PHILIPPINE TREATY LAW AND PRACTICE*

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In the book The Idea of Law, Professor Dennis Lloyd observed, "Every rule of international law imposes a legal fetter on national states in the international sphere, for this is the very sense and meaning of an international legal order."[1]

In a globalized world, nation-states are aptly described as independent within their respective borders but interdependent outside. The benefits of interaction and cooperation with other countries are generally beyond dispute. In the field of economics, for instance, a party raises his welfare much faster if he specializes in making a product and trades with another who makes another product than if the former makes those two products himself, as expounded by the principle of comparative advantage.

The Philippines has interacted and cooperated with neighboring countries and the rest of the international community through the decades, and as of this writing, has concluded some 1,660 agreements with them since 1946.

Immense opportunities are made possible by cooperation and exchanges with the international community, through the medium of agreements and other arrangements. For instance, entrepreneurs, exporters and other businesspersons can benefit from accords on trade access, investment promotion and protection, and avoidance of double taxation. Farmers, fisher folks and others may avail of foreign technical and development assistance. Students and the youth can tap

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[1] DENNIS LLOYD, THE IDEA OF LAW (Reading, UK: Cox and Wyman Ltd) 190 (1964).

educational and cultural exchange programs with other countries and international organizations.

From a larger perspective, a well-informed understanding of Philippine foreign policy and the country's rights, duties and commitments is best derived from an analysis of the treaties and other international agreements it has concluded.

I. PHILIPPINE FOREIGN POLICY OBJECTIVES

Philippine foreign policy is oriented towards the further enhancement of national security, the pursuit of economic diplomacy and the extension of full consular services to Filipino nationals wherever they may be. These three strands are called the "Three Pillars of Philippine foreign policy."

From February 2001 to the first half of 2010, during the presidency of Gloria Macapagal-Arroyo, the Philippines concluded some 393 agreements, notably eleven on the promotion and protection of overseas Filipino workers, ten tourism promotion agreements, nine investment promotion accords, eight health cooperation accords, six environmental conservation and protection agreements, and five on social security benefits. This record reflects the priority given these areas by the administration, especially on the welfare of overseas Filipinos, economic promotion and environment protection.

Among the agreements are a number of free trade agreements entered by the Philippines and its Association of Southeast Asian Nations (ASEAN) partners with the economies of major neighboring countries, the Japan-Philippines Economic Partnership Agreement, the Stockholm Convention on Persistent Organic Pollutants, arrangements for the headquarters here of the ASEAN Centre for Biodiversity and the Worldfish Centre, and the accessions to the Convention against Torture and the Protocol Additional to the Geneva Conventions of 12 August 1949.

Similar foreign policy priorities will most likely be pursued by the administration of President Benigno S. Aquino III, with added emphasis on human rights, international humanitarian law and anti-corruption.

This study is a modest attempt at documenting the treaty law and practice at the Office of Legal Affairs (OLA)of the Philippine Department of Foreign Affairs (DFA). As will be discussed below, OLA is the official repository of the treaties entered into by the country. The office also provides legal guidance and support to the DFA and other departments and agencies of the Philippine government in the negotiation, signing and ratification of international agreements.

This paper will examine the provisions of the Constitution which have relevance to treaty-making, and discuss the definition and coverage of the term "treaty," the capacity of states to enter into treaties, both at the international and domestic law levels, and the categories of international agreements, also in the international and domestic law levels.

These are followed by an analysis of the distinction between a memorandum of agreement (MOA) and a memorandum of understanding (MOU) in the international law sphere, and that between a treaty and an executive agreement in the domestic law sphere.

The study concludes with an examination of the steps in the treaty-making process, from the negotiation phase to a signed agreement's entry into force.

II. PARAMETERS IN THE FORMULATION AND CONDUCT OF FOREIGN POLICY

The substantive content of Philippine foreign policy is anchored on the Constitution, specifically the precepts that in the country's relations with other states the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination, and that the country adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations. Thus:

> Article II, Section 2. The Philippines renounces was an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.[2]
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> Article II, Section 7. The State shall pursue an independent foreign policy. In its relations with other states the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination.[3]

The provisions quoted above are supplemented by the foreign policy priorities of the President of the Philippines, as the chief architect of foreign policy, and his Secretary of Foreign Affairs.

On the other hand, the procedural dimension of foreign policy-making, which is the ambit of Philippine treaty law and practice, is based on the following:

> (a) The Philippine Constitution, specially Article VII, Section 21 which states, "*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;*

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[2] CONST. art. II, §2.
[3] CONST. art. II, §7.

(b) The ruling of the Supreme Court of the Philippines in *Commissioner of Customs v. Eastern Sea Trading*,[4] which made a distinction between treaties and executive agreements, the latter requiring the ratification by the President[5] in order to take effect, and related jurisprudence; and

(c) Executive Order No. 459, series of 1997, which sets the guidelines in the negotiation, conclusion and ratification of international agreements.

III. DEFINITION AND COVERAGE OF TREATIES

The term "treaty" is used in this study as defined in the Vienna Convention on the Law of Treaties,[6] Article 2 (1) of which states that:

> "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.

Under this definition, a treaty has the following elements:[7]

1. An international agreement. To be a treaty, an agreement has to have an international character.
2. Concluded between states. A treaty is between states, governments or their agencies or instrumentalities acting on behalf of states. A treaty may be concluded by heads of states or governments, their ministries or other state agencies.[8] An agreement or contract between international or multinational companies, or between a state and such a company, is not a treaty. This is true, even when such an agreement provides that it shall be interpreted in whole or in part by reference to rules of international law.[9]
3. In written form.
4. Governed by international law. This refers to the element of intent to create obligations under international law. If there is no such intention, the instrument is not a treaty.[10]
5. Whether embodied in a single instrument or in two or more related instruments. Treaties can also be drawn up in less formal ways, such as through the exchange of notes.

The Vienna Convention definition delimited treaties as between states.[11] However, states may also enter into treaties with international organizations. The latter class of agreements are governed by another set of rules, the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[12]

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[4] G.R. No. 14279,October 31,1961.
[5] Exec. Order No. 459, s. 1997, § 7.
[6] Adopted on 22 May 1969 and entered into force on 27 January 1980.
[7] ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 14-25 (2000)..
[8] *Id.* at 16.
[9] *Id.* at 15.
[10] *Id.* at 17.
[11] *Id.* at 14.
[12] Done in Vienna, Austria on 21 March 1986; not yet in force.

IV. CAPACITY TO ENTER INTO TREATIES

According to Article 6 of the Vienna Convention on the Law of Treaties, "every State possesses capacity to conclude treaties".

In the Philippines, the President, as Chief Executive and head of state, has the power to conduct foreign relations. As chief architect of Philippine foreign policy, he has the power to make treaties. As described by Senator Arturo Tolentino,

> 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.[13]

V. NATURE OF INTERNATIONAL AGREEMENTS[14]

In examining an international agreement, it is essential to identify the nature of the agreement in international law and Philippine domestic law. Under international law, the agreement may be in the nature of a treaty or the less formal Memorandum of Agreement, which creates legally-binding rights and obligations on the contracting parties, or a Memorandum of Understanding, which is a non-legally binding instrument.[15]

In addition, the agreement has to be classified whether it is a treaty which requires both presidential ratification and Senate concurrence, or an executive agreement which need presidential ratification, in order to enter in force.

A. IN INTERNATIONAL LAW

The negotiation, conclusion and ratification of treaties are governed by the Vienna Convention on the Law of Treaties and customary international law.

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[13] Arturo Tolentino, *The President and the Batasan on Foreign Affairs, in* THE POWERS OF THE PHILIPPINE PRESIDENT, as quoted by J. Eduardo Malaya, *Conflict and Cooperation in the Crafting and Conduct of Foreign Policy,* 84 PHIL.L.J. 561.

[14] OLA Office Order No. 02-07 - *Guidelines in Reviewing International Agreements,* in J. EDUARDO MALAYA, ED., MANUAL ON TREATIES REVIEW 1 (DFA-OLA)(2008).

[15] AUST, *supra* note 7 at 18.

Treaty/Memorandum of Agreement vs. Memorandum of Understanding

In international law and Philippine treaty law practices, the determining factor whether an international instrument is in the nature of a Treaty/Memorandum of Agreement (MOA) or a Memorandum of Understanding (MOU) is the intent of the contracting states to be legally-bound or otherwise by its provisions.[16]

The phrase "legally-binding" means a party to a treaty/MOA-type agreement may compel the other party to comply with its terms in case of a breach, including a possible recourse to a third-party compliance mechanism. In contrast, the parties to a MOU intend to carry out its terms on a best-effort basis.

A treaty/MOA often describes the specific responsibilities of, or actions to be undertaken by the parties with a view to the accomplishment of their goals.[17]

On the other hand, a MOU largely contains general principles of cooperation, broad goals and plans shared by the parties. It may list the obligations of both sides, but performance and compliance are on a best-effort basis. In essence, the objective of the parties to a MOU is to record their mutual understanding as to how they will conduct themselves, rather than to create international legal rights and obligations.

Nonetheless, both treaty/MOA and MOU are binding, following the principle of *pacta sunt servanda,*[18] with the qualification that with respect to a MOU, the latter is neither legally-binding nor legally enforceable. In case of a breach, the aggrieved party may not compel under international law the other party to carry out the provisions of a MOU.

The MOU format is useful in certain situations. It is preferred for reasons of confidentiality and the ease and convenience in concluding them. It is also often used when dealing with sensitive defense and national security matters or to protect delicate commercial information, such as those accompanying air services agreements.[19]

Since MOUs are non-legally binding, there is no international requirement to publish them. MOUs also usually come into force and effect upon signature.

MOUs which are in the form of declaration, implementing arrangement, letter of intent, joint communiqué and joint statement, do not require ratification

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[16] AUST, *supra* note 7at 20.

[17] OLA Memorandum dated 17 December 2007 - *Treaty MOA and MOU Terminologies, in* Malaya, *supra* note 14 at11-12.

[18] Latin for "agreements must be kept"

[19] AUST, *supra* note 7at 34-39.

by the President in order to enter into force. Nevertheless, MOUs whose provisions denote intent by the parties to be legally-bound, will require presidential ratification.[20]

The title of the instrument does not determine the nature of the instrument. What is determinative is the intent of the negotiating states to be legally-binding or not. It is only by examining its specific provisions can its real nature be established.

The treaty/MOA and MOU formats use differing terminologies, notably the use of the word "agree" in treaties/MOAs and "decide, accept or approve" in MOUs. "Parties" in treaties/MOAs are also referred to as "Participants" in MOUs.

Negotiators and drafters of agreements carefully choose the words they use, to properly indicate the intent to conclude a legally binding or non-legally binding instrument. OLA Office Circular dated 17 December 2007 lists the differing terminologies (see Annex).

President Gloria Macapagal-Arroyo expressed a preference for concluding MOAs over MOUs[21] as the agreed terms in the former can be clearly relied upon. Nonetheless, in addition to those stated above, a resort to the MOU format is likewise useful if another country is proposing the agreement and the Philippines is merely reacting to such initiative. MOU is also advisable where there is necessity for the Philippine side to retain flexibility in implementation.

Exchange of Notes

According to the Vienna Convention, a treaty may be "embodied in a single instrument or in two or more related instruments"[22] This phrase recognizes that the classic form for a treaty – a single instrument – has been joined by those drawn in less formal ways, such as exchanges of notes.

In an exchange of diplomatic notes, a country transmits to another country an initiating Note which contains the elements of a proposed agreement. If the proposed terms are acceptable, the recipient country may transmit a reply Note conveying its consent to be bound by those terms. The agreement takes effect on the date of the reply Note.

Many exchanges of notes appear to be in the nature of non-legally binding instruments, but due care has to be exercised as these could in fact be intended by the parties to be legally-binding.

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[20] *Supra* note 19.

[21] *Id.*

[22] Vienna Convention on the Law of Treaties, art. 2 (1).

If the notes are to be legally-binding, the initiating Note will have the following lines, in addition to the use of treaty/MOA terminologies in its body:[23]

> I have the honor to **propose** the following: xxx
>
> If the foregoing proposals are acceptable to the Government of xxx, I have the honor to propose that this Note and your reply in that sense shall **constitute an Agreement** between our two Governments, which **shall enter into force** on the date of your Excellency's reply.

On the other hand, a non-legally binding exchange of notes will have the following formulation:[24]

> As a result of these discussions it is the **understanding** of the Government of xxx that the following **arrangements will apply:**
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> If the foregoing proposals are acceptable to the Government of xxx, I have the honor to propose that this Note and your reply in that sense shall **constitute an Agreement** between our two Governments, which **shall enter into force** on the date of your Excellency's reply. *(Emphasis supplied)*

B. IN PHILIPPINE DOMESTIC LAW

The 1987 Constitution, Executive Order No. 459, series of 1997, and jurisprudence govern the subject in domestic law.

The distinction drawn between a treaty and an executive agreement is based on the cases *USAFFE Veterans v. Treasurer of the Philippines, et al*[25] (1959), and *Commissioner of Customs vs. Eastern Sea Trading* (1961), where the Supreme Court made a distinction between a "treaty", as referred to in the Constitution, and another class of agreements called "executive agreement." According to the Court,

> 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.

The above ruling has been observed through the years, and the practice became codified when Executive Order No. 459, series of 1997, was issued by President Fidel V. Ramos.[26]

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[23] AUST, *supra* note 7 at 355-356.

[24] *Id.*

[25] 105 Phil. 1030 (1959).

[26] *See also* Gonzalez v Hechanova, 9 SCRA 243; World Health Organization v. Hon. Aquino, 48 SCRA 242; and Joaquin Bernas, S.J., FOREIGN RELATIONS IN CONSTITUTIONAL LAW 112-115 (1995).

According to the executive order, the Office of Legal Affairs, on behalf of the DFA, determines whether an agreement is an executive agreement or treaty. Thus:

> Section 9. The Department of Foreign Affairs shall determine whether an agreement is an executive agreement or a treaty.[27]

As noted by Senator Miriam Defensor-Santiago, Chairperson of the Senate Committee on Foreign Relations,

> ... [I]t is the foreign affairs department which determines whether an agreement is an executive agreement on one hand; or a treaty on the other hand. This distinction is important, because while it is claimed that an executive agreement needs only ratification by the President, a treaty needs concurrence by the Senate. This distinction drawn between an executive agreement and a treaty is based on the 1961 case of Commissioner of Customs v. Eastern Sea Trading.[28]

Treaty vs. Executive Agreement

Executive Order No. 459 defines "treaties" as "international agreements entered into by the Philippines which require legislative concurrence after executive ratification," while "executive agreements" are "similar to treaties except that they do not require legislative concurrence."[29]

As noted in the *Eastern Sea Trading* ruling, a treaty would involve political issues or changes of national policy, or arrangements of permanent character.[30] An agreement which would conflict with existing laws and thus require amendment of said laws should be considered as a treaty requiring Senate concurrence. Those which may be in conflict with established national policy and require a change of said policy shall likewise be deemed as requiring Senate concurrence. Agreements which would require the enactment of a law for its implementation will also require Senate concurrence.

Examples of agreements treated as treaties are those that provide tax exemptions, because only Congress may grant such exemption[31]; grant privileges and immunities to individuals or international organizations, except diplomatic immunities and privileges for United Nations agencies and other international organizations which are by now the norm; provide direct allocation of funds, as this prerogative is exclusively lodged with Congress; and those that criminalize certain conduct, as only the legislature may pass a penal legislation.

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[27] Exec. Order No. 459, § 9.

[28] MIRIAM DEFENSOR-SANTIAGO, PROCEDURE FOR SENATE CONCURRENCE TO TREATIES 2 (2007)..

[29] Exec. Order No. 459, § 2 (b) & (c).

[30] Commissioner of Customs v. Eastern Sea Trading, G.R. No. 14279,October 31,1961..

[31] Tax exemptions may be made only under the authority of Congress in accordance with CONST. art. XVI, § 28 (2) and the TARIFF CODE.

To be likewise treated as requiring Senate concurrence are those which may contravene established constitutional or national policies, such as the no imposition of the death penalty, no establishment of foreign military bases,[32] no resort to third-party tribunal in case of disputes, policy of freedom from nuclear weapons in Philippine territory,[33] the One-China policy, and the archipelagic doctrine with respect to the country's maritime territory.[34]

On the other hand, executive agreements are those that which "embody adjustment of details carrying out well-established national policies and tradition, involving arrangements of a more or less temporary nature."[35]

The distinction between treaties and executive agreements has no bearing in the international law sphere. Both are covered by the term "treaty" as defined in the Vienna Convention and thus equally binding, unless the instrument is in the nature of a MOU, as noted earlier.

The following categories of agreements have been treated as executive agreements: air services agreement, cultural agreement, defense cooperation agreement, mutual logistics support agreement, scientific and technological cooperation agreement, economic cooperation agreement, agreement on gainful employment of spouses of members of diplomatic and consular missions; tourism cooperation agreement, investment promotion and protection agreement, labor promotion and protection agreement, maritime agreement, waiver of visa requirement agreement, and trade cooperation/facilitation agreements, such as those among ASEAN countries.[36]

In contrast, the following have been treated as treaties which require presidential ratification and Senate concurrence:

a) Status of forces agreement/Visiting forces agreement[37]
b) Comprehensive free trade agreement/economic partnership agreement, which go beyond what the President is allowed to undertake unilaterally under Article VI, Section 28(2) of the Constitution and the Customs and Tariff Code
c) Agreement on the avoidance of double taxation, since tax exemptions can be made only under the authority of Congress[38]

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[32] CONST. art. XVIII, § 25,

[33] CONST. art. II, § 8.

[34] OLA Office Order No. 02-07, *in* MALAYA, *supra* note 14, at 2.

[35] See Commissioner of Customs ruling. In U.S. jurisprudence, executive agreements fall under two categories: (1) agreements made purely as executive acts affecting external relations with or without legislative authorization, which may be called "presidential agreement," and (2) agreements entered into pursuance of acts of Congress, which are designated as "Congressional-Executive Agreement" (Hackworth, International Law, Vol. 1, p. 380).

[36] OLA Office Order No. 1 – 2007 dated 22 May 2007, in Malaya, *Manual on Treaties Review*), p. 13.

[37] CONST. art. XVIII, § 25.

[38] See CONST. art. XVI, § 28 (4).

> d) Agreement which establishes the headquarters of an international organization, with concomitant grant of immunities to the organization and its officials
> e) Agreement on the transfer of sentenced persons, since the exercise of criminal jurisdiction is based on the territoriality principle; and
> f) Other agreements, *"especially multilateral conventions, involving political issues or changes of national policy or involve international arrangements of a permanent character,"* pursuant to the Commission of Customs ruling.[39]

Foreign Loan

There are three broad categories of agreements which do not fall within the realm of the Vienna Convention on the Law of Treaties and Executive Order No. 459, namely foreign loans, grants and commercial contract. These are governed by domestic law.

The President is authorized under Article VII, Section 20 of the Constitution to contract or guarantee foreign loans, with the prior concurrence of the Monetary Board. Thus:

> Section 20. The President may contract or guarantee foreign loans on behalf of the Republic of the Philippines with the prior concurrence of the Monetary Board, and subject to such limitations as may be provided by law. The Monetary Board shall, within thirty days from the end of every quarter of the calendar year, submit to the Congress a complete report of its decision on applications for loans to be contracted or guaranteed by the Government or government-owned and controlled corporations which would have the effect of increasing the foreign debt, and containing other matters as may be provided by law.

Foreign loans are generally entered into by the Department of Finance. Other Departments, including the DFA, may conclude them only with the endorsement from the finance department. As the Constitution prescribes a distinct negotiation and approval process, foreign loan agreements do not undergo the usual treaty ratification procedure.

Grant/Official Development Assistance

The procedure for the conclusion of foreign grants and official development assistance (ODA) is governed by *The Official Development Act of 1996* (R.A. No. 8182). These agreements require endorsement from the National Economic Development Authority[40] as these have to be in line with national development plans and particularly when there are requirements for local counterpart funding.

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[39] OLA Office Order No. 1 – 2007.
[40] *Official Development Act of 1996* (R.A, 8182).

Commercial or Private Contract

An agreement between the Government or any of its subdivisions/agencies and a private entity or an entity which is not a subject of international law is a commercial or ordinary contract.[41] Agreements of this type are not within the realm of the Vienna Convention on the Law of Treaties.

In the authoritative book *Modern Treaty Law and Practice*, Anthony Aust describes the following as agreements which are governed by domestic law even if concluded between states:

> States can also contract with each other under domestic law. They may do so if the subject matter is exclusively commercial, such as the purchase of commodities in bulk... If a state leases land from another state for an embassy there will usually be an instrument under domestic law, such as a lease, though this may be granted pursuant to treaty... Treaties concerning loans may provide that the contractual arrangements for the loans shall be governed by the law of the lender state.[42]

VI. PROCEDURE IN THE NEGOTIATION AND RATIFICATION OF AGREEMENTS[43]

A. ISSUANCE OF FULL POWERS OR SPECIAL AUTHORITY

Executive Order No. 459[44] provides the guidelines in the negotiation of international agreements and their ratification. As a matter of policy, the negotiation of treaties and executive agreements shall be coordinated with, and made only with the participation of the Department of Foreign Affairs (DFA).[45]

Prior to the negotiation of a proposed international agreement, authorization should first be secured from the President by the lead government department or agency through the Secretary of Foreign Affairs. The DFA geographic office which covers the area or subject matter[46] is the conduit for securing the authorization.

The request for authorization shall be in writing, proposing the composition of the Philippine negotiating delegation and recommending the range of positions to be taken by the delegation.[47] The negotiating positions are generally classified as "confidential." The composition of any Philippine panel

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[41] ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 16 (2000).

[42] *Id.* at 24.

[43] OLA Circular No. 01-07.

[44] Issued on November 25, 1997 by President Fidel V. Ramos.

[45] Exec. Order No. 459, § 1.

[46] These are principally the Offices of American Affairs, Asian and Pacific Affairs, European Affairs and the Middle East and African Affairs, for bilateral agreements, and the Offices of ASEAN Affairs and the United Nations and other International Organizations, for multilateral agreements.

[47] Exec. Order No. 459, § 3.

and the designation of its chairperson shall be made in coordination with the DFA.[48]

For agreements requiring the concurrence of the Senate, the authorization shall be in the form of Full Powers and formal instructions. Full Powers, as defined in Executive Order No. 459, is *"the authority granted by a head of State or Government to a delegation head enabling the latter to bind his country to the commitments made in the negotiations to be pursued."*[49]

For agreements not requiring Senate concurrence, a written authorization from the President is sufficient.[50]

A special authority is generally not required for the signing of a declaration, letter of intent, joint communiqué, joint statement and the other political documents.

Signing of other types of MOUs whose texts indicate intent to be bound should require prior special authority.

The issuance of Full Powers or written authorization is made by the President who may delegate this function to the Secretary of Foreign Affairs.[51]

The following shall not be required Full Powers or written authorization prior to negotiating or signing an international agreement:[52]

> 1. The Secretary of Foreign Affairs.
> 2. Heads of Philippine diplomatic missions, for the purpose of *adopting the text* of an agreement between the Philippines and the state to which they are accredited.
> 3. Representatives accredited by the Philippines to an international conference or to an international organization or one of its organs, such as the Philippine Permanent Representative to the United Nations or to ASEAN, for the purpose of *adopting the text* of a treaty in that conference, organization or organ.

B. NEGOTIATIONS

When an agreement is proposed by another country or international organization for the consideration of the Philippines, or vice versa, the DFA geographic office which is responsible for the country's relations with the other party, shall request the views of other relevant DFA offices and other government agencies, by convening inter-office/agency meetings or through referrals for the latter's' comments.

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[48] *Id.*, § 1.
[49] *Id.*, § 2 (d).
[50] *Id.*, § 3.
[51] *Id.*, §4.
[52] *Id.*

The lead office or agency then convenes a meeting of the members of the negotiating panel prior to the commencement of negotiations for the purpose of establishing the parameters of the negotiating positions.[53] No deviation from the agreed parameters shall be made without consultations with the members of the negotiating panel.[54]

C. SIGNING OF THE AGREEMENT

In the case *Pimentel vs. Executive Secretary*,[55] the Supreme Court clarified that signing and ratification are two separate and distinct steps in the treaty-making process:

> If and when the negotiators finally decide on the terms of the treaty, the same is opened for signature. This step is primarily intended as a means of authenticating the instrument and for the purpose of symbolizing the good faith of the parties; but, significantly, it does not indicate the final consent of the state in cases where the ratification of the treaty is required. The document is ordinarily signed in accordance with the alternat, that is, each of the several negotiators is allowed to sign first on the copy which he will bring home to his own state.
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> Ratification, which is the next step, is the formal act by which a state confirms and accepts the provisions of a treaty concluded by its representatives. The purpose of ratification is to enable the contracting states to examine the treaty more closely and to give them an opportunity to refuse to be bound by it should they find it inimical to their interests. It is for this reason that most treaties are made subject to the scrutiny and consent of a department of the government other than that which negotiated them.

D. RATIFICATION BY THE PRESIDENT

After the signing of an agreement, the DFA geographic office transmits to the Office of Legal Affairs the original and/or certified true copy of the agreement. When transmitting the agreement, it is accompanied by the following, in line with DFA Department Order No. 21-99 dated 25 August 1999:

> 1. Certificates of concurrence of the agencies that participated in the inter-agency consultations and the negotiations; and
> 2. A summary of the benefits that will accrue to the Philippines once the agreement enters into force.

OLA then prepares the draft memorandum for the President, for the signature of the Secretary of Foreign Affairs, recommending the ratification of

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[53] *Id.*, § 5.
[54] *Id.*
[55] G.R. No. 158088, July 6,2005.

the signed agreement. If the agreement requires Senate concurrence, a draft letter-endorsement from the President to the Senate President is enclosed.

The original agreement is deposited with the Foreign Service Institute's Carlos P. Romulo Library, which serves as the archives of these agreements and other papers.

In its *Pimentel* ruling, the Supreme Court stated:

> Under our Constitution, 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. Hence, it is within the authority of the President to refuse to submit a treaty to the Senate or, having secured its consent for its ratification, refuse to ratify it. Although the refusal of a state to ratify a treaty which has been signed in its behalf is a serious step that should not be taken lightly, such decision is within the competence of the President alone, which cannot be encroached by this Court via a writ of mandamus.[56]

The Senate does not ratify a treaty. It concurs in the President's ratification of a treaty.[57]

E. CONCURRENCE OF THE SENATE

For international agreements that require the concurrence by the Senate of the ratification made by the President, the latter transmits the signed treaty to the Senate. The relevant DFA geographic office coordinates with the proponent/implementing agency in preparing the policy papers, for the perusal of the Senate Committee on Foreign Relations, and in presenting and justifying the agreement during the concurrence hearings.

The policy papers should contain information about the agreement that could address the frequently-asked questions during committee hearings, such as the nature, objective and other highlights of the agreement, its negotiating history, and the number of countries that have ratified the agreement, if it is multilateral in character. It shall likewise identify the benefits and relative importance of the agreement to the country.

In the Senate, the treaty undergoes three readings, as follows:[58]

The **first reading** consists of reading the title of the treaty, after which the Senate President transmits it to the Committee on Foreign Relations. The committee has 15 members. Of the 15 members, ten seats are reserved for the majority party and five to the minority. In practice, every committee meets once

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[56] *Supra* note 55.

[57] DEFENSOR-SANTIAGO, *supra* note 27 at 1.

[58] RULES OF THE SENATE, Rule 36, titled "Concurrence in Treaties"; *see also* DEFENSOR-ANTIAGO, *supra* note 27 at 3.

a month. The Rules of the Senate require that notice of meeting, including the agenda, place and time of the meeting, shall be given three days in advance to committee members.

At the committee hearing, the Secretary of Foreign Affairs or a senior DFA official will present the treaty and recommend concurrence, to be followed by the head or senior official of the proposing or implementing agency. Views on the proposed treaty from concerned sectors, if any, are heard.

A committee report is then prepared. A report and its recommendation must be approved by a majority of the regular committee members, plus the ex-officio members. If the report is unfavorable, the proposed treaty is transmitted to the archives of the Senate, in which case it dies a natural death. It may be recalled that according to the Constitution, "*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.*"[59]

During the **second reading,** the Chairperson of the Senate Committee on Foreign Relations delivers a sponsorship speech at the plenary session, to be followed by a formal debate. As noted by Senator Santiago, "*Unlike a bill, a treaty is not subject to amendment...*"[60]

The **third reading** is limited to the reading of the title of the treaty. No treaty is considered concurred in by the Senate unless it has passed three readings on separate days, and printed copies are distributed to the Senators three days before its passage, except when the President certifies to the necessity of its immediate concurrence to meet a public calamity or emergency. The treaty is then submitted to final vote by *yes* and *no.* The votes of at least two-thirds of all the Members of the Senate are required for concurrence to a treaty.

Accession, which is a method by which a state that is not among a treaty's original signatories becomes a party to it, follows the same ratification/concurrence process.

F. DECLARATION OR RESERVATION

It is possible for a party to a treaty to make an interpretative declaration at the time of signature or ratification of a treaty.

A declaration is defined as follows:

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[59] CONST. art. VII, § 21.

[60] DEFENSOR-ANTIAGO, *supra* note 27 , at 5. She added:"... although, as in the case of the controversial Japan-Philippine Economic Partnership Agreement, I shall recommend a conditional concurrence." *See also* JOAQUIN BERNAS, S.J., FOREIGN RELATIONS IN CONSTITUTIONAL LAW 111(1995.: "The Senate might give its concurrence but impose conditions or reservations related to its content. In such an eventuality, renegotiations might become necessary."

> A unilateral declaration, however phrased or named, made by a State or by an international organisation whereby that State or organisation purports to clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions.[61]

On the other hand, the Vienna Convention defines a reservation as:

> A unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.[62]

If the negotiating panel deems the making of a declaration or reservation as necessary, and the agreement, which is often of the multilateral type, allow a declaration or reservation upon signing, accession or on the deposit of the Instruments of Ratification, then a declaration or reservation can be drafted and then made on the signing, accession or ratification, or upon the deposit of the instrument of ratification.

The making of a reservation or declaration may be part of the negotiating parameters of the negotiating panel.

G. NOTIFICATION AFTER RATIFICATION

Upon its receipt of the Instrument of Ratification (and the Senate Resolution concurring in the ratification made by the President, if applicable), the DFA Office of Legal Affairs (OLA) notifies the concerned offices and agencies of the date of signature of the Instrument of Ratification as well as the date of the Senate Resolution, if applicable.

OLA transmits a Note verbale to the embassy of the other contracting State, or the international organization, notifying the latter of the ratification of the agreement in order to determine the date of its entry into force.

If the agreement requires that the original Instrument of Ratification be deposited with a depositary State or international organization for the agreement to enter into force, OLA transmits the original Instrument to the concerned DFA geographic office. The latter makes the deposit and informs OLA of the action taken, as well as the date of the entry into force of the agreement.

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[61] UN Doc. A/CN.4/491/Add, 4. Paragraph 361, *quoted in* AUST.*supra*note 40 at 102.

[62] Vienna Convention on the Law of Treaties, art.2 (1) (d).

H. ENTRY INTO FORCE

All international agreements generally undergo the domestic legal requirements of ratification,[63] except those that implement existing agreements and foreign loan agreements and commercial contracts, as noted earlier.

An international agreement enters into force only upon compliance with domestic ratification requirements.

An agreement that provides that it will enter into force upon signature is considered as entering into force *provisionally.* Provisional entry into force is allowed only if it is shown that a pressing national interest will be upheld. In consultation with concerned agencies, the DFA determines whether an international agreement or any amendment thereto, shall be given provisional effect.[64]

An international agreement, which requires the concurrence of the Senate, may not be given provisional effectivity, in keeping with Article VII, Section 21 of the Constitution.

This study is a modest attempt at documenting the treaty law and practice at, and from the perspective of, the Philippine Department of Foreign Affairs. It is hoped that it leads to a deeper understanding and fuller appreciation of this dynamic field where constitutional law, public international law and foreign policy intersect.

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[63] Exec. Order No. 459, § 6 (a).
[64] *Id.*, § 6 (b).