Supreme Court E-Library

SPECIAL THIRD DIVISION

[G.R. No. 195580. January 28, 2015]

NARRA NICKEL MINING AND DEVELOPMENT CORP., TESORO MINING AND DEVELOPMENT, INC., and McARTHUR MINING, INC., *petitioners, vs.* **REDMONT CONSOLIDATED MINES CORP.,** *respondent.*

SYLLABUS

1. POLITICAL LAW; NATIONAL ECONOMY AND PATRIMONY; THE GRANDFATHER RULE; THE USE OF THE GRANDFATHER RULE AS A "SUPPLEMENT" TO THE CONTROL TEST IS NOT PROSCRIBED BY THE CONSTITUTION OR THE MINING ACT OF 1995; SUSTAINED.— Nowhere in that disposition did the Court foreclose the application of the Control Test in determining which corporations may be considered as Philippine nationals. Instead, to borrow Justice Leonen's term, the Court used the Grandfather Rule as a "supplement" to the Control Test so that the intent underlying the averted Sec.2, Art. XII of the Constitution be given effect. The following excerpts of the April 21, 2014 Decision cannot be clearer: In ending, **the "control test" is still the prevailing mode of determining whether or not a corporation is a Filipino corporation**, within the ambit of Sec. 2, Art. XII of the 1987 Constitution, entitled to undertake the exploration, development and utilization of the natural resources of the Philippines. **When in the mind of the Court, there is doubt, based on the attendant facts and circumstances of the case**, in the 60-40 Filipino equity ownership in the corporation, **then it may apply the "grandfather rule."** With that, the use of the Grandfather Rule as a "supplement" to the Control Test is not proscribed by the Constitution or the Philippine Mining Act of 1995.

2. ID.; ID.; ID.; THE GRANDFATHER RULE IMPLEMENTS THE FILIPINO EQUITY REQUIREMENT IN THE CONSTITUTION; EXPLAINED.— To reiterate, Sec. 2, Art. XII of the Constitution reserves the exploration, development,

Supreme Court E-Library

and utilization of natural resources to Filipino citizens and "corporations or associations at least sixty *per centum* of whose capital is owned by such citizens." Similarly, Section 3(aq) of the Philippine Mining Act of 1995 considers a "corporation x x x registered in accordance with law at least sixty per cent of the capital of which is owned by citizens of the Philippines" as a person qualified to undertake a mining operation. Consistent with this objective, the Grandfather Rule was originally conceived to look into the *citizenship* of the individuals who ultimately own and control the shares of stock of a corporation for purposes of determining compliance with the constitutional requirement of Filipino ownership. It cannot, therefore, be denied that the framers of the Constitution have not foreclosed the Grandfather Rule as a tool in verifying the nationality of corporations for purposes of ascertaining their right to participate in nationalized or partly nationalized activities. x x x As further defined by Dean Cesar Villanueva, the Grandfather Rule is "**the method by which the percentage of Filipino equity in a corporation** engaged in nationalized and/or partly nationalized areas of activities, provided for under the Constitution and other nationalization laws, **is computed, in cases where corporate shareholders are present, by *attributing* the nationality of the second or even subsequent tier of ownership to determine the nationality of the corporate shareholder**." Thus, to arrive at the actual Filipino ownership and control in a corporation, both the direct and indirect shareholdings in the corporation are determined. x x x As shown by the quoted legislative enactments, administrative rulings, opinions, and this Court's decisions, the Grandfather Rule not only finds basis, but more importantly, it implements the Filipino equity requirement, in the Constitution.

3. ID.; ID.; ID.; EVEN IF THE 60-40 FILIPINO TO FOREIGN EQUITY RATIO IS APPARENTLY MET, A RESORT TO THE GRANDFATHER RULE IS NECESSARY IF DOUBT EXISTS AS TO THE *LOCUS* OF THE "BENEFICIAL OWNERSHIP" AND "CONTROL"; APPLICATION IN CASE AT BAR.— The Control Test and the Grandfather Rule are not, as it were, incompatible ownership-determinant methods that can only be applied alternative to each other. Rather, these methods **can, if appropriate, be used cumulatively in the determination of the ownership and control of**

corporations engaged in fully or partly nationalized activities, as the mining operation involved in this case or the operation of public utilities as in *Gamboa* or *Bayantel*. The Grandfather Rule, standing alone, should not be used to determine the Filipino ownership and control in a corporation, as it could result in an otherwise foreign corporation rendered qualified to perform nationalized or partly nationalized activities. Hence, **it is only when the Control Test is first complied with that the Grandfather Rule may be applied.** Put in another manner, if the subject corporation's Filipino equity falls below the threshold 60%, the corporation is immediately considered foreign-owned, in which case, the need to resort to the Grandfather Rule disappears. On the other hand, **a corporation that complies with the 60-40 Filipino to foreign equity requirement can be considered a Filipino corporation *if there is no doubt* as to who has the "beneficial ownership" and "control" of the corporation. In that instance, there is no need for** a dissection or further inquiry on the ownership of the corporate shareholders in both the investing and investee corporation **or the application of the Grandfather Rule.** As a corollary rule, even if the 60-40 Filipino to foreign equity ratio is apparently met by the subject or investee corporation, **a resort to the Grandfather Rule is necessary *if doubt exists* as to the *locus* of the "beneficial ownership" and "control."** In this case, a further investigation as to the nationality of the personalities with the beneficial ownership and control of the corporate shareholders in both the investing and investee corporations is necessary. As explained in the April 21, 2012 Decision, the "doubt" that demands the application of the Grandfather Rule in addition to or in tandem with the Control Test is not confined to, or more bluntly, does not refer to the fact that the apparent Filipino ownership of the corporation's equity falls below the 60% threshold. Rather, **"doubt" refers to various indicia that the "beneficial ownership" and "control" of the corporation do not in fact reside in Filipino shareholders but in foreign stakeholders**.

4. ID.; ID.; ANTI-DUMMY LAW; IN RELATION TO THE MINIMUM FILIPINO EQUITY REQUIREMENT IN THE CONSTITUTION, SIGNIFICANT INDICATORS OF THE DUMMY STATUS HAVE BEEN RECOGNIZED;

Supreme Court E-Library

ENUMERATION.— As provided in DOJ Opinion No. 165, Series of 1984, which applied the pertinent provisions of the Anti-Dummy Law in relation to the minimum Filipino equity requirement in the Constitution, "significant indicators of the dummy status" have been recognized in view of reports "that some Filipino investors or businessmen are being utilized or [are] allowing themselves to be used as dummies by foreign investors" specifically in joint ventures for national resource exploitation. These indicators are: 1. That the foreign investors provide practically all the funds for the joint investment undertaken by these Filipino businessmen and their foreign partner; 2. That the foreign investors undertake to provide practically all the technological support for the joint venture; 3. That the foreign investors, while being minority stockholders, manage the company and prepare all economic viability studies.

5. ID.; EXECUTIVE DEPARTMENT ; DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES (DENR); PANEL OF ARBITRATORS (POA); THE POA JURISDICTION TO MAKE PRELIMINARY FINDING OF THE REQUIRED NATIONALITY OF THE CORPORATE APPLICANT IN ORDER TO DETERMINE ITS RIGHT TO A MINING AREA OR A MINERAL AGREEMENT, SUSTAINED.— The April 21, 2014 Decision did not dilute, much less overturn, this Court's pronouncements in either *Gonzales* or *Philex Mining* that POA's jurisdiction "is limited only to mining disputes which raise questions of fact," and not judicial questions cognizable by regular courts of justice. However, to properly recognize and give effect to the jurisdiction vested in the POA by Section 77 of the Philippine Mining Act of 1995, and in parallel with this Court's ruling in *Celestial Nickel Mining Exploration Corporation v. Macroasia Corp.*, the Court has recognized in its Decision that in resolving disputes "involving rights to mining areas" and "involving mineral agreements or permits," the POA has jurisdiction to make a *preliminary* finding of the required nationality of the corporate applicant in order to determine its right to a mining area or a mineral agreement. x x x The present case arose from petitioners' MPSA applications, in which they asserted their respective rights to the mining areas each applied for. Since respondent Redmont, itself an applicant for exploration permits over the same mining areas, filed

Supreme Court E-Library

petitions for the denial of petitioners' applications, it should be clear that there exists a controversy between the parties and it is POA's jurisdiction to resolve the said dispute. POA's ruling on Redmont's assertion that petitioners are foreign corporations not entitled to MPSA is but a necessary incident of its disposition of the mining dispute presented before it, which is whether the petitioners are entitled to MPSAs. Indeed, as the POA has jurisdiction to entertain "disputes involving rights to mining areas," it necessarily follows that the POA likewise wields the authority to pass upon the nationality issue involving petitioners, since the resolution of this issue is essential and indispensable in the resolution of the main issue, *i.e.,* the determination of the petitioners' right to the mining areas through MPSAs.

LEONEN, *J., dissenting opinion*:

1. POLITICAL LAW; EXECUTIVE DEPARTMENT; DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES (DENR); PANEL OF ARBITRATORS (POA); THE CRUX OF THE CASE WHICH PERTAINS TO THE LEGAL STATUS OF PETITIONERS AND THE RIGHTS OR INHIBITIONS ACCRUING TO THEM ON ACCOUNT OF THEIR STATUS IS BEYOND THE COMPETENCE OF THE DENR PANEL OF ARBITRATORS; CASE AT BAR.— The jurisdiction of the DENR Panel of Arbitrators is spelled out in Section 77 of Republic Act No. 7942, otherwise known as the Philippine Mining Act of 1995 (the "Mining Act"): x x x The April 21, 2014 Decision sustained the jurisdiction of the DENR Panel of Arbitrators, relying on pronouncements made in *Celestial Nickel Mining Exploration Corporation v. Macroasia Corp.* which construed the phrase "disputes involving rights to mining areas" as referring "to any adverse claim, protest, or opposition to an application for mineral agreement." However, the Decision interpreted Section 77 of the Mining Act in a manner that runs afoul of this court's pronouncements in its Decision penned by Associate Justice Dante Tinga in *Gonzales v. Climax Mining Ltd.* and in its Decision penned by Associate Justice J.B.L. Reyes in *Philex Mining Corp. v. Zaldivia.* x x x The DENR Panel of Arbitrators, as its name denotes, is an arbitral body. It is not a court of law. Its competence rests in its capacity to resolve factual issues arising between parties with competing mining claims

Supreme Court E-Library

and requiring the application of technical expertise. In this case, Redmont has not even shown that it has a competing mining claim. It has asked only that petitioners be declared as not qualified to enter into MPSAs. By sustaining the jurisdiction of the DENR Panel of Arbitrators, the majority effectively diminishes (if not totally abandons) the distinction made in *Gonzales* and *Philex* between "mining disputes" and "judicial questions." Per *Gonzales* and *Philex,* judicial questions are cognizable only by courts of justice, not by the DENR Panel of Arbitrators. x x x The crux of this case relates to a matter that is beyond the competence of the DENR Panel of Arbitrators. It does not pertain to the intricacies and specifications of mining operations. Rather, it pertains to the legal status of petitioners and the rights or inhibitions accruing to them on account of their status. It pertains to a judicial question.

2. ID.; NATIONAL ECONOMY AND PATRIMONY; THE GRANDFATHER RULE DISTINGUISHED FROM THE CONTROL TEST; THE CONTROL TEST, RATHER THAN THE GRANDFATHER RULE, FINDS PRIORITY APPLICATION IN RECKONING THE NATIONALITIES OF CORPORATIONS ENGAGED IN NATIONALIZED ECONOMIC ACTIVITIES; SUSTAINED.— The Control Test, rather than the Grandfather Rule, finds priority application in reckoning the nationalities of corporations engaged in nationalized economic activities. The Grandfather Rule finds no basis in the text of the 1987 Constitution. It is true that the records of the Constitutional Commission "indicate an affirmative reference to the Grandfather Rule." However, whatever references these records make to the Grandfather Rule is not indicative of a consensus among all members of the Constitutional Commission. x x x In contrast, the Control Test is firmly enshrined by congressional dictum in a statute, specifically, Republic Act No. 8179, otherwise known as the Foreign Investments Act (FIA). As this court has pointed out, "[t]he FIA is the basic law governing foreign investments in the Philippines, irrespective of the nature of business and area of investment." Section 3 (a) of the Foreign Investments Act defines a "Philippine national" as including "a corporation organized under the laws of the Philippines of which at least sixty per cent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines." x x x

Supreme Court E-Library

> The Control Test serves the rationale for nationalization of economic activities. It ensures effective control by Filipinos and satisfies the requirement of beneficial ownership. x x x From the definition of "beneficial owner or beneficial ownership" provided by the Implementing Rules and Regulations (amended 2004) of Republic Act No. 8799, otherwise known as the Securities Regulation Code, "there are two (2) ways through which one may be a beneficial owner of securities, such as shares of stock: first, by having or sharing voting power; and second, by having or sharing investment returns or power." The Implementing Rules use "and/or"; thus, these are alternative means which may or may not concur.

APPEARANCES OF COUNSEL

Gatmaytan Yap Patacsil Gutierrez & Protacio for petitioners.
Reynaldo Melendres and *Legaspi Barcelo & Salamera Law Office* for respondents.

R E S O L U T I O N

VELASCO, JR., *J.*:

Before the Court is the Motion for Reconsideration of its April 21, 2014 Decision, which denied the Petition for Review on Certiorari under Rule 45 jointly interposed by petitioners Narra Nickel and Mining Development Corp. (Narra), Tesoro Mining and Development, Inc. (Tesoro), and McArthur Mining Inc. (McArthur), and affirmed the October 1, 2010 Decision and February 15, 2011 Resolution of the Court of Appeals (CA) in CA-G.R. SP No. 109703.

Very simply, the challenged Decision sustained the appellate court's ruling that petitioners, being foreign corporations, are not entitled to Mineral Production Sharing Agreements (MPSAs). In reaching its conclusion, this Court upheld with approval the appellate court's finding that there was doubt as to petitioners' nationality since a 100% Canadian-owned firm, MBMI Resources, Inc. (MBMI), effectively owns 60% of the common stocks of

Supreme Court E-Library

the petitioners by owning equity interest of petitioners' other majority corporate shareholders.

In a strongly worded Motion for Reconsideration dated June 5, 2014, petitioners-movants argued, in the main, that the Court's Decision was not in accord with law and logic. In its September 2, 2014 Comment, on the other hand, respondent Redmont Consolidated Mines Corp. (Redmont) countered that petitioners' motion for reconsideration is nothing but a rehash of their arguments and should, thus, be denied outright for being pro-forma. Petitioners have interposed on September 30, 2014 their Reply to the respondent's Comment.

After considering the parties' positions, as articulated in their respective submissions, We resolve to deny the motion for reconsideration.

I.
The case has not been rendered moot and academic

Petitioners have first off criticized the Court for resolving in its Decision a substantive issue, which, as argued, has supposedly been rendered moot by the fact that petitioners' applications for MPSAs had already been converted to an application for a Financial Technical Assistance Agreement (FTAA), as petitioners have in fact been granted an FTAA. Further, the nationality issue, so petitioners presently claim, had been rendered moribund by the fact that MBMI had already divested itself and sold all its shareholdings in the petitioners, as well as in their corporate stockholders, to a Filipino corporation—DMCI Mining Corporation (DMCI).

As a counterpoint, respondent Redmont avers that the present case has not been rendered moot by the supposed issuance of an FTAA in petitioners' favor as this FTAA was subsequently revoked by the Office of the President (OP) and is currently a subject of a petition pending in the Court's First Division. Redmont likewise contends that the supposed sale of MBMI's interest in the petitioners and in their "holding companies" is a question of fact that is outside the Court's province to verify in a Rule 45 certiorari proceedings. In any case, assuming that the

Supreme Court E-Library

controversy has been rendered moot, Redmont claims that its resolution on the merits is still justified by the fact that petitioners have violated a constitutional provision, the violation is capable of repetition yet evading review, and the present case involves a matter of public concern.

Indeed, as the Court clarified in its Decision, the conversion of the MPSA application to one for FTAAs and the issuance by the OP of an FTAA in petitioners' favor are irrelevant. The OP itself has already cancelled and revoked the FTAA thus issued to petitioners. Petitioners curiously have omitted this critical fact in their motion for reconsideration. Furthermore, the supposed sale by MBMI of its shares in the petitioner-corporations and in their holding companies is not only a question of fact that this Court is without authority to verify, it also does not negate any violation of the Constitutional provisions previously committed before any such sale.

We can assume for the nonce that the controversy had indeed been rendered moot by these two events. As this Court has time and again declared, the "moot and academic" principle is not a magical formula that automatically dissuades courts in resolving a case.[1] The Court may still take cognizance of an otherwise moot and academic case, if it finds that (a) there is a grave violation of the Constitution; (b) the situation is of exceptional character and paramount public interest is involved; (c) the constitutional issue raised requires formulation of controlling principles to guide the bench, the bar, and the public; and (d) the case is capable of repetition yet evading review.[2] The Court's April 21, 2014 Decision explained in some detail that all four

---

[1] *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP)*, G.R. No. 183591, October 14, 2008, 568 SCRA 402, 460.

[2] *David v. Macapagal-Arroyo*, G.R. No. 171396, *etc*., May 3, 2006, 489 SCRA 160; citing *Province of Batangas v. Romulo*, G.R. No. 152774, May 27, 2004, 429 SCRA 736; *Lacson v. Perez*, 410 Phil. 78 (2001); *Albaña v. Comelec*, 478 Phil. 941 (2004); *Chief Supt. Acop v. Guingona, Jr.*, 433 Phil. 62 (2002); *SANLAKAS v. Executive Secretary Reyes*, 466 Phil. 482 (2004).

Supreme Court E-Library

(4) of the foregoing circumstances are present in the case. If only to stress a point, we will do so again.

First, allowing the issuance of MPSAs to applicants that are owned and controlled by a 100% foreign-owned corporation, albeit through an intricate web of corporate layering involving alleged Filipino corporations, is tantamount to permitting a blatant violation of Section 2, Article XII of the Constitution. The Court simply cannot allow this breach and inhibit itself from resolving the controversy on the facile pretext that the case had already been rendered academic.

Second, the elaborate corporate layering resorted to by petitioners so as to make it appear that there is compliance with the minimum Filipino ownership in the Constitution is deftly exceptional in character. More importantly, the case is of paramount public interest, as the corporate layering employed by petitioners was evidently designed to circumvent the constitutional caveat allowing only Filipino citizens and corporations 60%-owned by Filipino citizens to explore, develop, and use the country's natural resources.

Third, the facts of the case, involving as they do a web of corporate layering intended to go around the Filipino ownership requirement in the Constitution and pertinent laws, require the establishment of a definite principle that will ensure that the Constitutional provision reserving to Filipino citizens or "corporations at least sixty *per centum* of whose capital is owned by such citizens" be effectively enforced and complied with. The case, therefore, is an opportunity to establish a controlling principle that will "guide the bench, the bar, and the public."

Lastly, the petitioners' actions during the lifetime and existence of the instant case that gave rise to the present controversy are capable of repetition yet evading review because, as shown by petitioners' actions, foreign corporations can easily utilize dummy Filipino corporations through various schemes and stratagems to skirt the constitutional prohibition against foreign mining in Philippine soil.

II.
The application of the Grandfather Rule is justified by the circumstances of the case to determine the nationality of petitioners.

To petitioners, the Court's application of the Grandfather Rule to determine their nationality is erroneous and allegedly without basis in the Constitution, the Foreign Investments Act of 1991 (FIA), the Philippine Mining Act of 1995,[3] and the Rules issued by the Securities and Exchange Commission (SEC). These laws and rules supposedly espouse the application of the Control Test in verifying the Philippine nationality of corporate entities for purposes of determining compliance with Sec. 2, Art. XII of the Constitution that only "corporations or associations at least sixty *per centum* of whose capital is owned by such [Filipino] citizens" may enjoy certain rights and privileges, like the exploration and development of natural resources.

The application of the Grandfather Rule in the present case does not eschew the Control Test.

Clearly, petitioners have misread, and failed to appreciate the clear import of, the Court's April 21, 2014 Decision. Nowhere in that disposition did the Court foreclose the application of the Control Test in determining which corporations may be considered as Philippine nationals. Instead, to borrow Justice Leonen's term, the Court used the Grandfather Rule as a "supplement" to the Control Test so that the intent underlying the averted Sec. 2, Art. XII of the Constitution be given effect. The following excerpts of the April 21, 2014 Decision cannot be clearer:

In ending, **the "control test" is still the prevailing mode of determining whether or not a corporation is a Filipino corporation**, within the ambit of Sec. 2, Art. XII of the 1987 Constitution, entitled to undertake the exploration, development and utilization of the natural resources of the Philippines. **When in the mind of the Court, there is doubt, based on the attendant facts and circumstances of the case**, in the 60-40 Filipino equity

[3] Republic Act No. (RA) 7942, effective April 14, 1995.

Supreme Court E-Library

ownership in the corporation, **then it may apply the "grandfather rule."** (emphasis supplied)

With that, the use of the Grandfather Rule as a "supplement" to the Control Test is not proscribed by the Constitution or the Philippine Mining Act of 1995.

The Grandfather Rule implements the intent of the Filipinization provisions of the Constitution.

To reiterate, Sec. 2, Art. XII of the Constitution reserves the exploration, development, and utilization of natural resources to Filipino citizens and "corporations or associations at least sixty *per centum* of whose capital is owned by such citizens." Similarly, Section 3(aq) of the Philippine Mining Act of 1995 considers a "corporation x x x registered in accordance with law at least sixty per cent of the capital of which is owned by citizens of the Philippines" as a person qualified to undertake a mining operation. Consistent with this objective, the Grandfather Rule was originally conceived to look into the *citizenship* of the individuals who ultimately own and control the shares of stock of a corporation for purposes of determining compliance with the constitutional requirement of Filipino ownership. It cannot, therefore, be denied that the framers of the Constitution have not foreclosed the Grandfather Rule as a tool in verifying the nationality of corporations for purposes of ascertaining their right to participate in nationalized or partly nationalized activities. The following excerpts from the Record of the 1986 Constitutional Commission suggest as much:

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.

MR. VILLEGAS: That is right.

x x x x x x x x x

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

Supreme Court E-Library

another corporation which is permitted by the Corporation Code, **does the Committee adopt the grandfather rule**?

MR. VILLEGAS: **Yes, that is the understanding of the Committee**.

As further defined by Dean Cesar Villanueva, the Grandfather Rule is "**the method by which the percentage of Filipino equity in a corporation** engaged in nationalized and/or partly nationalized areas of activities, provided for under the Constitution and other nationalization laws, **is computed, in cases where corporate shareholders are present, by *attributing* the nationality of the second or even subsequent tier of ownership to determine the nationality of the corporate shareholder**."[4] Thus, to arrive at the actual Filipino ownership and control in a corporation, both the direct and indirect shareholdings in the corporation are determined.

This concept of stock attribution inherent in the Grandfather Rule to determine the ultimate ownership in a corporation is observed by the Bureau of Internal Revenue (BIR) in applying Section 127 (B)[5] of the National Internal Revenue Code on

---

[4] Villanueva, Cesar Lapuz, *Philippine Corporate Law* (2001), p. 54. Emphasis and italicization supplied.

[5] SEC. 127. **Tax on Sale, Barter or Exchange of Shares of Stock Listed Traded through the Local Stock Exchange or through Initial Public Offering.** —

(B) Tax on Shares of Stock Sold or Exchanged Through Initial Public Offering. — There shall be levied, assessed and collected on every sale, barter, exchange or other disposition through initial public offering of shares of stock in closely held corporations, as defined herein, a tax at the rates provided hereunder based on the gross selling price or gross value in money of the shares of stock sold, bartered, exchanged or otherwise disposed in accordance with the propositon of shares of stock sold, bartered, exchanged or otherwise disposed to the total outstanding shares of stock after the listing in the local stock exchange:

x x x x x x x x x

For purposes of this Section, the term 'closely held corporation' means any corporation at least fifty percent (50%) in value of the outstanding capital stock of all classes of stock entitled to vote is owned directly or indirectly by or for not more than twenty (20) individuals.

Supreme Court E-Library

taxes imposed on closely held corporations, in relation to Section 96 of the Corporation Code[6] on close corporations. Thus, in BIR Ruling No. 148-10, Commissioner Kim Henares held:

> **In the case of a multi-tiered corporation, the stock attribution rule must be allowed to run continuously along the chain of ownership until it finally reaches the individual stockholders. This is in consonance with the "grandfather rule" adopted in the Philippines under Section 96 of the Corporation Code** (Batas Pambansa Blg. 68) which provides that notwithstanding the fact that all the issued stock of a corporation are held by not more than twenty persons, among others, a corporation is nonetheless not to be deemed a close corporation when at least two thirds of its voting stock or voting rights is owned or controlled by another corporation which is not a close corporation.[7]

For purposes of determining whether the corporation is a closely held corporation, insofar as such determination is based on stock ownership, the following rules shall be applied:

(1) Stock not Owned by Individuals. — **Stock owned directly or indirectly by or for a corporation, partnership, estate or trust shall be considered as being owned proportionately by its shareholders, partners or beneficiaries**. x x x

[6] Sec. 96. Definition and applicability of Title. –

A close corporation, within the meaning of this Code, is one whose articles of incorporation provide that: (1) All the corporation's issued stock of all classes, exclusive of treasury shares, shall be held of record by not more than a specified number of persons, not exceeding twenty (20); (2) all the issued stock of all classes shall be subject to one or more specified restrictions on transfer permitted by this Title; and (3) The corporation shall not list in any stock exchange or make any public offering of any of its stock of any class. **Notwithstanding the foregoing, a corporation shall not be deemed a close corporation when at least two-thirds (2/3) of its voting stock or voting rights is owned or controlled by another corporation which is not a close corporation within the meaning of this Code.**

Any corporation may be incorporated as a close corporation, except mining or oil companies, stock exchanges, banks, insurance companies, public utilities, educational institutions and corporations declared to be vested with public interest in accordance with the provisions of this Code.

[7] Dated December 17, 2010; emphasis supplied. See also BIR Ruling Nos. 072-97, July 2, 1997 and 055-81, March 23, 1981.

Supreme Court E-Library

In SEC-OGC Opinion No. 10-31 dated December 9, 2010 (SEC Opinion 10-31), the SEC applied the Grandfather Rule even if the corporation engaged in mining operation *passes the 60-40 requirement of the Control Test*, viz:

You allege that the structure of MML's ownership in PHILSAGA is as follows: (1) MML owns 40% equity in MEDC, while the 60% is ostensibly owned by Philippine individual citizens who are actually MML's controlled nominees; (2) MEDC, in turn, owns 60% equity in MOHC, while MML owns the remaining 40%; (3) Lastly, MOHC owns 60% of PHILSAGA, while MML owns the remaining 40%. You provide the following figure to illustrate this structure:

x x x x x x x x x

We note that the Constitution and the statute use the concept "Philippine citizens." Article III, Section 1 of the Constitution provides who are Philippine citizens: x x x This enumeration is exhaustive. In other words, there can be no other Philippine citizens other than those falling within the enumeration provided by the Constitution. Obviously, only natural persons are susceptible of citizenship. Thus, for purposes of the Constitutional and statutory restrictions on foreign participation in the exploitation of mineral resources, a corporation investing in a mining joint venture can never be considered as a Philippine citizen.

The Supreme Court En Banc confirms this [in]… Pedro R. Palting, vs. San Jose Petroleum [Inc.]. The Court held that a corporation investing in another corporation engaged in a nationalized activity cannot be considered as a citizen for purposes of the Constitutional provision restricting foreign exploitation of natural resources:

x x x x x x x x x

Accordingly, we opine that we must look into the citizenship of the individual stockholders, i.e. natural persons, of that investor-corporation in order to determine if the Constitutional and statutory restrictions are complied with. If the shares of stock of the immediate investor corporation is in turn held and controlled by another corporation, then we must look into the citizenship of the individual stockholders of the latter corporation. **In other words, if there are layers of intervening corporations investing in a mining joint venture, we must delve into the citizenship of the individual stockholders of each corporation.** This is the strict application

Supreme Court E-Library

of the grandfather rule, which the Commission has been consistently applying prior to the 1990s.

Indeed, the framers of the Constitution intended for the "grandfather rule" to apply in case a 60%-40% Filipino-Foreign equity corporation invests in another corporation engaging in an activity where the Constitution restricts foreign participation.

x x x x x x x x x

Accordingly, under the structure you represented, the joint mining venture is 87.04 % foreign owned, while it is only 12.96% owned by Philippine citizens. Thus, the constitutional requirement of 60% ownership by Philippine citizens is violated. (emphasis supplied)

Similarly, in the eponymous *Redmont Consolidated Mines Corporation v. McArthur Mining Inc., et al.*,[8] the SEC *en banc* applied the Grandfather Rule despite the fact that the subject corporations ostensibly have satisfied the 60-40 Filipino equity requirement. The SEC *en banc* held that **to attain the Constitutional objective of reserving to Filipinos the utilization of natural resources, *one should not stop where the percentage of the capital stock is 60%.*** Thus:

[D]oubt, 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; however, OMDC paid nothing for this subscription while MBMI paid ₱2,803,900.00 out of its total subscription cost of ₱3,331,000.00; (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; however, Palawan Alpha paid nothing for this subscription while MBMI paid ₱2,796,000.00 out of its total subscription cost of ₱3,996,000.00; (3) OMDC and MBMI subscribed to 6,663 and 3,331 shares, respectively, out of the authorized capital stock of Sara Marie; however, OMDC paid nothing for this

[8] SEC *En Banc* Case No. 09-09-177, March 25, 2010.

Supreme Court E-Library

subscription while MBMI paid ₱2,794,000.00 out of its total subscription cost of ₱3,331,000.00; 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 ₱2,500,000.00 out of its total subscription cost of ₱3,998,000.00. Thus, pursuant to the afore-quoted DOJ Opinion, the Grandfather Rule must be used.

x x x x x x x x x

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.**

The method employed in the Grandfather Rule of attributing the shareholdings of a given corporate shareholder to the second or even the subsequent tier of ownership hews with the rule that the "***beneficial ownership***" of corporations engaged in nationalized activities must reside in the hands of Filipino citizens. Thus, *even if the 60-40 Filipino equity requirement appears to have been satisfied*, the Department of Justice (DOJ), in its Opinion No. 144, S. of 1977, stated that **an agreement that may distort the actual economic or beneficial ownership of a mining corporation may be struck down as violative of the constitutional requirement**, viz:

In this connection, you raise the following specific questions:

1. Can a Philippine corporation with 30% equity owned by foreigners enter into a mining service contract with a foreign company granting the latter a share of not more than 40% from the proceeds of the operations?

x x x x x x x x x

Supreme Court E-Library

By law, **a mining lease may be granted only to a Filipino citizen, or to a corporation or partnership registered with the [SEC] at least 60% of the capital of which is owned by Filipino citizens** and possessing x x x. **The sixty percent Philippine equity requirement in mineral resource exploitation** x x x **is intended to insure, among other purposes, the conservation of indigenous natural resources, for Filipino posterity** x x x. I think it is implicit in this provision, even if it refers merely to ownership of stock in the corporation holding the mining concession, that **beneficial ownership of the right to dispose, exploit, utilize, and develop natural resources shall pertain to Filipino citizens, and that the nationality requirement is not satisfied unless Filipinos are the principal beneficiaries in the exploitation of the country's natural resources**. This criterion of beneficial ownership is tacitly adopted in Section 44 of P.D. No. 463, above-quoted, which limits the service fee in service contracts to 40% of the proceeds of the operation, thereby implying that the 60-40 benefit-sharing ration is derived from the 60-40 equity requirement in the Constitution.

x x x x x x x x x

It is obvious that while payments to a service contractor may be justified as a service fee, and therefore, properly deductible from gross proceeds, **the service contract could be employed as a means of going about or circumventing the constitutional limit on foreign equity participation and the obvious constitutional policy to insure that Filipinos retain beneficial ownership of our mineral resources**. Thus, every service contract scheme has to be evaluated in its entirety, on a case to case basis, to determine reasonableness of the total "service fee" x x x like the options available to the contractor to become equity participant in the Philippine entity holding the concession, or to acquire rights in the processing and marketing stages. x x x (emphasis supplied)

The "beneficial ownership" requirement was subsequently used *in tandem* with the "situs of control" to determine the nationality of a corporation in DOJ Opinion No. 84, S. of 1988, through the Grandfather Rule, *despite the fact that both the investee and investor corporations purportedly satisfy the 60-40 Filipino equity requirement*:[9]

[9] Dated April 26, 1988.

Supreme Court E-Library

This refers to your request for opinion on whether or not there may be an investment in real estate by a domestic corporation (the investing corporation) seventy percent (70%) of the capital stock of which is owned by another domestic corporation with at least 60%-40% Filipino-Foreign Equity, while the remaining thirty percent (30%) of the capital stock is owned by a foreign corporation.

x x x x x x x x x

This Department has had the occasion to rule in several opinions that it is implicit in the constitutional provisions, even if it refers merely to ownership of stock in the corporation holding the land or natural resource concession, **that the nationality requirement is not satisfied unless it meets the criterion of beneficial ownership, i.e. Filipinos are the principal beneficiaries in the exploration of natural resources** (Op. No. 144, s. 1977; Op. No. 130, s. 1985)**, and that in applying the same "the primordial consideration is situs of control, whether in a stock or non-stock corporation"** (Op. No. 178, s. 1974). As stated in the *Register of Deeds vs. Ung Sui Si Temple* (97 Phil. 58), obviously to insure that corporations and associations allowed to acquire agricultural land or to exploit natural resources "shall be controlled by Filipinos." Accordingly, **any arrangement which attempts to defeat the constitutional purpose should be eschewed** (Op. No 130, s. 1985).

We are informed that in the registration of corporations with the [SEC], compliance with the sixty per centum requirement is being monitored by SEC under the "Grandfather Rule" a method by which the percentage of Filipino equity in corporations engaged in nationalized and/or partly nationalized areas of activities provided for under the Constitution and other national laws is accurately computed, and the diminution if said equity prevented (SEC Memo, S. 1976). **The "Grandfather Rule" is applied specifically in cases where the corporation has corporate stockholders with alien stockholdings, otherwise, if the rule is not applied, the presence of such corporate stockholders could diminish the effective control of Filipinos**.

Applying the "Grandfather Rule" in the instant case, the result is as follows: x x x the total foreign equity in the investing corporation is 58% while the Filipino equity is only 42%, in the investing corporation, subject of your query, is disqualified from investing in real estate, which is a nationalized activity, as it does not meet

Supreme Court E-Library

the 60%-40% Filipino-Foreign equity requirement under the Constitution.

This pairing of the concepts "beneficial ownership" and the "situs of control" in determining what constitutes "capital" has been adopted by this Court in *Heirs of Gamboa v. Teves*.[10] In its October 9, 2012 Resolution, the Court clarified, thus:

> This is consistent with Section 3 of the FIA which provides that where 100% of the capital stock is held by "a trustee of funds for pension or other employee retirement or separation benefits," the trustee is a Philippine national if "at least sixty percent (60%) of the fund will accrue to the benefit of Philippine nationals." Likewise, Section 1(b) of the Implementing Rules of the FIA provides that "for stocks to be deemed owned and held by Philippine citizens or Philippine nationals, mere legal title is not enough to meet the required Filipino equity. **Full beneficial ownership of the stocks, coupled with appropriate voting rights, is essential**." (emphasis supplied)

In emphasizing the twin requirements of "beneficial ownership" and "control" in determining compliance with the required Filipino equity in *Gamboa*, the *en banc* Court explicitly cited with approval the SEC e*n banc*'s application in *Redmont Consolidated Mines, Corp. v. McArthur Mining, Inc., et al.* of the Grandfather Rule, to wit:

> Significantly, **the SEC en banc**, which is the collegial body statutorily empowered to issue rules and opinions on behalf of SEC, **has adopted the Grandfather Rule** in determining compliance with the 60-40 ownership requirement in favor of Filipino citizens mandated by the Constitution for certain economic activities. **This prevailing SEC ruling, which the SEC correctly adopted to thwart any circumvention of the required Filipino "ownership and control,"** is laid down in the 25 March 2010 SEC en banc ruling in Redmont Consolidated Mines, Corp. v. McArthur Mining, Inc., et al. x x x (emphasis supplied)

Applying *Gamboa*, the Court, in *Express Investments III Private Ltd. v. Bayantel Communications, Inc.*,[11] denied the foreign

---

[10] G.R. No. 176579, October 9, 2012.

[11] G.R. Nos. 175418-20, December 5, 2012.

creditors' proposal to convert part of Bayantel's debts to common shares of the company at a rate of 77.7%. **Supposedly, *the conversion of the debts to common shares by the foreign creditors would be done, both directly and indirectly, in order to meet the control test principle under the FIA*.** Under the proposed structure, the foreign creditors would own 40% of the outstanding capital stock of the telecommunications company on a direct basis, while the remaining 40% of shares would be registered to a holding company that shall retain, on a direct basis, the other 60% equity reserved for Filipino citizens. **Nonetheless, the Court found the proposal non-compliant with the Constitutional requirement of Filipino ownership** as the proposed structure would give more than 60% of the ownership of the common shares of Bayantel to the foreign corporations, viz:

> In its Rehabilitation Plan, among the material financial commitments made by respondent Bayantel is that its shareholders shall relinquish the agreed-upon amount of common stock[s] as payment to Unsecured Creditors as per the Term Sheet. **Evidently, the parties intend to convert the unsustainable portion of respondent's debt into common stocks, which have voting rights. If we indulge petitioners on their proposal, the Omnibus Creditors which are foreign corporations, shall have control over 77.7% of Bayantel, a public utility company. This is precisely the scenario proscribed by the Filipinization provision of the Constitution.** Therefore, the Court of Appeals acted correctly in sustaining the 40% debt-to-equity ceiling on conversion. (emphasis supplied)

As shown by the quoted legislative enactments, administrative rulings, opinions, and this Court's decisions, the Grandfather Rule not only finds basis, but more importantly, it implements the Filipino equity requirement, in the Constitution.

Application of the Grandfather Rule with the Control Test.

Admittedly, an ongoing quandary obtains as to the role of the Grandfather Rule in determining compliance with the minimum Filipino equity requirement vis-à-vis the Control Test. This

Supreme Court E-Library

confusion springs from the erroneous assumption that the use of one method forecloses the use of the other.

As exemplified by the above rulings, opinions, decisions and this Court's April 21, 2014 Decision, the Control Test can be, as it has been, applied *jointly with* the Grandfather Rule to determine the observance of foreign ownership restriction in nationalized economic activities. **The Control Test and the Grandfather Rule** are not, as it were, incompatible ownership-determinant methods that can only be applied alternative to each other. Rather, these methods **can, if appropriate, be used cumulatively in the determination of the ownership and control of corporations engaged in fully or partly nationalized activities**, as the mining operation involved in this case or the operation of public utilities as in *Gamboa* or *Bayantel*.

The Grandfather Rule, standing alone, should not be used to determine the Filipino ownership and control in a corporation, as it could result in an otherwise foreign corporation rendered qualified to perform nationalized or partly nationalized activities. Hence, **it is only when the Control Test is first complied with that the Grandfather Rule may be applied.** Put in another manner, if the subject corporation's Filipino equity falls below the threshold 60%, the corporation is immediately considered foreign-owned, in which case, the need to resort to the Grandfather Rule disappears.

On the other hand, **a corporation that complies with the 60-40 Filipino to foreign equity requirement can be considered a Filipino corporation *if there is no doubt* as to who has the "beneficial ownership" and "control" of the corporation. In that instance, there is no need for** a dissection or further inquiry on the ownership of the corporate shareholders in both the investing and investee corporation **or the application of the Grandfather Rule.**[12] As a corollary rule, even if the 60-40 Filipino to foreign equity ratio is apparently met by the subject or investee corporation, **a resort to the Grandfather Rule is**

---

[12] *See* SEC-OGC Opinion No. 03-08 dated 15 January 2008.

necessary *if doubt exists* as to the *locus* of the "beneficial ownership" and "control." In this case, a further investigation as to the nationality of the personalities with the beneficial ownership and control of the corporate shareholders in both the investing and investee corporations is necessary.

As explained in the April 21, 2012 Decision, the "doubt" that demands the application of the Grandfather Rule in addition to or in tandem with the Control Test is not confined to, or more bluntly, does not refer to the fact that the apparent Filipino ownership of the corporation's equity falls below the 60% threshold. Rather, **"doubt" refers to various indicia that the "beneficial ownership" and "control" of the corporation do not in fact reside in Filipino shareholders but in foreign stakeholders**. As provided in DOJ Opinion No. 165, Series of 1984, which applied the pertinent provisions of the Anti-Dummy Law in relation to the minimum Filipino equity requirement in the Constitution, "significant indicators of the dummy status" have been recognized in view of reports "that some Filipino investors or businessmen are being utilized or [are] allowing themselves to be used as dummies by foreign investors" specifically in joint ventures for national resource exploitation. These indicators are:

1. That the foreign investors provide practically all the funds for the joint investment undertaken by these Filipino businessmen and their foreign partner;

2. That the foreign investors undertake to provide practically all the technological support for the joint venture;

3. That the foreign investors, while being minority stockholders, manage the company and prepare all economic viability studies.

Thus, *In the Matter of the Petition for Revocation of the Certificate of Registration of Linear Works Realty Development Corporation*,[13] the SEC held that **when foreigners contribute more capital to an enterprise, doubt exists as to the actual**

[13] SEC *En Banc* Case No. 07-10-205, November 25, 2010.

Supreme Court E-Library

control and ownership of the subject corporation even if the 60% Filipino equity threshold is met. Hence, the SEC in that one ordered a further investigation, viz:

> x x x The [SEC Enforcement and Prosecution Department (EPD)] maintained that the basis for determining the level of foreign participation is the number of shares subscribed, regardless of the par value. Applying such an interpretation, the EPD rules that the foreign equity participation in Linearworks Realty Development Corporation amounts to 26.41% of the corporation's capital stock since the amount of shares subscribed by foreign nationals is 1,795 only out of the 6,795 shares. Thus, **the subject corporation is compliant with the 40% limit on foreign equity participation**. Accordingly, the EPD dismissed the complaint, and did not pursue any investigation against the subject corporation.
>
> x x x x x x x x x
>
> x x x [I]n this respect we find no error in the assailed order made by the EPD. The EPD did not err when it did not take into account the par value of shares in determining compliance with the constitutional and statutory restrictions on foreign equity.
>
> However, **we are aware that some unscrupulous individuals employ schemes to circumvent the constitutional and statutory restrictions on foreign equity**. **In the present case, the fact that the shares of the Japanese nationals have a greater par value but only have similar rights to those held by Philippine citizens having much lower par value, is highly suspicious.** This is because **a reasonable investor would expect to have greater control and economic rights than other investors who invested less capital than him.** Thus**, it is reasonable to suspect** that there may be secret arrangements between the corporation and the stockholders wherein **the Japanese nationals who subscribed to the shares with greater par value actually have greater control and economic rights** contrary to the equality of shares based on the articles of incorporation.
>
> With this in mind, we find it proper for the EPD to investigate the subject corporation. The EPD is advised to avail of the Commission's subpoena powers in order to gather sufficient evidence, and file the necessary complaint.

As will be discussed, even if at first glance the petitioners comply with the 60-40 Filipino to foreign equity ratio, **doubt**

Supreme Court E-Library

exists in the present case that gives rise to a reasonable suspicion that the Filipino shareholders do not actually have the requisite number of control and beneficial ownership in petitioners Narra, Tesoro, and McArthur. Hence, a further investigation and dissection of the extent of the ownership of the corporate shareholders through the Grandfather Rule is justified.

Parenthetically, it is advanced that the application of the Grandfather Rule is impractical as tracing the shareholdings to the point when natural persons hold rights to the stocks may very well lead to an investigation *ad infinitum*. Suffice it to say in this regard that, while the Grandfather Rule was originally intended to trace the shareholdings to the point where natural persons hold the shares, the SEC had already set up a limit as to the number of corporate layers the attribution of the nationality of the corporate shareholders may be applied.

In a 1977 internal memorandum, the SEC suggested applying the Grandfather Rule on two (2) levels of corporate relations for publicly-held corporations or where the shares are traded in the stock exchanges, and to three (3) levels for closely held corporations or the shares of which are not traded in the stock exchanges.[14] These limits comply with the requirement in *Palting v. San Jose Petroleum, Inc.*[15] that the application of the Grandfather Rule cannot go beyond the level of what is reasonable.

A doubt exists as to the extent of control and beneficial ownership of MBMI over the petitioners and their investing corporate stockholders.

In the Decision subject of this recourse, the Court applied the Grandfather Rule to determine the matter of true ownership and control over the petitioners as doubt exists as to the actual extent of the participation of MBMI in the equity of the petitioners and their investing corporations.

We considered the following membership and control structures and like nuances:

---

[14] Villanueva, Cesar Lapuz. *Philippine Corporate Law* (2001), p. 54.

[15] No. L-14441, December 17, 1966, 18 SCRA 924.

Supreme Court E-Library

Tesoro

Supposedly Filipino corporation Sara Marie Mining, Inc. (Sara Marie) holds 59.97% of the 10,000 *common* shares of petitioner Tesoro while the Canadian-owned company, MBMI, holds 39.98% of its shares.

Name	Nationality	Number of Shares	Amount Subscribed	Amount Paid
Sara Marie Mining, Inc.	Filipino	5,997	₱5,997,000.00	₱825,000.00
MBMI Resources, Inc.[16]	Canadian	3,998	₱3,998,000.00	₱1,878,174.60
Lauro L. Salazar	Filipino	1	₱1,000.00	₱1,000.00
Fernando B. Esguerra	Filipino	1	₱1,000.00	₱1,000.00
Manuel A. Agcaoili	Filipino	1	₱1,000.00	₱1,000.00
Michael T. Mason	American	1	₱1,000.00	₱1,000.00
Kenneth Cawkel	Canadian	1	₱1,000.00	₱1,000.00
	Total	10,000	₱10,000,000.00	₱2,708,174.60

In turn, the Filipino corporation Olympic Mines & Development Corp. (Olympic) holds 66.63% of Sara Marie's shares while the same Canadian company MBMI holds 33.31% of Sara Marie's shares. Nonetheless, it is admitted that Olympic did not pay a single peso for its shares. On the contrary, MBMI paid for 99% of the paid-up capital of Sara Marie.

Name	Nationality	Number of	Amount	Amount Paid
Olympic Mines & Development Corp.[17]	Filipino	6,663	₱6,663,000.00	**₱0.00**
MBMI Resources, Inc.	Canadian	3,331	₱3,331,000.00	₱2,794,000.00
Amanti Limson	Filipino	1	₱1,000.00	₱1,000.00
Fernando B. Esguerra	Filipino	1	₱1,000.00	₱1,000.00

[16] Emphasis supplied.

[17] Emphasis supplied.

Supreme Court E-Library

Lauro Salazar	Filipino	1	₱1,000.00	₱1,000.00
Emmanuel G. Hernando	Filipino	1	₱1,000.00	₱1,000.00
Michael T. Mason	American	1	₱1,000.00	₱1,000.00
Kenneth Cawkel	Canadian	1	₱1,000.00	₱1,000.00
	Total	10,000	₱10,000,000.00	₱2,800,000.00

The fact that MBMI had practically provided all the funds in Sara Marie and Tesoro creates serious doubt as to the true extent of its (MBMI) control and ownership over both Sara Marie and Tesoro since, as observed by the SEC, "a reasonable investor would expect to have greater control and economic rights than other investors who invested less capital than him." The application of the Grandfather Rule is clearly called for, and as shown below, the Filipinos' control and economic benefits in petitioner Tesoro (through Sara Marie) fall below the threshold 60%, viz:

Filipino participation in petitioner Tesoro: 40.01%

66.67/100 (Filipino equity in Sara Marie) x 59.97 (Sara Marie's share in Tesoro) = **39.98%**

39.98% + .03% (shares of individual Filipino shareholders [SHs] in Tesoro) = **40.01%**

Foreign participation in petitioner Tesoro: 59.99%

33.33/100 (Foreign equity in Sara Marie) x 59.97 (Sara Marie's share in Tesoro) = **19.99%**

19.99% + 39.98% (MBMI's direct participation in Tesoro) + .02% (shares of foreign individual SHs in Tesoro)
= **59.99%**

With only 40.01% Filipino ownership in petitioner Tesoro, as compared to 59.99% foreign ownership of its shares, it is clear that petitioner Tesoro does not comply with the minimum Filipino equity requirement imposed in Sec. 2, Art. XII of the Constitution. Hence, the appellate court's observation that Tesoro is a foreign corporation not entitled to an MPSA is apt.

Supreme Court E-Library

McArthur

Petitioner McArthur follows the corporate layering structure of Tesoro, as 59.97% of its 10, 000 common shares is owned by supposedly Filipino Madridejos Mining Corporation (Madridejos), while 39.98% belonged to the Canadian MBMI.

Name	Nationality	Number of Shares	Amount Subscribed	Amount Paid
Madridejos Mining Corporation	Filipino	5,997	₱5,997,000.00	₱825,000.00
MBMI Resources, Inc.[18]	Canadian	3,998	₱3,998,000.00	₱1,878,174.60
Lauro L. Salazar	Filipino	1	₱1,000.00	₱1,000.00
Fernando B. Esguerra	Filipino	1	₱1,000.00	₱1,000.00
Manuel A. Agcaoili	Filipino	1	₱1,000.00	₱1,000.00
Michael T. Mason	American	1	₱1,000.00	₱1,000.00
Kenneth Cawkell	Canadian	1	₱1,000.00	₱1,000.00
	Total	10,000	₱10,000,000.00	₱2,708,174.60

In turn, 66.63% of Madridejos' shares were held by Olympic while 33.31% of its shares belonged to MBMI. Yet again, Olympic did not contribute to the paid-up capital of Madridejos and it was MBMI that provided 99.79% of the paid-up capital of Madridejos.

Name	Nationality	Number of	Amount	Amount Paid
Olympic Mines & Development Corp.[19]	Filipino	6,663	₱6,663,000.00	**₱0.00**
MBMI Resources, Inc.	Canadian	3,331	₱3,331,000.00	₱2,803,900.00
Amanti Limson	Filipino	1	₱1,000.00	₱1,000.00
Fernando B. Esguerra	Filipino	1	₱1,000.00	₱1,000.00
Lauro Salazar	Filipino	1	₱1,000.00	₱1,000.00
Emmanuel G. Hernando	Filipino	1	₱1,000.00	₱1,000.00
Michael T. Mason	American	1	₱1,000.00	₱1,000.00
Kenneth Cawkel	Canadian	1	₱1,000.00	₱1,000.00
	Total	10,000	₱10,000,000.00	₱2,809,900.00

[18] Emphasis supplied.

[19] Emphasis supplied.

Supreme Court E-Library

Again, the fact that MBMI had practically provided all the funds in Madridejos and McArthur creates serious doubt as to the true extent of its control and ownership of MBMI over both Madridejos and McArthur. The application of the Grandfather Rule is clearly called for, and as will be shown below, MBMI, along with the other foreign shareholders, breached the maximum limit of 40% ownership in petitioner McArthur, rendering the petitioner disqualified to an MPSA:

Filipino participation in petitioner McArthur: 40.01%

66.67/100 (Filipino equity in Madridejos) x 59.97 (Madridejos' share in McArthur) = **39.98%**

39.98% + .03% (shares of individual Filipino SHs in McArthur) = **40.01%**

Foreign participation in petitioner McArthur: 59.99%

33.33/100 (Foreign equity in Madridejos) x 59.97 (Madridejos' share in McArthur) = **19.99%**

19.99% + 39.98% (MBMI's direct participation in McArthur) + .02% (shares of foreign individual SHs in McArthur) = **59.99%**

As with petitioner Tesoro, with only 40.01% Filipino ownership in petitioner McArthur, as compared to 59.99% foreign ownership of its shares, it is clear that petitioner McArthur does not comply with the minimum Filipino equity requirement imposed in Sec. 2, Art. XII of the Constitution. Thus, the appellate court did not err in holding that petitioner McArthur is a foreign corporation not entitled to an MPSA.

Narra

As for petitioner Narra, 59.97% of its shares belonged to Patricia Louise Mining & Development Corporation (PLMDC), while Canadian MBMI held 39.98% of its shares.

Supreme Court E-Library

Name	Nationality	Number of Shares	Amount Subscribed	Amount Paid
Patricia Lousie Mining and Development Corp.	Filipino	5,997	₱5,997,000.00	₱1,677,000.00
MBMI Resources, Inc.[20]	Canadian	3,996	₱3,996,000.00	₱1,116,000.00
Higinio C. Mendoza, Jr.	Filipino	1	₱1,000.00	₱1,000.00
Henry E. Fernandez	Filipino	1	₱1,000.00	₱1,000.00
Ma. Elena A. Bocalan	Filipino	1	₱1,000.00	₱1,000.00
Michael T. Mason	American	1	₱1,000.00	₱1,000.00
Robert L. McCurdy	Canadian	1	₱1,000.00	₱1,000.00
Manuel A. Agcaoili	Filipino	1	₱1,000.00	₱1,000.00
Bayani H. Agabin	Filipino	1	₱1,000.00	₱1,000.00
	Total	10,000	₱10,000,000.00	₱2,800,000.00

PLMDC's shares, in turn, were held by Palawan Alpha South Resources Development Corporation (PASRDC), which subscribed to 65.96% of PLMDC's shares, and the Canadian MBMI, which subscribed to 33.96% of PLMDC's shares.

Name	Nationality	Number of Shares	Amount Subscribed	Amount Paid
Palawan Alpha South Resource Development Corp.	Filipino	6,596	₱6,596,000.00	**₱0**
MBMI Resources, Inc.[21]	Canadian	3,396	₱3,396,000.00	₱2,796,000.00
Higinio C. Mendoza, Jr.	Filipino	1	₱1,000.00	₱1,000.00
Fernando B. Esguerra	Filipino	1	₱1,000.00	₱1,000.00
Henry E. Fernandez	Filipino	1	₱1,000.00	₱1,000.00
Ma. Elena A. Bocalan	Filipino	1	₱1,000.00	₱1,000.00
Michael T. Mason	American	1	₱1,000.00	₱1,000.00
Robert L. McCurdy	Canadian	1	₱1,000.00	₱1,000.00
Manuel A. Agcaoili	Filipino	1	₱1,000.00	₱1,000.00
Bayani H, Agabin	Filipino	1	₱1,000.00	₱1,000.00
	Total	10,000	₱10,000,000.00	₱2,804,000.00

[20] Emphasis supplied.

[21] Emphasis supplied.

Supreme Court E-Library

Yet again, PASRDC did not pay for any of its subscribed shares, while MBMI contributed 99.75% of PLMDC's paid-up capital. This fact **creates serious doubt as to the true extent of MBMI's control and ownership over both PLMDC and Narra** since "a reasonable investor would expect to have greater control and economic rights than other investors who invested less capital than him." Thus, the application of the Grandfather Rule is justified. And as will be shown, it is clear that the Filipino ownership in petitioner Narra falls below the limit prescribed in both the Constitution and the Philippine Mining Act of 1995.

Filipino participation in petitioner Narra: 39.64%

66.02/100 (Filipino equity in PLMDC) x 59.97 (PLMDC's share in Narra) = **39.59%**

39.59% + .05% (shares of individual Filipino SHs in McArthur) = **39.64%**

Foreign participation in petitioner Narra: 60.36%

33.98/100 (Foreign equity in PLMDC) x 59.97 (PLMDC's share in Narra) = 20.38**%**

20.38% + 39.96% (MBMI's direct participation in Narra) + .02% (shares of foreign individual SHs in McArthur) = **60.36%**

With 60.36% *foreign ownership* in petitioner Narra, as compared to only 39.64% Filipino ownership of its shares, it is clear that petitioner Narra does not comply with the minimum Filipino equity requirement imposed in Section 2, Article XII of the Constitution. Hence, the appellate court did not err in holding that petitioner McArthur is a foreign corporation not entitled to an MPSA.

It must be noted that the foregoing determination and computation of petitioners' Filipino equity composition was based on their ***common shareholdings***, not preferred or redeemable shares. Section 6 of the Corporation Code of the Philippines explicitly provides that "no share may be deprived of voting rights except those classified as 'preferred' or 'redeemable' shares." Further, as Justice Leonen puts it, there is "no indication

Supreme Court E-Library

that any of the shares x x x do not have voting rights, [thus] it must be assumed that all such shares have voting rights."[22] It cannot therefore be gainsaid that the foregoing computation hewed with the pronouncements of *Gamboa*, as implemented by SEC Memorandum Circular No. 8, Series of 2013, (SEC Memo No. 8)[23] Section 2 of which states:

> Section 2. All covered corporations shall, at all times, observe the constitutional or statutory requirement. For purposes of determining compliance therewith, the required percentage of Filipino ownership shall be applied to BOTH (a) the total outstanding shares of stock entitled to vote in the election of directors; AND (b) the total number of outstanding shares of stock, whether or not entitled to vote in the election of directors.

In fact, there is no indication that herein petitioners issued any other class of shares besides the 10,000 common shares. Neither is it suggested that the common shares were further divided into voting or non-voting common shares. Hence, for purposes of this case, items a) and b) in SEC Memo No. 8 both refer to the 10,000 common shares of each of the petitioners, and there is no need to separately apply the 60-40 ratio to any segment or part of the said common shares.

III.
In mining disputes, the POA has jurisdiction to pass upon the nationality of applications for MPSAs

Petitioners also scoffed at this Court's decision to uphold the jurisdiction of the Panel of Arbitrators (POA) of the Department of Environment and Natural Resources (DENR) since the POA's determination of petitioners' nationalities is supposedly beyond its limited jurisdiction, as defined in *Gonzales v. Climax Mining Ltd.*[24] and *Philex Mining Corp. v. Zaldivia*.[25]

---

[22] Dissenting Opinion, p. 41.

[23] Otherwise known as the "Guidelines on Compliance with the Filipino-Foreign Ownership Requirements Prescribed in the Constitution and/or Existing Laws by Corporations Engaged in Nationalized and Partly Nationalized Activities," dated May 20, 2013 and Published on May 22, 2013.

[24] 492 Phil. 682 (2005).

[25] 150 Phil. 547 (1972).

Supreme Court E-Library

The April 21, 2014 Decision did not dilute, much less overturn, this Court's pronouncements in either *Gonzales* or *Philex Mining* that POA's jurisdiction "is limited only to mining disputes which raise questions of fact," and not judicial questions cognizable by regular courts of justice. However, to properly recognize and give effect to the jurisdiction vested in the POA by Section 77 of the Philippine Mining Act of 1995,[26] and in parallel with this Court's ruling in *Celestial Nickel Mining Exploration Corporation v. Macroasia Corp.*,[27] the Court has recognized in its Decision that in resolving disputes "involving rights to mining areas" and "involving mineral agreements or permits," the POA has jurisdiction to make a *preliminary* finding of the required nationality of the corporate applicant in order to determine its right to a mining area or a mineral agreement.

There is certainly nothing novel or aberrant in this approach. In ejectment and unlawful detainer cases, where the subject of inquiry is possession *de facto*, the jurisdiction of the municipal trial courts to make a *preliminary* adjudication regarding ownership of the real property involved is allowed, but only for purposes of ruling on the determinative issue of material possession.

The present case arose from petitioners' MPSA applications, in which they asserted their respective rights to the mining areas each applied for. Since respondent Redmont, itself an applicant for exploration permits over the same mining areas, filed petitions for the denial of petitioners' applications, it should be clear that

---

[26] Section 77 of RA 7942:

Within thirty (30) days, after the submission of the case by the parties for the decision, the panel shall have exclusive and original jurisdiction to hear and decide the following:

(a) Disputes involving rights to mining areas;

(b) Disputes involving mineral agreements or permits.

[27] 565 Phil. 466 (2007). The Court held: "The phrase 'disputes involving rights to mining areas' refers to any adverse claim, protest, or opposition to an application for mineral agreement. The POA therefore has the jurisdiction to resolve any adverse claim, protest, or opposition to a pending application for a mineral agreement filed with the concerned Regional Office of the MGB. This is clear from Secs. 38 and 41 of the DENR A 96-40 x x x."

Supreme Court E-Library

there exists a controversy between the parties and it is POA's jurisdiction to resolve the said dispute. POA's ruling on Redmont's assertion that petitioners are foreign corporations not entitled to MPSA is but a necessary incident of its disposition of the mining dispute presented before it, which is whether the petitioners are entitled to MPSAs.

Indeed, as the POA has jurisdiction to entertain "disputes involving rights to mining areas," it necessarily follows that the POA likewise wields the authority to pass upon the nationality issue involving petitioners, since the resolution of this issue is essential and indispensable in the resolution of the main issue, i.e., the determination of the petitioners' right to the mining areas through MPSAs.

WHEREFORE, We **DENY** the motion for reconsideration **WITH FINALITY**. No further pleadings shall be entertained. Let entry of judgment be made in due course.

SO ORDERED.

Peralta, Mendoza, and *Jardeleza, JJ.,* concur.

Leonen, J., dissents. see separate opinion.

DISSENTING OPINION

LEONEN, *J.*:

I dissent from the majority's Resolution denying with finality the Motion for Reconsideration filed by petitioners. I maintain the positions I articulated in my Dissent to the April 21, 2014 Decision.

I welcome the majority's statements clarifying the relative applicability of the Grandfather Rule in relation to the Control Test. I particularly welcome the clarification that "it is only when the Control Test is *first* complied with that the Grandfather Rule may be applied."[1] This is in line with the position I articulated

[1] *Narra Nickel v. Redmont*, G.R. No. 195580, April 21, 2014, 12 [Per *J.* Velasco, Jr., Special Third Division Resolution].

Supreme Court E-Library

in my Dissent to the April 21, 2014 Decision that the Control Test should find priority in application, with the Grandfather Rule being applicable only as a "supplement."[2]

However, I maintain that the Panel of Arbitrators of the Department of Environment and Natural Resources (DENR Panel of Arbitrators) never had jurisdiction to rule on the nationalities of petitioners Narra Nickel Mining and Development Corp. (Narra), Tesoro Mining and Development, Inc. (Tesoro), and McArthur Mining, Inc. (McArthur) and on the question of whether they should be qualified to hold Mineral Production Sharing Agreements (MPSA). It is error for the majority to rule that petitioners are foreign corporations proceeding from the actions of a body which never had jurisdiction and competence to rule on the *judicial* question of nationality.

Likewise, I maintain that respondent Redmont Consolidated Mines Corp. (Redmont) engaged in blatant forum shopping. This, the lack of jurisdiction and competence of the DENR Panel of Arbitrators, and the error of proceeding from the acts of an incompetent body are sufficient grounds for granting the Petition and should suffice as bases for granting the present Motion for Reconsideration.

I

The DENR Panel of Arbitrators had no competence to rule on the Petitions filed by Redmont

The jurisdiction of the DENR Panel of Arbitrators is spelled out in Section 77 of Republic Act No. 7942, otherwise known as the Philippine Mining Act of 1995 (the "Mining Act"):

> Section 77. Panel of Arbitrators – . . . . Within thirty (30) working days, after the submission of the case by the parties for decision, the panel shall have exclusive and original jurisdiction to hear and decide on the following:

---

[2] *J.* Leonen, dissenting opinion in *Narra Nickel v. Redmont*, G.R. No. 195580, April 21, 2014, <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2014/april2014/195580_leonen.pdf>, [Per *J.* Velasco, Jr., Third Division].

Supreme Court E-Library

(a) Disputes involving rights to mining areas;
(b) Disputes involving mineral agreements or permit;
(c) Disputes involving surface owners, occupants and claimholders/concessionaires; and
(d) Disputes pending before the Bureau and the Department at the date of the effectivity of this Act.

The April 21, 2014 Decision sustained the jurisdiction of the DENR Panel of Arbitrators, relying on pronouncements made in *Celestial Nickel Mining Exploration Corporation v. Macroasia Corp.*[3] which construed the phrase "disputes involving rights to mining areas" as referring "to any adverse claim, protest, or opposition to an application for mineral agreement."[4]

However, the Decision interpreted Section 77 of the Mining Act in a manner that runs afoul of this court's pronouncements in its Decision penned by Associate Justice Dante Tinga in *Gonzales v. Climax Mining Ltd.*[5] and in its Decision penned by Associate Justice J.B.L. Reyes in *Philex Mining Corp. v. Zaldivia*.[6]

As pointed out in my Dissent to the April 21, 2014 Decision, "*Gonzales v. Climax Mining Ltd.*,[7] ruled on the jurisdiction of the Panel of Arbitrators as follows:"

> We now come to the meat of the case which revolves mainly around the question of jurisdiction by the Panel of Arbitrators: Does the Panel of Arbitrators have jurisdiction over the complaint for declaration of nullity and/or termination of the subject contracts on the ground of fraud, oppression and **violation of the Constitution**? This issue may be distilled into the more basic question of whether the *Complaint* raises a mining dispute or a judicial question.
>
> **A judicial question is a question that is proper for determination by the courts, as opposed to a moot question or**

---

[3] 565 Phil. 466 (2007) [Per *J.* Velasco, Jr., Second Division].

[4] *Id.* at 499.

[5] 492 Phil. 682 (2005) [Per *J.* Tinga, Second Division].

[6] 150 Phil. 547 (1972) [Per *J.* J.B.L. Reyes, *En Banc*].

[7] 492 Phil. 682 (2005) [Per *J.* Tinga, Second Division].

Supreme Court E-Library

one properly decided by the executive or legislative branch. A judicial question is raised when the determination of the question involves the exercise of a judicial function; that is, the question involves the determination of what the law is and what the legal rights of the parties are with respect to the matter in controversy.

On the other hand, a mining dispute is a dispute involving (a) rights to mining areas, (b) mineral agreements, FTAAs, or permits, and (c) surface owners, occupants and claimholders/concessionaires. Under Republic Act No. 7942 (otherwise known as the Philippine Mining Act of 1995), the Panel of Arbitrators has exclusive and original jurisdiction to hear and decide these mining disputes. The Court of Appeals, in its questioned decision, correctly stated that ***the Panel's jurisdiction is limited only to those mining disputes which raise questions of fact or matters requiring the application of technological knowledge and experience***.[8] (Emphasis supplied, citation omitted)

Philex Mining Corp. v. Zaldivia[9] settled what "questions of fact" are appropriate for resolution in a mining dispute:

We see nothing in [S]ections 61 and 73 of the Mining Law that indicates a legislative intent to confer real judicial power upon the Director of Mines. The very terms of [S]ection 73 of the Mining Law, as amended by Republic Act No. 4388, in requiring that the adverse claim must "state *in full detail the nature, boundaries* and *extent* of the adverse claim" show that the conflicts to be decided by reason of such adverse claim refer primarily to questions of fact. This is made even clearer by the explanatory note to House Bill No. 2522, later to become Republic Act 4388, that "[S]ections 61 and 73 that refer to the overlapping of claims are amended to expedite resolutions of mining conflicts * * *." **The controversies to be submitted and resolved by the Director of Mines under the sections refer ther[e]fore only to the overlapping of claims and administrative matters incidental thereto**.[10] (Emphasis supplied)

---

[8] *Id*. at 692-693, as cited in *J*. Leonen, dissenting opinion in *Narra Nickel v. Redmont*, G.R. No. 195580, April 21, 2014, <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2014/april2014/195580_leonen.pdf> 10–11 [Per *J*. Velasco, Jr., Third Division].

[9] 150 Phil. 547 (1972) [Per *J*. Reyes, J.B.L, En Banc].

[10] *Id*. at 553-554, as cited in *J*. Leonen, dissenting opinion in *Narra Nickel v. Redmont*, G.R. No. 195580, April 21, 2014, <http://sc.judiciary.gov.ph/pdf/

Supreme Court E-Library

The DENR Panel of Arbitrators, as its name denotes, is an arbitral body. It is not a court of law. Its competence rests in its capacity to resolve factual issues arising between parties with competing mining claims and requiring the application of technical expertise.

In this case, Redmont has not even shown that it has a competing mining claim. It has asked only that petitioners be declared as not qualified to enter into MPSAs.

By sustaining the jurisdiction of the DENR Panel of Arbitrators, the majority effectively diminishes (if not totally abandons) the distinction made in *Gonzales* and *Philex* between "mining disputes" and "judicial questions." Per *Gonzales* and *Philex,* judicial questions are cognizable only by courts of justice, not by the DENR Panel of Arbitrators.

The majority's reference to *Celestial* takes out of context the pronouncements made therein. To reiterate what I have stated in my Dissent to the April 21, 2014 Decision, "[t]he pronouncements in *Celestial* cited by the ponencia were made to address the assertions of Celestial Nickel and Mining Corporation (Celestial Nickel) and Blue Ridge Mineral Corporation (Blue Ridge) that the Panel of Arbitrators had the power to cancel *existing* mineral agreements pursuant to Section 77 of the Mining Act. . . . These pronouncements did not undo or abandon the distinction, clarified in *Gonzales*, between judicial questions and mining disputes."[11]

The crux of this case relates to a matter that is beyond the competence of the DENR Panel of Arbitrators. It does not pertain to the intricacies and specifications of mining operations. Rather, it pertains to the legal status of petitioners and the rights or

---

web/viewer.html?file=/jurisprudence/2014/april2014/195580_leonen.pdf> 11 [Per *J*. Velasco, Jr., Third Division].

[11] *J*. Leonen, dissenting opinion in *Narra Nickel v. Redmont*, G.R. No. 195580, April 21, 2014, <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2014/april2014/195580_leonen.pdf> 11 [Per *J*. Velasco, Jr., Third Division].

Supreme Court E-Library

inhibitions accruing to them on account of their status. It pertains to a judicial question.

II

On the applicability of the Grandfather Rule

I maintain the position I elucidated in my Dissent to the April 21, 2014 Decision. The Control Test, rather than the Grandfather Rule, finds priority application in reckoning the nationalities of corporations engaged in nationalized economic activities.

The Grandfather Rule finds no basis in the text of the 1987 Constitution. It is true that the records of the Constitutional Commission "indicate an affirmative reference to the Grandfather Rule."[12] However, whatever references these records make to the Grandfather Rule is not indicative of a consensus among all members of the Constitutional Commission. At most, these references are advisory and not binding on this court.[13] Ultimately, what is controlling is the text of the Constitution itself. This text is silent on the precise means of reckoning foreign ownership.

In contrast, the Control Test is firmly enshrined by congressional dictum in a statute, specifically, Republic Act No. 8179, otherwise known as the Foreign Investments Act (FIA).

---

[12] *Id*. at 34.

[13] To reiterate what I stated in my dissent in *Narra Nickel v. Redmont,* G.R. No. 195580, April 21, 2014,<http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2014/april2014/195580_leonen.pdf>36 [Per *J.* Velasco, Jr., Third Division]:

In the final analysis, the records of the Constitutional Commission do not bind this court. As Charles P. Curtis, Jr. said on the role of history in constitutional exegesis:

The intention of the framers of the Constitution, even assuming we could discover what it was, when it is not adequately expressed in the Constitution, that is to say, what they meant when they did not say it, surely that has no binding force upon us. If we look behind or beyond what they set down in the document, prying into what else they wrote and what they said, anything we may find is only advisory. They may sit in at our councils. There is no reason why we should eavesdrop on theirs.

Supreme Court E-Library

As this court has pointed out, "[t]he FIA is the basic law governing foreign investments in the Philippines, irrespective of the nature of business and area of investment."[14]

Section 3 (a) of the Foreign Investments Act defines a "Philippine national" as including "a corporation organized under the laws of the Philippines of which at least sixty per cent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines." In my Dissent to the April 21, 2014 Decision:

> This is a definition that is consistent with the first part of paragraph 7 of the 1967 SEC Rules, which [originally articulated] the Control Test: "[s]hares belonging to corporations or partnerships at least 60 per cent of the capital of which is owned by Filipino citizens shall be considered as of Philippine nationality."[15]

The Control Test serves the rationale for nationalization of economic activities. It ensures effective control by Filipinos and satisfies the requirement of beneficial ownership.

On the matter of control, my Dissent to the April 21, 2014 Decision explained that:

> It is a matter of transitivity[16] that if Filipino stockholders control a corporation which, in turn, controls another corporation, then the Filipino stockholders control the latter corporation, albeit indirectly or through the former corporation.
>
> An illustration is apt.

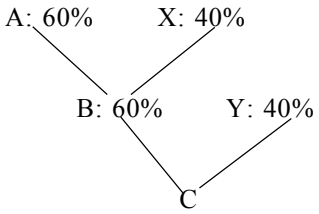
---

[14] *Gamboa v. Teves,* G.R. No. 176579, October 9, 2012, 682 SCRA 397, 435 [Per *J.* Carpio, *En Banc*].

[15] *J.* Leonen, dissenting opinion in *Narra Nickel v. Redmont*, G.R. No. 195580, April 21, 2014, <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2014/april2014/195580_leonen.pdf> 37 [Per J. Velasco, Jr., Third Division].

[16] *I.e.*, " ([o]f a relation) such that, if it applies between successive members of a sequence, it must also apply between any two members taken in order. For instance, if A is larger than B, and B is larger than C, then A is larger than C" <http://www.oxforddictionaries.com/us/definition/american_english/transitive>.

Suppose that a corporation, "C", is engaged in a nationalized activity requiring that 60% of its capital be owned by Filipinos and that this 60% is owned by another corporation, "B", while the remaining 40% is owned by stockholders, collectively referred to as "Y". Y is composed entirely of foreign nationals. As for B, 60% of its capital is owned by stockholders collectively referred to as "A", while the remaining 40% is owned by stockholders collectively referred to as "X". The collective A, is composed entirely of Philippine nationals, while the collective X is composed entirely of foreign nationals. (N.b., in this illustration, capital is understood to mean "shares of stock entitled to vote in the election of directors," per the definition in *Gamboa*[17]). Thus:



By owning 60% of B's capital, A controls B. Likewise, by owning 60% of C's capital, B controls C. From this, it follows, as a matter of transitivity, that A controls C; albeit indirectly, that is, through B.

This "control" holds true regardless of the aggregate foreign capital in B and C. As explained in *Gamboa*, control by stockholders is a matter resting on the ability to vote in the election of directors:

> Indisputably, one of the rights of a stockholder is the right to participate in the control or management of the corporation. This is exercised through his vote in the election of directors because it is the board of directors that controls or manages the corporation.[18]

---

[17] *Gamboa v. Teves*, G.R. No. 176579, June 28, 2011, 652 SCRA 690, 723 and 726 [Per J. Carpio, En Banc] as cited in J. Leonen, dissenting opinion in *Narra Nickel v. Redmont*, G.R. No. 195580, April 21, 2014, <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2014/april2014/195580_leonen.pdf> [Per *J*. Velasco, Jr., Third Division].

[18] *Id*. at 725.

Supreme Court E-Library

B will not be outvoted by Y in matters relating to C, while A will not be outvoted by X in matters relating to B. Since all actions taken by B must necessarily be in conformity with the will of A, anything that B does in relation to C is, in effect, in conformity with the will of A. No amount of aggregating the foreign capital in B and C will enable X to outvote A, nor Y to outvote B.

In effect, A controls C, through B. Stated otherwise, the collective Filipinos in A, *effectively* control C, through their control of B.[19]

From the definition of "beneficial owner or beneficial ownership" provided by the Implementing Rules and Regulations (amended 2004) of Republic Act No. 8799, otherwise known as the Securities Regulation Code, "there are two (2) ways through which one may be a beneficial owner of securities, such as shares of stock: first, by having or sharing voting power; and second, by having or sharing investment returns or power."[20] The Implementing Rules use "and/or"; thus, these are alternative means which may or may not concur.

On the first — voting power — my Dissent to the April 21, 2014 Decision pointed out that:

Voting power, as discussed previously, ultimately rests on the controlling stockholders of the controlling investor corporation. To go back to the previous illustration, voting power ultimately rests on A, it having the voting power in B which, in turn, has the voting power in C.[21]

On the second — investment returns or power — the same Dissent pointed out that:

As to investment returns or power, it is ultimately A which enjoys investment power. It controls B's investment decisions – including

---

[19] *J.* Leonen, dissenting opinion in *Narra Nickel v. Redmont*, G.R. No. 195580, April 21, 2014, <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2014/april2014/195580_leonen.pdf> 39 [Per *J.* Velasco, Jr., Third Division].

[20] *Id.* at 43-44.

[21] *Id.* at 44.

the disposition of securities held by B – and (again, through B) controls C's investment decisions.

Similarly, it is ultimately A which benefits from investment returns generated through C. Any income generated by C redounds to B's benefit, that is, through income obtained from C, B gains funds or assets which it can use either to finance itself in respect of capital and/or operations. This is a direct benefit to B, itself a Philippine national. This is also an indirect benefit to A, a collectivity of Philippine nationals, as then, its business – B – not only becomes more viable as a going concern but also becomes equipped to funnel income to A.

Moreover, beneficial ownership need not be direct. A controlling shareholder is deemed the indirect beneficial owner of securities (e.g., shares) held by a corporation of which he or she is a controlling shareholder. Thus, in the previous illustration, A, the controlling shareholder of B, is the indirect beneficial owner of the shares in C to the extent that they are held by B.[22]

However, 60 percent equity ownership is but a minimum. It is in this regard that the Dissent to the April 21, 2014 Decision recognized that the Grandfather Rule properly finds application as a "supplement" to the Control Test:

> Bare ownership of 60% of a corporation's shares would not suffice. What is necessary is such ownership as will ensure control of a corporation.

In *Gamboa*, "[f]ull beneficial ownership of 60 percent of the outstanding capital stock, coupled with 60 percent of the voting rights, is required."[23] ***With this in mind, the Grandfather Rule may be used as a supplement to the Control Test, that is, as a <u>further</u> check to ensure that control and beneficial ownership of a corporation is in fact lodged in Filipinos.***

---

[22] *Id*.

[23] *Gamboa v. Teves*, G.R. No. 176579, June 28, 2011, 652 SCRA 690, 730 [Per *J*. Carpio, *En Banc*], as cited in *J*. Leonen, dissenting opinion in *Narra Nickel v. Redmont*, G.R. No. 195580, April 21, 2014, <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2014/april2014/195580_leonen.pdf> 46 [Per *J*. Velasco, Jr., Third Division].

Supreme Court E-Library

For instance, Department of Justice Opinion No. 165, series of 1984, identified the following "significant indicators" or badges of "dummy status":

1. That the foreign investor provides practically all the funds for the joint investment undertaken by Filipino businessmen and their foreign partner[;]
2. That the foreign investors undertake to provide practically all the technological support for the joint venture[; and]
3. That the foreign investors, while being minority stockholders, manage the company and prepare all economic viability studies.[24]

In instances where methods are employed to disable Filipinos from exercising control and reaping the economic benefits of an enterprise, the ostensible control vested by ownership of 60% of a corporation's capital may be pierced. Then, the Grandfather Rule allows for a further, more exacting examination of who actually controls and benefits from holding such capital.[25]

The majority's Resolution denying the present Motion for Reconsideration recognizes that the Grandfather Rule alone does not suffice for reckoning Filipino and foreign equity ownership in corporations engaged in nationalized economic activities. The majority echoes the characterization of the applicability of the Grandfather Rule as only supplementary[26] and explains:

The Grandfather Rule, standing alone, should not be used to determine the Filipino ownership and control in a corporation, as it could result to an otherwise foreign corporation rendered qualified to perform nationalized or partly nationalized activities. Hence, **it**

---

[24] Sec. of Justice Op No. 165, s. 1984, as cited in *J.* Leonen, dissenting opinion in *Narra Nickel v. Redmont*, G.R. No. 195580, April 21, 2014, <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2014/april2014/195580_leonen.pdf> 47 [Per *J.* Velasco, Jr., Third Division].

[25] *J.* Leonen, dissenting opinion in *Narra Nickel v. Redmont*, G.R. No. 195580, April 21, 2014, <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2014/april2014/195580_leonen.pdf> 46-47 [Per *J.* Velasco, Jr., Third Division].

[26] *Id*.

Supreme Court E-Library

is only when the Control Test is first complied with that the Grandfather Rule may be applied. Put in another manner, if the subject corporation's Filipino equity falls below the threshold 60%, the corporation is immediately considered foreign-owned, in which case, the need to resort to the Grandfather Rule disappears.

On the other hand, **a corporation that complies with the 60-40 Filipino to foreign equity requirement can be considered a Filipino corporation *if there is no doubt* as to who has the "beneficial ownership" and "control" of the corporation. In that instance, there is no need for** a dissection or further inquiry on the ownership of the corporate shareholders in both the investing and investee corporation **or the application of the Grandfather Rule.** As a corollary rule, even if the 60-40 Filipino to foreign equity is apparently met by the subject or investee corporation, **a resort to the Grandfather Rule is necessary *if doubt exists* as to the *locus* of the "beneficial ownership" and "control."**[27]

III

Proceeding from the actions of the DENR Panel of Arbitrators is improper

Following the above-quoted portion in its discussion, the majority states that "[i]n this case, a further investigation as to the nationality of the personalities with the beneficial ownership and control of the corporate shareholders in both the investing and investee corporations is necessary."[28]

The majority then proceeds to an analysis of the equity structures of petitioners. The analysis notes that 59.97% of Narra's 10,000 shares[29] is held by Patricia Louise Mining and Development Corporation (Patricia Louise), 65.96% of whose shares is, in turn, held by Palawan Alpha South Resources Development Corporation (PASRDC). It adds that 59.97% of

---

[27] *Narra Nickel v. Redmont*, G.R. No. 195580, April 21, 2014, 12 [Per *J.* Velasco, Jr., Special Third Division Resolution]. Emphasis and underscoring from the original, citation omitted.

[28] *Id*.

[29] The majority's Resolution fails to specify if these are all common shares.

Supreme Court E-Library

Tesoro's 10,000 common shares is held by Sara Marie Mining, Inc. (Sara Marie), a Filipino corporation, 66.63% of whose shares is, in turn, held by Olympic Mines and Development Corporation (Olympic), another Filipino corporation. Finally, 59.97% of McArthur's 10,000 common shares is held by Madridejos Mining Corporation (Madridejos), a Filipino corporation, 66.63% of whose shares is, in turn, held by Olympic.

The majority also notes that 39.98% of Narra's shares is held by Canadian corporation MBMI Resources, Inc. (MBMI), while 39.98% of Tesoro's and McArthur's common shares is held by MBMI.[30] It adds that in the case of the majority shareholder of Narra (i.e., Patricia Louise), 33.96% of its shares is owned by MBMI, while in the cases of the respective majority shareholders of Tesoro and McArthur (i.e., Sara Marie, and Madridejos, respectively), 33.31% of their shares is held by MBMI.

The respective Filipino majority shareholders of Patricia Louise, Sara Marie, and Madridejos (i.e., PASRDC in the case of Patricia Louise, and Olympic in the cases of Sara Marie and Madridejos) did not pay for shares. Instead, MBMI paid for their respective paid-up capital. The majority concludes, applying the Grandfather Rule, that a foreign corporation — MBMI — breached the permissible maximum of 40% foreign equity participation in the three (3) petitioner corporations and that petitioners are foreign corporations not entitled to mineral production sharing agreements.

My Dissent to the April 21, 2014 Decision noted the inadequacy of relying merely on the denomination of shares as common or preferred:

> Proceeding from the findings of the Court of Appeals in its October 1, 2010 decision in CA-G.R. SP No. 109703, it appears that at least 60% of equities in Narra, Tesoro, and McArthur is owned by Philippine nationals. Per this initial analysis, Narra, Tesoro, and

[30] The majority's Resolution also fails to specify if these are all common shares.

McArthur ostensibly satisfy the requirements of the Control Test in order that they may be deemed Filipino corporations.

Attention must be drawn to how these findings fail to indicate which (fractional) portion of these equities consist of "shares of stock entitled to vote in the election of directors" or, if there is even any such portion of shares which are not entitled to vote. These findings fail to indicate any distinction between common shares and preferred shares (not entitled to vote). Absent a basis for reckoning non-voting shares, there is, thus, no basis for diminishing the 60% Filipino equity holding in Narra, Tesoro, and McArthur and undermining their having ostensibly satisfied the requirements of the Control Test in order to be deemed Filipino corporations qualified to enter into MPSAs.[31]

It is the majority's position that the mere reckoning of how shares are denominated — whether common or preferred — suffices. I, however, proffer an analysis that requires looking into the actual voting rights vested on each class of shares. While it is true that preferred shares are generally viewed as non-voting shares, a conclusion that the preferred shares involved in this case are totally bereft of voting rights is not warranted by a cursory consideration of how they are denominated.

The same Dissent conceded that a "more thorough consideration . . . could yield an entirely different conclusion."[32] This is what the majority endeavors to embark on. However, it is improper to proceed, as the majority does, from the action of a body without competence and jurisdiction as well as the imprudent acts of forum shopping of Redmont, and, in the process, lend legitimacy to the DENR Panel of Arbitrators' and Redmont's illicit actions:

Having made these observations, it should not be discounted that a more thorough consideration – as has been intimated in the earlier

---

[31] *J*. Leonen, dissenting opinion in *Narra Nickel v. Redmont*, G.R. No. 195580, April 21, 2014, <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2014/april2014/195580_leonen.pdf> 47-48 [Per . Velasco, Jr., Third Division].

[32] *Id*. at 52.

Supreme Court E-Library

disquisition regarding how 60% Filipino equity ownership is but a minimum and how the Grandfather Rule may be applied to further examine actual Filipino ownership – could yield an entirely different conclusion. In fact, Redmont has asserted that such a situation avails.

However, the contingencies of this case must restrain the court's consideration of Redmont's claims. Redmont sought relief from a body without jurisdiction – the Panel of Arbitrators – and has engaged in blatant forum shopping. It has taken liberties with and ran amok of rules that define fair play. It is, therefore, bound by its lapses and indiscretions and must bear the consequences of its imprudence.[33]

IV

Redmont engaged in blatant forum shopping

It would be remiss of this court to overlook Redmont's acts of forum shopping. To do so would enable Redmont to profit from its own imprudence and for this court to countenance a manifest disrespect for courts and quasi-judicial bodies. As extensively discussed in my Dissent to the April 21, 2014 Decision:

Redmont has taken at least four (4) distinct routes all seeking substantially the same remedy. Stripped of their verbosity and legalese, Redmont's petitions before the DENR Panel of Arbitrators, complaint before the Regional Trial Court, complaint before the Securities and Exchange Commission, and petition before the Office of the President all seek to prevent Narra, Tesoro, and McArthur as well as their co-respondents and/or co-defendants from engaging in mining operations. Moreover, these are all grounded on the same cause (i.e., that they are disqualified from doing so because they fail to satisfy the requisite Filipino equity ownership) and premised on the same facts or circumstances.

Redmont has created a situation where multiple tribunals must rule on the extent to which the parties adverse to Redmont have met the requisite Filipino equity ownership. It is certainly possible that conflicting decisions will be issued by the various tribunals over which Redmont's various applications for relief have been lodged.

---

[33] *Id*.

Supreme Court E-Library

It is, thus, glaring that the very evil sought to be prevented by the rule against forum shopping is being foisted by Redmont.

. . . . . .

It strains credulity to accept that Redmont's actions have not been willful. By filing petitions with the DENR Panel of Arbitrators, Redmont started the entire series of events that have culminated in: first, the present petition; second, the de-consolidated G.R. No. 205513; and third, at least one (1) more petition filed with this court.[34]

Following the adverse decision of the Panel of Arbitrators, Narra, Tesoro, and McArthur pursued appeals before the Mines Adjudication Board. This is all but a logical consequence of the POA's adverse decision. While the appeal before the MAB was pending, Redmont filed a complaint with the SEC and then filed a complaint with the Regional Trial Court to enjoin the MAB from proceeding. Redmont seems to have conveniently forgotten that it was its own actions that gave rise to the proceedings before the MAB in the first place. Moreover, even as all these were pending and in various stages of appeal and/or review, Redmont still filed a petition before the Office of the President.

Consistent with Rule 7, Section 5 of the 1997 Rules of Civil Procedure, the actions subject of these consolidated petitions must be dismissed with prejudice.[35]

Apart from the Petition subject of the present Motion for Reconsideration, two (2) other cases involving the same parties are now pending with this court. The first, G.R. No. 205513, relates to a Complaint for Revocation of the certificates of registration of Narra, Tesoro, and McArthur filed by Redmont with the Securities and Exchange Commission. G.R. No. 205513 was consolidated but later de-consolidated with this case. The second is a case pending with this court's First Division. This relates to the Petition filed by Redmont with the Office of the President in which it sought the cancellation of the financial or technical assistance agreement (FTAA) applications of Narra, Tesoro, and McArthur.

---

[34] Arising from Redmont's Petition with the Office of the President.

[35] *Id.* at 53-55.

Supreme Court E-Library

That there are now three (3) simultaneously pending Petitions with this court is the result of Redmont's contemporaneously having sought remedies from:

1. The DENR Panel of Arbitrators;
2. The Securities and Exchange Commission;
3. The Regional Trial Court, Quezon City; and
4. The Office of the President.

While this and the two other cases pending with this court diverge as to the procedural routes they have taken, they all boil down to the central issue of the nationalities of Narra, Tesoro and McArthur. It is manifest that Redmont engaged in blatant forum shopping. The April 21, 2014 Decision effectively rewarded Redmont's abuse of court processes. Worse, maintaining the status quo of having a multiplicity of cases reinforces the stance of leaving Redmont to reap the benefits of its unconscionable scheme.

ACCORDINGLY, I vote to grant the Motion for Reconsideration. I reiterate my vote to **GRANT** the Petition for Review on Certiorari subject of G.R. No. 195580. The assailed Decision dated October 1, 2010 and the assailed Resolution dated February 15, 2011 of the Court of Appeals Seventh Division in CA-G.R. SP No. 109703, which reversed and set aside the September 10, 2008 and July 1, 2009 Orders of the Mines Adjudication Board, should be **SET ASIDE and DECLARED NULL AND VOID.** The September 10, 2008 Order of the Mines Adjudication Board dismissing the Petitions filed by Redmont Consolidated Mines with the DENR Panel of Arbitrators must be **REINSTATED.**

MARVIC M.V.F. LEONEN

Associate Justice