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SO ORDERED.

Quisumbing (Chairperson), Carpio Morales, Velasco, Jr., and *Brion, JJ.,* concur.

SECOND DIVISION

[G.R. No. 152318. April 16, 2009]

DEUTSCHE GESELLSCHAFT FÜR TECHNISCHE ZUSAMMENARBEIT, also known as GERMAN AGENCY FOR TECHNICAL COOPERATION, (GTZ) HANS PETER PAULENZ and ANNE NICOLAY, *petitioners, vs.* **HON. COURT OF APPEALS, HON. ARIEL CADIENTE SANTOS, Labor Arbiter of the Arbitration Branch, National Labor Relations Commission, and BERNADETTE CARMELLA MAGTAAS, CAROLINA DIONCO, CHRISTOPHER RAMOS, MELVIN DELA PAZ, RANDY TAMAYO and EDGARDO RAMILLO,** *respondents.*

SYLLABUS

1. POLITICAL LAW; PUBLIC INTERNATIONAL LAW; DOCTRINE OF STATE IMMUNITY FROM SUIT; THE FACT THAT A FOREIGN STATE ENTERED INTO A CONTRACT WITH A PRIVATE PARTY DID NOT DISQUALIFY IT FROM INVOKING THE IMMUNITY FROM SUIT.— x x x 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

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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.

2. ID.; ID.; ID.; AVAILABLE TO FOREIGN STATES WHEN SUED IN THE COURTS OF THE LOCAL STATE TO MAINTAIN THE PEACE OF NATIONS.— 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.

3. ID.; ID.; ID.; TEST OF SUABILITY IN CASES OF GOVERNMENT AGENCIES.— 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 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. The following lucid discussion from Justice Isagani Cruz is pertinent: Where suit is filed not against the government itself or its officials but against one of its entities, it must be ascertained whether or not the State, as the principal that may ultimately be held liable,

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has given its consent to be sued. **This ascertainment will depend in the first instance on whether the government agency impleaded is incorporated or unincorporated. An incorporated agency has a charter of its own that invests it with a separate juridical personality**, like the Social Security System, the University of the Philippines, and the City of Manila. By contrast, the unincorporated agency is so called because it has no separate juridical personality but is merged in the general machinery of the government, like the Department of Justice, the Bureau of Mines and the Government Printing Office. **If the agency is incorporated, the test of its suability is found in its charter. The simple rule is that it is suable if its charter says so, and this is true regardless of the functions it is performing. Municipal corporations, for example, like provinces and cities, are agencies of the State when they are engaged in governmental functions and therefore should enjoy the sovereign immunity from suit. Nevertheless, they are subject to suit even in the performance of such functions because their charter provides that they can sue and be sued**. 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. x x x

4. ID.; ID.; ID.; 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; CASE AT BAR.— x x x Our ruling in *Holy See v. Del Rosario* provided a template on how a foreign entity desiring to invoke State immunity from suit could duly prove such immunity before our local courts. The principles enunciated in that case were derived from public international law. We stated then: 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. In the United States, the procedure followed is the process of "suggestion," where the foreign state or the international organization sued in an

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American court requests the Secretary of State to make a determination as to whether it is entitled to immunity. If the Secretary of State finds that the defendant is immune from suit, he, in turn, asks the Attorney General to submit to the court a "suggestion" that the defendant is entitled to immunity. In England, a similar procedure is followed, only the Foreign Office issues a certification to that effect instead of submitting a "suggestion" (O'Connell, I International Law 130 [1965]; Note: Immunity from Suit of Foreign Sovereign Instrumentalities and Obligations, 50 Yale Law Journal 1088 [1941]). 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*. x x x [A]s narrated in *Holy See*, it was the Secretary of Foreign Affairs which directed the OSG to intervene in behalf of the United States government in the *Baer* case, and such fact is manifest enough of the endorsement by the Foreign Office. We do not find a similar circumstance that bears here. The Court is thus holds and so rules that GTZ consistently has been unable to establish with satisfaction that it enjoys the immunity from suit generally enjoyed by its parent country, the Federal Republic of Germany. x x x

5. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *CERTIORARI*; LABOR ARBITER'S DECISION WAS NOT A PATENT NULLITY; EXPLAINED.— x x x [B]oth the Labor Arbiter and the Court of Appeals acted within proper bounds when they refused to acknowledge that GTZ is so immune by dismissing the complaint against it. Our finding has additional ramifications

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on the failure of GTZ to properly appeal the Labor Arbiter's decision to the NLRC. As pointed out by the OSG, the direct recourse to the Court of Appeals while bypassing the NLRC could have been sanctioned had the Labor Arbiter's decision been a "patent nullity." Since the Labor Arbiter acted properly in deciding the complaint, notwithstanding GTZ's claim of immunity, we cannot see how the decision could have translated into a "patent nullity." As a result, there was no basis for petitioners in foregoing the appeal to the NLRC by filing directly with the Court of Appeals the petition for *certiorari*. It then follows that the Court of Appeals acted correctly in dismissing the petition on that ground. x x x

6. ID.; APPEALS; EFFECT OF FAILURE TO PERFECT AN APPEAL FROM THE LABOR ARBITER'S DECISION; CASE AT BAR.— x x x As a further consequence, since petitioners failed to perfect an appeal from the Labor Arbiter's Decision, the same has long become final and executory. All other questions related to this case, such as whether or not private respondents were illegally dismissed, are no longer susceptible to review, respecting as we do the finality of the Labor Arbiter's Decision.

APPEARANCES OF COUNSEL

Jose Ngaw & Dante Diaz for petitioners.
Mel Mariano T. Ramos for Pura T. Ramos.
Ignacio Litong & Associates for private respondents.

D E C I S I O N

TINGA, *J.*:

On 7 September 1971, the governments of the Federal Republic of Germany and the Republic of the Philippines ratified an Agreement concerning Technical Co-operation (Agreement) in Bonn, capital of what was then West Germany. The Agreement affirmed the countries' "common interest in promoting the technical and economic development of their States, and recogni[zed] the benefits to be derived by both States from closer technical co-operation," and allowed for the conclusion of "arrangements concerning individual projects

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of technical co-operation."[1] While the Agreement provided for a limited term of effectivity of five (5) years, it nonetheless was stated that "[t]he Agreement shall be tacitly extended for successive periods of one year unless either of the two Contracting Parties denounces it in writing three months prior to its expiry," and that even upon the Agreement's expiry, its provisions would "continue to apply to any projects agreed upon x x x until their completion."[2]

On 10 December 1999, the Philippine government, through then Foreign Affairs Secretary Domingo Siazon, and the German government, agreed to an Arrangement in furtherance of the 1971 Agreement. This Arrangement affirmed the common commitment of both governments to promote jointly a project called, Social Health Insurance—Networking and Empowerment (SHINE), which was designed to "enable Philippine families–especially poor ones–to maintain their health and secure health care of sustainable quality."[3] It appears that SHINE had already been in existence even prior to the effectivity of the Arrangement, though the record does not indicate when exactly SHINE was constituted. Nonetheless, the Arrangement stated the various obligations of the Filipino and German governments. The relevant provisions of the Arrangement are reproduced as follows:

3. The Government of the Federal Republic of Germany shall make the following contributions to the project.

It shall

(a) second

- one expert in health economy, insurance and health systems for up to 48 expert/months,
- one expert in system development for up to 10 expert/months
- short-term experts to deal with special tasks for a total of up to 18 expert/months,

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[1] *Rollo,* p. 51.

[2] *Id.* at 56-57.

[3] *Id.* at 59.

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- project assistants/guest students as required, who shall work on the project as part of their basic and further training and assume specific project tasks under the separately financed junior staff promotion programme of the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ);

(b) provide *in situ*

- short-term experts to deal with diverse special tasks for a total of up to 27 expert/months,
- five local experts in health economy, health insurance, community health systems, information technology, information systems, training and community mobilization for a total of up to 240 expert/months,
- local and auxiliary personnel for a total of up to 120 months;

(c) supply inputs, in particular

- two cross-country vehicles,
- ten computers with accessories,
- office furnishings and equipment

up to a total value of DM 310,000 (three hundred and ten thousand Deutsche Mark);

(c) meet

- the cost of accommodation for the seconded experts and their families in so far as this cost is not met by the seconded experts themselves,
- the cost of official travel by the experts referred to in sub-paragraph (a) above within and outside the Republic of the Philippines,
- the cost of seminars and courses,
- the cost of transport and insurance to the project site of inputs to be supplied pursuant to sub-paragraph (c) above, excluding the charges and storage fees referred to in paragraph 4(d) below,
- a proportion of the operating and administrative costs;

x x x x x x x x x

4. The Government of the Republic of the Philippines shall make the following contributions to the project:

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It shall

(a) – provide the necessary Philippine experts for the project, in particular one project coordinator in the Philippine Health Insurance Corporation (Philhealth), at least three further experts and a sufficient number of administrative and auxiliary personnel, as well as health personnel in the pilot provinces and in the other project partners, in particular one responsible expert for each pilot province and for each association representing the various target groups,

- release suitably qualified experts from their duties for attendance at the envisaged basic and further training activities; it shall only nominate such candidates as have given an undertaking to work on the project for at least five years after completing their training and shall ensure that these Philippine experts receive appropriate remuneration,

- ensure that the project field offices have sufficient expendables,

- make available the land and buildings required for the project;

(b) assume an increasing proportion of the running and operating costs of the project;

(c) afford the seconded experts any assistance they may require in carrying out the tasks assigned to them and place at their disposal all necessary records and documents;

(d) guarantee that

- the project is provided with an itemized budget of its own in order to ensure smooth continuation of the project.

- the necessary legal and administrative framework is created for the project,

- the project is coordinated in close cooperation with other national and international agencies relevant to implementation,

- the inputs supplied for the project on behalf of the Government of the Federal Republic of Germany are exempted from the cost of licenses, harbour dues, import and export duties and other public charges and fees, as well as storage fees, or that any costs thereof are met, and that they are cleared by customs without delay. The aforementioned exemptions shall, at the request of the implementing agencies also apply to inputs procured in the Republic of the Philippines,

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- the tasks of the seconded experts are taken over as soon as possible by Philippine experts,

- examinations passed by Philippine nationals pursuant to this Arrangement are recognized in accordance with their respective standards and that the persons concerned are afforded such opportunities with regard to careers, appointments and advancement as are commensurate with their training.[4]

In the arraignment, both governments likewise named their respective implementing organizations for SHINE. The Philippines designated the Department of Health (DOH) and the Philippine Health Insurance Corporation (Philhealth) with the implementation of SHINE. For their part, the German government "charge[d] the Deustche Gesellschaft für Technische Zusammenarbeit[5] (GTZ[6]) GmbH, Eschborn, with the implementation of its contributions."[7]

Private respondents were engaged as contract employees hired by GTZ to work for SHINE on various dates between December of 1998 to September of 1999. Bernadette Carmela Magtaas was hired as an "information systems manager and project officer of SHINE;"[8] Carolina Dionco as a "Project Assistant of SHINE;"[9] Christopher Ramos as "a project assistant and liason personnel of NHI related SHINE activities by GTZ;"[10] Melvin Dela Paz and Randy Tamayo as programmers;[11] and Edgardo Ramilo as "driver, messenger and multipurpose service man."[12] The employment contracts of all six private respondents

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[4] *Id.* at 59-62.

[5] See *id.* at 2. Also known as the German Agency for Technical Cooperation.

[6] "GTZ" is apparently the acronym by which petitioner is commonly identified; we adopt the same for purposes of brevity.

[7] *Rollo,* p. 62.

[8] *Id.* at 64-67.

[9] *Id.* at 68-71.

[10] *Id.* at 72-75.

[11] *Id.* at 76-79, 80-83.

[12] *Id.* at 84-87.

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all specified Dr. Rainer Tollkotter, identified as an adviser of GTZ, as the "employer." At the same time, all the contracts commonly provided that "[i]t is mutually agreed and understood that [Dr. Tollkotter, as employer] is a seconded GTZ expert who is hiring the Employee on behalf of GTZ and for a Philippine-German bilateral project named 'Social Health Insurance—Networking and Empowerment (SHINE)' which will end at a given time."[13]

In September of 1999, Anne Nicolay (Nicolay), a Belgian national, assumed the post of SHINE Project Manager. Disagreements eventually arose between Nicolay and private respondents in matters such as proposed salary adjustments, and the course Nicolay was taking in the implementation of SHINE different from her predecessors. The dispute culminated in a letter[14] dated 8 June 2000, signed by the private respondents, addressed to Nicolay, and copies furnished officials of the DOH, Philheath, and the director of the Manila office of GTZ. The letter raised several issues which private respondents claim had been brought up several times in the past, but have not been given appropriate response. It was claimed that SHINE under Nicolay had veered away from its original purpose to facilitate the development of social health insurance by shoring up the national health insurance program and strengthening local initiatives, as Nicolay had refused to support local partners and new initiatives on the premise that community and local government unit schemes were not sustainable—a philosophy that supposedly betrayed Nicolay's lack of understanding of the purpose of the project. Private respondents further alleged that as a result of Nicolay's "new thrust, resources have been used inappropriately;" that the new management style was "not congruent with the original goals of the project;" that Nicolay herself suffered from "cultural insensitivity" that consequently failed to sustain healthy relations with SHINE's partners and staff.

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[13] See *id.* at 64, 68, 72, 76, 80, 84.

[14] *Rollo,* pp. 156-158.

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The letter ended with these ominous words:

> The issues that we [the private respondents] have stated here are very crucial to us in working for the project. We could no longer find any reason to stay with the project unless ALL of these issues be addressed immediately and appropriately.[15]

In response, Nicolay wrote each of the private respondents a letter dated 21 June 2000, all similarly worded except for their respective addressees. She informed private respondents that the "project's orientations and evolution" were decided in consensus with partner institutions, Philhealth and the DOH, and thus no longer subject to modifications. More pertinently, she stated:

> You have firmly and unequivocally stated in the last paragraph of your 8th June 2000 letter that you and the five other staff "could no longer find any reason to stay with the project unless ALL of these issues be addressed immediately and appropriately." Under the foregoing premises and circumstances, it is now imperative that I am to accept your resignation, which I expect to receive as soon as possible.[16]

Taken aback, private respondents replied with a common letter, clarifying that their earlier letter was not intended as a resignation letter, but one that merely intended to raise attention to what they perceived as vital issues.[17] Negotiations ensued between private respondents and Nicolay, but for naught. Each of the private respondents received a letter from Nicolay dated 11 July 2000, informing them of the pre-termination of their contracts of employment on the grounds of "serious and gross insubordination, among others, resulting to loss of confidence and trust."[18]

On 21 August 2000, the private respondents filed a complaint for illegal dismissal with the NLRC. Named as respondents

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[15] *Id.* at 157. Emphasis in the original.

[16] *Id.* at 159, 160, 161, 162, 163 & 164. Emphasis not ours.

[17] *Id.* at 165.

[18] *Id.* at 168-173.

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therein where GTZ, the Director of its Manila office Hans Peter Paulenz, its Assistant Project Manager Christian Jahn, and Nicolay.

On 25 October 2005, GTZ, through counsel, filed a Motion to Dismiss, on the ground that the Labor Arbiter had no jurisdiction over the case, as its acts were undertaken in the discharge of the governmental functions and sovereign acts of the Government of the Federal Republic of Germany. This was opposed by private respondents with the arguments that GTZ had failed to secure a certification that it was immune from suit from the Department of Foreign Affairs, and that it was GTZ and not the German government which had implemented the SHINE Project and entered into the contracts of employment.

On 27 November 2000, the Labor Arbiter issued an Order[19] denying the Motion to Dismiss. The Order cited, among others, that GTZ was a private corporation which entered into an employment contract; and that GTZ had failed to secure from the DFA a certification as to its diplomatic status.

On 7 February 2001, GTZ filed with the Labor Arbiter a "Reiterating Motion to Dismiss," again praying that the Motion to Dismiss be granted on the jurisdictional ground, and reprising the arguments for dismissal it had earlier raised.[20] No action was taken by the Labor Arbiter on this new motion. Instead, on 15 October 2001, the Labor Arbiter rendered a Decision[21] granting the complaint for illegal dismissal. The Decision concluded that respondents were dismissed without lawful cause, there being "a total lack of due process both substantive and procedural [*sic*]."[22] GTZ was faulted for failing to observe the notice requirements in the labor law. The Decision likewise proceeded from the premise that GTZ had treated the letter

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[19] See *id.* at 204-205. Order penned by Labor Arbiter Ariel Cadiente Santos, the Labor Arbiter who heard and eventually decided the complaint for illegal dismissal.

[20] See *id.* at 206-211.

[21] *Id.* at 212-223.

[22] *Id.*

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dated 8 June 2000 as a resignation letter, and devoted some focus in debunking this theory.

The Decision initially offered that it "need not discuss the jurisdictional aspect considering that the same had already been lengthily discussed in the Order de[n]ying respondents' Motion to Dismiss."[23] Nonetheless, it proceeded to discuss the jurisdictional aspect, in this wise:

> Under pain of being repetitious, the undersigned Labor Arbiter has jurisdiction to entertain the complaint on the following grounds:
>
> Firstly, under the employment contract entered into between complainants and respondents, specifically Section 10 thereof, it provides that "contract partners agree that his contract shall be subject to the LAWS of the jurisdiction of the locality in which the service is performed."
>
> Secondly, respondent having entered into contract, they can no longer invoke the sovereignty of the Federal Republic of Germany.
>
> Lastly, it is imperative to be immune from suit, respondents should have secured from the Department of Foreign Affairs a certification of respondents' diplomatic status and entitlement to diplomatic privileges including immunity from suits. Having failed in this regard, respondents cannot escape liability from the shelter of sovereign immunity.[*sic*][24]

Notably, GTZ did not file a motion for reconsideration to the Labor Arbiter's Decision or elevate said decision for appeal to the NLRC. Instead, GTZ opted to assail the decision by way of a special civil action for *certiorari* filed with the Court of Appeals.[25] On 10 December 2001, the Court of Appeals promulgated a Resolution[26] dismissing GTZ's petition, finding

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[23] *Id.* at 219.

[24] *Id.* at 220-221.

[25] Docketed as CA-G.R. SP No. 67794.

[26] *Rollo*, pp. 48-49. Resolution penned by Associate Justice Salvador T. Valdez, Jr. of the Court of Appeals Former Fifteenth Division, and concurred in by Associate Justices Mercedes Gozo-Dadole and Sergio L. Pestaño.

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that "judicial recourse at this stage of the case is uncalled for[,] [t]he appropriate remedy of the petitioners [being] an appeal to the NLRC x x x."[27] A motion for reconsideration to this Resolution proved fruitless for GTZ.[28]

Thus, the present petition for review under Rule 45, assailing the decision and resolutions of the Court of Appeals and of the Labor Arbiter. GTZ's arguments center on whether the Court of Appeals could have entertained its petition for *certiorari* despite its not having undertaken an appeal before the NLRC; and whether the complaint for illegal dismissal should have been dismissed for lack of jurisdiction on account of GTZ's insistence that it enjoys immunity from suit. No special arguments are directed with respect to petitioners Hans Peter Paulenz and Anne Nicolay, respectively the then Director and the then Project Manager of GTZ in the Philippines; so we have to presume that the arguments raised in behalf of GTZ's alleged immunity from suit extend to them as well.

The Court required the Office of the Solicitor General (OSG) to file a Comment on the petition. In its Comment dated 7 November 2005, the OSG took the side of GTZ, with the prayer that the petition be granted on the ground that GTZ was immune from suit, citing in particular its assigned functions in implementing the SHINE program—a joint undertaking of the Philippine and German governments which was neither proprietary nor commercial in nature.

The Court of Appeals had premised the dismissal of GTZ's petition on its procedural misstep in bypassing an appeal to NLRC and challenging the Labor Arbiter's Decision directly with the appellate court by way of a Rule 65 petition. In dismissing the petition, the Court of Appeals relied on our ruling in *Air Service Cooperative v. Court of Appeals*.[29] The central issue in that case was whether a decision of a Labor Arbiter

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[27] *Id.* at 45.

[28] The Resolution denying the Motion for Reconsideration was promulgated on 4 March 2002.

[29] 354 Phil. 905 (1998).

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rendered without jurisdiction over the subject matter may be annulled in a petition before a Regional Trial Court. That case may be differentiated from the present case, since the Regional Trial Court does not have original or appellate jurisdiction to review a decision rendered by a Labor Arbiter. In contrast, there is no doubt, as affirmed by jurisprudence, that the Court of Appeals has jurisdiction to review, by way of its original *certiorari* jurisdiction, decisions ruling on complaints for illegal dismissal.

Nonetheless, the Court of Appeals is correct in pronouncing the general rule that the proper recourse from the decision of the Labor Arbiter is to first appeal the same to the NLRC. *Air Services* is in fact clearly detrimental to petitioner's position in one regard. The Court therein noted that on account of the failure to correctly appeal the decision of the Labor Arbiter to the NLRC, such judgment consequently became final and executory.[30] GTZ goes as far as to "request" that the Court re-examine *Air Services*, a suggestion that is needlessly improvident under the circumstances. *Air Services* affirms doctrines grounded in sound procedural rules that have allowed for the considered and orderly disposition of labor cases.

The OSG points out, citing *Heirs of Mayor Nemencio Galvez v. Court of Appeals*,[31] that even when appeal is available, the Court has nonetheless allowed a writ of *certiorari* when the orders of the lower court were issued either in excess of or without jurisdiction. Indeed, the Court has ruled before that the failure to employ available intermediate recourses, such as a motion for reconsideration, is not a fatal infirmity if the ruling assailed is a patent nullity. This approach suggested by the OSG allows the Court to inquire directly into what is the main issue–whether GTZ enjoys immunity from suit.

The arguments raised by GTZ and the OSG are rooted in several indisputable facts. The SHINE project was implemented pursuant to the bilateral agreements between the Philippine

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[30] *Id.* at 916-917.

[31] 325 Phil. 1028 (1996).

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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.*,[32] 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.[33]

Beyond dispute is the tenability of the comment points 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,[34] 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

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[32] G.R. No. 101949, 1 December 1994, 238 SCRA 524.

[33] *Id.* at 536.

[34] See *Syquia v. Almeda Lopez*, 84 Phil. 312 (1949).

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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 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. The following lucid discussion from Justice Isagani Cruz is pertinent:

> Where suit is filed not against the government itself or its officials but against one of its entities, it must be ascertained whether or not the State, as the principal that may ultimately be held liable, has given its consent to be sued. **This ascertainment will depend in the first instance on whether the government agency impleaded is incorporated or unincorporated.**
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> **An incorporated agency has a charter of its own that invests it with a separate juridical personality**, like the Social Security System, the University of the Philippines, and the City of Manila. By contrast, the unincorporated agency is so called because it has no separate juridical personality but is merged in the general machinery of the government, like the Department of Justice, the Bureau of Mines and the Government Printing Office.
>
> **If the agency is incorporated, the test of its suability is found in its charter. The simple rule is that it is suable if its charter says so, and this is true regardless of the functions it is performing. Municipal corporations, for example, like provinces and cities, are agencies of the State when they are engaged in governmental functions and therefore should enjoy the sovereign immunity from suit. Nevertheless, they are subject to suit even in the performance of such functions because their charter provides that they can sue and be sued**.[35]

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[35] I. CRUZ, *PHILIPPINE POLITICAL LAW* (2002 ed.) at 43. Emphasis supplied. See also *Metran v. Paredes*, 79 Phil. 819 (1948).

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State immunity from suit may be waived by general or special law.[36] 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. These include the National Irrigation Administration,[37] the former Central Bank,[38] and the National Power Corporation.[39] In *SSS v. Court of Appeals*,[40] the Court through Justice Melencio-Herrera explained that by virtue of an express provision in its charter allowing it to sue and be sued, the Social Security System did not enjoy immunity from suit:

> We come now to the amendability of the SSS to judicial action and legal responsibility for its acts. To our minds, there should be no question on this score considering that the SSS is a juridical entity with a personality of its own. It has corporate powers separate and distinct from the Government. SSS' own organic act specifically provides that it can sue and be sued in Court. These words "sue and be sued" embrace all civil process incident to a legal action. So that, even assuming that the SSS, as it claims, enjoys immunity from suit as an entity performing governmental functions, by virtue of the explicit provision of the aforecited enabling law, the Government must be deemed to have waived immunity in respect of the SSS, although it does not thereby concede its liability. That statutory law has given to the private citizen a remedy for the enforcement and protection of his rights. The SSS thereby has been required to submit to the jurisdiction of the Courts, subject to its right to interpose any lawful defense. Whether the SSS performs governmental or proprietary functions thus becomes unnecessary to belabor. For by that waiver, a private citizen may bring a suit against it for varied objectives,

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[36] See *Traders Royal Bank v. Intermediate Appellate Court*, G.R. No. 68514, 17 December 1990, 192 SCRA 305, 310.

[37] See *Fontanilla v. Maliaman*, G.R. Nos. 55963 & 61045, 27 February 1991, 194 SCRA 486.

[38] See *Arcega v. Court of Appeals*, 160 Phil. 919 (1975); *Olizo v. Central Bank*, 120 Phil. 355 (1964).

[39] See *Rayo v. CFI of Bulacan*, 196 Phil. 572 (1981).

[40] See *SSS v. Court of Appeals*, 205 Phil. 609 (1983).

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such as, in this case, to obtain compensation in damages arising from contract, and even for tort.

A recent case squarely in point anent the principle, involving the National Power Corporation, is that of *Rayo v. Court of First Instance of Bulacan*, 110 SCRA 457 (1981), wherein this Court, speaking through Mr. Justice Vicente Abad Santos, ruled:

> "It is not necessary to write an extended dissertation on whether or not the NPC performs a governmental function with respect to the management and operation of the Angat Dam. It is sufficient to say that the government has organized a private corporation, put money in it and has allowed it to sue and be sued in any court under its charter. (R.A. No. 6395, Sec. 3[d]). As a government, owned and controlled corporation, it has a personality of its own, distinct and separate from that of the Government. Moreover, the charter provision that the NPC can 'sue and be sued in any court' is without qualification on the cause of action and accordingly it can include a tort claim such as the one instituted by the petitioners."[41]

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, governmental in nature as 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."[42] The

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[41] *Id.* at 624.

[42] See *rollo*, p. 110.

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Labor Arbiter accepted that claim in his Order denying the Motion to Dismiss,[43] 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."[44] 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.[45]

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.

GTZ itself provides a more helpful clue, inadvertently, through its own official Internet website.[46] In the "Corporate Profile" section of the English language version of its site, GTZ describes itself as follows:

As an international cooperation enterprise for sustainable development with worldwide operations, the federally owned Deutsche

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[43] *Id.* at 204.

[44] *Id.* at 278.

[45] *Id.* at 317.

[46] German language version at http://www.gtz.de/de/index.htm, while the English language version is at http://www.gtz.de/en/ (Last visited, 23 March 2009).

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Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH supports the German Government in achieving its development-policy objectives. It provides viable, forward-looking solutions for political, economic, ecological and social development in a globalised world. Working under difficult conditions, GTZ promotes complex reforms and change processes. Its corporate objective is to improve people's living conditions on a sustainable basis.

GTZ is a federal enterprise based in Eschborn near Frankfurt am Main. It was founded in 1975 as a company under private law. The German Federal Ministry for Economic Cooperation and Development (BMZ) is its major client. The company also operates on behalf of other German ministries, the governments of other countries and international clients, such as the European Commission, the United Nations and the World Bank, as well as on behalf of private enterprises. GTZ works on a public-benefit basis. All surpluses generated are channeled [*sic*] back into its own international cooperation projects for sustainable development.[47]

GTZ's own website elicits that petitioner is "federally owned," a "federal enterprise," and "founded in 1975 as a company under private law." GTZ clearly has a very meaningful relationship with the Federal Republic of Germany, which apparently owns it. At the same time, it appears that GTZ was actually organized not through a legislative public charter, but under private law, in the same way that Philippine corporations can be organized under the Corporation Code even if fully owned by the Philippine government.

This self-description of GTZ in its own official website gives further cause for pause in adopting petitioners' argument that GTZ is entitled to immunity from suit because it is "an implementing agency." The above-quoted statement does not dispute the characterization of GTZ as an "implementing agency of the Federal Republic of Germany," yet it bolsters the notion that as a company organized under private law, it has a legal personality independent of that of the Federal Republic of Germany.

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[47] "GTZ. Corporate Profile," at http://www.gtz.de/en/unternehmen/1698.htm (Last visited, 23 March 2009).

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The Federal Republic of Germany, in its own official website,[48] also makes reference to GTZ and describes it in this manner:

> x x x Going by the principle of "sustainable development," the German Technical Cooperation (Deutsche Gesellschaft für Technische Zusammenarbeit GmbH, GTZ) takes on non-profit projects in international "technical cooperation." **The GTZ is a private company owned by the Federal Republic of Germany**.[49]

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."[50]

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,[51] and following the most intelligent assumption we can gather,

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[48] http://www.deutschland.de (Last visited, 23 March 2009).

[49] "Das Deutschland Portal > German Technical Cooperation", at http://www.deutschland.de/ link.php?lang=2&category2=249&link_id=391 (Last visited, 23 March 2009, emphasis supplied).

[50] See CORPORATION CODE, Sec. 36.

[51] *Board of Commissioners v. Dela Rosa*, G.R. Nos. 95122-23, 31 May 1991, 197 SCRA 854; *Miciano v. Brimo*, 50 Phil. 867 (1924); *Lim and Lim v. Collector of Customs*, 36 Phil. 472; *Yam Ka Lim v. Collector of Customs*, 30 Phil. 46 (1915).

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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.

This absence of basis in fact leads to another important point, alluded to by the Labor Arbiter in his rulings. Our ruling in *Holy See v. Del Rosario*[52] provided a template on how a foreign entity desiring to invoke State immunity from suit could duly prove such immunity before our local courts. The principles enunciated in that case were derived from public international law. We stated then:

> 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.
>
> In the United States, the procedure followed is the process of "suggestion," where the foreign state or the international organization sued in an American court requests the Secretary of State to make a determination as to whether it is entitled to immunity. If the Secretary of State finds that the defendant is immune from suit, he, in turn, asks the Attorney General to submit to the court a "suggestion" that the defendant is entitled to immunity. In England, a similar procedure is followed, only the Foreign Office issues a certification to that effect instead of submitting a "suggestion" (O'Connell, I International Law 130 [1965]; Note: Immunity from Suit of Foreign Sovereign Instrumentalities and Obligations, 50 Yale Law Journal 1088 [1941]).
>
> 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

[52] *Supra* note 38.

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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*.[53]

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."[54] 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

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[53] *Id.* at 532.

[54] See *rollo*, pp. 204, 221.

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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.

Holy See made reference to *Baer v. Tizon*,[55] and that in the said case, the United States Embassy asked the Secretary of Foreign Affairs to request the Solicitor General to make a "suggestion" to the trial court, accomplished by way of a Manifestation and Memorandum, that the petitioner therein enjoyed immunity as the Commander of the Subic Bay Naval Base. Such circumstance is actually not narrated in the text of *Baer* itself and was likely supplied in *Holy See* because its author, Justice Camilio Quiason, had appeared as the Solicitor in behalf of the OSG in *Baer*. Nonetheless, as narrated in *Holy See*, it was the Secretary of Foreign Affairs which directed the OSG to intervene in behalf of the United States government in the *Baer* case, and such fact is manifest enough of the endorsement by the Foreign Office. We do not find a similar circumstance that bears here.

The Court is thus holds and so rules that GTZ consistently has been unable to establish with satisfaction that it enjoys the immunity from suit generally enjoyed by its parent country, the Federal Republic of Germany. Consequently, both the Labor Arbiter and the Court of Appeals acted within proper bounds when they refused to acknowledge that GTZ is so immune by dismissing the complaint against it. Our finding has additional ramifications on the failure of GTZ to properly appeal the Labor Arbiter's decision to the NLRC. As pointed out by the OSG, the direct recourse to the Court of Appeals while bypassing the NLRC could have been sanctioned had the Labor Arbiter's decision been a "patent nullity." Since the Labor Arbiter acted

[55] 156 Phil. 1 (1974).

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properly in deciding the complaint, notwithstanding GTZ's claim of immunity, we cannot see how the decision could have translated into a "patent nullity."

As a result, there was no basis for petitioners in foregoing the appeal to the NLRC by filing directly with the Court of Appeals the petition for *certiorari*. It then follows that the Court of Appeals acted correctly in dismissing the petition on that ground. As a further consequence, since petitioners failed to perfect an appeal from the Labor Arbiter's Decision, the same has long become final and executory. All other questions related to this case, such as whether or not private respondents were illegally dismissed, are no longer susceptible to review, respecting as we do the finality of the Labor Arbiter's Decision.

A final note. This decision should not be seen as deviation from the more common methodology employed in ascertaining whether a party enjoys State immunity from suit, one which focuses on the particular functions exercised by the party and determines whether these are proprietary or sovereign in nature. The nature of the acts performed by the entity invoking immunity remains the most important barometer for testing whether the privilege of State immunity from suit should apply. At the same time, our Constitution stipulates that a State immunity from suit is conditional on its withholding of consent; hence, the laws and circumstances pertaining to the creation and legal personality of an instrumentality or agency invoking immunity remain relevant. Consent to be sued, as exhibited in this decision, is often conferred by the very same statute or general law creating the instrumentality or agency.

WHEREFORE, the petition is *DENIED*. No pronouncement as to costs.

SO ORDERED.

Quisumbing (Chairperson), Carpio Morales, Velasco, Jr., and *Brion, JJ.,* concur.