Conflict and Cooperation in the Crafting and Conduct of Foreign Policy

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I. INTRODUCTION

A number of constitutional challenges have reached the Supreme Court of the Philippines with significant ramifications on diplomacy and foreign policy. Three petitions were filed against the R.P.-U.S. Visiting Forces Agreement (VFA)[1] and activities pursuant thereto.[2] Various interest groups

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The views expressed by the Author do not necessarily reflect those of the Department of Foreign Affairs.

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1. *See generally* Agreement Between the Government of the United States of America and the Government of the Republic of the Philippines Regarding the Treatment of the Republic of the Philippines Personnel Visiting the United States of America, Phil.-U.S., Oct. 9, 1998; Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines, Phil.-U.S., Feb. 10, 1998.

have also filed petitions against the Joint Marine Seismic Undertaking with China and Vietnam,[3] and the Philippine Archipelagic Baselines Law.[4]

In the third and most recent lawsuit against the VFA, which arose from rape allegations against a United States (U.S.) military serviceman, the Supreme Court upheld the constitutionality of the agreement.[5] In a rare move, however, the High Court declared the implementing custody agreements entered into between the Philippine Secretary of Foreign Affairs (Alberto G. Romulo) and the U.S. Ambassador (Kristie Anne Kenney), the Romulo-Kenney agreements, as "not in accordance with the VFA" and ordered the Secretary of Foreign Affairs to forthwith renegotiate the agreements.[6]

This and other similar cases have had a significant impact on the traditional primacy of the executive branch in the conduct of foreign affairs, and with reference to the baselines law, potentially on the policy-making role of Congress.

A review and reevaluation of jurisprudence and developments in this vital subject is timely, if only to shed light on its future direction. Will there be heightened conflict or increased cooperation between the executive and legislative branches? How can cooperation be enhanced? How will courts deal with future foreign affairs cases?

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2. Nicolas v. Romulo, 578 SCRA 438 (2009); Lim v. Executive Secretary, 380 SCRA 739 (2002); Bayan (Bagong Alyansang Makabayan) v. Zamora, 342 SCRA 449 (2000).

3. *See generally* A Tripartite Agreement for Joint Marine Scientific Research in Certain Areas in the South China Sea by and among China National Offshore Oil Corporation and Vietnam Oil and Gas Corporation and Philippine National Oil Company, Phil.-P.R.C.-Vietnam, Mar. 14, 2005; An Agreement for Joint Marine Seismic Undertaking in Certain Areas in the South China Sea by and between China National Offshore Oil Corporation and Philippine National Oil Company, Phil.-P.R.C., Sep. 1, 2004.

   See also GMANews.TV, Party-list groups ask SC to issue TRO vs JMSU, *available at* http://www.gmanews.tv/story/96595/party-list-groups-ask-sc-to-issue-tro-vs-jmsu (last accessed May 22, 2010).

4. *See generally* An Act to Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act No. 5446, to Define the Archipelagic Baseline of the Philippines and for Other Purposes, Republic Act No. 9522 (2009). The petition against the law is being heard as of this writing.

   See also Edu Punay, Constitutionality of Baselines Law questioned at Supreme Court, *available at* http://www.philstar.com/Article.aspx?articleId=454409&publicationSubCategoryId=63 (last accessed May 22, 2010).

5. *Nicolas*, 578 SCRA at 461.

6. *Id.* at 468.

This Article examines the allocation and interplay of constitutional powers relating to foreign policy-making and implementation among the executive, legislative, and judicial branches of government. The subject is analyzed largely from the viewpoint of constitutionality, that is, whether an official or agency that performed the action in question had the power to do so under the Constitution or statutes, and if so, whether the action was made within any applicable limitation on the exercise of said power.

This Article will therefore dwell not so much on the wisdom of a foreign policy, but more about its legality; not on the outcome but on the process. Assessing wisdom is generally the province of the social science disciplines and not much of law. As noted by the Supreme Court in *Tañada v. Angara*[7] on the issue of the ratification of the World Trade Organization (WTO) Agreement, "as to whether such exercise was wise, beneficial, or viable is outside the realm of judicial inquiry and review."[8]

II. FOREIGN RELATIONS POWER

A. Presidential Prerogative

In defining the powers of the executive branch, the Constitution does not specifically mention the conduct of foreign relations as one of the prerogatives vested in the President. This is implied from those which are particularly granted and entrusted to him.

The President nominates and, with the consent of the Commission on Appointments,[9] appoints ambassadors, other public ministers, and consuls[10] who represent the nation in other countries, the United Nations (UN) and other international organizations. He negotiates and, with the concurrence of the Senate, enters into treaties and international agreements.[11] He may contract or guarantee foreign loans on behalf of the Republic with the prior concurrence of the Monetary Board of the *Bangko Sentral ng Pilipinas*,[12] as well as manage the country's commercial and economic relations with other countries and regions, through the setting of tariff rates and import quotas.[13]

7. Tañada v. Angara, 272 SCRA 18 (1997).

8. *Id.* at 81.

9. *See* PHIL. CONST. art. VI, § 18.

10. PHIL. CONST. art. VII, § 16. *See also* Santos v. Macaraig, 208 SCRA 74, 85 (1992).

11. PHIL. CONST. art. VII, § 21.

12. PHIL. CONST. art. VII, § 20.

13. PHIL. CONST. art. VI, § 28.

The President, as Chief Executive, is assisted in the discharge of foreign affairs powers by the Secretary of Foreign Affairs principally,[14] and other cabinet members, especially those with responsibilities over trade and investment, national defense, finance, development planning, and labor and employment.[15]

The foreign affairs powers mentioned earlier are also known as diplomatic powers. The concept itself can be traced back to the 1935 Constitution. The 1935 Constitution, on the one hand, had a compact formulation and positive phraseology.[16] The 1987 Constitution, on the other hand, phrases the treaty-making power of the President negatively, with emphasis on the Senate concurrence process, as if to highlight the limitation on the exercise of the power.[17] The President's power to receive foreign ambassadors and envoys is no longer specified, though it is deemed carried over from the previous charter and is now part of statutory law.[18]

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14. *See* An Act Revising Republic Act No. 708, as Amended [Philippine Foreign Service Act of 1991], Republic Act No. 7157 (1991).

15. These correspond to the executive departments which are represented in the various embassies, consulates general and permanent missions through their service attachés, as well as those dealing with tourism, agriculture, science and technology, welfare, and education.

16. 1935 PHIL. CONST. art. I, § 10 (superseded 1971). This section provides:

> Sec. 10. The President shall have the power, with the concurrence of the two-thirds of all the Members of the Senate, to make treaties, and with the consent of the Commission on Appointments, he shall appoint ambassadors, other public ministers, and consuls. He shall receive ambassadors and other public ministers duly accredited to the Government of the Philippines.

Id.

17. *See* ALEX BRILLIANTES & BIENVENIDA AMARLES-LLAGO, THE PHILIPPINE PRESIDENCY 1898-1992 51 (1994). *See also* PHIL. CONST. art. XVIII, § 4. This section provides:

> Sec. 4. All existing treaties or international agreements which have not been ratified shall not be renewed or extended without the concurrence of at least two-thirds of the Members of the Senate.

Id.

18. Section 16, Article VII of the 1987 Constitution retained in the Chief Executive all the powers he had under the 1935 Constitution which was otherwise not mentioned in the 1973 Constitution, and stated further that such powers would remain with the President unless the legislature provided otherwise. *See* JOAQUIN BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 941-42 (2009 ed.) [hereinafter BERNAS, COMMENTARY]. *See also* Philippine Foreign Service Act of 1991; The

In practice, the President exercises diplomatic powers other than those mentioned earlier. These are to recognize states and governments, maintain diplomatic relations, and communicate and deal with foreign governments. Interacting and communicating with foreign governments on foreign policy implementation is traditionally the exclusive prerogative of the executive branch.

The eminent Senator and one-time Minister for Foreign Affairs Arturo Tolentino described this function, as follows:

> 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 our 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.[19]

The powers to protect the nation's borders, such as allowing the entry of aliens and deporting the undesirables, traditionally belong to the executive branch.[20] The President exercises significant powers in commercial and economic relations with other countries and regions through Congress' constitutionally-sanctioned delegation to him of the power to set tariff and regulate trade.[21] He also has the inherent power to make war in defense of the state in his capacity as Commander-in-Chief of the Armed Forces of the Philippines.[22]

In actions similar to domestic law-making, the Department of Foreign Affairs, on behalf of the President and through the Office of the Solicitor General, conveys its views before local courts on the applicability of

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Administrative Code of 1987 [ADMINISTRATIVE CODE], Executive Order No. 292 (1987).

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

20. This power is primarily exercised by the Bureau of Immigration. *See* An Act to Control and Regulate the Immigration of Aliens into the Philippines [Philippine Immigration Act of 1940], Commonwealth Act No. 613, as Amended, §§ 37-39 (1940); Go Tek v. Deportation Board, 79 SCRA 17, 21 (1976).

21. PHIL. CONST. art. VI, § 28. *See* An Act to Revise and Codify the Tariff and Customs Laws of the Philippines [TARIFF AND CUSTOMS CODE], Republic Act No. 1937, § 402 (1957).

22. PHIL. CONST. art. VII, § 18. (The exercise of the power to make war has to be related to the prerogative of Congress, which has the sole power to declare the existence of the state of war, under Section 23.).

international law, especially on the matters of privileges, immunities, and suability of foreign diplomats and foreign governments.[23]

The Constitution's mandate that the President ensure laws be faithfully executed[24] allows him further leeway in the conduct of diplomacy. The adoption by the 1935,[25] 1973,[26] and 1987 Constitutions of the generally accepted principles of international law as part of the law of the land strengthened his hand in this regard.[27] For instance, he finds statutory authority to turn over individuals to other sovereign states pursuant to extradition agreements[28] and sentenced person accords[29], as well as to promote the welfare of migrant workers and other overseas Filipinos.[30]

It has been argued that the President's foreign affairs powers are drawn not only from the Constitution and laws, but also from the nation's

23. Department of Foreign Affairs v. National Labor Relations Commission, 262 SCRA 39, 48-49 (1996). *See also* Jorge Coquia, *The Role of the Office of the Legal Adviser (Department of Foreign Affairs)*, DIPLOMAT REV., Jan. 15, 1990.

24. PHIL. CONST. art. VII, § 17.

25. 1935 PHIL. CONST. art. II, § 3 (superseded 1971).

26. 1973 PHIL. CONST. art. II, § 3 (superseded 1986).

27. PHIL. CONST. art. II, § 2.

28. *See* Secretary of Justice v. Lantion, 343 SCRA 377, 391 (2000). The Philippines has extradition agreements with 12 countries — Australia, Canada, China, Hongkong SAR, India, Indonesia, Korea, Micronesia, Switzerland, Thailand, U.S., and Spain.

29. The Philippines has transfer-of-sentenced-persons agreements with five countries — Canada, Cuba, Hong Kong SAR, Thailand and Spain. *See* J. Eduardo Malaya & Azela Aumpac, *The Transfer of Sentenced Persons Agreement: Humanitarian Dimensions and Foreign Policy Perspectives*, THE LAWYERS REV., June 20, 2008, at 9-10.

    Francisco Juan Larrañaga, a convicted rapist and murderer, availed of the transfer of sentenced persons treaty between Spain and the Philippines. *See* Sandy Araneta, Convicted rapist Larrañaga leaves for Spain, *available at* http://www.philstar.com/Article.aspx?articleid=511899 (last accessed May 22, 2010). *See also* Treaty on the Transfer of Sentenced Persons Between the Republic of the Philippines and the Kingdom of Spain, Phil.-Spain, May 18, 2007.

30. 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).

sovereignty and independence, or its very statehood.[31] 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 states in accordance with international law and practice. It would be a serious impairment of its right of external sovereignty and independence, if the government of the Philippines were fettered by specific provisions of the Constitution, whether express or implied, in its dealings with other states. Such limitations, if recognized, would place the country in a position not of legal equality with the other members of the international community but of inferiority with respect to them.[32]

This view carries great weight. Although not specified in the Constitution, the Chief Executive, on behalf of the nation, can acquire territory by discovery and occupation,[33] and conclude international agreements that do not constitute treaties in the constitutional sense, commonly known as "executive agreements."[34] These foreign affairs powers are inherently inseparable from the conception of statehood.

Supreme Court Justice Roberto Regala, who earlier served as Philippine Ambassador to Australia and to Italy, expressed similar views: "the power of the government over foreign affairs was not limited to the grants specified in the Constitution but included also authority derived from the position of the (country) as a sovereign nation."[35]

The preeminence of the executive branch in foreign affairs[36] is secure. The Supreme Court in *Bayan (Bagong Alyansang Makabayan) v. Zamora* in 2000 stated:

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31. VICENTE G. SINCO, PHILIPPINE POLITICAL LAW: PRINCIPLES AND CONCEPTS 298 (1954).

32. *Id.*

33. Declaring Certain Area Part of the Philippine Territory and Providing for Their Government and Administration, Presidential Decree No. 1596 (1978) (This decree formalized the Philippine claim to the *Kalayaan* Islands Group.).

34. *See* Usaffe Veterans Association, Inc. v. Treasurer of the Philippines, et al., 105 Phil. 1030 (1959); Commissioner of Customs v. Eastern Sea Trading, 3 SCRA 351 (1961) (This Case ruled on the validity of executive agreements although not referred to in the Constitution.).

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

36. More recently, the Supreme Court upheld this executive prerogative by denying a petition by various groups representing the interests of comfort women to compel the government to espouse their claims for an official apology and other forms of reparations against the Japanese government before

> 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. Wielding vast powers and influence, his conduct in the external affairs of the nation, as Jefferson describes, is '*executive altogether.*'[37]

The Court reiterated the above views in the case of *Pimentel, Jr. v. Office of the Executive Secretary*,[38] declaring that

> [i]n our system of government, the President, being the head of state, is regarded as the sole organ and authority in external relations and is the country's sole representative to foreign nations. As the chief architect of foreign policy, the President is the mouthpiece with respect to international affairs.[39]

The implementation of foreign policy by the President — as distinguished from the formulation of said policy — at times involves some determination on the substantive content of policy, and when it does so, the Congress does not always agree.[40]

B. Congressional Concurrence

The powers and functions of Congress in foreign affairs is considerable and best known by the vital role of its upper chamber in treaty-making. Under Section 21, Article VII of the Constitution, 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.[41]

The constitutional requirement for approving treaties — two thirds of all Senators, not necessarily those present — is a high standard. Enactment of laws, in contrast, requires mere majority vote.[42]

The President's nomination of ambassadors, other public ministers and consuls also needs confirmation from the Commission on Appointments.[43]

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international tribunals. *See* Vinuya v. Executive Secretary, G.R. No. 162230, APR. 28, 2010.

37. *Bayan,* 342 SCRA at 494 (citing IRENE CORTES, THE PHILIPPINE PRESIDENCY: A STUDY OF EXECUTIVE POWER 195 (1966) and ISAGANI CRUZ, PHILIPPINE POLITICAL LAW 223 (1995)) (emphasis supplied).

38. Pimentel, Jr. v. Office of the Executive Secretary, 462 SCRA 622 (2005).

39. *Id.* at 632.

40. *See* PHILLIP TRIMBLE, INTERNATIONAL LAW: UNITED STATES FOREIGN RELATIONS LAW 59 (2002).

41. PHIL. CONST. art. VII, § 21.

42. *See* PHIL. CONST. art. VI, § 16 (2).

Congress is also vested with the power of setting tariffs, import and export quotas, wharfage dues, and other duties or imposts which are central to foreign trade and economic policy.[44] The Constitution allows, however, its delegation to the executive branch.[45] As delegated under the Tariff and Customs Code, the President undertakes this power, upon investigation by the Tariff Commission and recommendation of the National Economic and Development Agency (NEDA) Board.[46]

Furthermore, the sole power to declare the existence of war belongs to Congress,[47] although the power to make and conduct war remains with the President in his capacity as the Commander-in-Chief of the nation's armed forces.[48]

It may appear that the initiative in foreign policy formulation and implementation is with the executive branch, and the legislature has its say principally through treaty concurrence and confirmation of appointments. Agreements concluded by diplomats, trade negotiators, and other officials may seem to be finished products when submitted to the Senate for concurrence. The latter then would have the choice between giving its concurrence, or withholding it, and asking the executive branch to renegotiate the agreement, if at all advisable.

In reality, Congress' influence is deep and wide-ranging. Executive departments and agencies often brief and consult with key members of Congress before and during negotiations on sensitive issues. Negotiators and their Cabinet Secretaries are not likely to commit the country on terms which may not be approved by the Senate. After all, these agreements may further need implementing legislation[49] or require funding from Congress.[50]

It is also Congress that sets budget allocations for various departments and agencies of government, including the Office of the President and the Department of Foreign Affairs, for the acquisition of embassy premises, payment of salaries and allowances of staff, and remittance of contributions to

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43. PHIL. CONST. art. VII, § 16 (1).

44. PHIL. CONST. art. VI, § 28 (2).

45. PHIL. CONST. art. VI, § 28 (2).

46. *See* TARIFF AND CUSTOMS CODE, § 402.

47. PHIL. CONST. art. VI, § 23 (1).

48. BERNAS, COMMENTARY, *supra* note 18, at 772-73.

49. *See* MERLIN MAGALLONA, FUNDAMENTALS OF PUBLIC INTERNATIONAL LAW 548-49 (2005).

50. PHIL. CONST. art. VI, § 29. *See* TRIMBLE, *supra* note 40, at 60-61.

international organizations.[51] This appropriations power is a most potent tool, as it affords Congress the ability to stall a measure proposed by an executive agency by refusing to fund it.

Congress routinely conducts inquiries in aid of legislations[52] on any matter of interest, including foreign policy. Through the general legislative or treaty concurrence processes, it often reserves oversight over executive activities. For instance, it created the Legislative Oversight Committee on the RP-U.S. VFA for purposes of monitoring VFA-related activities.[53]

The legislature may convey its views through formal resolutions or assert its role through its general law-making power. It can pass a law which may abrogate an executive agreement or supersede a treaty. In response to the significant outflow of Filipino migrant workers, Congress passed the Migrant Workers and Overseas Filipinos Act of 1995, which reoriented the work priorities of the DFA and Foreign Service. Without prejudice to the DFA's politico-security and economic diplomacy functions, the legislature mandated that the protection of Filipino migrant workers and the promotion of their welfare in particular, and the dignity and fundamental rights and freedoms of the Filipino citizen abroad in general, shall be the highest priority concerns of the Secretary of Foreign Affairs and the Philippine foreign service.[54]

Like any exercise of sovereign power, congressional powers in foreign affairs are subject to constitutional limitations. The legislature must be conscious of the implications of its action on the powers which are granted and allocated to other branches of government. Thus, Congress may not direct the conduct of negotiations, appoint delegates to international conferences (although congressional representatives are themselves often members of delegations, such as to UN General Assembly sessions), prevent the President from attending conferences, or recognize foreign governments. These are clearly the constitutional prerogatives of the President.[55] Furthermore, Congress has to observe the safeguards for individual rights, which are guaranteed under the Bill of Rights.[56]

51. PHIL. CONST. art. VI § 29 (1); BERNAS, COMMENTARY, *supra* note 18, at 811-14.

52. PHIL. CONST. art. VI, § 21.

53. *Bayan*, 342 SCRA at 468.

54. Migrant Workers and Overseas Filipinos Act of 1995, § 2.

55. *See* I.N.S. v. Chadha, 462 U.S. 919 (1983). The U.S. Supreme Court held that Congress could not stop the deportation of a non-resident alien because that was an executive function not permissible under the principle of separation of powers. *Id.* at 956-58.

56. PHIL. CONST. art. III, §§ 4, 5, 10 & 22; art. VI, § 31.

On the one hand, foreign policy is generally differentiated from diplomacy, in that foreign policy is the sum total of those principles under which a nation's relations with others are conducted; diplomacy, on the other hand, is the act of carrying foreign policy into effect.[57] The implementation of foreign policy, or diplomacy proper, is essentially the President's prerogative. The power to formulate such policy is shared between him and Congress.

C. Judicial Review

Among the powers which affect foreign affairs and entrusted to the Supreme Court under Section 5 (1), Article VIII of the 1987 Constitution are the following:

> (1) Exercise original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and over petitions for certiorari, prohibition, mandamus, quo warranto, and habeas corpus.
>
> (2) Review, revise, modify, or affirm on appeal or certiorari as the law or the Rules of Court may provide, final judgments and orders of lower courts in ... all cases in which the constitutionality of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.[58]

The Supreme Court can exercise original jurisdiction on cases pertaining to ambassadors and other diplomats. Jurisdiction over these diplomats are similarly conferred on and thus shared with regional trial courts under existing law.[59] It may be recalled that under public international law, foreign diplomats and consular officials, to a lesser extent, are generally not subject to the jurisdiction of local courts, except when there is a waiver of their immunity.[60] Given the nature of the issues affecting these officials who have special status under international law and the repercussions on bilateral relations these issues may have, the Constitution allows the filing of cases affecting them directly with the Supreme Court, unlike most other cases

57. SATOW'S GUIDE TO DIPLOMATIC PRACTICE 3 (Lord Gore-Booth, ed., 1979).

58. PHIL. CONST. art. VIII, § 5 (1) & (2).

59. An Act Reorganizing the Judiciary, Appropriating Funds Therefor, and for Other Purposes [Judiciary Reorganization Act of 1980], Batas Pambansa Blg. 129, As Amended, § 21 (1980).

60. *See* the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95 [hereinafter CDR] and the Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261 [hereinafter CCR]. *See also* An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3185, art. 2 (1932).

falling within its appellate jurisdiction, when these cases have first to be filed with and heard before the lower courts.[61]

Through the years, the Supreme Court has issued a number of rulings on cases involving foreign diplomats.[62] The High Court has even accepted cases filed by Philippine ambassadors and other diplomats belonging to the Philippine Foreign Service over internal administrative issues with the DFA.[63]

The Author is not fully convinced of the legal basis and functional necessity for the Supreme Court to directly hear cases involving Filipino diplomats. The latter are accorded privileges and immunities by their host government when assigned overseas, but are not entitled to such when they are in their own country.[64] Interpreting a similar provision, U.S. courts have been explicit that their provision refers to *foreign* ambassadors, public ministers, and consuls.[65]

Judicial review is the duty of the court to examine acts of the political branches and to invalidate those acts which may be in violation of the Constitution or the laws.[66] It includes the power to declare unconstitutional the application or operation of a treaty or an executive agreement, even though the legal basis for said measure is constitutional.[67] The power to review and invalidate international agreements is similarly shared by the Supreme Court with the lower courts.[68]

Being in the form of judicial review, the participation or intervention of the judiciary comes after the fact. It takes place when the act or measure in question is challenged in court. It is quite limited. Similar to the Senate's concurrence of treaties, courts enter the scene after the agreement has been negotiated and signed.

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61. PHIL. CONST. art. VIII, § 5 (1) & (2).

62. Cases involving accredited foreign diplomats dealt primarily on their entitlements to diplomatic immunities and privileges. *See* Liang v. People, 355 SCRA 125 (2001); Liang v. People, 323 SCRA 692 (2000); International Catholic Migration Commission v. Calleja, 190 SCRA 130 (1990); J.B.L Reyes v. Bagatsing, 125 SCRA 553 (1983); & World Health Organization v. Aquino, 48 SCRA 242 (1972).

63. *See Santos*, 208 SCRA 74 (1992); Manglapus v. Matias, 192 SCRA 496 (1990); & Astraquillo v. Manglapus, 190 SCRA 280 (1990).

64. *See* CDR and CCR, *supra* note 60.

65. EDWARD CORWIN & JACK PELTASON, UNDERSTANDING THE CONSTITUTION 95 (1965).

66. PHIL. CONST. art. VIII, § 1.

67. PHIL. CONST. art. VIII, §§ 1 & 5 (2).

68. BERNAS, COMMENTARY, *supra* note 18, at 995-96.

In practice, Courts are generally reticent in exercising judicial review. They do not assume jurisdiction over every actual controversy brought before it, even though the controversy is ripe for adjudication. This is particularly true with respect to cases deemed to be political questions. As defined in *Tañada & Macapagal v. Cuenco, et al.*,[69] these are "questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government."[70] Courts have also refrained from exercising jurisdiction over a case until the agreement at issue has been concluded and its terms questioned in an appropriate case.

Nevertheless, when courts decide to act and assert their constitutional mandate, such as when the Supreme Court ordered the executive branch to renegotiate an implementing agreement, its consequences are far-reaching.[71]

III. EXECUTIVE-LEGISLATIVE RELATIONS: AN INVITATION TO STRUGGLE

Congress has generally been supportive of the foreign affairs initiatives of the executive branch through the years. With the exception of treaties with Japan,[72] Senate concurrence has in the past usually been forthcoming.

Congress, however, has been increasingly vigilant and assertive in exercising its prerogatives on foreign affairs issues, and this was dramatically displayed when in 1991 its upper chamber withheld concurrence on the then proposed RP-U.S. Treaty of Friendship and Commerce.[73] This action paved

69. Tañada & Macapagal v. Cuenco, et al., 103 PHIL. 1051 (1965).

70. *Id.* at 1067 (emphasis omitted). *See also* Baker v. Carr, 369 U.S. 186, 217-18 (1962); U.S. courts have similarly shown a reluctance to second guess the actions of the President or Congress in the field of foreign affairs (*see* THOMAS BUERGENTHAL AND SEAN MURPHY, PUBLIC INTERNATIONAL LAW 183-86 (2002)). For instance, the U.S. Eleventh Circuit found that with respect to international commercial agreements such as North American Free Trade Agreement, the question of what constitutes a "treaty" requiring Senate ratification presents a non-justiciable political question (Made in the USA Foundation v. U.S., 242 F. 3d 1300, 1311-12 (2001)). The suit filed by 17 members of the House of Representatives challenging President Bill Clinton's ability to maintain a bombing campaign against Yugoslavia without an authorization by Congress was also dismissed (Campbell v. Clinton, 52 F. Supp. 2d 34, 41 (D.D.C. 1999)).

71. *Nicolas*, 578 SCRA at 468.

72. The Treaty of Peace signed in 1951 was not concurred in until 1956. The RP-Japan Treaty of Amity, Commerce, and Navigation concluded in 1960 was not ratified right away. *See* CORTES, *supra* note 37, at 190.

73. *Bayan*, 342 SCRA at 464.

the way for the closure of the U.S. bases in Subic Bay and Clark Field after decades in operation.[74]

The Senate narrowly passed in 1999 the RP-U.S. VFA, which allowed in again U.S. military personnel, this time on short visit for joint military exercises with the Philippine military.[75] The chamber also set up a bicameral oversight committee to monitor activities under the agreement.[76]

The difficulty in securing a two-thirds majority vote was seen again in the concurrence on the Agreement establishing the WTO.[77] The Japan-Philippines Economic Partnership Agreement (JPEPA)[78] similarly met stiff opposition and was concurred in only after the Senate received assurance from the executive branch that "[t]he implementation of measures by the Philippines and Japan will be in accordance with their respective Constitutions, laws, and regulations; and nothing in the JPEPA requires amendments of any of the existing provisions of the Philippine Constitution."[79]

For the above purpose, the Secretary of Foreign Affairs and the Japanese Foreign Minister (Masahiko Koumura) exchanged the Romulo-Koumura diplomatic Notes embodying the above shared understanding of their respective governments on the interpretation of the JPEPA.[80]

A departure from the customary simple majority requirement, the two-thirds rule can give sectional groups a veto on treaties. Furthermore, agreements submitted by the executive branch but not favored by the Senate leadership may not be taken up or deliberated on right away, thus holding them up.

Congressional concurrence in the treaty-making process is "deemed essential to provide a check on the executive in the field of foreign affairs. By requiring the concurrence of the legislature in the treaties entered into by

74. *Id.*

75. *Id.* at 469.

76. *Bayan*, 342 SCRA at 468.

77. *Tañada*, 272 SCRA at 82.

78. Agreement Between the Republic of the Philippines and Japan for an Economic Partnership, Phil.-Japan, Sep. 9, 2006.

79. Ministry of Foreign Affairs of Japan, Letter from Japanese Foreign Minister Masahiko Koumura to Secretary Alberto G. Romulo, *available at* http://www.mofa.go.jp/ region/asia-paci/philippine/epa0609/letter2.pdf (last accessed May 22, 2010).

80. Note dated Aug. 22, 2008 from Secretary Alberto G. Romulo to Japanese Foreign Minister Masahiko Koumura, and reply Note dated Aug. 28, 2008 from Japanese Foreign Minister Masahiko Koumura to Secretary Alberto G. Romulo.

the President, the Constitution ensures a healthy system of checks and balance necessary in the nation's pursuit of political maturity and growth."[81]

A defining case on the extent of the Senate's role in the formulation of foreign policy dealt with the still proposed ratification by the Philippines of the Rome Statute[82] which established the International Criminal Court, which is headquartered and now in operation in the Hague, the Netherlands. The Senate passed Resolution No. 94 expressing its sense that inasmuch as the Philippines signed the Rome Statute on 28 December 2002, the President may transmit the same to the Senate for the latter to determine whether to concur or not.[83] The Senate resolution was not heeded by the President.[84]

This prompted a Senator to file a petition for mandamus to compel the Executive Secretary and the Secretary of Foreign Affairs to submit the Rome Statute to the Senate for concurrence.[85] The Supreme Court denied the petition.[86] In *Pimentel, Jr. v. Office of the Executive Secretary*, the Court ruled that the Executive Secretary has no ministerial duty to submit an agreement concluded and signed by Philippine negotiators without the ratification by the President of the agreement.[87] The Court held that the power to ratify is vested in the President, subject to the concurrence of the Senate.[88] The role of the Senate, however, is limited only to giving or withholding its consent, or concurrence, to the ratification.[89]

Reflecting on U.S. experience, commentator Edward Corwin stated, "the Constitution, considered only for its affirmative grants of power capable of affecting the issue(s) is an invitation to struggle (between the President,

81. *Pimentel, Jr.*, 462 SCRA at 633 (citing *Bayan*, 342 SCRA at 496 and CORTES, *supra* note 37, at 189).

82. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. The Philippines has only recently implemented the Rome Statute through R.A. No. 9851. *See generally* An Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity, Organizing Jurisdiction, 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).

83. *Pimentel, Jr.*, 462 SCRA at 628-29.

84. *Id.*

85. *Id.*

86. *Id.* at 638.

87. *Id.* at 637-38.

88. *Id.*

89. *Pimentel, Jr.*, 462 SCRA at 637.

the Congress, and the people) for the privilege of directing American foreign policy."[90]

The above observation is increasingly descriptive of the Philippine experience.

IV. THE JUDICIARY ON FOREIGN AFFAIRS ISSUES: THE LEAST DANGEROUS BRANCH?

The judiciary has once been described as a passive branch[91] or the least dangerous branch among the three main branches of government.[92] Courts generally defer to the political branches on policy issues, and this posture of self-restraint finds extensive application on matters of inter-state relations.

The positions of Government on cases involving foreign affairs matters have largely been upheld by the courts through the decades. In fact, there has not been any official act affecting the relations of the Philippines with other countries which has been declared unconstitutional by the Philippine Supreme Court.[93]

The Supreme Court provided the reason for the reticence in the *People's Movement for Press Freedom (PMPF) v. Manglapus*,[94] thus:

> The conduct of foreign relations of our Government especially the sensitive matter of negotiating a treaty with a foreign government is lodged with the political Departments of the government ... the propriety of what may be done in the exercise of their political power powers is not subject to judicial inquiry.[95]

Yet, the judiciary's impact on foreign relations is ample. The Supreme Court, for instance, upheld the Romulo-Snyder agreement of 1950 which stipulated the return by the Philippine government of the monies advanced by the U.S. for the Philippines armed forces.[96] The High Court sustained

90. EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957 171 (4th ed., 1957).

91. Artemio Panganiban, *How the SC Decides Cases*, PHIL. DAILY INQUIRER, June 21, 2009, at A11.

92. Alexander Hamilton, *The Judiciary Department*, FEDERALIST PAPERS, May 28, 1788, No. 78.

93. JOAQUIN BERNAS, S.J., FOREIGN RELATIONS IN CONSTITUTIONAL LAW 123 (1995) [hereinafter, BERNAS, FOREIGN RELATIONS].

94. People's Movement for Press Freedom (PMFP) v. Manglapus, G.R. No. 84642, Sep. 13, 1988 (Unreported Supreme Court Resolution en banc).

95. *Id.*

96. *USAFFE Veteran Association Inc.*, 105 Phil. at 1038-39.

the R.P.-Japan Trade Agreement of 1950[97] and its successor agreement, the JPEPA.[98]

The Supreme Court in *Gonzales v. Hechanova*[99] invalidated the rice and corn importation contracts entered into by the Government with Vietnam and Myanmar, not for having been invalid in form but for being contrary to a law passed by Congress.[100] This is a rare ruling made by the Supreme Court which invalidated an act of the executive branch in its dealings with other governments. It held that the Constitution authorizes the nullification of a treaty, not only when it conflicts with the fundamental law, but also, when it runs counter to a specific act of Congress.[101]

Recently, vital foreign affairs initiatives have been increasingly challenged before the judiciary. Agreements submitted for Senate concurrence are often opposed by interested groups not only in Senate hearings but also in court, at times even prior to or in parallel, such as with the RP-U.S. VFA, WTO treaty, and JPEPA. Suits have been filed, as of this writing, against the Joint Marine Seismic Undertaking with Vietnam and China, and the Archipelagic Baselines Law, which served as basis for filing of the country's claim for an extended continental shelf.

Though reticent in posture and generally supportive of government's actions, rulings are at times accompanied by spirited dissents by individual justices. The Chief Justice Reynato S. Puno filed extensive dissents in the *Bayan*[102] and *Nicolas*[103] cases, which dealt with the RP-U.S. VFA, as well as in the JPEPA case.[104] In the *Nicolas* case, the Supreme Court sustained the agreement, but in an unprecedented move, invalidated the implementing agreements.[105]

V. PUBLIC OPINION & FOREIGN POLICY.

Sovereignty resides in the people,[106] and they have conceptually the final say on foreign and other public policies. The people speak through their duly

97. *Commissioner of Customs*, 3 SCRA at 357 (1963).

98. *See* Akbayan Citizens Action Party ("AKBAYAN") v. Aquino, 558 SCRA 468 (2008).

99. Gonzales v. Hechanova, 9 SCRA 230 (1963).

100. *Id.* at 243-44.

101. *Id.* at 243.

102. *Bayan*, 342 SCRA at 497-521 (J. Puno, dissenting opinion).

103. *Nicolas*, 578 SCRA at 469-86 (C.J. Puno, dissenting opinion).

104. *Akbayan*, 558 SCRA at 568-686 (C.J. Puno, dissenting opinion).

105. *Nicolas*, 578 SCRA at 467-68.

106. PHIL. CONST. art. II, § 2.

elected representatives — the President and congressional representatives — who comprise the two political branches of government.

It is often difficult to determine and assess public opinion on foreign affairs and other public policy issues, short of conducting scientific opinion surveys. Two cases provide illustrations of the sentiments felt by the more vocal, organized pressure groups. These cases provided further opportunity to the Court to expound its views.

In 1988, the negotiating panels of the Philippines and U.S. met to discuss the future of the U.S. military bases in Subic Bay and Clark Field in view of the then forthcoming expiration of the governing agreement.[107] Feeling excluded from the all-important talks, a group calling itself People's Movement for Press Freedom filed a petition for mandamus with the Supreme Court to require the Philippine panel to open the negotiation sessions to the public, reveal the agreed points so far achieved, and disclose to the public the positions of each sides on unresolved issues.[108] The group invoked the freedoms of speech and of the press and the people's right to information on matters of public concern.[109] The Supreme Court denied the petition, noting that:

> Under the Constitution, the conduct of foreign relations of our Government especially on the sensitive matter of negotiating a treaty with a foreign government is lodged with the political Departments of the government. It has been ruled that the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.
>
> ...
>
> The negotiation of treaties calls for a class of expertise, experience and sensitivity to national interest of an extremely high order. It would be a sad day indeed if in the negotiations leading to a treaty, the Philippine panel would be hampered or embarrassed by criticisms or comments from persons with inadequate knowledge or worse by publicity seekers or idle kibitzers.[110]

Adopting American jurisprudence on the matter, especially the leading case, *U.S. v. Curtiss-Wright Exports Corporation*,[111] the Court described the interaction between the political branches on matters of foreign relations:

> In this vast external realm, with its important, complicated 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

107. *PMPF*, G.R. No. 84642.

108. *Id.*

109. *Id.*; *see also* PHIL. CONST. art. III, §§ 4 & 7.

110. *PMPF*, G.R. No. 84642.

111. U.S. v. Curtiss-Wright Exports Corporation, 299 U.S. 304 (1936).

> of the Senate; but he alone negotiates. Into the field of negotiations the Senate cannot intrude; and Congress itself is powerless to invade it ... The President is the sole organ of the nation in its external relations, and its sole representative with foreign countries.[112]

The President, as chief diplomat, must be accorded a degree of discretion and freedom from statutory restrictions which would not be admissible where domestic affairs alone are involved.[113] After a treaty has been drafted and its terms are fully published, there is ample opportunity for discussion before it is approved.[114]

The "sole organ" principle was invoked by the Supreme Court in its rulings in *Bayan*[115] and *Pimentel, Jr.*,[116] but no reference was made to its earlier *PMPF* resolution. (This was perhaps because the latter was an unpublished resolution and therefore might have been missed out.) The *PMPF* resolution was nonetheless invoked in the executive privileges case *Chavez v. Public Estates Authority*[117] as support for on-going diplomatic negotiations as among the recognized exceptions to the constitutional right to information on matter of public concern.

The *PMPF* ruling was re-examined in minute details two decades later in the case over a comprehensive economic agreement with Japan.

In 2005, the House Special Committee on Globalization requested the Philippine negotiating panel for copy of the latest draft text of the JPEPA, which was being negotiated.[118] The negotiating panel sent a reply letter that a copy will be furnished once the negotiations are completed and a thorough legal review of the text conducted.[119] Amid speculations that the agreement was about to be signed by the two governments, a party-list group petitioned the Supreme Court for mandamus and prohibition.[120]

The Justices were divided on the issue.[121] The majority of the justices resolved to deny the petition,[122] albeit with a vigorous dissent from the

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112. *PMPF*, G.R. No. 84642.

113. *Id.*

114. *Akbayan*, 558 SCRA at 516.

115. *Bayan*, 342 SCRA at 494.

116. *Pimentel, Jr.*,462 SCRA at 632.

117. Chavez v. Public Estate Authority, 384 SCRA 152, 189, n. 40 (2002).

118. *Akbayan*, 558 SCRA at 505.

119. *Id.* at 506.

120. *Id.* at 507.

121. *Id.* at 554.

122. *Id.*

Chief Justice.[123] In *Akbayan Citizens Action Party ("AKBAYAN") v. Aquino*,[124] the majority reiterated the principles in *PMPF*, and stated:

> [W]hile the final text of the JPEPA may not be kept perpetually confidential — since there should be "ample opportunity for discussion before [a treaty] is approved" — the offers exchanged by the parties during the negotiations continue to be privileged even after the JPEPA is published. It is reasonable to conclude that the Japanese representatives submitted their offers with the understanding that "historic confidentiality" would govern the same. Disclosing these offers could impair the ability of the Philippines to deal not only with Japan but with other foreign governments in future negotiations.[125]
>
> ...
>
> While, on first impression, it appears wise to deter Philippine representatives from entering into compromises, it bears noting that treaty negotiations, or any negotiation for that matter, *normally* involve a process of *quid pro quo*, and *oftentimes negotiators have to be willing to grant concessions in an area of lesser importance in order to obtain more favorable terms in an area of greater national interest.*[126]
>
> ...
>
> Congress, while possessing vast legislative powers, may not interfere in the field of treaty negotiations. While Article VII, Section 21 provides for Senate concurrence, such pertains only to the validity of the treaty under consideration, not to the conduct of negotiations attendant to its conclusion.[127]

In the end, the Court dismissed the petition on the ground that diplomatic negotiations are considered as privileged and that petitioners were unable to show a sufficient showing of need to overcome the claim of privilege.[128]

VI. HEIGHTENED CONFLICT OR INCREASED COOPERATION?

In the Philippine constitutional system, Congress enacts the laws, and the President takes care that the laws are faithfully executed. The legislature determines national policies through the laws it passes, which 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.

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123. *Id.* at 568-686 (C.J. Puno, dissenting opinion).

124. *Akbayan*, 558 SCRA at 468 (*See* the dissenting opinion of Chief Justice Reynato Puno on the applicability of the *PMPF* ruling to the present case at 658-62.).

125. *Id.* at 516-17.

126. *Id.* at 517 (emphasis supplied).

127. *Id.* at 536.

128. *Id.* at 553-54.

The above is certainly true in the domestic sphere, but slightly different in the international sphere, argue some commentators.[129] The President has traditionally been pre-eminent in foreign affairs, being the sole organ of the nation in its external relations and its sole representative with foreign countries.[130] Accordingly, the President has the power to determine the policy of the nation in the field of external relations and the substantive content of said policy. The jurist-diplomat Roberto Regala, for one, further stated that the principle of separation of powers does not necessarily apply to external relations. For him, some commentators on constitutional questions believe that much of the controversy stems from the insistence of many leaders and writers on applying the principle of separation of powers in foreign affairs as it had been applied in domestic questions.[131]

Yet, it may be argued, en contra, that the phrase "sole organ" means that the President merely communicates and conveys to other countries the policy determined by Congress, and that he has no authority to *make* policy. This is an interpretation which is more in line with the separation of powers principle, as traditionally understood.

In the final analysis, the executive and legislative departments 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.

Commentator Hector S. de Leon noted that, "[w]hile 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."[132] Similarly Joaquin G. Bernas, S.J. stated, "foreign relations power is shared, both by law and by necessity, between the President and Congress ... In the conduct of foreign relations, cooperation is the rule; but "checks and balances" also operate."[133]

Each branch brings significant strengths to the foreign policy making process. Though the executive has the initiative and key people and resources on the diplomatic frontline, second-guessing by Congress can keep

129. *See Commissioner of Customs*, 3 SCRA at 357 (citing Francis B. Sayre, *The Constitutionality of Trade Agreement Acts,* 39 COLUM. L. REV. 651, 755). *See also* Reporters' Notes to the Restatement of the Foreign Relations Law of the United States (Third Restatement), vol. 1, § 1, at 9-10 (1987).

130. *Curtiss-Wright Exports Corporation*, 299 U.S. at 319.

131. REGALA, *supra* note 35, at 81 & 83. *See also Curtiss-Wright Exports Corporation*, 299 U.S. 304.

132. 2 HECTOR S. DE LEON, PHILIPPINE CONSTITUTIONAL LAW: PRINCIPLES AND CASES 392 (2004 ed.).

133. BERNAS, FOREIGN RELATIONS, *supra* note 93, at 102.

presidents from conceiving ill-conceived policies.[134] In fact, initiatives from Congress can also prompt presidents to consider new policies or new ways of thinking about old ones, and 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.[135] Courts, in turn, act as referees in times of conflict between the two political branches.

VII. CONCLUSION

In the often complex and delicate interactions between the executive, legislative, and judicial branches, it is easy to lose sight of the big picture. As a statesman once observed, "what we really face is not a quarrel about what the Constitution means, but about what, within the broad constitutional framework, our national interest requires."[136]

The preceding discussions allow us to draw the following postulates and their implications:

First, the President and Congress share the power to formulate foreign policy, the sum total of those principles under which a nation's relations with others are conducted. The initiative in the crafting of such policy is with the executive branch, but Congress and, in particular, its Senate, has a lot of influence and sway.

The implementation of foreign policy, or diplomacy, is largely the prerogative of the President and the executive branch.

Second, the constitutional allocation of powers in foreign affairs being "an invitation to struggle," tensions between executive and legislative branches are often the norm. Sharp conflicts are not unexpected, particularly if the leaderships of the two distinct branches are in opposing political parties.

Executive-legislative partnership is essential to a successful formulation and implementation of foreign policy. More cooperation and less conflict will take place if the role of Congress in the crafting of foreign policy is acknowledged and accommodated. This requires that not only should Senators have their say after agreements are concluded with and then submitted to the Senate for concurrence, but also that key leaders in both chambers are briefed and their advice sought before major foreign policy initiatives are launched and while being undertaken. They should also be

134. A QUESTION OF BALANCE: THE PRESIDENT, CONGRESS AND FOREIGN POLICY 3 (Thomas Mann, ed. 1990).

135. *Id.*

136. Warren Christopher, *Ceasefire between the Branches: A Compact in Foreign Affairs*, 66 FOREIGN AFF. J. 996 (1982).

provided timely information on major developments. As seen in the passage of the Baselines Law, the partnership between the executive and legislative branches was practical and invaluable.

Third, public opinion will increasingly influence foreign policy formulation and implementation. A vital foreign policy cannot sustain a foreign policy without the broad support or acquiescence of the people. A conscious effort to consult and seek support from the larger public on key foreign policy issues is essential.

Fourth, courts are the arbiter between the executive and legislative branches in their conflict on foreign policy issues.

Courts are generally reticent in exercising judicial review over foreign affairs issues. If they undertake a review, they will generally decide on the basis of constitutionality — whether the official which undertook the foreign policy measure had the power to do so, and within any applicable legal limitation. Courts will not pass judgment on the propriety or wisdom of the measure.

Judicial intervention and resolution will be more pronounced if there is a conflict between the political branches, or if there is lack of support, or worse, active resistance on key issues from the general public.

In sum, a dynamic working partnership among the three branches of government and a citizenry which is supportive of its government's main policies are indispensable in the attainment of the common good and national objectives in the often perilous international arena.