Republic of the Philippines
Department of Trade and Industry
Securities and Exchange Commission
SEC Bldg. EDSA, Greenhills, Mandaluyong City

REDMONT CONSOLIDATED MINES CORPORATION,
Complainant-Appellant,

-versus-

SEC En Banc Case No. 09-09-177
For: Review of CED Ruling

McARTHUR MINING INC., TESORO MINING AND DEVELOPMENT, INC., NARRA NICKEL MINING AND DEVELOPMENT INC., SARA MARIE MINING, INC., PATRICIA LOUISE MINING AND DEVELOPMENT CORPORATION, MADRIDEJOS MINING CORPORATION, BETHLEHEM NICKEL CORPORATION, SAN JUANICO NICKEL CORPORATION and MBMI RESOURCES, INC.,
Respondents-Appellees.

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DECISION

For consideration of the Commission *En Banc* is the *Appeal* of Redmont Consolidated Mines Corporation ("Redmont", for brevity) dated, and filed on, 22 September 2009, challenging the 3 September 2009 *Letter-Resolution* of this Commission's then Compliance and Enforcement Department ("CED")[1] which disposed of Redmont's *Complaint* for revocation of certificate(s) of registration ("Complaint for Revocation") against McArthur Mining Inc. ("McArthur"), Tesoro Mining and Development, Inc. ("Tesoro"), Narra Nickel Mining and Development Inc. ("Narra"), Sara Marie Mining, Inc. ("Sara Marie"), Patricia Louise Mining & Development Corporation ("Patricia Louise"), Madridejos Mining Corporation ("Madridejos"), Bethlehem Nickel Corporation ("Bethlehem"), San Juanico Nickel Corporation ("San Juanico") and MBMI Resources Inc. ("MBMI") -- collectively referred to hereunder as appellee-corporations.

The facts are:

Redmont is a domestic corporation engaged in the mining business with SEC Registration No. CS200617042. McArthur, Tesoro, Narra, Sara Marie, Patricia Louise, Madridejos, Bethlehem and San Juanico are likewise corporations incorporated in this jurisdiction to engage in mining, with SEC Registration Nos. CS200609757, CS200508289, CS200515093, CS200419133, CS200510130, CS200600067, CS200604840, and CS200515658, respectively. MBMI is a Canadian mining company

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[1] Now Enforcement and Prosecution Department.

focused on the exploration and development of nickel mineral properties in the Philippines.

On 14 August 2008, Redmont filed the Complaint for Revocation before the CED, praying that the certificates for registration of McArthur, Tesoro, Narra, Sara Marie, Patricia Louise, Madridejos, Bethlehem and San Juanico be revoked, on the ground that they violated the constitutionally and statutorily enshrined restriction on the foreign ownership of corporations engaged in the exploitation, development and utilization of natural resources. According to Redmont, none of the said corporations complied with such requirement because:

> 1. MBMI actually funded 99.78864%, 99.714%, 99.78571% and 99.80039% of the **paid-up capital** of Madridejos, Patricia Louise, Sara Marie and San Juanico, respectively, way above the maximum cap for foreign ownership of 40%, as shown by these corporations' respective Articles of Incorporation.
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> 2. MBMI actually funded 69.35204%, 69.35204%, and 69.41678% of the **paid-up capital** of McArthur, Tesoro and Bethlehem, respectively, way above the maximum cap for foreign ownership of 40%, as shown by these corporations' respective Articles of Incorporation. Further, even assuming that the subscribed capital stock purportedly meets the 40% maximum cap for foreign ownership, by the fraudulent scheme of "*cascading*" or "*company layering*" which deliberately hides its actual direct ownership of stocks through the first layer corporations, i.e. Madridejos (investing corporation in McArthur), Sara Marie (investing corporation in Tesoro), and San Juanico (investing corporation in Bethlehem), over which it has controlling interest as well, MBMI's actual interest in these investee corporations, i.e., McArthur, Tesoro and Bethlehem, is 60.04184%, 60.04184% and 64.02968%, respectively.
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> 3. Even assuming that the subscribed capital stock purportedly meets the 40% maximum cap for foreign ownership, by the fraudulent scheme of "*cascading*" or "*company layering*" which deliberately hides its actual direct ownership of stocks through the first layer corporation, i.e. Patricia Louise (investing corporation in Narra), over which it has controlling interest as well, MBMI's interest in investee corporation Narra is actually 63.90456%.[2]

Redmont arrived at such figures representing the supposed actual interest of MBMI in the investee corporations using the Grandfather Rule, which it argued must be observed in determining the nationality of a corporation instead of the Control Test.

[2]Complaint for Revocation, pp. 11-14, Annex "P" of Redmont's instant *Notice and Memorandum of Appeal* dated 22 September 2009.

On 3 September 2009, the CED issued the herein challenged *Letter-Resolution*, the pertinent portions of which read:

> "Based on the findings of this Department, the respondent corporations are Philippine nationals, as defined under Section 3 of the Foreign Investments Act of 1991 or Republic Act No. 7042 as amended by Republic Act No. 8179, except for MBMI Resources, Inc., a corporation registered in Canada. Respondent corporations are compliant with the 60-40% ownership requirements based on the Computation of Filipino and Foreign Percentage of Ownership provided by the Company Registration and Monitoring Department xxx.
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> xxx xxx xxx
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> Further, a careful and close scrutiny of the evidence gathered show that McArthur Mining, Inc., Tesoro Mining and Development Corporation, Sara Marie Mining, Inc., Madridejos Mining Corporation and Bethlehem Nickel Corp. have not yet started their commercial operations.
>
> However, Narra Nickel Mining & Development, Inc. and Patricia Louise Mining and Development Corp. have engaged in small-scale mining operations contrary to their respective primary purposes and the Foreign Investment Act and EO 584 because small-scale mining is an activity exclusively reserved for Filipino citizens and corporations wholly owned by Filipino citizens.
>
> xxx xxx xxx
>
> In view of the foregoing, both Narra Nickel & Development Corporation and Patricia Louise Mining and Development Corporation are hereby directed to cease from small-scale mining activity unless they amend their Articles of Incorporation and pay the following penalties payable to the Securities and Exchange Commission, viz:

VIOLATION	{Narra} Nickel & Development Corporation	Patricia Louise Mining and Development Corporation
1. Violation of Section 45 of the Corporate Code or *Ultra Vires Act*	P 10,000.00	P 10,000.00
2. Violation of Section 3 and 8 of the Foreign Investment Act of 1991	P 50,000.00	P 50,000.00
TOTAL>>>>>>	**P 60,000.00**	**P 60,000.00**

Please be guided accordingly."

In this *Appeal*, Redmont maintains that: (1) MBMI practically funded the incorporation of McArthur, Tesoro, Narra, Sara Marie, Patricia Louise, Madridejos, Bethlehem and San Juanico; (2) the said Canadian company admitted and represented in its 2006 Annual Report and/or in its website that it manages and controls such appellee-corporations; and (3) through the fraudulent scheme of "*cascading*" and "*company layering*", MBMI was able to use the purported nationality of its subsidiaries to gain access to the natural resources of the country which are constitutionally reserved to Filipino citizens.

Except for certain procedural matters as will be discussed hereunder, all of appellee-corporations, in their respective *Reply-Memoranda*, echo essentially similar arguments, to wit: (1) the outstanding capital stock, not the paid-up capital, is the basis for determining the nationality of corporations; (2) the correct method of computation of Filipino and foreign equity is the Control Test, not the Grandfather Rule; and (3) the alleged admissions and/or representations of MBMI cannot prejudice the Philippine-registered appellee-corporations because of the *res inter alios acta* rule, and because the same were made in unauthenticated documents and were quoted out of context.

Before we proceed, a specific concern of Patricia Louise must first be disposed of.

In its *Reply-Memorandum*, Patricia Louise argues, on both procedural and substantive grounds, that CED erred in concluding in its assailed *Letter-Resolution* that the company violated Sections 3 and 8 of the FIA, for which it had been imposed a penalty of Fifty Thousand Pesos (P50,000.00). It thus prays herein that the portion of CED's *Letter-Resolution* finding it liable for such violations be reversed.

The instant *Appeal* was instituted by Redmont to challenge the CED's ruling that the Philippine-registered appellee-corporations are Philippine nationals. If Patricia Louise desires to seek relief from the imposed penalty made in the same *Letter-Resolution* of CED, then it should file its own appeal to the Commission *En Banc*, subject to the jurisdictional and formal/procedural requirements of the Commission's 2006 Rules of Procedure.

We now come to the crux of this *Appeal*, that is, whether or not appellee-corporations are Philippine nationals qualified to engage in mining.

AS TO MCARTHUR, TESORO AND NARRA

On 2 January 2007, Redmont filed with the Panel of Arbitrators ('POA") of the Mines and Geo-Sciences Bureau ("MGB") of the Department of Environment and

Natural Resources ("DENR") Region IV (MIMAROPA) separate verified petitions against the Mineral Production Sharing Agreement ("MPSA") applications and the Exploration Permit Applications ("EPA") of McArthur, Tesoro and Narra. Redmont alleged that:

> 1. MBMI holds significant stakes in both McArthur and Madridejos (which assigned subject MPSA and/or EPA to McArthur) such that, in effect, MBMI owns at least 60% of the capital stock of McArthur.
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> 2. MBMI holds significant stakes in both Tesoro and Sara Marie (which assigned subject MPSA and/or EPA to Tesoro) such that, in effect, MBMI owns at least 60% of the capital stock of Tesoro.
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> 3. MBMI holds significant stakes in both Narra and Patricia Louise (which assigned subject MPSA and/or EPA to Narra) such that, in effect, MBMI owns at least 60% of the capital stock of Narra.[3]

and argued that MBMI, being the controlling interest, is the entity that stands to benefit most from the MPSA of McArthur, Tesoro and Narra which, when approved by the DENR, will in effect indirectly allow MBMI, a 100% Canadian corporation, to engage in mining activity despite its being s foreign corporation.[4]

On 14 December 2007, the POA of the DENR, essentially adopting the foregoing factual foundation and issue(s), rendered a *Resolution*, the pertinent portions of which read:

> "[T]he only issue that must be resolved is the issue of whether respondent corporations are of foreign nationality or of domestic Philippine corporation (sic), which would necessarily be the basis for the determination of the parties' qualification to engage in mining activities in the Philippines.
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> xxx xxx xxx
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> [H]e who controls the financial resources wields the power of control which the Canadian company, MBMI Resources, Inc. definitely does in the present cases. While it is admitted that the Filipino stockholders had subscribed to at least sixty percent of the capital stock, it is MBMI, the Canadian counterpart that has paid up the capital representing sixty percent of the total while the Filipino partners only paid the capital representing thirty percent.
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> It is clear therefore that the Canadian stockholders are the one in control of the corporations, solely on the strength of their far more

[3]Separate petitions filed with the POA (Annexes "M", "M-1" and "M-2", respectively, of Redmont's instant *Notice and Memorandum of Appeal* dated 22 September 2009).
[4]Ibid.

substantial financial investment in the said corporations in relation to that of the Filipino stockholders. xxx.

WHEREFORE, the Panel of Arbitrators finds the Respondents, McArthur Mining, Inc., Tesoro Mining and Development, Inc. and Narra Nickel Mining and Development Corp. as, DISQUALIFIED for being considered as Foreign Corporations. Their Mineral Production Sharing Agreement (MPSA) are hereby as, they are **DECLARED NULL AND VOID**.

Accordingly, the Exploration Permit Applications of Petitioner Redmont Consolidated Mines Corporation shall be given **DUE COURSE**, subject to compliance with the provisions of the Mining Law and its implementing rules and regulations."[5]

The POA, in its *Order* dated 7 February 2008, denied the Motion for Reconsideration of McArthur, Tesoro and Narra on the basis of, among others, the following:

"On the issue of the respondents being foreign corporations, this panel has already ruled that such is the case xxx. **Their own documents submitted before this panel clearly and unmistakably show that their foreign partners, MBMI, will pay and has actually paid more than sixty (60) per cent of the total capital**. xxx. The **control test** that respondents would like us to swallow is only on paper, but not in actual practice because it is the foreign partners, that runs (sic) the companies. Only a fool would believe that, your money is safe in the hands of the minority stockholders who have contributed a measly amount of less than thirty (30) per cent of the paid up capital. It is beyond reason to believe that one will yield control over the operation of a company to the ones who contribute less and don't have the financial resources to run the same. xxx."[6] (Emphasis supplied)

On 10 September 2008, the Mines Adjudication Board ("MAB") of the DENR issued an Order reversing and setting aside POA's 14 December 2007 *Resolution* and 7 February 2008 *Order*, to wit:

"The Board is satisfied that Appellants have adduced sufficient evidence to prove that they are Filipino corporations. The Board does not concur with the Panel's conclusion that the said corporations failed the so-called 'control test', simply because MBMI Resources, Inc., a Canadian corporation and common stockholder of the Appellants, holds the 'controlling interest in respondent companies' and hence 'is the sole entity that stands to benefit most from the MPSA application of the

[5]POA's Resolution dated 14 December 2007 (Annex "N" of Redmont's instant *Notice and Memorandum of Appeal* dated 22 September 2009).
[6]POA's *Order* dated 7 February 2008 (Annex "O" of Redmont's instant *Notice and Memorandum of Appeal* dated 22 September 2009).

respondent Filipino companies. xxx. Neither is the Board impressed with the Panel's convoluted and long-winded discussion of the 'control test'. A cursory perusal of the assailed Resolution would indicate that the Panel had neglected or omitted to cite legal provisions, statutory principles or jurisprudence in support of its conclusions. xxx.

xxx. Hence, the Board concurs with the observation of Appellants that 'The circumstance that a foreign corporation extended financial assistance or contribution to herein Respondents-Appellant, **without evidence of anything else**, is not sufficient to support the Panel's premise that the said foreign corporation now actually controls Respondents-Appellant corporations. xxx.

WHEREFORE, in view of the foregoing, the Mines Adjudication Board hereby **REVERSES** and **SETS ASIDE** the resolution dated 14 December 2007 of the Panel of Arbitrators of Region IV-B (MIMAROPA) in POA-DENR Case Nos. 2007-01, 2007-02 and 2007-03, and its Order dated 07 February 2008 denying the Motions for Reconsideration of the Appellants. The Petition filed by Redmont Consolidated Mines Corporation on 02 January 2007 is hereby ordered **DISMISSED.**"[7] (Emphasis supplied)

On 1 August 2009, Redmont filed a *Petition for Review*[8] with the Court of Appeals ("CA") docketed and pending as *CA-G.R. No. 109703* ("CA Case"), praying that the above MAB Order be reversed on, among others, the following grounds: (1) the MAB ruled that McArthur, Tesoro and Narra "*are Filipino corporations, when the evidence adduced clearly indicate that [MBMI] owns at least 60% of their capital stocks, and when MBMI itself admitted that it has such amount of ownership or interest in [McArthur, Tesoro and Narra], and when the evidence clearly shows that MBMI controls [them]*'; and (2) the MAB "*resolved the nationality issues of [McArthur, Tesoro and Narra] without awaiting the SEC's resolution on the complaint for revocation lodged by Redmont*".

Forum shopping exists when the elements of *litis pendentia* are present or where a final judgment in one case will amount to *res judicata* in the other.[9] The elements of *litis pendentia* as a ground for dismissal of an action are: (1) identity of parties, or at least such parties who represent the same interest in both actions; (2) identity of rights asserted and relief prayed for, the relief being founded on the same facts; and (3) the identity, with respect to the two preceding particulars in the two cases, is such that any judgment that may be rendered in the pending case, regardless of which party is successful, would amount to *res judicata* in the other.[10]

[7] MAB's Order dated 10 September 2008 (Annex "1" of Patricia Louise's *Reply-Memorandum* dated 10 November 2009).
[8] Petition for Review (Annex "3" of Patricia Louise's *Reply-Memorandum* dated 10 November 2009).
[9] First Philippine International Bank vs. CA, G.R. No. 115849, 24 January 1996.
[10] Hyatt Industrial Manufacturing Corporation vs. Asia Dynamic Electrix Corporation and CA, G.R. No. 163597, 29 July 2005.

A party is guilty of forum shopping when he repetitively avails of several judicial remedies in different courts, simultaneously or successively, all substantially founded on the same transactions and the same essential facts and circumstances, and all raising substantially the same issues either pending in, or already resolved adversely, by some other court. And what is truly important to consider in determining whether forum shopping exists is the vexation caused the courts and the litigants by a party who asks different courts and/or administrative agencies to rule on the same or related causes and/or grant the same or substantially the same reliefs, in the process creating the possibility of conflicting decisions being rendered by the different fora upon the same issues.[11]

Even the filing by a party of two (2) apparently different actions with two (2) ostensibly different reliefs prayed for, but with the same ultimate objective, constitutes forum shopping.[12]

It is evident from the foregoing that aside from the identity in the parties (i.e. Redmont vs. McArthur, Tesoro and Narra), the issue(s) raised in the CA Case and the factual foundations thereof (i.e. the alleged fraudulent scheme of "*cascading*" or "*company layering*", the contention that the Grandfather Rule must be used, the equity structure and paid-up capitalization of McArthur, Tesoro and Narra, the alleged admissions and/or representations of MBMI[13]) are substantially the same as those obtaining in the case at bar. **Yet, Redmont did not include this CA Case in the Certification Against Forum Shopping attached to the instant *Appeal*.**

To be sure, the MAB already ruled on the question of whether McArthur, Tesoro and Narra are Filipino corporations, the very same issue which is herein pending. Whether or not such ruling is legally sound is now up for the CA to decide.

For the above reasons, and in deference to the CA, we hereby resolve to set aside the ruling of the CED in its *Letter-Resolution* that McArthur, Tesoro and Narra are Philippine nationals, and to dismiss the complaint for revocation against the said corporations, without prejudice.

AS TO MADRIDEJOS, PATRICIA LOUISE, SARA MARIE, SAN JUANICO AND BETHLEHEM

We now come to the important issue: which between the Grandfather Rule and the Control Test should be used in the case at bar in order to determine the nationalities of Madridejos, Patricia Louise, Sara Marie, San Juanico and Bethlehem?

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[11] Tantoy, Sr. vs. CA, G.R. No. 141427, 20 April 2001.
[12] Supra, Note 7.
[13] Petition for Review (Annex "3" of Patricia Louise's *Reply-Memorandum* dated 10 November 2009), pp. 32-37.

The answer can be gleaned in the recent Department of Justice ("DOJ") Opinion No. 020, series of 2005[14], which adopted the 1967 SEC Rules implementing the requirement of the Constitution and other laws that the controlling interests in enterprises engaged in the exploitation of natural resources shall be owned by Filipino citizens, paragraph 7 of which provides:

> "**Shares belonging to corporations or partnerships at least 60% of the capital of which is owned by Filipino citizens shall be considered as of Philippine nationality,** ***but if the percentage of Filipino ownership in the corporation or partnership is less than 60%, only the number of shares corresponding to such percentage shall be counted as of Philippine nationality.*** Thus, if 100,000 shares are registered in the name of a corporation or partnership at least 60% of the capital stock or capital, respectively, of which belong to Filipino citizens, all of the said shares shall be recorded as owned by Filipinos. But if less than 60%, or say, only 50% of the capital stock or capital of the corporation or partnership, respectively, belongs to Filipino citizens, only 50,000 shares shall be counted as owned by Filipinos and the other 50,000 shares shall be recorded as belonging to aliens."

The DOJ went on:

> "The above-quoted SEC Rules provide for the manner of calculating the Filipino interest in a corporation for purposes, among others, of determining compliance with nationality requirements (the 'Investee Corporation'). Such manner of computation is necessary since the shares of the Investee Corporation may be owned both by individual stockholders ('Investing Individuals') and by corporations and partnerships ('Investing Corporation'). The said rules thus provide for the determination of nationality depending on the ownership of the Investee Corporation and, in certain instances, the Investing Corporation.
>
> Under the above-quoted SEC Rules, there are two cases in determining the nationality of the Investee Corporation. The first case is the 'liberal rule', later coined by the SEC as the Control Test in its 30 May 1990 Opinion, and pertains to the portion in said Paragraph 7 of the 1967 SEC Rules which states, *'(s)hares belonging to corporations or partnerships at least 60% of the capital of which is owned by Filipino citizens shall be considered as of Philippine nationality.'* Under the liberal Control Test, there is no need to further trace the ownership of the 60% (or more) Filipino stockholdings of the Investing Corporation since a corporation which is at least 60% Filipino-owned is considered as Filipino.
>
> The second case is the Strict Rule or the Grandfather Rule Proper and pertains to the portion in said Paragraph 7 of the 1967 SEC Rules which states, *"but if the percentage of Filipino ownership in the corporation or partnership is less than 60%, only the number of shares corresponding to such percentage shall be counted as of Philippine*

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[14] Addressed to then Secretary of the Department of Finance, the Honorable Cesar Purisima.

> *nationality.*" Under the Strict Rule or Grandfather Rule Proper, the combined totals in the Investing Corporation and the Investee Corporation must be traced (i.e., "grandfathered") to determine the total percentage of Filipino ownership.
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> Moreover, the ultimate Filipino ownership of the shares must first be *traced* to the level of the Investing Corporation and added to the shares directly owned in the Investee Corporation. xxx.
>
> xxx xxx xxx
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> In other words, based on the said SEC Rule and DOJ Opinion, the **Grandfather Rule** or the second part of the SEC Rule **applies only when the 60-40 Filipino-foreign equity ownership is in doubt** (i.e. in cases where the joint venture corporation with Filipino and foreign stockholders with less than 60% Filipino stockholdings [or 59%] invests in other joint venture corporation which is either 60-40% Filipino-alien or 59% less Filipino). Stated differently, where the 60-40 Filipino-foreign equity ownership is not in doubt, the Grandfather Rule will not apply." (Emphasis supplied).

Such doubt, we believe, exists in the instant case because the foreign investor, MBMI, provided practically all the funds of the remaining appellee-corporations. The records disclose that: (1) Olympic Mines and Development Corporation ("OMDC"), a domestic corporation, and MBMI subscribed to 6,663 and 3,331 shares, respectively, out of the authorized capital stock of **Madridejos**[15]; however, OMDC paid nothing for this subscription while MBMI paid P2,803,900.00 out of its total subscription cost of P3,331,000.00[16]; (2) Palawan Alpha South Resource Development Corp. ("Palawan Alpha"), also a domestic corporation, and MBMI subscribed to 6,596 and 3,996 shares, respectively, out of the authorized capital stock of **Patricia Louise**[17]; however, Palawan Alpha paid nothing for this subscription while MBMI paid P2,796,000.00 out of its total subscription cost of P3,996,000.00[18]; (3) OMDC and MBMI subscribed to 6,663 and 3,331 shares, respectively, out of the authorized capital stock of **Sara Marie**[19]; however, OMDC paid nothing for this subscription while MBMI paid P2,794,000.00 out of its total subscription cost of P3,331,000.00[20]; and (4) Falcon Ridge Resources Management Corp. ("Falcon Ridge"), another domestic corporation, and MBMI subscribed to 5,997 and 3,998 shares, respectively, out of the authorized capital stock of **San Juanico**; however, Falcon Ridge paid nothing for this subscription while MBMI paid P2,500,000.00 out of its total subscription cost of P3,998,000.00[21]. Thus, pursuant to the afore-quoted DOJ Opinion, the Grandfather Rule must be used.

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[15] Eighth Article, Madridejos' s Articles of Incorporation.
[16] Ninth Article, Madridejos's Articles of Incorporation.
[17] Tenth Article, Patricia Louise's Articles of Incorporation.
[18] Eleventh Article, Patricia Louise's Articles of Incorporation.
[19] Eighth Article, Sara Marie's Articles of Incorporation.
[20] Ninth Article, Sara Marie's Articles of Incorporation.
[21] Eighth Article, San Juanico's Articles of Incorporation.

We believe, that a revisit of the Control Test vis-à-vis the Grandfather Rule, as enunciated in the 1967 SEC Rules, is in order.

Let us take for example Corporation A, which is 60% Filipino-owned and 40% foreign-owned. Corporation A, in turn, owns 60% of the outstanding capital stock of Corporation C, with the remaining 40% being owned by foreigners. If the Control Test is followed, Corporation A's investment in 60% of Corporation C's outstanding capital stock shall be deemed as of Philippine nationality, thereby making Corporation C a Filipino national. If the Grandfather Rule is used, Corporation C would be foreign because Corporation A's investment therein of 60% must be broken down to determine the respective actual, indirect interests in Corporation C of Corporation A's Filipino and foreign shareholders. The respective resulting indirect interests in Corporation C of Corporation A's Filipino and foreign shareholders would now be added to the existing direct Filipino and/or foreign interest(s) in Corporation C. Thus, the resulting ownership ratio in Corporation C would be 64% foreign: 36% Filipino, arrived at as follows:

60% (Filipino equity in Corp. A) x 60% (Corp. A's equity in Corp. C) = 36% Filipino
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100

40% (foreign equity in Corp. A) x 60% (Corp. A's equity in Corp. C) = 24% foreign
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100

24% foreign + 40% (direct foreign investment in Corp. C) = 64% total foreign investment in Corp.

In the example above, when the Control Test is followed, Corporation C would be allowed to engage in a nationalized business or activity even if, in reality, it is 64% foreign-owned (comprised by the 24% indirect interest in Corporation C of Corporation A's foreign shareholders and by the 40% direct foreign interest in Corporation C). In short, the legal fiction under the Control Test that the 60% investment of the investing corporation (in this case, Corporation A) in the investee corporation (i.e., Corporation C) is deemed Filipino actually favors foreigners because their indirect interest in the investee corporation (Corporation C) through their ownership of 40% in the investing corporation (Corporation A) is unduly ignored. On the other hand, if we apply the Grandfather Rule, the foreigners would be barred from participating in such nationalized area of investment, their actual and true participation having been established.

The avowed purpose of the Constitution is to place in the hands of Filipinos the exploitation of our natural resources. Necessarily, therefore, the Rule interpreting the constitutional provision should not diminish that right through the legal fiction of corporate ownership and control. But the constitutional provision, as interpreted and practiced via the 1967 SEC Rules, has favored foreigners contrary to the command of the Constitution. **Hence, the Grandfather Rule must be**

applied to accurately determine the actual participation, both direct and indirect, of foreigners in a corporation engaged in a nationalized activity or business.

Compliance with the constitutional limitation(s) on engaging in nationalized activities must be determined by ascertaining if 60% of the investing corporation's outstanding capital stock is owned by "*Filipino citizens*", or as interpreted, by natural or individual Filipino citizens. If such investing corporation is in turn owned to some extent by another investing corporation, the same process must be observed. One must not stop until the citizenships of the individual or natural stockholders of layer after layer of investing corporations have been established, the very essence of the Grandfather Rule.

Lastly, it was the intent of the framers of the 1987 Constitution to adopt the Grandfather Rule. In one of the discussions on what is now Article XII of the present Constitution, the framers made the following exchange:

> "MR. NOLLEDO. In Sections 3, 9 and 15, the Committee stated local or Filipino equity and foreign equity; namely, 60-40 in Section 3, 60-40 in Section 9, and 2/3-1/3 in Section 15.
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> MR. VILLEGAS. That is right.
>
> MR. NOLLEDO. In teaching law, we are always faced with the question: 'Where do we base the equity requirement, is it on the authorized capital stock, on the subscribed capital stock, or on the paid-up capital stock of a corporation'? Will the Committee please enlighten me on this?
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> MR. VILLEGAS. We have just had a long discussion with the members of the team from the UP Law Center who provided us a draft. The phrase that is contained here which we adopted from the UP draft is '60 percent of voting stock.'
>
> MR. NOLLEDO. That must be based on the subscribed capital stock, because unless declared delinquent, unpaid capital stock shall be entitled to vote.
>
> MR. VILLEGAS. That is right.
>
> MR. NOLLEDO. Thank you.
>
> **With respect to an investment by one corporation in another corporation, say, a corporation with 60-40 percent equity invests in another corporation which is permitted by the Corporation Code, does the Committee adopt the grandfather rule?**
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> MR. VILLEGAS. **Yes, that is the understanding of the Committee.**

MR. NOLLEDO. Therefore, we need additional Filipino capital?

MR. VILLEGAS. Yes."[22]

Applying the Grandfather Rule in the instant case, however, would require more information because one would no longer just stop at the level or tier where the percentage of the outstanding capital stock is clearly 60%. To arrive at the actual Filipino and foreign equity in an investee corporation, both the direct and indirect interests in such corporation must be considered, and for such indirect interests (Filipino and foreign) to be determined, one must go to the different layers to ascertain the equity structures of the participating corporate stockholders. In short, additional information, which were not taken into account by the CED because they were no longer required under the Control Test, would now be needed to determine the nationalities of Madridejos, Patricia Louise, Sara Marie, San Juanico and Bethlehem under the Grandfather Rule.

To this end, we resolve to remand the case against Madridejos, Patricia Louise, Sara Marie, San Juanico and Bethlehem to the CED for further proceedings. In the conduct of such proceedings, CED is reminded to consider every piece of evidence already on record and, if necessary, to conduct further investigation in order to ascertain, consistent with the Grandfather Rule, the true, actual Filipino and foreign participation in each of these five (5) corporations. The CRMD is hereby directed to assist the CED.

WHEREFORE, premises considered, the Commission *En Banc* resolves, as it is hereby **RESOLVED**, to:

1. **SET ASIDE** the *Letter-Resolution* dated 3 September 2009 issued by the then Compliance and Enforcement Department, but only with respect to the finding that McArthur Mining Inc., Tesoro Mining and Development, Inc., and Narra Nickel Mining and Development Inc. are Philippine nationals, the same issue being a pending matter before the Court of Appeals, and **DISMISS**, without prejudice, the Complaint for Revocation against these corporations; and

2. **REMAND** the Complaint for Revocation, insofar as Sara Marie Mining, Inc., Patricia Louise Mining & Development Corporation, Madridejos Mining Corporation, Bethlehem Nickel Corporation and San Juanico Nickel Corporation is concerned, to the Enforcement and Prosecution Department (formerly Compliance and Enforcement Department) of this Commission, for further proceedings.

SO ORDERED.

[22]Record of the Constitutional Commission of 1986, Proceedings and Debates, Volume 3, pages 255-256.

Mandaluyong City, 25 March 2010.

FE B. BARIN
Chairperson

MA. JUANITA E. CUETO
Commissioner

RAUL J. PALABRICA
Commissioner

MANUEL HUBERTO B. GAITE
Commissioner

ELADIO M. JALA
Commissioner