G.R. No. 204605 – INTELLECTUAL PROPERTY ASSOCIATION OF THE PHILIPPINES, *Petitioner*, *v.* HON. PAQUITO OCHOA, EXECUTIVE SECRETARY, ET AL., *Respondents*.

Promulgated:

July 19, 2016

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SEPARATE CONCURRING OPINION

BRION, *J.*:

I write this Separate Opinion to emphasize my reasons for concurring with the *ponencia*'s conclusion that the Philippines' accession to the Madrid Protocol through an Executive Agreement is not unconstitutional.

I believe that the time has come for this Court to definitively set concrete parameters regarding the treatment of an international agreement as a treaty or as an executive agreement. To date, we have been using the discussion on what constitutes an "executive agreement" as discussed in the case *Commissioner of Customs v. Eastern Trading*,[1] a ***1961*** case decided long ***before*** the 1987 Constitution took effect and changed the language of the provision on the effectivity and validity of international agreements in the Philippines.

This change in ***constitutional language*** calls for a clarification of what may be the subject of executive agreements that no longer need Senate concurrence to be valid and effective in the Philippines. The need is now acute, particularly in the light of the recent cases questioning the treatment of international agreements as executive agreements, such as the Enhanced Defense Cooperation Agreement (*EDCA*) and now the present Madrid Protocol case.

To avoid further confusion, the need for litigation, and the consequent international embarrassment all these can cause, we should now exercise as well our power and duty to educate the bar and the public in the course of setting standards in determining when an international agreement may be entered into as an executive agreement.

These parameters, to my mind, should reflect the shared function of the Executive and the Legislature in treaties, which in turn fits into the larger context of the separation of powers and the checks and balances that underlie the operations of our government under the Constitution.

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[1] G.R. No. L-14279, October 31, 1961.

As I will discuss below, Section 21, Article VII of the 1987 Constitution is a reflection of this setup. It is a carefully worded provision in the Constitution made to ensure that the President's prerogative in the conduct of international affairs is subject to the check and balance by the Senate, requiring that the Senate first concur in international agreements that the President enters into before they take effect in the Philippines.

Under this regime, the Madrid Protocol is valid and effective in the Philippines as an executive agreement that the President can enter into without need of Senate concurrence. The reason, stated at its simplest, is that the President was merely implementing a policy previously approved through a law by Congress, when he signed the Madrid Protocol as an executive agreement. The obligations under the Madrid Protocol are thus valid and effective in the Philippines for having been made pursuant to the exercise of the President's executive powers.

Article VII, Section 21 of the 1987 Constitution in the context of separation of powers

The Philippine government operates under the complementary principles of separation of powers and checks and balances. The three functions of government are concentrated in its three great branches, with each branch supreme in its own sphere: the ***Legislature*** possesses the power to create laws that are binding in the Philippines, which the ***Executive*** has the duty to implement and enforce. The ***Judiciary***, on the other hand, resolves conflicts that may arise from the implementation of these laws and, on occasion, nullifies acts of government (whether legislative or executive) that have been made with grave abuse of discretion under the Court's expanded jurisdiction in Article VIII, Section 1 of the 1987 Constitution.[2]

That each branch of government is supreme in its own sphere does not, however, mean that they no longer interact with or are isolated from one another in the exercise of their respective duties.[3]

To be sure, one branch cannot usurp the power of another without violating the principle of separation of powers, but this is not an absolute rule; rather, it is a rule that operates hand in hand with arrangements that allow the participation of one branch in another branch's action under the system of checks and balances that the Constitution itself provides. The Constitution in fact imposes such joint action so that one branch can check and balance the actions of the other, to ensure public accountability and guard against the tyrannical concentration of power.

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2 *Angara v. Electoral Commission*, 63 Phil. 139 (1936).

3 Ibid.

Thus, Congress, while supreme in its authority to enact laws,[4] is checked and balanced in this authority through the President's veto power. Congress possesses, save for the limitations found in the Constitution, the full discretion to decide the subject matter and content of the laws it passes, but this bill, once passed by both houses of Congress, would have to be signed by the President. If the President does not approve of the bill, he can veto it and send the bill back to Congress with reasons for his disapproval. Congress, in turn, can either override the veto or simply accept the President's disapproval.[5]

The same dynamics apply to the enactment of the General Appropriations Act, which is inarguably the most important law passed by Congress every year. The GAA is subject to the President's item veto, a check-and-balance mechanism specific to appropriation bills.[6]

Note, too, that the declaration of martial law, while still a power of the President, is subject to check-and-balance mechanisms from Congress: The President is duty-bound, within forty-eight hours from declaring martial law or suspending the privilege of the writ of habeas corpus, to submit a report to Congress. Congress, voting jointly, may revoke the declaration or suspension. The President cannot set this revocation aside.[7]

The Court exercises a passive role in these scenarios, but it is duty-bound to determine (and nullify) acts of grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the other branches and other government agencies.[8]

The act of entering into international agreements operate under this wider context of separation of powers and checks and balances among the three branches of government.

Without doubt, the President has the sole authority over, and is the country's chief representative in the conduct of foreign affairs. This authority includes the negotiation and ratification of international agreements: the President has full discretion (subject to the limits found in the Constitution) to negotiate and enter into international agreements in behalf of the Philippine government. But this discretion is subject to a check and balance from the legislative branch of government, that is, the Senate has to give its concurrence with an international agreement before it may be considered valid and effective in the Philippines.[9]

Notably, the veto power of the President over bills passed by Congress works in a manner similar to the need for prior Senate concurrence over international agreements. ***First***, both are triggered through the exercise

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4 Article VI, Section 1 of the 1987 Constitution.
5 Article VI, Section 27 of the 1987 Constitution.
6 Ibid.
7 Article VII, Section 18 of the 1987 Constitution.
8 Article VIII, Section 1 of the 1987 Constitution; Article VII, Section 18 of the 1987 Constitution.
9 *Pimentel, Jr. v. Office of the Executive Secretary*, G.R. No. 158088, July 6, 2005, 462 SCRA 622.

by the other body of its governmental function – the President may only veto a bill after it has been passed by Congress, while the Senate may only exercise its prerogative to concur with an international agreement after it has been ratified by the President and sent to the Senate for concurrence. ***Second***, the governmental act would not take effect without the other branch's assent to it. The President would have to sign the bill, or let it lapse into law (in other words, he would have to choose not to exercise his veto prerogative) before the law could take effect. In the same light, the Senate would have to concur in the international agreement before it may be considered valid and effective in the Philippines. The similarities in these mechanisms indicate that they function as check and balance measures – to the prerogative of Congress in lawmaking, and to the President's exercise of its foreign affairs powers.

We should not forget, in considering the concurrence requirement, that the need for prior concurrence from the legislative branch before international agreements become effective in the Philippines has historically been the constitutional approach starting from the 1935 Constitution.

Under the 1935 Constitution, ***the President has the "power, with the concurrence of a majority of all the members of the National Assembly, to make treaties xxx."*** The provision, Article VII, Section 11, paragraph 7 is part of the enumeration of the President's powers under Section 11, Article VII of the 1935 Constitution. This recognition clearly marked treaty making to be an executive function, but its exercise was nevertheless subject to the concurrence of the National Assembly. A subsequent amendment to the 1935 Constitution, which divided the country's legislative branch into two houses,[10] transferred the function of treaty concurrence to the Senate, and required that two-thirds of its members assent to the treaty.

By 1973, the Philippines adopted a presidential parliamentary system of government, which merged some of the functions of the Executive and Legislative branches of government in one branch.[11] Despite this change,

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10 See the National Assembly's Resolution No. 73 in 1940.

11 See, Article VIII, Section 2 which provides:

SEC. 2. The Batasang Pambansa which shall be composed of not more than 200 Members unless otherwise provided by law, shall include representatives elected from the different regions of the Philippines, those elected or selected from various sectors as may be provided by law, and those chosen by the President from the members of the Cabinet. Regional representatives shall be apportioned among the regions in accordance with the number of their respective inhabitants and on the basis of a uniform and progressive ratio.

In reference to Article IX, Sections 1 to 3:

SECTION 1 There shall be a Cabinet which shall be composed of Ministers with or without portfolio appointed by the President. At least a majority of the Members of the Cabinet who are heads of ministries shall come from the Regional Representatives of the Batasang Pambansa.

The Prime Minister shall be the head of the Cabinet. He shall, upon the nomination of the President from among the Members of the Batasang Pambansa, be elected by a majority of all the Members thereof.

SEC. 2. The Prime Minister and the Cabinet shall be responsible to the Batasang Pambansa for the program of government approved by the President.

concurrence was still seen as necessary in the treaty-making process, as Article VIII, Section 14 required that a treaty should be first concurred in by a majority of all Members of the Batasang Pambansa before they could be considered valid and effective in the Philippines, thus:

> SEC. 14. (1) Except as otherwise provided in this Constitution, no treaty shall be valid and effective unless concurred in by a majority of all the Members of the Batasang Pambansa.

This change in the provision on treaty ratification and concurrence is significant for the following reasons:

First, the change **clarified the effect of the lack of concurrence to a treaty**, that is, a treaty without legislative concurrence shall not be valid and effective in the Philippines.

Second*, the change of wording also reflected the dual nature of the Philippines' approach in international relations.**[12] Under this approach, the Philippines sees international law and its international obligations from two perspectives: *first*, from the ***international plane, where international law reigns supreme over national laws; and *second*, from the ***domestic plane***, where the international obligations and international customary laws are considered in the same footing as national laws, and do not necessarily prevail over the latter.[13] The Philippines' treatment of international obligations as statutes in its domestic plane also means that they cannot contravene the Constitution, including the mandated process by which they become effective in Philippine jurisdiction.

Thus, while a treaty ratified by the President is binding upon the Philippines in the international plane, it would need the concurrence of the legislature before it can be considered as valid and effective in the Philippine domestic jurisdiction. Prior to and even without concurrence, the treaty, once ratified, is valid and binding upon the Philippines in the international plane. But in order to take effect in the Philippine domestic plane, it would have to first undergo legislative concurrence as required under the Constitution.

Third, that the provision had been couched in the negative emphasizes the mandatory nature of legislative concurrence before a treaty may be considered valid and effective in the Philippines.

SEC. 3. There shall be an Executive Committee to be designated by the President, composed of the Prime Minister as Chairman, and not more than fourteen other members, at least half of whom shall be Members of the Batasang Pambansa. The Executive Committee shall assist the President in the exercise of his powers and functions and in the performance of his duties as he may prescribe.

The Members of the Executive Committee shall have the same qualifications as those of the Members of the Batasang Pambansa.

[12] M. Magallona. "The Supreme Court and International Law: Problems and Approaches in Philippine Practice" 85 *Philippine Law Journal* 1, 2 (2010).

[13] See: *Secretary of Justice v. Hon. Lantion*, 379 Phil. 165, 212-213 (2000).

The phrasing of Article VIII, Section 14 of the 1973 Constitution has been retained in the 1987 Constitution, except for three changes: ***First***, the Batasang Pambansa has been changed to the Senate to reflect the current setup of our legislature and our tripartite system of government. ***Second***, the vote required has been increased to two-thirds, reflective of the practice under the amended 1935 Constitution. ***Third***, the term "***international agreement***" has been added, aside from the term *treaty*. Thus, aside from treaties, "international agreements" now need concurrence before being considered as valid and effective in the Philippines. Thus, Article VII, Section 21 of the present Constitution reads:

> 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 impact of the addition of the term "international agreement" in Section 21, Article VII of the 1987 Constitution

In the international sphere, the term international agreement covers both a treaty, an executive agreement, or by whatever name or title an agreement may be called, as long as it is concluded between States, is in written form, and is governed by international law. Thus, the Vienna Convention on the Law on treaties provide:

> Article 2. Section 1 (a) "Treaty" means an international agreement concluded between States in written form and governed by International Law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

The Philippines was a signatory of the Vienna Convention at the time the 1986 Constitutional Commission deliberated on and crafted the 1987 Constitution.[14] Deliberations of the Constitutional Commission even referred to the Vienna Convention on treaties while discussing what is now Article VII, Section 21.

Commissioner Sarmiento, in proposing that the term "international agreements" be deleted from Article VII, Section 21, noted that the Vienna Convention provides that treaties are international agreements, hence, including the term international agreement is unnecessary and duplicative.[15]

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[14] The Philippines deposited its instrument of ratification of the Vienna Convention on November 15, 1972.

[15] See the following discussion during the deliberations of the 1986 Constitutional Commission:

> MR. SARMIENTO: I humbly propose an amendment to the proposed resolution of my Committee and this is on page 9, Section 20, line 7, which is to delete the words "or international agreement." May I briefly explain.
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> First, Article VII of the 1935 Constitution does not mention international agreement. Second, the Vienna Convention on the Law on Treaties states that a treaty is an international agreement. Third, the very source of this provision, the United States Constitution, does not speak

However, this proposal was withdrawn, as several commissioners insisted on including the term "international agreement" as a catch-all phrase for agreements that are international and more permanent in nature. It became apparent from the deliberations that the ***commissioners consider a treaty to be a kind of international agreement*** that serves as a contract between its parties and is part of municipal law. Thus, it would appear that the inclusion of the term "international agreement" in Section 21, Article VII of the 1987 Constitution was meant to ensure that an international agreement, regardless of its designation, should first be concurred in by the Senate before it can be considered valid and effective in the Philippines.[16]

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of international agreement; it only speaks of treaties. So with that brief explanation, may I ask the Committee to consider our amendment.

Commissioners Guingona, Villacorta and Aquino are supportive of this amendment.

THE PRESIDENT: What does the Committee say?

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[16] In response to Commissioner Sarmiento's suggestion, Commissioner Concepcion offered the following insight:

MR. CONCEPCION: Madam President.

THE PRESIDENT: Commissioner Concepcion is recognized.

MR. CONCEPCION: Thank you, Madam President.

International agreements can become valid and effective upon ratification of a designated number of parties to the agreement. But what we can say here is that it shall not be valid and effective as regards the Philippines. For instance, there are international agreements with 150 parties and there is a provision generally requiring say, 50, to ratify the agreement in order to be valid; then only those who ratified it will be bound. Ratification is always necessary in order that the agreement will be valid and binding.

MR SARMIENTO: Do I take it to mean that international agreements should be retained in this provision?

MR. CONCEPCION: Yes. But when we say "shall not be valid and effective, we say AS REGARDS THE PHILIPPINES

MR. SARMIENTO: So, the Commissioner is for the inclusion of the words "AS REGARDS THE PHILIPPINES"?

MR. CONCEPCION: Yes. No agreement will be valid unless the Philippines ratifies it.

MR. SARMIENTO: So may I know the final position of the Committee with respect to my amendment by deletion?

MR. CONCEPCION: I would say "No treaty or international agreement shall be valid and effective AS REGARDS THE PHILIPPINES unless concurred in by at least two-thirds of all the members of the Senate."

MR. SARMIENTO: If that is the position of the Chief Justice who is an expert on international law . . .

MR. CONCEPCION: I am not an expert.

MR. SARMIENTO: . . . then I will concede. I think Commissioner Aquino has something to say about Section 20.

THE PRESIDENT: This particular amendment is withdrawn.

MS. AQUINO: Madam President, first I would like a clarification from the Committee. We have retained the words "international agreement" which I think is the correct judgment on the

Executive Agreements as an exception to the need for legislative concurrence in international agreements

Hand in hand with the above considerations of Section 21, Article VII, executive agreements have been recognized through jurisprudence and by the provisions of the 1973 and the 1987 Constitutions themselves.

Although the 1935 Constitution did not expressly recognize the existence and validity of executive agreements, jurisprudence and practice under it did. Thus, the *Commissioner of Customs v. Eastern Sea Trading*, a 1961 case, recognized the capacity of the President to enter into executive agreements and its validity under Philippine law,[17] *viz*:

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matter because an international agreement is different from a treaty. ***A treaty is a contract between parties which is in the nature of international agreement and also a municipal law in the sense that the people are bound.*** So there is a conceptual difference. However, I would like to be clarified if the international agreements include executive agreements.

MR. CONCEPCION: That depends upon the parties. All parties to these international negotiations stipulate the conditions which are necessary for the agreement or whatever it may be to become valid or effective as regards the parties. II RECORD, CONSTITUTIONAL COMMISSION (31 July 1986).

[17] The full discussion on executive agreements in Collector of Customs v. Eastern Shipping reads as:

The Court of Tax Appeals entertained doubts on the legality of the executive agreement sought to be implemented by Executive Order No. 328, owing to the fact that our Senate had not concurred in the making of said executive agreement. The concurrence of said House of Congress is required by our fundamental law in the making of "treaties" (Constitution of the Philippines, Article VII, Section 10[7]), which are, however, distinct and different from "executive agreements," which may be validly entered into without such concurrence.

Treaties are formal documents which require ratification with the approval of two thirds of the Senate. Executive agreements become binding through executive action without the need of a vote by the Senate or by Congress.

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. . . the right of the Executive to enter into binding agreements without the necessity of subsequent Congressional approval has been confirmed by long usage. From the earliest days of our history we have entered into executive agreements covering such subjects as commercial and consular relations, most-favored-nation rights, patent rights, trademark and copyright protection, postal and navigation arrangements and the settlement of claims. The validity of these has never been seriously questioned by our courts.

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Agreements with respect to the registration of trade-marks have been concluded by the Executive with various countries under the Act of Congress of March 3, 1881 (21 Stat. 502). Postal conventions regulating the reciprocal treatment of mail matters, money orders, parcel post, etc., have been concluded by the Postmaster General with various countries under authorization by Congress beginning with the Act of February 20, 1792 (1 Stat. 232, 239). Ten executive agreements were concluded by the President pursuant to the McKinley Tariff Act of 1890 (26 Stat. 567, 612), and nine such agreements were entered into under the Dingley Tariff Act 1897 (30 Stat. 151, 203, 214). A very much larger number of agreements, along the lines of the one with Rumania previously referred to, providing for most-favored-nation treatment in customs and related matters have been entered into since the passage of the Tariff Act of 1922, not by direction of the Act but in harmony with it.

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The use of executive agreements could presumably be the reason for its subsequent express recognition in subsequent constitutions. Article X,

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> International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements.
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> Furthermore, the United States Supreme Court has expressly recognized the validity and constitutionality of executive agreements entered into without Senate approval. (39 Columbia Law Review, pp. 753-754) (See, also, *U.S. v. Curtis-Wright Export Corporation*, 299 U.S. 304, 81 L. ed. 255; *U.S. v. Belmont*, 301 U.S. 324, 81 L. ed. 1134; *U.S. v. Pink*, 315 U.S. 203, 86 L. ed. 796; *Ozanic v. U.S.*, 188 F. 2d. 288; Yale Law Journal, Vol. 15, pp. 1905-1906; California Law Review, Vol. 25, pp. 670-675; Hyde on International Law [Revised Edition], Vol. 2, pp. 1405, 1416-1418; Willoughby on the U.S. Constitutional Law, Vol. I [2d ed.], pp. 537-540; Moore, International Law Digest, Vol. V, pp. 210-218; Hackworth, International Law Digest, Vol. V, pp. 390-407). (Emphasis supplied.)
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> In this connection, Francis B. Sayre, former U.S. High Commissioner to the Philippines, said in his work on "The Constitutionality of Trade Agreement Acts":
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> Agreements concluded by the President which fall short of treaties are commonly referred to as executive agreements and are no less common in our scheme of government than are the more formal instruments — treaties and conventions. They sometimes take the form of exchanges of notes and at other times that of more formal documents denominated "agreements" time or "protocols". The point where ordinary correspondence between this and other governments ends and agreements — whether denominated executive agreements or exchanges of notes or otherwise — begin, may sometimes be difficult of ready ascertainment. It would be useless to undertake to discuss here the large variety of executive agreements as such, concluded from time to time. Hundreds of executive agreements, other than those entered into under the trade-agreements act, have been negotiated with foreign governments. . . . It would seem to be sufficient, in order to show that the trade agreements under the act of 1934 are not anomalous in character, that they are not treaties, and that they have abundant precedent in our history, to refer to certain classes of agreements heretofore entered into by the Executive without the approval of the Senate. They cover such subjects as the inspection of vessels, navigation dues, income tax on shipping profits, the admission of civil aircraft, customs matters, and commercial relations generally, international claims, postal matters, the registration of trademarks and copyrights, etcetera. Some of them were concluded not by specific congressional authorization but in conformity with policies declared in acts of Congress with respect to the general subject matter, such as tariff acts; while still others, particularly those with respect of the settlement of claims against foreign governments, were concluded independently of any legislation." (39 Columbia Law Review, pp. 651, 755.)

Section 2 of the 1973 Constitution[18] included executive agreements as a subject matter of judicial review, and this is repeated in Article VIII, Section 5 (2)[19] of the 1987 Constitution.

Article X Section 2, (1) of the 1973 Constitution provided that:

> SEC. 2. xxx
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> (1) All cases involving the constitutionality of a treaty, executive agreement, or law shall be heard and decided by the Supreme Court en banc, and no treaty, ***executive agreement***, or law may be declared unconstitutional without the concurrence of at least ten Members. All other cases, which under its rules are required to be heard en banc, shall be decided with the concurrence of at least eight Members.

Article VIII, Section 5 (2) of the 1987 Constitution, on the other hand, states:

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> (2) Review, revise, reverse, 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:
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> (a) All cases in which the constitutionality or validity of any treaty, international or ***executive agreement***, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.
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The deliberations of the 1986 Constitutional Commission also show that the framers recognize that the President may enter into executive agreements, which are valid in the Philippines even without Senate concurrence:

> MS. AQUINO: Madam President, first I would like a clarification from the Committee. We have retained the words "international agreement" which I think is the correct judgment on the matter because an international agreement is different from a treaty. ***A treaty is a contract between parties which is in the nature of international agreement and also a municipal law in the sense that the people are bound. So there is a conceptual difference.*** However, I would like to be clarified if the international agreements include executive agreements.

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[18] SEC. 2. (1) The Supreme Court shall be composed of a Chief Justice and fourteen Associate Justices. It may sit en banc or in two divisions.

(2) All cases involving the constitutionality of a treaty, ***executive agreement***, or law shall be heard and decided by the Supreme Court en banc, and no treaty, executive agreement, or law may be declared unconstitutional without the concurrence of at least ten Members. All other cases, which under its rules are required to be heard en banc, shall be decided with the concurrence of at least eight Members.

[19] (2) Review, revise, reverse, 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:

(a) All cases in which the constitutionality or validity of ***any treaty, international or executive agreement***, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.

MR. CONCEPCION: That depends upon the parties. All parties to these international negotiations stipulate the conditions which are necessary for the agreement or whatever it may be to become valid or effective as regards the parties.

MS. AQUINO: Would that depend on the parties or would that depend on the nature of the executive agreement? According to common usage, there are two types of executive agreement: one is purely proceeding from an executive act which affects external relations independent of the legislative and the other is an executive act in pursuance of legislative authorization. The first kind might take the form of just conventions or exchanges of notes or protocol while the other, which would be pursuant to the legislative authorization, may be in the nature of commercial agreements.

MR. CONCEPCION: Executive agreements are generally made to implement a treaty already enforced or to determine the details for the implementation of the treaty. We are speaking of executive agreements, not international agreements.

MS. AQUINO: I am in full agreement with that, except that it does not cover the first kind of executive agreement which is just protocol or an exchange of notes and this would be in the nature of reinforcement of claims of a citizen against a country, for example.

MR. CONCEPCION: The Commissioner is free to require ratification for validity insofar as the Philippines is concerned.

MS. AQUINO: It is my humble submission that we should provide, unless the Committee explains to us otherwise, an explicit proviso which would except executive agreements from the requirement of concurrence of two-thirds of the Members of the Senate. Unless I am enlightened by the Committee I propose that tentatively, the sentence should read, "No treaty or international agreement EXCEPT EXECUTIVE AGREEMENTS shall be valid and effective."

FR. BERNAS: I wonder if a quotation from the Supreme Court decision might help clarify this:

The right of the executive to enter into binding agreements without the necessity of subsequent Congressional approval has been confirmed by long usage. From the earliest days of our history, we have entered into executive agreements covering such subjects as commercial and consular relations, most favored nation rights, patent rights, trademark and copyright protection, postal and navigation arrangements and the settlement of claims. The validity of this has never been seriously questioned by our Courts.

Agreements with respect to the registration of trademarks have been concluded by the executive of various countries under the Act of Congress of March 3, 1881 (21 Stat. 502). xxx International agreements involving political issues or changes of national policy and those involving international agreements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail, carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements.

MR. ROMULO: Is the Commissioner, therefore, excluding the executive agreements?

FR. BERNAS: ***What we are referring to, therefore, when we say international agreements which need concurrence by at least two-thirds are those which are permanent in nature.***

MS. AQUINO: And it may include commercial agreements which are executive agreements essentially but which are proceeding from the authorization of Congress. If that is our understanding, then I am willing to withdraw that amendment.

FR. BERNAS: If it is with prior authorization of Congress, then it does not need subsequent concurrence by Congress.

MS. AQUINO: In that case, I am withdrawing my amendment

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MR. GUINGONA: I am not clear as to the meaning of "executive agreements" because I heard that these executive agreements must rely on treaties. In other words, there must first be treaties.

MR. CONCEPCION: No, I was speaking about the common use, as executive agreements being the implementation of treaties, details of which do not affect the sovereignty of the State.

MR. GUINGONA: ***But what about the matter of permanence, Madam President? Would 99 years be considered permanent? What would be the measure of permanency? I do not conceive of a treaty that is going to be forever, so there must be some kind of a time limit.***

MR. CONCEPCION: ***I suppose the Commissioner's question is whether this type of agreement should be included in a provision of the Constitution requiring the concurrence of Congress.***

MR. GUINGONA: It depends on the concept of the executive agreement of which I am not clear. If the executive agreement partakes of the nature of a treaty, then it should also be included.

MR. CONCEPCION: Whether it partakes or not of the nature of a treaty, it is within the power of the Constitutional Commission to require that.

MR. GUINGONA: Yes. That is why I am trying to clarify whether the words "international agreements" would include executive agreements.

MR. CONCEPCION: No, not necessarily; generally no.

MR. TINGSON: Madam President.

THE PRESIDENT: Commissioner Tingson is recognized.

MR. TINGSON: If the Floor Leader would allow me, I have only one short question.

> MR. ROMULO: I wish to be recognized first. I have only one question. ***Do we take it, therefore, that as far as the Committee is concerned, the term "international agreements" does not include the term "executive agreements" as read by the Commissioner in that text?***
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> FR. BERNAS: ***Yes.***[20]

Thus, despite the attempt in the 1987 Constitution to ensure that all international agreements, regardless of designation, be the subject of Senate concurrence, the Constitution likewise acknowledged that the President can enter into executive agreements that the Senate no longer needs to concur in.

An ***executive agreement***, when examined under the definition of what constitutes a ***treaty*** under the Vienna Convention on Treaties, falls within the Convention's definition. An executive agreement as used in Philippine law is definitely "an international agreement concluded between States in written form and governed by International Law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation[.]"

The confusion that the seemingly differing treatment of executive agreement brings, however, is more apparent than real when it is considered that both instruments – a treaty and an executive agreement – both have constitutional recognition that can be reconciled: an executive agreement is an exception to the Senate concurrence requirement of Article VII, Section 21 of the 1987 Constitution; it is an international agreement that does not need Senate concurrence to be valid and effective in the Philippines.

Its exceptional character arises from the reality that the Executive possesses the power and duty to execute and implement laws which, when considered together with the President's foreign affairs powers, authorizes the President to agree to international obligations that he can already implement as Chief Executive of the Philippine government. In other words, the President can ratify as executive agreements those obligations that he can already *execute and implement* because they already carry *prior legislative authorization*, or have already gone through the treaty-making process under Article VII, Section 21 of the 1987 Constitution.[21]

In these lights, executive agreements are a function of the President's duty to execute the laws faithfully. They trace their validity from existing laws or treaties that have been authorized by the legislative branch of government. They implement laws and treaties.[22]

In contrast, treaties are international agreements that need concurrence from the Senate. They do not originate solely from the President's duty as the executor of the country's laws, but from the shared function that the

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[20] II RECORD, CONSTITUTIONAL COMMISSION 544-546 (31 July 1986).

[2121] *See* J. Brion's Dissenting Opinion in *Saguisag v. Executive Secretary*, G.R. No. 212426, January 12, 2016.

[22] Ibid.

Constitution mandated between the President and the Senate under Article VII, Section 21 of the 1987 Constitution.[23]

Between the two, a treaty exists on a higher plane as it carries the authority of the President and the Senate. Treaties, which have the impact of statutory law in the Philippines, can amend or prevail over prior statutory enactments.[24] Executive agreements – which are at the level of implementing rules and regulations or administrative orders in the domestic sphere – have no such effect. These cannot contravene or amend statutory enactments and treaties.[25]

This difference in impact is based on their origins: since a treaty has the approval of both the President and the Senate, it has the same impact as a statute. In contrast, since an executive agreement springs from the President's power to execute laws, it cannot amend or violate existing treaties, and must be in accord with and in pursuant to laws and treaties.[26]

Accordingly, the ***intended effect of an international agreement determines its form.***

When an international agreement merely implements an existing agreement, it is properly in the form of an executive agreement. In contrast, when an international agreement involves the introduction of a new subject matter or an amendment of existing agreements or laws, then it should properly be in the form of a treaty. Otherwise, the enforceability of this international agreement in the domestic sphere should be carefully examined, as it carries no support from the legislature. To emphasize, should an executive agreement amend or contravene statutory enactments and treaties, then it is void and cannot be enforced in the Philippines; the Executive who issued it had no authority to issue an instrument that is contrary to or outside of a legislative act or a treaty.[27]

In this sense, an executive agreement that creates new obligations or amends existing ones, has been issued with grave abuse of discretion amounting to a lack of or excess of jurisdiction, and can be judicially nullified through judicial review.

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[23] Ibid.

[24] See *Secretary of Justice v. Lantion*, 379 Phil. 165 (2004); *Bayan Muna v. Romulo*, 656 Phil. 246 (2011).

[25] See *Bayan Muna v. Romulo*, 656 Phil. 246 (2011); *Nicolas v. Romulo*, 598 Phil. 262 (2009); *Gonzales v. Hechanova*, 118 Phil. 1065 (1963); CIVIL CODE, Art. 7.; J. Brion's Dissenting Opinion in *Saguisag v. Executive Secretary*; G.R. No. 212426, January 12, 2016 and J. Carpio's Dissenting Opinion in *Suplico v. National Economic Development Authority*, G.R. No. 178830, 14 July 2008, 558 SCRA 329, 360-391.

[26] *See* J. Brion's Dissenting Opinion in *Saguisag v. Executive Secretary*; G.R. No. 212426, January 12, 2016.

[27] *See supra* note 25.

The obligations found in the Madrid Protocol are within the Executive's power to implement, and may be the subject of an executive agreement.

Applying these standards to the contents of the Madrid Protocol, I find that the obligations in this international agreement may be the subject of an executive agreement. **The Madrid Protocol facilitates the Philippines' entry to the Madrid System.[28] Under the Madrid System, a person can register his trademark internationally by filing for an international registration of his trademark in one of the contracting parties (*CP*) under the Madrid System. Once a person has filed for or acquired a trademark with the IPO in his country of origin (that is also a CP), he can file for the international recognition of his trademark with the same office.[29]**

The CP is then obligated to forward the request to the World Intellectual Property Organization's (*WIPO*) International Bureau, which

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[28] See Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks;

[29] Article 2 of the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks provides:

Article 2
Securing Protection through International Registration

(1) Where an application for the registration of a mark has been filed with the Office of a Contracting Party, or where a mark has been registered in the register of the Office of a Contracting Party, the person in whose name that application (hereinafter referred to as "the basic application") or that registration (hereinafter referred to as "the basic registration") stands may, subject to the provisions of this Protocol, secure protection for his mark in the territory of the Contracting Parties, by obtaining the registration of that mark in the register of the International Bureau of the World Intellectual Property Organization (hereinafter referred to as "the international registration," "the International Register," "the International Bureau" and "the Organization," respectively), provided that,

(i) where the basic application has been filed with the Office of a Contracting State or where the basic registration has been made by such an Office, the person in whose name that application or registration stands is a national of that Contracting State, or is domiciled, or has a real and effective industrial or commercial establishment, in the said Contracting State,

(ii) where the basic application has been filed with the Office of a Contracting Organization or where the basic registration has been made by such an Office, the person in whose name that application or registration stands is a national of a State member of that Contracting Organization, or is domiciled, or has a real and effective industrial or commercial establishment, in the territory of the said Contracting Organization.

(2) The application for international registration (hereinafter referred to as "the international application") shall be filed with the International Bureau through the intermediary of the Office with which the basic application was filed or by which the basic registration was made (hereinafter referred to as "the Office of origin"), as the case may be.

(3) Any reference in this Protocol to an "Office" or an "Office of a Contracting Party" shall be construed as a reference to the office that is in charge, on behalf of a Contracting Party, of the registration of marks, and any reference in this Protocol to "marks" shall be construed as a reference to trademarks and service marks.

(4) For the purposes of this Protocol, "territory of a Contracting Party" means, where the Contracting Party is a State, the territory of that State and, where the Contracting Party is an intergovernmental organization, the territory in which the constituting treaty of that intergovernmental organization applies.

will then forward it to the other CPs where the person has applied for trademark recognition.[30] The IPO in these countries would then determine whether the trademark may be registered under the laws of their country.[31]

Thus, a foreign national may, in applying for an international registration of his trademark, include the Philippines as among the jurisdictions with which he seeks to register his trademark. Upon receipt of his application from the IPO of his country of origin, the WIPO would forward the application to the Philippine Intellectual Property Office (*IPOPHIL*). The IPOPHIL would then conduct a substantive examination of the application, and determine whether the trademark may be registered under Philippine law.[32]

Note, at this point, that the Madrid Protocol does not replace the procedure for the registration of trademarks under the IP Code; neither does it impose or change the substantive requirements for the grant of a trademark. Whether through the mechanism under the Madrid Protocol or the IP Code, the requirements for a successful trademark registration remain the same.

In particular, the form for "Application for International Registration Governed Exclusively by the Madrid Protocol"[33] requires most (except for the name of the domestic representative) of the information necessary for an application for trademark registration under Section 124 of the IP Code.[34]

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30 Ibid.

31 Article 4 in relation to Article 5 of the Madrid Agreement Concerning the International Registration of Marks; in particular, the language of paragraph 1, Article 5 provides:

> (1) ***Where the applicable legislation so authorizes***, any Office of a Contracting Party which has been notified by the International Bureau of an extension to that Contracting Party, under Article 3ter(1) or (2), of the protection resulting from the international registration ***shall have the right to declare in a notification of refusal that protection cannot be granted in the said Contracting Party to the mark which is the subject of such extension.*** Any such refusal can be based only on the grounds which would apply, under the Paris Convention for the Protection of Industrial Property, in the case of a mark deposited direct with the Office which notifies the refusal. However, protection may not be refused, even partially, by reason only that the applicable legislation would permit registration only in a limited number of classes or for a limited number of goods or services.

See also IPOPHIL Office Order No. 139, Series of 2012, the Philippine Regulations Implementing the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks

32 *See* IPOPHIL Office Order No. 139, Series of 2012.

33 MM2 Form for the Application for International Registration of Governed Exclusively by the Madrid Protocol, accessed at http://www.wipo.int/export/sites/www/madrid/en/forms/docs/form_mm2.pdf

34 Sec. 124. Requirements of Application. -

124.1. The application for the registration of the mark shall be in Filipino or in English and shall contain the following:

(a) A request for registration;
(b) The name and address of the applicant;
(c) The name of a State of which the applicant is a national or where he has domicile; and the name of a State in which the applicant has a real and effective industrial or commercial establishment, if any;
(d) Where the applicant is a juridical entity, the law under which it is organized and existing;
(e) The appointment of an agent or representative, if the applicant is not domiciled in the Philippines;
(f) Where the applicant claims the priority of an earlier application, an indication of:
(i) The name of the State with whose national office the earlier application was filed or it filed with an office other than a national office, the name of that office,
(ii) The date on which the earlier application was filed, and
(iii) Where available, the application number of the earlier application;

Upon receipt and examination of this application, the IPOPHIL still possesses the discretion to grant or deny the same.[35]

The applicant or registrant (whether through the Madrid Protocol or the traditional means under the IP Code) would also still have to file a declaration of actual use of mark with evidence to that affect within three years from the filing date of the application, otherwise, its registration shall be cancelled.[36] The trademark registration filed through the Madrid Protocol is valid for ten years from the date of registration, the same period of protection granted to registrants under the IP Code.[37]

The ***net effect of implementing the Madrid Protocol is allowing the WIPO's International Bureau to forward an application before the IPOPHIL on behalf of the foreign national that filed for an international registration before the WIPO*** and chose to include the Philippines among the countries with which it intends to register its mark. This obligation of recognizing trademark registration applications filed through the WIPO's International Bureau may be entered into and implemented by the Executive without subsequent Senate concurrence.

As the *ponencia* has pointed out, Congress has made it the policy of the State to streamline administrative procedures of registering patents, trademarks, and copyrights. This declaration of the State's policy, when considered with the inherent and necessary power of the executive to draft its implementing rules and regulations in the implementation of laws, sufficiently allows the drafting of rules that would streamline the administrative procedure for the registration of trademarks by foreign nationals. These rules, of course, must not contradict or add to the law that it seeks to implement, that is, the procedure provided in the IP Code.

(g) Where the applicant claims color as a distinctive feature of the mark, a statement to that effect as well as the name or names of the color or colors claimed and an indication, in respect of each color, of the principal parts of the mark which are in that color;
(h) Where the mark is a three-dimensional mark, a statement to that effect;
(i) One or more reproductions of the mark, as prescribed in the Regulations;
(j) A transliteration or translation of the mark or of some parts of the mark, as prescribed in the Regulations;
(k) The names of the goods or services for which the registration is sought, grouped according to the classes of the Nice Classification, together with the number of the class of the said Classification to which each group of goods or services belongs; and
(l) A signature by, or other self-identification of, the applicant or his representative.

124.2. The applicant or the registrant shall file a declaration of actual use of the mark with evidence to that effect, as prescribed by the Regulations within three (3) years from the filing date of the application. Otherwise, the application shall be refused or the mark shall be removed from the Register by the Director.

124.3. One (1) application may relate to several goods and/or services, whether they belong to one (1) class or to several classes of the Nice Classification.

124.4. If during the examination of the application, the Office finds factual basis to reasonably doubt the veracity of any indication or element in the application, it may require the applicant to submit sufficient evidence to remove the doubt. (Sec. 5, R. A. No. 166a)

[35] See Chapter 3 of IPOPHIL Office Order No. 139, Series of 2012.

[36] Rule 20, IPOPHIL Office Order No. 139, Series of 2012.

[37] Rule 15, IPOPHIL Office Order No. 139, Series of 2012 provides:

Rule 15. Effects of an International Registration.-

(1) An ***international registration designating the Philippines shall have the same effect***, from the date of the international registration, as if an application for the registration of the mark had been filed directly with the IPOPHL under the IP Code and the TM Regulations. xxx

Since the Executive is already authorized to create implementing rules and regulations that streamline the trademark registration process provided under the IP Code, then the Philippines' obligation under the Madrid Protocol may be implemented without subsequent Senate concurrence. This obligation to recognize applications filed through the WIPO already has prior legislative authorization, given that the Executive can, in the course of implementing Section 124 of the IP Code, draft implementing rules that streamline the procedure without changing its substantive aspects.

As I have already pointed out, the Madrid Protocol merely allows the WIPO's International Bureau to file an application before the IPOPHIL on behalf of the foreign national that filed for an international registration before the WIPO. This practice is not prohibited under the IP Code, and may even be arguably encouraged under the declaration of state policy[38] in the IP Code. Notably, the IP Code does not require personal filing of the application for trademark registration; neither does it prohibit the submission of the application on behalf of an applicant.[39]

Indeed, the registration process under the Madrid Protocol would, in effect, dispense with the requirement of naming a domestic representative for foreign nationals not domiciled in the Philippines upon filing his application for trademark registration, as mandated in Section 124 of the IP Code. The domestic representative requirement is further explained in Section 125, *viz*:

> Sec. 125. Representation; Address for Service. - If the applicant is not domiciled or has no real and effective commercial establishment in the Philippines, he shall designate by a written document filed in the office, the name and address of a Philippine resident who may be served notices or process in proceedings affecting the mark. Such notices or services may be served upon the person so designated by leaving a copy thereof at the address specified in the last designation filed. If the person so designated cannot be found at the address given in the last designation, such notice or process may be served upon the Director. (Sec. 3, R. A. No. 166a)

The domestic representative requirement, however, is not entirely dispensed with by the operation of the Madrid Protocol. A domestic representative is still required to file a certificate of actual use of the

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[38] Section 2 of the IP Code provides:
SECTION 2. Declaration of State Policy. — The State recognizes that an effective intellectual and industrial property system is vital to the development of domestic and creative activity, facilitates transfer of technology, attracts foreign investments, and ensures market access for our products. It shall protect and secure the exclusive rights of scientists, inventors, artists and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such periods as provided in this Act. The use of intellectual property bears a social function. To this end, the State shall promote the diffusion of knowledge and information for the promotion of national development and progress and the common good. ***It is also the policy of the State to streamline administrative procedures of registering patents, trademarks and copyright***, to liberalize the registration on the transfer of technology, and to enhance the enforcement of intellectual property rights in the Philippines. (n)

[39] *See* Section 124 of the IP Code enumerating the requirements for an application of trademark.

trademark within three years from registration, so that the trademark applied for would not be cancelled.[40]

In the same light, applicants seeking to register their trademark license would also need a domestic representative in submitting a copy of the license agreement showing compliance with national requirements, within two months from the date of registration with the International Bureau.[41]

A domestic representative is also necessary should there be any opposition to the trademark registration or a provisional refusal thereof.[42]

Thus, a domestic representative is still integral to the process of registering a trademark in the Philippines. All foreign nationals not domiciled in the Philippines would still have to name a domestic representative in the course of his application for registration, otherwise, his trademark would, at the very least, be cancelled after three years of non-use. The Madrid Protocol, in streamlining the procedure for registering trademarks of foreign nationals, in effect directed the domestic representative's participation where necessary and merely postponed the naming of a domestic representative requirement under Section 124 of the IP Code. The Protocol did not all together forego with it.

Lastly, it does not escape us in reviewing the Executive's act of treating the Madrid Protocol as an executive agreement that the petition reached us through the Court's expanded jurisdiction. The petition for *certiorari* and prohibition challenging the constitutionality of the Madrid Protocol must thus be examined under the lens of grave abuse of discretion; that is, the executive must have acted so whimsically and capriciously that it amounted to an evasion of a positive duty or a refusal to perform a duty required by law.[43]

As I have earlier pointed out, the Executive's inherent capacity to enact implementing rules for the administrative procedure of registering trademarks, when construed together with the Congress' declared policy of streamlining administrative procedures for trademark registration, sufficiently allows the Executive to obligate the Philippine government to recognize trademark applications filed with the WIPO International Bureau. This obligation no longer needs Senate approval to be effective in the

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[40] *See* Rule 20, IPOPHIL Office Order No. 139, Series of 2012; Miscellaneous information provided by the World Intellectual Property Office Website on the Philippines' procedure in implementing the Madrid Protocol, accessed at http://www.wipo.int/madrid/en/members/profiles/ph.html?part=misc.

[41] *See* Rule 18, IPOPHIL Office Order No. 139, Series of 2012; Miscellaneous information provided by the World Intellectual Property Office Website on the Philippines' procedure in implementing the Madrid Protocol, accessed at http://www.wipo.int/madrid/en/members/profiles/ph.html?part=misc.

[42] *See* Rule 9, IPOPHIL Office Order No. 139, Series of 2012; Miscellaneous information provided by the World Intellectual Property Office Website on the Philippines' procedure in implementing the Madrid Protocol, accessed at http://www.wipo.int/madrid/en/members/profiles/ph.html?part=misc.

[43] Grave abuse of discretion implies such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction or, in other words, where the power is exercised in an arbitrary manner by reason of passion, prejudice, or personal hostility, and it must be so patent or gross as to amount to an evasion of a positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law *Land Bank of the Philippines v. Court of Appeals*, 456 Phil. 755, 786 (2003).

Philippines, as it already has prior legislative authorization that the Executive has the power to implement.

Thus, the Executive did not have a positive duty (though merely an option) to treat the Madrid Protocol as a treaty that should be submitted to the Senate for concurrence, and did not gravely abuse its discretion in treating the Protocol as an executive agreement.

WHEREFORE, premises considered, I join the *ponencia* in dismissing the present petition.

ARTURO D. BRION
Associate Justice

CERTIFIED XEROX COPY:
FELIPA B. ANAMA
CLERK OF COURT, EN BANC
SUPREME COURT