

## **CHINA NATIONAL MACHINERY & EQUIPMENT CORP. (GROUP), PETITIONER, VS. HON. CESAR D. SANTAMARIA, IN HIS OFFICIAL CAPACITY AS PRESIDING JUDGE OF BRANCH 145, REGIONAL TRIAL COURT OF ...**

*G.R. No. 185572. February 07, 2012*

Ponente: SERENO, J.

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### **SERENO, J.:**

This is a Petition for Review on Certiorari with Prayer for the Issuance of a Temporary Restraining Order (TRO) and/or Preliminary Injunction assailing the 30 September 2008 Decision and 5 December 2008 Resolution of the Court of Appeals (CA) in CA–G.R. SP No. 103351.[1]

On 14 September 2002, petitioner China National Machinery & Equipment Corp. (Group) (CNMEG), represented by its chairperson, Ren Hongbin, entered into a Memorandum of Understanding with the North Luzon Railways Corporation (Northrail), represented by its president, Jose L. Cortes, Jr. for the conduct of a feasibility study on a possible railway line from Manila to San Fernando, La Union (the Northrail Project).[2]

On 30 August 2003, the Export Import Bank of China (EXIM Bank) and the Department of Finance of the Philippines (DOF) entered into a Memorandum of Understanding (Aug 30 MOU), wherein China agreed to extend Preferential Buyer's Credit to the Philippine government to finance the Northrail Project.[3] The Chinese government designated EXIM Bank as the lender, while the Philippine government named the DOF as the borrower.[4] Under the Aug 30 MOU, EXIM Bank agreed to extend an amount not exceeding USD 400,000,000 in favor of the DOF, payable in 20 years, with a 5-year grace period, and at the rate of 3% per annum.[5]

On 1 October 2003, the Chinese Ambassador to the Philippines, Wang Chungui (Amb. Wang), wrote a letter to DOF Secretary Jose Isidro Camacho (Sec. Camacho) informing him of CNMEG's designation as the Prime Contractor for the Northrail Project.[6]

On 30 December 2003, Northrail and CNMEG executed a Contract Agreement for the construction of Section I, Phase I of the North Luzon Railway System from Caloocan to Malolos on a turnkey basis (the Contract Agreement).[7] The contract price for the Northrail Project was pegged at USD 421,050,000.[8]

On 26 February 2004, the Philippine government and EXIM Bank entered into a counterpart financial agreement – Buyer Credit Loan Agreement No. BLA 04055 (the Loan Agreement).[9] In the Loan Agreement, EXIM Bank agreed to extend Preferential Buyer's Credit in the amount of USD 400,000,000 in favor of the Philippine government in order to finance the construction of Phase I of the Northrail Project.[10]

On 13 February 2006, respondents filed a Complaint for Annulment of Contract and Injunction with Urgent Motion for Summary Hearing to Determine the Existence of Facts and Circumstances Justifying the Issuance of Writs of Preliminary Prohibitory and Mandatory Injunction and/or TRO against CNMEG, the Office of the Executive Secretary, the DOF, the Department of Budget and Management, the National Economic Development

Authority and Northrail.[11] The case was docketed as Civil Case No. 06-203 before the Regional Trial Court, National Capital Judicial Region, Makati City, Branch 145 (RTC Br. 145). In the Complaint, respondents alleged that the Contract Agreement and the Loan Agreement were void for being contrary to (a) the Constitution; (b) Republic Act No. 9184 (R.A. No. 9184), otherwise known as the Government Procurement Reform Act; (c) Presidential Decree No. 1445, otherwise known as the Government Auditing Code; and (d) Executive Order No. 292, otherwise known as the Administrative Code.[12]

RTC Br. 145 issued an Order dated 17 March 2006 setting the case for hearing on the issuance of injunctive reliefs.[13] On 29 March 2006, CNMEG filed an Urgent Motion for Reconsideration of this Order.[14] Before RTC Br. 145 could rule thereon, CNMEG filed a Motion to Dismiss dated 12 April 2006, arguing that the trial court did not have jurisdiction over (a) its person, as it was an agent of the Chinese government, making it immune from suit, and (b) the subject matter, as the Northrail Project was a product of an executive agreement.[15]

On 15 May 2007, RTC Br. 145 issued an Omnibus Order denying CNMEG's Motion to Dismiss and setting the case for summary hearing to determine whether the injunctive reliefs prayed for should be issued.[16] CNMEG then filed a Motion for Reconsideration,[17] which was denied by the trial court in an Order dated 10 March 2008.[18] Thus, CNMEG filed before the CA a Petition for Certiorari with Prayer for the Issuance of TRO and/or Writ of Preliminary Injunction dated 4 April 2008.[19]

In the assailed Decision dated 30 September 2008, the appellate court dismissed the Petition for Certiorari.[20] Subsequently, CNMEG filed a Motion for Reconsideration,[21] which was denied by the CA in a Resolution dated 5 December 2008.[22] Thus, CNMEG filed the instant Petition for Review on Certiorari dated 21 January 2009, raising the following issues: [23]

Whether or not petitioner CNMEG is an agent of the sovereign People's Republic of China.

Whether or not the Northrail contracts are products of an executive agreement between two sovereign states.

Whether or not the certification from the Department of Foreign Affairs is necessary under the foregoing circumstances.

Whether or not the act being undertaken by petitioner CNMEG is an act jure imperii.

Whether or not the Court of Appeals failed to avoid a procedural limbo in the lower court.

Whether or not the Northrail Project is subject to competitive public bidding.

Whether or not the Court of Appeals ignored the ruling of this Honorable Court in the Neri case.

CNMEG prays for the dismissal of Civil Case No. 06-203 before RTC Br. 145 for lack of jurisdiction. It likewise requests this Court for the issuance of a TRO and, later on, a writ of preliminary injunction to restrain public respondent from proceeding with the disposition of Civil Case No. 06-203.

The crux of this case boils down to two main issues, namely:

- Whether CNMEG is entitled to immunity, precluding it from being sued before a local court.
- Whether the Contract Agreement is an executive agreement, such that it cannot be questioned by or before a local court.

First issue: Whether CNMEG is entitled to immunity

This Court explained the doctrine of sovereign immunity in *Holy See v. Rosario*,[24] to wit:

There are two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory, a sovereign cannot, without its consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory, the immunity of the sovereign is recognized only with regard to public acts or acts *jure imperii* of a state, but not with regard to private acts or acts *jure gestionis*. (Emphasis supplied; citations omitted.)

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The restrictive theory came about because of the entry of sovereign states into purely commercial activities remotely connected with the discharge of governmental functions. This is particularly true with respect to the Communist states which took control of nationalized business activities and international trading.

In *JUSMAG v. National Labor Relations Commission*,<sup>[25]</sup> this Court affirmed the Philippines' adherence to the restrictive theory as follows:

The doctrine of state immunity from suit has undergone further metamorphosis. The view evolved that the existence of a contract does not, per se, mean that sovereign states may, at all times, be sued in local courts. The complexity of relationships between sovereign states, brought about by their increasing commercial activities, mothered a more restrictive application of the doctrine.

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As it stands now, the application of the doctrine of immunity from suit has been restricted to sovereign or governmental activities (*jure imperii*). The mantle of state immunity cannot be extended to commercial, private and proprietary acts (*jure gestionis*).<sup>[26]</sup> (Emphasis supplied.)

Since the Philippines adheres to the restrictive theory, it is crucial to ascertain the legal nature of the act involved – whether the entity claiming immunity performs governmental, as opposed to proprietary, functions. As held in *United States of America v. Ruiz* –<sup>[27]</sup>

The restrictive application of State immunity is proper only when the proceedings arise out of commercial transactions of the foreign sovereign, its commercial activities or economic affairs. Stated differently, a State may be said to have descended to the level of an individual and can thus be deemed to have tacitly given its consent to be sued only when it enters into business contracts. It does not apply where the contract relates to the exercise of its sovereign functions.<sup>[28]</sup>

A. CNMEG is engaged in a proprietary activity.

A threshold question that must be answered is whether CNMEG performs governmental or proprietary functions. A thorough examination of the basic facts of the case would show that CNMEG is engaged in a proprietary activity.

The parties executed the Contract Agreement for the purpose of constructing the Luzon Railways, viz:<sup>[29]</sup>

WHEREAS the Employer (Northrail) desired to construct the railways from Caloocan to Malolos, section I, Phase I of Philippine North Luzon Railways Project (hereinafter referred to as THE PROJECT);

AND WHEREAS the Contractor has offered to provide the Project on Turnkey basis, including design, manufacturing, supply, construction, commissioning, and training of the Employer's personnel;

AND WHEREAS the Loan Agreement of the Preferential Buyer's Credit between Export-Import Bank of China and Department of Finance of Republic of the Philippines;

NOW, THEREFORE, the parties agree to sign this Contract for the Implementation of the Project.

The above-cited portion of the Contract Agreement, however, does not on its own reveal whether the construction of the Luzon railways was meant to be a proprietary endeavor. In order to fully understand the intention behind and the purpose of the entire undertaking, the Contract Agreement must not be read in isolation. Instead, it must be construed in conjunction with three other documents executed in relation to the Northrail Project, namely: (a) the Memorandum of Understanding dated 14 September 2002 between Northrail and CNMEG;<sup>[30]</sup> (b) the letter of Amb. Wang dated 1 October 2003 addressed to Sec. Camacho;<sup>[31]</sup> and (c) the Loan Agreement.<sup>[32]</sup>

#### 1. Memorandum of Understanding dated 14 September 2002

The Memorandum of Understanding dated 14 September 2002 shows that CNMEG sought the construction of the Luzon Railways as a proprietary venture. The relevant parts thereof read:

WHEREAS, CNMEG has the financial capability, professional competence and technical expertise to assess the state of the [Main Line North (MLN)] and recommend implementation plans as well as undertake its rehabilitation and/or modernization;

WHEREAS, CNMEG has expressed interest in the rehabilitation and/or modernization of the MLN from Metro Manila to San Fernando, La Union passing through the provinces of Bulacan, Pampanga, Tarlac, Pangasinan and La Union (the 'Project');

WHEREAS, the NORTHRAIL CORP. welcomes CNMEG's proposal to undertake a Feasibility Study (the "Study") at no cost to NORTHRAIL CORP.;

WHEREAS, the NORTHRAIL CORP. also welcomes CNMEG's interest in undertaking the Project with Supplier's Credit and intends to employ CNMEG as the Contractor for the Project subject to compliance with Philippine and Chinese laws, rules and regulations for the selection of a contractor;

WHEREAS, the NORTHRAIL CORP. considers CNMEG's proposal advantageous to the Government of the Republic of the Philippines and has therefore agreed to assist CNMEG in the conduct of the aforesaid Study;

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#### II. APPROVAL PROCESS

2.1 As soon as possible after completion and presentation of the Study in accordance with Paragraphs 1.3 and 1.4 above and in compliance with necessary governmental laws, rules, regulations and procedures required from both parties, the parties shall commence the preparation and negotiation of the terms and conditions of the Contract (the "Contract") to be entered into between them on the implementation of the Project. The parties shall use their best endeavors to formulate and finalize a Contract with a view to signing the Contract within one hundred twenty (120) days from CNMEG's presentation of the Study.<sup>[33]</sup> (Emphasis supplied)

Clearly, it was CNMEG that initiated the undertaking, and not the Chinese government. The Feasibility Study was conducted not because of any diplomatic gratuity from or exercise of sovereign functions by the Chinese government, but was plainly a business strategy employed by CNMEG with a view to securing this commercial enterprise.

#### 2. Letter dated 1 October 2003

That CNMEG, and not the Chinese government, initiated the Northrail Project was confirmed by Amb. Wang in his letter dated 1 October 2003, thus:

1. CNMEG has the proven competence and capability to undertake the Project as evidenced by the ranking of 42 given by the ENR among 225 global construction companies.

2. CNMEG already signed an MOU with the North Luzon Railways Corporation last September 14, 2000

during the visit of Chairman Li Peng. Such being the case, they have already established an initial working relationship with your North Luzon Railways Corporation. This would categorize CNMEG as the state corporation within the People's Republic of China which initiated our Government's involvement in the Project.

3. Among the various state corporations of the People's Republic of China, only CNMEG has the advantage of being fully familiar with the current requirements of the Northrail Project having already accomplished a Feasibility Study which was used as inputs by the North Luzon Railways Corporation in the approvals (sic) process required by the Republic of the Philippines.[34] (Emphasis supplied.)

Thus, the desire of CNMEG to secure the Northrail Project was in the ordinary or regular course of its business as a global construction company. The implementation of the Northrail Project was intended to generate profit for CNMEG, with the Contract Agreement placing a contract price of USD 421,050,000 for the venture.[35] The use of the term "state corporation" to refer to CNMEG was only descriptive of its nature as a government-owned and/or -controlled corporation, and its assignment as the Primary Contractor did not imply that it was acting on behalf of China in the performance of the latter's sovereign functions. To imply otherwise would result in an absurd situation, in which all Chinese corporations owned by the state would be automatically considered as performing governmental activities, even if they are clearly engaged in commercial or proprietary pursuits.

### 3. The Loan Agreement

CNMEG claims immunity on the ground that the Aug 30 MOU on the financing of the Northrail Project was signed by the Philippine and Chinese governments, and its assignment as the Primary Contractor meant that it was bound to perform a governmental function on behalf of China. However, the Loan Agreement, which originated from the same Aug 30 MOU, belies this reasoning, viz:

Article 11. xxx (j) Commercial Activity The execution and delivery of this Agreement by the Borrower constitute, and the Borrower's performance of and compliance with its obligations under this Agreement will constitute, private and commercial acts done and performed for commercial purposes under the laws of the Republic of the Philippines and neither the Borrower nor any of its assets is entitled to any immunity or privilege (sovereign or otherwise) from suit, execution or any other legal process with respect to its obligations under this Agreement, as the case may be, in any jurisdiction. Notwithstanding the foregoing, the Borrower does not waive any immunity with respect of its assets which are (i) used by a diplomatic or consular mission of the Borrower and (ii) assets of a military character and under control of a military authority or defense agency and (iii) located in the Philippines and dedicated to public or governmental use (as distinguished from patrimonial assets or assets dedicated to commercial use). (Emphasis supplied.)

(k) Proceedings to Enforce Agreement In any proceeding in the Republic of the Philippines to enforce this Agreement, the choice of the laws of the People's Republic of China as the governing law hereof will be recognized and such law will be applied. The waiver of immunity by the Borrower, the irrevocable submissions of the Borrower to the non-exclusive jurisdiction of the courts of the People's Republic of China and the appointment of the Borrower's Chinese Process Agent is legal, valid, binding and enforceable and any judgment obtained in the People's Republic of China will be if introduced, evidence for enforcement in any proceedings against the Borrower and its assets in the Republic of the Philippines provided that (a) the court rendering judgment had jurisdiction over the subject matter of the action in accordance with its jurisdictional rules, (b) the Republic had notice of the proceedings, (c) the judgment of the court was not obtained through collusion or fraud, and (d) such judgment was not based on a clear mistake of fact or law.[36]

Further, the Loan Agreement likewise contains this express waiver of immunity:

15.5 Waiver of Immunity The Borrower irrevocably and unconditionally waives, any immunity to which it or its property may at any time be or become entitled, whether characterized as sovereign immunity or otherwise,

from any suit, judgment, service of process upon it or any agent, execution on judgment, set-off, attachment prior to judgment, attachment in aid of execution to which it or its assets may be entitled in any legal action or proceedings with respect to this Agreement or any of the transactions contemplated hereby or hereunder. Notwithstanding the foregoing, the Borrower does not waive any immunity in respect of its assets which are (i) used by a diplomatic or consular mission of the Borrower, (ii) assets of a military character and under control of a military authority or defense agency and (iii) located in the Philippines and dedicated to a public or governmental use (as distinguished from patrimonial assets or assets dedicated to commercial use).[37]

Thus, despite petitioner's claim that the EXIM Bank extended financial assistance to Northrail because the bank was mandated by the Chinese government, and not because of any motivation to do business in the Philippines,[38] it is clear from the foregoing provisions that the Northrail Project was a purely commercial transaction.

Admittedly, the Loan Agreement was entered into between EXIM Bank and the Philippine government, while the Contract Agreement was between Northrail and CNMEG. Although the Contract Agreement is silent on the classification of the legal nature of the transaction, the foregoing provisions of the Loan Agreement, which is an inextricable part of the entire undertaking, nonetheless reveal the intention of the parties to the Northrail Project to classify the whole venture as commercial or proprietary in character.

Thus, piecing together the content and tenor of the Contract Agreement, the Memorandum of Understanding dated 14 September 2002, Amb. Wang's letter dated 1 October 2003, and the Loan Agreement would reveal the desire of CNMEG to construct the Luzon Railways in pursuit of a purely commercial activity performed in the ordinary course of its business.

B. CNMEG failed to adduce evidence that it is immune from suit under Chinese law.

Even assuming arguendo that CNMEG performs governmental functions, such claim does not automatically vest it with immunity. This view finds support in *Malong v. Philippine National Railways*, in which this Court held that "(i)mmunity from suit is determined by the character of the objects for which the entity was organized." [39]

In this regard, this Court's ruling in *Deutsche Gesellschaft Für Technische Zusammenarbeit (GTZ) v. CA*[40] must be examined. In *Deutsche Gesellschaft*, Germany and the Philippines entered into a Technical Cooperation Agreement, pursuant to which both signed an arrangement promoting the Social Health Insurance–Networking and Empowerment (SHINE) project. The two governments named their respective implementing organizations: the Department of Health (DOH) and the Philippine Health Insurance Corporation (PHIC) for the Philippines, and GTZ for the implementation of Germany's contributions. In ruling that GTZ was not immune from suit, this Court held:

The arguments raised by GTZ and the [Office of the Solicitor General (OSG)] are rooted in several indisputable facts. The SHINE project was implemented pursuant to the bilateral agreements between the Philippine and German governments. GTZ was tasked, under the 1991 agreement, with the implementation of the contributions of the German government. The activities performed by GTZ pertaining to the SHINE project are governmental in nature, related as they are to the promotion of health insurance in the Philippines. The fact that GTZ entered into employment contracts with the private respondents did not disqualify it from invoking immunity from suit, as held in cases such as *Holy See v. Rosario, Jr.*, which set forth what remains valid doctrine:

Certainly, the mere entering into a contract by a foreign state with a private party cannot be the ultimate test. Such an act can only be the start of the inquiry. The logical question is whether the foreign state is engaged in the activity in the regular course of business. If the foreign state is not engaged regularly in a business or trade,

the particular act or transaction must then be tested by its nature. If the act is in pursuit of a sovereign activity, or an incident thereof, then it is an act *jure imperii*, especially when it is not undertaken for gain or profit.

Beyond dispute is the tenability of the comment points (sic) raised by GTZ and the OSG that GTZ was not performing proprietary functions notwithstanding its entry into the particular employment contracts. Yet there is an equally fundamental premise which GTZ and the OSG fail to address, namely: Is GTZ, by conception, able to enjoy the Federal Republic's immunity from suit?

The principle of state immunity from suit, whether a local state or a foreign state, is reflected in Section 9, Article XVI of the Constitution, which states that "the State may not be sued without its consent." Who or what consists of "the State"? For one, the doctrine is available to foreign States insofar as they are sought to be sued in the courts of the local State, necessary as it is to avoid "unduly vexing the peace of nations."

If the instant suit had been brought directly against the Federal Republic of Germany, there would be no doubt that it is a suit brought against a State, and the only necessary inquiry is whether said State had consented to be sued. However, the present suit was brought against GTZ. It is necessary for us to understand what precisely are the parameters of the legal personality of GTZ.

Counsel for GTZ characterizes GTZ as "the implementing agency of the Government of the Federal Republic of Germany," a depiction similarly adopted by the OSG. Assuming that the characterization is correct, it does not automatically invest GTZ with the ability to invoke State immunity from suit. The distinction lies in whether the agency is incorporated or unincorporated.

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State immunity from suit may be waived by general or special law. The special law can take the form of the original charter of the incorporated government agency. Jurisprudence is replete with examples of incorporated government agencies which were ruled not entitled to invoke immunity from suit, owing to provisions in their charters manifesting their consent to be sued.

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It is useful to note that on the part of the Philippine government, it had designated two entities, the Department of Health and the Philippine Health Insurance Corporation (PHIC), as the implementing agencies in behalf of the Philippines. The PHIC was established under Republic Act No. 7875, Section 16 (g) of which grants the corporation the power "to sue and be sued in court." Applying the previously cited jurisprudence, PHIC would not enjoy immunity from suit even in the performance of its functions connected with SHINE, however, (sic) governmental in nature as (sic) they may be.

Is GTZ an incorporated agency of the German government? There is some mystery surrounding that question. Neither GTZ nor the OSG go beyond the claim that petitioner is "the implementing agency of the Government of the Federal Republic of Germany." On the other hand, private respondents asserted before the Labor Arbiter that GTZ was "a private corporation engaged in the implementation of development projects." The Labor Arbiter accepted that claim in his Order denying the Motion to Dismiss, though he was silent on that point in his Decision. Nevertheless, private respondents argue in their Comment that the finding that GTZ was a private corporation "was never controverted, and is therefore deemed admitted." In its Reply, GTZ controverts that finding, saying that it is a matter of public knowledge that the status of petitioner GTZ is that of the "implementing agency," and not that of a private corporation.

In truth, private respondents were unable to adduce any evidence to substantiate their claim that GTZ was a "private corporation," and the Labor Arbiter acted rashly in accepting such claim without explanation. But neither

has GTZ supplied any evidence defining its legal nature beyond that of the bare descriptive “implementing agency.” There is no doubt that the 1991 Agreement designated GTZ as the “implementing agency” in behalf of the German government. Yet the catch is that such term has no precise definition that is responsive to our concerns. Inherently, an agent acts in behalf of a principal, and the GTZ can be said to act in behalf of the German state. But that is as far as “implementing agency” could take us. The term by itself does not supply whether GTZ is incorporated or unincorporated, whether it is owned by the German state or by private interests, whether it has juridical personality independent of the German government or none at all.

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Again, we are uncertain of the corresponding legal implications under German law surrounding “a private company owned by the Federal Republic of Germany.” Yet taking the description on face value, the apparent equivalent under Philippine law is that of a corporation organized under the Corporation Code but owned by the Philippine government, or a government-owned or controlled corporation without original charter. And it bears notice that Section 36 of the Corporate Code states that “[e]very corporation incorporated under this Code has the power and capacity x x x to sue and be sued in its corporate name.”

It is entirely possible that under German law, an entity such as GTZ or particularly GTZ itself has not been vested or has been specifically deprived the power and capacity to sue and/or be sued. Yet in the proceedings below and before this Court, GTZ has failed to establish that under German law, it has not consented to be sued despite it being owned by the Federal Republic of Germany. We adhere to the rule that in the absence of evidence to the contrary, foreign laws on a particular subject are presumed to be the same as those of the Philippines, and following the most intelligent assumption we can gather, GTZ is akin to a governmental owned or controlled corporation without original charter which, by virtue of the Corporation Code, has expressly consented to be sued. At the very least, like the Labor Arbiter and the Court of Appeals, this Court has no basis in fact to conclude or presume that GTZ enjoys immunity from suit.<sup>[41]</sup> (Emphasis supplied.)

Applying the foregoing ruling to the case at bar, it is readily apparent that CNMEG cannot claim immunity from suit, even if it contends that it performs governmental functions. Its designation as the Primary Contractor does not automatically grant it immunity, just as the term “implementing agency” has no precise definition for purposes of ascertaining whether GTZ was immune from suit. Although CNMEG claims to be a government-owned corporation, it failed to adduce evidence that it has not consented to be sued under Chinese law. Thus, following this Court’s ruling in *Deutsche Gesellschaft*, in the absence of evidence to the contrary, CNMEG is to be presumed to be a government-owned and -controlled corporation without an original charter. As a result, it has the capacity to sue and be sued under Section 36 of the Corporation Code.

C. CNMEG failed to present a certification from the Department of Foreign Affairs.

-In *Holy See*,<sup>[42]</sup> this Court reiterated the oft-cited doctrine that the determination by the Executive that an entity is entitled to sovereign or diplomatic immunity is a political question conclusive upon the courts, to wit:

In Public International Law, when a state or international agency wishes to plead sovereign or diplomatic immunity in a foreign court, it requests the Foreign Office of the state where it is sued to convey to the court that said defendant is entitled to immunity.

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In the Philippines, the practice is for the foreign government or the international organization to first secure an executive endorsement of its claim of sovereign or diplomatic immunity. But how the Philippine Foreign

Office conveys its endorsement to the courts varies. In *International Catholic Migration Commission v. Calleja*, 190 SCRA 130 (1990), the Secretary of Foreign Affairs just sent a letter directly to the Secretary of Labor and Employment, informing the latter that the respondent-employer could not be sued because it enjoyed diplomatic immunity. In *World Health Organization v. Aquino*, 48 SCRA 242 (1972), the Secretary of Foreign Affairs sent the trial court a telegram to that effect. In *Baer v. Tizon*, 57 SCRA 1 (1974), the U.S. Embassy asked the Secretary of Foreign Affairs to request the Solicitor General to make, in behalf of the Commander of the United States Naval Base at Olongapo City, Zambales, a “suggestion” to respondent Judge. The Solicitor General embodied the “suggestion” in a Manifestation and Memorandum as *amicus curiae*.

In the case at bench, the Department of Foreign Affairs, through the Office of Legal Affairs moved with this Court to be allowed to intervene on the side of petitioner. The Court allowed the said Department to file its memorandum in support of petitioner’s claim of sovereign immunity.

In some cases, the defense of sovereign immunity was submitted directly to the local courts by the respondents through their private counsels (*Raquiza v. Bradford*, 75 Phil. 50 [1945]; *Miquiabas v. Philippine-Ryukyus Command*, 80 Phil. 262 [1948]; *United States of America v. Guinto*, 182 SCRA 644 [1990] and companion cases). In cases where the foreign states bypass the Foreign Office, the courts can inquire into the facts and make their own determination as to the nature of the acts and transactions involved.[43] (Emphasis supplied.)

The question now is whether any agency of the Executive Branch can make a determination of immunity from suit, which may be considered as conclusive upon the courts. This Court, in *Department of Foreign Affairs (DFA) v. National Labor Relations Commission (NLRC)*,<sup>[44]</sup> emphasized the DFA’s competence and authority to provide such necessary determination, to wit:

The DFA’s function includes, among its other mandates, the determination of persons and institutions covered by diplomatic immunities, a determination which, when challenge, (sic) entitles it to seek relief from the court so as not to seriously impair the conduct of the country’s foreign relations. The DFA must be allowed to plead its case whenever necessary or advisable to enable it to help keep the credibility of the Philippine government before the international community. When international agreements are concluded, the parties thereto are deemed to have likewise accepted the responsibility of seeing to it that their agreements are duly regarded. In our country, this task falls principally of (sic) the DFA as being the highest executive department with the competence and authority to so act in this aspect of the international arena.[45] (Emphasis supplied.)

Further, the fact that this authority is exclusive to the DFA was also emphasized in this Court’s ruling in *Deutsche Gesellschaft*:

It is to be recalled that the Labor Arbiter, in both of his rulings, noted that it was imperative for petitioners to secure from the Department of Foreign Affairs “a certification of respondents’ diplomatic status and entitlement to diplomatic privileges including immunity from suits.” The requirement might not necessarily be imperative. However, had GTZ obtained such certification from the DFA, it would have provided factual basis for its claim of immunity that would, at the very least, establish a disputable evidentiary presumption that the foreign party is indeed immune which the opposing party will have to overcome with its own factual evidence. We do not see why GTZ could not have secured such certification or endorsement from the DFA for purposes of this case. Certainly, it would have been highly prudential for GTZ to obtain the same after the Labor Arbiter had denied the motion to dismiss. Still, even at this juncture, we do not see any evidence that the DFA, the office of the executive branch in charge of our diplomatic relations, has indeed endorsed GTZ’s claim of immunity. It may be possible that GTZ tried, but failed to secure such certification, due to the same concerns that we have discussed herein.

Would the fact that the Solicitor General has endorsed GTZ’s claim of State’s immunity from suit before this Court sufficiently substitute for the DFA certification? Note that the rule in public international law quoted in *Holy See* referred to endorsement by the Foreign Office of the State where the suit is filed, such foreign office

in the Philippines being the Department of Foreign Affairs. Nowhere in the Comment of the OSG is it manifested that the DFA has endorsed GTZ's claim, or that the OSG had solicited the DFA's views on the issue. The arguments raised by the OSG are virtually the same as the arguments raised by GTZ without any indication of any special and distinct perspective maintained by the Philippine government on the issue. The Comment filed by the OSG does not inspire the same degree of confidence as a certification from the DFA would have elicited.[46] (Emphasis supplied.)

In the case at bar, CNMEG offers the Certification executed by the Economic and Commercial Office of the Embassy of the People's Republic of China, stating that the Northrail Project is in pursuit of a sovereign activity.[47] Surely, this is not the kind of certification that can establish CNMEG's entitlement to immunity from suit, as Holy See unequivocally refers to the determination of the "Foreign Office of the state where it is sued."

Further, CNMEG also claims that its immunity from suit has the executive endorsement of both the OSG and the Office of the Government Corporate Counsel (OGCC), which must be respected by the courts. However, as expressly enunciated in *Deutsche Gesellschaft*, this determination by the OSG, or by the OGCC for that matter, does not inspire the same degree of confidence as a DFA certification. Even with a DFA certification, however, it must be remembered that this Court is not precluded from making an inquiry into the intrinsic correctness of such certification.

D. An agreement to submit any dispute to arbitration may be construed as an implicit waiver of immunity from suit.

In the United States, the Foreign Sovereign Immunities Act of 1976 provides for a waiver by implication of state immunity. In the said law, the agreement to submit disputes to arbitration in a foreign country is construed as an implicit waiver of immunity from suit. Although there is no similar law in the Philippines, there is reason to apply the legal reasoning behind the waiver in this case.

The Conditions of Contract,[48] which is an integral part of the Contract Agreement,[49] states:

### 33. SETTLEMENT OF DISPUTES AND ARBITRATION

#### 33.1. Amicable Settlement

Both parties shall attempt to amicably settle all disputes or controversies arising from this Contract before the commencement of arbitration.

#### 33.2. Arbitration

All disputes or controversies arising from this Contract which cannot be settled between the Employer and the Contractor shall be submitted to arbitration in accordance with the UNCITRAL Arbitration Rules at present in force and as may be amended by the rest of this Clause. The appointing authority shall be Hong Kong International Arbitration Center. The place of arbitration shall be in Hong Kong at Hong Kong International Arbitration Center (HKIAC).

Under the above provisions, if any dispute arises between Northrail and CNMEG, both parties are bound to submit the matter to the HKIAC for arbitration. In case the HKIAC makes an arbitral award in favor of Northrail, its enforcement in the Philippines would be subject to the Special Rules on Alternative Dispute Resolution (Special Rules). Rule 13 thereof provides for the Recognition and Enforcement of a Foreign Arbitral Award. Under Rules 13.2 and 13.3 of the Special Rules, the party to arbitration wishing to have an arbitral award recognized and enforced in the Philippines must petition the proper regional trial court (a) where the assets to be attached or levied upon is located; (b) where the acts to be enjoined are being performed; (c) in the principal place

of business in the Philippines of any of the parties; (d) if any of the parties is an individual, where any of those individuals resides; or (e) in the National Capital Judicial Region.

From all the foregoing, it is clear that CNMEG has agreed that it will not be afforded immunity from suit. Thus, the courts have the competence and jurisdiction to ascertain the validity of the Contract Agreement.

Second issue: Whether the Contract Agreement is an executive agreement

Article 2(1) of the Vienna Convention on the Law of Treaties (Vienna Convention) defines a treaty as follows:

[A]n international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

In *Bayan Muna v. Romulo*, this Court held that an executive agreement is similar to a treaty, except that the former (a) does not require legislative concurrence; (b) is usually less formal; and (c) deals with a narrower range of subject matters.[50]

Despite these differences, to be considered an executive agreement, the following three requisites provided under the Vienna Convention must nevertheless concur: (a) the agreement must be between states; (b) it must be written; and (c) it must be governed by international law. The first and the third requisites do not obtain in the case at bar.

A. CNMEG is neither a government nor a government agency.

The Contract Agreement was not concluded between the Philippines and China, but between Northrail and CNMEG.[51] By the terms of the Contract Agreement, Northrail is a government-owned or -controlled corporation, while CNMEG is a corporation duly organized and created under the laws of the People's Republic of China.[52] Thus, both Northrail and CNMEG entered into the Contract Agreement as entities with personalities distinct and separate from the Philippine and Chinese governments, respectively.

Neither can it be said that CNMEG acted as agent of the Chinese government. As previously discussed, the fact that Amb. Wang, in his letter dated 1 October 2003,[53] described CNMEG as a "state corporation" and declared its designation as the Primary Contractor in the Northrail Project did not mean it was to perform sovereign functions on behalf of China. That label was only descriptive of its nature as a state-owned corporation, and did not preclude it from engaging in purely commercial or proprietary ventures.

B. The Contract Agreement is to be governed by Philippine law.

Article 2 of the Conditions of Contract,[54] which under Article 1.1 of the Contract Agreement is an integral part of the latter, states:

#### APPLICABLE LAW AND GOVERNING LANGUAGE

The contract shall in all respects be read and construed in accordance with the laws of the Philippines.

The contract shall be written in English language. All correspondence and other documents pertaining to the Contract which are exchanged by the parties shall be written in English language.

Since the Contract Agreement explicitly provides that Philippine law shall be applicable, the parties have

effectively conceded that their rights and obligations thereunder are not governed by international law.

It is therefore clear from the foregoing reasons that the Contract Agreement does not partake of the nature of an executive agreement. It is merely an ordinary commercial contract that can be questioned before the local courts.

WHEREFORE, the instant Petition is DENIED. Petitioner China National Machinery & Equipment Corp. (Group) is not entitled to immunity from suit, and the Contract Agreement is not an executive agreement. CNMEG's prayer for the issuance of a TRO and/or Writ of Preliminary Injunction is DENIED for being moot and academic. This case is REMANDED to the Regional Trial Court of Makati, Branch 145, for further proceedings as regards the validity of the contracts subject of Civil Case No. 06-203.

No pronouncement on costs of suit.

**SO ORDERED.**

Corona, C.J., Carpio, Velasco, Jr., Leonardo-De Castro, Brion, Peralta, Bersamin, Abad, Villarama, Jr., Perez, Mendoza, Reyes, and Perlas-Bernabe, JJ., concur.  
Del Castillo, J., on leave.

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[1] China National Machinery & Equipment Corporation (Group) v. Hon. Cesar D. Santamaria, et al.

[2] Petition, rollo, Vol. I, p. 25; Memorandum of Understanding dated 14 September 2002, rollo, Vol. I, pp. 400-406.

[3] Petition, rollo, Vol. I, pp. 25-26; Memorandum of Understanding dated 30 August 2003, rollo, Vol. I, pp. 308-310, 407-409.

[4] Id.

[5] Memorandum of Understanding dated 30 August 2003, rollo, Vol. I, pp. 308-310, 407-409.

[6] Petition, rollo, Vol. I, p. 26; Letter dated 1 October 2003, rollo, Vol. I, pp. 311-312.

[7] Contract Agreement, rollo, Vol. I, pp. 126-130, 412-414.

[8] Memorandum of Agreement dated December 2003, rollo, Vol. I, pp. 198-201.

[9] Loan Agreement, rollo, Vol. I, pp. 242-282.

[10] Id.

[11] Complaint, rollo, Vol. I, pp. 102-125.

[12] Id.

[13] Order dated 17 March 2006, rollo, Vol. I, pp. 290-291.

[14] Urgent Motion for Reconsideration, rollo, Vol. I, pp. 292-307

[15] Motion to Dismiss, rollo, Vol. I, pp. 324-369.

[16] Omnibus Order dated 15 May 2007, rollo, Vol. I, pp. 648-658.

[17] Motion for Reconsideration, rollo, Vol. I, pp. 663-695.

[18] Order dated 10 March 2008, rollo, Vol. I, p. 737.

- [19] Petition for Certiorari, rollo, Vol. I, pp. 738-792.
- [20] CA Decision, rollo, Vol. I, pp. 81-99.
- [21] Motion for Reconsideration, rollo, Vol. I, pp. 971-1001.
- [22] CA Resolution, rollo, Vol. I, pp. 100-102.
- [23] Petition, rollo, Vol. I, pp. 27-28.
- [24] G.R. No. 101949, 1 December 1994, 238 SCRA 524, 535.
- [25] G.R. No. 108813, 15 December 1994, 239 SCRA 224.
- [26] *Id.* at 231-232.
- [27] 221 Phil. 179 (1985).
- [28] *Id.* at 184.
- [29] Contract Agreement, rollo, Vol. I, pp. 127, 413.
- [30] *Supra* note 2.
- [31] *Supra* note 6.
- [32] *Supra* note 9.
- [33] *Supra* note 2, at 400-402.
- [34] *Supra* note 6.
- [35] *Supra* note 8.
- [36] *Supra* note 9, at 260-261.
- [37] *Id.* at 268-269.
- [38] Petition, rollo, Vol. I, p. 47.
- [39] 222 Phil 381, 384 (1985).
- [40] G.R. No. 152318, 16 April 2009, 585 SCRA 150.
- [41] *Id.* at 165-173.
- [42] *Supra* note 24.
- [43] *Id.* at 531-533.
- [44] 330 Phil 573 (1996).
- [45] *Id.* at 587-588.
- [46] *Supra* note 40, at 174-175.
- [47] Petition, rollo, Vol. I, p. 30.
- [48] Conditions of Contract, rollo, Vol. I, pp. 202-241, 415-455.
- [49] *Supra* note 7. Clause 1.1 of the Contract Agreement provides:

The following documents shall constitute the Contract between the Employer and the Contractor, and each shall be read and construed as an integral part of the Contract:

- (1) Contract Agreement
- (2) Amendments, if any to the Contract documents agreed by the Parties
- (3) Conditions of Contract
- (4) Technical Documents
- (5) Preliminary Engineering Design including Bill of Quantities
- (6) Technical Specification

[50] G.R. No. 159618, 1 February 2011, 641 SCRA 244, 258-259.

[51] Supra note 7.

[52] Id.

[53] Supra note 6.

[54] Supra note 48.

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