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**THE LEGAL STATUS OF THE PHILIPPINE TREATY LIMITS AND
TERRITORIAL WATERS CLAIM IN INTERNATIONAL LAW:
NATIONAL AND INTERNATIONAL LEGAL PERSPECTIVES**

A thesis submitted in fulfilment of the requirements
for the award of the degree

Doctor of Philosophy

from

University of Wollongong

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2010

Certification

I, **Lowell B. Bautista**, declare that this thesis, submitted in fulfilment of the requirements for the award of Doctor of Philosophy, in the Australian National Centre for Ocean Resources and Security (ANCORS), Faculty of Law, University of Wollongong, is wholly my own work unless otherwise referenced or acknowledged. The document has not been submitted for qualifications at any other academic institution.

Lowell B. Bautista

1 May 2010

Abstract

The fundamental position of the Philippines regarding the extent of its territorial and maritime boundaries is based on two contentious premises: first, that the limits of its national territory are the boundaries laid down in the Treaty of Paris which ceded the Philippines from Spain to the United States; and second, that all the waters embraced within these delineated lines seaward of the baselines constitute its territorial waters.

The position of the Philippine Government is contested in the international community and runs against rules in the United Nations Convention on the Law of the Sea, which the Philippines signed and ratified. This situation poses two fundamental unresolved issues of conflict: first, is the issue on the breadth of its territorial sea, and second, its treatment of supposed archipelagic waters as internal waters. The twin issues of the legal status of the Philippine Treaty Limits and its extensive historic claims to territorial waters have been subject of much academic debate and serious criticisms.

The delimitation of Philippine territorial and maritime boundaries in conformity with international law necessitates the reform of the existing national legal, policy and administrative framework to resolve fundamental issues of conflict between domestic legislation and international law. This thesis, proceeding from both a national and an international legal perspective, clarifies the legal status of the Philippine Treaty Limits and territorial waters claim in international law, with a view to facilitating such reforms.

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List of Acronyms

ADB	Asian Development Bank
AJIL	American Journal of International Law
AOMM	Asian Pacific Economic Cooperation Ocean Related Ministerial Meeting
APCEL	Asia-Pacific Center for Environmental Law
APEC	Asia-Pacific Economic Cooperation
ARF	ASEAN Regional Forum
ASEAN	Association of Southeast Asian Nations
ASG	Abu Sayyaf Group
ASL	archipelagic sea lanes
ASLP	archipelagic sea lanes passage
BC	Before Christ
BIMP-EAGA	Brunei-Indonesia-Malaysia-Philippines East-ASEAN Growth Area
CORPATPHILINDO	Coordinated Patrol Philippines Indonesia
CSCAP	Council for Security Cooperation in the Asia Pacific
CTI	Coral Triangle Initiative
DFA	Department of Foreign Affairs
DIAC	Australian Department of Immigration and Citizenship
DOE	Department of Energy
ECS	Extended continental shelf
EEZ	Exclusive Economic Zone
ESCAP	United Nations Economic and Social Commission for Asia and the Pacific
FAO	Food and Agriculture Organization
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
ICJ	International Court of Justice
IILS	Institute of International Legal Studies
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
IMF	International Monetary Fund
IPOA	International Plan of Action
ISDS	Institute for Strategic and Development Studies
ISPS Code	International Port Facilities Security Code
ITLOS	International Tribunal for the Law of the Sea
IUU Fishing	Illegal Unreported Unregulated Fishing
JI	Jemaah Islamiyah
JMSU	Joint Marine Seismic Undertaking
KIG	Kalayaan Island Group
Km	kilometre
LNTS	League of Nations Treaty Series
LOSC	United Nations Convention on the Law of the Sea
m	miles
MA	Master of Arts
MGB	Mines and Geosciences Bureau
MILF	Moro Islamic Liberation Front

MNLF	Moro National Liberation Front
MOAC	Maritime and Ocean Affairs Center
MOU	Memorandum of Understanding
NAM	Non-Aligned Movement
NAMRIA	National Mapping and Resource Information Authority
NIGS	National Institute of Geological Sciences
NM	Nautical mile
PCIJ	Permanent Court of International Justice
PCTC	Philippine Center on Transnational Crime
PD	Presidential Decree
PDR	People's Democratic Republic
PEMSEA	Partnerships in Environmental Management for the Seas of East Asia
PhD	Doctor of Philosophy
PRC	People's Republic of China
PSI	Proliferation Security Initiative
RA	Republic Act
RI	Republic of Indonesia
RIAA	Reports of International Arbitration Awards
ROC	Republic of China (Taiwan)
RP	Republic of the Philippines
RSM	Rajah Sulaiman Movement
SCRA	Supreme Court Reports Annotated
SCS	South China Sea
SDS-SEA	Sustainable Development Strategy for the Seas of East Asia
SEATO	Southeast Asia Treaty Organisation
SOMTC	Senior Officials Meeting on Transnational Crime
SOVFA	Status of Visiting Forces Agreement
TAC	Treaty of Amity and Cooperation
TIAS	Treaties and Other International Acts Series
TIHPA	Turtle Islands Heritage Protected Area
TOP	Treaty of Paris
TS	Treaty Series
TWG	Technical Working Group
UK	United Kingdom
UN	United Nations
UN GA Res	United Nations General Assembly Resolution
UN GAOR	United Nations General Assembly Official Records
UNCLCS	United Nations Commission on the Limits of the Continental Shelf
UNCLOS	United Nations Conference on the Law of the Sea
UNEP	
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNTS	United Nations Treaty Series
UP	University of the Philippines
US	United States
USD	United States Dollar
USS	United States Ship

VAP	Vientiane Action Programme
WHO	World Health Organization
WSSD	World Summit on Sustainable Development
WTO	World Trade Organisation

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(2003)

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- Geneva Convention on the Continental Shelf*, opened for signature on 29 April 1958, 15 UST 471; 499 UNTS 311 (entered into force 10 June 1964)
- Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas*, opened for signature on 29 April 1958, 17 UST 138; 559 UNTS 285 (entered into force 20 March 1966)
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- Treaty Between the Kingdom of Spain and the United States of America for Cession of Outlying Islands of the Philippines*, U.S.-Spain, 7 November 1900, T.S. No. 345
- Treaty of Amity and Cooperation in Southeast Asia*, Indonesia, 24 February 1976.
- Treaty of Peace Between the United States of America and the Kingdom of Spain* (Treaty of Paris), U.S.-Spain, 10 December 1898, T.S. No. 343
- United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly*

Migratory Fish Stocks, opened for signature 4 August 1995 34 ILM 1542 (1995); 2167 UNTS 88 (entry into force 11 December 2001)

United Nations Charter, opened for signature 26 June 1945, 59 Stat. 1031; TS 993; 3 Bevans 1153 (entered into force 24 October 1945)

United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994)

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Chapter 1

Introduction

1.1. Introduction

The extent and definition of the Philippine national territory is disputed in international law.¹ The non-recognition of the maritime and territorial boundaries of the Philippines by other States springs from two primary points of contention. The first is the fundamental position of the Philippines that the limits of its national territory are the boundaries laid down in the Treaty of Paris of 10 December 1898 which ceded the Philippines from Spain to the United States;² and the second is its claim that all the waters embraced within the Philippine Treaty Limits seaward of its defined baselines are its territorial waters.³ The Philippine Treaty Limits is depicted in the figure that follows (Figure 1).

¹ Barbara Kwiatkowska, 'The Archipelagic Regime in Practice in the Philippines and Indonesia -- Making or Breaking International Law' (1991) 6 *International Journal of Estuarine and Coastal Law* 1 at 4. Kwiatkowska argues that, "[T]he legislation of the Philippines provides the most excessive instance of non-compliance with the LOS Convention's rules..." Joseph W. Dellapenna, 'The Philippines Territorial Water Claim in International Law' (1970-1971) 5 *Journal of Law & Economic Development* 45 at 53. Dellapenna asserts that, "[T]he purported historical basis of the Philippines claim cannot stand up under the most cursory consideration."

² Lowell B. Bautista, 'The Historical Context and Legal Basis of the Philippine Treaty Limits' (2008) 10 *Asian-Pacific Law and Policy Journal* 1 at 2. To be precise, three colonial treaties define the territorial boundaries of the Philippines: (1) Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.-Spain, 10 December 1898, T.S. No. 343 [Hereinafter referred to as *Treaty of Paris*]; (2) Treaty Between the Kingdom of Spain and the United States of America for Cession of Outlying Islands of the Philippines, U.S.-Spain, 7 November 1900, T.S. No. 345; (3) Convention Between the United States of America and Great Britain Delimiting the Boundary Between the Philippine Archipelago and the State of North Borneo, U.S.-U.K., 2 January 1930, T.S. No. 856.

³ Arturo Tolentino, 'The Philippine Territorial Sea' (1974) 3 *Philippine Yearbook of International Law* 46 at 53. While the terms "territorial sea" and "territorial waters" are used interchangeably in modern literature, the Philippines does not strictly claim a "territorial sea" *stricto sensu* as such is, by definition under the LOSC limited to a maximum breadth of twelve nautical miles. Article 3, LOSC. The territorial sea which the Philippines claims, which is based on historic right of title, is thus properly "historic waters" which is more akin to the regime of internal waters in the LOSC. *Please see*: Secretariat of the International Law Commission, 'Juridical Regime of Historic Waters Including Historic Bays' (1962) 2 *Yearbook of the International Law Commission* 1 at 13, which characterises historic waters as those over which a State has claimed historic right and exercised continuity of authority with the acquiescence or absence of opposition of other States. *See also*, L. J. Bouchez, *The*

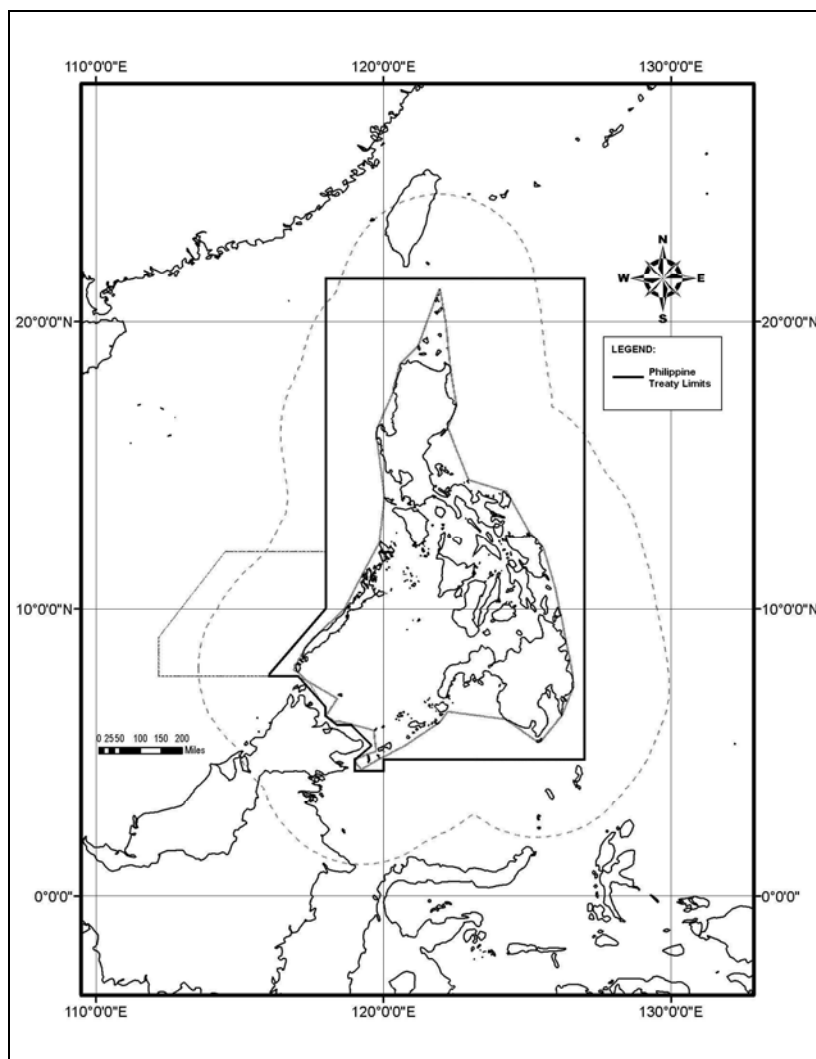


Figure 1. Map Depicting the Philippine Treaty Limits

The international community contests the position of the Philippines primarily because it runs against rules in the United Nations Convention on the Law of the Sea (LOSC),⁴ which the Philippines signed and ratified.⁵ Specifically, this is in conflict

Regime of Bays in International Law (1964) at 199, who defines historic waters as “[waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States.” The International Court of Justice (ICJ) defines historic waters as “waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title.” See, *The Anglo-Norwegian Fisheries Case* (United Kingdom v. Norway), 1951 I.C.J. 116, 132 (10 January).

⁴ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994). Hereinafter referred to as *LOSC*.

⁵ The Republic of the Philippines signed the LOSC on 10 December 1982 at the close of the Third United Nations Law of Sea Conference in Montego Bay, Jamaica and ratified it on 8 May 1984. The LOSC entered into force for the Philippines on 16 November 1994.

with the twelve-nautical mile (nm) maximum breadth of the territorial sea set in the LOSC,⁶ as well as the anomalous treatment of the waters enclosed by the baselines as internal waters instead of archipelagic waters,⁷ as provided for in the LOSC.

The delineation of the national boundaries and maritime jurisdictions of the Philippines has not proceeded because of these issues.⁸ More than a century after gaining independence, the boundaries of the Philippines still remain an issue left unsettled.⁹ In addition to the already problematic situation, the Philippines also asserts territorial sovereignty over the Kalayaan Island Group (KIG)¹⁰ and Scarborough Shoal¹¹ in the South China Sea, and still has a standing but dormant claim over Sabah.¹² It also shares overlapping maritime boundaries with seven

⁶ Article 3, LOSC. Robin R. Churchill and Vaughan Lowe, *The Law of the Sea* (1999) at 77-81.

⁷ See Articles 2 and 8 and compare with provisions of Part IV, LOSC. Article 50, LOSC allows archipelagic States to “draw closing lines for the delimitation of internal waters, in accordance with articles 9, 10 and 11” within their archipelagic waters.

⁸ Jay L. Batongbacal, ‘The Maritime Territories and Jurisdictions of the Philippines and the United Nations Convention on the Law of the Sea’ (2001) 76 *Philippine Law Journal* 123 at 157-159.

⁹ The Philippine declared its independence from Spain on 12 June 1898; and from the United States on 4 July 1946. On 4 August 1964, Republic Act No. 4166, officially proclaimed 12 June 1898 as Philippine Independence Day. The Philippines has just recently passed its baselines law, Republic Act No. 9522, 10 March 2009, with the territorial issues over the Kalayaan Island Group and Scarborough Shoal still left unsettled.

¹⁰ Lowell B. Bautista, ‘Thinking Outside the Box: The South China Sea Issue and the United Nations Convention on the Law of the Sea (Options, Limitations and Prospects)’ (2007) 81 *Philippine Law Journal* 699-731; H. Harry L. Roque Jr., ‘China’s Claim to the Spratlys Islands under International Law’ (1997) 15 *Journal of Energy and Natural Resources Law* 189 at 194.

¹¹ Scarborough Shoal is a group of islands and reefs located between the Macclesfield Bank and the Philippine island of Luzon in the South China Sea. The Philippines, the People’s Republic of China, and Republic of China (Taiwan) all claim Scarborough Shoal. Zou Keyuan, ‘Scarborough Reef: A New Flashpoint in Sino-Philippine Relations?’ (1999) 7(2) *Boundary & Security Bulletin* 71 at 74. Keyuan Zou, *Law of the Sea in East Asia: Issues and Prospects* (2005) at 66-67. Scarborough Shoal is referred to as Isla Bajo de Masinloc in the Philippines. See for example, Section 2(b), Republic Act No. 9522 [2009]. However, in this thesis, the term “Scarborough Shoal” will be used to avoid confusion.

¹² See literature on the Philippine claim to Sabah: Mohd. bin Dato’ Hj. Othman Ariff, *The Philippines’ Claim to Sabah: Its Historical, Legal, and Political Implications* (1970); S. Jayakumar, ‘The Philippine Claim to Sabah and International Law’ (1968) 10 *Malaya Law Review* 306; Michael Leifer, *The Philippine Claim to Sabah*, Hull Monographs on Southeast Asia No. 1 (1968); Geoffrey Marston, ‘International Law and the Sabah Dispute’ (1967) 3 *Australian Yearbook of International Law* 103; Geoffrey Marston, ‘International Law and the Sabah Dispute: A Postscript’ (1968-1969) 4 *Australian*

neighbouring States,¹³ which the Philippines has not yet delimited.¹⁴ Thus, the contentious issue of the Philippine national territory actually involves both contested territorial claims and overlapping maritime jurisdictional areas.

This introductory chapter provides a broad overview of the Philippine national territory and succinctly identifies the central issues to be addressed by the thesis. This chapter is of three parts. In the first part, the extent of the Philippine national territory is discussed by examining its constitutional definition and examining other domestic legislation implementing the various maritime zones under the LOSC. The second part clearly states the problem being addressed in the thesis, which is followed with a statement of the corresponding thesis of this research inquiry. In the third part, the purpose, scope and limitations of the thesis are articulated along with a synopsis of the thesis chapters. This chapter ends with the significance of this research and the gap it fills in the literature.

1.2. The Philippine National Territory

The national territory of the Philippines has been defined in the Constitution,¹⁵ in treaty law;¹⁶ and in numerous pieces of domestic legislation.¹⁷ The Philippine

Yearbook of International Law 138; Lela Garner Noble, *Philippine Policy Toward Sabah: A Claim to Independence* (1977); Paridah Abd. Samad and Darusalam Abu Bakar, 'Malaysia-Philippines Relations: The Issue of Sabah' (1992) 32 *Asian Survey* 554.

¹³ These countries are China, Indonesia, Malaysia, Palau, Japan, Vietnam and Taiwan.

¹⁴ Victor Prescott and Clive Schofield, 'Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean' (2001) 3(1) *Maritime Briefing*

¹⁵ The definition of the national territory in the current 1987 Philippine Constitution in Article I, reflects the previous constitutional definitions in both the 1935 and 1973 Philippine Constitutions. *Please see*, Article I, Section 1, 1935 Philippine Constitution; Article I, Section 1, 1973 Philippine Constitution.

¹⁶ *See* colonial treaties which define the Philippine national territory, *supra* note 2.

national territory consists of: first, all the islands and waters embraced within the Philippine archipelago; and second, all other territories belonging to the Philippines by historic right or legal title, over which the Philippines has sovereignty or jurisdiction.¹⁸

1.2.1. Geographical Description and Country Profile

The Republic of the Philippines constitutes an archipelago of 7,107 islands in the western Pacific Ocean, located off the southeastern coast of the Asian mainland, across the South China Sea in a strategic zone between China, Taiwan, Borneo and Indonesia.¹⁹ The Philippines, being entirely surrounded by the sea, is the only Southeast Asian country which shares no land boundaries with its neighbors (*See* Figure 2, below).²⁰ The total land area of the Philippines is 300,055 square kilometres which stretches for 1,850 kilometres from north to south while spanning 1,100 kilometres from east to west. The Philippines which lies between 116° 40' and 126° 34' E. longitude, and 4° 40' and 21° 10' N. latitude, is bordered on the east by the Philippine Sea, the South China Sea on the west, and the Celebes Sea on the

¹⁷ Domestic laws which define the national territory include: (1) Republic Act No. 3046: An Act to Define the Baselines of the Territorial Sea of the Philippines (1961); (2) Republic Act No. 5446: An Act to Amend Section One of R.A. 3046 (1968); (3) Presidential Proclamation No. 370: Declaring as Subject to the Jurisdiction and Control of the Republic of the Philippines All Mineral and Other Natural Resources in the Continental Shelf of the Philippines (1968); (4) Presidential Decree No. 1596: Declaring Certain Areas Part of the Philippine Territory and Providing for their Government and Administration (1978); (5) Presidential Decree No. 1599: Establishing an Exclusive Economic Zone and for Other Purposes (1978); and (6) Republic Act No. 9522, 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 (2009).

¹⁸ Article I, 1987 Philippine Constitution. *Please see*, record of deliberations of the 1987 Philippine Constitution pertaining to the National Territory, in: Raphael Perpetuo M. Lotilla (ed), *The Philippine National Territory: A Collection of Related Documents* (1995) at 555- 593.

¹⁹ Peter Haggett, *Encyclopedia of World Geography* (2001) at 2914 – 2915.

²⁰ USA International Business Publications, *Philippines Diplomatic Handbook* (2008) at 7 – 8.

south.²¹ The geographical configuration of the Philippine archipelago, as defined in the Treaty of Paris, appears to be in the form of a vast rectangle, measuring 600 miles in width and over 1,200 miles in length.²²



Figure 2. Map of Southeast Asia²³

The Philippine archipelago comprises three major island groups: Luzon, Visayas and Mindanao with the two largest islands (Luzon and Mindanao) together making up two-thirds of the total land mass and only nine other islands have an area of more than 1,000 square miles. Of the many islands comprising the archipelago, only 460 are larger than one square mile and about 1,000 are populated. Because of its archipelagic nature, the Philippines has one of the longest coastlines of any country

²¹ Even very early references in books published in the United States at the turn of the previous century already refer to the location of the Philippine archipelago in the same longitude and latitude. See for example, Charles Morris, *Our Island Empire: A Hand-book of Cuba, Porto Rico, Hawaii, and the Philippine Islands* (1899) at 334; Charles Harcourt Forbes-Lindsay, *The Philippines under Spanish and American Rules* (1906) at 17.

²² Frederick L. Wernstedt and Joseph Earle Spencer, *The Philippine Island World: A Physical, Cultural, and Regional Geography* (1967); Gregorio Magdaraog, *Environment and Natural Resources Atlas of the Philippines* (1998).

²³ Amarjit Kaur, *Wage Labour in Southeast Asia since 1840: Globalization, the International Division of Labour, and Labour Transformations* (2004) at 4.

with about 22,549 miles of coast most of which are irregular in nature with many bays, gulfs and inlets, creating many natural harbours which have proved advantageous for the pursuit of both trading and fishing.

The Philippines lies in the Pacific Ring of Fire, an area encircling the Pacific Ocean which is the most volcanically active region on earth. The Philippine Trench, the second deepest in the world at 34,578 feet deep, which lies off the coast of eastern Mindanao is the place where one tectonic plate is being forced beneath another (subduction); creating over 100 seismic faults between Luzon and Mindanao. Thus, the islands experience frequent earthquakes, tidal waves and volcanic eruptions. The topography of the Philippines is largely mountainous with extensive coastal lowlands and has a tropical monsoon climate. The country is in the Pacific typhoon path and receives numerous dangerous storms.²⁴

The Philippines is very rich in natural resources. It has good mineral deposits of copper, gold, silver, nickel, lead, chromium, zinc, cobalt, and manganese but many of them remain unexploited.²⁵ The extensive Philippine waters provide an abundance of fish which is both an important marketable commodity as well as a staple part of the diet and thus critical to the domestic food security. In 2008, the Philippines had a projected population of 90.4 million, and currently ranks as the 12th most populous country in the world, with about 11 per cent of the total population of more than 11

²⁴ See generally, A. L. Kroeber, *Peoples of the Philippines* (2008) at 22 – 26.

²⁵ Copper is the exception as it has been extensively mined and is the leading mineral product. Bureau of Mines and Geo-Sciences, *Geology and Mineral Resources of the Philippines* (1981); Natural Resources Management Center, *Estimate of Philippine Mineral Wealth* (1980); Pedro J. Cortez, *Philippine Geology and Mineral Resources* (1947).

million Filipinos overseas.²⁶ The Philippines had a literacy rate of 92.6% in 2003.²⁷ The Philippine national economy is the 47th largest in the world with a 2006 gross domestic product (GDP) of over US\$117.562 billion.²⁸

1.2.2. Domestic Legislation Defining the National Territory

This section discusses domestic legislation which define the extent of the national territory and the maritime jurisdictional zones of the Philippines. The illustration that follows is a map of the Philippines depicting the various LOSC maritime zones as defined in domestic law (Figure 3).

²⁶ National Statistics Office, 2000 Census-based Population Projection in collaboration with the Inter-Agency Working Group on Population Projections. Accessed Online: <http://www.census.gov.ph/>. Date Accessed: 20 March 2008.

²⁷ The Philippines: People, CIA World Factbook, Online at <http://www.cia.gov>. Date accessed: 9 January 2008.

²⁸ Report for selected subjects (Philippines), International Monetary Fund, 2006. Online at: <http://www.imf.org>. Date accessed: 12 December 2007

Please see print copy for image

Figure 3. Philippine Map depicting LOSC maritime zones²⁹

1.2.2.1. Constitution

The Philippine Constitution is the primary source of law which defines the extent and limits of the national territory of the Philippines as a State.³⁰ The constitutional

²⁹ Philippine National Mapping and Resource Information Authority

³⁰ The constitution is the most important part in organising a State. It contains not only the national territory, but more importantly, it states the set of rules and principles which serve as the fundamental

definition of the national territory has not changed drastically over the various periods of Philippine constitutional development.³¹ The Constitution being the supreme law of the land upon which all other laws should conform, this definition is mirrored in the various domestic laws which implement the LOSC maritime zones.³²

The current 1987 Philippine 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 of 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.³³

The constitutional definition of the national territory is the primary source of the difficulty of aligning domestic legislation with the obligations of the Philippines under the LOSC. The current definition of the national territory traces its roots in the Philippine Constitution of 1935 which expressly defined the extent of the Philippine national territory as comprising the territory set forth in Article III of the Treaty of Paris concluded between the United States and Spain on 10 December 1898, together with all the islands embodied in the treaty concluded between the United States and

law of the land. *See generally*, Geoffrey Marshall, *Constitutional Theory* (1971); Thomas Alexander Aleinikoff and John H. Garvey (eds), *Modern Constitutional Theory: A Reader* (2004).

³¹ The Philippines has a long history of democratic constitutional development. *Please see*, Article I, Section 1, 1935 Philippine Constitution; Article I, Section 1, 1973 Philippine Constitution; Article I, 1987 Philippine Constitution. The provision on the national territory in the 1935, 1973 and 1987 Philippine Constitutions is attached as APPENDIX 5. The Philippine Constitution has actually been rewritten seven times starting from the Biak-na-Bato Constitution in 1897 to the present 1987 Constitution. For resource material on the Philippine Constitution, *please see*: Hector S. De Leon, *Philippine Constitutional Law: Principles and Cases* (1999); Miriam Defensor-Santiago, *Constitutional Law: Text and Cases* (2000); Emmanuel T. Santos, *The Constitution of the Philippines: Notes and Comments* (2001); Isagani A. Cruz, *Constitutional Law* (2000); Joaquin G. Bernas, *The 1987 Constitution of the Republic of the Philippines: A Commentary* (2003).

³² *See* Philippine laws implementing the various LOSC maritime zones, *supra* note 17.

³³ Article I, National Territory, 1987 Philippine Constitution.

Spain on 7 November 1900 and the treaty concluded between the United States and Great Britain on 2 January 1930.³⁴

The Constitution of 1973 as well as the present 1987 Constitution have assumed continuity in this definition of the national territory on the basis of the same said treaties which effectively elevated the Treaty of Paris as forming the constitutional basis of the boundaries of the Republic of the Philippines.³⁵ However, the ratification of the Philippines of the LOSC gave rise to discrepancies in the definition of national territory as established by constitutional mandate and has resulted in confusion as to the identification of the boundaries of the Philippines.

1.2.2.2. Domestic Laws Implementing the LOSC

The Philippines has enacted domestic legislation that provide for the various maritime jurisdictional zones in the LOSC all of which except the recently enacted Archipelagic Baselines Law³⁶ predate the LOSC itself. In this section, the Philippine laws which provide for the territorial sea, contiguous zone, exclusive economic zone (EEZ), continental shelf and the outer limits of the continental shelf beyond 200 nautical miles are discussed from a domestic legal perspective.

³⁴ Article I, Section 1, 1935 Philippine Constitution. *See* colonial treaties which define the Philippine Treaty Limits, *supra* note 2.

³⁵ Joaquin G. Bernas, *Foreign Relations in Constitutional Law* (1995) at 42. The definition of the national territory in the 1987 Philippine Constitution essentially adopted the text of the 1973 Philippine Constitution, with a few modifications, and also retained the reference to the Philippine archipelago as a unity of land and water, particularly in characterising “all the waters around, between, and connecting the islands of the archipelago” as internal waters.

³⁶ Republic Act No. 9522, 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 (2009).

1.2.2.2.1. Baselines

Baselines are reference lines drawn by a coastal or archipelagic State from which its territorial limits as well as the various maritime jurisdictional zones are drawn. The baselines are used as the starting point from which to measure the breadth of the territorial sea,³⁷ contiguous zone,³⁸ EEZ³⁹ and continental shelf.⁴⁰ For archipelagic States, the waters enclosed by the baselines are called archipelagic waters over which an archipelagic State exercises sovereignty.⁴¹

The LOSC provides for three common methods for determining a State's baselines:⁴² (1) the normal baseline, according to Article 5, "is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State;" (2) the straight baseline, provided for in Article 7, can be employed when "the coastlines are indented and cut into or there is a fringe of islands along the coast in its immediate vicinity;" and (3) archipelagic baseline, in accordance with Article 47, is a method of "joining the outermost points of the outermost islands and drying reefs of an archipelago provided that within such baselines are included the main island and an area in which the ratio of the area of the water to the area of the land, including

³⁷ Article 3, LOSC.

³⁸ Article 33(2), LOSC.

³⁹ Article 57, LOSC.

⁴⁰ Article 76, LOSC.

⁴¹ Article 49, LOSC.

⁴² It should be noted that the LOSC in Article 14 allows the coastal State to determine its baselines by any of the methods provided in Part II, Section 2, which permits a range of circumstances, other than the default scenario of the low-water mark provided for in Article 5, where baselines can be drawn: fringing reefs (Article 6); straight baselines (Article 7); mouths of rivers (Article 9); bays (Article 10); ports (Article 11); roadsteads (Article 12); low-tide elevations (Article 13).

atolls, is between 1:1 and 9:1.”⁴³ The archipelagic nature of the Philippines makes the archipelagic baselines method the most applicable and advantageous method for delimiting the country’s baselines.

The Philippine Baselines Law, Republic Act No. 3046, was enacted on 17 June 1961.⁴⁴ This law, enacted before the entry into force of the LOSC, specifically refers to the Treaty of Paris in its preambular paragraph as determinative of the extent of the Philippine national territory:

WHEREAS, the Constitution of the Philippines describes the national territory as comprising all the territory ceded to the United States by the Treaty of Paris concluded between the United States and Spain on December 10, 1898, 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 November 7, 1900, and in the treaty concluded between the United States and Great Britain on January 2, 1930, and all the territory over which the Government of the Philippine Islands exercised jurisdiction at the time of the adoption of the Constitution;

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;

This law was authored by Senator Arturo Tolentino⁴⁵ in order to legislate the ‘archipelagic doctrine,’ i.e., the archipelago as the unity of land and water, which was espoused by the Philippines during the First United Nations Conference on the Law of the Sea (UNCLOS I) and as a reaction to the deliberations in UNCLOS I on the ‘regime of islands’ under which the Philippine archipelago may be treated.⁴⁶ The

⁴³ The other requirements for the drawing of archipelagic baselines are provided for in Article 47, LOSC. *See also*, Churchill and Lowe, *supra* note 6, at 123 – 124.

⁴⁴ Republic Act No. 3046, An Act to Define the Baselines of the Territorial Sea of the Philippines, 17 June 1961.

⁴⁵ Arturo Tolentino is a Filipino expert on the Law of the Sea and regarded as the father of the Philippine “archipelagic doctrine.”

⁴⁶ Douglas M. Johnston, *The Theory and History of Ocean Boundary-Making* (1988) at 115.

‘archipelagic principle’ is also referred to in the preambular paragraph of Republic Act No. 3046, which states:

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;

On 18 September 1968, Republic Act No. 5446 was enacted to correct the typographical errors in Republic Act 3046.⁴⁷ These legislation defined and described the baselines from which the territorial sea of the Philippines is measured. Under these laws, the baselines from which the territorial sea of the Philippines is determined consists of 79 straight lines joining 80 designated points on the outermost islands of the archipelago.⁴⁸ All waters within the straight baselines are considered inland or internal waters.⁴⁹

There are at least two aspects of the Philippine baselines law of 1968 which are not in conformity with the provisions of the LOSC on archipelagic baselines. First, three of the eighty baselines exceed 100nm in length, and one segment in the south-east of Mindanao in the Moro Gulf is 140nm in length.⁵⁰ This is incompatible with Article 47(2) of the LOSC which requires that the length of the straight archipelagic

⁴⁷ Republic Act No. 5446, An Act to Amend Section One of the Republic Act Numbered Thirty Hundred and Forty-Six, Entitled “An Act to Define the Baselines of the Territorial Sea of the Philippines,” 18 September 1968. The typographical errors pertained to errors found in the “measurement of angles and distances, thereby necessitating the revision of those points.” See, Proceedings of the Philippine House of Representatives on Senate Bill No. 954: An Act Amending Section One of Republic Act No. 3046, Entitled “An Act to Define the Baseline of the Territorial Sea of the Philippines”, in Lotilla, *supra* note 18, at 375.

⁴⁸ Section 1, Republic Act No. 5446.

⁴⁹ Section 2, Republic Act No. 3046.

⁵⁰ Kwiatkowska, *supra* note 1, at 4. Mohammed Munavvar, *Ocean States: Archipelagic Regimes in the Law of the Sea* (1995) at 132.

baselines must not exceed 100nm, except that three per cent of the total number may go beyond 100nm but only to a maximum of 125nm.⁵¹ Both Prescott and Jayewardene opine that the non-conforming segment in the Gulf of Moro could be easily adjusted to conform to the LOSC.⁵² The other inconsistency is more problematic: the treatment of the waters inside the baselines as internal waters instead of archipelagic waters.⁵³ The import of this position is clear from the sponsorship speech of Senator Tolentino, who said that: “All the waters within those baselines are internal waters subject to the exclusive sovereignty of the Philippines just like its land territory.”⁵⁴

It should be emphasised that only Section 1 of Republic Act 3046 was amended by Republic Act No. 5446.⁵⁵ The provision which provides that the waters within the baselines are internal waters of the Philippines, which is in Section 2, was not amended or repealed by the subsequent legislation. This is clear from the wording of Republic Act No. 5446, as well as from the record of the proceedings of the said law.⁵⁶ In addition, with respect to the controversial Philippine claim over a portion of North Borneo (Sabah),⁵⁷ Republic Act No. 5446 included a provision which states:

⁵¹ Article 47(2), LOSC.

⁵² Kwiatkowska, *supra* note 1, at 4; Hiran W. Jayewardene, *The Regime of Islands in International Law*, Publications on Ocean Development (1990) at 148-149.

⁵³ Section 2, Republic Act No. 3046.

⁵⁴ Proceedings of the Philippine Senate on Senate Bill No. 541: Baselines of the Philippine Territorial Sea [1960] in Lotilla, *supra* note 18, at 287, 319.

⁵⁵ Section 1, Republic Act No. 5446.

⁵⁶ Proceedings of the Philippine Senate on Senate Bill No. 954: An Act Amending Section One of Republic Act No. 3046, Entitled “An Act to Define the Baselines of the Territorial Sea of the Philippines” [1968] in Lotilla, *supra* note 18, at 373.

⁵⁷ In the words of the sponsor of the measure, Mr. San Juan, “A section, numbered as 2, is added to the original law. It states that the adoption of the baselines will not prejudice a delineation of the waters around Sabah. In the future, when we get the technical description and exercise jurisdiction over the territory, Sabah will be shown within the baselines.” *Please see*, Proceedings of the Philippine House of Representatives on Senate Bill No. 954: An Act Amending Section One of

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.⁵⁸

There were proposals to include Sabah within the baselines which were not adopted.⁵⁹ Instead, the Philippines expressly made a reservation of its claim over a portion of North Borneo (Sabah) with the intent to include it within the country's baselines in the future.⁶⁰ It should also be pointed out that both Republic Act 3046 and Republic Act No. 5446 do not mention nor include the KIG and Scarborough Shoal within the country's defined baselines. There are two reasons for this omission. First, it was only on 11 June 1978 that the Philippine claim to the KIG was first formalised and embodied in domestic legislation through Presidential Decree No.1596.⁶¹ Second, with respect to Scarborough Shoal, where the Philippines has previously exercised sovereignty which was never contested by other parties in the past, the territorial dispute only "came to the surface in 1997 when Filipino naval vessels prevented three Chinese boats from approaching the reef on 30 April and then hoisted the Philippine flag there."⁶²

Republic Act No. 3046, Entitled "An Act to Define the Baseline of the Territorial Sea of the Philippines" [1968] in Lotilla, *supra* note 18, at 375.

⁵⁸ Section 2 of Republic Act No. 5446.

⁵⁹ *Please see*, Proceedings of the Philippine House of Representatives on Senate Bill No. 954: An Act Amending Section One of Republic Act No. 3046, Entitled "An Act to Define the Baseline of the Territorial Sea of the Philippines" [1968] in Lotilla, *supra* note 18, at 375-387.

⁶⁰ *Ibid.* at 377. While the proceedings will bear that there was consensus that the Philippines has a "legitimate claim to Sabah" (at p. 383) and it has "sovereignty over Sabah" (at p. 379), its non-inclusion within the defined baselines was done to avoid making the amendment to the baselines controversial and unacceptable at UNCLOS III (at p. 378).

⁶¹ Presidential Decree No. 1596: Declaring Certain Areas Part of the Philippine Territory and Providing for their Government and Administration (1978).

⁶² Zou Keyuan, 'Scarborough Reef: A New Flashpoint in Sino-Philippine Relations?' (1999) 7(2) *Boundary & Security Bulletin* 71 at 73. The existing sovereignty territorial claims of the Philippines are discussed further in Chapter 7.

Thus, the two primary drivers to amend the Philippine Baselines Law of 1968 are clear: first, the imperative to establish a baselines system that is compatible with the LOSC, especially the provisions on archipelagos; and second, the need to clarify the country's position with respect to its territorial claims.⁶³ There have been several attempts throughout the previous Philippine administrations to amend the Philippine Baselines Law of 1968 but it was the May 2009 deadline to file a submission for the outer limits of its continental shelf beyond 200nm that provided the impetus for the passage of a new baselines law.⁶⁴ The National Mapping and Resource Information Authority (NAMRIA) prepared several baseline options which were submitted to the country's lawmakers for consideration.⁶⁵

On 10 March 2009, President Gloria Macapagal-Arroyo signed a new baselines law for the Philippines, Republic Act No. 9522, entitled, "An Act to Amend Certain

⁶³ Gil Bugaoisan, *RP cannot compromise its sovereignty – Nograls*, House of Representatives, 14th Congress of the Philippines, Public Relations and Information Department, 13 March 2009. Online at: <http://www.congress.gov.ph>. Date accessed: 9 January 2010.

⁶⁴ Mary Ann Palma, *The Philippines as an Archipelagic and Maritime Nation: Interests, Challenges and Perspectives*, RSIS Working Paper No. 182 (2009) at 4-5.

Symptomatic of the general confusion with respect to other LOSC issues and provisions that prevails in the country, Philippine government agencies, officials and the media convinced itself that May 2009 was the deadline set by the UN to submit its baselines. *Please see, inter alia*: Committee Affairs Department, *New Baselines Law Tops Foreign Affairs Committee Priorities*, House of Representatives, 14th Congress of the Philippines, 24 September 2007. Online at: <http://www.congress.gov.ph>. Date accessed: 10 January 2010; Marienne Go, 'Congress urged to pass bill on archipelagic baselines', *The Philippine Star*, 11 November 2008. Online at: <http://www.philstar.com>. Date accessed: 10 January 2010; Carmela Fonbuena, 'Ex-Cabinet Officials Urge 'Swift Passage' of Baseline Law', *Newsbreak Online*, 11 July 2008. Online at: <http://newsbreak.com.ph>. 10 January 2010.

⁶⁵ NAMRIA prepared the following baseline options: (1) Option 1: The main archipelago and Scarborough Shoal are enclosed by the baselines while KIG is classified as regime of islands. This is the option adopted by SB 1467; (2) Option 2: Only the main archipelago is enclosed by the baselines while KIG and Scarborough Shoal are classified as regime of islands. This is the official position of Malacanang through recent pronouncements and the DFA position paper written on 02 Aug 2005; (3) Option 3: The main archipelago and KIG are enclosed by the baselines while Scarborough Shoal is classified as regime of islands; and (4) Option 4: The main archipelago, KIG and Scarborough Shoal are enclosed by the baselines. This is the option adopted by HB 3216. Please see: Antonio F. Trillanes IV, *The Philippine Baseline Issue: A Position Paper*. Online at: <http://baselineissue.blogspot.com/>. Date accessed: 10 January 2010.

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.”⁶⁶ The new law drew 101 base points from Aparri in Cagayan, the northernmost tip of the Philippine archipelago, to Jolo in Sulu, the southernmost tip, which were plotted and straight lines drawn to connect these points to come up with the archipelagic baselines.⁶⁷ The new archipelagic baselines of the Philippines, from which the country’s claim for the outer limits of the continental shelf beyond 200 nautical miles were drawn from, are compliant with the provisions of the LOSC on archipelagos.⁶⁸

It should be noted that the 2009 Archipelagic Baselines Law of the Philippines, Republic Act No. 9522, does not include the KIG and Scarborough Shoal within the baselines system enclosing the entire archipelago. However, the law affirms the country’s exercise of sovereignty and jurisdiction over the KIG and Scarborough Shoal and provides that their baselines shall be determined in accordance with Article 121 of the LOSC on the regime of islands.⁶⁹ The new baselines law was

⁶⁶ Republic Act No. 9522, “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, 10 March 2009. This legislation is attached to this thesis as APPENDIX 11.

This law is based from House Bill No. 3216, entitled “An Act Defining the Archipelagic Baselines of the Philippine Archipelago, Amending for the Purpose Republic Act No. 3046, as Amended by Republic Act No. 5446”, filed by Representative Antonio Cuenco; and Senate Bill No. 2699, entitled “An Act to Amend Republic Act No. 3046, as Amended by Republic Act No. 5446, and for Other Purposes”, and authored by Senator Miriam Defensor-Santiago.

⁶⁷ Section 1, Republic Act No. 9522. *Please see*: Vivian Louis Forbes, ‘Philippines’ Archipelagic Baseline System’ (2009) 16(2) *Maritime Institute of Malaysia Bulletin* 12-15. See also: Vivian Louis Forbes, ‘Archipelagic Baseline Systems: Indonesia and the Philippines’ (2008) 15(1) *Maritime Institute of Malaysia Bulletin* 3 -14.

⁶⁸ Philippine Information Agency. “RP in the process of defining its actual archipelagic baselines – Ermita,” March 12, 2008. Online at: <http://www.gov.ph>. Date Accessed: 10 April 2008. TJ Burgonio, Joel Guinto, “Arroyo signs controversial baselines bill” *Philippine Daily Inquirer*, INQUIRER.net, 12 March 2009.

⁶⁹ Section 2, Republic Act No. 9522.

protested by both China and Vietnam.⁷⁰ The constitutionality of the law has also been challenged domestically with a petition for certiorari and prohibition filed in the Philippine Supreme Court to nullify Republic Act No. 9522 for being violative of the constitutional definition of the national territory.⁷¹

Thus, despite the passage of the 2009 Archipelagic Baselines Law of the Philippines, the following ambiguities persist: (1) whether the waters landward of the baselines are archipelagic waters or internal waters; (2) the status of the KIG and Scarborough Shoal, whether the features are rocks or islands, and the corresponding maritime zones that they generate;⁷² and (3) the position of the Philippines with respect to its claim to a portion of North Borneo (Sabah).⁷³

⁷⁰ Embassy of the People's Republic of China in Brunei, "China Lodges Stern Protest over Baselines Bill of the Philippines," 18 February 2009. Online at: <http://www.fmprc.gov.cn/ce/cebn/eng/sgxx/t537841.htm>. Date accessed; 27 April 2009. Ministry of Foreign Affairs, Vietnam. "Vietnam's response to Philippine President's signing of the Baseline Act," 27 April 2009. Online at: http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns090313185641. Date accessed: 27 April 2009.

⁷¹ *Prof. Merlin M. Magallona, et al., versus Hon. Eduardo Ermita, et. al*, G.R. No. 187167, 1 April 2009. Palma, *supra* note 64, at 4-5. To date, the Philippine Supreme Court has not yet decided on the petition.

⁷² Rodolfo C. Severino, 'Clarifying the New Philippine Baselines Law' in ASEAN Studies Centre (ed), *Energy and Geopolitics in the South China Sea: Implications for ASEAN and its Dialogue Partners* (2009) 74 at 75, who argues that "Although [Republic Act No. 9522] does not indicate which land features are islands in the UNCLOS sense and which ones are mere rocks, the new legislation brings the Philippine claim closer to consistency with the law of the sea, as far as maritime regimes are concerned." See also, Carlos F. Agustin, 'The Philippine Baselines: Why the big hullabaloo?', Baird Maritime, 09 June 2009. Online at: http://www.bairdmaritime.com/index.php?option=com_content&view=article&id=1963:the-philippine-baselines-why-the-big-hullabaloo&catid=100:general-interest&Itemid=207. Date accessed: 10 January 2010. Agustin argues since "it is impractical for the Philippines to enact a new law that alters its claim beyond that existing on record (PD 1596)," Republic Act No. 9522 only maintains the "status quo" and "[T]he overlapping claims are subject to legal determination bilaterally or multilaterally among claimant countries, and are covered by the 2002 Regional Declaration on Conduct of Parties to the South China Sea, which commits concerned parties to commonly agreed norms, particularly on the peaceful resolution of conflict."

⁷³ See Palma, *supra* note 63, at 5, who argues that "it has been posited that the lack of specific provisions on Sabah in the new law is construed as a diminution of the country's sovereignty over this territory." This author believes that Republic Act No. 9522 did not modify, amend or repeal Section 2 of Republic Act No. 5446 with respect to the Philippine claim to a portion of North Borneo (Sabah) including the reservation to draw baselines therein in the future, as discussed above.

1.2.2.2.2. Territorial Sea

The territorial sea, as defined by the LOSC, is a belt of coastal waters extending at most 12nm from the baseline of a coastal State.⁷⁴ The territorial sea is regarded as the sovereign territory of the State, although foreign ships are allowed innocent passage through it. This sovereignty also extends to the airspace over and seabed below.⁷⁵ The nature and extent of the territorial sea has been one of the most contentious issues in the law of the sea.⁷⁶

The Philippines claims a territorial sea that is unique in international law.⁷⁷ The breadth of the Philippine territorial sea is not proscribed by a maximum breadth, but is variable in width, defined by coordinates set forth in the Philippine Treaty Limits.⁷⁸ In Philippine law, all the waters beyond the outermost islands of the

⁷⁴ Article 3, LOSC. For academic literature on the regime of the territorial sea, *please see*: Lewis M. Alexander, 'The Expanding Territorial Sea' *The Professional Geographer* 6; Loftus Becker, 'The Breadth of the Territorial Sea and Fisheries Jurisdiction' (1959) 40 *Department of State Bulletin* 369; S. Whittemore Boggs, 'Delimitation of the Territorial Sea' (1930) 24 *American Journal of International Law* 541; Office of Legal Affairs Division for Ocean Affairs and the Law of the Sea, *The Law of the Sea: National Legislation on the Territorial Sea, the Right of Innocent Passage and the Contiguous Zone* (1995); Stuart B. Kaye, 'Territorial Sea Baselines along Ice-Covered Coasts: International Practice and Limits of the Law of the Sea' (2004) 35 *Ocean Development & International Law* 75; Tommy T. B. Koh, 'The Territorial Sea, Contiguous Zone, Straits and Archipelagoes under the 1982 Convention on the Law of the Sea' (1987) 29 *Malaya Law Review* 163; D. P. O'Connell, 'The Juridical Nature of the Territorial Sea' (1971) 45 *British Yearbook of International Law* 303; Shigeru Oda, 'Territorial Sea and Natural Resources' (1955) 4 *International and Comparative Law Quarterly* 415; Sayre A. Swaztrauber, *The Three-Mile Limit of Territorial Seas* (1972); United Nations Office of Legal Affairs, *Laws and Regulations on the Regime of the Territorial Sea* (1957).

⁷⁵ Article 17, LOSC. William K. Agyebeng, 'Theory in Search of Practice: The Right of Innocent Passage in the Territorial Sea' (2006) 39 *Cornell International Law Journal* 371; Francis Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea: the Current Regime of "Free" Navigation in Coastal Waters of Third States* (1990).

⁷⁶ Nasila S. Rembe, *Africa and the International Law of the Sea: A Study of the Contribution of the African States to the Third United Nations Conference on the Law of the Sea* (1980) at 90. Churchill and Lowe, *supra* note 6, at 77.

⁷⁷ In this chapter, and throughout the thesis, the terms "territorial waters" and "territorial sea" will be used interchangeably. *See generally*, Dellapenna, *supra* note 1, at 48.

⁷⁸ *See* colonial treaties which define the Philippine Treaty Limits, *supra* note 2.

archipelago but within Philippine Treaty Limits comprise the territorial sea of the Philippines.⁷⁹ The Philippine territorial sea claim, from a domestic legal perspective, finds legal basis both from the present 1987 Constitution and enacted domestic legislation. The Philippine archipelagic position embodied in the 1955 UN *Note Verbales*,⁸⁰ which first drew the attention of the world to the Philippine claim, was restated in the laws defining the baselines of the territorial sea of the Philippines,⁸¹ which were discussed above. The legal bases of the Philippine territorial waters claim will be discussed in Chapter 3.

1.2.2.2.3. Contiguous Zone

The contiguous zone as defined under the LOSC is a zone contiguous to the territorial sea which extends to a maximum breadth of 24nm from the baselines from which the territorial sea is measured.⁸² The coastal State exercises within this zone limited control for the purpose of preventing or punishing “infringement of its

⁷⁹ Fourth preambular clause, Republic Act No. 3046.

⁸⁰ *Note Verbale* dated 7 March 1955 from the permanent delegation of the Philippines to the United Nations. A/CN.4/94, Report of the International Law Commission Covering the Work of its Seventh Session 2 May-8 July 1955, Official Records of the General Assembly, Tenth Session, Supplement No. 9 (A/2934), 2 Yearbook of the International Law Commission 1955 at 52 – 53. *Note Verbale* dated 20 January 1956 from the permanent delegation of the Philippines to the United Nations, Document A/CN.4/99, A/CN.4/SER.A/1956/Add.1, 2 Yearbook of the International Law Commission 1956 at 69 – 70.

⁸¹ Republic Act No. 3046 entitled “An Act to Define the Baselines of the Territorial Sea of the Philippines” 17 June 1961; Republic Act No. 5446, entitled “An Act to Amend Section One of the Republic Act Numbered Thirty Hundred and Forty-Six, Entitled “An Act to Define the Baselines of the Territorial Sea of the Philippines,” 18 September 1968.

⁸² For academic literature on the regime of the contiguous zone, *please see*: Tommy T. B. Koh, ‘The Territorial Sea, Contiguous Zone, Straits and Archipelagoes under the 1982 Convention on the Law of the Sea’ (1987) 29 *Malaya Law Review* 163; Shigeru Oda, ‘The Concept of the Contiguous Zone’ (1962) 11 *International and Comparative Law Quarterly* 181

customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea”.⁸³

The contiguous zone of the Philippines is not embodied in a separate piece of legislation but rather included in the Philippine Mining Act of 1995, which it defines as follows:

- e. Contiguous zone refers to water, sea bottom and substratum measured twenty-four nautical miles (24 nm) seaward from the base line of the Philippine archipelago.⁸⁴

The said law declares that all mineral resources in lands privately or publicly owned within the territory and EEZ of the Philippines are property of the State, which shall promote and supervise for their rational exploration, development, utilisation and conservation while attentively safeguarding the environment and protecting the rights of affected communities as ancestral rights.⁸⁵ The definition of the contiguous zone in the Philippine Mining Act of 1995 seem to be misplaced and within the context of the law appears to fall more in the regime of the EEZ.

1.2.2.2.4. Exclusive Economic Zone

The LOSC provides that coastal States can exercise sovereign rights over an EEZ which shall not extend beyond 200nm from the territorial sea baselines.⁸⁶ In the EEZ, the coastal State has sovereign rights for the exploration, exploitation,

⁸³ Article 33, LOSC.

⁸⁴ Section 3 (e), Republic Act No. 7942, “An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, and Conservation,” otherwise known as the “Philippine Mining Act of 1995,” 3 March 1995.

⁸⁵ Section 2, Republic Act No. 7942.

⁸⁶ Article 57, LOSC.

conservation and management of all natural resources in the seabed, its subsoil and overlaying waters.⁸⁷ The LOSC allows other States the freedom of navigation and overflight over the EEZ, as well as to lay submarine cables and pipelines.⁸⁸

On 11 June 1978, then Philippine President Ferdinand Marcos promulgated Presidential Decree No. 1599 which established the EEZ of the Philippines which “extends to a distance of two hundred nautical miles beyond and from the baselines from which the territorial sea is measured.”⁸⁹ It further provided that “where the outer limits of the zone as thus determined overlap the exclusive economic zone of an adjacent or neighbouring 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.”⁹⁰ The Philippine claimed EEZ has a total area of 293,808 square km.⁹¹

In keeping with its overall constitutional policy on natural resources, the Philippines reserves the use and enjoyment of its marine wealth in the Philippine EEZ exclusively to Filipino citizens.⁹² In the words of the 1987 Philippine Constitution:

⁸⁷ Article 56, LOSC. The LOSC defines the regime of the exclusive economic zone in Part V. For academic literature on the regime of the EEZ, *please see*: Robert W. Smith, *Exclusive Economic Zone Claims: An Analysis and Primary Documents* (1986); Mohamed Dahmani, *The Fisheries Regime of the Exclusive Economic Zone* (1987); Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (1989); Francisco Orrego Vicuna, *The Exclusive Economic Zone: Regime and Legal Nature under International Law* (1989).

⁸⁸ Article 58, in relation to Article 87, LOSC.

⁸⁹ Section 1, PD 1599

⁹⁰ *Id.*

⁹¹ National Claimed Exclusive Economic Zone (EEZ), The Global Maritime Boundaries Database (GMBD), World Resources Institute (2001).

⁹² Peter B. Payoyo, ‘Philippine Marine Resources Policy in the Exclusive Economic Zone’ (1994) 2 *Asian Yearbook of International Law* 127, at 127.

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.⁹³

In a comprehensive study conducted by Payoyo which examined the Philippine constitutional policy on the EEZ in light of the relevant provisions of the LOSC, he concluded that “the constitutional policy is warranted as a legitimate expression of [Philippine] sovereign rights” and is “wholly consistent with the rights and obligations of coastal states envisioned by [the EEZ] regime.”⁹⁴

The Philippine EEZ law, without prejudice to the rights of the Philippines over its territorial sea and continental shelf, further asserted the exercise of the following within its EEZ:

- (a) Sovereignty rights (sic) for the purpose of exploration and exploitation, conservation and management of the natural resources, whether living or non-living, both renewable and non-renewable, of the seabed, including the subsoil and the 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.

Presidential Decree No. 1599 grants exclusively to a citizen of the Philippines, whether natural or juridical, and except in accordance with the terms of any

⁹³ Para 2, Sec. 2, Article XII, 1987 Philippine Constitution. The previous 1935 and the 1973 Constitutions do not mention maritime zones of maritime jurisdiction in its national economy provisions.

⁹⁴ Peter B. Payoyo, 'Legal Framework for the Development and Management of Non-Living Marine Resources: Philippine Concerns' in Joseph Sedfrey S. Santiago (ed), *Problems, Prospects and Policies: Non-Living Marine Resources of the Philippines: Policy and Legal Concerns* (1983) 1, at 32, 35 – 36.

agreement or licence entered into or granted by the Philippines, the right to explore or exploit any resources; carry out any search, excavation or drilling operations; conduct any research; construct, maintain or operate any artificial island, off-shore terminal, installation or other structure or device; or perform any act or engage in any activity which is contrary to, or in derogation of, the sovereign rights and jurisdiction provided in the said law.⁹⁵ In accordance with the LOSC, the Presidential Decree No. 1599 allows other States to enjoy in the Philippine EEZ “freedoms with respect to navigation and overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea relating to navigation and communications.”⁹⁶

The Philippine EEZ is a rich source of natural resources, principally, fisheries, oil and gas.⁹⁷ The fact that the Philippines shares maritime boundaries with several neighbouring States, is also a potential source of conflict.⁹⁸ The extension of the Philippine EEZ will result in an overlap with the maritime boundaries of the following countries: Taiwan, Malaysia, and Indonesia.⁹⁹ The KIG, which the Philippines claims along with seven other countries, is almost entirely within the Philippine EEZ.¹⁰⁰ There is clearly a need for the Philippines to negotiate with its

⁹⁵ Section 3, PD 1599

⁹⁶ Section 4, PD 1599.

⁹⁷ The EEZ is also defined in Republic Act No. 8550, “An Act Providing for the Development, Management and Conservation of the Fisheries and Aquatic Resources, Integrating all Laws Pertinent Thereto, and for other Purposes,” otherwise known as “The Philippine Fisheries Code of 1998” in Section 4 (18), as follows: “Exclusive Economic Zone (EEZ) - an area beyond and adjacent to the territorial sea which shall not extend beyond 200 nautical miles from the baselines as defined under existing laws.”

⁹⁸ Jonathan I. Charney and Lewis M. Alexander (eds), *International Maritime Boundaries* (1993). Volume 1, at 299.

⁹⁹ Hermogenes C. Fernandez, *The Philippine 200-Mile Economic Zone (Sources of Possible Cooperation or Disputes with Other Countries)* (1982) at 60 – 64.

¹⁰⁰ Xavier Furtado, ‘International Law and the Dispute over the Spratly Islands: Whither UNCLOS?’ (1999) 21 *Contemporary Southeast Asia* 386 at 392. The same is true for Scarborough Shoal, which lies within the Philippines’ 200nm EEZ. See Keyuan, *supra* note 62, at 75.

neighbouring States for the delimitation of these maritime boundaries.¹⁰¹ The overlapping maritime jurisdictional zones that the Philippines has with its neighbouring States are discussed in Chapter 7.

1.2.2.2.5. Continental Shelf

The LOSC defines the continental shelf as the area of the seabed and subsoil which extends beyond the territorial sea to a distance of 200nm from the territorial sea baseline and beyond that distance to the outer edge of the continental margin.¹⁰² The coastal State exercises sovereign rights for the purpose of exploration and exploitation of natural resources on the continental shelf.¹⁰³ The LOSC provides that the continental shelf can extend at least 200nm from the shore, and more under specified circumstances.¹⁰⁴

¹⁰¹ For a comparison of EEZ legislation in ASEAN, *please see*: Raymond S.K. Lim, 'EEZ Legislation of ASEAN States' (1991) 40 *International and Comparative Law Quarterly* 170.

¹⁰² Article 76, LOSC.

¹⁰³ Article 77, LOSC. *See* Churchill and Lowe, *supra* note 6, at 145, who point out that:

... a certain amount of duplication and possible confusion arose with the emergence of the concept of the 200-mile exclusive economic zone (EEZ) at UNCLOS III. ... There are, accordingly, now two distinct legal bases for coastal State rights in relation to the sea bed. The first is the classical doctrine of the continental shelf, as formulated in the Continental Shelf Convention and in customary international law, and as preserved in Part VI of the 1982 Law of the Sea Convention. The second is the newer concept of the EEZ, which is set out in Part V of the 1982 Convention and, ... is also now established in customary international law.

¹⁰⁴ Article 76, LOSC. For academic literature on the regime of the continental shelf, *please see*: Peter J. Cook and Chris M. Carleton (eds), *Continental Shelf Limits: The Scientific and Legal Interface* (2000); Myron H. Nordquist, John Norton Moore and Tomas H. Heidar (eds), *Legal and Scientific Aspects of Continental Shelf Limits* (2004); United Nations Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: National Legislation on the Continental Shelf* (1989); United Nations Division for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Definition of the Continental Shelf: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (1993).

The coastal State exercises sovereign rights over its continental shelf whether it is part of the natural prolongation of the State's territory.¹⁰⁵ The rights of the coastal state with respect to its continental shelf, which exist *ipso facto* and *ab initio*, need not be formally proclaimed.¹⁰⁶ This principle is affirmed by both the 1958 Geneva Convention on the Continental Shelf¹⁰⁷ and the LOSC, which state that "[T]he rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation."¹⁰⁸

The Philippine domestic legislation claiming a continental shelf is embodied in Presidential Proclamation No. 370, issued on 20 March 1968 by then Philippine President Ferdinand E. Marcos, which declared as subject to the jurisdiction and control of the Republic of the Philippines, all mineral and other natural resources in the continental shelf.¹⁰⁹ The law did not specify a distance criterion,¹¹⁰ which was then the trend in other jurisdictions, and merely provided that Philippine "exclusive jurisdiction and control for purposes of exploration and exploitation" extends "to

¹⁰⁵ Hungdah Chiu, 'The Problem of Delimiting the Maritime Boundary between the Exclusive Economic Zone and the Continental Shelf of Opposite States' in Tieya Wang and Ronald Macdonald (eds), *Essays in Honour of Wang Tieya* (1994) 181 at 182, 185.

¹⁰⁶ In the words of the International Court of Justice in the *North Sea Continental Shelf Case*:

The rights of the coastal State in respect of the area of the continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of sovereign rights for the purpose of exploring the sea-bed and exploiting its natural resources.

North Sea Continental Shelf Case (Fed. Rep. of Germany v. Denmark; Fed. Rep. of Germany v. Netherlands) I.C.J. Reports 3 [1969] paragraph 18.

¹⁰⁷ *Geneva Convention on the Continental Shelf*, opened for signature on 29 April 1958, 15 UST 471; 499 UNTS 311 (entered into force 10 June 1964).

¹⁰⁸ Article 2, paragraph 3, *Geneva Convention on the Continental Shelf*; Article 77, paragraph 3, LOSC.

¹⁰⁹ Presidential Proclamation No. 370: Declaring as Subject to the Jurisdiction and Control of the Republic of the Philippines All Mineral and Other Natural Resources in the Continental Shelf of the Philippines (1968).

¹¹⁰ The exploitability criterion is also reflected in Article 1, *Geneva Convention on the Continental Shelf*.

where the depth of the superjacent waters admits of the exploitation of such resources, including living organisms belonging to sedentary species.”¹¹¹ Further, and in anticipation of potential maritime overlaps with its neighbouring states, it provided that “[I]n 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 Philippine continental shelf claim preserves and specifically declares that “[T]he 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.”¹¹²

1.2.2.2.6. Outer Limits of Continental Shelf Beyond 200nm

The LOSC provides that a coastal State is allowed to claim the outer limits of a continental shelf beyond the 200nm but not exceeding 350nm from the baselines or 100nm from the 2500 metre isobath,¹¹³ subject to specified geologic criteria,¹¹⁴ and said limits are submitted to the United Nations Commission on the Limits of the Continental Shelf (UNCLCS).¹¹⁵ The UNCLCS would then make recommendations

¹¹¹ *Id.*

¹¹² Presidential Proclamation No. 370 of 20 March 1968, Declaring as Subject to the Jurisdiction and Control of the Republic of the Philippines all Mineral and other Natural Resources in the Continental Shelf.

¹¹³ The continental shelf of a coastal State, according to the LOSC in Article 76 (1), “comprises the sea-bed 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 200nm from the baselines from which the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.” *Please see*, Article 76, paragraphs 6 – 8, LOSC.

¹¹⁴ *Please see*: Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf, CLCS/11, 13 May 1999.

¹¹⁵ Rules of Procedure of the Commission on the Limits of the Continental Shelf, CLCS/40/Rev.1, 17 April 1999.

to the coastal State regarding the outer limits and the adoption of which would make it final and binding.¹¹⁶

In cases “[w]here a coastal State intends to establish, in accordance with Article 76, the outer limits of its continental shelf beyond 200nm, it shall submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible but in any case within 10 years of the entry into force of this Convention for that State.”¹¹⁷ The ten-year deadline would have expired on 15 November 2004 since the LOSC officially entered into force 16 November 1994. However, due to the difficulties encountered by developing countries in coming up with technical requirements of claiming a juridical continental shelf under Article 76 and Article 4 of Annex II of the LOSC, a decision was made during the May 2001 Meeting of State Parties to the LOSC to extend the deadline to 13 May 2009.¹¹⁸

In 2000, a multi-agency Technical Working Group (TWG) was convened by the Institute for International Legal Studies of the University of the Philippines Law Center to assist in the country’s preparation of its claim.¹¹⁹ The TWG identified three

¹¹⁶ Article 76(8), LOSC. *See also*, Alex G. Oude Elferink, ‘Article 76 of the LOSC on the Definition of the Continental Shelf: Questions Concerning its Interpretation from a Legal Perspective’ (2006) 21 *International Journal of Marine and Coastal Law* 269.

¹¹⁷ Article 4, Annex II, LOSC.

¹¹⁸ Decision Regarding the Date of Commencement of the Ten-Year Period for Making Submissions to the Commission on the Limits of the Continental Shelf Set Out in Article 4 of Annex II to the United Nations Convention on the Law of the Sea (Doc. SPLOS/72 of 29 May 2001), para. (a)). *See also* on technical aspects of CS delimitation and submission: Chris Carleton, ‘Article 76 of the UN Convention on the Law of the Sea—Implementation Problems from the Technical Perspective’ (2006) 21 *International Journal of Marine and Coastal Law* 287. For an analysis of recent submissions, *please see*: Alex G. Oude Elferink, ‘Continental Shelf Submissions: The Record to Date’ (2006) 21 *International Journal of Marine and Coastal Law* 309.

¹¹⁹ The author is part of the team which prepared this study. He acted as the Coordinator of the Studies for Defining an Extended Continental Shelf for the Philippines under the 1982 United Nations Convention on the Law of the Sea, Law of the Sea Program, Institute of International Legal Studies (IILS) from March 2003-August 2004 and Coordinator of the Legal and Policy Research on the

areas where the Philippines could make a submission for an extended continental shelf: the Spratlys as a natural prolongation of Palawan, Scarborough Shoal, and Benham Rise in the western Philippine Sea. The project also identified scientific and technical evidence to be obtained to support the country's submission.

On 8 April 2009, the Philippines filed a partial submission to the UNCLCS "that covers the Benham Rise Region on the country's Pacific coast."¹²⁰ The map that follows illustrates the Philippine extended continental shelf claim (Figure 4). The submission was made with the express reservation of the "right to make other submissions for such other areas of the continental shelf beyond 200 M at a future time."¹²¹ The submission clarified that although the Philippines "identified regions to its East and West over which it may be entitled to extended continental shelves... the Philippines is making a partial submission that covers the Benham Rise Region off the country's Pacific coast,"¹²² which "is not subject to any maritime boundary disputes, claims or controversies."¹²³ The Philippines' justification for the exercise of the option of partial submission was stated as follows:

As a gesture of good faith ... in order to avoid creating or provoking maritime boundary disputes where there are none, or exacerbating them where they may exist, in areas where maritime boundaries have not yet been delimited between opposite or adjacent coastal States. This is to build confidence and promote international cooperation in the peaceful and amicable resolution of maritime boundary issues. It does not in any manner prejudice the position of any coastal State.¹²⁴

Delineation of the Outer Limits of the Philippine Continental Shelf, IILS, from March 2003- August 2004. Records of this study are on file with author.

¹²⁰ Republic of the Philippines, Part I – Executive Summary, *A Partial Submission on the Outer Limits of the Continental Shelf of the Republic of the Philippines Pursuant to Article 76(8) of the United Nations Convention on the Law of the Sea*, at 8.

¹²¹ *Ibid.*, at 10.

¹²² *Ibid.*

¹²³ *Ibid.* at 12

¹²⁴ *Ibid.*

The Secretary-General of the United Nations received the submission made by the Philippines, and noted that “[I]n accordance with the Rules of Procedure of the Commission, a communication is being circulated to all Member States of the United Nations, as well as States Parties to the Convention, in order to make public the executive summary of the partial submission, including all charts and coordinates contained in that summary.”¹²⁵ The consideration of the partial submission made by the Philippines was included in the provisional agenda of the 24th session of the UNCLCS in New York from 10 August to 11 September 2009. The UNCLCS, upon completion of the consideration of the submission, will make recommendations pursuant to Article 76 of the LOSC.¹²⁶

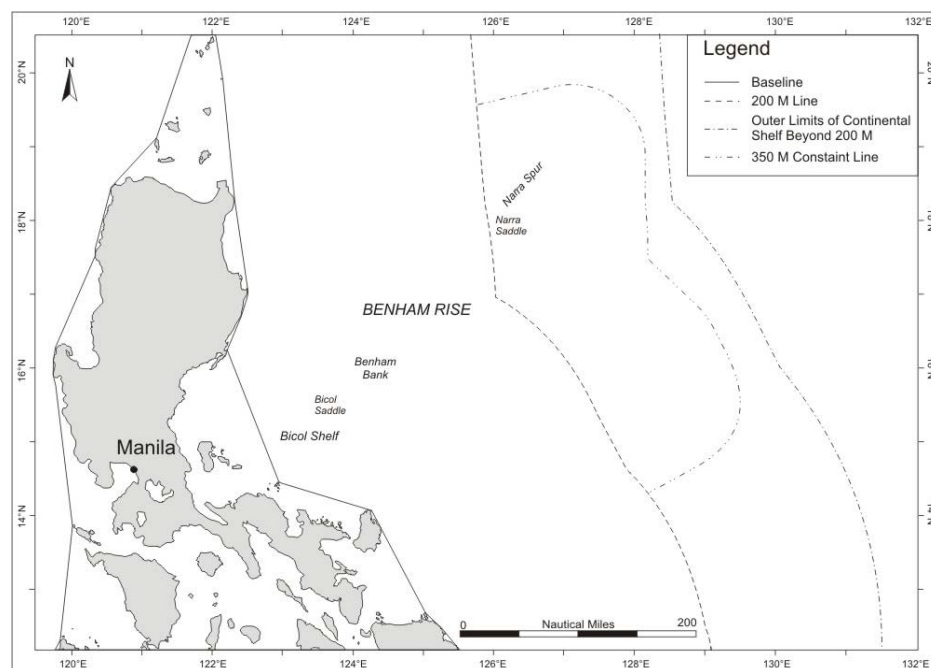


Figure 4. Philippine Extended Continental Shelf Claim

¹²⁵ United Nations, Receipt of the Submission made by the Republic of the Philippines to the Commission on the Limits of the Continental Shelf, 21 April 2009. CLCS.22.2009.LOS.

¹²⁶ *Ibid.* As previously discussed, on 27 March 2009, a Petition for Certiorari and Prohibition with Prayer for the Issuance of a Writ of Preliminary Prohibitory Injunction and/or Temporary Restraining Order was filed in the Philippine Supreme Court challenging the constitutionality of Republic Act No. 9522 or the New Philippine Baselines Law and to prevent the filing of the Philippine submission for the outer limits of its continental shelf beyond 200 nm to the UNCLCS. The petition is still pending with the Philippine Supreme Court.

1.3. Statement of the Problem

The central issue with respect to the legal status of the Philippine Treaty Limits and Philippine territorial waters claim is their conformity with international law. The definition of the Philippine national territory under its Constitution¹²⁷ and the obligations of the Philippines arising from the LOSC pose two fundamental unresolved issues of conflict: **first**, is the issue on the breadth of its territorial sea,¹²⁸ which under the LOSC should not exceed 12nm measured from the baselines¹²⁹ and **second**, the treatment of the waters within its baselines as internal waters and the waters from the baselines to the Philippine Treaty Limits as its territorial waters.¹³⁰

This incongruity springs from the Philippine interpretation of the archipelago concept,¹³¹ and its claim that the limits of its national territory are the imaginary lines of the Treaty Limits.¹³² The Philippines argues that it has consistently treated these

¹²⁷ Article I, Section 1, 1987 Philippine Constitution. Joaquin G. Bernas, *The 1987 Philippine Constitution: A Reviewer-Primer* (1997).

¹²⁸ Dellapenna, *supra* note 1. The breadth of the Philippine waters characterized as territorial varies. The widest distance spans 285 miles from the nearest shore. United States Department of State, *Limits in the Seas No. 36, National Claims to Maritime Jurisdiction* (2000).

¹²⁹ Article 3, LOSC.

¹³⁰ Part IV, Articles 46 to 54, LOSC. Estelito P. Mendoza, 'The Baselines of the Philippine Archipelago' (1969-1973) 46 *Philippine Law Journal* 628. Under the regime of archipelagic waters in the LOS Convention, the waters enclosed by archipelagic baselines are not territorial or 'internal waters', as evidently regarded in the Philippine Constitution. The Philippines regards these archipelagic waters as 'internal waters' which arguably are subject to its absolute sovereignty.

¹³¹ Jorge R. Coquia, 'Philippine Territory Under the New Constitution' (1974) 3 *Philippine Yearbook of International Law* 80; Barbara Kwiatkowska, 'The Archipelagic Regime in Practice in the Philippines and Indonesia -- Making or Breaking International Law' (1991) 6 *International Journal of Estuarine and Coastal Law* 1; Jorge R. Coquia, 'Analysis of the Archipelagic Doctrine in the New Convention on the Law of the Sea' (1982) 8 *Philippine Yearbook of International Law* 24; Miriam Defensor Santiago, 'The Archipelago Concept in the Law of the Sea: Problems and Perspectives' (1974) 49 *Philippine Law Journal* 315. For a detailed examination, *please see* Jose D. Ingles, 'The Archipelagic Theory' (1974) 3 *Philippine Yearbook of International Law* 23.

¹³² *See* colonial treaties which define the Philippine Treaty Limits, *supra* note 2.

Treaty Limits as defining the metes and bound of the Philippine archipelago, which consists of the unity of sea, land, and air-space.¹³³ The position of the Philippines is that all waters around, between and connecting the different islands of the Philippines irrespective of their width or dimensions, are subject to the exclusive sovereignty of the Philippines being necessarily appurtenances of its land territory, and an integral part of its internal waters.¹³⁴ The Philippines considers all the waters embraced within the imaginary lines of the Treaty Limits are considered as territorial waters on the basis of historic title.¹³⁵

As discussed in section 1.2.2.2, the Philippines has enacted various domestic legislation establishing its maritime zones,¹³⁶ as well as a Baselines Law¹³⁷ from which these zones are measured which are all superimposed upon the said Treaty Limits. There is thus in the case of the Philippines, a peculiarly confusing mix up of regimes.¹³⁸ In this *sui generis* scenario, the Philippine territorial sea overlaps with

¹³³ Merlin M. Magallona, 'Problems in Establishing Archipelagic Baselines for the Philippines: The UNCLOS and the National Territory' in *Roundtable Discussion on Baselines of Philippine Maritime Territory and Jurisdiction* (1995) 1.

¹³⁴ Philippine Note Verbale of 7 March 1955 to the United Nations Secretary General, commenting on the draft articles on the law of the sea then being prepared by the International Law Commission for the forthcoming Law of the Sea Conference.

¹³⁵ Hermogenes C. Fernandez, *The Philippine 200-Mile Economic Zone (Sources of Possible Cooperation or Disputes with Other Countries)* (1982) Please see, Vol. II, Official Records, Third U.N. Conference on the Law of the Sea, at 264, where the Philippines argued for the recognition of this historic title over its territorial sea in a similar manner that historic bays have been accorded such recognition.

¹³⁶ See Philippine laws implementing the various LOSC maritime zones, *supra* note 17.

¹³⁷ Republic Act No. 3046: An Act to Define the Baselines of the Territorial Sea of the Philippines (1961), Republic Act No. 5446: An Act to Amend Section One of R.A. 3046 (1968), and Republic Act No. 9522, 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 (2009).

¹³⁸ This is what Schofield and Storey has labelled as "international legal schizophrenia." In their words:

With regard to its maritime claims the Philippines seems to suffer from international legal schizophrenia—on the one hand claiming maritime zones consistent with international norms and on the other hand maintaining long-standing historically based claims that are distinctly at odds with contemporary international law, including the LOSC. In particular, the

those parts of the Philippine EEZ, which are located within the Philippine Treaty Limits; the KIG, which is ‘subject to the sovereignty of the Philippines’ as such is claimed as territory is also within the Philippine EEZ;¹³⁹ the waters within the archipelagic baselines are treated as internal waters¹⁴⁰ which are also all within the waters enclosed by the Philippine Treaty Limits; and finally, the entirety of all the waters and islands within the Philippine Treaty Limits, which are in some areas larger than the Philippine EEZ, are subject to Philippine sovereignty. This confusing superimposition of the various LOSC regimes as defined in domestic legislation with the constitutional definition of the national territory is illustrated in the map that follows (Figure 5). The incongruities are all too evident. Thus, the extent of the Philippine national territory is a basic issue that needs to be addressed before the delimitation of Philippine maritime and territorial boundaries with neighbouring States can even commence. At the core of all the above confusion is the overriding prejudicial legal issue with respect to the legal status of the Philippine Treaty Limits from a domestic law perspective and its corresponding implications to the obligations of the Philippines in international law.

Philippines continues to claim that all of the waters between its baselines and the lines defined by a series of treaties dating from 1898, 1900 and 1930, the so-called “Philippines Treaty Limits” or “Philippines Box,” constitute its territorial waters. Consequently, despite being a party to the LOSC, which provides a maximum limit to the territorial sea of 12 nautical miles, the Philippines simultaneously, asserts that it has territorial sea rights out to 285 nautical miles from its baselines to the furthest seaward point of the Treaty Limits.

Clive Schofield and Ian Storey, *The South China Sea Dispute: Increasing Stakes and Rising Tensions* (2009) at 27.

¹³⁹ Section 1, Presidential Decree No. 1596.

¹⁴⁰ Article 1, 1987 Philippine Constitution and Section 2, Republic Act No. 3046. It is the position of the author, as previously pointed out, that this ambiguity still persists despite the designation of archipelagic baselines in Republic Act No. 9522.

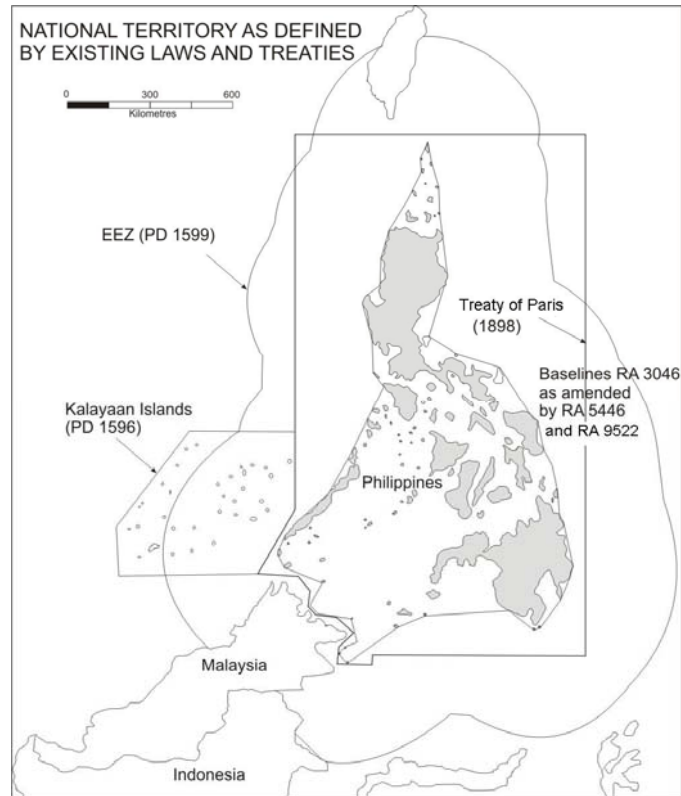


Figure 5. Philippine National Territory as Defined in National Legislation

1.4. Statement of the Thesis

This thesis, proceeding from both a national and an international legal perspective, clarifies the legal status of the Philippine Treaty Limits and territorial waters claim in international law. The delimitation of Philippine territorial and maritime boundaries in conformity with international law necessitates the reform of the existing national legal, policy and administrative framework to resolve fundamental issues of conflict between domestic legislation and international law.

1.5. Purpose, Scope and Limitations

This thesis provides a legal analysis of the legal status of the Philippine Treaty Limits and its historic territorial waters claim in international law. This thesis addresses the following four objectives: (1) analyse the extent, historical context and legal bases of the Philippine Treaty Limits and territorial waters claim; (2) explain the legal status of the Philippine Treaty Limits and territorial waters claim in international law; (3) discuss the implications of the above on navigational rights and access to Philippine waters, maritime boundary delimitation, maritime security and foreign policy.

This thesis only primarily provides a legal analysis of the issues involved and only cover technical matters insofar as they are relevant and necessary. Although this thesis inevitably discusses the disputed Philippine territorial sovereignty claims as well its overlapping maritime jurisdictional zones with its neighbouring States, this is not done in exhaustive detail. Moreover, since the legal determination of the possession and ownership over these disputed territories as well as actual delimitation of the overlapping maritime boundaries are not the main purposes of this research, this thesis only provides a broad framework for better appreciation and resolution of these maritime and territorial disputes.

1.6. Thesis Structure

The thesis is of eight chapters. **Chapter One**, the introductory chapter, situated the discussion of the thesis with a brief geographical description of the Philippine

archipelago and the definition of the national territory and maritime zones in domestic legislation. It also gave a broad overview of the contentious international legal issues pertaining to the Philippine Treaty Limits and territorial waters claim. The introductory chapter also summarised the thesis statement, the purpose, scope and limitations of this thesis and the significance of this research.

Chapter Two provides a concise historical background against which the Philippine Treaty Limits and territorial waters claim can be placed. This chapter is in four parts. The first part provides a brief outline of the development of the Philippines as a nation-State. The second part analyses the Philippine claim by providing its geographical extent, and examines the Philippine archipelago concept in the context of the Law of the Sea conferences. The third part traces the cession of the Philippines from Spain to the United States and discusses the nature and defects of the Spanish and American titles over the Philippines. This section also briefly discusses State succession in international law. The last part examines the colonial treaties which collectively defined the Philippine Treaty Limits.

Chapter Three discusses the legal bases of the Philippine Treaty Limits and territorial waters claim. This chapter is of three parts. The first part, by way of introduction, discusses the right of a State to define its territory within the constraints imposed under international law. The second part examines the legal bases of the Philippine claim: recognition by treaty; title from cession, devolution of treaty rights, succession to colonial boundaries, and historic title.

Chapter Four examines the legal status of the Philippine Treaty Limits and territorial waters claim in international law. This chapter analyses the Philippine position with respect to its Treaty Limits and territorial waters claim alongside the following five criteria: treaty interpretation, conflict with the Law of the Sea Convention; status in customary international law; the acquiescence and opposition of other States to the Philippine position and lastly, the opinion of publicists. This chapter adduces evidence and legal arguments both in support of and contrary to the Philippine position. The main conclusion drawn by the Chapter is that while the Philippines can satisfactorily present a legal case for the international legal validity of the Philippine Treaty Limits and territorial waters claim, the Philippine position can be assailed for lacking the crucial elements of acquiescence and recognition of States as well as the being in contravention of its conventional legal obligations under the Law of the Sea Convention.

Chapter Five analyses the international legal implications of the Philippine Treaty Limits and territorial waters claim on navigational rights in Philippine waters. This chapter examines and analyses the inconsistencies between the navigational regimes provided for in the LOSC and their implementation in the various Philippine maritime zones of jurisdiction. The main conclusion drawn by this Chapter is that the Philippine Treaty Limits pose the principal source of confusion and ambiguity with respect to the definition of the nature and rights of the various maritime jurisdictional zones which restrict the navigational rights of other States in Philippine waters.

Chapter Six analyses the international legal implications of the Philippine Treaty Limits and territorial waters claim on maritime security and access to marine

resources in Philippine waters. This chapter consists of three parts. In the first part, the functional basis of the Philippine Treaty Limits is explained in order to demonstrate that while the Philippines was not able to secure recognition of its historic territorial seas in the LOSC, the rights it was asserting were still embodied in the LOSC. The second and third parts discuss the implications of the Philippine Treaty Limits on maritime security and access to marine resources in Philippine waters, respectively. There are three main conclusions drawn by this Chapter. First, the LOSC sufficiently addresses the functional rights that the Philippines claims over the territory enclosed by the Treaty Limits which the Philippines can still assert despite of and independently of the non-recognition of the Treaty Limits by the international community. Secondly, the Treaty Limits position does not impose jurisdictional impediments for certain transnational crimes such as maritime piracy and illegal fishing. Lastly, transnational maritime threats such as counter terrorism, maritime piracy, sea lanes passage and security, and marine environmental protection have permitted cooperation despite the Treaty Limits position.

Chapter Seven identifies and analyses the international and domestic legal and policy implications of the Philippine Treaty Limits on the delimitation of Philippine territorial and maritime boundaries and on foreign policy. This chapter is of two parts. The first part discusses and analyses the existing sovereignty territorial claims of the Philippines and the overlapping maritime jurisdictional zones that the Philippines has with its neighbouring States. The second part explains how the Philippine Treaty Limits position has impacted Philippine foreign policy in the context of the maritime disputes in the Asia-Pacific region and within the dynamics of furthering the specific foreign policy interests and strategic foreign State partners

of the Philippines. There are two main conclusions drawn by this chapter. First, the Treaty Limits position has been the main obstacle in the delimitation of the country's overlapping maritime boundaries with its neighbours. Second, the Treaty Limits has been a prominent element of Philippine foreign policy especially during the LOSC negotiations but is increasingly being downplayed in the face of more strategic and current pressing national, regional, and international concerns and realities.

Chapter Eight, the concluding chapter, identifies options and recommendations for the revision of the Philippine territorial limits and maritime jurisdictional zones in conformity with international law. This chapter also provides a synthesis of the legal arguments raised in the previous eight chapters on the validity and legal status of the Philippine Treaty Limits and territorial waters claim in international law. This final chapter is of four parts. In the first part, a synthesis of the conflict between international law and municipal law with respect to the Philippine Treaty Limits and territorial waters claim is discussed. In the second part, legal and policy reforms needed to harmonise domestic and legislation are identified. The third part is an analysis of issues that the Philippines need to consider with respect to maritime boundary delimitation and dispute settlement. In the last part and by way of conclusion, final recommendations are provided.

1.7. Significance of the Research

The thesis addresses an apparent gap in both academic literature and in national State policy: has been no other study that squarely dealt with the question of the legal status of the Philippine Treaty Limits and the waters they enclose from both a

national and an international legal perspective. Furthermore, a comprehensive study of Philippine maritime boundaries has never been undertaken and the Philippines has yet to delimit any of its potential maritime boundaries. The study and delimitation of Philippine maritime boundaries also possesses critical national, regional and international significance.

The contribution of the thesis also lies in the potential assistance it may offer to the Philippine Government in the formulation of State policy and legally-defensible positions in future boundary negotiations and/or international litigation, and in the reform of national legislation in conformity with international law. The preparations required for negotiations and litigation require substantial time, human, and financial resources, the costs of which may be significantly reduced with the utilisation of the outputs of this thesis.

Chapter 2

Historical Background of the Philippine Treaty Limits and Territorial Waters Claim

2.1. Introduction

The aim of this chapter is to provide a concise historical background against which the Philippine Treaty Limits and territorial waters claim can be placed. This chapter is in four parts. The first part provides a brief outline of the development of the Philippines as a nation-State. The second part analyses the Philippine claim by providing its geographical extent, and examines the Philippine archipelago concept in the context of the Law of the Sea conferences. The third part traces the cession of the Philippines from Spain to the United States and discusses the nature and defects of the Spanish and American titles over the Philippines. This section also briefly discusses State succession in international law. The last part examines the colonial treaties which collectively defined the Philippine Treaty Limits.

2.2. The Philippine Nation-State

Even before the arrival of the first European on her shores, the Philippines already existed.¹ Extensive archaeological records and ancient narratives indicate that pre-colonial Philippines had robust trade relations with its neighbouring countries.²

Before the Spaniards arrived in the archipelago, an established system of government

¹ Teodoro A. Agoncillo, *History of the Filipino People* (1967) at 23; See also William Henry Scott, *Looking for the Prehispanic Filipino* (1992); William Henry Scott, *Prehispanic Source Materials for the Study of Philippine History* (1984); Daniel W. Tantoco, *A Selected Bibliography on Philippine Prehistory* (1970); F. Landa Jocano, *Philippine Prehistory: An Anthropological Overview of the Beginnings of Filipino Society and Culture* (1975).

² Stanley Karnow, *In Our Image: America's Empire in the Philippines* (1989) at 39. See also William Henry Scott, *Cracks in the Parchment Curtain, and Other Essays in Philippine History* (1985) at 60.

existed in the islands.³ When the first Spaniards arrived on the islands in 1521, they found that the Philippines had a civilisation of its own.⁴

2.2.1. Historical Antecedents

The Philippines was first brought to the attention of the western world or re-discovered, as it were, by Ferdinand Magellan, a Portuguese sailing under the Spanish flag on 16 March 1521.⁵ However, even before this, archaeological and paleontological evidence show that *Homo sapiens* existed in Palawan, a province of Luzon, circa 50,000 BC. The aboriginal people of the Philippines, the Negritos, are an Australo-Melanesian people, who arrived in the Philippines at least 30,000 years ago. It was the Spanish explorer Ruy Lopez de Villalobos who named the island *Las Islas Filipinas* (the Philippine Islands) in honour of the Spanish king, King Philip II (Felipe II de España). For the next three centuries the Philippines remained a crown colony of Spain.⁶

³ Helen R. Tubangui et al (eds), *The Filipino Nation: A Concise History of the Philippines* (1982) at 17. Hereinafter referred to as *The Filipino Nation*.

⁴ *Id.* at 20.

⁵ The Spanish Empire was one of the largest empires in world history, and one of the first global empires. The expedition to the Philippines followed from a division of the “undiscovered world” between Spain and Portugal, made by Pope Alexander VI in 1493 through the papal bull *Inter Caetera*, which granted to Spain all lands to the “west and south” of a pole-to-pole line 100 leagues west and south of any of the islands of the Azores or the Cape Verde Islands. A subsequent 1494 papal decree, the *Treaty of Tordesillas*, moved the line further west to a meridian 370 leagues west of the Portuguese Cape Verde Islands. See, R. P. Anand, *Origin and Development of the Law of the Sea* (1983) at 43-44. However, by 1521, the notion that the Pope had the right to convey sovereignty was no longer recognised. Please see, Hanns J. Buchholz, *Law of the Sea Zones in the Pacific Ocean* (1987) at 2; Jan Hendrik Willem Verzijl, Wybo P. Heere and J. P. S. Offerhaus, *International Law in Historical Perspective* (1979) at 230-234, 237.

⁶ The academic literature on Philippine history is quite extensive. See generally: Helen R. Tubangui et al (eds), *The Filipino Nation: A Concise History of the Philippines* (1982); Pedro A. Gagelonia, *Concise Philippine History* (1970); Teodoro A. Agoncillo and Oscar M. Alfonso, *History of the Filipino People* (1969); Antonio M. Molina, *The Philippines Through the Centuries* (1960); Gregorio F. Zaide, *The Republic of the Philippines: History, Government, and Civilization* (1970); Teodoro A. Agoncillo, *A Short History of the Philippines* (1969); Horacio Dela Costa, *Readings in Philippine History: Selected Historical Texts Presented with a Commentary* (1965); Emma Helen Blair and James Alexander Robertson, *The Philippine Islands 1493-1898* (1907); Lewis E. Gleeck, *General*

2.2.2. The Philippine Archipelago as a Single Territorial Entity

The Filipinos were never able to muster the critical mass necessary to oppose foreign colonial rule because they were divided by geography, religion, language, race, and culture.⁷ The Spanish colonial forces were masters of the ancient Roman military strategy of “divide and rule.”⁸ The Spanish government easily quelled local revolts and uprisings between natives of one region and natives from another region.⁹ Further, they had no concept of a Philippine national consciousness.¹⁰ In the words of Dr. Jose Rizal, “A man in the Philippines is only an individual; he is not a member of a nation.”¹¹

The birth of Philippine nationalism, and consequently the idea of the Philippines as a nation, came only after three centuries of Spanish colonial rule.¹² Two factors

History of the Philippines (1984); Renato Constantino and Letizia R. Constantino, *The Philippines: A Past Revisited* (1975); Onofre D. Corpuz, *The Roots of the Filipino Nation* (1989).

⁷ Frank L. Andrews, *The Philippine Insurrection (1899 -1902): Development of the U.S. Army's Counterinsurgency Policy* (MA Thesis, Louisiana State University and Agricultural and Mechanical College, 2002).

⁸ Amado Guerrero, *Philippine Society and Revolution* (1971) at 5; See also Clarence Henry Haring, *The Spanish Empire in America* (1985); Roger Bigelow Merriman, *The Rise of the Spanish Empire in the Old World and the New* (1962); Hugh Thomas, *Rivers of Gold: The Rise of the Spanish Empire, from Columbus to Magellan* (2005).

⁹ Austin Craig, *The Filipinos' Fight for Freedom: True History of the Filipino People During their 400 Years' Struggle told after the Manner of Jose Rizal* (1973) at 44; David Reeves Sturtevant, *Popular Uprisings in the Philippines, 1840-1940* (1976); Consorcia Lavadia Donovan, *The Philippine Revolution: A "Decolonized" Version* (unpublished PhD Thesis, Claremont Graduate School, 1976).

¹⁰ John N. Schumacher, *The Making of a Nation: Essays on Nineteenth-Century Filipino Nationalism* (1991) at 37.

¹¹ Agoncillo, *supra* note 1, at 123.

¹² See Benedict R. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1991); Ernest Gellner, *Nations and Nationalism* (1983); Eric J. Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality* (1992). See also Rizalino A. Oades, *The Social and Economic Background of Philippine Nationalism, 1830-1892* (PhD Thesis, University of Hawaii, 1974) studying the development of Philippine nationalism; Renato Constantino, *Neocolonial Identity and Counter-Consciousness: Essays on Cultural Decolonization* (1978); David Routledge, *Diego Silang and the Origins of Philippine Nationalism* (1979); Ernest Gellner, *Nations and Nationalism* (1983); Eric J. Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality* (1992);

contributed to the emergence of the notion of a unified Philippine State. First, the excesses and abuses of the Spanish regime caused the widespread discontent.¹³ Second, the *ilustrados* (local elites), who studied in Europe brought home the idea of liberalism.¹⁴ Emilio Aguinaldo states:

Spain maintained control of the Philippine Islands for more than three centuries and a half, during which period the tyranny, misconduct and abuses of the friars and the civil and military administrators exhausted the patience of the Filipinos and caused them to make a desperate effort to shake off the galling yoke of Spain.¹⁵

To list all the civil and political abuses of the Spaniards is unnecessary. Suffice it to say that the situation in 1898 was deplorable and the conditions were ripe for a revolution.

2.2.3. The Philippine Declaration of Independence

The increasing patriotic sentiments and nationalistic ideals became the main ideologies that fuelled the Philippine Revolution of 1896, which was the first Asian nationalist revolution.¹⁶ On 12 June 1898, Filipino revolutionary forces under General Emilio Aguinaldo, who would later become the Philippines' first Republican

Usha Mahajani, *Philippine Nationalism: External Challenge and Filipino Response, 1565-1946* (1971).

¹³ Agoncillo, *supra* note 1, at 133.

¹⁴ See Pedro S. de Achutegui and Miguel A. Bernad, *Aguinaldo and the Revolution of 1896: A Documentary History* (1972); Carlos Quirino, *The Young Aguinaldo: from Kawit to Biyak-na-Bato* (1969); Alfredo B. Saulo, *Emilio Aguinaldo: Generalissimo and President of the First Philippine Republic -- First Republic in Asia* (1983).

¹⁵ Emilio F. Aguinaldo, *True Version of the Philippine Revolution* (1899) at 3.

¹⁶ See Cesar Adib Majul, *The Political and Constitutional Ideas of the Philippine Revolution* (1967); Carlos Quirino, *Why the 1896 Philippine Revolution Failed* (1986); Florentino Rodao Garcia and Felice Noelle Rodriguez, *The Philippine Revolution of 1896: Ordinary Lives in Extraordinary Times* (2001).

President, proclaimed the Philippine Declaration of Independence.¹⁷ The Declaration proclaimed the sovereignty and independence of the Philippine Islands from the colonial rule of Spain after the latter was defeated at the Battle of Manila Bay during the Spanish-American War.¹⁸ On 23 January 1899, the First Philippine Republic, popularly known as the Malolos Republic,¹⁹ was inaugurated amidst colourful ceremonies in the central Luzon province of Bulacan.²⁰

However, neither the United States nor Spain²¹ recognised the Philippine Declaration of Independence.²² In fact, even before the smoke from the rubbles of the War had cleared, the Philippines found itself with a new colonial master: the United States. On 10 December 1898, in the aftermath of the Spanish-American War, the Philippines was ceded to the United States in the Treaty of Paris.²³ The United States further concluded two more treaties defining the limits of the Philippine archipelago,

¹⁷ Henri Turot, *Emilio Aguinaldo, First Filipino President, 1898-1901* (1981) at 94.

¹⁸ For literature on the Spanish-American War, see R. A. Alger, *The Spanish-American War* (1901); Elbert J. Benton, *International Law and Diplomacy of the Spanish-American War* (1968); W. Nephew King, *The Story of the Spanish-American War and the Revolt in the Philippines* (1900); Thomas G. Paterson and Stephen G. Rabe, *Imperial Surge: the United States Abroad, the 1890s - Early 1900s* (1992); Joseph Smith, *The Spanish-American War: Conflict in the Caribbean and the Pacific, 1895 - 1902* (1995); Richard H. Titherington, *A History of the Spanish-American War of 1898* (1900).

¹⁹ Antonio M. Molina, *The Philippines Through the Centuries* (1960), Volume II, at 193. See Teodoro A. Agoncillo, *Malolos: The Crisis of the Republic* (1960). See also Cesar Adib Majul, *Apolinario Mabini, Revolutionary: the Great Role He Played in the Malolos Congress, the birth of the Philippine Republic and the Filipino-American War* (1998).

²⁰ Agoncillo, *supra* note 1, at 249.

²¹ Teodoro A. Agoncillo, 'The Filipino Plea for Independence' in Thomas G. Paterson and Stephen G. Rabe (eds), *Imperial Surge: The United States Abroad, The Early 1890s - Early 1900s* (1992) 98 at 102.

²² See *Philippine Declaration of Independence*, 12 June 1898, at Kawit, Cavite, Philippines.

²³ Merlin M. Magallona, 'The Treaty of Paris of 10 December 1898: History and Morality in International Law' (2000) 75 *Philippine Law Journal* 159. See also Leon Raymond Camp, *The Senate Debates on the Treaty of Paris of 1898* (PhD Thesis, Pennsylvania State University, 1969) providing an excellent background on the historical context and rhetorical background of the Treaty of Paris debates in the U.S. Senate.

with Spain on 7 November 1900²⁴ and with Great Britain on 2 January 1930.²⁵ The Philippines was a colony of the United States for half a century.²⁶

As the Filipinos under the American regime showed increasing competence for self-rule, the United States approved the Tydings-McDuffie Act, providing for the eventual independence of the Philippines.²⁷ The Philippines gained its independence from American rule on 4 July 1946 and in the aftermath of the World War II was one of the original members of the United Nations.²⁸ It is through the forum of the United Nations that the Philippines first drew the attention of the world to the Philippine archipelago doctrine, which will be discussed in the next section.

This historical summary may seem but a sidebar to the discussion, but will be fully explored in the following section. The question of when sovereignty was validly transferred is a crucial issue in determining succession of States in international law.²⁹

²⁴ Treaty Between the Kingdom of Spain and the United States of America for Cession of Outlying Islands of the Philippines, U.S.-Spain, 7 November 1900, T.S. No. 345.

²⁵ Convention Between the United States of America and Great Britain Delimiting the Boundary Between the Philippine Archipelago and the State of North Borneo, U.S.-U.K., 2 January 1930, T.S. No. 856.

²⁶ Karen Wells Borden, *Persuasive Appeals of Imperialist and Anti-imperialist Congressmen in the Debates on Philippine Independence* (Phd Thesis, University of California, Los Angeles, 1973); Bernardita Reyes Churchill, *The Philippine Independence Missions to the United States, 1919-1934* (1983); Grayson L. Kirk, *Philippine Independence: Motives, Problems and Prospects* (1976).

²⁷ The Tydings-McDuffie Act (officially the Philippine Independence Act; Public Law 73-127) approved on 24 March 1934 was a United States federal law which provided for self-government of the Philippines and for Filipino independence (from the United States) after a period of ten years. It was authored by Maryland Senator Millard E. Tydings and Alabama Representative John McDuffie.

²⁸ On 4 July 1946 representatives of the United States of America and the Republic of the Philippines signed a Treaty of General Relations which provided for the recognition of the independence of the Republic of the Philippines as of 4 July 1946 and the relinquishment of American sovereignty over the Philippine Islands.

²⁹ See Daniel Patrick O'Connell, *State Succession in Municipal Law and International Law* (1967) discussing State succession in international law and its corresponding legal effects; Arthur Berriedale Keith, *The Theory of State Succession: With Special Reference to English and Colonial Law* (1907); R. W. G. de Muralt, *The Problem of State Succession with regard to Treaties* (1954); Daniel Patrick

2.3. Statement of the Philippine Claim

The Philippine asserts that the Treaty of Paris principally defines the territorial limits of the Philippines.³⁰ The Philippines claims that it acquired its current territorial boundaries marked on the map by what is called the “Philippine Treaty Limits” on the basis of three treaties: first, the Treaty of Paris between Spain and the United States of 10 December 1898; second, the Treaty of Washington between the United States and Spain of 7 November 1900; and lastly, the Treaty concluded between the United States and Great Britain on 2 January 1930.³¹ It further asserts that all the waters within the limits set forth in the above-mentioned treaties have always been regarded as part of the territory of the Philippines.³²

The Philippine territorial waters claim, which is based on historic right of title,³³ applies to the waters within the limits set forth in the colonial treaties,³⁴ which define

O’Connell, *The Law of State Succession* (1956). See also Lung-Fong Chen, *State Succession Relating to Unequal Treaties* (1974); Yilma Makonnen, *International Law and the New States of Africa: A Study of the International Legal Problems of State Succession in the Newly Independent States of Eastern Africa* (1983).

³⁰ Miriam Defensor Santiago, ‘The Archipelago Concept in the Law of the Sea: Problems and Perspectives’ (1974) 49 *Philippine Law Journal* 315 at 358.

³¹ *Note Verbale* dated 7 March 1955 from the permanent delegation of the Philippines to the United Nations. A/CN.4/94, Report of the International Law Commission Covering the Work of its Seventh Session 2 May-8 July 1955, Official Records of the General Assembly, Tenth Session, Supplement No. 9 (A/2934), 2 Yearbook of the International Law Commission 1955 at 52 – 53.

³² *Ibid.*

³³ Arturo M. Tolentino, ‘On Historic Waters and Archipelagos’ (1974) 3 *Philippine Law Journal* 31 at 51. See also Yehuda Z. Blum, *Historic Titles in International Law* (1965) providing a discussion of historic right of title in international law; Secretariat of the International Law Commission, ‘Juridical Regime of Historic Waters Including Historic Bays’ (1962) 2 *Yearbook of the International Law Commission* 1.

³⁴ Three colonial treaties define the territorial boundaries of the Philippines: (1) Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.-Spain, 10 December 1898, T.S. No. 343 [hereinafter referred to as Treaty of Paris]; (2) Treaty Between the Kingdom of Spain and the United States of America for Cession of Outlying Islands of the Philippines, U.S.-Spain, 7 November 1900, T.S. No. 345 [hereinafter referred to as Cession Treaty of 1900]; (3) Convention

the extent of the archipelago at the time it was ceded from Spain to the United States in 1898.³⁵ Thus, the delineated line of the Philippine Treaty Limits -- drawn around the archipelago -- marks the outer limits of the historic territorial seas of the Philippines.³⁶

The Philippine territorial waters claim first came to the attention of other States through *note verbales* addressed to the International Law Commission (ILC) in 7 March 1955³⁷ and reiterated in 20 January 1956.³⁸ These *note verbales* were sent by the permanent delegation of the Philippines to the United Nations as comments on the draft articles on the Regime of the Territorial Sea formulated by the ILC.³⁹ The diplomatic notes embodied the policy of the Philippine Government as regards the extent of its territorial waters. The claim is sufficiently described with clarity in the *note verbale*:

All waters around, between and connecting different islands belonging to the

Between the United States of America and Great Britain Delimiting the Boundary Between the Philippine Archipelago and the State of North Borneo, U.S.-U.K., 2 January 1930, T.S. No. 856 [hereinafter referred to as Boundaries Treaty of 1930].

³⁵ Arturo M. Tolentino, *The Waters Around Us* (1974) at 3. Jayewardene notes that "Of the archipelago claims, only the Philippines' claim appears to have been advanced as a truly historic claim to the waters of an archipelago." Hiran W. Jayewardene, *The Regime of Islands in International Law*, Publications on Ocean Development (1990) at 131.

³⁶ Estelito P. Mendoza, 'The Baselines of the Philippine Archipelago' (1969-1973) 46 *Philippine Law Journal* 628. The Philippine Treaty Limits boundary lines roughly form the shape of a rectangular frame, with the longitudinal and latitudinal lines specified in Art. III of the Treaty of Paris. See Treaty of Paris, *supra* note 34; see also, Jorge R. Coquia, *Selected Essays on the Law of the Sea* (1982) at 7. Arturo Tolentino, 'The Philippine Territorial Sea' (1974) 3 *Philippine Yearbook of International Law* 46 at 53. D. P. O'Connell, 'Mid-Ocean Archipelagoes in International Law' (1971) 45 *British Yearbook of International Law* 1 at 26.

³⁷ *Note Verbale* dated 7 March 1955, *supra* note 31.

³⁸ *Note Verbale* dated 20 January 1956 from the permanent delegation of the Philippines to the United Nations, Document A/CN.4/99, A/CN.4/SER.A/1956/Add.I, 2 Yearbook of the International Law Commission 1956 at 69-70.

³⁹ See United Nations, *Laws and Regulations on the Regime of the Territorial Sea* (1957) Herbert W. Briggs, 'Evolution of International Law in the 20th Century: International Law Commission Draft on Regime of the Territorial Sea: Remarks' (1956) 50 *American Society of International Law Proceedings* 135; Paik-San Chie, 'Article 3, Regime of the Territorial Sea' (1956) 50 *American Journal of International Law* 934.

Philippine Archipelago, irrespective of their width or dimension, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines. All other water areas embraced within the lines described in the Treaty of Paris of 10 December 1898, the Treaty concluded at Washington, D.C., between the United States and Spain on 7 November 1900, the Agreement between the United States and the United Kingdom of 2 January 1930, and the Convention of 6 July 1932 between the United States and Great Britain, as reproduced in section 6 of Commonwealth Act No. 4003 and article 2 of the Philippine Constitution, are considered as maritime territorial waters of the Philippines for purposes of protection of its fishing rights, conservation of its fishery resources, enforcement of its revenue and anti-smuggling laws, defence and security, and protection of such other interests as the Philippines may deem vital to its national welfare and security, without prejudice to the exercise by friendly foreign vessels of the right of innocent passage over those waters. All natural deposits or occurrences of petroleum or natural gas in public and/or private lands within the territorial waters or on the continental shelf, or its analogue in an archipelago, seaward from the shores of the Philippines which are not within the territories of other countries belong inalienably and imprescriptibly to the Philippines, subject to the right of innocent passage of ships of friendly foreign States over those waters.⁴⁰

The Philippines takes the view that the breadth of the territorial sea may extend beyond 12 miles.⁴¹ The exception is based upon historical grounds, by means of treaties or conventions between States.⁴² The Philippines asserts that the rule prescribing the limits of the territorial sea has been based largely on the continental nature of a coastal State which does not take into account the archipelagic nature of certain States like the Philippines.⁴³ The Philippines argues that within the waters of

⁴⁰ *Note Verbale* dated 7 March 1955, *supra* note 31.

⁴¹ François, J.P.A., (Special Rapporteur) Summary of Replies from Governments and Conclusions of the Special Rapporteur, U.N. Document A/CN.4/99 [4 May 1956], which states: "18. The Philippine Government considers that the breadth of the territorial sea may extend beyond twelve miles. Provisions should be included which take account of the special characteristics of countries like the Philippines which consist of archipelagos."

⁴² The regime of historic waters is an exceptional regime, which constitutes an exception to the general rules of international law governing the delimitation of the maritime domain of a State. Secretariat of the International Law Commission, 'Juridical Regime of Historic Waters Including Historic Bays' (1962) 2 *Yearbook of the International Law Commission* 1 at 7.

⁴³ *Note Verbale* dated 20 January 1956, *supra* note 38.

the Treaty Limits, high seas cannot exist.⁴⁴ It posits that this should be the case for archipelagos or territories composed of many islands like the Philippines, where the State would find the continuity of jurisdiction within its own territory disrupted, if certain bodies of water located between the islands composing its territory were declared or considered as high seas.⁴⁵ This is the official position taken and vigorously defended by the Philippines in all the United Nations Conferences on the Law of the Sea.⁴⁶ This is the same position enshrined in all the Philippine Constitutions⁴⁷ and embodied in domestic legislation.⁴⁸

2.3.1. Geographical Extent

The territory of the Philippines is clearly outlined in Article III of the Treaty of Paris, which specified the boundaries using latitudinal and longitudinal positions.⁴⁹ The

⁴⁴ François, J.P.A., (Special Rapporteur) Summary of Replies from Governments and Conclusions of the Special Rapporteur, Document A/CN.4/97/Add.1, [1 May 1956]. François summarizes the Philippine comment on the definition of the high seas as follows: “2. The Philippine Government assumes that high seas cannot exist within the waters comprised by the territorial limits of the Philippines. In case of archipelagos or territories composed of many islands like the Philippines, the State would find the continuity of jurisdiction within its own territory disrupted, if certain bodies of water located between the islands composing its territory were declared or considered as high seas.”

⁴⁵ Document A/CN.4/97/Add.1, 1 May 1956, 2 *Yearbook of the International Law Commission* 1956 at 13.

⁴⁶ James C. F. Wang, *Handbook on Ocean Politics & Law* (1992) at 46.

⁴⁷ The 1935, 1973 and the current 1987 Philippine Constitutions all contain provisions on defining the national territory. See Article I, Section 1, 1935 Philippine Constitution; Article I, 1973 Philippine Constitution; and Article I, 1987 Philippine Constitution. The Provisions on the National Territory in the 1935, 1973 and 1987 Philippine Constitutions, is attached to this thesis as APPENDIX 5.

⁴⁸ Domestic laws which define the national territory include: (1) Republic Act No. 3046: An Act to Define the Baselines of the Territorial Sea of the Philippines (1961); (2) Republic Act No. 5446: An Act to Amend Section One of R.A. 3046 (1968); (3) Presidential Proclamation No. 370: Declaring as Subject to the Jurisdiction and Control of the Republic of the Philippines All Mineral and Other Natural Resources in the Continental Shelf of the Philippines (1968); (4) Presidential Decree No. 1596: Declaring Certain Areas Part of the Philippine Territory and Providing for their Government and Administration (1978); (5) Presidential Decree No. 1599: Establishing an Exclusive Economic Zone and for Other Purposes (1978); and (6) Republic Act No. 9522, 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 (2009).

⁴⁹ Santiago, ‘The Archipelago Concept,’ *supra* note 30, at 358.

controversial article of cession reads as follows:

Article III. Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within the following line:

A line running from west to east along or near the twentieth parallel of north latitude, and through the middle of the navigable channel of Bachi, from the one hundred and eighteenth (118th) to the one hundred and twenty-seventh (127th) degree meridian of longitude east of Greenwich, thence along the one hundred and twenty seventh (127th) degree meridian of longitude east of Greenwich to the parallel of four degrees and forty five minutes ($4^{\circ} 45'$) north latitude, thence along the parallel of four degrees and forty five minutes ($4^{\circ} 45'$) north latitude to its intersection with the meridian of longitude one hundred and nineteen degrees and thirty five minutes ($119^{\circ} 35'$) east of Greenwich, thence along the meridian of longitude one hundred and nineteen degrees and thirty five minutes ($119^{\circ} 35'$) east of Greenwich to the parallel of latitude seven degrees and forty minutes ($7^{\circ} 40'$) north, thence along the parallel of latitude of seven degrees and forty minutes ($7^{\circ} 40'$) north to its intersection with the one hundred and sixteenth (116th) degree meridian of longitude east of Greenwich, thence by a direct line to the intersection of the tenth (10th) degree parallel of north latitude with the one hundred and eighteenth (118th) degree meridian of longitude east of Greenwich, and thence along the one hundred and eighteenth (118th) degree meridian of longitude east of Greenwich to the point of beginning. The United States will pay to Spain the sum of twenty million dollars (\$20,000,000) within three months after the exchange of the ratifications of the present treaty.⁵⁰

In the case at hand, the question is not the geographical description of the claimed boundary. The precise location of the “boundary line” as it were, is not disputed in this instance, but what that line signifies. The map that follows (Figure 6) illustrates the Philippine Treaty Limits. The legal status of the Philippine Treaty Limits and the waters they enclose will be discussed in Chapter 4.

⁵⁰ Article III, Treaty of Peace Between the United States of America and the Kingdom of Spain (Treaty of Paris) U.S.-Spain, 10 December 1898, T.S. No. 343.

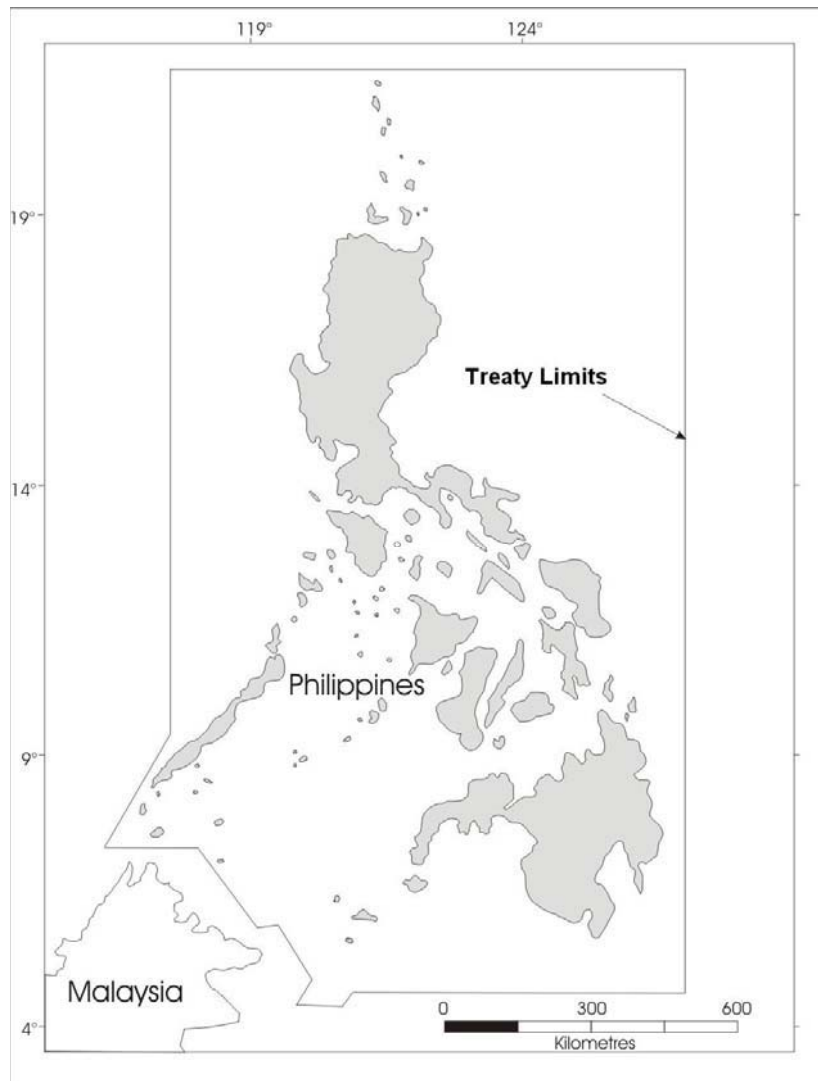


Figure 6. Philippine Map Showing Treaty Limits

2.3.2. The Archipelago Concept and the Philippine Position

The archipelagic nature of the Philippines is an essential aspect of the Philippine position with respect to its international treaty limits. The Philippines is a mid-ocean archipelago⁵¹ of 7,107 islands scattered over a vast expanse of sea. The legal

⁵¹ Mohammed Munavvar, *Ocean States: Archipelagic Regimes in the Law of the Sea* (1995) at 17, 21-22. For an excellent discussion of the historical background of mid-ocean archipelagos in the law of the sea, please see, D. P. O'Connell, 'Mid-Ocean Archipelagos in International Law' (1971) 45 *British Yearbook of International Law* 1; Miriam Defensor Santiago, 'The Archipelago Concept in the Law of the Sea: Problems and Perspectives' (1974) 49 *Philippine Law Journal* 315; Farhad Talaie,

definition of the archipelago in the LOSC strongly affirms the link between the land and the sea.⁵² This is exactly the definition that the Philippines has claimed for itself as an archipelagic State. The islands of the Philippine archipelago, although geographically fragmented have always consistently asserted that it be treated as a singular geographical, economic and political entity constituting a unity of land, sea and people.⁵³

However, the status of the Philippines as an archipelagic State is a matter different from its archipelagic nature. The former being a legal term of art used in the LOSC and the latter being more of a geologic or geographic description. In the words of Philippine jurist and Senator Miriam Defensor-Santiago:

The Constitution does not describe the Philippines as an archipelagic state, which is a term of art used by the UN Convention. If the Philippines declares itself an archipelagic state, the declaration would contradict the Treaty of Paris which sets out the boundaries of our national territory, which are wider than those allowed by the UNCLOS.⁵⁴

Senator Santiago believes that the Constitution has already defined the national territory, and any attempt to declare the Philippines as an archipelagic State under the LOSC would require charter change, because it would be tantamount to a reduction

‘Recognition of a Special Legal Regime for Mid-Ocean Archipelagos and its Implications for the Pacific Rim Region’ (1998) 10 *Pacifica Review* 203.

⁵² In the LOSC, an archipelago is defined 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.” Article 46, LOSC.

⁵³ Article 46, LOSC. Arturo M. Tolentino, ‘The Philippine Archipelago and the Law of the Sea’ (1983) 7 *Philippine Law Gazette* 1.

⁵⁴ Gil C. Cabacungan Jr., “Baseline bills to reduce RP’s territory, Santiago warns” *Philippine Daily Inquirer*. Online at: <http://newsinfo.inquirer.net/breakingnews/nation/view/20080325-126396/Baseline-bills-to-reduce-RPs-territory-Santiago-warns>. Date accessed: 6 April 2009.

of the national territory.⁵⁵ The senator argues that if the Philippines declares itself an archipelagic State, the declaration would contradict the Treaty of Paris which sets out the boundaries of the Philippine national territory, which are wider than those allowed by the LOSC.⁵⁶

The position of Senator Santiago over the archipelagic State status of the Philippines is not shared by Ambassador Alberto Encomienda, former Secretary-General of the Maritime and Ocean Affairs Center (MOAC) of the Department of Foreign Affairs.

In his words:

MOAC has taken the position that the Philippines does not need to declare itself as an archipelagic State. The Philippines was the first even to comport itself as an archipelago State and nation, from the very moment it gained Statehood, and the principal proponent of the archipelagic principle/doctrine. ... The Philippines further affirmed its adherence to this principle, as defined under Part IV of the 1982 LOSC, by signing and ratifying the Convention. Given the foregoing, the approach taken by MOAC was for the Philippines merely to harmonize its domestic legislation with the provisions of the 1982 LOSC. It is an archipelagic State under the LOSC with[out] any further need for declaring itself as such.⁵⁷

2.3.3. The Philippine Archipelago Concept in the Law of the Sea Conferences

The adoption of the archipelago concept in the Third United Nations Law of the Sea

⁵⁵ <http://www.miriam.com.ph/2008/03/25-march-2008-miriam-charter-bans.html>. Date accessed: 6 April 2009. *Also see* Jorge R. Coquia, 'Legal and Economic Aspects of the Philippine Implementation of the UN Convention on the Law of the Sea' (1995) *The Lawyer's Review* 9 at 11.

⁵⁶ For example, the provision on the limit of the maximum breadth of the territorial sea, Article 3 in relation to Article 48, LOSC. According to Senator Santiago, "If the Philippines declares itself an archipelagic state, our zone of sovereignty would collapse. Our internal waters would become archipelagic waters where the ships of all states will enjoy the right of innocent passage. In addition, foreign states would have the right of so-called archipelagic sea lane passage. Ships of all states would have the right of passage and their aircraft would have the right of over flight." Online at: <http://www.miriam.com.ph/2008/03/25-march-2008-miriam-charter-bans.html>. Date accessed: 6 April 2009.

⁵⁷ Alberto A. Encomienda, 'Maritime Security and Philippine Foreign Policy: An Overview and National Ocean Diplomacy Agenda' (Paper presented at the National Conference-Workshop on Maritime Security: Problems and Approaches, Manila, Philippines, 2003) at 53.

Conference (UNCLOS III) marked a significant victory for the Philippines.⁵⁸ This was largely due to the efforts of the Philippines and Indonesia who tirelessly campaigned and rallied developing archipelagic States in Southeast Asia towards a regional consensus on the need for the archipelagic principle at UNCLOS III.⁵⁹ Indeed, in many ways, the success of these two former colonies was symbolic of their independence and of their increasing new role in the international community as sovereign States.⁶⁰

Even prior to the LOSC, the Philippines already articulated and fought for the inclusion of the archipelagic doctrine in the First and Second Law of the Sea Conferences without success.⁶¹ As a result of the indifference of the international community to recognise the rights of archipelagic States, the Philippines did not sign

⁵⁸ The LOSC adopted the archipelago principle in Articles 46 – 54 on “Archipelagic States.” For academic literature on the archipelago principle in the LOSC, *please see*: Jorge R. Coquia, ‘Analysis of the Archipelagic Doctrine in the New Convention on the Law of the Sea’ (1982) 8 *Philippine Yearbook of International Law* 24; Jorge R. Coquia, ‘Development of the Archipelagic Doctrine as a Recognized Principle of International Law’ (1983) 58 *Philippine Law Journal* 13; Agim Demirali, ‘The Third United Nations Conference on the Law of the Sea and an Archipelagic Regime’ (1975-1976) 13 *San Diego Law Review* 742; Barry Hart Dubner, *The Law of Territorial Waters of Mid-Ocean Archipelagos and Archipelagic States* (1976); Barry Hart Dubner, ‘A Proposal for Accommodating the Interests of Archipelagic and Maritime States’ (1975-1976) 8 *New York University Journal of International Law and Politics* 39; Vicente B. Foz, ‘Philippines Espouses Archipelagic Principle’ (1973) 2 *Philippine Law Gazette* 3; Charlotte Ku, ‘The Archipelagic States Concept and Regional Stability in Southeast Asia’ (1991) 23 *Case Western Reserve Journal of International Law* 463; Barbara Kwiatkowska, ‘An Evaluation of State Legislation on Archipelagic Waters’ (1990) 6 *World Bulletin* 22; Mohammed Munavvar, *Ocean States: Archipelagic Regimes in the Law of the Sea* (1995); Farhad Talaie, ‘Recognition of a Special Legal Regime for Mid-Ocean Archipelagos and its Implications for the Pacific Rim Region’ (1998) 10 *Pacifica Review* 203.

⁵⁹ Jack A. Draper, ‘The Indonesian Archipelagic State Doctrine and Law of the Sea: “Territorial Grab” or Justifiable Necessity?’ (1977) 11 *International Lawyer* 143; Vicente B. Foz, ‘Philippines Espouses Archipelagic Principle’ (1973) 2 *Philippine Law Gazette* 3; Jose D. Ingles, ‘The Archipelagic Theory’ (1974) 3 *Philippine Yearbook of International Law* 23; Charlotte Ku, ‘The Archipelagic States Concept and Regional Stability in Southeast Asia’ (1991) 23 *Case Western Reserve Journal of International Law* 463; Barbara Kwiatkowska, ‘The Archipelagic Regime in Practice in the Philippines and Indonesia -- Making or Breaking International Law’ (1991) 6 *International Journal of Estuarine and Coastal Law* 1; Barbara Kwiatkowska, ‘An Evaluation of State Legislation on Archipelagic Waters’ (1990) 6 *World Bulletin* 22.

⁶⁰ Charlotte Ku, ‘The Archipelagic States Concept and Regional Stability in Southeast Asia’ (1991) 23 *Case Western Reserve Journal of International Law* 463.

⁶¹ Hiran W. Jayewardene, *The Regime of Islands in International Law*, Publications on Ocean Development (1990) at 131. Robin R. Churchill and Vaughan Lowe, *The Law of the Sea* (1999) at 118-120. R. P. Anand, *Origin and Development of the Law of the Sea* (1983) at 202 – 203.

the four Geneva Conventions on the Law of the Sea of 1958.⁶²

It would not be long before the Philippines will have another international opportunity to articulate its position. In 1968, the UN General Assembly established the Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor beyond the Limits of National Jurisdiction. In 1971 the Philippines was made a member of Sub-Committee II, one of three sub-committees constituted. It is within this new international platform that the Philippines found a stronger voice compared to the previous two Law of the Sea Conferences.⁶³ It was in Sub-Committee II that Estelito Mendoza, then Philippine Solicitor General, argued that the 7,000 islands of the Philippine archipelago should be treated as one whole unit. In his words:

More than seven thousand islands comprise the Philippines, ruled by one unitary government bound by a common heritage, beholden to the same traditions, pursuing the same ideals, interdependent and united politically, economically and socially as a nation. To suggest that each island has its own territorial sea and that baselines must be drawn around each island is to splinter into 7,000 pieces what is a single nation and a united state. One need only to imagine a map of the Philippines with territorial seas around each island and with pockets of high seas in between islands to realize the absurdity of the resulting situation. Depending on the breadth of the territorial sea that may emerge, such pockets of high seas in the very heart of the country may be such small areas of no more than 5 or 10 or 15 square miles. And yet, on account of this, on the pretext of going to those pockets of high seas, any vessel may intrude into the middle of our country, between, for example, the islands of Bohol and Camiguin which from shore to shore are separated by no more than 29 miles.⁶⁴

⁶² Jorge R. Coquia, 'Development of the Archipelagic Doctrine as a Recognized Principle of International Law' (1983) 58 *Philippine Law Journal* 13 at 17. In 1956, the United Nations held its first Conference on the Law of the Sea (UNCLOS I) at Geneva, Switzerland. UNCLOS I resulted in four treaties concluded in 1958: (1) *Convention on the Territorial Sea and Contiguous Zone*, U.N. Doc. A/Conf.13/52, entry into force: 10 September 1964; (2) *Convention on the Continental Shelf*, U.N. Doc. A/Conf.13/L55, entry into force: 10 June 1964; (3) *Convention on the High Seas*, U.N. Doc. A/Conf.13/L.53, entry into force: 30 September 1962; and (4) *Convention on Fishing and Conservation of Living Resources of the High Seas*, U.N. Doc. A/Conf.13/L.54 entry into force: 20 March 1966.

⁶³ *Id* at 19.

⁶⁴ Jorge R. Coquia, *Selected Essays on the Law of the Sea* (1982) at 6.

It is thus clear that the principal reason behind the adoption of the archipelagic doctrine is the unity of land, water and people into a single entity. In the words of the Head of the Philippine Delegation, Ambassador Arturo M. Tolentino:

The archipelagic concept finds its justification in the relationship between the land, the water and the people inhabiting the islands of the archipelago. It is for the purpose of achieving, maintaining and preserving this unity that we conceive of an archipelagic State as one whose component islands and other natural features form an intrinsic geographical, economic and political entity, and historically have been regarded as such.⁶⁵

The Philippines' international campaign for the adoption of the archipelagic principle was met with both support and opposition by States. The States of Africa and Latin America supported the archipelagic principle. This included endorsements from the Organization of African Unity, Latin American States Ecuador, Panama and Peru and the Asian African Legal Consultative Committee.⁶⁶ Expectedly, the maritime powers led by the United States, were the greatest opponents of the principle. They argued strongly against the idea of enclosing substantial areas of the seas by according them archipelagic status and thereby hampering the passage of the vessels of the maritime powers.⁶⁷ The maritime powers, however, were not entirely opposed to the idea. The

⁶⁵ Statement of Ambassador Arturo Tolentino, Head of the Philippine Delegation, at New York on 15 March 1973 before Sub-Committee II of the Sea-bed Committee.

⁶⁶ Jorge R. Coquia, 'Development of the Archipelagic Doctrine as a Recognized Principle of International Law' (1983) 58 *Philippine Law Journal* 13 at 21-25.

⁶⁷ The LOSC permits archipelagic States to suspend innocent passage through archipelagic waters temporarily and only after due publication if such suspension is essential for the protection of its security. Article 52, LOSC. One such instance occurred in 1988 when Indonesia suspended passage over two straits used for international navigation. The United States, in response to the 1988 Indonesian closure of the straits of Lombok and Sunda, emphatically protests:

No nation may, consistent with international law, prohibit passage of foreign vessels or aircraft or act in any manner that interferes with straits transit or archipelagic sea lanes passage. ... While it is perfectly reasonable for an archipelagic state to conduct naval exercises in its straits, it may not carry out those exercises in a way that closes the straits, either expressly or constructively, that creates a threat to the safety of users of the straits, or that hampers the right of navigation and overflight through the straits or archipelagic lanes.

Marian Nash Leich, 'Contemporary Practice of the United States Relating to International Law' (1989) 83 *American Journal of International Law* 558 at 560. For a discussion of navigational issues in Philippine waters, *please see*, Lowell B. Bautista, 'International legal implications of the Philippine

LOSC, which was arrived at using a consensus approach, provided the appropriate venue which struck the balance between the interests of the archipelagic States and the maritime powers.⁶⁸ The codification of the archipelagic concept alone in the LOSC is no small feat.⁶⁹

2.4. The Cession of the Philippines from Spain to the United States

The Philippines was a colony of Spain before it was ceded to the United States in the Treaty of Paris. This section will trace and discuss the transfers of sovereignty and title over the Philippine archipelago from Spain to the United States, and then from the United States to the current (2010) Philippine government after it gained its independence; as well the issues with respect to such succession of titles.

2.4.1. State Succession in International Law

In international law, “[w]hen one State takes the place of another and undertakes a permanent exercise of its sovereign territorial rights or powers, there is said to be a succession of States.”⁷⁰ In most instances, State succession entails the loss or

Treaty Limits on navigational rights in Philippine waters’ (2009) 1(3) *Australian Journal of Maritime and Ocean Affairs* 88.

⁶⁸ James C. F. Wang, *Handbook on Ocean Politics & Law* (1992) at 48, who notes that “archipelagic states acquiesced to demands from the world’s major maritime powers for a guarantee of traditional navigational and air routes rights.” These include, *inter alia*, innocent passage through archipelagic waters and international straits; and the recognition of traditional fishing rights and other existing agreements, including existing submarine cables through archipelagic waters. *See for example*, Articles 51, 52, 53 (paragraphs 2 to 3, and 11), and 54, LOSC.

⁶⁹ Farhad Talaie, *Analysis of the Rules of the International Law of the Sea Governing the Delimitation of Maritime Areas under National Sovereignty* (PhD Thesis, University of Wollongong, 1998) at 235 - 238.

⁷⁰ Amos S. Hershey, ‘The Succession of States’ (1911) 5 *American Journal of International Law* 285. *See also* J. Mervyn Jones, ‘State Succession in the Matter of Treaties’ (1947) 24 *British Yearbook of*

acquisition of territory.⁷¹ International law recognises five traditional modes of territory acquisition: (1) cession, (2) occupation, (3) accretion, (4) conquest or subjugation, and (5) prescription.⁷² In most cases, there is more than one mode of territorial acquisition because the modes may be inextricably linked.⁷³

The legitimacy of a territorial acquisition is a complex issue in international law.⁷⁴ Sometimes, similar to the case at hand, the basic point of inquiry is when the territorial acquisition took place. For instance, while annexation, or “discovery,” was historically a permissible mode of acquiring title to territory, it is now regarded as illegitimate.⁷⁵ The UN Charter prohibits the threat or use of force against the territorial integrity or political independence of any State.⁷⁶ Over the course of time,

International Law 360 differentiating between succession *in fact*, when one state follows another in possession of territory; and succession *in law*, or the succession of an heir to the deceased. The *Vienna Convention on Succession of States in respect of Treaties*, in Article 2(b) defines “succession of States” as “the replacement of one State by another in the responsibility for the international relations of territory.” *Vienna Convention on Succession of States in respect of Treaties*, opened for signature 23 August 1978, 1946 UNTS 3; 17 ILM 1488 (1978); 72 AJIL 971 (1978) (entered into force 6 November 1996).

⁷¹ Rein Mullerson, ‘Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia’ (1993) 42 *International and Comparative Law Quarterly* 473 at 475; James Crawford, *The Creation of States in International Law* (1979) at 400.

⁷² Robert Y. Jennings, *The Acquisition of Territory in International Law* (1963) at 16 -28. Ian Brownlie, *Principles of Public International Law* (1990) at 131.

⁷³ Randall Lesaffer, ‘Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription’ (2005) 16(1) *The European Journal of International Law* 25 at 39.

⁷⁴ Sean Fern, ‘Tokdo or Takeshima? The International Law of Territorial Acquisition in the Japan-Korea Island Dispute’ (2005) 5 *Stanford Journal of East Asian Affairs* 78 at 81.

⁷⁵ Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (1996) at 209 – 212.

⁷⁶ Compare United Nations Charter, opened for signature 26 June 1945, 59 Stat. 1031; TS 993; 3 Bevens 1153 (entered into force 24 October 1945), Article 2 para. 4, and Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, G.A. Res. 2625, at 121, U.N. GAOR, 25th Sess., 1883d plen. mtg., U.N. Doc. A/8028 (14 October 1970), (providing that “the territory of a State shall not be the object of acquisition by another State resulting from the threat of use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal”), with Stephen M. Schwebel, ‘What Weight to Conquest?’ (1970) 64 *American Journal of International Law* 344 at 345 differentiating between aggressive and defensive conquest.

the prohibition on the use of force has also become customary international law.⁷⁷

In practical terms, this means that the creation of new States in violation of this peremptory norm is illegal—*ex iniuria ius non oritur*: right can not grow out of injustice.⁷⁸ Clearly, a treaty of cession is void if it arises out of an act of annexation procured by the threat or use of force in violation of the UN Charter.⁷⁹ The cession of State territory is the peaceful transfer of ownership to another State.⁸⁰ According to Jennings, the cession of a territory involves the renunciation made by one State in favour of another of the rights and title which the former may have to the territory in question which is usually affected by a treaty of cession expressing agreement to the transfer.⁸¹

Although by today's standards the 1898 annexation of the Philippines by the United States was unlawful, it does not follow that the United States claims of sovereignty

⁷⁷ Article 2(4), UN Charter. For academic literature on the use of force in international law, *see*: Olivier Corten, 'The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate' (2005) 16 *European Journal of International Law* 803; Ian Brownlie, *International Law and the Use of Force by States* (1963); Anthony C. Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (1993); Thomas Ehrlich and Mary Ellen O'Connell, *International Law and the Use of Force* (1993); Christine D. Gray, *International Law and the Use of Force* (2000); Mary Ellen O'Connell, *International Law and the Use of Force: Cases and Materials* (2005).

⁷⁸ Such a principle has been recognised in following cases: Case of the Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), 1932 P.C.I.J. (ser. A/B) No. 46 (Mar. 29); Case Concerning the Legal Status of the South-Eastern Territory of Greenland (Nor. v. Den.), 1932 P.C.I.J. (ser. A/B) No. 48, at 277 (Aug. 3); Jurisdiction of the Courts of Danzig, Advisory Opinion (Danzig v. Pol.), 1928 P.C.I.J. (ser. B) No. 15, at 5 (Mar. 3); Legal Status of Eastern Greenland Dissenting Opinion (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 75 (Apr. 5).

⁷⁹ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980), Article 52, stating that "a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations," and Article 53, stating that "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. . . ."

⁸⁰ Jennings, *supra* note 72, at 16.

⁸¹ *Id.*

are unfounded.⁸² Under the doctrine of inter-temporal law, “a juridical fact must be appreciated in light of the law contemporary with it, and not the law in force at the time when a dispute in regard to it arises or fails to be settled.”⁸³ Thus, the legality of any act should be determined in accordance with the law of the time the act was committed, and not by reference to law as it might have become at a later date.⁸⁴ However, the legality of the annexation of the Philippines must also be differentiated from the legal personality or capacity of the United States to enter into an international agreement with Spain in respect of and on behalf of the Philippines.⁸⁵ In any case, suffice it to say that both Spain and the United States possessed the requisite legal personality or capacity to enter into treaties regarding the Philippines.⁸⁶

⁸² Carman F. Randolph, ‘Constitutional Aspects of Annexation’ (1898) 12 *Harvard Law Review* 291 at 304 – 315.

⁸³ *Island of Palmas*, (Neth. v. U.S.), 2 R. Int’l Arb. Awards 829 (Perm. Ct. Arb. 1928) at 839. See T. O. Elias, ‘The Doctrine of Intertemporal Law’ (1980) 74 *American Journal of International Law* 285 at 305 -307; R. Y. Jennings and Arthur Sir Watts, *Oppenheim’s International Law* (1997) at 1281-1282 discussing that “juridical fact must be appreciated in the light of the law contemporary with it. Similarly, a treaty’s terms are normally to be interpreted on the basis of their meaning at the time that the treaty was concluded, and in the light of circumstances then prevailing.”

⁸⁴ This is enshrined in the legal principle universally accepted in all modern democracies called *nulla poena sine lege*, which literally means, “no penalty without a law.” One cannot be penalized for doing something that is not prohibited by law, nor can penal laws be applied retroactively. Jerome Hall, ‘Nulla Poena Sine Lege’ (1937) 47(4) *Yale Law Journal* 165.

⁸⁵ This is a particularly complex issue and will not be dealt here. The right of States to resort to war was regarded as an inalienable part of their sovereignty in the nineteenth century. International law merely regulated what is admissible behaviour in the act of war (*jus in bello*) and not the question of whether entering into war is justifiable (*jus ad bellum*). The principles of peace and non-aggression and restrictions on the use of force and war proclaimed in the United Nations Charter came much later and only in the aftermath of World War II. For further reading, please see: Ian Brownlie, *International Law and the Use of Force by States* (1963); Yoram Dinstein, *War, Aggression, and Self-Defence* (2005); Christine D. Gray, *International Law and the Use of Force* (2000); Myres S. McDougal and Florentino P. Feliciano, *The International Law of War* (1994).

⁸⁶ This issue is particularly relevant with respect to the issue of succession to treaties. In this instance, since both the treaties and the succession in question took place before the entry into force of the *Vienna Convention on Succession of States in respect of Treaties* (which came into force in 1996), rules of customary international law would apply. See, Article 7, *Vienna Convention on Succession of States in respect of Treaties*. Otherwise, Article 11 of the same Convention would apply. See also, Article 62(2), *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969) (entered into force 27 January 1980), which stipulates that a fundamental change in circumstances may not be invoked as a ground for terminating or withdrawing from a treaty that establishes a boundary.

2.4.2. The Spanish Title over the Philippine Archipelago

In 1521, Spain claimed dominion over the Philippine archipelago on the basis of discovery, after Ferdinand Magellan landed in the Philippines and claimed it for Spain.⁸⁷ Discovery was then a valid mode of territorial acquisition.⁸⁸ In 1565, the first permanent Spanish settlement was established by Miguel López de Legazpi.⁸⁹ Legazpi was later appointed Governor-General and Manila was made capital in 1571.⁹⁰

Spain relinquished her over three centuries of title over the Philippine islands in the aftermath of the Spanish-American War, when the United States emerged as the victor.⁹¹ The Treaty of Peace⁹² was signed in Paris on 10 December 1898, which

⁸⁷ See Antonio Pigafetta, *Magellan's Voyage: A Narrative Account of the First Navigation* (1975) (R.A. Skelton trans., 1975), providing an eye-witness account of Magellan's expedition.

⁸⁸ Surya P. Sharma, *Territorial Acquisition, Disputes and International Law* (1997) at 40. Sharma opines that although discovery as a mode of acquisition of territorial rights was acknowledged during the fifteenth and sixteenth century by eminent writers on the law of nations like Vitoria, Freitas and Suarez it stood on shaky grounds as a source of title. Discovery as a mode of acquisition failed to receive the approval of reputed jurists such as Hugo Grotius, Pufendorf, and was contrary to state practice and the Roman Law, the source from which rules of international law were deduced. Sharma adds that since the discovery doctrine could not stand independently, it was accorded at most an inchoate title which needed to be perfected by some other evidence; see also Friedrich August Freiherr von der Heydte, 'Discovery, Symbolic Annexation and Virtual Effectiveness in International Law' (1935) 29 *American Journal of International Law* 448 at 452; Conrado Benitez, *History of the Philippines: Economic, Social, Cultural, Political* (1954) at 20.

⁸⁹ Agoncillo, *supra* note 1, at 83 (discussing the Cebu settlement on an island in Southern Philippines originally named *San Miguel*, later renamed *Santisimo Nombre de Jesus*).

⁹⁰ The Filipino Nation, *supra* note 3, at 37 (recording that Legazpi declared Manila a city on June 3, 1571 and proceeded to organize a municipal government).

⁹¹ Henry Arthur Francis Kamen, *Empire: How Spain Became a World Power 1492 -1763* (2003) at 197. See, *Eastern Green Land Case* (Den. v Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 47 (Apr. 1933) (declaring "conquest . . . operates as a cause of loss of sovereignty when there is war between two States and by reason of the defeat of one of them sovereignty passes from the loser to the victorious State"); Agoncillo, *supra* note 1, at 251.

⁹² Though originally titled Treaty of Peace, this treaty is now referred to as the Treaty of Paris in most literature. Treaty of Paris, *supra*, note 34.

ceded the archipelago to the United States.⁹³

As noted earlier in the chapter, prior to the cession, the Philippines had already declared independence from Spain on 12 June 1898.⁹⁴ During the last months of 1898, when the Treaty of Paris was negotiated, Filipinos sought sovereignty with legal and historical arguments and declared that the cession to the United States was illegitimate.⁹⁵ By August 1898, the Filipinos possessed most of their country, except for Manila and its surrounding areas.⁹⁶

Thus, the crucial question is: Was the cession of the Philippine archipelago valid under international law? Obviously, absent an established title, Spain cannot be said to have ceded whatever title it did not possess to the United States. In this respect, the rather confused “chains of title” successively or jointly invoked by the United States do not matter: no title, no “cession.”⁹⁷ Whether in 1898 or 1900 through treaties with the United States, or in 1930 through treaty with the United Kingdom, Spain could not have transferred more territorial rights than it actually possessed.

In 1898, at the time Spain ceded its sovereign rights of the Philippine archipelago to the United States, the prevailing international law theory was that an area inhabited by people not “permanently united for political action was deemed *territorium*

⁹³ Joseph Smith, *The Spanish-American War: Conflict in the Caribbean and the Pacific, 1895 -1902* (1995).

⁹⁴ Agoncillo, *supra* note 1, at 240, 568.

⁹⁵ Arthur Judson Brown, *The New Era in the Philippines* (1903) at 21.

⁹⁶ Peter W. Stanley, *A Nation in the Making: The Philippines and the United States, 1899-1921* (1974) at 51.

⁹⁷ Georg Schwarzenberger, ‘Title to Territory: Response to a Challenge’ (1957) 51 *American Journal of International Law* 308; J.G. Starke, ‘The Acquisition of Title to Territory by Newly Emerged States’ (1965-1966) 41 *British Yearbook of International Law* 411.

nullius (empty territory).”⁹⁸ It was widely acknowledged that a claim grounded on *territorium nullius* was binding over foreign powers. The two foreign powers simply ignored the fact that Spain never fully exercised control over the entire archipelago.⁹⁹ During the transfer of the Philippines, the parties did not obtain the native inhabitants’ consent, thus rendering their consent immaterial to the validity of the treaty.¹⁰⁰ Even if its title was challenged, the United States could rely on the international character of the cession of Philippines territory from Spain.¹⁰¹ First, Spain’s claim of title rests on the theory of *territorium nullius*.¹⁰² Second, the massive military victories of the United States over the nativist resistance allow the United States to claim legal title on the basis of conquest.¹⁰³ However, there was no need to raise these alternative theories; “[i]t was simply assumed, without question, that the Spanish cession was valid and that it applied to all parts of the colony.”¹⁰⁴

⁹⁸ Owen J. Lynch, Jr., ‘The Legal Bases of Philippine Colonial Sovereignty: An Inquiry’ (1987) 62 *Philippine Law Journal* 279 at 293 citing Mark Frank Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926) at 80; Gordon Bennett, *Aboriginal Rights in International Law* (1978) at 5.

⁹⁹ Cesar Adib Majul, *Muslims in the Philippines* (1973) at 290-308, discussing international recognition of Spanish sovereignty over the Sulu Sultanate as problematic with respect to the British and German governments.

¹⁰⁰ Agoncillo, *supra* note 1, at 256.

¹⁰¹ D. H. N. Johnson, ‘Consolidation as a Root of Title in International Law’ (1955) 1955 *Cambridge Law Journal* 215 at 215-256.

¹⁰² See, Sharma, *supra* note 88, at 45-46; Benjamin Obi Nwabueze, ‘A Constitutional History of Nigeria’ (1982) at 1.

¹⁰³ It must be clarified that, at that time, it was a legal requirement in international law to obtain the consent of the inhabitants of the territories to be annexed. As noted by Korman, “It was Grotius’ view that the rights of the conqueror over the conquered were, in his own time (the early seventeenth century), absolute and unlimited.” Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (1996) at 29, 7-12; Stephane Beaulac, ‘Vattel’s Doctrine on Territory Transfers in International Law and the Cession of Louisiana to the United States of America’ (2002-2003) 63 *Louisiana Law Review* 1327 at 1342.

¹⁰⁴ Lynch, *supra* note 98, at 293.

2.4.3. The American Title over the Philippine Archipelago

The United States bases its title to the Philippine archipelago on Spain's title, which was based on discovery, and the subsequent cession of the Philippines to the United States pursuant to the Treaty of Paris. This assumes that Spain had sovereignty over the Philippines until the Spanish-American War, enabling the cession.

The United States, however, was hardly concerned about the validity of its title over the Philippines islands.¹⁰⁵ After all, it was the era of American imperialist expansion, and the Philippines constituted a strategic possession in America's growing empire.¹⁰⁶ The Philippines was regarded as the "*el dorado* of the Orient."¹⁰⁷ It was seen as a source for vital raw materials, a market for American goods, a strategic naval base, and as Spain had done nearly three and one-half centuries earlier, an essential commercial trading post to China.¹⁰⁸ A series of recurrent economic crises exacerbated the need for new spiritual and commercial frontiers to replace an

¹⁰⁵ Antonio M. Molina, *The Philippines Through the Centuries* (1960), Volume II, at 199. Of course, from a domestic legal and constitutional perspective, the United States is convinced that it possessed the right to engage in wars for the acquisition of territory. In the words of Lebbeus R. Wilfey, 'The Legal Status of the Philippines - As Fixed by the Recent Decision of the Supreme Court in the Jury Trial Cases' (1904-1905) 14 *Yale Law Journal* 266 at 276:

The Constitution of the United States confers absolutely upon the government of the Union the power of making war and of making treaties, and the power of acquiring territory, either by conquest or treaty. The decisions of the Supreme Court from the days of Chief Justice Marshall to the present time leave no room for doubt that, under the Constitution, the government of the United States, by virtue of its sovereignty, has the full right to acquire territory enjoyed by every other sovereign nation.

¹⁰⁶ Paul Alexander Kramer, *The Blood of Government: Race, Empire, the United States, & the Philippines* (2006) at 82-84; Max Boot, *The Savage Wars of Peace: Small Wars and the Rise of American Power* (2002) at 105.

¹⁰⁷ Murat Halstead, *The Story of the Philippines and Our New Possessions* (1898) at 92.

¹⁰⁸ Thomas J. McCormick, 'Insular Possessions for the China Market' in Thomas G. Paterson and Stephen G. Rabe (eds), *Imperial Surge: The United States Abroad, the 1890s-Early 1900s*, Problems in American Civilization (1992) 56.

exhausted continental frontier and a saturated home market.¹⁰⁹ To many, the nation's future prosperity hinged on the outcome of the acquisition of the Philippines.

The Spanish-American War signalled the demise of the Spanish Empire and heralded the entry of the United States as a global power.¹¹⁰ The United States proudly brandished its democratic ideals and waged war against despotic Spain under the guise of its alleged commitment to democratic ideals and to the principle of self-determination.¹¹¹ Soon enough, it was clear that despite all promises to the contrary, the United States had no intention of granting independence to its new possession.¹¹² The Philippines realised its liberator was just another coloniser.

After it was granted independence in 1946,¹¹³ “the Philippine State succeeded to the rights of sovereignty exercised by the United States over the territory occupied by the Philippine Archipelago.”¹¹⁴ It was only a case of partial succession with respect to governments since the United States, the predecessor State, did not go out of existence but was merely dispossessed of the sovereign power it exercised over the

¹⁰⁹ Walter Lafeber, ‘The Need for Foreign Markets’ in J. Rogers Hollingsworth (ed), *American Expansion in the Late Nineteenth Century: Colonialist or Anticolonialist?* (1968) 41.

¹¹⁰ Joseph Smith, *The Spanish-American War: Conflict in the Caribbean and the Pacific, 1895 -1902* (1995) at 226.

¹¹¹ Michael H. Hunt, ‘American Ideology: Visions of National Greatness and Racism’ in Thomas G. Paterson and Stephen G. Rabe (eds), *Imperial Surge: The United States Abroad, the 1890s-Early 1900s*, Problems in American Civilization (1992) 14.

¹¹² Frank Hindman Golay, *Face of Empire: United States-Philippine Relations, 1898 – 1946* (1997) at 47.

¹¹³ The grant of independence is provided for in Public Act No. 127, 24 March 1934, 48 U.S. Stat. 456; as amended by Public Act No. 300, 7 August 1939, 53 U.S. Stat. 226. *See also*, Tydings-Mcduffie Act., Public Act No. 73-127, 24 March 1934, 48 U.S. Stat. 456.

¹¹⁴ Irene R. Cortes and Raphael Perpetuo M. Lotilla, ‘Nationality and International Law from the Philippine Perspective’ in Swan Sik Ko (ed), *Nationality and International Law in Asian Perspective* (1990) 335 at 402.

Philippine territory.¹¹⁵ Cortes and Lotilla note that:

The exercise by the United States of sovereign powers over the Philippine Islands was recognized by the rest of the international community. Hence, no serious questions have been raised regarding the competence of the United States to transfer its right of sovereignty over the Philippine territory and its inhabitants to an independent Philippine State.¹¹⁶

This recognition of the newly-independent Philippine State included the recognition of the territorial boundaries it succeeded from the United States, which the latter succeeded to from Spain. The following section will discuss in greater detail these colonial treaties which define the Philippine Treaty Limits.

2.5. Treaties Defining the Philippine Treaty Limits

The Philippines traces its current boundaries from the same territory ceded by Spain to the United States in 1898, which refers to the territory enclosed by the Treaty Limits as defined by the colonial treaties which will discussed in this section.

2.5.1. The Treaty of Paris of 1898

The ratification of the Treaty of Paris of 1898 was significant to United States foreign policy for three reasons. First, the treaty marked the end of the Spanish-American War.¹¹⁷ Second, it gave the United States control over Puerto Rico, Guam,

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ See R. A. Alger, *The Spanish-American War* (1901); Elbert J. Benton, *International Law and Diplomacy of the Spanish-American War* (1968); Richard H. Titherington, *A History of the Spanish-American War of 1898* (1900).

and the Philippines.¹¹⁸ The annexation of the Philippines, with the exception of Hawaii, marked the first extension of United States territorial sovereignty beyond the hemispheric limits of North America.¹¹⁹ Third, the treaty signalled the entry of the United States into the theatre of Asian power politics and into the race for global supremacy.¹²⁰

The destruction of the USS *Maine* in Havana Harbor on 15 February 1898 was a critical event in the Spanish-American War.¹²¹ Following the destruction, the United States declared war on Spain on 19 April 1898.¹²² It was the first war waged by America beyond its continental boundaries. The Spanish-American War was a global war which involved the Philippines, Guam, Puerto Rico, and Cuba. On 12 August 1898, President McKinley issued a proclamation suspending all hostilities.¹²³ After six months of hostilities, commissioners from the United States and Spain met in Paris on 1 October 1898 to end the war. However, the Philippines was not

¹¹⁸ Ivan Musicant, *Empire by Default: The Spanish American War and the Dawn of the American Century* (1998) at 626.

¹¹⁹ Irene Elwonger Newton, *The Treaty of Paris of 1898* (PhD Thesis, University of California, 1927).

¹²⁰ Robert E. Hannigan, *The New World Power: American Foreign Policy, 1898-1917* (2002) at 97.

¹²¹ The sinking of the *Maine* has been an area of great speculation. Four major investigations (two Naval Courts of Inquiry in 1898 and 1911 and two major private investigations commissioned by Admiral Hyman G. Rickover in 1976 and the National Geographic Society in 1999) were conducted to find the actual cause of the sinking of the *Maine*. These investigations yielded different conclusions. See Thomas B. Allen, 'Remember the Maine?' (1998) 193 *National Geographic* 92; Thomas B. Allen, 'A Special Report: What Really Sank the Maine?' (1998) 11 *Naval History* 30; Michael Blow, 'A Ship to Remember: The Maine and the Spanish-American War' (1992); Hyman George Rickover, *How the Battleship Maine was Destroyed* (1976).

¹²² For materials on the diplomacy and causes of the war, see James C Bradford (ed), *Crucible of Empire: The Spanish-American War and Its Aftermath* (1993); Lewis L. Gould, 'The Spanish-American War and President McKinley' (1982); Ernest R. May, *Imperial Democracy: The Emergence of America as a Great Power* (1961); Walter Millis, *The Martial Spirit: A Study of Our War with Spain* (1931); H. Wayne Morgan, *America's Road to Empire: The War with Spain and Overseas Expansion* (1965); John L. Offner, 'McKinley and the Spanish-American War' (2004) 34 *Presidential Studies Quarterly* 50; John L. Offner, *An Unwanted War: The Diplomacy of the United States and Spain over Cuba, 1895-1898* (1992); Julius W. Pratt, *The Expansionists of 1898* (1936); Thomas Schoonover, *Uncle Sam's War of 1898 and the Origins of Globalization* (2006); John Lawrence Tone, *War and Genocide in Cuba, 1895-1898* (2006).

¹²³ Honesto A. Villanueva, 'Diplomacy of the Spanish-American War, Chapter III' (1949) 14(2) *Philippine Social Sciences and Humanities Review* 429 at 467.

represented in Paris.¹²⁴

The Treaty of Paris transferred sovereignty over the Philippines from Spain to the United States upon payment of twenty million dollars (\$20,000,000) within three months after treaty ratification.¹²⁵ Some commentators viewed the United States as purchasing the Philippines from Spain. As one American senator put it, the United States “purchased the Filipinos at \$2.00 per head.”¹²⁶

The territorial limits of the Philippine Islands were defined in Article III of the Treaty of Paris. Drawn on a map, the coordinates in Article III of the Treaty of Paris represent the Philippine Treaty Limits. (Figure 6) This article of cession is the most contentious and problematic aspect of the Treaty of Paris.¹²⁷ Although the boundaries proposal made by the American commissioners was adopted almost exactly as they had proposed during the Paris Peace Conference,¹²⁸ the United States now contests these boundaries.¹²⁹

After the Treaty of Paris was signed in December 1898, the treaty required

¹²⁴ The American-Paris Commission consisted of William R. Day, Sen. Cushman K. Davis, Sen. William P. Frye, Sen. George Gray, and the Honorable Whitelaw Reid. The Queen Regent of Spain appointed the following to compose the Spanish Paris commission: Don Eugenio Montero Rios, Don Buenaventura de Abarzuza, Don Jose de Garnica y Diaz, Don Wenceslao Ramirez de VillaUrrutia, and Don Rafael Cerero y Saens. See Treaty of Paris, *supra* note 34, at Preamble; Agoncillo, *supra* note 1, at 251.

¹²⁵ Treaty of Paris, *supra* note 34.

¹²⁶ The Filipino Nation, *supra* note 3, at 109. See also, Leon Wolff, *Little Brown Brother: How the United States Purchased and Pacified the Philippine Islands at the Century's Turn* (1961).

¹²⁷ The interpretation of this Article will be discussed in Chapter 4 of this Thesis, in Section 4.2.1.

¹²⁸ Protocol No. 11 of the U.S. Delegation, Conference of October 31, 1898; see James A. Le Roy, *The Americans in the Philippines: a History of the Conquest and First Years of Occupation, with an Introductory Account of the Spanish Rule* (1970) at 374.

¹²⁹ J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive Maritime Claims* (1996) at 157. This will be discussed in Chapter 4 of this Thesis, in Section 4.2.1.1.

ratification by at least a two-thirds majority of the United States Senate. The President of the United States, with no attempt to influence the opinion of the body, transmitted the treaty to the United States Senate on 4 January 1899 with a brief message: "I transmit herewith, with a view to its ratification, a treaty of peace between the United States and Spain, signed at the city of Paris, on 10 December 1898; together with the protocols and papers indicated in the list accompanying the report of the Secretary of State."¹³⁰

The heated and highly emotional debate regarding the ratification of the treaty polarized the Senate and even the entire nation as citizens questioned United States imperialism and the nation's future role in Cuba and the Philippines.¹³¹ The treaty was approved on 6 February 1899 by a vote of fifty-seven to twenty-seven, only one vote more than the two-thirds majority required.¹³² The Spanish legislature refused to submit the treaty for ratification, but Queen Regent Christina ratified it on 19 March 1899.¹³³ After the formal exchange of ratifications, the treaty went into force.¹³⁴ In accordance with the treaty, Spain gave up all rights to Cuba and its possessions in the West Indies and surrendered Puerto Rico, the islands of Guam, and the Philippines to the United States.¹³⁵ This marked the end of the Spanish Empire in America and, for

¹³⁰ United States Foreign Relations, 1898 at 906.

¹³¹ Fred H. Harrington, 'The Anti-Imperialist Movement in the United States, 1898-1900' (1935) 22 *Mississippi Valley Historical Review* 211; Christopher Lasch, 'The Anti-Imperialists and the Inequality of Men' in J. Rogers Hollingsworth (ed), *American Expansion in the Late Nineteenth Century: Colonialist or Anticolonialist?* (1968) 89.

¹³² Honesto A. Villanueva, 'Diplomacy of the Spanish-American War, Chapter VI' (1950) 15(2) *Philippine Social Sciences and Humanities Review* 305 at 319.

¹³³ *Id.* at 329 (citing *Diario de las Sesiones de Cortes-Senado Legislatura de 1899* [Diary of the Cortes Senate Legislature Sessions of 1899], I, Apéndice 2.0 al num. 9 (Spain) "Spanish ratification of the treaty, March 19, 1899," in Department of State, Treaty Series 343, Exchange File).

¹³⁴ *Id.* at 319.

¹³⁵ Treaty of Paris, *supra* note 34, at Article V.

the most part, in the Pacific.¹³⁶ The year 1898 marked a turning point in American history, forcing the world to recognise the United States as a great power.¹³⁷

2.5.2. The Cession Treaty of 1900

The acquisition of the Philippines by the United States left some uncertainty on the issue of ownership of some islands which lie outside the lines of the Treaty of Paris. This included two small islands: Sibutu at the extreme southwest of the Sulu group toward Borneo and Kagayan de Sulu, lying northwest of Jolo in the Southern Philippines. The United States and Spain, “desiring to remove any ground of misunderstanding growing out of the interpretation of Article III of the Treaty of Paris,” met in Washington on 7 November 1900 to settle the title to these islands.¹³⁸

The result was the Cession Treaty of 1900 which states:

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 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 included within those lines.¹³⁹

The islands of Sibutu and Cagayan had always formed part of the possessions of the Sulu Sultanate, and the Cession Treaty of 1900 merely consolidated the American

¹³⁶ In accordance with the Treaty of Paris, Spain also gave up all rights to Cuba, Puerto Rico and the island of Guam to the United States. Article I and II, Treaty of Paris. *supra* note 34.

¹³⁷ Joseph Rogers Hollingsworth, *American Expansion in the Late Nineteenth Century: Colonialist or Anticolonialist?* (1968) at 1.

¹³⁸ This treaty is known as the Washington Treaty of 7 November 1900 in Philippine literature. *See* Cession Treaty of 1900, *supra* note 34.

¹³⁹ Cession Treaty of 1900, *supra* note 34.

possessions in the Sulu archipelago by including the said islands.¹⁴⁰ The possession of these islands has been disputed since the middle of the eighteenth century. The dispute continued until the United Kingdom, Germany, and Spain signed a protocol on 7 March 1885, which granted Spain sovereignty over the islands. In return, Spain renounced all claims of sovereignty over any part of Borneo. This included renouncing claims over certain adjoining islands named specifically as well as others comprised within the zone of three marine leagues from coast of Borneo.¹⁴¹ Spain took possession of these islands by this prior specific agreement with the United Kingdom. The later general provisions of the Treaty of Paris in 1898 did not include this territory. The delimitation as stated in Article III of the Treaty of Paris failed to enclose them within the lines drawn around the archipelago. Spain protested against the inclusion of these islands in the ceded territory. It argued that the previous specific particular description of the islands should prevail in law as it overrides the general description in the Treaty of Paris.¹⁴²

The United States contended that because other powers were anxious to secure the two islands, it could not advantageously allow them to pass in to the possession of another State.¹⁴³ In the end, in consideration for Spain's relinquishment, the United States agreed to pay Spain the sum of one hundred thousand dollars (\$100,000) to

¹⁴⁰ Vicente Abad Santos and Charles D. T. Lennhoff, 'The Taganak Island Lighthouse Dispute' (1951) 45 *American Journal of International Law* 680 at 681 citing *Foreign Relations of the United States* 542 (1907).

¹⁴¹ Newton, *supra* note 119, at 222. See also relevant discussion in: R. Haller-Trost, 'The Territorial Dispute between Indonesia and Malaysia over Pulau Sipadan and Pulau Ligitan in the Celebes Sea: A Study in International Law' (1995) 2 *Boundary & Territory Briefing* at 11-12.

¹⁴² Newton, *supra* note 119, at 222.

¹⁴³ During the peace negotiations, Germany had made attempts to secure a foothold in the Sulu group. *Id.*

remove all doubt as to the validity of the title.¹⁴⁴

2.5.3. The Boundaries Treaty of 1930

On 2 January 1930, the United States and the United Kingdom entered into a treaty concerning the boundaries of the Philippines and North Borneo, which was then under the rule of the British.¹⁴⁵ North Borneo, which is now the Malaysian state of Sabah, was then a protectorate of Great Britain even though its administration remained entirely in the hands of the British North Borneo Company.¹⁴⁶

The Boundaries Treaty of 1930 delimits the boundary¹⁴⁷ between the Philippine Archipelago (under United States sovereignty) and the State of North Borneo (under British protection) and clarifies those islands¹⁴⁸ in the region belonging to United States and those to the State of North Borneo. The negotiations between the United States and Great Britain leading up to the conclusion of the Boundaries Treaty solely focused on the status of the Turtle Islands and the Mangsee Islands.¹⁴⁹ When the Boundaries Treaty of 1930 was finalised, an exchange of notes supplemented the

¹⁴⁴ Sole Article, Cession Treaty of 1900, *supra* note 34.

¹⁴⁵ The Boundaries Treaty of 1930, *supra* note 34.

¹⁴⁶ See materials on the history of Sabah: Lela Garner Noble, *Philippine Policy Toward Sabah: A Claim to Independence* (1977); Nicholas Tarling, *Sulu and Sabah: A Study of British Policy Towards the Philippines and North Borneo from the Late Eighteenth Century* (1978); Kennedy G. Tregonning, *North Borneo* (1960); Kennedy G. Tregonning, *A History of Modern Sabah (North Borneo 1881-1963)* (1958); Leigh R. Wright, *The Origins of British Borneo* (1970).

¹⁴⁷ Article I, The Boundaries Treaty of 1930, *supra* note 34.

¹⁴⁸ Article III, The Boundaries Treaty of 1930, *supra* note 34, 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."

¹⁴⁹ Article IV, The Boundaries Treaty of 1930, *supra* note 34.

Treaty.¹⁵⁰ Pursuant to the notes, sovereignty over these islands was transferred to the United States, and it was agreed that Great Britain should continue to administer these islands until the United States gives notice that the administration of the islands be transferred to the United States.¹⁵¹

2.6. Conclusion

This chapter presented the historical context of the Philippine Treaty Limits and territorial waters claim by discussing the colonial treaties that collectively define the territorial boundaries of the Philippines. It provided a brief outline of the development of the Philippines as a nation-State from its pre-colonial origins until it gained its independence. This chapter likewise analysed the Philippine position by providing its geographical extent, and examining it in the context of the country's interpretation of the archipelago concept during the Law of the Sea Conferences. The legal basis of the Philippine Treaty Limits and territorial waters claim will be discussed in the next chapter.

¹⁵⁰ Exchange of Notes Regarding Certain Islands Off the Coast of Borneo, *please see* full texts in: Raphael Perpetuo M. Lotilla (ed), *The Philippine National Territory: A Collection of Related Documents* (1995) at 137-145.

¹⁵¹ Exchange of Notes, The British Ambassador to the Secretary of State, No. 679, 2 January 1930. *Ibid.* at 137; and The Secretary of State to the British Ambassador, 2 January 1930, *Ibid.*, at 139.

Chapter 3

Legal Basis of the Philippine Treaty Limits and Territorial Waters Claim

3.1. Introduction

This chapter discusses the legal bases of the Philippine Treaty Limits and territorial waters claim. This chapter is of three parts. The first part, by way of introduction, discusses the right of a State to define its territory within the constraints imposed under international law. The second part examines the legal bases of the Philippine claim: recognition by treaty; title from cession, devolution of treaty rights, succession to colonial boundaries, and historic title. This chapter merely covers the international legal bases of the Philippine Treaty Limits and territorial waters claim; an evaluation of their legal status in international law will be made in the next succeeding chapter.

This introductory section discusses the international legal norm of territorial integrity and Statehood, and the delimitation of maritime and territorial boundaries to theoretically situate the subsequent discussion on the legal bases of the Philippine position.

3.1.1. The International Legal Norm of Territorial Integrity and Statehood

In contemporary international law, territory is an indispensable constituent of statehood.¹ In the absence of a definite territory, a sovereign State cannot exist.² The

¹ *Montevideo Convention on the Rights and Duties of States*, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934). The convention sets out the definition, rights and duties of Statehood. Article 1 sets out the four criteria for Statehood: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States. *See* James

territorial boundaries of a State are indicative of the geographic limits of its sovereignty.³ The inviolability of international boundaries being a cornerstone of the international system, boundaries perform the vital task of constituting its subjects.⁴ Indeed, international law protects the sovereignty of a State over its territory from violation by other States.⁵

State boundaries being the main manifestation of sovereignty, the issue of boundary delimitation is intricately linked with territorial integrity and sentiments of nationalism.⁶

It is thus not a surprise that disputes over territorial borders stoke intense patriotic

Crawford, *The Creation of States in International Law* (1979); Malcolm N. Shaw, 'The International Law of Territory' (2008); Ian Brownlie, *Principles of Public International Law* (2003) at 105-106.

² P. K. Menon, 'The Acquisition of Territory in International Law: a Traditional Perspective' (1994) 22 *Korean Journal of Comparative Law* 125 at 125; Hersch Lauterpacht, 'Recognition of States in International Law' (1944) 53 *Yale Law Journal* 385 at 412. Surya P. Sharma, *Territorial Acquisition, Disputes and International Law* (1997) at 2, who notes that this requirement "should not be taken to mean that the frontiers of such entity should be precisely fixed beyond dispute before its existence can be recognized." Also see, Malcolm N. Shaw, *International Law* (2003) at 179, who opines that "there is no necessity in international law for defined and settled boundaries" and a State will still be "recognised as a legal person even though it is involved in a dispute with its neighbours as to the precise demarcation of its frontiers..."

³ Tuomas Forsberg, 'The Ground Without Foundation? Territory as a Social Construct' (2003) 8 *Geopolitics* 7 at 13; Alexander B. Murphy, 'National Claims to Territory in the Modern State System: Geographical Considerations' (2002) 7 *Geopolitics* 193 at 195.

⁴ Stuart Elden, 'Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders' (2006) 26 *SAIS Review* 11 at 12- 13; J. Samuel Barkin and Bruce Cronin, 'The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations' (1994) 48 *International Organization* 107 at 110-111; Jean-Marc F. Blanchard, 'Linking Border Disputes and War: An Institutional-Statist Theory' (2005) 10 *Geopolitics* 688 at 691.

⁵ *United Nations Charter*, opened for signature 26 June 1945, 59 Stat. 1031; TS 993; 3 Bevans 1153 (entered into force 24 October 1945). Article 2 of the United Nations Charter provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations." See also *Covenant of the League of Nations*, opened for signature on 28 June 1919, 225 Parry 195; 1 Hudson 1; 112 BFSP 13; 13 AJIL Supp. 128 (1919) (entered into force 10 January 1920), Article 10 stipulating that "[t]he Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League." But see, Shaw, *supra* note 2, at 443, who states that: "The principle of territorial integrity of states is well established However, it does not apply where the territorial dispute centres upon uncertain frontier demarcations."

⁶ David B. Knight, 'Identity and Territory: Geographical Perspectives on Nationalism and Regionalism' (1982) 72 *Annals of the Association of American Geographers* 514; Alexander A. Murphy, 'Historical Justifications for Territorial Claims' (1990) 80 *Annals of the Association of American Geographers* 531.

fervour, which often heightens the possibility of bloodshed and military conflict.⁷ Indeed, history is replete with disputes over boundaries.⁸ This underscores the imperative for clearly-defined territorial and maritime boundaries.⁹ The clear delineation of the limits and extent of a State's territorial jurisdiction is critical to avoid territorial disputes that can escalate into international conflict and possibly lead to war.¹⁰

The extent of a State's territory consists of the unity of its land, water, and air domains.¹¹ The sovereignty of a State is co-extensive with its territorial limits.¹² Within these limits a State exercises supreme authority, including legislative, judicial, and executive competence to the exclusion of other States, as well as the corollary

⁷ John Vasquez and Marie T. Henehan, 'Territorial Disputes and the Probability of War, 1816-1992' (2001) 38(2) *Journal of Peace Research* 123 at 124, 127. Oren Yiftachel, 'Territory as the Kernel of the Nation: Space, Time and Nationalism in Israel/Palestine' (2002) 7 *Geopolitics* 215.

⁸ Paul K. Huth, *Standing your Ground: Territorial Disputes and International Conflict* (1996); Jan Paulsson, 'Boundary Disputes Into the Twenty-First Century' (2001) 95 *American Society of International Law Proceedings* 122; Karen A. Rasler and William R. Thimpson, 'Contested Territory, Strategic Rivalries, and Conflict Escalation' (2006) 50(1) *International Studies Quarterly* 145; Harvey Starr and G. Dale Thomas, 'The Nature of Borders and International Conflict: Revisiting Hypotheses on Territory' (2005) 49(1) *International Studies Quarterly* 123.

⁹ In this chapter and throughout the thesis, the term "territorial boundary" refers to the geographic limits of the sovereignty exercised by a State. This pertains to both land or terrestrial borders, as well as boundaries located on water. For example, for coastal States (as opposed to land-locked States), sovereignty extends to a 12nm belt of territorial sea under the LOSC. The same sovereignty applies to historic bays, and to the archipelagic waters of archipelagic States. Thus, the geographic limits of these bodies of water is a "territorial boundary," and also a "maritime boundary" since they are located on water. The same is true of the Philippine Treaty Limits, which pertains to the extent of the territory being claimed by the Philippines; thus, is a "territorial boundary" and since it is located on water is also a "maritime boundary." In another sense, the term "maritime boundary" as used in this thesis will also be used to refer to the limits of the various maritime jurisdictional zones under the LOSC or to the agreed or adjudicated limits of such overlapping maritime zones between opposite or adjacent States.

¹⁰ David B. Knight, 'The Fine Line Between Peace and War: Reflections Upon McLaren's Neighbours for What it Suggests About the Role of Territory in Conflict' in Clive Schofield et al (eds), *The Razor's Edge: International Boundaries and Political Geography*, International Boundary Studies Series (2002) at 37.

¹¹ Christopher C. Joyner, *International Law in the 21st Century: Rules for Global Governance* (2005) at 43.

¹² *Island of Palmas* (Netherlands v. United States), 2 R. Int'l Arb. Awards 829 (Perm. Ct. Arb. 1928); see also Lea Brilmayer and Natalie Klein, 'Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator' (2000-2001) 33 *New York University Journal of International Law and Politics* 703 at 706.

obligation to refrain from acts of encroachment in foreign territory.¹³ The international legal order functions through the fundamental principle of the right of every State to exercise sovereignty within the limits of its territory.¹⁴ Territorial sovereignty constitutes the very nucleus of contemporary international law.¹⁵

Territorial integrity is a fundamental principle of international legal relations.¹⁶ International law enjoins States from the threat or use of force against the territorial integrity or political independence of any State.¹⁷ The obligation to respect the territorial integrity of a State presupposes the right of national self-determination in the drawing of its boundaries.¹⁸ These boundaries serve the dual function of determining the frontiers of a State's sovereignty and prescribing the limits of permissible encroachment by the international community.¹⁹

¹³ The sole arbitrator in the Island of Palmas case, Max Huber, then President of the Permanent Court of International Justice, declared that "territorial sovereignty involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and war, together with the rights which each State may claim for its nationals in foreign territory." *Island of Palmas*, *supra* note 12, at 839. Robert Gilpin, *War and Change in World Politics* (1981) at 17.

¹⁴ Alexander B. Murphy, 'National Claims to Territory in the Modern State System: Geographical Considerations' (2002) 7 *Geopolitics* 193 at 194.

¹⁵ James Crawford, *The Creation of States in International Law* (1979) at 26. In Ian Brownlie's words, sovereignty constitutes "the basic constitutional doctrine of the law of nations." Ian Brownlie, *Principles of Public International Law* (1990) at 287.

¹⁶ Mark W. Zacher, 'The Territorial Integrity Norm: International Boundaries and the Use of Force' (2001) 55 *International Organization* 215–250 at 221. *See also* Paul K. Huth, 'Territorial Disputes and International Conflict: Empirical Findings and Theoretical Explanations' in Martin Pratt and Janet Allison Brown (eds), *Borderlands Under Stress*, International Boundary Studies Series (2000) 97.

¹⁷ *See* Article 2, *United Nations Charter*; Article 10, *Covenant of the League of Nations*, *supra* note 5.

¹⁸ *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514 (14 December 1960); *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States*, G.A. Res. 2625, at 121, U.N. GAOR, 25th Sess., 1883d plen. mtg., U.N. Doc. A/8028 (14 October 1970); *see also* Article 11, *Vienna Convention on Succession of States in respect of Treaties*, opened for signature 23 August 1978, 1978 UNTS 3, 17 I.L.M. 1488 (entered into force 6 November 1996), noting that "a succession of States does not as such affect: (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary."

¹⁹ Stuart Elden, 'Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders' (2006) 26 *SAIS Review* 11.

However, the notion of State sovereignty as inalienable, full, and absolute currently has become, in a strict Westphalian sense,²⁰ increasingly qualified.²¹ A State's right to exercise sovereignty must be in accordance with recognised principles of international law.²² As a member of the family of nations, a State is bound by principles of both customary and conventional international law in all international matters.²³ However, when it is solely a question of municipal administration *sans* an international dimension, a State should reference only to its constitution, domestic laws, and the conduct of civilised States for guidance and direction.²⁴ International law urges States to uphold "the obligation not to intervene in the affairs of any other State."²⁵ In international law, the preeminence of State territorial sovereignty is directly linked to the duty of nonintervention.²⁶

²⁰ The Westphalian concept of nation-state sovereignty traces its origins to the Peace of Westphalia of 1648, which initiated a new order of states based on territorial integrity. Modernity and interdependence among states along with the blurring of state boundaries in a globalized free trade economy has since eroded and challenged this notion. See Stephane Beaulac, 'The Westphalian Model in Defining International Law: Challenging the Myth' (2004) 8 *Australian Journal of Legal History* 181.

²¹ Martti Koskeniemi, 'The Future of Statehood' (1991) 32 *Harvard International Law Journal* 397; Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (1999). Gene M. Lyons and Michael Mastanduno (eds), *Beyond Westphalia?: State Sovereignty and International Intervention* (1995) at 45.

²² Anthony Carty, *The Decay of International Law?: A Reappraisal of the Limits of Legal Imagination in International Affairs* (1986); Ingrid Detter Delupis, *The International Legal Order* (1994); Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (2005).

²³ I. I. Lukashuk, 'Control in Contemporary International Law' in W.E. Butler (ed), *Control Over Compliance with International Law* (1991) at 5.

²⁴ Hilary Charlesworth (ed), *The Fluid State: International Law and National Legal Systems* (2005) at 16; Ruth D. Masters, *International Law in National Courts: A Study of the Enforcement of International Law in German, Swiss, French, and Belgian Courts* (1968) at 11.

²⁵ *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States*, Preamble, *supra* note 18, at 121.

²⁶ See R. J. Vincent, *Nonintervention and International Order* (1974); Goronwy J. Jones, *The United Nations and the Domestic Jurisdiction of States: Interpretations and Applications of the Non-Intervention Principle* (1979); David Dickens and Guy Wilson-Roberts (eds), *Non-Intervention and State Sovereignty in the Asia-Pacific* (2000).

3.1.2. Delimitation of Maritime and Territorial Boundaries

The delimitation of maritime boundaries is an important issue in international law. The legal regime of maritime boundary delimitation, albeit a relatively modern phenomenon, is one of the most extensively researched fields in international law.²⁷ However, despite the expansive literature, the overwhelming majority of the world's boundaries have yet to be negotiated.²⁸ While States are not obliged to delineate any maritime boundaries, it is essential that the question of the ownership over ocean resources is settled. However, the delineation of maritime territorial claims and zones of national jurisdiction must be acceptable, not only to the negotiating States, but also to the international community. It is thus not a surprise that there is a preponderance of cases adjudicated at the international level involving the delimitation of maritime boundaries.²⁹

However, it must be remembered that the international legal rules and principles governing maritime delimitation distilled from State practice, judicial and arbitral decisions and treaties are formulated at a high level of generality and abstraction. The entire corpus of legal principles on maritime boundary delimitation is at best, mere

²⁷ See for example, John Robert Victor Prescott and Clive Schofield, *The Maritime Political Boundaries of the World* (2005); Ted L. McDorman, Douglas M. Johnston and Kenneth P. Beauchamp, *Maritime Boundary Delimitation: An Annotated Bibliography* (1983); Gerald Blake (ed), *Maritime Boundaries* (1994); Clive H. Schofield et al, *The Razor's Edge: International Boundaries and Political Geography*, International Boundary Studies Series (2002); Nuno Sergio Marques Antunes, *Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process* (2003).

²⁸ Gerald Blake, 'Boundary Disputes' in Michael Pacione (ed), *Applied Geography: Principles and Practice* (1999) 358 at 359. Jan Paulsson, 'Boundary Disputes Into the Twenty-First Century' (2001) 95 *American Society of International Law Proceedings* 122 at 123, who estimates that "some 260 maritime boundaries remain undelimited in the world today."

²⁹ Jonathan I. Charney, 'Ocean Boundaries between Nations: A Theory for Progress' (1984) 78 *American Journal of International Law* 582; Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005); Robert Kolb, *Case Law on Equitable Maritime Delimitation* (2003).

guidelines and not iron-clad rules that apply in any situation.³⁰

3.1.3. Legal Determination of State Boundaries and International Law

The competence of a State to delimit the extent of its maritime and territorial boundaries is undisputed, it being a unilateral act; but the validity of such delimitation with respect to other States is subject to the rules of international law.³¹ Thus, the legal determination of international maritime boundaries must be distinguished from a process by which a *national* maritime boundary is determined. States do not exist in a legal vacuum and the validity of national legislation ends at the national border.³²

In the main, the legal determination of maritime boundaries presupposes a legal title to territory.³³ In this sense, the process of delimitation merely pertains to the drawing of a boundary line of an area appertaining to the coastal State and not the determination *de novo* of such an area.³⁴ When there is a disagreement on a point of law or fact with

³⁰ Phil C. W. Chan, 'Acquiescence/Estoppel in International Boundaries: Temple of Preah Vihear Revisited' (2004) 3 *Chinese Journal of International Law* 421 at 722. Chan states that decisions of international tribunals are binding only *inter partes* and in respect of the particular disputes. *See also*: Article 59, Statute of the International Court of Justice, which states: "The decision of the Court has no binding force except between the parties and in respect of that particular case." Article 296(2), LOSC, which states: "Any such decision shall have no binding force except between the parties and in respect of that particular dispute."

³¹ *Anglo-Norwegian Fisheries Case* (United Kingdom v. Norway), 1951 ICJ Reports 116, 132.

³² Hugh M. Kindred and Phillip M. Saunders (eds), *International Law, Chiefly as Interpreted and Applied in Canada* (1987) at 431, which notes that the authority of the State to regulate conduct within its territory is supreme, subject only to certain limitations imposed under customary international law or by treaty (for example concerning certain diplomatic immunities and particular human rights).

³³ Kenneth P. Beauchamp, 'The Management Function of Ocean Boundaries' (1986) 23 *San Diego Law Review* 611 at 615.

³⁴ Donald W. Gregg, 'Sovereignty, Territory and the International Lawyer's Dilemma' (1988) 26 *Osgoode Hall Law Journal* 127; P. K. Menon, 'The Acquisition of Territory in International Law: a Traditional Perspective' (1994) 22 *Korean Journal of Comparative Law* 125; Georg Schwarzenberger, 'Title to Territory: Response to a Challenge' (1957) 51 *American Journal of International Law* 308; James W. Stillman, 'A New Method of Acquiring Territory' (1898) 10 *The Green Bag* 373. Lewis M. Alexander, 'Baseline Delimitations and Maritime Boundaries' (1982-1983) 23 *Virginia Journal of International Law* 503.

respect to the lines marking the limits of a State's territorial sovereignty, a boundary dispute arises.³⁵ On the other hand, when there is a disagreement with respect to a State's title to a territory, a territorial dispute occurs.³⁶ The former is governed by principles of maritime boundary delimitation³⁷ while the latter is governed by principles of international law relating to the acquisition of territory.³⁸ The issue of the legal status of the Philippine Treaty Limits and territorial waters claim lies at the intersection of these two concepts.

3.2. Legal Basis of the Philippine Treaty Limits and Territorial Waters Claim

The issue of territorial sovereignty, or title, according to Brownlie, "is often complex, and involves the application of various principles of law to the material facts."³⁹ He cautions that in this path of inquiry, the result of which "cannot always be ascribed to any single dominant rule or "mode of acquisition," since "labels are never a substitute for analysis."⁴⁰ In international law, title to territory is commonly rooted in several sources or modalities and frequently relative rather than absolute.⁴¹

³⁵ Please see, Surya P. Sharma, *Territorial Acquisition, Disputes and International Law* (1997) at 21 -29, who draws the distinction between a boundary dispute and a territorial dispute.

³⁶ S. Akweenda, *International Law and the Protection of Namibia's Territorial Integrity: Boundaries and Territorial Claims* (1997) at 5.

³⁷ D. C. Kapoor and Adam J. Kerr, *A Guide to Maritime Boundary Delimitation* (1986) S. P Jagota, *Maritime boundary* (1985) Edward Collins, Jr. and Martin A. Rogoff, 'The International Law of Maritime Boundary Delimitation' (1982) 34 *Maine Law Review* 1.

³⁸ Joshua Castellino and Steve Allen, *Title to Territory in International Law: A Temporal Analysis* (2003) Robert Y. Jennings, *The Acquisition of Territory in International Law* (1963) J.G. Starke, 'The Acquisition of Title to Territory by Newly Emerged States' (1965-1966) 41 *British Yearbook of International Law* 411.

³⁹ Ian Brownlie, *Principles of Public International Law* (2003) at 127.

⁴⁰ *Ibid.* In the words of Shaw, "The problem of how a State actually acquires its own territory in international is a difficult one ..." and "[N]one of the traditional modes of acquisition of territorial title satisfactorily resolves the dilemma..." Shaw, *supra* note 2, at 414.

⁴¹ See for example, the observation of Antunes that: "When affirming that 'in principle [the acquisition of territorial sovereignty] ought not normally to be merely a relative question', the Tribunal appears to depart, exceptionally, from what was until now settled jurisprudence." Nuno Sergio Marques Antunes,

The Philippine title over its Treaty Limits and territorial waters claim rests on the following grounds: recognition by treaty, title from cession, devolution of treaty rights, succession to colonial boundaries and historic title. These legal bases, arising mostly from the same set of historical and legal facts, are interrelated but also independent yet mutually reinforcing sources of Philippine title. This section will analyse each of these grounds.

3.2.1. Recognition by Treaty

The Treaty of Paris is the primary source of Philippine title over the territory enclosed by the Treaty Limits.⁴² In international law, boundary treaties are accorded special status sufficient to “constitute a root of title in themselves.”⁴³ The objective territorial regime that they establish creates binding rights even upon third States, and is valid *erga omnes*.⁴⁴ This exceptional treatment of boundary treaties is rooted in the importance that

‘The Eritrea-Yemen Arbitration: First Stage-The Law of Title to Territory Re-Averred’ (1999) 48 *International and Comparative Law Quarterly* 362 at 375. This is the same issue confronted by the International Court of Justice in the *The Minquiers and Ecrehos Case* where the Court was called upon to “appraise the relative strength of the opposing claims to sovereignty over the Ecrehos in the light of the facts considered...” *The Minquiers and Ecrehos Case* (France v. United Kingdom) Judgment of 17 November 1953: ICJ Reports 1953, p. 47 at p. 67.

⁴² Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.-Spain, 10 December 1898, T.S. No. 343 [Treaty of Paris]. The extent of the Philippine Treaty Limits is further defined in two subsequent confirmation treaties, as discussed in Chapter 2: the Treaty Between the Kingdom of Spain and the United States of America for Cession of Outlying Islands of the Philippines, U.S.-Spain, 7 November 1900, T.S. No. 345 [Cession Treaty of 1900]; and the Convention Between the United States of America and Great Britain Delimiting the Boundary Between the Philippine Archipelago and the State of North Borneo, U.S.-U.K., 2 January 1930, T.S. No. 856 [Boundaries Treaty of 1930]. The Treaty of Paris, not wanting in detail, clearly specified the territory just transferred with a system of lines defined by parallels of latitude and meridians of longitude in Article III.

⁴³ Shaw, *supra* note 2, at 417.

⁴⁴ *Ibid.* Please see, Eritrea-Yemen Arbitration (Phase I: Territorial Sovereignty and Scope of Dispute), Award of 3 October 1996, par. 153, where the Permanent Court of Arbitration declared:

Boundary and territorial treaties made between two parties are *res inter alios acta* vis-à-vis third parties. But this special category of treaties also represents a legal reality which necessarily impinges upon third states, because they have effect *erga omnes*. If State A has title to territory

international law places on the stability of boundaries.⁴⁵ This doctrine has been affirmed by international tribunals in a long line of cases.⁴⁶

It must be remembered that a treaty is similar in nature to a contract: willing parties assume obligations among themselves, and a party that fails to fulfil their obligations can be held liable under international law for that breach.⁴⁷ This is enshrined in the central principle of treaty law, expressed in the maxim *pacta sunt servanda* -- “pacts must be respected.”⁴⁸ Treaties which deal with rights over territory, such as a boundary treaty, even enjoy a preferred status since they are by their nature opposable *erga omnes*,⁴⁹ and “are unaffected by changes of sovereignty over the territory.”⁵⁰ The

and passes it to State B, then it is legally without purpose for State C to invoke the principle of *res inter alios acta*, unless its title is better than that of A (rather than of B). In the absence of such better title, a claim of *res inter alios acta* is without legal import.

⁴⁵ See excellent discussion on the doctrine on stability of boundaries in: Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The Role of Utī Possidetis* (2002) at 138 – 171, which traces a long line of international cases where the court has shown a particular bias in favour of the stability and finality of territorial boundaries. The primacy given to this doctrine cannot be more obvious than in Article 62 of the *Vienna Convention on the Law of Treaties* which recognises the rule concerning the fundamental change of circumstances (*rebus sic stantibus*) allowed an exception in favour of upholding treaties which establish a boundary. Article 62(2)(a), *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969) (entered into force 27 January 1980).

⁴⁶ See for example, the 1909 Grisbadarna Case, where the Permanent Court of Arbitration declared that: “It is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible.” *The Grisbadarna Case (Norway v. Sweden)* 11 R. Int’l Arb. Awards 155 (1909). This was reaffirmed in the 1994 Territorial Dispute between Libya and Chad, where the Court emphasised that: “Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by this Court.” *The Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)* Judgment of 3 February 1994, paras. 72- 73. See also, *Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 ICJ Reports, Merits, Judgment of 15 June 1962.

⁴⁷ See Shaw, *supra* note 2, at 810, 858-859. Peter Malanczuk and Michael Barton Akehurst, *Akehurst’s Modern Introduction to International Law* (1997) at 131 -133. See, Article 11, *Vienna Convention on the Law of Treaties*, *supra* note 45.

⁴⁸ Article 26, *Vienna Convention on the Law of Treaties*, *supra* note 45.

⁴⁹ See discussion in note 44. See discussion in Arthur Berriedale Keith, *The Theory of State Succession* (1907) at 27: “A boundary treaty, when completed is not a contract but a conveyance, and the boundaries established are, as in the case of private law, good against the world. The cessionary or the conqueror cannot re-open the question on any legal grounds.” For the concept of *erga omnes* in international law, please see: Alexander Orakhelashvili, ‘The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes’ (2006) 100 *The American Journal of International Law* 513; Olivia Lopes Pegna, ‘Counter-Claims and Obligations Erga Omnes before the International Court of Justice’ (1998) 9 *European Journal of International Law* 724; Maurizio Ragazzi, *The Concept of International*

colonial treaties that defined the Philippine Treaty Limits being boundary treaties, since they define the extent of the boundaries of the Philippine State, should be accorded this exceptional status; and the boundaries they establish respected.⁵¹

3.2.2. Title from Cession

The title of the Philippines, which is embodied in the colonial treaties that define the Philippine Treaty Limits, also arises from cession, which is a valid mode of acquiring territory in international law.⁵² According to Shaw, “[C]ession involves the peaceful transfer of territory from one sovereign to another (with the intention that sovereignty should pass) and has often taken place within the framework of a peace treaty following a war.”⁵³ All these elements are clearly met in the Philippine case. The Philippines was ceded from Spain to the United States in the Treaty of Paris of 1898, the peace treaty which ended the hostilities of the Spanish-American War. The clear language in Article

Obligations Erga Omnes (2000); Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005).

⁵⁰ See Peter Malanczuk and Michael Barton Akehurst, *Akehurst's Modern Introduction to International Law* (1997) at 162, who explain:

If a treaty delimits a boundary between two states, and if the territory on one side of the boundary is acquired by a third state, the third state is bound by the boundary treaty. The rule of automatic succession to boundary treaties is part of a wider principle that a state acquiring territory automatically succeeds to the boundaries of that territory, whether the boundaries are fixed by a treaty or whether they are fixed by the application of rules of customary law concerning title to territory and acquisition of territory.

⁵¹ Kaiyan Homi Kaikobad, ‘Some Observations on the Doctrine of Continuity and Finality of Boundaries’ (1983) 54 *British Year Book of International Law* 119 at 126- 136.

⁵² Traditional international law recognises five modes of acquiring title to territory: occupation, prescription, cession, accretion and conquest. For a discussion on the acquisition of territory in international law, please see: Merlin M. Magallona, ‘Acquisition and Loss of Territory in International Law’ in *International Law Issues in Perspective* (1996) 56; P. K. Menon, ‘The Acquisition of Territory in International Law: a Traditional Perspective’ (1994) 22 *Korean Journal of Comparative Law* 125; J.G. Starke, ‘The Acquisition of Title to Territory by Newly Emerged States’ (1965-1966) 41 *British Yearbook of International Law* 411; Robert Y. Jennings, *The Acquisition of Territory in International Law* (1963); Mark Frank Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926); Surya P. Sharma, *Territorial Acquisition, Disputes and International Law* (1997); Joshua Castellino and Steve Allen, *Title to Territory in International Law: A Temporal Analysis* (2003).

⁵³ Shaw, *supra* note 2, at 420. Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (1996) at 127.

III of the Treaty of Paris, clearly evinces the unequivocal intent to both relinquish and transfer sovereignty: “Spain cedes to the United States the archipelago known as the Philippine Islands...”⁵⁴

Therefore, the title held by Spain, predicated on discovery and occupation,⁵⁵ over the Philippine archipelago was transferred to the United States through a treaty of cession: the Treaty of Paris.⁵⁶ The colonial title held by the United States was transferred to the Philippines after it gained its independence.⁵⁷ Thus, the present title held by the Philippines over its territory can be traced to the titles held by Spain, and the United States. The Philippines, as a newly independent State, succeeded to the rights of these colonial powers by operation of the rules of succession of States to treaties after decolonisation.⁵⁸

⁵⁴ Article III, Treaty of Paris. The intent to relinquish and transfer sovereignty over Cuba, Puerto Rico and Guam, to the United States is also clear from the language of Article I and II, Treaty of Paris.

⁵⁵ This was previously discussed in Chapter 2. Spain initially acquired title over the Philippine archipelago by virtue of discovery, which was a valid mode of acquiring territory in international law; which was preceded by occupation. *See, Island of Palmas*, *supra* note 12, at 829.

⁵⁶ It can also be argued that the United States acquired title over the Philippines (which was then a crown colony of Spain) by conquest, after it defeated Spain in the Spanish-American War and annexed or occupied the defeated enemy’s territory. As correctly pointed out by McHugo, “frequently, the conquest of a territory was concluded by a treaty with the defeated power, and the acquisition thus took place by cession.” John McHugo, ‘How to Prove Title to Territory: A Brief, Practical Introduction to the Law and Evidence’ (1998) 2(4) *Boundary & Territory Briefing* at 3. Note that Article 52 of the *Vienna Convention on the Law of Treaties*, *supra* note 45, provides that a treaty is void if it has been procured by the threat or use of force in violation of the UN Charter (*See*, Article 2(4), UN Charter, *supra* note 5). This rule does not apply to earlier treaties, the titles established from which, remain valid because of the application of the doctrine of intertemporal law. *See for example*, T. O. Elias, ‘The Doctrine of Intertemporal Law’ (1980) 74 *American Journal of International Law* 285; Rosalyn Higgins, ‘Time and the Law: International Perspectives on an Old Problem’ (1997) 46 *International and Comparative Law Quarterly* 501.

⁵⁷ Shaw differentiates two modes by which a new State gains its independence: by constitutional means or by non-constitutional means. Shaw, *supra* note 2, at 415. The Philippines acquired its independence from the United States by constitutional means by virtue of the Tydings-McDuffie Act (Philippine Independence Act; Public Law 73-127) approved on 24 March 1934. Raphael Perpetuo M. Lotilla (ed), *The Philippine National Territory: A Collection of Related Documents* (1995) at 157-166.

⁵⁸ The process of decolonisation is based on the principle of self-determination as embodied in Article 1 of the UN Charter, *supra* note 5. Edward McWhinney, *Self-Determination of Peoples and Plural-Ethnic States in Contemporary International Law: Failed States, Nation-Building and the Alternative, Federal Option* (2007) at 177 – 190. *See especially*, Matthew Craven, ‘The International Law of State Succession’

3.2.3. Devolution of Treaty Rights

The Philippines as successor State to the United States, upon gaining independence, succeeded to the rights acquired by the United States under the treaties of cession and the boundary convention in the same manner that it succeeded to the obligations of the United States under the same international instruments. This is based on the basic principle in international law, sufficiently discussed above, that a succession of States does not affect a boundary or a boundary regime established by treaty.⁵⁹ The writing of jurists and State practice support the traditional doctrine that treaties of a territorial character constitute a special category and are not affected by a succession of States.⁶⁰

In this regard, according to Anthony Aust: “A new state will succeed, without any action by it, to treaties (or at least to the legal situation created by them) relating to matters such as the status of territory, boundaries or the navigation of rivers.”⁶¹ Further, the new State, from the date of independence assumes all obligations and responsibilities as well as all the rights and benefits enjoyed by the former colonial power arising out of any

(2000) 2 *International Law Forum du droit International* 202; Matthew C. R. Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (2007).

⁵⁹ Article 11, *Vienna Convention on the Law of Treaties*, *supra* note 45. See relevant discussion of the International Law Commission with respect to this article in: Arthur Watts, *The International Law Commission, 1949-1998* (1999) at 1052. Please see extensive literature on issue of state succession in international law: James Crawford, *The Creation of States in International Law* (1979); Krystyna Marek, *Identity and Continuity of States in Public International Law* (1968); Okon Udokang, *Succession of New States to International Treaties* (1972); Lung-Fong Chen, *State Succession Relating to Unequal Treaties* (1974); Daniel Patrick O’Connell, *State Succession in Municipal Law and International Law* (1967); Mudimuranwa Mutiti, *State Succession to Treaties in respect of Newly Independent African States* (1976); Yilma Makonnen, *International Law and the New States of Africa: A Study of the International Legal Problems of State Succession in the Newly Independent States of Eastern Africa* (1983); Arthur Berriedale Keith, *The Theory of State Succession: With Special Reference to English and Colonial Law* (1907); R. W. G. de Muralt, *The Problem of State Succession with regard to Treaties* (1954); P. K. Menon, *The Succession of States in Respect to Treaties, State Property, Archives, and Debts* (1991); Herbert Arnold Wilkinson, *The American Doctrine of State Succession* (1934); Matthew C. R. Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (2007).

⁶⁰ Arthur Watts, *The International Law Commission, 1949-1998* (1999), Volume II, at 1043, 1051.

⁶¹ Anthony Aust, *Modern Treaty Law and Practice* (2000) at 307.

valid international instrument.⁶² Thus, the Philippines not only succeeded to the colonial treaties that the United States signed with Spain⁶³ and the United Kingdom⁶⁴ defining the extent of the colony it formerly held; it also succeeded to the same territory and all the rights and obligations flowing therefrom.⁶⁵

The Philippines, before it was granted independence in 1946, was a dependent “overseas territory” of the United States until 1934. In 1935, its status changed to a “self-governing Commonwealth” after the passage of the Philippine Independence Act of 24 March 1934, which provided for a transitional ten-year period, after which the Philippines would be granted complete sovereignty and independence, which the United States granted on 4 July 1946.⁶⁶ However, as Bühler points out, despite the restrictions

⁶² *Ibid.* at 309. This is embodied in the principle of *res transit cum suo onere*, which means the ceded territory passes to the new sovereign with any burdens and obligations connected with the territory.

⁶³ Treaty of Paris and Cession Treaty of 1900, *supra* note 42.

⁶⁴ Boundaries Treaty of 1930, *supra* note 42.

⁶⁵ The Independence Act, in Section 2 (b)(4) provides: “[T]hat the Government of the Philippine Islands, on becoming independent of the United States, will assume all continuing obligations assumed by the United States under the treaty of peace with Spain ceding said Philippine Islands to the United States. Section 2(b)(4), *Philippine Independence Act*, *supra* note 57. Further, the same Act clearly stipulates that “[A]ll the property and rights which may have been acquired in the Philippine Islands by the United States under the treaties mentioned in the first section of this Act, ... are hereby granted to the government of the Commonwealth of the Philippine Islands when constituted. Section 5, *Philippine Independence Act*, *supra* note 57.

⁶⁶ Please see, generally: Miguel A. Bernad, *Tradition and Discontinuity: Essays on Philippine History and Culture* (1983); William Henry Scott, *Cracks in the Parchment Curtain, and Other Essays in Philippine History* (1985); Helen R. Tubangui et al (eds), *The Filipino Nation: A Concise History of the Philippines* (1982); Gregorio F. Zaide, *The Pageant of Philippine History: Political, Economic and Socio-Cultural* (1979). Also see materials on Philippine-United States colonial relations: Assembly American, *The United States and the Philippines* (1966); Keith Thor Carlson, *The Twisted Road to Freedom: America's Granting of Independence to the Philippines* (1995); Renato Constantino and Letizia R. Constantino, *The Philippines: The Continuing Past* (1978); David Vawter Dufault, *Francis B. Sayre and the Commonwealth of the Philippines, 1936-1942* (1972); Charles Burke Elliott, *The Philippines: The End of the Commission Government: A Study in Tropical Democracy* (1917); Charles O. Houston, *The Philippine Commonwealth* (1953); Paul Alexander Kramer, *The Blood of Government: Race, Empire, the United States, & the Philippines* (2006); Stuart Creighton Miller, “Benevolent Assimilation”: *The American Conquest of the Philippines, 1899-1903* (1982); Michael Paul Onorato, *A Brief Review of American Interest in Philippine Development, and Other Essays* (1968); William J. Pomeroy, *The Philippines: Colonialism, Collaboration, and Resistance* (1992); Russell Roth, *Muddy Glory: America's "Indian Wars" in the Philippines, 1899-1935* (1981); Bonifacio S. Salamanca, *The Filipino Reaction to American Rule 1901-1913* (1984); Daniel B. Schirmer and Stephen Roskamm Shalom, *The Philippines Reader: A History of Colonialism, Neocolonialism, Dictatorship, and Resistance* (1987); Peter W.

imposed by the United States, “the Philippines step by step acquired international status with far reaching *de facto* capacities like an independent State” even prior to 1946.⁶⁷ Thus, it can be validly argued that in the time leading to its independence and after, the Philippines has also attained the recognition of the community of nations as a separate and self-governing nation.⁶⁸ In the words of Bühler:

The formal acquisition of sovereign statehood of the “Republic of the Philippines”, however, merely involved a change of status of the Philippines without impairing the continuity of the international personality and *de facto* capacities it had already enjoyed some time before gaining full independence.⁶⁹

This recognition, it may be safely assumed, carried the recognition of the boundaries of the Philippines which it succeeded to from the United States, as well as in its own right. In fact, even acts of the United States confirmed this recognition.⁷⁰ This included the

Stanley, *A Nation in the Making: The Philippines and the United States, 1899-1921* (1974); George Edward Taylor, *The Philippines and the United States: Problems of Partnership* (1964).

⁶⁷ Konrad G. Bühler, *State Succession and Membership in International Organizations: Legal Theories versus Political Pragmatism* (2001) at 37. He further observes:

For instance, having separately signed and ratified the 1929, 1934 and 1939 Universal Postal Conventions, the Philippines were a full member of UPU and, as of 1939, no longer listed among the other non-sovereign members of the Union. In 1944 the Philippine Commonwealth took part in the Bretton Woods Conference on the basis of full equality and became one of the original members of the IMF and the World Bank with effect from December 27, 1945. Similarly, as one of the participants in the 1944 Chicago Conference, it signed the ICAO Convention, and on March 22, 1946, ratified the Air Services Transit Agreement and the Interim Agreement on International Civil Aviation. Finally, the Philippines not only were an original member of FAO as of October 16, 1945, but – having fought on the side of the Allies during World War II and adhered to the 1942 Declaration by the United Nations were even invited to the 1945 San Francisco Conference and become an original member of the United Nations.

⁶⁸ According to Shaw, recognition “is a statement by an international legal person as to the status in international law of another real or alleged international legal person or of the validity of a particular factual situation.” Shaw, *supra* note 2, at 368. For materials on recognition in international law, *please see*: Herbert W. Briggs, ‘Recognition of States: Some Reflections on Doctrine and Practice’ (1949) 49 *American Journal of International Law*; Philip Marshall Brown, ‘The Legal Effects of Recognition’ (1950) 44 *American Journal of International Law* 617; Hersch Lauterpacht, ‘Recognition of States in International Law’ (1944) 53 *Yale Law Journal* 385; Hersch Lauterpacht, *Recognition in International Law* (1947); P. K. Menon, *The Law of Recognition in International Law: Basic Principles* (1994).

⁶⁹ Konrad G. Bühler, *State Succession and Membership in International Organizations: Legal Theories versus Political Pragmatism* (2001) at 41.

⁷⁰ *See for example*, amicus brief submitted in 1938 by the United States Secretary of War claiming sovereign immunity for the Philippines. Amicus Curiae Brief of the US Secretary of State, as quoted in *Bradford v. Chase National Bank of the City of New York, USA*, Distr.Ct., New York (South Distr.) 24 F.Supp.28 (Judgment of 28 June 1938), reprinted in 6 AILC2, at 4 (1783-1968); 9 AD 35 (1938-40). As Bühler notes: “in 1945, finally paying regard to factual developments, the US Supreme Court seemed to

Philippine Independence Act itself, a contemporaneous construction of the Treaty of Paris, which was approved by the President of the United States.⁷¹ The Act positively states that the treaty rights acquired by the United States under the said colonial treaties, *vis-à-vis* Spain and Great Britain, were transferred to the Commonwealth of the Philippines upon the grant of Philippine Independence on 4 July 1946.⁷² Further, the 1935 Constitution of the Philippines, adopted for the newly-constituted Commonwealth of the Philippines, specifically included a categorical definition of the national territory as referring to limits set in the colonial treaties of the Treaty Limits.⁷³ This same Constitution was submitted and approved by then United States President Franklin D. Roosevelt on 23 March 1935.⁷⁴

3.2.4. Succession to Colonial Boundaries

The title of the Philippines over the territory enclosed by the Treaty Limits is also

have recognized the international statutes of the Philippine Commonwealth as a de facto separate and independent entity with treaty-making capacity on the international plane.” Bühler, *supra* note 67.

⁷¹ The Philippine Independence Act was submitted to the President of the United States by virtue of Section 3, *Philippine Independence Act*, *supra* note 57.

⁷² Section 2(b)(4) and Section 5, *Philippine Independence Act*, *supra* note 57.

⁷³ Article I, Section 1, The National Territory, 1935 Philippine Constitution, which reads:

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 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 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. (italics supplied)

⁷⁴ See Merlin M. Magallona, ‘The United Nations Convention on the Law of the Sea and Its Implications on the Territorial Sovereignty of the Philippines’ (1995) 11 *World Bulletin* 50 at 51. In the words of noted Philippine constitutionalist Vicente Sinco: “That approval gave the Constitution of the Philippines the effect of a mutual pledge between the American people and the Filipinos for the maintenance of the territorial integrity of the Commonwealth of the Philippines.” Vicente G. Sinco, *Philippine Political Law* (1954) at 118.

derived from the doctrine of *uti possidetis*.⁷⁵ This is the same territory under Spanish sovereignty ceded to the United States in the Treaty of Paris in 1898; and the same territory that the Philippines succeeded upon its independence in 1946.⁷⁶ This is the essence of the doctrine of *uti possidetis*: that States emerging from decolonisation inherit their colonial borders as they existed at independence.⁷⁷ In the words of the International Court of Justice (ICJ) in the *Frontier Dispute Case*: “The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved” where the application of the principle of *uti possidetis* result in the transformation of boundaries “into international frontiers in the full sense of the word.”⁷⁸

The ICJ has affirmed that “the principle of *uti possidetis* has kept its place among the

⁷⁵ For academic literature on the international legal concept of *uti possidetis*, please see: Tomas Bartos, ‘Uti Possidetis. Quo Vadis?’ (1997) 18 *Australian Yearbook of International Law* 37; Enver Hasani, ‘Uti Possidetis Juris: From Rome to Kosovo’ (2003) 27 *Fletcher Forum of World Affairs* 85; Paul R. Hensel, Michael E. Allison and Ahmed Khanani, ‘Territorial Integrity Treaties, Uti Possidetis, and Armed Conflict over Territory’ (Paper presented at the Building Synergies: Institutions and Cooperation in World Politics, University of Iowa, 2006); Marcelo G. Kohen, ‘Determining Boundaries in a Conflicted World: The Role of Uti Possidetis’ (2004) 98 *American Journal of International Law* 379; Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (2002); Edward McWhinney, *Self-Determination of Peoples and Plural-Ethnic States in Contemporary International Law: Failed States, Nation-Building and the Alternative, Federal Option* (2007); Steven R. Ratner, ‘Drawing a Better Line: Uti Possidetis and the Border of New States’ (1996) 90 *American Journal of International Law* 590; Andrew A. Rosen, ‘Economic and Cooperative Post-Colonial Borders: How Two Interpretations of Borders by the I.C.J. May Undermine the Relationship between Uti Possidetis Juris and Democracy’ (2006-2007) 25 *Penn State International Law Review* 207; Malcolm N. Shaw, ‘The Heritage of States: The Principle of Uti Possidetis Today’ (1996) 67 *British Year Book of International Law* 75; Joshua Castellino and Steve Allen, *Title to Territory in International Law: A Temporal Analysis* (2003).

⁷⁶ This is one of the legal consequences of State succession in international law. The successor State (the newly independent Philippine State) acquired the territory of the predecessor State (the United States, who acquired the same from Spain in 1898). Please see, J. Mervyn Jones, ‘State Succession in the Matter of Treaties’ (1947) 24 *British Yearbook of International Law* 360; Rein Mullerson, ‘Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia’ (1993) 42 *International and Comparative Law Quarterly* 473; D. P. O’Connell, ‘State Succession and the Effect upon Treaties of Entry into a Composite Relationship’ (1963) 39 *British Yearbook of International Law* 54; Krystyna Marek, *Identity and Continuity of States in Public International Law* (1968); Okon Udokang, *Succession of New States to International Treaties* (1972); Daniel Patrick O’Connell, *State Succession in Municipal Law and International Law* (1967); Mudimuranwa Mutiti, *State Succession to Treaties in respect of Newly Independent African States* (1976); Daniel Patrick O’Connell, *State Succession and Problems of Treaty Interpretation* (1964).

⁷⁷ Shaw, *supra* note 2, at 446-449.

⁷⁸ *Frontier Dispute* (Burkina Faso v Mali), Judgment, ICJ Reports 1986. p. 566, para. 23.

most important legal principles” on title to territory and boundary delimitation; and has resolved border disputes in conformity with boundaries as they stood at the time of independence of the States concerned.⁷⁹ The reason why newly created States after independence seek the international recognition of their colonial boundaries is to prevent fragmentation of its territorial basis.⁸⁰

The doctrine of *uti possidetis juris* “applies to offshore possessions and maritime spaces.”⁸¹ In the *Nicaragua v Honduras* case, where the issue before the Court was the “applicability of the *uti possidetis juris* principle to title to the islands and also to the establishment of a maritime boundary,” the Court noted that:

In the absence of any title based on the *uti possidetis juris* principle, the Court will seek to establish an alternative title to the islands arising out of *effectivités* in the post colonial era. It will also seek to ascertain whether there existed a tacit agreement as to the maritime boundary during the same period.⁸²

⁷⁹ *Frontier Dispute* (Burkina Faso v Mali), Judgment, ICJ Reports 1986, p. 567, para. 26. In the same case, the Chamber of the ICJ found that it: “cannot disregard the principle of *uti possidetis juris*, the application of which gives rise to this respect of intangibility of frontiers... It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power. (*Ibid.*, p. 565, para. 20). But see, Andrew A. Rosen, ‘Economic and Cooperative Post-Colonial Borders: How Two Interpretations of Borders by the I.C.J. May Undermine the Relationship between *Uti Possidetis Juris* and Democracy’ (2006-2007) 25 *Penn State International Law Review* 207 at 212, who argues that: “*Uti possidetis juris* is a concept with uncertain foundations in international law. It is unclear whether it is a principle or rule of international law, or whether it is customary international law, so it is neither a fundamental tenet nor a reliable source of guidance.”

⁸⁰ *Ibid.*

⁸¹ *Land, Island and Maritime Frontier Dispute* (El Salvador v Honduras: Nicaragua intervening) Judgment, ICJ Reports 1992, p. 558, para 333; p. 589, para. 386. This was affirmed by the Court in *Case Concerning Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras) Judgment, 8 October 2007, 46 ILM 1053, at 1083, para. 156.

⁸² *Nicaragua v Honduras*, 46 ILM 1078, par. 124. In the same case, the Court examined “colonial *effectivités*” first before post-colonial *effectivités*. In this respect, the Court has previously ruled that: “This test of “colonial *effectivités*” has been defined as “the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period.” [*Frontier Dispute* (Burkina Faso v. Republic of Mali), Judgment, ICJ Reports 1986, p. 586, para. 63; *Frontier Dispute* (Benin v. Niger), Judgment, ICJ Reports 2005, p. 120, para. 47] The ICJ has also clarified the following: “when the principle of the *uti possidetis juris* is involved, the *jus* referred to is not international law but the constitutional or administrative law of the pre-independence sovereign, in this case Spanish colonial law; and it is perfectly possible that that law itself gave no clear and definitive answer to the appurtenance of marginal areas, or sparsely populated areas of minimal significance. [*Land, Island and Maritime Frontier Dispute* (El Salvador v Honduras: Nicaragua intervening), Judgment, ICJ Reports 1992, p. 559, para. 333].

Thus, the Philippines can invoke *uti possidetis* in claiming title over the maritime space enclosed by the Treaty Limits,⁸³ on the basis of the colonial treaties,⁸⁴ as well as on the basis of *effectivités*.⁸⁵ In international law, original title can be derived from *uti possidetis juris* and confirmed by *effectivités*.⁸⁶ The effective exercise of powers appertaining to the authority of the State (*à titre de souverain*) over a given territory infers sovereign title. The conditions necessary to prove a claim of sovereignty on this basis was laid down by Permanent Court of International Justice in the *Eastern Greenland Case*:

a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual display of such authority.⁸⁷

The conduct of the parties to the colonial treaties and even third States since Philippine independence demonstrates the existence of a tacit agreement of the Treaty Limits as

⁸³ This must be read restrictively as the Philippine claim over the maritime area enclosed by the Treaty Limits is based on historic title. As such, the Philippines claims the maritime area as part of its territory and not as a maritime zone entitlement flowing from title over the land territory. This is encapsulated in the basic principle “the land dominates the sea,” which the ICJ has emphasised on a number of occasions. *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) Judgment, ICJ Reports 1969, p. 51, para. 96; *Aegean Sea Continental Shelf* (Greece v. Turkey), Judgment, ICJ Reports 1978, p. 36, para. 86; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Merits, Judgment, ICJ Reports 2001, p. 97, para. 185.

⁸⁴ See for example, in the *Eritrea v Ethiopia case*, where the Boundary Commission ruled that the ultimate border should be based on colonial boundary treaties, which should be interpreted in “good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Eritrea-Ethiopia Boundary Commission (EEBC): Decision Regarding Delimitation of the Border Between the State of Eritrea and the Federal Democratic Republic of Ethiopia, Decision, 1 January 2002, 41 ILM 1057 (2002), at 1073.

⁸⁵ In the *Nicaragua v. Honduras Case*, *supra* note 81, at pp. 1086 – 1091, the Court categorised the *effectivités* presented by the parties into: legislative and administrative control, application and enforcement of criminal and civil law, regulation of immigration, regulation of fisheries activities, naval patrols, oil concessions, and public works.

⁸⁶ See, *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia v. Malaysia), Judgment, ICJ Reports 2002, p. 682, para. 134; *Eritrea/Yemen Arbitration*, Territorial Sovereignty Award (Phase I), par. 239; *Qatar v. Bahrain*, *supra* note 83, pp. 99 -100, para. 197; *Minquiers and Ecrehos* (France v. United Kingdom) Judgment, ICJ Reports 1953, p. 71.

⁸⁷ *Legal Status of Eastern Greenland*, Judgment, 1933, PCIJ, Series A/B, No. 53, pp. 45-46.

constituting the territorial and maritime boundaries of the Philippine archipelago.⁸⁸

3.2.5. Historic Title

The following section will discuss the bases of the Philippine historic title over its Treaty Limits and territorial waters claim. This will be done by providing a discussion on the concept of historic title in international law and subsequently, examining the Philippine bases of historic title.

3.2.5.1. Historic Rights of Title in International Law

The question of historic title in international law has been the subject of several international disputes submitted for adjudication.⁸⁹ It is also a relevant factor in a number of still unresolved territorial and maritime disputes.⁹⁰ Historic rights of title

⁸⁸ Miriam Defensor Santiago, 'The Archipelago Concept in the Law of the Sea: Problems and Perspectives' (1974) 49 *Philippine Law Journal* 315 at 363. Filipino jurist Miriam Defensor-Santiago argues that there was no subsequent or simultaneous protest to the ratification of the Treaty of Paris with respect to the exercise of sovereignty by the United States over all the land and sea territory embraced in that treaty. After the Philippines gained independence, there was still no protest when it exercised sovereignty and jurisdiction over the same territory. The Philippines also sent diplomatic notes of the same tenor to various States regarding the extent of its domestic waters and territorial sea. Only the United States protested the Philippine claims; the silence of other States can be interpreted as a tacit recognition of the Philippine claim.

⁸⁹ In particular, it was an issue of importance several international adjudications such as the *Gulf of Fonseca* case, decided by the Central American Court of Justice; the *Island of Palmas* case, decided by Judge Huber as sole arbitrator, under the auspices of the Permanent Court of Arbitration; the case concerning the *Legal Status of Eastern Greenland* before the Permanent Court of International Justice; and some recent cases, such as the cases concerning *Fisheries* (United Kingdom v. Norway); *Minquiers and Ecrehos Islets* (United Kingdom v. France); *Certain Frontier Land* (Belgium v. Netherlands); and *Temple of Preah Vihear* (Cambodia v. Thailand), before the International Court of Justice.

⁹⁰ See for example, Faraj Abdullah Ahnish, *The International Law of Maritime Boundaries and the Practice of States in the Mediterranean Sea*, Oxford Monographs in International Law (1993); Andrea Gioia, 'Tunisia's Claims Over Adjacent Seas and the Doctrine of 'Historic Rights'' (1984) 11 *Syracuse Journal of International Law and Commerce* 327; Zou Keyuan, 'Historic Rights in International Law and China's Practice' (2001) 32 *Ocean Development and International Law* 149 at 194-251; Francesco Francioni, 'Status of the Gulf of Sirte in International Law' (1984) 11 *Syracuse Journal of International Law and Commerce* 311 at 325; John M. Spinnato, 'Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra' (1983) 13 *Ocean Development & International Law* 65- 85; Yehuda Z. Blum,

over land or maritime territories are acquired by a State through a process of historical consolidation.⁹¹ This involves a long period of continuous and undisturbed exercise of State sovereignty.⁹² In order to ripen into a valid title in international law, historic rights require not only effective occupation⁹³ but more importantly, the acquiescence of the international community.⁹⁴

3.2.5.1.1. Historic Title as a Mode of Acquiring Maritime Territory

The acquisition of historic title over maritime areas is not taken lightly in international law since such a territory is acquired at the expense of the entire community of States.⁹⁵ This is premised on the universally accepted principle of international law of the freedom of the high seas.⁹⁶ The high seas cannot be appropriated by any single State and all member-States of the community of nations enjoy equal rights over them. This is enshrined in the Grotian doctrine of *mare liberum* formulated to ensure the freedom of the high seas.⁹⁷ The high seas are in the nature of *res communis* or a property over

‘Current Development: The Gulf of Sidra Incident’ (1986) 80 *American Journal of International Law* 669.

⁹¹ Jennings, *supra* note 54, at 27. Please see excellent discussion of consolidation as a root of title in international law: D. H. N. Johnson, ‘Consolidation as a Root of Title in International Law’ (1955) 1955 *Cambridge Law Journal* 215.

⁹² See Yehuda Z. Blum, *Historic Titles in International Law* (1965)

⁹³ Yehuda Z. Blum, ‘Historic Rights’ in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (1984) 120.

⁹⁴ Bing Bing Jia, *The Regime of Straits in International Law* (1998) at 74.

⁹⁵ See for example, Shaw, *supra* note 2, at 438, who opines that “Where the territory involved is part of the high seas (i.e., *res communis*), acquiescence by the generality of states may affect the subjection of any part of it to another’s sovereignty, particularly by raising an estoppel.”

⁹⁶ Yehuda Z. Blum, *Historic Titles in International Law* (1965) at 237, 243.

⁹⁷ Hugo Grotius, *Mare Liberum* (2001) [translated with a revision of the Latin text of 1633 by Ralph van Deman Magoffin, 2001]. See also excellent synthesis in: Farhad Talaie, *Analysis of the Rules of the International Law of the Sea Governing the Delimitation of Maritime Areas under National Sovereignty* (PhD Thesis, University of Wollongong, 1998) at 11-25.

which the community of States exercises common ownership.⁹⁸ The presumption of the law is that the [high] seas are not susceptible to the normal processes of territorial acquisition and transfer and claims of ownership over them constitute an exception which must be justified by a special rule or exception recognised in international law.⁹⁹

3.2.5.1.2. Maritime Historic Title Claims

Maritime historic title claims may be of two types. The first one is a claim to full sovereignty over maritime areas which are claimed as either territorial sea/waters or internal waters. The second is a more limited claim only to particular rights, such as fishing, without asserting full or unlimited sovereignty.¹⁰⁰ The exceptional status of the high seas affects the acquisition of maritime historic rights in at least three ways.¹⁰¹ First, the exceptional claim can only be sanctioned through international acquiescence. Second, the requirements to establishing a maritime historic title differ to some extent over those pertaining to historic rights over land territory. Lastly, maritime historic title

⁹⁸ This is clearly enunciated in the 1958 Geneva Convention on the High Seas, which in Article 2, states that: “the high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty.” And in the 1982 LOSC, in Article 89, which states that “No State may validly purport to subject any part of the high seas to its sovereignty.”

⁹⁹ Yehuda Z. Blum, *Historic Titles in International Law* (1965) at 244-245. In the words of Grotius: “The sea is included among those things which are not articles of commerce, that is to say, the things that cannot become part of anyone’s private domain. Hence it follows..., that no part of the sea may be regarded as pertaining to the domain of any given nation.” (Grotius, *De Jure Commentarius*, Scott’s ed., Volume 1 (1950) at 236). This is supported by Oppenheim, who asserts that: “the term ‘freedom of the open sea’ indicates the rule of the Law of Nations that the open sea is not, and never can be, under the sovereignty of any State whatever. Since... the open sea can never be under the sovereignty of any State, no State has a right to acquire parts of the open sea through occupation.” (Oppenheim, op. cit., at 589). See also Schwarsenberger, 87 *Hague Recueil* (1955), Vol. I, at 367.

In the *Fisheries* case, the International Court of Justice emphasised the exceptional character of the regime of historic waters by defining them as “waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title.” ICJ Reports, 1951, p. 130. In other words, historic waters are waters which should have been part of the high seas but are considered otherwise because of historic title.

¹⁰⁰ Yehuda Z. Blum, *Historic Titles in International Law* (1965) at 247.

¹⁰¹ *Ibid.*, at 249-250.

must be based on adverse holding, and not by mere occupation, by the claimant that deprives the international community of a right which the latter formerly possessed.¹⁰²

The criteria for establishing title to historic waters are similar to those for the establishment of any other historic title to territory.¹⁰³ The claimant State must produce evidence of a long-standing intention to claim sovereignty over the waters in question and of the effective, peaceful and unopposed exercise of authority over the waters.¹⁰⁴ The burden of proving the existence of a historic title to a particular maritime area rests upon the coastal State making such a claim.¹⁰⁵ A record of historical consolidation would be expected in the form of evidence of recognition or at least acquiescence on the part of the other States.¹⁰⁶ Once established as historic waters, such an area has the same

¹⁰² See for example, the judgment in *Direct U.S. Cable Co. v. Anglo-American Telegraph Co.*, [1877] L.R. 2 A.C. at 419, with reference to the status of Conception Bay as an exception to the general rule of international law that such a bay is capable of appropriation as national waters:

That in point of fact, the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to show that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important. And moreover, (which in a British tribunal is conclusive) the British legislature has by Acts of Parliament declared it to be part of the British territory and part of the country subject to the legislature of Newfoundland.

V. Kenneth Johnston, 'Canada's Title to Hudson Bay and Hudson Strait' (1934) 15 *British Yearbook of International Law* 1 at 4, Note 2. See especially Thomas Willing Balch, 'Is Hudson Bay a Closed or an Open Sea' (1912) 6 *American Journal of International Law* 409.

¹⁰³ Antunes opines that there are conceptual and substantive differences between title to territory and entitlement to maritime areas. He however argues that historic title over a sea area indicates the existence of a 'sovereign title,' which is in a certain sense 'absolute'; and legally "must be attributed full precedence in delimitation, and cannot be deemed to be a mere relevant circumstance." See Nuno Sergio Marques Antunes, *Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process* (2003) at 133-134.

¹⁰⁴ Since title over such waters are considered derogations of general international law, the State claiming such should be able to prove that "she has exercised the necessary jurisdiction over them for a long period without opposition from other States, a kind of *possessio longi temporis*, with the result that her jurisdiction over these waters must now be recognized although it constitutes a derogation from the rules in force." *Anglo-Norwegian Fisheries Case*, 1951 ICJ 116, 130. See also, D. H. N. Johnson, 'Consolidation as a Root of Title in International Law' (1955) 1955 *Cambridge Law Journal* 215; Alexander A. Murphy, 'Historical Justifications for Territorial Claims' (1990) 80 *Annals of the Association of American Geographers* 531.

¹⁰⁵ Donat Pharand, 'Historic Waters in International Law with Special Reference to the Arctic' (1971) 21 *University of Toronto Law Journal* 1 at 13.

status as internal waters.¹⁰⁷

3.2.5.2. Philippine Bases of Historic Title

This section will elaborate and examine the historic title being claimed by the Philippines over its Treaty Limits and territorial waters on the basis of the following grounds: acquiescence and absence of protests from other States, maps depicting the Philippine claim, and the official position of the Philippines in international fora.

3.2.5.2.1. Acquiescence and Absence of Protests

It is a recognised principle of international law that acts of States “which would otherwise be illegal as contrary to existing international law may in time, by reason of the failure of other, especially interested, States to lodge effective protest ... be developed and consolidated as valid legal rights.”¹⁰⁸ However, since acquiescence involves inference of the implied consent of a State from its inaction; it is not lightly presumed and strictly interpreted.¹⁰⁹ In the context of international boundaries, which are notorious facts to the entire community of nations, the failure to protest can be

¹⁰⁶ These same criteria are applied to historic bays. According to commentators, Hudson Bay in Canada and the Sea of Azov in the Soviet Union do appear to satisfy the criteria and have attracted general recognition as historic bays. See L. J. Bouchez, *The Regime of Bays in International Law* (1964). Also see: *Juridical Regime of Historic Waters Including Historic Bays—Study Prepared by the Secretariat*, [1962] 2 Yearbook of the International Law Commission 7, U.N. Doc. A/CN.4/143/1962.

¹⁰⁷ E. D. Brown, *The UN Convention on the Law of the Sea, 1982: A Guide for National Policy Making Legislation and Administration* (1989) at 22.

¹⁰⁸ Phil C. W. Chan, ‘Acquiescence/Estoppel in International Boundaries: Temple of Preah Vihear Revisited’ (2004) 3 *Chinese Journal of International Law* 421 at 422.

¹⁰⁹ I. C. MacGibbon, ‘The Scope of Acquiescence in International Law’ (1954) 31 *British Yearbook of International Law* 143 at 168-169; Kaiyan Homi Kaikobad, ‘Some Observations on the Doctrine of Continuity and Finality of Boundaries’ (1983) 54 *British Year Book of International Law* 119 at 126.

fatal.¹¹⁰

The Philippine claim over its entire maritime and territorial domain arising from the colonial treaties have been open and public; as well as continuous and peaceful, and was exercised for a considerable length of time without protest from other States.¹¹¹ There was no recorded protest against the exercise of sovereignty by the United States over the land and sea territory embraced in the Treaty of Paris from the time of its ratification in 1899 until 1946, when the Philippines was granted independence. This spans a period of almost half a century. In 1946, when the Philippines duly exercised sovereignty and jurisdiction over the same territory, neither was there any protest.

It is inaccurate to say that the Philippine claim has not found recognition outside the Philippines. Spain had consistently recognised the boundaries set by the Treaty of Paris of 10 December 1898.¹¹² The United States opposed the claim during UNCLOS III but can be considered in estoppel in view of its previous contemporaneous acts of State which treated the international treaty limits as boundaries of the Philippine archipelago.¹¹³ In 1955, when the Philippines first announced to the world through

¹¹⁰ MacGibbon, *Ibid.* at 180-181. This includes the failure to protest to legislation, a declaration publicly made in the international sphere, and even to maps with regard to territorial claims. The Philippines has publicised its claim in all these forms. MacGibbon even states that formal notification of claims is not required, citing the *Island of Palmas* and *Clipperton Island* cases. *Ibid.* at 176 -177. The ICJ also had occasion to discuss notoriety and constructive notice in the *Anglo-Norwegian Fisheries Case*, ICJ Reports 1951, pp. 138-139.

¹¹¹ Thus, the Philippines can also raise the argument of prescription. See, *Island of Palmas Island of Palmas*, *supra* note 12, at 868.

¹¹² Jose D. Ingles, 'The U.N. Convention on the Law of the Sea: Implications of Philippine Ratification' (1983) 9 *Philippine Yearbook of International Law* 47 at 61.

¹¹³ *Id.* This includes, the Treaty between the United States and Great Britain of 2 January 1930, the Tydings-MacDuffie Act granting independence to the Philippines after a transition period of ten years expressly referred to the treaty limits as "boundaries" of the Philippines. Further, then US President Franklin D. Roosevelt approved the 1935 Philippine Constitution, Article 1 of which explicitly defined the national territory as that delimited *inter alia* by the Treaty of Paris and the 2 January 1930 Treaty between the United States and Great Britain.

diplomatic notes sent to the United Nations and to various States its official position with respect to its territorial waters claim, neither was there any protest from the United States or any third States for that matter. It is perhaps noteworthy to mention that indeed, at that time, there still was no consensus over the maximum breadth of the territorial sea allowed under international law.¹¹⁴ In fact, this lacuna in the state of international law would persist throughout all the three United Nations Conferences on the Law of the Sea and even beyond.¹¹⁵ Currently, not even State practice is universal nor are all commentators in agreement over whether the 12nm breadth of the territorial sea has attained customary international law status.¹¹⁶

In 1961, in reaffirmation of its position, the Philippine Congress enacted Republic Act

¹¹⁴ See, U.N. Doc. A/CN.4/SR.309, Summary Record of the 309th Meeting, 1 Yearbook of the International Law Commission (1955) at 157. *Please see* excellent historical research which shows conclusively that the three-mile rule of Eastern Europe had only an incidental connection with the cannon-shot rule: H. S. K. Kent, 'Historical Origins of the Three-Mile Limit' (1954) 48 *American Journal of International Law* 537; Wyndham L. Walker, 'Territorial Waters: The Cannon Shot Rule' (1945) 22 *British Yearbook of International Law* 210.

¹¹⁵ Rudiger Wolfrum and Volker Roben (eds), *Developments of International Law in Treaty Making* (2005) at 99. *Also see*, John O'Brien, *International Law* (2001) at 394.

¹¹⁶ Roach and Smith opines that: "the State practice of territorial sea claims has become, by large measure, relatively stable and in line with the customary international law reflected in the LOS Convention." See, J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive Maritime Claims* (1996) at 148. Churchill and Lowe, *supra* note 61 at 80, opine that: "The twelve mile limit is now firmly established in international law, and the practice, if not always the legislation, of all States is converging upon acceptance of that limit." Yoram Dinstein, 'Restatements of International Law by Technical/Informal Bodies' in Rudiger Wolfrum and Volker Roben (eds), *Developments of International Law in Treaty Making* (2005) 93 at 99, opines that before the twelve nm compromise in the LOSC, "[F]or centuries, it was taken for granted that customary international law mandates that the maximum extent of the territorial sea cannot exceed 3 nautical miles." Hui-Gwon Pak, *The Law of the Sea and Northeast Asia: a Challenge for Cooperation* (2000) at 30, who opines that "the breadth of the territorial sea ... is declaratory of customary international law." S. K. Verma, *An Introduction to Public International Law* (1998) at 297 who opines that: "Under customary international law, the breadth of the territorial sea has remained a thorny issue." In the case of the East African states, for example, Mlimuka argues that "the extensions of territorial waters beyond twelve miles, which were made by some African States in the 1960s and 1970s constituted a breach of emerging customary international law." But adds that "[A]s a justification for this breach, these States asserted that they had no participation in the evolution of such rules of customary international law, which were contrary to their political and economic aspirations, because as colonies they were simply objects and not subjects of international law when the rules were made." *Please see*: Aggrey K. L. J. Mlimuka, *The Eastern African States and the Exclusive Economic Zone: The Case of EEZ Proclamations, Maritime Boundaries, and Fisheries* (1998) at 56-57. *See also*, Farhad Talaie, 'Final Chapter in a Conflict over the Breadth of the Territorial Sea: Recognition of the Twelve Nautical Mile Limit as a Declaratory of Customary International Law' (1996) 36 *Indian Journal of International Law* 36-66.

No. 3046, designating its baselines and asserting its territorial waters claim measured from the same baselines and extending outwards to its international treaty limits.¹¹⁷ Roach and Smith note that the official protest of the United States to the Philippine territorial waters claim was delivered to the American Embassy in Manila on 29 January 1986 in the form of a telegram from the United States Department of State.¹¹⁸ Reckoned from the time the Philippine territorial waters claim was first announced until it was protested, this period of silence on the part of the leading maritime nation of the world spans three decades. In international law, the silence of State can imply consent; and the length of silence strengthens this presumption.¹¹⁹ At the very least, the Philippines has acquired title by occupation and prescription over a long period of time to its Treaty Limits and territorial waters.¹²⁰

3.2.5.1.2. Maps of the Philippine Islands

The present configuration of the Philippine archipelago, with its territorial and maritime limits clearly indicated by the famed rectangular box known as the Philippine Treaty Limits or Treaty of Paris lines has been indicated in almost all known maps of the Philippines. Even the earliest maps depicting the Philippine archipelago will show that

¹¹⁷ Republic Act No. 3046: An Act to Define the Baselines of the Territorial Sea of the Philippines, 17 June 1961, 67 *Official Gazette* 8271. See full text in: Raphael Perpetuo M. Lotilla (ed), *The Philippine National Territory: A Collection of Related Documents* (1995) at 276-280. See also, discussion in Chapter 1.

¹¹⁸ J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive Maritime Claims* (1996) at 158, footnote 17. Francalanci and Scovazzi mentions without citing any source, that the United States protested the legislation in 1961. See, Giampiero Francalanci and Tullio Scovazzi, *Lines in the Sea* (1994) at 100.

¹¹⁹ In the words of MacGibbon: "The presumption of consent which may be raised by silence is strengthened in proportion to the length of the period during which the silence is maintained." I. C. MacGibbon, 'The Scope of Acquiescence in International Law' (1954) 31 *British Yearbook of International Law* 143 at 143; 177-182.

¹²⁰ Jose D. Ingles, 'The U.N. Convention on the Law of the Sea: Implications of Philippine Ratification' (1983) 9 *Philippine Yearbook of International Law* 47 at 63.

the Philippine islands have been treated historically as a whole. (See Figure 7, below).

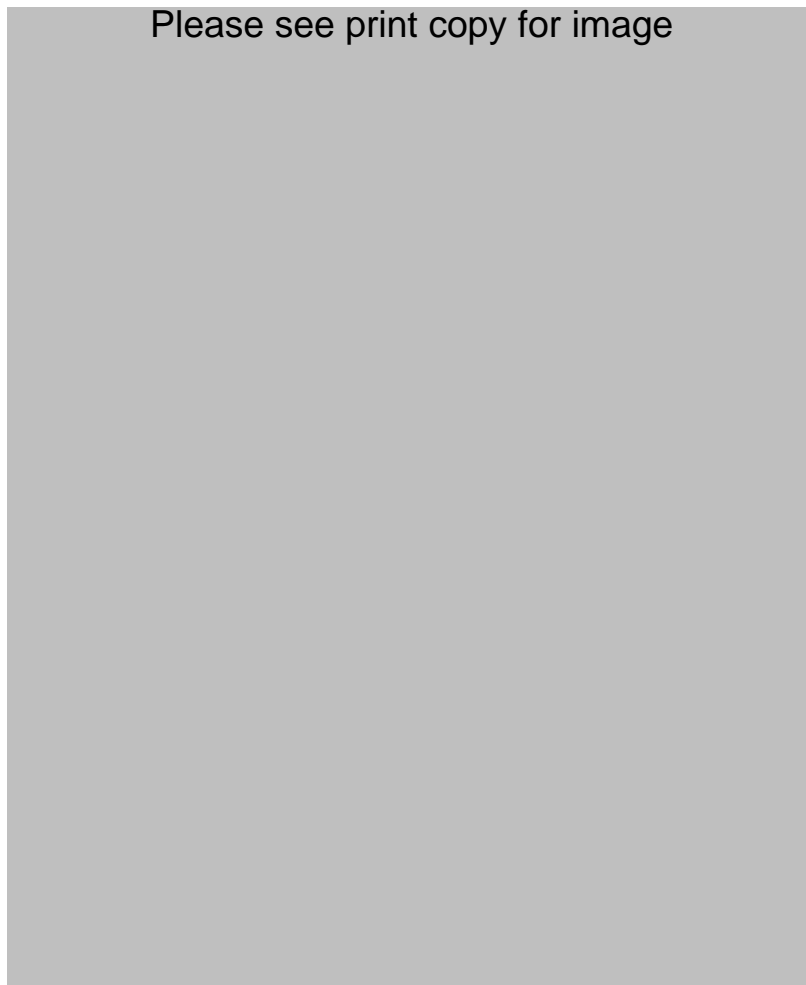


Figure 7. A 1764 Map showing Philippine Islands¹²¹

Brownlie argues that maps can constitute an admission against interest, which can be taken as indicative of acquiescence.¹²² This can be implied from previous acts of the United States. In 1902, the Bureau of Insular Affairs of the United States released a map of the Philippine Islands which reproduced the lines indicated in Article III of the Treaty

¹²¹ *Carte Des Isles Philippines Celebes et Moluques* (Paris, 1764). This map of the region shows the islands of the Philippines, Suluwesi, the Moloccus, Timor, Flores, Bali, and parts of Borneo and Java. This was drawn by Jaques Nicolaas Bellin (1703-1772), one of the most important and proficient French cartographers of the mid-eighteenth century. He was appointed the first Ingenieur Hydrographe de la Marine, and also Official Hydrographer to the French King. Online at: <http://www.swaen.com/antique-map-of.php?id=7125>. Date accessed: 6 April 2009.

¹²² Ian Brownlie, 'Recognition in Theory and Practice' (1982) 53 *British Year Book of International Law* 197 at 207.

of Paris of 10 December 1898.¹²³ In 24 July 1929, the United States Coast and Geodetic Survey also published charts which indicated the line delimiting the boundary separating the Philippine Archipelago and North Borneo, then a British protectorate.¹²⁴ On 2 January 1930 when the United States and Great Britain signed the Convention delimiting the boundary between the Philippine Archipelago and the State of North Borneo,¹²⁵ marked portions of these charts indicating the Treaty of Paris lines were attached to the same treaty and made a part thereof.¹²⁶ These maps, which illustrate the boundary so delimited in the treaty, are accepted as authoritative.¹²⁷

It must be conceded that maps or cartographic materials do not, of themselves, constitute territorial title or evidence sovereignty over territory.¹²⁸ In the words of the ICJ in the Frontier Dispute:

of themselves, and by virtue solely of their existence, [maps] cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights.¹²⁹

In recent times, judicial decisions have treated maps with considerable caution and have accorded them “no greater value than that of corroborative evidence endorsing a conclusion at which a court has arrived by other means unconnected with the maps.”¹³⁰

¹²³ Leon O. Ridao, ‘The Philippine Claims to Internal Waters and Territorial Sea: An Appraisal’ (1974) 3 *Philippine Yearbook of International Law* 57 at 71 citing *Island of Palmas*, *supra* note 12, 829 at 853.

¹²⁴ *Ibid.*

¹²⁵ Boundaries Treaty of 1930, *supra* note 42.

¹²⁶ Article II, Boundaries Treaty of 1930, *supra* note 42.

¹²⁷ Shaw, *supra* note 2, at 440.

¹²⁸ The words of Judge Huber are instructive: “only with the greatest caution can account be taken of maps in deciding a question of sovereignty. ... The first condition required of maps that are to serve as evidence on points of law is their geographical accuracy. It must be here pointed out that only maps of ancient date, but also modern, even official or semi-official maps seems wanting in accuracy.” *Island of Palmas*, *supra* note 12, pp. 852-853.

¹²⁹ *Frontier Dispute*, *supra* note 78, at p. 582, para. 54.

¹³⁰ *Ibid.*

However, maps still do carry some weight as evidence in maritime boundary disputes and are often offered as such in international adjudications involving questions of title to territory in international law.¹³¹ Thus, the evidentiary value of these maps in establishing the sovereignty of the Philippines over the maritime and territorial areas depicted is at best *prima facie* and consequently, disputable. In the case of the Philippines, the ancient nature of some of these maps depicting the territorial jurisdiction of the Philippines in addition to the fact that such maps were drawn by third parties may prove of value to support the Philippine claim.

3.2.5.1.3. Official Position in International Fora

The Philippines, in the conduct of its foreign policy and in all its participation and representations in regional and international fora have been consistent in its position with respect to its Treaty Limits and territorial waters claim. The Philippines has consistently argued its position clarifying and building up its case in various national, regional and international fora over the years.

It is through the efforts of the Philippines, along with other archipelagic States, that the archipelago principle found its way into the LOSC.¹³² The Philippines argued that the unity of the archipelagic State and the protection of its security, the preservation of its

¹³¹ Charles Cheney Hyde, 'Maps as Evidence in International Boundary Disputes' (1933) 27 *American Journal of International Law* 311; Hyung K. Lee, 'Mapping the Law of Legalizing Maps: The Implications of the Emerging Rule of Map Evidence in International Law' (2005) 14 *Pacific Rim Law and Policy Journal* 159; Dennis Rushworth, 'Mapping in Support of Frontier Arbitration: Maps as Evidence' (1998) 5 *Boundary & Security Bulletin* 51; Guenter Weissberg, 'Maps As Evidence in International Boundary Disputes: A Reappraisal' (1963) 57 *American Journal of International Law* 781.

¹³² Mohammed Munavvar, *Ocean States: Archipelagic Regimes in the Law of the Sea* (1995) at 87. In the words of Francalanci and Scovazzi, "The Philippines was the first State to put forward the concept of archipelagic waters in international practice." See, Giampiero Francalanci and Tullio Scovazzi, *Lines in the Sea* (1994) at 100.

political and economic unity, the preservation of its marine environment and the exploitation of its marine resources justified the inclusion of the waters inside an archipelago under the sovereignty of the archipelagic state and the granting of special status over such waters.¹³³

In the 1958 and 1960 Conferences on the Law of the Sea, when it was clear that no uniform rule on the breadth of the territorial sea existed, the Philippines proposed the archipelago theory, which sought to treat outlying or mid-ocean archipelagos such as the Philippines as a whole for the delimitation of territorial waters by drawing baselines from the outermost points of the archipelago and the belt of marginal seas outside of such baselines.¹³⁴ The archipelago theory was not adopted by the Conference for which reason the Philippines did not sign the four Geneva Conventions of 1958.¹³⁵

During UNCLOS III, the Philippines even submitted the following proposal with respect to the territorial sea: “Any State which, prior to the approval of the Convention, shall have already established a territorial sea with a breadth more than the maximum provided in this article shall not be subject to the limit provided therein.”¹³⁶ The head of

¹³³ Mohammed Munavvar, *Ocean States: Archipelagic Regimes in the Law of the Sea* (1995) at 87 – 88. R. P. Anand, *Legal Regime of the Sea-bed and the Developing Countries* (1975) at 153.

¹³⁴ Jorge R. Coquia, *Selected Essays on the Law of the Sea* (1982) at 5. See also Agim Demirali, ‘The Third United Nations Conference on the Law of the Sea and an Archipelagic Regime’ (1976) 13 *San Diego Law Review* 742 at 748, who noted that although the Philippine proposal that territorial water delimitation would not apply to Philippine historic waters, the issue has actually become moot since the Conference was not able to agree on the breadth of the territorial sea.

¹³⁵ U.N. Doc. A/CNF.13/18, U.N. Conference on the Law of the Sea, Vol. 1 at 290. In 1956, the United Nations held its first Conference on the Law of the Sea (UNCLOS I) at Geneva, Switzerland. UNCLOS I resulted in four treaties concluded in 1958: (1) *Convention on the Territorial Sea and Contiguous Zone*, U.N. Doc. A/Conf.13/52, entry into force: 10 September 1964; (2) *Convention on the Continental Shelf*, U.N. Doc. A/Conf.13/L55, entry into force: 10 June 1964; (3) *Convention on the High Seas*, U.N. Doc. A/Conf.13/L.53, entry into force: 30 September 1962; and (4) *Convention on Fishing and Conservation of Living Resources of the High Seas*, U.N. Doc. A/Conf.13/L.54, entry into force: 20 March 1966.

¹³⁶ UN Doc.C.2/Informal Meeting/29 May 1978, R. Platzoder, Third United Nations Conference on the Law of the Sea: Documents Vol. V (1984) at 145.

the Philippine delegation to the LOS Conferences, Ambassador Arturo Tolentino, argued that the case of the Philippines is *sui generis* and cannot be covered by the general rule that may be formulated on the breadth of the territorial sea in the Conference on the basis of legal and historic title.¹³⁷

Throughout all the Law of the Sea Conferences, the Philippines pleaded for the recognition of its Treaty Limits as encompassing its territorial sea on the basis of historic title.¹³⁸ However, the decision of the Conference to achieve agreement by consensus and largely due to the unexpected objection of the United States, the Philippine proposal was not included in the Informal Composite Negotiating Text (ICNT) or in the earlier drafts of the negotiating texts.¹³⁹

3.4. Conclusion

In international law, every State possesses the inalienable and unassailable right to effect the delimitation of its territory. However, such delimitation must be in accordance with international law, both customary and conventional.¹⁴⁰ While the act of delimitation is properly the subject of domestic law, its international validity is governed by

¹³⁷ Arturo Tolentino, 'The Philippine Territorial Sea' (1974) 3 *Philippine Yearbook of International Law* 46 at 53.

¹³⁸ Jose D. Ingles, 'The U.N. Convention on the Law of the Sea: Implications of Philippine Ratification' (1983) 9 *Philippine Yearbook of International Law* 47 at 55.

¹³⁹ *Id.* Also see, Barry Buzan, 'Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea' (1981) 75 *American Journal of International Law* 324; Jon M. Van Dyke, *Consensus and Confrontation: The United States and the Law of the Sea Convention* (1985).

¹⁴⁰ S. Whittemore Boggs, 'Delimitation of the Territorial Sea' (1930) 24 *American Journal of International Law* 541; S. Whittemore Boggs, 'Delimitation of the Territorial Sea: The Method of Delimitation Proposed by the Delegation of the United States at the Hague Conference for the Codification of International Law' (1930) 24 *American Journal of International Law* 541; Stuart B. Kaye, 'Territorial Sea Baselines along Ice-Covered Coasts: International Practice and Limits of the Law of the Sea' (2004) 35 *Ocean Development & International Law* 75.

international law.¹⁴¹ In a strict sense, the extent of a nation's territory is never truly determined unilaterally by that State. More so, it can neither be determined arbitrarily nor in violation of customary international law or treaty obligations; or despite the valid opposition or objection of other States. The issue of the validity of the limits of the Philippines's national territory lies at the intersection of international law and municipal law. The Philippines, as a member of the family of nations, recognises and is bound by principles of both conventional and customary international law in all matters having an international character.

This chapter discussed the international legal bases of the Philippine Treaty Limits and territorial waters claim. This chapter demonstrated that there is sufficient justification to conclude that the Philippine position is defensible under international law. The question, however, of whether it will stand international judicial adjudication or international recognition, is of course, a different matter altogether. This will be covered in the next chapter which will analyse this position and evaluate the legal status of the Philippine Treaty Limits and territorial waters claim in international law.

¹⁴¹ Florentino P. Feliciano, 'Comments on Territorial Waters of Archipelagos' (1962) 1 *Philippine International Law Journal* 157 at 159.

Chapter 4

The Legal Status of the Philippine Treaty Limits and Territorial Waters Claim in International Law

4.1. Introduction

This chapter examines the legal status of the Philippine Treaty Limits and territorial waters claim in international law. This chapter analyses the Philippine position with respect to its Treaty Limits and territorial waters claim alongside the following five criteria: treaty interpretation; conflict with the LOSC; status in customary international law; the acquiescence and opposition of other States to the Philippine position; and lastly, the opinion of publicists. This chapter adduces evidence and legal arguments both in support of and contrary to the Philippine position. The main conclusion drawn by the Chapter is that while the Philippines can satisfactorily present a legal case for the international legal validity of the Philippine Treaty Limits and territorial waters claim, the Philippine position can be assailed for lacking the crucial elements of the acquiescence and recognition of States as well as being in contravention of its conventional legal obligations under the LOSC.

The delimitation of the maritime and territorial limits of a State is not just a matter of constitutional or domestic statutory law.¹ The constitutions and statutes of a State are

¹ See for example, Articles 74 and 83, *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994). Hereinafter referred to as *LOSC*. Articles 74 and 83 on the delimitation of the exclusive economic zone and continental shelf between States with opposite or adjacent coasts, respectively, both state that boundary delimitations are to 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.”

domestic law which are binding only on the State promulgating them.² The drawing of territorial lines by a State which is not in conformity with international law will not be binding upon the community of nations.³ The delimitation of maritime areas and disputes over territory are governed by rules of international law.⁴ Maritime delimitation cannot be made unilaterally but must be effected by agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result; and failing such, recourse to a third party possessing the necessary competence.⁵ The community of nations has an interest in maintaining and asserting inclusive interests in ocean space and unless the Philippines can convincingly demonstrate that this ocean space should belong exclusively within its sovereignty, this interest will prevail.⁶

² Malcolm N. Shaw, *International Law* (2003) at 126-127. The relationship between international law and municipal law cannot be more clearer than in the enduring debate between the monist and dualist schools of thought. *See for example*, David J. Bederman, *The Spirit of International Law* (2002) at 140 -141; Edwin Borchard, 'The Relation between International Law and Municipal Law' (1940 -1941) 27 *Virginia Law Review* 137 at 140.

³ In addition, a State may also incur State responsibility for violating an international obligation. *See* Martin Dixon, *Textbook on International Law* (2007) at 244. *See also*, International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) II *Yearbook of the International Law Commission* 31.

⁴ Chris Carleton and Clive Schofield, 'Developments in the Technical Determination of Maritime Space: Delimitation, Dispute Resolution, Geographical Information Systems and the Role of the Technical Expert' (2002) 3(4) *Maritime Briefing* 1 at 2.

⁵ *North Sea Continental Shelf Cases*, Judgment, ICJ Reports 1969, pp. 46-47, para. 85; *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, ICJ Reports 1984, p. 246, at par. 112, p. 299.

⁶ John Byrne, 'Canada and the Legal Status of Ocean Space in the Canadian Arctic Archipelago' (1970) 28 *Faculty of Law Review* 1. In the words of Degan: "Like the airspace, maritime areas are but accessories to the land territory. As such they cannot be an object of occupation, cession or sales, or of State succession, unless the respective coast was lawfully acquired at the same time. In short, in the absence of coastal entitlement, there is no valid legal title on adjacent maritime areas." Vladimir-Djuro Degan, 'Consolidation of Legal Principles on Maritime Delimitation: Implications for the Dispute between Slovenia and Croatia in the North Adriatic' (2007) 6 *Chinese Journal of International Law* 601. at 613 -614. As succinctly stated by the International Court of Justice: "It is a general principle of law, confirmed by the jurisprudence of this Court, that a party which advances a point of fact in support of its claim must establish that fact. *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia v Singapore), Judgment, 23 May 2008, par. 45, p. 19 citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, para. 204, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility*, Judgment, I.C.J. Reports 1984, p. 437, para. 101."

The Philippine Treaty Limits, as extensively discussed in Chapter 3,⁷ constitute the territorial limits of the Philippine archipelago;⁸ with the territorial waters that the Philippines claims lying within these Limits.⁹ As shown in Chapter 3, the territorial sea¹⁰ that the Philippines claims is polygonal in shape and of irregular width at some points exceeding twelve nautical miles in width.¹¹ This chapter will address the critical issue of their validity in international law.

4.2. The International Legal Status of the Philippine Treaty Limits and Territorial Waters Claim

The international legal status of the Philippine Treaty Limits and territorial waters claim is both in the nature of a territorial dispute;¹² since the maritime space that they enclose

⁷ Chapter 3. Legal Basis of the Philippine Treaty Limits and Territorial Water Claim.

⁸ Merlin M. Magallona, 'The United Nations Convention on the Law of the Sea and Its Implications on the Territorial Sovereignty of the Philippines' (1995) 11 *World Bulletin* 50 at 51. *See also*, Lowell B. Bautista, 'The Historical Context and Legal Basis of the Philippine Treaty Limits' (2008) 10 *Asian-Pacific Law and Policy Journal* 1 at 2.

⁹ Arturo Tolentino, 'The Philippine Territorial Sea' (1974) 3 *Philippine Yearbook of International Law* 46 at 52.

¹⁰ It was at the Conference for the Codification of International Law, held at the Hague, March 13 – April 12, 1930, that the Second Committee (Committee on Territorial Waters) chose the term "territorial sea" in preference to the more commonly used term "territorial waters." In 1952, at its fourth session, the International Law Commission decided, in accordance with a suggestion of the Special Rapporteur, Mr. J.P.A. François, to use the term "territorial sea" in lieu of "territorial waters". *See* Yearbook of the International Law Commission, 1952, Volume II, document A/2163, para. 37. The UN General Assembly, however, in its relevant resolutions, continued using the term "territorial waters" in the title of the topic. As noted by Professor Nordquist: "The terms "territorial sea" and "territorial waters" are used interchangeably in State practice (including treaties and legislation), judicial decisions and arbitral awards and in literature. There is no substantial difference between these two terms, although there may be a subtle distinction in that territorial "waters" sometimes encompass internal waters." Myron H. Nordquist (ed), *United Nations Convention on the Law of the Sea, 1982: A Commentary* (1985) at 55-56. In this chapter, the terms "territorial sea" and "territorial waters" will be used interchangeably. The words "breadth," "extent," and "limit" are all used in the same sense and also used interchangeably.

¹¹ Arturo M. Tolentino, *The Philippines and the Law of the Sea: A Collection of Articles, Statements and Speeches* (1982) at 73; Arturo Tolentino, 'The Philippine Territorial Sea' (1974) 3 *Philippine Yearbook of International Law* 46 at 52; Leon O. Ridao, 'The Philippine Claims to Internal Waters and Territorial Sea: An Appraisal' (1974) 3 *Philippine Yearbook of International Law* 57 at 61.

¹² *But see* Stephen A. Kosc, 'Territorial Disputes and Interstate War, 1945-1987' (1995) 57(1) *The Journal of Politics* 159 at 161, who states that "A territorial dispute...exists when two or more states formally claim legitimate jurisdiction over the same piece of territory." He adds that there is "no dispute ... where an international boundary simply lacks adequate definition and is therefore marked differently on the official maps of the states sharing the boundary. Unless the states involved have made formal

the Philippines claims as sovereign territory,¹³ as well as a maritime boundary dispute;¹⁴ since the maritime jurisdictional claims of the Philippines overlap with the Treaty Limits and contravene the provisions of the LOSC.¹⁵

4.2.1. Treaty Interpretation

The interpretation of treaties is resorted to in instances when the wording or the language of a treaty is not clear, ambiguous or its meaning is not immediately apparent.¹⁶ Disputes over the interpretation of treaty provisions are often submitted to international tribunals and arbiters for resolution.¹⁷ In order to establish the meaning in context, these judicial bodies may review the preparatory work (*travaux préparatoires*) from the negotiation and drafting of the treaty as well as the final, signed treaty itself.¹⁸ In approaching the interpretation of the treaties here in dispute, we follow the rules

territorial claims which overlap, a dispute as such does not exist.” Thus, strictly speaking using this definition, the Treaty Limits claim is not a territorial dispute, unlike that of the Philippine claim over the Kalayaan Island Group or over Sabah.

¹³ Magallona, *supra* note 8, at 51.

¹⁴ In the context of the LOSC, this refers to delimitation of the territorial sea (Article 15, LOSC), exclusive economic zone (Article 74, LOSC) and continental shelf (Article 83, LOSC) between States with adjacent or opposite coasts. The Philippines by virtue of the Declaration it submitted upon signature and confirmed upon ratification specifically excludes maritime boundary disputes arising under Articles 15, 74 and 83 from compulsory adjudication or arbitration by virtue of Article 298, LOSC.

¹⁵ For example, Article 3, LOSC, on the breadth of the territorial sea; Article 49, LOSC, on the legal status of archipelagic waters; Article 50, LOSC, on the delimitation of internal waters; Articles 52 and 53, LOSC, on the rights of innocent passage and archipelagic sealanes passage in archipelagic waters, respectively. See Lowell B. Bautista, ‘International legal implications of the Philippine Treaty Limits on navigational rights in Philippine waters’ (2009) 1(3) *Australian Journal of Maritime and Ocean Affairs* 88

¹⁶ Shaw, *supra* note 2, at 838-844. Also see, Myres S. McDougal, James C. Miller and Harold D. Lasswell, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (1994).

¹⁷ Gerald G. Fitzmaurice, ‘The Law and Procedure of the International Court of Justice: Treaty Interpretation and Other Treaty Points’ (1951) 28 *British Year Book of International Law* 1. For example, see Article 286, LOSC.

¹⁸ Article 32, *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969) (entered into force 27 January 1980). Arnold Duncan McNair, *The Law of Treaties* (1961) at 411. But see, Jan Klabbers, ‘International Legal Histories: the Declining Importance of Travaux Préparatoires in Treaty Interpretation?’ (2003) 50 *Netherlands International Law Review* 267.

prescribed for the interpretation of treaties in the 1969 Vienna Convention on the Law of Treaties, which in this respect has been acknowledged by the ICJ as declaratory of customary international law and so is applicable even to earlier treaties.¹⁹ The relevant provision is Article 31(1): “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”²⁰

4.2.1.1. The Article of Cession merely pertained to the islands and did not include the waters within the Treaty Limits

The Philippines claims that the Treaty Limits are the territorial limits of the Philippine State. The question is whether this interpretation is consistent with the language and intent of the colonial treaties from which such lines were based.²¹ The contentious article in question is Article III, which is the article of cession in the Treaty of Paris,

¹⁹ In the *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)*, both contending parties, non-parties to the Vienna Convention, considered the Vienna Convention’s rules to be applicable ‘inasmuch as it reflects customary international law’. Judgment of 13 December 1999, para. 18., where the ICJ declared: “The Court has itself already had occasion in the past to hold that customary international law found expression in Article 31 of the Vienna Convention.” In the *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment of 17 December 2002, the ICJ could only apply the Vienna Convention’s rules by treating them as customary international law, as Indonesia is not a party to the Vienna Convention on the Law of Treaties. Even so, the Court felt the need to emphasise that Indonesia did ‘not dispute that these are the applicable rules’ (para. 37).

²⁰ Article 31 (1), *Vienna Convention on the Law of Treaties*, *supra* note 18. Each of these elements guides the interpreter in establishing what the Parties actually intended, or their “common will,” as Lord McNair put it in the *Palena* award. *See, Argentina/Chile Frontier Case* (1966), 38 ILR 10, at p. 89 (1969). While the Vienna Convention on the Law of Treaties embrace all interpretive approaches, Vagts notes that “ordinary meaning” takes primacy, original intent takes a secondary role when the parties intend a special meaning, and in such a case the *travaux préparatoires* is resorted to determine that intent. *See*, Detley F. Vagts, ‘Treaty Interpretation and the New American Ways of Law Reading’ (1993) 4 *European Journal of International Law* 472 at 484.

²¹ Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.-Spain, 10 December 1898, T.S. No. 343 [Treaty of Paris]. The extent of the Philippine Treaty Limits is further defined in two subsequent confirmation treaties: the Treaty Between the Kingdom of Spain and the United States of America for Cession of Outlying Islands of the Philippines, U.S.-Spain, 7 November 1900, T.S. No. 345 [Cession Treaty of 1900]; and the Convention Between the United States of America and Great Britain Delimiting the Boundary Between the Philippine Archipelago and the State of North Borneo, U.S.-U.K., 2 January 1930, T.S. No. 856 [Boundaries Treaty of 1930].

which reads as follows: “Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within the following line...”²²

At the heart of the discord is whether the cession contemplated the transfer of ownership of the islands alone or did it include the waters enclosed by these lines. There are two divergent views on the interpretation of Article III. The first view is that the cession of the Philippine Archipelago by Spain to the United States merely pertained to the islands and did not include the waters therein. The second view is that the transfer included not only the islands but the waters within the Treaty Limits.

The unambiguous and unequivocal language of the treaty provision is irrefutable.²³ In the words of Prescott and Schofield, “the documents defining the treaty limits explicitly state that they deal only with the allocation of islands.”²⁴ This position is shared by Max Sorensen, who said:

It seems quite clear that these treaties refer to the islands, that is the land territory, and not to the areas of the sea within the specified lines. This manner of defining the boundaries by longitudes and latitudes may have been the only practical method in view of the immense number of islands and could not be interpreted as revealing any intention to make provisions for the intervening waters outside what would otherwise be the ordinary limits of territorial waters.²⁵

The analysis of distinguished Filipino jurist Florentino Feliciano is also along the same position. In his words:

²² Article III, Treaty of Paris.

²³ *But see*, Jose Victor Villarino Chan-Gonzaga, ‘UNCLOS and the Philippine Territorial Seas: Problems, Perspectives and Options’ (1997) 42 *Ateneo Law Journal* 1 at 24-25.

²⁴ J. R. V. Prescott and Clive H. Schofield, *Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean* (2001) at 55.

²⁵ Max Sorensen, ‘The Territorial Sea of Archipelagos’ (1959) 6 *Netherlands International Law Review* 314 at 325.

What was intended to be ceded was the land area found within the said imaginary lines. The regular geometric nature of the line suggests that its purpose was not so much to mark a political boundary but rather to make certain that all the islands comprising the archipelago were included in the transfer. It would also seem open to doubt whether Spain had, prior to the Treaty of Paris, claimed and treated the waters within these imaginary lines as territorial waters of its colonial possession. Historic evidence, as distinguished from our simple assertion, that Spain had indeed characterized such waters as its territorial waters has yet to be presented.²⁶

The United States takes the same position and argues that these lines were not intended as boundary lines. The official position of the United States has been that: “the lines referred to in bilateral treaties between the United States and the United Kingdom and Spain merely delimited the area within which land areas belong to the Philippines and that they were not intended as boundary lines.”²⁷ The demarcation lines described in the Treaty were not State boundaries, but a cartographic device to simplify description of the lands concerned in the matter.²⁸ This was a common method of demarcation used in treaties especially during the colonial period.²⁹ The function of the coordinates is only

²⁶ Florentino P. Feliciano, “Comments on Territorial Waters of Archipelagos,” 1 *Philippine International Law Journal* (1962) at 160-161.

²⁷ Telegram, Department of State to American Embassy, Manila, 4 January 1958, MS. Department of State, File 756D.022/1-458, in 4 Whiteman, *Digest of International Law*, at 283.

²⁸ See for example, analysis of David H. Anderson, ‘The Status under International Law of the Maritime Areas around Svalbard’ (Paper presented at the Symposium on Politics and Law–Energy and Environment in the Far North Norwegian Academy of Science and Letters 24 January 2007) at 5, of a similar treaty [*Paris Treaty of 1920*, *infra* note 29]:

This was a standard method of identifying islands in old treaties, especially in colonial practice. These boxes did not have a jurisdictional purpose and they did not have wider significance in regard to the waters between the islands. The normal rules of international law applied to such waters within the box. The sides of the box do not create any sort of jurisdictional boundary. Some states in Asia and the Pacific have sought to advance claims to sovereignty or jurisdictional zones based on boxes, but these claims have not been accepted by many other states.

²⁹ See especially, *Treaty concerning the Status of Spitsbergen and conferring the Sovereignty on Norway*, UK Treaty Series No. 18 (1924), Cmd. 2092, 2 L.N.T.S. 7 [otherwise referred to as *Paris Treaty of 1920* or *Treaty concerning the Archipelago of Spitsbergen* or the *Svalbard Treaty*], which also used enclosing lines which is referred to in literature as the “Svalbard box.” Torbjørn Pedersen, ‘The Svalbard Continental Shelf Controversy: Legal Disputes and Political Rivalries’ (2006) 37(3) *Ocean Development & International Law* 339 at 342. See also, Ida Caracciolo, ‘Unresolved controversy: the legal situation of the Svalbard Islands maritime areas; an interpretation of the Paris Treaty in light of UNCLOS 1982’ (Paper presented at the Celebrating 20 years of Boundary Studies, Durham University, United Kingdom, 1-3 April 2009); Elen C. Singh, *The Spitsbergen (Svalbard) Question: United States Foreign Policy*,

to set out which islands are to be covered by the Treaty regime, which would be a sensible way of defining the geographical application of the Treaty regime, instead of naming all the islands.³⁰

This is the same conclusion reached by Professor Joseph Dellapenna who wrote a study examining the legal status of the Philippine territorial waters claim in international law:

The language of the Treaties was such as was commonly used to designate a region of numerous islands so as to avoid the necessity of enumerating each island separately with the consequent risk of omitting some. The treaties by themselves cannot be said to have committed the United States to an 'archipelago theory' of jurisdiction. Nor can their recapitulation in documents approved by the United States government have done so either, since the mere reference to, or quotation from, the Treaties cannot have added anything to the claim the United States under those Treaties, nor can it have alerted the United States that the Philippines intended this recapitulation to have any greater scope than that attributed by the United States to the Treaties.³¹

The United States, in fact, has never claimed a territorial sea greater than 12nm.³² In the 1973 Summer Session of the UN Seabed Committee at Geneva, Switzerland, the American delegate asserted his country's position that the United States did not exercise authority beyond the three-mile territorial sea limit and that the Treaty of Paris did not transfer to the United States any waters.³³ In this regard, the United States argues that

1907-1935 (1980); Geir Ulfstein, *The Svalbard Treaty: from Terra Nullius to Norwegian Sovereignty* (1995)

³⁰ Robin R. Churchill and Geir Ulfstein, *Marine Management in Disputed Areas: The Case of the Barents Sea* (1992) at 29. This was with respect to the "Svalbard box," mentioned above.

³¹ Joseph W. Dellapenna, 'The Philippines Territorial Water Claim in International Law' (1970-1971) 5 *Journal of Law & Economic Development* 45 at 54.

³² See literature on the territorial sea of the United States: Bruce E. Alexander, 'The Territorial Sea of the United States: Is It Twelve Miles or Not' (1989) 20 *Journal of Maritime Law and Commerce* 449; Henry M. Arruda, 'The Extension of the United States Territorial Sea: Reasons and Effects' (1988-1989) 4 *Connecticut Journal of International Law* 697; H. Gary Knight, 'The 1971 United States Proposals on the Breadth of Territorial Sea and Passage through International Straits' (1971-1972) 51 *Oregon Law Review* 759; John E. Noyes, 'United States of America Presidential Proclamation No. 5928: A 12-Mile U.S. Territorial Sea' (1989) 4 *International Journal of Estuarine and Coastal Law* 142.

³³ Chan-Gonzaga, *supra* note 23, at 22.

the territory conveyed to the Philippines upon independence from the former cannot include waters within the Treaty Limits but beyond the twelve-mile territorial sea limit allowed in international law.³⁴

In a 1961 Diplomatic Note, the United States rejected the Philippine interpretation claiming the waters within the Treaty Limits as part of Philippine territory, in the following manner:

The Philippine Government is also aware that the United States Government does not share its view concerning the proper interpretation of the provisions of the Treaty of Peace of December 10, 1898, between the United States and Spain, and the Treaty of Washington of November 7, 1900, by which Spain ceded the islands of the Philippine archipelago to the United States. Moreover, neither of the Parties to the Convention of January 2, 1930, between the United States and the United Kingdom, defining the boundary between the Philippines and North Borneo agrees with the Philippine interpretation of the provisions of that Convention relied on as one of the bases for the proposed legislation.³⁵

In 1973, in reply to the Statement made by Head of Philippine Delegation Arturo Tolentino at the Summer Session of the UN Seabed Committee held in Geneva, Switzerland, the delegate of the United States made clear his country's position:

In connection with the statement of the distinguished delegate of the Philippines, referring to the United States, we wish to state that the United States adheres to the three-mile limit of territorial sea, and in the Philippines we never exercised sovereignty beyond that limit. The Treaty of Paris did not transfer to us any waters; only the land area was ceded to us and it was over such land area that the United States exercised sovereignty. We did not acquire or exercise sovereignty and we did not transfer any sovereignty over any area of sea beyond the three-mile limit.³⁶

³⁴ *Id.*

³⁵ American Embassy Manila Diplomatic Note No. 836 of May 18, 1961, State Department File No. 796.022/5-2461.

³⁶ Arturo M. Tolentino, *The Philippines and the Law of the Sea: A Collection of Articles, Statements and Speeches* (1982) at 15.

In January 1986, the United States in protest to the Philippine Declaration made on its signature of the LOSC,³⁷ categorically contested the Philippine interpretation in the following words:

the Government of the United States does not share its view concerning the proper interpretation of the provisions of those treaties, as they relate to the rights of the Philippines in the waters surrounding the Philippine Islands. The Government of the United States continues to be of the opinion that neither those treaties, nor subsequent practice, has conferred upon the United States, nor upon the Republic of the Philippines as successor to the United States, greater rights in the waters surrounding the Philippine Islands than are otherwise recognized in customary international law.³⁸

The next section will discuss the other view that the cession of the Philippines from Spain to the United States included the transfer of the waters within the Treaty Limits.

4.2.1.2. The Article of Cession included not only the islands but the waters within the Treaty Limits

The second view is that the cession of the Philippines from Spain to the United States by virtue of the Treaty of Paris included not only the islands but the waters within the Treaty Limits. This is the position taken by the Philippines. This argument is based on both a textual analysis of the article in question and from the subsequent State practice of the United States.³⁹ In the words of Chan-Gonzaga:

The proponent submits that apparently the natural and ordinary meaning of the word – *archipelago* – comprehends an extensive body of water/sea possessed of a group of islands. Applying the textual approach of treaty analysis the conclusion is inescapable that the Treaty of Paris, especially Article III, transferred sovereignty over a body of water with all the islands embraced

³⁷ Philippine Declaration made upon signature (10 December 1982) and confirmed upon ratification (8 May 1984) of the United Nations Law of the Sea Convention, attached to this thesis as APPENDIX 8. See full text in: Raphael Perpetuo M. Lotilla (ed), *The Philippine National Territory: A Collection of Related Documents* (1995) at 509-510.

³⁸ J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive Maritime Claims* (1996) at 221.

³⁹ Magallona, *supra* note 8, at 56-60.

therein. And this body of water was defined in the technical description likewise found in the same article.⁴⁰

Thus, the crucial textual construction here proceeds from the definition of the term “archipelago,” which is defined as an “island-studded sea,”⁴¹ or “an expanse of water with many scattered islands.”⁴² In this regard, the sea rather than the terrestrial domain is the constitutive element.⁴³ Thus, the article of cession which refers to “the archipelago known as the Philippine islands,”⁴⁴ contemplated the transfer of the waters including the islands therein.⁴⁵ This is the position of Filipino jurist Miriam Defensor-Santiago, who stated in very clear language:

In view of the foregoing, the conclusion is ineluctable that the lines drawn in the Treaty of Paris of 1898 and the Convention of 1930, draw nothing less than the territorial limits of the Philippine Archipelago, at the very least, insofar as Spain and Great Britain are concerned.⁴⁶

The statement of sole arbitrator Max Huber, with reference to this article of cession, in *Island of Palmas* case,⁴⁷ that Article III “is so worded that it seem as though the Philippine Archipelago, within the *limits* fixed by that Article, was at the moment of cession under Spanish sovereignty...” seem to support the Philippine position that the

⁴⁰ Chan-Gonzaga, *supra* note 23, at 24-25.

⁴¹ Jose D. Ingles, ‘The Archipelagic Theory’ (1974) 3 *Philippine Yearbook of International Law* 23 citing the *Encyclopedia Britannica*.

⁴² *Merriam-Webster Online Dictionary* (2009). Merriam-Webster Online: <http://www.merriam-webster.com/dictionary/archipelago>. Date accessed: 6 October 2009.

⁴³ Chan-Gonzaga, *supra* note 23, at 24.

⁴⁴ Article III, Treaty of Paris.

⁴⁵ Jose D. Ingles, ‘The U.N. Convention on the Law of the Sea: Implications of Philippine Ratification’ (1983) 9 *Philippine Yearbook of International Law* 47 at 49.

⁴⁶ Miriam Defensor Santiago, ‘The Archipelago Concept in the Law of the Sea: Problems and Perspectives’ (1974) 49 *Philippine Law Journal* 315 at 362.

⁴⁷ *Island of Palmas Case*, (US v. Netherlands), 2 U.N. Rep. Intl. Arb. Awards 829.

geographical lines described in the treaty are boundary lines.⁴⁸ In the same case, the United States submitted as Exhibit No. 11, maps published in 1902 by the United States Bureau of Insular Affairs which reproduced the lines described in Article III of the Treaty of Paris.⁴⁹

The very language of the 2 January 1930 Convention between the United States and Great Britain also supports this interpretation.⁵⁰ The 1930 Convention, in reference to the lines drawn by the Treaty of Paris, is explicit that they constitute a boundary. The 1930 Convention in Article I states that the geographical line as beginning and ending “on the *boundary* defined by the Treaty between the United States of America and Spain signed at Paris, 10 December 1898.”⁵¹ Further, a reading of Article II of the same treaty leaves no doubt to the conclusion that the lines are indeed contemplated to be boundary lines. It provides:

It is agreed that if more accurate surveying and mapping of North Borneo, the Philippine Islands and intervening islands shall in the future show that the lines described above does not pass between Little Bakkungaan and Great Bakkungaan Islands, substantially as indicated on Chart No, 4720, the *boundary line* shall be understood to be defined in that area as a line passing between Bakkungaan and Great Bakkungaan Islands as indicated on the chart.

It is likewise agreed that if more accurate surveying and mapping shall show that the line described above does not pass between the Mangsee Islands and Mangsee Great Reef as indicated on Chart No. 4720, the *boundary* shall be understood to be defined in that area as a straight line drawn ..., passing through Mangsee Channel as indicated on attached Chart No. 4720 ... (emphasis supplied)⁵²

⁴⁸ *Ibid.*, at 842 – 43.

⁴⁹ *Island of Palmas Case*, II RIAA (1928), 829, at 853.

⁵⁰ Boundaries Treaty of 1930, *supra* note 21.

⁵¹ Article I, Boundaries Treaty of 1930.

⁵² Article II, Boundaries Treaty of 1930.

In interpreting the 1930 Convention, the Attorney Adviser of the US Department of State had occasion to clarify as follows:

While the *boundary line* is described only in geographic terms in the Convention, the attached map shows that the mid-line was apparently adopted at two points separating islands of the Mangsee Channel and the channel between Great and Little Bakkungaan Islands.⁵³

In addition to the textual construction of the article of cession, the subsequent and contemporaneous acts of the United States indicate that it was apparently its understanding “that the coordinates in Article III were territorial delimitations.”⁵⁴ This is the categorical interpretation of Filipino legal scholar Merlin Magallona, who has written extensively on the Treaty of Paris. In his words:

In denying that the Treaty of Paris defines the political boundaries of the Philippines, the US contradicts its own major legislative enactments of colonial policy governing the Philippines. These enactments stand as interpretations of the Treaty of Paris on the part of the US government and be held binding on itself.⁵⁵

The major colonial legislative enactments of the United States when it still exercised sovereignty and jurisdiction over the Philippines likewise confirm this position. The Philippine Autonomy Act, also known as the Jones Law,⁵⁶ a United States statute enacted by the US Congress in 1916, the first formal and official declaration of its commitment to grant independence to the Philippines since it took over the territory after the Spanish-American War in 1898 also buttresses this position. The US Congress, in laying down the territorial basis for the exercise of US sovereignty and jurisdiction,

⁵³ Whiteman, *Digest of International Law*, Volume 4, at 286 – 287.

⁵⁴ Chan-Gonzaga, *supra* note 23, at 29.

⁵⁵ Magallona, *supra* note 8, at 57.

⁵⁶ The Philippine Autonomy Act (Jones Law), “An Act to Declare the Purpose of the People of the United States as to the Future Political Status of the People of the Philippine Islands, and to Provide a More Autonomous Government for those Islands.” 29 August 1916.

recognises the territorial limits set forth in Article III of the Treaty of Paris as the “boundaries” of the Philippine Islands ceded to the United States government. In the very words of the statute:

Be it enacted by the Senate and House of Representatives of 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.⁵⁷

In 1917, when the US defined the “territorial jurisdiction and extent of powers of the Philippine government” in the Administrative Code of 1917, it also referred to the same colonial treaties as defining the limits of the Philippine Archipelago.⁵⁸ This is also the same territorial formulation adopted by the US Congress in the Hare-Hawes Cutting Act of 1933, which originally provided for the decolonisation of the Philippines.⁵⁹ The Tydings-McDuffie Act, officially known as the Philippine Independence Act,⁶⁰ approved as a United States federal law on 24 March 1934 which provided for self-

⁵⁷ Section 1, Philippine Autonomy Act.

⁵⁸ Section 14, Article IV, Administrative Code of 1916, O.G. Special Number, 1 July 1916; Section 16, Article IV, Administrative Code of 1917, Revised Administrative Code of the Philippines, Manila, Bureau of Printing, 1951. The two provisions are identical, and provides as follows:

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.

⁵⁹ An Act to Enable the People of the Philippine Islands to Adopt a Constitution and Form a Government for the Philippine Islands, to Provide for the Independence of the Same, and for Other Purposes (Hare-Hawes Cutting Act) 46 US Stat. 761. The pertinent part of Section 1 of which provides that:

... the Commonwealth of the Philippine Islands ... 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.

⁶⁰ The Tydings McDuffie Act, otherwise known as the Philippine Independence Act, approved on 24 March 1934.

government of the Philippines and for Filipino independence from the United States after a period of ten years, explicitly stated that the Commonwealth of the Philippine Islands:

... 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, 1900.⁶¹

Hence, the United States can be considered in estoppel.⁶² It must be remembered that the rules of treaty interpretation also take into account the context, and any subsequent practice in the application of the treaty which establish the agreement of the parties regarding its interpretation.⁶³ The acts executed or permitted to be executed by a party to a treaty may reasonably be regarded as indicative of its real intention.⁶⁴ In the words of Lord McNair in his treatise on the law of treaties: “We are dealing with a judicial practice worthy to be called a rule, namely that when there is a doubt as to the meaning of a provision or an expression contained in a treaty, the relevant conduct of the contracting parties after the conclusion of the treaty has a high probative value as to the intention at the time of its conclusion.”⁶⁵ Thus, it is apparent that the previous State practice of the United States with respect to the territorial limits of the Philippines seems to contradict its present day position that the cession never contemplated the

⁶¹ Section 1, 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 (otherwise known as the Philippine Independence Act or Tydings-McDuffie Act) 48 US Stat. 456.

⁶² Jose D. Ingles, ‘The U.N. Convention on the Law of the Sea: Implications of Philippine Ratification’ (1983) 9 *Philippine Yearbook of International Law* 47 at 61.

⁶³ Article 31(3), *Vienna Convention on the Law of Treaties*, *supra* note 18.

⁶⁴ Gerald G. Fitzmaurice, ‘The Law and Procedure of the International Court of Justice: 1951 -1954’ (1951) 33 *British Year Book of International Law* 204 at 223.

⁶⁵ Arnold Duncan McNair, *The Law of Treaties* (1961) at 423.

transfer of the expanses of water enclosed by the Treaty Limits and merely pertained to the islands therein.⁶⁶

4.2.2. Conflict with the Law of the Sea Convention

In international law, a treaty becomes binding and in force for its parties.⁶⁷ The only way for a State which enters into a treaty to limit the range of application of a treaty with respect to itself, is to make a reservation.⁶⁸ However, this is possible only if the treaty explicitly permits States to make reservations.⁶⁹ The Vienna Convention on the Law of Treaties in Article 19 provides that a State may make a reservation save in the following instances: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.⁷⁰

Many major multilateral treaties contain specific provisions specifying the type of reservations which are permissible, and those which are not.⁷¹ In the case of the LOSC,

⁶⁶ Chan-Gonzaga, *supra* note 23, at 29. Magallona, *supra* note 8, at 57-60. Jose D. Ingles, 'The Archipelagic Theory' (1974) 3 *Philippine Yearbook of International Law* 23 at 25. Arturo M. Tolentino, *The Philippines and the Law of the Sea: A Collection of Articles, Statements and Speeches* (1982) at 16, who states that "It may be very convenient now for the United States to say that she did not exercise sovereignty over the territorial sea of the Philippines because she is no longer there."

⁶⁷ Article 26, Vienna Convention on the Law of Treaties. Please note that the Vienna Convention on the Law of Treaties in Article 2(1)(f) defines a "contracting state" as a State who has consented to be bound by the treaty, whether or not the treaty has entered into force. Anthony Aust, *Modern Treaty Law and Practice* (2000) at 131.

⁶⁸ The Vienna Convention on the Law of Treaties in Article 2 defines a reservation as: "[A] unilateral statement, however phrased or named, made by a country, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." *Vienna Convention on the Law of Treaties*, *supra* note 18.

⁶⁹ Aust, *supra* note 67, at 105-116.

⁷⁰ Article 19, *Vienna Convention on the Law of Treaties*, *supra* note 18.

⁷¹ See for example, D. W. Bowett, 'Reservations to Non-Restricted Multilateral Treaties' (1976-1977) 48 *British Yearbook of International Law* 67; John King Gamble, Jr., 'Reservations to Multilateral Treaties:

Article 309 is clear that “[n]o reservations or exceptions may be made to this Convention unless expressly permitted by other articles of the Convention.” The prohibition being clear, the State party making the reservation must prove that such is specifically permitted by a provision in the Convention.⁷² If the Convention does not state that a particular provision allows a reservation, then, it is implied that a reservation is not permitted.⁷³

The LOSC provision on the breadth of the territorial sea in Article 3 of the Convention does not state that a reservation is allowed.⁷⁴ This means that the extent of the territorial sea cannot be subject of a reservation by a State party to the Convention. Moreover, taking due regard to the “package deal” nature of the Convention,⁷⁵ a reservation made

a Macroscopic View of State Practice’ (1980) 74 *American Journal of International Law* 372; Laurence R. Helfer, ‘Not Fully Committed-Reservations, Risk, and Treaty Design’ (2006) 31 *Yale Journal of International Law* 367; William A. Schabas, ‘Reservations to the Convention on the Rights of the Child’ (1996) 18 *Human Rights Quarterly* 472.

⁷² S. K. N. Blay, R. W. Piotrowicz and B. M. Tsamenyi, ‘Problems with the Implementation of the Third United Nations Law of the Sea Convention: the Question of Reservations and Declarations’ (1984-1987) 11 *Australian Yearbook of International Law* 67 at 67. In their words:

Article 309 prohibits the making of reservations “unless expressly permitted by the articles of [the] Convention”. Since none of the articles permit reservations, it follows that no party to the LOSC may lawfully make a reservation. This prohibition was considered appropriate by the framers of the LOSC because it was thought that reservations were inconsistent with the consensus approach adopted at the Third Law of the Sea Conference.

⁷³ The “no-reservation” policy in the LOSC is a product of the “package-deal” approach used in arriving at consensus during the negotiation of the LOSC. See Ted L. McDorman, ‘Reservations and the Law of the Sea Treaty’ (1981-1982) 13 *Journal of Maritime Law and Commerce* 481. However, the LOSC in Article 310 allows a State to make “declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.”

⁷⁴ Article 3, LOSC reads in full: “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.”

⁷⁵ Barry Buzan, ‘Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea’ (1981) 75 *American Journal of International Law* 324; Hugo Caminos and Michael R. Molitor, ‘Progressive Development of International Law and the Package Deal’ (1985) 79 *American Journal of International Law* 871.

to Article 3 being “incompatible with the object and purpose of the LOSC is also not permitted by the Vienna Convention on the Law of Treaties.”⁷⁶

The LOSC is a product of political compromise among various groups of competing interests and, because of this, it contains many provisions which are vague, ambiguous and subject to multiple interpretations. But the rule on the breadth of the territorial sea is clearly not one of these clauses. The fact that the LOSC was conceived, negotiated and eventually offered for signature and ratification as a “package deal” and the very wording of the treaty itself did not permit reservations indicates the legal obligation upon States parties to embrace the treaty in its entirety.⁷⁷ This means that States cannot simply choose and pick which provisions of the Convention it wishes to comply with.

The signature and ratification of the Philippines of the LOSC carries the reasonable and logical expectation that it will act in conformity with, and not frustrate, the object of the Convention and State practice consistent with it.⁷⁸ Further, it is naturally expected that the Philippines has to amend its domestic laws and regulations which are not in conformity with the LOSC. In the words of former ITLOS President Wolfrum:

National legislation of States Parties has to conform to the restrictions established by the LOS Convention as far as the extension of areas under national sovereignty or jurisdiction is concerned.⁷⁹

⁷⁶ Article 19(c), *Vienna Convention on the Law of Treaties*, *supra* note 18.

⁷⁷ Blay, et al, *supra* note 72 at 67.

⁷⁸ Article 300, LOSC. *See also*, Article 18 of the 1969 Vienna Convention on the Law of Treaties on the obligation not to defeat the object and purpose of a treaty prior to its entry into force; and Article 26 of the 1969 Vienna Convention on the Law of Treaties which embodies the international law principle of *pacta sunt servanda* for treaties in force.

⁷⁹ Rudiger Wolfrum, ‘The Legal Order for the Seas and Oceans’ in Myron H. Nordquist and John Norton Moore (eds), *Entry into force of the Law of the Sea Convention* (1995) 161 at 162.

The position of the Philippines with respect to its treatment of the Treaty of Paris lines as the limits of its territory and the domestic status of the water these lines enclose pose two points of conflict with the LOSC. First, the Philippine Treaty Limits encloses a territorial sea beyond the 12nm limit allowed under the LOSC.⁸⁰ The Philippine territorial sea is not even uniform in breadth and in some instances exceeds 200 nm.⁸¹ Second, the waters within the Philippine baselines are treated as internal waters where there is no right of innocent passage.⁸² On the other hand, the LOSC treats these waters as archipelagic waters where the rights of innocent passage and archipelagic sea lanes passage are accorded to all ships from all States.⁸³

Despite the valiant efforts of the Philippine delegation during the Law of the Sea Conferences, it is clear that UNCLOS III rejected the Philippine claim to its historic territorial sea beyond 12nm.⁸⁴ In fact, at the First and Second Law of the Sea Conferences, even the Philippine argument of treating the archipelago as a whole on historic grounds was not accepted.⁸⁵ At the LOS Conferences, the Philippines had three primary concerns. First, the recognition of its sovereignty over the waters around,

⁸⁰ Chan-Gonzaga, *supra* note 23, at 39. Article 3, LOSC.

⁸¹ Arturo M. Tolentino, *The Philippines and the Law of the Sea: A Collection of Articles, Statements and Speeches* (1982) at 71.

⁸² Section 2, Republic Act No. 3046, 17 June 1961. This section reads: "All waters within the baselines provided for in section one hereof are considered inland or internal waters of the Philippines." *Also see*, Article I, 1987 Philippine Constitution. The pertinent part reads: "...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." For the Philippine position at the LOS Conference, *see* Arturo M. Tolentino, 'Philippine Position on Passage Through Archipelagic Waters' (1975) 4 *Philippine Yearbook of International Law* 44.

⁸³ Articles 52 and 54, LOSC. Foreign vessels enjoy rights of innocent passage through archipelagic waters, which may be suspended temporarily for security reasons. Ships also enjoy archipelagic sea lane passage which may not be hampered or suspended. Articles 54, 44, LOSC. *See* Lowell B. Bautista, 'International legal implications of the Philippine Treaty Limits on navigational rights in Philippine waters' (2009) 1(3) *Australian Journal of Maritime and Ocean Affairs* 88.

⁸⁴ Barbara Kwiatkowska, 'The Archipelagic Regime in Practice in the Philippines and Indonesia -- Making or Breaking International Law' (1991) 6 *International Journal of Estuarine and Coastal Law* 1 at 8.

⁸⁵ Jayewardene, *supra* note 61, at 131.

between, and connecting the islands of the archipelago regardless of breadth and dimension which otherwise would have been treated as separate pockets of water under the regime of the territorial sea. Second, a passage regime through the same waters necessary to protect national security; and third, recognition of the rights to the marine resources in the areas enclosed by the Treaty Limits.⁸⁶ The “package deal” approach taken in the negotiations meant that there were heavy compromises needed to be made in order to move the Conference forward.⁸⁷ This included the Philippines’ positions. For one, it is clear that the LOSC regime of archipelagic waters is not the same as the regime of internal waters in the Philippine Constitution:

The concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or high sea from the rights of foreign vessels to transit passage for international navigation.⁸⁸

On 10 December 1982, when the Philippines signed the LOSC, it submitted a Declaration in accordance with Article 310 of the LOSC, which it confirmed upon ratification on 8 May 1984, which *inter alia*, contained the following:

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 10 December 1898, and the Treaty of Washington between the United States of America and Great Britain of 2 January 1930.⁸⁹

⁸⁶ Jay L. Batongbacal, ‘The Maritime Territories and Jurisdictions of the Philippines and the United Nations Convention on the Law of the Sea’ (2001) 76 *Philippine Law Journal* 123 at 148 – 149.

⁸⁷ Hugo Caminos and Michael R. Molitor, ‘Progressive Development of International Law and the Package Deal’ (1985) 79 *American Journal of International Law* 871; Peter B. Payoyo, *Cries of the Sea: World Inequality, Sustainable Development and the Common Heritage of Humanity* (1997) at 292.

⁸⁸ Paragraph 7, Philippine Declaration, *supra* note 37.

⁸⁹ Philippine Declaration, *supra* note 37.

Further, the Philippines declared in the same instrument that the signing of the LOSC “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”⁹⁰ and “over any territory over which it exercises sovereign authority ... and the waters appurtenant thereto.”⁹¹ The Philippine Declaration was protested by several nations,⁹² and criticised for amounting to a prohibited reservation under the LOSC.⁹³ It is clear that the Philippine Declaration, which does not seek to harmonise Philippine legislation with the Convention and instead appears to subvert it, does not constitute a declaration or statement allowed by the LOSC.⁹⁴ It is in effect in the nature of a reservation which is expressly forbidden by Article 309 of the Convention.⁹⁵ On 26 October 1988, in response to the objection made by Australia,⁹⁶ the Government of the Philippines submitted a Declaration which signified its intent to “harmonize its domestic legislation with the provisions of the Convention” including an assurance that “the Philippines will abide by the provisions of the said Convention.”⁹⁷

⁹⁰ Paragraph 1, Philippine Declaration. *Ibid.*

⁹¹ Paragraph 4, Philippine Declaration. *Ibid.*

⁹² These include Australia, Bulgaria, Byelorussia, Czechoslovakia, the Ukraine and USSR. *Please see, Objections and Other Communications Concerning the Philippine Declaration on Signing of the Convention on the Law of the Sea. See full text in: Lotilla, supra note 37, at 541-547.*

⁹³ L.D. M. Nelson, ‘Declarations, Statements and ‘Disguised Reservations’ with respect to the Convention on the Law of the Sea’ (2001) 50 *International and Comparative Law Quarterly* 767 at 780-781.

⁹⁴ Jose D. Ingles, ‘The U.N. Convention on the Law of the Sea: Implications of Philippine Ratification’ (1983) 9 *Philippine Yearbook of International Law* 47 at 66.

⁹⁵ Article 309, LOSC, provides that: “No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.” Further, Article 10 of the Vienna Convention on the Law of Treaties, to which the Philippines is a party, expressly provides that a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation “unless the reservation is prohibited by the Treaty.” *Vienna Convention on the Law of Treaties, supra note 18.*

⁹⁶ The Australian protest submitted on 3 August 1988, read in part: “Australia considers that [the] declaration made by the Republic of the Philippines is not consistent with article 309 of the Law of the Sea Convention, which prohibits the making of reservations, nor with article 310 which permits declarations to be made “provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of this Convention in their application to that State.”

⁹⁷ Philippine Declaration, 26 October 1988. Lotilla, *supra* note 37, at 548.

4.2.2.1. The International Law of Territorial Waters

The historical development of the issue on the delimitation of the outer limit of the territorial sea has been one of the most divisive issues in the law of the sea.⁹⁸ It has been particularly contentious for two reasons: first, because of its impacts on passage through straits used for international navigation;⁹⁹ and second, because the freedom of navigation in some parts of the high seas would be subject to the limited right of innocent passage.¹⁰⁰

The heated debates mirrored the centuries-old conflicting theories of free seas (*mare liberum*) versus closed seas (*mare clausum*).¹⁰¹ The opposing sides come from two conflicting interests: on the one hand, the interests of the maritime States; and on the other, the interests of the coastal States. The maritime States claim the free usage of the seas while the coastal States assert their exclusive sovereignty over maritime areas adjacent to their coastlines.¹⁰²

⁹⁸ UNCLOS I and UNCLOS II, as well as the previous 1930 Codification of International Law efforts, all failed to reach an agreement on the maximum breadth of the territorial sea. This is the reason why Article 3 of the LOSC is widely regarded as “one of the major achievements of UNCLOS III.” Myron H. Nordquist (ed), *United Nations Convention on the Law of the Sea, 1982: A Commentary* (1985) at 77.

⁹⁹ H. Gary Knight, ‘The 1971 United States Proposals on the Breadth of Territorial Sea and Passage through International Straits’ (1971-1972) 51 *Oregon Law Review* 759. Also, Frank Nolte, ‘Passage through International Straits: Free or Innocent --The Interests at Stake’ (1973-1974) 11 *San Diego Law Review* 815. *But see*, Horace B. Robertson, Jr., ‘Passage through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea’ (1979-1980) 20 *Virginia Journal of International Law* 801.

¹⁰⁰ William L. Schachte Jr. and J. Peter A. Bernhardt, ‘International Straits and Navigational Freedoms’ (1992-1993) 33 *Virginia Journal of International Law* 527. Please note that this also affects aircraft which do not have the right of innocent passage over the territorial sea. David John Harris, *Cases and Materials on International Law* (1991) at 353-354; Michael Akehurst, *A Modern Introduction to International Law* (1992) at 177.

¹⁰¹ Mónica Brito Vieira, ‘Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden’s Debate on Dominion over the Seas’ (2003) 64 *Journal of the History of Ideas* 361.

¹⁰² In the words of E.D. Brown, “the history of the modern international law of the sea can perhaps be best understood by perceiving it as a continual conflict between two opposing, yet complementary, fundamental principles—territorial sovereignty and the freedom of the seas”. E. D. Brown, ‘Maritime

The interests of the coastal States in the extension of their jurisdiction over the sea area along their coastlines can be summed up into three: first, the protection of their security; second, the furtherance of their economic interests; and third, the protection of the marine environment.¹⁰³ The maritime powers, for their part, sought to preserve and protect freedom of these same areas for navigation, overflight and the utilisation of the resources therein.¹⁰⁴ The law of the sea in general, and the LOSC in particular, developed to strike a balance between these interests.¹⁰⁵

In order to trace the origin and development of the territorial sea concept, it is not necessary for the limited purposes of this chapter, to give a detailed account of its foundations in Roman law,¹⁰⁶ through the maritime expropriates of the Middle Ages,¹⁰⁷ to the comments of Hugo Grotius, and beyond through Bynkershoek,¹⁰⁸ State practice in the eighteenth and nineteenth centuries,¹⁰⁹ the wide Latin American claims, to the

Zones: A Survey of Claims' in Robin Churchill, Myron H. Nordquist and S. Houston Lay (eds), *New Directions in the Law of the Sea: Documents* (1973) Volume III, at 157.

¹⁰³ C. John Colombos *The International Law of the Sea* (1967) at 87.

¹⁰⁴ Farhad Talaie, *Analysis of the Rules of the International Law of the Sea Governing the Delimitation of Maritime Areas under National Sovereignty* (PhD Thesis, University of Wollongong, 1998) at 35-37.

¹⁰⁵ Rudiger Wolfrum, 'The Legal Order for the Seas and Oceans' in Myron H. Nordquist and John Norton Moore (eds), *Entry into force of the Law of the Sea Convention* (1995) 161 at 162.

¹⁰⁶ Percy Thomas Fenn Jr., 'Origins of the Theory of Territorial Waters' (1926) 20 *American Journal of International Law* 465.

¹⁰⁷ Thomas W. Fulton, *The Sovereignty of the Sea: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters, with Special Reference to the Rights of Fishing and the Naval Salute* (1911) at 3-6; Pitman B. Potter, *The Freedom of the Seas in History, Law, and Politics* (1924) at 36-56.

¹⁰⁸ Wyndham L. Walker, 'Territorial Waters: The Cannon Shot Rule' (1945) 22 *British Yearbook of International Law* 210; Cornelis van Bynkershoek, *De Dominio Maris Dissertatio* (1923) at 41-45.

¹⁰⁹ Thomas Baty, 'The Three-Mile Limit' (1928) 22 *American Journal of International Law* 503; Bernard G. Heinzen, 'The Three-Mile Limit: Preserving the Freedom of the Seas' (1958-1959) 11 *Stanford Law Review* 597; H. S. K. Kent, 'Historical Origins of the Three-Mile Limit' (1954) 48 *American Journal of International Law* 537.

three Law of the Sea Conferences,¹¹⁰ and finally into the LOSC and modern State practice.¹¹¹ This chapter assumes a basic familiarity with the concept of the territorial sea and will go directly into a discussion on the issue of the breadth of the territorial sea in international law.

4.2.2.2. The Breadth of the Territorial Sea as a Rule of International Law

The right of a coastal State to a territorial sea¹¹² is automatic and inherent in sovereignty over the land¹¹³ and in effect, its possession is “not optional, not dependent upon the will of the State, but compulsory.”¹¹⁴ The sovereignty of a coastal State over its territorial sea is well-settled in contemporary international law.¹¹⁵ It is both a customary and a conventional rule of international law.¹¹⁶

¹¹⁰ Arthur H. Dean, ‘The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas’ (1960) 54 *American Journal of International Law* 751; Myres S. McDougal and William T. Burke, ‘Community Interest in a Narrow Territorial Sea Inclusive Versus Exclusive Competence Over the Oceans’ (1959-1960) 45 *Cornell Law Quarterly* 171; Shigeru Oda, ‘The Extent of the Territorial Sea—Some Analysis of the Geneva Conferences and Recent Developments’ (1962) 6 *Japanese Annual International Law* 7.

¹¹¹ John Robert Victor Prescott and Clive Schofield, *The Maritime Political Boundaries of the World* (2005); J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive Maritime Claims* (1996).

¹¹² See for example, 1972 Santo Domingo Declaration, reproduced as A/AC.138/80 in SBC Report 1972, approved by the Specialized Conference of the Caribbean Countries on Problems of the Sea, which formulated the following principle under the heading “territorial sea”: “The sovereignty of a State extends, beyond its land territory and its internal waters, to an area of the sea adjacent to its coast, designated as the territorial sea, including the superjacent air space as well as the subjacent seabed and subsoil.”

¹¹³ Rebecca M. Wallace, *International Law* (2005) at 148, who states that: “[T]he consequence of being a coastal State is that it possesses a territorial sea.”

¹¹⁴ This emerges clearly from the words of Lord McNair in the *Anglo-Norwegian Fisheries Case*: “To every State whose land territory is at any place washed by the sea, international law attaches a corresponding portion of maritime territory consisting of what the law calls territorial waters. International law does not say to a State: “You are entitled to claim territorial waters if you want them.” No maritime State can refuse them. International law imposes upon a maritime State certain obligations and confers upon it certain rights arising out of the sovereignty which it exercises over its maritime territory. The possession of this territory is not optional, not dependent upon the will of the State, but compulsory.” McNair, J. (dissenting opinion) *Anglo-Norwegian Fisheries Case*, ICJ Reports (1951) at 116.

¹¹⁵ Geoffrey Marston, ‘The Evolution of the Concept of the Sovereignty over the Bed and the Subsoil of the Territorial Sea’ (1976-1977) 48 *British Yearbook of International Law* 321., 332. In the words of

The status of the maximum breadth of the territorial sea of 12nm is not as clear-cut. While it is almost taken for granted by many modern international law commentators that the breadth of the territorial sea stands at 12nm, it has not always been the case.¹¹⁷ In fact, throughout most of the twentieth century the issue remained unresolved.¹¹⁸ The sovereignty of the coastal State over a maritime belt adjacent to its coasts has been recognised in international law even before the codification of the law of the sea in the LOSC.¹¹⁹ However the contentious twin issues have been its permissible extent and its method of delimitation.¹²⁰ A cursory survey of the historical development of the extent of the territorial sea will be instructive on understanding the current state of the law.¹²¹

Throughout history, maritime claims over territorial seas have been all but uniform and consistent.¹²² The claims varied both in width, dimension and the rights claimed over such waters. In the sixteenth and seventeenth centuries, the “range of visibility”

Marston, writing before the LOSC: “That States have sovereignty over the bed and subsoil of their territorial seas is now an uncontroverted rule of customary international law, quite apart from the provisions of Article 2 of the Convention on the Territorial Sea and the Contiguous Zone, 1958.”

¹¹⁶ Mark Eugen Villiger, *Customary International Law and Treaties* (1985) at 363. Also, Vladimir Duro Degan, *Sources of International Law* (1997) at 206 citing the Judgment of the ICJ in the *Nicaragua Case*, (*Nicaragua v US*) ICJ Reports (1986), at page 111, para. 212.

¹¹⁷ Sayre A. Swaztrauber, *The Three-Mile Limit of Territorial Seas* (1972) at 209, who notes that in 1958, when UNCLOS II was convened, “it faced an almost staggering range of claims” that “varied between three and two hundred miles.”

¹¹⁸ Churchill and Lowe even notes that “[D]oubts concerning the juridical nature of the territorial sea survived into the present century.” Robin R. Churchill and Vaughan Lowe, *The Law of the Sea* (1999) at 73.

¹¹⁹ But see comment by Churchill and Lowe who opine that: “[A]lthough the legislation of several States, ... declares that the State’s sovereignty ‘extends and has always extended to its territorial sea,’ such statements are historically incorrect: the true picture of the development of the concept is rather more complex.” Churchill and Lowe, *supra* note 118, at 71.

¹²⁰ S. Whittemore Boggs, ‘Delimitation of the Territorial Sea’ (1930) 24 *American Journal of International Law* 541.

¹²¹ D. P. O’Connel, ‘The Juridical Nature of the Territorial Sea’ (1971) 45 *British Yearbook of International Law* 303; Shigeru Oda, ‘Territorial Sea and Natural Resources’ (1955) 4 *International and Comparative Law Quarterly* 415.

¹²² Rebecca M. Wallace, *International Law* (2005) at 149.

criterion determined the extent of the waters over which the coastal State can claim jurisdiction.¹²³ Later, jurists like Grotius and Bynkershoek promoted the first physical method for the determination of the territorial sea limit: the cannon-shot rule.¹²⁴ In the eighteenth century, the range of the cannon was approximately equivalent to a marine league or three nautical miles.¹²⁵

It was the Italian jurist Galiani in 1782 who suggested that fixing three miles along the coast as a limit beyond which no cannon could possibly reach would be reasonable rather than determining the range of a cannon particularly positioned along any coast.¹²⁶ In 1793, the United States adopted, for the purposes of neutrality, the first zone of uniform breadth along its coast of three miles.¹²⁷ The three-mile limit soon gained rapid and widespread acceptance largely due to the adherence to it by the major maritime

¹²³ Sayre A. Swaztrauber, *The Three-Mile Limit of Territorial Seas* (1972) at 36–49, which is also called the “line-of-sight doctrine” with State claims varying from three miles to as wide as 50 miles.

¹²⁴ Churchill and Lowe, *supra* note 118, at 77. *But see* Wyndham L. Walker, ‘Territorial Waters: The Cannon Shot Rule’ (1945) 22 *British Yearbook of International Law* 210. Walker actually challenges the generally-accepted notion that the three-mile limit of the territorial sea originated from the cannon shot rule. In Walker’s words: “it seems not altogether improbable that the two rules never had any real historical connection, they may well have been wholly distinct rules having their roots in different parts of Europe.” *Id* at 213. *See also*, Bernard G. Heinzen, ‘The Three-Mile Limit: Preserving the Freedom of the Seas’ (1958-1959) 11 *Stanford Law Review* 597 at 602. This is also argued by Daniel Wilkes who argues that the following statement is a myth: “The concept of the territorial sea originated from the distance a cannon could shoot from land. Thus, with increased capabilities of military control, we have an increased territorial sea.” *See* Daniel Wilkes, ‘The Use of World Resources without Conflict: Myths about the Territorial Sea’ (1967-1968) 14 *Wayne Law Review* 441 at 443. He traces it instead to Hugo de Groot’s famous 1609 work, *Mare Liberum*.

¹²⁵ Bernard G. Heinzen, ‘The Three-Mile Limit: Preserving the Freedom of the Seas’ (1958-1959) 11 *Stanford Law Review* 597 at 604 -605, also disputes the connection between the cannon-shot rule and the three-mile territorial sea limit, in this wise: “Finally, the cannon-shot rule could not have applied to a distance of three miles from shore because an examination of gunnery tables shows that no cannon had a range of as much as three miles during the eighteenth century. Indeed during this period, most coastal cannons had an accurate range of no more than one mile, while a few mortars unsuited for use as coastal artillery, had a maximum range of no more than two and a half miles.”

¹²⁶ Bernard G. Heinzen, ‘The Three-Mile Limit: Preserving the Freedom of the Seas’ (1958-1959) 11 *Stanford Law Review* 597 at 616. Churchill and Lowe, *supra* note 118, at 78.

¹²⁷ Sayre A. Swaztrauber, *The Three-Mile Limit of Territorial Seas* (1972) at 58.

States.¹²⁸ The three-mile limit was however, “never unanimously accepted” according to Churchill and Lowe.¹²⁹

It was not until the 1930 Hague Codification Conference that doubts over the juridical status of the territorial sea were finally dispelled.¹³⁰ The 1930 Hague Codification Conference formally enshrined the principle of the coastal State’s sovereignty over the territorial sea, which to this day remains unchallenged.¹³¹ Corollary to this, sovereignty over the superjacent air space,¹³² and eventually over the bed of the territorial sea,¹³³ became firm principles of international law.¹³⁴ But certainly, the notion of the territorial sea preceded the 1930 Hague Codification Conference.¹³⁵

¹²⁸ Great Britain, which was the greatest power in the early nineteenth century, was the champion of the three-mile limit and chiefly responsible for its rise to status as a rule of international law. Other major powers soon commenced to follow suit: France, Canada, Austria, Prussia, Russia; the lesser powers of Europe: Belgium, Netherlands, Greece, Italy, Egypt; the Orient: Japan and Hawaii; and in the Western hemisphere: Chile, Ecuador, El Salvador, Argentina, Honduras and the United States. *Please see*, Sayre A. Swartztrauber, *The Three-Mile Limit of Territorial Seas* (1972) at 64-72.

¹²⁹ Churchill and Lowe, *supra* note 118, at 78. *See also*, Francis Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea: the Current Regime of “Free” Navigation in Coastal Waters of Third States* (1990) at 15, who states that “the three mile rule was not universally accepted as the limit of the territorial waters in international law.”

¹³⁰ Churchill and Lowe, *supra* note 118, at 74.

¹³¹ It must be emphasised though that the consolidation of the sovereignty theory over in respect of the waters is distinct from the claim over sovereignty over the superjacent air space and sea bed in the same maritime zone, which developed independently. The 1919 Paris Conference on a Convention for the Regulation of Aerial Navigation, in its Article 1 provided: “The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory. For the purpose of the present Convention, the territory of a State shall be understood as including the national territory ... and the territorial waters adjacent thereto.” Churchill and Lowe observe that: “[T]his Convention was also a significant step towards the general recognition of sovereignty over the territorial sea itself.” Churchill and Lowe, *supra* note 118, at 76.

¹³² *See for example*, Article 2, *Convention on International Civil Aviation*, opened for signature 7 December 1944, 61 Stat. 1180; 15 UNTS 295 (entered into force 14 April 1947). Article 2, Geneva Convention on the Territorial Sea and the Contiguous Zone, opened for signature 29 April 1958, 15 UST 1606; 516 UNTS 205 (entered into force 10 September 1964). Article 2(2), LOSC.

¹³³ Article 2, LOSC establishes that the coastal State [and an archipelagic State] exercises sovereignty over their territorial sea, including the air space above the territorial sea and its bed and subsoil. Nordquist, opines that this Article evolved from Articles 1 and 2 of the Convention on the Territorial Sea and the Contiguous Zone. *See* Myron H. Nordquist (ed), *United Nations Convention on the Law of the Sea, 1982: A Commentary* (1985) Volume 1 at 66.

¹³⁴ In the words of Marston: “the rule for the bed and subsoil of the territorial sea was conceived later than the corresponding rule for the superjacent waters and later even than that for the superjacent airspace, although the subsequent crystallization process resulted in a unitary customary rule and three separate

The 1930 Hague Conference failed to reach an agreement on the maximum width of the territorial sea.¹³⁶ This merely reflected the divergence of State practice at that time. For instance, there were claims of four nautical miles by Scandinavian countries such as Finland, Iceland, Norway and Sweden;¹³⁷ claims of six nautical miles by such countries as Italy, Greece, Portugal and Spain;¹³⁸ and the three nautical mile claims of the United States, Great Britain, Belgium, Canada, Denmark, Germany and Japan.¹³⁹ In 1900, 20 of the 21 States which claimed or acknowledged a territorial sea had positively adopted or acknowledged as law the three-mile or one-league limit.¹⁴⁰ While State practice in the nineteenth century shows that there was no claim of less than three nautical miles,

rules.” Geoffrey Marston, ‘The Evolution of the Concept of the Sovereignty over the Bed and the Subsoil of the Territorial Sea’ (1976-1977) 48 *British Yearbook of International Law* 321 at 332.

¹³⁵ In 1926, a draft code produced by the German Society of International Law mentioned: “The sovereignty of the coastal State extends over the territorial sea, subject to the generally recognized rules of international law, or a treaty providing for exceptions.”

In the same year, the American Institute of International Law also produced a draft Project on the National Domain, Article I of which read: “Every nation exercises sovereignty in an area of land and water within definite boundaries and in the space above the said area.”

The Japanese Association of International Law, also writing in 1926, produced a Code which stated that “every State has the right of sovereignty over its littoral waters.” In 1928, the *Institut de Droit International* produced a new draft which used the term “sovereignty” abandoning the previously used “a right of sovereignty” in the 1894 draft.

The 1929 Harvard Law School draft also used the term “sovereignty” with the Commentary stating that: “the sovereignty of the State is in all respects like its sovereignty over land territory and subject to the same limitations,” and that “the enjoyment of sovereignty over the marginal sea is so dependent upon the State’s sovereignty over its land territory that perhaps the conception of marginal seas should be treated as an independent conception.” *Please see*, D. P. O’Connell, ‘The Juridical Nature of the Territorial Sea’ (1971) 45 *British Yearbook of International Law* 303 at 348 citations omitted.

Eventually, the Second Committee on 20 March 1930 adopted the following text: “Article 1. The territory of a State includes a belt of sea described in this Convention as the territorial sea. Sovereignty over this belt is exercised subject to the conditions prescribed by the present Convention and the other rules of international law.”

¹³⁶ Shigeru Oda, *International Control of Sea Resources* (1989) at 36.

¹³⁷ S. Whittemore Boggs, ‘Delimitation of the Territorial Sea’ (1930) 24 *American Journal of International Law* 541 at 542.

¹³⁸ Talaie, *supra* note 104, at 278.

¹³⁹ Churchill and Lowe, *supra* note 118, at 78. Shigeru Oda, *International Control of Sea Resources* (1989) at 14.

¹⁴⁰ Bernard G. Heinzen, ‘The Three-Mile Limit: Preserving the Freedom of the Seas’ (1958-1959) 11 *Stanford Law Review* 597 at 632. The twenty States claiming a territorial sea with a maximum breadth of one league were Argentina, Austria-Hungary, Belgium, Brazil, Chile, Denmark, Ecuador, El Salvador, France, Germany, Great Britain, Greece, Honduras, Italy, Netherlands, Norway, Russia, Sweden, Turkey, and the United States. *Id.* at 632-634, citations omitted.

and therefore, even at that time, the minimum breadth of the territorial sea was not in dispute, the maximum breadth was a raging controversy.¹⁴¹

In a study on the attempts to establish a uniform rule concerning the extent of the territorial sea, Shigeru Oda, writing in 1955, came to the conclusion that “not only is there no uniform rule, but also it is very difficult, if not impossible, to enact generally acceptable international legislation on the breadth of the territorial sea.”¹⁴² Truly, “it is meaningless to speak of a single limit for territorial sea claims at any one time.”¹⁴³ Subsequent attempts at arriving at a global consensus on the breadth of the territorial sea through the First Conference on the Law of the Sea (UNCLOS I) in 1958, and in the Second Conference on the Law of the Sea (UNCLOS II) in 1960, likewise failed.¹⁴⁴ At both UNCLOS I and UNCLOS II, as it was in the 1930 Codification Conference, no article on the breadth of the territorial sea was adopted.¹⁴⁵ It was not until the UNCLOS III that the breadth of the territorial sea was finally codified in the LOSC.¹⁴⁶

¹⁴¹ Talaie, *supra* note 104, at 278.

¹⁴² Shigeru Oda, ‘Territorial Sea and Natural Resources’ (1955) 4 *International and Comparative Law Quarterly* 415 at 417.

¹⁴³ Churchill and Lowe, *supra* note 118, at 78-79.

¹⁴⁴ The Convention on the Territorial Sea and Contiguous Zone, entry into force: 10 September 1964 and the Convention on the Continental Shelf, entry into force: 10 June 1964, which came out of UNLOS II contain no provision on the breadth of the territorial sea since no proposal during the 1958 Conference received the required majority.

¹⁴⁵ For a discussion at UNLOS I, see Report of the First Committee, A/CONF.13/L.28 Rev.1 (1958), paras. 3–25, UNCLOS I, II Off. Rec. 115; and further discussions at the 14th and 15th plenary meetings, II Off. Rec. 35–47. At UNCLOS II, the only substantive agenda was “Consideration of the questions of the breadth of the territorial sea and fishery limits in accordance with resolution 1307 (XIII) adopted by the General Assembly on 10 December 1958” (see Volume I of this series, at 159). For a summary of the discussion in the Committee of the Whole, see A/CONF.19/L.4 (1960), UNCLOS II, Off. Rec. 169. The verbatim record of the general debate in the Committee of the Whole is reproduced in A/CONF.19/9, UNCLOS II, Off. Rec. (U.N. Sales No. 1962.V3 (1962)).

¹⁴⁶ Article 3, LOSC.

4.2.2.2.1. Conventional Rule of International Law

The codification of the maximum permissible breadth of the territorial sea at 12nm is one of the major achievements of the LOSC.¹⁴⁷ The wording of the LOSC on the maximum breadth of the territorial sea is clear and unambiguous:

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.¹⁴⁸

The LOSC in Article 2 declares that “the sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.”¹⁴⁹ This provision imposes two restrictions on the right of the coastal State over its territorial sea: a special limitation (subject to this Convention); and a general limitation (other rules of international law). This affirms that the LOSC constraints are not exhaustive and that it is necessary to refer also to other rules of international law.¹⁵⁰ The Hague Codification Commission, which first considered the draft article on this matter, explains the limitation:

¹⁴⁷ Myron H. Nordquist (ed), *United Nations Convention on the Law of the Sea, 1982: A Commentary* (1985) at 77.

¹⁴⁸ Article 3, LOSC. This provision substantially reproduced Article I of the 1958 Convention on the Territorial Sea and the Contiguous Zone, which was based on Article 1 of the draft of the International Law Commission.

¹⁴⁹ Article 2(3), LOSC. According to Professor Jesse Reeves, the reference to the “other rules of international law” in the wording of the final draft article “indicate that the draft did not include or enumerate all of the limitations which might exist upon the sovereign exercise of power by the littoral State, and suggest at least the possibility of additional limitations.” Further he mentioned that the wording “seems to emphasize the reluctance which the Commission had to recognize sovereignty over the territorial sea in any absolute or unqualified sense.” Jesse S. Reeves, ‘The Codification of the Law of Territorial Waters’ (1930) 24 *American Journal of International Law* 486 at 489.

¹⁵⁰ In the words of the 1930 Hague Codification Commission: “These limitations are to be sought in the first place in the present Convention; as, however, the Convention cannot hope to exhaust the matter, it has been thought necessary to refer also to other rules of international law. LON Doc. C.230.M.117.1930.V, p.6; Final Act of the Conference for the Codification of International Law, Doc. C.251.M.145.1930.V, p.126, as cited in Francis Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea: the Current Regime of “Free” Navigation in Coastal Waters of Third States* (1990) at 7. Also see, ILC Yearbook, 1956, Volume 2, at 265.

Obviously, sovereignty over the territorial sea, like sovereignty over the domain on land, can only be exercised subject to the conditions laid down by international law. As the limitations which international law imposes on the power of the State in respect of the latter's sovereignty over the territorial sea are greater than those it imposes in respect of the domain on land, it has not been thought superfluous to make special mention of these limitations in the text of the article itself.¹⁵¹

The International Law Commission (ILC), in its commentary on draft Article 1 which covers this matter intimated that there could be rights already existing under treaty or customary law which are “in excess of the rights recognised in the present draft” which are not limited by the present draft. In the words of the ILC:

It may happen that, by reason of some special relationship, geographical or other, between two States, rights in the territorial sea of one of them are granted to the other in excess of the rights recognised in the present draft. It is not the Commission's intention to limit in any way any more extensive right of passage or other right enjoyed by States by custom or treaty.¹⁵²

While it is arguable that the Philippine territorial sea claim can potentially though tenuously fall in both exceptions, i.e., as a special case covered by treaty law and/or custom, the special limitation still applies: the maximum breadth of 12nm imposed by the LOSC. Moreover, the twin-limitations operate conjunctively, following basic rules of statutory construction.¹⁵³

The text of the LOSC is always the starting point for its interpretation. In the words of Reisman: “[s]ince UNCLOS will produce a complex convention, an essentially textual approach to construction, as conceived by the Vienna Convention on the Law of Treaties, would appear required because of the Vienna Convention's directives, and

¹⁵¹ Myron H. Nordquist (ed), *United Nations Convention on the Law of the Sea, 1982: A Commentary* (1985) Volume III, at 467.

¹⁵² ILC Yearbook, 1956, Volume 2, at 265.

¹⁵³ Myres S. McDougal, James C. Miller and Harold D. Lasswell, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (1994) at 337-339.

ineluctable owing to the absence of a formal record of the *travaux*. The alternative hardly recommends itself.”¹⁵⁴ Nevertheless, if a strictly textual analysis left any ambiguity, which seems hardly called for in this case, recourse may be had to supplementary means of interpretation according to the Vienna Convention.¹⁵⁵

In fact, no interpretation seems necessary since the wording of the ILC draft, from which the present provision of the LOSC traces its origin, is equally clear and unambiguous: “[T]he Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles.”¹⁵⁶ The ILC Commentary on the same article is categorical: “international law did not justify an extension of the territorial sea beyond twelve miles” for in its opinion, “such an extension infringed the principle of the freedom of the seas, and was therefore contrary to international law.”¹⁵⁷

Thus, it is clear that even when the regime of the territorial sea was at its incipient stages, the breadth of the territorial sea contemplated in international law was at a

¹⁵⁴ W. Michael Reisman, ‘The Regime of Straits and National Security: An Appraisal of International Lawmaking’ (1980) 74 *American Journal of International Law* 48 at 55-56.

¹⁵⁵ Article 32, *Vienna Convention on the Law of Treaties*, *supra* note 18.

¹⁵⁶ Draft Article 2(3), Hague Codification. ILC. ILC Yearbook 1956, Volume 2, at 265.

¹⁵⁷ ILC Yearbook 1956, Volume 2, at 265. The Commission it took no decision as to the breadth of the territorial sea up to the limit of twelve miles although it did not succeed in reaching agreement on any other limit. The Commentary mentions that although the following view was not supported by the majority of the Commission: “Some members held that as the rule fixing the breadth at three miles had been widely applied in the past and was still maintained by a number of important maritime States, it should, in the absence of any other rule of equal authority, be regarded as recognized by international law and binding on all States.”

And further: “The extension by a State of its territorial sea to a breadth of between three and twelve miles was not characterized by the Commission as a breach of international law. Such an extension would be valid for any other State which did not object to it, and *a fortiori* for any State which recognized it tacitly or by treaty, or was a party to a judicial or arbitral decision recognizing the extension. A claim to a territorial sea not exceeding twelve miles in breadth could be sustained *erga omnes* by any State, if based on historic rights. But, subject to such cases, the Commission by a small majority declined to question the right of other States not to recognize an extension of the territorial sea beyond the three-mile limit.” International Law Commission, ILC Yearbook 1956, Volume 2, at 266.

maximum of 12nm.¹⁵⁸ It is safe to assume, and clearly indicated by the Commentary, that a territorial sea extension in excess of 12nm is a breach of international law. The status of a claim exceeding 12nm is clear in the words of Dupuy:

In the system of the LOS Convention the maximum limit of the territorial sea, and therefore of the sovereignty of the coastal State, is 12 nautical miles. A claim for, for example, a 200-mile territorial sea would accordingly not be valid and would consequently not transform the area in question into “territorial sea” for the purposes of the Convention.¹⁵⁹

The next section will discuss the breadth of the territorial sea as a customary rule of international law.

4.2.2.2.2. Customary Rule of International Law

While conventional or treaty-based international law cannot constitute universal international law, customary law binds all States except those who have specifically objected to the creation of a particular rule.¹⁶⁰ The relationship between treaties and custom in the law of the sea not being a novel subject, has attracted a fair amount of scholarship.¹⁶¹ The position of the vast majority of scholars who have written on this

¹⁵⁸ The Commentary states: “The Commission noted that the right to fix the limit of the territorial sea at three miles was not disputed. It states that international law does not permit that limit to be extended beyond twelve miles.” ILC Yearbook, ILC Yearbook 1956, Volume 2, at 267.

¹⁵⁹ Rene Jean Dupuy and Daniel Vignes (eds), *A Handbook on the New Law of the Sea* (1991) at 1050. Dupuy adds that “[T]here is no basis for declaring the coastal State’s exercise of jurisdiction in the extended zone as null and void in its entirety.” The area will just be considered part of the EEZ with “the rights and jurisdiction of the coastal State and the rights and freedoms of other State are governed by the relevant provisions of this Convention.”

¹⁶⁰ Anthony A. D’Amato, *The Concept of Custom in International Law* (1968). See also, Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (2000); Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005); Alexander Orakhelashvili, *Peremptory Norms in International Law* (2006).

¹⁶¹ John King Jr. Gamble and Maria Frankowska, ‘Observations, a Framework, and a Warning: The 1982 Convention and Customary Law of the Sea’ (1983-1984) 21 *San Diego Law Review* 491; Lawrence A. Howard, ‘The Third United Nations Conference on the Law of the Sea and the Treaty/Custom Dichotomy’ (1981) 16 *Texas International Law Journal* 321; Luke T. Lee, ‘The Law of the Sea Convention and Third States’ (1983) 77 *American Journal of International Law* 541; Leslie M. MacRae, ‘Customary International Law and the United Nations’ Law of the Sea Treaty’ (1983) 13 *California Western*

subject is that the LOSC generally codifies existing customary international law which may therefore be invoked by non-States parties as a source of rights as well as obligations.¹⁶² In the words of Boyle and Chinkin:

Whatever the position may have been when it was adopted, the 1982 Convention on the Law of the Sea has become accepted, in most respects, as a statement of contemporary international law on nearly all matters related to the oceans. Most of its provisions, including those that were new or emerging law in 1982, are not only treaty law for the large number of States parties, but customary law for all or nearly all States.¹⁶³

Thus, it is clear that there are provisions of the LOSC which codify existing customary international law.¹⁶⁴ The basic legal concept of State sovereignty in customary international law, expressed in, *inter alia*, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory.¹⁶⁵ There is little debate about the customary legal right of coastal States unilaterally to claim a territorial sea to the maximum extent of 12nm.¹⁶⁶

International Law Journal 181. For an excellent discussion of the traditional relationship between treaties and custom, see R.R. Baxter, 'Multilateral Treaties as Evidence of Customary International Law' (1965-1966) 41 *British Yearbook of International Law* 275.

¹⁶² Rudiger Wolfrum, 'The Legal Order for the Seas and Oceans' in Myron H. Nordquist and John Norton Moore (eds), *Entry into force of the Law of the Sea Convention* (1995) 161 at 174. See also, W.E. Butler, 'Custom, Treaty, State Practice and the 1982 Convention' (1988) 12 *Marine Policy* 182; A. L. Kolodkin, V. V. Andrianov and V. A. Kiselev, 'Legal Implications of Participation or Non-Participation in the 1982 Convention' (1988) 12 *Marine Policy* 187; Luke T. Lee, 'The Law of the Sea Convention and Third States' (1983) 77 *American Journal of International Law* 541.

¹⁶³ Alan Boyle and Christine Chinkin, 'UNCLOS III and the Process of International Law Making' in Thomas A. Mensah and Tafsir Malick Ndiaye (eds), *Law of the Sea, Environmental Law, and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (2007) 371 at 376.

¹⁶⁴ Shaw, *supra* note 2, at 492 – 493, who states that "[M]any of the provisions in the 1982 Convention ... have since become customary rules" which *prima facie* bind all States. But see, W. T. Burke, 'Customary Law of the Sea: Advocacy or Disinterested Scholarship' (1989) 14 *Yale Journal of International Law* 508, which questions the pronouncement (as embodied in Restatement (Third) of the Foreign Relations Law of the United States pt. V (1987) (The Law of the Sea)) declaring certain parts such as those pertaining to navigational rights in of the LOSC as customary international law.

¹⁶⁵ Military and Paramilitary Activities (Nicaragua/United States of America) Merits. I. 27.6.1986 ICJ Reports 1986, p. 14.

¹⁶⁶ Douglas M. Johnston and Phillip M. Saunders, *Ocean Boundary Making: Regional Issues and Developments* (1988) at 17-18

The question presents itself, then: is the 12 nm limit customary international law? As one commentator remarked:

As UNCLOS has attained near-universality and has become binding upon important maritime States, it can be said that the breadth of a territorial sea has been stabilized and, as such, is considered declaratory of customary international law.¹⁶⁷

It no longer seems to be seriously doubted that a 12nm territorial sea has been established by customary international law, or soon will be unless a trend develops toward even wider limits.¹⁶⁸ The best evidence of customary international law is State practice.¹⁶⁹ International law is created when there is consistent practice by a substantial number of States over a period of time.¹⁷⁰ In the case of the LOSC, as at 20 July 2009, there are 159 States parties to the Convention.¹⁷¹ The import of this is clear in the following words of Louis Sohn: “Once a convention is signed by a vast majority of the international community, its stature as customary international law is thereby strengthened, as such signatures are a clear evidence of an *opinio juris* that the convention contains generally acceptable principles.”¹⁷² The State practice of territorial sea claims has become relatively stable and in line with the customary international law reflected in the LOSC.¹⁷³ The next section will discuss the current State practice of territorial sea claims.

¹⁶⁷ Hui-Gwon Pak, *The Law of the Sea and Northeast Asia: a Challenge for Cooperation* (2000) at 30.

¹⁶⁸ William T. Burke, ‘Submerged Passage through Straits: Interpretations of the Proposed Law of the Sea Treaty Text’ (1976-1977) 52 *Washington Law Review* 193 at 194, Note 6.

¹⁶⁹ Mark Eugen Villiger, *Customary International Law and Treaties* (1985) at 4.

¹⁷⁰ Michael Akehurst, *A Modern Introduction to International Law* (1992) at 16-18.

¹⁷¹ United Nations Division for Ocean Affairs and the Law of the Sea, Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 20 July 2009, Online at: UN DOALOS Website. Date Accessed: 5 October 2009.

¹⁷² Louis B. Sohn, ‘Law of the Sea: Customary International Law Developments’ (1984-1985) 34 *American University Law Review* 271 at 279.

¹⁷³ Roach and Smith, *supra* note 38, at 148.

4.2.2.3. Territorial Sea Claims

The consensus reached at UNCLOS III on the maximum breadth of the territorial sea steadily aligned national legislation with the Article 3 of the LOSC.¹⁷⁴ The adoption of the LOSC has significantly influenced State practice. Prior to 1982, there were as many as 25 States claiming a territorial sea broader than 12nm; while 30 States, including the United States, claimed a territorial sea of less than 12nm.¹⁷⁵ After the LOSC was opened for signature, notes Roach and Smith, “State practice in asserting territorial sea claims has largely coalesced around the 12nm maximum breadth set by the LOSC.”¹⁷⁶

As of 28 May 2008, 141 States claim a territorial sea of 12nm or less.¹⁷⁷ Out this number, two States claim a territorial sea of three nautical miles: Jordan, and Palau; and two States claim a territorial sea of six nautical miles: Greece and Turkey.¹⁷⁸ There are

¹⁷⁴ Robert W. Smith, *Exclusive Economic Zone Claims: An Analysis and Primary Documents* (1986) at 6-8.

¹⁷⁵ Roach and Smith, *supra* note 38, at 540.

¹⁷⁶ *Ibid.*

¹⁷⁷ The following States claim a territorial sea of 12 miles or less: Albania, Algeria, Angola, Antigua and Barbuda, Argentina, Australia, Bahamas, Bahrain, Bangladesh, Barbados, Belgium, Belize, Brazil, Brunei, Bulgaria, Cambodia, Cameroon, Canada, Cape Verde, Chile, People’s Republic of China, Republic of China, Colombia, Comoros, Cook Islands, Costa Rica, Cote d’Ivoire, Croatia, Cuba, Cyprus, Democratic People’s Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Egypt, Equatorial Guinea, Eritrea, Estonia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Kenya, Kiribati, Kuwait, Latvia, Lebanon, Libya, Lithuania, Madagascar, Malaysia, Maldives, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia, Monaco, Morocco, Mozambique, Myanmar, Namibia, Nauru, Netherlands, New Zealand, Nicaragua, Nigeria, Niue, Norway, Oman, Pakistan, Panama, Papua New Guinea, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, São Tomé and Príncipe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, Sudan, Suriname, Sweden, Syria, Thailand, Timor-Leste, Tonga, Trinidad and Tobago, Tunisia, Turkey (in the Black sea and Mediterranean), Tuvalu, Ukraine, United Arab Emirates, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Vanuatu, Venezuela, Vietnam, Yemen. *See* United Nations Division for Ocean Affairs and the Law of the Sea, Table of Claims to Maritime Jurisdiction (as at 28 May 2008). Online at: UN DOALOS Website. Date Accessed: 8 May 2009.

¹⁷⁸ United Nations Division for Ocean Affairs and the Law of the Sea, Table of Claims to Maritime Jurisdiction (as at 28 May 2008). Online at: UN DOALOS Website. Date Accessed: 8 May 2009.

only nine States which claim a territorial sea in excess of 12nm, with seven States claiming 200nm: Benin, Congo, Ecuador, El Salvador, Liberia and Peru and Somalia; one State claiming 30nm: Togo; and the Philippines claiming a territorial sea of variable width defined by coordinates.¹⁷⁹

It is clear that only a handful of States still claim a territorial sea in excess of 12nm. In fact, Roach and Smith notes that there is “a definite trend for States to reduce excessive territorial sea claims to the norm of 12nm set forth in the LOSC.”¹⁸⁰ The United States, which operates a Freedom of Navigation Program, has challenged territorial claims on the world’s oceans and airspace that it considers excessive using diplomatic protests and/or by interference.¹⁸¹ Although the United States has yet to ratify the LOSC,¹⁸² and despite its longstanding claim of a three-mile territorial sea¹⁸³ which it extended to 12nm in 1998,¹⁸⁴ it insists that all States must obey the international law of the sea as embodied in the LOSC.¹⁸⁵

¹⁷⁹ *Ibid.*

¹⁸⁰ Roach and Smith, *supra* note 38, at 153.

¹⁸¹ *Ibid.*, at 153-161.

¹⁸² Please see the following on the issues with respect to the accession of the United States to the LOSC: David A. Colson, ‘United States Accession to the United Nations Convention on the Law of the Sea’ (1994-1995) 7 *Georgetown International Environmental Law Review* 651; ‘Message from the President of the United States and Commentary Accompanying the United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of the Part XI upon Their Transmittal to the United States Senate for Its Advice and Consent’ (1994-1995) 7 *Georgetown International Environmental Law Review* 77; John A. Duff, ‘A Note on the United States and the Law of the Sea: Looking Back and Moving Forward’ (2004) 35 *Ocean Development & International Law* 195; Ann L. Hollick, *U.S. Foreign Policy and the Law of the Sea* (1981).

¹⁸³ S. Whittemore Boggs, ‘Delimitation of the Territorial Sea: The Method of Delimitation Proposed by the Delegation of the United States at the Hague Conference for the Codification of International Law’ (1930) 24 *American Journal of International Law* 541 at 542, who states that: “With reference to the question of the breadth of the territorial sea, and the base-line, the American position is that territorial waters extend to three marine or nautical miles measured from low-water mark along the coast.”

¹⁸⁴ Since 1988, the United States has claimed a 12 mile territorial sea (Presidential Proclamation 5928, 27 December 1988, 54 Fed. Reg. 777 (9 January 1989)). Since the President’s Ocean Policy Statement of 10 March 1983, the United States has recognized territorial sea claims of other States up to a maximum breadth of 12 miles. See Bruce E. Alexander, ‘The Territorial Sea of the United States: Is It Twelve Miles or Not’ (1989) 20 *Journal of Maritime Law and Commerce* 449; Henry M. Arruda, ‘The Extension of the

4.2.3. Status in Customary International Law

This section will deal with the issue of the status of the Philippine Treaty Limits and territorial waters claim in customary international law.¹⁸⁶ This section will specifically look into the following four elements to assess the title that the Philippines asserts over the Treaty Limits: (1) historical consolidation; (2) acquisitive prescription; (3) effective occupation; (4) *opinio juris*; and persistent objection.

The Philippine Treaty Limits historic claim is principally founded on the premise that its longstanding declaration and assertion and the corresponding lack of opposition by other States has made it valid being based on norms of customary international law.¹⁸⁷

It is argued that the “[c]ontinuous exercise of authority for 70 years without effective protest by foreign governments established prescriptive title in the Philippines to the

United States Territorial Sea: Reasons and Effects’ (1988-1989) 4 *Connecticut Journal of International Law* 697; John E. Noyes, ‘United States of America Presidential Proclamation No. 5928: A 12-Mile U.S. Territorial Sea’ (1989) 4 *International Journal of Estuarine and Coastal Law* 142.

¹⁸⁵ John A. Duff, ‘A Note on the United States and the Law of the Sea: Looking Back and Moving Forward’ (2004) 35 *Ocean Development & International Law* 195 at 199.

¹⁸⁶ Customary international law is normally said to have two elements. First, there is an objective element consisting of sufficient State practice; and second, there is a subjective element requiring that the practice be accepted as law or followed from a sense of legal obligation, a requirement known as the *opinio juris* requirement. See for example, R.R. Baxter, ‘Multilateral Treaties as Evidence of Customary International Law’ (1965-1966) 41 *British Yearbook of International Law* 275; Josef L. Kunz, ‘The Nature of Customary International Law’ (1953) 47 *American Journal of International Law* 662; George Norman and Joel P. Trachtman, ‘The Customary International Law Game’ (2005) 99 *American Journal of International Law* 541; Vladimir Duro Degan, *Sources of International Law* (1997); Mark Eugen Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (1997).

This section uses customary international law in a restrictive sense and in particular, adopts the distinction made by D’Amato, between special (or “local” or “particular”) customary international law and general customary international law. In this dichotomy, the Philippine case is an example of a special customary law which “deals with non-generalizable topics such as title to or rights in specific portions of word real estate (e.g., cases of acquisitive prescription, boundary disputes, and so-called international servitudes), or with rules expressly limited to countries of a certain region.” Anthony A. D’Amato, ‘The Concept of Special Custom in International Law’ (1969) 63 *American Journal of International Law* 211 at 212- 213.

¹⁸⁷ Jay Batongbacal, ‘The Philippine National Marine Policy: Navigating Unpredictable Currents’ (Paper presented at the The Ocean Policy Summit, Lisbon, Portugal, 2005) at 3. Santiago, *supra* note 46, at 371.

waters in question.”¹⁸⁸ In UNCLOS II, Senator Tolentino objected to the application of any rule on the breadth of the territorial sea to the Philippine territorial waters arguing that to do so would be tantamount to a destruction of vested rights with neither compensation nor consent, a violation of universally recognised principles of law.¹⁸⁹ Senator Tolentino argued further that the Philippine title to the waters claimed was founded on history, existing treaties and actual occupation, was unique in law, and thereby not subject by the decision of the Conference. In his words: “The Philippines is *sui generis*, and cannot be covered by any general rule that may be formulated on the breadth of the territorial sea.”¹⁹⁰ In the period from 1946 after it gained its independence, the Philippines further consolidated its title to its present territory by a process of historical consolidation of title or of acquisitive prescription both of which are fully recognised by international law. These concepts will be discussed in the following sections.

4.2.3.1. Historical Consolidation

The principle of historical consolidation can be relied upon in instances “where territorial title is not based on an unequivocal treaty of cession specifically referring to the territory in question.”¹⁹¹ This doctrine was originally applied by the ICJ in the *Anglo-Norwegian Fisheries* case,¹⁹² and more recently in the *Cameroon/Nigeria*

¹⁸⁸ Joseph W. Dellapenna, ‘The Philippines Territorial Water Claim in International Law’ (1970-1971) 5 *Journal of Law & Economic Development* 45 at 50.

¹⁸⁹ The Statement of Senator A. Tolentino, Chief Philippine Delegate, (1960) Second United Nations Conference on the Law of the Sea, Verbatim Record of the Committee of the Whole, at 72-73.

¹⁹⁰ *Ibid.*, at 77.

¹⁹¹ R. Haller-Trost, ‘Historical Legal Claims: A Study of Disputed Sovereignty over Pulau Batu Puteh (Pedra Branca)’ (1993) 1 *Maritime Briefing* at 6. Thus, this section assumes *arguendo* that the established treaty title held by the Philippines over the territory it claims is assailable under international law.

¹⁹² *Fisheries Case (United Kingdom v. Norway)*, Judgment of 18 December 1951, [1951] ICJ Rep. 116, at 138. See also, D. H. N. Johnson, ‘Consolidation as a Root of Title in International Law’ (1955) 1955

case.¹⁹³ Sir Robert Jennings explained the concept of historical consolidation as follows:

In this respect such consolidation differs from acquisitive prescription properly so-called, as also in the fact that it can apply to territories that could not be proved to have belonged formerly to another State. It differs from occupation in that it can be admitted in relation to certain parts of the sea as well as on land. Finally, it is distinguished from international recognition - and this is the point of most practical importance - by the fact that it can be held to be accomplished not only by acquiescence properly so called, acquiescence in which the time factor can have no part, but more easily by a sufficiently prolonged absence of opposition either, in the case of land, on the part of States interested in disputing possession or, in maritime waters, on the part of the generality of States.¹⁹⁴

The process of historical consolidation as a mode of acquiring title is subtly different from occupation and prescription, according to Jennings. Prescription, he adds, “is based upon a peaceable, effective possession - a possession as of a sovereign extending over a considerable period” which must be proved using a variety of evidence particularly the attitude of third States which can become decisive ingredients in the process of creating title. The territorial title acquired from this process is respected in international law and is enshrined in the maxim *quieta non movere*.¹⁹⁵ The title is acquired and cannot be disturbed irrespective of the unlawfulness of the original taking

Cambridge Law Journal 215; Charles de Visscher, *Theory and Reality in Public International Law* (1968).

¹⁹³ *Land, Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, Judgment of 10 October 2002, [2002] ICJ Rep., para. 65. Thus, while originally applied by the ICJ with regard to the delimitation of maritime boundaries in the *Anglo-Norwegian Fisheries* case, the ICJ has transposed the doctrine to land disputes in the *Cameroon/Nigeria* case. See, Enrico Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality, and Legitimacy* (2006) at 88.

¹⁹⁴ Robert Y. Jennings, *The Acquisition of Territory in International Law* (1963) at 23-27.

¹⁹⁵ See for example, *Fisheries case (United Kingdom v. Norway)* (I.C.J. Reports 1951, p. 130).

of possession as well as the subsequent protests thereto in the interest of promoting peace and order.¹⁹⁶

The Arbitral Tribunal in the *Eritrea/Yemen* case¹⁹⁷ explained the concept of consolidation in its first Award in the following words:

But an historic title has also another and different meaning in international law as a title that has been created, or consolidated, by a process of prescription, or acquiescence, or by possession so long continued as to have become accepted by law as a title. These titles too are historic in the sense that continuity and the lapse of a period of time is of the essence.¹⁹⁸

The Tribunal further added:

The modern international law of the acquisition (or attribution) of territory generally requires that there be an intentional display of power and authority over the territory, by the exercise of jurisdiction and State functions, on a continuous and peaceful basis. The latter two criteria are tempered to suit the nature of the territory and the size of its population, if any.¹⁹⁹

In the case of the Philippines, the length of historical consolidation would comprise a period of over a hundred years if reckoned from the time the Treaty of Paris was signed in 1898, and even over three centuries if reckoned from the time Spain obtained title over the same territory. Over the same period, there appears to be both notoriety of the possession as well as the absence of protests from other States. However, these do not assure the Philippines of incontestable title. As the ICJ has reminded Nigeria which

¹⁹⁶ John O'Brien, *International Law* (2001) at 211.

¹⁹⁷ *Eritrea-Yemen Arbitration*, Phase I: Territorial Sovereignty and Scope of Dispute, Award, 9 October 1998.

¹⁹⁸ *Eritrea-Yemen Arbitration*, Phase I: Territorial Sovereignty and Scope of Dispute, Award, 9 October 1998, paragraph 106.

¹⁹⁹ *Ibid.*, at paragraph 239.

relied on the principle of historical consolidation of title in the *Cameroon v. Nigeria* Case:

The Court notes that the theory of historical consolidation is highly controversial and cannot replace the established modes of acquisition of title under international law, which take into account many other important variables of fact and law.²⁰⁰

The ICJ likewise clarified that, “the notion of historical consolidation has never been used as a basis of title in other territorial disputes, whether in its own or in other case law.”²⁰¹ However, in the same case, and immediately after, the ICJ declared that historical consolidation “cannot prevail over an established treaty title.”²⁰²

4.2.3.2. Acquisitive Prescription

In international law, title to land or sea territory can also be acquired through the process of acquisitive prescription.²⁰³ The adverse possession and actual exercise of sovereign rights of a State over period of time can remedy even an original defect in title and ultimately ripen to the acquisition of good title.²⁰⁴ The doctrine of acquisitive prescription, according to Oppenheim, does not require possession from time immemorial but merely undisturbed continuous possession.²⁰⁵ This applies even over

²⁰⁰ *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea Intervening) Judgment of 10 October 2002, p. 65.

²⁰¹ *Ibid.*

²⁰² *Ibid.* Giovanni Distefano, ‘The Conceptualization (Construction) of Territorial Title in the Light of the International Court of Justice Case Law’ (2006) 19 *Leiden Journal of International Law* 1041 at 1066.

²⁰³ Randall Lesaffer, ‘Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription’ (2005) 16(1) *The European Journal of International Law* 25 at 46. See especially, Douglas H. N. Johnson, ‘Acquisitive Prescription in International Law’ (1950) 27 *British Year Book of International Law* 332.

²⁰⁴ Surya P. Sharma, *Territorial Acquisition, Disputes and International Law* (1997) at 108.

²⁰⁵ R. Y. Jennings and Arthur Sir Watts, *Oppenheim’s International Law* (1997) at 706.

territory which a State originally took possession wrongfully.²⁰⁶ Through the passage of time, undisturbed possession will create the general conviction that the present condition of things is in conformity with international order.²⁰⁷ Professors Ian Brownlie and Malcolm Shaw share the opinion that acquisitive prescription operates only on territory which is not *terra nullius*, i.e. for instance, a territory under the former sovereignty of another State.²⁰⁸ Thus, in the case of the Philippine claim to its Treaty Limits, it must show that it has acquired territorial title, over the territory which Spain originally and the United States subsequently, exercised sovereignty.

The ICJ examined the application of the concept of acquisitive prescription in the *Kasikili* case.²⁰⁹ In that case, the ICJ identified four conditions for prescription, namely: (1) whether possession was exercised *à titre de souverain*; (2) whether the possession was peaceful and uninterrupted; (3) whether the possession was public; and (4) whether the possession has endured for a sufficient length of time. In the *Kasikili* the ICJ examined only the first condition and, having found that it was not satisfied, did not examine the remainder.²¹⁰ For an international tribunal to affirm the title of the Philippines over the territory it claims, it must show that all four conditions are satisfied.²¹¹

²⁰⁶ *Ibid.* According to Shaw, prescription legitimises “doubtful title by passage of time and the presumed acquiescence of the former sovereign, and it reflects the need for stability felt within the international system by recognising that territory in the possession of a state for a long period of time and uncontested cannot be taken away from that state without serious consequences for the international order. Shaw, *supra* note 2, at 426.

²⁰⁷ Tim Hillier, *Sourcebook on Public International Law* (1998) at 239.

²⁰⁸ See Shaw, *supra* note 2, at 426; Ian Brownlie, *The Rule of Law in International Affairs* (1998) at 154.

²⁰⁹ *Kasikili/Sedudu Island Case* (Botswana v Namibia) ICJ, 13 December 1999. See Malcolm N. Shaw, ‘Case Concerning Kasikili/Sedudu Island-Botswana/Namibia’ (2000) 49 *International and Comparative Law Quarterly* 964.

²¹⁰ In the *Botswana/Namibia case*, ICJ Reports 1999, pp. 1045, the ICJ noted the agreement of the parties that acquisitive prescription is recognised in international law.

²¹¹ Lesaffer, *supra* note 203, at 49.

4.2.3.3. Effective Occupation

In international law, the nature of the possession required to create and sustain title are important factors to consider in determining whether one has title or not.²¹² In this case, even if there were imperfections in the title acquired by the Philippines from the United States, which the latter acquired from Spain, it is still necessary, if that title is to be valid, to show that the Spanish and American titles constituted valid titles.²¹³ This means that if the Philippines did acquire title to all or part of the territory within the Treaty Limits, by the operation of the doctrine of *uti possidetis* in 1898, it would still need to show that it had maintained that title throughout the relevant intervening period.²¹⁴ As was stated by Judge Huber in the *Island of Palmas* case:

If a dispute arises as to the sovereignty over a certain portion of territory, it is customary to examine which of the States claiming sovereignty possesses a title - cession, conquest, occupation etc. - superior to that which the other States might possibly bring forward against it. However, if the contestation is based on the fact that the other Party has actually displayed sovereignty, it cannot be sufficient to establish the title by which territorial sovereignty was acquired at a certain moment; it must be shown that the territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical. This demonstration consists in the actual display of State activities, such as belongs only to the territorial sovereign.²¹⁵

In order for a disputed title over territory to be valid *erga omnes*, the possession exercised by the State should fulfil the following four criteria: (1) the possession exercised was *à titre de souverain*; (2) the possession was peaceful and uninterrupted; 3) the possession was public; and (4) the possession has endured for a sufficient length

²¹² Shaw, *supra* note 2, at 432-436.

²¹³ This is because of the nature of the title possessed by the Philippines, which, as the ICJ has differentiated in the *Western Sahara* case, is a derivative root of title (as opposed for instance to occupation, which is an original means of acquiring territory). See *Western Sahara* case (Advisory Opinion) 1975 ICJ 39, paras. 79 and 80.

²¹⁴ Martin Dixon, *Textbook on International Law* (2007) at 160-161.

²¹⁵ *Island of Palmas* (Netherlands v United States) (1928) 2 RIAA 829.

of time.²¹⁶ As Antunes notes, “the acquisition and maintenance of a sovereign title to territory depend on an effective occupation of the territory (*corpus occupandi*) and on the intention of carrying out that occupation *à titre de souverain* (*animus occupandi*).”²¹⁷ The legal title that the Philippines holds by virtue of the cession has to be confirmed by the effective exercise of sovereignty, or *effectivités*.²¹⁸ However, *effectivités*, as Shaw observes, “may confirm or complete but not contradict legal title established, for example by boundary treaties.”²¹⁹ Thus, the Philippines may validly invoke its title over the Philippine Treaty Limits on the basis of the colonial treaties from which such title is based on the argument that they are in the nature of boundary treaties. However, and as utilised by the ICJ in *Pulau Sipadan* case, the Court may ignore such title or find that no such treaty-based title exists and consider “*effectivités* as an independent and separate issue.”²²⁰

4.2.3.4. *Opinio Juris*

In the case of the Philippine historic claim to title to territory enclosed by the Treaty Limits, assuming that the Philippines possessed and maintained title over the same

²¹⁶ Enrico Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality, and Legitimacy* (2006) at 80-88.

²¹⁷ Nuno Sergio Marques Antunes, ‘The Eritrea-Yemen Arbitration: First Stage-The Law of Title to Territory Re-Averred’ (1999) 48 *International and Comparative Law Quarterly* 362 at 367, note 20.

²¹⁸ *Island of Palmas (Netherlands v United States)* (1928) 2 RIAA 829, at 884.

²¹⁹ Shaw, *supra* note 2, at 436.

²²⁰ *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment of 17 December 2002, *I. C. J. Reports* 2002, p. 625, p. 678, para. 127. The ICJ draws this distinction for *effectivités* which do not co-exist with any legal title. See: *Frontier Dispute (Burkina Faso v. Republic of Mali)* ICJ Reports 1986, p. 587, para. 63; *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, ICJ Reports 1994, p. 38, paras. 75-76; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, Merits, ICJ. Reports 2002, pp. 353-353, para. 68.

territory, for the title to be valid, the Philippines must still show and prove that its title has attained widespread and general acceptance by the community of nations as valid in international law.²²¹ As Schwarzenberger explains, international customary law has two constitutive elements: (1) a general practice of sovereign States and (2) the acceptance by the States of this general practice as law.²²² In the *Lotus*²²³ and *Asylum*²²⁴ cases, the ICJ ruled that to prove the existence of a rule in international customary law, it is necessary to establish not only that States act a certain way but that they do so because they recognise a legal obligation to this effect, i.e., with or without a treaty.²²⁵ This is what is called as *opinio juris*.²²⁶ The importance of the element of *opinio juris* in the formation of a custom is explained by Akehurst:

Opinio juris is necessary for the creation of customary rules; State practice, in order to create a customary rule, must be accompanied by (or consist of) statements that certain conduct is permitted, required or forbidden by international law (a claim that conduct is permitted can be inferred from the mere existence of such conduct, but claims that conduct is required or forbidden need to be stated expressly). It is not necessary that the State making such statements believes them to be true; what is necessary is that the statements are not challenged by other States.²²⁷

Thus, although through the operation of immemorial possession and acquisitive prescription “ultimately produces a single, common outcome – the acquisition of good

²²¹ See derisive yet insightful analysis of *opinio juris* as an element of customary international law in: Anthony D’Amato, ‘Trashing Customary International Law’ (1987) 81 *American Journal of International Law* 101.

²²² Georg Schwarzenberger, *A Manual of International Law* (1967) at 28.

²²³ *Lotus Case* (France v Turkey) (Judgment) [1927] PCIJ (ser A) No 10.

²²⁴ *Asylum Case*, (Colombia v Peru) ICJ Reports (1950).

²²⁵ Georg Schwarzenberger, *A Manual of International Law* (1967) at 32.

²²⁶ Otherwise referred to as *opinio iuris* or *opinio juris sive necessitatis*. See Peter Malanczuk and Michael Barton Akehurst, *Akehurst’s Modern Introduction to International Law* (1997) at 44; Jo Lynn Slama, ‘Opinio Juris in Customary International Law’ (1990) 15 *Oklahoma City University Law Review* 603.

²²⁷ Michael Akehurst, ‘Custom as a Source of International Law’ (1974-1975) 47 *British Year Book of International Law* 1 at 53.

title” and adverse possession remedies even an original defect in the title to the concerned territory, “entails acts of acquiescence by all other interested States in this exercise of State authority.”²²⁸

In the Philippine case, there is no evidence that there is widespread acceptance, tacit or otherwise, which suggests that the Philippine Treaty Limits is recognised as valid in international law. There seems to be no *opinio juris* supportive of such a claim.²²⁹

4.2.3.5. Persistent Objection

In international law, persistent objection is a valid defense against the application of customary international law unless that rule has attained the rare status of a peremptory norm or one of *jus cogens* character.²³⁰ In effect, a State that has persistently objected to a rule of customary international law during the course of the rule’s emergence is not bound by the rule.²³¹ However, this has been rarely invoked by States and hardly ever

²²⁸ Surya P. Sharma, *Territorial Acquisition, Disputes and International Law* (1997) at 108.

²²⁹ Roach and Smith, *supra* note 38, at 216-217; United States Department of State, *Limits in the Seas No. 112: United States Responses to Excessive Maritime Claims* (1992) at 50-51. *See especially*, Objections and Other Communications Concerning the Philippine Declaration on Signing of the Convention on the Law of the Sea, attached to this thesis as APPENDIX 8.

²³⁰ *See* academic literature on the persistent objector doctrine in international law: Jonathan I. Charney, ‘The Persistent Objector Rule and the Development of Customary International Law’ (1985) 56 *British Yearbook of International Law* 1; David A. Colson, ‘How Persistent Must the Persistent Objector Be’ (1986) 61 *Washington Law Review* 957; Holning Lau, ‘Rethinking the Persistent Objector Doctrine in International Human Rights Law’ (2005-2006) 6 *Chinese Journal International Law* 495; Ted L. Stein, ‘The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law’ (1985) 26 *Harvard International Law Journal* 457. *But see*: Anthony D’Amato, *International Soft Law, Hard Law, and Coherence*, Northwestern University School of Law Public Law and Legal Theory Series No. 08-01 (2008) at 17-19; Anthony D’Amato, ‘International Law as an Autopoietic System’ in Rudiger Wolfrum and Volker Roben (eds), *Developments of International Law in Treaty Making* (2005) 335 at 372-373.

²³¹ The International Court of Justice has recognised in several cases that a State which has consistently opposed from the beginning an emerging rule of customary law, that rule, although generally applicable, does not apply to the protesting State. *See for example*, the *Fisheries Case* (U.K. v. Norway) 1951 ICJ 116, where the ICJ held that the United Kingdom could not invoke against Norway the ten mile limit on straight lines closing bays to foreign fishing that was included in the 1882 North Sea Fisheries Convention because Norway has consistently objected to the rule. *Id.* at 131, 139. In the *Asylum Case*

has it reached international judicial adjudication.²³² There are two conditions for a State to invoke this rule and opt out of a customary rule. First, the State must object to the rule at its nascent stage and continue to object afterwards.²³³ Secondly, the objection must be consistent.²³⁴ In order to rebut the presumption of acceptance, the objection of the State must be clear and not merely silence or failure to object, which will be interpreted as consent.²³⁵ The first step in the inquiry on whether a State may validly invoke the persistent objector doctrine is to ask whether there is a treaty or convention applicable thereby removing the need to decide the issue on the basis of customary international law. The import of a State being party to a treaty is serious:

If the objecting state has signed a treaty which covers the issue (even if they have signed and later withdraw) they are no longer a persistent objector. They have consented, at least for a time, and should be bound by the norm if it has status of international custom.²³⁶

In the case at hand, the signature and ratification of the Philippines of the LOSC is fatal to its possible invocation of the doctrine of persistent objector. Also, the overwhelming

(Colombia v. Peru), 1950 ICJ 266, the Court applied this principle to a regional rule of customary international law and decided that the regional rule could not be invoked against Peru, which had repudiated it by refraining from ratifying the conventions that were the basis for that rule. *Id.* at 277-278. And most notably, the ICJ confirmed this principle in the *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark v. Netherlands) 1969 I.C.J. 3, where the Court noted that the delimitation rule in the 1958 Convention on the Continental Shelf was not binding on the Federal Republic of Germany as customary international law because it clearly reserved its position on the subject as soon as that rule was applied in North Sea delimitations. *Id.* at 18-19, 27.

²³² Ted L. Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law' (1985) 26 *Harvard International Law Journal* 457 at 459. The International Court of Justice only had the opportunity to discuss the matter on two cases: the *Asylum* case (Colombia v. Peru) 1950 ICJ Reports 266 and in the *Anglo-Norwegian Fisheries* case (United Kingdom v. Norway), 1951 ICJ Reports 116.

²³³ Mark Eugen Villiger, *Customary International Law and Treaties* (1985) at 16.

²³⁴ Jonathan I. Charney, 'Universal International Law' (1993) 87 *American Journal of International Law* 529 at 539, Note 44.

²³⁵ Vincyl Fon and Francesco Parisi, *Stability and Change in International Customary Law*, Berkeley Program in Law & Economics, Working Paper Series No. 96 (2003) at 5-6. Lynn Loschin, 'The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework' (1996) 2 *University of California Davis Law Review* 147 at 151.

²³⁶ Lynn Loschin, 'The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework' (1996) 2 *University of California Davis Law Review* 147 at 163.

number of territorial sea claims of 12nm can be taken as sufficient evidence of custom.²³⁷ As such, it will be binding upon the Philippines. Of course, it is not even necessary to peg the obligation as a norm of customary international law since there is a clear treaty provision in the LOSC which the Philippines as State party is bound to obey.²³⁸

4.2.4. Opposition and Acquiescence by other States

It is recognised in international law that State acts or measures which would otherwise be illegal as contrary to existing international law may in time, by reason of the failure of other States to lodge an effective protest may develop and consolidate as valid legal rights.²³⁹ This is through the process of acquiescence.²⁴⁰ In view of its potency in the creation of rules of customary international law and in the determination of title to territory and the delimitation of boundaries, acquiescence is, “not to be lightly presumed”²⁴¹ and must “be interpreted strictly.”²⁴²

The opposition and acquiescence of other States are important in determining the validity of the Philippine claim. In international law, for acquisition of title to be valid, the authority exercised by the claimant State must be accompanied by acquiescence by

²³⁷ Talaie, *supra* note 104, at 288.

²³⁸ For instance, Article 3, LOSC, *inter alia*. See also, Article 311 (2), LOSC and read in relation to Article 41, *Vienna Convention on the Law of Treaties*, *supra* note 18.

²³⁹ Phil C. W. Chan, ‘Acquiescence/Estoppel in International Boundaries: Temple of Preah Vihear Revisited’ (2004) 3 *Chinese Journal of International Law* 421 at 422.

²⁴⁰ Please see especially: I. C. MacGibbon, ‘The Scope of Acquiescence in International Law’ (1954) 31 *British Yearbook of International Law* 143; I.C. MacGibbon, ‘Customary International law and Acquiescence’ (1957) 33 *British Yearbook of International Law* 115.

²⁴¹ Kaiyan Homi Kaikobad, ‘Some Observations on the Doctrine of Continuity and Finality of Boundaries’ (1983) 54 *British Year Book of International Law* 119 at 126.

²⁴² I. C. MacGibbon, ‘The Scope of Acquiescence in International Law’ (1954) 31 *British Yearbook of International Law* 143 at 168 -169.

all other interested States. The acquiescence of a State may be express as well as implied. Acquiescence may be implied when an affected State fails to submit a protest in a sufficiently positive manner.²⁴³ It may also be implied by the failure of concerned States to refer the matter to the appropriate international organisation or international tribunal within a reasonable time.²⁴⁴

In the case at hand, the Philippine archipelago as a distinct and cohesive entity was a notorious fact, the existence of which cannot be easily denied. The earliest maps depicting the archipelago reflect the current configuration of the Philippine territory. This was the same territory that was under Spanish colony for over three centuries, during which time no other foreign power contested the territorial boundaries. This is the same territory which passed from Spanish sovereignty to that of the United States in 1898 as embodied in the Treaty of Paris.²⁴⁵ The Philippines has consistently claimed these Treaty lines as the limits of its territory in international fora including during all the Law of the Sea negotiations.²⁴⁶

This same territory, purposely delimited in metes and bounds, was further confirmed in subsequent treaties entered into by the United States with Spain in 1900²⁴⁷ and with Great Britain in 1930.²⁴⁸ This same territory was administered by the United States as

²⁴³ Malcolm Shaw opines that “the absence of protest implies agreement” and “the silence of other states can be used as an expression of *opinio juris* or concurrence in the new legal rule.” In this sense, “actual protests are called for to break the legitimising process.” Shaw, *supra* note 2, at 85.

²⁴⁴ I. C. MacGibbon, ‘The Scope of Acquiescence in International Law’ (1954) 31 *British Yearbook of International Law* 143 at 108-109.

²⁴⁵ Treaty of Paris, *supra* note 21.

²⁴⁶ See Jose D. Ingles, ‘The U.N. Convention on the Law of the Sea: Implications of Philippine Ratification’ (1983) 9 *Philippine Yearbook of International Law* 47.

²⁴⁷ Cession Treaty of 1900, *supra* note 21.

²⁴⁸ Boundaries Treaty of 1930, *supra* note 21.

its colony for almost half a century until 1946, when the Philippines declared its independence.²⁴⁹ The absence of any protest over a long period of time is incontrovertible. There was no protest subsequent or simultaneous to the ratification of the Treaty of Paris as with respect to the exercise of sovereignty by the United States over all the land and sea territory embraced in that treaty. Neither was there any protest after the Philippines gained independence when it exercised sovereignty and jurisdiction over the same territory.²⁵⁰ Never during the course of this long time frame did the United States, or any other foreign power for that matter, protested against the extent of the Philippine national territory.

When the Philippines tendered a *note verbale* to the Secretary General of the United Nations on 20 January 1956, it stated in clear terms the limits of its territorial seas, as follows:

The Philippine Government considers the limitation of its territorial sea as referring to those waters *within the recognized treaty limits*, and for this reason it takes the view that the breadth of the territorial sea *may extend beyond twelve miles*. It may therefore be necessary to make exceptions, upon historical grounds, by means of treaties or conventions between States...(emphasis added)²⁵¹

The Philippines also sent diplomatic notes of the same tenor to various States regarding the extent of its internal waters and territorial sea. Again, no protests were raised except that of the United States. The silence of these States can be taken as a tacit recognition

²⁴⁹ See for example, Karen Wells Borden, *Persuasive Appeals of Imperialist and Anti-Imperialist Congressmen in the Debates on Philippine Independence, 1912-1934* (1973); Bernardita Reyes Churchill, *The Philippine Independence Missions to the United States, 1919-1934* (1983); Raul P. De Guzman, *The Formulation and Implementation of the Philippine Independence Policy of the United States, 1929-1946* (Phd Thesis, University of Michigan, 1957).

²⁵⁰ Santiago, *supra* note 46, at 363.

²⁵¹ See Whiteman, Digest of International Law, Volume 4, pp. 282-283. See text of statements in 46 Philippine Law Journal 628 (1971); 3 Philippine Yearbook of International Law 28, 31 and 46 (1974).

of the Philippine claim.²⁵² As emphasised in the *Temple of Preah Vihear* Case, “a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation.”²⁵³ This doctrine, called estoppel, precludes a party from putting forth claims or allegations inconsistent with its previous conduct.²⁵⁴ The rationale behind this principle is to prevent a State from its own inconsistencies to the prejudice of another State.²⁵⁵ The pronouncement of the PCIJ in the *Legal Status of Eastern Greenland* case on the import of the renunciations in favour of Denmark made by Norway in respect of Greenland is instructive on this point:

[I]n accepting these bilateral and multilateral agreements as binding upon herself, Norway reaffirmed that she recognised the whole of Greenland as Danish; and thereby she debarred herself from contesting Danish sovereignty over the whole of Greenland, and in consequence, from proceeding to occupy any part of it.²⁵⁶

In the same manner, the colonial treaties that the United States entered into which confirm the territorial limits of the Philippines should bar her from contesting the Philippine claim and claiming a position inconsistent with its previous acts. Moreover, the notoriety of the facts of the Philippine claim, the general tolerance of the international community coupled with the interest of the United States on the matter and

²⁵² Santiago, *supra* note 46, at 363.

²⁵³ *Temple of Preah Vihear* (Cambodia v. Thailand) ICJ Reports 1962, p.6 at 40.

²⁵⁴ Please see following literature on estoppel in international law: Nuno Sergio Marques Antunes, ‘Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement’ (2000) 2(8) *Boundary & Territory Briefing*; D. W. Bowett, ‘Estoppel before International Tribunals and its Relation to Acquiescence’ (1957) 35 *British Yearbook of International Law* 176; Phil C. W. Chan, ‘Acquiescence/Estoppel in International Boundaries: Temple of Preah Vihear Revisited’ (2004) 3 *Chinese Journal of International Law* 421. It must be emphasised that estoppel, despite its obvious practical and evidential importance, cannot by itself establish title. See Shaw, *supra* note 2, at 439.

²⁵⁵ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1987) at 141-142.

²⁵⁶ *Legal Status of Eastern Greenland* (Denmark v. Norway) Judgment, PCIJ Series A/B No. 53, p. 22 at 68.

her prolonged abstention would in any case warrant the enforcement of the Philippine position against the United States.²⁵⁷

An examination of international jurisprudence which deal with the related issues of acquiescence, recognition and estoppel and their role in the settlement of boundary and territorial disputes will reveal that the probative or evidentiary value of specific acts depend largely on the interpretation of factual circumstances which are assessed subjectively, thereby obscuring any generalisation.²⁵⁸ This is the same situation as the case at hand.

The position of the United States with respect to the Treaty Limits is worth examining. It can be argued that the United States can be considered in estoppel in light of State practice which apparently confirmed the understanding that the coordinates in Article III of the Treaty of Paris were territorial delimitations. In fact, the United States has both actively and passively acquiesced in and accepted Spanish title to the Treaty Limits during the period prior to the independence of the Philippines and even after.²⁵⁹ The Philippines had dealings with the United States in relation to the territory of covered in the Treaty Limits which could only have taken place on the basis of Philippine title over

²⁵⁷ These are the very yardsticks used by the ICJ in the *Fisheries Case* to declare the Norwegian practice to be not contrary to international law. In the words of the ICJ: “[t]he notoriety of the facts of the Philippine claim, the general toleration of the international community, Great Britain’s position in the North Sea, her own interest in the question and her prolonged abstention would in any case warrant Norway’s enforcement of her system against the United Kingdom.” *Fisheries Case* (United Kingdom v. Norway), ICJ Judgment of 18 December 1951, ICJ Reports 1951, at 139. In the *Arbitral Award Case*, the ICJ noted that after failing “to raise any question with regard to the validity of the Award for several years,” Nicaragua was no longer in position to challenge its validity – only after a period of a little more than five years. *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)* ICJ Judgement of 18 November 1960, ICJ Reports 1960, at 213-214.

²⁵⁸ Nuno Sergio Marques Antunes, ‘Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement’ (2000) 2(8) *Boundary & Territory Briefing* at 35.

²⁵⁹ Magallona, *supra* note 8, at 57-60.

the same territory.²⁶⁰ Until relatively recently, the United States did not protest against the Philippine title, but only complained of its alleged non-compliance with the rules on the breadth of the territorial sea in the LOSC.²⁶¹ On the basis of international law and on the evidence considered, the Philippines seems to have good title to its territory within the Treaty Limits.²⁶² In fact, no State has protested or contested the ownership of the Philippines over any of the islands and islets lying within the Treaty Limits.

However, at this point it may be inane to argue of the validity of the Philippine claim on the basis alone of the strength of the operation of acquisitive prescription or of historical consolidation given the opposition of many States to it. This is a crucial factor in the legal status of the Treaty Limits in international law. As Sharma succinctly states: “the international tribunals have laid down that the possession must be undisturbed, uninterrupted or unchallenged.”²⁶³

In the case of the Philippines, the fact that it is ceded territory being claimed, is also important for two points. First, as pointed out by Shaw, since “cession has the effect of replacing one sovereign by another over a particular piece of territory, the acquiring state cannot possess more rights over the land that its predecessor had.”²⁶⁴ Clearly, the rights of the Philippines as a sovereign is derived from that of the United States who cannot transfer more than what it possessed. Secondly, the protests of the United States

²⁶⁰ *Ibid.* Chan-Gonzaga, *supra* note 23, at 29.

²⁶¹ *See*: Laws and Regulations on the Regime of the Territorial Sea (U.N. Legislative Series, 1957), ST/LEG/Ser.B?6, pp. 39-40. *Also*, Roach and Smith, *supra* note 38, at 216-217.

²⁶² Santiago, *supra* note 46, at 362.

²⁶³ Surya P. Sharma, *Territorial Acquisition, Disputes and International Law* (1997) at 110.

²⁶⁴ Shaw, *supra* note 2, at 421.

as the former sovereign carry more weight than even the consent of third States and will preclude title by prescription.²⁶⁵

The response of States to the Declaration made by the Philippines upon its signature of the LOSC embodies the strong opposition of States to the Philippine claim.²⁶⁶ The Philippine Declaration was strongly objected to by the Soviet Union, two of its former republics (Byelorussia and Ukraine), Bulgaria, Czechoslovakia, and Australia which regarded the Declaration as incompatible with Article 310 and as constituting a reservation prohibited under Article 309 of the LOSC.²⁶⁷ The United States in particular protested on the basis of its objection over the Philippine interpretation of the Treaty of Paris and the Washington Treaty of 1930, which the former does not share.²⁶⁸ The United States continues to be of the opinion that neither those treaties, nor subsequent practice, have “conferred upon the United States, nor upon the Republic of the Philippines as successor to the United States, greater rights in the waters surrounding the Philippine islands than are otherwise recognized in international law.”²⁶⁹

²⁶⁵ Shaw, *supra* note 2, at 438. The United States has also opposed and protested the Philippine interpretation of the archipelago concept on navigational grounds. See Barbara Kwiatkowska and Etty R. Agoes, ‘Archipelagic Waters: An Assessment of National Legislation’ in Rudiger Wolfrum (ed), *Law of the Sea at the Crossroads: the Continuing Search for a Universally Accepted Regime* (1991) 107 at 124-127. Also in, Roach and Smith, *supra* note 38, at 27, 402.

²⁶⁶ See: Objections and Other Communications Concerning the Philippine Declaration on Signing of the Convention on the Law of the Sea, attached to this thesis as APPENDIX 9.

²⁶⁷ *Ibid.* L.D. M. Nelson, ‘Declarations, Statements and ‘Disguised Reservations’ with respect to the Convention on the Law of the Sea’ (2001) 50 *International and Comparative Law Quarterly* 767 at 780-783. Blay, et al, *supra* note 72 at 96 -97.

²⁶⁸ The U.S. Response to the Philippine Pronouncement on the Archipelagic Doctrine, Lotilla, *supra* note 37, at 274.

²⁶⁹ Lotilla, *supra* note 37, at 546.

4.2.5. Opinion of Publicists

The rules of international law can be determined from a variety of sources.²⁷⁰ Article 38 of the ICJ Statute provides that in arriving at its decisions the Court shall apply international conventions, international custom, the “general principles of law recognized by civilized nations” and the “the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.”²⁷¹ The writings of publicists, strictly speaking, are not a source of law but are merely a subsidiary means of determining rules of law.²⁷²

In view of the scant legal and academic literature analysing the legal status of the Philippine Treaty Limits, it may be difficult to secure evidence of opinion of “the most highly qualified publicists” on the matter. Nevertheless, several scholars have given their opinion on the matter which this section will examine.

In 1970, Professor Joseph Dellapenna wrote one of the earliest analyses of the Philippine territorial waters claim in international law. In his evaluation of the Philippine historic title to its claimed territorial waters, he stated that:

The purported historical basis of the Philippine claim cannot stand up under the most cursory consideration. Thus the Treaties relied upon by the Philippines speak only of the islands belonging to the archipelago as being transferred, saying nothing of the waters surrounding them.²⁷³

²⁷⁰ Jorg Kammerhofer, ‘Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems’ (2004) 15 *European Journal of International Law* 523; Gordon E. Sherman, ‘Nature and Sources of International Law’ (1921) 15 *American Journal of International Law* 349; Vladimir Duro Degan, *Sources of International Law* (1997).

²⁷¹ Article 38, *Statute of the International Court of Justice*, opened for signature 26 June 1945, 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945) (entered into force 24 October 1945).

²⁷² John O’Brien, *International Law* (2001) at 95-97.

²⁷³ Joseph W. Dellapenna, ‘The Philippines Territorial Water Claim in International Law’ (1970-1971) 5 *Journal of Law & Economic Development* 45 at 53. As Dixon notes, “Today, the writings of even the most respected international lawyers cannot create law.” Martin Dixon, *Textbook on International Law*

He further adds:

The mere assertion of a title cannot vest rights so that the rights may not be challenged or denied by other national governments. Historical title to waters is established by long continued national usage implicitly or explicitly recognized by other States. This the Philippines has not shown, and does not appear able to show. It seems clear that the Philippines has no historical basis on which to establish a prescriptive title, and discussion in such terms by Filipino representatives cannot be very helpful.²⁷⁴

In a 2001 study on the undelimited maritime boundaries of the Asian Rim in the Pacific Ocean, maritime boundary experts Victor Prescott and Clive Schofield concluded that the Philippine argument that the Treaty Limits provide an historic claim to the waters lying within them “appears to have no validity in modern international law.”²⁷⁵

In a study by Professor Barbara Kwiatkowska which evaluated the archipelagic regime practice of the Philippines [and Indonesia], she opines that UNCLOS III rejected the Philippine claim to its historic territorial sea beyond 12nm.²⁷⁶ Further, she mentions that:

The legislation of the Philippines provides the most excessive instance of nonconformity with the LOS Convention’s rules as it regards Philippine archipelagic waters as strictly internal waters in which ... no innocent passage of foreign ships is recognized.²⁷⁷

(2007) at 47. This was not the case during the formative stages of international law, when writers such as Grotius, Bynkershoek, Vattel, Gentili and Pufendorf whose opinions “determined the scope, form and content of international law. Shaw, *supra* note 2, at 106.

²⁷⁴ *Id.* at 54.

²⁷⁵ Victor Prescott and Clive Schofield, ‘Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean’ (2001) 3(1) *Maritime Briefing* at 31.

²⁷⁶ Barbara Kwiatkowska, ‘The Archipelagic Regime in Practice in the Philippines and Indonesia -- Making or Breaking International Law’ (1991) 6 *International Journal of Estuarine and Coastal Law* 1 at 8.

²⁷⁷ *Ibid.*, at 4.

Kwiatkowska however adds that the fact that the Philippines continue to rely on its pre-UNCLOS III legislation which it intends to modify and its ratification of the LOSC which it appears to follow in practice, are important elements to be taken into account in any assessment.²⁷⁸

In a recent work by Professor Stuart Kaye which analyses the freedom of navigation in the Indo-Pacific Region, he mentioned the following with respect to the State practice of the Philippines in relation to the LOSC:

Contrary to the LOSC, the Philippines has proclaimed its territorial waters to be all those waters contained in what is usually described as the Treaty Limits Box. This large Box extends to as much as 350 kilometres away from the coast of the Philippines, and is *therefore not permissible in international law*. Australia and other States have protested the maintenance of the Box, even though the Philippines has indicated it will not enforce rights in the Box in a manner inconsistent with the LOSC.²⁷⁹ (Italics supplied)

The general consensus of scholars is that the Philippines failed to obtain recognition for this excessive territorial sea on historic grounds. The practical and eventual consequence of this is clear: "... the Philippines ultimately has no choice but to implement the Convention, for non-compliance places it in a far less favourable position on account of the non-recognition by foreign nations of any action that is inconsistent with the Convention's rules."²⁸⁰

²⁷⁸ *Id.*

²⁷⁹ Stuart Kaye, *Freedom of Navigation in the Indo-Pacific Region*, Papers in Australian Maritime Affairs (2008) at 34, 16. Kaye further notes the archipelagic State practice of the Philippines "doesn't comply with international law, and has no support from any other States."

²⁸⁰ Jay L. Batongbacal, 'The Maritime Territories and Jurisdictions of the Philippines and the United Nations Convention on the Law of the Sea' (2001) 76 *Philippine Law Journal* 123 at 157.

4.3. Conclusion

The object of this chapter was to determine the legal status of the Philippine Treaty Limits and territorial waters claim in international law on the basis of the following five criteria: treaty interpretation; conflict with the LOSC; status in customary international law; the acquiescence and opposition of other States to the Philippine position; and the opinion of publicists. On balance, the legal status of the Philippine Treaty Limits and territorial waters claim in international law appears to be tenuous. The issue, however, is not necessarily only legal. Comparable with most international territorial disputes, the Philippine claim is a political and diplomatic issue inasmuch as it is a legal issue. Victor Prescott insightfully states that, “disputes based solely on legal arguments ... are comparatively rare,” and the truth is, the “largest number of territorial disputes lack any significant legal component.”²⁸¹ Of course, the challenge of this intellectual exercise was to deal with the issue on its merits and its merits alone. But in the real world, this is and will never be the case. Ultimately, the validity or invalidity of the Philippine claim may never actually rest upon a judicial adjudication at all.

In reality, States act contrary to international law and not only fail to bring their municipal laws into conformity with international law, but also act in defiance of it.²⁸² The non-observance or utter disregard of States of obligations imposed by treaty or customary international law is not uncommon either.²⁸³ However, departures from

²⁸¹ John Robert Victor Prescott, *Political Frontiers and Boundaries* (1987) at 107.

²⁸² Mary Ellen O’Connell, ‘Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy’ (1998) 36 *Columbia Journal of Transnational Law* 473; Eric A. Posner and Alan O. Sykes, ‘Optimal War and Jus Ad Bellum’ (2004-2005) 93 *Georgetown Law Journal* 993.

²⁸³ For example, Iraq’s invasion of Kuwait in violation of the UN Charter, see Tom J. Farer, ‘The Prospect for International Law and Order in the Wake of Iraq’ (2003) 97 *American Journal of International Law* 621, among numerous examples.

international norms are rarely successful and quite quickly remedied by submission to arbitration or silently settled diplomatically.²⁸⁴ It is thus clear that the observance of international law is the custom and its non-observance – which is a notorious fact noted by the entire community of nations – the exception. Compliance with the rules of international law is the sole prerogative of the sovereign State.²⁸⁵ While international courts are established along with international legal procedures for the settlement of disputes, States are, in the main, under no obligation to submit their disputes to arbitration or judicial settlement.²⁸⁶ Moreover, quite often, there exists no authority or sanction to ensure compliance with the decision or finding of the court or arbitral body.²⁸⁷ In many cases, international legal procedures are largely unemployed and international law ignored by States in furtherance of their interests. Likewise, most international disputes are preferentially resolved politically or diplomatically.²⁸⁸

²⁸⁴ Jonathan I. Charney, 'Third Party Dispute Settlement and International Law' (1998) 36 *Columbia Journal of Transnational Law* 65 at 67, who states that "A relatively small proportion of disputes that involve questions of international law is submitted to formal dispute settlement."

²⁸⁵ See Eric A. Posner, 'Do States Have a Moral Obligation to Obey International Law' (2002-2003) 55 *Stanford Law Review* 1901 at 1905, who "argues that states do not have a general moral obligation to comply with international law." See also, Michael J. Glennon, 'How International Rules Die' (2004-2005) 93 *Georgetown Law Journal* 939, who explores the question of "whether compliance with international legal rules is obligatory."

²⁸⁶ Jonathan I. Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' (1998-1999) 31 *New York University Journal of International Law and Politics* 697, notes that due to the recent proliferation of international courts and other tribunals, "states involved in international disputes have a greater range of third-party dispute settlement vehicles than heretofore."

²⁸⁷ Judith O. Goldstein et al, 'Introduction: Legalization and World Politics' (2000) 54 *International Organization* 385 at 386, who observe that "Compliance with the judgments of international tribunals and WTO panels remains uneven. Military intervention, both unilateral and multilateral, continues to occur without clear international legal authority." See also, Philippe Sands, 'Enforcing Environmental Security: The Challenges of Compliance with International Obligations' (1993) 46 *Journal of International Affairs* 367; Beth A. Simmons, 'Capacity, Commitment, and Compliance: International Institutions and Territorial Disputes' (2002) 46(6) *Journal of Conflict Resolution* 829.

²⁸⁸ See for example, Debra P. Steger, 'Lessons from History: Trade and Peace' (2005) 37 *Studies in Transnational Legal Policy* 12 at 14, who notes that: "The WTO dispute settlement system is often touted as the "jewel in the crown" of the WTO. Over 320 complaints have been notified since 1995, and, of these, approximately one-fifth have been resolved diplomatically in consultations between the disputing parties."

Chapter 5

International Legal Implications of the Philippine Treaty Limits and Territorial Waters Claim on Navigational Rights in Philippine Waters

5.1. Introduction

This chapter analyses the international legal implications of the Philippine Treaty Limits and territorial waters claim on navigational rights in Philippine waters. This chapter examines and analyses the inconsistencies between the navigational regimes provided for in the LOSC and their implementation in the various Philippine maritime zones of jurisdiction. The main conclusion drawn by this Chapter is that the Philippine Treaty Limits pose the principal source of confusion and ambiguity with respect to the definition of the nature and rights of the various maritime jurisdictional zones which restrict the navigational rights of other States in Philippine waters.

The position of the Philippine Government, as previously discussed in Chapters 2¹ and 3,² with respect to the definition and extent of its national territory as referring to the territory enclosed by the lines of the Treaty of Paris pose serious consequences on the nation's current domestic laws and policies.³ This same position impinges on the country's implementation of the LOSC.⁴ At the heart of the issue is the fundamental inconsistency of the manner by which Philippine domestic legislation configure and

¹ Chapter 2. Historical Background of the Philippine Treaty Limits and Territorial Water Claim.

² Chapter 3. Legal Basis of the Philippine Treaty Limits and Territorial Water Claim.

³ Article I, National Territory, 1987 Philippine Constitution. Merlin M. Magallona, 'The United Nations Convention on the Law of the Sea and Its Implications on the Territorial Sovereignty of the Philippines' (1995) 11 *World Bulletin* 50 at 76. Magallona argues that the application of the LOSC raises fundamental questions that bear directly on the integrity of the Philippine State and its application will result in the diminution of Philippine territory as constitutionally defined.

⁴ Jay L. Batongbacal, 'The Maritime Territories and Jurisdictions of the Philippines and the United Nations Convention on the Law of the Sea' (2001) 76 *Philippine Law Journal* 123 at 123.

define the country's various maritime zones of jurisdiction and the legitimate way that a coastal State is allowed to extend its maritime zones under international law.⁵ The confused and confusing regimes result in an internally inconsistent patchwork of maritime jurisdictions.⁶ This chapter will look at two critical areas where the Philippine Treaty Limits have serious implications: navigational rights and access to resources in Philippine waters.

5.2. Navigational Rights in Philippine Waters

The LOSC secures the freedom of navigation on the high seas⁷ and contains provisions that assure the movement of ships in territorial seas,⁸ in archipelagic waters,⁹ in archipelagic sea lanes,¹⁰ and in straits used for international navigation.¹¹ The LOSC

⁵ Cabinet Committee on Maritime and Ocean Affairs, *National Marine Policy* (1994) at 7-8. The Philippine National Marine Policy states that "the extended maritime jurisdictions of the Philippines (i.e., territorial sea, contiguous zone and continental shelf) are well established under existing laws and customary international law. They are not dependent on UNCLOS as the norms on which they are based had become part of customary international law even before the entry into force of UNCLOS."

⁶ Jay Batongbacal, *The Metes and Bounds of the Philippine National Territory: An International Law and Policy Perspective* (2008) at 2.

⁷ Article 87, para. 1 (a), *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994). Hereinafter referred to as *LOSC*. Also see, Article 2, para. 1, 1958 Convention on the High Seas. *Convention on the High Seas*, adopted on 29 April 1958, UNTS, Volume 450, pp. 11, *et seq.* Michael A. Becker, 'The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea,' (2005) 46 *Harvard International Law Journal* 131.

⁸ Article 17, LOSC. See also, Article 14, *Geneva Convention on the Territorial Sea and the Contiguous Zone*, opened for signature 29 April 1958, 15 UST 1606; 516 UNTS 205 (entered into force 10 September 1964).

⁹ Article 52, LOSC.

¹⁰ Article 53, LOSC.

¹¹ Article 45, LOSC. See discussion in Satya N. Nandan and David H. Anderson, 'Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea' (1989) 60 *British Year Book of International Law* 159. Horace B. Robertson, Jr., 'Passage through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea' (1979-1980) 20 *Virginia Journal of International Law* 801. See *Corfu Channel Case* (United Kingdom v. Albania) ICJ Reports 1949, at p. 3, where the ICJ confirmed the right of innocent passage to warships through straits used for international navigation.

specifically guarantees three navigational rights: the right of innocent passage,¹² transit passage,¹³ and archipelagic sea lanes passage.¹⁴

Despite the contradiction in domestic legislation, the ratification of the Philippines of the LOSC implies the intent and obligation to respect the navigational rights in the Convention.¹⁵ The problematic position of the Philippine government with regard to the definition and extent of its national territory and domestic legislation defining its maritime zones poses three serious inconsistencies with the LOSC navigational regimes. First, the Philippines characterises the waters enclosed by the Philippine baselines as internal waters instead of archipelagic waters without the right of innocent passage or archipelagic sea lanes passage.¹⁶ Second, the Philippines treats the waters from the baselines up to the Philippine Treaty Limits as its territorial sea without the right of innocent passage.¹⁷ Third, the Philippines claims a 200nm EEZ extending from the same baselines which overlap with its territorial sea which does not respect high seas

¹² Article 17, LOSC grants ships of all States innocent passage through the territorial sea; Article 45, states that the regime of innocent passage applies to straits used for international navigation which cannot be suspended; Article 52, LOSC grants the right of innocent passage to all ships through archipelagic waters. See Francis Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea: the Current Regime of "Free" Navigation in Coastal Waters of Third States* (1990); Kari Hakapaa and Eric Jaap Molenaar, 'Innocent passage-past and present' (1999) 23 *Marine Policy* 131.

¹³ Articles 37 (2), 38, 39, 42, LOSC. V. D. Bordunov, 'The right of transit passage under the 1982 convention' (1988) 12(3) *Marine Policy* 219.

¹⁴ Article 53 (2), LOSC. See J. Peter A. Bernhardt, 'The Right of Archipelagic Sea Lanes Passage: A Primer' (1994-1995) 35 *Virginia Journal of International Law* 719.

¹⁵ Article 300, LOSC. Ramses Amer, 'Towards a Declaration on "Navigational Rights" in the Sea-Lanes of the Asia-Pacific' (1998) 20 *Contemporary Southeast Asia* 88 at 93.

¹⁶ Section 2, Republic Act No. 3046, *An Act to Define the Baselines of the Territorial Sea of the Philippines*, 17 June 1961, states that: "All waters within the baselines provided for in Section one hereof are considered inland or internal waters of the Philippines." Peter B. Payoyo, 'Legal Framework for the Development and Management of Non-Living Marine Resources: Philippine Concerns' in Joseph Sedfrey S. Santiago (ed), *Problems, Prospects and Policies: Non-Living Marine Resources of the Philippines: Policy and Legal Concerns* (1983) 1 at 18. As discussed in Chapter 1, this author argues that despite the passage of Republic Act No. 9522, the 2009 Archipelagic Baselines Law of the Philippines, the ambiguity over the status of the waters landward of the baselines persists, i.e., whether the waters enclosed by the archipelagic baselines are archipelagic waters or internal waters under domestic law.

¹⁷ J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive Maritime Claims* (1996) at 264, 400, 401.

navigation freedoms.¹⁸ The following sections will discuss these inconsistencies in detail.

5.2.1. Internal Waters

This section will discuss the legal regime of internal waters under the LOSC and the corresponding navigational rights in Philippine internal waters.

5.2.1.1. The Legal Regime of Internal Waters

The coastal State enjoys full sovereignty over its internal waters.¹⁹ Internal waters consist of harbours, lakes or rivers, or such waters found on the landward side of the territorial sea baseline.²⁰ The legal regime of internal waters is no different from the regime of land territory in terms of navigation and passage.²¹ The LOSC guarantees the right of a coastal State to draw baselines enclosing its internal waters.²² In these waters, even the right of innocent passage does not exist.²³ The singular exception to this rule is

¹⁸ Presidential Decree No. 1599, *Establishing an Exclusive Economic Zone and for other Purposes*, 11 June 1979. *But see* Section 4, of Presidential Decree No. 1599, which states that: “Other states shall enjoy in the exclusive economic zone freedoms with respect to navigation and overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea relating to navigation and communications.” *See also*, Jorge R. Coquia, ‘Development and Significance of the 200-Mile Exclusive Economic Zone’ (1979) 54 *Philippine Law Journal* 440. The LOSC guarantees high seas navigation freedoms in the EEZ in Article 58(2).

¹⁹ Article 2, LOSC. *See* V. D. Degan, ‘Internal Waters’ (1986) 17 *Netherland Yearbook of International Law* 3.

²⁰ Article 8(1), LOSC, which is identically worded as Article 5(1), Convention on the Territorial Sea. Please note the exception explicitly provided in Article 8(1) for archipelagic States, but read in relation with Article 50, LOSC.

²¹ Hasjim Djalal, ‘The Law of the Sea Convention and Navigational Freedoms’ in Donald R. Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea* (2000) 1 at 1. Malcolm N. Shaw, *International Law* (2003) at 493.

²² Article 8, LOSC.

²³ Article 18, LOSC. Robin R. Churchill and Vaughan Lowe, *The Law of the Sea* (1999) at 61.

where straight baselines are drawn along a coastline that is deeply indented or fringed with islands, enclosing as internal waters areas which were not considered previously as such, where the right of innocent passage is guaranteed.²⁴ Incursion or entry within these waters of a third State without the permission of the coastal State is considered a violation of the latter's national sovereignty.²⁵ As such, a coastal State has the right to protect its internal waters, subjacent seafloor and superjacent airspace by whatever offensive and defensive means they deem necessary.²⁶ A coastal State is also entitled to prohibit entry into its ports by foreign ships, except for ships in distress.²⁷ The coastal State enjoys full jurisdiction to enforce its laws against foreign merchant ships,²⁸ and to a limited extent against warships,²⁹ in its internal waters.

5.2.1.2. Navigational Rights in Philippine Internal Waters

The 1987 Philippine Constitution states clearly that: “[T]he waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions,

²⁴ Article 8 (2), LOSC; Article 5(2), Convention on the Territorial Sea.

²⁵ John Astley III and Michael N. Schmitt, ‘Law of the Sea and Naval Operations’ (1997) 42 *Air Force Law Review* 119 at 129.

²⁶ Ingrid Delupis, ‘Foreign Warships and Immunity for Espionage’ (1984) 78 *American Journal of International Law* 53 at 72-73.

²⁷ Churchill and Lowe, *supra* note 23, at 63 notes that “there is a clear customary law right of entry to ports [for] ships in distress.” In the *Nicaragua* case [1986] ICJ Rep. 14 at 111, the ICJ ruled that “by virtue of its sovereignty that the coastal State may regulate access to its ports.” See Louise de La Fayette, ‘Access to Ports in International Law’ (1996) 11 *International Journal of Marine & Coastal Law* 1; A. V. Lowe, ‘The Right of Entry into Maritime Ports in International Law’ (1976-1977) 14 *San Diego Law Review* 597.

²⁸ This principle is subject to a number of exceptions, see Peter Malanczuk and Michael Barton Akehurst, *Akehurst's Modern Introduction to International Law* (1997) at 175-176.

²⁹ Shaw, *supra* note 21, at 495, explains that “[T]his is due to the status of the warship as a direct arm of the sovereign of the flag state.” See also, Article 30, LOSC, which allows the coastal State to require a warship which does not comply with its law and regulations to leave the territorial sea immediately. See also, Bernard H. Oxman, ‘The Regime of Warships under the United Nations Convention on the Law of the Sea’ (1983-1984) 24 *Virginia Journal International Law* 809.

form part of the internal waters of the Philippines.”³⁰ This reflects the exact formulation in the Philippine *Note Verbales* of 7 March 1955 and 20 January 1956³¹ and reiterated in the Philippine Baselines Law of 1961, Republic Act No. 3046.³²

In the deliberations of the Philippine Baselines Law of 1961 in the Philippine Senate, its proponent explained that among the declared intentions of the law is the clarification of the position of the Philippines on navigational issues within its waters. In the words of Senator Arturo Tolentino:

All 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 baseline 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.³³

³⁰ Article 1, 1987 Philippine Constitution. It must be remembered that the Constitution of the Philippines defines the national territory as comprising all the territory ceded to the United States by the Treaty of Paris concluded between the United States and Spain on 10 December 1898, the limits of which are set forth in Article III of said treaty together with all the islands embraced in the treaty concluded in Washington, between the United States and Spain on 7 November 1900, and in the treaty concluded between the United States and Great Britain on 2 January 1930, and all the territory over which the Government of the Philippine Islands exercised jurisdiction at the time of the adoption of the Constitution. Joaquin G. Bernas, *The 1987 Constitution of the Republic of the Philippines: A Commentary* (1996) at 29.

³¹ Note Verbale dated 7 March 1955 from the Permanent Mission of the Philippines to the United Nations; Note Verbale dated 20 January 1956 from the Permanent Mission of the Philippines to the United Nations. Both *Note Verbales* state: “All the waters around, between and connecting the different islands belonging to the Philippine Archipelago, irrespective of their width and dimension, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines...” The abovementioned *Note Verbales* are attached to this thesis as APPENDICES 6 and 7, respectively.

³² Second preambular clause, Republic Act No. 3046, *supra* note 16, which states that “all the waters around, between and connecting the various islands of the Philippine 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.”

³³ Excerpt from the sponsorship speech of Senator Arturo Tolentino, in ‘Proceedings of the Philippine Senate on Senate Bill No. 541: Baselines of the Philippine Territorial Sea [1960] in Raphael Perpetuo M. Lotilla (ed), *The Philippine National Territory: A Collection of Related Documents* (1995) at 287.

Thus, from a domestic standpoint, the waters enclosed by the Philippine straight baselines are treated as internal waters.³⁴ Within these waters, the right of innocent passage does not exist.³⁵ It is problematic that in Philippine legislation, no distinction is made between internal waters and archipelagic waters.³⁶ Under the LOSC, the internal waters of archipelagic States refer to the waters enclosed by closing lines it may draw across river mouths, bays and harbours on its islands.³⁷ The LOSC clearly differentiates between internal waters and archipelagic waters, *inter alia*, for the purpose of navigational rights that coastal States and third States may assert over them.³⁸

³⁴ Republic Act No. 3046, *supra* note 16. This mirrors Article 5(1), *Geneva Convention on the Territorial Sea and the Contiguous Zone*, opened for signature 29 April 1958, 15 UST 1606; 516 UNTS 205 (entered into force 10 September 1964), which states “Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.” Hiran W. Jayewardene, *The Regime of Islands in International Law*, Publications on Ocean Development (1990) at 158. Clive Ralph Symmons, *The Maritime Zones of Islands in International Law* (1979) at 76-77.

The enactment of a new Philippine archipelagic baselines law, Republic Act No. 9522, *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*, 10 March 2009, raises question of the legal effect of this law on the status of the waters they enclose.

³⁵ This is essentially the core of the Philippine archipelago concept. See, Arturo M. Tolentino, ‘The Philippine Archipelago and the Law of the Sea’ (1983) 7 *Philippine Law Gazette* 1 at 3, noting the imprecise use of the terminology in his statement, “The waters inside the baselines are archipelagic and internal waters of the archipelagic State.”

Please note that this is the same position taken by Canada in enclosing its Arctic Archipelago with straight baselines, and claiming all the waters within as internal waters. See, Roach and Smith, *supra* note 17, at 117-118.

³⁶ The position taken by the Philippines, as embodied in the Declaration it submitted on signing LOSC, is that ‘[T]he concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines and removes straits connecting these waters with the economic zone or high sea from the rights of foreign vessels to transit passage for international navigation.’ Philippine Declaration on the Signing of the Convention on the Law of the Sea, 10 December 1982, in Lotilla, *supra* note 33, at 509. Hereinafter referred to as Philippine Declaration. The full text of the Philippine Declaration is attached as APPENDIX 8. See, Batongbacal, *supra* note 4, at 134, who argues that “the ambiguity with which the internal waters are distinguished from the territorial waters, particularly the lack of a clear rule for determining which portions are internal and which are territorial waters, practically meant a fusion of the two regimes within the treaty lines.”

³⁷ Article 50, LOSC. These closing lines must be in accordance with the normal rules on baselines contained in Articles 9, 10 and 11, LOSC. Article 8(1), LOSC which states that “waters landward side of the baselines of the territorial sea form part of the internal waters of the State” clearly excludes archipelagic States. See Kim Young Koo, ‘The Law of the Sea, Archipelagoes, and User States: Korea’ in Donald R. Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea* (2000) 158 at 160.

³⁸ The difference in terms of navigational rights cannot be any clearer: the right of innocent passage does not exist in internal waters, while ships of all States enjoy the right of innocent passage through archipelagic waters. Article 52(1), LOSC. S. K. N. Blay, R. W. Piotrowicz and B. M. Tsamenyi,

Specifically, ships of all States enjoy the right of innocent passage through archipelagic waters.³⁹ In addition, in designated sea lanes and air routes, all ships and aircraft enjoy the right of archipelagic sea lanes passage.⁴⁰ In contrast, if such were internal waters, foreign ships may be rightfully prohibited from entry as the right of innocent passage does not exist.⁴¹ This point of conflict will be further discussed in the subsequent discussions on archipelagic waters and territorial sea in this Chapter.

5.2.2. Archipelagic Waters

This section will discuss the legal regime of archipelagic waters under the LOSC and the corresponding navigational rights in Philippine archipelagic waters.

5.2.2.1. The Legal Regime of Archipelagic Waters

The radical recognition of the political and territorial unity of an archipelagic State in the LOSC also recognised the sovereignty of an archipelagic State over its archipelagic waters.⁴² The LOSC in Article 46 defines an archipelagic State as one that is constituted wholly by one or more archipelagos and which may include other islands.⁴³ An

'Problems with the Implementation of the Third United Nations Law of the Sea Convention: the Question of Reservations and Declarations' (1984-1987) 11 *Australian Yearbook of International Law* 67 at 96-97.

³⁹ Article 52 (1), LOSC. This right may only be suspended, temporarily and only in specified areas for reasons of security which shall take effect only after due publicity. Article 52(2), LOSC.

⁴⁰ Article 53 (1 and 2), LOSC. This right may be exercised through or over archipelagic waters and the adjacent territorial sea.

⁴¹ Churchill and Lowe, *supra* note 23, at 61, notes that there is no right in customary international law or State practice for foreign ships to enter a State's port or internal waters.

⁴² Part IV, LOSC. See historical discussion of the problem of mid-ocean archipelagos pre-LOSC in C. F. Amerasinghe, 'The Problem of Archipelagos in the International Law of the Sea' (1974) 23 *International and Comparative Law Quarterly* 539; D. P. O'Connell, 'Mid-Ocean Archipelagos in International Law' (1971) 45 *British Yearbook of International Law* 1.

⁴³ Article 46 (a), LOSC.

archipelago means a group of islands 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.”⁴⁴ Archipelagic waters comprise all the waters enclosed by archipelagic baselines.⁴⁵ Prior to the LOSC, archipelagic waters had the juridical nature of high seas where foreign flags enjoyed the traditional freedoms of navigation and overflight.⁴⁶

The sovereignty of the archipelagic State extends to the waters enclosed by the archipelagic baselines as well as the airspace, seabed, subsoil and resources in the subsoil of the archipelagic waters.⁴⁷ However, an archipelagic State shall respect existing agreements, traditional fishing rights and existing submarine cables within archipelagic waters.⁴⁸ Two passage regimes apply in all archipelagic waters: innocent passage⁴⁹ and archipelagic sea lanes passage.⁵⁰ All vessels, including warships, enjoy

⁴⁴ Article 46 (b), LOSC. L. L. Herman, ‘The Modern Concept of the Off-Lying Archipelago in International Law’ (1985) 23 *Canadian Yearbook of International Law* 172 at 179, calls this “the ‘entity’ tests for archipelagic status and the historical criterion.”

⁴⁵ Article 49(1), LOSC. Churchill and Lowe, *supra* note 23, at 120, opines that “Only an archipelagic State can draw archipelagic baselines around an archipelago.” *But see* Keyuan Zou, *Law of the Sea in East Asia: Issues and Prospects* (2005) at 56, who observes that “in state practice, a number of continental states have applied the concept of archipelagic waters to their mid-ocean islands and/or archipelagos, such as Denmark, Ecuador, and Norway, though they did not declare that the waters enclosed in the straight baselines were archipelagic waters.” *See especially*, Keyuan’s discussion and justification on the use of a “method similar to archipelagic straight baselines to measure the territorial sea of the Paracel Islands in 1996” which makes the “waters inside the baselines... the internal waters of China” despite his earlier assertion that continental States do not have this right.

⁴⁶ Farhad Talaie, ‘Recognition of a Special Legal Regime for Mid-Ocean Archipelagos and its Implications for the Pacific Rim Region’ (1998) 10 *Pacifica Review* 203 at 208.

⁴⁷ Article 49, LOSC.

⁴⁸ Article 51, LOSC. *See* requirements for the right of traditional fishing in archipelagic waters in Mohammed Munavvar, *Ocean States: Archipelagic Regimes in the Law of the Sea* (1995) at 161.

⁴⁹ Article 52(1), LOSC. Since the LOSC does not qualify the term ships accorded innocent passage through archipelagic waters in Article 52, this implies that this includes warships and all other categories of ships. Article 52, LOSC. W. E. Butler, ‘Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy’ (1987) 81 *American Journal of International Law* 331, at 345-346. *Also see*, Bernard H. Oxman, ‘The Regime of Warships under the United Nations Convention on the Law of the Sea’ (1983-1984) 24 *Virginia Journal International Law* 809 at 851

⁵⁰ Article 53, LOSC. *See* scholarly discussion in: J. Peter A. Bernhardt, ‘The Right of Archipelagic Sea Lanes Passage: A Primer’ (1994-1995) 35 *Virginia Journal of International Law* 719.

the right of innocent passage through archipelagic waters, but the archipelagic State may temporarily suspend innocent passage, on a non-discriminatory basis, through specified areas when the suspension is essential for the protection of the its security.⁵¹ Innocent passage requires a vessel to conduct continuous and expeditious transit in a manner that is not prejudicial to the peace, good order or security of the archipelagic State.⁵² The archipelagic State may also designate archipelagic sea lanes where other States may exercise the right of unimpeded archipelagic sea lanes passage under a normal mode of operation,⁵³ similar to transit passage.⁵⁴ The right of archipelagic sea lanes passage is a key navigational freedom.⁵⁵ The right of archipelagic sea lanes passage allows foreign ships and aircraft to tranverse in normal mode for continuous, expeditious and unobstructed transit from one part of the high seas or an EEZ to another part of the high seas or an EEZ.⁵⁶ This right is non-suspensible if exercised within an archipelagic sea lane.⁵⁷

5.2.2.2. Navigational Rights in Philippine Archipelagic Waters

The Philippines, geographically and legally, is an archipelagic State.⁵⁸ In Philippine domestic legislation, as stated earlier, what the LOSC considers archipelagic waters are

⁵¹ Articles 52(2) and 54, LOSC.

⁵² Articles 19 and 52, LOSC.

⁵³ Articles 52 and 53, LOSC

⁵⁴ Article 38, LOSC.

⁵⁵ Article 53(2), LOSC. William L. Schachte Jr. and J. Peter A. Bernhardt, 'International Straits and Navigational Freedoms' (1992-1993) 33 *Virginia Journal of International Law* 527 at 542.

⁵⁶ Article 53(3), LOSC.

⁵⁷ Article 53(3), LOSC. Article 53(3), LOSC, guarantees the right of navigation and overflight in the normal mode which means that submarines may go through archipelagic sea lanes submerged.

⁵⁸ Alberto A. Encomienda, 'Archipelagic Sea Lanes Passage and the Philippines Situation' in Myron H. Nordquist, Tommy T. B. Koh and John Norton Moore (eds), *Freedom of seas, passage rights, and the 1982 Law of the Sea Convention* (2009) 393 at 396.

referred to and treated as internal waters.⁵⁹ This refers to the waters landwards of the baselines.⁶⁰ The Philippines exercises full sovereignty over these waters as they are actually considered part of Philippine territory.⁶¹ As such, the right of innocent passage does not exist within these waters.⁶² Theoretically, therefore, a foreign vessel may be prohibited from entry and apprehended for intrusion into these waters.⁶³

In the present constitutional definition of Philippine internal waters⁶⁴ which are actually archipelagic waters in the LOSC,⁶⁵ the designation of archipelagic sea lanes in these waters could potentially raise constitutional issues.⁶⁶ If the LOSC would be applied, the waters landward of the archipelagic baselines would be classified as archipelagic waters where the right of innocent passage is guaranteed; as well as archipelagic sea lanes

⁵⁹ Article 1, 1987 Philippine Constitution. Paragraph 7, Philippine Declaration, *supra* note 36.

⁶⁰ Section 2, Republic Act No. 3046, *supra* note 16.

⁶¹ First and Second preambular clauses, Republic Act No. 3046, *supra* note 16.

⁶² Jorge R. Coquia, 'Some Legal and Constitutional Issues on Archipelagic Sea Lanes' in Maribel Aguilos (ed), *Designation of Sea Lanes in the Philippines* (1997) 52 at 54. Coquia opines that "[A]t most, innocent passage may be allowed within said waters." Molenaar notes that "all archipelagic States, except the Philippines, recognize the right of innocent passage in their archipelagic waters." Erik Jaap Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998) at 354.

⁶³ Churchill and Lowe, *supra* note 23, at 61, 65-66. See, Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (2006). But see, Josefa Rizalina Bautista, 'Commentary on Shipping Provisions of the Law of the Sea Convention' in Secretariat to the Cabinet Committee on the Law of the Sea Convention (ed), *Second Conference on the Review of the Law of the Sea Convention: Conference Documents* (1982) Volume IV, at 10, which states that:

The Philippine position on passage within archipelagic waters is to allow only innocent passage of commercial vessels, or those carrying cargo and passengers, but not of fishing boats, oil tankers, warships or nuclear powered vehicles. Submarines should sail on the surface and special rules should be provided for different types of vessels, requiring previous notification and/or consent in some cases.

⁶⁴ Article 1, 1987 Philippine Constitution.

⁶⁵ Article 49, LOSC. See Barbara Kwiatkowska, 'The Archipelagic Regime in Practice in the Philippines and Indonesia -- Making or Breaking International Law' (1991) 6 *International Journal of Estuarine and Coastal Law* 1 at 4; compare with: Paragraph 7, Philippine Declaration, Philippine Declaration, *supra* note 36.

⁶⁶ Gilbert Asuque, 'Legal and Ocean Policy Implications of Sea Lanes Designation' (1997) 1 *Ocean Law and Policy Series* 59 at 60.

passage where archipelagic sea lanes are designated.⁶⁷ The current Philippine regime of internal waters is clearly inconsistent with the LOSC.⁶⁸ While the sovereignty accorded to an archipelagic State over its archipelagic waters, the air space above those waters, the seabed, and the subsoil beneath those waters, including the sea lanes therein, is virtually complete;⁶⁹ it is not the same as the full territorial sovereignty over its internal waters.⁷⁰ Within these waters, the Philippines prohibits passage of ships carrying hazardous cargoes in transit through its EEZ and requires prior notification or authorisation for the passage of foreign vessels through its straits.⁷¹

There is much confusion and inconsistency in Philippine laws and policy⁷² as well as in academic literature with respect to navigational rights in Philippine archipelagic waters.⁷³ The imprecision, and not infrequent mix-up, in terminology is warranted by the fact that these concepts pre-dated the LOSC and were crafted at a time when the

⁶⁷ Article 49 in relation with Article 47, LOSC; Article 53 (12), LOSC. *Please see*, Republic Act No. 9522, *supra* note 34, which amended the Philippine baselines law and replaced straight baselines in the old legislation with archipelagic baselines.

⁶⁸ Article 50, LOSC. Stuart Kaye, *Freedom of Navigation in the Indo-Pacific Region*, Papers in Australian Maritime Affairs (2008) at 34.

⁶⁹ Article 49(2), LOSC.

⁷⁰ Churchill and Lowe, *supra* note 23, at 61.

⁷¹ Erik Jaap Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998) at 336. Symmons, *supra* note 34, at 71.

⁷² For example, the 1987 Philippine Constitution in Article I, defines the “waters around, between, and connecting the islands of the archipelago” as “internal waters,” which correspond to the waters enclosed by the baselines in the 1961 Philippine Baselines Law in Section 2. The 1955 and 1956 *Note Verbales* refer to them as “national or inland waters subject to the exclusive sovereignty of the Philippines,” as differentiated from “maritime territorial waters of the Philippines” which refer to “all other waters” embraced by the Philippine Treaty Limits subject to the “exercise by friendly foreign vessels of the right of innocent passage.” On the other hand, the Declaration submitted by the Philippines upon its signature of the LOSC states that “[T]he concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines...” If this is the case, does the right of innocent passage exist over these waters as provided for under the LOSC? Paragraph 7, Philippine Declaration, *supra* note 36.

⁷³ For example, Symmons, *supra* note 34, at 71 states that the Philippines allows “the right of ‘innocent passage’ through the enclosed waters; Barbara Kwiatkowska, ‘The Archipelagic Regime in Practice in the Philippines and Indonesia -- Making or Breaking International Law’ (1991) 6 *International Journal of Estuarine and Coastal Law* 1 at 4, states that the Philippines regards its archipelagic waters “as strictly internal waters in which ... no innocent passage of foreign ships is recognized.” Churchill and Lowe, *supra* note 23, at 128, conclude that “according to a Philippine *note verbale* of 1955 there is a right of innocent passage” in the waters enclosed by the baselines which retained the “status of internal waters.”

nature and corresponding rights and obligations over them were not yet settled in international law.⁷⁴ Despite the codification of the archipelago concept in the LOSC, this ambiguity persists to date.⁷⁵

As an archipelagic State, the Philippines should take advantage of the archipelagic regime provided by LOSC. The Philippines has yet to implement Part IV of the LOSC. This includes the designation of archipelagic sea lanes. An archipelagic State does not have to designate archipelagic sea lanes, but if it does, LOSC Article 53(4) requires that the designation include all normal passage routes used for international navigation.⁷⁶ While archipelagic States are given the right to designate sea lanes, no obligation exists in international law to compel an archipelagic State to do so.⁷⁷ Since the wording of the LOSC implies that it is permissive in character, the Philippines can opt not to designate

⁷⁴ Batongbacal, *supra* note 4, at 135; James C. F. Wang, *Handbook on Ocean Politics & Law* (1992) at 46-49; Symmons, *ibid.*, observes that “the early discussions on archipelagic regimes ... were more concerned with the question of the definition of ‘archipelagos’ and the drawing of the straight baselines than with the nature of the regime in the waters enclosed.” Jorge R. Coquia, ‘The Territorial Waters of Archipelagos’ (1962) 1(1) *Philippine International Law Journal* 139 at 139, who notes that the nature and the rules for the delimitation of the territorial seas of archipelagos were not settled at the 1958 Geneva Conference on the Law of the Sea which will persist even throughout the subsequent LOS Conferences.

The records of the 1986 Constitutional Commission also bear out the intentional evasiveness and sometimes, even lack of acquaintance of LOSC concepts. *See for example*, Committee Report No. 3 on Proposed Resolution No. 263 on National Territory, Deliberations of 26 June 1986, in Lotilla, *supra* note 33, at 558, which states that “no express reference be made on the Convention on the Law of the Sea as this would create confusion and that specific attention be made on the reservation of Mr. Tolentino.”

⁷⁵ For example, will the passage of Republic No. Act 9522, *supra* note 34, otherwise known as the new Philippine Archipelagic Baselines Law of 2009, transform the waters landwards of the archipelagic baselines into archipelagic waters (which were formerly referred to and treated as internal waters)? *See*, Kim Young Koo, ‘The Law of the Sea, Archipelagoes, and User States: Korea’ in Donald R. Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea* (2000) 158 at 161, who argues: “It is submitted that the waters enclosed by archipelagic baselines are neither internal waters nor territorial sea. They are archipelagic waters.”

⁷⁶ Article 53(4), LOSC. *See* Maribel Aguilos (ed), *Designation of Sea Lanes in the Philippines* (1997). It is this requirement to designate all routes that came under special scrutiny in light of Indonesia’s proposal. *See* Constance Johnson, ‘A Rite of Passage: The IMO Consideration of the Indonesian Archipelagic Sea-Lanes Submission’ (2000) 15 *International Journal of Marine & Coastal Law* 317.

⁷⁷ Hasjim Djalal, ‘The Law of the Sea Convention and Navigational Freedoms’ in Donald R. Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea* (2000) 1 at 4.

archipelagic sea lanes if it so desires.⁷⁸ The Philippines denies the right of archipelagic sea lane passage through its sea lanes.⁷⁹ The assertion of sovereignty over these supposed internal waters, a cornerstone of the Philippine Treaty Limits argument, is the primary source of this intractable position.

The issue of sea lanes passage through the Philippine archipelago has been characterised as a “prejudicial question,” i.e., the question of Philippine archipelagic sea lanes passage cannot be satisfactorily resolved unless the question of whether the Philippines will adhere to the Treaty Limits definition of the national territory or use the LOSC.⁸⁰ This will ultimately be a constitutional issue from a domestic point of view since the validity of a domestic legislation designating archipelagic sea lanes may be contrary to the letter and spirit of the Philippine Constitution considering that the waters within the Philippine archipelago are considered internal waters.⁸¹

Setting these domestic legal issues aside, and bearing in mind that the Philippines has recently passed a new baselines law, Republic Act No. 9552, which defines a system of

⁷⁸ Jay Batongbacal, ‘The Philippines’ Right to Designate Sea Lanes in Its Archipelagic Waters under International Law’ in Maribel Aguilos (ed), *Designation of Sea Lanes in the Philippines* (1997) 81 at 109.

⁷⁹ Paragraph 6, Philippine Declaration, *supra* note 36, which states: 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.

However, in international law, the obligations of the Philippines under LOSC remain. The Declaration, which has been protested and interpreted as a disguised reservation which is prohibited under LOSC, is ineffectual. L. D. M. Nelson, ‘Declarations, Statements and ‘Disguised Reservations’ with respect to the Convention on the Law of the Sea’ (2001) 50 *International and Comparative Law Quarterly* 767 at 780-781; S. K. N. Blay, R. W. Piotrowicz and B. M. Tsamenyi, ‘Problems with the Implementation of the Third United Nations Law of the Sea Convention: the Question of Reservations and Declarations’ (1984-1987) 11 *Australian Yearbook of International Law* 67 at 96-97. Articles 309, 310, LOSC.

⁸⁰ Jorge R. Coquia, ‘Some Legal and Constitutional Issues on Archipelagic Sea Lanes’ in Maribel Aguilos (ed), *Designation of Sea Lanes in the Philippines* (1997) 52 at 55.

⁸¹ *Ibid.*

archipelagic baselines for the Philippines,⁸² which implies that the Philippines has tacitly chosen archipelagic State status.⁸³ This status carries the corresponding legal obligation under the LOSC to designate archipelagic sea lanes within the waters inside these archipelagic baselines, otherwise the right of archipelagic sea lanes passage may be exercised through all routes normally used for international navigation.⁸⁴ The Philippines is aware that the sea lanes are the lifeline of the region and securing it means unimpeded access to raw materials, markets and investment opportunities to all the economies within the region heavily dependent on them.⁸⁵ The issue is of paramount importance that conflicting territorial claims remain unresolved but disputing States can still manage to cooperate in maintaining the security of sealanes.⁸⁶

⁸² Republic Act No. 9522, “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, 10 March 2009. This legislation is attached to this thesis as APPENDIX 11.

⁸³ This is still a issue open for debate. In fact, on 27 March 2009, a Petition Certiorari and Prohibition with Prayer for the Issuance of a Writ of Preliminary Prohibitory Injunction and/or Temporary Restraining Order was filed in the Philippine Supreme Court challenging the constitutionality of Republic Act No. 9522 or the New Philippine Baselines Law.

⁸⁴ See Article 53, LOSC. There is no compulsion upon the archipelagic State to designate archipelagic sea lanes, as the language of Article 53(1) is clearly permissive in character. However, failing such, Article 53(12) will operate which will allow third State to exercise the right of archipelagic sea lanes passage through all routes normally used for international navigation.

⁸⁵ See Ji Guoxing, *SLOC Security in the Asia Pacific*, Asia-Pacific Center for Security Studies Occasional Paper (2000); Joshua H. Ho, ‘The Security of Sea Lanes in Southeast Asia’ (2006) 46(4) *Asian Survey* 558; Henry J. Kenny, *An Analysis of Possible Threats to Shipping in Key Southeast Asian Sea Lanes* (1996).

⁸⁶ Council for Security Cooperation in the Asia-Pacific (CSCAP) Memorandum 1, *The Security of the Asia Pacific Region* (1994), which includes as a confidence building measure “cooperative efforts to ensure the security of sea-lanes and sea lines of communication.” Irini Laimou-Maniati, *The Management of the Sea Lanes of Communication in South East Asia and the ASEAN Regional Forum’s Performance*, Hellenic Foundation for European and Foreign Policy (ELIAMEP) Working Paper (1998), at 11, who notes that a common interest for all ARF is “the stability and peace in the environment, which will allow unimpeded passage through the vital SLOCs.” See also, Tamotsu Fukuda, *Managing Energy Insecurities in East Asia: Natural Resource Development and Sea-Lane Security* (2003), who looks at efforts to secure the safety of sea lines of Communication (SLOCs) as driven by energy scarcity where the main barrier to cooperation is the States’ territorial disputes. However he argues that cooperation is still possible as his comparative case study of Japanese-Russian and Japanese-Chinese energy cooperation show. See especially, W. Lawrence S. Prabhakar, ‘The Evolving Maritime Balance of Power in the Asia-Pacific: Maritime Doctrines and Nuclear Weapons at Sea’ in W. Lawrence S. Prabhakar, Joshua Ho and Sam Bateman (eds), *The Evolving Maritime Balance of Power in the Asia-Pacific: Maritime Doctrines and Nuclear Weapons at Sea* (2006) 37 at 47-49, who succinctly summarises the key issues with respect to SLOCs in the Asia-Pacific: innocent passage through territorial waters, transit passage through international straits, differences opinion between littoral States and extra-regional powers in terms of archipelagic sealanes passage, contention on naval activities in the EEZ, and lastly, the legal

5.2.3. Territorial Sea

This section will discuss the legal regime of the territorial sea under the LOSC and the corresponding navigational rights in the Philippine territorial sea.

5.2.3.1. Legal Regime of the Territorial Sea

The sovereignty of a coastal State extends to the outer limit of its territorial sea, which the LOSC defines as a belt of water not exceeding twelve nautical miles in width measured from the territorial sea baseline.⁸⁷ This sovereignty extends to the seabed and subsoil of the territorial sea, as well as air space above it,⁸⁸ which covers the exclusive right to the exploitation of all natural resources therein.⁸⁹ The territorial sea was originally conceived as an extension of the territorial land mass,⁹⁰ which is automatically appurtenant to a coastal State.⁹¹ The breadth of the territorial sea has

contentions relating to the shipment of nuclear wastes through certain areas and EEZs, territorial seas and straits.

⁸⁷ Article 2, LOSC.

⁸⁸ Article 2(2), LOSC. This mirrors Article 1 and 2, *1958 Convention on the Territorial Sea and the Contiguous Zone*, 29 April 1958, 516 UNTS 205. See Article 1, *Convention on International Civil Aviation*, 7 December 1944, (1994) 15 U.N.T.S. 295, Entry into force: 4 April 1947, which recognises that every State has complete and exclusive sovereignty over the airspace above its territory. This refers to the air space above the land and waters of the State. Geoffrey Marston, 'The Evolution of the Concept of the Sovereignty over the Bed and the Subsoil of the Territorial Sea' (1976-1977) 48 *British Yearbook of International Law* 321 at 332.

⁸⁹ Shigeru Oda, 'Territorial Sea and Natural Resources' (1955) 4 *International and Comparative Law Quarterly* 415 at 423.

⁹⁰ William K. Agyebeng, 'Theory in Search of Practice: The Right of Innocent Passage in the Territorial Sea' (2006) 39 *Cornell International Law Journal* 371 at 377.

⁹¹ In the words of McNair, in his dissenting opinion in the *Anglo-Norwegian Fisheries* case [1951] ICJ Rep 116 at 160:

International law does not say to a State: 'You are entitled to claim territorial waters if you want them.' No maritime State can refuse them. International law imposes upon a maritime State certain obligations and confers upon it certain rights arising out of the sovereignty which it exercises over its maritime territory. The possession of this territory is not optional, not dependent upon the will of the State, but compulsory.

varied and evolved over time.⁹² However, the justifications for coastal States to claim and enforce it have not: pollution and customs control, national security, neutrality, and navigational safety.⁹³

In the territorial sea, ships of all States enjoy the right of innocent passage.⁹⁴ The coastal State has the duty not to hamper the innocent passage of foreign ships through its territorial sea⁹⁵ provided the passage is “continuous and expeditious”⁹⁶ and “is not prejudicial to the peace, good order or security of the coastal State.”⁹⁷ A coastal State may adopt laws and regulations relating to innocent passage through its territorial sea⁹⁸ and may suspend the right of innocent passage by the coastal State for security reasons.⁹⁹

⁹² Shaw, *supra* note 21, at 505. Churchill and Lowe, *supra* note 23, at 77, who note that “[T]hroughout most of the history of the territorial sea, the question of its breadth has been a matter of controversy.” Roach and Smith, *supra* note 17, at 148-161. *See also*, Daniel Wilkes, ‘The Use of World Resources without Conflict: Myths about the Territorial Sea’ (1967-1968) 14 *Wayne Law Review* 441.

⁹³ William L. Schachte Jr. ‘The History of the Territorial Sea from a National Security Perspective’ (1990-1991) 1 *Territorial Sea Journal* 143 at 143.

⁹⁴ Article 17, LOSC. Shaw, *supra* note 21, at 507, notes that “The right of foreign merchant ships (as distinct from warships) to pass unhindered through the territorial sea of a coast has long been accepted principle of customary international law...”

⁹⁵ Article 24(1), LOSC.

⁹⁶ Article 18(2), LOSC.

⁹⁷ Article 19 (1), LOSC. The same article also lists activities which are deemed non-innocent. Hakapaa and Molenaar, *supra* note 12 at 132, correctly observe that the list is “not intended to be exhaustive.”

⁹⁸ Article 21 (1), LOSC. These laws and regulations must be given due publicity and “shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.” Article 21 (2 and 3), LOSC.

⁹⁹ Article 25 (3), LOSC. The suspension, however, must be temporary and non-discriminatory. For a discussion in Donald R. Rothwell, ‘Coastal State Sovereignty and Innocent Passage: The Voyage of the Lusitania Expresso’ (1992) 16 *Marine Policy* 427. *See* Hakapaa and Molenaar, *supra* note 12 at 134, which discusses the expansion of the interpretation of the term “security” to include such post-LOSC developments as Vessel Traffic Services (VTS) and Ship Reporting Systems (SRS) within the IMO framework.

5.2.3.2. Navigational Rights in the Philippine Territorial Sea

The Philippine territorial sea, as discussed in Chapter 2,¹⁰⁰ refers to a perimeter of water from the baselines enclosing the archipelago extending seawards up to the Treaty Limits.¹⁰¹ Thus, the Treaty Limits¹⁰² mark the outer limits of the historic territorial sea of the Philippines¹⁰³ from the high seas.¹⁰⁴ As explained in previous chapters, the Philippine territorial sea is not of uniform width nor is it measured from the baselines as specified in the LOSC.¹⁰⁵ It is not 12nm in breadth¹⁰⁶ and actually within the Philippine territory.¹⁰⁷ It also overlaps with the Philippine EEZ¹⁰⁸ and the Kalayaan Island Group in the South China Sea where the Philippines asserts full sovereignty.¹⁰⁹

¹⁰⁰ Chapter 2. Historical Background of the Philippine Treaty Limits and Territorial Water Claim. As previously noted in Chapter 1, this thesis uses the terms “territorial sea” and “territorial waters” interchangeably. However, to be precise, the Philippines does not claim a territorial sea, in a strict LOSC sense, but rather claims a territorial sea on the basis of historic right of title which is akin to the regime of internal waters in the LOSC.

¹⁰¹ Fourth preambular clause, Republic Act No. 3046, *supra* note 16, defines it as follows: “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.”

¹⁰² Please note that the Philippines also asserts that the Philippine Treaty Limits also define the extent of the archipelago at the time it was ceded from Spain to the United States in 1898. As noted in Chapter 3, the Philippine territorial sea is based on historic right of title. Arturo M. Tolentino, ‘On Historic Waters and Archipelagos’ (1974) 3 *Philippine Law Journal* 31 at 51; Arturo M. Tolentino, *The Waters Around Us* (1974) at 3. Jayewardene notes that “Of the archipelago claims, only the Philippines’ claim appears to have been advanced as a truly historic claim to the waters of an archipelago.” Hiran W. Jayewardene, *The Regime of Islands in International Law*, Publications on Ocean Development (1990) at 131.

¹⁰³ Estelito P. Mendoza, ‘The Baselines of the Philippine Archipelago’ (1969-1973) 46 *Philippine Law Journal* 628. The Philippine Treaty Limits boundary lines roughly form the shape of a rectangular frame, with the longitudinal and latitudinal lines specified in Art. III of the Treaty of Paris. *See also*, Jorge R. Coquia, *Selected Essays on the Law of the Sea* (1982) at 7. Arturo Tolentino, ‘The Philippine Territorial Sea’ (1974) 3 *Philippine Yearbook of International Law* 46 at 53. D. P. O’Connell, ‘Mid-Ocean Archipelagos in International Law’ (1971) 45 *British Yearbook of International Law* 1 at 26.

¹⁰⁴ Estelito P. Mendoza, ‘Current Developments on the Law of the Sea Relevant to the Philippines’ (1974) 19 *Ateneo Law Journal* 1 at 2.

¹⁰⁵ Jose D. Ingles, ‘The U.N. Convention on the Law of the Sea: Implications of Philippine Ratification’ (1983) 9 *Philippine Yearbook of International Law* 47 at 48.

¹⁰⁶ Arturo M. Tolentino, ‘Territorial Sea and Archipelagic Waters’ (1976) 5 *Philippine Yearbook of International Law* 47 at 47.

¹⁰⁷ Joseph W. Dellapenna, ‘The Philippines Territorial Water Claim in International Law’ (1970-1971) 5 *Journal of Law & Economic Development* 45 at 48. The area being claimed by the Philippines as its historic territorial sea measures 263,300 square nautical miles. Lauro Baja, *The Philippine National Territory* (2008) at 5.

The Philippines respects the navigational right of innocent passage in its territorial sea.¹¹⁰ The Philippines however makes a distinction on the passage of merchant vessels and warships, and of vessels of special characteristics.¹¹¹ While the Philippines grants innocent passage to merchant vessels; warships need to seek prior notification and consent before they are allowed passage through the Philippine territorial sea.¹¹² The Philippines has also asserted that it does not permit the passage of nuclear cargo vessels in its territorial sea.¹¹³ The Philippines has enacted laws and regulations which apply in the territorial sea,¹¹⁴ including prohibiting the discharge of oil, noxious gaseous and liquid substances and other harmful substances from any ship or other man-made structures at sea, into the territorial sea and inland navigable waters of the

¹⁰⁸ Presidential Decree No. 1599, *supra* note 18. The corresponding navigational rights in the EEZ under international law and those in the Philippine EEZ will be discussed in the next succeeding section.

¹⁰⁹ Presidential Decree No. 1596, *Declaring Certain Area Part of the Philippine Territory and Providing for their Government and Administration*, 11 June 1978. Section 1, states that the area within the boundaries specified, “including the seabed, subsoil, continental margin and air space shall belong and be subject to the sovereignty of the Philippines.” *But see*, Section 2(a), Republic No. Act 9522, *supra* note 34, which asserts that the baseline in “The Kalayaan Island Group as constituted under Presidential Decree No. 1596” “over which the Philippines likewise exercises sovereignty and jurisdiction 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.”

¹¹⁰ Juan Arreglado, *Delimitation of the Extent of the Philippine Maritime Territory* (1982) at 20, 27. The 1955 and 1956 *Note Verbales*, state that the rights asserted by the Philippines over its “maritime territorial waters” is “without prejudice to the exercise by friendly foreign vessels of the right of innocent passage over those waters.”

¹¹¹ Jorge R. Coquia, ‘Analysis of the Archipelagic Doctrine in the New Convention on the Law of the Sea’ (1982) 8 *Philippine Yearbook of International Law* 24 at 32.

¹¹² Josefa Rizalina Bautista, ‘Commentary on Shipping Provisions of the Law of the Sea Convention’ in Secretariat to the Cabinet Committee on the Law of the Sea Convention (ed), *Second Conference on the Review of the Law of the Sea Convention: Conference Documents* (1982) Volume IV, at 6.

¹¹³ Stuart Kaye, *Freedom of Navigation in the Indo-Pacific Region*, Papers in Australian Maritime Affairs (2008) at 14. In an 23 September 1968 *aide memoire* to the British Embassy, the Philippines has asserted that the “combined units of British and Australian armed public vessels or any other public vessels ... cannot assert or exercise the right of innocent passage through the Philippine territorial sea without the permission of the Philippine Government.” *See* Symmons, *supra* note 34, at 71. This prohibition covers “entry, even in transit, as well as the keeping or storage and disposal of hazardous and nuclear wastes into the country for whatever purpose.” *See* Section 4(d), Republic Act No. 6969, *An Act to Control Toxic Substances and Hazardous and Nuclear Wastes, Providing Penalties for Violations Thereof, and For Other Purposes*, 26 October 1990.

¹¹⁴ This is also provided in Article 21, LOSC.

Philippines.¹¹⁵ In keeping with the broad constitutional definition of Philippine waters, domestic marine pollution laws also apply in the territorial sea.¹¹⁶

The Philippine Treaty Limits position which regards the waters enclosed by these lines from the baselines as the territorial sea of the Philippines severely restricts the implementation of the LOSC with respect to the territorial sea. While the Philippines respects the right of innocent passage over its territorial sea, some of these waters -- specifically those beyond 12nm and up to the maximum distance of 200nm from the baselines within the Philippine Treaty Limits -- are properly classified as EEZ, where high seas freedoms of navigation should apply. Applying the more restrictive innocent passage regime over these waters is contrary to the letter and intent of the LOSC.¹¹⁷

5.2.4. Exclusive Economic Zone

This section will discuss the legal regime of the EEZ under the LOSC and the corresponding navigational rights in the Philippine territorial sea.

¹¹⁵ Section 4, Presidential Decree No. 979, The Philippine Marine Pollution Decree of 1976, amending Presidential Decree No. 600, Marine Pollution Decree of 1974, 18 August 1976. Section 3(d) includes “the territorial sea and inland waters” in the definition of navigable waters.

¹¹⁶ Raphael Perpetuo M. Lotilla, ‘The Efficacy of the Anti-Pollution Provisions of the 1982 Law of the Sea Convention: A View from South East Asia’ (1992) 41 *International and Comparative Law Quarterly* 137 at 146-148.

¹¹⁷ Article 58 (1), LOSC. Further, the treatment of these waters, which are considered EEZ under the LOSC, as Philippine territorial sea also contravenes Article 89 (by operation of Article 58(2)), LOSC which states that “No State may validly purport to subject any part of the high-seas to its sovereignty.” See Duk-ki Kim, ‘A Korean Perspective’ (2005) 29 *Marine Policy* 157 at 157-158.

5.2.4.1. The Legal Regime of the Exclusive Economic Zone

The EEZ can be briefly defined as a maritime zone beyond and adjacent to the territorial sea extending up to 200nm from the baseline of a coastal State.¹¹⁸ The concept of the EEZ is one of recent origin, and was only given binding recognition through its inclusion in the LOSC.¹¹⁹ Within the EEZ, the LOSC gives the coastal State sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living.¹²⁰ The coastal State also has jurisdiction with regard to the establishment and use of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment.¹²¹ The LOSC particularly declares that the EEZ is subject to ‘a specific legal regime.’¹²² It is thus a *sui generis* regime, as the EEZ is neither the territorial sea nor the high seas but partakes of the characteristics of both regimes.¹²³

¹¹⁸ Article 57, LOSC.

¹¹⁹ Part V, LOSC. Please see, excellent academic material on the EEZ: David Joseph Attard, *The Exclusive Economic Zone in International Law* (1987); Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (1989); Francisco Orrego Vicuna, *The Exclusive Economic Zone: Regime and Legal Nature under International Law* (1989).

¹²⁰ Article 56 (1)(a), LOSC.

¹²¹ Article 56 (1)(b), LOSC.

¹²² Article 55, LOSC.

¹²³ Jorge Castaneda, ‘Negotiations on the Exclusive Economic Zone at the Third United Nations Conference on the Law of the Sea’ in Jerzy Makarczyk (ed), *Essays in International Law in Honour of Judge Manfred Lachs* (1984) 605 at 615. This characterisation raises the question of residual rights, or uses of the sea which are not mentioned or covered by the relevant provisions of the LOSC, including future uses of the sea. See, Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005) at 132. It is largely unresolved whether residual rights in the EEZ remain with the international community or do they fall within the competence of the coastal State. The LOSC resolves this problem in Article 59, which provides: “In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.” See Vicuna, *supra* note 119, at 44, who opines that the terms of the LOSC allows for the interpretation of the EEZ as either high seas or *sui generis*.

The coastal State possesses a resource-oriented functional competence in the zone; and exercises sovereign rights (and not sovereignty) in the EEZ for economic purposes.¹²⁴ In the EEZ, other States enjoy the freedoms of navigation and overflight.¹²⁵ This includes the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines.¹²⁶ After the entry into force of the LOSC, State practice with respect to the breadth of the EEZ has been in compliance with the 200nm limit imposed in the LOSC.¹²⁷ The ICJ has also declared that the EEZ has become a part of customary international law.¹²⁸

¹²⁴ Article 56, LOSC.

¹²⁵ Article 58(1) in relation with Article 87, LOSC.

¹²⁶ Article 58 (1), LOSC.

¹²⁷ Raymond S. K. Lim, 'EEZ Legislation of ASEAN States' (1991) 40 *International and Comparative Law Quarterly* 170 at 171. Hugo Caminos, 'Harmonization of Pre-Existing 200-Mile Claims in the Latin American Region with the United Nations Convention on the Law of the Sea and Its Exclusive Economic Zone' (1998-1999) 30 *University of Miami Inter-American Law Review* 9; Robert B. Krueger and Myron H. Nordquist, 'The Evolution of the 200-Mile Exclusive Economic Zone: State Practice in the Pacific Basin' (1978-1979) 19 *Virginia Journal of International Law* 321; Barbara Kwiatkowska, '200-Mile Exclusive Economic/Fishery Zone and the Continental Shelf-An Inventory of Recent State Practice: Part 1' (1994) 9 *International Journal of Marine and Coastal Law* 199; Barbara Kwiatkowska, '200-Mile Exclusive Economic/Fishery Zone and the Continental Shelf-An Inventory of Recent State Practice: Part 2' (1994) 9 *International Journal of Marine and Coastal Law* 337; Barbara Kwiatkowska, '200-Mile Exclusive Economic/Fishery Zone and the Continental Shelf-An Inventory of Recent State Practice: Part 3' (1995) 10 *International Journal of Marine and Coastal Law* 53; Aggrey K. L. J. Mlimuka, *The Eastern African States and the Exclusive Economic Zone: The Case of EEZ Proclamations, Maritime Boundaries, and Fisheries* (1998)

¹²⁸ *Case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* [1985] ICJ Rep 13; *See also, Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area Canada/United States of America* [1984] ICJ Rep 246 at 33, in the words of the ICJ: "the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law."

5.2.4.2. Navigational Rights in the Philippine Exclusive Economic Zone

The Philippines enacted Presidential Decree No. 1599 on 11 June 1978 establishing an EEZ extending to a distance of 200nm from the baselines.¹²⁹ The Philippine EEZ measures about 395,400 square nautical miles.¹³⁰ In the Philippine EEZ, other States enjoy “freedoms with respect to navigation and overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea relating to navigation and communications.”¹³¹ However, except in accordance with the terms of any agreement or license entered into with the Republic of the Philippines no person shall explore or exploit any resources, carry out any search, excavation or drilling operations, conduct any research in the Philippine EEZ.¹³² Further, the construction, maintenance or operation of any artificial island, off-shore terminal, installation or other structure or device, are prohibited within the Philippine EEZ.¹³³ The Philippine EEZ law provides for appropriate sanctions for violations of any of its provisions including the seizure and forfeiture of vessels and other equipment used in connection with the prohibited acts.¹³⁴

¹²⁹ Section 1, Presidential Decree No. 1599, *supra* note 18. Republic Act No. 7942, The Philippine Mining Act of 1995, defines 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 nm) offshore.

¹³⁰ Lauro Baja, *The Philippine National Territory* (2008) at 4.

¹³¹ Section 2, Presidential Decree No. 1599, *supra* note 18.

¹³² Section 3(a)(b)(c), Presidential Decree No. 1599, *supra* note 18.

¹³³ Section 3(d), Presidential Decree No. 1599, *supra* note 18, subject to the proviso: “Except in accordance with the terms of any agreement entered into with the Republic of the Philippines or of any license granted to it or under the authority by the Republic of the Philippines...”

¹³⁴ Section 5, Presidential Decree No. 1599, *supra* note 18.

The Philippines prohibits “the entry, even in transit, of hazardous and nuclear wastes and their disposal into the Philippine territorial limits,”¹³⁵ which presumably includes its EEZ. Specifically, the Philippines prohibits ‘the storage, importation, or bringing into Philippine territory, including its maritime economic zones, even in transit, either by means of land, air or sea transportation or otherwise keeping in storage any amount of hazardous and nuclear wastes in any part of the Philippines.’¹³⁶ The Philippines is a signatory to the Basel Convention and restricts the transit of hazardous wastes and other wastes.¹³⁷

As pointed out earlier, the Philippine EEZ overlaps with the historic Philippine territorial waters claim. In fact, in some areas, the Philippine territorial sea extends further than the Philippine EEZ.¹³⁸ There is a clear distinction in terms of navigational rights that may be exercised in these zones. While ships of all States exercise freedom of navigation and overflight in the EEZ,¹³⁹ only the right of innocent passage exist in the territorial sea.¹⁴⁰ The Philippine EEZ law, in Section 2, explicitly states that the rights established in the EEZ are “without prejudice to the rights of the Republic of the Philippines over its territorial sea and continental shelf.”¹⁴¹ This reiterates the position

¹³⁵ Section 2, Republic Act No. 6969, *supra* note 113.

¹³⁶ Section 13 (d), Republic Act No. 6969, An Act to Control Toxic Substances and Hazardous and Nuclear Wastes Providing Penalties for Violations Thereof, and for other Purposes, 26 October 1990.

¹³⁷ *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, opened for signature 22 March 1989, 1673 UNTS 126; 28 ILM 657 (1989) (entered into force 5 May 1992). *See also* Department Administrative Order 29, series of 1992, implementing Republic Act No. 6969, *supra* note 113.

¹³⁸ This would be in the northeastern corner of the Treaty Limits, on the Pacific side of northern Luzon. *See*, Proceedings of the Batasang Pambansa Concurring in the United Nations Convention on the Law of the Sea, Resolution No. 633, in Raphael Perpetuo M. Lotilla (ed), *The Philippine National Territory: A Collection of Related Documents* (1995) at 526 -527.

¹³⁹ Article 58, LOSC.

¹⁴⁰ Article 17, LOSC.

¹⁴¹ Section 2, Presidential Decree No. 1599, *supra* note 18. This applies only to the following:

in the Philippine Declaration that its signature to the LOSC “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 Limits.¹⁴² However, the Philippine EEZ law grants the above high seas freedoms without the explicit “without prejudice” clause.¹⁴³ And since the Philippine EEZ overlaps with its territorial sea, there is a potential anomalous domestic legal scenario where high seas freedoms are recognised on its territorial sea.¹⁴⁴ From an international law perspective, however, no such conflict exists as the LOSC clearly accords freedoms of navigation and overflight to all ships in the EEZ.¹⁴⁵

5.2.5. Straits used for International Navigation

This section will discuss the legal regime of the straits used for international navigation under the LOSC and the corresponding navigational rights in the straits used for international navigation in Philippine waters.

(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.

¹⁴² Paragraph 2, Philippine Declaration, *supra* note 36.

¹⁴³ Section 4, Presidential Decree No. 1599, *supra* note 18, which reads: “Other states shall enjoy in the exclusive economic zone freedoms with respect to navigation and overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea relating to navigation and communications.”

¹⁴⁴ Batongbacal, *supra* note 4, at 142.

¹⁴⁵ Article 58(1), LOSC.

5.2.5.1. The Legal Regime of Straits Used for International Navigation

The extension of the territorial sea resulted in most of the straits used for international navigation which were previously subject to the high seas freedom of navigation to fall within the territorial seas of one or more coastal States.¹⁴⁶ This would have resulted in these straits coming under the sovereignty of coastal States¹⁴⁷ and consequently governed by the restrictive innocent passage rules of navigation. However, in straits used for international navigation, the maritime powers and user States wanted to secure their navigational rights which were not sufficiently safeguarded under the right of innocent passage.¹⁴⁸ In order to balance the competing interests of the international community in ensuring freedom of navigation and the flow of international commerce against those of the coastal States bordering these straits to protect their sovereignty and national security, the LOSC fashioned the concept of transit passage as one of the fundamental navigational rights.¹⁴⁹

The regime of transit passage applies to straits which are used for international navigation between one part of the high seas or an EEZ to another part of the high seas or an EEZ.¹⁵⁰ The LOSC in Article 38(1) provides that ‘all ships and aircraft enjoy the

¹⁴⁶ Michael Reisman, 'The Regimes of Straits and National Security: An Appraisal of International Lawmaking' (1980) 74(48) *American Journal of International Law* 30, 67; George Grandison and Virginia Meyer, 'International Straits, Global Communications, and the Evolving of the Sea' (1974-75) 8 *Vanderbilt Journal of Transnational Law* 393, 393-94.

¹⁴⁷ Myres S McDougal and William T Burke, 'The Community Interest in a Narrow Territorial Sea: Inclusive versus Exclusive Competence over the Oceans' (1960) 45 *Cornell Law Quarterly* 171, 165-66.

¹⁴⁸ Innocent passage right could be suspended by coastal States, which endangered sea communication, See John Norton Moore, 'The Regime of Straits and the Third United Nations Conference on the Law of the Sea' (1980) 74 *American Journal of International Law* 43, 86.

¹⁴⁹ Please see, V. D. Bordunov, 'The right of transit passage under the 1982 convention' (1988) 12(3) *Marine Policy* 219; Karin M. Burke and Deborah A. DeLeo, 'Innocent Passage and Transit Passage in the United Nations Convention on the Law of the Sea' (1982-1983) 9 *Yale Journal of World Public Order* 389.

¹⁵⁰ Article 37, LOSC.

right of transit passage, which shall not be impeded.’ Ships and aircraft are given the freedom or right to enter, leave or return from a strait State and the right to continuous and expeditious navigation and overflight. The right may be exercised by all ships and aircraft, which includes merchant ships and government ships such as warships and submarines and references to aircraft include overflight of State aircraft and scheduled and non-scheduled airlines as well.¹⁵¹

The State bordering the strait has limited legislative jurisdiction and cannot hamper or suspend transit passage.¹⁵² With respect to navigation, it could be argued that the transit passage regime implies that the strait is no longer to be considered as part of the territorial sea of the bordering State and that coastal State’s powers in the strait are different from those which can be exercised in the territorial sea. However, Article 34 of the LOSC provides that the regime of passage through straits used for international navigation shall not affect the legal status of the waters forming such straits. This article confirms that even though the regime applicable to navigation through certain straits is more extensive than innocent passage, it is without prejudice to the coastal State’s sovereignty and jurisdiction.

Foreign ships exercising transit passage have a duty to refrain from any activities other than those incidental to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or distress.¹⁵³ In addition, ships and aircraft should

¹⁵¹ This is a gap between regulation in the LOSC and the 1944 Convention on International Civil Aviation with regard to the legal principle of air space above maritime zones (straits, internal waters, archipelagic waters, and territorial sea) and their sovereignty over these maritime zones which extend to the air space.

¹⁵² Article 42 (2), LOSC.

¹⁵³ Article 39 (1) (c), LOSC.

traverse without delay through or over the straits,¹⁵⁴ must not use or threaten the use of force,¹⁵⁵ nor may they conduct unauthorised research or survey activities.¹⁵⁶ Unlike in the territorial sea, submarines and underwater vehicles exercising transit passage are not required to navigate on the surface and show their flags. Based on common practice, submarines and underwater vehicles may transit in their normal mode.

5.2.5.2. Navigational Rights in Straits Used for International Navigation in Philippine Waters

There are several Philippine straits used for international navigation, among these are the San Bernardino Strait between Luzon and Samar, and Surigao Strait between Leyte and Mindanao.¹⁵⁷ There are at least eight major straits lying wholly within Philippine waters, and another three on its borders.¹⁵⁸ The figure below shows the existing navigational routes in Philippine waters.

¹⁵⁴ Article 39 (1) (a), LOSC.

¹⁵⁵ Article 39 (1) (b), LOSC.

¹⁵⁶ Article 40, LOSC.

¹⁵⁷ Mario C. Manansala, 'The Philippines and the Third Law of the Sea Conference: Scientific and Technical Impact' (1974) 3 *Philippine Yearbook of International Law* 135 at 141. International passage through other routes such as through the Mindoro Strait, Basilan Passage, Balabac and Sibutu Passage still have to be settled in account of the exercise of full Philippine sovereignty over these waters.

¹⁵⁸ These include: Bashi Channel between Batanes Islands and Taiwan; Balintang Channel between Babuyan and Batanes Islands; Babuyan Channel between Babuyan Batanes Islands and the Cagayan coast; Verde Island Passage between Batangas and Mindoro; Mindoro Strait between Mindoro and Palawan; San Bernardino Strait between Sorsogon and Northern Samar; Surigao Strait between Southern Leyte and Surigao del Norte; Basilan Strait between Basilan and Zamboanga del Sur; Sibutu Pass between Tawi-Tawi and Sibutu Island; Balabac Strait between Balabac Island on the southern tip of Palawan and Sabah; and Balut Channel between Saranggani Island on the southern tip of Mindanao and Indonesia. See, Jay Batongbacal, 'The Philippines' Right to Designate Sea Lanes in Its Archipelagic Waters under International Law' in Maribel Aguilos (ed), *Designation of Sea Lanes in the Philippines* (1997) 81 at 84.

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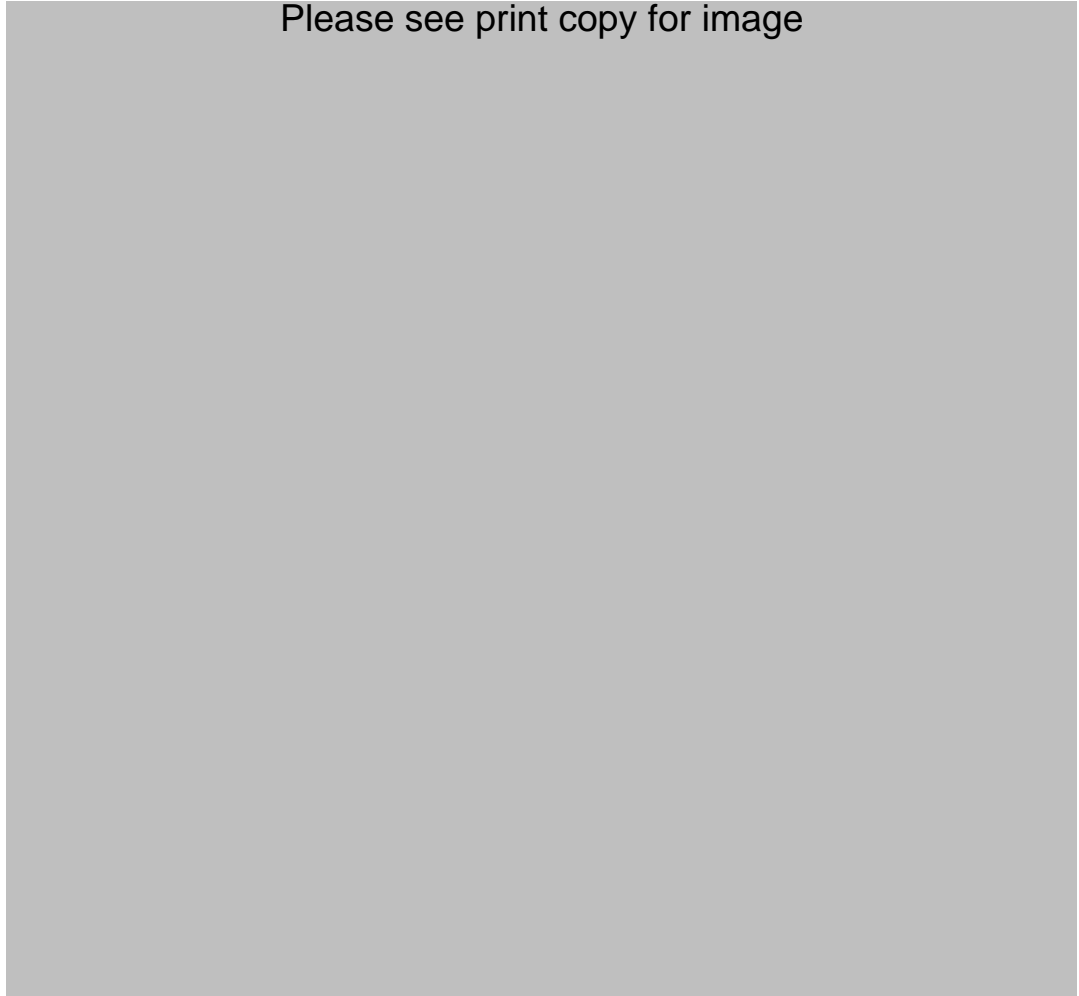


Figure 8. Existing Navigational Routes in Philippine Waters¹⁵⁹

According to Batongbacal, “even the actual application of Part III to the geographic situation of the Philippines prevents the classification of almost all Philippine straits as straits used for international navigation.”¹⁶⁰ The reason being the location of the major navigational routes in Philippine waters do not provide direct passage between one part of the high seas or EEZ and another part of the high seas or EEZ, but rather link the high seas and EEZ to Philippine archipelagic waters.¹⁶¹ Thus, a ship entering through an “entry strait” into Philippine archipelagic waters can take a range of routes to an “exit

¹⁵⁹ National Mapping and Resource Information Authority, Existing Navigational Routes in Philippine Waters.

¹⁶⁰ Batongbacal, *supra* note 158, at 100.

¹⁶¹ *Ibid.*

strait” from Philippine archipelagic waters back into the EEZ or the high seas. This geographical situation sufficiently prevents the application of Part III of the LOSC to all straits within Philippine waters.¹⁶² In this regard, the more appropriate concern for the Philippines is the issue of archipelagic sea lanes passage, which has been discussed in Section 5.2.2.2 of this Chapter. In respect of the transit of vessels, Kaye notes that:

The Philippines largely complies with the requirements of the LOSC with respect to the transit of vessels, although it has expressed concern over military activities in its EEZ. However, there are no specific provisions limiting military vessels transiting through the archipelago.¹⁶³

However, it should be emphasised yet again that the treatment of the waters inside the Philippine Treaty Limits as internal waters, as sufficiently addressed in previous Chapters, pose the primary domestic legal problem with respect to the question of straits and their associated navigational rights under the LOSC to be properly implemented in Philippine waters.

5.3. Conclusion

This chapter has discussed the international legal implications of the Philippine Treaty Limits and territorial waters claim on navigational rights under the LOSC. In particular, this chapter has highlighted the inconsistencies in Philippine domestic law and policy with respect to the definition of the rights and obligations pertaining to the various maritime jurisdictional zones. It is precisely because of these ambiguities in domestic legislation, arising principally from the Philippine Treaty Limits position, that the navigational rights of other States in the LOSC are not recognised in Philippine waters.

¹⁶² *Ibid.*

¹⁶³ Stuart Kaye, *Freedom of Navigation in the Indo-Pacific Region*, Papers in Australian Maritime Affairs (2008) at 34.

The freedoms of navigation and overflight are of fundamental importance to all States. The various navigation regimes under the LOSC are a compromise between the various and competing interests between coastal, strait, archipelagic and maritime States.¹⁶⁴ Thus, the Philippines, like any country in the world, needs to assert and exercise sovereign control over the movement of trade and commerce, and the access to the resources within its waters. However, it must also respect the imposition of reasonable restrictions on the entry of foreign vessels and access to resources in a State's territory under international law.

¹⁶⁴ William L. Schacte, 'The Value of the 1982 UN Convention on the Law of the Sea: Preserving our Freedoms and Protecting the Environment' (1992) 23 *Ocean Development & International Law* 55 at 60. Robin Warner, 'Implementing the Archipelagic Regime in the International Maritime Organization' in Donald R. Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea* (2000) 170 at 172, who observes that "UNCLOS provisions on passage through archipelagic waters represent an amalgam of the views taken by archipelagic and maritime user States during LOSC III, providing the archipelagic State with increased sovereign control over the waters between the constituent islands while guaranteeing a non-suspensible form or passage for maritime user States in waters which were formerly high seas."

Chapter 6

International Legal Implications of the Philippine Treaty Limits and Territorial Waters Claim on Maritime Security and Access to Marine Resources in Philippine Waters

6.1. Introduction

This chapter analyses the international legal implications of the Philippine Treaty Limits and territorial waters claim on maritime security and access to marine resources in Philippine waters. It explains the specific resource-oriented rights and security-related interests that the Philippines asserts over the Philippine Treaty Limits. This chapter consists of three parts. In the first part, the functional basis of the Philippine Treaty Limits is explained in order to demonstrate that while the Philippines was not able to secure recognition of its historic territorial seas in the LOSC, the rights it was asserting were still embodied in the LOSC. The second and third parts discuss the implications of the Philippine Treaty Limits on maritime security and access to marine resources in Philippine waters, respectively. There are three main conclusions drawn by this Chapter. Firstly, the LOSC sufficiently addresses the functional rights that the Philippines claims over the territory enclosed by the Treaty Limits which the Philippines can still assert despite and independently of the non-recognition of the Treaty Limits by the international community. Secondly, the Treaty Limits position does not impose jurisdictional impediments for certain transnational crimes such as maritime piracy, and illegal fishing. Lastly, transnational maritime threats such as counter terrorism, maritime piracy, sea lanes passage and security, and marine environmental protection have permitted cooperation despite the Treaty Limits position.

6.2. The Functional Basis of the Philippine Treaty Limits

The Philippine Treaty Limits is not only a territorial boundary,¹ it is also a functional boundary.² These lines not only mark the outer limits of Philippine territory, they were also conceptualised and defined for functional purposes.³ This differentiation is more pronounced in ocean boundary delimitation, as opposed to international land boundary delimitations where boundaries are established to “delimit territorial sovereignty for all purposes between competing states” while in the former, boundary delimitations “determine sovereign rights or jurisdiction for limited functional purposes.”⁴ The Treaty of Paris did not delimit specific maritime zones but drew what is called an “all purpose maritime boundary, which is intended to delimit all maritime areas of the Parties.”⁵ This line of delimitation is what is otherwise referred to as “single maritime boundary” which has increasingly been the trend in both maritime agreements and international adjudication.⁶

¹ In the words of Oppenheim: “Boundaries of State territory are the imaginary lines on the surface of the earth which separate the territory of one State from that of another, or from unappropriated territory, or from the Open Sea.” R. Y. Jennings and Arthur Sir Watts, *Oppenheim’s International Law* (1997) at 661. A territorial boundary performs, according to Ian Brownlie, *The Rule of Law in International Affairs* (1998) at 151-152, the primary legal function of a boundary: “to indicate the allocation of territory to States.”

² Douglas M. Johnston, *The Theory and History of Ocean Boundary-Making* (1988) at 7-8. According to Johnston, the LOSC “recognized and promoted the modern concept of functional jurisdiction, as distinguished from the traditional concept of territorial jurisdiction.” In this sense, a maritime zone is “conceived and articulated in terms of a designated range of multi-functional competences of the coastal state, subject to various limitations, exclusions and qualifications...”

³ Jay L. Batongbacal, ‘The Maritime Territories and Jurisdictions of the Philippines and the United Nations Convention on the Law of the Sea’ (2001) 76 *Philippine Law Journal* 123 at 135.

⁴ Jonathan I. Charney, ‘Ocean Boundaries between Nations: A Theory for Progress’ (1984) 78 *American Journal of International Law* 582 at 586.

⁵ Irini Papanicolopulu, ‘Some Thoughts on the Extension of Existing Boundaries for the Delimitation of New Maritime Zones’ in Rainer Lagoni and Daniel Vignes (eds), *Maritime Delimitation* (2006) 223 at 231. See examples of treaties which draw an all purpose maritime boundary in: Jonathan I. Charney and Lewis M. Alexander (eds), *International Maritime Boundaries* (1993). Volume I, at 427-445, 675-689.

⁶ Gerald H. Blake, *Maritime Boundaries and Ocean Resources* (1987) at 7-8. The parties in the following cases have requested a single maritime boundary: *St Pierre and Miquelon* (Canada v. France), 31 ILM 1149 (1992), 95 ILR 645; *Eritrea v. Yemen*, 114 ILS 1; *Qatar v. Bahrain*, ICJ Reports (2001) 40; *Cameroon v. Nigeria*, ICJ Reports (2002) 303. See Jon M. Van Dyke, ‘The Republic of Korea’s Maritime

The functional basis of the Philippine Treaty Limits is clear from the wording of the 1955 and 1956 *Note Verbales* which embodied and announced to the international community the position of the Philippines with respect to the waters enclosed by the Philippine Treaty Limits.⁷ The waters within the Treaty Limits were:

considered as maritime territorial waters of the Philippines for purposes of protection of its fishing rights, conservation of its fishery resources, enforcement of its revenue and anti-smuggling laws, defence and security, and protection of such other interests as the Philippines may deem vital to its national welfare and security...⁸

The Philippine declaration is in keeping with State practice at that time which was “often couched in issue-specific functionalist terms.”⁹ Thus, the Philippines identified a functional basis for the territorial sea it claims, which Batongbacal notes, “is an important point when one considers that normally, territorial waters are conceptualized as extensions of the land territory without a functional justification.”¹⁰ Claims of this nature were not uncommon at that time when the LOSC was still being negotiated and States were asserting functional zone claims which “related to fishing, fishery conservation, pollution and the exploitation of natural resources.”¹¹ As Natalie Klein

Boundaries’ (2003) 18 *International Journal of Marine and Coastal Law* 509 at 516, who notes that: “Another important emerging trend is that most countries now prefer a single maritime boundary that divides the exclusive economic zone and the continental shelf at the same location. The factors governing these two separate delimitations are the same, and it is convenient in most regions to have the same line for both boundaries.” See especially, Nuno Sergio Marques Antunes, *Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process* (2003) at 335-342.

⁷ *Note Verbale* dated 7 March 1955 from the Permanent Mission of the Philippines to the United Nations; *Note Verbale* dated 20 January 1956 from the Permanent Mission of the Philippines to the United Nations. Hereinafter referred to as *Note Verbales*. The *Note Verbales* are attached to this thesis as APPENDICES 6 and 7, respectively.

⁸ *Ibid.*

⁹ Douglas M. Johnston and Phillip M. Saunders, *Ocean Boundary Making: Regional Issues and Developments* (1988) at 55.

¹⁰ Batongbacal, *supra* note 3, at 135.

¹¹ Ali A. Hakim, *The Middle Eastern States and the Law of the Sea*, Contemporary Issues in the Middle East (1979) at 3, 20. See Peter Malanczuk and Michael Barton Akehurst, *Akehurst’s Modern Introduction*

observes, prior to the LOSC, the conservation of fishery resources was “the primary vehicle to claim extended rights over the living resources of the oceans” employed by coastal States.¹²

Within its proper historical context, it is not unusual that the Philippines enumerated an inventory of rights and competencies over its territorial sea claim. As Churchill and Lowe note, it is “historically incorrect” to assert that the sovereignty of the coastal State “has always extended to its territorial sea.”¹³ What is exceptional of the Philippine position is that such rights were being claimed over vast expanses of water which would not have otherwise been under the sovereignty of the coastal State.¹⁴ In fact, the above *Note Verbale* was submitted by the Philippines to seek an exception upon historical grounds, against the rules on the breadth of the territorial sea being formulated by the International Law Commission (ILC).¹⁵

to *International Law* (1997), at 183, who notes that “Since about 1960 there has been a tendency for states to claim exclusive fishery zones beyond their territorial seas.”

¹² Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005) at 167.

¹³ Robin R. Churchill and Vaughan Lowe, *The Law of the Sea* (1999) at 71. Geoffrey Marston, ‘The Evolution of the Concept of the Sovereignty over the Bed and the Subsoil of the Territorial Sea’ (1976-1977) 48 *British Yearbook of International Law* 321 at 332, who notes the crystallisation process which transformed the idea that the superjacent waters, bed and subsoil, as well as the superjacent airspace of the territorial sea was an extension of the sovereignty of the coastal State into a customary rule. *See also*, Jesse S. Reeves, ‘The Codification of the Law of Territorial Waters’ (1930) 24 *American Journal of International Law* 486 at 489, who observed the reluctance of the ILC “to recognize sovereignty over the territorial sea in any absolute or unqualified sense.”

¹⁴ These waters, if not accorded territorial sea status would be considered “high seas.” *See* Article 26 (1), *ILC Draft Articles on the Territorial Sea*, Yearbook of the International Law Commission 1956, Volume II, at 259.

¹⁵ Article 3(2), *ILC Draft Articles on the Territorial Sea*, which states that “The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles.” Yearbook of the International Law Commission 1956, Volume II, at 256. The breadth of the territorial sea as a conventional and customary rule of international law was discussed in Section 4.2.2. in Chapter 4.

The ILC only initiated its work on the “regime of territorial waters” in 1951,¹⁶ and even with the codification of the rules on the territorial sea in 1958, no agreement was reached as to its maximum breadth.¹⁷ However, historic title was recognised as an exception to the rule of using the equidistant line in delimiting territorial seas between adjacent or opposite coasts.¹⁸ The attempt to fix the width of the territorial sea at the UNCLOS I and II also failed.¹⁹ In 1955, when the Philippines articulated its position, the report of Mr. J. P. A. Francois, special rapporteur on the regime of the territorial sea, stated that coastal States are allowed to extend its territorial sea to twelve miles, and exclusive fishing rights for nationals of the coastal State was confined to the extent of three miles.²⁰ It was thus necessary for the Philippines to explicitly state its position and clarify the basis for such.²¹

The functional rights asserted by the Philippines over the waters enclosed by the Treaty Limits can be clustered into two categories: resource-oriented rights and security-related interests. These are the very same rationale for the archipelago theory: economic

¹⁶ Shigeru Oda, ‘Territorial Sea and Natural Resources’ (1955) 4 *International and Comparative Law Quarterly* 415 at 417.

¹⁷ *Geneva Convention on the Territorial Sea and the Contiguous Zone*, opened for signature 29 April 1958, 15 UST 1606; 516 UNTS 205 (entered into force 10 September 1964).

¹⁸ Article 12, *Geneva Convention on the Territorial Sea and the Contiguous Zone*. Klein, *supra* note 12, at 232-233, who notes that the *Grisbadarna* and *Anglo-Norwegian Fisheries* cases also referred to historic title in “altering a boundary based on the median line.”

¹⁹ Churchill and Lowe, *supra* note 13, at 79.

²⁰ J.P.A. Francois, “Third Report on the Regime of the Territorial Sea,” UN A/CN.4/77 (1954). See Report of the International Law Commission to the General Assembly, Document A/2693, Yearbook of the International Law Commission, 1954, Volume II, at 153. See R. P. Anand, *Origin and Development of the Law of the Sea* (1983) at 167, who notes that at that time, the limits of the “territorial waters were also accepted as the limits of exclusive fisheries jurisdiction by the coastal state....”

²¹ See for example, James C. F. Wang, *Handbook on Ocean Politics & Law* (1992) at 110, who opines that “For more than 300 years, along with the freedom of navigation, freedom to fish was a part of the general concept of freedom of the seas.” He adds that “nations generally agreed that coastal states could claim exclusive jurisdiction over fisheries within the narrow belt of ocean known as territorial water; beyond that zone fisheries became ‘common property’ belonging to whoever had the capacity to take advantage of them.”

reasons and national security.²² The resource-related rights asserted by the Philippines pertained principally to fishery resources. Those relating to security were broadly defined to include enforcement of revenue and anti-smuggling laws and those relating to defense and security, and all other interests that the Philippines may deem vital to its national welfare and security.

The Philippines, however, recognised the right of innocent passage “by friendly foreign vessels” over the waters within the Treaty Limits.²³ In addition to the abovementioned rights that the Philippines asserted over the water column, the Philippines also asserted rights over the continental shelf enclosed by the Treaty Limits:

All natural deposits or occurrences of petroleum or natural gas in public and/or private lands within the territorial waters or on the continental shelf, or its analogue in an archipelago, seaward from the shores of the Philippines which are not within the territories of other countries belong inalienably and imprescriptibly to the Philippines, subject to the right of innocent passage of ships of friendly foreign States over those waters.²⁴

The rights thus asserted by the Philippines over the territory enclosed by the Treaty Limits pertained to both the water column and the continental shelf.

6.3. Access to Marine Resources in Philippine Waters

After having clarified the functional rights claimed by the Philippines with respect to resources within the Treaty Limits, this section will discuss how the LOSC has

²² Rosario S. Sagmit and Nora N. Soriano, *Geography in the Changing World* (2003) at 54.

²³ Note Verbales, *supra* note 7. Please note that the Philippines enacted its baselines law in 1961 through Republic Act No. 3046. Inferentially and harmonising the Philippine Government’s subsequent position on this matter, the right of innocent passage only applies seawards of the baselines [and not to *all* the waters within the Philippine Treaty Limits] since the waters inside the baselines are considered internal waters where no right of innocent passage exists by definition.

²⁴ *Ibid.*

addressed these concerns notwithstanding the non-recognition of the historic territorial sea of the Philippines. The discussion above argued that the Philippines asserted an economic and a security basis for the territory enclosed by the Treaty Limits. This section will discuss the implications of the Philippine Treaty Limits and territorial waters claim on access to marine resources in Philippine waters.

The Philippines reiterated its historic territorial seas claim during the UNCLOS III with the same functional justifications noted above but was not accepted at the Conference.²⁵ Moreover, the LOSC codified the maximum breadth of the territorial sea to 12nm which also applies to archipelagic States.²⁶ Since the regime of the territorial sea under the LOSC recognises the sovereignty of the coastal State over its territorial sea, it is no longer necessary to assert the functional rights and competencies that the Philippines enumerated above.²⁷ However, the LOSC has also categorically settled the question of the breadth of the territorial sea over which such rights and competencies can be rightfully applied.

²⁵ This was clearly understood by the head of the Philippine Delegation to UNCLOS, Arturo Tolentino. In his words:

In the third UNCLOS ... we again pressed for the recognition of our historic territorial sea as an exception to the maximum breadth of twelve nautical miles of territorial sea for all states.... Our proposed exception on historic territorial sea was thus rejected.

Proceedings of the Batasang Pambansa Concurring in the United Nations Convention on the Law of the Sea, Resolution No. 633, in Raphael Perpetuo M. Lotilla (ed), *The Philippine National Territory: A Collection of Related Documents* (1995) at 516. See also, Francisco Orrego Vicuna, *The Exclusive Economic Zone: Regime and Legal Nature under International Law* (1989) at 7, who notes that it is “the concept of the special interest of the coastal State” such as the Philippines to exploit fisheries resources which was a principal basis of the proposals during the LOS Conferences.

²⁶ Article 3, LOSC, in relation with Articles 47 and 48, LOSC.

²⁷ Article 2, LOSC.

In practical terms, this means that while the functional rights²⁸ being asserted by Philippines over its historic territorial sea are all safeguarded in the LOSC; it may not apply to the entirety of the water enclosed by the Treaty Limits. Nonetheless, these rights are within the legislative and enforcement jurisdiction of the coastal State in the LOSC regimes of the territorial sea, as well as in the EEZ.²⁹ The sovereignty of the coastal State over all resources in its territorial sea is both enshrined in customary international law and codified in the LOSC;³⁰ while the sovereign rights of the coastal State over its EEZ is indisputable in the LOSC.³¹ In fact, the LOSC went further than the fishery resources that the Philippines was claiming over the waters inside the Treaty Limits by giving the coastal State sovereign rights over all the economic resources of the sea, seabed and subsoil of its EEZ, which includes not only fish, but also minerals beneath the seabed.³² Even Arturo Tolentino, who was Head of the Philippine delegation to the Law of the Sea Conferences, acknowledged that “the 200-mile exclusive economic zone was adopted to overcome and be a substitute for claims for territorial seas wider than 12 miles.”³³ The Philippine historic territorial waters measure

²⁸ See Proceedings of the Batasang Pambansa Concurring in the United Nations Convention on the Law of the Sea, Resolution No. 633, *in* Lotilla, *supra* note 25, at 517, where Arturo Tolentino acknowledged the LOSC is advantageous to the Philippines “from a pragmatic standpoint” since “vast resources will come under the dominion and jurisdiction of the Republic of the Philippines” and it will mean the “legal unification of the land and waters of the archipelago in the light of international law.”

²⁹ Churchill and Lowe, *supra* note 13, at 92-100; 166-169. Articles 2 and 56, LOSC. *See also*, Article 33, LOSC, on the control that the coastal State may exercise on its contiguous zone.

³⁰ Article 2, LOSC. Oda, *supra* note 16, at 420. Shigeru Oda, *International Control of Sea Resources* (1989) at 13, who states: “There appears to be no question that the coastal State has sovereignty over its territorial sea. Monopoly over the resources contained within its territorial sea has not been subject to any doubt.”

³¹ Article 56, LOSC. Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (1989) at 4, who notes that a characteristic feature of the EEZ is “the unprecedented cumulation of resource-related powers on the part of the coastal state in general, and a juxtaposition of the coastal state rights over living and non-living resources of the sea-bed, its subsoil and the superjacent waters in particular...”

³² Article 56(1), LOSC. Francisco Orrego Vicuna, *The Exclusive Economic Zone: Regime and Legal Nature under International Law* (1989) at 24-25.

³³ Arturo M. Tolentino, *The Philippines and the Law of the Sea: A Collection of Articles, Statements and Speeches* (1982) at 98.

263,000 square nautical miles, while the Philippine EEZ measures 395,000 square nautical miles. In effect, under the LOSC, the Philippines gained 132,100 square nautical miles of waters as EEZ.³⁴

In this respect, understood by those who negotiated the LOSC, “the EEZ is the key to a general compromise solution – a package deal – the parts of which form an indivisible whole.”³⁵ In the words of Dr Andres Aguilar:

... acceptance of a narrow territorial sea implies acceptance of a wide economic zone. In other words, the agreement to set the width of the territorial sea at 12 miles is conditional on the acceptance of an economic zone with a width of no less than 200 miles from the baselines from which the territorial sea is measured. In this connection the slogan: ‘There will be no 12 without 200’ was coined.³⁶

Furthermore, while UNCLOS III rejected the historic territorial sea claim of the Philippines, it still won a major victory with the recognition of the archipelagic principle in the LOSC.³⁷ However, this was not equivalent to the “national or inland waters” being claimed by the Philippines which is subject to its “exclusive sovereignty.”³⁸ On the other hand, the LOSC did categorically recognise the sovereignty of the archipelagic State over its archipelagic waters, including their superjacent air space and the resources therein.³⁹ But, this sovereignty is subject to a number of rights enjoyed by third States such as existing agreements, traditional fishing rights and existing submarine cables and the navigational rights of other States in

³⁴ *Ibid.*

³⁵ Andres Aguilar M., ‘The Patrimonial Sea or Economic Zone Concept’ (1974) 11 *San Diego Law Review* 579 at 596.

³⁶ *Ibid.*

³⁷ Part IV, LOSC. Lawrence Juda, *International Law and Ocean Use Management: The Evolution of Ocean Governance* (1996) at 220-221.

³⁸ Note Verbales, *supra* note 7.

³⁹ Article 49 (1), LOSC.

archipelagic waters.⁴⁰ The Philippines though was able to secure its “principal and enduring interest in the exclusive exploitation of the fisheries and other biological resources of the waters around the islands.”⁴¹

In addition, the archipelagic regime under the LOSC recognises the sovereignty of the archipelagic State over its archipelagic waters as well as to their sea bed and subsoil, and the resources contained therein.⁴² This covers the other aspect of the Philippine Treaty Limits position referring to the resources “on the continental shelf, or its analogue in an archipelago” as belonging “inalienably and imprescriptibly to the Philippines.”⁴³ This also validly falls within the regime of the continental shelf under the LOSC and in customary international law.⁴⁴ Thus, international law preserves the rights over non-living resources asserted by the Philippines over the seabed under its archipelagic waters.⁴⁵

⁴⁰ Churchill and Lowe, *supra* note 13, at 125. See Articles 51, 52, 53, and 54, LOSC.

⁴¹ Clive Ralph Symmons, *The Maritime Zones of Islands in International Law* (1979) at 76-77.

⁴² Article 49(2), LOSC.

⁴³ In the exact words of the Note Verbale: “All natural deposits or occurrences of petroleum or natural gas in public and/or private lands within the territorial waters or on the continental shelf, or its analogue in an archipelago, seaward from the shores of the Philippines which are not within the territories of other countries belong inalienably and imprescriptibly to the Philippines, subject to the right of innocent passage of ships of friendly foreign States over those waters.” See Batongbacal, *supra* note 3, at 135, who considers this a “major victory considering the alternative view that it did not.”

⁴⁴ Articles 76 and 77, LOSC. Churchill and Lowe, *supra* note 13, 142-145. Symmons, *supra* note 41, at 77, notes that the Philippines already considers the seabed under its archipelagic waters as “under its sovereignty, on archipelagic regime basis, irrespective of depth of exploitability...”

⁴⁵ See Philippine laws claiming non-living resources in its continental shelf: Presidential Proclamation No. 370, *Declaring as Subject to the Jurisdiction of the Republic of the Philippines all Mineral and Other Natural Resources of the Continental Shelf*, 20 March 1968; Section 3, Presidential Decree No. 463, *The Mineral Resources Development Decree of 1974*, 17 May 1974, as amended by Presidential Decree No. 1385 and Presidential Decree No. 1677; Section 2, Republic Act No. 7942, *The Philippine Mining Act of 1995*, 3 March 1995; Section 3, Republic Act No. 387, amending Presidential Decree, *Petroleum Act of 1949*, 18 June 1949.

6.4. Maritime Security

This section discusses the implications of the Philippine Treaty Limits on maritime security. The section will be of three parts. It will begin with a concise definition of maritime security and an identification of specific and transnational maritime threats faced by the Philippines. The second part will discuss specific jurisdictional issues which result from the Philippine Treaty Limits. The third part will examine issues which have permitted regional cooperation that transcended disputes over territory or overlapping maritime boundaries. This section will also discuss particular domestic and regional initiatives that deal with the issue of counter-terrorism, maritime piracy, sea lanes passage and marine environmental protection.

The term “maritime security” is an evolving concept with no universally accepted definition.⁴⁶ Its meaning often varies depending on the context and the users. Maritime security, at its narrowest conception, involves protection from direct threats to the territorial integrity of a State. The new and continually evolving nature of maritime threats which are interconnected and recognise no national boundaries necessitate a more expansive definition of maritime security.⁴⁷ These various maritime threats

⁴⁶ Catherine Zara Raymond and Arthur Morrien, ‘Security in the Maritime Domain and Its Evolution Since 9/11’ in Rupert Herbert-Burns, Sam Bateman and Peter Lehr (eds), *Lloyd’s MIU Handbook of Maritime Security* (2008) 3 at 9.

⁴⁷ In the ASEAN alone, there have been numerous initiatives which sought to address transnational threats to maritime security multilaterally: Second Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 29-30 April 2003; Joint Declaration on Co-operation to Combat Terrorism, 14th ASEAN-EU Ministerial Meeting, Brussels 27-28 January 2003; Joint Declaration of ASEAN and China on Cooperation in the Field of Non-Traditional Security Issues, 6th ASEAN-China Summit, Phnom Penh, 4 November 2002; Declaration on Terrorism by the 8th ASEAN Summit, Phnom Penh, 3 November 2002; 2001 ASEAN Declaration on Joint Action to Counter Terrorism, Bandar Seri Begawan, 5 November 2001; Manila Declaration on the Prevention and Control of Transnational Crime, Asia Regional Ministerial Meeting on Transnational Crime, Manila, 23-25 March 1998.

include traditional maritime security issues such as piracy and armed robbery at sea,⁴⁸ drug trafficking,⁴⁹ people smuggling;⁵⁰ and post-September 11 concerns over the threat of maritime terrorism,⁵¹ and other transnational crimes.⁵² The concept has also expanded to include threats to the marine environment such as land-based marine pollution,⁵³ increased shipping traffic,⁵⁴ degradation of marine habitats,⁵⁵ illegal unreported unregulated (IUU) fishing,⁵⁶ and even climate change.⁵⁷

⁴⁸ The issue of piracy in waters of Southeast Asia has been the subject of much academic research. *See for example*, the following recent studies: Erik Barrios, 'Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia' (2005) 28 *Boston College International and Comparative Law Review* 149; Robert C. Beckman, 'Combatting Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward' (2002) 33 *Ocean Development & International Law* 317; Peter Chalk, 'Contemporary Maritime Piracy in Southeast Asia' (1998) 21 *Studies in Conflict & Terrorism* 87; Catherine Zara Raymond, 'Piracy in Southeast Asia: New Trends, Issues and Responses' (2005) 9 *Harvard Asia Quarterly*; Werner vom Busch and Tobias Rettig (eds), *Covering Maritime Piracy in Southeast Asia* (2006); Graham Gerard Ong, *Piracy, Maritime Terrorism and Securing the Malacca Straits* (2006); Adam J. Young, *Contemporary Maritime Piracy in Southeast Asia: History, Causes and Remedies* (2007)

⁴⁹ Sam Bateman, 'Regional Responses to Enhance Maritime Security in East Asia' (2006) 18(2) *Korean Journal of Defense Analysis* 25 at 28-30.

⁵⁰ Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Asia Pacific Region* (2003).

⁵¹ Sam Bateman, 'Assessing the Threat of Maritime Terrorism: Issues for the Asia-Pacific Region' (2006) 2 *Security Challenges* 77; Stanley D. Brunn (ed), *11 September and Its Aftermath: The Geopolitics of Terror* (2004); A. Suzette V. Suarez, 'Post September 11 Security Challenges to the Legal Regime of the Maritime Carriage of Nuclear and Radioactive Materials' (2003) 18 *The International Journal of Marine and Coastal Law* 423.

⁵² Paul J. Smith, *Terrorism and Violence in Southeast Asia: Transnational Challenges to States and Regional Stability* (2004).

⁵³ Articles 207 and 213, LOSC. *See also*, David Hassan, *Protecting the Marine Environment from Land-based Sources of Pollution: Towards Effective International Cooperation* (2006).

⁵⁴ Joon-Soo Jon, 'East Asian Shipping Ownership' in Andrew Forbes (ed), *The Strategic Importance of Seaborn Trade and Shipping* (2003) 61 at 67.

⁵⁵ *See for example*, In-Taek Hyun and Miranda A. Schreurs (eds), *The Environmental Dimension of Asian Security: Conflict and Cooperation over Energy, Resources, and Pollution* (2007).

⁵⁶ Organisation for Economic Co-operation and Development, *Fish Piracy: Combatting Illegal, Unreported and Unregulated Fishing* (2004).

⁵⁷ Melinda Kimble, 'Climate Change: Emerging Insecurities' in Felix Dodds and Tim Pippard (eds), *Human and Environmental Security* (2005) 103-114. Asian Development Bank, *A Regional Review of the Economics of Climate Change in Southeast Asia* (2007) at 1-2, which states that "climate change is both a development and environmental problem" with "[D]eveloping countries are more vulnerable than wealthier countries to climate change."

In the Southeast Asian context, the sea is an important source of livelihood and food; and a source of maritime threats.⁵⁸ The distinctively maritime character of the Asia-Pacific region makes the sea and issues with regard to the sea important in the international relations of the region.⁵⁹ The maritime strategic geography of the Asia-Pacific region has major implications for maritime security: first, the high density of shipping traffic in the region;⁶⁰ and second, the number of key straits and navigational chokepoints.⁶¹ These factors are also key vulnerabilities that render the issue of securing the safety of region's seas of global importance.

6.4.1. Philippine Maritime Threats

In this era of rapid globalisation, maritime threats are perceived from, analysed and dealt in a transnational context.⁶² This is the same for the Philippines. Philippine

⁵⁸ P. P. Wong, 'The Coastal Environment of Southeast Asia' in Avijit Gupta (ed), *The Physical Geography of Southeast Asia* (2005) 177-192. *See especially*, Rommel C. Banlaoi, 'Maritime Security Threats in Post-9/11 Southeast Asia: Regional Responses' in Rupert Herbert-Burns, Sam Bateman and Peter Lehr (eds), *Lloyd's MIU Handbook of Maritime Security* (2008) 253-266.

⁵⁹ *See for example*, W. Lawrence S. Prabhakar, 'The Evolving Maritime Balance of Power in the Asia-Pacific: Maritime Doctrines and Nuclear Weapons at Sea' in W. Lawrence S. Prabhakar, Joshua Ho and Sam Bateman (eds), *The Evolving Maritime Balance of Power in the Asia-Pacific: Maritime Doctrines and Nuclear Weapons at Sea* (2006) 253 at 255-256.

⁶⁰ Peter Chalk, 'Maritime Terrorism: Threat to Container Ships, Cruise Liners, and Passenger Ferries' in Rupert Herbert-Burns, Sam Bateman and Peter Lehr (eds), *Lloyd's MIU Handbook of Maritime Security* (2008) 117.

⁶¹ For recent materials that address the issue of securing the key straits and navigational chokepoints in the region, *please see*: Ramses Amer, 'Towards a Declaration on "Navigational Rights" in the Sea-Lanes of the Asia-Pacific' (1998) 20 *Contemporary Southeast Asia* 88; Joshua H. Ho, 'The Importance and Security of Regional Sea Lanes' in Kwa Chong Guan and John K. Skogan (eds), *Maritime Security in Southeast Asia* (2007) 21; Joshua H. Ho, 'The Security of Sea Lanes in Southeast Asia' (2006) 46(4) *Asian Survey* 558; Mark J. Valencia and James Barney Marsh, 'Access to Straits and Sealandes in Southeast Asian Seas: Legal, Economic and Strategic Considerations' (1985) 16 *Journal of Maritime Law and Commerce* 513; Graham Gerard Ong, *Piracy, Maritime Terrorism and Securing the Malacca Straits* (2006).

⁶² Rommel C. Banlaoi, 'Maritime Security Threats in Post-9/11 Southeast Asia: Regional Responses' in Rupert Herbert-Burns, Sam Bateman and Peter Lehr (eds), *Lloyd's MIU Handbook of Maritime Security* (2008) 253; Donna J. Nincic, 'The Challenge of Maritime Terrorism: Threat Identification, WMD and Regime Response' (2005) 28(4) *Journal of Strategic Studies* 619.

maritime threats include terrorist⁶³ and other illicit transnational maritime activities such as piracy, illicit trafficking of narcotics, weapons, human and cargoes, among others.⁶⁴ The Philippine National Marine Policy defines maritime security “as a state wherein the country’s marine assets, maritime practices, territorial integrity and coastal peace and order are protected, conserved and enhanced.”⁶⁵ A key component of these objectives is to “protect and defend the integrity of the Philippines’ marine resources.”⁶⁶ In terms of enforcement, the principal duty to uphold the sovereignty and defend the territory of the Philippines falls upon the Armed Forces of the Philippines.⁶⁷

The protection of the integrity and sovereignty of the Philippine State, Alberto Encomienda argues, “presupposes that the country’s national territory and maritime jurisdictions are already clearly defined and boundaries or borders demarcated/delineated.”⁶⁸ In the case of the Philippines, the identification of the maritime threats is even made more complicated because of the uncertainty of the area where relevant Philippine maritime security laws will be enforced.

⁶³ Paul Rodell, ‘The Philippines and the Challenge of International Terrorism’ in Paul J. Smith (ed), *Terrorism and Violence in Southeast Asia: Transnational Challenges to States and Regional Stability* (2004) 122.

⁶⁴ Rommel C. Banlaoi, ‘The Abu Sayyaf Group: Threat of Maritime Piracy and Terrorism’ in Peter Lehr (ed), *Violence at Sea: Piracy in the Age of Global Terrorism* (2007) 121.

⁶⁵ Cabinet Committee on Maritime and Ocean Affairs, *National Marine Policy* (1994) at 11.

⁶⁶ *Ibid.*, at 12.

⁶⁷ Article II, Section 3, 1987 Philippine Constitution.

⁶⁸ Alberto A. Encomienda, ‘Maritime Security and Philippine Foreign Policy: An Overview and National Ocean Diplomacy Agenda’ (Paper presented at the National Conference-Workshop on Maritime Security: Problems and Approaches, Manila, Philippines, 2003) at 6.

6.4.2. Specific Jurisdictional Issues

The issue of jurisdiction is one of the most fundamental questions of law.⁶⁹ For the purposes of this section, and with respect to the issue of the Philippine Treaty Limits, the issue of jurisdiction principally refers to territorial jurisdiction.⁷⁰ The characterisation and legal treatment of the waters enclosed by the Treaty Limits determine the nature of the offense committed and whether Philippine Courts may validly acquire jurisdiction over the offenders and the offense committed.⁷¹ Thus, from the perspective of domestic civil and criminal proceedings, the importance of drawing precise boundaries cannot be overemphasised.⁷² The boundaries must be clear for they define the limits of the territorial jurisdiction of a government. The Philippines can “legitimately exercise powers of government only within the limits of its territorial jurisdiction” and “[B]eyond these limits, its acts are *ultra vires*.”⁷³

⁶⁹ In its most basic sense, jurisdiction refers to the power of a court to adjudicate cases and issue orders. Territorial jurisdiction refers to the territory within which a court or government agency may properly exercise its power. *See, e.g. Ruhrgas AG v. Marathon Oil Co. et al.*, 526 U.S. 574 (1999). According to Ivan Shearer, “Jurisdiction in international law is commonly described as comprehending the power to prescribe, the power to adjudicate and the power to enforce.” Ivan Shearer, ‘Jurisdiction’ in Sam Blay, Ryszard Piotrowicz and B. Martin Tsamenyi (eds), *Public International Law: An Australian Perspective* (1997) 161 at 162.

⁷⁰ Territorial jurisdiction is to be distinguished from subject-matter jurisdiction, which is the power of a court to render a judgment concerning a certain subject matter, or personal jurisdiction, which is the power of a court to render a judgment concerning particular persons, wherever they may be. Unlike subject-matter jurisdiction, territorial jurisdiction may be waived, even unintentionally, by a defendant. Personal jurisdiction, territorial jurisdiction, subject-matter jurisdiction, and proper notice to the defendant are prerequisites for a valid judgment.

⁷¹ In the words of the Philippine Supreme Court in *Guinhawa v. People of the Philippines*, G.R. No. 162822, 25 August 2005: “Jurisdiction is conferred by the Constitution or by law. It cannot be conferred by the will of the parties, nor diminished or waived by them. The jurisdiction of the court is determined by the averments of the complaint or Information, in relation to the law prevailing at the time of the filing of the criminal complaint or Information, and the penalty provided by law for the crime charged at the time of its commission.”

⁷² *See* Oscar M. Herrera, *Remedial Law* (1992) at 3, who states that: “There are three important requisites which must be present before a court can acquire criminal jurisdiction. First, the court must have jurisdiction over the subject matter. Second, the court must have jurisdiction over the territory where the offense was committed. Third, the court must have jurisdiction over the person of the accused.” *See also*, *Cruz v. Court of Appeals*, G.R. No. 123340, 29 August 2002.

⁷³ *Mariano, Jr. v. Commission on Elections*, G.R. Nos. 118577 and 118627, 242 SCRA 211, 217 (1995).

In reality, as Palma succinctly observes, the core issue is the “lack of clear policy direction on the legal regime applied in Philippine waters.”⁷⁴ The issue, however, is actually more hypothetical than real. This can be problematic for domestic or even international crimes where the location of the offense committed is an important element of the crime committed and determinative of the court’s jurisdiction. However, as this section will elaborate, for certain crimes such as piracy, illegal fishing and other transnational crimes, the Treaty Limits position pose no real conflict in respect of jurisdiction.

6.4.2.1. Maritime Piracy

The definition of piracy is contained in Article 101 of the LOSC, which pertains to acts “on the high seas” or “outside the jurisdiction of any State.”⁷⁵ In Philippine law, on the other hand, piracy is defined as:

a crime committed by any person who, on the high seas, *or in Philippine waters*, shall attack or seize a vessel or, not being a member of its complement nor a passenger, shall seize the whole or part of the cargo of said vessel, its equipment, or personal belongings of its complement or passengers (italics supplied).⁷⁶

In this case, the expansive definition of piracy under Philippine law appears to be immaterial. Traditionally regarded as *hostis humani generis*, the enemy of the human

⁷⁴ Mary Ann Palma, *The Philippines as an Archipelagic and Maritime Nation: Interests, Challenges and Perspectives*, RSIS Working Paper No. 182 (2009) at 18-19.

⁷⁵ Article 101, LOSC.

⁷⁶ Article 122, Philippine Revised Penal Code, as amended by Republic Act No. 7659. *See also*, *People of the Philippines v Tulin*, G.R. No. 111709, 30 August 2001; *People vs. Lol-lo*, G.R. No. L-17958, 27 February 1922; *Habana vs. Robles*, G.R. No. 131522, 19 July 1999.

race,⁷⁷ the pirate is punishable by all nations, wherever he may be found, without regard to where the offence occurred.⁷⁸ In international law, the crime of piracy is regarded as a universal crime subject to universal jurisdiction.⁷⁹ In fact, for centuries it was the only offence in international law which was subject to universal jurisdiction.⁸⁰ Since universal jurisdiction does not require a nexus between the regulating nation and the conduct, offender, or victim, this meant that a State which has universal jurisdiction may punish a pirate although the State has no links of territoriality or nationality with the offender or victim.⁸¹

⁷⁷ See for instance, *United States v. Smith*, 5 Wheat. (U.S.) 153 (1820). But see, Edwin D. Dickinson, 'Is the Crime of Piracy Obsolete?', 8 *Harvard Law Review* 334 (1925) at 351-358. See especially, Eugene Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation', 45 *Harvard International Law Journal* 183 (2004). See also, Mark W. Janis, *An Introduction to International Law* (2003) at 325; M. Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', 42 *Virginia Journal of International Law* 81, 108 (2001); and Kenneth C. Randall, 'Universal Jurisdiction under International Law', 66 *Texas Law Review* 785, 798 (1988).

⁷⁸ See the classic formulation of universal jurisdiction for the crime of piracy enunciated by John Basset Moore in *The Lotus Case*:

[A]s the scene of the pirate's operation is the high seas, which is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of mankind – *hostis humani generis* – whom any nation may in the interest of all capture and punish.

The S.S. *Lotus* (France v. Turkey) 1927 P.C.I.J. (ser. A) No. 10, at 65, 70 (September 7) (Moore, J. dissenting).

⁷⁹ Malvina Halberstam, 'Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety' (1988) 82 *American Journal of International Law* 269, at 272. Also, Yana Shy Kraytman, 'Universal Jurisdiction – Historical Roots and Modern Implications' (2005) 2 *BSIS Journal of International Studies* 94 at 97. But see, Joshua Michael, 'Universal Jurisdiction and the Pirate: Time for an Old Couple to Part' (2006) 39 *Vanderbilt Journal of Transnational Law* 973, who argues that allowing States to exercise universal jurisdiction over pirates violates the due process rights of the pirates and poses a threat to international stability. He proposes prohibiting States from exercising universal jurisdiction over pirates and instead requiring that States wishing to exercise jurisdiction over pirates base that jurisdiction on a more traditional jurisdiction form.

⁸⁰ Eugene Kontorovich, *A Positive Theory of Universal Jurisdiction* (23 March 2004), bepress Legal Series, Working Paper 211. Online at: <http://law.bepress.com/expresso/eps/211/>.

⁸¹ *Ibid.* at Note 2, citing *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 371 (E.D. La. 1997) quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 cmt. a (1987); Curtis A. Bradley, 'Universal Jurisdiction and U.S. Law', 2001 *University of Chicago Legal Forum* 323, 323-24 (2001).

6.4.2.2. Illegal Fishing

The crime of illegal fishing, under Philippine law, is committed:

when a person catches, takes or gathers or causes to be caught, taken or gathered fish, fishery or aquatic products *in Philippine waters* with the use of explosives, electricity, obnoxious or poisonous substances (italics supplied).⁸²

It is also “unlawful for any foreign person, corporation or entity to fish or operate any fishing vessel in Philippine waters.”⁸³ In fact, under Philippine law, the mere “entry of any foreign fishing vessel in Philippine waters shall constitute a prima facie evidence that the vessel is engaged in fishing in Philippine waters.”⁸⁴ The Philippine Fisheries Code of 1998, broadly defines Philippine waters to include “waters over which the Philippines has sovereignty and jurisdiction, and the country’s 200-nautical mile Exclusive Economic Zone (EEZ) and continental shelf.”⁸⁵

Again, in this regard, the expansive definition of Philippine waters does not seem material. This is actually in accord with the definition of illegal fishing under the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU).⁸⁶ Under the IPOA-IUU, illegal fishing takes place

⁸² Section 33, Presidential Decree No. 1058, as amended by Presidential Decree No. 704, 16 May 1975. *See also*, Section 88, Republic Act No. 8550, 25 February 1998.

⁸³ Section 87, Republic Act No. 8550, 25 February 1998.

⁸⁴ *Ibid.*

⁸⁵ Section 3(a), Republic Act No. 8550, 25 February 1998.

⁸⁶ The UN Food and Agricultural Organisation (FAO), International Plan of Action (IPOA)-International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2001), defines “illegal fishing” as follows:

3.1 Illegal fishing refers to activities:

3.1.1 conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;

3.1.2 conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management

where vessels operate in violation of the laws of a fishery and can apply to fisheries that are under the jurisdiction of a coastal State or to high seas fisheries regulated by regional organisations.⁸⁷

However, as succinctly summarised by Palma, “[S]ome of the sanctions applied to fisheries violations by foreign fishers are inconsistent with international regulations.”⁸⁸ In particular, with respect to the application and enforcement Philippine fisheries regulations in the EEZ. For example, the detention of the crew of fishing vessels for violations of immigration law⁸⁹ is justified if the apprehension of the foreign fishing vessel was made in the territorial sea, where international law recognises the sovereignty of the coastal State.⁹⁰ However, if the vessel was apprehended in the EEZ, this measure is not allowed under Article 73(3) of the LOSC which provides that penalties for violations of fisheries laws in the EEZ may not include imprisonment or corporal punishment, in the absence of agreements to the contrary with the States concerned.⁹¹

Another matter which needs to be addressed is the prompt release of vessels apprehended for fishing violations. While Philippine fisheries regulations provide for the sequestration and auctioning of foreign fishing vessels, the release of such vessels is

measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or

3.1.3 in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.

⁸⁷ *Ibid.*

⁸⁸ Mary Ann Palma, *Analysis of the Adequacy of the Philippine Legal, Policy, and Institutional Framework to Combat Illegal, Unreported, and Unregulated Fishing* (PhD Thesis, University of Wollongong, 2006) at 234.

⁸⁹ *Ibid.* citing DA-FAO 200, Section 6.

⁹⁰ Article 2, LOSC.

⁹¹ Article 73 (3), LOSC.

not provided for.⁹² This is contrary to the LOSC in Article 73(2), which provides that arrested vessels shall be promptly released upon the posting of a reasonable bond or other security.⁹³

6.4.2.3. Other Transnational Crimes

In terms of other transnational crimes, such as illicit trafficking of narcotic drugs and psychotropic substances and trafficking in persons, the Philippine Treaty Limits position imposes no obstacle in terms of jurisdiction. Philippine law defines illegal drug trafficking as follows:

The illegal cultivation, culture, delivery, administration, dispensation, manufacture, sale, trading, transportation, distribution, importation, exportation and possession of any dangerous drug and/or controlled precursor and essential chemical.⁹⁴

Philippine law prescribes the maximum penalty of death for the manufacture,⁹⁵ sale, trading, administration, dispensation, delivery, distribution and transportation,⁹⁶ and importation⁹⁷ of dangerous drugs.⁹⁸ Another non-traditional security issue in Southeast Asia is human trafficking.⁹⁹ In an effort to deal with the problem, the Philippines passed Republic Act No. 9208, the Anti-Trafficking in Persons Act of 2003, a penal law

⁹² Palma, *supra* note 88, at 234, *citing* DA-FAO 200, Section 6(1).

⁹³ Article 73 (2), LOSC. Please note that this provision applies to both arrested vessels and their crew.

⁹⁴ Section 3(r), Republic Act No. 9165, Comprehensive Dangerous Drugs Act of 2002, 7 June 2002.

⁹⁵ Section 8, Republic Act No. 9165, Comprehensive Dangerous Drugs Act of 2002, 7 June 2002.

⁹⁶ Section 5, Republic Act No. 9165, Comprehensive Dangerous Drugs Act of 2002, 7 June 2002.

⁹⁷ Section 4, Republic Act No. 9165, Comprehensive Dangerous Drugs Act of 2002, 7 June 2002.

⁹⁸ The Philippines has prohibited the imposition of the death penalty, but drug offenders are still punished harshly if caught – the minimum sentence is 12 years in prison for possession of .17 ounce of illegal drugs. *See* Republic Act No. 9346, An Act Prohibiting the Imposition of Death Penalty in the Philippines, 24 June 2006.

⁹⁹ Rommel C. Banlaoi, *Philippine Security in the Age of Terror: National, Regional, and Global Challenges in the Post-9/11 World* (2010) at 262-263.

against human trafficking, sex tourism, sex slavery and child prostitution.¹⁰⁰ The same is true of other Philippine laws which penalise transnational criminal activity, such as money laundering,¹⁰¹ and air hijacking.¹⁰² These laws clearly do not make a distinction as to whether the offense was committed in Philippine waters rendering the Philippine Treaty Limits position irrelevant.

6.4.3. Transnational Maritime Threats that Permitted Cooperation Despite Treaty Limits

The global scope of maritime threats necessitates a concerted effort to deal with these issues on a transnational scale. In Southeast Asia, the following have been identified as key maritime security challenges: piracy, maritime terrorism, transnational criminal trafficking operations, refugees and illegal migration, and protecting energy routes.¹⁰³ In the Asia-Pacific and Southeast Asian regions, where the Philippines is part of, there have been numerous efforts that addressed these issues at the bilateral and multilateral

¹⁰⁰ Republic Act No. 9208, Anti-Trafficking in Persons Act of 2003, 26 May 2003.

¹⁰¹ Republic Act No. 9160, Anti-Money Laundering Act of 2001, 29 September 2001. The Law defines money laundering, as follows:

Sec. 4. Money Laundering Offense. – Money laundering is a crime whereby the proceeds of an unlawful activity are transacted, thereby making them appear to have originated from legitimate sources. It is committed by the following:

- (a) Any person knowing that any monetary instrument or property represents, involves, or relates to, the proceeds of any unlawful activity, transacts or attempts to transact said monetary instrument or property.
- (b) Any person knowing that any monetary instrument or property involves the proceeds of any unlawful activity, performs or fails to perform any act as a result of which he facilitates the offense of money laundering referred to in paragraph (a) above.
- (c) Any person knowing that any monetary instrument or property is required under this Act to be disclosed and filed with the Anti-Money Laundering Council (AMLC), fails to do so.

¹⁰² Section 1, Republic Act No. 6235, An Act Prohibiting Certain Acts Inimical to Civil Aviation, 19 June 1971. *See also*, Executive Order No. 246, Reconstituting the National Action Committee on Anti-Hijacking (updating Executive Orders No. 393, dated 24 January 1990 and No. 452, dated 5 April 1991) as the National Action Committee on Anti-Hijacking and Anti-Terrorism.

¹⁰³ Robert Wohlschlegel, Curtis W. Turner, and Kent Butts, “United States Army Pacific’s Defense Environmental and International Cooperation (DEIC) Workshop,” 9(4) *Issue Paper* (2004) at 1.

levels,¹⁰⁴ some which will be discussed below. This section will also discuss transnational maritime threats which have permitted cooperation despite the issue of the Philippine Treaty Limits.

6.4.3.1. Counter Terrorism

The 11 September 2001 terrorist attack on the United States was an important global turning point.¹⁰⁵ Since then, the way the world looked at and addressed the issue of terrorism has never been the same. In the maritime sector, the vulnerability of the world's oceans -- including its sea lanes, ports, vessels, and cargoes -- have been a major source of global anxiety. In response, new legal regimes have been put in place to address the dangers of maritime terrorist attacks especially the possibility of using vessels as weapons for terrorist activities. Some of the initiatives undertaken by States include the International Port Facilities Security Code (ISPS Code),¹⁰⁶ the Proliferation Security Initiative (PSI),¹⁰⁷ and the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.¹⁰⁸ The risk

¹⁰⁴ See for example, Sam Bateman and Stephen Bates (eds), *The Seas Unite: Maritime Cooperation in the Asia Pacific Region* (1996); Sam Bateman and Stephen Bates (eds), *Calming the Waters: Initiatives for Asia Pacific Maritime Cooperation* (1996); Dalchoong Kim, Seo-Hang Lee and Jin-Hyun Paik (eds), *Maritime Security and Cooperation in the Asia-Pacific Toward the 21st Century* (2000).

¹⁰⁵ The profound effect of this event is clear from the voluminous 9/11-related literature produced, see for example, Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (2003); Stanley D. Brunn (ed), *11 September and Its Aftermath: The Geopolitics of Terror* (2004); Richard A. Falk, *The Great Terror War* (2002); Adam Hodges and Chad Nilep (eds), *Discourse, War and Terrorism* (2007); Michael Parenti, *The Terrorism Trap: September 11 and Beyond* (2002).

¹⁰⁶ *Amendments to the Annex to the International Convention for the Safety of Life at Sea*, opened for signature 12 December 2002 (entered into force 1 July 2004), annex (International Code for the Security of Ships and Port Facilities), otherwise known as the 'ISPS Code.' The ISPS Code was passed as an amendment to the *International Convention for the Safety of Life at Sea*, opened for signature 1 November 1974, 1184 UNTS 2 (entered into force 25 May 1980), which adopted a new chapter XI-2, entitled 'Special Measures to Enhance Maritime Security,' which required that States comply with the ISPS Code.

¹⁰⁷ Craig H. Allen, *Maritime Counterproliferation Operations and the Rule of Law* (2007) at 46 -59.

¹⁰⁸ Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, opened for signature 14 October 2005, IMO Doc LEG/CONF.15/21 (not yet in force), otherwise known as 'SUA Protocol 2005.'

and threat of terrorist attack is heightened by several armed groups in the region with maritime capabilities.¹⁰⁹

The Philippines has sought to address these issues at the regional, bilateral and national levels. At the regional level, the ASEAN, to which the Philippines is a founding member, has also responded to the dangers of terrorism.¹¹⁰ The Philippines is a

¹⁰⁹ These include groups such as the Jemaah Islamiyah (JI), the Moro Islamic Liberation Front (MILF), the Rajah Sulaiman Movement (RSM), and the Abu Sayyaf Group (ASG). See for example discussion of these threats in Rommel C. Banlaoi, 'The Abu Sayyaf Group: Threat of Maritime Piracy and Terrorism' in Peter Lehr (ed), *Violence at Sea: Piracy in the Age of Global Terrorism* (2007) 121; Rommel C. Banlaoi, 'Maritime Security Threats in Post-9/11 Southeast Asia: Regional Responses' in Rupert Herbert-Burns, Sam Bateman and Peter Lehr (eds), *Lloyd's MIU Handbook of Maritime Security* (2008) 253; Rommel C. Banlaoi, 'Maritime Terrorism in Southeast Asia: The Abu Sayyaf Threat' (2005) 58(4) *Naval War College Review* 63.

There have been several recent alarming examples of the nefarious activities of these groups which have caused widespread panic and concern not only of the casualties involved but also of the lack of the legal and enforcement capacity to curb these lawless elements. Although it is beyond the scope of this thesis, and surely deserving of more extensive treatment, some of the more notable incidences referred to, which are attributed to these armed groups are: (1) the bombing of the *Superferry 14*, 27 February 2007, with 116 dead, is considered the Philippines' deadliest terrorist attack and the world's deadliest terrorist attack at sea; (2) *MV Doña Ramona*, 28 August 2005, which killed one and left 29 survivors.

¹¹⁰ Some of the major ASEAN Declarations, Joint Communiqués, and Other Documents to Combat Transnational Crime and International Terrorism include: Joint Declaration on Co-operation to Combat Terrorism, 14th ASEAN-EU Ministerial Meeting, Brussels, 27 January 2003; Joint Declaration of ASEAN and China on Cooperation in the Field of Non-Traditional Security Issues, Phnom Penh, 4 November 2002; Declaration on Terrorism by the 8th ASEAN Summit, Phnom Penh, 3 November 2002; 2001 ASEAN Declaration on Joint Action to Counter Terrorism, Bandar Seri Begawan, 5 November 2001; Manila Declaration on the Prevention and Control of Transnational Crime (1998); ASEAN Declaration on Transnational Crime, Manila, 20 December 1997; Joint Communiqué of the Third ASEAN Plus Three Ministerial Meeting on Transnational Crime (AMMTC+3), Bandar Seri Begawan, 7 November 2007; Joint Communiqué of the Sixth ASEAN Ministerial Meeting on Transnational Crime (AMMTC), Bandar Seri Begawan, 6 November 2007; Joint Communiqué of the Fifth ASEAN Ministerial Meeting on Transnational Crime (AMMTC), Ha Noi, 29 November 2005; Joint Communiqué of the Second ASEAN Plus Three Ministerial Meeting on Transnational Crime (AMMTC+3), Ha Noi, 30 November 2005; Joint Communiqué of the 25th ASEAN Chiefs of Police Conference, Bali, Indonesia, 16-20 May 2005; Joint Communiqué of the 24th ASEAN Chiefs of Police Conference, Chiang Mai, Thailand, 16-20 August 2004; Joint Communiqué of the First ASEAN Plus Three Ministerial Meeting on Transnational Crime (AMMTC+3), Bangkok, 10 January 2004; Joint Communiqué of the Fourth ASEAN Ministerial Meeting on Transnational Crime (AMMTC), Bangkok, 8 January 2004; Joint Communiqué of the Special ASEAN Ministerial Meeting on Terrorism (AMMTC), Kuala Lumpur, 20-21 May 2002; Joint Communiqué of the Third ASEAN Ministerial Meeting on Transnational Crime (AMMTC), Singapore, 11 October 2001; Joint Communiqué of the Second ASEAN Ministerial Meeting on Transnational Crime (AMMTC), Yangon, 23 June 1999; Treaty on Mutual Legal Assistance in Criminal Matters, Kuala Lumpur, 29 November 2004; Agreement on Information Exchange and Establishment of Communication Procedures; Work Programme to Implement the ASEAN Plan of Action to Combat Transnational Crime, Kuala Lumpur, 17 May 2002; Memorandum of Understanding between the Governments of the Member Countries of the Association of Southeast Asian Nations (ASEAN) and the Government of the People's Republic of China on Cooperation in the Field of Non-traditional Security Issues; ASEAN-United States of America Joint Declaration for Cooperation to Combat International Terrorism, Bandar Seri Begawan, 1 August 2002; ASEAN Standing Committees Chairmen's Letter to US Secretary of State Colin Powell on

signatory to major ASEAN declarations that seek to address transnational crime and terrorism.¹¹¹ It is also an important player in both Track I regional bodies such as the ASEAN Regional Forum (ARF);¹¹² and Track II regional bodies such as the Council for Security Cooperation in the Asia Pacific (CSCAP),¹¹³ which address issues that promote maritime security cooperation and enhance regional security not only in Southeast Asia, but also in the wider Asia-Pacific.

At the bilateral level, the Philippines has several existing agreements in place with neighbouring countries such as Indonesia and Malaysia on maritime law enforcement cooperation on border issues. This includes the RP-Indonesia Border Crossing

Terrorists Attack, Bandar Seri Begawan, 13 September 2001; ASEAN Plan of Action to Combat Transnational Crime. ASEAN Secretariat Website. Online at: <http://www.aseansec.org/13844.htm>. Date accessed: 22 April 2009.

¹¹¹ One of the earliest ASEAN documents that addressed the issue of regional cooperation in the area of transnational crime was the ASEAN Declaration on Transnational Crime signed in Manila on 20 December 1997, which was soon followed by the 1998 Manila Declaration on the Prevention and Control of Transnational Crime. More recent declarations include the ASEAN Declaration on Joint Action to Counter Terrorism adopted on 5 November 2001 at the 7th ASEAN Leaders' Summit in Brunei; and the Work Programme to Implement the ASEAN Plan of Action to Combat Transnational Crime, which included a component on terrorism, adopted on 16-17 May 2002 at the ASEAN Senior Officials Meeting on Transnational Crime (SOMTC) in Kuala Lumpur. At the Special ASEAN Ministerial Meeting on Terrorism, held in Kuala Lumpur on 20-21 May 2002, the Ministers agreed to enhance the sharing of experiences on counter-terrorism and the exchange of information on terrorists, modus operandi and intelligence.

¹¹² The ASEAN Regional Forum (ARF) is an important Track I regional body established at the Twenty-Sixth ASEAN Ministerial Meeting and Post Ministerial Conference, held in Singapore on 23-25 July 1993. The ARF currently has 27 participants which includes countries from outside the ASEAN region such as the United States, the European Union and the Russian Federation. The Philippines is a member of the ARF. The ARF has issued the Statement on Cooperation against Piracy and other Threats to Maritime Security on 17 June 2003, which aims to promote maritime security cooperation not only in Southeast Asia, but also in the entire Asia-Pacific region.

¹¹³ The Council for Security Cooperation in the Asia Pacific (CSCAP) is an important Track II regional body organised in 1992 with the goal of contributing to the efforts towards regional confidence building and enhancing regional security through dialogues, consultation and cooperation. The Philippines, through the Institute for Strategic and Development Studies (ISDS) is a founding and active member of CSCAP. CSCAP now has 21 full members and one associate member. CSCAP memoranda which are submitted for consideration at Track One levels, addressing transnational issues have been produced, such as: Guidelines for Regional Maritime Cooperation, Guidelines for Maritime Cooperation in Enclosed and Semi-Enclosed Seas and Similar Sea Areas of the Asia Pacific, Memorandum No. 2-Asia Pacific Confidence and Security Building Measures, among others.

System¹¹⁴ and the RP-Malaysia Memorandum of Agreement on Anti-Smuggling Cooperation.¹¹⁵ There have also been national efforts to address the growing threat of transnational crimes.¹¹⁶

¹¹⁴ Republic of the Philippines and Republic of Indonesia, “Joint Implementation of the Border Patrol Agreement and Border Crossing Agreement between the Government of the Republic of the Philippines and Government of the Republic of Indonesia signed in Jakarta, Indonesia on 11 March 1975,” Manila, 1 July 1975. The implementation of this Joint Border Patrol Agreement includes the regular annual Coordinated Patrol Philippines Indonesia (CORPATPHILINDO) exercise for 10 days in their common border areas between southern Mindanao and North Sulawesi, involving surface vessels and surveillance aircrafts.

¹¹⁵ Some relevant bilateral agreements between the Philippines and Malaysia: Memorandum of Understanding on Defense Cooperation between the Government of the Philippines and the Government of Malaysia, Done in Quezon City, Philippines on 26 September 1994; Memorandum of Understanding on the Establishment of a Joint Commission for Bilateral Cooperation between the Government of the Philippines and the Government of Malaysia, Done in Kuala Lumpur, Malaysia on 22 July 1993; Second Protocol (1994) to the 1976 Agreement on Anti-smuggling Cooperation between the Government of the Philippines and the Government of Malaysia, Done in Kuala Lumpur, Malaysia on 29 March 1995; Protocol to the Agreement on Anti-smuggling Cooperation between the Government of the Philippines and the Government of Malaysia, Done in Kuala Lumpur, Malaysia on 1 September 1967. Available online at the ASEAN Secretariat website.

¹¹⁶ On 15 January 1999, the Philippine Center on Transnational Crime (PCTC) was created to address the following: illicit trafficking of narcotic drugs and psychotropic substances; money laundering; terrorism; arms smuggling; trafficking in persons; piracy; and other crimes that have an impact on the stability and security of the country. *See* Executive Order No. 62, Creating the Philippine Center on Transnational Crime to Formulate and Implement a Concerted Program of Action of All Law Enforcement, Intelligence and Control of Transnational Crime, 15 January 1999.

The Philippines has also passed an anti-terrorism law, the Human Security Act of 2007, The Philippines has also passed an anti-terrorism law, the Human Security Act of 2007, which expands the definition of terrorism to include acts already criminalised in other domestic legislation and instituting more punitive sanctions for their commission. *Please see*, Section 3, Republic Act No. 9372. These include “an act punishable under any of the following provisions of the Revised Penal Code: a. Article 122 (Piracy in General and Mutiny in the High Seas or in the Philippine Waters); b. Article 134 (Rebellion or Insurrection); c. Article 134-a (Coup d’ Etat), including acts committed by private persons; d. Article 248 (Murder); e. Article 267 (Kidnapping and Serious Illegal Detention); f. Article 324 (Crimes Involving Destruction), or under Presidential Decree No. 1613 (The Law on Arson); Republic Act No. 6969 (Toxic Substances and Hazardous and Nuclear Waste Control Act of 1990); Republic Act No. 5207, (Atomic Energy Regulatory and Liability Act of 1968); Republic Act No. 6235 (Anti-Hijacking Law); Presidential Decree No. 532 (Anti-Piracy and Anti-Highway Robbery Law of 1974); and, Presidential Decree No. 1866, as amended (Decree Codifying the Laws on Illegal and Unlawful Possession, Manufacture, Dealing in, Acquisition or Disposition of Firearms, Ammunitions or Explosives)” for the purpose of “sowing and creating a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand...” The penalty imposed is “forty (40) years of imprisonment, without the benefit of parole as provided for under Act No. 4103, otherwise known as the Indeterminate Sentence Law, as amended.”

6.4.3.2. Maritime Piracy

Despite the downward trend in the incidence of piracy and armed robbery against ships in the region since 2003, these issues remain a perennial problem in the waters of Southeast Asia.¹¹⁷ The same trend can be said in the case of the Philippines and the numbers alone seem quite insignificant compared to the global total of incidents. However, there appears to be in the case of the Philippines, a dangerous nexus between what has been called “political piracy” or the use of piracy to raise funds to finance a struggle, and terrorism.¹¹⁸ In 2007, in order to strengthen security in the southern waters of the Philippines; “Coast Watch South” project was initiated.¹¹⁹ Through this project, the Philippine Navy will set up 17 Coast Watch stations stretching from Mangsi Island off Palawan province to the Davao coast, forming a U-shaped “barrier” to guard the country’s porous southern sea borders against terror groups and other transnational criminals.¹²⁰ The program is funded by the United States government with assistance from Australia and covers the long shorelines and vast sea lanes of Davao, Sarangani,

¹¹⁷ See Catherine Zara Raymond, ‘Piracy in Southeast Asia: New Trends, Issues and Responses’ (2005) 9 *Harvard Asia Quarterly*; Derek Johnson and Mark J. Valencia, *Piracy in Southeast Asia: Status, Issues, and Responses* (2005); Adam J. Young, *Contemporary Maritime Piracy in Southeast Asia: History, Causes and Remedies* (2007). See also, ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships Annual Report, 1 January-31 December 2007* (2008).

¹¹⁸ An example of this type of piratical attack was the February 2000 bombing of the inter-island ferry Our Lady of the Mediatrix, which the Philippine Government attributed to the MILF, and the August 1991 attack on the Christian missionary vessel *MV Doulous*. This threat is more acute in the Southern Philippines where piracy has always been an endemic problem no less because of armed insurgent and separatist groups such as the MILF, Moro National Liberation Front (MNLF), and the ASG. See Stefan Eklof Amirell, ‘Political Piracy and Maritime Terrorism: A Comparison between the Straits of Malacca and the Southern Philippines’ in Graham Gerard Ong (ed), *Piracy, Maritime Terrorism and Securing the Malacca Straits* (2006) 52 at 60-62.

¹¹⁹ Criselda Yabes, “Coast Watch South: Guarding Sulu’s Wealth,” Newsbreak, 17 December 2008. Online at: <http://www.abs-cbnnews.com/features/12/17/08/coast-watch-south-guarding-sulus-wealth>. Date accessed: 23 April 2009.

¹²⁰ Joel Guinto, “Navy to Seal Off Southern Sea Borders,” 25 September 2007. Online at: [Inquirer.net](http://www.inquirer.net). Date accessed: 23 April 2009.

Sulu and Tawi-Tawi with the direct participation of the Philippine Navy and the Philippine Marines as well as the Philippine Air Force.¹²¹

For a maritime country such as the Philippines with a very long coastline and very limited fiscal resources, the problem of maritime piracy is made more onerous because of the costs of maritime surveillance and the associated expense of setting up land-based homeland security,¹²² and the pervasive problem of corruption.¹²³ In Southeast Asia, “cooperation against piracy is predominantly bilateral in nature,” observes Banlaoi.¹²⁴ The Philippines, for example, has a border-crossing agreement with Malaysia, and has established a coordination system with port authorities of Indonesia.¹²⁵

6.4.3.3. Sea Lanes Passage

The Philippine Treaty Limits position impinges directly on the issue of designation of archipelagic sea lanes in Philippine waters.¹²⁶ As elaborated in Chapters 1 and 3, the Philippines considers the waters within the said Treaty Limits as internal waters and not archipelagic waters.¹²⁷ This is a constitutional limitation which has been the paramount domestic hindrance in the designation of archipelagic sea lanes within Philippine

¹²¹ Jaime Laude, “Pentagon commits firm support to AFP coast watch in South,” Philstar.com, 10 July 2008. Online at: <http://www.philstar.com/Article.aspx?articleid=72096>. Date accessed: 23 April 2009.

¹²² Peter Chalk, *The Maritime Dimension of International Security: Terrorism, Piracy and Challenges for the United States* (2008) at 12. Chalk also mentioned the problem of corruption, at 44,

¹²³ *Ibid.*, at 22, 44.

¹²⁴ Banlaoi, *supra* note 99, at 244.

¹²⁵ *Ibid.*

¹²⁶ Jorge R. Coquia, ‘Some Legal and Constitutional Issues on Archipelagic Sea Lanes’ in Maribel Aguilos (ed), *Designation of Sea Lanes in the Philippines* (1997) 52 at 53.

¹²⁷ Chapter 5. International Legal Implications of the Philippine Treaty Limits on Navigational Rights in Philippine Waters. Tomas Aquino, ‘Implications of Sea Lanes Designation on Safety of Navigation and Sovereignty Issues’ in Maribel Aguilos (ed), *Designation of Sea Lanes in the Philippines* (1997) 15 at 15.

waters.¹²⁸ As examined in Chapters 1 and 5, from both a domestic and international perspective there remains an ambiguity and uncertainty over the treatment of these waters as well as the navigational rights and obligations within these waters.¹²⁹

It does not need much elaboration that the sea lanes that traverse the waters of the Philippine archipelago have a regional and global significance not only because of the amount of shipping traffic that goes through them,¹³⁰ but also because of their “strategic and significant role in biodiversity conservation, fisheries management and environmental management.”¹³¹ The preparatory documents for UNCLOS I in Geneva in 1958 listed several Philippine straits used for international navigation. Among these are the San Bernardino Strait between Luzon and Samar, and Surigao Strait between Leyte and Mindanao.¹³²

¹²⁸ Article 1, 1987 Philippine Constitution.

¹²⁹ Stuart Kaye, *Freedom of Navigation in the Indo-Pacific Region*, Papers in Australian Maritime Affairs (2008) at 34.

¹³⁰ Xuegang Zhang, “China’s Energy Corridors in Southeast Asia,” 8(3) China Brief, 4 February 2008. Online at: http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=4693. Date accessed: 24 April 2009.

¹³¹ Porfirio M. Alino, ‘Effective Coastal Zone Management Practices in the Philippines’ in Nobuo Nobuo Mimura (ed), *Asian-Pacific Coasts and Their Management: States of Environment* (2008) 217. Also see, Alberto A. Encomienda, ‘Archipelagic Sea Lanes Passage and the Philippines Situation’ in Myron H. Nordquist, Tommy T. B. Koh and John Norton Moore (eds), *Freedom of seas, passage rights, and the 1982 Law of the Sea Convention* (2009) 393 which proposes to treat the entire archipelago as a Particularly Sensitive Sea Area (PSSA).

¹³² Mario C. Manansala, ‘The Philippines and the Third Law of the Sea Conference: Scientific and Technical Impact’ (1974) 3 *Philippine Yearbook of International Law* 135 at 141. International passage through other routes such as through the Mindoro Strait, Basilan Passage, Balabac and Sibutu Passage still have to be settled in account of the exercise of full Philippine sovereignty over these waters.

6.4.3.4. Marine Environmental Protection

The Philippines is considered the centre of marine biodiversity in the world,¹³³ and according to Conservation International (CI), “one of the few nations that is, in its entirety, both a hotspot and a megadiversity country, placing it among the top priority hotspots for global conservation.”¹³⁴ Many species of flora and fauna found only in the Philippines are already endangered and even under severe threat of possible extinction.¹³⁵ The Philippine coastal and marine ecosystem is threatened by numerous factors including the problem of pollution, overexploitation and weak institutional and legal capacity of agencies with environmental conservation mandates.¹³⁶

The protection and conservation of the marine environment is clearly an issue that transcends national borders. It is not a surprise therefore that the position of the Philippines on the Treaty of Paris limits position has not been a major obstacle in the

¹³³ Kent E. Carpenter and Victor G. Springer, ‘The Center of the Center of Marine Shore Fish Biodiversity: the Philippine Islands’ (2005) 72(4) *Environmental Biology of Fishes* 467. Before the publication of Carpenter’s and Springer’s study, Wallacea in Indonesia was considered the center of marine biodiversity in the world, but a closer look revealed that central Philippines had a “higher concentration of species per unit area than anywhere else in Indonesia.” *Ibid.*, at 473. A triangular region extending also to Malaysia and Indonesia has long been called the Earth’s “center” of marine biodiversity. But within that triangle, the portion of the Philippine archipelago between the islands of Luzon and Mindanao is packed with more species than any other sub-section, according to Carpenter’s research. Carpenter, who coordinates global marine species assessment for the World Conservation Union, worked with Victor Springer of the Smithsonian Institution and in conjunction with the Conservation International organization in producing the “center of center” biodiversity analysis.

¹³⁴ Conservation International, Biodiversity Hotspots: Philippines. Online at: <http://www.biodiversityhotspots.org/xp/hotspots/philippines/Pages/default.aspx>. Date accessed: 26 April 2009.

¹³⁵ See for example, Ashton, P.S. 1997. “Before the memory fades: Some notes on the indigenous forests of the Philippines,” *Sandakania* 9:1-190; Brown, R.M., Diesmos, A.C. & Alcala, A.C. “The state of Philippine herpetology and the challenges for the next decade,” *Silliman Journal* 42:18-87 (2001); Collar, N.J., Mallari, N.A.D. & Tabaranza, B.R. Jr. *Threatened Birds of the Philippines* (1999); Danielsen, F. & Treadaway, C. G. 2004. Priority conservation areas for butterflies (Lepidoptera: Rhopalocera) in the Philippine Islands. *Animal Conservation* 7: 79-92; Mallari, N.A.D., Tabaranza, B.R. Jr. & Crosby, M.J. *Key Conservation Sites in the Philippines* (2001).

¹³⁶ Alan K. J. Tan, Preliminary Assessment of Philippine’ Environmental Law. Asia-Pacific Centre for Environmental Law (APCEL) website. Online at: <http://law.nus.edu.sg/apcel/>. Date accessed: 26 April 2009.

issue marine environmental protection in the region. In fact, in Southeast Asia, much progress has been made in regional cooperation in this area. The adoption of the Sustainable Development Strategy for the Seas of East Asia (SDS-SEA) is one such example. The SDS-SEA addresses and provides a platform for cooperation at the regional, subregional, national and local levels, and for intergovernmental, interagency and intersectoral collaboration on such issues as World Summit on Sustainable Development (WSSD) targets for sustainable development; implementation of integrated ocean and coastal management approaches; and action programs aimed at solving problems and deficiencies in ocean and coastal governance.¹³⁷ The SDS-SEA actually builds upon other regional programmes of action developed over the years through the UNEP Regional Seas Programme,¹³⁸ United Nations Economic and Social Commission for Asia and the Pacific (ESCAP),¹³⁹ and Asia-Pacific Economic Cooperation (APEC),¹⁴⁰ among others. The Putrajaya Declaration of Regional

¹³⁷ The decision to prepare SDS-SEA arose from an intergovernmental meeting of 11 countries of East Asia held in Dalian in July 2000. The countries involved are Brunei Darussalam, Cambodia, China, Democratic People's Republic of Korea, Indonesia, Malaysia, Philippines, Republic of Korea, Singapore, Thailand, and Vietnam. In March 2002, Japan joined the Intergovernmental Meeting of PEMSEA, which endorsed the Strategy in principle and agreed to pursue intersectoral consultations at national, regional, and international levels. The Strategy is a product of joint efforts by the concerned countries and other stakeholders through 3-year consultations and consensus-building at all levels. Partnerships in Environmental Management for the Seas of East Asia (PEMSEA), *Sustainable Development Strategy for the Seas of East Asia: Regional Implementation of the World Summit on Sustainable Development Requirements for the Coasts and Oceans* (2003) at 35-98.

¹³⁸ The UNEP Regional Seas Programme covers 18 regions of the world, making it one of the most globally comprehensive initiatives for the protection of marine and coastal environments. The Philippines is a member of the East Asian Seas programme. In April 1981, the Action Plan for the Protection and Development of the Marine and Coastal Areas of the East Asian Region was adopted by Indonesia, Malaysia, Philippines, Singapore and Thailand, which was revised in 1994.

¹³⁹ The United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) is the regional development arm of the United Nations for the Asia-Pacific region. It has a membership of 62 Governments, 58 of which are in the region. The Philippines was admitted as a member of ESCAP on 28 March 1947.

¹⁴⁰ Asia-Pacific Economic Cooperation (APEC) is a forum for 21 Pacific Rim countries. The Philippines became a member of APEC on 6-7 November 1989. At the 1st APEC Ocean-related Ministerial Meeting, Seoul, Korea, 22-26 April 2002, the Seoul Ocean Declaration (2002) was adopted, which, along with the Strategic Framework1 for the Marine Resource Conservation Working Group (2005) and the Bali Plan of Action (2005) are the priority frameworks for implementation within the APEC framework. The resulting Bali Plan of Action (BPA) was adopted at the 2nd Ocean-Related Ministerial Meeting (AOMM 2) held in

Cooperation for the Sustainable Development of the Seas of East Asia¹⁴¹ formally adopted the SDS-SEA as a regional strategy for the sustainable development of the seas of the region.

Within the ASEAN, there are also examples of development of a framework to improve regional coordination for the integrated protection and management of coastal zones, development of a regional action plan for the protection of the marine environment from land-based and sea-based activities, such as the Hanoi Plan of Action (1999-2004)¹⁴² which promotes regional coordination to protect Marine Heritage Parks and Reserves; and the Vientiane Action Programme 2004-2010 (VAP),¹⁴³ adopted and endorsed by the ASEAN Leaders during the 10th ASEAN Summit in Vientiane, Lao PDR, in 2004, succeeded the Hanoi Plan of Action.¹⁴⁴

Bali from 16-17 September 2005 provided an opportunity for APEC Ministers to give a more focused level of commitment to marine issues.

¹⁴¹ Putrajaya Declaration of Regional Cooperation for the Sustainable Development of the Seas of East Asia, Adopted at the East Asian Seas Congress 2003, Putrajaya, 12 December 2003.

¹⁴² The Hanoi Plan of Action (HPA) which covers the period from 1999 to 2004, is the first in a series of plans of action building up to the realisation of the goals of the ASEAN Vision 2020 which sets out a broad vision for ASEAN in the year 2020, adopted at the Second ASEAN Informal Summit, held in Kuala Lumpur on 15 December 1997. Online at: <http://www.aseansec.org/8754.htm>. Date accessed: 26 April 2009.

¹⁴³ The Vientiane Action Programme (VAP) was endorsed at the 10th ASEAN Summit in Vientiane, Lao PDR on 29 November 2004. The VPA is a six-year plan (2004-2010) which is the successor of the Hanoi Plan of Action to realize the end goal of the ASEAN Vision and the Declaration of ASEAN Concord II. It focuses on deepening regional integration and narrowing the development gap within ASEAN, particularly the least developed member countries. Summit leaders agreed to establish the ASEAN Development Fund to support the implementation of VAP and future action programmes. Online at: <http://www.aseansec.org/VAP-10th%20ASEAN%20Summit.pdf>. Date accessed: 26 April 2009.

¹⁴⁴ The specific programme area and measures in the VAP on coastal and marine environment can be found in Item 3.3.7 on the Coastal and Marine Environment. The VAP seeks to: “Enhance inter-agency and inter-sectoral coordination at the national, regional and international levels for achieving sustainable development of the ASEAN’s coastal and marine environment; Further expand and implement the ASEAN Marine Water Quality Criteria; and Implement the ASEAN Criteria for Marine Heritage Areas, and ASEAN Criteria for National Protected Areas to establish a representative network of protected areas to protect critical habitats.”

In addition, there have been initiatives that dealt directly or indirectly with endangered species trade in the region.¹⁴⁵ These include the establishment of the Turtle Islands Heritage Protected Area (TIHPA) in 1996,¹⁴⁶ the formulation of a tri-national marine turtle conservation program involving Indonesia, Malaysia, and the Philippines,¹⁴⁷ and the adoption of the East Asia Regional Policy Agenda on promoting sustainable and equitable practices in the international trade in coral reef species.¹⁴⁸ Another notable cooperative arrangement in the region is the Coral Triangle Initiative (CTI).¹⁴⁹ The Coral Triangle is home to the highest diversity of marine life on earth and covers all or parts of the exclusive economic zones of Indonesia (Central and Eastern), East Timor, the Philippines, Malaysia (part of Borneo), Papua New Guinea and the Solomon Islands.

6.5. Conclusion

This Chapter clarified the functional bases of the Philippine Treaty Limits. The discussion explained the two bases of the Treaty Limits: economic or resource-oriented reasons and security-related interests and the historical context for this assertion. The

¹⁴⁵ PEMSEA, 'Sustainable Trade in Marine and Endangered Species in East Asia' 1(1) *Policy Brief*, May 2004 at 3.

¹⁴⁶ On 31 May 1996 Turtle Islands was declared as Turtle Island Heritage Protected Area (TIHPA) through a MOA between the Republic of the Philippines and the Government of Malaysia. TIHPA is the first and only trans-frontier protected area for marine turtles in the world. Management of the TIHPA is shared by both countries, making possible the conservation of habitats and sea turtles over a large area independent of their territorial boundaries.

¹⁴⁷ PEMSEA, *supra* note 145 at 3.

¹⁴⁸ *Ibid.*

¹⁴⁹ The Coral Triangle Initiative (CTI) was initiated in August 2007 by President Susilo Bambang Yudhoyono of Indonesia who wrote to seven other leaders proposing a new Coral Triangle Initiative on Coral Reefs, Fisheries, and Food Security (CTI). The leaders formally endorsed the CTI in the APEC Leaders Declaration on Climate Change, Energy Security and Clean Development in September 2007. The CTI was again formally endorsed in November 2007 by Brunei-Indonesia-Malaysia-Philippines East ASEAN Growth Area (BIMP-EAGA) and ASEAN. The following countries are CTI members: Indonesia, the Philippines, Malaysia, Timor Leste, and the Solomon Islands.

Philippine Treaty Limits position was articulated when the modern law of the sea was still at its incipient stage. The rights asserted by the Philippines over the territory these lines enclose, at that time, were not guaranteed or recognised in international law. The valiant efforts of the Philippines to secure international recognition of the Philippine Treaty Limits may have failed but the rights it was asserting were included and codified in the LOSC or otherwise embodied in customary norms of international law. In many respects, and especially in terms of access to resources, the LOSC presents a balance of rights and obligations which are favourable to archipelagic States, including the Philippines. The LOSC recognised the broad authority of a coastal State over living and non-living resources within its territorial sea, archipelagic waters and EEZ.

While the uncertainty over the limits of the national territory of the Philippines because of the Philippine Treaty Limits impinges on issues such as navigation, the same cannot be said on other areas such as maritime security and access to marine resources in Philippine waters. The position of the Philippines may seem intractable from a domestic point of view which has been an impediment for the Philippines to proceed with negotiations with its neighbours to delimit overlapping maritime zones. However, on other issues that transcend boundaries such as marine environmental protection, or issues of transnational importance such as terrorism, maritime piracy and sealanes passage, the Philippines has been more than willing to set aside its Treaty Limits position and cooperate with other States, even with those States it has maritime or territorial disputes with. In these instances, the Treaty Limits position is more prudently construed and interpreted and take on a secondary importance to other issues, thus, permitting cooperation.

Chapter 7

Implications of the Philippine Treaty Limits and Territorial Waters Claim on the Delimitation of Philippine Territorial and Maritime Boundaries and Foreign Policy

7.1. Introduction

The purpose of this chapter is to identify and analyse the international and domestic legal and policy implications of the Philippine Treaty Limits on the delimitation of Philippine territorial and maritime boundaries and on foreign policy. This chapter is of two parts. The first part discusses and analyses the existing territorial sovereignty claims of the Philippines and the overlapping maritime jurisdictional zones that the Philippines has with its neighbouring States, all of which remains to be delimited. The second part explains how the Philippine Treaty Limits position has impacted Philippine foreign policy in the context of the maritime disputes that characterise the Asia-Pacific region and within the dynamics of furthering the specific foreign policy interests and relationship with strategic foreign State partners of the Philippines. There are two main conclusions drawn by this chapter. First, the Treaty Limits position has been the main obstacle in the delimitation of the country's overlapping maritime boundaries with its neighbours. Second, the Treaty Limits has been a prominent element of Philippine foreign policy especially during the LOSC negotiations but is increasingly being downplayed in the face of more strategic and current pressing national, regional, and international concerns and realities.

7.2. Maritime Boundary Delimitation

The value of establishing maritime boundaries that are of sound basis in international law and therefore respected by the international community is self-evident.¹ The fundamental purpose of maritime boundary delimitation is to provide clarity and certainty to all maritime States and users in order to minimise inter-State conflict and promote the sustainable management and governance of the oceans. In the words of Lord Curzon: “Frontiers are the razor’s edge on which hang suspended the issue of war or peace and the life of nations.”² Uncertain boundaries increase political and security risks.³ Unresolved boundaries have serious economic consequences as such may stall exploration of resources⁴ disrupt fishing⁵ or impede shipping;⁶ hamper environmental conservation measures;⁷ and may also trigger intense diplomatic disputes as when a

¹ Geoffrey Marston, ‘The Stability of Land and Sea Boundary Delimitations in International Law’ in Gerald Blake (ed), *Maritime Boundaries* (1994) 144 at 152.

² Victor Prescott, *Boundaries and Frontiers* (1978) at 18.

³ Seamus McElroy, ‘Failure to Resolve Marine Boundary Disputes Raises Tensions in SE Asia’ (1992) 16 (6) *Marine Policy* 488; Seo-Hang Lee Lee, ‘Security of SLOCs in East Asia’ in Kent Calder and Fereidun Fesharaki (eds), *Maritime Shipping in Northeast Asia: Law of the Seas, Sea Lanes, and Security* (1998) 63 at 66.

⁴ Stephen W. Ritterbush, ‘Marine Resources and the Potential for Conflict in the South China Sea’ (1978) 2 *Fletcher Forum* 64; Mark J. Valencia (ed), *The South China Sea: Hydrocarbon Potential and Possibilities of Joint Development* (1982); Mark J. Valencia, Jon M. Van Dyke and Noel A. Ludwig, *Sharing the Resources of the South China Sea* (1997).

⁵ Robin Churchill, ‘Fisheries Issues in Maritime Boundary Delimitation’ (1993) 14 *Marine Policy* 44. See for example, Susumu Kume, *Tuna Resources in the South China Sea* (1973); M. N. Mistakidis, *The Crustacean Resources and Related Fisheries in the Countries Bordering the South China Sea* (1973); D. Menasveta, S. Shindo and S. Chullarsorn, *Pelagic Fishery Resources of the South China Sea and Prospects for their Development* (1973); Porfirio M. Alino et al, ‘The Fisheries Potential of the Kalayaan Island Group, South China Sea’ in Brian Morton (ed), *The Marine Biology of the South China Sea III* (1998) 219.

⁶ Adam J. Young and Mark J. Valencia, ‘Conflation of Piracy and Terrorism in Southeast Asia: Rectitude and Utility’ (2003) 25(2) *Contemporary Southeast Asia* 269 at 270. See also Mark J. Valencia, ‘Northeast Asia: Transnational Navigational Issues and Possible Cooperative Responses’ in Kent Calder and Fereidun Fesharaki (eds), *Maritime Shipping in Northeast Asia: Law of the Seas, Sea Lanes, and Security* (1998) 17 at 22-24.

⁷ See for example, Edgardo D. Gomez, ‘The South China Sea: Conservation Area or War Zone?’ (1994) 28(3) *Marine Pollution Bulletin* 132; Douglas M. Johnston, *Environmental Management in the South China Sea: Legal and Institutional Developments* (1982).

fisherman is caught or if oil is discovered in an area of overlapping claims.⁸ Conversely, the certainty of a nation's boundaries enhances stability and promotes peaceful relations among neighbouring States sharing the same boundaries and resources.⁹ In the words of Robert Frost, "Good fences make good neighbours."¹⁰

In the case of the Philippines, the Philippine Treaty Limits have been a major impediment in the delimitation of the maritime boundaries of the Philippines.¹¹ Negotiations over overlapping maritime zones with its neighbours have been stalled over this particular issue.¹² The uncertainty in the treatment of the waters enclosed by the Philippine Treaty Limits has also caused confusion in the domestic enforcement of legislation by local maritime enforcement agencies and even led to cases that escalated into litigation involving foreign nationals.¹³ The territorial claims of the Philippines have been contested and protested by other claimants and in the past, and in some cases

⁸ Brian Morton, 'Fishing for Diplomacy in China's Seas' (2003) 46(7) *Marine Pollution Bulletin* 795-796.

⁹ W. Lawrence S. Prabhakar, 'The Regional Dimension of Territorial and Maritime Disputes in Southeast Asia' in Kwa Chong Guan and John K. Skogan (eds), *Maritime Security in Southeast Asia* (2007) 34 at 42, 44.

¹⁰ Robert Frost, from his metaphorical poem "Mending Wall" published in 1914.

¹¹ Victor Prescott and Clive Schofield, 'Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean' (2001) 3(1) *Maritime Briefing* at 3.

¹² For example, the Philippine-Indonesian talks on boundary delineation which formally commenced in 1994 has been stalled many times over because of this singular issue. Victor Prescott, 'Indonesia's Maritime Claims and Outstanding Delimitation Problems' (1996) 3(4) *Boundary & Security Bulletin* 91 at 96-97.

¹³ Under Philippine law, foreign poachers are fined US\$100,000 and detained until deported and boats, fishing equipment and catch are confiscated. The frequent arrests of Chinese poachers off Palawan in the past have prompted the establishment of a special multi-agency committee to handle their cases to avoid straining Manila's diplomatic ties with Beijing. *See for example*, Yvette Lee and Inday Espina-Varona, "Chinese Poachers Caught at Philippines Marine Park Now Center of Scandal, International Incident," *Underwater Times.Com*, 26 December 2006; Underwatertimes.com News Service, "Chinese Poachers Charged, Jailed in the Philippines Over Wrasse Poaching in Marine Park," *Underwater Times.Com*, 2 January 2007; Marlon Ramos, "Legal Team Formed to Help Prosecute Chinese Poachers," *Philippine Daily Inquirer*, 15 January 2007.

have resulted in the suspension of diplomatic relations.¹⁴ The position of the Philippine Government has been a constant source of discomfiture for the country's diplomats in international fora.¹⁵

The current configuration of the Philippine national territory drawn according to the Treaty Limits has been a major stumbling block in the delimitation of the country's maritime boundaries and the drawing of the various maritime jurisdictional zones it is entitled under the LOSC.¹⁶ There are two possible causes for maritime boundary disputes. First, disputed sovereignty over land; and second, overlapping entitlements to maritime rights and jurisdiction.¹⁷ The Philippines has both. The following sections will discuss these disputes.

7.2.1. Territorial Sovereignty Claims

In addition to the overlapping maritime jurisdictional zones that the Philippines has with neighbouring States, there is the more contentious issue of Philippine territorial sovereignty claims which are contested by other States. The Philippines claims territorial sovereignty over the following, which is also claimed by other States: (1) the

¹⁴ The Philippines and Malaysia, over the issue of Sabah, have closed their embassies twice: in 1963, and in 1968. Darusalam Abu Bakar Paridah Abd. Samad, 'Malaysia-Philippines Relations: The Issue of Sabah' (1992) 32(6) *Asian Survey* 554 at 557.

¹⁵ Joel D. Adriano, "China, Philippines stoke island tensions," Asia Times Online. Online at: http://www.atimes.com/atimes/Southeast_Asia/KC27Ae02.html. Date accessed: 27 March 2009. Also Alberto A. Encomienda, 'Maritime Security and Philippine Foreign Policy: An Overview and National Ocean Diplomacy Agenda' (Paper presented at the National Conference-Workshop on Maritime Security: Problems and Approaches, Manila, Philippines, 2003) at 41.

¹⁶ Chen Hurng-yu, "Manila flexes its muscles in South China Sea dispute," Taiwan Journal. Online at: <http://taiwanjournal.nat.gov.tw/ct.asp?xItem=49115&CtNode=118>. Date accessed: 6 March 2009.

¹⁷ David Anderson, "Methods of Resolving Maritime Boundary Disputes," A summary of a meeting of the International Law Discussion Group at Chatham House on 14th February, 2006, at 1. Online at: http://www.chathamhouse.org.uk/files/3307_ilp140206.doc. Date Accessed: 15 March 2009. The first type inevitably results from the first in instances where the disputed territory has a coast.

Kalayaan Island Group; (2) Scarborough Shoal; (3) Sabah; (4) Miangas; and (5) other islands such as Orchid Island, Marianas Islands and Caroline Islands.

This section concentrates on the international legal basis of the Philippine claims to sovereignty over these features and their relationship to the Treaty Limits rather than the basis of the competing claims to sovereignty.

7.2.1.1. Kalayaan Island Group

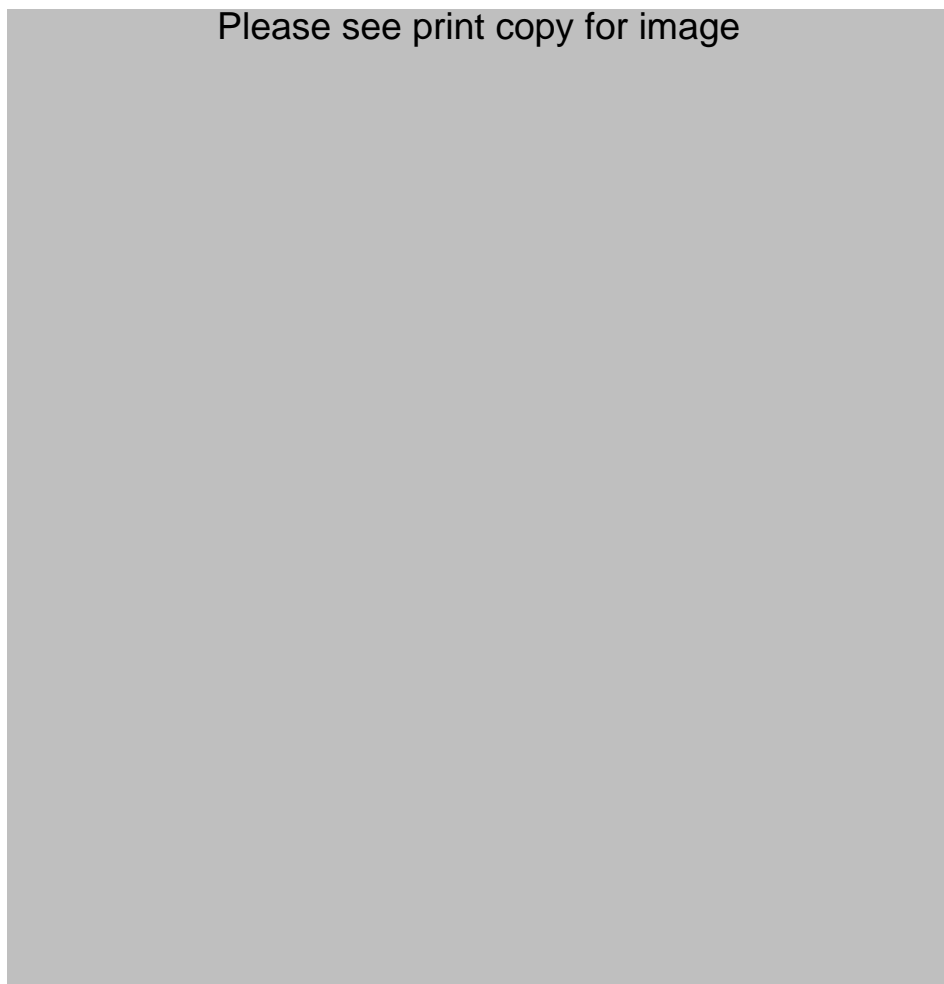


Figure 9. Competing Claims in the South China Sea¹⁸

¹⁸ GlobalSecurity.Org website. Online at: <http://www.globalsecurity.org/military/world/war/spratly-conflict.htm>. Date accessed: 27 April 2009.

The South China Sea Islands is an archipelago of over 250 islands, atolls, cays, shoals, reefs, and sandbars, most of which have no native inhabitants.¹⁹ The islands of the South China Sea can be further subdivided into four sub-archipelagos: (1) The Spratly Islands; (2) the Macclesfield Bank;²⁰ (3) the Paracel Islands;²¹ and (4) the Pratas Islands.²² The majority of the disputed islands are located in the Paracel and Spratly Island chains.²³ The Philippines claims several islands in the South China Sea which it calls the Kalayaan Island Group (KIG).²⁴ The contest over territorial sovereignty over the KIG is part of, and inextricably linked to, the bigger dispute over the South China

¹⁹ The number of features varies. As Schofield and Storey correctly notes, “While some commentators have offered figures as high as 500, the number is more commonly put at 150-180.” Clive Schofield and Ian Storey, *The South China Sea Dispute: Increasing Stakes and Rising Tensions* (2009) at 11.

²⁰ Macclesfield Bank (which the Chinese call as *Zhongsha Qundao* or literally Central Sand Islands) is an elongated atoll of underwater reefs and shoals in South China Sea and part of the disputed South China Sea Islands. It is claimed by the Republic of China, the People’s Republic of China, and Vietnam. It is located east-south-east of the Paracel Islands, distantly southwest of the Pratas Islands and north of the Spratly Islands. There are no military stations here. It is a rich fishing ground and difficult to navigate due to the shallow submerged reefs. See, “South China Sea Islands”, online: Wikipedia <http://en.wikipedia.org/wiki/South_China_Sea_Islands>. Also see parallel site with identical information “South China Sea Islands.” Online: http://www.asinah.net/articles/content/s/so/south_china_sea_islands.html. [Hereinafter South China Sea Islands]

²¹ The Paracel Islands (which the Chinese call the *Xisha Islands* and the Vietnamese call *Hoàng Sa*) are a group of small islands and reefs in the South China Sea and part of the South China Sea Islands, about one-third of the way from central Vietnam to the northern Philippines. South China Sea Islands, *ibid*.

The Paracel Islands are surrounded by productive fishing grounds and by potential oil and gas reserves. In 1932, French Indochina annexed the islands and set up a weather station on Pattle Island; maintenance was continued by its successor, Vietnam. The People’s Republic of China has occupied the Paracel Islands since 1974, when its troops seized a South Vietnamese garrison occupying the western islands. The islands are claimed by the Taiwan and Vietnam. South China Sea Islands, *ibid*.

The islands have no indigenous inhabitants. The PRC announced plans in 1997 to open the islands for tourism. The small Chinese port facilities on Woody Island and Duncan Island are being expanded. There is one airport. South China Sea Islands, *ibid*.

²² The Pratas Islands (which the Chinese call the *Dongsha Islands* or “East Sand Islands”) are located in the middle of the South China Sea. It has historically been uninhabited, and nations like China and Japan claimed it to be their overseas territory. After World War II, the islands and the sea area around it were mandated by United Nations. Today they are administered by the Taiwan and even assigns the place a postal code (817). South China Sea Islands, *ibid*.

²³ The Spratlys links the Pacific Ocean and the Indian Ocean. All its islands are coral, low and small, about five to six metres above water, spread over 160,000 to 180,000 square kilometers of sea zone (or 12 times that of the Paracels), with a total land area of ten square kilometers only. The Paracels also has a total land area of ten square kilometers spread over a sea zone of 15,000 to 16,000 square kilometers. South China Sea Islands, *ibid*.

²⁴ Juan Arreglado, *Kalayaan: Historical, Legal, Political Background* (1982); Ulises Granados, ‘Ocean Frontier Expansion and the Kalayaan Islands Group Claim: Philippines’ Postwar Pragmatism in the South China Sea’ (2009) 9 *International Relations of the Asia-Pacific* 267.

Sea (Please refer to Figure 9, above). The issue of territorial sovereignty over the KIG is complex for the several reasons: first, because of the number of parties directly and indirectly involved;²⁵ second, because of its geo-political²⁶ and strategic importance;²⁷ and third, because of its economic resource potential.²⁸

In the view of the Philippines, the KIG is distinct from and not part of the Spratly Island Group or the Paracels, which the Philippines does not claim.²⁹ The area claimed by the

²⁵ There are six nations which assert overlapping and conflicting claims over the islands: China, Taiwan, Vietnam, the Philippines, Malaysia, and Brunei, which all anchor their claims on both customary and conventional principles of international law, and in particular on provisions of the LOSC. There are some analysts who include Indonesia as a possible seventh claimant country. Indonesia does not claim any of the islands in the South China Sea. However, the Chinese and Taiwanese claims in the South China Sea extend into Indonesia's EEZ and continental shelf, including Indonesia's Natuna gas field. *See especially*, Hanns J. Buchholz, *Law of the Sea Zones in the Pacific Ocean* (1987) at 30-56.

²⁶ Liselotte Odgaard, 'The South China Sea: ASEAN's Security Concerns About China' (2003) 34 *Security Dialogue* 11; Page E. Small, *China's Naval Modernization and Implications for the South China Sea* (2002)

²⁷ *See* Liselotte Odgaard, 'Deterrence and Co-operation in the South China Sea' (2001) 23 *Contemporary Southeast Asia* 292. The article argues that the South China Sea dispute promotes the emergence of a regional order combining deterrence with consultation and limited cooperation. For an examination of China's policy towards the South China Sea after the post-Cold War era, *see* Shee Poon Kim, 'The South China Sea in China's Strategic Thinking' (1998) 19 *Contemporary Southeast Asia* 369.

²⁸ Robert Catley and Makmur Keliat, *Spratlys: The Dispute in the South China Sea* (1997) at 44-59. Stephen W. Ritterbush, 'Marine Resources and the Potential for Conflict in the South China Sea' (1978) 2 *Fletcher Forum* 64; Susumu Kume, *Tuna Resources in the South China Sea* (1973); Mark J. Valencia, Jon M. Van Dyke and Noel A. Ludwig, *Sharing the Resources of the South China Sea* (1997); Porfirio M. Alino et al, 'The Fisheries Potential of the Kalayaan Island Group, South China Sea' in Brian Morton (ed), *The Marine Biology of the South China Sea III* (1998) 219.

²⁹ Ministry of Defense, *The Kalayaan Islands*, Series One Monograph No. 4 (1982) at 13, which succinctly summarises the Philippine position:

It is a generally accepted practice in oceanography to refer to a chain of islands through the name of the biggest island in the group or through the use of a collective name. Note that Spratly (island) has an area of only 13 hectares compared to the 22 hectare area of the Pagasa Island. Distance-wise, Spratly Island is some 210nm off Pagasa Islands. This further stresses the argument that they are not part of the same island chain. The Paracels being much further (34.5nm northwest of Pagasa Island) is definitely a different group of islands."

As observed by Granados, "the official Philippine position maintains that the Spratly Islands are a different geographical entity. That is, as it is the opinion of several Philippine and non-Philippine authors, the current claim is not over the Spratly Islands, but rather over another insular group, namely the KIG." *See* Ulises Granados, 'Ocean Frontier Expansion and the Kalayaan Islands Group Claim: Philippines' Postwar Pragmatism in the South China Sea' (2009) 9 *International Relations of the Asia-Pacific* 267 at 271. *See also*: Gerardo Martin C. Valero, *Spratly Archipelago: Is the Question of Sovereignty Still Relevant?* (1993) at 65-66.

Of course, many scholars characterise the KIG as part of the Spratlys. *See* for example, Christopher C. Joyner, 'The Spratly Islands Dispute: Rethinking the Interplay of Law, Diplomacy, and Geo-politics in the South China Sea' (1998) 13 *International Journal of Marine and Coastal Law* 193 at 201-202; Zou

Philippines in the South China Sea is outside the Philippine Treaty Limits.³⁰ The basis of the Philippine claim to the KIG does not rest on the Treaty of Paris but on discovery and effective occupation.³¹ The constitutional definition of the national territory includes the KIG in the phrase “and all other territories over which the Philippines has sovereignty or jurisdiction.”³² It is also outside of the old baselines enclosing the Philippine archipelago.³³ It is, however, within the 200nm Philippine EEZ, generated from the mainland.³⁴ The islands are considered part of the Republic of the Philippines by virtue of Presidential Decree No. 1596, enacted on 11 June 1978 and registered with the UN Secretariat on 14 May 1980. Kalayaan is a municipality of the Province of

Keyuan, ‘The Chinese Traditional Maritime Boundary Line in the South China Sea and its Legal Consequences for the Resolution of the Dispute over the Spratly Islands’ (1999) 14 *International Journal of Marine and Coastal Law* 27 at 30; Xavier Furtado, ‘International Law and the Dispute over the Spratly Islands: Whither UNCLOS?’ (1999) 21 *Contemporary Southeast Asia* 386 at 392. *See also*, Greg Austin, ‘Unwanted Entanglement: The Philippines’ Spratly Policy as a Case Study in Conflict Enhancement?’ (2003) 34(1) *Security Dialogue* 41; Chen Jie, ‘China’s Spratly Policy: With Special Reference to the Philippines and Malaysia’ (1994) 34(10) *Asian Survey* 893; Romeo R. Suarez, *The Spratlys: Its Geopolitical Implications to Philippine Defense and Security* (Master in National Security Administration Thesis, 1991).

³⁰ Section 1, Presidential Decree No. 1596, 11 June 1978.

³¹ Haydee B. Yorac, ‘The Philippine Claim to the Spratly Islands Group’ (1983) 58 *Philippine Law Journal* 42 at 44. The Philippines contends that the KIG was *res nullius* as there was no effective sovereignty over the islands until the 1930s when France and then Japan acquired the islands. When Japan renounced their sovereignty over the islands in the San Francisco Peace Treaty in 1951, there was a relinquishment of the right to the islands without any special beneficiary. Therefore, the Philippines argues that the islands became *res nullius* and available for annexation. This is what Tomas Cloma did in 1956, upon which the Philippines traces its argument.

³² Article I, 1987 Philippine Constitution. In the 1973 Philippine Constitution, “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 or legal title...” which includes the KIG. *Ibid.*

³³ Republic Act No. 3046, An Act to Define the Baselines of the Territorial Sea of the Philippines, 17 June 1961, as amended by Republic Act No. 5446, An Act to Amend Section One of the Republic Act Numbered Thirty Hundred and Forty-Six, Entitled “An Act to Define the Baselines of the Territorial Sea of the Philippines” 18 September 1968.

³⁴ Keyuan Zou, *Law of the Sea in East Asia: Issues and Prospects* (2005) at 66. As pointed out by Schofield and Storey, “Another key issue that affects the South China Sea disputes is that of the status of islands and their capacity to generate extensive claims to maritime space.” Schofield and Storey, *supra* note 19, at 17-18. This would depend on which features are “islands” or “rocks” as defined in Article 121, LOSC. This is a topic beyond the scope of this thesis.

Palawan, in the southern part of the Philippines. It is composed of seven islands, all currently occupied by the Philippines.³⁵

The Philippine claim over the KIG includes not only the islands but also the waters and the seabed as well as the airspace within the area defined by Presidential Decree No. 1596. Zou Keyuan believes that “[I]ts validity is questionable in international law, just like the alleged Chinese claim to the entire South China Sea based upon the U-shaped boundary line shown on the Chinese map.”³⁶

The 2009 Archipelagic Baselines Law of the Philippines, Republic Act No. 9522, does not include the KIG within the baselines system enclosing the entire archipelago but affirms the country’s exercise of sovereignty over the KIG and claims it as a “regime of islands” under Article 121 of the LOSC.³⁷ This has triggered diplomatic protests from China and Vietnam.³⁸ The maritime dispute over the islands of the South China Sea is a perennial source of uncertainty in the bilateral relations of China especially with the member States of the Association of Southeast Asian Nations (ASEAN).³⁹ While China

³⁵ 1) Pag-asu-32.2 hectares; 2) Likas-18.6 hectares; 3) Parola-12.7 hectares; 4) Lawak-7.9 hectares; 5) Kota-6.45 hectares; 6) Patag-0.52 hectares; and 7) Panota-0.44 hectares.

³⁶ Zou Keyuan, ‘Scarborough Reef: A New Flashpoint in Sino-Philippine Relations?’ (1999) 7(2) *Boundary & Security Bulletin* 71 at 75.

³⁷ Section 2 (a), Republic Act No. 9522, “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, 10 March 2009. This legislation is attached to this thesis as APPENDIX 11.

³⁸ Embassy of the People’s Republic of China in Brunei, “China Lodges Stern Protest over Baselines Bill of the Philippines,” 18 February 2009. Online at: <http://www.fmprc.gov.cn/ce/cebn/eng/sgxx/t537841.htm>. Date accessed: 27 April 2009. Ministry of Foreign Affairs, Vietnam. “Vietnam’s response to Philippine President’s signing of the Baseline Act,” 27 April 2009. Online at: http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns090313185641. Date accessed: 27 April 2009.

³⁹ See for example, Leszek Buszynski, ‘ASEAN, the Declaration on Conduct, and the South China Sea’ (2003) 25 *Contemporary Southeast Asia* 343; J. N. Mak, *Sovereignty in ASEAN and the Problem of Maritime Cooperation in the South China Sea*, S. Rajaratnam School of International Studies Working Paper (2008); Liselotte Odgaard, ‘The South China Sea: ASEAN’s Security Concerns About China’ (2003) 34 *Security Dialogue* 11; Joshua P. Rowan, ‘The U.S.-Japan Security Alliance, ASEAN and the South China Sea Dispute’ (2005) 45(3) *Asian Survey* 414.

may not have the necessary power projection to impose naval hegemony in the South China Sea, the Philippines regards the problem of the South China Sea as a direct danger to its national security.⁴⁰

The Philippine policy towards the issue of South China Sea adheres to the 2002 ASEAN-China Declaration of Conduct in the South China Sea, whereby the parties agreed to settle disputes in a peaceful and friendly manner through consultation and refraining from the use of force or threat of force to resolve the dispute.⁴¹

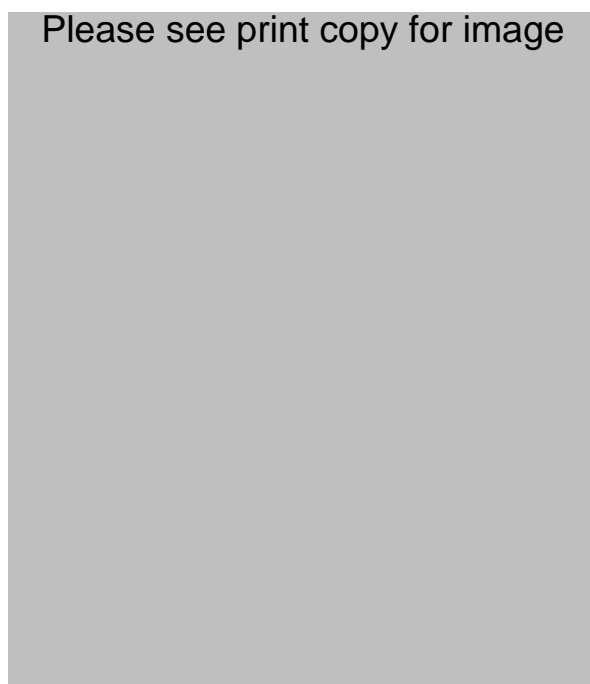


Figure 10. Map Showing Joint Marine Seismic Undertaking (JMSU) Area⁴²

⁴⁰ Ralf Emmers, *Maritime Disputes in the South China Sea: Strategic and Diplomatic Status Quo*, Institute of Defence and Strategic Studies (2005) at 2. *See especially*, Rommel C. Banlaoi, *Security Aspects of Philippines-China Relations: Bilateral Issues and Concerns in the Age of Global Terrorism* (2007).

⁴¹ The Declaration on the Conduct of Parties in the South China Sea, 4 November 2002, Phnom Penh, Kingdom of Cambodia. *See also*, Terms of Reference of the ASEAN-China Joint Working Group on the Implementation of the Declaration on the Conduct of Parties in the South China Sea. Online at: <http://www.aseansec.org/16885.htm>. Date accessed: 27 April 2009.

⁴² Petroleum Exploration & Production, PNOC Exploration Corporation website. Online at: <http://www.pnoc-ec.com.ph/ourbusiness.html>. Date accessed: 27 April 2009.

On 14 March 2005, China, the Philippines, and Vietnam signed the Joint Marine Seismic Undertaking (JMSU) in the South China Sea, in order to identify oil and natural gas deposits for possible future development (*See Figure 10, above*).⁴³ The agreement has been criticised for being “largely a sellout on the part of the Philippines.”⁴⁴ According to this view, it appears that the Philippines “has made breathtaking concessions in agreeing to the area for study, including parts of its own continental shelf not even claimed by China and Vietnam.”⁴⁵ The area of exploration thrusts into the KIG and abuts Malampaya, a Philippine producing gas field; and one-sixth of the entire area, closest to the Philippine coastline, is actually outside the claims by China and Vietnam.⁴⁶ University of the Philippines law professor Harry Roque believes that the JMSU “could weaken the country’s claim” to the KIG and since the JMSU area is within the Philippines EEZ, such an agreement violates the Philippine Constitution and other domestic laws which reserve the exploitation of such areas to Filipinos.⁴⁷ However, Philippine Department of Justice Secretary Raul Gonzalez, in a memorandum to Philippine President Gloria Macapagal-Arroyo, stated that the “seismic work or pre-exploration activities,” which the tripartite agreement allowed, “is not prohibited in the Constitution.” He also pointed out the agreement “does not delve into sovereignty issues.”⁴⁸ The JMSU lapsed in June 2008 and was not extended by the parties; and since

⁴³ The JMSU was signed by the Philippine National Oil Co. (PNOC), China National Offshore Oil Corp. (CNOOC) and Vietnam Oil and Gas Corp. (PetroVietnam).

⁴⁴ Barry Wain, “Manila’s Bungle in The South China Sea,” *Far Eastern Economic Review*, January/February 2008. Online at: http://www.viet-studies.info/kinhte/Manila_South_China_Sea.htm. Date accessed: 27 April 2009.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ Aurea Calica, “UP Lawyer: Spratlys Deal Weakened RP Claim,” *Philippine Star*, 10 March 2008

⁴⁸ Miriam Grace Go, “Spratlys: Within Exclusive Zone/Palace: Nothing Wrong with Deal,” *abs-cbnNEWS.com/Newsbreak*, 9 March 2008.

the JMSU ended, no other cooperative undertakings among the disputants have been launched.⁴⁹

7.2.1.2. Scarborough Shoal

The Scarborough Shoal⁵⁰ is a group of islands and reefs in an atoll located between the Macclesfield Bank and the Philippine island of Luzon in the South China Sea. (See Figure 11, below).⁵¹ The shoal is a protrusion in a 3,500m deep abyssal plain, which forms a triangular shaped chain of reefs and islands 55 km around with an area of 150 square km. Several of the islands are one-half to three metres high and many of the reefs are just below water at high tide. The Shoal has a lagoon with an area of 130 km² and depth of about 15 metres. Near the mouth of this lagoon are the ruins of an iron tower, 8.3m high which was constructed in 1965 by the Philippine Navy who first raised a flag there. The nearest landmass is Palauig, Zambales, on Luzon Island in the Philippines, 137 miles (220 km) away. It is about 123 miles (198 km) west of Subic Bay.⁵²

⁴⁹ See Schofield and Storey, *supra* note 19, at 24-25, 28-29, who called the JMSU “seductive in concept” but fundamentally flawed in execution.”

⁵⁰ It is otherwise called Panatag Shoal in the Philippines and Huangyan Dao by the Chinese.

⁵¹ Zou Keyuan, ‘Scarborough Reef: A New Flashpoint in Sino-Philippine Relations?’ (1999) 7(2) *Boundary & Security Bulletin* 71.

⁵² Daojiong Zha and Mark J. Valencia, ‘Mischief Reef: Geopolitics and Implications’ (2001) 31 *Journal of Contemporary Asia* 86 at 91. Scarborough Shoal. Online at: http://en.wikipedia.org/wiki/Scarborough_Shoal. Date accessed: 27 April 2009.

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Figure 11. Map Showing Scarborough Shoal⁵³

The Scarborough Shoal is claimed by three countries: the Philippines, China, and Taiwan.⁵⁴ The area is permanently occupied by the Philippines. Scarborough Shoal is outside the Philippine Treaty Limits⁵⁵ but is within the Philippine 200nm EEZ.⁵⁶ Scarborough Shoal has been used as a target range by the US military and every time they went there, they had secured permission from the Philippine military authorities. There is a possibility of oil and gas in the seabed in the vicinity of Scarborough Shoal

⁵³ Zou Keyuan, 'Scarborough Reef: A New Flashpoint in Sino-Philippine Relations?' (1999) 7(2) *Boundary & Security Bulletin* 71 at 72.

⁵⁴ Ian James Storey, 'Creeping Assertiveness: China, the Philippines and the South China Sea Dispute' (1999) 21 *Contemporary Southeast Asia* 95 at 98.

⁵⁵ Victor Prescott and Clive Schofield, 'Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean' (2001) 3(1) *Maritime Briefing* at 28.

⁵⁶ Yann Huei Song, 'The Overall Situation in the South China Sea in the New Millenium: Before and After the September 11 Terrorist Attacks' (2003) 34 *Ocean Development and International Law* 229 at 239. Of course, the statement ignores the possibility that the Scarborough Shoal can generate maritime zones, in particular an EEZ, of its own.

area as well as prospects for minerals such as manganese, cobalt, nickel and chromite. The Scarborough Shoal is also an important fishing ground and international navigational waterway.⁵⁷

The Philippine sovereignty claim over the Scarborough Shoal is based on its proximity as the area is entirely within the Philippine EEZ and on the principle of *terra nullius*, as the area has not been previously claimed by a sovereign State.⁵⁸ The reliance of the Philippines on proximity or adjacency as the basis of title may not stand in international law, as such are not grounds for claiming ownership of territory in international law.⁵⁹ In the Las Palmas case, for example, the Philippines (represented by the United States) lost the island of Las Palmas which is close to Davao and well within the territorial limits of the Treaty of Paris lines.⁶⁰ Further, the LOSC does not establish title to territories under international law.⁶¹ The regime of the EEZ only gives sovereign rights over the exploration and exploitation of minerals and other resources in that zone, but does not override sovereignty over a territory.⁶² The sovereign occupation and other acts of *effectivités* by the Philippines are sounder basis for the claim.⁶³

⁵⁷ *Ibid.* Zou Keyuan, 'Scarborough Reef: A New Flashpoint in Sino-Philippine Relations?' (1999) 7(2) *Boundary & Security Bulletin* 71 at 72.

⁵⁸ Section 2(b) of the new Philippine archipelagic baselines law, claims the Scarborough Shoal as part of the territory of the Philippines under a "regime of islands." Republic Act No. 9522, "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, 10 March 2009. This legislation is attached to this thesis as APPENDIX 11.

⁵⁹ Surya P. Sharma, *Territorial Acquisition, Disputes and International Law* (1997) at 51-60.

⁶⁰ Island of Palmas Case, II RIAA (1928), 829.

⁶¹ R. Haller-Trost, 'Historical Legal Claims: A Study of Disputed Sovereignty over Pulau Batu Puteh (Pedra Branca)' (1993) 1 *Maritime Briefing* at 3.

⁶² Part V, LOSC. For literature on the legal regime of the EEZ, *please see*: David Joseph Attard, *The Exclusive Economic Zone in International Law* (1987); Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (1989); Francisco Orrego Vicuna, *The Exclusive Economic Zone: Regime and Legal Nature under International Law* (1989).

⁶³ John McHugo, 'How to Prove Title to Territory: A Brief, Practical Introduction to the Law and Evidence' (1998) 2(4) *Boundary & Territory Briefing* at 10-15.

In view of the fact that Scarborough Shoal is within the Philippine EEZ, the country can strengthen its sovereign claim of ownership with the construction of an artificial island in the area.⁶⁴ The LOSC grants the State who owns the EEZ the exclusive right to establish and maintain artificial islands within the zone.⁶⁵ In addition, the Philippine claim over Scarborough Shoal can be strengthened by doing the following: full implementation of the Scarborough Shoal Lighthouse Rehabilitation Project; establishment of a marine scientific research facility in the area; development of the area as a tourist destination and a sporting venue; and the inclusion of Scarborough Shoal within the country's baselines. The 2009 Archipelagic Baselines Law, Republic Act No. 9522, does not include Scarborough Shoal as a basepoint for the system of baselines enclosing the archipelago. Instead, Philippine sovereignty and jurisdiction is affirmed and the Shoal is claimed under the "regime of islands"⁶⁶ that is, maritime claims are measured from the normal baselines of these features. However, it remains unclear which features the Philippines claims as islands and the maritime zones they will potentially generate under Article 121 of the LOSC.

⁶⁴ However, while such is certainly an act of administration, it can be argued that the critical date for this dispute has passed. The construction of artificial islands is actually mandated by Presidential Decree No. 1599, which in Section 2, claims for the Philippines "[E]xclusive rights and jurisdiction with respect to the establishment and utilization of artificial islands, off-shore terminals, installations and structures, ..." Presidential Decree No. 1599, Establishing an Exclusive Economic Zone and for other Purposes, 11 June 1978.

⁶⁵ Articles 56 and 60, LOSC. Robin R. Churchill and Vaughan Lowe, *The Law of the Sea* (1999) at 153.

⁶⁶ Section 2(b), Republic Act No. 9522, "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, 10 March 2009.

7.2.1.3. Sabah

The Philippines has a pending sovereign claim of title over a portion of north Borneo, which is now the Malaysian state of Sabah.⁶⁷ The Philippines traces its title to Sabah to the title of the Sultanate of Sulu, which was once recognized by the family of nations as possessing international legal personality.⁶⁸ Sabah was originally a part of the Sultanate of Brunei in the early 16th century. It was ceded to the Sultanate of Sulu in 1658 as a prize for helping the Sultan of Brunei against his enemies. On 22 January 1878, in exchange for the provision of arms to the Sultan to resist the Spanish colonizers and an annual payment of 5,000 Mexican dollars, the Sultan of Sulu executed a lease agreement to Baron Von Overbeck, an Austrian partner representing The British North Borneo Company and his British partner Alfred Dent.⁶⁹ This lease continued until the independence and formation of the Malaysian federation in 1963 together with Singapore, Sarawak and the states of Malaya.⁷⁰ Until 2004, the Malaysian Embassy in the Philippines had been paying cession/rental money amounting to US\$1,500 per year (about 6,300 Malaysian Ringgits) to the heirs of the Sultanate of Sulu.⁷¹

On 12 September 1962, the territory of North Borneo, and the full sovereignty, title and dominion over the territory were ceded by the then reigning Sultan of Sulu, HM Sultan

⁶⁷ Martin Meadows, 'The Philippine Claim to North Borneo' (1962) 77 *Political Science Quarterly* 321.

⁶⁸ Geoffrey Marston, 'International Law and the Sabah Dispute' (1967) 3 *Australian Yearbook of International Law* 103 at 104.

⁶⁹ George McT. Kahin, 'The State of North Borneo 1881-1946' (1947) 7(1) *The Far Eastern Quarterly* 43

⁷⁰ On 16 September 1963, North Borneo together with Malaya, Sarawak and Singapore formed the Federation of Malaysia and from then on, it became known as Sabah and declared independent from British sovereignty. See, Kenneth G. Tregonning, *A History of Modern Sabah (North Borneo 1881-1963)* (1958); Leigh R. Wright, *The Origins of British Borneo* (1970).

⁷¹ Sultanate of Sulu & North Borneo/Sabah, "Sabah is an Issue between Lessor Landlord (The Sultan of Sulu) and Illegal Tenant (Malaysia). Online at: <http://www.royalsulu.com/issues.html>. Date accessed: 28 April 2009.

Muhammad Esmail E. Kiram I, to the Philippines.⁷² This cession effectively gave the Philippine government the full authority to pursue their claim in international courts. In 1963, after the inclusion of Sabah in the federation, the Philippines severed diplomatic relations with Malaysia.⁷³ Diplomatic relations soon resumed after succeeding Philippine administrations have placed the claim in the back burner in the interest of pursuing cordial economic and security relations with Malaysia. The Philippines has proposed that the issue be submitted to the International Court of Justice for resolution, suggestions which have been consistently rejected by Malaysia.⁷⁴

Sabah is clearly outside the Treaty of Paris Limits. It is also outside of the baselines that enclose the Philippine archipelago.⁷⁵ However, Republic Act No. 5446, which defined the baselines of the Philippines, provides that “[T]he 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.”⁷⁶ In principle, the constitutional definition of the national territory still includes Sabah under the phrase “and all other territories over which the

⁷² Geoffrey Marston, ‘International Law and the Sabah Dispute’ (1967) 3 *Australian Yearbook of International Law* 103 at 105.

⁷³ Paridah Abd. Samad and Darusalam Abu Bakar, ‘Malaysia-Philippines Relations: The Issue of Sabah’ (1992) 32(6) *Asian Survey* 554 at 557.

⁷⁴ S. Jayakumar, ‘The Philippine Claim to Sabah and International Law’ (1968) 10 *Malaya Law Review* 306 at 306. In 2001, the Philippines filed an application for permission to intervene in the Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment of 17 December 2002 which had the “unintended” consequence of bringing the issue of the Philippine claim over Sabah before the ICJ. See, Abdul Kadir Mohamad, *Pacific Settlement of Disputes Based on International Law: Malaysia’s Experiences at the International Court of Justice* (2008) at 23, 28 -33.

⁷⁵ Republic Act No. 9522, 10 March 2009.

⁷⁶ Section 2, Republic Act No. 5446.

Philippines has sovereignty or jurisdiction.”⁷⁷ However, the previous reference to Sabah in the 1973 Philippine Constitution, under the phrase “all the other territories belonging to the Philippines by historic or legal title” has been dropped.⁷⁸ There have been numerous pronouncements at the executive level that the Philippines intends to drop its claim over Sabah,⁷⁹ but there has been no clear policy document or domestic legislation formalising this position. As such, the issue has remained an occasional source of diplomatic irritant and at times overshadowed attempts for deeper cooperation between the two countries.⁸⁰

On 6 May 2009, Malaysia and Vietnam filed a joint submission where the area claimed as part of continental shelf beyond 200nm clearly projected from Sabah, thereby effectively declaring Sabah to be a Malaysian territory. The Philippines submitted a protest on 4 August 2009 to the Secretary-General of the United Nations, the relevant portion read:

The Joint Submission for the Extended Continental Shelf by Malaysia and Vietnam lays claim on areas that are disputed not only because they overlap with that of the Philippines, but also because of the controversy arising from the territorial claims on some of the islands in the area including North Borneo.⁸¹

⁷⁷ Article I, 1987 Philippine Constitution. See deliberations on the national territory in Raphael Perpetuo M. Lotilla (ed), *The Philippine National Territory: A Collection of Related Documents* (1995) at 565-570.

⁷⁸ In the 1973 Philippine Constitution, “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 or legal title...” includes Sabah. Paridah Abd. Samad and Darusalam Abu Bakar, ‘Malaysia-Philippines Relations: The Issue of Sabah’ (1992) 32 *Asian Survey* 554 at 558.

⁷⁹ Jeremia C. Flores, Clarenca S. Reyes and Rodolfo C. Sabio, ‘The Legal Implications of the Unilateral Dropping of the Sabah Claim’ (1982) 57 *Philippine Law Journal* 78; Paridah Abd. Samad and Darusalam Abu Bakar, ‘Malaysia-Philippines Relations: The Issue of Sabah’ (1992) 32 *Asian Survey* 554 at 558.

⁸⁰ Amitav Acharya, *A Survey of Military Cooperation among ASEAN States: Bilateralism or Alliance?*, Centre for International and Strategic Studies Occasional Paper Number 14 (1990) at 1, 8, 26.

⁸¹ The Philippines, Letter to the Secretary-General of the United Nations, No.000819, 4 August 2009. Online at: http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm. Date accessed: 10 January 2010.

In its reply to the Philippine protest, Malaysia stated its position that it “has never recognized the Philippines’ claim to the Malaysian state of Sabah, formerly known as North Borneo.”⁸² However, in view of the protest filed by the Philippines against the joint submission of Malaysia and Vietnam, the Commission will be constrained from considering the application unless and until the parties have discussed and resolved their disputes.

7.2.1.4. Miangas

The island of Palmas, also referred to as Miangas, is an island located between Mindanao, the Philippines and the northernmost Indonesian island of Nanusa (*See* Figure 12, below). It was the subject of the famous Island of Palmas Case,⁸³ a territorial dispute between the Netherlands and the United States which was heard at the Permanent Court of Arbitration and decided by the Swiss arbitrator Max Huber in 1928.⁸⁴ Huber ruled in favour of Netherlands and held that Netherlands had actual title over the island of Palmas despite the fact that it is located within the Treaty of Paris limits.⁸⁵ The Indonesian archipelagic straight baseline system includes Miangas as a basepoint.⁸⁶ Since this basepoint is located within the Philippine Treaty Limits, the

⁸² Malaysia, Letter to the Secretary-General of the United Nations, HA 41/09, 21 August 21, 2009. Online at: http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm. Date accessed: 10 January 2010.

⁸³ Island of Palmas Case, (Scott, Hague Court Reports 2d 83 (1932), (Perm. Ct. Arb. 1928), 2 U.N. Rep. Intl. Arb. Awards 829). Max Huber, ‘The Island of Palmas (Miangas) Arbitral Award’ (1928) 22 *American Journal of International Law* 867.

⁸⁴ Daniel-Erasmus Khan, ‘Max Huber as Arbitrator: The Palmas (Miangas) Case and Other Arbitrations’ (2007) 18(1) *European Journal of International Law* 145.

⁸⁵ Article III, Treaty of Paris. Victor Prescott and Clive Schofield, ‘Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean’ (2001) 3(1) *Maritime Briefing* at 44.

⁸⁶ The island of Miangas was originally included in the 1960 Indonesian baselines law [Law No. 4/Prp/1960] and in all the subsequent revisions [Law No. 6/1996, Government Regulation No. 31/1998] including the latest 2002 Government Regulation on archipelagic baseline No. 38/2002.

Indonesian archipelagic baselines regime actually protrudes into the Treaty Limits.⁸⁷ Further, this effectively cuts off 15,000 square miles of Philippine territorial waters located within the Treaty Limits.⁸⁸ Accordingly, approximately 15,000 square miles of what the Philippines considers as territorial waters, by virtue of their being inside the Treaty Limits, are considered by Indonesia to be part of its archipelagic waters since they are inside Indonesia's archipelagic baselines.



Figure 12. Miangas inside Treaty Limits⁸⁹

The maritime boundary between the Philippines and Indonesia in this area remain unsettled primarily because of the issue over Miangas and its use as a basepoint in the archipelagic baselines of Indonesia. Jayewardene argues that since the Treaty Limits

⁸⁷ Hiran W. Jayewardene, *The Regime of Islands in International Law*, Publications on Ocean Development (1990) at 416.

⁸⁸ H. Harry L. Roque, Jr., 'Palmas Arbitration Revisited' (2003) 77 *Philippine Law Journal* 437 at 439.

⁸⁹ Jayewardene, *supra* note 87, at 416.

predate the Indonesian archipelagic regime, “the Philippines may seek exclusion of the overlapping Indonesian archipelagic waters on the basis of prior or historic title.”⁹⁰ Roque argues that utilising the island as a basepoint for the drawing of Indonesia’s archipelagic baselines is not justified and recommends that the island be enclaved instead.⁹¹ This recommendation is supported by *Jayewardene*, in which case Miangas will only have a belt of territorial waters and as a basepoint only include areas outside of the Philippine Treaty Limits.⁹²

The title of Indonesia over Miangas, which it traces from the *Palmas* arbitration, has been challenged recently by arguments repudiating the arbitral award.⁹³ The main proponent of this argument is Philippine law professor Harry Roque. Roque argues that “[T]he *Palmas* arbitration is, on the basis of criticisms made by the most qualified publicists, at best defective, and at worse, erroneous.”⁹⁴ He is of the opinion that the Philippines cannot be bound by the arbitral award since it is not a party to the arbitration; nor is the same binding on the Philippines as successor State of the United States for two reasons: first, “at the time of the arbitration, the United States had no interest over the island of *Palmas*, nor to any of the islands comprising the Philippine archipelago;” and second, “there is nothing, to date, to show that the Philippines has agreed to succeed the United States in the arbitral award.”⁹⁵

⁹⁰ *Ibid.*

⁹¹ Roque, *supra* note 88, at 462.

⁹² *Jayewardene*, *supra* note 87, at 416-417.

⁹³ Roque, *supra* note 88, at 437.

⁹⁴ *Ibid.*, at 461.

⁹⁵ *Ibid.* 461 – 462.

This position is strongly disputed by Indonesia which argues that both countries already had maritime border agreements, and that the Philippines had given its official recognition of Indonesian sovereignty over the islands in several bilateral meetings.⁹⁶ A recent tourist map which included Miangas (and also Marore) has fuelled nationalistic sentiments in Indonesia and has even prompted the Indonesian Navy to release a statement that it is ready to deploy warships to secure the waters near Miangas and Marore islands.⁹⁷ Indonesian Foreign Affairs Minister Hassan Wirajuda in a statement that Indonesia is in a strong legal and political position as the owner of Miangas Island and cites a Protocol of an Extradition Agreement between Indonesia and the Philippines which confirms the Indonesia's ownership and the Philippines' recognition of Indonesia's title over Miangas.⁹⁸

7.2.1.5. Other Islands

The Philippines, which has been a crown colony of Spain for over three centuries, was a vast overseas territory which covered the entirety of the Philippine archipelago as has come to be known today and stretched as far as Guam and Saipan in the Marianas and the Caroline Islands.⁹⁹ The Spanish colonial administration, from which the current Philippine government traces its title, also governed various Pacific island colonies from Manila. These include the present-day Caroline Islands, Guam, Northern Marianas Islands, Palau and parts of Micronesia. After the Spanish-American War, the title of

⁹⁶ Miangas and Marore Islands, Indonesia Forum. Online at: <http://www.topix.com/forum/world/indonesia/T1DNIH7LMP5T7HVKC4>, Date accessed: 10 April 2009.

⁹⁷ *Id.*

⁹⁸ Minister Allays Fears Over Miangas Ownership, Indonesian Embassy, 16 February 2009. Online at: http://www.kbrisingapura.com/news_1602_2009_1.php?lang=eng. Date accessed: 10 April 2009.

⁹⁹ Manuel L. Quezon III, "A Primer on Philippine Territorial Claims," Online at: <http://www.arabnews.com/?page=7§ion=0&article=107756&d=12&m=3&y=2008>. Arab News, 12 March 2008. Date accessed: 28 April 2009.

Spain over the Philippines was transferred to the United States by virtue of the Treaty of Paris. However, the Treaty of Paris in 1898 ceded to the United States the Philippines and the Marianas, while the United States allowed Spain to retain the Carolines, which were in turn, sold by Spain to Germany in 1899.¹⁰⁰ The other island colonies were given separate administrations under American oversight after Spain transferred power to the United States in accordance with the Treaty of Paris. In addition, other possessions governed by Spanish Manila in Borneo, Halmahera, Taiwan, Pulau Ternate and Pulau Tidore, were transferred to non-American entities after the Spanish-American War. However, while the transfer of power after Spanish colonial rule was made clear through treaties, the sovereignty over other territories were not as clear. Many of those disputes continue today.¹⁰¹

7.2.2. Overlapping Maritime Jurisdictional Zones

The Philippines has overlapping maritime zones with the following countries: Japan, Taiwan, China, Vietnam, Malaysia, Indonesia, and Palau. Where there are overlapping maritime claims a potential maritime boundary also exists. The Philippines has no existing maritime boundary delimitation agreement with any of its neighbouring States. The Philippines has commenced bilateral negotiations to settle maritime boundaries in a number of cases, but to date has not achieved a successful conclusion. Moreover, the boundary disputes have not been subject to third party intervention. The greater number of these disputes are overlapping EEZ claims. (*See* Figure 13, below). The Philippines being entirely surrounded with water shares maritime boundaries with several of its

¹⁰⁰ *Ibid.*

¹⁰¹ International Disputes, Foreign relations of the Philippines. Online at: http://en.wikipedia.org/wiki/Foreign_relations_of_the_Philippines#Relations_with_specific_countries_and_regions. Date accessed: 27 April 2009.

neighbouring States. All the States have ratified the LOSC¹⁰² and have proclaimed maritime zones which overlap with each other and need to be delimited. This section will briefly discuss these maritime jurisdictional overlaps. The relevance of the Treaty Limits position in each of these overlapping maritime jurisdictional zones will depend on two factors. First, whether the overlapping zone is within or outside the Treaty Limits; and second, whether there is sufficient State practice or recognition to support the conclusion that the other party would respect the Treaty Limits or accord it the status of a relevant circumstance which should be taken in the final delimitation of the overlapping maritime zone.

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Figure 13. Map Showing Overlapping Maritime Jurisdictional Zones¹⁰³

¹⁰² With the exception of Taiwan, which is not considered a State within the UN system. See United Nations Division for Ocean Affairs and the Law of the Sea (DOALOS), "Table of Claims to Maritime Jurisdiction (as at 28 May 2008). Online at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf. Date accessed: 28 April 2009. The relevant States referred to here and their respective dates of ratification of or accession to the LOSC: Philippines (08/05/1984), China (07/06/1996), Indonesia (03/02/1986), Japan (20/06/1996), Malaysia (14/10/1996), and Palau (30/09/1996).

¹⁰³ Philippine National Mapping and Resource Information Authority (NAMRIA)

7.2.2.1. China-Philippines



Figure 14. Overlapping Maritime Zones with China, Japan and Taiwan¹⁰⁴

The Philippines and China share overlapping EEZ having both proclaimed EEZs which extend 200nm from the baselines as shown in Figure 14 above. The distance between the two countries means that there is no need to delimit a common territorial sea boundary as no such overlap exists.¹⁰⁵ Prescott and Schofield identified three factors that might encourage deviations from the line of equidistance in this instance. First, is the disputed ownership of both China and the Philippines over Scarborough Shoal, which is referred to by the Chinese as Huangyan Dao.¹⁰⁶ Second, China might raise the issue of equity since drawing the full extent of the equidistant claims of China, Japan and the Philippines will result in China being unable to claim a full 200nm EEZ.¹⁰⁷ This will occur because of the effect of extending equidistance lines from Japan's islands,

¹⁰⁴ Victor Prescott and Clive Schofield, 'Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean' (2001) 3(1) *Maritime Briefing* at 29.

¹⁰⁵ This ignores, for the purpose of discussion, the Philippine Treaty Limits.

¹⁰⁶ Victor Prescott and Clive Schofield, 'Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean' (2001) 3(1) *Maritime Briefing* at 28 – 30. Zou Keyuan, 'Scarborough Reef: A New Flashpoint in Sino-Philippine Relations?' (1999) 7(2) *Boundary & Security Bulletin* 71.

¹⁰⁷ *Ibid.*, at 30.

Sakishima Gunto, and the Philippines' most northerly islands lie seawards of Lan Yu, China's most easterly islands.¹⁰⁸ The third factor is the Philippine Treaty Limits, which, if given full effect as constituting the historic territorial seas of the Philippines will deprive China of maritime space measuring 14,000 nm² (48,000 km²) in the northwest corner of the Treaty Limits. Prescott and Schofield opine that this is a concession which China will most likely not accede "[I]n view of the weakness of the historical waters concept."¹⁰⁹

7.2.2.2. Indonesia-Philippines

The Philippines and Indonesia, both claim archipelagic State status, have overlapping EEZs in the Celebes Sea.¹¹⁰ Both States claim EEZs which extend 200nm from the baselines. However, while Indonesia claims a 12nm territorial sea, the Philippines claims all the waters inside the Treaty Limits as its territorial waters. If the Philippines insists on using the Treaty Limits territorial sea claim, then a territorial sea boundary between Indonesia and the Philippines needs to be delimited.¹¹¹ The equidistance line seems to be an equitable solution to delimit the maritime boundary for both countries, as depicted in Figure 15 below. However, the presence of the Indonesian island of Miangas, which is within the Philippine Treaty Limits as discussed above in Section 7.2.1.4., is also disputed by the Philippines, making negotiations on territorial and maritime boundary disputes difficult for the two countries.¹¹²

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.* at 31.

¹¹⁰ *Ibid.*, at 42.

¹¹¹ *Ibid.*, at 43.

¹¹² *Ibid.*, at 44.

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Figure 15. Overlapping Maritime Zones with Indonesia and Palau¹¹³

7.2.2.3. Japan-Philippines

The Philippines and Japan both claim EEZs which extend 200nm from the baselines and have overlapping EEZs. This overlap is in the most southerly Japanese islands of Sakishima Gunto and the most northerly islands of the Philippines.¹¹⁴ Please refer to Figure 14, above. The use of the equidistance line in this case will not result in an unequitable maritime boundary for both parties. However, the eastern terminus of this equidistance line would protrude inside the Philippine Treaty Limits. This would effectively cut off 630nm² of sea and seabed lying within the Treaty Limits to Japan.¹¹⁵ If the Treaty Limits were set aside, it will be favourable for the Philippines to use its

¹¹³ Victor Prescott and Clive Schofield, 'Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean' (2001) 3(1) *Maritime Briefing* at 43.

¹¹⁴ *Ibid.*, at 46.

¹¹⁵ *Ibid.*

archipelagic baselines as the basis for delimitation with Japan, instead of the normal baselines.¹¹⁶

7.2.2.4. Malaysia-Philippines

The Philippines and Malaysia have overlapping EEZ claims in three areas: in the South China Sea, the Sulu Sea, and the Celebes Sea, as depicted in the map in Figure 16 below.¹¹⁷ Both States claim EEZs which extend 200nm from their baselines. However, while Malaysia claims a territorial sea of 12nm, the Philippines claims as its historic territorial seas all the waters within its Treaty Limits. The Philippines and Malaysia may potentially have overlapping territorial seas if the Treaty Limits were not accepted as a maritime boundary. (see below, Figure 16).

There are two complicating factors why a simple equidistance line may not be adhered to by the two States in delimiting their maritime boundaries. First, is the longstanding claim of the Philippines to portions of North Borneo, which is now the Malaysian state of Sabah, as discussed in Section 7.2.1.3 of this Chapter.¹¹⁸ Second, is the status of the Treaty Limits as a maritime boundary and specifically the position of the Philippines

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.* at 53.

¹¹⁸ The discussion in Section 7.2.1.3. covered the implications of the joint submission on 6 May 2009 made by Malaysia and Vietnam to the United Nations Commission on the Limits of the Continental Shelf which claimed as part of continental shelf beyond 200nm clearly projected from Sabah. See Literature on the issue of the Philippine claim to Sabah: Mohd. bin Dato' Hj. Othman Ariff, *The Philippines' Claim to Sabah: Its Historical, Legal, and Political Implications* (1970); Jeremia C. Flores, Clarenca S. Reyes and Rodolfo C. Sabio, 'The Legal Implications of the Unilateral Dropping of the Sabah Claim' (1982) 57 *Philippine Law Journal* 78; S. Jayakumar, 'The Philippine Claim to Sabah and International Law' (1968) 10 *Malaya Law Review* 306; Michael Leifer, *The Philippine Claim to Sabah*, Hull Monographs on Southeast Asia No. 1 (1968); Geoffrey Marston, 'International Law and the Sabah Dispute' (1967) 3 *Australian Yearbook of International Law* 103; Lela Garner Noble, *Philippine Policy Toward Sabah: A Claim to Independence* (1977); Paridah Abd. Samad and Darusalam Abu Bakar, 'Malaysia-Philippines Relations: The Issue of Sabah' (1992) 32 *Asian Survey* 554.

that such constitutes the limits of its historic territorial seas.¹¹⁹ There is evidence showing that Malaysia has accepted the status of the Treaty Limits as an international boundary including official Malaysian maps.¹²⁰ In this instance, assuming the Philippines abandons its claim to Sabah, both countries can agree that the Treaty Limits constitutes their maritime boundary through parts of the South China Sea and the Sulu Sea.¹²¹ Prescott and Schofield note that this “possibility exists even though the documents defining the treaty limits explicitly state that they deal only with the allocation of islands”¹²²

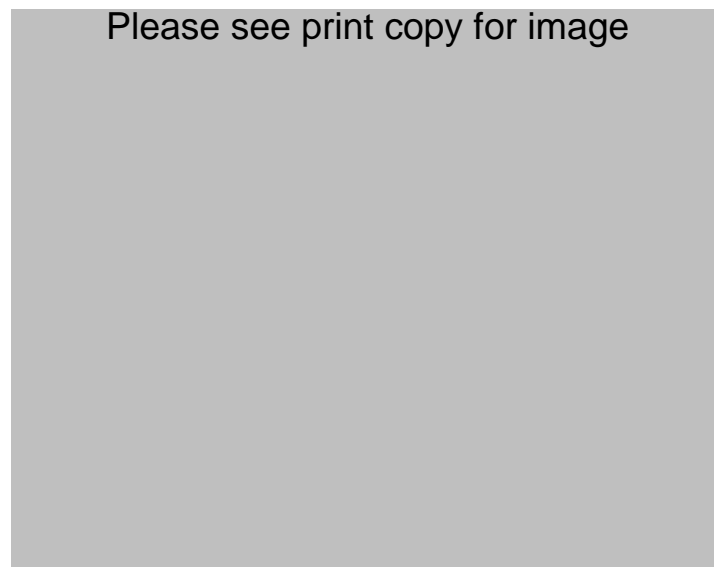


Figure 16. Overlapping Maritime Zones with Malaysia¹²³

¹¹⁹ Victor Prescott and Clive Schofield, 'Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean' (2001) 3(1) *Maritime Briefing* at 54.

¹²⁰ Director of National Mapping Malaysia (1979) *Map showing territorial waters and continental shelf boundaries of Malaysia*, Sheet 2, Mercator projection, scale 1:1.5 million at 5°30'N, as cited in Victor Prescott and Clive Schofield, 'Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean' (2001) 3(1) *Maritime Briefing* at 54.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ Victor Prescott and Clive Schofield, 'Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean' (2001) 3(1) *Maritime Briefing* at 54.

7.2.2.5. Palau-Philippines

The Republic of Palau is a small island State in the Pacific Ocean which lies less than 400nm southeast of the Philippine island of Mindanao. Palau is an archipelagic State although it has not proclaimed archipelagic baselines. Both Palau and the Philippines claim 200nm EEZ, which overlap. Please refer to Figure 15, above. In this instance, given that Palau is a group of small, isolated islands, the Philippines might argue that giving full effect to these features may result in the equidistance line being inequitable. Prescott and Schofield note that there is “a significant disparity in the length of the coastline involved, the sizes of the States and the populations involved” between the two States.¹²⁴ On its part, Palau can argue that its island features should be given full entitlement given its limited marine resources compared to the Philippines.

On 8 May 2009, the Republic of Palau made its submission to the United Nations Commission on the Limits of the Continental Shelf (UNCLCS) with in respect of three areas: the Southeast area; the West area; and the North area.¹²⁵ On 4 August 2009, the Government of the Philippines submitted a letter to the Secretary-General of the United Nations, informing UNCLCS of its protest for Palau’s submission, which states:

...the Philippines and Palau have overlapping maritime jurisdictions in terms of their 200 M Exclusive Economic Zones (EEZ) and 200 M Continental Shelves, which, as of this date have yet to be resolved by the two countries. The dispute brought about by the overlap in the juridical continental shelves of the two coastal states necessarily carry on to their extended continental shelves beyond 200 M distance...¹²⁶

¹²⁴ *Ibid.* at 58.

¹²⁵ Republic of Palau submission to United Nations Commission on the Limits of the Continental Shelf, 8 May 2010. http://www.un.org/Depts/los/clcs_new/submissions_files/submission_plw_41_2009.htm. Date accessed: 10 January 2010.

¹²⁶ Philippine Communication submitted to the United Nations Secretary-General with regard to the submission made by Palau to the Commission on the Limits of the Continental Shelf, 4 August 2009. Online at: http://www.un.org/Depts/los/clcs_new/submissions_files/plw41_09/clcs_41_2009_los_phl.pdf. Date accessed: 10 January 2010.

In view of this, the Philippines requested the UNCLCS to refrain from considering the application of Palau until the parties have discussed and resolved their disputes over their overlapping maritime jurisdiction.¹²⁷

7.3. Foreign Policy

The 1987 Philippine Constitution clearly states that an independent Philippine foreign policy should be pursued with paramount consideration given to national sovereignty, territorial integrity, national interest and right to self determination.¹²⁸ Philippine diplomacy is based on three pillars: first, the preservation and enhancement of national security; second, the promotion and attainment of economic security through the mobilization of external resources for economic advancement and social development; and third, the protection of the rights and promotion of the welfare and interests of Filipinos overseas.¹²⁹ These pillars are interlinked, reinforce each other and give substantive content to Philippine foreign relations. The current administration identified eight realities that characterise the international and regional environment to which the Philippines must respond in order to achieve the goals of Philippine foreign policy.¹³⁰

The fifth reality reads as follows:

¹²⁷ *Ibid.* at 2.

¹²⁸ Section 7, Article II, 1987 Philippine Constitution.

¹²⁹ Alberto G. Romulo, 'Philippine Foreign Policy Realities,' Speech, 17 September 2004, Philippine Plaza. Online at: <http://www.dfa.gov.ph/archive/speech/romulo/realities.htm>. Date accessed: 21 April 2009.

¹³⁰ Philippine foreign relations is guided by the following eight realities: First reality: China, Japan and the United States have a determining influence in the security situation and economic evolution of East Asia. Second reality: more and more Philippine foreign policy decisions have to be made in the context of the ASEAN. Third reality: the International Islamic Community will become more and more important to the Philippines. Fourth reality: the coming years will see the redefinition of the role of multilateral and inter-regional organizations in promoting common interest. Fifth reality: the defense of the nation's sovereignty, the protection of its environment, and natural resources can be carried out only to the extent that we get others to respect our rights over our maritime territory. Sixth reality: the country's economic growth will continue to require direct foreign investment and relations with the EU will remain important;

The defense of the nation's sovereignty, the protection of its environment, and natural resources can be carried out only to the extent that we get others to respect our rights over our maritime territory.¹³¹

This is reflected in the words of former Philippine Ambassador Rodolfo C. Severino who opined that the foremost threat to the country is “the uncertain extent of the Philippines’ territorial sea and exclusive economic zone.”¹³² He expounds that this threat includes disputes over conflicting territorial and/or maritime claims with China, Vietnam, Malaysia and Brunei over the South China Sea as well as overlapping EEZ with Japan in the north and Indonesia in the south; territorial and maritime issues with China in the north and Malaysia in the south; and overlapping EEZ with Palau in the east.¹³³ Indeed, as expressed by Alberto Encomienda, the Treaty of Paris “box” has been a continuing burden in the conduct of foreign policy and has directly affected Philippine maritime security.¹³⁴

Filipino nationalism is an important element of Philippine foreign policy.¹³⁵ This is not surprising given the country’s long history of foreign subjugation. The Philippine Treaty Limits position figured very prominently in the negotiations during the Law of

Seventh reality: a country like the Philippines can benefit most quickly from international tourism. Eighth reality: Filipinos overseas will continue to play a critical role in the country’s economic and social stability. *Ibid.*

¹³¹ National Economic and Development Authority, *Medium-Term Philippine Development Plan 2004-2010* (2004) at 269.

¹³² Rodolfo C. Severino, ‘The Philippines’ Foreign Relations: Threats and Opportunities’ (2003) *Viewpoint* 1 at 1.

¹³³ *Ibid.*, at 2.

¹³⁴ Alberto A. Encomienda, ‘Maritime Security and Philippine Foreign Policy: An Overview and National Ocean Diplomacy Agenda’ (Paper presented at the National Conference-Workshop on Maritime Security: Problems and Approaches, Manila, Philippines, 2003) at 41.

¹³⁵ In numerous moments in its history, Philippine nationalism, embedded in highly emotive and emotional language, can outweigh economic, diplomatic or even strategic arguments. *For example*, the removal of the US military bases in 1991, the execution of Filipina domestic worker Flor Contemplacion in Singapore for murder in 1995, the Mischief Reef incident with China in 1999. *See for example*, Renato Cruz De Castro, ‘The Revitalized Philippine-US Security Relations: The Triumph of Bilateralism Over Multilateralism in Philippine Foreign Policy?’ in Amitav Acharya and See Seng Tan (eds), *Asia-Pacific Security Cooperation: National Interests and Regional Order* (2004) 157-171.

the Sea Conferences. The Philippines articulated its position within the context of the archipelago concept which it sought to include in the LOSC.¹³⁶ This has been previously discussed in Chapter 2.¹³⁷

In an increasingly borderless world where the movement of goods, ideas, trade and people seemingly ignore traditional territorial State boundaries, the salience of the Treaty Limits position has been greatly diminished. Furthermore, on the face of more pressing national, regional, and international concerns such as the global financial crisis, counterinsurgency and terrorism, climate change and sea level rise; as well as the growing emphasis on multilateral cooperation and consensus-building in international relations, the advantages of adhering to the Treaty Limits position have become seriously challenging. However, it is still evident that contentious issues over conflicting sovereignty and jurisdictional claims are here to remain given factors such as increasing demand for scarce energy resources, apprehension over dwindling oil supply, concerns over sea lane security and freedom of navigation over the world's waters, the military activities of the disputing claimant States, and growing nationalism.

¹³⁶ The LOSC adopted the archipelago principle in Articles 46–54 on “Archipelagic States.” There is an abundance of materials that discuss the contribution of the Philippines in the recognition of the archipelago principle in the LOSC. See Jorge R. Coquia, ‘Analysis of the Archipelagic Doctrine in the New Convention on the Law of the Sea’ (1982) 8 *Philippine Yearbook of International Law* 24; Jorge R. Coquia, ‘Development of the Archipelagic Doctrine as a Recognized Principle of International Law’ (1983) 58 *Philippine Law Journal* 13; Agim Demirali, ‘The Third United Nations Conference on the Law of the Sea and an Archipelagic Regime’ (1975-1976) 13 *San Diego Law Review* 742; Barry Hart Dubner, *The Law of Territorial Waters of Mid-Ocean Archipelagos and Archipelagic States* (1976); Barry Hart Dubner, ‘A Proposal for Accommodating the Interests of Archipelagic and Maritime States’ (1975-1976) 8 *New York University Journal of International Law and Politics* 39; Vicente B. Foz, ‘Philippines Espouses Archipelagic Principle’ (1973) 2 *Philippine Law Gazette* 3; Charlotte Ku, ‘The Archipelagic States Concept and Regional Stability in Southeast Asia’ (1991) 23 *Case Western Reserve Journal of International Law* 463; Barbara Kwiatkowska, ‘An Evaluation of State Legislation on Archipelagic Waters’ (1990) 6 *World Bulletin* 22; Mohammed Munavvar, *Ocean States: Archipelagic Regimes in the Law of the Sea* (1995); Farhad Talaie, ‘Recognition of a Special Legal Regime for Mid-Ocean Archipelagos and its Implications for the Pacific Rim Region’ (1998) 10 *Pacifica Review* 203.

¹³⁷ Chapter 2. Historical Background of the Philippine Treaty Limits and Territorial Water Claim.

7.3.1. Maritime Disputes in the Asia-Pacific Region

The States in the Asia-Pacific Region have a distinctively strong maritime orientation. This is to be expected in a region encompassing a vast maritime area, with significant maritime frontiers and sensitive maritime interests. At the forefront of regional security concerns are maritime disputes.¹³⁸ The predominant majority of these points of conflict involve disputes over islands, continental shelf and, of late, extended continental shelf claims, EEZ boundaries and other offshore resource issues.¹³⁹ Territorial disputes have the potential of developing into crises that threaten regional stability and freedom of navigation.¹⁴⁰ Most of these territorial disputes are maritime in nature and involve conflicting claims to either islands or littoral waters, contribute to interstate tension in Southeast Asia.¹⁴¹

The potential for militarised conflict over a number of territorial as well inter-State disputes in the ASEAN has been mitigated, if not always avoided, by the development of the key ASEAN norms of non-intervention in the internal affairs of another State and the respect for the independence and sovereignty of each member State.¹⁴² These norms are embodied in ASEAN's 1976 Treaty of Amity and Cooperation (TAC) in Southeast

¹³⁸ W. Lawrence S. Prabhakar, 'The Regional Dimension of Territorial and Maritime Disputes in Southeast Asia: Actors, Disagreements and Dynamics' in Kwa Chong Guan and John K. Skogan (eds), *Maritime Security in Southeast Asia* (2007) 34.

¹³⁹ Ramses Amer, 'The Association of South-East Asian Nations and the Management of Territorial Disputes' (2002) 9 *Boundary & Security Bulletin* 81.

¹⁴⁰ Ian James Storey, 'Creeping Assertiveness: China, the Philippines and the South China Sea Dispute' (1999) 21 *Contemporary Southeast Asia* 95.

¹⁴¹ M. Taylor Fravel, 'Regime Insecurity and International Cooperation: Explaining China's Compromises in Territorial Disputes' (2005) 30(2) *International Security* 46; M. Taylor Fravel, 'Power Shifts and Escalation: Explaining China's Use of Force in Territorial Disputes' (2008) 32(3) *International Security* 44.

¹⁴² Timo Kivimäki, 'The Long Peace of ASEAN' (2001) 28(1) *Journal of Peace Research* 5 at 10-11.

Asia.¹⁴³ The TAC, some scholars have argued, is the central pillar of ASEAN and the source of the norms of non-confrontation and consensus building which is the key in maintaining peace, stability and order in the region.¹⁴⁴ The enduring presence of maritime tension over disputed territories between and among the various ASEAN States may be unavoidable altogether but the commitment of the member States to building regional cooperation and the institutionalisation of multilateral fora have prevented the escalation or eruption of military confrontation and war.¹⁴⁵

7.3.2. Philippine Foreign Strategic Partnerships

The Philippines is an active participant in global affairs and maintains peaceful diplomatic relations with all sovereign States. The Philippines is a charter member of the United Nations and participates in all its functional groups;¹⁴⁶ a founding member of

¹⁴³ ASEAN Treaty of Amity and Cooperation in Southeast Asia, Indonesia, 24 February 1976. Aside from the ASEAN States, the following States outside Southeast Asia have acceded to this Treaty: Papua New Guinea (5 July 1989); China (8 October 2003); India (8 October 2003); Japan (2 July 2004); Pakistan (2 July 2004); Republic of Korea (27 November 2004); and The Russian Federation (29 November 2004).

¹⁴⁴ Nikolas Busse, 'Constructivism and Southeast Asian Security' (1999) 12(1) *The Pacific Review* 39; Helen E. S. Nesadurai, 'ASEAN and Regional Governance after the Cold War: from Regional Order to Regional Community?' (2009) 22 *The Pacific Review* 91 at 97-98; Amitav Acharya, 'Ideas, Identity and Institution-building: From the "ASEAN Way" to the "Asia-PacificWay"?' (1997) 10(3) *The Pacific Review* 319; Shaun Narine, 'The English School and ASEAN' (2006) 19(2) *The Pacific Review* 199 at 203-204. But see J. N. Mak, *Sovereignty in ASEAN and the Problem of Maritime Cooperation in the South China Sea*, S. Rajaratnam School of International Studies Working Paper (2008) at 2, who argues that the "The ASEAN norms do not seem to have contributed as much to a working regional order at sea."

¹⁴⁵ An example of which is the ASEAN Regional Forum (ARF), the principal forum for security dialogue in Asia which draws together 27 countries which have a bearing on the security of the Asia Pacific region. See also, Declaration of ASEAN Concord II (Bali Concord II), Bali, Indonesia, 7 October 2003; Declaration on the Conduct of Parties in the South China Sea, Phnom Penh, Cambodia, 4 November 2002; ASEAN Declaration on The South China Sea, Manila, Philippines, 22 July 1992, *inter alia*. See also excellent discussion in Vivian Louis Forbes, *Conflict and Cooperation in Managing Maritime Space in Semi-Enclosed Seas* (2001).

¹⁴⁶ This includes participation in the UN bodies such as Food and Agriculture Organization (FAO); the World Health Organization (WHO); the United Nations Educational, Scientific and Cultural Organization (UNESCO); and the Economic and Social Commission for Asia and the Pacific (ESCAP). It was formerly a member of the now-defunct Southeast Asia Treaty Organisation (SEATO).

the Association of Southeast Asian Nations (ASEAN),¹⁴⁷ and a member of the Non-Aligned Movement (NAM).¹⁴⁸ The Philippines has been an elected member of the Security Council¹⁴⁹ and currently sits as permanent member to several other UN bodies.¹⁵⁰ The Philippines was also a founding member of the Asian Development Bank (ADB), which is headquartered in Manila; and a member of the International Monetary Fund (IMF), the World Bank, and the General Agreement on Tariffs and Trade (GATT).¹⁵¹

A defining and enduring characteristic of Philippine foreign relations is the close economic, political and military ties it has with closest foreign ally: the United States.¹⁵² This relationship is founded on the Philippines being formerly part of United States territory and commonwealth before achieving independence.¹⁵³ Until November 1992, pursuant to the 1947 Military Bases Agreement, the United States maintained two major

¹⁴⁷ The Association of Southeast Asian Nations (ASEAN) a geo-political and economic organization of 10 countries located in Southeast Asia, which was formed on 8 August 1967 by Indonesia, Malaysia, the Philippines, Singapore and Thailand. Since then, membership has expanded to include Brunei, Burma (Myanmar), Cambodia, Laos, and Vietnam.

¹⁴⁸ The Non-Aligned Movement (NAM) is an international organization of states considering themselves not formally aligned with or against any major power bloc. It was founded in April 1955; as of 2007, it has 118 members.

¹⁴⁹ On 1 January 2004, the Philippines assumed one of the elected seats in the United Nations Security Council for the term 2004-2005.

¹⁵⁰ UN Economic and Social Council (until 31 December 2009); UN Human Rights Council (until 31 December 2009); UN Committee on the Protection of All Migrant Workers and Members of Their Families (31 December 2010); and permanent member of the following UN bodies: Committee on Information; Committee on the Peaceful Uses of Outer Space; Special Committee on Peacekeeping Operations; Executive Committee on the High Commissioner's Programme.

¹⁵¹ Economically, the Philippines is also participant in the Asia-Pacific Economic Cooperation, the Colombo Plan, Group of 24, G-20, G-77, Next Eleven and the World Trade Organization (WTO).

¹⁵² *Please see*, Renato Cruz De Castro, 'Twenty-First Century Philippine-American Security Relations: Managing an Alliance in the War of the Third Kind' (2006) 2 *Asian Security* 102, examines the changing nature of twenty-first century Philippine-US security relations.

¹⁵³ Rommel C. Banlaoi, 'The Role of Philippine-American Relations in the Global Campaign against Terrorism: Implications for Regional Security' (2002) 24(2) *Contemporary Southeast Asia* 294 at 295-297.

bases in the Philippines, Clark Air Force Base, and Subic Naval Station.¹⁵⁴ The Philippines being a staunch ally of the United States, has supported many points of United States foreign policy, including the Iraq War and the War on Terror.¹⁵⁵ Former United States President George W. Bush praised the Philippines as a bastion of democracy in the East and called the Philippines America's oldest ally in Asia.¹⁵⁶ The United States maintains alliance relationship with the Philippines and one of the largest recipients of United States foreign military assistance.¹⁵⁷

The Republic of the Philippines and the United States still adhere to the Mutual Defense Treaty they signed and ratified on 30 August 1951 in Washington.¹⁵⁸ The overall accord contained eight articles and dictated that both nations would support each other if either the Philippines or the United States were to be attacked by an external party.¹⁵⁹ For purposes of the Treaty "an armed attack on either of the Parties is deemed to include an

¹⁵⁴ The Philippine Senate rejected the bases treaty in September 1991. The Philippine Government notified the United States that it has one year from 6 December 1991 to complete withdrawal. The last U.S. forces departed on 24 November 1992. The Philippine Government has since converted the former military bases for civilian commercial use.

¹⁵⁵ See Paolo Pasicolan, 'Strengthening the U.S.-Philippine Alliance for Fighting Terrorism,' Executive Memorandum No. 815, 13 May 2002. Online: <http://www.heritage.org/research/asiaandthepacific/em815.cfm>. Date accessed: 26 November 2009, who observes that: "The war on terrorism has given the United States and the Philippines a chance to revive their dormant alliance. The Philippines is leading efforts to combat terrorism in Southeast Asia."

¹⁵⁶ Speech of (then) United States President George W. Bush to the Philippine Congress, 18 October 2003. *But see*, William T. Tow and Amitav Acharya, *Obstinate or Obsolete? The US Alliance Structure in the Asia-Pacific*, Department of International Relations Working Papers 2007/4 (2007) at 15, who notes that: "Since the end of the Cold War, Singapore has arguably surpassed Thailand and the Philippines—formal US treaty allies—in importance to the US as a regional security partner."

¹⁵⁷ Renato Reyes, "Sovereignty Made Cheap: RP One of Biggest Recipients of US Military Aid," 8 January 2007. Online at: <http://natoreyes.wordpress.com>. Date accessed: 27 April 2009. The Philippines and the United States supported each other in wars such as: the Spanish-American War, World War I, World War II, Hukbalahap Rebellion, the Korean War, Communist Insurgency in the Philippines, the Vietnam War, the Gulf War, War in Kosovo, War on Terror, insurgency operations in the Philippines, the 2003 Invasion of Iraq.

¹⁵⁸ Mutual Defense Treaty between the Republic of the Philippines and the United States of America, signed at Washington August 30, 1951, entered into force August 27, 1952, 3 UST 3947; Treaties and Other International Acts Series (TIAS) 2529; 177 UNTS 133.

¹⁵⁹ Article IV, Mutual Defense Treaty between the Republic of the Philippines and the United States of America.

armed attack on the metropolitan territory of either of the Parties, or on the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels or aircraft in the Pacific.”¹⁶⁰ This can arguably include the island territories claimed by the Philippines in the South China Sea.¹⁶¹ The question is when and how the United States should assist the Philippines in case of an armed attack on its territory, including its island territories.¹⁶² The United States has indicated that the Mutual Defense Treaty “does not automatically cover the Spratlys since they are disputed territory which were not even claimed by Manila until after the Treaty was signed.”¹⁶³ The United States has reminded the Philippines that it will provide military assistance in the Spratlys for “peace and stability in the region” and not because of any mutual defense treaty with the Philippines but to protect United States interest.¹⁶⁴ Also, the Treaty advocates the peaceful resolution of international disputes and enjoins the parties to refrain from the threat or use of force inconsistent with the purpose of the United Nations.¹⁶⁵

Other than the United States, the Philippines maintains close bilateral relations with other States such as Australia, which has become the second largest provider of defense

¹⁶⁰ Article V, Mutual Defense Treaty between the Republic of the Philippines and the United States of America.

¹⁶¹ Interestingly enough, the United States and the Republic of China also signed a Mutual Defense Treaty in 1954, which was terminated by the United States in 1980. *See* Mutual Defense Treaty between the United States of America and the Republic of China, Signed at Washington 2 December 1954, Entered into Force 3 March 1955 by the exchange of instruments of ratification at Taipei, Terminated by the United States of America 1980. Online at: <http://www.taiwandocuments.org/mutual01.htm>. Date accessed: 27 April 2009.

¹⁶² Ulises Granados, ‘Ocean Frontier Expansion and the Kalayaan Islands Group Claim: Philippines’ Postwar Pragmatism in the South China Sea’ (2009) 9 *International Relations of the Asia-Pacific* 267 at 279.

¹⁶³ Ralph A. Cossa, *Security Implications of Conflict in the South China Sea: Exploring Potential Triggers of Conflict* (1998) at 5.

¹⁶⁴ Rolio Golez, Press Statement, 20 November 1998. Online at: <http://www.geocities.com/pmcmsr/golez.html>. Date accessed: 27 April 2009.

¹⁶⁵ Article 1, Mutual Defense Treaty between the Republic of the Philippines and the United States of America.

training to the Philippines after the United States.¹⁶⁶ In March 2003, the governments of Australia and the Philippines signed a memorandum of understanding (MoU) pertaining to the combating of international terrorism and transnational crime, and another MoU on combating transnational crime (between the Australian Federal Police and the Philippines National Police) in July 2003.¹⁶⁷ The two countries also held counter terrorism consultations in the Philippines in July 2006 and May 2008. In November 2005, the Australian Department of Immigration and Citizenship (DIAC) (formerly the Department of Immigration and Multicultural Affairs (DIMA)) concluded an MoU with the Philippine Government on border control and migration management cooperation.¹⁶⁸ In May 2007 on a visit to Australia by President Arroyo, Australia and the Philippines signed a Status of Forces Agreement.¹⁶⁹

Another country with which the Philippines has strong bilateral relations is China. Despite intermittent strained relations between the Philippines and China due to tensions and territorial disputes in the South China Sea, bilateral relations between the two countries have significantly progressed in recent years.¹⁷⁰ The robust state of

¹⁶⁶ Republic of the Philippines Country Brief-April 2009. Australian Department of Foreign Affairs and Trade. Online at: http://www.dfat.gov.au/geo/philippines/philippines_brief.html. Date accessed: 27 April 2009.

¹⁶⁷ *Ibid.* In July 2003, Australia announced a three-year \$5 million package of counter-terrorism assistance to the Philippines Government. In October 2004, Australia announced a doubling of this assistance to \$10 million over five years. This assistance package provides practical assistance in policing, immigration, port security and cooperation to address regional counter-terrorism issues. The Philippines is also benefiting from elements of the \$92.6 million Regional Counter-Terrorism Package announced in the 2006-2007 Budget.

¹⁶⁸ *Ibid.*

¹⁶⁹ Philippines-Australia the Status of Visiting Forces Agreement (SOVFA), signed in Canberra, May 2007. The agreement still needs the approval of two-thirds of the Philippine Senate's members for the agreement to take effect.

¹⁷⁰ Several major bilateral agreements were signed between the two countries over the years. These include : Joint Trade Agreement (1975); Scientific and Technological Cooperation Agreement (1978); Postal Agreement (1978); Air Services Agreement (1979); Cultural Agreement (1979); Investment Promotion and Protection Agreement (1992); Agreement on Agricultural Cooperation (1999); Tax Agreement (1999); Treaty on Mutual Judicial Assistance on Criminal Matters (2000); Extradition Treaty (2001); Agreement on Mutual Visa Exemption for Holders of Diplomatic and Official/Service Passports

bilateral relations is highlighted by the state visit to China of Philippine President Gloria Macapagal-Arroyo on 1-3 September 2004, and that of Chinese President Hu Jintao to the Philippines on 26-28 April 2005.¹⁷¹ It is clear from the numerous bilateral agreements between the two countries that China is an important trade and economic partner of the Philippines.¹⁷² There are groups in the Philippines which have raised the issue of the legality of these agreements.¹⁷³ The formidable size of China's naval and military forces especially compared to the miniscule capabilities of the Philippine armed and naval forces, not to mention its importance as a global economic superpower, makes it strategic for the Philippines to engage China diplomatically. The standing territorial issues between the two countries remain but the threat or actual use of force is diminished and subsumed under equally important issues such as trade and good neighbourly relations.¹⁷⁴

(2004); and Agreement for Joint Marine Seismic Undertaking in Certain Areas of the South China Sea by and between the Philippine National Oil Company and the China National Offshore Oil Corporation. In May 2000, on the eve of the 25th anniversary of diplomatic relations, foreign ministers of the two countries signed a Joint Statement defining the framework of bilateral relations in the 21st century. Philippine Embassy, Beijing, "Overview of Philippines-China Relations," Philippine Consulate-General Shanghai website. Online at: <http://www.philcongshanghai.org/RP-China.htm>. Date accessed: 27 April 2009.

¹⁷¹ *Ibid.*

¹⁷² Philippine Embassy-Beijing, "Updates on Philippine-China Relations" Online at: <http://www.philembassy-china.org/en/relations/update1.html>. Date accessed: 27 April 2009.

¹⁷³ Arnel D. Mateo, "Primer on RP-China Agreements: Legal Objections and Remedies," Online at: http://www.bilaterals.org/article.php3?id_article=8026. Date accessed: 27 April 2009.

¹⁷⁴ Aileen Baviera, 'Bilateral Confidence Building with China in Relation to the South China Seas Dispute: A Philippine Perspective' (2001) at 6, 19-21.

7.4. Conclusion

The Philippine Treaty Limits position is a major obstacle why the Philippines has not yet delimited its territorial and maritime boundaries in accordance with the maritime zones of jurisdiction provided under the LOSC nor has it implemented the various obligations as a coastal State. This problem has hindered the negotiation of maritime boundaries and resolution of overlapping claims to maritime jurisdiction with the neighbouring States of the Philippines. The uncertainty over the issue of ownership over various territories being claimed by the Philippines has also been a major stumbling block in the delimitation of the territorial and maritime boundaries of the Philippines. In some instances, the tenacious adherence to these claims has made it ignore stark realities such as the right of people to self-determination. The obstinate refusal to let go of these claims, symptomatic of the nation's insistence on the Treaty Limits as the limits of the nation's territory has prevented the country from moving forward. However, adherence to the Treaty Limits position has been greatly diminished brought about by present-day realities which blur traditional territorial State boundaries, and the increasing emphasis on multilateral cooperation and consensus-building in international relations.

Chapter 8

Conclusion

8.1. Introduction

The purpose of this concluding chapter is to identify options and recommendations for the revision of the claims and legislation of the Philippines in respect of its territorial limits and maritime jurisdictional zones such that they are in conformity with international law. This chapter will also provide a synthesis of the legal arguments raised in the previous seven chapters on the validity and legal status of the Philippine Treaty Limits and territorial waters claim in international law and the impacts of the national boundaries on navigational rights and access to resources in Philippine waters, maritime security, maritime boundary delimitation, and foreign policy. This final chapter will be of four parts. In the first part, a synthesis of the conflict between international law and municipal law with respect to the Philippine Treaty Limits and territorial waters claim will be discussed. In the second part, legal and policy reforms needed to harmonise domestic and legislation will be identified. The third part will be an analysis of issues that the Philippines needs to consider with respect to maritime boundary delimitation and dispute settlement. In the last part, and by way of conclusion, final recommendations will be provided.

The issue of the limits of national territory of the Philippines is a politically sensitive process both from a national and international perspective. Domestically, the constitutional definition of the national territory is the paramount obstacle in the

performance of the Philippines of its treaty obligations under the LOSC.¹ This, however, is not the only hurdle. The Philippines is a nation with a strong democratic tradition,² a people which takes empowerment seriously having toppled dictators and removed erring presidents,³ and a judiciary known for its independence.⁴ It will take more than the empty coercive forces of international law⁵ for the Philippines to ‘give up’ claimed maritime space the country has defended to be part of its patrimony.⁶

¹ Article 1, 1987 Philippine Constitution and other laws defining the national territory and the various maritime jurisdictional zones under the LOSC. As discussed in the Chapter 1, from a constitutional perspective, the Philippine Treaty Limits define the boundaries of the country’s national territory. Proceeding from this premise, a re-definition of the national territory would require an amendment of the Constitution.

² Eva-Lotta E. Hedman and John Thayer Sidel, *Philippine Politics and Society in the Twentieth Century: Colonial Legacies, Post-colonial Trajectories* (2000) at 13-35.

³ Eva-Lotta E. Hedman, *In the Name of Civil Society: From Free Election Movements to People Power in the Philippines* (2005); Mary Racelis, ‘New Visions and Strong Actions: Civil Society in the Philippines’ in Marina Ottaway and Thomas Carothers (eds), *Funding Virtue: Civil Society Aid and Democracy Promotion* (2000) 159-186.

⁴ Jan Willem Bakker, *The Philippine Justice System: The Independence and Impartiality of the Judiciary and Human Rights from 1986 till 1997* (1997). See also, C. Neal Tate, ‘The Judicialization of Politics in the Philippines and Southeast Asia’ (1994) 15 *International Political Science Review* 187.

⁵ As correctly pointed out by Blay, “the enforcement of international law is principally non-coercive, and the instances in which coercion has been used are the exceptions rather than the rule.” See Sam Blay, ‘The Nature of International Law’ in Sam Blay, Ryszard Piotrowicz and B. Martin Tsamenyi (eds), *Public International Law: An Australian Perspective* (1997) 1 at 5. The issue of State compliance with international law is a well-researched area of international law and international relations. See, Kal Raustiala and Anne Marie Slaughter, ‘International Law, International Relations and Compliance’ in Walter Carlsnaes, Thomas Risse-Kappen and Beth A. Simmons (eds), *Handbook of International Relations* (2002) 538, which survey recent developments in the study of compliance in both the international relations and international law literature. See also, Asher Alkoby, ‘Theories of Compliance with International Law and Challenge of Cultural Difference’ (2008) 4 *Journal of International Law and International Relations* 151 at 153, who argues that. “Cultural diversity ... is a crucial explanatory factor that is often overlooked in the study of international normative change” and proposes that “theory of state compliance with international norms must therefore consider cultural diversity a crucial factor when attempting to build a coherent compliance model.” See also, Oona A. Hathaway, ‘Between Power and Principle: An Integrated Theory of International Law’ (2005) 72 *University of Chicago Law Review* 469, using an ‘integrated theory of international law’ seeks to explain why States would commit to treaties that potentially constrain their behaviour and how treaties, once accepted, influence or fail to influence State behaviour.

⁶ Merlin M. Magallona, ‘The United Nations Convention on the Law of the Sea and Its Implications on the Territorial Sovereignty of the Philippines’ (1995) 11 *World Bulletin* 50 at 51-52, *et seq.*, Arturo Tolentino, ‘The Philippine Territorial Sea’ (1974) 3 *Philippine Yearbook of International Law* 46 at 51; Estelito P. Mendoza, ‘The Baselines of the Philippine Archipelago’ (1969-1973) 46 *Philippine Law Journal* 628 at 632-633. But see, Jorge R. Coquia, ‘The Philippine Declaration of National Territory Before the UNCLOS’ (2004) 23 *World Bulletin* 1 at 12; Florentino P. Feliciano, ‘Comments on Territorial Waters of Archipelagos’ (1962) 1 *Philippine International Law Journal* 157 at 160-161; Jay L. Batongbacal, ‘The Maritime Territories and Jurisdictions of the Philippines and the United Nations Convention on the Law of the Sea’ (2001) 76 *Philippine Law Journal* 123 at 157; Jose Victor Villarino

From an international perspective, the issue is more straightforward. The international community is not interested in colonial treaties which supposedly defined the territorial and maritime boundaries of the Philippines. The paramount interest of the international community is to safeguard their rights and interests with regard to access to resources, freedom of navigation and other lawful uses of the sea in Philippine waters. The Philippine claims to expansive territorial waters and maritime space claimed as territory necessarily call these rights into question.

In establishing its offshore jurisdictional zones, the Philippines needs to deal with three types of geographical issues.⁷ First, the baselines along the coast from which the breadth of the zones is measured. As discussed in Chapter 1, this author argues that despite the passage of Republic Act No. 9522, the 2009 Archipelagic Baselines Law of the Philippines,⁸ the ambiguity over the status of the waters landward of the baselines persists, i.e., whether the waters enclosed by the archipelagic baselines are archipelagic waters or internal waters under domestic law.⁹ Secondly, the issue with respect to the width of the various zones starting with the breadth of the Philippine territorial sea, which at some expanses not only exceeds the 12nm territorial sea limit under the LOSC

Chan-Gonzaga, 'UNCLOS and the Philippine Territorial Seas: Problems, Perspectives and Options' (1997) 42 *Ateneo Law Journal* 1 at 47- 48.

⁷ Lewis M. Alexander, 'Baseline Delimitations and Maritime Boundaries' (1982-1983) 23 *Virginia Journal of International Law* 503 at 519.

⁸ Republic Act No. 9522, 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, 10 March 2009.

⁹ See, Section 2, Republic Act No. 3046: An Act to Define the Baselines of the Territorial Sea of the Philippines, 17 June 1961, which expressly provides that "All waters within the baselines provided for in section one hereof are considered inland or internal waters of the Philippines." It is uncertain whether this section is impliedly amended, modified or repealed by the operation of Section 8, Republic Act No. 9522, which states that: "The provisions of Republic Act No. 3046, as amended by Republic Act No. 5446, and all other laws, decrees, executive orders, rules and issuances inconsistent with this Act are hereby amended or modified accordingly."

but even the 200nm EEZ.¹⁰ Thirdly, the seaward and lateral limits of the zones which overlap with the maritime zones of neighbouring States and will need to be delimited.¹¹ Ultimately, irrespective of whether the maritime boundaries of the Philippines will be delimited through negotiations between the parties or submitted to third party dispute settlement, such delimitations will be governed by principles and rules of international law.¹²

The issue of the legal status and validity of both the Philippine claim to the Philippine Treaty Limits as defining the metes and bounds of its territory as well as its historic claim to an expansive territorial sea within those limits is primarily an international legal issue. In an attempt to provide an objective and balanced study, the approach taken by this thesis is to first, explain the historical background and legal bases of the Treaty Limits and territorial waters claim, which have been principally addressed in Chapters 2

¹⁰ As discussed in Chapter 1, the case of the Philippines is *sui generis* since the Philippine territorial sea overlaps with those parts of the Philippine EEZ which are located within the Philippine Treaty Limits. As summarised by Kwiatkowska, the Philippine territorial sea “is in some places (mostly in the south) less than 3 miles, and in others it is over 12 miles, while from a point in Western Luzon it extends to 140 miles and from a point in East Luzon as far as 290 miles.” See, Barbara Kwiatkowska, 'The Archipelagic Regime in Practice in the Philippines and Indonesia -- Making or Breaking International Law' (1991) 6 *International Journal of Estuarine and Coastal Law* 1 at 9.

¹¹ As discussed in Section 7.2.2 of Chapter 7, the Philippines has overlapping maritime zones with the following countries: Japan, Taiwan, China, Vietnam, Malaysia, Indonesia, and Palau. The Philippines has no existing maritime boundary delimitation agreement with any of its neighbouring States. While the Philippines has commenced bilateral negotiations to settle maritime boundaries in a number of cases, but to date have not achieved a successful conclusion, neither has the boundary disputes been subject to third party intervention.

¹² Chris Carleton and Clive Schofield, 'Developments in the Technical Determination of Maritime Space: Delimitation, Dispute Resolution, Geographical Information Systems and the Role of the Technical Expert' (2002) 3(4) *Maritime Briefing* 1 at 3. See, Article 38 of the ICJ Statute which provides that in arriving at its decisions the ICJ shall apply international law as summarised in Article 38. See also, Article 279, LOSC in relation to Articles 2(3) and 33(1), UN Charter.

and 3;¹³ and then to secondly to proceed to give an analysis of these arguments against the relevant rules and principles of international law, which was done in Chapter 4.¹⁴

However, as this thesis has demonstrated, the issue of the Philippine Treaty Limits and territorial waters claim is more than a domestic and international legal issue. It also has significant implications in terms of, for example, navigational rights in Philippine waters, which was addressed in Chapter 5; on maritime security and access to marine resources in Philippine waters, which was the focus in Chapter 6, and on the delimitation of Philippine territorial and maritime boundaries and foreign policy, which were dealt with in Chapter 7.

8.2. Conflict between International Law and Municipal Law

There are two central issues with respect to the question of the Philippine Treaty Limits and territorial waters claim: first, the validity of the Philippine claims in international law, both conventional and customary; and second, the implications of the Philippine position to Philippine domestic legislation and policy. Ultimately, although dangerously subversive from a nationalistic point of view, the following questions must be put forth and addressed: first, whether the Treaty Limits conformed with customary international law at the time the Treaty of Paris was signed or with the prevailing State practice at that time; and secondly, whether the Treaty Limits are in direct contravention of the

¹³ Chapter 2. Historical Background of the Philippine Treaty Limits and Territorial Water Claim; Chapter 3. Legal Basis of the Philippine Treaty Limits and Territorial Water Claim.

¹⁴ Chapter 4. The Legal Status of the Philippine Treaty Limits in International Law and Territorial Water Claim in International.

conventional obligations of the Philippines under the LOSC which sets the maximum breadth of the territorial sea at 12nm.¹⁵

In Chapter 3, this thesis discussed the legal bases of the Philippine claim: recognition by treaty, title from cession, devolution of treaty rights, succession to colonial boundaries and historic title. The subsequent chapter, Chapter 4, examined and analysed the international legal status of the Philippine Treaty Limits and territorial waters claim. This was undertaken using a set of five criteria: treaty interpretation, conflict with the LOSC, status in customary international law, the acquiescence and opposition of States to the Philippine position, and lastly, the opinion of publicists. In these two chapters, the critical point made was that the issue can be judiciously argued both ways. A further point raised throughout the thesis is that the formulation of the issue as being principally and strictly legal is narrow and must be discarded. This narrow definition of the problem has obstructed consideration of the issue within the broader context of the other areas and concerns on which the issue of the Philippine Treaty Limits and territorial waters claim can impinge. These issues were extensively covered in the chapters which dealt with the implications on navigation, maritime boundary delimitation, maritime security, foreign policy and access to resources.

The issue of non-compliance with an international norm is not to be taken lightly. Discussing uniformity of legislation within a transnational context is straightforward if the law in question is clearly inconsistent. But how does one proceed after an inconsistency has been detected? What are the means of addressing such an inconsistency within the international legal order and within the domestic legal

¹⁵ Article 3, LOSC. This issue was addressed in Chapter 4 of this thesis, in Section 4.2.2.2.

framework? The Philippine legal framework pertaining to its maritime zones should be put on the reform agenda. The problem has dragged on long enough. The following are some of the steps in the view of the author, that need to be done: first, the Philippines must take the necessary legal, regulatory and administrative reforms to adopt, amend or withdraw existing legal or administrative domestic issuances with a view towards the harmonisation of its domestic legal framework with customary and conventional international law; second, the Philippines should seriously commit a whole-of-government approach towards the proper implementation of the LOSC within its domestic legal system including the designation of archipelagic sea lanes, and the delimitation of its overlapping maritime boundaries with its neighbours, among others. These steps essentially require the vertical harmonisation of laws with the international legal order and a horizontal harmonisation of laws across administrative agencies implementing national policies and legislation.

8.3. Legal and Policy Reform

There is always a fragile balance between obeying international law and maintaining sovereign autonomy. Especially from a political standpoint, the leaders of a country are not always keen to lose face with their fellowmen for acts that may be interpreted domestically as treasonous or *un-nationalistic* even when such policy shifts mean bringing the country's policies into line with international norms. A sound objective is to ensure that Philippine leaders are cognisant of the need to clearly articulate the strategic rationale for the Treaty Limits and the constitutional changes needed to avoid any misperceptions about their intent and purpose both within the nation and in the international community. The Philippines needs to strike the right balance between

excessive timidity and unbridled nationalism in foreign policy. It is important for the Philippines to understand that the Treaty Limits still carry a great deal of colonial historical baggage. The Philippines must be aware of its strategic concerns in the contemporary context.

There is a need not only to clarify the Philippine position, but more importantly, to decide on instituting the necessary reforms to domestic legislation with a genuine motive of harmonising them with the country's international law commitments, and in particular with those laid down in the LOSC. This involves the difficult question of resolving the conflict between the Philippine constitutional provision on the national territory and the LOSC. The issue of whether the Treaty Limits are to be kept or abandoned must be seriously addressed, once and for all.

The first critical step for the Philippine Government, even prior to initiating maritime boundary delimitation negotiations, is a constitutional re-definition of the extent of the Philippine national territory. This is a domestic decision that needs to be made at the executive level and submitted to the Filipino people for approval.¹⁶ The process of amending or revising the Philippine Constitution will not be an easy or politically palatable task, neither will it be inexpensive.¹⁷ The second step is the reform of domestic legislation that define the various maritime zones of jurisdiction under the LOSC. Many of these laws predate the LOSC and were crafted out of a particular need

¹⁶ The 1987 Philippine Constitution provides that "any amendment to, or revision of, this Constitution may be proposed by: (1) The Congress, upon a vote of three-fourths of all its Members; or (2) A constitutional convention. [Article XVII, Section 1] or "directly proposed by the people through initiative" [Article XVII, Section 2]. This amendment or revision "shall be valid when ratified by a majority of the votes cast in a plebiscite." [Article XVII, Section 4].

¹⁷ See Dante Gatmaytan-Magno, 'Changing Constitutions: Judicial Review and Redemption in the Philippines' (2008) 25 *UCLA Pacific Basin Law Journal* 1, which examines the role of the Philippine Supreme Court as the protector of the Constitution and the country's democracy through its decisions that sought to amend or revise the Constitution.

or expediency that may no longer hold for the present. This step would require a comprehensive review of existing legislation and policies directly and indirectly dealing with all oceans uses in order to ensure that the domestic legal and policy frameworks comply with the treaty obligations of the Philippines under the LOSC. The enactment of Republic Act No. 9522, which is technically compliant with the requirements of Article 47 of the LOSC, appears to be a step in the right direction. However, unless the constitutional constraints are surmounted, the legality of such legislation will always be open to challenge domestically.

8.4. Maritime Boundary Delimitation and Dispute Settlement

The intractable position of the Philippine Government with respect to the definition and extent of the national territory as those defined in the Treaty Limits has prevented and stalled negotiations with neighbouring States on the delimitation of the maritime boundaries of the country. This was discussed in Chapter 7.¹⁸ The Philippines needs to seriously reconsider its options and formulate a negotiating position and strategy that is legally defensible and mutually acceptable to other States. This is part of its duty to negotiate in good faith international law.¹⁹

The potential conflict existing between the Philippine Constitution provision on the national territory, which can be interpreted to contemplate the boundaries of the Treaty Limits, and the implementation as well as the very constitutionality of the LOSC, is a

¹⁸ Chapter 7. International Legal Implication of the Philippine Treaty Limits and Territorial Water Claim on the Delimitation of Philippine Territorial and Maritime Boundaries and Foreign Policy.

¹⁹ See, Article 2(2), UN Charter; Article 26 and 31(3), Vienna Convention on the Law of Treaties; and Article 300, LOSC. David J. Bederman, *The Spirit of International Law* (2002) at 156; Martin A. Rogoff, 'The Obligation to Negotiate in International Law: Rules and Realities' (1994-1995) 16 *Michigan Journal of International Law* 141 at 156.

bona fide concern. In Philippine jurisprudence, the established view is that a treaty prevails over an ordinary statute.²⁰ In instances where there is a conflict between a treaty or a statute and the Philippine Constitution, the judiciary will exert every effort to reconcile the apparent conflict.²¹ However, where the conflict is irreconcilable, the Philippine Supreme Court will not quibble and surely decide that the Constitution must of necessity prevail over the treaty.²²

In a situation, however, where the conflict is irreconcilable and a choice has to be made between a rule of international law and municipal law, jurisprudence dictates that municipal law should be upheld by the municipal courts for the reason that such courts are organs of municipal law and are accordingly bound by it in all circumstances. ... In states where the constitution is the highest law of the land, such as the Republic of the Philippines, both statutes and treaties may be invalidated if they are in conflict with the constitution.²³

Indeed, the 1987 Philippine Constitution specifically empowers the Supreme Court to declare a treaty unconstitutional.²⁴

²⁰ In some cases the Philippine Supreme Court has even ruled that a treaty “merely acquired the status of a statute” as in the case of *British American Tobacco v. Camacho*, G.R. No. 163583, 20 August 2008, with respect to the General Agreement on Tariffs and Trade of 1947.

²¹ See for example, Dissenting Opinion of Justice Puno in *Secretary of Justice v. Lantion*, G.R. No. 139465, 18 January 2000, in respect of treaties. The Philippine Supreme Court has ruled in a long line of cases the fundamental rule that if two or more laws govern the same subject, every effort to reconcile and harmonize them must be taken so that statutes are so construed and harmonised with other statutes as to form a uniform system of jurisprudence. See for example, the words of the Supreme Court in the case of *Akbayan v Comelec*, G.R. No. 147066, 26 March 2001:

Interpretare et concordare legibus est optimus interpretandi, which means that the best method of interpretation is that which makes laws consistent with other laws. Accordingly, courts of justice, when confronted with apparently conflicting statutes, should endeavor to reconcile them instead of declaring outright the invalidity of one against the other. Courts should harmonize them, if this is possible, because they are equally the handiwork of the same legislature.

²² This doctrine is well settled in Philippine jurisprudence. See: *Ichong vs. Hernandez*, 101 Phil. 1155 [1957]; *Gonzales vs. Hechanova*, 9 SCRA 230 [1963]; *In re: Garcia*, 2 SCRA 984 [1961].

²³ *Secretary of Justice v. Lantion*, G.R. No. 139465, 18 January 2000.

²⁴ Section 5(2)(a), Article VIII, 1987 Philippine Constitution. To be legally precise, the Philippine Constitution vests the power of judicial review or the power to declare a law, treaty, international or executive agreement, presidential decree, order, instruction, ordinance, or regulation not only in the Supreme Court, but in all Regional Trial Courts. *Spouses Mirasol v. Court of Appeals*, G.R. No. 128448, 1 February 2001, 351 SCRA 44 (2001). In the same case, the Supreme Court stated: “As a rule, the courts will not resolve the constitutionality of a law, if the controversy can be settled on other grounds. The policy of the courts is to avoid ruling on constitutional questions and to presume that the acts of the political departments are valid, absent a clear and unmistakable showing to the contrary. To doubt is to sustain. This presumption is based on the doctrine of separation of powers. This means that the measure had first been carefully studied by the legislative and executive departments and found to be in accord

Nonetheless, hypothetically, the resolution of this issue would largely depend on whether the case is brought before a domestic court or an international tribunal. If the issue is brought before an international tribunal, it is obvious that the Philippines may not plead its own municipal law as an excuse for failure to comply with its obligations under the LOSC.²⁵ This is an established principle in international law.²⁶ On the other hand, if the issue is brought before a Philippine domestic court, the LOSC can be declared unconstitutional. Thus, the LOSC, insofar as its conflicting provisions are concerned, would not be valid and operative in the domestic sphere. Accordingly, the unconstitutional provisions of the LOSC can be ignored domestically, but only at the risk of international repercussions before an international court.²⁷ However, under

with the Constitution before it was finally enacted and approved.” In the case of *National Economic Protectionism Association v. Honorable Roberto V. Ongpin*, G.R. No. 67752, 10 April 1989, the Philippine Supreme Court clarified that: “The constitutionality of an act of the legislature will not be determined by the courts unless that question is properly raised and presented in appropriate cases and is necessary to a determination of the case, i.e., the issue of constitutionality must be the very *lis mota* presented.” Thus, the above are some of the criteria that the Supreme Court will need to examine in its examination of the petition assailing the constitutionality of Republic Act No. 9522 in the pending case, *Prof. Merlin M. Magallona, et al., versus Hon. Eduardo Ermita, et. al*, G.R. No. 187167, 1 April 2009.

²⁵ See, Peter Malanczuk and Michael Barton Akehurst, *Akehurst's Modern Introduction to International Law* (1997) at 64, who correctly emphasised that: “This is particularly true when, as often happens, a treaty or other rule of international law imposes an obligation on states to enact a particular rule as part of their own municipal law. ... Similarly, there is a general duty for states to bring domestic law into conformity with obligations under international law. But international law leaves the method of achieving this result to the domestic jurisdiction of states.”

²⁶ Article 27, *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969) (entered into force 27 January 1980). See, Malcolm N. Shaw, *International Law* (2003) at 124, who clearly explained the reason for this rule of international law: “The general rule with regard to the position of municipal law within the international sphere is that a state which has broken a stipulation of international law cannot justify itself by referring to its domestic legal situation. It is no defence to a breach of an international obligation to argue that the state acted in such a manner because it was following the dictates of its own municipal law. The reasons for this inability to put forward internal rules as an excuse to evade international responsibility are obvious. Any other situation would permit international law to be evaded by the simple method of domestic legislation.”

²⁷ Letter from Raul M. Gonzales, Secretary of Department of Justice to Estelito Mendoza, Co-Chairman, Commission on Marine and Ocean Affairs, 15 August 2008, at 5. See, Philippine Declaration recognizing as compulsory the jurisdiction of the International Court of Justice, in conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, 23 December 1971, Deposited with the Secretary-General of the United Nations on 18 January 1972. The Philippines submitted a reservation that its acceptance of the compulsory jurisdiction of the ICJ does not include, *inter alia*, “in respect of the territory of the Republic of the Philippines, including its territorial seas and inland waters.”

international law, a State cannot justifiably relieve itself of the obligation to implement a treaty just because its domestic courts have ruled that it is unconstitutional.

8.5. General Recommendations

In conclusion, two recommendations are put forward to address the issue of the Philippine Treaty Limits and territorial waters claim. The first recommendation is to secure definite, stable and internationally recognised boundaries. It is clearly not within the national interests of the Philippines, or any State for that matter, to tolerate a situation wherein its territorial and maritime boundaries are deprived of international recognition and respect. The national frontiers of the Philippine archipelago which is largely contested in the international community have been subject of numerous, vicious, and constant protests, disagreements and violations. The current status of uncertainty with respect to the country's boundaries has also severely restricted sincere foreign policy initiatives to delimit the country's borders with its neighbouring States and regional efforts towards cooperative maritime arrangements towards curbing piracy, terrorism, and IUU fishing.

The second task is to directly and systematically address the physical coverage and legal jurisdictional extent of the Philippine national territory. The Philippine Government needs to prepare a comprehensive implementation plan of the LOSC which should be implemented as soon as practicable. This includes designating archipelagic sea lanes for submission to the International Maritime Organisation (IMO), and initiating maritime boundary delimitation negotiations with neighbouring States. The LOSC gives primacy to the rights of States parties to negotiate in good faith especially in the delimitation of

maritime zones.²⁸ Failing such negotiations, the LOSC allows resort to third-party dispute settlement or international litigation or arbitration, if necessary.²⁹ Alternatively, there are also other options to delimitation such as joint development and cooperative mechanisms, especially pending final delimitation.³⁰ The Philippine Government should also consider these options. On a more practical level, the country's national marine policy and its entire framework of legislation and institutional arrangements dealing with its maritime domain must be examined and amended or revised, if necessary.

The Philippines needs to find a near optimal solution that will secure for the country the greatest extent of claims with the most likelihood of being accepted by the community of nations. The unilateral declaration of sovereignty which is almost universally

²⁸ See Articles 15, 74, and 83, LOSC for the rules on the delimitation of maritime boundaries between opposite or adjacent States, in relation to the good faith requirement in Article 300, LOSC.

²⁹ Article 287, LOSC. The LOSC provides for a dispute settlement mechanism to settle maritime boundary (and other disputes), see: Jonathan I. Charney, 'The Implications of Expanding International Dispute Settlement Systems: the 1982 Convention on the Law of the Sea' (1996) 90 *American Journal of International Law* 69; Florentino P. Feliciano, 'Some Aspects of the Dispute Settlement Provisions of the 1982 United Nations Convention on the Law of the Sea' in Kathleen I. Matics, Ted L. McDorman and Catherine Parker (eds), *SEAPOL Workshop on Regime Building in South-East Asia* (1992) 41; Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005); Mom Ravin, 'Law of the Sea Maritime Boundaries and Dispute Settlement Mechanisms' (United Nations-the Nippon Foundation Fellow, Germany, 2005); Rosemary Gail Rayfuse, 'The Future of Compulsory Dispute Settlement under the Law of the Sea Convention' (2005) 30 *Victoria University of Wellington Law Review* 683; Howard Schiffman, 'The Dispute Settlement Mechanism of UNCLOS: A Potentially Important Apparatus for Marine Wildlife Management' (1998) 1 *Journal of International Wildlife Law and Policy* 293; Anne Sheehan, 'Dispute Settlement under UNCLOS: The Exclusion of Maritime Delimitation Disputes' (2005) 24 *University of Queensland Law Journal* 165; Tullio Treves, 'Dispute Settlement Clauses in the Law of the Sea Convention and their Impact on the Protection of the Marine Environment: Some Observations' (1999) 8 *Review of European Community & International Environmental Law* 6.

³⁰ See literature on joint development of disputed areas: Charles Liu, 'Chinese Sovereignty and Joint Development: A Pragmatic Solution to the Spratly Islands Dispute' (1996) 18 *Loyola of Los Angeles International and Comparative Law Journal* 864; Lian A. Mito, 'The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands' (1998) 13 *American University Law Review* 726; David M. Ong, 'Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?' (1999) 93 *American Journal of International Law* 771; Gillian Triggs, Bialek, Dean, 'The New Timor Sea Treaty and Interim Arrangements for Joint Development of Petroleum Resources of the Timor Gap' (2002) 3 *Melbourne Journal of International Law* 322; Mark J. Valencia (ed), *The South China Sea: Hydrocarbon Potential and Possibilities of Joint Development* (1982); Mark J. Valencia, 'Taming Troubled Waters: Joint Development of Oil and Mineral Resources in Overlapping Claim Areas' (1986) 23 *San Diego Law Review* 661; Masahiro Miyoshi, 'The Joint Development of Offshore Oil and Gas in Relation to Maritime Boundary Delimitation' (1999) 2 *Maritime Briefing* 1.

challenged is tantamount to no sovereignty. Despite the concerns over suffering the embarrassment of inconsistency, the Philippines should once and for all settle this issue. Indeed, the idea of sovereignty carries a very strong emotional appeal to the nationalistic sentiments of Filipinos, or to the people of every nation for that matter. However, the obstinate refusal to abandon an idea with a tenuous basis in international law is more embarrassing for the Philippines.

As a democracy, a maritime nation and member of the community of nations, the Philippines has a vested interest in becoming a more influential and constructive actor in the security affairs of the region. This means that the Philippines will need to pay greater attention to the strategic dimension of its treaty commitments, its multilateral relationships and to work more cooperatively on transnational issues. Ultimately, an act which is not in conformity with international is actually antithetical to the interests of the Philippines.

The integrity of the Philippine national polity must align and further the national interests and not hamper national developmental policies and international commitments. In closing, and ultimately, domestic legislative change is an imperative towards the harmonisation of Philippine laws with international legal obligations. It is contended here that there seems to be no other alternative.

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APPENDICES

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