LEGAL FRAMEWORK FOR THE DEVELOPMENT AND MANAGEMENT OF NON-LIVING MARINE RESOURCES: PHILIPPINE CONCERNS

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I. INTRODUCTION

Vastly expanded coastal state jurisdiction under the new law of the sea has resulted in increased demands for capability to take advantage of the resource bounty of hydrospace within national claims. Although the record, thus far, indicates that coastal states which are developing countries are still roughly beginning to exploit the benefits of extended maritime zones,[1] the possibilities of tapping broadened marine space and resources for significant gains have been demonstrated.[2]

Under the 1982 Convention on the Law of the Sea (hereinafter, Convention), the rights and obligations of a coastal state respecting the resources of the ocean are allocated and defined according to different regimes which generally cover distinct maritime spaces spelled out in the Convention. The purpose of this paper is to outline these rights and obligations particularly as they relate to the non-living resources of the sea. It will also present the peculiar situation of the Philippines as an archipelagic state in light of its evolving policy on the development and management of non-living marine resources.

The correlation of the Philippine policy on non-living resources with the 1982 Convention not only suggests the urgency of a more rigorous program to develop these resources within the reach or at the disposal of the country. More importantly, the framework established regarding coastal state rights, obligations and policies on non-living marine resources does illuminate the prospect of resolving profoundly related issues such as coastal zone management, maritime boundary delimitation, and regional cooperation on marine affairs.

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[1]E. Miles, Implications of the New Law of the Sea for National Ocean Policy (Lecture delivered at the Law Center, University of the Philippines, December, 1991).

[2]*See e.g.*, B. KWIATKOWSKA, THE 200-MILE EXCLUSIVE ECONOMIC ZONE IN THE NEW LAW OF THE SEA (1989).

II. THE REGIME OF NON-LIVING RESOURCES UNDER THE CONVENTION

The rules on non-living resources may be classified under two broad principles which coincide with the most general spatial regimes defined under the 1982 Convention: National Jurisdiction and Common Heritage of Mankind. The principle of National Jurisdiction which extends to the outer limits of the Exclusive Economic Zone and/or the Continental Shelf explores the varied nuances of coastal state authority over maritime spaces which include (1) internal waters, (2) archipelagic waters, (3) territorial sea, (4) the contiguous zone, (5) the exclusive economic zone, and (6) the continental shelf. The principle of Common Heritage of Mankind governs the international seabed area and its resources *in situ* and is subject to the controversial Part XI of the Convention. For the purposes of this paper, only the National Jurisdiction principle on non-living resources will be discussed.

The development and management of the non-living resources of the sea involve a non-traditional use of the ocean and the rules thereon are of relatively recent origin. It was only after the Truman Proclamation of 1945, declaring that a contiguous nation exercises jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas, that the legal foundation for extended off-shore non-living resources activity was consolidated. Principally motivated by the harnessing of petroleum and other minerals from the continental shelf, the movement to establish coastal authority over non-living resources beyond national territory has been widely accepted. At present, the natural resources extracted from the seas include not only hydrocarbons and hard minerals, but also all other renewable non-living resources such as energy derived from waves, tides, winds, salinity and the ocean's thermal gradient. Submarine oil and gas are an increasingly significant source of world energy, accounting for more than 20% of the global supply.[3]

Within the maritime zones enumerated in the Convention are localized all conceivable non-living resources over which coastal state authority is defined. It may then be asked: What is the nature, extent or limitation of this authority incorporated into these zones of national jurisdiction?

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[3]J. Ettinger, A. King, and P. Payoyo, Ocean Governance and the Global Picture (paper presented at the *Pacem in Maribus XIX*, Lisbon, 1991).

Internal Waters and Territorial Sea

The regime of marine internal waters[4] and territorial sea[5] both stipulate the unconditional sovereignty of a coastal state with regard to resource-oriented activities that may be carried out within these zones. The coastal state is, therefore, authorized to adopt any policy on the exploration and exploitation of non-living resources within its internal waters or territorial sea. Even the right of innocent passage by other states cannot serve to limit the absolute authority of a coastal state in managing and developing its non-living resources in the territorial sea. This is evidenced by the legislative competence of a coastal state to adopt laws and regulations on, for instance, the protection of cables and pipelines, or marine scientific research and hydrographic surveys, or preservation of the marine environment in the territorial sea, to the extent that these activities are resource-oriented and impact on the right of innocent passage.[6]

Archipelagic Waters

Part IV of the Convention establishes the *sui generis* regime of archipelagic waters enclosed by baselines drawn in accordance with the Convention. The sovereignty of the archipelagic state is expressly defined as extending not only to these archipelagic waters but also to "the air space over archipelagic waters, as well as their bed and subsoil, and the resources contained therein."[7] Notwithstanding the sovereign authority of the archipelagic state over the resources within the zone, the Convention states that this sovereignty is subject to certain conditions.[8] These conditions relate to the rights of immediately adjacent neighboring states over the resources within the archipelagic waters zone, and are stipulated in two closely interwoven provisions:

> Article 47
> *Archipelagic Baselines*
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> ... 6. If part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighboring state, *existing rights and all other legitimate interests which the latter state has traditionally exercised in such waters and all rights stipulated by agreement* between those states shall continue to be respected. (Emphasis supplied)

[4]Convention on the Law of the Sea (1982), art. 8 [hereinafter CONVENTION].
[5]CONVENTION, art. 2.
[6]*See* CONVENTION, art. 21.
[7]CONVENTION, art. 49 (2).
[8]CONVENTION, art. 49 (3).

Article 51
Existing Agreements, Traditional Fishing Rights and Existing Submarine Cables

1. Without prejudice to Article 49 [Legal status of archipelagic waters, the air space over archipelagic waters and of their bed and subsoil], an archipelagic State shall respect *existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities* of the immediately adjacent neighboring States in certain areas falling within archipelagic waters. The terms and conditions for the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the States concerned, be regulated by bilateral agreements between them. Such rights shall not be transferred to or shared with third States or their nationals.

2. An archipelagic State shall respect *existing submarine cables laid by other states and passing through its waters without making a landfall*. An archipelagic State shall permit the maintenance and replacement of such cables upon receiving due notice of their location and the intention to repair or replace them. (Emphasis supplied)

Although the sovereignty of the archipelagic state is affirmed, the above provisions point out that the exercise of this sovereignty is restrained by established or pre-existing, but not future, rights of immediately adjacent neighboring states. Since these pre-existing rights may involve access to non-living resources, the archipelagic state's authority over these same resources could not be considered as absolute.

Exclusive Economic Zone and Inner Continental Shelf

"Sovereign rights" is the generalized formula employed in the Convention to designate the authority of the coastal state over the resources of the Exclusive Economic Zone (EEZ) - spatially defined as not extending beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.[9] This is provided in Article 56 (1) (a) of the Convention which states:

1. In the exclusive economic zone, the coastal state has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; ...

[9]CONVENTION, art. 57.

In contrast to the regime of living resources of the exclusive economic zone, principally governing fisheries,[10] the regime of non-living resources of the exclusive economic zone provides for less proscriptions for the coastal state in the exercise of its sovereign rights. The only qualification to the resource jurisdiction of a coastal state over the non-living resources of the EEZ is in the nature of accommodating the rights of other states in the EEZ, particularly "the freedoms referred to in Article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines."[11] In the event of conflict between the competing uses of the EEZ, *i.e.*, for instance, the coastal state's sovereign right of exploring and exploiting, or conserving and managing non-living resources versus another state's freedom of navigation, the dispute shall be subject to "compulsory procedures entailing binding decisions" under the Settlement of Disputes provisions of the Convention.[12] It is in view of the possibility of conflicting assertion of rights in the EEZ that both the coastal state and third state are thus mutually obligated to "have due regard to the rights and duties of other state[s]."[13]

Another conceivable limitation to the sovereign right of a coastal state over its non-living resources is embodied in a general state obligation found in Part XII of the Convention on Protection and Preservation of the Marine Environment. Article 193 provides that "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment."

The regime on non-living resources of the EEZ may be analyzed into two sub-regimes following the situs of non-living resources in the EEZ. First, the non-living resources throughout the water column (*e.g.*, dissolved minerals and thermal energy) and on the water surface (*e.g.*, waves and winds) of the EEZ are covered by the general rule on "sovereign rights" principle. Inasmuch as the Convention does not qualify the sovereign rights of a coastal state over these resources, the coastal state has quite an expansive authority over these resources. There are no express limitations set forth to curtail this authority. The second sub-regime defines the rules respecting the non-living resources of

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[10]*See* CONVENTION, arts. 61 - 73.

[11]CONVENTION, art. 58 (1).

[12]CONVENTION, art. 297 (1) (a) and (b); *see also* the so-called Castaneda Rule in Article 59.

[13]CONVENTION, arts. 56 (2) and 58 (3).

the seabed and subsoil of the EEZ, and the Convention makes reference to the applicability of the Continental Shelf regime in regard to these resources.[14]

The "inner" continental shelf[15] regime assimilated in the regime of the EEZ is legally conceived as the sea-bed and subsoil of the submarine areas extending beyond the territorial sea to a distance of 200 nautical miles from the appropriate baselines.[16] The sovereign rights of the coastal state over the continental shelf refer to the exclusive right of the state to explore and exploit its natural resources.[17] These rights, according to the Convention "do not depend on occupation, effective or notional, or on any express proclamation"[18] and "are exclusive in the sense that if the coastal state does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal state."[19]

In addition to its sovereign rights of exploring and exploiting the non-living resources of the continental shelf, the coastal state also has the following exclusive rights to further its resource activities on the continental shelf:

> (1) Construct, operate and use artificial islands, installations and structures on the continental shelf;[20]
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> (2) Authorize and regulate drilling on the continental shelf for all purposes;[21] and
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> (3) Exploit the subsoil by means of tunnelling, irrespective of the depth of the water above the subsoil.[22]

Outer Continental Shelf

When the continental margin of a coastal state extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, the regime of the continental shelf introduces a nuance with respect to exploitation of natural resources of the "outer" continental shelf. Although the sovereign rights principle

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[14]CONVENTION, art. 56 (3).
[15]Term used in KWIATKOWSKA, *supra* note 2.
[16]CONVENTION, art. 76 (1).
[17]*See* CONVENTION, art. 77 (1).
[18]CONVENTION, art. 77 (3).
[19]CONVENTION, art. 77 (2).
[20]CONVENTION, art. 80.
[21]CONVENTION, art. 81.
[22]CONVENTION, art. 85.

still applies, thus establishing the parallelism[23] between the regimes of the "inner" and "outer" continental shelf, the Convention imposes, as it were, an "international tax" for the exploitation of the continental shelf beyond 200 nautical miles. In effect, therefore, the outer continental shelf regime blends the principles of National Jurisdiction and Common Heritage of Mankind into a graphic compromise. Article 82, the relevant provision, states:

> Article 82
> *Payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles*
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> 1. The coastal state shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth the territorial sea is measured.
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> 2. The payments and contributions shall be made annually with respect to all production at a site after the first five years of production at the site. For the sixth year, the rate of payment or contribution shall be 1 per cent of the value of the production at the site. The rate shall increase by 1 per cent for each subsequent year until the twelfth year and shall remain at 7 per cent thereafter. Production does not include resources used in connection with exploitation.
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> 3. A developing state which is a net importer of a mineral resource produced from its continental shelf is exempt from making such payments or contribution in respect of that mineral resource.
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> 4. The payments or contributions shall be made through the Authority, which shall distribute them to States parties to this Convention, on the basis of equitable sharing criteria, taking into account the interests and needs of the developing States, particularly the least developed and the land-locked among them.

If and when the coastal state intends to establish the outer limits of its continental shelf beyond 200 nautical miles, it shall submit the necessary information or the particulars of such limits to the Commission on the Continental Shelf set up under Annex II of the Convention.[24]

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[23]*See* KWIATKOWSKA, *supra* note 2.
[24]*See* CONVENTION, art. 4 of Annex II and art. 76 (8).

III. THE PHILIPPINE POLICY ON NON-LIVING MARINE RESOURCES

Based on the Regalian doctrine of state ownership of all natural resources,[25] the 1987 Philippine Constitution has vested on the state the power of full control and supervision over the exploration, development, and utilization of these natural resources and has adopted the policy that "the state may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens."

The nationalist orientation of the basic policy on natural resources is apparent and is further strengthened by the more specific constitutional policy of reserving exclusively to Filipino citizens the use and enjoyment of the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone.[26] This "exclusive reservation of marine wealth to the Filipino" policy, however, applies absolutely to marine living resources and only generally to non-living resources of the sea. The Constitution does state a departure from the nationalist preference. This is so because the Constitution conceives of an exception when non-living marine resources can be shared with foreign interests: in the event of *large-scale* activities thereon. The treatment of this exceptional posture on non-living marine resources is given in the context of the constitutionally mandated management scheme for the mineral resources of the country. Whereas foreign access is prohibited in regard to the use and enjoyment of living as well as non-living marine resources, foreign participation is sanctioned for the large-scale exploration, development and utilization of land-based or marine non-living/mineral resources, as discerned from the language of the relevant provision:

> The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for *large scale exploration, development, and utilization* of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources. (emphasis supplied)

In a presidential legislative order prescribing the guidelines for the negotiation and conclusion of the aforesaid agreements, "large scale mining" has been defined as "those proposals for contracts or agreements

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[25]CONST ., art. XII, sec. 2, par. (1).
[26]CONST ., art. XII, sec. 2, par. (2).

for mineral resource exploration, development and utilization involving a committed capital investment in a single mining unit project of at least Fifty Million Dollars in United States currency (US $50,000)."[27] Thus, non-Filipino entities, specifically limited to foreign-owned corporations, are henceforth allowed participation in contracts solely involving large-scale mining of sea-based minerals.

Although the constitutional provision on contracts with foreign-owned companies is a new one not found in either the 1935 or 1973 Constitutions, the policy on foreign participation for expanded mineral resource activities could be traced back to the early 1970s. The novel "service-contract" regime of mineral resource development was introduced by Presidential Decree No. 87, the Oil Exploration and Development Act of 1972.[28] The so-called "concession system", which was followed before and embodied, for instance, in the Petroleum Act of 1949,[29] was then effectively displaced.[30]

Admittedly, the service contract regime does away with the Filipino citizenship requirement for individuals or corporations to enter into contracts concerning exploitation of natural resources. Under this production-sharing system, service and technology are furnished by a contractor entitling it to a service fee while financing is provided by Government which owns all petroleum produced.[31] If the contractor furnishes services, technology and financing, the proceeds of the sale of the petroleum produced under the contract shall be the source of funds for payment of the service fee and the operating expenses due the contractor.[32]

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[27]Exec. Order No. 279 (1987) entitled "Authorizing the Secretary of Environment and Natural Resources to negotiate and conclude joint-venture co-production, or production-sharing agreements for the exploration, development and utilization of mineral resources, and prescribing the guidelines for such agreements and those agreements involving technical or financial assistance by foreign owned-corporations for large-scale exploration, development and utilization of minerals."

[28]Superseding the barely three-month old Pres. Decree No. 8 entitled "An Act to Promote the Discovery and Production of Indigenous Petroleum" which advanced for the first time the service contract concept.

[29]Rep. Act No. 387, as amended.

[30]*See* G. Villareal, and B. Migallos, *Oil Exploration Contracts Under Pres. Decree No. 87*, 53 PHIL. L.J. 367 (1978); V. Dimagiba, *Service Contract Concepts in Energy*, 57 PHIL. L.J. 307 (1982); M. Ynson, and J. Floro, *Energy Legislation in the Philippines*, 3 PHILIPPINE ENVIRONMENTAL LAW 19 (1984); and D. Drigot, *Interest in Oil as a Factor in the Philippine Claims and Disputes over Marine Territory in the South China Sea*, 3 PHIL. YRBK. INT'L. L. 39 (1982).

[31]Pres. Decree No. 87, sec. 6.

[32]Pres. Decree No. 87, sec. 7.

In the 1989 "Guidelines on Mineral Production Sharing Agreement under Executive Order No. 279, "applicable to, among others, offshore areas within the Philippine exclusive economic zone"[33] a service contract or "mineral production sharing agreement" is an "agreement wherein the Government grants the Contractor the exclusive right to conduct mining operations within, but not title over, the Contract Area and shares in the production whether in kind or in value as owner of the minerals therein. The Contractor provides all the necessary financing, technology, management and personnel.[34]

In the service contract, the contractor also undertakes to conduct his operations according to the relevant laws and regulations on environmental protection.[35] Thus, the contractor, under Presidential Decree No. 1198, is required to restore, rehabilitate and return to the fullest extent possible the natural environment subject or affected by mining operations to their original condition. However, under the Marine Pollution Decree of 1974,[36] punishable "dumping" does not include "the disposal of wastes or other matter directly arising from or related to the exploitation and associated off-shore processing of seabed mineral resources."[37]

A perusal of the history of the service contract regime in the Philippines clearly points out the pivotal role of government off-shore oil interest in its evolution.[38] Fundamental considerations in off-shore oil drilling and exploration have primarily dictated the need for the service contract system and, in turn, have further validated the crucial role of this system in the energy self-reliance program of the government.[39] The institution of the service contract, including its

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[33]DENR Adm. O. No. 57 (1989), art. 3, par. 3.3.

[34]DENR Adm. O. No. 57 (1989), art. 3, par. 3.1. The Philippine Service Contract System is, thus, unlike the Indonesian Production Sharing Contract scheme wherein the state has control over management in the contract area. *See* Mochtar Kusuma-Atmadja, National Policy on the Exploration and Exploitation of Off-shore Mineral Resources: Some Legal Issues (paper presented at the SEAPOL International Conference, Bali, 1990).

[35]Pres. Decree No. 87 (1972), sec. 8 (d) and 9 (h); Exec. Order No. 279 (1987), sec. 2 (1); DENR Adm. O. No. 57 (1989), art. 6, par. 6.17 (f).

[36]Pres. Decree No. 600.

[37]Pres. Decree No. 600, sec. 3(d).

[38]*See* D. Drigot, *Interest in Oil as a Factor in the Philippine Claims and Disputes over Marine Territory in the South China Sea*, 3 PHIL. YRBK. INT'L. L. 39 (1982); and V. Dimagiba, *Service Contract Concepts in Energy*, 57 PHIL. L.J. 307 (1982).

[39]*See* D. Drigot, *Interest in Oil as a Factor in the Philippine Claims and Disputes over Marine Territory in the South China Sea*, 3 PHIL. YRBK. INT'L. L. 39 (1982). Although it is the Office of Energy Affairs (Exec. Order No. 193 (1987) and/or the Energy Coordination Council (Exec. Order No. 338 (1988), which is primarily responsible for all programs and policies in the field of energy, including off-shore energy, the Department of Environment and Natural Resources, through its Secretary, is the institution authorized to

scheme of contractor rights and obligations and its system of incentives,[40] is, hence, a central concept in any understanding of the Philippine policy on non-living marine resources.

The review of the Philippine policy on non-living marine resources will not be complete without discussion of the constitutional and legislative framework directly pertaining to maritime areas subject to national jurisdiction. This reference is necessary in order to establish points of alignment between the municipal law framework of national maritime jurisdiction and the definition of extended maritime jurisdiction under the 1982 Convention, which, although it has not yet entered into force, was signed[41] and ratified by the Philippines.

At the outset, it is important to highlight the departure made by the Constitutional definition of the Philippine archipelago from the archipelagic regime of the 1982 Convention. The sole Constitutional provision of the Article on National Territory provides:

> 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 terrestial, fluvial, and aerial domains, including its territorial sea, the seabed, the subsoil, the insular shelves, and other submarine areas. *The waters around, between and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines.* (Emphasis supplied)

Under the regime of archipelagic waters in the 1982 Convention described earlier, the waters enclosed by archipelagic baselines are not territorial or "internal waters", as these are evidently regarded by the Constitution. The rights of immediately adjacent neighboring states qualify archipelagic state sovereignty in the conventional regime of archipelagoes. However, the Philippines regards these archipelagic waters as "internal waters" which arguably are subject to its absolute sovereignty. Part of the reason for the peculiar treatment of archipelagic waters under municipal law is the previous advocacy by the Philippines of its "historic" territorial waters[42] which was, however, rejected by the UNCLOS III. In a series of state acts, the Philippines gradually retreated from this controversial historic claim

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negotiate and conclude agreements for the exploration, development and utilization of off-shore minerals (Exec. Order No. 279 (1987).

[40]*See* Pres. Decree No. 1857.

[41]*See*, however, Philippine Declaration on the signing of the Convention.

[42]*See* CONST. (1973), art. I, sec. 1 and the treaty limits defined in CONST. (1935), art. I, sec. 1; *see also* M. Defensor-Santiago, *The Archipelagic Concept in the Law of the Sea: Problems and Perspectives* for the Secretariat to the Cabinet Committee on the Law of the Sea, Series One Monograph No. 2 (1982).

by modifying its position increasingly in consonance with 1982 Convention.

By signing and ratifying the Convention, the Philippines committed itself to definitely refrain from acts which would defeat the object and purpose of the Convention, including its provisions on Archipelagoes, before it has entered into force.[43] Legally, the Philippines cannot, therefore, insist that its archipelagic waters are subject to its unconditional sovereignty, which may have been implied by the Declaration it made upon signing the Convention. Responding to objections made by States which have asserted that the Philippines made an unwarranted reservation to the Convention,[44] the Philippines in 1988, issued a declaration that it will "abide by the provisions of the Convention" and that "the necessary steps are being undertaken to enact legislation dealing with archipelagic sealanes passage and the exercise of Philippine sovereign rights over archipelagic waters, in accordance with the Convention."[45] A pending legislation in Congress[46] which purports to delineate Philippine baselines in accordance with the Convention[47] also proves the policy preference to conform with Convention.[48] Although the ambivalence of Philippine policy in regard to Philippine internal water/territorial sea claims has not been settled, it would seem that the trend of State practice on this matter is towards greater conformity with the 1982 Convention.

Apart from the unresolved question of the status of Philippine archipelagic waters and the limits of the Philippine territorial sea, the other aspects of Philippine municipal law policy on maritime regimes that bear on the management and development of non-living resources are consistent with the new law of the sea. Presidential Decree 1599 of 1978, which establishes the Exclusive Economic Zone of the Philippines was patterned after the relevant provisions of the Informal Composite Negotiating Text of UNCLOS III which eventually were reproduced in the 1982 Convention. With this law, the sovereign rights of the country to the 200 nm EEZ have been consolidated.

The inner continental shelf regime of the Convention is, thus, by definition incorporated into Philippine municipal law through Pres. Decree 1959. To the extent that the 1968 Proclamation on the

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[43]*See* Vienna Convention on the Law of Treaties (1969), art. 18.

[44]*See* Declaration of the Philippines upon Signing the Convention.

[45]*See* KWIATKOWSKA, *The Archipelagic Regime in Practice in the Philippines and Indonesia: Making of Breaking International Law?* 1991 INTERNATIONAL JOURNAL OF ESTUARINE AND COASTAL LAW 1.

[46]S. Bill No. 206, introduced by Senator L. Shahani.

[47]Cf. *see* Rep. Act No. 3046 as amended by Rep. Act No. 5446.

[48]KWIATKOWSKA, *supra* note 45.

Philippine Continental Shelf,[49] which employs the "adjacency" and "exploitability" criteria, is inconsistent with the "distance" criterion in defining the continental shelf, the former is to be deemed accordingly modified. And since, under customary and conventional international law, the rights of a coastal state over the continental shelf, whether inner or outer, "do not depend on occupation, effective or notional, or on any express proclamation,"[50] the sovereign rights of the Philippines over its outer continental shelf areas could, likewise, be assumed. Senate Bill No. 599, proposed as the "Philippine Continental Shelf Act of 1988" effectively vests in the President the power to further refine and implement the sovereign rights of the country over the continental shelf.

On the Kalayaan Claim

It is said that the Philippine claim to the Kalayaan Island group in the disputed Spratlys was largely motivated by off-shore oil interest in the area.[51] On this premise, the annexation of the Kalayaan group, effected in 1978 through Presidential Decree No.1596, projects certain issues respecting the overall national policy on non-living marine resources. For instance, does the Philippine policy posture on off-shore oil in the Kalayaan express possibility of peaceful settlement of boundary disputes in the South China Sea? Does it exacerbate the situation in the disputed zone? Since the political basis of the claim is, by and large, rooted in the resource potential of the area, the resolution of the ownership problem will have to reckon with the national policy on non-living marine resources, particularly on off-shore oil. In other words, how can a national policy on hydrocarbon development in the Kalayaan area contribute to a valid, acceptable and durable legal framework for defining the maritime boundaries of the Philippines in the disputed area?

From the standpoint of the national jurisdiction principle in the international law of the sea, the territorial or ownership claim of the Philippines over the Kalayaan group inquires into the spatial extent of the Philippine sovereignty and sovereign rights in this particular maritime area. Three facets of this principle draw up the legal perspective in appreciating the resource jurisdiction problem in the Kalayaan group: (i) baseline delineation, (ii) delimitation of maritime zones and (iii) enclosed and semi-enclosed seas.

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[49]Proc. No. 307 (1968).

[50]CONVENTION, art. 77 (3).

[51]D. Drigot, *Interest in Oil as a Factor in the Philippine Claims and Disputes over Marine Territory in the South China Sea*, 3 PHIL. YRBK. INT'L. L. 39 (1982).

Philippine "baselines for the territorial sea" have already been defined under Republic Act No. 5446. The baselines completely enclose all the island groups of the archipelago, except that this definition of baselines "is without prejudice to the delineation of the baselines of the territorial sea around the territory of Sabah, situated in North Borneo, over which the Republic of the Philippines has acquired dominion and sovereignty." Under Presidential Decree 1956, annexing the Kalayaan group to Philippine territory, boundaries enclosing the Kalayaan -- "a distinct and separate municipality of the Province of Palawan" -- were further defined. Whereas the baselines defined under RA 5446 could be crudely considered as archipelagic baselines *eo nomine* under the 1982 Convention, the enclosing lines defined in PD 1596 are definitely not "archipelagic baselines" because they do not join "outermost points of the outermost islands and drying reefs of the archipelago."[52] Philippine Treaty Limits do not at all connect with the baselines under RA 5446. As it stands under the rules of the Convention on delineation of baselines, the claim to the Kalayaan group as part of the Philippine archipelago cannot, therefore, be sustained.

Senate Bill No. 206, which seeks to redefine the archipelagic baselines of the Philippines in accordance with the 1982 Convention, draws 78 lines around the archipelago that do not include or enclose the Kalayaan group. This pending legislation, certified for "immediate enactment, to meet an emergency" by President Corazon Aquino, did not incorporate the national territory claimed under PD 1596. Presumably, therefore, the intent of this legislation is to suspend a definitive state position on the Spratlys vis-a-vis the conventional regime of archipelagoes under international law.

The second facet of the national jurisdiction problem involved in the Kalayaan claim has reference to the delimitation process. On account of extended zones of hydrospace jurisdiction, overlapping maritime claims between neighboring, adjacent or opposite states become inevitable. In the case of the Philippines, overlapping maritime and/or resource zones occur in the South China Sea (north and the east), Sulu Sea (Southeast), Celebes Sea (South) and part of the Pacific Ocean (Southwest). The Convention outlines the rules on delimitation as a solution to the problem of overlapping jurisdictional zones.

Delimitation under the Convention is essentially a process of agreement between or among states with opposite or adjacent coasts in defining the horizontal reach of their respective maritime zones. The

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[52]*See* CONVENTION, art. 47(1).

territorial sea,[53] the EEZ,[54] and the continental shelf[55] are the maritime zones expressly made subject to delimitation. A perusal of the thrusts of the treaty rules would suggest that the Philippine Kalayaan claim also partakes a problem significantly involving delimitation.

Article 15
Delimitation of the territorial sea between States with opposite or adjacent coasts

Where the coasts of two states are opposite or adjacent to each other, neither of the two states is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two states is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

Article 74
Delimitation of the exclusive economic zone between States with opposite or adjacent coasts

1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such agreements shall be without prejudice to the final delimitation.

4. Where there is an agreement in force between States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.

Article 83
Delimitation of the continental shelf between States with opposite or adjacent coasts

[53]CONVENTION, art. 51.
[54]CONVENTION, art. 74.
[55]CONVENTION, art. 83.

> 1. The delimitation of the continental shelf between states with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
>
> 2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
>
> 3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such agreements shall be without prejudice to the final delimitation.
>
> Where there is an agreement in force between States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.

On several occasions, the International Court had adjudicated on delimitation controversies and the rule that emerges from this jurisprudence is that the resolution of boundary issues depends on equitable criteria determined on the basis of the peculiarity of factual settings.[56] There is, therefore, no hard-and-fast rule on delimitation of overlapping zones. The Conventional rules on delimitation, however, point to *ad interim* arrangements pending delimitation of maritime boundaries, and herein lies the significance of these arrangements to the Philippines' Kalayaan claim.

The above-quoted provisions on delimitation, particularly on the EEZ and continental shelf, evidently articulate a general obligation on the part of adjacent or opposite states to cooperate in entering into "provisional arrangements" during a "transitional period" to final delimitation. The conflicting claims over the Spratlys can, hence, be subjected to the legal regime of *ad interim* arrangements. This is consistent with the obligation of all states to settle their disputes by peaceful means.[57] The Philippines may well take into account these

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[56]*See* North Sea Continental Shelf Cases 3 (I.C.J. 1969); Arbitration between the United Kingdom and the French Republic on the Delimitation of the Continental Shelf, 3 June 1977; Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) [1982] I.C.J. REP. 18; Case Concerning the Maritime Boundary in the Gulf of Main Area, [1984] I.C.J. REP.; Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta) 24 I.L.M. 1189 (Sept. 1985). *See also* W. Burke, Zones, Limits, Baselines and Boundaries (Lecture delivered at the Law Center, University of the Philippines, December 1991).

[57]CONVENTION, arts. 279 and 280; UN CHARTER, art. 33.

considerations in evolving its overall policy on non-living marine resources situated within the contested South China Sea areas.

A last feature of the jurisdictional claim over the Kalayaan relates to the regime of Enclosed or Semi-enclosed Seas under Part IX of the Convention. Situated amidst the South China Sea, which is a "sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States,"[58] the Kalayaan or Spratlys could be the subject of a cooperative projects among the littoral States.[59] The development and management of non-living resources in the Kalayaan could then be part of a broader framework of regional or subregional cooperation on marine activities and resources concerning the South China Sea. This development is as yet speculative, but the multilateral approach implied invites inevitable attention to the possibilities of a regional outlook in the evolution and strengthening of a Philippine policy on non-living marine resources.

From an international law standpoint, the prevailing uncertainty of title over the Kalayaan area does not preclude the Philippines from granting service contracts in the area. Although the rule is that states can only license areas of the EEZ or continental shelf which are subject to their sovereign rights,[60] the grant of an interest could be deemed as constituting state practice that can reinforce a territorial claim.[61] On the part of the private company or contractor involved, the security of title is, of course, established but only precariously because the award cannot be asserted as against third parties who are also claiming competing jurisdictional interests in the same area. The potential disputes that arise which flows from unilateral licensing in the Kalayaan can be minimized, if not obliterated, through a regional approach to non-living marine resources.

IV. REGIONAL FRAMEWORK FOR THE DEVELOPMENT AND MANAGEMENT OF NON-LIVING MARINE RESOURCES

The concept of "regionalism" in marine affairs, as a legal notion and an approach in solving practical problems, is recognized not only in

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[58]CONVENTION, art. 122.

[59]*See* CONVENTION, art. 123.

[60]I. Townsend-Gault, The Impact of a Joint Development Zone on Previously Granted Interests (paper prepared for the Joint Development Conference, London, July 1989).

[61]*Id.*

the 1982 Convention but in other international instruments as well.[62] Of course, it is not disputed that regionalism, especially in the law of the sea, has certain drawbacks, but its promise of reassuring and useful results in the management of ocean speace is too evident to be doubted.[63]

Bilateral approaches to ocean problems are not precluded by, and in fact could contribute to the building up of, regionalism. But especially in a setting like South East Asia, where all states have signed (and some have even ratified) the 1982 Convention, the prospects of a regional approach are most inviting. Resolving the problems of the South China Sea may very well start with the assumption that the Convention had already furnished the building blocks for a regional approach. The provision on Enclosed or Semi-Enclosed Seas is a starting point for the littoral states of the South China Sea to develop a common solution to pressing South China Sea concerns.

Under the provision on Enclosed or Semi-Enclosed Seas in the Convention, the duty to cooperate among littoral states on a range of issues is indicated by the use of the mandatory word "shall." Cooperation in the field of non-living resources is not, however, expressly listed among the items subject to this regime of enclosed or semi-enclosed seas:

> Article 123
> *Co-operation of States bordering enclosed semi-enclosed seas*
>
> States bordering an enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavor, directly or through an appropriate regional organization:
>
> (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;
>
> (b) to co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
>
> (c) to co-ordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
>
> (d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.

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[62]*See e.g.*, UN CHARTER, chapter VIII or the Antarctic Treaty, 1 December 1959, 402 U.N.T.S. 71 (1961).

[63]*See* R. BILDER, REGIONALISATION OF THE LAW OF THE SEA (1977).

Notwithstanding the silence of the above provision on cooperation on non-living resources, regionalism in regard to non-living marine resources is, nevertheless, not precluded as a field of multinational cooperative action among the littoral states in enclosed or semi-enclosed seas. The implicit duty to cooperate in this sphere arises on account of the nexus between economic and environmental demands of all resource-oriented activities in enclosed or semi-enclosed seas, on the one hand, and, on the other, the recognition made in the Convention that "the problems of ocean space are closely interrelated and need to be considered as a whole."[64] Arguably then, the duty to cooperate among the littoral states of the South China Sea, which duty is by the way increasingly accepted as a general norm of international law, can validly be extended in the management, development, exploration and exploitation of non-living marine resources, whether renewable or non-renewable.

Cooperation in the management and development of non-living marine resources at the regional level can take place without a continuum of "teamwork" scenarios. On the one end, cooperation can take place by simply affecting some form of concentration in the legislation or national policies of the states concerned.[65] At the other end of the cooperation-continuum is the establishment of a formal regional organization or institutional structures by states in the region to respond to relevant marine concerns.

More and more, the virtue of marine regionalism in the South China Sea is being recognized.[66] But the extent and intensity of regional cooperation in the management and development of non-living marine resources in the area only barely reveal the recognition of the need or obligation to cooperate among the littoral states. Certain factual ingredients of regional cooperation on non-living resources in the South China Sea are, however, already discernible.

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[64]*See* CONVENTION, preamble.

[65]Or, "implicit regionalism" as termed by Prof. Johnston; *see* BILDER, *supra* note 63. *See also* G. Kent, *Harmonizing Extended Zone Legislation in Southeast Asia*, 13 OCEAN DEV. & INT'L. L. 247 (1983).

[66]*See e.g.* L. Alexander, Marine Regionalism in the Southeast Asian Seas (Research Report No.11, East-West Center, Hawaii, 1982); T. McDorman, *Problems of Maritime Boundary Delimitation with Special Reference to Southeast Asia* , 10 PHIL YRBK. INT'L. L. 52 (1984); M. Valencia, *Joint Jurisdiction and Development in Southeast Asian Seas: Factors and Candidate Areas*, 10 ENERGY 573-579 (1985); W Ostreng, *The Politics of Continental Shelves: The South China Sea in Comparative Perspective*, 20 COOPERATION AND CONFLICT 253 (1985); A. Sugiarto, *The South China Sea: Its Ecological Features and Potentials for Developing Cooperation*, 18 INDONESIAN QUARTERLY 116 (1990).

Proposals for joint-development of hydrocarbons in the South China Sea have already been put forward.[67] Notwithstanding existing boundary disputes or delimitation issues, joint development has been shown to be an effective mechanism for the management of non-living resources.[68] This could very well be considered as a crucial project in the overall strategy of confidence-building so necessary in the region.[69]

Short of setting up a joint-management and development regime for non-living resources, cooperation in other sectoral concerns in marine affairs (like fisheries, shipping and navigation or marine scientific research) could, likewise, lead to cooperation in the non-living resources sector. In carrying out their obligation to preserve and protect the marine environment, South China Sea states were, therefore, encouraged to establish minimum licensing standards for off-shore oil and gas activities.[70] Expanded cooperation in all spheres of marine activity can, hence, effectively address potential conflict situations arising from unsettled jurisdictional claims.[71] This brings out the important question of institutional machinery for marine affairs cooperation. In this light, the role of regional organizations, like the ASEAN or regional entities within the UN system, in activating and coordinating marine-related initiatives, becomes quite important.[72]

Within the ASEAN framework of cooperation in the South China Sea, a relatively direct form of non-living marine resources management program is seen. Present cooperation of ASEAN states in petroleum matters takes place within the institutional umbrella of the ASEAN Council on Petroleum (ASCOPE). The ASCOPE consists of

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[67]M. Valencia and M. Miyoshi, *Southeast Asian Seas: Joint Development of Hydrocarbons in Overlapping Claim Areas?* 16 OCEAN DEV. & INT'L. L. 211 (1986); G. Nayoan and Z. Achmad, Identifying Possible Cooperation in Developing Hydrocarbon Resources within Offshore Border Areas in South China Sea (PERTAMINA, presented as keynote address at workshop on managing hydrocarbon operations in Southeast Asia, Denpasar, Indonesia, 1990)

[68]F. Vicuna, Regional Cooperation in Non-living Resources (paper presented at the *Pacem in Maribus XIX*, Lisbon, 1991).

[69]H. Djalal, *Potential Conflicts in the South China Sea: In Search of Cooperation*, 18 INDONESIAN QUARTERLY 127 (1990). *See also* B.A. Hamzah, Conflicting Claims in the South Spratly Islands: Some Tentative Remarks on the Need to Adopt Confidence-Building Measures (paper presented at the SEAPOL International Conference, Bali, 1990).

[70]*See* Report on the Workshop on Managing Potential Conflicts in the South China Sea (Bali, 1990). Recently, the ASEAN, in a meeting of environment ministers, decided to impose a levy on vessels plying the region to raise funds for the purpose of combatting piracy and cleaning up oil spills and other forms of marine pollution.

[71]*See* A. Alatas, *Managing the Potentials of the South China Sea*, 17 INDONESIAN QUARTERLY 114 (1990).

[72]*See* B. Kwiatkowska, *Institutional Marine Affairs Cooperation in Developing State Relations*, 1990 MARINE POLICY 385 (Sept. 1990).

national oil companies and agencies of the member states. Among its activities, the ASCOPE facilitates the process of gradually aligning the contracting systems of the ASEAN in the same way that it attempts to standardize hardware, measurements, data reporting and terminology. "ASCOPE is pressing toward the voluntary adoption of common practices through a slow, evolutionary, adaptive process. ASCOPE's approach recognizes that nations will harmonize their practices when they foresee mutual benefits."[73] Although no joint-development schemes are ambitioned by the ASCOPE, the particular basis of a cooperation regime has been laid down. Recent successfully conducted projects by the ASCOPE include the "Stratigraphy Correlation of Petroliferous Basins in the South China/Natuna Sea," "Resource Assessment of Hydrocarbons of the Southeast Asia Countries" and "Joint Study Projects for Environment and Safety."[74]

V. SOME CONCLUSIONS

The new international law of the sea has inaugurated a profound altered principle of ocean resources management that recasts the traditional understanding of state sovereignty. Rights and obligations of coastal states, like the Philippines, are now interwoven into a whole matrix of national, regional and global community interests. Developmental and environmental objectives play a rather magnified role in the overall customary and conventional regime of marine resources in the law of the sea.

The development, management, exploration and exploitation of non-living resources within the ambit of the national jurisdiction principle reflect a set of rights and duties for the Philippines under international law with which the Philippines has generally adopted and conformed in practice. Notwithstanding present predicaments, the expectations of the international legal community especially in regard to archipelagic and coastal state rights and obligations developed during the UNCLOS III are, therefore, increasingly satisfied.

From a legal standpoint, two urgent problems that affect the national program on non-living marine resources confront Philippine policy-makers. The first involves the major difficulty of discordance between the Constitutional definition of maritime jurisdiction

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[73]G. Kent, *Harmonizing Extended Zone Legislation in Southeast Asia*, 13 OCEAN DEVT. & INTL. L. 247, 260-261 (1983).

[74]G. Nayoan and Z. Achmad, Identifying Possible Cooperation in Developing Hydrocarbon Resources within Offshore Border Areas in South China Sea (PERTAMINA, presented as keynote address at workshop on managing hydrocarbon operations in Southeast Asia, Denpasar, Indonesia, 1990).

jurisdiction and the regime of archipelagic waters under the 1982 Convention. At the moment, the issue is conceptual. But when the navigational and foreign access regimes in archipelagic waters come into practical conflict with the sovereignty principle applied to resource-oriented activities within this maritime space, the uncertainty of resolution could affect the emergence or development of a durable national ocean policy. Considering antecedent state practice on the part of the Philippines, the resolution of this problem, it seems, consists in abandoning advocacy of the Philippine Constitution.

Secondly, the outstanding question of the Kalayaan claim potentially disrupts a stable program on the development, management, exploration and exploitation of non-living marine resources. The status of the Philippine claim is not at all clear from the perspective of delimitation and delineation of baselines. In this sense, a regional approach that could encompass the entire South China Sea may be articulated. And inasmuch as the waters, so to speak, of regional cooperation in this enclosed or semi-enclosed sea have already been tested, the settlement of the problem may not be too distant.