DOMESTICATING INTERNATIONAL LAW: RESOLVING THE UNCERTAINTY AND INCONGRUENCE[*]

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Abstract

This paper analyzes the issues that arise from the domestication of international law in the Philippine legal system. The first part of the paper discusses the methods of domestication generally and as found in the Philippine context. The second part of the paper analyzes the questions on transcendence and ratification that arise from the various methods of domestication. The paper also looks at how executive agreements are defined and construed vis-à-vis treaties and other international agreements, as well as the absence of rules on the third class of sources of international law – General Principles of Law. Finally, the last part of the paper provides recommendations on resolving the identified questions through legislative action, judicial construction, and executive correction.

I. Introduction

A. International Law and its Sources

International law can be defined in numerous ways,[1] but the gist of these definitions is that it provides for the rules that govern the relationship between states. It is also generally accepted that Article 38 of the International Court of Justice ("ICJ") Statute provides for the sources of international law.[2] These sources are treaties, customs, and general principles of law. An international convention[3] or treaty is "an international agreement concluded between States in written form and governed by

[*] This paper is a revised and expanded version of the author's Edgardo Angara Professorial Chair Lecture delivered in December 2020.

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[1] Stephen Neff argues that "the ambiguity of the term 'international law' leads to various different answers to the question of when international law 'began'". Stephen C. Neff, A Short History of International Law, in MALCOLM EVANS (EDD.), INTERNATIONAL LAW 30 (2nd ed., 2006).

[2] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (OUP, 8th ed., 2012).

[3] Statute of the International Court of Justice art. 38, ¶ 1(a), June 26, 1945, 33 U.N.T.S. 993 (entered into force Oct. 24, 1945) [hereinafter *ICJ Statute*]. "International conventions, whether general or particular, establishing rules expressly recognized by the contesting states."

international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[4]

A custom[5] is a general practice of states recognized as a legal obligation. This definition is derived from the twin requirements of state practice and *opinio juris* for establishing custom.[6]

While there is no unanimity on its definition, general principles can be defined as rules derived from national laws.[7]

One way of looking at these sources is that these are the three forms international law takes.

B. Meaning of Domestication

While international law defines the relationship between states, it also provides for rules that states must apply within their territories. For example, international human rights law provides for obligations of states to protect the rights of persons within their jurisdiction.

To apply international law within the domestic sphere, it must be "domesticated." This paper defines *domestication* as the process by which national law applies international law. A rule of international law is domesticated "when a State incorporates it and weaves it into its own domestic legislation and rule-making procedures."[8]

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[4] Vienna Convention on the Law of Treaties, art. 2, ¶ 1(a), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

[5] *ICJ Statute* art. 38, ¶ 1(b). "[I]nternational custom, as evidence of a general practice accepted as law."

[6] *See* Rommel J. Casis, *Re-Customizing Customary International Law*, 2019 PHIL. Y.B. INT'L L. 3.

[7] Hugh Thirlway, *The Sources of International Law*, *in* EVANS (ED.), *supra* note 1.

[8] Anthony D'Amato, *The Coerciveness of International Law,* 52 GERMAN Y.B. INT'L L. 437, 443 (2009).

In the Philippines, the Constitution provides the rules on the domestication of international law. Specifically, the Incorporation Clause[9] and Treaty Clause[10] of the Philippine Constitution supply the domestication rules. However, apart from these rules, there seem to be other methods (i.e., extra-constitutional rules) to apply international law in the Philippines. This paper refers to these constitutional and extra-constitutional rules as the *domestication* process.

II. Methods for Domestication

A. According to International Law

1. The Dualist and Monist Perspectives

The dualist perspective "emphasizes the distinct and independent character of the international and national legal systems."[11] It considers them as "distinct legal systems that exist alongside each other."[12] Thus, under dualism, international law and municipal law[13] are two separate legal systems.

The consequence of this separation is that international law must be "formally incorporated into municipal law[13] before it would be enforceable before a municipal court."[14]

Another consequence of the dualist perspective is that "[n]either legal order has the power to create or alter rules of the other."[15]

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[9] CONST. art II, § 2. "The Philippines renounces war as an instrument of national policy, **adopts the generally accepted principles of international law as part of the law of the land** and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations" (emphasis supplied).

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

[11] CRAWFORD, *supra* note 2, at 48.

[12] G. Ferreira & A. Ferreira-Snyman, *The Incorporation of Public International Law into Municipal Law and Regional Law against the Background of the Dichotomy between Monism and Dualism,* 17 POTCHEFSTROOM ELEC. L.J. 1470, 1471 (2014).

[13] Municipal law refers to national or domestic law of each state.

[14] Fereira & Ferreira-Snyman, *supra* note 14, at 1471.

[15] CRAWFORD, *supra* note 4, at 48.

Crawford explains the dualist perspective further stating that:

> When international law applies in whole or in part within any national legal system, this is because of a rule of that system giving effect to international law. In case of a conflict between international law and national law, the dualist would assume that a national court would apply national law, or at least that it is for the national system to decide which rule is to prevail.[16]

On the other hand, the monist perspective "postulates that national and international law form one legal order, or at least a number of interlocking orders which should be presumed to be coherent and consistent."[17] In other words, to the monist, public international law and municipal law is "a single system of law."[18]

A single legal system implies that "international law can be applied directly within the national legal order."[19] Specifically, international law "is directly enforceable before municipal courts without any need for incorporation into municipal law."[20]

However, not all legal systems are purely monist or dualist, as some legal systems display elements of both.[21] As will be discussed later in this paper, the Philippines is an example of a state with dualist and monist tendencies.

2. The Philippine Position

The Philippines is believed to follow the dualist model.[22] This belief is said to be justified by the incorporation and treaty clauses of the Constitution.

The Philippine Supreme Court has ruled that "international law can become part of the sphere of domestic law either by **transformation** or **incorporation**."[23]

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[16] *Id.*
[17] *Id.*
[18] Fereira & Ferreira-Snyman, *supra* note 12, at 1471.
[19] CRAWFORD, *supra* note 2, at 48.
[20] Fereira & Ferreira-Snyman, *supra* note 12, at 1471.
[21] *Id.* at 1471-72.
[22] MERLIN MAGALLONA, THE SUPREME COURT AND INTERNATIONAL LAW: PROBLEMS AND APPROACHES IN PHILIPPINE PRACTICE 2 (2010); Sep. Op. of J. Vitug in Gov't of the United States v. Purganan, G.R. No. 148571, Dec. 17, 2002 (Resolution).
[23] Pharmaceutical and Health Care Ass'n. v. Duque III, G.R. No. 173034, 535 SCRA 265, Oct. 9, 2007 [hereinafter *Pharmaceutical*].

According to the Court, the transformation method requires that international law be transformed into domestic law through a constitutional mechanism.[24] In the Philippines, transformation applies to treaties that require Senate concurrence for validity.

Generally speaking, transformation results from dualism as the latter requires that "an international treaty norm should [not] automatically be part of national legal systems."[25] Furthermore, it is also a function of sovereignty: "that when a nation undertakes an international obligation, that nation is entitled to determine for itself its method of implementing or fulfilling that obligation, so long as it does so in good faith."[26] Furthermore, some states have little democratic participation in the treaty-making process "giving no formal role to parliaments or structuring the government so that control over foreign relations is held by certain elites."[27] Thus, "the act of transformation serves as an important democratic check on the treaty-making process."[28] Furthermore, "legislatures may also wish to tailor the act of transformation… by rewording the treaty to match domestic circumstances."[29]

On the other hand, the incorporation method applies when, by mere constitutional declaration, international law is deemed to have the force of domestic law.[30] Incorporation appears to be an application of the monist perspective.

The advantage of incorporation is that it "increases [the] importance and weight"[31] of treaties and customs and likewise "decreases the likelihood that national authorities will refuse or neglect to provide for transforming the treaty norms into domestic law."[32] Furthermore, "direct application better assures the other parties that all parties will carry out their obligations under the treaty."[33]

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[24] *Id.*
[25] John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86(2) AM. J. INT'L L. 310, 323 (1992).
[26] *Id.*
[27] *Id.*
[28] *Id.* at 324.
[29] *Id.*
[30] *Pharmaceutical*, 535 SCRA 2657.
[31] Jackson, *supra* note 25, at 322.
[32] *Id.*
[33] *Id.*

As further discussed in the following section, the Philippines appears to use both incorporation and transformation as domestication methods.

B. According to Domestic Law

1. Constitutional Methods

a. Incorporation Clause

Section 2 of Article II (Declaration of Principles and State Policies) of the Philippine Constitution provides that the State "adopts the generally accepted principles of international law as part of the law of the land." This rule is known as the Incorporation Clause.

Philippine jurisprudence has interpreted "generally accepted principles of international law" as referring to customary international law.[34] The Court has also applied it to argue that customs such as *pacta sunt servanda*,[35] state immunity,[36] and the provisions of the Vienna Convention on Diplomatic Relations[37] are binding on the Philippines. Strangely, the Court has sometimes applied the Incorporation Clause to treaties[38] and principles not clearly identified as customs.[39] It must also be noted that the Court sometimes applies the Incorporation Clause to other international law sources. In one case, the Court added "international jurisprudence"[40] as part of the law

[34]Gov't of Hongkong Special Administrative Region v. Olalia, Jr., G.R. No. 153675, Apr. 19, 2007.

[35] Manila Int'l Airport Authority v. Commission on Audit, G.R. No. 218388, Oct. 15, 2019; Air Canada v. Comm'r of Internal Revenue, G.R. No. 169507, Jan. 11, 2016; Land Bank of the Phils. v. Atlanta Industries, Inc., G.R. No. 193796, July 2, 2014; Tañada v. Angara [hereinafter *Tañada*], G.R. No. 118295, 272 SCRA 18, May 2, 1997.

[36] JUSMAG Philippines v. Nat'l Lab. Re. Comm'n, G.R. No. 108813, Dec. 15, 1994; Baer v. Tizon, G.R. No. 24294, May 3, 1974.

[37] Reyes v. Bagatsing, G.R. No. 65366, Nov. 9, 1983.

[38] Liban v. Gordon, G.R. No. 175352, Jan. 18, 2011; Sehwani, Inc. v. In-N-Out Burger, Inc., G.R. No. 171053, Oct. 15, 2007; Ebro III v. Nat'l Lab. Rel. Comm'n, G.R. No. 110187, Sept. 4, 1996; Agustin v. Edu, G.R. No. 49112, Feb. 2, 1979.

[39] In Bayan Muna v. Romulo, G.R. No. 159618, 641 SCRA 17, Feb. 1, 2011 [hereinafter *Bayan Muna*], the Court seemed to have applied the Incorporation Clause to this statement: "By their voluntary act, nations may decide to surrender or waive some aspects of their state power or agree to limit the exercise of their otherwise exclusive and absolute jurisdiction." In Vinuya v. Romulo, G.R. No. 162230, Aug. 12, 2014 the Court considered "commitment to the laws of war and humanity" as enshrined in the Incorporation Clause.

[40] *Bayan Muna*, 641 SCRA 17.

of the land.[41] This is problematic because, under Article 38 of the ICJ Statute, judicial decisions are merely material sources, unlike custom, which is a formal source.[42]

Thus, because the Incorporation Clause allows the direct application of customary international law in Philippine cases, one can argue that the Philippines follows the monist approach.

However, the counterargument is that the Incorporation Clause is how customary law is internalized into national law. This means that the constitutional process transforms customary international law into national law.[43] If this is the case, the Philippines is dualist in the application of customary international law. Jurisprudence supports this characterization. In one case, the Philippine Supreme Court noted that "the established pattern…would show a leaning toward the dualist model."[44]

Notice, however, that Philippine law does not require legislative action for customary international law to be applicable in the Philippines. All that is needed is the determination by a competent court that the custom exists and is applicable. However, in doing so, the courts usually do not undertake an independent determination of the existence of the customary norm by weighing the evidence for state practice and *opinio juris*.

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[41] *Id.*

[42] Crawford explains that "Formal sources are those methods or the creation of rules of general application which are legally binding on their addressees. The material sources provide evidence of the existence of rules which, when established are binding and of general application. *See* CRAWFORD, *supra* note 2, at 20.

[43] MAGALLONA, *supra* note 22, at 3.

[44] J. Vitug *supra* note 22.

b. Treaty Clause

i. Transformation by Ratification and Concurrence

Treaties become part of the law of the land through transformation under Article VII, Section 21 of the Constitution, which provides that "[n]o treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate."[45]

The Court has explained that "[w]hile the President has the sole authority to negotiate and enter into treaties, the Constitution provides a limitation to his power by requiring the concurrence of 2/3 of all the members of the Senate for the validity of the treaty entered into by him."[46] The Court added:

> The participation of the legislative branch in the treaty-making process was deemed essential to provide a check on the executive in the field of foreign relations. By requiring the concurrence of the legislature in the treaties entered into by the President, the Constitution ensures a healthy system of checks and balance necessary in the nation's pursuit of political maturity and growth.[47]

Curiously, no similar check is made on courts when they identify customary international law, which the Philippines is bound to comply with. It may be said that when a court recognizes a new custom, it is establishing a new rule as new legislation establishes a new rule.

The Court has stated that "[f]ollowing ratification by the Senate, no further action, legislative or otherwise, is necessary. Thereafter, the whole of government—including the judiciary—is duty-bound to abide by the treaty, consistent with the maxim *pacta sunt servanda*."[48]

But this is not always true.

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[45] *Pharmaceutical*, 535 SCRA 265.

[46] Pimentel, Jr. v. Office of the Executive Secretary, G.R. No. 158088, July 6, 2005.

[47] *Id.*

[48] David v. Senate Electoral Tribunal, G.R. No. 221538, Sept. 20, 2016.

Treaties would generally require a certain number of ratifications before they enter into force. Thus, Senate concurrence alone would not be sufficient if the requirement for the entry into force of the treaty (e.g., number of ratifications required) has not been complied with.

Treaties may require implementing legislation. Thus, if the treaty requires implementing legislation, further legislation is needed after the concurrence, before a treaty becomes binding.

Because a treaty is not required to be transformed into a statute, one can argue that this is monist. However, similar to the Incorporation Clause argument, the constitutional provision itself may be considered the mechanism for transforming a treaty into national law.

However, if this is the case (i.e., the constitutional provisions provide for how custom and treaty become applicable under Philippine law), then there is only one process and not two (i.e., transformation and incorporation). The domestication process for both treaty and custom is via the Constitution. The only difference is that incorporation is via judicial action for custom, while for treaties, the transformation is via executive and legislative action.

ii. Transformation by Legislation

Jurisprudence also seems to recognize another type of transformation.

Specifically, some cases suggest that ratification and concurrence are not enough to make treaties applicable in the Philippines.

The Court said:

- [t]he transformation method requires that an international law be transformed into a domestic law through a constitutional mechanism such as local legislation;[49]
- treaties or conventional international law must go through a process prescribed by the Constitution for it to be transformed into municipal

[49] *Pharmaceutical,* 535 SCRA 265.

law that can be applied to domestic conflicts;[50] and

- there must be an act more than ratification to make a treaty applicable in our jurisdiction.[51]

Thus, based on these statements, there is a need for local legislation to make treaties applicable in the Philippines. This principle was applied in *Pharmaceutical and Health Care Association v. Duque III.*[52] The Court ruled that while the instruments in question were not treaties, they transformed into domestic law through local legislation, the Milk Code.

2. Extra-Constitutional Methods

There have been cases where the Philippines has recognized the applicability of international law outside of the Treaty or Incorporation Clauses. This does not mean that these methods are unconstitutional. It only implies that the constitutional mechanisms are not exclusive nor exhaustive.

a. Custom Without an Incorporation Clause

The Court has ruled that "[e]ven without this affirmation [from the Incorporation Clause], principles of International Law are deemed incorporated as part of the law of the land as a condition and consequence of our admission in the society of nations."[53] This statement implies that the Philippines is bound by customary international law even without the Incorporation Clause.

The Court has also said that:

> [E]ven in the absence of an express declaration in the Constitution that the generally accepted principles of international law are made a part of the law of the Nation, we are bound to uphold the immunities above referred to. And this should be true as long as the civilized world or majority of the independent countries composing it still abide by the rules of international law, and as long as the Philippines continues, as it must

[50] *Id.*

[51] Wilson v. Ermita, G.R. No. 189220, Dec. 7, 2016.

[52] *Pharmaceutical*, 535 SCRA 265.

[53] The Holy See v. Rosario, Jr., G.R. No. 101949, Dec. 1, 1994, citing United States v. Guinto, 182 SCRA 644, Feb. 26, 1990.

continue, to have an intercourse with such countries.[54]

It seems that the Court argued for the binding effect of custom despite the absence of the Incorporation Clause on the basis of the Philippines' membership in the society of nations or as a requirement to maintain its relationship with other countries.

In *Republic v. Sandiganbayan*,[55] the Court held that while the Bill of Rights under the 1973 Constitution was not operative during the period after the People Power Revolution and before the promulgation of the Provisional Constitution, the protection afforded to individuals under the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights remained in effect during the interregnum. It explained that the revolutionary government, after installing itself as the de jure government, assumed responsibility for the State's good faith compliance with the Covenant to which the Philippines is a signatory. As for the Declaration, it said that "the Court considers the Declaration as part of customary international law, and that Filipinos as human beings are proper subjects of the rules of international law laid down in the Covenant." Thus, in this case, the Court applied either customary or conventional human rights law without internalization or transformation via the Philippine Constitution.

b. Administrative Issuances

The Executive branch of government uses administrative issuances to implement international law obligations in the absence of explicit implementing legislation. Perhaps the best example of this is how the Philippines implements multilateral environmental agreements ("MEAs").

For example, to implement the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), the Department of Environment and Natural Resources ("DENR") issued its Department Administrative Order (D.A.O.) 91-55. This department issued the order pursuant to Article VIII, Section 1 of CITES, which in turn requires parties to penalize trade in or possession of specimens. D.A.O. 91-55 declares the *dugong* or sea cow a protected marine mammal and thus prohibits the killing or taking of the same for whatever purpose. On the other

[54] Dizon v. Commanding General of the Phil. Ryukus Command, U.S. Army, G.R. No. 2110, July 22, 1948.

[55] Rep. of the Phil. v. Sandiganbayan, G.R. No. 104768, July 21, 2003.

hand, D.A.O. 90-46 states that it was issued in furtherance of CITES Article VII (4).[56] To implement the Montreal Protocol, the DENR issued DENR A.O. 2013-25, which provided for the phase-out schedule and control of the importation of the hydrochlorofluorocarbons.

In addition to implementing treaty provisions, administrative issuances also invoke international law principles (e.g., precautionary principle) as a basis for rules,[57] implying their binding nature in this jurisdiction.

III. Analysis of Problems

A. Questions of Transcendence

1. Supremacy of Domestic Law

In several Philippine cases, the Supreme Court has upheld the supremacy of Philippine law over international law.

In *Bayan Muna v. Romulo,* it said that "in the domestic sphere, [treaties or executive agreements] can be held invalid if it violates the Constitution."[58]

In *Gonzales v. Hechanova*, it said that "an international agreement may be invalidated by Philippine courts, because under the Constitution, the Supreme Court may not be deprived of its jurisdiction to "review, revise, reverse, modify, or affirm all cases in which the constitutionality or validity of any treaty, law, ordinance, or executive order or regulation is in question."[59] The Court interpreted this to mean that the Philippine Constitution authorizes the nullification of a treaty when it conflicts with the fundamental law and when it runs counter to an act of Congress.

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[56] This provides that "[s]pecimens of an animal species included in Appendix I bred in captivity for commercial purposes, or of a plant species included in Appendix I artificially propagated for commercial purposes, shall be deemed to be specimens of species included in Appendix II."

[57] *See* Rommel J. Casis, *A Brief review of the Precautionary Principle as Observed from Philippine State Practice,* 2017 PHIL. Y.B INT'L. L. 91 (2017).

[58] *Bayan Muna*, 641 SCRA 17.

[59] Gonzales v. Hechanova, G.R. No. 21897, Oct. 22, 1963.

The fact that a valid treaty under international law can be considered invalid under Philippine law demonstrates the view that national law is supreme over international law. Only a superior law can invalidate another law.

2. *The Primacy of International Law*

The Court has also upheld the primacy of international law over Philippine law.

In *Tañada v. Angara,* the Court recognized that "while sovereignty has traditionally been deemed absolute and all-encompassing on the domestic level, it is, however, subject to restrictions and limitations voluntarily agreed to by the Philippines, expressly or impliedly, as a member of the family of nations." [60] It further added:

> By their inherent nature, treaties really limit or restrict the absoluteness of sovereignty. By their voluntary act, nations may surrender some aspects of their state power in exchange for greater benefits granted by or derived from a convention or pact. After all, states, like individuals, live with coequals, and in pursuit of mutually covenanted objectives and benefits, they also commonly agree to limit the exercise of their otherwise absolute rights.[61]

It further argued that "[t]he sovereignty of a state therefore cannot in fact and in reality be considered absolute. Certain restrictions enter into the picture: (1) limitations imposed by the very nature of membership in the family of nations and (2) limitations imposed by treaty stipulations." The Court went further and used as evidence the UN Charter and other multilateral and bilateral treaties, that involve limitations on Philippine sovereignty. The Court concluded by ruling that "a portion of sovereignty may be waived without violating the Constitution."[62]

The Court has also said that: "On the rationale that the Philippines has adopted the generally accepted principles of international law as part of the law of the land, a

[60] *Tañada*, 272 SCRA 18.
[61] *Id.*
[62] *Tañada*, 272 SCRA 18.

portion of sovereignty may be waived without violating the Constitution."[63]

The Court has noted the obligation of the Philippines to adjust its laws in relation to international law:

> As an integral part of the community of nations, we are responsible to assure that our government, Constitution and laws will carry out our international obligation. Hence, we cannot readily plead the Constitution as a convenient excuse for non-compliance with our obligations, duties and responsibilities under international law.[64]

This statement from the Court makes the Constitution subservient to international law.

3. Equality of International and Philippine Law

In some cases, the Court has ruled that international law is equal to domestic law.

It has been argued that while a treaty would constitute part of the law of the land, it would not be superior to a statute, an enactment of Congress, but rather it would be in the same class as the latter.[65] Thus, the Court considered a treaty as a law of the same level as a statute in this case.

In another case, the Court ruled that Philippine law on trademarks "must subordinate an international agreement inasmuch as a municipal tribunal is deciding the apparent clash."[66] The Court added:

> Withal, the fact that international law has been made part of the law of the land does not by any means imply the primacy of international law over national law in the municipal sphere. Under the doctrine of incorporation as applied in most countries, rules of international law are given a standing equal, not superior, to national legislative enactments.

So, in these cases, the Court places international law at the same level as local law.

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[63] *Bayan Muna*, 641 SCRA 17.
[64] Bayan v. Zamora, G.R. Nos. 138570, 342 SCRA 449, Oct. 10, 2000 [hereinafter *Bayan*].
[65] Abbas v. COMELEC, G.R. No. 89651, Nov. 10, 1989.
[66] Philip Morris v. CA, G.R. No. 91332, July 16, 1993.

B. The Incongruence of International and Domestic Concepts

1. The Ratification Question

The Vienna Convention on the Law of Treaties ("VCLT") identifies ratification as one of the acts whereby a State establishes its consent to be bound by a treaty on the international plane.[67]

The Court has defined ratification as "the formal act by which a state confirms and accepts the provisions of a treaty concluded by its representative [and] is generally held to be an executive act, undertaken by the head of the state or of the government."[68]In another case, it said that it is "the act by which the provisions of a treaty are formally confirmed and approved by a State [and by doing so]… a state expresses its willingness to be bound by the provisions of such treaty."[69] These definitions appear to correspond to the VCLT rule that ratification is the final act that indicates a state's consent to be bound.

The Court has also explained that under our 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.[70]

The Court has further clarified that "[i]n our jurisdiction, the power to ratify is vested in the President and not, as commonly believed, in the legislature. The role of the Senate is limited only to giving or withholding its consent, or concurrence, to the ratification."[71]

This clarification becomes necessary because, under the Treaty Clause, a treaty will only be valid and effective if at least two-thirds of all the members of the Senate

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[67] VCLT, *supra* note 4, art. 2, ¶ 1(b).
[68] Pimentel, Jr. v. Office of the Executive Secretary, G.R. No. 158088, July 6, 2005.
[69] *Id.*
[70] *Id.*
[71] *Bayan*,342 SCRA 449.

concurs.[72] Being a step after the president approves a treaty and being a requirement for the validity of a treaty, it is understandable why the Senate concurrence may be considered the "ratification" referred to in the VCLT. However, the Court is adamant in defining ratification as the act of the president.

Defining ratification as the act of the president gives rise to several questions:

> First, when ratification is required under international law, it is the final act to demonstrate the state's consent to be bound to a treaty. But if ratification is the act of the President of the Philippines, it is not the final act, as concurrence by the Senate follows it. So at what point is the Philippines bound by a treaty? It seems that, based on these cases, the treaty is binding on the Philippines earlier under international law than under Philippine law.
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> Second, what is the effect of violation by the Philippines of a treaty obligation after ratification by the President but before Senate concurrence? Under Philippine law, before Senate concurrence, the treaty would still not be binding on the Philippines. But if the President ratifies, the Court's statement means that the Philippines is bound.
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> Third, is it possible to consider Senate concurrence as what constitutes ratification under international law? This would seem to be the case since it comes later and is the act that makes a treaty binding on the Philippines under Philippine law. However, that would mean that what the Court identifies as ratification is not ratification under international law.[73]
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> Fourth, is it possible to consider the combined process of presidential ratification and Senate concurrence as ratification under international law? This seems logical as a treaty requires executive and legislative action to be valid under Philippine law. However, the plain text of the Court's decisions does not support this view.

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

[73] This poses a problem for Philippine Bar examinees if they are asked the question: "What is ratification?" Should they answer on the basis of Philippine jurisprudence or international law?

2. *Executive Agreements*

The topic of executive agreements deserves its own paper or even a book because of its long history and the number of issues involved. Thus, the following discussion is only a superficial treatment intended only to identify the general concerns.

a. Basis for Validity

In *Saguisag v. Ochoa*,[74] the Court has upheld the power of the president to enter into executive agreements on a wide range of subjects. It said:

> The power of the President to enter into *binding* executive agreements without Senate concurrence is already well-established in this jurisdiction. That power has been alluded to in our present and past Constitutions, in various statutes, in Supreme Court decisions, and during the deliberations of the Constitutional Commission. They cover a wide array of subjects with varying scopes and purposes, including those that involve the presence of foreign military forces in the country.[75]

In *Bayan v. Exec. Sec. Zamora,*[76] the Court stated that it had recognized the binding effect of executive agreements even without the concurrence of the Senate or Congress.[77]

According to these cases, the basis for the validity of executive agreements are:

- allusions in the present and past Constitutions;
- allusions in various statutes;
- Supreme Court decisions; and
- deliberations of the Constitutional Commission.

b. The Distinction Between Executive Agreements and Treaties

The cases above state that an executive agreement does not require Senate concurrence. This position implies that an executive agreement is not a treaty under

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[74] Saguisag v. Ochoa, Jr., G.R. No. 212426, 779 SCRA 241, Jan. 12, 2016 [hereinafter *Saguisag*].
[75] *Id.*
[76] *Bayan*, 342 SCRA 449.
[77] It must be noted that the treaty in question in this case was not an executive agreement.

Philippine law because a treaty requires Senate concurrence to be valid under the Constitution.

Executive Order No. 459 ("EO 459") defines executive agreements as "similar to treaties except that they do not require legislative concurrence." Interestingly, EO 459 defines an executive agreement based on the consequence of its nature (i.e., non-necessity of Senate concurrence) rather than what qualifies as an instrument as an executive agreement.[78]

Under EO 459, treaties and executive agreements are two types of international agreements. It defines an international agreement as:

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

On the other hand, EO 459 defines treaties as "international agreements entered into by the Philippines which require legislative concurrence after executive ratification."[80]

> The Court, citing foreign secondary sources, has explained that:
>
> a treaty has greater "dignity" than an executive agreement, because its constitutional efficacy is beyond doubt, a treaty having behind it the authority of the President, the Senate, and the people; a ratified treaty, unlike an executive agreement, takes precedence over any prior statutory enactment.[81]

However, in *Bayan v. Exec. Sec. Zamora,* the Court went on to say that "in international law, there is no difference between treaties and executive agreements in their binding effect upon states concerned, as long as the negotiating functionaries

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[78] It may be said that the whole point in defining an executive agreement is to determine whether it needs Senate concurrence. Defining the term in this way prevents any meaningful distinction between it and a treaty.

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

[80] Exec. Order No. 459 (1997), § 2(b).

[81] *Bayan Muna*, 641 SCRA 17.

have remained within their powers."[82] Strangely, the Court would base the distinction between treaties and executive agreements on whether the negotiators acted within their authority.[83]

The next statement made by the Court was that: "[i]nternational law continues to make no distinction between treaties and executive agreements: they are equally binding obligations upon nations."[84] Thus, the Court invokes international law as the basis for the rule that treaties and executive agreements are equally binding.[85]

In another case, the Court explained the difference between executive agreements and treaties:

> *First*, executive agreements must remain traceable to an express or implied authorization under the Constitution, statutes, or treaties. The absence of these precedents puts the validity and effectivity of executive agreements under serious question for the main function of the Executive is to enforce the Constitution and the laws enacted by the Legislature, not to defeat or interfere in the performance of these rules. In turn, executive agreements cannot create new international obligations that are not expressly allowed or reasonably implied in the law they purport to implement.
>
> *Second*, treaties are, by their very nature, considered superior to executive agreements. Treaties are products of the acts of the Executive and the Senate unlike executive agreements, which are solely executive actions. Because of legislative participation through the Senate, a treaty is regarded as being on the same level as a statute. If there is an irreconcilable conflict, a later law or treaty takes precedence over one that is prior. An executive agreement is treated differently. Executive agreements that are inconsistent with either a law or a treaty are considered ineffective. Both types of international agreement are

[82] *Bayan*, 342 SCRA 449.

[83] Certainly, the Court could not possibly mean to say that if they acted within their authority, the instrument would be a treaty and if not, it would be an executive agreement.

[84] *Bayan*, 342 SCRA 449.

[85] The Court in making this assertion cites foreign secondary sources and not any of the three formal sources of international law.

nevertheless subject to the supremacy of the Constitution.[86]

Regarding the first requirement, there is a need to clarify "express or implied authorization." Under Philippine law, every treaty needs to be consistent with the Philippine Constitution. Is this consistency sufficient to constitute "express or implied authorization"? If this is the case, then the first requirement is not a high threshold because proponents of an executive agreement would have to show that it does not violate the Constitution, other treaties, or Philippine laws.

c. Coverage of Executive Agreements

One way to distinguish between treaties and executive agreements may be to limit the scope of the latter. The Court has pointed out that:

> save for the situation and matters contemplated in Sec. 25, Art. XVIII of the Constitution—when a treaty is required, the Constitution does not classify any subject, like that involving political issues, to be in the form of, and ratified as, a treaty. What the Constitution merely pres-cribes is that treaties need the concurrence of the Senate by a vote defined therein to complete the ratification process. [citations omitted].[87]

Thus, while treaties may cover any area, executive agreements may be limited to particular areas. This limitation can be the justification for not requiring Senate concurrence.

In *Commissioner v. Eastern Sea Trading,* the Court stated that:

> International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying *adjustments of detail* carrying out well-established national policies and traditions and those involving arrangements of a more or less *temporary* nature usually take the form of executive agreements.[88]

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[86] *Saguisag*, 779 SCRA 241.
[87] *Bayan Muna*, 641 SCRA 17.
[88] Comm'r of Customs v. Eastern Sea Trading, G.R. No. 14279, Oct. 31, 1961.

However, the Court has more recently noted that:

> almost half a century has elapsed since the Court rendered its decision in *Eastern Sea Trading*. Since then, the conduct of foreign affairs has become more complex and the domain of international law wider, as to include such subjects as human rights, the environment, and the sea. In fact, in the US alone, the executive agreements executed by its President from 1980 to 2000 covered subjects such as defense, trade, scientific cooperation, aviation, atomic energy, environmental cooperation, peace corps, arms limitation, and nuclear safety, among others. Surely, the enumeration in *Eastern Sea Trading* cannot circumscribe the option of each state on the matter of which the international agreement format would be convenient to serve its best interest.[89]

The Court has also ruled that:

> the categorization of subject matters that may be covered by international agreements mentioned in *Eastern Sea Trading* is not cast in stone. There are no hard and fast rules on the propriety of entering, on a given subject, into a treaty or an executive agreement as an instrument of international relations. The primary consideration in the choice of the form of agreement is the parties' intent and desire to craft an international agreement in the form they so wish to further their respective interests. Verily, the matter of form takes a back seat when it comes to effectiveness and binding effect of the enforcement of a treaty or an executive agreement, as the parties in either international agreement each labor under the *pacta sunt servanda* principle.[90]

This is an interesting argument from the Court as it allows the government to characterize any international agreement as an executive agreement to avoid constitutional requirements. It also characterizes the difference between an executive agreement and a treaty as merely one of form. It further reiterates that an executive agreement is just as binding as a treaty, as it is subject to the *pacta sunt servanda* principle.

More recently, and gleaning from the discussion of the Constitutional

[89] *Bayan Muna*, 641 SCRA 17.
[90] *Id.*

Commission, the Court summarized the relationships between treaties and executive agreements:[91]

1. Treaties, international agreements, and executive agreements are all constitutional manifestations of the conduct of foreign affairs with their distinct legal characteristics.

a. Treaties are formal contracts between the Philippines and other States-parties, which are in the nature of international agreements, and also of municipal laws in the sense of their binding nature.

b. International agreements are similar instruments, the provisions of which may require the ratification of a designated number of parties thereto. These agreements involving political issues or changes in national policy, as well as those involving international agreements of a permanent character, usually take the form of treaties. They may also include commercial agreements, which are executive agreements essentially, but which proceed from previous authorization by Congress, thus dispensing with the requirement of concurrence by the Senate.

c. Executive agreements are generally intended to implement a treaty already enforced or to determine the details of the implementation thereof that do not affect the sovereignty of the State.

2. Treaties and international agreements that cannot be mere executive agreements must, by constitutional decree, be concurred in by at least two-thirds of the Senate.

3. However, an agreement—the subject of which is the entry of foreign military troops, bases, or facilities—is particularly restricted. The requirements are that it be in the form of a treaty concurred in by the Senate; that when Congress so requires, it be ratified by a majority of the votes cast by the people in a national referendum held for that purpose; and that it be recognized as a treaty by the other contracting State.

4. Thus, executive agreements can continue to exist as a species of international agreements.

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[91] *Saguisag*,779 SCRA 241.

Noticeably, the description of international agreements is confusing. First, it says that international agreements are "similar instruments" to treaties, implying a separate category. Subsequently, it says that "agreements involving political issues or changes in national policy, as well as those involving international agreements of a permanent character, usually take the form of treaties." This implies that treaties are a category of international agreements. Also, the fact that such agreements are "usually" in the form of treaties means that they may be in the form of international agreements that are not treaties. However, can they be executive agreements? Based on what the Court said, it is possible.

It said that executive agreements are "generally intended to implement a treaty already enforced or to determine the details of the implementation thereof that do not affect the sovereignty of the State." This implies that all executive agreements must be connected to the implementation of an existing treaty.

C. Absence of Rules for GPL

General principles of law ("GPL") constitute the third class of formal sources of international law.[92] International law scholars generally consider GPL as principles of domestic law that international courts can use where there is no custom or treaty applicable and avoid *non-liquet*.

Under the Constitution, there seems to be no explicit rule for general principles of law, unlike customs and treaties. However, the Court, at least in one case,[93] seemed to be confused about GPL. First, it said that international law "springs from general principles of law" and cited Article 38 of the ICJ Statute. While GPL is one of the three formal sources, it certainly is not the source of international law itself. If one had to choose, a better choice would have been custom.

The Court then went on to say that:

> General principles of law include principles of equity, *i.e.*, the general principles of fairness and justice, based on the test of what is reasonable. The Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention

[92] ICJ Statute art. 38, ¶ 1 (c). "[T]he general principles of law recognized by civilized nations."
[93] International School Alliance of Educators v. Quisumbing [hereinafter *Int'l School*], G.R. No. 128845, 333 SCRA 13, June 1, 2000.

> against Discrimination in Education, the Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation—all embody the general principle against discrimination, the very antithesis of fairness and justice.

While *equity* has been recognized as a GPL,[94] what the Court cites are international instruments which contain provisions on the prohibition against discrimination. While the principle against discrimination may arguably be GPL, the proper evidence would have been municipal law instruments to show that it is found in a substantial number of jurisdictions worldwide. The fact that the Court used the Universal Declaration of Human Rights and international law treaties to defend the principle of non-discrimination suggests that what it was referring to was custom and not GPL.

Finally, the Court said that "[t]he Philippines, through its Constitution, has incorporated this principle as part of its national laws."[95] The Court seems to be referring to the Incorporation Clause. This means that the Court has identified the Incorporation Clause as the portal through which GPL can be applied under Philippine law.

However, considering that the Court has misunderstood the meaning of GPL under international law, can the Court's pronouncement, in this case, be regarded as a binding rule? It might actually be referring to custom and not GPL.

Thus, there is no explicit constitutional rule for the application of GPL under Philippine law, unlike treaties and customs.

IV. Proposed Solutions

A. Legislative Action

When concurring with the ratification of the President, the Senate may decide whether implementing legislation is necessary. This initial determination should be binding unless challenged in the courts. This would preclude any uncertainty as to

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[94] *Id.*

[95] *Int'l School,* 333 SCRA 13.

whether treaties are self-executing or not.

The legislature may also consider operationalizing customary norms into statutes. Ordinarily, customary norms do not come with specific rules for their operationalization. Some of these particular rules are found in binding international law instruments (i.e., treaties) and non-binding (e.g., UN GA resolutions) or decisions of international tribunals.

However, it may be best for the legislature to tap the expertise of an institution like the University of the Philippines Law Center to draft necessary legislation to operationalize customary international law principles. The same institution may also keep track of developments in customary international law. This would also lessen the burden on the courts in determining the existence of customary international law and evaluating its specific local application.

Regarding the uncertainty in the nature of executive agreements in relation to treaties, Congress may enact a statute establishing clear rules on international agreements that are required to be in treaty form and may be in the form of executive agreements. A statute will allow for greater specificity than a judicial pronouncement.

B. Judicial Reconstruction

Inconsistent jurisprudence or jurisprudential rules which deviate from international norms create problems of incongruence. It is therefore up to the Court to make the necessary corrections to resolve this incongruence. The difficulty is that the Court will only have an occasion to align doctrine when there is an actual case.

However, one way to make doctrinal adjustments without waiting for a case is by establishing rules of procedure. The Court may consider setting rules for proving the existence of a custom or general principles of law. This may include what type of evidence is admissible or the probative value of different types of evidence. For example, the Court adopted the precautionary principle in the Rules of Procedure for Environmental Cases.[96]

As discussed earlier, the terms transformation and incorporation found in

[96] ENVT'L PROC. RULE, A.M. No. 09-6-8-SC (2010); *See* Rommel J. Casis, *Green Rules: Gray Areas and Red Flags,* 86(4) PHIL. L.J. (2012).

jurisprudence to describe the domestication process are problematic. In the case of incorporation, what happens essentially is that the courts recognize the existence of custom. It is this recognition that makes the customary rule binding in this jurisdiction. There is actually no transformation in the case of treaties except in the case where treaty provisions are written into a statute. In cases where the Senate merely concurs with the Presidential ratification, what actually happens is also recognition of the binding effect of the treaty because all the constitutional requirements are complied with. Even in cases where treaties require implementing legislation, the latter is not what makes the treaty binding. Thus, in the case of customary international law or general principles of law, domestication occurs by judicial recognition of the rule. In contrast, in the case of treaties, domestication occurs by executive and legislative recognition of the treaty. The Court may want to adopt the term "recognition" to describe the process of domestication rather than "transformation" and "incorporation." Treaties and customs are incorporated into Philippine law by recognition by the relevant branch of government.

C. Executive Correction

EO 459 defines international agreements, treaties, and executive agreements in a manner that appears to be inconsistent with the Constitution and international law. This should be corrected. A full and comprehensive analysis of why EO 459 may be unconstitutional and inconsistent with international law principles requires its own paper and cannot be accomplished here.

However, it may be helpful to point out that the definition of the terms under EO 459 is an excellent place to start this correction. Particularly, the distinction between treaties and executive agreements provided for by EO 459 is unhelpful.

If what distinguishes treaties from executive agreements is the necessity of Senate concurrence, then executive agreements can never have the force and effect of treaties because all treaties require Senate concurrence for validity under the Constitution. While decades of practice may recognize executive agreements as a subspecies of international agreements, this cannot override the Constitution. Therefore, it would be best that EO 459 be revised to indicate clear rules when an international agreement qualifies as an executive agreement.

For instance, executive agreements may be limited to inter-governmental contracts not involving *acts jure imperii* but only *jure gestionis*. Agreements where government agencies merely coordinate efforts to solve cross-border problems (e.g., smuggling, illegal fishing, transboundary environmental damage, etc.) and that do not require sovereignty's diminution may be subject to executive agreements.

Without this executive correction, the continued practice of executive agreements is nothing more than a means to circumvent the constitutional requirement for Senate concurrence.