sea, but it could acquire sovereignty over a particular sea, as far as that was under its power, subject to the rights of innocent passage and navigation by others.

Puffendorf argued that a nation could justifiably claim dominion in the neighboring sea, because it had the right of exclusive fishing as well as the right to secure and defend itself.

DEFENSOR-SANTIAGO, supra note 27, at 22.
TOLENTINO, supra note 4, at 83.
LEE, supra note 18, at 6.
Then at the dawn of the eighteenth century, the modern principle of territorial sea delimitation was expounded upon. The Dutch jurist Cornelius van Bynkershoek posited that “the dominion of States extended over the neighboring seas as far, and only as far, as it was able to command and control it from the land.”36 And this range of command and control came to be recognized as three (3) nautical miles or the equivalent of one (1) marine league. 46

For a time, this three mile range was the commonly claimed breadth of the territorial sea. And up to the 1958 Convention on the Territorial Sea, international law seemed to have recognized this limit. 36 This principle came to be popularly known as the "cannon-shot" rule. Parenthetically, this appellation tends to deceive students of history and international law, because the maximum range of a cannon was only one mile and rather this rule "has its origins in the maritime league which was a twentieth part of one degree or three nautical miles."37

Finally, by the nineteenth century, grand maritime claims became rarer and Professor Defensor-Santiago notes that:

the views of Grotius on imperium and of Bynkershoek on dominion helped to produce a conception of sovereignty of the coastal State over the territorial sea, of the same nature as sovereignty over the territorial land. Vis-à-vis these ideas on sovereignty, certain authors wanted to confine the coastal States only to specific and strictly defined rights: de la Perdelle... acknowledge only coastal servitudes, ... while Fauchille... only a right of self-defense over a belt of sea ... essentially as mare liberum.38

Such was the prevailing thought when the nations of the world first met in a general conference39 in 1958 to discuss the law and the future of the seas. But the States Parties were not able to agree on the very important question of how many miles the breadth of the territorial sea should be. This was because of the fact that, for compelling reasons, the great powers of the world40 and other maritime States viewed the conference as a rendezvous for preserving the traditional three-mile limit of the territorial seas.41 However, while the conference clearly failed to adopt a uniform rule as to the breadth, the International Law Commission in its report to the assembly categorically took the position that "any claim of more than twelve (12) miles was clearly indefensible."42

* Cited in Fuzon, supra note 43, at 556.
* COQUIA, SELECTED ESSAYS, supra note 3, at 13.
* Id.
* DEFENSOR-SANTIAGO, supra note 27, at 6.
* In this conference, represented were 79 members of the United Nations, and the Federal Republic of Germany, Switzerland, Holy See, South Korea, Vietnam, San Marino and Monaco, as well as seven specialized agencies and nine intergovernmental organizations as observers.
* United States, United Kingdom, Japan, Holland, Greece, France, West Germany.
* 52 Am. JUR. INT'L L. 610 (1958).
* Id. at 614, citing Francois, Speech.

On December 10, 1958, the General Assembly again passed a resolution to convene a second Conference on the Law of the Sea to discuss the breadth of the territorial sea. This conference was held from March 17 to April 27, 1960, in Geneva, Switzerland. Eighty seven States were represented at this meeting and the States in attendance were the same as in the 1958 conference, except for the addition of Cameroon and Guinea and the absence of Afghanistan. Seven specialized UN agencies together with eight intergovernmental organizations were observers.47

By his own admission, the Head of the United States delegation explains in an article for the American Journal of International Law that, in this conference, the United States wanted to keep "the areas of the high seas as extensive as possible and have the territorial seas as narrow as possible."48 The narrow sea was pegged by the US-Canada joint proposal at six miles. But this proposal failed, by one vote, to secure the required two thirds vote in the plenary session’s final voting. Thus, as in the first conference, the Geneva Convention of 1960 likewise failed to agree on a uniform breadth for the territorial sea.

It took thirteen years before the nations of the world once more gathered in plenary to try to settle the breadth of the territorial sea. Even then, it took about another decade before a comprehensive agreement could be concluded. One consolation though, is that the limits have finally been set by UNCLOS III.

C. The Philippines and UNCLOS

The issues of archipelago theory and the territorial sea delimitation are particularly relevant and important for the Philippines because these are major issues for which the Philippines has been fighting in the UNCLOS meetings.49

As regards the archipelago theory, the Philippines has consistently taken the stand that straight baselines should be drawn around the archipelago connecting the outermost points of the outermost islands and to consider all the waters inside the baselines as internal waters subject to the territorial sovereignty of the Philippine State. This principle is embodied in the Constitutions of the Republic as part of the definition of the national territory.

On the other hand, the Philippine delegation to the UNCLOS meetings in 1958, 1960 and 1974 also fought for the recognition of the treaty limits as historic waters which should constitute an exception to the accepted rules for delimitation of the territorial seas in the same way that historic bays are excluded.

This territorial sea of the Philippines "at some places near Mindanao is less than three miles, but in some places in Luzon, east and west of Luzon in the north, they
extend to over one or two hundred miles. It has been the stand of the Philippines therefore, that regardless of how the UNCLOS III delimits or defines the breadth of the territorial sea, its unique historic territorial sea should be exempted, just like historic bays.

The UNCLOS III has finally provided for archipelagic States and the limit of the territorial seas in the final treaty. Ironically, it has also opened the windows into an all-new world of problems and issues. While UNCLOS III had affirmed the archipelago principle of unity of land and water— it has created a regime of archipelagic waters to which the Philippines has some constitutional objections. On the other hand, while the limit of the territorial sea has finally been prescribed by the Convention, no exception has been recognized in favor of the historic waters of the Philippines. Again, there are certain constitutional implications arising out of this issue.

Indeed, there are numerous issues that are ripe for theoretical and scholarly examination but the proponent will focus, in this study, only on the question of the territorial sea of the Philippines. Thus, the brief discussion which will follow this section shall be confined to the relevant provisions of UNCLOS III as regards the delimitation of the territorial sea of archipelagos. The emphasis on this study is but the tip of the iceberg of opportunities and prospects in the Convention which we call UNCLOS III.

D. Territorial Waters of Archipelagos

The Philippines is an archipelagic State under the provisions of UNCLOS III, being a State constituted wholly by one archipelago.

1. DELIMITING THE TERRITORIAL SEA

Under Article 48 of the Convention, an archipelagic State shall measure the breadth of its territorial sea, the exclusive economic zone and the continental shelf from the archipelagic baselines drawn in accordance with Article 47 of the same Convention, UNCLOS III.

Said archipelagic baselines are drawn by joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.

It is essential to note at this point that the ratio of water to land if the treaty limits are applied is 5 to 1, while it is approximately only 1.9 to 1 if the UNCLOS III is strictly enforced.

The drawing of the archipelagic baselines is not supposed to depart to any appreciable extent from the general configuration of the archipelago, and shall not be to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea-level have been built on them or where the low tide elevation is situated wholly or partially at a distance not exceeding the breadth of the territorial sea from the nearest island.

To emphasize perhaps a bias towards mare liberum, the Convention expressly requires that the system of straight baselines shall not be applied by an archipelagic State in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another State.

Moreover, the baselines drawn under this article are required to be drawn on chart of a scale or scales adequate for ascertaining their positions, which charts shall be given due publicity and deposited with the Secretary General of the United Nations Organization.

Having drawn or charted the baselines, an archipelagic State may then determine the limits of its territorial seas. And for archipelagic States, they have the right to establish the breadth of their territorial sea up to a limit not exceeding twelve nautical miles from the archipelagic baselines as determined in accordance with the Convention. The outer limits of this territorial sea is the line every point of which is at a distance from the nearest point of the baseline equivalent to the breadth of the territorial sea.

2. INNOCENT PASSAGE IN THE TERRITORIAL SEA

The sovereignty of an archipelagic State, like the Philippines, extends beyond the land territories and internal waters to the adjacent belt of sea described as the territorial seas. But this sovereignty is to be exercised in accordance with the Convention and other rules of international law. In line with this, the Convention does provide that

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60 Id. at 73.
62 The Philippine Constitution considers waters inside the baselines as Internal Waters. See Phil. Const. art. 1 (1987).
63 UNCLOS III, supra note 61, art. 46(9).
64 Id., supra note 10, at 9.
65 COQUEL, SELECTED ESSAYS, supra note 3, at 50.
66 UNCLOS III, supra note 61, art. 46(9).
67 Id.
68 Id.
69 Id.
70 Id.
71 Id.
72 Id.
73 Id.
ships of all states enjoy the right of innocent passage through the territorial sea of the
third State. The rules for the exercise of such a right are laid down in Section 3, Part II
of the Convention.

Article 18 of the Convention defines passage to mean navigation through the
territorial sea for the purpose of:

(a) traversing that sea without entering internal waters or calling at a
roadstead or port facility outside internal waters; or
(b) proceeding to or from internal waters or a call at such roadstead or port
facility.

Article 19 on the other hand, provides that passage is innocent so long as it is not
prejudicial to the peace, good order or security of the coastal State.

E. UNCLOS III and the Seas

UNCLOS III is an international agreement heralded to complete the apportioning
of the seas. It has also been hailed as embodying the promise of the common heritage
of humankind. Ironically, there is an apparent conflict between the Convention and
the Philippine Constitution as to the territorial waters of the Philippines. This conflict
is what this whole study is all about.

III. THE NATIONAL TERRITORY

The land was ours before we were the land's. She was our land more than a hundred
years before we were her people. She was ours. Such as she was, such as she would
become.

- Robert Frost
The Gift Outright (1942)

The territorial limits of the Philippines are principally defined by Article III of the
Treaty of Paris concluded between Spain and the United States on 10 December 1898. By
means of metes and bounds, the Treaty determines the political boundaries of the
Philippine territory. To sustain the Philippines' claim on the waters within the so-called
"treaty limits" however, it is necessary to establish the real meaning of Article III.

A. The Treaty Limits

In Article III of the Treaty of Paris, the contracting parties declared that Spain cedes
the United States the archipelago known as the Philippine Islands, comprehending the islands lying within the following line:

A line running from west to east along or near the twentieth parallel of north
latitude, and through the middle of the navigable channel of Bashi, from the one
hundred and eighteenth (118th) to the one hundred and twenty seventh (127th)
degree meridian of longitude east of Greenwich, thence along the one hundred and
twenty seventh (127th) degree meridian of longitude east of Greenwich to the
parallel of four degrees and forty five minutes (4 45') north latitude, thence along
the parallel of four degrees and forty five minutes (4 45') north latitude to its
intersection with the meridian of longitude one hundred and nineteen degrees and
thirty five minutes (119 35') east of Greenwich, thence along the meridian of longitude
one hundred and nineteen degrees and thirty five minutes (119 35') east of Greenwich
to the parallel of latitude seven degrees and forty five minutes (7 45') north, thence
along the parallel of latitude seven degrees and forty five minutes (7 45') north to its
intersection with the one hundred and sixteenth (116th) degree meridian of longitude
east of Greenwich, thence by a direct line to the intersection of the tenth (10th)
degree parallel of north latitude with the one hundred and eighteenth (118th) degree
meridian of longitude east of Greenwich, thence along the one hundred and
eighteenth (118th) degree meridian of longitude east of Greenwich to the point of
beginning.

Substantially, this is an adoption of the draft proposed by the United States during
the conference of October 31, 1898.

Thus was defined the so-called "International Treaty limits" of the Philippine
territory. Taking into account the concept of archipelago which envisions a unity of
land and water, the Philippines contends that the territory ceded by Spain did not
consist only of the dry islands but the waters as well, as circumscribed by the technical
description.

B. Philippine Constitutional Law

The constitutional definition of national territory covers not only the territorial
areas set forth in the Treaty of Paris but also that of the Treaty of Washington of 1900
and the Treaty of 1930. The Treaty of Washington was a subsequent treaty between the
United States and Spain on November 7, 1900 by which Spain surrendered to the
United States "all claims of title which she may have had at the time of the conclusion

76 Protocol No. 11 of the United States Delegation, Conference of 31 October 1898. "Spain hereby cedes to
the United States the Archipelago known as the Philippine Islands and lying within the following lines."
Soeverignty of the Philippines, VIII The Lawyer's REVIEW 2 (1994).
78 Id.
of the Treaty of Paris to any and all islands belonging to the Philippine archipelago, lying outside the lines described in Article III of the Treaty and particularly the islands of Cagayan, Sulu and Sibutu and their dependencies, and agrees that all such islands shall be comprehended in the cession of the archipelago as fully as if they had been expressly included in these lines. 192

In January 2, 1930, the United States and the United Kingdom also entered into a treaty concerning the boundaries of the Philippines and North Borneo, then under the rule of the British. 193

These treaties (including the Treaty of Paris) describe at the very least the territorial domain of the Philippine archipelago which passed from the sovereignty of Spain to that of the United States by their Treaty of 1898. 194 This sovereignty was later granted to the successor Philippine Republic. All the three treaties were expressly incorporated in the definition of the Philippine territory under the Philippine Constitution of 1935. 195

Again in the 1971 Constitutional Convention, reference was made to the Treaty of Paris boundaries. In its Report No. 01, 196 the Committee on National Territory stated:

Now if we plot on a map the boundaries of this archipelago as set forth in the Treaty of Paris, a huge or great rectangle will emerge, having about 600 miles in width and over 12,000 miles in length. Inside this rectangle are the 7,100 islands comprising the Philippine islands.

Committee Chairperson Vicente Quisito, responding to a query by Delegate Roseller Lim (Zambanga) as to where the Philippine archipelago was, said that the Committee comprehended the area delineated in the Treaty of Paris. 197

The conclusion that can be gathered from an examination of the discussions in the 1971 Constitutional Convention, specifically that of February 17, 1972, is that the "Philippine archipelago" as used in the 1973 constitutional definition of territory corresponds with that defined in Article I of the 1935 Constitution with the possible exception of the Batanes group of islands. 198

The same intent and contemplation is inherent in the definition under the 1987 Constitution. The Philippine Constitution of 1987 broadly defines the national territory to wit:

Washington.199

192 Treaty to Define the Philippine-North Borneo Border, 13 V L.N.T.S. 297 (1930) [hereinafter Treaty of 1930].
193 COQUA, SELECTED ESSAYS supra note 3.
194 PHIL. CONST. art. 1 (1935).
195 Committee Report No. 01, Committee on National Territory, 1971 Constitutional Convention, 15 January 1972.
196 Session of 14 February 1972.
198 PHIL. CONST. art. 1.
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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 terrestrial sea, the bed of the subsoil, the in situ, submarine areas, 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. 200 (emphasis added)

The definition in the 1987 Constitution use the words "all other territories over which the Philippines has sovereignty or jurisdiction." The deletion of reference to old treaties like the Treaty of Paris however, does not nullify the claims under these treaties, for at any rate the use of "Philippine archipelago with all the islands and waters embraced therein" are deemed to suffice. 201 Thus, it is safe to declare that the said term - Philippine archipelago - as used in the 1973 and 1987 Constitutions contemplates the technical descriptions of Article III of the Treaty of Paris. 202

Although the said Constitution made no mention of the Treaty of Paris, which was the 1935 Constitution's principal point of reference for delineation of Philippine territory, the Philippine archipelago of the new Constitution is, according to the sponsor of the provision, also the archipelago of the Treaty of Paris. 203

C. The Tolentino Declaration

In view of the express mandate of the Philippine Constitution, the Filipino delegation to the Third United Nations Convention on the Law of the Sea maintained the position that "sovereignty cannot be surrendered." For them, there would be no acceptable compromise if it impairs or diminishes Philippine sovereignty over the present internal and territorial waters. 204

In an attempt to harmonize the provisions of UNCLOS III with the fundamental law, Minister Arturo M. Tolentino, then the Chairperson of the Philippine delegation, "made a declaration under Article 318 of the Convention that the signing of the Convention by the Philippines should 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." 205

This declaration however, has not been universally accepted and had been objected to. First, the United States has maintained that the Treaty of Paris in the past did not transfer any waters, but that only the land area was surrendered and it was only over such land area that the United States had duly exercised sovereignty. 206 Second, several

200 NELLEDO, supra note 81 at 74.
201 See BERNAS, supra note 88, at 17 and 30.
202 Id.
203 ARTURO TOLENTINO, supra note 4, at 27.
204 COQUA, Legal and Economic Aspects, supra note 6.
205 TOLENTINO, supra note 4, at 15.
206 Objecting to the declaration were Byelorussia, Union of Soviet Socialist Republics, Bulgaria, Ukraine
countries had opposed the declaration as being a reservation prohibited under Article 309 of the Convention.96

The author shall seek to discuss these two objections in this study. But for purposes of logical presentation, these shall be addressed separately. The United States' position shall hereinafter be tackled, while the second objection shall be discussed in the next chapter.

D. Interpreting Article III of the Treaty of Paris

It is ineluctable that by the Treaty of Paris, Spain ceded to the United States the archipelago known as the Philippine islands. What is contested however, is the Philippine claim that a line was then drawn around the archipelago, which boundary line now marks the outer limits of the historic territorial sea of the Philippines.97

The American delegate to the 1973 Summer Session of the UN Seabed Committee at Geneva, Switzerland asserted his country's position that the United States did not exercise authority beyond the three-mile limit of the territorial sea, and that the Treaty of Paris did not transfer to the United States any waters.98 Consequently, the Americans posit that the Republic of the Philippines cannot insist that the territory devolved to it at the dawn of independence included waters within the international treaty limits but beyond the three-mile (now 12 miles) allowable breadth.

In the context of the two conflicting schools of thought regarding the territorial waters of the Philippines, it becomes important and necessary to interpret the controversial article III of the Treaty of Paris. It is with great reluctance that the proponent addresses this issue because there is no part of the law of treaties which a writer will approach with more trepidation than the question of interpretation.99

1. BASIC RULES OF TREATY INTERPRETATION

In its basic sense, interpretation of treaties embodies the duty of giving effect to the expressed intention of the High Contracting Parties, that is, their intent as manifested in the text of the treaty, in the light of the surrounding circumstances.100 It is a juristic process focused on the sense of the word used, and not with the will to use that particular word.101 Thus the ultimate purpose of searching for the intent of the parties to a treaty is to determine the "sense" for which the terms are employed.102

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The usual clauses of statutory construction are employed in the interpretation of treaties . . . and the words used are to be given their ordinary and natural meaning.103 In Article 31(1) of the Vienna Convention on the Law of Treaties,104 it is categorically stated that a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." It is important to note that this is one section in the Convention adopted without dissent at the Conference and thus may be considered as declaratory of existing law.105

Indeed, in international law, as far as the basic approaches to treaty interpretation are concerned, the textual approach centers on an analysis of the words used.106

In this regard, the International Court of Justice in 1950 had the opportunity to interpret an international covenant in the Interpretation of Peace Treaties Case.107 The Court ruled on and emphasized the need to focus on the natural and ordinary meaning of the terms of the Peace Treaties.108 Early on, in 1925, the Permanent Court of International Justice in the Advisory Opinion on the Polish Postal Service in Danzig interpreted the words "postal service" under a treaty in its ordinary sense so as to include the normal functions of a postal service.

The golden rule of treaty interpretation is best summed up by the International Law Commission in its commentary to the proposals submitted to the Vienna Conference. That these are based on the view that the text must be preserved to be the authentic expression of the intention of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation ab initio into the intentions of the parties.109

2. ARTICLE III OF THE TREATY OF PARIS

This brings the study therefore to an attempt to "elucidate the meaning" of Article III of the Treaty of Paris. Substantially, the said article provides that Spain cedes the Philippine archipelago to the United States; and continues by providing a technical description in metes and bounds of a particular geographic area.110 The Treaty signed

99 Interpretation of the Peace Treaties Case (Judgment), 1950 I.C.J. Reports 221 (hereinafter the Peace
Treaties Case (Judgment)).
100 Id.
102 De Arechaga, supra note 105 at 48.
103 Treaty of Paris, supra note 78, art. 3.
104 Treaty of Washington, supra note 82.
at Washington on November 7, 1900 also noted the cession made under Article III.\textsuperscript{112} Finally, the convention between the United States and the United Kingdom of January 2, 1930\textsuperscript{113} set forth geographic lines separating the Philippine archipelago from the British protectorate of North Borneo.

Applying the rules of treaty interpretation, the first query should be: Is Article III of the Treaty of Paris clear or ambiguous? The proponent submits that it is the former. It is an unequivocal cession of territory by an old colonial power to an emerging one.

a) Textual Analysis

The words Cede and Archipelago\textsuperscript{114} are the key terms of the said article. There is no dispute that under general law to cede is to designate the transfer of territory from one government to another.\textsuperscript{115} It is a method by which territory is transferred from one state to another by agreement between them.\textsuperscript{116} Therefore, that there was a transfer of territory and of sovereignty over the Philippine islands is NOT contested.

As already stated, what is at issue is the validity of the Philippine claim to a territorial sea which corresponds to the delimitation set by the Treaty of Paris. Pivotal in determining the answer is the interpretation of "the archipelago known as the Philippine islands."\textsuperscript{117}

The term archipelago is derived from the Greek word πελάγος which means "sea."\textsuperscript{118} By tradition the core constitutive of said geographical entity are the waters or the sea; not the terrestrial domain. Thus, the concept has traditionally referred NOT only to a group of islands, but also to an intimate and inseparable combination of land and sea.\textsuperscript{119} The Encyclopedia Britannica describes it as "any island-studded sea" It is a sea dotted with islands.\textsuperscript{120} And even the Naval Oceanographic Office of the United States has defined the term to mean "a sea or part of a sea studded with islands, often synonymous with island groups."\textsuperscript{121}

The proponent submits that apparently the natural and ordinary meaning of the word - archipelago - comprehends an extensive body of water/sea possessed of a group of islands. Applying the textual approach of treaty analysis the conclusion is inescapable that the Treaty of Paris, specifically Article III, transferred sovereignty over a body of water with all the islands embraced therein. And this body of water was defined in the technical description likewise found in said article. Thus, having first looked to the articles themselves and finding the meaning intended to be expressed is clear, we are not at liberty to go further.\textsuperscript{122}

b) The Doubtful Phrase

Concededly, certain doubts are raised by the phrase "comprehending the islands between the lines of."\textsuperscript{123} The United States posits the view that those lines therefore are mere delimitations of the geographical area within which belong the islands of the Philippines.\textsuperscript{124} The writer Sorensen also embraces such a view, writing that this manner of defining territorial boundaries may have been the only practical method at that time especially in view of the enormous number of islands.\textsuperscript{125}

c) Subsequent Practice

However it appears that these positions are contrary to and negated by the actuation of the contracting parties, particularly the United States of America, as colonial power regarding Philippine territory.\textsuperscript{126}

The following facts are uncontested and immortalized in the annals of history. First, no more than two years after the Treaty of Paris, a subsequent treaty (Treaty of Washington) was entered into between the United States and Spain on November 7, 1900.\textsuperscript{127} This treaty had to be concluded in order to remove a misunderstanding over certain islands like Cagayan, Sulu and Sibutu growing out of the interpretation of Article III of the Treaty of Paris.\textsuperscript{128} Here again, reference was made to the use of "archipelago" in the original treaty and to the technical descriptions of Article III.

In addition to the two treaties for the delimitation of Philippine territorial limits, the United States concluded with the United Kingdom the Convention of January 2, 1930.\textsuperscript{129} In this agreement, the United States is explicit that the lines drawn by the Treaty of Paris constitute a boundary.\textsuperscript{130} The said geographic line was described in Article I as beginning and ending "on the boundary defined by the Treaty of Paris constituting a boundary."\textsuperscript{131} The said geographic line was described in Article I as beginning and ending "on the boundary defined by the Treaty of Paris constituting a boundary."\textsuperscript{131}

\textsuperscript{112} Treaty of Paris, supra note 83.
\textsuperscript{113} Treaty of Paris, supra note 78, art. 3.
\textsuperscript{114} BLACK'S LAW DICTIONARY (1951).
\textsuperscript{115} Cruz, supra note 103, at 113.
\textsuperscript{116} Treaty of Paris, supra note 78, art. 3.
\textsuperscript{117} HECTOR DE LIGON, TEXTBOOK ON THE PHILIPPINE CONDITION 44 (1991).
\textsuperscript{119} MERRIAM-WEBSTER DICTIONARY (1974).
\textsuperscript{120} UNITED STATES NAVAL GEOGRAPHIC OFFICE, GLOSSARY OF OCTANOGRAPHIC TERMS (1960).
\textsuperscript{121} DR. LUSHDINGTON, THE FRANCIP 150 (1855).
\textsuperscript{122} Treaty of Paris, supra note 78, art. 3.
\textsuperscript{123} Telegraph, Department of State to American Embassy in Manila, 4 January 1958, M.S. Department of State, file 756 D.02/1-458.
\textsuperscript{125} Supra note 117, at 3.
\textsuperscript{126} Treaty of Washington, supra note 82.
\textsuperscript{127} I ACTS OF THE PHILIPPINE COMMISSION 98.
\textsuperscript{128} Treaty of 1930, supra note 83.
\textsuperscript{129} Supra note 76, at 3.
\textsuperscript{130} Id. note 2.
Article II is more explicit in defining the boundary lines and needs to be quoted substantially:

It is agreed that if more accurate surveying and mapping of North Borneo, the Philippine islands and intervening islands shall in the future show that the line described above does not pass between Little Bakkaguan Islands substantially as indicated on Chart Number 4720, the boundary line shall be understood to be defined in that area as a line passing between Little Bakkaguan and Greater Bakkaguan Islands as indicated on the chart.

It is likewise agreed that if more accurate surveying and mapping shall show that the line described above does not pass between Mang See Islands and Mang See Great Reef as indicated on Chart Number 4720, the boundary line shall be understood to be defined in that area as a straight-line drawn... passing through Mang See Channel as indicated on attached Map No. 4720...

On August 29, 1916, the Congress of the United States passed and approved United States Public Law 240, popularly known as the Jones Law, granting to the Philippines a more autonomous status. In defining the use of "Philippine" in the law, the Congress categorically provided that:

it applies to and include the Philippine Islands ceded to the United States government by the Treaty between the United States and Spain on the tenth day of December, eighteen hundred and ninety-eight, the boundaries of which are set forth in Article III of said Treaty...

In 1917, the United States through the government of the Philippine Islands defined the "territorial jurisdiction and extent of powers of the Philippine government" in the promulgation of the Administrative Code of 1917. In very explicit terms, the legislature declared that:

The territory over which the government of the Philippine Islands exercises jurisdiction consists of the entire Philippine archipelago and is comprised in the limits defined by the Treaties between the United States of America and Spain...

This definition in the Administrative Code of 1917 was reiterated in the Fisheries Act of 1932, passed by the Philippine Legislature. The law clearly provided that the territorial sea of the Philippines extended to the treaty limits.

Note that this law was passed under the American regime and thus was signed (for approval) by the American Governor-General who represented American sovereignty at that time.

134 Administrative Code of 1917, §1.
135 Fisheries Act of 1932, §1.
136 Coquila, Selected Essays, supra note 3, at 8.
137 Id.
138 Magallona, supra note 76, at 4.

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Then in 1934, the United States Congress approved the Tydings-McDuffie Law which contained a provision pertaining to the geographic or territorial limits of the Philippines. This law constituted the basis for the scheduled transfer of US territorial sovereignty to an independent Philippine republic. In Section 1 of the law, the Commonwealth Government of the Philippines which was the transitory authority was to exercise jurisdiction over all the territory ceded to the United States by Spain on the tenth day of December 1898, the boundaries of which are set forth in Article III of said treaty...

It is worthy of mention also that in 1902, the government of the United States, acting under Congressional Authority, published "A Pronouncing Gazette and Geographical Dictionary of the Philippine Islands" as Document Number 280. This Gazette included maps and charts fixing the territorial boundaries of the Philippine Islands by using the coordinates of the Treaty of Paris limits. Then during the Commonwealth period, a government bureau in Washington, DC issued maps of the Philippines showing the boundaries indicated by the Treaty of Paris coordinates and along these boundaries were the words - "Commonwealth of the Philippines." On July 24, 1929, the US Coast and Geodetic Survey Service also published certain charts indicating the boundary line separating the Philippine archipelago and North Borneo.

Finally, in 1935, the Constitution of the Philippines was submitted to the President of the United States of America for his approval. The very first article of the Constitution described the extent of Philippine territory and expressly invoked the treaty limits. Yet curiously, President Theodore Roosevelt approved and signed the fundamental law of our first republic.

Analyzing the legal import of these legislative and executive enactments on the part of the United States, Professor Merlin Magallona of the University of the Philippines College of Law posits:

it should be assumed that the territorial limits recognized in these enactments also determined the extent by which the United States government actually applies its sovereign and jurisdictional powers. In this sense, the United States applied the limits set forth in the Treaty of Paris as the extent of the exercise of its sovereignty; hence as political boundaries. Necessarily, it is to the same extent of territorial sovereignty that the Philippines succeeded...

133 Tydings-McDuffie Law, §3.
135 Tourski, supra note 4, at 74.
136 Miranda Defensor-Santiago, supra note 27, at 49.
137 Magallona, supra note 76, at 4.
Moreover, in the use of the term “boundary(ies)” in the legal documents aforementioned, a very important legal implication surfaces, in that the enactments would be understood to refer explicitly to a specific area of jurisdiction and sovereignty. In international law, boundary is defined as a line “which determines the limit of the territorial sphere of jurisdiction of States.”146 It is an ineluctable fact in international law that a boundary is a “permanent line of de jure jurisdiction.”146

Professor Miriam Defensor-Santiago writes that in view of the foregoing, the conclusion is inescapable, “that the lines drawn in the Treaty of Paris and the Convention of 1930 draw nothing less than the territorial limits of the Philippine archipelago.”147 at the very least, insofar as Spain, Great Britain, and the United States are concerned.

Minister Arturo Tolentino calls it as a case where the United States is definitely in estoppel.147 But in the context of the law of treaties, it is a “crystal” manifestation of intent as regards the interpretation of Article III of the Treaty of Paris.

Article 31(3) of the Vienna Convention provides that in the general role of interpretation there shall be taken into account, together with the context, any subsequent practice in the application of the treaty which established the agreement of parties regarding its interpretation.148 For if all the parties execute it, or permit its execution, in a particular manner, that fact may reasonably be taken as indicative of real intention.148

Sir Robert Phillimore so aptly puts it with his declaration that: usage is a great interpreter of treaties.149 Indeed this is also the basic thrust of a statement by Lord McNair in his eloquent and erudite treatise on the Law of Treaties:

We are dealing with a judicial practice worthy to be called a rule, namely that when there is a doubt as to the meaning of a provision or an expression contained in a treaty, the relevant conduct of the contracting parties after the conclusion of the treaty has a high probative value as to the intention at the time of its conclusion.150

Fitzmaurice also commends subsequent practice for its superior reliability as an indication of meaning.150

146 supra note 142, at 48.
147 supra note 4, at 74.
148 supra note 104, art. 31(3).
149 supra note 99, at 423.
150 Id. at 429, Report of Queen’s Advocate (13 February 1866).
151 Id. at 424.
152 Fitzmaurice, supra note 106, at 223.
153 supra note 4, at 15.
154 Id. at 16.
155 Case of the Legal Status of Eastern Greenland (Judgment), 1933 P.C.I.J. Series A/B Number 53 at 49.
158 supra note 27, at 49.
159 supra note 4, at 1x.
160 supra note 27, at 49.
the ratification of the Treaty of Paris as regards the exercise of sovereignty by the United States over all the Philippine land and sea territory embraced in that treaty. She also points out that there was no protest as well when the Philippines became independent and exercised sovereignty over the same territory.\footnote{Note verba} Second, on January 20, 1956, the Philippines tendered to the Secretary-General of the United Nations a note 
terme with the clarification of the limits of our territorial sea:

The Philippine Government considers the limitation of its territorial sea as referring to those waters within the recognized treaty limits, and for this reason it takes the view that the breadth of the territorial sea may extend beyond twelve miles. (emphasis added)\footnote{Note verba dated 20 January 1957 of the Permanent Mission of the Philippines to the United Nations, Y.B. INT'L. L. COMM. 70 (1956).}

Diplomatic notes were also delivered to various states regarding the said extent of the territorial seas of the Philippines. But aside from the invocation of its misguided interpretation by the United States, no protests were raised.\footnote{Defensor-Santiago, supra note 27, at 49.}

The 1971 Constitutional Convention Committee on the National Territory also invoked historic right in stating that the Treaty of Paris was a declaration to the world that the Philippine archipelago, occupied by Spain for over 300 years, ceded to the United States was bounded by the lines specified in the Treaty.\footnote{Nolledo, supra note 81, at 77.} Professor Nolledo, in a speech before the Convention notes that the claim is predicated upon Spain's title across a colonial span of more than three centuries, unchallenged except in sporadic instances.\footnote{Jose Nolledo, Speech, Opposing the Deletion of the National Territory in the Constitutional Convention of 1971, 15 February 1972.}

On the question of historic waters, it should be noted at the outset that it has long been part of international law that, on the basis of long continued use and treatment as part of the coastal domain, waters which would not otherwise have that character may be claimed as territorial waters.\footnote{Sir Gerald Fitzmaurice, 30 B.Y.I.L. 27 (1953).} Historic title is a generally recognized basis of acquired or established rights.\footnote{Arturo Tolentino, The Philippine Territorial Sea, A Statement Delivered at the Second UN Conference on the Law of the Sea, III Proc. Y.B. INT'L. L. 52.}

In 1958, a study of the United Nations Secretariat on Judicial Regime of Historic Waters after the two conferences on the Law of the Sea in Geneva, shows:

it is generally recognized in the doctrine and practice of international law that States may, under circumstances on historic guides, have valid claim to certain waters adjacent to their country.

\footnote{A.C.N. 4/143, 9 March 1962 at 16.}

[All authorities seem to agree that historic title can apply also to waters other than bays, i.e. generally to all waters which can be included in the maritime domain of a State.]\footnote{The Fisheries Case (Judgment), 1951 I.C.J. REPORTS 116.}

In the Fisheries case, the parties and the International Court of Justice were in agreement that historic title may be applied to the territorial sea and internal waters. The Fisheries case made the express recognition of historic title when it declared:

the Norwegian government has relied upon a historic title clearly referable to the waters of Lophavet . . . from which it follows that these waters were recorded as falling within Norwegian sovereignty.\footnote{Magallona, supra note 76.}

Indeed, there is in principle therefore, no obstacle to recognizing a special breadth of a State's territorial sea.\footnote{Id. at 3.} Unfortunately, UNCLOS III does not recognize these historic territorial waters. The signature and the ratification of the Convention by the Philippines therefore, give rise to a crucial question of constitutional law.

VI. UNCLOS III AND THE PHILIPPINE CONSTITUTION

The Constitution is the source of legislative (and executive) authority against which the waves of legislative (and executive) enactments may dash, but over which it cannot leap!

- Government v. Springer
50 Phil 259, 309 (1927)

An application of Articles 47 and 48 of UNCLOS III in relation to its Article 3 will destroy the juridical nature of the Philippine Treaty Limits as the constitutionally defined territory of the Philippine State.\footnote{See Joaquin Bernas, THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 17, 30 (1987).} Non-recognition of the Philippine claim under devolution of treaty rights, and historic title "presents a case of lost boundaries."\footnote{UNCLOS III, supra note 61, arts. 47 and 48.}

The Philippine signature to and ratification of the UNCLOS III pose, therefore, a valid question of constitutional law. It has been settled in the next preceding chapter that the territorial sea of the Philippines, as enshrined in Article I of all three (3) Constitutions of the Republic, embraces the limits of the Treaty of Paris. But under the legal regime of the UNCLOS III, drawn from the baselines of the archipelago, the
width of the territorial sea is limited to a seaward breadth of twelve (12) nautical miles.\textsuperscript{174}

This Chapter will be devoted to a discussion of the constitutional implications of the Philippine participation in UNCLOS III, with a discussion of the legal effects and consequences of the Tolentino declaration. Preliminary however, and in order to put the discussion into context, the writer would like to briefly discuss the extent of the “watering down of Philippine territorial sovereignty.”\textsuperscript{175}

A. The Watered-Down Sovereignty

As has already been discussed, the UNCLOS III divides the seas from the archipelagic baselines, outward into four maritime zones. These zones are the territorial sea, the contiguous zone, the exclusive economic zone (EEZ) and the high seas. A territorial sea of twelve nautical miles is a zone of sovereignty (subject only to innocent passage) drawn from the archipelagic baselines.\textsuperscript{176} From the twelve nautical mile mark of the territorial sea, the State may draw another twelve nautical mile area as its contiguous zone.\textsuperscript{177} A State is also allowed by the new legal regime to have an EEZ which is two hundred nautical miles in breadth from the baselines.\textsuperscript{178} The waters beyond these zones are part of the high seas.\textsuperscript{179}

Under the provisions of UNCLOS III, the sovereignty of a coastal State extends beyond its land territory and internal waters and, in the case of archipelagoes, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.\textsuperscript{180} In the contiguous zone, the State may exercise the control necessary to:

(a) to prevent infringement of its customs, fiscal, immigration and sanitary laws, and regulations within its territory or territorial sea; or
(b) punish infringement of the above laws and regulations committed within its territory or territorial seas.\textsuperscript{181}

Then, the exclusive economic zone is a legal regime which gives the coastal State sovereign rights over the area but only for the purpose of exploring, and exploiting, conserving and managing the natural resources, as well as establishing artificial islands, marine scientific research and the protection of the marine environment.\textsuperscript{182}

\textsuperscript{174} UNCLOS III, supra note 61, art. 3.

\textsuperscript{175} Magallona, supra note 76, at 5.

\textsuperscript{176} UNCLOS III, supra note 61, art. 3, in relation to arts. 47, 48, 17.

\textsuperscript{177} UNCLOS III, supra note 61, art. 46(9).

\textsuperscript{178} Id.

\textsuperscript{179} Id.

\textsuperscript{180} Id.

\textsuperscript{181} Id.


\textsuperscript{184} UNCLOS III, supra note 61, art. 46(9).

\textsuperscript{185} Magallona, supra note 76, at 5.


\textsuperscript{187} Magallona, supra note 76, at 5.
Philippines as successor of the United States of America, under and arising out of the Treaty of Paris between Spain and the United States of America of December 10, 1898, and the Treaty of Washington between the United States of America and Great Britain of January 2, 1930."186 This Declaration however, was subsequently objected to by Byelorussia, the Union of Soviet Socialist Republics, Bulgaria, Ukraine Soviet Socialist Republic, Czechoslovakia and Australia on the ground that this was a prohibited reservation under Article 309 of the Convention.187

It is important therefore to determine the nature of a reservation and consequently to examine the text of the Philippine declaration, in order to settle the controversy surrounding the Philippine Declaration of December 10, 1898.

1. RESERVATIONS

Treaties are like municipal laws in that they create binding legal obligations and establish binding legal rights. But unlike municipal laws which are of universal application, the law of nations permit States to accept a treaty and its provisions à la carte - accepting some and "opting out" from the other provisions.188 And the method under the law of treaties for such "opting out" is to make a reservation at the time a State signs, accepts, approves or accedes to a treaty or convention.

The definition of reservation under Article 2(1)(d) of the Vienna Convention on the Law of Treaties is "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, approving, accepting or acceding to a treaty, whereby it purports to exclude or to modify the legal effects of certain provisions of the treaty in their application to that State."189

Professors Dixon and McCorquodale defines the term as "the means whereby States accept as many of the rights and obligations under a treaty as possible, whilst expressly stating that there are some provisions of the treaty which they cannot accept."190 Professor Isagani Cruz, former Associate Justice of the Philippine Supreme Court, would define the term as something that qualifies, makes conditional and / or modifies the original agreement of the parties to the treaty.191

2. NATURE OF THE PHILIPPINE DECLARATION

The proponent takes the position in this study that the declaration made by Minister Tolentino at Montego Bay, though proclaimed to be a mere understanding pursuant to Article 310 of the Convention, constituted in a reality a reservation which is prohibited under Article 309 of the same Convention. Paragraph two of the Declaration cannot possibly be defended as merely a means of harmonization of the provisions of UNCLOS III to the letter and the spirit of Article I of the Philippine Constitution.

a) Textual Analysis

Implicit in the Philippine Declaration (particularly paragraph two) is a reiteration of the long-standing Philippine claim to the seas of the treaty limits as constitutive of historic territorial seas. The use of the strong declaration that the signing shall "not in any manner affect the sovereign rights of the Republic of the Philippines," clearly demonstrates the resolve and the intent of the Government continue to recognizing and enforcing the treaty limits as the Philippine political boundaries notwithstanding the contrary delimitation provisions under UNCLOS III. This view is reinforced by the fact that despite the entry into force of the Convention last November 16, 1994, the Government of the Philippines has yet to abandon the Philippine claim to the said historic seas. The only exception along the statement of Commissioner Haydee Yorac, during her candidacy for the International Tribunal on the Law of the Sea, that the Philippines will take steps to harmonize its internal laws with the Convention.

Clearly, the Philippine declaration does not only modify the legal effect of certain provisions of the UNCLOS III in their application to the Philippine State, rather, it seeks to totally exclude itself from the operation of certain provisions of the Convention. In insisting on the "sovereign rights" of the Republic, the delegation was unilaterally excluding the Philippine State from the provisions of UNCLOS III as regards the delimitation of the territorial seas of the archipelagic State Parties.

b) The Declaration and the Convention Goals

It must be noted that the new frontier which is the ocean is three dimensional. The world has gone beyond the traditional use of the seas as merely for navigation; and has expanded to utilization of marine resources, submarine highway, as dumping grounds for pollutants. On the other hand, the seabed has been tapped for its energy and minerals.192 Thus, for twelve years or so, the international community endeavored to codify the law, and upon the entry into force of the new convention it will be the universal law of the waters of the earth, the ruling international law that shall govern and regulate the rights and exploitation of the resources in the deep seabed outside the limits of the nations with respect to the enjoyment and use of the seas, their waters and resources, and, to a certain extent, the airspace above them.193

It is apparent that the major thrust and aim of the UNCLOS III is to create an "international law and order" in the utilization and exploitation of the oceans and seas. In the new convention there have been major innovations and one of these is the expansion of a coastal State's maritime zones. The traditional territorial sea has been

187 Coquia, Legal and Economic Aspects, supra note 6.
188 REBECCA WALLACE, INTERNATIONAL LAW 223 (2d ed. 1992).
189 Vienna Convention, supra note 104, art. 2(1)(d).
190 DIXON AND MCCORQUODALE, CASES AND MATERIALS ON INTERNATIONAL LAW 64 (1991).
191 CRUZ, supra note 103, at 174.
193 ToLENTINO, supra note 4, at 97.
extended to twelve (12) nautical miles; the contiguous zone has also been doubled to twenty-four (24) nautical miles and a two hundred miles exclusive economic zone has been introduced into the new legal regime. For purposes of this study, the proponent shall concern himself only with the territorial sea.

Through the centuries of history, jurists and practitioners of the law of nations have grappled with the question of how to determine the territorial jurisdiction of States in relation to the waters adjacent to their coasts. It had been generally agreed that States possess and may exercise certain sovereign rights over their coasts. But not until UNCLOS III had there been a clear and complete determination of the nature and extent of these rights.\(^1\)

In 1958, the States of the world attempted to settle this controversy at the Geneva Conference on the Law of the Sea but no agreement was reached.\(^2\) The very same question was raised when the second UN Conference on the Law of the Sea met from March 27, to April 27, 1960 in Geneva, Switzerland. But as in the 1958 conference, the 1960 conference failed to arrive at a uniform rule as to the breadth of the territorial sea.\(^3\)

It cannot be over-emphasized therefore that the delimitation of the territorial sea under UNCLOS III forms part of an important legal regime aimed at a system of "international law and order" for the seas. This contention is further strengthened by the reality that the twelve miles granted to a coastal State is a solid sphere of sovereignty qualified only by the right of innocent passage.

The Philippine declaration is clearly an essential modification of the legal regime under UNCLOS III. This is because the extent and breadth of the waters provided under the so-called treaty limits extend way beyond the twelve miles maximum distance allowed under UNCLOS III. As mentioned earlier, the average length of the territorial sea under the Treaty of Paris is estimated to be at one hundred nautical miles.

In the Case of the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1951), the International Court of Justice had occasion to say in an advisory opinion for the General Assembly of the United Nations that, "a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral provisions or particular agreements, the purpose and raison d'être of the Convention.\(^4\)

If the Philippines was allowed to derogate from the provisions of UNCLOS III, it would result in certain essential implications. First, it would mean that the Philippines will exercise territorial sovereignty over strategic areas of the ocean adjacent to her, to the exclusion of the neighboring States. These oceans are not only important transportation and communications route in the far east but are also inhabited by the most bountiful of resources in this part of the world. Second, it is calculated that the total area of the Philippine territorial sea would amount to about 520,700 square miles\(^5\) or 1,965,700 square kilometers.\(^6\) This means an increase in the territorial sea by fifty percent compared to that than if the Philippines followed the regime set under UNCLOS III.\(^7\) Finally, if the "Philippines asserts its maritime area based on the Treaty of Paris, it will be involved in unnecessary disputes with all its neighboring countries whose EEZ's overlap with those of the Philippines, such as Malaysia, Indonesia, Vietnam, China, and Taiwan.\(^8\)

Under the facts and the law, the Philippine Declaration, though brilliantly crafted and called by another designation, is nothing but a reservation "of our sovereign rights as successor Republic of the United States of America."\(^9\) Moreover, it is undeniably an attempt to prevent the operation of Article 3, in relation to Articles 47 and 48 of UNCLOS III in the determination of the territorial sea of the Philippines. It clearly modifies the legal relationship of the Philippines with UNCLOS III and the other States parties as it is excluded from a very important provision of the Convention if and when the declaration is given effect.

The nullity of the declaration is apparent in view of the express prohibition under Article 309 of UNCLOS III.\(^10\) And under Article 19 of the Vienna Convention a State may, when signing a treaty, formulate a reservation UNLESS: (a) the reservation is prohibited by the treaty.\(^11\)

3. THE PHILIPPINE DEFENSE

During the meetings/sessions of the Batasan Pambansa in 1984, Minisier Tolentino in arguing for the ratification of UNCLOS III stated that "the declaration is in accordance with Article 310 of the Convention as an interpretative statement according to the practice of archipelagic States."\(^12\) He explained that the said declaration or statement would bind and oblige only those States which agree to recognize the rights enshrined in the declaration.\(^13\) It was therefore, merely a notice to all State Parties as regards Philippine domestic legislation and practice.\(^14\) His latest contention was that

\(^{12}\) UNCLOS Primer, supra note 186, at 15.

\(^{13}\) Bucholz, supra note 1, at 47.

\(^{14}\) Magallona, supra note 76, at 5.

\(^{15}\) Coquia, Legal and Economic Aspects, supra note 6, at 12.

\(^{16}\) Declaration, supra note 188, at 12.

\(^{17}\) UNCLOS III, supra note 61, art. 309.

\(^{18}\) Vienna Convention, supra note 104, art. 19.

\(^{19}\) Coquia, Legal and Economic Aspects, supra note 6, at 12.

\(^{20}\) Id.

\(^{21}\) Id.
the signature and the ratification by the Philippines of UNCLOS III remains valid since its assent to the Convention was not contingent on the acceptance of the Philippine declaration.311

The arguments put forward by Minister Tolentino completely miss the point and nature of reservations in international law. First, it does not matter that the signature and ratification of the Philippines was unconditional. Because the determination of the nature of a statement in a treaty is exclusively within the realm of analyzing the import and intent of the statement, and is not dependent on the conditionality of the signature or ratification.

Secondly, an examination of the text of the declaration clearly belies the contention of Senator Tolentino that it was mere notice of Philippine domestic legislation and practice. At this point, a complete reproduction of the relevant portions of the December 10, 1982 Declaration of the Republic is essential. The declaration reads thus:

The government of the Republic of the Philippines hereby manifests that in signing the 1982 United Nations Convention on the Law of the Sea it does so with the understandings embodied in this declaration, made under the provisions of Article 310 of the Convention, to wit:

. . .

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

The strong, unequivocal, and categorical assertion of sovereign rights is ineluctably the import and intent of said portion of the declaration. Nowhere it is mentioned that this was a mere notice of internal policies and legislation. In fact, can we find any specific allusion to a particular law or executive enactment in the text. The general invocation of legislation in paragraph five does not enable the notice that Minister Tolentino was referring to in his statements before the Batasan.

Finally, there is also no legal support for the submission that this declaration was a mere interpretative statement. Rebecca Wallace writes that:

"a reservation is distinct from an interpretative declaration in that the latter is simply a statement by the party to the treaty as to the position it adopts concerning some aspect of the treaty. It is not an attempt by the State in question to achieve a derogation from the application of the treaty."

311 Declaration, supra note 188, ¶ 5 states: "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."

312 WALLACE, supra note 190, at 223.

By its name, an interpretative declaration is merely an affirmation of a State's interpretation or "position" as to certain provisions of a treaty or convention. But an analysis of the Philippine Declaration would reveal that neither Minister Tolentino nor the Republic was merely stating an interpretation or position but rather both were claiming that the signing did not affect sovereign rights.314 In the light of the Convention's non-acceptance of the Philippine request to have its territorial seas exempted, the statement is clearly derogatory of the UNCLOS III provisions on delimitation of the territorial seas.

In theory therefore, an analysis of the declaration and its consequences would support the view that it is a reservation in that it attempts to exclude the Philippine territorial seas from the rules of UNCLOS III. Yet, in the end, the very character of those statements would greatly depend on the operationalization by and actuation of the Philippine government.

C. Article III (UNCLOS) and the Constitution

UNCLOS III does not recognize the Philippine claim over her historic territorial seas. The provisions on the delimitation of territorial seas of archipelagic States are categorical. The States are to draw the baselines in accordance with the provisions of Article 47 and the twelve mile breadth of the territorial sea shall be measured from the archipelagic baselines drawn in accordance with the said Article 47.315 of the Convention. It also seems that the declaration made by Minister Tolentino in the signing had no legal effect under the terms of the Convention, specifically Article 309 which prohibits a reservation.

There is therefore an apparent conflict between the ratification by the Philippines of the 1982 UNCLOS III and the intent of the framers of the Constitutional provision of the national territory. This conflict embodies both a constitutional and international law perspective. But for the purposes of this study, the proponent will focus only on the constitutional law aspect because if any relevant challenge is to arise, it will be in the domestic scene.

1. A TREATY AND THE CONSTITUTION

First of all, there is no necessity to discuss the perspectives of the major theories in conflict between international and municipal laws. The monist theory basically adheres to the view that there is a oneness or unity of all law.316 Oppenheim-Lauterpacht writes that to monists, the main reason for the essential identity of both international and municipal law is that some of the fundamental notions of international law cannot be comprehended without the assumption of a superior legal order from which the various systems of municipal law are in a way, derived by way of delegation.317

314 Declaration, supra note 188, ¶ 2.
315 UNCLOS III, supra note 61, art. 47.
316 CCKL, supra note 103, at 3.
317 Quoted in id.
On the other hand, the dualist theory espouses a dichotomy of the law and point to the well-established differences of international and municipal law.

However, the monist and dualist theories will have no place in a challenge before Philippine courts regarding the constitutionality of UNCLOS III.

Indeed, under the Philippine Constitution, the State adopts the generally accepted principles of international law as part of the law of the land. By this express provision in the fundamental law, the Philippines embraces the doctrine of incorporation thereby making unnecessary the approval of local legislation in order to implement and enforce in the Philippines the general principles of international law. And the principle of *pacta sunt servanda* is not only a general principle of international law but veritably is part of the regime of customary international law. But in a conflict between a treaty and the fundamental law of the land, the latter shall prevail. Even Minister Tolentino recognized the primacy of the Constitution when he told a seminar organized by the Institute of International Legal Studies of the University of the Philippines that “the Philippines should legislate and implement the Convention, consistent with the Philippine Constitution, for the Philippine interests.”

More importantly, “[a] treaty is as much a part of Philippine law.” In 1884, the Supreme Court of the United States “unanimously held that a treaty was a law of the land, as an Act of Congress was.” Indeed, in one case, the Supreme Court of the Philippines likewise held that a treaty has two aspects: (1) As an International Agreement between States and (2) as Municipal Law for the people of each State to observe.

Concededly, as declared by the Court in *La Costa v. Fernandez*, “treaties create a binding obligation in the parties founded on the generally accepted principle of *pacta sunt servanda* adopted as part of the law of the land.”

However, the Constitution of the Republic, in Article VIII, Section 5(2), expressly authorizes the Supreme Court to nullify and declare as unconstitutional a treaty whenever such is in conflict with, or in contradistinction of, the fundamental law of the land. In the case of *Gonzales v. MACHAERO*, the President, by executive agreement, contracted for the importation of rice from Vietnam and Burma without getting the certification of cereal shortage of the National Economic Council as mandated by existing law. One of the defenses of the Government was that a treaty or executive agreement had already been signed by the President and that the Philippines was therefore already bound by an international obligation. Rejecting this argument, the Supreme Court had the opportunity to say that:

D. Recapitulation

This chapter has revealed the possibility of a controversy coming to fore between the Constitution of the Philippines and the UNCLOS III because the latter does not recognize the territorial seas envisioned by the former as being embraced in the term Philippine Archipelago. The Tolentino Declaration was an attempt to resolve the difference but as this chapter has also shown, it is of the nature of a reservation which is prohibited by the Convention in Article 309 thereof. It is imperative therefore, that the options open to the Philippine State be explored and examined.

V. CONCLUSION

*Yesterday we were in the humdrum of the event tenor of sedentary life. Today we tread on the gangway that leads to Destiny!*  
- Samuel F. Gege  
*Gangway for Destiny*

This study was a stimulating intellectual odyssey for the proponent. It began with a single treaty at the dawn of American hegemony and imperialism in the Pacific - the
The Philippines then enshrined the treaty limits in its constitutional regime. The 1935 constitution expressly referred to the Treaty of Paris and the two later agreements, namely, the Treaty of Washington and the Treaty of 1930. Both the 1973 and 1987 Constitutions have deleted express references to these treaties in an attempt to purge the fundamental law of any vestige of the nation’s colonial past, but the records of the Convention (1971) and the Commission (1986) reveal the understanding that the claim has not been abandoned.

Subsequently, the United Nations Convention on the Law of the Sea was approved and signed by the Philippines in 1982. The Philippines ratified it two years later. Yet, the exception requested by the Philippines as regards her territorial seas was not embodied in the final text. Consequently, Minister Tolentino, then Chairman of the delegation, made a declaration under Article 310 of the Convention231 that the signature of the Philippines was not an abandonment of her sovereign rights as successor of the United States of America, clearly a reference to the Philippine claim on the historic territorial seas. This declaration was objected to by a number of States which argued that it was in effect a reservation by the Philippines which was prohibited by Article 309 of the same Convention.

Two questions were therefore addressed in this study. First was the issue of whether or not Article III of the Treaty of Paris was actually a delimitation of the Philippine territory. Second, was the legal consequence and effect of the Philippine declaration at Montego Bay during the signing ceremonies of the UNCLOS III.

Anent the first issue, the proponent proposed that this was an issue of treaty interpretation. An analysis of the controversial article was therefore made and it became apparent that the treaty should indeed be interpreted as having delimited the Philippine territory.

Authorities are unanimous that the words of a treaty should be given their ordinary and natural meaning. The treaty provided that what was being ceded was an archipelago, and it was proven that the natural and ordinary meaning of archipelago is a geographic unit primarily a sea/ocean and studded with islands or land formations. It was therefore argued that the United States could no longer claim that what the treaty in fact meant was that only the lands or islands were being ceded. For absent any clear indication of a contrary special meaning, no other meaning other than the ordinary one, should be given to the provisions of a treaty.

Moreover, the subsequent practice of the United States, especially its legislative and executive enactment, clearly pointed to the fact that said country treated the lines described in the treaty as political boundaries. According to the law on treaties, substantial probative value should also be given to these subsequent acts in the determination of the meaning of certain provisions in a treaty.

123 See supra note 4, at 24.
As regards the second issue, the study first inquired into the meaning of reservations in international law. The authorities were agreed that basically, the term refers to a statement or declaration attempting to modify or exclude a treaty provision in its application to the State making said statement. Again the proponent did a textual as well as a contextual analysis of the Philippine declaration and arrived at the conclusion that indeed the Philippine statement was no less than a reservation.

B. Conclusion

The principles of public international law, particularly the law on treaties, as embodied in and articulated by the different authorities support the thesis that no other interpretation could be had of the Treaty of Paris but that it actually delimited the territory of the Philippine archipelago. An application of the Vienna Convention on the Law of Treaties and an examination of the opinion of publicists strengthens the interpretation placed by the GRP on the text of the treaty and the subsequent practice of the United States of America.

On the other hand, the very same application of the Vienna Convention reveals that the Philippine declaration was indeed a reservation. Though couched and named otherwise, its effect was already derogated from the rules of delimiting the territorial sea as established by UNCLOS III. The implication of its categorical and unequivocal terms fall squarely into the definition of a reservation as accepted by international law.

From the foregoing, there is apparently a conflict between the UNCLOS III and the Philippine constitution. On one hand, there is a municipal law (1987 Constitution) declaring the National Territory of the Philippines, which in the contemplation of the framers included the waters within the international treaty limits. On the other hand, the UNCLOS III does not recognize these waters as part of the Philippine territorial sea because the Convention prescribes its own rules in the delimitation of the territorial sea and in fact, does not embody the Philippine request for an exception similar to that granted to historic bays.

It is also inescapable to conclude that the declaration did not settle anything because of the fact that it was, in effect, a prohibited reservation on the part of the Philippines.

Therefore, the Philippines necessarily finds itself in a dilemma, from which all indications no amount of legal craftsmanship would be able to resolve unless it involves the consent of any of the parties (Philippines or the world) to yield to the position of the other. Perhaps if the Philippines had to face such a dilemma at an earlier time, it would have made sense to say damn the world, enclose the seas. But at an epoch where the world is slowly shrinking into one global village and the nations are increasingly interdependent and linked by trade, culture, history and politics - the resolution of such a dilemma calls for a comprehensive balancing of options and interests in order to evolve a policy which is truly for the benefit of the Republic.

To this end, the proponent submits that the problem and the issue is no longer strictly legal. It has mused into a policy issue because its resolution no longer entails just an examination of the legal principles involved, but will have to be interfaced with the complicated realities of the international politics of the seas.

Indeed it would be easy to stand on one's ground on the legal principles of the issue, but the law, moreo constitutional law, should not be static. Rather, it should be fluid and dynamic, able to change with and adapt to the times. Mr. Justice Oliver Wendell Holmes, Jr. reminds policy makers that the "law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

Thus, hereunder is a proposed policy for the future.

C. Policy For The Future

The Philippines and the world do stand at an important threshold in the history of humankind. Not only is another century coming to an end, but the world is so very different from that which began this century. The many changes in the political, economic, and security realities during the last few years "require that the country tread gingerly but surely on the shifting sands of diplomacy."229 It would be unfortunate if the Philippines is unable to evolve a policy on UNCLOS which is in the interest of the nation and its future in the world community. The crux of Philippine foreign policy should be how to survive as an independent and sovereign nation in these times.230

President Ferdinand E. Marcos, who was gifted with an acute sense of history and Realpolitik, defined foreign policy as "the articulation of a nation's fondest needs and aspirations. And in international affairs, it is its sole weapon for the promotion of national interest.231"

Ambassador Jose D. Ingles writes something which could be used as framework for the policy being envisioned by the proponent. He said thus:

The Philippines, in recognition of its compelling national interests and in response to the inevitable pressure of new world developments, necessarily has to modify its outlook and revise its policies in ways which take on a more precise account of interests in a radically altered world environment. Thus in the last twelve months we have begun a process of change unprecedented in our short history as a free country. Flexibility has been the touchstone of the emerging foreign policy; and national interest its unchanging guide; and a hard and independent assessment of new international realities its new hallmark. [emphasis added]

230 J o e Ingles, Philippine Foreign Policy 46 (1982).
231 D e p a r t m e n t o f Foreign Affairs, Digest of Philippine Foreign Policy 6 (1980).
Therefore, the formulation of a policy on this particular dilemma should come only after a thorough understanding of the complications of the problems as well as of the interests that are at stake. Any policy for the future should begin with a survey of the variables that have to be considered before an official policy direction is set by the government.

The proponent does not claim that this survey will cover all the necessary issues to examine. This is merely an attempt to discuss certain major issues which are essential to a basic understanding of the requirements of an appropriate foreign policy direction on the territorial sea conflict with the UNCLOS III.

D. Considerations

I. UNCLOS III

The 1982 United Nations Conference on the Law of the Sea is an important element of the system of international order in the seas. It can actually be called a "law" made by the international community, unlike the 1958 Convention on the Territorial Sea.

Developing countries did participate in the 1958 conference on the law of the sea but did not have a say in the conclusion of the resulting convention because they were newly-independent at that time. On the other hand, UNCLOS III is highly considered to be a success on their part as it largely reflects the "thinking and attitudes" of the Third World. Two very important indications of this are the twelve-mile limit of the territorial sea which is six miles more than the US-Canada joint proposal and the archipelago doctrine espoused by Third World States like the Philippines, Indonesia, Mauritius and Fiji.

a) Territory

The UNCLOS III is vital to the future of the peace of the planet. The lands of the earth have already been apportioned and boundaries have been more or less settled during the immediate post-colonial period. The only next possible frontier for expansion and conquest is the sea. Peace and security of all will be threatened if there are no rules which will govern the seas and their resources, whether on the surface or in the seabed.

The world is to take heed therefore of Minister Tolentino's reminder that "wars have been fought for the mastery or control of land. Many lives have been given up in such wars." How unfortunate if leaders of the times do not learn from the lessons of the past because humankind shall be doomed, in the words of Santayana, to repeat history. And the history of conquest that is recorded is nothing but a story of bloodshed, sacrifice, sorrow and terror.

b) Economics

Further, history is pregnant with examples where nations go to war not because of politics but because of the politics of economics. Famine and drought are forcing the nations of the world to consider the ocean as the next supplier of resources and food.

Futuristic thought even contemplates the building of cities at the bottom of the waters of the earth.

c) Importance of UNCLOS III

In light of the foregoing considerations, it is undeniable that the Convention is essential to the peace of the world as it embodies "all the laws to govern the conduct of nations, their rights and duties, in relation to the use and exploitation of the waters and resources of the sea, and the seabed and subsoil beneath the seas."22

Therefore, if the Philippines insists on its rights as the "successor of the United States of America," it could catastrophically undermine the fabric of cooperation and consensus that underlies the Convention. It could open the floodgates to a deluge of claims from other coastal States which do not even enjoy a scintilla of support in international law. The proponent concedes that this is speculative but foreign policy is essentially concerned with anticipation of scenarios and the balancing of options. The Spratleys issue is a very relevant example of the complexities of the international politics that exist in the law of the seas.

The proponent is not proposing a total surrender of sovereignty as of yet. But only that the Philippine claim shall be pursued within the framework of the UNCLOS and international law.

In light of the stakes involved in the success or failure of UNCLOS III, the Philippine direction in foreign policy should be concerned with minimizing that conflict and the differences between State Parties because it is also to the interest of the Philippines that UNCLOS is able to finally control the relations within the maritime world, especially since the Philippines is situated in the South China Sea, touted as a possible flashpoint of conflict.

Such a direction in foreign policy would be in line with Resolution Number 51 dated March 1989 of the Senate of the Philippines which declared that:

it is imperative for the Philippines to adopt an independent foreign policy which would promote the needs and aspirations of the Filipino people as well as enable the Philippines to contribute to international peace and order.

2. PRESERVING THE PATRIMONY

An important point to consider also is the position of some nationalist quarters that the historic waters should be protected and preserved by the Philippine government for the posterity of the nation. Interrelated with this issue is the economic implications of the territorial seas. Commissioner Jose Nolledo delivered a very moving and poignant speech on the national territory before the 1971 Constitutional Convention. He said thus:

22 Tolentino, supra note 4, at 83.
We do not talk of resources only on land. We have to protect as well our resources in the sea. For the wealth of the sea is enormous. The sea yields the great variety of fish that forms part of our diet. The sea is a source of minerals like petroleum. It is a source of pearls that may win human hearts. It is a source of cobalt that gives power. It gives forth sea weeds that bring about iodine. It produces salt that makes our food tasty. It provides with ever continuous supply of silica used in the manufacture of our glasses. It is precisely the richness of the sea that makes the eyes of selfish powers bulge with condemnable envy and envious them with the desire for territorial aggrandizement.

Beyond the economics of preserving the international treaty limits, it should also be noted that territorial sovereignty is the seat of fundamental principles in international law and relations. Hence, a State's sovereignty is co-extensive with the country's territorial limits and its political boundaries are the frontiers of its sovereignty. If the Philippines was allowed to consider the waters within the treaty limits - UNCLOS III would have allowed the country to exercise territorial sovereignty over said waters, subject only to the right of innocent passage and navigation on the part of other States of the world.

These considerations, however, are justifiable only if one seeks recourse to sentimental appeals to anachronistic notions of claims over territories of land and sea reminiscent of the colonial era of history. For no reason any longer exists for a country to insist on exercising sovereignty over vast areas of ocean space.

a) National Security

The very bed-rock of the territorial sea was the requirement of national security. This is now an outdated idea or rationale since missiles and bombers have completely revolutionized the art of warfare. The seas no longer offer any physical protection to the State because the stealth and speed of new generation military aircraft have negated the advantage of space between the coast and the high seas. A hundred miles of territorial sea is also no longer a deterrent to cruise missiles and inter-continental ballistic rockets. Further, the triad of cruise missiles, intercontinental ballistic missiles and the submarine launched missiles can penetrate even the most active of defenses and their crews can actually seek out even imprecisely located targets.

b) Economic Development

The perspective embraced by Commissioner Nolledo is also not as valid anymore in the context of the regime of exclusive economic zones (EEZ). By this EEZ concept, there is an extension of a coastal State's economic sovereignty to a maximum breadth of two hundred nautical miles from the baselines of an archipelago. Thus, the EEZ wipes out the economic importance of the territorial seas.

In the EEZ, all States of the world shall continue to enjoy the freedom of navigation, overflight and laying of submarine cables and pipelines. The coastal State however,
THE OBLIGATIONS OF THE PHILIPPINES UNDER TREATY OR GENERAL PRINCIPLES OF INTERNATIONAL LAW.

This option however, will have to take into consideration the possibility of a domestic backlash against such an abandonment, for it cannot be denied that there are still certain sectors in Philippine society which have an aversion to any policy or State action that may be characterized as a surrender of sovereignty and independence.

It should also be considered that in effect, there is a relinquishment of territorial rights. Territory has always been a matter or issue of national heritage and pride, which never fails to stoke the fires of nationalism.

Given a small, but vocal group of nationalists - any attempt to effect such constitutional change is a potent and volatile mix which could easily mire this country in division and hate. Moreover, there must also be considered the length of time and the amount of money that the nation would have to spend on the process of amendment, as well as the prevalent wariness of the public as to proposals to amend the fundamental law. Hence, the other options come into play.

The second option is to ensure that the GRP does not give rise to a ripe and justiciable cause of action for a taxpayer's suit against the constitutionality of the Convention. The Courts have been very strict in the application of the rules of standing when it comes to the constitutionality of statutes and other executive acts.

Therefore, the GRP may just refrain from passing a law that expressly implements the provisions of UNCLOS or spend any money for the implementation of such. Maintenance of the status quo would be the most stable and undivisive foreign policy option for the Philippines. While it may fail to definitively settle the issue, it enables all parties to justify further inaction in regard to provoking a confrontation as to the territorial seas.

Third, the benefits of UNCLOS can be shared by the Philippines without the need to spell out a categorical position as long as it makes clear through the back-channels of diplomacy that it no longer has any intention of derogating from the provisions of the convention. This is also a variation, if not a complement, to the second option submitted by the proponent.

Fourth, there has been a suggestion that the Philippines continue to maintain the position that the territorial seas of the archipelago extend up to the limits of the Treaty of Paris, but at the same time the GRP should make a waiver of territorial jurisdiction as to the breadth of sea beyond the twelve-mile UNCLOS III limit.

Concededly, this is an ingenious alternative to the other options because it clearly addresses the nationalist sentiment. But the proponent submits that the adoption of such an option could still result in disagreement within the social framework, because notwithstanding the euphemism - waiver of jurisdiction - Filipinos are bound to realize that the bottomline is loss of territorial sovereignty. Moreover, it would be a more

magnanimous gesture on the part of the Philippines to abandon the claim because of international cooperation and harmony, than to maintain it because of national pride.

In the end however, notwithstanding the option chosen by government, there should be an effort to come to a national consensus that the times are no longer compatible with grandiose claims to vast areas of ocean space. This is an opportunity to marshall the unity of the people and for once, be able to come to one position as a nation, without being divided by ideology and extremism. More often than not, Filipinos do not form a uniform perception of national issues. The nation has yet to learn the one great historical lesson of this century which is that to become a true nation, capable of becoming a respectable and responsible member in the world community, imbued with a correct sense of internationalism, the people must first develop a sense of national unity, a deep sense of national community.

The bottom line of these recommendations is that the Philippines, in line with the national interest, should no longer insist on the international treaty limits. The Treaty of Paris, whatever it may mean in law, is indeed a part of a past that the world and humanity would want to forget. The Philippines, in so forgetting, would lend credence to the Pardo position that indeed the seas are the common heritage of humankind.

The writer understands the sentiment of the nationalist that the national heritage, if you could call the international treaty limits that he preserved for the posterity of those who are yet to come. Indeed, as a romantic, he could shed a tear for such a position; as a soldier-hero, he could give up his life defending the historic seas; but as a policy maker, he is bound by the maxim that the good of the state is the highest value.

To paraphrase a master of Realpolitik, Prince Otto Eduard Leopold von Bismarck, he cannot reconcile his personal sympathies with his sense of duty as policy maker; indeed he sees in them the seeds of disloyalty to the Sovereign and the people he serves.

This study began as an inquiry into a question of international law; and it ended with a foreign policy discussion. This only serves to bolster the oft-forgotten reality that the law does not operate in solitude. Because every position that a lawyer advocates and every decision that a judge renders, touch people and nations who have to continue with life even after the last pleading had been archived.