01 September 2011

SEC-OGC Opinion No. 11-37
Foreign equity/foreign president in mining corporation

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Madam:

This refers to your letter dated 24 January 2011 addressed to Director Benito A. Cataran of the Commission's Company Registration and Monitoring Department *("CRMD")*. Said letter was endorsed to the Office of the General Counsel on 07 February 2011.

Your inquiry involves Hodong Development Corporation *("Hodong")*, a corporation registered with the Commission since 24 April 2008. In your letter, you alleged that the president of Hodong is Mr. Dong Ju Heo, a Korean national. You have also attached documents showing that Mr. Dong Ju Heo has been representing himself as the president of Hodong.

We quote the questions you raised in your letter as follows:

"1. Is it allowed by SEC and under existing laws for a Foreigner to be elected or taking up the position of President in a corporation whose percentage of sharing is 60 percent owned by Filipinos and 40 percent owned by Foreigners?
2. As a regulating body, how should SEC act in response to said situation?
3. In such case, what legal action must be taken by parties who were misled?
4. Does SEC have the full mandate under existing laws to resolve the said issue?"

To answer your first question, we must first look into what kind of a corporation Hodong is, since this would determine whether it is a corporation engaged in an activity where foreign ownership is restricted under Philippine laws.

The Articles of Incorporation of Hodong states that the primary purpose of the corporation is "to engage in the business of mining and mineral products." The law has specific citizenship requirements when a mining corporation is involved, *viz:*

Article XII, Section 2 of the Constitution provides that:

> "Section 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty *per centum* of whose capital is owned by such citizens. xxx"

The quoted Constitutional provision is replicated in the Foreign Investment Negative List[1] which states that foreign ownership is limited up to 40% in "exploration, development and utilization of natural resources.[2]" Mining, which involves the exploration, development and utilization of natural resources, is a partly nationalized activity.

The issue is whether or not a foreigner can be the president of Hodong, a mining corporation.

We opine that he cannot.

In a previous opinion, the Commission has ruled on Sec. 2-A of Commonwealth Act No. 108[3], otherwise known as the "Anti-Dummy Law", as follows:

> "On the citizenship requirement of corporate officers. Sec. 2-A of Commonwealth Act No. 108[4], as amended, bans foreigners from being

[1] Executive Order No. 858 dated 05 February 2010.
[2] *Id.*, par. 17.
[3] Approved 30 October 1936.
[4] "Section 2-A. *Unlawful use, exploitation or enjoyment.* — Any person, corporation, or association which, having in its name or under its control, a right, franchise, privilege, property or business, the exercise or enjoyment of which is expressly reserved by the Constitution or the laws to citizens of the Philippines or of any other specific country, or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens, permits or allows the use, exploitation or enjoyment thereof by a person, corporation or association not possessing the requisites prescribed by the Constitution or the laws of the Philippines; or leases, or in any other way, transfers or conveys said right, franchise, privilege, property or business to a person, corporation or association not otherwise qualified under the Constitution, or the provisions of the existing laws; or in any manner permits or allows any person, not possessing the qualifications required by the Constitution, or existing laws to acquire, use, exploit or enjoy a right, franchise, privilege, property or business, the exercise and enjoyment of which are expressly reserved by the Constitution or existing laws to citizens of the Philippines or of any other specific country, **to intervene in the management, operation, administration or control thereof, whether as an officer, employee or laborer therein with or without remuneration** except technical personnel whose employment may be specifically authorized by the Secretary of Justice, and any person who knowingly aids, assists or abets in the planning consummation or perpetration of any of the acts herein above enumerated shall be punished by imprisonment for not less than five nor more than fifteen years and by a fine of not less than the value of the right, franchise or privilege enjoyed or acquired in violation of the provisions hereof but in no case less than five thousand pesos: *Provided, however,* That the president, managers or persons in charge of corporations, associations or partnerships violating the

elected or appointed to management positions as president, vice-president, treasurer, secretary, etc. **in business activities where there is a constitutional or statutory provision imposing a specific nationality requirement as a requisite for the exercise or enjoyment of a right, franchise or privilege.**"[5] (Emphasis supplied.)

This reiterates a previous opinion of the Department of Justice *("DOJ")* on the same:

> "A reading of Section 2-A readily reveals the legislative intent to complement our nationalization laws by closing any avenue whereby aliens may defeat their purpose [King vs. Hernaez, 4 SCRA 792, (1962)]. It penalizes the employment of aliens in any position pertaining to management, operation, administration and control, "whether as an officer, employee, or laborer therein", which means that the employment of a person who is not a Filipino citizen even in a minor or clerical or non-control position is prohibited.
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> xxx
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> In arriving at this conclusion, I am guided by the underlying intent behind the nationalization of employment provided for in the Anti-Dummy Law, which is to eradicate the shackles of foreign economic control and domination in the country." [King vs. Hernaez, supra, at p. 804; Universal Corn Products, Inc. vs. Rice and Corn Board, 20 SCRA 1048 (1967).]"[6]

Thus, being a domestic corporation engaged in a partly nationalized activity, Hodong cannot have a foreigner as President.

As to your second and third questions, you may file a complaint with the Enforcement and Prosecution Department *("EPD")* of the Commission, which shall conduct an investigation into the matter. Based on the results of such investigation, the Commission may impose sanctions for violation of the laws and rules, and may recommend the filing of criminal complaints.

As to your last question regarding the matter of the jurisdiction of the Commission over the issue at hand, the answer lies in the following:

1. Section 17 (4) of the Corporation Code[7] empowers the Commission to reject the articles of incorporation or disapprove any amendment thereto on the ground that:

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provisions of this section shall be criminally liable in lieu thereof: *Provided, further,* That any person, corporation or association shall, in addition to the penalty imposed herein, forfeit such right, franchise, privilege, and the property or business enjoyed or acquired in violation of the provisions of this Act: *And 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." **(Emphasis supplied.)**

[5] SEC Opinion addressed to Mr. K. J. Mctavish dated December 8, 1995.

[6] DOJ Opinion No. 037, s. 1976, 2nd Indorsement, February 26, 1976.

[7] Batas Pambansa Blg. 68 (May 1, 1980).

"the percentage of ownership of the capital stock to be owned by citizens of the Philippines has not been complied with as required by existing laws or the Constitution."

2. Presidential Decree 902-A[8], Section 3 states that:

"The Commission shall have absolute jurisdiction, supervision and control over all corporations, partnerships or associations, who are the grantees of primary franchise and/or a license or permit issued by the government to operate in the Philippines; and in the exercise of its authority, it shall have the power to enlist the aid and support of any and all enforcement agencies of the government, civil or military."

3. Under Section 5 of the SRC, the Commission shall have, among others, the following powers and functions:

"(a) Have jurisdiction and supervision over all corporations, partnerships or associations who are the grantees of primary franchises and/or a license or permit issued by the Government;"

4. The Foreign Investments Act[9], the law from which the Foreign Investment Negative List emanates, provides that:

"SEC. 14. *Administrative Sanctions.* - A person who violates any provision of this Act or of the terms and conditions of registration or of the rules and regulations issued pursuant thereto, or aids or abets in any manner any violation shall be subject to a fine not exceeding One hundred thousand pesos [P100,000].

If the offense is committed by a juridical entity, it shall be subject to a fine in an amount not exceeding 1/2 of 1% of total paid-in capital but not more than Five million pesos [P5,000,000]. The president and/or officials responsible therefor shall also be subject to a fine not exceeding Two hundred thousand pesos [P200, 000].

In addition to the foregoing, any person, firm or juridical entity involved shall be subject to forfeiture of all benefits granted under this Act.

SEC shall have the power to impose administrative sanctions as provided herein for any violation of this Act or its implementing rules and regulations."

5. Section 144 of the Corporation Code also provides that:

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[8] SEC Reorganization Act (March 11, 1976).

[9] Republic Act No. 7042, as amended by Republic act No. 8179 (1991).

"Violations of any of the provisions of this Code or its amendments not otherwise specifically penalized therein shall be punished by a fine of not less than one thousand (P1,000.00) pesos but not more than ten thousand (P10,000.00) pesos or by imprisonment for not less than thirty (30) days but not more than five (5) years, or both, in the discretion of the court. If the violation is committed by a corporation, the same may, after notice and hearing, be dissolved in appropriate proceedings before the Securities and Exchange Commission: Provided, That such dissolution shall not preclude the institution of appropriate action against the director, trustee or officer of the corporation responsible for said violation: Provided, further, That nothing in this section shall be construed to repeal the other causes for dissolution of a corporation provided in this Code."

The foregoing, in conjunction with the Anti-Dummy Law, gives the Commission the power to "administratively enforce compliance with the foreign nationality restrictions of the Anti-Dummy Law and impose administrative sanctions authorized by law, such as fines, removal from office or revocation of corporate/partnership franchise against any person or entity found to have violated said Law."[10]

However, please note that criminal matters are referred to the DOJ, as it is the Secretary of Justice who is tasked by law to investigate and prosecute all violations of penal laws, including violations of the Anti-Dummy Law."[11] Also, if the issues are intracorporate, it is the Regional Trial Courts that have jurisdiction, based on Section 5.2 of the SRC.

This Opinion is based solely on the facts disclosed in the query and relevant solely to the particular issues raised therein. It shall likewise be understood that the foregoing shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts. If, upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.

VESPER JULIUS B. GARCIA
Officer-in-Charge

[10] SEC Opinion dated January 19, 1996, addressed to Hon. Mohd A. Omar Fajardo.
[11] *Pp. vs. Gacott, et al.* G.R. No. 116049, March 20, 1995.