EN BANC

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

x----------

DISSENTING OPINION

"Para kayong mga birhen na naniniwala sa pag-ibig ng isang puta!"[1]
- Heneral Luna kina Pedro Paterno, Felix Buencamino, at Emilio Aguinaldo noong sinabi nila na nangako ang mga Amerikano na kikilalanin nila ang kasarinlan ng mga Pilipino

LEONEN, *J.*:

1987 Constitution, Article XVIII, Section 25:

> *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.*

In a disturbing turn of events, the majority of this court just succeeded in amending this constitutional provision. At the very least, it emasculated its text and weakened its spirit.

An agreement signed by our Secretary of Defense and the Ambassador of the United States that grants United States military personnel

---

[1] *Heneral Luna*, Dir. Jerrold Tarog Artikulo Uno Productions (2015). The inclusion of this quote is to emphasize its metaphor and not meant in any way to denigrate the human dignity of commercial sex workers.

and their contractors operational control over unspecified locations within Philippine territory in order to pre-position military equipment as well as to use as launching pads for operations in various parts of the globe is not binding until it is concurred in by the Senate. This is in accordance with Article XVIII, Section 25 and Article VII, Section 21 of the Constitution.

Furthermore, the Enhanced Defense Cooperation Agreement (EDCA) does not simply implement the Agreement Between the Government of the United States of America and the Government of the Republic of the Philippines Regarding the Treatment of United States Armed Forces Visiting the Philippines (Visiting Forces Agreement or VFA). The EDCA substantially modifies or amends the VFA. An executive agreement cannot amend a treaty. Nor can any executive agreement amend any statute, most especially a constitutional provision.

The EDCA substantially modifies or amends the VFA in the following aspects:

First, the EDCA does not only regulate the "visits" of foreign troops. It also allows the temporary stationing on a rotational basis of US military personnel and their contractors in physical locations with permanent facilities and pre-positioned military materiel.

Second, unlike the VFA, the EDCA allows pre-positioning of military materiel, which can include various types of warships, fighter planes, bombers, and vessels, as well as land and amphibious vehicles and their corresponding ammunition.

Third, the VFA contemplates the entry of troops for various training exercises. The EDCA allows our territory to be used by the United States to launch military and paramilitary operations to be conducted within our territory or against targets in other states.

Fourth, the EDCA introduces the following concepts not contemplated in the VFA or in the 1951 Mutual Defense Treaty, namely: (a) agreed locations; (b) contractors; (c) pre-positioning of military materiel; and (d) operational control.

Lastly, the VFA does not have provisions that may be construed as a restriction or modification of obligations found in existing statutes. The EDCA contains provisions that may affect various statutes, including (a) the jurisdiction of courts, (b) local autonomy, and (c) taxation.

There is no showing that the new matters covered in the EDCA were

contemplated by the Senate when it approved the VFA. Senate Resolution No. 105, Series of 2015, which expresses the sentiment of that legislative chamber, is a definite and unequivocal articulation of the Senate: the VFA was not intended to cover the matters now included in the EDCA. In the view of the Senate reading the same provisions of the Constitution as we do, the EDCA should be in treaty form.

The EDCA, in its current form, is only an official and formal memorial of agreed provisions resulting from the negotiations with the United States. The President has the discretion to submit the agreement to the Senate for concurrence. The EDCA is a treaty and requires Senate concurrence.

I

The EDCA should comply with Article XVIII, Section 25 of the Constitution.

Bayan v. Zamora[2] interpreted the scope of this provision when it discussed the constitutionality of the VFA. Similar to the EDCA, the VFA was a product of negotiations between the two governments relating to mutual security interests. Unlike the EDCA, however, the VFA was submitted to the Senate for concurrence, thus:

> On July 18, 1997, the United States panel, headed by US Defense Deputy Assistant Secretary for Asia Pacific Kurt Campbell, met with the Philippine panel, headed by Foreign Affairs Undersecretary Rodolfo Severino, Jr., to exchange notes on "the complementing strategic interests of the United States and the Philippines in the Asia-Pacific region." Both sides discussed, among other things, the possible elements of the Visiting Forces Agreement (VFA for brevity). Negotiations by both panels on the VFA led to a consolidated draft text, which in turn resulted [in] a final series of conferences and negotiations that culminated in Manila on January 12 and 13, 1998. Thereafter, then President Fidel V. Ramos approved the VFA, which was respectively signed by public respondent Secretary Siazon and Unites States Ambassador Thomas Hubbard on February 10, 1998.
>
> On October 5, 1998, President Joseph E. Estrada, through respondent Secretary of Foreign Affairs, ratified the VFA.
>
> On October 6, 1998, the President, acting through respondent Executive Secretary Ronaldo Zamora, officially transmitted to the Senate of the Philippines, the Instrument of Ratification, the letter of the President and the VFA, for concurrence pursuant to Section 21, Article VII of the 1987 Constitution. The Senate, in turn, referred the VFA to its Committee on Foreign Relations, chaired by Senator Blas F. Ople, and its Committee

[2] *Bayan v. Zamora,* 396 Phil. 623 (2000) [Per J. Buena, En Banc].

on National Defense and Security, chaired by Senator Rodolfo G. Biazon, for their joint consideration and recommendation. Thereafter, joint public hearings were held by the two Committees.

On May 3, 1999, the Committees submitted Proposed Senate Resolution No. 443 recommending the concurrence of the Senate to the VFA and the creation of a Legislative Oversight Committee to oversee its implementation. Debates then ensued.

On May 27, 1999, Proposed Senate Resolution No. 443 was approved by the Senate, by a two-thirds (2/3) vote of its members. Senate Resolution No. 443 was then re-numbered as Senate Resolution No. 18.

On June 1, 1999, the VFA officially entered into force after an Exchange of Notes between respondent Secretary Siazon and United States Ambassador Hubbard.[3] (Citations omitted)

Bayan held that Article XVIII, Section 25 of the Constitution applies to the VFA:

Section 25, Article XVIII disallows foreign military bases, troops, or facilities in the country, unless the following conditions are sufficiently met, *viz*: (a) it must be under a treaty; (b) the treaty must be duly concurred in by the Senate and, when so required by Congress, ratified by a majority of the votes cast by the people in a national referendum; and (c) recognized as a treaty by the other contracting state.

There is no dispute as to the presence of the first two requisites in the case of the VFA. The concurrence handed by the Senate through Resolution No. 18 is in accordance with the provisions of the Constitution, whether under the general requirement in Section 21, Article VII, or the specific mandate mentioned in Section 25, Article XVIII, the provision in the latter article requiring ratification by a majority of the votes cast in a national referendum being unnecessary since Congress has not required it.

As to the matter of voting, Section 21, Article VII particularly requires that a treaty or international agreement, to be valid and effective, must be concurred in by at least two-thirds of all the members of the Senate. On the other hand, Section 25, Article XVIII simply provides that the treaty be "duly concurred in by the Senate."

Applying the foregoing constitutional provisions, a two-thirds vote of all the members of the Senate is clearly required so that the concurrence contemplated by law may be validly obtained and deemed present. While it is true that Section 25, Article XVIII requires, among other things, that the treaty — the VFA, in the instant case — be "duly concurred in by the Senate," it is very true however that said provision must be related and viewed in light of the clear mandate embodied in Section 21, Article VII, which in more specific terms, requires that the concurrence of a treaty, or international agreement, be made by a two-thirds vote of all the members of the Senate. Indeed, Section 25, Article XVIII must not be treated in isolation to Section 21, Article VII.

---

[3] Id. at 632–637.

> 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.
>
> . . . .
>
> Having resolved that the first two requisites prescribed in Section 25, Article XVIII are present, we shall now pass upon and delve on the requirement that the VFA should be recognized as a treaty by the United States of America.
>
> . . . .
>
> 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.[4]

Lim v. Executive Secretary[5] further explored the scope of the VFA as it dealt with the constitutionality of the Terms of Reference of the "Balikatan 02-1" joint military exercises between the Philippines and the United States:

> The Terms of Reference rightly fall within the context of the VFA.
>
> After studied reflection, it appeared farfetched that the ambiguity surrounding the meaning of the word "activities" arose from accident. In our view, it was deliberately made that way to give both parties a certain leeway in negotiation. 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 nation's 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.
>
> Under these auspices, the VFA gives legitimacy to the current Balikatan exercises. It is only logical to assume that "Balikatan 02-1," a "mutual anti-terrorism advising, assisting and training exercise," falls under the umbrella of sanctioned or allowable activities in the context of the agreement. Both the history and intent of the Mutual Defense Treaty and the VFA support the conclusion that combat-related activities — as opposed to combat itself — such as the one subject of the instant petition, are indeed authorized.
>
> That is not the end of the matter, though. Granted that "Balikatan

---

4 Id. at 654–657.

5 430 Phil. 555 (2002) [Per J. De Leon, Jr., En Banc].

> 02-1" is permitted under the terms of the VFA, what may US forces legitimately do in furtherance of their aim to provide advice, assistance and training in the global effort against terrorism? Differently phrased, may American troops actually engage in combat in Philippine territory? The Terms of Reference are explicit enough. Paragraph 8 of section I stipulates that US exercise participants may not engage in combat "except in self-defense." We wryly note that this sentiment is admirable in the abstract but difficult in implementation. The target of "Balikatan 02-1," the Abu Sayyaf, cannot reasonably be expected to sit idly while the battle is brought to their very doorstep. They cannot be expected to pick and choose their targets for they will not have the luxury of doing so. We state this point if only to signify our awareness that the parties straddle a fine line, observing the honored legal maxim "*Nemo potest facere per alium quod non potest facere per directum.*" The indirect violation is actually petitioners' worry, that in reality, "Balikatan 02-1" is actually a war principally conducted by the United States government, and that the provision on self-defense serves only as camouflage to conceal the true nature of the exercise. A clear pronouncement on this matter thereby becomes crucial.
>
> *In our considered opinion, neither the MDT nor the VFA allow foreign troops to engage in an offensive war on Philippine territory.*[6] (Emphasis supplied)

Nicolas v. Romulo[7] involved the grant of custody of Lance Corporal Daniel Smith to the United States pursuant to the VFA and reiterated the ruling in *Bayan*:

> [A]s an implementing agreement of the RP-US Mutual Defense Treaty, it was not necessary to submit the VFA to the US Senate for advice and consent, but merely to the US Congress under the Case–Zablocki Act within 60 days of its ratification. It is for this reason that the US has certified that it recognizes the VFA as a binding international agreement, i.e., a treaty, and this substantially complies with the requirements of Art. XVIII, Sec. 25 of our Constitution.[8]

The controversy now before us involves more than the VFA. Reading the entirety of the Constitution is necessary to fully appreciate the context of the interpretation of Article XVIII, Section 25.

II

Foreign policy indeed includes security alliances and defense cooperation among states. In the conduct of negotiations and in the implementation of any valid and binding international agreement, Article II

---

6 Id. at 575–576. "*Nemo potest facere per alium quod non potest facere per directum*" translates to "No one is allowed to do indirectly what he is prohibited to do directly."

7 598 Phil. 262 (2009) [Per J. Azcuna, En Banc].

8 Id. at 284–285.

of the Constitution requires:

> Section 2. The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.
>
> . . . .
>
> Section 7. 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.

Article 2(4) of the Charter of the United Nations similarly provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[9]

Our use of force is not completely proscribed as the Charter of the United Nations provides for the inherent right of individual or collective self-defense:

> **CHAPTER VII: ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION**
>
> . . . .
>
> **Article 51.** Nothing in the present Charter shall impair the inherent right of individual or collective self-defen[s]e if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defen[s]e shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[10]

Furthermore, falling within the penumbra on the use of force are pre-

---

[9] Charter of United Nations, Chapter I, art. 2(4) <http://www.un.org/en/documents/charter/chapter1.shtml> (visited January 11, 2016).

[10] Charter of United Nations, Chapter VII, art. 51 <http://www.un.org/en/documents/charter/chapter7.shtml> (visited January 11, 2016). *See Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America),* I.C.J. 1984 I.C.J. 39

emptive self-defense,[11] self-help, and humanitarian interventions.[12]

Another exception would be the collective security system set up under the Charter of the United Nations, with the Security Council acting in accordance with Chapter VII of the Charter. Under Article 42:

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.[13]

We fall within this exception when we participate in the enforcement of the resolutions of the Security Council.[14]

Generally, the President's discretion is plenary in matters falling within executive functions. He is the chief executive,[15] having the power of control over all executive departments, bureaus, and offices.[16] Further, "by constitutional fiat and by the intrinsic nature of his office, the President, as head of State, is the sole organ and authority in the external affairs of the country [and] [i]n many ways, the President is the chief architect of the nation's foreign policy."[17]

---

[11] *See* Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, THE WASHINGTON QUARTERLY 26:2, 89–103 (2003). *See* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 242-243 (1994), citing US Secretary of State Webster in his diplomatic note in the 1842 *Caroline Case*. According to Professor Higgins, under customary international law, pre-emptive self-defense may be resorted to when the necessity is "instant, overwhelming, and leav[es] no choice of means, and no moment for deliberation."

[12] *See* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 245-248 (1994). *See* Keynote address by Jacques Forster, Vice President of the International Committee of the Red Cross, presented at the Ninth Annual Seminar on International Humanitarian Law for Diplomats accredited to the United Nations, Geneva, 8–9 March 2000 <https://www.icrc.org/eng/resources/documents/misc/57jqjk.htm> (visited January 11, 2016): "The use of force by the international community should come within the scope of the United Nations Charter. International humanitarian law cannot be invoked to justify armed intervention because it has nothing to do with the right of States to use force. Its role is strictly limited to setting limits to armed force irrespective of the legitimacy of its use." *See also* United Nations Security Council Resolution 1674 (2006) on the concept of Responsibility to Protect <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1674(2006)> (visited January 11, 2016).

[13] Charter of United Nations, Chapter VII, art. 42 <http://www.un.org/en/sections/charter/chapter7.shtml> (visited January 11, 2016).

[14] *See* Charter of United Nations, Chapter VII, art. 44 <http://www.un.org/en/documents/charter/chapter7.shtml> (visited January 11, 2016). *See also* Enforcement action through regional arrangements under Articles 52 (1) and 53 (1) of the United Nations Charter. <http://www.un.org/en/sections/un-charter/chapter-viii/index.html> (visited January 11, 2016).

[15] CONST., art. VII, sec.1.

[16] CONST., art. VII, sec.17.

[17] *Bayan v. Zamora*, 396 Phil. 623, 663 (2000) [Per J. Buena, En Banc].

The President is also the Commander-in-Chief of all armed forces of the Philippines.[18] He has the power to "call out such armed forces to prevent or suppress lawless violence, invasion or rebellion . . . suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law"[19] subject to the conditions and requisites under the provision.

However, the President's discretion to allow our participation in the use of force—whether by committing our own military assets and personnel or by allowing our territory to be used as waypoints, refueling or staging areas—is also constrained by the Constitution. In this sense, the power of the President as Commander-in-Chief and head of state is limited by the sovereign through judicially determinable constitutional parameters.

III

With respect to the use of or threat to use force, we can discern a gradation of interrelations of the legislative and executive powers to ensure that we pursue "an independent foreign policy" in the context of our history.

Article VI, Section 23 of the Constitution covers declarations of a state of war. It is vested solely in Congress, thus:

> Section 23. (1) The Congress, by a vote of two-thirds of both Houses in joint session assembled, voting separately, shall have the sole power to declare the existence of a state of war.
>
> (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 powers shall cease upon the next adjournment thereof.

Informed by our history and to ensure that the independence of our foreign policy is not compromised by the presence of foreign bases, troops, or facilities, the Constitution now provides for treaty recognition, Senate concurrence, and public ratification when required by Congress through Article XVIII, Section 25, thus:

> Section 25. 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

---

[18] CONST., art. VII, sec.18.
[19] CONST., art. VII, sec.18.

> 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.

The prohibition in Article XVIII, Section 25 relates only to international agreements involving foreign military bases, troops, or facilities. It does not prohibit the President from entering into other types of agreements that relate to other aspects of his powers as Commander-in-Chief.

In *Bayan*:

> Section 25, Article XVIII is a ***special provision that applies to treaties which involve the presence of foreign military bases, troops or facilities in the Philippines***. Under this provision, the concurrence of the Senate is only one of the requisites to render compliance with the constitutional requirements and to consider the agreement binding on the Philippines. Section 25, Article XVIII ***further requires that "foreign military bases, troops, or facilities" may be allowed in the Philippines only by virtue of a treaty duly concurred in by the Senate, ratified by a majority of the votes cast in a national referendum held for that purpose if so required by Congress, and recognized as such by the other contracting state***.
>
> . . . .
>
> ***Section 25, Article XVIII disallows foreign military bases, troops, or facilities in the country, unless the following conditions are sufficiently met***, *viz*: (a) it must be under ***a treaty***; (b) the treaty must be ***duly concurred in by the Senate and, when so required by Congress, ratified by a majority of the votes cast by the people in a national referendum***; and (c) ***recognized as a treaty by the other contracting state***.[20] (Emphasis supplied)

"Foreign military bases, troops, and facilities" should not be read together but separately. Again, in *Bayan*:

> Moreover, it is specious to argue that Section 25, Article XVIII is inapplicable to mere transient agreements for the reason that there is no permanent placing of structure for the establishment of a military base. On this score, the Constitution makes no distinction between "transient" and "permanent." Certainly, we find nothing in Section 25, Article XVIII that requires foreign troops or facilities to be stationed or placed permanently in the Philippines.
>
> It is a rudiment in legal hermeneutics that when no distinction is made by law, the Court should not distinguish—*Ubi lex non distinguit nec nos distinguire debemos*.

---

[20] *Bayan v. Zamora,* 396 Phil. 623, 651–655 (2000) [Per J. Buena, En Banc].

In like manner, we do not subscribe to the argument that Section 25, Article XVIII is not controlling since no foreign military bases, but merely foreign troops and facilities, are involved in the VFA. Notably, a perusal of said constitutional provision reveals that the proscription covers "foreign military bases, troops, or facilities." Stated differently, this prohibition is not limited to the entry of troops or facilities without any foreign bases being established. The clause does not refer to "foreign military bases, troops, or facilities" collectively but treats them as separate and independent subjects. The use of comma and the disjunctive word "or" clearly signifies disassociation and independence of one thing from the others included in the enumeration, 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.

To this end, the intention of the framers of the Charter, as manifested during the deliberations of the 1986 Constitutional Commission, is consistent with this interpretation:

> "MR. MAAMBONG. I just want to address a question or two to Commissioner Bernas.
>
> This formulation speaks of three things: foreign military bases, troops or facilities. My first question is: If the country does enter into such kind of a treaty, must it cover the three—bases, troops or facilities—or could the treaty entered into cover only one or two?
>
> FR. BERNAS. Definitely, it can cover only one. Whether it covers only one or it covers three, the requirements will be the same.
>
> MR. MAAMBONG. In other words, the Philippine government can enter into a treaty covering not bases but merely troops?
>
> FR. BERNAS. Yes.
>
> MR. MAAMBONG. I cannot find any reason why the government can enter into a treaty covering only troops.
>
> FR. BERNAS. Why not? Probably if we stretch our imagination a little bit more, we will find some. We just want to cover everything."

Moreover, military bases established within the territory of another state is no longer viable because of the alternatives offered by new means and weapons of warfare such as nuclear weapons, guided missiles as well as huge sea vessels that can stay afloat in the sea even for months and years without returning to their home country. These military warships are actually used as substitutes for a land-home base not only of military aircraft but also of military personnel and facilities. Besides, vessels are mobile as compared to a land-based military headquarters.

> At this juncture, we shall then resolve the issue of whether or not the requirements of Section 25 were complied with when the Senate gave its concurrence to the VFA.
>
> Section 25, Article XVIII disallows foreign military bases, troops, or facilities in the country, unless the following conditions are sufficiently met, *viz*: (a) it must be under a treaty; (b) the treaty must be duly concurred in by the Senate and, when so required by congress, ratified by a majority of the votes cast by the people in a national referendum; and (c) recognized as a treaty by the other contracting state.[21] (Citations omitted)

The ponencia, among others, interprets "shall not be allowed" as being limited to the "initial entry" of bases, troops, or facilities.[22] Subsequent acts are treated as no longer being subject to Article XVIII, Section 25 and are, therefore, only limited by other constitutional provisions and relevant laws.[23]

This interpretation is specious and ahistorical.

There is nothing in Article XVIII, Section 25 that defines the extent and scope of the presence of foreign military bases, troops, or facilities, thereby justifying a distinction between their initial entry and subsequent activities. Its very structure shows that Article XVIII, Section 25 is not a mere gateway for the entry of foreign troops or facilities into the Philippines for them to carry out any activity later on.

The provision contains measures designed to protect our country in the broader scheme of international relations. Military presence shapes both foreign policy and political relations. War—or the threat thereof through the position of troops, basing, and provision of military facilities—is an extension of politic, thus:

> The use of military force is a means to a higher end—the political object. War is a tool that policy uses to achieve its objectives and, as such, has a measure of rational utility. So, the purpose for which the use of force is intended will be the major determinant of the course and character of a war. As Clausewitz explains, war "is controlled by its political object," which "will set its course, prescribe the scale of means and effort which is required, and makes its influence felt throughout down to the smallest operational detail.[24]

---

21 Id. at 653–655.

22 Ponencia, pp. 26–27.

23 Id. at 28.

24 Thomas Waldman, *Politics and War: Clausewitz's Paradoxical Equation*, AUTUMN 2 (2010) <http://strategicstudiesinstitute.army.mil/pubs/parameters/Articles/2010autumn/Waldman.pdf> (visited January 11, 2016).

With respect to the entry and presence of foreign military bases, troops, and facilities, Article XVIII, Section 25 of the 1987 Constitution enables government to politically negotiate with other states from a position of equality. The authority is not exclusively granted to the President. It is shared with the Congress. The Senate participates because no foreign base, troop, or facility may enter unless it is authorized by a treaty.

There is more evidence in the text of the provision of a sovereign intent to require conscious, deliberate, and public discussion regarding these issues.

The provision gives Congress, consisting of the Senate and the House of Representatives, the option to require that the treaty become effective only when approved by a majority of the people in a referendum. Furthermore, there is the additional requirement that the authority will be absent if the other state does not treat the same instrument that allows their bases, troops, and facilities to enter our territory as a treaty.

The provision ensures equality by requiring a higher level of public scrutiny. Unlike in the past when we bargained with the United States from a position of weakness, the Constitution opens the legislative forum so that we use the freedoms that we have won since 1946 to ensure a fair agreement. Legislative hearings make the agreements more publicly legible. They allow more criticism to be addressed. Public forums clarify to the United States and other foreign military powers interested in the Philippines the full extent of interest and the various standpoints of our different constituents. As a mechanism of public participation, it also assures our treaty partners of the durability of the various obligations in these types of security arrangements.

The EDCA was negotiated in private between representatives of the President and the United States. The complete text of the negotiations was presented to the public in time for the visit of the President of the United States. During its presentation, the President's representatives took the position that no further public discussion would be held that might affect the terms of the EDCA. The President presented the EDCA as a final product withdrawn from Senate or Congressional input. The President curtailed even the possibility of full public participation through a Congressional Resolution calling for a referendum on this matter.

The Separate Opinion of former Chief Justice Puno in *Bayan* provides a picture of how the Constitutional Commission recognized the lopsided relationship of the United States and the Philippines despite the 1951 Mutual Defense Treaty and the 1947 Agreement Between the United States of

America and the Republic of the Philippines Concerning Military Bases (1947 Military Bases Agreement):

> To determine compliance of the VFA with the requirements of Sec. 25, Art. XVIII of the Constitution, ***it is necessary to ascertain the intent of the framers of the Constitution as well as the will of the Filipino people who ratified the fundamental law. This exercise would inevitably take us back to the period in our history when U.S. military presence was entrenched in Philippine territory with the establishment and operation of U.S. Military Bases in several parts of the archipelago under the 1947 R.P.-U.S. Military Bases Agreement.*** As articulated by Constitutional Commissioner Blas F. Ople in the 1986 Constitutional Commission deliberations on this provision, ***the 1947 RP-US Military Bases Agreement was ratified by the Philippine Senate, but not by the United States Senate. In the eyes of Philippine law, therefore, the Military Bases Agreement was a treaty, but by the laws of the United States, it was a mere executive agreement. This asymmetry in the legal treatment of the Military Bases Agreement by the two countries was believed to be a slur to our sovereignty.*** Thus, in the debate among the Constitutional Commissioners, the unmistakable intention of the commission emerged that this *anomalous asymmetry must never be repeated.* ***To correct this historical aberration, Sec. 25, Art. XVIII of the Constitution requires that the treaty allowing the presence of foreign military bases, troops, and facilities should also be "recognized as a treaty by the other contacting party."*** In plain language, *recognition of the United States as the other contracting party of the VFA should be by the U.S. President with the advice and consent of the U.S. Senate.*
>
> The following exchanges manifest this intention:
>
> "MR. OPLE. Will either of the two gentlemen yield to just one question for clarification? Is there anything in this formulation, whether that of Commissioner Bernas or of Commissioner Romulo, that will prevent the Philippine government from abrogating the existing bases agreement?
>
> FR. BERNAS. To my understanding, none.
>
> MR. ROMULO. I concur with Commissioner Bernas.
>
> MR. OPLE. I was very keen to put this question because I had taken the position from the beginning — and this is embodied in a resolution filed by Commissioners Natividad, Maambong and Regalado — that it is very important that the government of the Republic of the Philippines be in a position to terminate or abrogate the bases agreement as one of the options . . . . we have acknowledged starting at the committee level that *the bases agreement was ratified by our Senate; it is a treaty under Philippine law. But as far as the Americans are concerned, the Senate never took cognizance of this and therefore, it is an executive agreement.* That creates a wholly unacceptable asymmetry between the two countries. Therefore, in my opinion, the right step to take, if the

government of our country will deem it in the national interest to terminate this agreement or even to renegotiate it, is that we must begin with a clean slate; *we should not be burdened by the flaws of the 1947 Military Bases Agreement. . .*

MR. ROMULO. Madam President, I think the two phrases in the Bernas formulation take care of Commissioner Ople's concerns.

The first says "EXCEPT UNDER THE TERMS OF A TREATY." That means that if it is to be renegotiated, it must be under the terms of a new treaty. The second is the concluding phrase which says: "AND RECOGNIZED AS A TREATY BY THE OTHER CONTRACTING STATE."

. . . .

MR. SUAREZ. Is the proposal prospective and not retroactive in character?

FR. BERNAS. Yes, it is prospective because it does not touch the validity of the present agreement. However, if a decision should be arrived at that the present agreement is invalid, then even prior to 1991, this becomes operative right away.

MR. SUAREZ. In other words, we do not impress the previous agreements with a valid character, neither do we say that they are null and void *ab initio* as claimed by many of us here.

FR. BERNAS. The position I hold is that it is not the function of this Commission to pass judgment on the validity or invalidity of the subsisting agreement.

MR. SUAREZ . . . the proposal requires recognition of this treaty by the other contracting nation. How would that recognition be expressed by that other contracting nation? That is in *accordance with their constitutional or legislative process, I assume.*

FR. BERNAS. As Commissioner Romulo indicated, since this certainly would refer only to the United States, because it is only the United States that would have the possibility of being allowed to have treaties here, then *we would have to require that the Senate of the United States concur in the treaty because under American constitutional law, there must be concurrence on the part of the Senate of the United States to conclude treaties.*

. . . .

FR. BERNAS. When I say that the other contracting state must recognize it as a treaty, by that I mean *it must perform all the acts required for the agreement to reach the*

> *status of a treaty under their jurisdiction.*"[25] (Emphasis supplied)

By allowing the entry of United States military personnel, their deployment into undefined missions here and abroad, and their use of military assets staged from our territory against their present and future enemies based on a general provision in the VFA, the majority now undermines the measures built into our present Constitution to allow the Senate, Congress and our People to participate in the shaping of foreign policy. The EDCA may be an agreement that "deepens defense cooperation"[26] between the Philippines and the United States. However, like the 1947 Military Bases Agreement, it is the agreement more than any other that will extensively shape our foreign policy.

IV

Article VII, Section 21 of the Constitution complements Article XVIII, Section 25 as it provides for the requisite Senate concurrence, thus:

> Section 21. 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.

The provision covers both *"treaty and international agreement."* Treaties are traditionally understood as international agreements entered into between states or by states with international organizations with international legal personalities.[27] The deliberate inclusion of the term "international agreement" is the subject of a number of academic discussions pertaining to foreign relations and international law. Its addition cannot be mere surplus. Certainly, Senate concurrence should cover more than treaties.

That the President may enter into international agreements as chief architect of the Philippines' foreign policy has long been acknowledged.[28] However, whether an international agreement is to be regarded as a treaty or as an executive agreement depends on the subject matter covered by and the temporal nature of the agreement.[29] *Commissioner of Customs v. Eastern*

---

[25] J. Puno, Dissenting Opinion in *Bayan v. Zamora,* 396 Phil. 623, 672–675 (2000) [Per J. Buena, En Banc].

[26] Agreement between the Government of the Philippines and the Government of the United States of America on Enhanced Defense Cooperation (2014), Art. 1, sec. 1.

[27] *See* Vienna Convention on the Law of Treaties (1969), art. 2(1)(a) and Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, art. 2(1)(a) (1986).

[28] *See Bayan v. Zamora*, 396 Phil. 623 (2000) [Per J. Buena, En Banc]; and *Pimentel, Jr. v. Office of the Executive Secretary*, 501 Phil. 303 (2005) [Per J. Puno, En Banc]. *See also* Exec. Order No. 292 (1987), Book IV, Title I, sec. 3(1) and 20.

[29] *Commissioner of Customs v. Eastern Sea Trading*, 113 Phil. 333 (1961) [Per J. Concepcion, En Banc].

Sea Trading[30] differentiated international agreements that require Senate concurrence from those that do not:

> International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying *adjustments of detail* carrying out well-established national policies and traditions and those involving arrangements of a more or less *temporary* nature usually take the form of executive agreements.[31] (Emphasis in the original)

Indeed, the distinction made in *Commissioner of Customs* in terms of international agreements must be clarified depending on whether it is viewed from an international law or domestic law perspective. Dean Merlin M. Magallona summarizes the differences between the two perspectives:

> *From the standpoint of Philippine constitutional law, a treaty is to be distinguished from an executive agreement*, as the Supreme Court has done in *Commissioner of Customs v. Eastern Sea Trading* where it declares that "the concurrence of [the Senate] is required by our fundamental law in the making of 'treaties' . . . which are, however, distinct and different from 'executive agreements,' which may be validly entered into without such concurrence."
>
> *Thus, the distinction rests on the application of Senate concurrence as a constitutional requirement.*
>
> *However, from the standpoint of international law, no such distinction is drawn.* Note that for purposes of the Vienna Convention on the Law of Treaties, in Article 2(1)(a) the term "treaty" is understood as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." . . . The Philippines is a party to the Convention which is already in force. In the use of the term "treaty," Article 2(1)(a) of the Vienna Convention on the Law of Treaties between States and International Organizations, which is not yet in force, the designation or appellation of the agreement also carries no legal significance. Provided the instruments possess the elements of an agreement under international law, they are to be taken equally as "treaty" without regard to the descriptive names by which they are designated, such as "protocol," "charter," "covenant," "exchange of notes," "modus vivendi," "convention," or "executive agreement."[32] (Emphasis supplied, citations omitted)

Under Article 2(2)[33] of the Vienna Convention on the Law of Treaties,

---

30 Id.

31 Id. at 338.

32 MERLIN M. MAGALLONA, A PRIMER IN INTERNATIONAL LAW 62–64 (1997).

33 Article 2. USE OF TERMS

. . . .

in relation to Article 2(1)(a),[34] the designation and treatment given to an international agreement is subject to the treatment given by the internal law of the state party.[35] Paragraph 2 of Article 2 specifically safeguards the states' usage of the terms "treaty" and "international agreement" under their internal laws.[36]

Within the context of our Constitution, the requirement for Senate concurrence in Article VII, Section 21 of the Constitution connotes a special field of state policies, interests, and issues relating to foreign relations that the Executive cannot validly cover in an executive agreement:

> As stated above, an executive agreement is outside the coverage of Article VII, Section 21 of the Constitution and hence not subject to Senate concurrence. However, the demarcation line between a treaty and an executive agreement as to the subject-matter or content of their coverage is ill-defined. The courts have not provided reliable guidelines as to the scope of executive-agreement authority in relation to treaty-making power.
>
> *If executive-agreement authority is un-contained, and if what may be the proper subject-matter of a treaty may also be included within the scope of executive-agreement power, the constitutional requirement of Senate concurrence could be rendered meaningless. The requirement could be circumvented by an expedient resort to executive agreement.*
>
> *The definite provision for Senate concurrence in the Constitution indomitably signifies that there must be a regime of national interests, policies and problems which the Executive branch of the government cannot deal with in terms of foreign relations except through treaties concurred in by the Senate under Article VII, Section 21 of the Constitution. The problem is how to define that regime, i.e., that which is outside the scope of executive-agreement power of the President and which exclusively belongs to treaty-making as subject to Senate concurrence.*[37] (Emphasis supplied)

Thus, Article VII, Section 21 may cover some but not all types of executive agreements. Definitely, the determination of its coverage does not depend on the nomenclature assigned by the President.

Executive agreements are international agreements that pertain to

---

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

[34] 1. For the purposes of the present Convention:
(a) "Treaty" means 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;

[35] *See* Merlin M. Magallona, *The Supreme Court and International Law: Problems and Approaches in Philippine Practice*, in INTERNATIONAL RELATIONS PAMPHLET SERIES NO. 12, 16–17 (2010).

[36] *See* 1 OLIVIER CORTIEN AND PIERRE KLEIN, THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 34 and 55 (2011).

[37] MERLIN M. MAGALLONA, A PRIMER IN INTERNATIONAL LAW 66–67 (1997).

mere adjustments of detail that carry out well-entrenched national policies and traditions in line with the functions of the Executive. It includes enforcement of existing and valid treaties where the provisions are clear. It involves arrangements that are of a temporary nature. More importantly, it does not amend existing treaties, statutes, or the Constitution.

In contrast, international agreements that are considered ***treaties*** under our Constitution involve key political issues or changes of national policy. These agreements are of a permanent character. It requires concurrence by at least two-thirds of all the members of the Senate.

Even if we assume that the EDCA's nomenclature as an "executive agreement" is correct, it is still the type of international agreement that needs to be submitted to the Senate for concurrence. It involves a key political issue that substantially alters or reshapes our national and foreign policy.

Fundamentally however, the President's classification of the EDCA as a mere "executive agreement" is invalid. Article XVIII Section 25 requires that the presence of foreign troops, bases, and facilities must be covered by an internationally binding agreement in the form of a treaty concurred in by the Senate.

V

The Solicitor General, on behalf of government, proposes that we should view the EDCA merely as an implementation of both the Mutual Defense Treaty and the VFA. In his view, since both the Mutual Defense Treaty and the VFA have been submitted to the Senate and concurred in validly under the governing constitutional provisions at that time, there is no longer any need to have an implementing agreement similarly submitted for Senate concurrence.

The Chief Justice, writing for the majority of this court, agrees with the position of the Solicitor General.

I disagree.

The proposal of the Solicitor General cannot be accepted for the following reasons: (1) the Mutual Defense Treaty, entered into in 1951 and ratified in 1952, cannot trump the constitutional provision Article XVIII, Section 25; (2) even the VFA, which could have been also argued as implementing the Mutual Defense Treaty, was presented to the Senate for ratification; (3) the EDCA contains significant and material obligations not contemplated by the VFA; and (4) assuming *arguendo* that the EDCA only

provides the details for the full implementation of the VFA, Article XVIII, Section 25 still requires that it at least be submitted to the Senate for concurrence, given the history and context of the constitutional provision.

VI

The 1951 Mutual Defense Treaty cannot be the treaty contemplated in Article XVIII, Section 25. Its implementation through an executive agreement, which allows foreign military bases, troops, and facilities, is not enough. If the Mutual Defense Treaty is the basis for the EDCA as a mere executive agreement, Article XVIII, Section 25 of the Constitution will make no sense. An absurd interpretation of the Constitution is no valid interpretation.

The Mutual Defense Treaty was entered into by representatives of the Philippines and the United States on August 30, 1951 and concurred in by the Philippine Senate on May 12, 1952. The treaty acknowledges that this is in the context of our obligations under the Charter of the United Nations. Thus, Article I of the Mutual Defense Treaty provides:

> The Parties undertake, as set forth in the Charter of the United Nations, 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.

Further, the treaty expresses the desire of the parties to "maintain and develop their individual and collective capacity to resist armed attack." Thus, in Article III of the Treaty:

> 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.

While these provisions in the 1951 Mutual Defense Treaty could reasonably be interpreted to include activities done jointly by the Philippines and the United States, nothing in International Law nor in the Constitution can be reasonably read as referring to this treaty for the authorization for "foreign military bases, troops, or facilities" after the ratification of the 1987 Constitution.

Again, the constitutional provision reads:

> Section 25. ***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)

There is a time stamp to the obligation under this provision. The prohibition against "foreign military bases, troops, or facilities," unless covered by treaty or allowed through a referendum, becomes effective "after the expiration in 1991 of the Agreement . . . concerning Military Bases." The treaty about to expire refers to the 1947 Military Bases Agreement as amended. This was still in effect at the time of the drafting, submission, and ratification of the 1987 Constitution.

The constitutional timeline is unequivocal.

The 1951 Mutual Defense Treaty was in effect at the time of the ratification of the Constitution in 1987. It was also in effect even after the expiration of the Military Bases Agreement in 1991. We could reasonably assume that those who drafted and ratified the 1987 Constitution were aware of this legal situation and of the broad terms of the 1951 treaty yet did not expressly mention the 1951 Mutual Defense Treaty in Article XVIII, Section 25. We can conclude, with sturdy and unassailable logic, that the 1951 treaty is not the treaty contemplated in Article XVIII, Section 25.

Besides, the Executive also viewed the VFA as an implementation of the 1951 Mutual Defense Treaty. Yet, it was still submitted to the Senate for concurrence.

Parenthetically, Article 62 of the Vienna Convention on the Law of Treaties[38] provides for the principle of "*rebus sic stantibus,*" in that a

---

[38] Article 62. Fundamental Change of Circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treary unless:

a. The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

b. The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty;

a. If the treaty establishes a boundary; or

b. If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

fundamental change of circumstances may be a ground to terminate or withdraw from a treaty.[39] Dean Merlin M. Magallona is of the view that there has been a fundamental change in circumstances that allows the Philippines to terminate the 1951 Mutual Defense Treaty.[40] Although we should acknowledge this suggestion during the oral arguments by petitioners, we do not need to go into such an issue and at this time to be able to resolve the controversies in this case. We await a case that will provide a clearer factual backdrop properly pleaded by the parties.

In addition, the Mutual Defense Treaty is not the treaty contemplated by Article XVIII, Section 25 on account of its subject matter. In Paragraph 5 of its Preamble, the Mutual Defense Treaty articulates the parties' desire "to strengthen their present efforts to collective defense for the preservation of peace and security pending the development of a more comprehensive system of regional security in the Pacific Area." Article II further clarifies the treaty's purpose:

> 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.*** (Emphasis supplied)

Clearly, none of its provisions provide specifically for the presence of a base, troops, or facilities that will put it within the ambit of Article XVIII, Section 25. Its main aim is to provide support against state enemies effectively and efficiently. Thus, for instance, foreign military bases were covered in the 1947 Military Bases Agreement.

The VFA cannot also be said to be the treaty required in Article XVIII, Section 25. This is because the United States, as the other contracting party, has never treated it as such under its own domestic laws. The VFA has the same status as that of the 1947 Military Bases Agreement in that it is merely an executive agreement on the part of United States:

> As articulated by Constitutional Commissioner Blas F. Ople in the 1986 Constitutional Commission deliberations on this provision,

---

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Vienna Convention of the Law of Treaties (1969) <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> (visited January 11, 2016).

[39] Vienna Convention of the Law of Treaties, art. 62 (1969) <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> (visited January 11, 2016).

[40] Merlin M. Magallona, *A Critical Review of the EDCA* 29 (2014) (Unpublished), annexed to petitioners' Memorandum.

> ***the 1947 RP-US Military Bases Agreement was ratified by the Philippine Senate, but not by the United States Senate. In the eyes of Philippine law, therefore, the Military Bases Agreement was a treaty, but by the laws of the United States, it was a mere executive agreement. This asymmetry in the legal treatment of the Military Bases Agreement by the two countries was believed to be a slur to our sovereignty.***[41] (Emphasis supplied)

In *Nicolas*, Associate Justice Antonio T. Carpio himself underscored the non-treaty status of the Visiting Forces Agreement in light of *Medellin v. Texas*[42] in his Separate Opinion, thus:

> Under *Medellin,* the VFA is indisputably not enforceable as domestic federal law in the United States. On the other hand, since the Philippine Senate ratified the VFA, the VFA constitutes domestic law in the Philippines. This unequal legal status of the VFA violates Section 25, Article XVIII of the Philippine Constitution, which specifically requires that a treaty involving the presence of foreign troops in the Philippines must be equally binding on the Philippines and on the other contracting State.
>
> In short, the Philippine Constitution bars the efficacy of such a treaty that is enforceable as domestic law only in the Philippines but unenforceable as domestic law in the other contracting State. The Philippines is a sovereign and independent State. It is no longer a colony of the United States. This Court should not countenance an unequal treaty that is not only contrary to the express mandate of the Philippine Constitution, but also an affront to the sovereignty, dignity and independence of the Philippine State.
>
> There is no dispute that Section 25, Article XVIII of the Philippine Constitution governs the constitutionality of the VFA. Section 25 states:
>
> > Section 25. 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**.
>
> The clear intent of the phrase "**recognized as a treaty by the other contracting State**" is to insure that the treaty has the same legal effect on the Philippines as on the other contracting State. This requirement is unique to agreements involving the presence of foreign

---

41 J. Puno, Dissenting Opinion in *Bayan v. Zamora,* 396 Phil. 623, 672–673 (2000) [Per J. Buena, En Banc].

42 128 S.Ct. 1346; 170 L.Ed.2d 190.

troops in the Philippines, along with the requirement, if Congress is so minded, to hold a national referendum for the ratification of such a treaty.

The deliberations of the Constitutional Commission reveal the sensitivity of the framers to the "unacceptable asymmetry" of the then existing military bases agreement between the Philippines and the United States. The Philippine Senate had ratified the military bases agreement but the United States Government refused to submit the same to the U.S. Senate for ratification. Commissioner Blas Ople explained this "unacceptable asymmetry" in this manner:

> . . . But I think we have acknowledged starting at the committee level that the bases agreement was ratified by our Senate; **it is a treaty under Philippine law. But as far as the Americans are concerned, the Senate never took cognizance of this and, therefore, it is an executive agreement. That creates a wholly unacceptable asymmetry between the two countries**. Therefore, in my opinion, the right step to take, if the government of our country will deem it in the national interest to terminate this agreement or even to renegotiate it, is that we must begin with a clean slate; we should not be burdened by the flaws of the 1947 Military Bases Agreement. I think that is a very important point. I am glad to be reassured by the two Gentlemen that there is nothing in these proposals that will bar the Philippine government at the proper time from exercising the option of abrogation or termination.

Eventually, the Constitutional Commission required that any agreement involving the presence of foreign troops in the Philippines must be "**recognized as a treaty by the other contracting State**." This means that the other contracting State must recognize the agreement as a treaty, as distinguished from any other agreement, and if its constitutional processes require, submit the agreement to its proper legislative body for ratification as a treaty. As explained by Commissioner Father Joaquin Bernas, S.J., during the deliberations of the Constitutional Commission:

> Third, on the last phrase "AND RECOGNIZED AS A TREATY BY THE OTHER CONTRACTING NATION," **we enter into a treaty and we want the other contracting party to respect that document as a document possessing force in the same way that we respect it**. The present situation we have is that the bases agreement is a treaty as far as we are concerned, but it is only an executive agreement as far as the United States is concerned, because the treaty process was never completed in the United States because the agreement was not ratified by the Senate.
>
> So, for these reasons, I oppose the deletion of this section because, first of all, as I said, it does not prevent renegotiation. Second, it respects the sovereignty of our people and the people will be in a better position to judge whether to accept the treaty or not, because then they will be voting not just on an abstraction but they will be voting after examination of the terms of the treaty negotiated by

> our government. And third, **the requirement that it be recognized as a treaty by the other contracting nation places us on the same level as any other contracting party.**

The following exchanges in the Constitutional Commission explain further the meaning of the phrase "**recognized as a treaty by the other contracting State**":

> FR. BERNAS: Let me be concrete, Madam President, in our circumstances. Suppose they were to have this situation where our government were to negotiate a treaty with the United States, and then the two executive departments in the ordinary course of negotiation come to an agreement. As our Constitution is taking shape now, if this is to be a treaty at all, it will have to be submitted to our Senate for its ratification. Suppose, therefore, that what was agreed upon between the United States and the executive department of the Philippines is submitted and ratified by the Senate, then it is further submitted to the people for its ratification and subsequently, we ask the United States: "**Complete the process by accepting it as a treaty through ratification by your Senate as the United States Constitution requires," would such an arrangement be in derogation of sovereignty?**
>
> MR. NOLLEDO: Under the circumstances the Commissioner just mentioned, Madam President, on the basis of the provision of Section 1 that "sovereignty resides in the Filipino people," then we would not consider that a derogation of our sovereignty on the basis and expectation that there was a plebiscite.
>
> xxx xxx xxx
>
> FR. BERNAS: As Commissioner Romulo indicated, since this certainly would refer only to the United States, because it is only the United States that would have the possibility of being allowed to have treaties here, then we would have to require that the Senate of the United States concur in the treaty because under American constitutional law, there must be concurrence on the part of the Senate of the United States to conclude treaties.
>
> MR. SUAREZ: Thank you for the clarification.
>
> Under the 1935 Constitution, if I recall it correctly, treaties and agreements entered into require an exchange of ratification. I remember that is how it was worded. We do not have in mind here an exchange of ratification by the Senate of the United States and by the Senate of the Philippines, for instance, but only an approval or a recognition by the Senate of the United States of that treaty.
>
> FR. BERNAS: **When I say that the other contracting state must recognize it as a treaty, by that I mean it**

> **must perform all the acts required for that agreement to reach the status of a treaty under their jurisdiction.**
>
> Thus, Section 25, Article XVIII of the Philippine Constitution requires that any agreement involving the presence of foreign troops in the Philippines must be **equally legally binding both on the Philippines and on the other contracting State**. This means the treaty must be enforceable under Philippine domestic law as well as under the domestic law of the other contracting State. Even Justice Adolfo S. Azcuna, the *ponente* of the majority opinion, and who was himself a member of the Constitutional Commission, **expressly admits** this when he states in his *ponencia*:
>
> > The provision is thus designed to ensure that any agreement allowing the presence of foreign military bases, troops or facilities in Philippine territory shall be **equally binding on the Philippines and the foreign sovereign State involved. The idea is to prevent a recurrence of the situation where the terms and conditions governing the presence of foreign armed forces in our territory were binding on us but not upon the foreign State**.
>
> An "**equally binding**" treaty means exactly what it says — the treaty is enforceable as domestic law in the Philippines and likewise enforceable as domestic law in the other contracting State.[43] (Emphasis in the original, citations omitted)

Surprisingly, through his Concurring Opinion in this case, Associate Justice Carpio has now abandoned his earlier views.

This court's interpretation of a treaty under Article XVIII, Section 25 in *Bayan*, which did away with the requirement that the agreement be recognized as a treaty by the other contracting party, has resulted in an absurd situation of political asymmetry between the United States and the Philippines. A relationship where both parties are on equal footing must be demanded, and from one state to another. The Philippine government must be firm in requiring that the United States establish stability in its international commitment, both by legislation and jurisprudence.

The doctrine laid down in *Bayan*, insofar as the VFA is concerned, should now be revisited in light of new circumstances and challenges in foreign policy and international relations.

VII

Even if we assume that the Mutual Defense Treaty and the VFA are the treaties contemplated by Article XVIII, Section 25 of the Constitution,

---

[43] J. Carpio, Dissenting Opinion in *Nicolas v. Romulo*, 598 Phil. 262, 308–312 (2009) [Per J. Azcuna, En Banc].

this court must determine whether the EDCA is a valid executive agreement as argued by respondents.

It is not. The EDCA modifies these two agreements.

Respondents claim that the EDCA is an executive agreement and merely implements the Mutual Defense Treaty and VFA.[44] In arguing that the EDCA implements the Mutual Defense Treaty, respondents state that the latter has two operative principles: (1) the Principle of Defensive Reaction under Article IV;[45] and (2) the Principle of Defensive Preparation under Article II.[46] According to respondents, "[t]he primary concern of the EDCA is the Principle of Defensive Preparation in order to enhance both parties' abilities, if required, to operationalize the Principle of Defensive Reaction."[47] The specific goals enumerated in the EDCA demonstrate this:

> 56. The specific purposes of the EDCA-to "[s]upport the Parties' shared goal of improving interoperability of the Parties' forces, and for the Armed Forces of the Philippines ("AFP"), [to address its] 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" properly fall within the MDT's objective of developing the defense capabilities of the Philippines and the US. The EDCA implements the MDT by providing for a mechanism that promotes optimal cooperation between the US and the Philippines.[48]

Similarly, respondents allege that the EDCA implements the VFA in relation to the entry of United States troops and personnel, importation and exportation of equipment, materials, supplies, and other property, and movement of vessels and aircraft in the Philippines.[49] Respondents rely on this court's pronouncement in *Lim* that combat-related activities are allowed under the VFA:

> 61. Article I of the EDCA provides that its purposes are to support "the Parties' shared goal of improving interoperability of the

---

44 Respondents' Memorandum, pp. 15–16.

45 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.

46 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.

47 Respondents' Memorandum, p. 15.

48 Id. at 16.

49 Id., *citing* Agreement between the Government Republic of the Philippines and the Government of the United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines (1998), art. I, VII, and VIII.

> Parties' forces, and for the Armed Forces of the Philippines ("AFP"), [to address its] 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."
>
> 62. The Honorable Court in *Lim* ruled that these activities are already covered by the VFA. Under *Lim,* "maritime security, maritime domain awareness, and humanitarian assistance and disaster relief capabilities" are activities that are authorized to be undertaken in the Philippines under the VFA.
>
> 63. Article II of the EDCA reiterates the definition of "United States personnel" in the VFA which means "United States military and civilian personnel temporarily in the Philippines in connection with activities approved by the Philippines."
>
> 64. Article III of the EDCA provides for the "Agreed Locations" where the Philippines authorizes US to "conduct 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."
>
> 65. Article IV of the EDCA authorizes the prepositioning and storing of defense equipment, supplies and materiel. Under Article IV in relation to Article III of the EDCA, the "prepositioning of equipment, supplies and materiel" is an "activity" to be approved by the Philippine Government "through bilateral security mechanisms, such as the MDB and SEB."
>
> 66. In sum, what the EDCA does is to enhance the existing contractual security apparatus between the Philippines and the US, set up through the MDT and the VFA. It is the duty of the Honorable Court to allow this security apparatus enough breathing space to respond to perceived, anticipated, and actual exigencies.

As discussed earlier, an executive agreement merely provides for the detailed adjustments of national policies or principles already existing in other treaties, statutes, or the Constitution. It involves only the enforcement of clear and specific provisions of the Constitution, law, or treaty. It cannot amend nor invalidate an existing statute, treaty, or provision in the Constitution. It includes agreements that are of a temporary nature.

This is not the case with the EDCA.

The EDCA contains significant and material obligations not contemplated by the VFA. As an executive agreement, it cannot be given any legal effect. The EDCA substantially modifies and amends the VFA in at least the following aspects:

First, the EDCA does not only regulate the "visits" of foreign troops. It allows the temporary stationing on a rotational basis of United States military personnel and their contractors on physical locations with permanent facilities and pre-positioned military materiel.

Second, unlike the VFA, the EDCA allows the pre-positioning of military materiel, which can include various types of warships, fighter planes, bombers, land and amphibious vehicles, and their corresponding ammunition.

Third, the VFA contemplates the entry of troops for various training exercises. The EDCA allows our territory to be used by the United States to launch military and paramilitary operations conducted in other states.

Fourth, the EDCA introduces new concepts not contemplated in the VFA, namely: (a) agreed locations; (b) contractors; (c) pre-positioning of military materiel; and (d) operational control.

Lastly, the VFA did not have provisions that may have been construed as a restriction or modification of obligations found in existing statutes. The EDCA contains provisions that may affect various statutes including, among others, (a) the jurisdiction of courts, (b) local autonomy, and (c) taxation.

VIII

Article I(1)(b) of the EDCA authorizes United States forces access to "Agreed Locations" in the Philippines on a rotational basis.[50] Even while the concept of "rotation" may refer to incidental and transient presence of foreign troops and contractors, the nature of the "Agreed Locations" is eerily similar to and, therefore, amounts to basing agreements.

"Agreed Locations" has been defined by the EDCA in Article II(4) as:

> ***Facilities and areas*** that are ***provided*** by the Government of the Philippines through the AFP and ***that United states forces, United States contractors, and others as mutually agreed, shall have the right to access and use*** pursuant to this Agreement. Such agreed Locations may be listed in an annex to be appended to this Agreement, and may be further described in implementing agreements. (Emphasis supplied)

[50] (b) Authorizing access to Agreed Locations in the territory of the Philippines by United States forces on a rotational basis, as mutually determined by the Parties.

As treaties, the 1947 Military Bases Agreement and its various amendments specified the actual location of the physical locations of United States troops and facilities. The EDCA, however, now delegates the identification of the location not to a select Senate Committee or a public body but simply to our military representatives in the Mutual Defense Board and the Security Enhancement Board.

More importantly, the extent of access and use allowed to United States forces and contractors under the EDCA is broad. It is set out in Article III:

> Article III
>
> Agreed Locations
>
> 1. With 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 0f vessels; temporary maintenance of vehicles, vessels, arid 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.
>
> 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, and airfields), including those owned or controlled by local governments, and to other land and facilities (including roads, ports, and airfields).
>
> 3. Given the mutuality of benefits, the Parties agree that the *Philippines shall make Agreed Locations available to United States forces without rental or similar costs*. United States forces shall cover their necessary operation expenses with respect to their activities at the Agreed Locations.
>
> 4. The *Philippines hereby grants to the United States, through bilateral security mechanisms, such as the MDB and SEB, operational control of Agreed Locations for construction activities and authority to undertake such activities on, and make alterations and improvements to, Agreed Locations*. United States forces shall consult on issues regarding such construction; alterations, and improvements on the Parties' shared intent that the technical requirements and construction standards of any such projects undertaken by or on behalf of United States forces should be consistent with the requirements and standards of both Parties.

. . . .

6. *United States forces shall be responsible on the basis of proportionate use for construction, development, operation, and maintenance costs at Agreed Locations.* Specific funding arrangements may be fined in Implementing arrangements. (Emphasis supplied)

Parsing the provisions carefully, we find that the Agreed Locations may be used for:

(1) training;

(2) transit;

(3) support and related activities;

(4) refueling of aircraft;

(5) bunkering of vessels;

(6) temporary maintenance of vehicles, vessels, and aircraft;

(7) temporary accommodation of personnel;

(8) communications;

(9) pre-positioning of equipment, supplies, and materiel;

(10) deploying forces and materiel; and

(11) other activities as the parties may agree.

There is no hierarchy among these activities. In other words, functions (2) to (11) need not be supportive only of training or transit. Function (10), which pertains to deployment of United States forces and materiel, can be done independently of whether there are training exercises or whether the troops are only in transit.

The permission to do all these activities is explicit in the EDCA. Government has already authorized and agreed that "United States forces, United States contractors, and vehicles, vessels, and aircraft operated by or for United States forces" may conduct all these activities. Carefully breaking down this clause in Article III(1) of the EDCA, the authorization is already granted to:

(a) "United States forces";

(b) "United States contractors"; and

(c) "vehicles, vessels, and aircraft operated by or for United States forces."

United States military forces will not only be allowed to "visit" Philippine territory to do a transient military training exercise with their Philippine counterparts. They are also allowed to execute, among others, the following scenarios:

One: Parts of Philippine territory may be used as staging areas for special or regular United States military personnel for intervention in conflict areas in the Southeast Asian region. This can be in the form of landing rights given to their fighter jets and stealth bombers or way stations for SEALS or other special units entering foreign territory in states not officially at war with the Philippines.

Two: Parts of Philippine territory may be used to supplement overt communication systems of the United States forces. For instance, cyberwarfare targeting a state hostile to the United States can be launched from any of the Agreed Locations to pursue their interests even if this will not augur well to Philippine foreign policy.

Three: Parts of Philippine territory may be used to plan, deploy, and supply covert operations done by United States contractors such as Blackwater and other mercenary groups that have been used by the United States in other parts of the world. The EDCA covers these types of operations within and outside Philippine territory. Again, the consequences to Philippine foreign policy in cases where targets are found in neighboring countries would be immeasurable.

The Visiting Forces Agreement does not cover these sample activities. Nor does it cover United States contractors.

IX

Blanket authority over Agreed Locations is granted under Article VI, Section 3 of the EDCA. The United States forces are given a broad range of powers with regard to the Agreed Locations that are "necessary for their operational control or defense."[51] This authority extends to the protection of United States forces and contractors. In addition, the United States is merely

[51] Agreement between the Government of the Philippines and the Government of the United States of America on Enhanced Defense Cooperation (2014), art. VI(3). United States forces are authorized to exercise all rights and authorities within Agreed Locations that are necessary for their operational control or defense, including taking appropriate measures to protect United States forces and United States contractors. The United States should coordinate such measures with appropriate authorities of the Philippines.

obligated to coordinate with Philippine authorities the measures they will take in case they deem it necessary to take action.

In contrast, the Mutual Defense Treaty is different. It is specific to the maintenance and development of the Philippines and the United States' individual and collective capacity to resist armed attack. The parties' goal under the Mutual Defense Treaty is to enhance collective defense mechanisms for the preservation of peace and security in the Pacific area.[52]

While certain activities such as "joint RP-US military exercises for the purpose of developing the capability to resist an armed attack fall . . . under the provisions of the RP-US Mutual Defense Treaty," [53] the alleged principles of Defensive Reaction and Defensive Preparation do not license the ceding of authority and control over specific portions of the Philippines to foreign military forces without compliance with the Constitutional requirements.[54] Such grant of authority and control over Agreed Locations to foreign military forces involves a drastic change in national policy and cannot be done in a mere executive agreement.

Moreover, nothing in the VFA provides for the use of Agreed Locations to United States forces or personnel, considering that the VFA focuses on the visitation of United States armed forces to the Philippines in relation to joint military exercises:

> Preamble
>
> The Government of the United States of America and the Government of the Republic of the Philippines,
>
> 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;
>
> *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 United States and the Republic of the Philippines promotes their common security interests;*
>
> Recognizing the desirability of defining the treatment of United States personnel visiting the Republic of the Philippines[.]

---

52 Mutual Defense Treaty between the Republic of the Philippines and the United States of America (1951), Preamble, par. 4.

53 *Nicolas v. Romulo*, 598 Phil. 262, 284 (2009) (Per J. Azcuna, En Banc].

54 *See* CONST., art. XVIII, sec. 25.

(Emphasis supplied)

In *Lim*, the Terms of Reference[55] of the "Balikatan 02-1" joint military exercises is covered by the VFA. Hence, under the VFA, activities such as joint exercises, which "include training on new techniques of patrol

---

[55] The Terms of Reference provides:

I. *POLICY LEVEL*

1. The Exercise shall be Consistent with the Philippine Constitution and all its activities shall be in consonance with the laws of the land and the provisions of the RP-US Visiting Forces Agreement (VFA).
2. The conduct of this training Exercise is in accordance with pertinent United Nations resolutions against global terrorism as understood by the respective parties.
3. No permanent US basing and support facilities shall be established. Temporary structures such as those for troop billeting, classroom instruction and messing may be set up for use by RP and US Forces during the Exercise.
4. The Exercise shall be implemented jointly by RP and US Exercise Co-Directors under the authority of the Chief of Staff, AFP. In no instance will US Forces operate independently during field training exercises (FTX). AFP and US Unit Commanders will retain command over their respective forces under the overall authority of the Exercise Co-Directors. RP and US participants shall comply with operational instructions of the AFP during the FTX.
5. The exercise shall be conducted and completed within a period of not more than six months, with the projected participation of 660 US personnel and 3,800 RP Forces. The Chief of Staff, AFP shall direct the Exercise Co-Directors to wind up and terminate the Exercise and other activities within the six month Exercise period.
6. The Exercise is a mutual counter-terrorism advising, assisting and training Exercise relative to Philippine efforts against the ASG, and will be conducted on the Island of Basilan. Further advising, assisting and training exercises shall be conducted in Malagutay and the Zamboanga area. Related activities in Cebu will be for support of the Exercise.
7. Only 160 US Forces organized in 12-man Special Forces Teams shall be deployed with AFP field commanders. The US teams shall remain at the Battalion Headquarters and, when approved, Company Tactical headquarters where they can observe and assess the performance of the AFP Forces.
8. US exercise participants shall not engage in combat, without prejudice to their right of self-defense.
9. These terms of Reference are for purposes of this Exercise only and do not create additional legal obligations between the US Government and the Republic of the Philippines.

II. *EXERCISE LEVEL*

1. *TRAINING*

a. The Exercise shall involve the conduct of mutual military assisting, advising and training of RP and US Forces with the primary objective of enhancing the operational capabilities of both forces to combat terrorism.
b. At no time shall US Forces operate independently within RP territory.
c. Flight plans of all aircraft involved in the exercise will comply with the local air traffic regulations.

2. *ADMINISTRATION & LOGISTICS*

a. RP and US participants shall be given a country and area briefing at the start of the Exercise. This briefing shall acquaint US Forces on the culture and sensitivities of the Filipinos and the provisions of the VFA. The briefing shall also promote the full cooperation on the part of the RP and US participants for the successful conduct of the Exercise.
b. RP and US participating forces may share, in accordance with their respective laws and regulations, in the use of their resources, equipment and other assets. They will use their respective logistics channels.
c. Medical evaluation shall be jointly planned and executed utilizing RP and US assets and resources.
d. Legal liaison officers from each respective party shall be appointed by the Exercise Directors.

3. *PUBLIC AFFAIRS*

a. Combined RP-US Information Bureaus shall be established at the Exercise Directorate in Zamboanga City and at GHQ, AFP in Camp Aguinaldo, Quezon City.
b. Local media relations will be the concern of the AFP and all public affairs guidelines shall be jointly developed by RP and US Forces.
c. Socio-Economic Assistance Projects shall be planned and executed jointly by RP and US Forces in accordance with their respective laws and regulations, and in consultation with community and local government officials.

and surveillance to protect the nation's 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,"[56] are authorized. However, *Lim* specifically provided for the context of the conduct of the *combat-related activities* under the VFA: President George W. Bush's international anti-terrorism campaign as a result of the events on September 11, 2001.[57]

Meanwhile, the EDCA unduly expands the scope of authorized activities to Agreed Locations with only a vague reference to the VFA:

> Article I
> Purpose and Scope
>
> 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 capacity to resist armed attack, and *within the context of 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 Locations 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.* (Emphasis supplied)

The VFA was ratified in 1998. However, in 2011, the Obama Administration announced its plan of intensifying its presence in the Asia-Pacific region.[58] The United States hinges this pivot on maritime peace and

---

[56] *Lim v. Executive Secretary,* 430 Phil. 555 (2002) [Per J. De Leon, Jr., En Banc].

[57] Id. at 564.

[58] Manyin, Mark E., *Pivot to the Pacific? The Obama Administration's "Rebalancing" Toward Asia* (2012) <https://www.fas.org/sgp/crs/natsec/R42448.pdf> (visited January 11, 2016). *See* Jonathan G.

security in the region in relation to a stable international economic order.[59] Hence, their Department of Defense enumerates three maritime objectives: "to safeguard the freedom of the seas; deter conflict and coercion; and promote adherence to international law and standards."[60]

To achieve these objectives, the United States conducts operations, exercises, and training with several countries it considers allies in the region.[61] Nevertheless, key to the United States' military strategy is the enhancement of its forward presence in the Asia-Pacific:

> Force Posture
>
> One of the most important efforts the Department of Defense has underway is *to enhance our forward presence by bringing our finest capabilities, assets, and people to the Asia-Pacific region.* The U.S. military presence has underwritten security and stability in the Asia-Pacific region for more than 60 years. Our forward presence not only serves to deter regional conflict and coercion, it also allows us to respond rapidly to maritime crises. Working in concert with regional allies and partners enables us to respond more effectively to these crises.
>
> The United States maintains 368,000 military personnel in the Asia-Pacific region, of which approximately 97,000 are west of the International Date Line. *Over the next five years, the U.S. Navy will increase the number of ships assigned to Pacific Fleet outside of U.S. territory by approximately 30 percent, greatly improving our ability to maintain a more regular and persistent maritime presence in the Pacific. And by 2020, 60 percent of naval and overseas air assets will be home-ported in the Pacific region. The Department will also enhance Marine Corps presence by developing a more distributed and sustainable laydown model.*
>
> *Enhancing our forward presence also involves using existing assets in new ways, across the entire region, with an emphasis on operational flexibility and maximizing the value of U.S. assets despite the tyranny of distance.* This is why the Department is working to develop a more distributed, resilient, and sustainable posture. As part of this effort, the United States will maintain its presence in Northeast Asia, while enhancing defense posture across the Western Pacific, Southeast Asia, and the Indian Ocean.
>
> . . . .
>
> *In Southeast Asia, the Department is honing an already robust*

Odom, *What Does a "Pivot" or "Rebalance" Look Like? Elements of the U.S. Strategic Turn Towards Security in the Asia-Pacific Region and Its Waters*, 14 APLPJ 2–8 (2013); Ronald O'Rourke, *Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress*, (2015) <https://www.fas.org/sgp/crs/row/R42784.pdf> (visited January 11, 2016).

59 United States Department of Defense, *The Asia-Pacific Maritime Security Strategy: Achieving U.S. National Security Objectives in a Changing Environment*, (1–2) <http://www.defense.gov/Portals/1/Documents/pubs/NDAA%20A-P_Maritime_SecuritY_Strategy-08142015-1300-FINALFORMAT.PDF (visited January 11, 2016).

60 Id. at 1.

61 Id. at 23–24.

> *bilateral exercise program with our treaty ally, the Republic of the Philippines, to assist it with establishing a minimum credible defense more effectively. We are conducting more than 400 planned events with the Philippines in 2015, including our premier joint exercise, Balikatan, which this year was the largest and most sophisticated ever. During this year's Balikatan, more than 15,000 U.S., Philippine, and Australian military personnel exercised operations involving a territorial defense scenario in the Sulu Sea, with personnel from Japan observing.*[62] (Emphasis supplied)

These changes in United States policy are reflected in the EDCA and not in the VFA. Thus, there is a substantial change of objectives.

If, indeed, the goal is only to enhance mutual defense capabilities under the Mutual Defense Treaty through conduct of joint military exercises authorized by the VFA, then it behooves this court to ask the purpose of providing control and authority over Agreed Locations here in the Philippines when it is outside the coverage of both the Mutual Defense Treaty and the VFA. Through a vague reference to the VFA, respondents fail to establish how the EDCA merely implements the VFA. They cannot claim that the provisions of the EDCA merely make use of the authority previously granted under the VFA. What is clear is that the Agreed Locations become a platform for the United States to execute its new military strategy and strengthen its presence in the Asia-Pacific, which is clearly outside the coverage of the VFA.

In addition, the EDCA does not merely implement the Mutual Defense Treaty and VFA when it provides for the entry of United States private contractors into the Philippines.

In the EDCA, United States contractors are defined as follows:

> 3. "United States contractors" means companies and firms, and their employees, under contract or subcontract to or on behalf of the United States Department of Defense. *United States contractors are not included as part of the definition of United States personnel in this Agreement, including within the context of the VFA.*[63] (Emphasis supplied)

This definition admits that the VFA does not provide for the entry of contractors into Philippine territory. The activities that United States contractors are allowed to undertake are specific to United States forces or personnel only as can be gleaned from this court's decisions in *Bayan, Lim*, and *Nicolas*. Hence, the extensive authority granted to United States

---

62 Id. at 22–23.

63 Agreement between the Government of the Philippines and the Government of the United States of America on Enhanced Defense Cooperation (2014), art. II (3).

contractors cannot be sourced from the VFA:

> Article II
> DEFINITIONS
>
> . . . .
>
> 4. "Agreed Locations" means facilities and areas that are provided by the Government of the Philippines through the AFP and that United States forces, *United States contractors*, and others as mutually agreed, *shall have the right to access and use pursuant to this Agreement.* Such Agreed Locations may be listed in an annex to be appended to this Agreement, and may be further described in implementing arrangements.
>
> . . . .
>
> Article III
> AGREED LOCATIONS
>
> 1. With 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; refuel big of aircraft; bunkering 0f 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 IV
> EQUIPMENT, SUPPLIES, AND MATERIEL
>
> . . . .
>
> 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.*
>
> 5. The Parties share an intent that *United States contractors may carry out such matters in accordance with, and to the extent permissible under, United States laws, regulations, and policies.* (Emphasis supplied)

Respondents, through the Office of the Solicitor General, insist that the EDCA is an implementing agreement of the Mutual Defense Treaty and the VFA. They do so based on the conclusion that all treaties or agreements

entered into by the Philippines pursuant to certain principles contained in the Mutual Defense Treaty may be considered subservient to these treaties. This will substantially weaken the spirit of Article XVIII, Section 25 and the sovereign desire to achieve an independent foreign policy.

X

The EDCA authorizes the use of Philippine territory as bases of operations. Although not as permanent as those set up pursuant to the 1947 Military Bases Agreement, they are still foreign military bases within the contemplation of Article XVIII, Section 25 of the Constitution.

The development and use of these Agreed Locations are clearly within the discretion of the United States. The retention of ownership by the Philippines under Article V(1)[64] of the EDCA does not temper the wide latitude accorded to the other contracting party. At best, the United States' only obligation is to consult and coordinate with our government. Under the EDCA, the consent of the Philippine government does not extend to the operations and activities to be conducted by the United States forces and contractors. Operational control remains solely with the United States government. The agreement did not create a distinction between domestic and international operations. Ownership of the Agreed Locations under the EDCA is a diluted concept, with the Philippine government devoid of any authority to set the parameters for what may and may not be conducted within the confines of these areas.

What constitutes a "base" in the context of United States–Philippine relations may be explored by revisiting the 1947 Military Bases Agreement.[65] In one of the agreement's preambular clauses, the United States and Philippine governments agreed that in line with cooperation and common defense, the United States shall be granted the use of certain lands of the public domain in the Philippines, free of rent.[66] In line with the promotion of mutual security and territorial defense, the extent of rights of the contracting parties in the use of these lands was described in Article III of the agreement:

Article III

---

[64] "The Philippines shall retain ownership of and title to Agreed Locations."

[65] A copy is contained in Treaties and Other International Agreements of the United States of America 1776-1949, as compiled under the direction of Charles I. Bevans, LL.B., *Assistant Legal Adviser, Department of State* <http://kahimyang.info/kauswagan/Downloads.xhtml?sortorder=znoblair> (visited November 5, 2015).

[66] WHEREAS, the Governments of the United States of America and of the Republic of the Philippines 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;

Description of rights

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.*

2. Such *rights, power and authority shall include*, inter alia, the right, power 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;

c) to control (including the right to prohibit) in so far as may be required for the efficient operation and safety of the bases, and within the limits of military necessity, anchorages, moorings, landings, takeoffs, movements and operation of ships and waterborne craft, aircraft and other vehicles on water, in the air or on land comprising or in the vicinity of the bases;

d) 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 sub-marine 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;

e) *to construct, install, maintain, and employ on any base any type of facilities, weapons, substance, device, 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.*

3. In the exercise of the above-mentioned rights, power and authority, the United States agrees that the powers granted to it will not be used unreasonably or, unless required by military necessity determined by the two Governments, so as to interfere with the necessary rights of navigation, aviation, communication, or land travel within the territories of the Philippines. *In the practical application outside the bases of the rights, power and authority granted in this Article there shall be, as the occasion requires, consultation between the two Governments.* (Emphasis supplied)

The bases contemplated by the 1947 Military Bases Agreement contain the elements of (a) absolute control of space; (b) the presence of a

foreign command; and (c) having a purpose of a military nature. The agreement also relegates the role of the Philippine government to a mere "consultant" in cases of applications falling outside the terms provided in Article III.

The EDCA contains similar elements.

However, the EDCA has an open-ended duration. Despite having an initial term of 10 years, Article XII(4) specifically provides for the automatic continuation of the agreement's effectivity until a party communicates its intent to terminate.[67]

The purpose of the Agreed Locations is also open-ended. At best, its definition and description of rights provide that the areas shall be for the use of United States forces and contractors. However, short of referring to Agreed Locations as bases, the EDCA enumerates activities that tend to be military in nature, such as bunkering of vessels, pre-positioning of equipment, supplies, and materiel, and deploying forces and materiel.[68] The United States is also allowed to undertake the construction of permanent facilities,[69] as well as to use utilities and its own telecommunications systems.[70]

Most significant is the Philippine government's grant to the United States government of operational control over the Agreed Locations:[71]

---

67 4. This Agreement shall have an initial term of ten years, and thereafter, it shall continue in force automatically unless terminated by either Party by giving one year's written notice through diplomatic channels of its intention to terminate this Agreement.

68 Agreement between the Government of the Philippines and the Government of the United States of America on Enhanced Defense Cooperation (2014), art. III (1).

69 Agreement between the Government of the Philippines and the Government of the United States of America on Enhanced Defense Cooperation (2014), art. V (4) provides: All buildings, non-relocatable structures, and assemblies affixed to the land, in the Agreed Locations, including ones altered or improved by United States forces, remain the property of the Philippines. Permanent buildings constructed by United States forces become the property of the Philippines, once constructed, but shall be used by United States forces until no longer required by United States forces.

70 Agreement between the Government of the Philippines and the Government of the United States of America on Enhanced Defense Cooperation (2014), art. VII provides for the use of utilities and communication systems:
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 or charges, no less favorable than those available to the AFP or the Government of the Philippines in like circumstances, less charges for taxes and similar fees, which will be for the account of the Philippine Government. United States forces' costs shall be equal to their pro rata share of the use of such utilities.;
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 telecommunication 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 as required to ensure the full ability to operate telecommunication systems, and the right to use all necessary radio spectrum allocated for this purpose. Consistent with the 1992 Constitution and Convention of the ITU, United States forces shall not interfere with frequencies in use by local operators. Use of the radio spectrum shall be free of cost to the United States.

71 Agreement between the Government of the Philippines and the Government of the United States of America on Enhanced Defense Cooperation (2014), art. III (4).

Article VI
Security

. . . .

> 3. United States forces are authorized to exercise all rights and authorities within Agreed Locations that are necessary for their operational control or defense, including taking appropriate measures to protect United States forces and United States contractors. The United States should coordinate such measures with appropriate authorities of the Philippines.
>
> 4. The Parties shall take all reasonable measures to ensure the protection, safety, and security of United States property from seizure by or conversion to the use of any party other than the United States, without the prior written consent of the United States. (Citation omitted)

The United States Department of Defense Dictionary of Military and Associated Terms[72] defines "operational control" as:

> [O]perational control — The authority to perform those functions of command over subordinate forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction necessary to accomplish the mission. Also called OPCON.

Similar to the 1947 Military Bases Agreement, the role of the Philippine government has been reduced to that of a consultant, except that the EDCA avoided the use of this label.

In some respects, too, the EDCA is similar to the Treaty of Friendship, Cooperation and Security between the Government of the Republic of the Philippines and the Government of the United States of America, which was rejected by the Philippine Senate in 1991. This rejected treaty[73] defines installations as:

---

[72] November 8, 2010, As Amended Through June 15, 2015 <http://fas.org/irp/doddir/dod/jp1_02.pdf> (visited November 5, 2015):
1. Scope
The Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms sets forth standard US military and associated terminology to encompass the joint activity of the Armed Forces of the United States. These military and associated terms, together with their definitions, constitute approved Department of Defense (DOD) terminology for general use by all DOD components.
2. Purpose
This publication supplements standard English-language dictionaries and standardizes military and associated terminology to improve communication and mutual understanding within DOD, with other federal agencies, and among the United States and its allies.

[73] This treaty contains a Supplementary Agreement on Installations and Military operating Procedures (Supplementary Agreement Number Two), which provides:
ARTICLE 1
PURPOSES OF THE UNITED STATES MILITARY PRESENCE IN THE PHILIPPINES

> "Installations" on the base authorized for use by the United States forces are buildings and structures to include non-removable buildings, structures, and equipment therein owned by the Government of the Philippines, grounds, land or sea areas specifically delineated for the purpose. "Non-removable buildings and structures" refer to buildings, structures, and other improvements permanently affixed to the ground, and such equipment, including essential utility systems such as energy and water production and distribution systems and heating and air conditioning systems that are an integral part of such buildings and structures, which are essential to the habitability and general use of such improvements and are permanently attached to or integrated into the property.

The treaty, which was not concurred in by the Senate, sets the parameters for defense cooperation and the use of installations in several provisions:

> Article IV
> Use of Installations by the US Forces
>
> 1. Subject to the provisions of this Agreement, the Government of the Philippines authorizes the Government of the United States to continue to use for military purposes certain installations in Subic Naval Base.
>
> 2. The installations shall be used solely for the purposes authorized under this Agreement, and such other purposes as may be mutually agreed upon
>
> 3. Ownership of all existing non-removable buildings and structures in Subic Naval Base is with the Government of the Philippines which has title over them. The Government of the Philippines shall also become owner of all non-removable buildings and structures that shall henceforth be constructed in Subic Naval Base immediately after their completion, with title thereto being vested with the Government of the Philippines.

The Government of the Republic of the Philippines authorizes the Government of the United States of America to station United States forces in the Philippines, and in connection therewith to use certain installations in Subic Naval Base, which is a Philippine military base, designated training areas and air spaces, and such other areas as may be mutually agreed, for the following purposes and under the terms and conditions stipulated in this Agreement:
a. training of United States forces and joint training of United States forces with Philippine forces;
b. servicing. provisioning, maintenance, support and accommodation of United States forces;
c. logistics supply and maintenance points for support of United States forces;
d. transit point for United States forces and United States military personnel;
e. projecting or operating United States forces from the installations under conditions of peace or war, provided that military combat operations of United States forces directly launched from installations on the base authorized for United States use shall be subject to prior approval of the Government of the Philippines;
f. such other purposes, consistent with this Agreement, as may be mutually agreed.

4. The Government of the United States shall not remove, relocate, demolish, reconstruct or undertake major external alterations of non-removable buildings and structures in Subic Naval Base without the approval of the Philippine commander. The United States shall also not construct any removable or non-removable buildings or structures without the approval of the Philippine Commander. The Philippine Commander will grant such approval for reasons of safety as determined jointly by the Philippine and United States Commanders

. . . .

8. The Government of the United States shall bear costs of operations and maintenance of the installations authorized for use in accordance with Annex B to this Agreement.

9. The Government of the Philippines will, upon request, assist the United States authorities in obtaining water, electricity, telephone and other utilities. Such utilities shall be provided to the Government of the United States, United States contractors and United States personnel for activities under this Agreement at the rates, terms and conditions not less favorable than those available to the military forces of the Philippine government, and free of duties, taxes, and other charges.

. . . .

Article VII
Defense Cooperation and Use of Philippine Installations

1. Recognizing that cooperation in the areas of defense and security serves their mutual interest and contributes to the maintenance of peace, and reaffirming their existing defense relationship, the two Governments shall pursue their common concerns in defense and security.

2. The two Governments recognize the need to readjust their defense and security relationship to respond to existing realities in the national, regional, and global environment. To this end, the Government of the Republic of the Philippines allows the Government of the United States to use installations in Subic Naval Base for a specified period, under specific conditions set forth in Supplementary Agreement Number Two: Agreement on Installations and Military Operating Procedures and Supplementary Agreement Number Three: Agreement on the Status of Forces.

3. Both governments shall also cooperate in the maintenance, upgrading and modernization of the defense and security capabilities of the armed forces of both countries, particularly of those of the Republic of the Philippines. In accordance with the common desire of the Parties to improve their defense relationship through balanced, mutual contributions to their common defense, the Government of the United States shall, subject to the constitutional procedures and to United States Congressional action, provide security assistance to the Government of the

> Philippines to assist in the modernization and enhancement of the capabilities of the Armed Forces of the Philippines and to support appropriate economic programs.

The 1987 Constitution does not proscribe the establishment of permanent or temporary foreign military bases. However, the Constitution now requires that decisions on the presence of foreign military bases, troops, and facilities be not the sole prerogative of the President and certainly not the prerogative at all of the Secretary of Defense or Philippine Representatives to the Mutual Defense Board and the Security Enhancement Board.

Absent any transmission by the President to the Senate, the EDCA remains a formal official memorial of the results of intensive negotiations only. It has no legal effect whatsoever, and any implementation at this stage will be grave abuse of discretion.

XI

Thus, the EDCA amends the VFA. Since the VFA is a treaty, the EDCA cannot be implemented.

Treaties, being of the same status as that of municipal law, may be modified either by another statute or by the Constitution itself.[74] Treaties such as the VFA cannot be amended by an executive agreement.

XII

Petitioners invoke this court's power of judicial review to determine whether respondents from the Executive Branch exceeded their powers and prerogatives in entering into this agreement on behalf of the Philippines "in utter disregard of the national sovereignty, territorial integrity and national interest provision of the Constitution, Section 25 of the Transitory provisions of the Constitution, Section 21 and other provisions of the Philippine Constitution and various Philippine laws and principles of international law."[75]

Petitioners submit that all requisites for this court to exercise its power of judicial review are present.[76] Petitioners in G.R. No. 212444 discussed that they had legal standing and they raised justiciable issues. Petitioners in

---

[74] *See Gonzales v. Hechanova*, 118 Phil. 1065 (1963) [Per J. Concepcion, En Banc] and *Ichong v. Hernandez*, 101 Phil. 1155 (1957) [Per J. Labrador, En Banc].

[75] Memorandum for Petitioners Bayan, et al., pp. 3–4.

[76] Memorandum for Petitioners Bayan, et al., pp. 19–25; Memorandum for Petitioners Saguisag, pp.11–17; Memorandum for Petitioners-in-Intervention KMU, pp. 5–6.

G.R. No. 212426 similarly discussed their legal standing, the existence of an actual case or controversy involving a conflict of legal rights, and the ripeness of the case for adjudication.[77]

Respondents counter that only the Senate may sue on matters involving constitutional prerogatives, and none of the petitioners are Senators.[78] They submit that "[t]he silence and active non-participation of the Senate in the current proceedings is an affirmation of the President's characterization of the EDCA as an executive agreement,"[79] and "there is no such actual conflict between the Executive and the Senate."[80] They add that the overuse of the transcendental importance exception "has cheapened the value of the Constitution's safeguards to adjudication."[81]

Article VIII, Section 1 of the Constitution now clarifies the extent of this court's power of judicial review "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."[82]

The 1936 landmark case of *Angara v. Electoral Commission*[83] explained the fundamental principle of separation of powers among government branches and this court's duty to mediate in the allocation of their constitutional boundaries:

> In times of social disquietude or political excitement, the great landmarks of the Constitution are apt to be forgotten or marred, if not entirely obliterated. In cases of conflict, the judicial department is the only constitutional organ which can be called upon to determine the proper allocation of powers between the several departments and among the integral or constituent units thereof.
>
> . . . The Constitution sets forth in no uncertain language the restrictions and limitations upon governmental powers and agencies. If these restrictions and limitations are transcended it would be inconceivable if the Constitution had not provided for a mechanism by which to direct the course of government along constitutional channels, for then the distribution of powers would be mere verbiage, the bill of rights mere expressions of sentiment, and the principles of good government mere political apothegms. Certainly, the limitation and restrictions embodied in our Constitution are real as they should be in any living constitution. . . .
>
> The Constitution is a definition of the powers of government. . . The Constitution itself has provided for the instrumentality of the judiciary

---

77 Memorandum for Petitioners Saguisag, pp.11–17.
78 Memorandum for Respondents, pp. 4–5.
79 Id. at 6.
80 Id. at 7.
81 Id. at 8.
82 CONST., art. VIII, sec. 1.
83 63 Phil. 139 (1936) [Per J. Laurel, En Banc].

> as the rational way. And when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them. This is in truth all that is involved in what is termed "judicial supremacy" which properly is the power of judicial review under the Constitution. Even then, this power of judicial review is limited to actual cases and controversies to be exercised after full opportunity of argument by the parties, and limited further to the constitutional question raised or the very *lis mota* presented. Any attempt at abstraction could only lead to dialectics and barren legal questions and to sterile conclusions unrelated to actualities. Narrowed as its function is in this manner, the judiciary does not pass upon questions of wisdom, justice or expediency of legislation. More than that, courts accord the presumption of constitutionality to legislative enactments, not only because the legislature is presumed to abide by the Constitution but also because the judiciary in the determination of actual cases and controversies must reflect the wisdom and justice of the people as expressed through their representatives in the executive and legislative departments of the governments of the government.[84]

Jurisprudence abounds on these four requisites for the exercise of judicial review. It must be shown that an actual case or controversy exists; that petitioners have legal standing; that they raised the constitutionality question at the earliest possible opportunity; and that the constitutionality question is the very *lis mota* of the case.[85]

This court can only exercise its power of judicial review after determining the presence of all requisites, such as an actual case or controversy, in consideration of the doctrine of separation of powers. It cannot issue advisory opinions nor overstep into the review of the policy behind actions by the two other co-equal branches of government. It cannot assume jurisdiction over political questions.

XIII

The requirement for an actual case or controversy acknowledges that courts should refrain from rendering advisory opinions concerning actions by the other branches of government.[86]

---

[84] Id. at 157–159 (1936) [Per J. Laurel, En Banc].

[85] *See Francisco, Jr. v. House of Representatives,* 460 Phil. 830, 892 (2003) [Per J. Carpio-Morales, En Banc].

[86] *Lozano v. Nograles,* 607 Phil. 334, 340 (2009) [Per C.J. Puno, En Banc]. *See also* J. Leonen, Dissenting and Concurring Opinion in *Disini, Jr. v. Secretary of Justice,* G.R. Nos. 203335, February 18, 2014, 716 SCRA 237, 535 [Per J. Abad, En Banc].

Courts resolve issues resulting from adversarial positions based on existing facts established by the parties who seek the court's application or interpretation of a legal provision that affects them.[87] It is not for this court to trigger or re-enact the political debates that resulted in the enactment of laws after considering broadly construed factual circumstances to allow a general application by the Executive.[88]

The requisite actual case or controversy means the existence of "a conflict of legal rights, an assertion of opposite legal claims susceptible of judicial resolution; the case must not be moot or academic or based on extra-legal or other similar considerations not cognizable by a court of justice."[89] It means the pleadings show "an active antagonistic assertion of a legal right, on the one hand, and a denial thereof on the other; that is, it must concern a real and not a merely theoretical question or issue."[90]

Thus, it is not this court's duty to "rule on abstract and speculative issues barren of actual facts."[91] Ruling on abstract cases presents the danger of foreclosing litigation between real parties, and rendering advisory opinions presents the danger of a court that substitutes its own imagination and predicts facts, acts, or events that may or may not happen.[92] Facts based on judicial proof must frame the court's discretion,[93] as "[r]igor in determining whether controversies brought before us are justiciable avoids the counter majoritarian difficulties attributed to the judiciary."[94]

Abstract cases include those where another political department has

---

87 *Diocese of Bacolod v. COMELEC,* G.R. No. 205728, January 21, 2015 < http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/january2015/205728.pdf> [Per J. Leonen, En Banc].

88 Id.

89 *Information Technology Foundation of the Philippines v. COMELEC,* 499 Phil. 281, 304 (2005) [Per J. Panganiban, En Banc], *citing Republic v. Tan,* G.R. No. 145255, 426 SCRA 485, March 30, 2004 [Per J. Carpio-Morales, Third Division]. *See also* J. Leonen, Dissenting and Concurring Opinion in *Disini, Jr. v. Secretary of Justice,* G.R. Nos. 203335, February 18, 2014, 716 SCRA 237, 534 [Per J. Abad, En Banc]; and *In the Matter of: Save the Supreme Court Judicial Independence and Fiscal Autonomy Movement v. Abolition of Judiciary Development Fund (JDF) and Reduction of Fiscal Autonomy,* UDK-15143, January 21, 2015 < http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/january2015/15143.pdf> [Per J. Leonen, En Banc].

90 *Information Technology Foundation of the Philippines v. COMELEC,* 499 Phil. 281, 305 (2005) [Per J. Panganiban, En Banc], *citing Vide: De Lumen v. Republic,* 50 OG No. 2, February 14, 1952, 578. *See also* J. Leonen, Dissenting and Concurring Opinion in *Disini, Jr. v. Secretary of Justice,* G.R. Nos. 203335,February 18, 2014, 716 SCRA 237, 534–535 [Per J. Abad, En Banc]; and *In the Matter of: Save the Supreme Court Judicial Independence and Fiscal Autonomy Movement v. Abolition of Judiciary Development Fund (JDF) and Reduction of Fiscal Autonomy,* UDK-15143, January 21, 2015 < http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/january2015/15143.pdf> [Per J. Leonen, En Banc].

91 J. Leonen, Dissenting Opinion in *Imbong v. Ochoa,* G.R. Nos. 204819, April 8, 2014, 721 SCRA 146, 731 [Per J. Mendoza, En Banc], *citing Angara v. Electoral Commission,* 63 Phil. 139, 158 (1936) [Per J. Laurel, En Banc]; and *Guingona, Jr. v. Court of Appeals,* 354 Phil. 415, 429 (1998) [Per J. Panganiban, First Division].

92 Id.

93 Id.

94 Id. at 721.

yet to act. In other words, a case not ripe for adjudication is not yet a concrete case.

Republic of the Philippines v. Roque[95] clarified the concept of having an actual case or controversy and the aspect of ripeness:

> Pertinently, a justiciable controversy refers to an existing case or controversy that is appropriate or ripe for judicial determination, not one that is conjectural or merely anticipatory. Corollary thereto, by "ripening seeds" it is meant, not that sufficient accrued facts may be dispensed with, but that a dispute may be tried at its inception before it has accumulated the asperity, distemper, animosity, passion, and violence of a full blown battle that looms ahead. The concept describes a state of facts indicating imminent and inevitable litigation provided that the issue is not settled and stabilized by tranquilizing declaration.
>
> A perusal of private respondents' petition for declaratory relief would show that they have failed to demonstrate how they are left to sustain or are in immediate danger to sustain some direct injury as a result of the enforcement of the assailed provisions of RA 9372. Not far removed from the factual milieu in the *Southern Hemisphere* cases, private respondents only assert general interests as citizens, and taxpayers and infractions which the government could prospectively commit if the enforcement of the said law would remain untrammelled. As their petition would disclose, private respondents' fear of prosecution was solely based on remarks of certain government officials which were addressed to the general public. They, however failed to show how these remarks tended towards any prosecutorial or governmental action geared towards the implementation of RA 9372 against them. In other words, there was no particular, real or imminent threat to any of them As held in *Southern Hemisphere:*
>
> > Without any justiciable controversy, the petitions have become pleas for declaratory relief, over which the Court has no original jurisdiction. Then again, declaratory actions characterized by "double contingency" where both the activity the petitioners intend to undertake and the anticipated reaction to it of a public official are merely theorized, lie beyond judicial review for lack of ripeness.
> >
> > The possibility of abuse in the implementation of RA 9372 does not avail to take the present petitions out of the realm of the surreal and merely imagined. Such possibility is not peculiar to RA 9372 since the exercise of any power granted by law may be abused. Allegations of abuse must be anchored on real events before courts may step in to settle actual controversies involving rights which are legally demandable and enforceable.[96] (Emphasis supplied, citations omitted)

---

[95] G.R. No. 204603, September 24, 2013, 706 SCRA 273 [Per J. Perlas-Bernabe, En Banc].

[96] *Republic of the Philippines v. Roque,* G.R. No. 204603, September 24, 2013, 706 SCRA 273, 284–285 [Per J. Perlas-Bernabe, En Banc]. *See also* J. Leonen, Dissenting and Concurring Opinion in *Disini,*

Our courts generally treat the issue of ripeness for adjudication in terms of actual injury to the plaintiff.[97] The question is whether "the act being challenged has had a direct adverse effect on the individual challenging it."[98] The Petitions are premature. Since the Senate has yet to act and the President has yet to transmit to the Senate, there is no right that has been violated as yet.

XIV

There is still a political act that must happen before the agreement can become valid and binding. The Senate can still address the constitutional challenges with respect to the contents of the EDCA. Thus, the challenges to the substantive content of the EDCA are, at present, in the nature of political questions.

However, the nature of the EDCA, whether it is a treaty or merely an executive agreement, is ripe for adjudication.

In 1957, *Tañada v. Cuenco*[99] explained the concept of political questions as referring to issues that depend not on the legality of a measure but on the wisdom behind it:

> As already adverted to, the objection to our jurisdiction hinges on the question whether the issue before us is political or not. In this connection, Willoughby lucidly states:
>
> > "Elsewhere in this treatise the well-known and well-established principle is considered that it is not within the province of the courts to pass judgment upon *the policy* of legislative or executive action. Where, therefore, *discretionary* powers are granted by the Constitution or by statute, the *manner* in which those powers are exercised is not subject to judicial review. The courts, therefore, concern themselves only with the question as to the *existence and extent of these discretionary powers.*
> >
> > As distinguished from the judicial, the legislative and executive departments are spoken of as the *political* departments of government because in very many cases their action is necessarily dictated by considerations of public or political policy. ***These considerations of public***

Jr. v. Secretary of Justice, G.R. Nos. 203335, February 18, 2014, 716 SCRA 237, 536–537 [Per J. Abad, En Banc].

97 *Lawyers Against Monopoly and Poverty v. Secretary of Budget and Management,* 686 Phil. 357 [Per J. Mendoza, En Banc].

98 Id. at 369, *citing Lozano v. Nograles,* 607 Phil. 334 (2009) [Per C.J. Puno, En Banc], *in turn citing Guingona, Jr. v. Court of Appeals*, 354 Phil. 415, 427–428 [Per J. Panganiban, First Division].

99 103 Phil. 1051 (1957) [Per J. Concepcion, En Banc].

> ***or political policy of course will not permit the legislature to violate constitutional provisions, or the executive to exercise authority not granted him by the Constitution or by statute, but, within these limits,*** they do permit the departments, separately or together, to *recognize that a certain set of facts exists* or that a given status exists, and these determinations, together with the consequences that flow therefrom, may not be traversed in the courts."

To the same effect is the language used in Corpus Juris Secundum, from which we quote:

> "It is well-settled doctrine that political questions are not within the province of the judiciary, except to the extent that power to deal with such questions has been conferred upon the courts by express constitutional or statutory provisions.
>
> "It is not easy, however, to define the phrase 'political question', nor to determine what matters fall within its scope. It is frequently used to designate all questions that the outside the scope of the judicial questions, which under the constitution, are to be *decided by the people in their sovereign capacity,* or in regard to which *full discretionary authority* has been delegated to the *legislative or* executive branch of the government."

Thus, it has been repeatedly held that the question whether certain amendments to the Constitution are invalid for non-compliance with the *procedure* therein prescribed, is *not* a political one and may be settled by the Courts.

In the case of In re McConaughy, the nature of political question was considered carefully. The Court said:

> "At the threshold of the case we are met with the assertion that the questions involved are political, and not judicial. If this is correct, the court has no jurisdiction as the certificate of the state canvassing board would then be final, regardless of the actual vote upon the amendment. The question thus raised is a fundamental one; but it has been so often decided contrary to the view contended for by the Attorney General that it would seem, to be finally settled.
>
> . . . .
>
> . . . *What is generally meant, when it is said that a question is political, and not judicial, is that* ***it is a matter which is to be exercised by the people in their primary political capacity,*** **or that it has been specifically delegated to some other department or particular officer of the government,** ***with discretionary power to act.*** Thus the *Legislature may in its discretion* determine whether it will pass a law or submit a proposed constitutional amendment to the people. The courts have

> no judicial control over such matters, not merely because *they involve political question*, but because they are matters which the people have by the Constitution delegated to the Legislature. The Governor may exercise the powers delegated-to him, free from judicial control, *so long as he observes the laws and acts within the limits of the power conferred.* His discretionary acts cannot be controllable, not primarily because they are of a political nature, but because the Constitution and laws have placed the particular matter under his control. *But every officer under a constitutional government must act according to law and subject him to the restraining and controlling power of the people, acting through the courts, as well as through the executive or the Legislature.* One department is just as representative as the other, and *the judiciary is the department which is charged with the special duty of determining the limitations which the law places upon all official action.* The recognition of this principle, unknown except in Great Britain and America, is necessary, to 'the end that the government may be one of laws and not men'—words which Webster said were the greatest contained in any written constitutional document."

In short, the term "political question" connotes, in legal parlance, what it means in ordinary parlance, namely, a question of policy. In other words, in the language of Corpus JurisSecundum (*supra*), it refers to *"those questions which, under the Constitution, are to be* ***decided by the people*** *in their sovereign capacity, or in regard to which* ***full discretionary authority*** *has been delegated to the Legislature or executive branch of the Government." It is concerned with issues dependent upon the* ***wisdom,*** *not legality, of a particular measure.*[100] (Emphasis supplied, citations omitted)

Francisco v. House of Representatives [101] involved the second impeachment Complaint filed against former Chief Justice Hilario Davide before the House of Representatives and raised the issue of whether this raised a political question. It traced the evolution of jurisprudence on the political question doctrine and the effect of this court's expanded power of judicial review under the present Constitution on this doctrine:

> As pointed out by *amicus curiae* former dean Pacifico Agabin of the UP College of Law, this Court has in fact in a number of cases taken jurisdiction over questions which are not truly political following the effectivity of the present Constitution.
>
> In *Marcos v. Manglapus*, this Court, speaking through Madame Justice Irene Cortes, held:
>
> > The present Constitution limits resort to the political question doctrine and broadens the scope of judicial inquiry into areas which the Court, under previous constitutions,

[100] Id. at 1065–1067.

[101] 460 Phil. 830 (2003) [Per J. Carpio-Morales, En Banc].

> would have normally left to the political departments to decide. . . .
>
> In *Bengzon v. Senate Blue Ribbon Committee*, through Justice Teodoro Padilla, this Court declared:
>
> > The "allocation of constitutional boundaries" is a task that this Court must perform under the Constitution. Moreover, as held in a recent case, (t)he political question doctrine neither interposes an obstacle to judicial determination of the rival claims. The jurisdiction todelimit constitutional boundaries has been given to this Court. It cannot abdicate that obligation mandated by the 1987 Constitution, although said provision by no means does away with the applicability of the principle in appropriate cases.
>
> And in *Daza v. Singson*, speaking through Justice Isagani Cruz, this Court ruled:
>
> > In the case now before us, the jurisdictional objection becomes even less tenable and decisive. The reason is that, even if we were to assume that the issue presented before us was political in nature, we would still not be precluded from resolving it under the expanded jurisdiction conferred upon us that now covers, in proper cases, even the political question. . . .
> >
> > . . . .
> >
> > In our jurisdiction, the determination of a truly political question from a non-justiciable political question lies in the answer to the question of ***whether there are constitutionally imposed limits on powers or functions conferred upon political bodies. If there are, then our courts are duty-bound to examine whether the branch or instrumentality of the government properly acted within such limits***[.][102] (Emphasis supplied)

In *Diocese of Bacolod v. COMELEC*,[103] this court held that the political question doctrine never precludes this court's exercise of its power of judicial review when the act of a constitutional body infringes upon a fundamental individual or collective right.[104] However, this will only be true if there is no other constitutional body to whom the discretion to make inquiry is preliminarily granted by the sovereign.

---

[102] Id. at 910–912 (2003) [Per J. Carpio-Morales, En Banc]. *See also Diocese of Bacolod v. COMELEC*, G.R. No. 205728, January 21, 2015 <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/january2015/205728.pdf> [Per J. Leonen, En Banc].

[103] G.R. No. 205728, January 21, 2015 <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/january2015/205728.pdf> [Per J. Leonen, En Banc].

[104] *Diocese of Bacolod v. COMELEC*, G.R. No. 205728, January 21, 2015 <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/january2015/205728.pdf> [Per J. Leonen, En Banc].

Ruling on the challenge to the content of the EDCA will preclude and interfere with any future action on the part of the Senate as it inquires into and deliberates as to whether it should give its concurrence to the agreement or whether it should advise the President to reopen negotiations to amend some of its provisions. It is the Senate, through Article VII, Section 21 in relation to Article XVIII, Section 25, that was given the discretion to make this initial inquiry exclusive of all other constitutional bodies, including this court. A policy of deference and respect for the allocation of such power by the sovereign to a legislative chamber requires that we refrain from making clear and categorical rulings on the constitutional challenges to the content of the EDCA.

XV

It is true that we have, on certain occasions, substantially overridden the requirements of justiciability when there is an imminent threat to the violation of constitutional rights. In *Garcia v. Drilon,*[105] I stated that:

> I am aware of our precedents where this Court has waived questions relating to the justiciability of the constitutional issues raised when they have "transcendental importance" to the public. In my view, this accommodates our power to promulgate guidance "concerning the protection and enforcement of constitutional rights." We choose to rule squarely on the constitutional issues in a petition wanting all or some of the technical requisites to meet out general doctrines on justiciability but raising clear conditions showing imminent threat to fundamental rights. ***The imminence and clarity of the threat to fundamental constitutional rights outweigh the necessity for prudence.*** In a sense, our exceptional doctrine relating to constitutional issues of "transcendental importance" prevents courts from the paralysis of procedural niceties when clearly faced with the need for substantial protection.[106] (Emphasis supplied, citations omitted)

There is, however, no need to invoke these exceptions. The imminence of the implementation of the EDCA and, therefore, the clarity of the impending threat to constitutional rights do not appear cogent if we declare that the EDCA, without Senate concurrence, is not yet valid and binding as a treaty or fully complying with the requirements of Article XVIII, Section 25.

XVI

The proposed disposition of this case does not in any way discount the deployment of the expertise of the Executive as it conducts foreign policy.

---

[105] J. Leonen, Concurring Opinion in *Garcia v. Drilon*, G.R. No. 179267, June 25, 2013, 699 SCRA 352 [Per J. Perlas-Bernabe, En Banc].

[106] Id. at 493.

Nor should we arrogate executive discretion by compelling the President to transmit the agreement to the Senate for concurrence.[107]

Nevertheless, the judiciary has the duty to ensure that the acts of all branches of government comply with the fundamental nature of the Constitution.[108] While the EDCA is a formal and official memorial of the results of negotiations between the Philippines and the United States, it is not yet effective until the Senate concurs or there is compliance with Congressional action to submit the agreement to a national referendum in accordance with Article XVIII, Section 25 of the Constitution.

It is, thus, now up to the President. Should he desire to continue the policy embedded in the EDCA, with deliberate dispatch he can certainly transmit the agreement to the Senate for the latter to initiate the process to concur with the agreement. After all, on these matters, the sovereign, speaking through the Constitution, has assumed that the exercise of wisdom is not within the sole domain of the President. Wisdom, in allowing foreign military bases, troops, or facilities, is likewise within the province of nationally elected Senators of the Republic.

On these matters, the Constitution rightly assumes that no one person—because of the exigencies and their consequences—has a monopoly of wisdom.

In my view, the same security concerns that moved the President with haste to ratify the EDCA signed by his Secretary of Defense will be the same security concerns—and more—that will move the Senate to consider the agreement with dispatch. There are matters of national consequence where the views of an elected President can be enriched by the views of an elected Senate. Certainly, the participation of the public through these mechanisms is as critical as the foreign policy directions that the EDCA frames.

By abbreviating the constitutional process, this court makes itself vulnerable to a reasonable impression that we do not have the courage to enforce every word, phrase, and punctuation in the Constitution promulgated by our People. We will stand weak, as an institution and by implication as a state, in the community of nations. In clear unequivocal words, the basic instrument through which we exist requires that we interpret its words to make real an independent foreign policy. It requires measures be fully publicly discussed before any foreign resource capable of making war with our neighbors and at the command of a foreign sovereign—foreign military bases, troops and facilities—becomes effective.

---

[107] *Pimentel, Jr. v. Office of the Executive Secretary*, 501 Phil. 303 (2005) [Per J. Puno, En Banc].

[108] CONST., art. VIII, sec. 1 and 5(2).

Instead, the majority succumbed to a narrative of dependence to a superpower.

Our collective memories are perilously short. Our sense of history is wanting.

The Americans did not recognize the Declaration of Independence of 1898, which was made possible by the blood of our ancestors. They ignored their agreements with the Filipino revolutionaries when they entered Intramuros and staged the surrender of the Spanish colonizers to them. They ignored our politicians when they negotiated the Treaty of Paris. Not a single Filipino was there—not even as an observer. They triggered armed conflict with the Filipino revolutionaries. The schools they put up attempted to block out the inhumanity and barbarism in the conflict that followed. Only a few remember the massacres of Samar, of Bud Dajo, and of other places in our country. In the memory of many Filipinos today, these brutalities have been practically erased.

Filipino veterans of World War II who fought gallantly with the Americans, now gray and ailing, still await equal treatment with United States war veterans. Filipina comfort women of that war still seek just treatment and receive no succor from the ally with and for whom they bled and suffered.

The 1951 Mutual Defense Treaty and the Visiting Forces Agreement was in effect when the Chinese invaded certain features within our Exclusive Economic Zone in the West Philippine Sea. The Americans did not come to our aid. The President of the United States visited and, on the occasion of that visit, our own President announced the completion of the EDCA. No clear, unequivocal, and binding commitment was given with respect to the applicability of the Mutual Defense Treaty to the entirety of our valid legal claims in the West Philippine Sea. The commitment of the United States remains ambiguous. The United States' statement is that it will not interfere in those types of differences we have with China, among others.

The inequality of the Mutual Defense Treaty is best presented by the image of a commissioned but rusting and dilapidated warship beached in a shoal in the West Philippine Sea. This ship is manned by a handful of gallant heroic marines, and by the provisions of the Mutual Defense Treaty, an attack on this ship—as a public vessel—is what we are relying upon to trigger mutual defense with the United States.

We remain a permanent ally of the United States. For decades, we relied on them for the training of our troops and the provision of military materiel. For decades, we hosted their bases. Yet, our armed forces remain

woefully equipped. Unlike in many of their other allies, no modern US-made fighter jet exists in our Air Force. We have no credible missile defense. Our Navy's most powerful assets now include a destroyer that was decommissioned by the United States Coast Guard.

It is now suggested that these will change with the EDCA. It is now suggested that this court should act to make that change possible. Impliedly, it is thus also suggested that the Senate, or Congress, or the People in a referendum as provided in our Constitution, will be less patriotic than this court or the President.

There has never been a time in our history—and will never be a time in the future—when the national interest of the United States was subservient to ours. We cannot stake our future on how we imagine the United States will behave in the future. We should learn from our history. If we wish the United States to behave in a way that we expect, then our government should demand clear commitments for assistance to our primary interests. The likelihood that this will happen increases when agreements with them run through the gauntlet of public opinion before they become effective.

Certainly, this is what the Constitution provides. Certainly, this is the least that we should guarantee as a court of law.

FINAL NOTE

In 1991, there was the "Senate that Said No" to the extension of the stay of military bases of the United States within Philippine territory. That historical decision defined the patriotism implicit in our sovereignty. That single collective act of courage was supposed to usher opportunities to achieve the vision of our Constitution for a more meaningful but equal relationship with the American empire. That act was the pinnacle of decades of people's struggles.

History will now record that in 2016, it is this Supreme Court that said yes to the EDCA. This decision now darkens the colors of what is left of our sovereignty as defined in our Constitution. The majority's take is the aftermath of squandered opportunity. We surrender to the dual narrative of expediency and a hegemonic view of the world from the eyes of a single superpower. The opinion of the majority of this Supreme Court affirms executive privileges and definitively precludes Senate and/or Congressional oversight in the crafting of the most important policies in our relations with the United States and, implicitly, its enemies and its allies. In its hurry to abbreviate the constitutional process, the majority also excludes the possibility that our people directly participate in a referendum called to

affirm the EDCA.

Article XVIII, Section 25 does not sanction the surreptitious executive approval of the entry of United States military bases or any of its euphemisms (i.e., "Agreed Locations") through strained and acrobatic implication from an ambiguous and completely different treaty provision.

The majority succeeds in emasculating our Constitution. Effectively, this court erases the blood, sweat, and tears shed by our martyrs.

I register more than my disagreement. I mourn that this court has allowed this government to acquiesce into collective subservience to the Executive power contrary to the spirit of our basic law.

I dissent.

ACCORDINGLY, I vote to **PARTIALLY GRANT** the Petitions and to **DECLARE** the Enhanced Defense Cooperation Agreement (EDCA) between the Republic of the Philippines and the United States of America as a ***formal and official memorial of the results of the negotiations*** concerning the allowance of United States military bases, troops, or facilities in the Philippines, which is **NOT EFFECTIVE** until it complies with the requisites of Article XVIII, Section 25 of the 1987 Philippine Constitution, namely: (1) that the agreement must be in the form of a treaty; (2) that the treaty must be duly concurred in by the Philippine Senate and, when so required by Congress, ratified by a majority of votes cast by the people in a national referendum; and (3) that the agreement is either (a) recognized as a treaty or (b) accepted or acknowledged as a treaty by the United States before it becomes valid, binding, and effective.

MARVIC M.V.F. LEONEN
Associate Justice