NICOLAS V. ROMULO: SUPREME COURT OF THE PHILIPPINES RULES ON POST-*MEDELLIN* CONSTITUTIONALITY OF A SOLE-EXECUTIVE AGREEMENT NEGOTIATED WITH THE UNITED STATES

BENJAMIN BROCKMAN-HAWE*

On February 11, 2009 the Supreme Court of the Philippines ("the Court") *En Banc* handed down its judgment in the consolidated cases of *Suzette Nicolas y Sombilon vs. Alberto Romulo, etc., et.al., Jovito Salonga, et. al. vs. Daniel Smith, et. al.,* and *Bagong Alyansang Makabayan (BAYAN), etc., et. al. vs. President Gloria Macapagal Arroyo, etc., et. al.*[1] The Court, by a vote of 9-4 with two abstentions,[2] upheld the constitutionality of the RP-US Visiting Forces Agreement (VFA), which establishes jurisdiction over U.S. military personnel traveling to the Philippines, and with reference to the *Subic Rape Case* declared that the Romulo-Kenney Agreements of December 19 and 22, 2006 were inconsistent with the VFA. *Nicolas* is noteworthy as the first decision in which a foreign court considered the effect of the U.S. Supreme Court's ruling in *Medellin v. Texas*[3] on an agreement concluded with the President of the United States but not ratified by the U.S. Senate (a 'sole-executive agreement').[4] This comment analyzes the case and its implications for U.S. foreign relations.

I. BACKGROUND

A. U.S. – Philippine Relations

Between 1898 and 1946 the Philippines were a territory of the United States,

* Benjamin Brockman-Hawe graduated Boston University School of Law with Honors in the Concentration of International Law in 2008. He currently works in the Hague at Trial Chamber II of the Special Court for Sierra Leone.

1. Suzette Nicolas y Sombilon v. Romulo, Judgment in the Joined Cases of G.R. No. 175888, G.R. No. 17605 and G.R. No. 17622, (S.C. February 11, 2009),*available at* http://sc.judiciary.gov.ph/jurisprudence/2009/feb2009/175888.htm. (Phil.)

2. Evangeline De Vera, *SC Rules Against Smith Transfer to Embassy but Status Quo Stays*, MALAYA NEWS, Feb. 12, 2009, http://www.malaya.com.ph/feb12/news4.htm (explaining that Justice Antonio Eduardo Nachura, solicitor general when the suit reached the Supreme Court, and the newly appointed Justice Diosdado Peralta recused themselves).

3. Medellín v. Texas, 552 U.S. 491, 128 S. Ct. 1346 (2008) (finding the International Court of Justice's *Avena* decision was not directly enforceable federal law and the President's memorandum saying that state courts would give effect to the decision did not require states to reconsider and review claims without regard to state procedural default rules). *See generally* Margaret E. McGuinness, *Medellín v. Texas: Supreme Court Holds ICJ Decisions under the Consular Convention Not Binding Federal Law, Rejects Presidential Enforcement of ICJ Judgments over State Proceedings*, ASIL INSIGHTS, April 18, 2008, http://www.asil.org/insights080418.cfm (providing a general overview and analysis of *Medellín v. Texas*).

4. *See generally* Frederic L. Kirgis, *International Agreements and U.S. Law*, ASIL INSIGHTS, May 1997, http://www.asil.org/insigh10.cfm (providing a thorough discussion of the President's authority to conclude sole executive agreements before *Medellín v. Texas*)

and the relationship between the two countries was characterized by slow transfer of sovereignty from the latter to the former.[5] Having achieved full independence in 1946, the Republic of the Philippines became a treaty ally of the United States under the1951 Mutual Defense Treaty (MDT).[6] United States military personnel were stationed on twenty-three sites in the Philippines until 1991, when the Military Bases Agreement governing the bases expired and was not replaced.[7] However, in response to a 1995 territorial dispute with China in the South China Sea, President Ramos invited the U.S. to negotiate the new Visiting Forces Agreement (VFA) with the Philippines.[8] In 1998 consultations for the VFA concluded, and the resulting document, in which both countries reaffirmed their commitment to the MDT, entered into force on June 1, 1999.[9]

B. The Visiting Forces Agreement

The VFA has been ratified by the Phillipine Senate and, as an agreement concluded solely by the U.S. President, was reported to the U.S. Congress in compliance with the Case-Zablocki Act.[10] The primary purpose of the VFA is to establish rules governing the relationship between U.S. service members visiting the Phillipines and Philippine law. Regarding criminal jurisdiction, Article V establishes the sole jurisdiction of Filipino authorities over US personnel who violate any Philippine laws, but U.S. military authorities have exclusive jurisdiction over crimes against American property, security or personnel, and retain the right to exercise sole jurisdiction over any personnel accused of committing a crime during the performance of their official duties.[11] The VFA also establishes various procedural safeguards for U.S. service members detained, taken into custody, or prosecuted by Philippine authorities, including the right to a prompt and speedy trial, to be informed of the charges against them and to be granted access to appropriate U.S. authorities.[12]

5. *See* TEODORO C. AGONCILLO & MILAGROS C. GUERRERO, HISTORY OF THE FILIPINO PEOPLE 241-497 (8th ed. 1990) (providing a general historical overview of the Filipino people).

6. Mutual Defense Treaty between the United States of America and the Republic of the Philippines, U.S.-Phil., Aug. 30, 1951, 3 U.S.T. 3947.

7. DONALD E. WEATHERBEE, RALF EMMERS, MARI PANGESTU, & LEONARD C. SEBASTIAN, INTERNATIONAL RELATIONS IN SOUTHEAST ASIA: THE STRUGGLE FOR AUTONOMY 84 (1st ed. 2005); RENATO CONSTANTINO & LETIZIA R. CONSTANTINO, THE PHILIPPINES: THE CONTINUING PAST 205 (1978).

8. BERNARD D. COLE, THE GREAT WALL AT SEA: CHINA'S NAVY ENTERS THE TWENTY-FIRST 43 (2001).

9. Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines, U.S.-Phil., Feb. 10, 1998,T.I.A.S. No. 12931 [hereinafter Visiting Forces Agreement], *available at* http://www.derechos.org/nizkor/us/doc/vfa.html.

10. The Case-Zablocki Act, 1 U.S.C. 112b (1972). *See also Suzette Nicolas y Sombilon*, Judgment in the Joined Cases of G.R. No. 175888, G.R. No. 17605 and G.R. No. 17622, para. 28.

11. Visiting Forces Agreement, *supra* note 9, at Arts. 5(1) - 5(3).

12. *Id*. at Art. V(9).

C. The Subic Rape Case and the Romulo-Kenney Agreements of 2006

In December 2005, a Filipino prosecutor issued indictments against four members of the U.S. Armed Forces for allegedly raping a Filipino woman, dubbed "Nicole" by the media, in Subic.[13] One year later the Regional Trial Court of Makati acquitted three of the servicemen but convicted Lance Corporal Daniel Smith of rape.[14] The Trial Court ordered that Smith be confined to the Makati jail pending his transfer to the National Bilibid Prison in Muntinlupa City.[15] Smith filed a motion for reconsideration on December 5, 2006, which the Trial Court denied on the 12th of December.[16] On December 14, 2006 he filed a petition for certiorari with the Court of Appeals.[17]

The Romulo-Kenney Agreements were arranged between and signed by Ambassador Kristie Kenney on one side, and respectively Chief State Prosecutor Jovencito Zuno and Secretary of Foreign Affairs Alberto G. Romulo on the other. Ostensibly "in accordance with the Visiting Forces Agreement," they provided for the transfer of Smith from the Makati jail to a detention facility operated by the U.S. government and dictated the conditions of his detention there.[18] As per the Agreements, on December 29, 2006 Smith was transferred to the custody of the U.S. On January 2, 2007 the Court of Appeals held that the petition for certiorari filed by Smith was moot in light of this arrangement.[19] Petitioners challenged this decision, arguing that the Philippines should maintain physical custody over Smith since the VFA was incompatible with several provisions of the 1987 Constitution of the Republic of the Philippines.[20]

II. THE MAJORITY DECISION

The Court began by examining the consistency of the VFA with the Filipino Constitution, which requires at Article XVII, Section 25 that "foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and . . . *recognized as a treaty by the other Contracting State*."[21] After noting that Section 25 should be read broadly in light of its purpose, which is "to ensure that any agreement allowing [a foreign military presence] be equally binding on the Philippines and the foreign sovereign state involved,"[22] the Court concluded that the VFA met the constitutional requirement

13. *Groups Vow to Continue Anti-VFA Campaign Despite Nicole's Recantation*, BULATLAT, Mar. 18, 2009, http://www.bulatlat.com/main/2009/03/18/groups-vow-to-continue-anti-vfa-campaign-despite-nicole%e2%80%99s-recantation/.

14. *Suzette Nicolas y Sombilon*, Judgment in the Joined Cases of G.R. No. 175888, G.R. No. 17605 and G.R. No. 17622 para 6.

15. *Id*. at para. 7.

16. Puno C.J., dissenting at para. 6 *available at* http://sc.judiciary.gov.ph/ jurisprudence/2009 /feb2009/ 175888_176051_176222_puno.htm.

17. *Id*. at para 7.

18. *Suzette Nicolas y Sombilon*, Judgment in the Joined Cases of G.R. No. 175888, G.R. No. 17605 and G.R. No. 17622 at para. 8.

19. *Id.* at para 9.

20. *Id.* at para 11.

21. *Id*. at para. 13.

22. *Id.* at para. 20.

for two reasons. First, as held by the Court in the prior case *Bayan v. Zamora* nearly one decade ago,[23] despite not having been submitted to the U.S. Senate for advice and consent the VFA nevertheless imposes a binding legal obligation on the United States. To that effect "[n]otice can be taken of the internationally known practice of the United States . . . " of concluding sole-executive agreements and notifying Congress of such under the Case-Zablocki Act.[24] Second, the Court concluded that the purpose of the VFA was to implement the Mutual Defense Treaty of 1951, which was approved after the advice and with the consent of the U.S. Senate.[25] The Court reasoned that, as an implementation agreement, only notification of the VFA's conclusion to the U.S. Congress under Case-Zablocki Act was required for compliance with Section 25 of the 1987 Constitution.[26]

The Court also addressed the claim that the U.S. Supreme Court decision in *Medellín* had altered the constitutionality of the VFA. In *Medellín*, the U.S. Supreme Court held that, absent language within a treaty to the effect that it was self-executing or Congressional legislation implementing the accord, international agreements entered into by the United States could not be enforced as part of its domestic law.[27] Petitioners argued that because the VFA was part of the domestic law of the Philippines, *Medellín* had rendered the VFA unequally binding on the two Contracting States and violated Section 25.[28]

The majority rejected the argument, holding that the VFA was both self-executing (since "the parties intend[ed] its provision to be enforceable, precisely because the Agreement is intended to carry out obligations and undertakings under the RP-US Mutual Defense Treaty")[29] and was subject to implementing legislation (vis-à-vis notification to the U.S. Congress under the Case-Zablocki Act, "inasmuch as it is the very purpose and intent of the US Congress that executive agreements registered under this Act within 60 days from their ratification be immediately implemented.").[30] Moreover, although the Court had previously recognized that the purpose of Section 25 was to ensure that a bilateral agreement with the U.S. covering military matters was 'equally binding', the majority held that absolute 'alignment and parity' regarding the enforceability of international obligations was not required by the Constitution.[31] Instead, formulaic mutual acknowledgement of an agreement's 'treaty' status could suffice.[32] Noting that the U.S. Supreme Court in *Weinberger* concluded that executive agreements are

23. Bayan v. Zamora, Judgment in the Joined Cases of G.R. No. 138570 , G.R. No. 138572, G.R. No. 138587, G.R. No. 138680, and G.R. No. 138698, (S.C. October 10, 2000), *available at* http://sc.judiciary.gov.ph/jurisprudence/2000/oct2000/138570.htm.

24. *Suzette Nicolas y Sombilon*, Judgment in the Joined Cases of G.R. No. 175888, G.R. No. 17605 and G.R. No. 17622 at para. 24.

25. *Nicolas v. Romulo*, at para. 42.

26. *Id.* at paras. 26-31. *See* Case-Zablocki Act of August 12, 1972, 1 U.S.C. §112B (2009).

27. Medellín v. Texas, 128 S. Ct. 1346, 1368 (2008).

28. *Nicolas v. Romulo*, at para. 39.

29. *Id.* at para. 42.

30. *Id.* at para. 43.

31. *Id.* at para. 48.

32. *Id.*

'treaties' within the meaning of that word, the majority was satisfied that the obligations imposed by Section 25 had been met.[33]

The opinion then briefly addressed the claims that the provision of the VFA partially immunizing U.S. personnel from the jurisdiction of local courts violated Article VIII, Section 5(5) of the 1987 Constitution, which establishes the exclusive authority of the Supreme Court in adopting rules of procedure for all courts in the Philippines, and that the transfer of Smith to U.S. custody contravenes the Constitution's Article III, Section 1 equal protection guarantees.[34] With respect to both the Court noted that constitutional protections are not without limit, and that in the present case general principles of international law, incorporated into the Constitution at Article 2 Section 2, constituted "a substantial basis for a different treatment of a member of a foreign military."[35] Because international law provides that "the laws (including rules of procedure) of one State do not extend or apply – *except to the extent agreed upon* – to subjects of another State,"[36] the Constitution can accommodate Article V of the VFA and the transfer of Smith to U.S. custody.

Having acknowledged the constitutionality of the VFA, of its own volition the majority weighed in on the legality of the Romulo-Kenney Agreements. Recalling that Article V of the Agreement calls for "[t]he confinement or detention by Philippine authorities [. . .]" the Court concluded that detention by U.S. authorities was not in accord with the VFA.[37] It was therefore ordered that the Secretary of Foreign Affairs "negotiate with the United States representatives for [an] appropriate agreement on detention facilities" consistent with Article V.[38]

III. THE DISSENTING OPINIONS

Chief Justice Puno and Associate Justice Carpio, joined by Associate Justices Alicia Austria-Martinez and Conchita Carpio-Morales, drafted separate dissents in which they strongly condemned the majority's analysis of *Medellín* 's impact on the VFA.[39] Justice Carpio's impassioned dissent begins by describing what is at stake in *Nicolas*:

> In short, the Philippine Constitution bars the efficacy of such a treaty that is enforceable as domestic law only in the Philippines but unenforceable as domestic law in the other contracting State. The Philippines is a sovereign and independent State. It is no longer a colony of the United States. This Court should not countenance an unequal treaty that is not only contrary to the express mandate of the Philippine

33. *Id.* at para. 49.
34. *Id.* at paras. 30-31.
35. *Id.* at para. 32.
36. *Id.* at para. 34 (emphasis added).
37. *Id.* at para. 36, quoting Visiting Forces Agreement, *supra* note 9, at art. 5, § 10.
38. *Id.* at para. 52.
39. *Nicolas v. Romulo* (Carpio, J. dissenting), at para. 1, *available at* http://sc.judiciary.gov.ph/jurisprudence/2009/feb2009/175888_176051_176222_carpio.htm [hereinafter Carpio, J. dissent]; Puno, C.J. dissent, *supra* note 16, at para. 2.

> Constitution, but also an affront to the sovereignty, dignity and independence of the Philippine State.[40]

Although Justice Carpio joined the Court in 2001 and did not participate in *Bayan*, he hinted that he regards it as having been correctly decided when it was handed down. However, he also makes it clear that *Medellín* should be treated as a "supervening event" that has manifestly altered the legality of the VFA as well as the Mutual Defense Treaty.[41] After analyzing the framework for domestic enforceability established by *Medellín*, he concluded that both bilateral agreements are neither self-executing nor had were subject to implementing legislation. With regard to the former, he noted that the text of the VFA and MDT provides no hint of "intention that [they] be 'self-executing.'"[42] Respecting the latter, he argued that if the Vienna Convention on Consular Relations at issue in *Medellín* was not regarded by the U.S. Supreme Court as having domestic effect, then certainly the MDT, which contains only the usual "ratification and entry into force provision found in treaties," also does not.[43] Similarly, the VFA certainly should not be regarded as subject to congressional implementing legislation, since:

> [n]otification under the Case-Zablocki Act is obviously far less significant legally than ratification by the U.S. Senate of a treaty. If a ratified treaty does not automatically become part of U.S. domestic law under *Medellín*, with more reason a merely notified executive agreement does not form part of U.S. domestic law.[44]

Finally, Justice Carpio broke with the majority and pointed out that the *travaux preparatoirs* of Article XVIII Section 25 make it clear that the purpose of the provision was to ensure that any agreement involving foreign troops on Filipino soil is equally legally binding in absolute terms on both Contracting States and that it takes the form of a treaty.[45] As an international obligation embodied "merely [in] an executive agreement"[46] the VFA falls short of the constitutional threshold. Interestingly, although he argues throughout his dissent that the MDT is unconstitutional, in his conclusion Justice Carpio confines himself to affirming the unconstitutionality of the VFA and noting that he would have ordered Smith transferred from the U.S. embassy to the New Bilibid Prison, pending final resolution of his appeal.[47]

Chief Justice Puno, who also dissented in *Bayan*, was largely in agreement with Justice Carpio. His dissent reasserts his longstanding belief that *Bayan* was

40. Carpio, J. dissenting at para. 4, *supra* note 39.

41. *Id.* at para. 1.

42. *Id.* at para. 11, quoting Medellín v. Texas, 128 S. Ct. 1346, 1356 (2008). Justice Carpio points out that the MDT only contains the usual "ratification and entry into force provisions found in treaties." *Id.* at para. 25. Although he does not explicitly do so, it may be inferred that this argument extends to the VFA as well.

43. *Id.*

44. *Id.* at para. 23.

45. *Id.* at paras. 5-10.

46. *Id.* at para. 23.

47. *Id.* at para. 28.

wrongly decided and reflects the strict interpretation he would have applied to Article XVIII Section 25,[48] his dissatisfaction with the "asymmetry in the legal treatment" the VFA embodied in 2000 and continues to perpetuate post-*Medellín*,[49] and his belief that the VFA fulfilled neither requirement for domestic enforcement imposed by the U.S. Supreme Court.[50] His opinion is noteworthy for its specific examination of *Medellín*'s impact on the U.S. President's power to conclude domestically enforceable sole-executive agreements. Justice Puno concluded that:

> In fine, the U.S. President's authority to enter into treaties that are enforceable within its domestic sphere was severely limited by *Medellín* In *Medellín* [. . .], the Supreme Court held that "the president's authority to act, as with the exercise of any governmental power, must stem from an act of Congress or from the Constitution itself."[51]

Upon comparison of the Presidential Memorandum at issue in *Medellín* and the VFA, Justice Puno reasoned that:

> [i]n sum, the non-self-executing character of the [VFA and MPT] not only refutes the notion that the ratifying parties vest the President with authority to unilaterally make treaty obligations binding on domestic courts, but also prohibits him from doing so. The responsibility to transform an international obligation arising from a non-self-executing treaty into domestic law falls on Congress, not the Executive.[52]

IV. CONCLUSION

Several aspects of the majority and dissenting opinions are striking and worthy of comment. First, it is surprising that the majority decided to sidestep the issue of the domestic legal effects of a U.S. Presidential executive agreement and declare that the Filipino Constitution requires equality but not parity in the enforceability of international obligations in light of *Medellín*'s recognition of a limited Presidential authority to conclude sole-executive agreements with domestic legal effect. In his majority opinion in *Medellín*, U.S. Supreme Court Chief Justice Roberts acknowledged that the President has a "narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement."[53] This power is based on "a history of congressional acquiescence [that] can be treated as a "gloss on 'Executive Power' vested in the President by §1 of Art. II."[54] Justice Puno ignores this language completely, and the majority in *Nicolas* could have used it to distinguish *Medellín* on the grounds that the Presidential Memorandum at issue in the U.S. case represented a unique attempt by the Executive branch to convert an international obligation approved by the U.S. Congress into domestically binding law absent congressional authorization to do

48. Puno, C.J. dissent, *supra* note 16, at paras. 31-32.
49. *Id.* at para. 49.
50. *Id.* at paras. 28, 39 & 49.
51. *Id.* at para. 25.
52. *Id.* at para. 29.
53. Medellín v. Texas, 128 S. Ct. 1346, 1372 (2008).
54. *Id*. at 1371 (citing *Dames & Moore v. Regan*, 453 U. S. 654, 686 (1981)).

so,[55] whereas the VFA is an arrangement of a type embodied by an executive agreement as a matter of historical practice.[56] *Medellín* may also be distinguished as concerning the power of the President to displace State criminal law,[57] whereas the VFA is an agreement more closely tied to the Presidents powers as Commander-in-Chief, as it largely covers jurisdiction of U.S. military courts over U.S. personnel in the Philippines.[58] Thus the separation-of-powers issues at stake in *Medellín* are not present with respect to the VFA, and the President's authority to engage in executive agreements that become binding domestic law likely remains unaffected by the outcome of *Medellín*.

A second startling aspect of the majority opinion is its decision to regard the VFA as implemented through notification under the Case-Zablocki Act. This portion of the opinion is conspicuous for the lack of jurisprudence justifying the conflation of notification and implementation. It is, however, not nearly as unexpected as the majority's failure to properly apply *Medellín* to the treaty. Although *Medellín* is generally regarded as providing a less-than-clear framework for determining when treaties are self-executing and which are not,[59] the U.S. Supreme Court *did* at a minimum clarify that the intent of signatory parties and language of the agreement must be examined.[60] Not only did the Court in *Nicolas*

55. *Id.* at 1372, citing Brief for United States as Amicus Curiae Supporting Petioners, Sanchez-Llamas v. Oregon, 548 U.S. 331 (2005), (Nos. 05–51 and 04–10566), at 29–30 (noting that the Presidential Memorandum at issue was described by the Executive Branch itself as an "unprecedented action").

56. CRS REPORT FOR CONGRESS, CONGRESSIONAL OVERSIGHT AND RELATED ISSUES CONCERNING THE PROSPECTIVE SECURITY AGREEMENT BETWEEN THE UNITED STATES AND IRAQ 28 & n.89 (2008), *available at* http://assets.opencrs.com/rpts/RL34362_20080528.pdf (noting that "[t]he only SOFA agreement to which the United States is a party that was concluded as a treaty is the North Atlantic Treaty Status of Forces Agreement (NATO SOFA), 4 U.S.T. 1792, entered into force August 23, 1953.").

57. *Medellín* , 128 S. Ct. at 1370.

58. Visiting Forces Agreement, *supra* note 9, at art. V(6).

59. *See e.g.*, Ronald A. Brand, *Treaties and the Separation of Powers in the United States: A Reassessment after* Medellín v. Texas, 47 DUQUESNE L. REV. (*forthcoming* 2009) (manuscript at 3), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1319818, ("What it does take for a treaty provision to be self-executing is now less clear than prior to the *Medellín* decision, with some of the language of the majority opinion squarely requiring explicit language of self-implementation in a treaty, and other language providing a contrary statement that a treaty provision may be self-executing without specific statement to that effect."). *See also* Frederic L. Kirgis, *International Law in the American Courts – The United States Supreme Court Declines to Enforce the I.C.J.'s Avena Judgment Relating to a U.S. Obligation under the Convention on Consular Relations*, 9 GERMAN L. J. 619, 623-629 (2008) *available at* http://www.germanlawjournal.com/print.php?id=958; Luke A. McLaurin, Medellín v. Texas *and the Doctrine of Non-Self-Executing Treaties* 20 MICH. INT'L LAW. 1, 4 (2008).

60. Incidentally, this means that Chief Justice Puno's analysis of *Medellín* is also incorrect inasmuch as he asserts that the "[U.S. Supreme] Court adopted a *textual approach* in determining whether the relevant treaty sources are self-executory." In fact, "[t]he *Medellín* opinion states in several places that courts should look to the intentions of the U.S. treaty-makers to determine whether a treaty is self-executing." Ingrid Weurth, *Medellín : The New, New Formalism?*, 13 LEWIS & CLARK L. REV. 1, 14 (2009) citing *inter alia Medellín*, 128 S. Ct. at 1366 ("Our cases simply require courts to decide whether a treaty's terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect."); *Medellín*, 128 S. Ct. at 1366 ("Nothing . . . suggests that the President or Senate intended the improbable result of giving the judgments of an international

fail to examine either element, but it (along with Justice's Puno and Carpio) ignored language in *Medellín* that would have abrogated its need to do so; the U.S. Supreme Court at one point suggests that, with respect to sole-executive agreements that self-execution may not be relevant in terms of determining the domestic effect of an agreement, since there was leeway for the Supreme Court to find that "congressional acquiescence [alone] could support the President's asserted authority to create domestic law pursuant to a non-self executing treaty."[61]

Till now, scholars have discussed *Medellín* in terms of its implications for the development of domestic treaty law while paying comparatively little attention to its practical effects on U.S. relations with its allies. *Nicolas* is the first challenge to a bilateral agreement with the U.S. brought under *Medellín* and heard by a foreign court, and though the arrangement at issue emerged intact this time, the serious shortcomings of the majority and dissenting opinions hint at a future of sole-executive agreements with dubious enforceability abroad, even when those agreements can reasonably be construed as consistent with *Medellín*. As a potent reminder that the effects of *Medellín* on U.S. relations have only just begun to manifest, *Nicolas* has already incited Executive action,[62] and may finally inspire Congressional action clarifying the domestic obligations of the U.S. vis-à-vis its international obligations as embodied in thousands of bilateral agreements as well.

tribunal a higher status than that enjoyed by 'many of our most fundamental constitutional protections.'" *id.* at 1367 (quoting Sanchez-Llamas v. Oregon, 548 U.S. 331, 360 (2006)); *id.* at 1358 ("Article 94 . . . [does not] indicate that the Senate that ratified the U.N. charter intended to vest ICJ decisions with immediate legal effect in domestic courts."); *id*. at 1358 ("the Executive Branch has unfailingly adhered to its view that the relevant treaties do not create domestically enforceable federal law."). *Id*. at 1351. *See also* McLaurin, *supra* note 59, at 4.

61. *Medellín* , 128 S. Ct. at 1372.

62. On March 13, 2009 U.S. President Barack Obama called Filipino President Gloria Macapagal-Arroyo to reaffirm his commitment to the VFA. *Obama calls Arroyo on VFA*, PHILLIPINE DAILY ENQUIRER, March 15, 2008, *available at* http://www.asianewsnet.net/news.php?sec=1&id=4530.