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G.R. No. 212426 – Rene A.V. Saguisag, et al. v. Executive Secretary Paquito N. Ochoa, Jr., et al.; **G.R. No. 212444** – Bagong Alyansang Makabayan (BAYAN), represented by its Secretary General, Renato M. Reyes, Jr., et al., v. Department of Defense Secretary Voltaire M. Gazmin, et al.; 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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SEPARATE CONCURRING OPINION

CARPIO, J.:

The threshold issue in this case is whether the Enhanced Defense Cooperation Agreement (EDCA) merely implements the existing and ratified 1951 Mutual Defense Treaty¹ (MDT), or whether the EDCA is a new treaty requiring Senate ratification to take effect.

The answer to this question turns on whether, under present circumstances, the attainment of the purpose of the MDT requires the EDCA. The fundamental rule in treaty interpretation is that a treaty must be interpreted “in the light of its object and purpose.”²

As stated in the MDT, the purpose of the United States (U.S.) and the Philippines in forging the MDT is to “declare publicly and formally their sense of unity and their common determination to defend themselves against

¹ The Philippine Senate ratified the MDT on 12 May 1952 under Senate Resolution No. 84.

² Article 31 of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention) provides:

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and **in the light of its object and purpose.**

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

x x x. (Emphasis supplied)

The Philippines acceded to the Vienna Convention on 15 November 1972.

external armed attack.” If the MDT cannot attain this purpose without the EDCA, then the EDCA merely implements the MDT and Executive action is sufficient to make the EDCA valid.

A ratified treaty like the MDT must be interpreted to allow the Executive to take all necessary measures to insure that the treaty’s purpose is attained. A ratified treaty cannot be interpreted to require a second ratified treaty to implement the first ratified treaty, as a fundamental rule is that a treaty must be interpreted to avoid a “result which is manifestly absurd or unreasonable.”³ This is particularly true to a mutual defense treaty the purpose of which is mutual self-defense against sudden armed attack by a third state.

However, if the MDT can attain its purpose without the EDCA, then the EDCA is a separate treaty that requires Senate ratification. I shall discuss why, under present circumstances, the EDCA is absolutely necessary and essential to attain the purpose of the MDT.

With the departure in 1992 of U.S. military forces from Subic Naval Base and Clark Air Base in Luzon, a power vacuum resulted in the South China Sea. As in any power vacuum, the next power would rush in to fill the vacuum. Thus, China, the next power after the U.S., filled the power vacuum in the South China Sea, which includes the West Philippine Sea.⁴

In early 1995, barely three years after the departure of U.S. military forces from the Philippines, China seized Mischief Reef from the Philippines. There was no power to deter China as the U.S. forces had left. The Philippines did not anticipate that China would rush in to fill the power vacuum, or if the Philippines anticipated this, it did not upgrade its military to deter any Chinese aggression. After China seized Mischief Reef in 1995, the Philippines still did not upgrade its military, particularly its navy.

In 2012, China seized Scarborough Shoal from the Philippines, which could offer no armed resistance to Chinese naval forces. The Scarborough Shoal seizure finally made the Philippine Government realize that there was an absolute need to deter China’s creeping invasion of Philippine islands, rocks and reefs in the West Philippine Sea. Thus, the Philippines rushed the modernization of its navy and air force. The Philippines also agreed with the U.S. to use the MDT to preposition U.S. war materials in strategic locations in


³ Article 32 of the 1969 Vienna Convention on the Law of Treaties provides:

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) **leads to a result which is manifestly absurd or unreasonable.** (Emphasis supplied)

⁴ See Administrative Order No. 29, 5 September 2012.



the Philippines, particularly in the islands of Palawan and Luzon facing the West Philippine Sea.

In modern warfare, the successful implementation of a mutual defense treaty requires the strategic prepositioning of war materials. Before the advent of guided missiles and drones, wars could take months or even years to prosecute. There was plenty of time to conscript and train soldiers, manufacture guns and artillery, and ship war materials to strategic locations even after the war had started. Today, wars could be won or lost in the first few weeks or even first few days after the initial outbreak of war.

In modern warfare, the prepositioning of war materials, like mobile anti-ship and anti-aircraft missiles, is absolutely necessary and essential to a successful defense against armed aggression, particularly for a coastal state like the Philippines. This is what the EDCA is all about - the prepositioning in strategic locations of war materials to successfully resist any armed aggression. Such prepositioning will also publicly telegraph to the enemy that any armed aggression would be repelled. The enemy must know that we possess the capability, that is, the war materials, to defend the country against armed aggression. Otherwise, without such capability, we telegraph to the enemy that further seizure of Philippine islands, rocks and reefs in the South China Sea would be a walk in the park, just like China's seizure of Mischief Reef and Scarborough Shoal. Without such capability, we would practically be inviting the enemy to seize whatever Philippine island, rock or reef it desires to seize in the West Philippine Sea.

Since 2014, China has started building artificial islands in the Spratlys out of submerged areas like Mischief Reef and Subi Reef, or out of rocks that barely protrude above water at high tide like Fiery Cross Reef. China has so far created a 590-hectare artificial island in Mischief Reef which is only 125 nautical miles (NM) from Palawan, well within the Philippines' Exclusive Economic Zone (EEZ). In comparison, San Juan City is 595 hectares in area. China has built a 390-hectare artificial island in Subi Reef, outside the Philippines' EEZ but within its Extended Continental Shelf (ECS). China has created a 265-hectare artificial island in Fiery Cross Reef, outside the Philippines' EEZ but within its ECS.

China claims that its island-building activities are for civilian purposes but the configuration of these artificial islands shows otherwise. The configuration of China's Mischief Reef island, which is China's largest artificial island in the Spratlys, is that of a combined air and naval base, with a 3,000-meter airstrip.⁵ The configuration of China's Subi Reef island is that of a naval base with a 3,000-meter airstrip. The configuration of China's Fiery Cross Reef island is that of an airbase with a 3,000-meter airstrip and a harbor for warships.

⁵ A 3,000-meter airstrip is long enough for any military aircraft of China to land and take off. A Boeing 747 airliner, or a B52 bomber, can easily land and take off on a 3,000-meter airstrip.



These three air and naval bases form a triangle in the Spratlys, **surrounding** the islands occupied by the Philippines.

Mischief Reef, located mid-way between Palawan and Pagasa, is ideally situated to block Philippine ships re-supplying Pagasa, the largest Philippine-occupied island in the Spratlys. Mischief Reef is also close to the gas-rich Reed Bank, the gas field that should replace Malampaya once Malampaya runs out of gas in 10 to 12 years. Malampaya supplies 40% of the energy requirement of Luzon. The Reed Bank and Malampaya are well within the Philippines' EEZ. However, China's 9-dashed lines enclose entirely the Reed Bank and encroach partly on Malampaya.

It is obvious that China will use the three air and naval bases in its artificial islands to prevent Philippine ships and planes from re-supplying Philippine-occupied islands in the Spratlys, forcing the Philippines to abandon its occupied islands. Already, Chinese coast guard vessels are preventing medium-sized Philippine ships from re-supplying the BRP Sierra Madre, the dilapidated Philippine landing ship beached in Ayungin Shoal, just 20 NM from Mischief Reef. Only the Philippines' use of small watercrafts enables the re-supply to the BRP Sierra Madre, which is manned by about a dozen Philippine marine soldiers. The Philippines' small watercrafts can navigate the shallow waters of Ayungin Shoal while China's large coast guard vessels cannot.

With the anticipated installation by China of military facilities and war materials in its three air and naval bases in the Spratlys, expected to be completed before the end of 2016, China will begin to aggressively enforce its 9-dashed lines claim over the South China Sea. Under this claim, China asserts sovereignty not only to all the islands, rocks and reefs in the Spratlys, but also to 85.7% of the South China Sea, comprising all the waters, fisheries, mineral resources, seabed and submarine areas enclosed by the 9-dashed lines. Under this claim, the Philippines will lose 381,000 square kilometers⁶ of its EEZ in the West Philippine Sea, a maritime space larger than the total Philippine land area of 300,000 square kilometers. China's 9-dashed lines claim encroaches on all the traditional fishing grounds of Filipino fishermen in the South China Sea: Scarborough Shoal, Macclesfield Bank and the Spratlys.

The Philippines, acting by itself, cannot hope to deter militarily China from enforcing its 9-dashed lines claim in the West Philippine Sea. The Philippines cannot acquire war materials like anti-ship and anti-aircraft missiles off the shelf. The operation of anti-ship missiles requires communications with airborne radar or satellite guidance systems. With the completion of China's air and naval bases before the end of 2016, the Philippines has no time to acquire, install and operate an anti-ship missile system on its own. Military and

⁶ Final Transcript Day 1 – Merits Hearing, page 58, line 11, Philippines-China Arbitration, <http://www.pcacases.com/web/sendAttach/15487>.



security analysts are unanimous that there is only one power on earth that can deter militarily China from enforcing its 9-dashed lines claim, and that power is the United States. This is why the MDT is utterly crucial to the Philippines' defense of its EEZ in the West Philippine Sea.

Of course, the United States has repeatedly stated that the MDT does not cover the disputed islands, rocks and reefs in the South China Sea. We understand this because at the time the MDT was signed the Philippine territory recognized by the United States did not include the Kalayaan Island Group in the Spratlys. However, the MDT provides that an armed attack on "public vessels or aircraft" (military or coast guard ship or aircraft) of either the United States or the Philippines in the Pacific area is one of the grounds for a party to invoke mutual defense under the MDT.⁷ The United States has officially clarified that the Pacific area includes the South China Sea.⁸

If China's navy ships attack a Philippine military ship re-supplying Philippine-occupied islands in the Spratlys, that will be covered by the MDT. However, unless the U.S. and the Philippines have prepositioned anti-ship missiles in Palawan, there will be no deterrence to China, and no swift response from U.S. and Philippine forces. The absence of any deterrence will likely invite Chinese harassment, or even armed attack, on Philippine re-supply ships. That will lead to the loss of all Philippine-occupied islands in the Spratlys, as well as the loss of the gas-rich Reed Bank.

The prepositioning of war materials is a necessary and essential element to achieve the purpose of the MDT. Article II of the MDT expressly provides:

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.**
(Emphasis supplied)

The prepositioning of war materials is the very essence of the phrase to "**maintain and develop (the Parties') individual and collective capacity to resist armed attack.**" Without the prepositioning of war materials, a Party to the MDT cannot maintain and develop the capacity to resist armed attack. Without the prepositioning of war materials, a Party is simply and totally unprepared for armed attack.

The 1987 Constitution defines the "national territory" to include not only islands or rocks above water at high tide but also the seabed, subsoil and other

⁷ Article IV of the MDT provides: "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. x x x."

⁸ Letter of U.S. Secretary of State Cyrus Vance to Philippine Secretary of Foreign Affairs Carlos P. Romulo dated 6 January 1979; Letter of U.S. Ambassador to the Philippines Thomas C. Hubbard to Foreign Secretary Domingo L. Siazon dated 24 May 1999.

submarine areas “over which the Philippines has sovereignty **or jurisdiction.**” Article 1 of the 1987 Constitution provides:

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

Thus, the Philippine “national territory” refers to areas over which the Philippines has “sovereignty *or* jurisdiction.” The Constitution mandates: “The State shall protect the nation’s marine wealth in its archipelagic waters, territorial sea, and **exclusive economic zone**, and reserve its use and enjoyment exclusively to Filipino citizens.”⁹

Under both customary international law and the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the Philippines has “sovereign rights” and “**jurisdiction**”¹⁰ to exploit exclusively all the living and non-living resources within its EEZ. Under the UNCLOS, the Philippines has the sovereign rights to exploit exclusively the mineral resources within its ECS.¹¹

⁹ Section 2, Article XII of the 1987 Constitution. Emphasis supplied.

¹⁰ Article 56 of UNCLOS provides:

Article 56

Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:

(a) **sovereign rights** for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) **jurisdiction** as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

x x x (Emphasis supplied)

¹¹ Article 77 of the UNCLOS provides:

Article 77

Rights of the coastal State over the continental shelf

1. The coastal State exercises over the continental shelf **sovereign rights for the purpose of exploring it and exploiting its natural resources.**

2. The rights referred to in paragraph 1 are **exclusive** in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil. (Emphasis supplied)

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Under the UNCLOS, the Philippines also has sole “**jurisdiction**” to create artificial islands or install structures within its EEZ¹² and ECS.¹³

In short, under international law and in particular under the UNCLOS, the Philippines has **jurisdiction** over its EEZ and ECS. Thus, under domestic law, the Philippines’ EEZ and ECS form part of Philippine “national territory” since the Constitution defines “national territory” to include areas over which the Philippines has “**jurisdiction**,” a term which means less than sovereignty. However, under international law, the Philippine “national territory” refers to the areas over which the Philippines has **sovereignty**, referring to the Philippines’ land territory, archipelagic waters and territorial sea, excluding areas over which the Philippines exercises only jurisdiction like its EEZ and ECS.

China has already invaded **repeatedly** Philippine “national territory” in two separate areas, one in the Kalayaan Island Group in the Spratlys and the other in Scarborough Shoal. When China seized in 1988 Subi Reef, a submerged area within the Philippines’ ECS and beyond the territorial sea of any high tide feature,¹⁴ China invaded Philippine national territory as defined in the Constitution. When China seized in 1995 Mischief Reef, a submerged area within the Philippines’ EEZ and beyond the territorial sea of any high tide feature,¹⁵ China invaded Philippine national territory as defined in the Constitution. When China seized in 2012 Scarborough Shoal, a rock above water at high tide and constituting land territory under international law, China invaded Philippine national territory as defined in the Constitution and as understood in international law. Republic Act No. 9522, amending the Philippine Baselines Law, expressly declares that Scarborough Shoal is part of Philippine territory over which the Philippines exercises “**sovereignty and jurisdiction.**”¹⁶

¹² Article 60 of the UNCLOS provides:

Article 60

Artificial islands, installations and structures in the exclusive economic zone

1. In the exclusive economic zone, **the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:**

(a) **artificial islands;**

(b) installations and structures for the purposes provided for in article 56 and other economic purposes;

(c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

2. **The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.**

x x x (Emphasis supplied)

¹³ Article 80 of the UNCLOS provides:

Article 80

Artificial islands, installations and structures on the continental shelf

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

¹⁴ Final Transcript Day 2 – Merits Hearing, page 23, lines 7, 8 and 9, Philippines-China Arbitration, <http://www.pcacases.com/web/sendAttach/1548>.

¹⁵ Id.

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After China's seizure of Scarborough Shoal in 2012, the Philippines finally woke up and summoned the political will to address the serial and creeping Chinese invasion of Philippine national territory. Thus, the EDCA was born, to give much needed teeth to the MDT as a deterrent to further Chinese aggression in the West Philippine Sea. Without the EDCA, the MDT remains a toothless paper tiger. With the EDCA, the MDT acquires a real and ready firepower to deter any armed aggression against Philippine public vessels or aircrafts operating in the West Philippine Sea.

With the EDCA, China will think twice before attacking Philippine military re-supply ships to Philippine-occupied islands in the Spratlys. With the EDCA, the Philippines will have a fighting chance to hold on to Philippine-occupied islands in the Spratlys. With the EDCA, China will think twice before attacking Philippine navy and coast guard vessels patrolling the West Philippine Sea. This will give the Philippines a fighting chance to ward off China's impending enforcement of its 9-dashed lines as China's "national boundaries" as shown in its 2013 official vertical map.¹⁷

The number and sites of the "agreed locations" to place the prepositioned war materials must necessarily remain numerous and anonymous. The "agreed locations" must be numerous enough to survive repeated or surprise armed attacks. There must not only be redundant "agreed locations" but also dummy "agreed locations" to mislead the enemy. The sites of many of the "agreed locations" cannot be disclosed publicly because that will give the enemy the fixed coordinates of the "agreed locations," making them easy targets of long-range enemy cruise missiles. The number and sites of the "agreed locations" are matters best left to the sound discretion of the Executive, who is the implementing authority of the MDT for the Philippines.

The implementation of the MDT is a purely Executive function since the Senate has already ratified the MDT. The implementation of the MDT is also part of the purely Executive function of the President as Commander-in-Chief of the Armed Forces. As executor and "chief architect"¹⁸ of the country's relations with foreign countries, including our treaty ally the United States, the President is constitutionally vested with ample discretion in the implementation of the MDT. EDCA, being essentially and entirely an implementation of the MDT, is within the sole authority of the President to enter into as an executive agreement with the U.S.

¹⁶ Section 2 of RA No. 9522 provides: "The baseline in the following areas over which the Philippines likewise exercises sovereignty and jurisdiction shall be determined as "Regime of Islands" under the Republic of the Philippines consistent with Article 121 of the United Nations Convention on the Law of the Sea (UNCLOS):

- a) The Kalayaan Island Group as constituted under Presidential Decree No. 1596; and
- b) **Bajo de Masinloc, also known as Scarborough Shoal.**" (Emphasis supplied)

¹⁷ In its *Note Verbale* of 7 June 2013 to China, the Philippines stated it "**strongly objects to the indication that the nine-dash lines are China's national boundaries in the West Philippine Sea/South China Sea.**" (Emphasis supplied)

¹⁸ *Pimentel, Jr. v. Office of the Executive Secretary*, 501 Phil. 303 (2005).



Article VIII of the MDT provides: “This Treaty shall remain in force indefinitely. Either party may terminate it one year after notice is given to the other Party.” Neither the Philippines nor the United States has terminated the MDT. On the contrary, the 1998 Visiting Forces Agreement between the Philippines and the United States, which the Philippine Senate has ratified, expressly states that the parties are “[r]eaffirming their obligations under the Mutual Defense Treaty of August 30, 1951.” Thus, the continued validity and relevance of the MDT cannot be denied.

Moreover, the Senate ratification of the MDT complies with the requirement of Section 25, Article XVIII¹⁹ of the 1987 Constitution that any agreement allowing foreign military facilities in the Philippines, like the repositioning of U.S. war materials, must be embodied in a treaty and ratified by two-thirds vote²⁰ of the Senate. That treaty is the MDT which the Philippine Senate ratified by two-thirds vote on 12 May 1952²¹ and which the U.S. Senate ratified on 20 March 1952.²²

In summary, the EDCA is absolutely necessary and essential to implement the purpose of the MDT, which on the part of the Philippines, given the existing situation in the West Philippine Sea, is to deter or repel any armed attack on Philippine territory or on any Philippine public vessel or aircraft operating in the West Philippine Sea. To hold that the EDCA cannot take effect without Senate ratification is to render the MDT, our sole mutual self-defense treaty, totally inutile to meet the grave, even existentialist,²³ national security threat that the Philippines is now facing in the West Philippine Sea.

China has already invaded several geologic features comprising part of Philippine “national territory” as defined in the Constitution. The territorial integrity of the Philippines has been violated openly and repeatedly. The President, as Commander-in-Chief of the Armed Forces, “chief architect” of foreign policy and implementer of the MDT, has decided on the urgent need

¹⁹ Section 25, Article XVIII of the 1987 Constitution provides: “After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except **under a treaty duly concurred in by the Senate** and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State.” (Emphasis supplied)

²⁰ Section 21, Article VII of the 1987 Constitution provides: “No treaty or international agreement shall be valid and effective unless **concurred in by at least two-thirds of all the Members of the Senate.**” (Emphasis supplied)

²¹ The 1935 Constitution, under which the MDT was ratified, also required ratification of treaties by two-thirds vote of the Senate. Section 10(7), Article VII of the 1935 Constitution provides: “The President shall have the power, **with the concurrence of two thirds of all the Members of the Senate**, to make treaties, and with the consent of the Commission on Appointments, he shall appoint ambassadors, other public ministers; and consuls. He shall receive ambassadors and other public ministers duly accredited to the Government of the Philippines.” (Emphasis supplied)

²² See footnote 7, *Nicolas v. Romulo*, 598 Phil. 262 (2009).

²³ China’s successful control of the South China Sea will force the Philippines to share a 1,300-kilometer sea border with China, from Balabac Island in Palawan to Yamin Island in Batanes, very close to the Philippine coastline facing the South China Sea. This will bring the Philippines into China’s orbit, with the Philippines adhering to China’s positions on matters involving foreign policy.



to fortify Philippine military defenses by prepositioning war materials of our treaty ally on Philippine soil. This Court should not erect roadblocks to the President's implementation of the MDT, particularly since time is of the essence and the President's act of entering into the EDCA on his own does not violate any provision of the Constitution.

A final word. The EDCA does not detract from the legal arbitration case that the Philippines has filed against China under UNCLOS. The EDCA brings into the Philippine strategy the element of credible self-defense. Having refused to participate in the legal arbitration despite being obligated to do so under UNCLOS, China is now using brute force to assert its claim to almost the entire South China Sea. Given this situation, the proper equation in defending the Philippines' maritime zones in the West Philippine Sea is "legal right plus credible self-defense equals might."

Accordingly, I vote to **DISMISS** the petitions on the ground that the EDCA merely implements, and in fact is absolutely necessary and essential to the implementation of, the MDT, an existing treaty that has been ratified by the Senate.



ANTONIO T. CARPIO

Associate Justice