

**RENE A.V. SAGUISAG, WIGBERTO E. TAÑADA, FRANCISCO
DODONG; NEMENZO, JR., SR. MARY JOHN MANANZAN,
PACIFICO A. AGABIN, ESTEBAN STEVE; SALONGA, H.
HARRY L. ROQUE, JR., EVALYN G. U...**

G.R. No. 212426. July 26, 2016

Ponente: SERENO, C.J.

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SERENO, C.J.:

The Motion for Reconsideration before us seeks to reverse the Decision of this Court in *Saguisag et. al., v. Executive Secretary* dated 12 January 2016.[1] The petitions in *Saguisag, et. al.*[2] had questioned the constitutionality of the Enhanced Defense Cooperation Agreement (EDCA) between the Republic of the Philippines and the United States of America (U.S.). There, this Court ruled that the petitions be dismissed.[3]

On 3 February 2016, petitioners in the Decision filed the instant Motion, asking for a reconsideration of the Decision in *Saguisag, et. al.*, questioning the ruling of the Court on both procedural and substantive grounds, viz:

WHEREFORE, premises considered, petitioners respectfully pray that the Honorable Court RECONSIDER, REVERSE, AND SET - ASIDE its Decision dated January 12, 2016, and issue a new Decision GRANTING the instant consolidated petitions by declaring the Enhanced Defense Cooperation Agreement (EDCA) entered into by the respondents for the Philippine government, with the United States of America, UNCONSTITUTIONAL AND INVALID and to permanently enjoin its implementation.

Other forms of relief just and equitable under the premises are likewise prayed for.

At the outset, petitioners questioned the procedural findings of the Court despite acknowledging the fact that the Court had given them standing to sue.[4] Therefore this issue is now irrelevant and academic, and deserves no reconsideration.

As for the substantive grounds, petitioners claim this Court erred when it ruled that EDCA was not a treaty.[5] In connection to this, petitioners move that EDCA must be in the form of a treaty in order to comply with the constitutional restriction under Section 25, Article XVIII of the 1987 Constitution on foreign military bases, troops, and facilities.[6] Additionally, they reiterate their arguments on the issues of telecommunications, taxation, and nuclear weapons.[7]

We deny the Motion for Reconsideration.

Petitioners do not present new arguments to buttress their claims of error on the part of this Court. They have rehashed their prior arguments and made them responsive to the structure of the Decision in *Saguisag*, yet the points being made are the same.

However, certain claims made by petitioners must be addressed.

On verba legis interpretation

Petitioners assert that this Court contradicted itself when it interpreted the word "allowed in" to refer to the initial entry of foreign bases, troops, and facilities, based on the fact that the plain meaning of the provision in question referred to prohibiting the return of foreign bases, troops, and facilities except under a treaty concurred in by the Senate.[8]

This argument fails to consider the function and application of the verba legis rule.

Firstly, verba legis is a mode of construing the provisions of law as they stand.[9] This takes into account the language of the law, which is in English, and therefore includes reference to the meaning of the words based on the actual use of the word in the language.

Secondly, by interpreting "allowed in" as referring to an initial entry, the Court has simply applied the plain meaning of the words in the particular provision.[10] Necessarily, once entry has been established by a subsisting treaty, latter instances of entry need not be embodied by a separate treaty. After all, the Constitution did not state that foreign military bases, troops, and facilities shall not subsist or exist in the Philippines.

Petitioners' own interpretation and application of the verba legis rule will in fact result in an absurdity, which legal construction strictly abhors.[11] If this Court accept the essence of their argument that every instance of entry by foreign bases, troops, and facilities must be set out in detail in a new treaty, then the resulting bureaucratic impossibility of negotiating a treaty for the entry of a head of State's or military officer's security detail, meetings of foreign military officials in the country, and indeed military exercises such as Balikatan will occupy much of, if not all of the official working time by various government agencies. This is precisely the reason why any valid mode of interpretation must take into account how the law is exercised and its goals effected.[12] Ut res magis valeat quam pereat.

The Constitution cannot be viewed solely as a list of prohibitions and limitations on governmental power, but rather as an instrument providing the process of structuring government in order that it may effectively serve the people.[13] It is not simply a set of rules, but an entire legal framework for Philippine society.

In this particular case, we find that EDCA did not go beyond the framework. The entry of US troops has long been authorized under a valid and subsisting treaty, which is the Visiting Forces Agreement (VFA).[14] Reading the VFA along with the longstanding Mutual Defense Treaty (MDT)[15] led this Court to the conclusion that an executive agreement such as the EDCA was well within the bounds of the obligations imposed by both treaties.

On strict construction of an exception

This Court agrees with petitioners' cited jurisprudence that exceptions are strictly construed.[16] However, their patent misunderstanding of the Decision and the confusion this creates behooves this Court to address this argument.

To be clear, the Court did not add an exception to Section 25 Article XVIII. The general rule is that foreign bases, troops, and facilities are not allowed in the Philippines.[17] The exception to this is authority granted to the foreign state in the form of a treaty duly concurred in by the Philippine Senate.[18]

It is in the operation of this exception that the Court exercised its power of review. The lengthy legal analysis resulted in a proper categorization of EDCA: an executive agreement authorized by treaty. This Court undeniably considered the arguments asserting that EDCA was, in fact, a treaty and not an executive agreement, but these arguments fell flat before the stronger legal position that EDCA merely implemented the VFA and MDT. As we stated in the Decision:

xxx [I]t must already be clarified that the terms and details used by an implementing agreement need not be

found in the mother treaty. They must be sourced from the authority derived from the treaty, but are not necessarily expressed word-for-word in the mother treaty.[19]

Hence, the argument that the Court added an exception to the law is erroneous and potentially misleading. The parties, both petitioners and respondents must therefore read the Decision carefully in order to fully comply with its disposition.

On EDCA as a treaty

The principal reason for the Motion for Reconsideration is evidently petitioners' disagreement with the Decision that EDCA implements the VFA and MDT. They reiterate their arguments that EDCA's provisions fall outside the allegedly limited scope of the VFA and MDT because it provides a wider arrangement than the VFA for military bases, troops, and facilities, and it allows the establishment of U.S. military bases.[20]

Specifically, petitioners cite the terms of the VFA referring to "joint exercises,"[21] such that arrangements involving the individual States-parties such as exclusive use of prepositioned materiel are not covered by the VFA. More emphatically, they state that prepositioning itself as an activity is not allowed under the VFA.[22]

Evidently, petitioners left out of their quote the portion of the Decision which cited the Senate report on the VFA. The full quote reads as follows:

Siazon clarified that it is not the VFA by itself that determines what activities will be conducted between the armed forces of the U.S. and the Philippines. The VFA regulates and provides the legal framework for the presence, conduct and legal status of U.S. personnel while they are in the country for visits, joint exercises and other related activities.[23]

Quite clearly, the VFA contemplated activities beyond joint exercises, which this Court had already recognized and alluded to in *Lim v. Executive Secretary*,[24] even though the Court in that case was faced with a challenge to the Terms of Reference of a specific type of joint exercise, the Balikatan Exercise.

One source petitioners used to make claims on the limitation of the VFA to joint exercises is the alleged Department of Foreign Affairs (DFA) Primer on the VFA, which they claim states that:

Furthermore, the VFA does not involve access arrangements for United States armed forces or the pre-positioning in the country of U.S. armaments and war materials. The agreement is about personnel and not equipment or supplies.[25]

Unfortunately, the uniform resource locator link cited by petitioners is inaccessible. However, even if we grant its veracity, the text of the VFA itself belies such a claim. Article I of the VFA states that "[a]s used in this Agreement, 'United States personnel' means United States military and civilian personnel temporarily in the Philippines in connection with activities approved by the Philippine Government." [26] These "activities" were, as stated in *Lim*, left to further implementing agreements. It is true that Article VII on Importation did not indicate pre-positioned materiel, since it referred to "United States Government equipment, materials, supplies, and other property imported into or acquired in the Philippines by or on behalf of the United States armed forces in connection with activities to which this agreement applies[.]" [27]

Nonetheless, neither did the text of the VFA indicate "joint exercises" as the only activity, or even as one of those activities authorized by the treaty. In fact, the Court had previously noted that

[n]ot much help can be had therefrom [VFA], unfortunately, since the terminology employed is itself the source of the problem. The VFA permits United States personnel to engage, on an impermanent basis, in "activities," the exact meaning of which was left undefined. The expression is ambiguous, permitting a wide

scope of undertakings subject only to the approval of the Philippine government. The sole encumbrance placed on its definition is couched in the negative, in that United States personnel must "abstain from any activity inconsistent with the spirit of this agreement, and in particular, from any political activity." All other activities, in other words, are fair game.[28]

Moreover, even if the DFA Primer was accurate, properly cited, and offered as evidence, it is quite clear that the DFA's opinion on the VFA is not legally binding nor conclusive.[29] It is the exclusive duty of the Court to interpret with finality what the VFA can or cannot allow according to its provisions.[30]

In addition to this, petitioners detail their objections to EDCA in a similar way to their original petition, claiming that the VFA and MDT did not allow EDCA to contain the following provisions:

1. Agreed Locations
2. Rotational presence of personnel
3. U.S. contractors
4. Activities of U.S. contractors[31]

We ruled in *Saguisag, et. al.* that the EDCA is not a treaty despite the presence of these provisions. The very nature of EDCA, its provisions and subject matter, indubitably categorize it as an executive agreement - a class of agreement that is not covered by the Article XVIII Section 25 restriction - in painstaking detail.[32] To partially quote the Decision:

Executive agreements may dispense with the requirement of Senate concurrence because of the legal mandate with which they are concluded. As culled from the afore-quoted deliberations of the Constitutional Commission, past Supreme Court Decisions, and works of noted scholars, executive agreements merely involve arrangements on the implementation of existing policies, rules, laws, or agreements. They are concluded (1) to adjust the details of a treaty; (2) pursuant to or upon confirmation by an act of the Legislature; or (3) in the exercise of the President's independent powers under the Constitution. The *raison d'être* of executive agreements hinges on prior constitutional or legislative authorizations.

The special nature of an executive agreement is not just a domestic variation in international agreements. International practice has accepted the use of various forms and designations of international agreements, ranging from the traditional notion of a treaty - which connotes a formal, solemn instrument - to engagements concluded in modern, simplified forms that no longer necessitate ratification. An international agreement may take different forms: treaty, act, protocol, agreement, concordat, *compromis d'arbitrage*, convention, covenant, declaration, exchange of notes, statute, pact, charter, agreed minute, memorandum of agreement, *modus vivendi*, or some other form. Consequently, under international law, the distinction between a treaty and an international agreement or even an executive agreement is irrelevant for purposes of determining international rights and obligations.

However, this principle does not mean that the domestic law distinguishing treaties, international agreements, and executive agreements is relegated to a mere variation in form, or that the constitutional requirement of Senate concurrence is demoted to an optional constitutional directive. There remain two very important features that distinguish treaties from executive agreements and translate them into terms of art in the domestic setting.

First, executive agreements must remain traceable to an express or implied authorization under the Constitution, statutes, or treaties. The absence of these precedents puts the validity and effectivity of executive agreements under serious question for the main function of the Executive is to enforce the Constitution and the laws enacted by the Legislature, not to defeat or interfere in the performance of these rules. In turn, executive

agreements cannot create new international obligations that are not expressly allowed or reasonably implied in the law they purport to implement.

Second, treaties are, by their very nature, considered superior to executive agreements. Treaties are products of the acts of the Executive and the Senate unlike executive agreements, which are solely executive actions. Because of legislative participation through the Senate, a treaty is regarded as being on the same level as a statute. If there is an irreconcilable conflict, a later law or treaty takes precedence over one that is prior. An executive agreement is treated differently. Executive agreements that are inconsistent with either a law or a treaty are considered ineffective. Both types of international agreement are nevertheless subject to the supremacy of the Constitution.[33] (Emphasis supplied, citations omitted)

Subsequently, the Decision goes to great lengths to illustrate the source of EDCA's validity, in that as an executive agreement it fell within the parameters of the VFA and MDT, and seamlessly merged with the whole web of Philippine law. We need not restate the arguments here. It suffices to state that this Court remains unconvinced that EDCA deserves treaty status under the law.

On EDCA as basing agreement

Petitioners claim that the Decision did not consider the similarity of EDCA to the previous Military Bases Agreement (MBA) as grounds to declare it unconstitutional.[34]

Firstly, the Court has discussed this issue in length and there is no need to rehash the analysis leading towards the conclusion that EDCA is different from the MBA or any basing agreement for that matter.

Secondly, the new issues raised by petitioners are not weighty enough to overturn the legal distinction between EDCA and the MBA.

In disagreeing with the Court in respect of the MBA's jurisdictional provisions, petitioners cite an exchange of notes categorized as an "amendment" to the MBA, as if to say it operated as a new treaty and should be read into the MBA.[35]

This misleadingly equates an exchange of notes with an amendatory treaty. Diplomatic exchanges of notes are not treaties but rather formal communication tools on routine agreements, akin to private law contracts, for the executive branch.[36] This cannot truly amend or change the terms of the treaty,[37] but merely serve as private contracts between the executive branches of government. They cannot ipso facto amend treaty obligations between States, but may be treaty-authorized or treaty-implementing.[38]

Hence, it is correct to state that the MBA as the treaty did not give the Philippines jurisdiction over the bases because its provisions on U.S. jurisdiction were explicit. What the exchange of notes did provide was effectively a contractual waiver of the jurisdictional rights granted to the U.S. under the MBA, but did not amend the treaty itself.

Petitioners reassert that EDCA provisions on operational control, access to Agreed Locations, various rights and authorities granted to the US "ensures, establishes, and replicates what MBA had provided." [39] However, as thoroughly and individually discussed in *Saguisag, et. al.*, the significant differences taken as a whole result in a very different instrument, such that EDCA has not re-introduced the military bases so contemplated under Article XVIII Section 25 of the Constitution.[40]

On policy matters

Petitioners have littered their motion with alleged facts on U.S. practices, ineffective provisions, or even absent provisions to bolster their position that EDCA is invalid.[41] In this way, petitioners essentially ask this Court to

replace the prerogative of the political branches and rescind the EDCA because it not a good deal for the Philippines. Unfortunately, the Court's only concern is the legality of EDCA and not its wisdom or folly. Their remedy clearly belongs to the executive or legislative branches of government.

EPILOGUE

While this Motion for Reconsideration was pending resolution, the United Nations Permanent Court of Arbitration tribunal constituted under the Convention on the Law of the Sea (UNCLOS) in Republic of the Philippines v. People's Republic of China released its monumental decision on the afternoon of 12 July 2016.[42] The findings and declarations in this decision contextualizes the security requirements of the Philippines, as they indicate an alarming degree of international law violations committed against the Philippines' sovereign rights over its exclusive economic zone (EEZ).

Firstly, the tribunal found China's claimed nine-dash line, which included sovereign claims over most of the West Philippine, invalid under the UNCLOS for exceeding the limits of China's maritime zones granted under the convention.[43]

Secondly, the tribunal found that the maritime features within the West Philippine Sea/South China Sea that China had been using as basis to claim sovereign rights within the Philippines' EEZ were not entitled to independent maritime zones.[44]

Thirdly, the tribunal found that the actions of China within the EEZ of the Philippines, namely; forcing a Philippine vessel to cease-and-desist from survey operations,[45] the promulgation of a fishing moratorium in 2012,[46] the failure to exercise due diligence in preventing Chinese fishing vessels from fishing in the Philippines' EEZ without complying with Philippine regulations,[47] the failure to prevent Chinese fishing vessels from harvesting endangered species,[48] the prevention of Filipino fishermen from fishing in traditional fishing grounds in Scarborough Shoal,[49] and the island-building operations in various reefs, all violate its obligations to respect the rights of the Philippines over its EEZ.[50]

Fourthly, the tribunal rejected Chinese claims of sovereignty over features within the Philippine's EEZ,[51] and found that its construction of installations and structures, and later on the creation of an artificial island, violated its international obligations.[52]

Fifthly, the tribunal found that the behaviour of Chinese law enforcement vessels breached safe navigation provisions of the UNCLOS in respect of near-collision instances within Scarborough Shoal.[53]

Finally, the tribunal found that since the arbitration was initiated in 2013, China has aggravated the dispute by building a large artificial island on a low-tide elevation located in the EEZ of the Philippines aggravated the Parties' dispute concerning the protection and preservation of the marine environment at Mischief Reef by inflicting permanent, irreparable harm to the coral reef habitat of that feature, extended the dispute concerning the protection and preservation of the marine environment by commencing large-scale island-building and construction works at Cuarteron Reef, Fiery Cross Reef, Gaven Reef (Norths Johnson Reef, Hughes Reef, and Subi Reef, aggravated the dispute concerning the status of maritime features in the Spratly Islands and their capacity to generate entitlements to maritime zones by permanently destroying evidence of the natural condition of Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, and Subi Reef.[54]

Taken as a whole, the arbitral tribunal has painted a harrowing picture of a major world power unlawfully imposing its might against the Philippines, There are clear indications that these violations of the Philippines' sovereign rights over its EEZ are continuing. The Philippine state is constitutionally-bound to defend its

sovereignty, and must thus prepare militarily.

No less than the 1987 Constitution demands that the "State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens." [55]

No less than the 1987 Constitution states that the principal role of the military under the President as commander-in-chief shall be as protector of the people and the State to secure the sovereignty of the State and the integrity of the national territory. [56]

To recall, the Philippines and the U.S. entered into the MDT in 1951 [57] with two things in mind, first, it allowed for mutual assistance in maintaining and developing their individual and collective capacities to resist an armed attack; [58] and second, it provided for their mutual self-defense in the event of an armed attack against the territory of either party. [59] The treaty was premised on their recognition that an armed attack on either of them would equally be a threat to the security of the other. [60]

The EDCA embodies this very purpose. It puts into greater effect a treaty entered into more than 50 years ago in order to safeguard the sovereignty of the Philippines, and cement the military friendship of the U.S. and Philippines that has thrived for decades through multiple presidents and multiple treaties. While it is a fact that our country is now independent, and that the 1987 Constitution requires Senate consent for foreign military bases, troops, and facilities, the EDCA as envisioned by the executive and as formulated falls within the legal regime of the MDT and the VFA.

In the context of recent developments, the President is bound to defend the EEZ of the Philippines and ensure its vast maritime wealth for the exclusive enjoyment of Filipinos. In this light, he is obligated to equip himself with all resources within his power to command. With the MDT and VFA as a blueprint and guide, EDCA strengthens the Armed Forces of the Philippines and through them, the President's ability to respond to any potential military crisis with sufficient haste and greater strength.

The Republic of Indonesia is strengthening its military presence and defences in the South China Sea. [61] Vietnam has lent its voice in support of the settlement of disputes by peaceful means [62] but still strongly asserts its sovereignty over the Paracel islands against China. [63] The international community has given its voice in support of the tribunal's decision in the UNCLOS arbitration. [64]

Despite all this, China has rejected the ruling. [65] Its ships have continued to drive off Filipino fishermen from areas within the Philippines' EEZ. [66] Its military officials have promised to continue its artificial island-building in the contested areas despite the ruling against these activities. [67]

In this light, the Philippines must continue to ensure its ability to prevent any military aggression that violates its sovereign rights. Whether the threat is internal or external is a matter for the proper authorities to decide. President Rodrigo Roa Duterte has declared, in his inaugural speech, that the threats pervading society are many: corruption, crime, drugs, and the breakdown of law and order. [68] He has stated that the Republic of the Philippines will honor treaties and international obligations. [69] He has also openly supported EDCA's continuation. [70]

Thus, we find no reason for EDCA to be declared unconstitutional. It fully conforms to the Philippines' legal regime through the MDT and VFA. It also fully conforms to the government's continued policy to enhance our military capability in the face of various military and humanitarian issues that may arise. This Motion for Reconsideration has not raised any additional legal arguments that warrant revisiting the Decision.

WHEREFORE, we hereby DENY the Motion for Reconsideration.

SO ORDERED.

Velasco, J., Bersamin, Del Castillo, Perez Mendoza, and Reyes, JJ., concur.

Carpio, J., Ireiterate my Separate Concurring Opinion.

Leonardo-De Castro, J., Please see Dissenting Opinion.

Brion, J., See Dissenting Opinion.

Peralta, J., I join the opinion of J. Carpio.

Perlas-Bernabe, J., Please see Dissenting Opinion.

Leonen, J., See Dissenting Opinion.

Jardeleza, J., No part.

Caguioa, J., No part.

NOTICE OF JUDGMENT

Sirs/Mesdames:

Please take notice that on July 26, 2016 a Decision/Resolution, copy attached herewith, was rendered by the Supreme Court in the above-entitled cases, the original of which was received by this Office on August 4, 2016 at 3:00 p.m.

Very truly yours,

(SGD)FELIPA G. BORLONGAN-ANAMA

Clerk of Court

[1] Rene A. V. Saguisag, et al. v. Executive Secretary Paquito N. Ochoa, Jr., et al./Bagong Alyansang Makabayan (Bayan), et al. v. Department of National Defense Secretary Voltaire Gazmin, et al., G.R. No. 212426 & G.R. No. 212444, 12 January 2016 [hereinafter Decision].

[2] Petition of Saguisag et al., rollo (G.R. No. 212426, Vol. I), pp. 3-66; Petition of Bayan et al., rollo (G.R. No. 212444, Vol. I), pp. 3-101.

[3] Decision, p. 116.

[4] Motion for Reconsideration, pp. 5-11.

[5] Id. at 17.

[6] Id. at 18-75.

[7] Id. at 75-81.

[8] Id. at 20.

[9] Republic v. Lacap, G.R. No. 158253, 2 March 2007, 546 PHIL 87-101.

[10] Decision, p. 35.

[11] Green v. Bock Laundry Machine Co., 490 U.S. 504 (109 S.Ct. 1981, 104 L.Ed.2d 557)

[12] JMM Promotions & Management, Inc. v. National Labor Relations Commission, G.R. No. 109835, 22

November 1993.

[13] See discussion of Justice George A. Malcolm in *Government of the Philippine Islands v. Springer*, G.R. No. 26979, 1 April 1927, 50 PHIL 259-348.

[14] Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines, Phil.-U.S., 10 February 1998, TIAS No. 12931 (entered into force 1 June 1999) [hereinafter VFA].

[15] Mutual Defense Treaty between the Republic of the Philippines and the United States of America, 30 August 1951, 177 UNTS 133 (entered into force 27 August 1952).

[16] Motion for Reconsideration, p. 20.

[17] 1987 CONSTITUTION, Article 18, Sec. 25.

[18] *Id.*

[19] Decision, p. 55.

[20] Motion for Reconsideration, p. 30.

[21] *Id.* at 34.

[22] *Id.* at 36.

[23] Decision, p. 66, citing Joint Report of the Committee on Foreign Relations and the Committee on National Defense and Security reproduced in *SENATE OF THE PHILIPPINES, THE VISITING FORCES AGREEMENT: THE SENATE DECISION 206* (1999), at 205-206, 231.

[24] *Lim v. Executive Secretary*, 430 Phil. 555 (2002).

[25] Motion for Reconsideration, p. 35.

[26] VFA, *supra* note 14.

[27] *Id.*

[28] *Lim v. Executive Secretary*, *supra* note 24.

[29] "[A]n advisory opinion of an agency may be stricken down if it deviates from the provision of the statute," *Cemco Holdings, Inc. v. National Life Insurance Co. of the Philippines, Inc.*, G.R. No. 171815, 7 August 2007, 556 PHIL 198-217.

[30] "All cases involving the constitutionality of a treaty, international or executive agreement, or law, which shall be heard by the Supreme Court en banc" 1987 Constitution, Article VIII, Sec. 4(2); "All cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question." 1987 CONSTITUTION Article VIII, Sec. 5(a).

[31] Motion for Reconsideration, pp.38-47.

[32] Decision p. 39-113.

[33] Decision, pp. 45-47.

[34] Motion for Reconsideration, p. 49.

[35] Id. at 49-50.

[36] "An 'exchange of notes' is a record of a routine agreement, that has many similarities with the private law contract. The agreement consists of the exchange of two documents, each of the parties being in the possession of the one signed by the representative of the other. Under the usual procedure, the accepting State repeats the text of the offering State to record its assent. The signatories of the letters may be government Ministers, diplomats or departmental heads. The technique of exchange of notes is frequently resorted to, either because of its speedy procedure, or, sometimes, to avoid the process of legislative approval." Available at <<https://treaties.un.org/Pages/overview.aspx?path=overview/definition/pagelen.xml#exchange>> (last viewed 8 April 2016).

[37] Adolfo v. Court of First Instance of Zambales, G.R. No. L-30650, 31 July 1970.

[38] Bayan Muna v. Romulo, 656 Phil. 246 (2011).

[39] Motion for Reconsideration, p. 53.

[40] Decision, pp. 75-113

[41] U.S. practice on contractors, dispute resolution, jurisdiction, taxation, nuclear weapons, and the U.S. stance on China are just some of these issues raised by petitioners at the policy level.

[42] The Republic of the Philippines v. The People's Republic of China, Case No. 2013-19 (Perm Ct. Arb.), award available at <http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf> (last visited 22 July 2016).

[43] Id. at 111-112 (¶261-262).

[44] Id. at 174; 254 (¶626).

[45] Id. at 282 (¶708).

[46] Id. at 284 (¶712).

[47] Id. at 296 (¶753).

[48] Id. at 397 (¶992).

[49] Id. at 318 (¶814).

[50] Id. at 397 (¶993).

[51] Id. at 403 (¶1006).

[52] Id. at 414-415 (¶1036-1037); 415 (¶1043).

[53] Id. at 435 (¶1109).

[54] Id. at 464 (¶1181).

[55] 1987 CONSTITUTION, Article XII, Sec. 2.

[56] 1987 CONSTITUTION, Article II, Sec. 3.

[57] Mutual Defense Treaty between the Republic of the Philippines and the United States of America, 30 Aug. 1951, 177 UNTS 133 (entered into force 27 Aug. 1952).

[58] 1951 MDT, Art. II.

[59] 1951 MDT, Arts. IV-V.

[60] COLONEL PATERNO C. PADUA, REPUBLIC OF THE PHILIPPINES UNITED STATES DEFENSE COOPERATION: OPPORTUNITIES AND CHALLENGES, A FILIPINO PERSPECTIVE 6 (2010).

[61] "Indonesia Will Defend South China Sea Territory With F-16 Fighter Jets" available at <<http://www.bloomberg.com/news/articles/2016-03-31/indonesia-to-deploy-f-16s-to-guard-its-south-china-sea-territory>> (last visited 22 July 2016); See also "Indonesia looks to boost defenses around Natuna Islands in South China Sea" available at <<http://www.japantimes.co.jp/news/2015/12/16/asia-pacific/politics-diplomacy-asia-pacific/indonesia-looks-boost-defenses-around-natuna-islands-south-china-sea/#.V5GJrNJ97IV>> (last visited 22 July 2016).

[62] "World leaders react to South China Sea ruling" available at <<http://www.philstar.com/headlines/2016/07/13/1602416/world-leaders-react-south-china-sea-ruling>> (last visited 22 July 2016).

[63] "Why is the South China Sea contentious?" available at <<http://www.bbc.com/news/world-asia-pacific-13748349>> (last visited 22 July 2016).

[64] "World leaders react to South China Sea ruling" available at <<http://www.philstar.com/headlines/2016/07/13/1602416/world-leaders-react-south-china-sea-ruling>> (last visited 22 July 2016).

[65] "Beijing rejects tribunal's ruling in South China Sea case" available at <<https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china>> (last visited 22 July 2016); "China 'does not accept or recognize' tribunal's South China Sea ruling" available at <<http://cnnphilippines.com/world/2016/07/12/china-reaction-tribunal-ruling.html>> (last visited 22 July 2016).

[66] "Filipino fishermen still barred from Scarborough Shoal" available at <<http://cnnphilippines.com/news/2016/07/15/scarborough-shoal-filipino-fishermen-chinese-coast-guard.html>> (last visited 22 July 2016).

[67] "PLAN'S Wu to CNO Richardson: Beijing Won't Stop South China Sea Island Building" available at <<https://news.usni.org/2016/07/18/plans-wu-cno-richardson-beijing-wont-stop-south-china-sea-island-building>> (last visited 22 July 2016).

[68] Inaugural address of President Rodrigo Roa Duterte, 30 June 2016, available at <<http://www.gov.ph/2016/06/30/inaugural-address-of-president-rodrigo-roa-duterte-june-30-2016/>> (last visited 22 July 2016).

[69] Inaugural address of President Rodrigo Roa Duterte, 30 June 2016, available at <<http://www.gov.ph/2016/06/30/inaugural-address-of-president-rodrigo-roa-duterte-june-30-2016/>> (last visited 22 July 2016).

[70] "Duterte in favor of continuing EDCA" available at <<http://www.philstar.com/headlines/2016/05/26/1587112/duterte-favor-continuing-edca>> (last visited 22 July 2016).

DISSENTING OPINION

LEONARDO-DE CASTRO, J.:

I hereby reiterate my dissent. The implementation of the Enhanced Defense Cooperation Agreement (EDCA) without Senate concurrence will be in contravention of the clear and unequivocal mandatory provision of Section 25, Article XVIII of the Constitution.

Senate Resolution No. 105 dated November 10, 2015, stating the strong sense of the Senate that "[t]he RP-US Treaty requires Senate concurrence in order to be valid and effective," is in accord with the aforesaid constitutional provision.

The majority opinion penned by the Honorable Chief Justice Maria Lourdes P. A. Sereno makes mention of the recent favorable ruling of the United Nations Permanent Court of Arbitration concerning the respective territorial claims of the Philippines and the People's Republic of China over portions of the West Philippine Sea. Thus, the majority stresses that the President of the Philippines need to equip himself with all resources within his power to command in order to defend our preferent rights over our exclusive economic zone. Chief Justice Sereno argues that there is no reason to declare the EDCA unconstitutional given that it "strengthens the Armed Forces of the Philippines and through them, the President's ability to respond to any potential military crisis with sufficient haste and greater strength." The above assertions are, however, irrelevant in determining the issue of the constitutionality of treating the EDCA as a binding international agreement without Senate concurrence.

The wisdom and political reasons behind the EDCA are not in issue in this case, but rather the non-observance of the mandatory processes dictated by the Constitution regarding the allowance of foreign military bases, troops, or facilities in the Philippines. Section 25, Article XVIII of the Constitution dictates that agreements such as the EDCA must be submitted to the Senate for its concurrence and, if Congress so requires, to the Filipino people for ratification via a national referendum. These constitutionally ordained processes would save from constitutional infirmity the presence of foreign military bases, troops, or facilities in the Philippines.

Section 25, Article XVIII of the Constitution reads:

ARTICLE XVIII TRANSITORY PROVISIONS

SEC. 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.

As held in *BAYAN (Bagong Alyansang Makabayan) v. Zamora*,^[1] Section 25, Article XVIII covers three different situations: the presence within the Philippines of (a) foreign military bases, or (b) foreign military troops, or (c) foreign military facilities, such that a treaty that involves any of these three, standing alone, falls within the coverage of the said provision. The deliberations of the 1986 Constitutional Commission bear out this interpretation, to wit:

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 requirement 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.[2] (Citation omitted.)

On March 14, 1947, the Philippines and the United States entered into a Military Bases Agreement (MBA) which granted to the United States government the right to retain the use of the bases listed in the Annexes of said agreement. The term of the MBA was set to expire in 1991 in accordance with the Ramos-Rusk Agreement.

Subsequently, on August 30, 1951, the Philippines and the United States entered into the Mutual Defense Treaty (MDT) in order to actualize their desire "to declare publicly and formally their sense of unity and their common determination to defend themselves against external armed attack"[3] and "further 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." [4] It is noteworthy that the MDT provides as follows:

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 process.

In 1986, in view of the impending expiration of the MBA in 1991, the members of the Constitutional Commission deliberated on the issue of the continued presence of foreign military bases in the country in this wise:

FR. BERNAS. My question is: Is it the position of the committee that the presence of foreign military bases in the country under any circumstances is a derogation of national sovereignty?

MR. AZCUNA. It is difficult to imagine a situation based on existing facts where it would not. However, in the abstract, it is possible that it would not be that much of a derogation. I have in mind, Madam President, the argument that has been presented. Is that the reason why there are U.S. bases in England, in Spain and in Turkey? And it is not being claimed that their sovereignty is being derogated. Our situation is different from theirs because we did not lease or rent these bases to the U.S. The U.S. retained them from us as a colonial power.

FR. BERNAS. So, the second sentence, Madam President, has specific reference to what obtains now.

MR. AZCUNA. Yes. It is really determined by the present situation.

FR. BERNAS. Does the first sentence tolerate a situation radically different from what obtains now? In other words, if we understand sovereignty as auto-limitation, as a people's power to give up certain goods in order to obtain something which may be more valuable, would it be possible under this first sentence for the nation to negotiate some kind of a treaty agreement that would not derogate against sovereignty?

MR. AZCUNA. Yes. For example, Madam President, if it is negotiated on a basis of true sovereign equality, such as a mutual ASEAN defense agreement wherein an ASEAN force is created and this ASEAN force is a foreign military force and may have a basis in the member ASEAN countries, this kind of a situation, I think,

would not derogate from sovereignty.

MR. NOLLEDO. Madam President, may I be permitted to make a comment on that beautiful question. I think there will be no derogation of sovereignty if the existence of the military bases as stated by Commissioner Azcuna is on the basis of a treaty which was not only ratified by the appropriate body, like the Congress, but also by the people.

I would like also to refer to the situation in Turkey where the Turkish government has control over the bases in Turkey, where the jurisdiction of Turkey is not impaired in anyway, and Turkey retains the right to terminate the treaty under circumstances determined by the host government. I think under such circumstances, the existence of the military bases may not be considered a derogation of sovereignty, Madam President.

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.[5] (Emphasis supplied.)

Section 25, Article XVIII came into effect upon the expiration of the MBA in 1991. Thereafter, foreign military bases, troops, or facilities were no longer allowed in the Philippines, unless the three requirements set forth in Section 25, Article XVIII are met.

On February 10, 1998, the Philippines and the United States entered into the Visiting Forces Agreement (VFA). The scope and purpose of the VFA can be gleaned from its Preamble, which reads in part:

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[.] (Emphasis supplied).

Like the MBA, the VFA, which reaffirmed the parties' obligations under the MDT, was still submitted to and was concurred in by the Philippine Senate on May 27, 1999.[6]

Thereafter, on April 28, 2014, the Governments of the Philippines and the United States entered into the assailed EDCA.

The EDCA

Under the EDCA, the Philippines shall provide the United States forces access and use of portions of Philippine territory called "Agreed Locations" without any obligation on its part to pay any rent or similar costs.[7] Therein, the United States may undertake the following types of activities: security cooperation exercises; joint and combined training activities; humanitarian and disaster relief activities; and such other activities that as may be agreed upon by the Parties.[8] Article 111(1) of the EDCA further states in detail the activities that the United States may conduct inside the 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 aircrafts operated by or for United States forces may conduct the following activities with respect to Agreed Locations: training; transit; support and related activities; refueling of aircraft; bunkering of vessels; temporary maintenance of vehicles, vessels, and aircraft; temporary accommodation of personnel; communications; prepositioning of equipment, supplies, and materiel; deploying forces and materiel; and such other activities as the Parties may agree. (Emphasis supplied.)

The United States is granted operational control of Agreed Locations to do construction activities, make alterations or improvements of the Agreed Locations.[9] Permanent buildings constructed by the United States forces become the property of the Philippines, once constructed, but shall be used by the United States forces until no longer required.[10] The United States forces are authorized to exercise all rights and authorities within the Agreed Locations that are necessary for their operational control or defense, including taking appropriate measures to protect United States forces and United States contractors.[11]

The United States is further authorized to preposition and store defense equipment, supplies, and materiel ("prepositioned materiel"), including but not limited to, humanitarian assistance and disaster relief equipment, supplies and material, at Agreed Locations.[12]

Considering the presence of United States armed forces: military personnel, vehicles, vessels, and aircrafts and other defensive equipment, supplies, and materiel in the Philippines, for obvious military purposes and with the obvious intention of assigning or stationing them within the Agreed Locations, said Agreed Locations are clearly overseas military bases of the United States with the Philippines as its host country.

In fact, the provisions of the EDCA bear striking similarities with the provisions of the MBA:

Military Bases Agreement (March 14, 1947)

Enhanced Defense Cooperation Agreement (April 28, 2014)

Article III: 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.

Article III: AGREED LOCATIONS

4. The Philippines hereby grants 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. xxx.

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 xxx.

Article III: DESCRIPTION OF RIGHTS

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;

Article III: AGREED LOCATIONS

4. The Philippines hereby grants 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. xxx.

Article III: DESCRIPTION OF RIGHTS

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

xxxx

(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;

Article III: AGREED LOCATIONS

5. The Philippine Designated Authority and its authorized representative shall have access to the entire area of the Agreed Locations. Such access shall be provided promptly consistent with operational safety and security requirements in accordance with agreed procedures developed by the Parties.

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.

Article III: DESCRIPTION OF RIGHTS

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

xxxx

(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.

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 and for United States forces may conduct the following activities with respect to Agreed Locations: training; transit; support and related activities; refueling of aircraft; bunkering of vessels; temporary maintenance of vehicles, vessels, and aircraft; temporary accommodation of personnel; communications; prepositioning of equipment, supplies, and materiel; deploying forces and materiel; and such other activities as the Parties may agree.

Article IV: EQUIPMENT, SUPPLIES, AND MATERIEL

1. The Philippines hereby authorizes the United States forces, xxx to preposition and store defense equipment, supplies, and materiel ("prepositioned materiel") xxx.

xxxx

3. The prepositioned materiel of the United States forces shall be for the exclusive use of the United States forces, and full title to all such equipment, supplies, and materiel remains with the United States. United States forces shall have control over the access to and disposition of such prepositioned materiel and shall have the unencumbered right to remove such prepositioned materiel at any time from the territory of the Philippines. (Emphases supplied.)

The provisions of the EDCA indubitably show that it is an international agreement that allows the presence in the Philippines of foreign military bases, troops, or facilities, and thus require that the three requisites under Section 25, Article XVIII be complied with. The EDCA must be submitted to the Senate for concurrence; otherwise, the same is rendered ineffective.

In *BAYAN v. Zamora*,^[13] the Court rejected the argument that Section 25, Article XVIII does not apply to mere transient agreements such as the VFA, holding that:

[I]t 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. (Emphasis supplied.)

The VFA, which allows only the temporary visits of the United States forces in the Philippines as it was extensively pointed out by the respondents in the above-cited *BAYAN* case, was considered by the Court to require Senate concurrence, notwithstanding its avowed purpose of implementing the MDT. With more reason, therefore, that the practically permanent stay of United States bases, troops and facilities in the Philippines for the duration of the EDCA requires the same Senate concurrence.

The Court discussed in *BAYAN* that:

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.

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.[14]

The ponencia, however, still insists that the EDCA is an executive agreement that merely implements the MDT and the VFA such that it was well within the bounds of the obligations imposed by the said treaties. Hence, the EDCA need not comply with the requirements under Section 25, Article XVIII.

I reiterate my disagreement to this position. The EDCA goes far beyond the terms of the MDT and the VFA.

The EDCA is an entirely new agreement as it creates new obligations on the part of the Philippines and confers unprecedented rights and concessions in favor of the United States.

With respect to the MDT, said treaty did not contain any provision regarding the presence in Philippine territory - whether permanent or temporary - of foreign military bases, troops, or facilities. There is nothing in the MDT that makes any reference or cites any connection to the basing agreement which was then already expressly covered by a prior treaty, the MBA.

Thus, the presence of foreign military bases, troops, or facilities provided under the EDCA cannot be traced to the MDT.

Moreover, Article IV of the MDT states that the individual parties to the treaty "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 process." [15] Therefore, the MDT expressly recognizes the need for each party to comply with their respective constitutional processes in carrying out their obligations under the MDT.

If the MDT were to be implemented through the EDCA as the ponencia suggests, Philippines must adhere to the mandate of Section 25, Article XVIII.

In relation to the VFA, the EDCA transcends in scope and substance the provisions of the said treaty. The VFA is confined to the "visit" to the Republic of the Philippines "from time to time of elements of the United States armed forces" and for that purpose the parties to the VFA saw the "desirability of defining the treatment of United

States personnel visiting the Republic of the Philippines."[16]

In particular, the VFA defines the treatment of "United States personnel" temporarily in the Philippines in connection with the activities approved by the Philippine government[17] as follows:

1)

The admission of United States personnel and their departure from Philippines in connection with activities covered by the agreement, and the grant of exemption to United States personnel from passport and visa regulations upon entering and departing from the Philippines;[18]

2)

The validity of the driver's license or permit issued by the United States, thus giving United States personnel the authority to operate military or official vehicles within the Philippines;[19]

3)

The rights of the Philippines and the United States in matters of criminal jurisdiction over United States personnel who commit offenses within the Philippine territory and punishable under Philippine laws;[20]

4)

The importation and exportation of equipment, materials, supplies and other property, by United States personnel free from Philippine duties, taxes and similar charges;[21]

5)

The movement of United States aircrafts, vessels and vehicles within Philippine territory;[22] and

6)

The duration and termination of the agreement.[23]

In contrast, the EDCA specifically deals with the following matters, which go beyond the contemplation of temporary visits of United States personnel under the VFA:

1)

The authority of the United States forces to access facilities and areas, termed as "Agreed Locations," and the activities that may be allowed therein;[24]

2)

The grant to the United States of operational control of Agreed Locations to do construction activities and make alterations or improvements thereon;[25]

3)

The conditional access to the Agreed Locations of the Philippine Designated Authority and its authorized representative;[26]

4)

The storage and prepositioning of defense equipment, supplies and materiel, as well as the unimpeded access granted to the United States contractors to the Agreed Locations in matters regarding the prepositioning, storage, delivery, management, inspection, use, maintenance and removal of the defense equipment, supplies, and materiel; and the prohibition that the preposition materiel shall not include nuclear weapons;[27]

5)

a) The ownership of the Agreed Locations by the Philippines, b) the ownership of the equipment, materiel, supplies, relocatable structures and other moveable property imported or acquired by the United States, c) the ownership and use of the buildings, non- relocatable structures, and assemblies affixed to the land inside the Agreed Locations;[28]

6)

The cooperation between the parties in taking measures to ensure protection, safety and security of United States forces, contractors and information in Philippine territory; the primary responsibility of the Philippines to secure the Agreed Locations, and the right of the United States to exercise all rights and authorities within the Agreed Locations that are necessary for their operational control or defense;[29]

7)

The use of water, electricity and other public utilities;[30]

8)

The use of the radio spectrum in connection with the operation of a telecommunications system by the United States;[31]

9)

The authority granted to the of the United States to contract for any materiel, supplies, equipment, and services (including construction) to be furnished or undertaken inside Philippine territory;[32]

10)

The protection of the environment and human health and safety, and the observance of Philippine laws on environment and health, and the prohibition against the intentional release of hazardous waste by the United States and the containment of thereof in case a spill occurs;[33]

11)

The need to execute implementing arrangements to address details concerning the presence of United States forces at the Agreed Locations and the functional relations between the United States forces and the AFP with respect to the Agreed Locations;[34] and

12)

The resolution of disputes arising from the EDCA through consultation between the parties.[35]

Clearly, the provisions of the EDCA cannot be justified as mere implementation of the VFA.

The EDCA permits the construction of permanent buildings and the improvement of existing ones in the Agreed Locations, which are to be used indefinitely during the agreed ten (10) year period, which is renewable automatically unless terminated by either party by giving one (1) year's written notice through diplomatic channels of its intention to terminate the agreement. This further evinces the permanence of the envisaged stay of United States forces and contractors. This is a far cry from the temporary visits of United States military forces contemplated in the VFA.

The EDCA allows United States forces and United States contractors to stay in the Agreed Locations to undertake military activities within the duration of the EDCA, as above mentioned.

The ponencia, however, interpreted the phrase "allowed in" in Section 25, Article XVIII as referring to "initial

entry," explaining that the entry of the United States bases, troops and facilities under the EDCA is already allowed in view of the "initial entry" of United States troops under the VFA.

Said position glaringly ignores the fact that the entry of visiting foreign military troops must be in accordance with the limited purpose of the VFA and the character and terms by which the presence of such troops is allowed. The VFA is restricted to "temporary visits" of United States military and civilian personnel to our country. The EDCA cannot include purposes, which are alien or not germane to the purposes of the VFA. The VFA and the EDCA have distinct and separate purposes. The presence or establishment of foreign military bases or foreign military facilities, apart from the presence of foreign military troops in the country, is treated separately under Section 25, Article XVIII. In other words, the allowance of the temporary presence of United States military troops under the VFA cannot by any stretch of the imagination include permission to establish United States military bases or facilities or the indefinite maintenance of United States troops in the so-called Agreed Locations under the EDCA. The more onerous obligations of the Philippines and the far-reaching privileges accorded the United States under the EDCA cannot be justified as nor deemed to be mere implementing arrangements of the VFA.

The settled rule is that the plain, clear and unambiguous language of the Constitution should be construed as such and should not be given a construction that changes its meaning.[36] As held in *Chavez v. Judicial and Bar Council*[37]:

The language used in the Constitution must be taken to have been deliberately chosen for a definite purpose. Every word employed in the Constitution must be interpreted to exude its deliberate intent which must be maintained inviolate against disobedience and defiance. What the Constitution clearly says, according to its text, compels acceptance and bars modification even by the branch tasked to interpret it.

With due respect, the Honorable Chief Justice Maria Lourdes P. A. Sereno's theory of "initial entry" mentioned above ventured into a construction of the provisions of Section 25, Article XVIII of the Constitution which is patently contrary to the plain language and meaning of the said constitutional provision.

All told, the EDCA cannot be treated as a mere implementing agreement of the VFA and the MDT. As the EDCA is an entirely new international agreement that allows the presence of foreign military bases, troops and facilities in the Philippines, the three requisites under Section 25, Article XVIII of the Constitution must be strictly complied with. Unless the EDCA is submitted to the Senate for its concurrence, its implementation will run afoul of the clear constitutional mandate of Section 25, Article XVIII of the Constitution.

Accordingly, I vote to grant the motions for reconsideration.

[1] 396 Phil. 623, 653 (2000).

[2] *Id.* at 650-654.

[3] Mutual Defense Treaty, Preamble, paragraph 3.

[4] *Id.*, Preamble, paragraph 4.

[5] IV RECORD OF THE CONSTITUTIONAL COMMISSION, pp. 661-662.

[6] Senate Resolution No. 18; *BAYAN (Bagong Alyansang Makabayan) v. Zamora*, *supra* note 1 at 654-655.

[7] Enhanced Defense Cooperation Agreement, Article III (3).

[8] *Id.*, Article I (3).

- [9] Id., Article III (4).
 - [10] Id., Article V (4).
 - [11] Id., Article VI (3).
 - [12] Id., Article IV (1).
 - [13] Supra note 1 at 653.
 - [14] Id. at 654-655.
 - [15] Mutual Defense Treaty, Article IV, first paragraph.
 - [16] Visiting Forces Agreement, Third and Fifth preambulatory clauses.
 - [17] Id., Article I.
 - [18] Id., Article III.
 - [19] Id., Article IV.
 - [20] Id., Article V.
 - [21] Id., Article VII.
 - [22] Id., Article VIII.
 - [23] Id., Article IX.
 - [24] Enhanced Defense Cooperation Agreement, Article II.
 - [25] Id., Article III (4).
 - [26] Id., Article III (5).
 - [27] Id., Article IV.
 - [28] Id., Article V.
 - [29] Id., Article VI.
 - [30] Id., Article VII (1).
 - [31] Id., Article VII (2).
 - [32] Id., Article VIII.
 - [33] Id., Article IX.
 - [34] Id., Article X.
 - [35] Id., Article XI.
 - [36] Soriano III v. Lista, 447 Phil. 566, 570 (2003).
 - [37] 709 Phil. 478,487-488 (2013).
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DISSENTING OPINION

BRION, J.:

I.

Prefatory Statement & Position

I write this Dissenting Opinion to reiterate my position that the Executive Department under President Benigno Aquino III disregarded the clear commands of the Constitution and the required constitutional process when it implemented the Enhanced Defense Cooperation Agreement (EDCA) as an Executive Agreement. I thus vote for the grant of the motions for reconsideration.

The EDCA, an international agreement between the Philippines and the United States, should be covered by a treaty that, under the Constitution, requires concurrence by the Senate. The agreement should be made through a treaty rather than an executive agreement because it embodies new arrangements and new resulting obligations that are not present in the existing treaties. In its present form, the agreement is invalid and cannot thus be effective.

I arrived at this conclusion after considering Article VII, Section 21 and Article XVIII, Section 25 of the 1987 Constitution.

Article VII, Section 21 renders any international agreement invalid and ineffective in the Philippines unless it has been concurred in by the Senate. Article XVII, Section 25, on the other hand, specifies that agreements allowing the entry of foreign military bases, troops, or facilities into the Philippines shall be in the form of a treaty and, thus, obligatorily be submitted to the Senate for concurrence.

I submit these considerations and conclusions to the Court with no intent to object to the entry of foreign military bases, troops, or facilities in the Philippines if such entry would truly reflect the will of the Filipino people expressed through the Senate of the Philippines.

At this point in time when Philippine territorial sovereignty is being violated, we cannot simply turn our backs on foreign assistance, such as that of the EDCA, that is made available to the country. But because of the implications of the EDCA for the Filipino people (as it may unnecessarily expose them to the dangers inherent in living in a country that serves as an implementing location of the U.S. Pivot to Asia strategy, as discussed below), the people - even if only through the Senate - should properly be informed and should give their consent. This is what our Constitution provides in allowing foreign bases or their equivalent into the country, and this Court - with its sworn duty as guardian of the Constitution - should protect both the Constitution and its safeguards, as well as the people in their right to be informed and to be consulted.

To be very clear, this Dissent relates solely to the Executive and this Court's acts of disregarding the clear terms prescribed and the process required by the Constitution. Why the Court so acted despite the clear terms of the cited constitutional provisions, only the majority of this Court can fully explain. The undeniable reality, though, is that the ponencia justified its conclusions by inordinately widening the scope of the presidential foreign affairs powers and misapplying the constitutional provisions mentioned above. Whichever way the matter is viewed, the result is the same - a clear violation of the 1987 Constitution.

I find it particularly timely to stress the constitutional violations at this point when talks of constitutional amendments again resound in the air; it would be useless to go through an amendatory exercise if we do not accord full respect to the Constitution anyway, or if our obedience to the Constitution depends on political

considerations and reasons extraneous to the Constitution.

I stress, too, that as Members of the Highest Court of the land, we owe utmost fidelity to our country's fundamental law, and have the duty to ensure its proper enforcement. The President, similarly burdened with the same duty, must owe the Constitution the same fidelity. The oaths we respectively took impose this obligation upon all of us. We must thus act on the present motions for reconsideration by re-examining the challenged ruling and by giving a more focused analysis on the issues based on what the Constitution truly requires.

It is well to recognize that part of the Court's compliance with its constitutional duty is to accord due deference to the President's authority and prerogatives in foreign affairs; that we should do so, fully aware that the President's discretion (or for that matter, the discretion exercised by all officials) in a constitutional and republican government is - by constitutional design - purposely limited. This case, in particular, presents a situation where foreign affairs powers that essentially belong to the President are shared with the Senate of the Philippines.[1]

All these form part of my original position that the President's use of an Executive Agreement as the medium to implement the EDCA does not comply with Article XVII, Section 21 and Article XVIII, Section 25, of the 1987 Constitution. As a consequence, the Executive Agreement that was signed cannot be "valid and effective" for being contrary to the Constitution; it continues to be so unless the EDCA is submitted to and concurred in by the Senate.

This position, in my view, will not pose any danger at all to the country under the present circumstances of international tension and on-going diplomatic interactions as my objection solely relates to the process. It is within the power of this Court to suspend the effectiveness of the ruling recommended by this Dissent, to allow the Executive and the Senate time to comply with the required constitutional process. After the EDCA's submission to the Senate within the time frame recommended by this Dissent and thereafter the Senate's concurrence, the EDCA can then be fully implemented as a treaty.

A. The Present Motions for Reconsideration

The present Motions for Reconsideration ask the Court to reconsider its previous ruling in *Saguisag v. Executive Secretary* (dated January 12, 2016) that recognized the EDCA, as written and signed, to be a validly entered Executive Agreement, thereby bypassing the need for the Senate concurrence that the Constitution requires.

The ponencia dismisses these motions, noting that they failed to present arguments sufficient to justify the reversal of the Court's previous Decision. In so ruling, the ponencia relies on the premise that the President may enter into an executive agreement allowing the entry of foreign military bases, troops, or facilities if:

- (1) it is not the instrument that allows the initial presence of foreign military bases, troops, or facilities;[2] or
- (2) it merely implements existing laws or treaties.[3]

The EDCA, according to the ponencia, merely implements the country's existing treaties with the U.S., specifically the 1998 Visiting Forces Agreement (VFA) and the 1951 Mutual Defense Treaty (MDT).[4]

With due respect, these positions present an overly simplistic interpretation of Article XVIII, Section 25 of the Constitution. A deeper consideration of this provision demonstrates the need for approaches more nuanced than those that the ponencia now takes.

For one, the ponencia should have appreciated that Article XVIII, Section 25 does not exist in a vacuum. As with any constitutional provision, it must be read, interpreted, and applied in harmony with the rest of the Constitution[5] in order not to negate the effectiveness of other provisions and of the key constitutional principles that underlie the Constitution. The affected underlying principles are the separation of powers and the check and

balance principles.

These nuances, when applied to the present case, lead me to conclude that the EDCA should have been entered into as a treaty that requires Senate concurrence. This deficiency, as I will discuss further, is not irremediable under the terms of this Dissent,

II.

Article VII, Section 21 of the Constitution requires that agreements containing new obligations be in the form of a treaty concurred in by the Senate; this rule should apply to new obligations under Article XVIII, Section 25 on the entry of foreign military bases, troops or facilities.

A. (a) The Ponencia and Verba Legis

The ponencia, in dismissing the petitioners' motions for reconsideration, refuses to accord merit to the petitioners' position that a verba legis approach to Article XVIII, Section 25 requires that every entry of foreign military troops, bases, or facilities should be covered by a treaty.

To the ponencia, the verba legis principle only requires that an international agreement be in the form of a treaty only for the initial entry of foreign military bases, troops and facilities. This, to the ponencia, is the appropriate application of verba legis, as the petitioners' application of the verba legis principle would lead to absurdity.

The ponencia further posits that requiring a treaty for every entry of foreign military troops could lead to the bureaucratic impossibility of negotiating a treaty for every entry of a Head of State's security detail of military officers, for meeting with foreign military officials in the country, and indeed for military exercises such as the Balikatan; all these would occupy much of the official working time of various government agencies.[6]

To support this interpretation, the ponencia also notes that Article XVIII, Section 25 of the 1987 Constitution does not prohibit foreign military bases, troops, or facilities, but merely restricts their entry to the country.[7]

(b) My View of Verba Legis

In contrast with these expressed positions, I hold the view that under the principles of constitutional construction, verba legis (i.e., the use of ordinary meaning or literal interpretation of the language of a provision)[8] is only proper and called for when the statute is clear and unequivocal,[9] not when there are latent ambiguities or obscurity in the provision to be applied.

The Court (through former Chief Justice Enrique Fernando) demonstrated the application of this rule in *J.M. Tuason & Co., Inc. v. Land Tenure Administration* when it said: "We look to the language of the document itself in our search for its meaning. We do not of course stop there, but that is where we begin." [10] Justice Fernando then pointed out that constitutional construction may be reduced to a minimum and the provision should be given its ordinary meaning when the "language employed is not swathed in obscurity." [11]

A plain reading of Section 25, Article XVIII reveals that, on its face, it is far from complete, thus giving rise to the present "coverage" and other directly related issues. In the context of the case before us, it does not expressly state that it should only be at the initial entry (as the ponencia posits) or upon every entry (as the petitioners claim). Section 25 provides:

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.

Note that under these wordings a latent ambiguity exists on what the word "allow" in the phrase "shall not be allowed," covers: does it refer only to the first entry thus permitting all subsequent entries, or is a treaty required for every entry. Also, is the "purpose" of allowing entry relevant in determining the scope of the entries allowed under a treaty? In the context of the present case, the unavoidable question is - is a treaty called for in order to allow entry?

The provision, to be sure, contains no express and specific statement or standard about these details and leaves the fleshing out to interpretation and construction. The ponencia, with its verba legis approach, of course, simply states that treaties - i.e., the 1951 Mutual Defense and the 1998 Visiting Forces Agreement - are in place and, from there, proceeds to conclude that all entries shall be allowed after the first entry under these treaties. In this way, the ponencia gave Article XVIII, Section 25 a simplistic application that misses the provision's wordings and intent.

What the ponencia has not taken into account at all, is the deeper consideration that Section 25 was enacted to strike a balance between preserving the country's territorial sovereignty and recognizing the need for foreign military cooperation. This balance was crafted in response to the country's history and experience with foreign military bases, and its perceived threat to full independence.^[12] Indeed, the country's past experiences with foreign military presence had not been free from pain, but our constitutional framers recognized that there could be instances when foreign military presence would be necessary and thus gave the Constitution a measure of flexibility through Section 25.

To be sure, the requirement that every entry of foreign military bases, troops, or facilities in the Philippines be covered by a treaty does not and cannot achieve this balance. This requirement would unduly clog up government in its foreign and military affairs, and impede (or even block the possibility of) foreign military alliances, perhaps to the point of extreme difficulty in maintaining these ties if they materialize at all. In sum, the process would simply be too paralyzing for the government, and could not have been the interpretation intended by the framers of the Constitution when they drafted Section 25.

At the same time, Article XVIII Section 25 cannot be construed as a blanket authority to allow foreign military presence in the Philippines after the government agrees to its initial entry. Interpreting Article XVIII, Section 25 in this manner would expand Section 25 to areas beyond its intended borders and thereby unduly restrict the constitutionally mandated participation of the Senate in deciding the terms and degree of foreign military presence in the country. This blanket authority would lay open the country and its sovereignty to excessive foreign intrusion without the active consent of the people.

To fully capture and apply the balance envisioned when Article XVIII, Section 25 was drafted, we must look at its interaction with key provisions of the Constitution involving the conduct of international agreements, as well as with the principles of separation of powers and check and balance that underlie our Constitution. These principles are the measures that the Constitution institutionalizes in order to ensure that a balanced and very deliberate governmental approach is taken in protecting the country's sovereignty from foreign intrusion.

I submit, based on these premises, that the ponencia's conclusions disregard at least three vital and important concepts in the country's tripartite system of government under the Constitution:

first, that the President's foremost duty is to preserve and defend the Constitution;

second, that the President in the exercise of his powers cannot disregard the separation of powers and check and balance principles that underlie our system of government under the Constitution; and

third, that the totality of governmental powers involved in entering international agreements, although predominantly executive in character because the President leads the process, still involves shared functions among the three branches of government.

B. The President's role in defending and preserving the Constitution

The supremacy of the Constitution means that in the performance of his duties, the President should always be guided and kept in check by the safeguards crafted by the framers of the Constitution and ratified by the people.

Thus, while due deference and leeway should be given when the President exercises his powers as the commander in chief of the country's armed forces^[13] and as the chief architect of its international affairs,^[14] this deference should never be used to allow him to countermand what the Constitution provides, as the President is himself a creature of the Constitution and his first and foremost task is to preserve and defend it.

No less than the oath of office required of the President before he assumes office (under Article VII, Section 5 of the Constitution) requires him to "faithfully and conscientiously fulfill my duties as President (or Vice-President or Acting President) of the Philippines, preserve and defend its Constitution, execute its laws xxx."

Notably, the President shares this duty with all government employees and officials, including members of the judiciary. Article IX-B, Section 4 requires all public officers and employees to "take an oath or affirmation to uphold and defend this Constitution."

Taken together, these oath requirements are reminders of the duty of all persons working for the government - regardless of the branch to which they belong - to actively maintain their fealty to the present Constitution. For members of the judiciary, this duty requires that they faithfully apply what the Constitution provides, even if they do not fully agree with these terms, with their established interpretation, and with their application to actual situations.

C. The President's foreign affairs power in the wider operational context of our government's tripartite system

a. The foreign affairs power in its wider context

While the President is undeniably the chief architect of foreign policy and is the country's chief representative in international affairs,^[15] this wide grant of power operates under the wider context of the shared functions of the three branches of government in the conduct of international relations.

I discern this legal reality in the phrasing and placement of Section 21, Article VII of the Constitution, which is the general provision governing the entry into a treaty:

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 inclusion of Section 21 under the Article on the Executive Department is significant as this Article defines the powers of the President. Section 21 signifies the recognition of the President's foreign affairs power (among them, the negotiation and ratification of international agreements) as well as the limitation of this power.

The limitation can be found in the check-and-balance measure from the Senate that Section 21 provides, which requires prior Senate concurrence in the treaties and international agreements that the President enters into, before they become valid and effective. The required Senate concurrence is a check on the Executive's treaty-making prerogative, in the same manner that the Executive's veto on laws passed by Congress is a check on the latter's legislative powers.

To be sure, not every step by the Executive in the international sphere requires prior Senate concurrence under our

Constitution which itself expressly recognizes that the President, in the conduct of international affairs, may enter into executive agreements that are not subject to Senate concurrence.

Article VIII, Section 4(2) of the Constitution separately refers to treaties and to international or executive agreements, thus expressly recognizing these two mediums of international relations. The constitutional recognition of these mediums and their distinctions are likewise expressed in jurisprudence, history, and the underlying structure of our government as discussed below. These are not idle distinctions because of their potentially deep impact on the operation of our government, in relation particularly to its three great branches that, although separate and distinct from one another, also interact in constitutionally defined areas.

In considering the two mediums that the Constitution recognizes in relation to the President's foreign affairs powers, the deeper question to contend with centers on the interface among the three great branches of government when they act and interact with one another: who decides when to treat an international agreement as a treaty or as an executive agreement; and what are the parameters for arriving at this decision.

The President's power over foreign relations under the Constitution generally gives him the prerogative to decide whether an international agreement should be considered a treaty or an executive agreement. He is also the chief architect of foreign policy and is the country's representative with respect to international affairs.[16] He is vested with the authority to preside over the nation's foreign relations, particularly in dealing with foreign states and governments, extending or withholding recognition, maintaining diplomatic relations, and entering into treaties.[17] In the realm of treaty making, the President has the sole authority to negotiate with other States.[18]

His authority over foreign relations, however, is not unlimited. For one, in deciding whether an international agreement shall be in the form of a treaty or an executive agreement, placing the entire discretion in the President potentially renders Section 21 a nullity or, at the very least, waters down the Constitution's concurrence requirement.

Of course, in a situation where there are no discoverable standards that definitively guide the President's determination, the demand for prompt action on foreign affairs matters could arguably and incontestably lead to the treatment of international agreements as executive agreements. This result is not remote given that the alternative is the sharing of power with a 24-member Senate and with the uncertainty and intractability that this sharing entails. The situation, however, would be otherwise if applicable standards are in place or can be discerned.

In the Philippines' constitutional situation, while the Constitution does not specifically direct when an international agreement should be in the form of a treaty or an executive agreement, standards can be discerned by tracing the authority through which these agreements were arrived at and made effective, and by considering the impact of these agreements on the Philippine legal system.

As I have earlier explained, Section 21, Article VII of the 1987 Constitution governs the process by which a treaty is ratified and made valid and effective in the Philippines. The treaty-making process involves a shared function between the Executive and the Senate: the President negotiates and ratifies, but the Senate must concur for the treaty to be valid and effective.

From this general perspective and the general terms of Section 21, the President's act of entering into executive agreements may be considered an exception to the treaty-making process: the President may enter into executive agreements which are international agreements that, until now, have been defined as international agreements "similar to treaties except they do not require legislative concurrence." [19] They have also been described to have "abundant precedent in history" and may either be concluded based on a "specific congressional authorization" or

"in conformity with policies declared in acts of Congress with respect to the general subject matter." [20]

Closely examined, the exceptional character of an executive agreement in relation to a treaty, its definition, and the general description shown above, cannot but lead to the conclusion that entry into an executive agreement does not purely involve the exercise of foreign affairs powers although the entry occurs in a foreign relations environment. While the President also deals with another State in a foreign affairs setting when negotiating and entering into an executive agreement, invalidity does not result even if no Senate intervention takes place, apparently because the President exercises a power that is solely and constitutionally his. This presidential power, based on the listing of powers under the Constitution, can only be the authority and duty to execute the laws and ensure their implementation. [21]

Under this close inspection and consideration of the sharing of power under Section 21, what stands out clearly is that the President can negotiate and ratify as executive agreements only those that he can competently execute and implement on his own, i.e., those that have prior legislative authorization, or those that have already undergone the treaty-making process under Article VII, Section 21 of the 1987 Constitution. From the perspective of Section 21, treaty making is different and cannot be solely the President's as this power, by constitutional mandate, is one that he must share with the Senate.

Viewed and explained in this manner, executive agreements are clearly part of the President's duty to execute the laws faithfully. These agreements trace their validity from existing laws or treaties duly authorized by the legislative branch of government; they implement laws and treaties.

In contrast, treaties - as international agreements that need concurrence from the Senate [22] - do not originate solely from the President's duty as the executor of the country's laws, but from the shared function between the President and the Senate that the Constitution mandated under Article VII, Section 21 of the 1987 Constitution.

Between the two, a treaty exists on a higher plane as it carries the authority of the President and the Senate. [23] Treaties, which have the impact of statutory law in the Philippines, can amend or prevail over prior statutory enactments. Executive agreements - which exist at the level of implementing rules and regulations or administrative orders in the domestic sphere - have no such effect. [24] They cannot contravene or amend statutory enactments and treaties. [25]

This difference in impact is based on their origins: since a treaty has the approval of both the President and the Senate, it has the same impact as a statute. In contrast, since an executive agreement springs from the President's power to execute laws, it cannot amend or violate existing treaties, and must be in accord with and made pursuant to laws and treaties. [26]

Accordingly, the intended effect of an international agreement determines its form.

When an international agreement merely implements an existing agreement or law, it is properly in the form of an executive agreement. In contrast, when an international agreement involves the introduction of a new subject matter or the amendment of existing treaties or laws, then it should properly be in the form of a treaty. [27]

Still another way of looking at the matter is from the prism of the shared function that Section 21 directly implies. In other words, based on the constitutional design reflected in Section 21, action on international agreements is always a shared function among the three branches of government.

Treaties that the President enters into should have the required Senate concurrence for its validity and effectivity. Even the President's executive agreements that are within the President's authority to enter into without Senate concurrence, effectively reflect a shared function as they implement laws passed by Congress or treaties that the

Senate has previously concurred in. The judicial branch of government, on the other hand, passively participates in international agreements through the exercise of judicial power; courts have the duty to ensure that the Executive and the Legislature stay within their spheres of competence, and that the constitutional standards and limitations set by the Constitution are not violated.

Under these norms, an executive agreement that creates new obligations or amends existing ones should properly be classified and entered into as a treaty. When implemented as an executive agreement that does not have the benefit of the treaty-making process and its Senate concurrence, such executive agreement is invalid and ineffective, and can judicially be so declared through judicial review.

D. Article XVIII, Section 25 reinforces Article VII, Section 21.

That the entry of foreign military bases, troops, or facilities into the country is specifically covered by its own provision (i.e., Section 25, Article XVIII of the Constitution) does not change the dynamics that come into play in reading, interpreting, and implementing Section 25 and Section 21. In fact, these constitutional provisions actually reinforce one another.

Article XVIII, Section 25 of the 1987 Constitution does not specifically contradict the President's authority to conduct foreign affairs; neither does it limit the Senate's check-and-balance prerogative to concur in treaties under Section 21. Article XVIII, Section 25, too, is not an exception to Article VII, Section 21, but must be read under the terms of this latter provision.

Viewed in this manner, the standard for determining the form of an international agreement for the entry of foreign military bases, troops, or facilities in the Philippines should be the same standard used to determine whether any international agreement should be in the form of an executive agreement or a treaty.

To reiterate this standard in the context of Article XVIII, Section 25: when an international agreement involves new obligations or amendments to existing obligations on foreign military bases, troops or facilities in the Philippine territory, the agreement should be in the form of a treaty that requires Senate concurrence; if, on the other hand, the agreement merely implements an existing treaty or law, then the subsequent entry of foreign military troops, bases, or facilities may be in the form of an executive agreement.

Note, at this point, that Congress cannot legislate the entry of foreign military troops, bases, or facilities into the country as Section 25, Article XVIII of the Constitution specifically requires that this action be made through the shared action of the President and the Senate. Consistent with the delineation of authority on the entry of military bases, troops or facilities, the President can only enter into an executive agreement allowing such entry to implement treaties on foreign military presence that are already in place.

The ponencia's insistence on confining Section 25 to the initial entry of foreign military bases, troops, or facilities contradicts and disrupts the check-and-balance harmony that Section 21 fosters. If we were to follow its argument that Section 25 is confined only to the initial entry, then subsequent changes or amendments to these agreements would no longer require a treaty, and would tilt the balance in favor of the President, contrary to the dictates of Section 21, Article VII of the 1987 Constitution.

Under the present circumstances, the affirmation of the ponencia's ruling effectively means that the President alone - by executive agreement - can determine the entry of foreign military presence, checked only by a Court already bound to the ponencia, as initial entry has been made under the general terms of the Mutual Defense Treaty and the Visiting Forces Agreements.

To carry the resulting consequence further, troops and facilities allowed via the EDCA through an Executive

Agreement, would now be allowed simply because there had been earlier entries although their entries had effectively made the Philippines a forward base for American military operations. All these would be established at the sole will of one person, the President of the Philippines, abetted by this Court, and without the benefit of the collective wisdom of the Filipino people expressed through the Senate.

It is not for me, nor for this Court, to argue about the wisdom of this resulting arrangement, but this Court must stand up and assert its duties and prerogatives when the arrangements violate the terms of the Constitution.

Based on the relationship between Article VII, Section 21 and Article XVIII, Section 25 discussed in this dissenting opinion; on the principles of separation of powers and check and balance that underlie the Constitution; and on the duty of all officials to uphold and defend the Constitution, I submit that the ponencia and its "initial entry approach" incorrectly answers the following material issues:

(1)

Does the EDCA introduce foreign military bases, troops, or facilities into the Philippines that call for the application of Article XVIII, Section 25?

(2)

Do the obligations found in the EDCA impose new obligations or amend existing ones regarding the presence of military bases, troops, or facilities in the Philippines?

(3)

On the basis of the responses to (1) and (2), can the EDCA be recognized as valid and effective without need for Senate concurrence?

To restate my position: since the EDCA introduces foreign military bases, troops, or facilities in the Philippines within the contemplation of Article XVIII, Section 25 of the 1987 Constitution, and since these are undertaken as obligations different from those found under currently existing treaties with the U.S., then the EDCA, as an executive agreement, is invalid and ineffective. Its terms cannot be enforced in the Philippines unless it is entered into as a treaty concurred in by the Senate.

III.

EDCA imposes new obligations that are different from those found in the MDT and the VFA.

The ponencia, in arguing that the EDCA has been properly entered into through an executive agreement, reiterates that it merely implements existing treaties between the Philippines and the U.S., specifically, the 1998 Visiting Forces Agreement (VFA) and the 1951 Mutual Defense Treaty (MDT).

The ponencia stresses that the VFA allows the entry of U.S. military troops and the conduct of related activities, which includes the activities agreed upon under the EDCA.

A. Purpose and contents of the EDCA

The EDCA was signed on April 28, 2014, in Manila, by Philippines Defense Secretary Voltaire Gazmin and U.S. Ambassador to the Philippines Philip Goldberg, in time for the official State Visit of U.S. President Barack Obama.

The ten-year accord is the second military agreement between the U.S. and the Philippines (the first being the 1998 VFA) since American troops withdrew from its Philippines naval base in 1992. The U.S. withdrew because

the covering Military Bases Agreement (MBA) had expired.

The MDT, on the other hand, is merely a mutual defense alliance and cooperation agreement that does not contain authorizing provisions for the entry of military bases, troops, or facilities into the Philippines. There was thus no existing military bases agreement in 1992 that would have supported the continued maintenance of U.S. military bases, troops, or facilities in the Philippines; hence, the U.S. withdrawal.

The EDCA allows the U.S. to station military troops and to undertake military operations in Philippine territory without establishing a permanent military base[28] and with the stipulation that the U.S. is not allowed to store or position any nuclear weapon in Philippine territory.[29]

The EDCA has two main purposes.

First, it is intended to provide a framework for activities for defense cooperation in accordance with the MDT and the VFA.

Second, it is an agreement for the grant to the U.S. military of the right to use identified portions of the Philippine territory referred to in the EDCA as "Agreed Locations." This right is fleshed out in the EDCA through terms that identify the privileges granted to the U.S. in bringing in troops and facilities, in constructing structures, and in conducting activities within Philippine territory.[30]

The EDCA has a term of ten years, unless both the U.S. and the Philippines formally agree to alter it.[31] The U.S. is bound to hand over any and all facilities in the "Agreed Locations" to the Philippine government upon the EDCA's termination.

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

First, it reiterates the purposes of the MDT and the VFA by affirming that the U.S. and the Philippines shall continue to conduct joint activities in pursuit of defense cooperation.

Second, it contains an entirely new agreement pertaining to the Agreed Locations, the right of the U.S. military to stay in these areas, and to conduct activities that are not imbued with mutuality of interests and cannot, by any means, be reconciled with the idea of defense cooperation.

B. The EDCA as a continuation of the VFA and MDT under new and expanded dimensions

Under the 1998 VFA, the Philippines' primary obligation is to facilitate the entry and departure of U.S. personnel in relation to "covered activities." It merely defines the status and treatment of U.S. personnel visiting the Philippines "from time to time" in pursuit of cooperation to promote "common security interests." Essentially, the 1998 VFA is a treaty governing the sojourn of U.S. forces in this country for joint exercises.[32]

Interestingly, the 1998 VFA does not itself expressly specify what activities would allow the entry of U.S. troops. The parties left this aspect open, and recognized that the activities that shall require the entry of U.S. troops are subject to future agreements and approval by the Philippine Government.

Note, however, that the VFA does not authorize U.S. personnel to permanently stay in the Philippines, nor does it allow any activity related to the establishment and operation of bases.

Interestingly, these very same activities that the VFA did not allow, became the centerpiece of the EDCA which facilitates a more permanent presence of U.S. military troops and facilities in "Agreed Locations" in the Philippines, to the extent that these "Agreed Locations" (as discussed below) fit the description of modern military bases.

Agreed Locations are portions of the Philippine territory whose use is granted to the U.S.[33] Under the EDCA, U.S. personnel can:

(i)

preposition and store defense equipment, supplies, and materiel in Agreed Locations;

(ii)

have unimpeded access to Agreed Locations on all matters relating to the prepositioning and storage of defense equipment, supplies, and materiel; and

(iii)

exercise all rights and authorities within the Agreed Locations that are necessary for their operational control or defense.

In the same manner, U.S. contractors (entities not within the coverage of either the 1951 MDT or the 1998 VFA) are also allowed unimpeded access to the Agreed Locations in matters relating to the preposition and storage of defense equipment, supplies, and materiel.

Within the Agreed Locations, the U.S. may additionally conduct trainings for its troops, transit, support, and related activities.[34] The EDCA also allows the U.S. to use the Agreed Locations to refuel aircraft, bunker vessels, and temporarily maintain vehicles, vessels, and aircraft.[35]

The EDCA so provides with no qualification as to the purpose these vessels, vehicles, and aircraft may have when entering Philippine jurisdiction. It also permits the temporary accommodation of personnel,[36] again without any qualification as to the purpose of their visit.

The U.S. forces may also engage in communications activities that include the use of its own radio spectrum,[37] similarly without any limitation as to the purpose by which such communications shall be carried out.

Further, within the Agreed Locations, the U.S. can also preposition defense equipment, supplies, and materiel under the exclusive use and control of U.S. forces.[38] Thus, the right to deploy weapons can be undertaken even if it is not in the pursuit of joint activities for common security interests.

Note, at this point, that the Senators, during the ratification of the 1998 VFA, observed that it only covers temporary visits of U.S. troops and personnel in the country. These Senators gave their consent to the 1998 VFA based on the knowledge that U.S. Forces' stay in the country may last only up to three weeks to six months[39] per batch.

This temporary stay of U.S. Forces in the Philippines under the VFA means that this agreement does not cover, nor does it give its approval to, a more permanent stay of U.S. Forces and their equipment in the Philippines; this coverage and approval came only under the EDCA and the Agreed Locations it provides. Note in this regard that if the EDCA had not envisioned the stay of U.S. Forces and equipment in the Agreed Locations for a period longer than that envisioned in the VFA, it would not have added obligations regarding the storage of their equipment and materiel.

All these show that the EDCA embodies arrangements of a more permanent nature than the arrangements under the VFA; there was a marked qualitative and quantitative change in the Philippines-U.S. military arrangements from the VFA to the EDCA. The EDCA therefore cannot merely be an agreement implementing the 1998 VFA.

More aptly described, the EDCA may be a continuation of the 1998 VFA, but the continuity is under new and

expanded dimensions. These added dimensions reinforce the view that the EDCA effectively allows the establishment of a military base, albeit in a modern form, together with all the rights and activities that the use and operation of a military base requires.

Notably, the 1998 VFA had also been recognized as an implementation of the 1951 MDT, yet the Government deemed it necessary to have it embodied in a treaty concurred in by the Senate.

Early in the deliberations of the Senate's concurrence to the 1998 VFA, the senator-sponsors characterized it merely as a subsidiary or implementing agreement to the 1951 MDT.[40] Nevertheless, Senator Tatad, one of the VFA's co-sponsors, recognized that Article XVIII, Section 25 of the Constitution prohibits the 1998 VFA from being executed as a mere executive agreement.[41]

The senators therefore agreed during their deliberations that an agreement implementing the 1951 MDT requires a treaty and Senate concurrence.[42] This was because the agreement, despite its affirmation of and consistency with the 1951 MDT, allowed the entry of U.S. troops in the Philippines, the situation covered by Article XVIII, Section 25.

This same reasoning should also apply when the U.S. transitioned from the VFA to the EDCA. In fact, there is greater reason now to require a treaty since the EDCA allows a more permanent presence of U.S. troops and military equipment in the Philippines, equivalent in fact to the establishment of modern military bases that had not been contemplated at all under the earlier treaties. This enhancement, while generally consistent with the intents of the 1951 MDT and the 1998 VFA, creates new arrangements and new obligations that bring EDCA fully within the coverage of Article XVIII, Section 25 of the Constitution.

Note that the 1951 MDT merely embodied a defense agreement, focused as it is on defenses against armed external attacks.[43] It made no provision for bases, troops, or facilities. The entry of U.S. military bases and troops had been embodied in different, separate agreements, specifically, through the Military Bases Agreement (MBA) which expired in 1992, and through the current 1998 VFA.

With the lapse of the 1947 MBA, the MDT, on its own, does not have any provision allowing the entry of US military bases or facilities in the Philippines. The 1987 Constitution precisely foresaw the expiration of the 1947 MBA, and required that any subsequent extension of the presence of U.S. military bases, troops or facilities in the Philippines should be the subject of another treaty that would require Senate concurrence.[44]

Given the EDCA's introduction of U.S. military facilities that fall within the definition of "bases" (as discussed below) and the lack of any existing treaty allowing the entry of facilities of this type, the EDCA arguably now stands as an agreement taking the place of the 1947 MBA and should thus undergo the treaty-concurrence process that the 1987 Constitution requires. It cannot merely derive its validity and effectiveness from the 1951 MDT and 1998 VFA as an implementing instrument of these earlier agreements.

IV.

EDCA allows the entry of U.S. bases and facilities in the Philippines.

Neither can I agree with the ponencia's continued denial of the EDCA's character as a basing agreement. A reading of the EDCA will reveal that it provides for arrangements equivalent to the establishment in this country of a foreign military base, based on the concept of a base under the 1947 Military Bases Agreement (MBA), under Philippine laws, or in the modern equivalent of a base under current U.S. military strategies and practices.

On this point and with due respect, the ponencia is plainly in error.

A. Obligations under the EDCA are similar to the obligations under the 1947 MBA.

The obligations under the EDCA are notably similar and even equivalent to the obligations under the 1947 R.P.-U.S. Military Bases Agreement (MBA) which expired in 1992.

They pursue the same purpose of identifying portions of the Philippine territory over which the U.S. is granted specific rights for its military activities, undertaken within the "bases" under the MBA and within the "Agreed Locations" in the case of the EDCA. Thus, only the name of the situs of operations varies.

These rights may be categorized into four:

(i)

the right to construct structures and other facilities for the proper functioning of the bases or the Agreed Locations;

(ii)

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

(iii)

the right to the prepositioning of defense equipment, supplies, and materiel; and

(iv)

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

For clarity, I present below a side by side comparison of the relevant provisions of the EDCA and the 1947 MBA.

EDCA

1947 MBA

Article III, Section 1

With the consideration of the views of the Parties, the Philippines hereby authorizes and agrees that United States forces, United States contractors, and vehicles, vessels, and aircraft operated by or for United States forces may conduct the following activities with respect to Agreed Locations: training, transit, support and related activities, refueling of aircraft; bunkering of vessels; temporary maintenance of vehicles, vessels, and aircraft; temporary accommodation of personnel; communications; prepositioning of equipment, supplies, and materiel; deploying forces and materiel, and such other activities as the Parties may agree.

Article VI, Section 3

United States forces are authorized to exercise all rights and authorities within the Agreed Locations that are necessary for their operational control or defense, including undertaking appropriate measures to protect United States forces and United States contractors. The United States should coordinate such measures with appropriate authorities of the Philippines.

Article III, par. 1

It is mutually agreed that the United States shall have the rights, power and authority within the bases which are necessary for the establishment, use, operation and defense thereof or appropriate for the control thereof and all the rights, power and authority within the limits of territorial waters and air space adjacent to, or in the

vicinity of, the bases which are necessary to provide access to them, or appropriate for their control.

Article III, Section 4

The Philippines hereby grants to the United States, through bilateral security mechanisms, such as the MDB and SEB, operational control of Agreed Locations for construction activities and authority to undertake activities on, and make alterations and improvements to, Agreed Locations. xxx

Article III, par. 2 (a) and (b)

xxxx

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;

xxxx

Article VII, Section 1.

The Philippines hereby grants to United States forces and United States contractors the use of water, electricity, and other public utilities on terms and conditions, including rates of charges, no less favorable than those available to the AFP or the Government of the Philippines. xxx

Article VII, Section 2

The Parties recognize that it may be necessary for United States forces to use the radio spectrum. The Philippines authorizes the United States to operate its own telecommunications systems [as telecommunication is defined in the 1992 Constitution and Convention of the International Telecommunication Union ("ITU")]. This shall include the right to utilize such means and services required to ensure the full ability to operate telecommunications systems and the right to use all necessary radio spectrum allocated for this purpose.

xxx

Article III, par 2 (d)

xxxx

the right to acquire, as may be agreed between the two Governments, such rights of way, and to construct thereon, as may be required for military purposes, wire and radio communications facilities, including submarine and subterranean cables, pipe lines and spur tracks from railroads to bases, and the right, as may be agreed upon between the two Governments, to construct the necessary facilities;

xxxx

Article IV, Section 1

The Philippines hereby authorizes United States forces, through bilateral mechanisms, such as the MDB and

SEB, to preposition and store defense equipment, supplies and materiel ("prepositioned materiel"), including, but not limited to, humanitarian assistance and disaster relief equipment, supplies, and materiel, at Agreed Locations. xxx

Article IV, Section 3

The prepositioned materiel of the United States shall be for the exclusive use of United States forces, and full title to all such equipment, supplies, and materiel remains with the United States. United States forces shall have control over the access and disposition of such prepositioned materiel and shall have the unencumbered right to remove such prepositioned materiel at any time from the territory of the Philippines.

Article IV, Section 4

United States forces and United States contractors shall have unimpeded access to Agreed Locations for all matters relating to the prepositioning and storage of defense equipment, supplies, and materiel including delivery, management, inspection, use, maintenance, and removal of such equipment, supplies, and materiel.

Article III, par (2) (e)

xxxx

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.

Article III, Section 2

When requested, the Designated Authority of the Philippines shall assist in facilitating transit or temporary access by United States forces to public land and facilities (including roads, ports, an airfield) including those owned or controlled by local governments, and to other land and facilities (including roads, ports, and airfields).

Article VII

It is mutually agreed that the United States may employ and use for United States military forces any and all public utilities, other services and facilities, airfields, ports, harbors, roads, highways, railroads, bridges, viaducts, canals, lakes, rivers, and streams in the Philippines under conditions no less favorable than those that may be applicable from time to time to the military forces of the Philippines.

Presented in this manner, only those who refuse to see cannot discern the undeniable similarities and parallelisms between the expired 1947 MBA and the EDCA in terms of the rights conferred on the U.S. and its military forces.

Since the EDCA effectively allows the U.S. to "re-introduce" and "re-establish" military bases in the Philippines, albeit in a modernized form and on a piece-meal basis, its implementation should comply with the requirements of Article XVIII, Section 25 of the Constitution. It can only be recognized as valid and effective if the Senate concurs,

B. The EDCA allows the entry of military bases in the Philippines, whether in the traditional or in the modernized concepts of a military base.

Independently of the concept of military bases under the 1947 MBA, the provisions of the EDCA more than

sufficiently show that it seeks to allow in this country the military elements that Article XVIII, Section 25 intends to regulate.

There exists no rigid definition of a military base. However, it is a term used in the field of military operations and thus has a generally accepted connotation.

The U.S. Department of Defense Dictionary of Military and Associated Terms defines a base as "an area or locality containing installations which provides logistics or other support;" home airfield; or home carrier.[45]

We formulated our own definition of a base under Presidential Decree No. 1227 which states that a military base is "any military, air, naval, coast guard reservation, base, fort, camp, arsenal, yard, station, or installation in the Philippines,"[46] A military base connotes the presence, in a relatively permanent degree, of troops and facilities in a particular area.[47]

Both definitions are consistent with the use that EDCA allows for the U.S. and its forces.[48] For greater emphasis, the EDCA allows U.S. military personnel to enter and remain in Philippine territory. It grants the U.S. the right to construct structures and assemblies.[49] It also allows the U.S. to preposition defense equipment, supplies and materiel.[50] The U.S. personnel may also use the Agreed Locations to refuel aircraft and bunker vessels.[51]

Thus, the EDCA's Agreed Locations are areas where the U.S. can perform military activities in structures built by U.S. personnel. The extent of the U.S.' right to use the Agreed Locations is broad enough to include even the stockpiling of weapons and the sheltering and repair of vessels under the exclusive control of U.S. personnel.

Under these terms, what the EDCA clearly allows are military activities undertaken in fixed or pre-determined locations or military bases as this term is defined above. If the Agreed Locations do not at all exactly fit the description of the base established under the terms of the 1947 MBA, they are nevertheless forward military bases of the U.S. - the equivalent of a military base in the immediate post-World War II world, re-created in, and answering to the military demands of, the 21st century. That the EDCA allows these arrangements for an initial period often (10) years, to continue automatically unless terminated, is a concrete indicator that it pertains to the presence on Philippine soil of foreign military bases, troops, and facilities on a more or less permanent basis.

Our understanding of the provision's coverage should also be adjusted to take into account contemporary developments such as the U.S.'s Pivot to Asia strategy[52] which calls for U.S. presence in Asia in terms of the forward deployment of U.S. military forces. The EDCA fulfills this U.S. strategy as its Agreed Locations are the forward deployment sites where U.S. military forces are to be deployed, ready with manpower, arms, and resources for battle. In this sense, the EDCA does not merely involve training or temporary sojourns, but more or less permanent sites that the U.S. can use as needed for its own military purposes.

Even under the U.S. redefinitions of a military base, the EDCA would still involve the entry of military bases in the Philippines. It should be noted that the obligations under the EDCA correspond to the contemporary reclassification of a military base, i.e., the Main Operating Base (MOB),[53] Forward Operating Site (FOS),[54] and Cooperative Security Location (CSL),[55] all footnoted below.

Essentially, the reconfiguration of what constitutes a U.S. base corresponds to the U.S.'s strategic objective of providing multiple avenues of access for contingency operations. Through access agreements (such as the EDCA), the U.S. maintains overseas military presence without the added costs and complications of establishing permanent bases. This is the U.S. "presence" that the Pivot to Asia speaks of. With the Philippines as an implementing location of this "pivot" strategy, the country and its people would necessarily be exposed to all the dangers to which the U.S. would be exposed, even to the threats and dangers extraneous to Philippine interests.

All these should be made known and clarified with the Filipino people in the manner the Constitution commands.

V.

Effectivity of the EDCA in the Philippines

Based on all the above considerations, this Dissent concludes that the EDCA, instead of simply implementing the terms of the 1951 MDT and the 1998 VFA, carries terms significantly broader in scope than the terms of these two earlier treaties. A more correct description of EDCA is that it goes beyond the scope of an implementing agreement; it is a substantively independent agreement that adds to what the 1951 MDT and the 1998 VFA provide.

The EDCA ultimately embodies a new agreement that touches on military bases, troops, or facilities beyond the scope of the 1951 MDT and the 1998 VFA, and should be covered by a treaty pursuant to Article XVIII, Section 25 and Article VII, Section 21, both of the 1987 Constitution.

Without the referral to and concurrence by the Senate as a treaty, the EDCA is a constitutionally deficient international agreement; hence, it cannot be valid and effective in our country.

To remedy the constitutional deficiency, the best recourse available to the Court under the present circumstances of territorial conflict, regional tension, and actual intrusion into Philippine territory, is to reconsider its Decision of January 12, 2016:

- by declaring that the EDCA is constitutionally deficient as an Executive Agreement; it cannot be valid and effective in its present form;
- by suspending pro hac vice the operations of its rules on the finality of its rulings;
- by giving the President the opportunity to refer the EDCA as a treaty to the Senate for its consideration and concurrence, within ninety (90) days from the service of the Court's ruling on reconsideration; and
- by recognizing that the EDCA, once referred to and concurred in by the Senate, complies with the requirements of Article VII, Section 21 and Article XVIII, Section 25 of the Constitution.

If no referral is made to the Senate within 90 days from receipt, the conclusion that the President committed grave abuse of discretion by entering into an executive agreement instead of a treaty, and by certifying to the completeness of the Philippine internal process, shall be final and effective.

[1] Treaty making has historically been a shared function between the President and the legislature.

Under the 1935 Constitution, the President has the "power, with the concurrence of a majority of all the members of the National Assembly, to make treaties..." The provision, Article VII, Section 11 paragraph 7, is part of the enumeration of the President's powers under Section 11, Article VII of the 1935 Constitution. This recognizes that treaty making is an executive function, but its exercise should be subject to the concurrence of the National Assembly. A subsequent amendment to the 1935 Constitution, which divided the country's legislative branch to two houses, transferred the function of treaty concurrence to the Senate, and required that two-thirds of its members assent to the treaty.

By 1973, the Philippines adopted a presidential parliamentary system of government, which merged some of the functions of the Executive and Legislative branches of government in one branch. Despite this change, concurrence was still seen as necessary in the treaty making process, as Article VIII, Section 14 required that a

treaty should be first concurred in by a majority of all Members of the Batasang Pambansa before they may be considered valid and effective in the Philippines, thus:

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

[2] Page 5 of the ponencia's Draft Resolution dated April 11, 2016.

[3] Pages 8 to 10 of the ponencia's Draft Resolution dated April 11, 2016.

[4] Page 6 of the ponencia's Draft Resolution dated April 11, 2016; the ponencia also argues in pp. 10-11 that the EDCA is not a basing agreement.

[5] It is a well-established rule in constitutional construction that no one provision of the Constitution is to be separated from all the others, to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. Sections bearing on a particular subject should be considered and interpreted together as to effectuate the whole purpose of the Constitution and one section is not to be allowed to defeat another, if by any reasonable construction, the two can be made to stand together.

In other words, the court must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make the words idle and nugatory. *Francisco v. House of Representatives*, G.R. No. 160261, November 10, 2003, 415 SCRA 44, citing *Civil Liberties Union v. Executive Secretary*, 194 SCRA 317, 330-331 (1991).

[6] Page 5 of the ponencia's Draft Resolution dated April 11, 2016.

[7] *Id.*

[8] The first principle of constitutional construction is *verba legis*, that is, wherever possible, the words used in the Constitution must be given their ordinary meaning except where technical terms are employed; *Francisco v. House of Representatives*, *supra* note 5.

[9] It is well-settled that where the language of the law is clear and unequivocal, it must be given its literal application and applied without interpretation; *Commissioner of Internal Revenue v. Central Luzon Drug Corporation*, G.R. No. 159610, 12 June 2008, 554 SCRA 398, 409.

[10] G.R. No. L-21064, February 18, 1970, 31 SCRA 413, 422.

[11] *Id.*

[12] During the constitutional deliberation on Article XVIII, Section 25, two views were espoused on the presence of military bases in the Philippines. One view was that espoused by the anti-bases group; the other group supported the view that this should be left to the policy makers.[12]

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

After the agreement expires in 1991, the question therefore, is: Should we extend a new treaty for these bases to stay put in 1991 in our territory? The position of the committee is that it should not, because the presence of such bases is a derogation of Philippine sovereignty.

It is said that we should leave these matters to be decided by the executive, since the President conducts foreign relations and this is a question of foreign policy. I disagree, Madam President. This is not simple a

question of foreign policy; this is a question of national sovereignty. And the Constitution is anything at all, it is a definition of the parameters of the sovereignty of the people.[12]

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

xxx this is neither the time nor the forum to insist on our views for we know not what lies in the future. It would be foolhardy to second-guess the events that will shape the world, our region, and our country by 1991. It would be sheer irresponsibility and a disservice of the highest calibre to our own country if we were to tie down the hands of our future governments and future generations.[12]

Despite his view that the presence of foreign military bases in the Philippines would lead to a derogation of national security, Commissioner Azcuna conceded that this would not be the case if the agreement to allow the foreign military bases would be embodied in a treaty.[12]

After a series of debates, Commissioner Romulo proposed an alternative formulation that is now the current Article XVIII, Section 25.[12] He explained that this is an explicit ban on all foreign military bases other than those of the U.S.[12] Based on the discussions, the spirit of the basing provisions of the Constitution is primarily a balance of the preservation of the national sovereignty and openness to the establishment of foreign bases, troops, or facilities in the country[12]

Article XVIII, Section 25 imposed three requirements that must be complied with for an agreement to be considered valid insofar as the Philippines is concerned. These three requirements are: (1) the agreement must be embodied in a treaty; (2) the treaty must be duly concurred in by 2/3 votes of all the members of the Senate;12 and (3) the agreement must be recognized as a treaty by the other State.

[13] Article VII, Section 18 of the 1987 Constitution provides:

SECTION 18. The President shall be the Commander in Chief of all armed forces of the Philippines and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion xxx.

[14] In our system of government, the President, being the head of state, is regarded as the sole organ and authority in external relations and is the country's sole representative with foreign nations. As the chief architect of foreign policy, the President acts as the country's mouthpiece with respect to international affairs. Hence, the President is vested with the authority to deal with foreign states and governments, extend or withhold recognition, maintain diplomatic relations, enter into treaties, and otherwise transact the business of foreign relations. In the realm of treaty making, the President has the sole authority to negotiate with other states; *Pimentel v. Executive Secretary*, 501 Phil. 304, 313 (2005).

[15] *Id.* See also *Bayan v. Executive Secretary*, 396 Phil 623, 663 (2000), where we held:

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. In many ways, the President is the chief architect of the nation's foreign policy; his "dominance in the field of foreign relations is (then) conceded." Wielding vast powers and influence, his conduct in the external affairs of the nation, as Jefferson describes, is "executive altogether."

[16] *Pimentel v. Executive Secretary*, *supra* note 14, at 317-318.

[17] *Id.*

[18] *Id.*

[19] Section 2(c) of Executive Order No. 459, Series of 1997.

[20] See *Commissioner of Customs v. Eastern Trading*, G.R. No. L-14279, October 31, 1961, citing Francis B. Sayre, former U.S. High Commissioner to the Philippines, said in his work on "The Constitutionality of Trade Agreement Acts":

Agreements concluded by the President which fall short of treaties are commonly referred to as executive agreements and are no less common in our scheme of government than are the more formal instruments -treaties and conventions. They sometimes take the form of exchanges of notes and at other times that of more formal documents denominated "agreements" time or "protocols." The point where ordinary correspondence between this and other governments ends and agreements - whether denominated executive agreements or exchanges of notes or otherwise - begin, may sometimes be difficult of ready ascertainment. It would be useless to undertake to discuss here the large variety of executive agreements as such, concluded from time to time. Hundreds of executive agreements, other than those entered into under the trade agreements act, have been negotiated with foreign governments xxx. It would seem to be sufficient, in order to show that the trade agreements under the act of 1934 are not anomalous in character, that they are not treaties, and that they have abundant precedent in our history, to refer to certain classes of agreements heretofore entered into by the Executive without the approval of the Senate. They cover such subjects as the inspection of vessels, navigation dues, income tax on shipping profits, the admission of civil aircraft, customs matters, and commercial relations generally, international claims, postal matters, the registration of trademarks and copyrights, etcetera. Some of them were concluded not by specific congressional authorization but in conformity with policies declared in acts of Congress with respect to the general subject matter, such as tariff acts; while still others, particularly those with respect of the settlement of claims against foreign governments, were concluded independently of any legislation." (39 Columbia Law Review, pp. 651, 755.)

[21] Constitution, Article VII, Sections 5 and 17.

[22] Section 2 (b) of Executive Order No. 459, Series of 1997.

[23] CONSTITUTION, Article VII, Section 21. See also *Bayan Muna v. Romulo*, 656 Phil. 246, 269- 274 (2011), citing Henkin, *Foreign Affairs and the United States Constitution* 224 (2nd ed., 1996); and Borchard, Edwin, *Treaties and Executive Agreements-Reply*, Yale Law Journal, June 1945.

[24] *Gonzales v. Hechanova*, 118 Phil. 1065, 1079 (1963).

[25] *Adolfo v. CFI of Zambales*, 145 Phil. 264, 266-268 (1970).

[26] *Bayan Muna v. Romulo*, supra note 23.

[27] Id.

[28] EDCA, Preamble, par. 5.

[29] Id., Article IV, par. 6.

[30] Id., Article III.

[31] Id., Article XII (4).

[32] *Lim v. Executive Secretary*, G.R. No. 151445. April 11, 2002. In this manner, visiting U.S. forces may sojourn in Philippine territory for purposes other than military. As conceived, the joint exercises may include training on new techniques of patrol and surveillance to protect the nations marine resources, sea search-and-rescue operations to assist vessels in distress, disaster relief operations, civic action projects such as

the building of school houses, medical and humanitarian missions, and the like.

[33] EDCA, Article II (4).

[34] EDCA, Art III, Sec. 1.

[35] Id.

[36] Id.

[37] EDCA, Art. VII, Sec. 2.

[38] EDCA, Art. IV, Secs. 1 & 3.

[39] The senators argued the precise length of time but agreed that it would not exceed six months. (See Senate of the Philippines, Resolution on Second Reading, P.S. Res. No. 443 - Visiting Forces Agreement, May 17, 1999, Records and Archives Service Vol. 133, pp. 23-25.)

[40] Sponsorship speeches of Senator Tatad and Senator Biazon, Senate deliberations on P.S. Res. No. 443 - Visiting Forces Agreement (Senate deliberations), May 3, 1999, pp. 8 and 44: The VFA gives "substance [to the MDT] by providing the mechanism to regulate the circumstances and conditions under which the U.S. forces may enter" the country.

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

For that purpose, an executive agreement might have sufficed, were there no constitutional constraints. But the Constitution requires the Senate to concur in all international agreements. So the Senate must concur in the Visiting Forces Agreement, even if the U.S. Constitution does not require the U.S. Senate to give its advice and consent. (Senate deliberations, May 25, 1999, A.M., p. 17.)

[42] Senate Resolution No. 1414.

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

The accord defines the meaning of an armed attack as including armed attacks by a hostile power on a metropolitan area of either party, on the island territories under their jurisdiction in the Pacific, or on their armed forces, public vessels or aircrafts in the Pacific. The U.S. government guaranteed to defend the security of the Philippines against external aggression but not necessarily against internal subversion. The treaty expressly stipulates that the treaty terms are indefinite and would last until one or both parties terminate the agreement by a one year advance notice.

[44] See Article XVIII, Section 25 of the 1987 Constitution.

[45] U.S. Department of Defense, Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms, p. 21 (2015) at <http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf>.

[46] Section 2, Presidential Decree No. 1227.

[47] IV RECORDS, CONSTITUTIONAL COMMISSION 86 (September 18, 1986):

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

Mr. Maambong: Yes.

[48] Enhanced Defense Cooperation Agreement (hereinafter referred to as EDCA), Art. III Sec. 1. These activities are: "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."

[49] EDCA, Article V, Sec. 2.

[50] EDCA, Art IV, Sec. 1.

[51] Id.

[52] During the latter part of the first term of the Obama Administration, the U.S. announced a shift in its global strategy in favor of a military and diplomatic "pivot," or "rebalance" toward Asia. The strategy involved a shift of the U.S.'s diplomatic, economic, and defense resources to Asia, made urgent by "the rise of Chinese regional power and influence, and China's apparent inclination to exercise its burgeoning military power in territorial disputes with its neighbors." These disputes affected sea lanes that are vital to the U.S. and its allies; hence, the U.S. was particularly concerned with their peaceful resolution. John Hemmings., *Understanding the U.S. Pivot: Past, Present, and Future*. 34(6) Royal United Services Institute Newsbrief (November 2014), accessible from John Hemmings' webpage at (November 26, 2014), [<https://hemmingsjohn.wordpress.com/2014/11/27/understanding-the-us-pivot-past-present-and-future/>] (last accessed on December 8, 2015)].

The key to the new strategy in the military-political area is "presence: forward deployment of U.S. military forces; a significant tempo of regional diplomatic activity (including helping Asian countries resolve disputes that they can't resolve themselves); and promoting an agenda of political reform where it is appropriate." This meant, among others, the strengthening of U.S.' military alliance with Asian countries, including the Philippines. Richard C. Bush III. "No rebalance necessary: The essential continuity of U.S. policy in the Asia-Pacific" Brookings Institution (March 18, 2015) available at <http://www.brookings.edu/blogs/order-from-chaos/posts/2015/03/18-value-of-continuity-us-policy-in-asia-pacific> (last accessed on December 8, 2015).

[53] Main operating bases, with permanently stationed combat forces and robust infrastructure, will be characterized by command and control structures, family support facilities, and strengthened force protection measures. Examples include Ramstein Air Base (Germany), Kadena Air Base (Okinawa, Japan), and Camp Humphreys (Korea).

[54] Forward operating site will be an expandable "warm facilities" maintained with a limited U.S. military support presence and possibly prepositioned equipment. FOSs will support rotational rather than permanently stationed forces and be a focus for bilateral and regional training. Examples include the Sembawang port facility in Singapore and Soto Cano Air Base in Honduras.

[55] Cooperative security locations will be facilities with little or no permanent U.S. presence. Instead they will be maintained with periodic service, contractor, or host-nation support. CSLs will provide contingency access and be a focal point for security cooperation activities. A current example of a CSL is in Dakar, Senegal, where the U.S.

Air Force has negotiated contingency landing, logistics, and fuel contracting arrangements, and which served as a staging area for the 2003 peace support operation in Liberia.

DISSENTING OPINION

PERLAS-BERNABE, J.:

I maintain my dissent. The certiorari petitions[1] attributing grave abuse of discretion against herein respondents, acting for and on behalf of the Government of the Republic of the Philippines (RP or Philippines), for entering into the Enhanced Defense Cooperation Agreement (EDCA) with the Government of the United States of America (US) as an executive agreement are meritorious. The motions for reconsideration,[2] which mainly argue that the EDCA significantly amends, modifies, or expands the provisions of existing military treaties, and introduces new concepts, obligations, and arrangements therein,[3] and that it is a basing agreement which requires constitutional legislative approval for its effectivity,[4] should therefore be granted.

I.

A thorough study of the provisions of the EDCA vis-a-vis the provisions of our past agreements with the US on the same subject matter ultimately impresses upon me that the EDCA should have been entered into as a treaty, and not as an executive agreement. This is because the EDCA does not merely embody detail adjustments to existing national policies that are, more or less, only temporary in nature. Quite the opposite, it substantially modifies our present policies and arrangements with the US Government on national defense. In *Commissioner of Customs v. Eastern Sea Trading*:[5]

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.[6]

The need for the EDCA to be entered into as a treaty stems from the mandate of Section 25, Article XVIII of the 1987 Philippine Constitution which provides:

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 and underscoring supplied)

Contrary to the ponencia's stand, this constitutional provision does not only pertain to the conduct of "initial entry" as there is no temporal qualification which situates the allowance of foreign military bases, troops, or facilities in the Philippines,[7] As aptly pointed out by petitioners, the constitutional requirements set forth therein are clear and unambiguous which clearly do not require further construction or interpretation,[8] Certainly, we should not make a qualification when there is none. Following the plain language of the law, the presence of foreign military bases, troops, or facilities in the Philippines is only constitutionally permissible if it is sanctioned by a treaty duly concurred in by Senate.[9]

For context, the Agreement between the RP and the US (Parties) concerning Military Bases contained in this constitutional provision pertains to the Military Bases Agreement of 1947[10] (MBA), whereby the US was

accorded the following rights: (a) power, authority, and control over military establishments;^[11] (b) use, operation, and defense of its bases, as well as the areas adjacent thereto in order to access the same;^[12] (c) use of certain land, coastal areas, and the air for military maneuvers, staging areas, and other military exercises, free of charge;^[13] and (d) entry of US base personnel, their families, and other technical personnel of other nationalities into the Philippines.^[14] The Parties agreed that the MBA would be effective for a period of ninety-nine (99) years,^[15] or until the year 2046. Throughout the years, a number of piecemeal amendments were made thereto, particularly: (a) the shortening of its term to a total of forty-one (41) years, or until 1991, pursuant to the Ramos-Rusk Agreement;^[16] (b) the return of 17 US military bases to the Philippines, in accordance with the Bohlen-Serrano Memorandum of Agreement;^[17] (c) the recognition of Philippine sovereignty over the Clark and Subic Bases through the Romulo-Murphy Exchange of Notes of 1979;^[18] and (d) the placing of the concept of operational use of military bases by the US Government within the context of Philippine sovereignty, including the need for prior consultation with the Philippine Government on the former's use of the bases, pursuant to the Romualdez-Armacost Agreement of 1983.^[19] Apparently, these amendments were reflective of the Philippines' intention to gradually restrict US control over the bases. The growing recalcitrance on US control was the catalyst for the adoption of Section 25, Article XVIII of the 1987 Philippine Constitution which, as above-cited, stringently demands, as a first requisite, a treaty duly concurred in by Senate, if we were to allow once more the presence of foreign military bases, troops, or facilities in the country.

II.

With the expiration of the MBA, no treaty subsists which would legitimize the presence of foreign military bases, troops, or facilities in the Philippines, at least, to the extent provided for in the EDCA. The closest subsisting legal anchorage for US military presence in the Philippines would be the Mutual Defense Treaty Between the Republic of the Philippines and the United States of America (the Mutual Defense Treaty or the MDT), signed on August 30, 1951, and the Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines (Visiting Forces Agreement or the VFA), signed on February 10, 1998.^[20] However, the obligations of the RP Government to the US Government under the MDT and VFA are clearly limited in scope as compared to the EDCA. As will be later elaborated upon, the EDCA institutionalizes the functional equivalent of military bases in the Philippines through its introduction of the concept of "Agreed Locations." Due to sheer variance of purpose, context, and parameters, this arrangement cannot find its legal bearings from the MDT or the VFA.

For its part, the MDT only embodies the Parties' general commitment to "maintain and develop their individual and collective capacity to resist [an] armed attack."^[21] Under the MDT, the Parties "[d]eclare publicly and formally their sense of unity and determination to defend themselves against [an] external armed attack," and recognize their 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."^[22] Notably, the MDT was aligned with the situation at that time: it was a collaborative response of the RP and US Governments to the burgeoning threats brought about by the period of communist expansion in Asia following World War II and the Korean War.^[23] Thus, as pointed out by my esteemed colleague, Associate Justice Marvic M.V.F. Leonen (Justice Leonen), the MDT's main aim is to provide support against state enemies effectively and efficiently.^[24] In this regard, no way should the MDT be construed as a blanket license to legitimize subsequent agreements that further military objectives beyond this purpose. The MDT was in effect (and still remains in effect^[25]) at the time the 1987 Constitution was adopted. Hence, it would be rather absurd for Section 25, Article XVIII of the 1987 Philippine Constitution to require a treaty duly concurred in by Senate anew if the presence of foreign military bases, troops, or facilities was already validated by the MDT.

This finding is more forceful in the case of the VFA. The VFA merely provides a mechanism for regulating the circumstances and conditions under which US forces may visit the Philippines for bilateral military exercises. In simple terms, these exercises pertain to joint training. As signified in the Terms of Reference of the "Balikatan 02-1," "[t]he Exercise is a mutual counter-terrorism advising, assisting[,] and training Exercise"[26] and that it "shall involve the conduct of mutual military assisting, advising[,] and training of [Republic of the Philippines (RP)] and US Forces with the primary objective of enhancing operational capabilities of both forces to combat terrorism." [27] In this respect, the VFA governs the entry and exit of US personnel in the country [28] and establishes the manner of disposing criminal cases against any of its members, who commits an offense in the Philippines. [29] The VFA also establishes a procedure for resolving differences that may arise between the two sides with regard to the provisions of the agreement. [30]

III.

Although the EDCA states that it seeks to deepen defense cooperation between the Parties, and maintain and develop individual and collective capacity to resist armed attacks in furtherance of Article II of the MDT, and within the context of the VFA, [31] it provides material obligations and activities not covered by the said treaties and, thus, partake of the nature of a treaty itself. As above-intimated, the principal modification ushered in by the EDCA which thus demand that it be entered into as a treaty revolve around what it terms "Agreed Locations." As defined in the EDCA:

Article II DEFINITIONS

xxxx

4. "Agreed Locations" means facilities and areas that are provided by the Government of the Philippines through the [Armed Forces of the Philippines] 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 in this Agreement, and may be further described in implementing arrangements. (Emphases and underscoring supplied)

While the EDCA mentions in one of its preambular paragraphs that the "Parties share an understanding for the [US] not to establish a permanent military presence or base in the territory in the Philippines," [32] a conscientious examination of its provisions governing the rights to access and use granted to US forces and contractors, including their vehicles, vessels, and aircrafts, shows that an "Agreed Location" under the auspices of the EDCA is, in reality, the functional equivalent of a military base. The concept of a "military base" was instructively discussed by my respected colleague Associate Justice Arturo D. Brion (Justice Brion) in his own dissent on the main:

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

Under our laws, we find the definition of a military base in Presidential Decree No. 1227 [Section 2] which states that a military base is "any military, air, naval, coast guard reservation, base, fort, camp, arsenal, yard, station, or installation in the Philippines. A military base connotes the presence, in a relatively permanent degree, of troops and facilities in a particular area. [33] (Emphases and underscoring supplied)

No matter how the agreement attempts to mask it, the "Agreed Locations" under the EDCA fit the bill of a military base as above-attributed. At its core, "Agreed Locations" constitute areas of Philippine territory provided

for by the RP to the US for the use of the latter's forces and contractors in their various military endeavors. In particular, the EDCA authorizes US forces and contractors, including their vehicles, vessels, and aircrafts, to conduct any of the following military 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." [34] Noticeably, the enumeration does not mention that an activity must be interrelated to another. Thus, for instance, prepositioning of equipment, supplies, and materiel may be independently conducted by US forces even if there is no training exercise with Philippine troops involved. US forces may also deploy forces or its already prepositioned equipment from within our territory, regardless of our interest in said activity.

Central to the pursuit of these activities is the grant to the US Government of operational control. Under the EDCA, "operational control" has been defined as "[t]he 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." [35] The Philippines, however, was not completely removed of any role: unfortunately, it was only relegated to the role of consultant. The EDCA provides that "[US] forces shall consult on issues regarding construction, alterations, and improvements based on the Parties' shared intent that the technical requirements and construction standards of any such projects undertaken by or on behalf of [US] forces should be consistent with the requirements and standards of both Parties." [36] There is a gaping hole though in the EDCA anent the binding force of any consultation conducted, much more, the consequence of any failure to seek prior consultation with the Philippine Government.

Further, while the EDCA provides that the Philippines shall retain ownership and title to the "Agreed Locations," [37] the same effectively translates to the Philippines holding only a nominal title to said locations, as the concept of "operational control" allows the US to ultimately exercise beneficial ownership over the same. These privileges over the "Agreed Locations" also do not come with a fee since "the Parties agree that the Philippines shall make the Agreed Locations available to the [US] forces without rental or similar costs," save for the necessary operational expenses which, of course, should be shouldered by the US Government. [38] In this relation, it must be highlighted that the EDCA shall subsist for a period of at least (10) years, which is, in fact, even subject to automatic renewal unless terminated in advance (one year prior notice) by a party. [39] Thus, the arrangement established is undeniably, one of a "relatively permanent degree."

Finally, it is telling to note that "[i]mplementing arrangements may address additional details concerning the presence of [US] forces at Agreed Locations and the functional relations between [US] forces and the [Armed Forces of the Philippines] with respect to Agreed Locations." [40] To this, one of the petitioners astutely questions: "[i]f the EDCA is the alleged implementing agreement of the VFA [or the MDT], then why does [it] also need implementing arrangements to carry out its provisions?" [41]

To reify the point that the "Agreed Locations" under the EDCA is the functional equivalent of a military base, reproduced below is a tabular comparison [42] provided by one of the petitioners juxtaposing the provisions of the MBA and the EDCA. The resemblance between the two is unmistakable, if not uncanny:

1. Both the MBA and EDCA allow similar activities.

MBA

EDCA

Article III: Description of Rights

xxxx

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;

xxxx

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 xxx.

Article III Agreed Locations

xxxx

4. The Philippines hereby grants to the United States, xxx operational control of Agreed Locations for construction activities and authority to undertake such activities on, and make alterations and improvements to, Agreed Locations. xxx

xxxx

6. United States forces shall be responsible on the basis of proportionate use for construction, development, operation, and maintenance costs at Agreed Locations. xxx.

Article III

Agreed Locations

1. xxx [T]he Philippines hereby authorizes and agrees that United States forces, United States contractors, and vehicles, vessels, and aircraft operated by or for the United States forces may conduct the following activities with respect to Agreed Locations: training; transit; support and related activities; refueling of aircraft; bunkering of vessels; temporary maintenance of vehicles, vessels, and aircrafts; temporary accommodation of personnel; communications; prepositioning of equipment, supplies, and materiel; deploying forces and materiel; xxx.

Article IV

Equipment, Supplies, and Materiel

1. The Philippines hereby authorizes United States forces, through bilateral security mechanism, such as the MDB and SEB, to preposition and store defense equipment, supplies, and materiel ("prepositioned materiel"). xxx

2. Terms of ownership: under both the MBA and EDCA that the US retains the same species of ownership over its facilities.

MBA

EDCA

Article XVII: Removal of Improvements

[Article VII: Ownership and Dispositions of Buildings, Structures, and Other Property of the 1988 Memorandum of Agreement between the United States of America and the Philippines supplementing and Amending the Agreement of March 14, 1947]

1. It is mutually agreed that the United States shall have the right to remove or dispose of any or all removable

improvements, equipment, or facilities located at or on any base and paid for with funds of the United States. xxx.

2. Non-removable buildings and structures within the bases, including essential utility systems xxx are the property of the Government of the Philippines, and shall be so registered. xxx The United States, shall, however, have the right of full use, in accordance with this Agreement, of such non-removable buildings and structures within the United States Facilities at the bases. xxx.

Article V

Ownership

xxxx

3. United States forces and United States contractors shall retain title to all equipment, materiel, supplies, relocatable structures, and other moveable property that have been imported into or acquired within the territory of the Philippines by or on behalf of the United States forces.

xxxx

4. 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.

3. Comparing the MBA with EDCA in terms of control of the bases vis-a-vis the "Agreed Locations."

MBA

EDCA

Article III: 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 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. (Emphasis supplied)

Article III

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, xxx. (Emphasis supplied)

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. xxx. (Emphasis supplied)

IV.

In any case, it should be highlighted that in *Bagong Alyansang Makabayan (BAYAN) v. Zamora*,^[43] the Court ruled that the phrase "foreign military bases, troops, or facilities" under Section 25, Article XVIII of the 1987 Philippine Constitution should be treated as separate and independent subjects, and thus, any of the three standing alone places it under the provision's coverage. Therefore, even if it is assumed that the "Agreed Locations" cannot be classified as a military base in view of the ten (10)-year term^[44] of the EDCA which would supposedly strip it of the character of permanency, its concept of "Agreed Locations" and the allowable activities therein correspond to the definition of facilities in accordance with the US Department of Defense's (DoD) report to the US Congress regarding the renewed US Global Position, entitled "Strengthening U.S. Global Defense Posture."^[45] Specifically, the DoD defined the US global posture in the context of a cross-section of five elements, i.e., relationships, activities, facilities, legal arrangements, and global sourcing and surge. "Facilities" were referred to as the place where its forces live, train, and operate, including the prepositioned equipment and materiel that permits the deployment and sustainment of forces;^[46] while "Activities" were defined in the context of security cooperation activities to achieve proficiency in joint and combined operations.^[47] Both elements parallel the "Agreed Locations" and the allowable activities in the EDCA, which altogether puts it within the ambit of Section 25, Article XVIII of the 1987 Philippine Constitution.

Conclusion

The provisions on "Agreed Locations" in the EDCA coalesce into a novel and distinct arrangement neither contained nor contemplated in previous treaties between the Philippine and US Governments. It is untrue that the EDCA merely implements the MDT and/or the VFA because these latter treaties are far limited in scope compared to the former. Under the MDT the RP is obligated to cooperate with the US Government through collective efforts to resist an external armed attack; on the other hand, the VFA is but a regulation of the entry, exit, and dispute settlement terms which govern joint training activities conducted by RP and US forces. On the contrary, the EDCA legitimizes the effective installation of foreign military bases (or at least their functional equivalent), troops, or facilities in the Philippines. Thus, as the EDCA alters our existing policies and arrangements on national defense, it should have been entered into by the respondents as a treaty and not an executive agreement in order to comply with Section 25, Article XVIII of the 1987 Constitution. Failing in which, grave abuse of discretion was committed.

For these reasons, I maintain my dissent and vote to GRANT the motions of reconsideration.

[1] Rollo (G.R. No. 212426) Vol. I, pp. 3-66; and rollo (G.R. No. 212444), Vol. I, pp. 3-101.

[2] See motions for reconsideration of the following: (a) petitioners Rene A.V. Saguisag, et al. (Saguisag, et al.) in G.R. No. 212426 dated February 3, 2016; (b) petitioners Bagong Alyansang Makabayan, et al. (BAYAN, et al.) dated February 3, 2016; and (c) petitioners-in-intervention Kilusang Mayo Uno, et al. (Mayo Uno, et al.) dated February 4, 2016.

[3] See motions for reconsideration of BAYAN, et al. in G.R. No. 212444 dated February 3, 2016, pp. 28-41; and Saguisag, et al. in G.R. No. 212426 dated February 3, 2016, pp. 9-25.

[4] See motions for reconsideration of Saguisag, et al. in G.R. No. 212426 dated February 3, 2016, pp. 25-30; and BAYAN, et al. in G.R. No. 212444 dated February 3, 2016, pp. 49-52.

[5] 113 Phil. 333 (1961).

[6] Id. at 338, citations omitted.

[7] See ponencia, p. 37.

[8] See motion for reconsideration of BAYAN, et al. in G.R. No. 212444 dated February 3, 2016, pp. 18-27.

[9] The requisite concurrence of Senate is relatedly provided for in Section 21, Article VII of the 1987 Constitution:

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.

[10] Signed by the Philippines and the US on March 14, 1947 and concurred in by the Philippine Senate on March 26, 1947.

[11] See Article III, MBA.

[12] See id.

[13] See Article VI, MBA.

[14] See Article XI, MBA.

[15] See Article XXIX, MBA.

[16] See Foreign Service Institute, *Agreements on United States Military Facilities in Philippine Military Bases 1947-1985*, (Pacifico A. Castro revised ed. 1985), p. xiii. See also ponencia, p. 10.

[17] Id. at xii. See also ponencia, pp. 10-11.

[18] Id. at xiii. See also ponencia, p. 11.

[19] Id. at xiii-xiv. See also ponencia, p. 11.

[20] See *Bagong Alyansang Makabayan (BAYAN) v. Zamora*, 396 Phil. 623, 637-645 (2000), where the VFA was quoted in full text.

[21] See Dissenting Opinion on the main of Justice Leonen, p. 20, citing Article III (should be Article II), MDT.

[22] See third and fourth preambular paragraphs, MDT; emphasis and underscoring supplied.

[23] See Vaugh, Bruce (2007) "US Strategic Defense Relationships in the Asia-Pacific Region." Congressional Research Service, pp. 22-24. <<https://www.fas.org/sgp/crs/row/RL33821.pdf>> (visited June 2, 2016).

[24] See Dissenting Opinion, p. 22.

[25] See *Primer Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines* <<http://web.archive.org/web/2007092704626/http://www.dfa.gov.ph/vfa/content/Primer.htm>> (visited June 2, 2016).

[26] See paragraph I (6), Draft Terms of Reference of "Balikatan 02-1" (TOR), cited in *Lim v. Executive Secretary*, 430 Phil. 555, 566 (2002).

[27] See paragraph II (1) (a) of the TOR; id. at 566-567.

[28] Article III, VFA.

[29] Article V, VFA.

[30] See Primer Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines <<http://web.archive.org/web/2007092704626/http://www.dfa.gov.ph/vfa/content/Primer.htm>> (visited June 2, 2016). See also Motion for reconsideration of Saguisag et al., pp. 18-19.

[31] Article I (1), EDCA.

[32] See 5[th] preambular paragraph, EDCA.

[33] See Dissenting Opinion, p. 47.

[34] Article III (1), EDCA.

[35] Justice Leonen's Opinion, p. 42, citing United States Department of Defense Dictionary of Military and Associated Terms.

[36] Article III (4), EDCA.

[37] Article V (1), EDCA.

[38] See Article III (3), EDCA.

[39] See Article XII (4), EDCA.

[40] Article X (3), EDCA.

[41] See motion for reconsideration of Saguisag, et al. in G.R. No. 212426 dated February 3, 2016, p. 17.

[42] See id. at 26-29. See also provisions in the 1947 MBA and EDCA.

[43] Supra note 20, at 653 (2000).

[44] Article XII (4), EDCA.

[45] The said report defined "facilities" in three (3) categories:

- A Main Operating Base (MOB) is an enduring strategic asset established in friendly territory with permanently stationed combat forces, command and control structures, and family support facilities. MOB's serve as the anchor points for throughput, training, engagement, and US commitment to NATO. MOB's have: robust infrastructure; strategic access; established Command and Control; Forward Operating Sites and Cooperative Security Location support capability; and enduring family support facilities. These are already in existence.

- A Forward Operating Site (FOS) is an expandable host-nation "warm site" with a limited U.S. military support presence and possibly prepositioned equipment. It can host rotational forces and be a focus for bilateral and regional training. These sites will be tailored to meet anticipated requirements and can be used for an extended time period. Backup support by a MOB may be required.

- A Cooperative Security Location (CSL) is a host-nation facility with little or no permanent U.S. presence. CSLs will require periodic service, contractor and/or host nation support. CSLs provide contingency access and are a focal point for security cooperation activities. They may contain prepositioned equipment. CSLs are: rapidly scalable and located for tactical use, expandable to become a FOS, forward and expeditionary. They will have no family support system.

(See <<http://www.globalsecurity.org/military/facility/intro.htm>> [last visited June 2, 2016]. See also

Strengthening U.S. Global Defense Posture, Report to Congress, September 2004, p. 10. <http://www.dmzhawaii.org/wp-content/uploads/2008/12/global_posture.pdf> [last visited May 31, 2016]). See also dissenting opinion of Justice Brion, pp. 48-49.

[46] See Strengthening U.S. Global Defense Posture, Report to Congress, September 2004, p. 8. <http://www.dmzhawaii.Org/wp-content/uploads/2008/12/global_posture.pdf> (last visited May 31, 2016).

[47] See id. at 7-8.

DISSENTING OPINION

LEONEN, J.:

I reiterate my Dissent Opinion,[1] which was promulgated with the initial Decision[2] on this case. In so doing, I am honored to join Associate Justices Teresita J. Leonardo-de Castro, Arturo D. Brion, and Estela M. Perlas-Bernabe. I briefly recall the points that I previously made.

I do not agree that the Enhanced Defense Cooperation Agreement (EDCA) is a binding executive agreement that escapes scrutiny under Article XVIII, Section 25[3] of the Constitution. It is not merely an implementation of the 1998 Visiting Forces Agreement.

EDCA substantially amends and modifies the Visiting Forces Agreement. When the Visiting Forces Agreement was ratified, the Senate and the public did not consider whether their actions would later on allow the presence of foreign military bases in any part of this country. It is pure legal sophistry to say that the "Agreed Locations" in EDCA are not foreign military bases. These "Agreed Locations" are foreign military bases of the United States.

To now say that it was so would be to imply that the Senate at that time was engaged in a grand deceit. Nothing in the Visiting Forces Agreement hints at permanent bases under any kind of control of a foreign power, pre-positioning of men and material to be used for internal or external operations other than training purposes, and the acceptance of the presence of "contractors," which may consist of private armed groups or "mercenaries" chosen by the United States to be stationed in our country.

Our Constitution has introduced elaborate safeguards before any foreign military base—no matter how it is called—will be again allowed within our territory. Article XVIII, Section 25 requires that this undergo a conscious, deliberate, and publicly transparent process with the Senate. The same provision requires that the stationing of foreign troops in foreign bases or "Agreed Locations" must be through a treaty—not merely through an implementing executive agreement. Although the President is free to negotiate such an agreement, the basic law contemplates that the results of the negotiation should be the subject of public discussion.

The presence of foreign military bases is of such consequence that the Constitution itself also provides the possibility of an alternative mechanism for its allowance. Hence, Article XVIII, Section 25 also provides for the possibility of approval through a national referendum, should that be the preference of Congress.

EDCA was negotiated in the strictest confidentiality, and its contents were made known to the public only when it was signed by the Secretary of National Defense and ratified by the President. It does not take much to see how obviously it deviates from the constitutional mandate.

The presence of foreign military bases in our country, especially that of the United States, has grave repercussions on our independence and on our governance. If there is any historical lesson that we must learn from the 1947 Military Bases Agreement, it is that our national interest can easily be co-opted and made subservient to the

interests of the United States. Rather than an independent and sovereign state, our country can easily be reduced to a Base Nation: a platform from which to project the military strength of the United States for its own defense.

I am fully aware of the political dynamics occasioned by the intrusions of another foreign interest in the West Philippine Sea. However, the recent arbitral award issued by the international arbitral panel created under the auspices of the United Nations Law of the Sea has elevated our stature in the field of international law. It provides material for our diplomacy on the basis of respect for the rule of law.

We cannot afford to weaken our position by showing the world that we cannot even follow the clear and legible provisions of our own Constitution.

Neither can we be driven by what we conceive as the necessities of national security or foreign policy. That is not our mandate. It is not our place to predict what the Senate will do or doubt that it will not be able to appreciate the same complexities and concerns on national security and foreign policy, which have animated some of our discussions. Certainly, there can be more creative solutions that augur better with our sense of independence, sovereignty, and dignity than abject surrender to this planet's superpowers.

With the majority's position on the nature of the EDCA, we effectively rendered the Senate constitutionally impotent. We have smuggled foreign military bases into our country. We have succumbed to views that assume our vulnerability and our surrender to the hegemonic expediency of the United States.

This is not what the Constitution requires. Our basic law imagines more for us as a People.

ACCORDINGLY, I vote to PARTIALLY GRANT the Petitions and to DECLARE the Enhanced Defense Cooperation Agreement 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.

[1] J. Leonen, Dissenting Opinion in *Rene A. V. Saguisag, et al. v. Executive Secretary Paquito N. Ochoa, et al.*, G.R. No. 212426, January 12, 2016 <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/january2016/212426_leonen.pdf> [Per C.J. Sereno, En Banc].

[2] *Rene A. V. Saguisag, et al. v. Executive Secretary Paquito N. Ochoa, et al.*, G.R. No. 212426, January 12, 2016 <<http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/january2016/212426.pdf>> [Per C.J. Sereno, En Banc].

[3] CONST., art. XVIII, sec. 25 provides:

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.

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