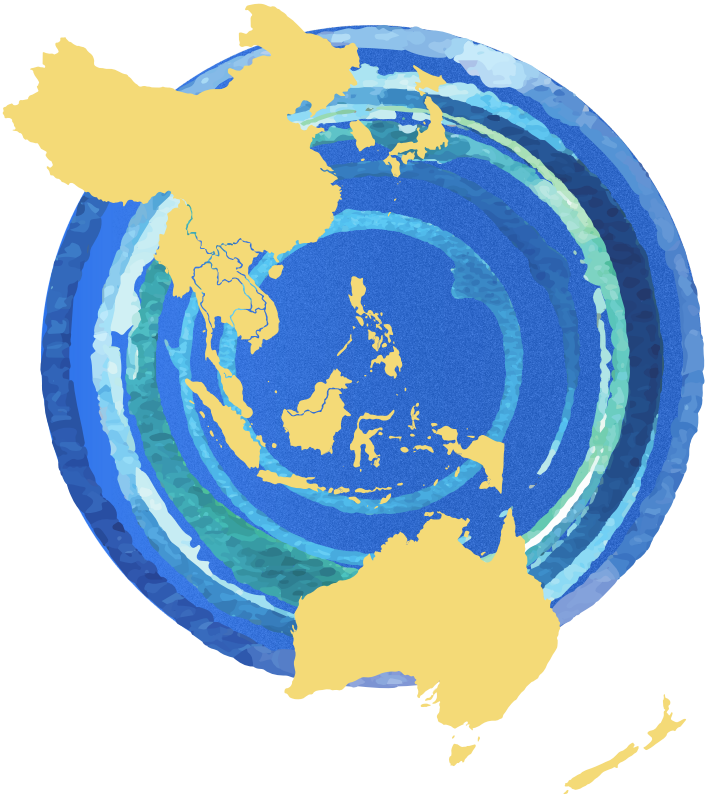
Working Together To Secure Our Seas

A Primer on Philippine Maritime Zones



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FOUNDATION FOR THE NATIONAL INTEREST

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About the Foundation for the National Interest

The Foundation for the National Interest (FNI), circa 2020, is a gathering of likeminded Filipinos who have the Philippines' national interest at the core of its activities. FNI is an independent institution devoted to the pursuit and promotion of the Philippines' national interest. FNI conducts research and publication activities, facilitates dialogue and conversations, provides training and capacity-building programs, as well as maintains a pool of domestic partnerships and international linkages that furthers the cause of Philippine development.

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Working Together To Secure Our Seas: A Primer on Philippine Maritime Zones

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List of Abbreviations

AO	*Administrative Order*
ASEAN	*Association of Southeast Asian Nations*
ASL	*Archipelagic sea lane*
CABCOM MOA	*Cabinet Committee on Maritime and Ocean Affairs*
CLCS	*Commission on the Limits of the Continental Shelf*
ConCon	*Constitutional Convention*
DFA	*Department of Foreign Affairs*
ECS	*Extended continental shelf*
EEZ	*Exclusive economic zone*
EO	*Executive Order*
GEACOP	*Greater East Asia Co-Prosperity Sphere*
ISA	*International Seabed Authority*
ITLOS	*International Tribunal for the Law of the Sea*
KIG	*Kalayaan Island Group / Kalayaan Group of Islands*
MBD	*Maritime Boundary Delimitation*
MSC-IMO	*Maritime Safety Committee, International Maritime Organization*
NAMRIA	*National Mapping and Resource Information Authority*
NMP	*National Marine Policy, 1994*
NM	*Nautical miles*
PCA	*Permanent Court of Arbitration*
PD	*Presidential Decree*
PH/RP	*The Philippines; Republic of the Philippines*
PRC	*China; People's Republic of China*
RA	*Republic Act*
REE	*Rare earth elements*
RI	*Indonesia; Republic of Indonesia*
SB	*Senate Bill*
SCS	*South China Sea*
TOP	*Treaty of Paris*
UK	*Great Britain; United Kingdom of Great Britain and Northern Ireland*
UN	*United Nations*
UNCLOS/LOSC	*UN Convention on the Law of the Sea / Law of the Sea Convention*
US	*The United States*
WPS	*West Philippine Sea*

List of Philippine Laws Cited

Act No. 2711	*An Act Amending the Administrative Code (s. 1917)*
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 (s. 1932)*
Public Law No. 40	*Philippine Autonomy Act; The Jones Law (s. 1916)*
Public Law No. 127	*Philippine Independence Act; The Tydings-Mcduffie Act (s. 1934)*
1935 Constitution	
1973 Constitution	
1987 Constitution	
Presidential Decree No. 1596	*Declaring Certain Area part of the Philippine Territory and Providing for their Government and Administration (s. 1978)*
PD No. 1599	*Establishing an Exclusive Economic Zone and for other purposes (s. 1978)*
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 (s. 1968)*
Administrative Order No. 29	*Naming the West Philippine Sea of The Republic of the Philippines, and for other purposes (s. 2012)*
Republic Act No. 387	*An Act to Promote the Exploration, Development, Exploitation, and Utilization of the Petroleum Resources of the Philippines, to Encourage the Conservation of such Petroleum Resources, to Authorize the Secretary of Agriculture and Natural Resources to Create an Administration Unit and a Technical Board in the Bureau of Mines, to Appropriate funds therefore, and for other purposes; Petroleum Act (s. 1949)*
RA No. 3046	*An Act to Define the Baselines and the Territorial Sea of the Philippines (s. 1961)*
RA No. 5446	*An Act to Amend Section One of Republic Act Numbered Thirty Hundred And Forty-Six, Entitled "An Act to Define the Baselines of the Territorial Sea of the Philippines" (s. 1968)*
RA No. 7952	*An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, and Conservation; Philippine Mining Act (s. 1995)*
RA No. 9522	*An Act to Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act No. 5446, to Define the Archipelagic Baseline of the Philippines and for other purposes (s. 2009)*
Senate Bill No. 541	*Baselines of the Philippine Territorial Sea (s. 1960)*
House Bill No. 35	*An Act Establishing the Benham Rise Research and Development Institute, Providing funds therefor, and for other purposes (s. 2019)*
HB No. 816	*An Act Providing for the Establishment of the Archipelagic Sea Lanes in the Philippine Archipelagic Waters, Prescribing the Rights and*

	Obligations of Foreign Ships and Aircraft Exercising the Right Of Archipelagic Sea Lanes Passage (s. 2019)
Executive Order No. 738	*Establishing Cabinet Committee on the Treaty on the Law of the Sea (s. 1981)*
EO No. 239	*Reorganizing the Department of Foreign Affairs and for other purposes (s. 1987)*
EO No. 328	*Reconstituting the Cabinet Committee on the Law of the Sea (s. 1988)*
EO No. 186	*Expanding the Coverage of the Cabinet Committee on the Law of the Sea and Renaming It as the Cabinet Committee On Maritime and Ocean Affairs (s. 1994)*
EO No 25	*Changing the Name of "Benham Rise" to "Philippine Rise" and for other purposes (s. 2017)*
1994 National Marine Policy	

List of Rulings and Decisions Cited

1910 US vs. Bull	*G.R. No. L-5270, January 15, 1910* *The United States, plaintiff-appellee vs. H.N. Bull, defendant-appellant*
1922 Philippine Islands vs. Wong Cheng	*G.R. No. L-18924, October 19, 1922* *The People of the Philippine Islands, plaintiff-appellant vs. Wong Cheng (alias Wong Chun), defendant-appellee*
2011 Magallona *et al*. vs. Ermita *et al*.	*G. R. No. 187167, August 16, 2011* *Prof. Merlin M. Magallona et al., Petitioners vs. Hon. Eduardo Ermita et al., Respondents*
2016 Republic of the Philippines vs. People's Republic of China	*PCA Case No. 2013-19* *In the Matter of the South China Sea Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between The Republic of the Philippines and The People's Republic of China*

List of other laws and International Treaties & Conventions Cited

1878 Territorial Waters Jurisdiction Act, Singapore	*An Act to Regulate the Law Relating to the Trail of Offences Committed on the Sea with a Certain Distance of the Coast of Her Majesty's Dominions*
1898 Treaty of Paris	*Treaty of Peace Between The United States Of America and The Kingdom Of Spain (1898)*
1900 Treaty of Washington	*Treaty Between The Kingdom Of Spain and The United States of America for Cession of Outlying Islands of The Philippines (1900)*
1930 Convention	*Convention Between The United States of America and Great Britain Delimiting the Boundary Between The Philippine Archipelago and the State of North Borneo (1930)*
1951 Treaty of San Francisco	*No. 1832. Argentina, Australia, Belgium, Bolivia, Brazil, etc.: Treaty of Peace with Japan (With Two Declarations). Signed at San Francisco, on 8 September 1951*
1963 Manila Accord	*No. 8029. Philippines, Federation of Malaya and Indonesia: Manila Accord. Signed at Manila on 31 July 1963*
1982 UNCLOS	*UN Convention on the Law of the Sea (1982)* *UNCLOS I (1958)* *UNCLOS II (1960)* *UNCLOS III (1967)*
2019 RP-RI EEZ Boundary Treaty	*An Agreement Delineating the Boundary Between the Overlapping Exclusive Economic Zones of The Philippines and Indonesia* *(s. 2019)*
Act No. 4, Indonesia	*Act No. 4 of 1960 Concerning Indonesian Waters*
Act No. 5, Indonesia	*Act No. 5 of 1983 on the Indonesian Exclusive Economic Zone*
Act No. 6, Indonesia	*Act No. 6 of 8 August 1996 Regarding Indonesian Waters*
Government Regulation No. 38, Indonesia	*Government Regulation No. 38 Of 2002, As Amended by Government Regulation No. 37 Of 2008 On Indonesian Archipelagic Baselines*
Act No. 83, Malaysia	*An Act Relating to Continental Shelf of Malaysia, the Exploration thereof and the Exploitation of its Natural Resources and for Matters Connected Therewith (Revised-1972); 1966 Continental Shelf Act*
Act No. 311, Malaysia	*An Act Pertaining to the Exclusive Economic Zone and Certain Aspects of the Continental Shelf Of Malaysia and to Provide for the Regulation of Activities in the Zone and on the Continental Shelf and for Matters Connected Therewith; 1984 Exclusive Economic Zone Act*
IMO Assembly Resolution A.858(20)	*Procedure for the Adoption and Amendment of Traffic Separation Schemes, Routeing Measures other than Traffic Separation Schemes, Including Designation and Substitution of Archipelagic Sea Lanes, and Ship Reporting Systems (Adopted on 27 November 1997)*

Foreword

As a sailor in service to our maritime nation, I had the wonderful opportunity of seeing and living the beauty and richness that makes the Philippines. It always exhilarates me to feel the gentle breeze on my face while witnessing a pod of dolphins galloping at the vow of the vessel as we cruise along the water; at dusk, to bask in the colors of the crimson sky as the sun gently sets in the distant horizon; and to be met at dawn by *basnigs* escorted by seagulls returning to port with their load of fish catch. The Philippines is indeed blessed; deserving of being called "The Pearl of the Orient." It is a unison of both exotic islands and vibrant seas, the expanse of the water area more than seven times of the land that stores vast amounts of resources still waiting to be discovered, harnessed, nourished, and safeguarded.

Despite the wealth that the seas hold, with the Philippines being in the apex of the Coral Triangle, the center of the world's largest marine biodiversity, the poorest of the poor Filipinos are its fisherfolks. I recall in our endeavor to contribute to maritime governance and enforce maritime laws as part of the Navy's sovereignty patrols, we always came across the dilemma of how to charge maritime offenders due to the conflicting laws on determining the character of waters in which these violations took place, particularly when the violations were committed beyond the 12 nautical miles from the archipelagic baselines. No one in the command structure would be able to give a clear guidance on the matter, and it was left to the apprehending officer at the scene to make the call on what to charge the violators, to the person's detriment.

It was only when I became chief of the Navy that I came across the National Marine Policy (NMP) of 1994. The NMP is a comprehensive enduring policy framework that laid out the vision, goals, and direction that our nation as an archipelagic state can pursue, so it can make use of its strengths for the well-being of the Filipino in a manner acceptable to the international community under the UN Convention on the Laws of Sea (UNCLOS) which came into force on that very year. I could not understand then why it was never widely disseminated and taught to all navy personnel. I later discovered as the Executive Director of the National Coast Watch Council Secretariat, that only a handful of people at all levels of the government and the society were aware of the NMP and know how to take the great opportunity of harnessing the rich marine resources in a sustainable and equitable manner.

On 13 January 2013, the USS Guardian (MCM5), a United Stated Navy warship, was grounded at Tubbataha Reef National Park, a World Heritage Site, causing damage to the marine environment. It was during this incident that I encountered then Assistant Secretary for Maritime and Ocean Concerns for the Department of Foreign Affairs, Gilberto Asuque. We immediately discussed, together with other concerned agencies, to assess the gravity of the incident and to draw up a plan of action, as the case was both sensitive and complex, covering several issues that comes with a maritime incident inside national archipelagic waters, one of which involved a foreign warship that carried hazardous material to a sensitive marine ecological area.

It was here that I came to note the depth of knowledge and expertise of the author not only on International Relations (IR) but also on maritime and ocean matters, which is complemented by his passion to be of service and his inherent deep sense of patriotism. He played a major role on the way the country dealt with incidents that resulted in all parties being satisfied with the outcome.

As seen by current practices and actions to address maritime challenges, the Philippines has not considered its geographical nature in its national laws, policies, and programs. This in part due to the local and inward-looking thinking and failure to accept that the country's development lies in its blue economy as an archipelagic and maritime nation. This is evident in how we have acted and continue to act in the lackluster implementation of the 1994 NMP, such as: in defining the limits of its maritime territories and jurisdiction, in enforcing marine and maritime related regulations, and in securing the waters and resources from illegal activities. These challenges impact on the ability of the country to promote and maintain its interests in various marine sectors such as fisheries and other living resources, biodiversity conservation, oil, gas, and mining resources, shipping and navigation, ports and harbors use, maritime manpower, maritime trade, defense, recreation, tourism, and scientific research. These problems also adversely impact on how the Philippines have handled other concerns with regional and international security implications.

The Primer on Philippine Maritime Zones entitled "Working Together in Securing Our Seas" comes at an appropriate time with the geopolitical situation in the region getting to be volatile. Ambassador Asuque presents his book in a clear, straight forward, logical, and comprehensive manner that is easy to read, well-researched, and filled with lots of rare, valuable insider details and insights. More importantly, as the author lays his well-founded basis, the book concludes with a presentation of crucial actions that the Philippines must undertake such that proper governance can be implemented to harness and secure our maritime entitlements. The primer is aptly titled to show that these cannot be done by any single individual, entity, or agency, but only through the collective effort of the entire maritime nation. It is highly recommended for all students of IR, marine affairs, policymakers, maritime governance regulators, implementors and enforcers, as well as those who have a keen interest in this archipelagic state.

It is reassuring to know that the Philippines is fortunate to have maritime advocates with the caliber and stature of Ambassador Asuque, who continue to unselfishly dedicate themselves with their valuable knowledge and expertise to inform and inspire Filipinos to be aware of what and who we are as a people: an archipelagic state and quintessentially, a maritime nation.

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Former Executive Director
National Coast Watch Council Secretariat
(16 June 2014 – 03 June 2020)

Introduction

Do we need "fences" around the Philippine archipelago? Is this the right way forward as what Robert Frost, in his 1914 poem *Mending Wall*, suggested by sharing a relevant message for our time that: "Good fences make good neighbors"?[1] He writes:

> *There where it is we do not need the wall:*
> *He is all pine and I am apple orchard.*
> *My apple trees will never get across*
> *And eat the cones under his pines, I tell him.*
> *He only says, "Good fences make good neighbors"*

In today's reality in our maritime domain, do our neighbors stay in their backyards and avoid crossing fences such that: "My apple trees will never get across"? The reality is that we have a serious problem in our maritime backyard, especially in the West Philippine Sea. We need to fix the "fence", but we need to build it first. "Maritime fences" are unlike land-based hedges or walls, for obvious reasons. Neighboring countries may agree on their maritime boundaries by bilateral or multilateral agreements. But in agreeing on their maritime boundaries, a reference point or document must be agreed upon by every concerned nation. Today, the reference document that offers a common purpose for all is the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

There are key historical and legal documents, such as maps, treaties, laws, and jurisprudence that will influence government policies and actions in defining or delineating the Philippine maritime zones. For a comprehensive compilation of documents, we refer to readers to the monumental work *The Philippine National Territory* published by the University of the Philippines Law Center-Institute of International Legal Studies and the Department of Foreign Affairs, Foreign Service Institute.

This primer aims to provide a holistic discussion on the UNCLOS in relation to the maritime zones, archipelagic waters, and the strategic importance for legislating these zones with an official map showing the coordinates of each segment of the zones. The author and the Foundation for the National Interest hope this primer could assist the Philippine Congress in assessing the pending bills on the "Act Defining the Maritime Zones of the Republic of the Philippines".

The maritime zones that the Philippines, as an archipelagic State, may establish under UNCLOS starting from the baselines are 1) the 12 nautical mile (NM) territorial sea, 2) the 24 NM contiguous zone, 3) the 200 NM exclusive economic zone (EEZ), 4) the 200 NM

[1] Mending Wall, Robert Frost, accessed on 15 June 2021 from: https://www.poetryfoundation.org/poems/44266/mending-wall

legal continental shelf, 5) the extended continental shelf, 6) archipelagic waters, and 7) internal waters. Beyond the EEZ and the Continental Shelf is the regime of the high seas and the deep-sea ocean floor. These zones and the sovereign rights therein are illustrated in figures 1 and 2 pictured below.

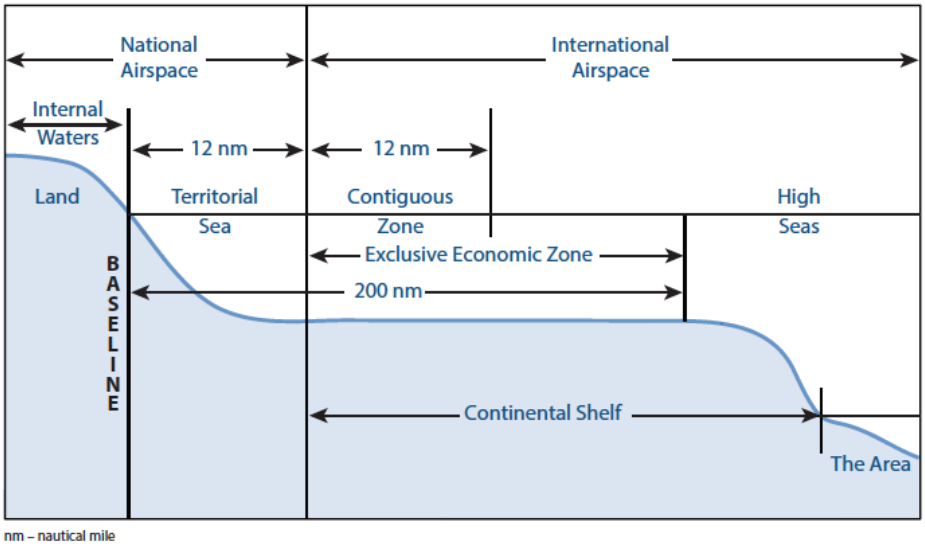


Figure 1. *Legal boundaries of the oceans and airspace.*[2]

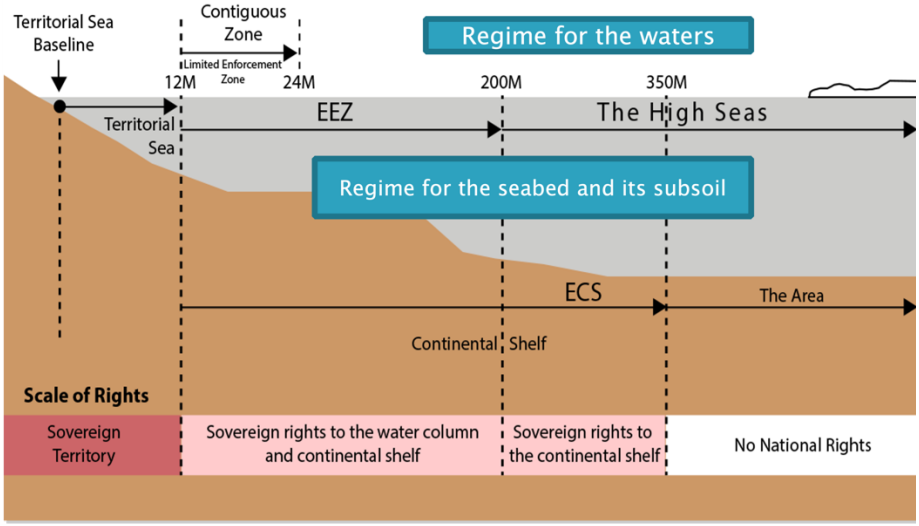


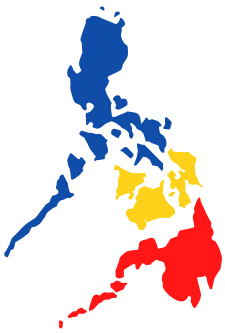
Figure 2. *The sovereign rights emanating from each zone, taken from the presentation of Retired Supreme Court Justice Antonio Carpio.*

For the ease of the readers, this primer is simplified into three overarching chapters. While voluminous, we intend for each chapter to comprehensively capture the important details of this equally complex subject matter. The first and second chapters will cover the

[2] Maritime Zones Schematic, The Fletcher School, Tuff University, accessed on 3 March 2021 from: https://sites.tufts.edu/lawofthesea/chapter-two/

national territory of the Philippines in its entirety, covering the colonial legacies of the country's past, the domestic laws institutionalizing the country's claims in the West Philippine Sea, and how our maritime zones are made compatible with UNCLOS. Chapter 3 will closely look at the important points of the Philippines' monumental win against China at The Hague and what this international jurisprudence means for most of our claims in the West Philippine Sea. Lastly, Chapter 4 will explore some practicable approach on how to build our maritime "fences".

The Filipinos need documents to clearly understand the scenario in the context of national interest and international law, especially under UNCLOS which "constructs" maritime zones with defined coordinates of the maximum limits of those zones – akin to building maritime "fences". This primer hopes to contribute to the continuing understanding by the current generation – and the next – of their maritime domain and be emboldened in unity to defend their inalienable sovereignty and sovereign rights over the UNCLOS-compliant maritime zones encompassing the living and non-living resources in the waters.



Chapter 1

The National Territory of the Philippines I

Colonial Legacies and Domestic Laws

1

The National Territory of the Philippines I
Colonial Legacies and Domestic Laws

Colonial Legacies of the Philippine islands

Spanish period

A country is conveniently and pragmatically visualized with its image on a map: "The earliest maps where the Philippines or parts of it appear were probably made by the Chinese with whom the Philippines has had ties since the time when land bridges connected to mainland Asia" and that "(A)s early as the Ming dynasty (1368-1644), the Philippines had already appeared in Chinese maps."[1]

Between 1650 and 1898, most interior maps of the Philippines were produced by friars who set up the missions, and the very few Spanish and American military engineers taken from Acapulco on the Manila Galleons.[2] Further, José Maria Cariñ̆o stated that:

> "Of all the maps on the Philippines made during the Spanish period, the most important by far is by Pedro Murillo y Velarde. Coming out more than two centuries after Hernando de Magallanes set foot in the country, Murillo y Velarde's 1734 map is considered the first complete and scientific map of the Philippines. Up until then no map of the Philippines had been drawn with such care and on such a large scale. So significant was this map that up to the end of the 18th century, it was the standard map referred to in admiralty proceedings. A number of European cartographers after Murillo y Velarde also used the map as the basis for their own or made reproduction with only minor changes and often without acknowledgement."[3]

Described as the "Mother of all Philippine maps" and the "Holy Grail of Philippine cartography", the *Carta Hydrographica y Chorographica de las Yslas Filipinas* is a 1.2 by 1.5-meter scientific map prepared by the Jesuit friar Pedro Murillo Velarde, drawn by Filipino artist Francisco Suarez and Filipino engraver Nicolas de la Cruz Bagay, and published in 1734 in Manila.

The *Murillo y Velarde* map shows the maritime routes from Manila to Spain and Mexico, consisting of 12 panels, six on each side depicting the ethnic groups in the Philippines in the 18th century, the country's fauna, flora, as well as the interior topography of colonial Manila. During the 14th century, maps showing trade routes for Spanish ships were the secret documents of Spain and other European trading nations. But more than a

sailing document, the *Murillo y Velarde* map became one of the vital historical documents on the image of the archipelago during the Spanish era.

The *Murillo y Velarde* map provides an image of the islands and carries significant historical value because it shows the Scarborough Shoal (also called *Bajo de Masinloc* and *Panacot*) and the Spratly Islands or the Kalayaan Island Group (also called *Bajo de Paragua*) as falling within the dominion of Spain.[4] This map could be considered as among the first visual and official evidence of the territory of the Philippines, shown in figure 1-1.

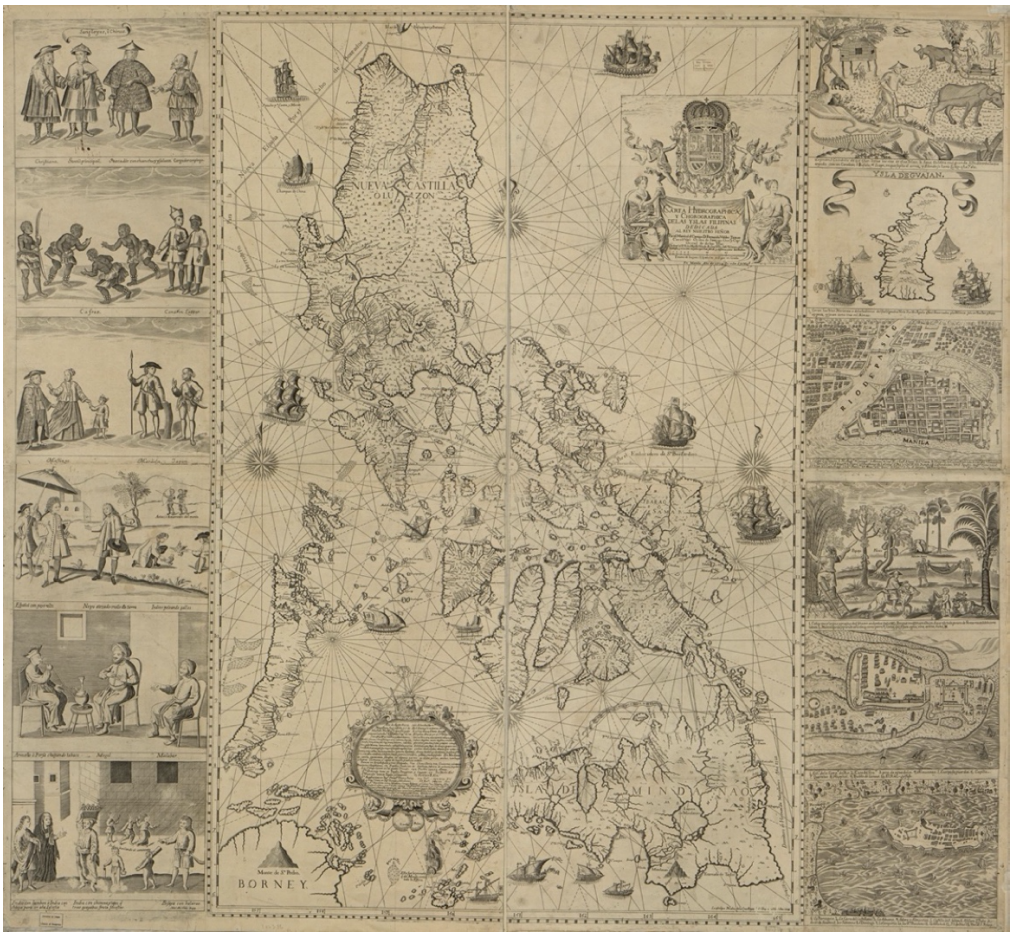


Figure 1-1. *The 'Carta Hydrographica y Chorographica de las Yslas Filipinas', or colloquially known as the 'Murillo y Velarde' map, was officially used by Spanish conquistadors*.

Spain acquired title over the Philippine islands by occupation, one of the modes of acquisition of land or territory.[5] Ferdinand Magellan could not be considered as having "discovered" the *Las Islas Filipinas* in 1521 as a mode of title for Spain since the islands long existed before the arrival of the European conquistadors and were already known or discovered by neighboring countries for the purpose of trade. Perhaps, it could be stated that Magellan "re-discovered" and occupied the islands for King Philip II of Spain, for whom the archipelago was named and who financed the expedition sailing westward from the line

created by the Treaty of Demarcation signed in Tordesillas in 1494 (*Treaty of Tordesillas*).

Under the Treaty arranged by Spanish-born Pope Alexander VI Borgia, Spain and Portugal divided the world into two hemispheres by drawing a north-to-south line of demarcation in the Atlantic Ocean, about 100 leagues (approximately 555 kilometers or 345 miles) west of the Cape Verde Islands, off the coast of northwestern Africa. All continents, islands, and other lands discovered, occupied, and controlled west of the line belonged to Spain and east of the demarcation line belonged to Portugal. Thus, *Las Islas Filipinas* came under the dominion of Spain, and through the various sailing maps and other cartographic works, including the *Murillo y Velarde* map, the islands in this archipelago were known as the Philippines.

American Period

From a colony of Spain, the Philippines became a colony of the United States by conquest and cession at the end of the Spanish-American War in the Battle of Manila Bay on 01 May 1898. This came about in the "Treaty of Peace between the United States of America and the Kingdom of Spain" signed by their diplomatic representatives on 10 December 1898 in Paris in their desire "to end the state of war now existing between the two countries". The negotiation in Paris in October 1898 between the US and Spanish delegations was governed by the law of the victors whereby the US demanded that Spain surrender the whole archipelago or none. Thus, under the Treaty of Paris (TOP), Spain "cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within the following line:" (Art. III), which then identified the treaty limits by coordinates based on the proposal of the American commissioners that "was adopted almost exactly as they had proposed during the Paris Peace Conference."[6] The US paid Spain $20,000,000 for the latter's surrender of the Philippines. Lines of the 1898 TOP is shown in figure 1-2.

Under the Treaty, Spain also "relinquishes all claim of sovereignty over and title to Cuba" (Art. I), and "cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones" (Art. II).

But Art. III on the Philippine boundaries failed to include some islands in the southern part of the archipelago that belonged to Spain. This was rectified in the "Treaty Between the Kingdom of Spain and the United States of America for the Cession of Outlying Islands of the Philippines", signed in Washington on 07 November 1900 (1900 Treaty of Washington or Cession Treaty).

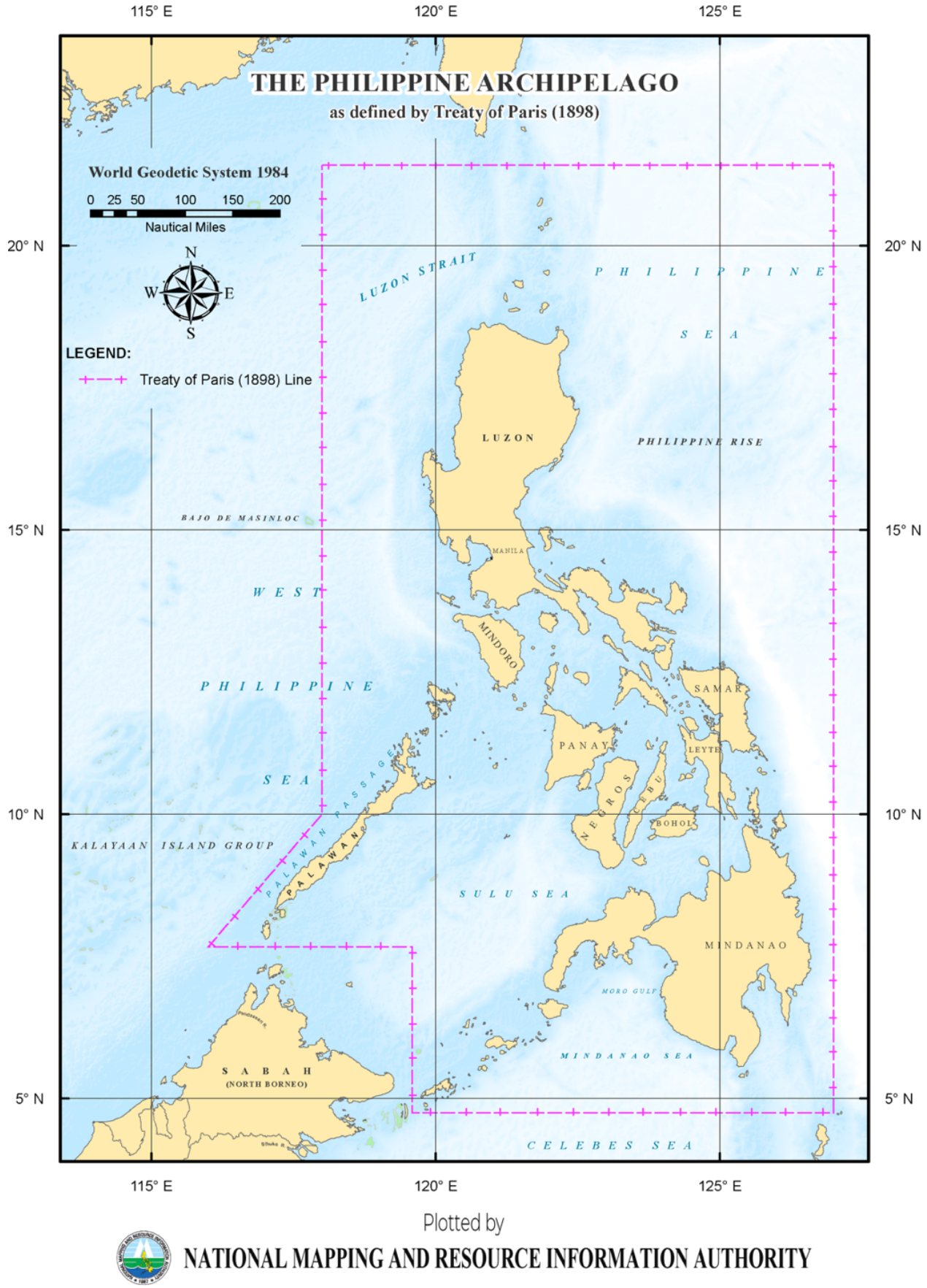


Figure 1-2. *Philippine map outlining the 1898 Treaty of Paris.*

The 1900 Treaty of Washington came into effect on 23 March 1901 with the exchange of ratification documents. The sole article of the Treaty removed any misunderstanding on the interpretation of Article III of the 1898 Treaty, stating:

> "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." (Underlining supplied)[7]

In consideration for that explicit statement of relinquishment, the United States paid Spain the additional sum of $100,000. The Treaty of Washington unequivocally established US possessions in the Sulu archipelago particularly the Cagayan and Sibutu islands.

The Treaties of 1898 and 1900 were the basis for identifying the Philippine Islands that came under the jurisdiction of the United States. Public Law No. 240 of 1916 (Philippine Autonomy Act or Jones Law) stated as follows:

> "Section 1.—The Philippines
>
> Be it enacted by the Senate and House of Representatives the United States of America in Congress assembled, That the provisions of this Act and the name "The Philippines" as used in this Act shall apply to and include the Philippine Islands ceded to the United States Government by the treaty of peace concluded between the United States and Spain on the eleventh day of April, eighteen hundred and ninety-nine, the boundaries of which are set forth in Article III of said treaty, together with those islands embraced in the treaty between Spain and the United States concluded at Washington on the seventh day of November, nineteen hundred."[8]

Again, in Act No. 2711, the Revised Administrative Code of 1917, Art. IV, Sec. 16 states:

> "Territorial jurisdiction and extent of powers of Philippine government. The territory over which the Government of the Philippine Islands exercises jurisdiction consists of the entire Philippine Archipelago and is comprised in the limits defined by the treaties between the United States and Spain, respectively signed in the city of Paris on the tenth day of December eighteen hundred and ninety-eight, and in the city of Washington on the seventh day of November, one thousand nine hundred."[9]

In Act No. 4003 or the Fisheries Act of 1932, the US defined under Art. II, Sec. 6:

> "Philippine waters, or territorial waters of the Philippines", includes all waters pertaining to the Philippine Archipelago, as defined in the treaties between the United States and Spain, dated respectively the tenth of December, eighteen hundred and ninety-eight, and the seventh of November, nineteen hundred."

The Philippine territory needed another clarification in relation to southern islands and its immediate neighbor. Thus, the "Convention Between the United States of America and Great Britain Delimiting the Boundary Between the Philippine Archipelago and the State of North Borneo" was signed in Washington on 02 January 1930. This Convention established the line separating the islands belonging to the Philippine Archipelago and the islands belonging to the State of North Borneo (then under British jurisdiction) and solely focused on the status of the Turtle Islands and the *Mangsee* Islands. Article III of the 1930 Convention states:

> "All islands to the north and east of the said line and all islands and rocks traversed by the said line, should there be any such, shall belong to the Philippine Archipelago and all islands to the south and west of the said line shall belong to the State of North Borneo."[10]

The territorial boundaries of the Philippine archipelago were established under these three (3) treaties: the 1898 Treaty of Paris, the 1900 Treaty of Washington, and the 1930 Convention between the US and Great Britain. Collectively, they are called the *Philippine Treaty Limits*. Plotting the coordinates in these three treaties produced the TOP map, as shown in figure 1-3.

Japanese Period

Japan occupied the Philippines as a forward base against the US forces. During the occupation, the Japanese military authorities organized a puppet government while promising independence for the Philippines. But during the occupation, the Filipinos remained an ally of the United States and the underground resistance provided intelligence for Gen. MacArthur for his planned return and conducted guerrilla attacks on Japanese forces all over the country.

The Philippine territory as defined in the TOP was unchanged even though the entire archipelago was made part of the Greater East Asia Co-Prosperity Sphere (GEACOP), Japan's failed attempt to form an economic and military bloc consisting of nations within East and Southeast Asia against Western colonization and manipulation.[11] There were no recorded efforts of the Japanese military authorities and the puppet government in Manila to redefine the extent, coverage, and scope of the Philippine territory especially in relation to the GEACOP. They were mainly pre-occupied with establishing and controlling one pro-Japanese political party, KALIBAPI, and fighting the guerrillas.

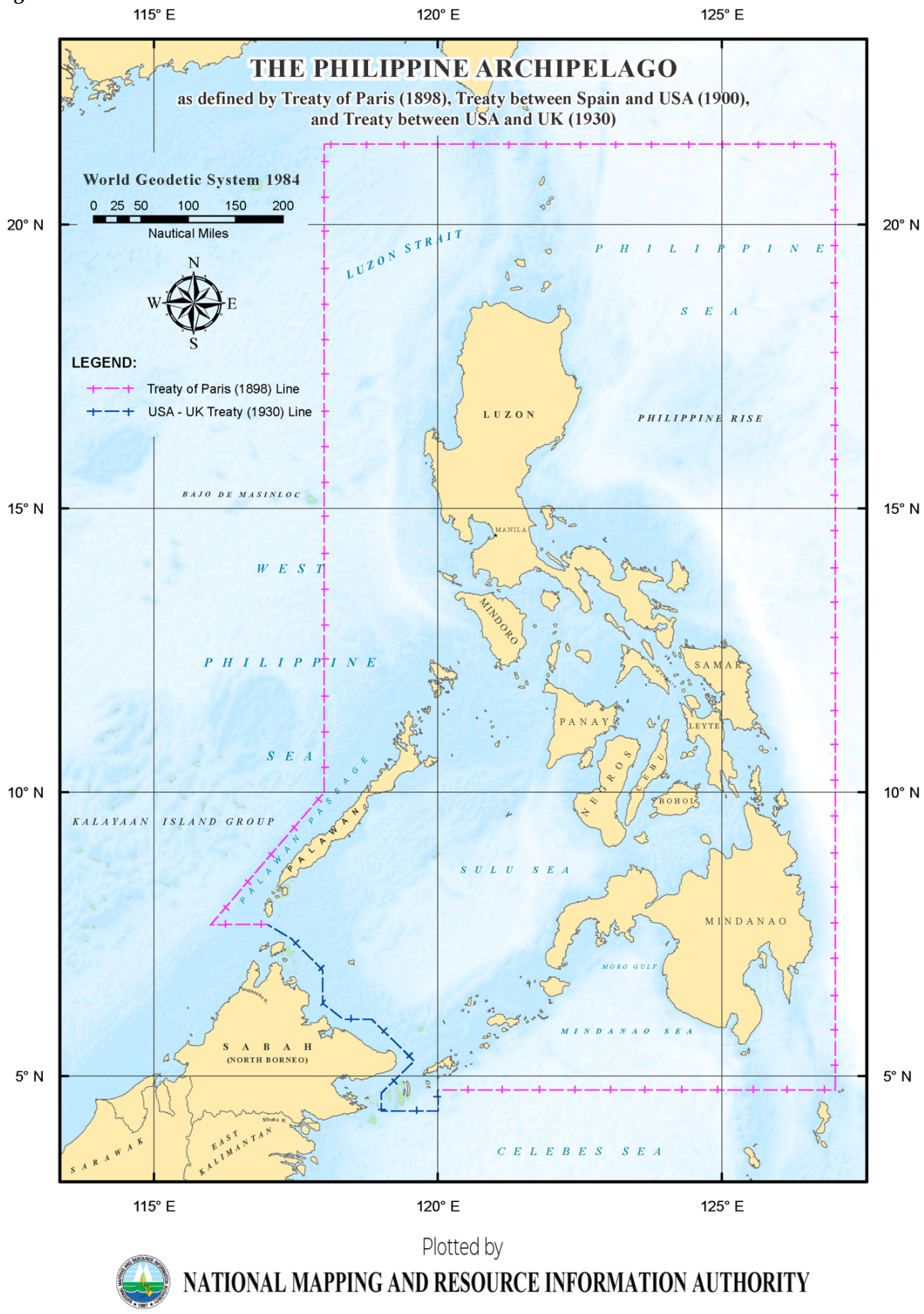


Figure 1-3. *Philippine map outlining the 1898 Treaty of Paris, the 1900 Treaty of Washington, and the 1930 USA-UK Convention.*

Defining the Philippine National Territory

Philippine Laws

The "Philippine Treaty Limits" – that is comprised of the 1898 Treaty of Paris, the 1900 Treaty of Washington, and the 1930 US-UK Treaty – remained in force as the historical genesis of defining the Philippines' national territory in the following Constitutions.

1935 Constitution

Article 1 of the 1935 Constitution on The National Territory states:

> "Section 1. 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 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."

The premise for defining the national territory based on the "Philippine Treaty Limits" was set in Public Law No. 127, "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", also known as the Philippine Independence Act or the 1934 Tydings-McDuffie Act.

Section 1 of the Philippine Independence Act states that the "Philippine Legislature is hereby authorized to provide for the election of delegates to a constitutional convention… to formulate and draft a constitution for the government of the Commonwealth of the Philippine Islands, subject to the conditions and qualifications prescribed in this Act, which shall exercise jurisdiction over all the territory ceded to the United States by the treaty of peace concluded between the United States and Spain on the 10th day of December, 1898, the boundaries of which are set forth in Article III of said treaty, together with those islands embraced in the treaty between Spain and the United States concluded at Washington on the 7th day of November, 1900."

The 1934 Tydings-McDuffie Act practically enshrined the Philippine Treaty Limits in the drafting of the 1935 constitution. During the 1934 Constitutional Convention (ConCon), there were valiant attempts to exclude the titles of the three treaties in the definition of the national territory. In the "Proceedings on the National Territory of the 1934-1935 Constitutional Convention", Delegate José M. Aruego declared in his intervention:

> "I feel that we should not embody in this priceless legacy to the coming generations of Filipinos the history of our subjection as a race, the history of our frustrated attempts to set

> ourselves free. The Treaty of Paris, in the conclusion of which we were completely denied any representation, for our envoy plenipotentiary, Agoncillo, was denied admission to the Paris Conference of 1898, serves, as far as I am concerned, not as a monument to a glorious past, but as a reminder of subjection. Mention of Article III of the Treaty of Paris carries with it the unfortunate controversies regarding the twenty million dollars often referred to as the purchase price of the Philippine Islands. I feel, Mr. President, that it is humiliating to the dignity of the race to perpetuate in this document a reminder of all of these things."[12]

1973 Constitution

The titles of the three treaties were still included in the draft definition of Article I, Section 1 on the National Territory, prepared by Delegate Eduardo Quintero, Chairman of the Committee on National Territory of the 1971 Constitutional Convention (ConCon).[13] However, Delegate Custodio A. Villalva pointed out in his intervention the erroneous technical description of the Philippine territory in Article III of the Treaty of Paris of 1898 which was adopted in Article I of the 1935 Constitution. Delegate Villalva stated that the 1898 Treaty of Paris fixed the northern boundary along the 20th north latitude, thus excluding Batanes. Citing historical facts, he said that Batanes has been a part of the Philippines since the Spanish and American regimes. To address this technical error within the 1898 TOP, he then recommended the approval of Section 1 of the Committee Report which included the last phrase: "...and all other territories over which the Government of the Philippines has been exercising jurisdiction or over which it has a right."[14] This phrase also implied that it covers the Philippines' claim over Sabah and the Kalayaan Islands. Paragraph 12 of the "Minutes of the Session, February 12, 1972" stated that:

> "Delegate Quintero suggested that the Committee be allowed to show slides of national territory boundaries so that arguments of the sponsors could be properly appreciated. He then recounted historical events that led to the formal filing of the Philippine claim to Sabah, and urged Members who had played vital roles in the prosecution of the claim to support the move for the eventual annexation of the dispute territory."[15]

Further, in paragraph 14.1 of the Minutes: "(E)laborating on the merits of the Sabah claim, Delegate Jai M. Anni cited its historical justification and urged the Convention to provide the Constitutional basis for a stronger Philippine position."[16] Delegate Geronimo M. Cabal was supposed to present a report on the Kalayaan Islands but was deferred until members were furnished copies of the report.[17]

The Committee on the National Territory chaired by Delegate Quintero considered all comments on the draft Section 1. In the "Minutes of the Session, February 17, 1972", Delegate Quintero presented to the ConCon delegates a revised draft of Section 1 that took out the titles of the three treaties and replaced with the words: ***and all the other territories belonging to the Philippines by historic right or legal title***.[18] During the interpellation, as recorded in the Minutes of the Proceedings: "Delegate Pedro G. Exmundo inquired if HISTORIC RIGHT in Line 6 referred to all the territories ceded by Spain to the United States under the Treaty of Paris. Delegate Quintero replied in the affirmative."[19]

To further explain the deletion of the treaty titles in Section 1 and in reply to the proposal of Delegate Roseller T. Lim that the term PHILIPPINE ARCHIPELAGO be legally defined in the article, Delegate Quintero "explained that the Committee had decided to avoid any mention of the treaties between powers which colonized the Philippines."[20]

Moreover, on the disputed territories (i.e., Sabah and Kalayaan Islands): "Delegate Victor de la Serna inquired if BELONGING TO THE PHILIPPINES BY HISTORIC RIGHT OR LEGAL TITLE in Lines 5 and 6, implied that the country was already asserting the sovereignty over dispute territories. Delegate Quintero replied in the negative."[21]

Following the 1972 Constitutional Convention, the 1973 Constitution defined the national territory accordingly**:**

> "SECTION 1. 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 or legal title, including the territorial sea, the air space, the subsoil, the sea-bed, the insular shelves, and the other submarine areas over which the Philippines has sovereignty or jurisdiction. The waters around, between, and connecting the islands of the archipelago, irrespective of their breadth and dimensions, form part of the internal waters of the Philippines."

1987 Constitution

Article 1 of the 1987 Constitution defined the national territory as follows:

> *"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."*

The phrase "historic right or legal title" was included in the initial draft of Article I prepared by the Committee on National Territory, chaired by Delegate Jose Nolledo, and was submitted to the Constitutional Convention in Committee Report No. 3, later embodied in Resolution 263. In his sponsorship speech, Delegate Nolledo said the Committee adopted the definition of the national territory as set forth in the 1973 Constitution with slight modification, considering the exclusive economic zone now recognized by the 1982 UNCLOS. Addressing the ConCon President Cecilia Muñoz-Palma, Delegate Nolledo said:

> "The 1973 definition of our national territory, Madam President, adopted in toto by the Committee with addition, contains the following: 1) reference of the Philippine archipelago as comprising the national territory, and the word "archipelago" was used to project the archipelagic principle; 2) reference to specific areas suggestive of the air and undersea world within the jurisdiction and sovereignty of the Philippines. Thus, the use of the words "territorial sea, air space, subsoil, sea-bed, insular shelves, and other submarine areas"; and 3) the statement that all the other territories belonging to the Philippines by historic right or

> legal title. So, we did not refer anymore to the Treaty of Paris, the Treaty in Washington, etc., in the 1973 or 1986 definition.
>
> The Philippines, Madam President, is justifiably jealous of its waters. We have fought for the adoption of the archipelagic principle in various conferences on the Law of the Sea, and for many years this principle has met serious resistance from the world powers particularly Japan and even the United States. The previous conferences resulted in a stalemate. Our fight for this principle culminated in the Convention on the Law of the Sea signed at Jamaica on December 10, 1982."[22]

The Sabah Issue

There was extensive debate on the text of the Article on National Territory during sessions covering the period of 26 June to 10 July 1986 which centered on the phrase "belonging to the Philippines by historic right or legal title" and whether the Philippines should strengthen, weaken, or abandon its claim over Sabah and the Kalayaan Islands.

In the "Deliberations of July 3, 1986", Delegate Fr. Joaquin Bernas S.J. proposed to replace the above-quoted phrase to "over which the government exercises sovereign jurisdiction." He explained that:

> "... the Article on National Territory should not contain any clause, phrase or word which may diplomatically harm Philippine relations with other countries. He pointed out that the phrase 'legal title' has acquired a definite historical meaning on account of the fact that it was put in the 1973 Constitution as a cover-all for claims to Sabah, the Marianas and other areas over which the Philippines was not actually exercising jurisdiction. He said that to keep said phrase in the Constitution would mean continuing the irritation it has generated among neighbor countries."[23]

The proposed amendment was not accepted by Delegates Adolfo S. Azcuna, Serafin V.C. Guingona and, Nolledo. Delegate Guingona registered his opposition to Fr. Bernas' proposal explaining: "...it could be misconstrued to mean dropping the claim to Sabah, instead of having a flexible provision that would give the government ample room for future claims."[24] As a rejoinder to the remarks of Delegate Guingona, Fr. Bernas pointed out that:

> "...although the amendment does not include Sabah, neither does it exclude it. He stated that the country adheres to the generally accepted principle of international law which enables nations to acquire territory through various modes like cession and purchase and accordingly, the amendment embodies a flexible concept which would permit, not just the present government, but also any future government to include in the Philippine territory any area over which it may exercise sovereign jurisdiction at that time."[25]

The issue was referred to the Committee on National Territory to consider all comments by delegates and to submit a compromise text. In a record titled "Deliberations of July 10, 1986", the ConCon discussed on second reading the proposed amendment to change the phrase "and all the other territories over which the government exercises sovereign or jurisdiction" into the phrase "all other territories over which the PHILIPPINES HAS SOVEREIGNTY OR jurisdiction". Delegate Fr. Bernas explained the change of the

phrase as follows:

> "...on the change from 'government' to PHILIPPINES, this is a recognition of the recommendation made by Commissioner Padilla that instead of 'government' we use PHILIPPINES; on the change from 'exercises' to HAS, this is in recognition of the sole objection of Commissioner Concepcion on this Article. The word HAS is of a broader appreciation than 'exercises'. As explained by Commissioner Concepcion yesterday, one can continue to have jurisdiction over a territory even if it is physically wrested from him, whereas in order to acquire a territory, one must exercise jurisdiction over it. But one does not lose a territory simply because he has lost the physical exercise of jurisdiction. One still continues to have jurisdiction even if he has lost effective exercise. The example given yesterday was that the jurisdiction over the Philippines when Japan was exercising control over the Philippines was not lost. So, with these, may I repeat, the phrase will now be "and all the other territories over which the PHILIPPINES HAS SOVEREIGNTY OR jurisdiction."[26]

In reply to the question by Delegate Crispino M. De Castro on the reason why the words "historic right or legal title" were dropped from the Article on National Territory of the 1973 Constitution, which implied abandoning the claim to Sabah, Fr. Bernas explained:

> "**FR. BERNAS**. I already said we are not dropping any claim.
> **MR. DE CASTRO**. The sponsor is not dropping any claim but he leaves this claim to be settled under international law and not state it on the provision on National Territory, am I correct?
> **FR. BERNAS**. I said I am prescinding from any claim which may have been made by the government of the Philippines. It is not a question of dropping or continuing; it is a question of prescinding – P-R-E-S-C-I-N-D-I-N-G.
> **MR. DE CASTRO**. Madam President, we are playing with words here. Frankly and forthrightly, why do we not state that we are claiming or we are abandoning our claim? Why play with words? Thank you" (Emphases supplied).[27]

But delegates continued to question why the Sabah claim was left out for consideration by the drafting committee and not addressed in the text of the National Territory. In reply to the question by Delegate Yusuf R. Abubakar on whether the Philippines has ever acquired jurisdiction over Sabah, Fr. Bernas said:

> "**FR. BERNAS.** We are not answering that question here; we are prescinding that question here.
> **MR. ABUBAKAR.** But we spoke of jurisdiction. Why are we afraid to face the issue and not answer the question if we have acquired jurisdiction over Sabah?
> **FR. BERNAS.** Because I am not in a position to answer the factual issues of the case. The complicated issues of the case are factual. We have not been given the documents for us to examine. How can we make a judgement over that? We believe that if we have to make a judgement, it must be a judgement with due process. And due process is a process which decides only after hearing. We have not heard; we have not seen the evidence.
> **MR. ABUBAKAR.** In other words, from the sponsor's reply and from his knowledge and whatever evidence we have, he does not put in the Record that the Philippines has acquired jurisdiction over Sabah?

FR. BERNAS. We are not.
MR. ABUBAKAR. Thank you" (Emphases supplied).[28]

After voting on second and third readings, the ConCon approved the proposed Resolution 263 with the text of Article 1 on National Territory as amended stating: **all other territories over which the Philippines has sovereignty or jurisdiction**.

Presidential Decree No. 1596, 11 June 1978

According to Daniel Dzurek, "The area of the Spratly islands in the South China Sea is the most contested place on the planet. It includes both sovereignty and jurisdictional (boundary) disputes."[29] It is also the most compelling issue confronting the national security and territorial integrity of the Philippines.

Located at the southern portion of the South China Sea, the Spratly Archipelago is a chain of rock formations some appearing during high tide and other features submerged at low tide, cays, and reefs covering an area of about 200 hectares (490 acres) with the following coordinates: 10°N 114°E / 10°N 114°E.

Aileen Baviera and Jay Batongbacal underscore the importance of these features: "The Kalayaan Island Group (KIG) is a group of over fifty features and their surrounding waters that belong to the Philippines, located in what is internationally known as the Spratly Islands. The KIG is not the same as the Spratlys, however, as there are features in the Spratlys that are not part of the KIG. The KIG has been the subject of the Philippines' official and private interests since before it became an independent republic. The islands, reefs and rocks of the KIG are nearest the Philippine main archipelago and are believed to be both economically valuable and strategically important for purposes of national security."[30]

Brunei, China, Malaysia, the Philippines, Vietnam, and Taiwan all have claims on the Spratlys. The People's Republic of China (PRC) claims the entire island chain with its nine-dash lines. Vietnam claims the Paracels and the Spratly Islands. Malaysia occupies five reefs including the Swallow Reef, which it has expanded with dredged materials. The Philippines essentially claims only the western section of the Spratlys, which is nearest to Palawan, and named it the Kalayaan Island Group (KIG). Brunei claims a reef in the southern part of the Spratlys which is still underwater. The Republic of China (Taiwan) claims the *Penghu* (Pescadores), Spratly Islands, and the Paracels Islands. The conflicting claims brought a tense diplomatic standoff among the claimant countries with China and Vietnam engaged in several armed clashes.

The Philippine claim in the Spratly islands rests on the assumption that after Japan renounced its title to the islands in the San Francisco Treaty of Peace of 08 September 1951, they reverted to being *terra nullius* because the title was not explicitly passed to another state. Chapter II, Art. 2 of the 1951 San Francisco Treaty states: "(f) Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands." Other claimant states have

opposed the Philippine position on *terra nullius*.

Various statements were made by Philippine officials claiming the Spratly Islands even before the signing of the San Francisco Treaty. In 1947, a year after Philippine independence, the Philippine Secretary of Foreign Affairs called for the territory occupied by Japan during the Second World War to be awarded to the Philippines, and on 17 May 1950, President Elpidio Quirino told a press conference that the Spratly islands belonged to the Philippines. The statement, however, was disavowed by a government spokesman.[31]

In 1947, Tomas Cloma, a Filipino adventurer, lawyer, and fishing magnate from the province of Bohol discovered a group of several uninhabited and unoccupied islands/islets in the vastness of the Luzon Sea. On 11 May 1956, Tomas Cloma and his brother Filemon, together with 40 men, took formal possession of the islands, sand cays, sand bars, coral reefs, and fishing ground lying some 380 miles west of the southern end of Palawan with a total area of 64,976 square nautical miles and named it *Free Territory of Freedomland*. Four days, Cloma issued and posted copies of his "Notice to the Whole World" on each of the islands as a decisive manifestation of his claim over the territory "based on the rights of discovery and/or occupation, open, public and adverse against the whole world".[32] He then made representations with Philippine Secretary of Foreign Affairs Carlos P. Garcia, who was also from Bohol, of his discovery, possession, and occupation of the *Free Territory of Freedomland*. Following his demarche to the Secretary of Foreign Affairs, Cloma formally declared on 31 March 1956 the establishment of the *Free Territory of Freedomland*, and on 06 July 1956, he made known to the whole world his claim and creation of a separate government with Flat Island (*Patag* Island) as the capital and a list of cabinet ministers including a minister for foreign affairs and a minister for maritime affairs.

As expected, the other neighboring claimants unequivocally opposed Cloma's claim and declaration. The Republic of China (Taiwan) made clear its opposition by bringing men and equipment to Itu Aba on 24 September 1956 converting the nearly 50-hectare island, the largest rock formation in the island chain, as a military base.

Cloma's courageous defense of his claim over the chain of islands he proclaimed as *Freedomland* gathered no support from the Philippine government. In 1972, Cloma was detained by President Marcos for four months for unauthorized use of a naval rank of "admiral." His valiant efforts to strengthen his claim came to an end on 04 December 1974 when President Marcos forced Cloma to sign the "Deed of Assignment and Waiver of Rights to the Government of the Philippines" for and in consideration of PhP1.00, for "patriotism and love of country, the Philippines," and "to give the Philippine Government and the Filipinos a free hand in taking whatever action they would deem necessary regarding the group of islands known as FREEDOMLAND…"[33]

In March 1976 when the *Freedomland* was part of Philippine territory, President Marcos issued Letter of Instructions No. 1-76 organizing the AFP Western Command based in Palawan to abate any untoward incident arising from the claim.

On 11 June 1978, President Marcos signed Presidential Decree (PD) No.1596 entitled "Declaring Certain Area Part of the Philippine Territory and Providing for Their Government and Administration". PD 1596 defined by metes and bounds the cluster of islands and islets in the South China Sea as the "Kalayaan Island Group" and constituted the KIG as a distinct and separate municipality in the Province of Palawan.

PD 1596 describes much of the area in the KIG as "part of the continental margin of the Philippine archipelago", in effect putting the claim under the 1958 Geneva Convention on the Continental Shelf that entered into force on 10 June 1964. Reiterating the *terra nullius* nature of the islands, PD 1596 justifies Philippine ownership of the KIG as areas that "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." Furthermore, PD 1596 defends Philippine ownership of the KIG by stating that "...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."

The conflicting claims over the Spratly Islands have ignited tensions and diplomatic protests among the claimant States. On 16 January 1974, then South Vietnam and China engaged in war over the Paracels islands. China defeated South Vietnam and gained control over the Paracels. In recent years, the Philippines and China have engaged in diplomatic and legal battles over the Spratlys involving injuries by Chinese coast guard vessels of Filipino fishermen and challenging Philippine Navy and Coastal Guard ships while on sovereignty patrol.

The Philippine Government has consistently defended its sovereignty over the KIG especially on the exploration and exploitation of seabed resources. In the dispute over the Philippine exploration in the Reed Bank, the Department of Foreign Affairs sent Note Verbale No. 110885 on 04 April 2011 to the Embassy of the People's Republic of China in Manila outlining the legal basis of Philippine ownership over the KIG, as follows:

> "**FIRST**, the Republic of the Philippines has sovereignty and jurisdiction over the Kalayaan Island Group (KIG);
> **SECOND**, even while the Republic of the Philippines has sovereignty and jurisdiction over the KIG, the Reed Bank where GSEC 101 is situated does not form part of the 'adjacent waters,' specifically the 12 M territorial waters of any relevant geological feature in the KIG either under customary international law or the United Nations Convention on the Law of the Sea (UNCLOS);
> **THIRD**, Reed Bank is not an island, a rock, or a low tide elevation. Rather, Reed Bank is a completely submerged bank that is part of the continental margin of Palawan. Accordingly, Reed Bank, which is about 85 M from the nearest coast of Palawan and about 595 M from the coast of Hainan, forms part of the 200 M continental shelf of the Philippine archipelago under UNCLOS;

> **FOURTH**, Articles 56 and 77 of UNCLOS provides that the coastal or archipelagic State exercises sovereign rights over its 200 M Exclusive Economic Zone and 200 M Continental Shelf. As such, the Philippines exercises exclusive sovereign rights over the Reed Bank. Therefore, the action of the Philippine Department of Energy is fully consistent with international law. It does not impinge on the sovereignty of the People's Republic of competing claims in the Spratlys." (Emphases supplied)[34]

The map of Kalayaan Island Group with the names of the features is shown in figure 1-4.

On 05 September 2012, President Benigno Aquino III issued Administrative Order (AO) No. 29 entitled "Naming the West Philippine Sea of the Republic of the Philippines, and for other purposes." Under Section 1, the maritime areas on the western side of the Philippine archipelago are named the West Philippine Sea. These areas include the Luzon Sea as well as the waters around, within, and adjacent to the Kalayaan Island Group and *Bajo de Masinloc*, also known as Scarborough Shoal. Section 2 of the same Administrative Order states that the naming of the West Philippine Sea is without prejudice to the determination of the maritime domain over territories in which the Republic of the Philippines has sovereignty and jurisdiction.

AO 29 laid the premise for the government's exploration and exploitation of the resources in the WPS, as follows:

> "**WHEREAS**, the Philippines exercises sovereign rights under the principles of international law, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS), to explore and exploit, conserve and manage the natural resources, whether living or non-living, both renewable and non-renewable, of the sea-bed, including the subsoil and the adjacent waters, and to conduct other activities for the economic exploitation and exploration of its maritime domain, such as the production of energy from the water, currents and winds;
>
> **WHEREAS**, the Philippines exercises sovereign jurisdiction in its EEZ with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; protection and preservation of the marine environment; and other rights and duties provided for in UNCLOS; and
>
> **WHEREAS**, in the exercise of sovereign jurisdiction, the Philippines has the inherent power and right to designate its maritime areas with appropriate nomenclature for purposes of the national mapping system."

AO 29 likewise instructed NAMRIA to produce and publish charts and maps of the Philippines reflecting the West Philippine Sea. The NAMRIA Administrative map with the text "West Philippine Sea" is shown in figure 1-5.

Figure 1-4. *Philippine map outlining the Kalayaan Island Group, west of Palawan, as stated in Presidential Decree No. 1596.*

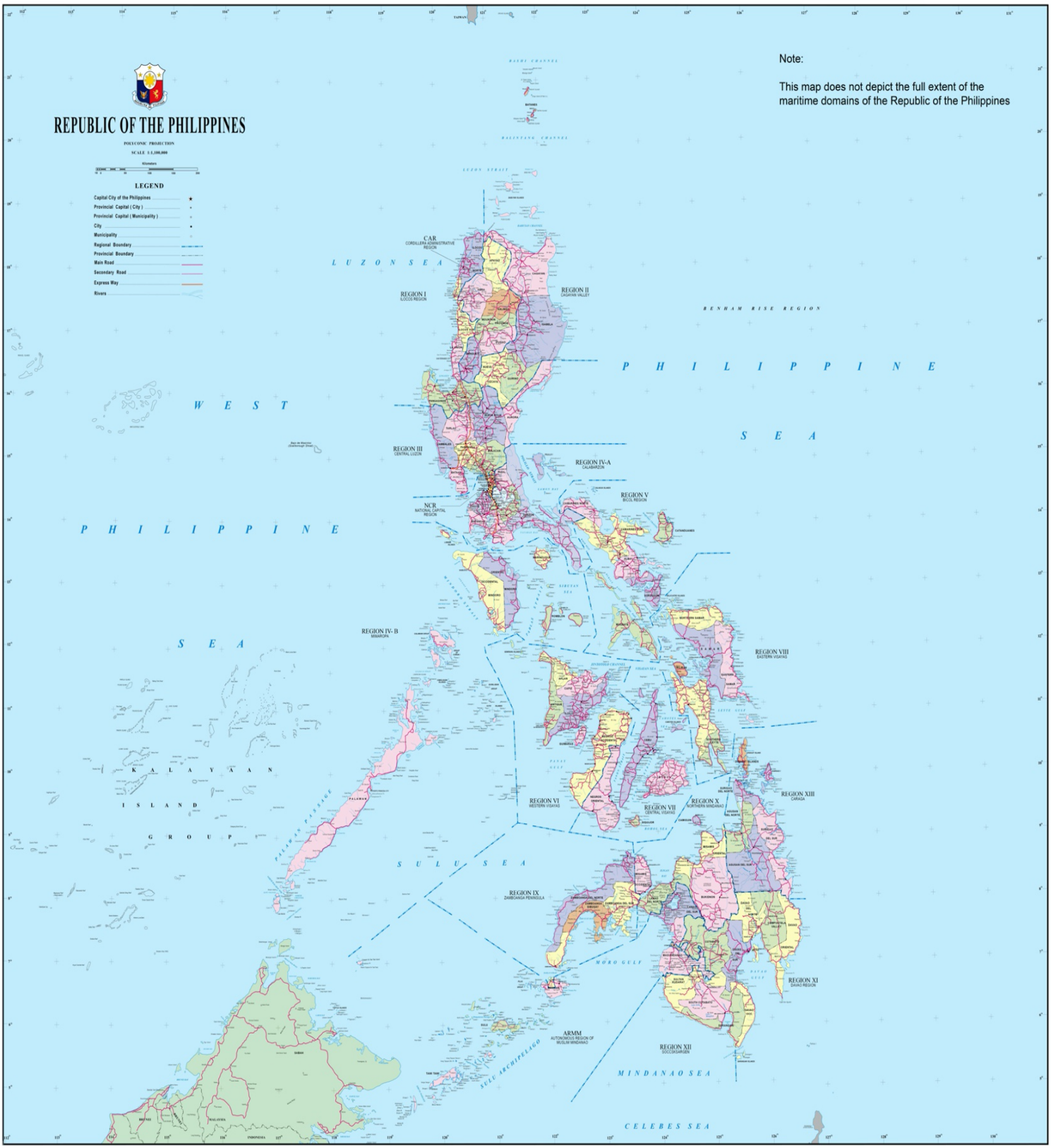


Figure 1-5. *Philippine map as determined by Administrative Order No. 29.*

Baselines

Three United Nations Conferences on the Law of the Sea

The main function of baselines is to determine at what specific point along the coastline of a state will the various maritime zones be measured. The outer limits of the territorial sea, contiguous zone, exclusive economic zone, and continental shelf will be plotted from the baselines.

The 1930 Conference on the Codification of International Law held in The Hague, The Netherlands took up the issue of baselines in relation to the establishment of a territorial sea. The Hague Conference could not reach an immediate agreement on the breadth of the territorial sea where states delegates proposed various estimates and made it clear that they could not surrender what all of them presently possessed.[35]

The Conference failed to adopt any agreement on the law of the sea. However, it became important in succeeding discussions: "Nevertheless the work done by the conference in respect of baselines formed a useful basis for the International Law Commission (ILC) when it came to consider the topic as part of the study on the law of the sea in the early 1950s. The Commission's deliberations resulted in a number of articles dealing with baselines being included in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone."[36]

This Convention was one of the four conventions adopted at the First UN Conference on the Law of the Sea (UNCLOS I) held in Geneva in 1958. The three other conventions were the Convention on the High Seas, the Convention on the Continental Shelf, and the Convention on Fishing and Conservation of the Living Resources of the High Seas: "The first three of these were ratified by substantial numbers of States and were also based in large measure upon customary international law, as presented in the ILC's report. Consequently, these three conventions constitute the core of the generally accepted rules of the law of the sea concerning maritime zones."[37]

While UNCLOS I succeeded in adopting the four conventions, it was not able to resolve the issue on the breadth of the territorial sea as delegations held firmly on their positions that brought about conflicting national interests during the UN conference. The issue was taken up in UNCLOS II which was held in Geneva from 17 March to 26 April 1960 where the Philippine Delegation, headed by Sen. Tolentino, sought to gain acceptance of the Philippine historic waters concept as an exception to the rule on a uniform breadth of the territorial sea.

UNCLOS II "failed, by only one vote, to adopt a compromise formula providing for a six-mile territorial sea plus a six-mile fishery zone. The agreement on the breadth of the territorial sea had to await the preparation of the Convention drawn up by the Third United Nations Conference on the Law of the Sea (UNCLOS III), more than half a century after the

first attempt at the Hague."[38] The Hague conference, held in 1930 as one of four major intergovernmental attempts to codify an international law of the sea, failed to adopt a convention on territorial waters. The breadth of maritime zones including a uniform breadth of the territorial sea was finally agreed at UNCLOS III.

Amb. Tommy T.B. Koh, President of the Third UN Conference on the Law of the Sea, described the UNCLOS as "A constitution for the Oceans." UNCLOS is the culmination of three UN Conferences on the Law of the Sea that started in 1956 with UNCLOS 1, continued in 1960 in UNCLOS II, and concluded on 10 December 1982 at the end of UNCLOS III in Montego Bay, Jamaica.

UNCLOS establishes a comprehensive regime of law and order in the world's oceans and seas establishing rules governing all uses of the oceans and their resources. It enshrines the notion that all problems of ocean space are closely interrelated and must be addressed as a whole.

The Convention entered into force in accordance with Art. 308 on 16 November 1994, 12 months after the date of deposit of the sixtieth instrument of ratification or accession. Today, it is the globally recognized regime dealing with all matters relating to the law of the sea. UNCLOS comprises 320 articles and nine annexes, governing all aspects of ocean space, such as delimitation, environmental control, marine scientific research, economic and commercial activities, transfer of technology, and the settlement of disputes relating to ocean matters. At the time of its adoption, the Convention embodied traditional rules for the uses of the oceans and at the same time introduced new legal concepts and regimes and addressed new concerns. The Convention also provided the framework for further development of specific areas of the law of the sea.[39]

Normal baselines

Article 3 of the 1958 Geneva Convention and Article 5 of the 1982 UNCLOS contain identical texts stating:

> "The normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.
> The effect of choosing the low-water line, rather than the high-tide line, is to push the outer limit of the territorial sea and other zones seawards, particularly on coasts where there is an extensive tidal range."[40]

Straight baselines

Straight baselines may be applied in localities where the coastline is deeply indented and cut into, or if there is a fringe of island along the coast in its immediate vicinity. This method was developed in the context of Norway's coastline of rock rampart (loc. *skjaergaard*)

which comprised many islands and rocks features:

> "In theory, it would be difficult to draw the baseline along the Norwegian coast by following the low-water mark around all the fjords, islands and rocks and by drawing lines across bays; but in practice this would be very cumbersome, and it would be difficult to ascertain the outer limit of the Norwegian territorial sea."[41]

Thus, for Norway and other similarly situated coastal states, Article 7, Section 1 of UNCLOS provides that "the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured." In Section 2, "(W)here because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with this Convention" The other sections of Article 7 provide for the technical requirements for straight baselines that "must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters." Article 14 allows for a combination of methods for determining baselines to suit different conditions.

Archipelagic baselines

Particular attention is given to archipelagic baselines that is now applied by the Philippines. The type of baselines for archipelagos that will reinforce the unity of land and water was the subject of discussions between the 1930 Hague Conference and the 1958 UNCLOS I, but no agreement was ever achieved for the regime of archipelagos. UNCLOS I discussed applying the straight baseline method for coastal archipelagos, but again there was no consensus on the issue: "It was unsuccessfully argued by some at the 1958 conference, notably Indonesia, the Philippines, Denmark and Yugoslavia, that the rules on straight baselines, which deal with coastal archipelagos, could be applied by analogy to 'mid-ocean' archipelagos such as Tonga and the Philippines."[42] But the broad differences between a coastal archipelago and mid-ocean archipelago and the application of the straight baseline method made it difficult to reach an agreement on a set of rules for such group of islands:

> "The main advocates of a special regime for archipelagos at the 1958 conference were Indonesia and the Philippines. Shortly before the conference, in 1957 and 1955 respectively, these two States announced that they would enclose the whole of their archipelagos by straight lines and the treat the waters thus enclosed as internal waters. These claims were followed by detailed legislation in 1960 and 1961."[43]

Republic Act (RA) No. 3046 was enacted on 17 June 1961 entitled "An Act to Define the Territorial Sea of the Philippines." RA 3046 and Indonesia's Act No. 4 Concerning Indonesia Waters, enacted on 18 February 1960, defining Indonesian waters as the territorial sea and internal waters, were protested by many States. The protests on the Philippine claim for the territorial sea will be discussed later in this primer.

Further, "The question of a special archipelagic regime was taken up and vigorously pursued at UNCLOS III by a group of archipelagic States (Fiji, Indonesia, Mauritius and the Philippines), and as a result the Law of the Sea Convention contains a special regime for mid-ocean archipelagos in Part IV."[44]

Article 46 of UNCLOS defines an "archipelago" as a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters, and other natural features form an intrinsic geographical, economic, and political entity, or which historically have been regarded as such. An "archipelagic State" means a State constituted wholly by one or more archipelagos and may include other islands. The technical requirements for drawing archipelagic baselines are enumerated in Article 47, as follows:

> "Article 47 Archipelagic baselines
>
> 1. An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.
> 2. The length of such baselines shall not exceed 100 nautical miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.
> 3. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.
> 4. Such baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.
> 5. The system of such baselines shall not be applied by an archipelagic State in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another State.
> 6. If a part of the of an archipelagic State lies between two parts of an immediately adjacent neighboring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters and all rights stipulated by agreement between those States shall continue and be respected.
> 7. For the purpose of computing the ratio of water to land under paragraph l, land areas may include waters lying within the fringing reefs of islands and atolls,

> including that part of a steep-sided oceanic plateau which is enclosed or nearly enclosed by a chain of limestone islands and drying reefs lying on the perimeter of the plateau.
> 8. The baselines drawn in accordance with this article shall be shown on charts of a scale or scales adequate for ascertaining their position. Alternatively, lists of geographical coordinates of points, specifying the geodetic datum, may be substituted.
> 9. The archipelagic State shall give due publicity to such charts or lists of geographical coordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations."

It is from the baselines – whether normal, straight, or archipelagic – that the 12 NM Territorial Sea, 24 NM Contiguous Zone, the 200 NM Exclusive Economic Zone, and the Continental Shelf are measured.

RA 3046 and RA 5446 (Sec. 2 on Sabah)

Prior to the 1982 UNCLOS, the customary rule on the breadth of the territorial sea was the 3 NM "cannon-shot" rule measured from the shoreline: "The distance was chosen as a matter of reasonableness and convenience, cannon of the day having a range of under three miles: it was not chosen as the precise range of actual cannon. The three-mile limit was adopted for neutrality purposes by the United States at the beginning of the War of the Coalition of 1793. Thenceforward the 'cannon-shot' principle was commonly treated as generating a continuous belt of maritime territory three miles in breadth, although this belied its origin. The three-mile rule gained rapid and widespread acceptance."[45] It was only under the 1982 UNCLOS that a uniform 12 NM territorial sea was adopted for all states.

The Philippine Treaty Limits were considered by the US during its colonial governance of the archipelago as the historical lines that identified the islands seized from Spain. The waters enclosed by the treaty limits were referred as Philippine waters and the limits of the territorial sea were based on the customary international practice of the 3 NM cannon-shot rule.

On internal waters, Article 5 of the 1958 Geneva Convention and Article 8 of the 1982 UNCLOS contain common texts that state: "...waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State."

Contrary to the international rule at that time, the expanded limits of the Philippine territorial sea and internal waters were established in Republic Act No. 3046 titled "An Act to Define the Baselines of the Territorial Sea of the Philippines", approved on 17 June 1961.

The preambular clauses state:

> "**WHEREAS**, all the waters within the limits set forth in the above-mentioned treaties have always been regarded as part of the territory of the Philippine Islands;

> **WHEREAS**, all the waters around, between and connecting the various islands of the Philippines archipelago, irrespective of their width or dimension, have always been considered as necessary appurtenances of the land territory, forming part of the inland or internal waters of the Philippines;
> **WHEREAS**, all the waters beyond the outermost islands of the archipelago but within the limits of the boundaries set forth in the aforementioned treaties comprise the territorial sea of the Philippines
> **WHEREAS**, the baselines from which the territorial sea of the Philippines is determined consist of straight lines joining appropriate points of the outermost islands of the archipelago; and
> **WHEREAS**, the said baselines should be clarified and specifically defined and described for the information of all concerned;" (Emphases supplied)

The list of coordinates in Section 1 of RA 3046 defined the "baselines for the territorial sea of the Philippines." Section 2 defined the internal or inland waters as: "All waters within the baselines provided for in Section one..."

RA 3046 was amended seven years later by RA 5446, approved on 18 September 1968. Section 1 corrected typographical errors in the basepoints in RA 3046. Section 2 retained the definition of the territorial sea with respect to the archipelago and Sabah, which states:

> "Section 2. The definition of the baselines of the territorial sea of the Philippine Archipelago as provided in this Act is without prejudice to the delineation of the baselines of the territorial sea around the territory of Sabah, situated in North Borneo, over which the Republic of the Philippines has acquired dominion and sovereignty."[46]

The reference to Sabah in Section 2 reflects the compelling need to sustain the efforts to resolve the territorial dispute with Malaysia considering the Manila Accord signed on 31 July 1963 by the Philippines, Malaysia, and Indonesia after a meeting from 7 to 11 June 1963 in Manila. The Accord lists a series of agreements and a joint statement by the three States to seek a peaceful settlement of the Philippine claim to Sabah.

The corrections in RA 5446, shown in figure 1-6, were meant to address errors in the measurement of angles and distances of the baselines. In his sponsorship speech for House Bill Nos. 17834 and 17936 to correct the typographical errors in the law defining the baselines of the Philippines, Congressman Fresco San Juan explained:

> "The baselines of our waters define which of our territorial waters are to be considered territorial seas and which are the inland waters of the Philippines. These baselines were determined by using the straight-line and not the mean lower low watermark method. The latter method would make our baselines very irregular and also leave open to intrusion by foreign vessels the seas connecting the different islands. Such a situation might endanger our inland waters. We have chosen to use the straight-line method whereby designated points from the outermost islands of the Philippines are connected together. The lines joining these points in a clockwise method would be our baselines."[47]

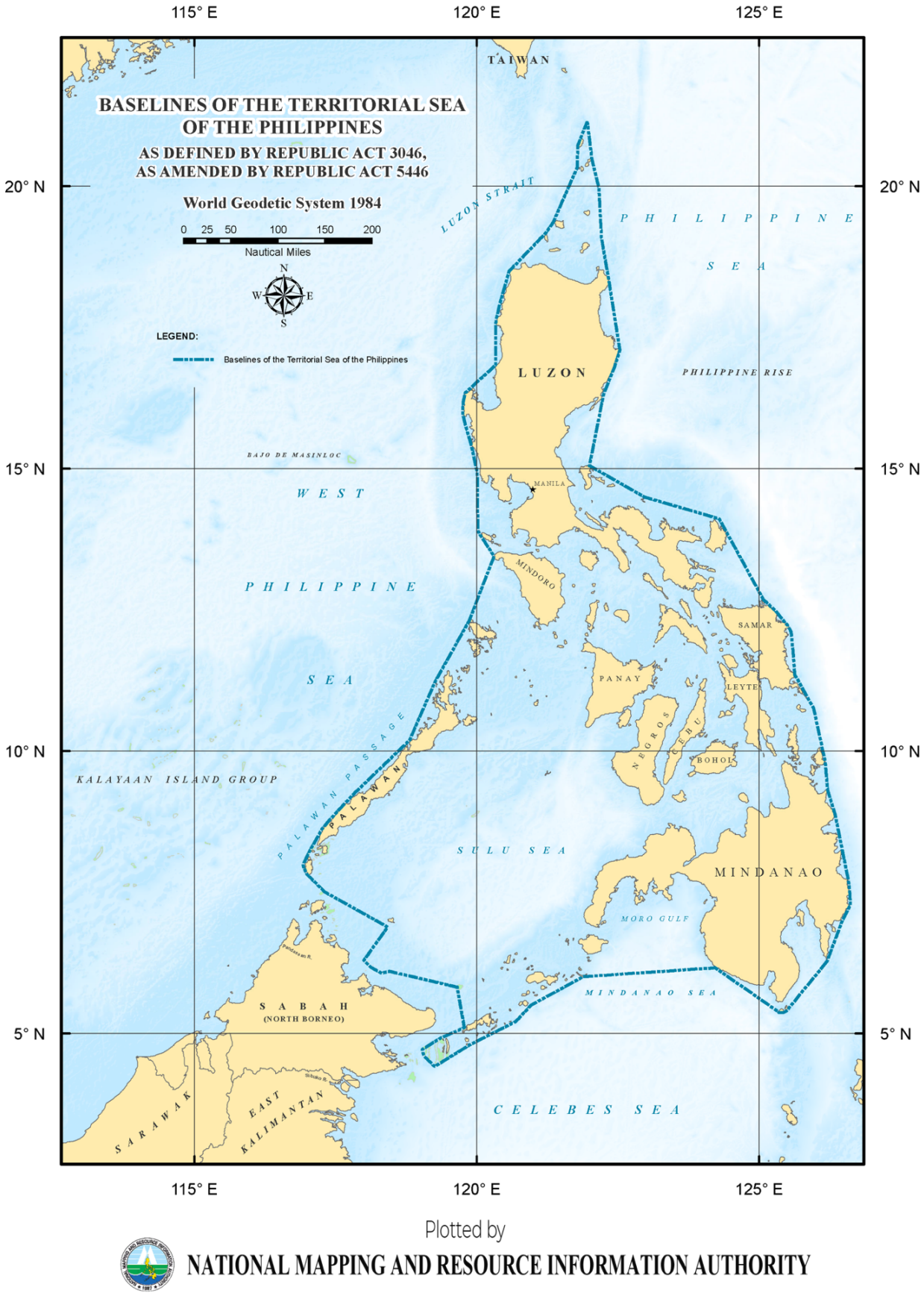


Figure 1-6. *Philippine map as determined by RA 3046, as amended by RA 5446.*

The 1958 Geneva Convention was the reference international law in applying the straight baseline for the Philippine archipelago. RA 5446 was a technical correction only of the coordinates of the baselines in RA 3046 and the use of the straight baselines method was retained pursuant to the fourth *Whereas* clause in the original law. While the Philippines was described as an Archipelago in RA 3046 and RA 5446, a separate regime for archipelagos including the archipelagic baseline method was still a concept in the 1960s and 1970s and only became international law in the 1982 UNCLOS under Part IV.

The straight baselines in RA 3046, as amended by RA 5446, followed the technical requirements under Article 4 of the 1958 Convention the Territorial Sea and Contiguous Zone, which states:

> "Article 4
> 1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.
> 2. The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.
> 3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.
> 4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage.
> 5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.
> 6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given."[48]

The problem with the straight baselines was not so much on its technical application to the Philippine coastline but more on the interpretation of the baselines as the starting point for the seaward measurement of the territorial sea up to the limits of the 1898 Treaty of Paris. RA 3046 and RA 5446 legislated the waters in the TOP box from the straight baselines as the territorial sea and the waters landward side of the baselines are the internal waters. This was, however, contrary to customary and international law.

The lines in the three Treaties were the "historical lines" that identified the islands and waters comprising the Philippine territory that were surrendered by Spain to the US. However, the US did not consider the waters in the treaty limits as territorial sea but applied the customary "cannon-shot" rule especially in administrative orders and jurisprudence covering the Philippine colony. In US vs Bull (1910), 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 of Manila Bay, she was within territorial waters, and a new set of principles became application."[49]

In People of the Philippine Islands vs. Wong Cheng (1922), the Philippine Supreme Court discussed the issue of territorial sea limits where the State exercises jurisdiction regarding the smoking of opium aboard a foreign-flag ship: "…the use of this drug, its mere possession in such a ship, without being used in our territory, does not bring about in the said territory those effects that our statute contemplates avoiding. Hence such a mere possession is not considered a disturbance of the public order. But to smoke opium within our territorial limits, even though aboard a foreign merchant ship, is certainly a breach of the public order here established, because it causes such drug to produce its pernicious effects within our territory."[50]

The expansive territorial sea of the Philippines under RA 3046, as amended by RA 5446, faced tremendous opposition by maritime powers. The United States stated as early as 1958 that it recognized only a three-mile territorial sea for each island.

In his sponsorship speech for Senate Bill (SB) No. 541 on the baselines of the territorial sea of the Philippines, Senator Arturo Tolentino discussed the efforts of the Philippine Delegation to the Second Conference on the Law of the Sea held in Geneva from March to April 1960, which he headed, as follows:

> "We tried as the first maneuver to seek a recognition of the exceptional position of the Philippines by asking that in the resolutions establishing the width of the territorial seas there be included a provision to the effect that the rule established in such resolution was not to apply to historic waters. We phrased it in general terms in order not to single out the Philippines because in our country 'historic waters' should be exempted from this principle. The United States did not wish to include our exception in its resolution.
>
> xxxxxxxxx
>
> We had to ask for this (the exemption provision) because we felt that the approval of the uniform rule establishing six miles without recognizing an exception which would apply to the Philippines might seriously affect us in that it would cause a dismemberment of our territory. With respect to the uniform breadth, if our exception would be recognized, we do not care what the uniform breadth will be. They could fix it at six miles, 12 miles, or 20 miles.
>
> We did not care, so long as our exception would be recognized. We were, therefore, advocating the recognition by the great maritime powers of exceptional cases where a uniform rule would not be applicable."[51]

In the end, the Philippine position on "historic waters" exemption was not accepted in the diplomatic conference. Nevertheless, the Senate voted to approve SB 541 amidst global opposition. Senator Tolentino explained:

> "All the waters within those baselines are internal waters subject to the exclusive sovereignty of the Philippines just like its land territory. All the waters outside the baselines and until the treaty limits comprise our territorial sea, over which foreign merchant vessels would have the right of innocent passage. With the technical description provided in this bill, foreign merchant vessels would know at what time they would be violating Philippine territory and sovereignty, that is, the moment they pass these baselines and penetrate into inland waters without permission from the Philippine government."[52]

The Tolentino Bill – SB 541 – was transmitted to the House of Representatives as an urgent bill to pass a law on the territorial sea without a counterpart House Bill. The Speaker of the House approved the motion to debate SB 541 on the floor after it was reported to the House Committee on Transportation and Communications chaired by Congressman Valerian C. Yancha. The record of the proceedings provides interesting discussions on the implications of the Philippine claim for an expanded territorial sea and internal waters. Congressman Yancha and Congressman Benjamin T. Ligot addressed the issue of international opposition to the Philippine territorial sea:

> "**MR. LIGOT:** Suppose this bill leads us to international complications, say China or Japan *object*[ed] to this territorial jurisdiction which we propose to establish. How will this bill stand?
> **MR. YANCHA:** We have to define our territorial waters so that we can request other nations recognize the limit of our territorial waters.
> **MR. LIGOT:** Suppose they will not recognize such territorial jurisdiction?
> **MR. YANCHA:** That is for our diplomatic service to implement after Congress has defined the limit of our territorial waters.
> **MR. LIGOT:** It might lead us to war.
> **MR. YANCHA:** There will be no war. On the other hand, if we do not define the limit there might be international complications. This is just like two persons with adjacent lands. If they agree on their boundaries they will respect those and there will be no trouble. If they do not agree, if they do not define their boundaries and yet ask each other to recognize those limits, that might lead to war later on.
> **MR. LIGOT:** We will establish our own boundary, *motu proprio*.
> **MR. YANCHA:** The agreement will come later. We will establish the limit and then invite them to recognize that limit" (Emphases and italics added).[53]

And the Philippines never got an international acceptance of the breadth of our territorial sea limits and internal waters. Despite the issues surrounding the territorial sea, the House approved on second and third reading the Tolentino bill that eventually passed into law as RA 3046 which was amended seven years later by RA 5446. There was no acceptance by foreign governments of the TOP-based territorial sea of the Philippines. But with the adoption of the UNCLOS in 1982, steps were taken to harmonize domestic laws with international law.

The Philippines signed the UNCLOS on 10 December 1982 along with other delegates to the final meeting of UNCLOS III in Montego Bay, and ratified it on 08 March 1984. UNCLOS entered into force for the Philippines on 16 November 1994. In his

sponsorship speech at the Batasang Pambansa for concurrence in UNCLOS, Sen. Tolentino said: "May I say it was the unanimous view of delegations at the Conference on the Law of the Sea that archipelagos are among the biggest gainers or beneficiaries under the Convention on the Law of the Sea."[54]

The Batasang Pambansa adopted Resolution No. 121 on 27 February 1981 concurring in UNCLOS "with the understanding embodied in the Declaration filed on behalf of the Republic of the Philippines by the head of the Philippine delegation when he signed the said Convention." Every paragraph of the Declaration reflecting the position of the Philippines on historic waters, territorial sea, and internal waters, EEZ, KIG, and rights arising from the treaty limits, are as follows:

> "1. The signing of the Convention by the Government of the Republic of the Philippines shall not in any manner impair or prejudice the sovereign rights of the Republic of the Philippines under and arising from the Constitution of the Philippines;
> 2. Such signing shall not in any manner affect the sovereign rights of the Republic of the Philippines as successor of the United States of America, under and arising out of the Treaty of Paris between Spain and the United States of America of December 10, 1898, and the Treaty of Washington between the United States of America and Great Britain of January 2, 1930;
> 3. Such signing shall not diminish or in any manner affect the rights and obligations of the contracting parties under the Mutual Defense Treaty between the Philippines and the United States of America of August 30, 1951, and its related interpretative instruments; nor those under any other pertinent bilateral or multilateral treaty or agreement to which the Philippines is a party;
> 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 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 those waters with the economic zone or high seas from the rights of foreign vessels for transit passage for international navigation.
> 8. The agreement of the Republic of the Philippines to the submission for peaceful resolution, under any of the procedures provided in the Convention, of disputes under Article 298 shall not be considered as a derogation of Philippine sovereignty"[55]

The Philippine Declaration received 8 protests from Byelorussian Soviet Socialist Republic, China, Czechoslovakia, Union of Soviet Socialist Republics, Ukrainian Soviet

Socialist Republic, United States of America, Vietnam, and Australia. The US renewed its protests made in 1961 and 1969 on the claim by the Philippines on the extent of its internal waters stressing that "in international law, including that reflected in the 1982 Law of the Sea Convention, the concept of internal waters differs significantly from the concept of archipelagic waters. Archipelagic waters are only those enclosed by properly drawn archipelagic baselines and are subject to the regimes of innocent passage and archipelagic sea lanes passage."

In the same statement, the US stated that it does not share the view of the Philippines concerning the proper interpretation of the provisions of the 1898 Treaty of Paris, the 1900 Treaty of Washington, and the 1930 US-UK Convention, as they related to the rights of the Philippines in the waters surrounding the Philippine islands. The US reiterated its opinion that neither those treaties, nor subsequent practice, has conferred greater rights in the waters surrounding the Philippine islands that are otherwise recognized in customary international law.[56]

In reply to the protest by Australia and to the other seven protests, the Philippines transmitted a declaration to the UN Secretary General on 26 October 1988 that "the Philippine Government intends to harmonize the domestic legislation with the provisions of the Convention", that "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", and that Philippine Government assures "State Parties to the Convention that the Philippines will abide by the provisions of the said Convention".[57] The reply reiterates the phrase in Art. 310 that declarations are to be made "with a view, inter alia, to the harmonization of the laws and regulations with the provisions of this Convention."

The necessary steps to implement UNCLOS began with Executive Order (EO) No. 738, signed by President Ferdinand E. Marcos on 03 October 1981, entitled "Establishing the Cabinet Committee on the Treaty on the Law of the Sea" to coordinate the policies and activities of concerned government agencies on the implementation of the Treaty in all its aspects "in order to optimize the benefits that the Philippines can derive from it, particularly on the 200-miles Exclusive Economic Zone." President Marcos then issued EO 1034 on 28 June 1985 that transferred the Cabinet Committee to the Office of the Prime Minister.

After the People Power Revolution, President Corazon C. Aquino signed EO 239 on 24 July 1987 that transferred the Law of the Sea Secretariat under EO 1034 from the defunct Office of the Prime Minister to the Department of Foreign Affairs. Then, President Aquino issued EO 328 on 05 June 1988 reconstituting the Cabinet Committee on the Law of the Sea "to undertake studies concerning the implementation of the United National Convention on the Law of the Sea and the harmonization of domestic laws and regulations with the Convention, in preparation for its entry into force." President Fidel V. Ramos issued EO 186 on 12 July 1994 expanding the coverage of the Cabinet Committee and renaming it as the Cabinet Committee on Maritime and Ocean Affairs (CABCOM MOA) headed by the

Secretary of Foreign Affairs with additional functions "to include the formulation of practical and viable policies and addressing the various concerns which affect the implementation of the United Nations Convention on the Law of the Sea and other marine-related matters." The Department of Foreign Affairs served as the Secretariat of the Cabinet Committee that organized and hosted the various inter-agency meetings and public events.

Section 6 of EO 186 directed the Cabinet Committee to formulate and present a comprehensive action plan to the President and the Cabinet implementing the UNCLOS. On 8 November 1994, the Cabinet Committee presented the National Marine Policy (NMP) to President Ramos which provided, among other purposes, various options in defining the territory of the Philippine archipelago to resolve the conflict between the extent of the territorial sea based on the treaty limits and the UNCLOS provisions for a maximum breadth of 12 NM. These options were mainly in the form of maps showing different plotting of baselines on the archipelago and, separately, the KIG as another archipelago or as a regime of islands, in line with the rationale of the NMP "to expand the country's resource bases and mobilize these to contribute to national development", "address the needs of the impoverished social groups, and transform "the physical coverage and legal extent of jurisdictional control by the Philippines over its internal and adjacent marine areas brought about by the United Nations Convention on the Law of the Sea."[58]

The CABCOM MOA conducted public discussions on the NMP especially on the different maps on the options to define the maritime zones of the archipelago and the KIG. The discussions on the option maps and the other components of the NMP were carried forward through different administrations by the Department of Foreign Affairs as Secretariat of the Cabinet Committee. The Department gave briefings, organized public forums on maritime issues, and attended hearings by the Senate and the House of Representatives on various bills defining the maritime zones of the Philippines.

Republic Act 9522

The process of harmonizing our domestic legislation with UNCLOS begins with aligning our baselines under RA 3046 and RA 5446 with Art. 47 on the Archipelagic Baselines. This is the purpose of RA 9522 entitled "An Act To Amend Certain Provisions Of Republic Act No. 3046, As Amended By Republic Act No. 5446, To Define The Archipelagic Baselines Of The Philippines, and for Other Purposes" which was enacted on 12 March 2009.

Section 1 of RA 9522 defines and describes the coordinates of the 101 basepoints, starting from *Amianan* Island (Philippine Archipelagic Base Point – PAB 1), the northern most island, then going clockwise to PAB 2 in *Balintang* Island on the Pacific ocean, down to SE *Sarangani* Island (PAB26), thence westward over the Mindanao Sea to the *Tawi-Tawi* chain of islands in PAB 43 and 44 (Alice Reef), thence going NW over the *Balabac* Island and *Balabac* Great Reef (PAB 54, 54A, 54B and 55), thence to the Palawan Passage over the West Philippine Sea all the way up north to connect with *Amianan* Island (PAB 85).

Under Section 2 of RA 9522, the baselines for the KIG under PD 1596 and the *Bajo de Masinloc*, "shall be determined as 'Regime of Islands' under the Republic of the Philippines consistent with Article 121 of the United Nations Convention on the Law of the Sea (UNCLOS)." Art. 121 states:

> "1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
> 2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
> 3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

On 01 April 2009, the Philippines deposited with the UN Secretary-General the list of geographical coordinates of points under RA 9522, pursuant to Art. 47, paragraph 9 of UNCLOS. The list of geographical coordinates of points is referenced to the World Geodetic System of 1984 (WGS84) and is available from the website of the UN Division on the Law of the Sea.[59] The archipelagic baselines under RA 9522 are plotted in figure 1-7.

Supreme Court decision, G.R No. 187167, 16 August 2011

The constitutionality of the new archipelagic baselines was upheld in the case of Prof. Magallona *et al*. vs. Executive Secretary Ermita *et al*. with the decision written by Senior Associate Justice Antonio Carpio. The petitioners assailed the constitutionality of RA 9522 on two principal grounds, namely:

1. RA 9522 reduces Philippine maritime territory, and logically, the reach of the Philippine state's sovereign power, in violation of Article 1 of the 1987 Constitution, embodying the terms of the Treaty of Paris and ancillary treaties, and
2. RA 9522 opens the country's waters landward of the baselines to maritime passage by all vessels and aircrafts, undermining Philippine sovereignty and national security, contravening the country's nuclear-free policy, and damaging marine resources, in violation of relevant constitutional provisions."[60]

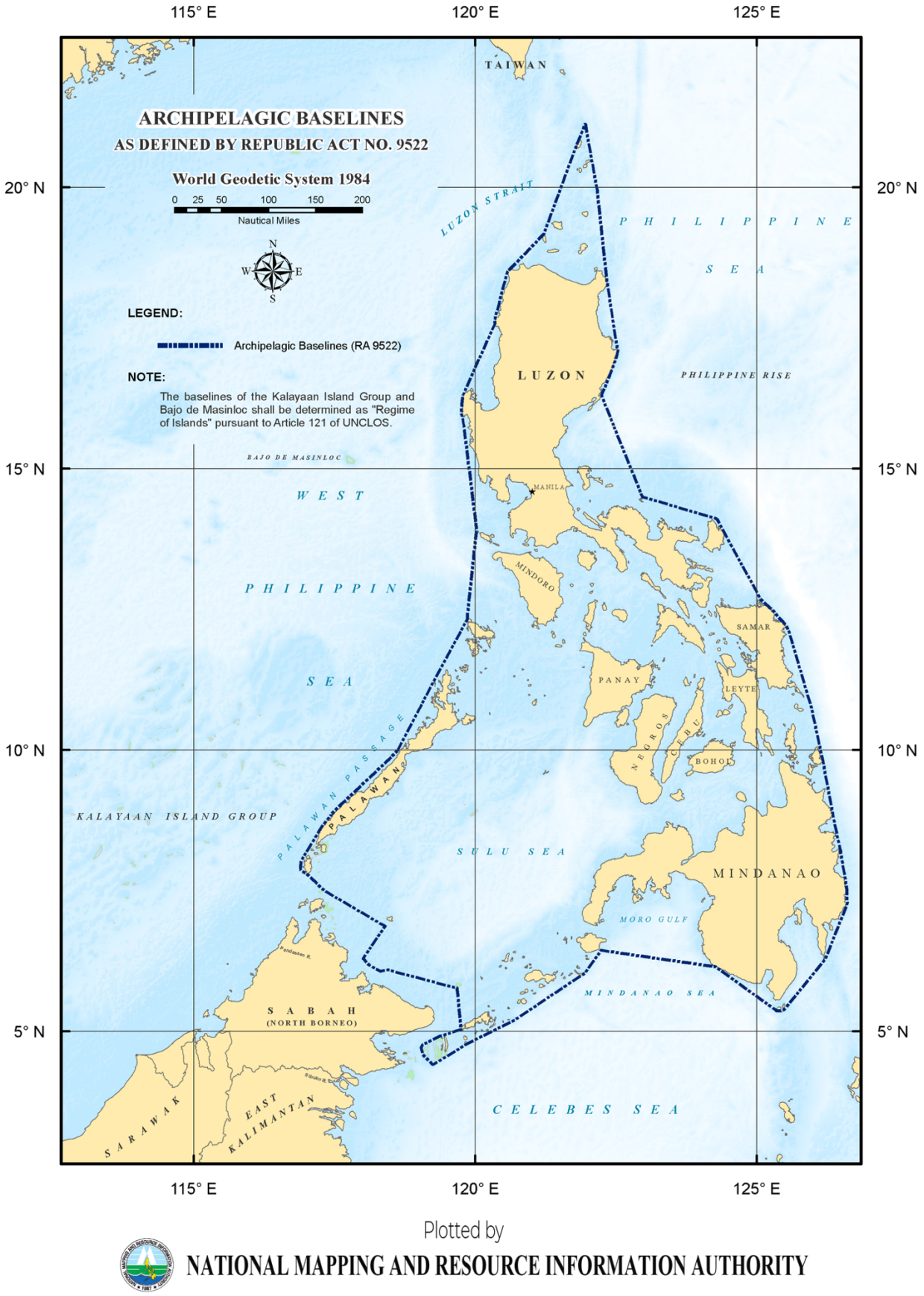


Figure 1-7. *Philippine map as determined by RA 9522.*

On the first ground, the Supreme Court opined that:

> "...baselines laws are nothing but statutory mechanisms for UNCLOS III States parties to delimit with precision the extent of their maritime zones and continental shelves. In turn, this gives notice to the rest of the international community of the scope of the maritime space and submarine areas within which States parties exercise treaty-based rights, namely, the exercise of sovereignty over territorial waters (Article 2), the jurisdiction to enforce customs, fiscal, immigration, and sanitation laws in the contiguous zone (Article 33), and the right to exploit the living and non-living resources in the exclusive economic zone (Article 56) and continental shelf (Article 77).
>
> Even under petitioners' theory that the Philippine territory embraces the islands and all the waters within the rectangular area delimited in the Treaty of Paris, the baselines of the Philippines would still have to be drawn in accordance with RA 9522 because this is the only way to draw the baselines in conformity with UNCLOS III. The baselines cannot be drawn from the boundaries or other portions of the rectangular area delineated in the Treaty of Paris, but from the outermost islands and drying reefs of the archipelago.
>
> UNCLOS III and its ancillary baselines laws play no role in the acquisition, enlargement or, as petitioners claim, diminution of territory. Under traditional international law typology, States acquire (or conversely, lose) territory through occupation, accretion, cession and prescription, not by executing multilateral treaties on the regulations of sea-use rights or enacting statutes to comply with the treaty's terms to delimit maritime zones and continental shelves. Territorial claims to land features are outside UNCLOS III, and are instead governed by the rules on general international law."[61]

On the second ground, the Supreme Court opined:

> "Whether referred to as Philippine internal waters' under Article I of the Constitution or as 'archipelagic waters' under UNCLOS III (Article 49 [1]), the Philippines exercises sovereignty over the body of water lying landward of the baselines, including the air space over it and the submarine areas underneath. UNCLOS III affirms this:
>
> Article 49. Legal status of archipelagic waters, of the air space over archipelagic waters and of their bed and subsoil. –
>
> 1. The **sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines** drawn in accordance with article 47, described as archipelagic waters, regardless of their depth or distance from the coast.
>
> 2. **This sovereignty extends to the air space over the archipelagic waters, as well as to their bed and subsoil, and the resources contained therein.**
>
> x x x x
>
> 4. 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,**

bed and subsoil, and the resources contained therein. (Emphases supplied)

The fact of sovereignty, however, does not preclude the operation of municipal and international law norms subjecting the territorial sea or archipelagic waters to necessary, if not marginal, burdens in the interest of maintaining unimpeded, expeditious international navigation, consistent with the international law principle of freedom of navigation. Thus, domestically, the political branches of the Philippine government, in the competent discharge of their constitutional powers, may pass legislation designating routes within the archipelagic waters to regulate innocent and sea lanes passage. Indeed, bills drawing nautical highways for sea lanes passage are now pending in Congress.

In the absence of municipal legislation, international law norms, now codified in UNCLOS III, operate to grant innocent passage rights over the territorial sea or archipelagic waters, subject to the treaty's limitations and conditions for their exercise. Significantly, the right of innocent passage is customary international law, thus automatically incorporated in the corpus of Philippine law. No modern State can validly invoke its sovereignty to absolutely forbid innocent passage that is exercised in accordance with customary international law without risking retaliatory measures from the international community.

The fact that for archipelagic States, their archipelagic waters are subject to both the right of innocent passage and sea lanes passage does not place them in lesser footing vis-à-vis continental coastal States which are subject, in their territorial sea, to the right of innocent passage and the right of transit passage through international straits. The imposition of these passage rights through archipelagic waters under UNCLOS III was a concession by archipelagic States, in exchange for their right to claim all the waters landward of their baselines, regardless of their depth or distance from the coast, as archipelagic waters subject to their territorial sovereignty. More importantly, the recognition of archipelagic States' archipelago and the waters enclosed by their baselines as one cohesive entity prevents the treatment of their islands as separate islands under UNCLOS III. Separate islands generate their own maritime zones, placing the waters between islands separated by more than 24 nautical miles beyond the States' territorial sovereignty, subjecting these waters to the rights of other States under UNCLOS III."[62]

On the petitioners' argument that the RA 9522 baselines do not enclose the KIG and thus is left outside Philippine territory, the Supreme Court said Section 2 of the law commits to text the Philippines' continued claim of sovereignty and jurisdiction over the KIG and the Scarborough Shoal and stressed that:

"Had Congress in RA 9522 enclosed the KIG and the Scarborough Shoal as part of the Philippine archipelago, adverse legal effects would have ensued. The Philippines would have committed a breach of two provisions of UNCLOS III. First, Article 47 (3) of UNCLOS III requires that "[t]he drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago." Second, Article 47 (2) of UNCLOS III requires that "the length of the baselines shall not exceed 100 nautical miles," save for three per cent (3%) of the total number of baselines which can reach up to 125 nautical miles.

Although the Philippines has consistently claimed sovereignty over the KIG and the Scarborough Shoal for several decades, these outlying areas are located at an appreciable

> distance from the nearest shoreline of the Philippine archipelago, such that any straight baseline loped around them from the nearest basepoint will inevitably 'depart to an appreciable extent from the general configuration of the archipelago."[63]

In dismissing the petition, the Supreme Court emphasized that it is the prerogative of Congress to legislate our baselines, although the drawing of baselines by States is only permissive under UNCLOS. Nevertheless, the Court explained that:

> "Absent an UNCLOS III compliant baselines law, an archipelagic State like the Philippines will find itself devoid of internationally acceptable baselines from where the breadth of its maritime zones and continental shelf is measured. This is a recipe for a two-fronted disaster: first, it sends an open invitation to the seafaring powers to freely enter and exploit the resources in the waters and submarine areas around our archipelago; and second, it weakens the country's case in any international dispute over Philippine maritime space. These are consequences Congress wisely avoided.
>
> The enactment of UNCLOS III compliant baselines law for the Philippine archipelago and adjacent areas, as embodied in RA 9522, allows an internationally-recognized delimitation of the breadth of the Philippines' maritime zones and continental shelf. RA 9522 is therefore a most vital step on the part of the Philippines in safeguarding its maritime zones, consistent with the Constitution and our national interest."

Taking together the depth of legal history of the Philippines' colonial legacy through its Treaty Limits, the many Constitutions that enshrined said treaty limits in one form or another, and the many domestic laws that sought to build a foundational bloc for legislating base archipelagic zones, the Philippines has a long and noteworthy experience with maritime jurisprudence. The next chapter will explore how the Philippines' maritime zones are harmonized with the 1982 UNCLOS.

NOTES

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[2] *Ibid*., 35.

[3] *Ibid*., 35.

[4] Recommended reference for Bajo de Masinloc is NAMRIA and UP IMALOS, *Bajo de Masinloc, Scarborough Shoal, Maps and Documents,* Batongbacal, J. and Carandang, E., editors (2014, NAMRIA and IMLOS).

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[8] *Ibid*., 76. While the TOP was signed by the representatives on 10 December 1898, the date in the Jones Law referred to the date of exchange of ratification papers and proclamation of ratification in Washington on 11 April 1898.

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[10] *Ibid*., 136.

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[13] *Ibid*., p. 413, Minutes of the Proceedings on the National Territory of the 1971 Constitutional Convention.

[14] *Ibid*., 413-414.

[15] *Ibid*., 415.

[16] *Ibid*.

[17] *Ibid*., par. 15 & 15.1.

[18] *Ibid*., 424. Lines 5 & 6.

[19] *Ibid*., 424, par. 8.4.

[20] *Ibid*., 425, par. 8.10.

[21] *Ibid*., par. 8.12.

[22] R.C.C. No. 18 Thursday, June 26, 1986, accessed on 2 May 2021 from: https://www.officialgazette.gov.ph/1986/06/26/r-c-c-no-18-thursday-june-26-1986/

[23] Deliberations of July 3, 1986, in UP Law Center IILS and DFA FSI, THE PHILIPPINE NATIONAL TERRITORY, A Collection of Related Documents, *op. cit.*, 575.

[24] *Ibid*.

[25] *Ibid*.

[26] *Ibid*.

[27] *Ibid*., 591.

[28] *Ibid*.

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[33] *Ibid*., 627-628, Deed of Assignment and Waiver of Rights.

[34] As cited in The Republic of the Philippines vs. The People's Republic of China, PCA Case No. 2013-19, The South China Sea Arbitration Award of 12 July 2016, 266.

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[42] *Ibid*., 118.

[43] *Ibid*., 119.

[44] *Ibid*., 120.

[45] *Ibid*., 78.

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[53] *Ibid*., 328-329, Proceedings of the Philippine House of Representatives on Senate Bill No. 954.

[54] *Ibid*., 517.

[55] *Ibid*., 509-510, Philippine Declaration on the Signing of the Convention on the Law of the Sea.

[56] *Ibid*., 545-546, Objections and Other Communications Concerning the Philippine Declaration on Signing of the Convention on the Law of the Sea.

[57] *Ibid*., 548, Philippine Response to the Australian Protest (1988).

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[60] Prof. Merlin Magallona *et al*. vs. Hon. Eduardo Ermita *et al*., GR No. 187167, 16 August 2011.

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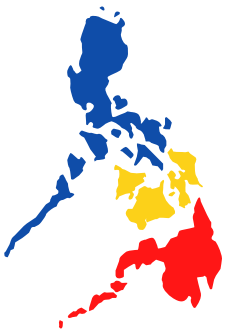


Chapter 2

The National Territory of the Philippines II

Philippine Maritime Zones and the UNCLOS

☙ 2 ❧

The National Territory of the Philippines II
Philippine Maritime Zones and the UNCLOS

With an UNCLOS-compliant archipelagic baselines, the Philippines should now consider the official designation of the maritime zones. UNCLOS recognizes the sovereignty of States such that the decision to legislate the maximum reach of each zone is a prerogative of the state. The preambular clause in UNCLOS indicates the permissive nature of designating the zones, stating:

> "*Recognizing* the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment" (Underlining supplied)

The relevant UNCLOS provisions on the maritime zones of the Philippines include the aspects of territorial sea, archipelagic internal waters, contiguous zone, the 200 NM exclusive economic zone, archipelagic waters, and the 200 NM continental shelf.

Territorial Sea

Section 2 of UNCLOS on Territorial Sea and Contiguous Zone states:

> "SECTION 2. LIMITS OF THE TERRITORIAL SEA
> Article 3 Breadth of the territorial sea
>
> Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.
>
> Article 4 Outer limit of the territorial sea
>
> The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea."

The Philippines has the sovereign right to determine the reach of the territorial sea if it does not exceed 12 NM from the archipelagic baseline. Alternatively, the Philippines may

choose to leave as undefined the maximum breadth of the territorial sea and assume an application of the 12 NM.

Internal Waters vis-a-vis internal waters in archipelagos

Article 8 on Internal Waters of UNCLOS states:

> "1. Except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.
> 2. Where the establishment of a straight baseline 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 in this Convention shall exist in those waters."

Normal baselines establish the internal waters defined in Article 8. Internal waters for archipelagos are defined differently under Part IV. Article 49.1 describes archipelagic waters as the waters enclosed by the archipelagic baselines drawn in accordance with Article 47 regardless of their depth or distance from the coast. On the delimitation of internal waters in archipelagos, Article 50 states that within its archipelagic waters, the archipelagic State may draw closing lines for the delimitation of internal waters, in accordance with Articles 9 on mouths of rivers, 10 on bays, and 11 on ports. These articles specify the geographical, hydrological, and technical requirements for delimiting the internal waters.

There are many bays in the Philippines that would need to be defined as internal waters within its archipelagic waters, i.e., Manila Bay, *Sarangani* Bay, *Baler* Bay, Honda Bay, etc. The territorial sea is an extension of the sovereignty of State over the land territory as clearly stated in Part II, Section 1 of UNCLOS. But that sovereignty is not absolute as indicated in Article 2.3:

> "PART II. TERRITORIAL SEA AND CONTIGUOUS ZONE
>
> SECTION 1. GENERAL PROVISIONS
>
> Article 2. Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil
>
> 1. The sovereign of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
>
> 2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
> 3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law."

Under Article 17, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.

Contiguous Zone

The regime for the contiguous zone is defined under UNCLOS, as follows:

> "SECTION 4. CONTIGUOUS ZONE
>
> Article 33 Contiguous zone
>
> 1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
>
> (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
>
> (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.
>
> 2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured."

The contiguous zone "has its origins in functional legislation such as the eighteenth century 'Hovering Acts' enacted by Great Britain against foreign smuggling ships hovering within distances of up to eight leagues (i.e. twenty four miles from the shore. These Acts, which had effect from 1736 until their repeal by the 1876 Customs Consolidation Act, were at the time regarded as permitted by 'the common courtesy of nations for their convenience."[1] The concept of the contiguous zone developed through the years from 1736 resolving various issues such as seizure of foreign ships within the customs zone of another state, the relation to the three-mile limit of the territorial sea, the doctrine of hot pursuit, distinction with the fisheries zones, enforcement of local laws on foreign ships especially for liquor smuggling, interdiction of unlawful traffic in narcotics, among others.

In the years between the 1930 and 1958 Geneva conferences, "State practice remained divided between those States, such as the United Kingdom, which did not recognise the validity of contiguous zone claims, and the increasing number of States which made such claims."[2] The different State practices on the contiguous zone, fisheries zone, and other jurisdictional zones (i.e., special customs and security, sanitary, and immigration) were carried in the report of the International Law Commission and at the Geneva conference.

Churchill and Lowe stated that "With the establishment of 200-mile fishery jurisdiction in the LOSC (Law of the Sea Convention), the distinction between the two kinds of zone was put beyond argument. The 1958 (Geneva) conference eventually agreed upon the establishment of a contiguous zone within which the coastal State enjoys limited jurisdiction" (Parentheses added).[3] Further, "States are not obliged to maintain contiguous

zones, as they are to maintain territorial sea; and unlike the continental shelf, the contiguous zone is not automatically ascribed to the coastal State. Under both the 1958 and 1982 Conventions a State must choose whether to claim a contiguous zone..."[4]

The Philippines has no official designation of its contiguous zone. However, RA 7942 otherwise known as the Philippine Mining Act of 1995 defined under Section 3 (e) – Definition of Terms – the Contiguous Zones are defined as the "water, sea bottom and substratum measured twenty-four nautical miles (24 NM) seaward from the base line of the Philippine archipelago." The relevance of this definition in RA 7942 to the purpose of the contiguous zone under Article 33.1 (a) and to mining was not explained.

RA 7942 also included in its definition of the EEZ in Section 3(o) as "the water, sea bottom and subsurface measured from the baseline of the Philippine archipelago up to two hundred nautical miles (200 n.m.) offshore" (underlining supplied). However, the law did not have any provision for a marine environment-friendly seabed mining. Article 56. 1 (a) of UNCLOS provides that in the EEZ the coastal State has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds" (underlining supplied). However, it must be noted that seabed mining is a new industrial activity where the Philippines would still require new expertise and technology.

200 NM Exclusive Economic Zone

UNCLOS defines the regime of the EEZ as follows:

> "PART V EXCLUSIVE ECONOMIC ZONE
>
> Article 55 Specific legal regime of the exclusive economic zone
>
> The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.
>
> Article 57 Breadth of the exclusive economic zone
>
> The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."

The concept of an exclusive economic zone was developed sometime in 1945 from the desire of coastal States, especially those in Latin America and Africa, to expand their territorial seas and fishing zones to gain more access to marine resources. Kenya brought this concept to the Asian-African Legal Committee in January 1971, and to the UN Seabed

Committee in the following year:

> "Kenya's proposal received active support from many Asian and African States. At about the same time many of the Latin American States began to develop a similar concept of the patrimonial sea. The two lines of approach had effectively merged by the time UNCLOS began, and the new concept – the EEZ being the preferred name – had attracted the support of most developing States and began to attract support from some developed coastal States such as Canada and Norway. The EEZ is a reflection of the aspiration of the developing countries for economic development and their desire to gain greater control over the economic resources of their coasts, particularly fish stocks, which in many cases were largely exploited by the distant-water fleets of developed States."[5]

Presidential Decree No. 1599 on the EEZ

Before the Philippines signed UNCLOS in 1982 followed by its ratification on 08 May 1984, President Marcos signed PD No. 1599 on 11 June 1978 establishing, under Section 1, the Exclusive Economic Zone of the Philippines to 200 nautical miles beyond and from the baselines from which the territorial sea is measured. The baselines then were defined under RA 3046 as amended by RA 5446. The EEZ under PD 1599 was proclaimed 16 years before the entry-into-force of UNCLOS in 1994 and six years before ratification by the Philippines.

The EEZ concept was being discussed at UNCLOS III that started in late 1973 in New York with the adoption of UNCLOS by the conference delegates. Within this period, President Marcos issued PD 1599 declaring the Philippine EEZ on the basis that "such a zone is now a recognized principle of international law."[6]

Even well ahead of the adoption of Part V of UNCLOS on the EEZ, Sections 2 and 3 of PD 1599 enumerate the rights of the Philippines in its EEZ and the prohibited acts, which captured most of the provisions under Art. 36 of UNCLOS on the rights, jurisdiction, and duties of the coastal State in the EEZ. PD 1599 states:

> "Section 2. Without prejudice to the rights of the Republic of the Philippines over it territorial sea and continental shelf, it shall have and exercise in the exclusive economic zone established herein the following;
>
> (a) Sovereignty 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 sea-bed, including the subsoil and the superjacent 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, 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.

Section 3. Except in accordance with the terms of any agreement entered into with the Republic of the Philippines or of any license granted by it or under authority by the Republic of the Philippines, no person shall, in relation to the exclusive economic zone:

(a) explore or exploit any resources;
(b) carry out any search, excavation or drilling operations:
(c) conduct any research;
(d) construct, maintain or operate any artificial island, off-shore terminal, installation or other structure or device; or
(e) perform any act or engage in any activity which is contrary to, or in derogation of, the sovereign rights and jurisdiction herein provided.

Nothing herein shall be deemed a prohibition on a citizen of the Philippines, whether natural or juridical, against the performance of any of the foregoing acts, if allowed under existing laws."

The adoption of UNCLOS Part V on the EEZ and Part IV on Archipelagic States was seen as a compromise to the Philippine position for an exemption from the uniform rule on the breadth of the territorial sea based on "historic waters." The Philippine Delegation to UNCLOS II and III did not gain enough support for its proposal. In his sponsorship speech at the Batasang Pambansa session to consider Resolution 633 concurring in UNCLOS, Senator Arturo Tolentino, head of the Delegation, explained the decision to accept the compromise:

"Mr. Speaker, the problem of the Philippines on this aspect of the Convention was not just one of strict law but more of a choice of policy, after weighing positive and negative factors. We put the question to ourselves in this form: Considering the Convention as a whole with both beneficial and adverse effects, which would be more advantageous to the Filipino people – to accept or to reject the Convention? We opted for acceptance. The provisions of the exclusive economic zone and the recognition of the archipelagic principle contributed to tilting the balance in favor of signing the Convention.

x x x x x x x x x x

The exclusive economic zone of the Philippines measures about 395,400 square nautical miles. This area that we have been claiming as our historic territorial sea extending to the limits of the Treaty of Paris measures 263,300 square nautical miles. The exclusive economic zone, therefore, is bigger than the territorial sea by 132,100 square nautical miles which is equivalent to 45,211,225 hectares. The Philippines will be entitled to all the resources – living and nonliving – in this vast additional area of the seas around the archipelago.

Then, we should consider, Mr. Speaker, that under the archipelagic principle, the whole area inside the archipelagic baselines becomes a unified whole and the waters between the islands which formerly were regarded by international law as open or international sea now become waters under the complete sovereignty of the Filipino people…

x x x x x x x x x x

> From a pragmatic standpoint, therefore, the advantage to our country and people not only in terms of the legal unification of land and waters of the archipelago in the light of international law but also in terms of the vast resources that will come under the dominion and jurisdiction of the Republic of the Philippines, your Committee on Foreign Affairs does not hesitate to ask this august Body to concur in the Convention by approving the resolution before us today."[7]

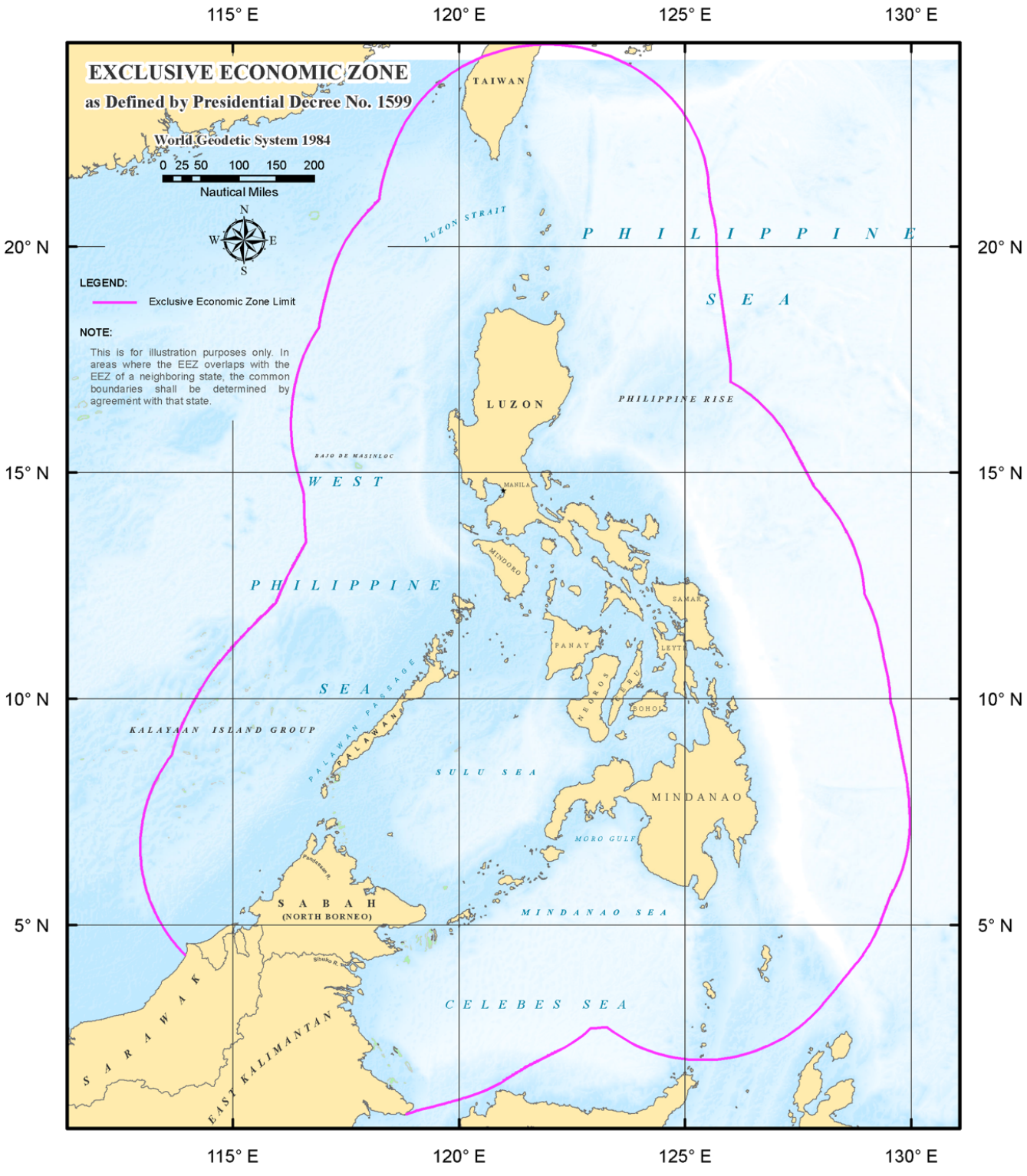
The Philippine EEZ under PD 1599 is shown in figure 2-1.

Article XII, Section 2, 1987 Constitution on marine resources

UNCLOS specifies the sovereign rights of coastal States in the EEZ, as follows:

> "Article 56 Rights, jurisdiction and duties of the coastal State in the exclusive economic zone
>
> 1. In the exclusive economic zone, the coastal State has:
>
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
>
> (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
>
> (i) the establishment and use of artificial islands, installations and structures;
>
> (ii) marine scientific research;
>
> (iii) the protection and preservation of the marine environment;
>
> (c) other rights and duties provided for in this Convention.
>
> 2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
>
> 3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

The sovereign rights of the coastal State for the purpose of exploring and exploiting, conserving, and managing the natural resources, whether living or non-living, of the waters in the EEZ align with Article XII, Section 2, second paragraph of the Constitution that: "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."



Plotted by
NATIONAL MAPPING AND RESOURCE INFORMATION AUTHORITY

Figure 2-1. *Philippine map outlining Presidential Decree No. 1599.*

Philippines-Indonesia EEZ Boundary Treaty, 01 August 2019

The 200 NM EEZ of the Philippines and Indonesia overlap in the Mindanao Sea and Celebes Sea and in the southern section of the Philippine Sea in the Pacific Ocean. Indonesia ratified UNCLOS on 03 February 1986. The overlaps between the Philippines' and Indonesia's exclusive economic zones are illustrated in figure 2-2.

Article 74.1 of UNCLOS provides that: "The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

Art. 74.4 further provides that: "Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement."

PD 1599 on the EEZ also provides 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." Thus, in accordance with UNCLOS, the Philippines and Indonesia agreed to conduct series of negotiations to delimit their overlapping EEZs and embody the results of the negotiations in Treaty.

The Philippines and Indonesia commenced their Maritime Boundary Delimitation (MBD) talks during the First Senior Officials Meeting on the MBD held in Manado, Indonesia on 23-25 June 1994, about five months before the entry into force of UNCLOS. Prior to this meeting, the Department of Foreign Affairs conducted studies on the measures to be taken to ensure compliance by the Philippines of its obligations under UNCLOS including the programs and actions to address the overlapping EEZ with neighboring coastal States. The Philippines and Indonesia MBD talks applied the principles of international law on the delimitation of the overlapping EEZs such as the use of the median line. Both worked to achieve an equitable solution in accordance with the 1982 UNCLOS and used creative options as appropriate.

Among the factors that influenced the development of creative options were the geographic (length of the coastline, size of the land mass, etc.), economic (agriculture, industrial, trading, domestic shipping, and other maritime activities), and social (size of the fishing communities along the relevant coasts, population, regional migration, ethnic interaction of the coastal States, etc.) circumstances existing in the relevant areas of the two opposite coastal States. These factors constituted the elements for the so-called Proportionality Principle and Principle of Equity that were applied in the MBD negotiations.

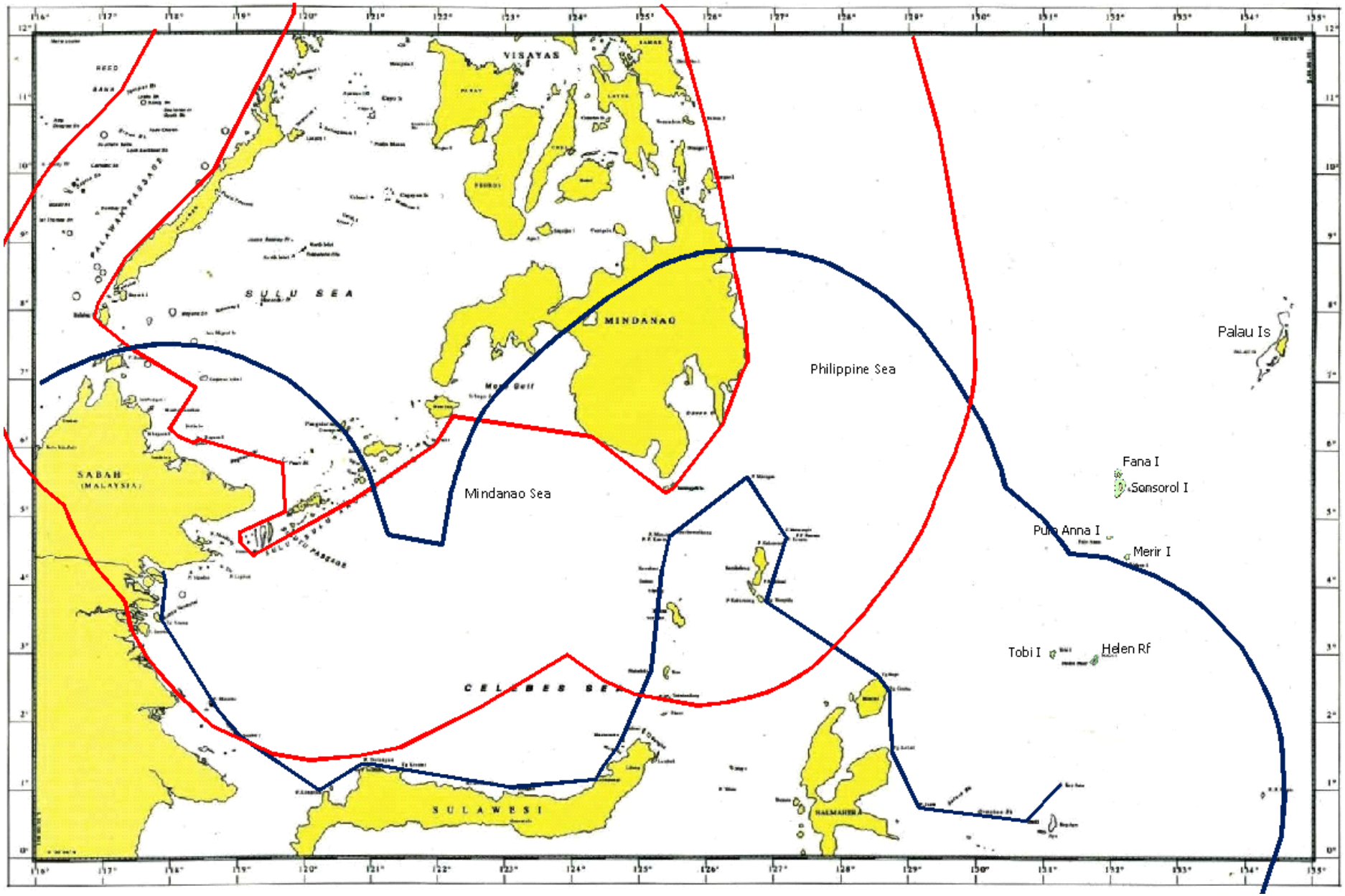


Figure 2-2. *The overlapping exclusive economic zones of the Philippines and Indonesia before the two countries' Maritime Boundary Delimitation talks in 2019.*

Considering these factors, the creative solution between the Philippines and Indonesia, including adjustments of the median line on a give-and-take basis, achieving a single line, limiting the MBD talks on the EEZ (but not covering the seabed and joint cooperation), led towards an agreed EEZ boundary.[8]

The Philippines and Indonesia took 23 years since the first meeting in 1994 to conclude the negotiations with the signing of the Agreement on 23 May 2014 in Manila. The negotiations were stalled for some time because Indonesia had difficulty in accepting the position of the Philippines to use the coastline as a basis for determining the median line. Indonesia noted that the Philippine baselines were not compliant with the 1982 UNCLOS and using the coastline as a basis for the MBD was not consistent with the UNCLOS archipelagic basepoints of Indonesia. These issues, including the Philippine position on the Las Palmas/*Miangas* Island of Indonesia made it difficult for the two sides to bridge the gap created by their negotiating positions.

The issue on the Las Palmas/*Miangas* Island was quickly resolved by referring to the Protocol to the Extradition Treaty Between the Philippines and Indonesia signed for the Philippines by Secretary Vicente Abad Santos on 10 February 1976 stating:

> "That the Republic of Indonesia is the sole owner of an island known as Las Palmas (P. Miangas) as a result of the arbitral award made on April 4, 1928 (The United States of America and the Netherlands."[9]

With this Protocol and the enactment into law of RA 9522, the Philippines-Indonesia MBD Talks resumed as the Philippines now has the UNCLOS compliant archipelagic baselines. Indonesia established UNCLOS-compliant archipelagic baselines in 2002 that were modified in 2008.[10] The MBD Talks concluded on 06 May 2014 with the recommendation to sign and ratify the "Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of the Philippines Concerning the Delimitation of the Exclusive Economic Zone Boundary (with map). Manila, 23 May 2014."

The Agreement was ratified by President Rodrigo R. Duterte on 15 February 2017 and by the Indonesian Parliament on 27 April 2017. To complete the domestic procedure, the Philippine Senate concurred with the President's ratification on 03 June 2019. The delimitation treaty entered into force on 01 August 2019 following the exchange by the two countries' foreign ministers of the instruments of ratification in a special ceremony in Bangkok, Thailand.

The delimitation line is composed of eight turning points. The National Mapping and Resource Information Authority (NAMRIA), a member of the Philippine Technical Working Group on the MBD, provided the map showing the gain and loss status of the Philippines in terms of the EEZ space and the distances of the turning points vis-à-vis the basepoints of both countries, as shown in figure 2-3.[11]

LEGEND:

— PH Baselines
— RI Baselines
— Median Line
— EEZ Boundary Lines

Total No. of Line Segments	7
Longest Segment	133.89M
Shortest Segment	37.323M
Total Length	627.51M

- PH Area Gained = 6,427.6 km²
- RI Area Gained = 6,018.95 km²
- PH Net Gain = 408.65 km²

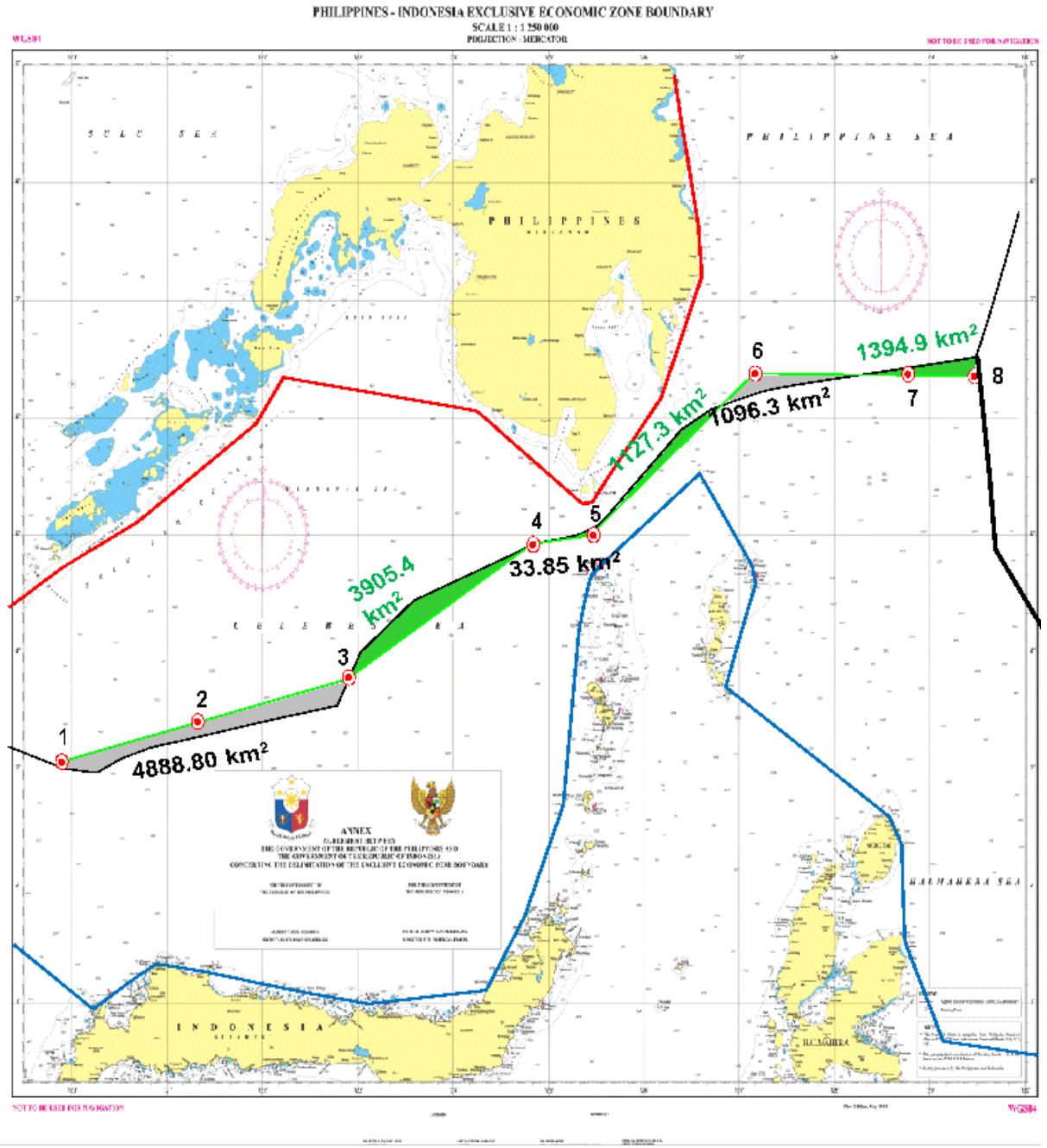


Figure 2-3. *Philippine map outlining the maritime area gains and losses of the Philippines and Indonesia.*

The Agreement is expected to benefit the Philippines and Indonesia economically and politically by promoting more bilateral cooperation in the EEZ. Doing so would advance the common interest of managing and preserving the resources in the EEZ and further strengthening maritime security cooperation between the two countries.

With a clearly demarcated EEZ boundary as guided by the official chart, Filipino fishing vessels and fishermen will be able to operate and undertake livelihood activities in the Philippine EEZ knowing where the Indonesian EEZ begins. Coast Guard and law enforcement authorities of the Philippines and Indonesia will now know the maximum extent of their respective EEZs thereby implement rules and regulations with a clear jurisdictional area. Furthermore, Filipino fisheries authorities can advise fishing communities, especially in Mindanao, on the limits of the Philippine EEZ.

The PH-RI Agreement on the EEZ Boundary established the practice, guiding principles, and jurisprudence and methods, all based on international law specifically UNCLOS and Philippine laws, that will be applied to future MBD talks of the Philippines with its neighboring coastal States. The Philippines has overlapping EEZs with Palau including a trilateral overlap with Indonesia, and with Japan in the Eastern seaboard of Luzon. The official EEZ boundaries of the Philippines and Indonesia is found in figure 2-4, an official map plotted by NAMRIA.

Archipelagic Waters

With the archipelagic baselines in RA 9522, Art. 49.1 of UNCLOS gives a simple definition of archipelagic waters as the waters enclosed by the archipelagic baselines regardless of their depth or distance from the coast. This simple definition, however, has underlying conditionalities:

> "The concept of archipelagic waters is a new one in international law. Such waters are neither internal waters nor territorial sea, although they bear a number of resemblance to the latter."[12]

Under Art. 49, the Philippines exercises sovereignty over its archipelagic waters and under Art. 49.2, "to the air space over the archipelagic waters, as well as to their bed and subsoil, and the resources contained therein." This sovereignty is subject to the obligations under Part IV – Archipelagic States – pertaining to existing agreements with other states, traditional fishing rights, existing submarine cables (Art. 51), Right of Innocent Passage (Art. 52), and the Right of Archipelagic Sea Lanes Passage (ASL, Art. 53). Art. 52 of the UNCLOS states:

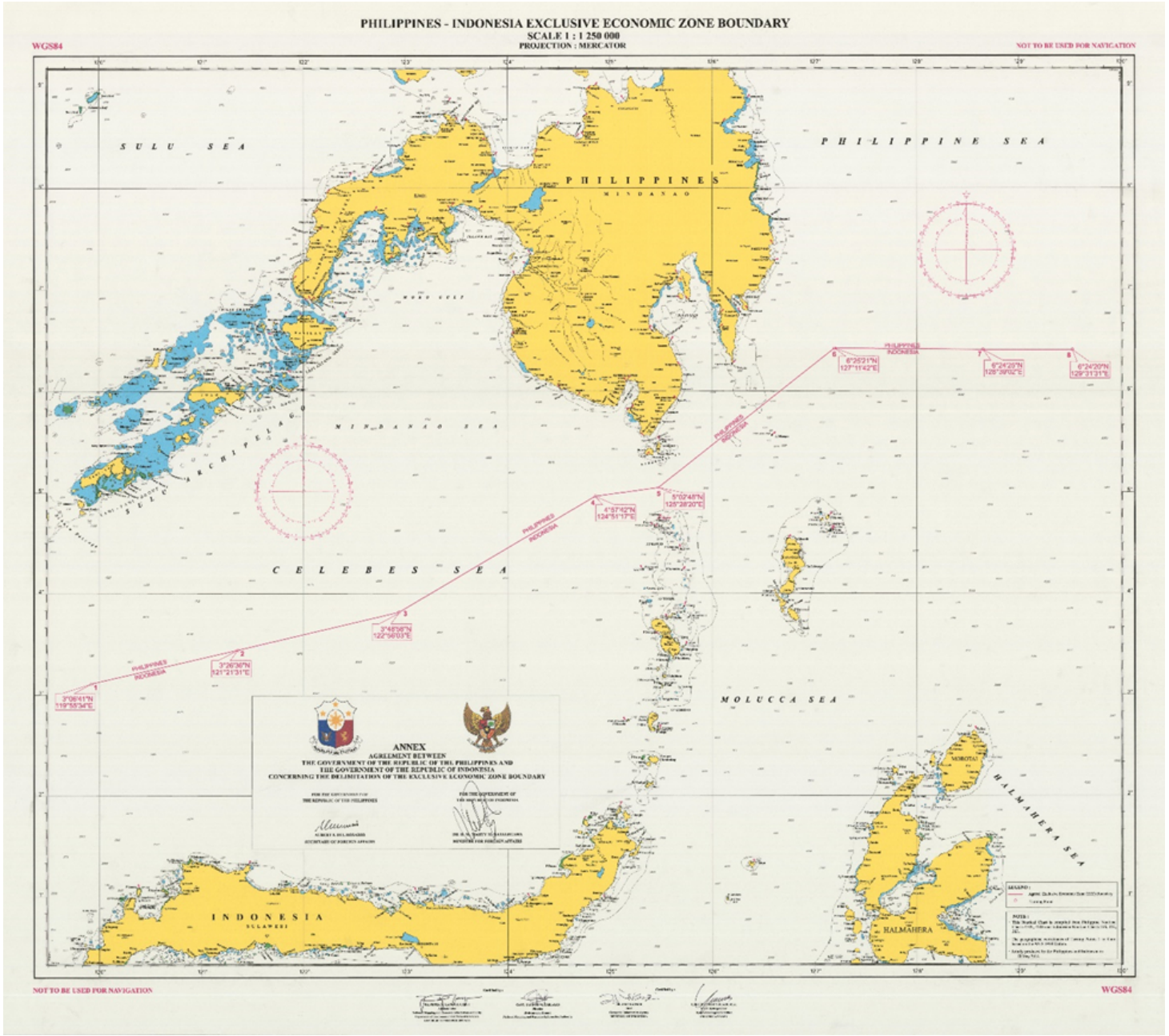


Figure 2-4. *Official map showing the EEZ boundaries of the Philippines and Indonesia, as annexed in the Agreement between the two countries.*

> "1. Subject to article 53 and without prejudice to article 50, ships of all States enjoy the right of innocent passage through archipelagic waters, in accordance with Part II, section 3.
> 2. The archipelagic State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its archipelagic waters the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published." (Underlining supplied)

The conditions of innocent passage of ships through archipelagic waters are listed in Articles 18.2 on "continuous and expeditious" passage subject to certain conditions on stopping and anchoring and Art. 19.1 wherein "(P)assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State."

In addition to the right of innocent passage of ship in archipelagic waters, Art. 53.1-2 states:

> "1. An archipelagic State may designate sea lanes and may designate sea lanes and air routes thereabove, suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea.
> 2. All ships and aircraft enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes."

The ASL "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, bed and subsoil, and the resources contained therein." (Art. 49.4) The ASLs will be discussed in the Part IV.B.

As discussed in the segment on internal waters, the Philippines would have to draw closing lines on bays in accordance with Art. 50 to define the internal waters within the archipelagic waters.

However, to reconcile Art. 50 with the definition of internal waters in the second paragraph of Art. 1 of 1987 Constitution, we revert to the Supreme Court decision on this issue in Magallona vs. Ermita stating that:

> "the Philippines exercises sovereignty over the body of water lying landward of the baselines, including the air space over it and the submarine areas underneath" and "(T)he fact that for archipelagic States, their archipelagic waters are subject to both the right of innocent passage and sea lanes passage does not place them in lesser footing vis-à-vis continental coastal States which are subject, in their territorial sea, to the right of innocent passage and the right of transit passage through international straits."

200 NM Continental Shelf

UNCLOS establishes the sovereign rights of coastal State on their continental shelf, as follows:

"PART VI CONTINENTAL SHELF

Article 76 Definition of the continental shelf

1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.
2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.
3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof

x x x x x x x x x

Article 77. Rights of the coastal State over the continental shelf

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.
3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.
4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

Article 78. Legal status of the superjacent waters and air space and the rights and freedoms of other States

1. The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters.
2. The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention.

Article 80. Artificial islands, installations and structures on the continental shelf

Article 60 applies mutatis mutandis to artificial islands, installations and structures on the continental shelf.

Article 81 Drilling on the continental shelf

The coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes."

The decisive event in the State practice on the exploration and exploitation of resources on the ocean floor was the executive order of US President Harry Truman on 28 September 1945 proclaiming that the resources on the continental shelf contiguous to the United States belonged to the United States which, according to Michael Scharf, was:

> "a radical departure from the existing approach, under which the two basic principles of the law of the sea had been a narrow strip of coastal waters under the exclusive sovereignty of the coastal state and an unregulated area beyond that known as the high seas."[13]

Further, Ian Brownlie stated that "The thesis contained in the Truman proclamation proved attractive to a diversity of states. The new principle provided a stable basis for exploitation of petroleum and at the same time made a reasonable accommodation for freedom of fishing and navigation in the superjacent waters. However, the practice was far from uniform and the discussions in the International Law Commission in the years 1951-6 indicated the immaturity of the legal regime. As a consequence the text of the Convention on the Continental Shelf adopted at the Law of the Sea Conference of 1958 represented in part at least an essay in the progressive development of the law."[14]

The following articles are the relevant provisions of the 1958 Convention on the Continental Shelf that codified emergent rules of customary international law:

"Article 1

For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

Article 2

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.
3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or any express proclamation.
4. The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable

> stage, either are immobile or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.
>
> Article 3
> The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.
>
> Article 4
> Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of submarine cables or pipe lines on the continental shelf."

RA 387, or the Petroleum Act of 1949, and Presidential Proclamation No. 370 of 20 March 1968, have referred to the continental shelf of the Philippines as one of the areas where the State shall exercise its jurisdiction for the exploration, exploitation, and utilization of the country's petroleum resources. The Petroleum Act of 1949 mentioned in Article 3 that:

> "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 imperceptibility." (Underlining supplied)

The same phrase "on the continental shelf, or its analogue in an archipelago" is in Section 14 on Free Areas which are open to application for Exploration Concession by any duly qualified person.

Proclamation No. 370, signed by President Marcos, is entitled "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". The single operative paragraph of the Proclamation declares that:

> "...all the mineral and other natural resources in the 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 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."

RA 387 was already in force before the 1958 Geneva Convention on the Continental Shelf entered into force on 10 June 1964. Citing RA 387, Proclamation 370 set the premise under customary international law for declaring State jurisdiction and control of the

continental shelf by stating in the *Whereas* clause that:

> "...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;"

The State powers expressed in these domestic laws were eventually embedded within the relevant provisions of the 1958 Geneva Convention.

Philippine Extended Continental Shelf: The Philippine (Benham) Rise

The 200 NM continental shelf has become customary international law codified in the 1958 Convention on the Continental Shelf:

> "In the years following the 1958 conference, attention was increasingly given to the resources of the deep sea bed beyond the physical continental shelf. It became clear that, given sufficient investment, there were few, if any, areas of the ocean bed which could not be exploited in some way. It was feared that the consequence of continued adherence to the exploitability test in the face of rapidly developing technology, rendering ever deeper areas 'exploitable' would be the eventual extension of coastal state 'continental shelf' claims so as to cover the entire ocean floor. This would in practice have benefited only those few States with the technology necessary to exploit the deep ocean bed."[15]

The issue on the outer limits of the 200 NM continental shelf was discussed in UNCLOS III with great difficulty especially with the emergent rules on the EEZ. Developed countries, especially those with the technology for deep seabed exploration, were reluctant to limit their claim to resources beyond the outer portion of their continental margin. Other States wish to secure agreement in UNCLOS III to the 200 NM limit and leave the area beyond that limit to form the International Seabed Area where the fruits of exploitation will benefit all states which, pursuant to the proposal of Dr. Arvid Pardo of Malta, aims to reserve the seabed and ocean floor beyond national jurisdiction as the Common Heritage of Mankind.

The debates in UNCLOS III on this issue brought out a compromise agreement contained in Part XI on "The Area", which is defined in Article I.1 (1) of UNCLOS as the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction. Article 136 states that: "The Area and its resources are the common heritage of mankind."

The agreement on Part XI on the Area requires the technical process to establish the outer limits of the 200 NM continental shelf of coastal States:

> "In broad terms, therefore, a coastal State is entitled to a continental shelf consisting of (a) the sea bed reaching 200 miles from the baselines, and (b) subject to the 'Irish formula', any

> area of physical continental margin (often known as the 'outer' continental shelf) beyond it. The limits established by the 1982 Convention allow the inclusion within national jurisdiction of substantially the whole of the physical continental margin."[16]

This complex test on the outer continental shelf, described as the 'Irish formula', is applied in Article 76 – Definition of the Continental Shelf.

To avoid disputes over the limits of the outer continental shelf, Annex II of UNCLOS established the Commission on the Limits of the Continental Shelf (CLCS) which consists of 21 members who shall be experts in the field of geology, geophysics (or hydrography), elected by States Parties to the Convention from among their nationals, having due regard to the need to ensure equitable geographical representation, who shall serve in their personal capacity. Among the functions of the CLCS is to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with Article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea.

The Philippines submitted to the CLCS in New York on 08 April 2009 the papers to establish its Extended Continental Shelf (ECS) beyond the 200 NM continental shelf measured from the baseline and from the northeastern seaboard in the Philippine Sea. On 12 April 2012, the CLCS adopted in full the Philippines' Submission for an ECS in the Benham Rise Region. The outer limits of the ECS, as established based on the CLCS recommendations, are defined by 226 points, covering a seabed area of 135,506 square kilometers. The shallowest part, which is the Benham Bank, is less than 50 meters deep. It is connected to the Luzon margin through the *Palanan* and Bicol Saddle.[17]

President Rodrigo Duterte, in Executive Order No. 25 issued on 16 May 2017, changed the name of the undersea feature known as the Benham Rise into "Philippine Rise" with instructions to NAMRIA to publish the corresponding map and to the Department of Foreign Affairs to transmit the appropriate notification to the United Nations.

The UN received the notification and issued Maritime Zone Notifications released on 15 March 2018 containing the "Circular Communications from the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs on the change of name from Benham to Philippine Rise."[18] The Philippine Rise is compliant with UNCLOS Part VI Art. 76 which outlines the technical, geological, geophysical, and hydrological requirements to designate an ECS. Paragraphs 4 to 7 of Art. 76 gives the specific requirements to establish the outer edge of the continental margin wherever the margin extends beyond 200 NM from the baselines. Aside from the United Nations, the Philippines has deposited the chart 4726A, shown in figure 2-5, and the list of geographical coordinates of its ECS to the International Seabed Authority pursuant to Art. 84.2 of UNCLOS.[19]

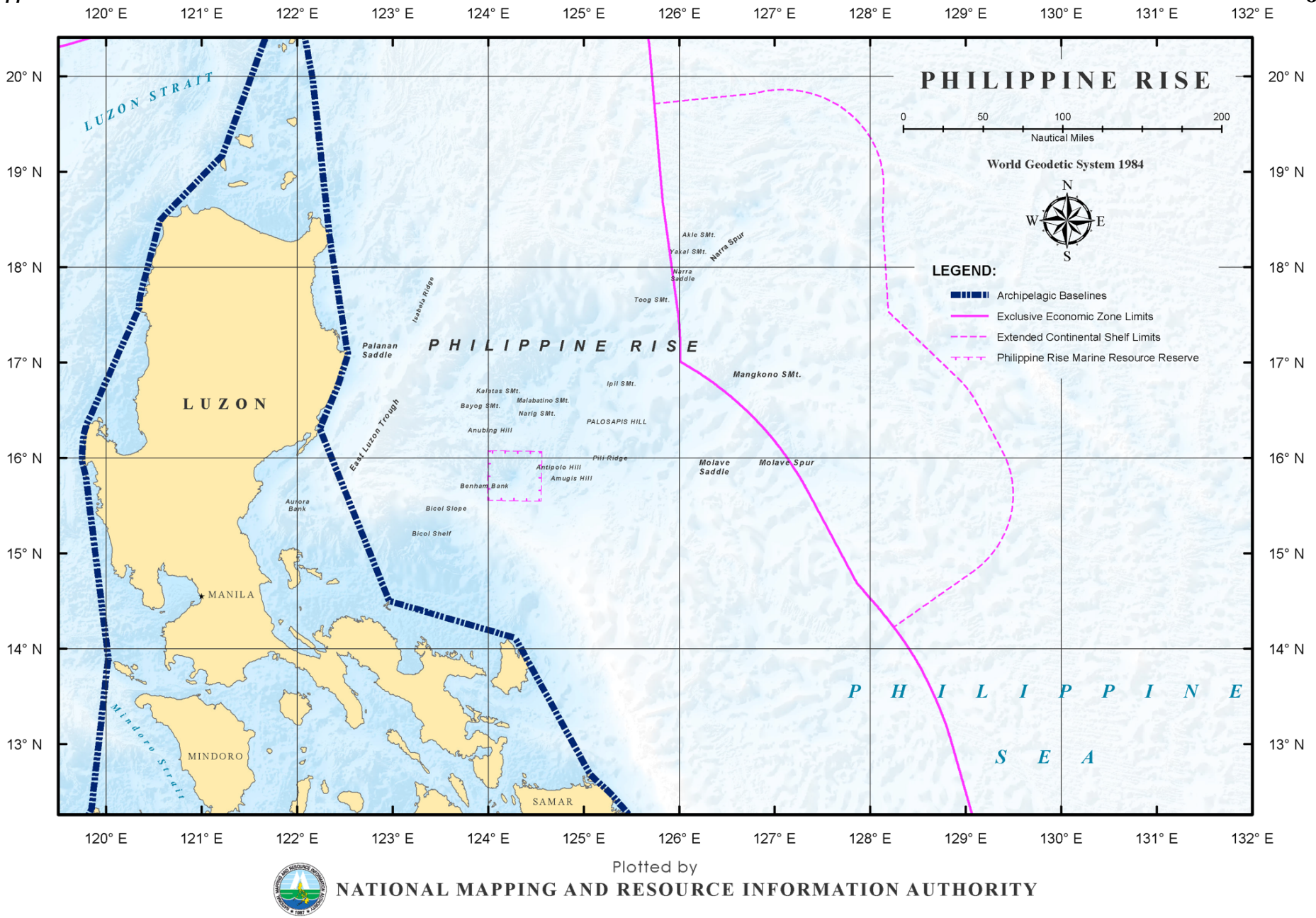


Figure 2-5. *Philippine map outlining the Northeastern seaboard containing features of the Philippine Rise and the extended continental shelf limits.*

The Philippine Rise is vital for the Philippines since it contains natural resources which "consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species...", as defined in Article 77.4 of UNCLOS. An expanse of the Philippine Rise contains rare earth materials, essential for today's electronic equipment such as computers, cell phones, and other high-tech gadgets, i.e., lithium batteries that power electric cars (see figures 2-6, 2-7, and 2-8). These deep-seabed minerals are polymetallic nodules, polymetallic sulfides, and cobalt-rich ferromanganese crusts.

The exploration and exploitation of natural resources in the Area and ECS by coastal States are to be coordinated with the International Seabed Authority (ISA), an autonomous international organization established under UNCLOS and the 1994 Agreement relating to the Implementation of Part XI of UNCLOS.

The ISA is the organization through which States Parties to UNCLOS organize and control all mineral-resources-related activities in the area for the benefit of mankind. In so doing, ISA has the mandate to ensure the effective protection of the marine environment from harmful effects that may arise from deep-seabed related activities. ISA has its headquarters in Kingston, Jamaica. It came into existence on 16 November 1994, upon the entry into force of UNCLOS. In accordance with article 156 (2) of UNCLOS, all States Parties to UNCLOS are *ipso facto* members of ISA. As of 01 May 2020, ISA has 168 members, including the European Union.

Under Art. 82 of UNCLOS, coastal States shall make payments or contributions in kind through the ISA for the exploitation of the non-living resources of the continental shelf beyond the 200 NM from the baselines. Thus, the Philippines is required to comply with Art. 82 should it exploit the resources in the ECS.

In this regard, the Philippines must establish the policies, laws, regulations, administrative structure, and personnel to protect and develop the resources in the Philippine Rise in consultation with the ISA. It is important to reiterate that, pursuant to Art. 77.1 of UNCLOS, the Philippines "exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources." Furthermore, the Philippines has absolute sovereign rights over the resources in its continental shelf including the Philippine Rise as provided for in Art. 77.2 that these rights "are <u>exclusive</u> in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities <u>without the express consent of the coastal state</u>" (Underlining supplied). Art. 77.3 further provides that "the rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation."

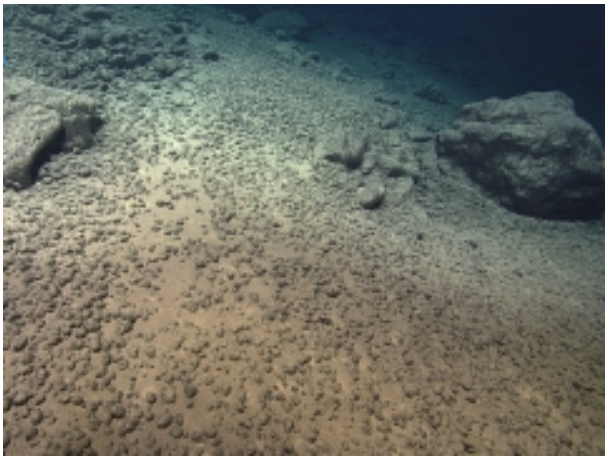


Figure 2-6. *Polymetallic nodules.*

Polymetallic nodules[20] *(figure 2-6) are composed mainly of Mn, Fe, Silicates, and hydroxides. It is the trace metal contents such as Ni, Cu, Co, and Mn and Rare Earth Elements (REE) that are attracting interests to mine these deposits to meet the growing demand for these metals. The nodules vary in size from micro-nodules to about 20 cm, the common size being two to eight centimeters.*

Polymetallic sulfides[21] *(figure 2-7) are found in metalliferous muds and brine coming out from deep seabed vents that were first discovered in the Red Sea Rift System. These seabed minerals contain large amounts of copper, zinc, lead, iron, silver, and gold. Several hydrothermal sites were explored along the East Pacific Rise System, Galapagos Ridge, the Juan de Fuca and Gorda Ridges in the 70's.*

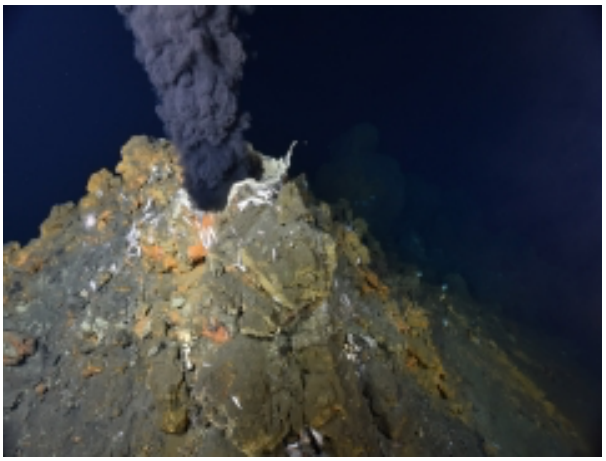


Figure 2-7. *Polymetallic sulfides.*

Figure 2-8. *Cobalt-rich ferromanganese crusts.*

Cobalt-rich ferromanganese crusts[22] *(figure 2-8) occur within the EEZ of countries. Similar in general composition to the polymetallic nodules, cobalt crusts are attracting investment in exploration for higher cobalt percentage (up to 2 %), platinum (0.0001 %) and Rare Earth Elements (REE) besides Nickel and Manganese.*

In other words, the right to explore and exploit the natural resources in the 200 NM continental shelf and ECS "do not depend on occupation or proclamation but automatically attach to the coastal State". However, "it is for the coastal State, through its own laws and regulations, to define the conditions under which exploration and exploitation of the shelf may be conducted."[23] House Bill No. 35, filed during the 18th Congress, intends to create a government agency – the Benham Rise Research and Development Institute –to establish a scientifically sound management framework that would address the research, development, exploration, conservation, and biodiversity concerns of the Benham Rise Region.[24]

The Philippine regulations over its continental shelf and ECS should apply Art. 78 of UNCLOS, which provides that the "rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters" and that the "exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention."

In effect, the freedoms of navigation and overflight are to be respected in the superjacent waters over the 200 NM continental shelf of the Philippines (which is the EEZ) as well as over the ECS.

The area beyond national jurisdiction, namely, the Philippine 200 NM EEZ and continental shelf and the Philippine Rise is the high seas governed by Part VII of UNCLOS:

> "PART VII HIGH SEAS
> SECTION 1. GENERAL PROVISIONS
> Article 86. Application of the provisions of this Part
>
> The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgment of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.
>
> Article 87. Freedom of the high seas
>
> 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:
>
> (a) freedom of navigation;
> (b) freedom of overflight;
> (c) freedom to lay submarine cables and pipelines, subject to Part VI;
> (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
> (e) freedom of fishing, subject to the conditions laid down in section 2;
> (f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

Article 88. Reservation of the high seas for peaceful purposes

The high seas shall be reserved for peaceful purposes.

Article 89. Invalidity of claims of sovereignty over the high seas

No State may validly purport to subject any part of the high seas to its sovereignty.

Article 90. Right of navigation

Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas."

It is important to note that should the Philippines legislate its maritime zones up to the 200 NM EEZ and continental shelf, such law would deliver a strong message of a high seas in the WPS where Articles 88, 89 and 90 will apply.

NOTES

[1] Churchill and Lowe, *op. cit.*, 132.

[2] *Ibid*., 135.

[3] *Ibid*.

[4] *Ibid*.

[5] *Ibid*., 160-162.

[6] Refer to the second *WHEREAS* clause of PD 1599.

[7] The Philippine National Territory, A Collection of Related Documents, *op. cit.*, 516-517, Proceedings of the Batasang Pambansa Concurring in the United Nations Convention on the Law of the Sea, 6th Regular Session.

[8] DFA Briefing Paper for the Senate Committee on Foreign Affairs for Concurrence to the PH-Indonesia EEZ Delimitation October 2015, 1-3. Atty. Asuque headed the PH Technical Working Group that negotiated the PH-RI EEZ Boundary Treaty.

[9] UP Law Center IILS and DFA FSI, *op. cit.*, 464, Protocol to the Philippines-Indonesia Extradition Treaty of 10 February 1976.

[10] DFA Briefing Paper for the Senate Committee on Foreign Affairs, 7. Government Regulation No. 38 of 2002 as amended by the Government Regulation No. 37 of 2008 on the Indonesian archipelagic baselines.

[11] *Ibid*., 11.

[12] Churchill and Lowe, *op. cit.*, 125.

[13] Scharf, M. The Truman Proclamation on the Continental Shelf. In *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* , accessed on 07 May 2021 from: https://www.cambridge.org/core/books/customary-international-law-in-times-of-fundamental-change/truman-proclamation-on-the-continental-shelf

[14] Brownlie, I. *Principles of Public International Law*, 5th ed. 1998 (UK, Oxford University Press), 213.

[15] Churchill and Lowe, *op. cit.*, 147.

[16] *Ibid*., 149.

[17] National Mapping and Resource Information Authority, Philippine ECS Delimitation, accessed on 03 March 2021 from: http://www.namria.gov.ph/projects.aspx

[18] UN DOALOS, accessed on 01 March 2021 from: https://www.un.org/depts//los/LEGISLATIONANDTREATIES/STATEFILES/PHLhttp://www.namria.gov.ph/project s.aspx.htm

[19] International Seabed Authority (ISA), Article 84(2) – Charts and Lists of Geographical Coordinates, accessed from: https://www.isa.org.jm/deposit-charts, on 1 March 2021

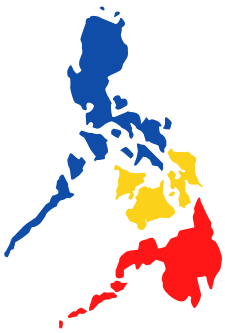
[20] ISA photo, accessed on 01 March 2021 from https://www.isa.org.jm/exploration-contracts/polymetallic-nodules

[21] ISA photo, accessed on 01 March 2021 from https://www.isa.org.jm/exploration-contracts/polymetallic-sulphides

[22] ISA photo, accessed on 01 March 2021 from: https://www.isa.org.jm/index.php/exploration-contracts/cobalt-rich-ferromanganese

[23] Churchill and Lowe, *op. cit.*, 153.

[24] HB No. 35 – An Act Establishing the Benham Rise Research and Development Institute, Providing Funds Thereof, and for Other Purposes, accessed from:https://www.congress.gov.ph/legisdocs/basic_18/HB00035.pdf, on 6 March 2021.



Chapter 3

The West Philippine Sea
and
The Philippines vs. China Arbitral Award

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The West Philippine Sea and The Philippines v. China Arbitral Award

As discussed in the preceding chapter of this primer, President Benigno Aquino III issued Administrative Order No. 29 on 05 September 2012 entitled "Naming the West Philippine Sea of the Republic of the Philippines, and for other purposes." Under Section 1, the entire maritime area on the western side of the Philippine archipelago is effectively named the West Philippine Sea (WPS). These areas include the Luzon Sea as well as the waters around, within, and adjacent to the Kalayaan Island Group and Scarborough Shoal (*Bajo de Masinloc*): "now the most famous shoal in Philippine history due to its occupation by China in July 2012 after a dramatic three-month standoff between Chinese and Philippine vessels."[1] To ensure that the Philippines will continue to exercise sovereignty over these areas, Section 2 states that the naming of the West Philippine Sea is without prejudice to the determination of the maritime domain over territories in which the Republic of the Philippines has sovereignty and jurisdiction.

The South China Sea (SCS) is also on the western side of the Philippines and covers a vast sea area that overlaps with the WPS. From the eastern side of the mainland of the People's Republic of China, the SCS is bounded from the north by the Republic of China (Taiwan), to the east by the Philippines, then across the sea to the west by the Socialist Republic of Vietnam and to the south by Brunei Darussalam, Republic of Indonesia, Malaysia, and Republic of Singapore.

In the vastness of the SCS are various high tide and low tide physical features, i.e., reefs, banks, shoals, rocks, and islands. These physical features are now the source of territorial and maritime disputes among China, the Philippines, Malaysia, and Vietnam. China claims the whole of the SCS while the other claimant States have declared sovereignty over specific physical features and sovereign rights over identified maritime areas.

The naming of the western seas as WPS has now highlighted the territorial and maritime dispute with China over the KIG and *Bajo de Masinloc*. The Philippines brought this maritime dispute to an arbitral tribunal. A landmark decision was delivered on 12 July 2016 in PCA Case No. 2013-19 between the Republic of the Philippines and the People's Republic of China. The Award of the five-member Arbitral Tribunal in the Permanent Court of Arbitration (PCA), in The Hague, The Netherlands is the culmination of over 21 years of sustained challenge by the Philippines of China's excessive claim over the South China Sea.

The fundamental issue raised by the Philippines against China in the arbitration case is the very essence of the dispute settlement mechanism under Part XV of UNCLOS, which covers disputes between State Parties "concerning the interpretation or application of this Convention." The Philippine case has nothing to do with a territorial claim or territorial sovereignty over the West Philippine Sea. Sovereignty disputes and other matters not regulated by UNCLOS "continue to be governed by the rules and principles of general international law."[2] Territorial disputes may be resolved by customary rules or laws and not under UNCLOS.

The conflict with China and other claimant States on the South China Sea may trace its inception from 1947 with the claim by the Philippines of the Spratly Islands and Atty. Cloma's possession and occupation of the Free Territory of *Freedomland* (now KIG). But the diplomatic and legal challenge became prominent in January 1995, during the term of President Fidel V. Ramos, when China erected a make-shift structure over the Mischief Reef (*Panganiban* Reef) purportedly as a civilian shelter for Chinese fishermen during a storm. Today, China has taken control of Mischief Reef with the addition of artificial islands transformed into military facilities by massive dredging and reclamation of seven coral reefs that began in 2014. China has previously declared that it has "indisputable sovereignty" over the *Nansha* (China's 'official' name for Spratly/KIG) Islands and its adjacent waters based on its nine-dash lines over the South China Sea.

The Philippines discussed the Mischief Reef incident and other actions by China within the Philippine EEZ and the South China Sea in various diplomatic consultations over the years including meetings of the Association of Southeast Asian Nations (ASEAN). The Philippines has issued the appropriate diplomatic protests and taken actions by the Philippine Navy, Philippine Air Force, and Philippine Coast Guard short of any armed confrontation to challenge Chinese intrusions and violations of Philippine sovereignty over its maritime domain, preventing exploration on the *Recto* Bank, attack on Filipino fishermen, and prevented them from fishing in the Philippine EEZ, destruction of the marine environment through dredging and building of artificial islands.

The Government's response to Chinese aggression has been consistently guided by the principles in the Constitution that "(T)he Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations" and the State policy that:[3]

> "(I)n its relations with other states the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination."[4]

After exhausting all diplomatic and peaceful means to resolve the dispute and following an extensive and comprehensive assessment by the Philippines of the appropriate action to take against China, the Philippines under the administration of President Benigno Aquino III was left with no other alternative but to bring the matter for dispute resolution

under Part XV of UNCLOS.

To initiate the arbitration, the Philippines submitted a "Notification and Statement of Claim" on 22 January 2013 to the International Tribunal for the Law of the Sea (ITLOS) in Hamburg, Germany, with a copy furnishing the Chinese Embassy in Manila *via* Note Verbale personally handed over to the Chinese Ambassador who was summoned to the Department of Foreign Affairs. China rejected the arbitration and returned the "Notification and Statement of Claim of the Philippines" in a reply Note Verbale to the DFA on 19 February 2013.

With the submission of the Notification, the Philippines initiated legal proceedings against China pursuant to Section 2 (Compulsory Procedures Entailing Binding Decisions), Articles 286 and 287, and in accordance with Article 1 of Annex VII – Arbitration - of the Convention.

The Philippines was represented in this case by counsels and advocates from the law firm Foley Hoag LLP, Washington and Boston led by Mr. Paul S. Reichler, who assisted in the preparation of the Memorial. After coordination by the Philippines with the ITLOS through its counsels, the ITLOS constituted the 5-member Arbitral Tribunal on 21 June 2013 pursuant to the procedure set out in Annex VII of UNCLOS to hear and decide the case in The Republic of the Philippines vs. The People's Republic of China.

The Agent of the Philippines in this case was Solicitor General Jose C. Calida who replaced Solicitor General Florin T. Hilbay last 30 June 2016. The members of the Arbitral Tribunal were Judge Thomas A. Mensah of Ghana, Judge Jean-Pierre Cot of France, Judge Stanislaw Pawlak of Poland, Professor Alfred H.A. Soons of the Netherlands, and Judge Rüdiger Wolfrum of Germany. Judge Thomas A. Mensah serves as President of the Tribunal. The Permanent Court of Arbitration acts as the Registry in the proceedings.

China had no representation nor filed a Counter-Memorial during the entire trial of the case. Its seats were empty during the hearings at the Peace Palace in The Hague, although China has issued statements in various fora commenting on the issues raised by the Philippines mostly centered on the narrative that the Tribunal has no jurisdiction as the core of the dispute is about sovereignty over the South China Sea through its "historic" nine-dash lines. The Tribunal, in the award, writes on the matter of jurisdiction:

> "The Tribunal convened a hearing on jurisdiction and admissibility in July 2015 and rendered an Award on Jurisdiction and Admissibility on 29 October 2015, deciding some issues of jurisdiction and deferring others for further consideration. The Tribunal then convened a hearing on the merits from 24 to 30 November 2015."[5]

The Arbitral Award is a 479-page document with 1,203 items or sections that each addressed a specific issue and annexes composed of four maps and thirty-two figures.

The Tribunal clearly stated what it can and cannot decide in this case. It has been asked and will decide on the "disputes between the Parties regarding the legal basis of maritime rights and entitlements in the South China Sea, the status of certain geographic features in the South China Sea, and the lawfulness of certain actions taken by China in the South China Sea." And on what it cannot and will not act on, the Tribunal declared that it "has not been asked to, and does not purport to, make any ruling as to which State enjoys sovereignty over any land territory in the South China Sea, in particular with respect to the disputes concerning sovereignty over the Spratly Islands or Scarborough Shoal. None of the Tribunal's decisions in this Award are dependent on a finding of sovereignty, nor should anything in this Award be understood to imply a view with respect to questions of land sovereignty."[6]

Furthermore, "the Tribunal has not been asked to, and does not purport to, delimit any maritime boundary between the Parties or involving any other State bordering on the South China Sea. To the extent that certain of the Philippines' claims relate to events at particular locations in the South China Sea, the Tribunal will address them only insofar as the two Parties' respective rights and obligations are not dependent on any maritime boundary or where no delimitation of a boundary would be necessary because the application of the Convention would not lead to any overlap of the two Parties' respective entitlements."[7]

Having established the fundamental premise of the arbitration, the Tribunal then presented the four categories of the dispute brought by the Philippines, as follows:

> "First, the Philippines has asked the Tribunal to resolve a dispute between the Parties concerning the source of maritime rights and entitlements in the South China Sea. Specifically, the Philippines seeks a declaration from the Tribunal that China's rights and entitlements in the South China Sea must be based on the Convention and not on any claim to historic rights. In this respect, the Philippines seeks a declaration that China's claim to rights within the 'nine-dash line' marked on Chinese maps are without lawful effect to the extent that they exceed the entitlements that China would be permitted by the Convention.[8]
>
> Second, the Philippines has asked the Tribunal to resolve a dispute between the Parties concerning the entitlements to maritime zones that would be generated under the Convention by Scarborough Shoal and certain maritime features in the Spratly Islands that are claimed by both the Philippines and China.[9]
>
> Third, the Philippines has asked the Tribunal to resolve a series of disputes between the Parties concerning the lawfulness of China's actions in the South China Sea.[10] (In this category, the Philippines enumerated three major violations of China against UNCLOS on (a) fishing, oil exploration, navigation, construction of artificial islands and installations; (b) failing to protect and preserve the marine environment; and (c) inflicting severe harm on the marine environment by constructing artificial islands and engaging in extensive land reclamation at seven reefs in the Spratly Islands.)
>
> Fourth, the Philippines has asked the Tribunal to find that China has aggravated and extended

> the disputes between the Parties during the course of this arbitration by restricting access to a detachment of Philippine marines stationed at Second Thomas Shoal and by engaging in the large-scale construction of artificial islands and land reclamation at seven reefs in the Spratly Islands."[11]

At the conclusion of the hearing on the merits of the case on 30 November 2015, Solicitor General Calida presented the Philippines' Final Submissions composed of Parts A and B (with 15 items).[12] The Tribunal decisions on these Submissions are summarized in Chapter X Dispositif, items/section 1202 and 1203 of the Award.

This briefing primer will present the quoted decisions (with the item/section number for accuracy) of the Tribunal on substantive matters relevant to the UNCLOS maritime zones. The Award is highly relevant to the status of the *Pagasa* Island (Thitu Island) in the KIG/WPS (Spratly Island Group); the *Ligaw* Island (Itu Aba), the largest island in the Spratlys and controlled by Taiwan; the *Panatag* Shoal or *Bajo de Masinloc* (Scarborough Shoal) in the WPS, where the stand-off between the Philippines and China began on 08 April 2012; the *Ayungin* Shoal (Second Thomas Shoal) where a derelict Philippine Navy ship, the BRP Sierra Madre, was sunk over the shoal to assert sovereignty and which Chinese vessels continue to harass; the *Panganiban* (Mischief) and the *Kagitingan* (Fiery Cross) Reefs where China built artificial islands by dredging and reclamation and subsequently used as military facilities; and the *Recto* Bank (Reed Bank) where the *Malampaya* gas field in the Philippine EEZ is located and the current flashpoint with China over the exploration of natural gas by the Department of Energy.

Jurisdiction of the Tribunal to Decide the Case

"164. In its Award, the Tribunal unanimously concluded that it:

> A. FINDS that the Tribunal was properly constituted in accordance with Annex VII to the Convention.
>
> B. FINDS that China's non-appearance in these proceedings does not deprive the Tribunal of jurisdiction.
>
> C. FINDS that the Philippines' act of initiating this arbitration did not constitute an abuse of process.
>
> D. FINDS that there is no indispensable third party whose absence deprives the Tribunal of jurisdiction." x x x x x x x (items E to J omitted)

Nature of the Arbitral Award

"165. The Tribunal's Award on Jurisdiction is an 'award of the arbitral tribunal' for the purposes of Article 10 of Annex VII to the Convention. Pursuant to Article 11 of Annex VII to the Convention, '[t]he award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute."

China's 'Nine-Dash Line' and Historic Rights Claim in the Maritime Areas of the South China Sea: Submission Nos. 1 and 2

"223. During the Third United Nations Conference on the Law of the Sea (the "Third UN Conference"), Article 12 of the 1958 Convention was adopted as Article 15 of the 1982 Convention, without significant discussion. The principal proponent of the **concept of historic title** in the course of the Conference was, in fact, **the Philippines**, which employed the term with respect to a **claim (which it has since abandoned) to a territorial sea within the lines fixed by the Treaty of Paris** of 1898 between Spain and the United States that governed the cession of the Philippines.

"278. With respect to Submission No. 2, for the reasons set out above, the Tribunal concludes that, as between the Philippines and China, China's claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the **'nine-dash line' are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the Convention. The Tribunal concludes that the Convention superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein.**

"631. The Tribunal has already held (see paragraphs 277 to 278 above) that there is no legal basis for any Chinese historic rights, or sovereign rights and jurisdiction beyond those provided for in the Convention, in the waters of the South China Sea encompassed by the 'nine-dash line'. The Tribunal sees no evidence that, prior to the Convention, China ever established a historic right to the exclusive use of the living and non-living resources of the waters of the South China Sea, whatever use it may historically have made of the Spratly Islands themselves. In any event, any such right would have been superseded by the adoption of the Convention and the legal creation of the exclusive economic zone. The 'nine-dash line' thus cannot provide a basis for any entitlement by China to maritime zones in the area of Mischief Reef or Second Thomas Shoal that would overlap the entitlement of the Philippines to an exclusive economic zone and continental shelf generated from baselines on the island of Palawan." (Emphases supplied)

The Status of Features in the South China Sea

Submission Nos. 4 and 6: The Status of Features as Above/Below Water at High Tide

"382. Based on the considerations outlined above, the Tribunal reaches the following conclusions regarding the status of features in the South China Sea. The following features include, or in their natural condition did include, rocks or sand cays that remain above water at high tide and are, accordingly, high-tide features: (a) **Scarborough Shoal,** (b) Cuarteron Reef, (c) **Fiery Cross Reef,** (d) Johnson Reef, (e) McKennan Reef, and (f) Gaven Reef (North).

383. The following features are, or in their natural condition were, exposed at low tide and submerged at high tide and are, accordingly low-tide elevations: (a) Hughes Reef, (b) Gaven Reef (South), (c) Subi Reef, (d) **Mischief Reef**, (e) **Second Thomas Shoal**.

384. The Tribunal additionally records that Hughes Reef lies within 12 nautical miles of the high-tide features on McKennan Reef and Sin Cowe Island, Gaven Reef (South) lies within 12 nautical miles of the high-tide features at Gaven Reef (North) and Namyit Island, and that Subi Reef lies within 12 nautical miles of the high-tide feature of Sandy Cay on the reefs to the west of Thitu." (Emphases supplied)

Submission Nos. 3, 5, and 7: The Status of Features as Rocks/Islands

For purposes of brevity, the decisions on these submissions are abbreviated, as follows:

"643. …, under Article 121(3) of the Convention, the high-tide features at Scarborough Shoal are rocks that cannot sustain human habitation or economic life of their own and accordingly shall have no exclusive economic zone or continental shelf.

644. …, for purposes of Article 121(3) of the Convention, the high-tide features at Johnson Reef, Cuarteron Reef, and **Fiery Cross Reef** are rocks that cannot sustain human habitation or economic life of their own and accordingly shall have no exclusive economic zone or continental shelf.

645. …, for purposes of Article 121(3) of the Convention, the high-tide features at Gaven Reef (North) and McKennan Reef are rocks that cannot sustain human habitation or economic life of their own and accordingly shall have no exclusive economic zone or continental shelf.

646. …, **Mischief Reef and Second Thomas Shoal** are both low-tide elevations that generate no maritime zones of their own. The Tribunal also concludes that none of the high-tide features in the Spratly Islands are capable of sustaining human habitation or an economic life of their own within the meaning of those terms in Article 121(3) of the Convention. All of the high-tide features in the Spratly Islands are therefore legally rocks for purposes of Article 121(3) and do not generate entitlements to an exclusive economic zone or continental shelf. There is, accordingly, no possible entitlement by China to any maritime

zone in the area of either Mischief Reef or Second Thomas Shoal…

647. …, the Tribunal concludes that both **Mischief Reef and Second Thomas Shoal** are located within 200 nautical miles of the Philippines' coast on the island of Palawan and are located in an area that is not overlapped by the entitlements generated by any maritime feature claimed by China. It follows, therefore, that, as between the Philippines and China, Mischief Reef and Second Thomas Shoal form part of the exclusive economic zone and continental shelf of the Philippines." (Emphases supplied)

Chinese Activities in the South China Sea

Submission No. 8: Alleged Interference with the Philippines' Sovereign Rights in its EEZ and Continental Shelf

"716. Based on the considerations outlined above, the Tribunal finds that China has, through the operation of its marine surveillance vessels with respect to M/V Veritas Voyager on 1 to 2 March 2011 breached Article 77 of the Convention with respect to the Philippines' sovereign rights over the non-living resources of its continental shelf in the area of Reed Bank. The Tribunal further finds that China has, by promulgating its 2012 moratorium on fishing in the South China Sea, without exception for areas of the South China Sea falling within the exclusive economic zone of the Philippines and without limiting the moratorium to Chinese flagged vessels, breached Article 56 of the Convention with respect to the Philippines' sovereign rights over the living resources of its exclusive economic zone."

Submission No. 9: Alleged Failure to Prevent Chinese Nationals from Exploiting the Philippines' Living Resources

"757. Based on the considerations outlined above, the Tribunal finds that China has, through the operation of its marine surveillance vessels in tolerating and failing to exercise due diligence to prevent fishing by Chinese flagged vessels at Mischief Reef and Second Thomas Shoal in May 2013, failed to exhibit due regard for the Philippines' sovereign rights with respect to fisheries in its exclusive economic zone. Accordingly, China has breached its obligations under Article 58(3) of the Convention."

Submission No. 10: China's Actions in Respect of Traditional Fishing at Scarborough Shoal

"814. Based on the considerations outlined above, the Tribunal finds that China has, through the operation of its official vessels at Scarborough Shoal from May 2012 onwards, unlawfully prevented Filipino fishermen from engaging in traditional fishing at Scarborough Shoal. The Tribunal records that this decision is entirely without prejudice to the question of sovereignty over Scarborough Shoal."

Submission Nos. 11 and 12(B): Alleged Failure to Protect and Preserve the Marine Environment

"992. Based on the considerations outlined above, the Tribunal finds that China has, through its toleration and protection of, and failure to prevent Chinese fishing vessels engaging in harmful harvesting activities of endangered species at **Scarborough Shoal, Second Thomas Shoal** and other features in the Spratly Islands, breached Articles 192 and 194(5) of the Convention.

993. The Tribunal further finds that China has, through its island-building activities at Cuarteron Reef, **Fiery Cross Reef,** Gaven Reef (North), Johnson Reef, Hughes Reef, Subi Reef and **Mischief Reef,** breached Articles 192, 194(1), 194(5), 197, 123, and 206 of the Convention." (Emphases supplied)

Submission No. 12: Occupation and Construction Activities on Mischief Reef

"1043. Based on the considerations outlined above, the Tribunal finds that China has, through its construction of installations and artificial islands at Mischief Reef without the authorisation of the Philippines, breached Articles 60 and 80 of the Convention with respect to the Philippines' sovereign rights in its exclusive economic zone and continental shelf. The Tribunal further finds that, as a low-tide elevation, Mischief Reef is not capable of appropriation."

Submission No. 13: Operation of Law Enforcement Vessels in a Dangerous Manner

"1109. Based on the considerations outlined above, the Tribunal finds that China has, by virtue of the conduct of Chinese law enforcement vessels in the vicinity of Scarborough Shoal, created serious risk of collision and danger to Philippine vessels and personnel. The Tribunal finds China to have violated Rules 2, 6, 7, 8, 15, and 16 of the COLREGS and, as a consequence, to be in breach of Article 94 of the Convention."

Aggravation or Extension of the Dispute between the Parties: Submission No. 14

"1181. Based on the considerations outlined above, the Tribunal finds that China has in the course of these proceedings aggravated and extended the disputes between the Parties through its dredging, artificial island-building, and construction activities. In particular, while these proceedings were ongoing:

(a) China has aggravated the Parties' dispute concerning their respective rights and entitlements in the area of Mischief Reef by building a large artificial island on a low-tide elevation located in the exclusive economic zone of the Philippines.

(b) China has aggravated the Parties' dispute concerning the protection and preservation of the marine environment at Mischief Reef by inflicting permanent,

irreparable harm to the coral reef habitat of that feature.

(c) China has extended the Parties' dispute concerning the protection and preservation of the marine environment by commencing large-scale island-building and construction works at Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, and Subi Reef.

(d) China has aggravated the Parties' dispute concerning the status of maritime features in the Spratly Islands and their capacity to generate entitlements to maritime zones by permanently destroying evidence of the natural condition of **Mischief Reef**, Cuarteron Reef, **Fiery Cross Reef,** Gaven Reef (North), Johnson Reef, Hughes Reef, and Subi Reef." (Emphases supplied)

On the Archipelagic Baselines around the Spratly Islands or Kalayaan Island Group

"574. In any event, however, even the Philippines could not declare archipelagic baselines surrounding the Spratly Islands. Article 47 of the Convention limits the use of archipelagic baselines to circumstances where 'within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.' The ratio of water to land in the Spratly Islands would greatly exceed 9:1 under any conceivable system of baselines…

597. Archipelagic States are defined in Article 46 as States 'constituted wholly by one or more archipelagos and may include other islands.' The Philippines is an archipelagic State (being constituted wholly by an archipelago), is entitled to employ archipelagic baselines, and does so in promulgating the baselines for its territorial sea. China, however, is constituted principally by territory on the mainland of Asia and cannot meet the definition of an archipelagic State."

In summary, the Tribunal decided in favor of the Philippines in almost all of Submissions except on Submission B.15 requesting the Tribunal to call on China to "respect the rights and freedoms of the Philippines" and "comply with its duties under the Convention" and to "exercise its rights and freedoms in the South China Sea with due regard to those of the Philippines under the Convention." On Submission B.15, the Tribunal in item/section 1201 of the Award stated that it is "beyond dispute that both Parties are obliged to comply with the Convention, including its provisions regarding the resolution of disputes, and to respect the rights and freedoms of other States under the Convention. Neither Party contests this, and the Tribunal is therefore not persuaded that it is necessary or appropriate for it to make any further declaration."

But more importantly for the Philippine case against China, the Award unequivocally ruled that there was no legal basis for China to claim historic rights to resources within the sea areas falling within the 'nine-dash line, that UNCLOS has superseded any historic rights or other sovereign rights or jurisdiction (such as the nine-dash lines) in excess of the limits

imposed therein, that all of the high-tide features in the Spratly Islands which are legally rocks for purposes of Article 121(3) and do not generate entitlements to an exclusive economic zone or continental shelf, and certain sea areas are within the exclusive economic zone of the Philippines because those areas are not overlapped by any possible entitlement of China.

Art. 121 paragraph 1 provides that: "An island is a naturally formed area of land, surrounded by water, which is above water at high tide" and paragraph 3 states:

> "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." (Underlining supplied)

The Tribunal conducted an extensive analysis of Art. 121 (3) explaining the origin, meaning, logic, and relevance of each word and article to the entitlement of coastal States to maritime zones for the island or rock. This briefing primer will not delve into that extensive discussion but will highlight decisions of the Tribunal, as follows:

On "human habitation"

> "…with respect to 'human habitation', the critical factor is the non-transient character of the inhabitation, such that the inhabitants can fairly be said to constitute the natural population of the feature, for whose benefit the resources of the exclusive economic zone were seen to merit protection. The term 'human habitation' should be understood to involve the inhabitation of the feature by a stable community of people for whom the feature constitutes a home and on which they can remain.[13]

> The military or other government personnel presently stationed on the features in the Spratly Islands (such as Pagasa Island of the Philippines in the KIG and Itu Aba of Taiwan on the Spratly Island Group) do not "suffice to constitute 'human habitation' for the purposes of Article 121(3)" because "(T)hese groups are heavily dependent on outside supply, and it is difficult to see how their presence on any of the South China Sea features can fairly be said to be sustained by the feature itself, rather than by a continuous lifeline of supply and communication from the mainland. Military or other governmental personnel are deployed to the Spratly Islands in an effort to support the various claims to sovereignty that have been advanced. There is no evidence that they choose to inhabit there of their own volition…[14]

> The Tribunal sees no indication that anything fairly resembling a stable human community has ever formed on the Spratly Islands. Rather, the islands have been a temporary refuge and base of operations for fishermen and a transient residence for labourers engaged in mining and fishing. The introduction of the exclusive economic zone was not intended to grant extensive maritime entitlements to small features whose historical contribution to human settlement is as slight as that. Nor was the exclusive economic zone intended to encourage States to establish artificial populations in the hope of making expansive claims, precisely what has now occurred in the South China Sea. On the contrary, Article 121(3) was intended to prevent such developments and to forestall a provocative and counterproductive effort to

manufacture entitlements."[15]

On "economic life of their own"

"…the history of extractive economic activity does not constitute, for the features of the Spratly Islands, evidence of an economic life of their own. In reaching this conclusion, however, the Tribunal takes pains to emphasize that the effect of Article 121(3) is not to deny States the benefit of the economic resources of small rocks and maritime features. **Such features remain susceptible to a claim of territorial sovereignty and will generate a 12-nautical-mile territorial sea, provided they remain above water at high tide.** Rather, the effect of Article 121(3) is to prevent such features—whose economic benefit, if any, to the State which controls them is for resources alone—from generating a further entitlement to a 200-nautical-mile exclusive economic zone and continental shelf that would infringe on the entitlements generated by inhabited territory or on the area reserved for the common heritage of mankind.[16]

The 'of their own' component is essential to the interpretation because it makes clear that a **feature itself (or group of related features) must have the ability to support an independent economic life, without relying predominantly on the infusion of outside resources** or serving purely as an object for extractive activities, without the involvement of a local population. In the Tribunal's view, for economic activity to constitute the economic life of a feature, the resources around which the economic activity revolves must be local, not imported, as must be the benefit of such activity. Economic activity that can be carried on only through the continued injection of external resources is not within the meaning of 'an economic life of their own.' Such activity would not be the economic life of the feature as 'of its own', but an economic life ultimately dependent on support from the outside. Similarly, purely extractive economic activities, which accrue no benefit for the feature or its population, would not amount to an economic life of the feature as 'of its own" (Emphases supplied).[17]

Thus, the features in the Spratly Island Group or the Kalayaan Island Group, or in the West Philippine Sea that remain above water at high tide but cannot sustain human habitation or economic life of their own such as Itu Aba and *Pagasa* (Thitu) are all legally rocks and not islands and therefore can only project a 12-mile territorial sea, not an EEZ or a continental shelf.

The challenge for the Philippines now is the enforcement of the Arbitral Award. Justice Antonio Carpio said:

"China has refused to comply with the arbitral award and UNCLOS has no mechanism to enforce the award. State parties that ratified UNCLOS undertook to comply in good faith with any arbitral award under UNCLOS. But if a state party reneges on this treaty obligation, and refuses to comply with an adverse award, there is no world sheriff or policeman to enforce the award. There is a rule of law, embodied in the award, but there is no rule of justice because of the absence of an enforcement mechanism."[18]

The other claimant States in the SCS as well as Japan, US and EU have welcomed the Award which President Duterte has described in his speech at the 75th UN Assembly on 23 September 2020, as "now part of international law, beyond compromise and beyond the reach of passing governments to dilute, diminish or abandon."

Indonesian President Joko Widodo had stated that, "the 'nine-dashed line' that China says marks its maritime border has no basis in any international law," adding that, "(T)here is no territorial dispute between Indonesia and China." In a letter sent to UN Secretary-General António Guterres on 28 May 2020, Indonesia reiterated "that the Nine-Dash line map implying historic rights claim clearly lacks international legal basis and is tantamount to upset UNCLOS 1982… As a State Party to UNCLOS 1982, Indonesia has consistently called for the full compliance toward international law, including UNCLOS 1982. Indonesia hereby declares that it is not bound by any claims made in contravention to international law, including UNCLOS 1982."[19]

Malaysia, in a statement issued by the Ministry of Foreign Affairs following the decision of the Arbitral Tribunal, said "...Malaysia believes that all relevant parties can peacefully resolve disputes by full respect for diplomatic and legal processes; and relevant international law and 1982 UNCLOS. Malaysia believes that it is important to maintain peace, security and stability through the exercise of self-restraint in the conduct of activities that may further complicate disputes or escalate tension, and avoid the threat or use of force in the South China Sea."[20] On 23 April 2020, the Malaysian Ministry of Foreign Affairs declared that Malaysia remains firm in its commitment to safeguard its interests and rights in the South China Sea that should remain a sea of peace and trade. The Ministry added that matters relating to the South China Sea must be resolved peacefully based on the principles of international law, including the 1982 UNCLOS.

Vietnam transmitted a Note Verbale to the UN Secretary-General on 30 March 2020 that reiterated the decision of the Arbitral Award that the maritime entitlements of high-tide features in the SCS "shall be determined in accordance with Article 121 (3) of UNCLOS".[21] Vietnam opposes any maritime claims in the East Sea that exceed the limits provided in UNCLOS, including claims to historic rights; these claims are without lawful effect. Vietnam's position on the Arbitral Award reiterates its Statement sent to the Tribunal on 05 December 2014 that none of the maritime features referred to by the Philippines in case can generate maritime entitlements more than 12 nautical miles since they are low-tide elevations or "rocks which cannot sustain human habitation or economic life of their own" under Article 121(3) of the Convention.

Singapore also supported the Arbitral Award. In a statement after the decision was announced, the Ministry of Foreign Affairs Spokesman said: "Singapore is not a claimant state and we do not take sides on the competing territorial claims. However, we support the peaceful resolution of disputes among claimants in accordance with universally-recognized principles of international law, including UNCLOS, without resorting to the threat or use of

force. As a small state, we strongly support the maintenance of a rules-based order that upholds and protects the rights and privileges of all states. Singapore values our long-standing and friendly relations with all parties, bilaterally and in the context of ASEAN."[22]

The Arbitral Award has given clarity to the sovereign rights of coastal States in the SCS in their maritime zones and the illegality of China's nine-dash line.

At the 37th ASEAN Summit in Hanoi on 12 November 2020, the Leaders reaffirmed their "shared commitment to maintaining and promoting peace, security, and stability in the region, as well as to the peaceful resolution of disputes, including full respect for legal and diplomatic processes, without resorting to the threat or use of force, in accordance with the universally recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[23]

Japan's Foreign Minister Fumio Kishida in statement issued on the Final Award of the Arbitral Tribunal saying, "Japan has consistently advocated the importance of the rule of law and the use of peaceful means, not the use of force or coercion, in seeking settlement of maritime disputes. As the Tribunal's award is final and legally binding on the parties to the dispute under the provisions of UNCLOS, the parties to this case are required to comply with the award. Japan strongly expects that the parties' compliance with this award will eventually lead to the peaceful settlement of disputes in the South China Sea.[24]

The United States also supports the Arbitral Award. In a statement issued following the announcement of the decision, State Department Spokesman John Kirby said, "The United States strongly supports the rule of law. We support efforts to resolve territorial and maritime disputes in the South China Sea peacefully, including through arbitration. When joining the Law of the Sea Convention, parties agree to the Convention's compulsory dispute settlement process to resolve disputes. In today's decision and in its decision from October of last year, the Tribunal unanimously found that the Philippines was acting within its rights under the Convention in initiating this arbitration. As provided in the Convention, the Tribunal's decision is final and legally binding on both China and the Philippines. The United States expresses its hope and expectation that both parties will comply with their obligations.[25]

In a recent White House press briefing, President Joseph Biden, Jr. said: "We are going to make it clear that, in order to deal with these things, we are going to hold China accountable to follow the rules, to follow the rules, whether it relates to the South China Sea or the North China Sea or the agreement made on Taiwan or a whole range of other things." And during his call with Chinese President Xi Jinping on 10 February 2021, President Biden underscored his fundamental concerns about Beijing's coercive and unfair economic practices, crackdown in Hong Kong, human rights abuses in Xinjiang, and increasingly assertive actions in the region, including towards Taiwan.[26]

The European Union, in the Declaration by the High Representative on behalf of the EU on the Award issued on 15 July 2016, stated: "The European Union and its Member States, as contracting parties to the United Nations Convention on the Law of the Sea (UNCLOS), acknowledge the Award rendered by the Arbitral Tribunal, being committed to maintaining a legal order of the seas and oceans based upon the principles of international law, UNCLOS, and to the peaceful settlement of disputes. The EU does not take a position on sovereignty aspects relating to claims. It expresses the need for the parties to the dispute to resolve it through peaceful means, to clarify their claims and pursue them in respect and in accordance with international law, including the work in the framework of UNCLOS."[27]

On 16 April 2021, the EU issued its Strategy for Cooperation in the Indo-Pacific – Council Conclusions – that acknowledge the importance of a meaningful European naval presence in the Indo-Pacific and that their strategic approach and engagement with the region should aim to secure free and open maritime supply routes in full compliance with international law, in particular UNCLOS, in the interest of all.[28] In line with the Council conclusions, the EU called out China for endangering peace in the SCS and urged all parties to abide by the 2016 Arbitral Award.

NOTES

[1] Senior Associate Justice Antonio T. Carpio, message in NAMRIA and UP IMALOS, *Bajo de Masinloc, Scarborough Shoal, Maps and Documents,* Batongbacal, J. and Carandang, E., eds. (2014, NAMRIA and IMLOS).

[2] Last premabular clause of UNCLOS: "Affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law."

[3] The Constitution of the Republic of the Philippines 1986, Art. II, Section 1 – Principles.

[4] *Ibid*., Art. II, Section 7 – State Policies.

[5] Permanent Court of Arbitration Press Release, 12 July 2016, *The South China Sea Arbitration* (The Republic of the Philippines V. The People's Republic of China), accessed on 02 March 2021 from: https://docs.pca-cpa.org/2016/07/PH- CN-20160712- Press-Release-No-11-English.pdf.

[6] The Republic of the Philippines vs. The People's Republic of China, PCA Case No. 2013-19, The South China Sea Arbitration Award of 12 July 2016, items/sections 2 and 5, 1-2.

[7] *Ibid*., 2, Section 6.

[8] *Ibid*., 2, Section 7.

[9] *Ibid*., 2, Section 8.

[10] *Ibid*., 3, Section 9.

[11] *Ibid*., 3, Section 10.

[12] *Ibid*., 41, Section 112.

[13] *Ibid*., 227, Section 542.

[14] *Ibid*., 252, Section 620.

[15] *Ibid*., 253, Section 621.

[16] *Ibid*., 254, Section 624.

[17] *Ibid*., 211, Section 500.

[18] Carpio, A. T., Follow Rule of Law but Aspire for Rule of Justice, commencement speech at the Ateneo Law School graduation rites on 14 July 2019, Institute of Maritime and Ocean Affairs, accessed on 05 March 2021 from: https://www.imoa.ph

[19] Benar News, In Letter to UN Chief, Indonesia Takes Stand on South China Sea, accessed on 08 May 2021 from https://www.benarnews.org/english

[20] Statement by Malaysia, Ministry of Foreign Affairs, accessed on 8 May 2021 from https://www.kln.gov.my/

[21] Letter dated 13 June 2016 from the Permanent Representative of Viet Nam to the United Nations addressed to the Secretary-General, accessed on 08 May 2021 from: https://digitallibrary.un.org/record/832559?ln=en

[22] Ministry of Foreign Affairs of Singapore, accessed on 8 May 2021 from:

https://www.mfa.gov.sg/Newsroom/Press-Statements-Transcripts-and-Photos/2016/07/MFA-Spokesmans-comments-on-the-ruling-of-the-Arbitral-Tribunal-in-the-Philippines-v-China-case-under

[23] Chairman's Statement Of The 37th Asean Summit Ha Noi, 12 November 2020, accessed on 08 May 2021 from: https://asean.org/storage/43-Chairman's-Statement-of-37th-ASEAN-Summit-FINAL.pdf

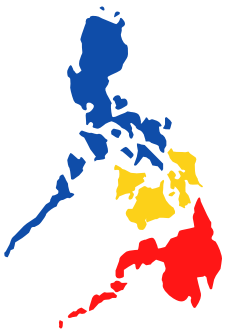
[24] Statement of Japan Foreign Minister on the Final Award of the Arbitral Tribunal, accessed on 8 May 2021 from: https://www.mofa.go.jp/press/release/press4e_001204.html

[25] Press Statement of John Kirby, Assistant Secretary and Department Spokesman, Washington DC, 12 July 2016, accessed on 8 May 2021 from: http://www.state.gov

[26] Readout of President Joseph R. Biden, Jr. Call with President Xi Jinping of China, White House Press Office, accessed on 8 May 2021 from https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/10/

[27] Declaration by the High Representative on behalf of the EU on the Award issued on 15 July 2016, accessed on 8 May 2021 from https://www.consilium.europa.eu/en/press/press-releases/2016/07/15/south-china-sea-arbitration/

[28] EU Strategy for Cooperation in the Indo-Pacific, accessed on 8 May 2021 from: https//eeas.europa.eu/headquarters/homepage/96741/eu-strategy-cooperation-indo-pacific_en



Chapter 4

Ways Forward

Policy Options for the Philippines

4

Ways Forward
Policy Options for the Philippines

Defining and Delineating the Philippine Maritime Zones

The designation and legislation of the maritime zones of a coastal state is not mandatory under UNCLOS. To indicate the permissive nature of these zones, the Convention uses the word "*may*" in Art. 33.2 on the Contiguous Zone, Art. 47.1 on the drawing of archipelagic baselines, and Art. 53.1 on the designation of archipelagic sea lanes. Art. 3 recognizes the right of coastal States to establish a territorial sea provided it does not exceed 12 NM from the baselines. Art. 33.2 provides that the contiguous zone "may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured." Art. 57 states that the EEZ "shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." Art. 76.1 provides that the legal continental shelf shall extend "to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance." For the ECS, Art. 76.2 emphasizes that it "shall not extend beyond the limits provided for in paragraphs 4 to 6", which are the technical requirements under the so-called Irish formula.

It is for the States in the exercise of sovereign power to enact into domestic law the maximum extent of each maritime boundaries. In the Preamble, UNCLOS gives "due regard for the sovereignty of all States" in its desire to establish a legal order for the seas and oceans.[1] Thus, it is the sovereign will of the State to legislate its maritime zones. But what is mandatory under UNCLOS, is the maximum extend of each zone. States may designate maritime zones lower than the limits under UNCLOS as specific circumstances may require. UNCLOS recognizes the rights of States to designate these maritime zones, but it is up to the concerned State to legislate them with exact measurements.

While the Philippines "adopts the generally accepted principles of international law as part of the law of the land," the measures to implement those principles domestically must be enacted into law or regulations to ensure consistency with international practice or treaties and thus obviate protests from other countries.[2] To elaborate on this point, the Supreme Court, in the Magallona vs. Ermita case, stated:

> "Significantly, the right of innocent passage is a customary international law, thus automatically incorporated in the corpus of Philippine law. No modern State can validly invoke its sovereignty to absolutely forbid innocent passage that is exercised in accordance

with customary international law without risking retaliatory measures from the international community."

It is the sovereign prerogative of the Philippine government to legislate the UNCLOS maritime zones, as it has legislated the archipelagic baselines under RA 9522. The case of Magallona vs. Ermita recognizes this sovereign prerogative of the State in the case of designating ASLs wherein "…the political branches of the Philippine government, in the competent discharge of their constitutional powers, may pass legislation designating routes within the archipelagic waters to regulate innocent and sea lanes passage. Indeed, bills drawing nautical highways for sea lanes passage are now pending in Congress."

Indeed, various bills on the UNCLOS maritime zones have been filed in the Senate and House of Representatives since the Convention entered into force for the Philippines in 1994 and from the administrations of President Fidel V. Ramos to President Rodrigo Duterte.[3] This is all in accordance with the assurance to "State Parties to the Convention that the Philippines will abide by the provisions" of UNCLOS and that "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". None of these bills, however, have been passed into law. All were archived at the end of the term of each Congress. It is now the challenge for the current and succeeding terms of Congress to consider the passage of the maritime zones law.

Neighboring ASEAN countries facing the SCS have legislated their respective maritime zones. Indonesia has Act No. 5 of 18 October 1983 on the EEZ, Act No. 6 of 08 August 1996 regarding Indonesian Waters, including the territorial sea and archipelagic waters, Government Regulation No. 38 of 2002 as amended by the Government Regulation No. 37 of 2008 on the coordinates of the archipelagic baselines, and has concluded maritime boundary delimitation agreements with eight countries including the Philippines.[4]

Malaysia has its 1966 Continental Shelf Act – Act No. 57 of 28 July 1966, as Amended by Act No. 83, Proclamation of the Economic Zone of 25 April 1978, the Exclusive Economic Zones Act of 1984, Act No. 311, and has concluded maritime boundary delimitation agreements with Indonesia, Thailand, and Singapore.[5]

Vietnam has issued a Statement on 12 November 1982 on the Territorial Sea Baseline of Vietnam with the annex containing the list of "Coordinates of the Points Establishing the Straight Baseline from which the Breadth of the Territorial Seas of Viet Nam is measured."[6] Singapore, as a member of the British Commonwealth, has its 1878 Territorial Waters Jurisdiction Act designating 3 NM (UK colonial legislation) that was amended on May 2008 by No. 1485 – Singapore Maritime Zones declaring 12 NM and has maritime boundary agreements with Malaysia and Indonesia.[7]

The Philippines had a resounding victory in the arbitration case against China with the Arbitral Award confirming Philippine sovereign rights over the EEZ and continental shelf,

particularly that "there is no legal basis for any Chinese historic rights, or sovereign rights and jurisdiction beyond those provided for in the Convention, in the waters of the South China Sea encompassed by the 'nine-dash line." With this legal victory, the Philippines should now strengthen the rule of law in the WPS, beginning with clearly defined and legislated UNCLOS maritime zones.

The maritime zones law would, among its main provisions, declare: a 12 NM territorial sea, a 24 NM contiguous zone, a 200 NM EEZ (repealing PD 1599 in the process), a 200 NM continental shelf, provide for the delimitation of any overlapping EEZ with neighboring coastal states following the Philippines-Indonesia EEZ Boundary Treaty, declare a Regime of Islands in the KIG and *Bajo de Masinloc* (pursuant to RA 9522, Sec. 2) by establishing a 12 NM territorial sea around high-tide features or rocks such as *Pagasa* and the *Panatag*/Scarborough Shoal in line with the decision of the Arbitral Tribunal that these features are not entitled to an EEZ or continental shelf, and repeal PD 1596 on KIG in the process.

Starting from the RA 9522 archipelagic bases, the proposed laws on the Philippine maritime zones would identify and define the metes and bounds of the breadth of the territorial sea (abandoning the expansive limits under RA 3046 and RA 5446), contiguous zone, EEZs, and continental shelf, incorporating the Philippine-Indonesia EEZ boundary, and the ECS in the Philippine Rise.

The proposed law should clearly establish the sovereign rights of the Philippines in each of these zones consistent with UNCLOS with specific instructions to concerned authorities to enforce these rights and implement the corresponding regulations to secure our rights to the resources in the sea, seabed, and subsoil as well as the airspace over these zones, and protect the marine environment.

The identification of the latitudes and the longitudes of the specific points relative to the distance of each maritime zones from the archipelagic baselines is required by the relevant provisions of UNCLOS for the purpose of "ascertaining their position" and for the publicity of such charts or lists of geographical coordinates" that shall be deposited to the UN Secretary-General.[8] This requirement should be specified in the proposed law on maritime zones or delegated to NAMRIA.

The Philippine Treaty Limits should remain and cannot be erased nor relegated as a footnote because the treaty limits are an important part of our history as a nation. The Philippines was borne in the motherhood of Spain and the United States, with islands therein and the TOP limits as indelible parts of our heritage. While the Arbitral Award stated that UNCLOS "superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein", it made no comment on the status of the historic rights in relation to the story of a nation. Therefore, the proposed maritime zones law should provide a section in the text for the meaning of the historical treaty limits as only identifying the islands under the jurisdiction of Spain and carried over to the TOP limits.

A separate proposed law is suggested to establish the ASL subject to the relevant provisions of UNCLOS and regulations by the International Maritime Organization (IMO).

With this proposed law, a map capturing the full features of the Philippines' maritime zones – including the baseline, internal archipelagic waters, territorial sea, contiguous zones, and the extended continental shelf – must be annexed.

A 12 NM territorial sea may form circles around high-tide features in the WPS as shown in figure 4-1, provided that NAMRIA conducts the necessary geological and hydrographic surveys essential in determining the features where base points could be plotted. This, however, could take time and resource. Supplementarily, an unofficial projection of the maritime zones by the author is found in figure 4-2.

Designating Archipelagic Sea Lanes in Philippine Archipelagic Waters

RA 9522 has drawn archipelagic baselines around the archipelago such that the waters from the landward side of the baselines are called archipelagic waters wherein the Philippines exercises sovereignty. The definition and legal status of archipelagic waters, of the air space over the archipelagic waters, and of their bed and subsoil are stated in Art. 49 of UNCLOS.

As discussed in the previous sections, the Philippines would have to consider the measures to harmonize the definition of internal waters in Art. 1 of the Constitution and archipelagic waters under UNCLOS Art. 49.1 and Art. 50 on internal waters in archipelagic waters, in relation to the decision on this issue in the Magallona vs. Ermita case. This issue should be clarified prior to any decision to designate ASL.

The designation of ASL passage is permissive under Art. 53.1 of UNCLOS. The technical requirements for the measurement and designation of ASL are provided for under Art. 53 with the details specified in Art. 53.5 that states:

> "Such sea lanes and air routes shall be defined by a series of continuous axis lines from the entry points of passage routes to the exit points. Ships and aircraft in archipelagic sea lanes passage shall not deviate more than 25 nautical miles to either side of such axis lines during passage, provided that such ships and aircraft shall not navigate closer to the coasts than 10 per cent of the distance between the nearest points on islands bordering the sea lane."

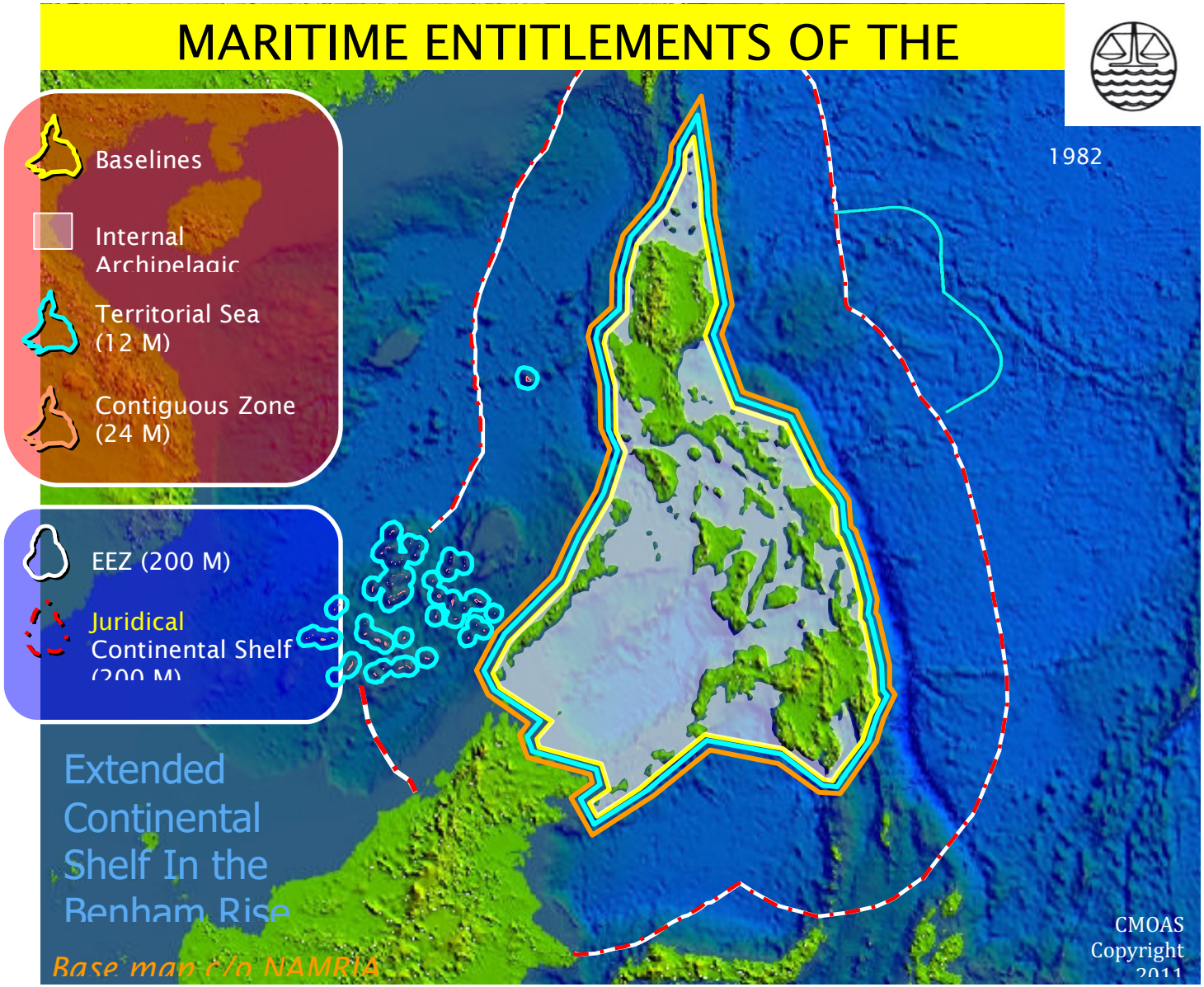


Figure 4-1. *A comprehensive map showing the maritime zones of the Philippines. Base map provided by the National Mapping and Resource Information Authority. Commission on Maritime and Ocean Affairs Secretariat (2011).*

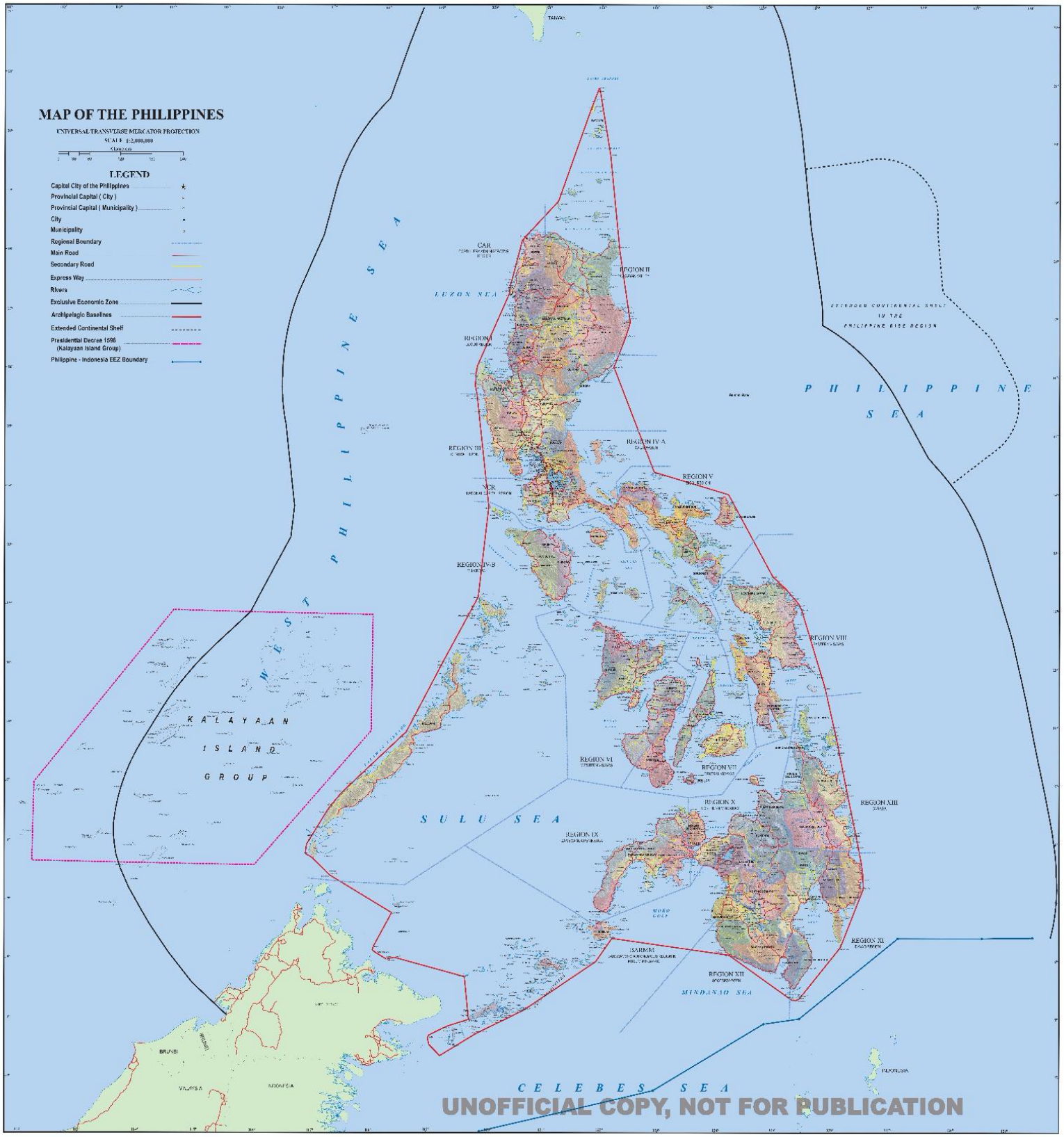


Figure 4-2. *Unofficial map showing the complete maritime entitlements of the Philippines. Author's copy.*

Once designated, Art. 53.2 states:

> "All ships and aircraft enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes." Art. 53.3 defines ASL passage as " the exercise in accordance with this Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone." (Underlining supplied)

This means that a foreign submarine may sail submerged in the ASL while in passage (as this is its normal mode) but must surface showing its flag when sailing through the territorial sea of an archipelagic State, either in entry or exit mode. In the case of an aircraft carrier in ASL passage, the ship can launch planes from the deck (as this is its normal mode). The ASL passage of all ships and aircraft must observe the limits of the axis line defined in Art.53.4. The passage must be continuous, expeditious, and unobstructed transit from entry to exit of the archipelagic waters. In other words, there should be no deviation from the ASL routes in order to ensure quick entry and exit.

If the Philippines decides to designate its ASL, Art. 53.9 makes it mandatory to (with the use of the word "shall") refer proposals for an ASL "to the competent international organization with a view to their adoption". The IMO, through the Maritime Safety Committee (MSC), is the competent organization to adopt ASL proposals pursuant to IMO Assembly Resolution A.858 (20) adopted on 27 November 1997 entitled "Procedure for the Adoption and Amendment of Traffic Separation Schemes, Routeing Measures Other Than Traffic Separation Schemes, Including Designation and Substitution Of Archipelagic Sea Lanes, and Ship Reporting Systems."[9] The procedure is incorporated under Part H – Adoption, Designation and Substitution of Archipelagic Sea Lanes in the IMO publication Ships' Routeing.

Finally, Art. 53.12 of UNCLOS provides that:

> "If an archipelagic State does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation." (Underlining supplied)

Indonesia is the first and only Southeast Asian country to designate 3 ASLs (partial) in 1998, going north-south over its archipelagic waters after adoption by the IMO-MSC, and has deposited with the UN Secretary-General the list of geographical coordinates of points of the Indonesian ASLs.[10]

The Philippines may choose not to designate ASLs subject to Art. 53.12 of UNCLOS. But if it decides to designate ASL, the Philippines must designate the concerned government agencies, mainly the NAMRIA, to conduct the necessary hydrological and geographical surveys and prepare the maps on the proposed ASL and the Department of Foreign Affairs to prepare the documents and attachments for submission to the IMO-MSC.

The Philippines cannot unilaterally designate ASL in the archipelagic waters. In line with IMO Assembly Resolution A.858 (20), the IMO-MSC must first adopt the ASL to be incorporated in an IMO Assembly resolution calling on all States to instruct ships flying their flag to observe the approved axis lines when sailing through the Philippine archipelagic waters. Legislating ASLs with defined coordinates of the axis lines without first submitting the proposal to the IMO for adoption will mean a lengthy process to amend the law, if the IMO does not adopt the ASL proposal because the axis lines did not comply with the IMO requirements and have not been fully deliberated in the MSC by all IMO member States.

In this context, Representative Rozzano Rufino Biazon filed House Bill No. 816 (First Regular Session of the 18th Congress) entitled "An Act Providing for the Establishment of the Archipelagic Sea Lanes in the Philippine Archipelagic Waters, Prescribing the Rights and Obligations of Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lanes Passage." Recognizing the important role of the IMO in the adoption of the ASL, Sec. 12 of the draft law empowers the President to promulgate through Executive Issuances the ASL in accordance with the IMO Convention and Regulations and other relevant international agreements. It may be assumed that in HB 816, the ASL would be designated by the President through an executive order only after the ASL proposal has been prepared by the NAMRIA and other concerned agencies, submitted the proposal through stakeholder consultations, endorsed to the President and the cabinet for approval, and submission to the IMO for adoption. Only when the IMO-MSC adopts the Philippine ASL proposal would the President issue the executive order promulgating the ASL. Certainly, this will be a long process that may take a few years. The possible ASLs in the Philippine archipelagic waters are indicated figure 19, from a presentation of the Center for International Law, National University of Singapore.

Working together to secure the Philippine maritime domain

We were taught in schools that the Philippines is an archipelago with 7,107 islands. Today, the Philippines has over 500 new islands. In 2019, NAMRIA confirmed that with a new mapping system the country now has, by official count, a total of 7,641 islands.[11] We need to secure the waters around these islands through measures under UNCLOS coupled with effective monitoring and enforcement.

The Maritime Zones Law and the Archipelagic Sea Lanes Law would establish the legal and administrative mechanisms to enforce the rule of law and the rule of justice in Philippine waters. It would also be among the steps to de-escalate the disputes in the SCS; by identifying the exact coordinates of the zones and clearly establish where the high seas in the WPS begin. The 200 NM EEZ measured from the RA 9522 baselines would identify potential overlapping claims that would be the subject of maritime boundary delimitation talks, like the Philippines-Indonesia EEZ Boundary Treaty. The ASL will enable our security agencies to monitor and enforce rules for safe maritime traffic especially for military vessels.

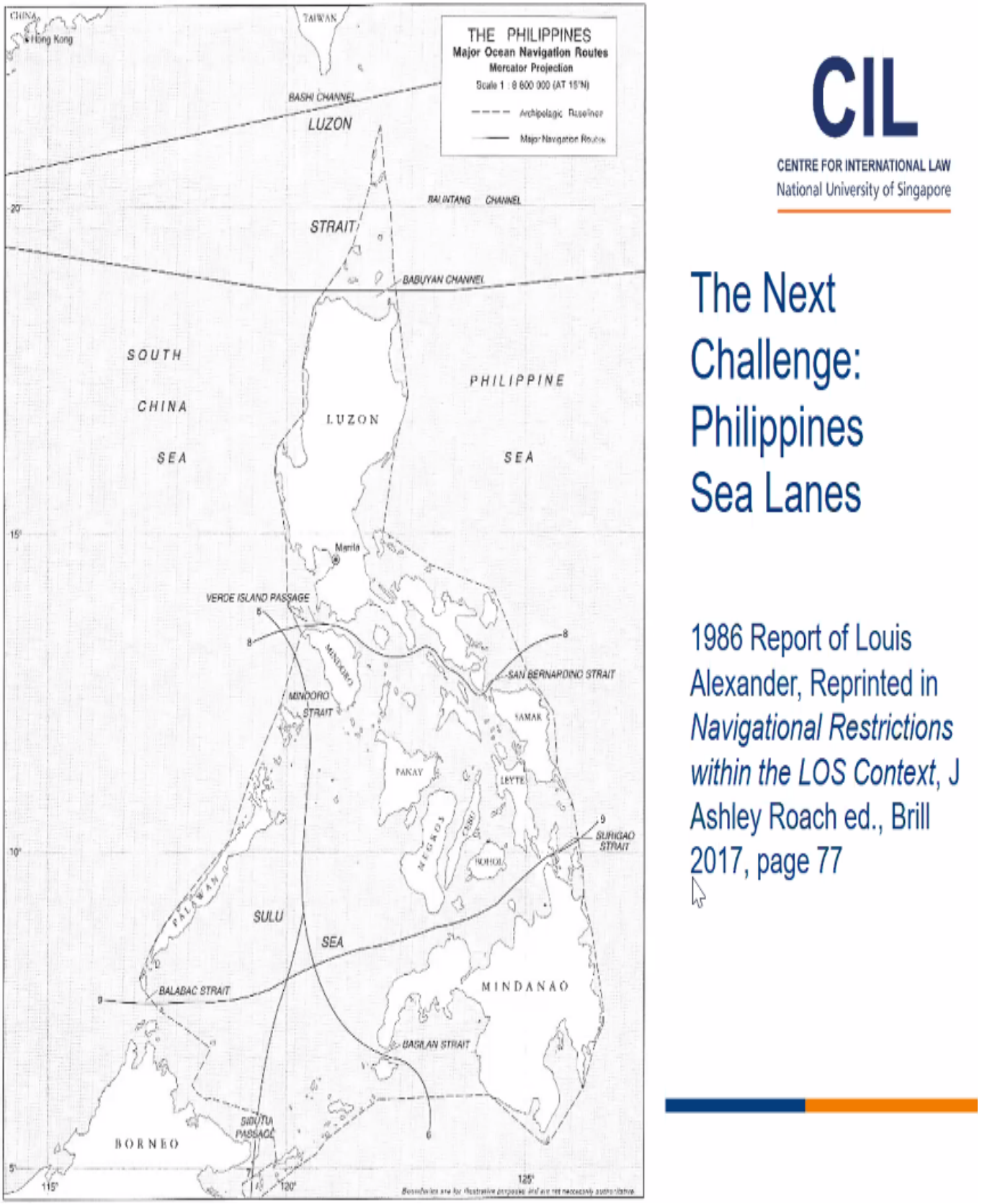


Figure 4-3. *Potential Philippine archipelagic sea lanes*. Extracted from a presentation by Prof. Robert Beckman for the Foundation for the National Interest's *Kwentong Mandaragat* webinar episode titled "Perspectives on Archipelagic Sea Lanes".

These proposed domestic legislations and the Arbitral Award will be among our formidable tools when we negotiate with our neighbors to resolve conflicts in the South China Sea and the West Philippine Sea. Diplomacy will play a key role in defending and promoting our maritime interests. The Philippines and other claimant States in the SCS have their own national interest to protect. The country must work with other States to achieve a balancing of interests, united in purpose to work for peace and stability in the region. But we must be prepared for a long haul as this will be a generational task for our diplomats and other public servants, even beyond President Duterte's term.

A coalition of nations that support international law principles such as the sanctity of treaty obligations, rule of law, and freedom of navigation will further broaden and deepen our engagements through the diplomatic route. It takes time, hard work, and patience for diplomacy to produce results. But certainly, diplomacy works!

But diplomacy cannot be the stand-alone solution. The government must look back into the long history of this conflict, as our ASEAN neighbors have done, to develop a long-term strategy that involves national security and defense, enhancement of regional and global trade and economic opportunities, increasing access of fisherfolks to the resources of the sea, marine environment protection, and climate change. The government must address the problem of continuity of actions to avoid shifting of foreign policies for every change in administrations after a national election. The 180-degree turn in foreign policy from the previous administration to the current administration has not only impacted the credibility of the Philippines to address the conflict with China on the WPS but has also affected the importance of the Arbitral Award. In the process, the Philippines is captured by the aggressive tactics and narratives of China.

An updated National Marine Policy with a long-term and strategic approach on the WPS, the archipelagic waters, and the Philippine (Benham) Rise is now essential and imperative for the sovereignty, territorial integrity, and international stature of the Philippines.

The Executive and Legislative branches must be clear and united in the country's national strategic objectives and tactical approaches towards a rising and aggressive China. With an UNCLOS-compliant Maritime Zones Act and an ASL Law, the Philippines, through its negotiators and defense agencies, would be in a position of strength to promote and protect our national interests anchored on the rule of law. We must have the tools to counter the Chinese narrative on the SCS with a consistent inoculation of the truth and persistence in invoking international law especially UNCLOS. With our political will, the Filipinos must do what is necessary for the nation and its future generation.

How good should our maritime "fences" be to have good neighbors? We first must build the "fences". The materials for good fences are before us if we use them wisely and competently, namely, UNCLOS, international law, the steadfast adherence to the "rule of law", and a government committed to promote and defend the country's national interest.

NOTES

[1] UNCLOS Preamble: "Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment."

[2] 1987 Philippine Constitution, Art. II, Section 2.

[3] Examples include: House Bill (HB) No. 808, *An Act Defining the Maritime Zones of the Republic of the Philippines*; HB No. 04195 and HB No. 6156 both entitled, *An Act Declaring and Defining the Maritime Zones under Jurisdiction of the Republic of the Philippines*, all filed in the 18th Congress; Senate Bill (SB) No. 174, *An Act to Define the Maritime Zones of the Philippines*, and SB No. 39, *An Act to Define the Maritime Zones of the Republic of the Philippines*, both filed in the 16th Congress; and SB No. 2737, *An Act to Define the Maritime Zones of the Republic of the Philippines*, filed last 15th Congress.

[4] Submissions by Indonesia in compliance with the depository obligations pursuant to UNCLOS, UN-DOALOS, accessed on 8 May 2021 from: https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/IDN.htm

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About the Author

Atty. Gilberto G.B. Asuque served in the Department of Foreign Affairs (DFA) as a career Foreign Service Officer. He has retired from the DFA in 2019 with the rank of Chief of Mission I.

He served as Philippine Ambassador to Lebanon from 2009 to 2011 and Philippine Permanent Representative to the International Maritime Organization (IMO) and related inter-governmental organizations from 2016 to 2018. He also served as Alternate Permanent Representative and Deputy Permanent Representative to the IMO from 1997 to 2002.

Ambassador Asuque performed various duties in the DFA as Assistant Secretary for Maritime and Ocean Concerns from 2011 to 2014, DFA Spokesperson from 2004 to 2006, Deputy Chief of Mission in the Philippine Embassy in Tokyo and Philippine Embassy in London; Consul General in Calgary, Canada, and in Tel Aviv, Israel; Executive Director of the DFA Maritime and Ocean Affairs Unit from 1994 to 1997, Director in the DFA Office of Legal Affairs and in various capacities during his assignments in embassies, consulates general of the Philippines and in the Home Office of the DFA from 1986 to 2019. Prior to joining the Philippine foreign service, Atty. Asuque was a broadcast journalist and TV newscaster from 1972 to 1986.

Ambassador Asuque is a graduate of the IMO International Maritime Law Institute in Malta with a degree in Master of Laws in International Maritime Law and the University of Greenwich in London with a degree of Master of Arts in Maritime Policy. He also completed specialized training in maritime Boundary Delimitation, Maritime Boundary Disputes, Maritime Disputes and Arbitration, Maritime Casualty Investigation, Implementation of the International Ship and Port Security Code, and Implementation of the International Oil Pollution Compensation Fund.

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