Republic of the Philippines

**Supreme Court**

Manila

**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. Ursua, Edre U. Olalia, Dr. Carol Pagaduan-ARAULLO, dr. roland simbulan and Teddy Casiño**

*Petitioners,*

 *-versus-* G.R. No. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

For: Certiorari and Prohibition with Prayer for a Preliminary Prohibitory Injunction and/ or Temporary Restraining Order

**EXECUTIVE SECRETARY PAQUITO OCHOA, DEPARTMENT OF DEFENSE SECRETARY VOLTAIRE GAZMIN, DEPARTMENT OF FOREIGN AFFAIRS SECRETARY ALBERT DEL ROSARIO, JR., DEPARTMENT OF BUDGET AND MANAGEMENT SECRETARY FLORENCIO ABAD,ARMED FORCES OF THE PHILIPPINES CHIEF OF STAFF GENERAL EMMANUEL T. BAUTISTA,**

*Respondents,*

*x------------------------------------------------x*

**petition for Certiorari and Prohibition**

**with Prayer for the issuance of a writ of Prohibitory Injunction and/ or Temporary Restraining OrdeR**

**PREFATORY STATEMENT**

“*September 16, 1991, may well be the day when we in this Senate found the soul, the true spirit of this nation because we mustered the courage and the will to declare the end of foreign military presence in the Philippines”*

*“Therefore I vote No to this treaty, and if it were only possible, I would vote 203 million times No.”*

*- Senate President Jovito R. Salonga*

The postcolonial history of the relations between Philippines and of the United States of America is akin to that of an unequal and exploitative love affair. Without fail, the Philippines takes on the role of the dedicated lover, whose undying devotion is reciprocated with abuse and exploitation by its partner; The unhappy and often disadvantageous results for the Philippines, of this unequal and unseemly relationship, are demonstrated often enough in treaties and agreements on trade and defense it enters into with the US.

There was one shining moment however, when the Philippines grew a backbone and finally decided that it will no longer be a doormat for the US.

On September 16, 1991, despite pressure from the Executive and the US government itself, and risking their political careers, 12 Senators rejected a proposed US-RP Treaty of Friendship, Cooperation and Peace that would have extended to another 10 years one of United States’ most strategic bases, the Subic Naval Base (at this point, the Clark Air Force Base had already been closed due to the eruption of Mount Pinatubo).

The Senate, led by then Senate President Jovito R. Salonga, voted 12-11 against the proposed treaty, thus ending 470 years of foreign military presence in the Philippines.

The vote was prompted by a groundswell of nationalism with the renewed assertion of national sovereignty and the intensifying resistance to US military presence in the country. It was also a signal that the Philippines was ready to rid itself of US military presence.

Sadly, this sense of nationalism and desire for genuine independence has been steadily eroded and even eclipsed. From the Visiting Forces Agreement (VFA) and the Mutual Logistics and Support Agreement (MLSA) which allowed the return and servicing of US military forces and war materiel inside Philippine territory,to the secret negotiations and rushed passage of the Enhanced Defense Cooperation Agreement (EDCA), the lack of the Philippine government’s resolve to uphold and protect Philippine sovereignty and national interest has never been more apparent.

The EDCA is a clear departure from and reversal of the stand taken by the Philippine Senate in 1991. Its terms and conditions put the country in an even worse situation than what would have transpired if the US-RP Treaty of Friendship, Cooperation and Peace that was sent to the Senate for ratification had not beenrejected.

The Executive has circumvented the correct and brave stand taken by the Philippine Senate in 1991 in refusing to renew the RP-US bases treaty by illegally entering into the EDCA.

This agreement will allow the US government to use Philippine military bases, essentially allowing them to build structures, store as well as preposition weapons, defense supplies and materiel, station troops, civilian personnel and defense contractors, transit and station vehicles, vessels, and aircraft. This will effectively allow them to establish and operate *defacto* military bases anywhere on Philippine soil, minus the cost of paying for one.

Contemporary geopolitical realities are being used as justification for the rush to an agreement like the EDCA: the behemoth that is China rising to a new and expanded sense of its historic purpose and place as a civilization and as an emerging world power, and the economic and natural resources its rapidly growing economy needs to turn vision into reality.

As the center of Chinese expansionism straddles Philippine territories in the West Philippine Sea, the EDCA is being touted as the sure-fire deterrent to the Chinese dragon; it is also being pictured as our best hope for developing credible minimum defense capability for the Armed Forces of the Philippines (AFP), even if there is no provision at all in the agreement expressly obligating the US armed forces to transfer military hardware and technology to the AFP in exchange for the accommodations granted by the Philippines to the United States under the agreement.

At the very least, the Philippine government must comply with Constitutional requirements when entering into international treaties and agreements such as the EDCA.

More than this, the Philippine government must negotiate the best possible terms for a just, fair and equitable agreement with the national interest as a paramount consideration should one be found necessary.

In both respects, the Executive has miserably failed. Not only is the EDCA a violation of the Philippine Constitution, it also does not provide any substantial, long-term real benefit, much less distinct advantage or improvement in our position vis-à-vis the United States.

Hence, Petitioners call upon the Honorable Court to wield its supreme Constitutional duty, to declare the EDCA as unconstitutional for patently violating the 1987 Constitution.

## nature of the action

1. Petitioners, by counsel, respectfully file this Petition for Certiorari and Prohibition under Rule 65 of the Rules of Court, and in accordance with Section 1, Article VIII of the 1987 Constitution, Public Respondents having committed grave abuse of discretion amounting to lack or excess of jurisdiction when they entered into the Enhanced Defense Cooperation Agreement on behalf of the Philippines, with the government of the United States of America.
2. Petitioners pray that the Honorable Court declare that Public Respondent Defense Secretary committed grave abuse of discretion amounting to lack or excess of jurisdiction when he entered into the Enhanced Defense Cooperation Agreement on behalf of the Philippines, and that the Honorable Court declare that the Enhanced Defense Cooperation Agreement is unconstitutional for patently violating various provisions of the 1987 Constitution and for being grossly contrary to the national interest.
3. Petitioners also pray that after due hearing and deliberation, this Honorable Court permanently enjoin Public Respondents from funding and implementing the agreement in question.
4. Finally, Petitioners pray that the Honorable Court, pending a final resolution on this Petition, issue a preliminary prohibitory injunction and/or a Temporary Restraining Order, prohibiting Public Respondents, and anyone acting under their authority, stead, or behalf, from implementing the provisions of the Enhanced Defense Cooperation Agreement during the pendency of the case.

**II. timeliness of the petition**

1. On April 28, 2014, the Enhanced Defense Cooperation Agreement was signed by Department of National Defense Secretary Voltaire Gazmin for the Government of the Republic of the Philippines, and by US Ambassador for the Philippines Philip Goldberg for the Government of the United States of America.
2. Under Rule 65 of the 1997 Rules of Civil Procedure, Petitioners have sixty (60) days from the date of the questioned acts or the date of receipt of the questioned document within which to file this Petition. Counting from 28 April 2014, Petitioners have until 27 June 2014 within which to file this Petition. Hence, Petitioners are filing the instant Petition on time.
3. The corresponding docket and other lawful fees and deposit for costs are paid simultaneously with the filing of this Petition.
4. Petitioners respectfully submit as **ANNEX A** a *copy* of the “Enhanced Defense Cooperation Agreement” in compliance with Rule 65 of the 1997 Rules of Civil Procedure.
5. Petitioners respectfully submit that since the “Enhanced Defense Cooperation Agreement” is an official act of the Executive Department, it is subject to judicial notice under Section 1, Rule 129 of the Rules of Court, such that there is no need for the submission in the instant proceeding of a certified true copy of the “Enhanced Defense Cooperation Agreement.”

**III. THE PARTIES**

1. Petitioners Rene A.V. Saguisag and Wigberto E. Tañada are former Senators of the Republic of the Philippines who were part of the “Magnificent 12” members of the Upper House who voted in 1991 against a proposed treaty that would extend the stay of the US military bases in the Philippines for another 10 years.
2. Petitioner Francisco “Dodong” Nemenzo, Jr. is a former President of the University of the Philippines, Filipino citizen and taxpayer.
3. Petitioner Pacifico A. Agabin is a former Dean of the University of the Philippines College of Law, the incumbent general counsel of the IBP, Filipino citizen and taxpayer.
4. Petitioner Sr. Mary John Mananzan is a former President of St. Scholastica’s College, a current Executive Director of its Institute for Women’s Studies, and a Filipino citizen and taxpayer.
5. Petitioners Esteban “Steve” Salonga, H. Harry L. Roque, Jr., Evalyn Ursua and Edre U. Olalia are lawyers, members in good standing of the Integrated Bar of the Philippines (IBP), Filipino citizens and taxpayers.
6. Petitioners Dr. Carol Pagaduan-Araullo and Dr. Roland Simbulan are activists, Filipino citizens and taxpayers.
7. Petitioner Teddy Casiño is a former party-list representative at the House of Representatives, an activist, Filipino citizen and taxpayer.
8. All Petitioners may be served with notices, pleadings and other processes of this Honorable Court through their counsel, the *Roque & Butuyan Law Offices*, with address at 1904 Antel Corporate Center, 121 Valero Street, Salcedo Village, Makati City.

 The **Public Respondents** are the following public officials:

1. Public Respondent Executive Secretary Paquito Ochoa, Jr. is being sued in his official capacity as the Executive Secretary to the President, and as the representative of the Executive Department that will implement and execute the “Enhanced Defense Cooperation Agreement.” He is,*inter alia*, tasked, subject to the control and supervision of the President, to carry out the functions assigned by law to the Executive Office. He may be served with summons, notices, pleadings and other processes of this Honorable Court at at the Office of the Executive Secretary, Premier Guesthouse, Malacañang Compound, San Miguel, Manila.
2. Public Respondent Secretary Voltaire Gazmin is being sued in his official capacity as the Secretary of the Department of National Defense, and who signed the “Enhanced Defense Cooperation Agreement” for the Government of the Republic of the Philippines. Further, under the EDCA, the Department of National Defense is the “designated authority” of the Philippines. He may be served with notices, pleadings and other processes of this Honorable Court at the Department of National Defense, DND Building, Segundo Ave., Camp General Emilio Aguinaldo Quezon City, Philippines 1110.
3. Public Respondent Secretary Albert Del Rosario is being sued in his official capacity as the Secretary of the Department of Foreign Affairs, which is, *inter alia*,the prime agency of government responsible for the pursuit of the State's foreign policy. He may be served with summons, notices, pleadings and other processes of this Honorable Court at 2330 Roxas Boulevard, Pasay City.
4. Public Respondent Secretary Florencio Abad,is being sued in his official capacity as Secretary of the Department of Budget and Management (hereinafter DBM)**,** which isthe department charged with the release of public funds for programs of the Philippine government such as the implementation of the Enhance Defense Cooperation Agreement. He may be served with summons and other papers and processes of this Honorable Court at the DBM, Gen. Solano St., San Miguel, Manila.
5. General Emmanuel T. Bautista is being sued in his official capacity as the Chief of Staff of the Armed Forces of the Philippines, which under the EDCA is the Philippine government entity that will provide the “agreed locations.” He may be served with summons, notices, pleadings and other processes of this Honorable Court at Office of the Chief of Staff, Camp General Emilio Aguinaldo, Quezon City, Philippines, 1110.

**IV. STATEMENT OF FACTS**

**AND ANTECEDENT PROCEEDINGS**

1. In 1951, the Philippines and the United States of America (US) entered into the Mutual Defense Treaty (MDT) a copy of which is attached as **ANNEX B**, which obligates both parties to maintain and develop their individual and collective defense capabilities against any potential armed attack from enemies.
2. On February 10, 1998 the Philippines and the US entered into the Visiting Forces Agreement (VFA) a copy of which is attached as **ANNEX C**, a Status of Forces Agreement for the purpose of supposed visits of US personnel engaged in joint military exercises and other activities as may be approved by the Philippine Government. The counterpart agreement, a copy of which is attached as **ANNEX D,** for Philippine personnel visiting the United States, was signed on October 9, 1998. The VFA was ratified by the Philippine Senate on May 27, 1999.
3. In 2002, the Philippines and the US entered into the Mutual Logistics and Support Agreement (also known generically as Acquisition and Cross-Servicing Agreement) for the purpose of enabling and facilitating the reciprocal provision of logistical support, supplies and services between the armed forces of the two Parties.
4. Concerned citizens, civil society organizations and multi-sectoral groups subsequently filed with the Supreme Court various petitions challenging the constitutionality of the VFA. In October 10, 2000, the first challenge was dismissed by the Supreme Court in the case of *Bayan vs. Zamora.[[1]](#footnote-2)*. A second challenge was brought in the case of *Sombilon vs. Romulo[[2]](#footnote-3)*, which was dismissed by the Supreme Court on February 11, 2009.
5. In 2009, the United States foreign policy took a definitive turn from its former focus and emphasis on the Middle East towards the Asia-Pacific Region termed “pivot to Asia”[[3]](#footnote-4).
6. In August 2013, the Governments of the Philippines and the United States of America began negotiations on the Enhanced Defense Cooperation Agreement (EDCA). Several rounds of negotiations were held thereafter.
7. Eight months later, both Parties held the eighth and final round of negotiations on the EDCA.
8. On April 28, 2014, immediately prior to the arrival of US President Barack Obama for his first state visit to the Philippines, the EDCA was signed by Department of National Defense Secretary Voltaire Gazmin for the Philippines and by US Ambassador to the Philippines Philip Goldberg for the US government.
9. The content of the new agreement was only made public in the evening of April 29, 2014, or a full day after it was signed, after the departure of US President Obama, and after public clamor for the document to be released.
10. On 02 May 2014, Department of National Defense Undersecretary and the Philippines’ chief negotiator Pio Lorenzo Batinostated that “EDCA is just the enhancement of that capacity as joint exercises are envisioned to do.”[[4]](#footnote-5) Usec. Batino further said that “This policy was reaffirmed in the Visiting Forces Agreement (VFA) … The EDCA just further implements the policies already agreed [upon].”[[5]](#footnote-6) Usec. Batino concluded that “Thus, the EDCA does not need ratification.”[[6]](#footnote-7)
11. On 06 May 2014, Department of Foreign Affairs spokesman Charles Jose stated that as far as the DFA is concerned, the EDCA, is an “executive agreement.”[[7]](#footnote-8)

**V. grounds for the petition**

1. This Petition is for Certiorari and Prohibition. Petitioners submit that Public Respondent Defense Secretary Gazmin committed grave abuse of discretion amounting to lack or excess of jurisdiction in entering into the Enhanced Defense Cooperation Agreement on behalf of the Government of the Republic of the Philippines.
2. Further, Petitioners contend that the EDCA is unconstitutional for blatantly violating various provisions of the Philippine Constitution and for being contrary to the national interest.
3. Petitioners do not have at their disposal any appeal, nor any plain, speedy, and adequate remedy in the ordinary course of law, except the instant Petition for Certiorari, and Prohibition, and Mandamus with Prayer for the Issuance of a Writ of Preliminary Prohibitory Injunction and/or Temporary Restraining Order.
4. The signing and/or implementation of the EDCA during the litigation will definitely work injustice to Petitioners and would render judgment in the instant petition moot, academic and ineffectual.
5. The acts of Public Respondents, if not immediately restrained or enjoined, will cause grave and irreparable injury to Petitioners as Filipino citizens, and taxpayers, and the entire Filipino people as the violates the Philippine Constitution, and Philippine sovereignty, resulting in the unlawful use of public funds.
6. For the same reasons, the commission and continuance of the acts complained of during the pendency of this petition will work injustice to Petitioners, and to the people of the Republic of the Philippines. Petitioners pray for the exemption from the posting of a bond in view of the nature of the instant petition.
7. This petition is anchored on the following grounds:

**VI. ARGUMENTS**

##### **Procedural and Jurisdictional Issues**

1. **THE CONTROVERSY IS SUFFICIENTLY RIPE FOR THE HIGH COURT’S ADJUDICATION.**
2. **THERE IS AN ACTUAL CASE OR CONTROVERSY, WHICH CALLS FOR THE EXERCISE OF JUDICIAL POWER.**
3. **THE PETITIONERS HAVE STANDING TO FILE THE INSTANT PETITION.**

**Substantive Issues**

**(Grounds for the Petition)**

1. **THE PUBLIC RESPONDENT DEFENSE SECRETARY COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN SIGNING THE ENHANCED DEFENSE COOPERATION AGREEMENT (EDCA), PURPORTEDLY DESIGNED TO FURTHER THE MUTUAL DEFENSE TREATY BETWEEN THE PHILIPPINES AND THE UNITED STATES, ON THE GROUND THAT IT CANNOT FURTHER A TREATY THAT IS BOTH UNCONSTITUTIONAL AND CONTRARY TO THE INTENTS AND PURPOSES OF THE UNITED NATIONS CHARTER, TO WHICH BOTH COUNTRIES ARE PARTIES.**
2. **THE MDT, A CREATURE OF A DIFFERENT ERA, HAS ALREADY BEEN SUPERSEDED BY THE 1987 CONSTITUTION AND ITS EXPRESS REJECTION OF WAR AS A NATIONAL POLICY.**
3. **THE MDT ALSO CONTRADICTS OUR OBLIGATIONS AS A MEMBER OF THE UNITED NATIONS, UNDER WHOSE OWN CHARTER THE USE OF FORCE AS A MEANS TO SETTLE DISPUTES BETWEEN AND AMONG STATES HAS BEEN OUTLAWED.**
4. **ASSUMING ARGUENDO THAT The MDT IS CONSTITUTIONAL,the edcacannot be considered to be a further implementation of policies previously agreed upon in the mdt and in the VFA.**
5. **THE PUBLIC RESPONDENT DEFENSE SECRETARY COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN HE SIGNED THE EDCA BECAUSE IT VIOLATES THE PROHIBITION ON NUCLEAR WEAPONS IN THE COUNTRY AND DEPRIVES THE SUPREME COURT OF ITS CONSTITUTIONAL PREROGATIVES:**
6. **IT VIOLATES ARTICLE II, SECTION 8 OF THE 1987 CONSTITUTION, WHICH PROHIBITS NUCLEAR WEAPONS IN THE COUNTRY.**
7. **IT DEPRIVES THE SUPREME COURT OF ITS EXERCISE OF CONSTITUTIONAL POWERS PROVIDED FOR UNDER ARTICLE VIII, SECTION 1 OF THE 1987 CONSTITUTION.**
8. **THE PUBLIC RESPONDENT DEFENSE SECRETARY COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN THEY SIGNED THE EDCA SINCE THE EDCA IS CONTRARY TO NATIONAL INTEREST AND IS IN FACT, HIGHLY DISADVANTAGEOUS TO IT:**
9. **ALTHOUGH IT WAS SIGNED IN THE CONTEXT OF HEIGHTENED TENSION WITH CHINA AND DANGLED AS PROOF OF AMERICA’S “IRONCLAD” COMMITMENT TO DEFEND THE PHILIPPINES AGAINST CHINESE EXPANSIONISM, THERE IS NO ASSURANCE THAT THE UNITED STATES WILL ACTUALLY COME TO THE AID OF THE PHILIPPINES IN CASE OF AN INVASION BY CHINA.**
10. **ASSUMING A*RGUENDO* THAT THE MUTUAL DEFENSE TREATY IS CONSTITUTIONAL, IT IS INAPPLICABLE IN THIS CIRCUMSTANCE AS THE WEST PHILIPPINE SEA IS NEITHER A METROPOLITAN TERRITORY NOR ISLANDS IN THE PACIFIC AS PROVIDED IN THE MDT.**
11. **THETERMS AND PROVISIONS OF THE EDCA ARE AN AFFRONT TO THE NATIONAL INTEREST AS THEY ARE EVIDENTLY ONE-SIDED IN FAVOR OF THE UNITED STATES OF AMERICA, WHEN VIEWED FROM SIMILAR OR ANALOGOUS AGREEMENTS ENTERED INTO BY THE LATTER WITH SOME OF ITS OTHER ALLIES.**
12. **IN SIGNING THE EDCA ON BEHALF OF THE PHILIPPINE GOVERNMENT, PUBLIC RESPONDENT DEFENSE SECRETARY COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION BECAUSE IN DOING SO, HE MADE THE PHILIPPINES A TARGET OF US ENEMIES PURSUANT TO THE INTERNATIONAL HUMANITARIAN LAW PROVISION ON ITS GEOGRAPHIC APPLICATION.**

**V. THE PUBLIC RESPONDENT DEFENSE SECRETARY COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN SIGNING THE EDCA, AND/OR IN SUBSEQUENTLY failing to formally transmit the EDCA to the Philippine Senate for its concurrence, SINCE THE EDCA IS A TREATY – AND NOT MERELY AN EXECUTIVE AGREEMENT – AND MUST THEREFORE COMPLY WITH THE CONSTITUTIONAL REQUIREMENTS FOR THE VALIDITY OF A TREATY**.

1. **section 25, article xviii of The 1987 Constitution requires that any foreign military BASES, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate.**
2. **section 25, article xviii of the 1987 constitution applies to the edca since this constitutional provision makes no distinction WHETHER THE FOREIGN MILITARY BASES, TROOPS, OR FACILITIES ARE TEMPORARY, transient OR PERMANENT in nature.**
3. **There is greater reason to consider EDCA a treaty as THE PRESENCE OF AMERICAN BASES, FORCES, or facilities UNDER it is of a permanent nature, and not merely temporary.**

**VII. DISCUSSIONS**

**Procedural and Jurisdictional Issues**

1. It is well-settled that like almost all powers conferred by the Constitution, the power of judicial review is subject to limitations, to wit:

*“Judicial review, which is merely an aspect of judicial power, demands the following:*

*(1) there must be an actual case calling for the exercise of judicial power;*

*(2) the question must be ripe for adjudication;  and*

*(3) the person challenging must have “standing”; that is, he has personal and substantial interest in the case, such that he has sustained or will sustain direct injury**.”[[8]](#footnote-9)*

***There is an actual case or controversy involving a conflict of legal rights***

1. It is a settled doctrine that the courts shall only act when there is an actual case or controversy involving a conflict of legal rights, an assertion of opposite legal claims susceptible of judicial adjudication.[[9]](#footnote-10)
2. The opposite claims involved in this case are the constitutional power of the Senate to concur to a treaty or international agreement and the power of the President as the head of state in the realm of foreign policy.
3. While Petitioners recognize the powers and prerogatives of the President as “the sole organ and authority in external relations and is the country’s sole representative with foreign nations”[[10]](#footnote-11) andas the chief architect of foreign policywho acts as the country’s mouthpiece with respect to international affairs 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,”[[11]](#footnote-12) Petitioners are equally aware that such power of the President is not absolute.
4. Hence, under Section 21 of Article VII, the Constitution regulates such foreign relations powers of the President when it provides that "[n]o treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate."
5. Also, Section 25 of the Transitory Provisions of the Constitution underscored the importance of the concurrence of the Senate, to wit:

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.

1. Conspicuously, the EDCA was framed as an agreement in furtherance of the Mutual Defense Treaty between the Republic of the Philippines and the United States of America (the “MDT”), signed at Washington on August 30, 1951, and the Agreement between the Government of the Republic of the Philippines and the United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines (the “VFA”), signed in Manila of the tenth day of February 1998.
2. EDCA is purportedly aimed at deepening defense cooperation between the Philippines and the United States of America “in furtherance of Article II of the MDT, which states that “the Parties separately and jointly by self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack,” and within the context of the VFA.”
3. Thus, by framing the EDCA as an agreement in furtherance of the MDT and VFA, the President has effectively rendered nugatory the constitutional requirement for the concurrence of the Senate for the validity and effectivity of a treaty or international agreement.
4. Contrary to the interpretation of the Office of the Chief Executive, the MDT cannot be invoked by the Philippines in case of a conflagration in the West Philippine Sea as it is only applicable in case of an armed attack against our “metropolitan territory” or attacks against our “islands in the Pacific”. Since there is currently no armed attack, and since an attack on the Spratlys and the adjacent environs in the West Philippine Sea cannot trigger the application of the MDT, the EDCA cannot possibly be based on the MDT. Neither can it be anchored on the VFA because the presence of US troops pursuant to EDCA goes beyond “visiting”. It is in fact an implementation of a US Defense policy to do away with fixed large-scale bases.
5. This clear presence of conflicting claims of legal rights susceptible of judicial sufficiently established the need for the court to exercise its power of adjudication.

***The case is ripe for adjudication;***

1. Furthermore, the controversy that compelled the Petitioners to file the instant petition before the Honorable Court is sufficiently ripe for adjudication.
2. In *Lozano vs. Nograles*,[[12]](#footnote-13) the Supreme Court reiterated the principle of ripeness, to wit:

 *“An aspect of the "case-or-controversy" requirement is the requisite of "ripeness." In the United States, courts are centrally concerned with whether a case involves uncertain contingent future events that may not occur as anticipated, or indeed may not occur at all. Another approach is the evaluation of the twofold aspect of ripeness: first, the fitness of the issues for judicial decision; and second, the hardship to the parties entailed by withholding court consideration. In our jurisdiction, the issue of ripeness is generally treated in terms of actual injury to the plaintiff. Hence, a question is ripe for adjudication when the act being challenged has had a direct adverse effect on the individual challenging it.* ***An alternative road to review similarly taken would be to determine whether an action has already been accomplished or performed by a branch of government before the courts may step in.”[[13]](#footnote-14)****(Emphasis supplied)*

1. With the actual signing of the EDCA by Defense Secretary Voltaire Gazmin and US Ambassador to Manila Philip Goldberg on 28 April 2014, the case is now ripe for adjudication and the Court is called upon to exercise its power of judicial review.

***Petitioners have standing to file the instant Petition***

1. The Supreme Court, in many cases, has discussed this principle of locus standi. In *Bayan Muna vs. Romulo*[[14]](#footnote-15), it explained that-

*“Locus standi is "a right of appearance in a court of justice on a given question." Specifically, it is "a party’s personal and substantial interest in a case where he has sustained or will sustain direct injury as a result" of the act being challenged, and "calls for more than just a generalized grievance."[[15]](#footnote-16)*

1. Moreover, in *Southern Hemisphere Engagement Network vs. Anti-Terrorism Council*,[[16]](#footnote-17) the Court reiterated that “(l)ocus standi or legal standing is a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”[[17]](#footnote-18)
2. In the instant petition, Petitioners as citizens assert their fundamental rights guaranteed by the Constitution and injured by the enforcement of the EDCA, which injury may be redressed by the declaration of the EDCA as unconstitutional. Thus, the Petitioners have the standing to file the instant petition. As the Honorable Court held in the landmark case of *Roque v. House of Representatives*,

“When suing as a citizen, the interest of the petitioner assailing the constitutionality of a statute must be direct and personal. He must be able to show, not only that the law or government act is invalid, but also that he sustained or is in imminent danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers thereby in some indefinite way. It must appear that the person complaining has been or is about to be denied some right or privilege to which he is lawfully entitled or that he is about to be subjected to some burdens or penalties by reason of the statue or act complained of. ***In fine, when the proceeding involves the assertion of a public right, the mere fact that he is a citizen satisfies the requirement of personal interest.”***[[18]](#footnote-19)[emphasis supplied]

1. Furthermore, the Supreme Court has held that concerned citizens can bring suits if the constitutional question they raise is of 'transcendental importance’, which must be settled early.[[19]](#footnote-20)
2. Thus, in *Defensor-Santiago v. Comelec*, this Honorable Court declared that "[a] party's standing is a procedural technicality which it may, in the exercise of its discretion, set aside in view of the importance of the issues raised.”[[20]](#footnote-21)
3. Moreover, it was held in *Kilosbayan vs. Guingona*,[[21]](#footnote-22) and reiterated in *Tatad v. Secretary*,[[22]](#footnote-23) that procedural technicalities may be set aside by the Court in cases of transcendental importance in view of the importance of the issues involved.
4. Thus, as the issues raised by Petitioners in the instant case are of paramount public interest, involving as it does, the proper exercise of the executive power to enter into international agreements, it is humbly prayed that the Honorable Court brush aside procedural barriers, if any, in taking cognizance of the issues now raised.
5. The Honorable Supreme Court has repeatedly and consistently affirmed that the Court may brush aside technicalities of procedure where a rigid adherence to the rules would prejudice substantial justice,[[23]](#footnote-24) where the issues are of first impression and entail interpretation of key provisions of the Constitution and law,[[24]](#footnote-25) or where the case involves matters of transcendental importance,[[25]](#footnote-26) such as in cases involving the right to life.[[26]](#footnote-27) As the Honorable Court held in *Solicitor General v. Metropolitan Manila Authority*:

“Unquestionably, the Court has the power to suspend procedural rules in the exercise of its inherent power, as expressly recognized in the Constitution, to promulgate rules concerning 'pleading, practice and procedure in all courts. In proper cases, procedural rules may be relaxed or suspended in the interest or suspended in the interest of substantial justice, which otherwise may be miscarried because of a rigid and formalistic adherence to such rules.”[[27]](#footnote-28)

1. As was held by the High Court in the VFA cases[[28]](#footnote-29), the Court, in the exercise of its sound discretion, may brush aside procedural barriers and take cognizance of a case in view of the paramount importance and the constitutional significance of the issues raised.
2. Thus, as the issues raised by the Petitioners in the instant case are of paramount public interest, involving as it does, the exclusive power of the Senate to concur in treaty or international agreement, and the extent of the power of the executive branch to enter into international agreements, Petitioners humbly pray that the Honorable Court brush aside procedural barriers, if any, in taking cognizance of the issues raised by this Petition.

**SUBSTANTIVE ISSUES**

**I. THE PUBLIC RESPONDENT DEFENSE SECRETARY COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN SIGNING THE ENHANCED DEFENSE COOPERATION AGREEMENT (EDCA), PURPORTEDLY DESIGNED TO FURTHER THE MUTUAL DEFENSE TREATY BETWEEN THE PHILIPPINES AND THE UNITED STATES, ON THE GROUND THAT IT CANNOT FURTHER A TREATY THAT IS BOTH UNCONSTITUTIONAL AND CONTRARY TO THE INTENTS AND PURPOSES OF THE UNITED NATIONS CHARTER, TO WHICH BOTH COUNTRIES ARE PARTIES**

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***A*. *The MDT, a creature of a different era, has already been superseded by the 1987 Constitution and its express renunciation of war as an instrument of national policy*.**

1. The Mutual Defense Treaty, signed between the Philippines and the United States in 1951, is said to be the anchor to the Enhanced Defense Cooperation Agreement.
2. Stated in another way, the provisions of the EDCA itself claim that it is no more than a mere implementation of policies already set forth in the MDT and later on, in the Visiting Forces Agreement (VFA).
3. However, the constitutionality of the MDT, a document born in the Cold War-era, must now be squarely attacked, simply because its provisions directly contradict the peace-oriented 1987 Charter.
4. Under the 1987 Philippine Constitution:

“Section 2. **The Philippines renounces war as an instrument of national policy**, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations.” (Emphasis supplied)

1. In the first place, while the MDT purports to abide by the UN Charter and its peaceful aims and purposes,[[29]](#footnote-30)the very language of the Treaty as far as its invocation of collective self-defense in case of an armed attack, is couched in such general terms that it undermines the very specific intents of the inherent right of self-defense expressed in Art. 51 of the UN Charter.
2. This is seen in the expansiveness of the coverage of the Treaty, which embraces practically the entirety of the Pacific ocean, as if it were the reserve of only two countries – the United States of America and the Philippines, as can be seen in Article III of the Treaty:

“The Parties, through their Foreign Ministers or their deputies, will consult together from time to time regarding the implementation of this Treaty and whenever in the opinion of either of them the territorial integrity, political independence or security of either of the Parties **is threatened by external armed attack in the Pacific.**”[emphasis supplied]

1. Article III is the hermeneutical key to the Treaty’s specifications of instances when an armed attack may trigger collective self-defense between the United States of America and the Philippines, which include, but are not limited to the following:

“For the purpose of [Article IV](http://avalon.law.yale.edu/20th_century/phil001.asp#art4), an armed attack on either of the Parties is deemed to include an armed attack on the metropolitan territory of either of the Parties, or on the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels or aircraft in the Pacific.”

1. The over-breadth in the coverage of the Treaty thus opens the entire Pacific Ocean to an escalation of hostilities, as its language allows for trans-boundary uses of force against what the two Parties may arbitrarily consider to be an invasion of their respective territories in the Pacific region without a clear clarification of the metes and bounds of such territories.
2. Such over-breadth undermines the very international peace and security it purports to protect and preserve.
3. Because the MDT contravenes the constitutional policy against war, it must be struck down for being unconstitutional.

**B. *The MDT also contradicts our obligations as a member of the United Nations, under whose own Charter the use of force as a means to settle disputes between and among states has been outlawed*.**

1. The use of force to settle dispute among states is now prohibited in international law.
2. This prohibition has the status of a *jus cogens* norm, and is expressed in Art. II (4) of the UN Charter, which states thus:

 “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

1. This then imposes on the Philippines an *erga omnes omnium* obligation – or an obligation under customary international law that attaches to all members of the international community – to abide by the prohibition in question.
2. One of the generally accepted principles of international law is *pacta sunt servanda.*
3. State parties must comply with their treaty obligations in good faith. The Philippines has to comply with its treaty obligations in good faith, and at least take steps to fulfill these obligations.
4. Under the doctrine of incorporation, the principle of *pacta sunt servanda* forms part of municipal law.
5. Thus, in addition, as a Charter member of the UN, the Philippines has an obligation to comply with the provisions of the UN Charter under the principle of *pacta sunt servanda*; that is, it is bound by an obligation *erga omnes partes*, one that attaches to all members of the multi-lateral treaty, in relation to the same prohibition.
6. Thus, the international obligation of the Philippines to comply with the prohibition on the use of force to settle disputes between and among states is of dual character from the point of view of sources: as a *jus cogens* norm binding on all states and as treaty obligation binding on all parties to the UN Charter.
7. Further, the same obligation has also been constitutionalized in Philippine jurisdiction in two ways: first, by express renunciation of war as a national policy and by the *jus cogens* norm prohibiting the use of force to settle disputes between and among states made part of Philippine municipal law through the *Incorporation Clause* of the 1987 Charter.
8. Philippine obligations under the MDT cannot override its *jus cogens* obligations under the UN Charter and under customary international law.
9. As already stated in the preceding section, the MDT violates the specific exclusionary intents of Art. 51 of the UN Charter on when and where the right to collective self-defense may be invoked.
10. Such a violation is a breach of Philippine obligations to the peaceful settlement of disputes between and among states as a member of the United Nations.

***C. Assuming arguendo that the MDT is constitutional, the EDCA cannot be considered to be afurther implementation of policies previously agreed upon in the MDT and the VFA.***

1. First, the MDT cannot have an application in the current case as it is only applicable for the purpose of resisting armed attack. As provided in Article II of the MDT:

 “ARTICLE II. In order more effectively to achieve the objective of this Treaty, the Parties separately and jointly by self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack.”

1. Further, there are no provisions in the MDT that authorize and provide for any subsequent agreement in furtherance of its purpose.
2. The VFA also cannot have an application in EDCA since the VFA only covered the entry of American troops *visiting*the Philippines for the purpose of training exercises.
3. The VFA does not cover any establishment of foreign military structures for the use of the foreign troops, nor does it cover the storage of foreign defense supplies and materiel.
4. Nothing in the MDT or the VFA provides for (1) Construction of facilities and infrastructure upgrades; and (2) Storage and prepositioning of defense and HADR equipment, supplies and materiél. These policies are unique to the EDCA.
5. These two main purposes of the EDCA therefore, cannot be said to be merely advancing the implementation of the MDT or the VFA.
6. The provision of the Constitution is clear and unequivocal. Foreign military bases, troops, or facilities are not allowed unless there is a concurrence by the Senate.
7. The MDT’s express purpose is to bind the parties to an obligation to defend each other from enemy attacks. The VFA’s express purpose is to allow joint exercises by the US and Philippine militaries.
8. The EDCA provides as its purpose:

Article 1

3. The parties agree that the United States may undertake the following types of activities in relation to its access and use of Agreed Locations: security cooperation exercises; joint and combined training activities; humanitarian assistance and disaster relief activities; and such other activities as may be agreed upon by the Parties.

1. Nothing in either the MDT or the EDCA allows the presence of troops or materials for the purpose of humanitarian assistance and disaster relief activities.
2. A comparative table of the key features of the MDT, the VFA and the EDCA will show thus:

|  |  |  |  |
| --- | --- | --- | --- |
|  | MDT | VFA | EDCA |
| Date entered into | Signed - August 30, 1951 | Signed – February 10, 1998Ratified - May 27, 1999 | Signed - April 28, 2014 |
| Historical background during period entered into | Period of communist expansion in Asia in the period following World War II and the Korean War[[30]](#footnote-31) | Period of “access” as a new approach in maintaining US presence in Southeast Asia. Instead of permanent bases the approach seeks bilateral arrangements – like those with Singapore – for training, exercises and interoperability to allow for uninterrupted forward deployment in the region.[[31]](#footnote-32) | Period of heightened tensions in the West Philippine Sea. [[32]](#footnote-33)Period of the US pivot to the Asia Pacific from previous focus on Europe and the Middle East.Signed on the day of the arrival of US President Barack Obama for a State Visit. |
| Purpose of the agreement | Provides that the parties recognize that an armed attack in the Pacific Area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes. [[33]](#footnote-34) | Provides a mechanism for regulating the circumstances and conditions under which United States forces may visit the Philippines for bilateral military exercises. The VFA governs the entry and exit of U.S. personnel in the country and establishes the manner of disposing of criminal cases against any of its members, who commits an offense in the Philippines. The VFA also establishes a procedure for resolving differences in that may arise between the two sides with regard to the provisions of the agreement. [[34]](#footnote-35) | Provides cooperation by way of (1) Construction of facilities and infrastructure upgrades; and (2) Storage and prepositioning of defense and HADR equipment, supplies and material.[[35]](#footnote-36) |

1. It is important to note that the VFA primer provided by the DFA states:

“Neither does the Philippine Government intend to allow any United States military facilities or any other foreign military facilities to be established in the country again. There is just no compelling political or defense consideration for such a course of action.

The VFA pertains to the treatment of United States troops temporarily visiting the Philippines to conduct bilateral exercises with the Philippines These visits will be temporary and, as stated above, will not constitute a permanent stationing of United States troops on Philippine soil.

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. Any effort by the United States to assist the Philippines on military equipment and supplies will be governed by the 1947 Military Assistance Agreement and the 1953 Mutual Defense Assistance Agreement. Any other envisaged arrangements not falling under these two agreements will require fresh agreements, which the Philippines has no intention of concluding in the immediate future.”

1. Hence, there is no doubt that the EDCA expands the coverage of both the MDT and the VFA , specifically in the establishment of facilities in “Agreed Locations”, and storage and prepositioning of defense and HADR supplies, equipment and materiel.
2. Moreover, the MDT has been superseded by the 1987 Constitution.
3. The MDT was entered into by the US and the Philippines in 1951. As such, whatever requirements that the 1987 Constitution provides for in relation to entry into treaties cannot be dismissed by simply arguing that a new treaty is just an extension of the old one.
4. Further, the actions of the government in relation to the Visiting Forces Agreement should be a guide to how the EDCA should be treated.
5. The VFA also provided that it is aligned with the obligations already established under the MDT. Still, the government still saw fit to enter into the VFA through a treaty concurred with by the Senate, and not just through an executive agreement.
6. If the VFA was also a furtherance of the MDT, why then was it in a form of a treaty? Why did the government not use the same reasoning to enter into an agreement without the need of Senate concurrence?
7. Is it for mere expediency? To provide a “welcoming gift” for a visiting President? Shall we bargain, or worse, give away for free our sovereignty and the Philippine Constitution for such reasons?
8. Furthermore, the government’s own actions in relation to the VFA estops them now from claiming that the EDCA does not need Senate concurrence.
9. The EDCA actually implements a new US defense policy in line with their “pivot” to Asia.
10. Whereas the focus of US foreign policy was concentrated before on the Middle East, the focus has now turned to Asia, especially in light of the emerging superpower, China.
11. In light of this, US foreign policy has shifted into stationing US military troops “temporarily” in foreign bases, while keeping a constant military presence in Asia.
12. This means that EDCA will involve stationing of troops in the Philippines in a manner, which was not provided for either in the MDT or the VFA.
13. Hence, EDCA requires Senate concurrence as required by Section 25, Article XVIII of the 1987 Constitution.
14. Therefore, in any case, the Executive Department, through the Public Respondents, has the ministerial duty to formally transmit the EDCA to the Philippine Senate for its concurrence, in accordance with Section 25, Article XVIII of the 1987 Constitution.
15. Consequently, the Executive Department, through the Public Respondents, unlawfully neglected the performance of an act which the Constitution specifically enjoins as a duty resulting from the office--- by failing to transmit the EDCA to the Philippine Senate for its concurrence in accordance with Section 25, Article XVIII of the Constitution.

**II. The public Respondent defense secretary committed grave abuse of discretion when he signed the EDCA because the EDCA VIOLATES THE CONSTITUTIONAL PROHIBITION ON NUCLEAR WEAPONS IN THE COUNTRY AND DEPRIVES THE SUPREME COURT OF ITS CONSTITUTIONAL PREROGATIVES.**

**--------------------------------------------------**

***A. The EDCA violates Article II, Section 8 of the 1987 Constitution, which prohibits nuclear weapons in the country.***

1. The Philippine Constitution expressly provides in Article II, Section 8:

Section 8. The Philippines, consistent with the national interest, adopts and pursues a policy of freedom from nuclear weapons in its territory.

1. The Philippine primer released by the government on the EDCA states that among the main features of the EDCA is a “Prohibition of entry to the Philippines of nuclear weapons, and reference to respective obligations of both Parties under the Chemical Weapons Convention and the Biological Weapons Convention”.
2. The Preamble of the EDCA provides:

“Recalling the Parties’ respective international obligations, including those provided under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction and the Convention on the Prohibition of the Development, Production and Stockpiling of the Bacteriological (Biological) and Toxin Weapons and on their Destruction;”

1. The much bandied about provision that purportedly prevents the entry of nuclear weapons in the Philippines actually states:

Article IV

6. The prepositioned materiel shall not include nuclear weapons.

1. In fact, the Executive has, intentionally or not, misled the public.
2. There is in fact no absolute statement in the EDCA that prohibits the entry into the Philippines of nuclear weapons. The EDCA only disallows the prepositioning of nuclear weapons.
3. There is no express prohibition for the entry of nuclear weapons through the other activities allowed by the EDCA namely: transit; refueling of aircraft; bunkering of vessels; and temporary maintenance of vehicles, vessels and aircraft among others.
4. It is the height of naiveté to believe that US planes or vessels, which may be stationed in the Philippines in connection with the EDCA, or to carry out refueling, or in transit, will not carry nuclear weapons.
5. The Constitutional prohibition is absolute in its prohibition against nuclear weapons in its territory. As such, no vessel or aircraft of the US, which enters Philippine territory, should be allowed to carry nuclear weapons. Yet, the language of EDCA only prohibits nuclear weapons if they are prepositioned. There is no prohibition present in all the other activities that EDCA allows where US troops, supplies and materiel enter Philippine territory.
6. Further, while the government argues that they are able to check all the facilities of the US under EDCA as the “Designated Authority” is allowed access to all “Agreed Locations” to ensure that nuclear weapons are not brought into the country, there is no way that such a provision will be enforceable by the Philippine government.
7. It is clear, upon a closer examination of the EDCA, that access to the Agreed Locations by Designated Authority is contingent on “operational safety and security requirements”.
8. It is clear from the EDCA that it is the United States that has operational control of Agreed Locations:

“Article III

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

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 VI

3. United States forces are authorized to exercise all rights and authorities within Agreed Locations that are necessary for their operational control or defense…”

103. Locations may not be accessed by Designated Authority based on “operational safety”. As such, they are free to bring any supplies or materiel without limitation.

***B. The EDCA deprives the Supreme Court of its exercise of its Constitutional Powers provided for under Article VIII, Section 1 of the Constitution.***

104. The EDCA provides in Article XI, the procedure for resolution of disputes. It states,

“The parties agree to resolve any dispute arising under this Agreement exclusively through consultation between the Parties. **Disputes and other matters subject to consultation under this Agreement shall not be referred to any national or international court**, tribunal, or other similar body, or to any third party for settlement, unless otherwise agreed by the Parties.”*(emphasis supplied)*

105. This is in direct contravention of the constitutional powers granted exclusively to the Judiciary under Article VIII, Section 1 of the Constitution which states,

**“Section 1.** The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.”

106. This exclusive jurisdiction given to the Supreme Court cannot be derogated by a mere Executive Agreement.

107. This provision of the EDCA also gives rise to questions as to how US troops, personnel and contractors will be treated under possible criminal prosecutions.

108. It cannot be denied that the Subic Rape Case tackled by the Court in *Sombilon v. Executive Secretary* raised issues as to the ability of the Philippine government to properly prosecute and punish those who may be guilty of crimes committed in the Philippines by visiting foreign forces.

 109. Moreover, the recent grounding of a US minesweeper at the Tubbattaha Reef, which caused unimaginable damage to the natural habitatthere, also underscored the inability of the Philippine government to hold the US liable for damage to the environment that may be caused by their presence.

110. It is a reiteration of the same colossal problems posed arising from toxic contamination of base environs caused by untreated waste materiel left by the US armed forces when they pulled out of the Clark and Subic bases.

111. All these issues are sure to arise under the EDCA. There is however, little that is actually known with how these shall be treated, except for this provision which provides even less clarity than an analogous provision found in the VFA.

112. The even more vague provision regarding dispute resolutions under the EDCA gives rise to the real threat that the Judiciary will be deprived of its Constitutional powers if the US invokes the provision.

**III. the public Respondent defense secretary committed grave abuse of discretion AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN THEY SIGNED THE EDCA SINCE THE EDCA IS CONTRARY TO NATIONAL INTEREST AND IS IN FACT, HIGHLY DISADVANTAGEOUS TO IT.**

**-------------------------------------------------**

***A. Although it was signed in the context of heightened tension with China and dangled as proof of America’s “ironclad” commitment to defend the Philippines against Chinese expansionism, there is no assurance that the United States will actually come to the aid of the Philippines in case of an invasion by China*.**

113. The Section 7 of Article II of the Constitution provides,

“Section 7. The State shall pursue an independent foreign policy. In its relations with other states, the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination.”

114. In all its international dealings, the State is required to first consider if its position is in line with the Philippines’ national interest.

115. The Executive has failed in this regard since the EDCA is patently contrary to Philippine national interest.

116. Many pronouncements have been made by government officials trumpeting the fact that EDCA will aid us with our current dispute with China over the West Philippine Sea.

117. Initially after his arrival to the Philippines however, US President Barack Obama would not expressly state that the US would come to the aid of the Philippines in case of an armed attack by China.

118. This is in stark contrast to his clear and unequivocal statement during his visit to Japan where he expressly stated the US Commitment. He stated this in the Joint Press Conference with Prime Minister Shinzo Abe during his visit to Tokyo.

119. He stated, “Let me reiterate that our treaty commitment to Japan’s security is absolute. And Article 5 (of the treaty) covers all territories under Japan’s administration, including the Senkaku Islands.”[[36]](#footnote-37)

120. Further, it is not the EDCA which will or should compel the US government to come to the aid of the Philippines in the event of an armed attack. This obligation is already on the part of the US based on the MDT, which provides,

“ARTICLE IV. Each Party recognizes that an armed attack in the Pacific area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes.”

121. Even then however, this aid will not be automatic or immediate as the MDT provides that constitutional processes must first be complied with.

122. In the case of the US, this may require their Congress to first approve of military action. As such, there is no such new advantage to the Philippines as a result of the EDCA as claimed.

123. On the other hand, it will only likely increase the ire of China as seen in Chinese media where the Chinese news agency, Xinhua has published the following editorial:

“By striking the defense deal with the United States at this moment despite domestic opposition, the Aquino administration has made its intention clear: to confront China with U.S. backing.

Such an aggressive posture could easily lead to further provocation. An emboldened Aquino would make an amicable solution to the territorial disputes more difficult, if not impossible, and intensify regional tensions.”[[37]](#footnote-38)

***B. The MDT is inapplicable in the circumstance as the West Philippine Sea is neither a metropolitan territory nor islands in the Pacific as provided in the MDT.***

124.In any case, the MDT is potentially inapplicable in the current circumstances surrounding the tension between the Philippines and China as the West Philippine Sea is neither a metropolitan territory, nor islands in the Pacific.

125. The MDT specifically provides what an “armed attack” is,

ARTICLE V. For purposes of ARTICLE IV, an armed attack on either of the Parties is deemed to include an armed attack on the metropolitan territory of either of the Parties, or on the island territories under its jurisdiction in the Pacific Ocean, its armed forces, public vessels or aircraft in the Pacific.

126. First, the MDT does not even define what metropolitan territories are. Hence, there can be a denial of aid by the US in relation to the dispute that is currently in place.

127. The US government can also claim that the Scarborough and Ayungin Shoals are not islands in the Pacific.

128. All these considerations in place allow the US government to escape its treaty obligations to the Philippines by stating that the MDT does not apply to the ongoing dispute with China.

***C. The terms and provisions of the EDCA are an affront to the national interest as they are evidently lopsided in favor of the United States of America, when viewed from similar or analogous agreements entered into by the latter with some of its other allies***

129.The EDCA provides,

 Article III

3. Given the mutuality of benefits, the parties agree that the Philippines shall make Agreed Locations available to the United States forces without rental or similar costs. United States forces shall cover their necessary operational expenses with respect to their activities at the Agreed Locations.

130. Proponents of the EDCA say that the Philippines stands to benefit form the EDCA. The primer released by the Philippine government outlines the following as among the benefits of EDCA for the Philippines:

* Philippine ownership of buildings and infrastructure once constructed by US military;
* Sharing and joint use of facilities in the Agreed Locations, including those built by the US military;[[38]](#footnote-39)

131. However, these benefits, whether or not intentionally, are quite misleading.

132. Insofar as ownership of buildings and infrastructure are concerned, while the EDCA does state that they these shall be owned by the Philippines once constructed, the EDCA also states:

“Article V

4. xxx Permanent buildings constructed by United States forces become property of the Philippines, once constructed, but shall be used by United States forces until no longer required by United States forces.”

133. At the very minimum, based on the initial time line of the EDCA, the Philippines cannot use the buildings and facilities built by the United States until after at least ten years. And since the EDCA continues in force automatically, this benefit may not come into force until well after that.

134. Insofar as sharing and joint use of facilities in Agreed Locations, there is nothing contained in Article III that states that the Philippine forces are able to share in the facilities built by the US in the Agreed Locations. In fact, the entire Article only covers what the Philippines shall provide for the US forces, including the fact that no rental or similar costs will be paid by US forces. However, there is nothing in the Article that stands to benefit the Philippines in a way that the primer released by the government states.

135. At the time of the negotiations for the treaty for the US Bases in 1991, the US Government offered to pay US$203 million for its continued lease of the Subic Naval base .

136. With the EDCA, not only is the Philippines not receiving any remuneration for allowing US presence in the country, it has committed to making all the effort to facilitate US presence in the country, including providing security for the facilities, equipment, supplies and materiel to be stored. All these for the measly return of by then, old building, facilities and infrastructure and the possible sale or transfer of equipment determined to be excess.

137. Even the access provisions show a clear disdain for Philippines and a marked advantage for the US:

“Article III

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

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.”

138. The Philippine government also trumpets the advantages of US presence brings in disaster relief. However, the US is expected to assist in disaster relief efforts anyway, with our without EDCA.

139. Further, the HADR equipment only forms a small part of what the EDCA will allow the US forces to store in the Philippines. Therefore, the advantage to having HADR equipment nearby may very minimal.

140.Yet, what exactly do we get in return? We actually get a pittance. We are dubbed, since the Bush years, as a major non-NATO ally and more recently, in the words of President Obama, as the “coordinator” for the US in the ASEAN region.

141. For all that the Philippines is supposedly now the largest benefactor of the Pentagon's Foreign Military Financing budget, receiving $11 million in 2005, $12 million in 2006 and $13 million in 2007[[39]](#footnote-40) but compared to what Pakistan is getting from the US, our share of foreign military financing is peanuts.

142. Over the last few years, the US has given more than $ 7 billion to Pakistan in direct assistance – that is, in funds to purchase weapons, supplies and equipment, purportedly to help it fight the Taliban.

143. In fact, it has become yet another sore point for US planners, who lament that the funds supposedly intended to develop Pakistan’s counter-terrorism capabilities, were all funnelled to purchases by the Pakistani armed forces of “heavy arms, aircraft and equipment that U.S. officials say are far more suited for conventional warfare with India, its regional rival.”[[40]](#footnote-41)

144. Compare that to American military aid to the Philippines, which comes in the form of financing; that is, no money actually reaches Philippine coffers. Funds are directly funnelled to American firms contracted by the US government to supply mostly refurbished equipment to the Philippine military, like Vietnam-war era helicopters, trucks and patrol boats.

145. The Center for Public Integrity places Pakistan on the third spot in its list of top 10 recipients of US military aid three years after 9/11. The Philippines is not on that list:

**Top 10 U.S. Military Aid Recipients
Three Years After 9/11[[41]](#footnote-42)**

|  |  |
| --- | --- |
| **Country** | **Total** |
| [Israel](http://projects.publicintegrity.org/MilitaryAid/country.aspx?iso=IL) | $9,094,874,000 |
| [Egypt](http://projects.publicintegrity.org/MilitaryAid/country.aspx?iso=EG) | $6,025,456,540 |
| [Pakistan](http://projects.publicintegrity.org/MilitaryAid/country.aspx?iso=PK) | $4,682,808,397 |
| [Jordan](http://projects.publicintegrity.org/MilitaryAid/country.aspx?iso=JO) | $2,670,414,688 |
| [Afghanistan](http://projects.publicintegrity.org/MilitaryAid/country.aspx?iso=AF) | $2,663,783,836 |
| [Colombia](http://projects.publicintegrity.org/MilitaryAid/country.aspx?iso=CO) | $2,048,565,665 |
| [Turkey\*](http://projects.publicintegrity.org/MilitaryAid/country.aspx?iso=TR) | $1,324,923,070 |
| [Peru](http://projects.publicintegrity.org/MilitaryAid/country.aspx?iso=PE) | $445,825,971 |
| [Bolivia](http://projects.publicintegrity.org/MilitaryAid/country.aspx?iso=BO) | $320,682,000 |
| [Poland](http://projects.publicintegrity.org/MilitaryAid/country.aspx?iso=PL) | $313,136,119 |
| \* The $1 billion grant made to Turkey through the Economic Support Fund for fiscal year 2003 was rescinded in 2005. |

A more up-to-date data from the United States Agency for International Development (USAID), albeit limited only to the year 2012, underscores this sad truth:

Data for Foreign Assistance Fast Facts: FY2012 **Top 10 Recipients of U.S. Economic and Military Assistance: Obligations**

# (in $US billions)

| **Country** | **Economic** | **Military** | **Total** |
| --- | --- | --- | --- |
| Afghanistan | 3.3 | 9.6 | 12.9 |
| Israel | 0.0 | 3.1 | 3.1 |
| Iraq | 0.8 | 1.2 | 1.9 |
| Egypt | 0.1 | 1.3 | 1.4 |
| Pakistan | 1.1 | 0.1 | 1.2 |
| Jordan | 0.8 | 0.3 | 1.1 |
| Ethiopia | 0.9 | 0.0 | 0.9 |
| Kenya | 0.7 | 0.0 | 0.7 |
| Colombia | 0.5 | 0.1 | 0.6 |
| Haiti | 0.5 | 0.0 | 0.5 |
| SOURCE: USAID Foreign Assistance Database (http://gbk.eads.usaidallnet.gov/). |
| Prepared by USAID Economic Analysis and Data Services.[[42]](#footnote-43) |
|  |

146. It is no wonder that despite years of American military aid to the Philippines, our armed forces remains the most poorly-equipped in the Asian region. *Barya-barya lang at mga pinaglumaan na ang bigay nila sa atin.*

147. For example, the most recent acquisitions of the AFP from the US in the wake of heightened tensions at the West Philippine Sea are two decommissioned cutters from the US Coastguard whose relatively advanced armaments had been stripped off the two vessels by American authorities before these were turned over to the Philippines.

148. And this is not to mention the concerns raised by critics that while US military aid has boosted counter-insurgency capabilities of the Philippine military “it has come at the price of a U.S. blind eye to [human rights abuses in the Philippines].”[[43]](#footnote-44)

149.Any talk of American assistance to the Philippines to develop a “minimum credible defense capability” rings hollow in the face of these facts.

150. And the little cash that the Americans allow the Philippine military to have – as in the case of financial support for the annual Balikatan exercises –unfortunately end up in the pockets of some corrupt Filipino generals, if the revelations of Navy Lt. Senior Grade Mary Nancy Gadian are to be believed.[[44]](#footnote-45)

151. A comparative table of analogous or similar Status of Forces Agreements (SOFAs) the US has entered into with some of its other allies - Iraq, Japan and South Korea – will show in great detail how our own negotiators for the EDCA have placed national interest at such a great disadvantage:

|  |  |  |  |
| --- | --- | --- | --- |
|  | US-Iraq | US-Japan | US-South Korea |
| Presence of Similar “Agreed Locations” | Yes 🡪”Agreed facilities and areas” | Yes 🡪 "Facilities and areas" | Yes 🡪 “Facilities and Areas” |
| Definition/Determination of Similar “Agreed Locations” | Article 2: Definition of Terms1. “Agreed facilities and areas" are those Iraqi facilities and areas owned by the Government of Iraq that are in use by the United States Forces during the period in which this Agreement is in force. | Article II:1. (a) The United States is granted, under Article VI of the Treaty of Mutual Cooperation and Security, the use of facilities and areas in Japan. Agreements as to specific facilities and areas shall be concluded by the two Governments through the Joint Committee provided for in Article XXV of this Agreement. "Facilities and areas" include existing furnishings, equipment and fixtures necessary to the operation of such facilities and areas.1. (b) The facilities and areas of which the United States has the use at the time of expiration of the Administrative Agreement under Article III of the Security Treaty between Japan and the United States of America,shall be considered as facilities and areas agreed upon between the twoGovernments in accordance with sub-paragraph a above. | Article II: Facilities and Areas - Grant and Return 1. (a) The United States is granted, under Article IV of the Mutual Defense Treaty, the use of facilities and areas in the Republic of Korea. Agreements as to specific facilities and areas shall be concluded by the two Governments through the Joint Committee provided for in Article XXVIII of this Agreement. "Facilities and areas" include existing furnishings, equipment, and fixtures, wherever located, used in the operation of such facilities and areas.  |
| Use of “Agreed Locations” | Some may be exclusively used by the United States and some may be shared between Iraq and the United States.Article 6: Use of Agreed Facilities and Areas2. In accordance with this Agreement, Iraq authorizes the United StatesForces to exercise within the agreed facilities and areas all rights and powersthat may be necessary to establish, use, maintain, and secure such agreedfacilities and areas. The Parties shall coordinate and cooperate regardingexercising these rights and powers in the agreed facilities and areas of jointuse. | Article II:l. (a) The United States is granted, under Article VI of the Treaty ofMutual Cooperation and Security, the use of facilities and areas in Japan.4. (a) When facilities and areas are temporarily not being used by the United States armed forces, the Government of Japan may make, or permit Japanese nationals to make, interim use of such facilities and areas provided that it is agreed between the two Governments through the Joint Committee that such use would not be harmful to the purposesfor which the facilities and areas are normally used by the United States armed forces.(b) With respect to facilities and areas which are to be used by United States armed forces for limited periods of time, the Joint Committee shall specify in the agreements covering such facilities and areas the extent to which the provisions of this Agreement shall apply. | Article II: Facilities and Areas - Grant and Return4. (a) When facilities and areas are temporarily not being used and the Government of the Republic of Korea is so advised, the Government of the Republic of Korea may make, or permit nationals of the Republic of Korea to make, interim use of such facilities and areas provided that it is agreed between the two Governments through the Joint Committee that such use would not be harmful to the purposes for which the facilities and areas are normally used by the United States armed forces. |
| Return of “Agreed Locations” to Host Country | Article 5: Property Ownership6. The United States shall return agreed facilities and areas and any nonrelocatablestructures and assemblies on them that it had built, installed, orestablished during the term of this Agreement, according to mechanisms andpriorities set forth by the Joint Committee. Such facilities and areas shall behanded over to the Government of Iraq free of any debts and financialburdens.7. The United States Forces shall return to the Government of Iraq theagreed facilities and areas that have heritage, moral, and politicalsignificance and any non-relocatable structures and assemblies on them thatit had built, installed, or established, according to mechanisms, priorities,and a time period as mutually agreed by the Joint Committee, free of anydebts or financial burdens.8. The United States Forces shall return the agreed facilities and areas to theGovernment of Iraq upon the expiration or termination of this Agreement, orearlier as mutually agreed by the Parties, or when such facilities are nolonger required as determined by the JMOCC, free of any debts or financialburdens. | Article II:2. At the request of either Government, the Governments of Japan and the United States shall review such arrangements and may agree that such facilities and areas shall be returned to Japan or that additional facilities and areas may be provided.3. The facilities and areas used by the United States armed forces shall be returned to Japan whenever they are no longer needed for purposes of this Agreement, and the United States agrees to keep the needs for facilities and areas under continual observation with a view toward suchReturn.Article IV:1. The United States is not obliged, when it returns facilities and areas to Japan on the expiration of this Agreement or at an earlier date, to restore the facilities and areas to the condition in which they were at the time they became available to the United States armed forces, or to compensate Japan in lieu of such restoration.2. Japan is not obliged to make any compensation to the United States for any improvements made in the facilities and areas or for the buildings or structures left thereon on the expiration of this Agreement or the earlier return of the facilities and areas. | Article II: Facilities and Areas - Grant and Return2. At the request of either Government, the Governments of the United States and the Republic of Korea shall review such agreements and may agree that such facilities and areas or portions thereof shall be returned to the Republic of Korea or that additional facilities and areas may be provided. 3. The facilities and areas used by the United States shall be returned to the Republic of Korea under such conditions as may be agreed through the Joint Committee whenever they are no longer needed for the purposes of this Agreement and the United States agrees to keep the needs for facilities and areas under continual observation with a view toward such return.Article IV: Facilities and Areas - Return of Facilities 1. The Government of the United States is not obliged, when it returns facilities and areas to the Government of the Republic of Korea on the expiration of this Agreement or at an earlier date, to restore the facilities and areas to the condition in which they were at the time they became available to the United States armed forces, or to compensate 'the Government of the Republic of Korea in lieu of such restoration. 2. The Government of the Republic, of Korea is not obliged to make any compensation to the Government of the United States for any improvements made in facilities and areas or for the buildings and structures left thereon on the expiration of this Agreement or the earlier return of the facilities and areas.  |
| Storage of Military/Defense Equipment | Allowed | Allowed | Allowed |
| Public Utilities | Not explicitly stated | Article VII:The United States armed forces shall have the use of all public utilitiesand services belonging to, or controlled or regulated by the Governmentof Japan, and shall enjoy priorities in such use, under conditions no less favorable than those that may be applicable from time to time to the ministries and agencies of the Government of Japan. | Article VI: Utilities and Services1. The United States armed forces shall have the use of all utilities and services which are owned, controlled or regulated by the Government of the Republic of Korea or local administrative subdivisions thereof. The term "utilities and services" shall include, but not be limited to, transportation and communications facilities and systems, electricity, -gas, water, steam, heat, light, power, and sewage disposal. The use of utilities and services as provided herein shall not prejudice the right of the United States to operate military transportation, communication power and such other utilities and services deemed necessary for the operations of the United States armed forces. This right shall not be exercised in a manner inconsistent with the operation by the Government of the Republic of Korea of its utilities and services. 2. The use of such utilities and services by the United States shall be in accordance with priorities, conditions, and rates or tariffs no less favorable than those accorded any other user. |

152. There are glaring differences in these Status of Forces Agreements with Japan, South Korea and Iraq. These serve to highlight the clear disadvantage that the Philippines has with regard to the EDCA.

153. In the matrix, it can be seen that these Status of Forces Agreements deal with Agreed Locations, which is the main focus of the EDCA. Here, we see some fundamental differences:

154.In the Iraq, Japan and South Korea SOFAs, there is a possibility of interim use of the host countries of the facilities constructed by the US in the Agreed Locations. No such provision is present in the EDCA, where facilities are for the use of the United States until they are no longer needed.

155.Upon the return of the Agreed Locations, the Iraq, Japan and South Korea SOFAs explicitly state that absolutely no compensation shall be made on any construction or improvements made by the US in the Agreed Locations.

156. In the EDCA, no such provision is present. Instead, Parties or Designated Authorities shall consult regarding the terms of return of any Agreed Locations, **including possible compensation for improvements or construction**[[45]](#footnote-46).

157. While the United States shall bear the cost of utilities in terms no less favorable than those enjoyed by government, similar to the Japan SOFA, the cost of taxes and similar fees on these utilities shall be on account of the Philippines[[46]](#footnote-47), which is not present in the Japan and South Korean SOFAs.

158. In effect, the Philippine government shall bear the cost of the taxes on the utilities of the US, which is not present in the other agreements.

**IV. IN SIGNING THE EDCA ON BEHALF OF THE PHILIPPINE GOVERNMENT, PUBLIC RESPONDENT DEFENSE SECRETARY COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION BECAUSE IN DOING SO, HE MADE THE PHILIPPINES A TARGET OF US ENEMIES PURSUANT TO THE INTERNATIONAL HUMANITARIAN LAW PROVISION ON ITS GEOGRAPHIC APPLICATION.**

**--------------------------------------------------**

159. Article 52 (2) of Additional Protocol I to the Geneva Conventions state Additional Protocol provides,

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

160. Under this definition of military objectives, two criteria must be fulfilled. First, that the object has to contribute effectively to the military action of the enemy. Second, its destruction, capture or neutralization has to offer a definite military advantage for the other side.[[47]](#footnote-48)

161. Legitimate military targets include: armed forces and persons who take part in the fighting; positions or installations occupied by armed forces as well as objectives that are directly contested in battle; military installations such as barracks, war ministries, munitions or fuel dumps, storage yards for vehicles, airfields, rocket launch ramps, and naval bases.[[48]](#footnote-49)

162. The “basing” of US troops, facilities and equipment in Philippine territory makes the Philippines a legitimate target for enemies of the US as provided for by the laws on International Humanitarian Law even if the potential US conflict does not geographically include the Philippines.

163. This is because US military facilities located in the Philippines can be considered to effectively contribute to US military action.

164. This is confirmed by the EDCA itself as the agreement includes among others,

“Article III

1. With consideration of the views of the Parties, the Philippines hereby authorizes and agrees that United States forces, United States contractors, and vehicles, vessels and aircraft operated by or for the United States forces may conduct the following activities with respect to Agreed Locations: training; transit; support and related activities; 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.
2. 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.

Article IV

1. The Philippines hereby authorizes United States forces, through bilateral security 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.”

 165. These may be considered as legitimate targets of US enemies. Therefore, it puts Philippine territories, particularly, the “Agreed Locations” in harm’s way if the US enters into an international armed conflict even if the potential US conflict is not geographically in the Philippines.

166. This is also one important reason why the EDCA should be made subject to Senate concurrence: pursuant to its constitutional duty, the Upper House should be allowed to seriously weigh the implications of making the country a potential target of attack by the enemies of the US by allowing the latter to preposition equipment and weaponry in Philippine territory through the EDCA.

**V. THE PUBLIC RESPONDENTS COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN SIGNING THE EDCA AND/OR IN SUBSEQUENTLY failing to formally transmit the EDCA to the Philippine Senate for its concurrence, SINCE THE EDCA IS A TREATY – AND NOT MERELY AN EXECUTIVE AGREEMENT – AND MUST THEREFORE COMPLY WITH THE CONSTITUTIONAL REQUIREMENTS FOR THE VALIDITY OF A TREATY.**

**--------------------------------------------------**

**A. *Section 25, Article XVIII of The 1987 Constitution requires that any foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate.***

167. In the first place, the EDCA is a treaty and not merely an executive agreement. Therefore, it must have the concurrence of the Senate of the Philippines before it can be operable.

168. The Vienna Convention on the Law of Treaties provides in Article 2(1)(a) that:

“treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

169. The 1987 Philippine Constitution makes a distinction between a Treaty and an Executive Agreement. However, its effects in creating obligations on the part of the Philippines under international law are the same. Hence, the Philippines is bound by its obligations in good faith whether or not the agreement is domestically defined to be a treaty or an executive agreement.

170. Under the Vienna Convention, a Treaty and Memorandum of Agreement creates legally binding obligations between the parties as opposed to a Memorandum of Understanding, which is non-legally binding.

171. Nevertheless, it this distinction is made insignificant due to one of the generally accepted principles of international law, that is *pacta sunt servanda.[[49]](#footnote-50)*

172. This principle provides that state parties must comply with their treaty obligations in good faith. Whether the instrument entered into by the Philippines is a Treaty or Executive Agreement, the Philippines has to comply with its obligations in good faith, and at least take steps to fulfill these obligations. Under the doctrine of incorporation, the principle of *pacta sunt servanda* also forms part of municipal law.

173. That the Philippines will be bound by such agreements, whether they are considered treaties or executive agreements, highlights the importance of the requirement of Senate concurrence.

174. Considering this, we see the wisdom of the framers of the Constitution when they included in the 1987 Philippine Constitution requirements for certain agreements to be in the form of treaties. This is so that these agreements will not only be considered by the Executive department, but the Legislative as well.

175. In the case of the Philippine Constitution, the Senate is charged with examining such agreements and see if they conform to our national interest and policy.

176. Thus, it is of prime import that when entering into such treaties and agreements, the Philippine government ensures that it identifies which kind of agreement it is entering into so that proper procedures may be followed.

177.One such instance where express concurrence of the Senate is especially required is found in the 1987 Philippine Constitution’s transitory provisions in Art. XVIII, Sec. 25:[[50]](#footnote-51)

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

178. And the Honorable Court in ***Bayan v. Executive Secretary[[51]](#footnote-52)*** held that this provision “…specifically deals with treaties involving foreign military bases, troops, or facilities,…”

179. Further, Article XVIII, Section 25 is complemented by Article VII, Section 21 of the Constitution, which states:

Section 21. No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all Members of the Senate.

180.Clearly, the Philippine Senate must concur with the EDCA as it clearly deals with the entry of United States military bases, troops, or facilities in the Philippines.

181.Examining the EDCA, we find that it allows the presence of United States military bases, troops, or facilities in the Philippine, as clearly stated in its Article III: :

“Article III

1. With consideration of the views of the Parties, the Philippines hereby authorizes and agrees that the **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.” (emphasis and underscoring supplied)

182. It is clear that the EDCA provides for the entry of and establishment of foreign military facilities as well as storage and prepositioning of foreign equipment, supplies and materiel, not to mention US military forces, personnel and contractors.

183. By claiming that the EDCA is a mere executive agreement, the Executive has bypassed the exclusive power given by the Constitution to the Philippine Senate under Article XVIII, Sec. 25, as stated above, and Article VII, Sec. 21 of the Constitution.

184. Therefore, it is clear that the Public Respondents have committed grave abuse of discretion by entering into the EDCA, as well as in subsequently failing to formally transmit the EDCA to the Philippine Senate for its concurrence, in accordance with Section 25, Article XVIII of the Constitution.

***B. Section 25, Article XVIII of the 1987 Constitution applies to the EDCA since this constitutional provision makes no distinction whether the foreign military bases, troops, or facilities are temporary, transient, or permanent in nature.***

185. Section 25, Article XVIII of the 1987 Constitution provision makes no distinction whether the foreign military bases, troops, or facilities are temporary, transient, or permanent in nature. As held by the Honorable Court in ***Bayan v. Executive Secretary,[[52]](#footnote-53)***to wit:

Moreover, it is specious to argue that Section 25, Article XVIII is inapplicable to mere transient agreements for the reason that there is no permanent placing of structure for the establishment of a military base. On this score, the Constitution makes no distinction between "transient’ and "permanent". Certainly, we find nothing in Section 25, Article XVIII that requires *foreign troops or facilities* to be stationed or placed ***permanently***in the Philippines.

It is a rudiment in legal hermenuetics that when no distinction is made by law, the Court should not distinguish-***Ubi lex non distinguit nec nos distinguire debemos.[[53]](#footnote-54)***(emphasis in the original)

186. As the EDCA clearly provides for the entry of and establishment of foreign military facilities as well as storage and prepositioning of foreign equipment, supplies and materiel, not to mention US military forces, personnel and contractors, the constitutional requisites of Section 25, Article XVIII of the 1987 Constitution applies to EDCA. And it is legally inconsequential whether or not the presence of foreing military bases, troops, or facilities under the EDCA is temporary, transient, or permanent.

***C. There is greater reason to consider EDCA a treaty as it is of a permanent nature, and not merely temporary.***

187. The Executive previously considered the VFA as a treaty and transmitted it to the Senate for its concurrence, though the VFA’s effects can be said to be merely temporary. There is greater reason to consider the EDCA a treaty since its effects are permanent.

188. The Supreme Court has made a clear distinction between a treaty and an executive agreement. In the *Commissioner of Customs vs. Eastern Sea Trading[[54]](#footnote-55)*, the Supreme Court held:

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.

189. Note the following provisions of the EDCA:

“Article III

4. The Philippines hereby grants to the United States, through bilateral security mechanisms, such as the MDB and SEB, operational control of Agreed Locations for construction activities and authority to undertake such activities on, and make alterations and improvements to, Agreed Locations. United States forces shall consult on issues regarding such construction, alterations, and improvements based on the Parties’ shared intent that the technical requirements and construction standards of any such projects undertaken by or on behalf of the United States forces should be consistent with the requirements and standards of both Parties.

Article V

2. The United States shall return fo the Philippines any Agreed Locations, or any portion thereof, including non-relocatable structures and assemblies constructed, modified, or improved by the United States, once no longer required by United States forces for activities under this Agreement. The Parties or the Designated Authorities shall consult regarding the terms of return of any Agreed Locations, including possible compensation for improvements or construction.

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 the United States forces until no longer required by United States forces.

Article XII

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

190. First, the EDCA provides for the construction of facilities which shall be for the exclusive use of US military forces, with nominal ownership being with the Philippines. Clearly, this involves actions which have implications which may be permanent in nature.

191. The question also arises in the “rotational” presence of troops in the country. Lest it be forgotten, the “rotational” troops brought about by the VFA has resulted in a continued presence of US forces in Mindanao since 2002. Thus, the term “rotational” cannot be used to deny that the EDCA implies a permanent and not a temporary arrangement. On the contrary, that the US troops will be rotating in and out of the country means a constant, permanent presence.

192. The term of EDCA, while merely being ten years, automatically renews. The phrasing is clever to be sure, making it appear that the treaty has a lifetime. However, given the automatically renewing nature of it, there can be no doubt that the same have implications, which may be permanent in nature.

193. To allow the Executive to get away with bypassing the Senate as it did with the EDCA, is to open the floodgates to the potential entry into agreements by the Executive by merely name-checking previous treaties even if their contents are completely different from each other.

194. This violates the system of checks and balances which is a cornerstone of our democracy. This will give the Executive unfettered power to bargain away our democratic freedoms and sovereignty. This cannot and must not stand!

195. Ultimately, the Senate may well concur with the EDCA as it is. This Senate may decide that the times call for such an agreement. However, they cannot be deprived of the opportunity to do so.

196. It cannot be emphasized enough that the task of ensuring freedom and liberty lies in the legislature as well, which is why the Constitution provides that certain government acts must have its concurrence. To bypass the Senate for whatever reason is a betrayal of the highest order. As the eminent Justice Oliver Wendell Holmes stated:

Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.[[55]](#footnote-56)

**APPLICATION FOR THE ISSUANCE OF A**

**WRIT OF PRELIMINARY PROHIBITORY INJUNCTION**

**AND/OR A TEMPORARY RESTRAINING ORDER (TRO)**

 199. Moreover, it is clear from the foregoing that there is a violation of the Petitioners’ rights as taxpayers, who suffer and will continue to suffer severe injury and damage from the expenditure of public funds to enforce or implement the unconstitutional provisions of the EDCA.

 200. The acts of Public Respondents, if not immediately restrained or enjoined, will cause grave and irreparable injury to Petitioners, as Filipino citizens, and taxpayers, as the implementation or impending implementation of the unconstitutional provisions of the EDCA shall violate the fundamental law of the Republic of the Philippines.

 201. For the same reasons, the commission and continuance of the implementation of the EDCA during the pendency of this petition will work injustice to Petitioners, and the nation.

 202. Hence, if the implementation of the EDCA is not immediately enjoined, Petitioners and millions of Filipinos will suffer great or irreparable injury before the matter can be heard by the Honorable Court.

 203. Thus, Petitioners respectfully pray that the Honorable Court immediately enjoin Public Respondents from implementing the EDCA, pending the resolution of this petition, through the issuance of a preliminary prohibitory injunction and/or a temporary restraining order. Petitioners also pray for the exemption from the posting of a bond in view of the transcendent nature of the instant petition.

**PRAYER**

 **WHEREFORE**, premises considered, Petitioners most respectfully pray that this Honorable Court:

1. Pending the resolution of this Petition, immediately issue a Temporary Restraining Order and/or Writ of Preliminary Prohibitory Injunction, prohibiting the Public Respondents from implementing the Enhanced Defense Cooperation Agreement, and the Public Respondent Secretary of the Department of Budget and Management from releasing public funds for its implementation;
2. After due deliberations, DECLARE that the Enhanced Defense Cooperation Agreementis UNCONSTITUTIONAL and VOID for patently violating the pertinent provisions of the 1987 Philippine Constitution and for being grossly disadvantageous and contrary to the national interest;
3. After due deliberations, permanently prohibit Public Respondents from funding and implementing the EDCA;
4. Finally, DECLARE that the Enhanced Defense Cooperation Agreementis a treaty that requires Senate concurrence.

*Other just and equitable reliefs under the premises are likewise prayed for.*

Makati City for City of Manila, 26 May 2014.

**ROQUE & BUTUYAN LAW OFFICES**

*Counsel for Petitioners*

1904 Antel Corporate Center

121 Valero Street, Salcedo Village

Makati City

Email: mail@roquebutuyan.com

Tel. Nos. 887-4445/887-3894;

Fax No: 887-3893

**By:**

 **H. HARRY L. ROQUE, JR.**

Roll No. 36976

 PTR No. 4264493/Jan 30, 2014/Makati

 IBP No. 01749/Lifetime

 MCLE Exemption No. IV-000513

 (issued on Feb 15, 2013)

 **JOEL R. BUTUYAN**

 Roll No. 36911

 PTR No. 4264495/Jan 30, 2014/Makati

 IBP No. 01742/Lifetime

 MCLE Compliance No. IV-0011417

 (issued on Jan 11, 2013)

 **ROMEL R. BAGARES**

 Roll No. 49518

 PTR No. 4264492/Jan 30, 2014/Makati

 IBP No. 961461/Jan 29, 2014/Socsargen

 MCLE Compliance No. IV-017519

 (issued on Jan 25, 2013)

 **GEEPEE A. GONZALES**

Roll No. 59686

 PTR No. 4264494/Jan 39, 2014/Makati

 IBP No. 961252/Jan 27, 2014/

Oriental Mindoro

MCLE Compliance No. IV-0005346

(issued on Mar 28, 2012)

**ETHEL C. AVISADO**

Roll No. 56254

PTR No. 4281935/Feb 12, 2014/Makati

IBP No. 961251/Jan 27, 2014/Davao

MCLE Compliance No. IV-019563

(issued on May 2, 2013)

Copy furnished:

**Executive Secretary Paquito Ochoa, Jr.**

Premier Guesthouse

Malacañang Compound,

San Miguel, Manila

**Secretary VolataireGazmin**

Department of National Defense

DND Building, Segundo Ave.

Camp General Emilio Aguinaldo

Quezon City

**Secretary Albert del Rosario**

Department of Foreign Affairs

2330 Roxas Boulevard

Pasay City

**Secretary Florencio Abad**

Department of Budget and Management

DBM, Gen. Solano St., San Miguel, Manila.

**Gen. Emmanuel T. Bautista**

Office of the Chief of Staff

Camp General Emilio Aguinaldo

Quezon City

**The Office of the Solicitor General**

134 Amorsolo Street, Legaspi Village,

Makati

**EXPLANATION**

 For lack of messengerial services and due to the distance between the parties, this Petition is being served on the other parties by registered mail in accordance with the Rules of Court.

 **ETHEL C. AVISADO**

1. Bayan, et. al. vs. Executive Secretary, et. al.,G.R. No. 138572, 10 October 2000 Philippine Constitution Association, Inc., et. al. vs. Executive Secretary, et. al., G.R. No. 138587, 10 October 2000Giungona, et. al. vs. Estrada, et. al., G.R. No. 138680, 10 October 2000Integrated Bar of the Philippines, et. al. vs. Estrada, et. al., G.R. No. 138698, 10 October 2000and Salonga, et. al. vs. Executive Secretary, et. al., G.R. No. 138570, 10 October 2000 [↑](#footnote-ref-2)
2. Suzette Nicolas y Sombilon vs. Alberto Romulo,et. al., G.R. No. 175888 Salonga vs. Smith, GR No 176051, Bayan vs. Macapagal-Arroyo, G.R. No. 176222, 11 February 2009.\_ [↑](#footnote-ref-3)
3. Manyin, Mark E. (2012). “Pivot to the Pacific? The Obama Administration’s “Rebalancing” Toward Asia”.Congressional Research Service, USA. [↑](#footnote-ref-4)
4. http://globalnation.inquirer.net/103372/dnd-edca-not-treaty-needs-no-senate-ok [↑](#footnote-ref-5)
5. Id. [↑](#footnote-ref-6)
6. Id. [↑](#footnote-ref-7)
7. http://www.gmanetwork.com/news/story/359813/news/nation/dfa-prepared-to-defend-edca-if-ordered-by-the-supreme-court [↑](#footnote-ref-8)
8. Guingona vs. Court of Appeals, G.R. No. 125532.  July 10, 1998 citing Philippine Association of Colleges and Universities vs. Secretary of Education, 97 Phil. 806, 810 (1955); and Tan vs. Macapagal, 43 SCRA 678, 680-682, February 29, 1972 and People vs. Vera, 65 Phil. 58, 89 (1937). [↑](#footnote-ref-9)
9. CRUZ, supra note 61, at 23. See also International Longshoremen's and Warehousemen's Union, Local 37 v. Boyd, 347 US 222 (1954), quoted in ROTUNDA, supra note 64, at 1026-1027. [↑](#footnote-ref-10)
10. Pimentel vs. Executive Secretary, G.R. No. 158088, July 6, 2005citing Cortes, The Philippine Presidency: A Study of Executive Power (1966), p. 187. [↑](#footnote-ref-11)
11. Id. citing Cruz, Philippine Political Law (1996 Ed.), p. 223. [↑](#footnote-ref-12)
12. G.R. No. 187883, June 16, 2009 [↑](#footnote-ref-13)
13. Id. citing Tribe, American Constitutional Law, 3d ed. 2000, p. 335; Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Guingona, Jr. v. Court of Appeals, 354 Phil. 415, 427-428 (1998); Francisco, Jr. v. House of Representatives, 460 Phil. 830, 901-902 (2003); and G.R. No. L-34161, February 29, 1972, 43 SCRA 677, 682. [↑](#footnote-ref-14)
14. G.R. No. 159618, February 1, 2011  [↑](#footnote-ref-15)
15. Id. citing David v. Macapagal-Arroyo, G.R. No. 171396, May 3, 2006, 489 SCRA 160 and Jumamil v. Café, G.R. No. 144570, September 21, 2005, 470 SCRA 475; citing Integrated Bar of the Philippines v. Zamora, G.R. No. 141284, August 15, 2000, 338 SCRA 81. [↑](#footnote-ref-16)
16. # G.R. No.   178552, 5 October 2010

 [↑](#footnote-ref-17)
17. Citing Integrated Bar of the Philippines v. Zamora, 392 Phil. 618, 633 (2000), citing Baker v. Carr, 369 U.S. 186 (1962). [↑](#footnote-ref-18)
18. H. Harry L. Roque, et al, v. House of Representatives, GR. No. 160292, 25 May 2004. [↑](#footnote-ref-19)
19. Kilosbayan v. Morato, G.R. No. 118910, November 16, 1995 [↑](#footnote-ref-20)
20. Defensor-Santiago v. Comelec, G.R. No.127325, March 19, 1997. See also Cruz v. Secretary, G.R. No.135385, December 6, 2000. [↑](#footnote-ref-21)
21. 232 SCRA 110. [↑](#footnote-ref-22)
22. G.R. No. 124360, November 5, 1997. [↑](#footnote-ref-23)
23. Solicitor-General v. Metropolitan Manila Authority, G.R. No.102782, December 11, 1991. [↑](#footnote-ref-24)
24. Philippine International Air Terminals Co., G.R. No.155001, May 5, 2003. [↑](#footnote-ref-25)
25. Defensor-Santiago v. Comelec, G.R. No.127325, March 19, 1997. See KMU v. Garcia, G.R. No.115381, December 23, 1994 (standing); Kilosbayan v. Guingona, G.R. No.113375, May 5, 1994 (standing); Kilosbayan v. Morato, G.R. No.118910, November 16, 1995 (standing); Solicitor-General v. Metropolitan Manila Authority, G.R. No.102782, December 11, 1991. (standing, propriety of prohibition); Osmena v. Comelec, G.R. No.100318, July 30, 1991 (standing, etc.); Daza v. Singson, G.R. No.86344, December 21, 1989 (propriety of remedy); Association of Small Landowners in the Philippines v. Secretary, G.R. No.79310, July 14, 1989; Philippine International Air Terminals Co., G.R. No.155001, May 5, 2003 (standing), particularly J. Panganiban, sep.op. [↑](#footnote-ref-26)
26. Botona v. CA, G.R. No. 120650, February 21, 2003. [↑](#footnote-ref-27)
27. Solicitor-General v. Metropolitan Manila Authority, G.R. No.102782, December 11, 1991. [↑](#footnote-ref-28)
28. Bayan, et. al. vs. Executive Secretary, et. al.,G.R. No. 138572, 10 October 2000 Philippine Constitution Association, Inc., et. al. vs. Executive Secretary, et. al., G.R. No. 138587, 10 October 2000Giungona, et. al. vs. Estrada, et. al., G.R. No. 138680, 10 October 2000Integrated Bar of the Philippines, et. al. vs. Estrada, et. al., G.R. No. 138698, 10 October 2000and Salonga, et. al. vs. Executive Secretary, et. al., G.R. No. 138570, 10 October 2000 [↑](#footnote-ref-29)
29. Art. 1 of the Treaty states thus:

“The Parties undertake, as set forth in the [Charter of the United Nations](http://avalon.law.yale.edu/20th_century/unchart.asp), to settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.” [↑](#footnote-ref-30)
30. Vaugh, Bruce (2007) “US Strategic and Defense Relationships in the Asia-Pacific Region”. Congressional Research Service.retrieved through <http://www.wikileaks.org> at <http://wlstorage.net/file/crs/RL33821.pdf> on May 9, 2014. [↑](#footnote-ref-31)
31. Id. [↑](#footnote-ref-32)
32. <http://www.rappler.com/thought-leaders/56518-ph-us-enhanced-defense-cooperation-agreement> retrieved on May 9, 2014 [↑](#footnote-ref-33)
33. Article IV, Mutual Defense Treaty of 1951 [↑](#footnote-ref-34)
34. Department of Foreign Affairs Primer on theRP-US VFA retrieved from [http://web.archive.org/web/20070927074626/http://www.dfa.gov.ph/vfa/content/Primer.htm](http://web.archive.org/web/20070927074626/http%3A//www.dfa.gov.ph/vfa/content/Primer.htm) on May 9, 2014. [↑](#footnote-ref-35)
35. http://www.gov.ph/2014/04/28/qna-on-the-enhanced-defense-cooperation-agreement/ [↑](#footnote-ref-36)
36. http://www.japantimes.co.jp/news/2014/04/24/national/obama-tells-abe-security-treaty-covers-senkakus/#.U2muN4GSwVA [↑](#footnote-ref-37)
37. http://news.xinhuanet.com/english/world/2014-04/28/c\_133294852.htm [↑](#footnote-ref-38)
38. http://www.gov.ph/2014/04/28/qna-on-the-enhanced-defense-cooperation-agreement/ [↑](#footnote-ref-39)
39. Shaun Waterman, Analysis: US Military aid to the Philippines,United Press International February 12, 2008, available at <http://www.upi.com/Emerging_Threats/2008/02/12/Analysis-US-military-aid-to-Philippines/UPI-69661202876457/>< last visited August 26, 2009>, [↑](#footnote-ref-40)
40. # Greg Miller, Pakistan fails to aim billions in U.S. military aid at Al Qaeda, LA Times, November 5, 2007, available at <http://articles.latimes.com/2007/nov/05/world/fg-uspakistan5><last visited August 26, 2009>.

 [↑](#footnote-ref-41)
41. The Center for Public Integrity, Collateral Damage: Human Rights and US Military Aid after 9/1,May 22,2007, available at <http://projects.publicintegrity.org/MilitaryAid/><last visited August 26, 2009>. [↑](#footnote-ref-42)
42. See the USAID’s US Overseas Loan and Grants, available at: <http://gbk.eads.usaidallnet.gov/data/fast_facts_text_descriptions.html#chart2><last visited, May 13, 2014> [↑](#footnote-ref-43)
43. Water, supra note at 11. [↑](#footnote-ref-44)
44. See Bong Sarmieno, Why Ex-Navy Officer Gadian Spoke Out, Transparency International, available at <http://www.transparencyreporting.net/index.php?option=com_content&view=article&id=187:why-ex-navy-officer-gadian-spoke-out&catid=44:stories&Itemid=94><last visited May 13, 2014> [↑](#footnote-ref-45)
45. Article V, Paragraph 2 of the Enhanced Defense Cooperation Agreement [↑](#footnote-ref-46)
46. Article VII, Paragraph 1 of the Enhanced Defense Cooperation Agreement [↑](#footnote-ref-47)
47. Sassoli, Marco (2003). “Legitimate Targets of Attacks Under International Humanitarian Law”, International Humanitarian Law Research Initiative. Harvard University. Cambridge, MA. http://www.hpcrresearch.org/sites/default/files/publications/Session1.pdf [↑](#footnote-ref-48)
48. Rado, Gaby (2011). “Legitimate Military Targets”.Crimes of War. http://www.crimesofwar.org/a-z-guide/legitimate-military-targets/ [↑](#footnote-ref-49)
49. Tanada v. Angara, 338 Phil. 546, 592. [↑](#footnote-ref-50)
50. For an account of the provenance of this provision, see Joaquin Bernas, S.J. The 1987 Constitution of the Republic of the Philippines: A Commentary 1212-1216 (1996). [↑](#footnote-ref-51)
51. G.R. No. 138570, Oct. 10, 2000. [↑](#footnote-ref-52)
52. G.R. No. 138570, Oct. 10, 2000. [↑](#footnote-ref-53)
53. Id. [↑](#footnote-ref-54)
54. G.R. No. L-14279            October 31, 1961 [↑](#footnote-ref-55)
55. Missouri, Kansas & Texas Railway Company of Texas vs. Clay May, 194 US 267 [↑](#footnote-ref-56)