

International Agreements in Constitutional Law: The Suspended RP-China (ZTE) Loan Agreement

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I. CONSTITUTIONAL PROVISIONS

The Constitution, Article 7, on the Executive Department, provides:

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

Sec. 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.

Thus, the Constitution recognizes at least two forms of international agreements, as follows: a) foreign loans, which require prior concurrence of the Monetary Board;¹ and b) treaties or international agreements, which require concurrence of at least two-thirds of all members of Senate, or 16 out of 24 senators.²

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1. PHIL. CONST. art. VII, § 20.
2. PHIL. CONST. art. VII, § 21.

The Constitution does not provide a definition of these two forms of international agreements. But since our Constitution “adopts the generally accepted principles of international law as part of the law of the land,”³ the obvious reference is the 1969 Vienna Convention on the Law of Treaties, which 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.”⁴

Under this definition by the 1969 Vienna Convention, the generic term “international agreement” includes both foreign loans and treaties, provided each one is concluded between two states, or between a state and an international organization.

II. TREATY DISTINGUISHED FROM EXECUTIVE AGREEMENT

Black’s Law Dictionary defines a loan as “[d]elivery by one party to, and receipt by, another party of sum of money upon agreement, express or implied, to repay it with or without interest.”⁵ If the loan is transacted between two states, then it becomes an international agreement.

Under the Constitution, a foreign loan would take one of two natures:

- (1) If it is a foreign loan per se, meaning by itself, unconnected with other matters, then it requires prior concurrence of the Monetary Board. It could be designated as an executive agreement;⁶
- (2) If it is a foreign loan connected with other matters, then it is in effect a treaty, which requires Senate concurrence.⁷

The Constitution makes no mention of “executive agreement,” particularly as an exemption to the general rule of Senate concurrence for any international agreement. Black’s Law Dictionary defines an executive agreement as “[a] treaty-like agreement with another country in which the President may bind the country without submission to the Senate,”⁸ citing the 1937 case of *U.S. v. Belmont*.⁹ We inherited this executive agreement doctrine during the American colonial regime.

3. PHIL. CONST. art. II, § 2.

4. Vienna Convention on the Law of Treaties, May 23, 1969, art. I, ¶ 1, 115 U.N.T.S. 331.

5. BLACK’S LAW DICTIONARY 936 (6th ed. 1990).

6. PHIL. CONST. art. VII, § 20.

7. PHIL. CONST. art. VII, § 21.

8. BLACK’S, *supra* note 5, at 569.

9. *U.S. v. Belmont*, 301 U.S. 324 (1937).

The 1935 Constitution, although it contained a provision for Senate concurrence in a treaty, did not include the phrase “or international agreement,” which is now found in the equivalent provision of the 1987 Constitution.¹⁰ For this reason, the Records of the 1986 Constitutional Commission show that initially, Commissioner Sarmiento moved that the phrase “or international agreement” should be deleted, but later withdrew his amendment, after Commissioner Concepcion said that international agreements never bind the Philippines, unless the Philippines ratifies them.¹¹

Commissioner Aquino asked whether “executive agreements” would also need confirmation. Commissioner Concepcion replied that executive agreements are generally made to implement a treaty already enforced, or to determine the details for the implementation of the treaty. Commissioner Aquino then proposed to amend the provision, so that it would read “No treaty or international agreement, except executive agreement, shall be valid and effective.” But she later withdrew this amendment for being unnecessary, after Commissioner Bernas quoted a passage from the landmark case of *Commissioner of Customs, et al. v. Eastern Sea Trading*,¹² discussed below.¹³

Commissioner Bernas, interpreting *Eastern Sea*,¹⁴ made the point that a treaty has a permanent nature, while an executive agreement has a temporary nature. Commissioner Aquino clarified that no Senate concurrence is needed for an executive agreement, such as a commercial agreement undertaken after prior authorization from Congress. Commissioner Bernas agreed that if an executive agreement has been reached after prior Congress authorization, then there is no need for Senate concurrence.¹⁵

Under the rules of constitutional construction, the intent of both the framers (meaning the Constitutional Commission) and adopters (meaning the people) is controlling. In case of conflict, the intent of the adopters will control. Since the people are represented by the Supreme Court, this means that the Supreme Court, in the exercise of the power of judicial review, is not bound by the opinions expressed during deliberation of the constitutional commission. Thus, in the 1974 case of *Aquino v. Enrile*,¹⁶ the

10. PHIL. CONST. art. VII, § 21.

11. II RECORDS OF THE CONSTITUTIONAL COMMISSION 544-45 [hereinafter RECORDS].

12. *Commissioner of Customs, et al. v. Eastern Sea Trading*, 3 SCRA 351 (1961).

13. RECORDS, *supra* note 11.

14. *Eastern Sea*, 3 SCRA at 356.

15. RECORDS, *supra* note 11.

16. *Aquino v. Enrile*, 59 SCRA 183 (1974).

Supreme Court held that the intent of the commission is not controlling by itself, but merely sheds light on the intent of the framers.

The distinction drawn in the records of the constitutional commission between a treaty as permanent in nature, and an executive agreement as temporary in nature no longer stands alone. The distinction now goes beyond this simplistic formula, as explained below.

Under Memorandum Circular No. 89¹⁷ dated 19 December 1988, “Providing for the Procedure for the Determination of International Agreements as Executive Agreements,” then Executive Secretary Catalino Macaraig, Jr., by authority of the President, said:

It is an accepted principle recognized in Philippine jurisprudence that international agreements which have the nature of an executive agreement do not require the concurrence of the Senate to be valid and effective.

...

[T]he matter should be brought to the attention of the Secretary of the Department of Foreign Affairs by a memorandum of the official responsible for the negotiation of said agreement. The said memorandum shall be referred to the Legal Adviser of the said Department and the Assistant Secretary in charge of the liaison between the Department of Foreign Affairs and the Senate, for their comment.

Whenever circumstances permit, consultations shall be made with the leadership and members of the Senate.

The Secretary of the Department of Foreign Affairs shall forthwith make the proper recommendation to the President.¹⁸

Under Executive Order No. 459,¹⁹ “Providing for the Guidelines in the Negotiation of International Agreements and Its Ratification” [sic] dated 25 November 1997, Section 9 provides: “The Department of Foreign Affairs shall determine whether an agreement is an executive agreement or a treaty.”²⁰

III. DISTINCTION UNDER AMERICAN LAW

The United States Constitution contains a provision substantially similar to ours, thus: “[The President] shall have Power, by and with the Advice and

17. Providing for the Procedure for the Determination of International Agreements as Executive Agreements, Memorandum Circular No. 89 (Dec. 19, 1988).

18. *Id.*

19. Office of the President, Executive Order No. 459, Providing for the Guidelines in the Negotiation of International Agreements and Its Ratification (Nov. 25, 1997).

20. *Id.*

Consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.”²¹ And yet, in the landmark case of *U.S. v. Curtiss-Wright Corporation*,²² the U.S. Supreme Court carved out an exception in favor of executive agreements.

In the United States, the landmark case on executive agreements is the 1936 case of *Curtiss-Wright*²³ where the U.S. Supreme Court ruled:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.²⁴

Since then, certain famous American cases have legitimated the idea of the President’s foreign affairs power, independent of legislative power delegated by the Congress.²⁵ The American cases also established executive agreements as one of the outer limits of that power. This independent role of the President in foreign affairs has fluctuated with the strength of the particular President and the exigencies of the moment. Thus, the U.S. President resolved the Iran hostage crisis with an executive agreement, because congressional support was either not necessary, or not feasible. But in such scandals as the Vietnam War, Watergate, the arms sales to Iran, and assistance to the contras in Nicaragua, Congress reasserted its authority.

Under contemporary American jurisprudence, an executive agreement is an international agreement entered into by the President, but does not require Senate approval, if it is based on any of the following grounds:

- (1) the constitutional authority vested in the President, namely, as chief executive, as commander-in-chief, as chief diplomatic officer, and as executor of the law of nations;
- (2) legislation enacted by Congress, authorizing the President to conclude such arrangements;
- (3) provisions of a treaty, for which the Senate provided its advise and consent, and in which executive agreements are authorized, such as mutual defense assistance agreements;

21. U.S. CONST. art. 2, § 2, ¶ 2.

22. *U.S. v. Curtiss-Wright Corporation*, 299 U.S. 304 (1936).

24. *Id.*

25. *Id.* at 321-22.

25. See, e.g. *Dames & Moore v. Regan*, 453 U.S. 654 (1981), *American Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003).

(4) a combination of paragraphs (2) and (3).

Under the U.S. State Department Foreign Affairs Manual,²⁶ the following are the factors which should be considered when determining whether to proceed as a treaty or as an executive agreement:

- (1) extent to which it involves commitments or risks affecting the entire nation;
- (2) whether the agreement is intended to affect state laws;
- (3) whether the agreement can be implemented without the enactment of subsequent legislation;
- (4) past practices of the US as to similar arrangements;
- (5) Congress's preference as to the type of agreement;
- (6) degree of formality desired for the agreement;
- (7) proposed duration of the agreement, need for immediate conclusion of the agreement, and the desirability of concluding routine or short-term agreement;
- (8) the general international practice as to similar agreements;
- (9) avoidance of invading or compromising the constitutional power of the Senate, the Congress, and the President.²⁷

The U.S. State Department Foreign Affairs Manual also provides that the State Department will consult with congressional leaders and committees, when considering whether to perfect a treaty or an executive agreement.²⁸

IV. DISTINCTION UNDER UNITED NATIONS GUIDE

The United Nations Treaty Reference Guide makes the following distinctions between treaty and agreement:

(b) Treaty as a specific term: ... Usually the term “treaty” is reserved for matters of more gravity that require more solemn agreements Typical examples of international instruments designated as “treaties” are Peace Treaties, Border Treaties, Delimitation Treaties, Extradition Treaties, and Treaties of Friendship, Commerce, and Cooperation. The use of the term “treaty” for international instruments has considerably declined in the last decades in favor of other terms.

...

26. U.S. State Department Foreign Affairs Manual, 11 FAM 720 (2006) available at <http://www.state.gov/documents/organization/88317.pdf> (last accessed Sep. 5, 2008).

27. *Id.* at 4.

28. *Id.* at 5-6.

(b) Agreement as a particular term: “agreements” are usually less formal, and deal with a narrower range of subject-matter than “treaties.” There is a general tendency to apply the term “agreement” to bilateral or restricted multilateral treaties. It is employed especially for instruments of a technical or administrative character, which are signed by the representatives of government departments, but are not subject to ratification. Typical agreements deal with matters of economic, cultural, scientific, and technical cooperation. Agreements also frequently deal with financial matters, such as avoidance of double taxation, investment, or financial assistance Nowadays by far the majority of international agreements are designated as agreements.²⁹

V. PHILIPPINE CASE LAW

Possibly the first landmark case on executive agreements was the 1959 case of *USAFFE Veterans Association, Inc. v. Treasurer of the Philippines*,³⁰ where the Supreme Court ruled that the following arguments seem persuasive:

[E]xecutive agreements may be entered into with other states and are effective, even without the concurrence of the Senate From the point of view of international law, there is no difference between treaties and executive agreements in their binding effect upon states concerned, as long as the negotiating functionaries have remained within their powers “The distinction between so-called executive agreements and ‘treaties’ is purely a constitutional one and has no international legal significance.”

...

In the leading case of *B. Altman & Co. v. U.S.*, it was held that “an international compact negotiated between the representatives of two sovereign nations and made in the name or behalf of the contracting parties and dealing with important commercial relations between the two countries, is a treaty both internationally, although as an executive agreement it is not technically a treaty requiring the advise and consent of the Senate

Executive agreement fall into two classes: (1) agreements made purely as executive acts affecting external relations, and independent of, or without, legislative authorization, which may be termed as presidential agreement; and (2) agreement entered into in pursuance of acts of Congress, which have been designated as Congressional-Executive Agreements.³¹

29. United Nations Reference Guide *available at* <http://untreaty.un.org/English/guide.asp> (last accessed Sep. 05, 2008).

30. *USAFFE Veterans Association, Inc. v. Treasurer of the Philippines*, 105 Phil. 1030 (1959).

31. *Id.* at 1037-38 (citing *B. Altman & Co. v. U.S.*, 224 U.S. 583 (1912)).

The next landmark case, which has since become authoritative, was the 1961 case of *Commissioner of Customs v. Eastern Sea Trading*,³² which quoted with approval from the decision of the Court of Appeals:

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.

...

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

...

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.

...

In this connection, Francis B. Sayre, former U.S High Commissioner to the Philippines, said in his work on “The Constitutionality of Trade Agreement Acts”:

It would seem to be sufficient, in order to show that the trade agreements under the Act of 1934 are not anomalous in character, that they are not treaties, and that they have abundant precedent in our history, to refer to certain classes of agreements heretofore entered into by the Executive without the approval of the Senate. They cover such subjects as ... commercial relations generally, etc.³³

This landmark case of *Eastern Sea Trading*³⁴ concerned the May 1950 RP-US Trade and Financial Agreements, which were implemented by Executive Order No. 328 dated 22 June 1950. It has since been the leading authority on the constitutionality of executive agreements. *Eastern Sea Trading*³⁵ has been cited in a line of cases, including the following:

32. *Commissioner of Customs, et al. v. Eastern Sea Trading*, 3 SCRA 351 (1961).

33. *Id.* at 356-57 (citing Francis B. Sayre, *The Constitutionality of Trade Agreement Acts*, 39 COLUM. L. REV. 651, at 755).

35. *Id.*

35. *Id.*

- (1) the 2000 case of *Bayan v. Zamora*,³⁶ concerning the RP-US;
- (2) Visiting Forces Agreement;
- (3) the February 2007 case of *Abaya v. Ebdane, Jr.*³⁷ concerning the RP-Japan Exchange of Notes dated 27 December 1999, and Loan Agreement No. PH-P204 dated 28 December 1999;
- (4) the June 2007 case of *Department of Budget and Management Procurement Service v. Kolonwel Trading*,³⁸ concerning the 2000 RP-IBRD Loan Agreement No. 7118-PH, and the RP-ADB Loan No. 1654-PHI. This *Kolonwel*³⁹ decision cited the *Abaya*⁴⁰ ruling.

VI. RP – CHINA (ZTE) LOAN AGREEMENT

It is respectfully submitted that the present RP – China (ZTE) loan agreement is an executive agreement, on the following grounds:

- (1) It is a soft loan, and the risks to the nation are not significant;
- (2) It is not intended to affect Philippine laws;
- (3) It can be implemented without the enactment of subsequent legislation, save for the necessary provision in the national appropriations act;
- (4) Past foreign loan agreements have been upheld as valid executive agreements, notably in the 2007 *Abaya*⁴¹ and *Kolonwel*⁴² cases;
- (5) It is a short-term agreement;
- (6) The validity of executive agreements is considered a norm of international law, and more specifically as a principle of international customary law. In international law, as in Philippine constitutional law, custom is the best interpreter of the laws. *Optimum legum interpretres consuetude*; and,
- (7) To require Senate concurrence would compromise the constitutional power of the President as chief diplomatic officer.

36. *Bayan v. Zamora*, 342 SCRA 449 (2000).

37. *Abaya v. Ebdane*, 515 SCRA 720 (2007).

38. *Department of Budget and Management Procurement Service v. Kolonwel Trading*, 524 SCRA 591 (2007).

39. *Id.*

40. *Abaya*, 515 SCRA at 772.

41. *Id.* at 756-73.

42. *Kolonwel*, 524 SCRA at 608-09

Since a loan agreement would create future indebtedness which would require payment by the National Treasury, it should follow the following process for perfection of an agreement:

- (1) The Department of Budget and Management (DBM) should issue a Forward Obligational Authority (FOA);
- (2) The Office of the President should issue Full Powers to the Department of Finance (DOF);
- (3) The DOF, on behalf of the Republic of the Philippines, should enter into the loan agreement;
- (4) The Monetary Board has to approve the loan;
- (5) Congress, in the exercise of the power of the purse, should approve the loan through the annual appropriations act.

At present, this RP–China loan agreement, in the form of an executive agreement, is a work in progress. The Supreme Court has issued a temporary restraining order on the present negotiations. Accordingly, the President has issued instructions to suspend the executive proceedings, during the pendency of the Supreme Court petition. This paper merely discusses its constitutionality as such. It will become a valid executive agreement without Senate participation, provided that it follows the five-step procedure indicated. The question of alleged irregularities in its negotiation is a separate issue.