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## **Comparative Analysis Of The Memorandum Of Agreement On The Ancestral Domain (MOA-AD) Aspect Of The GRP-MILF Tripoli Agreement On Peace Of 2001 And Framework Agreement On The Bangsamoro (FAB)**

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**COMPARATIVE ANALYSIS OF THE MEMORANDUM  
OF AGREEMENT ON THE ANCESTRAL DOMAIN (MOA-AD) ASPECT  
OF THE GRP-MILF TRIPOLI AGREEMENT ON PEACE OF 2001  
AND FRAMEWORK AGREEMENT ON THE BANGSAMORO (FAB)**

*A paper delivered on the occasion of the Chief Justice Artemio V. Panganiban  
Professorial Chair on Liberty and Prosperity 2<sup>nd</sup> Lecture Series*

**SEDFREY M. CANDELARIA**

*Dean*

Ateneo Law School

*29 November 2013*



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## I. Introduction

### A. Peace Processes and Peace Agreements, In General<sup>1</sup>

Peace processes, which often culminate in the adoption of agreements, have been used traditionally in international law to end armed conflicts. The form within which negotiated settlements have been contained are primarily up to the negotiating parties to determine. However, the legal characterization of these agreements are independently and objectively governed by a set of rules either under the municipal legal system or at the level of international law.

A peace treaty is an “agreement or contract made by belligerent powers, in which they agree to lay down their arms, and by which they stipulate the conditions of peace and regulate the manner in which it is to be restored and supported.”<sup>2</sup> Apart from being a source of international obligations, treaties have been utilized at a national level to transfer territory, settle disputes, protect human rights, and regulate commercial relations.<sup>3</sup>

Peace agreements, as presently applied, are often used as a mode to end hostilities between a state and a non-state entity due to secessionist struggles or problems. This is especially so at a time when non-state entities are standing firm in their demands for self-determination as they incessantly fight for independence.

Self-determination is closely intertwined with the right to independence. At present, self-determination has come to mean one of three things:

- (1) independence for new states emerging from the collapse of communism (e.g., Ukraine or Slovenia);
- (2) independence for homogenous sub-units within nation-states (e.g., Quebec or Eritrea); or
- (3) greater internal autonomy for smaller identity groups within existing states (e.g., Aaland Islands under Finland or Faeroe Islands under Denmark).<sup>4</sup>

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<sup>1</sup> Discussions herein have been derived from the present writer’s co-authored discourse in a related article in “*An Overview of the International Legal Concept of Peace Agreements as Applied to Current Philippine Peace Processes*, ” 53 ATENEO. L.J. 263, 266-270 (2008).

<sup>2</sup> BLACK’S LAW DICTIONARY 1502 (6<sup>th</sup> ed. 1990).

<sup>3</sup> JOAQUIN G. BERNAS, S.J., *An Introduction to Public International Law* 25 (1<sup>st</sup> ed. 2002) [hereinafter BERNAS, PIL].

<sup>4</sup> Michael J. Kelly, *Political Downsizing: The Re-Emergence of Self-Determination, and the Movement Toward Smaller, Ethnically Homogenous States*, 47 DRAKE L. REV. 209, 221 (1999).

In international law, an entity's right to self-determination covers two important rights:

- (1) the right to freely determine their political status and freely pursue their economic, social and cultural development; and
- (2) the right to freely dispose of the natural wealth and resources for their own ends without prejudice to any obligations arising out of international cooperation.<sup>5</sup>

Self-determination is supported by international law and embodied in international instruments such as the Charter of the United Nations, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. The great urge of peoples to determine their own economic, social, and cultural development causes opposition or hostilities within a state or nation. Therefore, peace agreements are relevant, particularly at the national level, in trying to resolve these hostilities.

Most peace agreements have one common feature — they are used as a means to an end, which is to attain peace, by leading towards building a positive momentum for a final and comprehensive settlement. Peace agreements are generally “contracts intended to end a violent conflict, or to significantly transform a conflict, so that it can be more constructively addressed.”<sup>6</sup> There are various types of peace agreements, each with their own distinct purpose.

The United Nations uses the following classifications to differentiate the various types of peace agreements:

*Ceasefire Agreements* – These typically short-lived agreements are “military in nature” and are used to temporarily stop a war or any armed conflict for an “agreed-upon timeframe or within a limited area.”<sup>7</sup>

*Pre-Negotiation Agreements* – These agreements “define how the peace will be negotiated” and serve to “structure negotiations and keep them on track” in order to reach its goal of ending the conflict.<sup>8</sup>

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<sup>5</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>6</sup> Nita Yawanarajah & Julian Ouellet, Peace Agreements, *available at* [http://www.beyondintractability.org/essay/structuring\\_peace\\_agree/](http://www.beyondintractability.org/essay/structuring_peace_agree/) (last accessed Sep. 3, 2008).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

*Interim or Preliminary Agreements* – These agreements are undertaken as an “initial step toward conducting future negotiations,” usually seen as “commitments to reach a negotiated settlement.”<sup>9</sup>

*Comprehensive and Framework Agreements* – Framework Agreements are agreements which “broadly agree upon the principles and agenda upon which the substantive issues will be negotiated” and are usually accompanied by Comprehensive Agreements which “address the substance of the underlying issues of a dispute,” seeking to find the “common ground between the interests and needs of the parties to the conflict, and resolve the substantive issues in dispute.”<sup>10</sup>

*Implementation Agreements* – These agreements “elaborate on the details of a Comprehensive or Framework Agreement” to facilitate the implementation of the comprehensive agreement.<sup>11</sup>

As to its components, most peace agreements address three main concerns: procedure, substance, and organization.<sup>12</sup> The procedural components provide for the methods that establish and maintain peace such that they delineate the *how* of a peace process.<sup>13</sup> These include the setting up of schedules and institutions that “facilitate the implementation of substantive issues such as elections, justice, human rights and disarmament.”<sup>14</sup> The substantive components provide for the changes to be made after the peace agreement is reached such as political, economic, and social structural changes that are needed to “remedy past grievances and provide for a more fair and equitable future.”<sup>15</sup> The organizational or institutional components are mechanisms intended to “promote the peace consolidation efforts”<sup>16</sup> such that they address the *who* aspect of the agreement.<sup>17</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*



The components of peace agreements are illustrated in the following:

SUBJECTS	PROCEDURE	SUBSTANCE
NORTH KOREA & SOUTH KOREA	<p>The leaders of North Korea and South Korea agreed to set up the first regular freight train service for half a century, linking the two countries divided by a heavily fortified border.<sup>18</sup> They also agreed to hold meetings with the ministers and defense officials, and to establish a cooperation zone around a contested sea border on the west of the Korean peninsula.<sup>19</sup></p>	<p>Both parties agree to formally end the 1950-1953 Korean War, which technically is still going on because a peace treaty has yet to be signed.<sup>20</sup> North Korea would also have to give up all its nuclear weapons as part of their deal.<sup>21</sup></p>
INDONESIAN GOVERNMENT & REBELS FROM THE FREE ACEH MOVEMENT	<p>There was disarmament by the rebels overseen by a joint European and ASEAN monitoring team, as well as by the pro-government militias in Aceh.<sup>22</sup> A human rights court and a truth and reconciliation commission was also established.<sup>23</sup></p>	<p>Both parties signed a peace deal intended to end their nearly 30-year conflict.<sup>24</sup> Under the agreement, the rebels have agreed to set aside their demand for full independence, accepting instead a form of local self-government and the right to eventually establish a political party.<sup>25</sup> In turn, the Indonesian government has agreed to “release political</p>

<sup>18</sup> North Korea and South Korea Peace Agreement, *available at* <http://warsigns.isins.com/2007/10/04/north-korea-and-south-korea-peaceagreement/> (last accessed Sep. 3, 2008).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> British Broadcasting Corporation, Aceh Rebels Sign Peace Agreement, *available at* <http://news.bbc.co.uk/1/hi/world/asia-pacific/4151980.stm> (last accessed Sep. 3, 2008).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

		prisoners and offer farmland to former combatants to help them reintegrate into civilian life.” <sup>26</sup>
NEPALESE GOVERNMENT & NEPAL MAOISTS	There was disarmament by the Maoist Combatants, monitored by the United Nations, as well as by the Nepali Army. <sup>27</sup> Both parties also agreed to form a transitional government and to hold elections for a constituent assembly to establish a new constitution and governmental system. <sup>28</sup>	A Comprehensive Peace Agreement was signed by the Chairman of the Communist Party of Nepal and the Prime Minister of Nepal to end 11 years of civil war. <sup>29</sup> The agreement provided for the progressive restructuring of the state to resolve existing problems in the country, based on class, caste, religion and sex. <sup>30</sup>

It can be gleaned then that although the main goal of peace agreements is to achieve peace or to end hostilities between or among parties, each and every peace agreement varies as to its procedural and substantive components. Peace agreements adopt various measures in addressing their own respective dilemmas and each has its own distinct way of enabling the parties involved in the agreement to cooperate and comply with the agreed terms to ensure the success of the measures adopted.

### **B. Current Challenges to On-going Peace Process in a Philippine Context**

In an armed conflict with secessionist undertones, the form and content of a peace agreement are crucial in terms of its eventual implementation at the domestic level where the arena of the armed conflicts is in place. As a matter of fact the success of a peace settlement is measured not only in the signing of the peace agreement by the negotiating parties, but, more importantly, when accepted by the public at large.

Our Government continues to negotiate with a number of armed groups for a final peace settlement. A previous Final Peace Agreement with the Moro National Liberation Front is in the process of review. The Memorandum of Agreement on the

<sup>26</sup> *Id.*

<sup>27</sup> Revolutionary Communist Party, USA, Nepal Maoists and Government Sign Peace Agreement, *available at* <http://rwor.org/a/072/nepalagree-en.html> (last accessed Sep. 3, 2008).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

Ancestral Domain (MOA-AD) with the Moro Islamic Liberation Front in 2008 was struck down by the Supreme Court in the *Province of North Cotabato, et al. v. The GRP Peace Panel on Ancestral Domain, et al.*, G.R. Nos. 183591, 183752, 183893, 183951 and 183962, October 14, 2008. But a new agreement had finally emerged, *i.e.*, the Framework Agreement on the Bangsamoro (FAB) of 2012.

The fate of the FAB is presently awaiting final determination by the Supreme Court. This comparative study of the MOA-AD and the FAB is not intended to predict the outcome of the deliberations of the Court but to incisively inquire into the art or technique of drafting peace agreements and, consequently, appreciate the unique characteristics defining peace negotiations.

This study concludes with the thought that a peace agreement, no matter how well crafted, remains vulnerable to the constant test of public scrutiny at every stage of its implementation. Negotiating parties must remain steadfast in their resolve to see the logical conclusion to their agreement by maintaining the trust they have reposed upon each other at the negotiating table.

## II. On Title

MOA-AD	FAB
“Memorandum of Agreement on the Ancestral Domain Aspect of the GRP-MILF Tripoli Agreement on Peace of 2001”	“Framework Agreement on the Bangsamoro”

### Commentary:

The FAB does not make any reference to Ancestral Domain. This is conceptually significant in that the MOA-AD was principally intended to be a preliminary document on consensus points preparatory to the adoption of a separate agreement on Governance and the final Comprehensive Compact. On the other hand, the FAB is intended to be an enumeration of principles and processes awaiting further negotiations which will incrementally generate Annexes that will form part of FAB.

It is readily apparent that the MOA-AD centered on the concept of ancestral domain of the Bangsamoro derived from both international law and municipal law instruments. At the international level, ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples are immediate legal sources. The Indigenous Peoples’ Rights Act of 1997, which draws from the two international instruments, provides the domestic legal framework on the concept of ancestral domain as provided by the 1987 Constitution.

### III. On Outline of the MOA-AD and FAB

MOA-AD	FAB
Terms of Reference Concepts and Principles Territory Resources Governance	Establishment of the Bangsamoro Basic Law Powers Revenue Generation and Wealth-Sharing Territory Basic Rights Transition and Implementation Normalization Miscellaneous Annex on Transitional Arrangements and Modalities Annex on Revenue Generation and Wealth Sharing

#### Commentary:

The outline of the FAB indicates clearly that the two negotiating panels had deferred discussions on some fundamental components of the FAB through the use of Annexes attached therein, *e.g.* Annex on Transitional Arrangements and Modalities and Annex on Revenue Generation and Wealth-Sharing. This may have been deliberately designed to avoid possible contentious details in the FAB which may make the FAB vulnerable to immediate constitutional challenge as suffered by the MOA-AD. A calibrated discussion of details of the FAB, such as, transition, implementation and normalization in various phases is more likely to delay any widespread reaction from unconvinced stakeholders on the process.

#### IV. On Terms of Reference

MOA-AD	FAB
<ul style="list-style-type: none"> <li>• Agreement for Cessation of Hostilities dated July 18, 1997</li> <li>• General Framework of Agreement of Intent dated August 27, 1998</li> <li>• Agreement on General Framework for Resumption of Peace Talks dated March 24, 2001</li> <li>• Tripoli Agreement dated June 22, 2001 between GRP and MILF</li> <li>• Tripoli Agreement dated December 23, 1976 and the Final Agreement on the Implementation of the 1976 Tripoli Agreement dated September 2, 1996 between GRP and MNLF</li> <li>• R.A. No. 6734, as amended by R.A. No. 9054 (ARMM Law)</li> <li>• ILO Convention No. 169</li> <li>• UN Declaration on the Rights of the Indigenous Peoples</li> <li>• R.A. No. 8371 (IPRA)</li> <li>• U.N. Charter</li> <li>• UN Universal Declaration on Human Rights</li> <li>• International Humanitarian Law (IHL)</li> <li>• Internationally recognized human rights instruments</li> <li>• Compact rights entrenchment from regime of dar-ul-mua' hada (territory under compact)</li> <li>• Compact rights entrenchment from regime of dar-ul-sulh (territory under peace agreement)</li> <li>• Treaty as solemn agreement in writing that sets out understandings, obligations, and benefits for both parties</li> </ul>	<p>(no counterpart)</p>

**Commentary:**

The FAB does not contain a set of Terms of Reference (TOR) at all. One can only surmise that after the decision of the Supreme Court on the MOA-AD, the present Government Peace Panel had taken extra precaution to avoid “internationalizing” the agreement by declaring, through the direct pronouncement of the President himself, that the FAB should be within the framework of the Constitution.

An examination of the TOR of the MOA-AD shows citations of ILO 169, UNDRIP, U.N. Charter, Universal Declaration of Human Rights, International Humanitarian Law and “internationally recognized human rights.” The Philippines is a party to all these international instruments and, therefore, the enumeration merely confirms adherence to our legal commitments. Besides, the doctrine of incorporation, as treated in the case of *Tañada v. Angara*, 272 SCRA 18 (1997), allows the applicability of generally accepted principles of international law, such as, human rights, to a domestic setting. The FAB may be measured in accordance with these norms.

Of immediate interest is the use of the terms “territory under compact” (regime of dar-ul-mua’hada) and “territory under peace agreement” (regime of dar-ul-sulh). One writer clarifies the meaning of these terms as follows:

“With all due respect, this is not a new tool in the promotion of foreign relations, especially in the area of security and peace. During the nascency of political Islam in the City State of Madinah the Prophet Muhammad (peace be upon him) established a commonwealth with non-Muslim tribes within its surrounding environs – the Jews in the oases of Maqna, Adhruh and Jarba to the south and the Christians of Aqaba, who were taken under the protection of the city state in consideration of a payment later called jizyah, which included land and head tax.

For intents and purposes, these areas are territories under compact, each an associate state of Madinah,”<sup>31</sup>

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<sup>31</sup> Nasser A. Marohomsalic, “*The Framework Agreement on the Bangsamoro: Towards Hurdling the Constitutional Obstacle to Moro Self-Determination*,” IBP Journal, Special Issue No. 2, December 2012, p. 16.

Finally, the use of the term “treaty” in the MOA-AD raised some concerns as the North Cotabato decision directly addressed. Oppositors to the MOA-AD have argued that the term treaty may seem to impart the sovereign status of the other signatory to the MOA-AD. It is submitted, however, that the concept of treaty may be used in a domestic sense. In the case of Canada, treaty simply means an agreement between people.<sup>32</sup> The Government of Canada and the courts understand treaties between the Crown and the indigenous peoples to be solemn agreements that set out promises, obligations and benefits for both parties.<sup>33</sup> Treaty in the Canadian setting means a negotiated agreement between a First Nation and the Central Government that spells out the rights of the First Nation with respect to lands and resources over specified areas. The Treaty of Waitangi of the Maori people in the context of New Zealand is another example that may be cited.

The problem of legal characterization of agreements signed by States with non-state parties had been dealt with by Christine Bell in her authoritative work on the peace agreements.<sup>34</sup>

Bell identifies the legal problematique within the context of Vienna Convention on the Law of Treaties which defines a treaty as “an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever particular designation.”<sup>35</sup> But Bell proceeded to expound on the difficulty of applying this test on certain groups, such as, armed opposition groups, indigenous peoples and sub-state regions and minorities if the traditional notion of “subjects of international law” would underlie these groups’ legal status and posits as follows:

“The difficulty is that deciding whether some or all the agreements signed by these non-state groups constitute binding international agreements is a tautological exercise. . . . Rosalyn Higgins has suggested that the notion of international participants in an international legal system conceived of as a ‘particular decision-making process; may be more conducive to

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<sup>32</sup> [http://nwt-tro.inac-ainc.gc.ca/youthbuzz/gl\\_e.htm](http://nwt-tro.inac-ainc.gc.ca/youthbuzz/gl_e.htm).

<sup>33</sup> <http://www.reconciliationmovement.org/resources/glossary.html>.

<sup>34</sup> Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria*, Oxford University Press, Great Britain, 2008.

<sup>35</sup> *Id.*, p. 128, citing VCLT, May 23, 1969, 115 UNTS 331.



understanding the current status of non-state actors than traditional subject-object dichotomies.”<sup>36</sup>

The Philippine Supreme Court in the MOA-AD judgment had strictly applied the subject-object dichotomy by declaring the MOA-AD as a non-treaty instrument using the VCLT definition.

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<sup>36</sup> *Id.*, pp. 129-135.

## V. On Concepts and Principles

### A. Bangsamoro

MOA-AD	FAB
<ul style="list-style-type: none"> <li>• Bangsamoros:               <ul style="list-style-type: none"> <li>➤ Moros</li> <li>➤ Indigenous Peoples</li> </ul> </li> </ul>	
<ul style="list-style-type: none"> <li>• Bangsamoro People:               <ul style="list-style-type: none"> <li>➤ Natives or original inhabitants of Mindanao and its adjacent islands including Palawan and the Sulu archipelago at the time of conquest and their descendants</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• I.5. Bangsamoro identity:               <ul style="list-style-type: none"> <li>➤ Natives or original inhabitants of Mindanao and the Sulu archipelago and its adjacent islands including Palawan, and their descendants whether of mixed or of full blood with right to identify themselves as Bangsamoro by ascription or self-ascription. Spouses and their descendants as Bangsamoro.</li> </ul> </li> </ul>
<ul style="list-style-type: none"> <li>• “Freedom of choice” of the Indigenous Peoples</li> </ul>	<ul style="list-style-type: none"> <li>• I.5. “Freedom of choice” of other Indigenous Peoples.</li> <li>• VI.3 Indigenous Peoples’ rights respected.</li> </ul>

### Commentary:

The differences in the description of Bangsamoro are as follows: (1) MOA-AD enumerated Moros and Indigenous Peoples as Bangsamoros; (2) FAB used the term Bangsamoro identity; (3) while both MOA-AD and FAB retained the identical reference to natives or original inhabitants in Mindanao and adjacent islands, FAB further extended coverage to descendants, “whether of mixed or full blood” with right to identify themselves as Bangsamoro or self-ascription; and, (4) FAB included “spouses and their descendants as Bangsamoro.”

It appears that the FAB derived the IPRA concept of self-ascription to identify the Bangsamoro people. Section 3(h) of IPRA states:

“(h) Indigenous Cultural Communities/Indigenous Peoples – refer to a group of people or homogenous societies identified by self-ascription and ascription by others, x x x”

The “freedom of choice of Indigenous Peoples” while conceptually identical requires a closer examination when FAB used the term “other Indigenous Peoples.” The latter contemplates presumably the lumads of Mindanao currently settled within the ARMM and adjacent islands identified as part of the Bangsamoro as the New Autonomous Political Entity (NPE).

## B. Ancestral Domain

MOA-AD	FAB
<ul style="list-style-type: none"> <li>• Ownership of homeland vested exclusively in them by virtue of prior rights of occupation that had inhered in them as sizeable bodies of people, delimited by their ancestors since time immemorial, and being the first politically organized dominant occupants.</li> </ul>	
<ul style="list-style-type: none"> <li>• Ancestral domain               <ul style="list-style-type: none"> <li>➤ not part of public domain</li> <li>➤ native title inclusive of ancestral, communal, customary lands, maritime, fluvial and alluvial domains and all natural resources.</li> </ul> </li> </ul>	
<ul style="list-style-type: none"> <li>• IPRA definition of ancestral domain and ancestral land.</li> </ul>	
<ul style="list-style-type: none"> <li>• Right to self-governance derived historically under the “Suzerain authority of the sultanates and the Pat a Pangampong ku Ranaw.”               <ul style="list-style-type: none"> <li>➤ Sultanates as states or Karajaan/Kadatuan with elements of nation-state</li> <li>➤ “First Nation”</li> <li>➤ Entered into treaties of amity and commerce</li> </ul> </li> </ul>	
<ul style="list-style-type: none"> <li>• Respect for one’s identity and parity of esteem of everyone in the political</li> </ul>	

community.	
• Vested property rights recognized.	• VI.2. Vested property rights recognized.

### **Commentary:**

#### *1. Bangsamoro Homeland*

The second provision under “Concepts and Principles” of the MOA-AD provides for the foundation of the Bangsamoro homeland, to *wit*:

“2. It is essential to lay the foundation of the Bangsamoro homeland in order to address the Bangsamoro people’s humanitarian and economic needs as well as their political aspirations. Such territorial jurisdictions and geographic areas being the natural wealth and patrimony represent the social, cultural and political identity and pride of all the Bangsamoro people. Ownership of the homeland is vested exclusively in them by virtue of their prior rights of occupation that had inhered in them as sizeable bodies of people, delimited by their ancestors since time immemorial, and being the first politically organized dominant occupants.”

The foundation of the Bangsamoro homeland to address the Bangsamoro people’s humanitarian and economic needs as well as their political aspirations is synonymous to or legally approximates the declaration of the state policy under Republic Act (R.A.) No. 8371, otherwise known as the “The Indigenous Peoples’ Rights Act of 1997 (IPRA)”, of protecting the rights of indigenous peoples over the ancestral domain to ensure their economic, social and cultural well-being:

“Section 2. Declaration of State Policies. – The State shall recognize and promote all the rights of Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs) hereunder enumerated within the framework of the Constitution:

X X X

b) The State shall protect the rights of ICCs/IPs to their ancestral domains to ensure their economic, social and cultural well being and shall recognize the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain;

X X X.”

## 2. *Native Title*

The third paragraph under the heading “Concepts and Principles” of the MOA-AD makes use of the concept of native title as basis for acknowledging the rights of the Bangsamoro people over ancestral land and domain. Thus:

“3. Both Parties acknowledge that ancestral domain does not form part of the public domain but encompasses ancestral, communal, and customary lands, maritime, fluvial and alluvial domains as well all natural resources therein that have inured or vested ancestral rights on the basis of native title. Ancestral domain and ancestral land refer to those held under claim of ownership, occupied or possessed, by themselves or through the ancestors of the Bangsamoro people, communally or individually since time immemorial continuously to the present, except when prevented by war, civil disturbance, force majeure, or other forms of possible usurpation or displacement by force, deceit, stealth, or as a consequence of government project or any other voluntary dealings entered into by the government and private individuals, corporate entities or institutions.”

Existing provisions of IPRA confirm the rights of indigenous peoples over ancestral domain, inclusive of ancestral land, based on native title. There is no reason why the Bangsamoro people could not invoke this, subject to the enjoyment by other indigenous peoples of vested rights within the territory of the Bangsamoro Juridical Entity (BJE).

Sections 3 (1) and 4 of the IPRA provide:

“Section 3. Definition of Terms. – For purposes of this Act, the following terms shall mean:

X X X

1) Native Title – refers to pre-conquest rights to lands and domains which, as far back as memory reaches, have been held under a claim of private ownership by ICCs/IPs,<sup>37</sup> have never been public lands and are thus indisputably presumed to have been held that way since before the Spanish Conquest;

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<sup>37</sup> Under the Definition of Terms of IPRA, “ICC/IP” means indigenous cultural communities/indigenous people.

x x x

Section 4. Concept of Ancestral Lands/Domains. – Ancestral lands/domains shall include such concepts of territories which cover not only the physical environment but the total environment including the spiritual and cultural bonds to the area which the ICCs/IPs possess, occupy and use and to which they have claims of ownership.”

### *3. Ancestral Domain and Ancestral Land*

The above-quoted provision under “Concepts and Principles” of the MOA-AD likewise made reference to the terms “ancestral domain” and “ancestral land”. The description of the terms “ancestral domain” and “ancestral land” is similar to the definitions of the same terms under the IPRA:

“Section 3. Definition of Terms. – For purposes of this Act, the following terms shall mean:

a) Ancestral Domains – Subject to Section 56 hereof, refer to all areas generally belonging to ICCs/IPs comprising lands, inland waters, coastal areas, and natural resources therein, held under a claim of ownership, occupied or possessed by ICCs/IPs, themselves or through their ancestors, communally or individually since time immemorial, continuously to the present except when interrupted by war, force majeure or displacement by force, deceit, stealth or as a consequence of government projects or any other voluntary dealings entered into by government and private individuals, corporations, and which are necessary to ensure their economic, social and cultural welfare. It shall include ancestral land, forests, pasture, residential, agricultural and other lands individually owned whether alienable and disposable or otherwise, hunting grounds, burial grounds, worship areas, bodies of water, mineral and other natural resources, and lands which may no longer be exclusively occupied by ICCs/IPs but from which they traditionally had access to for their subsistence and traditional activities, particularly the home ranges of ICCs/IPs who are still nomadic and/or shifting cultivators;

b) Ancestral Lands – Subject to Section 56 hereof, refers to land occupied, possessed and utilized by individuals, families and clans who are members of the ICCs/IPs since time immemorial, by themselves or through their predecessors-in-interest, under claims of individual or traditional group ownership, continuously, to the present except when interrupted by war, force majeure or displacement by force, deceit, stealth, or as a consequence of government projects and other voluntary dealings entered into by government and private individuals/corporations, including, but not limited to, residential lots, rice terraces or paddies, private forests, swidden farms and tree lots;

x x x.”

#### 4. *Right to Self-Governance*

The Bangsamoro people’s right to self-governance is expressly provided in the MOA-AD, particularly under “Concepts and Principles”:

“4. Both Parties acknowledge that the right to self-governance of the Bangsamoro people is rooted on ancestral territoriality exercised originally under the suzerain authority of their sultanates and the Pat a Pangampong ku Ranaw. x x x.”

The right to self-governance is not a new and unique concept in the Philippine legal history. Under the IPRA, the legislature explicitly recognized the right to self-governance of indigenous peoples:

“Section 13. Self-Governance. – The State recognizes the inherent right of ICCs/IPs to self-governance and self-determination and respects the integrity of their values, practices and institutions. Consequently, the State shall guarantee the right of ICCs/IPs to freely pursue their economic, social and cultural development.”

#### 5. *First Nation*

The MOA-AD uses the term “First Nation” to describe the Bangsamoro people:

## “Concepts and Principles

X X X

“4. Both Parties acknowledge that the right to self-governance of the Bangsamoro people is rooted on ancestral territoriality exercised originally under the suzerain authority of their sultanates and the Pat a Pangampong ku Ranaw. The Moro sultanates were states or karajaan/kadatuan resembling a body politic endowed with all the elements of nation-state in the modern sense. As a domestic community distinct from the rest of the national communities, they have a definite historic homeland. They are the ‘First Nation’ with defined territory and with a system of government having entered into treaties of amity and commerce with foreign nations.”  
(*Underscoring supplied*)

The use of the term “first nation” to describe the Bangsamoro people may be justified in the context of the use of the term in the case of Canada. “First nation,” referring to many aboriginal peoples and the assembly of First Nations, specifically pertains to the various governments of the first peoples of Canada. “First nation” is a term used to describe the Indians, tribes, and bands that are frequently utilized by the federal, provincial, and territorial governments in Canada. There are over six hundred (600) first nations across Canada with forty-six (46) first nations in Alberta. The main Alberta-based tribal communities include the Blackfoot, Tsu’uT’ina, Stoney, Plains Cree, Woodland Cree, Chipewyan, Beaver and Slavey. No inference of co-equal or parity status in international law may be drawn from this concept.<sup>38</sup>

### 6. *Entrenchment of the Bangsamoro Homeland*<sup>39</sup>

The second paragraph of provision no. 4 under “Concepts and Principles” of the MOA-AD provides:

“4. x x x. The Parties concede that the ultimate objective of entrenching the Bangsamoro homeland as a territorial space is to secure their identity and posterity, to protect their property rights and resources as well as to establish a system of governance suitable and acceptable to them as a distinct dominant people. For this purpose, the treaty rights emanating from

<sup>38</sup> Assembly of First Nations and Aboriginal Studies Glossary; [http://www.education.gov.ab.ca/FNMI/fnmiPolicy//Glossary .asp](http://www.education.gov.ab.ca/FNMI/fnmiPolicy//Glossary.asp).

<sup>39</sup> See MOA-AD, Concepts and Principles, No. 4.



the principles of territorial treaty regime or territory under peace agreement as are consistent with internationally recognized humanitarian laws and human rights instruments shall entitle them to fully determine their future political status by popular consultation.” (*Underscoring supplied*)

The ultimate objective of entrenching the Bangsamoro homeland is analogous to the declared state policy under the IPRA. Thus:

“Section 2. Declaration of State Policies. – The State shall recognize and promote all the rights of Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs) hereunder enumerated within the framework of the Constitution:

a) The State shall recognize and promote the rights of ICCs/IPs within the framework of national unity and development;

b) The State shall protect the rights of ICCs/IPs to their ancestral domains to ensure their economic, social and cultural well being and shall recognize the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain;

c) The State shall recognize, respect and protect the rights of ICCs/IPs to preserve and develop their cultures, traditions and institutions. It shall consider these rights in the formulation of national laws and policies;

d) The State shall guarantee that members of the ICCs/IPs regardless of sex, shall equally enjoy the full measure of human rights and freedoms without distinctions or discriminations;

e) The State shall take measures, with the participation of the ICCs/IPs concerned, to protect their rights and guarantee respect for their cultural integrity, and to ensure that members of the ICCs/IPs benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population; and

f) The State recognizes its obligations to respond to the strong expression of the ICCs/IPs for cultural integrity by assuring maximum ICC/IP participation in the direction of education, health, as well as other services of ICCs/IPs, in order to render such services more responsive to the needs and desires of these communities.

Towards these ends, the State shall institute and establish the necessary mechanisms to enforce and guarantee the realization of these rights, taking into consideration their customs, traditions, values, beliefs, their rights to their ancestral domains.”

The use of the term “treaty rights” in the above-quoted provision of the MOA-AD may be justified in light of our comment on the meaning of treaty in the context of this peace agreement.

#### *7. Authority and Jurisdiction Over Ancestral Domain and Ancestral Land*

Under “Concepts and Principles,” the MOA-AD states that the BJE shall have authority and jurisdiction over ancestral domain and ancestral lands:

“6. Both Parties agree that the Bangsamoro Juridical Entity (BJE) shall have the authority and jurisdiction over the Ancestral Domain and Ancestral lands, including both alienable and non-alienable lands encompassed within their homeland and ancestral territory, as well as the delineation of ancestral domain/lands of the Bangsamoro people located therein.”

The grant of authority and jurisdiction over ancestral domains and ancestral land to the Bangsamoro people is justifiable as it is similar to the rights of indigenous peoples to their ancestral domains and ancestral lands under Sections 7 and 8 of the IPRA:

“Section 7. Rights to Ancestral Domains. – The rights of ownership and possession of ICCs/IPs to their ancestral domains shall be recognized and protected. Such rights shall include:

- a. Rights of Ownership – The right to claim ownership over lands, bodies of water traditionally and actually occupied by ICCs/IPs, sacred places, traditional hunting and fishing grounds, and all improvements made by them at any time within the domains;

- b. Right to Develop Lands and Natural Resources – Subject to Section 56 hereof, right to develop, control and use lands and territories traditionally occupied, owned, or used; to manage and conserve natural resources within the territories and uphold the responsibilities for future generations; to benefit and share the profits from allocation and utilization of the natural resources found therein; the right to negotiate the terms and conditions for the exploration of natural resources in the areas for the purpose of ensuring ecological, environmental protection and the conservation measures, pursuant to national and customary laws; the right to an informed and intelligent participation in the formulation and implementation of any project, government or private, that will affect or impact upon the ancestral domains and to receive just and fair compensation for any damages which they sustain as a result of the project; and the right to effective measures by the government to prevent any interference with, alienation and encroachment upon these rights;
- c. Right to Stay in the Territories – The right to stay in the territory and not be removed therefrom. No ICCs/IPs will be relocated without their free and prior informed consent, nor through any means other than eminent domain. Where relocation is considered necessary as an exceptional measure, such relocation shall take place only with the free and prior informed consent of the ICCs/IPs concerned and whenever possible, they shall be guaranteed the right to return to their ancestral domains, as soon as the grounds for relocation cease to exist. When such return is not possible, as determined by agreement or through appropriate procedures, ICCs/IPs shall be provided in all possible cases with lands of quality and legal status at least equal to that of the land previously occupied by them, suitable to provide for their present needs and future development. Persons thus relocated shall likewise be fully compensated for any resulting loss or injury;
- d. Right in Case of Displacement – In case displacement occurs as a result of natural catastrophes, the State shall

endeavor to resettle the displaced ICCs/IPs in suitable areas where they can have temporary life support system: Provided, That the displaced ICCs/IPs shall have the right to return to their abandoned lands until such time that the normalcy and safety of such lands shall be determined: Provided, further, That should their ancestral domain cease to exist and normalcy and safety of the previous settlements are not possible, displaced ICCs/IPs shall enjoy security of tenure over lands to which they have been resettled: Provided, furthermore, That basic services and livelihood shall be provided to them to ensure that their needs are adequately addressed:

- e. Right to Regulate Entry of Migrants – Right to regulate the entry of migrant settlers and organizations into the domains;
- f. Right to Safe and Clean Air and Water – For this purpose, the ICCs/IPs shall have access to integrated systems for the management of their inland waters and air space;
- g. Right to Claim Parts of Reservations – The right to claim parts of the ancestral domains which have been reserved for various purposes, except those reserved and intended for common and public welfare and service; and
- h. Right to Resolve Conflict – Right to resolve land conflicts in accordance with customary laws of the area where the land is located, and only in default thereof shall the complaints be submitted to amicable settlement and to the Courts of Justice whenever necessary.

Section 8. Rights to Ancestral Lands. – The right of ownership and possession of the ICCs/IPs, to their ancestral lands shall be recognized and protected.

- a. Right to transfer land/property – Such right shall include the right to transfer land or property rights to/among members of the same ICCs/IPs, subject to customary laws and traditions of the community concerned.

- b. Right to Redemption – In cases where it is shown that the transfer of land/property rights by virtue of any agreement or devise, to a non-member of the concerned ICCs/IPs is tainted by the vitiated consent of the ICCs/IPs, or is transferred for an unconscionable consideration or price, the transferor ICC/IP shall have the right to redeem the same within a period not exceeding fifteen (15) years from the date of transfer.”

### 8. *Vested Rights*

The MOA-AD, under “Concepts and Principles”, provides:

“7. Vested property rights upon the entrenchment of the BJE shall be recognized and respected subject to paragraph 9 of the strand on Resources.”

It is worth stressing the value of including a provision on the recognition of and respect for vested property rights in the MOA-AD similar to Section 56 of the IPRA, as follows:

“Section 56. Existing Property Rights Regimes. – Property rights within the ancestral domains already existing and/or vested upon effectivity of this Act, shall be recognized and respected.”

It is instructive to note that the FAB dispenses with the references to ancestral domain but retained the concept of vested property rights.

### C. Rights

MOA-AD	FAB
<ul style="list-style-type: none"> <li>• Protection of civil rights and religious liberties.</li> </ul>	<ul style="list-style-type: none"> <li>• V. Collective democratic rights of constituents in Bangsamoro shall be recognized in Bangsamoro Basic Law.</li> <li>• VI.1. Basic Rights and Freedoms               <ul style="list-style-type: none"> <li>➤ Life and inviolability of one’s person and dignity;</li> <li>➤ Freedom and expression of religion and beliefs;</li> <li>➤ Privacy;</li> <li>➤ Freedom of speech;</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>➤ Express political opinion and pursue democratically political aspiration;</li> <li>➤ Seek constitutional change by peaceful and legitimate means;</li> <li>➤ Women’s meaningful political participation, and protection from all forms of violence;</li> <li>➤ Freely choose one’s place of residence and the inviolability of the home;</li> <li>➤ Equal opportunity and non-discrimination in social and economic activity and public service, regardless of class, creed, disability, gender and ethnicity;</li> <li>➤ Establish cultural and religious associations;</li> <li>➤ Freedom from religious, ethnic and sectarian harassment; and</li> <li>➤ Redress of grievances and due process of law.</li> </ul>
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**Commentary:**

Unlike the MOA-AD, the FAB elaborated on the basic rights and freedoms of the constituents in the Bangsamoro. Renunciation of any form of violence is guaranteed through an express reference to constitutional change by peaceful and legitimate means. The FAB underscores the role of women in the political life of the Bangsamoro.

The classification of basic rights in FAB is indicative of the specific human rights concerns besetting the region subject of the agreement. However, this is not an exclusive enumeration but must be viewed in the whole spectrum of rights regime under the Philippine Constitution and other treaty-based human rights protection mechanisms. As it is, the FAB regime of rights is a special legal regime which will

be interpreted in light of the specific social, political and economic milieu of the constituents in Bangsamoro.

#### **D. Entity**

<b>MOA-AD</b>	<b>FAB</b>
<ul style="list-style-type: none"> <li>• Bangsamoro Juridical Entity (BJE) as authority</li> </ul>	<ul style="list-style-type: none"> <li>• I.1. Bangsamoro is the New Autonomous Political Entity (NPE)</li> </ul>

#### **Commentary:**

There is a marginal distinction between the contemplated entities under both agreements. It is clear, however, that both agreements intended to replace the existing Autonomous Region in Muslim Mindanao.

## VI. On Territory

MOA-AD	FAB
<ul style="list-style-type: none"> <li>• “Bangsamoro homeland and historic territory” refers to:               <ul style="list-style-type: none"> <li>➤ land mass</li> <li>➤ maritime domain</li> <li>➤ terrestrial domain</li> <li>➤ fluvial domain</li> <li>➤ alluvial domain</li> <li>➤ aerial domain</li> <li>➤ atmospheric space above territory</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• V.5. Territory refers to:               <ul style="list-style-type: none"> <li>➤ land mass</li> <li>➤ maritime</li> <li>➤ terrestrial</li> <li>➤ fluvial and alluvial domains</li> <li>➤ aerial domain</li> <li>➤ atmospheric space above it</li> </ul> </li> </ul> <p>[note: Governance to be agreed upon in sections on wealth and power sharing]</p>
<ul style="list-style-type: none"> <li>• Mindanao territory – Sulu – Palawan</li> </ul>	<ul style="list-style-type: none"> <li>• I.3. Provinces, cities, municipalities, barangays and geographic areas within Bangsamoro as “constituent units” with authority to regulate its own responsibility. Privileges enjoyed by LGUs shall not be diminished unless modified pursuant to Bangsamoro local government code.</li> </ul>
<ul style="list-style-type: none"> <li>• Agreed Schedules (Categories)</li> </ul>	
<ul style="list-style-type: none"> <li>• Core of Bangsamoro Juridical Entity:               <ul style="list-style-type: none"> <li>➤ ARMM</li> <li>➤ Lanao del Norte Municipalities of:                   <ul style="list-style-type: none"> <li>– Baloi</li> <li>– Munai</li> <li>– Nunungan</li> <li>– Pantar</li> <li>– Tagoloan</li> <li>– Tangkal</li> </ul> </li> </ul> </li> </ul> <p>[note: These voted for inclusion in the ARMM during 2001 plebiscite.]</p> <ul style="list-style-type: none"> <li>• plebiscite within 12 months from signing of MOA-AD in covered areas as listed in</li> </ul>	<ul style="list-style-type: none"> <li>• V.1. Core of Bangsamoro Provinces               <ul style="list-style-type: none"> <li>➤ ARMM</li> <li>➤ Lanao del Norte Municipalities of:                   <ul style="list-style-type: none"> <li>– Baloi</li> <li>– Munai</li> <li>– Nunungan</li> <li>– Pantar</li> <li>– Tagoloan</li> <li>– Tangkal</li> </ul> </li> </ul> </li> </ul> <p>[note: These voted for inclusion in the ARMM during 2001 plebiscite, inclusive of all other</p>



<p>Category A (Annex)</p> <ul style="list-style-type: none"> <li>• 15 months from signing MOA-AD to finish Comprehensive Compact.</li> </ul>	<p>barangays in the municipalities of Kabacan, Carmen, Aleosan, Pigkawayan, Pikit, Midsayap]</p> <ul style="list-style-type: none"> <li>➤ Cotabato City</li> <li>➤ Isabela City</li> <li>➤ All other contiguous areas where there is a resolution of the local government unit or a petition of at least 10 percent of the qualified voters in the area asking for their inclusion at least 2 months prior to the conduct of the ratification of the Bangsamoro Basic Law and the process of delimitation of the Bangsamoro.</li> </ul> <p>V.2. International third party monitoring team to ensure credible process in V.1.</p>
<ul style="list-style-type: none"> <li>• Category B (Special Intervention Areas) – outside BJE but subject of special socio-economic and cultural affirmative action not earlier than 25 years from signing of Comprehensive Compact, pending conduct of plebiscite to determine the question of accession to the BJE.</li> </ul>	<ul style="list-style-type: none"> <li>• V.3. Option of contiguous areas and those outside core territory with substantial populations of Bangsamoro to be part of the territory upon petition of at least 10 percent of the residents and approved by a majority of qualified voters in a plebiscite.</li> <li>• VI.4. Central Government to protect Bangsamoro people outside territory and undertake programs for their rehabilitation and development.</li> </ul>
<ul style="list-style-type: none"> <li>• Category B subject to further negotiations by the Parties.</li> </ul>	
<ul style="list-style-type: none"> <li>• Internal Waters (15 kms. from coastline of BJE) <ul style="list-style-type: none"> <li>➤ BJE with jurisdiction over management, conservation, development, protection,</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• V.4. Internal and territorial waters determined in Annexes on Wealth and Power Sharing.</li> </ul>

<p>utilization and disposition of all natural resources living and non-living.</p>	
<ul style="list-style-type: none"> <li>• Territorial Waters (beyond BJE internal waters up to the Republic of the Philippines baselines south east and south west of mainland Mindanao) <ul style="list-style-type: none"> <li>➤ Joint jurisdiction, authority and management over areas and all natural resources, living, and non-living</li> <li>➤ Details in a later agreement</li> <li>➤ Boundaries of territorial waters shall stretch beyond the 15-km. BJE internal waters up to the Central Government's baselines under existing laws.</li> <li>➤ In the southern and eastern part of the BJE demarcated by a line drawn from the Maguling Point, Palimbang, Province of Sultan Kudarat up to the straight baselines of the Philippines.</li> <li>➤ In the northwestern part, demarcated by a line drawn from Little Sta. Cruz Island, Zamboanga City, up to Naris Point, Bataraza, Palawan.</li> <li>➤ In the western part of Palawan, demarcated by a line drawn from the boundary of Bataraza and Rizal up to the straight baselines of the Philippines</li> <li>➤ Final demarcation determined by a joint technical body.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• V.4. Internal and territorial waters determined in Annexes on Wealth and Power Sharing.</li> </ul>
<ul style="list-style-type: none"> <li>• Sharing of Minerals on Territorial Waters in favor of BJE through production sharing or economic cooperation <ul style="list-style-type: none"> <li>➤ all potential source of energy</li> <li>➤ petroleum in situ</li> <li>➤ hydrocarbon</li> <li>➤ natural gas</li> <li>➤ other minerals</li> <li>➤ deposits or fields</li> </ul> </li> </ul>	
<ul style="list-style-type: none"> <li>• Allowed activities on Territorial Waters: <ul style="list-style-type: none"> <li>➤ exploration and utilization of natural resources</li> </ul> </li> </ul>	

<ul style="list-style-type: none"> <li>➤ establishment and use of artificial islands, installations and structures</li> </ul> <p>Joint *</p> <ul style="list-style-type: none"> <li>➤ marine scientific research</li> </ul> <p>Joint *</p> <ul style="list-style-type: none"> <li>➤ protection and preservation of environment</li> <li>➤ conservation of living resources</li> <li>➤ regulation of shipping and fishing activities</li> <li>➤ enforcement of police and safety measures, including interdiction of the entry and use of the waters by criminal elements and hot pursuit of criminal elements.</li> <li>➤ Regulation and control of contraband and illegal entry of prohibited materials and substances, including smuggling</li> <li>➤ Others agreed upon mutually</li> </ul> <p>[<u>note</u>: *Exploration and utilization of non-living resources and marine research and environmental protection shall be done jointly through production-sharing or joint development agreements.]</p>	
<ul style="list-style-type: none"> <li>• Joint Commission for implementing joint management of resources <ul style="list-style-type: none"> <li>➤ 1 representative each</li> <li>➤ consensus decision-making</li> <li>➤ recommendatory</li> </ul> </li> </ul>	
<ul style="list-style-type: none"> <li>• BJE “associative governance” to cover: <ul style="list-style-type: none"> <li>➤ those under proclamation for agricultural and human settlements intended for Bangsamoro people</li> <li>➤ all alienable and disposable lands</li> <li>➤ pasture lands</li> <li>➤ timberlands</li> </ul> </li> </ul>	

## **Commentary:**

### *1. Composition of the Bangsamoro territory*

The first paragraph of the heading “Territory” of the MOA-AD states:

“1. The Bangsamoro homeland and historic territory refer to the land mass as well as the maritime, terrestrial, fluvial and alluvial domains, and the aerial domain, the atmospheric space above it, embracing the Mindanao-Sulu-Palawan geographic region. However, delimitations are contained in the agreed Schedules (Categories).”

It is important to point out that the quoted provision on Territory in the MOA-AD should be viewed as legally limited by the constitutional definition of the National Territory as follows:

#### “ARTICLE I

#### NATIONAL TERRITORY

The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all other territories over which the Philippines has sovereignty or jurisdiction, consisting of its terrestrial, fluvial and aerial domains, including its territorial sea, the seabed, the subsoil, the insular shelves, and other submarine areas. The waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines.”

The FAB similarly refers to the same scope of the territory found in the MOA-AD. However, the FAB has modified the process of accommodating Category B (Special Intervention Areas) of the MOA-AD by committing Central Government to undertake rehabilitation and development as initially intended in the MOA-AD.

### *2. Plebiscite*

The conduct of a plebiscite is stipulated under Territory 2 (d) of the MOA-AD, as follows:

2. Toward this end, the Parties entered into the following stipulations:

x x x

d. Without derogating from the requirements of prior agreements, the government stipulates to conduct and deliver, within six (6) months following the signing of the Memorandum of Agreement on the Ancestral Domain, a plebiscite covering the areas as enumerated in the list and depicted in the map as Category A attached herein (the “Annex”). The Annex constitutes an integral part of this framework agreement.”

x x x.”

The conduct of plebiscite under the MOA-AD is analogous to the provisions of ARMM Law, to wit:

“Section 1. Expanded Autonomous Region. – (1) The Autonomous Region in Muslim Mindanao which, under the provisions of Republic Act No. 6734, the Organic Act for the Autonomous Region in Muslim Mindanao, is composed of the four provinces of Lanao del Sur, Maguindanao, Sulu and Tawi-Tawi, is hereby expanded to include the provinces and cities, enumerated hereunder, which vote favorably to be included in the expanded area of the autonomous region and for other purposes, in a plebiscite called for that purpose in accordance with Sec. 18, Article X of the Constitution.

The new area of autonomy shall then be determined by the provinces and cities that will vote/choose to join the said autonomy. It is understood that Congress may by law which shall be consistent with the Constitution and in accordance with the provisions of Republic Act No. 7160, the Local Government Code of 1991, provide that clusters of contiguous-Muslim-dominated municipalities voting in favor of autonomy be merged and constituted into a new province(s) which shall become part of the new Autonomous Region.

(2) Plebiscite Coverage. The plebiscite shall be conducted in the provinces of Basilan, Cotabato, Davao del Sur, Lanao del Norte, Lanao del Sur, Maguindanao, Palawan, Sarangani, South Cotabato, Sultan Kudarat, Sulu, Tawi-Tawi, Zamboanga del Norte, Zamboanga del Sur and the newly created Province of Zamboanga Sibugay, and (b) in the cities of Cotabato, Dapitan, Dipolog, General Santos, Iligan, Kidapawan, Marawi, Pagadian, Puerto Princesa, Digos, Koronadal, Tacurong and Zamboanga.”

Both MOA-AD and FAB comply with the constitutional requirement of a plebiscite in areas subject of the core territory.

### *3. Territorial Waters*

The MOA-AD expressly includes a provision on territorial waters under paragraph 2 (g) of the heading “Territory”, to wit:

“2. Toward this end, the Parties entered into the following stipulations:

g. Territorial Waters:

(1) The territorial waters of the BJE shall stretch beyond the BJE internal waters up to the Republic of the Philippines (RP) baselines south east and south west of mainland Mindanao. Beyond the fifteen (15) kilometers internal waters, the Central Government and the BJE shall exercise joint jurisdiction, authority and management over areas and [of] all natural resources, living and non-living contained therein. The details of such management of the Territorial Waters shall be provided in an agreement to be entered into by the Parties.

(2) The boundaries of the territorial waters shall stretch beyond the 15-km. BJE internal waters up to the Central Government’s baselines under existing laws. In the southern and eastern part of the BJE, it shall be demarcated by a line drawn from the Maguling Point, Palimbang, Province of Sultan Kudarat up to the straight baselines of the Philippines. On the northwestern part, it shall be demarcated by a line drawn from Little Sta. Cruz Island, Zamboanga City, up to Naris Point, Bataraza, Palawan. On the western part of Palawan, it shall be demarcated by a line drawn from the boundary of Bataraza and Rizal up to the straight baselines of the Philippines.

The final demarcation shall be determined by a joint technical body composed of duly-designated representatives of both Parties, in coordination with the appropriate Central Government agency in accordance with the above guidelines.”

The provision on territorial waters of the MOA-AD may be justified under Article 1 of the Constitution on National Territory, the concept of municipal waters under Republic Act No. 7160, otherwise known as the Local Government Code of

1991, and the concept of waters within ancestral lands under IPRA. It is submitted that the grant of territorial waters to the BJE may be allowed considering that it is akin to the grant of municipal waters to local government units and rights over waters within ancestral lands of the indigenous peoples, which are culled out from the internal waters of the Philippines.

For appropriate guidance, the following provisions of the Constitution and other existing laws are instructive:

### **Constitution**

#### *Article I-National Territory*

“The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all other territories over which the Philippines has sovereignty or jurisdiction, consisting of its terrestrial, fluvial and aerial domains, including its territorial sea, the seabed, the subsoil, the insular shelves, and other submarine areas. The waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines.”

#### *Section 2, Article XII – National Economy and Patrimony*

“Section 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.

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.

The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fish-workers in rivers, lakes, bays, and lagoons.

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

The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.”

### **Local Government Code**

“Section 131. Definition of Terms. – When used in this Title, the term:

x x x

(r) ‘Municipal Waters’ includes not only streams, lakes, and tidal waters within the municipality, not being the subject of private ownership and not comprised within the national parks, public forest, timber lands, forest reserves or fishery reserves, but also marine waters included between two lines drawn perpendicularly to the general coastline from points where the boundary lines of the municipality or city touch the sea at low tide and a third line parallel with the general coastline and fifteen (15) kilometers from it. Where two (2) municipalities are so situated on the opposite shores that there is less than fifteen (15) kilometers of marine waters between them, the third line shall be equally distant from opposite shores of the respective municipalities;”

x x x.”



## **ARMM Law**

### *Article XII – Economy and Patrimony*

“Section 24. Aquatic and Fisheries Code. – The Regional Assembly may enact an aquatic and fisheries code which shall enhance, develop, conserve, and protect marine and aquatic resources, and shall protect the rights of subsistence fisherfolk to the preferential use of communal marine and fishing resources, including seaweeds. This protection shall extend to offshore fishing grounds, up to and including all waters fifteen (15) kilometers from the coastline of the autonomous region but within the territorial waters of the Republic, regardless of depth and the seabed and the subsoil that are included between two (2) lines drawn perpendicular to the general coastline from points where the boundary lines of the autonomous region touch the sea at low tide and a third line parallel to the general coastline.

The provinces and cities within the autonomous region shall have priority rights to the utilization, development, conservation, and protection of the aforementioned offshore fishing grounds.

The provinces and cities concerned shall provide support to subsistence fisherfolk through appropriate technology and research, adequate financial, production, marketing assistance, and other services.

The Regional Assembly shall enact priority legislation to ensure that fish-workers shall receive a just share from their labor in the utilization, production, and development of marine and fishing resources.

The Regional Assembly shall enact priority legislation to develop science, technology, and other disciplines for the protection and maintenance of aquatic and marine ecology.”

## **IPRA**

“Section 3. Definition of Terms. – For purposes of this Act, the following terms shall mean:

- (a) Ancestral Domains – Subject to Section 56 hereof, refer to all areas generally belonging to ICCs/IPs comprising lands, inland waters, coastal areas, and natural resources therein, held under a claim of

ownership, occupied or possessed by ICCs/IPs, themselves or through their ancestors, communally or individually since time immemorial, continuously to the present except when interrupted by war, force majeure or displacement by force, deceit, stealth or as a consequence of government projects or any other voluntary dealings entered into by government and private individuals, corporations, and which are necessary to ensure their economic, social and cultural welfare. It shall include ancestral land, forests, pasture, residential, agricultural, and other lands individually owned whether alienable and disposable or otherwise, hunting grounds, burial grounds, worship areas, bodies of water, mineral and other natural resources, and lands which may no longer be exclusively occupied by ICCs/IPs but from which their traditionally had access to for their subsistence and traditional activities, particularly the home ranges of ICCs/IPs who are still nomadic and/or shifting cultivators;

X X X

(o) Sustainable Traditional Resource Rights – refer to the rights of ICCs/IPs to sustainably use, manage, protect and conserve a) land, air, water, and minerals; b) plants, animals and other organisms; c) collecting, fishing and hunting grounds; d) sacred sites; and e) other areas of economic, ceremonial and aesthetic value in accordance with their indigenous knowledge, beliefs, systems and practices; and

X X X.”

Finally, the creation of a Joint Commission under the MOA-AD does not mean an abdication of sovereign rights and functions over the maritime areas.

The FAB deferred the details on the internal and territorial waters in the Annexes on Wealth and Power-Sharing.

#### 4. *Associative Character*

The MOA-AD uses the term “associative governance,” as follows:

“Territory

X X X

3. From and after entrenchment of compact rights over the Bangsamoro homeland and the territorial jurisdictions for associative governance shall likewise embrace those under proclamation for agricultural and human settlements intended for the Bangsamoro people, all alienable and disposable lands, pasture lands, timberlands together with all existing civil and military reservations, parks, old growth or natural forests declared as forest reserves, watersheds, mangroves, fishponds, wetlands, marshes, inland bodies of water; and all bays, straits and channels found within the BJE.”

An associative character of governance in the MOA-AD is merely descriptive of a relationship between two (2) entities, in this case between the Government of the Republic of the Philippines and the Bangsamoro people. It may mean the two institutions are related to each other but not of equal status.

#### 5. *Formation or Constitution of Political Subdivisions*

Paragraph 4 under “Territory” of the MOA-AD states:

“4. All territorial and geographic areas in Mindanao and its adjacent islands including Palawan, and the Sulu archipelago that have been declared recognized, and/or delineated as ancestral domain and ancestral land of the Bangsamoro people as their geographic areas, inclusive of settlements and reservations, may be formed or constituted into political subdivisions of the Bangsamoro territorial jurisdictions subject to the principles of equality of peoples and mutual respect and to the protection of civil, political, economic, and cultural rights in their respective jurisdictions.” (*Underscoring supplied*)

The right of the Bangsamoro people to form or constitute political subdivisions is analogous to the right to create, divide or abolish provinces, cities, municipalities or barangay under R.A. No. 6734, as amended by R.A. No. 9054, otherwise known as the Organic Act for the Autonomous Region in Muslim Mindanao (ARMM Law).

Section 19, Article VI of the ARMM Law provides:

“Section 19. Creation, Division or Abolition of Provinces, Cities, Municipalities or Barangay. – The Regional Assembly may create, divide, merge, abolish, or substantially alter boundaries of provinces, cities, municipalities or barangay in accordance with the criteria laid down by Republic Act No. 7160, the Local Government Code of 1991, subject to the approval by a majority of the votes cast in a plebiscite in the political units directly affected. The Regional Assembly may prescribe standards lower than those mandated by Republic Act No. 7160, the Local Government Code of

1991, in the creation, division, merger, abolition, or alteration of the boundaries of provinces, cities, municipalities, or barangay. Provinces, cities, municipalities, or barangay created, divided, merged, or whose boundaries are altered without observing the standards prescribed by Republic Act No. 7160, the Local Government Code of 1991, shall not be entitled to any share of the taxes that are allotted to the local governments units under the provisions of the Code.

The financial requirements of the provinces, cities, municipalities, or barangay so created, divided, or merged shall be provided by the Regional Assembly out of the general funds of the Regional Government.

The holding of a plebiscite to determine the will of the majority of the voters of the areas affected by the creation, division, merger, or whose boundaries are being altered as required by Republic Act No. 7160, the Local Government Code of 1991, shall, however, be observed.

The Regional Assembly may also change the names of local government units, public places and institutions, and declare regional holidays.”

#### *6. Joint Determination of Geographic Areas*

The MOA-AD states that the Parties have agreed to the joint determination of the subject geographic areas, specifically Paragraph No. 5 under “Territory” thereof:

“5. For purposes of territorial delimitation, the Parties have agreed to the joint determination of geographic areas encompassed within the territorial borders of the Bangsamoro homeland and territory based on the technical maps and data submitted by both sides as provided above.”

The foregoing clause is defensible on the basis of Article 14 of ILO 169. Thus:

“2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.”

## VII. On Resources

MOA-AD	FAB
<ul style="list-style-type: none"> <li>• BJE authority over natural resources               <ul style="list-style-type: none"> <li>➤ land use</li> <li>➤ development</li> <li>➤ conservation</li> <li>➤ disposition</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• IV.2. Bangsamoro Basic Law – power to create own sources of revenue and to levy taxes, fees, and charges, including power to determine tax bases and tax rates.</li> </ul>
<ul style="list-style-type: none"> <li>• BJE may enter into joint development of natural resources designed as commons or shaped resources.</li> </ul>	<ul style="list-style-type: none"> <li>• IV.8. Intergovernmental body to be created by Bangsamoro legislative body to ensure harmonization of environmental and development plans composed of representatives from Bangsamoro and Central Government.</li> </ul>
<ul style="list-style-type: none"> <li>• Bangsamoro People “appropriate juridical entity” authority over natural resources within its territorial jurisdiction               <ul style="list-style-type: none"> <li>➤ develop ancestral domain</li> <li>➤ protect environment</li> <li>➤ develop natural resources in ancestral domain or enter into joint development on strategic minerals designated as commons or shared resources</li> <li>➤ revoke or grant concessions, timber license, contracts for utilization of natural resources designated as commons, mechanisms for economic cooperation with respect to strategic minerals</li> <li>➤ enact agrarian laws over ancestral land</li> </ul> </li> </ul>	
<ul style="list-style-type: none"> <li>• BJE and Central Government wealth-sharing               <ul style="list-style-type: none"> <li>➤ mutually agreed percentage ratio in favor of the BJE from revenues derived from development of any resources for the benefit of the Bangsamoro people.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• IV.4. Bangsamoro to have a just and equitable share in revenues for exploration, development or utilization of natural resources in all areas within jurisdiction of Bangsamoro in accordance with formula agreed upon by the</li> </ul>

	<p>Parties.</p> <ul style="list-style-type: none"> <li>IV. 6. See Annex on Revenue Generation and Wealth Sharing, July 13, 2013.</li> </ul>
<ul style="list-style-type: none"> <li>BJE authority to enter into trade relations with foreign countries and to open trade missions.</li> </ul>	<ul style="list-style-type: none"> <li>IV.3. Bangsamoro authority to receive grants and donations from domestic and foreign sources, and block grants and subsidies from the Central Government, including authority to contract loans from domestic and foreign lending institutions (except those requiring sovereign guaranty, which would require the approval of the Central Government).</li> </ul>
<ul style="list-style-type: none"> <li>Central Government in charge of external defense.</li> </ul>	
<ul style="list-style-type: none"> <li>Participation in international meetings, Philippine official missions engaged in negotiation of border agreements for environmental protection, equitable sharing of revenues in the areas of sea and bodies of water adjacent to or between islands forming part of the ancestral domain.</li> </ul>	
<ul style="list-style-type: none"> <li>Strategic resources operations subject to Central Government direction in times of national emergency.</li> </ul>	
<ul style="list-style-type: none"> <li>BJE share 75:25 in favor of BJE from total production.</li> </ul>	<ul style="list-style-type: none"> <li>Annex on Revenue Generation and Wealth Sharing</li> </ul>
<ul style="list-style-type: none"> <li>BJE share 75:25 in favor of BJE from royalties, bonuses, taxes, charges, custom duties, imposts on natural resources and mineral resources.</li> </ul>	
<ul style="list-style-type: none"> <li>Reparation to Bangsamoro people for unjust dispossession of territorial and proprietary rights.</li> </ul>	<ul style="list-style-type: none"> <li>VI.2. Legitimate grievances arising from unjust dispossession of territorial and proprietary rights subject of reparation</li> </ul>

	<ul style="list-style-type: none"> <li>• VIII.2. Program on transitional justice.</li> </ul>
<ul style="list-style-type: none"> <li>• Proclamations over natural forests and watersheds to remain until modified by BJE.</li> </ul>	
<ul style="list-style-type: none"> <li>• Land tenure instruments issues (e.g. MPSA, IFMA, concessions) by Government and ARMM to remain unless modified by BJE.</li> </ul>	
<ul style="list-style-type: none"> <li>• Establishment of 5-member BJE economic-export mission for the conduct of BJE's associative parallel relationships.</li> </ul>	<ul style="list-style-type: none"> <li>• IV.7. Intergovernmental fiscal policy board composed of representatives from Bangsamoro and Central Government to address revenue imbalances and fluctuations in regional financial needs and revenue-raising capacity. Once full fiscal autonomy is achieved by Bangsamoro, Central Government representative may no longer be necessary.</li> </ul>
<ul style="list-style-type: none"> <li>• Third Party Facilitator to invite international development agencies to appoint 2 members and designate 1 as Chairperson for the Mission; BJE to designate 1 Co-Chairman while 2 members designated by Central Government and BJE.</li> </ul>	
	<ul style="list-style-type: none"> <li>• IV.5. Bangsamoro auditing body to be created without prejudice to power of national COA over accounts of government instrumentality, including GOCCs.</li> </ul>

### **Commentary:**

#### *1. Authority Over Natural Resources*

Paragraph 1 under “Resources” of the MOA-AD provides, among others, that “(t)he Bangsamoro juridical entity is empowered with authority and responsibility for the land use, development, conservation and disposition of the natural resources within the homeland.”

Furthermore, the MOA-AD, as provided in its Paragraph 2 under “Resources”, states that “The Bangsamoro People through their appropriate juridical entity shall, among others, exercise power or authority over the natural resources within its territorial jurisdiction: x x x.”

This provision is consistent with the constitutional framework for allowing Autonomous Regions to legislate on ancestral domain and natural resources, particularly Section 20, Article X of the 1987 Philippine Constitution:

“Section 20. Within its territorial jurisdiction and subject to the provisions of this Constitution and national laws, the organic act of autonomous regions shall provide for legislative powers over:

- (1) Administrative organization;
- (2) Creation of sources of revenues;
- (3) Ancestral domain and natural resources;
- (4) Personal, family, and property relations;
- (5) Regional urban and rural planning development;
- (6) Economic, social, and tourism development;
- (7) Educational policies;
- (8) Preservation and development of the cultural heritage; and
- (9) Such other matters as may be authorized by law for the promotion of the general welfare of the people of the region.”(*Underscoring supplied*)

The foregoing constitutional mandate is reflected in Section 7, Article III of the ARMM Law:

“Section 8. Regional Government Authority Over Natural Resources.  
– Subject to the provisions of the Constitution and this Organic Act, the Regional Government shall have the authority, power and right to explore, develop and utilize the natural resources including surface and sub-surface rights, in-land and coastal waters, and renewable and non-renewable resources in the autonomous region. Muslims and the other indigenous cultural communities shall, however, have priority rights to explore, develop and utilize the said resources in the areas designated as parts of their respective ancestral domains.”

Similarly, Section 57 of IPRA clearly confers upon the indigenous peoples priority rights in the harvesting, extraction, development or extraction of natural resources within their ancestral domains. Thus:

“Section 57. Natural Resources within Ancestral Domains. – The ICCs/IPs shall have the priority rights in the harvesting, extraction,



development or exploitation of any natural resources within the ancestral domains. A non-member of the ICCs/IPs concerned may be allowed to take part in the development and utilization of the natural resources for a period of not exceeding twenty-five (25) years renewable for not more than twenty-five (25) years: Provided, That a formal and written agreement is entered into with the ICCs/IPs concerned or that the community, pursuant to its own decision making process, has agreed to allow such operation: Provided, finally, That the all extractions shall be used to facilitate the development and improvement of the ancestral domains.”

The FAB again deferred discussion on details on natural resources in the Annex on Revenue Generation and Wealth Sharing. However, the concept of a just and equitable share is the same as the MOA-AD. Compared to the MOA-AD, the FAB does not refer to trade relations with foreign countries but recognizes Bangsamoro authority to receive grants and donations even from foreign sources, including authority to contract loans from foreign lending institutions, except those requiring sovereign guaranty which would require approval of the Central Government.

## 2. *Right to Develop and Utilize Natural Resources*

Paragraph 1 (a) under “Resources” of the Agreement states:

“1. The Bangsamoro Juridical Entity is empowered with authority and responsibility for the land use, development, conservation and disposition of the natural resources within the homeland. Upon entrenchment of the Bangsamoro Juridical Entity, the land tenure and use of such resources and wealth must reinforce their economic self-sufficiency. Among the purposes or measures to make progress more rapid are:

- a. Entry into joint development, utilization, and exploitation of natural resources designed as commons or shared resources, which is tied up to the full setting of appropriate institution, particularly affecting strategic minerals”;

This clause is justifiable on the basis on the right over ancestral domain to develop land and natural resources under Section 7 (b) of IPRA:

“Section 7. Rights to Ancestral Domain. – The rights of ownership and possession of ICCs/IPs to their ancestral domains shall be recognized and protected. Such rights shall include:

x x x

b. Right to Develop Lands and Natural Resources. Subject to Section 56 hereof, right to develop, control and use lands and territories traditionally occupied, owned, or used: to manage and conserve natural resources within the territories and uphold the responsibilities for future generations; to benefit and share the profits from allocation and utilization of the natural resources found therein; the right to negotiate the terms and conditions for the exploration of natural resources in the areas for the purpose of ensuring ecological, environmental protection and the conservation measures, pursuant to national and customary laws; the right to an informed and intelligent participation in the formulation and implementation of any project, government or private, that will affect or impact upon the ancestral domains and to receive just and fair compensation for any damages which they sustain as a result of the project; and the right to effective measures by the government to prevent any interference with, alienation and encroachment upon these rights; x x x.” (*Underscoring supplied*)

### 3. *Right to Revoke or Grant Forest Concessions, Timber License, Contracts or Agreements*

Paragraph 2 (d) under “Resources” of the MOA-AD, provides that the Bangsamoro people shall, as regards their authority or jurisdiction over the natural resources within its territorial jurisdiction, have the right:

“d. To revoke or grant forest concessions, timber license, contracts or agreements in the utilization and exploitation of natural resources designated as commons or shared resources, mechanisms for economic cooperation with respect to strategic minerals, falling within the territorial jurisdiction of the Bangsamoro Juridical Entity; x x x.”

The foregoing provision is analogous to Section 5, Article X of the ARMM Law on the validity of similar agreements entered into by the Government of the Republic of the Philippines:

“Section 5. Ecological Balance. – x x x. Forest concessions, timber licenses, contracts, or agreements of any kind or nature whatsoever granted by

the central government or national government or by the Regional Government as of the date of the approval of this Organic Act, are hereby cancelled, nullified and voided, and shall not be renewed until thirty (30) years after the approval of this Organic Act. x x x.”

#### 4. *Right to Enact Agrarian Law*

The MOA-AD, particularly under the “Resources” heading, likewise states that the Bangsamoro people shall have the power to enact agrarian laws:

“2. The Bangsamoro People through their appropriate juridical entity shall, among others, exercise power or authority over the natural resources within its territorial jurisdiction:

x x x

e. To enact agrarian laws and programs suitable to the special circumstances of the Bangsamoro people prevailing in their ancestral lands within the established territorial boundaries of the Bangsamoro homeland and ancestral territory within the competence of the Bangsamoro juridical entity; x x x.”

This right is clearly granted to the autonomous regions, under Section 8, Article X of the ARMM Law, as follows:

“Section 8. Regional Land Reform. – Subject to the provisions of the Constitution, the Regional Assembly may enact an agrarian reform law suitable to the special circumstances prevailing in the autonomous region.”

#### 5. *Strategic Minerals*

The wording on the right over strategic minerals provided in paragraph 5 of the heading “Resources” of the MOA-AD reads:

“5. Jurisdiction and control over, and the right of exploring for, exploiting, producing and obtaining all potential sources of energy, petroleum, in situ, fossil fuel, mineral oil and natural gas, whether onshore or offshore, is vested in the Bangsamoro juridical entity as the party having control within its territorial jurisdiction, provided that in times of national emergency, when public interest so requires, the Central Government may, during the emergency, for a fixed period and under reasonable terms as may be agreed by both Parties, temporarily assume or direct the operations of such strategic resources.

## 6. *Wealth-Sharing*

Paragraph 3 under “Resources” of the MOA-AD provides:

“3. The Bangsamoro Juridical Entity, and the Central Government agree on wealth-sharing based on a mutually agreed percentage ratio in favor of the Bangsamoro juridical entity through an economic cooperation agreement or arrangement over the income and revenues that are derived from the exploration, exploitation, use and development of any resources for the benefit of the Bangsamoro people.”

This is consistent with the principle of *jura regalia* or regalian doctrine wherein the National Government does not concede ownership of strategic minerals and other potential sources of energy. However, the principle of “sharing” may be legally justified with the BJE as in the provisions on local autonomy and the autonomous regions.

## 7. *Profit Split*

The MOA-AD provides for profit sharing between the National Government and the BJE in favor of the latter, specifically:

“Resources

x x x

6. The Bangsamoro government-take or profit split from total production shall be shared with the Central Government on a percentage ratio of 75:25 in favor of the Bangsamoro juridical entity. All royalties, bonuses, taxes, charges, custom duties or imposts on natural resources and mineral resources shall be shared by the Parties on a percentage ratio of 75:25 in favor of the Bangsamoro juridical entity.”

The exact sharing ratio with the government on strategic minerals is not found in any law (*i.e.*, ARMM Law, Local Government Code, Mining Act, People’s Small-scale Mining Act.). It may be argued, however that the 75:25 profit split in terms of total production, and 75:25 profit split as regards royalties, bonuses, taxes, etc. on natural resources, both in favor of the BJE, are justifiable to assist the BJE in their own economic development.

## 8. *Unjust Dispossession*

Paragraph 7 under “Resources” of the MOA-AD acknowledges the right of the BJE against unjust dispossession of territorial and proprietary rights:

“7. The legitimate grievances of the Bangsamoro people arising from any unjust dispossession of their territorial and proprietary rights, customary land tenures, or their marginalization shall be acknowledged. Whenever restoration is no longer possible, the GRP shall take effective measures or adequate reparation collectively beneficial to the Bangsamoro people, in such quality, quantity and status to be determined mutually by both Parties.”

The foregoing right is analogous to the indigenous peoples’ right to stay in their territories. Thus, under Section 7(c) of the IPRA:

“Section 7. Rights to Ancestral Domains. – The rights of ownership and possession of ICCs/IPs to their ancestral domains shall be recognized and protected. Such rights shall include:

x x x

c. Right to Stay in the Territories – The right to stay in the territory and not be removed therefrom. No ICCs/IPs will be relocated without their free and prior informed consent, nor through any means other than eminent domain. Where relocation is considered necessary as an exceptional measure, such relocation shall take place only with the free and prior informed consent of the ICCs/IPs concerned and whenever possible, they shall be guaranteed the right to return to their ancestral domains, as soon as the grounds for relocation cease to exist. When such return is not possible, as determined by agreement or through appropriate procedures, ICCs/IPs shall be provided in all possible cases with lands of quality and legal status at least equal to that of the land previously occupied by them, suitable to provide for their present needs and future development. Persons thus relocated shall likewise be fully compensated for any resulting loss or injury;

x x x.”

The FAB similarly recognizes the concept of reparation for legitimate grievances arising from unjust dispossession of territorial and proprietary rights of the Bangsamoro and aims to implement a program on transitional justice.

### VIII. On Governance

MOA-AD	FAB
<ul style="list-style-type: none"> <li>• Consultations with Bangsamoro people to resolve conflict</li> </ul>	
<ul style="list-style-type: none"> <li>• Secure identity and posterity</li> </ul>	
<ul style="list-style-type: none"> <li>• Protect property rights</li> </ul>	
<ul style="list-style-type: none"> <li>• System of governance suitable to a distinct dominant people with freedom of choice of Indigenous Peoples</li> </ul>	<ul style="list-style-type: none"> <li>• II.3. Basic Law reflects Bangsamoro life and meets internationally accepted standards.</li> </ul>
<ul style="list-style-type: none"> <li>• Multinational third-party to monitor implementation of Comprehensive Compact</li> </ul>	
<ul style="list-style-type: none"> <li>• “Associative relationship” <ul style="list-style-type: none"> <li>➢ Shared authority and responsibility</li> <li>➢ Structure defined in Comprehensive Compact</li> <li>➢ Period of transition in Comprehensive Compact to specify relationship between Central Government and the BJE</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• I.4. “Asymmetric relationship”</li> <li>• III.1. Central Government with reserved powers; Bangsamoro with exclusive powers; shared concurrent powers; (Annex on Power-Sharing).</li> </ul>
<ul style="list-style-type: none"> <li>• “Entrenchment” is the creation of a process of institution building to exercise shared authority over territory and defined functions of associative character.</li> </ul>	
<ul style="list-style-type: none"> <li>• Deferral of modalities of governance to settle outstanding political issues after MOA-AD signing.</li> </ul>	
<ul style="list-style-type: none"> <li>• Basic Law of BJE to contain institutions for governance in a Comprehensive Compact.</li> </ul>	<ul style="list-style-type: none"> <li>• II. “Basic Law” ... consistent with all agreements of the Parties.</li> <li>• II.4. Formulated by Bangsamoro and ratified within its territory.</li> </ul>
<ul style="list-style-type: none"> <li>• Compliance with associative arrangements upon entry into force of Comprehensive Compact.</li> </ul>	
<ul style="list-style-type: none"> <li>• Mechanisms for implementation of MOA-AD to be spelt out in Comprehensive</li> </ul>	<ul style="list-style-type: none"> <li>• VII. Transition and Implementation</li> </ul>

<p>Compact.</p> <ul style="list-style-type: none"> <li>➤ “Any provisions of the MOA-AD requiring amendments to the existing legal framework shall come into force upon signing of a Comprehensive Compact and upon effecting the necessary changes to the legal framework with due regard to non derogation of prior agreements and within the stipulated timeframe to be contained in the Comprehensive Compact.”</li> </ul>	<ul style="list-style-type: none"> <li>➤ Annex on Transitional Arrangements and Modalities (VII.2.) February 27, 2013</li> <li>➤ E.O. to create Transition Commission (TC) with Congressional Resolutions (VII.3.)</li> <li>➤ TC to draft Basic Law (VII.4.a.) and certified urgent (VII.7.)</li> <li>➤ TC “to work on proposals to amend Philippine Constitution for the purpose of accommodating and entrenching in the Constitution the agreements of the Parties whenever necessary without derogating from any prior peace agreements” (VII.4.b.)</li> <li>➤ TC to coordinate development agreements (VII.4.c.)</li> <li>➤ 7 members selected by GPH and 8, including Chairman, selected by MILF (VII.5.)</li> <li>➤ Basic Law to create Bangsamoro Transition Authority (BTA) rendering ARMM abolished (VII.8.)</li> <li>➤ BTA during interim period to give rise to ministerial form and Cabinet system (VII.9.)</li> <li>➤ BTA replaced in 2016 by Bangsamoro Government upon assumption of Legislative Assembly</li> </ul>
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	<p>(VII.10.)</p> <ul style="list-style-type: none"> <li>➤ Third party monitor composed of international bodies (VII.11–12.)</li> </ul>
<ul style="list-style-type: none"> <li>• Institutions to be built by BJE: <ul style="list-style-type: none"> <li>➤ civil service</li> <li>➤ electoral</li> <li>➤ financial and banking</li> <li>➤ education</li> <li>➤ legislation</li> <li>➤ legal</li> <li>➤ economic</li> <li>➤ police and internal security force</li> <li>➤ judicial system</li> <li>➤ correctional institutions</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• I.2. Ministerial form under an electoral system contained in the Bangsamoro Basic Law to be implemented through legislation enacted by the Bangsamoro Government and correlated with national laws.</li> <li>• III.2. Central Government powers: <ul style="list-style-type: none"> <li>➤ defense and external security</li> <li>➤ foreign policy</li> <li>➤ common market and global trade</li> <li>➤ coinage and monetary policy</li> <li>➤ citizenship and naturalization</li> <li>➤ postal service</li> </ul> </li> </ul>
<ul style="list-style-type: none"> <li>• Details of agreed consensus points on Governance to be discussed in negotiations of the Comprehensive Compact.</li> </ul>	
	<ul style="list-style-type: none"> <li>• III.3. Bangsamoro powers <ul style="list-style-type: none"> <li>➤ Shari'ah justice system – applies only to Muslims</li> </ul> </li> </ul>
	<ul style="list-style-type: none"> <li>• III.4. Bangsamoro Basic Law may provide for the power of the Bangsamoro Government to accredit halal-certifying bodies in the Bangsamoro.</li> </ul>
	<ul style="list-style-type: none"> <li>• III.5. Bangsamoro Basic Law to provide justice system; including improving local civil courts and ADR.</li> </ul>
	<ul style="list-style-type: none"> <li>• III.6. Recognition of</li> </ul>



	indigenous processes as ADR.
	<ul style="list-style-type: none"> <li>• VIII. Normalization <ul style="list-style-type: none"> <li>➤ Police system (VIII.3.)</li> <li>➤ Independent Commission (VIII.4.)</li> <li>➤ Decommissioning of MILF forces (VIII.5.)</li> <li>➤ Ceasefire monitoring until decommissioning completed (VIII.6.)</li> <li>➤ Parties to work on reduction and control of firearms and disbandment of private arms and armed groups (VIII.8.)</li> <li>➤ Timetable in Annex on Normalization (VIII.9.)</li> <li>➤ Trust Fund (VIII.11.)</li> </ul> </li> </ul>
	<ul style="list-style-type: none"> <li>• IX.1. No unilateral implementation</li> </ul>
	<ul style="list-style-type: none"> <li>• IX.2. Complete Comprehensive Compact by end of 2012.</li> </ul>

### **Commentary:**

#### *1. Basic Law in Relation to Comprehensive Compact*

The MOA-AD and the FAB both have the concept of a Basic Law which elaborates the institutions of governance.

Unlike the FAB, the MOA-AD specifically reserved the Governance strand in a standalone agreement to distinguish the scope of the MOA-AD.

The FAB elaborated on the modalities of the transition period, such as, the creation of a Transition Commission to draft a Basic Law which will form part of a final Comprehensive Compact.

## 2. *Relationship between Central Government and New Autonomous Political Entity*

Both MOA-AD and the FAB preferred a relationship between the Central Government and the New Autonomous Political Entity envisioned by the Bangsamoro people.

The MOA-AD described the relationship as “associative” while the FAB characterized it as “asymmetric” wherein the Central Government has reserved powers with the Bangsamoro exercising exclusive powers and shared concurrent powers to be enjoyed by both.

In the North Cotabato case, the Supreme Court struck down the MOA-AD concept of an associative relationship. The FAB deferred the contents of the asymmetric character of the relationship with the Central Government in another Annex on Power-Sharing.

## 3. *Changes to Existing Legal Framework*

Of particular interest is the following provision in the MOA-AD which was also struck down by the Supreme Court as unconstitutional:

“7. The parties agree that the mechanisms and modalities for the actual implementation of this MOA-AD shall be spelt out in the Comprehensive Compact to mutually take such steps to enable it to occur effectively.

Any provisions of the MOA-AD requiring amendments to the existing legal framework shall come into force upon signing of a Comprehensive Compact upon effecting the necessary changes to the legal framework with due regard to non derogation of prior agreements and within the stipulated timeframe to be contained in the “Comprehensive Compact.”

It is instructive to compare the tenor of the quoted MOA-AD provision with the following text of the FAB under VII.4.b:

“VII. Transition and Implementation

x x x

4. The functions of the Transition Commission are as follows:

x x x

b. To work on proposals to amend the Philippine Constitution for the purpose of accommodating and entrenching in the constitution the agreements of the

parties whenever necessary without derogating from any prior peace agreements;”

In the North Cotabato case, the Supreme Court observed that the MOA-AD provision in question was an expression of a legal commitment by the GRP Negotiating Panel in grave abuse of discretion amounting to lack or excess of jurisdiction notwithstanding the position taken by the Panel that this was consistent with the mandate of the Panel under E.O. No. 3 of 2001 that the comprehensive peace process may require administrative action, new legislation, or even constitutional amendments.

## **IX. Conclusion**

The FAB is incrementally being enfolded with the full spectrum of a more comprehensive comparative analysis to unfold in the next few months of intense negotiations between the two panels.

At this stage, it may be the better part of wisdom and the exercise of utmost prudence to observe the process rather than to telegraph an immediate judgment on the validity of the contents of the FAB. A definitive discourse on the FAB and the Annexes will be appropriate at a more opportune moment.

Meanwhile, one may tentatively view the FAB as reminiscent of the spirit of the MOA-AD as this initial phase of the study has constantly depicted.