

**AN UNTRAMMELED CHIEF ARCHITECT:
EXAMINING THE BINDING EFFECT OF THE SO-CALLED
“GENTLEMEN’S AGREEMENT” IN THE
WEST PHILIPPINE SEA ***

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ABSTRACT

Sovereign rights cannot, and should never be, surrendered or diminished—much less through a secret verbal agreement made by those authorized to represent the Philippines in foreign relations. This Article examines the concept of a “gentlemen’s agreement” from the perspective of international law and Philippine municipal law. The analysis will then be juxtaposed with the extent of the treaty-making power of the President and his alter egos to bind the Philippines in such agreements. Ultimately, this Article proposes constitutional reforms to limit the otherwise untrammelled authority of the President as the Chief Architect of Philippine foreign policy.

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INTRODUCTION

The rift over the West Philippine Sea took a different turn when news of the so-called “Gentlemen’s Agreement” between China and the Philippines surfaced in the early quarter of 2024. The two countries allegedly had a verbal arrangement wherein China will “allow” the Philippines to enter the disputed Ayungin Shoal located within the Philippines’ 200 nautical mile-exclusive economic zone (“EEZ”),¹ while the Philippines’ access would be limited to delivering water and food provisions to the personnel stationed at BRP Sierra Madre, a Philippine warship that serves as a sovereign marker in the disputed waters.² The agreement was intended to de-escalate the tension

¹ Joahna Lei Casilao, *EXPLAINER: What is the Ayungin Shoal and why is it important?*, GMA NEWS ONLINE, June 5, 2024, at <https://www.gmanetwork.com/news/topstories/nation/909087/explainer-what-is-the-ayungin-shoal-and-why-is-it-important/story/>; Christopher Bodeen, *China publicizes for the first time what it claims is a 2016 agreement with Philippines*, AP NEWS, May 3, 2024, at <https://apnews.com/article/china-south-china-sea-philippines-alleged-agreement-0006abb98502727972872bcecf49a51>.

² Filane Mikee Cervantes, *Duterte admin execs: No gentleman’s agreement with China*, PNA, May 21, 2024, at <https://www.pna.gov.ph/articles/1225196>; Giselle Ombay, *‘Gentleman’s agreement’ allowed in int’l law but legality depends on content —DOJ*, GMA NEWS ONLINE, May 20, 2024, at <https://www.gmanetwork.com/news/topstories/nation/907357/gentlemans-agreement-legality-doj/story>.

between the two countries, without necessarily abdicating their claims on the said waters.³

Former President Rodrigo Roa Duterte, as well as several public officials who served during his administration, publicly rejected the existence of such an agreement.⁴ They claimed that China merely aims to sow misinformation and mischief to divide the Philippines.⁵ As a response to these denials, China accused the Philippines of “unilaterally abandon[ing]”⁶ the agreement and “engag[ing] in increasing numbers of illegal activities that infringe on China’s territorial sovereignty.”⁷ According to China, under the Gentlemen’s Agreement, the Philippines has committed to “not to reinforce its illegally ‘grounded’ warship, not to send additional personnel, not to hype the tension, and to communicate with the Chinese side before transporting supplies.” In turn, “the Chinese side allows the Philippines to deliver daily necessities to the personnel aboard the warship based on humanitarian principles.”⁸

For all its posturing, however, China has not put forward evidence to prove the existence of the Gentlemen’s Agreement since not a single official document or proof was submitted to back up its claims. As an attempt, it publicized an alleged transcript of a wiretapped communication between the Filipino Western Command (“Wescom”) Chief and Chinese

³ Yukio Tajima & Ramon Royandoyan, *China claims South China Sea deal with Philippines' Duterte*, NIKKEI ASIA, Apr. 19, 2024, at <https://asia.nikkei.com/politics/international-relations/south-china-sea/china-claims-south-china-sea-deal-with-philippines-duterte>; Prime Sarmiento, *Philippines urged to honor Gentleman's Agreement on Ren'ai Jiao*, CHINA DAILY, Apr. 18, 2024, at <https://www.chinadailyhk.com/hk/article/581265>.

⁴ Cervantes, *supra* note 2; Charie Abarca, *China insists 'gentleman's agreement' under Duterte administration*, INQUIRER.NET, Apr. 11, 2024, at <https://globalnation.inquirer.net/231491/china-on-gentlemans-agreement>.

⁵ Cervantes, *supra* note 2.

⁶ Lin Yongxin, *Philippines strays down dangerous path by breaching "gentleman's agreement" with China*, CHINA MIL. ONLINE, Apr. 26, 2024, archived at https://web.archive.org/web/20240427013510/http://eng.chinamil.com.cn/OPINIONS_209196/Opinions_209197/16304102.html; Global Times, *Current Philippine admin unilaterally abandons 'gentleman's agreement': Chinese embassy*, GLOB. TIMES, Apr. 18, 2024, at <https://www.globaltimes.cn/page/202404/1310843.shtml>.

⁷ Yongxin, *supra* note 6; Abarca, *supra* note 4.

⁸ Yongxin, *supra* note 6; Wang Hanling, *US behind the Philippines' farce over Ren'ai Jiao*, CHINA DAILY, May 17, 2024, at <https://www.chinadailyhk.com/hk/article/583403>.

Military *Attaché*—the genuineness of which was already refuted by the Wescom chief himself.⁹

In any case, President Ferdinand “Bongbong” Marcos, Jr. denied having knowledge of such an agreement. He also categorically declared that if any such agreement had existed, he is already rescinding it.¹⁰ In theory, this rescission should be sufficient to deter China’s claims within the Philippines’ EEZ. Yet, China continues to exhibit confronting acts against the Philippines, such as, but not limited to, pumping water cannons against Philippine patrol and civilian boats on multiple occasions, tormenting Filipino fishermen, installing floating barriers to restrict access to the Ayungin Shoal,¹¹ and engaging in dangerous “control measures” that had already damaged Philippine vessels and injured Filipinos—all caught on video-recording as hard and tangible proof of China’s questionable activities for the international community to consume for perpetuity.¹²

At any rate, the purported existence of such a Gentlemen’s Agreement has given rise to considerable debate and controversy in the public sphere. Central to these discussions are key questions: First, what was agreed upon, if any, between the Philippines and China? Second, who were the personalities that supposedly represented the Philippines in the negotiations leading to the Gentlemen’s Agreement? Third, would such an agreement violate the national interest of the Philippines and its fundamental laws? Nevertheless, what is clear is that China is invoking a certain agreement, while the Philippines is denying having entered into one; or if one indeed existed, that such an agreement is inconsistent with its fundamental law.¹³

⁹ See Tina Santos, *Carlos: Transcript of China call ‘twisted, manipulated,’* INQUIRER.NET, May 23, 2024, at <https://newsinfo.inquirer.net/1943759/carlos-transcript-of-china-call-twisted-manipulated>.

¹⁰ Bodeen, *supra* note 1.

¹¹ Kathleen Magramo, Dhruv Tikelar, & Brad Lendon, *Chinese water cannon damages ship in new South China Sea flare-up, Philippines says*, CNN WORLD, Apr. 30, 2024, at <https://www.cnn.com/2024/04/30/asia/china-water-cannon-damages-philippines-ship-intl-hnk-ml/index.html>.

¹² Joseph Morong, *China Coast Guard seizes PH guns in latest Ayungin encounter*, GMA NEWS ONLINE, June 18, 2024, at <https://www.gmanetwork.com/news/topstories/nation/910397/china-coast-guard-philippine-guns-ayungin/story/>. See, e.g., Aaron-Matthew Lariosa, *Philippine Sailor Severely Injured, Vessels Damaged as Chinese Block South China Sea Mission*, USNI NEWS, June 17, 2024, at <https://news.usni.org/2024/06/17/philippine-sailor-severely-injured-vessels-damaged-as-chinese-block-south-china-sea-mission>.

¹³ See also Ruby Rosselle Tugade, *Ayungin Shoal and the spectre of informal international law*, NEW MANDALA, May 29, 2024, at <https://www.newmandala.org/the-spectre-of-informal-international-law>.

Considering that whether such an agreement has legal effect from the perspective of international law will only depend on the rules of international law, e.g., if “the negotiating functionaries have remained within their powers,”¹⁴ and *not* from the perspective of Philippine municipal law, then it is theoretically possible for a gentlemen’s agreement, or any other agreement of similar nature, to be declared as inconsistent with our fundamental law on the one hand, while being considered to have legal effect in the international plane, on the other hand. This is especially true in view of the dualist character of the Philippine legal system.¹⁵

This Article, then, intends to delve deeper on the concept of a gentlemen’s agreement, regardless of the factual circumstances surrounding its veracity or extent insofar as the dispute between the Philippines and China is concerned. Based on publicly available sources on what could have been agreed upon between the Philippines under former President Duterte and China, this Article defines a gentlemen’s agreement as one that is unwritten, usually secret, and may or may not be considered by the States involved as legally binding to them. For academic purposes, however, the Article will focus on the class of gentlemen’s agreement wherein the participating States have expressed, at least as between themselves, some level of willingness to be bound.

Specifically, the Article aims to probe on the following queries:

- (1) Is it possible for a gentlemen’s agreement, as defined, to have legal force and effect insofar as international law and Philippine municipal law are concerned?;
- (2) Does the President, either personally or through his alter ego or duly-designated representative, have the competence to bind the Philippines to a gentlemen’s agreement, as defined, insofar as international law and Philippine municipal law are concerned?; and
- (3) Under the assumption that the first two queries are answered in the affirmative, can constitutional reform safeguard Philippine

¹⁴ *Bayan Muna v. Romulo* [hereinafter “*Bayan Muna*”], 656 Phil. 246, 269 (2011), citing *BAYAN v. Zamora* [hereinafter “*BAYAN*”], 396 Phil. 623, 658 (2000).

¹⁵ See, generally, Merlin M. Magallona, *The Supreme Court and International Law: Problems and Approaches in Philippine Practices*, 85 PHIL. L.J. 1, 2 (2010).

national interest against a gentlemen's agreement that may be perceived to be disadvantageous and, if so, how should this constitutional reform be implemented?

In the process, the Article will re-examine the treaty-making power of the President with the objective of contributing to a clearer understanding of the extent and limitations of this power as exercised by the "chief architect" of Philippine foreign policy. Ultimately, the Article will recommend amendments to the provisions governing the treaty-making power of the President under the 1987 Constitution ("the Constitution") to prevent the Philippines from being placed in a similarly perilous situation in the future.

I. THE CONCEPT OF AN "INTERNATIONAL AGREEMENT" UNDER INTERNATIONAL LAW AND PHILIPPINE MUNICIPAL LAW

Part I of this Article examines how international law and municipal law view the concept of an "international agreement." In particular, it inspects the relevant conditions that are indispensable for any agreement to be considered as binding as between and among States. In the process, it tackles how States treat gentlemen's agreements or other verbal agreements over history, and whether such kind of agreement can become binding and effective from the perspective of international law and municipal law.

A. Under International Law

1. *Vienna Convention on the Law of Treaties*

Any discussion on the established framework of international law concerning international agreements would point to the 1969 Vienna Convention on the Law of Treaties ("VCLT"),¹⁶ the comprehensive international agreement that governs treaties in international law resulting in it being frequently called the "treaty of treaties."¹⁷ The VCLT, which is considered to be a codification of "previously existing customary law with a

¹⁶ Vienna Convention on the Law of Treaties [hereinafter "VCLT"], May 23, 1969, 1155 U.N.T.S. 331.

¹⁷ *50 Years Vienna Convention on the Law of Treaties*, UNIVERSITÄT WIEN WEBSITE, at <https://eur-int-comp-law.univie.ac.at/en/events-and-conferences-international-law/50-years-vienna-convention-on-the-law-of-treaties> (last accessed June 22, 2024).

few modifications due to progressive development,”¹⁸ entered into force on January 27, 1980¹⁹ after it had been approved by the United Nations (UN) Conference on the Law of Treaties during its second session on May 22, 1969 and opened for signature among UN member states.²⁰

As a brief history, the VCLT was initiated through the efforts of the International Law Commission (ILC), a UN body that was organized for the promotion of the progressive development of international law and its codification.²¹ During its first formal session, the ILC saw that the customary law of treaties is a matter suitable for codification. The ILC, based on reports from Special Rapporteur Sir Humphrey Waldock, recommended a draft to the UN General Assembly together with a proposal to formalize a convention on the matter.²² Acting favorably on the recommendations of the ILC, the UN General Assembly, through Resolution 2166 (XXI), decided to convene the UN Conference on the Law of Treaties²³ which eventually led to the adoption of the VCLT.

The final version of the VCLT has eight parts: (1) Introduction; (2) Conclusion and entry into force of treaties; (3) Observance, application, and interpretation of treaties; (4) Amendment and modification of treaties; (5) Invalidity, termination and suspension of the operation of treaties; (6) Miscellaneous provisions, (7) Depositaries, notifications, corrections, and registration, and (8) Final provisions. The introductory part of the VCLT crucially sets out among others, the scope of the VCLT, i.e., what types of agreements are covered by the convention.²⁴

¹⁸ Karl Zemanek, *Vienna Convention on the Law of Treaties*, UN AUDIOVISUAL LIBRARY OF INTL. LAW WEBSITE, at <https://legal.un.org/avl/ha/vclt/vclt.html>.

¹⁹ *Status of Treaties: Vienna Convention on the Law of Treaties*, U.N. TREATY COLLECTION WEBSITE, at https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en (last accessed June 22, 2024).

²⁰ United Nations Conference on the Law of Treaties, *Official Records of the United Nations Conference on the Law of Treaties First and Second Sessions Vienna, 26 March–24 May 1968 and 9 April–22 May 1969*, at 273, 284, U.N. Doc. A/CONF.39/11/Add.2, U.N. Sales No. E.70.V.5 (1971).

²¹ G.A. Res. 174 (II), Establishment of an International Law Commission, U.N. Doc. A/RES/174(II), 105 (Nov. 21, 1947).

²² Zemanek, *supra* note 18.

²³ *See, generally*, G.A. Res. 2166 (XXI), International Conference of Plenipotentiaries on the Law of Treaties, U.N. Doc. A/RES/174(II), 95 (Dec. 5, 1966).

²⁴ *See, generally*, VCLT.

Under Article 1,²⁵ in relation to Article 2 of the VCLT, the convention unequivocally lays down its application to only “treaties” concluded between States. Article 2(a) of the VCLT defines a “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 its particular designation.”²⁶

For VCLT to be applicable to any agreement, the following conditions must concur, namely: (1) the agreement must be concluded between States; (2) it must be in written form; and (3) it must be governed by international law. The definition also makes it clear that the number of embodying instruments or the designation of the agreement is immaterial in determining whether the VCLT applies.

The first condition expressly excludes agreements that are entered into between States and other non-State subjects of international law such as international organizations or insurgent communities,²⁷ or those between other non-State subjects of international law. As a matter of fact, there is a separate convention that governs treaties between States and international organizations, or those between international organizations. The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, adopted on March 21, 1986, separately provides for substantive and procedural rules that govern treaties as between said entities.²⁸ However, this international agreement has not yet entered into force considering the lack of required signatories.²⁹

²⁵ VCLT art. 1. “*Scope of the present Convention*[.] The present Convention applies to treaties between States.”

²⁶ VCLT art. 2(a).

²⁷ Reports of the International Law Commission on the 2nd Part of its 17th Session, 3-28 January 1966 and on its 18th session, 4 May-19 July 1966 [hereinafter “18th Session Draft Articles”], 21 U.N. GAOR Supp. No. 9, 22, U.N. Doc. A/6309/Rev.I (1966), *reprinted in* II Y.B. INT’L L. COMM’N 172, U.N. Doc. A/CN.4/SER.A/1966/Add.I. (1966).

²⁸ *See* United Nations Conference on the Law of Treaties, *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations*, U.N. Doc. A/CONF. 129/16/Add.1 (Vol. II), U.N. Sales No. E.94.V.5, 95-109 (1995).

²⁹ *Status of Treaties: Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, U.N. TREATY COLLECTION WEBSITE, at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&clang=_en (last visited June 22, 2024).

Anent the second condition, the VCLT specifically limits its coverage to agreements that are in written form only. In other words, as far as the VCLT is concerned, there can be no such thing as a verbal treaty. This qualification is particularly evident in the latter portion of the VCLT, which specifically addresses the actual text of the treaty and has no application to agreements not in written form³⁰—for example, the functions of a depositary,³¹ correction of errors in the text of a treaty,³² and the registration and publication of treaties,³³ among others.

With regard to the final condition on the agreement being governed by international law, the qualification ensures that agreements which are merely regulated by the municipal law of one of the parties or by some other national law system chosen by the parties will not be covered by the VCLT.³⁴ For such instances, then, it should be the applicable municipal law that should apply.

Thus, it can be inferred that agreements such as the gentlemen's agreement, by virtue of being unwritten, are not governed by the provisions of the VCLT as a convention. These types of agreements, being verbal and usually discreet in nature, fall outside the scope of the VCLT which applies strictly to agreements "in written form."

The foregoing discussion then raises a critical question regarding the validity and binding nature of a gentlemen's agreement, given its exclusion from the definition of "international agreement" that establishes the substantive and procedural rules concerning treaties. In other words, this Article asks: does the exclusion of agreements not in written form from the VCLT imply that said agreements are not recognized as valid and binding under international law, or merely that a different set of rules governs them? Significantly, no less than the VCLT itself provides guidance in addressing this question, thereby justifying reference to the treaty in the assessing the validity and binding effect of a gentlemen's agreement under international law.

³⁰ 18th Session Draft Articles, *supra* note 27, at 22–24.

³¹ VCLT art. 76(2).

³² Art. 79.

³³ Art. 80.

³⁴ 18th Session Draft Articles, *supra* note 27, at 22.

2. *Validity and Binding Effects of Non-Treaty Agreements*

Article 3 of the VCLT immediately follows the provisions of the VCLT concerning what are covered by said convention, to wit:

Article 3

International agreements not within the scope of the present Convention

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, *shall not affect*:

- (a) the *legal force* of such agreements;
- (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;
- (c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.³⁵

Verily, in the said provision, the VCLT expressly clarifies that the limited applicability of the VCLT to treaties as defined by the convention will not affect agreements that are excluded insofar as: (a) the legal force of such agreements; (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention; and (c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

While the VCLT only applies to treaties in written form, it also makes clear in Article 3(a) that such limitation does not in any way imply that unwritten agreements lack validity or legal effect. In fact, the ILC itself recognized that “oral international agreements may possess legal force and that certain of the substantive rules set out in the draft articles may have relevance also in regard to such agreements.”³⁶

³⁵ VCLT art. 3. (Emphasis supplied.)

³⁶ 18th Session Draft Articles, *supra* note 27, at 24.

Relatedly, Article 3(b) recognizes that some of the provisions of the VCLT may also apply to unwritten agreements: not through the legal force of the VCLT, but by virtue of another legal *imprimatur*. For this, a reference to the sources of international law under Article 38 of the Statute of the International Court of Justice (“ICJ Statute”)³⁷ is apt, as “[t]he most authoritative enumeration of the sources of international law.”³⁸ Article 38 of the ICJ Statute outlines that aside from international conventions, other sources of international law would include international custom and general principles of law, among others. On this point, provisions of international conventions like the VCLT can also form part of international custom.

In *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*,³⁹ for instance, the International Court of Justice (ICJ) made a pronouncement concerning the customary status of certain provisions of the United Nations Convention on the Law of the Sea (“UNCLOS”).⁴⁰ As far as the Article 3 of the VCLT is concerned, it acknowledges that certain provisions of the VCLT may be binding to unwritten agreements in situations where its provisions attain the level of international custom and are understood to apply to all types of agreements, whether written or unwritten.

In sum, a reading of the VCLT would yield the following relevant observations: *first*, that the VCLT only covers international agreements that are in writing; *second*, that the VCLT recognizes that treaties do not comprise the entire gamut of agreements in international law, since the VCLT admits of exclusions such as “international agreements not in written form, among others”;⁴¹ and *third*, that the non-applicability of the VCLT to unwritten

³⁷ U.N. CHARTER art. 94(1); Statute of the International Court of Justice [hereinafter “ICJ Statute”], art. 38, June 26, 1945, I-1 D.F.A.T.S. 55, 1 P.T.S. 51.

“1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

³⁸ Pangilinan v. Cayetano, 898 Phil. 522, 559 (2021), *citing* Rubrico v. Macapagal-Arroyo, 627 Phil. 37, 80 (2010) (Carpio-Morales, J., *concurring*).

³⁹ Judgment, 2023 I.C.J. Rep. 413 (July 13).

⁴⁰ *See id.* at 443–47.

⁴¹ VCLT, art. 3.

agreements does not necessarily preclude situations where its provisions can apply to unwritten agreements.

3. Historical Treatment of Non-Treaty Agreements

While unwritten agreements have, in all likelihood, existed since the early stages of human civilization, their use and emergence were increasingly observed and recorded during the First World War. During this period, secret agreements which involved political concessions between States that were involved in the war became rampant. Examples include the Sykes-Picot agreement where the United Kingdom and France agreed to cooperate in removing Turkey's influence from Arab territory in the Ottoman Empire; a 1915 agreement between Russia, France, and the United Kingdom where the countries agreed to allow Russia to annex Constantinople in exchange for Russia's recognition of the United Kingdom's sphere of influence over Persia; and the London Treaty of April 26, 1915 where the Allies secured the cooperation of Italy during the war in exchange for the recognition of Italy's control over portions of Germany and the Ottoman Empire.⁴²

The proliferation of agreements that were secret and unknown to the general public led to a trend of transparency and accountability as led by the United States through President Woodrow Wilson.⁴³ Thus, upon the conclusion of World War I and the constitution of the League of Nations, the predecessor of the UN, transparency of international agreements became so primordial that member-States of the League of Nations decided to have the validity and binding effect of treaties and international agreements contingent upon their compliance with the publication requirement of the Covenant of the League of Nations.

In particular, the Covenant of the League of Nations ("the Covenant"), under Article 18, provides that no treaty or international agreement shall be binding until registered:

Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered.⁴⁴

⁴² Ashley Deeks, *A (Qualified) Defense of Secret Agreements*, 49 ARIZ ST. L.J. 713, 730–31 (2017).

⁴³ *Id.* at 714.

⁴⁴ LEAGUE OF NATIONS COVENANT art. 16.

The strong language of Article 18 of the Covenant clearly suggested that, at least insofar as the members of the League of Nations, that the registration of a treaty or international agreement was a condition *sine qua non* for it to be valid. This, in effect, meant that secret agreements, whether oral or written, or oral agreements, whether secret or public, would not have been considered as binding under the auspices of the Covenant. Surely, gentlemen's agreements which are usually both unwritten and secret would be treated no differently by the Covenant, since there is no way for such a kind of agreements to be registered.

Considering, however, that the nature of diplomatic relations will always feature some level of confidentiality and secrecy between States,⁴⁵ it appears that the international community has veered away from solidifying the tenor of Article 18 of the Covenant into general practice. To note, the League of Nations, at its height, only had about 63 member-States,⁴⁶ as opposed to the near-universal membership that the current UN enjoys.

The manifestation of the international community's intent to abandon or opt not to adopt the provisions of Article 18 of the Covenant is the provisions of the UN Charter itself. A reading of the UN Charter would show that nowhere was Article 18 of the Covenant adopted in the said text. Instead, the UN Charter featured Article 102 which states:

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that

⁴⁵ "At the very least, this jurisdiction recognizes the common law holding that there is a governmental privilege against public disclosure with respect to state secrets regarding military, *diplomatic* and other national security matters. [I]nformation on inter-government exchanges prior to the conclusion of treaties and executive agreements may be subject to reasonable safeguards for the sake of national interest." Chavez v. Pres. Comm'n on Good Gov't, 360 Phil. 133, 161–62 (1998), *first citing* 4 RECORD CONST. COMM'N 90, 921–22, 931 (Sept. 23, 1986); *and then citing* 5 RECORD CONST. COMM'N 91, 25 (Sept. 24, 1986).

⁴⁶ *The League of Nations*, U.N. GENEVA WEBSITE, at <https://www.ungeneva.org/en/about/league-of-nations/overview>.

treaty or agreement before any organ of the United Nations.⁴⁷

Instead of the strong language that Article 18 of the Covenant offered, the UN Charter presented a more forgiving provision due to the “realpolitik nature of international diplomacy.”⁴⁸ While Article 18 of the Covenant tied the validity and binding effect of treaties and international agreements to their registration and publication, the UN Charter merely withheld the assistance of organs of the UN from unregistered treaties.

Curiously, the ICJ in *Corfu Channel (United Kingdom of Great Britain v. Albania)*,⁴⁹ the first ever case it decided, did not make any reference to Article 102 of the UN Charter when the United Kingdom and Albania referred to it a Special Agreement which, among others, granted the ICJ jurisdiction pursuant to Article 36(1) of the ICJ Statute.⁵⁰ The Special Agreement was notably not registered, but such was not factored in by the ICJ before extending assistance in favor of both member-States.⁵¹

It is important to note at this point that Article 102 of the UN Charter is only concerned with registered and unregistered treaties or international agreements. *In other words, it is not the secrecy or the unwritten nature of an agreement which would affect States’ ability to access organs of the UN for assistance, but only its status of registration.* After all, there are public and/or written agreements that will still be outside the ambit of Article 102 of the UN Charter by virtue of their non-registration.

What is certain, nevertheless, is that gentlemen’s agreements are included in those classes of agreements that would fall outside the ambit of Article 102 of the UN Charter. By virtue of these kinds of agreements being usually secret and unwritten, it follows that they would not be registered or are even incapable of being registered. Thus, assuming the existence of any gentlemen’s agreement between the Philippines and China, the current UN system prohibits the two countries from accessing any UN organ for assistance if necessary and appropriate.

⁴⁷ U.N. CHARTER art. 102.

⁴⁸ Deeks, *supra* note 42, at 737.

⁴⁹ Preliminary Objection, 1948 I.C.J. Rep. 15 (Mar. 25).

⁵⁰ *See, generally, id.*; ICJ Statute art. 36(1). “1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.”

⁵¹ *See Corfu Channel (U.K. v. Alb.)*, Judgment, 1949 I.C.J. Rep. 4 (Apr. 9).

4. *Relevance of Form on the Force and Effect of Agreements*

Inability to access the assistance of UN organs, however, does not in any way suggest that gentlemen's agreements are not valid, binding, or capable of having legal effect. While such may have been the case under the auspices of the League of Nations, member-States of the UN clearly decided to adopt a different approach on unregistered agreements. While unregistered agreements such as gentlemen's agreements cannot be referred to organs of the UN, it logically follows that they could be referred to remedies outside the UN system. This situation can be considered as a badge that the international community recognizes that unregistered agreements *may* be valid.

To further understand the treatment of gentlemen's agreements under international law, a review of relevant case law is apt. The validity of oral agreements has been tackled as early as 1931 in *Legal Status of Eastern Greenland (Denmark v. Norway)*,⁵² when Denmark initiated an action before the Permanent Court of International Justice (PCIJ) against Norway for the legal status of certain territories in Eastern Greenland. Prior to 1814, Denmark and Norway were under one rule.⁵³ With the division, Norway continued to occupy portions of Eastern Greenland which Denmark historically claims as its own.⁵⁴ Over the course of negotiating, the Norwegian Minister for Foreign Affairs, Nils Claus Ilhen, made the following verbal pronouncements which later came to be known as the *Ihlen Declaration*:

[T]he plans of the Royal Government in regard to the sovereignty of Denmark over the whole of Greenland would not encounter any difficulties on the part of Norway.⁵⁵

Denmark argued that this pronouncement by the Norwegian foreign minister, in effect, bound Norway to recognize the sovereignty of Denmark over the disputed territories in Eastern Greenland.⁵⁶ Although Ilhen's reply could not be considered as Norway's "definitive recognition of Danish sovereignty,"⁵⁷ the PCIJ ruled that:

⁵² Judgment, 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5).

⁵³ *Id.* at 27.

⁵⁴ *See id.* at 44.

⁵⁵ *Id.* at 36–37, 73.

⁵⁶ *Id.* at 44, 69.

⁵⁷ *Id.* at 69.

The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.⁵⁸

In the dissenting opinion of Judge Anzilotti in the same case, he argued that an agreement between two States does not necessarily need to be in writing for it to be valid:

As regards the form, it should be noted, to begin with, that as both Parties are agreed as to the existence and tenor of these declarations, the question of proof does not arise. Moreover, there does not seem to be any rule of international law requiring that agreements of this kind must necessarily be in writing, in order to be valid.⁵⁹

While the PCIJ did not specifically describe what type of obligation the Ihlen Declaration is, there is an opinion that “there is certainly no open denial by the Court of the proposition that an oral agreement may be fully operative in law.”⁶⁰ It would seem that the only more difficult hurdle that oral agreements need to address is evidentiary, i.e., how the existence of the oral agreement can be established in view of the absence of a written document evincing the contents of the agreement. This can be gleaned from the converse of the aforementioned excerpt in Judge Anzilotti’s dissenting opinion: that the question of proof arises when both parties do not agree on the very existence of agreements by means of verbal declarations.⁶¹

It was not only the now-defunct PCIJ that had the occasion to pronounce on the said issue. The ICJ, as early as 1961, in the Preliminary Objections stage of *Temple of Preah Vihear (Cambodia v. Thailand)*,⁶² declared that:

As regards the questions of forms and formalities, as distinct from intentions, the Court considers that, to cite examples drawn from the field of private law, there are cases where, for the protection

⁵⁸ *Id.* at 70.

⁵⁹ *Id.* at 91 (Anzilotti, J., *dissenting*).

⁶⁰ Kelvin Widdows, *On the Form and Distinctive Nature of International Agreements*, 7 AUSTL. Y.B. INT’L L. 114, 119 (1977).

⁶¹ *See* Den. v. Nor., 1933 P.C.I.J. (Anzilotti, J., *dissenting*) at 91.

⁶² Preliminary Objections, 1961 I.C.J. Rep. 17 (May 26).

of the interested parties, or for reasons of public policy, or on other grounds, the law prescribes as mandatory certain formalities which, hence, become essential for the validity of certain transactions, such as for instance testamentary dispositions; and another example, amongst many possible ones, would be that of a marriage ceremony. But the position in the cases just mentioned (wills, marriage, etc.) arises because of the existence in those cases of mandatory requirements of law as to forms and formalities. Where, on the other hand, as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it.⁶³

The liberal treatment of international law as to the form of agreements that may create legal effects as between States was further made clear by the ICJ in *Aegean Sea Continental Shelf (Greece v. Turkey)*.⁶⁴ In the said case, the ICJ was confronted with the issue as to whether a joint communique between representatives of the two States could constitute an international agreement under international law. While the ICJ eventually decided that the joint communique was inconclusive as to any agreement between Greece and Turkey, it had the occasion to make the following pronouncements as to the form of agreements:

On the question of form, the Court need only observe that it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement (cf. Arts. 2, 3 and 11 of the Vienna Convention on the Law of Treaties). Accordingly, whether the Brussels Communiqué of 31 May 1975 does or does not constitute such an agreement essentially depends on the nature of the act or transaction to which the Communiqué gives expression; and it does not settle the question simply to refer to the form—a communiqué—in which that act or transaction is embodied. On the contrary, in determining what was indeed the nature of the act or transaction embodied in the Brussels Communiqué, the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up.⁶⁵

⁶³ *Id.* at 31.

⁶⁴ Judgment, 1978 I.C.J. Rep. 3 (Dec. 19).

⁶⁵ *Id.* at 39.

Notably, *Aegean Sea Continental Shelf* was decided already during the effectivity of the VCLT; in fact, the aforementioned quote makes reference to the VCLT. Aside from affirming that form is not crucial for the determination of what can constitute a binding agreement under international law, the ICJ provided a rough standard as to what can constitute as an agreement between States, i.e., “to have regard above all to its actual terms and to the particular circumstances in which it was drawn up.”⁶⁶

As a matter of fact, the deference of international law to the clear intention of States is so well-entrenched such that the ICJ has even recognized the binding nature of unilateral acts even when no bilateral transaction has ostensibly crystallized between two States.

Such was the case in *Nuclear Tests (Australia v. France)*⁶⁷ which involved a series of nuclear tests that were conducted by France in the Pacific Ocean near the territory of Australia. Over the course of negotiations, the French Embassy in Wellington sent a Note to the New Zealand Ministry of Foreign Affairs which contained the following language:

France, at the point which has been reached in the execution of its programme of defence by nuclear means, will be in a position to move to the stage of underground tests, as soon as the test series planned for this summer is completed.

Thus the atmospheric tests which are soon to be carried out will, in the normal course of events, be the last of this type.⁶⁸

In recognizing that the unilateral acts of France alone can constitute as its binding obligation in relation to Australia, the ICJ pronounced that:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international

⁶⁶ *Id.*

⁶⁷ Judgment, 1974 I.C.J. Rep. 253 (Dec. 20).

⁶⁸ *Id.* at 469–470.

negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.⁶⁹

As is consistent with the *Temple of Preah Vihear*, the ICJ also said that

With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form.⁷⁰

The foregoing would, thus, suggest that in determining whether a State has bound itself to an agreement with another State concerning any subject, the form of the agreement is immaterial so long as a clear intention to be bound is evident by virtue of the actual terms of the interstate transaction and with reference to the particular circumstances where such transaction took place.

B. International Agreements under Philippine Municipal Law

Considering that the gentlemen's agreement is not precluded from having legal force and effect under international law, this Article must also examine whether the same holds true under Philippine municipal law. This is so because, as initially mentioned, the Philippines adopts a dualist approach in relation to international law.⁷¹

1. International Agreements Recognized under Philippine Law

Perhaps owing to the broad executive powers of the President, the Constitution does not enumerate the types of agreements that may be validly concluded, between or among the Philippines and other states, by the

⁶⁹ *Id.* at 472.

⁷⁰ *Id.* at 473.

⁷¹ For a discussion on the concept of dualism, see *United States v. Purganan*, 438 Phil. 417 (2002).

President or his authorized representative. At the very least, Article VII, Section 21 of the Constitution mentions two concepts, i.e., “treaty,” and “international agreement”:

Section 21. No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.⁷²

Article VII, Section 21 of the Constitution provides guidance that in case of “treaties” and “international agreements,” the concurrence of the Senate is required before they may become valid and effective in the Philippines. Senate concurrence operates as a legislative check upon what would otherwise be a free-reign of the exercise of the treaty-making powers of the President.

It therefore becomes imperative, as a starting point, to ascertain the meaning of “treaties,” “international agreements,” and other foreign agreements that may be entered into by the President aside from those expressly referred to by the Constitution.

Treaties have been loosely defined as “pacts among sovereign countries” and “tools of international relations since antiquity.”⁷³ They are formally defined under the VCLT as written international agreements concluded between States and are governed by international law.⁷⁴ To successfully conclude a treaty, the following steps should be followed, namely: (a) negotiation of the terms of the treaty, (b) signature by the State’s representative, (c) ratification or formal acceptance of the terms of the treaty by the State, and (d) exchange of the instruments of ratification to signify the effectivity of the treaty.⁷⁵ In the Philippines, the word “treaty” encompasses “conventions,” “declarations,” “covenants” and “acts.”⁷⁶

⁷² CONST. art. VII, § 21.

⁷³ CONG. RSCH. SERV., *Overview of President’s Treaty-Making Power*, in CONSTITUTION ANNOTATED (2022), available at https://constitution.congress.gov/browse/essay/artII-S2-C2-1-1/ALDE_00012952.

⁷⁴ VCLT art. 2(1)(a). “1. For the purposes of the present Convention: (a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;”

⁷⁵ *Pimentel v. Exec. Sec’y*, 501 Phil. 303, 314–15 (2005), citing ISAGANI CRUZ, INTERNATIONAL LAW 172–74 (1998 ed.).

⁷⁶ Exec. Order No. 459 (1997), § 2. Providing for the Guidelines in the Negotiation of International Agreements and Its Ratification.

On the other hand, unlike a treaty, an “international agreement” is not as readily discernible in form or definition. The phrase “international agreement,” which did not appear in the 1935 and 1973 Constitutions, was deliberately added in the 1987 Constitution to expand the scope of agreements that need Senate concurrence, as illustrated in the following exchanges between Commissioner Quesada and Commissioner Regalado:

MS. QUESADA. [...] I would like to ask some clarification on the coverage or the scope of these treaties or international agreements.

* * *

MR. REGALADO. The phrase “international agreement” here was used by the Committee because, *formerly, the provision spoke only of treaties. However, treaties alone are not the only vehicles for international accord.* Later, there developed in the United States things like *executive agreements* which did not require the concurrence of the U.S. Congress, although in the Philippines, our President entered into an executive agreement with the United States on the Bell Trade Act but with prior approval of Congress.

There *are other agreements in other countries* which are called “*administrative agreements*” instead of “executive agreements.” This kind is the one existing between the United States and Japan. The reason for that is simple; they could not call it an executive agreement because at the time the agreement was signed, Emperor Hirohito had been virtually divested of powers because it was General MacArthur who was running the show. So, they called it an administrative agreement, which actually was not strictly an executive agreement.

There are also things like *multilateral treaties or international conventions* — like the Convention on the Law of the Sea that we have been discussing. So it was felt that all these international agreements, since they deal with our external relations, should also require the concurrence of the Senate.

MS. QUESADA. So, this would include conventions like that adopted by the International Labor Organization (ILO).

MR. REGALADO. The Convention on the Law of the Sea, the Universal Copyright Convention — those are the things that we took into account.

MS. QUESADA. *So, it would have to be concurred in by Congress.* I had to seek this clarification because in the past regime, there was this organization trying to work out with the Members of the Assembly to ratify a treaty or a convention that had been adopted by ILO in which the Philippines was a signatory. But in the long run, we found out that it needed only the President to ratify that ILO Convention. I am speaking of ILO Convention 149 which had something to do with the conditions of life and work of nursing and other health personnel. So, this should now be covered not merely by a presidential act but with the concurrence of Congress.

MR. REGALADO. *Under the former regime, there was no counterpart provision of concurrence by Congress with respect to international agreements. There was also none in the 1935 Constitution and the truth is many of us did not know what were the international agreements being concluded by the President on his own authority.*⁷⁷

Clearly, the framers of the Constitution sought to avoid, if not prevent, the pernicious practice in the previous regimes wherein the President concluded other forms of international agreements “on his own authority” without informing the Filipinos.

In fact, as an attempt to add more safeguards, the treaty-making provision under the Constitution was originally conceived to require the concurrence of not only the Senate, but also of the House of Representatives. The rationale is simple: the members of the House are the direct representatives of the people who should have a say in the treaties that concern their sovereign rights:

MR. OPLE. [...] I have another question concerning Section 22 on treaties and international agreements. May I know why the Committee would involve both the Senate and the House of Representatives in the ratification of a treaty or an international agreement; whereas under the previous Constitutions prevailing until the 1973 Constitution and in accordance with the practice worldwide, it is the Senate that ratifies treaties?

MR. AZCUNA. The Committee will be happy to entertain any proposal to amend this portion. But the reason for the inclusion of the House of Representatives in the concurrence on treaties is

⁷⁷ 2 RECORD CONST. COMM’N 42, 400–01 (July 29, 1986). (Emphasis supplied.)

that the Committee believes that the House of Representatives represents the districts directly, the more populous representation of the people. *We believe in institutionalizing people power, that treaties should be submitted to the representatives of the people, especially because these treaties may concern sovereignty and sovereign rights. But that will be open to amendments.*

MR. OPLE. Thank you very much for indicating openness on this matter.

I always thought that the Senate and the House enjoy a kind of symmetry of exclusive powers. Appropriations bills may originate only in the House but by tradition, the Senate is the treaty-ratifying Chamber. Is it correct to say that according to Section 22, even executive agreements will have to be passed upon by the legislature?

MR. AZCUNA. That is correct.⁷⁸

Unfortunately, these propositions were not adopted in the final version of Section 21, Article VII of the Constitution.

Interestingly, in 1997, President Fidel V. Ramos signed Executive Order (EO) No. 459, defining an “international agreement” as that referring to any contract or understanding, between the Philippines and another government, purely in written form:

SEC. 2. *Definition of Terms.* —

a. *International agreement* — a contract or understanding, regardless of nomenclature, entered into between the Philippines and another government in *written form* and governed by international law, whether embodied in a single instrument or in two or more related instruments.⁷⁹

This effectively limited the scope of “international agreements” to only “written” instruments based on the contemporaneous construction of the Executive department. Thus, it appears that the word “international agreement” should be construed in relation to the word “treaty,” and may therefore include similar terms such as “act, protocol, agreement, *compromis*

⁷⁸ 2 RECORD CONST. COMM’N 36, 116–17 (July 22, 1986). (Emphasis supplied.)

⁷⁹ Exec. Order No. 459 (1997), § 2.

d' arbitrage, concordat, convention, declaration, exchange of notes, pact, statute, charter and *modus vivendi*,” as explained in *BAYAN v. Zamora*:

A treaty, as defined by the Vienna Convention on the Law of Treaties, is “an international instrument 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.” There are many other terms used for a treaty or international agreement, some of which are: act, protocol, agreement, *compromis d' arbitrage*, concordat, convention, declaration, exchange of notes, pact, statute, charter and *modus vivendi*. All writers, from Hugo Grotius onward, have pointed out that the names or titles of international agreements included under the general term treaty have little or no legal significance. Certain terms are useful, but they furnish little more than mere description.⁸⁰

2. Other Types of Foreign Agreements

Apart from international agreements and treaties, there exists other forms of foreign agreements which do not strictly fall within the scope of either; consequently, they do not need Senate concurrence.

For one, case law has consistently recognized the power of the President to enter into “executive agreements.”⁸¹ In the often-cited case of *Commissioner of Customs v. Eastern Sea Trading*, the Supreme Court defined executive agreements as agreements which embody “*adjustments of detail* carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature.” As opposed to treaties, executive agreements do not need Senate concurrence to be valid and binding:

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

⁸⁰ 396 Phil. 623, 657–58, *citing* VCLT art. 2.

⁸¹ *Saguísag v. Ochoa* [hereinafter “*Saguísag*”], 777 Phil. 280, 372 n.172 (2016). *See, e.g., Bayan Muna*, 656 Phil. 246, 273–274, *citing* Comm’r of Customs v. Eastern Sea Trading [hereinafter “*Eastern Sea Trading*”], 113 Phil. 333, 338 (1960); *BAYAN*, 396 Phil. at 658–59; *Neri v. Senate Comm. on Accountability of Pub. Officers & Investigations*, 586 Phil. 135, 167–68 (2008); *Abaya v. Ebdane*, 544 Phil. 645, 691–92 (2007).

* * *

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.⁸²

The deliberations of the members of the Constitutional Commission reveal that executive agreements do not fall under the umbrella of “international agreements” in Section 21, Article VII of the Constitution. This is because, unlike treaties, executive agreements are not of a permanent nature and are generally made to “implement a treaty already enforced” or “to determine the details for the implementation of the treaty,” *viz.*

MS. AQUINO. Madam President [...] I would like to be clarified *if the international agreements include executive agreements.*

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

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

MR. CONCEPCION. *Executive agreements are generally made to implement a treaty already enforced or to determine the details for the implementation of the treaty. We are speaking of executive agreements, not international agreements.*⁸³

⁸² *Eastern Sea Trading*, 113 Phil. at 338, citing Francis Sayre, *The Constitutionality of the Trade Agreement Acts*, 39 COLUM. L. REV. 751, 753, 755 (1939). (Emphasis supplied).

⁸³ 2 RECORD CONST. COMM’N 44, 544–45 (July 31, 1986). (Emphasis supplied.)

Closer examination reveals that the distinction between treaties and executive agreements is more apparent than real. While there is technically no substantive difference between the two, only treaties are subject to Senate concurrence. Even under the municipal definition of “executive agreement” as provided for by EO No. 459, an executive agreement is simply defined as “similar to treaties except that they do not require legislative concurrence.”⁸⁴

The same executive order empowers the Department of Foreign Affairs (DFA) to initially determine whether an agreement is an executive agreement or a treaty,⁸⁵ which, in effect, virtually allows the DFA, as the alter ego of the President, to decide which agreements would require Senate concurrence.

Likewise, the Supreme Court has recognized the difficulty in distinguishing which international agreements require Senate concurrence and which do not, yet it has nevertheless upheld the validity of executive agreements entered into without Senate concurrence.⁸⁶

By upholding the validity of executive agreements and affirming that they do not require Senate concurrence, the Supreme Court has in fact recognized the existence of other international or foreign agreements which do not require Senate concurrence to have legal force and effect. This, in turn, highlights an important question as to which class of agreements will gentlemen’s agreements fall from the perspective of Philippine municipal law.

On one hand, it can be argued that gentlemen’s agreements should be circumscribed by the broad term international agreements, if not for the contemporaneous construction by the Executive department which restricts international agreements to those agreements in writing; on the other hand, if gentlemen’s agreements fall under that class of agreements outside treaties and international agreements, then it would follow that no Senate concurrence is necessary for them to be binding. In any case, what is clear is that *Philippine law does not preclude the validity of a gentlemen’s agreement.*

⁸⁴ Exec. Order No. 459 (1997), § 2(c). “*Executive Agreements* — similar to treaties except that they do not require legislative concurrence.”

⁸⁵ § 9. “*Determination of the Nature of the Agreement.* — The Department of Foreign Affairs shall determine whether an agreement is an executive agreement or a treaty.”

⁸⁶ *Saguisag*, 777 Phil. at 371–72.

II. PRESIDENTIAL TREATY-MAKING POWER AND AUTHORITY TO CONCLUDE A GENTLEMEN'S AGREEMENT

Having established that gentlemen's agreements may have force and binding effect from the perspective of international law and Philippine municipal law, this Article then explores the power of the President or his alter egos to bind the Philippines to such an agreement. Again, this will be tackled from the perspective of international law and municipal law, and with special attention to the existence and extent of safeguards that are currently in place against gentlemen's agreements that may be considered disadvantageous to the Philippines' national interest.

A. Under International Law

Among the parts of the VCLT is the recognition of the proper person or office endowed with the authority to represent the State parties. This is laid down under Part II on the *Conclusion and Entry into Force of Treaties*, which recognizes that every State possesses the capacity to conclude treaties.⁸⁷

While States have the capacity to conclude treaties, it is a basic principle that "States can only act through its agents and representatives."⁸⁸ Article 7 of the VCLT provides the rule as to who can bind a State to a treaty:

Article 7
Full powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:
 - (a) he produces appropriate full powers; or
 - (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

⁸⁷ VCLT art. 6.

⁸⁸ German Settlers in Poland, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6, 22 (Sept. 10).

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

- (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
- (b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;
- (c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.⁸⁹

The first paragraph provides for conditions before a person can be considered as having the authority to adopt or authenticate the text of a treaty or to express a State's consent to be bound. Under Article 7(1) of the VCLT, a person can be considered as having such an authority if such person is able to produce appropriate full powers⁹⁰ or if it appears from the practice of the States concerned or from other circumstances that their intention was to consider said person as having the authority to represent the State.

The second paragraph, on the other hand, can be considered as an exception to the general rule provided by the first paragraph. Paragraph 2 enumerates persons who, by virtue of their functions and without having to produce full powers, are considered as having the authority to represent their State: (1) the Head of State; (2) the Head of Government; (3) The Minister for Foreign Affairs; and (4) the heads of diplomatic missions; and (5) representatives accredited by States to an international conference or to an international organization or one of its organs.

⁸⁹ VCLT art. 7.

⁹⁰ *See* art. 2(c). “‘Full powers’ refers to ‘a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting, or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty.’”

It should be noted, nonetheless, that heads of diplomatic missions are considered as having the authority to only adopt a text of a treaty between the accrediting State and the State to which they are accredited. Representatives to international conferences or international organizations are likewise authorized to only adopt a text of a treaty in said conference, organization, or organ. For all the other aforementioned officials, i.e., Head of State, Head of Government, and the Minister for Foreign Affairs, they are considered as having the authority to perform all acts relating to the conclusion of a treaty. The ILC, in explaining why no full powers are necessary when dealing with the abovementioned officials, to wit:

In these cases, therefore, the other representatives are entitled to rely on the qualification of the person concerned to represent his State without calling for evidence of it. The first of these categories covers Heads of State, Heads of Government and Ministers for Foreign Affairs, who are considered as representing their State for the purpose of performing all acts relating to the conclusion of a treaty. In the case of Foreign Ministers, their special position as representatives of their State for the purpose of entering into international engagements was expressly recognized by the Permanent Court of International Justice in the *Legal Status of Eastern Greenland* case in connection with the “Ihlen declaration.”⁹¹

In the Philippines, the President⁹²—who serves as both Head of State and Head of Government,⁹³— and the Secretary of Foreign Affairs,⁹⁴ the Philippine equivalent of a Minister of Foreign Affairs, are authorized to perform acts related to the conclusion of treaties.

At this point, it is worth discussing the distinction drawn by the VCLT between the Head of State, Head of Government, and the Minister of Foreign Affairs, on the one hand, and the heads of diplomatic missions or representatives to international conferences, organizations, or organs, on the other. While the first class of officials is entitled to perform “all acts relating to the conclusion of a treaty,” the second class is empowered only

⁹¹ 18th Session Draft Articles, *supra* note 27, at 26. (Citations omitted.)

⁹² See *supra* Part I.A.2; *infra* Part II.B.

⁹³ *De Lima v. Duterte*, 865 Phil. 578, 600, 602 (2019), *citing* *David v. Macapagal-Arroyo*, 522 Phil. 705, 764 (2006).

⁹⁴ ADM. CODE, bk. IV, tit. 1, ch. 1, § 3(5). “*Powers and Functions.* - To carry out its mandate and accomplish its mission, the Department shall: (5) Negotiate treaties and other agreements pursuant to instructions of the President, and in coordination with other government agencies[.]”

to “adopt the text of a treaty.” In other words, there are acts which are considered to be beyond the authorization of the second class of officials—unless they theoretically produce full powers under Article 7(1) of the VCLT, which indicates a language similar to the authority of the first class of officials.

The distinction between the two classes of officials is based on the distinct capacity of a State to adopt a text of a treaty *vis-à-vis* to express its consent to be bound by said treaty, although the powers of the first class of officials are without a doubt more encompassing than merely being able to express a State’s consent to be bound. These represent two separate and distinct steps in treaty-making.

“Adoption’ is the formal act by which the form and content of a proposed treaty text are established.”⁹⁵ In the said act, a State expresses its agreement to the contents of treaty, i.e., the treaty text.⁹⁶ However, whether a State would consent to be bound by the provisions of said treaty is another matter. Heads of diplomatic missions and representatives to international conferences, organizations, and organs are authorized, by virtue of their position, to adopt the text of any treaty being negotiated, but such act will *not* mean that the sending State already becomes bound to comply with the provisions of said treaty under the principle of *pacta sunt servanda*.⁹⁷ Adoption is governed by Article 9 of the VCLT.⁹⁸

Consent to be bound, on the other hand, and as the term suggests, refers to the act by which a State fully undertakes to undertake the treaty as its obligation under international law.⁹⁹ Under Article 11 of the VCLT, this can be done by signature, exchange of instruments constituting a treaty,

⁹⁵ *Glossary of terms relating to Treaty Actions*, U.N. TREATY COLLECTION WEBSITE, at https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml (last visited June 22, 2024).

⁹⁶ *Id.*

⁹⁷ VCLT art. 26. *See* Gabčíkovo-Nagymaros Project (Hung. v. Slov.), Judgment, 1997 I.C.J. Rep. 7, 78–79 (Sept. 25).

⁹⁸ VCLT art. 9. “*Adoption of the text*[.]

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.”

⁹⁹ U.N. OFFICE OF LEGAL AFFAIRS, TREATY HANDBOOK, U.N. Sales No. E.12.V1 (2013).

ratification, acceptance, approval or accession, or by any other means if so agreed by the State parties.¹⁰⁰ When a State consents to be bound by a treaty, its stipulations should thus “be performed by them in good faith.”¹⁰¹ Unless any other official of a State produces full powers which expressly indicate their authority to express a State’s consent to be bound to a treaty, this authority would be limited only to the Head of State, Head of Government, and the Minister for Foreign Affairs.

The different steps of merely adopting a text of a treaty and expressing a State’s consent to be bound are owed to the fact that States usually put in place a municipal procedure which should first be complied with by the representatives prior to expressing a State’s consent to be bound.¹⁰² According to the ILC, the various methods of expressing a State’s consent to be bound were devised “specifically for the purpose of enabling Governments to reflect fully upon the treaty before deciding whether or not the State should become a party to it, and also of enabling them to take account of any domestic constitutional requirements.”¹⁰³

Insofar as the Philippines is concerned, this is done by obtaining the concurrence of the Senate under Article VII, Section 21 of the 1987 Constitution and only with respect to treaties and international agreements.¹⁰⁴ In other jurisdictions, such as the United Kingdom that feature a parliamentary government, this is done when the “Government lays the signed treaty before Parliament, along with an Explanatory Memorandum.”¹⁰⁵ Some countries have historically legislated more specific restrictions in their respective municipal laws to limit the power of State representatives in binding their States in international law.¹⁰⁶ A good example is Austria which, based on Article 50 of its 1920 Constitution, requires the approval of the National Council for “[a]ll international political treaties and all other treaties, insofar as they contain provisions modifying existing

¹⁰⁰ VCLT art. 11. “*Means of expressing consent to be bound by a treaty*[.] The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.”

¹⁰¹ Art. 26.

¹⁰² 18th Session Draft Articles, *supra* note 27, at 69.

¹⁰³ *Id.* at 71.

¹⁰⁴ CONST. art. VII, § 21. “No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.”

¹⁰⁵ Arabella Lang, *How Parliament treats treaties* (House of Commons Library, Briefing Paper No. 9247, 2021), U.K. PARLIAMENT HOUSE OF COMMONS LIBRARY WEBSITE, at <https://commonslibrary.parliament.uk/research-briefings/cbp-9247/>.

¹⁰⁶ 18th Session Draft Articles, *supra* note 27, at 69.

laws.”¹⁰⁷ The VCLT is clear, however, that the procedure of complying with a municipal procedure by representatives of a State is a separate matter that is not a concern of the VCLT.

While the VCLT differentiates between the mere adoption of a text *vis-à-vis* the expression by a State of its consent to be bound, it does not imply that the VCLT requires, as a condition *sine qua non* before recognizing an act of expressing a State’s consent to be bound, that a State has complied with applicable municipal procedures for the validity of a treaty. After all, Article 7 of the VCLT is unequivocal in recognizing the authority of Heads of State, Heads of Government, and Ministers of Foreign Affairs in performing all acts relating to a treaty.

The ILC in the Draft Articles of the VCLT explained that:

The word “ratification”, as the definition in article 2 indicates, is used here and throughout these draft articles exclusively in the sense of ratification on the international plane. Parliamentary “ratification” or “approval” of a treaty under municipal law is not, of course, unconnected with “ratification” on the international plane, since without it the necessary constitutional authority to perform the international act of ratification may be lacking. But it remains true that the international and constitutional ratifications of a treaty are entirely separate procedural acts carried out on two different planes.¹⁰⁸

In other words, Heads of State, Heads of Government, and Ministers of Foreign Affairs are well within their powers to ratify a treaty in the international plane *regardless* of compliance with municipal procedures that seek to check and balance their treaty-making powers. However, the additional step of separating the adoption of the text of a treaty *vis-à-vis* the expression of a State’s consent to be bound allows for a period of time within which municipal procedures can be complied with, unless the treaty otherwise indicates or the State parties otherwise have agreed that the signature of a representative should serve both purposes.¹⁰⁹

This setup explains why, for instance, the Philippines, under former President Joseph Ejercito Estrada, already signed the Rome Statute on

¹⁰⁷ AUSTRIA CONST. (1920), art. 50(1). See U.N. Secretariat, Laws and Practices concerning the Conclusion of Treaties [hereinafter “Conclusion of Treaties”], at 10–11, U.N. Doc. ST/LEG/SER.B/3, U.N. Sales No. 1952.V.4 (U.N. Secretariat trans.) (1952).

¹⁰⁸ 18th Session Draft Articles, *supra* note 27, at 30.

¹⁰⁹ VCLT art. 12.

December 28, 2000, but was only able to ratify the same on August 30, 2011 under former President Benigno Simeon Aquino III. Prior to ratifying the Rome Statute, the Executive branch secured the concurrence of the Senate through Resolution No. 057-11 issued on August 23, 2011.¹¹⁰

The VCLT merely accommodates the process of securing the necessary municipal approvals before a State formally expresses its consent to be bound. In any event, international law will always be a separate “plane” from municipal law. As aforementioned, *international law is only concerned with the authority that a State representative possesses*, as such will be sufficient to bind the State to the extent that the representative is competent pursuant to Article 7 of the VCLT.

The most prominent manifestation of this concept is Article 46 of the VCLT which specifically tackles the provisions of internal law regarding competence to conclude treaties:

Article 46

Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.¹¹¹

A reading of this provision would show that any internal law which restricts the competence of a State representative to express a State’s consent to be bound *cannot be invoked to invalidate a treaty*.

Strictly speaking, non-compliance with, for instance, the Senate concurrence requirement under Article VII, Section 21 of the Constitution would not hinder the binding effect of a treaty to which the President, and

¹¹⁰ Barbara Marchadesch, *PHL took long, hard road to signing Rome Statute of ICC*, GMA NEWS ONLINE, Mar. 14, 2018, at <https://www.gmanetwork.com/news/topstories/special-reports/646621/phl-took-long-hard-road-to-signing-rome-statute-of-icc/story>; Pangilinan v. Cayetano, 898 Phil. at 526–27. See S. Res. 57, 15th Cong., 2nd Sess. (2011).

¹¹¹ VCLT art. 46.

even the Secretary of Foreign Affairs for that matter, may have already expressed the Philippines' consent to be bound.

According to the ILC, municipal limitations affecting the treaty-making power of State representatives "take various forms."¹¹² These, however, can be roughly divided into limitations that "upon the power of a government to enter into treaties and those which merely limit the power of a government to enforce a treaty within the State's internal law without some form of endorsement of the treaty by the legislature."¹¹³ In any case, Article 46 of the VCLT makes clear that, at least as a general rule, a State's consent to a treaty will not be invalidated by mere invocation of an inconsistent municipal law.

Some jurists held the view that any municipal procedure which restricts or provides conditions on the competence of State representatives to bind their States should be considered part of international law "so as to avoid, or at least render voidable, any consent to a treaty given on an international plane in disregard of a constitutional limitation."¹¹⁴ This was, however, critically opposed by members of the ILC because that would, in effect, force international law to adopt and recognize certain municipal laws of States as part of it.¹¹⁵

Eventually, the ILC and State parties to the VCLT settled with a rule wherein international law provides for "procedures and conditions [...] under which the various categories of State organs and agents will be recognized as competent to carry out such procedures on behalf of their State."¹¹⁶ Should such procedures and conditions be present, then a State will be bound under international law regardless of whether municipal limitations have been complied with. This is the case even if such a situation may lead to the invalidity of the treaty *as far as municipal law is concerned*, or even to the State representative being held liable for failure to abide by applicable municipal laws.¹¹⁷ The ILC was able to find state practice appearing to support the aforementioned rule, as well as international jurisprudence seemingly evidencing the reluctance of international tribunals in "go[ing] behind" the ostensible authority of a State agent to bind a State.¹¹⁸

¹¹² 18th Session Draft Articles, *supra* note 27, at 69.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 70.

¹¹⁶ *Id.* at 69.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 70–71.

To avoid an absolutist approach, the VCLT recognizes an exception, based on two conditions, in situations where the violation of municipal law is: (1) manifest; and (2) concerned a rule of internal law of fundamental importance. In the hope of providing context to this provision, Article 46(2) of the VCLT provides that a violation is manifest “if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and good faith.”¹¹⁹ However, even the ILC admits that the question of whether a violation is manifest will be decided on a case-to-case basis.¹²⁰

Having reviewed the provisions of the VCLT regarding the President’s power to bind the State in international law—in a manner that is *almost* independent of the limitations imposed by the Constitution or domestic law—the question remains whether these provisions also apply to obligations that do not qualify as treaties under the VCLT, such as a gentlemen’s agreement.

It is apt to recall Article 3(b) of the VCLT which makes reservations on the possibility of the application of VCLT to obligations that are not considered treaties, e.g., written agreements. It states that the non-applicability of the VCLT to other non-treaty agreements does not affect, among others, “the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention.”¹²¹ This Article advances the position that the VCLT provisions on the power of the Heads of State, Heads of Government, and Ministers of Foreign Affairs to bind their States, as well as the prohibition on the invocation of municipal law restrictions on the competence of State representatives, likewise apply to gentlemen’s agreements.

It should be recognized that the VCLT is a product of the Draft Articles on the Law of Treaties, which was one of the materials drafted by the ILC pursuant to its mandate to codify customary international law.¹²² In other words, the ILC would have been expected to scrutinize state practice

¹¹⁹ VCLT art. 46.

¹²⁰ 18th Session Draft Articles, *supra* note 27, at 72.

¹²¹ VCLT art. 3(b).

¹²² *See, generally*, 18th Session Draft Articles, *supra* note 27. *See supra* note 21 and accompanying text.

and *opinio juris*¹²³ as the basis for drafting the provisions of what eventually became the VCLT.

Furthermore, the ICJ has always been “mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law.” This was pronounced by the international tribunal in *Gabcikovo-Nagymaros Project*¹²⁴ more than two decades ago. It has also been observed that the ICJ has applied the VCLT to numerous cases without first determining whether the disputing States are State parties to the convention.¹²⁵

The ICJ also made the same pronouncements relating to specific provisions of the VCLT in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*,¹²⁶ *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*,¹²⁷ and *Questions Relative to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*.¹²⁸ The competence of certain officials to bind their respective States in international law is already part of customary law.

¹²³ In *North Sea Continental Shelf (Ger. v. Den.)*, Judgment, 1969 I.C.J. Rep. 3, 44 (Feb. 20), the ICJ explained the two elements of international customary law: “The essential point in this connection—and it seems necessary to stress it—is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*;—for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.”

¹²⁴ 1997 I.C.J. 7, 38.

¹²⁵ Zemanek, *supra* note 18, at 3.

¹²⁶ See Advisory Opinion, 1971 I.C.J. Rep. 16 (June 21). “[T]he Court relied on a provision of VCLT not yet in force and declared it to be part of customary international law.” Marija Đorđeska, *The Process of International Law—Making: The Relationship between the International Court of Justice and the International Law Commission*, 15 INT’L & COMP. L. REV. 7, 15–16 n.26 (2015).

¹²⁷ See Judgment, 1973 I.C.J. Rep. 3 (Feb. 2). “[T]he Court invoked art.52 and art. 62 of VCLT and declared them to be customary international law despite the VCLT not being yet in force.” Đorđeska, *supra* note 126.

¹²⁸ See Judgment, 2012 I.C.J. Rep. 422, 456–57 (July 20). “The Court observes that, under Article 27 of the Vienna Convention on the Law of Treaties, which reflects customary law, Senegal cannot justify its breach of the obligation [...]”

B. Under Philippine Municipal Law

In the Philippines, the President’s foreign relations powers are all-encompassing: it includes the power to make treaties,¹²⁹ the power to appoint ambassadors, ministers and consuls with the consent of the Commission on Appointments,¹³⁰ the power to expel or deport undesirable aliens,¹³¹ the power to contract foreign loans,¹³² the exercise of war powers,¹³³ among others.

Of particular relevance is the President’s treaty-making powers. Through this power, the President may negotiate, make, and enter into treaties with other equally sovereign states. More importantly, the President may conclude other kinds of international agreements that are not strictly classified as a “treaty”—which have a binding effect upon the Philippines—inssofar as international law is concerned. This treaty-making power is provided for under the 1935, 1973 and the 1987 Constitutions, as follows:

1935 Constitution, as amended	Art. VII, Section 10. (7) <i>The President shall have the power, with the concurrence of two-thirds of all the Members of the Senate to make treaties, and with the consent of the Commission on Appointments, he shall appoint ambassadors [...].</i>
1973 Constitution, as amended	Art. VIII, Section 14. (1) <i>Except as otherwise provided in this Constitution, no treaty shall be valid and effective unless concurred in by a majority of all the Members of the Batasang Pambansa.</i> Art. XIV, Section 15. Any provision of paragraph one, Section fourteen, Article Eight and of this Article notwithstanding, <i>the President may enter into international treaties or agreements as the national welfare and interest may require.</i>
1987 Constitution	Art. VII, Section 21. No <i>treaty or international agreement</i> shall be valid and effective unless <i>concurred in by at least two-thirds of all the Members of the Senate.</i>

¹²⁹ CONST. art. VII, § 21.

¹³⁰ CONST. art. VII, § 16.

¹³¹ See JOAQUIN G. BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 942 (2009), *citing* Tan Tong v. Deportation Bd., 96 Phil. 934, 936 (1955).

¹³² CONST. art. VII, § 20.

¹³³ CONST. art. VI, § 23(2).

A plain comparison of the treaty-making powers in the three (3) Philippine Constitutions leads to a few observations. Foremost, in addition to “treaties,” the 1987 Constitution added the phrase “international agreements” that was not previously present in the 1935 and 1973 Constitutions. As previously discussed, it was the intention of the framers to expand the scope of agreements that need Senate concurrence so as to prevent the practice of having the President enter into agreements only on his sole authority.¹³⁴ Logically, it should also be noted that the addition of the phrase “international agreements” is a concession that the agreements that the President may enter into were not simply limited to “treaties” as indicated in the 1935 and 1973 Constitutions.

Second, all the Constitutions required the concurrence of the Senate before any treaty may be valid and binding in the Philippines. However, under the 1973 Constitution, the President can, unilaterally, without the concurrence of the Senate, enter into treaties or agreements if the subject matter concerns national welfare and interest. Sensing the danger of abuse, the 1987 Constitution amended this provision and reverted to the provision in the 1935 Constitution of requiring prior Senate concurrence before recognizing the validity of *any* treaty entered into by the President. As observed by the Supreme Court in *Saguisag v. Ochoa*:

Previously, treaties under the 1973 Constitution required ratification by a majority of the *Batasang Pambansa*, except in instances wherein the President “may enter into international treaties or agreements as the national welfare and interest may require.” This left a large margin of discretion that the President could use to bypass the Legislature altogether. This was a departure from the 1935 Constitution, which explicitly gave the President the power to enter into treaties only with the concurrence of two-thirds of all the Members of the Senate. The 1987 Constitution returned the Senate’s power and, with it, the legislative’s traditional role in foreign affairs.¹³⁵

Finally, the 1987 Constitution did not explicitly identify the person upon whom the treaty-making power is vested, as opposed to the 1935 and the 1973 Constitutions which categorically conferred upon the President the power to make treaties. Nevertheless, case law has consistently recognized that the President, as the “chief architect” of the nation’s foreign policy, has the authority to deal with foreign states and governments:

¹³⁴ 2 RECORD CONST. COMM’N 42, 400–01 (July 29, 1986).

¹³⁵ *Saguisag*, 777 Phil. at 331–32. (Citations omitted.)

As the chief architect of foreign policy, the President acts as the country's mouthpiece with respect to international affairs. Hence, the President is vested with the authority to deal with foreign states and governments, extend or withhold recognition, maintain diplomatic relations, enter into treaties, and otherwise transact the business of foreign relations.¹³⁶

The rationale of bestowing upon the President the privilege of being the chief architect of the foreign policy is not hard to discern. The President is in the best position to make decisions regarding the country's foreign affairs because he has a monopoly of military intelligence data and information about foreign countries.¹³⁷

To balance the treaty-making powers, the Constitution placed several safeguards. For one, the Senate is given the power to concur in treaties as a form of legislative check in the President's treaty-making powers.¹³⁸ It must be emphasized, however, that the Senate's power is limited only to the giving or withholding of consent in the President's ratification, not in the ratification *per se* of the treaty which belongs to the President.¹³⁹ For another, the Constitution itself placed limits on some specific matters, namely: the policy on nuclear weapons;¹⁴⁰ the fixing of tariff rates;¹⁴¹ the granting of tax exemption;¹⁴² the contracting of foreign loans;¹⁴³ and the authorization of the presence of foreign military bases, troops, or facilities in the country, which must be in the form of a treaty.¹⁴⁴

Nevertheless, these limitations placed on the President's treaty-making powers seem insufficient, if not futile.

Notably, the treaty-making power of the President in the Constitution was patterned after Article II, Section 2 of the US Constitution, which provides:

¹³⁶ *Pimentel*, 501 Phil. 303, 313, *citing* CRUZ, *supra* note 75, at 223.

¹³⁷ *Saguísag*, 777 Phil. at 330–31, *citing* *Vinuya v. Romulo*, 633 Phil. 538, 570 (2010).

¹³⁸ *Pimentel*, 501 Phil. at 314, *first citing* IRENE CORTES, *THE PHILIPPINE PRESIDENCY: A STUDY OF EXECUTIVE POWER* 187 (1966); *and then citing* ISAGANI CRUZ, *PHILIPPINE POLITICAL LAW* 223 (1996 ed.).

¹³⁹ *Pimentel*, 501 Phil. 303, 314–15, *citing* CRUZ, *supra* note 75, at 223.

¹⁴⁰ *Saguísag*, 777 Phil. at 389, *citing* CONST. art. II, § 8.

¹⁴¹ *Id.* at 390, *citing* CONST. art. VI, § 28(2).

¹⁴² *Id.*, *citing* CONST. art. VI, § 28(4).

¹⁴³ *Id.*, *citing* CONST. art. VII, § 20.

¹⁴⁴ *Id.*, *citing* CONST. art. XVIII, § 25.

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors [...].¹⁴⁵

This provision is an encapsulation of Alexander Hamilton's view that "the President as Chief Executive has sole and unlimited authority to determine the nation's foreign policy."¹⁴⁶ Because of this, the exercise of the treaty-making powers of the US President is described as "practically without limitation, and may extend to any subject, or agreement relative thereto, not forbidden by the Constitution, and not inconsistent with the nature of the Government itself and that of the state."¹⁴⁷

The Hamiltonian view still pervades the Philippine legal system. In the annals of Philippine jurisprudence, the Philippine Supreme Court has, more often than not, upheld the primacy of the position of the Chief Executive as the "sole organ in the conduct of foreign relations."¹⁴⁸ By virtue of this, the President has the choice, to enter into foreign agreements, such as the Enhance Defense Cooperation Agreement or RP-U.S. Non-Surrender Agreement, either by way of executive agreement or a treaty.¹⁴⁹

¹⁴⁵ U.S. CONST. art. II, § 2, cl. 2.

¹⁴⁶ *The President's Power in the Field of Foreign Relations*, 1 Op. O.L.C. 49, 49–50 (1937).

¹⁴⁷ Augustus Bacon, *The Treaty-Making Power of the President and the Senate*, 182 N.A.M. REV. 502, 502 (1906), *citing* *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890).

¹⁴⁸ *Saguisag*, 777 Phil. at 330. (Citations omitted.)

¹⁴⁹ *See, e.g., id.* at 393–96; *Bayan Muna*, 656 Phil. at 284–85. *But see Saguisag*, 777 Phil. at 396.

"2. If the agreement is not covered by [Article XVIII, Section 25 of the Constitution], then the President may choose the form of the agreement (i.e., either an executive agreement or a treaty), provided that the agreement dealing with foreign military bases, troops, or facilities is not the principal agreement that first allows their entry or presence in the Philippines.

3. The executive agreement must not go beyond the parameters, limitations, and standards set by the law and/or treaty that the former purports to implement; and must not unduly expand the international obligation expressly mentioned or necessarily implied in the law or treaty.

4. The executive agreement must be consistent with the Constitution, as well as with existing laws and treaties."

In *Pimentel v. Executive Secretary*, the Supreme Court clarified that the President has the sole authority to negotiate with other states. Even if the treaty has been signed by the Philippine representative, *the President has the discretion whether to ratify the treaty and submit it to the Senate for concurrence*. Conversely, the President may refuse to ratify a treaty, or having ratified it, refuse to submit it to the Senate. Thus, the President could not be compelled by *mandamus* to transmit the signed copy of the Rome Statute of the International Criminal Court to the Senate of the Philippines.¹⁵⁰

In *Vinuya v. Romulo*, the Court emphasized that the courts cannot interfere with the discretion of the Executive Department to bring, or refuse to bring, individual claims against foreign governments. Thus, the refusal of various executive agencies in assisting Filipino comfort women raped during the Japanese Occupation to file claims against responsible Japanese officials, cannot be considered as grave abuse of discretion.¹⁵¹

In *Pangilinan v. Cayetano*, the Court affirmed the power of the president to unilaterally withdraw from treaties, depending on the manner by which legislative imprimatur impelled the president's action to enter into the treaty (i.e., “when the withdrawal itself will be contrary to a statute, or to a legislative authority to negotiate and enter into a treaty, or an existing law which implements a treaty”), or on whether the Senate “concurred and expressly declared that any withdrawal [from international agreements] must also be made with its concurrence.” Thus, the Court affirmed the Philippines' unilateral withdrawal from the Rome Statute in 2018, without the concurrence of the Senate in the withdrawal.¹⁵²

Finally, in *Esmero v. Duterte*, the Supreme Court affirmed the exclusive foreign affairs power of the President even with respect to settlement of international disputes. Here, the petitioners sought to compel President Duterte, through a writ of *mandamus*, to “defend” the national territory by requesting patrol boats from the UN and suing China before the ICJ. The Supreme Court dismissed the Petition and ruled that the President cannot be compelled to act in a particular manner to respond to any threat (actual or imminent), from another State to the sovereignty of the Philippines.¹⁵³

¹⁵⁰ *Pimentel*, 501 Phil. at 317–18.

¹⁵¹ *Vinuya v. Romulo*, 633 Phil. at 569–71.

¹⁵² *Pangilinan v. Cayetano*, 898 Phil. at 526, 592–94.

¹⁵³ *Esmero v. Duterte*, 898 Phil. 522, 526, 592–94 (2021).

Clearly, the Constitution itself has vested virtually unlimited treaty-making powers upon the President.

III. POTENTIAL DANGERS IN THE CONTEXT OF THE GENTLEMEN'S AGREEMENT

Prescinding from the foregoing discussion, it is clear that under international law, Heads of States, Heads of Government, Ministers of Foreign Affairs or their duly authorized representatives, may very well bind the countries they are representing, (1) regardless of the formalities of the agreement they have entered into, e.g., whether written or orally, and (2) irrespective of whether the agreement is valid insofar as the municipal law of the State's representative is concerned. What is important, insofar as international law is concerned, is the clear and unmistakable intention of the parties to be bound, as manifested by their prior and subsequent actions.¹⁵⁴

On the other hand, the 1987 Constitution itself has unknowingly created an untrammled Chief Executive who can bind the Philippines to certain foreign agreements on his own authority, without checks and balances. As discussed, the addition of the word "international agreements" to Article VII, Section 21 of the Constitution is not a sufficient safeguard because, like treaties, "international agreements" are limited to agreements in written form.¹⁵⁵ There are other classes of "foreign agreements" that are already existing, and which may be invented in the future, that are not in written form—and therefore do not require Senate concurrence.

In the current state of things, the Philippines has unknowingly allowed itself to be placed in a fragile position. In theory, it is susceptible to being bound to foreign agreements without its knowledge and consent, such as this alleged Gentlemen's Agreement, wherein part of its sovereign rights to its exclusive economic zone were allegedly surrendered to a foreign power. Of course, insofar as municipal law is concerned, such an agreement will, and always be, void and of no legal effect, as the state representative has clearly committed grave abuse of discretion and exceeded his authority in negotiating such matters.¹⁵⁶

¹⁵⁴ *Aegean Sea Continental Shelf (Greece v. Turk.)*, Judgment, 1978 I.C.J. Rep. 3 (Dec. 19), 39. *See supra* Part I.A.4.

¹⁵⁵ *See supra* Part I.B.

¹⁵⁶ *See* CONST. art. VIII, § 1, ¶ 2.

Fortunately for the Philippines, former President Duterte himself and all implicated officials under his administration denied not only their participation in, but also the very existence of, the so-called Gentlemen's Agreement. More importantly, President Marcos, Jr. categorically and unequivocally stated that he was rescinding such agreement, if one has existed, between the Philippines and China.

With this clear and unequivocal repudiation, coupled with China's failure to substantiate its claims that the so-called Gentlemen's Agreement ever existed in the first place, it becomes clear that China's position does not have an ounce of color of authority.

Nevertheless, to avoid being placed in a similar predicament in the future, the Philippines should add explicit constitutional safeguards to limit the otherwise untrammled treaty-making power of the President.

IV. POLICY RECOMMENDATIONS THROUGH CONSTITUTIONAL REFORM

Considering the immense power of the President to deal with other States and to bind the Philippines to obligations in the field of international law, any limitation and restriction to this power should be provided by constitutional fiat. This should be the case even when, based on the foregoing discussions, international law and municipal law are always considered as separate fields and that the former generally does not concern itself with the municipal law of States. The benefits of constitutional reform on this power will be discussed from both the perspectives of municipal and international law.

Insofar as municipal law is concerned, there is no question that the Constitution reigns supreme and absolute,¹⁵⁷ to which all laws and public acts should conform with. From the perspective of Philippine law, no statute or treaty can prevail over the Constitution.¹⁵⁸ Thus, the strongest safeguard that can be developed by the Philippines to ensure that no gentlemen's agreement could prejudice national interests is a corresponding constitutional provision that could anticipate its legal effects. In such a situation, then, the Philippines can at least state that it is bound not to

¹⁵⁷ *Manila Prince Hotel v. Gov't Serv. Ins. Sys.*, 335 Phil. 82, 101 (1997).

¹⁵⁸ *Sec'y of Justice v. Lantion*, 379 Phil. 165, 213 (2000).

recognize any gentlemen's agreement that has been entered into in contravention of a constitutional provision.

At present, Article VII, Section 21 of the Constitution makes it clear that no treaty or international agreement can be binding and effective unless concurred in by the Senate. As raised, the advent of case law which recognizes a type of agreement, i.e., executive agreements, that does not require the concurrence of the Senate to be binding and effective necessarily implies that not all agreements that are entered into by the President with other States require Senate concurrence. The Constitution can be described as being silent at best, and compromising at worst, in setting an ironclad rule for gentlemen's agreements.

That said, this Paper recommends, as a possible constitutional reform, an improvement of Article VII, Section 21 of the 1987 Constitution on three cumulative or alternative fronts:

First, in addition to requiring the concurrence of the Senate only for an agreement to be binding and effective, the constitution can also expressly tie the requirement of Senate concurrence as a condition *sine qua non* to the competence or authority of the President itself to enter into agreements.

Second, the Constitution can expressly indicate that all types of agreements that are entered into with another State should be subject to Senate concurrence; or the Constitution must expand the scope of Article VII, Section 21 by providing for a parameter as to what types of agreements should be subject to Senate concurrence.

Third, the Constitution can explore enumerating subject matters which it considers of paramount importance, such that Senate concurrence will always be required in such situations regardless of the type of agreement entered into by the President.

The first recommendation is based on a reading of Article VII, Section 21, which ostensibly only suspends the binding effect of treaties and international agreements that are entered into by the President until they are concurred in by the Senate. Although this provision may be argued to also have a limiting effect to the competence or authority of the President to bind the Philippines in the international plane, no phrases to that effect are currently featured by Article VII, Section 21 of the Constitution. The practice of States in implementing constitutional limitations has been observed to involve two types, namely, "those types of provision which place

constitutional limits upon the power of a government to enter into treaties and those which merely limit the power of a government to enforce a treaty within the State's internal law without some form of endorsement of the treaty by the legislature."¹⁵⁹

It is submitted that, as an additional check and balance, Article VII, Section 21 can be amended to indicate that Senate concurrence also affects the competence of the President to enter into treaties and international agreements.

The second submission, on the other hand, is based on the current state of regulations and case law that govern the scope of "treaty or international agreement." Existing administrative issuances, coupled with the formal recognition by the Supreme Court that there are conceivably other types of agreements in the international sphere which fall outside the phrase "treaty or international agreement," inevitably created a class of agreements that does not fall under "treaty or international agreement" and thus does not require Senate concurrence to be binding and effective.

Other States have used additional language to describe what agreements are covered by their respective constitutional limitations that require legislative approval. For example, Bolivia has utilized the term "international treaties and conventions" as those over which the legislature can grant or withhold approval;¹⁶⁰ El Salvador has utilized the term "treaties or pacts" over which its Legislative Assembly has the power to ratify or withhold ratification;¹⁶¹ and Costa Rica has utilized the term "international agreements, treaties, and concordats" over which its Legislative Assembly may approve or withhold approval of.¹⁶² Surely, it would do no harm for Article VII, Section 21 to further specify what types of agreements should be subject to Senate concurrence.

For the third recommendation, the Philippines can also explore the option of enumerating the subject matters that would inevitably require Senate concurrence regardless of the type of agreement entered into. This is also not new based on the practice of other States, which outlines several

¹⁵⁹ 18th Session Draft Articles, *supra* note 27, at 69.

¹⁶⁰ BOL. CONST. (1945, amend.) art. 58(13) (U.N. Secretariat trans.). *See* Conclusion of Treaties, *supra* note 107, at 21.

¹⁶¹ EL SAL. CONST. (1950) art. 46(29) (U.N. Secretariat trans.). *See* Conclusion of Treaties, *supra* note 107, at 44.

¹⁶² COSTA RICA CONST. (1949) art. 121(4) (Ministry of Foreign Affairs trans.). *See* Conclusion of Treaties, *supra* note 107, at 38.

areas of concern such that any agreement that falls under those topics will inevitably require the approval of their respective legislative bodies.

As an example, Liechtenstein law provides that

Treaties by which national territory is ceded, national property alienated, rights of sovereignty or State prerogatives disposed of, any new burden for the Principality or its citizens imposed or any obligation to the detriment of the rights of the People of the Principality contracted shall not be valid unless they have received the assent of Parliament.¹⁶³

Poland, on the other hand, enumerates the following types of agreements as requiring prior consent of its legislative body, through a statute, for their ratification:

- 1) peace, alliances, political or military treaties;
- 2) freedoms, rights or obligations of citizens, as specified in the Constitution;
- 3) the Republic of Poland's membership in an international organization;
- 4) considerable financial responsibilities imposed on the State;
- 5) matters regulated by statute or those in respect of which the Constitution requires the form of a statute.¹⁶⁴

Iceland also requires the President to obtain the consent of the *Althingi*, its national parliament, for agreements that “entail the renouncement of, or servitude on, territory or territorial waters of if they entail constitutional changes.”¹⁶⁵

The current version of Article VII, Section 21 is plain and was not phrased to enumerate subject matters that would require Senate concurrence

¹⁶³ LIECH. CONST. (1921) art. 8(2) (European Commission for Democracy through Law trans.). See Conclusion of Treaties, *supra* note 107, at 75.

¹⁶⁴ POL. CONST. (1997, amend.) art. 89. See also POL. CONST. (1947) art. 49 (Polish and Information Service, New York City trans.); Conclusion of Treaties, *supra* note 107, at 94.

¹⁶⁵ ICE. CONST. (1944, amend.), art. 21. See Conclusion of Treaties, *supra* note 107, at 62 (Information Office of the Icelandic Ministry of Foreign Affairs trans.).

regardless of the type of agreement entered into by the President. However, this Article submits that a perusal of the 1987 Constitution would show that it has, in another part, indicated at least one area of concern so as to expressly require Senate concurrence. Article XVIII, Section 25 of the Constitution states that should foreign military bases, troops, or facilities be allowed in the Philippines, the President *must* seek Senate concurrence, among others, for any treaty to that effect to be effective.¹⁶⁶

Granting that the Constitution has already specified one subject matter, i.e., foreign military bases, troops, or facilities, as falling under that class of agreements that will always require Senate concurrence to be binding and effective, any effort to strengthen Senate concurrence as a check and balance to the President's treaty-making powers should also explore expanding the list.

The Philippines can, thus, explore the prospect of using more definitive terms to indicate what type of agreements should be subject to Senate concurrence and, necessarily, what type of agreements need not be. Intuitively, this will strengthen Senate concurrence as a check and balance mechanism because it serves to clarify the line between agreements that require Senate concurrence and those that do not.

However, it also leads to two byproducts that are also related to checks and balances: *first*, it compels the executive to disclose the existence of the agreement for the purpose of undergoing the Senate concurrence procedure; and *second*, it makes clear that Philippine law will not recognize the validity and binding effect of agreements that clearly should be subject to Senate concurrence but were not submitted for such.

As far as international law is concerned, it pays to recall that it is not usually concerned with provisions of municipal law concerning restrictions and limitations that qualify the competence or authority of its representatives to enter into treaties. The general rule in Article 46 of the VCLT clearly provides that a State "may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law

¹⁶⁶ CONST. art. XVIII, § 25. "After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning military bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State."

regarding competence to conclude treaties as invalidating its consent.”¹⁶⁷ In other words, compliance with the constitutional limitation requiring Senate concurrence as a condition before any President can ratify a treaty or international agreement is not usually the concern of international law. A treaty that has been ratified by the President can still bind the Philippines under international law even sans the concurrence of the Senate.

However, this Article submits that constitutional reform to express and clarify the limits of the treaty-making power of the President *may* likewise prove to be beneficial even when viewed from the perspective of international law. This is because Article 46 of the VCLT admits of an exception, that is, when the violation of the provision of a State’s internal law “was manifest and concerned a rule of its internal law of fundamental importance.”¹⁶⁸

The addition of language to bolster the limitations to the treaty-making power of the President under Article VII, Section 21 of the Constitution can contribute to making more “manifest” any disregard by the President and of the State with whom an agreement is being entered into of clear constitutional limitations. As provided by Article 46(2) of the VCLT, a violation is manifest “if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.”¹⁶⁹

Thus, a clearly laid out constitutional provision that outlines the conditions for a President to have an authority to ratify any treaty or international agreement will put the Philippines in a better position to defend itself in the international plane as against possible allegations by another State concerning some agreement that has been entered into by and between the representatives of both States. After all, States can be expected to exercise some form of diligence to ensure that the officials that purport to be authorized to bind their sending State are, indeed, authorized at least based on their fundamental law.¹⁷⁰

¹⁶⁷ VCLT art. 46(1).

¹⁶⁸ Art. 46(1).

¹⁶⁹ Art. 46(2).

¹⁷⁰ “Whether a State was negligently ignorant, *ie* whether it ought to have known of the violation of internal law, depends on the applicable standard of care. Art 46 para 2 defines this standard objectively with reference to the principle of good faith and to the normal practice followed in such a situation by an average or reasonable State. Despite its objective character, the required standard of care thus largely depends on the particular circumstances of the case.” OLIVER DÖRR & KIRSTEN SCHMALENBACH, *Invalidity, Termination and Suspension of the Operation of Treaties*, in VIENNA CONVENTION ON THE LAW OF TREATIES:

While the defense of incompetence of a State representative has not seen much usage in disputes between States concerning the binding effects of an international agreement,¹⁷¹ it would be well within the Philippines' national interest to cover Article VII, Section 21 on all possible fronts.

That said, this Article explores possible amendments that can be introduced to Article VII, Section 21 of the Constitution. Synthesizing the foregoing discussion, the provision can be amended to state as follows:

Section 21. No treaty or international agreement, shall be *ratified, or be* valid and effective unless concurred in by at least two-thirds of all the Members of the Senate. *Provided, that any agreement, regardless of form and permanence, involving the sovereignty, independence, and territorial integrity of the Philippines, shall likewise require such concurrence by the Senate before it can be ratified by the President.*

The inclusion of such a safeguard would eliminate any remaining doubts and ambiguities. Under municipal law, neither the President nor his alter egos may enter into any foreign agreement—verbal or otherwise, permanent or temporary—concerning the aforementioned subject matters.

In turn, as far as international law is concerned, the caveat will serve as a notice to the whole international community, pursuant to the aforementioned Article 46 of the VCLT, that the President or his authorized representatives cannot unilaterally ratify treaties or other foreign agreements that would compromise the Philippines' independence, sovereignty, and territorial integrity.¹⁷²

A COMMENTARY 791 (Oliver Dörr & Kirsten Schmalenbach eds., 2012). (Citations omitted, emphasis omitted.)

¹⁷¹ “This will, however, only rarely be the case since, typically, the applicable provisions of internal law are difficult to interpret or superseded by subsequent practice.” *Id.* at 793.

¹⁷² “[A] violation of internal law would only be manifest if the limitation of the representative’s authority could have been ascertained by simply reading the foreign State’s internal law, provided the pertinent legal instruments were ‘properly publicized’ and easily accessible.” *Id.* at 792. (Citations omitted, emphasis omitted.)

CONCLUSION

Article VII, Section 21 of the Constitution should be one of the focus points of any discourse on constitutional reform. With the current geopolitical landscape becoming increasingly global, foreign relations will become more and more central in the vast duties and responsibilities that befall the President. Especially in the context of the disputed waters in the West Philippine Sea, the Constitution can serve as a lighthouse that can illuminate and guide the President and his *alter egos* whenever negotiating and entering into international agreements with other States—or as a steadfast bastion that unequivocally lays down the limits of what could be an untrammled power to bind the Philippines in the field of international relations.

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