From "Chief Architect" to "Primary Architect" of Foreign Policy: Treaty Making in Light of *Pangilinan v. Cayetano* on the Withdrawal from the Rome Statute of the International Criminal Court

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I. INTRODUCTION

The ruling[1] of the Supreme Court of the Philippines on the withdrawal of the Philippines as a State Party to the Rome Statute of the International Criminal Court[2] was eagerly awaited, and once promulgated, received significant attention within and outside the country. After all, it had deep implications on the "War on Drugs," a centerpiece of the Duterte Administration's

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The positions stated in this Comment do not constitute the official views of the Department of Foreign Affairs of the Republic of the Philippines. As such, any errors in the Comment are the sole responsibility of the Authors.

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1. Pangilinan v. Cayetano, G.R. No. 238875, Mar. 16, 2021, *available at* https://sc.judiciary.gov.ph/20238 (last accessed Jan. 30, 2022).
2. Rome Statute of the International Criminal Court, *adopted* July 17, 1998, 2187 U.N.T.S. 3. [hereinafter Rome Statute].

campaign against criminality.[3] The Supreme Court in *Pangilinan v. Cayetano*[4] dismissed the three petitions challenging the withdrawal "for being moot"[5] and thus sustained the withdrawal. This represented a victory for the President, who ordered the move, and was welcome news to him and the executive branch of the Philippine Government.

At the same time, the Senate, some of whose members filed the petition challenging the withdrawal, issued a statement

> welcom[ing] the guideline pronounced by the Court that 'even if [the Philippines] has deposited the instrument of withdrawal, it shall not be discharged from any criminal proceedings[;] Whatever process was already initiated before the International Criminal Court obliges the [S]tate [P]arty to cooperate.' [The Senate] take[s] this as a step in the right direction towards attaining government accountability and substantial justice.[6]

A Senator also expressed satisfaction that the Supreme Court expressly "recognized the role and power of the Senate ... in treaty abrogation"[7] and news accounts highlighted the three rules which would henceforth govern any withdrawal from treaties:

> (1) [The] Presidents can withdraw if he/she determines that the treaty is contradictory to the Constitution or our laws[;]
>
> (2) [The] Presidents cannot unilaterally withdraw from a treaty that was entered into with congressional imprimatur[; and]

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3. Human Rights Watch, *Philippines 'War on Drugs'*, *available at* https://www.hrw.org/tag/philippines-war-drugs (last accessed Jan. 30, 2022).

4. Pangilinan v. Cayetano, G.R. No. 238875, Mar. 16, 2021, *available at* https://sc.judiciary.gov.ph/20238 (last accessed Jan. 30, 2022).

5. *Id.* at 100.

6. Senate of the Philippines, Updated Statement on the Decision of the Supreme Court on Pangilinan, et al. vs. Cayetano, et al. (G.R. No. 238875), *available at* http://legacy.senate.gov.ph/press_release/2021/0722_pangilinan2.asp (last accessed Jan. 30, 2022) [http://perma.cc/KZP6-4M5M].

7. Senate of the Philippines, Drilon: SC Affirms Senate's Role and Power in Treaty Withdrawal, *available at* http://legacy.senate.gov.ph/press_release/2021/0723_drilon1.asp (last accessed Jan. 30, 2022) [https://perma.cc/LXQ4-TKER].

> (3) [The] Presidents cannot unilaterally withdraw if the Senate has expressly declared that the treaty they entered into can only be withdrawn with the concurrence of the upper house[.][8]

This prompted a prominent jurist to ask: "Who won the ICC withdrawal case?"[9]

The Court, in a 101-page *ponencia* written by Justice Marvic M.V.F. Leonen, made important pronouncements, notably that domestic statutes "must prevail"[10] over treaties, seemingly abandoning the well-settled principle that a statute may be modified by a subsequent treaty concurred in by the Senate, and that the President is the "primary architect of [Philippine] foreign policy,"[11] which differs from the earlier description of him as the "chief architect."[12]

Commentaries on the *Pangilinan* ruling have dealt with, among others, the merits (or lack of them) and implications of the withdrawal, including whether it "will diminish the [ ] people's protection under international law[,]"[13] as well as on whether withdrawal from treaties is a power shared between the President and the Senate or within the residual (and thus exclusive) power of the President, in view of the apparent lacunae on this point in the 1987 Constitution.

Judicial consideration of constitutional issues generally focuses on the issue of power, that is, whether or not the official undertaking a questioned act has the power or authority to do so under the Constitution or law.[14] Rarely would courts "dwell ... on the wisdom of [an act], but more [on] its legality,

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8. Lian Buan, *President Has 'Much Leeway' to Withdraw from Treaty – Supreme Court*, RAPPLER, July 21, 2021, *available at* https://www.rappler.com/nation/supreme-court-decision-president-leeway-withdraw-from-treaty (last accessed Jan. 30, 2022) [https://perma.cc/4HL5-5N6C].

9. Artemio V. Panganiban, *Who Won the ICC Withdrawal Case?*, PHIL. DAILY INQ., Aug. 29, 2021, *available at* https://opinion.inquirer.net/143580/who-won-the-icc-withdrawal-case (last accessed Jan. 30, 2022) [https://perma.cc/S7QC-9MEY].

10. *Pangilinan*, G.R. No. 238875, at 53.

11. *Id.* at 3.

12. Saguisag v. Executive Secretary, G.R. No. 212426, 779 SCRA 241, 359 (2016) (citing Pimentel, Jr. v. Office of the Executive Secretary, G.R. No. 158088, 462 SCRA 622 (2005); PHIL. CONST. art. VII, § 1; Instituting the "Administrative Code of 1987" [ADMIN. CODE], Executive Order No. 292, bk. IV, tit. I, §§ 3 (1) & 20; & VICENTE G. SINCO, PHILIPPINE POLITICAL LAW: PRINCIPLES AND CONCEPTS 297 (10th ed. 1954)).

13. *Pangilinan*, G.R. No. 238875, at 12.

14. *See* PHIL. CONST. art. VIII, § 1.

not [so much] on the outcome but on the process."[15] As noted in *Tañada v. Angara*[16] on the issue of the ratification of the World Trade Organization (WTO) Agreement, "[a]s to whether such exercise was wise, beneficial[,] or viable is outside the realm of judicial inquiry and review."[17]

This Comment seeks to examine the *Pangilinan ponencia* from the perspective of treaty and foreign policy making, its nature and processes, and discern if there are implications to it, as well on diplomacy, as these may be far-reaching and point to new directions in judicial thinking on these important fields.

II. *PIMENTEL V. EXECUTIVE SECRETARY*, REPUBLIC ACT NO. 9851, AND OTHER ANTECEDENTS

The *Pangilinan* case is not the first case that reached the Philippine Supreme Court pertaining to the Rome Statute of the International Criminal Court. The Court dealt with it in *Pimentel v. Executive Secretary*[18] in 2005.

There has been considerable interest in recent years in the establishment of a permanent international tribunal to "investigate[ ], and, where warranted, [try] individuals charged with the gravest crimes of concern to the international community[.]"[19]

The Philippine delegation participated in the negotiation sessions, taking an active role in the Drafting Committee of the Statute.[20] The Convention was adopted in July 1998 in Rome, and "[t]he Philippines signed the Statute on [28 December 2000] through *Charge d'Affaires* Enrique A. Manalo of the Philippine Mission to the United Nations."[21] But with strong lobbying against

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15. J. Eduardo Malaya, *Conflict and Cooperation in the Crafting and Conduct of Foreign Policy*, 55 ATENEO L.J. 126, 128 (2010).

16 Tañada v. Angara, G.R. No. 118295, 272 SCRA 18 (1997).

17. *Id.* at 81.

18. Pimentel, Jr. v. Office of the Executive Secretary, G.R. No. 158088, 462 SCRA 622 (2005).

19. International Criminal Court, About the Court, *available at* https://www.icc-cpi.int/about (last accessed Jan. 30, 2022) [https://perma.cc/SB6Z-YMPF].

20. *Pangilinan*, G.R. No. 238875, at 5. *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rome Statute of the International Criminal Court and Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, ¶ 19, U.N. Doc. A/CONF.183/13 (Vol. I) (July 17, 1998).

21. *Pimentel*, 462 SCRA at 628.

it from the police and military establishments, the then President hesitated to ratify the convention and send it to the Senate for concurrence.[22] In 2005, the Senate issued a resolution urging the President to ratify and transmit it for concurrence.[23] Left unheeded, a number of Senators led by Aquilino Pimentel brought a petition for *mandamus* before the Supreme Court.[24]

Any inquiry on treaty-making and concurrence will commence with Article VII, Section 21 of the 1987 Constitution, which states 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."[25]

In its ruling in *Pimentel v. Executive Secretary*, the Court through Justice Reynato Serrano Puno dismissed the petition, stating that

> under [the] Constitution, the power to ratify is vested in the President, subject to the concurrence of the Senate. The role of the Senate, however, is limited only to giving or withholding its consent, or concurrence, to the ratification. Hence, it is within the authority of the President to refuse to submit a treaty to the Senate or, having secured its consent for its ratification, refuse to ratify it. Although the refusal of a [S]tate to ratify a treaty which has been signed in its behalf is a serious step that should not be taken lightly, such decision is within the competence of the President alone, which cannot be encroached by this Court via a writ of *mandamus*.[26]

Four years later, in 2009, with the Rome Statute still not ratified, Congress enacted Republic Act No. 9851, the Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity,[27] which echoes the substantive provisions of the Convention.

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22. Barbara Marchadesch, *PHL Took Long, Hard Road to Signing Rome Statute of ICC*, GMA NEWS, Mar. 14, 2018, *available at* https://www.gmanetwork.com/news/news/specialreports/646621/phl-took-long-hard-road-to-signing-rome-statute-of-icc/story (last accessed Jan. 30, 2022) [https://perma.cc/UZZ9-ZGR8].

23. Resolution Respectfully Expressing the Sense of the Senate that since the Philippines has been a Signatory to the Rome Statute of the International Criminal Court Since 28 December 2002 the President may now Transmit the Rome Statute to the Senate for Ratification Proceedings, S. Res. No. 171, 13th Cong., 1st Reg. Sess. (2005).

24. *Pimentel*, 462 SCRA at 628.

25. PHIL. CONST. art. VII, § 21.

26. *Id.* at 637-38 (citing Bayan v. Zamora, G.R. No. 138570, 342 SCRA 449 (2000); ISAGANI A. CRUZ, INTERNATIONAL LAW 174 (7th ed. 1998); & JOVITO R. SALONGA & PEDRO L. YAP, PUBLIC INTERNATIONAL LAW 138 (5th ed. 1992)).

27. An Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity, Organizing Jurisdiction,

Two years later, a new President assumed office, who finally ratified the Rome Statute and submitted it to the Senate for concurrence, which the latter did so in August 2011[28] with a vote of 17-1.[29] The Philippines deposited its instrument of ratification of the Rome Statute, and in November 2011, the Rome Statute entered into force for the Philippines.[30] The country was the 16th State Party from the Asia-Pacific region.[31]

Six years later, "[o]n [24 April] 2017, Atty. Jude [Josue] Sabio filed a complaint before the [ICC on the] alleged summary killings when President Rodrigo Roa Duterte was the mayor of Davao City."[32] "On [6 June] 2017, Senator Antonio Trillanes IV and Representative Gary Alejano filed a 'supplemental communication' before the [ICC] with regard to" [33] the Duterte Administration's campaign against illegal drugs.[34]

On 8 February 2018, the ICC Office of the Prosecutor "commenced the preliminary examination of the atrocities allegedly committed in the Philippines pursuant to the [ ] Administration's 'war on drugs.'"[35]

Designating Special Courts, and for Related Purposes, [Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity], Republic Act No. 9851 (2009).

28. *Pangilinan*, G.R. No. 238875, at 6 & Resolution Concurring in the Ratification of the Rome Statute of The International Criminal Court, S. Res. 57, whereas cl. para. 7, 15th Cong. 2d Reg. Sess. (2011).

29. Senate of the Philippines, Miriam Lauds PH Membership to The International Criminal Court, *available at* https://web.archive.org/web/20210306104110/https://legacy.senate.gov.ph/press_release/2011/0826_santiago1.asp.

30. Rome Statute, *supra* note 2.

31. *Pangilinan*, G.R. No. 238875, at 6.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

On 16 March 2018, "the Philippines formally [transmitted] its Notice of Withdrawal from the [Rome Statute] to the United Nations[,]" the convention's depositary.[36]

In a statement issued on 18 March 2019, the President of the Assembly of State Parties of the Rome Statute, Mr. O-Gon Kwon, "reiterated his regret regarding the withdrawal of the Philippines," which had fully taken effect a day prior, or on 17 March 2019.[37]

In this instant case of *Pangilinan*, a ruling 16 years after *Pimentel*, both the petitioners and the respondent government officials are in agreement that the Constitution is clear with respect to entry into, ratification of, and concurrence to treaties, but has no provision on the termination of or withdrawal from treaties.[38]

Finding that the Philippines' notice of withdrawal from the Rome Statute was conveyed to and acknowledged by the International Criminal Court, the

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36. *Id*. at 7. The Philippines deposited its notification of withdrawal to the Secretary-General of the United Nations on 17 March 2018. The substantive portions of the notification read in part —

> The Philippines assures the community of nations that the Philippine Government continues to be guided by the rule of law embodied in its Constitution, which also enshrines the country's long-standing tradition of upholding human rights.
>
> The Government affirms its commitment to fight against impunity for atrocity crimes, notwithstanding its withdrawal from the Rome Statute, especially since the Philippines has a national legislation punishing atrocity crimes. The Government remains resolute in effecting its principal responsibility to ensure the long-term safety of the nation in order to promote inclusive national development and secure a decent and dignified life for all.
>
> The decision to withdraw is the Philippines' principled stand against those who politicize and weaponize human rights, even as its independent and well-functioning organs and agencies continue to exercise jurisdiction over complaints, issues, problems[,] and concerns arising from its efforts to protect its people.

U.N. Secretary-General, *Rome Statute of the International Criminal Court, Rome, 17 July 1998, Philippines: Withdrawal*, U.N. Doc. C.N.138.2018.TREATIES-XVIII.10 (Mar. 19, 2018).

37. International Criminal Court, President of the Assembly of States Parties Regrets Withdrawal from the Rome Statute by the Philippines, *available at* https://www.icc-cpi.int/Pages/item.aspx?name=pr1443 (last accessed Jan. 30, 2022) [https://perma.cc/UM4Q-EEVJ].

38. *Pangilinan*, G.R. No. 238875, at 9-10.

Supreme Court rendered on 16 March 2021 an *en banc* Decision dismissing the petitions as moot.[39]

Case dismissals for being moot generally merit brief explanation. However, the Court issued an expansive *ponencia* dealing with, among others, the executive power pertaining to diplomacy and foreign relations which deserve close reading. This Comment will examine three items which relate to the President's foreign relations powers, notably the status of a treaty vis-à-vis legislation, the parameters in withdrawing from treaties, and the nature of treaty-making and foreign policy making, generally.

III. STATUS OF TREATY VIS-À-VIS LAW

Pangilinan dwelt on the relation between treaty and legislation, stating in effect that statute "must prevail"[40] over a treaty. Thus —

> [*A*] *treaty cannot amend a statute.* When the president enters into a treaty that is inconsistent with a prior statute, the president may unilaterally withdraw from it, unless the prior statute is amended to be consistent with the treaty. A statute enjoys primacy over a treaty. It is passed by both the House of Representatives and the Senate, and is ultimately signed into law by the president. In contrast, a treaty is negotiated by the president, and legislative participation is limited to Senate concurrence. Thus, there is greater participation by the sovereign's democratically elected representatives in the enactment of statutes.[41]
>
> ...
>
> Thus, a valid treaty or international agreement may be effective just as a statute is effective. It has the force and effect of law. Still, statutes enjoy preeminence over international agreements. *In case of conflict between a law and a treaty, it is the statute that must prevail.*[42]

Though the logic seems impeccable, the above pronouncements depart from settled jurisprudence on the interrelationship between treaties and laws.

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39. *Id.* at 99.

40. *Id.* at 53.

41. *Id.* at 4 (emphasis supplied).

42. *Id.* at 53 (emphasis supplied).

A. Treaty as in the Same Class as Law of the Land[43]

In a long line of cases, the Supreme Court has consistently held that a treaty can amend a prior statutory enactment.[44] The reasoning is that under the Constitution, an international agreement once concurred in by the Senate becomes "valid and effective."[45] This means that it becomes part of domestic law.[46] The Senate's concurrence makes the treaty "legally effective and binding by transformation"[47] and imparts upon it "the force and effect of a statute enacted by Congress."[48] It would be "in the same class" as a law.[49]

A treaty assumes a double character: *first*, as a source of international obligation on the part of the Philippines under international law; and *second*, as domestic law, where it is also a source of rights and duties for individuals, whether natural or juridical persons.[50]

A treaty "constitute[s] part of the law of the land. But as [an] internal law, it would not be superior to [a statute] ... [but] rather it would be in the same class as the latter[.]"[51] In the event of a conflict between a treaty and a statute,

43. MERLIN M. MAGALLONA, FUNDAMENTALS OF PUBLIC INTERNATIONAL LAW, 552 & 554 (2005).

44. Intellectual Property Association of the Philippines v. Ochoa, G.R. No. 204605, 797 SCRA 134, 187 (2016) (citing Secretary of Justice v. Lantion, 379 Phil. 165, 197 (2000) & Bayan Muna v. Romulo, G.R. No. 159618, 641 SCRA 244, 313 (2011)).

45. PHIL. CONST. art. VII, § 21.

46. MAGALLONA, *supra* note 43, at 543 (citing Guerrero's Transport Services v. Blaylock Trans. Services Employees Association-Kilusan, G.R. No. L–41518, 71 SCRA 621, 629 (1976)). According to the Supreme Court, "[a] treaty has two [ ] aspects — as an international agreement between [S]tates, and as municipal law for the people of each [S]tate to observe." *Id.*

47. David v. Senate Electoral Tribunal, G.R. No. 221538, 803 SCRA 435, 528 (2016).

48. *Id.*

49. MAGALLONA, *supra* note 43, at 552 & 554 (citing Abbas v. Commission on Elections, G.R. No. 89651, 179 SCRA 287, 294 (1989)).

50. MAGALLONA, *supra* note 43, at 543-44. It was noted that a treaty becomes valid and effective upon Senate concurrence, provided it has also entered into force by its own provisions. *Id.*

51. *Abbas*, 179 SCRA at 294 (citing JOVITO R. SALONGA, PUBLIC INTERNATIONAL LAW 320 (4th ed. 1974) (citing Head Money Cases, 112 U.S. 580 (1884) & Foster v. Nelson, 27 U.S. 253 (1829))).

the conflict may be resolved by applying the rule *lex posterior derogate priori* (later law supersedes earlier law).[52]

Having the impact of statutory law, a treaty "can amend or prevail over prior statutory enactments."[53] In other words, it "takes precedence over any prior statutory enactment,"[54] and following the principle of *lex posterior derogate priori*, it can repeal or amend a statute, in the same manner that a statute can repeal an earlier treaty.[55]

Thus, in *Marubeni v. Commissioner of Internal Revenue*,[56] the Supreme Court applied the special rate of corporate income tax for non-resident corporations as fixed by the Philippine-Japan Tax Convention.[57] It gave effect to the Tax Convention which amended the Internal Revenue Code by reducing the tax rate from 35% (under the Code) to not exceeding 25% of the gross income (under the Tax Convention), with respect to Japanese corporations.[58] This is an example of a treaty taking precedence over a statutory enactment.

In *Deutsche Bank AG Manila Branch v. Commissioner of Internal Revenue*,[59] the Supreme Court held that "the obligation to comply with a tax treaty must take precedence over" a revenue memorandum order issued by the Bureau of Internal Revenue pursuant to the Internal Revenue Code.[60] Emphatically, the Court said that "noncompliance with tax treaties has negative implications on international relations, and unduly discourages foreign investors."[61]

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52. MAGALLONA, *supra* note 43, at 554.

53. *Intellectual Property Association of the Philippines*, 797 SCRA at 187 (citing *Secretary of Justice*, 379 Phil. & *Bayan Muna*, 641 SCRA).

54. *Bayan Muna*, 641 SCRA at 260 (citing Nicolas v. Romulo, G.R. No. 175888, 578 SCRA 438, 496 (2009) (J. Carpio, dissenting opinion) (citing Edwin Borchard, *Treaties and Executive Agreements — A Reply*, 54 YALE L.J. 616 (1945))).

55. *Secretary of Justice*, 322 SCRA at 197.

56. Marubeni Corporation v. Commissioner of Internal Revenue, G.R. No. 76573, 177 SCRA 500 (1989).

57. *Id.*

58. *Id.* at 511.

59. Deutsche Bank AG Manila Branch v. Commissioner of Internal Revenue, G.R. No. 188550, 704 SCRA 216 (2013).

60. *Id.* at 229.

61. *Id.*

Though as noted in *Pangilinan*, in contrast to a statute, legislative participation in treaty-making is limited to the Senate. However, it is so by constitutional design. [62] The Constitution made treaty-making the responsibility of the President and the Senate.[63] Significantly, the House of Representatives has not been assigned a constitutional role. It is most likely because Senators are elected by voters nationwide and thus are expected to look after broader national issues, and also serve a longer term of four years, while their Lower House counterparts represent specific districts and sectors and have shorter terms of three years.[64] As noted in *AKBAYAN v. Aquino*,[65] "it is not even Congress as a whole that has been given the authority to concur as a means of checking the treaty-making power of the President, but only the Senate."[66]

Once a treaty has been concurred in by the Senate and "transformed"[67] into domestic law, "no further action, legislative or otherwise, is necessary" for its implementation, as noted by Dean Merlin M. Magallona.[68] "Thereafter, the whole of government — including the Judiciary — is duty-bound to abide by the treaty, consistent with the maxim *pacta sunt servanda*."[69]

Clearly, as internal law, a treaty is not inferior to a domestic statute, but in the same class as the latter.[70]

B. Weakening of the President's Treaty-Making Powers and Its Complications

At a forum weeks after the release of the *Pangilinan* ruling, Justice Antonio T. Carpio noted that the ruling creates many complications, puts into doubt a long line of existing agreements, starting with tax treaties, and that it "will bog down and weaken the President in entering into treaties."[71] Justice Carpio explained —

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62. *Pangilinan*, G.R. No. 238875, at 4.

63. PHIL. CONST. art. VII, § 21.

64. *See generally* PHIL. CONST. art. VI, §§ 2 & 5 (1).

65. Akbayan Citizens Action Party (AKBAYAN) v. Aquino, G.R. No. 170516, 558 SCRA 468 (2008).

66. *Id.* at 536 (emphasis omitted). *See* HARRY S. ROQUE, ET AL., INTERNATIONAL LAW: A PHILIPPINE PERSPECTIVE 349 (2020).

67. MAGALLONA, *supra* note 43, at 546.

68. *Id.* at 547.

69. *David*, 803 SCRA at 528.

70. *Abbas*, 179 SCRA at 294.

71. University of the Philippines College of Law, Video, *Understanding the President's Treaty Powers, Senate Concurrence and Vested Rights Under the Recent Pangilinan v.*

> Under the *Pangilinan* decision, before the President can enter into a treaty, he must now first verify that the treaty does not conflict with existing law. If it conflicts with existing law, the law must first be amended before the President can sign the treaty. Otherwise, the President will be entering into a treaty in bad faith, because he is not authorized to enter into a treaty that conflicts with existing law. He is also bound to faithfully execute the law, including statutes, and he cannot commit that Congress, an independent and co-equal branch of government, will in the future amend the existing law. It seems that the *Pangilinan* decision even prevents the President from stipulating that the treaty will take effect only upon enactment by Congress of an amendatory legislation. *This will bog down and weaken the President's power to enter into treaties. Under the Pangilinan decision, the President's treaty making power has considerably been watered down.*
>
> In the United States, under *Medellin v. Texas*, the U.S. Senate concurrence can expressly declare a treaty as self-executing, making the treaty a part of U.S. domestic law, thereby amending or repealing any inconsistent prior law. By holding that the Philippine Senate's concurrence cannot make the concurred treaty prevail over a prior statute, the *Pangilinan* decision deprives the Philippine Senate the flexibility that the U.S. Senate enjoys in concurring to a treaty.
>
> Under international law, the Philippines will be liable under the concurred treaty, even if the concurred treaty conflicts with Philippine statute. This creates another anomaly. A foreigner can enforce the concurred treaty against a Filipino citizen in the foreign court. On the other hand, a *Filipino citizen cannot enforce the concurred treaty against a foreigner in a Philippine court* until existing law is amended by Congress to conform to the concurred treaty. *There are many tax treaties concurred by the Senate that derogate from the Tax Code. The effectivity and validity of these tax treaties are now in doubt, because they are meant to repeal existing provisions of the Tax Code* without Congress enacting any amendatory or repealing law.[72]

These observations of Justice Carpio highlights *Pangilinan*'s inconsistency with a long line of jurisprudence and the complications it brought, which the *ponencia* may not have foreseen. Contrary to what some have asserted that the ruling strengthened the hand of the President in treaty-making,[73] *Pangilinan*

Cayetano Ruling, FACEBOOK, Aug. 11, 2021, *available at* https://www.facebook.com/uplawofficial/videos/558289462037111 (discussion begins at 14:35 to 18:20) (last accessed Jan. 30, 2022) [https://perma.cc/BS5N-P69W] (citing Medellin v. Texas. 552 U.S. 491 (2008)) (emphases supplied).

72. *Id.*

73. Kristine Joy Patag, *Ruling on ICC Withdrawal Gives Executive Too Much Power — Law Experts*, PHIL. STAR, Aug. 11, 2021, *available at*

weakened it considerably. It may be worth noting that most treaties concurred in by the Senate have no subsequent implementing legislation, notably tax treaties, as treaties have been considered as having the force and effect of law. The implementation of these treaties thus becomes suspect, wreaking havoc on the country's treaty system.

In addition, *Pangilinan* also seems to require both legislative chambers — the House of Representatives and the Senate — to enact implementing legislation on measures that have been duly considered and acted upon by the Senate in its treaty concurrence capacity. This not only diminishes, if not disregards, the constitutionally assigned primacy of the upper chamber on matters pertaining to foreign affairs but also creates additional work for both chambers which they can barely afford in view of their already heavy workload, including the conduct of committee hearings on bills and the investigations in aid of legislation.

IV. CONDITIONS ON WITHDRAWAL FROM TREATIES

The Philippines has entered into a few thousand treaties since 1946, and some 3,367 were in force in 2020.[74] Treaties are terminated upon the expiry of their intended duration, upon performance of the specified undertaking, when superseded by another treaty, upon withdrawal by a party, or as a consequence of its breach.[75] Many international agreements have defined durations, often five years,[76] and these would expire at the end of the agreed period.

There have not been many treaty withdrawals by the Philippines, and the notable exceptions are that from the Rome Statute[77] and the aborted

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https://www.philstar.com/headlines/2021/08/11/2119234/ruling-icc-withdrawal-gives-executive-too-much-power-law-experts (last accessed Jan. 30, 2022) [https://perma.cc/G5R5-SEQ2].

74. PHILIPPINE TREATIES IN FORCE 2020 xvii (J. Eduardo Malaya & Crystal Gale Dampil-Mandigma eds., 2021).

75. Vienna Convention on the Law of Treaties, arts. 54-64, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

76. *See* JOSE EDUARDO MALAYA & ROMMEL J. CASIS, TREATIES: GUIDANCE ON PRACTICES AND PROCEDURE 114 (2018).

77. Press Release *by* International Criminal Court, *ICC Statement on the Philippines' Notice of Withdrawal: State participation in Rome Statute system essential to international rule of law* (Mar. 20, 2018) (*available at* https://www.icc-cpi.int/news/icc-statement-philippines-notice-withdrawal-state-participation-rome-statute-system-essential (last accessed Jan. 30, 2022) [https://perma.cc/MRL6-SPAQ]).

withdrawal from the PH-U.S. Visiting Forces Agreement (VFA).[78] Under the Rome Statute, a State Party may withdraw by transmitting a written notification, and the withdrawal takes effect one year after the receipt of the notification.[79]

When the *Pangilinan* ruling came out, commentators highlighted the following pronouncements on any future withdrawal from treaties —

> [*T*]*he president can withdraw from a treaty as a matter of policy in keeping with* [*the Philippine*] *legal system, if a treaty is unconstitutional or contrary to provisions of an existing prior statute. However, the president may not unilaterally withdraw from a treaty: (a) when the Senate conditionally concurs, such that it requires concurrence also to withdraw; or (b) 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.*
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> ...
>
> [T]he President's discretion to withdraw is qualified by the extent of legislative involvement on the manner by which a treaty was entered into or came into effect. The President cannot unilaterally withdraw from treaties that were entered into pursuant to the legislative intent manifested in prior laws, or subsequently affirmed by succeeding laws. Treaties where Senate concurrence for accession is expressly premised on the same concurrence for withdrawal likewise cannot be the subject of unilateral withdrawal. *The imposition of Senate concurrence as a condition may be made piecemeal, through individual Senate resolutions pertaining to specific treaties, or through encompassing legislative action, such as a law, a joint resolution by Congress, or a comprehensive Senate resolution.*[80]

Pangilinan thus makes three propositions, as follows:

(1) The President can withdraw from a treaty if a treaty is unconstitutional or contrary to provisions of an existing prior statute.[81]

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78. CNN Philippines Staff, *Duterte Cancels Order to Terminate VFA with US*, CNN PHIL., July 30, 2021, *available at* https://www.cnnphilippines.com/news/2021/7/30/Visiting-Forces-Agreement-Philippines-United-States-Duterte-Austin.html (last accessed Jan. 30, 2022) [https://perma.cc/KZM4-HF5Z].

79. Rome Statute, *supra* note 2, art. 127.

80. *Pangilinan*, G.R. No. 238875, at 4-5 & 100 (emphases supplied).

81. *Id.* at 4-5.

(2) The President may not unilaterally withdraw from a treaty when the Senate conditionally concurs, such that it requires concurrence also to withdraw;[82]

(3) The President may not unilaterally withdraw from a treaty 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.[83]

There seems to be no issue with respect to the third proposition as entry into treaty, which is undertaken pursuant to an express legislative mandate, should require congressional assent prior to any withdrawal from the relevant treaty. After all, under the constitutional set-up of the Philippines, Congress sets legislative policy which the President is supposed to implement.

However, the first and second instances require closer examination.

That the President should withdraw from a treaty "*if a treaty is unconstitutional or contrary to provisions of an existing prior statute*"[84] is a given. As noted by Justice Carpio, the President is duty bound to faithfully execute the law and cannot enter into a treaty which is on its face unconstitutional or contrary to law.[85] But how about a proposed withdrawal from an international agreement which is neither unconstitutional nor contrary to law but necessary to the national interest, for instance, a termination of a scientific and technological cooperation agreement or a host country agreement for an international organization? In other words, can treaty withdrawal be undertaken in pursuit of the national interest, or should there be first a finding of unconstitutionality or unlawfulness? Is there a place for action in pursuit of the national interest which is central to international relations?

The above questions are not rhetorical in light of the constitutional provision that among the "paramount considerations" in the relations with other States is the "national interest."[86]

On the second instance, since early 2017 when the President started to advocate a foreign policy more independent from traditional partners and

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82. *Id.*

83. *Id.* It is also mentioned in the decision that "the president enjoys some leeway in withdrawing from agreements which he or she determines to be contrary to the Constitution or statutes." *Id.* at 51 (emphasis omitted).

84. *Pangilinan*, G.R. No. 238875, at 5 (emphasis supplied).

85. University of the Philippines College of Law, *supra* note 71.

86. PHIL. CONST. art. II, § 7. "National interest" is also referred to in Article II, Section 8 of the Constitution, viz. — "The Philippines, consistent with the national interest, adopts and pursues a policy of freedom from nuclear weapons in its territory." PHIL. CONST. art. II, § 8.

spoke about withdrawing from the Rome Statute[87] and terminating the PH-U.S. VFA, the Senate began inserting provisos to its concurrence to treaty ratification — by stating that withdrawal from the treaty shall be made only with its concurrence.

In February 2017, 14 of 24 Senators signed a Resolution "*expressing the sense of the Senate that termination of, or withdrawal from, treaties and international agreements concurred in by the Senate shall be valid and effective only upon concurrence by the Senate.*"[88]

Thereafter, in March 2017, the Senate inserted in its concurrence resolution to the Paris Agreement on Climate Change a proviso that "*the President of the Philippines may, with the concurrence of two-thirds of all the members of the Senate, withdraw from the Agreement.*"[89]

When the Senate gave its concurrence to the Rome Statute in August 2011, no such provision in its resolution of concurrence was inserted.[90] After the notice of withdrawal from the Rome Statute was transmitted to the UN Secretary General on 16 March 2018, several Senators attempted to pass a resolution that its assent should be obtained first before withdrawal.[91] However, as noted in *Pangilinan* —

> Senate Resolution No. 289, or the 'Resolution Expressing the Sense of the Senate that Termination of, or Withdrawal from, Treaties and International Agreements Concurred in by the Senate shall be Valid and Effective Only

87. Pia Ranada, *Duterte threatens PH withdrawal from ICC*, RAPPLER, Nov. 17, 2016, *available at* https://www.rappler.com/nation/152706-duterte-threatens-philippines-withdraw-international-criminal-court (last accessed Jan. 30, 2022) [https://perma.cc/JJ8C-LAPF].

88. Resolution Expressing the Sense of the Senate that Termination of, or Withdrawal from, Treaties and International Agreements Concurred in by the Senate Shall Be Valid and Effective Only upon Concurrence by the Senate, S. Res. No. 289, 17th Cong., 1st Reg. Sess. (2017).

89. Resolution Concurring in the Accession to the Paris Agreement, S. Res. No. 320, 17th Cong., 1st Reg. Sess. (2017) (emphasis supplied).

90. "Senate concurrence to the Rome Statute was obtained following President Benigno Aquino III's (President Aquino) election. On August 23, 2011, the Senate, with a vote of 17-1, passed Resolution No. 546 — enabling the Philippines' consummate accession to the Rome Statute." *Pangilinan*, G.R. No. 238875, at 6.

91. *Id.* at 7-8.

> Upon Concurrence by the Senate,' has been presented to but, thus far, never adopted by the Senate.[92]

This supposed inaction of the Senate was among the bases cited in the *ponencia* in dismissing the petitions for being moot.[93] For the *ponencia*, had the Senate in fact issued a subsequent Resolution requiring the President to seek its concurrence to the withdrawal from the Rome Statute, the outcome of *Pangilinan* could have been different.[94]

With the promulgation of the *Pangilinan* decision, proposed Senate Resolution No. 918 was filed by Senator de Lima on 28 September 2021 recommending the amendment of Section 101, Rule 36 of the Senate Rules of Procedure making Senate concurrence a condition prior to the withdrawal from treaties and international agreements to which it gave its concurrence.[95] This resolution is pending as of this writing.

A. No Role for the Senate in Treaty Termination in the Constitution

To require concurrence for withdrawal from treaties which the Senate earlier gave its assent on entry appears reasonable and logical. This is the so-called "mirror principle"[96] which the *Pangilinan ponencia* adopted — since the Senate participates in entry into treaties via the concurrence process, it should similarly participate in withdrawal from treaties.[97] However, the mirror principle is an inference that has no clear constitutional basis.

In the first Rome Statute case, *Pimentel v. Executive Secretary*, the Court had examined the treaty making process, and summed up the role of the Senate as follows —

> [U]nder [the] Constitution, the power to ratify is vested in the President, subject to the concurrence of the Senate. The role of the Senate, however, is *limited only* to giving or withholding its consent, or concurrence, to the ratification. Hence, it is within the authority of the President to refuse to

92. *Id.* at 68 (citing S. Res. No. 289).

93. *Pangilinan*, G.R. No. 238875, at 68.

94. *Id.* at 55.

95. Resolution Amending Section 101, Rule XXXVI of the Rules of the Senate Making Senate Concurrence a Condition Prior to Withdrawal from Treaties and International Agreements to Which It Gave Its Concurrence, S. Res. No. 918, 18th Cong., 3d Reg. Sess. (2021) (citing S. Rules of Procedure, rule XXXVI, § 101 (July 2020)).

96. *See* Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 YALE L.J. FORUM 432, 480-81 (2018).

97. *Pangilinan*, G.R. No. 238875, at 44 (citing *Id.*).

> submit a treaty to the Senate or, having secured its consent for its ratification, refuse to ratify it.[98]

Pimentel had clarified the role of the Senate in entry to treaties.[99] No mention was made in *Pimentel* of the role of the Senate in withdrawal from treaties, and prudently so, as this issue was not raised.

While the President's power to terminate a treaty is not textually mentioned in the Constitution as among the President's executive powers, it is likewise clear that such power was not assigned by the Constitution to any other branch of Government. Strictly speaking, the Senate therefore may not exercise a right not granted by the Constitution. As noted by Professor Phillip Trimble in his study of U.S. practice —

> The fact that the text of Article II [of the U.S. Constitution] grants the power to make treaties to the President with the consent of the Senate, but does not address the question of termination, can be read to create a negative implication: *the Framers did not intend Senate participation in treaty termination or they would have said so*. The fact that several Framers specifically remarked on the importance of making it difficult to get into treaty obligations similarly suggests they were less concerned about getting out of them.[100]

In and of itself, requiring Senate concurrence in withdrawal from treaties has no clear constitutional basis and can be considered as overstepping on the foreign affairs powers of the President.

B. Treaty Termination as Restoring Sovereignty

As noted in *Tañada v. Angara*, by their inherent nature, "treaties really limit or restrict the absoluteness of sovereignty."[101] By its "voluntary act" of entering into a treaty, the Philippines, through the President, "may surrender some aspects of [its] state power in exchange for greater benefits granted by or derived from a convention or pact."[102]

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98. *Pimentel*, 462 SCRA at 637-38 (emphasis supplied) (citing *Bayan*, 342 SCRA at 492 & CRUZ, *supra* note 26, at 174).

99. *Id.*

100. PHILLIP R. TRIMBLE, INTERNATIONAL LAW: UNITED STATES FOREIGN RELATIONS LAW 150 (2002) (emphasis supplied).

101. Tañada v. Angara, G.R. No. 118295, 272 SCRA 18, 66 (1997).

102. *Id.* Further,

> treaties have been used to record agreements between States concerning such widely diverse matters as, for example, the lease of naval bases, the

In many treaties, "the Philippines has effectively agreed to limit the exercise of its sovereign powers of taxation, eminent domain[,] and police power[,]" [103] motivated by the "underlying consideration [for] ... the reciprocal commitment of the other contracting [S]tates in granting the same privilege and immunities to the Philippines, its officials[,] and its citizens."[104] Moreover, States "accept that the benefits of the reciprocal obligations involved outweigh the costs associated with any loss of political sovereignty."[105]

In contrast, treaty withdrawal is a re-assertion of Philippine sovereignty which was previously "auto-limited" and burdened by an earlier entry into a treaty. While Senate concurrence or consent is needed in the entry into a treaty,[106] in view of the resulting "auto-limitations" and burdens to the country's sovereignty, the Constitution has deemed it best *not* to impose a similar provision in the President's termination of a treaty. This analysis rebuts the mechanistic approach of the mirror principle.

The above view is also more consistent with the inherent power of the President, as Chief Executive[107] of the country and Commander-in-Chief of the Armed Forces[108] to assert, re-assert, and protect the country's sovereignty, and to remove "auto-limitations" or burdens on Philippine sovereignty if previously voluntarily assumed.

C. Similar Case of Removal of Congressionally-Confirmed Appointees

Withdrawal from treaties is similar to the President's power to remove executive officers earlier confirmed by Congress, through the Commission on Appointments. The President nominates and, with the consent of the Commission of Appointments, appoints the heads of the executive departments, ambassadors, officers of the armed forces from the rank of

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> sale or cession of territory, the termination of war, the regulation of conduct of hostilities, the formation of alliances, the regulation of commercial relations, the settling of claims, the laying down of rules governing conduct in peace[,] and the establishment of international organizations. The sovereignty of a [S]tate therefore cannot in fact and in reality be considered absolute.

Id. at 67 (citing SALONGA, *supra* note 51, at 287).

103. *Id.* at 70.

104. *Id.*

105. *Id.* (citing MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 14 (1995)).

106. PHIL. CONST. art. VII, § 21.

107. PHIL. CONST. art. VII, § 1.

108. PHIL. CONST. art. VII, § 18.

colonel or naval captain, and other officers whose appointments are vested in him in the Constitution.[109] However, once appointed, their services can be terminated without the consent of the Commission on Appointments.

As noted by Professor Trimble,

> the President may fire an official, even though his appointment was approved by the Senate, and the same is the case with ambassadors. Unilateral power to fire officials may be important to enable the President to see that the laws are faithfully executed, just as unilateral power to fire ambassadors is important to enable the President to control the conduct of foreign relations.[110]

In the same vein, the President may unilaterally terminate treaties even though those treaties were entered into with the consent of the Senate. The decision to stay with or withdraw from a treaty is best treated as an executive function as it is within the President's residual powers. It is also a political question or issue that falls within the ambit of the foreign affairs powers vested in the President.

D. Treaty Termination as Within the President's Residual Powers

There is also constitutional basis for the position that withdrawal from treaties is within the residual powers of the President. As noted in *Marcos v. Manglapus*,[111] "the powers of the President cannot be said to be limited only to the specific powers enumerated in the Constitution. In other words, executive power is more than the sum of specific powers so enumerated." Thus —

> It would not be accurate [ ] to state that 'executive power' is the power to enforce the laws, for the President is head of [S]tate as well as head of government and whatever powers inhere in such positions pertain to the office unless the Constitution itself withholds it. Furthermore, the Constitution itself provides that the execution of the laws is only one of the

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109. PHIL. CONST. art. VII, § 16. This Section provides —

> The President shall nominate and, with the consent of the Commission on Appointments, appoint the heads of the executive departments, ambassadors, other public ministers and consuls, or officers of the armed forces from the rank of colonel or naval captain, and other officers whose appointments are vested in him in this Constitution.

PHIL. CONST. art. VII, § 16.

110. TRIMBLE, *supra* note 100, at 150 (citing Myers v. United States, 272 U.S. 52 (1926)).

111. Marcos v. Manglapus, G.R. No. 88211, 177 SCRA 668, 691-92 (1989).

> powers of the President. *It also grants the President other powers that do not involve the execution of any provision of law, e.g., his power over the country's foreign relations*.[112]

As noted earlier, the President, being the head of State and government, is regarded as the sole organ and authority in external relations and is the country's sole representative with foreign nations.[113] Hence, the President is vested with the authority to "deal with foreign [S]tates and governments, extend or withhold recognition, maintain diplomatic relations, enter into treaties, and otherwise transact the business of foreign relations."[114]

The realm of treaty-making necessarily includes the unmaking of such a treaty. The President has the inherent power to withdraw from a treaty consistent with his recognized power to deal with foreign States and governments and maintain or break diplomatic relations. The power to terminate or withdraw from a treaty is inherently executive, such "power to terminate a treaty belongs to the President's residual power over foreign affairs."[115] As noted by a commentator,

> to hold that the Senate must also concur in terminating a treaty is to read into the Constitution what is clearly not there. To say that Senate concurrence is likewise required in terminating a treaty is to expand an otherwise limited role — a role assigned by the Constitution no less. Since treaty termination is not explicitly granted by the Constitution to the Senate, and since it is inherently an executive function, the residual power to terminate a treaty thus belongs to the President.[116]

It has thus been argued that the President's foreign affairs powers are drawn not only from the Constitution and laws, but also from the nation's sovereignty and independence, or its very statehood. According to Dean Vicente G. Sinco, the power of the President over foreign affairs is derived "not only from specific provisions of the Constitution but also from customs and positive rules followed by independent [S]tates in accordance with international law and practice."[117] Supreme Court Justice Roberto Regala,

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112. *Id.* at 691 (emphasis supplied). *See also* Arvin Antonio Ortiz, A Preliminary Analysis of the Philippines' Withdrawal from ICC: Who Holds the Power to Terminate a Treaty?, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3607698 (last accessed Jan. 30, 2022) [https://perma.cc/ZS9A-NHEU].

113. *Pimentel*, 462 SCRA at 632 (citing IRENE R. CORTES, THE PHILIPPINE PRESIDENCY: A STUDY OF EXECUTIVE POWER 187 (1966)).

114. ISAGANI A. CRUZ, PHILIPPINE POLITICAL LAW 457 (2014).

115. Ortiz, *supra* note 112, at 7.

116. *Id.* at 13.

117. SINCO, *supra* note 12, at 298.

who served as Philippine Ambassador to Australia and to Italy, expressed similar views — "[T]he power of the government over foreign affairs was not limited to the grants specified in the Constitution but also included authority derived from the position of the (country) as a sovereign nation."[118]

Moreover, the Constitution's charge to the President to "ensure that the laws be faithfully executed"[119] allows him further leeway in the conduct of diplomacy. For instance, he finds statutory authorities to send over individuals to other countries pursuant to extradition agreements[120] and sentenced person accords,[121] as well as to promote the welfare of migrant workers and other overseas Filipinos.[122]

V. NATURE OF FOREIGN POLICY MAKING

Foreign policy is defined as the "general objectives that guide the activities and relationships of one [S]tate in its interactions with other [S]tates. The development of foreign policy is influenced by domestic considerations, the policies or behavior of other [S]tates, or plans to advance specific geopolitical designs."[123] On the other hand, diplomacy is the conduct of foreign policy, and alliances, trade and commerce, international cooperation and comity are manifestations of it.[124]

In his conduct of diplomacy, the President and his alter egos in the executive branch negotiate and, with the concurrence of the Senate, enter

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118. ROBERTO REGALA, LAW AND DIPLOMACY IN A CHANGING WORLD 83 (1965).

119. PHIL. CONST. art. VII, § 17.

120. J. EDUARDO MALAYA, ET AL., ENHANCING INTERNATIONAL LEGAL COOPERATION: EXTRADITION, MUTUAL LEGAL ASSISTANCE, TRANSFER OF SENTENCED PERSONS, AND COOPERATION ON TRANSNATIONAL ORGANIZED CRIMES AND NARCOTIC DRUGS (2019).

121. *Id. See also* J. Eduardo Malaya & Azela Arumpac, *The Transfer of Sentenced Persons Agreement: Humanitarian Dimensions and Foreign Policy Perspectives*, The Lawyers Review, at 9-10 (2008).

122. An Act to Institute the Policies of Overseas Employment and Establish a Higher Standard of Protection and Promotion of the Welfare of Migrant Workers, Their Families and Overseas Filipinos in Distress, and for Other Purposes [Migrant Workers and Overseas Filipinos Act of 1995], Republic Act No. 8042 (1995).

123. Encyclopædia Britannica, Foreign Policy, *available at* https://www.britannica.com/topic/foreign-policy (last accessed Jan. 30, 2022) [https://perma.cc/3S9E-NR9Y].

124. *Id.*

into treaties and international agreements.[125] He nominates and, with the consent of the Commission on Appointments, appoints ambassadors, other public ministers, and consuls who represent the nation in other countries.[126] He may contract and guarantee foreign loans on behalf of the Republic with the prior concurrence of the Monetary Board of the *Bangko Sentral ng Pilipinas*,[127] as well as manage the country's commercial and economic relations, through the setting of tariff rates and import quotas.[128] He secures and defends the State in his capacity as Commander-in-Chief of the Armed Forces of the Philippines.[129] "In practice, the President also exercises diplomatic powers other than those" specified in the Constitution,[130] notably receiving foreign ambassadors,[131] recognizing States and governments, maintaining diplomatic relations, and communicating and dealing with foreign governments,[132] as well as monitoring and protecting the nation's borders, notably allowing the entry of aliens and deporting the undesirable ones.[133]

The Supreme Court examined the nature of diplomacy, particularly the conduct of negotiations in *People's Movement for Press Freedom v. Manglapus*, and noted —

> [D]iplomacy requires centralization of authority and expedition of decision which are inherent in executive action. Another essential characteristic of diplomacy is its confidential nature.
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> ...
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> A complicated negotiation... cannot be carried through without many, many private talks and discussions, man to man; many tentative suggestions and proposals. Delegates from other countries come and tell you in confidence of their troubles at home and of their differences with other countries and

125. PHIL. CONST. art. VII, § 21.

126. PHIL. CONST. art. VII, § 16.

127. PHIL. CONST. art. VII, § 20.

128. PHIL. CONST. art. VI, § 28.

129. PHIL. CONST. art. VII, § 18.

130. Malaya, *supra* note 15, at 130.

131. *Id.* at 129.

132. *Id.* at 130.

133. This power is primarily exercised by the Bureau of Customs. *See* An Act to Control and Regulate the Immigration of Aliens into the Philippines [The Philippine Immigration Act of 1940], Commonwealth Act No. 613, §§ 37-39 (1940) (as amended).

> with other delegates; they tell you of what they would do under certain circumstances and would not do under other circumstances.[134]

Though not at play all the time, the elements of centralization of authority, expedition of decision, and confidentiality are essential in the President's conduct of relations with other countries, regions, and international organizations.

A. President's Functional Advantages in Foreign Affairs

Outside of the text of the 1987 Constitution, operationally the President enjoys certain practical advantages over other branches in the field of foreign affairs. As noted in *People's Movement for Press Freedom*, citing with approval the leading American case *United States v. Curtiss-Wright Export Corp.* —

> [The President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular[,] and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.[135]

In view of the President's access to information and intelligence as Commander-in-Chief, and his control, through the Secretary of Foreign Affairs of the Department of Foreign Affairs, he has the functional advantage in the conduct of foreign policy which includes the making and unmaking of treaties. As a legal scholar has put it, "[t]hese advantages include: unity of office, as opposed to the potential for conflict; secrecy; dispatch, unhindered by deliberative tendency; expertise and access to information; and availability. Functionally, these official qualities put the President in the best position to conduct foreign affairs."[136]

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134. *AKBAYAN*, 558 SCRA at 514-15 (citing People's Movement for Press Freedom v. Manglapus, G.R. No. 84642, at 3 (1988)).

135. *Id.* (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)).

136. David C. Scott, *Presidential Power to "Un-Sign" Treaties*, 69 U. CHI. L. REV. 1447, 1466 (citing THE FEDERALIST No. 64, at 390-91 (John Jay) (Clinton Rossiter ed., 1961)). Scott further writes —

> 'In the second half of the twentieth century, the President's control of information and expertise has loomed overwhelming, as military technology and foreign intelligence have become more complex and the need for secrecy appeared more compelling.'... Although Congress

B. Policy Considerations for Respect for Presidential Prerogatives in Treaty Termination

Rather than thinking of treaties as an odd form of domestic statute, Professor Trimble stated that "it is more compelling to view [treaties] as an instrument of foreign policy and treaty termination as one facet of the spectrum of activities conducted in the life of a treaty, ranging from negotiation through interpretation and supervision, all of which are within the domain of the executive branch."[137]

As opposed to the legislative process of enacting and repealing laws, the acts leading to negotiation, ratification, and termination of a treaty are not so much legislative in character, but more executive involving an assessment of foreign government behavior. Verily, "[o]ften the decision to terminate requires a balance of negative and positive consequences, foreign as well as domestic, and the executive can more effectively perform a genuine balancing analysis since Congress would ordinarily credit domestic consequences almost exclusively."[138]

There have been a number of treaty withdrawals in the U.S. without the participation of the Senate, and a few were challenged before the courts, but invariably the U.S. Supreme Court upheld the withdrawal.[139] In *Goldwater v. Carter*,[140] on the unilateral termination of the Mutual Defense Treaty with the Republic of China (Taiwan), the U.S. Supreme Court remanded the case to

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> has developed its own expertise, because the President controls the State Department, he probably maintains a significant advantage regarding treaties.

Id. (citing Louis Henkin, Foreign Affairs and the United States Constitution 32 (2d ed. 1996)).

137. TRIMBLE, *supra* note 100, at 151.

138. *Id.* at 151–52.

139. Scott, *supra* note 136, at 1465 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 339 (Am. Law Inst. 1987)). It summarized that under the law of the United States, with respect to treaties and international agreements, the President has the power:

> (1) to suspend or terminate an agreement in accordance with its terms;
> (2) to make the determination that would justify the United States in terminating or suspending an agreement because of its violation by another party or because of supervening events, and to proceed to terminate or suspend the agreement on behalf of the United States; or
> (3) to elect in a particular case not to suspend or terminate an agreement.

Id.

140. Goldwater v. Carter, 444 U.S. 996 (1979).

the district court with an instruction that the complaint be dismissed, without ruling on the merits.[141] Four justices in the majority concluded that the case should be dismissed because the issue presented a non-justiciable political question that was inappropriate for resolution by the Courts.[142] In the case of *Beacon Products Corp. v. Reagan*,[143] the District Court dismissed the suit seeking to prevent President Reagan from unilaterally terminating the Treaty of Friendship with Nicaragua, citing it as a non-justiciable political question following the argument of the four-Justice plurality in the *Goldwater* case.[144]

In *Kucinich v. Bush*,[145] members of Congress challenged President Bush's unilateral withdrawal from the 1972 Anti-Ballistic Missile Treaty without approval of Congress.[146] The District Court of Columbia dismissed the case and ruled that it was a non-justiciable question.[147] The Court therein had an opportunity to pass upon *Goldwater v. Carter*, where they stated that Justice Rehnquist's plurality opinion was "instructive and compelling."[148] *Kucinich* recognized that "in finding the claim non-justiciable, Justice William Rehnquist emphasized the lack of any textual provision providing either branch with authority for treaty termination."[149] In *Goldwater*, Justice Rehnquist stated —

> Here, while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty. ... In light of the absence of any constitutional provision governing the termination of a treaty, and the fact that different termination procedures may be appropriate for different treaties, the instant case [ ] 'must surely be controlled by political standards.'[150]

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141. *Id.* at 996.

142. *Id.* at 1002-03 & 1005-06.

143. Beacon Products Corp. v. Reagan, 633 F. Supp. 1191 (D. Mass. 1988) (U.S.).

144. *Id.* at 1196.

145. Kucinich v. Bush, 236 F.Supp.2d 1 (D.C. 2002) (U.S.).

146. *Id.*

147. *Id.* at 18.

148. *Id.* at 14.

149. *Id.*

150. *Id.* (citing *Goldwater*, 444 U.S. at 1002-03).

C. Recovering the "National Interest" in Foreign Policy Making

When Congress, the Senate, or some of its members, or other sectors of society disagree with the President's decision on key foreign affairs and other issues, they often resort to the courts. However, as stated earlier, the courts can only rule on the constitutionality or validity of a challenged act, but not its wisdom.[151] As in the case of the withdrawal from the Rome Statute or the Philippine-U.S. Visiting Forces Agreement, the issue is not just a question of law but of policy, of what is in the best interest of the country. As noted by Professor Trimble, "it is more compelling to view [treaty] as an instrument of foreign policy."[152]

Many have argued for leeway and flexibility in the conduct of diplomacy and foreign policy because "the law is too abstract, too inflexible, too hard to adjust to the demands of the unpredictable and the unexpected."[153] Legal rules cannot realistically "suppress the chaotic and dangerous aspirations of governments in the international field."[154] Many diplomats and international relations experts believe that foreign policy has to be rescued from its moorings in law. George F. Keenan, for one, wrote that

> the most serious fault [in American] ... policy lie in something that [one] might call the legalistic-moralistic approach to [legal] problems.
>
> ...
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> The function of a system of international relationships is not to inhibit this process of change by imposing a legal straitjacket upon it but rather to facilitate it: to ease its transitions, to temper the asperities to which it leads, to isolate and moderate the conflicts to which it gives rise, and to see that these conflicts do not assume forms too unsettling for international life in general. But this is a task for diplomacy, in the most old-fashioned sense of the term.[155]

This sentiment was echoed by Hans Morgenthau who stated that "legal obligations must yield to the national interest."[156] Thus,

> [n]ot only are there no supra-national moral principles concrete enough to give guidance to the political actions of individual nations; there is also no agency on the international scene to protect and promote the interests of

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151. Malaya, *supra* note 15, at 128.

152. TRIMBLE, *supra* note 100, at 151.

153. MARK W. JANIS, AMERICA AND THE LAW OF NATIONS 1776-1939 70 (2010) (citing GEORGE F. KENNAN, AMERICAN DIPLOMACY 1900-1950 85 (1951)).

154. JANIS, *supra* note 153, at 70 (citing KENNAN, *supra* note 153, at 83).

155. KENNAN, *supra* note 153, at 95.

156. Hans J. Morgenthau, *The Primacy of the National Interest*, AM. SCHOLAR, Volume No. 18, Issue No. 2, at 211.

> individual nations, and to guard their very existence, except the individual nations themselves. To say, then, that a nation should be guided by moral principles and not by the national interest is really tantamount to saying that a nation should be guided by a chimera and should commend the national interest, nay, its very existence, to the accidents of history or to the care of other nations.[157]

The above observations are not novel nor radical as the Constitution mandates that in "relations with other [S]tates, the paramount consideration shall be national sovereignty, territorial integrity, *national interest*, and the right to self-determination."[158]

VI. REBALANCING EXECUTIVE-CONGRESSIONAL INTERACTIONS ON FOREIGN AFFAIRS ISSUES

A. From "Sole Organ" to "Chief Architect" to "Primary Architect"

Generally, "the pursuit of foreign [policy] is in the executive domain, and thus, pertains to the [P]resident."[159] For some years now, jurisprudence has described the President as the "chief architect of foreign policy," and this term has been echoed by the Presidential Spokesman,[160] among other personalities. However, in its opening lines, *Pangilinan* described the President as primary architect of foreign policy, to wit — "The president, *as primary architect of our foreign policy* and as head of [S]tate is allowed by the Constitution to make preliminary determinations on what ... might urgently be required in order that our foreign policy may manifest our national interest."[161]

This is where there is a rare nod to national interest in the ruling, although none with reference to treaty withdrawal.

In subsequent discussions, the *ponencia* stated that "*the president, as primary architect of foreign policy, negotiates and enters into international agreements. However,*

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157. *Id.*

158. PHIL. CONST. art. II, § 7 (emphasis supplied).

159. *Pangilinan*, G.R. No. 238875, at 78.

160. Krissy Aguilar, *Roque Denies 'Intruding' in Foreign Affairs After Locsin Tells Him to 'Lay Off'*, PHIL. DAILY. INQ., Feb. 2, 2021, *available at* https://newsinfo.inquirer.net/1391142/roque-denies-intruding-in-foreign-affairs-after-locsin-tells-him-to-lay-off (last accessed Jan. 30, 2022) [https://perma.cc/W9GH-QW9R].

161. *Pangilinan*, G.R. No. 238875, at 3 (emphasis supplied).

the president's power is not absolute, but is checked by the Constitution, which requires Senate concurrence."[162]

In the view of the present Authors, *Pangilinan* attempts to rebalance the interrelationship between the President and Congress on foreign affairs issues towards the latter, and perhaps with good reason, as the original description of the former was the "sole organ" in foreign relations and only much later, "chief architect."

The Supreme Court in *People's Movement for Press Freedom v. Manglapus*[163] adopted in 1988 the characterization in *U.S. v. Curtiss-Wright Export Corp.*[164] that the President is the sole organ and sole representative of the nation in its negotiations with foreign countries —

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of [7 March] 1800, in the House of Representatives, 'The President is the *sole organ* of the nation in its external relations, and its sole representative with foreign nations.'[165]

In 2000, however, in affirming that the President is the "sole organ and authority in the external affairs of the country,"[166] the Supreme Court in *BAYAN v. Zamora*[167] added for the first time that he is also the "chief architect of the nation's foreign policy" —

> By constitutional fiat and by the intrinsic nature of his office, the President, as head of State, is the *sole organ* and authority in the external affairs of the country. In many ways, the President is the *chief architect* of the nation's foreign policy; his 'dominance in the field of foreign relations is (then) conceded.'[168]

The term "chief architect" was carried forward in 2005 in *Pimentel*, which stated that

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162. *Id.* at 50 (emphasis supplied).

163. People's Movement for Press Freedom v. Manglapus, G.R. No. 84642 (1988).

164. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

165. *People's Movement for Press Freedom*, G.R. No. 84642, at 5 (emphasis supplied & omitted) (citing *Curtiss-Wright Export Corp.*, 299 U.S. at 319).

166. *Bayan*, 342 SCRA at 494.

167. Bayan (Bagong Alyansang Makabayan) v. Zamora, G.R. No. 138570, 342 SCRA 449 (2000).

168. *Id.* at 494 (citing CORTES, *supra* note 113, at 195) (emphasis supplied).

> [i]n [the Philippine] system of government, the President, being the head of [S]tate, is regarded as the sole organ and authority in external relations and is the country's sole representative with foreign nations. As the chief architect of foreign policy, the President acts as the country's mouthpiece with respect to international affairs.[169]

By the time of *AKBAYAN v. Aquino* (2008)[170] and *Saguisag v. Executive Secretary* (2016),[171] its place in jurisprudence was firm. In *Saguisag*, the Court stated that the President is the "constitutionally assigned chief architect of our foreign policy," thus, "[a]s the *sole organ* of our foreign relations and the *constitutionally assigned chief architect* of our foreign policy, the President is vested with the exclusive power to conduct and manage the country's interface with other states and governments."[172]

Looking back, however, the starting point was "sole organ" of the nation vis-à-vis other countries. As described by Arturo Tolentino, an eminent Senator and Minister for Foreign Affairs —

> The President is the sole spokesman of the Government in foreign relations. ... He is the only official of this Government whose positions and views in [the Philippines'] dealings with other countries are taken by other Governments as those of the Philippine Government. His is the only voice which other Governments will take as expressing the official stand of our Government. In short, he is the official channel of communication to which other Governments will listen to ascertain the position and views of the Philippine Government in our relations with them.[173]

B. Viewing Pangilinan as a Call for Closer Collaboration

The shifts in foreign policy directions in recent years, as exemplified by the withdrawal from the Rome Statute and the attempted termination of the PH-U.S. VFA, prompted stiff opposition from certain sectors and a re-examination of the roles of the President and Congress in foreign affairs matters. On the issue of the VFA, the Senate passed a resolution asking the

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169. *Pimentel*, 462 SCRA at 632 (citing CORTES, *supra* note 113, at 187)).

170. Akbayan Citizens Action Party (AKBAYAN) v. Aquino, G.R. No. 170516, 558 SCRA 468, 536 (2008).

171. Saguisag v. Executive Secretary, G.R. No. 212426, 779 SCRA 241 (2016).

172. *Id.* at 359 (citing *AKBAYAN*, 558 SCRA; *Pimentel*, 462 SCRA; PHIL. CONST. art. VII, § 1; ADMIN CODE, bk. IV, tit. I, §§ 3 (1) & 20; & SINCO, *supra* note 12, at 297-98) (emphasis supplied).

173. Arturo Tolentino, *The President and the Batasan on Foreign Affairs*, *in* THE POWERS OF THE PHILIPPINE PRESIDENT 136 (Froilan Bacungan ed.1983).

Supreme Court whether concurrence of the Senate is necessary in its proposed abrogation.[174]

In the Philippine constitutional system, Congress enacts the laws, and the President takes care that the laws are faithfully executed.[175] The Legislature determines the national policies through the laws it passes, and in turn, the President, as his primary duty, executes and implements. The latter, after all, is the Chief Executive. This, in essence, is the separation and balance of powers principle in operation.[176]

However, in the field of foreign relations, the President is given considerable leeway in view of his being the "sole organ" of the nation in its external relations and its sole representative with foreign countries.[177]

"Primary architect" of foreign policy — rather than chief architect — is more in line with the original characterization of the President as "sole organ" where the Executive is the branch of government that communicates with other countries and implements policies co-determined with Congress, notably the Senate. The term does not also have the connotation that he adopts and decides on foreign policy to the exclusion of others. He is the primary architect in light of the traditional primacy of the Executive in the field of foreign affairs, but he coordinates in policy-making with Congress as the secondary architect.

In the final analysis, the Executive and Legislative have to interact and work together to achieve the common good and purposes in foreign affairs. They are not independent from each other, but interdependent with each other.

"While the conduct of foreign policy falls within the exclusive domain of the President, the making of foreign policy is the joint function of the President and Congress," [178] noted the commentator Hector de Leon. Similarly, Joaquin G. Bernas, S.J. stated that "foreign relations power is shared, both by law and by necessity, between the President and Congress. ... In the

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174. Resolution Asking the Honorable Supreme Court of the Philippines to Rule on Whether or Not Concurrence of the Senate is Necessary in the Abrogation of a Treaty Previously Concurred in by the Senate, S. Res. No. 337, 18th Cong., 1st Reg. Sess. (2020) &. S. JOURNAL NO. 59, at 1300-01, 18th Cong., 1st Reg. Sess. (Mar. 2, 2020).

175. PHIL. CONST. art. VI, § 1 & art. VII, § 17.

176. *See* Malaya, *supra* note 15. The same cooperation and interdependence among the three branches of government were enjoined in order to foster a more effective Philippine foreign policy. *Id.*

177. *Saguisag*, 779 SCRA at 359.

178. HECTOR S. DE LEON, PHILIPPINE CONSTITUTIONAL LAW 392 (2004).

conduct of foreign relations, cooperation is the rule; but 'checks and balances' also operate."[179]

It has been said that "it is not even Congress as a whole that has been given the authority to concur as a means of checking the treaty-making power of the President, but only the Senate."[180] Also, "the Philippine Constitution, unlike that of the U.S., does not [ ] grant the Senate the power to advise the Executive in the making of treaties, but only vests in that body the power to concur ... after negotiations have been concluded."[181] Nevertheless, the two branches can still collaborate as a matter of practice.

Each of the three main branches of government brings significant strengths to the foreign policy-making process. Though the Executive has the initiative and key people and resources on the diplomatic frontline, "[s]econd-guessing by Congress can keep presidents from [pursuing] ill-conceived policies[,]"[182] the political scientist Thomas Mann noted. Further,

> [i]nitiatives from [Congress] can also prompt presidents to consider new policies or new ways of thinking about old ones. ... Open debate in Congress can help build the public support needed to sustain foreign policies over the long term and to adjust those policies to better serve the interests and values of the [ ] people.[183]

The courts, in turn, act as referee in times of conflict between the two political branches.

The re-characterization of the President as "primary architect" underscores the importance of close collaboration between the Executive and

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179. JOAQUIN G. BERNAS, S.J., FOREIGN RELATIONS IN CONSTITUTIONAL LAW 102 (1995).

180. *AKBAYAN*, 558 SCRA at 536 (emphasis omitted). *See* ROQUE, *supra* note 66.

181. *AKBAYAN*, 558 SCRA at 541 (citing U.S. CONST. art. II, § 2 & PHIL. CONST. art. VII, § 21) (emphasis omitted). The Supreme Court further stated that

> Article II Section 2 of the U.S. Constitution states: '[the President] shall have [p]ower, by and with the [a]dvice and [c]onsent of the Senate, to make Treaties, provided two[-]thirds of the Senators present concur ...' On the other hand, Article VII[,] Section 21 of the Philippine Constitution states: 'No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.'

Id.

182. THOMAS MANN, A QUESTION OF BALANCE: THE PRESIDENT, CONGRESS AND FOREIGN POLICY 3 (1990).

183. *Id.*

the Legislative on foreign affairs matters in order to achieve commonality of purposes and objectives and avoid sudden swings in foreign policy directions.

C. Pangilinan Decision: Doctrinal or Obiter?

When the *Pangilinan* ruling came out, it was welcomed by the Presidential Spokesperson as it sustained the withdrawal from the Rome Statute but he demurred on its pronouncement that the ICC "retains jurisdiction over any and all crimes committed by government actors until [17 March] 2019."[184] This begs the question whether parties can pick and choose portions of the ruling which supports their position.

In an opinion-editorial titled "Who Won the ICC Withdrawal Case?," Chief Justice Artemio V. Panganiban stated that given the conflicting claims, "[*p*]*lainly then, the respondents won because, to repeat, the petitions were 'DISMISSED for being moot.' Only the portions supporting this disposition constitute the ratio decidendi (rationale for the decision) and are binding. All other statements are not binding and cannot be cited as precedents*."[185]

At a webinar on the *Pangilinan* ruling, Justice Vicente Mendoza said much the same thing, emphasizing that the ruling is "not a decision but an advisory opinion."[186] "There was neither a case nor a controversy," he said.[187]

In line with the observations of Justices Panganiban, Mendoza, and Carpio, the concluding lines in *Pangilinan* on the inclusion of Senate concurrence as a condition for treaty withdrawal and how it may be done — "*may be made piecemeal, through individual Senate resolutions pertaining to specific treaties, or through encompassing legislative action, such as a law, a joint resolution by Congress, or a comprehensive Senate resolution*"[188] — can be considered as obiter dictum. It is an advice — nay, a recommendation — which the issue did not call for.

VII. RECAPITULATION

Pangilinan v. Cayetano is one of the more consequential judicial decisions on foreign affairs in recent times. It elicited much attention, if not controversy, in view of the sensitivity of the issue, the novelty of the subject and its

184. *Pangilinan*, G.R. No. 238875, at 99.

185. *Panganiban*, *supra* note 9 (emphasis supplied).

186. University of the Philippines College of Law, *supra* note 71.

187. *Id.* & Buan, *supra* note 8.

188. *Pangilinan*, G.R. No. 238875, at 100.

elucidation of a constitutional lacunae. It was also referred to by the International Criminal Court in The Hague.[189]

With the 101-page *ponencia*, it is perhaps inevitable that *Pangilinan's* expansive commentaries and ambition to recapitulate and restate jurisprudence, as well as to shed additional light on gaps in foreign policy-making would invite counterarguments and critiques, which happened in this case.

Nevertheless, *Pangilinan* was promulgated with no dissent from the other Justices and is now part of Philippine jurisprudence. And even if parts of it are not controlling, these must be reckoned with.

Based on the preceding discussions, the Authors draw the following conclusions:

First, in contrast to a statute, legislative participation in treaty-making is limited to the Senate, but it is so by constitutional design. Accordingly, "it is not [ ] Congress as a whole that has been given the authority to concur as a means of checking the treaty-making power of the President, but only the Senate."[190] A treaty is therefore not, by nature, inferior to a statute but of the same class as the latter, as held by the Supreme Court in a long line of cases.

To place a treaty as inferior to statute creates dilemmas and unintended consequences, notably the disregard of the constitutionally assigned role of the Senate on matters pertaining to foreign policy, the placement of doubt on the mass of existing treaties, and the additional requirement for both chambers of

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189. Public Redacted Registry Report on Victims' Representations, Case No. ICC-01/21-11, annex I, (Aug. 27, 2021), *available at* https://www.icc-cpi.int/RelatedRecords/CR2021_07669.PDF (last accessed Jan. 30, 2022). In the Public Redacted Registry Report on Victims' Representations dated 27 August 2021 published by the International Criminal Court with respect to the Office of the Prosecutor's request for authorization to investigate the alleged situation in the Philippines in the context of the "War on Drugs", the ruling in *Pangilinan* was referred to as follows —

> On 21 July 2021, the Supreme Court of the Philippines made public its ruling that the ICC retains jurisdiction 'over any and all acts committed by government actors until March 17, 2019. [The] withdrawal from the Rome Statute does not affect the liabilities of individuals charged before the International Criminal Court for acts committed up to this date.'

Id. ¶ 30 (citing *Pangilinan*, G.R. No. 238875, at 99).

190. *AKBAYAN*, 558 SCRA at 536.

Congress to enact implementing legislations to the treaties that the Senate has passed upon and concurred in.

Second, although requiring concurrence for withdrawal from a treaty to which the Senate earlier gave its assent on entry appears reasonable and logical, it has no clear constitutional basis. Strictly speaking, the Senate may not exercise a right not granted by the Constitution. On the other hand, there is strong constitutional basis for treaty withdrawal as within the residual powers of the President. Requiring Senate concurrence to treaty withdrawal can thus be considered as an overreach and overstepping on the foreign affairs powers of the President.

Third, the re-characterization of the President as the "primary architect" of foreign policy — rather than "chief architect" — is in keeping with his original role as "sole organ" in foreign relations. It is a move in the right direction in light of the balance of powers principle.

Fourth, collaboration between the Executive and the Legislative is a constitutional necessity in view of their shared powers over foreign policy. The two branches have to engage and work together to achieve the common good and purposes in international relations.

Finally, foreign policy issues are not mere legal or constitutional issues, but more so, political questions, the resolution of which are at times best left to the political branches. In the international plane, treaties are instruments of foreign policy which are anchored on national interest. It is necessarily so because in relations with other countries, paramount consideration must be accorded to the national interest, as the Constitution ordains.[191] To the extent possible therefore, excessive legalism must be avoided. In fact, what is often faced is not a contest about "what the Constitution means, but about what, within the broad constitutional framework, [does] national interest require[?]"[192]

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191. *See* PHIL. CONST. art. II, § 7.

192. Malaya, *supra* note 130, at 147 (citing Warren Christopher, *Ceasefire Between the Branches: A Compact in Foreign Affairs*, 60 FOREIGN AFF. J. 989, 996 (1982)) (emphasis omitted).