REFLECTIONS ON THE FRAMEWORK OF MANILA-TAIPEI RELATIONS AND CURRENT BILATERAL OCEAN-USE DISPUTES*

*Raphael Perpetuo M. Lotilla***

1. Introduction

For some time now, various government officials and offices have been preoccupied with questions involving diverse aspects of the Philippine's relationship with Taiwan, among them: trade and investment, official loans and development aid, labor, fisheries and navigation. During the same period, the public has been presented with several proposals from the Congress on the adoption of a framework for carrying on those relations. But little effort, if any, has been devoted to an examination of the current framework, giving rise to the impression that there is no framework in place at all.

The following paper intends to contribute to the effort at restoring some balance in the discussion by analyzing the current legal framework, including its development over the years, with some limitations imposed by the inaccessibility of documents relating to the operations of the Philippine's unofficial representation in Taipei. The paper also seeks to evaluate the proposals to change the existing framework, and discuss features of that framework in relation to the various approaches to the current fisheries and navigation disputes with Taiwan.

2. A Framework for the Pursuit of Essential Relations

2.1. Coming to Terms with the People's Republic of China on Its Terms

The Philippines inaugurated diplomatic relations with the People's Republic of China on 9 June 1975 under the terms of the Joint Communique signed by Ferdinand Marcos and Chou Enlai on 5 June 1975.[1] Like many other countries which recognized the People's Republic

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**Associate Professor of Law, University of the Philippines and Director, Institute of International Legal Studies, University of the Philippines Law Center.

[1] PHILIPPINE DIPLOMACY: CHRONOLOGY & DOCUMENTS 1972-1981 335 (1981).

during the seventies, the Philippines agreed to include language addressing the Taiwan question;[2] thus, the Philippines not only recognized the PROC government as "the sole legal government of China," but also stated that it "fully understands and respects the position of the Chinese Government that there is but one China and that Taiwan is an integral part of Chinese territory."[3]

In addition, relations with the *de facto* government on Taiwan had to be severed because a "German solution" then[4] or what lives on as a "Korean solution" today[5] was, and remains, totally unacceptable to the PROC.[6] This formula would allow third-state recognition of "two states in one China," thus preserving the concept of China with Taiwan as an integral part of its territory, but would accept, for the time being, the reality of its division politically.[7] From the standpoint of Taiwan,

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[2]Different formulas, essentially patterned after that of Canada, have been used. Canada felt that it would not be in accordance with international usage for it to be asked to endorse the PROC's position on the extent of its territorial sovereignty (over Taiwan), thus a more ambiguous wording had to be employed. *See* Lyushun Shen, *The Taiwan Issue in Peking's Foreign Relations in the 1970s: A Systematic Review*, 1 CHINESE Y.B. INT'L. L. & AFFAIRS 74, 76 (1981).

[3]The only other country to use the terms "understand and respect" is Japan. *See* survey found in *id.* at 77.

[4]The concept of a "stabilized *de facto* regime" was developed by German writers "in order to describe the international legal status of all entities exercising effective control over a certain territory without being recognized *de jure*, without having to strain the traditional civil war scenario. It was demonstrated, for instance, that in State practice after World War II, such stabilized *de facto* regimes had not only taken part in multilateral treaties, but also concluded all kinds of bilateral agreements without necessarily being recognized thereby by the other contracting parties, or -- even more importantly -- that the territorial integrity and political independence of these *de facto* entities are as much protected by Article 2 (4) of the UN Charter as those of states proper." Simma, *Legal Aspects of Intra-(East-West)German Relations*, 4 CHINESE Y. B. OF INT'L L. & AFFAIRS 148, 152 (1984). But this legal construct was only a transitional one as the two Germanys were admitted to the United Nations on 18 September 1973 as separate members.

[5]The PROC deals with the two Koreas as separate political entities. *See* "Liberals urge Taiwan to apply for UN membership," Bulletin Today, 12 June 1991, at 2, col. 8. The Philippines is now taking steps to establish diplomatic relations with North Korea (*see* "RP okays formal ties with N. Korea," Bulletin Today, 14 June 1991, at 1, col. 2) as it maintains existing diplomatic relations with South Korea.

[6]While the PROC insists on its traditional position, as "for the ROC, the closer the United States came to normalizing relations with the PRC, the more willing the government of the ROC became to tolerate the so-called 'German solution', in which the United States would have full diplomatic relations with both Peking and Taipei." Hungdah Chiu, *The International Law of Recognition and Multi-System Nations -- With Special Reference to the Chinese (Mainland-Taiwan) Case*, 1 CHINESE Y. B. OF INT'L L. & AFFAIRS 1, 9 (1981).

[7]Hungdah Chiu, *id.* at 8, writes, thus:

the acceptance of such a formula would make Article 2(4) of the United Nations Charter unequivocably applicable and therefore prevent the use of force to unify Taiwan with the rest of China.[8] Taiwan's growing insistence that this formula be applied to it runs counter to the PROC position that the reunification of China is a purely internal matter which, therefore, does not preclude the PROC from employing force.[9] It will be recalled that the Philippines joined other countries including the United States and Japan in an unsuccessful attempt to allow both the People's Republic of China and the Republic of China to be seated in the United Nations.[10] But under the Joint Communique, the Philippines

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> It is submitted that a sound principle of recognition is to treat recognition as a legal act; furthermore, the exercise of the legal act should be strictly in conformity with the reality of the situation . . .
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> If one applies the above-stated principle of recognition to the multi-system nations case, then their recognition problem can be satisfactorily solved. Each part of a multi-system nation should be recognized as an independent state or international entity by third countries. In the meantime, the national goal of unification of each part of a multi-system nation remains unaffected by the act of recognition . . . Domestically, the government can still claim to be the only legal government of both parts of a multi-system nation, but such a claim should not prevent a third country from entering into diplomatic or other relations with the other part of a multi-system nation.

[8]See letter of John Norton Moore to Hungdah Chiu which suggested the following: "the prohibition on the use of force, contained in Article 2(4) of the United Nations Charter, should, I believe, be clearly recognized as governing relations between the two China's as well as other divided nations such as Korea and Germany. Future relations in such divided nation settings must, under the Charter, proceed peacefully with the concurrence of all concerned and not depend on the threat or use of force." 4 CHINESE Y.B. INT'L. L. & AFFAIRS 6 (1984).

[9]Just last week, newspaper reports quoted the Taiwan Affairs Office in Beijing as saying: "We stress the use of peaceful methods to reunify the country. However, we will not promise to abandon the military option . . . This is by no means a threat to the Taiwan people but is aimed at thwarting foreign interference in China's reunification process and thwarting schemes to realise independence for Taiwan. "China won't rule out takeover of Taiwan," Bulletin Today, 9 June 1991, at 2, col. 1.

[10]While the Philippines voted against the UN General Assembly resolution recognizing representatives of the People's Republic of China as the only official representatives of China to the UN, the Philippines was in favor of granting recognition to the PROC in parallel with the ROC as the successor of the former government of China -- the "Two-China" policy. *See* P. VALERA-QUISUMBING, BEIJING-MANILA DETENTE 84-85 (1983). In Japan's view, the "Reversed Important Matter Draft Resolution" in the U.N. General Assembly was intended "to designate the possible ostracism of the Nationalist Taiwan Government which had theretofore represented China in the United Nations as a matter to be decided by a two-thirds majority, instead of a simple majority, without placing any particular impediment to deciding Chinese representation of the Peking Government in the United Nations by a simple majority. It was tantamount to an effort to retain, if practicable, a seat for the Nationalist Government along with one for the Peking Government as both representing China in the United Nations (Two Chinas or Two Governments of China)." Yuichi Takano, *The*

committed itself, among others, to the removal of all its official Philippine representations from Taiwan within a month from its signature.[11] The Philippine Government also issued an announcement on 9 June 1975 terminating all existing official relations with the Republic of China and abrogating the Philippine-ROC Treaty of Amity and Friendship.[12]

Then Foreign Affairs Undersecretary Manuel Yan reiterated last year in his testimony before the House Committee on Foreign Affairs the reasons for the fundamental shift in Philippine policy toward China, a decision which in his view has been sustained by developments since 1975.[13] Those reasons may be summarized as follows: the importance of formal relations with a major world power geographically proximate to the Philippines and universally recognized as a principal actor in the international arena and in the region; the large potential of China as a market for Philippine products and as a stable source of crude oil; the internal security dividends that would be earned by having official relations with China in the form of reduced support for the communist-led revolutionary movement and enhanced control over the activities of Chinese nationals in the Philippines.[14]

2.2. *Asectai: A Non-stock, Non-profit Medium*

In the absence of formal diplomatic relations, states which desired to maintain "substantive relations" with Taiwan had to resort to the establishment of unofficial mechanisms.[15] In the case of the Philippines, such a mechanism was necessary in order to assure continuation of commerce between the two countries that in 1974 "was

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Japan-China Joint Communique and the Termination of State of War, 17 JAPANESE ANNUAL INT'L. L. 62, 63 (1973).

[11]Part III of the Joint Communique.

[12]As reported in P. VALERA-QUISUMBING, *supra* note 10, at 89.

[13]Minutes of the Meeting of the Committee on Foreign Affairs, House of Representatives, 17 October 1989, pp. 2-3.

[14]*Id.*

[15]See Clough, *Taiwan's International Status*, 1 CHINESE Y.B. INT'L. L. & AFFAIRS 17, 26-30 (1981). The unofficial representatives of ASEAN countries in Taiwan included, in 1981, the following: Indonesian Chamber of Commerce to Taipei; Taipei Administration Office; Thai Administration Office; Thai Airways International, Ltd.; Malaysian Airline System; and Asian Exchange Center, Inc. (Philippines). Singapore had at that time a Trade Representative in Taipei. See list of "Foreign Semi-official or Unofficial Missions in the Republic of China" in 1 CHINESE Y.B. INT'L. L. & AFFAIRS 17, 268-269(1981) and subsequent volumes of that publication. Both Indonesia and Singapore had, at that time, no diplomatic relations with the PROC, although the former consistently observed adherence to its One-China policy; thus, its representation in Taiwan was strictly private in character.

worth nearly U.S. $140 million . . . and favourable to the Philippines by 2 to 1."[16]

For the above purpose, the Asian Exchange Center, Inc. (Asectai or the Center) was organized as a private non-stock corporation under the general corporation law.[17] It was registered with the Securities and Exchange Commission (SEC) in December 1975 although diplomatic relations with the government on Taiwan were cut off in June 1975 and embassy officials withdrawn within the period stipulated in the Communique.[18]

The purposes of Asectai as described in its articles of incorporation give a very general idea of the work for which it was organized. The first corporate purpose is "To establish and develop the commercial and industrial interests of Filipino nationals here and abroad, and assist in all measures designed to promote and maintain the trade relations of the country with the nationals of other foreign countries."[19] There is nothing to suggest that its operations are to be confined to a particular place, and there is absolutely no hint that it is to undertake its major work in Taiwan. The Malacañang text of Executive Order No. 931 reflects this broad formulation,[20] but the text of the same presidential issuance as published in the Official Gazette describes Asectai's purpose in more circumscribed terms as the promotion of "friendly cooperation with the Republic of China on Taiwan mainly in the fields of economic, trade, cultural and scientific endeavor, following the severance of diplomatic relations between our two countries."[21]

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[16]Glenn, "Taiwan's reaction to the Marcos trip," in FAR EASTERN ECONOMIC REV. 19 (27 June 1975). Manila-Taipei bilateral trade for a ten-year period up to 1989 was such that "the total trade deficit against the Philippines and favoring Taiwan has been almost $10 billion." Testimony of Department of Trade and Industry Secretary Jose Concepcion Jr., Minutes of the House of Representatives Committee on Foreign Affairs Meeting of 13 March 1990.

[17]Batas Pambansa Blg. 88 (1980).

[18]Bulletin Today, 22 June 1975.

[19]The others are: "2. To receive and accept grants and subsidies that are reasonably necessary in carrying out the corporate purpose, provided that they are not subject to conditions defeatist of or incompatible with said purpose; 3. To acquire by purchase, lease or by any gratuitous title real and personal properties as may be necessary for the use and need of the corporation and to dispose of the same in like manner when they are no longer needed or useful; and 4. To do and perform any and all acts which are or may be deemed reasonably necessary to carry out the above-stated purpose." *See* Articles of Incorporation.

[20]Refer to discussion in Part 2.3, *infra*.

[21]First preambular paragraph of Executive Order No. 931, 80 OFFICIAL GAZETTE [hereinafter O.G.] 1090 (1984).

Asectai had five incorporators[22] who also served as the first directors of the corporation. It has an original corporate term of fifty years[23] and has its principal office in Manila with a post office box address.[24] There is nothing to indicate that the incorporators of Asectai were acting other than in their private capacities, but the corporation is described as a private one "organized under government auspices in accordance with the laws of the Republic of the Philippines,"[25] "at the instance of the Ministry of Foreign Affairs and with the approval of the President of our Republic."[26]

As to the Asectai's activities, Executive Order No. 931 notes that the Center "not only performs in Taiwan consular and trade functions but more importantly is mandated to attract Taiwanese investments to strengthen the economy of the Philippines."[27] This is corroborated by Asectai's president-director who described it as having been

> organized as a non-stock corporation . . . to perform discreetly consular and embassy functions in Taiwan, a country with which we had ceased to maintain diplomatic relations[,] . . . in furtherance of our people to people foreign policy to foster economic, trade, cultural and scientific relations with nations without diplomatic ties with us.[28]

The Asectai is also listed as one of those unofficials in Taiwan which receives visa applications.[29]

Executive Order No. 931 also states that "the Ministry of Foreign Affairs of the Philippines has exercised close supervision over the operations and activities of the Asian Exchange Center, Inc., including its branch office in Taipei, Taiwan, Republic of China,"[30] and that

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[22]Simeon R. Roxas, Florencio C. Guzon, Manuel K. Dayrit, Pio K. Luz, and Eduardo B. Ledesma.

[23]Fourth paragraph, Articles of Incorporation.

[24]Art. 1, By-laws.

[25]First preambular paragraph of Exec. Order No. 931, 80 O.G. 1090 (1984).

[26]Letter of Director Narciso Ramos to the Securities and Exchange Commission dated 21 November 1983.

[27]Eighth preambular paragraph of Exec. Order No. 931, 80 O.G. 1090 (1984).

[28]Letter of Director Narciso Ramos to the Securities and Exchange Commission dated 21 November 1983.

[29]1 CHINESE Y.B. INT'L. L. & AFFAIRS 268 (1981). The unofficial representatives of Indonesia, Singapore, Thailand, and Malaysia do the same. In the case of the Japanese organization, visa applications are transfered to the Japanese Consulate in Hong Kong for processing. *Id.*

[30]Third preambular paragraph of Exec. Order No. 931, 80 O.G. 1090 (1984).

> to all intents and purposes, the Asian Exchange Center in Taiwan is now a dependent office of the Ministry of Foreign Affairs and regarded as a Class I foreign service post thereof, subject to the rules and regulations of the said Ministry applicable to all diplomatic posts and foreign service units of the Philippines the world over . . .[31]

That Asectai's address filed with the Securities and Exchange Commission[32] was at the 4th Floor, Consular Building, which was then part of the Ministry of Foreign Affairs complex at Padre Faura, independently confirms that relationship.[33]

Under its by-laws, Asectai may establish overseas agencies or branch offices[34] headed by a Board-appointed Director who, in turn, appoints the officials and employees of that agency or branch.[35] The relative length devoted to provisions in the by-laws on the operation of overseas branches, as contrasted with Asectai's bare post office box number Philippine address, gives the only hint of the corporation's main place of operation. The corporation's regular members consist of the original incorporators and others who, upon application for membership, are unanimously admitted by the Board.[36]

But there may have been problems in the internal operations of the Center since, in September 1982, a list of an entirely new set of members of the corporation was submitted to the SEC, describing them as the present members and having been admitted "in accordance with the By-Laws of the Corporation."[37] Also submitted to the SEC was a document constituting the minutes of the meeting of the Center's members held on 17 September 1982[38] at which a new set of board members[39] and officers[40] was elected. The first resolution adopted by the new Board

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[31]Fifth preambular paragraph of Exec. Order No. 931, 80 O.G. 1090 (1984).

[32]See address appearing in Second Conference Letter dated 4 October 1983 from the SEC.

[33]See also statement of Asectai president-director quoted in text accompanying note 50, *infra*.

[34]Art. 1, By-Laws.

[35]Art. 7(2), By-Laws, as amended by Resolution No. 5 dated 7 June 1976 as readopted in Resolution No. 6 dated 11 Sept. 1978. Resolution No. 5 was adopted at a meeting held in Taipei, thus contrary to sec. 51 of the Corporation Code, which requires such meetings to be held in the city where the principal office is located.

[36]Art. 2(a), By-Laws.

[37]Certification made by Mr. Antonio A. Alon, Secretary, dated 15 September 1982.

[38]Minutes of the meeting of the members of the "Asian Exchange Center, Inc." held in Manila on September 17, 1982 at 12:30 in the afternoon.

[39]With Benjamin T. Tirona as Chairman, Joaquin Venus as Vice-Chairman, and Narciso Ramos, Salvador Pena, Agerico O. Lacanlale, and Lilia de Lima as members.

[40]Narciso Ramos, President; Lilia de Lima, Treasurer; Antonio A. Alon, Secretary; and Benjamin T. Tirona, Director of the Center.

created a management audit team to "conduct a thorough and impartial inquiry into the present set-up and operation of the Corporation's Center in Taipeh,"[41] emphasizing, among others, an inquiry "into the financial condition of the Center/Agency and reasons for its failure to submit the necessary reports."[42]

Later, however, former Foreign Affairs Secretary Narciso Ramos, in a letter to the other new members of the Center, expressed his feeling that "there is something amiss about our appointment as members of the . . . Center" since "we had not been told under whose authority we were so appointed or designated."[43] Thus, he "had some talks with ex-Ambassador Simeon Roxas, former President of the . . . Center . . . and at that time concurrently Director of the Center in Taipei, and . . . both agreed that the only way to rectify the anomalous situation is to observe the provisions of the By-Laws of the Corporation regarding membership (Article 2-a) and succession (Articles 8-12)."[44] Accordingly, the old board met to accept the applications for membership of the new officers, and the members of the old board together with the old president resigned.[45] Subsequently, the newly admitted members reelected the directors and officers elected and chosen by themselves previously.[46]

2.3. *From unofficial to a color of officiality*

Despite its private corporate shell, however, the Asectai assumed a *sui generis* corporate character when it insisted, and the SEC

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[41]Resolution No. 1 included in the Minutes cited at note 38, *supra*.

[42]*Id.* The other tasks emphasized were the following: "1. To look into the present operation, staffing of personnel and program being pursued by the Agency; . . . 3. To submit within 30 days its findings and general recommendations taking into consideration the economy, requisite qualifications for officers and employees, a definition or description of duties of each personnel, and a general program for the Center to follow in order to achieve the maximum service and objectives."

[43]Letter of Narciso Ramos dated 14 August 1982 addressed to Joaquin T. Venus Jr., Salvador T. Pena, Agerico Lacanlale, and Lilia B. de Lima.

[44]*Id.*

[45]Minutes of the Special Meeting of the Board of Directors called by the President on 4 December 1982.

[46]Secretary Ramos's letter of 14 December 1982, addressed to the other new members of the corporation, reads in part, as follows:

> In the attached minutes which I ask you to sign, the necessary legal steps by which we could become members/directors/officers of the Corporation appear to have been taken as recorded.
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> With the signing of these minutes, you will agree that we shall have solved one legal and bothersome technicality affecting our status in the Asian Exchange Center, Inc.

agreed, on its being exempted from regular reportorial requirements.[47] As Asectai's president-director explained to the SEC,[48]

> [m]ost of the important functions and activities of the Center are confidential in nature and are closely supervised by the Ministry of Foreign Affairs, Manila. Our reports and financial statements are likewise strictly classified which we regularly submit to our Foreign Office. As a non-stock, non-profit corporation, we have no financial transactions to report to the SEC.
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> Because of its special, extraordinary character, we believe the Asian Exchange Center is one of those corporations and organizations exempted from the accounting rules of the Securities and Exchange Commission.

But although it was exempt from the accounting and other requirements of the SEC, Asectai's reports are not subjected to Commision on Audit scrutiny as these are private. As a general rule, the Asectai observes government rules and regulations in its financial transactions but these are waived in favor of ordinary practices and procedures for private corporations when observance of government rules "may be considered as impractical or inappropriate because of the confidential and autonomous character of the Corporation."[49]

The uncertainty in the rules to be applied to Asectai and the problematic instances narrated in the preceding part of this paper tend to show that an entirely unofficial arrangement may not be advisable from the standpoint of the government for purposes of effective implementation of policies, ensuring continuity of operations and accountability of personnel and sustained feedback. Unless a legal vinculum is established between the government and the Asectai, problems will recur involving the private corporate entity's and its officers' accountability to the government for acts which, shorn of their non-governmental outer garb, are essentially governmental functions. Under Philippine law, a private corporation has a personality separate and distinct from that of other legal persons including the State, and enjoys autonomy in the conduct of its affairs subject only to state regulation; thus, the State cannot interfere in the international organization and operations of a private corporation except in limited

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[47]The Asectai failed to submit the general information sheet for the years 1978 to 1983; Minutes of Members' annual meeting were not filed for the years 1978 and 1980-1982, and filed late in 1979 and 1983; financial statements for 1980-1982 were not submitted; five corporate books were not registered.

[48]Letter of Director Narciso Ramos dated 21 November 1983.

[49]Art. 10, section V of By-Laws, as amended by Resolution No. 5 dated 7 June 1976 as readopted in 1978.

instances specified by law.[50] For domestic law purposes, linkage -- indirect as it must be as dictated by the circumstances -- between the Asectai or its activities and the government is required.

The link, tenuous it may be, was established through the issuance of Executive Order No. 931 placing the Asian Exchange Center, Inc., including its branch office in Taipei, "under the Office of the President." At this point, it becomes necessary to clarify that there are two versions of the text of Executive Order 931: one which was signed by then President Marcos, attested by Deputy Executive Assistant Joaquin Venus and remains filed in Malacañang, and another which was printed in the Official Gazette. The discrepancy between the text as signed and the text as published, however, has no effect on the placing of Asectai under the Philippine President's office inasmuch as the prescriptive part of the published and the signed texts both contain that provision. The difference lies in the reference to the "Republic of China" found in the preambular paragraphs and in the title and body of the published text,[51] references which are absent from the signed text. In addition, the published text's preambular paragraphs contain more detail regarding the Asectai's operations.[52]

Among the major reasons stated in the published text for placing Asectai under the Office of the President were the following:

> (1) the Ministry of Foreign Affairs' close supervision might gradually expand to such an extent that the operations and activities of the Center will completely be under the jurisdiction and control of the Ministry of Foreign Affairs;[53] and
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> (2) the function entrusted to the Center of fostering friendly relations with the Republic of China short of diplomatic dealings is a delicate and precarious responsibility owing to our commitment to the People's Republic of China to avoid official contracts (sic) with the ruling government on Taiwan which is the Government of the Republic of China.[54]

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[50]Sec. 3 of Pres. Decree No. 902-A gives the Securities and Exchange Commission "absolute jurisdiction, supervision, and control over all corporations." But this is to be taken in the context of the jurisdiction of the SEC to *hear* and decide cases under sec. 5 and the enumeration of its powers under sec. 6.

[51]See text accompanying notes 21 and 30, *supra* and note 54, *infra*. The title of the published text is "Placing the Asian Exchange Center, Inc., Including its Branch Office in Taipei, *Taiwan, Republic of China*, Under the Office of the President." (Emphasis supplied). 80 O.G. 1090 (1984). The signed text's title is "Placing the Asian Exchange Center, Inc., Including its Branch Office in Taipei, Under the Office of the President."

[52]*Id.*

[53]Fourth preambular paragraph of Exec. Order No. 931, 80 O.G. 1090 (1984).

[54]Sixth preambular paragraph of Exec. Order No. 931, 80 O.G. 1090 (1984).

> Therefore, the special status of the . . . Center in Taipei of having unofficial dealings with a country with which we have no diplomatic relations should make it a separate and distinct entity from the regular official diplomatic posts of the Philippines under the Ministry of Foreign Affairs[55]

to be placed instead "under the Office of the President of the Philippines in order that it may operate with more flexibility to attain its objectives."[56]

But the presidential issuance, while establishing a formal link between the government and Asectai for domestic law purposes, did not change Asectai's private corporate character. The preambular paragraphs of both signed and published texts reiterate that the corporation's activities are governed by its articles of incorporation, by-laws, and pertinent resolutions of its board of directors.[57] Asectai's placement under the president's office, however, in the context of the problems encountered in the former's operations, would allow the government to directly intervene in its internal organization and operations.

The creation of Asectai under the general private corporation law followed the pattern of creation of many corporations organized by the government or with government funds as private stock corporations during this period, with the difference that Asectai is a non-stock one with persons designated by the government as members. But since membership in non-stock corporations is in an individual capacity, not on the basis of ownership of capital stock, the government has no legal control at all times over individual members and, consequently, over the board of trustees elected by the members. Executive Order No. 931 seeks to achieve that control.

With Executive Order No. 931 in place, there was a mechanism for handling transition problems within Asectai and those which may be brought about by transitions from one government administration to another such as those which must have occured during the change from the Marcos to the Aquino government.

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[55]Seventh preambular paragraph of Exec. Order No. 931, 80 O.G. 1090 (1984).

[56]Last preambular paragraph of Exec. Order No. 931, 80 O.G. 1090 (1984).

[57]Second preambular paragraph of the signed and published texts of Exec. Order No. 931.

3. Proposals to Change the Existing Framework

In this part of the paper, we remind ourselves once more of the maximum foreign policy objective of the government on Taiwan: to achieve diplomatic recognition as China's sole legitimate government. Failing in that, the Chinese on Taiwan have campaigned for the maintenance of simultaneous official relations by third states with itself and the PROC. But since this is an arrangement which remains unacceptable to the PROC and would automatically result in a severance of relations by the PROC, the pressure to pursue this arrangement amounts to an indirect means for attaining Taiwan's maximum position. The same can be said of what appears as an active encouragement on Taiwan's part[58] of third-state actions found fundamentally objectionable by the PROC, such as the passage of domestic legislation that would directly or indirectly strengthen the prospects for the emergence of an independent Taiwan.

Taiwan's campaign has been directed at economically vulnerable developing states, dubbed "tiny friends" by the Taiwanese press.[59] The group includes Belize, Guinea-Bissau, and Nicaragua which recently switched recognition to the ROC after having been "wooed by concessionary loans and other development assistance."[60]

Notwithstanding its financial woes, the Philippine government has explicitly stated its position to adhere to the One-China policy as agreed upon with the PROC in the 1975 Joint Communique.[61] From a foreign policy standpoint, Philippine credibility in the region and in the world would suffer tremendously if it took the path of Taiwan's "tiny

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[58]The head of the Pacific Economic and Cultural Center, Taiwan's unofficial representation in Manila, was quoted by the Bulletin Today ("RP-Taiwan bill pushed") as pressing for the passage of the Philippine-Taiwan Beneficial Relations Act and, at the same time, hailing the resolution of the League of Municipal Mayors of the Philippines supporting the passage of the bill in Congress -- if true, a clear interference in Philippine domestic affairs.

[59]FAR EASTERN ECONOMIC REVIEW ASIA 1991 Y.B. 223 (1991).

[60]*Id.* The assistance package to Guinea-Bissau was reported to be worth at least US$50 million. *Id.*

[61]This was stressed by different officials: Senate Foreign Relations Committee Chairperson L. Ramos-Shahani in *One-China Policy*, FOREIGN RELATIONS J. 93, 96 (June 1985); The House of Representatives' Subcommittee on ASEAN and Asia-Pacific Affairs recommended approval of a substitute consolidated bill, section 2 of which states: "In considering relations between the Philippines and Taiwan, the joint communique of the Government of the Republic of the Philippines and the Government of the People's Republic of China, signed on 9 June 1975, shall be the basic document applicable;" Foreign Affairs Undersecretary Pablo Suarez in "One-China policy stands, says DFA undersecretary," Manila Times, 11 December 1989, also reported in "One-China stand affirmed," Manila Bulletin, 5 November 1989; Statement of then Foreign Affairs Secretary Manuel Yan, Minutes of the Meeting of the Committee on Foreign Affairs, House of Representatives, 17 October 1989, p. 3.

friends." The major members of ASEAN all have diplomatic relations with the PROC. Malaysia, the Philippines and Thailand established diplomatic ties with the PROC in the seventies;[62] Indonesia and Singapore did so in August and October, respectively, of 1991.[63] In 1989, over 150 countries in the world recognized the PROC, 117 of which had embassies in Beijing.[64]

While aggressively pushing for strengthened economic relations with Taiwan, the Executive[65] and the Senate[66] have, at least in their pronouncements, avoided the appearance of supporting a "One-China, One-Taiwan" policy. A sub-committee of the House of Representatives, however, has considered the passage of a bill that indirectly pursues such a policy through an express mention of Taiwan,[67] although the entire House has not acted on the same.

Knowing the Philippines' economic predicament, Taiwan continues to exert pressure on the Philippines as it has done to some African and Latin American states. But if the Taiwanese do not know it yet, the Philippines politically is not as puny as Belize or Guinea-Bissau nor as far removed from China as Nicaragua or Liberia. The Philippine government needs to lay down in no uncertain terms to the Taiwanese authorities that the Philippines will not turn around on its One-China policy within the context of the 1975 Joint Communique. For Taiwan to insist otherwise is to insist on damaging the credibility of the Philippines before other countries in the region and in the world. The message must be clear: Don't kick the Philippines while it's down. Taiwan must be reminded that the Philippines stood by Taiwan's side faithfully and extended strong support throughout that period in its development when it was most vulnerable economically and militarily. Taiwan must reciprocate today without demanding concessions which demean the national pride of Filipinos.

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[62]Malaysia on 31 May 1974, and Thailand on 1 July 1975. For text, see P. VALERA-QUISUMBING, *supra* note 10, at 320-324.

[63]FAR EASTERN ECONOMIC REVIEW ASIA 1991 Y.B. 206 (1991).

[64]Testimony of then Foreign Affairs Undersecretary Manuel Yan, Minutes of the Meeting of the Committee on Foreign Affairs, House of Representatives, 17 October 1989, p. 3.

[65]*Id.*, reiterating President Aquino's statements, at p. 4.

[66]Senate Committee Report No. 1354 submitted by the Committees on Foreign Relations and Economic Affairs recommending approval of substitute Senate Bill No. 1823 entitled "An Act Providing for the Enhancement of Economic, Trade, Commercial, Cultural, Educational, Scientific, Technical, Social and Other Relations Between the Philippines and Foreign Entities."

[67]House of Representatives Sub-Committee on Asean and Asia-Pacific Affairs Report of 18 May 1989.

Indeed, a credible, stable, and economically progressive Philippines with well-developed essential relations with Taipei and strong diplomatic relations with Beijing would be in a much more enhanced position to influence the PROC into adopting a peaceful approach to the resolution of the Taiwan question than a Philippines diplomatically estranged from or distrusted by the PROC ever can. The stronger the economic links between the Philippines and Taiwan, on the other hand, the greater will be the former's stake in the maintenance of the economic system that prevails in the latter. The same logic applies to the Southeast Asian region as a whole which, given its high level of economic cooperation with Taiwan, would be adversely affected by any economic disruption that may result from the employment of force in the reunification of Taiwan with the rest of China.

In view of the foregoing, I submit that any proposed legislation relating to Manila-Taipei relations ought not to be place-specific, and must seriously address the upgrading of essential bilateral relations within an unofficial framework.

Note, however, that steps strengthening these relations have been taken without resorting to legislation and without unnecessarily going beyond the existing framework. One is the change in name of Asectai's Taipei office to the Manila Economic Cultural Office and its Taiwanese counterpart in the Philippines from Pacific Economic and Cultural Center to Taipei Economic and Cultural Office.[68] The change in name does not alter the private character of each of these entities but the attachment of names of places is more reflective of a bilateral relationship. Another change relates to the formal passage by the Board of Investments of its Resolution No. 046 which guarantees full protection under Philippine laws to Taiwanese investors and investments.[69] Still another, and a largely unnoticed one, is a change in the Secretary of Justice's opinion on the means of compliance with the requirement in the Family Code that citizens of a foreign country wishing to obtain a marriage license in the Philippines must submit "a certificate of legal capacity to contract marriage, issued by their respective diplomatic or consular officials."[70] In an opinion rendered in 1989, the Secretary of Justice ruled that a certification by the Pacific

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[68]Manila Standard, 30 December 1989.

[69]Board of Investments Resolution No. 046, s. of 1989 (approved on 23 February 1989). The resolution states, in part, "that Taiwanese investors and investments in the Republic of the Philippines are entitled to all the basic rights and guarantees provided in the Constitution and Executive Order No. 226," and proceeded to enumerate those rights. Exec. Order No. 226 is the Omnibus Investments Code of 1987.

[70]Exec. Order No. 209 (1988), art. 21 (The Family Code of the Philippines).

Economic and Cultural Center would be sufficient compliance with the Family Code.[71] This constitutes a reversal of previous opinions which ruled that

> all Chinese nationals wishing to obtain a marriage license and to contract marriage in the Philippines are to be treated alike as citizens of the People's Republic of China by requiring them to secure a certificate of legal capacity to marry from its embassy in the Philippines.[72]

As the above provision of the Family Code illustrates, Philippine laws dealing with a foreign element do not necessarily require that for the laws of a foreign country to be given application in the Philippines, there must be diplomatic relations between that country and the Philippines. The use of the word "country" or an equivalent term in most if not all conflict of law rules[73] allows Philippine authorities to give recognition to laws applied on Taiwan, in the absence of a clear statutory intention or specification to the contrary. Thus, a proposed provision of law which specifies that "whenever Philippine laws refer a matter to the laws of the foreign entity, the law applied by such foreign entity shall be considered the applicable law for that matter"[74] carries no substantial value. A related proposal that all "Philippine laws referring to a state, government, nation or similar entity shall include, relate and apply to a foreign entity"[75] may have the unfortunate result of depriving Philippine authorities of flexibility in the implementation of national policies. For instance, the proposal may have the effect of requiring, for purposes of the Philippine immigration law, a separate quota for immigrants from Taiwan in addition to that for the PROC, contrary to the policy of construing strictly entitlement to immigration quotas.[76] A related proposal that in case "a contract, agreement or transaction calls for the application of the laws applicable in Taiwan, such laws shall refer to those applicable in Taiwan at the time said contract, agreement or transaction was signed,"[77] would insulate the contract from changes in Taiwanese law. While such a "frozen" law formula would be useful in case of a take-over

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[71]Op. of the Sec. of Justice No. 112, s. 1989. The opinion mentioned "that PECC extends assistance to Taiwanese nationals on matters involving their private affairs."

[72]Op. of the Sec. of Justice No. 113, s. 1976; and No. 226, s. 1976.

[73]See, for example: CIVIL CODE, arts. 16(2), 16(1), 17(1), 17(3), 1753, 815, 816, 817; FAMILY CODE, art. 21; CORPORATION CODE, secs. 123, 125(2), 129, 132(1), 132(2).

[74]Senate Bill No. 1823, sec. 5(2).

[75]Senate Bill No. 1823, sec. 5(1).

[76]Commonwealth Act No. 613 (1940), sec. 13, provides thus: "there may be admitted into the Philippines immigrants, termed 'quota immigrants' not in excess of fifty (50) of any one nationality."

[77]Draft House Bill accompanying ASEAN and Asia-Pacific Affairs Sub-Committee Report of 18 May 1989, sec. 8(2).

by the PROC, this may only create unwanted rigidities for current contractual transactions.

Neither can we improve on existing Philippine foreign investment laws which grant protection to foreign investors and their investments without regard for the existence or non-existence of diplomatic relations with the state of which the investor is a national. The Foreign Investments Act of 1991[78] as well as the Omnibus Investments Act of 1987[79] are of this nature.

If a law is to be passed which merely recreates Asectai or resurrects it in another corporeal form, there is no substantial change from existing arrangements. Perhaps the Taiwanese should be enlightened that they are better off with Executive Order 931, the published text of which refers not only to Taiwan but to the "Republic of China." While the Taiwan-treasured reference does not appear in the signed text, there is no one who legally is in a position to question before the courts which of the texts is the controlling one since no rights of third persons are involved. Thus, there will always be a presumption that the published text contains legislative recognition of the entity "Republic of China." In contrast, the best thing that Taiwan can get through a new law is a mere mention of Taiwan but not of the ROC.

As for visits by Philippine officials to Taiwan, the PROC should be made to understand that in our system of government, public officials, particularly members of the Congress, are free to make private or personal visits almost everywhere that pleases them. But Beijing has not shown unreasonable sensitiveness on this issue alone, if unaccompanied by other acts. Lee Kuan Yew, for instance, visited Taipei directly after his visit to Beijing in October 1990.[80] The current ban on official visits to Taiwan is counterproductive because, anyway, we cannot control the departure of our officials. That they are able to visit Taiwan, despite the ban, carries the presumption that they obtained the requisite permission, in which case, their trips can be viewed as official. But existing difficulties can be easily remedied with the repeal of Executive Order No. 313[81] which was issued by the President after she

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[78]Rep. Act No. 7042, "An Act to Promote Foreign Investments, Prescribe the Procedures for Registering Enterprises Doing Business in the Philippines, and for Other Purposes" approved on 13 June 1991.

[79]Exec. Order No. 226, as amended by Rep. Act No. 7042, approved on 17 July 1987.

[80]FAR EASTERN ECONOMIC REVIEW ASIA 1991 Y.B. 224 (1991).

[81]Approved on 17 December 1987. Among others, it prohibits visits by Philippine officials to Taiwan and Philippine officials from receiving Taiwanese officials visiting the Philippines, and prohibits official activity relating to Taiwan from being carried out without clearance from the Department of Foreign Affairs.

lost her legislative powers. Of course, officials from the Executive Department which implements Philippine foreign policy should be able to restrain themselves from making similar high-profile visits.

Another problem area is the separation of Asectai from the Department of Foreign Affairs for purposes of supervision. There is at present a bifurcation between the initiation and implementation of policies toward PROC on the one hand and toward Taiwan on the other. Furthermore, since Asectai is directly supervised by the Office of the President, the coordination of policy toward both can only take place at the Cabinet level through inter-agency committees. The lag-time between events and the requisite action may become unduly prolonged if an effort is made to conduct inter-agency consultation. On the other hand, a swift response may have to be made at the expense of coordination. But this is an administrative problem that can be readily resolved through the use of the President's powers under the Administrative Code.[82]

There has also been a failure to make it appear that all essential Philippine activities in Taiwan are conducted through Asectai. Thus, the Department of Trade and Industry has a Philippine Trade Representative in Taiwan who appears in the official government directory as if he is directly accredited to the Taiwanese government.[83] Controversies or confusion generated by perceptions that Philippine representation in Taiwan is official can be avoided if the officer concerned appears on official Philippine records as accredited not to Taiwan but to Asectai instead.

At present, too, career personnel of the Department of Foreign Affairs are not assigned to work with Asectai. But there are not enough retired career personnel or private professionals who can take care of Asectai's functions in maintaining essential bilateral relations. This is a proper area for legislation, if necessary, that would allow secondment of foreign service career personnel to Asectai, or for their formal resignation from the government while on service with Asectai without losing their government rank or privileges.[84] But since Asectai is under

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[82]THE REVISED ADMINISTRATIVE CODE OF 1987.

[83]See 1989 PHILIPPINE GOVERNMENT DIRECTORY 66 (1989) which lists the members of the Foreign Trade Service Corps.

[84]The Japanese arrangement is of this nature. "Japan severed diplomatic relations with Taiwan in 1972 and negotiated an unofficial arrangement to take their place. The Japanese set up an unofficial Interchange Association to take care of their interests in Taiwan with an office in Tokyo headed by the vice president of the Keidanren (Federation of Economic Organizations) and an office in Taipei headed by a former Japanese ambassador. Both offices were staffed by officials *on leave* from their

the president's office, government officials seconded to the president's office can be assigned to work with Asectai in the performance of its functions in Taipei without necessity for authorizing legislation.

Entering into agreements with Taiwan is also problematic since the Philippines does not have diplomatic relations with it. There is an agreement reported by the Taiwanese as having been entered into with the Philippines, the "Agreement Between the Republic of China Central Weather Bureau (CWB) and the Philippine Atmospheric, Geophysical and Astronomical Services Administration (PAGASA)."[85]

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government agencies, most of them from the Foreign Ministry." Clough, *supra* note 15, at 27 (emphasis supplied).

The mechanisms set up by ASEAN countries were described by Sheng-tsung Yan, a Taiwanese writer, in 1982 prior to Singaporean establishment and Indonesian restoration of diplomatic relations with Beijing, as follows:

> An ROC Trade Mission was established in Singapore in 1969 to conduct quasi-diplomatic functions. In return, Singapore installed its Trade Representative offices in Singapore and Taipei enjoyed almost diplomatic-like privileges and immunities. Furthermore, a great deal of high ranking officials of both countries exchanged visits, a fact *virtually unknown to outsiders*. In 1982, two way trade between Singapore and the ROC reached $726 million. All of these facts indicate that Singapore maintains close and friendly relation with the Republic of China.
>
> Indonesia and the ROC each set up its Chamber of Commerce Office in the other's capital in 1971 to take care of semi-official business . . . In the same year [1982], trade between the two countries reached $682 million.
>
> Thailand and the ROC reached an agreement in 1975 in which the Thai International Airways Office in Taipei and the China Airlines Office in Bangkok were authorized to conduct affairs such as providing travelling documents and promoting trade and tourism. Relations between Bangkok and Taipei have been further strengthened. In 1980, the ROC office in Bangkok changed its name to "The Far East Trade Office" to advance its status, while its Thai counterpart set of [sic] a separate entity "The Thai Administration Office in Taipei." Two way trade between Thailand and the ROC reached $411 million in 1982.
>
> In Kuala Lumpur, the ROC established its Far East Trade and Tourist Center in 1975 while Malaysia established the Malaysia Airlines Office in Taipei in 1977 to conduct matters of mutual concern between the two countries. It is noteworthy that two way trade reached $692 million in 1982.
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> . . . in 1975, the Philippines installed "The Asian Exchange Center" in Taipei, and the ROC "The Pacific Economic and Cultural Center Office in Manila," to administer trade, cultural, and other relations between the two countries. There was a total of $304 million in two way trade in 1982.

Book review in 2 CHINESE Y.B. INT'L L. & AFFAIRS 335-336 (1982) (emphasis supplied).

[85]It appears to be an arrangement for technical or scientific information exchange or cooperation. Described in 4 CHINESE Y.B. INT'L L. & AFFAIRS 333 (1984).

The agreement appears to be an administrative arrangement for the sharing of technical or scientific information, and thus is quite unlikely to touch raw diplomatic nerves. More substantive agreements like investment guarantee and avoidance of double taxation agreements, however, constitute an entirely different matter. If Malaysia has an investment guarantee agreement with Taiwan, as reported in the press,[86] its nature and details would be worth looking into since Malaysia recognized PROC at around the same time as the Philippines did and maintains only unofficial relations with Taipei. Indonesia's agreements with Taiwan are also instructive since they are made through purely private organizations.[87] Singapore's tax agreement with Taiwan, in the form of an exchange of letters between the Taxation Department of the Ministry of Finance, ROC and the Inland Revenue Commission, Republic of Singapore, was entered into prior to Singapore's recognition of the PROC.[88] Nevertheless, Malaysia's and Singapore's investment guarantee and double taxation agreements with Taiwan, if the former is confirmed, do not explain why Thailand, with which Taiwan has no such agreements,[89] attracts just as much Taiwanese investments as they do compared with those attracted by the Philipines.

In the case of the U.S., an elaborate mechanism in statutory form[90] had to be formulated because of the U.S. policy decision to defend Taiwan and to supply it with weapons, and because certain treaties and agreements between the two were important to Taiwan's survival.[91] But these factors were not present in the relationship between the ROC and its other supporters including the Philippines prior to derecognition of ROC.[92] Thus, the passage of a Philippine version of the U.S. Taiwan

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[86]L. Cabanes, "Investment guarantee accord with RP sought," Bulletin Today, 14 June 1991, at B-1, col. 5.

[87]For instance, the Agricultural Technical Cooperation Agreement Between the Chinese Chamber of Commerce to Jakarta and the Indonesian Chamber of Commerce to Taipei (East Java) and (Yogyakarta) of 26 October 1979 and 7 November 1980, respectively. Reported in 1 CHINESE Y.B. INT'L L. & AFFAIRS 192 (1981).

[88]Signed on 30 December 1981; reported in 2 CHINESE Y.B. INT'L L. & AFFAIRS 343 (1982). A previous agreement was signed on 18 September 1979 for reciprocal exemption from income and business tax derived from operation of air transport. 1 CHINESE Y.B. INT'L L. & AFFAIRS 193 (1981).

[89]Testimony of then Foreign Affairs Secretary Manuel Yan, Minutes of the House of Representatives Committee on Foreign Affairs Meeting of 17 October 1989, at p. 4.

[90]The U.S. Taiwan Relations Act.

[91]Clough, *supra* note 15, at 26.

[92]This was noted in Japan's case: "Unlike the United States, Japan had taken no responsibility for Taiwan's security. None of the government-to-government agreements between Japan and the Republic of China was vital to Taiwan's survival nor was special legislation required to permit substantive relations between Japan and Taiwan to continue with little change. Japan has no Taiwan Relations Act; it was able

Relations Act this late in the day would only underline the Philippine's vulnerability to foreign "greenmail" and undermine further its standing in the region and in the larger community of nations.[93]

4. The Framework Under Stress: Approaches to the Fisheries and Navigation Disputes

Consistent with its foreign policy objectives, Taipei views the fisheries and navigation disputes with the Philippines as an opportunity for elevating its international legal status. Thus, the Taiwanese have bannered the consultation meeting held in Manila on 21-22 May 1991 between representatives of the Philippines and Taiwan as the first government-to-government contact in sixteen years between the two countries. But, laying aside the foreign policy aims of Taiwan, its legal position on the use of ocean space is worthwhile examining vis-a-vis the Philippines' own position. The following discussion is confined to a consideration of Manila-Taipei fishing and navigation disputes in the area near or along the Bashi Channel.

4.1. Philippine Maritime Zones Legislation

The legal articulation of the Philippine position came earlier than Taiwan's and there is basis for the view that Taiwan defined its position on certain aspects of the law of the sea in response to actions taken by the Philippines. The basic law which implements the Philippine view under its Constitution of the maritime territory subject to its sovereignty is Republic Act No. 3046[94] which defines the baselines of the territorial sea and treats all waters seaward of the baselines "but within the boundaries set forth in the . . . treaties"[95] as comprising the

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to ensure continuation of the relationship through changes in administrative regulations." Clough, *supra* note 15, at 28.

[93]According to press reports, "[t]he majority of the 28 remaining envoys accredited to Taiwan come from small developing nations in Latin America and Africa," and the Saudi Arabian recognition of the PROC in July 1990, as well as that of Indonesia and Singapore, "raised the question of how much longer South Korea and South Africa would stay with Taipei since diplomats say that both countries' long-term interests lay with mainland China." FAR EASTERN ECONOMIC REVIEW ASIA 1991 Y.B. 223 (1991).

[94]Passed in 1961. As amended by Rep. Act No. 5446.

[95]The first preambular paragraph of the law enumerates the treaties as follows: the Treaty of Paris concluded between the U.S. and Spain on 10 December 1898, the treaty concluded at Washington between the U.S. and Spain on 7 November 1900, and the treaty concluded between the U.S. and Great Britain on 2 January 1930. In addition to the territory defined in these treaties, the national territory includes "all the territory over which the Government of the Philippine Islands exercised jurisdiction at the time of the adoption of the [1935] Constitution."

territorial sea of the Philippines.[96] I have not come across documents expressing the views of the government on Taiwan regarding the Philippines baselines law and its claim to historic waters, but, as at least one book suggests,[97] it must have found anomalous that waters nearer to Taiwan than to the Philippines were claimed by the Philippines for itself. The Taiwanese can take the maximalist position that since no other state recognizes the extensive Philippine claim, the claim holds no water. Taiwan and the Philippines, however, are both aware of the Chinese claim to historic waters that, if taken seriously, would convert the South China Sea into a "Chinese lake."[98]

In 1978, the Philippines declared a 200-mile exclusive economic zone.[99] At that time, the concept of an economic zone was consolidated in the Third United Nations Conference on the Law of the Sea, and the Philippine EEZ law was based on the ideas that had emerged in the Conference.[100]

Newspaper reports mention, however, that the Philippines has a twelve-mile territorial sea. Clarifications, therefore, are in order: First, a twelve-mile territorial sea is provided for in the United Nations Convention on the Law of the Sea,[101] not under Philippine law. Second, since the Philippines claims a territorial sea more extensive than twelve miles, the Philippines would be renouncing such a claim if it opts for the twelve-mile territorial sea instead.[102] Third, twelve miles is a maximum limit.[103] Thus, since non-declaration does not automatically grant the coastal state the entire breadth of twelve miles, a state has to declare the breadth of its territorial sea. The Philippines does not appear ready to do the latter at this point.

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[96]Fourth preambular paragraph, Rep. Act No. 3046.

[97]ATLAS FOR MARINE POLICY IN SOUTHEAST ASIAN SEAS 50 (Morgan and Valencia eds. 1983)

[98]See Figure 1 reproduced from a map of the People's Republic of China. An extreme Chinese interpretation is that all the waters within its international boundaries indicated in the map, brushing close to the South China Sea shoreline of Luzon and Palawan islands, are part of Chinese territory. The minimum Chinese position is that all the islands found within those boundaries are Chinese territories, which islands may generate maritime zones.

[99]Pres. Decree 1599. Issued on 11 June 1978.

[100]The second preambular paragraph of Pres. Decree 1599 states, thus: "Whereas, such a zone is now a recognized principle of international law."

[101]A/CONF.62/122. 7 Oct. 1982 [hereinafter UNCLOS].

[102]A corollary question is: Can the government renounce it? It is interesting to note that the reference to the territorial sea up to the treaty limits is found only in the preambular paragraphs of Rep. Act 3046, not in the main body of the law itself. Its main sponsor, then Senator Tolentino, expressed the view that the government could change its mind on this.

[103]UNCLOS, art. 3.

4.2. Taiwanese Maritime Zones Legislation

On 6 September 1979, or just more than a year after the Philippines declared its EEZ, the Executive Yuan of the ROC declared that the "territorial sea of the ROC should be measured from the baselines and shall extend to the outer limits of the water area of twelve nautical miles from such baselines"[104] and its exclusive economic zone "shall be measured from the baselines from which the territorial sea is measured and shall extend to the outer limits of the water area of two hundred nautical miles from such baselines."[105] On 30 April 1981, Taiwan also passed a statute entitled "Measures for Strengthening the Control over Fishing Vessels and Fishermen"[106] which imposes sanctions on Taiwanese fishing vessels which illegally enter foreign territorial sea or economic zone[107] and those "which violate an international fishery agreement or a cooperation contract."[108]

But, while claiming a territorial sea and exclusive economic zone drawn from its baselines, Taiwan has not publicly adopted those baselines yet. And the method for determining China's baselines as announced by the PROC (using exclusively straight baselines method) differs from that announced by Taiwan (a combination of 75% straight baselines and 25% normal baselines).[109] Experts point out that the Philippine claim to historic territorial waters extending up to the "treaty limits" and the claims to an exclusive economic zone by Taiwan would overlap in "a huge triangular-shaped area in the Bashi Channel."[110] If the Philippines were to give up its claim to historic waters and settle for a twelve-mile territorial sea and a 200-mile exclusive economic zone, there still would be an overlap of its EEZ with that of Taiwan. But, in the area covered by the EEZ of either country, foreign vessels would enjoy freedom of navigation[111] although they are

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[104]1 CHINESE Y.B. INT'L L. & AFFAIRS 151 (1981).

[105]*Id.* at 152.

[106]The main points are reproduced in *id.* at 152-153.

[107]*Id.* at 152.

[108]*Id.* at 153.

[109]Nien-Tsu Alfred Hu, "The 1982 UN Law of the Sea Convention: Current Problems and Issues to the Republic of China." Draft of a paper presented at the 1991 SEAPOL Workshop on the entry into force of the Law of the Sea Convention, 27-29 May 1991, Chiang Mai, Thailand.

[110]D. JOHNSTON & M. VALENCIA, PACIFIC OCEAN BOUNDARY PROBLEMS 83 (1991); Morgan and Valencia, *supra* note 97, at 50.

[111]Sec. 4 of Pres. Decree 1599 provides, thus: "Other states shall enjoy in the exclusive economic zone freedoms with respect to *navigation* and overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea relating to navigation and communications." (Emphasis supplied) The Taiwanese

not entitled to fish in the same area. From the Taiwanese standpoint, therefore, the EEZ regime would at least ease their navigation problems.

4.3. The Controversy and the UNCLOS

Newspaper reports have cited the applicability or non-applicability of the UNCLOS to the conflicting claims of the Philippines and Taiwan. But while the UNCLOS contains rules governing the EEZ, UNCLOS is not yet in force.[112] Some of its provisions, however, may be declaratory of existing customary rules of international law. In fact, a big problem is determining which UNCLOS rules are customary; although, whether or not the UNCLOS rules on the EEZ form part of customary international law, Philippine and Taiwanese municipal legislation on the EEZ, which antedated the adoption of the UNCLOS in 1982, constitute independent bases for their respective EEZ claims.

Taiwan, which is neither a signatory to nor a ratifier of the UNCLOS, has opted to have the best of all worlds by choosing from among the UNCLOS provisions those that are most favorable to its interests. This approach is suggested by the comments of ROC Foreign Minister Chu Fu-sung before the Committee on Foreign Affairs of the Legislative Yuan:[113]

> In the past we participated in various maritime conferences, but since our withdrawal from the United Nations [in 1971, we have been unable] to participate in these conferences. Consequently, we did not participate in signing [the 1982 United Nations] Convention on the Law of the Sea . . .
>
> This convention includes a lot of articles and is an important convention among general international conventions. Our country . . . is located within an ocean region; therefore after its entry into force, this Convention would have far reaching effects on our country. . . . After the Law of the Sea Convention enters into force, our attitude is that in principle we will comply with its terms. However, because of the region in which we are located and because our political environment differs from those of other countries, so *we must have certain*

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declaration on the EEZ, on the other hand, states: "Other states may enjoy in the exclusive economic zone of the Republic of China the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and engage in such other activities with respect to navigation and communication as permitted by international law." Paragraph 2(3) reproduced in 1 CHINESE Y.B. INT'L L. & AFFAIRS 152 (1981).

[112]As of 30 December 1990, 45 states have signed the Convention but 60 states must ratify it before it can enter into force.

[113]2 CHINESE Y.B. INT'L L. & AFFAIRS 248 (1982) (emphasis supplied).

> *reservations and [special considerations with respect to] some aspects [of the Convention]*. We are still studying the problem. (*Li-fa Yuan kung-pao* (Gazette of the Legislative Yuan), Vol. 72, No. 38 (May 11, 1983), pp. 109, 111.)

While the foregoing statement is expressly premised on the Convention's entry into force, the Taiwanese position at present appears to be no different as we shall see below.

The Philippines, on the other hand, has signed and ratified the Convention, although it has not brought its domestic laws into line with the Convention. In case of a conflict between the Convention and domestic laws, the latter, therefore, and not the UNCLOS, are the ones which the government is obliged to follow. This is pursuant to the understanding made by the Philippines upon signature and confirmed upon ratification of the UNCLOS that

> The Convention shall not be construed as amending in any manner any pertinent laws and Presidential Decrees . . .; the Government of the Republic of the Philippines maintains and reserves the right and authority to make any amendments to such laws, decrees or proclamation pursuant to the provisions of the Philippine Constitution . . .[114]

Acceptance of the UNCLOS by the Philippines in its discussions with Taiwan would open the way for arguments in support of the following: (1) the exercise of fishing rights by Taiwanese fishermen in so-called traditional fishing grounds within archipelagic waters; (2) the pushing back of the outermost extent of the northern part of the Philippine EEZ with the application of either the principle of equidistance or that of equity[115] in resolving overlapping EEZ claims under Article 74 of the UNCLOS; and (3) possible participation by Taiwanese fishermen in the utilization of resources in the Philippine EEZ under Article 62(2) of the UNCLOS. The Philippine Constitution would forbid direct utilization of fisheries resources by foreigners, but if the UNCLOS served as the take-off point for discussions, there would arise stronger foreign pressure to formulate arrangements that would indirectly achieve this. Under the Philippine Constitution, fishing within the territorial sea is limited only to Filipino citizens.[116] Overlapping part of this vast area, though in certain places going beyond it, is the Philippine exclusive economic zone whose utilization,

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[114]Paragraph 5 of the Declaration of 10 December 1982.

[115]The use of equity involves consideration of various factors including historic use of fishing grounds, navigation, security, and traditional maritime treaties.

[116]Art. XII, sec. 2(2).

under the Philippine Constitution, is also reserved to Filipino citizens.[117]

Taiwan was reported to have forwarded the view that the Sulu Sea, Pacific Ocean and the Mindanao Sea are "traditional fishing grounds" of Taiwanese fishermen.[118] The basis for this Taiwanese argument is the UNCLOS, Art. 51(1) of which provides that an archipelagic state

> shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring 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.

As Hasjim Djalal of Indonesia has explained, however, the concept of "traditional fishing rights" contains four elements relating to "the fishermen themselves, their equipment, their catch, and the area of their fishing activities."[119] He went on to state the following:

> (1) The fishermen in order to be protected under this category must have been fishing for a sufficient length of time in the area; thus, newcomers could not be regarded to have "traditional fishing rights". (2) Their equipment must be sufficiently "traditional", thus, fishermen using modern technology could not be regarded as falling under the definition of 'traditional fishing rights'; otherwise, local and poor fishermen using traditional equipment would be placed at a tremendous disadvantage. (3) Since the catch of "traditional fishing" is normally not very substantial, the notion of "traditional fishing right" excludes the possibility of a sharp increase in the catch by using modern equipment and methods or by establishing large-scale joint ventures with "non-traditional" fishermen. (4) The area or the fishing ground of traditional fishing rights must have been frequented for a sufficient length of time; the area, therefore, should be relatively easy to determine by observing the actual practice.

The Philippines must therefore oppose the Taiwanese position that appears to bank for support on the argument that certain UNCLOS provisions are customary rules. Taking a more narrow approach, the Philippines can insist on the inapplicability of the traditional fishing rights concept to Taiwanese fishermen who are well-supplied with modern fishing equipment. That there is "a long history of unregulated

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[117]Art. XII, sec. 2(2).

[118]"Taiwan request rejected," New Chronicle, 22 May 1991, at 1.

[119]Djalal, *Indonesia and the New Extension of Coastal State Sovereignty and Jurisdiction at Sea*, in JOHNSTON, REGIONALIZATION OF THE LAW OF THE SEA 283, 284 (1978).

fishing on both sides of the Luzon Strait"[120] should not be taken to mean that thereby these fisheries have been converted into traditional fishing grounds of foreign illegal fishermen. While the Philippines has been unable fully to enforce its fisheries and navigation laws, it has consistently proceeded against violators apprehended in its territorial sea and EEZ.

Article 74 of the UNCLOS contains guideposts for resolving overlapping EEZ claims. Article 74 states, in part as follows:

> 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 cooperation, 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 arrangements shall be without prejudice to the final delimitation. (Emphasis supplied).

Note, however, that both Philippine and Taiwanese legislations provide rules which partly refer to international law for the resolution of overlapping EEZ claims. The relevant provision of Pres. Decree No. 1599 provides, thus:

> where the outer limits of the zone as thus determined overlap the exclusive economic zone of an adjacent or neighboring state, the common boundaries shall be determined by agreement with the state concerned or in accordance with pertinent generally recognized principles of international law on delimitation.[121]

The Taiwanese declaration, on the other hand, provides the following:

> Where the exclusive economic zone of the Republic of China extends over any part of the exclusive economic zones as proclaimed by other states, the boundaries shall be determined by agreement between the states concerned or in accordance with generally accepted principles of international law on delimitation.[122]

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[120]Baum, "Low breaking strain," FAR EASTERN ECONOMIC REVIEW 15, 23 May 1991.

[121]Proviso found in sec. 1.

[122]Paragraph 2(2) reproduced in 1 CHINESE Y.B. INT'L L. & AFFAIRS 152 (1981).

Both legislations talk of states; hence, since the Philippines does not recognize the ROC as a state, the above laws can only serve as guidelines for negotiating an effective arrangement between the two parties.

In the EEZ, the utilization of living resources, particularly fisheries, is regulated by the UNCLOS. Article 62 states, in part, as follows:

> 2. The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements . . . *give other States access to the surplus of the allowable catch.*

While the coastal State, in giving access to other states to its EEZ, can take into account *the significance of the living resources of the area to its economy and its other national interests,*[123] it must also take into account "the requirements of developing States in the subregion or region in harvesting part of the surplus and the need *to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.*"[124]

Foreign fishing vessels which violate the coastal state's regulations applicable to the EEZ cannot, under the UNCLOS, be imposed the penalty of imprisonment or any other form of corporal punishment "in the absence of agreements to the contrary by the States concerned."[125] In addition, although the coastal state is empowered to take such measures, including boarding, inspection arrest and judicial proceedings, to enforce its laws on the EEZ adopted in conformity with the Convention,[126] arrested vessels and their crews "shall be promptly released upon the posting of reasonable bond or other security."[127]

The UNCLOS provisions cannot be invoked by Taiwan because it is not a party to the Convention, and the Convention is not yet in force. The Taiwanese, like the U.S., cannot be allowed to choose provisions of

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[123]UNCLOS, art. 62(3) (emphasis supplied).

[124]UNCLOS, art. (62)3 (emphasis supplied).

[125]UNCLOS, art. 73(3).

[126]UNCLOS, art. 73(1).

[127]UNCLOS, art. 73(2). But see Pres. Decree No. 1599, sec. 5(b) which imposes for acts violating its provisions on the EEZ a fine or imprisonment ranging from six months to ten years, or both, in the court's discretion. Vessels and other equipment or articles used in connection with the offense are subject to seizure and forfeiture.

the UNCLOS which are favorable to it and label these as customary rules of international law. The Philippines must take the position that since the UNCLOS was negotiated as a package deal involving *quids pro quos*, its new provisions cannot give rise to customary rules. A state which desires to invoke them must become a party to the Convention; otherwise, the Philippines, like other states-parties to the Convention will have given up precious *quids* without receiving any *quos* of value in return. The starting point in any discussion of a *modus vivendi* with the Taiwanese, therefore, should be the existing laws of the Philippines, not the UNCLOS.

Under Rep. Act 3046 as amended, innocent passage of foreign vessels within the territorial sea (from the baselines up to the treaty limits) is allowed, but Philippine practice requires prior notification of or authorization by the coastal state. Even the UNCLOS recognizes the coastal state's power to

> adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following: x x x (e) the prevention or infringement of the fisheries laws and regulations of the coastal State[128]

The least the Philippines can do, if it does decide to designate sealanes through its historic territorial sea, is formally to retain the notification or authorization requirements no matter how difficult to implement these might be. An interesting example of a prior notification requirement is that agreed upon between Papua New Guinea and the U.S. which states, in part, that "United States fishing vessels will give 24 hours advance notice of all entries and exits into and from the territorial waters in transit to and from the archipelagic waters."[129] Other special rules and regulations can also be adopted to ensure that the passage of foreign fishing vessels remain innocent such as the storage of nets while the vessel is in transit.[130]

The Philippine government was reported to have decided to establish sealanes through which all foreign vessels may exercise the right of innocent passage -- a concession that would provide Taiwanese

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[128]UNCLOS, art. 21.

[129]The Exchange of Notes between Papua New Guinea and the U.S.A. Concerning Certain Requirements Within Archipelagic Waters of 25 March 1987. *See* NEW DIRECTIONS IN THE LAW OF THE SEA, Release 88-1, P. Fisheries. Compiled and edited by K. Simmonds. Copy made available to the writer by Dr. Barbara Kwiatkowska, Director of the Netherlands Institute on the Law of the Sea.

[130]R. CHURCHILL AND A. LOWE, THE LAW OF THE SEA 66 (1983; with addenda, 1985).

fishing fleets with access routes to international fishing grounds.[131] Such sealanes, however, must not be within the baselines established under Republic Act 3046. Sealanes within the waters landward of the baselines may be seen as partaking of the nature of archipelagic sealanes[132] introduced under the UNCLOS, a concept that considerably clips the powers of the Philippines over foreign vessels passing through waters currently treated as internal waters under its laws. Should we agree to the formal establishment of internal sealanes, we would have allowed the Taiwanese to pick at will the choice cuts from UNCLOS.

4.4. Related Issues

The problem arising from the arrest of Taiwanese vessels and fishermen who illegaly enter Philippine internal waters or fish in areas exclusively reserved for Filipinos is a problem that also afflicts other ASEAN countries, as well as other coastal states in the world which have rich fishing grounds.[133] But there is no reason why, knowing the difficulties that Filipino fishermen have experienced in the hands of governments of other states, the Philippines cannot agree to discuss ways of effectively regulating would-be violators while extending assistance to those who find themselves drifting in distress in Philippine waters. The Philippines should also upgrade its marine law-enforcement capability in order to cope with illegal fishermen which are said to include "illegal tuna catchers involving some 50 foreign vessels operating off western Luzon" and who "are believed to be hauling more than 20,000 metric tons of tuna, valued at P1 billion annually."[134] The acquisition of six French-made warships costing 2 billion dollars by the Taiwanese should raise grave concern on the part of the Philippines as these can be used to challenge Philippine maritime claims, or support fishing claims of Taiwanese fishermen.[135]

Discussions and negotiations, however, can be very well carried out within the existing unofficial framework. Various agreements between Taiwan and other countries with whom Taiwan has no diplomatic relations have been unofficially entered into. The legal enforceability against the Philippine government of such agreements are at best doubtful, but the obligations they set forth can be made binding

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[131]"Taiwan sea lane granted," New Chronicle, 6 June 1991, at 11.

[132]UNCLOS, Part IV, arts. 46-54.

[133]*See, e.g.*, Kuen-Chen Fu, *Trespassing Taiwanese Fishing Vessels in Some ASEAN States' Waters*, U. BRITISH COLUMBIA L. R. 110 *et seq.* (1990).

[134]"Foreign boats poach on RP fishing areas with impunity," Bulletin Today, 11 June 1991, at B-1, col. 8.

[135]"France to sell 6 warships costing $2B to Taiwan," Bulletin Today, 22 June 1991, at 4, col. 7.

unilaterally in the domestic plane by the government whose interests are embodied in the agreement. In the end, what matters is that both parties implement an agreement regardless of its status under international or domestic law or the means employed by each party under its domestic law to implement it. It is necessary, however, for the Philippines to impress upon Taiwan that the former places importance on the unofficial process, and that it can be relied upon to observe its unofficial commitments.

It is also important to remind ourselves in our ongoing interaction with the Taiwanese that we should not lose sight of the PROC's presence in the background. The PROC supports the same Chinese maritime and other territorial claims pushed by Taiwan. The ongoing controversy between Taiwan, supported by PROC, and the Japanese over some islands illustrates this point. The claims of the PROC in the South China Sea are based to a large extent on the claims previously articulated by the Nationalist Chinese government.

5. Conclusion

There is no compelling necessity for retelling the individual conclusions reached in particular portions of the foregoing discussion, except perhaps for a few general observations. First, bilateral relations between Manila and Taipei must continue to be conducted within an unofficial framework; that framework should be the bottom line. There is a need, however, for the Philippine government to accord full significance to this unofficial framework, and thereby convince Taiwanese authorities of the importance we attach to it. Second, Manila-Taipei bilateral relations must be upgraded to reflect changing realities within the framework of unofficial but essential relations. On the other hand, there is a need to reassure the PROC that Philippine relations with Taiwan will remain to be conducted, as that of most countries, on an unofficial level. The Philippines and its officials must acquire particular sensitivity to the PROC's concern, not so much that relations with Taiwan are not official, but that they formally appear to be so. Our neighbors in ASEAN have developed that sensitiveness and have thus avoided, unlike the Philippines, irritants in their relations with the PROC while pursuing unfettered bilateral relations with Taiwan. The simultaneous presence of representatives of the PROC and Taipei, China in the Asian Development Bank is but an example of PROC's primordial concern for form.[136] In the past, the Philippines has tried to circumvent the unofficial framework; thus, there is a need to rechannel the implementation of governmental policies relative to

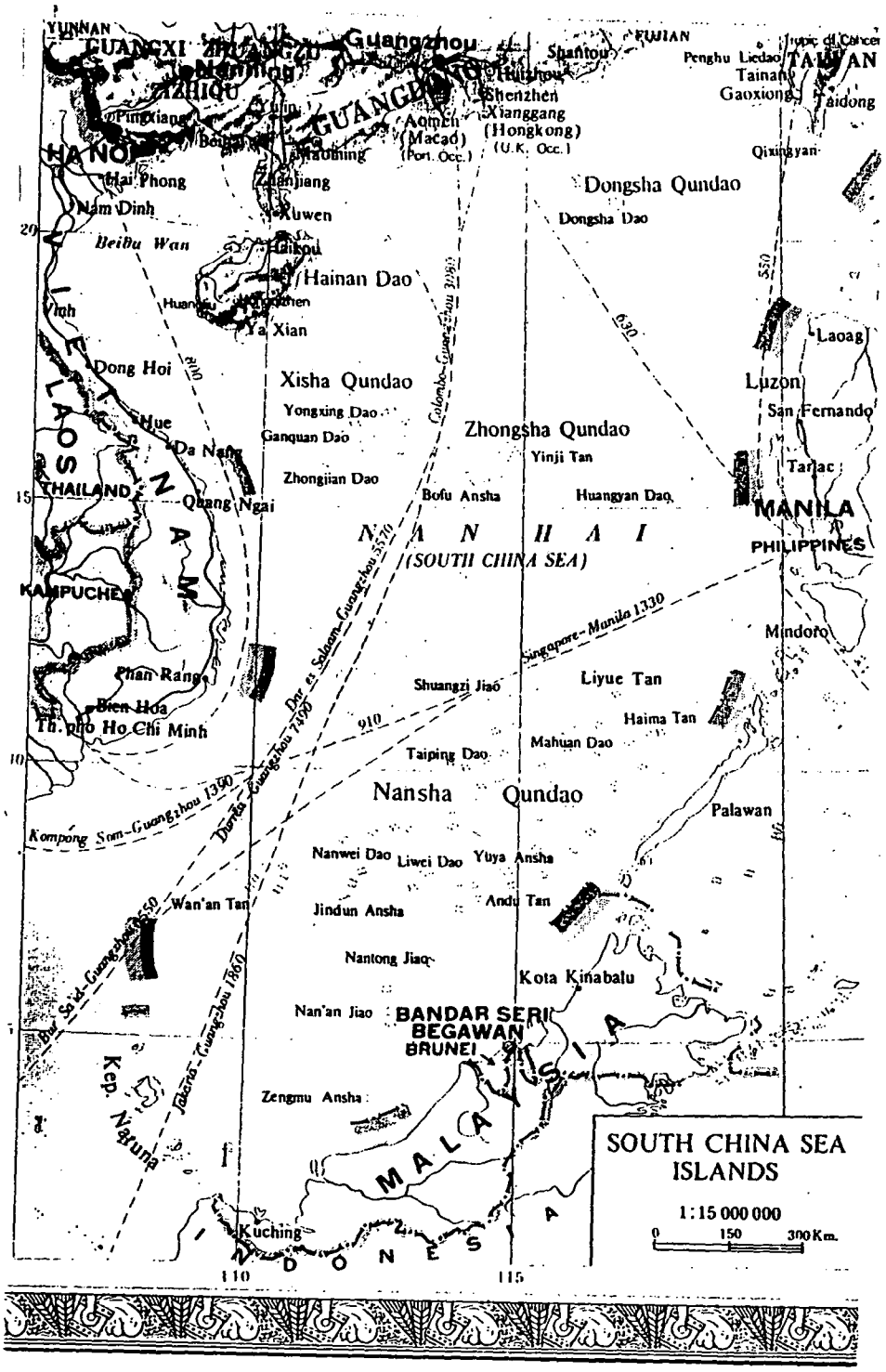
[136]Membership in the ADB is open to "countries," not necessarily limited to states.

Taiwan through this mechanism. There is also a need to upgrade the quality of personnel in Asectai so that it can fully perform its functions. Taiwan needs to be reassured that for as long as the Philippines shares strong mutual interests with it, the unofficiality of their relations would not in any way detract from their essential character.

Second, this unofficial framework can effectively serve as the mechanism for resolving current navigation and fishing disputes with Taiwan. Discussions between Manila and Taipei can be carried out by their representatives accredited to their respective unofficial missions. In the discussions, the Philippine Constitution and prevailing domestic laws shall serve as the Philippine delegation's terms of reference. A state-to-state agreement arising from such discussions is out of the question; the Philippines and Taiwan, however, can take unilateral steps to implement an unofficial agreement. On the Philippine side, the President as commander-in-chief of the armed forces can give instructions to the navy on the implementation of that agreement; she can also issue similar orders to other law-enforcement agencies.

Taiwan, on the other hand, has to begin behaving like the newly industrialised country that it is. Taiwan has to develop rational development aid and trade and investment policies relative to the Philippines, and abandon a long-formed habit of using these exclusively for extracting concessions from the other party. It must acquire sophistication in the promotion of its interests in the Philippines and expand the range of its contacts among the Philippine population. For instance, if Taiwan is to be taken seriously about sharing its experience in land reform, it ought to accelerate contacts with community-based non-governmental organizations working with farmers, not with those who, because of their interest in the existing backwardness of the economy, are opposed to a land reform program on the Taiwanese scale. Much more also can be done to promote non-economic exchanges, such as academic, professional and other forms of educational, scientific and cultural interaction.

Finally, the Filipino electorate should exert pressure on Philippine politicians to place the national interest above all else and to behave in a manner that would induce respect for Philippine foreign policy positions. For as long as there are officials who grovel before foreigners in order to obtain access to resources with which to advance their petty interests in Philippine politics, foreigners will retain serious doubts about the reliability and consistency of the Philippines in foreign relations. The approach of the 1992 elections can be an opportunity for bringing about a qualitative change, and a positive one, in that aspect of our relations with Taiwan.



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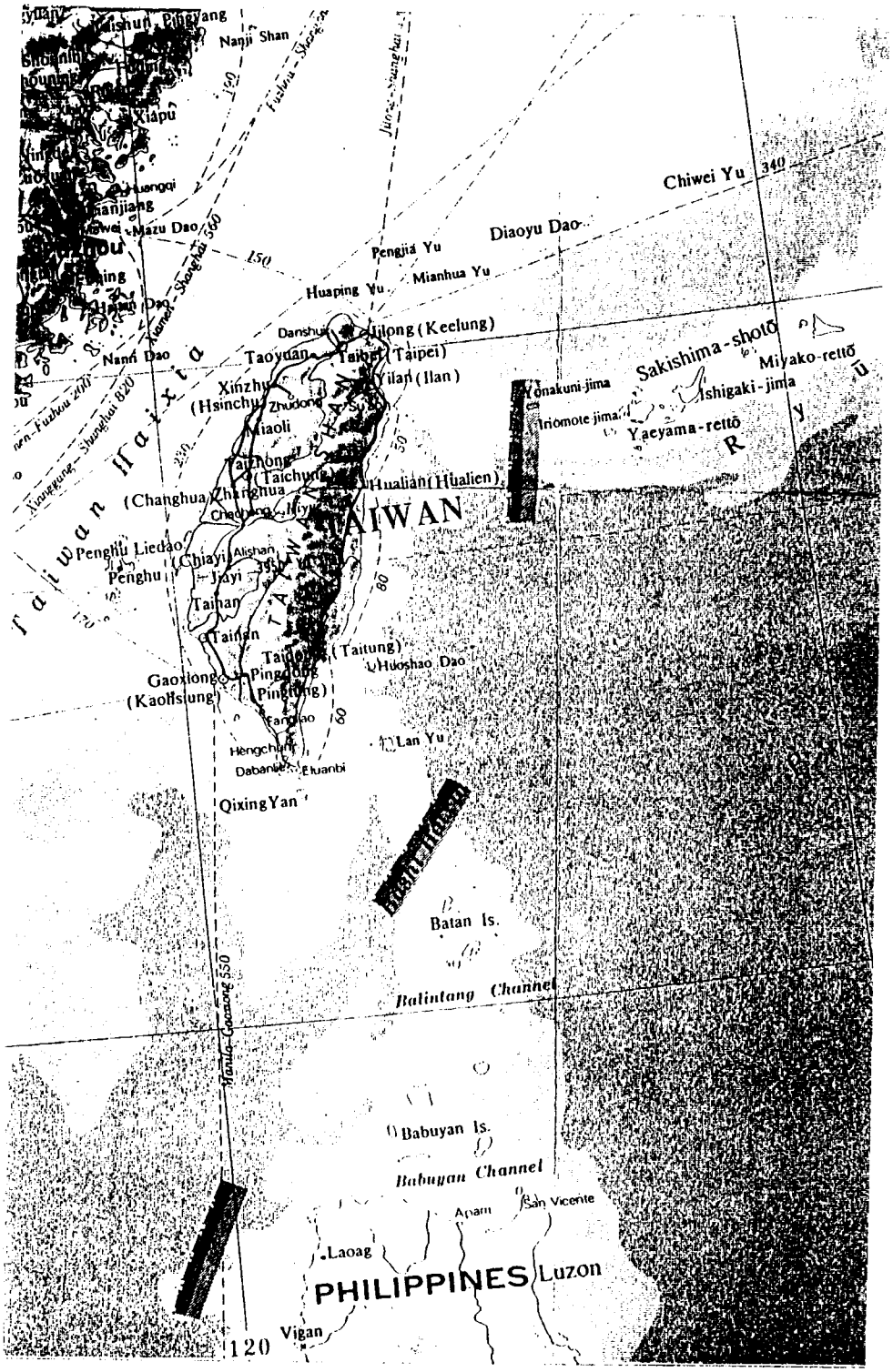
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