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[G.R. No. 170516, July 16, 2008]

AKBAYAN CITIZENS ACTION PARTY ("AKBAYAN"), PAMBANSANG KATIPUNAN NG MGA SAMAHAN SA KANAYUNAN ("PKSK"), ALLIANCE OF PROGRESSIVE LABOR ("APL"), VICENTE A. FABE, ANGELITO R. MENDOZA, MANUEL P. QUIAMBAO, ROSE BEATRIX CRUZ-ANGELES, CONG. LORENZO R. TANADA III, CONG. MARIO JOYO AGUJA, CONG. LORETA ANN P. ROSALES, CONG. ANA THERESIA HONTIVEROS-BARAQUEL, AND CONG. EMMANUEL JOEL J. VILLANUEVA, PETITIONERS, VS. THOMAS G. AQUINO, IN HIS CAPACITY AS UNDERSECRETARY OF THE DEPARTMENT OF TRADE AND INDUSTRY (DTI) AND CHAIRMAN AND CHIEF DELEGATE OF THE PHILIPPINE COORDINATING COMMITTEE (PCC) FOR THE JAPAN-PHILIPPINES ECONOMIC PARTNERSHIP AGREEMENT, EDSEL T. CUSTODIO, IN HIS CAPACITY AS UNDERSECRETARY OF THE DEPARTMENT OF FOREIGN AFFAIRS (DFA) AND CO-CHAIR OF THE PCC FOR THE JPEPA, EDGARDO ABON, IN HIS CAPACITY AS CHAIRMAN OF THE TARIFF COMMISSION AND LEAD NEGOTIATOR FOR COMPETITION POLICY AND EMERGENCY MEASURES OF THE JPEPA, MARGARITA SONGCO, IN HER CAPACITY AS ASSISTANT DIRECTOR-GENERAL OF THE NATIONAL ECONOMIC DEVELOPMENT AUTHORITY (NEDA) AND LEAD NEGOTIATOR FOR TRADE IN SERVICES AND COOPERATION OF THE JPEPA, MALOU MONTERO, IN HER CAPACITY AS FOREIGN SERVICE OFFICER I, OFFICE OF THE UNDERSECRETARY FOR INTERNATIONAL ECONOMIC RELATIONS OF THE DFA AND LEAD NEGOTIATOR FOR THE GENERAL AND FINAL PROVISIONS OF THE JPEPA, ERLINDA ARCELLANA, IN HER CAPACITY AS DIRECTOR OF THE BOARD OF INVESTMENTS AND LEAD NEGOTIATOR FOR TRADE IN GOODS (GENERAL RULES) OF THE JPEPA, RAQUEL ECHAGUE, IN HER CAPACITY AS LEAD NEGOTIATOR FOR RULES OF ORIGIN OF THE JPEPA, GALLANT SORIANO, IN HIS OFFICIAL CAPACITY AS DEPUTY COMMISSIONER OF THE BUREAU OF CUSTOMS AND LEAD NEGOTIATOR FOR CUSTOMS PROCEDURES AND PAPERLESS TRADING OF THE JPEPA, MA. LUISA GIGETTE IMPERIAL, IN HER CAPACITY AS DIRECTOR OF THE BUREAU OF LOCAL EMPLOYMENT OF THE DEPARTMENT

OF LABOR AND EMPLOYMENT (DOLE) AND LEAD NEGOTIATOR FOR MOVEMENT OF NATURAL PERSONS OF THE JPEPA, PASCUAL DE GUZMAN, IN HIS CAPACITY AS DIRECTOR OF THE BOARD OF INVESTMENTS AND LEAD NEGOTIATOR FOR INVESTMENT OF THE JPEPA, JESUS MOTOOMULL, IN HIS CAPACITY AS DIRECTOR FOR THE BUREAU OF PRODUCT STANDARDS OF THE DTI AND LEAD NEGOTIATOR FOR MUTUAL RECOGNITION OF THE JPEPA, LOUIE CALVARIO, IN HIS CAPACITY AS LEAD NEGOTIATOR FOR INTELLECTUAL PROPERTY OF THE JPEPA, ELMER H. DORADO, IN HIS CAPACITY AS OFFICER-IN-CHARGE OF THE GOVERNMENT PROCUREMENT POLICY BOARD TECHNICAL SUPPORT OFFICE, THE GOVERNMENT AGENCY THAT IS LEADING THE NEGOTIATIONS ON GOVERNMENT PROCUREMENT OF THE JPEPA, RICARDO V. PARAS, IN HIS CAPACITY AS CHIEF STATE COUNSEL OF THE DEPARTMENT OF JUSTICE (DOJ) AND LEAD NEGOTIATOR FOR DISPUTE AVOIDANCE AND SETTLEMENT OF THE JPEPA, ADONIS SULIT, IN HIS CAPACITY AS LEAD NEGOTIATOR FOR THE GENERAL AND FINAL PROVISIONS OF THE JPEPA, EDUARDO R. ERMITA, IN HIS CAPACITY AS EXECUTIVE SECRETARY, AND ALBERTO ROMULO, IN HIS CAPACITY AS SECRETARY OF THE DFA,* RESPONDENTS.

D E C I S I O N

CARPIO MORALES, J.:

Petitioners – non-government organizations, Congresspersons, citizens and taxpayers – seek via the present petition for mandamus and prohibition to obtain from respondents the full text of the Japan-Philippines Economic Partnership Agreement (JPEPA) including the Philippine and Japanese offers submitted during the negotiation process and all pertinent attachments and annexes thereto.

Petitioners Congressmen Lorenzo R. Tañada III and Mario Joyo Aguja filed on January 25, 2005 House Resolution No. 551 calling for an inquiry into the bilateral trade agreements then being negotiated by the Philippine government, particularly the JPEPA. The Resolution became the basis of an inquiry subsequently conducted by the House Special Committee on Globalization (the House Committee) into the negotiations of the JPEPA.

In the course of its inquiry, the House Committee requested herein respondent Undersecretary Tomas Aquino (Usec. Aquino), Chairman of the Philippine Coordinating Committee created under Executive Order No. 213 ("Creation of A Philippine Coordinating Committee to Study the Feasibility of the Japan-Philippines Economic Partnership Agreement")[1] to study and negotiate the proposed JPEPA, and to furnish the

Committee with a copy of the latest draft of the JPEPA. Usec. Aquino did not heed the request, however.

Congressman Aguja later requested for the same document, but Usec. Aquino, by letter of November 2, 2005, replied that the Congressman shall be provided with a copy thereof "once the negotiations are completed and as soon as a thorough legal review of the proposed agreement has been conducted."

In a separate move, the House Committee, through Congressman Herminio G. Teves, requested Executive Secretary Eduardo Ermita to furnish it with "all documents on the subject including the latest draft of the proposed agreement, the requests and offers etc."[2] Acting on the request, Secretary Ermita, by letter of June 23, 2005, wrote Congressman Teves as follows:

> In its letter dated 15 June 2005 (copy enclosed), [the] D[epartment of] F[oreign] A[ffairs] explains that **the Committee's request to be furnished all documents on the JPEPA may be difficult to accomplish at this time, since the proposed Agreement has been a work in progress for about three years**. A copy of the draft JPEPA will however be forwarded to the Committee as soon as the text thereof is settled and complete. (Emphasis supplied)

Congressman Aguja also requested NEDA Director-General Romulo Neri and Tariff Commission Chairman Edgardo Abon, by letter of July 1, 2005, for copies of the latest text of the JPEPA.

Chairman Abon replied, however, by letter of July 12, 2005 that the Tariff Commission does not have a copy of the documents being requested, albeit he was certain that Usec. Aquino would provide the Congressman with a copy "once the negotiation is completed." And by letter of July 18, 2005, NEDA Assistant Director-General Margarita R. Songco informed the Congressman that his request addressed to Director-General Neri had been forwarded to Usec. Aquino who would be "in the best position to respond" to the request.

In its third hearing conducted on August 31, 2005, the House Committee resolved to issue a subpoena for the most recent draft of the JPEPA, but the same was not pursued because by Committee Chairman Congressman Teves' information, then House Speaker Jose de Venecia had requested him to hold in abeyance the issuance of the subpoena until the President gives her consent to the disclosure of the documents.[3]

Amid speculations that the JPEPA might be signed by the Philippine government within December 2005, the present petition was filed on December 9, 2005.[4] The agreement was to be later signed on September 9, 2006 by President Gloria Macapagal-Arroyo and Japanese Prime Minister Junichiro Koizumi in Helsinki, Finland, following which the President endorsed it to the Senate for its concurrence pursuant to Article VII, Section 21 of the Constitution. To date, the JPEPA is still being deliberated upon by the Senate.

The JPEPA, which will be the first **bilateral** free trade agreement to be entered into by the Philippines with another country in the event the Senate grants its consent to it, covers a broad range of topics which respondents enumerate as follows: trade in goods, rules of origin, customs procedures, paperless trading, trade in services, investment, intellectual property rights, government procurement, movement of natural persons, cooperation, competition policy, mutual recognition, dispute avoidance and settlement, improvement of the business environment, and general and final provisions.[5]

While the final text of the JPEPA has now been made accessible to the public since September 11, 2006,[6] respondents do not dispute that, at the time the petition was filed up to the filing of petitioners' Reply - when the JPEPA was still being negotiated - the initial drafts thereof were kept from public view.

Before delving on the substantive grounds relied upon by petitioners in support of the petition, the Court finds it necessary to first resolve some material procedural issues.

Standing

For a petition for mandamus such as the one at bar to be given due course, it must be instituted by a party aggrieved by the alleged inaction of any tribunal, corporation, board or person which unlawfully excludes said party from the enjoyment of a legal right.[7] Respondents deny that petitioners have such standing to sue. "[I]n the interest of a speedy and definitive resolution of the substantive issues raised," however, respondents consider it sufficient to cite a portion of the ruling in *Pimentel v. Office of Executive Secretary*[8] which emphasizes the need for a "personal stake in the outcome of the controversy" on questions of standing.

In a petition anchored upon the right of the people to information on matters of public concern, which is a public right by its very nature, petitioners need not show that they have any legal or special interest in the result, it being sufficient to show that they are citizens and, therefore, part of the general public which possesses the right.[9] As the present petition is anchored on the right to information and petitioners are all suing in their capacity as citizens and groups of citizens including petitioners-members of the House of Representatives who additionally are suing in their capacity as such, the standing of petitioners to file the present suit is grounded in jurisprudence.

Mootness

Considering, however, that "[t]he principal relief petitioners are praying for is the disclosure of the contents of the JPEPA prior to its finalization between the two States parties,"[10] public disclosure of the text of the JPEPA after its signing by the President, during the pendency of the present petition, has been largely rendered moot and academic.

With the Senate deliberations on the JPEPA still pending, the agreement as it now stands

cannot yet be considered as final and binding between the two States. Article 164 of the JPEPA itself provides that the agreement does not take effect immediately upon the signing thereof. For it must still go through the procedures required by the laws of each country for its entry into force, *viz*:

> Article 164
> Entry into Force
>
> This Agreement shall enter into force on the thirtieth day after the date on which the Governments of the Parties exchange diplomatic notes informing each other **that their respective legal procedures necessary for entry into force of this Agreement have been completed.** It shall remain in force unless terminated as provided for in Article 165.[11] (Emphasis supplied)

President Arroyo's endorsement of the JPEPA to the Senate for concurrence is part of the legal procedures which must be met prior to the agreement's entry into force.

The text of the JPEPA having then been made accessible to the public, the petition has become moot and academic to the extent that it seeks the disclosure of the "full text" thereof.

The petition is not entirely moot, however, because petitioners seek to obtain, not merely the text of the JPEPA, but also the Philippine and Japanese offers in the course of the negotiations.[12]

A discussion of the substantive issues, insofar as they impinge on petitioners' demand for access to the Philippine and Japanese offers, is thus in order.

Grounds relied upon by petitioners

Petitioners assert, *first*, that the refusal of the government to disclose the documents bearing on the JPEPA negotiations violates their right to information on matters of public concern[13] and contravenes other constitutional provisions on transparency, such as that on the policy of full public disclosure of all transactions involving public interest.[14] *Second*, they contend that non-disclosure of the same documents undermines their right to effective and reasonable participation in all levels of social, political, and economic decision-making.[15] *Lastly*, they proffer that divulging the contents of the JPEPA only after the agreement has been concluded will effectively make the Senate into a mere rubber stamp of the Executive, in violation of the principle of separation of powers.

Significantly, the grounds relied upon by petitioners for the disclosure of the **latest text** of the JPEPA are, except for the last, the same as those cited for the disclosure of the Philippine and Japanese **offers**.

The first two grounds relied upon by petitioners which bear on the merits of respondents' claim of privilege shall be discussed. The last, being purely speculatory given that the Senate is still deliberating on the JPEPA, shall not.

The JPEPA is a matter of public concern

To be covered by the right to information, the information sought must meet the threshold requirement that it be a matter of public concern. *Apropos* is the teaching of *Legaspi v. Civil Service Commission*:

> In determining whether or not a particular information is of public concern there is no rigid test which can be applied. `Public concern' like `public interest' is a term that eludes exact definition. Both terms embrace a broad spectrum of subjects which the public may want to know, either because these directly affect their lives, or simply because such matters naturally arouse the interest of an ordinary citizen. In the final analysis, it is for the courts to determine on a case by case basis whether the matter at issue is of interest or importance, as it relates to or affects the public.[16] (Underscoring supplied)

From the nature of the JPEPA as an international trade agreement, it is evident that the Philippine and Japanese offers submitted during the negotiations towards its execution are matters of public concern. This, respondents do not dispute. They only claim that diplomatic negotiations are covered by the doctrine of **executive privilege**, thus constituting an exception to the right to information and the policy of full public disclosure.

Respondents' claim of privilege

It is well-established in jurisprudence that neither the right to information nor the policy of full public disclosure is absolute, there being matters which, albeit of public concern or public interest, are recognized as privileged in nature. The types of information which may be considered privileged have been elucidated in *Almonte v. Vasquez,*[17] *Chavez v. PCGG,*[18] *Chavez v. Public Estate's Authority,*[19] and most recently in *Senate v. Ermita*[20] where the Court reaffirmed the validity of the doctrine of executive privilege in this jurisdiction and dwelt on its scope.

Whether a claim of executive privilege is valid depends on the ground invoked to justify it and the context in which it is made.[21] In the present case, the ground for respondents' claim of privilege is set forth in their **Comment**, *viz:*

> x x x The categories of information that may be considered privileged includes matters of diplomatic character and under negotiation and review. In this case, the privileged character of the **diplomatic negotiations** has been categorically invoked and clearly explained by respondents particularly respondent DTI Senior Undersecretary.

> The documents on the proposed JPEPA as well as the text which is subject to negotiations and legal review by the parties fall under the exceptions to the right of access to information on matters of public concern and policy of public disclosure. They come within the coverage of executive privilege. At the time when the Committee was requesting for copies of such documents, the negotiations were ongoing as they are still now and the text of the proposed JPEPA is still uncertain and subject to change. Considering the status and nature of such documents then and now, these are evidently covered by executive privilege consistent with existing legal provisions and settled jurisprudence.
>
> Practical and strategic considerations likewise counsel against the disclosure of the "rolling texts" which may undergo radical change or portions of which may be totally abandoned. Furthermore, the **negotiations of the representatives of the Philippines as well as of Japan must be allowed to explore alternatives in the course of the negotiations in the same manner as judicial deliberations and working drafts of opinions are accorded strict confidentiality.**[22] (Emphasis and underscoring supplied)

The ground relied upon by respondents is thus not simply that the information sought involves a diplomatic matter, but that it pertains to diplomatic negotiations then in progress.

Privileged character of diplomatic negotiations

The privileged character of diplomatic negotiations has been recognized in this jurisdiction. In discussing valid limitations on the right to information, the Court in *Chavez v. PCGG* held that "information on inter-government exchanges prior to the conclusion of treaties and executive agreements may be subject to reasonable safeguards for the sake of national interest."[23] Even earlier, the same privilege was upheld in *People's Movement for Press Freedom (PMPF) v. Manglapus*[24] wherein the Court discussed the reasons for the privilege in more precise terms.

In *PMPF v. Manglapus*, the therein petitioners were seeking information from the President's representatives on the state of the then on-going negotiations of the RP-US Military Bases Agreement.[25] The Court denied the petition, stressing that "**secrecy of negotiations with foreign countries is not violative** of the constitutional provisions of freedom of speech or of the press nor **of the freedom of access to information**." The Resolution went on to state, thus:

> **The nature of diplomacy requires centralization of authority and expedition of decision which are inherent in executive action. Another essential characteristic of diplomacy is its confidential nature.** Although much has been said about "open" and "secret" diplomacy, with disparagement of the latter, Secretaries of State Hughes and Stimson have clearly analyzed and

justified the practice. In the words of Mr. Stimson:

> "**A complicated negotiation . . . cannot be carried through without many, many private talks and discussion, man to man; many tentative suggestions and proposals. Delegates from other countries come and tell you in confidence of their troubles at home and of their differences with other countries and with other delegates; they tell you of what they would do under certain circumstances and would not do under other circumstances. . . If these reports . . . should become public . . . who would ever trust American Delegations in another conference?** (United States Department of State, Press Releases, June 7, 1930, pp. 282-284.)."

x x x x

There is frequent criticism of the secrecy in which negotiation with foreign powers on nearly all subjects is concerned. This, it is claimed, is incompatible with the substance of democracy. As expressed by one writer, "It can be said that there is no more rigid system of silence anywhere in the world." (E.J. Young, Looking Behind the Censorship, J. B. Lippincott Co., 1938) President Wilson in starting his efforts for the conclusion of the World War declared that we must have "open covenants, openly arrived at." He quickly abandoned his thought.

No one who has studied the question believes that such a method of publicity is possible. **In the moment that negotiations are started, pressure groups attempt to "muscle in." An ill-timed speech by one of the parties or a frank declaration of the concession which are exacted or offered on both sides would quickly lead to widespread propaganda to block the negotiations. After a treaty has been drafted and its terms are fully published, there is ample opportunity for discussion before it is approved.** (The New American Government and Its Works, James T. Young, 4th Edition, p. 194) (Emphasis and underscoring supplied)

Still in *PMPF v. Manglapus,* the Court adopted the doctrine in *U.S. v. Curtiss-Wright Export Corp*.[26] that the President is the sole organ of the nation in its negotiations with foreign countries, *viz*:

> "x x x In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, **"The**

> **President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."** Annals, 6th Cong., col. 613. . . (Emphasis supplied; underscoring in the original)

Applying the principles adopted in *PMPF v. Manglapus,* it is clear that while the final text of the JPEPA may not be kept perpetually confidential - since there should be "ample opportunity for discussion before [a treaty] is approved" - the offers exchanged by the parties during the negotiations continue to be privileged even after the JPEPA is published. It is reasonable to conclude that the Japanese representatives submitted their offers with the understanding that "**historic confidentiality**"[27] would govern the same. Disclosing these offers could impair the ability of the Philippines to deal not only with Japan but with other foreign governments **in future negotiations**.

A ruling that Philippine offers in treaty negotiations should now be open to public scrutiny would discourage future Philippine representatives from frankly expressing their views during negotiations. While, on first impression, it appears wise to deter Philippine representatives from entering into compromises, it bears noting that treaty negotiations, or any negotiation for that matter, normally involve a process of *quid pro quo*, and **oftentimes negotiators have to be willing to grant concessions in an area of lesser importance in order to obtain more favorable terms in an area of greater national interest**. *Apropos* are the following observations of Benjamin S. Duval, Jr.:

> x x x **[T]hose involved in the practice of negotiations appear to be in agreement that publicity leads to "grandstanding," tends to freeze negotiating positions, and inhibits the give-and-take essential to successful negotiation.** As Sissela Bok points out, if "negotiators have more to gain from being approved by their own sides than by making a reasoned agreement with competitors or adversaries, then they are inclined to 'play to the gallery . . ." In fact, **the public reaction may leave them little option**. It would be a brave, or foolish, Arab leader who expressed publicly a willingness for peace with Israel that did not involve the return of the entire West Bank, or Israeli leader who stated publicly a willingness to remove Israel's existing settlements from Judea and Samaria in return for peace.[28] (Emphasis supplied)

Indeed, by hampering the ability of our representatives to compromise, we may be jeopardizing higher national goals for the sake of securing less critical ones.

Diplomatic negotiations, therefore, are recognized as privileged in this jurisdiction, the JPEPA negotiations constituting no exception. It bears emphasis, however, that such privilege is only **presumptive**. For as *Senate v. Ermita* holds, recognizing a type of information as privileged does not mean that it will be considered privileged in all instances. Only after a consideration of the context in which the claim is made may it be determined if there is a public interest that calls for the disclosure of the desired information, strong enough to overcome its traditionally privileged status.

Whether petitioners have established the presence of such a public interest shall be discussed later. For now, the Court shall first pass upon the arguments raised by petitioners against the application of *PMPF v. Manglapus* to the present case.

Arguments proffered by petitioners *against* the application of *PMPF v. Manglapus*

Petitioners argue that *PMPF v. Manglapus* cannot be applied *in toto* to the present case, there being substantial factual distinctions between the two.

To petitioners, the *first* and most fundamental distinction lies in the nature of the treaty involved. They stress that *PMPF v. Manglapus* involved the Military Bases Agreement which necessarily pertained to matters affecting national security; whereas the present case involves an economic treaty that seeks to regulate trade and commerce between the Philippines and Japan, matters which, unlike those covered by the Military Bases Agreement, are not so vital to national security to disallow their disclosure.

Petitioners' argument betrays a faulty assumption that information, to be considered privileged, must involve national security. The recognition in *Senate v. Ermita*[29] that executive privilege has encompassed claims of varying kinds, such that it may even be more accurate to speak of "executive privileges," cautions against such generalization.

While there certainly are privileges grounded on the necessity of safeguarding national security such as those involving military secrets, not all are founded thereon. One example is **the "informer's privilege,"** or the privilege of the Government not to disclose the identity of a person or persons who furnish information of violations of law to officers charged with the enforcement of that law.[30] The suspect involved need not be so notorious as to be a threat to national security for this privilege to apply in any given instance. Otherwise, the privilege would be inapplicable in all but the most high-profile cases, in which case not only would this be contrary to long-standing practice. It would also be highly prejudicial to law enforcement efforts in general.

Also illustrative is the **privilege accorded to presidential communications**, which are presumed privileged without distinguishing between those which involve matters of national security and those which do not, the rationale for the privilege being that

> x x x [a] **frank exchange** of exploratory ideas and assessments, free from the glare of publicity and pressure by interested parties, is essential to protect **the independence of decision-making** of those tasked to exercise Presidential, Legislative and Judicial power. x x x[31] (Emphasis supplied)

In the same way that the privilege for judicial deliberations does not depend on the nature of the case deliberated upon, so presidential communications are privileged whether they involve matters of national security.

It bears emphasis, however, that the privilege accorded to presidential communications is

not absolute, one significant qualification being that "the Executive **cannot**, any more than the other branches of government, invoke a general confidentiality privilege to **shield** its officials and employees from investigations by the proper governmental institutions into **possible criminal wrongdoing**." [32] This qualification applies whether the privilege is being invoked in the context of a judicial trial or a congressional investigation conducted in aid of legislation.[33]

Closely related to the "presidential communications" privilege is the **deliberative process privilege** recognized in the United States. As discussed by the U.S. Supreme Court in *NLRB v. Sears, Roebuck & Co*,[34] deliberative process covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. Notably, the privileged status of such documents rests, **not on the need to protect national security** but, on the "obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news," the objective of the privilege being to enhance the quality of agency decisions. [35]

The diplomatic negotiations privilege bears a close resemblance to the deliberative process and presidential communications privilege. It may be readily perceived that the rationale for the confidential character of diplomatic negotiations, deliberative process, and presidential communications is similar, if not identical.

The earlier discussion on *PMPF v. Manglapus*[36] shows that the privilege for diplomatic negotiations is meant to encourage a frank exchange of exploratory ideas between the negotiating parties by shielding such negotiations from public view. Similar to the privilege for presidential communications, the diplomatic negotiations privilege seeks, through the same means, to protect the independence in decision-making of the President, particularly in its capacity as "the sole organ of the nation in its external relations, and its sole representative with foreign nations." And, as with the deliberative process privilege, the privilege accorded to diplomatic negotiations arises, not on account of the content of the information *per se*, but because the information is part of a process of deliberation which, in pursuit of the public interest, must be presumed confidential.

The decision of the U.S. District Court, District of Columbia in *Fulbright & Jaworski v. Department of the Treasury*[37] enlightens on the close relation between diplomatic negotiations and deliberative process privileges. The plaintiffs in that case sought access to notes taken by a member of the U.S. negotiating team during the U.S.-French **tax treaty** negotiations. Among the points noted therein were the issues to be discussed, positions which the French and U.S. teams took on some points, the draft language agreed on, and articles which needed to be amended. Upholding the confidentiality of those notes, Judge Green ruled, thus:

> **Negotiations between two countries to draft a treaty represent a true example of a deliberative process. Much give-and-take must occur for the**

> **countries to reach an accord.** A description of the negotiations at any one point would not provide an onlooker a summary of the discussions which could later be relied on as law. It would not be "working law" as the points discussed and positions agreed on would be subject to change at any date until the treaty was signed by the President and ratified by the Senate.
>
> **The policies behind the deliberative process privilege support non-disclosure. Much harm could accrue to the negotiations process if these notes were revealed. Exposure of the pre-agreement positions of the French negotiators might well offend foreign governments and would lead to less candor by the U. S. in recording the events of the negotiations process.** As several months pass in between negotiations, this lack of record could hinder readily the U. S. negotiating team. Further disclosure would reveal prematurely adopted policies. If these policies should be changed, public confusion would result easily.
>
> **Finally, releasing these snapshot views of the negotiations would be comparable to releasing drafts of the treaty, particularly when the notes state the tentative provisions and language agreed on. As drafts of regulations typically are protected by the deliberative process privilege,** Arthur Andersen & Co. v. Internal Revenue Service, C.A. No. 80-705 (D.C.Cir., May 21, 1982)**, drafts of treaties** should **be accorded the same protection.** (Emphasis and underscoring supplied)

Clearly, the privilege accorded to diplomatic negotiations follows as a logical consequence from the privileged character of the deliberative process.

The Court is not unaware that in *Center for International Environmental Law (CIEL), et al. v. Office of U.S. Trade Representative*[38] - where the plaintiffs sought information relating to the just-completed negotiation of a United States-Chile Free Trade Agreement - the same district court, this time under Judge Friedman, consciously refrained from applying the doctrine in *Fulbright* and ordered the disclosure of the information being sought.

Since the factual milieu in *CIEL* seemed to call for the straight application of the doctrine in *Fulbright*, a discussion of why the district court did not apply the same would help illumine this Court's own reasons for deciding the present case along the lines of *Fulbright*.

In both *Fulbright* and *CIEL*, the U.S. government cited a statutory basis for withholding information, namely, Exemption 5 of the Freedom of Information Act (FOIA).[39] In order to qualify for protection under Exemption 5, a document must satisfy two conditions: (1) it must be either **inter-agency or intra-agency** in nature, and (2) it must be both **pre-decisional and part of the agency's deliberative or decision-making process**.[40]

Judge Friedman, in *CIEL*, himself cognizant of a "superficial similarity of context" between the two cases, based his decision on what he perceived to be a significant

distinction: he found the negotiator's notes that were sought in *Fulbright* to be "clearly internal," whereas the documents being sought in *CIEL* were those produced by or exchanged with an outside party, *i.e*. Chile. The documents subject of *Fulbright* being clearly internal in character, the question of disclosure therein turned not on the threshold requirement of Exemption 5 that the document be inter-agency, but on whether the documents were part of the agency's pre-decisional deliberative process. On this basis, Judge Friedman found that "Judge Green's discussion [in *Fulbright*] of the harm that could result from disclosure therefore is irrelevant, **since the documents at issue [in *CIEL*] are not inter-agency, and the Court does not reach the question of deliberative process.**" (Emphasis supplied)

In fine, *Fulbright* was not overturned. The court in *CIEL* merely found the same to be irrelevant in light of its distinct factual setting. Whether this conclusion was valid - a question on which this Court would not pass - the ruling in *Fulbright* that "[n]egotiations between two countries to draft a treaty represent a true example of a deliberative process" was left standing, since the *CIEL* court explicitly stated that it did not reach the question of deliberative process.

Going back to the present case, the Court recognizes that the information sought by petitioners includes documents produced and communicated by a party external to the Philippine government, namely, the Japanese representatives in the JPEPA negotiations, and to that extent this case is closer to the factual circumstances of *CIEL* than those of *Fulbright*.

Nonetheless, for reasons which shall be discussed shortly, this Court echoes the principle articulated in *Fulbright* that the public policy underlying the deliberative process privilege requires that diplomatic negotiations should also be accorded privileged status, even if the documents subject of the present case cannot be described as purely internal in character.

It need not be stressed that in *CIEL*, the court ordered the disclosure of information based on its finding that the first requirement of FOIA Exemption 5 - that the documents be inter-agency - was not met. In determining whether the government may validly refuse disclosure of the exchanges between the U.S. and Chile, it necessarily had to deal with this requirement, it being laid down by a statute binding on them.

In this jurisdiction, however, there is no counterpart of the FOIA, nor is there any statutory requirement similar to FOIA Exemption 5 in particular. Hence, Philippine courts, when assessing a claim of privilege for diplomatic negotiations, are more free to focus directly on the issue of **whether the privilege being claimed is indeed supported by public policy**, without having to consider - as the *CIEL* court did - if these negotiations fulfill a formal requirement of being "inter-agency." Important though that requirement may be in the context of domestic negotiations, it need not be accorded the same significance when dealing with international negotiations.

There being a public policy supporting a privilege for diplomatic negotiations for the

reasons explained above, the Court sees no reason to modify, much less abandon, the doctrine in *PMPF v. Manglapus*.

A *second* point petitioners proffer in their attempt to differentiate *PMPF v. Manglapus* from the present case is the fact that the petitioners therein consisted entirely of members of the mass media, while petitioners in the present case include members of the House of Representatives who invoke their right to information not just as citizens but as members of Congress.

Petitioners thus conclude that the present case involves the right of members of Congress to demand information on negotiations of international trade agreements from the Executive branch, a matter which was not raised in *PMPF v. Manglapus*.

While indeed the petitioners in *PMPF v. Manglapus* consisted only of members of the mass media, it would be incorrect to claim that the doctrine laid down therein has no bearing on a controversy such as the present, where the demand for information has come from members of Congress, not only from private citizens.

The privileged character accorded to diplomatic negotiations does not *ipso facto* lose all force and effect simply because the same privilege is now being claimed under different circumstances. The probability of the claim succeeding in the new context might differ, but to say that the privilege, as such, has no validity at all in that context is another matter altogether.

The Court's statement in *Senate v. Ermita* that "presidential refusals to furnish information may be actuated by any of at least three distinct kinds of considerations [state secrets privilege, informer's privilege, and a generic privilege for internal deliberations], and may be asserted, **with differing degrees of success**, in the context of either judicial or legislative investigations,"[41] implies that a privilege, once recognized, may be invoked under different procedural settings. That this principle holds true particularly with respect to diplomatic negotiations may be inferred from *PMPF v. Manglapus* itself, where the Court held that it is the President alone who negotiates treaties, and not even the Senate or the House of Representatives, unless asked, may intrude upon that process.

Clearly, the privilege for diplomatic negotiations may be invoked not only against citizens' demands for information, but also in the context of legislative investigations.

Hence, the recognition granted in *PMPF v. Manglapus* to the privileged character of diplomatic negotiations cannot be considered irrelevant in resolving the present case, the contextual differences between the two cases notwithstanding.

As *third* and last point raised against the application of *PMPF v. Manglapus* in this case, petitioners proffer that "the socio-political and historical contexts of the two cases are worlds apart." They claim that the constitutional traditions and concepts prevailing at the time *PMPF v. Manglapus* came about, particularly the school of thought that the

requirements of foreign policy and the ideals of transparency were incompatible with each other or the "incompatibility hypothesis," while valid when international relations were still governed by power, politics and wars, are no longer so in this age of international cooperation.[42]

Without delving into petitioners' assertions respecting the "incompatibility hypothesis," the Court notes that the ruling in *PMPF v. Manglapus* is grounded more on the nature of treaty negotiations as such than on a particular socio-political school of thought. If petitioners are suggesting that the nature of treaty negotiations have so changed that "[a]n ill-timed speech by one of the parties or a frank declaration of the concession which are exacted or offered on both sides" no longer "lead[s] to widespread propaganda to block the negotiations," or that parties in treaty negotiations no longer expect their communications to be governed by historic confidentiality, the burden is on them to substantiate the same. This petitioners failed to discharge.

Whether the privilege applies only at certain stages of the negotiation process

Petitioners admit that "diplomatic negotiations on the JPEPA are entitled to a reasonable amount of confidentiality so as not to jeopardize the diplomatic process." They argue, however, that the same is privileged "only at certain stages of the negotiating process, after which such information must necessarily be revealed to the public."[43] They add that the duty to disclose this information was vested in the government when the negotiations moved from the formulation and exploratory stage to the firming up of definite propositions or official recommendations, citing *Chavez v. PCGG*[44] and *Chavez v. PEA*.[45]

The following statement in *Chavez v. PEA*, however, suffices to show that the doctrine in both that case and *Chavez v. PCGG* with regard to the duty to disclose "definite propositions of the government" does not apply to diplomatic negotiations:

> We rule, therefore, that the constitutional right to information includes official information on on-going negotiations before a final contract. **The information, however, must constitute definite propositions by the government and should not cover recognized exceptions like privileged information, military and diplomatic secrets and similar matters affecting national security and public order**. x x x[46] (Emphasis and underscoring supplied)

It follows from this ruling that even definite propositions of the government may not be disclosed if they fall under "recognized exceptions." The privilege for diplomatic negotiations is clearly among the recognized exceptions, for the footnote to the immediately quoted ruling cites *PMPF v. Manglapus* itself as an authority.

Whether there is sufficient *public interest* to overcome the claim of privilege

It being established that diplomatic negotiations enjoy a presumptive privilege against disclosure, even against the demands of members of Congress for information, the Court shall now determine whether petitioners have shown the existence of a public interest sufficient to overcome the privilege in this instance.

To clarify, there are at least two kinds of public interest that must be taken into account. One is the presumed public interest **in favor of keeping the subject information confidential**, which is the reason for the privilege in the first place, and the other is the public interest **in favor of disclosure**, the existence of which must be shown by the party asking for information. [47]

The criteria to be employed in determining whether there is a sufficient public interest in favor of disclosure may be gathered from cases such as *U.S. v. Nixon*,[48] *Senate Select Committee on Presidential Campaign Activities v. Nixon*,[49] and *In re Sealed Case*.[50]

U.S. v. Nixon, which involved a claim of the presidential communications privilege against the subpoena *duces tecum* of a district court in a *criminal* case, emphasized the need to balance such claim of privilege against the constitutional duty of courts to ensure a fair administration of *criminal* justice.

> x x x **the allowance of the privilege** to withhold evidence that is *demonstrably relevant* in a criminal trial **would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice.** Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases. (Emphasis, italics and underscoring supplied)

Similarly, *Senate Select Committee v. Nixon*,[51] which involved a claim of the presidential communications privilege against the subpoena *duces tecum* of a Senate committee, spoke of the need to balance such claim with the duty of Congress to perform its *legislative* functions.

> The staged decisional structure established in *Nixon v. Sirica* was designed to ensure that the President and those upon whom he directly relies in the performance of his duties could continue to work under a general assurance that their deliberations would remain confidential. So long as **the presumption that the public interest favors confidentiality can be defeated only by a strong showing of need by another institution of government- a showing that the responsibilities of that institution cannot responsibly be fulfilled without**

> **access to records of the President's deliberations**- we believed in *Nixon v. Sirica*, and continue to believe, that the effective functioning of the presidential office will not be impaired. x x x
>
> x x x x
>
> **The sufficiency of the Committee's showing of need has come to depend, therefore, entirely on whether the subpoenaed materials are critical to the performance of its legislative functions.** x x x (Emphasis and underscoring supplied)

In re Sealed Case[52] involved a claim of the deliberative process and presidential communications privileges against a subpoena *duces tecum* of a grand jury. On the claim of deliberative process privilege, the court stated:

> The deliberative process privilege is a *qualified* privilege and **can be overcome by a *sufficient showing of need*. This need determination is to be made flexibly on a case-by-case, ad hoc basis**. "[E]ach time [the deliberative process privilege] is asserted the district court must undertake a fresh balancing of the competing interests," **taking into account factors such as "the relevance of the evidence," "the availability of other evidence," "the seriousness of the litigation," "the role of the government," and the "possibility of future timidity by government employees**. x x x (Emphasis, italics and underscoring supplied)

Petitioners have failed to present the strong and "*sufficient showing of need*" referred to in the immediately cited cases. The arguments they proffer to establish their entitlement to the subject documents fall short of this standard.

Petitioners go on to assert that the non-involvement of the Filipino people in the JPEPA negotiation process effectively results in the bargaining away of their economic and property rights without their knowledge and participation, in violation of the due process clause of the Constitution. They claim, moreover, that it is essential for the people to have access to the initial offers exchanged during the negotiations since only through such disclosure can their constitutional right to effectively participate in decision-making be brought to life in the context of international trade agreements.

Whether it can accurately be said that the Filipino people were not involved in the JPEPA negotiations is a question of fact which this Court need not resolve. Suffice it to state that respondents had presented documents purporting to show that public consultations were conducted on the JPEPA. Parenthetically, petitioners consider these "alleged consultations" as "woefully selective and inadequate."[53]

AT ALL EVENTS, since it is not disputed that the offers exchanged by the Philippine and Japanese representatives have not been disclosed to the public, the Court shall pass upon

the issue of whether access to the documents bearing on them is, as petitioners claim, essential to their right to participate in decision-making.

The case for petitioners has, of course, been immensely weakened by the disclosure of the full text of the JPEPA to the public since September 11, 2006, even as it is still being deliberated upon by the Senate and, therefore, not yet binding on the Philippines. Were the Senate to concur with the validity of the JPEPA at this moment, there has already been, in the words of *PMPF v. Manglapus*, "ample opportunity for discussion before [the treaty] is approved."

The text of the JPEPA having been published, petitioners have failed to convince this Court that they will not be able to meaningfully exercise their right to participate in decision-making unless the initial offers are also published.

It is of public knowledge that various non-government sectors and private citizens have already publicly expressed their views on the JPEPA, their comments not being limited to general observations thereon but on its specific provisions. Numerous articles and statements critical of the JPEPA have been posted on the Internet.[54] Given these developments, there is no basis for petitioners' claim that access to the Philippine and Japanese offers is essential to the exercise of their right to participate in decision-making.

Petitioner-members of the House of Representatives additionally anchor their claim to have a right to the subject documents on the basis of Congress' inherent power to regulate commerce, be it domestic or international. They allege that Congress cannot meaningfully exercise the power to regulate international trade agreements such as the JPEPA without being given copies of the initial offers exchanged during the negotiations thereof. In the same vein, they argue that the President cannot exclude Congress from the JPEPA negotiations since whatever power and authority the President has to negotiate international trade agreements is derived only by delegation of Congress, pursuant to Article VI, Section 28(2) of the Constitution and Sections 401 and 402 of Presidential Decree No. 1464.[55]

The subject of Article VI Section 28(2) of the Constitution is not the power to negotiate treaties and international agreements, but the power to fix tariff rates, import and export quotas, and other taxes. Thus it provides:

> (2) The Congress may, by law, authorize the President to fix within specified limits, and subject to such limitations and restrictions as it may impose, tariff rates, import and export quotas, tonnage and wharfage dues, and other duties or imposts within the framework of the national development program of the Government.

As to the power to negotiate treaties, the constitutional basis thereof is Section 21 of Article VII - the article on the Executive Department - which states:

> No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.

The doctrine in *PMPF v. Manglapus* that the treaty-making power is exclusive to the President, being the sole organ of the nation in its external relations, was echoed in *BAYAN v. Executive Secretary*[56] where the Court held:

> **By constitutional fiat and by the intrinsic nature of his office, the President, as head of State, is the sole organ and authority in the external affairs of the country. In many ways, the President is the chief architect of the nation's foreign policy; his "dominance in the field of foreign relations is (then) conceded." Wielding vast powers and influence, his conduct in the external affairs** of the nation, as Jefferson describes, is "*executive altogether*."
>
> **As regards the power to enter into treaties or international agreements, the Constitution vests the same in the President, subject only to the concurrence of at least two thirds vote of all the members of the Senate.** In this light, the negotiation of the VFA and the subsequent ratification of the agreement are exclusive acts which pertain solely to the President, in the lawful exercise of **his *vast executive and diplomatic powers granted him no less than by the fundamental law itself. Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it*.** x x x (Italics in the original; emphasis and underscoring supplied)

The same doctrine was reiterated even more recently in *Pimentel v. Executive Secretary*[57] where the Court ruled:

> In our system of government, the President, being the head of state, is regarded as **the sole organ and authority in external relations and is the country's sole representative with foreign nations.** As the chief architect of foreign policy, the President acts as the country's mouthpiece with respect to international affairs. Hence, **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**. x x x (Emphasis and underscoring supplied)

While the power then to fix tariff rates and other taxes clearly belongs to Congress, and is exercised by the President only by delegation of that body, it has long been recognized that

the power to enter into treaties is vested directly and exclusively in the President, subject only to the concurrence of at least two-thirds of all the Members of the Senate for the validity of the treaty. In this light, the authority of the President to enter into trade agreements with foreign nations provided under P.D. 1464[58] may be interpreted as an acknowledgment of a **power already inherent in its office**. It may not be used as basis to hold the President or its representatives accountable to Congress for the conduct of treaty negotiations.

This is not to say, of course, that the President's power to enter into treaties is unlimited but for the requirement of Senate concurrence, since the President must still ensure that all treaties will substantively conform to all the relevant provisions of the Constitution.

It follows from the above discussion that Congress, while possessing vast legislative powers, may not interfere in the field of treaty negotiations. While Article VII, Section 21 provides for Senate concurrence, such pertains only to the validity of the treaty under consideration, not to the conduct of negotiations attendant to its conclusion. Moreover, it is not even Congress as a whole that has been given the authority to concur as a means of checking the treaty-making power of the President, but only the Senate.

Thus, as in the case of petitioners suing in their capacity as private citizens, petitioners-members of the House of Representatives fail to present a *"sufficient showing of need"* that the information sought is critical to the performance of the functions of Congress, functions that do not include treaty-negotiation.

Respondents' alleged failure to timely claim executive privilege

On respondents' invocation of executive privilege, petitioners find the same defective, not having been done seasonably as it was raised only in their Comment to the present petition and not during the House Committee hearings.

That respondents invoked the privilege for the first time only in their Comment to the present petition does not mean that the claim of privilege should not be credited. Petitioners' position presupposes that an assertion of the privilege should have been made during the House Committee investigations, failing which respondents are deemed to have waived it.

When the House Committee and petitioner-Congressman Aguja requested respondents for copies of the documents subject of this case, respondents replied that the negotiations were still on-going and that the draft of the JPEPA would be released once the text thereof is settled and complete. There was no intimation that the requested copies are confidential in nature by reason of public policy. The response may not thus be deemed a claim of privilege by the standards of *Senate v. Ermita*, which recognizes as claims of privilege only those which are accompanied by **precise and certain reasons** for preserving the **confidentiality** of the information being sought.

Respondents' failure to claim the privilege during the House Committee hearings may not, however, be construed as a waiver thereof by the Executive branch. As the immediately preceding paragraph indicates, what respondents received from the House Committee and petitioner-Congressman Aguja were mere requests for information. And as priorly stated, the House Committee itself refrained from pursuing its earlier resolution to issue a subpoena *duces tecum* on account of then Speaker Jose de Venecia's alleged request to Committee Chairperson Congressman Teves to hold the same in abeyance.

While it is a salutary and noble practice for Congress to refrain from issuing subpoenas to executive officials - out of respect for their office - until resort to it becomes necessary, the fact remains that such requests are not a compulsory process. Being mere requests, they do not strictly call for an assertion of executive privilege.

The privilege is an exemption to Congress' power of inquiry.[59] So long as Congress itself finds no cause to enforce such power, there is no strict necessity to assert the privilege. In this light, respondents' failure to invoke the privilege during the House Committee investigations did not amount to a waiver thereof.

The Court observes, however, that the claim of privilege appearing in respondents' Comment to this petition fails to satisfy in full the requirement laid down in *Senate v. Ermita* that the claim should be invoked by the President or through the Executive Secretary "by order of the President."[60] Respondents' claim of privilege is being sustained, however, its flaw notwithstanding, because of circumstances peculiar to the case.

The assertion of executive privilege by the Executive Secretary, who is one of the respondents herein, without him adding the phrase "by order of the President," shall be considered as partially complying with the requirement laid down in *Senate v. Ermita.* The requirement that the phrase "by order of the President" should accompany the Executive Secretary's claim of privilege is a new rule laid down for the first time in *Senate v. Ermita*, which was not yet final and executory at the time respondents filed their Comment to the petition.[61] A strict application of this requirement would thus be unwarranted in this case.

Response to the Dissenting Opinion of the Chief Justice

We are aware that behind the dissent of the Chief Justice lies a genuine zeal to protect our people's right to information against any abuse of executive privilege. It is a zeal that We fully share.

The Court, however, in its endeavor to guard against the abuse of executive privilege, should be careful not to veer towards the opposite extreme, to the point that it would strike down as invalid even a legitimate exercise thereof.

We respond only to the salient arguments of the Dissenting Opinion which have not yet been sufficiently addressed above.

1. After its historical discussion on the allocation of power over international trade agreements in the United States, the dissent concludes that "it will be turning somersaults with history to contend that the President is the sole organ for external relations" in that jurisdiction. With regard to this opinion, We make only the following observations:

   There is, at least, a core meaning of the phrase "sole organ of the nation in its external relations" which is not being disputed, namely, that the power to directly negotiate treaties and international agreements is vested by our Constitution only in the Executive. Thus, the dissent states that "Congress has the power to regulate commerce with foreign nations **but does not have the power to negotiate international agreements directly**."[62]

   What is disputed is how this principle applies to the case at bar.

   The dissent opines that petitioner-members of the House of Representatives, by asking for the subject JPEPA documents, are not seeking to directly participate in the negotiations of the JPEPA, hence, they cannot be prevented from gaining access to these documents.

   On the other hand, We hold that this is one occasion where the following ruling in *Agan v. PIATCO*[63] - and in other cases both before and since - should be applied:

   > **This Court has long and consistently adhered to the legal maxim that those that cannot be done directly cannot be done indirectly.** *To declare the PIATCO contracts valid despite the clear statutory prohibition against a direct government guarantee* ***would not only make a mockery of what the BOT Law seeks to prevent*** *-- which is to expose the government to the risk of incurring a monetary obligation resulting from a contract of loan between the project proponent and its lenders and to which the Government is not a party to --* ***but would also render the BOT Law useless for what it seeks to achieve*** *-- to make use of the resources of the private sector in the "financing, operation and maintenance of infrastructure and development projects" which are necessary for national growth and development but which the government, unfortunately, could ill-afford to finance at this point in time.*[64]

   Similarly, while herein petitioners-members of the House of Representatives may not have been aiming to participate in the negotiations directly, opening the JPEPA negotiations to their scrutiny - even to the point of giving them access to the offers exchanged between the Japanese and Philippine delegations - would have made a mockery of what the Constitution sought to prevent and rendered it useless for what it sought to achieve when it vested the power of direct negotiation solely with the President.

What the U.S. Constitution sought to prevent and aimed to achieve in defining the treaty-making power of the President, which our Constitution similarly defines, may be gathered from Hamilton's explanation of why the U.S. Constitution excludes the House of Representatives from the treaty-making process:

> x x x The fluctuating, and taking its future increase into account, the multitudinous composition of that body, forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character, decision, ***secrecy*** and **dispatch**; are incompatible with a body so variable and so numerous. The very complication of the business by introducing a necessity of the concurrence of so many different bodies, would of itself afford a solid objection. The greater frequency of the calls upon the house of representatives, and the greater length of time which it would often be necessary to keep them together when convened, to obtain their sanction in the progressive stages of a treaty, would be source of so great inconvenience and expense, as alone ought to condemn the project. [65]

These considerations *a fortiori* apply in this jurisdiction, since the Philippine Constitution, unlike that of the U.S., does not even grant **the Senate** the power to advise the Executive in the making of treaties, but only vests in that body the power to concur in the validity of the treaty after negotiations have been concluded.[66] Much less, therefore, should it be inferred that the House of Representatives has this power.

Since allowing petitioner-members of the House of Representatives access to the subject JPEPA documents would set a precedent for future negotiations, leading to the contravention of the public interests articulated above which the Constitution sought to protect, the subject documents should not be disclosed.

2. The dissent also asserts that respondents can no longer claim the diplomatic secrets privilege over the subject JPEPA documents now that negotiations have been concluded, since their reasons for nondisclosure cited in the June 23, 2005 letter of Sec. Ermita, and later in their Comment, necessarily apply only for as long as the negotiations were still pending;

   In their Comment, respondents contend that "the negotiations of the representatives of the Philippines as well as of Japan must be allowed to explore alternatives in the course of the negotiations in the same manner as judicial deliberations and working drafts of opinions are accorded strict confidentiality." **That respondents liken the documents involved in the JPEPA negotiations to judicial deliberations and working drafts of opinions evinces, by itself, that they were claiming confidentiality not only until, but even after, the conclusion of the negotiations.**

Judicial deliberations do not lose their confidential character once a decision has been promulgated by the courts. The same holds true with respect to working drafts of opinions, which are comparable to intra-agency recommendations. Such intra-agency recommendations are privileged even after the position under consideration by the agency has developed into a definite proposition, hence, the rule in this jurisdiction that agencies have the duty to disclose only definite propositions, and not the inter-agency and intra-agency communications during the stage when common assertions are still being formulated.[67]

3. The dissent claims that petitioner-members of the House of Representatives have sufficiently shown their need for the same documents to overcome the privilege. Again, We disagree.

   The House Committee that initiated the investigations on the JPEPA did not pursue its earlier intention to subpoena the documents. This strongly undermines the assertion that access to the same documents by the House Committee is critical to the performance of its legislative functions. If the documents were indeed critical, the House Committee should have, at the very least, issued a *subpoena duces tecum* or, like what the Senate did in *Senate v. Ermita*, filed the present petition as a legislative body, rather than leaving it to the discretion of individual Congressmen whether to pursue an action or not. Such acts would have served as strong indicia that Congress itself finds the subject information to be critical to its legislative functions.

   Further, given that respondents have claimed executive privilege, petitioner-members of the House of Representatives should have, at least, shown how its lack of access to the Philippine and Japanese offers would hinder the intelligent crafting of legislation. **Mere assertion that the JPEPA covers a subject matter over which Congress has the power to legislate would not suffice**. As *Senate Select Committee v. Nixon*[68] held, the showing required to overcome the presumption favoring confidentiality turns, not only on the nature and appropriateness of the function in the performance of which the material was sought, but also the degree to which the material was necessary to its fulfillment. This petitioners failed to do.

   Furthermore, from the time the final text of the JPEPA including its annexes and attachments was published, petitioner-members of the House of Representatives have been free to use it for any legislative purpose they may see fit. Since such publication, petitioners' need, if any, specifically for the Philippine and Japanese offers leading to the final version of the JPEPA, has become even less apparent.

   In asserting that the balance in this instance tilts in favor of disclosing the JPEPA documents, the dissent contends that the Executive has failed to show how disclosing them after the conclusion of negotiations would impair the performance of its functions. The contention, with due respect, misplaces the *onus probandi*. While, in keeping with the general presumption of transparency, the burden is initially on the

Executive to provide precise and certain reasons for upholding its claim of privilege, once the Executive is able to show that the documents being sought are covered by a recognized privilege, the burden shifts to the party seeking information to overcome the privilege by a strong showing of need.

When it was thus established that the JPEPA documents are covered by the privilege for diplomatic negotiations pursuant to *PMPF v. Manglapus*, the presumption arose that their disclosure would impair the performance of executive functions. It was then incumbent on petitioner- requesting parties to show that they have a strong need for the information sufficient to overcome the privilege. They have not, however.

4. Respecting the failure of the Executive Secretary to explicitly state that he is claiming the privilege "by order of the President," the same may not be strictly applied to the privilege claim subject of this case.

   When the Court in *Senate v. Ermita* limited the power of invoking the privilege to the President alone, it was laying down a new rule for which there is no counterpart even in the United States from which the concept of executive privilege was adopted. As held in the 2004 case of *Judicial Watch, Inc. v. Department of Justice*,[69] citing *In re Sealed Case*,[70] "the issue of whether a President must personally invoke the [presidential communications] privilege remains an open question." *U.S. v. Reynolds*,[71] on the other hand, held that "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer."

   The rule was thus laid down by this Court, not in adherence to any established precedent, but with the aim of preventing the abuse of the privilege in light of its highly exceptional nature. The Court's recognition that the Executive Secretary also bears the power to invoke the privilege, provided he does so "by order of the President," is meant to avoid laying down too rigid a rule, the Court being aware that it was laying down a new restriction on executive privilege. It is with the same spirit that the Court should not be overly strict with applying the same rule in this peculiar instance, where the claim of executive privilege occurred before the judgment in *Senate v. Ermita* became final.

5. To show that *PMPF v. Manglapus* may not be applied in the present case, the dissent implies that the Court therein erred in citing *US v. Curtiss Wright*[72] and the book entitled *The New American Government and Its Work*[73] since these authorities, so the dissent claims, may not be used to calibrate the importance of the right to information in the Philippine setting.

   The dissent argues that since *Curtiss-Wright* referred to a conflict between the executive and legislative branches of government, the factual setting thereof was different from that of *PMPF v. Manglapus* which involved a collision between

governmental power over the conduct of foreign affairs and the citizen's right to information.

That the Court could freely cite *Curtiss-Wright* - a case that upholds the secrecy of diplomatic negotiations against congressional demands for information - in the course of laying down a ruling on the public right to information only serves to underscore the principle mentioned earlier that the privileged character accorded to diplomatic negotiations does not *ipso facto* lose all force and effect simply because the same privilege is now being claimed under different circumstances.

PMPF v. Manglapus indeed involved a demand for information from private citizens and not an executive-legislative conflict, but so did *Chavez v. PEA*[74] which held that "the [public's] right to information . . . does not extend to matters recognized as privileged information under the separation of powers." What counts as privileged information in an executive-legislative conflict is thus also recognized as such in cases involving the public's right to information.

Chavez v. PCGG[75] also involved the public's right to information, yet the Court recognized as a valid limitation to that right the same privileged information based on separation of powers - closed-door Cabinet meetings, executive sessions of either house of Congress, and the internal deliberations of the Supreme Court.

These cases show that the Court has always regarded claims of privilege, whether in the context of an executive-legislative conflict or a citizen's demand for information, as closely intertwined, such that the principles applicable to one are also applicable to the other.

The reason is obvious. If the validity of claims of privilege were to be assessed by entirely different criteria in each context, this may give rise to the *absurd result* where **Congress** would be denied access to a particular information because of a claim of executive privilege, but **the general public** would have access to the same information, the claim of privilege notwithstanding.

Absurdity would be the ultimate result if, for instance, the Court adopts the "clear and present danger" test for the assessment of claims of privilege against citizens' demands for information. If executive information, when demanded by a citizen, is privileged only when there is a clear and present danger of a substantive evil that the State has a right to prevent, it would be very difficult for the Executive to establish the validity of its claim in each instance. In contrast, if the demand comes from Congress, the Executive merely has to show that the information is covered by a recognized privilege in order to shift the burden on Congress to present a strong showing of need. **This would lead to a situation where it would be more difficult for Congress to access executive information than it would be for private citizens.**

We maintain then that when the Executive has already shown that an information is covered by executive privilege, the party demanding the information must present a "strong showing of need," whether that party is Congress or a private citizen.

The rule that the same "showing of need" test applies in both these contexts, however, should not be construed as a denial of the importance of analyzing the context in which an executive privilege controversy may happen to be placed. Rather, it affirms it, for it means that the specific need being shown by the party seeking information in every particular instance is highly significant in determining whether to uphold a claim of privilege. **This "need" is, precisely, part of the context in light of which every claim of privilege should be assessed.**

Since, as demonstrated above, there are common principles that should be applied to executive privilege controversies across different contexts, the Court in *PMPF v. Manglapus* did not err when it cited the *Curtiss-Wright* case.

The claim that the book cited in *PMPF v. Manglapus* entitled *The New American Government and Its Work* could not have taken into account the expanded statutory right to information in the FOIA assumes that the observations in that book in support of the confidentiality of treaty negotiations would be different had it been written after the FOIA. Such assumption is, with due respect, at best, speculative.

As to the claim in the dissent that "[i]t is more doubtful if the same book be used to calibrate the importance of the right of access to information in the Philippine setting considering its elevation as a constitutional right," we submit that the elevation of such right as a constitutional right did not set it free from the legitimate restrictions of executive privilege which is itself **constitutionally-based**.[76] Hence, the comments in that book which were cited in *PMPF v. Manglapus* remain valid doctrine.

6. The dissent further asserts that the Court has never used "need" as a test to uphold or allow inroads into rights guaranteed under the Constitution. With due respect, we assert otherwise. The Court has done so before, albeit without using the term "need."

   In executive privilege controversies, the requirement that parties present a "sufficient showing of need" only means, in substance, that they should show a public interest in favor of disclosure sufficient in degree to overcome the claim of privilege.[77] Verily, the Court in such cases engages in a **balancing of interests**. Such a balancing of interests is certainly not new in constitutional adjudication involving fundamental rights. *Secretary of Justice v. Lantion*,[78] which was cited in the dissent, applied just such a test.

   Given that the dissent has clarified that it does not seek to apply the "clear and present danger" test to the present controversy, but the balancing test, there seems to be no substantial dispute between the position laid down in this *ponencia* and that

reflected in the dissent as to what test to apply. It would appear that the only disagreement is on the results of applying that test in this instance.

The dissent, nonetheless, maintains that "it suffices that information is of public concern for it to be covered by the right, regardless of the public's need for the information," and that the same would hold true even "if they simply want to know it because it interests them." As has been stated earlier, however, there is no dispute that the information subject of this case is a matter of public concern. The Court has earlier concluded that it is a matter of public concern, not on the basis of any specific need shown by petitioners, but from the very nature of the JPEPA as an international trade agreement.

However, when the Executive has - as in this case - invoked the privilege, and it has been established that the subject information is indeed covered by the privilege being claimed, can a party overcome the same by merely asserting that the information being demanded is a matter of public concern, without any further showing required? Certainly not, for that would render the doctrine of executive privilege of no force and effect whatsoever as a limitation on the right to information, because then the sole test in such controversies would be whether an information is a matter of public concern.

Moreover, in view of the earlier discussions, we must bear in mind that, by disclosing the documents of the JPEPA negotiations, the Philippine government runs the grave risk of betraying the trust reposed in it by the Japanese representatives, indeed, by the Japanese government itself. How would the Philippine government then explain itself when that happens? Surely, it cannot bear to say that it just **had to** release the information because certain persons simply wanted to know it "because it interests them."

Thus, the Court holds that, in determining whether an information is covered by the right to information, a specific "showing of need" for such information is not a relevant consideration, but only whether the same is a matter of public concern. When, however, the government has claimed executive privilege, and it has established that the information is indeed covered by the same, then the party demanding it, if it is to overcome the privilege, must show that that the information is vital, not simply for the satisfaction of its curiosity, but for its ability to effectively and reasonably participate in social, political, and economic decision-making.[79]

7. The dissent maintains that "[t]he treaty has thus entered the ultimate stage where the people can exercise their **right to participate** in the discussion whether the Senate should concur in its ratification or not." (Emphasis supplied) It adds that this right "will be diluted unless the people can have access to the subject JPEPA documents". What, to the dissent, is a dilution of the right to participate in decision-making is, to Us, simply a recognition of the qualified nature of the public's right to information. It is beyond dispute that the right to information is not absolute and that the doctrine of

executive privilege is a recognized limitation on that right.

Moreover, contrary to the submission that the right to participate in decision-making would be diluted, We reiterate that our people have been exercising their right to participate in the discussion on the issue of the JPEPA, and they have been able to articulate their different opinions without need of access to the JPEPA negotiation documents.

Thus, we hold that the balance in this case tilts in favor of executive privilege.

8. Against our ruling that the principles applied in *U.S. v. Nixon*, the *Senate Select Committee* case, and *In re Sealed Case*, are similarly applicable to the present controversy, the dissent cites the caveat in the *Nixon* case that the U.S. Court was there addressing only the President's assertion of privilege in the context of a criminal trial, not a civil litigation nor a congressional demand for information. What this caveat means, however, is only that courts must be careful not to hastily apply the ruling therein to other contexts. It does not, however, absolutely mean that the principles applied in that case may never be applied in such contexts.

Hence, U.S. courts have cited *U.S. v. Nixon* in support of their rulings on claims of executive privilege in contexts other than a criminal trial, as in the case of *Nixon v. Administrator of General Services*[80] - which involved former President Nixon's invocation of executive privilege to challenge the constitutionality of the "Presidential Recordings and Materials Preservation Act"[81] - and the above-mentioned *In re Sealed Case* which involved a claim of privilege against a *subpoena duces tecum* issued in a grand jury investigation.

Indeed, in applying to the present case the principles found in *U.S. v. Nixon* and in the other cases already mentioned, We are merely affirming what the Chief Justice stated in his Dissenting Opinion in *Neri v. Senate Committee on Accountability*[82] - a case involving an executive-legislative conflict over executive privilege. That dissenting opinion stated that, while *Nixon* was not concerned with the balance between the President's generalized interest in confidentiality and congressional demands for information, "**[n]onetheless the [U.S.] Court laid down principles and procedures that can serve as torch lights to illumine us on the scope and use of Presidential communication privilege in the case at bar.**"[83] While the Court was divided in *Neri*, this opinion of the Chief Justice was not among the points of disagreement, and We similarly hold now that the *Nixon* case is a useful guide in the proper resolution of the present controversy, notwithstanding the difference in context.

Verily, while the Court should guard against the abuse of executive privilege, it should also give full recognition to the validity of the privilege whenever it is claimed within the proper bounds of executive power, as in this case. Otherwise, the Court would undermine its own credibility, for it would be perceived as no longer aiming to strike a

balance, but seeking merely to water down executive privilege to the point of irrelevance.

Conclusion

To recapitulate, petitioners' demand to be furnished with a copy of the **full text** of the JPEPA has become moot and academic, it having been made accessible to the public since September 11, 2006. As for their demand for copies of the Philippine and Japanese **offers** submitted during the JPEPA negotiations, the same must be denied, respondents' claim of executive privilege being valid.

Diplomatic negotiations have, since the Court promulgated its Resolution in *PMPF v. Manglapus* on September 13, 1988, been recognized as privileged in this jurisdiction and the reasons proffered by petitioners against the application of the ruling therein to the present case have not persuaded the Court. Moreover, petitioners - both private citizens and members of the House of Representatives - have failed to present a *"sufficient showing of need"* to overcome the claim of privilege in this case.

That the privilege was asserted for the first time in respondents' Comment to the present petition, and not during the hearings of the House Special Committee on Globalization, is of no moment, since it cannot be interpreted as a waiver of the privilege on the part of the Executive branch.

For reasons already explained, this Decision shall not be interpreted as departing from the ruling in *Senate v. Ermita* that executive privilege should be invoked by the President or through the Executive Secretary "by order of the President."

WHEREFORE, the petition is **DISMISSED**.

SO ORDERED.

Quisumbing, Corona, Chico-Nazario, Velasco, Jr., Nachura, Reyes, and Leonardo-De Castro, JJ., concur.
Puno, C.J., See Dissenting Opinion.
Carpio, J., See concurring Opinion.
Azcuna, J., I dissent in a separate opinion.
Tinga, J., In the result. see separate opinion.
Ynares-Santiago, and Austria-Martinez, JJ., joins CJ's dissenting opinion.
Brion, J., no part.

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* In the case title as indicated in the petition, only the name of Usec. Thomas G. Aquino appears in the portion for "Respondents," to wit: "HON. THOMAS G. AQUINO, in his capacity as Chairman and Chief Delegate of the Philippine Coordinating Committee for the Japan-Philippines Economic Partnership Agreement, et al." (Underscoring supplied) The

other respondents are enumerated in the body of the petition. (*Rollo,* pp. 20-23) The Court *motu proprio* included the names of these other respondents in the case title to conform to Sec. 1, par. 2, Rule 7 of the Rules of Civil Procedure, as well as the capacities in which they are being sued. Moreover, it inserted therein that respondent Usec. Aquino, as stated in the petition, is also being sued in his capacity as DTI Undersecretary.

[1] Effective May 28, 2003.

[2] Annex "F" of Petition, *rollo*, p. 95.

[3] The Petition quoted the following statement of Congressman Teves appearing in the transcript of the Committee hearing held on October 12, 2005:

> THE CHAIRPERSON. Now I call on Usec. Aquino to furnish us a copy of the draft JPEPA and enunciate to this body the positive as well as the negative impact of said agreement. Is this the draft that the government will sign in December or this will still be subjected to revisions in the run-up to its signing? x x x **We requested also to subpoena this but then the Speaker requested me to hold in abeyance because he wanted to get a (sic) consent of the President before we can x x x the department can furnish us a copy of this agreement.** (*Rollo*, p. 32)

[4] Id. at 16.

[5] Annex "A," Comment, *rollo*, p. 207.

[6] Respondents' Manifestation dated September 12, 2007; *vide* "Business Philippines: A Department of Trade and Industry Website" at www.business.gov.ph, particularly www.business.gov.ph/DTI_News.php?contentID=136 (visited August 9, 2007).

[7] *Legaspi v. Civil Service Commission*, G.R. No. L-72119, May 29, 1987; 150 SCRA 530, 535.

[8] G.R. No. 158088, July 6, 2005; 462 SCRA 622, 630-631.

[9] *Supra* note 7 at 536.

[10] Reply to the Comment of the Solicitor General, *rollo*, p. 319 (underscoring supplied).

[11] Business Philippines: A Department of Trade and Industry Website, http://www.business.gov.ph/filedirectory/JPEPA.pdf, accessed on June 12, 2007.

[12] By Resolution dated August 28, 2007, this Court directed the parties to manifest

whether the Philippine and Japanese offers have been made accessible to the public just like the full text of the JPEPA and, if not, whether petitioners still intend to pursue their prayer to be provided with copies thereof. In compliance, petitioners manifested that the offers have not yet been made public and reiterated their prayer that respondents be compelled to provide them with copies thereof, including all pertinent attachments and annexes thereto (Manifestation and Motion dated September 17, 2007). Respondents, on the other hand, asserted that the offers have **effectively** been made accessible to the public since September 11, 2006 (Manifestation dated September 12, 2007). Respondents' claim does not persuade, however. By their own manifestation, the documents posted on the DTI website on that date were only the following: (1) Joint Statement on the Occasion of the Signing of the Agreement between Japan and the Republic of the Philippines, (2) the full text of the JPEPA itself and its annexes, (3) the JPEPA implementing Agreement, and (4) "resource materials on the JPEPA including presentations of the [DTI] during the hearings of the Senate's Committee on Trade and Commerce and Committee on Economic Affairs." While these documents no doubt provide very substantial information on the JPEPA, the publication thereof still falls short of addressing the prayer of petitioners to be provided with copies of the Philippine and Japanese offers. Thus, the petition, insofar as it prays for access to these offers, has not become moot.

[13] CONSTITUTION, Art. III, Sec. 7.

[14] Id. at Art. II, Sec. 28.

[15] Id. at Art. XIII, Sec. 16.

[16] *Supra* note 7 at 541.

[17] 314 Phil. 150 (1995).

[18] 360 Phil. 133 (1998).

[19] 433 Phil. 506 (2002).

[20] G.R. No. 169777, April 20, 2006, 488 SCRA 1.

[21] Id. at 51.

[22] *Rollo*, pp. 191-192.

[23] 360 Phil. 133, 764 (1998), citing V RECORD OF THE CONSTITUTIONAL COMMISSION 25 (1986).

[24] G.R. No. 84642, Resolution of the Court En Banc dated September 13, 1988.

[25] Specifically, petitioners therein asked that the Court order respondents to (1) open to petitioners their negotiations/sessions with the U.S. counterparts on the agreement; (2) reveal and/or give petitioners access to the items which they have already agreed upon; and (3) reveal and/or make accessible the respective positions on items they have not agreed upon, particularly the compensation package for the continued use by the U.S. of their military bases and facilities in the Philippines.

[26] 299 U.S. 304 (1936).

[27] *Vide Xerox Corp. v. U.S.* (12 Cl.Ct. 93). Against the claim of a taxpayer for the production of a letter from the Inland Revenue of the United Kingdom to the associate commissioner of the Internal Revenue Service (IRS), defendant asserted a claim of privilege, relying on the affidavit of Lawrence B. Gibbs, Commissioner of IRS, which stated that the production of the letter "would impair the United States government's ability to deal with the tax authorities of foreign governments * * * by breaching the **historic confidentiality** of negotiations between the United States and foreign sovereigns * * *." (Emphasis supplied) The U.S. court therein ruled thus: "Given the context in which the letter in question was written, it is reasonable to conclude that frank and honest expression of views on the treaty language in issue were expressed, views that ostensibly were expressed in the belief that "historic confidentiality" would govern such expressions." (Underscoring supplied)

[28] B. DuVal, Jr., Project Director, American Bar Foundation. B.A., 1958, University of Virginia; J.D., 1961, Yale University, The Occasions Of Secrecy (47 U. Pitt. L. Rev. 579).

[29] Supra note 20 at 46.

[30] Ibid.

[31] Supra note 19 at 189.

[32] *Senate Select Committee on Presidential Campaign Activities v. Nixon,* 498 F.2d 725, 162 U.S.App.D.C. 183.

[33] *Vide Arnault v. Nazareno*, 87 Phil. 29, 46 (1950): "In the present case the jurisdiction of the Senate, thru the Special Committee created by it, to investigate the Buenavista and Tambobong estates deal is not challenged by the petitioner; and we entertain no doubt as to the Senate's authority to do so and as to the validity of Resolution No. 8 hereinabove quoted. The transaction involved a questionable and allegedly unnecessary and irregular expenditure of no less than P5,000,000 of public funds, of which Congress is the

constitutional guardian. x x x"

[34] 421 U.S., at 150, 95 S.Ct. 1504, reiterated in *Department of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Association*, 532 U.S. 1, 121 S.Ct. 1060.

[35] Id. at 151, 95 S.Ct. 1504 (emphasis supplied).

[36] Supra note 24.

[37] 545 F.Supp. 615, May 28, 1982.

[38] 237 F.Supp.2d 17.

[39] 5 U.S.C. 552(b)(5).

[40] *CIEL v. Office of U.S. Trade Representative*, 237 F.Supp.2d 17. *Vide Department of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Association*, 532 U.S. 1, 121 S.Ct. 1060: "Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). To qualify, a document must thus satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it."

[41] Supra note 20 at 46 (emphasis supplied).

[42] Petitioners expound as follows:

> "It has been 18 years since the *PMPF v. Manglapus* case, and the world has changed considerably in that span of time. The Berlin Wall fell in 1989, bringing down with it the Cold War and its attendant hostilities, and ushering in a new era of globalization and international economic cooperation as we know it. The Philippines now finds itself part of an international economic community as a member of both the ASEAN Free Trade Area (AFTA) and the World Trade Organization (WTO). Domestically, this Honorable Court has repeatedly upheld the people's right to information on matters of public concern, allowing ordinary Filipino citizens to inquire into various government actions such as GSIS loans to public officials, settlement of Marcos ill-gotten wealth, and sale of reclaimed land to foreign corporations." (*Rollo*, p. 326)

[43] *Rollo*, pp. 50-51.

[44] *Supra* note 18.

[45] *Supra* note 19.

[46] 433 Phil. 506, 534 (2002), citing *PMPF v. Manglapus, supra* note 24 and *Chavez v. PCGG, supra* note 18.

[47] *In re Sealed Case* (121 F.3d 729, 326 U.S.App.D.C. 276 [1997]) states thus: "*Nixon, GSA, Sirica,* and the other *Nixon* cases all employed a balancing methodology in analyzing whether, and in what circumstances, the presidential communications privilege can be overcome. **Under this methodology, these opinions balanced the public interests served by protecting the President's confidentiality in a particular context with those furthered by requiring disclosure."** (Emphasis supplied)

[48] 418 U.S. 683 (1974).

[49] *Supra* note 31.

[50] *Supra* note 47.

[51] *Supra* note 32

[52] *Supra* note 47.

[53] *Rollo*, p. 349.

[54] For a small sampling, *vide* "Primer sa Japan-Philippine Economic Partnership Agreement" (JPEPA) at www.bayan.ph/downloads/Primer%20on%20jpepa.pdf; "A RESOLUTION EXPRESSING SUPPORT TO THE CALLS FOR THE SENATE TO REJECT THE JAPAN-PHILIPPINES PARTNERSHIP AGREEMENT (JPEPA)" at www.nccphilippines.org/indexfiles/Page1562.htm; "JPEPA Ratification: Threat Economics" at http://www.aer.ph/index.php?option/=com_content&task=view&id=632&Itemid=63 (all sites visited on February 2, 2008).

[55] Entitled "A DECREE TO CONSOLIDATE AND CODIFY ALL THE TARIFF AND CUSTOMS LAWS OF THE PHILIPPINES," promulgated June 11, 1978. In light of the arguments of petitioners, the most salient portion of the provisions cited by them is Section 402(1) which states, in part: "For the purpose of expanding foreign markets x x x in establishing and maintaining better relations between the Philippines and other countries, the President is authorized from time to time:
(1.1) To enter into trade agreements with foreign governments or instrumentalities thereof; x x x"

[56] 396 Phil. 623, 663 (2000).

[57] G.R. No. 158088, July 6, 2005, 462 SCRA 622, 632-633.

[58] *Supra* note 55.

[59] G.R. No. 169777, April 20, 2006, 488 SCRA 1, 44.

[60] Id. at 68.

[61] According to the records of this Court, the judgment in *Senate v. Ermita* was entered on July 21, 2006. Respondents filed their Comment on May 15, 2006.

[62] Revised Dissenting Opinion, p. 15 (Emphasis and underscoring supplied).

[63] 450 Phil. 744 (2003), penned by then Associate Justice Puno.

[64] Id., at 833 (Italics in the original, emphasis and underscoring supplied)

[65] The Federalist, No. 75 (Italics in the original, emphasis and underscoring supplied).

[66] Article II Section 2 of the U.S. Constitution states: "He [the President] shall have Power, by **and with the Advice** and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur x x x". (Emphasis and underscoring supplied) On the other hand, Article VII Section 21 of the Philippine Constitution states: "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate."

[67] *Supra* note 18.

[68] 162 U.S. App.D.C. 183, 189.

[69] 365 F.3d 1108, 361 U.S.App.D.C. 183 (2004).

[70] *Supra* note 47.

[71] 345 U.S. 1, 73 S.Ct. 528 (1953)

[72] *Supra* at note 63.

[73] *Supra* at note 64.

[74] *Supra* note 19.

[75] *Supra* at note 18.

[76] *U.S. v. Nixon* (418 U.S. 683) states: "Nowhere in the Constitution x x x is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the *effective discharge of a President's powers*, it is **constitutionally based**." (Emphasis, italics and underscoring supplied)

[77] *In re Sealed Case* (121 F.3d 729) states thus: "*Nixon, GSA, Sirica*, and the other *Nixon* cases all employed a balancing methodology in analyzing whether, and in what circumstances, the presidential communications privilege can be overcome. **Under this methodology, these opinions balanced the public interests served by protecting the President's confidentiality in a particular context with those furthered by requiring disclosure**." (Emphasis and underscoring supplied)

[78] G.R. No. 139465, October 17, 2000, penned by then Associate Justice Reynato S. Puno.

In that case, respondent Mark Jimenez claimed under **the due process clause the right to notice and hearing** in the extradition proceedings against him. Consider the following enlightening disquisition of the Court:

> "In the case at bar, on one end of the balancing pole is the private respondent's **claim to due process** predicated on Section 1, Article III of the Constitution, which provides that "No person shall be deprived of life, liberty, or property without due process of law..." Without a bubble of a doubt, procedural due process of law lies at the foundation of a civilized society which accords paramount importance to justice and fairness. It has to be accorded the weight it deserves.
>
> "This brings us to the other end of the balancing pole. Petitioner avers that the Court should give more weight to our national commitment under the RP-US Extradition Treaty to expedite the extradition to the United States of persons charged with violation of some of its laws. Petitioner also emphasizes the need to defer to the judgment of the Executive on matters relating to foreign affairs in order not to weaken if not violate the principle of separation of powers.
>
> "Considering that in the case at bar, the extradition proceeding is only at its evaluation stage, the nature of the right being claimed by the private respondent is nebulous and *the degree of prejudice he will allegedly suffer is weak*, we

accord *greater weight to the interests espoused by the government* thru the petitioner Secretary of Justice. x x x (Emphasis, italics, and underscoring supplied)

[79] Constitution, Art. XIII, Sec. 16.

[80] 433 U.S. 425.

[81] 88 Stat. 1695.

[82] G.R. No. 180643, March 25, 2008.

[83] Emphasis supplied.

DISSENTING OPINION

PUNO, C.J.:

Some 22,000 years ago, the *homo sapiens* in the Tabon caves of Palawan gathered food, hunted, and used stone tools to survive. Advancing by thousands of years, the early inhabitants of our land began to trade with neighboring countries. They exchanged wax, rattan, and pearls for porcelain, silk, and gold of China, Indo-China, and Malaysia.[1] The 16th century then ushered in the galleon trade between Manila and Acapulco. The 1700s saw the genesis of the Filipino trading with the British, followed by the German and the French in the 1800s. The 1900s opened commerce between the Philippines and the United States of America.[2] Today, with the onset of globalization of the economy and the shrinking of the world through technology, a far more complicated international trade has become a matter of survival - much like gathering food and hunting 22,000 years ago - to both countries and individuals.

The growth and development envisioned by globalization are premised on the proposition that the whole world economy would expand and become more efficient if barriers and protectionist policies are eliminated. Expansion will happen as each country opens its doors to every other producer, and more efficient producers start to compete successfully with countries that produce at higher costs because of special protections that domestic laws and regulations provide. Smaller countries and small enterprises will then concentrate their resources where they can be most competitive. The logic is that ultimately, the individual consumer will benefit and lower cost will stimulate consumption, thus increasing trade and the production of goods and services where it is economically

advantageous.[3]

Not a few world leaders, however, have cautioned against the downside of globalization. Pope John Paul II observed that "(g)lobalization has also worked to the detriment of the poor, tending to push poorer countries to the margin of international economic and political relations. Many Asian nations are unable to hold their own in a global market economy."[4] Mahatma Gandhi's words, although referring to infant industrialization, are prescient and of similar import: "The world we must strive to build needs to be based on the concept of genuine social equality...economic progress cannot mean that few people charge ahead and more and more are left behind."

The key to resolving the decisive issue in the case at bar turns on the proper framework of analysis. The instant case involves primarily not an assessment of globalization and international trade or of the extent of executive privilege in this global arena, but a valuation of the **right of the individual and his representatives in Congress to participate in economic governance**. Economic decisions such as forging comprehensive free trade agreements impact not only on the growth of our nation, but also on the lives of individuals, especially those who are powerless and vulnerable in the margins of society.

First, the facts.

In 2002, Japanese Prime Minister Junichiro Koizumi introduced the "Initiative for Japan-ASEAN Comprehensive Economic Partnership."[5] President Gloria Macapagal-Arroyo proposed the creation of a working group to study the feasibility of an economic partnership with Japan.[6] In October of that year, the Working Group on the Japan-Philippine Economic Partnership Agreement (JPEPA) was formed, consisting of representatives
from concerned government agencies of the Philippines and Japan. It was tasked to study the possible coverage and content of a mutually beneficial economic partnership between the two countries.[7]

On 28 May 2003, the Philippine Coordinating Committee (PCC), composed of representatives from eighteen (18) government agencies, was created under Executive Order No. 213. It was tasked to negotiate with the Japanese representatives on the proposed JPEPA, conduct consultations with concerned government and private sector representatives, and draft a proposed framework for the JPEPA and its implementing agreements.[8]

In June 2003, the Working Group signified that both countries were ready to proceed to the next level of discussions and thus concluded its work. The Joint Coordinating Team (JCT) for JPEPA, composed of representatives from concerned government agencies and the private sector, was then created.[9]

On 11 December 2003, Prime Minister Koizumi and President Macapagal-Arroyo agreed that the Japanese and Philippine governments should start negotiations on JPEPA in 2004 based on the discussions and outputs of the Working Group and the Joint Coordinating Team. In February 2004, negotiations on JPEPA commenced.[10]

On 25 January 2005, petitioners Congressman Lorenzo R. Tañada III and Congressman Mario Joyo Aguja jointly filed **House Resolution No. 551, "Directing the Special Committee on Globalization to Conduct an Urgent Inquiry in Aid of Legislation on Bilateral Trade and Investment Agreements that Government Has Been Forging, with Far Reaching Impact on People's Lives and the Constitution But with Very Little Public Scrutiny and Debate**."[11] In the course of the inquiry conducted by the Special Committee on Globalization (Committee), respondent DTI Undersecretary Thomas G. Aquino was requested to furnish the Committee a copy of the latest draft of the JPEPA. Respondent Undersecretary Aquino was the Chairperson of the PCC. He did not accede to the request.[12]

On 10 May 2005, Congressman Herminio G. Teves, as Chairperson of the Special Committee on Globalization, wrote to respondent Executive Secretary Eduardo Ermita, requesting that the Committee be furnished all documents on the JPEPA, including the latest drafts of the agreement, the requests and the offers.[13] Executive Secretary Ermita wrote Congressman Teves on 23 June 2005, informing him that the DFA would be **unable to furnish the Committee all documents on the JPEPA, since the proposed agreement "has been a work in progress for about three years." He also said that a copy of the draft agreement would be forwarded to the Committee "as soon as the text thereof is settled and complete."**[14]

On 1 July 2005, petitioner Congressman Aguja, as member of the Committee, wrote NEDA Director-General Romulo Neri and respondent Tariff Commission Chairperson Abon to request copies of the latest text of the JPEPA. Respondent Chairperson Abon wrote petitioner Congressman Aguja on 12 July 2005 that the former did not have a copy of the document being requested. He also stated that "the negotiation is still ongoing" and that he was certain respondent Undersecretary Aquino would provide petitioner Congressman Aguja a copy "once the negotiation was completed."[15] For its part, NEDA replied through respondent Assistant Director-General Songco that petitioner Congressman Aguja's request had been forwarded to the office of respondent Undersecretary Aquino, who would be in the best position to respond to the request.[16]

In view of the failure to furnish the Committee the requested document, the Committee resolved to subpoena the records of the DTI with respect to the JPEPA. However, House Speaker Jose de Venecia requested the Committee to hold the subpoena in abeyance, as he wanted to secure first the consent of President Macapagal-Arroyo to furnish the Committee a copy of the JPEPA.[17]

On 25 October 2005, petitioner Congressman Aguja, as member of the Committee, wrote to the individual members of the PCC, reiterating the Committee's request for an update on the status of the JPEPA negotiations, the timetable for the conclusion and signing of the agreement, and a copy of the latest working draft of the JPEPA.[18] None of the members provided the Committee the requested JPEPA draft. In his letter dated 2 November 2005, respondent Undersecretary Aquino replied that the **Committee would be provided the latest draft of the agreement "once the negotiations are completed and as soon as a thorough legal review of the proposed agreement has been conducted."**[19]

As the Committee has not secured a copy of the full text of the JPEPA and its attachments and annexes despite the Committee's many requests, petitioners filed the instant Urgent Petition for Mandamus and Prohibition on 9 December 2005. They pray that the Court (1) order respondents to provide them the full text of the JPEPA, including the Philippine and Japanese offers and all pertinent attachments and annexes thereto; and (2) restrain respondents from concluding the JPEPA negotiations, signing the JPEPA, and transmitting it to the President until said documents have been furnished the petitioners.

On 17 May 2006, respondents filed their Comment. Petitioners filed their Reply on 5 September 2006.

On 11 September 2006, a certified true copy of the full text of the JPEPA **signed by President Macapagal-Arroyo and Prime Minister Koizumi** with annexes and the implementing agreement was posted on the website of the Department of Trade and Industry and made accessible to the public.[20] **Despite the accessibility of the signed full text of the JPEPA**, petitioners reiterated in their Manifestation and Motion filed on 19 September 2007 their prayer that respondents furnish them copies of the initial offers (of the Philippines and of Japan) of the JPEPA, including all pertinent attachments and annexes thereto, and the **final text of the JPEPA prior to signing by the President** (the "subject JPEPA documents").[21]

I respectfully submit that the *ponencia* overlooks the fact that it is the **final text of the JPEPA prior to its signing by the President that petitioners seek to access** when the *ponencia* holds at the outset, *viz*:

> Considering, however, that "[t]he principal relief petitioners are praying for is the disclosure of the contents of the JPEPA prior to its finalization between the two States parties," (Reply to the Comment of the Solicitor General, *rollo*, p. 319 [underscoring supplied]) public disclosure of the **text of the JPEPA after its signing by the President**, during the pendency of the present petition, has been largely rendered moot and academic.
>
> xxx xxx xxx
>
> The text of the JPEPA having been made accessible to the public, the petition

has become moot and academic to the extent that it seeks the disclosure of the "full text" thereof.[22] (*emphasis supplied*)

Thus, insofar as petitioners' access to the **final text of the JPEPA prior to signing by the President** is concerned, the *ponencia* failed to include the same among the issues for the Court to resolve.

The issues for resolution in the case at bar are substantive and procedural, *viz*:

I. Do petitioners have standing to bring this action for mandamus in their capacity as citizens of the Republic, taxpayers and members of Congress?

II. Does the Court have jurisdiction over the instant petition?

III. Do petitioners have a right of access to the documents and information being requested in relation to the JPEPA?

IV. Will petitioners' right to effective participation in economic decision-making be violated by the deferral of the public disclosure of the requested documents until such time that the JPEPA has been concluded and signed by the President?

I shall focus on the jugular issue of whether or not petitioners have a right of access to the subject JPEPA documents. Let me first take up **petitioners' demand for these documents as members of the House of Representatives**.

I. The context: the question of access of the members of the House of Representatives to the subject JPEPA documents is raised in relation to international trade agreement negotiations

In demanding the subject JPEPA documents, **petitioners suing as members of the House of Representatives** invoke their **power over foreign trade** under Article VI, Section 28 (2) of the 1987 Constitution which provides, *viz*:

> Sec. 28 (2). The **Congress may, by law, authorize the President to fix within specified limits**, and subject to such **limitations and restrictions as it may impose**, **tariff rates, import and export quotas, tonnage and wharfage dues**, and other **duties or imposts** within the framework of the national development program of the Government. (*emphasis supplied*)

Respondents, on the other hand, deny petitioners' demand for information by contending that the President is the **sole organ of the nation in external relations** and has **sole authority** in the **negotiation of a treaty; hence, petitioners as members of the House of Representatives** cannot have access to the subject JPEPA documents.[23] On closer

examination, respondents' contention can be reduced into two claims: (1) the executive has **sole** authority in treaty negotiations, hence, the House of Representatives has no power in relation to treaty negotiations; and (2) the information and documents used by the executive in treaty negotiations are confidential.

To buttress their contention, which the *ponencia* upholds, respondents rely on **United States v. Curtiss-Wright Export Corporation**, [24] a case that has become a classic authority on recognizing executive primacy or even exclusivity in foreign affairs in the U.S.[25] and in the Philippines.[26] They also cite **People's Movement for Press Freedom (PMPF) v. Manglapus, the only Philippine case wherein the Court, in an unpublished Resolution, had occasion to rule on the issue of access to information on treaty negotiations. PMPF v. Manglapus** extensively quoted **Curtiss-Wright**, *viz*:

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but **he alone negotiates**. **Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.** As Marshall said in his great argument of March 7, 1800, in the House of Representatives, `The **President is the sole organ of the nation in its external relations**, and its **sole representative with foreign nations**.' Annals, 6th Cong., col. 613. The Senate Committee on Foreign Relations at a very early day in our history (February 15, 1816), reported to the Senate, among other things, as follows:
>
> `The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee considers this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. **The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.'** 8 U.S. Sen. Reports Comm. on Foreign Relations, p. 24.
>
> It is important to bear in mind that **we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations - a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.** It is quite apparent that if, in the maintenance

> of our international relations, embarrassment -perhaps serious embarrassment- is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, 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 his 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.** Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty - a refusal the wisdom of which was recognized by the House itself and has never since been doubted. [27] *(emphasis supplied)*

In examining the validity of respondents' contention and the *ponencia*'s affirmation thereof, that the executive has sole authority in treaty negotiations, and that information pertaining to treaty negotiations is confidential, let me begin by **tracing respondents' and the *ponencia*'s steps back to U.S. jurisdiction** as they heavily rely on **Curtiss-Wright,** which was quoted in **PMPF v. Manglapus,** for their position.

In the U.S., there is a long-standing debate on the locus of the primary or even exclusive power over foreign affairs.[28] Ironically, while **Curtiss-Wright** is considered a most influential decision on asserting presidential primacy in foreign affairs, the issue in that case was the validity of **Congress' delegation of its foreign affairs power** to the President; President Franklin D. Roosevelt ordered an embargo on ammunition sales to two South American countries **in execution of a Joint Resolution of Congress.** Towards the end of the *ponencia*, Justice Sutherland stated that "it was not within the power of the President to repeal the Joint Resolution."[29] The oft-quoted "sole organ" remark in **Curtiss-Wright** has not a few times been regarded in the U.S. as dictum in that case.[30] I make this observation to caution against over-reliance on **Curtiss-Wright**, but the case at bar is not the occasion to delve into and settle the debate on the locus of the primary power in the broad area of foreign affairs. In this vast landscape, I shall limit my view only to the subject matter of the instant case -- **the openness or secrecy of treaty negotiations and, more particularly, of trade agreement negotiations.**

Aside from the fact that **Curtiss-Wright** did not involve treaty negotiations, much less **trade agreement** negotiations, that case was decided in 1936 or more than 70 years ago. Since then, **the dynamics of the allocation of power over international trade agreements between the executive and the legislature has dramatically changed.** An appreciation of these developments would provide a useful backdrop in resolving the issue of access to the subject JPEPA documents.

A. Negotiation of trade agreements: the question of power allocation between the executive and Congress in U.S. jurisdiction

The U.S. constitution is a good place to start in understanding the allocation of power over international trade agreements between the executive and the legislative branches of government.

Article II of the U.S. Constitution grants the President the power to make treaties, but only with the approval of a super-majority of the Senate.[31] Under Article I, Congress has the power to regulate foreign trade,[32] including the power to "lay and collect Taxes, Duties, Imposts and Excises."[33]

While the drafters of the U.S. Constitution discussed the commerce power and the power to make treaties,[34] there is scant information on how they intended to allocate the powers of foreign commerce between the political branches of government.[35] "The well-recognized utility of Congressional involvement in treaty and international agreement negotiation applies with even greater force when it comes to international trade. For here, the **making of international agreements intersects with the Constitution's express grant of authority to Congress to regulate commerce with foreign nations**." (*emphasis supplied*) [36]

The drafters of the Constitution gave the President power to negotiate because of the need to demonstrate clear leadership and a unified front when dealing with other nations.[37] The Senate was given the power to ratify treaties because, as the more "contemplative" arm of the legislature, it was less subject to short-term interests than the House while still directly representing the interests of the people.[38] Congress was granted the power to set tariffs and to regulate commerce in order to check the powers of the Executive.[39]

Thus, under the U.S. Constitution, the President has the power to negotiate international treaties, but does not have the constitutional authority to regulate commerce or to determine tariffs and duties. On the other hand, Congress has the power to regulate commerce with foreign nations, but does not have the power to negotiate international agreements directly.[40] That **there is a question on the demarcation of powers between the President and Congress in international trade agreements cannot escape the eye.** Throughout U.S. history, answers to this question have come in various permutations.

In the late 1700s, after the U.S. established its independence, it had a weak military and relied on trade policies to maintain its independence and guard its national security through restriction of imports or exports with offending great powers.[41] Congress implemented these trade policies through legislation[42] and ratification of commercial treaties

negotiated by the President.[43] **This continued in the 1800s** - the **President** negotiated treaties, including trade treaties, and secured the requisite Senate concurrence. [44]

But **beginning in the 1920s, Congress began to reassert its power over the development of international trade policy**.[45] It began passing protectionist legislation to respond to pressure from domestic industries and agriculture.[46] In 1930, Congress passed the Smoot-Hawley Tariff Act of 1930,[47] which increased tariffs to an average of fifty-three percent and increased the number of products subject to duties.[48] In retaliation, other countries quickly subjected the U.S. to similar tariffs. In the mid-1930s, Congress realized that its setting of tariffs was at best inefficient[49] and thus **passed the Reciprocal Trade Agreement Act of 1934 (the 1934 Act)**.[50]

The 1934 Act **allowed the President to reduce tariffs within guidelines prescribed by Congress.**[51] It permitted the President to issue a Presidential Proclamation enacting international agreements that lowered tariffs without any further action by Congress.[52] Needless to state, the 1934 Act was a significant delegation of Congress' power to set tariffs. But the Act had a limited lifespan and, with each extension of the Act, Congress issued more guidelines and restrictions on the powers it had delegated to the President.[53]

The **modern period saw a drastic alteration in the U.S. approach to negotiating trade agreements**.[54] Instead of making additional changes to the 1934 Act, Congress passed the **Trade Act of 1974** (the 1974 Act), which created **modern procedures called the "fast track."**[55] Fast track legislation was enacted to address conflicts between the President and Congress.[56] These conflicts stemmed from the presidential exercise of the executive trade agreement authority and the ordinary congressional approval procedures, which resulted in ongoing amendments and a slower, less reliable trade negotiation process.[57] Fast track procedures were intended as a "consultative" solution to foreign trade disputes between Congress and the President.[58] It was designed to benefit both branches of government by allowing congressional input into trade agreement negotiations while enabling "the President to guarantee to international trading partners that Congress will decide on the final agreement promptly."[59]

The **1974 Act** broadened the scope of powers delegated to the President who was given the authority to make international trade agreements affecting both tariff and non-tariff barriers.[60] With the 1974 Act, Congress delegated to the President both the power to set tariffs and the power to regulate commerce with foreign nations.[61] But while the scope of the powers granted to the President was broader, the **extent of the grant was limited. Unlike in the 1934 Act, Congress did not give the President the authority to enact international trade agreement by a simple proclamation**.[62] Instead, the **President had**

to seek congressional approval.[63] To facilitate approval, the fast track mechanism put in place procedures for congressional review of the agreement during the negotiation process.[64] The most significant feature of the fast track procedure was that Congress could only approve or disapprove, but not modify, the text of the agreement.[65] This mechanism gave the President greater credibility when negotiating international agreements, because other countries knew that the agreements would not be subject to prolonged debates and drastic changes by Congress.[66]

In the 1980s, legislation made the fast track procedure increasingly complicated.[67] The Trade and Tariff Act of 1984 added a requirement that the President consult with the House Ways and Means Committee and the Senate Finance Committee before giving notice of his intent to sign the agreement so that the committees could disapprove the negotiations before formal talks even began.[68] Congress effectively retained a bigger portion of its constitutional authority over regulation of international trade.[69] In 1988, Congress passed the **Omnibus Trade and Competitiveness Act of 1988**.[70] The Act further "enhance(d) Congress' power in two respects: by reserving for either House the power to block extension of the Fast Track authority past the original expiration date and for both houses to derail already authorized agreements from the Fast Track."[71] Aside from the House Ways and Means and Senate Finance Committees, the House Rules Committee was given the power to "derail" an extension of the fast track.[72] The Act extended the fast-track for only three years.[73]

The fast track legislation saw its end in 1994.[74] For the **first time** after fifty years, the executive branch was without authority to enter into international trade agreements except through treaties subject to Senate approval. Despite persistent attempts by President William J. Clinton and President George H.W. Bush to renew the fast track,[75] **Congress refused to grant the executive branch the power to enter directly into international trade agreements from 1994 until August 2002**.[76]

Finally, with the dawn of the **new millennium**, Congress enacted the **Bipartisan Trade Promotion Authority Act of 2002** (Trade Act of 2002),[77] which provided for a revised fast-track procedure under the new label, "trade promotion authority (TPA)."[78] The Trade Act of 2002 was billed as "establish(ing) a partnership of equals. It recognizes that **Congress' constitutional authority to regulate foreign trade and the President's constitutional authority to negotiate with foreign nations are interdependent.** It requires a working relationship that reflects that interdependence."[79] (*emphasis supplied*) The purpose of the Act was to attempt again to resolve the ambiguity in the constitutional separation of powers in the area of international trade.[80]

The Trade Act of 2002 was intended for **Congress to retain its constitutional authority**

over foreign trade while allowing performance by the President of the role of negotiation,[81] but with Congress keeping a **closer watch on the President**.[82] Aside from providing **strict negotiating objectives** to the President, Congress reserved the right to veto a negotiated agreement.[83] The **President's power is limited by specific guidelines and concerns identified by Congress** and his negotiations may address only the issues identified by Congress in the statute and must follow **specific guidelines**.[84] Authorization to negotiate is given if the President determines that foreign trade is "unduly burden(ed) and restrict(ed)" and "the purposes, policies, priorities, and objectives of (the Trade Act of 2002) will be promoted" by the negotiations.[85] The Act provides five additional limitations on the negotiation of agreements regarding tariff barriers.[86] Negotiation of agreements regarding non-tariff barriers is subject to the objectives, limitations and requirement of consultation and notice provided in the Act.[87] In addition, the President must notify Congress prior to initiating negotiations, in order for the final negotiated agreement to be eligible for TPA.[88] The President is also required to **consult Congress regarding the negotiations "before and after submission of the notice**."[89] The Act also requires the President to make specific determinations and special consultations with Congress in the areas of agriculture and textiles.[90]

As **oversight** to ensure that the President follows the guidelines laid out by Congress, the Trade Act of 2002 created a **Congressional Oversight Group (COG) composed of members of Congress, in order to provide direct participation and oversight to trade negotiations initiated under the Act**.[91] The COG membership includes four members of the House Committee on Ways and Means, four members of the Senate Committee on Finance, and members of the committees of the House and the Senate, "which would have . . . jurisdiction over provisions of law affected by a (sic) trade agreement negotiations . . . ."[92] Each member of the **COG is an official advisor to the U.S. delegation in negotiations for any trade agreement under the Act**.[93] The COG was created "to provide an additional consultative mechanism for Members of Congress and to provide advice to the (United States Trade Representative) on trade negotiations."[94]

To enter into an international agreement using the TPA procedures, the President must first consult with the Senate Committee on Finance, the House Committee on Ways and Means, and the COG.[95] He must then provide written notice to Congress of his intention to enter into negotiations.[96] The notice must include the date that negotiations are scheduled to begin, the specific objectives of the negotiations, and whether the President seeks to create a new agreement or modify an existing agreement.[97] Six months prior to signing an agreement, the President must "send a report to Congress . . . that lays out what he plans to do with respect to (U.S.) trade laws."[98] At that time, Congress reviews the proposed agreement. The Trade Act of 2002 "provides for a resolution process where Congress can specifically find that the proposed changes are `inconsistent' with the negotiating

objectives."[99]

In defending the complexity of the Trade Act of 2002, Congress points out that "the negotiating objectives and procedures . . . represent a very careful substantive and political balance on some very complex and difficult issues such as investment, labor and the environment, and the relationship between Congress and the Executive branch during international trade negotiations."[100] Without doubt, the Act ultimately places much more stringent limitations on the President's ability to negotiate effectively with foreign nations than previous fast-track legislation did.[101]

Given this slice of U.S. history showing the allocation of power over international trade agreement negotiations between the executive and Congress in U.S. jurisdiction, **it will be turning somersaults with history to contend that the President is the sole organ for external relations**. The "sole organ" remark in **Curtiss-Wright** simply does not apply to the negotiation of international trade agreements in the U.S. where **Congress is allowed**, at the very least, to **indirectly participate in trade negotiations** through the setting of statutory limits to negotiating objectives and procedures, and to **almost directly negotiate** through the Congressional
Oversight Group.

Let me now discuss the allocation of power over international trade agreements between the Executive and Congress in Philippine jurisdiction.

B. Negotiation of trade agreements:
the question of power allocation between
the Executive and Congress in Philippine jurisdiction

In their Reply, petitioners refute respondents' contention that the President is the sole organ of the nation in its external relations and has exclusive authority in treaty negotiation by asserting that Congress has the power to legislate on matters dealing with **foreign trade;** hence, they should have access to the subject JPEPA documents.

Specifically, as aforementioned, petitioners as members of the House of Representatives point to Article VI, Section 28 (2) of the 1987 Constitution, as basis of their power over foreign trade. It provides, *viz*:

> Sec. 28 (2). The **Congress may, by law, authorize the President** to fix within specified limits, and subject to such limitations and restrictions as it may impose, **tariff rates, import and export quotas, tonnage and wharfage dues**, and other **duties or imposts** within the framework of the national development program of the Government. (*emphasis supplied*)

They contend that, pursuant to this provision, the Executive's authority to enter into international trade agreements is a **legislative power delegated to the President** through Sections 401 and 402 of Presidential Decree No. 1464 or the Tariff and Customs Code of

the Philippines, *viz*:

Sec. 401.Flexible Clause. —

a.In the interest of national economy, general welfare and/or national security, and subject to the limitations herein prescribed, the **President**, upon recommendation of the National Economic and Development Authority (hereinafter referred to as NEDA), **is hereby empowered: (1) to increase, reduce or remove existing protective rates of import duty (including any necessary change in classification).** The existing rates may be increased or decreased to any level, in one or several stages but in no case shall the increased rate of import duty be higher than a maximum of one hundred (100) per cent *ad valorem*; **(2) to establish import quota or to ban imports of any commodity, as may be necessary**; and (**3) to impose an additional duty on all imports** not exceeding ten (10%) percent *ad valorem* whenever necessary;

xxx xxx xxx

c.The power of the President to increase or decrease rates of import duty within the limits fixed in subsection "a" shall include the authority to modify the form of duty. In modifying the form of duty, the corresponding *ad valorem* or specific equivalents of the duty with respect to imports from the principal competing foreign country for the most recent representative period shall be used as bases.

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Sec. 402.Promotion of Foreign Trade. ——

a. For the purpose of expanding foreign markets for Philippine products as a means of assistance in the economic development of the country, in overcoming domestic unemployment, in increasing the purchasing power of the Philippine peso, and in establishing and maintaining better relations between the Philippines and other countries, **the President, is authorized from time to time:**

   (1)To enter into trade agreements with foreign governments or instrumentalities thereof; and

   (2)Tomodify import duties (including any necessary change in classification) **and other import restrictions, as are required or appropriate to carry out and promote foreign trade with other countries:...**

b. **The duties and other import restrictions as modified in subsection "a" above, shall apply to articles which are the growth, produce or**

manufacture of the specific country, whether imported directly or indirectly, with which the Philippines has entered into a trade agreement: xxx

c. **Nothing in this section shall be construed to give any authority to cancel or reduce in any manner any of the indebtedness of any foreign country to the Philippines or any claim of the Philippines against any foreign country.**

d. **Before any trade agreement is concluded with any foreign government or instrumentality thereof, reasonable public notice of the intention to negotiate an agreement with such government or instrumentality shall be given in order that any interested person may have an opportunity to present his views to the Commission** which shall seek information and advice from the Department of Agriculture, Department of Natural Resources, Department of Trade and Industry, Department of Tourism, the Central Bank of the Philippines, the Department of Foreign Affairs, the Board of Investments and from such other sources as it may deem appropriate.[102] (*emphasis supplied*)

Indeed, it is indubitable that **Article VI, Section 28 (2) of the 1987 Constitution, vests Congress with power over foreign trade**, at least with respect to the **fixing of tariff rates, import and export quotas, tonnage and wharfage dues and other duties and imposts, similar to the power of Congress under the U.S. Constitution**. This grant of power to the Philippine Congress is not new in the 1987 Constitution. The 1935 Constitution, in almost similar terms, provides for the same power under Article VI, Section 22(2), *viz*:

> Sec. 22(2). The Congress may **by law authorize the President, subject to such limitations and restrictions as it may impose** to fix, within specified limits, tariff rates, import and export quotas, and tonnage and wharfage dues.[103] (*emphasis supplied*)

Pursuant to this provision, Congress enacted Republic Act. No. 1937, entitled, "An Act to Revise and Codify the Tariff and Customs Laws of the Philippines," in 1957. Section 402 of the Act is the precursor of Section 402 of the Tariff and Customs Code of the Philippines of 1978,[104] which petitioners cite. In almost identical words, these sections provide for the authority of the President to "enter into trade agreements with foreign governments or instrumentalities thereof."[105] Section 401 of both the Tariff and Customs Code of 1978 and Republic Act No. 1937 also provide for the power of the President to, among others, increase or reduce rates of import duty.[106]

The provision in Article VI, Section 22(2) of the 1935 Constitution --to authorize the President, by law, to fix, within specified limits, tariff rates, import and export quotas, and

tonnage and wharfage dues -- was inspired by a desire to enable the nation, through the President, to carry out a unified national economic program and to administer the laws of the country to the end that its economic interests would be adequately protected.[107] This intention to implement a unified national economic program was made explicit in the 1987 Constitution with the addition of the phrase "within the framework of the national development program of the government," upon motion of Commissioner Christian Monsod. He explained the rationale for adding the phrase, *viz*:

> The reason I am proposing this insertion is that an economic program has to be internally consistent. While it is directory to the President - and it says "within specified limits" on line 2 - there are situations where the limits prescribed to the President might, in fact be distortive of the economic program.
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> xxx xxx xxx
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> **We are not taking away any power from Congress**. We are just saying that as a frame of reference, the authority and the limits prescribed should be consistent with the economic program of government **which the legislature itself approves.**[108](*emphasis supplied*)

In sum, while provision was made for granting authority to the President with respect to the fixing of tariffs, import and export quotas, and tonnage and wharfage dues, **the power of Congress over foreign trade,** and its authority to delegate the same to the President **by law, has consistently been constitutionally recognized**.[109] Even **Curtiss-Wright,** which respondents and the *ponencia* rely on, make a qualification that the foreign relations power of the President, "**like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."**[110] **Congress' power over foreign trade is one such provision that must be considered in interpreting the treaty-making power of the President.**

Moreover,while **Curtiss-Wright** admonished that "...if, in the maintenance of our international relations, embarrassment -perhaps serious embarrassment- is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved,"[111] the 1987 Constitution itself, reiterating the 1935 and the 1973 Constitutions, provides that **Congress may, by law, authorize the President** to fix tariff rates, import and export quotas, tonnage and wharfage dues **within specified** limits, and **subject to such limitations and restrictions** as Congress may impose. **One cannot simply turn a blind eye on Congress' foreign trade power granted by the Constitution in interpreting the power of the Executive to negotiate international trade agreements.**

Turning to the case at bar, **Congress undoubtedly has power over the subject matter of**

the JPEPA,[112] as this agreement touches on the fixing of "tariff rates, import and export quotas, tonnage and wharfage dues, and other duties or imposts." **Congress can, in fact, revoke or amend the power of the President to fix these as authorized by law or the Tariff and Customs Code of 1978**. Congress can legislate and conduct an inquiry in aid of legislation on this subject matter, as it did pursuant to House Resolution No. 551. The **purpose of the legislative inquiry in which the subject JPEPA documents are needed is to aid legislation**, which is **different from the purpose of the negotiations conducted by the Executive, which is to conclude a treaty**. Exercised within their proper limits, the power of the House of Representatives to conduct a legislative inquiry in aid of legislation and the power of the executive to negotiate a treaty should not collide with each other.

It is worth noting that petitioner members of the House of Representatives are **not seeking to directly participate** in the negotiation of the JPEPA, **nor are they indirectly interfering** with the Executive's negotiation of the JPEPA. They seek access to the subject JPEPA documents for purposes of their inquiry, in aid of legislation, on the forging of bilateral trade and investment agreements with minimal public scrutiny and debate, as evinced in the title of **House Resolution No. 551, "Directing the Special Committee on Globalization to Conduct an Urgent Inquiry in Aid of Legislation on Bilateral Trade and Investment Agreements that Government Has Been Forging, with Far Reaching Impact on People's Lives and the Constitution But with Very Little Public Scrutiny and Debate**."[113] In relation to this, the *ponencia* states, *viz*:

> Whether it can accurately be said that the Filipino people were not involved in the JPEPA negotiations is a question of fact which this Court need not resolve. Suffice it to state that respondents had presented documents purporting to show that public consultations were conducted on the JPEPA. Parenthetically, petitioners consider these "alleged consultations" as "woefully selective and inadequate."[114]

Precisely, the inquiry in aid of legislation under House Resolution No. 551 seeks to investigate the sufficiency of public scrutiny and debate on the JPEPA, considering its expansiveness, which is well within the foreign trade power of Congress. At this point, it is in fact impossible for petitioners to interfere with the JPEPA negotiations, whether directly or indirectly, as the negotiations have already been concluded. Be that as it may, the earlier discussion on the allocation of international trade powers between the Executive and Congress in U.S. jurisdiction has shown that it is not anathema to the preservation of the treaty-making powers of the President for Congress to indirectly participate in trade agreement negotiations.

Let us now proceed to respondents' argument that the subject JPEPA documents are covered by the diplomatic secrets privilege and should
therefore be withheld from Congress. In so proceeding, it is important to bear in mind the interdependence of the power of Congress over foreign trade and the power of the executive over treaty negotiations.

C. The power of Congress to conduct inquiry in aid of legislation on foreign trade vis-à-vis executive privilege

In **Senate v. Ermita**,[115] the Court defined"executive privilege" as the right of the President and high-level executive branch officials to withhold information from Congress, the courts, and the public.

In the U.S., it is recognized that there are at least four kinds of executive privilege: (1) military and state secrets, (2) presidential communications, (3) deliberative process, and (4) law enforcement privileges.[116] In the case at bar, respondents invoke the state secrets privilege covering diplomatic or foreign relations and the deliberative process privilege. Let me first take up the diplomatic secrets privilege.

1. Diplomatic secrets privilege

In **Almonte v. Vasquez,**[117] the Court recognized a common law governmental privilege against disclosure, with respect to state secrets bearing on diplomatic matters.[118] In **Chavez v. PCGG,**[119]the Court also recognizedtheconfidentialityof information on inter-government exchanges prior to the conclusion of treaties and executive agreements **subject to reasonable safeguards on the national interest**.[120] It also reiterated the privilege against disclosure of state secrets bearing on diplomatic matters, as held in **Almonte**. Citing **Chavez, Senate v. Ermita** also acknowledged the states secrets privilege bearing on diplomatic matters. In **PMPF v. Manglapus**, the Court upheld the confidentiality of treaty negotiations. In that case, petitioners sought to compel the representatives of the President in the then **ongoing** negotiations of the **RP-U.S. Military Bases Agreement** to give them access to the negotiations, to treaty items already agreed upon, and to the R.P. and U.S. positions on items that were still being contested.

In determining the applicability of the diplomatic secrets privilege to the case at bar, I **reiterate the primordial principle in Senate v. Ermita** that a claim of executive privilege may be valid or not **depending on the ground invoked to justify it and the context in which it is made.** Thus, even while **Almonte** and **Senatev. Ermita** both recognized the state secrets privilege over diplomatic matters, and **Chavez** and **PMPF v. Manglapus** both acknowledged the confidentiality of inter-government exchanges **during** treaty negotiations, the validity of the claim of the diplomatic secrets privilege over the subject JPEPA documents shall be examined under the **particular circumstances of the case at bar**. I especially take note of the fact that unlike **PMPF v. Manglapus,** which involved a request for access to information **during negotiations** of a **military treaty**, the case at bar involves a request for information **after the conclusion of negotiations** of an **international trade agreement**. Bearing this context in mind, let me now delve into the merits of the invocation of executive privilege.

Almonte, Chavez, Senate v. Ermita, and PMPF v. Manglapus did not discuss the

manner of invoking the diplomatic secrets privilege. For the proper invocation of this privilege, U.S. v. Reynolds[121]is instructive. This case involved the military secrets privilege, which can be analogized to the diplomatic secrets privilege, insofar as they are both based on the nature and the content of the information withheld. I submit that we should follow the procedure laid down in **Reynolds** to determine whether the diplomatic secrets privilege is properly invoked, *viz*:

> The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a **formal claim of privilege, lodged by the head of the department** which has control over the matter, after actual personal consideration by that officer. The **court itself must determine whether the circumstances are appropriate for the claim of privilege**, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.
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> It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.[122] (*emphasis supplied*) (footnotes omitted)

In the case at bar, the **reasons for nondisclosure** of the subject JPEPA documents are stated in the 23 June 2005 letter of respondent Secretary Ermita to Congressman Teves, Chairperson of the House Special Committee on Globalization, *viz*:

> "Dear Congressman Teves,
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> xxx xxx xxx
>
> In its letter dated 15 June 2005 (copy enclosed), DFA explains that the Committee's request to be furnished all documents on the JPEPA may be **difficult to accomplish at this time, since the proposed Agreement has been a work in progress for about three years. A copy of the draft JPEPA will however be forwarded** to the Committee **as soon** as the **text thereof is settled and complete**. (*emphasis supplied*)
>
> In the meantime, DFA submits copies of the following documents:
>
> - Joint Statement on the JPEPA issued in December 2002
> - JPEPA Joint Coordinating Team Report dated December 2003

- Joint Announcement of the Philippine President and the Japanese Prime Minister issued in December 2003
- Joint Press Statement on the JPEPA issued in November 2004

xxx xxx xxx

For your information.

Very truly yours,

(Signed)
Eduardo R. Ermita[123]

Respondents' Comment further warned of the danger of premature disclosure of the subject JPEPA documents, *viz*:

> **... At the time when the Committee was requesting the copies of such documents, the negotiations were ongoing as they are still now and the text of the proposed JPEPA is still uncertain and subject to change. Considering the status and nature of such documents then and now, these are evidently covered by executive privilege...**
>
> **Practical and strategic considerations likewise counsel against the disclosure of the "rolling texts" which may undergo radical change or portions** of which may be **totally abandoned**. Furthermore, the negotiations of the representatives of the Philippines as well as of Japan must be **allowed to explore alternatives in the course of the negotiations.**..[124]

The reasons cited by respondents for refusing to furnish petitioners the subject JPEPA documents demonstrate that these documents contain matters that should not be disclosed, lest the ongoing negotiations be hampered. As respondents further explain in their Comment, if premature disclosure is made while negotiations are ongoing, the Philippine panel and the President would be "hampered and embarrassed by criticisms or comments from persons with inadequate knowledge of the nuances of treaty negotiations or worse by publicity seekers or idle kibitzers."[125]

Without ruling on the confidentiality of the subject JPEPA documents during negotiations (as this is no longer in issue), I submit that **the reasons provided by respondents for invoking the diplomatic secrets privilege while the JPEPA negotiations were ongoing no longer hold now that the negotiations have been concluded.** That respondents were claiming confidentiality of the subject JPEPA documents **during -- not after -- negotiations** and providing reasons therefor is indubitable. The 23 June 2005 letter of respondent Secretary Ermita to Congressman Teves states that the "proposed Agreement has been a **work in progress for about three years**." Likewise, respondents' Comment states that "(a)t the time when the Committee was requesting the copies of such documents**,**

the negotiations were ongoing as they are still now." Both statements show that the subject JPEPA documents were being withheld from petitioners **during and not after negotiations, and that the reasons provided for withholding them refer to the dangers of disclosure while negotiations are ongoing and not after they have been concluded.**

In fact, respondent Secretary Ermita's 23 June 2005 letter states that a "copy of the **draft JPEPA**" as soon as "the **text thereof is settled and complete**" would be forwarded to the Committee, which is precisely one of the subject JPEPA documents, *i.e.*, the **final text of the JPEPA prior to its signing by the President**. Similarly, in his letter dated 2 November 2005, respondent Undersecretary Aquino replied that the Committee would be provided the **latest draft** of the agreement "once the **negotiations are completed** and as soon as a thorough legal review of the proposed agreement has been conducted."[126] Both letters of Secretary Ermita and Undersecretary Aquino **refer to the draft texts of the JPEPA** that they would provide to the Committee once the **negotiations and text are completed, and not to the final text of the JPEPA after it has been signed by the President**. The discussion *infra* will show that in the case of the North American Free Trade Agreement (NAFTA), the complete text of the agreement was released **prior** to its signing by the Presidents of the U.S., Canada and Mexico. Likewise, **draft texts** of the Free Trade Area of the Americas (FTAA) have been **made accessible to the public.** It is **not a timeless absolute** in foreign relations that the text of an international trade agreement prior to its signing by the President should not be made public.

For a claim of diplomatic secrets privilege to succeed, it is **incumbent upon respondents** to satisfy the Court that the disclosure of the subject JPEPA documents **after the negotiations have been concluded would prejudice our national interest, and that they should therefore be cloaked by the diplomatic secrets privilege**. It is the task of the Executive to show the Court the reason for the privilege **in the context in which it is invoked**, as required by **Senate v. Ermita**, just as the U.S. government did in **Reynolds**.[127] Otherwise, the Court, which has the duty to determine with finality whether the circumstances are appropriate for a claim of privilege,[128] will not have any basis for upholding or rejecting respondents' invocation of the privilege. The requirement to show the reason for the privilege is especially important in the case at bar, considering that the subject JPEPA documents are part of trade agreement negotiations, which involve the interdependent powers of the Executive over treaty negotiations and the legislature over foreign trade, as recognized in both Philippine and U.S. jurisdictions. Upon the Executive's showing of the reason and circumstances for invoking the diplomatic secrets privilege, the Court can then consider whether the application of the privilege to the information or document in dispute is warranted. As the Executive is given the opportunity to show the applicability of the privilege, there is a safeguard for protecting what should rightfully be considered privileged information to uphold national interest.

With respondents' failure to provide reasons for claiming the diplomatic secrets privilege after the conclusion of negotiations, the inevitable conclusion is that respondents cannot withhold the subject JPEPA documents.

The contentions in the Concurring Opinion of Justice Carpio that a State may wish to keep its offers "confidential even after the signing of the treaty because it plans to negotiate similar treaties with other countries and it does not want its negotiating positions known beforehand by such countries," and that "(i)f the Philippines does not respect the confidentiality of the offers and counter-offers of its negotiating partner State, then other countries will be reluctant to negotiate in a candid and frank manner with the Philippines" [129] are speculative and matters for respondents to show the Court. The same holds true as regards the assertion in the Separate Opinion of Justice Tinga that "with respect to the subject treaty, the Government of the Philippines should expectedly heed Japan's normal interest in preserving the confidentiality of the treaty negotiations and conduct itself accordingly in the same manner that our Government expects the Japanese Government to observe the protocol of confidentiality."[130]

Respondents having failed in shielding the subject JPEPA documents with the diplomatic secrets privilege, let us now proceed to determine whether they can keep these documents secret under the deliberative process privilege, which is a distinct kind of executive privilege. The Separate Opinion of Justice Tinga asserts, however, that while there is a distinction between the diplomatic secrets privilege and the deliberative process privilege, "they should be jointly considered if the question at hand, as in this case, involves such diplomatic correspondences related to treaty negotiations...Thus, it would not be enough to consider the question of privilege from only one of these two perspectives as both species of privilege should be ultimately weighed and applied in conjunction with each other."

Indeed, the diplomatic character of the JPEPA deliberations or negotiations and the subject JPEPA documents was considered in determining the applicability of the diplomatic secrets privilege in the above discussion. But as respondents have failed in protecting the subject JPEPA documents with this kind of privilege that considers the diplomatic character of negotiations, the next question to consider is whether another kind of privilege -- that does not hinge on the diplomatic nature of negotiations, but on the deliberative status of information alone - can shield the subject JPEPA documents.

2. Deliberative process privilege

The "deliberative process privilege" was not literally invoked in the 23 June 2005 letter of respondent Secretary Ermita or in respondents' Comment. Nevertheless, Secretary Ermita's statement that "the Committee's request to be furnished all documents on the JPEPA may be difficult to accomplish at this time, since the proposed Agreement has been a work in progress for about three years, (a) copy of the draft JPEPA will however be forwarded to the Committee as soon as the text thereof is settled and complete," and respondents' afore-quoted assertion of danger of premature disclosure[131] in their Comment show reliance on the deliberative process privilege.

In the U.S., it is settled jurisprudence that the **deliberative process privilege justifies** the

government's withholding of documents and other materials that would reveal "**advisory opinions**, **recommendations** and **deliberations comprising part of a process by which governmental decisions** and policies are formulated."[132] In 1958, the privilege was **first recognized** in a U.S. federal case, **Kaiser Aluminum Chemical Corp. v. United States,** [133] in which the term "executive privilege" was also originally used.

Kaiser was a suit filed against the U.S. in the Federal Court of Claims. Plaintiff Kaiser sought documents from the General Services Administration in the context of an action for breach of the most favored purchaser clause of a contract for the sale of war aluminum plants to plaintiff. The Court of Claims held that the production of **advisory opinion on intra-office policy** in relation to the sale of aluminum plants to plaintiff and to another entity was contrary to public interest; thus, the U.S. must be allowed to claim the executive privilege of nondisclosure. The Court sustained the following justification of the government for withholding a document:

> The document . . . contains opinions that were rendered to the Liquidator of War Assets by a member of his staff concerning a proposed sale of aluminum plants.**Those opinions do not necessarily reflect the views of, or represent the position ultimately taken by, the Liquidator of War Assets.A disclosure of the contents of documents of this nature would tend to discourage the staffs of Government agencies preparing such papers from giving complete and candid advice and would thereby impede effective administration of the functions of such agencies**.[134] (*emphasis supplied*)

Thereupon, the Court etched out the **classic justification** of the **deliberative process privilege**, *viz*:

> **Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected** if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act.[136] (*emphasis supplied*)

The Court also threw in **public policy** and **public interest** as bases for the deliberative process privilege, *viz*:

> ...Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen...There is a **public policy involved in this claim of privilege for this advisory opinion -the policy of open, frank discussion between subordinate and chief concerning administrative action**. [137]
>
> xxx xxx xxx
>
> ... Viewing this claim of privilege for the intra-agency advisory opinion in its

> entirety, we determine that the Government's claim of privilege for the document is well-founded. It would be **definitely contrary to the public interest in our view for such an advisory opinion on governmental course of action to be produced by the United States** under the coercion of a bar against production of any evidence in defense of this suit for contract damages.[138] (*emphasis supplied*)

The Court also held that the **judicial branch**, and not the executive branch, is the **final arbiter of whether the privilege should apply**, contrary to the government's assertion that the head of the relevant agency should be allowed to assert the privilege unilaterally.[139]

Courts and scholars have identified **three purposes**[140] of the privilege: (1) to protect **candid discussions within an agency**;[141] (2) to **prevent public confusion from premature disclosure of agency opinions** before the agency has established a final policy; [142] and (3) to **protect against confusing the issues and misleading the public** by dissemination of documents suggesting **reasons and rationales for a course of action, when these were not in fact the ultimate reasons** for the agency's action.[143]

Two requisites are essential for a valid assertion of the privilege: the material must be **pre-decisional** and **deliberative**. To be "**pre-decisional**," a document must be **generated before the adoption of an agency policy**. To be "**deliberative**," it must reflect the give-and-take of the consultative process.[144] Both requirements stem from the privilege's "ultimate purpose (which) ... is to **prevent injury to the quality of agency decisions**" by allowing government officials freedom to debate alternative approaches in private.[145] The deliberative process privilege **does not shield documents that simply state or explain a decision** the government has already made; nor does the privilege cover material that is **purely factual**, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations.[146] There must also be a **formal assertion** of the privilege by the head of the department in control of the information based on his actual personal consideration of the matter and an **explanation as to why the information sought falls within the scope of the privilege.**[147]

Once the agency has shown that the material is **both pre-decisional and deliberative**, the material enjoys **a qualified privilege that may be overcome by a sufficient showing of need**, as held in **In re Sealed Case (Espy)**.[148] In general, courts balance the need for information against the harm that may result from disclosure. Thus, "each time (the deliberative process privilege) is asserted, the district court must undertake a fresh balancing of the competing interests," taking into account factors such as "the relevance of the evidence," "the availability of other evidence," "the seriousness of the litigation," "the role of the government," and the "possibility of future timidity by government employees."

[149] These rulings were made in the context of the refusal of the White House to submit some documents sought by a grand jury subpoena.[150]

In our jurisdiction, the Court has had no occasion to recognize and rule on the applicability of the deliberative process privilege. In the recent case Neri v. Senate Committees,[151] the Court recognized the claim of the presidential communications privilege, which is closely associated with the deliberative process privilege.[152] In In re Sealed Case (Espy), the distinction between the two privileges was explained, *viz*:

> Both are executive privileges designed to **protect executive branch decision-making**, but one (deliberative process privilege) applies to **decision-making of executive officials generally**, the other specifically to **decision-making of the President**. The presidential privilege is rooted in **constitutional separation of powers principles and the President's unique constitutional role**; the deliberative process privilege is primarily a **common law privilege**...Consequently, congressional or judicial negation of the presidential communications privilege is subject to greater scrutiny than denial of the deliberative privilege... Unlike the deliberative process privilege (which covers only **material that is pre-decisional and deliberative**),[153] the presidential communications privilege applies to **documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative** ones."[154] (*emphasis supplied*)

The distinction notwithstanding, there is no reason not to recognize in our jurisdiction the deliberative process privilege, which has essentially the same purpose as the presidential communications privilege, except that it applies to executive officials in general.

Let us now determine whether the deliberative process privilege will shield from disclosure the following JPEPA documents sought by petitioners: (1) the initial offers (of the Philippines and Japan) of the JPEPA, including all pertinent attachments and annexes thereto; and (2) the final text of the JPEPA prior to the signing by the President. **The answer is in the negative**.

It is my considered view that the subject JPEPA documents do not come within the purview of the kind of information which the deliberative process privilege shields in order to promote frank and candid discussions and protect **executive branch decision-making of the Philippine government**. The **initial offers** are not in the nature of "**advisory opinions**, **recommendations** and **deliberations**"[155] similar to those submitted by the subordinate to the chief in a government agency, as in the seminal case of **Kaiser**. The **initial offer of the Philippines** is not a document that offers alternative courses of action to an executive official to aid in the decision-making of the latter, but is instead a proposal to **another government**, the Japanese government, to institute negotiations. The end in view of these negotiations is not a decision or policy of the Philippine government, but a joint decision or

agreement between the Philippine and the Japanese governments.

Likewise, the **final text of the JPEPA prior to signing** by the President is not in the nature of an advice or recommendation or deliberation by executive officials of the Philippine government, as it is the handiwork of **the Philippine and the Japanese negotiating panels working together.** The documents sought to be disclosed are **not of the same nature as internal deliberations** of the Department of Trade and Industry or the Philippine negotiating panel in crafting and deciding the initial offer of the Philippines or internal memoranda of Philippine government agencies to advise President Macapagal-Arroyo in her decision to sign the JPEPA. **Extending the mantle of protection of the deliberative process privilege to the initial offers of the Philippines and of Japan and the final JPEPA text prior to signing by President Macapagal-Arroyo will be tantamount to extending the protection of executive branch decision-making to the executive branch not only of the Philippine government, but also of the Japanese government, which, in trade agreement negotiations, represents an interest adverse to that of the Philippine government.** As seen from the rationale and history of the deliberative process privilege, this is **not the intent** of the deliberative process privilege. [156] Given the nature of the subject JPEPA documents, it is the diplomatic secrets privilege that can properly shield them upon sufficient showing of reasons for their confidentiality. Hence, the invocation of deliberative process privilege to protect the subject JPEPA documents must fail.

But this is not all. In **Senate v. Ermita,** the Court also required that executive privilege **must be invoked by the President, or the Executive Secretary "by order of the President,"** unlike in U.S. jurisdiction where, as afore-discussed, the formal assertion of the head of the department claiming the privilege suffices. [157] **In the case at bar**, the Executive Secretary invoked both the deliberative process privilege and the diplomatic secrets privilege **not "by order of the President,"** as his 23 June 2005 letter quoted above shows. Accordingly, the invocation of executive privilege was not properly made and was therefore without legal effect.

Senate v. Ermita was decided on **20 April 2006** and became final and executory on **21 July 2006**. Hence, it may be argued that it cannot be used as a yardstick to measure whether respondent Secretary Ermita properly invoked executive privilege in his **23 June 2005** letter. It must be noted, however, that the case at bar has been pending decision even after the finality of **Senate v. Ermita**. During the time of its pendency, respondents failed to inform the Court whether Executive Secretary Ermita's position bore the imprimatur of the Chief Executive. The period of nearly two years from the time **Senate v. Ermita** became final up to the present is more than enough leeway for the respondents to comply with the requirement that executive privilege be invoked by the President, or the Executive Secretary "by order of the President." Contrary to the assertion of the *ponencia*,[158] the Court would not be overly strict in exacting compliance with the **Senate v. Ermita** requirement, considering the two-year margin the Court has afforded respondents.

Let us now determine whether the **public's constitutional right to information and participation** can be trumped by a claim of executive privilege over the documents sought to be disclosed.

II. The context: the question of the right of access of the petitioner private citizens to the subject JPEPA documents is raised in relation to international trade agreement negotiations on the strength of a constitutional right to information and participation

A. The developing openness of trade agreement negotiations in U.S. jurisdiction

The waning of the exclusivity of executive power over negotiations of international trade agreements vis-à-vis Congressional power over foreign trade was accompanied by a developing **openness to the public of international trade agreement negotiations** in U.S. jurisdiction.

Historically, the American public only had an **indirect participation** in the trade negotiation process. Public involvement primarily centered on electing representatives who were responsible for shaping U.S. trade policy.[159] **From the 18th century until the early 1930s,** U.S. international trade relations[160] were largely left to the interplay between these public delegates in the legislative and the executive branches and similar officials in foreign nations.[161] But this **trend began to see changes** during the **Great Depression** in the early 1930s and the enactment of the **Trade Agreements Act of 1934**,[162] under which regime the 1936 case **Curtiss-Wright** was decided.

As afore-discussed, the U.S. Congress passed the Reciprocal Trade Agreement Act of 1934 (the 1934 Act).As an economic stimulus, the 1934 Act authorized the President to address economic stagnation by reducing tariffs on foreign goods by as much as fifty percent.[163] When the President took such an action, America's trading partners reciprocated by reducing tariffs placed on U.S. goods, thereby stimulating the U.S. economy.[164] **Confronted with the Great Depression and the subsequent deterioration of the global economy, the 1934 Act called for a single, strong voice to deal effectively with foreign nations.** Thus, the President, with this Congressional mandate, became the **chief American trade negotiator** with complete and unrestricted authority to enter into binding international trade agreements.[165]

While the 1934 Act gave trading muscle to the President, it also **created the first formal method of public participation in the international trade negotiation process.** Section 4 of the 1934 Act required **"reasonable public notice"** of the President's intention to enter into agreements with foreign states,[166] thereby giving American citizens the opportunity to **know with which foreign nations the U.S. government proposed to negotiate.** Pursuant to the 1934 Act, the President established the Trade Agreements Committee,

which was composed of high-ranking members of the executive branch.[167] The Trade Agreements Committee, commonly known as the Committee for Reciprocity Information, conducted **public hearings** at which specific items up for negotiation with a particular country would be discussed.[168] But with the Congress left almost completely outside the trade negotiation process and **agreements being concluded and implemented in relative obscurity**, the attention of Congress and the public turned more toward the pressing domestic issues, at least until the dawn of the `70s.[169]

The **Cold War** and the lingering **Vietnam War made international relations increasingly significant to the general welfare of the U.S.** By the mid-1970s, the **post-World War II economic dominance of the U.S. began to deteriorate**.[170] Under Japan's lead, Asia began gaining economic strength, quickly joining Europe as a major global industrial competitor to the U.S. At the same time, **increased media coverage brought international trade issues to the public's attention**[171] and moved the public to **challenge the traditions, institutions, and authority of government with respect to trade issues.**

With the swell of public activism, the **U.S. Congress re-analyzed its transfer of powers over international trade issues.** Thus, as afore-discussed, in **1974**, after forty years of continuous presidential authority over international trade matters, Congress passed the Trade Act of 1974.[172] The **Trade Act of 1974 increased the levels of public involvement in international trade negotiations,** far beyond the requirement of notice of a proposed trading partner under the 1934 Act. The 1974 Act **required international agreements to include provisions creating domestic procedures through which interested public parties could participate in the international trade process**.[173] It also required the President to **seek information and advice from both private and public sectors.**[174] For this purpose, it incorporated the use of **advisory committees** and included spontaneous opportunities for **acceptance of information from the public.**[175] Thus, the 1974 Act, supplemented by several amendments passed in 1979 and 1988, **opened the door to unprecedented formal and direct public participation**[176] in the negotiation of international trade agreements and contributed to a rekindled awareness of government activities and their impact on the public.[177]

Towards the latter half of the 1980s, government leaders and trade experts again began to advocate **reduced trade barriers as an answer to economic difficulty.** They became convinced that increased emphasis on free global trade was the key to future economic prosperity. The idea of increasing the size and strength of the national economy by reducing restrictions on foreign trade was the impetus behind trade agreements such as the 1993 North American Free Trade Agreement (NAFTA)[178] concluded among the U.S., Mexico and Canada. The launch of the NAFTA and the completion of the World Trade Organization's (WTO) Uruguay round in the mid-`90s swept in a new era of unprecedented

international collaboration on trade policy.[179]

In the 1990s, the **changing nature of world politics and economics focused international issues on economic well-being** rather than on political and military dominance. Fearing environmental destruction and increased unemployment, members of Congress, commentators, and special interest groups have **used trade agreements such as NAFTA and the mass media to heighten public awareness and participation in international trade relationships**.[180] The 1990s led the American public to realize that **international trade issues had a direct impact on their standard of living and way of life,**[181] **thus fomenting public participation in international trade negotiations**. With the growing concern over the far-reaching implications of bilateral and multilateral international trade agreements and the increased focus upon the processes by which they are negotiated, calls for greater openness and public participation in their negotiation have come in many forms and from many corners, particularly in the U.S. **A central component of the demand for participation has been to gain access to negotiating documents shared by the U.S. with other governments prior to the conclusion of a free trade agreement**.[182]

The **1990s saw a continuous expansion of public access to the international trade agreement process**. Rather than simply being left to point out failures in already existing agreements, **individuals were now allowed to help shape future agreements.** In reemphasizing the open government mentality of the 1970s, **the 1990s marked the beginning of a new era in trade negotiations.** Private individuals now played an important role in many areas throughout the international trade agreement process.[183] The **Trade Act of 2002** was then passed, **enhancing transparency** through **increased and more timely access to information regarding trade issues and activities of international trade institutions; increased public access to meetings, proceedings, and submissions at the World Trade Organization (WTO); and increased and more timely public access to all notifications and supporting documentation by parties to the WTO.**[184]

Public participation in international trade negotiations affects trade negotiations in two distinct ways. **First**, it serves as a **check on the power of elected and bureaucratic leaders** by generating and limiting the issues that require government action. **Second**, it provides those in positions of power and influence with **specific, detailed information upon which to base their decisions;** for in the absence of public input, government officials risk making decisions based on **incomplete information**, thereby **compromising public policy**.[185]

The public participates in trade negotiations in various ways. Individuals influence governmental action by electing the President and members of Congress, joining special interest groups that lobby influential members of the executive and the legislative branches, initiating litigation, serving on presidentially appointed advisory committees,

testifying at international trade commission hearings, and protesting individually or as a group. But **ultimately**, the degree of public involvement in any area of government policy **depends on the amount of available access**.[186]

Although the NAFTA negotiations have been criticized for being shrouded in much secrecy, the U.S. government released on 6 September 1992, the most recent text of the NAFTA, **prior to its signing** by Canadian Prime Minister Brian Mulroney, U.S. President George H.W. Bush and Mexican President Carlos Salinas on October 7, 1992.[187]

The negotiation of the Free Trade Area of the Americas (FTAA) that began in 1995 has also shown a changing landscape that allows for greater public participation in international trade negotiations. In their Santiago Summit in 1998, the heads of thirty-four Western Hemisphere states extended **principles of participation** explicitly to the FTAA:

> **The FTAA negotiating process will be transparent** . . . in order to create the opportunities for the full participation by all countries.We encourage **all segments of civil society to participate in and contribute to the process in a constructive manner**, through our respective mechanisms of dialogue and consultation and by presenting their views through the mechanism created in the FTAA negotiating process.[188]

The Santiago Declaration also includes a pledge to "promote the necessary actions for government institutions to become **more participatory structures**." [189] (*emphasis supplied*) In the Quebec Summit in 2001, the heads of State went even further and declared their commitment to "the full participation of all persons in the political, economic, social and cultural life of our countries."[190] They also addressed **participation** in the context of an FTAA and committed to --

> Ensure the **transparency of the negotiating process**, including through **publication of the preliminary draft FTAA Agreement** in the four official languages as soon as possible and the **dissemination of additional information on the progress of negotiations**; [and to] Foster through their respective national dialogue mechanisms and through appropriate FTAA mechanisms, a process of **increasing and sustained communication with civil society to ensure that it has a clear perception of the development of the FTAA negotiating process**; [and to] invite civil society to continue to contribute to the FTAA process . . .[191] (*emphasis supplied*)

Thus, the Presidential summits, which have established both the impetus and the context for an FTAA, unmistakably contemplate **public access to the negotiating process,** and the FTAA itself is a central part of that process.[192] In July 2001 came the **first public release of the preliminary official text of the FTAA**. A **revised draft of the text was released** in November 2002 and again in 2003.[193] This notwithstanding, civil society organizations

have expressed great concern for and emphasis on the timeliness of information given to the public and input given to negotiators. They have observed that the draft text is published long after issues are actually negotiated; they have thus proposed specific mechanisms for the timely release of negotiating documents, many of which were procedures already in place in the World Trade Organization (WTO).[194]

The **need to create meaningful public participation during negotiation and implementation** applies to both multilateral agreements, such as the FTAA, and to bilateral agreements.[195] **Public participation gives legitimacy to the process and result**, and it **strengthens the political will of populations who must support ratification and implementation once the text is finalized**. The wide range of expertise available outside of governmental corridors would also be more fully accessible to officials if an organic and meaningful exchange of ideas is part of the process. While it is true that participation implies resource allocation and sometimes delay, these are **investments in a democratic outcome** and should not be seen as costs.[196]

Secrecy has long played an integral but also controversial role in the negotiation of international agreements. It facilitates frank discussion, minimizes posturing and allows flexibility in negotiating positions. But it is also **prone to abuse** and is often assailed as undemocratic and facilitating abuse of power. **In the public eye, excessive secrecy** can **weaken accountability and undermine the legitimacy of government action.**[197] Generally, it can also **undermine the faith of the public in the need for secrecy**[198] for "secrecy can best be preserved only when credibility is truly maintained."[199]

The tension between secrecy and the demand for openness continues, but circumstances have changed, as the international trade agreements of today tend to be far more authoritative and comprehensive than those negotiated by Presidents Woodrow Wilson, George Washington and John Jay. These trade agreements have broader and more direct consequences on private conduct. As the trend on international trade agreements will only continue, it is important to **revisit the tension between secrecy and openness. The fact alone that secrecy shrouded negotiations of international agreements three hundred or even twenty-five years ago can no longer justify the continuation of that approach in today's era of the NAFTA, CAFTA (Central American Free Trade Agreement), and a prospective FTAA.**[200]

These developments in the openness to the public of international trade agreement negotiations show that **secrecy in the negotiation of treaties is not a rule written in stone**. Revisiting the balance between secrecy and openness is an imperative, **especially in the Philippines where the right to information has been elevated to a constitutional right essential to our democratic society.**

B. Democracy and the rights to information and participation

1. Philippine Constitutional provisions on information and transparency

Of all the organic laws of our country, the 1987 Constitution holds most sacrosanct the people's role in governance. As a first principle of government, the 1987 Constitution declares in Article II, Section 1, Declaration of Principles and State Policies, that the **Philippines is not only a republican but also a democratic state.** The word "democratic" was added to "republican" as a "pardonable redundancy" to highlight the importance of the people's role in government, as evinced by the exchanges in the 1986 Constitutional Commission, *viz*:

> MR. NOLLEDO. I am putting the word "democratic" because of the provisions that we are now adopting which are covering **consultations with the people**. For example, we have provisions on recall, initiative, the **right of the people even to participate in lawmaking and other instances that recognize the validity of interference by the people through people's organizations** . . . [201]
>
> xxx xxx xxx
>
> MR. OPLE. The **Committee added the word "democratic" to "republican," and, therefore, the first sentence states: "The Philippines is a republican and democratic state."**
>
> May I know from the committee the reason for adding the word "democratic" to "republican"? The constitutional framers of the 1935 and 1973 Constitutions were content with "republican." Was this done merely for the sake of emphasis?
>
> MR. NOLLEDO. Madam President, that question has been asked several times, but being the proponent of this amendment, I would like the Commissioner to know that **"democratic" was added** because of the **need to emphasize** people power and the many provisions in the Constitution that we have approved related to recall, people's organizations, initiative and the like, which recognize the **participation of the people in policy-making** in certain circumstances."
>
> MR. OPLE. I thank the Commissioner. That is a very clear answer and I think it does meet a need. . .
>
> xxx xxx xxx
>
> **MR. NOLLEDO. According to Commissioner Rosario Braid, "democracy" here is understood as participatory democracy.**[202] (*emphasis supplied*)

Of a similar tenor is the following exchange between **Commissioners Abraham Sarmiento and Adolfo Azcuna**:

> MR. SARMIENTO. When we speak of republican democratic state, are we referring to representative democracy?
>
> MR. AZCUNA. That is right.
>
> MR. SARMIENTO. So, why do we not retain the old formulation under the 1973 and 1935 Constitutions which used the words "republican state" because "republican state" would refer to a democratic state where people choose their representatives?
>
> MR. AZCUNA. We **wanted to emphasize the participation of the people in government**. [203] (*emphasis supplied*)

In line with this desideratum, our fundamental law enshrined in rubric the indispensability of the people's participation in government through **recall**,[204] **initiative**,[205] and **referendum.**[206]

Similarly, it expressly provided for the **people's right to effective and reasonable participation in Article XIII, Section 16, on Social Justice and Human Rights**, *viz*:

> The **right** of the people and their organizations to **effective and reasonable participation** at all levels of social, political, and **economic decision-making** shall not be abridged. The State shall, by law, facilitate the establishment of adequate consultation mechanisms. (*emphasis supplied*)

To prevent the participation of the people in government from being a mere chimera, the 1987 Constitution also gave more muscle to their **right to information, protected in the Bill of Rights,** by strengthening it with the provision on transparency in government, and by underscoring the importance of communication. Thus, the 1987 Constitution provides in Article III, Section 7 of the Bill of Rights, *viz*:

> The **right of the people to information** on matters of **public concern** shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law. (*emphasis supplied*)

Symmetrical to this right to information are the following provisions of the 1987 Constitution:

> Article II, Section 28, Declaration of State Principles and Policies:
>
> Subject to reasonable conditions prescribed by law, the State adopts and implements a **policy of full public disclosure of all its transactions involving public interest**. (*emphasis supplied*)

Article XI, Section 21, National Economy and Patrimony:

> Foreign loans may be incurred in accordance with law and the regulation of the monetary authority. **Information on foreign loans obtained or guaranteed by the Government shall be made available to the public**. (*emphasis supplied*)

The objective of the 1987 Constitution is to attain an **open and honest government** predicated on the people's right to know, as shown by the following portion of the deliberations of the 1986 Constitutional Commission, *viz:*

> MR. OPLE. Mr. Presiding Officer, this amendment is proposed jointly by Commissioners Ople, Rama, Treñas, Romulo, Regalado and Rosario Braid. It reads as follows: "SECTION 24. THE STATE SHALL ADOPT AND IMPLEMENT A POLICY OF FULL PUBLIC DISCLOSURE OF ALL ITS TRANSACTIONS SUBJECT TO REASONABLE SAFEGUARDS ON NATIONAL INTEREST AS MAY BE PROVIDED BY LAW."
>
> xxx xxx xxx
>
> In the United States, President Aquino has made much of the point that the government should be open and accessible to the public. This amendment is by way of providing an umbrella statement in the Declaration of Principles for all these safeguards for an **open and honest government** distributed all over the draft Constitution. **It establishes a concrete, ethical principle for the conduct of public affairs in a genuinely open democracy, with the people's right to know as the centerpiece.**[207](*emphasis supplied*)

The correlative policy of public disclosure and the people's right to information were also expounded by Constitutional Commissioners **Joaquin Bernas** and **Napoleon Rama**, *viz*:

> FR. BERNAS. Just one observation, Mr. Presiding Officer. I want to comment that Section 6 (referring to Section 7, Article III on the right to information) talks about the right of the people to information, and corresponding to every right is a duty. In this particular case, **corresponding to this right of the people is precisely the duty of the State to make available whatever information there may be needed that is of public concern. Section 6 is very broadly stated so that it covers anything that is of public concern**. It would seem also that the **advantage of Section 6 is that it challenges citizens to be active in seeking information rather than being dependent on whatever the State may release to them.**
>
> xxx xxx xxx
>
> MR. RAMA. There is a difference between the provisions under the Declaration of Principles and the provision under the Bill of Rights. The basic difference is

> that the Bill of Rights contemplates collision between the rights of the citizens and the State. Therefore, it is **the right of the citizen to demand information.** While under the Declaration of Principles, **the State must have a policy, even without being demanded, by the citizens, without being sued by the citizen, to disclose information and transactions**. So there is a basic difference here because of the very nature of the Bill of Rights and the nature of the Declaration of Principles.[208] (*emphases supplied*)

Going full circle, the 1987 Constitution provides for the vital role of information in nation-building in the opening Declaration of State Principles and Policies and in the General Provisions towards the end of the Constitution.

Article II, Section 24, provides, *viz*:

> Sec. 24. The State recognizes the **vital** role of communication and **information in nation-building**. (*emphasis supplied*).

Article XVI, Section 10, General Provisions provides, *viz*:

> Sec. 10. The State shall provide the policy environment for the full development of Filipino capability and the **emergence of communication structures suitable to the needs and aspirations of the nation and the balanced flow of information into, out of, and across the country,** in accordance with a policy that respects the freedom of speech and of the press. (*emphasis supplied*)

Constitutional Commissioner **Rosario Braid** explained the rationale of these provisions on information and communication in her sponsorship speech, *viz*:

> MS. ROSARIO BRAID. We cannot talk of the functions of communication unless we have a philosophy of communication, unless we have a vision of society. Here we have a preferred vision where opportunities are provided for participation by as many people, where there is unity even in cultural diversity, for there is freedom to have options in a pluralistic society. **Communication and information provide the leverage for power. They enable the people to act, to make decisions, to share consciousness in the mobilization of the nation**.[209] (*emphasis supplied*)

With the constitutional provisions on transparency and information brightlined in neon as backdrop, we now focus on the people's right to information.

2. Focusing on the right to information

The constitutional provision on the people's right to information made its **maiden appearance** in the Bill of Rights of the 1973 Constitution, but without the phrase "as well as to government research data used as basis for policy development." The phrase was added in the 1987 Constitution to stop the government practice during Martial Law of

withholding social research data from the knowledge of the public whenever such data contradicted policies that the government wanted to espouse.[210]

Likewise, the framers of the 1987 Constitution expandd the scope of "transactions" that may be accessed, to include negotiations leading to the consummation of contracts and treaties, but subject to "reasonable safeguards on national interest."[211]

The intent of the constitutional right to information, as pointed out by Constitutional Commissioner Wilfrido V. Villacorta, is "to adequately inform the public so that nothing vital in state affairs is kept from them"[212] In **Valmonte v. Belmonte**,[213] we explained the rationale of the right of access to information, *viz*:

> A**n informed citizenry with access to the diverse currents in political, moral and artistic thought and data relative to them, and the free exchange of ideas and discussion of issues thereon is vital to the democratic government envisioned under our Constitution.** The cornerstone of this republican system of government is delegation of power by the people to the State. In this system, governmental agencies and institutions operate within the limits of the authority conferred by the people. Denied access to information on the inner workings of government, the citizenry can become prey to the whims and caprices of those to whom the power had been delegated...
>
> xxx xxx xxx
>
> ...The right of access to information ensures that these freedoms are not rendered nugatory by the government's monopolizing pertinent information. For an essential element of these freedoms is to keep open a continuing dialogue or process of communication between the government and the people. It is in the interest of the State that the channels for free political discussion be maintained to the end that the government may perceive and be responsive to the people's will. Yet, this **open dialogue can be effective only to the extent that the citizenry is informed and thus able to formulate its will intelligently. Only when the participants in a discussion are aware of the issues and have access to information relating thereto can such bear fruit**.
>
> **The right to information is an essential premise of a meaningful right to speech and expression.** But this is not to say that the right to information is merely an adjunct of and therefore restricted in application by the exercise of the freedoms of speech and of the press. Far from it**. The right to information goes hand-in-hand with the constitutional policies of *full public disclosure* (footnote omitted) and *honesty in the public service* (footnote omitted). It is meant to enhance the widening role of the citizenry in governmental decision-making as well as in checking abuse in government.**[214] (*emphases supplied*)

Notably, the right to information was written in broad strokes, as it merely required that information sought to be disclosed must be a **matter of public concern.**[215] In Legaspi v. Civil Service Commission,[216] the Court elucidated on the meaning of "matters of public concern," *viz*:

> In determining whether or not a particular information is of public concern, there is no rigid test which can be applied. "Public concern" like "public interest" is a term that eludes exact definition. Both terms embrace a broad spectrum of subjects which the public may want to know, either because these **directly affect their lives, or simply because such matters naturally arouse the interest of an ordinary citizen.** In the final analysis, it is for the courts to determine on a case by case basis whether the **matter at issue is of interest or importance, as it relates to or affects the public**.[217] (*emphasis supplied*)

Under both the 1973 and the 1987 Constitutions, the right to information is **self-executory**. It is a public right that belongs to and can be invoked by the people. Consequently, **every citizen** has the "standing" to challenge any violation of the right and may seek its enforcement. [218] The **self-executory status** and the significance in a democracy of the right of access to information were emphasized by the Court in **Gonzales v. Narvasa,**[219] *viz*:

> Under both the 1973 (footnote omitted) and 1987 Constitutions, this (the right to information) is a **self-executory provision which can be invoked by any citizen before the courts...**
>
> Elaborating on the significance of the right to information, the Court said in Baldoza v. Dimaano (71 SCRA 14 [1976]...) that "[t]he incorporation of this right in the Constitution is a **recognition of the fundamental role of free exchange of information in a democracy. There can be no realistic perception by the public of the nation's problems, nor a meaningful democratic decision-making if they are denied access to information of general interest. Information is needed to enable the members of society to cope with the exigencies of the times**." [220] (*emphases supplied*)

Prior to the 1973 Constitution, this right was merely statutory in character, as stressed in **Subido v. Ozaeta.**[221] In said case, Subido was an editor of the **Manila Post**. He filed a petition for mandamus to compel the respondents Secretary of Justice and Register of Deeds of Manila to furnish him the list of real estate properties sold to aliens and registered with the Register of Deeds of Manila since the promulgation of Department of Justice Circular No. 128, or to allow him to examine all records in the respondents' custody relative to the said transactions, after his requests to the Secretary of Justice and the Register of Deeds were denied.

The Court upheld the contention of the respondents that the 1935 Constitution did not guarantee freedom of information or freedom to obtain information for publication. The Court ruled that "**the right to examine or inspect public records is purely a question of statutory construction**." [222] Section 56 of Act No. 496, as amended by Act No. 3300, saved the day for Subido, as it provided that "all records relating to registered lands in the office of the Register of Deeds shall be open to the public subject to such reasonable regulations as may be prescribed by the Chief of the General Land Registration Office with the approval of the Secretary of Justice." Hence, the petition for mandamus was granted.

The **Subido Court's** interpretation of the 1935 Constitution followed U.S. jurisprudence **that did not and continues not to recognize a constitutional right of access to information on matters of public concern.** Let us briefly examine the right of access to information in U.S. and other jurisdictions.

3. Right to information in U.S. and other jurisdictions

a. U.S. jurisdiction

The U.S. Supreme Court has recognized a constitutional **right to receive information** integral to the **freedom of speech** under the First Amendment to the U.S. Constitution. It has ruled, however, that the **right of access to information is not constitutionally mandated, but statutorily granted**.[223]

The U.S. Supreme Court first identified a constitutional **right to receive information** in the **1936 case Grosjean v. American Press Company**.[224] In that case, the U.S. High Court, citing Judge Cooley, held that a free and general discussion of public matters is essential to prepare the people for an intelligent exercise of their rights as citizens.[225] In the **1976 case Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,**[226] widely considered to be the seminal "right to receive" case, [227] a Virginia statute forbidding pharmacists from advertising the prices of prescription drugs was held unconstitutional by the U.S. High Court. It reasoned that the free speech guarantee of the **First Amendment covered not only the speaker, but also the recipient of the speech.** While commercial speech was involved in that case, the Court left no doubt that the constitutional protection for **receipt of information** would apply with even more force when more directly related to self-government and public policy.[228]

On the premise that information is a prerequisite to meaningful participation in government, the U.S. Congress passed the **Freedom of Information Act of 1966 (FOIA)**. [229] In the leading FOIA case, **Environmental Protection Agency v. Mink**, [230] the U.S. Supreme Court held that the FOIA "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands."[231] In **Department of Air Force v. Rose**, [232] the same Court held that the basic purpose of the

law was "to open agency action to the light of public scrutiny." In **National Labor Relations Board v. Robbins Tire & Rubber Co.**,[233] the U.S. High Court ruled that the basic purpose of the FOIA "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[234]

Under the FOIA, the reason for the request for information has no bearing on the merits of the request.[235] But while the FOIA promotes a policy of public disclosure, it recognizes certain exemptions from disclosure, among which are matters "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order."[236]

Still and all, the U.S. Supreme Court characterized the **right of access to information as statutory and not constitutional in Houchins v. KQED, Inc., et al.**, [237] *viz*: "**(T)here is no constitutional right to have access to particular government information, or to require openness from the bureaucracy.** . . The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." [238] **Neither the U.S. courts nor the U.S. Congress recognizes an affirmative constitutional obligation to disclose information concerning governmental affairs;** such a duty cannot be inferred from the language of the U.S. Constitution itself.[239]

Like the U.S., other countries also recognize a statutory right to information as discussed below.

b. Other jurisdictions
(i.e., UK, Australia and New Zealand)

In the **United Kingdom**, the last four decades of the 20th century saw a gradual increase in the rights of the individual to elicit information from the public authorities.[240] This trend culminated in the passage of the "Freedom of Information Act 2000" (FOIA 2000). FOIA 2000 conferred a
right of access to official information to every person, irrespective of that person's interest in the information. It covers all information, regardless of subject matter, but also provides for specific exemptions.

Exemptions under FOIA 2000 can be either **absolute** or **qualified**. When the exemption is absolute, the right to disclosure does not apply; but when it is **qualified, the right will not be applied only if the public interest in maintaining the exemption outweighs the public interest in disclosure of the information**.[241] The weighing of the public interest must be carried out by reference to the **particular circumstances** existing at the time a request for information is made. "The central question in every case is the content of the

particular information in question. **Every decision is specific to the particular facts and circumstances under consideration**."[242] Thus, while a public authority may properly refuse to disclose information subject to a qualified exemption, a change in surrounding circumstances may result in the public authority being obliged to disclose the information upon a subsequent request.[243]

Among the **qualified exemptions** are information that "would be **likely to prejudice**...relations between the United Kingdom and any other State"[244] and "confidential information obtained from a State other than the United Kingdom..."[245]

Ahead of the United Kingdom, the **Commonwealth of Australia** passed its "Freedom of Information Act 1982 (Act 1982)." Act 1982 gives every person a legally enforceable right to obtain access to information of a public agency without requirement to demonstrate a need to know.[246] At the same time, it recognizes two basic kinds of exemptions: (1) exemptions which protect a document of a particular class or kind **without a need to refer to the effects of disclosure** (**class exemption**), and (2) exemptions which depend on **demonstrating a certain likelihood that a particular harm would result from disclosure** of a document (**harm-based exemption**).

Covered by the **harm-based exemptions** are documents that "would, or could reasonably be expected to, **cause damage** to...the international relations of the Commonwealth" or "would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth."[247]

Almost simultaneous with Australia, **New Zealand** enacted the "Official Information Act 1982 (OIA)," which allows its citizens, residents, persons in New Zealand, and companies incorporated in New Zealand to request official information. Under the OIA, exemptions may be divided into two broad classes: (1) "those that are engaged upon their terms being satisfied," and (2) "those that will be disengaged if, in the circumstances, the withholding of particular information is outweighed by other considerations which render it desirable in the public interest to make that information available."[248] Among the exemptions included in the first class is information that would be likely to **prejudice** the entrusting of information to the Government of New Zealand on a basis of confidence by the government of any other country or any agency of such government.[249]

Taking into account the higher constitutional status of the right of access to information in Philippine jurisdiction compared with the statutorily granted right of access to information in U.S. and other jurisdictions, let me now turn to the question of whether executive privilege can constitute an exception to the right of access and be used to withhold information from the public.

C. Adjudicating the constitutional right to information vis-à-vis executive privilege in Philippine jurisdiction

1. The general rule and the exception

With the elevation of the right to information to constitutional stature, the starting point of the inquiry is the **general rule** that the public has a right to information on matters of public concern and the State has a corresponding duty to allow public access to such information. It is recognized, however, that the constitutional guarantee admits of **exceptions** such as "limitations as may be provided by law."[250] Thus, as held in **Legaspi**, "in every case, the availability of access to a particular public record" is circumscribed by two elements: (1) the information is "of **public concern** or one that involves public interest," and, (2) it is "**not exempt** by law from the operation of the constitutional guarantee."[251]

The question of access is first addressed to the government agency having custody of the information sought. **Should the government agency deny access, it "has the burden of showing that the information requested is not of public concern, or, if it is of public concern, that the same has been exempted by law from the operation of the guarantee"** because "(t)o hold otherwise will serve to dilute the constitutional right. As aptly observed, `...the government is in an advantageous position to marshal and interpret arguments against release...' (87 Harvard Law Review 1511 [1974])."[252] Furthermore, the Court ruled that "(t)o safeguard the constitutional right, every denial of access by the government agency concerned is subject to review by the courts."[253]

There is **no dispute that the subject JPEPA documents are matters of public concern** that come within the purview of Article III, Section 7 of the Bill of Rights. **The thorny issue is whether these documents, despite being of public concern, are exempt** from being disclosed to petitioner private citizens on the ground that they are covered by executive privilege.[254]

Unlike the U.S., U.K., Australia, and New Zealand, the Philippines does not have a comprehensive freedom of information law that enumerates the exceptions or sources of exceptions[255] to the right to information. In our jurisdiction, various laws provide exceptions from the duty to disclose information to the public, such as Republic Act No. 8293 or the "Intellectual Property Code," Republic Act No. 1405 or the "Secrecy of Bank Deposits Act," and Republic Act No. 6713 or the "Ethical Standards Act."[256]

Respondents contend that Executive Order 464 (E.O. 464), "Ensuring Observance of the Principle of Separation of Powers, Adherence to the Rule on Executive Privilege and Respect for the Rights of Public Officials Appearing in Legislative Inquiries in Aid of Legislation under the Constitution, and for other Purposes,"[257] provides basis for

exemption of the subject JPEPA documents from the operation of the constitutional guarantee of access to information. They argue that while **Senate v. Ermita** struck down Sections 2(b) and 3 of E.O. 464 as unconstitutional, Section 2(a), which enumerates the scope of executive privilege including information prior to the conclusion of treaties, was spared from a declaration of constitutional infirmity.[258] However, it is easily discernible from the title and provisions of E.O. 464 that **this presidential issuance applies to executive privilege invoked against the legislature in the context of inquiries in aid of legislation, and not to executive privilege invoked against private citizens asserting their constitutional right to information.**[259] It thus cannot be used by respondents to discharge their burden of showing basis for exempting the subject JPEPA documents from disclosure to petitioners suing as private citizens.

Respondents also rely on **Almonte**, **Chavez v. PCGG**, **Senate v. Ermita**, and **PMPF v. Manglapus** to carve out from the coverage of the right to information the subject JPEPA documents. Let us put these cases under the lens of scrutiny to determine the correctness of respondents' reliance upon them.

As noted earlier, **Almonte** recognized a common law governmental privilege against disclosure, with respect to **state secrets bearing on military and diplomatic matters**.[260] This case involved an investigation by the Office of the Ombudsman that required the Economic Intelligence and Investigation Bureau (EIIB) to produce records pertaining to their personnel. As the Court found that no military or diplomatic secrets would be disclosed by the production of these records and there was no law making them classified, it held that disclosure of the records to the Office of the Ombudsman was warranted. In arriving at this conclusion, the Court noted that **the case did not concern a demand by a citizen for information under the freedom of information guarantee of the Constitution**, but involved the power of the Office of the Ombudsman to obtain evidence in connection with an investigation conducted by it vis-a-vis the claim of privilege of an agency of the Government. It is thus not difficult to see that the facts and issue of **Almonte** starkly differ from the **case of petitioner private citizens who are enforcing their constitutional right to information**. Given this distinction, I submit that **Almonte** cannot provide the backbone for exemption of the subject JPEPA documents from disclosure. The same holds true with respect to **Senate v. Ermita** in which the constitutionality of E.O. 464 was at issue, and the Court ruled, *viz*:

> E.O 464 is concerned only with the **demands of Congress for the appearance of executive officials in the hearings** conducted by it, and **not with the demands of citizens for information pursuant to their right to information** on matters of public concern.[261] (*emphasis supplied*)

In **Chavez v. PCGG**, the Court, citing the above-quoted exchanges of the Constitutional Commissioners regarding the constitutional right to information, recognized that "information on **inter-government exchanges prior** to the conclusion of treaties and executive agreements may be **subject to reasonable safeguards** for the sake of national

interest." Be that as it may, in **Chavez v. PCGG,** the Court resolved the issue whether the government, through the Presidential Commission on Good Government (PCGG), could be compelled to disclose the proposed terms of a **compromise agreement with the Marcos heirs** as regards their alleged ill-gotten wealth. **The Court did not have occasion to rule on the diplomatic secrets privilege vis-à-vis the constitutional right to information**.

It was in **PMPF v. Manglapus** that the Court was confronted with a collision between a citizen's constitutional right to information and executive secrecy in foreign affairs. As afore-discussed, the Court, in denying the petition in an unpublished Resolution, quoted at length **Curtiss-Wright's** disquisition on the necessity of secrecy in foreign negotiations. Again, the relevant portion of that quote, which was cited by respondents, reads, *viz*:

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but **he alone negotiates**. **Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.** As Marshall said in his great argument of March 7, 1800, in the House of Representatives, `The **President is the sole organ of the nation in its external relations**, and its **sole representative with foreign nations**.' Annals, 6th Cong., col. 613.
>
> xxx xxx xxx
>
> It is important to bear in mind that **we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations - a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.** It is quite apparent that if, in the maintenance of our international relations, embarrassment -perhaps serious embarrassment- is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, 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 his 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.** Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty - a

refusal the wisdom of which was recognized by the House itself and has never since been doubted.[262] *(emphasis supplied)*

The Court followed this quote with the **conclusion** that "**(w)e have the same doctrine of separation of powers** in the Constitution and the same grant of authority in foreign affairs to the President as in the American system. The same reasoning applies to treaty negotiations by our Government."

Taking a hard look at the facts and circumstances of **PMPF v. Manglapus,** it cannot escape one's eye that this **case did not involve a question of separation of powers arising from a legislative inquiry**, as in the case of the House of Representative's demand on President Washington for papers relating to the Jay Treaty. In **PMPF v. Manglapus**, petitioners invoked their right to information under Article III, Section 7; and freedom of speech and the press under Article III, Section 4. They sought to compel the representatives of the President of the Philippines in the then ongoing negotiations of the **RP-U.S. Military Bases Agreement** to (1) open to petitioners the negotiations/sessions of respondents with their U.S. counterparts on the RP-U.S. Military Agreement; (2) reveal and/or give petitioners access to the items which they (respondents) had already agreed upon with their American counterparts relative to the review of the RP-U.S. Military Bases Agreement; and (3) reveal and/or make accessible to petitioners the respective positions of respondents and their U.S. counterparts on items they had not agreed upon, particularly the compensation package for the continued use by the U.S. of their military bases and facilities in the Philippines. The above quote from **Curtiss-Wright,** referring to a conflict between the executive and the legislative branches of government, was therefore **different** from the factual setting of **PMPF v. Manglapus.** The latter case which involved a collision between governmental power over the conduct of foreign affairs with its secrecy prerogative on the one hand, and the citizen's right to information under the Constitution on the other.

The **PMPF Court** did stress that secrecy of negotiations with foreign countries did not violate freedom of access to information and freedom of speech and of the press. Significantly, it quoted ***The New American Government and Its Work*****,** *viz*:

> The nature of diplomacy requires centralization of authority and expedition of decision which are inherent in executive action. Another essential characteristic of diplomacy is its confidential nature. Although much has been said about "open" and "secret" diplomacy, with disparagement of the latter, Secretaries of State Hughes and Stimson have clearly analyzed and justified the practice. In the words of Mr. Stimson:
>
> "A complicated negotiation... cannot be carried through without many, many private talks and discussions, man to man; many tentative suggestions and proposals. Delegates from other countries come and tell you in confidence of their troubles at home and of their differences with other countries and with other delegates; they tell you of what they do under certain circumstances and

would not do under other circumstances... If these reports...should become public...who would ever trust American Delegations in another conference? (United States Department of State, Press Releases, June 7, 1930, pp. 282-284).

xxx xxx xxx

"There is frequent criticism of the secrecy in which negotiation with foreign powers on nearly all subjects is concerned. This, it is claimed, is incompatible with the substance of democracy. As expressed by one writer, `It can be said that there is no more rigid system of silence anywhere in the world.' (E.J. Young, Looking Behind the Censorship, J.B. Lippincott Co., 1938) President Wilson in starting his efforts for the conclusion of the World War declared that we must have `open covenants, openly arrived at.' He quickly abandoned his thought.

"No one who has studied the question believes that such a method of publicity is possible. In the moment that negotiations are started, pressure groups attempt to `muscle in.' An ill-timed speech by one of the parties or a frank declaration of the concessions which are extracted or offered on both sides would quickly lead to widespread propaganda to block the negotiations. After a treaty has been drafted and its terms are fully published, there is ample opportunity for discussion before it is approved." (*The New American Government and Its Work*, James T. Young, 4th edition, p. 194)[263] (*emphasis supplied*)

It is worth noting that while the above quote speaks of the evil of "open" diplomacy, it does not discuss the value of the right of access to information; much less, one that is constitutional in stature. The ***New American Government and Its Work*** was published in 1940, **long before** the Freedom of Information Act was passed in the U.S. in 1966. It did not and could not have taken into account the expanded statutory right to information in FOIA. **It is more doubtful if this book can be used to calibrate the importance of the right of access to information in the Philippine setting, considering its elevation as a constitutional right.**

Be that as it may, I submit that as both **Chavez v. PCGG** and **PMPF v. Manglapus** are **extant case law recognizing the constitutionally-based diplomatic secrets privilege over treaty negotiations,** respondents have discharged the burden of showing the bases for exempting the subject JPEPA documents from the scope of the constitutional right to information.

Prescinding from these premises, the next question to grapple with is whether the exemption or diplomatic secrets privilege over treaty negotiations as recognized in **Chavez v. PCGG** and **PMPF v. Manglapus** is absolute or qualified.

2. Diplomatic secrets privilege covering treaty negotiations:

An absolute or qualified exemption?

It is my considered view that the diplomatic secrets privilege is a qualified privilege or qualified exemption from the coverage of the right to information. In **Chavez v. PCGG**, the Court cited the following deliberations of the 1986 Constitutional Commission in recognizing that "inter-government exchanges prior to the conclusion of treaties and executive agreements may be subject to reasonable safeguards for the sake of national interest," *viz*:

> MR. SUAREZ. And when we say "transactions" which should be distinguished from contracts, agreements, or treaties or whatever, does the Gentleman refer to the steps leading to the consummation of the contract, or does he refer to the contract itself?
>
> MR. OPLE. The "transactions" used here, I suppose, is generic and, therefore, it can **cover both steps leading to a contract, and already a consummated contract**, Mr. Presiding Officer.
>
> MR. SUAREZ. This contemplates **inclusion of negotiations leading to the consummation of the transaction**?
>
> MR. OPLE. Yes, **subject to reasonable safeguards on the national interest.**
>
> MR. SUAREZ. Thank you. Will the **word "transactions" here also refer to treaties, executive agreements** and service contracts particularly?
>
> MR. OPLE. I suppose that is **subject to reasonable safeguards on national interest** which include the national security."[264] (*emphasis supplied*)

The above deliberations show that negotiation of treaties and executive agreements may or may not come within the purview of "transactions" covered by the right to information, **subject to reasonable safeguards to protect national interest**.[265] In other words, the diplomatic secrets privilege over treaty negotiations may provide a ground for exemption, but **may be overcome if there are reasonable safeguards to protect the national interest**. It is thus **not an absolute exemption or privilege, but a qualified one.**

The Freedom of Information Act 2000 of the **United Kingdom** provides that when an exemption is **qualified, the right to information will not be upheld only if the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.** The Act treats as **qualified exemptions** information that "would be **likely to prejudice**...relations between the United Kingdom and any other State"[266] and "confidential information obtained from a State other than the United Kingdom...."[267] As such, these exemptions may be overcome by a higher public interest in disclosure.

It may be argued that the subject JPEPA documents consist of information similar to information covered by the above-cited qualified exemptions under the Freedom of Information Act 2000. The qualification of the above exemptions in the United Kingdom is made in the context of a statutory grant of a right to information. In the Philippines where the right to information has more force and effect as a constitutional right, there is all the more reason to give it stronger muscle by qualifying the diplomatic secrets privilege exemption. This approach minimizes the risk of unjustifiably withholding diplomatic information that is of public concern but covered by overly broad absolute exemptions.

We thus come to the **task of cobbling the appropriate test** to weigh the **public interest in maintaining the exemption or privilege over diplomatic secrets and the public interest in upholding the constitutional right to information and disclosing the subject JPEPA documents.**

3.The test to use in adjudicating the constitutional right to information vis-à-vis executive privilege is the "balancing of interests," and not the "showing of need"

While I agree with the *ponencia's* treatment of the diplomatic secrets privilege as a qualified privilege and its recognition of the need to formulate a weighing test, it is my humble view that, contrary to its position, we cannot use the test laid down in **U.S. v. Nixon**,[268] **Senate Select Committee v. Nixon**,[269] and **In re Sealed Case (Espy)**[270] that the Court should determine whether there is a "sufficient showing of need" for the disclosure of disputed documents. **None of these three cases can provide the proper test**. The requirement of "showing of need" applies when executive privilege is invoked against an **evidentiary need for information, such as in the case of another government entity seeking information in order to perform its function;** that is, the court in **U.S. v. Nixon**, the Senate in **Senate Select Committee**, and the grand jury in **In re Sealed Case (Espy)**.

In the adjudication of rights guaranteed in the Constitution, however, the Court has never used "showing of need" as a test to uphold rights or allow inroads into them. I respectfully submit that we ought not to weigh the need to exercise the right to free speech or free assembly or free practice of religion. These are freedoms that have been won by all for the benefit of all, without the requisite showing of need for entitlement. When we valuate these constitutional rights, we do not consider their necessity for the performance of a function, as in the case of government branches and entities. The **question** in the adjudication of constitutional rights is whether the incursion into a right is **peripheral or essential**, as when there is only a "**soft restraint**" on the potential extraditee's right to procedural due process;[271] or whether there is a **heavier public interest** that must prevail over a constitutional right in order to preserve an ordered society, such as when there is a "**clear and present danger**" of a substantive evil that the State has a right to prevent as demonstrated in free speech cases,[272] or when there is a "**compelling state interest**" that must override the free exercise of religion.[273]

The right to information lies at the heart of a government that is not only republican but also democratic. For this reason, Article III, Section 7[274] of the 1987 Constitution, calls for "an informed citizenry with access to the diverse currents in political, moral and artistic thought and data relative to them, and the free exchange of ideas and discussion of issues thereon is vital to the democratic government envisioned under our Constitution." [275] Thus, employing the **"balancing of interests" test**, the public interest in upholding this constitutional right of the public to information must be carefully **balanced** with the public interest in nondisclosure of information in relation to treaty negotiations. This test is in line with the approach adopted in the right to access statute of the United Kingdom and New Zealand.

There is a **world of difference** between employing the "balancing of interests" test and the "showing of need" test adopted by the *ponencia* from **U.S. v. Nixon**, **Senate Select Committee v. Nixon**, and **In re Sealed Case (Espy)**. In **U.S. v. Nixon**, the "showing of need" was necessary, as the information was being sought by a court as **evidence in a criminal proceeding.** In **Senate Select Committee**, the information was being sought by the Senate to **resolve conflicting testimonies in an investigation conducted in the exercise of its oversight functions over the executive branch and in aid of legislation pertaining to executive wrongdoing.** Finally, in **In re Sealed Case (Espy)**, the information was being sought by the grand jury to **investigate whether a government official had committed a crime**.

In weighing the "showing of need" in all three cases, the courts considered the relevance of the evidence, the availability of other evidence, and the criticality of the information sought in the performance of the functions of the court, the Senate, and the grand jury, respectively. These considerations have no meaning in petitioners' assertion of their right to information, for there is no proceeding in relation to which these considerations can be measured. It easily leaps to the eye that these considerations do not apply to adjudication on the constitutional right to information in relation to executive privilege, but the *ponencia* does not state what the "showing of need" consists of in the context of the public's assertion of the right to information.

Insofar as the constitutional right of access is concerned, the writing on the wall indicates that it **suffices that information is of public concern for it to be covered by the right, regardless of the public's need for the information** - whether to assess the performance of the JPEPA Philippine negotiating panel and express satisfaction or dissatisfaction, or to protest the inclusion of repulsive provisions in the JPEPA, or to keep public officials on their toes by making them aware that their actions are subject to public scrutiny - **or regardless of the public's lack of need for the information, if they simply want to know it because it interests them.**[276]

The right to information is a constitutional right **in and of itself** and does not derive its significance only in relation to the exercise of another right, such as the right to free speech or a free press if that is the kind of "function" of an individual that can be equated with the

functions of government agencies in the above cases cited by the *ponencia*. To reiterate, **Valmonte** teaches that the right to information is not merely an adjunct of the right to free speech and a free press. Stated another way, **the right to information is an end in itself,** even as it may be exercised in furtherance of other rights or purposes of an individual. To say that one exercises the right to information simply to be informed, and not because of a particular need, is not a meaningless tautology. Thus, instead of using "showing of need" as a passport to access purportedly privileged information, as in the case of government entities needing information to perform a **constitutionally mandated duty**, the yardstick with respect to individuals exercising a **constitutionally granted right** to information should be the importance of the right and the public interest in upholding it.

Prescinding from these premises, I respectfully submit that the test laid down by the *ponencia* -- which predicates access to information on a "showing of need" understood in the context of **U.S. v. Nixon**, **Senate Select Committee v. Nixon**, and **In re Sealed Case (Espy) --** will have the **pernicious effect** of subverting the nature, purpose and wisdom of including the "right to information on matters of public concern" in the Bill of Rights as shown in the above-quoted deliberations of the 1986 Constitutional Commission. It sets an **emasculating precedent** on the interpretation of this all-important constitutional right and **throws into perdition** the philosophy of an open government, painstakingly enshrined by the framers of the 1987 Constitution in the many scattered provisions from beginning to end of our fundamental law.

Applying the **balancing of interests test** to the case at bar leads to the ineluctable conclusion that the scale must be tilted in favor of the people's right to information for, as shown earlier, the **records are bereft of basis for finding a public interest to justify the withholding of the subject JPEPA documents after the negotiations** have been concluded. Respondents have **not shown a sufficient and specific public interest** to defeat the recognized public interest in exercising the constitutional right to information to **widen the role of the citizenry in governmental decision-making by giving them a better perspective of the vital issues confronting the nation,**[277] **and to check abuse in government.**[278]

As aforestated, the **negotiations are already concluded** and the JPEPA has been submitted to the Senate for its concurrence. The **treaty has thus entered the ultimate stage** in which the people can exercise their right to participate in the discussion on whether the Senate should concur in its ratification or not. **This right will be diluted, unless the people can have access to the subject JPEPA documents.**

The *ponencia* cites **PMPF v. Manglapus**, **Chavez v. PCGG and Chavez v. Public Estates Authority**[279] **and Senate v. Ermita** as authorities for holding that the subject JPEPA documents are traditionally privileged; and emphasizes that "(t)he privileged character accorded to diplomatic negotiations does not *ipso facto* lose all force and effect simply because the same privilege is now being claimed under different circumstances."[280] This approach espoused by the *ponencia*, however, deviates from the fundamental

teaching of **Senate v. Ermita** that a claim of executive privilege may be held "valid or not **depending on the ground invoked to justify it and the context in which it is made**."

In **U.S. v. Nixon**, the leading U.S. case on executive privilege, the U.S. Supreme Court was careful to delineate the applicability of the principles of the case in stating that "(w)e are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials."[281] I respectfully submit that the **Court likewise ought to take half a pause in making comparisons and distinctions between the above Philippine cases cited by the *ponencia* and the case at bar; and examine the underlying reasons for these comparisons and distinctions, lest we mistake apples for oranges.**

That the application of the "showing of need" test to executive privilege cases involving branches of government and of the "balancing of interests" test to cases involving the constitutional right to information could yield different results is not an absurdity. The difference in results would not be any more absurd than it would be for an accused to be adjudged innocent in a criminal action but liable in a civil action arising from one and the same act he committed.[282] There is no absurdity when a distinction is made where there are real differences.

Indeed, it is recognized that executive privilege is also constitutionally based. Proceeding from the respondents' and the *ponencia's* reliance on **Curtiss-Wright**, even this case, as aforestated, makes a qualification that the foreign relations power of the President, "**like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."**[283] In drawing the contours and restrictions of executive privilege, which finds its origins in the U.S., the constitutional status of the right to information in the Philippines -- which is not true of the statutory right to information in the U.S. -- must at the same time be given life, especially considering the many contested provisions of the JPEPA as shown in the ensuing discussion.

D. Right to information, informed debate, and the contested provisions of the JPEPA

The exercise of the right to information and informed debate by the public on the JPEPA are crucial in light of the comprehensiveness and impact of this agreement. It is an amalgam of two distinct agreements - a bilateral free trade agreement and a bilateral investment agreement. Thus, international and constitutional law expert Justice Florentino P. Feliciano cautions that we must be **"twice as awake, twice as vigilant"** in examining very carefully the provisions of the agreement.[284] The nearly 1,000-page JPEPA contains 16 chapters, 165 articles and eight annexes covering a **wide range of economic**

cooperation including trade in goods, rules of origin, customs procedures, paperless trading, mutual recognition, trade in services, investment, movement of natural persons, intellectual property, government procurement, competition, improvement of the business environment, cooperation and dispute avoidance and settlement.

The JPEPA's comprehensive scope is paralleled by the **widespread expression of concern** over its ratification. **In the Senate,** there is a move to concur in the President's ratification **provided** that the JPEPA comply with our constitutional provisions on public health, protection of Filipino enterprises, ownership of public lands and use of natural resources, ownership of private lands, reservation of certain areas of investment to Filipinos, giving to Filipinos preference in the national economy and patrimony, regulation of foreign investments, operation of public utilities, preferential use of Filipino labor and materials, practice of professions, ownership of educational institutions, state regulation of transfer of technology, ownership of mass media, and ownership of advertising firms.

Among scholars and the public, not a few have registered strong reservations on the ratification of the JPEPA for its being studded with provisions that are **detrimental to the Filipino interest**.[285] While the executive branch and other groups have expressed support for the JPEPA, these contested provisions, at the very least, **merit public debate and access to the subject JPEPA documents, for they have far-reaching effects on the public's interest and welfare.**

Two highly contested JPEPA provisions are Articles 89 and 94. Advocates against the JPEPA contend that these provisions run afoul of the 1987 Constitution, primarily Article XII, on the National Economy and Patrimony. Article 89 of the JPEPA provides for National Treatment, *viz*:

> Article 89
> National Treatment
>
> Each Party shall accord to investors of the other Party and to their investments treatment **no less favorable than that it accords, in like circumstances, to its own investors and to their investments** with respect to the establishment, acquisition, expansion, management, operation, maintenance, use, possession, liquidation, sale, or other disposition of investments.

In the opinion rendered by **Justice Feliciano** in response to the invitation to deliver a statement at a hearing of the Senate Joint Committee on Foreign Relations and the Committee on Trade and Commerce, he explained that the "national treatment" obligation requires the Philippines to "treat Japanese investors as if they were Philippine nationals, and to treat Japanese investments in the Philippines as if such investments were owned by Philippine nationals."[286] This provision raises serious constitutional questions and need untrammeled discussion by the public, as entry into certain sectors of economic activity in our country is restricted to natural persons who are Philippine citizens or to juridical persons that are at least sixty, seventy or one hundred percent owned by Philippine citizens.

Among these constitutional provisions are Article XII, Section 2 on the utilization of lands and other natural resources of the Philippines;[287] Article XII, Section 11 on the operation of public utilities;[288] Article XII, Section 14, paragraph 2 on the practice of professions; [289] and Article XIV, Section 4(2),[290] among others.[291]

To be sure, Article 94 of the JPEPA provides for an option on the part of the Philippines to uphold the constitutional and statutory provisions referred to above despite their collision with the "national treatment" obligation in Article 89. That option is exercised by listing, in the Schedule to Part I of Annex 7 of the JPEPA, the existing non-conforming constitutional and legal provisions that the Philippines would like to maintain in effect, notwithstanding the requirements of Article 89 of the JPEPA.[292] The Philippines exercised that option by attaching its Schedule to Part I of Annex 7 of the JPEPA. Be that as it may, some scholars note that the Philippine Schedule is not a complete list of all the currently existing constitutional and statutory provisions in our legal system that provide for exclusive access to certain economic sectors by Philippine citizens and Philippine juridical entities that have a prescribed minimum Philippine equity content. They claim that the most dramatic example of an omission is the aforementioned Article XII, Section 11 of the Constitution, relating to the operation of public utilities. They cite other examples: the afore-mentioned Article XII, Section 14 relating to the practice of all professions, save in cases prescribed by law; Article XIV, Section 4(2) relating to ownership and administration of educational institutions; Article XVI, Section 11(1)[293] relating to mass media; and Article XVI, Section 11(2)[294] relating to the advertising industry.[295]

On **trade and investment**, former **U.P. College of Law Dean Merlin Magallona**, an international law expert, explained as resource person in the hearing of the Senate Joint Committee on Foreign Relations and the Committee on Trade and Commerce that, under Articles 96 and 98 of the JPEPA, the Philippines stands as an insurance company for Japanese investments against private acts.[296]

Articles 96 and 98 of the JPEPA provide, *viz*:

Article 96
Protection fromStrife

1. Each Party shall accord to investors of the other Party that have suffered loss or damage relating to their investments in the Area of the former Party due to armed conflict or state of emergency such as revolution, insurrection, civil disturbance or any other similar event in the Area of that former Party, treatment, as regards restitution, indemnification, compensation or any other settlement, that is no less favorable than the most favorable treatment which it accords to any investors.

2. Any payments made pursuant to paragraph 1 above shall be effectively

realizable, freely convertible and freely transferable.

Article 98
Subrogation

1. If a Party or its designated agency makes a payment to any of its investors pursuant to an indemnity, guarantee or insurance contract, arising from or pertaining to an investment of that investor within the Area of the other Party, that other Party shall:

   (a) recognize the assignment, to the former Party or its designated agency, of any right or claim of such investor that formed the basis of such payment; and

   (b) recognize the right of the former Party or its designated agency to exercise by virtue of subrogation any such right or claim to the same extent as the original right or claim of the investor.

2. Articles 95, 96 and 97 shall apply *mutatis mutandis* as regards payment to be made to the Party or its designated agency first mentioned in paragraph 1 above by virtue of such assignment of right or claim, and the transfer of such payment.

Dean Magallona pointed out that under Articles 96 and 98 of the JPEPA, the Japanese government may execute with a Japanese investor in the Philippines a contract of indemnity, guaranty, or insurance over loss or damage of its investments in the Philippines due to revolution, insurrection, or civil disturbance. Compensation by the Japanese government to its investor under such contract will give rise to the right of the Japanese government to be subrogated to the right or claim of the Japanese investor against the Philippine government. The Philippines recognizes explicitly this assignment of right or claim of the Japanese investor against the Philippine Government under Article 98. In effect, he warns that the Philippines has made itself liable for acts of private individuals engaged in revolution, insurrection or civil disturbance. He submits that this is an abdication of sovereign prerogative, considering that under general or customary international law, the Philippines is subject to international responsibility only by reason of its own sovereign acts, not by acts of private persons.[297]

Environmental concerns have also been raised in relation to several provisions of the JPEPA, among which is Article 29 on Originating Goods, which provides, *viz*:

Article 29
Originating Goods

1. Except as otherwise provided for in this Chapter, a good shall qualify as an originating good of a Party where:

(a) the good is wholly obtained or produced entirely in the Party, as defined in paragraph 2 below;

(b) the good is produced entirely in the Party exclusively from originating materials of the Party; or

(c) the good satisfies the product specific rules set out in Annex 2, as well as all other applicable requirements of this Chapter, when the good is produced entirely in the Party using nonoriginating materials.

2. For the purposes of subparagraph 1(a) above, the following goods shall be considered as being wholly obtained or produced entirely in a Party:

xxx xxx xxx

(i) articles collected in the Party which can no longer perform their original purpose in the Party nor are capable of being restored or repaired and which are fit only for disposal or for the recovery of parts or raw materials;

(j) scrap and waste derived from manufacturing or processing operations or from consumption in the Party and fit only for disposal or for the recovery of raw materials;

(k) parts or raw materials recovered in the Party from articles which can no longer perform their original purpose nor are capable of being restored or repaired; and

(l) goods obtained or produced in the Party exclusively from the goods referred to in subparagraphs (a) through (k) above.

Annex 1[298] of the JPEPA reduced the tariff rates for these goods to zero percent, below the minimum set forth in the current Philippine schedule, JPEPA opponents point out.[299] There are allegations from the public that the above provisions on **trade of toxic and hazardous wastes** were **deleted** in the working draft text of the JPEPA as of 21 April 2003, but these provisions found their way back into the final text signed by President Macapagal-Arroyo. If true, it would be in the public's interest to know why said provisions were put back, as they affect the public welfare; and how it is in the Philippine interest to include them in the JPEPA.[300]

Various concerned sectors have also expressed their objection to some provisions of the JPEPA. A substantial number of **fishermen** harp on the inadequacy of protection given to their sector and the violation of the Philippine Constitution with respect to deep-sea fishing. In Annex 7, 2B (Schedule of the Philippines)[301] of the JPEPA, the Philippine government made a reservation on national treatment by invoking Article 12 of the 1987

Constitution under the heading: "Sector: Fisheries, Sub-sector: Utilization of Marine Resource."[302] The measures invoked by the Philippine government are: 1) no foreign participation is allowed for small-scale utilization of marine resources in archipelagic waters, territorial sea and Exclusive Economic Zones; 2) for deep-sea fishing corporations, associations or partnerships having a maximum 40 percent foreign equity can enter into co-production, joint venture or production-sharing agreement with the Philippine government.[303] Concerned sectors contend, however, that the second measure violates Article XII, Section 2 of the Philippine Constitution which mandates, without qualification, the protection of the nation's marine wealth in Philippine archipelagic waters, territorial sea and EEZ; and reserves "its use and enjoyment exclusively to Filipino citizens."[304]

The **food sector** also complains about the insufficiency of protection from export subsidies under Article 20 of the JPEPA, which, according to it, makes it possible for Japan to engage in **agriculture dumping**, one of the most trade-distorting practices of rich countries.[305] Article 20 of the JPEPA, provides *viz*:

> Article 20
> Export Duties
>
> Each Party shall exert its **best efforts** to eliminate its duties on goods exported from the Party to the other Party. (*emphasis supplied*)

This sector raises the objection that while the JPEPA only requires "best efforts," both the Japan-Indonesia Economic Partnership Agreement (JIEPA) and the Japan-Malaysia Economic Partnership Agreement (JMEPA) disallow the introduction or the maintenance of agriculture export subsidies.[306]

Without adjudging the merits of objections to the above provisions of the JPEPA, the fact that these concerns are raised and that these provisions will impact on the lives of our people stress the need for an **informed debate** by the public on the JPEPA. Rooted in the unique Philippine experience, **the 1987 Constitution strengthened participatory democracy not only in our political realm but also in the economic arena. Uninformed participation in the governance of the country impairs the right of our people to govern their lives while informed debate serves as the fountainhead from which truth and the best interest of the country will spring.**

By upholding the constitutional right to information over the invocation of executive privilege in the instant case, it is my considered view that **the subject JPEPA documents** should be disclosed considering the **particular circumstances of the case at bar**. In arriving at this conclusion, a **balancing of interests test** has to be employed which will allow the executive to show the public interest it seeks to protect in invoking executive privilege. The test serves as a **safeguard** against disclosure of information that should properly be kept secret. There is thus no foundation for the fears expressed in the Separate Opinion of **Justice Tinga**, *viz*: "(The ruling) would establish a general rule that diplomatic

negotiations of treaties and other international agreements...belong to the public record since it is encompassed within the constitutional right to information...if indeed the Philippines would become unique among the governments of the world in establishing that these correspondences related to treaty negotiations are part of the public record, I fear that such doctrine would impair the ability of the Philippines to negotiate treaties or agreements with foreign countries." As afore-discussed, allowing public access to trade agreement negotiations and draft texts, in various degrees and ways, has gained momentum in the landscape of U.S. diplomatic and foreign relations. I submit that, when warranted, **we must overcome the entropy of the old tradition of secrecy**.

Contrary to the Separate Opinion of Justice Tinga, the Executive as the custodian of records of negotiations of treaties and other international agreements has the **discretion** to classify information as confidential in accordance with applicable laws, and not let it become part of the public record of a government in the sunshine. But when the executive is haled to court to enforce a constitutional right to this information, it is the court's task **in each particular case to balance the executive's need for secrecy in treaty negotiations with the constitutional right to information**, and decide whether that particular information should be disclosed or kept confidential.[307] Finally, the discussion in the Separate Opinion of Justice Tinga on the application of Article 32, Supplementary Means of Interpretation, of the Vienna Convention on the Law of Treaties[308] and the question of whether the subject JPEPA documents constitute "preparatory work" under this provision are **premature,** as the Philippine Senate has not concurred in the ratification of the JPEPA; hence, it has not entered into force. I submit that the question is not relevant to the resolution of the case at bar, as we are not here engaged in an interpretation of the JPEPA.

In sum, transparency and opacity are not either-or propositions in the conduct of international trade agreement negotiations. The degree of confidentiality necessary in a particular negotiation is a point in a continuum where complete disclosure and absolute secrecy are on opposite ends.[309] In assigning this fulcrum point, it is my humble view that the Court should balance the need for secrecy of the Executive and the demand for information by the legislature or the public. The balancing act in every case safeguards against disclosure of information prejudicial to the public interest and upholds the fundamental principle enunciated in **Senate v. Ermita**[310] **--** that a claim of executive privilege "may be valid or not **depending on the ground invoked to justify it and the context in which it is made.**"[311]

We elevated the right to information to constitutional stature not without reason. In a democracy, debate -- by the people directly or through their representatives in Congress - is a discussion of and by the informed and not an exchange of surpluses of ignorance.[312] **In the arena of economic governance, the right to debate and participate is exercised not as an end in itself. Especially for the powerless whose sword and shield against abuse is their voice, the exercise of the right is not merely rhetoric. It is a fight from the gut to satisfy basic human needs and lead a humane life.**

I vote to grant the petition.

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[1] Philippine Yearbook 2005, National Statistics Office (2005), p. 44.

[2] *Id.* at 50-51, 54-55.

[3] De Leon, A., "Entering the Lists: SMEs in Globalized Competition," Bridging the Gap: Philippine Small and Medium Enterprises and Globalization, Alfonso, O., ed. (2001), p. 49.

[4] Pope John Paul II, "Ecclesia in Asia," Synod of Bishops in Asia, 1999.

[5] Petition, p. 17; *see also* Comment, p. 4.

[6] *Id.*

[7] *Id.* at 18.

[8] §2, Executive Order No. 213, promulgated May 28, 2003.

[9] Petition, p. 18; *see also* Comment, p. 4 and Annex C.

[10] *Id*. at 19.

[11] *Id*. at 19; *see also* Annex C.

[12] *Id*. at 21-22.

[13] *Id*. at 22.

[14] *Id*. *See also* Annex I.

[15] *Id*. *See also* Annex J.

[16] *Id*. at 23-24, Annex K.

[17] *Id*. at 25, citing TSN, Committee Hearing on Resolution No. 551, 12 October 2005.

[18] *Id*. at 26, Annexes M-1 to M-15, N-1 to N-7.

[19] *Id*. at 28, Annex P.

[20] Respondents' Manifestation, pp. 2-3.

[21] Petitioners' Manifestation and Motion, p. 3.

[22] *Ponencia*.

[23] Comment, p. 24; *ponencia*. 1987 Phil. Const. Art. VII on the Executive Department, §21 provides, *viz*:

> Section 21. No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.

[24] 299 U.S. 304 (1936).

[25] Ducat, C., Constitutional Interpretation: Powers of Government (2000), Vol. 1., p. 252; Powell, H., "The President's Authority over Foreign Affairs: An Executive Branch Perspective," 67 George Washington Law Review (March 1999), n.8. *See also Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corporation, Civil Aeronautics Board*, 333 U.S. 103 (1948); *Webster v. Doe*, 486 U.S. 592, 605-06 (1988); Harlow v. Fitzgerald, 457 U.S. 800, 812 n.19 (1982).

[26] *See Santos v. Executive Secretary Catalino Macaraig and Secretary Raul Manglapus*, G.R. No. 94070, April 10, 1992, 208 SCRA 74, and *People's Movement for Press Freedom, et al. v. Manglapus, et al.*, G.R. No. 84642, September 13, 1988.

[27] *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 319-320 (1936), citing 1 Messages and Papers of the Presidents, 194.

[28] Powell, H., "The President's Authority over Foreign Affairs: An Executive Branch Perspective," 67 George Washington Law Review 527 (1999). *See also* Henkin, L. Foreign Affairs and the United States Constitution 36 (2nd ed.)

[29] *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 331 (1936).

[30] JusticeSutherland's use of the "sole organ" remark in *Curtiss-Wright* prompted Justice

Robert Jackson to say in the 1952 landmark case *Youngstown Sheet and Tube Co. v. Sawyer* (343 U.S. 579) that at best, what can be drawn from Sutherland's decision is the intimation that the President "might act in external affairs without congressional authority, but not that he might act contrary to an act of Congress." Justice Jackson also noted that "much of the (Sutherland) opinion is dictum." In 1981, the District of Columbia Circuit cautioned against placing undue reliance on "certain dicta" in Sutherland's opinion: "To the extent that denominating the President as the `sole organ' of the United States in international affairs constitutes a blanket endorsement of plenary Presidential power over any matter extending beyond the borders of this country, we reject that characterization." (*American Intern. Group v. Islamic Republic of Iran*, 657 F.2d 430, 438 n.6 [D.C. Cir. 1981]) (Fisher, L., Invoking Executive Privilege: Navigating Ticklish Political Waters, 8 William and Mary Bill of Rights Journal [April 2000], p. 583, 608-609).

In *Dames & Moore v. Regan* (453 U.S. 654 [1981]), the U.S. Supreme Court observed that sixteen years after **Curtiss-Wright** was decided, Justice Jackson responded to the virtually unlimited powers of the executive in foreign affairs in the landmark case *Youngstown Sheet and Tube Co. v. Sawyer* (343 U.S. 579, p. 641), *viz*:

> "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image."

[31] U.S. Const. Art. II, §2, cl. 2 provides, *viz*: "(The President) shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."

[32] U.S. CONST. Art. I, §8, cl. 3 provides, *viz*: "The Congress shall have the power...to regulate Commerce with foreign Nations . . . ."

[33] U.S. CONST. Art. I, §8, cl. 1.

[34] Wright, L., "Trade Promotion Authority: Fast Track for the Twenty-First Century?," 12 William and Mary Bill of Rights Journal 979, 982 (2004). "*See* generally 1 The Debates in the Several Conventions on the Adoption of the Federal Constitution (Jonathan Elliot ed., Burt Franklin reprints, photo. reprint 1987) (2d ed. 1836); The Federalist No. 75 (Alexander Hamilton); James Madison, Journal of the Federal Convention (E.H. Scott ed., Books for Libraries Press 1970) (1840); 2 James Madison, The Debates in the Federal Convention of 1787 which Framed the Constitution of the United States of America (Gaillard Hunt & James Brown Scott eds., 1987)." *Id.* at Note 25.

[35] *Id.*, citing John Linarelli, International Trade Relations and the Separation of Powers Under the United States Constitution, 13 Dick. J. Int'l L. 203, 224 (1995) ("Hardly anything can be found in the documentation relating to the drafting of the Constitution so

as to glean any intent on the separation of powers in the area of foreign commerce."). *Id.* at Note 26.

[36] *Id.* at 981-82, citing 148 Cong. Rec. S10,660 (daily ed. Oct. 17, 2002) (statement of Sen. Baucus).

[37] *Id.* "*See* The Federalist No. 75 (Alexander Hamilton). Another concern was that the legislative branch would not represent the best interests of the nation as a whole, whereas the President would place the national interests ahead of those of individual states. *See* Robert Knowles, Comment, Starbucks and the New Federalism: The Court's Answer to Globalization, 95 Nw. U. L. Rev. 735, 771 (2001) (referring to the "concerns raised by Madison that the treaty-maker should represent the interests of the entire nation")." *Id.* at Note 21.

[38] *Id.* at 982, citing John O. McGinnis & Michael B. Rappaport, Our Supermajoritarian Constitution, 80 Tex. L. Rev. 703, 760 (2002).

[39] *See* Michael A. Carrier, All Aboard the Congressional Fast Track: From Trade to Beyond, 29 Geo. Wash. J. Int'l L. & Econ. 687, 688-89 (1996).

[40] *Supra* note 34.

[41] Koh, H. & Yoo, J., "Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law," 26 Int'l Law 715, 720 (1992).

[42] Wilson, T., "Note, Who Controls International Trade? Congressional Delegation of the Foreign Commerce Power," 47 Drake L. Rev. 141, 164 (1998).

[43] *Supra* note 34, citing John Linarelli, International Trade Relations and the Separation of Powers Under the United States Constitution, 13 Dick. J. Int'l L. 203, 208-209 (1995) ("Hardly anything can be found in the documentation relating to the drafting of the Constitution so as to glean any intent on the separation of powers in the area of foreign commerce."). *Id.* at Note 26.

[44] *Id.*, citing John Linarelli, International Trade Relations and the Separation of Powers Under the United States Constitution, 13 Dick. J. Int'l L. 203, 208 (1995).

[45] *Supra* note 42 at 166.

[46] *Id.* referring to the Tariff Act of 1922.

[47] *Supra* note 34 at 983. The Smoot-Hawley Tariff Act, Pub. L. No. 71-361, 46 Stat. 590

(1930). "The Smoot-Hawley Tariff Act was the ultimate display of U.S. protectionism, John Linarelli, International Trade Relations and the Separation of Powers Under the United States Constitution, 13 Dick. J. Int'l L. 203, 210 (1995), and resulted from Congress caving to special interests. Harold Hongju Koh, Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha, 18 N.Y.U. J. Int'l L. & Pol. 1191, 1194 (1986) ("Because congressional logrolling and horsetrading contributed to every individual duty rate, Smoot-Hawley set the most protectionist tariff levels in U.S. history.")." *Id.* at Note 36.

[48] *Supra* note 42 at 166 referring to the Tariff Act of 1922.

[49] Wright, L., "Trade Promotion Authority: Fast Track for the Twenty-First Century?", 12 William and Mary Bill of Rights Journal 979, 984 (2004), citing John Linarelli, International Trade Relations and the Separation of Powers Under the United States Constitution, 13 Dick. J. Int'l L. 203, 211 (1995).

[50] *Id.* citing Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-316, 48 Stat. 943 (1934) (allowing the President to negotiate tariff agreements with foreign nations and implement them by Presidential Proclamation without congressional approval).

[51] *Id.* at Note 41, citing John Linarelli, International Trade Relations and the Separation of Powers Under the United States Constitution, 13 Dick. J. Int'l L. 203, 211 (1995).

[52] *Id.,* citing John Linarelli, International Trade Relations and the Separation of Powers Under the United States Constitution, 13 Dick. J. Int'l L. 203, 211-212 (1995), citing Reciprocal Trade Agreements Act of 1934.

[53] Koh, H., "Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha," 18 N.Y.U. J. Int'l L. & Pol. 1191, 1196 (1986).

[54] Koh, H., "The Fast Track and United States Trade Policy," 18 Brook. J. Int'l L. 143, 143-48 (1992).

[55] Trade Act of 1974, 19 U.S.C.A. §§2191-94.

[56] Carr, T., "The Executive Trade Promotion Authority and International Environmental Review in the Twenty-First Century," 25 Houston Journal of International Law 141, 144-145 (2002).

[57] *Id.* at 145.

[58] *Id.*

[59] *Id.* citing Powell, F., "Environmental Protection in International Trade Agreements: The Role of Public Participation in the Aftermath of the NAFTA," 6 Colo J. Int'l Envtl. L. & Pol'y 109, 116 (1995).

[60] *Supra* note 49 at 984, citing Wilson, T., "Note, Who Controls International Trade? Congressional Delegation of the Foreign Commerce Power," 47 Drake L. Rev. 141, 169-171 (1998). "Nontariff barriers (NTBs) are essentially anything other than a tariff or quota that is used to restrict trade. The General Agreement on Tariffs and Trade (GATT) broadly defines NTBs as `[l]aws, regulations, judicial decisions and administrative rulings of general application . . . pertaining to . . . requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use . . . .' General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, art. X, para. 1. Examples include customs valuation, import licensing rules, subsidies, compatibility standards, quality standards, health and safety regulations, and labeling laws. John J. Jackson et al., Legal Problems of International Economic Relations 411 (4th ed. 2002)." *Id.* at Note 47.

[61] *Id.* at 985.

[62] Wright, L., "Trade Promotion Authority: Fast Track for the Twenty-First Century?," 12 William and Mary Bill of Rights Journal 979, 984-85 (2004), citing Wilson, T., "Note, Who Controls International Trade? Congressional Delegation of the Foreign Commerce Power," 47 Drake L. Rev. 141, 170 (1998), referring to the Trade Act of 1974.

[63] *Id.*

[64] *Id.* citing Wilson, *supra* note 62 at 170-172, referring to the Trade Act of 1974.

[65] *Id.*

[66] *Id.*, at 985 (2004), citing Koh, H., "Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha," 18 N.Y.U. J. Int'l L. & Pol. 1191, 1200-03.

[67] Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948.

[68] Koh, H., "The Fast Track and United States Trade Policy," 18 Brook. J. Int'l L. 143, 149 (1992).

[69] Wright, L., "Trade Promotion Authority: Fast Track for the Twenty-First Century?," 12 William and Mary Bill of Rights Journal 979, 986 (2004), citing Koh, H., *supra* note 68 at

150.

[70] Pub. L. No. 100-418, 102 Stat. 1107.

[71] *Supra* note 68 at 151.

[72] *Supra* note 69, citing Koh, H., "The Fast Track and United States Trade Policy," 18 Brook. J. Int'l L. 143, 151 (1992), referring to the 1988 Act §1103(b)(5)(A)-(B)). "Section 1103(b)(5)(A) defines the term `extension disapproval resolution' as:

a resolution of either House of the Congress . . . [that] disapproves the request of the President for the extension . . . of the [fast-track] provisions to any implementing bill submitted with respect to any trade agreement entered into under section 1102(b) or (c) of such Act after May 31, 1991, because sufficient tangible progress has not been made in trade negotiations.

Section 1103(b)(5)(B) provides that extension disapproval resolutions `may be introduced in either House of Congress by any member of such House [and] shall be jointly referred, in the House of Representatives, to the Committee on Ways and Means and the Committee on Rules.'" *Id.* at Note 60.

[73] *Id.*, citing C. O'Neal Taylor, Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned into a Battle, 28 Geo. Wash. J. Int'l L. & Econ. 1, 31 (1994): The President's agreements were only to receive fast track treatment if they were entered into before June 1, 1991. For agreements entered into after May 31, 1991, but before June 1, 1993, fast track was available only if the President requested an extension of negotiating authority and neither house adopted an extension disapproval resolution before June 1, 1991.

[74] *Id.* at 988, citing Housman, R., "The Treatment of Labor and Environmental Issues in Future Western Hemisphere Trade Liberalization Efforts," 10 Conn. J. Int'l L. 301, 311-13 (1995).

"Initially, the (Clinton) administration sought a virtually unfettered extension of fast-track authority for a seven year period. . . . This first proposal was met with immediate and unified opposition . . . . (T)his first surge of opposition amounted to a game of `policy chicken.'

Facing continuing opposition, the administration floated a second fast-track proposal . . . . Republicans and the business community once again came out against this new proposal. . . . (T)he administration dropped its second fast-track proposal and floated in its place yet another proposal. . . . While the third proposal garnered quick support from opponents of the prior two proposals, it did not fare well (with other groups). The administration rushed to counter this opposition, relying heavily on the argument that the extension of fast-track

was vital to give the administration credibility. . . . In the end, the Uruguay Round bill went forward without any fast-track extension." *Id.* at Note 70 (footnotes omitted).

[75] *Id.*, citing Lenore Sek, Congr. Res. Serv., Pub. No. IB10084, Trade Promotion Auth. (Fast-Track Authority for Trade Agreements): Background & Devs. in the 107th Congress (2003), detailing multiple proposals and speeches made by Clinton and Bush requesting renewal of fast-track authority); Clinton Makes Fast Track Plea To Congress, (Nov. 5, 1997), at http:// www.cnn.com/ALLPOLITICS/1997/11/05/trade/ (last visited Mar. 4, 2003); David Schepp, Bush Wants More Trade Powers, BBC News Online (Mar. 23, 2001), available at http://news.bbc.co.uk/1/hi/business/1238717.stm.

[76] *Id.*, citing John R. Schmertz & Mike Meier, U.S. Enacts New "Fast-Track" Trade Bill, 8 Int'l L. Update 126 (2002).

[77] 19 U.S.C.A. §§3801-13.

[78] Trade Act of 2002 §3804 (detailing the new fast-track procedures).

[79] *Supra* note 69, citing 148 Cong. Rec. S10,661 (daily ed. Oct. 17, 2002) (statement of Sen. Baucus).

[80] *Id.* at 989.

[81] *Id.*, citing 148 Cong. Rec. S7768 (daily ed. Aug. 1, 2002) (statement of Sen. Baucus) ("This will give Congress a chance to affect the outcome of the negotiations well before they occur.").

[82] *Id.*, citing 148 Cong. Rec. S10,660 (daily ed. Oct. 17, 2002) (statement of Sen. Baucus) ("Indeed, the Trade Act of 2002 contemplates an even closer working relationship between Congress and the Administration . . . .").

[83] Wright, L., "Trade Promotion Authority: Fast Track for the Twenty-First Century?," 12 William and Mary Bill of Rights Journal 979, 989 (2004), citing Trade Act of 2002 §3805(b). "If the agreement negotiated by the administration does not meet the congressional requirements, `there are ways that either House of Congress can derail a trade agreement.' 148 Cong. Rec. S7768 (daily ed. Aug. 1, 2002) (statement of Sen. Baucus) (referring to Trade Act of 2002 §3805(b))." *Id.* at Note 80.

[84] Trade Act of 2002 §3803 provides the authorization for the President to negotiate a trade agreement with a foreign country regarding tariff and/or nontariff barriers and the guidelines he must follow.

[85] Trade Act of 2002 §3803.

[86] *Id.*, §3803(a). Limitations on modifications to tariff barriers primarily set minimums for rate of duty reductions.

[87] *Supra* note 83 at 990, citing Trade Act of 2002 §3803(b) (limiting agreements as provided in sections 3802 and 3804). "The President's actions are considerably more restricted under the Trade Act of 2002 than under previous legislation. Compare Trade Act of 1974, 19 U.S.C.A. §§2101-2495 (1974) and Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 with Trade Act of 2002, §§3801-13." *Id.* at Note 84.

[88] Trade Act of 2002 §3804(a).

[89] *Id.*, §3804.

[90] *Id.*, § 3804(b)-(c).

[91] *Id.*, §3807.

[92] *Id.,* §3807(a)(2)-(3).

[93] *Id.,* §3807(a)(4). "Without accreditation, congressional representatives would be bystanders and would not be permitted to participate directly in negotiations. As accredited representatives, the members of the COG have the authority to act on behalf of the United States in negotiations." *Supra* note 83 at 992, citing Note 98.

[94] Wright, L., "Trade Promotion Authority: Fast Track for the Twenty-First Century?," 12 William and Mary Bill of Rights Journal 979, 992 (2004), citing 148 Cong. Rec. S9108 (daily ed. Sept. 24, 2002) (statement of Sen. Grassley); *see also* Trade Act of 2002 §3807(a)(4). The purpose of the COG is "to provide advice to the Trade Representative regarding the formulation of specific objectives, negotiating strategies and positions, the development of the applicable trade agreement, and compliance and enforcement of the negotiated commitments under the trade agreement."

[95] Trade Act of 2002 §3804(a)(2).

[96] *Id.*, §3804(a)(1) (requiring that written notice be provided at least ninety days prior to the commencement of negotiations).

[97] *Id.*, §3804(a)(1).

[98] *Supra* note 94, citing 148 Cong. Rec. S7768 (daily ed. Aug. 1, 2002) (statement of Sen. Baucus) (referring to §3804(a)(3)).

[99] *Id.*, citing 148 Cong. Rec. S7768 (daily ed. Aug. 1, 2002) (statement of Sen. Baucus) (setting limitations on trade authorities procedures Trade Act of 2002 §3805(b)).

[100] *Id.*, citing 148 Cong. Rec. S9107 (daily ed. Sept. 24, 2002) (statement of Sen. Grassley).

[101] *Supra* note 94 at 992.

[102] §§401-402, Tariff and Customs Code of the Philippines, Presidential Decree No. 1464, promulgated June 11, 1978, amending Republic Act No. 1937, An Act to Revise and Codify the Tariff and Customs Laws of the Philippines, enacted on June 22, 1957.

[103] Congress authorized the President to enter into foreign trade agreements and to impose and regulate duties and other import restrictions, under Rep. Act No. 1189, entitled "An Act Authorizing the President of the Republic of the Philippines to Enter into Trade Agreements with Other Countries for a Limited Period and for Other Purposes," enacted on June 20, 1954; and Rep. Act. No. 1937, entitled "An Act to Revise and Codify the Tariff and Customs Laws of the Philippines," enacted on June 22, 1957.

[104] Tariff and Customs Code of 1978, Presidential Decree No. 1464, provides, *viz*:

> WHEREAS, the **Tariff and Customs Code of the Philippines known as Republic Act No. 1937** has been amended by several Presidential Decrees dating back to the year 1972;
>
> xxx xxx xxx
>
> NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Republic of the Philippines, by virtue of the powers in me vested by the Constitution, do hereby order and decree as follows:
>
> Section 1.Codification of all Tariff and Customs Laws. -- All tariff and customs laws embodied in the present Tariff and Customs Code and various laws, presidential decrees and executive orders including new amendments thereto made in this Decree, are hereby **consolidated into a single Code to be known as the Tariff and Customs Code of 1978** which shall form an integral part of this Decree.(*emphasis supplied*)

[105] §402, Tariff and Customs Code of 1978, Presidential Decree No. 1464, provides for the authority of the President to enter into trade agreements, *viz*:

> **Sec. 402.Promotion of Foreign Trade. --**
>
> a.For the purpose of expanding foreign markets for Philippine products as a means of assistance in the economic development of the country, in overcoming domestic unemployment, in increasing the purchasing power of the Philippine peso, and in establishing and maintaining better relations between the Philippines and other countries, **the President, is authorized from time to time:**
>
> **(1)To enter into trade agreements with foreign governments or instrumentalities thereof;** (*emphasis supplied*)

§402, Rep. Act. No. 1937, provides for the authority of the President to enter into trade agreements, *viz*:

> **Sec. 402.Promotion of Foreign Trade**
>
> a. For the purpose of expanding foreign markets for Philippine products as a means of assisting in the economic development of the country, in overcoming domestic unemployment, in increasing the purchasing power of the Philippine peso, and in establishing and maintaining better relationship between the Philippines and other countries, the President, upon investigation by the Commission and **recommendation of the National Economic Council, is authorized from time to time:**
>
> **(1)To enter into trade agreements with foreign governments or instrumentalities thereof;** (*emphasis supplied*)

[106] §401, Tariff and Customs Code of 1978, Presidential Decree No. 1464, provides, *viz*:

> **Sec. 401.Flexible Clause.**
>
> In the interest of national economy, general welfare and/or national security, and subject to the limitations herein prescribed, the **President**, upon recommendation of the National Economic and Development Authority (hereinafter referred to as NEDA), **is hereby empowered: (1) to increase, reduce or remove existing protective rates of import duty (including any necessary change in classification).** The existing rates may be increased or decreased to any level, in one or several stages but in no case shall the increased rate of import duty be higher than a maximum of one hundred (100) per cent *ad valorem*; **(2) to establish import quota or to ban imports of any commodity, as may be necessary**; and (**3) to impose an additional duty on all imports** not

exceeding ten (10%) percent *ad valorem* whenever necessary; (*emphasis supplied*)

§401, Rep. Act. No. 1937, provides, *viz*:

> **Sec. 401.Flexible Clause.**
>
> The President, upon investigation by the Commission and recommendation of the National Economic Council, is hereby empowered to **reduce** by not more than fifty per cent or to **increase** by not more than five times the rates of import duty expressly fixed by statute (including any necessary change in classification) when in his judgment such modification in the rates of import duty is necessary in the interest of national economy, general welfare and/or national defense. (*emphasis supplied*)

[107] Aruego, J., The Framing of the Philippine Constitution (1936), Vol. 1, p. 388.

[108] 2 RECORDS OF THE CONSTITUTIONAL COMMISSION, p. 191.

[109] The 1973 Constitution similarly provides in Article VIII, Sec. 17(1), *viz*:

> Sec. 17(1). The National Assembly may by law authorize the Prime Minister to fix within specified limits, and subject to such limitations and restrictions as it may impose, tariff rates, import and export quotas, tonnage and wharfage dues, and other duties or imposts.

[110] *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 320 (1936).

[111] *Id.*

[112] *See* Comment, p. 2. The JPEPA is a comprehensive bilateral free trade agreement (FTA). FTAs cover both tariff and non-tariff barriers.

[113] *Id*. at 19; *see also* Annex C.

[114] *Ponencia*.

[115] G.R. No. 169777, April 20, 2006, 488 SCRA 1, 45.

[116] Iraola, R. "Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions," 87 Iowa Law Review 1559, 1571 (2002).

[117] G.R. No. 95367, May 23, 1995, 244 SCRA 286.

[118] *Id*., citing 10 Anno., Government Privilege Against Disclosure of Official Information, 95 L. Ed. 3-4 and 7, pp. 427-29, 434.

[119] G.R. No. 130716, December 9, 1998, 299 SCRA 744.

[120] 5 RECORDS OF THE CONSTITUTIONAL COMMISSION, p. 25.

[121] 345 U.S. 1 (1953).

[122] *Id.* at 7-8, 10.

[123] Petition, Annex I.

[124] Comment, p. 21.

[125] *Id.* at 23.

[126] *Id*. at 28, Annex P.

[127] In **Reynolds**, the Secretary of the Air Force filed a formal "Claim of Privilege" and objected to the production of the document "for the reason that the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force." The Judge Advocate General of the U.S. Air Force also filed an affidavit, which claimed that the demanded material could not be furnished "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment." On the record before the trial court, it appeared that the accident that gave rise to the case occurred to a military plane that had gone aloft to test secret electronic equipment. The **Reynolds Court** found that **on the basis of all the circumstances of the case before it**, there was **reasonable danger** that the accident investigation report would contain references to the **secret electronic equipment** that was the primary concern of the mission, which would be exposed if the investigation report for the accident was disclosed.

[128] 345 U.S. 1, 8 (1953).

[129] Concurring Opinion of Justice Antonio T. Carpio.

[130] Separate Opinion of Justice Dante O. Tinga.

[131] "... At the time when the Committee was requesting the copies of such documents, the

negotiations were ongoing as they are still now and the text of the proposed JPEPA is still uncertain and subject to change. Considering the status and nature of such documents then and now, these are evidently covered by executive privilege...

... Practical and strategic considerations likewise counsel against the disclosure of the "rolling texts" which may undergo radical change or portions of which may be totally abandoned. Furthermore, the negotiations of the representatives of the Philippines as well as of Japan must be allowed to explore alternatives in the course of the negotiations..." Comment, p. 21.

[132] *In re Sealed Case (Espy)*, 121 F.3d 729 (1997), p. 737, citing *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 324 (D.D.C.1966), aff'd, 384 F.2d 979 (D.C.Cir.1967); accord *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 151-53, 95 S.Ct. 1504, 1516-18, 44 L.Ed.2d 29 (1975); *EPA v. Mink*, 410 U.S. 73, 86-93, 93 S.Ct. 827, 835-39, 35 L.Ed.2d 119 (1973).

[133] 157 F. Supp. 939 (Ct. Cl. 1958).

[134] *Id*., Note 4.

Kennedy, M., "Escaping the Fishbowl: A Proposal to Fortify the Deliberative Process Privilege," 99 Northwestern University Law Review (hereafter Kennedy) 1769 (2005).

[136] 157 F. Supp. 939 (Ct. Cl. 1958), pp. 945-946.

[137] *Id.* at 946.

[138] *Id.* at 947.

[139] *Id.* at 947-948.

[140] Kennedy, *supra* note 135 at 1769; *see also* Iraola, R. "Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions," Iowa Law Review, vol. 87, no. 5, August 2002, pp. 1559 and 1578, citing *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 12 (D.D.C. 1995), aff'd, 76 F.3d 1232 (D.C. Cir. 1996).

[141] *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132 (1975).

[142] *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997).

[143] *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980).

[144] *Id.*

[145] *In re Sealed Case (Espy),* 121 F.3d 729 (1997), p. 736, citing *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132 (1975).

[146] *Id.* at 736.

[147] *Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 399 (D.C. Cir. 1984)*.

[148] *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

[149] *Id.* at 737-38; *see also In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992) (discussing how, in balancing competing interests, the court should consider a number of factors such as the relevance of the evidence, seriousness of the litigation, and availability of other evidence); Jensen, K., "The Reasonable Government Official Test: A Proposal for the Treatment of Factual Information under the Federal Deliberative Process Privilege," 49 Duke L.J. 561, 578-579 (1999) (discussing and identifying the factors).

[150] The *In re Sealed Case (Espy)* arose because of allegations that U.S. Secretary of Agriculture, Mike Espy, may have improperly accepted gifts from individuals and organizations with business before the U.S. Department of Agriculture. These allegations led to the appointment of an Independent Counsel, to investigate the allegations and to prosecute any related violations of federal law that the Office of the Independent Counsel (OIC) reasonably believed had occurred. The same allegations led the President of the United States to direct the White House Counsel to investigate Espy's conduct in order to advise the President on whether he should take executive action against Espy. The White House publicly released a report on Espy produced by the White House Counsel. Subsequently, a grand jury issued the subpoena *duces tecum* at issue in this case. The subpoena sought all documents on Espy and other subjects of the OIC's investigation that were "accumulated for, relating in any way to, or considered in any fashion, by those persons who were consulted and/or contributed directly or indirectly to all drafts and/or versions" of the White House Counsel's report. The subpoena specifically requested notes of any meetings in the White House concerning Espy and of any conversations between Espy or his counsel and White House employees. The White House produced several folders of documents, but withheld some on the basis mostly of deliberative process privilege.

[151] G.R. No. 180643, March 25, 2008.

[152] With respect to deliberative process privilege, only pre-decisional and deliberative

materials are covered; hence, the agency must first show that the agency material sought is pre-decisional and deliberative for a qualified privilege to attach. With respect to presidential communications privilege, the presidential communications must be made in the performance of the President's responsibilities of his office and in the process of shaping policies and making decisions. Once this requisite is satisfied, a qualified privilege attaches to the presidential communication.

[153] *In re Sealed Case*, 121 F.3d. at 737.

[154] *Id*. at 745.

[155] *In re Sealed Case (Espy)*, 121 F.3d 729 (1997), p. 737, citing *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 324 (D.D.C.1966), aff'd,384 F.2d 979 (D.C.Cir.1967); accord *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 151-53, 95 S.Ct. 1504, 1516-18, 44 L.Ed.2d 29 (1975); *EPA v. Mink,* 410 U.S. 73, 86-93, 93 S.Ct. 827, 835-39, 35 L.Ed.2d 119 (1973).

[156] This conclusion is in line with the ruling of the U.S. District Court of the District of Columbia in **Center for International Environmental Law (CIEL) v. Office of the United States Trade Representative** (237 F. Supp. 2d 17) which the *ponencia* discusses. However, **CIEL** was litigated under the Freedom of Information Act (FOIA) in the U.S. which requires that information/communication should be "inter-agency" for it to come within the protection of the deliberative process privilege. The FOIA does not have a counterpart in the Philippines. Instead, the above conclusion on the non-application of the deliberative process privilege to the subject JPEPA documents was reached by going back to the rationale and history of deliberative process privilege.

In **CIEL,** nonprofit groups monitoring international trade and environmental issues brought a Freedom of Information Act (FOIA) suit against the Office of the United States Trade Representative, seeking information related to the **negotiation of the U.S.-Chile Free Trade Agreement.** Under the FOIA, deliberative and pre-decisional communications **between and within agencies of the U.S. government are exempt from government duty to disclose information.** Accordingly, the U.S. District Court of the District of Columbia held that **communications between the U.S. and Chile, in the course of treaty negotiations, were not "inter-agency" within the meaning of FOIA exemption and thus should be disclosed to the nonprofit groups seeking access to them.**

The District Court explained its ruling, *viz*:

> For purposes of the **inter-agency requirement**, the Supreme Court has noted that the term **"`agency' means `each authority of the Government of the United States**,' § 551(1), and `includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government ..., or any

independent regulatory agency,' § 522(f)." *Klamath Water Users,* 532 U.S. at 9, 121 S.Ct. 1060. In general, this definition establishes that **communications between agencies and outside parties are not protected under Exemption 5 (deliberative process privilege)**... *See, e.g., Brownstein Zeidman & Schomer v. Dep't of the Air Force,* 781 F.Supp. 31, 35 (D.D.C.1991) ("While FOIA exemption 5 does protect intra-governmental deliberations, it **does not cover negotiations between the government and outside parties**."); *see also Mead Data Central, Inc. v. United States Dep't of the Air Force,* 566 F.2d at 257-58 (policy objectives of Exemption 5 **not applicable to negotiations between agency and outside party**).

... Chilean officials are not "enough like the agency's own personnel to justify calling their communications `intra-agency.' " *Klamath Water Users,* 532 U.S. at 12, 121 S.Ct. 1060. Nor did the documents that Chile submitted to USTR play "essentially the same part in [the] agency's process of deliberation as documents prepared by agency personnel might have done." ...**It may be true, as defendants assert, that Chilean proposals and responses are essential to USTR's development of its own negotiating positions, but the role played by such documents is unmistakably different from the role of internally created documents; Chile shares its positions not in order to advise or educate USTR but in order to promote its own interests.** *See* Def. Mem. at 22 (acknowledging that "Chile seeks to achieve its own objectives through the negotiations"). Nor does the fact that USTR "needs to understand what is important to Chile in order to develop its own positions" confer inter-agency status on these external documents. Def. Mem. at 21. (237 F. Supp. 2d 17, 25).

xxx xxx xxx

The decision in *Ryan v. Dep't of Justice,* 617 F.2d 781, also is distinguishable. In *Ryan,* the court of appeals held that communications produced by Senators in response to an agency questionnaire regarding nominating procedures for judicial candidates fell within the narrow ambit of Exemption 5 (deliberative process privilege). The court characterized the Senators as "temporary consultants" who were "solicited to give advice only for specific projects." ... **In the instant case, by contrast, the Chilean officials were not solicited for advice but rather negotiated with and treated as adversaries openly seeking to advance their own interests**... (237 F. Supp. 2d 17, 28). (*emphasis supplied*)

The District Court of the District of Columbia distinguished the **CIEL case** from **Fulbright & Jaworski v. Dep't. of Treasury** (545 F. Supp. 615 [D.D.C. 1982]), which also dealt with deliberative process privilege in relation to treaty negotiations (and which the *ponencia* likewise discussed), *viz*:

In that case (**Fulbright & Jaworski**), one of very few to consider Exemption 5 (deliberative process privilege) in the context of foreign relations, **individual**

> **notes taken by a United States negotiator during treaty discussions with France were protected from release under Exemption 5. The court held that "releasing these snapshot views of the negotiations would be comparable to releasing drafts of the treaty" and consequently would risk great harm to the negotiations process...** Despite the superficial similarity of context - the "give-and-take" of treaty negotiations - the **difference is that the negotiator's notes at issue in *Fulbright & Jaworski* were clearly internal.** The question of disclosure turned not on the inter-agency requirement of Exemption 5 but on whether or not the documents were part of the agency's pre-decisional deliberative process... Judge Green's discussion of the harm that could result from disclosure therefore is **irrelevant**, since the **documents at issue here are not inter-agency**, and **the Court does not reach the question of deliberative process**. (237 F. Supp. 2d 17, 29) (*emphasis supplied*)

[157] *U.S. v. Reynolds*, 345 U.S. 1 (1953); *Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 399 (D.C. Cir. 1984)*.

[158] *Ponencia*.

[159] Schoenborn, B., "Public Participation In Trade Negotiations: Open Agreements, Openly Arrived At?," 4 Minnesota Journal of Global Trade 103 (1995). "As delegates, elected representatives act on their constituents' behalf in both foreign and domestic affairs. Interested private parties or organizations meet with their elected officials to discuss U.S. foreign trade policy when current issues pertain to their particular businesses. Typically, these occasions arise when issues are `intermestic.' Intermestic issues are those that effect both domestic and international policies. John W. Spanier & Eric M. Uslaner, American Foreign Policy Making and the Democratic Dilemmas 28 (1994). Intermestic issues, such as trade and energy issues, attract increased interest group representation, articulation, and influence. Often `so many groups have interests in the outcome of policies and see the stakes as so high that these groups may control much of the policy process. Businesses, banks, agriculture and shipping interests, and labor organizations have a natural interest in trade, foreign investment, and tariff issues.'" *Id.* at Note 10 (citations omitted).

[160] *Id.* "For most of U.S. history, international trade relationships were considered a relatively minor area of government activity. Generally, domestic issues are more important than foreign issues to Americans because the public considers those issues that most closely affect daily life to be most important to them. According to the Gallup Poll, since the late 1960s, Americans have consistently placed domestic issues far above foreign issues when considering the most important problem facing the country. Harold W. Stanley & Richard G. Niemi, Vital Statistics on American Politics 164 (4th ed. 1994). In most years after 1972, over 80% of those surveyed chose a domestic issue over a foreign one. While international trade most certainly affects life in the broad sense by creating new markets for goods and increasing the size of the economy, many Americans do not see it as a pressing issue, central to the way in which they live their lives." *Id.* at Note 11 (citations

omitted).

[161] *Id.*, citing John Day Larkin, Trade Agreements: A Study in Democratic Methods 122-28 (1940). "For example, the Fordney-McCumber Act of 1922, though it delegated some congressional tariff-making powers to the President, still led to increased tariffs because the President found himself under too much congressional scrutiny to act in the best interests of the nation. Overall, when considering international trade agreements, most members of Congress may be divided into two groups: those who are protectionist at all times and give interest groups whatever they need to retain their tariffs; and those who do not, in principle, favor protectionism but feel they must not let their constituents down while a tariff bill is pending. As a result, allowing legislative input into the process of enacting trade agreements led only to increased tariffs with relatively few instances of tariff reductions. To avoid the evils of logrolling and partisan politics, Congress enacted legislation establishing general policies to be carried out by the administration. This action was the only way to lower tariffs "in the public interest without opening up a logrolling orgy." *Id.* at Note 16 (citations omitted).

[162] *Id.* at 105-06.

[163] 19 U.S.C. §1351(a)(2) (1934) (current version at 19 U.S.C. §1351 [1988]) ("No proclamation shall be made increasing or decreasing by more than 50 per centum any existing rate of duty or transferring any article between the dutiable and free lists.").

[164] *Supra* note 159 at 108. "From 1934 to 1939, the reciprocal trade agreements stimulated the domestic economy enormously. Walter La Feber, The American Age 356 (1989). U.S. exports rose by nearly one billion dollars and the U.S. favorable trade imbalance increased from one-half billion dollars to one billion dollars." *Id.* at Note 21.

[165] *Id.*

[166] As codified in 19 U.S.C. §1354 (1934), the 1934 Act provided:

> Before any foreign trade agreement is concluded with any foreign government or instrumentality thereof under the provisions of Part III of this title, reasonable public notice of the intention to negotiate an agreement with such government or instrumentality shall be given in order that any interested person may have an opportunity to present his views to the President, or to such agency as the President may designate, under such rules and regulations as the President may prescribe; and before concluding such agreement the President shall seek information and advice with respect thereto from the United States Tariff Commission, the Departments of State, Agriculture, and Commerce and from such other sources as he may deem appropriate. (current version at 19 U.S.C. §1354 [1988]).

[167] *Supra* note 159 at 109, citing Larkin, J.D., Trade Agreements: A Study in Democratic Methods, 48-58 (1940).

[168] *Id. at* 109, Note 24.

[169] *Id.* at 111-112.

[170] *Id.* at 112. "According to the Economic Report of the President, 1975 was the last year the United States experienced a merchandise trade surplus (i.e., the value of exports was greater than the value of imports). Stanley & Niemi, Vital Statistics on American Politics 370 (4th ed. 1994). Moreover, in 1974 and 1975, America's gross domestic and national products declined as the nation suffered a recession. *Id.* at 417." *Id.* at Note 34.

[171] "One issue that raised public awareness with regard to international trade was the oil embargo of 1973. The Organization of Petroleum Exporting Countries (OPEC) agreed on reduced production levels that increased world prices. This action was taken in retaliation for the U.S. support of Israel in the Arab-Israeli War. As a result of America's dependence on Middle-Eastern oil, prices skyrocketed and long lines at the gas pump led to a wave of economic insecurity across America. See generally Ibrahim F.I. Shihata, The Case for the Arab Oil Embargo (1975) (discussing the history and politics surrounding the 1973 Arab oil embargo)." *Id.* at Note 36.

[172] Trade Act of 1974, 19 U.S.C. §§2101-2487 (Supp. V 1975) (current version at 19 U.S.C. §§2101-2487 [1988]). With regard to the Act of 1974, Professors Jackson and Davey have stated that "[i] n many ways, the struggle of Congress to regain some authority over international economic affairs was best manifested in the passage of the 1974 Trade Act ..." Jackson & Davey, Legal Problems of International Economic Relations 77 (2d ed. 1986).

[173] 19 U.S.C. §2155 (Supp. V 1975) (current version at 19 U.S.C. §2155 [1988]).

[174] The president must seek information and advice on negotiating objectives, bargaining positions, the operation of a trade agreement once entered into, and other matters arising in connection with the development, implementation, and administration of U.S. trade policy. 19 U.S.C. §2155(a).

[175] 19 U.S.C. §2155(a)-(c).

[176] Additionally, §2155 of the 1974 Act created the Advisory Council for Trade Policy and Negotiations (ACTPN). That group was established as a permanent group to provide constant policy advice on matters such as negotiating objectives, bargaining positions, and the operation of trade agreements. 19 U.S.C. §2155.

[177] Schoenborn, B., "Public Participation In Trade Negotiations: Open Agreements, Openly Arrived At?," 4 Minnesota Journal of Global Trade 103, 113-114 (1995).

[178] *Id.* at 114-115. "As a result of a similar economic climate which, during the Great Depression, spurred the passage of the 1934 Act, the Reagan and Bush Administrations initiated the concept of reducing barriers to trade between Mexico, Canada, and the United States in order to increase the economies of all three nations involved. President Clinton supported and Congress passed the North American Free Trade Agreement in December 1993." *Id.* at Note 48.

[179] Katt, Jr., W., "The New Paper Chase: Public Access to Trade Agreement Negotiating Documents," 106 Columbia Law Review 679, Note 2 (2006).

[180] Schoenborn, B., "Public Participation In Trade Negotiations: Open Agreements, Openly Arrived At?," 4 Minnesota Journal of Global Trade 103, 116 (1995). "James O. Goldsborough notes that the public is becoming more engaged in U.S. foreign policy in the post-Cold War period. `The idea is that foreign and domestic policy are becoming one, and that presidents no longer can treat foreign policy as their own privileged -- and private -- domain.' James O. Goldsborough, Whose View? Despite Heightened Public Interest in Foreign Policy, the President Must Prevail, San Diego Union-Trib., Jun. 14, 1993, at B5. Goldsborough also states that the public will continue to demand a stronger voice in international affairs.

In an era of free trade with Mexico, fair trade with Japan and environmental treaties that attempt to preserve the earth for future generations, foreign policy has achieved a domestic content it has not had before. There is nothing `foreign' about such issues. They have a direct impact on the quality of life of individuals." *Id.* at Note 50.

[181] *Id.* at 116. "`(N)ow, for the first time, ordinary Americans are beginning to discover that national and international trade decisions have critical relevance to their daily lives. And as they increasingly seek a greater voice ... the trading game will never again be the same.' Charles Lewis, The Treaty No One Could Read: How Lobbyists and Business Quietly Forged NAFTA, Wash. Post, June 27, 1993, at C1." *Id.* at Note 52.

[182] *Supra* note 179.

[183] Schoenborn, B., "Public Participation In Trade Negotiations: Open Agreements, Openly Arrived At?," 4 Minnesota Journal of Global Trade 103, 123 (1995).

[184] Katt, Jr., W., "The New Paper Chase: Public Access to Trade Agreement Negotiating Documents," 106 Columbia Law Review (2006) 679, citing 19 U.S.C.A. §3802(b)(5).

[185] *Supra* note 183 at 116.

[186] *Id.* at 122.

[187] Gregory, M. "Environment, Sustainable Development, Public Participation and the NAFTA: A Retrospective," 7 Journal of Environmental Law and Litigation (1992), 99, 101.

[188] Dannenmaier, E., "Trade, Democracy, and the FTAA: Public Access to the Process of Constructing a Free Trade Area of the Americas," 27 Fordham International Law Journal 1066, 1078 (2004) citing Second Summit of the Americas: Declaration of Principles and Plan of Action, Santiago, Chile, Apr. 19, 1998, reprinted in 37 I.L.M. 947, 950 (1998).

[189] *Id.* at 1078 citing Second Summit of the Americas: Declaration of Principles and Plan of Action, Santiago, Chile, Apr. 19, 1998, reprinted in 37 I.L.M. 947, 951 (1998).

[190] *Id.*, citing Third Summit of the Americas: Declaration of Principles, Quebec City, Canada, Apr. 22, 2001, available at http://www.ftaa-alca.org/summits/quebec/declara_e.asp.

[191] *Id.*, citing Third Summit: Declaration of Principles; Plan of Action at 14-15.

[192] *Id.*

[193] *Id.* at 1082-83.

[194] *Id.* at 1096.

[195] *Id.* at 1116.

[196] *Id.* at 1115.

[197] Katt, Jr., W., "The New Paper Chase: Public Access to Trade Agreement Negotiating Documents," 106 Columbia Law Review 679, 681 (2006).

[198] *Id.* at 697, citing Robert P. Deyling, Judicial Deference and De Novo Review in Litigation over National Security Information under the Freedom of Information Act, 37 Vill. L. Rev. 67, 93 (1992).

[199] *N.Y. Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring)

[200] *Supra* note 197 at 681.

[201] 4 RECORDS OF THE CONSTITUTIONAL COMMISSION, p. 735.

[202] *Id.* at 752.

[203] *Id.* at 769.

[204] 1987 Phil. Const. Art. X, §3.

[205] 1987 Phil. Const., Art. VI, §32; Art. X, §3.

[206] 1987 Phil. Const., Art. VI, §32; Art. X, §3.

[207] 5 RECORDS OF THE CONSTITUTIONAL COMMISSION, p. 24.

[208] *Id.* at 26.

[209] *Id.* at 83.

[210] 1 Records of the Constitutional Commission, pp. 708-710, 757-758, 760.

[211] The Records of the Constitutional Commission state, *viz*:

> MR. SUAREZ. And when we say "transactions" which should be distinguished from contracts, agreements, or treaties or whatever, does the Gentleman refer to the steps leading to the consummation of the contract, or does he refer to the contract itself?
>
> MR. OPLE. The "transactions" used here, I suppose, is generic and, therefore, it can **cover both steps leading to a contract, and already a consummated contract**, Mr. Presiding Officer.
>
> MR. SUAREZ. This contemplates **inclusion of negotiations leading to the consummation of the transaction**?
>
> MR. OPLE. Yes, **subject to reasonable safeguards on the national interest.**
>
> MR. SUAREZ. Thank you. Will the **word "transactions" here also refer to treaties, executive agreements** and service contracts particularly?
>
> MR. OPLE. I suppose that is **subject to reasonable safeguards on national interest** which include the national security. (*emphasis supplied*) (5 Records of

the Constitutional Commission, p. 25)

[212] 1 Records of the Constitutional Commission, p. 709.

[213] G.R. No. 74930, February 13, 1989, 170 SCRA 256 (1989).

[214] *Id*. at 264-266.

[215] BERNAS, J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY (hereafter Bernas) (2003), p. 372.

[216] G.R. No. L-72119, May 29, 1987, 150 SCRA 530.

[217] *Id.* at 541.

[218] *Id.* at 371.

[219] G.R. No. 140835, August 14, 2000, 337 SCRA 733.

[220] *Id.* at 746-747.

[221] 80 Phil. 383 (1948).

[222] *Id.*

[223] Dissenting Opinion of Justice Reynato S. Puno in Tolentino v. COMELEC, et al., G.R. No. 148334, January 21, 2004, 420 SCRA 438, 489.

[224] 297 U.S. 233 (1936).

[225] *Id.* at 249-250, citing 2 Cooley, Const. Lim. 8th ed. p. 886.

[226] 425 U.S. 748 (1976).

[227] Bunker, M., Splichal, S., Chamberlin, B., Perry, L., "Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology," 20 Florida State Law Review 543, 549 (1993).

[228] 425 U.S. 748, 765, Note 19 (1976).

[229] Wilcox, W., "Access to Environmental Information in the United States and the United Kingdom," 23 Loyola of Los Angeles International & Comparative Law Review 121, 124-125 (2001).

[230] 410 U.S. 73 (1973).

[231] *Id*. at 80.

[232] 425 U.S. 352, 372 (1976).

[233] 437 U.S. 214 (1978).

[234] *Id.* at 242.

[235] *EPA v. Mink*, 410 U.S. 73 (1973).

[236] 5 U.S.C. 552 (b)(1).

[237] 438 U.S. 1 (1978).

[238] *Id.* at 14, citing *Pell v. Procunier*, 417 U.S. 817 (1974) and Stewart, "Or of the Press," 26 Hastings LJ 631, 636 (1975).

[239] Note, "The Rights of the Public and the Press to Gather Information," 87 Harvard Law Review 1505, 1512-13 (1974).

[240] COPPEL, P., INFORMATION RIGHTS (2007), p. 2.

[241] *Id.,* pp. 4-5, 8, 505; Freedom of Information Act 2000, §2(2)(b).

[242] *Export Credits Guarantee Department v. Friends of the Earth*, [2008] EWHC 638 (Admin), citing *Department for Education and Skills v. Information Commissioner and the Evening Standard* (2007) UKIT EA 2006 0006 at [20] .

[243] Coppel, P., *supra* note 240 at 550.

[244] Freedom of Information Act 2000, §27(1)(a).

[245] *Id.* at §27(2).

[246] Freedom of Information Act 1982, §11(2).

[247] *Id.* at §33.

[248] Coppel, P., *supra* note 240 at 67.

[249] Official Information Act 1982, §§6(b) and 27(1); Coppel, *supra* note 240, pp. 68-69.

[250] 1987 Phil. Const. Art. III, §7.

[251] G.R. No. L-72119, May 29, 1987, 150 SCRA 530.

[252] *Id.* Analogously, in the U.S., the Freedom of Information Act (FOIA) was enacted to facilitate public access to government documents. The statute was designed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." Consistent with this purpose and the plain language of the FOIA, the burden is on the government agency to justify the withholding of any requested documents. (references omitted) *U.S. Department of State v. Ray, et al*., 502 U.S. 164, 173 (1991).

[253] G.R. No. L-72119, May 29, 1987, 150 SCRA 530.

[254] *See Legaspi v. Civil Service Commission*, G.R. No. L-72119, May 29, 1987, 150 SCRA 530, 541; *See also* Comment, pp. 15-21.

[255] For example, the U.S. FOIA provides for the following sources of exceptions from the duty to disclose information, *viz*:
(b) This section (referring to the FOIA) does not apply to matters that are--

> (1) (A) specifically authorized under criteria established by an **Executive order** to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
>
> xxx xxx xxx
>
> (3) specifically exempted from disclosure by **statute** (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld... (5 U.S.C. 552 [b] [1] and [3])

[256] Bernas, pp. 372-73.

[257] Issued by President Gloria Macapagal-Arroyo on September 28, 2005. E.O. 464 provides in relevant part, *viz*:

> Section 1. Appearance by Heads of Departments Before Congress. In accordance with Article VI, Section 22 of the Constitution and to implement the Constitutional provisions on the separation of powers between co-equal branches of the government, all heads of departments of the Executive Branch of the government shall secure the consent of the President prior to appearing before either House of Congress.
>
> When the security of the State or the public interest so requires and the President so states in writing, the appearance shall only be conducted in executive session.
>
> Section 2. Nature, Scope and Coverage of Executive Privilege.
>
> (a) Nature and Scope. - The rule of confidentiality based on executive privilege is fundamental to the operation of government and rooted in the separation of powers under the Constitution (*Almonte vs. Vasquez*, G.R. No. 95367, 23 May 1995). Further, Republic Act No. 6713 or the Code of Conduct and Ethical Standards for Public Officials and Employees provides that Public Officials and Employees shall not use or divulge confidential or classified information officially known to them by reason of their office and not made available to the public to prejudice the public interest.
>
> Executive privilege covers all confidential or classified information between the President and the public officers covered by this executive order, including:
>
> Conversations and correspondence between the President and the public official covered by this executive order (*Almonte vs. Vasquez,* G.R. No. 95367, 23 May 1995; *Chavez v. Public Estates Authority*, G.R. No. 133250, 9 July 2002);
>
> Military, diplomatic and other national security matters which in the interest of national security should not be divulged (*Almonte vs. Vasquez*, G.R. No. 95367, 23 May 1995; *Chavez v. Presidential Commission on Good Government*, G.R. No. 130716, 9 December 1998).
>
> Information between inter-government agencies prior to the conclusion of treaties and executive agreements (*Chavez v. Presidential Commission on Good Government*, G.R. No. 130716, 9 December 1998);
>
> Discussion in close-door Cabinet meetings (*Chavez v. Presidential Commission on Good Government*, G.R. No. 130716, 9 December 1998);
>
> Matters affecting national security and public order (*Chavez v. Public Estates*

Authority, G.R. No. 133250, 9 July 2002).

(b) Who are covered. The following are covered by this executive order:

Senior officials of executive departments who in the judgment of the department heads are covered by the executive privilege;

Generals and flag officers of the Armed Forces of the Philippines and such other officers who in the judgment of the Chief of Staff are covered by the executive privilege;

Philippine National Police (PNP) officers with rank of chief superintendent or higher and such other officers who in the judgment of the Chief of the PNP are covered by the executive privilege;

Senior national security officials who in the judgment of the National Security Adviser are covered by the executive privilege; and

Such other officers as may be determined by the President.

Section 3. Appearance of Other Public Officials Before Congress. All public officials enumerated in Section 2 (b) hereof shall secure prior consent of the President prior to appearing before either House of Congress to ensure the observance of the principle of separation of powers, adherence to the rule on executive privilege and respect for the rights of public officials appearing in inquiries in aid of legislation.

[258] Comment, pp. 18-20.

[259] The Court ruled in *Senate v. Ermita*, *viz:*

E.O 464 is concerned only with the demands of Congress for the appearance of executive officials in the hearings conducted by it, and not with the demands of citizens for information pursuant to their right to information on matters of public concern.

[260] G.R. No. 95367, May 23, 1995, 244 SCRA 286, citing 10 Anno., Government Privilege Against Disclosure of Official Information, 95 L. Ed. 3-4 and 7, pp. 427-29, 434.

[261] G.R. No. 169777, April 20, 2006, 488 SCRA 1 (2006). The right to information was involved in that case only "(t)o the extent that investigations in aid of legislation are generally conducted in public;" thus, "any executive issuance tending to unduly limit disclosures of information in such investigations necessarily deprives the people of information which, being presumed to be in aid of legislation, is presumed to be a matter of public concern."

[262] *PMPF v. Manglapus*, G.R. No. 84642, September 13, 1988, pp. 5-6.

[263] *PMPF v. Manglapus*, G.R. No. 84642, September 13, 1988, pp. 3-4.

[264] 5 RECORDS OF THE CONSTITUTIONAL COMMISSION, p. 25.

[265] With respect to the disclosure of the subject JPEPA documents to the House Special Committee on Globalization conducting an inquiry in aid of legislation, the "reasonable safeguard(s) for the sake of national interest" is that the said documents are released only after employing a "balancing of interests test" as will subsequently be shown.

[266] Freedom of Information Act 2000, §27(1)(a).

[267] *Id.* at §27(2).

[268] 418 U.S. 683 (1974).

[269] 498 F.2d 725, 162 U.S. App. D.C. 183.

[270] 121 F.3d 729, 326 App. D.C. 276.

[271] *Secretary of Justice v. Lantion*, G.R. No. 139465, October 17, 2000, 322 SCRA 160.

[272] *Cabansag v. Fernandez*, 102 Phil. 152; *Gonzales v. COMELEC*, 137 Phil. 489 (1969); *Bradenburg v. Ohio*, 395 U.S. 444 (1969).

[273] *Estrada v. Escitor*, A.M. No. P-02-1651, August 4, 2003, 408 SCRA 1.

[274] 1987 Phil. Const. Art. III, §7 provides, *viz*:

> The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.

[275] *Valmonte*, *supra* at 264.

[276] Similarly, as afore-discussed, the statutes on the right of access to information of the United States, United Kingdom, and Australia, among others, do not require a

demonstration of need or reason to access information.

[277] *Legaspi v. Civil Service Commission*, G.R. No. L-72119, May 29, 1987, 150 SCRA 530, 541; 1 RECORDS OF THE CONSTITUTIONAL COMMISSION, p. 709.

[278] G.R. No. 74930, February 13, 1989, 170 SCRA 256, 266.

[279] 433 Phil. 506 (2002).

[280] *Ponencia*.

[281] 418 U.S. 683, 712 at Note 19.

[282] Similarly, the application of the U.S. Freedom of Information Act (FOIA) can yield different results between a request for information by the public and by the legislature. The FOIA requires executive agencies to make documents available to the public, but sets forth nine exemptions from the Act, including matters that are specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such executive order... These exemptions justify denial to the public of information from executive agencies, but **they do not apply to Congress**. FOIA specifically provides that these exemptions do not constitute authority to withhold information from Congress.

[283] *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 320 (1936).

[284] TSN, Hearing of the House of Representatives Special Committee on Globalization and WTO, 12 October 2005, p. 11.

[285] *See* Salazar, M., "JPEPA Concerns," Manila Bulletin, 2 June 2008; Aning, J., "Santiago slammed for "conditional" stance on JPEPA, Philippine Daily Inquirer (www.inq7.net), 26 April 2008.

[286] Memorandum of Justice Florentino P. Feliciano on the Constitutional Law Aspects of the Japan-Philippines Economic Partnership Agreement (JPEPA), Hearing of the Senate Joint Committee on Foreign Relations and Committee on Trade and Commerce, 8 October 2007, p. 7.

[287] 1987 Phil. Const. Art. XII, §2 provides, *viz*:

> Section 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State.

With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty *per centum* of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.

The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.

The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fish workers in rivers, lakes, bays, and lagoons.

The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.

The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.

[288] 1987 Phil. Const. Art. XII, §11 provides, *viz*:

Section 11. No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines, at least sixty *per centum* of whose capital is owned by such citizens; nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital, and all the executive and managing officers of such corporation or association must be

citizens of the Philippines.

[289] 1987 Phil. Const. Art. XII, §14 provides in relevant part, *viz*:

> ... The practice of all professions in the Philippines shall be limited to Filipino citizens, save in cases prescribed by law.

[290] 1987 Phil. Const. Art. XIV, §4(2) provides, *viz*:

> Section 4.... (2) Educational institutions, other than those established by religious groups and mission boards, shall be owned solely by citizens of the Philippines or corporations or associations at least sixty *per centum* of the capital of which is owned by such citizens. The Congress may, however, require increased Filipino equity participation in all educational institutions.
>
> The control and administration of educational institutions shall be vested in citizens of the Philippines.
>
> No educational institution shall be established exclusively for aliens and no group of aliens shall comprise more than one-third of the enrollment in any school. The provisions of this subsection shall not apply to schools established for foreign diplomatic personnel and their dependents and, unless otherwise provided by law, for other foreign temporary residents.

[291] *Supra* note 286 at 7-8.

[292] *Id.* at 8.

[293] 1987 Phil. Const. Art. XVI, §11 (1) provides, *viz*:

Section 11. (1) The ownership and management of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or associations, wholly-owned and managed by such citizens.

[294] 1987 Phil. Const. Art. XVI, §11 (1) provides, *viz:*

> Sec. 11. (2) The advertising industry is impressed with public interest, and shall be regulated by law for the protection of consumers and the promotion of the general welfare.
>
> Only Filipino citizens or corporations or associations at least seventy *per centum* of the capital of which is owned by such citizens shall be allowed to engage in the advertising industry.

The participation of foreign investors in the governing body of entities in such industry shall be limited to their proportionate share in the capital thereof, and all the executive and managing officers of such entities must be citizens of the Philippines.

[295] *Supra* note 286 at 8-9.

[296] Dean Merlin Magallona, TSN, Hearing of the Senate Joint Committee on Foreign Relations and Committee on Trade and Commerce, 8 October 2007; *see also* Position Paper of Magkaisa Junk JPEPA, Hearing of the Senate Joint Committee on Foreign Relations and Committee on Trade and Commerce, 4 October 2007, p. 8, citing Dean Merlin Magallona's August 14 Senate lecture on the Constitutional and Legal Implications of the JPEPA.

[297] *Id.*

[298] Some of these goods provided in Annex 1 of the JPEPA are the following:

Heading No.	Description
2620.60 00	Ash and residues (other than from the manufacture of iron or steel) containing arsenic, mercury, thallium or their mixtures, of a kind used for the extraction of arsenic or those metals or for the manufacture of their chemical compounds
2621.1000	Ash and residues from the incineration of municipal waste
3006.80	Waste pharmaceuticals
3825.5000	Wastes of metal pickling liquors, hydraulic fluids, brake fluids and anti-freeze fluids

[299] Position Paper of Magkaisa Junk JPEPA, Hearing of the Senate Joint Committee on Foreign Relations and Committee on Trade and Commerce, 4 October 2007, p. 3.

[300] Position Paper of Magkaisa Junk JPEPA, Hearing of the Senate Joint Committee on Foreign Relations and Committee on Trade and Commerce, 4 October 2007, citing provisions of the working draft text of the JPEPA as of 21 April 2003 (accessed through the Philippine Institute for Development Studies, the government research institution tasked to study the JPEPA) and Article 29 of the JPEPA signed by President Gloria Macapagal-Arroyo.

[301] Annex 7, 2B of the JPEPA provides, *viz*:

2B: Schedule of the Philippines
1. Sector: Fisheries
Sub-Sector: Utilization of Marine Resource
Industry Classification:
Type of National Treatment (Article 89)
Reservation:
Measures: The Constitution of the Republic of the Philippines, Article XII
Description: 1. No foreign participation is allowed for small-scale utilization of marine resources in archipelagic waters, territorial sea and exclusive economic zones. 2. For deep-sea fishing, corporations, associations or partnerships with maximum 40 percent foreign equity can enter into coproduction, joint venture or production sharing agreement with the Philippine Government. (*emphasis supplied*)

[302] Position Paper of Pambansang Lakas ng Kilusang Mamamalakaya ng Pilipinas (Pamalakaya), Hearing of the Senate Joint Committee on Foreign Relations and Committee on Trade and Commerce, 8 October 2007, p. 4.

[303] *Id.*

[304] Position Paper of Magkaisa Junk JPEPA Coalition, Hearing of the Senate Joint Committee on Foreign Relations and Committee on Trade and Commerce, 14 September 2007, p. 14.

1987 Phil. Const. Art. XII, §2 provides in relevant part, *viz*:

The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.

[305] Position Paper of Task Force Food Sovereignty and the Magkaisa Junk JPEPA Coalition, Hearing of the Senate Joint Committee on Foreign Relations and Committee on Trade and Commerce, 8 October 2007, p. 4.

[306] *Id.*

[307] This approach is similar to the observation in the Separate Opinion of Justice Tinga that it can be deduced from an 18 July 1997 decision of the International Criminal Tribunal for the former Yugoslavia that the "invocation of states secrets cannot be taken at face value but must be assessed by the courts."

[308] The Vienna Convention on the Law of Treaties provides in Article 32, *viz*:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31 (General rule of interpretation), or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

[309] Katt, Jr., W., "The New Paper Chase: Public Access to Trade Agreement Negotiating Documents," 106 Columbia Law Review 679, 693 (2006).

[310] G.R. No. 169777, April 20, 2006, 488 SCRA 1 (2006).

[311] *Id.* at 51.

[312] In the words of Thomas Jefferson, "if a nation expects to be ignorant and free in a state of civilization, it expects what never was and will never be." Letter from Thomas Jefferson to Colonel Charles Yancey (Jan. 6, 1816), in 10 THE WRITINGS OF THOMAS JEFFERSON 4 (Paul L. Ford ed., 1899), cited in LIBRARY OF CONGRESS, RESPECTFULLY QUOTED 97 (Suzy Platt ed., 1989).

CONCURRING OPINION

***CARPIO, J.*:**

I concur with the *ponencia* of Justice Conchita Carpio Morales on the following grounds:

1. Offers and counter-offers between States negotiating a treaty are expected by the negotiating States to remain confidential during the negotiations prior to the signing of the treaty. There is no dispute on this.
2. After the signing of the treaty, the public disclosure of such offers and counter-offers depends on the consent of **both** negotiating States. A State may wish to keep its offers and counter-offers confidential even after the signing of the treaty because it plans to negotiate similar treaties with other countries and it does not want its negotiating positions known beforehand by such other countries. The offers and counter-offers of a negotiating State usually include references to or discussions of the offers and counter-offers of the other negotiating State. Hence, a negotiating State cannot decide alone to disclose publicly its own offers and counter-offers if they refer to or discuss

the offers and counter-offers of the other negotiating State.

3. If the Philippines does not respect the confidentiality of the offers and counter-offers of its negotiating partner State, then other countries will be reluctant to negotiate in a candid and frank manner with the Philippines. Negotiators of other countries will know that Philippine negotiators can be forced to disclose publicly offers and counter-offers that their countries want to remain confidential even after the treaty signing. Thus, negotiators of such countries will simply repeat to Philippine negotiators offers and counter-offers that they can disclose publicly to their own citizens, which offers and counter-offers are usually more favorable to their countries. This denies to Philippine negotiators the opportunity to hear, and explore, other more balanced offers or counter-offers from negotiators of such countries. A writer on diplomatic secrets puts it this way:

> x x x Disclosure of negotiating strategy and goals impairs a party's ability to negotiate the most favorable terms, because a negotiating party that discloses its minimum demands insures that it will get nothing more than the minimum. Moreover, those involved in the practice of negotiations appear to be in agreement that publicity leads to `grandstanding,' tends to freeze negotiating positions, and inhibits the give-and-take essential to successful negotiation. As Sissela Bok points out, if `negotiators have more to gain from being approved by their own sides than by making a reasoned agreement with competitors or adversaries, then they are inclined to `play to the gallery . . . .' In fact, the public reaction may leave them little option. It would be a brave, or foolish, Arab leader who expressed publicly a willingness for peace with Israel that did not involve the return of the entire West Bank, or Israeli leader who stated publicly a willingness to remove Israel's existing settlements from Judea and Samaria in return for peace.[1]

4. In the present case, at least one negotiating State - the Philippines - does not want to disclose publicly the offers and counter-offers, including its own. The Philippines is expected to enter into similar treaties with other countries. The Court cannot force the Executive branch to telegraph to other countries its possible offers and counter-offers that comprise our negotiating strategy. That will put Philippine negotiators at a great disadvantage to the prejudice of national interest. Offers and counter-offers in treaty negotiations are part of diplomatic secrets protected under the doctrine of executive privilege. Thus, in *United States v. Curtiss-Wright*,[2] the leading case in American jurisprudence on this issue, the U.S. Supreme Court, quoting with approval a letter of President George Washington, held:

> x x x Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty - **a refusal the wisdom of which was recognized by the House itself and has never since been doubted**. In his reply to the request,

President Washington said:

> The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic**; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers**. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent. (Emphasis supplied)

5. The negotiation of treaties is different from the awarding of contracts by government agencies. In diplomatic negotiations, there is a traditional expectation that the offers and counter-offers of the negotiating States will remain confidential even after the treaty signing. States have honored this tradition and those that do not will suffer the consequences. There is no such expectation of keeping confidential the internal deliberations of government agencies after the awarding of contracts.

6. However, in the ratification of a treaty, the Senate has the right to see in **executive session,** the offers and counter-offers made in the treaty negotiations even in the absence of consent from our treaty partner State. Otherwise, the Senate cannot examine fully the wisdom of the treaty. In the present case, however, the Senate is not a party.

Accordingly, I vote to **DISMISS** the petition.

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[1] Benjamin S. DuVal, *The Occasions of Secrecy*, University of Pittsburgh Law Review, Spring 1986

[2] 299 U.S. 304 (1936).

SEPARATE DISSENTING OPINION

AZCUNA, *J.*:

I fully agree with the Dissenting Opinion of Chief Justice Reynato S. Puno.

The *ponencia* regrettably assumes that the power of Congress, when it investigates, is either in aid of legislation or by way of oversight. What appears to have been forgotten is an equally important and fundamental power and duty of Congress and that is its informing function by way of investigating for the purpose of enlightening the electorate.

Arthur M. Schlesinger, in THE IMPERIAL PRESIDENCY, aptly quotes Wilson on CONGRESSIONAL GOVERNMENT on this power:

> Congress's "only whip," Wilson said, "is investigation," and that "the chief purpose of investigation, even more than the direction of affairs, was the enlightenment of the electorate. The inquisitiveness of such bodies as Congress is the best conceivable source of information.... The informing function of Congress should be preferred even to its legislative function." For "the only really self-governing people is that people which discusses and interrogates its administration."[1]

This is all the more compelling in our polity because our Constitution is replete and suffused with provisions on transparency, accountability and the right of the people to know the facts of governance, as pointed out by the Chief Justice. Neither is the Philippines the only country that has done this. Only last year, 2007, Mexico amended its Constitution to raise to the level of a fundamental right the public's right to know the truth, thereby providing that: "All information in the possession of any federal, state and municipal authority, entity, body or organization is public xxxx." The amendment reads:

> The Amendment to Article 6 of the Constitution
>
> The Permanent Commission of the Honorable Congress, in full use of the power bestowed on it by Article 135 of the Constitution, and after approval by both the Chamber of Deputies and the Senate of Mexico, as well as the legislatures, decrees:
>
> A second paragraph with seven subsections is hereby added to Article 6 of the Mexican Constitution.
>
> Single Article. A second paragraph with seven subsections is added to Article 6 of the Mexican Constitution, which will now read as follows:
>
> Article 6...

For purposes of the exercise of the right to access to information, the federal government, the states of the Federal District, each in their respective jurisdictions, will comply with the following principles and bases:

I. All information in the possession of any federal, state and municipal authority, entity, body and organism [organs] is public and may only be temporarily withheld in the public interest in accordance with legislation. In interpreting this right, the principle of the maximum public-ness must prevail.

II. Information referring to individual's private lives and personal data shall be protected as stipulated in and with the exceptions established by law.

III. Without having to show any involvement in the topic or justify its use, all individuals will have access, free of charge, to public information, his/her personal data, or to the rectification of said data.

IV. Mechanisms for access and expeditious review procedures shall be established. These procedures will be substantiated before specialized, impartial bodies with operational, managerial and decision-making autonomy.

V. Entities herein mandated shall preserve their documents in updated administrative archives and shall publish in the available electronic media complete, updated information about their management indicators and the exercise of public resources.

VI. Legislation will determine the manner in which those mandated to comply will make public the information about public resources given to individuals or entities.

VII. Incompliance [Noncompliance] with the stipulations regarding access to public information will be sanctioned accordingly to the law.

TRANSITORY ARTICLES

First. The present Decree shall go into effect the day after its publication in the Official Federal Gazette.

Second. The federal government, the states and the Federal District, in their respective jurisdictions, shall issue legislation about access to public information and transparency, or make the necessary changes no later than one year after this Decree goes into effect.

> **Third.** The federal government, the states and the Federal District must establish electronic systems so that any person can use from a distance the mechanisms for access to information and the review procedures mentioned in this Decree. Said systems must be functioning no later than two years after the Decree goes into effect. State laws shall establish whatever is needed for municipalities with more than 60,000 inhabitants and the territorial sub-divisions of the Federal District to have their own electronic systems within that same period of time. [Emphasis supplied.][2]

Transparency is in fact the prevalent trend and non-disclosure is the diminishing exception. The reason lies in the recognition under international law of the fundamental human right of a citizen to take part in governance, as set forth in the 1948 United Nations Universal Declaration of Human Rights, a right that cannot be realized without access to information.

And even in the United States from where the privilege originated no President has claimed a general prerogative to withhold but rather the Executive has claimed particular exceptions to the general rule of unlimited executive disclosure:

> Conceding the idea of Congress as the grand inquest of the nation, Presidents only claimed particular exceptions to the general rule of unlimited executive disclosures - Washington, the protector of the exclusive constitutional jurisdiction of one house of Congress against invasion by the other house; Jefferson, the protector of presidential relationship within the executive branch and the defense of that branch against congressional harassment; Taylor, the protection of ongoing investigation and litigation; Polk, the protection of state secrets in intelligence and negotiation. While exceptions might accumulate, no President had claimed a general and absolute prerogative to withhold.[3]

The President, therefore, has the burden to show that a particular exception obtains in every case where the privilege is claimed. This has not been done in the present case. All that the Senate is asking for are copies of the starting offers of the Philippines and of Japan. What is the deep secret in those papers? If the final product is and has been disclosed, why cannot the starting offers be revealed? How can anyone, the Senate or the electorate included, fathom - to use the favorite word of a counsel - the end product if one is not told the starting positions?

Furthermore, Executive Secretary Ermita did not really invoke the privilege. All he said was that, at the time of the request, negotiations were on-going, so that it was difficult to provide all the papers relative to the proposed Treaty (which was then the request of the Senate). He did not say it was privileged or secret or confidential but that it was difficult at the time to comply with the request as the Executive understandably had its hands full in the midst of the negotiations.

Now the negotiations are over. The proposed treaty has been signed and submitted to the Senate for ratification. There is no more difficulty in complying with the now reduced

request of giving copies of the starting offers of the Philippines and of Japan.

Since the privilege is an exception to the rule, it must be properly, seasonably and clearly invoked. Otherwise, it cannot be applied and sustained.

Finally, as *Ex parte Milligan*[4] sums it:

> A country preserved at the sacrifice of all the cardinal principles of liberty is not worth the cost of preserving.[5]

I vote to compel disclosure of the requested documents.

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[1] Schlesinger, 10, 76-77 quoting: Wilson, CONGRESSIONAL GOVERNMENT, 278, 279, 299, 301, 303. (Emphasis supplied.)

[2] Ricardo Becerra, Mexico: Transparency and the Constitution, Voices of Mexico, Issue 80, Sept.-Dec. 2007, pp. 11-14.

[3] *Op cit*., note 1 at 83.

[4] 4 Wall. 120, 126 (1866).

[5] *See*, A.M. Schlesinger, Jr., THE IMPERIAL PRESIDENCY, 1973, p. 70.

SEPARATE OPINION

Tinga, J.:

The dissent of our eminent Chief Justice raises several worthy points. Had the present question involved the legislative consideration of a domestic enactment, rather than a bilateral treaty submitted for ratification by the Senate, I would have no qualms in voting to grant the petition. However, my vote to dismiss the petition, joining in the result of the *ponencia* of the esteemed Justice Morales, is due to my inability to blithely disregard the diplomatic and international ramifications should this Court establish a rule that materials relevant to treaty negotiations are demandable as a matter of right. The long-standing tradition of respecting the confidentiality of diplomatic negotiations is embodied in the rule according executive privilege to diplomatic secrets.

The *ponente* engages in a thorough and enlightening discussion on the importance and vitality of the diplomatic secrets privilege, and points out that such privilege, which is a specie of executive privilege, serves to balance the constitutional right to information invoked in this case. If I may add, in response to the Dissenting Opinion which treats the deliberative process privilege as "a distinct kind of executive privilege" from the "diplomatic secrets privilege", notwithstanding the distinction, both deliberative process privilege and diplomatic secrets privilege should be jointly considered if the question at hand, as in this case, involves such diplomatic correspondences related to treaty negotiations. The diplomatic character of such correspondences places them squarely within the diplomatic secrets privilege, while the fact that the ratification of such treaty will bestow on it the force and effect of law in the Philippines also places them within the ambit of the deliberate process privilege. Thus, it would not be enough to consider the question of privilege from only one of those two perspectives, as both species of executive privilege should be ultimately weighed and applied in conjunction with each other.

In ascertaining the balance between executive privilege and the constitutional right to information in this case, I likewise consider it material to consider the implications had the Court established a precedent that would classify such documents relating to treaty negotiations as part of the public record since it is encompassed within the constitutional right to information. The Dissenting Opinion is unfortunately unable to ultimately convince that establishing such a general rule would not set the Philippines so far apart from the general practice of the community of nations. For if indeed the Philippines would become unique among the governments of the world in establishing that these correspondences related to treaty negotiations are part of the public record, I fear that such a doctrine would impair the ability of the Philippines to negotiate treaties or agreements with foreign countries. The Philippines would become isolated from the community of nations, and I need not expound on the negative and destabilizing implications of such a consequence.

It should be expected that national governments, including our own, would insist on maintaining the presumptive secrecy of all documents and correspondences relating to treaty negotiations. Such approach would be maintained upon no matter how innocuous, honest or above-board the privileged information actually is, since an acknowledgment that such information belongs to the public record would diminish a nation's bargaining power in the negotiation of treaties. This truth may be borne moreso out of *realpolitik*, rather then the prevalence of a pristine legal principle, yet it is a political reality which this Court has to contend with since it redounds to the ultimate wellbeing of the Philippines as a sovereign nation. On the premise that at least a significant majority of the most relevant players in the international scene adhere to the basic confidentiality of treaty negotiations no matter the domestic implications of such confidentiality, then it can only be expected that such nations will hesitate, if not refuse outright, to negotiate treaties with countries which do not respect that same rule.

The Dissenting Opinion does strive to establish that in certain countries such as the United States, the United Kingdom, Australia and New Zealand, there is established a statutory right to information that allows those states' citizens to demand the release of documents

pertinent to public affairs. However, even the dissent acknowledges that in the United Kingdom for example, "confidential information obtained from a State other than the United Kingdom" or information that would be likely to prejudice relations between the United Kingdom and other countries are exempt from its own Freedom of Information Act of 2000. It is impossible to conclude, using the examples of those countries, that there is a general presumptive right to access documents relevant to diplomatic negotiations.

It would be a different matter if the petitioners or the dissent were able to demonstrate that a significant number of nations have adopted a paradigm that incorporates their treaty negotiations into the public record out of recognition of the vital right to information, transparency, good governance, or whatever national interest revelation would promote; or that there is an emerging trend in international law that recognizes that treaty negotiations are not privileged in character, or even if so, that the privilege is of such weak character that it may easily be overcome. If either circumstance was established, it would be easier to adopt the position of the dissent, which admirably attempts to infuse full vitality into the constitutional rights of the people, as it would assure that such constitutional affirmation would not come at the expense of the country's isolation from the community of nations.

Unfortunately, neither the Dissenting Opinion nor the petitioners herein, have attempted to engage such perspective. A cursory inquiry into foreign jurisprudence and international law does not reveal that either of the two trends exist a the moment. In the United Kingdom, the concept of State interest immunity (formerly known as "Crown Privilege") guarantees that information, the disclosure of which would be prejudicial to the interests of the State, may not be disclosed. In the *Corfu Channel Case*,[1] the International Court of Justice affirmed the United Kingdom's refusal to turn over certain documents relevant to its dispute with Albania on the ground of national security. In Australia, the Attorney General's certification that information may not be disclosed for the reason that it would prejudice the security, defense or international relations of Australia is authoritative and must be adhered to by the court.[2]

According to commentaries on the law on evidence in Pakistan, "if the privilege is claimed on the ground that the document relates to the affairs of the State which means maters of public nature in which a State is concerned and disclosure of which will be prejudicial to public interest or endangers national defense or is detrimental to good diplomatic relations then the general rule [of judicial review] ceases to apply and the Court shall not inspect the document or show it to the opposite party unless the validity of the privilege claimed is determined."[3]

The International Criminal Tribunal for the former Yugoslavia, in a decision dated 18 July 1997, did recognize an international trend that in cases where national security or state secrets privilege is invoked, the courts may nonetheless assess the validity of the claim, thus requiring the disclosure of such documents to the courts or its designates.[4] Nonetheless, assuming that such a ruling is indicative of an emerging norm in international law, it only establishes that the invocation of state secrets cannot be taken at face value but

must be assessed ;by the courts. The Dissenting Opinion implicitly goes further and establishes that documents involved in diplomatic negotiations relating to treaty agreements should form part of the public record as a consequence of the constitutional right to information. I would have been more conformable to acknowledge such a doctrine if it is supported by a similar trend in foreign jurisprudence or international law.

Where the contracting nations to a treaty share a common concern for the basic confidentiality of treaty negotiations it is understandable that such concern may evolve unto a firm norm of conduct between them for as long as no conflict between them in regard to the treaty emerges. Thus, with respect to the subject treaty the Government of the Philippines should expectedly heed Japan's normal interest in preserving the confidentiality of the treaty negotiations and conduct itself accordingly in the same manner that our Government expects the Japanese Government to observe the protocol of confidentiality.

Even if a case arises between the contracting nations concerning the treaty it does not necessarily follow that the confidentiality of the treaty negotiations may be dispensed with and looked into by the tribunal hearing the case, except for the purposes mentioned in Article 32 of the Vienna Convention of the Law of Treaties. The Article provides:

Article 32
Supplementary means of interpretation

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leaves to a result which is manifestly absurd or unreasonable.

The aforequoted "preparatory work" or *travaux preparatiores* may be used either to confirm the meaning of the treaty or as an aid to interpretation where, following the application of Article 32, the meaning is ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.[5] The article may be limited in design as a rule in the interpretation of treaties.

Moreover, it is less clear what exactly classifies documents or correspondences as "preparatory work." Should such preparatory work have been cleared for disclosure by the negotiating countries? In 1995, the International Court of Justice, in *Qatar v. Bahrain,*[6] dealt with Bahrain's claim that following Article 32, the ICJ should adopt its theory concerning a territorial dispute based on the text of a documents headed "Minutes" signed at Doha on 25 December 1990 by the Ministers for Foreign Affairs of Bahrain, Qatar and Saudi Arabia. While the ICJ ultimately rejected Bahrain's contention on the ground that such minutes could not provide conclusive supplementary elements for the interpretation of

the text adopted, it is useful to dwell on the fact that such a document classified as "preparatory work" was, at the very least, expressly approved by the negotiating parties through their Foreign Ministers.

In the case at bar, it appears that the documents which the petitioners are particularly interested in their disclosure are the various drafts of the JPEPA. It is not clear whether such drafts were ever signed by the Philippine and Japanese governments, or incorporated in minutes or similar documents signed by the two governments. Even assuming that they were signed but without any intention to release them for public documentation, would such signatures already classify the minutes as part of "preparatory work" which, following the Vienna Convention, provides supplementary means of interpretation and should logically be within the realm of public disclosure? These are manifestly difficult questions which unfortunately, the petitioners and the Dissenting Opinion did not adequately address.

Finally, I wish to add that if the petitioner in this case is the Senate of the Philippines, and that it seeks the requested documents in the process of deliberating on the ratification of the treaty, I will vote for the disclosure of such documents, subject to mechanisms such as *in camera* inspection or executive sessions that would have accorded due regard to executive privilege. However, the reason behind such a position will be based not on the right to information, but rather, on the right of the Senate to fully exercise its constituent function of ratifying treaties.

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[1] United Kingdom v. Albania, 1949 I.C.J. 4 (Apr. 9).

[2] See paragraphs 144 & 145, **DECISION ON THE OBJECTION OF THE REPUBLIC OF CROATIA TO THE ISSUANCE OF *SUBPOENAE DUCES TECUM*,** International Criminal Tribunal for the former Yugoslavia (18 July 1997).

[3] See id.

[4] See note 2.

[5] International Law, ed. By Malcolm D. Evans, p. 188.

[6] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment,* ICJ Reports 995.
