TERMINATION OF THE R.P. – U.S. VISITING FORCES AGREEMENT: Its Legality and Impact on the Maritime Dispute in the West Philippine Sea

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INTRODUCTION

Last February 11, 2020, the Duterte administration notified the U.S. Government that it would terminate the Visiting Forces Agreement (VFA) with the United States.[1] President Rodrigo Duterte made this decision without consulting Foreign Affairs Secretary Teodoro L. Locsin and Defense Secretary Delfin Lorenzana.[2] Secretary Locsin stated before the Foreign Relations Committee of the Philippine Senate last February 6, 2020, that "the continuance of the agreement is deemed to be more beneficial to the Philippines compared to any benefits were it to be terminated".[3] Instead, "a vigorous review of the Visiting Forces Agreement is called for," according to Secretary Locsin.[4] On February 10, 2020, the Senate of the Philippines adopted Senate Resolution No. 312 as Resolution No. 37 and earnestly requested "the President to reconsider his planned abrogation of the Visiting Forces Agreement in the meantime that the Senate is conducting a thorough review of the same."[5] Undeterred, the Duterte administration pushed through with the termination of the VFA.[6] This recent development on the subsistence of the VFA has been brewing since President Duterte took office in 2016. As

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[1] Sofia Tomacruz, *Philippines sends VFA notice of termination to U.S.*, Rappler, Feb. 11, 2020, and updated on Feb. 12, 2020, *available at* https://www.rappler.com/nation/251508-philippines-terminates-visiting-forces-agreement-united-states (last visited May 8, 2020).

[2] *Id.*

[3] *Id.*

[4] Paolo Romero, *Locsin says VFA needs 'vigorous review'*, PHIL. STAR, Feb. 7, 2020, *available at*, https://www.philstar.com/headlines/2020/02/07/1991105/locsin-says-vfa-needs-vigorous-review (last visited May 8, 2020).

[5] S. Res. No. 37, 18th Cong., 1st Reg. Sess. (2020).

[6] Tomacruz, *supra* note 1.

early as October 21, 2016, while on a state visit to China, President Rodrigo Duterte announced his "separation from the United States" at a forum attended by Filipino and Chinese businessmen and Chinese Vice Premier Zhang Gaoli.[7] He also said that the separation is not just military-wise but economically as well.[8] He also added that he has "realigned" himself with China and their ideological flow and will also go to Russia and talk to Russian President Vladimir Putin and tell him that "there are three of us against the world."[9] These comments came amidst the rising tensions between the Philippines and China over the maritime dispute in the West Philippine Sea. These comments also came at a time when the United States seeks to reassert itself geopolitically in Asia after a decade of wars in Afghanistan and Iraq. However, with President Duterte, a clarification must be sought first before making any conclusions. Eventually, the President did clarify his comments, and no separation will happen between him and the U.S.[10]

Then, on December 16, 2016, during a speech in Davao City, President Duterte stated that America should be put on notice and prepare for the eventual repeal or abrogation of the VFA.[11] That eventuality was triggered on January 23, 2020, when President Duterte threatened to terminate the VFA due to the cancellation by the U.S. Government of the U.S. Visa of Senator Ronald "Bato" Dela Rosa during a speech in the province of Leyte.[12] Duterte went on to say that if the United States does not correct the cancellation of Senator Dela Rosa's Visa, the VFA will be terminated.[13] In less than a month, the Duterte administration pulled the plug on the VFA on February 11, 2020.[14] On March 9, 2020, the Senate led by Senate President Vicente Sotto, III filed a Petition for Declaratory Relief and Mandamus with the Supreme Court to

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[7] Ben Blanchard, *Duterte aligns Philippines with China, says U.S. has lost*, Reuters, Oct. 20, 2016, *available at* https://www.reuters.com/article/us-china-philippines/duterte-aligns-philippines-with-china-says-u-s-has-lost-idUSKCN12K0AS (last visited May 7, 2020).

[8] *Id.*

[9] *Id.*

[10] Neil Jerome Morales, *Philippines' Duterte says didn't really mean 'separation' from U.S.,* Reuters, Oct. 22, 2016, *available at* https://www.reuters.com/article/us-china-philippines-idUSKCN12L28T (last visited May 7, 2020).

[11] Pia Ranada, *Duterte wants VFA scrapped, but will 'wait' for Trump*, Rappler, Dec. 17, 2016, *available at* https://www.rappler.com/nation/155785-duterte-visiting-forces-agreement-trump (last visited May 8, 2020).

[12] Sofia Tomacruz, *After U.S. cancels Bato's visa, Duterte threatens to scrap visiting forces agreement*, Rappler, Jan. 23, 2020, and updated on Jan. 25, 2020, *available at* https://www.rappler.com/nation/250054-duterte-threatens-scrap-visiting-forces-agreement-january-2020 (last visited May 8, 2020).

[13] *Id.*

[14] Tomacruz, *supra* note 1.

clarify its role as an institution in the cancellation of treaties.[15] Three months later, President Duterte would change his tune once again on the abrogation of the VFA by calling for a suspension of the termination of the VFA for six months starting on June 1, 2020 which is extendible for another six months, thereafter, the 180 day period for the effectivity of the termination of the VFA shall resume.[16]

The unilateral abrogation by President Duterte of the VFA with the United States, albeit later suspended, will have a severe and profound effect on the Philippines' national security, particularly on the maritime dispute with China in the West Philippine Sea. Moreover, the establishment of a precedent in recognizing the power of the President to abrogate treaties unilaterally can affect not only the relationship of the Philippines with other countries and its ability to negotiate with them, but it also grants unbridled power in one chief executive to repeal treaties and concomitantly the laws enacted in furtherance of said treaties.

Whether the President can unilaterally abrogate a treaty seems simple enough for its advocates and critics. Senator Francis Tolentino stated that since there is no express provision found in Article VII, Section 21 of the 1987 Constitution[17] that provides for Senate concurrence in treaty abrogation, the Senate has no power in the termination of treaties and international agreements.[18] On the other hand, Senator Franklin Drilon argued that since the treaties and international agreements that the President enters into cannot be valid without Senate Concurrence, then withdrawal therefrom should only be valid with the Senate's concurrence.[19] As simple as both Senators' arguments may sound, such simplicity is only on the surface as there is no express provision in the 1987 Constitution that provides for the abrogation of

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[15] Petition by Senate of the Philippines, as represented by Vicente C. Sotto III, in his capacity as Senate President, Ralph G. Recto, in his capacity as Senate President Pro Tempore, Juan Miguel "Migz" F. Zubiri, in his capacity as Majority Leader, Franklin M. Drilon, in his capacity as Minority Leader, and Richard J. Gordon, and Panfilo "Ping" M. Lacson, in their individual capacity as members of the Senate of the Philippines, Mar. 9, 2020 (on file with the Supreme Court), in Senate of the Philippines v. Office of the Executive Secretary, G.R. No. 251977 (Supreme Court, filed Mar. 9, 2020).

[16] CNN Philippines Staff, *PH suspends termination of Visiting Forces Agreement with US — DFA*, June 2, 2020, and updated on June 3, 2020, *available at* https://www.cnnphilippines.com/news/2020/6/2/locsin-VFA-termination-suspension-.html (last visited June 7, 2020).

[17] SECTION 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.

[18] Francis N. Tolentino, Senator of the Philippines, Remarks at the Senate Floor (Feb. 11, 2020) (transcript *available at* https://news.mb.com.ph/2020/02/13/vfa-and-separation-of-powers/ (last accessed May 9, 2020)).

[19] Katrina Hallare, *Drilon joins Senate leaders' move to question VFA abrogation before SC*, PHIL. DAILY INQUIRER., Feb. 16, 2020, *available at* https://newsinfo.inquirer.net/1229429/drilon-joins-senate-leaders-move-to-question-vfa-abrogation-before-sc (last visited May 9, 2020).

a treaty. The silence of the 1987 Constitution on treaty abrogation amounting to a legal issue was mentioned by Justice Francis H. Jardeleza during the oral arguments of *Pangilinan v. Cayetano*[20] or otherwise known as the case on the Rome Statute withdrawal of President Duterte.[21] Justice Jardeleza pointed out during the said oral arguments that both the petitioners and the government cannot find textual support in the 1987 Constitution for their arguments on the unilateral abrogation from a treaty by the President.[22] What is certain is that there is, at the very least, a legal issue brought about by the unilateral termination of a treaty by the President, considering that the 1987 Constitution is silent on whether or not the President can abrogate treaties and international agreements without Senate concurrence. Recently, the Supreme Court, in its ruling in *Pangilinan v. Cayetano,*[23] ruled that the discretion of the President in withdrawing from a treaty is not absolute[24] and is subject to the guidelines that it adopted in "evaluating cases concerning the President's withdrawal from international agreements."[25]This article will analyze the said legal issue in relation to the termination of the VFA along with the possible impact on the maritime dispute between the Philippines and China on the West Philippine Sea.

I. TRILATERAL RELATIONSHIP OF THE PHILIPPINES, CHINA, AND THE UNITED STATES IN THE WEST PHILIPPINE SEA

A. History

According to Justice Antonio T. Carpio, the Scarborough Shoal was initially not included in the territory ceded by Spain to the United States under the 1898 Treaty of Paris because the Scarborough Shoal was outside the territorial line drawn in the treaty.[26] Two years later, the United States and

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[20] *Pangilinan v. Cayetano* [hereinafter "Pangilinan"], G.R. No. 238875, March 16, 2021. This refers to the copy initially released by the Supreme Court.

[21] Ina Reformina, *No need for Senate concurrence? SC tackles petitions vs Philippines' ICC pullout*, ABS-CBN News, Aug. 29, 2018, *available at* https://news.abs-cbn.com/news/08/29/18/no-need-for-senate-concurrence-sc-tackles-petitions-vs-philippines-icc-pullout (last visited May 10, 2020).

[22] *Id.*

[23] *Pangilinan*, G.R. Nos. 238875.

[24] *Id.* at 4.

[25] *Id.* at 51.

[26] Antonio T. Carpio, *The South China Sea West Philippine Dispute*, THE INSTITUTE FOR MARITIME AND OCEAN AFFAIRS *available at* https://www.imoa.ph/lecture-the-south-china-sea-west-philippine-dispute-justice-antonio-t-carpio-philippine-social-science-center/ (last visited Sept. 9, 2020).

Spain entered into the 1900 Treaty of Washington, where Spain clarified that it ceded to the United States "any and all islands belonging to the Philippine Archipelago, lying outside the lines of the Treaty of Paris."[27] Almost 38 years later, another determination that the Scarborough Shoal formed part of Philippine territory was made by U.S. Secretary of State, Cordell Hull in his Memorandum of July 27, 1938, to the Secretary of War, Harry Woodring, that:

> Because of the absence of other claims, the shoal should be regarded as included among the islands ceded to the United States by the American-Spanish Treaty of November 7, 1900… In the absence of evidence of a superior claim to Scarborough Shoal by any other government, the Department of State would interpose no objection to the proposal of the Commonwealth Government to study the possibilities of the shoal as an aid to air and ocean navigation.[28]

Then, in 1946, the Philippines and the United States entered into the Treaty of General Relations in which the U.S. relinquished all control and sovereignty over the Philippine Islands, except the areas that would be covered by the American military bases in the country.[29] This agreement will give root to decades of U.S. military presence in the Philippines through the Military Bases Agreement (MBA) of 1947, the Military Assistance Agreement of 1947, and the Mutual Defense Treaty (MDT) of 1951.[30] The Americans had several military installations in the Philippines during the Cold War, and the two most prominent bases that it had were the Clark Air Base in Angeles, Pampanga, and the Subic Naval Base in Olongapo, Zambales. The bases would prove to be particularly useful for the U.S. military during the Korean and Vietnam Wars as a logistics hub supporting its operations.[3132]

In 1972, U.S. President Richard M. Nixon traveled to then reclusive People's Republic of China and met with Chairman Mao Zedong.[33] This initial breakthrough in the Sino–U.S. relations will culminate in the establishment of

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[27] *Id.*

[28] *Id.*

[29] *Saguisag v. Ochoa,* [hereinafter "Saguisag"]. G.R. Nos. 212426, Jan. 12, 2016, at 10. This refers to the copy initially released by the Supreme Court.

[30] *Id.*

[31] Philip Shenon, *U.S. preparing to abandon Clark Air Base,* THE BALTIMORE SUN (U.S.A.), July 16, 1991, *available at* https://www.baltimoresun.com/news/bs-xpm-1991-07-16-1991197006-story.html (last visited Sept. 9, 2020).

[32] Colonel Rolando C. San Juan, Closure of U.S. Military Bases in the Philippines: Impact and Implications, at 5 (April 1993) (unpublished Study Project, U.S. Army War College) (on file with U.S. Army War College), *available at* https://apps.dtic.mil/dtic/tr/fulltext/u2/a264489.pdf (last visited Sept. 10, 2020).

[33] Council on Foreign Relations, *U.S. Relations with China 1949–2020, available at* https://www.cfr.org/timeline/us-relations-china (last visited Sept. 11, 2020).

diplomatic recognition between the countries in 1979.[34] In the same year, sovereignty over the U.S. military bases in the Philippines was ceded to the latter by the former through the amendment of the Military Bases Agreement (MBA) of 1947.[35] Then, in 1991, with the end of the Cold War, and the lease by the Americans on the Clark Air Base and Subic Naval Base set to expire, the Senate of the Philippines voted to reject the proposed Philippine–U.S. Treaty of Friendship, Peace, and Cooperation and the new military bases agreement which would have extended the stay of the U.S. military in the Philippines for another ten (10) years.[36]

On February 8, 1995, a little more than two years after the U.S. military left the Philippines at the end of 1992, the Chinese occupied the Mischief Reef, which is barely 200 kilometers from Palawan.[37] This sudden aggression in the Spratly Islands by the Chinese led to a public hearing in the Senate Foreign Relations and Defense Committees.[38] During the hearing, the Senators discussed the invocation of the 1951 Mutual Defense Treaty with then Foreign Affairs Secretary Roberto Romulo and Foreign Affairs Undersecretary Rodolfo Severino.[39] According to Marites Dañguilan Vitug, "the discussion was open-ended, leaving Philippine officials with differing interpretations."[40]In 1999, almost seven years from the U.S. military's departure from Philippine soil, the Americans made a return after the Philippines and the U.S. entered into a Visiting Forces Agreement.[41] The VFA was called a "reaffirm[ation] [of the] obligations under the MDT" in *Saguisag v. Ochoa*.[42]

In 2012, the dreaded event occurred when China, now a world economic power, seized the Scarborough Shoal.[43] This seizure came after the announced

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[34] *Id.*

[35] M. Victoria Bayoneto, *The Former U.S. Bases in the Philippines: An Argument for the Application of U.S. Environmental Standards to Overseas Military Bases*, 6 FORDHAM ENVTL. L. REV. 111, 126 (2011).

[36] JOAQUIN L. GONZALES III, PHILIPPINE LABOUR MIGRATION CRITICAL DIMENSIONS ON PUBLIC POLICY, 36 (1998).

[37] Lieutenant Colonel Stanley E. Meyer, *Incident at Mischief Reef: Implications for the Philippines, China, and the United States*, at 1 (Jan 1996) (unpublished Study Project, U.S. Army War College) (on file with U.S. Army War College), *available at* https://www.hsdl.org/?view&did=451792 (last visited Sept. 11, 2020).

[38] MARITES DAÑGUILAN VITUG, ROCK SOLID HOW THE PHILIPPINES WON ITS MARITIME CASE AGAINST CHINA, 100 (2018).

[39] *Id.*

[40] *Id.* at 111.

[41] *Bayan (Bagong Alyansang Makabayan) v. Zamora* [hereinafter "Bayan"], G.R. No. 138570, 342 SCRA 449, 469 (2000).

[42] *Saguisag*, G.R. Nos. 212426, at 13.

[43] Reuters Staff, *China says 'situation' at disputed Scarborough Shoal has not changed*, Reuters, Oct. 31, 2016, *available at* https://www.reuters.com/article/us-southchinasea-china-philippines/china-says-situation-at-disputed-scarborough-shoal-has-not-changed-idUSKBN12V0YT (last visited Sept. 12, 2020).

foreign policy shift of the U.S. or a "pivot" from the Middle East to East Asia.[44] These rising tensions led to the creation of the Enhanced Defense Cooperation Agreement (EDCA) between the Philippines and the U.S. Entered into by both countries as an executive agreement, the EDCA is effective for ten years and gave U.S. troops, planes, and ships increased presence in Philippine military bases, on a rotation basis.[45] It also allowed the U.S. to build equipment and facilities to store supplies, including ammunition, in selected bases.[46] On March 1, 2019, U.S. Secretary of State, Michael R. Pompeo issued a statement saying that "any armed attack on any Philippine forces, aircraft, or public vessels in the South China Sea will trigger mutual defense obligations under Article 4 of our Mutual Defense Treaty."[47] This is an assurance to ambiguities and different interpretations in the geographic coverage in Article IV and Article V of the 1951 MDT, which provides:

> ARTICLE IV. Each Party recognizes that an armed attack in the *Pacific area* on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes.
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> Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations, Such [sic] measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.[48]
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> ARTICLE V. For the purpose of Article IV, an armed attack on either of the Parties is deemed to include an armed attack on the *metropolitan territory* of either of the Parties, or on the Island territories under its jurisdiction in the Pacific Ocean, its armed forces, public vessels or aircraft in the Pacific.[49]

Some were of the opinion that "the U.S. was not obliged to help the Philippines because the treaty was not crystal clear on its geographic coverage," particularly on the words "Pacific Area" in Article IV and "metropolitan

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[44] Hillary Clinton, *America's Pacific Century*, Foreign Policy, Oct. 11, 2011, *available at* https://foreignpolicy.com/2011/10/11/americas-pacific-century/ (last visited Sept. 9, 2020).
[45] VITUG, *supra* note 38, at 110.
[46] *Id.*
[47] Pia Rañada, *In Pompeo visit, Philippines gets timely assurance from oldest ally*, Rappler, March 2, 2019, *available at* https://rappler.com/newsbreak/in-depth/mike-pompeo-visit-philippines-gets-timely-assurance-from-oldest-ally (last visited Sept. 13, 2020).
[48] 1951 Mutual Defense Treaty, art. IV, Aug. 30, 1951, *available at* https://www.officialgazette.gov.ph/1951/08/30/mutual-defense-treaty-between-the-republic-of-the-philippines-and-the-united-states-of-america-august-30-1951/ (last visited Sept. 13, 2020) (Emphasis supplied.)
[49] *Id.* at art.V

territory" in Article V.[50] All of that has been clarified by Secretary Pompeo's comments on March 1, 2019.[51] Recently, the United States announced a new position on the maritime claims in the South China Sea.[52] On July 13, 2020, U.S. Secretary Pompeo issued a statement entitled "U.S. Position on Maritime Claims in the South China Sea."[53] This new U.S. position is beneficial to the Philippines as it recognizes and reinforces the award issued by the Permanent Court of Arbitration in the case of *Philippines v. China*,[54] which rejected the "nine-dash line" claim of China, to wit:

> As the United States has previously stated, and as specifically provided in the Convention, the Arbitral Tribunal's decision is final and legally binding on both parties. Today we are aligning the U.S. position on the PRC's maritime claims in the SCS with the Tribunal's decision. Specifically:
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> - The PRC cannot lawfully assert a maritime claim – including any Exclusive Economic Zone (EEZ) claims derived from Scarborough Reef and the Spratly Islands – vis-a-vis the Philippines in areas that the Tribunal found to be in the Philippines' EEZ or on its continental shelf. Beijing's harassment of Philippine fisheries and offshore energy development within those areas is unlawful, as are any unilateral PRC actions to exploit those resources. In line with the Tribunal's legally binding decision, the PRC has no lawful territorial or maritime claim to Mischief Reef or Second Thomas Shoal, both of which fall fully under the Philippines' sovereign rights and jurisdiction, nor does Beijing have any territorial or maritime claims generated from these features.
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> - As Beijing has failed to put forth a lawful, coherent maritime claim in the South China Sea, the United States rejects any PRC claim to waters beyond a 12-nautical mile territorial sea derived from islands it claims in the Spratly Islands (without prejudice to other states' sovereignty claims over such islands). As such, the United States rejects any PRC maritime claim in the waters surrounding Vanguard Bank (off Vietnam), Luconia Shoals (off Malaysia), waters in Brunei's EEZ, and Natuna Besar (off Indonesia). Any PRC action to harass other states' fishing or hydrocarbon development in these waters – or to carry out such activities unilaterally – is unlawful.

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[50] VITUG, *supra* note 38, at 100.
[51] Rañada, *supra* note 47.
[52] Michael R. Pompeo, Secretary of State, *U.S. Position on Maritime Claims in the South China Sea,* U.S. State Department, July 13, 2020, *available at* https://www.state.gov/u-s-position-on-maritime-claims-in-the-south-china-sea/ (last visited Sept. 12, 2020).
[53] *Id.*
[54] *Philippines v. China (In the Matter of South China Sea Arbitration),* PCA Case No. 2013-19 (Perm. Ct. Arb.).

> • The PRC has no lawful territorial or maritime claim to (or derived from) James Shoal, an entirely submerged feature only 50 nautical miles from Malaysia and some 1,000 nautical miles from China's coast. James Shoal is often cited in PRC propaganda as the "southernmost territory of China." International law is clear: An underwater feature like James Shoal cannot be claimed by any state and is incapable of generating maritime zones. James Shoal (roughly 20 meters below the surface) is not and never was PRC territory, nor can Beijing assert any lawful maritime rights from it.[55]

B. The R.P.–U.S. Visiting Forces Agreement is a deterrent to Chinese Aggression in the West Philippine Sea

In his Separate Concurring Opinion in the case of *Saguisag v. Ochoa*,[56] Justice Carpio spoke of a power vacuum in the South China Sea after the American's departure in 1992.[57] The power vacuum was filled by China, which culminated in its seizure of the Mischief Reef in 1995.[58] In an opinion column in the Philippine Daily Inquirer, Justice Carpio stated that the MDT and the VFA "are treaties to deter aggression, warning possible aggressors that they face the combined military might of the alliance should any aggression be committed against any of the treaty allies."[59] He further states that "[t]he United Nations Charter, which outlaws wars of aggression, allows states to enter into collective self-defense treaties to repel aggression by other states."[60]

Secretary Locsin also stated during the public hearing before the Senate Foreign Relations Committee last February 6, 2020, that "the regular presence of US forces including those conducting Freedom of Navigation Operations in the South China Sea including the West Philippine Sea serve as a deterrent to China taking more aggressive actions in the West Philippine Sea."[61] The VFA is considered the implementing rule of the 1951 MDT between the Philippines and the U.S.[62] Secretary Locsin further adds that "[c]orollarily, the

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[55] Pompeo, *supra* note 52 (Emphasis supplied.)
[56] *Saguisag*, G.R. Nos. 212426.
[57] *Id.* at 2 (Carpio, *J.*, *separate concurring opinion).*
[58] *Id.*
[59] Antonio T. Carpio, *The MDT and VFA as deterrence,* PHIL. DAILY INQUIRER, July. 9, 2020, *available at* https://opinion.inquirer.net/131573/the-mdt-and-vfa-as-deterrence (last visited Sept. 13, 2020).
[60] *Id.*
[61] Secretary Teodoro L. Locsin, Jr., Speech delivered before the Senate Foreign Relations Committee, GSIS Building, Senate of the Philippines (Feb. 6, 2020), available at: https://rappler.com/nation/full-text-locsin-speech-impact-assessment-visiting-forces-agreement-termination (last visited Sept. 13, 2020).
[62] Michael Bueza, *EXPLAINER: Visiting Forces Agreement*, Rappler, Jan. 31, 2020, *available at* https://rappler.com/newsbreak/iq/explainer-visiting-forces-agreement (last visited Sept. 13, 2020).

MDT is a deterrent to any attack from any power. The termination of the VFA will very likely dilute the US commitment to the MDT."[63] He elaborates on how much of a deterrent the VFA is along with the 1951 MDT and the EDCA to Chinese aggression in the West Philippine Sea, *to wit*:

> In a mutual defense arrangement, no one counts cost because while it exists, both parties draw down on its main benefit – and what is that benefit? *It is deterrence*. The geographical proximity of the Philippines to the most likely aggressor against the US or against the Philippines given the MDT and its supportive arrangements in the EDCA and VFA, *is a severe deterrent*.
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> That proximity means response will be near instantaneous. In mutual defense, there is to be no second thought or any second wasted in response. In warfare, time is power and money.[64]

Nevertheless, how is the VFA a deterrent, exactly? Why is it necessary given the presence of 1951 MDT and the EDCA?

Secretary Locsin states in his speech before the Senate Foreign Relations Committee last February 6, 2020, that "[t]he VFA ensures operability of other Philippines-US defense arrangements and modalities of cooperation",[65] *to wit*:

> Other Philippines-US agreements and modalities of defense and security operation may be rendered inoperative, despite remaining legally valid. *Some of these agreements and modalities of cooperation include the Mutual Defense Treaty, which the VFA serves. The Enhanced Cooperation Development Agreement, which gives substance to the commitments in the MDT.*
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> For the MDT, the VFA is the substance that makes it real and makes it work. The EDCA, on the other hand, is hinged on the VFA. There would essentially be no practical use for an EDCA in the absence of the VFA, which is the legal framework for the presence of US military personnel in military exercises and actual military responses under the MDT. Without them the MDT is just a piece of paper. There are contrary views to this.[66]

Besides being a deterrent to Chinese aggression, the VFA also provides all modes of military capability training to the Armed Forces of the Philippines through "covering external defense, counterterrorism, humanitarian aid and disaster response."[67] According to Secretary Locsin, there were "some 319

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[63] Locsin, *supra* note 61.
[64] *Id.* (Emphasis supplied.)
[65] *Id.*
[66] *Id.* (Emphasis supplied.)
[67] JC Gotinga, *What will happen to PH military if the VFA is terminated?,* Rappler, Feb. 11, 2020, *available at* https://rappler.com/newsbreak/iq/what-happens-philippine-military-vfa-terminated (last visited Sept. 13, 2020).

activities lined up for the year" 2020 alone between the Armed Forces of the Philippines and the U.S. military.[68] Moreover, funding for equipment, assets, and systems will dwindle. According to Secretary Locsin, "[w]ithout the VFA, the US Departments of State and Defense will be hard put to get funds from the US Congress for [foreign military financing] and other defense assistance programs to the Philippines."[69] This is precisely what happened when the U.S. military left in 1992, and the Philippine armed forces suffered.[70] Also, the VFA provides the Armed Forces of the Philippines with valuable intelligence and surveillance, especially in counter-terrorism, which were instrumental in reclaiming Marawi from Maute terrorists in 2017.[71] According to Secretary Locsin, the U.S., through the VFA, are also "instrumental in assisting the Philippines to combat non-traditional security threats such as trafficking in persons, cyberattack, terrorism, and illegal narcotics through training, joint exercises, and exchange visits."[72] Secretary Locsin further stated that the U.S. through the VFA "has also provided support for humanitarian assistance and disaster response as well as search and rescue operations."[73] This was evident during the aftermath of Supertyphoon Yolanda (Haiyan) in 2013.[74] All of these strategic advantages and benefits will be lost if the VFA is abrogated.

Notwithstanding the suspension of the termination of the VFA, the VFA's existence is still hanging by a thread and its deterrent impact cannot have its full effect. Justice Carpio has stated that "[t]o be an effective deterrence against foreign aggression, the MDT and the VFA must be beyond question as to their validity. Otherwise, possible aggressors will not be deterred as they may be misled into thinking that the mutual defense treaty is invalid or ineffective."[75]

II. CONSTITUTIONAL PRINCIPLES ON TREATIES

A. Shared Responsibility and Checks and Balances

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[68] Locsin, *supra* note 61.
[69] *Id.*
[70] VITUG, *supra* note 38, at 110.
[71] Gotinga, *supra* note 67.
[72] Locsin, *supra* note 61.
[73] *Id.*
[74] Gotinga, *supra* note 67.
[75] Carpio, *supra* note 59.

The seminal case of *Angara v. The Electoral Commission*[76] is the authority in the separation of powers under Philippine jurisprudence. In the said case, Justice Jose P. Laurel elucidated on the separation of powers in our system of government:

> The separation of powers is a fundamental principle in our system of government. It obtains not through express provision but by actual division in our Constitution. Each department of the government has exclusive cognizance of matters within its jurisdiction, and is supreme within its own sphere. But it does not follow from the fact that the three powers are to be kept separate and distinct that the Constitution intended them to be absolutely unrestrained and independent of each other. The Constitution has provided for an elaborate system of checks and balances to secure coordination in the workings of the various departments of the government.[77]

One of the examples of the said system is the treaty entrance process of the government. Justice Arturo D. Brion gave an example of the elaborate system of checks and balances about the process of treaty entrance in his dissenting opinion in the case of *Saguisag v. Ochoa*:[78]

> Under this system, the functions of government are divided among three branches of government, each one supreme within its own sphere: the executive administers and enforces laws; the legislature formulates and enacts laws; and the judiciary settles cases arising out of the enforcement of these laws[93] *The requirement of Senate concurrence to the executive's treaty-making powers is a check on the prerogative of the Executive, in the same manner that the Executive's veto on laws passed by Congress[94] is a check on the latter's legislative powers*.[79]

The Supreme Court, in the majority opinion in *Saguisag v. Ochoa,*[80] through then Chief Justice Maria Lourdes Sereno, pronounced that the role of the President and the Senate when it comes to treaties and international agreements is a shared responsibility, *to wit*:

> The responsibility of the President when it comes to treaties and international agreements under the present Constitution is therefore *shared* with the Senate.[81]

Such shared responsibility by the President and the Senate regarding treaties and international agreements is without prejudice to the principle that the President carries the mandate of being the sole organ in the conduct of

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[76] G.R. No. L-45081, July 15, 1936, *available at* https://lawphil.net/judjuris/juri1936/jul1936/gr_l-45081_1936.html (last visited Aug. 14, 2020).
[77] *Id.*
[78] *Saguisag,* G.R. Nos. 212426.
[79] *Id.*, at 21 (Brion, *J.*, *dissenting opinion*). (Emphasis supplied.)
[80] *Id.* (*majority opinion).*
[81] *Id.* at 8 (*majority opinion*). (Emphasis supplied.)

foreign relations.[82] However, treaties and international agreements are not mere conduct of foreign relations but have the status, effect, and impact of statutory law in the Philippines; they can amend or prevail over prior statutory enactments.[83] In the case of *Bayan (Bagong Alyansang Makabayan) v. Zamora*,[84] the Supreme Court stated the Senate's role concerning treaties is legislative in character, *to wit*:

> For the role of the Senate in relation to treaties is *essentially legislative in character*;[57] the Senate, as an independent body possessed of its own erudite mind, has the prerogative to either accept or reject the proposed agreement, and whatever action it takes in the exercise of its wide latitude of discretion, pertains to the wisdom rather than the legality of the act. In this sense, the Senate partakes a principal, yet delicate, role in keeping the principles of *separation of powers* and of *checks and balances* alive and vigilantly ensures that these cherished rudiments remain true to their form in a democratic government such as ours. The Constitution thus animates, through this treaty-concurring power of the Senate, a healthy system of checks and balances indispensable toward our nation's pursuit of political maturity and growth. True enough, rudimentary is the principle that matters pertaining to the wisdom of a legislative act are beyond the ambit and province of the courts to inquire.[85]

Moreover, executive agreements that the President can enter into on behalf of the State without Senate concurrence derive their validity from a treaty it seeks to implement. The separate concurring opinion of Justice Brion in *Intellectual Property Association of the Philippines v. Ochoa*[86] gave an eloquent explanation of how executive agreements derived their validity from treaties, *to wit*:

> In other words, the President can ratify as executive agreements those obligations that he can already *execute and implement* because they already carry *prior legislative authorization,* or have already gone through the treaty-making process under Article VII, Section 21 of the 1987 Constitution.
>
> In these lights, executive agreements are a function of the President's duty to execute the laws faithfully. They trace their validity from existing laws or treaties that have been authorized by the legislative branch of government. They implement laws and treaties.[87]

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[82] *Saguisag,* G.R. Nos. 212426, at 6 (*majority opinion).*
[83] *Id.* at 25 (Brion, *J.*, *dissenting opinion*).
[84] *Bayan*, 342 SCRA 449.
[85] *Id.* at 496.
[86] *Intellectual Property Association of the Philippines v. Ochoa* [hereinafter "IPAP"], G.R. No. 204605, July 19, 2016. This refers to the copy initially released by the Supreme Court.
[87] *Id.* at 13 (Brion, *J.*, *separate concurring opinion*).

The President's and the Senate's shared responsibility regarding treaties and international agreements manifests itself in the 1987 Constitution through Article VII, Section 21:

> **SECTION 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.

Textually, Article VII, Section 21 of the 1987 Constitution, only covers treaty or international agreement entrance, and there is no mention of treaty or international agreement withdrawal. Its predecessors in the 1935 and 1973 Constitution provided the same features of shared power between the executive branch and legislative branch when it comes to treaty entrance but were silent when it comes to treaty withdrawal. Article VII, Section 10(7) of the 1935 Constitution provides:

> **(7)** The President shall have the power, with the concurrence of 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.

Article VIII, Section 14(1) of the 1973 Constitution provides:

> **SEC. 14. (1)** Except as otherwise provided in this Constitution, no treaty shall be valid and effective unless concurred in by a majority of all the Members of the Batasang Pambansa.

These three versions of the Philippine Constitution on treaty entrance are also similar to what is in Article II, Sec. 2, Clause 2 of the United States Constitution since it only provided the process and shared responsibility of the President and the Senate in treaty entrance but, is silent on treaty withdrawal, *to wit*:

> Section 2
>
> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.
>
> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;

The silence of the Philippine and American Constitutions on treaty withdrawal has led to the respective arguments by proponents and critics of

the power of the Philippine President to abrogate treaties unilaterally, which are based mainly on implication.[88] A more in-depth look into the intent of the framers of the 1987 Constitution on why they did not provide a provision on unilateral abrogation of a treaty is not available as there are no records of debate done on the matter in the 1986 Constitutional Convention.[89] In the United States, eminent Constitutional Law scholar Laurence Tribe has a profound theory on why the American Founding Fathers did not provide for a provision on treaty withdrawal or termination. According to Professor Tribe, "the very fact that the Constitution does not prescribe a mode for treaty termination suggests that the framers did not think any one mode appropriate in all cases, and therefore left the matter to be resolved in light of the particular circumstances of each situation."[90] The theory posited by Professor Tribe suggests that there is no black and white rule on treaty termination but rather a standard of rules that will be applied depending on the circumstances and the nature of the treaty.

Professor Harold Hongju Koh of Yale Law School proposed a "mirror principle" as a standard in evaluating the degree of congressional approval in the entry into and exit from a treaty and the subject matter of a treaty.[91] Combining these two propositions of Professors Tribe and Koh, there are circumstances where treaty withdrawal or termination is a shared responsibility between the President and the Senate. This proposition was echoed by Justice Marvic M.V.F. Leonen in *Pangilinan v. Cayetano*, where the Court held:

> Nonetheless, the President's discretion on unilaterally withdrawing from any treaty or international agreement is not absolute.
>
> As primary architect of foreign policy, the president enjoys a degree of leeway to withdraw from treaties. However, this leeway cannot go beyond the president's authority under the Constitution and the laws. *In appropriate cases*, legislative involvement is imperative. The president cannot unilaterally withdraw from a treaty if there is subsequent legislation which affirms and implements it.[92]

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[88] *See* pages 176-177.

[89] Reformina, *supra* note 21.

[90] Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 YALE L.J. F. 432, 461 (2018-2019). *Available at* https://www.yalelawjournal.org/forum/presidential-power-to-terminate-international-agreements (last visited July 6, 2020), *citing* Laurence H. Tribe, *A Constitutional Red Herring:* Goldwater v. Carter, NEW REPUBLIC, Mar. 17, 1979, at 14-16; *Treaty Termination: Hearings Before the S. Comm. on Foreign Relations*, 96th Cong. 589 (1979).

[91] Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 YALE L.J. F. 432, 463 (2018-2019). *Available at* https://www.yalelawjournal.org/forum/presidential-power-to-terminate-international-agreements (last visited July 6, 2020).

[92] *Pangilinan*, G.R. Nos. 238875, at 4. (Emphasis supplied.)

B. Pacta Sunt Servanda and Amity with All Nations

One of the declared principles in 1987 Constitution, which is otherwise known as the doctrine of incorporation,[93] is that the Philippines adopts the generally accepted principles of international law as part of the law of the land, *to wit*:

> **SECTION 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*.[94]

One of those generally accepted principles of international law that has been repeatedly upheld by the Supreme Court[95] is *Pacta Sunt Servanda,* which means treaties shall be complied with in good faith. Since the Philippines is a party[96] to the 1969 Vienna Convention on the Law of Treaties*,* which incorporates *Pacta Sunt Servanda* as its Article 26,[97] *Pacta Sunt Servanda* is not only a part of the law of the land by virtue of the doctrine of incorporation but also through the doctrine of transformation. During the oral arguments in *Pangilinan v. Cayetano,*[98] the counsel for the Senators, Hon. Ibarra "Barry" Gutierrez, III (Akbayan Partylist) argued that the withdrawal of a treaty on arbitrary grounds violates *Pacta Sunt Servanda.*[99] Justice Leonen responded by saying that treaties have withdrawal mechanics in them, and when invoked, the withdrawal is in good faith.[100] Sure enough, the Court rejected Congressman Barry Gutierrez's argument in its decision in *Pangilinan v. Cayetano*:

> The Philippines' withdrawal was submitted in accordance with relevant provisions of the Rome Statute. The President complied with the provisions of the treaty from which the country withdrew. There cannot be

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93 *Bayan Muna vs. Romulo,* G.R. No. 159618, Feb. 1, 2011, *available at* https://lawphil.net/judjuris/juri2011/feb2011/gr_159618_2011.html (last visited Aug. 14, 2020).

94 CONST., art. II, sec. 2.(Emphasis supplied.)

95 *Deutsche Bank AG Manila Branch v. Commissioner of Internal Revenue,* G.R. No. 188550, August 19, 2013; Land Bank of the Philippines v. Atlanta Industries, Inc., G.R. No. 193796, July 2, 2014.

96 The Philippines ratified the *1969 Vienna Convention on the Law of Treaties* on Nov. 15, 1972. *See* United Nations Treaty Collections (Chapter XXIII Law of Treaties), *available at* https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII1&chapter=23&Temp=mtdsg3&clang=_en (last visited May 10, 2020).

97 1969 Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.

98 *Pangilinan*, G.R. Nos. 238875.

99 Oscar Franklin Tan, *Leonen: President can cancel ICC treaty*, PHIL. DAILY INQUIRER., Oct. 15, 2018, *available at* https://opinion.inquirer.net/116757/leonen-president-can-cancel-icc-treaty (last visited May 20, 2020).

100 *Id.*

> a violation of pacta sunt servanda when the executive acted precisely in accordance with the procedure laid out by that treaty.[101]

However, "treaty exit clauses do not exist in a vacuum," according to Duke Law School Professor Laurence R. Helfer.[102] Some treaties do not have exit clauses or withdrawal mechanisms. A 2010 study based on a random sample of 142 international agreements published in the United Nations Treaty Series (UNTS) found that only 60% of treaties surveyed contained an exit clause.[103] According to Professor Helfer, in cases where treaties do not provide exit clauses and withdrawal mechanisms, the provisions of the 1969 Vienna Convention on the Law of Treaties*,* widely known as the codification of customary international law,[104] will be applied as the default rules.[105] Article 56 of the 1969 Vienna Convention on the Law of Treaties provides for the rules when treaties do not provide an exit clause or withdrawal mechanism, *to wit*:

> Article 56
>
> Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal
>
> 1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
>
> (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
>
> (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.
>
> 2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

An example of a situation where Article 56 of the 1969 Vienna Convention on the Law of Treaties was applied when North Korea attempted to withdraw from the International Convention on Civil and Political Rights (ICCPR) in 1997.[106] The United Nations Human Rights Committee (HRC) issued a General Comment concluding that "the ICCPR is not capable of denunciation

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101 *Pangilinan*, G.R. Nos. 238875, at 82.

102 Laurence R. Helfer, *Terminating Treaties in* THE OXFORD GUIDE TO TREATIES 649 (Duncan Hollis ed., 2012).

103 *Id.* at 641.

104 Universität Wien, 50 Years Vienna Convention on the Law of Treaties, *available at* https://juridicum.univie.ac.at/news-events/news-detailansicht/news/50-years-vienna-convention-on-the-law-of-treaties/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=c429b920a208a21200d829194f27c907 (last visited May 23, 2020).

105 Helfer, *supra* note 102, at 637.

106 Helfer, *supra* note 102, at 639.

or withdrawal."[107] In applying Article 56 of the 1969 Vienna Convention on the Law of Treaties, the U.N. Human Rights Committee explained that the absence of an exit clause was not an oversight since the ICCPR belong to the people living in the territory of the State party, and changes in government or State succession cannot divest it.[108] As a result, the ICCPR does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of a specific provision to that effect.[109] Ultimately, North Korea did not push through with its withdrawal from the ICCPR. It submitted its long-overdue second periodic report to the HRC in 2000 and participated in examining that report in the following year.[110]

There is a situation where a State can lose the right to invoke a ground for invalidating, terminating, withdrawing from, or suspending the operation of a treaty as provided by Article 45 of the 1969 Vienna Convention on the Law of Treaties:

> Article 45
>
> *Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty*
>
> A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:
>
> (a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or
>
> (b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

Clearly, the withdrawal from a treaty can be made in bad faith and in violation of *Pacta Sunt Servanda. Pacta Sunt Servanda* stresses that these pacts and clauses are the law between the parties, and implies that the non-fulfillment of respective obligations is a breach of the pact.[111] According to Professor Helfer:

> The foundational principle of State consent governs the design and operation of all treaty exit clauses. At the negotiation stage, State representatives have free reign to choose the substantive and procedural rules that will govern the future cessation of their relationship. Once those rules have been adopted as part of the final text, however, a State that ratifies or accedes to the treaty also accepts any conditions or restrictions

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[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] Helfer, *supra* note 102, at 640.
[111] Tesi Lou S. Guanzon, *Pacta Sunt Servanda*, *available at* http://www.sgv.ph/pacta-sunt-servanda-by-tesi-lou-s-guanzon-september-23-2013/ (last visited May 24, 2020).

> on termination, withdrawal, or denunciation that the treaty contains.[14] Unilateral exit attempts that do not comply with these conditions or restrictions are ineffective. A State that ceases performance after such an attempt remains a party to the treaty, albeit one that may be in breach of its obligations.[112]

To put all of this in perspective, *Pacta Sunt Servanda* facilitates amity with all nations. It fosters partnerships and builds alliances among states, which leads to amity among nations. Preserving such partnerships and alliances by the Philippines with its fellow ASEAN countries and its long-time allies, such as the United States, Japan, South Korea, and Australia is crucial at this time to counter the aggression and militarization of the South China Sea, which includes the West Philippine Sea, by China. This is why the Philippines must be in good faith in its dealings with its partners and allies, notwithstanding the different policies of transient occupants of political office. Justice Arturo Buena, in his ponencia in *Bayan (Bagong Alyansang Makabayan) v. Zamora,* profoundly encapsulated the government's role, the Constitution, and the Philippine State as a whole in pursuance of amity with all nations:

> As a member of the family of nations, the Philippines agrees to be bound by generally accepted rules for the conduct of its international relations. *While the international obligation devolves upon the state and not upon any particular branch, institution, or individual member of its government, the Philippines is nonetheless responsible for violations committed by any branch or subdivision of its government or any official thereof. 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.*[113]

To pursue amity with all nations, it must be firm that the government's checks and balances are working, and each branch of government is keeping each other accountable when it comes to the Philippines' international obligations. A violation by the Philippines of its international obligations, through an act of one branch of the government, will render the entire Philippine State liable.

C. Ratified Treaty Concurred by the Senate has the Status of Law

According to Justice Carpio, "[a] fundamental principle in constitutional law is that laws are repealed or amended only by subsequent laws, either expressly, or impliedly due to irreconcilable inconsistency between the prior and later law. This principle is so fundamental that it is not even written in the

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[112] Helfer, *supra* note 102, at 636.
[113] *Bayan*, 342 SCRA 449, 493.

Constitution."[114] Justice Carpio further states that since a ratified treaty with concurrence by the Senate has the same status of a law enacted by Congress, it falls within the ambit of Article 7 of the Civil Code of the Philippines,[115] which provides:

> **Article 7.** Laws are repealed only by subsequent ones, and their violation or non-observance shall not be excused by disuse, or custom or practice to the contrary.
>
> When the courts declared a law to be inconsistent with the Constitution, the former shall be void and the latter shall govern.
>
> Administrative or executive acts, orders and regulations shall be valid only when they are not contrary to the laws or the Constitution.

Moreover, Justice Carpio explains that a ratified treaty concurred by the Senate "may also be amended or repealed, expressly or impliedly, by a later law."[116] Applying Article 7 of the Civil Code of the Philippines to ratified treaties concurred by the Senate, it follows that treaties can only be repealed by a subsequent treaty. All of these modes amending or repealing a law, whether expressly or impliedly, by a later law involves Congress's participation as the law-making branch of the government. Justice Carpio ultimately opines:

> [T]hat Article 7 of the Civil Code lays down the fundamental principle that no one is above the law, not even the President. The law is forever, unless amended or repealed by a subsequent law. If we allow the President to terminate a law like the VFA by his sole action, then we have placed the President above the law.[117]

As previously mentioned, the Senate's role in the treaty entrance process is legislative in character, as stated by the Supreme Court in *Bayan (Bagong Alyansang Makabayan) v. Zamora.*[118] In constitutional law parlance, this process is also called the doctrine of transformation. In the case of *Pharmaceutical and Healthcare Association of the Philippines v. Duque,* the Supreme Court ruled that the transformation of international law to domestic law is through local legislation. Through transformation, treaties form part of the law of the land, *to wit*:

> Under the 1987 Constitution, international law can become part of the sphere of domestic law either by **transformation** or **incorporation**. The transformation method requires that an international law be transformed into a domestic law through a constitutional mechanism such as local

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[114] Antonio T. Carpio, *Terminating the VFA,* PHIL. DAILY INQUIRER, Feb. 27, 2020, *available at* https://opinion.inquirer.net/127653/terminating-the-vfa (last visited Sept. 13, 2020).
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Bayan*, 342 SCRA 449.

> legislation. The incorporation method applies when, by mere constitutional declaration, international law is deemed to have the force of domestic law.[12]
>
> Treaties become part of the law of the land through **transformation** pursuant to 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." Thus, treaties or conventional international law must go through a process prescribed by the Constitution for it to be transformed into municipal law that can be applied to domestic conflicts.[119]

Therefore, it is unequivocal that once treaties are concurred by at least two-thirds of the Senate, it is a law pursuant to constitutional law, general law, and jurisprudence. Since a treaty that is concurred by at least two-thirds of the Senate is a law, it follows that it can only be terminated by a subsequent treaty, whether expressly or impliedly, pursuant to Article 7 of the Civil Code of the Philippines. For domestic law, this requires another process prescribed by Article VI, Sections 26(2)[120], and 27[121] of the 1987 Constitution. For treaties, this can be through the ratification of another treaty and subsequently concurred by the Senate that expressly repeals a prior treaty or when a new treaty impliedly repeals a prior treaty due to the incompatibility of the two treaties with each other. The process of the Senate's concurrence to a treaty also requires three (3) readings similar to what is provided in Article VI, Sections 26(2)[122], and 27[123] of the 1987 Constitution. Rules XXXVI of the Rules of the Senate provides the requirement of three readings for the concurrence in treaties by the Senate, *to wit*:

RULE XXXVI

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[119] *Pharmaceutical and Health Care Association of the Philippines v. Health Secretary Francisco T. Duque III, et al.,* G.R. No. 173034, October 9, 2007.

[120] (2) No bill passed by either House shall become a law unless it has passed three readings on separate days, and printed copies thereof in its final form have been distributed to its Members three days before its passage, except when the President certifies to the necessity of its immediate enactment to meet a public calamity or emergency. Upon the last reading of a bill, no amendment thereto shall be allowed, and the vote thereon shall be taken immediately thereafter, and the yeas and nays entered in the Journal.

[121] SECTION 27. (1) Every bill passed by the Congress shall, before it becomes a law, be presented to the President. If he approves the same, he shall sign it; otherwise, he shall veto it and return the same with his objections to the House where it originated, which shall enter the objections at large in its Journal and proceed to reconsider it. If, after such reconsideration, two-thirds of all the Members of such House shall agree to pass the bill, it shall be sent, together with the objections, to the other House by which it shall likewise be reconsidered, and if approved by two-thirds of all the Members of that House, it shall become a law. In all such cases, the votes of each House shall be determined by yeas or nays, and the names of the Members voting for or against shall be entered in its Journal. The President shall communicate his veto of any bill to the House where it originated within thirty days after the date of receipt thereof; otherwise, it shall become a law as if he had signed it.

[122] CONST. art. VI, sec. 26, par. 2.

[123] CONST. art. VI, sec. 27, par. 1.

Concurrence In Treaties

> **SEC. 101.** When a treaty is received in the Senate for its concurrence, the same shall be referred to the Committee on Foreign Relations. After the Committee has reported the treaty to the Senate, the Second Reading of the treaty shall take place and during this period it shall be opened to general debate and to amendments. After the close of the debate, the treaty shall be voted upon and once approved shall pass to its Third Reading.[124]

The Senators, who filed a Petition for Declaratory Relief and Mandamus with the Supreme Court to clarify its role as an institution in the cancellation of treaties last March 9, 2020 in the wake of President Duterte's abrogation of the VFA, stated in the Petition that the reason on why Rule XXXVI of the Rules of the Senate on Concurrence of Treaties requires three (3) readings—just like for statutes—is to allow the Senate as a body "to properly examine the nature, objectives, benefits and relative importance of the agreement to the country."[125]

Ultimately, no less than the Constitution assigns legislative power—which includes the power to enact, amend, and repeal laws—to the Congress.[126] In the case of *Ople v. Torres*,[127] the Supreme Court stated through Justice Puno that:

> Legislative power is "the authority, under the Constitution, to make laws, and to alter and repeal them." [8] The Constitution, as the will of the people in their original, sovereign and unlimited capacity, has vested this power in the Congress of the Philippines. [9] The grant of legislative power to Congress is broad, general and comprehensive. [10] The legislative body possesses plenary power for all purposes of civil government. [11] Any power, deemed to be legislative by usage and tradition, is necessarily possessed by Congress, unless the Constitution has lodged it elsewhere. [12128s]

Prescinding from the above-mentioned legal bases, a unilateral abrogation of a treaty by the President is unconstitutional since it is tantamount to a unilateral repeal of a law by the President.

III. THE MIRROR PRINCIPLE

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[124] RULES OF THE SENATE, rule xxxvi, *available at* https://www.senate.gov.ph/about/RULES%20OF%20THE%20SENATEJULY%202020(EDP%20FINAL)%20.pdf (last visited June 14, 2020).
[125] Petition, *supra* note 15, at 35 at para. 74.
[126] CONST. art. VI, sec. 1.
[127] *Ople v. Torres et al.,* 293 SCRA 141 (1998)
[128] *Id.* at 149.

A. Subject Matter of Agreement in Issue and Degree of Legislative Participation

Professor Harold Hongju Koh, the Sterling Professor of International Law at Yale Law School, former Dean of Yale Law School, and former Legal Advisor to the U.S. State Department conceived the term mirror principle as a standard for determining legislative participation in treaty exits.[129] According to Professor Koh, the mirror principle is "the commonsense notion that the degree of legislative participation necessary to exit an international agreement should mirror the degree of legislative participation required to enter it in the first place."[130] Professor Koh further states that:

> Under the mirror principle, there should be parity of authority for entry and exit from an international agreement. Absent exceptional circumstances, a treaty entered into with substantial legislative participation cannot be lawfully terminated by the President alone. The same degree of legislative participation is legally required to exit from as to enter an international commitment.[131]

The Petition for Declaratory Relief and Mandamus with the Supreme Court in order to clarify its role as an institution in the cancellation of treaties filed by the Senators last March 9, 2020 in the wake of President Duterte's abrogation of the VFA cited Professor Koh and called for the application of the mirror principle in entry into and exit from treaties.[132] The Court made mention of the Mirror Principle conceptualized by Professor Koh in *Pangilinan v. Cayetano*.[133] The Court suggested that the Mirror Principle be applied in conjunction with framework conceptualized by Justice Robert H. Jackson, in his concurring opinion in the case of *Youngstown Sheet & Tube Co. v. Sawyer*,[134] *to wit*:

> The mirror principle echoes the points raised by Justice Robert H. Jackson's renowned concurrence in the separation-of-powers case, Youngstown Sheet & Tube Co. v. Sawyer. There, he laid down three categories of executive action as regards the necessity of concomitant legislative action:
>
> > Category One: "when the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate";

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129 Koh, *supra* note 91, Abstract, at 432.
130 Koh, *supra* note 91, at 453–454.
131 Koh, *supra* note 91, at 455.
132 Petition, *supra* note 15, at 44–48.
133 *Pangilinan*, G.R. Nos. 238875, at 43–45.
134 *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952) (Jackson, *J., concurring opinion*).

> Category Two: "when the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain"; and
>
> Category Three: "when the President takes measures incompatible with the expressed or implied will of Congress, his power is at his lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[135]

According to Professor Koh, there are two factors under the mirror principle in determining the exit process in an international agreement: "the subject matter of an agreement at issue and the degree of congressional approval involved in both the entry into and exit from it."[136] The framework conceptualized by Justice Jackson in his concurring opinion in the case of *Youngstown Sheet & Tube Co. v. Sawyer* only covers "the degree of congressional approval involved in both the entry into and exit from it."[137] It does not cover "the subject matter of an agreement at issue" which determines "which branch of government has substantive constitutional prerogatives regarding that area of foreign policy."[138] Generally, the subject matter of an international agreement determines the form of the agreement. In *Bayan Muna v. Romulo*,[139] the Supreme Court stated that there are two forms of international agreements: treaties and executive agreements.[140] The most crucial distinction between the two is that treaties require legislative concurrence after executive ratification, while executive agreements do not require legislative concurrence and are usually less formal and deal with a narrow range of subject matters than treaties.[141] The case of *Intellectual Property Association of the Philippines v. Ochoa*[142], citing Executive Order No. 459, series of 1997, which is otherwise known as Providing for the Guidelines in the Negotiation of International Agreements and its Ratification (issued November 25, 1997 by President Ramos), defined international agreements as distinguished from treaties and executive agreements in relation to Article VII, Section 21 of the 1987 Constitution, which provides:

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135 *Pangilinan*, G.R. Nos. 238875, at 44–45.
136 Koh, *supra* note 91, at 463.
137 Koh, *supra* note 91, at 462.
138 *Id.*
139 *Bayan Muna*, G.R. No. 159618.
140 *Id.*
141 *Id.*
142 *IPAP*, G.R. No. 204605.

> Sec. 2. Definition of Terms.
>
> a. International agreement - shall refer to 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.
>
> b. Treaties - international agreements entered into by the Philippines which require legislative concurrence after executive ratification. This term may include compacts like conventions, declarations, covenants and acts.
>
> c. Executive Agreements - similar to treaties except that they do not require legislative concurrence.[143]

In his separate concurring opinion in *Intellectual Property Association of the Philippines v. Ochoa,*[144] Justice Brion elucidated on the addition of the term "international agreement" in Article VII, Section 21 of the 1987 Constitution, *to wit*:

> Commissioner Sarmiento, in proposing that the term "international agreements" be deleted from Article VII, Section 21, noted that the Vienna Convention provides that treaties are international agreements, hence, including the term international agreement is unnecessary and duplicative.[15]
>
> However, this proposal was withdrawn, as several commissioners insisted on including *the term "international agreement" as a catch-all phrase for agreements that are international and more permanent in nature.* It became apparent from the deliberations that the ***commissioners consider a treaty to be a kind of international agreement*** that serves as a contract between its parties and is part of municipal law. *Thus, it would appear that the inclusion of the term "international agreement" in Section 21, Article VII of the 1987 Constitution was meant to ensure that an international agreement, regardless of its designation, should first be concurred in by the Senate before it can be considered valid and effective in the Philippines.*[145]

Based on the foregoing, it is only in executive agreements where legislative concurrence is not required. Therefore, congressional approval in all other international agreements is required. The aforementioned distinction between treaties and executive agreements provides the situations in determining the degree of congressional approval involved in both the entry into and exit from it.[146]

Regarding the factor of the subject matter of an international agreement at issue, identifying such factor is harder to determine given the lack of a definitive law or ruling by the Supreme Court on whether an international

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[143] *Id.* at 9–10.
[144] *Id.*
[145] *Id.* at 7 (Brion, *J.*, *separate concurring*) (Emphasis supplied.)
[146] Koh, *supra* note 91, at 463.

agreement is in the form of a treaty or executive agreement. According to Professor Koh, considering the subject matter of an international agreement is what makes the degree of legislative participation in the entry or exit into international agreements "substance dependent" because it considers which branch of government has substantive constitutional prerogatives to make law in any particular area of foreign policy.[147] A Philippine case that has considered the subject matter of an international agreement in determining the entry into an international agreement is the case of *Intellectual Property Association of the Philippines v. Ochoa*.[148] In the said case, the international agreement involved was the Madrid Protocol and its subject matter was the protection of trademarks and management of trademark registration.[149] The Court ruled that the Madrid Protocol is an executive agreement as determined by the Department of Foreign Affairs and based on historical and judicial precedent, *to wit*:

> As the foregoing pronouncement indicates, the registration of trademarks and copyrights have been the *subject* of executive agreements entered into without the concurrence of the Senate. Some executive agreements have been concluded in conformity with the policies declared in the acts of Congress *with respect to the general subject matter*.[150]
>
> x x x
>
> Accordingly, DFA Secretary Del Rosario's *determination and treatment* of the *Madrid Protocol* as an executive agreement; being in apparent contemplation of the express state policies on intellectual property as well as within his power under Executive Order No. 459, are upheld.[151]

Moreover, the Supreme Court in the same case stated that "the Department of Foreign Affairs, through Section 9, Executive Order No. 459, is initially given the power to determine whether an agreement is to be treated as a treaty or as an executive agreement."[152] The Court also added that there are no hard and fast rules when it comes to determining the form of international agreement based on a given subject, *viz*:

> [A]t this point that there are no hard and fast rules on the propriety of entering into a treaty or an executive agreement on a given subject 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 their international agreement in the form they so wish to further their respective interests. The matter of form takes a back seat when it comes to

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147 Koh, *supra* note 91, Abstract, at 432.
148 *IPAP*, G.R. No. 204605.
149 *Id.* at 2.
150 *Id.* at 11.
151 *Id.* at 12.
152 *IPAP,* G.R. No.204605, at 10.

> effectiveness and binding effect of the enforcement of a treaty or an executive agreement; inasmuch as all the parties; regardless of the form, become obliged to comply conformably with the time-honored principle of *Pacta Sunt Servanda.*[153]

Such is the real challenge of applying the mirror principle in international agreements that the Philippines are a party to because the form of the international agreement is determined upon entry by the Executive through the Department of Foreign Affairs and not by law or jurisprudence. As a result, this can affect the other factor in determining the exit process in an international agreement proposed by Professor Koh, that is, the degree of congressional approval required in both the entry into an international agreement and the exit from it.[154] In other words, an international agreement that is determined to be an executive agreement by the Department of Foreign Affairs when it should be a treaty will render the mirror principle inutile. Although the courts can always intervene if there is grave abuse of discretion amounting to lack or in excess of jurisdiction by the Executive, the courts can only base their rulings on applicable laws on the subject matter, which can only provide a narrow precedent. An example of this is the case of *Intellectual Property Association of the Philippines v. Ochoa.*[155] The Intellectual Property Association of the Philippines alleged that former Department of Foreign Affairs Secretary Albert Del Rosario gravely abused his discretion when he determined that the Madrid Protocol is an executive agreement.[156] The Supreme Court, through then Justice Lucas P. Bersamin, ruled that the Executive Secretary and Secretary Del Rosario did not abuse their discretion in determining that the Madrid Protocol is an executive agreement on the ground that the registration of trademarks and copyrights have always been the subject of executive agreements entered into without the concurrence of the Senate.[157] The Supreme Court cited the case of *Commissioner of Customs v. Eastern Sea Trading* and the work of Francis B. Sayre, former U.S. High Commissioner to the Philippines, named the "The Constitutionality of Trade Agreement Acts".[158] Nevertheless, as previously mentioned, the Supreme Court also ruled that "there are no hard and fast rules on the propriety of entering into a treaty or an executive agreement on a given subject as an instrument of international relations."[159]

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153 *Id.* at 12.
154 Koh, *supra* note 91, at 463.
155 *IPAP*, G.R. No. 204605.
156 *Id.* at 9.
157 *Id.* at 10–11.
158 *Id.*
159 *IPAP*, G.R. No. 204605, at 12.

Another example of this is the dissenting opinion on the merits of *Goldwater v. Carter*[160] by Justice William J. Brennan. According to Justice Brennan, the unilateral abrogation by President Jimmy Carter of the Sino-American Mutual Defense Treaty is valid since "the defense treaty was predicated upon the now-abandoned view that the Taiwan Government was the only legitimate political authority in China" and that American jurisprudence and the U.S. Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes.[161]

Therefore, peripheral factors can also affect an international agreement's subject matter in applying the mirror principle. Hence, a case-by-case basis approach in evaluating the subject matter of an agreement, in order to determine the correct exit process in an international agreement with the mirror principle as a guide, is apropos.

B. Application of the Mirror Principle to the Withdrawal from the RP-U.S. Visiting Forces Agreement

Any issue or controversy on the required type of agreement for the RP-U.S. Visiting Forces Agreement is quashed by the constitutional requirement of Article XVIII, Section 25 of the 1987 Constitution that foreign military troops shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate, *to wit*:

> **SECTION 25.** After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State.

On May 27, 1999, the Senate of the Philippines gave its concurrence to the Philippines' entrance to the VFA.[162] A question to the validity of the VFA was raised by several petitioners which ultimately arrived at the Supreme Court's doorstep, which became the case of *Bayan (Bagong Alyansang Makabayan) v. Zamora.*[163]In this case, petitioners questioned the validity of the VFA on the ground that the United States only considers the VFA as an executive

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

161 *Id.* at 1007 (Brennan, *J*., *dissenting*).

162 Senate of the Philippines, *Senate adopts resolution urging President to reconsider plan terminating VFA*, Press Release, Feb. 12, 2020, *available at* https://www.senate.gov.ph/press_release/2020/0210_prib1.asp (last accessed July 18, 2020).

163 *Bayan*, 342 SCRA 449.

agreement.[164] The Court, however, did not give credence to this argument, and ruled that:

> …it is inconsequential whether the United States treats the VFA only as an executive agreement because, under international law, an executive agreement is as binding as a treaty.[35] To be sure, as long as the VFA possesses the elements of an agreement under international law, the said agreement is to be taken equally as a treaty.
>
> A treaty, as defined by the Vienna Convention on the Law of Treaties, is "an international instrument concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation."[36] There are many other terms used for a treaty or international agreement, some of which are: act, protocol, agreement, compromis d' arbitrage, concordat, convention, declaration, exchange of notes, pact, statute, charter and modus vivendi. All writers, from Hugo Grotius onward, have pointed out that the names or titles of international agreements included under the general term **treaty** have little or no legal significance. Certain terms are useful, but they furnish little more than mere description.[37]
>
> Article 2(2) of the Vienna Convention provides that "the provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms, or to the meanings which may be given to them in the internal law of the State."
>
> Thus, 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 have remained within their powers.[38] International law continues to make no distinction between treaties and executive agreements: they are equally binding obligations upon nations.[39][165]

According to Justice Carpio, any doubt about how the United States treated the RP-U.S. Visiting Forces Agreement and its validity under Philippine law has been put to rest by the enactment of the U.S. government of the Asia Reassurance Initiative Act of 2018 (ARIA).[166] Justice Carpio prefaced his opinion that he dissented in the ruling in *Nicolas v. Romulo*[167] on the ground that the 1987 Constitution expressly requires "that any agreement allowing the presence of foreign soldiers in the country must be "recognized as a treaty by the other contracting state."[168] Justice Carpio further stated that he also based his dissent in the U.S. case of *Medellin v. Texas,*[169] where the Supreme Court of

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[164] *Id.*
[165] *Id.* at 488–489.
[166] Carpio, *supra* note 59.
[167] *Nicolas v. Romulo*, G.R. No. 175888, Feb. 11, 2009, (Carpio, J., dissenting opinion).
[168] Carpio, *supra* note 59.
[169] *Medellín v. Texas,* 552 U.S. 491 (2008)

the United States ruled that treaties "are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms."[170] In Justice Carpio's dissent in *Nicolas v. Romulo,* he stated that *Medellin* proffered a solution, *to wit*:

> *Medellin* recognized that at least some 70-odd treaties of the United States would be affected by the ruling that a treaty, even if ratified by the U.S. Senate, is not self-executory. *Medellin* even proffered a solution - *legislation by the U.S. Congress giving wholesale effect to such ratified treaties. Medellin* explains:
>
> > The dissent worries that our decision casts doubt on some 70-odd treaties under which the United States has agreed to submit disputes to the ICJ according to "roughly similar" provisions. x x x Again, under our established precedent, some treaties are self-executing and some are not, depending on the treaty. That the judgment of an international tribunal might not automatically become domestic law hardly means the underlying treaty is "useless." x x x Such judgments would still constitute international obligations, the proper subject of political and diplomatic negotiations. x x x ***And Congress could elect to give them wholesale effect (rather than the judgment-by-judgment approach hypothesized by the dissent, x x x) through implementing legislation, as it regularly has***. x x x[171]

According to Justice Carpio, the ARIA is the implementing legislation that gives a wholesale effect to the said "at least some 70-odd treaties of the United States" that will be affected by the ruling of *Medellin.*[172] Justice Carpio further states that the 1951 Mutual Defense Treaty between the Philippines and the United States and all related and subsequent bilateral security agreements and arrangements concluded on or before the date of the enactment of this Act, including the Enhanced Defense Cooperation Agreement (EDCA), are covered by the "wholesale effect" of the ARIA.[173] Section 202 (d) of the ARIA provides:

> The United States Government is committed to the Mutual Defense Treaty between the Republic of the Philippines and the United States of America, done at Washington August 30, 1951, and all related and subsequent bilateral security agreements and arrangements concluded on or before the date of the enactment of this Act, including the Enhanced Defense Cooperation Agreement (EDCA), done at Manila April 28, 2014.

Based on the foregoing facts, and any doubts about its validity quashed, the VFA cannot be terminated without Senate concurrence pursuant to the

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[170] *Id.* at 505.
[171] *Nicolas,* G.R. No. 175888, February 11, 2009, (Carpio, *J.*, *dissenting opinion*) (Emphasis supplied.)
[172] Carpio, *supra* note 59.
[173] *Id.*

mirror principle.[174] The subject matter of the VFA is foreign military presence in the Philippines, which is required by no less than the 1987 Constitution to be in treaty form, and to be treated as such by the other contracting State, which are both present in the case of the VFA. In addition, the degree of legislative participation in the entrance to the VFA was concurred by a two-thirds (2/3) vote of the Senate on May 27, 1999.[175] It is then unequivocal that the withdrawal from the VFA requires the same degree of legislative participation for its entrance, that is, Presidential action with Senate concurrence.

C. Application of the Guidelines in *Pangilinan v. Cayetano* to the Withdrawal from the RP-U.S. Visiting Forces Agreement

The Supreme Court, through Justice Leonen, pronounced the guidelines in "evaluating cases concerning the President's withdrawal from international agreements."[176] They are:

> 1. The President enjoys some leeway in withdrawing from agreements which he or she determines to be contrary to the Constitution or statutes.
> 2. The President cannot unilaterally withdraw from agreements which were entered into pursuant to congressional imprimatur.
> 3. The President cannot unilaterally withdraw from international agreements where the Senate concurred and expressly declared that any withdrawal must also be made with its concurrence.[177]

Applying the guidelines, first, the withdrawal from the VFA by the President requires Senate concurrence. President Duterte's withdrawal from the VFA was not made on constitutional or legal grounds but on the cancellation of Senator Dela Rosa's U.S. Visa.[178] Moreover, as previously mentioned, any doubt on the constitutionality and validity of the VFA has been put to rest by the enactment by the U.S. Government of the ARIA.[179] Hence, the President has no leeway in withdrawing from the VFA since he has made no case that the VFA is contrary to the Constitution or any statute.

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[174] Koh, *supra* note 136.
[175] *Bayan,* 342 SCRA at 469.
[176] *Pangilinan*, G.R. Nos. 238875, at 51–56.
[177] *Id.*
[178] *See* page 175.
[179] *See* pages 202–204.

Second, the VFA was entered into with congressional imprimatur pursuant to the 1951 MDT between the Philippines and the U.S. As previously mentioned, the VFA is the implementing rule of the 1951 MDT.[180]In *Pangilinan v. Cayetano,* the Court expressly provided that an implementing law of a prior treaty signifies legislative approval or imprimatur of the prior treaty, *to wit*:

> Similarly, a statute subsequently passed to implement a prior treaty signifies legislative approbation of prior executive action. This lends greater weight to what would otherwise have been a course of action pursued through executive discretion. When such a statute is adopted, the president cannot withdraw from the treaty being implemented unless the statute itself is repealed.[181]

Lastly, the Senate of the Philippines has expressly asked the President to reconsider the withdrawal from the VFA while it conducts a vigorous review[182] when it adopted Senate Resolution No. 312 as Resolution No. 37.[183] This is an express declaration by the Senate that it must be consulted in the withdrawal from the VFA by the President. The Court in *Pangilinan v. Cayetano*, ruled that its express declaration that a withdrawal from a treaty "may be embodied in the same resolution in which it expressed its concurrence" or "[i]t may also be that the Senate *eventually* indicated such a condition in a subsequent resolution."[184] Moreover, the Senate adopted Senate Resolution No. 337 as Resolution No. 39, where it asked the Supreme Court "to rule on whether or not the concurrence of the Senate is necessary in the abrogation of a treaty previously concurred in by the Senate."[185] The Resolution was manifested when the Senators filed a Petition for Declaratory Relief and Mandamus with the Supreme Court to clarify its role as an institution in the cancellation of treaties.

Indubitably, the withdrawal from the VFA by the President requires Senate concurrence based on the guidelines set forth in *Pangilinan v. Cayetano.*

CONCLUSION

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[180] *See* page 182.
[181] *Pangilinan*, G.R. Nos. 238875, at 54. (Emphasis supplied.)
[182] *Supra* note 4.
[183] *Supra* note 5.
[184] *Pangilinan*, G.R. Nos. 238875, at 55.
[185] S. Res. No. 39, 18th Cong., 1st Reg. Sess. (2020).

The beauty in the mirror principle is that it neither favors unilateral abrogation of a treaty by the President, exclusively, nor a Senate concurrence to every withdrawal from a treaty made by the President, exclusively. Instead, it accommodates the shared responsibility of the President and the Senate over treaties. At the same time, it recognizes the realities of exigencies that require the President to exercise what Justice Santiago M. Kapunan called "on-the-spot decisions that may be imperatively necessary in emergency situations to avert great loss of human lives and mass destruction of property."[186] Professor Koh also recognizes that for the mirror principle to be workable, "any constitutional approach must be able to accommodate all political exigencies."[187] Moreover, according to Professor Koh, the mirror principle is substance-dependent, which makes it flexible enough to consider the subject matter of the treaty or international agreement instead of relying merely on the legislature's degree of legislative participation in the entrance to the treaty or international agreement.[188] In other words, the mirror principle is substance-dependent because it considers "which branch of government has substantive constitutional prerogatives to make law in any particular area of foreign policy."[189] What is clear is that a blanket rule allowing a unilateral abrogation of a treaty or international agreement by the President is against "the announced policy of the 1986 Constitutional Commission, which was precisely to limit rather than expand presidential powers."[190] Having the mirror principle can protect lawfully entered treaties and international agreements from the whims and caprice of transient politicians in public office. Applying the mirror principle,[191] the termination of the VFA requires Senate concurrence. A ruling from the Supreme Court recognizing the Senate's power in the process of termination of a treaty can bolster the deterrent effect of the VFA since it will provide the VFA with more stable and legitimate status.

The negative implications of the blanket power to unilaterally abrogate a treaty by the President can also affect the State's ability to conduct foreign policy, the ability to negotiate treaties, and the legal rights derived from a treaty that are deeply entrenched in the Philippine legal system. Professor Koh stated that as "a functional matter, an overbroad unilateral executive withdrawal power would not only risk overly hasty, partisan, or parochial withdrawals by Presidents, but would also tend to weaken systemic stability and the

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[186] *Integrated Bar of the Philippines v. Zamora*, 338 SCRA 81, 111 (2000).
[187] Koh, *supra* note 91, at 463.
[188] *Id.*
[189] Koh, *supra* note 91, Abstract, at 432.
[190] *Marcos v. Manglapus,* 177 SCRA 668, 715–716, (1989) (Cruz, J., dissenting opinion).
[191] Koh, *supra* note 136.

negotiating credibility and leverage of all Presidents."[192] Professor Helfer augments this by stating that:

> [T]reaties that permit easy denunciation may also create impediments to future cooperation. One concern is that a State will invoke a denunciation or withdrawal clause (or credibly threaten to do so) whenever economic, political, or other pressures make compliance costly or inconvenient. Seen from this vantage point, an exit provision enables a State to quit a treaty and, after the withdrawal takes effect, engage in conduct that would have been a violation had it remained a member of the agreement. But the risks of exit extend beyond such opportunistic behaviour. States that prefer to cooperate but fear that their treaty partners may withdraw from the agreement also have less incentive to invest in treaty compliance.[193]

Secretary Locsin mentioned such fact during the hearing before the Senate Foreign Relations Committee last February 6, 2020:

> While the VFA is a bilateral agreement between the Philippines and the US, there may be repercussions in the way other US-allied and/or US-friendly countries – e.g. Japan, Australia, South Korea, Singapore, and Israel – perceive and/or conduct their foreign relations with the Philippines should it be decided that the agreement be terminated.
>
> Philippine credibility to deliver on mutual military arrangements to maintain peace and stability in the region depend as much, if not more, on our American alliance. Behind us, is a sense of American support.[194]

As previously mentioned in Part II (B) of this Article, it is essential that the Philippines maintain its alliances with its fellow ASEAN Countries and long-time allies in the United States, Japan, South Korea, and Australia in countering the aggression of the Chinese in the South China Sea.[195] Such alliance and cooperation will help ensure that there is freedom of navigation and overflight in the South China Sea and that there are no overlaps between the Exclusive Economic Zones of the Philippines, Vietnam, and Malaysia in the Spratly's area.[196]

Moreover, Professor Koh states that an abrupt withdrawal from a treaty is difficult due to all the legal rights that domestic actors have relied upon since treaties are a part of the law of the land.[197] Furthermore, Professor Koh states

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[192] Koh, *supra* note 91, at 450.
[193] Helfer, *supra* note 102, at 648.
[194] Locsin, *supra* note 61.
[195] *See* page 192.
[196] Justice Antonio T. Carpio, Speech delivered at the 73rd Commencement Exercises of the Ateneo Law School, Areté, Ateneo De Manila University (July 14, 2019), *available at* https://ateneo.edu/a ps/law/new s/justice-carpio-graduates-aspire-rule-justice#:~:text=At%20the%20Ateneo%20Law%20School's,and %20the%20rule%20of%20justice. (last visited Sept. 15, 2020).
[197] Koh, *supra* note 91, at 455.

that "those treaties lay a foundation upon which, over time, sedimentary layers of legal acts, executing legislation, and court decisions build a deeply internalized framework of transnational law that embeds treaty membership strongly into the domestic fabric of political life."[198] Therefore, there can be many negative consequences in policymaking that can occur if the President has a blanket power to abrogate a treaty unilaterally. Ultimately, instead of aiding the President, the adverse effects on policymaking by a blanket power to unilaterally abrogate a treaty can compromise the President's mandate of being the sole organ of the State in the conduct of foreign affairs. As an example of this, one need not look further than the abrogation of the VFA. In his separate concurring opinion in *Saguisag v. Ochoa*,[199] Justice Carpio spoke of the realities for the Philippines not having the VFA in its pursuit of protecting its territory and its exclusive economic zone:

> The Philippines, acting by itself, cannot hope to deter militarily China from enforcing its 9-dashed lines claim in the West Philippine Sea. The Philippines cannot acquire war materials like anti-ship and anti-aircraft missiles off the shelf. The operation of anti-ship missiles requires communications with airborne radar or satellite guidance systems. With the completion of China's air and naval bases before the end of 2016, the Philippines has no time to acquire, install and operate an anti-ship missile system on its own. Military and security analysts are unanimous that there is only one power on earth that can deter militarily China from enforcing its 9-dashed lines claim, and that power is the United States. *This is why the MDT is utterly crucial to the Philippines' defense of its EEZ in the West Philippine Sea.*[200]

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[198] *Id.*

[199] *Saguisag,* G.R. Nos. 212426.

[200] Id. at 4–5 (Carpio, *J.*, *separate concurring opinion*). (Emphasis supplied.)