32. The Philippines

Communication transmitted to the Secretariat, 28 July 2022:

> Executive Order No. 459[81] provides the guidelines on the negotiation and conclusion of international agreements by the Philippines, including the determination of the date of entry into force of such agreements.
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> Sec. 6(*a*) provides that, as a general rule, an international agreement enters into force only upon compliance with the domestic requirements stated in EO No. 459. By way of exception, an international agreement may be given provisional effect, provided that certain conditions are satisfied.
>
> Sec. 2(*f*) defines "provisional effect" as the "recognition by one or both sides of the negotiation process that an agreement be considered in force pending compliance with domestic requirements for the effectivity of the agreement."
>
> Sec. 6(*b*) provides that in order for an international agreement to be given provisional effect, there must be a showing that a pressing national interest will be upheld thereby.
>
> "National interest" is defined under Sec. 2(*e*) as an "advantage or enhanced prestige or benefit to the country as defined by its political and/or administrative leadership."
>
> The conclusion of any international agreement by the Philippines presupposes the fulfillment of an underlying national interest. However, mere national interest is insufficient to justify the application of provisional effect to an international agreement. The national interest to be upheld by the application of provisional effect should be "pressing."
>
> The determination of what is a pressing national interest is a function reposed in the Department of Foreign Affairs, which, pursuant to Sec. 6(*b*), shall determine, in coordination with the concerned agencies, whether a treaty or an executive agreement, or any amendment thereto, shall be given provisional effect.
>
> EO No. 459 has to be construed alongside relevant provisions of the *1987 Constitution*. In particular, Sec. 21 of Art. VII of the *Constitution* 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." Further, Sec. 25 of Art. XVIII of the *Constitution* provides that "foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State."
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> The above Constitutional provisions make Senate concurrence as a legal imperative prior to the entry into force of a treaty, precluding the grant of provisional effect thereon.
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> Treaties are defined under Sec. 2(*b*) of EO No. 459 as "international agreements entered into by the Philippines which require legislative concurrence after executive ratification."
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> Within the domestic legal sphere, they are considered superior to executive agreements, which are defined under Sec. 2(*c*) of EO No. 459 as international agreements that are "similar to treaties except that they do not require legislative concurrence."

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[81] *Providing for the Guidelines in the Negotiation of International Agreements and [Their] Ratification*, 25 November 1997.

In *Pangilinan* v. *Cayetano,*[82] the Supreme Court expounded on the scope of international agreements that will require Senate concurrence, *viz*:

Article VII, Section 21 [of the 1987 Constitution] does not limit the requirement of [S]enate concurrence to treaties alone. It may cover other international agreements, including those classified as executive agreements, if: (1) they are more permanent in nature; (2) their purposes go beyond the executive function of carrying out national policies and traditions; and (3) they amend existing treaties or statutes.

In *Saguisag* v. *Ochoa,*[83] the Supreme Court stated that "under international law, the distinction between a treaty and an international agreement or even an executive agreement is irrelevant for purposes of determining international rights and obligations."

In Philippine treaty practice, multilateral or bilateral treaties negotiated by the Bureau of Investments and international legal cooperation agreements negotiated by the Department of Justice, such as extradition, mutual legal assistance, and transfer of sentenced persons agreements, have not been given provisional application.

In view of the above-cited laws and jurisprudence, the provisional application of international agreements may only be given:

1. to those that do not require Senate concurrence;

2. that a national interest of a pressing character will be upheld by such provisional application; and

3. such determination shall be made by the Department of Foreign Affairs, through an inter-agency mechanism.

[82] G.R. Nos. 238875, 239483, and 240954, 16 March 2021.

[83] G.R. Nos. 212426 and 212444, 12 January 2016.