Testing Constitutional Waters VI: Developments in Treaty-Making and the Enhanced Defense Cooperation Agreement

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I. INTRODUCTION

The continuing military build-up by the People's Republic of China (China) over the West Philippine Sea poses tremendous political pressure on the Republic of the Philippines (Philippine) Government to respond decisively notwithstanding the inadequate capacity of its military force to match Chinese military advances. Consequently, an attempt to reinforce the Philippine military force has been initiated through the Enhanced Defense Cooperation Agreement (EDCA). The goal is quite clear-cut, but the means of entering into such Agreement has been contentious.

A constitutional challenge to EDCA in the form it has undertaken, i.e., an executive agreement, has made it necessary to re-visit the constitutional standards and practice in the legal characterization of agreements entered into by State authorities.

Applied to Vulnerable Sectors, 50 ATENEO L.J. 823 (2006); & *The Philippines and the Convention on the Rights of the Child: Evaluating Compliance with Respect to International Standards for Procedural Rules Involving Children*, 49 ATENEO L.J. 1016 (2004).

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This Article attempts to provide an overview of treaty law and practice in relation to the case of *Saguisag v. Executive Secretary*.[1] First, it will identify the standards observed when entering into international agreements in accordance with international and domestic law. Second, it will provide a discussion of the case of *Saguisag*, setting down the issues and arguments raised by the parties and the rulings made by the Supreme Court of the Philippines (Supreme Court). The Authors shall thenceforth endeavor to clarify the interpretative tools applied by the Justices in rendering their respective opinions and evaluate the case in light of the established legal standards of treaty-making. To conclude, the Authors shall strive to determine and assess the impact of the *Saguisag* Decision on the development of the Philippine treaty-making process.

II. DEVELOPMENT OF STANDARDS REGARDING INTERNATIONAL AGREEMENTS AND TREATY-MAKING

A. Recognized Practice in International Law

Treaties, as a source of international law, have a fundamental role in international relations. They pave the way for "developing peaceful co-operation among nations, whatever their constitutional and social systems[.]"[2] They are also considered as "the primary source of legal relations between [ ] States[,]"[3] seeing that they serve as the general legislation under the international law regime, and vehicles for the codification of international law, which ultimately bind Member-States.[4] In return, States obtain benefits from cooperation in the form of external defense, industry regulation, enforcement of obligations, and improved social welfare services, to name a few.[5]

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1. Rene A.V. Saguisag v. Executive Secretary Paquito, G.R. Nos. 212426 & 212444, Jan. 12, 2016, *available at* http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/january2016/212426.pdf (last accessed Aug. 31, 2016).

2. Vienna Convention on the Law of Treaties pmbl., *opened for signature* May 22, 1969, 1155 U.N.T.S. 331 (entered into force on Jan. 27, 1980) [hereinafter VCLT].

3. VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 1 (Oliver Dörr & Kirsten Schmalenbach eds., 2012) (emphasis omitted).

4. AMERICAN LAW INSTITUTE, THE RESTATEMENT, THIRD, ON THE FOREIGN RELATIONS LAW OF THE UNITED STATES 144-45 (1990).

5. *See generally* Thomas J. Miles & Eric A. Posner, Which States Enter into Treaties, and Why? (A Working Paper on Public Law and Legal Theory for the University of Chicago) 4, *available at* http://www.law.uchicago.edu/files/files/420.pdf (last accessed Aug. 31, 2016).

States rely on treaties because of their obvious law-making characteristics.[6] Attempts at treaty-making can be traced back to the inter-war period from 1919 to 1939[7] when the League of Nations emphasized the need to keep a "scrupulous respect for all treaty obligations."[8] The growing importance of treaty-making was further strengthened in the wake of the tragedy brought by the Second World War.[9] Since then, almost 45,000 bilateral treaties and 8,000 multilateral treaties have been concluded.[10] This development can be attributed to "the process of negotiation and the binding character of treaties [that] have made them the closest analogy to an international legislative instrument so far devised."[11] Thus, the law-making characteristic of treaties, combined with the mutual adherence expected of States, serve as good reasons for why treaties are so central today.

Given the role of treaties in international law, it is important to understand the process of treaty-making and its implications. This can be achieved by first analyzing the meaning and scope of the term "treaty," including the requirements needed to attain such status, and thereafter, by determining the applicable provisions of the Constitution and other laws.

1. Rules and Principles contained in the Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties (VCLT)[12] is considered to be the authoritative guide to treaty law and practice.[13] Under the VCLT, a treaty is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single

6. Alan Boyle, *Reflections on the Treaty as a Law-Making Instrument*, *in* 40 YEARS OF THE VIENNA CONVENTION ON THE LAW OF TREATIES 3-4 (Alexander Orakhelashvili & Sarah Williams ed., 2010).7. The inter-war period marked a period where several treaties were entered into for the sake of attempting a more lasting peace. *See* Ben Pi, et al., Inter-war Period: Causes of WWII, *available at* http://inter-wars.weebly.com/index.html (last accessed Aug. 31, 2016).

7. The inter-war period marked a period where several treaties were entered into for the sake of attempting a more lasting peace. *See* Ben Pi, et al., Inter-war Period: Causes of WWII, *available at* http://inter-wars.weebly.com/index.html (last accessed Aug. 31, 2016).

8. League of Nations Covenant, pmbl.

9. Miles & Posner, *supra* note 5, at 2.

10. *Id.*

11. Boyle, *supra* note 6, at 4.

12. VCLT, *supra* note 2.

13. AMERICAN LAW INSTITUTE, *supra* note 4, at 145.

instrument or in two or more related instruments and whatever its particular designation."[14]

The use of the term "treaty" in international law relates to the term as used in the municipal sphere.[15] Generally, however, there is disparate use of the term in both international and domestic law.[16] This is attributed to the fact that domestic law subjects international agreements to an "internal ratification process" before it can be considered a treaty.[17] Consequently, internal procedures have resulted in several designations or titles such as "executive agreement" or "administrative agreement."[18]

Gathering from the definition under VCLT, a treaty has the following elements:

(1) It must be an international agreement such that it is international in nature;[19]

(2) It must be concluded between States.[20] The term "[S]tate" as an element of a treaty requires the determination of sovereignty and statehood for the reason that "[a] treaty is between [S]tates, governments or their agencies, or instrumentalities acting on behalf of [S]tates." [21] However, entities with ambiguous international status may still enter into treaties, provided that they are recognized in accordance with the UN's admission process or the rules on membership under the VCLT;[22]

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14. VCLT, *supra* note 2, art. 2 (1) (a).

15. VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 3, at 46.

16. *Id.*

17. *Id.*

18. *Id.* For example, an executive agreement refers to an international agreement entered into solely by the Pres*i*dent without requiring Senate concurrence. *See* Miriam Defensor-Santiago, *International Agreements in Constitutional Law: The Suspended RP-China (ZTE) Loan Agreement*, 53 ATENEO L.J. 537, 538 (2008).

19. Jose Eduardo Malaya III & Maria Antonina Mendoza-Oblena, *Philippine Treaty Law and Practice*, 35 IBP J. 1, 3 (2010).

20. *Id.* & JOAQUIN G. BERNAS, S.J., INTRODUCTION TO PUBLIC INTERNATIONAL LAW 22 (2009 ed.) [hereinafter BERNAS, PIL].

21. BERNAS, PIL, *supra* note 20, at 22.

22. VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 3, at 22-23. The U.N. admission process refers to Article 4 of the UN Charter which provides:

(1) Membership in the United Nations is open to all other peace-loving [S]tates which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

(3) It must be in written form;[23]

(4) It must be governed by international law.[24] States must show their intent to be bound under international law. Without such intent, no treaty is concluded;[25] and

(5) It may be embodied in a single instrument or in two or more related instruments. The VCLT does not provide for further formal requirements for its validity other than its being in written form; therefore, a treaty may come in whatever form, such as through the exchange of notes.[26]

States are conferred with legal personality to create and assume international rights and duties.[27] However, "international legal personality does not necessarily entail the legal capacity to act on the international plane."[28] Even if States may not have the capacity to act, the capacity to conclude a treaty is granted can be granted upon persons or human beings.[29] Still, not all persons are qualified to conclude a treaty on behalf of the State. Only State authorities with full powers to contract on its behalf are sanctioned to conclude treaties pursuant to Article 7 of the VCLT,[30] to wit:

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(2) The admission of any such [S]tate to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

UN Charter, art. 4.

Likewise, the determination of membership under the VCLT or the so-called Vienna formula is expressed in Article 81 thereof, viz. —

> The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention[.]

VCLT, *supra* note 2, art. 81.

23. BERNAS, PIL, *supra* note 20, at 22 & Malaya & Mendoza-Oblena, *supra* note 19, at 3.

24. Malaya & Mendoza-Oblena, *supra* note 19, at 3.

25. *Id.*

26. *Id.*

27. VCLT, *supra* note 2, art. 6. *See also* JOHN O' BRIEN, INTERNATIONAL LAW 138 (2001).

28. VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 3, at 107.

29. *Id.*

30. *Id.* at 29 & VCLT, *supra* note 2, art. 7.

(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.

(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) [H]eads 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) [R]epresentatives accredited by States to an international conference[,] 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.[31]

The powers under Article 7 of the VCLT relate to the capacity to negotiate, adopt, and/or authenticate the provisions of the treaty, and to convey the State's intention to be bound thereby. The extent of these powers to act is left to the decision of the States.[32]

2. A Look into United States of America (U.S.) Practice

A treaty is a legally binding agreement between States.[33] Under international law, it does not require any process, provided the States bind themselves.[34] Once there is consent or indication of the States' intent to be bound, a treaty is concluded, whatever its particular designation.[35] Notwithstanding, some States have a narrower interpretation of what constitutes a treaty. In some

31. VCLT, *supra* note 2, art. 7.

32. VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 3, at 124.

33. Congressional Research Service Library of Congress, Treaties and Other International Agreements: The Role of the United States Senate (A Study Prepared for the Committee on Foreign Relations of the US Senate) 1, *available at* https://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf (last accessed Aug. 31, 2016).

34. *See* Malaya & Mendoza-Oblena, *supra* note 19, at 4.

35. VCLT, *supra* note 2, art. 2 (1) (a).

jurisdictions, a stringent process must be followed before an international agreement is considered a treaty.

Under U.S. law, the concurrence of two-thirds of the Senate is required for international agreements to be regarded as treaties.[36] Thus, "the word treaty is reserved for an agreement that is made 'by and with the Advice and Consent of the Senate' [and] ... international agreements not submitted to the Senate are known as 'executive agreements[.]'"[37]

a. International Agreements

International agreements not submitted to the U.S. Senate may fall under any of the following: (a) congressional-executive agremeents; (b) agreements pursuant to treaties; and (c) sole executive agreements.[38]

First, congressional-executive agreements are executive agreements which are authorized by Congress or submitted to Congress for approval.[39] Foreign trade, foreign military assistance, and foreign economic assistance fall under this type of agreement.[40]

Second, an executive agreement may arise pursuant to an existing treaty, such as when it is meant to implement the treaty.[41] An example of this would be security treaties.[42] This type of agreement becomes problematic when it is unclear whether it falls "within the purview of an existing treaty."[43]

Third, the President is empowered to enter into international agreements. The U.S. Constitution allows the President, on his own prerogative, to make international agreements concerning matters within his authority.[44] Despite not having to go through the Senate, however, these kinds of executive agreements remain internationally binding.[45] Though domestic law may delineate and differentiate these various forms of

36. U.S. CONST. art. II, § 2, ¶ 2.

37. Congressional Research Service Library of Congress, *supra* note 33, at 1.

38. *Id.* at 5.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. Congressional Research Service Library of Congress, *supra* note 33, at 5.

44. U.S. CONST. art. II, § 2, ¶ 2 & AMERICAN LAW INSTITUTE, *supra* note 4, § 303.

45. *See* Georgetown Law Library, U.S. Treaties & Agreements, *available at* http://guides.ll.georgetown.edu/c.php?g=365734&p=2471160 (last accessed Aug. 31, 2016).

agreements vis-à-vis treaties, no such dichotomy exists in international law; for the latter, both are treated as one and the same, and equally binding upon State-parties.[46]

b. Treaties Under U.S. Law

Treaty-making includes negotiation and conclusion, consideration by the Senate, and Presidential ratification.[47] Negotiation is a process by which representatives of States agree on the form and content of the agreement.[48] Meanwhile, conclusion pertains to the end of the negotiation, where parties sign the agreement to indicate its finality.[49] It is noteworthy, however, that the signing does not actually correspond to the agreement's entry into force, since the agreement is still subject to ratification, pursuant to the internal law of the State.[50] Once the agreement has been concluded, the President transmits it to the Senate for advice and consent.[51] During Senate consideration, amendments may be recommended or conditions be placed in the resolution of ratification.[52] Thereafter, the Senate votes on the resolution, requiring two-thirds majority of the Senators present for its approval.[53] Once approved by the Senate, the treaty is transmitted back to the President.[54] He or she can choose either to ratify the treaty by signing the instrument, or to refuse consent due to unreasonable reservations and conditions attached to it.[55] Should he or she ratify the treaty, the President then directs the Secretary of State to act as required for the treaty to enter into force.[56]

Given the stricter definition of the term "treaty" and the deliberately more difficult treaty-making process under U.S. law, an issue arises as to when an international agreement must be concluded as a treaty before it can be considered binding upon the U.S.

Senators prefer that international agreements be concluded as treaties, especially when the subject matter is of primary significance.[57] In order to

46. Congressional Research Service Library of Congress, *supra* note 33, at 4.

47. *Id.* at 6-12.

48. *Id.* at 6.

49. *Id.*

50. *Id.* at 6-7.

51. *Id.* at 7.

52. *See* Congressional Research Service Library of Congress, *supra* note 33, at 11.

53. *Id.*

54. *Id.* at 12.

55. *Id.*

56. *Id.*

57. *Id.* at 26.

address this concern, procedures have been laid down in the form of the International Agreements Consultation Resolution, which calls for consultation between the executive and legislative branches of the government to determine the form of prospective international agreements.[58] Through these procedures, coupled with periodical reports submitted to the government, the following criteria are suggested for classifying agreements into treaties and other forms:

(1) The degree of commitment or risk for the entire Nation;

(2) Whether the agreement is intended to affect state laws;

(3) Whether the agreement requires enabling legislation;

(4) Past U.S. practice;

(5) The preference of Congress;

(6) The degree of formality desired;

(7) The proposed duration and the need for prompt conclusion; and

(8) General international practice on similar agreements.[59]

B. Identification of Trends and Normative Developments in the Philippines

1. Executive Agreement or Treaty: When Proper?

Executive agreements differ from treaties in such a way that the former do not require the approval of two-thirds of the Senate before they become binding.[60] Failure to determine the appropriate form may therefore result in an instrument's invalidity. To this end, it is necessary to define the type of instrument entered into to be able to abide by the procedural requirements for its validity. However, the Supreme Court has acknowledged that it is not an easy task.[61] There lies the problem of "distinguishing when an international agreement needed Senate concurrence for validity, and when it did not,"[62] as there is no specific standard in determining the propriety of a treaty or an executive agreement as regards a given subject matter.[63] The crux of the problem now becomes this — when should international

58. Congressional Research Service Library of Congress, *supra* note 33, at 26.

59. *Id.*

60. *See* Commissioner of Customs v. Eastern Sea Trading, 3 SCRA 351, 355-56 (1961).

61. *Saguisag*, G.R. Nos. 212426 & 212444.

62. *Id.*

63. Bayan Muna v. Romulo, 641 SCRA 244, 261 (2011). It provides that "[t]he primary consideration in the choice of the form of agreement is the parties' intent and desire to craft an international agreement in the form they so wish to further their respective interests." *Id.*

agreements be concluded as treaties and when should it be in the form of executive agreements? In an attempt to arrive at a set of criteria to help distinguish the two, it is vital to first examine the nature of executive agreements.

An executive agreement is a form of an international agreement that "is not technically a treaty requiring the advice and consent of the Senate."[64] It covers a broad range of subject matter, viz. —

> [T]he conduct of foreign affairs has become more complex and the domain of international law wider, as to include such subjects as human rights, the environment, and the sea. ... Surely, the enumeration in [*Commissioner of Customs v.*] *Eastern Sea Trading* cannot circumscribe the option of each state on the matter of which the international agreement format would be convenient to serve its best interest.
>
> ...
>
> It would be useless to undertake to discuss here the large variety of executive agreements as such concluded from time to time.[65]

Further, as held in *USAFFE Veterans Association, Inc. v. The Treasurer of the Philippines*,[66] executive agreements can be divided into two classes, namely:

> (1) [A]greements made purely as executive acts affecting external relations and independent of or without legislative authorization, which may be termed as presidential agreements; and
>
> (2) [A]greements entered into in pursuance of [the] acts of Congress, which have been designated as Congressional-Executive Agreements.[67]

Proceeding therefrom, one distinction drawn between a treaty and an executive agreement is based on the *Eastern Sea Trading*[68] case. It states that "[i]nternational agreements embodying adjustments of detail carrying out well-established national polices and traditions and those involving arrangements of a more or less temporary nature usually take the form of

64. USAFFE Veterans Association, Inc. v. Treasurer of the Philippines, et al., 105 Phil. 1030, 1037 (1959) (citing Altman v. U.S., 224 U.S. 583, 601 (1912)).

65. *Bayan Muna*, 641 SCRA at 261-62.

66. *USAFFE Veterans Association, Inc.*, 105 Phil. 1030.

67. *Id.* at 1038. Let it be noted that this classification does not seem to hold much bearing, as it was arguably no longer in tune with the times. *See* Arvin Jo, Foreign-Funded Government Procurement: An Examination of the Propriety and Implication of Characterizing a Foreign Loan Agreement as an Executive Agreement (2009) (unpublished J.D. thesis, Ateneo de Manila University) (on file with the Professional Schools Library, Ateneo de Manila University).

68. *Eastern Sea Trading*, 3 SCRA 351.

executive agreements."[69] In addition, the Constitutional Commission clarified that an executive agreement must be traceable to an express or implied authorization under the Constitution, statutes, or treaties,[70] or "hinge on prior constitutional or legislative authorizations."[71]

When there is a question as to whether an agreement should be concluded as a treaty or executive agreement, the Office of the President together with the Department of Foreign Affairs (DFA) issued internal procedures for consultation. In 1988, Memorandum Circular No. 89 was issued, which called for discussion in case of conflict as to whether an agreement is a treaty or an executive agreement.[72] The consultation is conducted by the DFA and the Senate, in which they are both given the opportunity to comment on the propriety of the form of the agreement.[73] Then again, in 1997, Executive Order No. 459[74] or the Guidelines in the Negotiation of International Agreements and its Ratification was issued. It gave the DFA the power to determine "whether an agreement is an executive agreement or a treaty."[75] In light of this latest issuance, the executive department has been given wide discretion to determine the form of the international agreement.

2. The Treaty-Making Process Under Philippine Law

A treaty is both an agreement between States and an internal law for the citizens of the contracting State.[76] In the Philippines, the Constitution sets certain requirements for a treaty to bind its citizens. Particularly, it requires

69. *Id.* at 356 (emphases omitted).

70. II RECORD OF THE CONSTITUTIONAL COMMISSION, SESS. 43, at 545 (1986).

71. *Saguisag*, G.R. Nos. 212426 & 212444 (emphasis omitted). *See* Elyrhey Vasig, The Extent of Legislative Power in Curtailing or Regulating Executive Agreements (2010) (unpublished J.D. thesis, Ateneo de Manila University) (on file with the Professional Schools Library, Ateneo de Manila University).

72. Department of Foreign Affairs, DFA Memorandum Circular No. 89, Series of 1988 (Dec. 19, 1988).

73. *Id.*

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

75. *Id.* art. 9.

76. Adolfo S. Azcuna, *The Supreme Court and Public International Law*, 46 ATENEO L.J. 24, 35 (2001).

Senate concurrence, not only in treaties but also in all international agreements,[77] to the exclusion of executive agreements.[78]

Similar to the U.S., treaty-making in the Philippines is a joint function of the executive and the legislative departments. This is enshrined in Article VII, Section 21 of the Constitution, which provides that "[n]o treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate."[79] As emphasized in *Bayan v. Zamora*,[80] the role of the Senate is to ensure that treaties are in accordance with the laws and in furtherance of the nation's interest, keeping with the principle of checks and balances,[81] to wit —

> For the role of the Senate in relation to treaties is essentially legislative in character; the Senate, as an independent body possessed of its own erudite mind, has the prerogative to either accept or reject the proposed agreement, and whatever action it takes in the exercise of its wide latitude of discretion, pertains to the wisdom rather than the legality of the act. In this sense, the Senate partakes a principal, yet delicate, role in keeping the principles of *separation of powers* and of *checks and balances* alive and vigilantly ensures that these cherished rudiments remain true to their form in a democratic government such as ours. The Constitution thus animates, through this treaty-concurring power of the Senate, a healthy system of checks and balances indispensable toward our nation[']s pursuit of political maturity and growth. True enough, rudimentary is the principle that matters pertaining to the wisdom of a legislative act are beyond the ambit and province of the courts to inquire.[82]

Treaty-making involves a two-step process: negotiation and the actual making of the treaty.[83] The negotiation phase is lodged solely upon the President, to the exclusion of Congress,[84] whereas the latter phase requires the submission of the agreement to the Senate for its concurrence, guaranteeing the binding characteristic of the treaty.[85] During negotiation, the President negotiates the terms without any intrusion on the part of the

77. PHIL. CONST. art. VII, § 21 & JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 935 (2009 ed.) [hereinafter BERNAS COMMENTARY].

78. II RECORD, 1986 PHIL. CONST., SESS. 43, at 544-46 (1986). The Constitutional Commission agreed that the term "international agreements" does not include the term "executive agreements." *Id.*

79. PHIL. CONST. art VII, § 21.

80. Bayan (Bagong Alyansang Makabayan) v. Zamora, 342 SCRA 449 (2000).

81. *Id.* at 496.

82. *Id.*

83. BERNAS COMMENTARY, *supra* note 77, at 938.

84. *Id.*

85. PHIL. CONST. art VII, § 21.

legislature.[86] Once negotiation has been settled, the President submits the treaty to the Senate for ratification.[87] Without the approval of the Senate, the agreement entered into during the negotiation phase cannot bind the State.[88] In brief, a treaty must obtain the two-third votes of the Senate in order to give rise to a State obligation.[89]

Albeit the breadth of power is lodged upon the President, the Philippine Constitution regulates such power in conducting foreign policy. This has been emphasized by the Supreme Court in its decision in *Lim v. Executive Secretary*[90] —

> The Constitution also regulates the foreign relations powers of the Chief Executive when it provides that '[n]o treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate.' Even more pointedly, the Transitory Provisions state:
>
> > Sec[tion] 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.
>
> The aforequoted provisions betray a marked antipathy towards foreign military presence in the country, or of foreign influence in general. Hence, foreign troops are allowed entry into the Philippines only by way of direct exception. Conflict arises then between the fundamental law and our obligations arising from international agreements.[91]

Article XVIII, Section 25 of the Constitution is considered *lex specialis* and strictly governs the capacity of the State to enter into treaties concerning foreign military bases. In the original draft of the above provision, it was proposed that there be an absolute ban on foreign military bases, troops, or facilities upon the expiration of the R.P.-U.S. Bases Agreement in 1991.[92] However, due to much contention and after a series of amendments, the Constitutional Commission rejected the proposal and reformulated the

86. BERNAS COMMENTARY, *supra* note 77, at 938 (citing U.S. v. Curtis-Wright Corp., 299 U.S. 304, 319 (1936)).

87. E.O. 459, § 7 (B) (i).

88. BERNAS COMMENTARY, *supra* note 77, at 938.

89. PHIL. CONST. art VII, § 21.

90. Lim v. Executive Secretary, 380 SCRA 739 (2002).

91. *Id.* at 757.

92. BERNAS COMMENTARY, *supra* note 77, at 1397.

provision, allowing the U.S. to have military bases in the Philippines, but subject to a treaty strictly concluded in accordance with Philippine standards.[93] This reaffirms the constitutionally mandated principle that treaty-making is a shared function between the President and the Senate.

Bearing in mind the different requirements in treaty-making, it is necessary to determine the nature of the agreement under international law and domestic law. On the one hand, there exists no distinction between the different forms of international agreements under international law. On the other hand, domestic law, as in the case of the Philippines and the U.S., strictly requires Senate concurrence for the conclusion of a treaty. Without it, said treaty cannot bind the State in the national sphere. In fact, Article 46 of the VCLT allows a State to invalidate a treaty when, in concluding the treaty, it violates domestic law of fundamental importance.[94]

3. Jurisprudential Developments in the Municipal Sphere

A survey of cases reveals that the Supreme Court has adopted a "situational approach" in deciding cases concerning public international law.[95] With this approach, the Supreme Court takes into consideration the factual circumstances and decides the issue at hand depending on the needs of the times.[96] For example, in the 1940s, after the Second World War, developments veered towards international human rights law.[97] After a decade, the Supreme Court focused on international obligations and national exigencies.[98] Recently, the Supreme Court has confronted issues concerning the environment and human rights, and has also had several opportunities to shed light on the validity of treaties such as the Visiting Forces Agreement (VFA) and the EDCA.[99]

A survey of the leading cases further shows the primacy given by the Supreme Court to the Constitution; where the Supreme Court has upheld several of its key principles, such as one's right to travel,[100] the right against

93. IV RECORD OF THE CONSTITUTIONAL COMMISSION, SESS. 43, at 544-46 (1986), at 580-795.

94. Congressional Research Service Library of Congress, *supra* note 33, at 20-21 (citing VCLT, *supra* note 2, art. 46).

95. Azcuna, *supra* note 76.

96. *Id.*

97. *Id.*

98. *Id.* at 27.

99. *Id.* at 27-28.

100. *Id.* (citing Marcos v. Manglapus, 177 SCRA 668, 706-07 (1989)).

arbitrary detention,[101] and the sovereign immunity of the State.[102] In deciding cases, the Supreme Court has always applied the generally accepted principles of international law as adopted by the Philippine Constitution.[103]

III. *SAGUISAG V. EXECUTIVE SECRETARY* — THE VALIDITY OF THE ENHANCED DEFENSE COOPERATION AGREEMENT

A. Overview of the Case

The EDCA is an agreement between the Philippines and the U.S., signed on 28 April 2014 by the parties' duly appointed representatives — Defense Secretary Voltaire T. Gazmin, for the Philippines, and Ambassador Philip S. Goldberg, for the U.S.[104] It aims to further the implementation of the Philippine-U.S. Mutual Defense Treaty (MDT) which was entered into in 1951.[105] It also provides a general framework to expand cooperation between the two countries, by which U.S. forces would be allowed to (a) construct facilities,[106] (b) store and position defense equipment and supplies,[107] and (c) conduct military exercises in the Agreed Locations, under strict supervision of the Armed Forces of the Philippines and under the jurisdiction of the Philippine Government.[108]

In a case consolidating three petitions — *Saguisag v. Executive Secretary*, *BAYAN v. Department of National Defense Secretary*, and *Kilusang Mayo Uno* as petitioners-in-intervention — pleadings were filed by various concerned individuals and groups questioning the constitutionality of the EDCA.[109] It was primarily argued that the President had not transmitted the EDCA to the Philippine Senate for its concurrence.[110] This, stated the petitioners, was in clear violation of the strict constitutional requirements set out by Section 25, Article XVIII of the Constitution, which requires that any international

101. Azcuna, *supra* note 76, at 27-28 (citing Mejoff v. Director of Prisons, 90 Phil. 70, 74 (1951)).

102. *Id.* at 27-28 (citing Baer v. Tizon, 57 SCRA 1, 9 (1974)).

103. *Id.*

104. *See* Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America on Enhanced Defense Cooperation, Phil.-U.S., Apr. 28, 2014 [hereinafter EDCA].

105. *Id.* pmbl.

106. *Id.* art 3 (4).

107. *Id.* art 4 (1).

108. *Id.* art. 1 (3) & Official Gazette, Q&A on the Enhanced Defense Cooperation Agreement, *available at* http://www.gov.ph/2014/04/28/qna-on-the-enhanced-defense-cooperation-agreement/ (last accessed Aug. 31, 2016).

109. *Saguisag*, G.R. Nos. 212426 & 212444.

110. *Id.*

agreement concerning foreign military bases, troops, or facilities must be concluded by virtue of a treaty duly concurred in by the Senate.[111]

The main theory advanced by the petitioners was that the President cannot enter into an executive agreement on foreign military bases, troops, or facilities without the approval of the Senate.[112] They put forward the following Constitutional provisions that were allegedly violated by the EDCA: Article VII, Section 21; Article XVIII, Section 25; Article I; Article II, Sections 2, 7, & 8; Article VI, Section 28(4); and Article VIII, Sec. I.[113] In reply, the respondents contended petitioners' lack of standing to bring the suit and raised laws and jurisprudence to support its case.[114]

B. The Decision of the Court

The Supreme Court sided with the respondents, ruling that the military deal signed by the Philippines and the U.S. is an executive agreement and is therefore constitutional, even without the need of Senate approval.[115] Below is a summary of the issues raised and the corresponding ratiocination of the Supreme Court.

1. Standing of Petitioners

The respondents argued that the petitioners lack the proper legal standing, which should have deprived the Supreme Court of its power of judicial review.[116] *Locus standi* or legal standing refers to the right of the parties "to bring the matter to the court for adjudication."[117] It requires petitioners to have a "personal and substantial interest in the case" such that they will be deprived of a legal right or privilege by reason of the subject matter involved.[118] In this case, the Supreme Court held that the petitioners, as taxpayers, cannot claim to have legal standing since public funds have not yet been appropriated for the implementation of the EDCA.[119] Co-petitioners who are party-list representatives likewise do not have legal standing because "the power to concur in a treaty or an international agreement is an

111. PHIL. CONST., art. XVIII, § 25. *See also Bayan*, 342 SCRA at 482.

112. *Saguisag*, G.R. Nos. 212426 & 212444.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Saguisag*, G.R. Nos. 212426 & 212444.

119. *Id.*

institutional prerogative granted by the Constitution to the Senate, not to the entire [l]egislature."[120]

Nevertheless, the Supreme Court found basis to review the case on the ground that it involves matters of transcendental importance.[121]

2. The validity of the EDCA as an Executive Agreement

The President is the executor of laws. This duty is expressed in Article VII, Section 17 of the Constitution, viz. — "[t]he President shall have control of all the executive departments, bureaus, and offices. He shall ensure that the laws be faithfully executed."[122] The Supreme Court interpreted this inherent duty of the President to execute laws to include "the duty to defend the State, for which purpose he may use that power in the conduct foreign relations."[123] Congress cannot limit the President's power to implement the laws it has enacted.[124] In *Saguisag*, the Supreme Court explained —

> [Th]e presidential role in foreign affairs is dominant and the President is traditionally accorded a wider degree of discretion in the conduct of foreign affairs. The regularity, nay, validity of his actions are adjudged under less stringent standards, lest their judicial repudiation lead to breach of an international obligation, rupture of state relations, forfeiture of confidence, national embarrassment[,] and a plethora of other problems with equally undesirable consequences.[125]

Proceeding from this concept of the presidential role in foreign affairs, the Supreme Court ruled that the President may enter into an executive agreement on foreign military bases, troops, or facilities.[126] However, he can only do so subject to the limitations established under Article XVIII, Section 25 of the Constitution:

> (1) It is not the instrument that allows the presence of foreign military bases, troops, or facilities; or
>
> (2) It merely aims to implement an existing law or treaty.[127]

The majority was convinced that the EDCA "merely involves 'adjustments in detail' in the implementation of the MDT and the VFA,"[128]

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120. *Id.*

121. *Id.*

122. PHIL. CONST. art. VII, § 17.

123. *Saguisag*, G.R. Nos. 212426 & 212444.

124. *Id.*

125. *Id.* (citing Secretary of Justice v. Lantion, 322 SCRA 160, 222 (2000) (J. Puno, dissenting opion)).

126. *Saguisag*, G.R. Nos. 212426 & 212444.

127. *Id.*

both of which the Senate has ratified. Hence, following the principle that an implementation of an existing treaty is a purely executive function, it is within the sole authority of the President to enter into the EDCA as an executive agreement.[129]

The Supreme Court went on to discuss that, following the rules of statutory construction, the plain reading of Article XVIII, Section 25 only applies when the agreement in question allows the *initial* entry of military bases, troops, or facilities to Philippine territory.[130] Since the EDCA did not concern the issue of the *initial* entry of military bases, troops, or facilities, reliance on said provision does not hold water.[131] The executive may then choose the type of instrument it will enter into given the inapplicability of the provision.[132]

On 26 July 2016, the Supreme Court, voting 9-4, denied the motions for reconsideration seeking to reverse the Decision dated 12 January 2016.[133] In affirming the constitutionality of the EDCA, the Supreme Court stated that petitioners failed to "present new arguments to buttress their claims of error on the part of this Court"[134] and maintained that the EDCA is an executive agreement given that it merely implements the VFA and MDT.[135]

In brief, the Supreme Court ruled that the EDCA does not require the concurrence of the Senate under Article XVIII, Section 25 of the Constitution.[136] It is valid as an executive agreement, wholly consistent with the treaties it seeks to implement, i.e., the MDT and the VFA.[137]

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128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Saguisag*, G.R. Nos. 212426 & 212444.

133. Rene A.V. Saguisag v. Executive Secretary Paquito, G.R. Nos. 212426 & 212444, July 26, 2016, *available at* http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/july2016/212426.pdf (last accessed Aug. 31, 2016) [hereinafter *Saguisag Resolution*] & Tetch Torres-Tupas, It's final: Edca constitutional; petitions vs SC ruling junked, *available at* http://globalnation.inquirer.net/141913/final-edca-constitutional-petitions-vs-sc-ruling-junked (last accessed Aug. 31, 2016).

134. *Id.*

135. *Id.*

136. *Saguisag*, G.R. Nos. 212426 & 212444.

137. *Id.*

C. Dissenting Opinions

Several of the Justices, however, did not share the same opinion as the majority. Their dissenting opinions focused primarily on the strict requirements set by the Constitution. Justice Marvic M.V.F. Leonen advanced that the EDCA is not consistent with the terms of the MDT and the VFA, thereby requiring an entirely new treaty.[138] In addition, Justice Arturo D. Brion held that the invalidity of the EDCA stems from the lack of Senate concurrence.[139] He argued that "the President's role as executor of the laws is preceded by the duty to preserve and defend the Constitution, which was allegedly overlooked."[140] Further, he stated that the status of the EDCA as an executive agreement is not a political question subject to the sole discretion of the executive.[141] Accordingly, it is within the competence of the Judiciary to resolve this issue in accordance with Constitutional standards.[142]

IV. TREATY-MAKING AND THE VALIDITY OF THE EDCA

> *In times of social disquietude or political excitement, the great landmarks of the Constitution are apt to be forgotten or marred, if not entirely obliterated.*
>
> — Justice Jose P. Laurel[143]

Drawing on the standards laid down under international law and the practice observed in the Philippines, this Article now attempts to fill in the gap in our understanding of the treaty-making process so as to better evaluate the validity of the EDCA.

A. Histrorical Context: The Legal Regime on the Presence of U.S. Armed Forces in the Philippines

To better understand the context which called for the EDCA, it is best to look at the history of the presence of the U.S. Armed Forces in the Philippines: the past and existing international agreements, their respective purposes, form, and status.

1. 1947 Military Bases Agreement (MBA)

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138. *See Saguisag*, G.R. Nos. 212426 & 212444 (J. Leonen, dissenting opinion).

139. *See Saguisag*, G.R. Nos. 212426 & 212444 (J. Brion, dissenting opinion).

140. *Saguisag*, G.R. Nos. 212426 & 212444 (citing *Saguisag*, G.R. Nos. 212426 & 212444 (J. Brion, dissenting opinion)).

141. *See Saguisag*, G.R. Nos. 212426 & 212444 (J. Brion, dissenting opinion).

142. *Id.*

143. Angara v. Electoral Commission, 63 Phil. 139, 157 (1936).

The Military Bases Agreement is a joint agreement between the Philippines and the US which was signed in 14 March 1947.[144] It principally granted the U.S. the right to establish and retain bases in the Philippines as "required by military necessity."[145] Its validity was originally set for a period of 99 years but was later on shortened to 25 years; ultimately, it expired in 1991.[146] This prompted the closure of military bases in the Philippines.[147]

2. 1951 Mutual Defense Treaty

The MDT, signed on 30 August 1951,[148] serves as the "sole military alliance pact entered into by the Philippines."[149] It intends to strengthen the Philippines' collective defense through joint training with the US military forces.[150] The Agreement was concurred in by the Senate and was entered into force on 27 August 1952.[151]

3. 1999 Visiting Forces Agreement

The VFA between the Philippines and the U.S. was signed on 10 February 1998, after having been ratified by the Senate on 27 May 1999.[152] It aims to establish a mechanism regulating the circumstances under which U.S. forces may visit the Philippines to undertake military exercises.[153] The VFA generally governs the entry and exit of U.S. personnel in the country and sets a procedure for resolving issues that may arise between the two parties.[154]

However, its validity was questioned in *Bayan v. Zamora*, which the Supreme Court thereafter dismissed on the ground that there was no grave

144. Agreement concerning military bases, Phil.-US, art. XXIX, Mar. 14, 1947, 43 U.N.T.S. 271.

145. *Id.* art. I (2).

146. Francisco S. Tatad, *The flaws of EDCA must be cured*, MANILA TIMES, Feb. 2, 2016, *available at* http://www.manilatimes.net/the-flaws-of-edca-must-be-cured/242779/ (last accessed Aug. 31, 2016).

147. *Id.*

148. Mutual Defense Treaty, Phil.-US, Aug. 30, 1951, 177 U.N.T.S. 133.

149. Jose Eduardo Malaya III, *"Constitutional Processes" Requirement in the PH-US Mutual Defense Treaty*, 85 PHIL. L.J. 992, 992 (2011).

150. *Id.* (citing *Lim*, 380 SCRA at 744).

151. Nicolas v. Romulo, 578 SCRA 438, 458 n. 7 (2009).

152. *See Bayan*, 342 SCRA at 469.

153. *Id.*

154. Motion for Reconsideration by the Petitioners, at 18-19, *in Saguisag*, G.R. Nos. 212426 & 212444 (on file with the Supreme Court); & Azcuna, *supra* note 76, at 41.

abuse of discretion on the part of the President.[155] The main point of the argument brought up by the petitioners in that case was that the VFA was in direct violation of Article XVIII, Section 25 of the Constitution, and in conflict with Article VII, Section 21 of the same.[156] The Supreme Court, in defining the applicable constitutional provisions brought into question, clarified that

> the "concurrence requirement" under Section 25, Article XVIII must be construed in relation to the provisions of Section 21, Article VII. In a more particular language, the concurrence of the Senate contemplated under Section 25, Article XVIII means that at least two-thirds of all the members of the Senate favorably vote to concur with the treaty-the VFA in the instant case.[157]

In resolving the issue of whether the phrase "recognized as a treaty by the other contracting state" requires the advice and consent of the U.S. Senate pursuant to its own constitutional process, the Supreme Court went on to say that the phrase means that "the other contracting party accepts or acknowledges the agreement as a treaty."[158] To require the U.S. to submit the VFA to its Senate is superfluous, owing to the fact that an executive agreement is as binding as a treaty in accordance with the VCLT.[159]

From the foregoing, all legal regimes concerning the presence of U.S. military bases, troops, and/or facilities are embraced in treaties, duly concurred in by Senate. One therefore wonders what necessitates the conclusion of the EDCA through an executive agreement.

B. A Critique of the Decision Upholding the Validity of the EDCA

The Supreme Court ruling in *Saguisag* resolving the validity of the EDCA as an executive agreement clearly raises concerns and confusion as regards the treaty-making process. As such, the Authors will discuss the different approaches adopted by the Supreme Court in an attempt to determine the weight of the Decision in the treaty-making process of the Philippines.

1. Applying the Rules of Statutory Construction and the Liberal Interpretation of Article XVIII, Section 25 of the Constitution

The Supreme Court interestingly applied the plain meaning of the language, or the *verba legis* rule, in ruling in favor of the respondents.[160] It insinuated

155. *Bayan*, 342 SCRA at 494-95 & 497.

156. *Id.* at 482-84.

157. *Id.* at 487.

158. *Id.* at 488 (emphasis omitted).

159. *Id.*

160. *Saguisag*, G.R. Nos. 212426 & 212444.

that the provision meant what it said. Citing *Francisco, Jr. v. Nagmamalasakit na mga Manananggol ng mga Manggagawang Pilipino, Inc.*[161] —

> It is to be assumed that the words in which constitutional provisions are couched express the objective sought to be attained. They are to be given their ordinary meaning except where technical terms are employed in which case the significance thus attached to them prevails. ... [The] language as much as possible should be understood in the sense they have in common use.[162]

As per the principle of *verba legis*, the Supreme Court, using the Oxford English Dictionary, defined the word *allow* to mean "to permit, enable; to give consent to the occurrence of or relax restraint on (an action, event, or activity); to consent to the presence or attendance of (a person)."[163] While it is conceded that the term *allow* was properly defined, it is worth stressing that the Supreme Court stretched its interpretation of the phrase to mean "*initial* entry" of foreign military bases, troops, or facilities. The definition neither specifies nor implies a certain discrete point in time. Hence, the plain reading of the text should have meant that *any* entry of foreign military bases, troops, or facilities is prohibited under the Constitution. Clearly, the Supreme Court altogether adopted a liberal interpretation and went beyond the plain meaning of the text.

In this light, the Authors find instructive the Dissenting Opinion of Justice Arturo D. Brion to the extent that "the provision is neither plain, nor that simple."[164] Informed by our history, the Article stresses the importance of the joint function of the executive and the legislative departments in entering into international agreements. By constitutional fiat, Congress defines and sets forth the national policy and necessary legislation to which any subsequent executive agreements should adhere and be subordinated to.[165] Allowing unbridled discretion on the part of the executive in concluding executive agreements would not only "circumvent the method set out in the Constitution that deliberately made entering treaties more difficult than passing legislation, but it would indirectly reduce the influence of [S]tates whose interests were seen to be protected by requiring a two-thirds majority of the Senators voting."[166] As in the case of international agreements involving foreign military bases, the Constitution provides a *lex*

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161. Francisco, Jr. v. Nagmamalasakit na mga Manananggol ng mga Manggagawang Pilipino, Inc., 415 SCRA 44 (2003).

162. *Id.* at 126 (emphasis omitted).

163. *Saguisag*, G.R. Nos. 212426 & 212444.

164. *Saguisag*, G.R. Nos. 212426 & 212444 (citing *Saguisag* (J. Brion, dissenting opinion)).

165. *See* Congressional Research Service Library of Congress, *supra* note 33, at 25.

166. Congressional Research Service Library of Congress, *supra* note 33, at 25.

specialis which specifically addressed the importance of the subject matter. By relying on the broad power of the President in conducting foreign relations, there exists a gap in the law where the President can skirt around the process laid down by the Constitution. Hence, it is the Authors' considered view that the law should be strictly construed to insure that the important international obligations are concluded as treaties.

2. The Spirit of the Law: Setting Legal Standards as to When Foreign Military Bases, Troops, or Facilities are Allowed Entry in the Philippines

As discussed earlier, Article XVIII, Section 25 of the Constitution is the *lex specialis* which governs the entry of foreign military bases, troops, or facilities in the country. Proceeding therefrom, the Supreme Court deduced three legal standards — based on the intent of the Constitutional Commission — to help determine under what circumstances foreign military bases, troops, or facilities can be allowed entry in the Philippines.[167]

a. First Standard: Independence from Foreign Control

"[I]ndependence does not mean the absence of foreign participation;"[168] rather, it refers to "the freedom from undue foreign control[.]"[169] Consistent therewith, the Supreme Court set the threshold to effective command and control that the U.S. can exercise over the Agreed Locations.[170] The concept of command and control relates to "the overall power and responsibility exercised by the commander with reference to a mission."[171] Quite the reverse, operational control is "the delegable aspect of combatant command," [172] which involves the employment of commands and assignment of tasks, to name a few.[173]

Putting it into context, the Supreme Court was convinced that the EDCA only gave the U.S. limited control, i.e., operational control over its own forces.[174] Command and control still remain with the Philippine government. Further, the Supreme Court went on to discuss the Philippines' ownership of the Agreed Locations. However, the Authors deem it to be unwarranted because, as the Supreme Court already acknowledged, what is being prohibited under the Constitution is the mere presence of U.S.

167. *Saguisag*, G.R. Nos. 212426 & 212444.

168. *Id.* (citing Tañada v. Angara, 272 SCRA 18, 62 (1997)).

169. *Saguisag*, G.R. Nos. 212426 & 212444.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

military bases, troops, or facilities.[175] Ownership of the subject areas does not prevent the EDCA from violating the Constitution.[176]

b. Second Standard: Philippine sovereignty and applicable law

Adjunct to the first standard, the framers of the Constitution intend to maintain the Philippines' sovereignty and jurisdiction over its territory.[177] This is enshrined in Article I of the Constitution, which states that the Philippines shall have sovereignty or jurisdiction over its national territory.[178] "Sovereignty is the possession of sovereign power, while jurisdiction is the conferment by law of power and authority to apply the law."[179] Testing this standard in the case of *Saguisag*, the Supreme Court was satisfied that the text of the EDCA gives the Philippines continued sovereignty and jurisdiction over these areas on the ground that the Philippines retains ownership over the Agreed Locations.[180] By this interpretation, the Philippines' sovereignty and jurisdiction arise from the State's exercise of its right of ownership.

c. Third Standard: Respect for National Security and Territorial Integrity

Finally, the last standard assures that an international agreement does not threaten the country's national security and territorial integrity. It contemplates a fear of justified attack on the Philippines in order to invalidate an international agreement.[181] Applying such standard in *Saguisag*, the Supreme Court discussed that any existing fear of attack on the Agreed Locations by reason of the presence of U.S. personnel is defused by States' adherence to international humanitarian law.[182] If anything, the Supreme Court sees the EDCA as the country's defensive response to any attack on its territorial integrity.[183]

3. Adopting the Situational Approach in Deciding Cases Concerning Public International Law

That the Decision in *Saguisag* was greatly influenced by the political situation of the Philippines affects the development of treaty-making in the country.

175. *Saguisag*, G.R. Nos. 212426 & 212444, at 99.

176. *Id.*

177. *Id.*

178. PHIL. CONST. art. I.

179. *Saguisag*, G.R. Nos. 212426 & 212444 (citing BLACK'S LAW DICTIONARY 927 & 1523 (9th ed. 2009)).

180. *Saguisag*, G.R. Nos. 212426 & 212444.

181. *Id.*

182. *Id.*

183. *Id.*

In upholding the constitutionality of the EDCA, it seems that the Supreme Court applied the "*situational approach*" as the key criterion in identifying the form of the international agreement. It is no secret that the Philippines and China have their respective claims over the West Philippine Sea. The EDCA could essentially equip the Philippines with the assistance of U.S. Military forces when the need arises. In his concurring opinion, Justice Antonio T. Carpio laid down the context as to the necessity of the EDCA,[184] to wit —

> [T]he EDCA is absolutely necessary and essential to implement the purpose of the MDT, which on the part of the Philippines, given the existing situation in the West Philippine Sea, is to deter or repel any armed attack on Philippine territory or on any Philippine public vessel or aircraft operating in the West Philippine Sea. To hold that the EDCA cannot take effect without Senate ratification is to render the MDT, our sole mutual self-defense treaty, totally inutile to meet the grave, even existentialist, national security threat that the Philippines is now facing in the West Philippine Sea.[185]

Then-Solicitor General Florin T. Hilbay also supported Justice Carpio's ratiocination over the constitutionality of the EDCA during his oral arguments before the Supreme Court.[186] He argued that the EDCA is intended to assist the Philippine national defense in light of threats to the integrity of the country's national territory.[187] Likewise, "some justices acknowledged that [the Supreme Court] cannot disregard [the current Philippine maritime dispute with China over the West Philippine Sea] when ruling on the constitutionality of the agreement."[188]

It is notable that the Supreme Court, in its resolution dated 26 July 2016, also discussed how the constitutionality of the EDCA supports the need to strengthen the Philippine's military capability in securing its rights over the West Philippine Sea in light of the recent decision of the arbitral tribunal in *Republic of the Philippines v. People's Republic of China.*[189] The Supreme Court concluded that

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184. *Id.* (J. Carpio, concurring opinion).

185. *Id.*

186. Jay L. Batongbacal, EDCA and the West Philippine Sea, *available at* http://www.rappler.com/thought-leaders/77823-edca-west-philippine-sea-america (last accessed Aug. 31, 2016).

187. *Id.*

188. Rappler.com, SC rules: PH-US military deal constitutional, *available at* http://www.rappler.com/nation/116081-sc-ruling-edca-constitutional (last accessed Aug. 31, 2016).

189. *Saguisag Resolution*, G.R. Nos. 212426 & 212444 (citing Republic of the Philippines v. The People's Republic of China, Case No. 2013-19 (Perm Ct. Arb.), *available at* http://www.pcacases.com/pcadocs/PH-CN%20-%20201607 I 2%20-%20Award.pdf (last accessed Aug. 31, 2016)).

> [t]he findings and declarations in this decision [of the arbitral tribunal] contextualizes the security requirements of the Philippines, as they indicate an alarming degree of international law violations committed against the Philippines' sovereign rights over its exclusive economic zone (EEZ).[190]

Further, environmental protection, health, and safety are some of the defining features of the EDCA.[191] With the adverse effects of environmental degradation slowly becoming evident, the country needs a massive rehabilitation project. Through the EDCA, the U.S. military offered assistance and support to the Philippines in recovering from calamities and in dealing with climate change.[192]

To the Supreme Court, it is thus through the EDCA that the Philippines can address the creeping Chinese invasion of Philippine national territory and the damages brought by the destructive forces of nature. Given the country's lack of war equipment vital to a successful defense, the EDCA will provide the Philippines a fighting chance to ward off China's enforcement of its 9-dash line.[193] Further, the robust environmental provisions of the EDCA will help the country in coming up with immediate action to address the growing concern of environmental contamination.[194] These dictates of necessity resulted in the EDCA.[195]

C. The Implication of the Saguisag Decision in the Development of the Treaty-Making Process

The Constitution clearly provides for a strict requirement as to the necessity of Senate concurrence in concluding treaties which concern foreign military bases, troops, or facilities. This strict condition stemmed from the country's struggle for independence and has long been emphasized in several landmark cases decided by the Supreme Court.[196] In fact, these cases emphasized the limitation of the President's power of entering into foreign relations through

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190. *Id.*

191. EDCA, *supra* note 104, art. IX (1). It provides —

> The Parties recognize and acknowledge the importance of protection of the environment and human health and safety ... and agree to implement this Agreement in a manner consistent with the protection of the natural environment and human health and safety and to pursue a preventative rather than reactive approach to environmental protection.

Id.

192. *Saguisag*, G.R. Nos. 212426 & 212444.

193. *Id.*

194. Official Gazette, *supra* note 108.

195. *Saguisag*, G.R. Nos. 212426 & 212444.

196. *See e.g.*, *Bayan*, 342 SCRA at 483 & *Lim*, 380 SCRA at 763-64.

Article XVIII, Section 25 of the Constitution.[197] Hence, the Supreme Court cannot simply adopt a liberal interpretation of the law in accordance with its primary duty to uphold the Constitution.

Indeed, the Philippines may well have territorial and other national interests which influenced the government to enter into the EDCA. Yet the Constitution must not be forgotten in view of serving these interests. It is for this reason that the Authors are convinced to the extent that the President, albeit given broad powers to enter into foreign relations to protect national interest, should uphold the Constitution at all costs.

V. CONCLUSION

The Authors highlighted in this Article the overriding political concerns that Philippine authorities have been grappling with in light of the unrelenting push of Chinese authorities to establish their claims over the West Philippine Sea using the 9-dash line concept. The urgency of the situation has prompted the entire machinery of the Philippine Government, inclusive of the Judiciary, to advance a clear message to the international community that it is a primordial duty of the government to construct a unified voice. Unfortunately, the immediate task of the Judiciary to determine the validity of EDCA in regard to its proper form has been subsumed in the exigencies of the situation by adopting the most convenient means of responding to the situation. By concluding through the majority opinion that EDCA need not take the form of a treaty, thus requiring concurrent by the Senate, the Judiciary may have deprived the Senate of a more expansive opportunity to explore a range of political options in addressing the West Philippine Sea dispute.

197. *Id.*