

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. 150-2004

December 10, 2004

MR. GEORGE M. JEREOS
Commissioner
Bureau of Customs
Department of Finance

**Re : Government-to-Government arrangement on Acquisition
of BOC's Non Intrusive Container Inspection System**

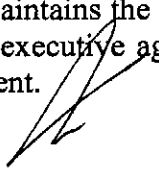
Dear Commissioner Jereos:

This refers to your letter dated November 4, 2004 which we received on November 10, 2004 requesting guidance on the possible implications of a government to government arrangement on the acquisition of the Bureau of Customs' (BOC) Non-Intrusive Container Inspection System Project (CISP) in relation to R.A. 9184. The project involves the use of x-ray machines as an alternative to actual physical inspection in the examination of shipments and the movement of cargos in the BOC. The substantive issue for resolution is as follows:

Whether or not the purchase of X-ray machines from the government of Israel on a soft loan basis with counter trade can be made on a negotiated basis.

MOU: An International Agreement

We shall establish at the outset the nature of the proposed Memorandum of Understanding (MOU) between the Government of Israel and the Government of the Republic of the Philippines. The Department of Justice (DOJ) by way of Opinion No. 70 series of 2004 maintains the view that said MOU partakes of an International Agreement of temporary nature i.e., executive agreement, and that the president is not precluded from entering into an executive agreement.



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

Having ascertained the nature of the MOU, we proceed to discuss the implication of the contemplated arrangement.

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:

Section 4. Scope and Application.- This Act shall apply to the procurement of Infrastructure Projects, Goods, 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.¹

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 which we are bound to obey.² 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.³

Adherence to the generally accepted principle of international law of *pacta sunt servanda*⁴, which has adopted as part of the law of our land⁵ 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 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 are expressly excluded from the ambit of the present procurement law.

It also bears stressing at this juncture, R.A. 9184 contemplates to place under its province government procurement with the private sector and not those involving government-to-government arrangements on the acquisition of goods, infrastructure or services.

Hence, the MOU under consideration undoubtedly does not stand to run counter to the provisions of R.A. 9184. Its terms shall stand alone and the guidelines it sets shall be the governing law between the two contracting states.

¹ Emphasis supplied.

² See *La Chemise Lacoste, S.A. vs. Hemandas, G.R.*, No. L-63796-97, May 21, 1984.

³ See *Tanada vs. Angara, G.R.* No. 118295, May 2, 1997 citing *Salonga and Yap*, p. 305

⁴ Translated as "agreements must be kept" and likewise interpreted to mean "international agreements must be performed in good faith"

⁵ See Section 3, Article II, 1987 Constitution

This opinion is being rendered on the basis of the facts and particular circumstances as represented. It may not necessarily be applicable upon a different set of facts or circumstances.

We trust that this clarifies matters.

Very truly yours,

(Sgd.)JOSE MARTIN C. SYQUIA
Executive Director III

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REGISTRY RECEIPT
051657
Post Office
Letter/Package No. ENT
Posted on **PHILIPPINES**
Preserve this receipt for reference in case of inquiry
NO. **DEC 23 2004**
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November 23, 2004

HON. GEORGE M. JEREOS

Commissioner
Bureau of Customs
Ground Floor, OCOM Building,
Gate 3, South Harbor, Port Area,
Manila

Dear Commissioner Jereos:

This refers to your letter dated November 4, 2004, addressed to the Honorable Secretary Emilia T. Boncodin as Chairperson of the Government Procurement Policy Board, which we received through facsimile on November 10, 2004, seeking guidance on the possible implications of a Government to Government arrangement on the acquisition of your agency's Container Inspection System Project in relation to Republic Act 9184 and its Implementing Rules and Regulations Part A.

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 GPPB for appropriate resolution should referral thereto becomes necessary.

Very truly yours,



JOSE MARTIN C. SYQUIA
Executive Director III