IMPLEMENTATION OF INTERNATIONAL AGREEMENTS AND THE SELF-EXECUTING AND NON-SELF-EXECUTING DICHOTOMY: THE CASE OF THREE HCCH CONVENTIONS

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Abstract

While the negotiation of and entry into international agreement are vital in treaty-making, equally important is the transformation of such agreement into the domestic legal system and the implementation of its provisions. A central issue in this phase is whether or not a particular agreement is "self-executing," i.e., if it can be carried out or enforced using existing legal authorities and without the need for further action by the legislature or the courts. This article examines this issue by analyzing the Philippines' accession to, and implementation of, three conventions (Inter-country Adoption, Apostille, and Service Conventions) under the Hague Conference of Private International Law, all intended to facilitate cross-border transactions. It then recommends certain standards — namely the States Parties' intent, specificity, non-prohibition, existence of legal right, and practicability —

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in making a determination whether an international agreement is self-executing or otherwise.

Introduction

Since the Philippines' accession to the Statute of the Hague Conference on Private International Law ("HCCH") in 2010, the robust portfolio of private international law conventions under the Conference's auspices have come to light. This is no less driven by a convergence of state policies and private sector representations to facilitate cross-country transactions and hasten the disposition of civil and commercial cases through various means, including multilateral international agreements. For its part, the Department of Foreign Affairs ("DFA") had wanted to streamline certain consular processes, and so took the lead in the country's accessions in 2018 to the Apostille Convention, and in 2020, to the Service Convention, in coordination with the Supreme Court of the Philippines.

Indeed, "cross-country" and "facilitation" are in the heart of private international law. Touted as one of the most "dynamic and rapidly evolving field of direct relevance to sophisticated lawyers [and the present co-authors would add, 'and other stakeholders'] working in a broad spectrum of international and transactional contexts,"[1] private international law has seen a surge of importance in the twenty-first century and even during the COVID-19 pandemic when globalization is largely driven by private activity.[2]

Ratification of international agreements—particularly multilateral ones, whether in the public or private international law spheres—requires an assessment of their potential benefits and costs, the so-called National Interest Analysis,[3] with the obligations arising therefrom requiring good faith state implementation. In certain instances, the country's legal and operational frameworks may need to be amended and harmonized (through the passage of implementing legislation or administrative regulation) to conform with the obligations. The oft-repeated debate on how international agreements are

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[1] David P. Stewart, *Private International Law: A Dynamic and Developing Field Anniversary Contributions - Private International Law*, 30 U. Pa. J. Int'l L. 1121 (2009).

[2] *Id.*

[3] J. Eduardo Malaya and Rommel J. Casis, Treaties: Guidance to Practices and Procedures 28 (University of the Philippines Law Center, 2018) (citing Department of Foreign Affairs O. No. 21-99).

transformed into a domestic legal system, and whether particular agreements are self-executing or not, are determinative of a state's success in operationalizing these provisions.

In the context of the Apostille and Service Conventions, the central issues that the diplomat-lawyers at the DFA Office of Treaties and Legal Affairs ("OTLA") had to address were the nature of these Conventions and the mode of implementation. Specifically, this refers to whether the obligations required legislations for their implementation (i.e., the agreements are deemed "non-self-executing") or may already be carried out using existing legal authorities (i.e., the agreements are "self-executing").

This article thus seeks to examine the nature of agreements and their implementation, as well as the factors which may be considered in determining whether particular agreements are self-executing or otherwise.[4] It is divided into four parts: the first part shall review the concept of treaties and executive agreements, and the jurisprudence on self-executing and non-self-executing agreements. The second part will provide an overview of private international law in the Philippines and the HCCH, the foremost intergovernmental organization in private international law, to which the Philippines is a state party. It will also examine three HCCH Conventions (Intercountry Adoption, Apostille and Service) acceded to by the country. In the third part, the implementation of these Conventions will be analyzed in light of the factors used in making the self-executing/non-self-executing dichotomy, including the framework for making such classification. Finally, the article will conclude with a restatement of the key principles discussed, and lay the importance of prompt and good-faith implementation of agreements.

I. Implementation of Agreements: Classification Between Self-Executing and Non-Self-Executing

Section 21, Article VII of the 1987 Philippine Constitution states 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." A treaty or an international agreement would therefore need the ratification by the President and the

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[4] For this paper, the term "agreement" may be used interchangeably with international agreement or treaties. However, executive agreements shall be referred to specifically as such.

concurrence to the said ratification by the Senate before it becomes valid and effective.

The term "treaty" is used in this article in its domestic law sense—an international agreement that underwent Senate concurrence, as required under the Philippine Constitution—and not as understood in international law. The distinction between treaties and executive agreements has no bearing in the international law sphere because a treaty under the Vienna Convention on the Law of Treaties generally means "an international agreement 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."[5]

Consequently, an executive agreement is also a "treaty" under international law since there is no distinction as to the manner by which an agreement may have been approved or confirmed domestically. While domestic law may call an instrument an executive agreement, it is still a treaty under the Vienna Convention on the Law of Treaties if it complies with the elements provided under Art. 2(1)(a) thereof, notably that it is legally binding under international law and not a non-legally binding memorandum of understanding.

Under domestic laws, however, the phrase "treaty or international agreement" in Section 21, Article VII of the Constitution must be examined in light of a series of Supreme Court decisions clarifying its coverage.

A. Treaties and Executive Agreements

In the seminal case *USAFFE v. Treasurer of the Philippines*,[6] the Supreme Court stated that:

> [A] treaty is not the only form that an international agreement may assume. For the grant of the treaty-making power to the Executive and the Senate does not exhaust the power of the government over international relations. Consequently, executive

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

[6] USAFFE v. Treasurer of the Philippines, G.R. No. L-10500, June 30, 1959.

> agreements may be entered with other states and are effective even without the concurrence of the Senate...[7]

In addition to a treaty, which is defined as an international agreement entered into by the Philippines requiring legislative concurrence after executive ratification,[8] the government can enter into an executive agreement, an instrument that is similar to a treaty, but does not require legislative concurrence to enter into force.[9]

The Supreme Court, in *Commissioner of Customs v. Eastern Sea Trading*,[10] elaborated on the distinction between the two instruments in this manner:

> International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements.[11]

An international agreement which would conflict with existing laws and thus require amendment of said laws should take the form of a treaty (and therefore also require Senate concurrence). Thus, those that may be at variance with or entail departure from established national policies (e.g., archipelagic doctrine),[12] need the enactment of legislation for its implementation, or with provisions that criminalizes certain conduct will all require Senate concurrence.[13]

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[7] *Id.*

[8] EXEC. ORDER NO. 459, s. 1997 ("Providing For The Guidelines In The Negotiation Of International Agreements And Its Ratification"). This term may include compacts, conventions, covenants, and acts.

[9] Exec. Order No. 459 (1997), §2(c).

[10] Commissioner of Customs v. Eastern Sea Trading, G.R. No. L-14279, Oct. 31, 1961.

[11] *Id.*

[12] J. EDUARDO MALAYA AND MARIA ANTONINA-OBLENA, PHILIPPINE TREATIES INDEX 1946-2010 7 (2010); *see also* MALAYA & CASIS, *supra* note 3, at 11.

[13] MALAYA & CASIS, *supra* note 3, at 11-13. The following categories of agreements, among others, have been classified as treaties: status of forces agreement/visiting forces agreement; comprehensive free trade agreement and economic partnership agreement whose provisions go

On the other hand, executive agreements are those considered to embody the "*adjustments of detail* carrying out well-established national policies" and involve arrangements of temporary nature, such as cultural, scientific and technological cooperation, economic cooperation, and labor promotion and protection agreements.[14]

As to executive agreements, *USAFFE Veterans Association*[15] is also instructive in categorizing it into two classes: "(a) agreements made purely as executive acts affecting external relations and independent of or without legislative authorization, which may be termed Presidential Agreements, and (b) agreements entered into in pursuance of acts of Congress, which may be designated as Congressional-Executive Agreements." To the latter can be added, in the present co-authors' view, international agreements entered into pursuant to a treaty concurred in by the Senate, the congressional body entrusted under the Constitution with matters pertaining to foreign policy.

At the heart of these pronouncements is the primacy of the executive in matters relating to foreign relations. As observed by eminent constitutionalist Dean Joaquin G. Bernas, S.J.:

> If one must look for a specific constitutional justification for such practice... it is submitted that through such executive agreements the President merely carries out his duty to 'ensure that the laws will be faithfully executed.' What the President does in such situations would be unlike the formulation of administrative regulations by administrative agencies pursuant to a delegating law.

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beyond the President's tariff-setting powers under Section 28(2), Article VI of the Constitution; agreement on the avoidance of double taxation; headquarters/host country agreement which grants immunities upon the headquarters of an international organization; and agreement on the transfer of sentenced persons (since the exercise of criminal jurisdiction is based on the territoriality principle).

[14] *Id.* The other agreements classified as executive agreements include air services agreement; defense cooperation agreement; mutual logistics support agreement; agreement on gainful employment of spouses of members of diplomatic and consular missions; investment promotion and protection agreement; maritime agreement; waiver of visa requirement agreement; and trade cooperation/facilitation agreements, such as those among ASEAN countries.

[15] USAFFE v. Treasurer of the Philippines, *supra* note 6.

Administrative regulations do not need confirmation by Congress but draw their strength from the delegating law.[16]

The 1987 Constitution also carries this understanding. The debate among the members of the Constitutional Commission ("CONCOM") on the concept of executive agreement is a result of the proposed resolution of Commissioner Hilario Davide, Jr. entitled "Resolution To Incorporate In The New Constitution A Provision Requiring The Approval Or Consent Of The Legislature For The Effectivity And Validity Of Treaties, Executive Agreements And Recognition Of States Or Governments," which would eventually become Section 21, Article VII of our present Constitution.[17]

The debate was on whether or not executive agreements should be reviewed by the legislature.[18] There were earlier confusions on the definition of an executive agreement, with Commissioner Roberto Concepcion arguing that "[e]xecutive agreements are generally made to implement a treaty already enforced or to determine the details for the implementation of the treaty"— "details of which do not affect the sovereignty of the State."[19] To complement this, Commissioner Felicitas Aquino agreed with the latter definition, adding that "except that it does not cover the first kind of executive agreement which is just protocol or an exchange of notes and this would be in the nature of reinforcement of claims of a citizen against a country, for example."[20] Commissioner Aquino then proposed an amendment, which read: "No treaty or international agreement EXCEPT EXECUTIVE AGREEMENTS shall be valid and effective," in the belief that executive agreements should be excepted from the requirement of concurrence of two-thirds of the Members of the Senate.[21]

Nonetheless, for then Commissioner Fr. Bernas, this amendment is unnecessary.[22] He pointed out the Supreme Court decision in *Commissioner of*

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[16] JOAQUIN BERNAS, S.J., THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 906 (2003).

[17] Alain B. Baguisi and Jilliane Joyce R. De Dumo, *Executive Agreements: The Ties That Don't Quite Bind* (2012), U.P. College of Law (unpublished).

[18] *Id.*

[19] *See* Record of the 1986 Constitutional Commission, Volume II.

[20] *Id.*

[21] *Id.*

[22] Baguisi & De Dumo, *supra* note 17.

Customs v. Eastern Sea Trading[23] where the "right of the executive to enter into binding agreements without the necessity of subsequent Congressional approval has been confirmed by long usage... [t]he validity of this has never been seriously questioned by our Courts." He also cited the case of *Gonzales v. Hechanova*[24] as instructive as to the nature of executive agreements.[25] Furthermore, Fr. Bernas added that what are referred to as international agreements which need the concurrence of at least two-thirds of the members of the Senate are those permanent in nature, as opposed to executive agreements which are temporary.[26]

It is for this reason that Commissioner Aquino decided to withdraw her proposed amendment.[27] The deliberations eventually adopted the principle that international agreements do not include the term executive agreements. Thus, the concurrence of at least two-thirds of all the members of the Senate is not needed for an executive agreement to be valid and effective.

These policies and practices would later be codified in Executive Order No. 459, series of 1997, issued by the Office of the President,[28] which requires that authorization from the President be secured prior to negotiating agreements. This authorization may be in the form of a Full Powers and instructions, in cases of changes in national policy or those involving international arrangements of a permanent character entered into in the name of the Government of the Republic of the Philippines; and written authorization or Special Authority in cases of other agreements, such as those classified as executive agreements.[29]

Discussed thus far are the negotiation of an international agreement and its transformation into the domestic legal order—through presidential ratification and Senate concurrence in the case of a treaty, and solely through presidential ratification in the case of an executive agreement. This, however, pertains to the entry phase, and not yet the implementation of the agreement, although the two phases are closely linked. As earlier opined, the consideration of how the agreement will be approved domestically considers its impact on existing law or

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[23] Commissioner of Customs v. Eastern Sea Trading, *supra* note 10.

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

[25] *Id.*

[26] *Id.*

[27] Baguisi & De Dumo, *supra* note 17.

[28] *See* MALAYA & MENDOZA-OBLENA, *supra* note 12, at 512.

[29] *Id.* at 26.

national policy and the manner of its implementation. The discussion now proceeds to the implementation phase.

B. *Treaty as Law of the Land*[30]

The Constitution states that an international agreement once concurred in by the Senate becomes "valid and effective."[31] This means that it becomes domestic law.[32] The Senate's concurrence makes the treaty "legal[ly] effective and binding by transformation… [and] has the force and effect of a statute enacted by Congress."[33] It would then be "in the same class" as a law.[34]

A treaty, therefore, assumes a double character: one, a source of international obligation on the part of the Philippines under international law, and second, as domestic law, where it is also a source of rights and duties for individuals, whether natural or juridical persons.[35]

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[30] U.S. CONSTITUTION, art. VI states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (underscoring supplied)

[31] There are two methods on how international law can find itself in the Philippine legal framework: the doctrines of incorporation and transformation. In *PIHAP vs. Duque* (G.R. No. 173034, Oct. 9, 2007), the distinction between the two doctrines were explained: "[u]nder 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 legislation. The incorporation method applies when, by mere constitutional declaration, international law is deemed to have the force of domestic law."

[32] MERLIN MAGALLONA, FUNDAMENTALS OF PUBLIC INTERNATIONAL LAW 543 (2005) (citing Guerrero's Transportation Services v. Blayblock Transportation Services Employees Association-Kilusan, G.R. No. L–41518, June 30, 1976). (According to the Supreme Court, "[a] treaty has two (2) aspects — as an international agreement between states, and as municipal law for the people of each state to observe.")

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

[34] MAGALLONA, *supra* note 32, at 552 (citing Abbas v. Commission on Elections, 179 SCRA 287 (1978)).

[35] *Id.,* at 544. It was noted that the treaty becomes valid and effective upon Senate concurrence provided it has also entered into force by its own provisions.

Having the impact of statutory law, a treaty can amend or prevail over prior statutory enactment.[36] It takes precedence over any prior statutory enactment,[37] and following the principle *lex posterior derogat priori*, it can repeal or amend a statute, in the same manner that a statute may repeal an earlier treaty."[38] While a treaty has the force and effect of law and can amend or prevail over prior statutory enactments, an executive agreement has no such effect.[39]

For instance, in *Marubeni v. Commissioner of Internal Revenue*,[40] the Supreme Court applied the special rate of corporate income tax for non-resident corporation as fixed by the PH-Japan Tax Convention. It gave effect to the Convention which amended the Internal Revenue Code by reducing the tax rate from 35% (under the Code) to not exceeding 25% of the gross income (under the Tax Convention),[41] at least with respect to Japanese corporations. This is an example of a treaty taking precedence over a statutory enactment.

C. *Treaty and its Self-Executing Nature Generally*

In his book *Fundamentals of Public International Law*,[42] Dean Merlin Magallona summarized the state of jurisprudence on the matter in the following manner:

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[36] *See* Intellectual Property Association of the Philippines v. Ochoa, G.R. No. 204605, July 19, 2016.

[37] Bayan Muna v. Romulo, G.R. No. 159618, February 1, 2011.

[38] Secretary of Justice v. Hon. Ralph Lantion and Mark Jimenez, G.R. No. 139465, Oct. 17, 2000.

[39] Intellectual Property Association of the Philippines v. Ochoa, G.R. No. 204605, July 19, 2016.

[40] Marubeni v. Commissioner of Internal Revenue, G.R. No. 76573, September 14, 1989.

[41] *Id.*

[42] MAGALLONA, *supra* note 32. In U.S. jurisprudence, there is an expectation that treaties would be self-executing, or at least that the courts would apply treaties to the fullest extent possible, in light of Article VI of the U.S. Constitution which states that a treaty is "the supreme Law of the Land." (Philip Trimble, UNITED STATES FOREIGN RELATIONS LAW, 2002, 152-154). As stated in the Reporter's Notes to the Restatement (Third) of Foreign Relations Law, "agreements that can be readily given effect by executive or judicial bodies … without further legislation, are deemed self-executing, unless a contrary intention is manifest. Obligations not to act, or to act only subject to limitations, are generally self-executing" (RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, Sec. 111, Reporter's Note 5, 1987). In the 1950s, then U.S. Senator John Bricker of Ohio proposed a constitutional amendment "stipulating that treaties would not go into force, unless approved by both houses of Congress and all forty-eight states, and requiring congressional action before executive agreements went into effect" (Duane A. Tananbaum, *The Bricker Amendment Controversy: Its Origins and Eisenhower's Role*, Diplomatic History, Volume 9, Issue 1, January

Q. Is a treaty self-executing, or does it require a further legislative or executive act to be a source of legal rights and obligations?

A. Generally, for a treaty to "be valid and effective," the Constitution requires only the concurrence of the Senate and no more.

Accordingly, the Supreme Court has applied treaties to which the Philippines is a part, as self-executing instruments, requiring no further prerequisite to their effectivity within Philippine jurisdiction. This is illustrated in Marubeni v. Commissioner of Internal Revenue (118 SCRA 500) as to the Tax Convention with Japan; in La Chemiste Lacoste v. Fernandez (129 SCRA 373) with respect to the Paris Convention for the Protection of Industrial Property; and in KLM Royal Dutch Airline v Court of Appeals (65 Phil. 237) as to the Convention for the Unification of Certain Rules Relating to International Air Travel (Warsaw Convention).

Based on Philippine ratification, the Supreme Court in WHO v. Aquino (48 SCRA 422) considers the Philippines bound by the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations (1 Phil. T.S 621). The Court then states: "This is a treaty commitment voluntarily assumed by the Philippines and as such as the force and effect of law."

1985, Pages 73–93, https://doi.org/10.1111/j.1467-7709.1985.tb00523.x) This clause would have meant that all treaties and international agreements in the U.S. would be non-self-executing, and prevented congressional implementation of a treaty by legislation that is outside constitutionally-granted legislative powers, thus overruling the U.S. Supreme Court's holding in *Missouri v. Holland.* (Curtis Bradley and Jack Goldsmith, FOREIGN RELATIONS LAW 6TH EDITION (2017), 336. *See also Missouri v. Holland,* 252 U.S. 416, 40 S. Ct. 382, 1920; *Case Brief,* at https://www.lexisnexis.com/community/casebrief/p/casebrief-missouri-v-holland. ["By U.S. Const. art. II, § 2, the power to make treaties is delegated expressly, and by U.S. Const. art. VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute implementing the treaty under U.S. Const. art. I, § 8, as a necessary and proper means to execute the powers of the government"]). The proposed amendment was defeated, thus "sav[ing] [the U.S. Constitution] from the most radical overhauling in its history" (*Tananbaum*, *supra*).

It is possible, however, that a treaty itself may provide for its application or enforcement through the enactment of a legislative act, or executive or administrative measures. (underscoring supplied)

Dean Bernas likewise stated that:

> Once Senate concurrence is given, the President may make the treaty ... If he does ... it is then that it binds as both international law and, where it touches domestic relations, also domestic law ... There may be instances when the language of the treaty need[s] further action by Congress before it can be fully implemented. For instance, the treaty itself might require the parties to enact implementing legislation as a pre-condition for its effectivity... Certainly, for instance, if the implementation of the treaty requires expenditure of public funds, congressional action would be needed.[43] (underscoring supplied)

An example of a treaty which requires legislation is the International Convention on the Elimination of All Forms of Discrimination, which obligates states parties "to declare an offense punishable by law all discrimination of ideas based on racial superiority or hatred" among other acts. For this purpose, Presidential Decrees Nos. 966 (July 20, 1976) and 1350-A (Apr. 17, 1978) were issued to implement it.[44] Similarly, treaties that raise taxes, require appropriation of funds, create criminal responsibility,[45] or are intended by the parties not to be so, are not self-executing. Relatedly, as civil and political rights enshrined in the Constitution have been deemed generally justiciable, and therefore self-executory, provisions pertaining to economic, social, and cultural rights are generally not self-executing.[46]

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[43] JOAQUIN G. BERNAS, S.J., FOREIGN RELATIONS IN CONSTITUTIONAL LAW 111-112 (1995).

[44] *Magallona*, *supra* note 32, at 548-549.

[45] PHILIP TRIMBLE, UNITED STATES FOREIGN RELATIONS LAW 160 (2002).

[46] The Supreme Court had in various cases consistently ruled that provisions dealing with civil and political rights can be taken cognizance by the Court even in the absence of implementing law from Congress. This is so since a reading of the Bill of Rights provisions yields a conclusion that these are all self-executing provisions, meaning, they are "complete in itself and become operative without the aid of supplemental or enabling legislation, or they supply a sufficient rule

From the above discussions, certain principles emerge: a treaty may be said to be "self-executing" if it can be implemented—or enforced through the courts at the behest of a litigant—without the need for any independent action by a legislative or executive official;[47] otherwise, it is non-self-executing. In contrast, an executive agreement need not necessarily be non-self-executing, or require legislative enactment for its implementation, particularly if it was entered into in pursuance of acts of Congress (or of the Senate in the case of a prior treaty), or if it "embod[ies] *adjustments of detail* carrying out well-established national policies and traditions" which can be implemented on the basis of existing law or presidential authorities.[48]

II. Private International Law in Philippine Practice

A. Private International Law as a Field of Practice in the Philippines

Though not as celebrated as public international law, private international law has a long history in the Philippine legal system. Defined as the "body of conventions, model laws, national laws, legal guides, and other documents and instruments that regulate private relationships across national borders,"[49] it is the dualistic character of private international law (i.e., balancing "international consensus with domestic recognition and implementation"[50]) that gives it a continuing relevance in light of globalization and the increased mobility of people and transactions.

Specifically, rapid globalization necessitates a stable set of laws that are both recognized and enforced by different states to which the transacting parties (or the transaction itself) have a close connection to. This is because "[t]he nexus between private international law and globalization is about responsiveness to a

by means of which the right it grants may be enjoyed or protected" (*see Manila Prince Hotel v. GSIS*. G.R. No. 122156, February 3, 19970). On the other hand, the economic, social, and cultural guarantees under the Constitution are generally non-self-executing; hence, violation of these may not be acted by the Court in the absence of a legislation from the Congress (*see* Tondo Medical Center Employees Association v. Court of Appeals, G.R. No. 167324, July 17, 2007).

47 TRIMBLE, *supra* note 45, at 152.

48 *See* USAFFE Veterans Association v. Treasurer of the Philippines, *supra* note 6.

49 Don Ford, *Private International Law,* AMERICAN SOCIETY OF INTERNATIONAL LAW, 3 (Aug. 2, 2013), https://www.asil.org/sites/default/files/ERG_PRIVATE_INT.pdf.

50 *Id.*

relative interdependence of legal systems,"[51] as "the conflict rules of a given legal system reflect the degree to which that system accommodates situations arising from elsewhere."[52] In this sense, should a dispute arise from an international commercial contract, there would be an endless course of suits filed in different states (which can afford a certain level of advantage to one of the transacting parties), if there is no controlling legal principle recognized by all parties involved. With the rising number of cross-border transactions concluded periodically, globalization cannot afford unstable legal systems, as "international commercial contract[s]… in its wider sense, is the motor of economic globalization."[53]

The Philippines is no less familiar to the situation. With the significant Filipino diaspora and increasing forays of Philippine companies in foreign markets, such as the Bench and Jollibee brands, the country has been faced with complex conflicts of law concerns, particularly in the field of family law and corporate disputes. From recognition and enforcement of divorce to issues on surrogacy and child support, it is clear that it is to the best interest of the Philippines to take an active participation in the development of conventions in this field and ensure that the rights and welfare of the Filipino community and corporate entities overseas are promoted and protected.

Thus comes the important role of international law experts and diplomats who have been in recent years looking into a body of work of international agreements,[54] municipal laws, and rules of procedures,[55] in an attempt to

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[51] Olusoji Elias, *Globalisation and private international law: reviewing contemporary local law,* 36 AMICUS CURIAE 5 (2001), https://sas-space.sas.ac.uk/3746/1/1319-1424-1-SM.pdf.

[52] *Id.*

[53] *Id.*

[54] *See* Elliot Cheatham, *Sources of Rules for Conflict of Laws*, 89 U. PA. L. REV. 430, 442 (1941), https://scholarship.law.upenn.edu/penn_law_review/vol89/iss4/2. The article stated that "[t]here was for long a doubt whether the treaty power extended over the whole field of Conflict of Laws. x x x These doubts have been completely dispelled, it is believed, by a series of recent cases. x x x Chief Justice Hughes stated the broad control of treaty-making power over Conflict of Laws: 'The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations, and agreement with respect to the rights and privileges of citizens of the United States in foreign countries, and of the nationals of such countries within the United States, and the disposition of property of aliens dying within the territory of the respective parties, is within the scope of that power, and any conflicting law of the State must yield.'"

[55] *See* D. Josephus Jitta, *The Development of Private International Law Through Conventions*, 29 YALE L.J. 497, 499 (1920), https://digitalcommons.law.yale.edu/ylj/vol29/iss5/2. The article stated that "[t]he conception that private international law should exclusively be part of the law of a country

streamline issues on jurisdiction, choice of law, and recognition and enforcement of foreign judgments, among others.[56]

As an advocate of private international law and with a mandate to negotiate international agreements,[57] the DFA led the push for the Philippines' membership in the HCCH in 2010, in order to adopt "best practices" (i.e., model standards) from other contracting states and contribute to the discussions on inter-state legal cooperation. As the designated national organ to the HCCH, the DFA facilitates regular inter-agency discussions to ensure that the Hague Conventions to which the Philippines is a Contracting Party are properly implemented, update the competent authorities in the Philippines on significant movements in the HCCH, and develop a Philippine position and strategy framework on other Hague Conventions which the country may accede to in the future. The co-authors of this paper proposed such a strategy framework or roadmap which also appeared in the 2020 article *The HCCH Conventions and their Practical Effects to Private International Law in the Philippines.*[58]

B. The Hague Conference on Private International Law (HCCH) and the Philippines

The leading international organization in the field of private international law is the Hague Conference on Private International Law or HCCH. The acronym HCCH stands for Hague Conference on Private International Law - Conférence de La Haye de droit international privé, its name in the English and French languages.

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is a too narrow conception. Private international law is certainly a matter of national regulation, it includes directions, given by the lawgiver of a country to the courts of the same country, for their guidance in matters connected with aliens, foreign laws and foreign judgments. But private international law may be considered from a higher point of view, that of a union of nations, or States… and even from the point of view of the collectivity of nations, acting as the public power of mankind and able to give to mankind universally working regulations. We have to discriminate, therefore, a national branch of private international law, and an international or universal branch. x x x"

[56] *See* Elizabeth Aguiling-Pangalangan, *International Judicial Cooperation through The Hague Conference of Private International Law*, 2017 PHIL. Y.B. INT'L L. 31, 46-48.

[57] Exec. Order No. 459 (1997).

[58] J. Eduardo Malaya and Jilliane Joyce De Dumo-Cornista, *The HCCH Conventions and their Practical Effects to Private International Law in the Philippines*, 45(2) J. INTEGRATED BAR PHIL., 41-84 (September 2020).

Described by Jovito Salonga as "the most remarkable international organization dealing with the unification of conflict rules,"[59] the HCCH was first convened on Sept. 12, 1893 by Tobias Asser, a Dutch jurist, scholar, and statesman. The HCCH was convened as a multilateral platform for dialogue, discussion, negotiation and collaboration to create strong legal frameworks governing private cross-border interactions among people and businesses.[60] During this period, the HCCH produced various documents, in the areas of succession, family law, and civil procedure, including the Hague Convention on Civil Procedure.[61]

Over the years, the HCCH formally evolved as an inter-governmental organization under the "Statute of the Hague Conference on Private International Law" (hereinafter "HCCH" Statute"). The Statute was adopted during the Seventh Session of the Hague Conference on Private International Law on Oct. 31, 1951 and entered into force on July 15, 1955, initially with sixteen contracting states.[62] Though still referred to as a Conference, the HCCH is an international organization with distinct legal personality, has a permanent headquarters, and maintains a secretariat headed by a Secretary General. To date, the HCCH is a robust inter-governmental organization with eighty-five Members (eighty-four states and the European Union), building bridges between legal systems and reinforcing legal certainty and security through its various Conventions.[63]

There are currently forty-one Conventions (including the HCCH Statute) under the helm of the HCCH, covering cross-cutting issues in family law, commercial law, and civil procedure. A list of the forty-one HCCH Conventions is found in the Annex to this article.

In the late 2000s, the DFA OTLA,[64] then headed by the first co-author as Assistant Secretary, advocated for the country's membership in the HCCH. The decision to join came rather late for the country, given the long history and existence of the HCCH.

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59 JOVITO SALONGA, PRIVATE INTERNATIONAL LAW 36 (1995).

60 HCCH, *125 Years HCCH*, (Sept. 12, 2018), https://www.hcch.net/en/news-archive/details/?varevent=636.

61 *Id.*

62 Statute of the Hague Conference on Private International Law, ¶2, July 15, 1955, 220 U.N.T.S. 121 [hereinafter HCCH Statute].

63 HCCH, *About HCCH*, (n.d.), https://www.hcch.net/en/about.

64 The office was titled simply as the Office of Legal Affairs. The change in office name was made in 2018.

After consultations with the Department of Justice ("DOJ") and other relevant agencies, the DFA sought, and received approval, from the Office of the President to join the HCCH, and later deposited the instrument of accession signed by President Gloria Macapagal Arroyo with the Government of The Netherlands, which acts as the depositary for HCCH instruments.

The Philippines became a Contracting Party to the HCCH Statute on July 14, 2010, with the DFA as its national organ to the HCCH under Article 7(1) of the Statute.[65] As the national organ, the DFA is tasked as the communications liaison between the Philippines and the HCCH.

Even before it became a member, the Philippines had acceded to the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Intercountry Adoption Convention"). Accession to specific conventions by a non-member country is allowed under the HCCH rules. After joining the HCCH in July 2010, the Philippines completed accessions to three more conventions, namely (a) Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("Child Abduction Convention"); (b) Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents ("Apostille Convention"); and (c) Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Service Convention").

This paper will examine three of the four Conventions acceded to, namely the Intercountry Adoption, Apostille and Service Conventions, including the manner by which their provisions were implemented domestically. The fourth one, the Child Abduction Convention, will not be taken up as the implementing regulations have yet to be issued by the concerned agency.

C. Intercountry Adoption Convention

As a context, the Special Commission of the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Intercountry Adoption Convention") noted that the number of intercountry adoptions increased considerably after the World War II.[66] Because it was creating

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[65] HCCH Statute, *supra* note 62, art. 7(1).

[66] HCCH, *Information Brochure*, 5 (2017), https://assets.hcch.net/docs/994654cc-a296-4299-bd3c-f70d63a5862a.pdf, *citing* G. Parra-Aranguren, *Explanatory Report on the 1993 Hague Intercountry*

"serious and complex humanitarian and legal problems [in the] absence of existing domestic and international legal instruments" that were targeted towards a multilateral approach,[67] the HCCH Contracting states decided to adopt the Intercountry Adoption Convention.

The Convention is intended to establish "safeguards which ensure that intercountry adoptions take place in the best interest of the child and with respect for the child's fundamental rights;" and prevent the abduction, the sale of, or traffic in children. It is also meant to complement Article 21 of the UN Convention on the Rights of the Child (UNCRC), "by adding substantive safeguards and procedures to the broad principles and norms laid down in the Convention on the Rights of the Child."

Particularly, the Convention emphasizes certain principles and minimum standards which contracting states should apply when considering intercountry adoption. These principles include the following:

1. Principle of best interests of the child – contracting states must "ensure the child is adoptable; preserve information about the child and his/her parents; evaluate thoroughly the prospective adoptive parents; match the child with a suitable family; [and] impose additional safeguards where needed." In addition, the Convention mandates that "States should establish safeguards to prevent abduction, sale and trafficking in children for adoption by protecting birth families from exploitation and undue pressure; ensuring only children in need of a family are adoptable and adopted; preventing improper financial gain and corruption; and regulating agencies and individuals involved in adoptions by accrediting them in accordance with Convention standards."
2. Principle of subsidiarity – contracting states recognize that national solutions must first be considered before intercountry adoption may be resorted to, including the option that the child may be raised by his or her birth family or extended

Adoption Convention, in Proceedings of the Seventeenth Session (1993), https://assets.hcch.net/docs/78e18c87-fdc7-4d86-b58c-c8fdd5795c1a.pdf.

[67] *Id.*

family, whenever possible, or other forms of permanent care in the country of origin.

3. Cooperation through Central Authorities – The Convention provides for a system of Central Authorities which must supervise the implementation of intercountry adoption within their given jurisdictions.

There are currently 102 contracting states to the Convention.

The Philippines signed the Convention on July 17, 1995, and after its ratification by the President on Jan. 8, 1996, it was submitted to and concurred in by the Senate on June 4, 1996.[68] The Philippines' Instrument of Ratification was deposited on July 2, 1996, and the Convention entered into force for the Philippines on Nov. 1, 1996.

While steps were being undertaken for the accession to the Convention, the proposed "Act Establishing the Rules to Govern Inter-Country Adoption of Filipino Children, and for Other Purposes" was filed in Congress, and eventually enacted into law as Republic Act (R.A.) No. 8043 on June 7, 1995.

R.A. No. 8043 created the Intercountry Adoption Board ("ICAB") [69] and empowered it "to prepare, review or modify, and thereafter, recommend to the DFA, Memoranda of Agreement respecting inter-country adoption consistent with the implementation of this Act and its stated goals, entered into, between and among foreign governments, international organizations and recognized international non-governmental organizations."[70] Furthermore, Section 15 of said law provided the following:

> Sec. 15. *Executive Agreements.*—The Department of Foreign Affairs, upon representation of the Board, shall cause the preparation

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[68] J. EDUARDO MALAYA AND CRYSTAL GALE DAMPIL-MANDIGMA, PHILIPPINE TREATIES IN FORCE 2020 230 (2021).

[69] Rep. Act No. 8043 (1995), art. II, §4, "The Inter-Country Adoption Board. – There is hereby created the Inter-Country Adoption Board to act as the central authority in matters relating to inter-country adoption. It shall act as the policy-making body for purposes of carrying out the provisions of this Act, in consultations and coordination with the Department, the child-care and placement agencies, adoptive agencies, as well as non-government organizations engaged in child-care and placement activities. xxx".

[70] Rep. Act No. 8043 (1995), art. II, §6(k).

> of Executive Agreements with countries of the foreign adoption agencies to ensure the legitimate concurrence of said countries in upholding the safeguards provided by this Act.

It may be recalled that the first step in the process of accession to the Intercountry Adoption Convention—that of signing—took place a month after the enactment of R.A. No. 8043.

For the implementation of the Intercountry Convention, the ICAB was designated as Central Authority, the term used in HCCH Conventions to refer to implementing agencies. Through the pro-active programs of the ICAB, the Philippines is considered to have one of the "best practices" in the implementation of the Intercountry Adoption Convention.[71]

D. Apostille Convention

The Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, more commonly known as the "Apostille Convention", simplifies the authentication process of public documents whenever they are used abroad or in foreign jurisdictions.

The DFA OTLA and Office of Consular Affairs had identified accession to the Convention as a priority starting in the late 2000s in order to lessen the administrative burdens on the business community and the overseas Filipino workers, among other sectors, who needed to present documents in other countries. The Philippine Chamber of Commerce and Industry also recommended accession. The earlier challenges were the need to upgrade the authentication database and ensure recognition by the Judiciary of the new authentication format as a valid piece of evidence.

The HCCH explained the Convention's importance in the following wise:

> Public documents, such as birth certificates, judgments, patents or notarial attestations (acknowledgments) of signatures, frequently need to be used abroad. However, before a public

[71] *See* HCCH, *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice* (2008), https://assets.hcch.net/docs/bb168262-1696-4e7f-acf3-fbbd85504af6.pdf.

> document can be used in a country other than the one that issued it, its origin must often be authenticated. The traditional method for authenticating public documents to be used abroad is called legalization and consists of a chain of individual authentications of the document. This process involves officials of the country where the document was issued as well as the foreign Embassy or Consulate of the country where the document is to be used. Because of the number of authorities involved, the legalisation process is frequently slow, cumbersome and costly… Where it applies, the treaty reduces the authentication process to a single formality: the issuance of an authentication certificate by an authority designated by the country where the public document was issued. This certificate is called an *Apostille*.[72]

In essence, the apostille replaces the authentication certificate (colloquially known as certificates with "red ribbon") by certifying the origin of the public document to which it relates.[73]

The usual authentication process is comprised of the following steps: (1) a document is first certified by the issuing government agency such as the Philippine Statistics Authority for birth certificates; (2) the certified document is then submitted to the DFA for authentication; and (3) the authenticated document will be submitted to the relevant foreign Embassy or Consulate for legalization. In contrast, the Apostille Convention trims down the process down to two steps: (1) a document is first certified by the issuing government agency; and (2) the certified document is apostillized by the DFA.[74] The apostillized document is automatically recognized by all 117 contracting states (except at this time of writing, Austria, Finland, Germany and Greece),[75] to the Apostille

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[72] HCCH, *The ABCs of Apostilles: How to ensure that your public documents will be recognized abroad*, 2 (n.d.), https://assets.hcch.net/docs/6dd54368-bebd-4b10-a078-0a92e5bca40a.pdf [hereinafter *The ABCs of Apostilles*].

[73] *See* Department of Foreign Affairs, *Question-And-Answer and Infographics on Authentication Through Apostille* (n.d.), https://dfa.gov.ph/dfa-news/dfa-releasesupdate/ 22280-question-and-answer-and-infographics-on-authentication-through-apostille___[hereinafter *Question-And-Answer and Infographics*].

[74] *Id.*

[75] The Federal Republic of Germany, Finland, Republic of Austria, and the Hellenic Republic have objected to the Philippines' accession to the *Apostille* Convention, and thus as of this writing do

Convention; hence, the document no longer needs to pass through another authentication or legalization by the foreign embassies in the Philippines.

The Apostille however only applies if both the country where the public document was issued and the country where the public document is to be used are Parties to the Convention.[76] If the document originated from or to be used in a country which is not a party to the Convention, such as some ASEAN member states, or if it originates from or to be used in Austria, Finland, Germany and Greece,[77] the traditional authentication ("red ribbon") process will apply.

Because of its practical effects, the Apostille Convention has attracted the highest number of ratifications and accessions.[78] The Convention entered into force for the Philippines on May 14, 2019,[79] with the DFA Office of the Consular Affairs as the Competent Authority.

As of Jan. 2020, or after nine months of the Convention's implementation, the DFA Office of Consular Affairs had issued over 520,000 apostilles. These apostilles may be verified online by inputting the appropriate number or code written in the issued apostille.[80]

The Philippines' accession was welcomed by several groups, including legal professionals, the business sector, overseas Filipino workers, and the overburdened Philippine embassies and consulates worldwide. The Convention enabled them to legalize public documents for foreign use with less rigidity and cost, while taking advantage of present technology.[81]

On the part of the DFA and its foreign service posts, the use of apostilles significantly eased their workload and gave them added safety nets that ensured that the signature in the document they are presented with is indeed authentic.

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not recognize the *apostilles* issued by the country. *See* HCCH, *Declarations/Reservations/ Notifications to the Philippines' Accession* (n.d.), https://www.hcch.net/en/instruments/ conventions/ status-table/notifications/?csid=1398&disp=type.

[76] *The ABCs of Apostilles*, *supra* note 72, at 7.

[77] *See Question-And-Answer and Infographics*, *supra* note 73.

[78] HCCH, *Apostille Handbook on the Practical Operation of the Apostille Convention*, 1 (2013), https://assets.hcch.net/docs/ff5ad106-3573-495b-be94-7d66b7da7721.pdf.

[79] MALAYA & DAMPIL-MANDIGMA, *supra* note 68, at 230.

[80] Department of Foreign Affairs, *Apostille Verification* (n.d.), https://www.dfa.gov.ph/verify-apostille.

[81] Jomel Manaig, *Goodbye ribbons! Hello apostilles!*, BUSINESS MIRROR (May 28, 2019), https://business mirror.com.ph/2019/05/28/goodbye-ribbons-hello-apostilles/.

Immediately after the Philippines' accession and upon representations by the DFA OTLA, the Supreme Court of the Philippines complemented the action and moved to recognize the apostille as a valid piece of evidence in domestic courts. Such reference may be found in Section 3(e) of A.M. No. 19-08-14-SC or the Rules of Procedure for Admiralty Cases,[82] and Section 24, Rule 132 of A.M. No. 19-08-15-SC or the 2019 Amendments to the Revised Rules on Evidence.[83] Section 24 of Rule 132 on Proof of Official Record states, in part, as follows:

> If the office in which the [official] record is kept is in a foreign country which is a contracting party to a treaty or convention to which the Philippines is also a party or considered a public document under such treaty or convention pursuant to paragraph (c) of section 19 hereof, the certificate or its equivalent shall be in the form

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[82] RULES OF PROCEDURE FOR ADMIRALTY CASES, Rule 2, § 3(e). Verified Complaint. – The verified complaint shall state or contain: x x x (e) Specification of all evidence supporting the cause of action, such as affidavits of witnesses… **Official documents from a foreign jurisdiction shall be considered as admissible when duly authenticated in accordance with The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, otherwise known as the Apostille Convention**. x x x.

[83] REV. RULES ON EVID., Rule 132, § 24. Proof of official record. — The record of public documents referred to in paragraph (a) of Section 19, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his or her deputy, and accompanied, if the record is not kept in the Philippines, with a certificate that such officer has the custody.

If the office in which the record is kept is in a foreign country which is a contracting party to a treaty or convention to which the Philippines is also a party or considered a public document under such treaty or convention pursuant to paragraph (c) of section 19 hereof, the certificate or its equivalent shall be in the form prescribed by such treaty or convention subject to reciprocity granted to public documents originating from the Philippines.

For documents originating from a foreign country which is not a contracting party to a treaty or convention referred to in the next preceding sentence, the certificate may be made by a secretary of the embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in which the record is kept, and authenticated by the seal of his or her office.

A document that is accompanied by the certificate or its equivalent may be presented in evidence without further proof, the certificate or its equivalent being *prima facie* evidence of the due execution and genuineness of the document involved. The certificate shall not be required when a treaty or convention between a foreign country and the Philippines has abolished the requirement, or has exempted the document itself from this formality.

> prescribed by such treaty or convention subject to reciprocity granted to public documents originating from the Philippines. xxx
>
> A document that is accompanied by the certificate or its equivalent may be presented in evidence without further proof, the certificate or its equivalent being prima facie evidence of the due execution and genuineness of the document involved. The certificate shall not be required when a treaty or convention between a foreign country and the Philippines has abolished the requirement, or has exempted the document itself from this formality.

Moving forward, the DFA Office of Consular Affairs is taking steps towards implementation of the successor e-Apostille program, which "promotes the use of technology to further enhance the secure and effective operation"[84] of the Apostille Convention.

E. Service Convention

The Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Service Convention") is a classic example of private international law's tangible contribution in fostering inter-state legal and judicial cooperation, and more importantly, in addressing delays in court proceedings and enhancing the administration of justice.

With at least seventy-three contracting states, the Service Convention is an effective tool to facilitate the "transmission of documents (whether judicial or extrajudicial document) from one State to another State."[85] For the Convention to apply, the following requirements must be met:

1) A document is to be transmitted from one state party to the Convention to another state party for service in the latter (i.e., the law of the state of origin determines whether or not a document has to be transmitted abroad for service in the other state);

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[84] Christopher Bernasconi, *The electronic Apostille Program* (*e-APP*) (2013), http://mddb.apec.org/Documents/2013/EC/WKSP3/13_ec_wksp3_008.pdf (citing the 2012 Special Commission on e-APP).

[85] HCCH, *Frequently Asked Questions on the Service Convention*, XLV ¶ I.1 (n.d.), https://assets.hcch.net/docs/aed182a1-de95-4eaf-a1ae-25ade7cd09de.pdf.

2) An address for the person to be served is known;
3) The document to be served is a judicial or extrajudicial document; and
4) The document to be served relates to a civil and/or commercial matter.[86]

Under the Convention, the authority or judicial officer competent under the law of the requesting state shall transmit the document to be served to a Central Authority of the requested state (i.e., the state where the service is to occur).[87] The request for service transmitted to the Central Authority must comply with the Model Form annexed to the Convention, and be accompanied by the documents to be served (the list of documents to be served is to be determined according to the law of the requesting state).[88]

The Central Authority however may refuse execution of the request if the Central Authority considers that the request does not meet the formal and substantive requirements of the Convention,[89] or if it considers that execution of the service would infringe the sovereignty or security of the requested state.[90] As stated in the Convention's title, it is applicable to documents in civil and commercial cases and not to criminal cases.

The Service Convention is meant to address efficiency issues in the justice system, as it allows for the direct transmission of documents to a competent judicial authority who may execute the service.

Prior to the Convention, outbound documents from domestic courts are first transmitted to the DFA main office in Manila, which then forwards them to the relevant Philippine Embassy or Consulate General abroad. The Embassy or Consulate General then requests the host Ministry of Foreign Affairs to have the service done by local authorities. The Embassy or Consulate General at times send the documents directly via registered mail. The turnaround time for the service often take four to six months. On some occasions, there is no return (result) of service.

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[86] *Id.* at XLV-XLVI, ¶ 3.
[87] *Id.* at XLVI, ¶ 7.
[88] *Id.* at XLVII, ¶¶ 10-11.
[89] *Id.* at XLIX, ¶ 19.
[90] *Id.*

On the other hand, prior also to the Convention, inbound documents from foreign jurisdictions are first transmitted to the Ministry of Foreign Affairs, which then transmits them to their Embassy in Manila. The latter in turn transmits the documents to the DFA main office. The DFA OTLA then sends the documents to the Executive Judge of the area where the service is expected to be made, with a request to serve the same. The turnaround time for the service is the same as for outbound documents, and within that period, cases are on a standstill while awaiting the return (result) of service.

Under the Service Convention, this roundabout way of serving will no longer apply, as documents will henceforth be directly transmitted from one Central Authority to another. The experience under the Convention is that documents are served within one and a half months.[91]

After securing the concurrence of the Supreme Court to the accession to the Convention and approval for such accession from the Office of the President, the DFA deposited the instrument of accession on Mar. 4, 2020 in The Hague. For the Philippines, the Convention entered into force on Oct. 1, 2020.[92]

For the implementation of the Convention, the Supreme Court designated the Office of the Court Administrator ("OCA") as Central Authority for the Philippines, and the latter office issued Administrative Order No. 251-2020 dated Sept. 11, 2020[93] to operationalize the Convention.

This OCA guideline finds basis in A.M. No. 19-10-20-SC or the 2019 Amendments to the 1997 Rules of Civil Procedure, specifically Rule 14, Section 17 thereof,[94] where the Service Convention is referred to. Specifically, Section 17

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[91] HCCH, *Authorities and Practical Information on the Service Convention* (n.d.), https://www.hcch.net/en/instruments/conventions/authorities1/?cid=17.

[92] MALAYA & DAMPIL-MANDIGMA, *supra* note 68, at 230-231.

[93] *Guidelines on the Implementation in the Philippines of the Hague Service Convention on the Service Abroad of Judicial Documents in Civil and Commercial Matters,* https://sc.judiciary.gov.ph/13918/.

[94] REV. RULES ON CIV. PROC., Rule 14, § 17. Extraterritorial service. — When the defendant does not reside and is not found in the Philippines, and the action affects the personal status of the plaintiff or relates to, or the subject of which is, property within the Philippines, in which the defendant has or claims a lien or interest, actual or contingent, or in which the relief demanded consists, wholly or in part, in excluding the defendant from any interest therein, or the property of the defendant has been attached within the Philippines, service may, by leave of court, be effected out of the Philippines by personal service as under Section 6; **or as provided for in international conventions to which the Philippines is a party**; or by publication in a newspaper of general circulation in such places and for such time as the court may order, in which case a

provides that extraterritorial service "may, by leave of court, be effected out of the Philippines by personal service as under Section 6; or as provided for in international conventions to which the Philippines is a party or by publication in a newspaper of general circulation x x x."

III. A Framework for Classifying Agreements as Self-Executing and Non-Self-Executing and the HCCH Conventions

A. *The Four-Doctrine Approach*

To recall the earlier discussions on the implementation of international agreements, the Executive makes an initial evaluation on the domestic approval requirements for a proposed agreement, including the legal basis by which its provisions will be implemented. To this end, principles such as a treaty having the force and effect of law, and generally considered as self-executing, are applied. An executive agreement may also be self-executing if entered into pursuant to acts of Congress (or of the Senate with respect to a prior treaty), or if merely "embodying *adjustments of detail* carrying out well-established national policies and traditions." In the case of the latter, the same may be implemented based on existing laws or presidential authorities; otherwise, it may not be implemented without congressional enactment.

How to make the distinction between self-executing and non-self-executing agreements has been the subject of many scholarship, where the bifurcated definitions of the two, albeit simplified by negating each other's meaning, underscores the need for standards in order to "legitimately … conclude that particular treaties are or are not judicially enforceable without additional legislation."[95] One of these is the four-doctrine approach propounded by Prof. Carlos Manuel Vasquez.[96]

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copy of the summons and order of the court shall be sent by registered mail to the last known address of the defendant, or in any other manner the court may deem sufficient. Any order granting such leave shall specify a reasonable time, which shall not be less than sixty (60) calendar days after notice, within which the defendant must answer. (15a).

[95] Carlos Manuel Vasquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 696 (1995), https://scholarship.law.georgetown.edu/facpub/1016.

[96] *Id.*

The first principle that should be considered in determining whether an agreement is self-executing or not is the intention of the parties.[97] Intent is a matter of proof and may be determined through various pieces of evidence, such as the records of an agreement and testimonies of the individuals who facilitated the accession.[98]

In *Nicolas v. Romulo,*[99] the PH-US Visiting Forces Agreement ("VFA") was deemed to be self-executing "because the parties intend its provisions to be enforceable."[100] This "intent" was considered in light of how the VFA was meant to carry out state obligations and undertakings under the PH-US Mutual Defense Treaty, and the subsequent actions of the state parties to comply with the same (i.e., "[a]s a matter of fact, the VFA has been implemented and executed, with the U.S. faithfully complying with its obligation to produce L/CPL Smith before the court during the trial.").[101]

Second, an implementing legislation is necessary "if the norm the treaty establishes is 'addressed' as a constitutional matter to the legislature."[102] This standard requires an examination of the treaty's text, so that the provisions thereof must have some form of specificity to guide the parties in its implementation. For instance, "precatory" treaties or those that "do not impose obligations but, instead, set forth aspirations,"[103] have been classified as non-self-executing. The underlying premise is that precatory provisions are not judicially enforceable not because of the absence of intent to make it so, but because under the separation of powers principle, lack of a judicially enforced standard makes it political question which the courts cannot entertain.[104]

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[97] *Id.* at 700.

[98] *Id.* at 711. "[i]n Frolova v. USSR, the court enumerated the following factors as relevant to whether the treaty was 'intended to be self- executing': (1) the language and purposes of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capability of the judiciary to resolve the dispute."

[99] Nicolas v. Romulo, G.R. No. 175888, Feb. 11, 2009.

[100] *Id.*

[101] *Id.*

[102] Vasquez, *supra* note 95, at 697.

[103] *Id.* at 712.

[104] *Id.*

A similar approach was made in Philippine jurisprudence, in *Tanada v. Angara*,[105] where the Supreme Court held that broad declaration of principles and state policies are not "intended to be self-executing principles ready for enforcement through the courts."[106] Hence, when an international agreement outlines procedural matters which may be easily adopted by domestic implementing authorities, the same may be considered as self-executing.

Third, legislation is necessary "if the treaty purports to accomplish what under [the] **Constitution** may be accomplished only by statute."[107] To this extent, provisions in the Constitution such as those referring to foreign ownership limitations or the Bill of Rights,[108] may be construed as absolute prohibitions, so that international agreements that have been acceded to cannot be implemented without consideration to these constitutional requirements.

Finally, legislation is needed "if no law confers a right of action on a plaintiff seeking to enforce the treaty."[109] An examination of existing domestic legal framework in a given subject matter is therefore necessary before an agreement may be classified as self-executing or not. If there are existing laws or administrative regulations already present for which interested parties may seek recourse from, then the same can be considered as self-executing.

B. Applying the Four-Doctrine Approach to the HCCH Conventions

1. Apostille Convention

In the case of the Apostille Convention, the instrument of accession was deposited in Sept. 2018 with the HCCH depositary, the Government of the Netherlands, after the President had ratified the Convention. After its entry into

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[105] Tanada v. Angara, G.R. No. 118295, May 2, 1997.

[106] *Id.*

[107] Vasquez, *supra* note 95, at 697.

[108] *Id.* at 718. ("The dearth of case law on the "constitutionality" version of the doctrine indicates that this category is of limited practical significance. The types of treaties that have been considered non-self-executing for constitutional reasons include treaties that purport to raise revenue, treaties that purport to make conduct criminal, and treaties that purport to appropriate money. Whether these conclusions are sound, and whether there are other powers that the lawmakers possess but the treaty makers lack, are beyond the scope of this article.")

[109] *Id.* at 697.

force for the Philippines in May 2019,[110] the DFA implemented the shift to the apostille format of authentication through the issuance of administrative regulations. This was followed by the issuances by the Supreme Court of circulars which recognized the apostille as a valid piece of evidence before domestic courts. In short, the Apostille Convention was treated as a self-executing agreement.

Prior to the Apostille system, there was an existing legal basis and bureaucratic procedure for public documents to be used overseas. It is a customary consular service undertaken by foreign ministries, consulates general and consular sections of embassies on the basis of the 1963 Vienna Convention on Consular Relations, which was concurred in by the Senate in May 1965,[111] to wit:

> Art. 5. Consular functions shall consist in ... (f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain administrative nature ... (underscoring supplied)

The Administrative Code of 1987, in Section 21(4), Title 1, Book IV, also enumerates as among the functions of Philippine consular establishments the performance of "notarial functions allowed by regulations." The apostille merely simplified this process.

Because the apostille, as a replacement for the usual authentication certificate recognized by domestic courts, is also a source of right among litigants, it needed to be similarly recognized as an acceptable piece of evidence in court. This is where the rule-making power of the Judiciary came in. Section 5(5), Article VIII of the Constitution gives the Supreme Court the power to "[p]romulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases." This wide latitude given to the Judiciary is an important element in the practice of international law in the Philippines, considering that the courts, as the ultimate arbiters of litigant rights, have the ability to craft rules that can facilitate judicially enforceable rights.

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[110] MALAYA & DAMPIL-MANDIGMA, *supra* note 68, at 230.
[111] *Id.* at 262.

The Supreme Court's inclusion of Section 24, Rule 132 in the 2019 Amendments to the Revised Rules on Evidence, as well as Section 3(e) in the Rules of Procedure for Admiralty Cases, highlights the complementary role of the courts in implementing international agreements.

Here, an implementing legislation was no longer necessary because the legal bases for the authentication of public documents, whether through the red ribbon method or the apostille, was in place. Instead, what was needed were complementary guidelines, which were within the powers of the implementing agencies—the DFA and the Supreme Court—to issue.

Thus, within the framework of the four-doctrine approach, the Apostille Convention is considered self-executing because the Philippines, and in particular, the DFA as the Competent Authority under the Convention, intended it to be enforceable. Steps were in fact undertaken (e.g., systems upgrade) during the preparatory stages to ensure that the Convention is operationally feasible in the country. The Convention itself is also littered with procedural matters[112] that leaves no room for doubt on how an implementing authority should enforce it, and there is no known constitutional provision which prohibits its implementation. Because the apostille, as a replacement for the traditional authentication certificate recognized by domestic courts, is also a source of right among litigants, it needed to be similarly recognized as an acceptable piece of evidence in court, which the Supreme Court did through its rule-making power. Underlying all these is the presence of firm legal bases and bureaucratic procedure in dealing with public documents to be used abroad, with the apostille simplifying this process.

2. *Service Convention*

The extraterritorial service of documents in civil or commercial matters via the diplomatic channel is of a well-established consular function. In fact, the courts have long assisted the DFA in the service of foreign judicial orders through its network of sheriffs across the country. This consular service is based on the Vienna Convention on Consular Relations, which states that "Art. 5. Consular

[112] Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, arts. 4-8, Oct. 5, 1961, 1562 U.N.T.S. 331.

functions shall consist in … (j) transmitting judicial and extrajudicial documents …"

The Administrative Code, in Section 21(5), Title 1, Book IV, also cites as a function of consular establishments the "transmit(tal) (of) judicial and extrajudicial documents." Extraterritorial service had been also recognized in Section 15, Rule 14 of the (old) Rules on Civil Procedure.[113] That provision highlighted the need for a judicially approved method to conduct extraterritorial service.

After its effectivity for the Philippines in Oct. 2020, the Service Convention was implemented by the adoption of a streamlined process in lieu of the service via diplomatic channels. The Supreme Court's Office of the Court Administrator issued Administrative Order No. 251-2020 dated Sept. 11, 2020[114] to operationalize the Convention, as authorized by the Court's A.M. No. 19-10-20-SC or the 2019 Amendments to the 1997 Rules of Civil Procedure, under Rule 14, Section 17 thereof,[115] where the Service Convention is legally recognized.

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[113] Rules on Civ. Proc., Rule 14, §15. Extraterritorial service. — When the defendant does not reside and is not found in the Philippines, and the action affects the personal status of the plaintiff or relates to, or the subject of which is, property within the Philippines, in which the defendant has or claims a lien or interest, actual or contingent, or in which the relief demanded consists, wholly or in part, in excluding the defendant from any interest therein, or the property of the defendant has been attached within the Philippines, service may, by leave of court, be effected out of the Philippines by personal service as under section 6; or by publication in a newspaper of general circulation in such places and for such time as the court may order, in which case a copy of the summons and order of the court shall be sent by registered mail to the last known address of the defendant, or in any other manner the court may deem sufficient. Any order granting such leave shall specify a reasonable time, which shall not be less than sixty (60) days after notice, within which the defendant must answer.

[114] *Guidelines on the Implementation in the Philippines of the Hague Service Convention on the Service, supra* note 93.

[115] Rev. Rules on Civ. Proc., Rule 14, §17. Extraterritorial service. — When the defendant does not reside and is not found in the Philippines, and the action affects the personal status of the plaintiff or relates to, or the subject of which is, property within the Philippines, in which the defendant has or claims a lien or interest, actual or contingent, or in which the relief demanded consists, wholly or in part, in excluding the defendant from any interest therein, or the property of the defendant has been attached within the Philippines, service may, by leave of court, be effected out of the Philippines by personal service as under Section 6; **or as provided for in international conventions to which the Philippines is a party**; or by publication in a newspaper of general circulation in such places and for such time as the court may order, in which case a copy of the summons and order of the court shall be sent by registered mail to the last known

What the (present) Revised Rules on Civil Procedure did was to recognize an alternative process (as outlined in the Service Convention) that is also utilized by other contracting states, but still requiring judicial approval, thus working within the limits imposed by the remedial law. Corollary, the subsequent issuance of Administrative Order No. 251-2020 was an implementing guideline within the Court's rule-making power.

Thus, the Service Convention is a self-executing agreement using the same standards. Apart from the intent (which is borne out by the official records of the instrument), the text of the Service Convention is also filled with procedural guideposts,[116] with the option to oppose certain provisions which a contracting state may find difficult to implement.[117]

3. *Intercountry Adoption Convention*

The proponents of the accession to the Intercountry Adoption Convention awaited the enactment in June 1995 of R.A. No. 8043, which established the Rules governing Inter-Country Adoption of Filipino Children, before having the Convention signed. As earlier mentioned, R.A. No. 8043 mandated and authorized the ICAB[118] to prepare and recommend Agreement respecting inter-country adoption between and among foreign governments and international organizations,[119] and the DFA, upon representation of the Board, shall cause the preparation of Executive Agreements with other countries on inter-country adoption.[120]

Following this mandate, the DFA considered the HCCH Intercountry Adoption Convention,[121] the primary and authoritative international instrument

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address of the defendant, or in any other manner the court may deem sufficient. Any order granting such leave shall specify a reasonable time, which shall not be less than sixty (60) calendar days after notice, within which the defendant must answer. (15a).

[116] Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, arts. 2-17, Nov. 15, 1965, 1703 U.N.T.S. 424.

[117] *Id.,* art. 21.

[118] Rep. Act No. 8043, art. II, §4.

[119] Rep. Act No. 8043, art. II, §6(k).

[120] Rep. Act No. 8043, art. III, §15.

[121] Under art. 44(a) of the HCCH Intercountry Adoption Convention, non-HCCH Member States are allowed to accede to it.

on intercountry adoption with 102 states parties.[122] Accession to this Convention means establishing a network with competent authorities on intercountry adoptions, as well as harmonizing policies and practices on the matter.[123] It also meant safeguarding the rights of Filipino children who are qualified for adoption. So, in Jan. 1996, the Convention was ratified by the President and concurred in by the Senate in July 1996.

It is noted that even though R.A. No. 8043 had authorized the entry into "agreement respecting inter-country adoption,"[124] and specified "executive agreement" for it, the Convention was still submitted to the Senate for concurrence, which the latter granted.

It is the view of the co-authors of this paper that considering the authority under Sections 6(k) and 15 of R.A. No. 8043, the entry to the Intercountry Adoption Convention and its domestic approval process were intended by Congress to be as an executive agreement, so that its submission for Senate concurrence was no longer necessary. Inasmuch as the subject was a novel one for the country at that time, the cautious approach to the matter is understandable.

Nonetheless, the Intercountry Adoption Convention also fulfils the standards as self-executing, notably the clear intent of the Convention to be self-executing and presence of numerous procedural safeguards to ensure the rights of adopted children. There is in fact a clear congressional mandate to the executive branch to enter into international agreements on the subject matter. The submission of the Convention to the Senate for concurrence, however, was a matter of choice and not legal necessity.

C. The Fifth Element of "Practicability"

All things considered, all three Conventions fall squarely within the requirements of self-executing agreements: intent, specificity, non-prohibition, and existence of a legal right. At the same time, what this paper may contribute to scholarship is the addition of another element within the Philippine context and at least in the area of private international law: the matter of practicability.

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[122] HCCH, 1993 HAGUE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION, 25 YEARS OF PROTECTING CHILDREN IN INTERCOUNTRY ADOPTION 8 (2018), https://assets.hcch.net/docs/ccbf557d-d5d2-436d-88d6-90cddbe78262.pdf.

[123] *Id.*

[124] Rep. Act No. 8043, art. II, §15.

Practicability here refers to the ability of operationalizing an international agreement by working on the existing legal frameworks, whether fragmented or otherwise. At the core of this element is a balancing of interests that must be carefully done by the government and its stakeholders: on one hand, there is a need to give immediate effect to an international agreement and ease the burden of the private sector and ensure the rights of children; and on the other hand, a need to ensure compliance with existing domestic legal frameworks. However, the co-authors of this paper wish to emphasize that the ratification or accession should not be used as a ground to organize, fix, or rearrange fragmented domestic legal frameworks. That is not the function of international agreements altogether. Instead, it is meant to give the most practical benefit to the public, that is, in the context of the three HCCH Conventions, an efficient means of facilitating private cross-border transactions and litigations and ensuring the best interest of children who are up for foreign adoption. When the relevant domestic legal frameworks or bases exist, though seemingly varied and dissipate these may be, consideration of a subject international agreement as self-executing can be explored.

The element of practicality can be seen as having been considered in the treatment of the Apostille and Service Conventions as self-executing, given their obvious benefits to the public, after all the legal frameworks for their implementations are present.

Professor Rommel Casis made similar observations in his study of the Philippines' implementation of multilateral environment agreements ("MEAs"), such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the Convention on Biological Diversity, where there is a dearth of treaty-specific implementing statutes. To comply with the obligations under the MEAs, the relevant government agencies like the Department of Environment and Natural Resources, have to rely on legislations on related subject matters and resort to "action plans" and administrative issuances, some of whose enforcement provisions may not have clear statutory basis. There are advantages to the approach of relying on administrative issuances for MEA enforcement, to wit:

> … First, administrative issuances do not undergo the same political obstacles as statutes and therefore may take less time and effort to complete. This consideration is important when the environmental problem sought to be remedied requires urgent

> attention. Second, the rules required to enforce MEAs may require technical knowledge more accessible to experts in the executive branch than to politicians in Congress… Third, the issuance of these regulations may not require the political horse trading that may be necessary for the passage of legislation. When political considerations are suppressed, the benefit is that the provisions are not "watered down" …[125]

IV. Towards Good-Faith Performance of Agreements

A cardinal principle in international law is that agreements "must be performed by (the parties) in good faith"[126] and with a view to the full observance and smooth implementation of its provisions. This ensures the stability of agreements, which are the building blocks of peace, cooperation, and security among states.[127] The issue as to whether an agreement is self-executing or not has relevance to the pace at which it can be implemented.

A determination that an agreement is non-self-executing will most likely mean a delay in having to wait for Congress to pass implementing legislation. Delay not only defers domestic implementation of a desirable norm (if the norm was not desirable in the first place, presumably the executive branch would not have concluded the agreement), but also defers the changes in a foreign government behavior sought through the treaty negotiation and may risk backsliding from the commitments undertaken.[128] The issue is thus not only a legal or constitutional one; it may have policy implications.

As perhaps now clear at this point, there are policy justifications for having agreements as self-executing, particularly treaties concurred in by the Senate. The examination of the Apostille and Service Conventions, which find basis in the 1963 Vienna Convention on Consular Relations and the Administrative Code of 1987, bore this out. The same observation can be said of the Intercountry Adoption Convention, which is anchored on R.A. No. 8034.

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[125] Rommel J. Casis, *Developing Country Implementation of Multilateral Environmental Agreements: The Philippine Experience*, 2017 PHIL. Y.B. INT'L L 57 (2017).

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

[127] MALAYA & DAMPIL-MANDIGMA, *supra* note 68, at 380.

[128] Trimble, *supra* note 45, at 165.

The examination of the three HCCH Conventions and the observations on the implementation of MEAs highlight the challenges faced by government agencies, concerned civil society organizations, and other sector stakeholders who are interested in seeing the good-faith implementation of agreements, and the fulfillment of committed policy objectives.

In a previous article written by the co-authors of this paper,[129] they advocated for the Philippines' accession to other HCCH conventions[130] in view of their direct relevance and benefits to the overseas Filipinos, the business community, and the society in general. A call was also made to the legal profession, the law academe, the business community, and the rest of society to remain engaged with each other and the relevant national government agencies in order to ensure that the dialogues and discussions in this and other fields of international law thrive and continue.

Thus, in the process of acceding to these Conventions, a clearer understanding of the distinction between self-executing and non-self-executing agreements and the standards that would apply in making the distinction is helpful. As a contribution to the scholarship, this paper posited a practicability analysis as a policy consideration to ensure that the interests of various stakeholders are taken into account.

In the end, agreements are not simply the embodiment of the commitments of states between and among themselves, and with respect to private international law ones, their efforts at harmonizing conflicts-of-law principles; these are meant to provide tangible benefits to states and peoples in terms of convenience, cooperation, security, and peace. International agreements are indeed intended to respond to global needs, while respecting unique domestic legal requirements and traditions.

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[129] *See* Malaya & De Dumo-Cornista, *supra* note 58.

[130] *Id.* Four priority conventions were stated, namely the Evidence, Child Support, Choice of Court, and the Recognition and Enforcement of Foreign Judgments Conventions.