

## RECENT DEVELOPMENTS

### “People Power” and Pacific Security: The United States-Philippine Alliance After the 1986 Philippine Constitution

#### FACTS

After World War II, the Truman and Eisenhower Administrations negotiated a series of treaties with nations around the world in an effort to deter communist aggression.<sup>1</sup> In the Far East, the United States recognized the necessity of a continued military presence in its former territory, the newly-independent Republic of the Philippines.<sup>2</sup> The Philippine government shared this view,<sup>3</sup> and in 1947 the

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<sup>1</sup> These treaties provided for the security of the Americas, see Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. No. 1838, 21 U.N.T.S. 77; Western Europe and the North Atlantic, see North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, T.I.A.S. No. 1964, 34 U.N.T.S. 243 [hereinafter NATO Treaty]; Australia and New Zealand, see Security Treaty between Australia, New Zealand and the United States, Sept. 1, 1951, Australia-New Zealand-United States, 3 U.S.T. 3421, T.I.A.S. No. 2493 [hereinafter ANZUS Treaty]; Japan, see Security Treaty between the United States of America and Japan, Sept. 8, 1951, United States-Japan, 3 U.S.T. 3329, T.I.A.S. No. 2491 (superseded by the Treaty of Mutual Cooperation and Security between the United States of America and Japan, Jan. 19, 1960, United States-Japan, 11 U.S.T. 1632, T.I.A.S. No. 4509 [hereinafter Japan Treaty]); the Republic of Korea, see Mutual Defense Treaty between the United States and Korea (South), Oct. 1, 1953, United States-Korea, 5 U.S.T. 2368, T.I.A.S. No. 3097 [hereinafter Korea Treaty]; Southeast Asia, see South East Asian Collective Defense Treaty, Sept. 8, 1954, 6 U.S.T. 81, T.I.A.S. No. 3170, 209 U.N.T.S. 23 [hereinafter SEATO Treaty]; and the Republic of China, see Mutual Defense Treaty, Dec. 2, 1954, United States-China, 6 U.S.T. 433, T.I.A.S. No. 3178 [hereinafter China Treaty]. The United States formalized this new “alliance-building” policy, a reversal of its traditional isolationist position, in the Vandenberg Resolution of 1948. S. Res. 239, 80th Cong., 2d Sess. (1948), *reprinted in* S. Rep. No. 1361, 80th Cong. 2d Sess. 1-2 (1948). The Vandenberg Resolution called for United States development of, and association with, “regional and other collective arrangements,” or alliances. *Id.* These alliances emphasized self-help and mutual aid.

<sup>2</sup> The Philippines achieved independence on July 4, 1946, after 47 years as a territory of the United States. Pre-war isolationist criticism of the Philippines as an “Achilles’ heel” of the United States had ceased, and their value to the defense of the Western Pacific had become clear. S. KIM, UNITED STATES-PHILIPPINE RELATIONS: 1946-1956 2 (1968). In 1944, the United States Congress authorized negotiation with Philippine leaders to withhold, acquire, or retain such bases in the Philippines as might be deemed necessary for mutual defense. 58 Stat. 625 (1944).

<sup>3</sup> One of the Philippine Congress’ first postwar acts was to give the President the authority to negotiate an agreement with the United States providing for a continued

United States and the Philippines signed the Military Bases Agreement.<sup>4</sup> Concern subsequently arose over potential Japanese resurgence,<sup>5</sup> Soviet aggression,<sup>6</sup> and internal insurgency,<sup>7</sup> as well as the extent of the United States commitment to the Philippines.<sup>8</sup> As a result of these concerns, the United States and the Philippines negotiated the Mutual Defense Treaty of 1951, in which each party pledged to cooperate to resist armed attack.<sup>9</sup>

Following ratification of the Mutual Defense Treaty, the initial concern over the United States commitment to the Philippines faded.

United States military presence. Official Gazette, Republic of the Philippines, vol. 41 no. 8, Nov. 1945, at 952. Prior to World War II many Philippine leaders had advocated a policy of neutrality for an independent Philippines. S. KIM, *supra* note 2, at 5. Like the isolationist position in the United States, this view declined in influence after the war, although a number of prominent Filipino leaders, such as Senator Claro M. Recto, continued to advocate a greater distance in relations between the Philippines and the United States. See S. KIM *supra* note 2, at 23.

<sup>4</sup> Agreement Concerning Military Bases, March 14, 1947, United States-Philippines, 61 Stat. 4019, T.I.A.S. No. 1775 [hereinafter Military Bases Agreement]. To protect vital interests in the Western Pacific and Southeast Asia, the United States has developed a forward military deployment strategy, which requires access to military facilities adjacent to the Asian mainland. This strategy produces a "force multiplier effect:" the United States is able to provide a military presence in the region using fewer ships and planes than it would be able to do if its forces were confined to bases in the continental United States or United States Pacific island territories. See L. GRINTER, *THE PHILIPPINE BASES: CONTINUING UTILITY IN A CHANGING STRATEGIC CONTEXT* 5-8 (1980).

<sup>5</sup> The Filipino people suffered greatly under the Japanese occupation, and wanted a guarantee that Japan would never again become a military threat. See Official Gazette, Republic of the Philippines, vol. 47, no. 8, Aug. 1951, at 4068-70. Further, the proposed peace treaty with Japan appeared unduly lenient, especially regarding payment of reparations. See S. KIM, *supra* note 2, at 7; Official Gazette, Republic of the Philippines, vol. 47, no. 7, July 1951, at 3408-11 (statement of President Quirino). See generally Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, T.I.A.S. No. 2490, 136 U.N.T.S. 45 (entry into force April 28, 1952).

<sup>6</sup> The Soviets detonated an atomic device on the Arctic island of Novaya Zemlya in August 1949, N.Y. Times, Sept. 24, 1949, at p. 1, col. 8; signed a 30-year treaty of alliance with the People's Republic of China in 1950, N.Y. Times, Feb. 15, 1950, at p. 1, col. 4; and armed and trained North Korea for its invasion of South Korea. See N.Y. Times, June 26, 1950, at p. 3, col. 7.

<sup>7</sup> The Hukbalahap guerrillas, or Huks, fought against the Japanese from 1942 through the end of the occupation. Communists influenced the movement throughout the war; by 1945 the Huk leader was the Communist Luis Taruc. Efforts at compromise by the Philippine government failed, and by 1950 significant areas of the nation were under Huk control or subject to attack. S. KIM, *supra* note 2, at 17-18.

<sup>8</sup> Youngblood, *Philippine-American Relations under the "New Society"*, in U.S. FOREIGN POLICY IN ASIA 389-90 (Y.-h. Jo ed. 1978).

<sup>9</sup> Mutual Defense Treaty between the United States of America and the Republic of the Philippines, Aug. 30, 1951, United States-Philippines, 3 U.S.T. 3947, T.I.A.S. No. 2529 [hereinafter Mutual Defense Treaty].

Dissatisfaction remained, however, with perceived inequities in the Military Bases Agreement.<sup>10</sup> Apprehension developed over the possibility that the presence of the United States bases might draw the Philippines into a conflict solely involving United States interests.<sup>11</sup> The importance of the United States bases in the Philippines, especially the facilities at Subic Bay and Clark Field,<sup>12</sup> coupled with the growing number of nuclear-powered and nuclear-armed United States naval vessels<sup>13</sup> and nuclear-armed United States aircraft, raised fears of a potential Soviet nuclear strike on the bases.<sup>14</sup> After President Ferdinand Marcos declared martial law in 1972,<sup>15</sup> many Filipinos also

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<sup>10</sup> For example, the Military Bases Agreement gave wide legal authority in criminal cases to the United States military. Filipinos considered this an insult to the Philippine judicial system and an infringement of Philippine sovereignty. Many found it especially irritating that Japan, the defeated enemy, had greater control over the United States bases on Japanese soil than the Philippines retained over bases in its territory. Youngblood, *supra* note 8, at 390-91. Subsequent amendments to the agreement addressed this problem. See *infra* note 32.

<sup>11</sup> Youngblood, *supra* note 8, at 390.

<sup>12</sup> Subic Bay Naval Base is the largest naval installation outside the United States and is vital to the operations of the Seventh Fleet in the Pacific. The supply depot at Subic Bay is the largest United States overseas supply depot. Clark Air Base is the only major tactical air force base in the far western Pacific area, outside of Japan and Korea, and is headquarters for the 13th Air Force, which has command and control of all western Pacific air operations. Other important facilities include Wallace Air Station, Cubi Point Naval Air Station, and San Miguel Naval Communications Station. *United States-Philippines Relations and the New Base and Aid Agreements: Hearings Before the Subcomm. on Asian and Pacific Affairs of the House Comm. on Foreign Affairs*, 98th Cong., 1st Sess. 7-12 (1983) (statement of Adm. Robert L. J. Long, U.S. Navy, Commander in Chief, Pacific) [hereinafter *Bases Hearings*]; see also *Id.* at 229-32 (statement of Alvin J. Cottrell of the Center for Strategic and International Studies).

<sup>13</sup> At the time of ratification of the Mutual Defense Treaty, the United States Navy consisted of conventionally powered and armed vessels. By the mid-1950's, however, the United States began to deploy nuclear-powered submarines, see *JANE'S FIGHTING SHIPS* 388 1958-59 (entry into service of USS Nautilus in 1955), and nuclear-powered ships, see *JANE'S FIGHTING SHIPS* 700 (1985-86) (deployment of cruiser USS Long Beach in 1959); see generally HEWLETT & DUCAN, *NUCLEAR NAVY* (1974). A survey of current United States Navy ships indicates that over 40% of the total number of major warships (submarines, carriers, battleships, cruisers, destroyers and frigates) are nuclear-powered. See *JANE'S FIGHTING SHIPS* 657 (1985-86).

<sup>14</sup> See, e.g., *Bases Hearings*, *supra* note 12, at 89 (declaration of principles of the Anti-Bases Coalition of the Philippines: "The bases are actual storage sites of nuclear weapons, and are regularly visited by nuclear armed ships. . . . They . . . serve as magnets of nuclear attack or counter-attack"); *Foreign Assistance and Related Programs Appropriations for 1980: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 96th Cong., 1st Sess. 299 (statement of Charito L. Planas before Subcommittee on Foreign Operations regarding Philippine basing rights) [hereinafter *Base Rights Hearings*].

<sup>15</sup> N.Y. Times, Sept. 23, 1972, at A1, col. 7. President Marcos justified the move

began to perceive the United States military bases and military aid to the Philippines as supporting the martial law regime.<sup>16</sup> As a result, opposition to the continued presence of the United States bases in the Philippines grew throughout the 1970's and 1980's.

With the overthrow of President Marcos and the assumption of power by Corazon Aquino in 1986,<sup>17</sup> the continued access of United States armed forces to military facilities in the Philippines has become more uncertain.<sup>18</sup> The new Philippine Constitution, overwhelmingly approved on February 2, 1987,<sup>19</sup> specifically provides for a referendum on any treaty which would extend the Military Bases Treaty past its present expiration date in 1991.<sup>20</sup> The constitution also establishes a

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on the grounds that it was necessary to stop increasing Communist violence, and was justified under the 1935 Philippine constitution. *Id.*

<sup>16</sup> The declaration of principles of the Anti-Bases Coalition states, "The bases . . . strengthen authoritarian rule typified by the Marcos regime." *Bases Hearings, supra* note 12, at 89; *see id.* at 87 (statement of former Philippine Senator Benigno S. Aquino); *see also Base Rights Hearings, supra* note 14, at 295.

<sup>17</sup> *TIME*, Mar. 10, 1986, at 14-37 (details of the Philippine revolution); *see CRISIS IN THE PHILIPPINES* (J. Bresnan ed. 1986) (analysis of the events culminating in the 1986 revolution).

<sup>18</sup> Early in her administration, President Aquino indicated her intention to call a referendum on the question of continuation of the United States military presence. *L.A. Times*, Apr. 11, 1986, sec. IV, at 18, col. 3 (city ed.). Prior to the disputed February 1986 election and subsequent revolution, the United States was concerned that Mrs. Aquino would demand the closure of the bases should she come to power. In a speech just before the election, however, she stated: "Concerning the military bases, let me simply reiterate the assurances I have already given, that we do not propose to renounce the existing Military Bases Agreement or the Treaty of Mutual Defense with the United States." Address by Corazon Aquino, *reprinted in part in* Barnds, *Political and Security Relations*, in *CRISIS IN THE PHILIPPINES* 228, 256 (J. Bresnan ed. 1986). Since that time she has repeated the assurance that the Philippine government will abide by the terms of the Military Bases Agreement, while stating that after the Agreement expires in 1991 she will "keep her options open." *TIME*, Mar. 10, 1986, at 26. Mrs. Aquino also informed President Reagan of her intention during their meeting in Washington, D.C. on Sept. 17, 1986. *N.Y. Times*, Sept. 18, 1986, at A3, cols. 4-5.

A number of prominent supporters of President Aquino, however, oppose continuation of the United States military presence in the Philippines. For example, Jose Diokno, the head of the presidential commission investigating human rights abuses under martial law, is also secretary-general of the Anti-Bases Coalition. *L.A. Times*, July 12, 1986, sec. 1, at 4, cols. 5-6.

<sup>19</sup> *L.A. Times*, Feb. 4, 1987, sec. I, at 1, col. 5.

<sup>20</sup> Article XVIII, sec. 25 of the Treaty states:

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 Congress

policy of opposition to the presence of nuclear weapons in Philippine territory.<sup>21</sup> With these developments in mind, the United States began formulating plans for the establishment of alternative bases in the region.<sup>22</sup>

## II. LEGAL BACKGROUND

The Mutual Defense Treaty<sup>23</sup> and the Military Bases Agreement<sup>24</sup> govern the United States-Philippines alliance. The Mutual Defense Treaty defines the security relationship between the two parties. Its general provisions closely resemble the provisions of a number of other contemporary treaties.<sup>25</sup> The purpose of the Treaty is to deter

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.

PHIL. CONST. art. XVIII, sec. 25.

A number of leftist members of the constitutional drafting committee proposed an immediate ban on the presence of United States bases in the Philippines. The majority of the committee, supporters of President Aquino, opposed this proposal and it was not adopted. L.A. Times, Feb. 3, 1987, sec. I, at 12, col. 1.

<sup>21</sup> PHIL. CONST. art. II, sec. 8. Article II, section 8 states: "The Philippines, consistent with the national interest, adopts and pursues a policy of freedom from nuclear weapons in its territory." *Id.* The adopted version is milder, however, than the version proposed by the leftist bloc, which would have declared the Philippines a "nuclear-free" zone and banned the use of nuclear power or the presence of nuclear devices. L.A. Times, Sept. 20, 1986, sec. 1, at 5, col. 1. On Feb. 1, 1987, President Aquino's Executive Secretary, Joker Arroyo, stated that the Philippines would have to ask the United States "through diplomatic channels" if it was bringing nuclear weapons into Philippine territory. "If the United States admits the presence of these nuclear weapons, perhaps it would be a problem." N.Y. Times, Feb. 2, 1987, at A3, col. 4 (nat'l ed.).

<sup>22</sup> N.Y. Times, Jan. 25, 1987, at A6, col. 1 (nat'l ed.). The estimated cost of such a relocation is \$3-\$8 billion. Additionally, none of the alternative sites, such as Okinawa, Guam, the Marianas, or Singapore, are acceptable equivalents to the Philippine facilities, particularly Subic Bay. L. GRINTER, *supra* note 4, at 15-17. See Feeney, *The Pacific Basins System and U.S. Security*, in U.S. FOREIGN POLICY AND ASIAN-PACIFIC SECURITY 163, 208-213 (W. Tow & W. Feeney eds. 1982) (analysis of alternative base sites).

<sup>23</sup> See Mutual Defense Treaty, *supra* note 9 and accompanying text.

<sup>24</sup> See Military Bases Agreement, *supra* note 4 and accompanying text.

<sup>25</sup> The Mutual Defense Treaty most closely resembles the ANZUS Treaty. See ANZUS Treaty *supra* note 1 (signed two days after the Mutual Defense Treaty). The preamble and the first six articles of both treaties are very similar, with articles I, IV, V and VI being virtually identical and articles II and III differing only slightly. The two treaties differ primarily in that the ANZUS treaty establishes an ANZUS Council and empowers it to deal with other governments and organizations in the region, *id.* at art. VII, VIII, while the Mutual Defense Treaty establishes no corresponding body. See *infra* note 49.

The Mutual Defense Treaty also bears great similarity to the Japan Treaty, *supra* note 1; the Korea Treaty, *supra* note 1; and the China Treaty, *supra* note 1. The most

aggression and strengthen collective defense.<sup>26</sup> Each party to the Treaty pledges to "maintain and develop" its capacity to resist armed attack through self-help and mutual aid.<sup>27</sup> In addition, each party vows to respond to an armed attack against the other party,<sup>28</sup> and undertakes to consult with the other party occasionally and whenever the threat of external armed attack arises.<sup>29</sup> The Mutual Defense Treaty remains in force indefinitely, but each signatory retains the right to withdraw upon one year's notice.<sup>30</sup>

In contrast to the generality of the Mutual Defense Treaty, the Military Bases Agreement,<sup>31</sup> as amended,<sup>32</sup> specifically authorizes United

important difference between the treaties being the three latter treaties explicitly provide the United States with access to military facilities in the territory of the other party. Japan Treaty, *supra* note 1, at art. VI; Korea Treaty, *supra* note 1, at art. IV, China Treaty, *supra* note 1, at art. VII. In addition, the Mutual Defense Treaty is substantially similar to the NATO Treaty, *supra* note 1, and the SEATO Treaty, *supra* note 1.

<sup>26</sup> The Mutual Defense Treaty, *supra* note 9, at preamble, 3rd-4th recitals, states that the parties:

Desir[e] to declare publicly and formally their sense of unity and their common determination to defend themselves against external armed attack, so that no potential aggressor could be under the illusion that either of them stands alone in the Pacific Area,

Desir[e] further to strengthen their present efforts for collective defense for the preservation of peace and security pending the development of a more comprehensive system of regional security in the Pacific Area[.]

See *infra* note 58 and accompanying text.

<sup>27</sup> Mutual Defense Treaty, *supra* note 9, at art. II. Article II of the Mutual Defense Treaty states: "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." *Id.*; see *infra* notes 60-63 and accompanying text.

<sup>28</sup> Mutual Defense Treaty, *supra* note 9, at art. IV. Article IV of the Mutual Defense Treaty provides that "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." *Id.* The article further provides that any such attacks and responses shall be reported to the United Nations Security Council and terminated when that body takes action. *Id.*

<sup>29</sup> *Id.* at art. III. Article III states: "The Parties . . . 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." *Id.*

<sup>30</sup> *Id.* at art. VIII. Article VIII of the Mutual Defense Treaty states: "This Treaty shall remain in force indefinitely. Either Party may terminate it one year after notice has been given to the other party." *Id.*

<sup>31</sup> Military Bases Agreement, *supra* note 4.

<sup>32</sup> Since 1947 the United States and the Philippines have negotiated seventeen amendments to the Bases Treaty. Fourteen amendments concern property transfers by the United States to the Philippines, taxation, criminal jurisdiction, and other administrative

States ships, aircraft, and ground forces<sup>33</sup> to enter and make use of

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matters. Amendment to Bases Treaty, July 1 and Sept. 12, 1947, United States-Philippines, 3 U.S.T. 457, 458, T.I.A.S. No. 2406 (status of Leyte-Samar Naval Base); Amendment to Bases Treaty, Oct. 12, 1947, United States-Philippines, 3 U.S.T. 458, T.I.A.S. No. 2406 (transfer of Mariveles Quarantine Reservation (Station) to the Philippines); Amendment to Bases Treaty, Dec. 23 and Dec. 24, 1947, United States-Philippines, 3 U.S.T. 476, 479, T.I.A.S. No. 2406 (transfer of excess land near Nichols Field to the Philippines); Amendment to Bases Treaty, Jan. 2, and Jan. 3, 1948, United States-Philippines, 3 U.S.T. 480, T.I.A.S. No. 2406 (transfer of islets near Corregidor to the Philippines); Amendment to Bases Treaty, Feb. 19 and Feb. 29, 1948, United States-Philippines, 3 U.S.T. 482, 483, T.I.A.S. No. 2406 (retention of Corregidor military cemetery by the United States); Amendment to Bases Treaty, Mar. 31 and Apr. 1, 1948, United States-Philippines, 3 U.S.T. 485, 487, T.I.A.S. No. 2406 (relinquishment of United States Military Cemetery No. 2 on Rigal); Amendment to Bases Treaty, May 14 and May 16, 1949, United States-Philippines, 63 Stat. 2660, T.I.A.S. No. 1963 (extension of United States armed forces temporary quarters occupancy); Implementation Agreement, Dec. 29, 1952, United States-Philippines, 3 U.S.T. 5334, T.I.A.S. No. 2739 (tax exemption for United States military agencies and contractors); Implementation Agreement, May 29 and June 17, 1953, United States-Philippines, 4 U.S.T. 1693, 1696, T.I.A.S. No. 2835 (United States importer license fee exemption); Amendment to Bases Treaty, Aug. 10, 1965, United States-Philippines, 22 U.S.T. 1469, T.I.A.S. No. 7160 (criminal jurisdiction time limit extension).

Three further amendments are of critical importance to the United States. The 1966 Amendment shortens the treaty duration from 99 years from the date the treaty came into force to 25 years from the date of the amendment, after which date the treaty is subject to termination by either party. Amendment to Bases Treaty, Sept. 16, 1966, United States-Philippines, 17 U.S.T. 1212, T.I.A.S. No. 6084 [hereinafter Term Amendment].

A 1979 Amendment reaffirms that the bases are Philippine military bases under Philippine sovereignty, Amendment to Bases Treaty, Jan. 7, 1979, United States-Philippines, 30 U.S.T. 863, T.I.A.S. No. 9224 [hereinafter 1979 Amendment], and requires a Philippine commander at each base under whom a United States commander exercises control over each United States facility and over all United States personnel, equipment, material, and operations. *Id.* at 879. In addition, the amendment reaffirms the assurance of unhampered United States access to the bases. *Id.* at 864; *see also infra* note 85. Additionally, the amendment supersedes the original grant and definition of bases and requires a comprehensive review of the treaty every five years until termination of the agreement. *Id.*

Most recently, a 1983 amendment requires prior consultation with the Philippine government before United States military operations may occur in the Philippines, notwithstanding the 1979 Amendment's assurance of unhampered United States access. Amendment to Bases Treaty, June 1, 1983, United States-Philippines, U.S.T., T.I.A.S. No. 10699 [hereinafter 1983 Bases Amendment]. The amendment does not, however, require prior consultation if the United States conducts the operation in accordance with the Mutual Defense Treaty, or the SEATO Treaty, *supra* note 1. *See infra* note 88 and accompanying text.

<sup>33</sup> The pertinent provisions appear in articles III, IV, VI and VII. Article III presents the description of United States rights:

1. It is mutually agreed that the United States shall have the rights, power and authority within the bases which are necessary for the establishment, use,

Philippine ports and specified military installations, such as Subic Bay and Clark Field.<sup>34</sup> The Military Bases Agreement operates independently of the Mutual Defense Treaty,<sup>35</sup> remaining in force until

operation and defense thereof or appropriate for the control thereof of all the rights, power and authority within the limits of territorial waters and air space adjacent to, or in the vicinity of, the bases which are necessary to provide access to them, or appropriate for their control.

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

(a) to construct (including dredging and filling), operate, maintain, utilize, occupy, garrison and control of [sic] the bases;

(b) to improve and deepen the harbors, channels, entrances and anchorages, and to construct or maintain necessary roads and bridges affording access to the bases;

(c) to control (including the right to prohibit) . . . anchorages, moorings, landings, takeoffs, movements and operation of ships and water-borne craft, aircraft and other vehicles on water, in the air or on land comprising or in the vicinity of the bases;

Military Bases Agreement, *supra* note 4, at art. III.

Article IV covers shipping and navigation:

1. It is mutually agreed that United States public vessels operated by or for the War or Navy Departments, the Coast Guard . . . and the military forces of the United States, military and naval aircraft and Government-owned vehicles, including armor, shall be accorded free access to and movement between ports and United States bases throughout the Philippines, including territorial waters, by land, air and sea.

*Id.* at art. IV.

Article VI covers maneuvers and other areas:

The United States shall, subject to previous agreement with the Philippines, have the right to use land and coastal sea areas of appropriate size and location for periodic maneuvers, for additional staging areas, bombing and gunnery ranges, and for such intermediate airfields as may be required for safe and efficient air operations.

*Id.* at art. VI.

Article VII covers the use of public services:

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

*Id.* at art. VII.

<sup>34</sup> Annexes A and B of the Bases Agreement, as signed in 1947, list the United States military installations covered by the treaty including the major bases at Subic Bay and Clark Field. *See* 1979 Amendment, *supra* note 32.

<sup>35</sup> In a letter related to the 1979 Amendment, Secretary of State Cyrus Vance stated:

The Mutual Defense Treaty has a force and effect independent of the Military Bases Agreement. In fact, the Mutual Defense Treaty . . . states in [its] preamble that "nothing in this present instrument shall be considered or interpreted as in any way or sense altering or diminishing any existing [a]greements

September 16, 1991, after which date either party may terminate the treaty, absent an agreement to extend, upon one year's notice.<sup>36</sup>

The new constitution of the Philippines addresses two issues of critical importance to the United States-Philippines alliance which the Mutual Defense Treaty and the Military Bases Agreement have established. First, the constitution prohibits the presence of foreign military bases, troops, or facilities after the Military Bases Agreement expires in 1991, unless otherwise provided for by a treaty on which the Philippine Senate has duly agreed and which the "other contracting State" recognizes as a treaty.<sup>37</sup> Even with such an agreement, however, the constitution provides that the Philippine Congress may require ratification of the treaty in a national referendum.<sup>38</sup> Second, the constitution establishes a policy of exclusion of nuclear weapons from Philippine territory where such exclusion is "consistent with the national interest."<sup>39</sup>

Determination of the status of the Mutual Defense Treaty and the Military Bases Agreement after the Philippine revolution requires recourse to principles of customary international law,<sup>40</sup> as well as the Vienna Convention on the Law of Treaties.<sup>41</sup> Determination of the significance of the provisions of the Mutual Defense Treaty and the Military Bases Agreement necessitates treaty interpretation, likewise requiring reference to governing principles of international law.<sup>42</sup> The Vienna Convention sets forth internationally accepted rules of interpretation,<sup>43</sup> the most important of which in the instant matter are

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or understandings between the United States of America and the Republic of the Philippines." The Mutual Defense Treaty and the Military Bases Agreement have their own separate provisions for termination.

1979 Amendment, *supra* note 32, at 889; see Mutual Defense Treaty, *supra* note 9, at preamble, recital 5.

<sup>36</sup> Term Amendment, *supra* note 32.

<sup>37</sup> PHIL. CONST. art. XVIII, sec. 25.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at art II, sec. 8.

<sup>40</sup> See 2 C. HYDE, INTERNATIONAL LAW 1528-29 (2d rev. ed. 1951); L. OPPENHEIM, INTERNATIONAL LAW 830-31 (H. Lauterpacht ed. 1948).

<sup>41</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entry into force Jan. 27, 1980) [hereinafter Vienna Convention]. Article 42 pertains to the validity and continuation in force of treaties. Article 61 allows termination due to supervening impossibility of performance. See *infra* notes 51-52 and accompanying text. Article 62 allows termination due to fundamental change of circumstances. See *infra* notes 53-55 and accompanying text.

<sup>42</sup> See J. BRIERLY, THE LAW OF NATIONS 325-27 (6th ed. 1963); A. MCNAIR, THE LAW OF TREATIES 175-95 (1938); L. OPPENHEIM, *supra* note 40, at 856-63.

<sup>43</sup> The United States signed the Vienna Convention on April 24, 1970. 64 DEP'T

the ordinary meaning of the terms<sup>44</sup> in context and in light of their purpose,<sup>45</sup> further agreements made in connection with the conclusion of the treaty or regarding its interpretation, and subsequent practices by the parties.<sup>46</sup> Furthermore, any determination of the effect of the Philippine Constitution on Philippine treaty relations requires application of international law principles, with the Vienna Convention again providing the norm.<sup>47</sup>

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ST. BULL. 684 (Dec. 13, 1971). President Nixon transmitted the Vienna Convention to the United States Senate on Nov. 22, 1971, recommending ratification. *Id.* To date, however, the Senate has not given its advice and consent to ratification of the Convention. Furthermore, the Vienna Convention is inapplicable to the Military Bases Agreement and the Mutual Defense Treaty, since the Convention applies only to treaties which are "concluded by States after the entry into force of the present Convention with regard to such state." Vienna Convention, *supra* note 41, at art. 4. Both treaties entered into force prior to the Vienna Convention. Nevertheless, the Convention has persuasive value as an expression of a number of basic international legal principles. Moreover, the Philippines has ratified the Convention, 68 DEP'T ST. BULL., 247 (Feb. 26, 1973), providing additional justification for use of the Vienna Convention as a guide in interpreting treaties between the Philippines and the United States.

<sup>44</sup> The ordinary meaning of a term is the usual meaning in the language of everyday life, unless it is used in a special technical sense, or unless another meaning is evident from the context. L. OPPENHEIM, *supra* note 42, at 858.

<sup>45</sup> The meaning of a term in isolation may differ from its meaning when used with other terms. "[W]hile a term may be 'plain' *absolutely*, what a Court adjudicating upon the meaning of a treaty wants to ascertain is the meaning of the term relatively, that is, in relation to the circumstances in which the treaty was made." A. McNAIR, *supra* note 42, at 175 (emphasis original). The intention of the parties to the treaty is of the highest importance to the determination of the meaning of the term. "The primary rule is that the tribunal should seek to ascertain from all the available evidence the intention of the parties in using the word or phrase being interpreted." *Id.* at 185.

<sup>46</sup> The Vienna Convention provides:

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

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

Vienna Convention, *supra* note 41, at art. 31. The Vienna Convention further provides for the application of relevant rules of international law, *id.* at art. 31(3)(c); special meanings established by the parties, *id.* at Art. 31(4); and recourse to the preparatory work of the treaty and the circumstances of its acceptance if the prior methods lead to "ambiguous" or "absurd" results. *Id.* at art. 32.

<sup>47</sup> Vienna Convention, *supra* note 41, at art. 27. In particular, Article 27 of the Vienna Convention states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." *Id.*

## ANALYSIS

In light of the applicable principles of international law, the terms of the Mutual Defense Treaty and the Military Bases Agreement continue to bind the new Philippine government. Any attempt by the Philippine government, based on the new constitution's provisions, to deny the United States full access to military facilities in the Philippines would constitute a material breach of both the Mutual Defense Treaty and the Military Bases Agreement,<sup>48</sup> as would denial of port access to United States nuclear-armed ships<sup>49</sup> or the denial of landing rights to United States aircraft. A ban on the stationing of United States ground forces at select Philippine military facilities may constitute a breach of the Mutual Defense Treaty and would constitute a breach of the Military Bases Agreement. Prohibition of the presence of nuclear weapons at Philippine military facilities on-shore would breach the Military Bases Agreement but not the Mutual Defense Treaty. Such drastic policies, however, are not mandated by the terms of the new Philippine constitution.

The 1986 revolution did not relieve the Philippines of its obligations under the Mutual Defense Treaty or the Military Bases Treaty. Under customary international law, a change in the government of one of the parties to a treaty, or even a change in the type of government of the party, does not affect the binding force of the treaty.<sup>50</sup> The exception to this general rule, a change in form of the government from a form which the treaty presupposes to one which makes

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<sup>48</sup> See *supra* note 35.

<sup>49</sup> In regard to the very similar ANZUS Treaty, the government of New Zealand in fact instituted a ban on port access by nuclear-armed or nuclear-powered ships. As a result of such a ban, New Zealand refused to allow a port call by the USS Buchanan (a non-nuclear vessel) on Feb. 4, 1985. N.Y. Times, Feb. 5, 1985, at A1, col. 2. In response to this action, the United States formally suspended its military obligations to New Zealand under the ANZUS Treaty. N.Y. Times, Aug. 12, 1987, at A10, col. 1 (nat'l ed.). The action of the United States is in accord with Article 60(2)(b) of the Vienna Convention. See *infra* note 69. See also Note, *The Incompatibility of ANZUS and a Nuclear-Free New Zealand*, 26 VA. J. INT'L L. 455 (1986) (argument in favor of termination). But see Note, *Collective Security Treaties and the Ability of Allies to Limit the Movement of United States' Military Forces—New Zealand's Nuclear Ban*, 4 DICK. J. INT'L L. 119 (1985) (supporting New Zealand's action). The close similarity of the ANZUS Treaty to the Mutual Defense Treaty justifies use of the same reasoning to conclude that a similar ban by the Philippines would materially breach the Mutual Defense Treaty. See *infra* note 100.

<sup>50</sup> L. OPPENHEIM, *supra* note 40, at 830; C. HYDE, *supra* note 40, at 1528. It is the state which executes the treaty, not the government; such changes in government do not change the person of the state.

performance of treaty obligations impossible,<sup>51</sup> does not apply in this instance. The form of the Philippines government has not changed; it remains a constitutional republic. More importantly, the Philippine governmental change does not constitute a basis for termination under the Vienna Convention. The change did not bring about "the disappearance or destruction of an object indispensable for the execution" of the treaties<sup>52</sup> justifying termination on the ground of supervening impossibility of performance; no fundamental change of circumstances<sup>53</sup> justifying termination occurred, as the change did not alter an essential basis of consent of the Philippines to be bound by the treaties.<sup>54</sup> Nor did the change "radically . . . transform the extent of the obligations still to be performed,"<sup>55</sup> since the identity of the Philippine government is irrelevant to the extent of the Philippines' outstanding obligation, here the provision of access to military facilities. Finally, the new Philippine government has itself expressed the intention to uphold its treaty obligations, both explicitly, in statements by President Aquino,<sup>56</sup> and implicitly, in the terms of Article XVIII, section 25 providing for renegotiation of a bases treaty for 1991 expiration of the Military Bases Agreement.<sup>57</sup>

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<sup>51</sup> L. OPPENHEIM, *supra* note 40, at 831; C. HYDE, *supra* note 40, at 1528.

<sup>52</sup> Vienna Convention, *supra* note 41, at Art. 61. Article 61 of the Vienna Convention states:

1. A party may invoke the impossibility of performing a treaty as a ground for terminating . . . it if impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty.
2. Impossibility of performance may not be invoked by a party as a ground for terminating . . . the operation of a treaty if the impossibility is the result of a breach by that party . . . of an obligation under the treaty.

*Id.*

<sup>53</sup> Vienna Convention, *supra* note 41, at art. 62. Article 62 of the Vienna Convention states:

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

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

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

*Id.*

<sup>54</sup> Vienna Convention, *supra* note 41, at art. 62(1)(a); *see also supra* note 53. This provision parallels the customary rule. *See supra* note 51 and accompanying text. If anything, the revolution reinstated the republican institutions which characterized the Philippine government at the time of execution of the treaties.

<sup>55</sup> Vienna Convention, *supra* note 41, at art. 62 (1)(b); *see also supra* note 53.

<sup>56</sup> *See supra* note 18.

<sup>57</sup> PHIL. CONST. art. XVIII, sec. 25.

The continued willingness of the Philippine government to cooperate with the United States is essential to the effective implementation of the Mutual Defense Treaty. In the treaty, the United States and the Philippines express their sense of unity "so that no potential aggressor could be under the illusion that either of them stands alone in the Pacific Area."<sup>58</sup> The use of the words "potential aggressor" shows that the parties serve warning to all states that aggressive actions will meet unified resistance. The assertion that the apparent isolation of either party is an "illusion" serves as a further warning. Statements by the signatories confirm the parties' intent that the Mutual Defense Treaty act as a deterrent.<sup>59</sup>

Article II of the Mutual Defense Treaty 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."<sup>60</sup> The plain meaning of "self-help" is an ongoing effort by each party to provide sufficient resources for its own defense. More importantly, "jointly by . . . mutual aid" implies that each party will in good faith take actions to assist the other in meeting its treaty obligations.<sup>61</sup> The purpose of these efforts is to "maintain and develop" the defensive capacity of the alliance.<sup>62</sup> Use of these words

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<sup>58</sup> Mutual Defense Treaty, *supra* note 9, at preamble, recital 3.

<sup>59</sup> On the occasion of the signing of the Mutual Defense Treaty, President Truman stated: "[The Treaty] is a strong step toward security and peace in the Pacific. It demonstrates to all nations that we intend to continue our common course and to work together in the future, as we have in the past, for peace for all mankind." Mutual Defense Treaty with Philippines Signed, 25 DEP'T ST. BULL. 422 (Sept. 10, 1951). Philippine President Quirino remarked at the same ceremony: "Our purpose is . . . to give notice that a potential aggressor must henceforth take due account of our common purpose and united will to act in self-defense." *Id.* at 423. Quirino also described the treaty as one of "mutual defense with unavoidable connotations of military action." *Id.*

During debate in the Philippine Senate over ratification of the Mutual Defense Treaty, Senator Lorenzo Sumulong stated, "[The Mutual Defense Treaty] is a reaffirmation of the policy consistently followed by our Republic . . . of cooperating closely with the people and government of the United States in all matters referring to the defense of common interests in the Pacific." Sumulong, *For the United States-Philippines Mutual Defense Pact*, 27 PHIL. L. J. 388 (1952) (text of a speech delivered on the Philippine Senate floor on May 7, 1952).

<sup>60</sup> Mutual Defense Treaty, *supra* note 9, at art. II; *see also supra* note 27.

<sup>61</sup> The Vienna Convention, article 31(1), provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning." Vienna Convention, *supra* note 41, at art. 31(1). The Mutual Defense Treaty preamble supports the interpretation in stating the parties' desire "further to strengthen their present efforts for collective defense." Mutual Defense Treaty, *supra* note 9, at preamble, recital 4.

<sup>62</sup> Mutual Defense Treaty, *supra* note 9, at art. II.

implies that the parties will strive to improve the effectiveness of their defenses, the further implication being neither party will take actions which reduce the effectiveness of the alliance.<sup>63</sup>

Consideration of the Philippines military capability and geographical location indicates that the Philippines provision of mutual aid must include access to naval facilities by the United States. Philippine military strength, while substantial,<sup>64</sup> may be insufficient to meet serious external threats alone.<sup>65</sup> The Philippines presently faces a serious insurgency problem;<sup>66</sup> forces committed to dealing with insurgents would be unavailable to defend against an external armed attack. A United States naval presence is necessary to deter any external attack.<sup>67</sup> Furthermore, the great distance between the United States and the Philippines makes any necessary support and resupply operations impractical if conducted by air alone. The United States consequently must have access to ports in the Philippines in order effectively to fulfill its defense obligations under the Mutual Defense Treaty and other treaties. The Philippine government has consistently provided such access.<sup>68</sup>

<sup>63</sup> Article II begins by stating the purpose of the parties' efforts is to "more effectively achieve the objective" of the treaty. *Id.* Each party's actions must therefore enhance, not detract from, deterrence.

<sup>64</sup> The regular armed forces of the Philippines currently numbers 113,000, of which 70,000 comprise the army, 26,000 the navy and 17,000 the airforce; reserves total 48,000. *THE MILITARY BALANCE* 166-67 (1986-1987).

<sup>65</sup> The Philippine army suffers from poor training and lack of equipment. By one estimate, it would require approximately \$1 billion in aid to restore the Armed Forces of the Philippines (AFP) to adequate combat condition. *See NEWSWEEK*, May 11, 1987, at 37.

<sup>66</sup> The New People's Army, a communist revolutionary group, numbers at least 15,000 guerrillas and is active in 62 of the 73 Philippine provinces. *NEWSWEEK*, Feb. 17, 1986, at 23; *see TIME*, Feb. 3, 1986, at 36-37 (analysis of New People's Army). The Moro National Liberation Front, a Muslim separatist group, has 11,000 or more armed fighters. *THE MILITARY BALANCE* 167 (1986-1987). *See generally* SENATE COMM. ON FOREIGN RELATIONS, INSURGENCY AND COUNTERINSURGENCY IN THE PHILIPPINES, S. REP. NO. 99, 99th Cong., 1st Sess. (1985).

<sup>67</sup> In 1985, Paul D. Wolfowitz, Assistant Secretary of State for East Asian and Pacific Affairs, stated: "[W]ithout access to ports and the surface ship deployments that access supports, we cannot maintain the naval presence in the Pacific that helps to deter war and preserve the peace." Wolfowitz, *The Pacific: Region of Promise and Challenge*, 85 DEP'T. ST. BULL. 37, 38 (Apr. 1985).

<sup>68</sup> *See, e.g.* 35 DEP'T. ST. BULL. 95 (July 16, 1956) (joint statement of United States Vice-President Nixon and Philippine President Magsaysay); 49 DEP'T. ST. BULL. 863 (Dec. 2, 1963) (SEATO exercises); 55 DEP'T. ST. BULL. 533 (Oct. 10, 1966) (joint communique of United States President Johnson and Philippine President Marcos on importance of Mutual Defense Treaty and Military Bases Agreement).

A complete prohibition of United States port access would frustrate the purpose of the Mutual Defense Treaty and thereby constitute a material breach of the treaty under the terms of the Vienna Convention.<sup>69</sup> Even if the Philippine constitution required the enactment of such a policy, the Philippine government could not use the provision as justification for failure to perform its treaty obligations.<sup>70</sup> Such a policy, however, is not mandatory under the Philippine constitution. Article XVIII, section 25 does not impose an absolute ban on the presence of foreign military bases, troops, or facilities. Rather, it requires that a treaty be duly negotiated, concurred in by the Senate, approved in a national referendum if Congress so requires, and recognized as a treaty by the other party to the treaty.<sup>71</sup> The Philippine government thus "retains all its options."<sup>72</sup>

Selectively granting or denying port access to United States ships based on their armaments would place an arbitrary obstacle before United States naval operations in view of the number of United States nuclear ships,<sup>73</sup> their integration with conventionally armed vessels, and the necessity for non-disclosure of the presence or absence of such weapons.<sup>74</sup> Such a policy likewise would breach the Mutual Defense Treaty. Proper consideration of the clause "consistent with

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<sup>69</sup> Vienna Convention, *supra* note 41, at Art. 60(3)(b). Article 60(3)(b) defines a material breach as "the violation of a provision essential to the accomplishment of the object or purpose of the treaty." *Id.*

<sup>70</sup> Vienna Convention, *supra* note 41, at art. 27; *see also supra* note 46.

<sup>71</sup> PHIL. CONST. art. XVIII, sec. 25.

<sup>72</sup> "Government policy makers are therefore given sufficient flexibility . . . to exercise any option on the bases." Philippine News, week of Jan. 7-13, 1987, at 5, col. 2 (excerpt from a primer on the 1986 Draft Constitution prepared by the Committee on Information Policy of the Constitutional Commission).

<sup>73</sup> *See supra* note 13. Note that the Philippine constitutional provision would not apply to nuclear-powered vessels.

<sup>74</sup> Assistant Secretary Wolfowitz thus stated: "[W]e have only one navy—not one conventionally-capable and one nuclear-capable navy; not one navy to accommodate one country's policy and another navy for the rest of the world." Wolfowitz, *ANZUS Alliance*, 85 DEP'T. ST. BULL. 65, 66 (June 1985).

Refusal to comment on the presence or absence of nuclear weapons aboard naval vessels is a long-standing United States policy. *See* Bureau of Public Affairs, U.S. Dep't of State, Current Policy No. 674, *The ANZUS Alliance 2* (1985). Assistant Secretary Wolfowitz stated: "[W]e can't go around advertising which of those ships has nuclear weapons on board, or when they do and when they don't. For an ally to insist on that kind of disclosure as a condition for port access is just not responsible." Wolfowitz, *supra* note 67, at 38. Secretary of State George Schultz stated, "Our policy of neither confirming nor denying the presence of nuclear weapons is essential: it prevents adversaries from identifying our most capable ships, thereby enhancing targeting difficulties and reinforcing deterrence." 85 DEP'T. ST. BULL. 33 (Sept. 1985).

the national interest" can avoid this result.<sup>75</sup> United States port access for purposes of resupply during an external armed attack, for example, would be clearly consistent with the national interest of the Philippines, as would the continued deterrent effect of a United States naval presence in the region.

Similar reasoning supports United States access to Philippine air installations. Air superiority is essential to any modern military operation.<sup>76</sup> The United States would have great difficulty defending the Philippines without access to Clark Field. Any Philippine government policy denying the United States access to Philippine air bases would therefore materially breach the Mutual Defense Treaty. The possible transitory presence of nuclear weapons aboard United States strategic bombers making use of Clark Field<sup>77</sup> entails another potential conflict with the Philippine policy against the presence of nuclear weapons. Again the United States policy of neither confirming nor denying the presence of nuclear weapons would operate.<sup>78</sup> More importantly, it is very unlikely that the United States would use such weapons in any Philippine defense operation.<sup>79</sup>

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<sup>75</sup> In an interview on Dec. 17, 1986, Justice Cecilia Munoz Palma, president of the Constitutional Commission which drafted the new Philippine Constitution, stated, "[T]he policy on freedom from nuclear weapons must be consistent with the national interest. The policy is not *absolutely* against nuclear weapons." Philippine News, week of Dec. 24-30, 1986, at 4, col. 3 (emphasis added).

<sup>76</sup> See generally M. ARMITAGE & P. MASAN, AIR POWER IN THE NUCLEAR AGE (1983); E. EMME, THE IMPACT OF AIR POWER: NATIONAL SECURITY AND WORLD POLITICS (1959). As early as 1949, Winston Churchill stated in an address at the Massachusetts Institute of Technology, "For good or ill air mastery is today the supreme expression of military power, and fleets and armies, however necessary and important, must accept subordinate rank." Churchill, *United We Stand Secure*, VITAL SPEECHES, Apr. 1, 1949, at 381.

<sup>77</sup> Allegations abound as to the presence of nuclear weapons at Clark Field. See, e.g. TIME, Feb. 3, 1986, at 33; *Bases Hearings*, *supra* note 12, at 89.

<sup>78</sup> See L.A. Times, Sept. 20, 1986, sec. I, at 5, col. 2.

<sup>79</sup> Tactical nuclear weapons constitute a defense against large concentrations of troops, tank battalions, etc. Use of tactical nuclear weapons is envisioned primarily in the context of a NATO-Warsaw Pact conflict in Europe. See B. BERKOWITZ, AMERICAN SECURITY: DILEMMA FOR A MODERN DEMOCRACY 150-66 (1986) ("Nuclear weapons are the classical solution to NATO's disadvantage in numbers."); T. MURRAY, NUCLEAR POLICY FOR WAR AND PEACE 65 (1960); see generally H. KISSINGER, NUCLEAR WEAPONS AND FOREIGN POLICY (1957). Tactical nuclear weapons are singularly inappropriate for the defense of a mountainous, heavily forested tropical island nation located hundreds of miles from the nearest large land army.

The 1983 Amendment, *supra* note 32, arguably applies to strategic nuclear weapons, to the extent they would be delivered by missiles. See *infra* note 88. This amendment would not seem to apply to strategic nuclear weapons delivered by long-range bombers.

While a ban on United States access to Philippine ports or air bases would clearly breach the Mutual Defense Treaty, a prohibition on the stationing of United States troops in the Philippines may constitute a breach of the treaty if the presence of such troops is necessary for the effective performance of United States defense obligations. Prior Philippine efforts to attain military self-reliance and the policy of calling in allied troops only as a last resort<sup>80</sup> may indicate that the presence of United States troops is not necessary. Prohibition of the storage of nuclear weapons at Philippine bases onshore, however, would not breach the Mutual Defense Treaty, as such weapons are not essential to the defense of the Philippines and their absence would not impair the effective performance of United States defense obligations.<sup>81</sup>

While the Mutual Defense Treaty authorizes the United States to make use of Philippine ports, airfields and military bases under the general language of article II,<sup>82</sup> the Military Bases Agreement, as amended,<sup>83</sup> clearly and specifically authorizes any and all United States ships, planes and ground forces<sup>84</sup> to utilize the listed Philippine military facilities. Any Philippine government policy restricting<sup>85</sup> or denying United States naval, air or ground forces access to the listed facilities would constitute a material breach of the Military Bases Agreement. Under article III of the Agreement, the United States has "the right, power and authority . . . to install, maintain and employ on any base any type of . . . weapons . . . that may be requisite or appropriate."<sup>86</sup> There are only two limitations on this

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<sup>80</sup> A joint communique issued December 7, 1975, stated:

President Marcos explained his efforts to attain military self-reliance and his policy not to allow the introduction of foreign ground troops into the Philippines for its defense except as a last resort. President Ford expressed support for these realistic policies.

1979 Amendment, *supra* note 32, at 867.

<sup>81</sup> See *supra* note 79.

<sup>82</sup> See *supra* notes 60-80 and accompanying text.

<sup>83</sup> See Military Bases Agreement, *supra* note 4; 1979 Amendment, *supra* note 32.

<sup>84</sup> See *supra* note 33.

<sup>85</sup> 1979 Amendment, *supra* note 32, at 864. The 1979 Amendment states:

The United States shall have the use of certain facilities and areas within the bases and shall have effective command and control over such facilities and over United States personnel, employees, equipment and material. Consistent with its rights and obligations under the 1947 Agreement as amended, the United States shall be assured unhampered military operations involving its forces in the Philippines.

*Id.*

<sup>86</sup> Military Bases Agreement, *supra* note 4, at art. III, sec. 2(e).

power. First, any use of the bases for "military combat operations" other than in the context of the Mutual Defense or SEATO<sup>87</sup> Treaties, and any long-range missile deployment, shall be the subject of prior consultation with the Philippine government.<sup>88</sup> Second, the United States shall use its granted powers "reasonably."<sup>89</sup> The United States consequently would be within its rights under the Agreement to deploy nuclear weapons, subject to these limitations, at any facility listed in the Agreement. In particular, the storage of nuclear weapons at listed facilities, or the presence of nuclear weapons on naval vessels or aircraft making use of such facilities, would not constitute use for military combat operations. Any Philippine government policy prohibiting such deployment would constitute a breach of the Agreement if the deployment were reasonable under all the surrounding circumstances.

The United States should, nevertheless, take into account the concerns of the Philippines regarding nuclear weapons and the larger issue of the United States military presence. The Philippines has the right to terminate either treaty on one year's notice (after September 16, 1991 with respect to the Military Bases Agreement), and would be within its right to do so should it decide such a course of action to be in its national interest.<sup>90</sup> Termination of the alliance, however,

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<sup>87</sup> SEATO Treaty, *supra* note 1. After the conquest of South Vietnam in 1975, however, the SEATO Council voted to dissolve the Organization. 73 DEP'T. ST. BULL. 575 (Oct. 13, 1975). The Organization ceased to exist on June 30, 1977, although the collective defense treaty remains in force. N.Y. Times, July 1, 1977, at A3, col. 1. It is thus possible, but improbable, that the United States would use Philippine military bases within the context of the SEATO Treaty. Conceivably the United States might utilize the bases to support Thailand, another SEATO signatory, should an attack occur on that country.

<sup>88</sup> 1983 Amendment, *supra* note 32, at art. I. The full text of the article is:

Within the context of Philippine sovereignty, the operational use of the bases for military combat operations other than those conducted in accordance with the Philippines-United States Mutual Defense Treaty (footnote omitted) and the Southeast Asian Collective Defense Treaty (Manila Pact) (footnote omitted), or the establishment by the Government of the United States of long-range missiles in the bases, shall be the subject of prior consultation with the Government of the Philippines, notwithstanding the provision of the 1979 Amendment to the Military Bases Agreement assuring the United States of unhampered military operations involving its forces in the Philippines.

*Id.*

<sup>89</sup> Military Bases Agreement, *supra* note 4, at art. III.

<sup>90</sup> Vienna Convention, *supra* note 41, at Arts. 42, 54. Articles 42 and 54 of the Vienna Convention provide that termination of a treaty may take place as a result of the application of the provisions of the treaty. *Id.* Both the Mutual Defense Treaty and the Military Bases Agreement contain termination provisions. See *supra* notes 30 and 36.

would benefit neither the United States nor the Philippines. For the United States, the Philippine military facilities are crucial to the defense of United States interests in the western Pacific, as well as in the Indian Ocean.<sup>91</sup> The recent collapse of the ANZUS alliance,<sup>92</sup> and increased Soviet activity in the South China Sea and the Pacific,<sup>93</sup> provide additional incentive for United States to be flexible on these issues. In regard to the Philippines, presence of United States forces results in the creation of thousands of jobs and the injection of hundreds of millions of dollars into the Philippine economy,<sup>94</sup> as well as military protection. The current economic difficulties of the Philippines<sup>95</sup> make the loss of such a substantial asset undesirable. As the United States addresses Philippine concerns, the Philippines should give due consideration to the legitimate need for secrecy in the deployment of nuclear weapons.

A possible resolution of the problem of the presence of nuclear weapons in Philippine territory would be an amendment to the Military Bases Agreement, similar to the 1983 Amendment's provision concerning placement of long-range missiles.<sup>96</sup> The amendment would provide for prior consultation with the Philippine government before deployment of nuclear weapons at any Philippine military installation

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<sup>91</sup> See *Bases Hearings*, *supra* note 12, at 31-37 (statement of Richard L. Armitage, Assistant Secretary of Defense for International Security Affairs). These interests include protection of vital air and sea lanes, including oil supply routes, from the Indian Ocean to Japan and Korea; projection and support for the United States presence at Diego Garcia in the Indian Ocean; counteraction of Soviet activity in the South China Sea; and provision of contingent capability for operations in the Persian Gulf, the waters off East Africa, and the Middle East. *Id.*

<sup>92</sup> See *supra* note 49. On June 4, 1987, the New Zealand Parliament approved legislation formalizing the Labor Government policy denying port access to nuclear-armed or nuclear-powered ships. N.Y. Times, June 5, 1987, at A2, col. 4.

<sup>93</sup> The United States has expressed concern about the Soviet buildup at Cam Ranh Bay, Vietnam, and Kompong Som, Cambodia. N.Y. Times, Jan. 26, 1986, at A6, col. 1; see also *Bases Hearings*, *supra* note 12, at 34 (statement of Richard L. Armitage), as well as Soviet diplomatic activity in the South Pacific states of Vanuatu, Kiribati and Fiji, NEWSWEEK, Aug. 11, 1986, at 32.

<sup>94</sup> Over five years the United States will pay \$900 million for use of the bases, and will pay at least \$330 million in wages to 43,000 Filipino employees. N.Y. Times, Feb. 23, 1986, at D3, col. 1. The \$82 million in wages payed yearly to Filipino workers constitutes the second-largest payroll in the Philippines. L.A. Times, Feb. 3, 1987, sec. I, at p. 12, col. 2.

<sup>95</sup> The current foreign debt owed by the Philippines is \$28 billion; creditors recently agreed to a rescheduling plan covering \$10.8 billion of the total. N.Y. Times, June 12, 1987, at D2, col. 5.

<sup>96</sup> See *supra* note 88 and accompanying text.

used by the United States.<sup>97</sup> Such an amendment, as opposed to an outright ban, would leave the Philippine government with latitude to determine the national interest at the time of any such proposed deployment, and would thus be in accord with the constitutional provision.<sup>98</sup> Use of the upcoming review meeting in 1989<sup>99</sup> to implement such an amendment would demonstrate the good faith of the United States, and would enhance the likelihood of approval of an agreement extending or succeeding the Military Bases Agreement after 1991.<sup>100</sup>

### CONCLUSION

The alliance between the United States and the Philippines need not suffer harm as a result of the 1986 revolution and the subsequent adoption of the new Philippine constitution. The constitution does not mandate specific policies detrimental to the security interests of the two allies, nor does it require the Philippine government to breach its obligations under the Mutual Defense Treaty or the Military Bases Agreement. Rather, the new provisions give the Philippine government sufficient flexibility to act in accordance with its national interest as it perceives it. The provisions should alert the United States to address the reasonable concerns of the Filipino people regarding the presence of nuclear weapons and the right of the Philippines to pursue its

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<sup>97</sup> Such an amendment need not specifically mention nuclear weapons. This type of provision is already in force between the United States and Japan in regard to the Japan Treaty. See *supra* note 1. In an exchange of notes at the time of ratification of the treaty, the two parties agreed that "major changes" in the "equipment" of United States armed forces deployed in Japan would be the subject of prior consultation with the government of Japan. Exchange of Notes, Jan. 19, 1960, United States-Japan, 11 U.S.T. 1646, T.I.A.S. No. 4509. This provision in effect gives Japan a veto over United States deployment of nuclear weapons on Japanese territory. See Feeney, *supra* note 22, at 202.

<sup>98</sup> PHIL. CONST. art. II, sec. 8.

<sup>99</sup> The 1979 Amendment provides that "[i]n every fifth anniversary year from the date of this modification . . . there shall be begun and completed a complete and thorough review and reassessment of the agreement including its objectives, its provisions, . . . and the manner of implementation to assure that the agreement continues to serve the mutual interest of both parties." 1979 Amendment, *supra* note 32, at 864.

<sup>100</sup> A bill introduced in the Philippine Senate on Aug. 20, 1987 would outlaw the storage or possession of nuclear weapons "in whole or in part" and forbid transporting nuclear arms "into the country or within its territorial waters whether in transit or disembarkation," as well as through Philippine airspace. Atlanta Constitution, Aug. 21, 1987, at A3, col. 5. The bill's sponsor, Sen. Wigberto Tanada, favors removal of the United States bases from the Philippines. *Id.* This development underscores the urgency of the need for the United States to address Philippine concerns.

own foreign policy. The consequent reassessment may result in a strengthened United States-Philippine alliance.

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