EN BANC

[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 p:

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") 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." 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.

Amid speculations that the JPEPA might be signed by the Philippine government within December 2005, the present petition was filed on December 9, 2005. 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.

While the final text of the JPEPA has now been made accessible to the public since September 11, 2006, 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. 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 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. 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", 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
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> Entry into Force
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> 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. (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.

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 and contravenes other constitutional provisions on transparency, such as that on the policy of full public disclosure of all transactions involving public interest. 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. 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. (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, Chavez v. PCGG, Chavez v. Public Estate's Authority, and most recently in Senate v. Ermita 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. In the present case, the ground for respondents' claim of privilege is set forth in their Comment, viz.:

> . . . 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.
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> 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.
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> 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. (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." Even earlier, the same privilege was upheld in People's Movement for Press Freedom (PMPF) v. Manglapus 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. 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:
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> > "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.)."
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> xxx xxx xxx
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> 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.
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> 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. that the President is the sole organ of the nation in its negotiations with foreign countries, 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. . . (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" 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.:

> . . . [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. (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 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. 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:

> . . . [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. . . . (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." 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.

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, 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.

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 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 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.
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> 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.
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> 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— 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). 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.

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", 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.

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." 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 and Chavez v. PEA.

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. . . . (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.

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, Senate Select Committee on Presidential Campaign Activities v. Nixon, and In re Sealed Case.

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.

> . . . 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, 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. . . .
>
> xxx xxx xxx
>
> 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. . . . (Emphasis and underscoring supplied)

In re Sealed Case 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. . . . (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."

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. 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.

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 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. . . . (Italics in the original; emphasis and underscoring supplied)

The same doctrine was reiterated even more recently in Pimentel v. Executive Secretary 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. . . . (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 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. 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". 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. 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."

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 — 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.

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:

> . . . 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.

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. 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.

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 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, citing In re Sealed Case, "the issue of whether a President must personally invoke the [presidential communications] privilege remains an open question." U.S. v. Reynolds, 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 and the book entitled The

New American Government and Its Work 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 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. 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. 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, 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.

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 — which involved former President Nixon's invocation of executive privilege to challenge the constitutionality of the "Presidential Recordings and Materials Preservation Act" — 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 — 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." 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.

Ynares-Santiago and Austria-Martinez, JJ., join in the dissenting opinion of Chief Justice Puno.

Brion, J., took no part.

Puno, C.J., see dissenting opinion.

Carpio, J., see concurring opinion.

Azcuna, J., dissent in a separate opinion.

Tinga, J., in the result. see separate opinion.