

REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office

*Unit 2506 Raffles Corporate Center, Emerald Avenue, Ortigas Center, Pasig City
Telefax Nos. (02) 900-6741 to 44*

NPM No. 149-2004

November 26, 2004

MR. GREGORIO Y. TAN JR.
Deputy Administrator and OIC
National Food Authority
Matimyas Bldg. E. Rodriguez Sr. Ave.
Quezon City

**Re : Negotiations Pursuant to the World Trade Organization Agreement on
Agriculture (WTO-AoA)**

Dear Mr. Tan:

This has reference to your letter dated 24 September 2004, requesting for clarification on Republic Act No. 9184 (R.A. 9184) and its Implementing Rules and Regulations Part A (IRR-A) vis-à-vis the World Trade Organization Agreement on Agriculture (WTO-AoA).¹

In your letter, reference was made to the decision of the Philippine Government to negotiate for the extension of the special treatment for rice pursuant to paragraph 8 and 9 of Annex 5 of the Agreement on Agriculture (AoA) or to maintain the Quantitative Restrictions (QR) for rice imports. Under the WTO-AoA, the continuation of the special treatment would need to undergo a process of negotiations with other interested/concerned WTO members where they may obtain additional concessions from the Philippines in exchange for granting QR maintenance.

Apparently, in an earlier concluded negotiation, several countries have expressed their desire to be given country specific allocations of the Philippines minimum access volume (MAV). Significantly, under the present system, importation of rice is done from whichever country provides the best terms and there is no country specific allocation for the MAV.

In light of the foregoing considerations, clarification is sought on the following issues:

1. Whether the AoA executed pursuant to the WTO of which the Philippine government is a signatory is considered an executive/international agreement,

¹ Per NFA's representation, the Philippine government is a signatory to the WTO - Agreement on Agriculture.

hence, may fall within the purview of an executive agreement which must be observed under Sec. 4 of R.A. 9184 and Sec. 4.2 of the IRR-A;

2. Whether negotiated procurement as an alternative mode of procurement can be utilized if said agreement is considered an executive agreement or a government-to-government transaction?
3. Whether a bilateral agreement is needed to reflect the commitment of the Philippine government to grant a country specific allocation of the MAV. If so, can the agreement be signed by the Secretary of the Department of Agriculture?
4. Whether or not the Philippine government can make a commitment without violating R.A. 9184 and/or other laws or government regulations.
5. If the answer to query No. 4 is in the negative, what remedies or options are legally available to the Philippine government under the circumstances?²

GPPB is without power to pass upon the nature of external agreements entered into by the government

Whether the Agreement on Agriculture executed pursuant to the WTO – or any agreement of which the Philippine government is signatory -- is an international agreement or otherwise, is a question beyond the ambit of the authority of the Government Procurement Board (GPPB) to pass upon. The GPPB is an administrative agency entrusted with the task of effectuating the intent of the Government Procurement Reform Act; and as a matter of administrative practice, it renders opinion only on matters involving procurement and gives contemporaneous construction only of the statute and the legislative policy which it is mandated to implement.

Executive Agreements and/or international agreements are beyond the province of R.A. 9184

R.A. 9184 is clear-cut in its policy to be faithful to and show regard for international obligations to which the government has bound itself. Section 4 thereof states:

Sec. 4. *Scope and Application.* – This Act shall apply to the Procurement of Infrastructure Projects, Goods and Consulting Services, regardless of source of funds, whether local or foreign by all branches and instrumentalities of government, its department, offices and agencies, including government-owned and/or controlled corporations and local government units, subject to the provisions of Commonwealth Act No. 138. **Any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed.**³

The aforesaid provision is a clear manifestation of our avowed adherence to a policy of cooperation and amity with any and all nations and our recognition that an international or executive agreement is not a mere moral obligation to be enforced but creates a legal obligation

² Lifted *in toto* from subject NFA letter-query .

³ Emphasis supplied.

which we are bound to obey.⁴ It is said that a state which has contracted valid international obligations is bound to make in its legislations such modifications as may be necessary to ensure the fulfillment of the obligations.⁵

Adherence to the generally accepted principle of international law of *pacta sunt servanda*⁶ which has been adopted as part of the law of our land⁷ is real and substantiated even in the area of government procurement in the Philippines. The categorical expression in Section 4 of R.A. 9184 is a recognition of the value of ensuring faithful compliance with our obligations. In other words, R.A. 9184 law pushes treaties, international agreements and executive agreements out of its reach; hence, excludes them from the effect of its implementation. While the law embraces all procurement activities regardless of source of funds – domestic or foreign – procurement matters in treaties, international agreements and executive agreements remain unprejudiced by its provisions. At most, R.A. 9184 can be applied suppletorily in case of silence, ambiguity or obscurity of the provisions of the treaty, international agreement or executive agreement

Procurement rules and guidelines to be governed by the terms and conditions of the executive and/or international agreements

The terms and conditions embodied in the executive or international agreement shall govern the rules and guidelines to be followed in procurement activities subject of or incidental to the implementation of the said agreements. It is elementary in civilized nations that the stipulations, provisions and covenants of the parties in an agreement (contract) shall be the law between them. They have to agree on what procurement law shall be applied. In the absence of a law to be applied, either parties must craft the rules and regulations to govern the procurement process. This springs from the categorical exclusion of said agreements from the ambit of the present procurement law. If not for the said express exclusion, there should arise a need to fix an apparent incompatibility between the executive agreement and the municipal procurement law.

There is no prohibition to adopt provisions of RA 9184

We tread on the question of whether the alternative method of negotiated procurement may be utilized if the contemplated agreement is determined to be an executive agreement or international agreement.

It bears stressing at this juncture that there is no prohibition for the use of appropriate alternative methods of procurement in the intended importation activity by NFA. In fact, in as much as during negotiations the government stands at least in equal plane with counterpart government, it may negotiate that the terms and conditions of the agreement refer the rules and guidelines anent procurement matters to the provisions of R.A. 9184. While this is not a matter of direction of the law but in harmony with it, to effectuate the policies and principles behind its enactment, the government or its agencies must exert utmost effort to advance the essence of the procurement law on our side.

Prescinding from the foregoing considerations, the government may enter into executive agreements without violating the provisions of R.A. 9184. Incidentally, all other questions raised not directly answered have either been dealt with or answers to which become unnecessary because

⁴ See *La Chemise Lacoste, S.A. vs. Hemandas, GR.*, No. L-63796-97, May 21, 1984.

⁵ See *Tanada vs. Angara, G.R.* No. 118295, May 2, 1997 citing *Salonga and Yap*, p. 305

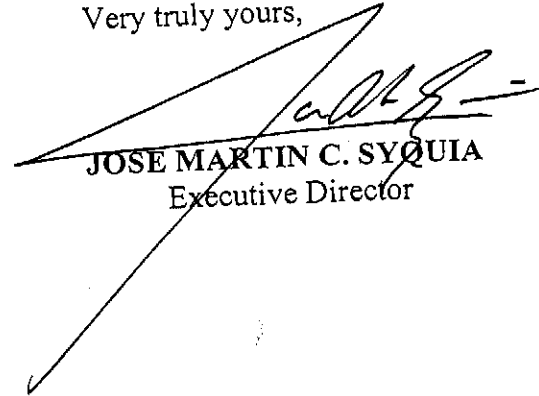
⁶ Translated as "agreements must be kept" and likewise interpreted to mean "international agreements must be performed in good faith"

⁷ See sec. 3, Article II, 1987 Constitution.

of discourse already made. Anent question No. 3, the GPPB is not in the position to render opinion or advice due to the limited powers granted to it. Besides, the wisdom behind the intended agency action is better subject to the determination of the NFA and its legality to the government agency upon which the power to review government contractual relations is lodged.

We trust that this clarifies matters

Very truly yours,



JOSE MARTIN C. SYQUIA
Executive Director

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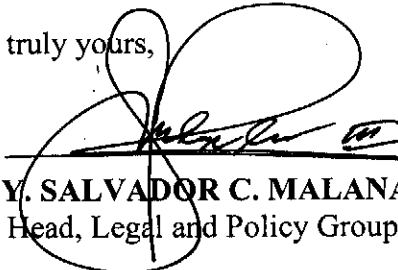
MR. GREGORIO Y. TAN, JR.
Deputy Administrator and OIC
National Food Authority
Matimyas Bldg. E. Rodriguez Sr. Ave
Quezon City

Dear Mr. Tan:

This refers to your letter-query dated September 24, 2004, which we received on September 27, 2004, addressed to Executive Director Jose Martin C. Syquia, requesting for clarification on Republic Act 9184 and its Implementing Rules and Regulations Part A vis-a-vis the World Trade Organization Agreement on Agriculture (WTO- AoA) of which the Philippine Government is a signatory.

We wish to inform you that we shall respond to your concerns either through phone or in writing at the earliest possible opportunity, or raise the same to the Government Procurement Policy Board for appropriate resolution should referral thereto becomes necessary.

Very truly yours,


ATTY. SALVADOR C. MALANA III
Head, Legal and Policy Group