SECOND DIVISION

G.R. No. 210858 – DEPARTMENT OF FOREIGN AFFAIRS, Petitioner, **v. BCA INTERNATIONAL CORPORATION,** Respondent.

Promulgated: 29 JUN 2016

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SEPARATE CONCURRING OPINION

LEONEN, *J.*:

This Petition for Review on Certiorari[1] assails the Resolution[2] dated September 2, 2013 and the Orders[3] dated October 11, 2013 and January 8, 2014 of Branch 146 of the Regional Trial Court of Makati City. The assailed judgments allowed the issuance of a subpoena *duces tecum* and subpoena *ad testificandum* to compel the officers of the Department of Foreign Affairs to testify and present documents to the *Ad Hoc* Arbitral Tribunal, which was constituted to resolve the issues between the parties.

On September 29, 2000, the Department of Foreign Affairs issued a Notice of Award to BCA International Corporation to undertake its Machine Readable Passport and Visa Project (Project).[4] In compliance with the Notice of Award, BCA International Corporation incorporated Philippine Passport Corporation to implement the Project.[5] On February 8, 2001, the Department of Foreign Affairs and Philippine Passport Corporation entered into a Build-Operate-Transfer Agreement.[6]

However, Department of Justice Opinion No. 10 dated March 4, 2002 stated that Philippine Passport Corporation had no personality to enter into the Build-Operate-Transfer Agreement since the Project was awarded to BCA International Corporation, not to Philippine Passport Corporation.[7] Thus, the Department of Foreign Affairs and BCA International Corporation entered into an Amended Build-Operate-Transfer Agreement[8] dated April 5,

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1 *Rollo*, pp. 17–45.
2 Id. at 51–56. The Resolution was penned by Judge Encarnacion Jaja G. Moya of Branch 146 of the Regional Trial Court, Makati City.
3 Id. at 46–48 and 50. The Orders were penned by Judge Encarnacion Jaja G. Moya of Branch 146 of the Regional Trial Court, Makati City.
4 Id. at 86.
5 Id.
6 Id. at 219–242, Annex 1 of Comment.
7 Id. at 193, Comment.
8 Id. at 85–119, Annex G of Petition.

2002[9] to replace BCA International Corporation as the party to the Agreement.[10]

During the implementation of the Project, dispute arose[11] between the parties. The Department of Foreign Affairs sought to terminate the Build-Operate-Transfer Agreement.[12] BCA International Corporation opposed the termination and filed a Request for Arbitration before the Philippine Dispute Resolution Center, Inc., invoking Section 19.02 of the Agreement:[13]

> ***Section 19.02. Failure to Settle Amicably*** - If the Dispute cannot be settled amicably within ninety (90) days by mutual discussion as contemplated under Section 19.01 herein, the Dispute shall be settled with finality by an arbitrage tribunal operating under International Law, hereinafter referred to as the "*Tribunal*," under the UNCITRAL Arbitration Rules contained in Resolution 31/98 adopted by the United Nations General Assembly on December 15, 1976, and entitled "*Arbitration Rules on the United Nations Commission on the International Trade Law*." The DFA and the BCA undertake to abide by and implement the arbitration award. The place of arbitration shall be Pasay City, Philippines, or such other place as may mutually be agreed upon by both parties. The arbitration proceeding shall be conducted in the English language.[14] (Emphasis in the original)

On June 29, 2009, the *Ad Hoc* Tribunal[15] was constituted to resolve the dispute.[16] On April 15, 2013, the *Ad Hoc* Tribunal granted BCA International Corporation's motion to apply for a subpoena to compel allegedly hostile witnesses.[17]

On May 15, 2013, BCA International Corporation filed before Branch 146 of the Regional Trial Court of Makati City a Petition[18] under Article 5.27(a)[19] of the Implementing Rules and Regulations of Republic Act No. 9285.[20] The Petition sought the issuance of a subpoena *ad testificandum* and

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9 Petitioner alleges that the Agreement was dated April 5, 2002 while respondent alleges that it was dated April 2, 2002. The Agreement is undated but was notarized on April 5, 2002.

10 *Rollo*, p. 193.

11 Petitioner alleges that respondent was financially incapable of implementing the Project (Id. at 19), while respondent alleges that petitioner committed numerous delays in the Project's implementation (Id. at 193–194).

12 Ponencia, pp. 1–2.

13 Id. at 2.

14 *Rollo*, p. 106.

15 Id. at 20. The Tribunal was composed of Dean Danilo Concepcion as Chair, and Dean Custodio O. Parlade and Professor Antonio P. Jamon as Members.

16 Ponencia, p. 2.

17 *Rollo*, p. 20.

18 Id. at 68–82.

19 DOJ Dept. Circ. No. 98 (2009), art. 5.27(a) provides:
Article 5.27. Court Assistance in Taking Evidence and Other Matters. (a) The arbitral tribunal or a party, with the approval of the arbitral tribunal may request from a court, assistance in taking evidence such as the issuance of subpoena *ad testificandum* and subpoena *duces tecum*, deposition taking, site or ocular inspection, and physical examination of properties. The court may grant the request within its competence and according to its rules on taking evidence.

20 Alternative Dispute Resolution Act of 2004 (2004).

a subpoena *duces tecum* to the following witnesses and the documents within their custody:[21]

Witness	Documents to be produced
1. Secretary of Foreign Affairs or his representative/s, specifically Undersecretary Franklin M. Ebdalin and Ambassador Belen F. Anota	a. Request for Proposal dated September 10, 1999 for the MRP/V Project; b. Notice of Award dated September 29, 2000 awarding the MRP/V Project in favor of BCA and requiring BCA to incorporate a Project Company to implement the MRP/V Project; c. Department of Foreign Affairs Machine Readable and Passport and Visa Project Build-Operate-Transfer Agreement dated February 8, 2001; d. Department of Foreign Affairs Machine Readable Passport and Visa Project Amended Build-Operate-Transfer Agreement dated April 5, 2002; e. Documents, records, papers and correspondence between DFA and BCA regarding the negotiations for the contract of lease of the PNB building, which was identified in the Request for Proposal as the Central Facility Site, and the failure of said negotiations; f. Documents, records, reports, studies, papers and correspondence between DFA and BCA regarding the search for alternative Central Facility Site; g. Documents, records, papers and correspondence between DFA and BCA regarding the latter's submission of the Project Master Plan (Phase One of the MRP/V Project); h. Documents, records, papers and correspondence among DFA, DFA's Project Planning Team, Questronix Corporation, MRP/V Advisory Board and other related government agencies, and BCA regarding the recommendation for the issuance of the Certificate of Acceptance in favor of BCA; i. Certificate of Acceptance for Phase One dated June 9, 2004 issued by DFA; j. Documents, records, papers and correspondence between DFA and BCA regarding the approval of the Star Mall complex as the Central Facility Site; k. Documents, records, papers and correspondence among DFA, Questronix Corporation, MRP/V Advisory Board and other related government agencies, and BCA regarding the recommendation for the approval of the Star Mall complex as the Central Facility Site; l. Documents, records, papers and correspondence between DFA and BCA regarding the DFA's request for BCA to terminate its Assignment Agreement with Philpass, including BCA's compliance therewith; m. Documents, records, papers and correspondence between DFA and BCA regarding the DFA's demand for BCA to prove its financial capability to

[21] Ponencia, p. 2.

	implement the MRP/V Project, including the compliance therewith by BCA; n. Documents, records, papers and correspondence between DFA and BCA regarding the DFA's attempt to terminate the Amended BOT Agreement, including BCA's response to DFA and BCA's attempts to mutually discuss the matter with DFA; o. Documents, records, papers and correspondence between DFA and MRP/V Advisory Board, DTI-BOT Center, Department of Finance and Commission on Audit regarding the delays in the implementation of the MRP/V Project, DFA's requirement for BCA to prove its financial capability, and the opinions of the said government agencies in relation to DFA's attempt to terminate the Amended BOT Agreement; and p. Other related documents, records, papers and correspondence.
2. Secretary of Finance or his representative/s, specifically former Secretary of Finance Juanita D. Amatong	a. Documents, records, papers and correspondence between DFA and Department of Finance regarding the DFA's requirement for BCA to prove its financial capability to implement the MRP/V Project and its former opinion thereon; b. Documents, records, papers and correspondence between DFA and DOF regarding BCA's compliance with DFA's demand for BCA to further prove its financial capability to implement the MRP/V Project; c. Documents, records, papers and correspondence between DFA and DOF regarding the delays in the implementation of the MRP/V Project; d. Documents, records, papers and correspondence between DFA and DOF regarding the DFA's attempted termination of the Amended BOT Agreement; and e. Other related documents, records, papers and correspondence.
3. Chairman of the Commission on Audit or her representative/s specifically Ms. Iluminada M. V. Fabroa (Director IV)	a. Documents, records, papers and correspondence between DFA and COA regarding the COA's conduct of a sectoral performance audit on the MRP/V Project; b. Documents, records, papers and correspondence specifically between DFA and COA regarding the delays in and its recommendation to fast-track the implementation of the MRP/V Project; c. Documents, records, papers and correspondence between DFA and COA regarding COA's advice to cancel the Assignment Agreement between BCA and Philpass "for being contrary to existing laws and regulations and DOJ opinion"; d. Documents, records, papers and correspondence between DFA and COA regarding DFA's attempted termination of the Amended BOT Agreement; and e. Other related documents, records, papers and correspondence.
4. Executive Director or any	a. Documents, records, papers and correspondence between DFA and BOT Center regarding the delays

officer or representative of the Department of Trade and Industry Build-Operate-Transfer Center, specifically Messengers Noel Eli B. Kintanar, Rafaelito H. Taruc and Luisito Ucab	in the implementation of the MRP/V Project, including DFA's delay in the issuance of the Certificate of the Department Acceptance for Phase One of the MRP/V Project and in approving the Central Facility Site at the Star Mall complex; b. Documents, records, papers and correspondence between DFA and BOT Center regarding BCA's financial capability and the BOT Center's opinion on DFA's demand for BCA to further prove its financial capability to implement the MRP/V Project; c. Documents, records, papers and correspondence between DFA and BOT Center regarding the DFA's attempt to terminate the Amended BOT Agreement, including the BOT Center's unsolicited advice dated December 23, 2005 stating that the issuance of the Notice of Termination was "precipitate, and done without first carefully ensuring that there were sufficient grounds to warrant such an issuance" and was "devoid of merit"; d. Documents, records, papers and correspondence between DFA and BOT Center regarding the DFA's unwarranted refusal to approve BCA's proposal to obtain the required financing by allowing the entry of a "strategic investor"; and e. Other related documents, records, papers and correspondence.
5. Chairman of the DFA MRP/V Advisory Board or his representative/s, specifically DFA Undersecretary Franklin M. Ebdalin and MRP/V Project Manager, specifically Atty. Voltaire Mauricio	a. Documents, records, papers and correspondence between DFA and the MRP/V Advisory Board regarding BCA['s] performance of its obligations for Phase One of the MRP/V Project, the Advisory Board's recommendation for the issuance of the Certificate of Acceptance of Phase One of the MRP/V Project and its preparation of the draft of the Certificate of Acceptance; b. Documents, records, papers and correspondence between DFA and the MRP/V Advisory Board regarding the latter's recommendation for the DFA to approve the Star Mall complex as the Central Facility Site; c. Documents, records, papers and correspondence between DFA and the MRP/V Advisory Board regarding BCA's request to allow the investment of S.F. Pass International in Philpass; d. Documents, records, papers and correspondence between DFA and the MRP/V Advisory Board regarding BCA's financial capability and the MRP/V Advisory Board's opinion on DFA's demand for BCA to further prove its financial capability to implement the MRP/V Project; e. Documents, records, papers and correspondence between DFA and the MRP/V Advisory Board regarding the DFA's attempted termination of the

	Amended BOT Agreement; and f. Other related documents, records, papers and correspondence.[22]

In its Comment[23] dated July 1, 2013, the Department of Foreign Affairs alleged that the information sought from the proposed witnesses and documents were protected by the deliberative process privilege.[24]

On September 2, 2013, the Regional Trial Court issued the Resolution[25] granting the Petition pursuant to Rule 9.8[26] of the Special Rules of Court on Alternative Dispute Resolution.[27] The trial court held that the information sought to be produced was no longer protected by the deliberative process privilege.[28] Citing *Chavez v. Public Estates Authority*,[29] it found that the Department of Foreign Affairs not only made a definite proposition but had already entered into a contract.[30] Thus, any evidence sought to be produced was no longer covered under the privilege.[31]

On September 6, 2013, the trial court issued a subpoena *duces tecum* and a subpoena *ad testificandum* ordering the persons listed in the Petition to appear and bring the required documents before the *Ad Hoc* Tribunal on October 14, 15, 16, and 17, 2013.[32] On September 12, 2013, the Department of Foreign Affairs filed a Motion to Quash Subpoena *Duces Tecum* and *Ad Testificandum*,[33] which was opposed[34] by BCA International Corporation.

On October 11, 2013, the Regional Trial Court issued the Order[35] denying the Motion to Quash since it was actually a motion for reconsideration, which was prohibited under Rule 9.9[36] of the Special Rules of Court on Alternative Dispute Resolution.[37] The Department of Foreign Affairs moved for reconsideration[38] of this Order.

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22 Id. at 2–5.
23 *Rollo*, pp. 134–146.
24 Id. at 26.
25 Id. at 51–56.
26 A.M. No. 07-11-08-SC (2009), rule 9.8 provides:
Rule 9.8. *Court action.* - If the evidence sought is not privileged, and is material and relevant, the court shall grant the assistance in taking evidence requested and shall order petitioner to pay costs attendant to such assistance.
27 A.M. No. 07-11-08-SC (2009).
28 *Rollo*, p. 52.
29 433 Phil. 506 (2002) [Per J. Carpio, En Banc].
30 *Rollo*, p. 55.
31 Id.
32 Ponencia, p. 6.
33 *Rollo*, pp. 147–165.
34 Id. at 166–177.
35 Id. at 46–48.
36 A.M. No. 07-11-08-SC (2009), rule 9.9 provides:
Rule 9.9. *Relief against court action.* - The order granting assistance in taking evidence shall be immediately executory and not subject to reconsideration or appeal. If the court declines to grant assistance in taking evidence, the petitioner may file a motion for reconsideration or appeal.
37 *Rollo*, p. 48.
38 Id. at 57–64.

On October 14, 15, 16, and 17, 2013, Former Undersecretary of Foreign Affairs Franklin D. Ebdalin, Project Manager Atty. Voltaire Mauricio, and Luisito Ubac of the Department of Trade and Industry testified before the *Ad Hoc* Tribunal.[39] On January 8, 2014, the trial court issued the Order[40] denying the Department of Foreign Affairs' Motion for Reconsideration on the ground that the appearance of the witnesses before the Tribunal rendered the action moot.[41]

Aggrieved, the Department of Foreign Affairs filed before this Court a Petition for Review with Urgent Prayer for the Issuance of a Temporary Restraining Order and/or Writ of Preliminary Injunction.[42] In the Resolution dated April 2, 2014, this Court issued a temporary restraining order enjoining the *Ad Hoc* Tribunal from taking cognizance of the witnesses' testimonies.[43]

The Department of Foreign Affairs argues that the Regional Trial Court erred in applying the Implementing Rules and Regulations of Republic Act No. 9285 and the Special Rules of Court on Alternative Dispute Resolution, considering that both parties agreed to be bound by the Arbitration Rules on the United Nations Commission on the International Trade Law (1976 UNCITRAL Arbitration Rules).[44] It further argues that the evidence sought by BCA International Corporation is covered by the deliberative process privilege.[45]

BCA International Corporation, on the other hand, argues that this Court has no jurisdiction to intervene in a private arbitration under (a) Article 5[46] of the UNCITRAL Model Law; (b) Article 5.4[47] of the Implementing Rules and Regulations of Republic Act No. 9285; and (c) Rule 1.1[48] of the Special Rules of Court on Alternative Dispute Resolution.[49]

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39 Id. at 28.
40 Id. at 50.
41 Id.
42 Id. at 17–45.
43 Ponencia, p. 6.
44 *Rollo*, 29–31.
45 Id. at 32–40.
46 United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006* <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html> (visited June 27, 2016). Article 5 provides:
Article 5. Extent of court intervention
In matters governed by this Law, no court shall intervene except where so provided in this Law.
47 DOJ Dept. Circ. No. 98 (2009), art. 5.4 provides:
Article 5.4. Extent of Court Intervention. In matters governed by this Chapter, no court shall intervene except in accordance with the Special ADR Rules.
48 A.M. No. 07-11-08-SC (2009), rule 1.1 provides:
Rule 1.1. *Subject matter and governing rules.* - The Special Rules of Court on Alternative Dispute Resolution (the "Special ADR Rules") shall apply to and govern the following cases:
a. Relief on the issue of Existence, Validity, or Enforceability of the Arbitration Agreement;
b. Referral to Alternative Dispute Resolution ("ADR");

BCA International Corporation insists that even if this Court did have jurisdiction, the evidence sought from the Department of Foreign Affairs would not be a state secret that, if revealed, would injure the public interest.[50] It argues that in any case, the Department of Foreign Affairs waived its right to confidentiality pursuant to Section 20.03 of the Amended Build-Operate-Transfer Agreement.[51]

From the arguments of the parties, the issues for this Court's resolution are:

First, which arbitration rules should apply to this case; and

Second, whether the evidence sought by BCA International Corporation from the Department of Foreign Affairs is covered by the deliberative process privilege.

I

Both parties stipulated in the Amended Build-Operate-Transfer Agreement that in case of dispute, the matter shall be brought to arbitration under the 1976 UNCITRAL Arbitration Rules, thus:

> ***Section 19.02. Failure to Settle Amicably*** - If the Dispute cannot be settled amicably within ninety (90) days by mutual discussion as contemplated under Section 19.01 herein, the Dispute shall be settled with finality by an arbitrage tribunal operating under International Law, hereinafter referred to as the "*Tribunal*," under the UNCITRAL Arbitration Rules contained in Resolution 31/98 adopted by the United Nations General Assembly on December 15, 1976, and entitled "*Arbitration Rules on the United Nations Commission on the International Trade Law*." The DFA and the BCA undertake to abide by and implement the arbitration award. The place of arbitration shall be Pasay City, Philippines, or such other place as may mutually be agreed upon by both parties. The arbitration proceeding shall be conducted in the English language.[52] (Emphasis in the original)

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c. Interim Measures of Protection;
d. Appointment of Arbitrator;
e. Challenge to Appointment of Arbitrator;
f. Termination of Mandate of Arbitrator;
g. Assistance in Taking Evidence;
h. Confirmation, Correction or Vacation of Award in Domestic Arbitration;
i. Recognition and Enforcement or Setting Aside of an Award in International Commercial Arbitration;
j. Recognition and Enforcement of a Foreign Arbitral Award;
k. Confidentiality/Protective Orders; and
l. Deposit and Enforcement of Mediated Settlement Agreements.

49 *Rollo*, pp. 198–211.
50 Id. at 212.
51 Id. at 213.
52 Id. at 106.

Article 33(1) of the 1976 UNCITRAL Arbitration Rules mandates that the arbitration tribunal shall apply the law designated by the parties. If the parties fail to designate the applicable law, the applicable law shall be that which is determined by the conflict of laws:

> **Article 33**
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> 1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

On the issue of which law applies in this case, I concur with the ponencia.

Since both parties are Filipino and did not designate the applicable law in the Agreement dated April 5, 2002, the applicable law is Republic Act No. 876.[53] Section 14 of Republic Act No. 876 allows the arbitrators to issue subpoenas at any time before the issuance of the award:

> SEC. 14. *Subpoena and subpoena duces tecum.*—Arbitrators shall have the power to require any person to attend a hearing as a witness. They shall have the power to subpoena witnesses and documents when the relevancy of the testimony and the materiality thereof has been demonstrated to the arbitrators. Arbitrators may also require the retirement of any witness during the testimony of any other witness. All of the arbitrators appointed in any controversy must attend all the hearings in that matter and hear all the allegations and proofs of the parties; but an award by the majority of them is valid unless the concurrence of all of them is expressly required in the submission or contract to arbitrate. The arbitrator or arbitrators shall have the power at any time, before rendering the award, without prejudice to the rights of any party to petition the court to take measures to safeguard and/or conserve any matter which is the subject of the dispute in arbitration.

Republic Act No. 9285,[54] its Implementing Rules and Regulations,[55] and the Special Rules on Alternative Dispute Resolution[56] may also apply since these are procedural laws that may be applied retroactively.[57]

II

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[53] The Arbitration Law (1953).
[54] Alternative Dispute Resolution Act of 2004 (2004).
[55] DOJ Dept. Circ. No. 98 (2009).
[56] A.M. No. 07-11-08-SC (2009).
[57] See *Korea Technologies, Co., Ltd. v. Hon. Lerma*, 566 Phil. 1, 27 (2008) [Per J. Velasco, Jr., Second Division].

The law recognizes the fundamental right of the People to be informed of matters of public concern. Article 3, Section 7 of the Constitution provides:

> ARTICLE III
> Bill of Rights
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> . . . .
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> SECTION 7. 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.

Similarly, Article II, Section 28 of the Constitution provides:

> ARTICLE II
> Declaration of Principles and State Policies
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> . . . .
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> SECTION 28. 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.

The right to information is not absolute and is "subject to limitations as may be provided by law."[58] One of the limitations imposed on the right to information is that of executive privilege.

In *Almonte v. Vasquez*,[59] Former Associate Justice Vicente V. Mendoza introduced the concept of governmental privilege against public disclosure:

> At common law a governmental privilege against disclosure is recognized with respect to state secrets bearing on military, diplomatic and similar matters. This privilege is based upon public interest of such paramount importance as in and of itself transcending the individual interests of a private citizen, even though, as a consequence thereof, the plaintiff cannot enforce his legal rights.
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> In addition, in the litigation over the Watergate tape subpoena in 1973, the U.S. Supreme Court recognized the right of the President to the confidentiality of his conversations and correspondence, which it likened to "the claim of confidentiality of judicial deliberations." Said the Court in *United States v. Nixon*:

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[58] CONST., art. III, sec. 7.
[59] 314 Phil. 150 (1995) [Per J. Mendoza, En Banc].

> The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of the government and inextricably rooted in the separation of powers under the Constitution. . . .
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> Thus, the Court for the first time gave executive privilege a constitutional status and a new name, although not necessarily a new birth.
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> . . . .
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> On the other hand, where the claim of confidentiality does not rest on the need to protect military, diplomatic or other national security secrets but on a general public interest in the confidentiality of his conversations, courts have declined to find in the Constitution an absolute privilege of the President against a subpoena considered essential to the enforcement of criminal laws.[60]

Executive privilege has been defined as "the power of the Government to withhold information from the public, the courts, and the Congress"[61] or "the right of the President and high-level executive branch officers to withhold information from Congress, the courts, and ultimately the public."[62]

Executive privilege has been further defined in *Neri v. Senate Committee on Accountability of Public Officers and Investigations, et al.*[63] to encompass two (2) kinds of privileged information: (1) presidential communications privilege and (2) deliberative process privilege. Thus:

> [T]here are two (2) kinds of executive privilege: one is the presidential communications privilege and, the other is the deliberative process privilege. The former pertains to "communications, documents or other materials that reflect presidential decision-making and deliberations and

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60 Id. at 167–171, *citing* Anno., *Government Privilege Against Disclosure of Official Information*, 95 L. Ed. §§3-4 and 7, pp. 427–429, 434; *United States v. Nixon*, 418 U.S. 683, 708-9, 41 L. Ed. 2d 1039, 1061-4 (1973); Freund, *The Supreme Court 1973 Term — Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 18–35 (1974); *United States v. Nixon*, 418 U.S. 683, 41 L. Ed. 2d 1039 (1974); and *Nixon v. Administrator of General Services*, 433 U.S. 425, 53 L. Ed. 2d 867 (1977).

61 *Senate v. Ermita*, 522 Phil. 1, 37 (2006) [Per J. Carpio Morales, En Banc], *citing* B. Schwartz, *Executive Privilege and Congressional Investigatory Power*, 47 Cal. L. Rev. 3.

62 Id. at 645, *citing* M. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069.

63 572 Phil. 554 (2008) [Per J. Leonardo-De Castro, En Banc].

> that the President believes should remain confidential." The latter includes "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."
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> Accordingly, they are characterized by marked distinctions. Presidential communications privilege applies to decision-making of the President while, the deliberative process privilege, to decision-making of executive officials. The first is rooted in the constitutional principle of separation of power and the President's unique constitutional role; the second on common law privilege. Unlike the deliberative process privilege, the presidential communications privilege applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones. As a consequence, congressional or judicial negation of the presidential communications privilege is always subject to greater scrutiny than denial of the deliberative process privilege.[64]

Unlike state secrets, the purpose of the privilege is not for the protection of national security.[65] The purpose is to protect the free exchange of ideas between those tasked with decision-making in the executive branch and to prevent public confusion before an agency has adopted a final policy decision:

> Courts have identified three purposes in support of the privilege: (1) it protects candid discussions within an agency; (2) it prevents public confusion from premature disclosure of agency opinions before the agency establishes final policy; and (3) it protects the integrity of an agency's decision; the public should not judge officials based on information they considered prior to issuing their final decisions. For the privilege to be validly asserted, the material must be pre-decisional and deliberative.[66]

Information is pre-decisional if no final decision has been made. On the other hand, information is deliberative if it exposes the decision-making process of the agency:

> A document is "predecisional" under the deliberative process privilege if it precedes, in temporal sequence, the decision to which it relates. In other words, communications are considered predecisional if they were made in the attempt to reach a final conclusion.
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> A material is "deliberative," on the other hand, if it reflects the give-and-take of the consultative process. The key question in determining whether the material is deliberative in nature is whether disclosure of the information would discourage candid discussion within the agency. If the disclosure of the information would expose the government's decision-making process in a way that discourages candid

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64 Id. at 645, *citing In Re: Sealed Case No. 963124*, June 17, 1997.

65 *See Akbayan v. Aquino*, 580 Phil. 422, 482 (2008) [Per J. Carpio Morales, En Banc].

66 C.J. Puno, Dissenting Opinion in *Neri v. Senate Committee on the Accountability of Public Officers*, 572 Phil. 554, 812 (2008) [Per J. Leonardo-De Castro, En Banc], *citing Kaiser Aluminum and Chemical Corp.*, 433 US 425 (1977) and *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 12 (D.D.C. 1995) (citation omitted), aff'd, 76 F.3d 1232 (D.C. Cir. 1996).

> discussion among the decision-makers (thereby undermining the courts' ability to perform their functions), the information is deemed privileged.[67]

Chavez does not mention deliberative process privilege per se. However, it differentiates the nature and duration of governmental privilege from that of public disclosure:

> Information, however, on on-going evaluation or review of bids or proposals being undertaken by the bidding or review committee is not immediately accessible under the right to information. While the evaluation or review is still on-going, there are "no official acts, transactions, or decisions" on the bids or proposals. However, *once the committee makes its official recommendation, there arises a "definite proposition" on the part of the government. From this moment, the public's right to information attaches, and any citizen can access all the non-proprietary information leading to such definite proposition.* In *Chavez v. PCGG*, the Court ruled as follows:
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> > Considering the intent of the framers of the Constitution, we believe that it is incumbent upon the PCGG and its officers, as well as other government representatives, to disclose sufficient public information on any proposed settlement they have decided to take up with the ostensible owners and holders of ill-gotten wealth. Such information, though, must pertain to definite propositions of the government, not necessarily to intra-agency or inter-agency recommendations or communications during the stage when common assertions are still in the process of being formulated or are in the "exploratory" stage. There is need, of course, to observe the same restrictions on disclosure of information in general, as discussed earlier — such as on matters involving national security, diplomatic or foreign relations, intelligence and other classified information.
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> . . . .
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> There is no claim by PEA that the information demanded by petitioner is privileged information rooted in the separation of powers. The information does not cover Presidential conversations, correspondences, or discussions during closed-door Cabinet meetings which, like internal deliberations of the Supreme Court and other collegiate courts, or executive sessions of either house of Congress, are recognized as confidential. This kind of information cannot be pried open by a co-equal branch of government. *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.* This is not the situation in the instant case.

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[67] *In Re: Production of Court Records and Documents*, February 14, 2012 <http://sc.judiciary.gov.ph/jurisprudence/2012/february2012/notice.pdf> 17 [Unsigned Resolution, En Banc], *citing Electronic Frontier Foundation v. US Department of Justice*, 2011 WL 596637 and *NLRB v. Sears, Roebuck & Co.*, 421 US 151.

> 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.* Congress has also prescribed other limitations on the right to information in several legislations.[68] (Emphasis supplied)

Thus, for the information to be covered by the deliberative process privilege, it must be (1) pre-decisional and (2) deliberative. The privilege ends when the executive agency adopts a definite proposition. *Akbayan v. Aquino*,[69] however, qualified that the privilege may continue *even after* a definite proposition has been made if the information concerns matters of national security, diplomatic relations, and public order or if public disclosure has been limited by law.[70]

III

In this case, the Regional Trial Court issued a subpoena *duces tecum* and a subpoena *ad testificandum* on the basis that the deliberative process privilege does not apply since the Department of Foreign Affairs already reached a definite proposition when it entered into the contract.

Chavez defines definite proposition as an "official recommendation"[71] or "official acts, transactions, or decisions"[72] without need of a consummated contract:

> Contrary to AMARI's contention, the commissioners of the 1986 Constitutional Commission understood that the right to information "contemplates inclusion of negotiations leading to the consummation of the transaction." Certainly, a consummated contract is not a requirement for the exercise of the right to information. Otherwise, the people can never exercise the right if no contract is consummated, and if one is consummated, it may be too late for the public to expose its defects.

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68 *Chavez v. Public Estate Authority*, 433 Phil. 506, 531–535 (2002) [Per J. Carpio, En Banc], *citing Chavez v. PCGG*, 360 Phil. 133, 166–167 (1998) [Per J. Panganiban, First Division]; *Aquino-Sarmiento v. Morato*, 280 Phil. 560, 570 (1991) [Per J. Bidin, En Banc]; *Almonte v. Vasquez*, 314 Phil. 150, 167 (1995) [Per J. Mendoza, En Banc]. *See Peoples Movement for Press Freedom, et al. v. Hon. Raul Manglapus*, G.R. No. 84642, April 13, 1988 [Unsigned Resolution, En Banc]. *See also* TAX CODE, sec. 270; Rep. Act No. 8800 (2000), sec. 14; Rep. Act No. 8504 (1998), sec. 3(n); Rep. Act No. 8043 (1995), sec. 6(j); and Rep. Act No. 7942 (1995), sec. 94(f).

69 580 Phil. 422 (2008) [Per J. Carpio Morales, En Banc].

70 Id. at 481–482, *citing Chavez v. Public Estate Authority*, 433 Phil. 506, 531–533 (2002) [Per J. Carpio, En Banc]; *Chavez v. PCGG*, 360 Phil. 133, 160–162 (1998) [Per J. Panganiban, First Division]; *Aquino-Sarmiento v. Morato*, 280 Phil. 560, 568–569 (1991) [Per J. Bidin, En Banc]; *Almonte v. Vasquez*, 314 Phil. 150, 167–171 (1995) [Per J. Mendoza, En Banc]; and *Peoples Movement for Press Freedom, et al. v. Hon. Raul Manglapus*, G.R. No. 84642, April 13, 1988 [Unsigned Resolution, En Banc].

71 *Chavez v. Public Estate Authority,* 433 Phil. 506, 532 (2002) [Per J. Carpio, En Banc]

72 Id.

> Requiring a consummated contract will keep the public in the dark until the contract, which may be grossly disadvantageous to the government or even illegal, becomes a *fait accompli*. This negates the State policy of full transparency on matters of public concern, a situation which the framers of the Constitution could not have intended. Such a requirement will prevent the citizenry from participating in the public discussion of any proposed contract, effectively truncating a basic right enshrined in the Bill of Rights. We can allow neither an emasculation of a constitutional right, nor a retreat by the State of its avowed "policy of full disclosure of all its transactions involving public interest."
>
> The right covers three categories of information which are "matters of public concern," namely: (1) official records; (2) documents and papers pertaining to official acts, transactions and decisions; and (3) government research data used in formulating policies. The first category refers to any document that is part of the public records in the custody of government agencies or officials. The second category refers to documents and papers recording, evidencing, establishing, confirming, supporting, justifying or explaining official acts, transactions or decisions of government agencies or officials. The third category refers to research data, whether raw, collated or processed, owned by the government and used in formulating government policies.
>
> The information that petitioner may access on the renegotiation of the JVA includes evaluation reports, recommendations, legal and expert opinions, minutes of meetings, terms of reference and other documents attached to such reports or minutes, all relating to the JVA. However, the right to information does not compel PEA to prepare lists, abstracts, summaries and the like relating to the renegotiation of the JVA. The right only affords access to records, documents and papers, which means the opportunity to inspect and copy them. One who exercises the right must copy the records, documents and papers at his expense. The exercise of the right is also subject to reasonable regulations to protect the integrity of the public records and to minimize disruption to government operations, like rules specifying when and how to conduct the inspection and copying.
>
> The right to information, however, does not extend to matters recognized as privileged information under the separation of powers. The right does not also apply to information on military and diplomatic secrets, information affecting national security, and information on investigations of crimes by law enforcement agencies before the prosecution of the accused, which courts have long recognized as confidential. The right may also be subject to other limitations that Congress may impose by law.[73]

The Department of Foreign Affairs claims that the definite propositions in this case concern the *implementation* and the *proposed termination* of the Amended Build-Operate-Transfer Agreement, and not

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[73] Id. at 532–534, *citing Chavez v. PCGG*, 360 Phil. 133, 166–167 (1998) [Per J. Panganiban, First Division]; *Legaspi v. Civil Service Commission*, 234 Phil. 521, 531–533 (1987) [Per J. Cortes, En Banc]; *Almonte v. Vasquez*, 314 Phil. 150, 167–171 (1995) [Per J. Mendoza, En Banc]; and *Aquino-Sarmiento v. Morato*, 280 Phil. 560, 568–569 (1991) [Per J. Bidin, En Banc].

necessarily the signing of the Agreement.[74] However, according to the Certificate of Acceptance of Phase I,[75] the Department of Foreign Affairs officially approved the implementation of the Agreement.[76] The Department of Foreign Affairs also alleges that it was "constrained to cancel the agreement."[77] Thus, the Department of Foreign Affairs made official recommendations concerning the implementation and termination of the Agreement. It should cease to be covered by the deliberative process privilege.

There is a need to further explain what constitutes definite propositions within the context of deliberative process privilege. *Chavez* did not require a consummated contract and held that even a proposed contract could be considered a definite proposition if there were official acts, transactions, and decisions that precipitated it. There is a lacuna, as in this case, as to what may constitute definite propositions when a perfected contract is in the process of being consummated.

IV

The deliberative process privilege may have already been waived by the Department of Foreign Affairs in the Amended Build-Operate-Transfer Agreement.

The deliberative process privilege is lesser in scope than the presidential communications privilege. Its coverage and duration are limited. It stands to reason that the privilege may be waived unless the information concerns national security, diplomatic relations, or public order.

In Sections 20.02 and 20.03 of the Amended Build-Operate-Transfer Agreement, the parties agreed to keep information relating to negotiations confidential, subject to certain limitations:

> ***Section 20.02***. None of the parties shall, at any time, before or after the expiration or sooner termination of this Amended BOT Agreement, without the consent of the other party, divulge or suffer or permit its officers, employees, agents or contractors to divulge to any person, other than any of its respective officers or employees who require the same to enable them to properly carry out their duties, any of the contents of this Amended BOT Agreement or any information relating to the negotiations concerning the operations, contracts, commercial or financial arrangements or affair of the other parties hereto. Documents marked "*CONFIDENTIAL*" or the like, providing that such material shall be kept

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74 *Rollo*, p. 38.
75 Id. at 283.
76 Id.
77 Id. at 19.

> confidential, and shall constitute prima facie evidence that such information contained therein is subject to the terms of this provision.
>
> ***Section 20.03***. The restrictions imposed in Section 20.02 herein shall not apply to the disclosure of any information:
>
> A. Which may now or hereafter come into public knowledge otherwise than as a result of a breach of an undertaking of confidentiality, or which is obtainable with no more than reasonable diligence from sources other than any of the parties hereto;
>
> B. Which is required by law to be disclosed to a [sic] any person who is authorized by law to receive the same;
>
> C. *To a court arbitrator or administrative tribunal the course of proceedings before it to which the disclosing party is party*; or
>
> D. To any consultants, banks, financiers, or legal or financial advisors of the disclosing party.[78] (Emphasis supplied)

The Department of Foreign Affairs was a party to the Amended Build-Operate-Transfer Agreement. While it stipulated that all matters concerning the contract were confidential, it similarly stipulated that information could be disclosed to a court arbitrator. If it intended to exercise its privilege to keep *all* matters concerning the Amended Build-Operate-Transfer Agreement including negotiations concerning its implementation confidential, it should not have agreed to the exceptions in Section 20.03 of the Agreement.

This stipulation, however, only affects disclosures made by officers of the Department of Foreign Affairs. The Department of Finance and the Commission on Audit were not parties to the Amended Build-Operate-Transfer Agreement; hence, they could still validly invoke the deliberative process privilege.

V

The deliberative process privilege may not always apply to arbitration proceedings under Republic Act No. 9285.

The deliberative process privilege is a privilege that an officer of an executive department may invoke to prevent *public* disclosure of any information that may compromise its decision-making capability. Its purpose "rests most fundamentally on the belief that were agencies forced to operate in a fishbowl, frank exchange of ideas and opinions would cease and

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[78] *Rollo*, pp. 106–107.

the quality of administrative decisions would consequently suffer."[79] This is to prevent subjecting an agency's decision-making process to public opinion before any definite policy action has been made.

Thus, the privilege may lose its purpose when the disclosure is not to the public. Here, the Department of Foreign Affairs opposed the disclosure of information to the *Ad Hoc* Tribunal by invoking the privilege, but the proceedings of the *Ad Hoc* Tribunal are not made public. Republic Act No. 9285 requires confidentiality in all arbitration proceedings:

> SEC. 23. *Confidentiality of Arbitration Proceedings.*—The arbitration proceedings, including the records, evidence and the arbitral award, shall be considered confidential and shall not be published except (1) with the consent of the parties, or (2) for the limited purpose of disclosing to the court of relevant documents in cases where resort to the court is allowed herein: *Provided, however*, That the court in which the action or the appeal is pending may issue a protective order to prevent or prohibit disclosure of documents or information containing secret processes, developments, research and other information where it is shown that the applicant shall be materially prejudiced by an authorized disclosure thereof. (Emphasis in the original)

Thus, considering that the records of the *Ad Hoc* Tribunal are confidential in nature, there could not have been any need for the Department of Foreign Affairs to invoke the deliberative process privilege.

ACCORDINGLY, I vote to **GRANT** the Petition

MARVIC M.V.F. LEONEN
Associate Justice

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[79] C.J. Puno, Dissenting Opinion in *Neri v. Senate Committee on the Accountability of Public Officers*, 572 Phil. 554, 811 (2008) [Per J. Leonardo-De Castro, En Banc], *citing* R. Iraola, *Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions*, 87 IOWA L. REV., 1559, 1577 (August, 2002).