

“CONSTITUTIONAL PROCESSES” REQUIREMENT IN THE PH-US MUTUAL DEFENSE TREATY*

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*‘The Mutual Defense Treaty...
continues to serve as a pillar of our
relationship and a source of stability
in the region...’*
—Hillary Rodham Clinton, U.S.
Secretary of State¹

INTRODUCTION

In 1951, the Mutual Defense Treaty between the Republic of the Philippines and the United States of America (MDT) was signed. The treaty is the sole military alliance pact entered into by the Philippines, although it has signed various forms of military cooperation agreements with South Korea, Spain, Russia, China and many other countries.²

In *Lim v. Executive Secretary*,³ the Supreme Court of the Philippines described the MDT “as the ‘core’ of the defense relationship between the Philippines and its traditional ally, the United States. Its aim is to enhance the strategic and technological capabilities of our armed forces through joint training with its American counterparts...”

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¹ Speech delivered at at the U.S. State Department after her meeting with the Philippines’ Department of Foreign Affairs (DFA) Secretary Albert del Rosario (Jan. 23, 2011), available at <http://iipdigital.usembassy.gov/iipdigital-en/index.html>.

² As of this writing, the Philippines has military cooperation with the following countries, namely U.S. (1951); Holy See (1952); Germany (1974); South Korea (1994) amended in 2007; France (1994); Malaysia (1994); Thailand (1997); Indonesia (1997); Vietnam (1998); Brunei (2001); Kuwait (2003); Singapore (2003); Czech Republic (2004); Italy (2004); China (2004); and Russian Federation (2009).

³ G.R. No. 151445, 380 SCRA 739, Apr. 11, 2002.

Under the MDT, the Philippines and the U.S. pledged to come to each other's aid in the event of external armed attack and to respond to the common danger in accordance with their "constitutional processes." This paper will expound on the meaning of the phrase "constitutional processes" and how this can be operationalized.

COMMITMENTS AND AREA OF COVERAGE

The MDT obligates the Parties to refrain from the threat or use of force and to resort to the pacific settlement of disputes in their relations with other countries. More significantly, the Parties shall develop their individual and collective capacity to resist armed attack through self-help and mutual aid, and in the event of an external armed attack against either of them, the two would act to meet the common dangers. Thus:

Art. I. The parties undertake as set forth in the Charter of the United Nations, to settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered and to refrain in their international relation from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

Art. 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.

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Art. 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.

MDT specifies its area of coverage to the Pacific area, as follows:

Art. V. For purposes of art. 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.

The treaty may therefore be invoked in the event of an armed attack in the Pacific area on either of the Parties, including in the following:

- (a) the metropolitan territory of either of the Parties
- (b) island territories under its jurisdiction in the Pacific Ocean
- (c) its armed forces, public vessels or aircraft in the Pacific.

In a letter to Foreign Affairs Secretary Domingo L. Siazon, Jr. dated May 24, 1999, U.S. Ambassador to the Philippines Thomas C. Hubbard affirmed its obligation under the MDT in the case of an attack against the metropolitan territory of the Philippines, as well as in the case of an attack on Philippine forces in the Pacific area and reiterated the earlier statement of U.S. Secretary of Defense William Cohen that the U.S. considers the South China Sea to be part of the Pacific area.⁴

CONSTITUTIONAL PROCESSES

Article IV states that in the event of an armed attack in the Pacific area on either of the Parties, each Party "would act to meet the common dangers in accordance with its constitutional processes." The two sides will first consult and they would respond in accordance with their constitutional processes. Responses to the external armed attack are not automatic.

It may be noted that the Mutual Defense Treaties of the U.S. with Japan,⁵ Korea⁶ and Australia⁷ and the North Atlantic Treaty Organization⁸ contain identical provisions on "constitutional processes."

⁴ Letter of U.S. Secretary of State Cyrus Vance to Philippine Secretary of Foreign Affairs Carlos P. Romulo (Jan. 6, 1979).

⁵ The Treaty of Mutual Security and Cooperation between US and Japan signed on Jan. 19, 1960:

Art. V. Each party recognizes that an armed attack against either party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes."

⁶ The Mutual Defense Treaty between the United States and Republic of Korea, signed Oct. 1, 1953 states:

Art. III. Each Party recognizes that an armed attack in the Pacific area on either of the Parties in territories now under their respective administrative control, or hereafter recognized by one of the Parties as lawfully brought under the administrative control of the other, would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes.

⁷ Security Treaty between Australia, New Zealand and the United States of America signed Sep. 1, 1951 states:

Art. IV. Each Party recognizes that an armed attack in the Pacific Area on any 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.

⁸ North Atlantic Treaty Organization states:

With respect to the PH-US MDT, the following Philippine constitutional provisions and principles are relevant:

***The right to self-defense
inheres in the State.***

In its Constitution, the Philippines renounces war as an instrument of national policy, thus:

Art. II, sec. 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.

Notwithstanding the above provision, the Philippine State is not precluded from defending itself from an invasion or similar threats, and in fact, has the primordial obligation to defend itself from these threats. The Constitution states that:

Art. II, sec. 4. The prime duty of the government is to serve and protect the people. The government may call upon the people **to defend the State** and, in the fulfillment thereof, all citizens may be required, under conditions provided by law, to render personal military or civil service.

Art. VI, sec. 23(1). The Congress, by a vote of two-thirds of both Houses in joint session assembled, voting separately, shall have the sole power to declare the existence of a state of war.

Art. VII, sec. 18. The President shall be the Commander-in-Chief of all the armed forces of the Philippines and whenever it becomes necessary, he may **call out such armed forces to prevent or suppress lawless violence, invasion or rebellion**. In case of invasion or rebellion, when the public safety requires it, he may, for a period not exceeding sixty days, suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law... (Emphasis supplied)

Art. V. The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently agree that, if such an attack occurs, each of them, in exercise of the right of individual or collective self-defense ... will assist the Party or Parties so attacked by taking forthwith ... such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Article II. "Its provisions (shall be) carried out by the Parties in accordance with their respective constitutional processes."

The eminent constitutionalist Joaquin Bernas, S.J., clarifies the war renunciation clause as follows:

The (Kellogg-Briand) Pact ... was the inspiration of the provision on renunciation of war in the Philippine Constitution when first adopted in 1935. The Pact renounced wars of aggression. All this is all that the Constitution renounces, for the power to wage defensive war is of the very essence of sovereignty. For that matter, the Constitution makes defense of the state a duty of government and of the people and gives to Congress the power to declare a state of war.⁹

Justice Isagani Cruz is of the same view, *to wit*, “This provision is based upon the inherent right of every State to existence and self-preservation. By virtue of this right, a State may take up all necessary action, including the use of armed force, to repel any threat to its security.”¹⁰

The Charter of the United Nations acknowledges the right of States to self-defense. Article 51 of the Charter recognizes “the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security...”

***Congress has the power
to declare war.***

As noted earlier, the Congress has the sole power to “declare the existence of a state of war.”¹¹

Notwithstanding the renunciation of war as an instrument of national policy, the Constitution vests in Congress the power to declare war. Given the expressed renunciation of war of aggression, the power given to Congress is phrased as “declare(ing) the existence of a state of war.” The difference between that phrase and “to declare war” is “not substantial but merely in emphasis.”¹² The declaration is the “reaction to an aggression directed against the country.”¹³

The State therefore can and should defend its territory from external armed attack pursuant to a declaration of war by Congress, or even in the absence of such declaration, in view of its inherent right to existence and self-preservation.

⁹ JOAQUIN BERNAS, S.J., FOREIGN RELATIONS IN CONSTITUTIONAL LAW 21-22 (1995).

¹⁰ ISAGANI CRUZ, PHILIPPINE POLITICAL LAW 55 (2002).

¹¹ CONST. art. VI.

¹² BERNAS, *supra* note 9, at 103.

¹³ CRUZ, *supra* note 10, at 179.

***The President, as Commander-in-Chief,
has power to wage war.***

In our jurisdiction, it is Congress that declares war or the existence of a state of war, but it is the President who makes war in his capacity as Commander-in-Chief. As expounded by Bernas:

... The provision (war powers of Congress) does not mean that the President is powerless to wage war in the absence of a declaration of war or of the existence of a state of war... While the Constitution gave the Legislature the power to declare war, the actual power to make war is lodged elsewhere, that is, in the executive power which holds the sword of war. The President is the Commander in Chief of the Armed Forces. **The Commander in Chief, when necessary, may make war even in the absence of a declaration of war.** In the words of the American Supreme Court, war being a question of actualities, 'the President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.' (Emphasis supplied)

In times of war, the successful conduct of military operation is the responsibility of the Commander in Chief and of the chain of command under him. But the war powers exist not only in times of war but also in times of peace. It includes not just the power to wage wars successfully but also the power and responsibility to prepare for the eventuality of war...¹⁴

"As Commander-in-Chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy," Bernas adds.¹⁵

STEPS IN CONSTITUTIONAL PROCESSES

In the event of an external armed conflict and the MDT is invoked, the following provisions of the treaty will apply:

Art. III. 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.

¹⁴ BERNAS, *supra* note 9, at 104-105, *referring to* Prize Cases, 2 Bl. 635 (U.S. 1863).

¹⁵ JOAQUIN BERNAS, S.J., THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 746, 866 (2003), *citing* Fleming v. Page, 9 How 603, 615 U.S. (1850).

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

Any such armed attack and all measures taken as a result thereof shall be **immediately reported to the Security Council of the United Nations**. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.” (Emphasis supplied)

Article 51 of the UN Charter also provides that, “... (m)asures taken by Members in the exercise of this right to self-defense shall be immediately reported to the Security Council...”

The constitutional processes in the context of art. IV, on the Philippine side, are therefore as follows:

1. The Foreign Ministers or their deputies will consult together regarding the implementation of the Treaty and in case of an external armed attack which threatens the territorial integrity, political independence or security of either Party.¹⁶
2. The Parties would act to meet the common dangers in accordance with their constitutional processes:
 - a. Since the application of the MDT presupposes the existence of an external armed attack, Congress can declare war or the existence of a state of war.
 - b. Even without such declaration by Congress, the President, in his capacity as the Commander-in-Chief¹⁷ of the armed forces, can direct the conduct of the armed forces and determine military operations and strategies.
 - c. Civilians may be called to render personal military or civil service to defend the State.

¹⁶ MDT, art. III.

¹⁷ CONST. art. VII, § 18

3. Any such armed attack and all measures taken as a result thereof shall be immediately reported to the UN Security Council.

The U.S. side will undergo a similar, parallel process. Under the U.S. Constitution, Congress has the power to declare war,¹⁸ while the President is Commander-in-Chief of the armed forces.¹⁹ The 1973 War Powers Resolution requires the U.S. President to obtain congressional authorization within 60 days of the start of military operations.²⁰

Notwithstanding the legal commitments under the MDT, it must be noted that the decision to invoke the MDT by a Party in the event of an external armed attack is a political decision, and the constitutional processes to be undertaken by both sides are likewise political in nature.

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¹⁸ U.S. CONST. art. I, § 8

¹⁹ Art. II, § 2

²⁰ War Powers Resolution of 1973, Nov. 7, 1973.