EXECUTIVE AGREEMENTS

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I. Introduction

A. *Secretary of Justice Opinion of* 1968**

On November 14, 1968, the Secretary of Justice forwarded to the Secretary of Foreign Affairs an opinion,[1] impugning the validity of the amendments to the Philippines-United States Military Bases Agreement of 1947.[2] These amendments, which refer to the provisions on Criminal Jurisdiction under Article XIII of the said Agreement, were concluded in an exchange of notes dated August 10, 1965[3] — without concurrence of the Senate of the Philippines. The Secretary of Justice doubts whether the President of the Republic of the Philippines, alone, may validly enter into such an agreement with a foreign government without the necessity of ratification thereof by the Senate.[4]

1. Gonzales shooting case

The Department of Foreign Affairs accordingly advised[5] the United States Government, through its Embassy in Manila, that the latter "has primary jurisdiction" over the case of Rogelio Gonzales who was shot to death by U.S. Marine Corporal Kenneth Smith at Sangley Point, Cavite, in July 1968.[6]

It must be recalled that when the said amendments were concluded in 1965, it was the understanding that they were effective upon signature;[7]

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** Printed in the Documents Section of this issue.

[1] Letter dated November 14, 1968 of the Secretary of Justice to the Secretary of Foreign Affairs.

On the early morning of July 26, 1968 U.S. Marine Corporal Kenneth Smith while on sentry duty at the main gate on Sangley Naval Base in Cavite City shot to death Rogelio Gonzalez whom he believed to be attempting to remove stolen property. An impasse developed over the question of jurisdiction: the Cavite authorities wanted Smith to stand trial before the Philippine courts; the U.S. Naval authorities claimed primary right to exercise jurisdiction. In resolving the jurisdictional issue it became important to determine whether the original Bases Agreement of 1947 or the amended one should be applied. The amendments were adopted by exchange of notes between Philippine Secretary of Foreign Affairs Mauro Mendez and U.S. Ambassador William McCormick Blair on August 10, 1965. *Ed.*

[2] I-2 DFATS 144, 61 Stat. 4019, 43 UNTS 271.

[3] Exchange of Notes dated August 10, 1965 between the Secretary of Foreign Affairs and the U.S. Ambassador to the Philippines, 16 UST 1090.

[4] Letter of the Secretary of Justice dated November 14, 1968, *supra.*

[5] Note dated November 27, 1968 of the Secretary of Foreign Affairs addressed to the U.S. Ambassador.

[6] *Ibid.*

[7] Exchange of Notes dated August 10, 1965, *supra*, note 3.

in fact, these amendments were already registered[8] with the United Nations, in accordance with Article 102 of the U.N. Charter.[9]

B. *Unstable application of executive agreements*

The uncertainties of agreements not concurred in by the Senate present themselves not only in administrative determinations but also in judicial decisions. In an earlier date, or on December 27, 1956, the Court of Tax Appeals reversed a decision[10] of the Commissioner of Customs. The tax court entertained doubts on the legality of the executive agreement sought to be implemented by Executive Order No. 328 dated June 13, 1960, owing to the fact that the Senate did not concur in making of the agreement.[11]

The issue becomes no less perplexing in the light of conflicting statements of some authorities[12] as to the nature, scope and validity of executive agreements. Indeed, the binding effect upon the nation of an agreement entered into by the Chief Executive without the concurrence of the Senate is not well ascertained.[13]

II. DEFINITION

A. *Term treaty in international plane*

Under contemporary international law,[14] any international agreement, concluded between states, in written form and governed by international law, whether embodied in a single instrument or two or more related instruments, and whatever its particular designation is a treaty.[15] The consent of a state to be bound by a *treaty* is invariably expressed — in the international plane — by signature, ratification, accession, acceptance, or approval.[16] Hence, a state, like the Philippines, has concluded a *treaty*, if, by any of these modes, it has given its consent to be bound by an agreement with a state or states. Internationally then, any agreement concluded by the Philippines having the foregoing characteristics is a *treaty*.

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[8] TIAS 5851.

[9] CIJ, Serie D No. 1 (2nd Ed.) (1947), at 33.

[10] Commissioner of Customs v. Eastern Sea Trading Company, G.R. No. 14279, October 31, 1961, 3 S.C.R.A. 351 (1961)

[11] *Ibid.*

[12] TAÑADA AND CARREON, POLITICAL LAW OF THE PHILIPPINES 337 (1961); see also Roxas, *RP-Japan Amity — Conflicts of Interests Handicaps Treaty Process*", Sunday Times, January 21, 1968.

[13] U.S. v. Belmont, 301 U.S. 324, 81 L. Ed. 715, 57 S. Ct. 758 (1937).

[14] See: The Draft Articles of the Law on Treaties, Reports of the International Law Commission, dated 4 May — 19 July 1966 (18th Session) [GA 21st Session Supplement No. 9 (a/6309/Rev. 1]

[15] *Ibid*, at 10.

[16] *Id.*

B. *On domestic plane*

1. Treaty and executive agreements defined

Under the municipal law, on the other hand, *not all* international agreements are *treaties.* Agreements concluded by the President which fall short of treaties are no less common in our scheme of government than are the more formal instruments, i.e., *treaties.* The constitution of the Philippines provides[17] that the "President shall have the power, with the concurrence of two thirds of all the members of the Senate, to make *treaties.*" As used in this provision, the term *treaties* includes any international agreement of whatever name and kind, provided that it is of such a nature as to require the concurrence of two-thirds of all the members of the Senate.[18] Without Senate concurrence such agreements are generally referred to as *executive agreements.*[19]

C. *Compared with treaties and other international agreements*

1. Fenwick, et al

Various authors have defined *treaty* in different ways. Cradall[20] describes *treaties* as contracts between states; Fenwick[21] maintains that they are compacts entered into between sovereign states for the purpose of creating new rights and duties or defining existing ones; and Wilson[22] states that the expression *treaty* is also loosely used a general term to designate any form of international agreement.

2. ILC Draft Articles

The Draft Articles on the Law of Treaties[23] prepared by the International Law Commission define *treaty* as —

> "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 the particular designation."

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[17] Art. VII, sec. 10(7).

[18] U.S. v. Belmont, *supra,* note 13; U.S. v. Pink, 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 7962; U.S. v. Curtiss-Wright Export Corporation, 299 U.S. 304; 57 S. Ct. 216, 81 L. Ed. 255 (1936), 2 Hyde, International Law chiefly as Interpreted and applied by the United States, 1405-16 (1943); 5 Moore, International Law Digest, at 210-18 (1906); 5 Hackworth, Digest of International Law, 390-407 (1943); Sayre, *The Constitutionality of the Trade Agreements Act,* 39 Colum. L. Rev. 753 (1939); Riesenfeld, *The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions,* 25 Calif. L. Rev. 670-675 (1937); 15 YALE L. J. 1905-06.

[19] *Ibid;* BISNAR, NOTES ON TREATIES AND TREATY MAKING IN THE PHILIPPINES 5 (1954)

[20] TREATIES, THEIR MAKING AND ENFORCEMENT. (2nd ed., 1916)

[21] INTERNATIONAL LAW 318 (1924)

[22] HANDBOOK OF INTERNATIONAL LAW 199 (3rd Ed. 1938)

[23] Sec. 1(a), Art. 2, Part 1, *supra.*

The Draft Articles, however, do not intend to deny the legal force of oral agreements.[24]

3. Conventions, accord, notes, etc.

In earlier times, the terms *treaty* and *convention* were employed almost exclusively to designate the instruments which are considered today as treaties in the generic sense.[25] *Treaties* and *conventions,* however, do not differ as regards their structure. They are now used indiscriminately at the pleasure of the contracting parties. The Department of Foreign Affairs of the Philippines does not, in fact, make any distinction in its treatment of them. But in addition to these instruments, there have come into use on a wide scale such terms as *agreement, accord arrangement, act, general act, compromis d'arbitrage, covenant, protocol, provisions, proces-verbal, declarations, cartel, notes,* etc. which are documents generally having relation to *treaties* but may not in themselves be *treaties.*

An examination of the more than 300 multipartite instruments concluded during the years 1919-1929 indicates that only 18 are designated as *treaties,* 123 as *conventions,* 105 as *protocols,* 39 as *agreements,* 9 as *statutes,* 12 as *declarations,* 5 as *arrangements,* 7 as *provisions,* 2 as *general acts,* and several as *regulations* (reglements).[26]

III. History

Since no division or limitation of the subject of international acts is laid down, there is *prima facie,* no reason to deny the use of executive agreements with whatever subjects that may be dealt with by the treaty-making power of the President. It would not be amiss to consider a brief survey of the history of *executive agreements* along with that of *treaties.*

A. *Ancient "international relations"*

Schuman[27] opens the curtains of human drama in international relations, thus:

> "Just as Sumerian mythology is the source of the later Greek Cult of Adonis and of the Jewish-Christian drama of the Messiah, so Sumerian 'international relation' reveals a design which has repeated itself through the ages whenever a multiplicity of sovereignties has existed in the same area. These city-states comprised of true state system which long endured. That is to say, power to command obedience was not centralized but dispersed among independent localities. Each magician-prince or god-king represented a ruling elite of landlords and priest, governed his subjects

[24] Ibid, Art. 3(d), Part I, *supra.*

[25] Bisnar, *op cit., supra,* at 5; *see also:* Castro, A Study of Philippine Treaty Practice, 19 UST Law Review, at 310.

[26] *Ibid,* at 2.

[27] International Politics 32 (6th Ed., 1958)

within defined boundaries and competed with other monarchs for land and power through bargaining and violence, i.e., diplomacy and war... War was normal... But peace could be made by 'treaty'."

1. Lagash-Umma treaty

The earliest "treaty" known to modern archeologist dated back 3000 B.C.[28] Since the date was late, the Sumerian state system having already existed for over a thousand years, many others must have preceded it. Here the Kings of Lagash and Umma, involved in a frontier dispute, agreed to submit their differences to the arbitration of Mesilim, King of Kish, who calling upon the gods arrived at an acceptable settlement (c. 2900 B.C.). Reparations were exacted. Divine wrath was invoked upon the vanguished, should they dare violate the new boundary. But then, as now, agreements among independent sovereignties became "scraps of clay" when political expediency dictated repudiation. A few years after signature, the fighting men of Umma launched a war of *revanche* and defeated Lagash.[29]

2. Babylonian: ancient diplomatic language

Meanwhile there transpired in the valley of the Nile a sequence of experiences not unlike those already reviewed. Here, also, about 5000 B.C., possibly earlier, city-states made war upon one another, until they were consolidated by conquest into two kingdoms of Upper and Lower Egypt, and united in the turn of about 32000 B.C. by Menes.[30] Egyptian-Hittite wars became chronic after Thotmes III (1480-1550 B.C.) invaded Syria. Clay tablets unearthed in the capital of Mitannis suggest that c. 1440 B.C. these states concluded a pact of non-aggression, mutual aid, and extradition. The agreement was made in three (3) languages: Egyptian, Hitties, and Babylonian, the diplomatic language of the time.

This agreement,[31] "witnessed by the thousand gods," was a pact of perpetual peace, outlawry of war, and mutual assistance. The obligations of "collective security" against aggression and revolution were reciprocal, as was also a provision for the extradition of fugitives.[32]

The reference is not to common criminal but to political offenders, who are usually exempt from extradition in modern treaties. In other respects, this document of 32 centuries ago reads like a pact of our own time.

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[28] *Id.*
[29] *Ibid*, at 29.
[30] *Ibid.*
[31] *Ibid.*
[32] *Ibid.*

3. Latin then French — language of diplomacy

Petty "international relations" existed among city-states like Syria, Assyria, Athens, and Rome.[33]

Ulpian, referred to these agreements as public and private conventions giving examples of each.[34] When Latin was still the language of diplomacy the technical terms *conventio publico* and *foedus* were used.[35] Compacts or agreements were known as *tractatus*.[36] In the 17th century, French was initiated by emperor and Pope as the language of international agreements.[37] Hence, the Latin word *tractatus*, to negotiate, was replaced by *traite* in French.

B. *Barangays: as "city-states"*

1. Kasi-kasi or sandugo

The Philippines has a similar experience. As early as the 13th century A.D., in the prehistoric Panay, a confederation of *barangays*, counterparts of Greek city-states, more specifically the Delphic Amphictiony in the 17th century B.C., were formed.[38] The international relations among the *barangays* depended much on the vagaries of war and peace.[39] Normally, the *barangay* carried on commerce and navigation with one another. They concluded "treaties" of alliance and friendship, sealed by traditional ceremony of blood compact called *kasi-kasi* or *sandugo*. The blood compact among ancient Filipinos was performed in the following manner: the persons negotiating the pact of friendship drew blood from a slight wound made on their left arms and mixed it in a cup of wine. The contracting parties drank the mixture in the same cup, thereby becoming bloodbrothers.[40]

IV. NATURE

A. *Practice in the Philippines*

1. Applicability of U.S. rules

Philippine practice in treaty-making is, by and large, influenced by the doctrines and rules developed in the United States.[41] This is because the provisions of the Philippine Constitution on the treaty-making power of the President are generally patterned after those of the United States.[42]

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[33] *Ibid*, at 29-35.
[34] 2 GROTIUS, DE JURE BELLI AC PACIS, 391 (1925)
[35] 22 ENCYCLOPEDIA BRITANNICA 438 (1953)
[36] *Ibid.*
[37] *Ibid.*
[38] ZAIDE, HISTORY OF THE PHILIPPINES 57 (1961)
[39] *Ibid.*
[40] 33 BLAIR & ROBERTSON. THE PHILIPPINE ISLANDS, 1493-1803 117 (1903-09)
[41] GAMBOA, AN INTRODUCTION TO PHILIPPINE LAW 435-36 (1955, 6th ed.)
[42] PHIL. CONST., Art. VII, sec. 10(7)

So are Philippine political laws. As a result United States interpretation and rules have been incorporated into the Philippine legal system.[43] The basis and, specially, the origin of the rules on executive agreement in the Philippine can be better understood by discussing the American practice.

At the outset, however, it is necessary to clarify the misconception of the participation of the Senate and, as some claim, the Congress in the making of executive agreements.

2. RP agreements, with or without Senate concurrence

As of this date, the President has made a total[44] of 543 agreements. Only 154 of these have been concurred into by the Senate of the Philippines. One may ask: What is then the validity or status of the agreements concluded by the President — *without* Senate concurrence?

3. Teehankee opinion of 1968

As stated before, Secretary of Justice Claudio Teehankee wrote to the Secretary of Foreign Affairs on November 14, 1968[45] that in his study of the Military Bases Agreement *as revised,* in connection with the fatal shooting of Rogelio Gonzales by U.S. Marine Corporal Kenneth Smith last July, he noted that "the amendments to the original Agreement of 1947 are embodied in a mere exchange of notes on August 10, 1965, between the Secretary of Foreign Affairs and the U.S. Ambassador to the Philippines and that these amendments have not been submitted, up to the present time, to the Senate for ratification." He therefore concluded that —

> "It is doubtful, to say the least, whether the President of the Republic of the Philippines, alone, may validly enter into such an agreement with a foreign government without the necessity of *ratification* thereof *by the* Senate in accordance with the Constitution."[46]

4. Ratification — an executive act

a. Senate never ratifies

In the first place, the opinion of Secretary Teehankee that the Amendments on criminal jurisdiction under Article XIII of the Military Bases Agreement of 1947 need "ratification" "by the Senate in accordance with

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[43] Gamboa, *op. cit. supra,* at 435-36

[44] DEPARTMENT OF FOREIGN AFFAIRS. OFFICE OF LEGAL AFFAIRS, A LIST OF AND AN INDEX TO PHILIPPINE TREATIES AND OTHER INTERNATIONAL AGREEMENTS (Manila, 1966).

[45] Letter dated November 14, 1968 of the Secretary of Justice to the Secretary of Foreign Affairs, *supra.*

[46] *Ibid.*

the constitution" is really at variance with the constitution. The constitution merely requires *concurrence*[47] — not ratification — by the Senate in the making of a treaty by the President. For properly speaking, it is the Chief Executive who *ratifies* international agreements — with or without being subject to the concurrence of the Senate — where ratification is deemed required.[48] In the language of Salonga:[49]

> "Ratification is an act by which the provisions of a treaty are commonly confirmed and approved by the State.... The act of ratification is effected by those organs which exercise the treaty-making of the State. As a rule *the power to ratify is vested in the head of State.*"

b. President, as principal, ratifies acts of his agent

Indeed, it is the President only who, as principal, can ratify the acts of *his* agents in eternal relations, e.g., the Secretary of Foreign Affairs, the ambassador, or any other official duly authorized by the President to represent him. There would be no basis of course for any of these officials to represent the Senate, much less the Congress; hence neither of the latter could assert the prerogative to ratify the acts of persons who are *not* its agents.

5. Flaw in domestic law may not invalidate agreement

In the second place, the excuse that the amendments are not effective due to the failure of one contracting party, the Philippines, to comply with its domestic law requirement, would not necessarily invalidate the amendments. For if the Draft Articles of the Law on Treaties[50] will be taken as expressive of the prevailing customary international law, then Article 43 thereof forbids what the Secretary of Justice was definitely suggesting. The provision reads:

> "A State may not invoke the fact that its consent to be bound by a a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless the violation of its internal law was manifest."

6. Some agreements adversely affected by Teehankee opinion

The opinion of the Secretary of Justice, if sustained, will adversely affect the status or validity of the following amendments to the 1947 Military Bases Agreements. These amendments, which are made effective upon signature by mere exchange of notes, have not been submitted to the Senate for concurrence:

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[47] Art. VII, sec. 10(7)

[48] Art. 2, Sec. 1(b), Draft Articles on the Law of Treaties.

[49] SALONGA, PRE-BAR GUIDE, INTERNATIONAL LAW 79 (1959)

[50] Reports of ILC, Supplement No. 9 (A/6309/Rev. 1) *Supra; see also:* Castro, *op. cit., supra,* at 314.

1. The exchange of notes of September 16, 1966 between Secretary of Foreign Affairs Narciso Ramos and Secretary of State Dean Rusk, reducing the term of the 1947 bases agreement to 25 years;

2. The exchange of notes of August 10, 1965 between Secretary of Foreign Affairs Mauro Mendez and Ambassador William McCormick Blair, Jr., amending Criminal Jurisdiction;

3. The exchange of notes of December 22, 1965 between Secretary of Foreign Affairs Mauro Mendez and Ambassador Blair, in which the United States relinquished to the Philippines the use of some base lands;

4. The exchange of notes of December 7, 1959 between Secretary Felixberto M. Serrano and U.S. Embassy Charge d'Affaires George M. Abbott, relinquishing the Community of Olongapo; and

5. Agreement on the Display of Philippine Flag at U.S. military bases, by exchange of notes on September 10-15, 1959.

Considering that these agreements are only some of the many which were designed to modify the terms and conditions of the original 1947 military bases agreement, and in view of the fact that so many years have elapsed from the date these agreements were made effective by mere signature, the serious implications of the issue raised by the 1968 opinion of the Secretary of Justice need not be over-emphasized.

7. Secretary of Foreign Affairs determines form of international agreements

The Secretary of Foreign Affairs, as *alter ego*[51] of the President in foreign relations, initially determines for the President in what form an international agreement will be finalized: *treaty* or *executive agreement*. The rule is to submit to the Senate international agreements involving *political* or *financial* implications; otherwise, the form of executive agreement is generally preferred. Ordinarily, executive agreements are finalized, hence valid and binding, upon signature.[52]

a. General criteria under jurisprudence

The Supreme Court gives the following guidelines:[53]

"International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually takes the form of *treaties*. But international agreement 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*."

[51] Villena v. Secretary of Interior, 67 Phil. 451. (1939)
[52] SALONGA, *op. cit. supra*, at 1405
[53] Commissioner of Customs et al v. Eastern Sea Trading, *supra*, note 10.

In this regard, the practice is to obtain the concurrence of the Senate at one specific stage of treaty-making, i.e., immediately before the President signs the instrument of ratification.[54] The instrument of ratification itself includes the resolution of the Senate giving its concurrence in the treaty.[55]

B. *Practice in the United States*

In the United States, it has been observed that the constitution[56] prescribes that the treaties shall be made by President, "provided two-thirds of the Senators present concurs." From this, it might be supposed that an agreement with a foreign state, to which the approbation of the Senate is not given is a thing unknown in its constitutional practice. However, it has long been the practice of the United States to contract with foreign governments in relation to a variety of matters through the medium of executive agreements, in the conclusion of which the advice and consent of the Senate has not been sought.[57]

1. Historical practice under the Articles of Confederation

In the Articles of Confederation, it had been forbidden for the states, without the consent of the Congress, "to enter into any conference, agreement, alliance or treaty with any king, prince, or state" without the same assent "to enter into any treaty, confederation or alliance," with each other.[58] The omission of *agreement* from the second list was apparently construed by certain states to permit agreements between members of the Confederation. Thus Virginia and North Carolina in 1779, and Pennsylvania and Virginia, in 1784, made agreements with reference to their common boundaries.[59]

a. When consent of Congress necessary

It was expressly held by the Supreme Court in *Wharton v. Wise*[60] that the last mentioned agreement was *not* a treaty, alliance, or confederation, within the meaning of Article IX, paragraph 2, of the Articles of Confederation.

It was also provided that the differences between two or more States concerning boundaries, jurisdiction, or any other cause whatsoever, might, on petition to the Congress of one of the parties, be referred

[54] The 1947 US-RP Military Bases Agreement, I-2 DFATS 144, 61 Stat. 4019, 43 UNTS 271.
[55] *Id.*
[56] Arts. 2, Sec. 2.
[57] 2 HYDE, *op. cit. supra*, at 1405.
[58] Art. IV, Secs. 1 & 2.
[59] 15 YALE L. J., *supra*, at 19.
[60] 153 U.S. 155, 14 S.G. 783, 38 L. Ed. 669 (1894); see also: United States v. Curtiss-Wright Corporation, *supra*, note 18.

for settlement to a commission to be established under the direction of the Congress, and that the decision thereof should be final.[61] Reference, therefore, to the Congress was optional, and the provision manifestly contemplated an attempted settlement by the states involved before the appeal was made to the Congress.

Several views had been advanced in the construction of the aforementioned constitutional declaration. Thus, Mr. James Barnett[62] averred that the practice in this matter under the confederation evidently led the framers of the constitution to prohibit agreements or compacts, except with the consent of the Congress. He further observed that it might be doubted whether the framers of the constitution used the words *agreements* and *compacts* either in the restricted or extended sense. For he believed that the framers had in mind the various compacts which the states, under the confederation, had made with each other, and that they intended apparently to provide that if states made agreements for the future, it must be with the assent of the Congress. And as the language of the constitutional provisions was that "no state shall, without the consent of the Congress, enter into any agreement by compact with another state or with foreign power,"[63] there was no distinction here, he concluded, between agreements, domestic or foreign, and the rule of construction, *noscitur a sociis,* would raise the presumption of a similar meaning and limitation for both.

b. Extradition agreements

In this regard, prohibition was directed to the formation of any combination tending to increase the political power of the States, which might encroach upon, or interfere with, the just supremacy of the United States. In line with this argument was the case of *Holmes v. Jennison*[64] where it was held that extradition by a State at the request of a foreign government, necessarily involved an agreement which was one of those forbidden to the State to enter except with the consent of the Congress. It also stated *obiter,* that such an agreement was *not* a *treaty.* Hence, the inference that extradition and similar agreements, made by the States, would be lawful, if authorized by the Congress.[65]

c. Treaty: mainly political agreements

In 1833, however, Mr. Justice Story declared in his work on constitutional law,[66] that *treaty* must apply only to engagements of political

[61] Art. IX, Sec. 2.
[62] 15 YALE L. J. *supra,* at 19.
[63] Art. 1, sec. 10.
[64] 14 Pet. 540, 10 L. Ed. 579 (1840); 15 YALE L. J., *supra,* at 20.
[65] 15 YALE L. J., *supra,* at 20.
[66] Secs. 1402-03.

character, and the others, agreements and compacts, he thought, might apply to what might be deemed mere private rights of sovereignty, such as questions of boundaries, interests in lands situated in the territory of each other, and other internal regulations for the mutual comforts and convenience of States bordering on the other.[67] To the same effect were the observations made by Judge Tanney in 1840, that the terms *treaty, agreements* and *compacts* as used in article I, section 10, of the constitution, could not be construed as synonymous with one another, and still less could either of them be held to mean the same thing with the word *treaty*.[68]

d. Influence of Vattel

In the Jennison case, undoubtedly, in the sense in which the word generally used, there was no *treaty* (between Vermont and Canada). For the term *treaty* here was meant an instrument written and executed with the formalities customary among nations; and as no clause in the constitution ought to be interpreted differently from the usual and fair import of the word used (if the decision of this case depended upon the word above mentioned) it should not be said that there was any express prohibition of the power exercised by the state of Vermont.[69] The Court then proceeded to quote definitions of these words as given by Vattel[70] who says: "*a treaty,* in Latin *foedus,* is a compact made with a view to the public welfare, by the superior power, either for perpetuity or for a considerable time . . . the compacts which have temporary matters for their objects are called *agreements, conventions,* and *pactions.* They are accomplished by one single act and not by repeated acts. These acts are perfected in their execution once and for all."[71]

e. Boundary disputes arrangements

In 1839 a boundary dispute[72] exemplified the above argument, for it was an agreement between the states of the Union and a foreign power made without the consent of the Congress, entered into between Maine and Massachusetts on one hand and Great Britain on the other. In this case, the forces of Maine and New Brunswick had been sent into the disputed territory. A collision was averted through the mediation of General Scott, and an agreement was reached by the Governors of Maine and Brunswick on March 21-23, 1839 by which each side should retain the possession of the territory occupied by each, pending final settlement by

[67] *Id.*
[68] 5 MOORE, *op. cit. supra,* at 210-11.
[69] Holmes v. Jennison, *supra,* note 64.
[70] LAW OF NATIONS, Sec. 153 (1805)
[71] *Id.*
[72] 15 YALE L.J., *supra,* at 23.

the American and British governments, but without prejudice to their respective rights and claims.

In this connection, opinions had been expressed that it was beyond the competence of a state of the Union and a bordering province of Canada to enter into an agreement, for example, to regulate fisheries in their contiguous waters. In *Manchester v. Massachusetts,*[73] however, Mr. Justice Blatchford said that the State of Massachusetts necessarily had control of her fisheries in the absence of congressional legislation assuming control for national government. Pending the settlement of this constitutional question, the bordering States of the Union might find it necessary to act in their own behalf, and made fisheries agreements with the Dominion on provincial governments of Canada.[74]

2. More recent doctrines

All this seems to point to the conclusion that mere subject matter will not make it a *treaty* as the term is used in the constitution of the United States. For the states may make with each other boundary adjustments and cessions of territory, but these are not *treaties.* Neither will it be a treaty because it is concluded with a foreign colony, for the the constitution provided for agreements with a foreign power.[75]

From the viewpoint of another author,[76] the declaration that "the president shall have the power by and with the consent of the Senate to make treaties, provided two-thirds of the Senators present concurs,"[77] sustains the conclusion that it is not to be rendered abortive by recourse to a different procedure for the use of which no provisions are made. In the case of *Monaco v. Mississippi,*[78] Chief Justice Hughes, speaking for the Court, stated that the Federal Government may effect an international settlement through treaty, agreement, arbitration or otherwise. This power,[79] according to the Courts, is a necessary concommitant of nationality.

C. *General practice in some other States*

1. In other federal system

a. Germany and Switzerland

In other federal systems, Germany and Switzerland, for example, the components states have limited rights of making treaties and, frequently,

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[73] 139 U.S. 240, 11 S. Ct. 559, 35 L. Ed. 159 (1891).
[74] 15 YALE L. J., *supra,* at 26.
[75] *Ibid.*
[76] 2 HYDE, *op. cit. supra,* at 1417
[77] Art. II, Sec. 2, Par. 2, U.S. Const.
[78] 292 U.S. 313, 54 S. Ct. 745, 78 L. Ed. 1282 (1934)
[79] U.S. v. Curtiss-Wright, *supra,* note 18; U.S. v. Belmont, *supra,* note 13 at 330.

with each other and with foreign States.[80] In Germany, the right of legislation has been well-settled. A fundamental law of the Government permitted postal and telegraphic treaties between individual States and their immediate neighbors.[81] Actual practice has, however, been broadened.

The Swiss Constitution gives to the confederation the sole right of "concluding *treaties* and alliances with foreign powers" but, by exception, the cantons preserve the right of concluding treaties with foreign powers, concerning the administration of public property, and border and police intercourse; such treaties shall contain nothing contrary to the confederation on the rights of other cantons.[82]

The reasons for these differences between the constitutions of Germany and Switzerland and the United States are, of course, historical. The thirteen original states, during the time of the confederation, never individually made any treaty with foreign powers. In Germany and Switzerland, the component states had each for several centuries enjoyed the right of making treaties and right of legation.[83]

b. Practice in Argentina

In Argentina, these are manifestly the agreements contemplated by its constitution,[84] where it is provided that the provinces shall have power to conclude with the knowledge of the Federal Congress, *partial treaties*. The agreements referred to as partial treaties relate to matters of administrative and judicial character or are purely local in scope and application. They are confessedly treaties of *quasi-sort*. They ought to be called agreements, and thus differentiated from engagements between nations, which necessarily belong to the field of foreign policy or international law, as may be necessary for the purposes of administrative, justice, or for regulating provincial interests, or undertaking public works, *etcetera*. However, they cannot, without authority from the Federal Congress, enter into partial treaties of a political character.[85]

It becomes necessary that whenever possible the subjects should be regulated through the action of the federal government. Nevertheless, it is the basic principle of federal government that the individual states enjoy an autonomy in matters merely local, not affecting the interest of the state as a whole.

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[80] 15 YALE L. J., *supra*, note 18 at 1905-06.
[81] *Ibid.*
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.*

2. Relevance of Grotius and other classicists

In international law, therefore, it seems universally recognized that not all agreements are treaties.[86] As early a writer as Grotius distinguished between international compacts and *sponsiores*, the latter being agreements entered into by a public officer and similar persons under the authority of a sovereign.[87]

This distinction had been adopted by later authors, as for instance, Rutleford.[88] To him, however, the distinction was not based upon the presence or absence of authorization from the sovereign, but upon the nature of the compacts. *Accords* and *conventions*, in his view, concern transitory affairs in contrast with a treaty which has a more permanent nature. This seems to be an international practice. There is on the other hand a bulk of solemn international instruments designated as *treaties*, and, on the other, a vast amount of less formal agreements, spoken as *protorols*, *modi vivendi*, etc.[89]

a. Executive agreement series

The Constitution of the United States, itself, probably under the influence of Vattel's terminology, distinguishes *treaties* and *compacts* insofar as the prohibition for the states is concerned. It has, in many cases, offered a way to avoid the necessity of complying with the 2/3 rule of the treaty-making clause of the constitution.[90] In this connection, it is certainly not without significance that the *executive agreements* published by the Department of State of the United States formerly in the *treaty series* now appear in special *Executive Agreements Series*.[91] Also authors have spoken of an agreement-making power of the President, in contrast to his treaty-making power.[92]

V. CLASSES

As a general rule, international agreements which are valid and binding although concluded without the intervention of the Senate are made in pursuance of the authority vested in the Chief Executive by the Constitution,[93] For the purpose, however, of clarity, such agreements may be roughly divided into the following categories. Throughout the

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[86] RIESENFELD, *op. cit. supra*, note 18 at 671.
[87] GROTIUS, *op. cit. supra*, note 34 at 15.
[88] NATURAL LAW (1956)
[89] RIESENFELD, *op. cit. supra*, note 18 at 671.
[90] CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 115 (1958).
[91] U.S. EXECUTIVE AGREEMENT SERIES (1930)
[92] MATHEWS, AMERICAN FOREIGN RELATIONS, CONDUCT AND POLICIES (1928), Note 1 at 431.
[93] U.S. v. Curtiss-Wright, *supra*, note 18.

discussion of the entire heading, to suggest that the rules are deeply enshrined in the system, old, hence settled, cases and doctrines are given preference. However, when specially relevant, recent cases are likewise cited.

A. *Agreements entered into by the President in harmony with act of Congress*

1. Reexamination: Can Congress authorize the President to conclude agreements?

There is still the minority view which holds that, in some instances, the President concludes agreements pursuant to the *authority* of an act of the Congress.[94] It is said that agreements entered into by virtue of an act of the Congress differ from ordinary treaty arrangements in that they have the sanction of a majority of both houses of Congress, instead of a vote of two-thirds of the Senators present in the executive session. They are usually concluded, it is added, subsequent to the passing of the enabling act of the Congress; whereas in treaties, the negotiation, in theory, at least, precedes action by the Senate.

a. President as "agent" of Congress

It is likewise contended that a subsequent enabling act of the Congress would validate a presidential agreement, inasmuch as the Supreme Court of the United States held that the consent of the Congress to the agreement between the States may be given subsequent to the conclusion of the agreement.[95] The legal basis of agreements of this class, therefore, is congressional action.[96]

It is further contended that the President of the United States, has entered into numerous agreements concerning commerce and navigation in the form of reciprocal arrangements on the suspension, for instance, of duties in return for equitable concessions. The President, it is argued, has been deemed in such a case to be the mere *agent* of the legislative department of the Government[97] to ascertain and declare the event upon which its expressed will is to take effect.[98]

2. Examples of Congressional "authority"

These arguments are not without specifications. By an act of June 12, 1934, the President of the United States was "authorized," within

[94] 15 YALE L. J., *supra*, note 18 at 1905-06.
[95] Green v. Biddle, 8 Wheat 1, 5 L. Ed. 547 (1823); Virginia v. Tennessee, 148 U.S. 503, 13 S. Ct. 728, 37 L. Ed. 537 (1893).
[96] 2 HYDE, *op. cit. supra*, at 1406; 15 YALE L. J., *supra*, note 18 at 1905-06.
[97] 36 COLUM. L. Rev., *supra*, at 759.
[98] Field (Marshall) & Co. v. Clark 143 U.S. 649, 12 S. Ct. 495, 35 L. Ed. 294 (1892)

a specified period of time "to enter into foreign trade agreements with foreign governments."[99] In pursuance of such authority, numerous such agreements were concluded.[100]

a. Trade-marks, copyright, etc.

In harmony with a like authority, the President has concluded in behalf of the United States agreements respecting international copyrights, and for the protection of trade marks. Through the instrumentality of the Postmaster General, he has concluded postal and money order conventions.[101] And also, through the means of a particular commission, established by a like authority, he has entered into important arrangements for the refunding of loans made to foreign States.[102] With the aid of an appropriate statute, the President has entered into arrangements for moratoria with debtor States[103] He has contracted for the acquisition of territory by means of congressional action approved by the President, the independent state of Texas was admitted into the Unions by this method.[104] The same process was utilized in the acquisition of Hawaii.[105]

b. Other forms of "authorizations"

In consequence of a congressional action, the President has, through the medium of the Secretary of Treasury, entered into agreements for the making of loans to the foreign powers.[106] It was in pursuance of an act of the Congress of March 2, 1903, which finalized the lease to the United States of lands of Cuba for naval stations. This agreement was signed by the President of Cuba on February 16, 1903. Again, by virtue of an act of the Congress, protocols defining more specifically the boundary line between the United States and Canada have entered into with Great Britain.[107] Supported by a joint resolution of the Congress, in another instance, approved June 19, 1934, the President accepted membership for the Government of the United States in the International Labor Organization.[108]

The foregoing illustrations all tend to show that, in the United States, the "participation" of the Congress has manifested itself chiefly in relation to regulation of commerce, especially as to trade-marks, copy-

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[99] 2 HYDE, *op. cit. supra*, at 1406; 15 Yale L. J. *supra*, at 1905-06.
[100] *Ibid.*
[101] 9 YALE L. J., *supra*, at 414.
[102] 2 HYDE, *op. cit. supra*, at 1408.
[103] MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 117-120 (1914).
[104] 2 HYDE, *op. cit. supra*, at 1408.
[105] *Ibid.*
[106] *Ibid.*
[107] 15 YALE L. J., *supra*, at 1905-06.
[108] 2 HYDE, *op. cit. supra*, at 1409.

rights, and postal relations. In all these cases, there is an enabling law, in consequence of which the President has made agreements.

3. Philippine examples

In the Philippines, the Congress also may, by joint resolution or some form of legislative action, give subsequent sanction to these kind of arrangements. Thus, the Executive Agreement between the Philippines and the United States concerning trade and related matters was accepted by Commonwealth Act No. 733 of the Congress of the Philippines. The alien Property Agreement between the same parties was made pursuant to Republic Act No. 8. The Agreement for the sale of surplus property was approved by the Congress under Republic Act No. 33.[109]

The Articles of Agreement of the International Monetary fund and the Articles of Agreement of the International Bank of Reconstruction and Development, both signed on behalf of the Commonwealth by Resident Commissioner Romulo on December 27, 1945, were accepted by Commonwealth Act No. 689. Membership of the Philippines in the UNESCO was approved by Joint Resolution No. 3 of October 17, 1946.[110] And lastly, the 1947 Military Bases Agreement between the Philippines and the United States was finalized, on the part of the former, in relation to a congressional resolution.[111]

4. 1964 Memorandum of Department of Foreign Affairs

After such a preponderance of "evidence" on the exercise of the power of the Congress to "authorize" the President conclude commercial agreements, one would perhaps, in resignation, accept the "primacy" of the Congress over the Chief Executive in the treaty-making power on this field at least. However, a closer investigiation of existing administrative and judicial determinations definitely and conclusively sustains the unbriddled control of the President of the power of treaty-making, undiminished by Congressional officiousness.

a. Senate, not Congress, merely concurs

In a memorandum dated May 15, 1964,[112] the Counselor for Legal Affairs, representing the Department of Foreign Affairs, wrote to the Chairman of the Senate Committee on Foreign Relations on the validity of the trade agreement between the Philippines and Indonesia finalized as a mere executive agreement on May 27, 1963, in this wise —

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[109] BISNAR, *op. cit. supra*, at 148.
[110] *Ibid.*
[111] I-2 DFATS 144, 61 Stat. 4019, 43 UNTS 271.
[112] Memorandum dated May 15, 1964 for the Chairman, Senate Committee on Foreign Relations; Castro, *op. cit. supra*, at 312-13.

> "The Phil-Indon trade agreements, we are told, may not be made as executive agreements because at the time they were concluded the 'authority' of the President under Section 402 of the Tariff and Customs Code to enter into such agreements *had already expired*. In other words, without the legislative authority given by said Section 402 of the Tariff and Customs Code, the President is powerless to enter into a trade agreement in the form of an executive agreement. As was pointed out during the hearing before the Foreign Relations Committee, this legal proposition is without support under the Constitution and the law. Paraphrasing the words of the U.S. Supreme Court, the President makes treaties with the Senate, but he alone negotiates. (U.S. v. Curtiss-Wright, 299 U.S. 304). Note the use of the word *Senate* instead of *Congress*. The task of treaty-making must be with the Senate since under the Constitution it is only this body, and not the whole Congress, that concurs in the ratification of a treaty by the President. . . ."

The Counselor for Legal Affairs continues to argue that, as above indicated, the Presidential power to make treaties is shared by the Senate only "by the simple act of concurring in the ratification thereof." He said that the necessary conclusion is "that the Congress as a whole is powerless to make treaties and that the treaty-making power, not being legislative nor judicial in character," must of necessity be lodged in the executive branch of the Government — more specifically the President. Rhetorically, he addresses the Committee:

> ". . . If Congress as a whole is constitutionally powerless to make alone international agreements, we ask How could Congress give or delegate an authority when it does not have that authority? Addressing the same question to the case now under consideration, how could the Congress of the Philippines pretend to authorize the President to enter into trade agreements under Sec. 402 of the Tariff and Customs Code, when Congress itself is without the same authority? The philosophic principle that *Nemo dat quod non habet* applies on all fours to any claim that Congress could. It has been said that 'the power to agree with a foreign state cannot be delegated by Congress because Congress itself has not that power'. (Fraser, Treaties and Executive Agreements, pp. 2-3.) Underlining supplied). *'As Congress possesses no power whatsoever to make international agreement, it has no such power to delegate'*. (John Basset Moore, Proceedings of the American Philosophical Society, 1921, Vol. LX, Minutes)."

5. 1961 Supreme Court Decision on Eastern Sea Trading

In the same vein is the *ratio decidendi* in the case of the *Commissioner of Customs v. Eastern Sea Trading*.[113] The Supreme Court of the Philippines settles the issue with finality by ruling —

> "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 5, 1881 (21 Stat. 502), postal conventions regulating the reciprocal treatment of mail matters, money orders, parcel post, etc.,

[113] Commissioner of Custom et al v. Eastern Sea Trading, *supra*, note 10.

> 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). The Executive agreements were concluded by the President pursuant to the McKinley Tariff Act of 1890 (26 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*...."

a. Congressional act mere surplusage

It has become abundantly clear that the tariff acts, insofar as the "grant" by the Congress of power to the President to make trade agreement is concerned may be thus considered as a surplusage.[114]

B. *Agreements made by the President upon his own authority*

1. Curtiss-Wright decision

a. President is sole spokesman in foreign affairs

The supremacy of the position of the Chief Executive in the control of foreign relations is better understood in the following language of the Supreme Court of the United States.[115]

> "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he *alone* negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument on March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations'." (Annals, 6th Cong., Col. 613).

b. U.S. Senate acknowledges position of President

The Court then continued to quote that the U.S. Senate Committee on Foreign Relations reported to the Senate on February 15, 1816 —

> " 'The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with brightest prospect of success. For his conduct he is responsible to the Constitution. The Committee considers this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety...'

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[114] *Ibid;* Castro, *op. cit. supra,* at 313.
[115] U.S. v. Curtiss-Wright Export Corp., *supra,* note 18.

c. Unique position — reasons

Explaining that secrecy is vital to the success of negotiations, the Supreme Court concludes:

> "'Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials.... Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty —a refusal the wisdom of which was recognized by the House itself and has never since been doubted.'"

It is evident that, in foreign affairs, the authority of the President is almost unlimited.

2. If President cannot fulfill; good faith

In the field of treaty-making, the President has set up some criteria. However, it is quite possible for the President to enter into agreements which would be better carried out if previously submitted to the Senate. In this case, it must be understood by the other government that if the policy promised by the President requires action by the Senate or, to be more effective, compliance with certain internal law requirements is necessary, then all that the Chief Executive pledges is the good faith of his government, more particularly his administration.[116]

3. Some examples

The following cases are representative of the agreements under this category:

1. Exchange of notes with Great Britain on the Turtle and Manganese Islands in September, 1946;

2. Agreement between the Philippines and the United States of August 22, 1946, regarding the transfer of Enemy Property in Davao Province and elsewhere;

3. Agreement between the Philippines and the United States of May 12, 1947, regarding meteorological facilities and training program, and air navigation facilities and training program; and

4. Philippines-South Vietnam Agreement on the Right, Privileges, and Immunities of the Philippine Civic Action Group (PHILCAG V);

5. Philippines-Indonesia agreement on Economic Cooperation consisting of a Joint Communique, the Djakarta Memorandum and a Supplementary Agreement, all signed in Djakarta on August 27, 1966;

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[116] BISNAR, *op. cit. supra*, at 146.

6. Philippines-Netherlands agreement concerning the Establishment of a Training Institute for Small Scale Industries Promotion of March 2, 1966;

7. IMCO Amendments to Article 17, 18 and 28. Accepted by the Secretary of Foreign Affairs on October 10, 1966.

4. Secretary of Foreign Affairs as alter ego of the President in foreign relations

a. Doctrine of Qualified Political Agency

These executive agreements are ordinarily concluded and finalized by the Secretary of Foreign Affairs (or the Ambassador or any other official duly authorized by the President), whose acts, in foreign relations, are, under the *Doctrine of Qualified Political Agency*[117] the acts of his principal, the President, unless disowned or reproved by the latter. As *alter ego* of the President, the Secretary of Foreign Affairs may validly accept amendment to a treaty through the medium of an executive agreement. In point are the amendments to IMCO (arts. 17, 18 and 28) and to Article XIII on Criminal Jurisdiction, Philippines-United States Military Agreement of 1947, which were concluded by exchange of notes on August 10, 1965. Again, on September 16, 1966, Secretary of States Dean Rusk exchanged notes reducing the duration of the lease of the military bases from 99 years to 25 years. Although these amendments to the 1947 Military Bases Agreement are concluded by the Secretary of Foreign Affairs by mere executive agreements, their validity and binding effect upon the nation, specially on international plane, cannot be disputed.[118]

C. *Agreements entered into by the Chief Executive in consonance with a previous treaty*

1. ICAO as source of agreements

By virtue and in pursuance of the convention on International Civil Aviation Organization, (ICAO) signed at Chicago on December 7, 1944, air transport agreements were concluded by the Philippines with other signatories, with the exception of the air treaties with Greece and the United States. By virtue of this authority, the President did not submit the agreements to the Senate for concurrence. However, the air transport agreement with the United States was submitted for concurrence by the Senate before it was discovered that there was no neces-

[117] Villena v. Secretary of Interior, *supra*, note 51 at 463-65; 1 TAÑADA AND CARREON, *op. cit. supra*, at 294-95

[118] Memorandum for the Secretary of Foreign Affairs dated March 7, 1967 of the Acting Chief, Treaties Division, Office of Legal Affairs Department of Foreign Affairs.

sity for so doing in view of the authorization under Article 83 of the Convention of the ICA which was previously concurred in by the Senate.

That with Greece signed at Athens on October 3, 1949, also provided for ratification, because Greece was not prepared to discharge fully its obligation under the agreement without ratification thereof in accordance with her constitutional processes. This was concurred in by the Philippine Senate in its Resolution No. 22 dated May 16, 1950.[119]

D. *Agreements made by virtue of his military powers*

1. Preliminaries of Peace

The military power is conferred on the President of the United States by the clause of the Constitution that "he shall be Commander-in-Chief of the army and navy of the United States and the militia of the several states, when called into the service of the United States."[120] The power to direct belligerents operations necessarily involves the right to suspend them under an agreement, which may embody terms of peace, to be settled in future formal treaty. These are called *Preliminaries of Peace* which have usually preceded the actual closing of the great wars of modern history.[121]

The most familiar example of many years is the peace protocol signed between the United States and Spain on August 12, 1898, which brought actual hostilities to a close. It practically settled the fate of Cuba and Puerto Rico, leaving only the title to the Philippines to be agreed upon at a future negotiations of a treaty of peace. Nevertheless, the preliminary character of the arrangements and its relations to the war power, made its submission to the Senate unnecessary.[122]

The President's control of the army and navy exists in time of peace as in time of war. It includes necessarily the disposition of these forces in whatsoever localities the President may select.[123] Therefore, when the Rush-Bagot Agreement on April 28-29, 1817 limited the naval forces of the United States and Great Britain on the Great lakes to a certain number of vessels, the President was merely exercising his powers as Commander-in-Chief of the navy.[124]

2. RP President as commander-in-chief

In the Philippines, the President has been conferred by the Constitution[125] a similar power. It gives him the power to be the "com-

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[119] BISNAR *op. cit. supra*, at 146.
[120] U.S. CONST. Art. II(2), see also, PHIL. CONST., art. 8, Sec. 1092).
[121] 15 YALE L. J., *supra*, at 70.
[122] *Ibid*, at 71.
[123] *Id.*
[124] *Ibid*, at 72.
[125] PHIL. CONST. art. 8, Sec. 10(2)

mander-in-chief of all armed forces of the Philippines" (and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion).[126] The Philippines has not yet had occasion to significantly use this power on the part of its President, but, when the occasion arises, not only would the need of promptness of action be great, but the obligations to be assumed would be ordinarily those which the President alone can carry out through his control of the armed forces. Armistice agreements are of this character.

It may be pertinent to point out that in his opinion Secretary Teehankee contended that as far as the "United States was concerned, it could be said that the (1947 military bases) agreement involved purely military matters falling under the exclusive domain and competence of the President of the United States as Commander-in-Chief of the U.S. Armed Forces."

a. In cases of invasion, insurrection, etc.

On the second aspect of this power, in case of invasion, insurrection, or rebellion, or imminent danger thereof, the President can of course suspend the privileges of the writ of habeas corpus, or place the Philippines or any part thereof under martial law. It is held that the Presidential determination of any of these cases or their imminency is conclusive upon any other persons, including the courts.[127]

E. *Agreements for the adjustments of claims or protection of citizens abroad*

1. Ministries of foreign affairs in charge of protection

In discussing this particular heading, the use of settled cases is employed, as in previous topics.

One of the principal duties of the department of state of the United States, as well as any other ministries of foreign affairs, relates to the protection of citizens abroad.[128] If the citizen receives an injury to person or property in a foreign country and the local tribunal or other authorities unjustly deny him redress, the department will, as a rule, present his claim to the government of the delinquent state.[129] If reparations take the form, as it usually does, of a payment of money damages, the state department acting on behalf of the claimant[130] receives the money in trust for the latter.

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[126] *Ibid.*
[127] PHIL. CONST., Art. VII, Sec. 2., *supra.*
[128] BISNAR, *op. cit. supra,* at 148.
[129] 15 YALE L. J., *supra,* note 18 at 76.
[130] BISNAR, *op. cit. supra,* at 148.

It may happen, however, that the foreign government may refuse or be unable to pay the debt immediately. In that case, the representatives of the two governments may enter into an agreement setting forth the amount due and date and terms of payment.[131]

Such were the agreements of the United States for instance, on May 1, 1852 with Venezuela and on May 24, 1897 with Chile. Both were not submitted to the Senate for approval nor was there any reason for doing so. It often happens, however, that the foreign government disputes the facts and the law involved in the claim, and recourse may be had to arbitration to effect a settlement.[132]

Moore stated in 1905 that "Pecuniary claims against governments have been settled by the President and no question as to his possession of such power, apart from discussion on its possible limitations, appears to have been seriously raised."[133]

2. Settlement of Sabah claim

It is submitted that the settlement of the Sabah claim falls under this area which the President can settle without the need of the intervention of the Senate, much less of the Congress. A local authority of course declared that " . . . the submission of claims against the Philippines to arbitration by simple executive agreement is deemed to be a procedure of doubtful expediency, for in such cases a resort must be had to Congress for an appropriation with which to pay the claims should any be awarded. The proper procedure in such cases would be to draw up the *compromise* as a formal treaty . . ."[134]

3. Peking Protocol of 1901

But to point out that this practice is settled by long usage, the President of the United States alone, entered into an important arrangement affecting the adjustment of claims of American citizens. This was the final protocol signed by the Allies at Peking. A peace protocol, as previously noted, does not require the assent of the Senate being an exercise of the war power of the President. But the agreement is preliminary and contemplates a subsequent embodiment of its terms in a formal treaty. The said protocol of September 7, 1901, was, to all intents and purposes, a definite settlement.[135]

4. Alaskan boundary settlement

Notwithstanding, however, the temporary and provisional arrangements effected by executive agreements, the President has not been dis-

[131] 15 YALE L. J., *supra*, at 77.
[132] 2 HYDE, *op. cit. supra*, at 1410.
[133] *Id.*
[134] BISNAR, *op. cit. supra*, at 148.
[135] 15 YALE L. J., *supra*, note 18 at 76.

posed to endeavor to bind the nation to make final adjustments of territorial differences save by treaty. An agreement providing for the adjustment of the Alaskan boundary by a joint commission, and concluded January 23, 1925, for arbitration of differences respecting sovereignty over island of Palmas assumed the form of a treaty and was submitted accordingly to the Senate for its approval.[136]

F. *Modi vivendi, protocols, and other political agreements*

1. "Boxer" rebellion settlement

The President has, by executive agreements, concluded certain important compacts with respect to political affairs in some cases establishing the basis of subsequent arrangements.[137] As previously noted, of such kind was the protocol signed at Washington on August 12, 1899 by Secretary of State and the French Ambassador, establishing the basis or condition of peace between the United States and Spain.[138] By means of a protocol signed at Peking on September 7, 1901, the United States joined Austria-Hungary, Belgium, Spain, France, Great Britain, Germany, Italy, Japan, Netherlands, and Russia in the agreement with China, fixing the basis for the heavy obligations to be undertaken by that State in consequence of the so-called "Boxer" rebellion in 1900.[139]

Through an exchange of notes on November 30, 1908, between the United States and Japan, an agreemment was made declaratory of policy of the contracting parties in the Far East, embracing, among other things, an expression of determination to support the independence and integrity of China, and the principle of equal opportunity for commerce and industry of all nations in that Empire.[140] And it is not without significance that it was seemingly regarded as feasible for the United States, by executing agreements, to participate in 1931, in armament truce, and in 1933, in a tariff truce, which were initiated by the League of Nations.[141] To the same end, through the instrument of an executive agreement, between the United States and Iceland, effected on July 1, 1941, the former undertook to defend the latter by United States forces.[142]

2. Modi vivendi

In this connection, there is a well defined type of agreement known as modus vivendi,[143] which has been regarded as falling within the

[136] 4 U.S.T. 4512.
[137] 2 HYDE, *op. cit. supra*, at 1409-11.
[138] *Ibid.*
[139] *Ibid.*
[140] 3 U.S.T. 2673.
[141] *Ibid*, at 3131.
[142] U.S. EXECUTIVE AGREEMENT SERIES, No. 253.
[143] 15 Yale L. J., *supra*, at 74.

powers of the President. As the name indicates, *modus vivendi* is in its nature a temporary or working arrangement made in order to bridge over some difficulty pending a permanent settlement.

What is considered as one of the most important *modi vivendi* in the diplomatic history of the United States was that of October 20, 1899 as to the Alaskan boundary. It established, as reviewed, a line boundary recognized by the United States and Great Britain for four years until a final settlement by an arbitral tribunal was reached. Other *modi vivendi* will be found in numerous instances in which the American Ministers and officers have, at the solicitation of foreign governments, acted as arbitrators in dispute between them. Thus, in 1896, at the request of Costa Rica and Nicaragua, President Cleveland appointed a United States engineer to decide the boundary marks between the two States.[144] Similarly, the United States continues to enter into *modi vivendi* in relations to commercial and other matters, and provisional arrangements which assume the form of executive agreements.[145]

a. RP-Japan provisional gareement of 1958

Although the Philippines has likewise entered into several *modi vivendi*, the Provisional Agreement concluded between the Philippines and Japan on July 4, 1958[146] allowing the entry of Japanese businessmen whose number will not exceed 350 at any given time is cited as a representative arrangement.

A. *Executive Agreements not undue delegation of legislative power*

1. **Legal "basis" of the claim**

It has often been asked whether the conclusion by the President of an international agreement without the subsequent apology by the Senate constitutes an undue delegation of legislative power.[147]

In case of the United States, and in regard to its international trade, Article 1 of its Constitution confers upon the Congress all legislative powers granted to the Federal Government, and in Section 8 thereof, it is provided in part that ". . . the Congress shall have the power to lay and collect taxes, duties, imports and excises . . . to regulate commerce with foreign nations, and among the several states . . ."

2. **"Intelligible" principle criterion**

On the other hand, the Constitution vests in the President the execution and administration of the laws passed by Congress. This, by nec-

[144] U.S. FOREIGN RELATIONS 102 (1896)
[145] 2 HYDE, *op. cit. supra*, at 1416.
[146] LAUREL, OUR TREATY WITH JAPAN 14 (1961)
[147] U.S. v. Belmont, *supra*, note 13 at 330; also Field (Marshall) & Co. v. Clark, *supra*, note 98.

essity, it is argued, places in the President's hands a large discretionary power which he must exercise in order to effectively enforce and execute congressional laws and policies.[148] In other words, it is pointed out, once the Congress enacts a law and lays down a policy, large discretionary power may be constitutionally vested in the President for carrying out the law and the declared policy.[149] Moreover, it is contended that, in short, the United States Supreme Court has laid down the doctrine, and consistently followed it, that a delegation of power by Congress to the President is not unconstitutional if the Congress shall lay down a legislative act, an "intelligible principle" to which the executive is directed to conform.[150]

3. Field v. Clark

As previously reviewed, there can neither be "authorization" nor delegation.

In *Field v. Clark*,[151] the Supreme Court of the United States ruled—

> ". . . the uniform, long-continued and undisputed legislative practice just disclosed rests upon an admissible view of the Constitution which even if the practice found far less support in principle than we think it does, we should not feel at liberty at this late day to disturb the Trade Agreement Act is so framed that it meets even the rigorous tests laid down by the Supreme Court for determining the Constitutionality of legislative delegation of powers is purely domestic."

4. Memorandum of DFA Legal Counselor

In the memorandum of the Department of Foreign Affairs previously referred to,[152] the Counselor for Legal Affairs also touched this point:

> "Reliance is placed on the validity of Sec. 402 of our Tariff and Customs Code by claiming the validity of U.S. trade acts and agreements made pursuant thereto as recognized by courts specially in the cases of Field vs. Clark, 143, U.S. 649 and Altman vs. United States, 224 U.S. 583.... In both cases, particularly in the Field vs. Clark case, the tariff act was challenged 'as delegating to him (the President) both legislative and treaty-making powers.' After holding that the Act did not constitute an improper delegation of legislative power, the Court in that case went on to say: 'What has been said is equally applicable to the objection that the third section of the act invests the President with treaty-making power'."

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[148] SAYRE, *supra*, note 18 at 759.
[149] 1 TAÑADA AND CARREON, *op. cit. supra*, at 759.
[150] *Ibid*, at 433-62.
[151] Field (Marshall) & Co. v. Clark, *supra*, note 98.
[152] Memorandum dated May 15, 1964, *supra*.

5. **Eastern Sea Trading decision**

Likewise, the Eastern Sea Trading case[153] *finally* settled the issued, thus:

> ". . . 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.*"

To capitulate, as the Congress has no power to conclude agreements, it cannot have the power to delegate.[154]

B. *Rule in the United States as to validity*

1. **Treaty v. executive agreements: binding effect**

Commissioner Francis B. Sayre[155] advanced the opinion that between a treaty and an executive agreement, neither was of superior validity insofar as international law was concerned. They were alike in that both constituted equally binding obligations upon the nation. He further observed that, from the point of view of constitutional law, hence, municipal law, there were important differences of substances as well as form. Treaties might be negotiated which departed widely from the existing laws or policies, and the Senate in approving their ratification would be subject to no restraint[156] or consideration within the general limits of the treaty-making power under the United States' form of government other than what was best for the nation.

a. Belmont case

As early as 1905, Professor Hyde opined that *executive* agreements, like *treaties,* had the force and effect of the supreme law for a nation.[157] In the Belmont case,[158] the majority opinion penned by Justice Sutherland, arrived at the conclusion that no state policy would prevail against the international compact involved, holding, in effect, that an executive agreement could override the pronounced public policy of a state law. Chief Justice Tanney[159] was even of the view that there is no reason to deny the use of executive agreement relating to whatever subjects may be dealth with by the treaty-making power of the President.

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[153] Commissioner of Customs v. Eastern Sea Trading, *supra,* note 10.
[154] U.S. v. Curtiss-Wright, *supra,* note 18.
[155] SAYRE, *supra,* note 18 at 751-55.
[156] *Ibid.*
[157] RISENFELD, *supra,* note 18 at 671.
[158] U.S. v. Belmont, *supra,* note 13.
[159] 5 MOORE, *op. cit. supra,* at 210-11.

b. Altman case

But it is noteworthy that Mr. Justice Stone, with whom concurred Justices Cardozo and Brandeis, expressly reserved an opinion at this point. The Altman case [160] did not necessarily require such a result as Mr. Justice Sutherland revealed and reached, and a lower court seemed to have taken an opposite view,[161] where it was said that such agreements were neither treaties nor had the force and effect of law.

2. Treaty as the supreme law

There is therefore no unanimity as to the rule. Although the *Four Packages of Cut Diamond* case[162] may represent an extreme minority view, it is certainly a liberal construction of the constitutional powers to hold that the President, merely on his powers on foreign relations, may override state law and public policy.[163] But admittedly, the majority opinion in the Belmont case represents the prevailing rule in the United States, even if the most extreme extensions which can be accorded to the power of the President in the field of international relations.

In this respect, the foregoing observations are indeed convincing in view of the express wording of the United States Constitution that —

> "this Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under authority of the United States, shall be the supreme law of the land, and Judges in every State shall be bound thereby, anything in the Constitution or the laws of any State to the contrary, notwithstanding."[164]

As observed, this situation may be due largely to the language of the Constitution which makes a treaty, generically including executive agreement, "the supreme law of the land."

C. *Validity in the Philippines*

1. Executive agreements to conform with Constitution and law

In the Philippines, no similar provision is present in the Constitution. This does not mean, however, that in order to be valid in this jurisdiction, international agreements, like treaties and executive agreements, should conform with the constitution only. One authority contends, that, unlike in the United States, the President of the Philippines must, in

[160] B. Altman Co. v. United States, 224 U.S. 583, 32 S. Ct. 593, 56 L. Ed. 894 (1912).
[161] In re Four Packages of Cut Diamonds, 255 Fed. 314 (1918).
[162] *Ibid.*
[163] RISENFELD, *supra*, note 18 at 674.
[164] Art. VI(2)

making executive agreements, act scrupulously within the laws and conform to the policies already established by the Congress.[165]

a. *Gonzales v. Hechanova*

In 1963, the Supreme Court by[166] *obiter* in the Hechanova case said:

> ". . . our Constitution authorizes the nullification of a treaty, not only when it conflicts with the fundamental law, but also when it runs counter to an act of Congress."

Obviously, the term *treaty* here is used to denote its conceptually generic signification.

The Court further stated that if an executive agreement is violative of a law, it is, from the constitutional viewpoint, unlawful. For although the President may, under the American constitutional system, enter into executive agreements without previous legislative authority, he may not, in this jurisdiction, by executive agreement, enter into a transaction which is prohibited by statutes enacted prior thereto, since, under the Constitution, the main function of the Chief Executive is to enforce laws enacted by the Congress.[167]

The Supreme Court went on to say that the President cannot interfere in the execution of the legislative enactments that have acquired the status of laws, by indirectly repealing the same through an executive agreement providing for the performance of the very act prohibited by said laws.[168]

In both jurisdictions of the Philippines and the United States, concededly the Supreme Court has the power of review over international agreements.[169]

VII. CONCLUSION

A. *Definition restated*

According to Miller, there is no exact definition of the expression *executive agreements*.[170] However, it is admitted that the term is generally used to refer to international agreements, regardless of terminology, made by the President without concurrence of the Senate.

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[165] BISNAR, *op. cit. supra*, at 7.

[166] Gonzales v. Hechanova et al, G.R. No. 21897, October 22, 1963, 60 O.G. 802 (Feb., 1964)

[167] *Ibid.*

[168] *Ibid.*

[169] Ibid; Risenfeld, *supra*, note 18 at 674.

[170] 1 MILLER, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES 9 (1931); see also: Memorandum dated May 14, 1964 of the Counselor of Legal Affairs *supra*.

1. Sto. Domingo case: undefined discretion of the President

The Sto. Domingo case,[171] perhaps, best illustrates the undefined discretion of the President in the making of executive agreements:

> "Obviously, the line between such agreements and treaties which have to be submitted to the Senate for its approval is not an easily definable one. So when the Senate refused in 1905 to ratify a treaty which the first Roosevelt had entered into with the Government of Sto. Domingo for putting its customs houses under United States control, the President simply changed the *treaty* into an *agreement* and proceeded to carry out its terms with the result that a year or so later the Senate capitulated and ratified the *agreement* thereby converting it once more into a *treaty*."

2. Hackworth statement of 1940

The immediately legal and practical reasons behind the undefined discretion of the President in the making of executive agreements are explained by Mr. G.M. Hackworth, a former President of the International Court of Justice and one-time Legal Adviser of the Department of State in his statement before the House Ways and Means Committee, 76th Congress, 34rd session, Hearing on Resolution No. 407 of February 1, 1940 —

> "While Article II, Section 2, of the Constitution authorizes the President by and with the advice and consent of the Senate to make treaties with foreign nations, it does not say that no other form of international agreement shall be concluded by the President. The fact is that the President has, from the beginning of the Government, entered into various forms of agreements with foreign countries which, while they fall short of treaties in that they do not follow the prescribed constitutional methods for the conclusion of treaties, are nevertheless valid and binding. The conduct of the foreign relations of this country is in its nature essentially an executive function. The President could not successfully deal with them, *if every agreement made by him on any and every question or subject of discussion between this and foreign governments required the approval of the Senate before becoming effective. Such a procedure would so hamstring the President as to render the conduct of the foreign relations nigh impossible. It would negate the underlying theme of the constitutional division of authority between the three branches of the Government.*"[172]

This afore-quoted statement gives the best reaction to the 1968 opinion of Secretary of Justice Teehankee on the validity of agreements not submitted to the Senate for its concurrence.

3. Binding effect upon the nation

From the standpoint of international law, *treaties* and *executive* agreements are alike in that both constitute equally binding obligation upon the nation.

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[171] CORWIN, *op. cit. supra*, at 115; see also: Memorandum of the Counselor of Legal Affairs dated May 14, *supra*.

[172] 5 HACKWORTH, *op. cit. supra*, at 397.