Securities and Exchange Commission
PHILIPPINES

BAGONG PILIPINAS

OFFICE OF THE GENERAL COUNSEL

06 November 2024

SEC OGC Opinion No. 24-34
Re: Foreigner appointed as Chairman of a corporation engaged in a partially nationalized economic activity

BERNABE & PARTNERS LAW OFFICE
2nd Floor, Romanavil Bldg.
San Jose St. Butuan City

Attention: Atty. Audie G. Bernabe

Dear Atty. Bernabe:

This refers to your letter dated 8 December 2020, requesting for an opinion on behalf of your client, Venkatesh Construction Corporation (VCC), a domestic corporation which, according to you, is engaged in a partially nationalized activity.

You disclosed that in 2017, one of the company directors, an Indian national, was appointed as the Chairman of the Board. Under the by-laws of VCC, the Chairman does not perform any executive functions. It is the President who manages the affairs of the corporation.

You raised the following queries:

1. Whether a foreigner is disqualified from acting as Chairman under the Anti-Dummy Law of a sixty percent (60%) [Filipino-owned] corporation engaged in partially nationalized activities even if he is not performing any executive function; and
2. Whether the SEC Opinion dated 15 May 1985 addressed to Atty. Francisco Angeles which opined that a foreigner is not disqualified to act as Chairman of a corporation engaged in nationalized and partially nationalized activity as long as he does not perform any executive function is superseded by SEC-OGC Opinion No. 16-12 dated 12 February 2016.

Section 2-A of the Commonwealth Act No. 108, otherwise known as the "Anti-Dummy Law", provides:

> " 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, <u>the exercise or enjoyment of which is expressly reserved by the Constitution or the laws to citizens of the Philippines</u>** or of any other specific country, or **<u>to corporations or associations at least sixty per centum of the capital of which is owned by such citizens</u>**, permits or allows the use, exploitation or enjoyment thereof by a person, corporation or association not possessing the requisites prescribed by a 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, **<u>to intervene in the management, operation, administration or control thereof, whether as an officer, employee or laborer therein with or without remuneration</u>** 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 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."

In a previous opinion[1], citing a Department of Justice Opinion, we opined that a President of a partly-nationalized corporation cannot be a foreigner pursuant to Section 2-A of the Anti-Dummy Law:

> "This reiterates a previous opinion of the Department of Justice ("DOJ") on the same:
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> 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 non-control position is prohibited.
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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).]
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> Thus, being a domestic corporation engaged in partly nationalized activity, Hodong cannot have a foreigner as President."

As to the position of a Chairman, in SEC Opinion dated 15 May 1985[2] (1985 Opinion), the Commission opined:

> "The concept of board chairman and his functions as an executive vary so widely in different companies as to be indefinable. There is no settled practice. The typical pattern of executive duties is that the president or the chairman of the board is designated usually by the by-laws but sometimes in board resolutions, as the general manager or chief executive officer of the corporation. If the chairman of the board is so designated, the president is frequently designated the chief administrative or chief operating officer [or] may simply clearly be the officer who succeeds to the chairman's executive duties in his absence or disability. In such a given situation, an alien cannot qualify as chairman of the board of directors. However, where the president is the chief executive officer, typically, the duties of the Chairman of the board relate to presiding at meetings of the board and of committees of which he is a member and carrying out such other duties as the board shall assign. The duty of the Chairman of the board as presiding officer is not an executive one."

Subsequently, in SEC-OGC Opinion No.07-07, the Commission opined that an alien national may assume the post of the Chairman of the Board whose act shall be limited to that of a presiding officer during board meetings.[3] This was reiterated in SEC-OGC Opinion No. 23-16[4], where the Commission opined that when the function of the Chairman of the Board as provided for in the by-laws consists merely of presiding at the meetings of the Board, a non-Philippine national may qualify as Chairman of the Board.

Thus, for as long as the Chairman does not perform any executive function and merely presides at board meetings, we answer your first query in the ***negative***.

As to your second query, we likewise answer the same in the ***negative***. In SEC-OGC opinion No. 16-12, the Commission opined that foreigners are disqualified from being elected as President/Chairman in a wholly or partially nationalized corporation. The opinion was based on the premise or given fact that the foreigner is the "President/Chairman", meaning, simultaneously performing the function of a President and Chairman. As previously stated, the position of President cannot be given to a foreigner in a partly nationalized corporation, even if such foreigner concurrently occupies/holds the position of chairman. However, when the issue concerns the position of the Chairman alone, the 1985 Opinion applies. Hence, SEC-OGC Opinion No. 16-12 did not supersede the latter.

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[1] SEC-OGC Opinion No. 11-37 dated 01 September 2011 addressed to Ms. Lailani Maniago.
[2] SEC Opinion dated 15 May 1985 addressed to Atty. Francisco F. Angeles.
[3] SEC Opinion No.07-07 dated 8 August 2007 addressed to Atty. Pastor M. Reyes, Jr.
[4] SEC-OGC Opinion No. 23-16 dated 24 November 2023 addressed to Mendiola Baul Valenzuela Law Office.

It shall be understood that the foregoing opinion is rendered based solely on the facts, circumstances, and documents disclosed/submitted and relevant solely to the particular issue raised therein. It shall not be 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. 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.

Very truly yours,

Romuald C Padilla
General Counsel