

**LEGAL, ECONOMIC, FINANCIAL AND TECHNICAL
OPINION ON THE: (1) CONTRACT BETWEEN THE
NORTH LUZON RAILWAYS CORPORATION AND CHINA
NATIONAL MACHINERY AND EQUIPMENT
CORPORATION; AND (2) BUYER CREDIT LOAN
AGREEMENT NO. BLA 04055 DATED 26 FEBRUARY
2004 BETWEEN THE EXPORT-IMPORT BANK OF CHINA
AND THE GOVERNMENT OF THE REPUBLIC OF THE
PHILIPPINES**

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I. EXECUTIVE SUMMARY

Legality of the Contract between NLRC and CNMEC

The Contract between the NLRC and CNMEC is unlawful and void for failure to comply with the mandatory requirement of competitive public bidding under RA 9184 in the selection of CNMEC as the Prime Contractor. While there are exceptions under RA 9184 where competitive public bidding may be dispensed with, these exceptions do not obtain in the selection of CNMEC, for the following reasons.

First, there is no "imminent danger to life or property during a state of calamity, or when time is of the essence arising from natural or manmade calamities or other causes where immediate action is necessary to prevent damage to or loss of life or property, or to restore vital public services, infrastructure facilities and other public utilities" or "where the subject contract is adjacent or contiguous to an ongoing infrastructure project." *Second*, the Contract cannot be construed as a treaty or executive agreement, whether viewed from the perspective of international law under Article 2(1)(a) of the Vienna Convention of the Law of Treaties or under Philippine law.

The Contract may be void as it appears to have failed to comply with the Government Auditing Code and the Administrative Code of 1987. To recall, the Northrail project will also be financed by counterpart funds from the government. By positive provision of law, a proposed government contract involving the expenditure of public funds that is unsupported by a certificate as to the existence of appropriation and the availability of necessary funds, which certificate must be attached to as an integral part of the proposed contract, is fatally defective.

Corollarily, CNMEC should establish that it is duly licensed to undertake infrastructure projects in the Philippines as required by RA 4566.

Legality of the Buyer Credit Loan Agreement

The Buyer Credit Loan Agreement between EXIM Bank and the Republic of the Philippines is of questionable validity as it appears that there was no prior concurrence by the Monetary Board, as required by Section 20, Article VII of the Constitution. In the same vein, the BCLA is so intertwined with the Contract such that they can be viewed as an integral agreement, as the appointment of CNMEC as Prime Contractor

under the Contract appears to be an indispensable consideration for the execution of the BCLA. Accordingly the nullity of the Contract casts doubt on the legality of the BCLA.

Economic, Financial & Technical Analysis of the Northrail Project

CNMEC is not technically qualified to be a Prime Contractor. CNMEC has not done any railway projects of similar magnitude in China or elsewhere in the world. Neither is it engaged in the manufacture of the railroad equipment contemplated in the Contract.

With the downgrading of the Northrail project from a standard-gauge electric train capable of airport express to a narrow-gauge diesel-powered train solely for commuter service, the contract price is on the high side. The government could have gotten a lower price and cheaper credit had it taken the minimum effort of asking other suppliers to submit proposals.

The Contract also contains many conditions disadvantageous to the government. It is silent on the specifications of the train equipment that is being procured; neither is there a standard warranty that the equipment to be supplied will be brand-new. Chinese engineering standards will be made to apply, completely ignoring accepted standards applicable to Philippine infrastructure projects. The risk cover for the project was delimited to a Chinese insurance company, whereas this should be under the GSIS or an accredited domestic insurer.

The involvement of BCDA in Northrail needs to be carefully reviewed, as it may be in violation of the limits imposed by its charter.

Recommendation

The Contract should be annulled by filing the appropriate action in court. As to the BCLA, further action thereon should be studied.

If warranted, the appropriate criminal, civil and/or administrative cases should be filed against the concerned public officials/private persons.

II. SCOPE/LIMITATION OF THE OPINION

This is an opinion on the legal, economic, financial and technical aspects of the: (1) Contract between North Luzon Railways Corporation ("NLRC") and the China National Machinery and Equipment Corporation ("CNMEC"); and the (2) Buyer Credit Loan Agreement No. BLA 04055 ("BCLA") dated 26 February 2004 between the Export-Import Bank of China ("EXIM Bank") and the Government of the Republic of the Philippines ("GRP"). Both the Contract and the BCLA pertain to the financing and implementation of the North Rail Project, Phase 1, Section 1 ("Northrail project"). The following documents constitute the Contract:

1. Contract Agreement dated 23 December 2003.
2. Amendments, if any.
3. Technical Document of Contract dated November 2003.
4. Conditions of Contract dated December 2003.
5. Preliminary Engineering Design including Bill of Quantities.
6. Technical Specification.

In the preparation of this opinion, the following documents, among others, were examined:

1. Buyer Credit Loan Agreement No. BLA 04055 dated 26 February 2004.
2. Contract Agreement dated 23 December 2003.
3. Technical Document of Contract dated November 2003.
4. Conditions of Contract dated December 2003.
5. MOU between NLRC and CNMEC dated 14 September 2002.
6. MOU between the EXIM Bank of China and the DOF dated 30 August 2003.
7. Letter of the Chinese Ambassador to the Secretary of Finance dated 1 October 2003.
8. DOJ Opinion dated 25 March 2004.
9. OGCC Opinion No. 211 s. 2003 dated 13 November 2003.
10. Privilege speech of Sen. Enrile on 14 February 2005.
11. Transcripts of the public hearing of the Senate Committee on Urban Planning on 11 February 2005.
12. Report on the Contract Agreement.
13. Various aide memoire, letters and reports.

III. LEGALITY OF THE CONTRACT BETWEEN NLRC AND CNMEC

The Contract is unlawful and void for lack of competitive public bidding.

The Contract between the NLRC and CNMEC designating the latter as the Prime Contractor for the Northrail project is unlawful and void for lack of competitive public bidding as required under Republic Act No. 9184 or the Government Procurement Reform Act ("RA 9184"). RA 9184 applies to all procurements of infrastructure projects. To quote:

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

In turn, Section 5(k) of RA 9184 defines "infrastructure projects" as to include the construction, improvement, rehabilitation, demolition, repair, restoration or maintenance of roads and bridges, railways, airports, seaports, communication facilities, civil works components of information technology projects, irrigation, flood control and drainage, water supply, sanitation, sewerage and solid waste management systems, shore protection, energy/power and electrification facilities, national buildings, school buildings, hospital buildings and other related construction projects of the government.

Undoubtedly, the Northrail project is an infrastructure project and the designation of CNMEC as Prime Contractor thereof is a procurement activity. Hence, such procurement must comply with and adhere strictly to the mandatory requirements, limitations and conditions prescribed in RA 9184. One such mandatory requirement is competitive public bidding. Thus:

Sec. 10. Competitive Bidding. - **All Procurement shall be done through Competitive Bidding**, except as provided for in Article XVI of this Act. (emphasis added)

Contrary to said mandatory requirement, the Northrail project was awarded to CNMEC without prior competitive public bidding. From the records, it appears that CNMEC, a Chinese government corporation, was selected/designated by the People's Republic of China ("PROC") as the Prime Contractor for the project and the GRP was simply "requested" to concur in or agree to such designation (see Letter dated Oct. 1, 2003, from Chinese Ambassador to RP to DOF). Earlier, the Department of Finance and EXIM Bank signed a MOU on August 30, 2003 to facilitate the utilization of US\$400M Preferential Buyer's Credit being extended by EXIM Bank to the RP to finance the construction of the Northrail project. And under a MOU dated September 1, 2003, between the RP and PROC, the parties mutually agreed to further negotiate the specific terms and conditions of the loan. Thus, there is every reason to believe that the designation by the PROC of CNMEC as Prime Contractor for the Northrail project was a precondition to the grant of the loan.

As it is, CNMEC was designated as Prime Contractor for the Northrail project through a negotiated procurement. However, under Section 53 of RA 9184, negotiated procurement can be resorted to as an "alternative method of procurement" and, therefore, being an exception to the public bidding requirement, only in case *inter alia* of "imminent danger to life or property during a state of calamity, or when time is of the essence arising from natural or manmade calamities or other causes where immediate action is necessary to prevent damage to or loss of life or property, or to restore vital public services, infrastructure facilities and other public utilities" or "where the subject contract is adjacent or contiguous to an ongoing infrastructure project." None of these circumstances existed at the time of the negotiated procurement.

In that regard, the mere circumstance that the Northrail project is financed through a "tied loan" from EXIM Bank under an arrangement which requires EXIM Bank to nominate/select the contractor for the project to be financed by the loan, does not alter the situation. Such an "arrangement" is by no means among the alternative methods of procurement enumerated under Section 48 of RA 9184 as allowable exceptions to the rule on public bidding. No other alternative method of procurement is contemplated as an exception to the competitive public bidding requirement. *Expresio unius est exclusio alterius*.

Neither can it be successfully argued that the BCLA or, for that matter, the Contract, are in the nature of treaties or executive agreements within the purview of Section 4 of RA 9184 which would justify a negotiated procurement. Two features of the Contract and the

BCLA (collectively, the Northrail agreements") are at once pertinent to this issue, which are:

(1) The Contract is an agreement between a government corporation created under the laws of the Republic of the Philippine, with a separate juridical personality, and a state-corporation created under the laws of the People's Republic of China, with a juridical personality of its own. On the other hand, the BCLA is an agreement between the GRP and EXIM Bank, a banking agency of the PROC, which presumably has its own juridical personality.

(2) It is provided in Clause 2 of the Contract that:

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

On the other hand, Section 15.1 of the BCLA requires that:

This Agreement shall be governed by and construed in accordance with the laws of the People's Republic of China.

Taking into account these two features of the Northrail agreements, they must be measured by the nature of a treaty as embodied in the usage of the term treaty in Article 2(1)(a) of the Vienna Convention of the Law of Treaties ("Vienna Convention"), which reads as follows:

"[T]reaty" means an 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[.] (Emphasis added)

By the legal standards set out in this provision, both agreements in question do not qualify as a treaty, first, because they are not agreements between States; and, secondly, because they are not governed by international law.

Except for the Republic of the Philippines as a party to the BCLA, all parties to the Northrail agreements are juridical persons under the national or internal law of the Republic of the Philippines and the PROC. They are not subjects or persons of international law; this being so, the agreements in question cannot by any stretch of legal imagination be considered as a source of international law of which a treaty is. They do

not have the competence to create international obligations. They do not have the capacity to conclude treaties. Simply, the parties to the agreements in question are not States, except in the case of the Philippines.

Moreover, the Northrail agreements themselves, by their own texts quoted above, testify that they are not governed by international law. They are agreements under the national law of the Republic of the Philippines and of the PROC.

It must be added that agreements concluded by States with individual or juridical persons are excluded from the coverage of the Vienna Convention. Having been concluded by entities which are not international organizations under international law, the Northrail agreements are likewise outside the purview of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organization.

Even if the Northrail agreements were to be denominated as a "treaty" and would provide for the application of international law, still they could not be covered by the international law of treaties if they are concluded, as they are, between a State and a foreign individual or corporation, or between two corporations. In the case of the Concession Agreement of 1933 between Persia and the Anglo-Iranian Oil Company, the International Court of Justice described it as a "Convention and contained an arbitration clause which provided for the application of . . . [international] law set forth in Article 38 of the Statute of the Permanent Court of International Justice". The Court declined to characterize it as a treaty, holding that the agreement was "nothing than a concessionary contract between a government and foreign corporation". (ICJ Reports, 1952,112) Whether agreements are to be regarded as treaties under international law depends not upon their designation as "agreement", "contract", or "treaty" or upon the objects to which they relate, but essentially on the nature of the obligation they create and on the law that governs them. Treaties create obligations under international law, not obligations under Philippine law or Chinese law.

The same would be true, from the viewpoint of international law, even if the Northrail agreements are to be designated as "executive agreements". The Vienna Convention, under its usage of the term treaty, as discussed above, includes "executive agreements". If an international agreement qualifies as a treaty under Article 2(1)(a), of the Vienna Convention in that it is an agreement between States and governed by international law, its particular designation as an "executive agreement" is of no legal importance; still it would be a treaty as thus characterized. In brief, under the Vienna Convention, no distinction is made between a "treaty" and an "executive agreement". But if an agreement lacks the

characteristics of a treaty as embodied in Article 2(1)(a) of the Vienna Convention — which is the case of the Northrail agreements — then it cannot qualify as a treaty under international law, whatever may be its designation.

However, Article 2(2) of the Vienna Convention provides:

The provisions of paragraph 1 regarding the use of the terms in the present Convention [including the term treaty] are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State. (Emphasis added)

Such is the case with the internal law of the Philippines: it strikes a distinction between a "treaty" and an "executive agreement" — a point which brings us to the relevant status of the Northrail agreements in Philippine law.

By constitutional mandate, the Vienna Convention forms part of Philippine law. On account of the fact that the Philippines is a party to the Convention, it is "valid and effective" as domestic law under the Constitution. (See *Guerrero's Transportation Services, Inc. v. Blaylock Transportation Services Employees Association - Kilusan*, GR No. L-41518, 30 June 1976; Section 21, Article VII, 1987 Constitution) The application of Article 2(1)(a) of the Vienna Convention as to the use of the term treaty in Philippine jurisdiction, is affirmed by the Supreme Court in *Bayan v. Executive Secretary* (GR No. 138570, 10 October 2000). The Supreme Court in this case takes the view that an executive agreement is "as binding as a treaty International law continues to make no difference between treaties and executive agreements: they are equally binding obligations upon nations."

Based on the following grounds, the Northrail agreements cannot qualify as treaties nor as executive agreements under Philippine law. *First*, the meaning of the term treaty under the Vienna Convention, as explained above, has been transformed into Philippine law under the Treaty Clause of the Constitution, thereby excluding the Northrail agreements from the legal status of a treaty as known in Philippine constitutional law, for the same reasons set out above.

Second, the Treaty Clause of the Constitution reads:

No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.

In the jurisprudence of the Supreme Court, as affirmed by the Constitutional Commission in framing the 1987 Constitution, an executive agreement is to be distinguished from a treaty in that it acquires validity and effectiveness without Senate concurrence. In *Commissioner of Customs v. Eastern Sea Trading* (3 SCRA 351, 356[1961]), the Supreme Court has pronounced that "the right of the Executive to enter into binding agreements without the necessity of subsequent congressional approval has been confirmed by long usage." Hence, in the Treaty Clause, quoted above, the words "treaty or international agreement" are to be interpreted as excluding an executive agreement(s). In view of this distinction, it is necessary to deal separately with the question as to whether the Northrail agreements may be characterized as executive agreements, even as it is conceded that they certainly are not treaties.

Despite this distinction, however, in legal function and status, a treaty and an executive agreement are in unity. An executive agreement is in the reality of legal relations between States, is a "treaty in simplified form", as described by the International Law Commission (ILC). It means "a treaty concluded by exchange of notes, exchange of letters, agreed minutes, memorandum of agreement, joint declaration or other similar instrument concluded by any similar procedure" As treaties in simplified form executive agreements are "identified by the absence of one or more of the characteristics of formal treaties"(ILC Yearbook, 1982, part II, p. 161)

Thus, the distinction between these two categories of international agreements in national law may be regarded as a matter of form, outside the requirement of Senate concurrence. One unifying factor of essential nature is that both categories establish or determine legal relations of the Philippines as a State with other States; they are both modalities of sovereignty expressed in international relations of the Philippines. Obviously, being agreements with a foreign corporation or between two corporations, the Northrail agreements do not measure up to the legal nature of executive agreements as agreements between States. Concretizing the sovereign function of executive agreements in the relations of the Philippines with other States, *Commissioner of Customs v. Eastern Sea Trading* (3 SCRA 351, 356[1961]) gives approval to the view that "international agreements embodying adjustments of details carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually takes the form of executive agreements."

Third, by the nature of the legal function and status of executive agreements explained above, it is submitted that the BCLA may not be characterized as an executive agreement under Section 20, Article VII of the Constitution. This provides, thus:

The President may contract or guarantee foreign loans on behalf of the Republic of the Philippines with the prior concurrence of the Monetary Board, and subject to such limitation as may be provided by law. (Emphasis added)

It is to be conceded that the President in the exercise of this constitutional authority may enter into executive agreements but, in keeping with the nature of executive agreements, this should be limited to two categories of executive agreements in terms of the personality of the other party, namely:

- (1) Loan or guarantee agreement between the Republic of the Philippines and another State, and
- (2) Loan or guarantee agreement between the Republic and an International Organization.

Accordingly, a loan or guarantee agreement with a foreign corporation or a foreign State corporation acting on its own juridical personality may not qualify as a party to an executive agreement. This exclusion may be justified by the limitation clause of Section 20, Article VII of the Constitution, given above.

In any event, the proviso in Section 4 of RA 9184 alluding to a treaty, international agreement or executive agreement as a possible exception to the requirement of public bidding, obviously contemplates that such agreements embody certain procurement procedures that are different from those found in RA 9184. Nowhere in the subject BCLA can be found such procurement procedures. PROC's agreement for CNMEC to act as Prime Contractor for the Project mentioned in a WHEREAS clause therein is actually embodied in the Letter dated October 1, 2003, of the Chinese Ambassador to the RP to the DOF. In other words, the designation of CNMEC as Prime Contractor is not among the provisions of the BCLA.

By acceding to such mode of negotiated procurement, the RP actually deprived itself of the benefits and advantages of an open, competitive public bidding. This is the accepted method for arriving at a fair and reasonable price and insures that overpricing, favoritism and other anomalous practices are eliminated or minimized. The openness of the bidding ensures transparency in the procurement process which is one of the governing principles on government procurement. (Sec. 3(a), RA 9184) The competitiveness aims to extend equal opportunity to enable private contracting parties who are eligible and qualified to participate in the bidding. (Sec. 3(b), RA 9184)

By its very nature and characteristic, a competitive bidding aims to protect the public interest by giving the public the best possible advantages through open competition. (*Caltex v. Delgado Bros.*, 96 Phil. 368). One such advantage is the lower, most reasonable price that would be secured by the Government through the rivalry or competition expected among the participating bidders. A "price challenge" would be a most effective way towards that end.

At the same time, public bidding seeks to prevent or curtail favoritism, fraud and corruption in the award of the contract (*San Diego v. Mun. of Naujan*, 107 Phil. 118) and also to avoid or preclude suspicion of anomalies in the execution of the contract. (*Matute v. Hernandez*, 66 Phil. 68; *Garcia v. Burgos*, 291 SCRA 546)

All of these benefits and advantages of public bidding, sad to say, were lost to the RP and went down the drain. The RP, wittingly or not, missed the opportunity to avail itself of the advantages to be derived from an open and competitive public bidding for the prosecution of a "priority project" of the President such as the Northrail project. To be sure, there are other prospective contractors, whether domestic or foreign, who are equally, if not more so, qualified and eligible to undertake the project, perhaps at a lower, more reasonable cost and more advantageous terms to the Government. To be sure, if given the chance, these other contractors would only be too willing to participate in the bidding and compete among themselves. Any suspicion of anomalies or irregularities attending the procurement process may yet be forestalled.

Significantly, the cited case of *Caltex v. Delgado Bros.*, supra, is authority for the proposition that any Government contract entered into without the required bidding is null and void and cannot adversely affect the rights of third parties.

The Contract may be void as it appears to have failed to comply with the Government Auditing Code of the Philippines and the Administrative Code of 1987.

From the records available, it appears that of the total project cost of US\$503M as approved by the NEDA, US\$107M has been earmarked as counterpart fund to be provided by the RP through NLRC. (Letter dated Jan. 6, 2004, of Socioeconomic Planning Secretary Romulo L. Neri to NLRC Pres. Jose L. Cortes, Jr.) Corollarily, it is relevant to inquire: To the extent that US\$107M out of the total project cost will be provided by funds of the Philippine Government, was the mandatory requirement

under Philippine law of available funding support for Government contracts involving the expenditure of public funds complied with?

Both the Government Auditing Code of the Philippines (PD 1445) and the Administrative Code of 1987 (Exec. Order No. 292, s. 1987) specifically proscribe the making of any contract by any government agency involving the expenditure of public funds unless there is an appropriation therefore, the unexpended balance of which, free of other obligations, is sufficient to cover the proposed expenditure, and unless the proper accounting official of the agency concerned shall have certified to the officer entering into the obligation that funds have been duly appropriated for the purpose and that the amount necessary to cover the proposed contract for the current fiscal (calendar) year is available for expenditure on account thereof, subject to verification by the auditor concerned. The certificate, signed by the proper accounting official and the auditor who verified it, shall be attached to and become an integral part of the proposed contract. Any contract entered into without complying with these documentary requisites is declared as void by the cited laws. (Sec. 85, 86 & 87, PD 1445; Sec. 46, 47 & 48, Ch. 7, Title I-B, Bk. V, EO 292, s. 1987)

Thus, by positive provisions of law, a proposed Government contract involving the expenditure of public funds that is unsupported by a certificate as to the existence of appropriation and the availability of the necessary funds, which is required to be attached to as an integral part of the proposed contract, is fatally defective and in the words of the Supreme Court, "suffers the vice of nullity". Indeed, "fund availability is, as it has always been, an indispensable prerequisite to the execution of any government contract involving the expenditure of public funds by all government agencies at all levels". (*COMELEC v. Padilla*, supra)

Curiously, the Contract was perfected before the BCLA was executed. It may, thus, be safely asserted that at the time of its perfection, the Contract was as yet unfunded in violation of the just-cited laws.

What happens now to the Contract which does not appear to be supported by the required certificate as to availability of funds as an integral attachment thereto? (Such certificate is not among the contract documents accompanying the Contract as an integral part thereof.) Will it now be struck down as void and, hence, without any binding force and effect? On this score alone, the Contract is of questionable validity.

**CNMEC should prove that it is
duly licensed to undertake
infrastructure projects in the
Philippines.**

Another corollary inquiry at this point is: Being a foreign contractor under the Contract, is the CNMEC duly licensed as such under Philippine law? Has it applied for and qualified for a contractor's license as required by Philippine law?

The existing Philippine law on the matter is RA 4566, otherwise known as the "Contractor's License Law". Under the said law, any prospective contractor for infrastructure projects must apply for a Contractor's License with the Philippine Licensing Board for Contractors created therein. To be qualified for such a license, the applicant must *inter alia* show at least 2 years of experience in the construction industry, and knowledge of the building, safety, health and lien laws of the Philippines and the rudimentary administrative principles of the contracting business as the Licensing Board deems necessary for the safety of the contracting business of the public. The applicant will undergo examination and investigation before the License is issued. Once issued, the License permits the qualified applicant to engage in business in the Philippines as a contractor. (Sec. 20 & 23)

In the case of a foreign contractor for a foreign-financed project (like CNMEC), it must apply for a Special License as such pursuant to the law. To be qualified for the grant of this Special License, the foreign contractor-applicant must *inter alia* be a bona fide contractor in its home country.

A penal sanction is imposed by RA 4566 on any contractor who contracts to or intends to construct a construction work without first securing a license to engage in the contracting business in the Philippines. The erring contractor shall be deemed guilty of a misdemeanor and, upon conviction, sentenced to pay a fine of not less than Php500.00 but not more than Php5,000.00. (Sec. 35)

Accordingly, CNMEG should be required to show/prove that it is duly licensed to do business in the Philippines as a Foreign Contractor pursuant to and in accordance with RA 4566.

IV. LEGALITY OF THE BUYER CREDIT LOAN AGREEMENT (BCLA)

The BCLA is of questionable validity for lack of prior concurrence by the Monetary Board. Section 20, Article VII of the Constitution provides:

The President may contract or guarantee foreign loans on behalf of the Republic of the Philippines with the **prior concurrence** of the Monetary Board, and subject to such limitations as may be provided by law. The Monetary Board shall, within thirty days from the end of every quarter of the calendar year, submit, to the Congress a complete report of its decisions on application for loans to be contracted or guaranteed by the government or government-owned and controlled corporations which would have the effect of increasing the foreign debt, and containing other matters as may be provided by law. (emphasis added)

The Constitution is explicit in requiring that a prior concurrence first be obtained. A review of the BCLA shows that Article 4 thereof contains an agreement precedent to its effectivity. This states that the Lender, the EXIM Bank, shall have no obligation under the contract and no disbursement shall be made unless and until the lender has notified the borrower that it has received certain documents, satisfactory in form and substance. One of these documents is evidence that the Central Bank has extended final approval on the facility. However, this provision in effect suspends only particular obligations under the contract until the Monetary Board has given its concurrence. The fact remains that it is already an executed agreement, thus certain provisions have become effective already, such as Section 6.5 on Management Fee and Section 6.6 on the Commitment Fee of the BCLA, that both accrue from the date of the agreement.

A careful reading of Section 20, Article VII of the Constitution reveals that the concurrence of the Monetary Board has to be obtained prior to the execution of the contract or the guarantee by the President or his alter-ego, and not only before the effectivity of the provisions of a perfected contract. Section I of CBP Circular No. 1232-90 (Revised Policy And Guidelines On Foreign Borrowings Pursuant To Republic Act No. 6142, As Amended dated March 7, 1990) provides:

I. Prescribed Prior Central Bank Approval

All foreign loans of the government including government-owned-and-controlled corporations as well as private firms shall require prior approval of the Central Bank thru the Management of External Debt Department (MEDD).

From the records available, it appears that there was no such prior concurrence by the Monetary Board. By "prior", what is meant is "formal" concurrence in the form of a resolution of the Monetary Board. For this reason, the BCLA is of questionable legality.

The BCLA is also of questionable legality as it is so intertwined with the Contract that they can be viewed as an integral agreement. As discussed above, the appointment of CNMEC as Prime Contractor under the Contract appears to have been an indispensable consideration for the execution of the BCLA. Accordingly, the nullity of the Contract for the reasons already stated casts doubt on the legality of the BCLA.

V. ECONOMIC, FINANCIAL AND TECHNICAL ANALYSIS OF THE PROJECT

5.1 Relevance of Rail Transit System

Mass rail transit system is considered as one among several public transport technologies. It is on top of the hierarchy of carrying capacities, followed by bus, high occupancy vehicles (HOV) and car. There are several types of mass rail transit systems from the automated guideway transport, monorail, and light rail transit, to heavy rail transit. In Metro Manila, thus far, light rail transit systems are already operational along Taft-Rizal Avenues, EDSA and Magsaysay Boulevard.

As a rule of thumb, mass rail transit systems are developed for the following reasons: a) urbanized areas with population of at least 1 million people, b) serve as line haul between or among urban areas and large scale residential areas, c) serve as people mover systems, and c) connection to major hubs, such as airports. By their very nature, rail transit systems serve the line haul service and rely on other modes for feeding and trip transfers.

The Northrail project was originally conceived to connect Clark with Bonifacio – two baselands under the jurisdiction of BCDA – and to provide a high-speed link to the proposed new international airport. This is no longer the case, as the current plan is for a revival of the old commuter train service of the Philippine National Railways. While the economic viability of the project may be conceded, it is also essential to review the financial viability of the project and how the resulting financial deficits shall be covered for long-term sustainability.

5.2 Economic Viability of the Northrail Project

It can be presumed that National Economic and Development Authority ("NEDA") has performed its duty to review the economic viability of the Northrail project. The economic viability of a project is essential in determining the benefits that will accrue from the project to the society. As such, it is among the principal considerations in the implementation of infrastructure projects from the points of view of addressing social and environmental concerns apart from contributing to the economic development. For infrastructure projects, NEDA sets the minimum hurdle for economic internal rate of return at 15%. International funding institutions, such as WB, JBIC and ADB, may consider IRR of less than 15%.

For rail projects, economic benefits being considered are measured in terms of how they maximize the level-of-service of the transportation system of a country in terms of operating and time costs savings of those diverted from other modes present in the area they are developed. Likewise, reduction in accident cost and benefits arising from the alleviation of negative impacts to the environment, notably to air quality, attributed to the rail projects are of equal importance. These benefits, discounted over time and are in real terms, are compared to the economic costs of the rail projects. There are a number of economic evaluation methods in this regard.

NEDA's internal evaluation of the new Northrail (dated 10 June 2003) was unclear about the economic viability, and whether it is for the whole segment of the rail project or only for Phase I. Its financial assessment, however, is surreal and does not jive with the evidence on rail projects in the Philippines and elsewhere.

5.3 Project Cost and Financial Viability of the Northrail Project

Project Cost

The standard practice for infrastructure projects is to conduct a detailed engineering design that leads to a cost estimate and technical specifications. An open bid can then be conducted on the same terms – that is, all bidders know exactly what is to be constructed, supplied, or installed as well as the owner's explicit requirements. However, particular to the Northrail project, there were no bidding and prior design activities.

In the absence of detailed engineering design and a transparent competitive tender, the project cost of Northrail as contracted with the CNMEC can not be said to be the best value for money that the Philippines could have secured. Neither could it be declared as resulting in "the cheapest per kilometer of rail", because it compares entirely different railway systems as shown in Table 5.3.1 below. The table below compares the key features of the rail projects in the Philippines.

Table 5.3.1 – Key Features of Rail Projects

Item	LRT 2	LRT 3	LRT1 Ext	Northrail
Track Gauge	Standard	Standard	Standard	Narrow
No. of tracks	Double	Double	Double	Double
Length of Line, in km	13.8	17	12	32.2
No. of stations	11	13	10	6
Track level	Elevated w/UG	Elevated w/UG	Elevated	At-grade
Traction (motive power)	Electric, DC	Electric, DC	Electric, DC	Diesel
No. of Rail Cars	18 EMU, 4	24 EMU, 3	14 EMU, 4	21 DMU;

	cars/train	cars/train	cars/train	4cars/train
Project Cost, US\$ million	670	675	843	>503

Exhibit 5.3-A provides a primer for understanding differences among railway systems, as a basis for understanding the items that underlie the Contract Price.

The next best method for assessing the reasonableness of Contract Price is to compare the current project costs (with CNMEC) with that of Northrail's internal estimates made in 1998 for the same Section 1 from Caloocan to Malolos. The latter amounted to \$603 million¹, which provides a ceiling or upper value because it entailed a higher grade of train system. The system to be supplied by CNMEC is of lower grade - a diesel-powered commuter train running at slower speed on narrow gauge (1.067m), while the former was planned to be electric-powered, faster speed, on standard gauge (1.435m) tracks.

Exhibit 5.3-B attempts to compare the different cost items under the China plan and the 1998 plan.

Total project cost for the current version is US\$503 million - with the CNMEC contract accounting for US\$421 million. The balance of \$82 million could be construed as the peso counterpart funds. It is unclear whether the \$82 million is intended to cover other cost items not revealed in the project cost breakdown; which omitted interest during construction, construction management, taxes, and contingencies. Also, a large portion of the relocation and resettlement cost is hidden in the budget of the National Housing Authority².

How much would the "unidentified" project cost items be? Interest during construction, including delays already being encountered, can be estimated to be around \$18 million - based on 3% interest. Taxes, such as VAT and import tax, are to be shouldered by Northrail and may amount to \$53 million, calculated from 'overt' cost items. Project and construction management could reach \$10.5 million, while 5% contingency equates to \$25 million. These four items already total \$106 million, not counting an indeterminate amount embedded in NHA budget for relocation costs.

The 'overt' cost items that can be evaluated reasonably are: a) civil and track works, b) signaling and communications, and c) rolling stock. The last two project components cost about \$72 million less in the CNMEC contract compared to the old Northrail configuration. This should be expected, because of the technical differences between the two versions.

¹ Revised Feasibility Study of Manila-Clark Railway, March 1998, as submitted to NEDA and DOTC.

² "Northrail project hit by more delays". Philippine Daily Inquirer, 07 July 2004.

Without a detailed comparison of the technical specifications, however, it can not be concluded that the \$72 million price reduction is reasonable. The Technical Document of Contract dated November 2003 between CNMEC and NLRC does not contain any provision for the Rolling Stock. Neither does it contain any warranty that the equipment to be delivered, such as the 21 DMUS (84 train coaches), will be brand new and not refurbished. In contrast, the Contract has reasonable technical descriptions and parameters for civil and track works, as well as signaling and communications, components.

The comparative prices for civil and track components are: \$287.53 million in the CNMEC contract versus \$251.85 million in the 1998 version. The new version should be lower than the 1998 version, not the other way around. They refer to the same track section and length, same number and location of stations, same number of bridges, same alignment, and nearly identical railway curves. The major difference is in track gauge: the newer version is on narrow gauge, the 1998 version is on standard gauge. As a consequence of this difference, the construction cost would have to be lower - smaller earthwork volume, narrower bridge and embankment widths. The price for engineering surveys and site investigations, at \$38.67 million, would be on the high side since the engineering data required were already gathered in 1998.

The 1998 project cost of the original Northrail configuration may well be higher by now, when inflation is factored in, or lower when the effect of the peso devaluation (₱38/\$1 in 1998) is considered for the foreign denominated components. Even if the aggregate effect is higher, the general principle that the current version of the project should cost lower than the 1998 version must still hold.

According to BCDA, the decision to change from high-speed to commuter train will "cost one-third of the 2.5 billion dollars estimated cost of a high-speed rail project".³ If this July 2002 pronouncement of BCDA - the main sponsor of Northrail - is to be believed, then the Contract Price should not have exceeded \$250 million.

Cost of Loan

Due to the nature of the loan - a buyer's credit, the cost of the project is inseparable from the terms and conditions of the BCDA. The terms are: 3% interest, 20 years to pay inclusive of 5 years grace period.

Compared to commercial loans on the domestic market, or the Spanish Loan⁴ offered in the past to Northrail, the Chinese loan is better. However, when compared to similar "tied loans" that the Philippines could secure, this is very expensive. For example, the features of the Obuchi

³ "Subic-Clark rail plan down from high-speed to commuter", Philippine Daily Inquirer, 26 July 2002.

⁴ The terms of the Spanish export-import bank, CESCE, was 10 years at an interest rate of 7.13%.

Loan are: 0.75% interest, 40 years to pay inclusive of 10 years grace period. The present value of the amortization payments on a Japan tied loan, had it been chosen for the \$400m rail loan, is \$42 million at the 15% discount rate used by NEDA. On the other hand, the present value of the China tied loan is \$146 million. The opportunity cost to the Philippines, therefore, is \$100 million more with the China loan than with the Japan loan.

A valid question may be asked: could the Philippines have accessed the Japan financing from JBIC? The answer is in the affirmative. In early 2000, then NEDA Deputy Ruperto Alonzo was quoted by Business World that a fact-finding mission from JBIC was coming in February 2000 to make a preliminary assessment of the Northrail project. That it was not pursued was probably due to JBIC's stringent condition on relocation before a loan is signed. In the China loan, the relocation issue was not a condition in the loan agreement but in the contract with CNMEC. Since the buyer's credit with China Exim Bank was dated 26 February 2004 while the supply contract was dated 30 December 2003, the effect on the relocation issue would have been the same.

The loan has some strange feature. It requires down payment equal to 5% of the contract price of \$421m (due within 30 days from signing of Loan Agreement), and advance payment of 25% (= \$105.26m) to CNMEC within 15 days from contract effectivity. This is on the high side. The Memorandum of Understanding also stipulated that \$27.54m of this advance payment shall be transferred to Northrail, for use in additional ROW, post demolition clearing, utilities diversion, permits and traffic management. Will this cover the cost of the National Housing Authority in relocating informal settlers, or on top of what NHA has budgeted out of its own resources? If it was meant for peso cost, why remit the down payment, and then get back an equivalent amount in pesos?

Financial Viability of Northrail

Official pronouncements to the contrary notwithstanding, the NLRC will lose money in the operation of the commuter train service between Caloocan and Malolos.

BCDA document forecasted 41,186 passengers per day for Section 1 of phase 1 of the project. This is about 14% of the current level of ridership on MRT 3, but at a project cost 75% of MRT 3. MRT 3 is subsidized by the government by at least P3 billion a year.

Table 5.3.2 compares the financial viability on existing railway lines. It showed that the government effectively subsidizes every rider on rails. In 2003, the subsidy averaged ₱32 on MRT 3, ₱24 on LRT 1, ₱5.1 on PNR commuter service, and a whopping ₱2,909 (₱875, if financial charges are excluded) on the PNR provincial long distance service. Time-wise, rail

should be charging higher than road-based public transport, as it does on LRT 1 and MRT 3, but the subsidy is still more than twice current fare levels. Had PNR paid ₱245 every passenger not to take its provincial service, the government would have saved about ₱150 million in 2003 and the rider could have taken an air-con bus, got shorter traveling time on a bus, and still have an extra ₱53 pocket money.

Table 5.3.2 - Fares and Subsidies on Rail Lines, Year 2003

Rail Line/Service	Ave. Fare (P)	Subsidy/Passenger	Equiv. Bus Fare	Fare Index
LRT 1	11.45	24.2	8.30	1.38
MRT 3	12.26	32.4	9.18	1.34
PNR Commuter	6.63	5.1	10.5	0.63
PNR Long Distance	245.13	2,909	437	0.56

The current version of the Northrail project is likely to perform somewhere in-between the PNR's long distance and commuter service, since the technology and service contemplated are quite similar. Its ability to repay the China loan is strongly doubtful.

The \$400 million China loan is an unconditional obligation of the Philippine government. In the 1998 version, only about 50% of project cost will be shouldered by the government (BCDA), with the balance coming from the private sector. Market risk rests with government for the current version; unlike in the 1998 version where commercial risk is to be assumed by the private investors. Moreover, also related to financial viability of the Northrail project is the formulation of subsidy mechanisms that can strengthen further the financial capability of the project, notably its sustainability. Urban and regional development along the corridor of the project, notably at its stations is one possible mechanism. This has been a practice in other countries.

It is common knowledge elsewhere that railway systems, unless certain subsidy mechanisms or other modes of supporting them are available, are not financially viable. All the existing rail lines in the Philippines are losing money – a few with traffic higher than what Northrail forecasted. Railway systems, such as in Japan, are supported by subsidies and urban or real estate developments in order for them to be sustainable. This is usually the case if the economic benefits justify the operation of such railway systems.

Limits to BCDA funding

The charter of BCDA, RA No. 7227, as amended by RA No. 7917, sets some limits on the scope of BCDA financial support. It is unclear whether it can subsidize the Northrail commuter service from Caloocan to Malolos since there are no former base lands at either end. Moreover,

proceeds from the sale of land are restricted in use. Only 27.5% of proceeds can be applied to finance the construction and upgrading of transport infrastructure. With the simultaneous construction of the Subic Port (P7 billion), the Subic-Tarlac Expressway (P19 billion), and Northrail (P28 billion), there is strong possibility that this limit may have already been breached.

Given the preceding points, it is therefore essential that some issues about implementation and operations of the project need to be clarified. Northrail does not have a franchise, a requirement for a public utility. It is a violation of law to 'borrow' PNR's franchise, as currently envisioned by BCDA. Likewise, it is suggested that the proponent of the project come up with their subsidy mechanisms and other modes on how to sustain the project once it is implemented or in operation.

5.4 Technical Qualifications of the Contractor/Proponent

The previous sections discussed the relevance of the railway systems and the project cost, economic and financial viability of the Northrail project. It was presented that though there are some signs of viability, there are still concerns that need to be further addressed. In this section, capacity and capability of the proponent of the project are assessed.

In order to analyze the qualifications of the contractor, it is the accepted practice for the Bids and Awards Committee to "determine the eligibility of prospective bidders". Since a bid process was never conducted for the project, determination of eligibility against a set of criteria could not have happened. The absence of bid documents, notwithstanding, infrastructure projects require three general criteria (a) legal, (b) technical, and (c) financial.

To be qualified, the contractor must satisfy three technical requirements: "1) competence and experience of the contractor in managing projects similar to the subject project, 2) competence and experience of the contractor's key personnel to be assigned to the subject project, 3) availability and commitment of the contractor's equipment to be used for the subject."

Technical Qualifications

One way of ascertaining the technical capability of a certain contract is to know if it has been engaged in similar projects before. Has CNMEC performed a railway project in the past? To answer this question, research on the Internet revealed a company named China National Machinery and Equipment Import and Export Corporation. It can be presumed to be the same as CNMEC, since the advertisement of the NLRC, claimed that the

contractor "is ranked no. 37 by the Global Engineering News Record in the 225 largest international contractors" and corroborated by the company's own web page (see Exhibits 5.4-A). The webpage of CNMEC states that it is a trading company focusing on "construction machinery, electricity, pumps and vacuum equipment, mining machinery". It has exported power plants, design and installation of float glass factories, and broadcast TV facilities. Railways construction and equipment was not mentioned as one of CNMEC's core competences. Neither has it claimed a single turnkey project for complete rail transport systems. If it had, it would have merited mention on its website, since an overseas or domestic rail project can only be bigger in scale than a broadcast facility. It can be inferred that the Northrail project in the Philippines will be CNMEC's first venture on the subject - either within China or outside China.

As to key personnel with experience in rail transport construction, a similar inference can be made. In the organizational chart of CNMEC website, there is none that would indicate railway engineering or construction. As a matter of sound business practice, it could not have a full complement of railway specialists since it never had a railway project in the past, nor railway construction considered as part of its core business activities. Logically, it would hire the key personnel later to undertake the Northrail project. The same can be said about availability and commitment of equipment to be used for the subject.

For a company with no proven track record in turnkey railway projects, the prudent approach would have been to enter into partnership with other companies with the relevant experience and expertise. Even the world's biggest railway suppliers associate themselves with other specialty railway companies. For example, Marubeni won the bid for the electromechanical components of Manila LRT 2 with Rotem and Toshiba. The Maglev project of Siemens in Shanghai included ThyssenKrupp and train builder Adtranz.

Is CNMEC a leading railway manufacturer or contractor in China? Internet search revealed that it is not among the 13 companies listed in the Made-in-China webpage (see Exhibit 5.4-B). None of its subsidiaries or affiliates is engaged in railway manufacture.

The two leading companies in China for railway construction are China Railway Engineering Corporation ("CREC") and China Railway Construction Corporation ("CRCC") (see Exhibit 5.4-C). It was stated by NLRC, however, that a bilateral agreement designated CNMEC as the prime contractor for the project. If indeed there was such a bilateral agreement, it would have been more credible if CREC or CRCC had been designated, rather than an unknown quantity in turnkey railway projects. For example, in the North-South railway project of Malaysia - which

intends to upgrade an existing narrow-gauge train system - the two contractors are China Railway Engineering Railway Corporation, and the Indian Railway Construction Company.

It should also be noted that the full name of the contractor is China National Machinery and Equipment Import and Export Corporation, a trading company. The omission of the appellation "Import and Export" in the Contract is misleading and may have been intentional to hide the fact that CNMEC is not technically qualified to be a Prime Contractor to undertake a turnkey railway project.

It can be concluded therefore that CNMEC is not technically qualified for the Northrail Project.

Financial Qualifications

The Balance Sheet of CNMEC is not available for a definitive assessment of its financial eligibility to undertake the project. As is the norm in China's state companies, CNMEC comprises several smaller state companies. However, it can be presumed that the combined group has adequate capitalization for the project: it was ranked 14th in contract volume among China's contractors - about \$1 billion in gross revenues, \$266 million of which is from domestic sources.

Besides, with a down payment equal to 25% of contract price (which amounts to 25% of \$421,050,000.00, or \$105 million), CNMEC will have sufficient advance money to execute the project without risking its own equity money. In other words, the down payment by Northrail would have remedied any financial inadequacy that CNMEC may have had at the beginning, if any.

Based on the above observations on the technical and financial capability of the CNMEC, one therefore can surmise that the company may not have some degree of competency to implement the project. Apart from the above pertinent technical, economic and financial points presented, there are other technical issues worth looking and these are summarized in the next section.

5.5 Other Pertinent Technical Issues

Incomplete specifications

As mentioned earlier, the technical specification for the Rolling Stock component is absent in the Technical Document of Contract dated November 2003 between CNMEC and NLRC. Presumably, this will be address later on since the same contract defined that "Technical Specification means the documents prepared by the Contractor, which shall contain detailed technical requirement for the Contractor to execute

the contract properly including scope of works, Contractor's establishment, specifications for materials, plant, construction equipment, workmanship, testing, measurement, etc."

There are broad parameters to delimit the civil and track works but none on the rolling stock (rail cars, bogies, capacity, speed, performance, air-conditioning, auxiliary equipment, etc.). In lieu of detailed specifications on electro-mechanical equipment, a set of performance criteria could have been defined. Intertwined with the ambiguity in specification is the issue of adjustment in Contract Price. It was stated that the total contract price shall be "adjusted and validated upon the completion of site survey, sub-soil investigation, and Preliminary Engineering Design provided there is a significant change/variation compared with the existing technical scheme in terms of scope and quantity of works and if ever requested by the Contractor." In the absence of detailed engineering design, the possibility of wide price adjustments at a later stage is very likely. Contractor has protected itself by being able to seek upward price adjustment. But no such leeway is mentioned for the Employer to negotiate downward price adjustment, in case there is significant reduction in quantity or scope.

The provision on approval of final specifications may be disadvantageous to NLRC. "The Employer's Representative shall give his approval or rejection within thirty (30) days calculated from the date of his receipt of these documentations." The construction or project implementation is supposed to commence only after conduct of Preliminary Engineering Design which will result, among others, with a Technical Specification. This period maybe too short, considering that up to now, NLRC has not even hired a competent Construction Manager or Works Engineers that can assist in evaluating the submitted specifications and oversee construction as NLRC representative.

Which Code shall apply in Engineering Design?

Section 2.2 of the Technical Conditions of Contract stated that Chinese Standards will be principally used in the construction of the railway system. In most, if not all, infrastructure projects of the government, the applicable codes (such as Structural Code of the Philippines, American Concrete Institute Code for concrete structures, AISC for steel structures, National Electrical Code of the Philippines, UIC for railway engineering) are given precedence.

Defects Liability Period

Section 26 of the Conditions of Contract provide for a 12 month period of liability, after turnover and acceptance of the facility to the Employer (NLRC). This is usual in infrastructure projects. However, the

provision in this contract needs to be examined carefully as it may absolve any liability for defective design that might not have been noticed during the 12 month period. The contract with CNMEC is not just a construction contract, but includes detailed engineering design. Moreover, it boasted that the project will be built "with no Filipino contractor."

Insurance Cover for Construction

Section 28.2 of the Conditions of Contract stipulates that construction and erection insurance shall be secured from a Chinese insurance company. This is highly unusual for infrastructure projects in the Philippines. Ordinarily, insurance for government assets stipulate the GSIS or a domestic insurer accredited by the Insurance Commission to issue the policy.

Basic purpose of the Rail Transit System (RTS)

One of the most common misunderstandings about the Northrail project is that it is the same old plan initiated by BCDA in 1995, and formalized in 1998. The 1998 configuration was intended to provide both a commuter service as well as an airport express service to the future Clark International Airport - with plans for a direct check-in at Fort Bonifacio Global City. This is no longer the case for the current configuration, which would have its final southern terminus at Caloocan City, rather than Fort Bonifacio. As a consequence in the change of plan, there is really no need for a rapid rail system capable of transporting airline passengers from Bonifacio to Clark in less than one hour. A conventional commuter train system - similar to what China has in abundance and to what PNR used to have in the past - would be adequate. Apparently, the modest objective now is simply to revive the old PNR Main Line North which was closed in 1984.

While the current configuration is a revival, NLRC is also correct in saying that it will be an entirely new system. The old rail tracks of PNR are no longer usable and the track elevations are too low in many sections. The allegation, however, that the trains will be able to run at 100kph is not factual. Upgrading the rail tracks in the future is possible, but this is not stipulated in the CNMEC Contract. To provide for this future option, the track infrastructure must already be designed for higher speeds. If the commuter service becomes successful, it may be extremely difficult to disrupt operations to allow upgrading works. Furthermore, it is unclear whether such a two-step plan is more economical than a one-step scheme.

Modern Railway Technology

It follows from the preceding section that the current configuration will be a conventional railway transport system, based on the century-old narrow gauge standard. The choice of CNMEC as a supplier (and China railway technologies, in general), despite its technical inexperience in railways, may be tolerable on this premise: a non-state-of-the-art railway system.

If the expectation is for a more advanced system, similar to the technologies adopted in LRT Line 2, then China (and CNMEC) is the wrong choice. It is instructive to note that China itself is turning to other countries and rail suppliers to modernize its extensive railway network. Five major rail routes in China, spanning 2,000 kilometers and costing 100 billion yen, will involve Kawasaki Heavy Industries Ltd of Japan, Alstom SA of France, and Bombardier Inc. of Canada.⁵ In the rail modernization plan of China, it is turning to foreign companies to bridge the technology gap without lifting its restriction on 70% local content. China's technology imports is restricted to "a relatively small number of high-tech components for automatic train control and signaling and telecommunications systems."⁶ Along this line, Alstom has announced a Euro620 million contract with China for the supply of 60 regional trains based on its latest EMU technology.⁷

⁵ "China Rail Modernisation Contract for Alstom, Bombardier and Kawasaki". British Railway News, 30 Aug 2004.

⁶ Knutton, Mike. "A Sleeping Giant Awakens". Railway Age, April 2003.

⁷ Press Release of Alstom dated 21 June 2005.

VI. Recommendation

The Contract should be annulled by filing the appropriate action in court. As to the BCLA, further action thereon should be studied.

If warranted, the appropriate criminal, civil and/or administrative cases should be filed against the concerned public officials/private persons.