



---

1-1-1987

## Removal Provisions of the Philippine-United States Military Bases Agreement: Can the United States Take it All

Maria Teresa M. Lim

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

---

### Recommended Citation

Maria T. Lim, *Removal Provisions of the Philippine-United States Military Bases Agreement: Can the United States Take it All*, 20 Loy. L.A. L. Rev. 421 (1987).

Available at: <https://digitalcommons.lmu.edu/llr/vol20/iss2/5>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

**REMOVAL PROVISIONS OF THE PHILIPPINE-UNITED  
STATES MILITARY BASES AGREEMENT: CAN  
THE UNITED STATES  
TAKE IT ALL?**

**I. INTRODUCTION**

Clark Air Base and Subic Bay Naval Base, located on the Philippine island of Luzon, constitute the largest American military installations outside the United States. The United States considers these bases' logistical capabilities to be extremely important military assets.<sup>1</sup> Command and control facilities at both bases are also substantial.<sup>2</sup>

Prospective termination of the bases' lease, however, draws near. America first established its military presence when Commodore Dewey's forces arrived in Manila Bay on May 1, 1898.<sup>3</sup> The 1947 Military Bases Agreement<sup>4</sup> embodies America's current right to unhampered

---

1. It is said of Clark Air Base that "[t]he runways and aircraft parking areas . . . are superb as are the warehouses and underground storage facilities for supplies and munitions. The petroleum, oils, and lubricants (POL) capacity is roughly equal to that of Kennedy International Airport in New York." *United States-Philippines Relations and the New Base and Aid Agreement: Hearings Before the Subcomm. on Asian and Pacific Affairs of the House Comm. on Foreign Affairs*, 98th Cong., 1st Sess. 193-94 (1983) (statement of Lieutenant Colonel William E. Berry, Jr., Asst. Professor at the United States Air Force Academy) [hereinafter 1983 *Hearings*]. The Subic Naval Supply Depot is described as "the largest U.S. overseas depot and can support every type of ship and aircraft in the Seventh Fleet inventory . . . . The Ship Repair Facility can perform 65% of all the maintenance required for the upkeep of Seventh Fleet ships." *Id.* at 194.

2. In describing communications equipment at Clark, Lieutenant Colonel Berry said: [It] is part of a three-way communications network involving similar resources in Japan and Korea. Clark has two satellite terminals which make an important communications link between US forces in the Pacific and those in the Indian Ocean. According to Air Force officials, no other facility in the Western Pacific offers such a variety of communication capabilities.

*Id.*

3. F. BUNGE, *PHILIPPINES: A COUNTRY STUDY* 22 (1984). At the time, the Philippines was a Spanish colony. The United States declared war on Spain when the United States battleship *Maine* was blown up in the harbor of Havana, Cuba, on February 15, 1898. W. BUTLER, J. HUMPHREY & G. BISSON, *THE DECLINE OF DEMOCRACY IN THE PHILIPPINES* 2 (1977). Commodore Dewey was sent to Manila Bay to destroy the Spanish armada harbored there. The American presence definitely offset the Spanish military forces. In her defeat, Spain agreed to cede its colonies to the United States through the Treaty of Paris. F. BUNGE, *supra*, at 22-23. See Treaty of Peace, Dec. 10, 1898, United States-Spain, art. III, 30 Stat. 1754, 1755. The Philippines remained a United States colony from 1898 to 1946.

4. Agreement between the Republic of the Philippines and the United States of America Concerning Military Bases, Mar. 14, 1947, United States-Philippines, 61 Stat. 4019, T.I.A.S. No. 1775 [hereinafter 1947 Agreement].

use of the military bases in the Philippines.<sup>5</sup> An amendment shortened the original ninety-nine year period to twenty-five years, with a proviso for renewal if mutually agreed upon at the termination of that period.<sup>6</sup> After September 16, 1991, United States access to the bases can be cut off with one year's notice from either government.<sup>7</sup>

Philippine President Corazon Aquino has said that she will respect the Agreement until 1991 and then keep her options open.<sup>8</sup> She has indicated that she prefers a new treaty to an extension of the current lease.<sup>9</sup> The United States, however, has begun assessing its own options should the treaty be terminated. Departure of the American forces could, not unrealistically, lead to their replacement by Soviet forces. The Soviets already occupy former American bases in Vietnam's Cam Ranh Bay. Together, Subic Bay and Cam Ranh Bay could become a "mutually supportive" pair of bases, increasing the risk of American combat operations in the South China region.<sup>10</sup>

This Comment examines the right of the United States to remove its base installations on or before the 1947 Agreement's termination. The removal provisions contained in Article XVII of the 1947 Agreement provide:

---

5. In 1944, the United States Congress called for the grant of independence to the Philippines, but naval and air bases "necessary for the mutual protection" of both countries were to be retained. S.J. Res. 93, 78th Cong., 2d Sess., U.S. CODE CONG. SERVICE 610 (1944). A year later, the Philippine Congress authorized the Philippine President to negotiate the establishment of such bases. H.R.J. Res. 4, July 28, 1945, Philippines, 41 Official Gazette 349. Thus in 1947, Philippine President Manuel Roxas and Paul McNutt, High Commissioner to the Philippines, signed the 1947 Agreement, which granted the United States the right to retain use of the bases. 1947 Agreement, *supra* note 4, art. I.

Republican members of Congress resisted Philippine independence on the basis that it would injure American security and trade interests in the Far East. C. BUSS, THE UNITED STATES AND THE PHILIPPINES: BACKGROUND FOR POLICY 11 (1977). However, the United States officially recognized Philippine independence in 22 U.S.C. § 1394(a) (1982), which provided for the President to withdraw sovereignty on the 4th day of July following a 10-year transition period. The same statute gave the President the authority to enter into negotiations over the status of the military bases. *Id.* § 1394(b); *see also id.* §§ 1385-1392 (providing for transfer of property rights to the Philippine government, except for the retention of the bases).

6. Exchange of Notes Amending Article XXIX of the 1947 Agreement, Sept. 16, 1966, United States-Philippines, 17 U.S.T. 1212, T.I.A.S. No. 6084 [hereinafter Exchange of Notes].

7. Based on the Bohlen-Serrano Agreement of 1959, Article XXIX was amended such that the 1947 Agreement and its revisions remain in force until September 16, 1991, "after which, unless extended for a longer period by mutual agreement, it shall become subject to termination upon one year's notice by either government." *Id.*

8. Tift, *Now the Hard Part*, TIME, Mar. 10, 1986, at 26.

9. Philippine President Aquino has said she will seek to have a full treaty replace the present executive agreement. N.Y. Times, Feb. 26, 1986, at A12, col. 5.

10. HOUSE COMM. ON FOREIGN AFFAIRS, 99TH CONG., 2D SESS., ASSESSING AMERICA'S OPTIONS IN THE PHILIPPINES 69, 85 (Comm. Print 1986) [hereinafter 1986 HOUSE REPORT].

1. It is mutually agreed that the United States shall have the right to remove or dispose of any or all removable improvements, equipment or facilities located at or on any base and paid for with funds of the United States. No export tax shall be charged on any material or equipment so removed from the Philippines.

2. All buildings and structures which are erected by the United States in the bases shall be the property of the United States and may be removed by it before the expiration of this Agreement or the earlier relinquishment of the base on which the structures are situated. There shall be no obligation on the part of [either country] to rebuild or repair any destruction or damage inflicted from any cause whatsoever on any of the said buildings or structures owned or used by the United States in the bases. The United States is not obligated to turn over the bases to the Philippines at the expiration of this Agreement or the earlier relinquishment of any bases in the condition in which they were at the time of their occupation, nor is the Philippines obliged to make any compensation to the United States for the improvements made in the bases or for the buildings or structures left thereon, all of which shall become the property of the Philippines upon the termination of the Agreement or the earlier relinquishment by the United States of the bases where the structures have been built.<sup>11</sup>

Article XVII appears to vest the United States with a broad and flexible removal right, while raising issues on the parameters of this right. For instance, does it give the United States the right to transfer or destroy all structures for security purposes just prior to termination of the Agreement? Moreover, does the Philippines have a duty to compensate the United States should base facilities be left behind? In answering these inquiries, it is vital to define the terms "removable improvements, equipment or facilities," and "buildings and structures."

Precise rules of international law that deal with the removal of fixtures are non-existent, but analogies can be made to the domestic law of both the United States and the Philippines. The two countries share common domestic property law principles. Where disputes on definitions or rules may arise, this Comment argues that Philippine civil law should more properly control the resolution. This Comment then interprets the Agreement's removal provisions based on guidelines from the

---

11. 1947 Agreement, *supra* note 4, art. XVII.

Vienna Convention on the Law of Treaties.<sup>12</sup>

Underlying these issues is the often sensitive question of how to approach the termination of military base agreements. Some view the issue purely as a political matter, to be discussed only at the negotiation table. Others view such agreements as "unequal treaties" and therefore voidable at the option of the weaker party.<sup>13</sup> This Comment considers the possibility that the Philippines will adopt the "unequal treaty" concept in order to invalidate the removal provisions. It is recognized, however, that this concept has not been fully accepted in international law.

This Comment argues that the removal provisions should not be exercised. As to the validity of the provisions, the United States and the Philippines arguably did not enjoy equal bargaining power at the inception of the Agreement. If the disproportion is sufficient, the 1947 Agreement is an "unequal treaty" and its provisions are voidable at the option of the Philippines. As to interpretation of the provisions, a rational reading of Article XVII suggests that the removal right only gives the United States the operational flexibility to improve and maintain facilities while American forces remain at the bases, not the right to destroy the base structures just before right of access to the bases terminates. The operational purpose of the provisions should then be expressly stated in any future treaty between the two countries.

## II. HISTORY OF THE 1947 AGREEMENT

Filipinos often say they have a "love-hate" relationship with the United States. During colonial days, the United States cultivated in the Filipinos a respect for democratic institutions. The Philippines looked upon the United States as its liberator in World War II and has since remained America's steadfast ally. Forty years of self-rule, however, have nurtured a nationalistic pride among the people. Most Filipinos no longer cherish the thought that they were once called America's "little brown brothers."

---

12. Vienna Convention on the Law of Treaties, May 22, 1969, *opened for signature* May 23, 1969, U.N. Doc. A/Conf.39/27, *reprinted in* J. SWEENEY, C. OLIVER & N. LEECH, *THE INTERNATIONAL LEGAL SYSTEM* 194 (Supp. 1981) [hereinafter Vienna Convention]. The Convention entered into force on January 27, 1980. As of December 31, 1979, the United States was not a party. Articles 31 and 32, which are discussed in this Comment are, however, representative of emerging customary rules of interpretation, and to that extent, will serve as guidelines for interpretation. *See* M. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* 342-46 (1985).

13. Lester, *Bizerta and the Unequal Treaty Theory*, 11 *INT'L & COMP. L.Q.* 847, 850 (1962); A. DAVID, *THE STRATEGY OF TREATY TERMINATION* 307-08 (1975). *See infra* notes 91-108 and accompanying text.

The following materials on pre-independence legislation, the 1947 Agreement and its subsequent amendments reflect this tension as the Philippines has increasingly asserted sovereignty over the base territories. These materials show the efforts to achieve a more equitable relationship with more reciprocal rights and obligations than existed under the "father-son" relationship of colonial days.

### *A. Pre-Independence Legislation*

As far back as 1916, Congress stated in the preamble of the Jones Act its intent to recognize Philippine independence as soon as a stable government could be established.<sup>14</sup> Subsequently, Congress drafted the Hare-Hawes-Cutting bill<sup>15</sup> to recognize Philippine independence after a ten-year transition period, during which the United States could retain its military bases.<sup>16</sup> The bill also provided the President with the power to negotiate with other foreign states for the perpetual neutralization of the Philippines upon its independence.<sup>17</sup>

President Hoover vetoed the act, in part because the concept of neutralization was inconsistent with retention of military bases in the Philippines.<sup>18</sup> Congress overrode the veto and repassed the act in 1933, retaining the two inconsistent clauses.<sup>19</sup> This time, the Philippine Congress rejected it because the bases were "inconsistent with true independence, violate national dignity, and are subject to misunderstanding."<sup>20</sup> In 1934, President Roosevelt urged that a new law be enacted eliminating military bases "simultaneously with the accomplishment of final Philippine independence," but left the question of naval bases open.<sup>21</sup>

The Tydings-McDuffie Act<sup>22</sup> was the final result of the independence bill drafts. Although it was almost identical to the Hare-Hawes-Cutting bill, it provided for dismantling of the military bases and for renegotiating naval and refueling stations with the Philippine government no later than two years after the proclamation of Philippine independence.<sup>23</sup>

While the United States policy encouraged progressive steps to

---

14. Jones Act, ch. 416, 39 Stat. 545 (1916).

15. H.R. 7233, 72nd Cong., 1st Sess., 75 CONG. REC. 1554 (1932).

16. 76 CONG. REC. 1078, § 10 (1932).

17. *Id.* at 1079, § 11.

18. 76 CONG. REC. 1761 (1933).

19. Hare-Hawes-Cutting Act, ch. 11, 47 Stat. 761 (1933).

20. 77 CONG. REC. 130 (1934).

21. *Id.* at 3715.

22. Tydings-McDuffie Act, ch. 84, 48 Stat. 456 (1934).

23. *Id.* § 10, at 463.

political independence, the Philippines grew in economic dependence. Tariff relief provisions, such as removing restrictions on Philippine imports, had been enacted in 1913 as well-meaning attempts to stimulate economic development.<sup>24</sup> The principal result of such acts, however, was to make the Philippines almost completely dependent on American markets.<sup>25</sup>

To a great extent, the Philippines was also militarily dependent on the United States. American forces were largely responsible for the external security and defense of the islands. No attempt was made to organize a Philippine army until 1935. Even then, the role of the local armed forces waxed and waned until long after World War II.<sup>26</sup>

### B. The 1947 Agreement

In 1941, Japan attacked the Philippines. Shortly after the attack, American and Filipino forces surrendered under the pressure of superior numbers. MacArthur led the American forces to reclaim the islands in 1944. The final fighting was fierce, leaving Manila one of the most devastated cities in the world after the war.<sup>27</sup>

The war left both the United States and the Philippines concerned with maintaining security and peace in the West Pacific region. High Commissioner Paul McNutt expressed his perception of the United States' obligation to the Far East in a 1946 radio address:

[I]t is the armed might of the United States, actual and potential, which must be depended upon by the United Nations . . .

---

24. F. BUNGE, *supra* note 3, at 33. High Commissioner Paul McNutt acknowledged in a January 18, 1946 letter to the President:

One is forced to conclude that the institution . . . of reciprocal free trade and its continuance . . . to 1941 over territory which was pledged . . . to a position of independence was unwise in that it embraced the mutually exclusive aims of political separatism and economic and financial dependence. . . . [A]fter over 30 years of forced development into almost complete economic dependence a sudden reversal of economy is impossible without courting disaster. . . .

BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 8554, 8 FOREIGN RELATIONS OF THE UNITED STATES 865 (1946) [hereinafter FOREIGN RELATIONS 1946].

25. 83 CONG. REC. A1023 (1938).

26. F. BUNGE, *supra* note 3, at 251-52. "The Filipino people know that the principal duty of a sovereign toward its wards is to protect them from external aggression." FOREIGN RELATIONS 1946, *supra* note 24, at 865.

27. F. BUNGE, *supra* note 3, at 39. An estimated one million Filipinos perished, many during the last months. There was also tremendous physical destruction by the time the war ended. *Id.* On January 18, 1946, McNutt wrote that: "The situation here is critical. It does not at this moment seem humanly possible for the Filipino people, ravaged and demoralized by the cruelest and most destructive of wars . . . to cope with the coincidence of political independence, sharp downward revision of economic standards, budgetary bankruptcy, and rehabilitation." FOREIGN RELATIONS 1946, *supra* note 24, at 865.

to furnish the police power and the moral hindrance to would-be aggressors. For this purpose, we need bases in the Far East. And bases in the Far East mean bases in the Philippines.<sup>28</sup>

In its Joint Resolution of June 29, 1944, Congress enlarged the right of the United States to reserve not only naval and fuelling stations but also military bases in the Philippines.<sup>29</sup> This resolution gave the President authority "to retain such bases, necessary appurtenances [and] rights . . . , in addition to any provided for by the [Tydings-McDuffie Act], as he may deem necessary for the mutual protection of [both countries]."<sup>30</sup>

Demoralized by the war and suffering inflation and food shortages, Filipinos prepared for the transition to independence, scheduled for July 4, 1946.<sup>31</sup> Already dependent on the United States for its economy and security, most Filipinos willingly agreed to a package of treaties which provided rehabilitation funds even though it qualified their new independence.<sup>32</sup> The most controversial treaty was the 1947 Agreement, in which the Philippines granted the United States the right to retain use of naval and air bases in the country for ninety-nine years.<sup>33</sup> This seemed to

28. 92 CONG. REC. A1100 (1946) (*quoted in* remarks of Hon. Carlos P. Romulo).

Just a few months earlier, however, House Representatives had criticized such a "police power" perception. On January 14, 1946, Representative Ludlow said:

With Japan beaten to her knees . . . why is it necessary to keep 70,000 of our American boys in the Philippines? . . . [W]e naturally wonder whether too much stress is not being placed on world regulation. . . . [B]ut it is not up to us to reach out and try to regulate everything around the earth. President Benjamin Harrison . . . once said to me: "We have no commission from God to police the world."

*Id.* at A35 (statement of Rep. Louis Ludlow). On January 28, Representative Miller noted that American soldiers questioned the need for the large number of occupation troops in the Philippines. He said: "It does seem ridiculous that we should have so many troops watching our friends. . . . [H]aving an armed force in our friend's house, watching every move they make, is not conducive to a lasting friendship." *Id.* at A287 (statement of Rep. A.L. Miller).

29. S.J. RES. 93, 78th Cong., 2d Sess., U.S. CODE CONG. SERVICE 610 (1944).

30. *Id.*

31. F. BUNGE, *supra* note 3, at 40.

32. The 1947 Military Bases Agreement, the 1947 Military Assistance Agreement and the 1951 Mutual Defense Treaty served to integrate the Philippines into emerging United States security arrangements in the Western Pacific. F. BUNGE, *supra* note 3, at 42-43.

The Military Assistance Agreement, signed one week after the Military Bases Agreement, provides for arms assistance, training and the use of facilities and vessels by the Philippine Armed Forces. Military Assistance Agreement, Mar. 21, 1947, United States-Philippines, art. 6, 61 Stat. 3283, 3284, T.I.A.S. No. 1662, at 85 [hereinafter Military Assistance Agreement].

The Mutual Defense Treaty provides that the contracting parties would act to meet the common dangers of external armed attack on either party, in accordance with their constitutional processes. Mutual Defense Treaty, Aug. 30, 1951, United States-Philippines, arts. III & IV, 3 U.S.T. 3947, 3950, T.I.A.S. No. 2529, at 6 [hereinafter Mutual Defense Treaty].

33. 1947 Agreement, *supra* note 4, art. I. For the current status of article I, see the 1979 Amendments, *infra* note 61.



transform the islands into a "quasi-protectorate" rather than an independent nation now responsible for its own destiny.<sup>34</sup>

In *Dizon v. Commanding General of the Philippine Ryukus Command*,<sup>35</sup> the Philippine Supreme Court decided that the 1947 Agreement was constitutional. The Court noted that under the 1935 Philippine Constitution, the generally accepted principles of international law were adopted as part of the law of the nation.<sup>36</sup> The majority then found that the military base rights granted to the United States were "no less than those conceded by the rule of international law to 'a foreign army allowed to march through a friendly country or to be stationed in it, by permission of its government or sovereign,'"<sup>37</sup> thus the 1947 Agreement could not be constitutionally objectionable.<sup>38</sup> Twenty years later, however, then Philippine Secretary of Justice Claudio Teehankee questioned whether the Philippine President alone had the constitutional authority to enter into an agreement for the use of sizeable portions of Philippine territory.<sup>39</sup>

Constitutional or not, the 1947 Agreement's provisions have caused

34. The United States acknowledged that "[s]ince the Filipinos will probably be unable to provide substantial air and naval forces and will require a number of years to develop their ground forces, the United States should be prepared to meet requirements for air and naval forces and, initially, to provide nearly all ground forces." BUREAU OF PUB. AFFAIRS, U.S. DEPT OF STATE, PUB. NO. 8451, FOREIGN RELATIONS OF THE UNITED STATES 1206 (1945) (letter of Secretary of War Stimson to President Truman) [hereinafter FOREIGN RELATIONS 1945]. A January 1945 editorial said that the "Filipino economy has been almost ruined by the Japanese invasion" and acknowledged that even with the independence of the islands, there would exist a "quasi-protectorate which the United States would practically maintain from the naval and air bases to be ceded." 92 CONG. REC. A583 (1946) (remarks of Hon. Carlos P. Romulo) (quoting Springfield (Mass.) Republican, Jan. 14, 1946).

It was understood at the time that such a joint defense system would limit Philippine exercise of foreign policy. The article of a Filipino lawyer named Vicente Villamin stated: [A] military establishment on Philippine territory . . . means that the Philippines will . . . inevitably be involved in any war which America may wage in that section of the world. Thus the Philippines, under an American law, will not have the first attribute of sovereign independence—the power to desist from or to declare war on her own volition.

91 CONG. REC. A5358 (1945) (statement of Rep. John Phillips). Another editorial stated that: "These bases limited the independence of the Philippines in foreign policy and in the power to declare war or even to remain neutral." *Id.* at A5620 (1945) (remarks of Hon. Carlos P. Romulo) (quoting Rochester (N.Y.) Times-Union, Dec. 11, 1945).

35. Judgment of July 22, 1948, Supreme Court of the Philippines, 46 Official Gazette, Supp. No. 1, at 68.

36. *Id.* at 73.

37. *Id.* at 74.

38. *Id.* at 76.

39. Letter from Claudio Teehankee, Philippine Secretary of Justice (currently Chief Justice of the Philippine Supreme Court), to the Philippine Secretary of Foreign Affairs (Nov. 14, 1968), reprinted in Lavinã, *Executive Agreements*, 44 PHILIPPINE L.J. 450, 482 (1969). Notwithstanding the theory that the 1947 Agreement is an executive agreement and therefore

tension over the years. Along with the right to retain bases free of rent,<sup>40</sup> the United States has navigational access to Philippine waters,<sup>41</sup> exemptions from customs<sup>42</sup> and income tax,<sup>43</sup> the use of public services,<sup>44</sup> and primary jurisdiction over criminal offenses.<sup>45</sup> The evolution of some provisions demonstrates how the countries have sought to deal with complaints that the Agreement interferes with Philippine sovereignty.

### 1. Criminal jurisdiction

Commentators have described the exercise of extraterritorial jurisdiction rights as being incompatible with the principle of territorial sovereignty. Some would argue that the imposition of such rights are still a "tool of colonialism."<sup>46</sup> Under Article XIII of the 1947 Agreement, the Philippines divested itself almost completely of criminal jurisdiction over on-base offenses.<sup>47</sup> In time of war, Philippine jurisdiction is virtually non-existent, as the United States could then also exercise jurisdiction over off-base offenses committed by American personnel.<sup>48</sup> Because of Philippine opposition to this extraterritoriality, the provisions have been amended several times in order to make them more acceptable.<sup>49</sup>

A 1965 amendment provided the Philippine government with the right to exercise primary jurisdiction over members of the American forces, except for offenses solely against United States property or security, or offenses against a member of the American forces or a civilian or their property.<sup>50</sup> The United States also retained primary jurisdiction

---

did not require Senate concurrence, (*see generally* Lavinā, *supra*), the authority of Philippine President Roxas in signing the 1947 Agreement remains an open question.

40. 1947 Agreement, *supra* note 4, preamble, para. 2.

41. *Id.* art. IV, para. 1.

42. *Id.* art. V.

43. *Id.* art. XII.

44. *Id.* art. VII. United States military forces were allowed to use "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" to the Philippine military forces. *Id.*

45. *Id.* art. XIII.

46. L. CHEN, *STATE SUCCESSION RELATING TO UNEQUAL TREATIES* 113 (1974).

47. 1947 Agreement, *supra* note 4, art. XIII.

48. *Id.* para. 6. In drafting the 1947 Agreement, the War and Navy Departments at first asserted that even in time of peace the United States should exercise jurisdiction over any offenses committed by American personnel. Philippine President Roxas took strong exception to this provision and it was not included in the final draft of the Agreement. *FOREIGN RELATIONS* 1946, *supra* note 24, at 881.

49. Major revisions of the criminal jurisdiction provisions were adopted in 1965, 1979 and 1983. *See infra* notes 50, 53 & 68 and accompanying text.

50. Criminal Jurisdiction Arrangements, Aug. 10, 1965, United States-Philippines, art. XIII, § 3(b)(i), 16 U.S.T. 1090, T.I.A.S. No. 5851.

over offenses "arising out of any act or omission done in the performance of official duty."<sup>51</sup> Much was left to be desired, however, and a comparison of the Agreement's provisions to the NATO Status of Forces Agreement<sup>52</sup> sharpens perception of the inequity of revised Article XIII.<sup>53</sup>

## 2. Aid or rent?

The Philippine government has received United States funding since independence. Whether such funds are "aid" or "rent" for the bases has been a subject of much debate. The funds cannot technically be called "rent" even though they act as such for all practical purposes, since the Agreement's preamble expressly provides the Philippines grant the bases free of rent.<sup>54</sup> "Rent" would connote an actual contractual obligation by the United States to compensate for the use of the bases.<sup>55</sup> "Aid," on the other hand, connotes one-sided charity without reciprocity of obligation.<sup>56</sup> Some Filipinos feel that the use of the word "aid" is an affront to

51. *Id.* art. XIII, § 3(b)(ii).

52. The Agreement between the Parties to the North Atlantic Treaty regarding the status of their Forces (SOFA), signed on June 19, 1951, was designed to "determine the status of the NATO Forces while serving on the territory of another member of the Alliance and to give these Forces a standard of legal treatment wherever they happen to be." It was signed by several European countries along with the United States. S. LAZAREFF, *STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW* 2-3 (1971).

53. The criminal jurisdiction provisions of the Agreement provide an on- or off-base arrangement for dividing jurisdiction. The NATO formula applies regardless of geographic area. *Id.* at 41-42.

The revised version of Article XIII is similar to the NATO Status of Forces Agreement (SOFA) with respect to the United States being a contracting party in both treaties, they both deal with military defense arrangements, and they define the jurisdiction to be exercised. Note, *Criminal Jurisdiction under the Revised Bases Agreement*, 41 *PHILIPPINE L.J.* 728, 742 (1966).

However, SOFA and the Bases Agreement (before and after the 1965 revision) differ in several respects. First, SOFA provides for mutual grants of rights and mutual surrender of jurisdiction. The Agreement's grant of the use of territory is unilateral. The second is with regard to the award of damages for acts done while not in the performance of duty. While SOFA provides that the assessment of damages is made by the receiving state, the Agreement provides that the American authorities, or the sending state, assess damages. Third, under the Agreement, the authority to determine whether an offense arose from an act done in the performance of duty is vested in the Commanding officer of the offender. Under article VIII, § 8 of SOFA, this determination is left to an arbitrator mutually selected by the contracting parties. Finally, the two treaties differ in regard to the custody of the offender who commits an offense subjecting him to the jurisdiction of the receiving state. Under SOFA, custody of the offender remains with the sending state only until the offender is charged. Under the Agreement, custody of the offender remains with the United States until the final judgment. *Id.* at 742-45.

54. 1947 Agreement, *supra* note 4, preamble, para. 2.

55. The distinction is also important in that if the funds were rent, the Philippine government would have a free hand in spending the money, without being subject to annual United States Congressional approval. F. BUNGE, *supra* note 3, at 220.

56. See 123 *CONG. REC.* 9724 (1977) (statement of Rep. Won Pat). Representative Won

national pride.<sup>57</sup>

At present, the only existing obligation of the United States president is to make his "best effort to obtain appropriation of security assistance."<sup>58</sup> Further, American grants of funds have been made in instruments separate from the Agreement itself or its amendments.<sup>59</sup> This fact suggests that the funds need not be conditions to the grant of bases.<sup>60</sup>

### C. *The 1979 Amendments*

The 1979 Amendments to the Agreement reaffirmed Philippine sovereignty over the bases.<sup>61</sup> The late 1960's and 1970's saw the Philippines

---

Pat asserted that "[t]he word aid isn't realistic. It is a subterfuge, a coverup. The U.S. is paying the Filipinos for the use of a portion of their islands for our own national interest." *Id.*

57. Teodoro Valencia, a well-known Filipino newspaper columnist, said:

Let the U.S. Congress stop giving us "aid" and start paying rentals or get out of the country. If they don't want to get out, let the world know they're here by force of arms. In such a case, we would be getting the queerest kind of protection from outside invaders by being invaded by the protector.

124 CONG. REC. 15,448 (1978) (statement of Rep. Won Pat).

58. *U.S., Philippines Conclude Bases Agreement Review*, 83 DEP'T ST. BULL. 21 (Aug. 1983) [hereinafter *Bases Agreement Review*]. It seems that the President can promise no more than his best efforts to obtain funds because of the constitutional allocation of powers. In response to a 1983 letter of inquiry by Representative Stephen Solarz, the State Department wrote that:

Because of the Constitutional allocation of powers, the Executive Branch cannot obligate the Congress to appropriate funds. Thus, references to military assistance made in connection with military facilities agreements have taken the form of undertakings by the Executive Branch to seek security assistance funds through the annual authorization and appropriation process. Consequently, regardless of the specific terms used in any agreement, each undertaking is, in effect, a "best efforts" obligation.

1983 *Hearings*, *supra* note 1, at 63 (letter by Powell A. Moore of the State Department).

59. The Philippines began receiving aid through the Military Assistance Agreement, *supra* note 32, a treaty distinct from the 1947 Military Bases Agreement. President Carter's 1979 agreement and President Reagan's 1983 agreement to provide United States appropriations have been in the form of letters. These letters were separate instruments from the amendments themselves. *See infra* note 60.

60. Representative Robert Drinan, in a session of the House, quoted from a March 25, 1980 article in the *Christian Science Monitor*:

It will be argued that we cannot cut or defer military assistance because such assistance is an integral part of the bases agreement. However, security assistance was not included in the text of the official agreement. Instead, the aid commitment was made in a letter from President Carter . . . in which he pledged the administration's "best effort."

. . . .  
 . . . There is nothing sacred or untouchable about the security assistance request . . . for the Philippines.

126 CONG. REC. 6589 (1980) (statement of Rep. Drinan).

61. Amendments to the Military Base Agreement, Jan. 7, 1979, United States-Philippines, 30 U.S.T. 863, T.I.A.S. No. 9224 [hereinafter 1979 Amendments]. Representatives of both

markedly asserting its leadership in the emerging Third World Bloc. The United States itself recognized a gradual changeover from the colonial relationship of prewar years.<sup>62</sup>

The 1979 Amendments provided for: (1) the installation of a Philippine commander at each base; (2) the reduction of areas under United States control on certain bases, while assuring the American forces of unhampered military operations, effective command and control over facilities and personnel; (3) the Philippine takeover of perimeter defense; and (4) a thorough review of the Agreement every five years.<sup>63</sup> President Jimmy Carter promised his best efforts to obtain a security assistance package of \$500 million for the 1979-83 period.<sup>64</sup>

#### D. *The 1983 Memorandum of Agreement*

The 1983 Memorandum<sup>65</sup> was a review of the existing Agreement rather than a renegotiation. It requires the United States to consult with the Philippine government before it can use the bases for military combat operations outside the purposes of the Mutual Defense Treaty.<sup>66</sup> The United States agreed to increase the access of Philippine commanders to the base facilities and pledged that American personnel would abstain from political activity in the Philippines.<sup>67</sup>

The only explicit amendment in the 1983 Memorandum gave the Philippines—along with the United States—the right to suspend the application of any provisions upon sixty-day notice in time of war.<sup>68</sup> The

---

governments agreed to modify the 1947 Agreement such that the bases were now "Philippine military bases over which Philippine sovereignty extends." *Id.* at 864. Article I, article XXVI and annexes A and B of the 1947 Agreement were superseded. *Id.*

62. See 115 CONG. REC. 34,794 (1969) (statement of Rep. Mansfield). Representative Mansfield commented that:

It would be well to bear in mind . . . that the Philippines ceased to be an American colony in 1946, and that . . . the situation has changed markedly. A quarter of a century later, the Philippines has moved a long way . . . from these vestiges of the past. A social, political, and economic momentum has been generated on the basis of an awakened Filipino nationalism which, in my judgment, is authentic, dynamic and constructive.

*Id.* See also 124 CONG. REC. 15,448 (1978) (statement of Rep. Won Pat) (there has been a "rise in Filipino nationalism and a corresponding rise in anti-Americanism, especially in the press and among the Filipino leadership").

63. 1979 Amendments, *supra* note 61, at 868 (Joint Statement of Philippine President Marcos and United States Vice President Mondale).

64. *Id.* at 886.

65. Memorandum of Agreement, June 1, 1983, United States-Philippines, art. I, T.I.A.S. No. 10699 [hereinafter 1983 Memorandum].

66. *Id.* art. I.

67. *Id.* arts. II-III.

68. *Id.* art. V. The 1947 Agreement vests the United States with exclusive jurisdiction in

Military Bases Agreement Joint Committee, composed of one representative from each government and their staff, was established as a consultation body on the implementation of Agreement provisions that cannot be resolved between the Philippine base commander and the United States facilities commanders.<sup>69</sup>

President Ronald Reagan agreed to make his best efforts to provide a security assistance package of \$900 million for the 1984-88 period.<sup>70</sup>

### *E. Future Negotiations*

In September 1986, a special Philippine presidential commission drafting a new constitution voted against a constitutional ban on the presence of American military bases.<sup>71</sup> Instead, the commission left to President Corazon Aquino the decision whether to renegotiate the Agreement. The Philippine Congress has also been given a major role in the approval of any new treaty. In a section on transitory provisions, a clause provides that after the Agreement expires in 1991, "foreign military bases, troops or facilities shall not be allowed in any Philippine territory except in accordance with a new treaty duly concurred by the (Philippine) Senate and, when Congress so requires, ratified by the people in a referendum or plebiscite called for that purpose."<sup>72</sup> Philippine and American negotiators are expected to begin discussing a possible renewal of the Agreement in 1988.<sup>73</sup>

The evolution of the agreements from the pre-independence era to the present illustrates the United States' gradual recognition of Philippine sovereignty over the base lands. It also demonstrates a shift in bargaining powers such that the two countries are currently on more equal footing.

## III. MILITARY BASE AGREEMENTS IN INTERNATIONAL LAW

Underlying the Agreement's removal issue is the question of what

---

time of war. 1947 Agreement, *supra* note 4, art. XIII. See also 1983 Hearings, *supra* note 1, at 287-88.

69. 1983 Memorandum, *supra* note 65, art. VII.

70. See *Bases Agreement Review*, *supra* note 58, at 21. The 1984-88 appropriations for the Philippines were in the following amounts:

Military Assistance	\$125,000,000
Foreign Military Sales Credits	\$300,000,000
Economic Support Fund Assistance	\$475,000,000

*Id.*

71. L.A. Times, Sept. 19, 1986, pt. I, at 12, col. 1.

72. *Id.* at cols. 2-3.

73. *Id.* at col. 4.

legal framework to use in construing the provisions, or for that matter, what law in general should apply to military base agreements. This section examines the application of a private law analogy to military base agreements.

International law is not an isolated system of jurisprudence. Article 38 of the Statute of the International Court of Justice provides that the sources of law available for the adjudication of disputes between nations include "the general principles of law recognized by civilized nations."<sup>74</sup> It is said the intention of this clause is "to authorise [sic] the Court to apply the general principles of municipal jurisprudence, in particular of private law, in so far as they are applicable to relations of States."<sup>75</sup>

To the extent the law of "civilized nations" contributes to international law, points of contact between the law of nations and private law may be established.<sup>76</sup> Sir Hersch Lauterpacht, formerly of the International Court of Justice, suggested that one such point of contact is where legal adjudication between states involves the application of the analogy of easements or servitudes in private law to construe treaty restrictions upon territorial sovereignty.<sup>77</sup>

A majority of commentators have found the legal nature of private law contracts and international treaties to be "essentially the same, and [the] fundamental identity of contracts and treaties is the usual basis of the exposition of the law of treaties."<sup>78</sup> Indeed, Lord McNair said that the development of the treaty as a concept in international law has been indebted to the contract of private law.<sup>79</sup>

The acquisition of sovereignty over land, sea and territorial waters is an area of international law which lends itself to the applicability of private law concepts.<sup>80</sup>

---

74. 1977 U.N.Y.B. 1190, 1193, U.N. Sales No. E.79.I.1.

75. A. VAMVOUKOS, *TERMINATION OF TREATIES IN INTERNATIONAL LAW* 31 (1985).

76. H. LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* 3 (1970).

77. *Id.*

78. F. NOZARI, *UNEQUAL TREATIES IN INTERNATIONAL LAW* 126 (1971). Some writers who agree with this concept are Grotius, Triepel, Brierly and Lauterpacht. *Id.* at 126-30. See generally H. LAUTERPACHT, *supra* note 76.

79. McNair, *The Functions and Differing Legal Character of Treaties*, 1930 BRIT. Y.B. INT'L L. 100, 106. A major exception to the principle that treaties be treated like private law contracts is the fact that freedom of consent of the parties has traditionally not been an essential condition of treaty validity. H. LAUTERPACHT, *supra* note 76, at 155. This consent exception as a ground for the invalidation of treaties has thus led to the debates over the unequal treaty concept. See *infra* text accompanying notes 93-101.

80. H. LAUTERPACHT, *supra* note 76, at 91. A distinction was made between leases of a purely private law type and those of a "disguised cession" type. However, since the political or

*A. International Leases*

Just as property rights which fall short of title may be created in private law, property rights may be created in international law with respect to a state's territory. Thus a state may lease to another a portion of its territory for a term of years.<sup>81</sup>

There are two categories of leases in international law. The first is of a purely private law type, where rent is paid for leased land, to be used for certain purposes for a term of years.<sup>82</sup> The other type is in the nature of "political" leases, or cessions disguised for the purpose of rendering a permanent loss of territory more palatable to the dispossessed state.<sup>83</sup>

The 1947 Agreement seems to be in the nature of a quasi-political lease. While it cannot be called a purely private lease since no rent is paid,<sup>84</sup> neither can it be called a purely "political" lease, since the loss of territory is not meant to be permanent. Between the two types, however, the 1947 Agreement leans toward a "political" lease. The original ninety-nine year grant of base territories was similar to a grant in perpetuity, and Philippine independence was arguably qualified by it. Certainly, the Agreement established an ongoing treaty of alliance between the United States and the Philippines.

The United States judiciary has recognized that leased territories for naval bases do not become territories of the United States. In *Vermilya-Brown Co. v. Connell*,<sup>85</sup> the United States Supreme Court considered whether the Fair Labor Standards Act covered American employees constructing a military base in Bermuda on land leased from Great Britain for ninety-nine years. In dictum, the majority also resolved the issue of whether the United States or Panama had sovereignty over the Canal Zone and decided that the Canal Zone was "admittedly territory over which we do not have sovereignty."<sup>86</sup> However, Congress has the power to regulate employment conditions of American citizens outside the territorial jurisdiction of the United States.<sup>87</sup>

---

"disguised" lease is achieved by enforcing the will of only one of the parties, it is not soundly based in law. *Id.* at 185.

81. Examples of leases include the United Kingdom's lease over Hong Kong for 99 years or the treaty between the United States and Panama for the use of the Panama Canal. See generally J. SWEENEY, C. OLIVER & N. LEECH, *THE INTERNATIONAL LEGAL SYSTEM* 775-76 (1981).

82. H. LAUTERPACHT, *supra* note 76, at 183-84.

83. *Id.* at 184-85. See also J. BRIERLY, *THE LAW OF NATIONS* 189 (1963).

84. See *supra* notes 54-55 and accompanying text.

85. 335 U.S. 377 (1948).

86. *Id.* at 381.

87. *Id.* at 389-90. The State Department has also rejected the suggestion that such bases are United States possessions. See *United States v. Spelar*, 338 U.S. 217 (1949), where the



In the present Agreement, the United States has possession of the bases, but the Philippines retains title and reversion rights to the land. In a 1953 opinion, United States Attorney General Herbert Brownell advised the Secretary of State that the United States retained title in the base lands. Philippine Senator Claro M. Recto rebutted this in a 1954 memorandum, in which he stated that this assertion by the United States long after the recognition of independence was "not only in plain contravention of the unambiguous terms of the Treaty of General Relations and the Bases Agreement, but . . . irreconcilable with the traditional American policy toward the Philippines."<sup>88</sup> Instead, Recto stated that the right of the United States in the base territories is only a " 'jus utendi' and . . . the transaction covered by the Bases Agreement is a 'lease.' "<sup>89</sup> Later, the United States recognized the correctness of the Philippine position and Vice President Richard Nixon went to the Philippines to deliver formally the muniments of title to the base lands.<sup>90</sup>

## B. *The Unequal Treaty Concept*

### 1. In general

The legal nature of private law contracts and international law treaties is essentially the same.<sup>91</sup> Unconscionable or adhesion contracts in

---

Court stated: " 'The arrangements under which the leased bases were acquired . . . did not and were not intended to transfer sovereignty over the leased areas from Great Britain to the United States.' " *Id.* at 219 (quoting *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948)). *But see In re Guzman and Latamble*, 7 Ann. Dig. 112 (Supreme Court of Cuba 1934) (the Supreme Court of Cuba held that the Guantanamo naval base was foreign territory vis-à-vis Cuba). See also Note, *Legal Aspects of the Panama Canal Zone—In Perspective*, 45 B.U.L. REV. 64, 74-75 (1965) for a discussion of *Vermilya-Brown Co.*

88. V. ABAD SANTOS, CASES AND OTHER MATERIALS ON INTERNATIONAL LAW 216 (1966).

89. *Id.* In support of his opinion, Recto stated in part:

The term "use" in its ordinary and legal acceptation (whether in the common law or civil law) is not synonymous with title or dominion. It connotes a right included in, and therefore inferior to, title or ownership.

. . . [T]he right of the United States in the base lands is only a "jus utendi" and . . . the transaction covered by the Bases Agreement is a "lease." . . . From the standpoint of our municipal law, however, the right of the United States to use the bases free of rent resembles the contract of *commodatum* or the servitude of use. The comparison might help in understanding the view that Philippine ownership of the bases is not incompatible with the United States right to maintain and operate them.

*Id.* "Jus utendi" refers to the "right to use property without destroying its substance." BLACK'S LAW DICTIONARY 779 (5th ed. 1979).

90. *Id.* at 217. It is unclear whether or not the United States possessed formal documents or title apart from the Treaty of Paris of 1898. As such, the muniments of title here were probably in the nature of a quitclaim deed.

91. H. LAUTERPACHT, *supra* note 76, at 156. See *supra* notes 78-79 and accompanying text.

private law are transactions in which the inequality of bargaining power between parties allows one party unconscionably to take advantage of the other. Such contracts are reviewable by the courts to determine their reasonableness. Any unreasonable provision will be unenforceable.<sup>92</sup>

In international law, the "unequal treaty" concept has been invoked as a ground for the avoidance of treaties. "Unequal treaties" have been defined based on two fundamental principles: sovereign equality among contracting parties and reciprocity for treaty rights and obligations.<sup>93</sup>

The sovereign equality of states is a generally accepted principle of international law.<sup>94</sup> At the 1968-69 Vienna Conference on the Law of Treaties, it was recognized that this principle "involved a new approach to the problem of unequal treaties obtained by coercion . . . . In accordance with the principles of the Charter of the United Nations, a treaty procured by the threat or use of force in any form was void."<sup>95</sup> Some countries have claimed that unequal treaties imposed by powerful states on weak states were tools of imperialism for acquiring territories.<sup>96</sup> As

---

92. See *Railroad Co. v. Lockwood*, 84 U.S. (17 Wall.) 357 (1873), where the Supreme Court found that contracts carriers made with customers to limit their liability were good in so far as they were reasonable. However, if such contracts went against public policy and totally excused the carriers for negligence, then "the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity." *Id.* at 381-82.

The principle of the inequality of bargaining power was further set down by Justice Frankfurter in his dissenting opinion in *United States v. Bethlehem Steel Corp.*, 315 U.S. 289 (1942):

It is said that familiar principles would be outraged if Bethlehem were denied recovery on these contracts. But . . . [d]oes any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other?

*Id.* at 326 (Frankfurter, J., dissenting). Justice Frankfurter further recognized that apart from fraud and physical duress, other grounds upon which courts could refuse to enforce contracts were situations "in which one party has unjustly taken advantage of the economic necessities of the other." *Id.* (Frankfurter, J., dissenting).

93. L. CHEN, *supra* note 46, at 31.

94. There is a growing consensus that the principle of sovereign equality of states as embodied in the United Nations Charter has developed into a peremptory norm of international law. *Cf.* Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946, 960-61 (1967); Sinclair, *Vienna Conference on the Law of Treaties*, 19 INT'L & COMP. L.Q. 47, 66-67 (1970).

95. *United Nations Conference on the Law of Treaties, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (Mar. 26-May 24, 1968) at 280, U.N. Doc. A/Conf.39/11, U.N. Sales No. E.68.V.7 (1969) [hereinafter *Conference Summary Records*].

96. In an effort to offset the domination of other European powers, the Soviet Union has frequently challenged the validity of unequal treaties. Stalin once said that "[t]he capitalist powers . . . do not conclude equal treaties with small nations because they do not regard them as their equals." L. CHEN, *supra* note 46, at 29. China found the notion of unequal treaties

such, this concept has frequently been invoked to serve political purposes. The problem with this approach has been and continues to be the vagueness of the "use of force" requirement. Two schools of thought were presented at the Vienna Conference on interpreting the "use of force" requirement. One school would confine the definition of coercion to physical or military force, while the other school would expand it to include political and economic pressure.<sup>97</sup>

Based on the reciprocity of rights and obligations established by a treaty's provisions, unequal treaties have been defined as "those in which the parties do not reciprocally promise to each other the same things, or things equivalent."<sup>98</sup> Examples of such treaties frequently relate to economic matters or cessions of territory.<sup>99</sup> For instance, Article 3 of the 1946 Trade Agreement between the United States and the Philippines imposed a ceiling on Philippine goods entering the United States but no

---

useful in her attempt to eliminate unilateral obligations imposed on it by the European powers in the 1920's and 1930's. *Id.*

97. Those arguing that only physical or military force constitute coercion found support in preparatory work done on the United Nations Charter in which the proposal for including economic pressure was rejected. Moreover, they argued that the concept of political and economic pressure was too vague and its existence could not easily be determined. L. CHEN, *supra* note 46, at 42-44; see *Conference Summary Records*, *supra* note 95, at 282-83.

On the other hand, those adopting the latter view contended that nonmilitary forms of pressure are "often more intense in their effect than military force," and to confine the concept of coercion to physical force might fail to eliminate situations in which the principle of sovereign equality of states might be frustrated. L. CHEN, *supra* note 46, at 44-46; see *Conference Summary Records*, *supra* note 95, at 287.

It is also unclear who decides whether certain political or economic pressures present at a treaty's inception conflict with the United Nations Charter. The answer inevitably leads back to the views of the contracting parties (or at least one of them). Ingrid Detter, a Talbot Research Fellow at Oxford, suggested it may serve purposes better to look to the actual contents of a treaty for grounds of voidance. She said that "the very contents of a treaty ought to be examined when the question of validity is discussed: the material contents of the instrument ought to be accepted as a separate ground of voidance, irrespective of whether the treaty had been concluded under force." Detter, *The Problem of Unequal Treaties*, 15 INT'L & COMP. L.Q. 1069, 1086 (1966).

98. L. CHEN, *supra* note 46, at 28 (quoting E. DE VATTEL, *THE LAW OF NATIONS* 199 (1858)). "If the performance of a treaty tends to give one of the contracting parties more nonreciprocal privileges or advantages than the 'fair intent and definite grant of the treaty' has warranted, then such a treaty may fall into the category of unequal treaty." *Id.* at 49.

The existence or nonexistence of reciprocity has been used to distinguish equal from unequal treaties. The principle of reciprocity finds expression in the Roman law's maxim *do ut es* (reciprocity, counterpart) or in the Anglo-American rule of *quid pro quo* (consideration). Reciprocity requires that a treaty be concluded on the basis of "mutual advantages that consider the interests of all contrasting parties, not some or one of the parties. . . . On the basis of reciprocity a contrasting party is willing to grant similar or identical privilege to the other parties." *Id.* at 33-34.

99. For examples of unequal treaties, see F. NOZARI, *supra* note 78, at 201-30.

similar restriction on American goods entering the Philippines.<sup>100</sup>

Treaties concerning cession of territory by one contracting party are sometimes considered unequal treaties. Other matters such as the use of international rivers, rights of passage, railway access, leased territories (perpetual or temporary) and military bases are also the favorite objects of unequal treaty claims.<sup>101</sup> Military base agreements in particular seem to inherently conflict with the idea of sovereignty.

## 2. In relation to military base agreements

In United Nations General Assembly sessions, military base agreements have often been condemned as "unequal."<sup>102</sup> Although the term "unequal treaty" has not been used in the International Law Commission's draft articles or reports, member states have used the term in commenting on military base disputes.<sup>103</sup> Needless to say, the concept was neither well recognized nor popular in the days of colonization.

During the twentieth century colonial era, superpowers secured alliance treaties for their own advantage. "[I]t was not unusual that at the time of state succession the successor states were forced to enter into new agreements for recognizing the political advantages which had been enjoyed by the colonial powers."<sup>104</sup> Some classic examples were the British treaties of alliance with Egypt, Transjordan, and Iraq, and the French treaties with Morocco and Tunisia.<sup>105</sup>

The United States has had its own share of discomfort over military bases in Morocco, the West Indies, Bahrain and Cuba.<sup>106</sup> Realizing that

---

100. Agreement on Trade and Related Matters, July 4, 1946, United States-Philippines, art. III, 61 Stat. 2611, T.I.A.S. No. 1588. Article V also restricted freedom to change the value of the Philippine peso in relation to the United States dollar. *Id.* art. V. This agreement has been subject to criticism as an unequal treaty. L. CHEN, *supra* note 46, at 39.

101. L. CHEN, *supra* note 46, at 38.

102. The General Assembly held an extra session in 1961 to discuss the dispute between France and Tunisia concerning the French military base in Bizerta. The Czechoslovakian delegate stated that "one-sided agreements for the location of military bases on foreign territories have been concluded, and are operating, under conditions which are at complete variance with the generally recognized principles of international law." 3 U.N. GAOR (1000th plen. mtg.) at 58, U.N. Doc. A/PV.1000 (1961).

Before the Sixth Committee of the General Assembly in 1963, the Ukrainian representative gave military base and military assistance treaties as examples of unequal treaties, since "[m]ilitary personnel stationed in a foreign country under some treaties of that type enjoyed virtually unlimited privileges and immunities, while the host country virtually surrendered all sovereignty over the bases." 18 U.N. GAOR C.6 (784th mtg.) at 18, U.N. Doc. A/C.6/SR.784 (1963).

103. F. NOZARI, *supra* note 78, at 115.

104. L. CHEN, *supra* note 46, at 54.

105. *See id.* at 54-59.

106. *See id.* at 59-64. The unequal aspect of the base agreement was highlighted in the case

base agreements could be viewed by the international community as an attempt to maintain the colonial status of a newly independent state, the United States has tried to negotiate with the colonial peoples, establishing the continuity of bases by new agreements rather than succession.<sup>107</sup>

American efforts to secure the consent of new states indicate the importance of formalizing a new agreement to maintain the United States' political advantage in these countries. Indeed, the United Nations General Assembly has maintained that, based on the sovereign equality of states, only the public expression of free consent on the part of states concerned may make the stationing of foreign forces acceptable as an exception to the sovereign equality principle.<sup>108</sup>

It is arguable that the colonial relationship between the United States and the Philippines in the pre-independence years makes the whole agreement voidable under the unequal treaty concept, thus also invalidating the removal provisions. A few days before passage of the 1934 Tydings-McDuffie Act, an author of some of the pre-Tydings drafts commented:

It may be . . . that an objectionable and indeed obnoxious plan might be accepted if the Filipinos were convinced that complete and immediate independence could not be obtained. The Philippines are dominated by the United States, and their inhabitants realize that they can obtain only what this Government grants. Their political status makes equal opportunities for bargaining impossible. They must take that which is given them.<sup>109</sup>

Subsequently, the Philippines agreed to the 1947 Agreement along with

of the West Indies base the United States obtained under a British lease. A former legal advisor to the United States Army pointed out the inappropriateness of insisting on West Indies' succession to the agreement:

The United States could . . . demand on valid legal grounds that . . . the West Indies Federation be required to accept the U.K. obligations under the Agreement. . . . It could refuse to recognize the West Indies Federation upon its independence if it did not assume the obligations of the Leased Bases Agreement. Action of this nature, however, would undoubtedly have repercussions, for it would in all probability be viewed by the international community . . . as an attempt to continue to subject the West Indies to . . . a colonial status.

Esgain, "Military Servitudes and the New Nations," *The New Nations in International Law and Diplomacy*, 1965 Y.B. WORLD POLITY 42, 78.

107. L. CHEN, *supra* note 46, at 61-62. This technique as applied in the West Indies produced the Defense Areas Agreement of 1961 between the two countries. *Id.* at 62.

108. The General Assembly in Resolution 41(I) urged the members "to undertake the . . . withdrawal . . . of their armed forces stationed in the territories of Members without their consent freely and publicly expressed in . . . agreements consistent with the Charter." G.A. Res. 41(I), U.N. Doc. A/64, at 66 (1946). *See also* L. CHEN, *supra* note 46, at 257 nn.62 & 63.

109. 77 CONG. REC. 3471 (1934) (remarks of Sen. King).

its independence, at a time when the country was in no meaningful economic or military position to reject the package of aid and agreements the United States was offering, even if it wanted. It is true that the Philippines benefitted from United States postwar rehabilitation funds and assistance, but this justly compensated the Philippine role in a war primarily fought between America and the Axis Powers. The influx of aid did not change the countries' bargaining positions.

Apart from inequality in the bargaining positions between the two countries at the inception of the Agreement, the 1947 Agreement in itself does not provide for reciprocal rights or obligations. Amendments to the 1947 Agreement's provisions through the decades indicate that attempts have been made to change this lack of reciprocity. It is likely that issues concerning extraterritorial jurisdiction and "rent" will continue to plague the Agreement's negotiations until a new treaty is executed.

However solid it may seem, the United States is not likely to accept an "unequal treaty" argument. One element that might invalidate a treaty is duress against the signer.<sup>110</sup> In the case of the Filipinos, there is no evidence that Philippine President Manuel Roxas was under duress when he signed the 1947 Agreement. Another element would be undue influence on account of the unequal legal status or actual power of the parties.<sup>111</sup> The legislative history of the Agreement arguably demonstrates the unequal power between the two countries. However, this element has traditionally not been recognized as tainting international agreements.<sup>112</sup> Moreover, the current disposition of international law is such that the unequal treaty theory is unlikely to have any practical effect.<sup>113</sup>

It should still be considered that only the public expression of free consent as suggested by the General Assembly will serve to quell clamors

---

110. Lester, *supra* note 13, at 850-51.

111. *Id.* at 851.

112. *Id.*

113. International law is in a developing process, however, and documents drafted in the late 1960's to 1980's evince a shift from traditional rejection of the unequal treaty argument. See, e.g., *Report of the 1966 Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States*, 21 U.N. GAOR at 172-73, U.N. Doc. A/6230 (1966) (the right of states to remove foreign military bases from their territory was considered essential to formulate the principle of sovereign equality of states); Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, *adopted by United Nations Conference on the Law of Treaties*, Mar. 26-May 24, 1968 and Apr. 9-May 22, 1969, U.N. Doc. A/Conf.39/26, at 285; Charter of Economic Rights and Duties of States, Dec. 12, 1974, art. 16, 29 U.N. GAOR Supp. (No. 31) at 53, U.N. Doc. A/9631 [hereinafter Charter of Economic Rights and Duties of States] ("It is the right and duty of all States . . . to eliminate . . . all forms of foreign . . . occupation and domination, and the economic and social consequences thereof, as a prerequisite for development.").

that any military bases agreement negotiated in the future is "unequal."<sup>114</sup> The following section establishes that political circumstances surrounding the drafting of the 1947 Agreement will have a bearing on legal construction of the present removal provisions.

#### IV. VIENNA CONVENTION RULES AND CONSTRUCTION OF THE REMOVAL PROVISIONS

Recent political upheavals in the Philippines have led to the evaluation of alternative base sites<sup>115</sup> and the costs of moving to such sites.<sup>116</sup> Assuming that either government chooses to give notice of termination, one question this Comment addresses is what constitutes "removable improvements, equipment or facilities" and "buildings and structures" within the provisions of the 1947 Agreement which permit their removal before expiration of the Agreement. This Comment also addresses related questions dealing with the time in which the removal right must be exercised and whether the Philippines has a duty to pay compensation should base facilities be left behind.

Article 31(1) of the Vienna Convention provides that 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."<sup>117</sup> The context includes the text of the treaty, subsequent agreements or practices in the interpretation or application of its provisions, other agreements relating to the treaty, and any relevant rules of international law.<sup>118</sup> Article 32 provides recourse to the preparatory

114. The "public expression of free consent" requirement might be in the form of a public referendum held in the receiving state. For example, Spain recently held a public referendum in which the people approved Spain's continuing alliance with NATO. Serrill, *A Stunning Win for NATO*, TIME, Mar. 24, 1986, at 44. In a similar vein, President Aquino has said she plans to call a referendum to allow the Filipino people to decide the future of the base installations. Wall St. J., Apr. 11, 1986, at 1, col. 3.

115. See L. NIKSCH, PHILIPPINE BASES: HOW IMPORTANT TO U.S. INTERESTS IN ASIA? 11 (The Library of Congress Issue Brief No. IB79041, 1980); Chappell, *U.S. security and the Philippines: an exchange*, 41 BULL. OF THE ATOM. SCIENTISTS 38 (1985); Deming, *How Vulnerable are the Bases?*, NEWSWEEK, Nov. 4, 1985, at 32; Sterba, *America's Philippine Bases: Vital, or Just Convenient?*, Wall St. J., Feb. 20, 1986, at 26, col. 2; Turner, *Alternatives Abound for Clark Field and Subic Bay*, L.A. Times, Feb. 2, 1986, pt. V, at 5, col. 4; Sterba, *Pacific Pit Stop: Philippine Rumbblings Imperil Bases that are Ideal for U.S. Military*, Wall St. J., Sept. 4, 1985, at 1, col. 1 [hereinafter *Pacific Pit Stop*].

116. See 1986 HOUSE REPORT, *supra* note 10; S. 2078, 99th Cong., 2d Sess., 132 CONG. REC. S1410 (1986) (a bill to direct the Secretary of Defense, for contingency planning purposes, to conduct an investigation on the feasibility and cost of relocating the military in the Philippines to alternative sites in the Pacific region).

117. Vienna Convention, *supra* note 12, art. 31.

118. *Id.* art. 31 (2)-(3). See I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 114-54 (1984).

work of the treaty and the circumstances of its conclusion when interpretation under Article 31 leaves the meaning ambiguous or leads to an unreasonable result.<sup>119</sup>

It is clear that interpretation of the 1947 Agreement's provisions in good faith should not lead to a manifestly absurd or unreasonable result.<sup>120</sup> The following sections examine other elements such as the ordinary meaning of the terms, the context of the treaty, subsequent or related agreements and preparatory work.

#### *A. Ordinary Meaning: Comparing American and Philippine Law*

Article XVII of the 1947 Agreement provides the United States with the right to remove "any or all removable improvements, equipment or facilities" without any export tax being charged on material removed.<sup>121</sup> It also provides for the removal of "[a]ll buildings and structures" before relinquishment of the base on which the structures are situated or before expiration of the Agreement.<sup>122</sup> The "ordinary meaning" of these terms must be examined under both American and Philippine law.

While the United States follows the common law system, the Philippines has a mixed common law and civil law system. The Spanish Civil Code is the original basis of Philippine jurisprudence.<sup>123</sup> Although Anglo-American common law has had a great influence on Philippine law in general,<sup>124</sup> the law of property has only been modified to a limited extent.<sup>125</sup> In terminology, the civil law classification of things as movables

---

119. Vienna Convention, *supra* note 12, art. 32.

120. I. SINCLAIR, *supra* note 118, at 120. Applying good faith to the interpretation of treaties derives from the rule of *pacta sunt servanda*, or good faith in the observance of treaties. *Id.* at 119.

121. 1947 Agreement, *supra* note 4, art. XVII, para. 1.

122. *Id.* art. XVII, para. 2.

123. Cuyugan, *Origin and Development of Philippine Jurisprudence*, 3 PHILIPPINE L.J. 205 (1917).

124. The Philippine Supreme Court has said that "[t]he jurisprudence of this jurisdiction is based upon the English Common Law in its present day form of Anglo-American Common Law to an almost exclusive extent." *In re Shoop*, 41 Phil. 213 (1920), reprinted in R. SCHLESINGER, *COMPARATIVE LAW* 222, 235 (1980). See also Cuyugan, *supra* note 123, at 191. "Since the advent of American sovereignty . . . immense modifications in our Spanish substantive law have been effected either expressly or by necessary implication . . . [S]uffice it to say that the Anglo-American jurisprudence has exerted a tremendous influence on our present jurisprudence." *Id.* at 198.

125. Cuyugan, *supra* note 123, at 206. American common law modified provisions on prescriptions, the Spanish Mortgage Law, the Torrens System and other property-related acts. *Id.* However, "Spanish-derived *substantive private law* never suffered wholesale abrogation." R. SCHLESINGER, *supra* note 124, at 237.



or immovables has been retained.<sup>126</sup> Decisions of the Philippine Supreme Court have frequently shown that despite differences in terminology and technique, application of the common law and civil law may ultimately reach identical results.<sup>127</sup> If the domestic law of both countries is founded on common principles, one might conclude that both countries will implicitly negotiate with that common understanding in mind.

1. "removable improvements, equipment or facilities"

American common law provides a broad and comprehensive reading of the terms "removable improvements, equipment or facilities." "Improvements" refers to additions or betterments of real property which enhance the value of the property.<sup>128</sup> "Equipment" refers to "anything used in equipping; . . . the articles comprising an outfit . . . ; tools, machinery, implements, appliances" and is usually considered movable property.<sup>129</sup> "Facilities" embraces "everything which aids or makes easier the performance of the activities involved in the business of the person or the corporation."<sup>130</sup>

Philippine law has almost identical definitions of these terms, referring to "equipment" as the "[m]aterials or articles used in equipping . . . ; the articles comprised in an outfit," and in industry, physical facilities including machineries and tools.<sup>131</sup> "Improvements" refers to "valuable additions or betterments," and in a building, the term "comprehend[s] everything that tends to enhance the value or convenience of such property."<sup>132</sup> Similarly, "facilities" is a term broad enough to have a similar definition in common law.

The word "removable" seems to apply to each of the terms. This implies that some "improvements, equipment or facilities" are *not* removable, or that they have become so attached to the land that they should be considered immovables or fixtures. Fixtures law provides that some things or chattels have become so much a part of the land that they

126. M. GAMBOA, AN INTRODUCTION TO PHILIPPINE LAW 152 (1955).

127. R. SCHLESINGER, *supra* note 124, at 236.

128. 42 C.J.S. *Improvements* § 1 (1944); see also Annotation, *What Constitutes Improvements, Alterations, or Additions Within Provisions of Lease Permitting or Prohibiting Tenants Removal thereof at Termination of Lease*, 30 A.L.R. 3D 998 (1970).

129. 30 C.J.S. *Equipment* (1965).

130. 35 C.J.S. *Facility* (1960).

131. F. MORENO, PHILIPPINE LAW DICTIONARY 211 (1982).

132. *Id.* at 292-93.

may pass by conveyance as part of the land.<sup>133</sup>

In American common law, whether chattels have become fixtures depends on three elements: (1) actual or constructive annexation to the realty; (2) appropriation to the purpose for which land is used; and (3) the objective intention of the annexer that the chattel become a fixture.<sup>134</sup>

Philippine property law, based on the civil law system,<sup>135</sup> appears more specific and divides things into movables and immovables. Whether a particular object is movable or not depends on "whether it is capable of being carried from place to place; . . . whether such change in location can be made without injury to the immovable to which it may be attached; and . . . whether the object . . . fall[s] within any of the ten classes of immovables."<sup>136</sup> Philippine law does not define immovables; rather, it enumerates them. The list includes buildings, roads and docks.<sup>137</sup>

In the 1947 Agreement, it may well be a question of fact as to which "improvements, equipment or facilities" are removable. Chairs, tables and beds have been recognized as "removable" chattels<sup>138</sup> while buildings and houses have been recognized as fixtures.<sup>139</sup> However, in *Hughes v. Kershow*,<sup>140</sup> a Colorado court recognized that a five-story brick building constructed by the tenant was covered by a provision in the lease that "all erections and improvements and repairs" made by the tenant were to remain personal property and could be removed by him within sixty days before the expiration of the lease.<sup>141</sup> The main limitation seems to be that a fixture removal may be prevented where such removal would do substantial damage to the leased premises.<sup>142</sup> Causing injury to the article or structure, but not to the realty, does not destroy the right of

---

133. See O. BROWDER, R. CUNNINGHAM & A. SMITH, *BASIC PROPERTY LAW* 510 (1984) [hereinafter O. BROWDER].

134. R. BOYER, *SURVEY OF THE LAW OF PROPERTY* 328 (1981). The third element involves an objective intention to be inferred from such factors as the nature of the article, the relation and situation of the annexer, and the purpose for which the annexation is made. *Id.* at 328-29. This intent element is often said to be the most compelling factor in determining whether a fixture remains removable or becomes part of the realty. See *Union Bldg. Co. v. Pennell*, 78 F.2d 959 (3d Cir. 1935).

135. Spanish jurisprudence finds its roots in the Roman civil law system, which was in turn extended to its colony, the Philippines. Cuyugan, *supra* note 123, at 200-05.

136. M. GAMBOA, *supra* note 126, at 155.

137. PHIL. CIV. CODE art. 415 (1980).

138. R. BOYER, *supra* note 134, at 327.

139. O. BROWDER, *supra* note 133, at 510.

140. 42 Colo. 210, 93 P. 1116 (1908).

141. *Id.* at 210, 93 P. at 1116.

142. O. BROWDER, *supra* note 133, at 511.

removal.<sup>143</sup>

In a similar vein, the Philippine Civil Code's list of immovable property includes "[e]verything attached to an immovable . . . in such a way that it cannot be separated therefrom without breaking the material or deterioration of the object."<sup>144</sup> The right to remove all "equipment or facilities" may further be limited by the fact that the Civil Code includes "[m]achinery . . . intended . . . for an industry" on its list of immovables.<sup>145</sup> Thus ship repair, aircraft maintenance, and communication and radar facilities are arguably immovable property which were intended to meet the needs of the military defense industry. Should these facilities be left, it may help the Philippines develop their own military defense industry in the future.

It should also be noted that Article XVII(1) sets no time limit for removal. The absence of a time requirement means that "removable improvements, equipment or facilities" may be removed subsequent to expiration of the Agreement, perhaps even after the United States forces have surrendered possession of the bases.

## 2. "buildings and structures"

The problem of ambiguity occurs in construing what the right to remove all "buildings and structures . . . erected by the United States"<sup>146</sup> actually entails. The term "buildings" is ambiguous since it has no universal meaning but depends on the circumstances or the intentions of the parties for its meaning.<sup>147</sup> Ordinarily, however, the term refers to a structure enclosing a space within walls and a roof.<sup>148</sup> The word usually refers to the entire building, unless qualifying words are used.<sup>149</sup> "Structure" is one of the broadest terms in the English language and can mean "any object constructed or installed by man, including, but without limitation, buildings [and] towers."<sup>150</sup> In the broadest sense, it can mean

143. 36A C.J.S. *Fixtures* § 22 (1961). See also O. BROWDER, *supra* note 133, at 511 ("Obviously this means damage other than the loss of the fixture itself").

144. PHIL. CIV. CODE art. 415(3). "Under this paragraph, for the incorporated thing to be considered realty property, the injury or breakage or deterioration in case of separation, must be SUBSTANTIAL." 2 PHIL. CIV. CODE ANN. art. 415, Comment 5 (1981).

145. PHIL. CIV. CODE art. 415(5).

146. 1947 Agreement, *supra* note 4, art. XVII, para. 2.

147. 12 C.J.S. *Building* (1980).

148. *Id.*

149. *Id.*

150. CAL. GOV'T CODE § 50485.1 (West 1983). It can include such things as ditches, drains, embankments, roads, shafts, tunnels and power lines. *Western Elec. Co. v. Colley*, 79 Cal. App. 770, 251 P. 331 (1926) (quoting *Mendoza v. Central Forest Co.*, 37 Cal. App. 289, 295, 174 P. 359, 361 (1918)).

“any production or piece of work artificially built up, or composed of parts joined together in some definite manner.”<sup>151</sup>

Arguably, the right to remove all “buildings” is limited by the fact that the Philippine Civil Code considers buildings to be immovables, provided that they are more or less of a permanent structure and there has been the intent of permanent annexation.<sup>152</sup> In *Ladera v. Hodges*,<sup>153</sup> the Philippine Court of Appeals decided that a true building that was not “merely superposed on the soil” was immovable or real property, whether a building was erected by the owner of the land or by a lessee.<sup>154</sup> Since buildings are immovables, it would seem inconsistent to allow their removal. The United States can validly claim, however, that the Agreement has expressly provided for the removal of buildings, whether or not there was original intent to permanently annex these buildings.

The lack of any qualifying words beside the term “structures” is particularly disturbing even as it provides the United States with a broad and flexible removal right. The provision allowing the removal of all “structures” seems to permit total destruction of the bases, from the roads and runways to the docks and towers. Allowing the United States such a broad privilege reinforces the view that the rights accorded by the 1947 Agreement were not reciprocal. Further, such a broad removal right does not take into account any future interest the Philippines may have in developing the same property.

The right of removal could be limited to some extent by excluding the immovables listed under the Philippine Civil Code. Thus “structures” should not be construed to encompass immovables such as: (1) “roads and constructions adhered to the soil”; (2) trees or plants attached to the land; (3) objects for use or ornamentation placed in buildings or on lands in a manner that reveals the United States’ intention to attach them permanently; (4) machinery or instruments intended by the United States for an industry or works and which tend to meet the needs of such industry; (5) docks and floating structures intended by their nature to remain at a fixed place on a river, lake or coast; and (6) contracts for public works, servitudes and other real rights over immovable property.<sup>155</sup>

---

151. 83 C.J.S. *Structure* (1953).

152. 2 PHIL. CIV. CODE ANN. art. 415, comment (3)(b).

153. Judgment of Sept. 23, 1952, Court of Appeals, Philippines, 48 Official Gazette 5374.

154. *Id.* at 5380.

155. PHIL. CIV. CODE art. 415. The list also comprises in part:

1) Land, buildings . . . ;

. . . .

3) Everything attached to an immovable in a fixed manner, in such a way that it

The civil law classification of movables and immovables may correspond roughly with common law personalty and realty in determining the "ordinary meaning" of terms, but should the application of the two systems prove slightly divergent, civil law principles should properly take precedence. A well-recognized rule in conflict of laws is the situs rule, where the laws of the location of the property govern the rights of the parties.<sup>156</sup> The Second Restatement of Conflict of Laws refers almost every question concerning "immovables" to the law of the situs of the realty.<sup>157</sup> Thus by analogy, since the bases are on Philippine territory, Philippine civil law should apply.

In the arbitration of *Aspinwall v. Venezuela*,<sup>158</sup> the United States and Venezuelan Claims Commission decided that "where language is employed in a treaty which is susceptible of two meanings, 'that is to be preferred which is least for the advantage of the party for whose benefit the clause is inserted.'" <sup>159</sup> This suggests that the removal provision will more likely be construed against the United States, for whose benefit Article XVII was included.

Finally, Roman civil law has been cited as the philosophical basis of international law.<sup>160</sup> American commentators have said that "the greater number of controversies between States would find a just solution in [the Roman civil law's] comprehensive system of practical equity, which furnishes principles of universal jurisprudence."<sup>161</sup> The terms "re-

cannot be separated therefrom without breaking the material or deterioration of the object;

5) . . . [R]eceptacles . . . or implements intended . . . for an industry or works which may be carried on in a building or on a piece of land, and which tend directly to meet the needs of the said industry or works;

6) Animal houses . . . or breeding places of similar nature . . . ; the animals in these places are included;

8) Mines, quarries, and slag dumps, while the matter thereof forms part of the bed, and waters either running or stagnant.

*Id.*

156. Justice Story stated over a century ago that "the laws of the place, where such [real] property is situate, exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities, which should accompany them." R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 398 (1980) (quoting J. STORY, CONFLICTS OF LAW § 424, at 708 (3d ed. 1846)).

157. R. WEINTRAUB, *supra* note 156, at 296-97.

158. *Aspinwall v. Venezuela* (United States v. Venezuela), No. 18, Dec. 5, 1885, *reprinted in* 4 J. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3616 (1898).

159. *Id.* at 3624.

160. H. TAYLOR, A TREATISE ON INTERNATIONAL PUBLIC LAW 20-21 (1901).

161. H. LAUTERPACHT, *supra* note 76, at 30.

movable improvements, equipment or facilities,” or “buildings and structures” ought to be interpreted consistent with the civil law concepts of movables and immovables.

Other matters that Article XVII(2) of the 1947 Agreement refers to are the time limit within which the “buildings and structures” may be removed and the duty of compensation for the facilities left behind. The paragraph provides for a right to remove before relinquishment of the base on which the structures are situated or before expiration of the Agreement.<sup>162</sup> After expiration, the United States loses its removal right unless the Philippines permits a reasonable time in which to implement this provision.<sup>163</sup> Paragraph (2) further provides that the Philippines need not pay compensation for improvements, buildings or structures left behind.<sup>164</sup> These shall become Philippine property at the termination of the Agreement, unless a new treaty is drafted to provide otherwise.

### *B. The Context of the 1947 Agreement*

While a reading of the removal provisions alone provides the United States with a broad removal right, any interpretation should also take into account the context of the 1947 Agreement. The context comprises the text of the Agreement, including its preamble and annexes, and any related or subsequent agreements.<sup>165</sup> The United States’ exercise of the removal provisions for termination purposes, in order to remove all facilities and structures just before the Agreement expires, may actually conflict with the context of the Agreement.

The text of the 1947 Agreement evinces an operation rather than termination purpose for the removal provisions. The preamble states that the Agreement’s purpose is to promote the mutual security of the United States and the Philippines, and to maintain peace in the Pacific.<sup>166</sup> Thus the two governments agreed to the Agreement’s terms for the “delimitation, establishment, maintenance and operation” of the military bases.<sup>167</sup> Article III provides the United States with wide opera-

---

162. 1947 Agreement, *supra* note 4, art. XVII, para. 2.

163. Within the context of military bases, a “reasonable time” in which to exercise the removal right may take a number of years, especially if the United States decides to wait for the installation of replacement facilities before the forces surrender possession of the Philippine bases. *See Pacific Pit Stop*, *supra* note 115, at 1, col. 1 (time required for replacement facilities elsewhere may take eight years).

164. 1947 Agreement, *supra* note 4, art. XVII, para. 2.

165. Vienna Convention, *supra* note 12, art. 31(2)-(3).

166. 1947 Agreement, *supra* note 4, preamble.

167. *Id.*

tional and use rights within the bases.<sup>168</sup> Further, the United States agreed not to use these rights "unreasonably."<sup>169</sup>

The need for operational flexibility properly requires the availability of a broad removal right. Under the removal provisions, the United States can improve deteriorating facilities and structures on the bases. Consequently, the removal right is corollary to maintaining the bases for mutual security purposes. Conversely, the removal of all facilities and structures just before the Agreement expires would not further mutual security purposes. With the bases left intact, the Philippine Armed Forces could assume operational and security functions in the Pacific region, filling in any gap the United States would leave behind.

Subsequent amendments to the 1947 Agreement establish that the United States has accorded the Philippines an increasing role in the operation of the bases and removal of any facilities or structures. The United States affirmed Philippine sovereignty over the bases in the 1979 Amendments.<sup>170</sup> In addition, the 1983 Memorandum provides the Military Bases Agreement Joint Committee, a consultation body which facilitates continuing implementation of the Agreement, with the authority to review base areas that may be returned to the Philippines.<sup>171</sup> This committee not only provides each country with a voice in negotiations, but also serves as a check on any unilateral action concerning the bases. Other amendments suggest that the United States practice has been to leave "buildings and structures" intact, by providing for the relinquishment of lands included in the original annexes of the 1947 Agreement.<sup>172</sup> Evidence of this practice suggests that the removal right, though broad, will probably not be exercised at all.

The 1947 Agreement should also be viewed in light of related agreements such as the Military Assistance Agreement and the Mutual Defense Treaty.<sup>173</sup> As mentioned before, the Philippines accepted the 1947 Agreement as one of a package of treaties upon independence. By these treaties, the United States forged a security alliance in the Pacific region. Full exercise of the removal provisions just prior to the Agreement's ex-

---

168. *Id.* art. III, paras. 1-2.

169. *Id.* para. 3.

170. *See supra* note 61 and accompanying text.

171. 1983 Memorandum, *supra* note 65, Joint Statement.

172. *See, e.g.*, Agreements Implementing the Agreement, July 1 & Sept. 12, 1947, United States-Philippines, 3 U.S.T. 457, T.I.A.S. No. 2406 (providing for transfer of Leyte-Samar to concurrent use by the forces); Transfer of Certain Military Reservations, May 14 & 16, 1949, United States-Philippines, 63 Stat. 2660, T.I.A.S. No. 1963 (amending annex 1 of the 1947 Agreement); 1979 Amendments, *supra* note 61, annexes I & II (reducing areas available to United States use).

173. *See supra* note 32 and accompanying text.

piration would contradict the spirit of the Mutual Defense Treaty. Leaving the buildings and structures as resources for the Philippine Armed Forces would better serve the interest of "strengthen[ing] . . . present efforts for collective defense for the preservation of peace and security . . . in the Pacific Area."<sup>174</sup> This would especially be true if the Mutual Defense Treaty continues despite the Agreement's termination.<sup>175</sup> The many security ties between the United States and the Philippines suggest that all facilities and structures will be left behind if expiration occurs on friendly terms. These structures will help the Philippines maintain security in the Pacific region and remain a close ally of the United States.

### C. *Supplementary Means of Interpretation*

Should interpretation of the removal provisions under Article 31 lead to manifestly absurd or unreasonable results, Article 32 of the Vienna Convention provides recourse to preparatory work on the 1947 Agreement and the circumstances of its conclusion.<sup>176</sup> If the United States chooses to fully exercise its broad removal right, such action arguably leads to an unreasonable result—total destruction of the bases. The interpretation should then take into consideration the colonial relationship of the two countries at the inception of the Agreement. The terms in the removal provisions would be construed against the party that drafted the provisions, in this case, the United States.

Moreover, exercise of the removal provisions should not lead to total destruction of the structures and facilities because it is evident that the drafters of the 1947 Agreement did not intend such a result. In a 1945 letter to President Truman, Secretary of War Stimson said that "a constant screening of United States base sites should release to the Filipinos sites as they become surplus to the United States needs. As they gain

---

174. Mutual Defense Treaty, *supra* note 32, preamble.

175. Regarding the Mutual Defense Treaty, consensus is that its retention is not incompatible with terminating the 1947 Agreement. In a 1979 letter, Secretary of State Cyrus Vance wrote that:

The Mutual Defense Treaty has 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 Agreements . . . between [both countries]."

The [two agreements] have their own separate provisions for termination.

M. NASH, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 1730 (1979). Article VIII of the Mutual Defense Treaty provides that the Treaty remains in force indefinitely, however, "[e]ither party may terminate it one year after notice has been given to the other Party." Mutual Defense Treaty, *supra* note 32, art. 8. Norway and Denmark are examples of countries that have signed a defense treaty (NATO) but do not house foreign military bases on their territories.

176. Vienna Convention, *supra* note 12, art. 32.



in effectiveness, the Filipino forces should be accorded *increasing participation* in the use of certain United States bases."<sup>177</sup> The foregoing quote establishes Stimson's intent that the structures and facilities would be returned to the Filipinos in the form of military bases, not destroyed realty.

In summary, do grounds exist for limiting the exercise of Article XVII? Either the invalidity of the whole Agreement or the Agreement's potential interpretation suggest an affirmative answer. The Philippines may argue that Article XVII is invalid since the whole 1947 Agreement is invalid as an "unequal treaty." This argument may be considered should the international legal community assent to use of the unequal treaty argument. Assuming the Agreement is not invalidated as an "unequal treaty," the removal provisions should not be interpreted to allow total destruction of the bases. As mentioned before, the use of comprehensive terms like "structures" without qualifying words can provide a very broad right of removal. Although a fair reading of Article XVII may not warrant total destruction of the bases, the provisions as they presently exist leave this choice open. Such a broad removal right in an international treaty is not warranted even by the private law of leases. It is highly unlikely that the removal of "buildings and structures" (including roads and water ports) can be achieved without doing substantial harm to the underlying realty.

Finally, it is submitted that the removal provisions only entitle the United States to tear down buildings and structures for the purpose of maximizing use of the property while American forces remain there, not to destroy the bases just before the right of access terminates. The primary interest of the United States in inserting these provisions at the Agreement's inception was the effective operation of the bases. Reading the provisions to give the United States the flexibility to improve deteriorating structures or facilities would be in consonance with maintenance of the bases for the mutual security of both countries.

## V. CONCLUSION

As the removal provisions currently stand, the parameters of the United States' removal right leave room for misinterpretation. The provisions' operational purpose, allowing removal for the improvement of

---

177. FOREIGN RELATIONS 1945, *supra* note 34, at 1206 (emphasis added). This intention has been objectively manifested in amendments to the Agreement over the years, which have either provided for the total relinquishment of lands or have allowed for concurrent use of base areas by both American and Filipino forces. *See supra* note 172.

facilities and structures, should be more clearly defined in any subsequently drafted treaty.

It should be noted that factors which favored the United States in 1947 are not dissimilar from those which give it an advantage at the negotiation table today.<sup>178</sup> However, world public opinion and anti-American sentiment over the bases<sup>179</sup> may compel efforts to avoid any semblance of inequality in the two countries' bargaining positions like that which may have tainted the 1947 Agreement.

Perhaps the United States does have a responsibility to protect vital shipping lanes and maintain a balance of security in the Western Pacific region. A majority of Filipinos do not object to the presence of the bases so much as to the reason for their presence. They are the reminder of a colonial past that continues to rear its head in the form of economic dependence. Although this Comment dealt only with removal provisions, any treaty negotiated in the future should provide for more reciprocal rights and obligations between the contracting nations.<sup>180</sup> The Filipino people's public expression of free consent will provide the final and essential element of future commitments to the bases.

*Maria Teresa M. Lim\**

---

178. The Philippines is currently struggling through what is probably its worst economic crisis since the postwar era. *See* Tift, *supra* note 8, at 25, col. 1.

179. Various leftist groups formed the Anti-Bases Coalition in February 1979. This group seeks the immediate abrogation of the Agreement. F. BUNGE, *supra* note 3, at 221. In the Declaration of Principles signed January 6, 1983, the Anti-Bases Coalition charged that the bases impair national sovereignty and violate article 16 of the Charter of Economic Rights and Duties of States adopted by the United Nations General Assembly in 1974. 1983 *Hearings*, *supra* note 1, at 89 app. 4; Charter of Economic Rights and Duties of States, *supra* note 113, art. 16.

180. This Comment focused on the Agreement's removal provisions. However, the author suggests that a new treaty be drafted in which just compensation for use of the bases would be part of the same instrument as the bases agreement. As such, the treaty would more closely resemble a private law contract with reciprocal rights and obligations.

\* "Praise be to the name of God . . .  
He changes times and seasons;  
He sets up kings and deposes them."

*Daniel 2:20-21*

