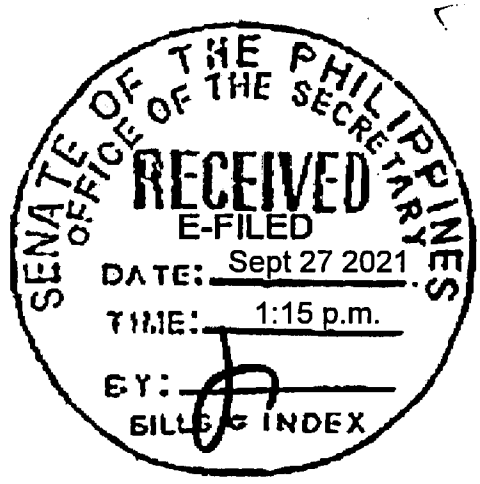

EIGHTEENTH CONGRESS OF THE)
REPUBLIC OF THE PHILIPPINES)
Third Regular Session)

SENATE

S. No. 2415

Introduced by **SENATOR LEILA M. DE LIMA**

AN ACT
TO PROTECT THE INTERESTS OF THE FILIPINO PEOPLE BY MANDATING THAT SENATE CONCURRENCE BE REQUIRED PRIOR TO WITHDRAWAL FROM TREATIES AND INTERNATIONAL AGREEMENTS

EXPLANATORY NOTE

The 1987 Constitution, Article II, Section 1, proclaims it a basic Principle of our system of government that "[t]he Philippines is a democratic and republican State," and that "[s]overeignty resides in the people and all government authority emanates from them."

Section 2 further proclaims, again as a basic Principle, that "[t]he Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations."

Article VII, Section 21, provides that "[n]o treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate."

Art. XVIII on Transitory Provisions, Section 4, provides that "All existing treaties or international agreements which have not been ratified shall not be renewed or extended without the concurrence of at least two-thirds of all the Members of the Senate."

Art. VI, Section 23 (1), provides that "[t]he Congress, by a vote of two-thirds of both Houses in joint session assembled, voting separately, shall have the sole power to declare the existence of a state of war."

On 16 March 2021, the Supreme Court, in the consolidated cases of *Sen. Francis Pangilinan, et. al. v. Cayetano, et al.*, G.R. No. 238875, *Philippine Coalition for the International Criminal Court (PCICC), et al. v. Office of the Executive Secretary, et al.*, G.R. No. 239483 and *Integrated Bar of the Philippines v. Office of the Executive Secretary, et al.*, G.R. No. 240954, declared that "the President's discretion to withdraw is qualified by the extent of legislative involvement on the manner by which a treaty was entered into or came into effect. The President cannot unilaterally withdraw from treaties that were entered into pursuant to the legislative intent manifested in prior laws, or subsequently affirmed by succeeding laws. Treaties where Senate concurrence for accession is expressly premised on the same concurrence for withdrawal likewise cannot be the subject of unilateral withdrawal. **The imposition of Senate concurrence as a condition may be made piecemeal, through individual Senate resolutions pertaining to specific treaties, or though encompassing legislative action, such as a law, a joint resolution by Congress, or a comprehensive Senate resolution.**" (Emphasis supplied)

Thus, according to the Supreme Court, a law may be passed to impose Senate concurrence as a condition prior to withdrawal from treaties.

On 11 August 2021, in a forum organized by the University of the Philippines College of Law, Retired Supreme Court Justice Antonio Carpio said that "[i]f the Senate does not assert its prerogative to concur, it will lose its prerogative to concur. There is constant battle among branches of government. The moment you concede your prerogative to another branch, that could bind you in the future."[1]

Justice Carpio is further quoted saying, "I think what the Senate should do is to say that the President can never unilaterally withdraw from a treaty without the consent of the Senate, and they should be very categorical about that. The moment

[1] Lopez, Virgil. *Carpio: Senate should assert power in treaty withdrawal following decision on ICC case.* GMA News Online (11 August 2021). Retrieved from: https://www.gmanetwork.com/news/news/nation/798910/carpio-senate-should-assert-power-in-treaty-withdrawal-following-decision-on-icc-case/story/

you show any doubt about your prerogative, you will lose it and this is exactly what happened here."[2]

The role of the Senate in treaty-making has been considered essential since the drafting of the United States Constitution, from which our Constitution was derived. In his paper, entitled "The Treaty-Making Power of the President and the Senate", former U.S. Senator Augustus Bacon emphasized the role of the Senate saying, "[i]ndeed, the importance of the Senate in the making of treaties was held in such esteem that a serious and determined effort was made to require two-thirds of the entire Senate to ratify a treaty, whether present or not."[3]

He added that "[o]f the treaty-making power, of the duty of the President, and of the duty of the Senate, it may properly be said that there is imposed by the constitution a reciprocal and a common duty, one in which each has the advantage of the services of the other, one in which there can be no compulsion, one in which each can defeat the work of the other, one in which the cooperation and the combination of the two, from the inception to the end, is necessary in order to comply fully with the intention and design of the Constitution-makers in this regard."

He further elucidated that "[i]t is a salutary practice for the President to be advised by the Senate whether there should or should not be an attempt to make a treaty, or to interfere in any manner with the affairs of other nations. There are Senators who have been in office for a generation and whose advice and counsel would be valuable to any President, however learned and able and patriotic he might be. It has rarely happened that a President, is superior, in either natural or acquired ability, to the average ability of the Senate. It has frequently happened that the President chosen has been without any experience in national public affairs. There may be at some time in the future an impulsive and strong-willed or, even possibly, a weak President. An election to the Presidency does not *ipso facto* endow one with all knowledge and all wisdom; and it is not an unreasonable suggestion that, in the aggregate of ninety Senators, many of them men of great capacity and of large experience, there is more of knowledge of public affairs, more of conservatism, more

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[2] *Ibid.*
[3] The North American Review, Apr. 1906, Vol. 182, No. 593 (Apr. 1906). Pg 507. Retrieved from: https://www.jstor.org/stable/pdf/25105548.pdf

of correct judgment of the requirements of public interest, than is possessed by any one man in the United States, whoever he may be."

In our history, the concurrence of the majority of Congress was required by the 1935 Constitution before entering into treaties and other international agreements. This legislative role was largely removed during the 1973 Constitution, which allowed the chief executive to "enter into international treaties or agreement as the national welfare and interest may require."[4]

The 1986 Constitutional Commission proposed to restore the role of the Senate in international agreements. Commissioner Adolfo Azcuna said that, "[t]he philosophy here is that henceforth ay international commitments of the country should have the ratification of the popular representatives of the people."[5]

It is acknowledged that the President is the chief architect of foreign policy. the President is vested with the authority to deal with foreign states and governments, extend or withhold recognition, maintain diplomatic relations, enter into treaties, and otherwise transact the business of foreign relations. In the realm of treaty-making, the President has the sole authority to negotiate with other states. Nonetheless, while the President has the sole authority to negotiate and enter into treaties, the Constitution provides a limitation to his power by requiring the concurrence of 2/3 of all the members of the Senate for the validity of the treaty entered into by him.[6]

The participation of the legislative branch in the treaty-making process was deemed essential to provide a check on the executive in the field of foreign relations. By requiring the concurrence of the legislature in the treaties entered into by the President, the Constitution ensures a healthy system of checks and balance necessary in the nation's pursuit of political maturity and growth.[7]

Indeed, even as the President has near exclusive access to information and expertise from our Department of Foreign Affairs (DFA) and his many sources of intelligence, the Senate has two crucial things which the whole of the executive

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[4] 1973 Philippine Constitution, Art. XIV, Section 15.
[5] Bernas, SJ. The Intent of the 1986 Constitution Writers. (1995) Pg. 488
[6] *Pimentel v. Executive Secretary*. G.R. No. 158088. 6 July 2005.
[7] *Ibid.*

branch does not: a direct mandate from our people and the constitutional power to disagree with him in treaty-making.

Even with decades worth of experience and training in foreign affairs, our DFA can only advise the President. They are under the control of the Office of the President and are not clothed with the power to check Presidential prerogative.

As popular representatives of the people, the Senate is given the power to participate in the treaty-making process. According to the Supreme Court, "while a treaty ratified by the President is binding upon the Philippines in the international plane, it would need the concurrence of the legislature before it can be considered as valid and effective in the Philippine domestic jurisdiction. Prior to and even without concurrence, the treaty, once ratified, is valid and binding upon the Philippines in the international plane. But in order to take effect in the Philippine domestic plane, it would have to first undergo legislative concurrence as required under the Constitution."[8]

Since a treaty has the approval of both the President and the Senate, it has the same impact as a statute.[9]

The Senate represents the legislative will of the whole country. As such, it stands to reason that Senate express its power to give or withhold concurrence to treaties and international agreements which likewise necessitated legislative concurrence prior to their ratification. In as much as a law requires both executive and legislative action before it is repealed, it is submitted that withdrawal from a treaty, akin to a law, should also require both executive and legislative action.

Otherwise, it would lead and, indeed, has already led to an absurd situation, whereby an action of unilateral withdrawal by the Executive, not sanctioned by the Filipino people through their duly elected representatives in the Legislature, would be legally and constitutionally invalid and, supposedly, ineffective domestically, yet has been considered binding on the Philippines as a State on the international level. Such a situation does not only create a legal conundrum, but also leads to a very real and dangerous erosion of our international standing and relationships in the

[8] *IPAP v. Ochoa.* G.R. No. 204605. 19 July 2016. Separate Concurring Opinion J. Brion.
[9] *Saguisag v. Ochoa.* G.R. No. 212426. 26 July 2016. Dissenting Opinion J. Brion.

international community, by putting into question the strength and reliability of our commitment to fulfilling our international obligations.

Since the Constitution and the laws abhor absurdities, and explicitly states that the Philippines is a democratic and republican state, wherein sovereignty resides in the people, and that it "adopts the generally accepted principles of international law as part of the law of the land" and "adheres to the policy of", among others, "amity with all nations", it becomes imperative, in the interest of abiding by the principle of *pacta sunt servanda*, which is arguably the oldest principle of international law,[10] to resolve this untenable contradiction in a manner consistent with the basic principles, including the system of checks and balances, set forth in our Constitution.

This bill, therefore, seeks to explicitly require the concurrence of at least two-thirds of the Senate to any act of withdrawal from a treaty it has previously concurred with the Executive in entering.

However, while it is submitted that the treaty-making power is shared by the President and the Senate, it is also acknowledged that on matters of national security in times of war, the President should be given the opportunity to act swiftly and without the burden of having to submit to a deliberative body. In the case of *U.S. v. Curtiss-Wright Export Corp.*[11], the U.S. Supreme Court said that "[the President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results."

Thus, since the Constitution has given the power to declare the existence of war to Congress, the Presidential power to withdraw from treaties as may be necessary for our national security is deemed authorized by legislative imprimatur during a state of war.

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[10] "Pacta Sunt Servanda," https://www.britannica.com/topic/pacta-sunt-servanda, last accessed on 3 September 2021.
[11] 299 U.S. 304 (1936).

This bill aims to protect the interests of our people by making sure that the constitutional checks that are in place during our entry into treaties remain so during our withdrawal from the same.

In view of the foregoing, the passage of this bill is earnestly sought.

LEILA M. DE LIMA

EIGHTEENTH CONGRESS OF THE)
REPUBLIC OF THE PHILIPPINES)
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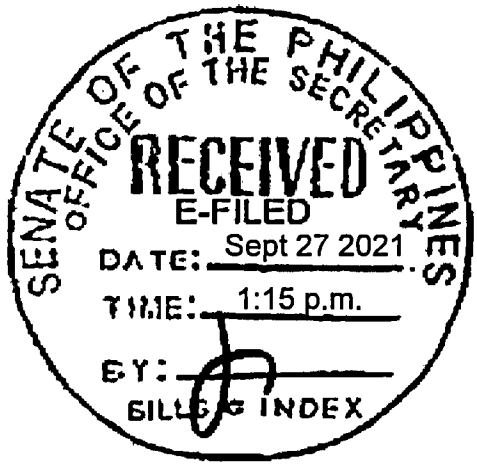

SENATE

S. No. 2415

Introduced by **SENATOR LEILA M. DE LIMA**

AN ACT
TO PROTECT THE INTERESTS OF THE FILIPINO PEOPLE BY MANDATING THAT SENATE CONCURRENCE BE REQUIRED PRIOR TO WITHDRAWAL FROM TREATIES AND INTERNATIONAL AGREEMENTS

Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

Section 1. The President of the Philippines shall secure the concurrence of not less than two-thirds of the members of the Senate prior to withdrawal from any treaty or international agreement, except in cases where the Philippines is in a state of war, as declared by the Congress.

Sec. 2. *Repealing Clause.* – All provisions of laws, presidential decrees, letters of instruction and other presidential issuances that are incompatible or inconsistent with the provisions of this Act are hereby deemed amended or repealed.

Sec. 3. *Effectivity.* – This Act shall take effect within fifteen (15) days after its publication in the Official Gazette or in at least two (2) national newspapers of general circulation.

Approved,