G.R. No. 212426 – RENE A.V. SAGUISAG, ET AL., *Petitioners v.* EXECUTIVE SECRETARY PAQUITO N. OCHOA, JR., ET AL., *Respondents.*

G.R. No. 212444 – BAGONG ALYANSANG MAKABAYAN (BAYAN), represented by its SECRETARY GENERAL RENATO M. REYES, JR., ET AL., *Petitioners v.* DEPARTMENT OF NATIONAL DEFENSE (DND) SECRETARY VOLTAIRE GAZMIN, ET AL., *Respondents*; KILUSANG MAYO UNO, represented by its CHAIRPERSON ELMER LABOG, ET AL., *Petitioners-in-Intervention*; RENE A.Q. SAGUISAG, JR., *Petitioner-in-Intervention.*

Promulgated:

January 12, 2016

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DISSENTING OPINION

BRION, *J.*:

Before this Court is the constitutionality of the Enhanced Defense Cooperation Agreement (*EDCA*), an executive agreement with the United States of America (*U.S.*) that the Executive Department entered into and ratified on June 6, 2014.[1]

This case is not an easy one to resolve for many reasons – the stakes involved in light of contemporary history, the limited reach of judicial inquiry, the limits of the Court's own legal competence in fully acting on petitions before it, and the plain and clear terms of our Constitution. While the petitions, the comments, and the *ponencia* all extensively dwell on constitutional, statutory, and international law, the constitutional challenge cannot be resolved based solely on our consideration of the Constitution nor through the prism of Philippine national interest considerations, both expressed and those left unspoken in these cases. In our globalized world where Philippine interests have long been intersecting with those of others in the world, the country's externalities – the international and regional situations and conditions – must as well be considered as operating background from where the Philippines must determine where its national interests lie.

From the practical point of view of these externalities and the violation of Philippine territorial sovereignty that some of us have expressed,

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[1] Instrument of Ratification, Annex A of the Memorandum of OSG, *rollo,* p. 476. [per p. 14 of *ponencia*, to verify from *rollo*]

a quick decision may immediately suggest itself – ***let us do away with all stops and do what we must to protect our sovereignty and national integrity.***

What renders this kind of resolution difficult to undertake is the violation of our own Constitution – the express manifestation of the collective will of the Filipino people – that may transpire if we simply embrace the proffered easy solutions. Our history tells us that we cannot simply turn a blind eye to our Constitution without compromising the very same interests that we as a nation want to protect through a decision that looks only at the immediate practical view. To lightly regard our Constitution now as we did in the past, is to open the way to future weightier transgressions that may ultimately be at the expense of the Filipino people.

It is with these thoughts that this Opinion has been written: I hope to consider all the interests involved and thereby achieve a result that balances the immediate with the long view of the concerns besetting the nation.

I am mindful, of course, that the required actions that would actively serve our national interests depend, to a large extent, on the political departments of government – the Executive and, to some extent, the Legislature.[2] The Judiciary has only one assigned role – to ensure that the Constitution is followed and, in this manner, ensure that the Filipino people's larger interests, as expressed in the Constitution, are protected.[3] *Small though this contribution may be, let those of us from the Judiciary do our part and be counted.*

I. THE CASE

I.A. The Petitions

The challenges to the EDCA come from several petitions that uniformly question – based on Article XVIII, Section 25 of the 1987 Constitution – **the use of an executive agreement as the medium for the agreement with the U.S.** The petitioners posit that the EDCA involves foreign military bases, troops, and facilities whose entry into the country should be **covered by a treaty concurred in by the Senate**.

They question substantive EDCA provisions as well, particularly the grant of telecommunication and tax privileges to the U.S. armed forces and its personnel;[4] the constitutional ban against the presence and storage of nuclear weapons within the Philippines;[5] the violation of the constitutional mandate to protect the environment;[6] the deprivation by the EDCA of the

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2 Constitution, Article VII, Section 21; Article XVIII, Section 25.
3 Derived from the Supreme Court's powers under Article VIII, Section 5(2)(a) of the Constitution.
4 *Bayan Muna, et al.* Petition (G.R. No. 212444), pp. 46-47, 79-81.
5 *Id.* at 52-57; *Saguisag, et al.* Petition (G.R. No. 212444), pp. 32-34.
6 *Bayan Muna, et al.* Petition (G.R. No. 212444), pp. 84-87.

exercise by the Supreme Court of its power of judicial review;[7] the violation of the constitutional policy on the preferential use of Filipino labor and materials;[8] the violation of the constitutional command to pursue an independent foreign policy;[9] the violation of the constitutional provision on the autonomy of local government units[10] and of National Building Code;[11] and, last but not the least, they question the EDCA for being a one-sided agreement in favor of the Americans.[12]

I.B. The Respondents' Positions

The respondents, through the Office of the Solicitor General (*OSG*), respond by questioning the petitioners on the threshold issues of justiciability, prematurity and standing, and by invoking the application of the political question doctrine.[13]

The OSG claims as well that the EDCA is properly embodied in an executive agreement as it is an exercise of the President's power and duty to serve and protect the people, and of his commander-in-chief powers;[14] that the practical considerations of the case requires a deferential review of executive decisions over national security;[15] that the EDCA is merely in implementation of two previous treaties – the Mutual Defense Treaty of 1951 (*1951 MDT*) and the Visiting Forces Agreement of 1998 (*1998 VFA*);[16] that the President may choose the form of the agreement, provided that the agreement dealing with foreign military bases, troops, or facilities is not the principal agreement that first allowed their entry or presence in the Philippines.

I.C. The *Ponencia*

The *ponencia* exhaustively discusses many aspects of the challenges in its support of the OSG positions. It holds that the President is the chief implementor of the law and has the duty to defend the State, and for these purposes, he may use these powers in the conduct of foreign relations;[17] even if these powers are not expressly granted by the law in this regard, he is justified by necessity and is limited only by the law since he must take the necessary and proper steps to carry the law into execution.

The *ponencia* further asserts that the President may enter into an executive agreement on foreign military bases, troops, or facilities, if:

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7 *Id.* at 40-43; *Saguisag, et al.* Petition (G.R. No. 212444), pp. 34-36.
8 *Bayan Muna, et al.* Petition (G.R. No. 212444), pp. 82-84.
9 *Id.* at 23-27; *Saguisag, et al.* Petition (G.R. No. 212444), pp. 36-38.
10 *Bayan Muna, et al.* Petition (G.R. No. 212444), pp. 87-89.
11 *Id.* at 90-91.
12 *Id.* at 44-45, 58-59; *Saguisag, et al.* Petition (G.R. No. 212426), pp. 39-49.
13 OSG Consolidated Comment, pp. 3-8.
14 *Id.* at 10-13.
15 *Id.* at 13-14.
16 *Id.* at 14-21.
17 *Ponencia*, pp. 3-7, 25-27.

(a) it is not the instrument that allows the presence of foreign military bases, troops, or facilities; or

(b) it merely aims to implement an existing law or treaty.[18]

It adds that the 1951 MDT is not an obsolete treaty;[19] that the 1998 VFA has already allowed the entry of U.S. troops and civilian personnel and is the treaty being implemented by the EDCA;[20] that the President may generally enter into executive agreements subject to the limitations defined by the Constitution, in furtherance of a treaty already concurred in by the Senate;[21] that the President can choose to agree to the EDCA either by way of an executive agreement or by treaty.[22] While it compares the EDCA with the 1951 MDT and the 1998 VFA, it claims at the same time it merely implements these treaties.[23]

On the exercise of its power of judicial review, the *ponencia* posits that the Court does not look into whether an international agreement should be in the form of a treaty or an executive agreement, save in the cases in which the Constitution or a statute requires otherwise;[24] that the task of the Court is to determine whether the international agreement is consistent with applicable limitations;[25] and that executive agreements may cover the matter of foreign military forces if these merely involve adjustments of details.[26]

I.D. <u>The Dissent</u>

I dissent, as I disagree that an executive agreement is the proper medium for the matters covered by the EDCA. The EDCA is an agreement that, on deeper examination, violates the letter and spirit of Article XVIII, Section 25 and Article VII, Section 21, both of the Constitution.

The EDCA should be in the form of a <u>treaty</u> as it brings back to the Philippines

- **the modern equivalent of the foreign military bases whose term expired in 1991 and which Article XVIII, Section 25 of the Constitution directly addresses;**

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18 *Id.* at 29-43.
19 *Id.* at 31.
20 *Id.* at 48-52.
21 *Id.* at 34-43.
22 *Id.* at 43-46.
23 *Id.* at 48-72.
24 *Id.* at 46.
25 *Id.*
26 *Id.* at 46-48.

- **foreign troops under arrangements outside of the contemplation of the visiting forces that the 1998 VFA allows; and**

- **military facilities that, under modern military strategy, likewise can be brought in only through a treaty.**

As the *ponencia* does, I shall discuss the background facts and the threshold issues that will enable *the Court and the reading public* to fully appreciate the constitutional issues before us, as well as my reasons for the conclusion that the EDCA, as an executive agreement, is constitutionally deficient.

I purposely confine myself to the term "constitutionally deficient" (instead of saying "unconstitutional") in light of my view that the procedural deficiency that plagues the EDCA as an executive agreement is remediable and can still be addressed. Also on purpose, I refrain from commenting on the substantive objections on the contents of the EDCA for the reasons explained below.

II. THE THRESHOLD ISSUES

The petitioners bring their challenges before this Court on the basis of their standing as citizens, taxpayers, and former legislators. The respondents, on the other hand, question the justiciability of the issues raised and invoke as well the *political question doctrine* to secure the prompt dismissal of the petitions. I shall deal with these preliminary issues below, singly and in relation with one another, in light of the commonality that these threshold issues carry.

The petitioners posit that the use of an executive agreement as the medium to carry EDCA into effect, violates Article XVIII, Section 25 of the 1987 Constitution and is an issue of transcendental importance that they, as citizens, can raise before the Supreme Court.[27] (*Significantly, the incumbent Senators are not direct participants in this case and only belatedly reflected their institutional sentiments through a Resolution.*)[28] The petitioners in G.R. No. 212444 also claim that the constitutionality of the EDCA involves the assertion and *protection of a public right*, in which they have a personal interest as affected members of the general public.[29]

The petitioners likewise claim that the EDCA requires the disbursement of public funds and the waiver of the payment of taxes, fees and rentals; thus, the petitioners have the standing to sue as taxpayers.[30]

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27 *Saguisag, et al.* Petition (G.R. No. 212426), pp. 19-22; *Bayan Muna, et al.* Petition (G.R. No. 212444), p. 6.

28 Senate Resolution No. 105 dated November 10, 2015.

29 *Bayan Muna, et al.* Petition (G.R. No. 212444), pp. 9-10.

30 *Saguisag, et al.* Petition (G.R. No. 212426), pp. 19-22.

They lastly claim that the exchange of notes between the Philippines' Department of National Defense Secretary Voltaire Gazmin and U.S. Ambassador Philip Goldberg[31] – the final step towards the implementation of the EDCA – rendered the presented issues ripe for adjudication.

The respondents, in response, assert that the petitioners lack standing,[32] and that the petitions raise political questions that are outside the Court's jurisdiction to resolve.[33]

They also argue that the issues the petitions raise are premature.[34] The EDCA requires the creation of separate agreements to carry out separate activities such as joint exercises, the prepositioning of materiel, or construction activities. At present, these separate agreements do not exist. Thus, the respondents state that the petitioners are only speculating that the agreements to be forged under the EDCA would violate our laws. These speculations cannot be the basis for a constitutional challenge.

II.A. *Locus Standi*

The *ponencia* holds that the petitioners do not have the requisite standing to question the constitutionality of the EDCA, but chooses to give due course to the petitions because of the transcendental importance of the issues these petitions raise.[35] In effect, the *ponencia* takes a liberal approach in appreciating the threshold issue of *locus standi.*

I agree with the *ponencia's* ultimate conclusions on the threshold issues raised. I agree as well that a justiciable issue exists that the Court can pass upon, although on both counts I differ from the *ponencia*'s line of reasoning. Let me point out at the outset, too, that judicial review is only an exercise of the wider judicial power that Article VIII, Section 1 of the Constitution grants and defines. One should not be confused with the other.

Judicial review is part of the exercise of judicial power under Article VIII, Section 1 of the Constitution, particularly when it is exercised under the judiciary's expanded power (*i.e.*, when courts pass upon the actions of other agencies of government for the grave abuse of discretion they committed), or when the Supreme Court reviews, on appeal or *certiorari,* the constitutionality or validity of any law or other governmental instruments under Section 5(2)(a) and (b) of Article VIII of the Constitution.

A basic requirement is the existence of an *actual case or controversy* that, viewed correctly, is a limit on the exercise of judicial power or the more specific power of judicial review.[36]

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31 *Id.* at 19.
32 OSG Consolidated Comment, pp. 3-5.
33 *Id.* at 5-7.
34 *Id.* at 7-8.
35 *Ponencia*, pp. 19-25.
36 *Imbong v. Ochoa, Jr.*, G.R. No. 204819, April 8, 2014, 721 SCRA 146, 278-279.

Whether such case or controversy exists depends on the existence of a *legal right* and the *violation of this right*, giving rise to a dispute between or among adverse parties.[37] Under the expanded power of judicial review, the actual case or controversy arises when an official or agency of government is alleged to have committed grave abuse of discretion in the exercise of its functions.[38]

Locus standi is a requirement for the exercise of judicial review[39] and is in fact an aspect of the actual case or controversy requirement viewed *from the prism of the complaining party whose right has been violated.*[40]

When a violation of a *private right* is asserted, the *locus standi* requirement is sharp and narrow because the claim of violation accrues only to the complainant or the petitioner whose right is alleged to have been violated.[41]

On the other hand, when a violation of a *public right* is asserted – *i.e.,* a right that belongs to the public in general and whose violation ultimately affects every member of the public – the *locus standi* requirement cannot be sharp or narrow; it must correspond in width to the right violated. Thus, the standing of even a plain citizen sufficiently able to bring and support a suit, should be recognized as he or she can then be deemed to be acting in representation of the general public.[42]

Transcendental importance is a concept (a much abused one) that has been applied in considering the requirements for the exercise of judicial power.[43] To be sure, it may find application when a public right is involved because a right that belongs to the general public cannot but be important.[44] Whether the importance rises to the level of being transcendental is a subjective element that depends on the user's appreciation of the descriptive word "transcendental" or on his or her calibration of the disputed issues' level of importance.

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37 *Id.* at 279-280.

38 See Separate Opinion of J. Brion in *Imbong v. Ochoa, Jr.*, *supra* note 36, at 489-491.

39 *Galicto v. Aquino*, 683 Phil. 141, 170 (2012).

40 *Ibid.*

41 See *David v. Macapagal Arroyo*, 552 Phil. 705 (2006), where the Court held that in private suits, standing is governed by the "real-parties-in interest" rule as contained in Section 2, Rule 3 of the 1997 Rules of Civil Procedure, as amended. It provides that "every action must be prosecuted or defended in the name of the real party in interest." Accordingly, the "real-party-in interest" is "the party who stands to be benefited or injured by the judgment in the suit or the party entitled to the avails of the suit." Succinctly put, the plaintiff's standing is based on his own right to the relief sought.

42 *De Castro v. Judicial and Bar Council*, 629 Phil. 629, 680 (2010).

43 See *Integrated Bar of the Philippines v. Zamora*, 392 Phil. 618, 634 (2000), citing *Tatad v. Secretary of the Department of Energy*, G.R. No. 124360, December 3, 1997, 281 SCRA 330, 349, citing *Garcia v. Executive Secretary*, G.R. No. 101273, July 3, 1992, 211 SCRA 219; *Osmeña v. COMELEC*, G.R. No. 100318, July 30, 1991, 199 SCRA 750; *Basco v. Pagcor*, G.R. No. 91649, May 14, 1991, 197 SCRA 52; and *Araneta v. Dinglasan*, 84 Phil. 368 (1949).

44 *Initiatives for Dialogue and Empowerment through Alternative Legal Services, Inc. (IDEALS, INC.) v. Power Sector Assets and Liabilities Management Corporation (PSALM)*, G.R. No. 192088, October 9, 2012, 682 SCRA 602, 633-634.

In either case, the use of transcendental importance as a justification is replete with risks of abuse as subjective evaluation is involved.[45] To be sure, this level of importance can be used as justification in considering *locus standi* with liberality,[46] but *it can never be an excuse to find an actual controversy when there is none.* To hold otherwise is to give the courts an unlimited opportunity for the exercise of judicial power – a situation that is outside the Constitution's intent in the grant of judicial power.

In the present cases, a violation of the Constitution, no less, is alleged by the petitioners through the commission of grave abuse of discretion. The violation potentially affects our national sovereignty, security, and defense, and the integrity of the Constitution – concerns that touch on the lives of the citizens as well as on the integrity and survival of the nation. In particular, they involve the nation's capability for self-defense; the potential hazards the nation may face because of our officials' decisions on defense and national security matters; and our sovereignty as a nation as well as the integrity of the Constitution that all citizens, including the highest officials, must protect.

In these lights, I believe that the issues involved in the present case are so important that a plain citizen *sufficiently knowledgeable of the outstanding issues*, should be allowed to sue. The petitioners – *some of whom are recognized legal luminaries or are noted for their activism on constitutional matters* – should thus be recognized as parties with proper standing to file and pursue their petitions before this Court.

II.B. Ripeness of the Issues Raised for Adjudication

I agree with the *ponencia*'s conclusion that the cases before this Court, *to the extent they are anchored on the need for Senate concurrence*, are ripe for adjudication. My own reasons for this conclusion are outlined below.

Like *locus standi*, ripeness for adjudication is an aspect of the actual case or controversy requirement in the exercise of judicial power.[47] The two concepts differ because ripeness is considered from the *prism, not of the party whose right has been violated, but from the prism of the actual violation itself.*

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[45] See Separate Opinion of *J. Brion* in *Cawad v. Abad*, G.R. No. 207145, July 28, 2015, citing *Quinto v. COMELEC*, G.R. No. 189698, December 1, 2009, 606 SCRA 258, 276 and *GMA Network v. COMELEC*, G.R. No. 205357, September 2, 2014, 734 SCRA 88, 125-126.

[46] See *CREBA v. ERC*, 638 Phil. 542, 556-557 (2010), where the Court provided "instructive guides" as determinants in determining whether a matter is of transcendental importance, namely: (1) the character of the funds or other assets involved in the case; (2) the presence of a clear case of disregard of a constitutional or statutory prohibition by the public respondent agency or instrumentality of the government; and (3) the lack of any other party with a more direct and specific interest in the questions being raised.

[47] *Imbong v. Ochoa, Jr.*, *supra* note 36, at 280.

Of the two basic components of actual case or controversy, namely, the *existence of a right* and the *violation of that right*, ripeness essentially addresses the latter component.[48] That a right exists is not sufficient to support the existence of an actual case or controversy; the right must be alleged to have been violated to give rise to a justiciable dispute. In other words, it is the *fact of violation* that renders a case ripe,[49] assuming of course the undisputed existence of the right violated.

In the present cases, Article VIII, Section 25 of the Constitution lays down in no uncertain terms the conditions under which foreign military bases, troops, and facilities may be allowed into the country: there should at least be the concurrence of the Senate.

Under these terms, the refusal to allow entry of foreign military bases, troops, and facilities into the country without the required Senate concurrence is a prerogative that the people of this country adopted for themselves under their Constitution: they want participation in this decision, however indirect this participation might be. This prerogative is exercised through the Senate; thus, a violation of this constitutional prerogative is not only a transgression against the Senate but one against the people who the Senate represents.

The violation in this case occurred when the President ratified the EDCA as an executive agreement and certified to the other contracting party (the U.S.) that all the internal processes have been complied with, leading the latter to believe that the agreement is already valid and enforceable. Upon such violation, the dispute between the President and the Filipino people ripened.

The same conclusion obtains even under the respondents' argument that the constitutionality of the EDCA is not yet ripe for adjudication, since it requires the creation of separate agreements to carry out separate activities such as joint exercises, the prepositioning of materiel, or construction activities. To the respondents, the petitioners are merely speculating on their claim of unconstitutionality since these separate agreements do not yet exist.

Indeed, issues relating to agreements yet to be made are not, and cannot be, ripe for adjudication for the obvious reason that they do not yet exist. The question of the EDCA's constitutionality, however, does not depend solely on the separate agreements that will implement it. The fact that an executive agreement had been entered into, not a treaty as required by Article XVIII, Section 25 of the Constitution, rendered the agreement's constitutional status questionable. Thus, when the exchange of notes that signaled the implementation of the EDCA took place, the issue of its compliance with the constitutional requirements became ripe for judicial intervention under our expanded jurisdiction.

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[48] *Id.*

[49] *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain*, 589 Phil. 387, 481 (2008).

II.C. The Political Question Doctrine

Another threshold issue that this Court must settle at the outset, relates to the political question doctrine that, as a rule, bars any judicial inquiry on any matter that the Constitution and the laws have left to the discretion of a coordinate branch of government for action or determination.[50]

The respondents raise the political question issue as part of their defense, arguing that the issues the petitioners raise are policy matters that lie outside the Court's competence or are matters where the Court should defer to the Executive.[51]

The political question bar essentially rests on the separation of powers doctrine that underlies the Constitution.[52] The courts cannot interfere with questions that involve policy determination exclusively assigned to the political departments of the government.[53] The American case of *Baker v. Carr*[54] best describes the standards that must be observed in determining whether an issue involves a political question, as follows:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[55]

From among these tests, the presence or absence of constitutional standards is the most relevant under the circumstances of the present consolidated cases.

After analyzing the issues raised, I find the respondents' position ***partly erroneous and partly premature for a political question doctrine ruling***.

This conclusion proceeds from my recognition that a distinction should be drawn in recognizing the constitutional issues before us, some of

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50 *Bondoc v. Pineda*, 278 Phil. 784 (1991).

51 *Javellana v. Executive Secretary*, 151-A Phil. 36, 131 (1973), citing *In Re McConaughy*, 119 N.W. 408, 417.

52 See *Garcia v. Executive Secretary*, 602 Phil. 64, 73-77 (2009).

53 *Ibid.*

54 369 U.S. 186 (1962).

55 *Id.* at 217.

which are procedural in character while others are substantive ones that require the application of different constitutional provisions.

The petitioners primarily question the constitutional validity of the EDCA for violation of Article XVIII, Section 25 of the 1987 Constitution. They challenge, as well, substantive provisions of the EDCA, among them, those relating to the grant of telecommunication privileges and tax exemptions to American visiting forces, and the EDCA provisions that would allegedly allow the entry of nuclear weapons into the country.

That the EDCA is an agreement that requires concurrence by the Senate before it can be considered valid and enforceable, is an issue that is essentially procedural as it requires that ***steps be taken*** before an international agreement can be considered fully valid and enforceable. It is ***an issue extrinsic to the terms of the EDCA*** and is properly a threshold issue that must be resolved before the substantive challenges to the EDCA's validity can be addressed.

Aside from being procedural, the issue relates as well to the standard set by the Constitution that delineates when an international agreement should be a treaty subject to Senate concurrence. The presence of this standard renders the determination of the medium to be used in forging an international agreement – whether as a treaty or as an executive agreement – an issue within the competence and authority of the courts to resolve in their role as guardians of the Constitution.[56]

Thus, the main issue the petitioners pose – the constitutional status of the EDCA as an executive agreement in light of the mandate of Article XVIII, Section 25 of the Constitution – is not a political question outside the judiciary's competence and authority to resolve. The respondents' argument on this point is therefore erroneous.

If indeed a referral to the Senate is required and no referral has been made, then the EDCA is ***constitutionally deficient*** so that its terms cannot be enforced. This finding renders further proceedings on the merits of the substantive issues raised, pointless and unwarranted. There is likewise no point in determining whether the substantive issues raised call for the application of the political question doctrine.[57]

On the other hand, the examination of the EDCA's substantive contents may be ripe and proper for resolution if indeed the EDCA can properly be the subject of an executive agreement. It is at that point when the respondents may claim that the substantive contents of the EDCA involve policy matters that are solely for the President to determine and that the courts may not inquire into under the separation of powers principle.[58] It

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56 *Dueas v. House of Representatives Electoral Tribunal*, 610 Phil. 730, 742 (2009); *Lambino v. Commission on Elections*, 536 Phil. 1, 111 (2006).

57 See Constitution, Article VII, Section 21.

58 *Bondoc v. Pineda*, *supra* note 50, at 784.

is only at that point when the application of the political question doctrine is called for.

In these lights (particularly, my position on the merits of the procedural issue raised), I find a ruling on the application of the political question doctrine to the substantive issues raised premature and unripe for adjudication; any ruling or discussion I may make may only confuse the issues when a proper petition on the constitutionality of the substantive contents of EDCA is filed.

III. THE FACTS

III.A. Historical, International and Regional Contexts

III.A(1) *The Early Years of Philippines-U.S. Relationship*

Active Philippine-American relations started in 1898, more than a century ago, when Commodore George Dewey and his armada of warships defeated the Spanish navy in the Philippines in the Battle of Manila Bay.[59] The sea battle was complemented by land assaults by Philippine forces who were then in open rebellion against Spain under the leadership of General Emilio Aguinaldo.[60]

The complementary effort started a relationship that, from the Philippine end, was characterized by hope of collaboration and assistance in the then colony's quest for independence from Spain.[61] But the fulfillment of this hope did not come to pass and was in fact shattered when America, with its own geopolitical interests in mind, decided to fight the Philippine forces and to keep the Philippines for itself as a colony. The American

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[59] On order of then U.S. Secretary of the Navy, Theodore Roosevelt, Commodore Dewey attacked the Spanish fleet in the Philippines. At noon of May 1, 1898, Commodore Dewey's ships had destroyed the Spanish fleet at the Battle of Manila Bay. See *Bayan Muna, et al.* Petition (G.R. No. 212444), pp. 11, citing http://www.history.com/this-day-in-history/battle-of-manila-bay.

See Zbigniew Brzesinski, *The Grand Chessboard - American Primacy and its Geostrategic Imperatives* (1997).

See also Fraser Weir. *A Centennial History of Philippine Independence, 1898-1998: Spanish-American War - War of Philippine Independence 1898-1901.* University of Alberta, available at https://www.ualberta.ca/~vmitchel/fw4.html; *The Spanish-American War, 1898.* United States Department of State, available at https://history.state.gov/milestones/1866-1898/spanish-american-war; and, *The Spanish-American War in the Philippines (1989).* American Experience, available at http://www.pbs.org/wgbh/amex/macarthur/peopleevents/pandeAMEX87.html.

[60] In the early part of 1898, the relations between the U.S. and Spain deteriorated. As the war became imminent, Commodore George Dewey, the commander of the U.S. Asiatic Squadron, had discussion with Emilio Aguinaldo's government in exile in Singapore and Hong Kong. See Weir, *supra* note 59.

[61] In the early part of 1898, the relations between the U.S. and Spain deteriorated. As the war became imminent, Commodore George Dewey, the commander of the U.S. Asiatic Squadron, had discussion with Emilio Aguinaldo's government in exile in Singapore and Hong Kong. See Weir, *supra* note 59.

objective was fully realized under the Treaty of Paris between Spain and the U.S., when the Philippines was handed by Spain to the U.S. as a colony.[62]

The result, of course, was inevitable as the Philippine forces were not then fighting for a change of masters but for independence. The Philippine forces fought the Americans in the Philippine-American war, and lost.[63]

Thus, a new colonizer took Spain's place. Unlike the Spanish colonial rule, however, one redeeming feature of the American colonial rule was the introduction of the concepts of democracy and governance.

As a colony, the Philippines, played a distinct role as the American outpost in the Far East as the American geopolitical interests slowly grew from the First World War years. By the end of the Second World War, the U.S.' international primacy was confirmed as the leader of the victor-nations. This international leadership role became sole leadership when the Soviet Union collapsed in the late 1980s. Thus, the U.S. now stands as the only global superpower whose military, economic, cultural, and technological reach and influence extend over all continents.[64]

III.A(2) ***The Post-W.W. II Years***

It was soon after Philippine independence, as the U.S. superpower status was rising, that the U.S. and the Philippines forged the **Military Bases Agreement of 1947** (*1947 MBA*) and the 1951 MDT. The 1947 MBA was the agreement specific to the U.S. bases, troops, and facilities in the Philippines,[65] while the 1951 MDT was the overarching document, entered

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62 Treaty of Peace Between the United States and Spain (December 10, 1898), Article III:
"Spain cedes to the United States the archipelago known as the Philippine Islands x x x"
See Yale Law School. The Avalon Project. *Treaty of Peace between the United States and Spain.* Available at http://avalon.law.yale.edu/19th_century/sp1898.asp.

63 Renato Constantino. *The Philippines: A Past Revisited* (1975), pp. 228-229.

64 See Brzesinski, *supra* note 59, at 3-29.
According to Brzesinski, America stands supreme in the four decisive domains of global power: (1) ***militarily***, it has an unmatched global reach; (2) ***economically***, it remains the main locomotive of global growth; (3) ***technologically***, it retains the overall lead in the cutting-edge areas of innovation; and (4) ***culturally***, despite some crassness, it enjoys an appeal that is unrivaled. ***The combination of all four makes America the only comprehensive superpower.***

Brzesinski traced the trajectory of the US's rise to global supremacy beginning from World War I (*WWI*) to the end of the Cold War, noting that the U.S.'s participation in WWI introduced it as a new major player in the international arena. While WWI was predominantly a European war, not a global one, its self-destructive power marked the beginning of the end of Europe's political, economic and cultural preponderance over the rest of the world. The European era in world politics ended in the course of World War II (*WWII*), the first truly global war. Since the European (i.e., Germany) and the Asian (i.e., Japan) were defeated, the US and the Soviet Union, two extra-European victors, became the successors to Europe's unfulfilled quest for global supremacy.

The contest between the Soviet Union and the US for global supremacy dominated the next fifty years following WWII. The outcome of this contest, the author believes, was eventually decided by non-military means: *political vitality, ideological flexibility, economic dynamism, and cultural appeal.* The protracted competition, in the end, eventually tip the scales in America's favor simply because it was much richer, technologically much more advanced, militarily more resilient and innovative, socially more creative and appealing.

65 See *Bayan Muna, et al.* Petition, GR No. 212444, pp. 13-14; and *Kilusang Mayo Uno, et al.* petition-in-intervention, p. 7.

into and ratified by the two countries as a treaty, to define the Philippine-American defense relationship in case of an armed attack by a third country on either of them.[66] As its title directly suggests, it is a defense agreement.

The solidity of the R.P.-U.S. relationship that started in the colonizer-colony mode, shifted to defense/military alliance (through the MBA, MDT, and their supplementary agreements) after Philippine independence, and began to progressively loosen as the Philippines tracked its own independent path as a nation. Through various agreements,[67] the American hold and the

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See also Stephen Shalom. *Securing the U.S.-Philippine Military Bases Agreement of 1947,* William Paterson University, available at http://www.wpunj.edu/dotAsset/209673.pdf; Robert Paterno. *American Military Bases in the Philippines: The Brownell Opinion,* available at http://philippinestudies.net/ojs/index.php/ps/article/viewFile/2602/5224; James Gregor. *The Key Role of U.S. Bases in the Philippines.* The Heritage Foundation, available at http://www.heritage.org/research/reports/1984/01/the-key-role-of-us-bases-in-the-philippines; Maria Teresa Lim. "Removal Provisions of the Philippine-United States Military Bases Agreement: Can the United States Take it All" 20 *Loyola of Los Angeles Law Review* 421, 421-422. See Fred Greene. *The Philippine Bases: Negotiating For the Future* (1988), p. 4.

The 1947 Military Bases Agreement was signed by the Philippines and the U.S. on March 14, 1947; it entered into force on March 26, 1947 and was ratified by the Philippine President on January 21, 1948. See Charles Bevans. *Treaties and Other International Agreements of the United States of America (1776-1949),* Available at United States Department of State, *https://books.google.com.ph/books?id=MUU6AQAAIAAJ&pg=PA55&lpg=PA55&dq=17+UST+1212:+TIAS+6084&source=bl&ots=VBt1V34ntR&sig=X2vYCbWVfJqF_o69-CcviP88zw0&hl=en&sa=X&ved=0ahUKEwiKg-jXq8LJAhXRBY4KHSicDeAQ6AEIGzAA#v=onepage&q=17%20UST%201212%3B%20TIAS%206084&f=false.*

The Philippine government also agreed to enter-into negotiations with the U.S., on the latter's request, to: expand or reduce such bases, exchange those bases for others, or acquire additional base areas. The agreement allowed the U.S. full discretionary use of the bases' facilities; gave criminal jurisdiction over U.S. base personnel and their dependents to the U.S. authorities irrespective of whether the alleged offenses were committed on or off the base areas. See Gregor, *supra.*

[66] The Philippines and the U.S. signed the MDT on August 30, 1951. It came into force on August 27, 1952 by the exchange of instruments of ratification between the parties. See Mutual Defense Treaty, U.S.-Philippines, August 30, 1951, 177 U.N.T.S. 134. Available at https://treaties.un.org/doc/Publication/UNTS/Volume%20177/volume-177-I-2315-English.pdf; See also *Bayan v. Gazmin* petition, GR No. 212444, at 14; *Saguisag v. Executive Secretary Ochoa* petition, GR No. 212426, p. 8; and *Kilusang Mayo Uno, et. al.* petition-in-intervention, p. 7.
It was concurred in by the Philippine Senate on May 12, 1952; and was advised and consented to by the U.S. Senate on March 20, 1952, as reflected in the U.S. Congressional Record, 82nd Congress, Second Session, Vol. 98 – Part 2, pp. 2594-2595. See *Nicolas v. Romulo,* 598 Phil. 262 (2009).

[67] *1956*: The Garcia-Bendetsen conference resolved the issue of jurisdiction in the American bases. The US began to recognize sovereignty of the Philippine government over the base lands. See *Exchange of Notes,* U.S.-Philippines, December 6, 1956, available at http://elibrary.judiciary.gov.ph/thebookshelf/docmonth/Dec/1956/35.

1959: Olongapo, which was then an American territory, was officially turned over by the US to the Philippines. Over the years, 17 of the 23 military installations were also turned over to the Philippines. See *Memorandum of Agreement,* U.S.-Philippines, October 12, 1959, available at http://elibrary.judiciary.gov.ph/thebookshelf/showdocs/35/11192.

1965: An agreement was signed revising Article XIII of the treaty wherein the US will renounce exclusive jurisdiction over the on-base offenses and the creation of a joint criminal jurisdiction committee. See *Exchange of Notes,* U.S.-Philippines, August 10, 1965, available at http://elibrary.judiciary.gov.ph/thebookshelf/showdocs/35/10934.

1966: The Ramos-Rusk Agreement reduced the term of the MBA to 25 years starting from that year. See Exchange of Notes, U.S.-Philippines, September 16, 1966, available at http://elibrary.judiciary.gov.ph/thebookshelf/showdocs/35/10859.

1979: The US reaffirmed Philippine sovereignty over the basis and placed each base under command of a Philippine base commander. See Office of the President of the Philippines. (1979). Official Week in Review. *Official Gazette of the Republic of the Philippines, 75(1),* iii-iv, available at http://www.gov.ph/1979/01/08/official-week-in-review-january-1-january-7-1979/.

length of stay of American military bases in the Philippines progressively shrunk.

The death knell for the U.S. military bases started sounding when a new Philippine Constitution was ratified in 1987. The new Constitution provides that ***after the expiration of the agreement on military bases, no foreign military bases, troops or facilities shall be allowed except through a treaty concurred in by the Senate or with the direct consent of the Filipino people if Congress would require this mode of approval.***[68]

The actual end of the military bases came in 1991 when the 1947 MBA expired with no replacement formal arrangement in place except the 1951 MDT.[69] For some years, R.P.-U.S. relationship on defense/military matters practically froze. The thaw only came when the 1998 VFA was negotiated and agreed upon as a treaty that the Philippine Senate concurred in.

III.A(3) *The U.S.'s "Pivot to Asia" Strategy*

During the latter part of the first term of the Obama Administration, the U.S. announced a shift in its global strategy in favor of a military and diplomatic "pivot" or "rebalance" toward Asia.[70] The strategy involved a shift of the U.S.'s diplomatic, economic, and defense resources to Asia, made urgent by "the rise of Chinese regional power and influence, and China's apparent inclination to exercise its burgeoning military power in territorial disputes with its neighbors."[71] These disputes affected sea lanes that are vital to the U.S. and its allies; hence, the U.S. was particularly concerned with their peaceful resolution.[72] Critical to the strategy is the projection of American power and influence worldwide.

The key to the new strategy in the military-political area is "***presence:*** *forward deployment of U.S. military forces; a significant tempo of regional diplomatic activity (including helping Asian countries resolve disputes that they cannot resolve themselves); and promoting an agenda of political reform where it is appropriate.*"[73] This meant, among others, the strengthening of American military alliance with Asian countries, including the Philippines.

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[68] Constitution, Article XVIII, Section 25.

[69] On September 16, 1991, the Philippine Senate voted to reject a new treaty that would have extended the presence of U.S. military bases in the Philippines. See *Bayan v. Zamora*, 396 Phil. 623, 632 (2002), citing the Joint Report of the Senate Committee on Foreign Relation and the Committee on National Defense and Security on the Visiting Forces Agreement.

[70] United States Department of Defense. *Sustaining U.S. Global Leadership: Priorities for 21st Century Defense* (January 2012), p. 2, available at http://archive.defense.gov/news/Defense_Strategic_Guidance.pdf.

[71] John Hemmings. Understanding the U.S. Pivot: Past, Present, and Future. 34(6) *Royal United Services Institute Newsbrief* (November 26, 2014), available at https://hemmingsjohn.wordpress.com/2014/11/27/understanding-the-us-pivot-past-present-and-future/.

[72] *Ibid.*

[73] Richard Bush, *No rebalance necessary: The essential continuity of U.S. policy in the Asia-Pacific.* Brookings Institution (March 18, 2015), available at http://www.brookings.edu/blogs/order-from-chaos/posts/2015/03/18-value-of-continuity-us-policy-in-asia-pacific.

The "pivot" has a direct relevance to Philippine concerns since it was prompted, among others, by "China's growing military capabilities and its increasing assertiveness of claims to disputed maritime territory, with implications for freedom of navigation and the United States' ability to project power in the region." [74] The opening of new areas for military cooperation with the Philippines is among the announced features of the "pivot." [75]

III.A(4) *The EDCA*

It was soon after the launch of the "pivot" strategy that the initiatives for the EDCA came. The EDCA, of course, did not introduce troops into the country for the first time, as the 1998 VFA already ushered in the presence of U.S. military troops on a *rotational but temporary* basis.

What the EDCA brought with it was the concept of "agreed locations" to which the U.S. has "unimpeded access" for the refueling of aircraft; bunkering of ships; pre-positioning and storage of equipment, supplies and materials; the introduction of military contractors into the agreed locations; and the stationing and deployment point for troops. [76]

In these lights, the confirmed and valid adoption of the EDCA would make the Philippines ***an active ally*** *participating either as a forward operating site (*FOS*) or Cooperative Security Location (*CSL*)* ***in the American "pivot" strategy*** or, in blunter terms, in the projection and protection of American worldwide power. *FOS and CSL shall be explained under the proper topic below.*

All these facts are recited to place our reading of the EDCA in proper context – historically, geopolitically, and with a proper appreciation of the interests involved, both for the Philippines and the U.S.

The U.S. is in Asia because of the geopolitical interests and the world dominance that it seeks to maintain and preserve.[77] Asia is one region that has been in a flux because of the sense of nationalism that had lain dormant among its peoples, the economic progress that many of its countries are experiencing as the economic winds shift to the East, and the emergence of China that – at the very least – is now gradually being recognized as a regional power with the potential for superpower status.[78] The Philippines

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[74] US Congressional Research Service, *Pivot to the Pacific? The Obama Administration's "Rebalancing" Toward Asia*, March 28, 2012, p. 2. Available at http://www.fas.org/sgp/crs/natsec/R42448.pdf.

[75] United States Department of Defense. *The Asia-Pacific Maritime Security Strategy: Achieving U.S. National Security Objectives in a Changing Environment,* (2015), p. 23. Available at http://www.defense.gov/Portals/1/Documents/pubs/NDAA%20A-P_Maritime_SecuritY_Strategy-08142015-1300-FINALFORMAT.PDF.

[76] EDCA, Article III.

[77] David Vine, *Base Nation: How U.S. Military Bases Abroad Harm America and the World* (2015), pp. 300-301.

[78] Brzesinski, *supra* note 59, at 151-193.

itself is encountering territorial problems with China because of the latter's claims in the West Philippine Sea; the Philippines has chosen the path of peace in the dispute through international arbitration.[79]

EDCA and Article XVIII, Section 25 of the Constitution, in their larger regional signification, mean that the Philippines would thereafter, not only be bound as an American ally under the 1951 MDT, but as an active participant as "pivot" and projection points in the grand American strategy in Asia.

How the Philippines will react to all these developments is largely for the Executive and the people (through the Legislature) to determine. In making its decisions, they must – at the very least – show one and all that our country is entitled to respect as an independent and sovereign nation. ***This respect must come primarily from within the Philipines and the Filipinos themselves, from the nation's own sense of self-respect: in negative terms, the Filipino nation cannot attain self-respect unless it shows its respect for its own Constitution - the only instrument that binds the whole nation.***

IV. THE PRESIDENT'S ROLE IN GOVERNANCE AND ITS LIMITS

This discussion is made necessary by the *ponencia*'s patent misconceptions regarding the role the President plays in governance as chief executive and implementor of policies and the laws.

IV.A. The *Ponencia* and My Objections

In upholding the constitutionality of the EDCA, the *ponencia* holds that the President's power and duty to ensure the faithful execution of our laws include the defense of our country as the commander-in-chief of the country's armed forces.[80] It contends that these powers, combined with the President's capacity as the country's sole organ in foreign affairs, empower the President to enter into international agreements with other countries and give him the *discretion* to determine whether an international agreement should be in the form of a treaty or executive agreement.

The patent misconception begins when the *ponencia* asserts that the President cannot function with crippled hands: "*the manner of the President's execution of the law, even if not expressly granted by the law, is justified by necessity and limited only by law since he must 'take necessary and proper steps to carry into execution the law.*"[81] It further adds that it is

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[79] The arbitration case was filed before the Permanent Court of Arbitration on January 22, 2013. See *Republic of the Philippines v. the People's Republic of China*, Permanent Court of Arbitration, available at http://www.pca-cpa.org/showpage65f2.html?pag_id=1529.

[80] *Ponencia*, pp. 25-28.

[81] *Id.* at 27.

the President's prerogative to do whatever is legal and necessary for the Philippines' defense interests.[82]

While acknowledging the Constitution's command that the entry of foreign military bases, troops, and facilities must be in a treaty, the *ponencia* asserts that *the EDCA should be examined in relation with this requirement alone, as the President's wide authority in external affairs should be subject only to the limited amount of checks and restrictions under the Constitution.*[83]

It is within this framework that the *ponencia* concludes that *the requirement under Article XVIII, Section 25 of the Constitution is limited to the* ***initial entry*** *of foreign military bases, troops, and facilities*. Thus, once a treaty has allowed the entry of foreign military bases, troops, and facilities into the Philippines, the *ponencia* posits that the President may enter into subsequent executive agreements that involve "detail adjustments" of existing treaties.[84]

I cannot fully agree with the *ponencia*'s approach and with its conclusions.

First and foremost, the *ponencia* overlooks that as Chief Executive, the President's role is not simply to execute the laws. This important function is preceded by ***the President's foremost duty to preserve and defend the Constitution***, the highest law of the land. The President's oath, quoted by the *ponencia* itself, in fact, states:

> I do solemnly swear (or affirm) that **I will faithfully and conscientiously fulfill my duties as President** (or Vice-President or Acting President) of the Philippines, **preserve and defend its Constitution,** execute its laws, do justice to every man, and consecrate myself to the service of the Nation. So help me God.[85] [Emphasis supplied]

The supremacy of the Constitution means that in the performance of his duties, the President should always be guided and kept in check by the safeguards that were crafted by the framers of the Constitution and ratified by the people. The Constitution prescribes the limitations to the otherwise awesome powers of the Executive who wields the power of the sword and shares in the power of the purse.

I also do not agree that constitutional limitations, such as the need for Senate concurrence in treaties, can be disregarded if they unduly "tie the hands" of the President.[86] These limitations are democratic safeguards that

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82 *Id.* at 28.

83 *Id.* at 28-46.

84 *Id.* at 28-34, 46-95.

85 Constitution, Article VII, Section 5.

86 Although the *ponencia* recognized constitutional provisions that restrict or limit the President's prerogative in concluding international agreements (see *ponencia*, pp. 34-43), it contradictorily asserts that "[n]o court can tell the President to desist from choosing an executive agreement over a treaty to embody

place the responsibility over national policy beyond the hands of a single official. Their existence is the hallmark of a strong and healthy democracy. In treaty-making, this is how the people participate – through their duly-elected Senate – or directly when the Congress so requires. *When the Constitution so dictates, the President must act through the medium of a treaty and is left with no discretion on the matter*. This is the situation under Article XVIII, Section 25 of the Constitution, whose application is currently in dispute.

Let it be noted that noble objectives do not authorize the President to bypass constitutional safeguards and limits to his powers. To emphasize this point, we only need to refer to Article VI, Section 23(2) of the Constitution:

> (2) In times of **war or other national emergency**, the **Congress may by law authorize the President**, for a limited period and subject to such restrictions as it may prescribe, **to exercise powers necessary and proper to carry out a declared national policy**. Unless sooner withdrawn by resolution of the Congress, such power shall cease upon the next adjournment thereof. [Emphasis supplied]

Thus, the President cannot, by himself, usurp the prerogatives of a co-equal branch to carry out what he believes is necessary for the country's defense interests. His position as the Commander-in-Chief of the Armed Forces of the Philippines *(AFP)* does not give him the sole discretion to increase our military's defensive capabilities; his role as commander-in-chief only gives him control of the military's chain of command. It grants him the power to call out the armed forces to prevent/suppress lawless violence, invasion, insurrection, or rebellion.[87]

The modernization of the military, in particular, is a joint responsibility of the political branches of the State because the Congress is responsible for crafting relevant laws[88] and for allocating funds for the AFP through the General Appropriations Act.[89] The increase or decrease of funds and the extent of defense initiatives to be undertaken are national policy matters that the President cannot undertake alone.

IV.B. The President's Foreign Relations Power should be Interpreted in the Context of the Separation of Powers Doctrine

We cannot also interpret a provision in the Constitution *in isolation* and *separately from the rest of the Constitution*. Similarly, we cannot determine whether the Executive's acts had been committed with grave

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an international agreement, unless the case falls squarely within Article VIII, Sec. 25" and that "[t]he President had the choice to enter into the EDCA by way of an executive agreement or a treaty." See *ponencia*, p. 43.

87 Constitution, Article VII, Section 18.

88 The Constitution vests legislative power upon the Congress of the Philippines. Thus, the Congress has the power to determine the subject matters it can legislate upon. See Constitution, Article VI, Section 1.

89 Constitution, Article VI, Section 25.

abuse of discretion without considering his authority in the context of the powers of the other branches of government.

While the President's role as the country's lead official in the conduct of foreign affairs is beyond question, his authority is not without limit. When examined within the larger context of how our tripartite system of government works (where each branch of government is supreme within its sphere but coordinate with the others), we can see that the conduct of foreign affairs, particularly when it comes to international agreements, is a *shared function* among all three branches of government.

The President is undeniably the chief architect of foreign policy and is the country's representative in international affairs.[90] He is vested with the authority to preside over the nation's foreign relations which involve, among others, dealing with foreign states and governments, extending or withholding recognition, maintaining diplomatic relations, and entering into treaties.[91] In the realm of treaty-making, the President has the sole authority to negotiate with other States.[92]

IV.B(1) ***Separation of Powers and the Treaty-Making Process***

This wide grant of authority, however, does not give him the license to conduct foreign affairs to the point of disregarding or bypassing the separation of powers that underlies our established constitutional system.

Thus, while the President has the sole authority to negotiate and enter into treaties, Article VII, Section 21 of the 1987 Constitution at the same time provides the limitation that two-thirds of the members of the Senate should give their concurrence for the treaty to be valid and effective.

Notably, this limitation is a not a new rule; the legislative branch of government has been participating in the treaty-making process by giving (or withholding) its consent to treaties since the 1935 Constitution. Section 10 (7), Article VII of the 1935 Constitution provides:

> Sec. 10. (7) The President shall have the power, with the concurrence of two-thirds of all the Members of the Senate, to make treaties x x x.

This tradition of legislative participation continued despite our presidential–parliamentary form of government under the 1973 Constitution, that is markedly different from the tripartite form of government that traditionally prevailed in the country. Section 14(1) Article VIII of the 1973 Constitution stated:

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90 *Pimentel v. Executive Secretary*, 501 Phil. 303, 317-318 (2005).
91 *Ibid.*
92 *Ibid.*

> Sec. 14. (1) Except as otherwise provided in this Constitution, no treaty shall be valid and effective unless concurred in by a majority of all the Members of the Batasang Pambansa.

That we have consistently included the participation of the legislative branch in the treaty-making process is not without an important reason: it provides a check on the Executive in the field of foreign relations. By requiring the concurrence of the Legislature in the treaties entered into by the President, the Constitution ensures a healthy system of checks and balances necessary in the nation's pursuit of political maturity and growth.

Under this system, the functions of government are divided among three branches of government, each one supreme within its own sphere: the executive administers and enforces laws; the legislature formulates and enacts laws; and the judiciary settles cases arising out of the enforcement of these laws[93] The requirement of Senate concurrence to the executive's treaty-making powers is a check on the prerogative of the Executive, in the same manner that the Executive's veto on laws passed by Congress[94] is a check on the latter's legislative powers.

Even the **executive agreements** that the President enters into without Senate concurrence has legislative participation – they are implementations of existing laws Congress has passed or of treaties that the Senate had assented to.[95] The President's authority to negotiate and ratify these executive agreements springs from his power to ensure that these laws and treaties are executed.[96]

The judicial branch of government's participation in international agreements is largely passive, and is only triggered when cases reach the courts. The courts, in the exercise of their judicial power, have the duty to ensure that the Executive and Legislature stay within their spheres of competence;[97] they ensure as well that constitutional standards and limitations set by the Constitution for the Executive and the Congress to follow are not violated.

Article VIII, Section 5 of the Constitution is even more explicit, as it gives the Supreme Court the jurisdiction "to review by appeal or *certiorari* all cases in which the constitutionality or validity of any treaty, international or executive agreement, law x x x is in question."

Thus, entry into international agreements is a *shared function* among the three branches of government. In this light and in the context that the President's actions should be viewed under our tripartite system of government, **I cannot agree with the *ponencia*'s assertion that the case**

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93 *Angara v. Electoral Commission*, 63 Phil 139 (1936).
94 Constitution, Article VI, Section 27(2).
95 *Commissioner of Customs v. Eastern Sea Trading*, 113 Phil. 333, 338-340 (1961).
96 Constitution, Article VII, Sections 5 and 17.
97 *Angara v. Electoral Commission, supra* note 93, at 157-159.

should be examined solely and strictly through the constitutional limitation found in Article XVIII, Section 25 of the Constitution.

IV.B(2) *Standards in Examining the President's Treaty-Making Powers*

Because the Executive's foreign relations power operates within the larger constitutional framework of separation of powers, I find the examination of the President's actions through this larger framework to be the better approach in the present cases. This analytical framework, incidentally, is not the result of my original and independent thought; it was devised by U.S. Supreme Court Associate Justice Robert Jackson in his Concurring Opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.[98]

Justice Jackson's framework for evaluating executive action categorizes the President's actions into three: *first*, when the President acts ***with authority from the Congress***, his authority is at its maximum, as it includes all the powers he possesses in his own right and everything that Congress can delegate.[99]

Second, "when the President acts ***in the absence of either a congressional grant or denial of authority***, he can only rely on his own independent powers, but there is a [twilight zone where] he and Congress may have concurrent authority, or where its distribution is uncertain."[100] In this situation, presidential authority can derive support from "congressional inertia, indifference or quiescence."[101]

Third, "when the President takes ***measures incompatible with the expressed or implied will of Congress***, his power is at its lowest ebb,"[102] and the Court can sustain his actions "only by disabling the Congress from acting upon the subject."[103]

This framework has been recently adopted by the U.S. Supreme Court in *Medellin v. Texas*,[104] a case involving the President's foreign affairs powers and one that can be directly instructive in deciding the present case.

In examining the validity of an executive act, the Court takes into consideration the varying degrees of authority that the President possesses. Acts of the President with the authorization of Congress should have the "widest latitude of judicial interpretation"[105] and should be "supported by the

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98 343 U.S. 579 (1952).
99 *Id.* at 635.
100 *Id.* at 637.
101 *Ibid.*
102 *Ibid.*
103 *Youngstown Sheet v. Sawyer*, *supra* note 98, at 637-638.
104 552 U.S. 491 (2008).
105 *Id.*, *supra* note 98, at 637.

strongest of presumptions."[106] For the judiciary to overrule the executive action, it must decide that the government itself lacks the power. In contrast, ***executive acts that are without congressional imprimatur would have to be very carefully examined.***

IV.B(3) *The Senate Objection to EDCA as an Executive Agreement*

In the present cases, ***the President's act of treating the EDCA as an executive agreement has been disputed by the Senate***, although the Senate is *not* an active party in the present cases.

On November 10, 2015, the Senate sent the Supreme Court a copy of Senate Resolution No. 1414[107] expressing its sentiment that the EDCA should have been entered into in the form of a treaty. Furthermore, and as will be explained in the succeeding portions of this Dissenting Opinion, the EDCA's provisions are not all within the terms of the two treaties properly ratified by the Senate – the 1951 MDT and 1998 VFA; hence, the President could not have drawn his authority from these agreements.

Thus, contrary to the *ponencia*'s assertion that the President's act of treating the EDCA as an executive agreement should be subject to the "least amount of checks and restrictions under the Constitution,"[108] this presidential action *should actually be very carefully examined*, in light of the Senate's own expressed sentiments on the matter.

The mandatory character of the executive–legislative power sharing should be particularly true with respect to the EDCA, as its adoption signifies ***Philippine participation in America's pivot strategy by making our country one of the "pivot" or projection points that would enforce America's military strategy***. In taking this kind of step, the Senate must simply be there to give its consent, as the Constitution envisions in situations involving the entry of foreign military bases, troops, and facilities into the country.

In these lights, I propose that we examine the President's act of treating the EDCA not simply by the standard of whether it complies with the limitation under Article XVIII, Section 25 of the Constitution, but in the context of how our government functions, and of other relevant provisions in the Constitution.

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106 *Ibid.*

107 Senate Resolution No. 1414 was entitled as the "Resolution expressing the strong sense of the Senate that any treaty ratified by the President of the Philippines should be concurred in by the Senate, otherwise the treaty becomes invalid and ineffective." It was signed by thirteen Senators: Senators Defensor-Santiago, Angara, Cayetano, P., Ejercito, Estrada, Guingona III, Lapid, Marcos, Jr., Osmeña III, Pimentel III, Recto, Revilla, Jr., and Villar. Available at https://www.senate.gov.ph/lisdata/2175018478!.pdf.

108 *Ponencia*, pp. 45-46.

IV.C. Constitutional Standards in Allowing the Entry of Foreign Military Bases, Troops, and Facilities in the Philippines

IV.C(1) *Article VII, Section 21 of the Constitution and Treaty-Making*

In general, the President's foreign affairs power must be exercised in compliance with Article VII, Section 21 of the Constitution, which requires the submission of treaties the President ratified, to the Senate for its concurrence. The Senate may either concur in, or withhold consent to, the submitted treaties.

Significantly, not all the international agreements that the President enters into are required to be sent to the Senate for concurrence. Jurisprudence recognizes that the President may enter into executive agreements with other countries,[109] and these agreements – under the proper conditions – do not require Senate concurrence to be valid and enforceable in the Philippines.[110]

IV.C(2) *Treaties and Executive Agreements under Article VII, Section 21*

Where lies the difference, it may well be asked, since both a treaty and an executive agreement fall under the general title of international agreement?

An **executive agreement** emanates from the President's duty to execute the laws faithfully.[111] They trace their validity from existing laws or from treaties that have been authorized by the legislative branch of government.[112] In short, they implement laws and treaties.

In contrast, **treaties** are international agreements that do not originate solely from the President's duty as the executor of the country's laws, but from the shared function that the Constitution mandates between the President and the Senate.[113] They therefore need concurrence from the Senate after presidential ratification, in order to fulfill the constitutional shared function requirement.[114]

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109 See *Land Bank of the Philippines v. Atlanta Industries, Inc.*, G.R. No. 193796, July 2, 2014, 729 SCRA 12, 30-31, citing *Bayan Muna v. Romulo*, 656 Phil. 246, 269-274 (2011); *Neri v. Senate Committee on Accountability of Public Officers and Investigations*, 586 Phil. 135, 168 (2008), citing *Usaffe Veterans Association, Inc. v. Treasurer of the Philippines*, 105 Phil. 1030, 1038 (1959); *Commissioner of Customs v. Eastern Sea Trading*, *supra* note 95.

110 *Ibid.*

111 Constitution, Article VII, Sections 5 and 17.

112 *Commissioner of Customs v. Eastern Sea Trading*, *supra* note 95.

113 Constitution, Article VII, Section 21. See also *Bayan Muna v. Romulo*, *supra* note 109, at 269-270.

114 *Ibid.*

Jurisprudential definitions of treaties and executive agreements are conceptually drawn from these distinctions although in *Bayan Muna v. Romulo*,[115] we simply differentiated treaties from executive agreements in this wise:

> Article 2 of the Vienna Convention on the Law of Treaties: 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 its particular designation. International agreements may be in the form of **(1) treaties that require legislative concurrence after executive ratification; or (2) executive agreements that are similar to treaties, except that they do not require legislative concurrence** and are usually less formal and deal with a narrower range of subject matters than treaties.[116] [Emphases supplied]

Bayan Muna likewise did not distinguish between treaties and executive agreements in terms of their binding effects on the contracting States concerned.[117] But neither one can contravene the Constitution.

This ambiguity perhaps might have been the root of the general statement that the Executive generally has the discretion to determine whether an international obligation should be in the form of a treaty or an executive agreement. This general statement, however, is far from complete and should be qualified because the *Executive's exercise of discretion* is affected and should be dictated by the demands of the enforceability of the obligations the international agreement creates in the domestic sphere.

Between a treaty and an executive agreement, a treaty exists on a higher plane as it carries the authority of the President and the Senate.[118] Treaties have the status, effect, and impact of statutory law in the Philippines; they can amend or prevail over prior statutory enactments.[119]

Executive agreements – which exist at the level of implementing rules and regulations or administrative orders in the domestic sphere – carry no such effect.[120] They cannot contravene statutory enactments and treaties and would be invalid if they do so.[121]

Again, this difference in impact is traceable to the source of their authority; since a treaty has the approval of both the President and the Senate, it has the same impact as a statute. In contrast, since an executive agreement springs from the President's power to execute laws, it cannot

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115 *Supra* note 109.
116 *Id.* at 269.
117 *Ibid.*
118 *Bayan Muna v. Romulo, supra* note 109, at 270, citing Henkin, *Foreign Affairs and the United States Constitution* 224 (2nd ed., 1996), and Edwin Borchard, *Treaties and Executive Agreements - Reply*, Yale Law Journal, June 1945.
119 *Ibid.*
120 *Gonzales v. Hechanova*, 118 Phil. 1065, 1079 (1963).
121 *Adolfo v. CFI of Zambales*, 145 Phil. 264, 266-268 (1970).

amend or violate existing treaties, and must be in accord with and be made pursuant to existing laws and treaties.[122]

Accordingly, the terms and objectives of the presidential entry into an international agreement dictates the form the agreement must take. When an international agreement is made ***merely to implement an existing law or treaty***, then it can properly take the form of an executive agreement.[123]

In contrast, when an international agreement involves the introduction of a ***new subject matter*** or ***the amendment of existing agreements or laws*** and has not passed the required executive and legislative processes, then it should properly be in the form of a treaty.[124]

To reiterate, the consequence of the violation of this norm impacts on the enforceability of the international agreement in the domestic sphere; should an executive agreement amend or contravene statutory enactments and treaties, then it is void and cannot be enforced in the Philippines for lack of the proper authority on the part of the issuer.

In judicial terms, the distinctions and their consequences mean that **an executive agreement that creates new obligations or amends existing ones, has been issued with grave abuse of discretion amounting to a lack of or in excess of jurisdiction, and can be judicially nullified under the courts' power of judicial review.**

IV.C(3) *Joint Reading of Article VII, Section 21 and Article XVIII, Section 25*

The dynamics that Article VII, Section 21 embody, should be read into Article XVIII, Section 25 of the 1987 Constitution, which specifically covers and applies to the entry of foreign military bases, troops, or facilities into the country.

It is on the basis of this joint reading that the ***ponencia's conclusion*** – that Article XVIII, Section 25 applies only to the **initial** entry of foreign military bases, troops, and facilities in the country – is ***essentially incorrect.***

Article XVIII, Section 25 does not provide for any such limitation in its applicability. Neither is there anything in the language of the provision that remotely implies this consequence. What it simply states is that foreign military bases, troops, and facilities may only be present in Philippine soil *in accordance with a treaty* concurred in by the Senate.

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122 *Bayan Muna v. Romulo, supra* note 109, at 1079-1080.
123 *Ibid.*
124 *Ibid.*

When the terms of Article XVIII, Section 25 treaty does not provide for situations or arrangements subsequent to the initial entry of foreign military bases, troops, or facilities in the country and the subsequent arrangements are still attributed to the same treaty made pursuant to Section 25, the combined reading of Article VII, Section 21 and Article XVIII, Section 25 must now come into play.

This combined reading simply means that after the initial entry of foreign military bases, troops, or facilities in the Philippines under a duly ratified treaty, subsequent arrangements relating to foreign military bases, troops or facilities that are claimed to be based on the same treaty, should be examined based on the treaty–executive agreement distinctions recognized by jurisprudence under Article VII, Section 21 of the Constitution.

In other words, any subsequent international agreement referring to military bases, troops or facilities should be ***examined based on whether it creates a new obligation or implements an existing one***. The determination of this question rests with the Executive but the treaty-executive agreement distinctions should limit the Executive's discretion when the new international agreement relates to a *new obligation* (or a change in an existing obligation) as the presence of foreign military bases, troops, or facilities in the Philippines should then be effected through another treaty.

To put it more bluntly, Article XVIII, Section 25 effectively removes the Executive's discretion in deciding the form of an international agreement because of this provision's explicit directive to use a treaty as the medium for new obligations created.

In *Bayan v. Zamora*,[125] our conclusion supported this position. We explained that Article XVIII, Section 25 makes no distinction as to whether the presence of foreign military bases, troops, or facilities may be transient or permanent.[126] By concluding that the permanence of foreign military bases, troops, or facilities is immaterial to the application of Article XVIII, Section 25, we effectively acknowledged that subsequent agreements that amend or introduce new obligations to existing treaties that previously allowed the entry of foreign military bases, troops or facilities, should be the subject of another treaty as they may enter the country on varying grounds, lengths or periods of time – all of which can change the nature of the obligations under existing treaties.

IV.C(4) ***The Dissent's Analytical Approach***

Given these parameters, I propose that we examine the constitutionality of the Executive's act of entering into the obligations found

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125 *Supra* note 69.

126 *Id.* at 653.

in the EDCA in the form of an executive agreement with these two questions:

> **(1) Does the EDCA involve the introduction into the Philippines of foreign military bases, troops, or facilities that call for its examination under Article XVIII, Section 25?**
>
> (2) **Does the EDCA impose new obligations, or amend or go beyond existing ones, regarding the presence of foreign military bases, troops, or facilities in the Philippines?**

If the EDCA introduces foreign military bases, troops, or facilities in the Philippines within the contemplation of Article XVIII, Section 25 of the 1987 Constitution, and if these obligations are different from those found in our existing treaty obligations with the U.S., then the EDCA cannot be enforced in the Philippines without the Senate's concurrence. **The *ponencia* is then incorrect and the Dissent must prevail.**

Conversely, if the EDCA merely implements present treaty obligations – particularly those under the 1951 MDT and the 1998 VFA – then the President was well within his powers in the execution of our present treaty obligations. **The *ponencia* is correct and the Dissent therefore fails.**

V. THE APPLICATION OF ARTICLE XVIII, SECTION 25 TO THE EDCA

V.A. The Article XVIII, Section 25 Dispute

When the subject of an international agreement falls under Article XVIII, Section 25 of the Constitution, the President – *by constitutional command* – must enter into a treaty subject to the concurrence of the Senate and, when Congress so desires, of the people through a national referendum.

This rule opens the door for Court intervention pursuant to its duty to uphold the Constitution and its further duty (under its power of judicial review) to pass upon any grave abuse of discretion committed by any official or agency of government. It is under this constitutionally-mandated terms that this Court invokes its power to review the constitutionality of the President's actions in handling the EDCA.

Within this framework, the issue these cases present is clear. The bottom line question is ***whether the President gravely abused his discretion in executing the EDCA as an executive agreement***; the alleged existence of grave abuse of discretion constitutes the *actual case or controversy* that allows the exercise of judicial power. ***Whether grave abuse exists, in turn, depends on the determination of whether the terms of the EDCA imposed***

new or amended existing obligations involving foreign military bases, troops, and facilities in the Philippines.

If the EDCA does, then it should have been in the form of a treaty submitted to the Senate for its concurrence. In resolving this question, I am guided ***first***, by the text of the Constitution itself and the meaning of its operative words in both their original and contemporaneous senses; ***second***, by the spirit that motivated the framing of Article XVIII, Section 25; and ***third***, by jurisprudence interpreting this provision.

The *ponencia* lays the premise that the President may enter into an executive agreement on foreign military bases, troops, or facilities if:

(a) it is not the instrument that allows the presence of foreign military bases, troops, or facilities; or

(b) it merely aims to implement an existing law or treaty.[127]

The *ponencia* follows this premise with the position that Article XVIII, Section 25 refers only to the initial entry of bases, troops, or facilities, and not to the activities done after entry.[128]

In construing Article XVIII, Section 25, the *ponencia* invokes the rule of *verba legis,* a cardinal rule of construction stating that when the law is clear and free from any doubt or ambiguity, then there is no room for construction or interpretation, only application.[129] The law must be given its literal meaning and applied without attempted interpretation.[130] The *ponencia* asserts that the plain meaning of "allowed in" refers solely to the initial entry.[131] Thus, after entry, any subsequent acts involving foreign military troops, bases, or facilities no longer fall under the coverage of Article XVIII, Section 25.[132]

I believe that the ponencia's approach and interpretation are incorrect because they are overly simplistic. The proper understanding of Article XVIII, Section 25 must take into account the many considerations that bear upon its plain terms, among them, the treaty–executive agreement distinctions under Article VII, Section 21 that I discussed above; the history of Article XVIII, Section 25; the motivations that drove the framers to adopt the provision; and the current and contemporaneous developments and usages that give full and effective meaning to the provision.

Separately from textual interpretation considerations and as part of the history of Article XVIII, Section 25, the basic concept of sovereignty that

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127 *Ponencia,* p. 29.
128 *Id.* at 33.
129 *Bolos v. Bolos,* G.R. No. 186400, 20 October 2010, 634 SCRA 429, 437.
130 *Ponencia,* p. 32.
131 *Id.* at 33.
132 *Ibid.*

underlies it should not be forgotten.[133] Sovereignty means the full right and power of the nation to govern itself, its people, and its territory without any interference from outside sources or entities.[134] Within its territory, a nation reigns supreme. If it will allow interference at all, such interference should be under the terms the nation allows and has accepted;[135] beyond those terms, the primacy of sovereignty is the rule.[136]

Thus, if interference were to be allowed at all, or if exceptions to full sovereignty within a territory would be allowed, or if there would be any ambiguity in the extent of an exception granted, the interference, exception or ambiguity must be resolved in favor of the fullest exercise of sovereignty under the obtaining circumstances. Conversely, if any ambiguity exists at all in the terms of the exception or in the terms of the resulting treaty, then such terms should be interpreted restrictively in favor of the widest application of the restrictions embodied in the Constitution and the laws.

The *ponencia* cannot be incorrect in stating the rule that when terms are clear and categorical, no need for any forced constitutional construction exists;[137] we need not divine any further meaning but must only apply terms in the sense that they are ordinarily understood.

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133 IV Record, Constitutional Commission 84, 659 and 661 (September 16, 1986), which reads:

> MR. AZCUNA: After the agreement expires in 1991, the question, therefore, is: Should we extend a new treaty for these bases to stay put in 1991 in our territory? The position of the committee is that it should not, because the presence of such bases is a derogation of Philippine sovereignty.
>
> It is said that we should leave these matters to be decided by the executive, since the President conducts foreign relations and this is a question of foreign policy. I disagree, Madam President. This is not simply a question of foreign policy; this is a question of national sovereignty. x x x
>
> FR. BERNAS: My question is: Is it the position of the committee that the presence of foreign military bases in the country under any circumstances is a derogation of national sovereignty?
>
> MR. AZCUNA: It is difficult to imagine a situation based on existing facts where it would not. x x x

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135 See *Tañada v. Angara*, 338 Phil. 546, 593 (1997), citing *Reagan v. Commission on Internal Revenue*, 141 Phil. 621, 625 (1969), where the Court discussed the concept of auto-limitation, *viz.*: "It is to be admitted that any State may by its consent, express or implied, submit to a restriction of its sovereignty rights. That is the concept of sovereignty as auto-limitation which, in the succinct language of Jellinek, 'is the property of a state-force due to which it has the exclusive capacity of legal-self determination and self-restriction.' A State then, if it chooses to, may refrain from the exercise of what otherwise is illimitable competence."

136 *Ibid.*

137 *Ponencia*, p. 32.

A flaw, however, exists in the *ponencia*'s application of *verba legis* as Article XVIII, Section 25 is ***neither plain nor that simple***.

As pointed out above, it must be read together with Article VII, Section 21 for the general rules on the treaty-making process. It also expressly refers to a historical incident – the then coming expiration of the 1947 MBA. From these take-off points, the Article XVIII, Section 25 proceeds to a list of the matters it specifically addresses – *foreign military bases, troops, or facilities*.

All these bring up the question that has so far been left undiscussed – **what are the circumstances that led to the expiration of the 1947 MBA and what are the foreign military bases, troops, and facilities that Article XVIII, Section 25 refers to?**

V.B. The History and Intent of Article XVIII, Section 25

The history of Article XVIII, Section 25 of the Constitution is practically summed up in the introductory phrase of the provision – *"After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases x x x."*

Purely and simply, the framers of the Constitution in 1986 then looked forward to the expiration of the U.S. bases coming in 1991 and wanted the terms of any future foreign military presence governed by the Constitution itself. Behind this intent is the deeper policy expressed under Article II, Section 7 of the Constitution –

> The State shall pursue an ***independent foreign policy***. In its relations with other states the paramount consideration shall be ***national sovereignty***, ***territorial integrity***, ***national interest***, and the ***right to self-determination***.

During the constitutional deliberation on Article XVIII, Section 25, two views were espoused on the presence of military bases in the Philippines. One view was that espoused by the anti-bases group; the other group supported the view that this should be left to the policy makers.

Commissioner Adolfo Azcuna expressed the sentiment of the first group when he stated in his privilege speech on 16 September 1986 that:

> After the agreement expires in 1991, the question therefore, is: Should we extend a new treaty for these bases to stay put in 1991 in our territory? The position of the committee is that it should not, because *the presence of such bases is a derogation of Philippine sovereignty*.
>
> It is said that we should leave these matters to be decided by the executive, since the President conducts foreign relations and this is a question of foreign policy. I disagree, Madam President. *This is not*

> *simple a question of foreign policy; this is a question of national sovereignty*. And the Constitution is anything at all, it is a definition of the parameters of the sovereignty of the people.[138]

On the other hand, the second group posited that the decision to allow foreign bases into the country should be left to the policy makers. Commissioner Jose Bengzon expressed the position of this group that:

> x x x this is neither the time nor the forum to insist on our views for we know not what lies in the future. It would be foolhardy to second-guess the events that will shape the world, our region and our country by 1991. It would be sheer irresponsibility and a disservice to the highest calibre to our own country if we were to tie down the hands of our future governments and future generations.[139]

Despite his view that the presence of foreign military bases in the Philippines would lead to a derogation of national security, Commissioner Azcuna conceded that this would not be the case if the agreement would allow the foreign military bases, troops, and facilities to be embodied in a treaty.[140]

After a series of debates, Commissioner Ricardo Romulo proposed an alternative formulation that is now the current Article XVIII, Section 25.[141]

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138 III Record, Constitutional Commission 86 (16 September 1986), p. 659.

139 IV Record, Constitutional Commission 82 (13 September 1986), pp. 617-618.

140 IV Record, Constitutional Commission 84 (16 September 1986), pp. 661-662, which reads:

> FR. BERNAS. My question is: Is it the position of the committee that the presence of foreign military bases in the country under any circumstances is a derogation of national sovereignty?
>
> MR. AZCUNA: It is difficult to imagine a situation based on existing facts where it would not. However, in the abstract, it is possible that it would not be that much of a derogation. I have in mind, Madam President, the argument that has been presented. Is that the reason why there are US. bases in England, in Spain and in Turkey? And it is not being claimed that their sovereignty is being derogated. Our situation is different from theirs because we did not lease or rent these bases to the U.S. The US. retained them from us as a colonial power.
>
> x x x x
>
> FR. BERNAS: Does the first sentence tolerate a situation radically different from what obtains now? In other words, if we understand sovereignty as autolimitation, as a people's power to give up certain goods in order to obtain something which may be more valuable, would it be possible under this first sentence for the nation to negotiate some kind of a treaty agreement that would not derogate against sovereignty?
>
> MR. AZCUNA: Yes. For example, Madam President, if it is negotiated on a basis of true sovereign equality, such as a mutual ASEAN defense agreement wherein an ASEAN force is created and this ASEAN force is a foreign military force and may have a basis in the member ASEAN countries, this kind of a situation, I think, would not derogate from sovereignty.

141 IV Record, Constitutional Commission 86 (18 September 1986), p. 787, which reads:

> MR. ROMULO: Madam President, may I propose my amendment to the Bernas amendment: "AFTER THE EXPIRATION OF THE RP--US AGREEMENT IN 1991, FOREIGN MILITARY BASES, TROOPS OR FACILITIES SHALL NOT BE ALLOWED IN THE PHILIPPINE TERRITORY EXCEPT UNDER THE TERMS OF A TREATY DULY CONCURRED IN BY THE SENATE, AND WHEN CONGRESS SO REQUIRES RATIFIED BY A MAJORITY OF THE VOTES CAST BY THE PEOPLE IN A REFERENDUM HELD FOR THAT PURPOSE AND RECOGNIZED AS A TREATY BY THE OTHER CONTRACTING STATE."

He explained that this is an explicit ban on all foreign military bases other than those of the U.S.[142] Based on the discussions, the spirit of the basing provisions of the Constitution is primarily a ***balance of the preservation of the national sovereignty*** **and** ***openness to the establishment of foreign bases, troops, or facilities in the country***.

Article XVIII, Section 25 imposed three requirements that must be complied with for an agreement to be considered valid insofar as the Philippines is concerned. These three requirements are: (1) the agreement must be embodied in a treaty; (2) the treaty must be duly concurred in by 2/3 votes of all the members of the Senate;[143] and (3) the agreement must be recognized as a treaty by the other State.

On the second requirement, the two-thirds concurrence of all the members of the Senate, the people's representative,[144] may be viewed as the people's "voluntary submission" of their sovereignty so they can reap the greater benefits of the agreement that the President, as policymaker, entered into.

When the Congress so requires, the agreement should be ratified by a majority of the votes cast by the people in a national referendum held for that purpose.[145] This additional requirement evinces the framers' intent to emphasize the people's direct participation in treaty-making.

In *Bayan v. Zamora,*[146] the Court relaxed the third requirement when it ruled that it is sufficient that "the other contracting party accepts or acknowledges the agreement as a treaty." In that case, since the U.S. had already declared its full commitment to the 1998 VFA,[147] we declared that it

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142 IV Record, Constitutional Commission 86 (18 September 1986), p. 780; which reads:

> FR. BERNAS: On the other hand, Madam President, if we place it in the Transitory Provisions and mention only the American State, the conclusion might be drawn that this applies only to foreign military bases of the United States. The conclusion might be drawn that the principle does not apply to other states.
>
> MR. ROMULO: That is certainly not our meaning. We do not wish any other foreign military base here and I think the phrase which says: "NO FOREIGN MILITARY BASES, TROOPS OR FACILITIES. . ." makes that very clear even if it is in the Transitory Provisions.

143 *Bayan v. Zamora*, *supra* note 69, at 652, stating that:

Undoubtedly, Section 25, Article XVIII, which specifically deals with treaties involving foreign military bases, troops, or facilities, should apply in the instant case. To a certain extent and in a limited sense, however, the provisions of Section 21, Article VII will find applicability with regard to the issue and for the sole purpose of determining the number of votes required to obtain the valid concurrence of the Senate, as will be further discussed hereunder.

x x x x

As noted, the "concurrence requirement" under Section 25, Article XVIII must be construed in relation to the provisions of Section 21, Article VII. In a more particular language, the concurrence of the Senate contemplated under Section 25, Article XVIII means that at least two-thirds of all the members of the Senate favorably vote to concur with the treaty, the VFA in the instant case.

144 Constitution, Article VII, Section 21. See also Joaquin Bernas, *The 1987 Constitution of the Republic of the Philippines: A Commentary* (1995), pp. 487-488.

145 Constitution, Article XVIII, Section 25.

146 *Supra* note 69.

147 *Id.* at 659.

was unnecessary for the U.S. to further submit the agreement to the U.S. Senate.[148]

This history highlights the importance of the issue now before us, and stresses as well how seriously the Constitution regards the Senate concurrence requirement. Thus, the issue can neither be simply glossed over nor disregarded on the basis of *stretched legal technicalities*. In case of doubt, as above discussed, such doubt should be resolved strictly in favor of what the Constitution requires in its widest sense.

V.C. Historical Roots of the U.S. Bases in the Philippines

As a U.S. colony after the Treaty of Paris of 1898, the whole Philippines could be equated to one big American base: the U.S. had sovereignty and had a free hand on how to deal with defense matters and its military forces in the Philippines.

The ***Tydings–McDuffie Act of 1934*** provided for the Philippines' self-government and specified a procedural framework for the drafting of a constitution for the government of the Commonwealth of the Philippines[149] within two years from the Act's enactment.[150] The Act, more importantly, mandated the recognition by the U.S. of the independence of the Philippine Islands as a separate and self-governing nation after a ten-year transition period.[151]

Prior to independence, the Act allowed the U.S to maintain military forces in the Philippines and to call all military forces of the Philippine government into U.S. military service.[152] **The Act empowered the U.S. President, within two years following independence, to negotiate for the establishment of U.S. naval reservations and fueling stations in the Philippine Islands.**[153]

The negotiations for American bases that took place after independence resulted in the 1947 MBA.

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148 *Id.* at 656-659.

149 The Tydings-McDuffie Act, also known as the Philippine Independence Act, was entitled "An Act to Provide for the Complete Independence of the Philippine Islands, to provide for the Adoption of a Constitution and a Form of Government for the Philippine Islands, and for other purposes." It was signed into law by President Franklin D. Roosevelt on March 24, 1934 and was approved by the Philippine Senate on May 1, 1934. See Encyclopedia Britannica, *Tydings-McDuffie Act*, available at http://www.britannica.com/topic/Tydings-McDuffie-Act and http://www.philippine-history.org/tydings-mcduffie-law.htm.

150 Tydings-McDuffie Act, Section 3.

151 *Id.*, Section 10.

152 *Id.*, Section 2(12). *See also* Ordinance appended to 1935 Constitution, Section 1(12).

153 *Id.*, Section 10(b).

V.C(1) *The 1947 Military Bases Agreement*

The 1947 MBA between the Philippines and the U.S. was signed on March 16, 1947. The agreement officially allowed the U.S. to establish, maintain, and operate air and naval bases in the country.[154] It provided for about 23 listed bases and facilities for use by Americans for a period of 99 years.[155] The most important of these bases were the 180,000-acre Clark Air Base in Pampanga, then the biggest American airbase outside of the continental U.S.A., and the Subic Naval Base in Zambales.

The bases covered by the 1947 MBA were ***fixed bases*** where American ***structures and facilities*** had been built and ***arms, weapons, and equipment were deployed and stored***, and where ***troops and civilian personnel were stationed***, together with their families.

Other provisions of the 29-article 1947 MBA were the following:

- The bases were properties over which the U.S. originally exercised sovereignty but this was subsequently transferred to the Philippines pursuant to the *Romulo-Murphy Agreement of 1979*. After the transfer, the U.S. and its armed forces and personnel were granted rent-free access up to the expiration of the Agreement.[156]
- The bases were for the mutual protection and cooperation of the two countries and for this purpose were for their use as U.S. and Philippine military installations.[157]
- The U.S. had the right, power and authority necessary for the establishment, operation, and defense of the bases and their control,[158] specifically:
    - To operate, maintain, utilize, occupy, garrison, and control the bases;
    - To improve and deepen the harbors, channels and entrances and anchorage, and to construct and maintain necessary roads and bridges accessing the bases;

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154 The 1947 MBA Whereas Clause, par. 7, states:
THEREFORE, the Governments of the Republic of the Philippines and of the United States of America agree upon the following terms for the delimitation, establishment, maintenance, and operation of military bases in the Philippines.

155 1947 MBA, Article XXIX; see Annexes A and B of the 1947 MBA.

156 The 1947 MBA Whereas clause states:
Whereas, the Governments of the Republic of the Philippines and of the United States of America are desirous of cooperating in the common defense of their two countries through arrangements consonant with the procedures and objectives of the United Nations, and particularly through a grant to the United States of America by the Republic of the Philippines in the exercise of its title and sovereignty, of the use, free of rent, in furtherance of the mutual interest of both countries, of certain lands of the public domain; x x x (Emphases supplied)

157 1947 MBA, Whereas Clause, Articles II and III.

158 *Id.*, Articles II, III, IV, VI, and VII.

- To control the operation and safety of the bases and all the structures and facilities in them;
- To acquire right-of-way by agreement and to construct telecommunication and other facilities;
- To construct, install, maintain and employ on any base any type of facilities, weapons, substance, device, or vessel as may be necessary;
- To bring into the Philippines members of the U.S. military forces and U.S. nationals employed under contract by the U.S. with the families, as well as technical personnel of other nationalities not otherwise excluded from the Philippines.

- The Philippine government was prohibited from granting any bases to other nations without U.S. consent.[159]
- The U.S. was permitted to recruit Filipino citizens, on voluntary basis, for service in the American military.[160]
- The U.S. base commanders had the right to tax, distribute utilities, hand out licenses, search without warrants, and deport undesirables.[161]

Complementing the signing of the 1947 MBA was the signing of the *Military Assistance Agreement of 1947* and the *1951 MDT*.

Over the years, various provisions of the 1947 MBA were amended, gradually delimiting U.S. control over the bases.[162] On September 16, 1966, the *Ramos-Rusk Agreement* reduced its term to 25 years starting from that year.

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159 *Id.*, Article XXV (1).

160 *Id.*, Article XXVII.

161 *Id.*, Articles XI, XII, XIII, XIV, and XV.

162 *The Ramos-Rusk Agreement of 1966* reduced the term of the 1947 Bases Treaty to a total of 44 years or until 1991.

The Bohlen-Serrano Memorandum of Agreement provided for the return to the Philippines of 17 U.S. military bases.

The Romulo-Murphy exchange of Notes of 1979 recognized Philippine sovereignty over the Clark and Subic Bases, reduced the area that could be used by the U.S. military, and provided for the mandatory review of the 1947 Bases Treaty every five years.

The Romualdez-Armacost Agreement of 1983 revised the 1947 Bases Treaty, particularly pertaining to the operational use of military bases by the U.S. government within the context of Philippine sovereignty, including the need for prior consultation with the Philippine government on the former's use of the bases for military combat operations or the establishment of long-range missiles.

The 1947 Military Assistance Agreement (1947 MAA) entered into by the President with the U.S. pursuant to the authority granted under Republic Act No. 9. The Agreement established the conditions under which the U.S. military assistance would be granted to the Philippines, particularly the provision of military arms, ammunitions, supplies, equipment, vessels, services, and training for the latter's defense forces.

The 1953 Exchange of Notes Constituting an Agreement Extending the Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America on Military Assistance to the Philippines (1953 Agreement) clarified that the 1947 Agreement would remain in force until terminated by any of the parties.

A review of the 1947 MBA in 1979 led to the formal transfer of control of Clark and Subic bases to the Philippines.[163] Thus, ***these bases became Philippine military installations containing U.S. military facilities***. The review also provided that each base would be ***under a Filipino base commander***; the ***Philippine flag was to fly singly in the bases***; the ***Philippine government was to provide security along the bases' perimeters***; and the review of the agreements would take place every five years starting in 1979.[164]

On September 16, 1991, the Philippine Senate rejected the proposed RP-US Treaty of Friendship, Cooperation and Security that would have extended the life of the bases for 10 more years.[165] The 1947 MBA was terminated on December 21, 1992 when the 25-year tenure lapsed. This prompted the U.S. to vacate its bases effective at the end of December 1992.[166] The departure of the U.S. warship *Bellau Wood* marked the closure of American military bases in the country.[167]

With the expiration of the 1947 MBA, the detailed arrangements for the presence of U.S. military forces and facilities in the Philippines, particularly those listed above, similarly ended, leaving only the general arrangements under the 1951 Mutual MDT.

V.C(2) ***The 1951 Mutual Defense Treaty***

The 1951 MDT was signed on August 30, 1951, while the U.S. was establishing a number of bilateral defense alliances with key Asian States as it positioned itself to contain communist expansion in Asia in the period following World War II and the Korean War. Despite periods of drift, its relationship with its Asian allies provided the U.S. support and assistance throughout the Cold War and during the Vietnam war.[168]

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163 See *Romulo-Murphy Exchange of Notes of 1979*.

164 See Official Gazette, *Report of President Marcos to the Batasang Pambansa,* January 15, 1979.

165 *Bayan v. Zamora, supra* note 69, at 632, which states:

> In view of the impending expiration of the RP-U.S. Military Bases Agreement in 1991, the Philippines and the U.S. negotiated for a possible extension of the military bases agreement. On September 16, 1991, the Philippine Senate rejected the proposed RP-U.S. Treaty of Friendship, Cooperation and Security which, in effect, would have extended the presence of U.S. military bases in the Philippines.

166 *Philippine Communications Satellite Corporation v. Globe Telecom, Inc.*, 473 Phil. 116, 122 (2004), which states:

> On 31 December 1991, the Philippine Government sent a *Note Verbale* to the U.S. Government through the U.S. Embassy, notifying it of the Philippines' termination of the RP-US Military Bases Agreement. The *Note Verbale* stated that since the RP-US Military Bases Agreement, as amended, shall terminate on 31 December 1992, the withdrawal of all U.S. military forces from Subic Naval Base should be completed by said date.

167 Gerald Anderson. *Subic Bay From Magellan to Pinatubo: The History of the US Naval Station, Subic Bay* (2006), p. 181. Available at https://books.google.com.ph/books?id=OfPs0NH5EuAC&printsec=frontcover&dq=subic+bay+from+magellan+to+pinatubo&hl=en&sa=X&ved=0ahUKEwjvitrLrNjJAhUBJ5QKHcBlCAUQ6AEIJDAA#v=onepage&q=subic%20bay%20from%20magellan%20to%20pinatubo&f=false.

168 Bruce Vaughn. "U.S. Strategic and Defense Relationships in the Asia-Pacific Region" *U.S. Congressional Research Service Report for Congress* (January 22, 2007). Available at https://www.fas.org/sgp/crs/row/RL33821.pdf.

The 1951 MDT provided the general terms of the defense alliance between the U.S. and the Philippines; the more detailed terms were reflected in the earlier 1947 MBA that expired and was not renewed in 1991.

The 1947 MBA and the 1951 MDT were the counterparts of U.S. agreements with the North Atlantic Treaty Organization (*NATO*) countries. One of those agreements was the NATO Status of Forces Agreement (*NATO-SOFA*), a multilateral agreement that applies to all the NATO-member countries.[169]

After the World War II, the U.S. maintained various European bases.[170] Despite the presence of these bases, the U.S. entered into the NATO-SOFA on June 19, 1951, to define the terms for the deployment *and status* of its military forces in these countries.[171] Most of the other NATO states, however, required ratification and implementing legislation, with additional agreements to implement the NATO-SOFA.[172]

The 1951 MDT provides for an alliance – that both nations would support one another if either the Philippines or the U.S. would be attacked by an external party.[173] It states that each party shall either, separately or jointly, through mutual aid, acquire, develop and maintain their capacity to resist armed attack.[174] It provides for a mode of consultations to determine the 1951 MDT's appropriate implementation measures and when either of the parties determines that their territorial integrity, political independence, or national security is threatened by *armed attack in the Pacific*.[175] An attack on either party will be acted upon in accordance with their

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169 R. Chuck Mason. "Status of Forces Agreement (SOFA): What is it, how is it utilized?" *U.S. Congressional Research Service Report for Congress* (March 15, 2012). Available at https://www.fas.org/sgp/crs/natsec/RL34531.pdf.

170 For an illustrated depiction of the increase of U.S. military bases around the world before (1939) and after (1945) World War III, see David Vine, *supra* note 77, at 32-36.

171 See Mason, *supra* note 169, stating that the U.S. and Germany entered into a supplemental agreement to the NATO SOFA (as provided in 14 U.S.T. 531; T.I.A.S. 5351. Signed at Bonn, August 3, 1959. Entered into force July 1, 1963) and additional exchange of notes related to specific issues (14 U.S.T. 689; T.I.A.S. 5352; 490 U.N.T.S. 30. Signed at Bonn, August 3, 1959. Entered into force July 1, 1963).

Also, the Manila Pact entered into on September 8, 1954 by the U.S., the Philippines, Australia, France, New Zealand, Pakistan, and Thailand, whereby the parties agreed, among others, to: settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations; and separately and jointly, by means of continuous and effective self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack and to prevent and counter subversive activities directed from without against their territorial integrity and political stability. See Southeast Asia Collective Defense Treaty (September 8, 1954). 209 U.N.T.S. 28-30. Available at https://treaties.un.org/doc/Publication/UNTS/Volume%20209/v209.pdf.

172 For example, the U.S. entered into supplementary agreement with the Federal Republic of Germany (which acceded to the NATO-SOFA in 1963) with respect to allied forces stationed permanently in Germany, see Dieter Fleck, *The Handbook of the Law on Visiting Forces* (2001), p. 353.

173 The 1951 MDT states the Parties' objective "[d]esiring to declare publicly and formally their sense of unity and their common determination to defend themselves against external armed attack, so that no potential aggressor could be under the illusion that either of them stands alone in the Pacific Area."

174 1951 MDT, Article II.

175 *Id.*, Article III .

constitutional processes and any armed attack on either party will be brought to the attention of the United Nations for immediate action.[176]

The accord defines the meaning of an armed attack as including armed attacks by a hostile power on a metropolitan area of either party, on the island territories under their jurisdiction in the Pacific, or on their armed forces, public vessels, or aircrafts in the Pacific.[177] The U.S. government guaranteed to defend the security of the Philippines against external aggression but not necessarily against internal subversion. The treaty expressly stipulates that its terms are indefinite and would last until one or both parties terminate the agreement by a one-year advance notice.[178] The treaty subsequently became the basis for an annual joint exercise, known as *Balikatan*, between the Philippines and the U.S.[179]

On the whole, the 1951 MDT embodied an alliance and defense agreement, focused as it is *on joint action and defenses against armed external attacks*. It made no provision for bases, troops, or facilities which the 1947 MBA contained and which lapsed when the MBA's term expired.

V.C(3) ***The 1998 Visiting Forces Agreement***

The 1998 VFA came after the expiration of the 1947 MBA in 1991 and opened a limited window for the ***presence of American troops*** in the Philippines. It was entered into during the era when the U.S. was envisioning "access" as a new approach in maintaining its presence in Southeast Asia. Instead of permanent bases, the approach sought bilateral arrangements – like those with Singapore – for ***training, exercises, and interoperability*** to allow for uninterrupted forward deployment in the Asian region; their continued presence in the region assures faster response to developments in flash points in the eastern hemisphere.[180]

In line with the American approach, the 1998 VFA allows the rotational presence of U.S. military forces and their operations anywhere in the Philippines for a *temporary but undefined length of time* to train and inter-operate with the Philippine armed forces and to use their facilities. The Philippines retains jurisdiction over criminal cases, including capital offenses, involving U.S. troops.[181]

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176 *Id.*, Article IV.

177 *Id.*, Article V.

178 *Id.*, Article VIII.

179 *Lim v. Executive Secretary*, 430 Phil 555, 562 (2002), which states: These so-called "Balikatan" exercises are the largest combined training operations involving Filipino and American troops. In theory, they are a simulation of joint military maneuvers pursuant to the Mutual Defense Treaty, a bilateral defense agreement entered into by the Philippines and the United States in 1951.

180 See H. Marcos Moderno, "A Decade of US Troops in Mindanao: Revisiting the Visiting Forces Agreement (2)" *MindaNews*, April 24, 2012, available at http://www.mindanews.com/special-reports/2012/04/24/a-decade-of-us-troops-in-mindanao-revisiting-the-visiting-forces-agreement-2/.

181 1998 VFA, Article V.

In *Bayan v. Zamora*,[182] the Court held that although the agreement did not entail the permanent basing of a foreign military force, it required a treaty because Article XVIII, Section 25 of the Constitution covers not only the presence of bases but also the presence of "troops."[183] As a treaty, the 1998 VFA required the concurrence of the Senate pursuant to Article VII, Section 21 of the Constitution.

The Court also held that the Philippines is bound to accept an official declaration by the U.S. to satisfy the requirement that the other contracting party must recognize the agreement as a treaty.[184] It noted that the Vienna Convention on the Law of Treaties leaves each state free to choose its form of giving consent to a treaty.[185]

V.D. The EDCA

As heretofore outlined, the U.S. adopted the "Pivot to Asia" strategy beginning 2009 under the administration of President Barack Obama. In the article *Explaining the U.S. Pivot to Asia,* Kurt Campbell and Brian Andrews enumerated six key efforts under the U.S.'s "Pivot to Asia" policy, namely: alliances; improving relationships with emerging powers; economic statecraft; engaging with multi-lateral institutions; support for universal values; and increasing military presence.[186]

On military presence, the operative word is **"presence"**: the forward deployment of U.S. military forces in Asia.[187] **The EDCA perfectly fits the American strategy as it allows the *prepositioning of equipment and supplies* in *agreed locations* to enhance the U.S.'s "development of a geographically dispersed, politically sustainable *force posture* in the region."**[188]

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182 *Supra* note 69.

183 *Id.* at 652, which states:

> On the whole, the VFA is an agreement which defines the treatment of United States troops and personnel visiting the Philippines. It provides for the guidelines to govern such visits of military personnel, and further defines the rights of the United States and the Philippine government in the matter of criminal jurisdiction, movement of vessel and aircraft, importation and exportation of equipment, materials and supplies.
>
> Undoubtedly, Section 25, Article XVIII, which specifically deals with treaties involving foreign military bases, troops, or facilities, should apply in the instant case. To a certain extent and in a limited sense, however, the provisions of Section 21, Article VII will find applicability with regard to the issue and for the sole purpose of determining the number of votes required to obtain the valid concurrence of the Senate, as will be further discussed hereunder.

184 *Id.* at 657, which states:

> This Court is of the firm view that the phrase ***recognized as a treaty*** means that the other contracting party ***accepts or acknowledges*** the agreement as a treaty. To require the other contracting state, the United States of America in this case, to submit the VFA to the United States Senate for concurrence pursuant to its Constitution, is to accord strict meaning to the phrase.

185 Joaquin Bernas, *supra* note 144, at 1400-1401.

186 See Kurt Campbell & Brian Andrews, *Explaining the US 'Pivot' to Asia,* August 2013, Chatham House, pp. 3-8. Available at https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Americas/0813pp_pivottoasia.pdf

187 *Id.* at 8.

188 *Ibid.*

The EDCA was signed on April 28, 2014, in Manila, by Philippine Defense Secretary Voltaire Gazmin, and U.S. Ambassador to the Philippines Philip Goldberg, in time for the official state visit by U.S. President Barack Obama. The 10-year accord is the second military agreement between the U.S. and the Philippines (the first being the 1998 VFA) since American troops withdrew from its Philippines naval base in 1992.

The agreement allows the U.S. to station troops and operations on Philippine territory without establishing a permanent base[189] and with the stipulation that the U.S. is not allowed to store or position any nuclear weapons on Philippine territory.[190]

The EDCA was entered into for the following purposes:

> 1. This Agreement deepens defense cooperation between the Parties and maintains and develops their individual and collective capacities, in furtherance of Article II of the MDT, which states that "the Parties separately and jointly by self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack," and within the context of the VFA. This includes:
>
> (a) Supporting the Parties' shared goal of improving interoperability of the Parties' forces and for the Armed Forces of the Philippines ("AFP"), addressing short-term capabilities gaps; promoting long-term modernization, and helping maintain and develop additional maritime security, maritime domain awareness, and humanitarian assistance and disaster relief capabilities; and
>
> (b) Authorizing access to Agreed Location in the territory of the Philippines by United States forces on a rotational basis as mutually determined by the Parties.
>
> 2. In furtherance of the MDT, the Parties mutually agree that this Agreement provides the principal provisions and necessary authorizations with respect to Agreed Locations.
>
> 3. The Parties agree that the United States may undertake the following types of activities in the territory of the Philippines in relation to its access to and use of Agreed Locations: security cooperation exercises; joint and combined training activities; humanitarian assistance and disaster relief activities; and such other activities as may be agreed upon by the Parties.[191]

To summarize, the **EDCA has two main purposes**:

First, it is intended as a framework for activities for defense cooperation in accordance with the 1951 MDT and the 1998 VFA.

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189 EDCA, Preamble, par. 5.
190 *Id.*, Article IV, par. 6.
191 *Id.*, Article I.

Second, it grants to the U.S. military the right to use certain identified portions of the Philippine territory referred to in the EDCA as Agreed Locations. *This right is fleshed out in the EDCA when the agreement identifies the privileges granted to the U.S. in bringing in troops and facilities, in constructing structures, and in conducting activities.*[192]

The EDCA is effective for 10 years, unless both the U.S. and the Philippines formally agree to alter it.[193] The U.S. is bound to hand over any and all facilities in the "Agreed Locations" to the Philippine government upon the termination of the Agreement.

In terms of contents, EDCA may be divided into two:

First, it reiterates the purposes of the 1951 MDT and the 1998 VFA in that it affirms the continued conduct of joint activities betweent the U.S. and the Philippines in pursuit of defense cooperation.

Second, it contains ***an entirely new agreement*** pertaining to Agreed Locations, the right of the U.S. military to stay in these areas and conduct activities which may not be imbued with mutuality of interests since they do not involve defense cooperation.

The latter provides support for two interrelated arguments that I will forward in this Opinion. ***First***, the EDCA refers to the presence of foreign military bases, troops, and facilities in this jurisdiction. ***Second***, the EDCA is not a mere implementation of, but goes beyond, the 1951 MDT and the 1998 VFA. It is an agreement that introduces new terms and obligations not found in the 1951 MDT and the 1998 VFA, and thus requires the concurrence of the Senate.

V.D(1) *Does the EDCA involve the entry of military bases to the Philippines as envisioned under Article XVIII, Section 25?*

V.D(1)(i) *The Concept of a Foreign Military Base*

A reading of the EDCA will reveal that it pertains to the presence in this country of a foreign military base or the modern equivalent of one. While Article XVIII, Section 25 mentions no definition of what a foreign military base, troops, or facility is, these terms, at the time the 1987 Constitution was drafted, carried a special meaning. In fact, this meaning was the compelling force that convinced the framers to include Article XVIII, Section 25 in the 1987 Constitution.

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192 *Id.*, Article III.

193 *Id.*, Article XII(4).

More specifically, when the framers of the 1987 Constitution referred to foreign military bases, they had in mind the then existing 1947 MBA.[194] This is apparent from the text of the provision itself which makes direct reference to the treaty, as well as from the exchanges of the framers of the 1987 Constitution prior to their vote on the proposed provision.[195]

In construing the meaning of statutes and of the Constitution, one aim is to discover the meaning that the framers attached to the particular word or phrase employed.[196] The pertinent statute or provision of the Constitution must then be "construed as it was intended to be understood when it was passed."[197]

Thus, a proper interpretation of the meaning of foreign military bases must take into account how it was understood by the framers in accordance with how the 1947 MBA established U.S. military bases in the Philippines. It is in this technical and precise meaning that the term military base was used. It is this kind of military bases that Article XVIII, Section 25 intends to cover, *subject to specific qualifications*.

Hence, the concept of military bases as illustrated in the 1947 MBA should be taken into account in ascertaining whether the EDCA contemplates the establishment of foreign military bases. This reality renders a comparison of the 1947 MBA and the EDCA appropriate.

To clarify this position, it is *not that the framers of the 1987 Constitution had in mind the specific existing foreign military bases under the 1947 MBA when they drafted Article XVIII, Section 25*. Such a position unjustifiably assumes that the framers lacked foresight and merely allowed themselves to be solely limited by the existing facts.

Rather, my position is that it is ***the concept of a foreign military base under the 1947 MBA***, and not the specific military bases listed in its Annexes, that should be determinative of what the Constitution intends to cover. ***The foreign military base concept should necessarily be adjusted, too, to take into account the developments under the new U.S. "Pivot to Asia" strategy***.

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194 V Records, Constitutional Commission 105. (October 11, 1986), which reads:

Mr. Bennagen: Point of information. I have with me a book of Patricia M. Paez, *The Bases Factor,* the authority on US relations. And reference to the agreement reads this way: Agreement between the Republic of the Philippines and the United States of America concerning military bases.

Mr. Azcuna: That is the official title. Why do we not use that? After the expiration of the agreement x x x.

195 *Ibid.*

196 Samson Alcantara. *Statutes* (1997 ed.) at 58; See also Ruben Agpalo, *Statutory Construction* (6th ed) at 282.

197 *Ernesto v. Court of Appeals,* 216 Phil. 319, 327-328 (1984).

V.D(1)(ii) ***EDCA and the 1947 MBA Compared***

A first material point to note is that ***the obligations under the EDCA are similar to the obligations found in the 1947 MBA.*** To support this view, I present below a side by side comparison of the relevant provisions of the EDCA and the 1947 MBA.

EDCA	**1947 MBA**
Article III, Section 1 With the consideration of the views of the Parties, the Philippines hereby authorizes and agrees that United States forces, United States contractors, and vehicles, vessels, and aircraft operated by or for United States forces may conduct the following activities with respect to Agreed Locations: training, transit, support and related activities, refueling of aircraft; bunkering of vessels; temporary maintenance of vehicles, vessels, and aircraft; temporary accommodation of personnel; communications; prepositioning of equipment, supplies, and materiel; deploying forces and materiel and such other activities as the Parties may agree. **Article VI, Section 3** United States forces are authorized to exercise all rights and authorities within the Agreed Locations that are necessary for their operational control or defense, including undertaking appropriate measures to protect United States forces and United States contractors. The United States should coordinate such measures with appropriate authorities of the Philippines.	**Article III, par. 1** It is mutually agreed that the United States shall have the rights, power, and authority within the bases which are necessary for the establishment, use, operation and defense thereof or appropriate for the control thereof and all the rights, power and authority within the limits of territorial waters and air space adjacent to, or in the vicinity of, the bases which are necessary to provide access to them, or appropriate for their control.
Article III, Section 4 The Philippines hereby grants to the United States, through bilateral security mechanisms, such as the MDB and SEB, operational control of Agreed	**Article III, par. 2 (a) and (b)** x x x x 2. Such rights, power, and authority shall include, inter alia, the right, power

Locations for construction activities and authority to undertake activities on, and make alterations and improvements to, Agreed Locations. x x x	and authority : (a) to construct (including dredging and filling), operate, maintain, utilize, occupy, garrison and control the bases; (b) to improve and deepen the harbors, channels, entrances and anchorages, and to construct or maintain necessary roads and bridges affording access to the bases; x x x x
Article VII, Section 1. The Philippines hereby grants to United States forces and United States contractors the use of water, electricity, and other public utilities on terms and conditions, including rates of charges, no less favorable than those available to the AFP or the Government of the Philippines. x x x **Article VII, Section 2** The Parties recognize that it may be necessary for United States forces to use the radio spectrum. The Philippines authorizes the United States to operate its own telecommunications systems (as telecommunication is defined in the 1992 Constitution and Convention of the International Telecommunication Union "ITU"). This shall include the right to utilize such means and services required to ensure the full ability to operate telecommunications systems and the right to use all necessary radio spectrum allocated for this purpose. xxx	**Article III, par 2 (d)** x x x x the right to acquire, as may be agreed between the two Governments, such rights of way, and to construct thereon, as may be required for military purposes, wire and radio communications facilities, including submarine and subterranean cables, pipe lines and spur tracks from railroads to bases, and the right, as may be agreed upon between the two Governments to construct the necessary facilities; x x x x
Article IV, Section 1 The Philippines hereby authorizes United States forces, through bilateral mechanisms, such as the MDB and SEB, to preposition and store defense equipment, supplies and materiel	**Article III, par (2) (e)** x x x x to construct, install, maintain, and employ on any base any type of facilities, weapons, substance, device,

("prepositioned materiel"), including, but not limited to, humanitarian assistance and disaster relief equipment, supplies, and materiel, at Agreed Locations. United States forces x x x **Article IV, Section 3** The prepositioned materiel of the United States shall be for the exclusive use of United States forces, and full title to all such equipment, supplies, and materiel remains with the United States. United States forces shall have control over the access and disposition of such prepositioned materiel and shall have the unencumbered right to remove such prepositioned materiel at any time from the territory of the Philippines. **Article IV, Section 4** United States forces and United States contractors shall have unimpeded access to Agreed Locations for all matters relating to the prepositioning and storage of defense equipment, supplies, and materiel including delivery, management, inspection, use, maintenance, and removal of such equipment, supplies and materiel.	vessel or vehicle on or under the ground, in the air or on or under the water that may be requisite or appropriate, including meteorological systems, aerial and water navigation lights, radio and radar apparatus and electronic devices, of any desired power, type of emission and frequency.
Article III, Section 2 When requested, the Designated Authority of the Philippines shall assist in facilitating transit or temporary access by United States forces to public land and facilities (including roads, ports, an airfield) including those owned or controlled by local governments, and to other land and facilities (including roads, ports and airfields).	**Article VII** It is mutually agreed that the United States may employ and use for United States military forces any and all public utilities, other services and facilities, airfields, ports, harbors, roads, highways, railroads, bridges, viaducts, canals, lakes, rivers and streams in the Philippines under conditions no less favorable than those that may be applicable from time to time to the military forces of the Philippines.

While the 1947 MBA grants broader powers to the U.S., due perhaps to the geopolitical context under which the agreement was forged (the 1947

MBA had an international, in contrast with EDCA's Asian, focus), the EDCA and the 1947 MBA essentially pursue the same purpose – ***the identification of portions of Philippine territory over which the U.S. is granted certain rights for its military activities***.

These rights may be categorized into four:

(1) the right to construct structures and other facilities for the proper functioning of the bases;

(2) the right to perform activities for the defense or security of the bases or Agreed Locations;

(3) the right to preposition defense equipment, supplies and materiel; and,

(4) other related rights such as the use of public utilities and public services.

Only those who refuse to see cannot discern these undeniable parallelisms.

Further, even independently of the concept of military bases under the 1947 MBA, the provisions of the EDCA itself provide a compelling argument that it seeks to allow in this country what Article XVIII, Section 25 intends to regulate.

There exists no rigid definition of a military base. However, it is a term used in the field of military operations and thus has a *generally accepted connotation.* The U.S. Department of Defense (*DoD*) Dictionary of Military and Associated Terms defines a base as *"an area or locality containing installations which provide logistic or other support"; home airfield; or home carrier.*[198]

Under our laws, we find the definition of a military base in Presidential Decree No. 1227 which states that a military base is "any military, air, naval, coast guard reservation, base, fort, camp, arsenal, yard, station, or installation in the Philippines."[199] A military base connotes the presence, in a relatively permanent degree, of troops and facilities in a particular area.[200]

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198 US Department of Defense, Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms, at 21 (2015), available at <http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf>.

199 Presidential Decree No. 1227, Section 2.

200 IV Records, Constitutional Commission 86 (September 18, 1986):

Fr. Bernas: By the term 'bases,' were we thinking of permanent bases?

Mr. Maambong: Yes.

In 2004, the U.S. DoD released *Strengthening U.S. Global Defense Posture,* a report to U.S. Congress about the renewed U.S. global position.[201] The U.S. DoD redefined and reclassified their military bases in three categories:

> **Main Operating Base (MOB)**
>
> Main operating bases, with permanently stationed combat forces and robust infrastructure, will be characterized by command and control structures, family support facilities, and strengthened force protection measures. Examples include Ramstein Air Base (Germany), Kadena Air Base (Okinawa, Japan), and Camp Humphreys (Korea).
>
> **Forward Operating Site (*FOS*)**
>
> Forward operating site will be an *expandable* "warm facilities" maintained with a *limited U.S. military support presence* and possibly *prepositioned* equipment. FOSs will support *rotational* rather than permanently stationed forces and be a focus for bilateral and regional training. Examples include the Sembawang port facility in Singapore and Soto Cano Air Base in Honduras.

The following are the key characteristics of an FOS:

First, an FOS is an expandable/scalable facility. Andrew Krepinevich and Robert Work noted that an FOS can support both small and large forces, and can be readily expanded to serve as expeditionary or campaign bases should a crisis erupt nearby.[202]

Second, the facility is maintained or "kept warm" by limited U.S. military support personnel or U.S. military contractors. It hosts *rotational* rather than permanently stationed forces. An FOS may also house prepositioned equipment.

Finally, an FOS facility does not need to be owned by the U.S. (*i.e.*, the Sembawang Port Facility and the Paya Lebar Airfield in Singapore). FOSs are generally bases that support *forward-deployed* rather than *forward-based* forces.[203]

The third classification of military bases is a ***Cooperative Security Location***, described as follows:

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[201] US DoD, *Strengthening U.S. Global Defense Posture: Report to Congress, U.S. Department of Defense,* (2004), pp. 10-11. Available at http://www.dmzhawaii.org/wp-content/uploads/2008/12/global_posture.pdf.

[202] Andrew Krepinevich and Robert Work. *A New Global Defense Posture for the Second Transoceanic Era* (2007), p. 19.

[203] Krepinevich and Work, *supra* note 201, at 18.

Cooperative Security Location (*CSL*)

> Cooperative security locations will be *facilities* with little or no permanent U.S. presence. Instead they will be *maintained with periodic service, contractor, or host-nation support.* CSLs will provide *contingency* access and be a focal point for security *cooperation* activities. A current example of a CSL is in Dakar, Senegal, where the U.S. Air Force has negotiated contingency landing, logistics, and fuel contracting arrangements, and which served as a staging area for the 2003 peace support operation in Liberia.[204]

The GDPR emphasized that the U.S.'s plan is **to *establish a network of FOSs and CSLs in Asia-Pacific* to support the global war on terrorism and to provide multiple avenues of access for contingency operations.** These facilities serve to expand training opportunities for the U.S. and the host-country. FOSs and CSLs allow U.S. forces to use these areas in times of crisis while *avoiding the impression of establishing a permanent presence.*[205] Notably, these access agreements are less expensive to operate and maintain than MOBs.[206] Moreover, FOSs and CSLs allow overseas military presence with a lighter footprint.[207]

To go back to the EDCA, it notably allows the U.S. to use the Agreed Locations for the following activities: *"training, transit, support and related activities, refueling of aircraft; bunkering of vessels; temporary maintenance of vehicles, vessels, and aircraft; temporary accommodation of personnel; communications; prepositioning of equipment, supplies, and materiel; deploying forces and materiel and such other activities as the Parties may agree."*[208]

In order to carry out these activities, the EDCA allows U.S. military personnel *to enter and remain in Philippine territory.* It grants the U.S. the right *to construct structures and assemblies.*[209] It also allows the U.S. to *preposition defense equipment, supplies and materiel.*[210] The U.S. personnel may also use the Agreed Locations *to refuel aircraft and bunker vessels.*[211]

Stockpiling of military materiel in the Philippines is explicitly permitted under the following EDCA provisions:

1. Article III, par. 1: The activities allowed on the agreed locations include: (i) the **prepositioning** of equipment,

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204 US DoD, *supra* note 201, at 10-11.

205 Bruno Charbonneau and Wayne Cox. *Locating Global Order: American Power and Canadian Security after 9/11* (2010), p. 65.

206 Stacie Pettyjohn. "*Minimalist International Interventions: For the Future US Overseas Presence, Access Agreement Are Key*" Summer 2013, RAND Corporation, *available at* http://www.rand.org/pubs/periodicals/rand-review/issues/2013/summer/for-the-future-us-overseas-presence.html.

207 *Id.* at 2.

208 EDCA, Article III Sec. 1.

209 *Id.*, Article V, Section 2.

210 *Id.*, Article IV, Sec. 1.

211 *Id.*

supplies, and materiel; (ii) deploying forces and materiel; and (iii) such other activities as the Parties may agree.

2. Article IV, par. 1: U.S. forces are allowed **to preposition and store defense equipment, supplies, material ("prepositioned materiel")**, *including, but not limited to,* humanitarian assistance and disaster relief equipment, supplies, and materiel, at agreed locations.

3. Article IV, par. 3: The **prepositioned materiel is for the exclusive use of U.S. forces** and full title shall belong to the U.S.

4. Article IV, par. 4: The U.S. forces and U.S. contractors shall have **unimpeded access** to the agreed locations **for all matters relating to the *prepositioning and storage* of defense equipment, supplies, and materiel, including delivery, management, inspection, use, maintenance, and removal of such equipment, supplies and materiel.**

Notably, **neither the 1951 MDT nor the 1998 VFA authorized stockpiling.** The 1951 MDT focused on developing the Philippines and the U.S.'s capacity to resist an armed attack while 1998 VFA focused on the entry and exit of US troops in the country. No provision in either treaty specifically allows stockpiling of military materiel.

In sum, the Agreed Locations mentioned in the EDCA are areas where the U.S. can perform military activities in structures built by its personnel. The extent of the U.S.' right to use of the Agreed Locations is broad enough to include even the *stockpiling of weapons* and the *shelter and repair of vessels* over which the U.S. personnel has exclusive control. Clearly, this is a military base as this term is ordinarily understood.

Further, as we held in *Bayan Muna,* Article XVIII, Section 25 refers to three different situations: the presence of foreign military bases, troops, or facilities.[212] ***Even assuming that the EDCA is not a basing agreement, it nevertheless involves the deployment of troops and facilities in Philippine soil.*** As I have already stated, the EDCA allows U.S. forces to enter and remain in the Philippines. It defines U.S. forces to include U.S. military and civilian personnel and U.S. Armed Forces property, equipment, and materiel.[213] The EDCA itself provides that the U.S. can deploy forces and materiel in the Agreed Locations.[214]

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[212] *Supra* note 109, at 653.

In like manner x x x such that, the provision contemplates three different situations - a military treaty the subject of which could be either (a) foreign bases, (b) foreign troops, or (c) foreign facilities - any of the three standing alone places it under the coverage of Section 25, Article XVIII.

[213] EDCA, Article II, Section 2.

[214] *Id.,* Article III, Section 1.

That the EDCA allows this arrangement for an initial period of 10 years, to continue automatically unless terminated,[215] is further proof that it pertains to the presence in Philippine soil of foreign military bases, troops, and facilities *on a more or less permanent basis*.

Note, at this point, that the Senators, during the ratification of the 1998 VFA, observed that it only covers *temporary* visits of U.S. troops and personnel in the country. ***These Senators gave their consent to the 1998 VFA on the knowledge that the U.S. forces' stay in the country may last only up to three weeks to six months per batch.***[216]

This temporary stay of U.S. forces in the Philippines under the 1998 VFA means that it *does not cover, or approve of, a more permanent stay of U.S. forces and their equipment in the Philippines. Significantly, this is the key characteristic of the Agreed Locations in the EDCA*. For, if the EDCA had not envisioned the stay of U.S. forces and equipment in the Agreed Locations in the Philippines for a period longer than envisioned in the 1998 VFA, it would not have added obligations regarding the ***storage*** of their equipment and materiel. The more permanent nature of the EDCA, in contrast to the 1998 VFA, indicates a change in the tenor of the agreement in the EDCA, one that does not merely implement the 1998 VFA.

V.D(2) ***Does the EDCA Merely Implement the 1951 MDT?***

This question responds to the *ponencia*'s argument that the EDCA can be embodied in an executive agreement because it merely provides implementing details for the 1951 MDT.[217]

V.D(2)(i) ***The Effects of the Expiration of the 1947 MBA and of the Adoption of the 1987 Constitution***

The sequence of events relating to American bases, troops, and facilities in the Philippines that took place since Philippine independence, is critical in responding to the question in caption. It should be remembered that as a condition under the Tydings-McDuffie Act for the grant of Philippine independence, the Philippines was bound to negotiate with the U.S. for bases in the Philippines, resulting in the 1947 MBA.

This agreement contained the detailed terms relating to the existence and operation of American bases and the presence of American forces and facilities in the Philippines. As its title denotes, the 1951 MDT is the treaty providing for alliance and mutual defense against armed attack on either country; ***it only generally contained the defense and alliance relationship between the Philippines and the U.S.***

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215 *Id.*, Article XII, Section 4.

216 The senators argued the precise length of time but agreed that it would not exceed six months. See Senate deliberations on P.S. Res. No. 443 – Visiting Forces Agreement, May 17, 1999, Records and Archives Service, Vol. 133, pp. 23-25.

217 *Ponencia*, pp. 48-66.

In 1987, the Philippines adopted a new Constitution. This Charter directly looked forward to the expiration of the 1947 MBA and provided for the terms under which foreign military bases, troops, and facilities would thereafter be allowed into the Philippines. The 1947 MBA expired in 1991 and no replacement treaty took its place; thus, ***all the detailed arrangements provided under the 1947 MBA for the presence of U.S. bases, troops and facilities also ended***, leaving only the 1951 MDT and its general terms in place.

Under this situation, the detailed arrangements that expired with the 1947 MBA were not carried over to the 1951 MDT as this treaty only generally provided for the defense and alliance relationship between the U.S. and the Philippines. Thus, there were no specific policies on military bases, troops, and facilities that could be implemented and operationalized by subsequent executive agreements on the basis of the MDT.

In particular, the terms of the 1947 MBA that had expired and had not been renewed cannot be deemed carried over to the 1951 MDT. If any such future agreements would be made after the effectivity of the 1987 Constitution, then such agreements would be governed by Article XVIII, Section 25 of the new Constitution.

Significantly, when the 1987 Constitution and its Article XVIII, Section 25 took effect, no absolute prohibition against the introduction of new U.S. bases, troops, and facilities was put in place. In fact the 1951 MDT then still existed as a general defense alliance of the Philippines and the U.S. against armed attack by third parties. But the introduction of military bases or their equivalent, of troops, and of military facilities into the Philippines can now only take place by way of a treaty concurred in by the Senate.

V.D(2)(ii) *The 1951 MDT examined in light of the EDCA*

That the EDCA is purely an implementation of the 1951 MDT and does not need to be in the form of a treaty, is not tenable for two reasons.

First, The EDCA grants rights and privileges to the U.S. that go well beyond what is contemplated in the 1951 MDT and the 1998 VFA.

Second, even the assumptions that the EDCA is indeed a mere implementation of both the earlier 1951 MDT and the 1998 VFA, this assumption by no means provides an argument in favor of treating the EDCA as an executive agreement. Notably, *the 1998 VFA is also recognized as an implementation of the 1951 MDT yet the Government deemed it necessary to have it embodied in a separate treaty concurred in by the Senate.*

On the first argument, an analysis of the 1951 MDT, the 1998 VFA, and the EDCA reveals that the ***EDCA is a stand-alone agreement.***

The 1951 MDT is a treaty intended for the collective defense of its signatory countries (*i.e.*, the U.S. and the Philippines) against external armed attack. This is apparent from its declaration of policies which states, among others, that the U.S. and the Philippines have agreed to the MDT in pursuit of their desire to –

> x x x declare publicly and formally their sense of unity and their common determination to **defend themselves against external armed attack,** so that no potential aggressor could be under the illusion that either of them stands alone in the Pacific area.[218]

The rest of the text of the 1951 MDT consistently highlights this goal. Its **Article II** states that the parties shall "separately and jointly by self-help and mutual aid maintain and develop their individual and collective capacity to resist armed attack." **Article III** provides that the parties shall "consult together" regarding the implementation of the MDT whenever in their opinion the "territorial integrity, political independence or security of either of the parties is threatened by external armed attack in the Pacific." **Article IV** declares that an armed attack in the Pacific area on either of the parties would be dangerous to each other's peace and safety and thus they would act to meet the common danger. **Article V** then proceeds to define an armed attack as to include an armed attack on "the metropolitan territory of either parties or on the island territories under its jurisdiction in the Pacific Ocean, its armed forces, public vessels and aircrafts in the Pacific."

This Court has had occasion to explain the nature of the 1951 MDT. In *Lim v. Executive Secretary*,[219] we said –

> x x x The MDT has been described as the core of the defense relationship between the Philippines and its traditional ally, the United States. Its aim is to enhance the strategic and technological capabilities of our armed forces **through joint training** with its American counterparts x x x. [Emphasis supplied]

Thus, the essence of the 1951 MDT is the conduct of joint activities by the U.S. and the Philippines in accordance with the dictates of *collective defense against an attack in the Pacific*. ***This is a focus that the EDCA lacks.***

V.D(2)(iii) *The 1951 MDT Compared with Other Defense Alliance Agreements*

Our military obligations to the U.S. under the 1951 MDT are (1) to maintain and develop our military capacity to resist armed attack, and (2) to recognize that an armed attack against the U.S. in the Pacific is an attack on

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218 1951 MDT, Preamble, par. 3.

219 *Supra* note 179, at 571-572.

the Philippines and to meet the common danger *in accordance with our constitutional process.* The relevant provisions read:

> **Article II.** In order more effectively to achieve the objective of this Treaty, the Parties separately and jointly by self-help and mutual aid will **maintain and develop their individual and collective capacity to resist armed attack.**
>
> **Article IV.** Each Party **recognizes** that an **armed attack** in the Pacific area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to **meet the common dangers** in **accordance with its constitutional processes**.
>
> Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.
>
> **Article V.** For purposes of ARTICLE IV, an armed attack on either of the Parties is deemed to include an armed attack on the metropolitan territory of either of the Parties, or on the island territories under its jurisdiction in the Pacific Ocean, its armed forces, public vessels or aircraft in the Pacific.

(Fortunately, the limits of the 1951 MDT have not been tested in actual operation since neither the Philippines nor the U.S. has as yet been the subject of an *armed* attack in the Pacific region.)

In relating the 1951 MDT to the EDCA, I glean from the *ponencia* the intent to seize the term "mutual aid" in developing the contracting parties' collective capacity to resist an armed attack, as basis for the US to establish a military base or a military facility or station military troops in the Philippines.[220] This reading, however, would be a novel one in the context of American agreements with other Asian countries with their own alliance and MDTs with the U.S.

Note that Article II of the RP-U.S. 1951 MDT is similar to the following provisions in other MDTs:

(1) The 1953 US-South Korean MDT

> Article II
>
> The Parties will consult together whenever, in the opinion of either of them, the political independence or security of either of the Parties is threatened by external armed attack. Separately and jointly, by self-help and ***mutual aid***, the Parties will ***maintain and develop appropriate means***

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220 *Ponencia*, pp. 54-63.

> ***to deter armed attack*** and will take suitable measures in consultation and agreement to implement this Treaty and to further its purposes.[221]

(2) The 1954 US-Taiwan (Republic of China) MDT

> Article II
>
> In order more effectively to achieve the objective of this Treaty, the Parties separately and jointly by self-help and ***mutual aid*** will maintain and develop their ***individual and collective capacity to resist armed attack*** and communist subversive activities directed from without against their territorial integrity and political stability.[222]

(3) the 1960 US-Japan Treaty of Mutual Co-operation and Security

> Article III
>
> The Parties, individually and in cooperation with each other, by means of continuous and effective self-help and ***mutual aid*** will ***maintain and develop***, subject to their constitutional provisions, ***their capacities to resist armed attack.***[223]

With little variance,[224] these articles are essentially identical to Article II of the RP-U.S. 1951 MDT.

But notably, despite the existence of the above-mentioned provisions, all three treaties also saw the need to include a *separate* provision explicitly granting the U.S. the right to access and use of areas and facilities of the other contracting party. Thus:

> Article IV
> (US-Korea)
>
> The Republic of Korea grants, and the United States of America accepts, **the right to dispose United States land, air and sea forces in and about the territory of the Republic of Korea** as determined by mutual agreement.[225]

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[221] Mutual Defense Treaty, U.S.-South Korea, October 1, 1953, 238 U.N.T.S. 202,204. Available at https://treaties.un.org/doc/Publication/UNTS/Volume%20238/v238.pdf.

[222] Mutual Defense Treaty, U.S.-Taiwan, December 10, 1954, 248 U.N.T.S. 214. Available at https://treaties.un.org/doc/Publication/UNTS/Volume%20248/v248.pdf.

[223] Treaty of Mutual Co-operation and Security, U.S.-Japan, January 19, 1960, 373 U.N.T.S. 188. Available at https://treaties.un.org/doc/Publication/UNTS/Volume%20373/v373.pdf.

[224] The US-Taiwan MDT states that self-help and mutual aid will be utilized by the Parties to resist not only an armed attack but also "communist subversive activities directed against Taiwan's territorial integrity and political stability." Moreover, the US-Korean Treaty adds the phrase "whenever, in the opinion of either of them, the political independence or security of either of the Parties is threatened by external armed attack" and uses the phrase "means to ***deter*** [an] armed attack") instead of "maintain and develop x x x their capacities to ***resist*** armed attack."

[225] Mutual Defense Treaty, U.S.-South Korea, *supra* note 221.

Article VII
(US-Taiwan)

> The Government of the Republic of China (Taiwan) grants, and the Government of the United States of America accepts, **the right to dispose such United States land, air and sea forces in and about Taiwan and the Pescadores** as may be required for their defense, as determined by mutual agreement.[226]

Article VI
(US-Japan)

> *For the purpose of contributing to the security of Japan and the maintenance of international peace and security in the Far East*, **the United States of America is granted the use by its land, air and naval forces of facilities and areas in Japan.**
>
> The use of these facilities and areas as well as the status of United States armed forces in Japan shall be governed by a separate agreement, replacing the Administrative Agreement under Article III of the Security Treaty between Japan and the United States of America, signed at Tokyo on February 28, 1952, as amended, and by such other arrangements as may be agreed upon.[227]

These three articles do not have any counterpart in the RP-US 1951 MDT. Understandably perhaps, counterpart provisions are not in the 1951 MDT as our commitment to grant the U.S. use and access to areas and facilities in the Philippine territory was embodied in an earlier agreement, the 1947 MBA (which, however, expired, thus ending the use and access grants to the U.S. and its armed forces).

In my view, the implication of the above-quoted provisions in the US-South Korea, US-Taiwan, and US-Japan treaties (on "mutual aid") is clear: **the obligation to provide mutual aid under Article II of the RP-US 1951 MDT (and its counterpart provisions) does *not* include the obligation to allow the entry and the stationing of U.S. troops or the establishment of military bases or facilities.**

In light particularly of the constitutional developments in 1987, the 1951 MDT cannot be invoked as an umbrella agreement that would legally justify the grant to the U.S. of entry, access, and use of Philippine-owned areas or facilities without Senate concurrence. These activities, which the EDCA seeks to do allegedly pursuant to the 1951 MDT, do not fall within the purview of our commitments under the earlier treaty.

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226 Mutual Defense Treaty, U.S.-Taiwan, *supra* note 222.

227 Treaty of Mutual Co-operation and Security, U.S.-Japan, *supra* note 223.

V.D(3) *Does the EDCA Merely Implement the 1998 VFA?*

Is the EDCA merely an agreement implementing the 1998 VFA which already allows the limited entry of U.S. military troops and the construction of facilities?

The quick and short answer to the above question is – No, the EDCA does not implement the 1998 VFA as the EDCA in fact provides a wider arrangement than the 1998 VFA with respect to the entry of military bases, troops, and facilities into the Philippines. A naughty view is that the 1998 VFA should form part of the EDCA and not the other way around. Another reality, based on the treaty-executive agreement distinctions discussed above, is that ***the EDCA introduces new arrangements and obligations to those existing under the 1998 VFA***; hence, the EDCA should be in the form of a treaty.

V.D(3)(i) *The 1998 Visiting Forces Agreement*

The Philippines' primary obligation under the 1998 VFA, is to facilitate the entry and departure of U.S. personnel in relation with "covered activities;"[228] it merely defines the treatment of U.S. personnel visiting the Philippines; hence, its name.[229] It is in fact a counterpart of the NATO-SOFA that the U.S. forged in Europe.

The Preamble of the VFA defines its objectives – to govern the terms of visits of "elements of the United States Armed Forces" to the Philippines, while the body of the agreement contains the agreed conditions. To quote from the relevant provisions of the 1998 VFA:

VISITING FORCES AGREEMENT

Preamble

> The Government of the Republic of the Philippines and the Government of the United States of America,
>
> Reaffirming their faith in the purposes and principles of the Charter of the United Nations and their desire to strengthen international and regional security in the Pacific area;
>
> Reaffirming their obligations under the Mutual Defense Treaty of August 30, 1951;

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228 1998 VFA, Article III(1).

229 *Bayan v. Zamora*, *supra* note 69. On the whole, the VFA is an agreement which defines the treatment of United States troops and personnel visiting the Philippines. It provides for the guidelines to govern such visits of military personnel, and further defines the rights of the United States and the Philippine government in the matter of criminal jurisdiction, movement of vessel and aircraft, importation and exportation of equipment, materials and supplies.

> Noting that **from time to time elements of the United States armed forces may visit the Republic of the Philippines**;
>
> Considering that cooperation between the Republic of the Philippines and the United States promotes their common security interests;
>
> Recognizing the desirability of defining the treatment of United States personnel **visiting** the Republic of the Philippines;
>
> Have agreed as follows:
>
> **Article I:** *Definitions*
>
> As used in this Agreement, "United States personnel" means United States military and civilian personnel temporarily in the Philippines **in connection with activities approved by the Philippine Government**. x x x
>
> x x x x
>
> **Article III:** *Entry and Departure*
>
> 1. The Government of the Philippines **shall facilitate the admission** of United States personnel and their departure from the Philippines **in connection with activities covered by this Agreement**. x x x

As the *ponencia* correctly observed, the 1998 VFA itself does not specify what "activities" would allow the entry of U.S. troops into the Philippines. The parties left this open and recognized that the activities that shall require the entry of U.S. troops are subject to future agreements and the approval by the Philippine Government.

How this approval, however, will be secured is far from certain. What is certain is that beyond the restrictive "visits" that the 1998 VFA mentions, nothing else is said under the express terms of the Agreement.

Harking back to the 1947 MBA and its clear and certain terms, what comes out boldly is that the 1998 ***VFA is not an agreement that covers "activities" in the way that the 1947 MBA did; it is simply an agreement regulating the status of and the treatment to be accorded to U.S. armed forces personnel and their aircraft and vehicles while visiting the Philippines***. The agreement itself does not authorize U.S. troops to permanently stay in the Philippines, nor authorize any activity related to the establishment and the operation of bases, as these activities had been defined under the 1947 MBA.

As discussed under the treaty–executive agreement distinctions above, if indeed the activities would be in line with the original intent of the 1998 VFA, then an executive agreement would suffice as an implementing agreement. On the other hand, if the activity would be a modification of the

1998 VFA or would be beyond its terms and would entail the establishment of a military base or facility or their equivalent, and the introduction of troops, then, a treaty duly concurred in by the Senate would be the appropriate medium of the U.S.–Philippines agreement.

This Court has had the opportunity to examine the 1998 VFA in *Bayan Muna* [230] and described the agreement in this wise –

> On the whole, the VFA is an agreement which defines the treatment of United States troops and personnel visiting the Philippines. It provides for the guidelines to govern such visits of military personnel, and further defines the rights of the United States and the Philippine government in the matter of criminal jurisdiction, movement of vessel and aircraft, importation and exportation of equipment, materials and supplies.

In *Lim v. Executive Secretary*,[231] this Court further explained:

> The VFA provides the "**regulatory mechanism" by which "United States military and civilian personnel [may visit] temporarily in the Philippines in connection with activities approved by the Philippine Government.**" It contains provisions relative to entry and departure of American personnel, driving and vehicle registration, criminal jurisdiction, claims, importation and exportation, movement of vessels and aircraft, as well as the duration of the agreement and its termination. [Emphasis supplied]

The 1998 VFA allows the entry of U.S. military personnel to Philippine territory and grants the U.S. specific rights; it is essentially an agreement governing the rules for the visit of "US armed forces in the Philippines *from time to time*"[232] in pursuit of cooperation to promote "common security interests;" it is essentially a treaty governing the sojourn of US forces in this country for joint exercises.[233]

Significantly, the 1951 MDT and the 1998 VFA contain a similar feature – joint activities in pursuit of common security interests. *The EDCA, on the other hand, goes beyond the terms of the 1951 MDT and the 1998 VFA.*

As explained above, the EDCA has two purposes. First, it is an agreement for the conduct of joint activities in accordance with the 1951 MDT and the 1998 VFA. This, however, is not the centerpiece of the EDCA. ***Its centerpiece is the introduction of Agreed Locations which are portions of the Philippine territory whose use is granted to the U.S.***[234] ***The EDCA***

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230 *Ibid.*

231 *Supra* note 179, at 572.

232 1998 VFA, Preamble, par. 4.

233 *Lim v. Executive Secretary, supra* note 179, at 575. In this manner, visiting US forces may sojourn in Philippine territory for purposes other than military. As conceived, the joint exercises may include training on new techniques of patrol and surveillance to protect the nations marine resources, sea search-and-rescue operations to assist vessels in distress, disaster relief operations, civic action projects such as the building of school houses, medical and humanitarian missions, and the like.

234 EDCA, Article II(4).

then proceeds to list the rights that the U.S. has over the Agreed Locations.[235]

A reading of the EDCA's provisions shows that the rights and *privileges granted to the U.S. do not always carry a concomitant right on the part of the Philippines nor do they involve joint exercises.* While the EDCA mentions that the Agreed Locations may be used for "security cooperation exercises"[236] and "joint and combined training activities,"[237] the provisions of the EDCA also provide for *the conduct of other activities beyond the 1951 MDT and the 1998 VFA.*

Within the Agreed Locations, the U.S. may conduct trainings for its troops, transit, support and related activities.[238] *The EDCA also allows the U.S. to use the Agreed Locations to refuel aircraft, bunker vessels, temporarily maintain vehicles, vessels and aircraft.*[239] Significantly, it *does not provide for any qualification on the purpose for the entry of these vessels, vehicles, and aircraft into Philippine jurisdiction.*

The EDCA also permits the temporary accommodation of personnel,[240] *again without any qualification as to the purpose of their visit.* The U.S. forces may also engage in communications activities including the use of its own radio spectrum,[241] *similarly without any limitation as to the purpose by which such communications shall be carried out.*

Further, within the Agreed Locations, the U.S. can also preposition defense equipment, supplies, and materiel over which the U.S. forces shall have exclusive use and control.[242] *Clearly, the right to deploy weapons can be undertaken even if it is not in the pursuit of joint activities for common security interests.*

These rights, granted to the U.S. under the EDCA, ***do not contain an element of mutuality*** in the sense that mutuality is reflected in the 1951 MDT and the 1998 VFA. As these rights go beyond the earlier treaties and are, in fact, independent sources of rights and obligations between the U.S. and the Philippines, they cannot be mere details of implementation of both the 1951 MDT and the 1998 VFA.

And, as pointed out earlier, the Agreed Locations under the EDCA are akin to the military bases contemplated under the 1947 MBA. Thus, by its own terms, the EDCA is not only a military base agreement outside the provisions of the 1951 MDT and the 1998 VFA, but a piecemeal introduction of military bases in the Philippines.

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235 *Id.*, Article III(1).
236 *Id.*, Article I(3).
237 *Ibid.*
238 *Id.*, Article III(1).
239 *Ibid.*
240 *Ibid.*
241 *Id.*, Article VII(2).
242 *Id.*, Article IV(1), (3).

Note that, at this point, there exists no agreement on the establishment of U.S. military bases in the Philippines; **the EDCA re-introduces a modernized version of the fixed military base concept contemplated and operationalized under the 1947 MBA.**

V.D(4) *The 1951 MDT and 1998 VFA in conjunction with the EDCA*

An additional dimension that the EDCA introduces – ***the treatment of U.S. forces and U.S. contractors*** – reveals that it does not merely implement the 1951 MDT and the 1998 VFA, but adds to the obligations in these agreements.

To support its conclusion that the EDCA implements the provisions in the 1951 MDT and the 1998 VFA, the *ponencia* points out that the EDCA references 1951 MDT and the 1998 VFA in allowing the entry of U.S. personnel and U.S. forces in the Philippines, and that the entry of U.S. contractors (who had not been mentioned in the 1998 VFA) do not contradict the obligations found in the 1998 VFA.

The *ponencia* further notes that the U.S. contractors had been expressly excluded from the definition of U.S. personnel and U.S. forces, in line with their definitions in the 1998 VFA.[243] They are not entitled to the same privileges that U.S. Personnel and U.S. forces enjoy under the 1998 VFA, but would have to comply with Philippine law to enter the Philippines.

The *ponencia* proceeds to argue that the lack of dissimilarities between the 1998 VFA and the EDCA point to the conclusion that the EDCA implements the 1998 VFA. By limiting the entry of persons under the EDCA to the categories under the 1998 VFA, the EDCA merely implements what had already been agreed upon under the 1998 VFA. The U.S. forces's authorization to perform activities under the EDCA does not change the nature of the EDCA as the 1998 VFA's implementing agreement, as the term "joint exercises" under the 1998 VFA denotes a wide range of activities that include the additional activities under the EDCA.

That the 1998 VFA and the EDCA are not dissimilar in terms of their treatment of U.S. forces and U.S. personnel, does not automatically mean that the EDCA simply implements the 1998 VFA, given the additional obligations that the EDCA introduces for the Philippine government.

As earlier discussed, the EDCA introduces military bases in the Philippines within the concept of the 1987 Constitution, and ***it is in light of these additional obligations that the EDCA's affirmation of the 1998 VFA should be viewed: the EDCA adds new dimensions to the treatment of U.S.***

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243 *Ponencia*, pp. 50-51.

Personnel and U.S. forces provided in the 1998 VFA, and these dimensions cannot be ignored in determining whether the EDCA merely implements the 1998 VFA.

Thus, while the EDCA affirms the treatment of U.S. personnel and U.S. forces in the Philippines, it at the same time ***introduces the Philippines' obligation to recognize the authority of U.S. Forces in the "Agreed Locations."*** Under the EDCA, U.S. forces can now ***preposition and store*** defense equipment, supplies, and materiel at Agreed Locations. They shall have ***unimpeded access*** to Agreed Locations for all matters relating to the prepositioning and storage of defense equipment, supplies, and materiel. Lastly, the EDCA ***authorizes the U.S. forces to exercise all rights and authorities within the Agreed Locations*** that are necessary for their operational control or defense. In contrast, the 1998 VFA only refers to the tax and duty-free entry of U.S. Government equipment in connection with the activities during their visit.

In the same manner, and despite being in a different class as U.S. personnel and U.S. forces, ***U.S. contractors are also allowed "unimpeded access" to the Agreed Locations*** when it comes to all matters relating to the ***prepositioning and storage of defense equipment, supplies and materiel***.

Thus, these groups of people (U.S. personnel, U.S. forces and U.S. contractors) have been referred to in the EDCA not merely to implement the 1998 VFA, but to further their roles in the Agreed Locations that the EDCA authorizes.

From these perspectives, the EDCA cannot be considered to be a simple implementation of the 1998 VFA. Rather, it is a continuation of the 1998 VFA under new dimensions. These dimensions should not and cannot be hidden behind reaffirmations of existing 1998 VFA obligations. These added dimensions reinforce the idea of military bases, as it allows them access to the Agreed Locations that, as I had earlier mentioned, is the cornerstone of the EDCA. From the legal end, ***the obligations under the EDCA, not its policy declarations and characterization***, should be decisive in determining whether Section 25, Article XVIII applies.

Lastly, even assuming that the EDCA is an implementation of the 1951 MDT and the 1998 VFA, the practice of the Government reveals that even when an agreement is considered as an implementation of a prior treaty, the concurrence of the Senate must still be sought.

Early in the Senate deliberations on the 1998 VFA, the senator-sponsors characterized it merely as a **subsidiary or implementing agreement** to the 1951 MDT.[244] Nevertheless, Senator Tatad, one of the 1998 VFA's co-sponsors, recognized that Article XVIII, Section 25 of the Constitution prohibits the 1998 VFA from being executed as a mere

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244 *Ibid.*

executive agreement,[245] for which reason it was sent to the Senate for concurrence.

The senators agreed during the deliberations that an agreement implementing the 1951 MDT requires Senate concurrence.[246] This is because the agreement, despite implementing or affirming the 1951 MDT, allows the entry of U.S. troops in the Philippines, a matter covered by Article XVIII, Section 25 of the Constitution.

Indeed, the 1998 VFA has been consistently treated as an implementation of the 1951 MDT. Nevertheless, the Government correctly chose to enter into the international agreement in the form of a treaty duly concurred in by the Senate, because it involves the entry of foreign military troops *independent of, and in addition to*, the general agreements in the 1951 MDT.

In the same manner, the EDCA, which purportedly implements and complements both the 1951 MDT and the 1998 VFA, should have likewise been submitted to the Senate for its concurrence because of the new obligations it introduces.

To reiterate, the EDCA allows for a more permanent presence of U.S. troops and military equipment in the Philippines (akin to establishing a base), which was not contemplated under the 1998 VFA. Thus, despite having been treated as an implementation of the 1951 MDT and the 1998 VFA, the new obligations under the EDCA calls for the application of Article XVIII, Section 25 of the Constitution and its submission to the Senate for concurrence.

V.E. The EDCA: the Actual and Operational View

As my last point, let me just say that ***the ponencia can engage in a lot of rationalizations and technical distinctions*** on why the EDCA provisions do not amount to or equate with the operation of military bases and the introduction of troops and facilities into the Philippines. The *ponencia* cannot escape the conclusion that translated to ***actual operational*** reality:

1. The activities described in the EDCA are no different from the ***operation*** of a military base in the 1947 sense, except that under the current U.S. strategy, a fixed base in the 1947 sense is hardly ever

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245 *Senate deliberations*, May 25, 1999, A.M., p. 17, which reads:

Senator Tatad. x x x Mr. President, distinguished colleagues, the Visiting Forces Agreement does not create a new policy or a new relationship. It simply seeks to implement and reinforce what already exists.

For that purpose, **an executive agreement might have sufficed, were there no constitutional constraints. But the Constitution requires the Senate to concur in all international agreements.** So the Senate must concur in the Visiting Forces Agreement, even if the U.S. Constitution does not require the U.S. Senate to give its advice and consent.

246 Senate Resolution No. 1414, *supra* note 107.

established because the expenses and administrative problems accompanying a fixed base can now be avoided. A military "facility" can very well serve the same purposes as a fixed military base under current technological advances in weaponry, transportation, and communications.[247] The U.S. can achieve the same results at less expense and with lesser problems if it would have guaranteed access to and control of specified areas such as the Agreed Locations that the EDCA conveniently provides.

FOSs or CSLs, as defined above, are *expandable* "warm facilities" maintained with *limited U.S. military support presence* and possibly *prepositioned* equipment.[248] FOSs will support *rotational* rather than permanently stationed forces, and will be a focus for bilateral and regional training and for *the deployment of troops and stored and prepositioned equipment, supplies, and materiel.*[249]

As has already been mentioned, examples include the Sembawang port facility in Singapore and Soto Cano Air Base in Honduras. *The Philippines will soon follow without the consent of the Filipino people and against the constitutional standards they set, if EDCA would be enforced without the benefit of Senate concurrence.*

2. Under the "pivot to Asia strategy," the operative word is "**presence**" which means ready access to equipment, supplies, and materiel by troops who can be ferried from safer locations and immediately be brought to the scene of action from the Agreed Locations. The EDCA provides such presence through the Agreed Locations; the access to these secured locations; the prepositioning and storage of defense (read as "military") equipment, supplies, and materiel; and the forward jump-off point for the deployment of troops to whatever scene of action there may be that Philippine locations may serve best.

3. From the point of view of "troops" that Article XVIII, Section 25 likewise regulates through Senate concurrence, note that in the EDCA, **contractual employees** are mentioned together or side-by-side with the military. This is a relatively recent development where contractual employees are used to provide the same services and serve hand in hand or as replacement or to augment regular military forces. The U.S. has put these contractual employees to good use in various local theaters of conflict, notably in Iraq, Afghanistan and Syria.[250] The U.S. has reportedly resorted to the use, not only of regular

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247 During the latter part of the Cold War, the term "facilities" was frequently substituted for the word "bases" to *soften* the negative political overtones normally associated with the basing of foreign troops in a sovereign country. In line with this thinking, the Stockholm International Peace Research Institute uses the term foreign military presence (FMP) to describe bases/facilities that house foreign troops in a sovereign state. See Krepinevich and Work, *supra* note 202.

248 *Strengthening U.S. Global Defense Posture: Report to Congress*, *supra* note 201.

249 *Ibid.*

250 See Jose Gomez del Prado. Privatization of War: Mercenaries, Private Military and Security Companies, *Global Research,* November 8, 2010. Available at http://www.globalresearch.ca/the-privatization-of-war-mercenaries-private-military-and-security-companies-pmsc/21826.

military forces, but of contractual employees who may provide the same services as military forces and who can increase their numbers without alerting the U.S. public to the actual number of troops maintained.

VI. CONCLUSION AND THE QUESTION OF REMEDY

Based on all the above considerations, I conclude that the EDCA, instead of being in implementation of the 1951 MDT and the 1998 VFA, is significantly broader in scope than these two treaties, and effectively added to what the 1951 MDT and the 1998 VFA provide.

The EDCA is thus a new agreement that touches on military bases, troops, and facilities beyond the scope of the 1951 MDT and the 1998 VFA, and should be covered by a treaty pursuant to Article XVIII, Section 25 and Article VII, Section 21, both of the 1987 Constitution. Without the referral and concurrence by the Senate, the EDCA is *constitutionally deficient* and, hence, cannot be enforced in our country.

To remedy the deficiency, the best recourse RECOMMENDED TO THE COURT under the circumstances is for the Court to **suspend the operations of its rules** on the finality of its rulings and for the Court to **give the President ninety (90) days from the service of its Decision, whether or not a motion for reconsideration is filed, the OPTION to refer the EDCA to the Senate for its consideration and concurrence.**

The referral to the Senate shall serve as a main or supplemental motion for reconsideration that addresses the deficiency, rendering the effects of the Court's Decision moot and academic. Otherwise, the conclusion that the President committed grave abuse of discretion by entering into an executive agreement instead of a treaty, and by certifying to the completeness of Philippine internal process, shall be fully effective.

As my last point, we must not forget that the disputed executive agreement that the President entered into is with the Americans from whom we trace the roots of our present Constitution. The Americans are a people who place the highest value in their respect for their Constitution. This should be no less than the spirit that should move us in adhering to our own Constitution. To accord a lesser respect for our own Constitution is to invite America's disrespect for the Philippines as a co-equal sovereign and independent nation.

ARTURO D. BRION
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