17 May 2021

SEC-OGC Opinion No. 21-08
Re: Appointment of a Foreign Director in a Corporation Engaged in a Partly Nationalized Activity

PRIME INFRASTRUCTURE HOLDINGS, INC.
16th Floor Three E-Com Center,
Bayshore Drive corner Ocean Drive,
Block 21 Mall of Asia Complex, Pasay City

Attention: **Attys. Jerry S. Coloma III and Keisha Trina M. Guangko**
Molo Sia Dy Tuazon and Coloma Law Offices
External Legal Counsel

Gentlemen:

This refers to your letter dated 23 March 2021 requesting for opinion from the Commission regarding the appointment of a foreign director in a corporation engaged in a partly nationalized activity.

As background, you stated that Trident Water Company Holdings, Inc. ("Trident Water") is a subsidiary of Prime Strategic Holdings, Inc. ("PSHI"), a 100% Filipino Corporation. After several acquisitions (i.e. Subscription Agreement and Share Purchase Agreement), Trident Water will be acquiring 51% voting shares in Manila Water Company, Inc. ("MWC") upon completion of certain closing conditions in the transactions ("the Acquisition").

After the Acquisition, Trident Water will be able to elect majority of the members of the Board of Directors of MWC.

Since MWC is involved in the business of operating a public utility, its foreign equity is limited to 40%. Based on the shareholding structure as of 31 December 2020, the percentage of foreign equity in MWC is 24.59%.

You further stated that MWC has an 11-seat Board of Directors ("Board") and Trident Water intends to nominate Mr. Guillaume Lucci ("Mr. Lucci"), an American, as a member of the Board, because of the latter's credentials and work experience. It was noted that Mr. Lucci would only be a director of MWC and not an officer.

Upon Mr. Lucci's nomination to the Board, Trident Water would then vote its shares in MWC in favor of, among others, Mr. Lucci.

Trident Water now seeks confirmation that there are no legal prohibitions against it voting for Mr. Lucci to be a director of MWC.

Hence this query.

Sections 22[1], 23[2], and 26[3] of the Revised Corporation Code ("RCC") provide for the qualifications, disqualifications and the manner of electing a member of the board of directors.

On the qualifications of the members of the board of directors, the RCC does not mention any restriction on the *nationality* of the person to be elected as member of said board.

It must be noted, however, that while the RCC does not impose restriction on the nationality of the members of the board of directors, the same shall be subject to the following: 1) the additional qualifications of a director that a private corporation may set forth in its By-Laws as provided in Section 46[4] of the RCC; and 2) the

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[1] Republic Act No. 11232, Revised Corporation Code of the Philippines, February 20, 2019, "SECTION 22. The Board of Directors or Trustees of a Corporation; Qualification and Term. — Unless otherwise provided in this Code, the board of directors or trustees shall exercise the corporate powers, conduct all business, and control all properties of the corporation.

Directors shall be elected for a term of one (1) year from among the holders of stocks registered in the corporation's books, while trustees shall be elected for a term not exceeding three (3) years from among the members of the corporation. Each director and trustee shall hold office until the successor is elected and qualified. A director who ceases to own at least one (1) share of stock or a trustee who ceases to be a member of the corporation shall cease to be such. x x x"

[2] *Ibid.*, "SECTION 23. Election of Directors or Trustees. — Except when the exclusive right is reserved for holders of founders' shares under Section 7 of this Code, **each stockholder or member shall have the right to nominate any director or trustee <u>who possesses all of the qualifications and none of the disqualifications set forth in this Code</u>.**

x x x x x x

The directors or trustees elected shall perform their duties as prescribed by law, rules of good corporate governance, and bylaws of the corporation."

[3] *Ibid.*, "SECTION 26. Disqualification of Directors, Trustees or Officers. — A person shall be disqualified from being a director, trustee or officer of any corporation if, within five (5) years prior to the election or appointment as such, the person was:

(a) Convicted by final judgment:
(1) Of an offense punishable by imprisonment for a period exceeding six (6) years;
(2) For violating this Code; and
(3) For violating Republic Act No. 8799, otherwise known as "The Securities Regulation Code";

(b) Found administratively liable for any offense involving fraudulent acts; and
(c) By a foreign court or equivalent foreign regulatory authority for acts, violations or misconduct similar to those enumerated in paragraphs (a) and (b) above.

The foregoing is without prejudice to qualifications or other disqualifications, which the Commission, the primary regulatory agency, or the Philippine Competition Commission may impose in its promotion of good corporate governance or as a sanction in its administrative proceedings."

[4] *Ibid.*, "SECTION 46. Contents of Bylaws. - A private corporation may provide the following in its bylaws: x x x

requirements under the 1987 Constitution[5], special laws such as the Commonwealth Act No. 108 or the Anti-Dummy Law[6] and/or special rules implemented by the regulatory authority of the industry (i.e. for example, the Department of Energy and Natural Resources and/or the National Water Resources Board).

Section 11 of the 1987 Constitution provides for the nationality requirements for corporations engaged in the operation of a public utility such as MWC, to wit:

> "SECTION 11. No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or **to corporations or associations organized under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens**, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. **The participation of foreign investors in the governing body of any public utility enterprise shall be limited to <u>their proportionate share</u> in its capital**, and all the executive and managing officers of such corporation or association must be citizens of the Philippines."

Meanwhile, Section 2-A of the Anti-Dummy Law, as amended, states:

> "SEC. 2-A. xxx xxx xxx Provided, finally, **That the election of aliens as members of the board of directors** or governing body of corporations or associations **engaging in partially nationalized activities shall be allowed in proportion to their allowable participation or share in the capital of such entities.**"

In this regard, the Commission has held in previous opinions[7] that foreigners can be elected as directors *in proportion to their allowable participation or share in the capital of corporations* engaged in activities that are reserved to Filipinos, but are prohibited from being elected as officers of a corporation, such as the President, Vice President, Treasurer and Secretary. Please note, however, that in determining the "representation of alien stockholders in the board of directors of corporations engaged in partially nationalized activities", the *basis should be the actual share* of the alien stockholders in the capital of the corporation which share, however, should not exceed the foreign equity ceiling, prescribed by law for a particular corporation or association.[8]

(f) **<u>The directors' or trustees' qualifications</u>**, duties and responsibilities, the guidelines for setting the compensation of directors or trustees and officers, and the maximum number of other board representations that an independent director or trustee may have which shall, in no case, be more than the number prescribed by the Commission; x x x"

[5] The 1987 Constitution, February 2, 1987

[6] Commonwealth Act No. 108, An Act to Punish Acts of Evasion of the Laws on the Nationalization of Certain Rights, Franchises or Privileges. As amended by R.A. 421, R.A. 134, R.A. 6084, and P.D. 715, October 30, 1936

[7] SEC-OGC Opinion No. 19-14 dated July 15, 2014 addressed to Mr. Isagani A. Zulueta; SEC-OGC Opinion No. 16-18 dated August 24, 2018 addressed to Rodrigo Berenguer & Guno

[8] DOJ Opinion No. 161, s. 1994, November 16, 1994

Based on the foregoing, we confirm your position that Trident Water can elect Mr. Lucci as **director** provided that the number of foreigners in the 11-member Board of MWC does not exceed the allowable seats (40% x 11) that may be filled up by a foreigner, subject to the above discussion. Please note further that this is subject to the limitations, *if any*, that are provided in MWC's By-Laws and in the applicable special rules that are implemented by the regulatory authority of the water industry.

It shall be understood, however, that the foregoing opinion is rendered solely on the basis of the facts and circumstances disclosed to the Commission, and should be considered relevant only to the particular issue raised therein. This opinion shall not be considered and used in the nature of a standing rule binding upon the Commission in other cases, or upon the courts whether of similar or dissimilar circumstances[9]. If, upon further inquiry or investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.

Respectfully yours,

ROMUALD C. PADILLA
General Counsel

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[9]SEC Memorandum Circular No. 15, Series of 2003, No.7