EN BANC

G.R. No. 204605 – INTELLECTUAL PROPERTY ASSOCIATION OF THE PHILIPPINES, Petitioner **v. HON. PAQUITO OCHOA, IN HIS CAPACITY AS EXECUTIVE SECRETARY, HON. ALBERT DEL ROSARIO, IN HIS CAPACITY AS SECRETARY OF THE DEPARTMENT OF FOREIGN AFFAIRS, AND HON. RICARDO BLANCAFLOR, IN HIS CAPACITY AS THE DIRECTOR GENERAL OF THE INTELLECTUAL PROPERTY OFFICE OF THE PHILIPPINES,** Respondents.

Promulgated:
July 19, 2016

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SEPARATE CONCURRING OPINION

LEONEN, *J.*:

In September 2011, upon the Intellectual Property Association of the Philippines' recommendation, the Department of Foreign Affairs endorsed to the President the accession to the Madrid Protocol.[1] The Department of Foreign Affairs classified the Madrid Protocol as an executive agreement that does not need ratification by the Senate[2] under Executive Order No. 459,[3] which provides:

> **SEC. 9. *Determination of the Nature of the Agreement.*** – The Department of Foreign Affairs shall determine whether an agreement is an executive agreement or a treaty. (Emphasis in the original)

On March 27, 2012, Former President Benigno C. Aquino III ratified the Madrid Protocol through an instrument of accession later deposited with the Director General of the World Intellectual Property Organization.[4]

On July 25, 2012, the Madrid Protocol was entered into force.[5]

Petitioner Intellectual Property Association of the Philippines filed this Special Civil Action for Certiorari[6] to assail the validity of the President's accession to the Madrid Protocol. It implies that the President

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1 *Rollo*, p. 108, OSG Comment.
2 Id. at 19–21, Petition.
3 Providing for the Guidelines in the Negotiation of International Agreements and its Ratification (1997).
4 *Rollo*, p. 14.
5 Id.
6 Id. at 3–34.

usurped the Senate's power to ratify treaties under our Constitution.[7] It argues that the Department of Foreign Affairs gravely abused its discretion in classifying the Madrid Protocol as an executive agreement instead of a treaty that requires senate concurrence.[8]

I

The ponencia proposes that we rule that although petitioner has no legal standing to file the petition, the issues involved in this case are of transcendental importance warranting this Court's exercise of its power of judicial review.

I concur with the able ponencia of my esteemed colleague Associate Justice Lucas P. Bersamin, finding that petitioner has no legal standing to bring this suit. Within our jurisdiction, petitioner's standing in a constitutional suit is still premised on a personal, direct, and material injury. Whether this right is shared with the public in general or only with a defined class does not matter. It is clear in this case that the affected practitioners in intellectual property actions are different from their incorporated association. As pointed out in the ponencia,[9] this holding is consistent with cases such as *Agan v. PIATCO*[10] and *De Castro v. Judicial and Bar Council*.[11] It is likewise consistent with *Integrated Bar of the Philippines v. Zamora*,[12] among others.

Neither should locus standi be immediately negated by an invocation of the concept of transcendental interest. The use of this exception to waive the requirement of locus standi is now more disciplined. In *Chamber of Real Estate and Builders' Association, Inc. v. Energy Regulatory Commission, et al.*,[13] this Court adopted the following determinants of whether an issue is of transcendental importance:

> (1) the character of the funds or other assets involved in the case; (2) the presence of a clear case of disregard of a constitutional or statutory prohibition by the public respondent agency or instrumentality of the government; and (3) the lack of any other party with a more direct and specific interest in the questions being raised.[14] (Citations omitted)

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7 Id. at 17.
8 Id. at 19–21.
9 Ponencia, pp. 7–8.
10 450 Phil. 744 (2003) [Per J. Puno, En Banc].
11 629 Phil. 629 (2010) [Per J. Bersamin, En Banc].
12 392 Phil. 618 (2000) [Per J. Kapunan, En Banc].
13 638 Phil. 542 (2010) [Per J. Brion, En Banc].
14 Id. at 557.

None of the above determinants are present in this case. This is not a case that involves funds, assets, or disregard of constitutional or statutory prohibition. None of the parties can claim direct interest in the issues raised.

For now, we provide a more studied balance between the need to comply with this Court's duty in Article VIII, Section 1[15] of the Constitution and its inherent nature as not being an advisory organ. We should continue our policy of judicial deference, albeit with vigilance against grave abuse of discretion, which have untold repercussions on fundamental constitutional rights.

Parenthetically, the Solicitor General presents the argument that certiorari under Rule 65, Section 1 of the Rules of Court is not the proper remedy for this action.[16] He correctly clarifies that the Secretary of the Department of Foreign Affairs was not exercising a judicial or quasi-judicial function when it determined that the Madrid Protocol was an executive agreement based on the powers granted by the President in Executive Order No. 459.[17] Nor does a Rule 65 certiorari lie against the President's accession to the Madrid Protocol on March 27, 2012.[18] This, too, is not a judicial or quasi-judicial function.

However, the procedural vehicle notwithstanding, the Rules of Court cannot limit the powers granted to this Court by the Constitution itself. Recalling Article VIII, Section 1 of the 1987 Constitution, judicial power includes "the duty . . . to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government."[19]

This constitutional mandate is sparse in its qualification of the nature of the action of "any branch or instrumentality of the government." Whether this Court may limit it only to judicial or quasi-judicial actions will be constitutionally suspect. The requirement is that there should be, in a justiciable case, a clear showing that there is "grave abuse of discretion amounting to lack or excess of jurisdiction."[20]

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[15] CONST., art. VIII, sec. 1 provides:
SECTION 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.
Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

[16] *Rollo*, pp. 114–115.

[17] Id. at 114.

[18] Id. at 115.

[19] CONST., art. VIII, sec. 1.

[20] CONST., art. VIII, sec. 1.

This constitutional mandate does not do away with the policy of judicial deference. Neither can it be read as changing the passive judicial temperament of this Court to active interference in the acts of the other constitutional departments and organs of government.[21] There must still be a justiciable case with a ripe and actual controversy.[22] The requirement to find "grave abuse of discretion" is a high bar. It requires capriciousness, arbitrariness, and actions without legal or constitutional basis.[23]

In my view, the Constitution itself has amended the Rules of Court impliedly, and we have recognized its effects in various cases. As in all implied amendments, this has been the occasion for not a few misinterpretations.

Thus, it is time for this Court to expressly articulate, through amendments of Rule 65, the constitutional mandate that we have so far been implementing.

II

The ponencia proposes to declare the President's accession to the Madrid Protocol a valid executive agreement that does not need to be ratified by the Senate.

Respectfully, I disagree.

I am not prepared to grant that the President can delegate to the Secretary of the Department of Foreign Affairs the prerogative to determine whether an international agreement is a treaty or an executive agreement. Nor should this case be the venue to declare that all executive agreements need not undergo senate concurrence. Tracing the history of Article VII, Section 21 of the Constitution reveals, through the "[c]hanges or retention of language and syntax[,]"[24] its congealed meaning. The pertinent constitutional provision has evolved into its current broad formulation to ensure that the power to enter into a binding international agreement is not concentrated on a single government department.

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21 *See Angara v. Electoral Commission,* 63 Phil. 139, 157–159 (1936) [Per J. Laurel, En Banc].

22 CONST., art. VIII, sec. 1.

23 J. Leonen Concurring Opinion in *Poe-Llamanzares v. Commission on Elections*, G.R. No. 221697, March 8, 2016 <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/march2016/221697_leonen.pdf> 25 [Per J. Perez, En Banc].

24 Id. at 54.

The 1935 Constitution recognized the President's power to enter into treaties. The exercise of this power was already limited by the requirement of legislative concurrence only with treaties, thus:

ARTICLE VII
EXECUTIVE DEPARTMENT

. . . .

SECTION 11. . . .

. . . .

(7) The president shall have the power, with the concurrence of a majority of all the Members of the National Assembly ***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 ministers duly accredited to the Government of the Philippines. (Emphasis supplied)

The 1973 Constitution also requires legislative concurrence for the validity and effectiveness of a treaty, thus:

ARTICLE VIII
THE NATIONAL ASSEMBLY

. . . .

SECTION 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 National Assembly. (Emphasis supplied)

The concurrence of the Batasang Pambansa was duly limited to treaties.

However, the first clause of this provision, "[e]xcept as otherwise provided[,]" leaves room for the exception to the requirement of legislative concurrence. Under Article XIV, Section 15 of the 1973 Constitution, requirements of national welfare and interest allow the President to enter into not only treaties but also international agreements without legislative concurrence, thus:

ARTICLE XIV
THE NATIONAL ECONOMY AND THE PATRIMONY OF THE NATION

. . . .

> SECTION 15. Any provision of paragraph one, Section fourteen, Article Eight and of this Article notwithstanding, the Prime Minister may enter into international treaties or agreements as the national welfare and interest may require.

This Court, in the recent case of *Saguisag v. Executive Secretary*,[25] characterized this exception as having "left a large margin of discretion that the President could use to bypass the Legislature altogether."[26] This Court noted this as "a departure from the 1935 Constitution, which explicitly gave the President the power to enter into treaties only with the concurrence of the [National Assembly]."[27]

As in the 1935 Constitution, this exception is no longer present in the current formulation of the provision. The power and responsibility to enter into treaties is now shared by the executive and legislative departments. Furthermore, the role of the legislative department is expanded to cover not only treaties but international agreements in general as well, thus:

> ARTICLE VII
> Executive Department
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> . . . .
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> 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. (Emphasis supplied)

In discussing the power of the Senate to concur with treaties entered into by the President, this Court in *Bayan v. Zamora*[28] remarked on the significance of this legislative power:

> For the role of the Senate in relation to treaties is essentially legislative in character; 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

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[25] G.R. No. 212426, January 12, 2016 <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/january2016/212426.pdf> [Per C.J. Sereno, En Banc].

[26] Id. at 7.

[27] Id.

[28] 396 Phil. 623 (2000) [Per J. Buena, En Banc].

> legislative act are beyond the ambit and province of the courts to inquire.[29] (Emphasis supplied, citations omitted)

Therefore, having an option does not necessarily mean absolute discretion on the choice of international agreement. There are certain national interest issues and policies covered by all sorts of international agreements, which may not be dealt with by the President alone. An interpretation that the executive has unlimited discretion to determine if an agreement requires senate concurrence not only runs counter to the principle of checks and balances; it may also render the constitutional requirement of senate concurrence meaningless:

> If executive-agreement authority is un-contained, and if what may be the proper subject-matter of a treaty may also be included within the scope of executive-agreement power, the constitutional requirement of Senate concurrence could be rendered meaningless. The requirement could be circumvented by an expedient resort to executive agreement.
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> The definite provision for Senate concurrence in the Constitution indomitably signifies that there must be a regime of national interests, policies and problems which the Executive branch of the government cannot deal with in terms of foreign relations except through treaties concurred in by the Senate under Article VII, Section 21 of the Constitution. The problem is how to define that regime, i.e., that which is outside the scope of executive-agreement power of the President and which exclusively belongs to treaty-making as subject to Senate concurrence.[30]

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

As long as the subject matter of the agreement covers political issues and national policies of a more permanent character, the international agreement must be concurred in by the Senate.

However, it may be unnecessary in this case to determine whether the Madrid Protocol amends Section 125 of the Intellectual Property Code.[31] The Solicitor General makes a persuasive argument that the accession to this international agreement does not per se remove the possibility of appointing a resident agent. Petitioner likewise acknowledges that domestic

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[29] Id. at 665.
[30] MERLIN M. MAGALLONA, A PRIMER IN INTERNATIONAL LAW 66–67 (1997).
[31] Rep. Act No. 8293 (1998).

requirements regarding local representation may be reserved by the executive upon accession to the Madrid Protocol, thus:

> 7.43 Under the *"Guide to the International Registration of Marks under the Madrid Agreement and the Madrid Protocol"*, the matter in relation to the appointment of a local representative before the Office of origin or the Office of a designated Contracting Party is outside the scope of the *Madrid Protocol* and is instead governed by the law and practice of the Contracting Party concerned. As such, there was no hindrance whatsoever for the Executive to have made a reservation when it acceded to the *Madrid Protocol*, to require foregoing applicants to obtain local representation in the Philippines upon the filing of trademark applications with the latter as the designated contracting party. Otherwise, the Executive should not have acceded to the *Madrid Protocol* without the concurrence of the Philippine Congress or should have done so only pursuant to an act of Congress.[32]

However, the proper calibration of these rights and privileges should await the proper case filed by a party with direct, personal, and material interest before the full range of legal arguments occasioned by the concrete realities of the parties can be fully appreciated.

I have no doubt that many of the lawyers who practice in the field of trademark protection in Intellectual Property Law do not have the myopic goal of simply being administrative agents or local post offices for owners of foreign marks. I have full confidence that they can meet the skill and accreditation requirements to work under the Madrid Protocol as well as any foreign lawyer. In an era of more transnational transactions and markets evolving from national boundaries, we should adapt as a profession, as surely as our products become more competitive. The sooner our profession adapts, the better it can assist our entrepreneurs and our own industries to weather the difficult political economies of the world market.

ACCORDINGLY, I vote to **DISMISS** the Petition for Certiorari.

MARVIC M.V.F. LEONEN
Associate Justice

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[32] *Rollo*, p. 343, Petitioner's Memorandum.