

COMMENT:

**CONFLICT AND COOPERATION IN THE CRAFTING AND
CONDUCT OF FOREIGN POLICY***

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A number of constitutional challenges have reached the Supreme Court of the Philippines with significant ramifications on foreign policy and the conduct of diplomacy. Three successive petitions were filed against the RP-US Visiting Forces Agreement (VFA)¹ and activities undertaken under it, one on the Joint Marine Seismic Undertaking with China and Vietnam, and yet another on the Philippine Archipelagic Baselines Law.²

In the third and most recent lawsuit against the Visiting Forces Agreement, which arose from the rape allegations against a U.S. military serviceman, the Supreme Court upheld the constitutionality of the agreement. In a rare move, however, the high court declared the implementing custody agreements entered into between the Philippine Secretary of Foreign Affairs and the U.S. Ambassador, the Romulo-Kenney agreements, as “not in accordance with the VFA” and ordered the Secretary of Foreign Affairs to forthwith renegotiate the agreements.³

These and similar cases have significant impact on the executive branch’s traditional primacy in the conduct of foreign affairs, and with reference to the baselines law, potentially on the policy-making role of Congress.

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¹ Bayan v. Exec. Sec., G.R. No. 138570, 342 SCRA 449, Oct. 10, 2000; Lim v. Exec. Sec., G.R. No. 151445, 380 SCRA 739, Apr. 11, 2002; Nicolas v. Romulo, G.R. No. 175888, 578 SCRA 438, Feb.11, 2009.

² The petition against the Rep. Act No. 9522 enacted on Mar. 10, 2009 is being heard as of this writing.

³ Nicolas.

A review of the jurisprudence and recent developments in this dynamic field is timely, if only to shed some light on its possible future direction. Will there be heightened conflict or increased cooperation among the executive and legislative branches? How can cooperation be enhanced? How may the courts deal with future foreign affairs issues?

This paper will examine the allocation of constitutional powers relating to foreign policy-making and implementation among the executive, legislative and judicial branches of government, and the interplay among the three. The subject will be analyzed largely from the viewpoint of constitutionality – that is, whether or not an official or agency, which made the action in question, had the power to do so under the Constitution or law; if it were thus empowered, then whether or not the action was made within any applicable limitation on the exercise of such power.

This paper will therefore dwell not so much on the wisdom of a foreign policy measures, but more about its legality; not so much on the foreign policy output, but on the policy-making process. Assessing wisdom is generally the province of the social science disciplines, not so much of law. As similarly noted by the Supreme Court in *Tañada v. Angara* on the WTO ratification issue, “as to whether such exercise was wise, beneficial or viable is outside the realm of judicial inquiry and review.”⁴

Foreign Relations Powers of the President

In defining the powers of the executive branch, the Constitution does not specifically mention the conduct of foreign relations as one of the prerogatives vested in the President. This is implied from those which are particularly granted and entrusted to him.

The President nominates and with the consent of the Commission on Appointments, appoints Ambassadors, other public ministers and consuls⁵ who represent the nation in other countries, the United Nations and other international organizations. He⁶ negotiates and, with the concurrence of the Senate, enters into treaties and international agreements.⁷ He may contract or guarantee foreign loans on behalf of the Republic with

⁴ *Tañada v. Angara*, G.R. No. 118295, 272 SCRA 18, May 2, 1997

⁵ CONST. art. VII, § 16; *See Santos v. Macaraig*, G.R. No. 94070, 208 SCRA 74, Apr. 10, 1992.

⁶ The pronoun “he” refers to the person of the President generically, although the incumbent is a female.

⁷ CONST. art. VII, § 21.

the prior concurrence of the Monetary Board⁸ of the Bangko Sentral ng Pilipinas, as well as manage the country's commercial and economic relations with other countries and regions, through the setting of tariff rates and import quotas.⁹

The President, as Chief Executive, is assisted in the discharge of foreign-affairs powers by the Secretary of Foreign Affairs principally,¹⁰ and other cabinet members, specially those with responsibilities over trade and investment, national defense, finance, development planning, and labor and employment.¹¹

The foreign affairs powers earlier mentioned, at times called "diplomatic powers," can be traced back to the 1935 Constitution. However, the latter had a compact formulation and positive phraseology.

Article VII, Section 10. The President shall have the power, with the concurrence of the two-thirds of all the Members of the Senate, to make treaties, and with the consent of the Commission on Appointments, he shall appoint ambassadors, other public ministers, and consuls. He shall receive ambassadors and other public ministers duly accredited to the Government of the Philippines.

The 1987 Constitution, on the other hand, phrases the treaty-making power of the President negatively, with emphasis on the Senate concurrence process, as if to highlight the limitation on the exercise of the power.¹² The President's power to receive foreign ambassadors and envoys is no longer specified, though it is deemed carried over from the previous charter and now part of statutory law.¹³

⁸ art. VII, § 20.

⁹ art. VI, § 28.

¹⁰ Rep. Act. No. 7157. This is the Foreign Service Act of 1991.

¹¹ These correspond to the executive departments which are represented in the various embassies, consulates general and permanent missions through their service attachés, as well as those dealing with tourism, agriculture, science and technology, social welfare, and education.

¹² See ALEX BRILLANTES & BIENVENIDA AMARLES-LLAGO, *THE PHILIPPINE PRESIDENCY 1898-1992* 51(1994) This negative phraseology is similarly expressed in the 1987 Constitution's Transitory Provision which reads, "*All existing treaties or international agreements which have not been ratified shall not be renewed or extended without the concurrence of at least two-thirds of the Members of the Senate*" (CONST. art. XVIII, § 4).

¹³ CONST. art. VII, § 16 retained in the Chief Executive all the powers he had under the 1935 Constitution which was otherwise not mentioned in the 1973 Constitution, and stated further that such powers would remain with the President unless the legislature provided otherwise. See JOAQUIN BERNAS, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 823 (1996 ed.). See also The Foreign Service Act of 1991 (R.A. 7157) and the Administrative Code of 1987 (Exec. Order No. 168).

In practice, however, the President exercises diplomatic powers other than those mentioned. These are to recognize states and governments, maintain diplomatic relations, and communicate and deal with foreign governments. Interacting and communicating with foreign governments, or properly, foreign policy implementation, is traditionally the exclusive prerogative of the executive branch.

The eminent Senator and one-time Minister for Foreign Affairs Arturo Tolentino described this function, as follows:

The President is the sole spokesman of the Government in foreign relations... He is the only official of this Government whose positions and views in our dealings with other countries are taken by other Governments as those of the Philippine Government. His is the only voice which other Governments will take as expressing the official stand of our Government. In short, he is the official channel of communication to which other Governments will listen to ascertain the position and views of the Philippine Government in our relations with them.¹⁴

The powers to protect the nation's borders, allow the entry of aliens and deport the undesirables traditionally belong to the executive branch.¹⁵ The President exercises significant powers in commercial and economic relations with other countries and regions through Congress' constitutionally-sanctioned delegation to him of the power to set tariff and regulate trade.¹⁶ He also has the inherent power to make war in defense of the state in his capacity as Commander-in-Chief¹⁷ of the country's armed forces.

In actions similar to domestic law-making, the Department of Foreign Affairs, on behalf of the President and through the Office of the Solicitor General, conveys its views before local courts on the applicability of international law, especially on the matters of privileges, immunities and suability of foreign diplomats and foreign governments.¹⁸

¹⁴ Arturo Tolentino, *The President and the Batasan on Foreign Affairs*, in, THE POWERS OF THE PHILIPPINE PRESIDENT 136 (Froilan Bacungan, ed.1983).

¹⁵ This power is primarily exercised by the Commission on Immigration. See *Go Tek v. Deportation Board*, G.R. No. 23846, 79 SCRA 17, Sep. 9, 1977.

¹⁶ CONST. art. VI, § 28. See TARIFF CODE, § 402. The Tariff and Customs Code is Pres. Dec. No. 1464.

¹⁷ CONST. art. VII, § 18. The exercise of the power to make war has to be related to the prerogative of Congress as "the sole power to declare the existence of the state of war" [CONST. art. VI, § 23(1)].

¹⁸ *Dept. of Foreign Affairs v. Nat'l Labor Relations Commission*, G.R. No. 113191, 262 SCRA 39, Sep. 18, 1996. See also Jorge Coquia, *The Role of the Office of the Legal Adviser (Department of Foreign Affairs)*, THE DIPLOMAT REVIEW (Manila, Jan. 15, 1990).

The Constitution's charge to the President to "ensure that the laws be faithfully executed"¹⁹ allows him further leeway in the conduct of diplomacy. The adoption by the 1935, 1973 and 1987 Constitutions of the generally accepted principles of international law as part of the law of the land strengthened his hand in this regard.²⁰ For instance, he finds statutory authorities to send over individuals to other countries pursuant to extradition agreements²¹ and sentenced person accords²², as well as to promote the welfare of migrant workers and other overseas Filipinos.²³

It has been argued that the President's foreign affairs powers are drawn not only from the Constitution and laws, but also from the nation's sovereignty and independence, or its very statehood. According to Dean Vicente Sinco, the power of the President over foreign affairs is derived:

...not only from specific provisions of the Constitution but also from customs and positive rules followed by independent states in accordance with international law and practice. It would be a serious impairment of its right of external sovereignty and independence, if the government of the Philippines were fettered by specific provisions of the Constitution, whether express or implied, in its dealings with other states. Such limitations, if recognized, would place the country in a position not of legal equality with the other members of the international community but of inferiority with respect to them.²⁴

This view carries great weight. Although not specified in the Constitution, the Chief Executive, on behalf of the nation, can acquire territory by discovery and occupation,²⁵ and conclude international agreements that do not constitute treaties in the traditional sense, commonly known as "executive agreements."²⁶ These foreign affairs powers are inherently inseparable from the conception of statehood.

¹⁹ CONST. art. VII, § 17.

²⁰ art. II, § 2.

²¹ See *Sec. of Justice v. Lantion*, G.R. No. 139465, 343 SCRA 377, Oct. 17, 2000. The Philippines has extradition agreements with 10 countries – Australia, Canada, China, Hongkong SAR, Indonesia, Korea, Micronesia, Switzerland, Thailand, and the United States. The agreements with India and Spain are awaiting Senate concurrence.

²² The Philippines has transfer of sentenced persons agreements with five countries – Canada, Cuba, Hong Kong SAR, Thailand and Spain. See J. Eduardo Malaya & Azela Aumpac, *The Transfer of Sentenced Persons Agreement: Humanitarian Dimensions and Foreign Policy Perspectives*, THE LAWYERS REVIEW, at 9-10, Jun. 20, 2008.

²³ Rep. Act. No. 8042. This is the Migrant Workers and Overseas Filipinos Act of 1995.

²⁴ VICENTE SINCO, PHILIPPINE POLITICAL LAW 298 (1954).

²⁵ Pres. Dec. No. 1596, Jun. 11, 1978. Formalized the Philippine claim to the Kalayaan Islands Group.

²⁶ See *USAFFE Veterans Ass'n, Inc. v. Treasurer of the Phil.*, No. 10500, 105 Phil. 1030, Jun. 30, 1959; *Commissioner of Customs v. Eastern Sea Trading*, G.R. No. 14279, 3 SCRA 351, Oct. 31, 1961, on the validity of "executive agreements" although not referred to in the Constitution.

Supreme Court Justice Roberto Regala, who earlier served as Philippine Ambassador to Australia and to Italy, expressed similar views:

[T]he power of the government over foreign affairs was not limited to the grants specified in the Constitution but included also authority derived from the position of the (country) as a sovereign nation.²⁷

The preeminence of the executive branch in foreign affairs is secure. The Supreme Court in *Bayan v. Executive Secretary* in 2000 stated:

By constitutional fiat and by the intrinsic nature of his office, the President as head of State, is the sole organ and authority in the external affairs of the country. In many ways, the president is the chief architect of the nation's foreign policy; his dominance in the field of foreign relations is (then) conceded. Wielding vast powers and influence, his conduct in the external affairs of the nation, as Jefferson describes, is 'executive altogether'.²⁸

The Court reiterated the above views in the 2005 case *Pimentel v. Executive Secretary*, thus:

In our system of government, the President, being the head of state, is regarded as the sole organ and authority in external relations and is the country's sole representative with foreign nations. As the chief architect of foreign policy, the President is the mouthpiece with respect to international affairs.²⁹

The implementation of foreign policy by the President – as distinguished from the formulation of such policy - at times involves some determination on the substantive content of policy, to which the Congress has not always agreed.³⁰

Foreign Relations Powers of Congress

The powers and functions of Congress in foreign affairs is considerable and best known by the vital role of its upper chamber in treaty-making:

²⁷ ROBERTO REGALA, LAW AND DIPLOMACY IN A CHANGING WORLD 83 (1965).

²⁸ *Bayan v. Exec. Sec.*, G.R. No. 138570, 342 SCRA 449, Oct. 10, 2000.

²⁹ *Pimentel v. Exec. Sec.*, G.R. No. 158088, 462 SCRA 622, Jul. 6, 2005.

³⁰ See e.g. PHILLIP TRIMBLE, INTERNATIONAL LAW: UNITED STATES FOREIGN RELATIONS LAW (2002).

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

The constitutional requirement for approving treaties – two-thirds of *all* Senators, and not merely those present – is a high standard. Enactment of laws, in contrast, requires a mere majority vote.

The President's nomination of ambassadors, other public ministers and consuls also needs the confirmation of the legislature's Commission on Appointments.³¹

Congress is also vested the power of setting tariffs, import and export quotas, wharfage dues and other duties or imposts which are central to foreign trade and economic policy. The Constitution allows, however, its delegation to the executive branch.³² As delegated under the Tariff and Customs Code,³³ the President undertakes this power, upon investigation by the Tariff Commission and recommendation of the National Economic and Development Agency (NEDA) Board.

Furthermore, the sole power to declare the existence of a state of war belongs to Congress,³⁴ although the power to make and conduct war remains with the President in his capacity as the Commander-in-Chief of the nation's armed forces.

It may appear that the initiative in foreign policy formulation and implementation is with the executive branch, and the legislature has its say principally through the treaty concurrence and appointment confirmation processes. Agreements concluded by diplomats, trade negotiators and other officials may seem to be finished products when submitted to the Senate for concurrence. The latter then would have the choice between giving its concurrence, or withholding it and asking the executive branch to renegotiate the agreement, if at all advisable.

In reality, Congress' influence is deep and wide-ranging. Executive departments and agencies often consult and brief key members of Congress before and during negotiations on sensitive issues. Negotiators and their Cabinet Secretaries are not likely to commit the country to terms which may

³¹ CONST. art. VI, § 23(1).

³² art. VI, § 28(2).

³³ See TARIFF CODE, § 402.

³⁴ CONST. art. VI, § 23(1).

not be approved by the Senate. After all, these agreements may need implementing legislation³⁵ or require funding from Congress.³⁶

It is also the Congress that sets the budget allocations for the various departments and agencies of government, including the Office of the President and the Department of Foreign Affairs, for the acquisition of embassy premises, payment of salaries and allowances of personnel, and remittance of contributions to international organizations, among others. The appropriations power is a most potent tool, as it affords Congress the ability to stall a measure proposed by an executive agency by refusing to fund it.

Congress routinely conducts inquiries in aid of legislations³⁷ on any matter of interest, including foreign policy. Through the general legislative or treaty concurrence processes, it at times reserves oversight over executive activities. For instance, it created the Legislative Oversight Committee on the RP-US Visiting Forces Agreement (VFA) for purposes of monitoring VFA-related activities.

The legislature may convey its views through formal resolutions, or assert its role through its general law-making power. It can pass a law which may abrogate an executive agreement or supersede a treaty. In response to the significant outflow of Filipino migrant workers, Congress passed the “Migrant Workers and Overseas Filipinos Act of 1995” which reoriented the work priorities of the DFA and foreign service. Without prejudice to the DFA’s politico-security and economic diplomacy functions, the legislature mandated that:

The protection of the Filipino migrant workers and the promotion of their welfare, in particular and the dignity and fundamental rights and freedoms of the Filipino citizen abroad, in general, shall be the highest priority concerns of the Secretary of Foreign Affairs and the Philippine foreign service Posts.

Like in the exercise of powers generally, congressional powers in foreign affairs are subject to constitutional limitations. The legislature must be conscious of the implications of its action on the powers which are granted and allocated to other branches of government. Thus, Congress may

³⁵ An example is the International Convention on the Elimination of All Forms of Racial Discrimination, which entered into force on Jan. 4, 1969, *as discussed in* MERLIN MAGALLONA, FUNDAMENTALS OF PUBLIC INTERNATIONAL LAW 548-49 (2005).

³⁶ CONST. art. VI, §§ 22, 29. *See* TRIMBLE, *supra* note 30, at 60-61.

³⁷ CONST. art. VI, § 21.

not direct the conduct of negotiations, appoint delegates to international conferences (although congressional representatives are themselves often members of delegations, such as to UN General Assembly sessions), prevent the President from attending conferences, or recognize foreign governments. These are clearly the constitutional prerogatives of the President.³⁸ Furthermore, Congress has to observe the safeguards for individual rights³⁹ which are guaranteed under the Bill of Rights.

Foreign policy is generally differentiated from diplomacy, in that foreign policy is the sum total of those principles under which a nation's relations with others are conducted. Diplomacy, on the other hand, is the act of carrying foreign policy into effect.⁴⁰ The implementation of foreign policy, or "diplomacy" proper, is essentially the President's prerogative. The power to formulate such policy is shared between him and Congress.

Judicial Powers over Foreign Affairs

Among the powers which affect foreign affairs and entrusted to the Supreme Court under the 1987 Constitution, *Article VIII, Section 5 (1)* are the following:

- (1) Exercise original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and over petitions for certiorari, prohibition, mandamus, quo warranto, and habeas corpus.
- (2) Review, revise, modify, or affirm on appeal or certiorari as the law or the Rules of Court may provide, final judgments and orders of lower courts in ... all cases in which the constitutionality of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.

The Supreme Court can exercise original jurisdiction on cases pertaining to ambassadors and other diplomats. Jurisdiction over these diplomats are similarly conferred on and thus shared with regional trial courts under existing law. It may be recalled that under public international law, foreign diplomats and to a lesser extent, consular officials, are generally

³⁸ See *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983). Here the U.S. Supreme Court held that Congress could not stop the deportation of a non-resident alien because that was an executive function and the action of Congress was not permissible under the principle of separation of powers.

³⁹ No law shall be passed abridging the freedom of speech (CONST. art. III, § 4) or religion (CONST. art. III, § 5), impairing contracts (CONST. art. III, § 10), in the nature of an ex post facto law or bill of attainder (CONST. art. III, § 22 III), or granting a title of royalty or nobility (CONST. art. VI, § 31).

⁴⁰ SATOW'S GUIDE TO DIPLOMATIC PRACTICE 3 (Lord Gore-Booth ed. 1979).

not subject to the jurisdiction of local courts, except when there is a waiver of their immunity.⁴¹ Given the nature of the issues affecting these officials who have special status under international law and the repercussions on bilateral relations these issues may have, the Constitution allows the filing of cases affecting them directly with the Supreme Court, unlike most other cases falling within its appellate jurisdiction, when these cases have first to be filed with and heard before the lower courts.

Through the years, the Supreme Court has issued a number of rulings on cases involving foreign diplomats.⁴² The high court has even accepted cases filed by Philippine ambassadors and other diplomats belonging to the Philippine Foreign Service over internal administrative issues with the DFA.⁴³

The present writer is not fully convinced of the legal basis and functional necessity for the Supreme Court to directly hear cases involving Filipino diplomats. The latter are accorded privileges and immunities by their host government when assigned overseas, but are not entitled to such when they are in their own country.⁴⁴ Interpreting a similar provision, U.S. courts have been explicit that their provision refers to *foreign* Ambassador, public ministers and consuls.⁴⁵

With reference to item 2 of Section 1 on the powers of the Supreme Court, judicial review is the power of the court to examine acts of the political branches and to invalidate those acts which may be in violation of the Constitution or the laws. It includes the power to declare unconstitutional the "application or operation" of a treaty or an executive agreement, even though the legal basis for said measure is constitutional.⁴⁶ The power to review and invalidate international agreements is similarly shared by the Supreme Court with the lower courts.

⁴¹ See Vienna Convention on Diplomatic Relations, Apr. 18, 1961, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf; and the Vienna Convention on Consular Relations, Apr. 24, 1963, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf.

⁴² Cases involving accredited foreign diplomats dealt primarily on their entitlements to diplomatic immunities and privileges, notably *World Health Org. v. Aquino*, G.R. No. 35131, 48 SCRA 242, Nov. 29, 1972; *Int'l Catholic Migration Commission v. Calleja*, G.R. No. 85750, 190 SCRA 130, Sep. 28, 1990; *Liang v. People*, G.R. No. 125865, 323 SCRA 692, Jan. 28, 2000 (Decision) Mar. 26, 2001 (Resolution).

⁴³ Cases decided by the Supreme Court which pertained to officials of the Department of Foreign Affairs and the foreign service include *Astrauillo v. Manglapus*, G.R. No. 88183, 190 SCRA 280, Oct. 3, 1990; *Manglapus v. Matias*, G.R. No. 89618, 192 SCRA 496, Dec. 20, 1990; *Santos v. Macaraig*, G.R. No. 94070, 208 SCRA 74, Apr. 10, 1992.

⁴⁴ See Vienna Conventions on Diplomatic Relations and on Consular Relations.

⁴⁵ EDWARD CORWIN & JACK PELTASON, *UNDERSTANDING THE CONSTITUTION* 95 (1965).

⁴⁶ CONST. art. VIII, §§ 1, 5(2).

Being in the form of judicial review, the participation or intervention of the judiciary comes after the fact. It takes place when the act or measure in question is challenged in court, pointing to its limited role. Similar to the Senate's concurrence of treaties, the courts enter the scene after the agreement has been negotiated and signed.

In practice, the courts are generally reticent in exercising judicial review. They do not assume jurisdiction over every actual case or controversy brought before it, even though ripe for resolution. This is particularly true with respect to cases deemed to be "political questions." As defined in *Tanada v. Cuenco*, these are:

...questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government.⁴⁷

Courts have also refrained from exercising jurisdiction over a case until the international agreement at issue has been concluded and its terms questioned in an appropriate case.

Nonetheless, when the courts decide to act and assert their constitutional mandate, such as when the Supreme Court ordered the executive branch to renegotiate an implementing agreement, its consequences are far-reaching.⁴⁸

Executive-Legislative Relations: "An Invitation to Struggle"

The Philippine Congress has generally been supportive of the foreign affairs initiatives of the executive branch through the years. With the exception of treaties with Japan,⁴⁹ Senate concurrence followed as a matter of course.

⁴⁷ 103 Phil. 1051, 1067 (1965). *See also* *Baker v. Carr*, 369 U.S. 185 (1962). American courts have similarly shown a reluctance to second guess the actions of the U.S. President or U.S. Congress in the field of foreign affairs; *See* THOMAS BUERGENTHAL & SEAN MURPHY, *PUBLIC INTERNATIONAL LAW* 183-86 (2002). *See e.g.* *Made in the USA Foundation v. U.S.*, 242 F. 3d 1300 (2001). There the U.S. Eleventh Circuit found that with respect to international commercial agreements such as the North American Free Trade Agreement, the question of what constitutes a "treaty" requiring Senate ratification presents a non-justiciable political question. *See also* *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999). This was a suit filed by 17 members of the House of Representatives challenging President Bill Clinton's ability to maintain a bombing campaign against Yugoslavia without an authorization by Congress which was also dismissed.

⁴⁸ *Nicolas v. Romulo*, G.R. No. 175888, 578 SCRA 438, Feb. 11, 2009.

⁴⁹ The Treaty of Peace with Japan, signed in 1951, was not concurred in until 1956. The RP-Japan Treaty of Amity, Commerce and Navigation concluded in 1960 was not ratified right away. *See* IRENE CORTES, *THE PHILIPPINE PRESIDENCY* 190.

However, Congress has been increasingly vigilant and assertive in exercising its prerogatives on foreign affairs issues, and this was dramatically displayed when in 1991 its upper chamber withheld concurrence on the then proposed RP-US Treaty of Friendship and Commerce. This action paved the way for the closure of the US bases in Subic Bay and Clark Field after decades in operation.

The Senate narrowly passed in 1999 the RP-US Visiting Forces Agreement, which allowed-in again US military personnel, this time on short visit for joint military exercises with the Philippine military. The chamber also set up a bicameral oversight committee to monitor activities under the agreement.⁵⁰

The difficulty in securing a two-thirds majority vote was seen again in the concurrence on the Agreement establishing the World Trade Organization.⁵¹ The RP-Japan Economic Partnership Agreement similarly met stiff opposition and was concurred in only after the Senate received assurance from the executive branch that:

- (a) The implementation of measures by the Philippines and Japan will be in accordance with their respective Constitutions, laws and regulations; and
- (b) Nothing in the JPEPA requires amendments of any of the existing provisions of the Philippine Constitution.

For the above purpose, the Secretary of Foreign Affairs and the Japanese Foreign Minister exchanged the Romulo-Koumura diplomatic Notes embodying the above shared understanding of their respective governments on the interpretation of the JPEPA.⁵²

A departure from the customary simple majority requirement, the two-thirds vote requirement for treaty concurrence can give minority or even sectional groups a veto on a broad range of foreign policy issues.

Agreements submitted by the executive branch but not favored by the Senate leadership may also not be taken up or deliberated in a speedy manner.

⁵⁰ Senate Resolution No. 17.

⁵¹ *Tañada v. Angara*, G.R. No. 118295, 272 SCRA 18, May 2, 1997.

⁵² Note dated Aug. 22, 2008 from Sec. Alberto Romulo to Japanese Foreign Minister Masahiko Koumura, and reply Note dated Aug. 28, 2008 from Japanese Foreign Minister Masahiko Koumura to Sec. Alberto Romulo.

The role of Congress in the treaty-making process, noted the Supreme Court, is “deemed essential to provide a check on the executive in the field of foreign affairs. By requiring the concurrence of the legislature in the treaties entered into by the President, the Constitution ensures a healthy system of checks and balance necessary in the nation’s pursuit of political maturity and growth.”⁵³

A defining case on the extent of the Senate’s role in the formulation of foreign policy dealt with the still proposed ratification by the Philippines of the Rome Statute which established the International Criminal Court, now headquartered in The Hague, Netherlands. The Senate passed Resolution No. 94 expressing its sense that inasmuch as the Philippines signed the Rome Statute on 28 December 2002, the President may transmit the same to the Senate for the latter to “determine whether to concur ... or not.”⁵⁴ The Senate resolution was not heeded by the President.

This prompted a Senator to file a petition for mandamus to compel the Executive Secretary and the Secretary of Foreign Affairs to submit the Rome Statute to the Senate for concurrence. The Supreme Court denied the petition. In *Pimentel v. Executive Secretary*, the Court ruled that the Executive Secretary has no ministerial duty to submit an agreement concluded and signed by Philippine negotiators without the ratification by the President of the agreement. “*The power to ratify is vested in the President, subject to the concurrence of the Senate. The role of the Senate, however, is limited only to giving or withholding its consent, or concurrence, to the ratification.*”⁵⁵

Reflecting on the U.S. experience, the commentator Edward Corwin stated:

[T]he Constitution, considered only for its affirmative grants of power capable of affecting the issue(s) is an invitation to struggle (between the President, the Congress, and the people) for the privilege of directing American foreign policy.⁵⁶

The above could also be said of the Philippine experience.

⁵³ *Pimentel v. Exec. Sec.*, G.R. No. 158088, 462 SCRA 622, Jul. 6, 2005, *citing* *Bayan v. Exec. Sec.*, G.R. No. 138570, 342 SCRA 449, Oct. 10, 2000.

⁵⁴ Approved on Aug. 15, 2006; Introduced by Senator Miriam Defensor Santiago.

⁵⁵ *Pimentel*.

⁵⁶ EDWARD CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957* 171 (4th Rev. ed. 1957).

**The Judiciary on Foreign Affairs Issues:
“The Least Dangerous Branch”?**

The judiciary has been described as a “passive branch”⁵⁷ or the “least dangerous branch” among the three main branches of government.⁵⁸ The courts generally defer to the political branches on policy issues, and this posture of self-restraint finds extensive application on matters of inter-state relations.

The positions of Government on cases involving foreign affairs matters have largely been upheld by the courts through the decades. *“There has not been any official act affecting the relations of the Philippines with other countries which has been declared unconstitutional by the Philippine Supreme Court,”* noted Fr. Joaquin Bernas.⁵⁹

The Supreme Court provided the reason for its reticence in the People’s Movement case, thus:

The conduct of foreign relations of our Government especially the sensitive matter of negotiating a treaty with a foreign government is lodged with the political Departments of the government... the propriety of what may be done in the exercise of their political powers is not subject to judicial inquiry.⁶⁰

Yet, the judiciary’s impact on foreign relations is ample. The Supreme Court, for instance, upheld the Romulo-Snyder agreement of 1950 which stipulated the return by the Philippine government of the monies advanced by the United States for the Philippine armed forces.⁶¹ The high court also sustained the RP-Japan Trade Agreement of 1950⁶² and its successor agreement, the JPEPA.

On the other hand, the Supreme Court in *Gonzalez v. Hechanova*⁶³ invalidated the rice and corn importation contracts entered into by the Government with Vietnam and Myanmar, not for having been invalid in form but for being contrary to a law passed by Congress. This is a rare ruling made by the High Court which invalidated an act of the executive branch in

⁵⁷ Artemio Panganiban, *How the SC Decides Cases*, PHIL. DAILY INQUIRER, Jun. 21, 2009, at A11.

⁵⁸ Alexander Hamilton, THE FEDERALIST NO. 78.

⁵⁹ JOAQUIN BERNAS, S.J., FOREIGN RELATIONS IN CONSTITUTIONAL LAW 123 (1995).

⁶⁰ See *People's Movement for Press Freedom v. Manglapus*; *Akbayan v. Aquino*.

⁶¹ *USAFFE Veteran Ass’n, Inc. v. Treasurer of the Phil.*, No. 10500, 105 Phil 1030, Jun. 30, 1959.

⁶² *Commissioner of Customs v. Eastern Sea Trading*, G.R. No. 14279, 3 SCRA 351, Oct. 31, 1961.

⁶³ *Gonzalez v. Hechanova*, G.R. No. 21897, 9 SCRA 230, Oct. 22, 1963.

its dealings with other governments. "*Our Constitution authorizes the nullification of a treaty, not only when it conflicts with the fundamental law, but also, when it runs counter to an (specific) act of Congress,*" the Court stated.

Recently, vital foreign affairs initiatives are increasingly challenged before the judiciary. Agreements submitted for Senate concurrence are often opposed by interested groups not only in Senate hearings but also in court, at times even prior to or in parallel, such as with the RP-US VFA, WTO treaty,⁶⁴ and JPEPA. Lawsuits have been filed, as of this writing, against the Joint Marine Seismic Undertaking with Vietnam and China, and the Archipelagic Baselines Law, which served as basis for the country's claim for an extended continental shelf.

Though reticent in posture and generally supportive of government's actions, recent rulings are at times accompanied by spirited dissents by individual justices. Chief Justice Reynato Puno wrote lengthy dissents in *Bayan v. Executive Secretary* and in *Nicolas v. Romulo*, which both dealt with the RP-US VFA, and in the JPEPA case. In the Nicolas case, the Supreme Court sustained the agreement, but in an unprecedented move, invalidated the implementing agreements.⁶⁵

Public Opinion and Foreign Policy

Sovereignty resides in the people, and they have the final say on foreign and other public policies. The people speak through duly-elected representatives -- the President and congressional representatives -- who comprise the two political branches of government.

It is often difficult to determine and assess public opinion on public policy issues, short of conducting scientific opinion surveys. Two cases provide illustrations of the sentiments felt by the more vocal, organized pressure groups.

In 1988, the negotiating panels of the Philippine and U.S. met to discuss the future of the U.S. military bases in Subic Bay and Clark Field in view of the then forthcoming expiration of the governing agreement. Feeling excluded from the all-important talks, a group calling itself "People's Movement for Press Freedom" filed a petition for mandamus with the Supreme Court to require the Philippine panel to open the negotiation

⁶⁴ Tañada v. Angara, G.R. No. 118295, 272 SCRA 18, May 2, 1997.

⁶⁵ Nicolas v. Romulo, G.R. No. 175888, 578 SCRA 438, Feb. 11, 2009.

sessions to the public, reveal the agreed points so far achieved, and disclose to the public the positions of each sides on unresolved issues. The group invoked the constitutional provisions which guarantee freedoms of speech and of the press⁶⁶ and the people's right to information on matters of public concern.⁶⁷

The Supreme Court denied the petition, noting that:

Under the Constitution, the conduct of foreign relations of our Government especially on the sensitive matter of negotiating a treaty with a foreign government is lodged with the political Departments of the government. It has been ruled that the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

...The negotiation of treaties calls for a class of expertise, experience and sensitivity to national interest of an extremely high order. It would be a sad day indeed if in the negotiations leading to a treaty, the Philippine panel would be hampered or embarrassed by criticisms or comments from persons with inadequate knowledge or worse by publicity seekers or idle kibitzers.⁶⁸

Adopting American jurisprudence on the matter, especially the leading case *U.S. v. Curtiss-Wright Exports Corporation*,⁶⁹ the Court described the interaction between the political branches on matters of foreign relations:

In this vast external realm, with its important, complicated and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiations the Senate cannot intrude; and Congress itself is powerless to invade it... The President is the sole organ of the nation in its external relations, and its sole representative with foreign countries...⁷⁰

The President, as chief diplomat, must be accorded "*a degree of discretion and freedom from statutory restrictions which would not be admissible where domestic affairs alone are involved*," added the high court. "*After a treaty has been*

⁶⁶ CONST. art. III, § 4.

⁶⁷ art. III, § 7.

⁶⁸ People's Movement for Press Freedom v. Manglapus, G.R. No. 84642, Sep. 13, 1988 (Resolution). *See also* MAGALLONA, *supra* note 35, at 550.

⁶⁹ United States v. Curtiss-Wright Exports Corp., 299 U.S. 304 (1936).

⁷⁰ People's Movement for Press Freedom, 4-5.

drafted and its terms are fully published, there is ample opportunity for discussion before it is approved.”

The “sole organ” principle was invoked by the Supreme Court in its rulings in *Bayan* (2000) and *Pimentel* (2005), but no reference was made in these two cases to the earlier *People’s Movement* resolution. This was perhaps because the latter is an unpublished resolution and therefore might have been overlooked.

The *People’s Movement* resolution was nonetheless cited in the executive privileges case *Francisco Chavez v. Public Estates Authority*⁷¹ as support for on-going diplomatic negotiations as among the recognized exceptions to the constitutional right to information on matter of public concern.

The *People’s Movement* ruling was revisited in minute detail two decades after its promulgation in the case over an economic agreement with Japan.

In 2005, the House Special Committee on Globalization requested the Philippine negotiating panel for copy of the latest draft text of the Japan-Philippine Economic Partnership Agreement (JPEPA), which was being negotiated. The negotiating panel sent a reply letter that a copy will be furnished once the negotiations are completed and a thorough legal review of the text conducted. Amid speculations that the agreement was about to be signed by the two governments, a party-list group petitioned the Supreme Court for mandamus and prohibition.

The Justices were divided on the issue. The majority of the justices resolved to deny the petition, albeit with a vigorous dissent from Chief Justice Puno. In *Akbayan Citizens Action Party v. Thomas Aquino*,⁷² the majority reiterated the principles in *People’s Movement v. Manglapus*, and stated:

...while the final text of the JPEPA may not be kept perpetually confidential – since there should be “ample opportunity for discussion before [a treaty] is approved” – the offers exchanged by the parties during the negotiations continue to be privileged even after the JPEPA is published. It is reasonable to conclude that the Japanese representatives submitted their offers with the

⁷¹ G.R. No. 133250, 384 SCRA 152, Jul. 9, 2002.

⁷² G.R. No. 170516, 558 SCRA 468, Jul. 16, 2008. *See* the dissenting opinion of Chief Justice Reynato Puno on the applicability of *People’s Movement* ruling to the present case.

understanding that “historic confidentiality” would govern the same. Disclosing these offers could impair the ability of the Philippines to deal not only with Japan but with other foreign governments in future negotiations.

...While, on first impression, it appears wise to deter Philippine representatives from entering into compromises, it bears noting that treaty negotiations, or any negotiation for that matter, normally involve a process of quid pro quo, and oftentimes negotiators have to be willing to grant concessions in an area of lesser importance in order to obtain more favorable terms in an area of greater national interest.

...Congress, while possessing vast legislative powers, may not interfere in the field of treaty negotiations. While Article VII, Section 21 provides for Senate concurrence, such pertains only to the validity of the treaty under consideration, not to the conduct of negotiations attendant to its conclusion.

Heightened Conflict or Increased Cooperation?

In the Philippine constitutional system, Congress enacts the laws, and the President takes care that the laws are faithfully executed. The legislature determines the national policies through the laws it passes, which in turn, the President, as his primary duty, executes and implements. The latter, after all, is the Chief Executive. This, in essence, is the separation and balance of powers principle in operation.

The above is certainly true in the domestic sphere, but it is slightly different in the international sphere, argue some commentators.⁷³ The President has traditionally been pre-eminent in foreign affairs, being - as discussed earlier - the "sole organ of the nation in its external relations and its sole representative with foreign countries." Accordingly, the President has the power to determine the policy of the nation in the field of external relations and the substantive content of said policy.

The jurist-diplomat Roberto Regala, for one, further argued that the principle of separation of powers does not necessarily apply to external relations:

⁷³ See *Commissioner of Customs v. Eastern Sea Trading*, G.R. No. 14279, 3 SCRA 351, Oct. 31, 1961.. See also 1 REPORTERS' NOTES TO THE RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (THIRD RESTATEMENT) 9-10 (1987).

Some commentators on constitutional questions believe that much of the controversy stems from the insistence of many leaders and writers on applying the principle of separation of powers in foreign affairs as it had been applied in domestic questions, he wrote.⁷⁴

Yet, it can also be said, *en contra*, that the phrase "sole organ" means that the President merely communicates and conveys to other countries the policy determined by Congress, and that he has no authority to *make* policy - an interpretation which is more in line with the separation of powers principle, as traditionally understood.

In the final analysis, the executive and legislative departments have to interact and work together to achieve the common good and purposes in foreign affairs. They are not independent from each other, but interdependent with each other.

"While the conduct of foreign policy falls within the exclusive domain of the President, the making of foreign policy is the joint function of the President and Congress", noted the commentator Hector de Leon.⁷⁵ Similarly Joaquin Bernas, SJ stated, *"foreign relations power is shared, both by law and by necessity, between the President and Congress... In the conduct of foreign relations, cooperation is the rule; but 'checks and balances' also operate."*⁷⁶

Each of the three main branches of government brings significant strengths to the foreign policy making process. Though the executive has the initiative and key people and resources on the diplomatic frontline, *"second-guessing by Congress can keep presidents from conceiving ill-conceived policies,"* the political scientist Thomas Mann noted. *"Initiatives from (Congress) can also prompt presidents to consider new policies or new ways of thinking about old ones... Open debate in Congress can help build the public support needed to sustain foreign policies over the long term and to adjust those policies to better serve the interests and values of the people."*⁷⁷ The courts, in turn, acts as referee in times of conflict between the two political branches.

In the often complex and delicate interactions between the executive, legislative and judicial branches, it is easy to lose sight of the big picture. As a statesman once observed, *"what we really face is not a quarrel about*

⁷⁴ REGALA, *supra* note 27, at 81, 83. *See also* United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936).

⁷⁵ HECTOR DE LEON, PHILIPPINE CONSTITUTIONAL LAW 392.

⁷⁶ BERNAS, S.J., *supra* note 59, at 102.

⁷⁷ A QUESTION OF BALANCE: THE PRESIDENT, CONGRESS AND FOREIGN POLICY 3 (Thomas Mann ed. 1990).

*what the Constitution means, but about what, within the broad constitutional framework, our national interest requires.*⁷⁸

The foregoing discussions allow us to draw the following postulates:

First, the President and Congress share the power to formulate foreign policy, the sum total of those principles under which a nation's relations with other countries are conducted. The initiative in the crafting of such policy is with the executive branch, but Congress and, in particular, its Senate, has a lot of influence and sway.

Second, the implementation of foreign policy, or diplomacy, is largely the prerogative of the President and the executive branch.

Third, the constitutional allocation of powers in foreign affairs being "an invitation to struggle," tensions between the executive and legislative branches are often the norm. Sharp conflicts should be expected, particularly when the leaderships of the two distinct branches are in the hands of rival political parties.

Fourth, executive-legislative partnership is essential to a successful formulation and implementation of foreign policy. More cooperation and less conflict will take place if the role of Congress in the crafting of foreign policy is acknowledged and accommodated. This requires that not only should Senators have their say after agreements are concluded with other countries and then submitted to the Senate for concurrence, but also that key leaders in both chambers are briefed and their advice sought before major foreign policy initiatives are launched and while being undertaken. They should also be provided timely information on other major developments. The timely passage of the Baselines Law showed how effective such a partnership can be.

Fifth, public opinion will increasingly influence foreign policy formulation and implementation. A vital foreign policy measure cannot be sustained without the support or, at the very least, acquiescence of the people. A conscious effort to consult and seek support from the larger public on key foreign policy issues is essential.

⁷⁸ Warren Christopher, *Ceasefire between the Branches: A Compact in Foreign Affairs*, 66 FOREIGN AFFAIRS JOURNAL 996 (1982).

Sixth, the courts are the arbiter between the executive and legislative branches in their conflict on foreign policy issues.

Seventh, courts are generally reticent in exercising judicial review over foreign affairs cases. If they undertake a review, they will generally decide on the basis of constitutionality – that is, whether the official or agency which undertook the foreign policy measure had the power to do so, and within any applicable legal limitation – and not on the propriety or wisdom of the measure.

Eighth, judicial intervention and resolution will be more pronounced if there is conflict between the political branches, or if there is lack of support, or worse, active resistance on key issues from the general public.

Indeed, a dynamic working partnership among the three main branches of government and a supportive citizenry are indispensable in the attainment of the common good and national objectives in the often perilous international arena.

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