THE MARITIME TERRITORIES AND JURISDICTIONS OF THE PHILIPPINES AND THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA*

*Jay L. Batongbacal***

I. INTRODUCTION

The entry into force of the United Nations Convention on the Law of the Sea last November 16, 1994 has created an internationally recognized legal framework for management of the oceans of the planet having the support of a great majority of nation states. The Philippines is a mid-ocean archipelago with definite maritime interests, straddling the Pacific Ocean, South China Sea and Celebes Sea, as well as enclosing the Sulu Sea, at the crossroads of international shipping, and within a unique nexus of maritime interests of foreign nations. And yet, since the time it signed the Convention in 1982, no concrete action for implementation has been taken in response to its eventual entry into force.

The main issue that has prevented the implementation of the Convention has been its impact on the national territory. This paper intends to delve into this issue by giving an overview of the development of our national territory laws, and the historical context for the introduction of the Convention. Thereafter, the impact of the Convention in the light of the current state of the law is briefly discussed, and recommendations are made on what needs to be done. It is hoped that by this examination, serious discussion may be provoked as to what steps the Government should take in order to see its way out of what will be shown to be an intricate legal and historical problem.

---

* Another version of this article was previously published by the UP Center for Integrative Development Studies under the title "Revisiting the Maritime Territories and Jurisdictions of the Philippines" in Public Policy: January-June 2001, Vol. 4, No. 1. The author would like to express his gratitude to the Office of the National Security Adviser under then Sec. Alexander Aguirre, for its support for this research.

** B.A. Poli. Sci., (1987); LL.B., University of the Philippines (1991); M.M.M., Dalhousie University, Canada (1997); Research Fellow, UP Archipelagic and Ocean Studies Program; Executive Director, Philippine Center for Marine Affairs, Inc.

A. THE PRE-SPANISH PERIOD

In the pre-Spanish period, the country was inhabited in villages scattered among the islands. Chronicles of the Spanish expeditions show that the islands were already inhabited and teeming with activity, with the people organized under village governments.[1] But it is not clear how such governments conceptualized their territories, which apparently extended a short distance from their shores as far as their boats could reach. When Miguel Lopez de Legazpi and his lieutenants arrived in Cebu and Manila, for example, his ships anchored offshore and required permission from the natives before making any landing, indicating an awareness of and respect for the degree of control exercised by the inhabitants over those waters.[2] However, this may have also been merely in accordance with accepted maritime practices at that time with respect to landing in unknown inhabited territories.

B. THE SPANISH PERIOD

It was during the consolidation of Spanish sovereignty over the country that the concept of the Philippines as a single territorial entity emerged, called the *Islas Filipinas* or Philippine Islands. The appellation itself bears significance, for it indicates that the Spanish sovereigns treated the islands as territories, but gave less or no importance to the waters around and between them. This is consistent with the Western concept of territory, which originally referred only to the land and not the sea.

The extension of a state's territory from the shoreline to a certain distance seawards had gained acceptance in the international law at the time, under what was known as the "cannon-shot rule." According to this rule, the distance to which a state may lawfully extend its exclusive dominion over the sea adjoining its territories, and beyond those portions of the sea embraced by its harbors, extended as far as its cannons could reach. Up to the late 1800s, this distance was accepted by a large number of European states to be one marine league (about 3 geographic miles) from the low water mark.[3]

---

[1] VICENTE ALBANO et. al., FOUNDERS OF FREEDOM 10-17 (1971).

[2] *Id.* at 9-10.

[3] However, this was not a universally accepted concept at the time. Up until the 1950s, countries claimed varying distances for different reasons. Many claimed three miles, others four, some 12, and in the case of South American countries, 200 miles. It was only after the First Law of the Sea Conference in 1958 that the majority began gravitating towards either three or 12 nautical miles. *See* ROBIN ROLF CHURCHILL & ALAN VAUGHAN LOWE, THE LAW OF THE SEA (2nd ed. 1988). *See also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 187-189 (4th ed. 1990).

The Spanish Law of Waters of 1866 became effective in the Philippines in 1871.[4] Included in this law was a provision which stated that:

> Art. I. The following are part of the national domain open to public use:
>
> ....
>
> 2. The coast sea, that is, the maritime zone encircling the coast, *to the full width recognized by international law.* The State provides for and regulates the police supervision and uses of this zone, as well as the right of refuge and immunity therein, in accordance with law and international treaties.[5] [Italics supplied.]

It would appear, therefore, that during its reign, the Spanish Crown regarded the Philippine territory to extend about three miles from the low water line around each of the islands of the archipelago. But this breadth was dependent on the international community as a matter of international law.

C. THE AMERICAN COLONIAL PERIOD

In the aftermath of the Spanish-American War, the Philippines was ceded to the United States in the *Treaty of Paris* of 1898.[6] Article III of the treaty states:

> Spain cedes to the United States the archipelago known as the Philippine *Islands*, and comprehending the *islands* within the following line:
>
> A line running from west to east along or near the twentieth parallel of north latitude, and through the middle of the navigable channel of Bachi, from the one hundred and eighteenth (118th) to the one hundred and twenty seventh (127th) degrees meridian of longitude east of Greenwich, thence along the one hundred and twenty seventh (127th) degree meridian of longitude east of Greenwich to the parallel of four degrees and forty five minutes (4°45') north latitude, thence along the parallel of four degrees and forty five minutes (4°45') north latitude to its intersection with the meridian of longitude one hundred and nineteen degrees and thirty five minutes (119°35') east of Greenwich, thence along the meridian of longitude one hundred and nineteen degrees and thirty five minutes (119°35') east of Greenwich to the parallel of latitude seven degrees and forty minutes (7°40') north, thence along the parallel of seven degrees and forty minutes (7°40') north to its intersection with the one hundred and sixteenth (116th) degree meridian of longitude east of Greenwich, thence by a direct line to the intersection of the

---

[4] Kok Wing v. Philippine National Railways, 54 Phil. 438 (1930).

[5] Villongco v. Moreno, G.R. L-17240 (1962); The full text of the provision may be found *in* RAMON AQUINO and CAROLINA GRIÑO, LAW OF NATURAL RESOURCES 425 (1957).

[6] Treaty of Peace Between the United States of America and the Kingdom of Spain (Dec. 10, 1898), *in* THE PHILIPPINE NATIONAL TERRITORY, Doc. 10, 32-37 (Raphael Perpetuo M. Lotilla ed., UP Institute of International Legal Studies and Foreign Service Institute, 1995) [hereinafter PNT].

> tenth (10th) degree parallel of north latitude with the one hundred and eighteenth (118th) degree meridian of longitude east of Greenwich, and thence along the one hundred and eighteenth (118th) degree meridian of longitude east of Greenwich to the point of the beginning. [Italics supplied.]

The line described an irregular rectangle surrounding the country's main islands,[7] but did not include some of what are now the southernmost islands of the Mindanao such as Sulu and Sibutu as well as a large triangular portion of the Sulu Sea extending to roughly where the Tubbataha Reef is located. In the subsequent *Treaty of Washington* of 1900, supplementing the Treaty of Paris, a singular article stated that

> Spain relinquishes to the United States all title and claim of title, which she may have had at the time of the conclusion of the Treaty of Peace of Paris, to *any and all islands* belonging to the Philippine Archipelago, *lying outside the lines* described in Article III of that Treaty and particularly to the islands of Cagayan, Sulu, and Sibutu and their dependencies, and agrees that all such *islands* shall be comprehended in the cession of the Archipelago as fully as if they had been expressly included within those lines.[8] [Italics supplied.]

The wording of the treaties refers clearly only to the islands and did not specifically refer to the waters within. This was consistent with the previous Spanish practice that did not consider the waters beyond three miles from the island shoreline as part of the territory. The inclusion of islands outside of the lines of the Treaty of Paris in the cession to the United States would also indicate that the lines described by Art. III were not regarded as territorial boundaries. If they were, then it would be inconsistent for places outside of such lines to be deemed included in "territorial" limits.

Apparently, the Americans always considered the Philippine national territory to extend only to three miles from the low water mark. In an early commentary in the 1950s regarding the relevant provision of the Spanish Law of Waters, Ramon Aquino and Carolina Griño (who would later on become husband and wife as well as Justices of the Supreme Court of the Philippines) wrote:

> (1) Meaning of maritime zone.- The jurisdictional limits of the Philippines generally include all of the land and water within its geographical boundaries including all rivers, lakes, bays, gulfs, straits, coves, inlets, creeks, roadsteads, and ports lying wholly within the 3-mile limit (Taylor, International Public Law, pp. 263, 293; Mr. Buchanan, Secretary of State, to Mr. Jordan, Jan. 23, quoted in I. Op. Atty. Gen. 542; Gallatin's Writings, II, 186). It further

---

[7] *Id.*

[8] Treaty Between the Kingdom Spain and the United States of America for Cession of Outlying Islands of the Philippines (1900), *in* PNT Doc. No. 11, 38-39.

> extends three geographical miles from the shore of the Islands of the Philippines, starting at low water mark (Mr. Jefferson, Secretary of State, to Mr. Welles, Secretary of Navy, Aug. 1862; I Moore International Law Digest, 703, et.seq.; I Oppenheim International Law, p. 241).
>
> It further includes those bays, gulfs, adjacent parts of the sea or recesses of the coast line whose width at their entrance is not more than twelve miles measured in a straight line from headland to headland (Taylor, International Public Law, p. 278; I Oppenheim International Law, p. 246; Opinion of Attorney-General Randolph, May 14, 1793, I Op. Atty. Gen. U.S. 32; Second Court of Commissioners of Alabama Claims, Stetson v. United States, No. 3993, class I; I Moore International Law Digest, pp. 699, 741). It further includes all straits only or less than six miles wide as wholly within the territory of the Philippines, while for those having more than that width, the space in the center outside of the marine league limits is considered as open sea (Taylor, International Public Law, pp. 279; I Oppenheim, International Law, pp. 249).
>
> It further extends for customs purposes at least four leagues from the coast (Customs Administrative Act, sec. 79). It further can be said that the Philippine Islands exercises in matters of trade for the protection of her marine revenue and in matters of health for the protection of the lives of her people a permissive jurisdiction, the extent of which does not appear to be limited within any certain mixed boundaries further than that it cannot be exercised within the jurisdictional waters of any other State, and that it can only be exercised over her own vessels and over such foreign vessels bound to one of the ports of the Philippines as are approaching but not yet within the territorial maritime belt (Op. Atty. Gen., Jan. 18, 1912).[9]

In the case of *United States vs. Bull*,[10] the Philippine Supreme Court ruled that

> No court of the Philippine Islands had jurisdiction over an offense or crime committed on the high seas or within the territorial waters of any other country, but when she came within 3 miles of a line drawn from the headlands which embrace the entrance to Manila Bay, she was within territorial waters, and a new set of principles became applicable.[11]

This was reiterated in the case of *People vs. Wong Cheng*.[12] Clearly, the juridical concept of territorial waters was in accord with the three-mile rule.

But the Americans also introduced other elements, which have been interpreted as extending the national territory beyond the normal three miles band, and which later would become the basis of the Archipelagic Doctrine espoused by the

---

[9] RAMON AQUINO and CAROLINA GRIÑO, LAW OF NATURAL RESOURCES 425-26 (1957).
[10] 15 Phil. 7 (1910). *Also in* PNT Doc. No. 13, 61-75, at 64.
[11] *Id.* at 12.
[12] 46 Phil. 729 (1922). *Also in* PNT, Doc. No. 17, 90-93, at 91.

Philippines. In the Jones Law[13] of 1916, the lines described by the Treaty of Paris were referred to as "boundaries."[14] Later on in 1930, the US and UK delimited the territories of the Philippines Islands and North Borneo through the Convention Between the United States of America and Great Britain Delimiting the Boundary Between the Philippine Archipelago and the State of North Borneo of 1930.[15] Its preambular paragraph referred to the desirability of delimiting definitely the boundary between the US and UK territories. In the Fisheries Act,[16] the law referred to the existence of *insular* fisheries,[17] which were apparently within territorial waters of the Philippines but not included within municipal waters. These insular fisheries extended three nautical miles from the low water mark.[18] The treaty lines were also referred to as "boundaries" in the Hare Hawes Cutting Act[19] of 1933, and the Tydings-McDuffie Act[20] of 1934. It has been argued that American references to the Treaty of Paris lines as "boundaries" under these laws constitute a recognition that they comprise the territorial limits of the country.[21]

Unfortunately, however, outside of these references, the American practice was otherwise, as in other documents[22] that consistently maintained the wording referring to the national territory as being comprised of islands within limits described in the Treaty of Paris and outside of the lines but encompassed by the Treaty of Washington. Although the word "boundaries" was used, the context in which the term was used did not indicate that it was intended to have the same meaning as territorial boundaries on land. All references to the "boundaries" as described in the Treaty of Paris also imply an acceptance of the description contained in the Treaty of Paris itself of the territories being comprised of islands,

---

[13] An Act to Declare the Purpose of the People of the United States as to the Future Political Status of the People of the Philippine Islands, and to Provide a More Autonomous Government for those Islands, Pub. L. No. 240, chap. 416, 39 Stat. 545, *in* PNT, Doc. No. 14, 76-87, at 76.

[14] *Id.*, Enacting Clause.

[15] PNT, Doc. No. 19, 134-136.

[16] Act No. 4003, An Act to Amend and Compile the Laws Relating to Fish and Other Aquatic Resources of the Philippine Islands, and for Other Purposes (1932), *in* PNT, Doc. No. 20:1, 146-147.

[17] *Id.*, sec. 16.

[18] Little comfort is to be drawn from this piece of legislation, however, as nowhere in the Act is it expressly mentioned that the waters between the seaward boundary of municipal waters to the Treaty limits are of the character of territorial waters. Designation of areas as fishing grounds are not in themselves indicative of a territorial character, as it is possible to have designated fishing grounds in the high seas.

[19] An Act to Enable the People of the Philippine Islands to Adopt a Constitution and Form a Government for the Philippine Islands, To Provide for the Independence of the Same, and for Other Purposes, Pub. L. No. 311, sec. 1, 46 Stat. 761 (1933), *in* PNT, Doc. No. 21, 148-156.

[20] An Act to Provide for the Complete Independence of the Philippine Islands, to Provide for the Adoption of a Constitution and A Form of Government for the Philippine Islands, and for Other Purposes, Pub. L. No. 127, sec. 1, 48 Stat. 456 (1934), *in* PNT, Doc. No. 22, 157-166.

[21] *See* Jose D. Ingles, *The U.N. Convention on the Law of the Sea: Implications of Philippine Ratification*, 9 PHIL. Y.B. INT'L. L. 47-68 (1983), and Juan Arreglado, *Legal Force and Effect of Philippine Ratification of the U.N. Convention on the Law of the Sea*, 10 PHIL. Y.B. INT'L. L. 38-51 (1984).

[22] ADMIN. CODE OF 1916, Act No. 2657, art. IV, sec. 14, *in* PNT, Doc. No. 15, 88; REV. ADMIN. CODE OF 1917, Act No. 2711, art. IV, sec. 16, *in* PNT, Doc. No. 16, 89.

and not including the intervening waters. Moreover, an inconsistency emerges in that, if the Treaty of Paris lines are considered as territorial boundaries, then the islands mentioned in the Treaty of Washington of 1900 are separate territorial entities since they precisely are *outside* of the Treaty of Paris lines. And while the treaty between the US and UK delimiting the respective territories were referred to the delimitation of "boundaries", the actual wording of the pertinent article is:

> It is hereby agreed and declared that *the line separating the islands* belonging to the Philippine Archipelago on the one hand and the islands belonging to the State of North Borneo which is under British protection on the other hand shall be and is hereby established....[23] [Italics supplied.]

The treaty also provided for the contingencies that if the lines described were subsequently proven by more accurate surveys to pass between certain islands and reefs, the line would automatically be adjusted to pass between them;[24] and that if the lines were found to pass through certain islands and rocks, the whole of such islands and rocks would still pertain to the Philippines.[25] These provisions for contingencies acknowledged the uncertainty of the location of the lines and tended to prove that in negotiating the agreements, the parties had only the islands, and not the waters, in mind as actual territories. It would certainly be odd to have indefinite and "mobile" territorial boundaries.

At this point, it may not be amiss to emphasize that the lines described in this treaty between the US and the UK should not be regarded as an amendment of the Treaty of Paris lines, as commonly implied from existing official maps that combine all these lines as "international treaty limits." The parties to these treaties are different, and the maxim *pacta tertiis nec nocent nec prosunt*, expressing that fundamental principle that a treaty applies only to the parties to it, clearly prevents such an interpretation.

The year 1928 saw the loss of one island within the treaty lines in favor of the Netherlands. The US and Netherlands had entered into arbitration proceedings regarding a dispute of sovereignty over the Island of Palmas, also known as Miangas, near the southern tip of Mindanao Island and well within the Treaty of Paris lines. In his award,[26] the arbitrator referred to the treaty lines as a "geographical frontierline,"

---

[23] Convention Between the United States of America and Great Britain Delimiting the Boundary Between the Philippine Archipelago and the State of North Borneo, art. I (1930), *in* PNT, Doc. No. 19, 134-136, at 134.

[24] *Id.*, art. II.

[25] *Id.*, art. III.

[26] Arbitral Award Rendered in Conformity with the Special Agreement Concluded on January 23, 1925 Between the United States of America and the Netherlands Relating to the Arbitration of Differences Respecting Sovereignty Over the Island of Palmas (Miangas) (1928), *in* 28A PNT 274-275, which follows the Note Verbale (Doc. No. 28) in the same book.

and found that, based on a letter signed by the US Secretary of State, the American view towards the use of the lines in relation to Spain was:

> The metes and bounds defined in the treaty were not understood by either party to limit or extend Spain's right of cession. *Were any island within those described bounds ascertained to belong in fact to Japan, China, Great Britain, or Holland, the United States could derive no valid title from its ostensible inclusion in the Spanish cession.* The compact upon which the United States negotiations insisted was that all Spanish title to the archipelago known as the Philippine Islands should pass to the United States - *no less or more than Spain's actual holdings therein, but all.* This Government must consequently hold that the only competent and equitable test of fact by which the title to a disputed cession in that quarter may be determined is simply this: "Was it Spain's to give? If valid title belonged to Spain, it passed; if Spain had no valid title, she could convey none."[27] [Italics supplied.]

Such a view tends to reinforce the argument that when the Treaty of Paris was negotiated, the intention of the US and Spain was to use the lines only as a means to identify the Spanish-held territories within them, as they impliedly acknowledged a possibility of other states holding title to specific islands within the lines. They were not territorial boundaries in the same way as land boundaries, otherwise they could not have intended to allow "pockets" of non-Philippine territories within them. This indicates that, considering the state practice of both Spain and the United States, the Treaty of Paris lines were not accorded the same status as land-based territorial boundaries, regardless of a number of references to those lines as "boundaries".

II. THE ERA OF THE 1935 CONSTITUTION

A. The Article on the National Territory

The 1935 Constitution focused attention on the concept of national territory. Although the debates in the Constitutional Convention dwelled more on the propriety of including a new and specific provision describing the national territory, what was important was that the delegation sought a legally acceptable formula for considering the archipelago as a single legal and political unit to which the fundamental law would be applied. The Chairman of the Committee on Territorial Delimitation filed a report[28] which pointed out an anomaly in the Treaty of Paris lines where the description of the location of the northern line (running west to east) was inconsistent with the specific latitude given, and proposed that a

---

[27] *Id.* at 105, *citing* a Letter from the Secretary of State of the United States, to the Spanish Minister at Washington (April 7, 1900).

[28] COMM. REP. NO. 7 (Aug. 31, 1934), *in* PNT, Doc. No. 23A, 168-171.

correction thereof in the Constitution be written in order "to avoid all possibility of confusion in the future regarding the real boundaries of our territory towards the north." The viewpoint was expressed that unless the anomaly was corrected, there would be some doubt as to whether the northernmost islands of the Batanes were included within the national territory, because the latitude specified that the northern Treaty of Paris line was located to the south of those islands. This indicated an understanding on the part of the delegates that the national territory extended to the waters within the treaty lines, and what was involved in the adjustment of the lines was not just the inclusion of islands but also of the Bashi Channel. The report recommended an article on the national territory which described its boundaries in metes and bounds similar to Art. III of the Treaty of Paris, but incorporating the correction of the anomaly as well as the adjustments necessary on account of other treaties.

However, the impact of regarding all the waters within the treaty lines as part of the national territory, equivalent to the land, is not so easily discernible. The debates[29] still reveal an attitude on the part of the delegates to consider only land as territory. Discussions dwelled, among other things, on the propriety of including an article on the national territory, acquisition of other islands as additional territories by virtue of the new article, and the implications of the article on treaty-making; but they did not touch on the legal status of the waters around, between, and connecting them. There was only one reference to the importance of the seas,[30] which was rather incidental. Subsequently, the Committee Chair submitted an amended draft article on the national territory, which stated that the national territory included "its jurisdictional water and air."

In the end, the Convention reached consensus on the following phraseology:

> The Philippines comprises *all the territory ceded to the United States* by the Treaty of Paris concluded between the United States and Spain on the tenth day of December, eighteen hundred and ninety-eight, the limits of which are set forth in Article III of said treaty, together with all the *islands* embraced in the treaty concluded at Washington, between the United States and Spain on the seventh

---

[29] Proceedings on the National Territory of the 1934-1935 Constitutional Convention, 11 RECORD OF THE CONSTITUTIONAL CONVENTION 21-40, *in* PNT, Doc. No. 23B, 172-258.

[30] *See id.* at 247-248, Interventions of Delegates Bautista Razona. Explaining the reason for including the proposed provision on the national territory, he stated:

"El objeto es cortar el paso de extrañas potencias, que, movidas por la avaricia, quisieran algún día valerse de nuestros propios compatriotas para adueñarse de una parte de nuestro territorio; y al mismo tiempo ahuyenar la posibilidad de que, por ciertas dádivas, el Presidente de la República y la Asemblea Nacional dispongan de un municipio, de una provincia o de una isla de este Archipíelago a favor de uno de los varios países que, por saber que en el seno de nuestras montañas se guarda oro de altísima ley, en el corazón de nuestros bosque se encierra un tesoro de inmenso valor y en el fondo de nuestros mares se esconden riquezas inagotables, codician tanto esta tierra de nuestros amores."

> day of November, nineteen hundred, and in the treaty concluded between the United States and Great Britain on the second day of January, nineteen hundred and thirty, and all territory over which the present Government of the Philippine Islands exercises jurisdiction.[31] [Italics supplied.]

Again, the above section refers to and reiterates the formulation of the national territory as islands. It also clearly relies upon the concept of state succession to the territories under previous sovereignty as the basis for defining the limits of the national territory; this is an important consideration in that it implies that the Philippines can succeed only to the rights of sovereignty as defined and exercised by the United States (and Spain before it), and not more. The use of the treaties as the reference points also carries with it the implication that "territory" referred to only land territory and its adjacent three-mile territorial sea, considering that:

> (1) Prior to the cession of the Philippines, Spain claimed only a maritime zone around the islands "to the full width recognized in international law" and therefore could not have intended to transfer to the US, any waters beyond that distance;
>
> (2) The official American viewpoint was that in negotiating the Treaty of Paris, they likewise referred only to the islands within the limits and did not make any claim as to the waters;
>
> (3) It is inconsistent to consider the islands outside of the Treaty of Paris lines, referred to in the treaty of 1900, as part of the Philippine territory, if such territory was precisely defined by the treaty lines; in addition, it opens to question the status of the waters around the islands, and between them and the treaty lines; and
>
> (4) The exact phraseology of the treaty between the US and UK, referring to the line it described as merely separating one group of islands from another, and the provision for adjustment if future survey and mapping revealed the more precise location of the islands and reefs near the line.

When President Truman issued the Proclamation declaring Philippine Independence in 1946,[32] the US again referred to the delimitation between the US and UK as a boundary. But despite this, it did not amount to a recognition of the

---

[31] CONST. (1935), art. I, sec. 1.

[32] Proclamation of Independence of the Philippines by the President of the United States of America (1946), 60 Stat 1352, *in* PNT, Doc. No. 24, 261-262.

entire Treaty of Paris lines as territorial limits, and at most referred to only the line between the Philippine Archipelago and the State of North Borneo.[33]

Subsequently, an exchange of notes took place between the Philippines and the UK, in which certain other groups of islands at the edge of North Borneo and the Sulu Sea were transferred to the Philippines.[34] This was likewise in accordance with the 1930 treaty between the US and UK.

B. The First Continental Shelf Claim

In 1949, the Philippines attempted to adopt and adapt the continental shelf doctrine as contained in the Truman Proclamation of 1945. This was through the promulgation of Republic Act No. 387, which claimed petroleum resources in the continental shelf or its analogue in the archipelago:

> Art. 3. *State ownership.*- All natural deposits or occurrences of petroleum or natural gas in public and/or private lands in the Philippines, whether found in, on or under the surface of dry lands, creeks, rivers, lakes, or other submerged lands within the territorial waters or on the continental shelf, or its analogue in an archipelago, seaward from the shores of the Philippines which are not within the territories of other countries, belong to the State, inalienably and imprescriptibly.

This manifested the increasing official interest on the resources in the waters around the islands, as it was the first major legal development on marine resources other than navigation and fisheries. It would remain the *status quo* for the next few years, until the United Nations initiated what would eventually result in the first conference on the Law of the Sea.

C. The Archipelagic Doctrine

In the early 1950s, the international community had still not come to a consensus regarding the precise width of the territorial seas to which coastal states may validly lay claim. In response to a communication from the UN Secretary-General seeking comments on the work of the International Law Commission for a proposed convention for all nations of the world to agree on the limits of the

---

[33] *Id.* The pertinent paragraph of the Proclamation reads:

"WHEREAS the United States of America by the Treaty of Peace with Spain of December 10, 1898, commonly known as the Treaty of Paris, and by The Treaty with Spain of November 7, 1900, did acquire sovereignty over the Philippines, and by the Convention of January 2, 1930, with Great Britain did delimit the *boundary between the Philippine Archipelago and the State of North Borneo*;... ." [Italics supplied.]

[34] Exchange of Notes between the United Kingdom and the Philippine Republic Regarding the Transfer of Administration of the Turtle and Mangsee Islands to the Philippine Republic, *in* PNT, Doc. No. 26, 265-269.

territorial sea, the Philippines made its first formal declaration of the "archipelagic doctrine" in a Note Verbale in 1956,[35] where it stated:

> All *waters around, between and connecting* the different islands belonging to the Philippine Archipelago, irrespective of their width or dimension, are necessary appurtenances of its land territory, forming an integral part of the *national or inland waters*, subject to the *exclusive sovereignty* of the Philippines. *All other water areas embraced within the lines* described in the Treaty of Paris of 10 December 1898, the Treaty concluded at Washington, D.C., between the United States and Spain on 7 November 1900, the Agreement between the United States and the United Kingdom of 2 January 1930, and the Convention of 6 July 1932 between the United States and Great Britain, as reproduced in Section 6 of Commonwealth Act No. 4003 and article 1 (this was inadvertently given as article 2 in the note verbale of 7 March 1955) of the Philippine Constitution, *are considered as maritime territorial waters of the Philippines for purposes of protection of its fishing rights, conservation of its fishery resources, enforcement of its revenue and anti-smuggling laws, defence and security, and protection of such other interests as the Philippines may deem vital to its national welfare and security, without prejudice to the exercise by friendly foreign vessels of the right of innocent passage over those waters.* All natural deposits or occurences of petroleum or natural gas in public and/or private lands within the territorial waters or on the continental shelf, or its analogue in an archipelago, *seaward from the shore of the Philippines* which are not within the territories of other countries, belong inalienably and imprescriptibly to the Philippines, *subject to the right of innocent passage of ships of friendly foreign States over those waters.*
>
> In view of the foregoing considerations, and in line with this article, the Philippine Government assumes that *high seas cannot exist within the waters comprised by the territorial limits* of the Philippines as set down in the international treaties referred to above. In case of archipelagos or territories composed of many islands like the Philippines, which has many bodies of waters enclosed within the group of islands, the State would find the continuity of jurisdiction within its own territory disrupted, if certain bodies of water located between the islands composing its territory were declared or considered as high seas. [Italics supplied.]

This was the first official declaration seeking to define the status of the waters within the Treaty of Paris lines as both "national or internal" waters and "maritime territorial" waters. However, the ambiguity with which the internal waters are distinguished from the territorial waters, particularly the lack of a clear rule for determining which portions are internal and which are territorial waters, practically meant a fusion of the two regimes within the treaty lines. As far as the international community was concerned, internal waters had to be clearly distinguished from

---

[35] Note Verbale dated 20 January 1956 from the Permanent Mission of the Philippines to the United Nations, *in* PNT, Doc. No. 28, 272-273.

territorial waters, because the right of innocent passage of foreign vessels[36] was recognized as applicable only in territorial waters.

Moreover, it should be noted that in its statement, the Philippines apparently identified a functional basis for claiming the territorial sea, i.e, it claimed territorial waters for specific purposes (protection of fishing rights, conservation of fishery resources, enforcement of revenue and anti-smuggling laws, defense, and security). This is an important point when one considers that normally, territorial waters are conceptualized as extensions of the land territory without a functional justification.

The Philippines further sought exemption from the proposed rule limiting the extent of the territorial sea to a fixed distance measured from the coast, as follows:

> The Philippine Government considers the limitation of its territorial sea as referring to those waters within the recognized treaty limits, and for this reason it takes the view that the breadth of the territorial sea may extend beyond twelve miles. *It may therefore be necessary to make exception, upon historical grounds, by means of treaties or conventions between States.* It would seem also that the rule prescribing the limits of the territorial sea has been based largely on the continental nature of a coastal State. The Philippine Government is of the opinion that certain provisions should be made taking into account the archipelagic nature of certain States like the Philippines. [Italics supplied.]

Incidentally, it is not widely known that the Philippines, in claiming rights to its resources in the "continental shelf, or its analogue in an archipelago," broke new ground in the first Law of the Sea Conference in 1958. At the conference, it was able to persuade the international community that the "continental shelf" doctrine applied equally to islands as to coastal states,[37] a major victory considering the alternative view that it did not.

Soon after receipt of the 1956 Note Verbale, the US challenged the Philippine claim to sovereignty over all the waters within the Treaty of Paris lines. In a telegram, the US Department of State declared:

> The United States' attitude with reference to the position of the Philippine Government quoted supra was that the lines referred to in the bilateral treaties between the United States and the United Kingdom and Spain merely delimited the area within which the land areas belong to the Philippines and

---

[36] The right of innocent passage refers to the right accorded to foreign vessels to traverse the territorial waters of a foreign state without having to seek permission to do so, as long as the vessel did not act in a manner that was prejudicial to the peace, good order, and security of the said state.

[37] C. SANGER, ORDERING THE OCEANS: THE MAKING OF THE LAW OF THE SEA 71, 73-74 (1986).

> that they were not intended as boundary lines. The United States, in 1958, stated that it recognized only a 3-mile territorial sea for each island.

The American response clearly presented a serious obstacle to the claims made in the 1956 Note Verbale: on the theory that the Philippines acquired sovereignty over its territory through state succession to the United States (which in turn succeeded to Spanish sovereignty), it could not have acquired more territory than its predecessors-in-interest, and therefore could not validly lay claim to territorial seas of more than three nautical miles from the coast. Thus began a long battle for the Philippine Archipelagic Doctrine, to bind the international community into legally recognizing the archipelago as a single social, geographic, and political unit. But in the 1958 and 1960 sessions of the United Nations Conference on the Law of the Sea (UNCLOS), the international community flatly rejected the archipelagic principles proposed by the Philippine delegation.

D. The Philippine Baselines Law

Seeing that there was an unmistakable trend in the international community to sooner or later come to agreement on the breadth of the territorial seas, as well as finding the utility of having a clearer definition of the maritime zones around the country for purposes of negotiating with others, Senator Arturo Tolentino introduced a bill that defined straight baselines around the country. This was due to his observation that in the previous UNCLOS sessions, the international community had come to accept two major points, namely, that (1) baselines are the basis for determining the territorial seas, and (2) the territorial sea shall have a fixed width measured from the baselines. Although the 1958 and 1960 sessions did not produce a consensus, nevertheless, it was believed that there was a need to consolidate the Philippine position by clarifying which waters were internal waters under the complete sovereignty of the State and which were considered territorial waters through which the right of innocent passage applied. Thus was born Republic Act No. 3046.[38]

Republic Act No. 3046 enclosed the outermost points of the archipelago within straight baselines and declared all waters between the island shorelines up to and within the baselines to be internal waters, and all waters between the baselines and the Treaty of Paris limits to be territorial waters. Later on, it would subsequently be clarified that the baseline system was without prejudice to the Philippine claim to Sabah.[39]

---

[38] Rep. Act No. 3046 (1961), An Act to Define the Baselines of the Territorial Sea of the Philippines, *in* PNT, Doc. No. 29, 276-280.

[39] Rep. Act No. 5446 (1968), An Act to Amend Section One of Republic Act No. 3046, Entitled "An Act to Define the Baselines of the Territorial Sea of the Philippines", *in* PNT, Doc. No. 30, 365-370.

The legislative debates on both laws were lengthy, but focused on only a few major concerns, namely, the impact of the bill on fishing rights of Filipinos within and outside the national territory, the entry of foreign vessels into the territorial and internal waters, and its impact on the claims to Sabah and Freedomland.[40] In the debates on the amendatory bill,[41] there was an awareness of the need for the law to stave off the imminent fragmentation of the archipelago if the international community limited itself to consideration of territorial seas based on a fixed, short distance from the baselines;[42] however, the attention of the legislators were soon largely absorbed by the Sabah claim.

Nonetheless, the importance of Rep. Act No. 3046 cannot be overemphasized. More than the 1956 Note Verbale, the Philippine Baselines Law represents the first unequivocal expansion of the Philippine legal claim to maritime spaces beyond that recognized by international law. Despite the discussions of the delegates to the Constitutional Convention regarding the article on the national territory in the 1935 Constitution, the resulting phraseology still did not reflect a clear claim as to both the land and water within the treaty limits. The 1956 Note Verbale clarified this intent, but while it was revolutionary in itself, it could still be regarded as a mere executive declaration or statement of administrative policy. Rep. Act No. 3046 gave the archipelagic concept of the Philippines (consolidating both the land and waters as one legal and political unit) the status of law, and later on would become the basis for elevating the same into a constitutional edict.

E. The Revised Continental Shelf Claim

In 1968, the Philippines issued a proclamation formally stating its claim to the continental shelf, as follows:

> WHEREAS, it is established international practice sanctioned by the law of nations that a coastal state is vested with jurisdiction and control over the mineral and other natural resources in its seabed and subsoil of the continental shelf adjacent to its coasts but outside the area of the territorial sea to where the depth of the superjacent waters admits of the exploitation of such resources;
>
> NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines, do hereby proclaim that *all the mineral and other natural resources in the*

---

[40] *See* Proceedings of the Philippine Senate on Senate Bill No. 541: Baselines of the Philippine Territorial Sea (1960), *in* PNT, Doc. No. 29A and 29B, 281-364.

[41] Rep. Act No. 5446 (1968).

[42] *See* Proceedings of the Philippine House of Representatives on Senate Bill No. 954: An Act Amending Section One of Republic Act No. 3046, Entitled "An Act to Define the Baselines of the Territorial Sea of the Philippines" (1968), *in* PNT, Doc. No. 30B, 375-409.

> *seabed and subsoil of the continental shelf adjacent to the Philippines, but outside the area of its territorial sea to where the depth of the superjacent waters admits of the exploitation of such resources*, including living organisms belonging to sedentary species, appertain to the Philippines and are subject to its exclusive jurisdiction and control for the purposes of exploration and exploitation. In any case where the continental shelf is shared with an adjacent state, the boundary shall be determined by the Philippines and that state in accordance with legal and equitable principles. *The character of the waters above these submarine areas as high seas and that of the airspace above those waters, is not affected by this proclamation.*[43] [Italics supplied.]

However, there are two problems with the phraseology of this proclamation. First, it makes the extent of the continental shelf dependent on a technology-driven criterion, i.e. "to where the depth of the superjacent waters admit of exploitation," which is not a fixed measure as its changes with the development of technologies to exploit offshore resources. In 1945, when the Truman Proclamation first declared the continental shelf doctrine, the maximum depth of exploitation was only about 30 feet; at present, such depth can already be measured in the thousands. Thus, the criterion leaves the extent of the continental shelf indeterminate.

The second problem is that the proclamation refers to submarine areas outside of the area of the territorial sea, and further states that it does not affect the status of high seas and airspace above the waters. If the term "territorial seas" refers to the area defined by Rep. Act No. 3046, extending to the Treaty of Paris limits, it is not clear what other areas would still be covered by the proclamation. On the other hand, if it were to follow international law, then the continental shelf areas could indeed be extensive.

III. THE ERA OF THE 1973 CONSTITUTION

The 1971 Constitutional Convention presented an opportunity for the Philippines to revise its constitutional formulation of the concept of national territory and accommodate the legal developments that had taken place since 1935. The new article in the 1973 Constitution stated:

> The national territory comprises the Philippine *archipelago*, with *all the islands and waters* embraced therein, and all the other territories belonging to the Philippines by historic right and legal title including the territorial sea, the air space, the subsoil, the seabed, the insular shelves, and the other submarine areas over which the Philippines has sovereignty or jurisdiction. *The waters*

---

[43] Presidential Proclamation No. 370, Declaring as Subject to the Jurisdiction and Control of the Republic of the Philippines All Mineral and Other Natural Resources in the Continental Shelf of the Philippines (1968), *in* PNT, Doc. No. 31, 410.

around, between, and connecting the islands of the archipelago, irrespective of their breadth and dimensions, form part of the internal waters of the Philippines.[44] [Italics supplied.]

The above provision formally elevated the Archipelagic Doctrine to the status of a Fundamental Law. Aside from re-igniting the debate on the implications of the provision on national territory to Philippine claims to Sabah, Freedomland, and even the Marianas Islands, the record reveals that there was vigorous discussion on the importance of incorporating the archipelagic principles in the Constitution as a means of legally protecting the inland waters from intrusion by foreigners. Of primary concern were "considerations of national defense and internal security" which demanded absolute control and dominion over all, the inter-island waters which were the main links of communication and transportation.[45] In a public hearing held for the Convention, Senator Tolentino, who participated in the UNCLOS conferences, pointed to the need for such a provision to support the Philippine position at the Law of the Sea conferences where the country was fighting a losing battle with the maritime powers over the archipelagic principles.[46] Tolentino correctly surmised that the country's state practice in support of the archipelagic principle was rather weak up to that point in time, and indeed, such a provision was required to legally demonstrate the archipelagic elements in the Philippine concept of the national territory. The provisions of the 1935 Constitution relied upon at that time referred to the country as merely a single political unit of geographically fragmented groups of islands without regard for the intervening waters, due to the reference to the provisions of the Treaty of Paris, Treaty of Washington, and the Convention between the US and UK.

The constitutional provision was subsequently incorporated in Philippine laws.[47]

A. The Kalayaan Island Group Claim

The Philippine claim to the Kalayaan Island Group was the next major legal development in our national territory laws after the promulgation of the 1973 Constitution. Prior to 1971, there was very little indication of any official inclination to include the islands west of Palawan in the national territory. The earliest official and recorded statement could be that which was made by a delegate to the 1935 Constitution, also during deliberations on the national territory provision, where it

---

[44] CONST. (1973), art. I, sec. 1.

[45] Sponsorship Speech of Delegate Cabal, Record of the Constitutional Convention, Session of February 14, 1972, No. 106.

[46] Stenographic Notes on the Public Hearing of the Committee on National Territory held on September 29, 1971, 8-10 (unpublished) (on file with author).

[47] For e.g., secs. 5 and 6, Pres. Decree No. 1587 (1978), REV. ADMIN. CODE OF 1978 (1978), *in* PNT, Doc. No. 41, 467.

was stated that the islands were clearly outside of the territorial limits contemplated, but nevertheless could be subject to a Philippine claim.[48] At that time, Japan had only begun to occupy the islands.

Japan had eventually placed the islands under the Shinnan Gunto or New South Islands administrative region under the jurisdiction of Japanese-occupied Taiwan. When World War II ensued, Japan launched attacks from the islands, such that in the post-war period, Filipino policymakers saw the need to place the islands within its national defense perimeters. The first official statement to this effect was made in 1946 by the Foreign Affairs Secretary; but this was not pursued at the San Francisco Treaty negotiations, and even then President Quirino merely said that possession of the islands "by an enemy" was a threat to national security.[49]

In 1956, Tomas Cloma laid claim to the islands west of Palawan, which he called Freedomland, but could not get government support for his claim. The most that the Philippine Government did was to issue a declaration that did not state a formal claim to the island group, but maintained that it was subject to the legitimate exploitation and exploration by Filipino citizens.[50]

It was only in 1972 when the Philippines took definite action to establish a legally defensible claim,[51] when President Marcos officially announced that it had

---

[48] *See* Intervention of Delegate Buendia, Proceedings on the National Territory of the 1934-1935 Constitutional Convention, 11 RECORD OF THE CONSTITUTIONAL CONVENTION 21-40, *in* PNT, Doc. No. 23B, 172-258, at 203-204. He stated:

"También quisiera hacer constar, como una mera información, que las islas disputadas entre el Japon y Francia, están fuera de nuestro territorio, de acuerdo con el Tratado de Paris y los siguientes de 1900 y 1930.

Hago esta declaración después de haber hecho un esfuerzo por localizar las citadas islas situadas hacia el Oeste de Palawan, con la ayuda de la Oficina de Coasta y Geodesia. Estas islas distan 165 millas marinas del puerto mas próximo de la Isla de Palawan, o sea, 70 millas menos que la distancia que media entre las citadas islas hacia el punto mas cercano de Indo-China, y están entre los 114° y 115° Este de Greenwich. Como quiera que nuestro territorio esta entre los 116° y 127° de longitud Este, dicho se está que las citadas islas están fuera de nuestro territorio.

Los distinguidos Miembros del Comité de Ponencías habían oído de boca del P. Ylla, en una declaración que hiciera ante el citado Comité, que las citadas islas están dentro de nuestro territorio; pero parece que el mismo P. Ylla ha cambiado de parecer sobre el particular, ante la realidad de los hechos arriba mencionados.

Esto, sin embargo, no quiere decir que no tenemos derecho para reclamar dichas islas. Al contrario, tenemos sobradas razones para reclamarlas, como son, a saber: su proximidad a la Isla de Palawan; y porque entre dichas Islas y Paragua sólo media un canal estrecho y poca profundidad, al paso que entre las mismas e Indo-China media un canal muy ancho y de mucha profundidad."

[49] H. Chiu and C. Park, *Legal Status of the Paracels and Spratly Islands*, 3 OCEAN DEVELOPMENT AND INTERNATIONAL LAW JOURNAL (1975), *cited in* LU NING, FLASHPOINT SPRATLYS! 25 (1995).

[50] GERALDO MARTIN C. VALERO, SPRATLY ARCHIPELAGO: IS THE QUESTION OF SOVEREIGNTY STILL RELEVANT? 63-65 (1993).

[51] For more details on the legal aspects of the claim, *see* Haydee Yorac, *The Philippine Claim to the Spratly Island Group*, 53 PHIL. L. J. 42-63 (1983).

occupied several islands as a measure of ensuring national security.[52] In 1978, President Marcos promulgated Presidential Decree No. 1596, which proclaimed Philippine sovereignty over the area encompassed in a modified parallelogram extending from the Palawan side of the Treaty of Paris limits, and officially called it the Kalayaan Island Group, constituted as a municipality of Palawan province. The decree asserted absolute sovereignty over the islands, waters, seabed, and subsoil of the area within the described boundaries.[53]

B. The Philippine EEZ Declaration

Presidential Decree No. 1599[54] was issued on the same day as Pres. Decree No. 1596. The decree declared an Exclusive Economic Zone (EEZ) in conformity with the EEZ provisions of the negotiating text of the ongoing Third United Nations Conference on the Law of the Sea. Within a 200 nautical mile zone measured from the baselines of the territorial sea, which were set under Republic Act No. 3046, the Philippines asserted that,

> Sec. 2. Without prejudice to the rights of the Republic of the Philippines over its territorial sea and continental shelf, it shall have and exercise in the exclusive economic zone established herein the following:
>
> a. Sovereign rights for the purpose of exploration and exploitation, conservation and management of the natural resources, whether living or non-living, both renewable and non-renewable, of the seabed, including the subsoil and the superadjacent waters, and with regard to other activities for the economic exploitation and exploration of the resources of the zone, such as the production of energy from the water, currents, and winds;
>
> b. Exclusive rights and jurisdiction with respect to the establishment and utilization of artificial islands, off-shore terminals, installations and structures,

---

[52] Press Statement (July 10, 1971), *quoted in* the Sponsorship Speech of Delegate Cabal, *supra* note 45.

[53] Pres. Decree No. 1596, Declaring Certain Areas Parts of Philippine Territory and Providing for their Government and Administration (1978), *in* PNT, Doc. No. 40, 465-466. The decree stated:

"WHEREAS, by reason of their proximity the cluster of islands and islets in the South China Sea situated in the following: ... are vital to the security and economic survival of the Philippines;

WHEREAS, much of the above area is part of the continental margin of the Philippine archipelago;

WHEREAS, these areas do not legally belong to any state or nation but, by reason of history, indispensable need, and effective occupation and control established in accordance with international law, such areas must now be deemed to belong and subject to the sovereignty of the Philippines;

WHEREAS, while other states have laid claims to some of these areas, their claims have lapsed by abandonment and can not prevail over that of the Philippines on legal, historical, and equitable grounds.

....

Section 1. The area within the following boundaries: ... including the seabed, subsoil, continental margin, and air space shall belong and be subject to the sovereignty of the Philippines. Such area is hereby constituted as a distinct and separate municipality of the Province of Palawan and shall be known as 'Kalayaan'."

[54] Pres. Decree No. 1599, Establishing an Exclusive Economic Zone and For Other Purposes (1979), *in* PNT, Doc. No. 42, 468-469.

> the preservation of the marine environment, including the prevention and control of pollution, and scientific research;
>
> c. Such other rights as are recognized by international law or state practice.

Resource-related activities, construction of artificial islands and installations, and other activities falling within the sovereign rights and jurisdiction of the country were limited to Filipino citizens, and any other person would be allowed to do so only under the terms of a prior agreement with the Philippines or a license granted by it. It also stated, in a separate provision, that,

> Sec. 4. 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.[55]

This provision, however, presents a potentially anomalous situation in relation to the territorial seas under Rep. Act No. 3046 as amended. One nuance that the incorporation of the negotiating text into the decree was unable to capture was that the EEZ was defined in the negotiating text to be a zone *beyond* the territorial sea. This distinction is not made in the text of the decree.[56] Section 2 makes a reservation that the Philippine sovereign rights within the EEZ are without prejudice to its rights over the territorial sea and continental shelf, which implies that despite the apparently limited scope of EEZ as enumerated, in areas falling within the territorial sea as defined by Rep. Act No. 3046, the rights arising out of full exercise of sovereignty are not affected. However, this reservation is not made with respect to section 4, which refers to the recognition in the EEZ of full freedom of navigation and overflight, laying of submarine cables and pipelines, and other internationally lawful uses of the EEZ relating to navigation and communication. Since the EEZ overlaps with much of the territorial sea area delineated by Rep. Act No. 3046 as amended, an anomalous interpretation may be made, in which the Philippines may be deemed by other countries to have recognized freedom of navigation, overflight, and communication in its territorial sea!

The EEZ Declaration likewise had the impact of converting about two-thirds of the Kalayaan Island Group (KIG) claim area, which was beyond the

---

[55] *Id.*

[56] Pres. Decree No. 1599, sec. 1, states:

"Section 1. There is hereby established a zone to be known as the exclusive economic zone of the Philippines. The exclusive economic zone shall extend to a distance of two hundred nautical miles beyond and from the baselines from which the territorial sea is measured; *Provided*, That, 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."

territorial sea defined in Republic Act No. 3046 and declared to be under complete sovereignty, into EEZ waters subject to the abovementioned freedoms, and apparently reducing the extent of sovereignty over much of the waters of the KIG to only sovereign EEZ rights. This is based on the reasoning that despite the fact that Presidential Decree Nos. 1596 and 1599 were issued on the same day, the EEZ decree is the later law by virtue of its number, and no reservation was made to provide for the KIG claim area; therefore Pres. Decree No. 1599 should be deemed to have amended Pres. Decree No. 1596.

C. The United Nations Convention on the Law of the Sea

In 1982, the Third United Nations Conference on the Law of the Sea in Montego Bay ended in the signing by the Philippine delegation of the United Nations Convention on the Law of the Sea[57] at the final session held in Montego Bay, Jamaica. Though the conference would come into force only in November 16, 1994, or twelve years later, the impact of the Convention on the national territory of the Philippines would be significant.

The Law of the Sea created a system of maritime zones based on the fundamental stage of establishing baselines from which the zones would be measured. These baselines could be either normal baselines using the low-water mark;[58] "straight baselines" pursuant to the rules laid down in the *Anglo-Norwegian Fisheries Case*[58a] which permitted the use of straight lines to connect the outermost points of deeply-indented coasts or fringing islands along the coastline;[59] or " straight archipelagic baselines" which could connect the outermost points of the outermost islands of a mid-ocean archipelagic state, subject to certain conditions.[60]

From these baselines, the following maritime zones were generated in favor of the coastal state:

> 1. Internal Waters, which referred to those waters lying within the landward side of the baseline,[61] and forming an integral part of the State territory[62] that was no different from the land. It included bays, estuaries and ports, mouths of rivers, navigable rivers and canals, subject to specific rules in the Convention.[63]

---

[57] Hereinafter referred to as the LOSC, in order to differentiate it from the UNCLOS, which is commonly used to refer to the three conferences that drafted the Convention.

[58] LOSC, art. 5.

[58a] Anglo-Norwegian Fisheries Case (I.K. v. Norway), 1951 I.C.J. Rep. 116.

[59] *Id.*, art. 7.

[60] *Id.*, art. 47.

[61] *Id.*, art. 8.

[62] *Id.*, art. 2, par. 1.

[63] *Id.*, arts. 9-12.

2. Territorial Sea, which referred to the waters from the baseline and seaward to a distance not exceeding 12 nautical miles.[64] It was deemed to be included in the territory of a State, and therefore also under its sovereignty,[65] but subject to the Right of Innocent Passage of foreign ships.[66] The scope of this right is defined by the Convention.[67]

3. Archipelagic Waters, which were the waters enclosed within straight archipelagic baselines,[68] if such were validly used. Such waters are also deemed to be under the sovereignty of archipelagic state,[69] but subject to recognition of the Right of Innocent Passage,[70] designation of Archipelagic Sea Lanes,[71] and recognition of traditional fishing rights and existing submarine cables, subject to international agreements.[72]

4. Contiguous Zone, which was the area contiguous to and beyond the Territorial Sea to a distance of another 12 nautical miles, in which the Coastal State exercises limited powers to prevent infringement of customs, fiscal, immigration, or sanitary regulations; or to punish infringements of those regulations committed within the state's territory or territorial sea.[73]

5. Exclusive Economic Zone, which extends up to 200 nautical miles from the baselines, and wherein the Coastal State has extensive rights and jurisdictions essentially with respect to natural resources, structures, marine scientific research, and marine environmental protection.[74] Within the EEZ, all other States enjoy the freedom of navigation and overflight, laying of submarine cables and pipelines.[75]

---

[64] *Id.*, art. 3.
[65] *Id.*, art. 2.
[66] *Id.*, art. 17.
[67] *Id.*, arts. 17-32.
[68] *Id.*, art. 49.
[69] *Id.*, art. 2, par. 1.
[70] *Id.*, art. 52.
[71] *Id.*, art. 53.
[72] *Id.*, art. 51.
[73] *Id.*, art. 33.
[74] *Id.*, arts. 55-75.
[75] *Id.*, art. 58, in relation to arts. 87-115.

The Right of Innocent Passage referred to above is one of the most important concepts that underpin Philippine concerns with implementation of the Law of the Sea Convention. The right of innocent passage through the territorial seas is the result of an attempt to reconcile the freedom of navigation with the theory of territorial seas.[76] Even prior to the Convention it had already been firmly established as a customary principle of international law.[77]

In contrast with high seas, territorial seas are areas of the ocean, including the air space above and the seabed and subsoil, to which the sovereignty of a coastal state extends.[78] The Convention recognized the right of innocent passage as it then existed in customary international law, and further clarified what rights and duties attached to its exercise, defining it as follows:

> Article 18. Meaning of passage
>
> 1. Passage means navigation through the territorial sea for the purpose of:
>
> (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
> (b) proceeding to or from internal waters or a call at such roadstead or port facility.
>
> 2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.
>
> Article 19. Meaning of innocent passage
>
> 1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.
>
> 2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:
>
> (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

---

[76] Phillip Jessup, *citad in* J. YTURRIAGA, STRAITS USED FOR INTERNATIONAL NAVIGATION: A SPANISH PERSPECTIVE 24 (1991).

[77] *Id.*

[78] LOSC, art. 2.

(b) any exercise or practice with weapons of any kind;
(c) any act aimed at collecting information to the prejudice of the defense or security of the coastal State;
(d) any act of propaganda aimed at affecting the defense or security of the coastal State;
(e) the launching, landing or taking on board of any aircraft;
(f) the launching, landing or taking on board of any military device;
(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
(h) any act of willful and serious pollution contrary to this Convention;
(i) any fishing activities;
(j) the carrying out of research or survey activities;
(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
(l) any other activity not having a direct bearing on passage.

A coastal state may validly take action to prevent passage that is not in accordance with the requirements above.[79] Otherwise, the right of innocent passage cannot be hampered;[80] neither can it be suspended, except temporarily in certain areas of the territorial sea where such suspension is essential for the protection of its security.[81] However, a coastal state can require ships exercising the right of innocent passage to use designated sea lanes and traffic separation schemes.[82]

The Convention also codified the international law on the Continental Shelf, which referred to the natural prolongation of the land territory of the state, beneath the sea but contiguous to the coast, and pertaining to the coastal state as an "inherent right" that exists *ipso facto* and *ab initio*, for purposes of exploring the seabed and exploiting its natural resources.[83] The Convention contained various rules for purposes of delimiting the outer limits of the Continental Shelf of states.[84]

Outside of all the maritime zones were the High Seas, or all parts of the sea not included in internal waters, territorial sea, EEZ, or archipelagic waters.[85] They were deemed to be beyond the sovereignty of any state, in which traditional High Seas Freedoms could be exercised. Within the High Seas, states could only exercise special limited jurisdictions.[86]

---

[79] *Id.*, art. 25, par. 1.
[80] *Id.*, art. 24, par. 1.
[81] *Id.*, art. 25, par. 2.
[82] *Id.*, art. 22.
[83] *Id.*, art. 76.
[84] *Id.*
[85] *Id.*, art. 86.
[86] *Id.*, arts. 86-120.

Beneath the waters lay the International Seabed Area, which pertained to the seabed, ocean floor, and subsoil beyond the limits of national jurisdiction. These were regarded as the "common heritage of mankind," which were not subject to private appropriation, nor to the sovereignty of any state. [87] The Convention laid down the rules for exploitation of this Area.[88]

The Convention also provided for special regimes not previously existent in international law. These special regimes included:

> 1. The Right of Transit Passage in straits used for international navigation.[89] This meant the exercise of freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one area of the EEZ or High Seas and another, or in order to enter or leave a state bordering the strait.[90] The Convention greatly limits the jurisdiction of the coastal state in matters which may affect passage.[91]
>
> 2. The Right of Archipelagic Sea Lanes Passage through archipelagic waters. This refers to the exercise of the right of navigation and overflight in "normal mode" for purposes of continuous, expeditious, unobstructed passage from one part of the High Seas or EEZ to another part thereof.[92] The right is exercised in sea lanes and air routes designated by the archipelagic state in consultation with International Maritime Organization. In theory, the sea lanes and air routes can reach up to 50 nautical miles in width; but the rules also provide that ships and aircraft cannot come closer to the coast than 1/10 of distance between bordering islands. If sea lanes and air routes are not designated, the right may be exercised through routes normally used for international navigation. [93]

---

[87] *Id.*, arts. 136-137.

[88] *Id.*, Part XI, as modified by the 1995 Agreement for the Implementation of Part XI of the United Nations Convention on the Law of the Sea.

[89] *Id.*, art. 38.

[90] *Id.*

[91] Under Art. 42 of the Convention, bordering States are to adopt rules and regulations only with respect to the safety of navigation and regulation of maritime traffic, marine pollution management by giving effect to international regulations, prevention of fishing by fishing vessels, and loading or unloading of commodities, currency, or persons in violation of customs, fiscal, immigration, or sanitary laws. Transit passage cannot be suspended or impeded in any manner by bordering states.

[92] LOSC, art. 53, par. 3.

[93] *Id.*, art. 53.

3. Provisions for management and conservation of fishing in the High Seas;[94]

4. Provisions encouraging control of marine pollution and protection of the marine environment;[95] and

5. Provisions regulating marine scientific research.[96]

D. Main Philippine Concerns

Of all the various portions and innovations of the Law of the Sea Convention, the primary causes of debate are the portions on the drawing of baselines from which the maritime zones are to be measured, and the recognition of passage regimes in favor of foreign vessels through those maritime zones. The techniques of drawing baselines from specific points on land are obviously inconsistent with the Philippines' legal formulation of territorial boundaries extending to points on the water enclosed by the Treaty of Paris lines. It has been argued that this results in the diminution of the Philippines' territory.[97] While from a Philippine perspective this may be the case, it must be noted that as far as the international community was concerned, the Philippines in fact expanded its legally recognized area of sovereignty upon the recognition of the archipelagic principle. With respect to passage rights, the international community was concerned with assuring the maximum extent of freedom of navigation through the legal regimes of innocent passage, transit passage, and archipelagic sea lanes passage. The recognition of these regimes within Philippine waters was a major issue for the country's negotiators because although the transit of commercial vessels could be accommodated, military vessels exercising the same rights within the archipelago were a different matter entirely.

In sum, the main Philippine concerns during the negotiation of the Convention on the Law of the Sea were, generally:

1. Recognition of sovereignty over waters around, between, and connecting the islands of the archipelago regardless of breadth and dimension, which were in danger of being disregarded by the territorial sea concepts then proposed;

---

[94] *Id.*, arts. 116-120.

[95] *Id.*, Part XII.

[96] *Id.*, Part XIII.

[97] *See* Merlin Magallona, *The UNCLOS and its Implications on the Territorial Sovereignty of the Philippines*, 11 WORLD BULLETIN 50-76 (Jan.-April 1995).

2. Exercise of the degree of control over passage of vessels through the same waters necessary to protect national security; and

3. Recognition of the rights to the marine wealth embraced within the areas described by the Treaty of Paris lines.

From an overview of the Convention's regime of maritime zones, it would appear that the Philippines was able to protect its interests in Nos. 1 and 3 above to a significant degree, much greater than what it would have been left with had the archipelagic state provisions in the Convention not been included. Without the archipelagic principles, the country would have been subjected to the ordinary regimes which would have fragmented the archipelago on account of pockets of High Seas between the islands, and due to the application of the Transit Passage in the various straits. If the area where resource and management rights could be legitimately exercised under the Convention were to be compared to the areas claimed within the Treaty of Paris lines, then there was indeed a corresponding increase.[98]

There were indeed compromises, as there was a corresponding responsibility to acknowledge innocent passage, archipelagic sea lanes passage, and traditional fishing rights. The impact of the latter issue was moderated by the fact that they required bilateral agreements to be implemented. With respect to the issues on passage, the Philippine delegation believed that the accommodation of the maritime powers was not too high a price to pay for the recognition of the remaining essence of archipelagic principles; they also believed that in time, technological developments would allow the country to compensate for weaknesses the country was exposed to by allowing such passage rights.[99] While it may be argued that the recognition of innocent passage and right of archipelagic sealanes passage in favor of foreign vessels are unacceptable for creating international highways for the maritime powers,[100] it must also be noted that historically and legally, the Philippines has recognized passage rights through its waters in favor of foreign vessels.

Without the archipelagic state provisions, it is likely that the international community would claim the Right of Transit Passage through the Philippines since the country is dotted with a number of straits that are traversed by traditional

---

[98] The main trade-off, according to Senator Tolentino, was the EEZ, which resulted in an increase of 132,100 square nautical miles to the area wherein the Philippines could avail of marine resources. The archipelagic waters provisions also meant that 141,800 square nautical miles of waters previously regarded by the international community as high seas came under the sovereignty of the Philippines. *See* Proceedings of the Batasang Pambansa Concurring in the United Nations Convention on the Law of the Sea, *in* PNT, Doc. No. 44D, 513-540, at 517.

[99] *Id.* at 515.

[100] *Id.* at 516.

international shipping routes.[101] In fact, for as long as the Philippines does not implement the archipelagic state provisions, the international community can plausibly claim that without implementation of the archipelagic state regime, only a 12-nautical mile territorial sea around each island can be recognized, implying that all straits within the Philippines are subject to Transit Passage and that pockets of High Seas exist within the islands. This can be obviated by application of the archipelagic state principles, and the passage of ships can be moderated by the designation of archipelagic sea lanes which are under the management of the Philippines, and can be substituted in certain circumstances. Likewise, the Philippines is allowed to suspend innocent passage in portions of archipelagic waters and thereby regulate inter-island passage activities of foreign vessels, which it could not do if such waters were regarded as pockets of High Seas.

E. Philippine Declarations Upon Signing of the Convention

The decision to sign the Convention was not easily made. After nearly 30 years of negotiations, the Philippines was able to gain some headway in the recognition of the archipelagic principles, but also had to give way to compromises. In signing the Convention, the Head of the Philippine delegation declared:

> Among the new concepts in the Convention is that of the archipelago. The Philippines advanced the archipelago principle as early as 1956 and we have established it in our national legislation. We are therefore happy that the archipelago principle has finally been recognized and accepted as part of public international law. Although we would have been much happier if our proposed amendments in this area had gained general acceptance, *we are satisfied, principally because of the inclusion of two basic considerations* in the text of the Convention.
>
> The first of these is the *recognition of the concept that an archipelago is an integrated unit* in which the "islands, waters and other natural features form an intrinsic geographical, economic, and political entity." No longer will the various islands of the archipelago be regarded as separate units, each with its own individual maritime areas, and the waters between them as distinct from the land territory. This archipelago concept carries far-reaching implications which can influence the interpretations of the provisions of the convention.
>
> The second welcome basic consideration that gives us satisfaction is the *recognition of the sovereignty of the archipelagic state over the archipelagic waters, the air space above them, the seabed and subsoil below them, and the resources contained therein.* The test states explicitly in clear terms the only qualification of this

[101] Prominent examples of these straits include the Balintang Channel between the Batanes Islands, Verde Island Passage between Southwest Luzon and Mindoro Island, the San Bernardino Strait between Southern Luzon and Samar Island, the Surigao Strait between Leyte Island and Northern Mindanao, and Mindoro Strait between Mindoro and Palawan.

sovereignty, by providing that this sovereignty is to be exercised "subject to the part," referring to Part IV on archipelagic states.

No qualification or limitation, therefore, outside of Part IV, on the exercise of sovereignty by the archipelagic states over the archipelagic waters would be valid. To make provisions outside of Part IV applicable to archipelagic states, the Convention expressly so provides. (Art. 52 and 54)

One consequence of this is that the archipelagic waters are subject only to two kinds of passage by foreign ships provided in Part IV of the Convention: (1) innocent passage, and (2) archipelagic sea lanes passage. This refers to all archipelagic waters, or waters inside the archipelagic baselines, wherever located, whether around or between the islands and whatever their breadth or dimension. *Transit passage, therefore, available to foreign ships in straits used for international navigation under Part III of the Convention, would not be available to them on national or domestic straits entirely within the archipelagic sealanes.*

Such national straits could be subject to sea lanes passage if the archipelagic state so decides. Of course, the elements of sea lanes passage are practically the same as those of transit passage; but while transit passage is imposed by the Convention on the waters of the coastal states concerned, sea lanes passage can be exercised by foreign ships only in such sea lanes as the archipelagic state may designate and establish.

Sea lanes passage does not impair the sovereignty of the archipelagic state over the waters of the sea lanes. It is thus expressly provided in Article 49, paragraph 4, that: "The regime of archipelagic sea lanes passage established in this Part shall not in other respects affect the status of the archipelagic waters, including the sea lanes, or the exercise by the archipelagic state of its sovereignty over such waters and their air space, seabed and subsoils, and the resources contained therein."

. . . .

You can readily see from this, Mr. President, that we have some problem with the 12-mile breadth of the territorial sea provided in the Convention. My government has studied the problem; it is a very difficult one for us. But this notwithstanding, my government nevertheless decided that it shall sign the Convention. The determining factor in arriving at this decision, as we have repeatedly stated, was the sovereignty of the archipelagic state over the Archipelagic waters, their air space, seabed, and subsoil and their resources. This sovereignty will bind together, in the eyes of International Law, the islands, waters, and other natural features of the Philippines as an "intrinsic geographical, economic and political entity."

. . . .

Our satisfaction with the EEZ may be better appreciated when we consider that the Philippine EEZ is more than 132,000 square nautical miles bigger

> than our historic territorial sea and therefore has a *compensating effect*.[102] [Italics supplied.]

From the above statement, it can be seen that despite the international community's non-acceptance of the Treaty of Paris lines as defining the extent of the territory of the Philippines, the head of the delegation considered that sufficient protection was accorded to Philippine interests in the recognition of the archipelagic principle insofar as they allowed for a concept of the archipelagic state as a single unified political entity, and for sovereignty over archipelagic waters. The Right of Archipelagic Sea Lanes Passage was accepted as an alternative to the more onerous Transit Passage regime that is provided for straits used for international navigation. And non-recognition of the Treaty of Paris limits as the maximum extent of the Philippine national territory was compensated by the recognition of the EEZ regime with assurance of access to resources within an even greater area beyond the archipelagic waters.

These statements, however, were cast in some ambiguity when the Philippines also submitted a formal declaration upon signing the Convention, which pertinently stated:

> 2. Such signing shall not in any manner affect the *sovereign rights* of the Republic of the Philippine *as successor* to the United States of America, under and arising out of the Treaty of Paris between Spain and the United States of America of December 19, 1898, and the Treaty of Washington between the United States of America and Great Britain of January 2, 1930;
>
> ....
>
> 4. Such signing shall not in any manner impair or prejudice the sovereignty of the Republic of the Philippines over any territory over which it exercises sovereign authority, such as the Kalayaan Islands, and the waters appurtenant thereto;
>
> 5. The Convention shall not be construed as amending in any manner any pertinent laws and Presidential Decrees or Proclamations of the Republic of the Philippines; the Government of the Republic of the Philippines maintains and reserves the right and authority to make any amendments to such laws, decrees, or proclamations pursuant to the provisions of the Philippine Constitution;
>
> 6. The provisions of the Convention on archipelagic passage through sea lanes *do not nullify or impair the sovereignty of the Philippines as an archipelagic state over the sea*

---

[102] Statement of the Head of the Philippine Delegation, Jamaica (December 10, 1982), *in* PNT, Doc. No. 44A, 505-508.

> *lanes and do not deprive it of authority to enact legislation to protect its sovereignty, independence, and security;*
>
> 7. The concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and *removes straits connecting these waters with the economic zone or high sea from the rights of foreign vessels to transit passage* for international navigation;... [103] [Italics supplied.]

A number of nations soon filed protests against the above declaration, averring, among others, that the matters referred to in the first paragraphs were in the nature of reservations prohibited by the Convention. The Convention was ratified two years later by the Batasang Pambansa,[104] after legislative deliberations which focused largely on the implications of the Convention to national security, fishing activities, and passage of foreign vessels.[105]

IV. UNDER THE 1987 CONSTITUTION

A. The Article on National Territory Revised

When a new Constitution was promulgated under the Aquino administration, it also contained a provision on the national territory, not too different from the 1973 formulation:

> The national territory comprises the Philippine archipelago, with *all the islands and waters embraced therein*, and all other territories over which the Philippines has sovereignty or jurisdiction, consisting of its *terrestrial, fluvial and aerial domains*, including its *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.[106] [Italics supplied.]

In addition, new provisions were added which indicated acceptance of certain concepts in the Law of the Sea, such as that on the protection of the marine wealth:

---

[103] The Philippine Declaration on the Signing of the Convention on the Law of the Sea, *in* PNT, Doc. No. 44B, 509-510.

[104] Res. No. 121, Resolution of the Batasang Pambansa Concurring in the United Nations Convention on the Law of the Sea (1984), *in* PNT, Doc. No. 44C, 511-512.

[105] *See* Proceedings of the Batasang Pambansa Convention on the Law of the Sea, *in* PNT, Doc. No. 44D, 513-540.

[106] CONST. art. I.

> The State shall protect the nation's marine wealth in its *archipelagic waters, territorial sea, and exclusive economic zone,* and reserve its use and enjoyment exclusively to Filipino citizens.[107]

Debates in the Constitutional Commission, however, reveal that the intention in adopting the article on the national territory was to simply use the 1973 formulation, though the Commissioners decided to place more emphasis on the fact that the Philippines is an archipelago. But discussions focused on the impact of the new provision on the Sabah claim, rather than on the maritime territorial areas. There were also disturbing indications that the Constitutional Commissioners were not properly informed of the meaning of the maritime zones, rights, and jurisdictions involved.[108]

B. Commitment to Abide by the Law of the Sea

From 1985, the Philippines had received a number of protests against the Declaration it filed when it signed the Convention on the Law of the Sea in 1982. Countries such as the Bellorussian Socialist Republic, China, Czechoslovakia, the USSR, the Ukrainian Socialist Republic, the United States and Vietnam filed their protests with the Secretary General of the United Nations. In 1988, Australia filed its own protest. These countries mostly argued that the Philippine Declaration was in the nature of reservations that were not allowed under the Convention.[109] The Philippines, in response to the Australian protest, issued a statement directed to all State Parties to the Convention saying:

> The Philippine Declaration was made in conformity with article 310 of the United Nations Convention on the Law of the Sea. The declaration consists of interpretative statements concerning certain provisions of the Convention.
>
> The Philippine Government *intends to harmonize its domestic legislation with the provisions of the Convention.*

---

[107] CONST. art. XII, sec. 2, par. 2.

[108] *See* Proceedings of the Deliberations of June 26, 1986, where the EEZ is referred to as expanding the country's territory, as against the three-mile rule which was observed, and the right of innocent passage as being necessary to save lives during fortuitous events. The EEZ is again referred to as the national territory in the record of Deliberations of June 30, 1986, and additionally, it is said that the provisions of the Convention on the Law of the Sea are reproductions of the definition of the country's national territory; straits are discussed as not being part of high seas, nor of the national territory. In the Deliberations of August 7, 1986, one Commissioner stated that the EEZ is now part of the internal waters of the Philippines; another said that the territorial waters can extend up to 300 miles from the nearest baselines under the archipelagic theory. *In* PNT, Doc. No. 48A, 555-593, and Doc. No. 49A, 595-608. These statements concretely indicate a lack of awareness of the actual meanings and implications of the various concepts of maritime zones under international law.

[109] China and Vietnam additionally contradicted the Philippines' claim to the Kalayaan Island Group.

> The *necessary steps are being undertaken* to enact legislation dealing with archipelagic sea lanes passage and the exercise of Philippine sovereign rights over archipelagic waters, *in accordance with the Convention.*
>
> The Philippine Government, therefore, wishes to assure the Australian Government and the States Parties to the Convention that the Philippines *will abide by* the provisions of the said Convention.[110] [Italics supplied.]

The meaning of the Philippine response is clear and unequivocal: the Philippines intends to abide by the Convention. However, since 1988, no concrete legislative or executive action has definitely resolved the issues of implementation of the Convention on the Law of the Sea.

C. Major Problem Areas and Issues

1. The Limitation of Choices

At the outset, it must be stated that the Philippine ratification of the Law of the Sea, together with subsequent official declarations reiterating the commitment to abide by its provisions, has charted the country's course irrevocably into compliance with the Convention. Not only does the rule of *pacta sunt servanda* demand it,[111] but even the ultimate and extreme option of denunciation of the Convention will not result in any advantage to the Philippines, as it is expressly provided that in the event of denunciation,

> 2. A State shall not be discharged by reason of the denunciation from the financial and contractual obligations which accrued while it was a Party to this Convention, *nor shall the denunciation affect any right, obligation, or legal situation of the State created through the execution of this Convention* prior to its termination for that State.
>
> 3. The *denunciation shall not in any way affect the duty of the State Party to fulfill any obligation embodied in this Convention to which it would be subject under international law independently of the Convention.*[112] [Italics supplied.]

Thus, it would appear that even if the Philippines were to attempt to withdraw from the Convention, it would still be legally bound, as far as the international community is concerned, to comply with its provisions. The second part of the first paragraph could be interpreted to mean that rights, obligations, or

---

[110] Philippine Response to the Australian Protest (Oct. 26, 1988), *in* PNT, Doc. No. 44F:1, 548.

[111] Vienna Convention on the Law of Treaties, art. 26. Reiterated in art.300 of the LOSC, as follows:

"State Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."

[112] LOSC, art. 317.

duties created by the express provisions of the Convention upon ratification and entry into force will remain enforceable, while the third paragraph could be interpreted to mean that portions of the Convention which may be deemed to have become customary international law, as far as the international community is concerned, would be enforceable just as well.

But the problem that would remain is that if the Convention is denounced and the country does not implement its provisions, then other countries could still demand that the more onerous obligations of the Convention be complied with by the Philippines (*e.g.*, transit passage through straits within the archipelago) while the latter would not even be able to exercise the relevant rights that would allow it to mitigate the impact of such obligations on the country.

2. Treaties and Philippine Constitutional Law

While the Constitution has provided for the incorporation of the general principles of international law as part of the law of the land,[113] it has placed treaties on the same level as statutes, and therefore subject to challenge before the Supreme Court.[114] Although a treaty may be declared invalid or unconstitutional, it is also accepted that a party to a treaty may not invoke provisions of its own internal law as justification for failure to perform its obligations under the treaty. Considering these rules, the Supreme Court has concluded that when a treaty is thus repealed or abrogated or amended as part of the law of the land, it still subsists as an obligation of the Philippines to the other State Party or Parties, although it may not be enforceable internally by the courts.[115]

The practical impact would be that if the Convention were successfully challenged before the Supreme Court, then there would be no duty on the part of agencies of the Government to implement it. The practical implication, perhaps, is that no appropriations will be devoted towards any activity that implements the Convention. In that case, then it would be as if the Government were to completely abdicate management of ocean activities insofar as it is covered by the Convention (which is quite a lot), because the Philippines would still be bound to passively comply with its obligations to the international community.

---

[113] CONST. art. II, sec. 2.

[114] CONST. art. VIII, sec. 4(2), under which the Supreme Court is granted jurisdiction to rule upon the constitutionality or validity of any treaty. This provision also existed under the previous Constitutions.

[115] *See* Abbas v. Commission on Elections, G.R. No. 89651, 179 SCRA 287 (1989).

3. The Existing Straight Baseline System

Republic Act No. 3046 establishes straight baselines in accordance with the *Anglo-Norwegian Fisheries Case.*[116] Among the options that have been proposed is the maintenance of this baseline system, or at least the use of modified straight baselines instead of archipelagic baselines to enclose the islands of the archipelago, in order that the waters within the baselines would retain their "internal" character. Such an option, however, is actually far less attractive than the archipelagic baseline system. First of all, the "new" internal character of the waters does not affect the right of innocent passage previously exercised by foreign ships through those waters. Second, the establishment of straight baselines brings all the straits in the archipelago within the ambit of the regime of Transit Passage,[117] which is even more onerous than Archipelagic Sea Lanes Passage.[118] Thus, for the sake of giving the nomenclature of "internal waters" to the waters within the straight baselines, the country would in effect be giving up even more control over the passage of foreign ships through those waters.

4. Striking A Middle Ground

From the foregoing, it appears that the Philippines ultimately has no choice but to implement the Convention, for non-implementation places it in a far less favorable position on account of the non-recognition by foreign nations of any action that is inconsistent with the Convention's rules. But in truth, this is not as negative a situation as it would seem.

5. Constitutional Flexibility

The ultimate impact of the Convention on the Constitution will no doubt be focused upon the article on the National Territory. However, the phraseology of the article is flexible enough to permit the incorporation of the system of maritime zones under the Convention into the Philippine legal system. This can be demonstrated if one were to momentarily disregard the historical antecedents of the Treaty of Paris and related agreements and consider the article in light of the Convention. Since the article on national territory does not specify the location or

---

[116] Angle-Norwegian Fisheries Case (U.K. v. Norway), 51 I.C.J. Rep. 116.

LOSC, art. 8. The second paragraph states:

"2. Where the establishment of straight baselines in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided by this Convention shall exist in those waters."

[117] *Id.*, Part III.

[118] There is no recognition of sovereignty over the waters beyond the 12 nautical mile limit; passage (both transit and innocent) cannot be suspended; and coastal state jurisdiction over passage is limited to only the select areas specified in the Convention.

breadth of the territorial sea or internal waters, there is no apparent inconsistency between it and the system of maritime zones described in the Convention.

The only major inconsistency would be the article's declaration that the waters "around, between and connecting" the islands of the archipelago are deemed as "internal waters," whereas the Convention defines "internal waters" as waters on the landward side of the baseline of the territorial sea, or waters within closing lines drawn across mouths of rivers, bays, and harbor works in the case of archipelagic waters. However, it is possible to adopt a new national legal definition of "internal waters" which would encompass the "archipelagic waters" as defined in the Convention. To date, no piece of Philippine legislation precisely defines "internal waters." The Constitution refers to the waters around, between, and connecting the islands as "*part of* the internal waters," implying that other Philippine waters (inland waters, for example) are also internal waters but not mentioned by the article. Such a national legal definition would bring the Convention within the ambit of the provision of the national territory. In any case, "archipelagic waters", which are likewise not expressly defined in statutory law, are recognized by the Constitution in a separate provision.[119]

Ultimately, it is not whether the bodies of water around, between, and connecting the islands are called "internal" which determines the effectiveness of State control over foreign vessels. It is international law which will become the basis for legitimacy or illegitimacy of State actions vis-à-vis foreign vessels within the waters of the archipelago. But to be able to exercise the rights and jurisdiction already recognized by international law, it is necessary to make use of the concepts provided by the Convention and adapt them to the Philippine legal system.

The character and extent of the territorial sea has also been at the center of the debate on the impact of the Convention. The resulting diminution of the territorial sea under the Convention, it is contended, is a diminution of our resource base and defense. However, it should be noted that the country's territorial sea as defined under Rep. Act No. 5446 is currently an even more liberal regime than territorial seas of other countries, owing to the provision of Pres. Decree No. 1599 recognizing freedom of navigation and overflight within the EEZ, which overlaps with the territorial sea from the baselines onward, without making the appropriate reservation of rights over the territorial sea. There is little else that can be seen as a diminution of sovereignty over the existing territorial waters of the country than according full freedom of navigation and overflight to foreign nations.

---

[119] CONST. art. XII, sec. 2, par. 2.

It should be remembered that at its core, the need for a territorial sea arose from the need to (1) secure the fisheries and other resources within the extension of the land territory, and (2) protect the State from the threat posed by naval ships.

With respect to the first, the concern for resources has adequately been addressed by the EEZ and continental shelf concepts, which extends the State's exclusive jurisdiction and protects its sole access to the resources seaward to at least 200 nautical miles. In fact, the area covered by the EEZ is far greater than that contained in the original treaty limits. As for the second, it should be noted that the idea of a definite breadth for the territorial sea sprang from the cannon-shot rule. As such, the security value of the territorial sea was tied to the range of naval artillery. In an era of guided missiles that can reach far beyond 500 miles, the importance of the security consideration for determining the breadth of the territorial sea obviously needs re-examination. The impact of the dimensions of the territorial sea on national defense planning has significantly diminished on account of the nature of modern weaponry. Thus, it would be more practical and useful to focus on the benefits of access to the resources rather than on the military value of the breadth of the territorial sea.

6. Advantageous Rights and Duties

The objection to the Convention, revolving around the impact on the national territory provision and the issue of passage of foreign vessels, has unfortunately obscured the greater advantages of the majority of the provisions in the Convention in recognizing State rights and jurisdiction in extended maritime areas which were not recognized before. The Convention does not deal with territory, after all, but rather the management of the oceans, and covers such activities as marine pollution, scientific research, and use of marine resources. On account of the continuing debate over some provisions of the Convention, the Philippines has failed to take advantage of the rights, jurisdictions, and obligations in all the other parts of the Convention in managing its oceans, some areas of which extend far beyond the original limits of the national territory. Using the Convention as basis or reference, other countries have gone far ahead in managing marine activities in their EEZs, territorial waters, or archipelagic waters, and have successfully entered into cooperative agreements with other states with respect to the exploitation of living and non-living resources.[120]

---

[120] For example, Indonesia has taken full advantage of the Convention to engage its neighbors in oil and gas exploration and fisheries cooperation, to institute a management regime for shipping in its archipelagic waters, and to take an active part in multilateral activities on marine pollution, fisheries, and ocean management. Before the Asian Financial Crisis of 1997, Indonesia had achieved economic development at a better pace in spite of the burdens of the Convention which the Philippines has been so concerned about.

It must be noted that the Philippines cannot afford to be left out of the continuing developments in the Law of the Sea. It has great maritime interests that have not been properly articulated on account of the deadlock created by the debate on its impact on the national territory. In the meantime, other countries have pushed forward, continuously building a regime for management of the ocean and its resources.

7. Mitigation of Impacts of Onerous Obligations

The main concerns of the Philippines about the Convention have been on the grant of archipelagic sea lanes passage and its impact on national security, territorial integrity, and the recognition of traditional fishing rights within archipelagic waters.

With respect to the second, while there is a duty to recognize traditional fishing rights, the modalities will still be subject to bilateral agreements between the archipelagic state and the state to which the fishers belong. This moderates to a great extent the impact of mere recognition, and allows the Philippines a degree of flexibility, as well as a mandate, to manage the traditional fishing activities of foreigners. To date, no work has been done on how this provision may be implemented by the Philippines, in contrast to other countries like Indonesia which has come up with a working definition of "traditional fishing,"[121] and Australia which forged agreements on it.[122] Yet, it is indisputable that many traditional Malaysian and perhaps Indonesian fishers traverse our waters in the southern fringes of the archipelago.

As for the first concern, what needs to be considered is that without implementation of the Convention, the Philippines cannot exercise any effective and legitimate regulation of international passage through its waters, either because the regime of Transit Passage can be invoked, or the Right of Archipelagic Sea Lanes Passage may be exercised by foreign ships in all normal routes of navigation for as long as no designation is made. Part IV of the Convention provides the basis for at least limiting the passage of ships to designated Archipelagic Sea Lanes, and these Sea Lanes can be substituted under conditions that the archipelagic state may define. In archipelagic waters outside of those designated for Archipelagic Sea Lane Passage, the exercise of the right of innocent passage may likewise be moderated by the

---

[121] In fact, it is a rather restrictive definition applicable to what may generally be described as artisanal fishers using small dug-out boats to fish for subsistence. Personal conversation with Amb. Hasjim Djalal at the First ASEAN Legal Experts Meeting on the UN Convention on the Law of the Sea, Manila Hotel (Nov. 26-27, 1997).

[122] The Torres Straits Treaty between Australia and Papua New Guinea signed in 1978 included a provision for access of traditional fishers; and a Memorandum of Understanding on Access by Traditional Indonesian Fisherperson was signed between Australia and Indonesia in 1974.

designation of sea lanes[123] and can even be suspended for reasons of security. What is important is that Part IV allows the Philippines a greater degree of control over passage than what would ensue if Transit Passage rights were to be invoked by the international community in Philippine waters, as they have ground to do so under existing legal conditions. Moreover, having a system of internationally recognized sea lanes allows the Philippines to rationalize its monitoring of foreign vessels use of the waters of the archipelago, and more efficiently allocate its meager resources for management of Philippine waters.

8. Complicating Factors

Apart from the issues relating directly to the inconsistencies between national territorial laws and international law, the status and enforceability of the Philippine jurisdiction in her maritime areas is complicated by the unresolved territorial issues pertaining to the Kalayaan Island Group claim, the Sabah claim, and relatively recently, Scarborough Shoal.[124] To date, no clear directions have been provided by either legislation or executive decision as to the pursuit of these claims to their logical conclusion; thus they remain problem areas for both legal and operational purposes.

Although the claim to the Kalayaan Island Group is stated in Pres. Decree No. 1596, the substantiation of that claim and its pursuit under international law, whether through foreign policy and diplomacy or through third-party settlement before an international body, have not been firmly and adequately addressed. The country's policy on pursuing the claim to Sabah remains ambiguous, and this was not clarified despite the abortive filing for Intervention in the case between Malaysia and Indonesia regarding sovereignty over Pulau Sipadan and Pulau Ligitan, two small islands off the coast of Sabah. And a clear legislative or executive statement as to the basis of the country's claim to Scarborough Shoal has yet to be issued. The official ambiguity as to the status of these claims, even under Philippine law, makes it even more difficult for the country to properly define and defend the maritime territories and jurisdictions that must necessarily be projected from the land territories of the archipelago.

---

[123] In the same manner that a coastal state is allowed to designate sea lanes and traffic separation schemes through the territorial sea; this is different from Archipelagic Sea Lanes where the Right of Archipelagic Sea Lanes Passage may be exercised.

[124] Scarborough Shoal is a largely submerged feature just outside of the Treaty of Paris Lines adjacent to Zambales. Since the early 1990s, relations between the Philippines and China have frequently been soured due to Chinese fishing activities in the Shoal, which is within the Philippine EEZ but outside of the Treaty of Paris Lines.

9. Redefining our Maritime Territories and Jurisdictions

The system of maritime zones created by our laws, and that under the Convention, are very different and will undoubtedly cause conflicts with other nations. Even if they were recognized by international law, the maritime zones created by Rep. Act No. 3046 as amended, Pres. Decree No. 1596, and Pres. Decree No. 1599 demand an enormous and complicated legal and logistical support structure in order for the country's rights and jurisdictions to be exercised effectively to protect and pursue the national interest in those areas. In view of the Law of the Sea, which is undoubtedly the law as far as the international community is concerned, these tasks are made even more difficult, perhaps impossible, to accomplish.

This author believes that the Treaty of Paris (and associated treaties) can no longer serve as the standard for defining the limits of our maritime territories and jurisdictions, because without recognition of those limits by the international community, any attempt to exercise sovereign acts will not be considered legal and will always be subject to contest. Only those acts in conformity with the current state of international law, much of which is embodied in the Law of the Sea Convention, will be considered valid. The history of Philippine laws and practice regarding its national territory militates against validly asserting full sovereignty in excess of what the Law of the Sea Convention provides.

In the first place, Spanish and US state practice with respect to the Treaty of Paris indicated that the Treaty lines were not considered as the outer limits of the country's maritime territories; the Philippines as successor-in-interest to these states could therefore not have acquired sovereignty over the water areas beyond the three nautical mile band adjacent to the islands. Second, the Philippines' claim to territorial seas up to the Treaty limits, as defined in Rep. Act No. 3046 as amended, is in the nature of a unilateral claim to "historic waters" that was in fact rejected by the international community in the course of the negotiations for the Law of the Sea Convention. Third, the Philippines' signature and ratification of the Law of the Sea Convention, and subsequent declaration to the effect that it will abide by the Convention, indicates that it has committed itself to abandoning the Treaty of Paris limits and redrawing the maritime territories and jurisdictions of the country in accordance with the rules set forth in the Convention. A contrary interpretation would mean a violation of the basic rule of *pacta sunt servanda* under the Law of Treaties.[125] Fourth, the validity of any action undertaken by the Philippines in areas of the sea that are beyond the maritime zones described by the Law of the Sea Convention, even though they are within the Treaty of Paris lines, will be measured

[125] Vienna Convention on the Law of Treaties, art. 26.

not against the municipal law, but rather against international law, in case of disputes with other countries. These actions will be very difficult to defend on account of the confusing system of maritime zones that are currently in place in the Philippines, and the history of Philippine state practice with respect to its maritime zones and jurisdictions which may be best described as ambiguous and inconsistent.

It should also be pointed out that in the management of the oceans, the interactivity of the marine environment and the mobility of the marine resources are such that boundary lines drawn on a map have little meaning. Activities on one side of any maritime border can impact upon the environment on the other side, perhaps to an even worse degree. Ocean management issues are transboundary in nature, and whether we advocate the Treaty of Paris lines or the Convention lines, ultimately the effectiveness of our actions will not be based on lines on a map, but on the extent that we can address the issues on multiple levels that are not geographically-defined. The ability to address these issues out at sea is dependent on the mutual cooperation of other states, which cannot be undertaken solely under the framework of municipal law, but rather under the framework defined by international conventions.

The Philippines' location at the nexus of the Southeast Asia, South China Sea, and Pacific Ocean makes it the most prone to multiple overlaps of maritime jurisdiction. To date there is no clear national policy on how the problems and issues created by these overlaps can be dealt with, because of the rigid territorial structure presumed to have been created by existing laws on the national territory. But these problems and issues are existing, continuing, and getting worse. For example, there is already a diffusion of Malaysian and Philippine settlements in the various islands along the Philippine-Malaysian border, threatening to render the border irrelevant to the people in those fringes of the territory. The competition for occupation of the features of the Spratly Island Group, of which the Kalayaan Island Group is a part, continually threatens to throw the littoral claimant states into conflict. In the north, Taiwanese fishers continually encroach upon the fishing grounds in the Batanes and northern portions of Luzon, to the detriment of the disadvantaged Filipino fishing communities in those areas. Every month, the newspapers are replete with news of incursions of foreign fishing vessels into Philippine waters. These are but some of the slowly escalating conflicts that are brewing, and yet the Philippines has not laid any groundwork for at least managing the existing problems and still relies upon an inconsistent legal framework of maritime zones.

V. CONCLUSION

Ultimately, the lines of a map, whether they are the Treaty of Paris lines or the Convention's maritime zones, are meaningless out at sea. Those lines do not impede the movement of resources, nor do they act as barriers to the impacts of the many uses of the ocean. What matters is human activity, and how to manage or influence such activity to the end that they do not diminish our interests in the areas where they occur, and that the Philippines interests in the resources and activities in those ocean areas are protected. Human activities can be influenced by legitimate and commonly accepted norms. The provisions of national laws on the national territory become less relevant where foreign vessels and the interests of the international community are concerned, but what will matter to them will be provisions of international agreements. Recognition of international norms allocating rights, duties, and obligations will be dependent on the terms of the latter rather than the former.

There is no doubt that the Philippines is already bound to implement the United Nations Convention on the Law of the Sea, as it has publicly declared to the international community for more than 10 years now. The real question, however, should not be whether or not the Convention increases or diminishes the extent of the national territory as drawn on a map, as the debates have tended to revolve around, but how the Philippines can exercise its rights under the Convention in order to pursue its maritime interests in the areas contemplated to be covered by the expanse of such territory. In the context of the international community, and considering the relative capacities of the Philippines vis-à-vis other nations, the pursuit of such interests can only be effectuated if there is active cooperation and compliance on the part of other countries.

The Law of the Sea has led to the rapid and progressive development of international law on practically every aspect of ocean use; these developments cannot be impeded or affected by the Treaty of Paris lines. All current and future developments in international law, especially with respect to international cooperation in the management of ocean spaces, are fundamentally based on the system of maritime zones defined in the Law of the Sea. This implies that an effective and internationally enforceable system of managing issues and problems in the ocean can only be pursued through the globally accepted framework of the Convention.

The Philippines must recognize that the United Nations Convention on the Law of the Sea provides an acceptable framework for engendering the cooperation of the international community in the management of shared resources and ocean spaces. It is high time that the Philippines commits itself to a program of

implementing the Convention, and enable itself to exercise its rights, as well as require compliance by other states of their duties and obligations. Otherwise, our maritime territories and jurisdictions will remain unilateral claims not entitled to recognition by other countries, and we will always be hampered in any effort to effectively manage any aspect of ocean activities or access any of our ocean resources, especially in spaces where our rights and jurisdictions will be subject to contest.

- o0o -

Figure 1. Graphic representation of the maritime boundaries of the Philippines under existing law, based on a map drawn by the National Mapping and Resource Inventory Authority (NAMRIA). The actual boundaries between the Exclusive Economic Zones (EEZ's) of the Philippines and neighboring countries have yet to be negotiated and delimited as required by PD 1599. The basis of the Philippines' claim to Scarborough Shoal (the dot adjacent to Zambales just outside the Treaty of Paris lines) cannot be found in current legislation. Likewise, it should be noted that the island of Las Palmas (or Miangas), near the southern tip of Davao Province in Mindanao and well inside the Treaty of Paris lines, has been declared to be part of Indonesian territory since 1928. And since the geographic extent of the Philippine claim to Sabah has never been officially or fully clarified, there is at present no means of determining the maritime zones that may be projected from the claimed land area. Not shown is the extent of the Continental Shelf, the precise extent of which has not been defined although it has been claimed under Proc. 370.

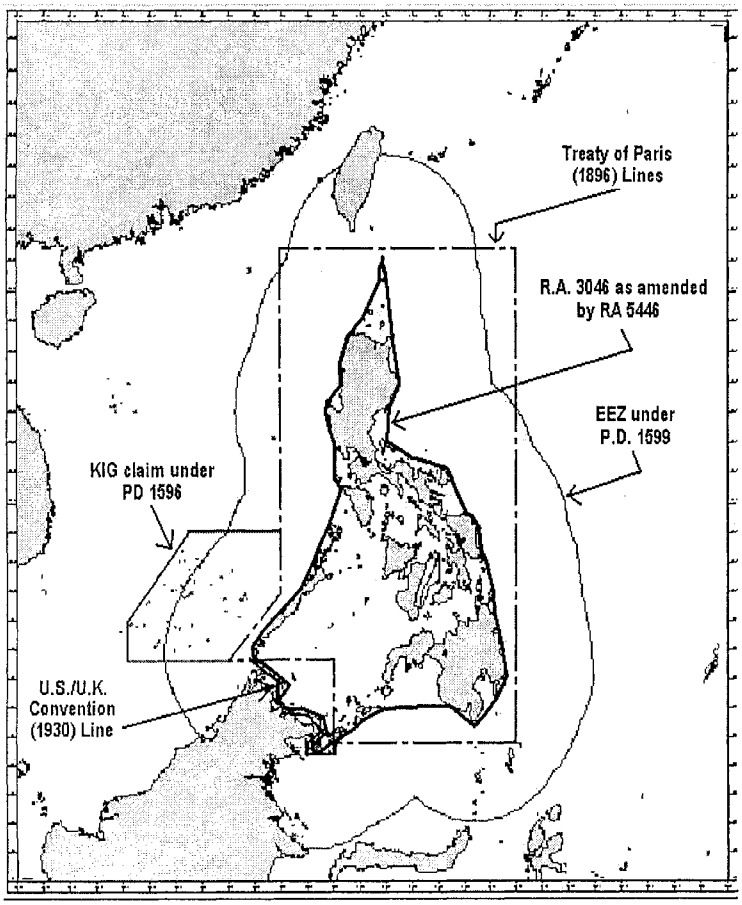


Figure 2. Illustration graphically showing the extent or levels of sovereignty and jurisdiction over maritime areas presently mandated under existing Philippine laws (the lighter shades represent less sovereignty or jurisdictions). Note the inconsistency of legally mandated sovereignty over areas of the sea outside the EEZ, where only sovereign rights are mandated by PD 1599 and freedom of navigation and overflight in favor of foreign countries is recognized even within the territorial seas defined under RA 5446. Likewise, note the indeterminate extent of the EEZ in areas which overlap with the EEZ's of neighboring countries.

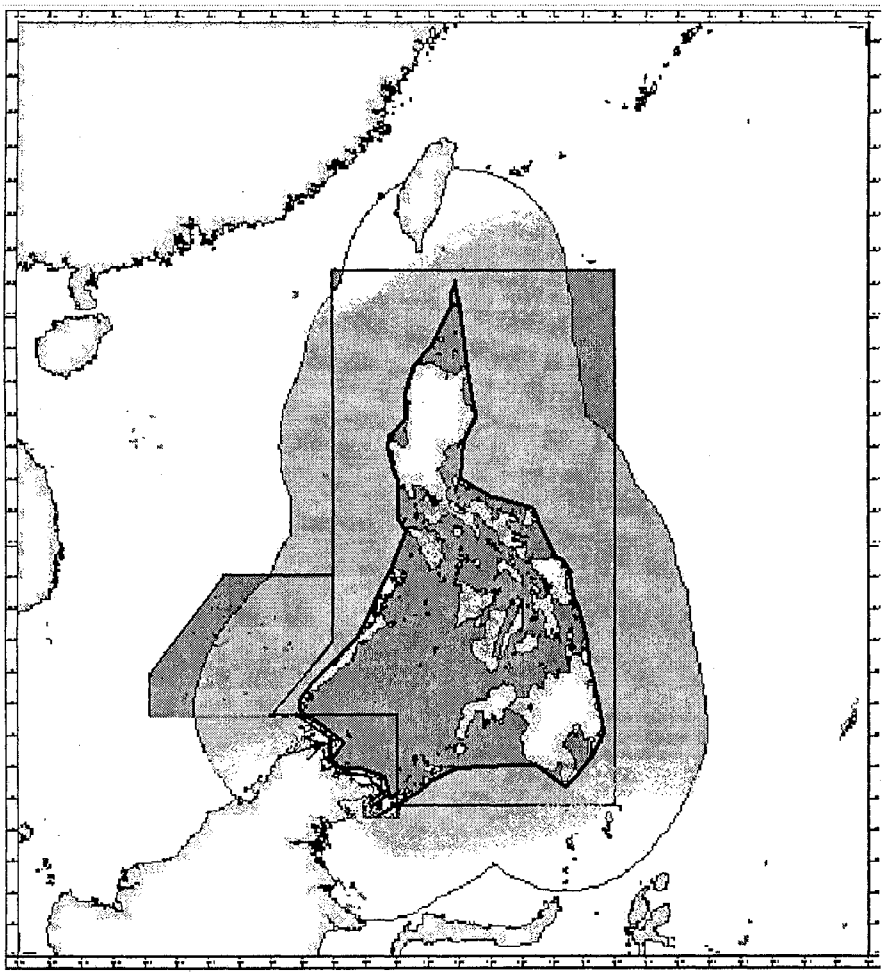
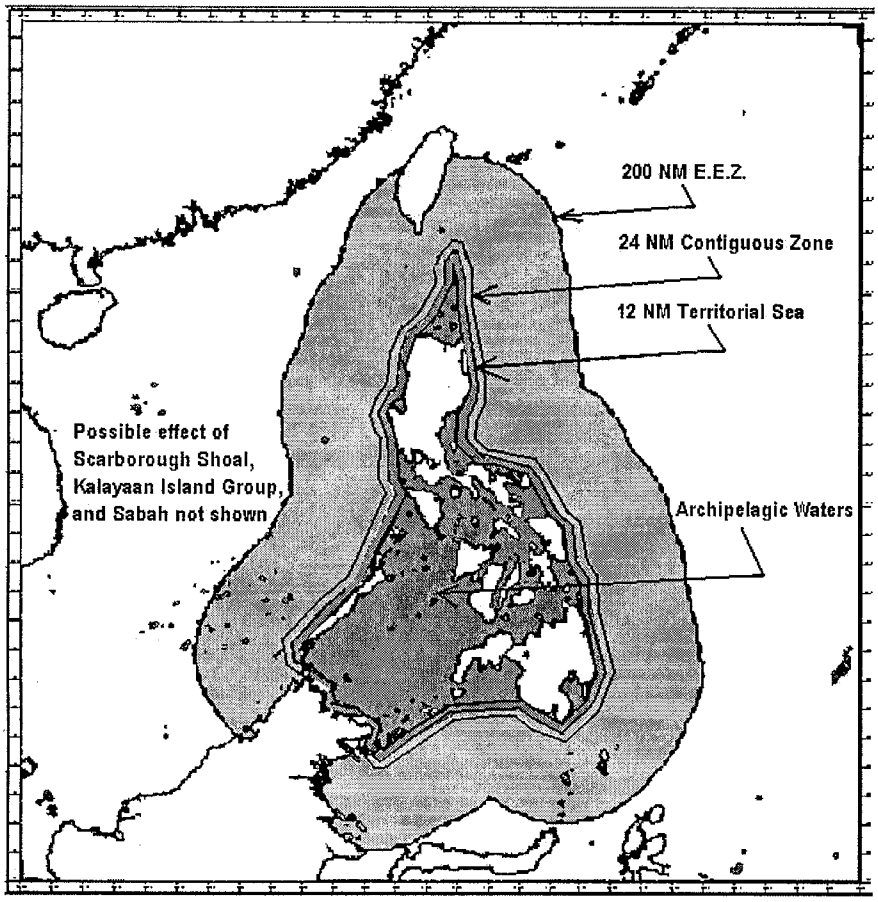


Figure 3. Illustration of one of several possible configurations of maritime zones which the Philippines may claim under the rules of the Law of the Convention, but without considering yet the effect of the Philippine claims to Scarborough Shoal, the Kalayaan Island Group, and Sabah, as well as the outcome of negotiations over the outer limits of the EEZ. Under this system of maritime zones, sovereignty is recognized within archipelagic waters subject only to the designation of archipelagic sea lanes for foreign vessels and aircraft. The 12 nautical mile territorial sea is likewise recognized to be under Philippine sovereignty, subject to the right of innocent passage; within the 24 nautical mile contiguous zone certain limited jurisdictions may exercised, and within the EEZ sovereign rights over the resources is recognized as prescribed under international law. Not shown is the extent of the Continental Shelf, the precise extent of which has not yet been defined and claimed.



Abstract:

THE FUNDAMENTAL RIGHT OF THE MARCOS HUMAN RIGHTS VICTIMS TO COMPENSATION

Professor Jon M. Van Dyke asserts that the right to obtain financial compensation is in itself a fundamental human right. This right is well-established under international law. The obligation to compensate victims of human rights abuse, meanwhile, is a responsibility of the successor government. Compensation for the victims of such abuses is one strategy that can be utilized in order to bring closure and reconciliation in a divided society.

The author claims that the Philippine government headed by then President Corazon Aquino, successor to the oppressive regime of Ferdinand Marcos, has occasionally recognized its obligation to the human rights victims. In general, however, it has ignored its responsibility under international law to compensate those who have suffered.

In this article, Prof. Van Dyke explains in detail how the Philippine government has failed in fulfilling its obligation to compensate the victims of the Marcos regime. He recommends that the Philippine government must reassess its position regarding the litigation and must support the victims in their efforts to collect judgment given on their behalf by the American courts.