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

12 January 2009
SEC-OGC Opinion No. 09-02
Re: Composition of the Board of Directors Under the Anti-Dummy Law

SEBASTIAN LIGANOR & GALINATO
1409 East Tower, Philippine Stock Exchange Centre,
Exchange Road, Ortigas Center, Pasig City

Attention: Atty. Fernando S. Maronilla

Sir:

This refers to your 21 January 2008 letter requesting confirmation of your position on some legal matters stated therein.

You mentioned that your client, JapanPNB Leasing and Finance Corporation ("JPNB", for brevity), is a domestic corporation primarily engaged in the business of leasing and financing and is sixty percent (60%) owned by Philippine National Bank ("PNB") and forty percent (40%) owned by IBJ Leasing Co. Ltd. ("IBJ"), a Japanese corporation. It intends to put up JPNB Rental Corporation ("JPNB Rental"), a wholly-owned subsidiary to engage primarily in the business of renting or leasing (except financial leasing) of all kinds of real and personal properties.

The proposed authorized capital stock of JPNB Rental is Fifty Million Pesos (P50,000,000.00), divided into five hundred thousand (500,000) shares with par value of One Hundred Pesos (P100.00) per share. The subscribers to the capital stock and the amount paid-in to their subscriptions are as follows:

Name	*Nationality*	*No. of Shares Subscribed*	*Amount Subscribed*	*Amount Paid*
JPNB Leasing and Finance Corporation	Filipino	124,995	P12,499,500	P 6,249,500
Omar Byron T. Mier	Filipino	1	100	100
Feliciano L. Miranda, Jr.	Filipino	1	100	100
Vicente LI. Ramirez Jr.	Filipino	1	100	100
Etsuo Okumura	Japanese	1	100	100
Hiroyuki Hatori	Japanese	1	100	100
	Total	125,000	P 12,500,000	P 6,250,000

The names, nationalities and residences of the incorporators – **who shall also act as the first set of directors** -- are as follows:

Name	*Nationality*	*Residence*
Omar Byron T. Mier	Filipino	Quezon City
Feliciano L. Miranda	Filipino	Marikina City
Vicente Ll. Ramirez, Jr.	Filipino	Muntinlupa City
Etsuo Okumura	Japanese	Makati City
Hiroyuki Hatori	Japanese	Makati City

According to you, since JPNB Rental is intended to be a wholly-owned subsidiary of JPNB, the purpose of the shares held by the five (5) incorporators is only to qualify them to the five (5)-member Board of Directors without transferring the beneficial ownership thereof, they being merely nominees or trustees of JPNB. Each incorporator will execute an acknowledgement that they are holding their respective shares *"in trust"* for JPNB.

You likewise mentioned that the application for registration of JPNB Rental was disallowed by our Company Registration and Monitoring Department ("CRMD") on the ground that it violates the Anti-Dummy Law[1]. Invoking the requirement of the said law that foreign stockholders shall only be entitled to seats in proportion to their share/participation in the corporation sought to be registered[2], CRMD is of the opinion that the two (2) Japanese nationals cannot be elected as directors of JPNB Rental, considering that they only have one (1) share each. As you stated, CRMD requires that each of the two (2) Japanese incorporators must have a twenty percent (20%) subscription of the authorized capital stock to become a director.

You thus request confirmation that:

1. The Anti-Dummy Law does not, in any way, apply to the proposed corporate structure of JPNB Rental since the application of the said law is limited to nationalized and partially nationalized undertaking.

[1] Commonwealth Act No. 108, as amended.

[2] Section 2-A. Any person, Corporation, or association, which, having in its name or under its control, a right, franchise, privilege, property or business, **the exercise or enjoyment of which is expressly reserved by the Constitution or the laws to citizens of the Philippines** or of any other specific country, **or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens**, permits or allows the use, exploitation or enjoyment thereof by a person, corporation or association not possessing the requisites prescribed by the Constitution or the laws of the Philippines; or leases, or in any other way, transfers or conveys said right, franchise, privilege, property or business to a person, corporation or association not otherwise qualified under the Constitution , or the provisions of the existing laws; or in any manner permits or allows any person, not possessing the qualifications required by the Constitution, or existing laws to acquire, use, exploit, or enjoy a right, franchise, privilege, property or business, the exercise and enjoyment of which are expressly reserved by the Constitution or existing laws to citizens of the Philippines or of any other specific country, to intervene in the management, operation, administration or control thereof, whether as an officer, employee or laborer therein with or without remuneration except technical personnel whose employment may be specifically authorized by the Secretary of Justice, and any person who knowingly aids, assists, or abets in the planning, consummation, or perpetration of any of the acts herein above enumerated shall be punished by imprisonment for not less than five nor more than fifteen years and by a fine of not less than the value of the right, franchise or privileged enjoyed or acquired in violation of the provisions hereof but in no case less than five thousand pesos: Provided, however, that the president, managers or persons in violating the provisions of this section shall be criminally liable in lieu thereof: Provided, further, That any person, corporation or association shall, in addition to the penalty imposed herein, forfeit such right, franchise, privilege and the property or business enjoyed or acquired in violation of the provisions of this Act; and **Provided, finally, That the election of aliens as members of the board of directors or governing body of corporations or associations engaging in partially nationalized activities shall be allowed in proportion to their allowable participation or share in the capital of such entities.**

2. A foreign national having only one qualifying share may legally become a member of the Board of Directors of a wholly-owned subsidiary not engaged in nationalized or partially nationalized undertakings.

3. The proposed corporate structure of JPNB Rental is perfectly legal.

Simply put, the issue is whether the Anti-Dummy Law applies to JPNB Rental and if so, whether the two (2) Japanese nationals may be elected to said corporation's Board of Directors.

As it stands, Section 2-A of the Anti-Dummy Law – which is against the employment by any person, corporation, or association of an alien, who shall intervene in the management, operation, administration or control thereof, whether as officer, employee, or laborer – **only applies** where the exercise or enjoyment of the property or of the franchise, privilege, or business engaged in by such person, corporation or association *"is expressly reserved by the Constitution or the law to the citizens of the Philippines"* or *"corporations or associations at least 60% of the capital of which is owned by such citizens."* [3] In short, the Anti-Dummy Law would only come into operation if the corporation concerned is engaged in a wholly or partially nationalized activity.

An undertaking or activity is partly nationalized, within the meaning of Section 2-A of the Anti-Dummy Law if its enjoyment or exercise is limited by the Constitution or any law to corporations or associations at least 60% of the capital of which is owned by Filipino citizens, that is to say, the minimum equity participation required to be owned by Filipinos is 60%.[4]

Section 8 of Republic Act No. 7042 or the Foreign Investments Act ("FIA"), as amended, provides in part:

> "Small and medium-sized domestic market enterprises with paid-in equity capital less than the equivalent of two hundred thousand US dollars (US$200,000.00) **are reserved to Philippine nationals**: Provided, That if (1) they involve advanced technology as determined by the Department of Science and Technology, or (2) they employ at least fifty (50) direct employees, then a minimum paid-in capital of one hundred thousand US dollars (US$100,000.00) shall be allowed to non-Philippine nationals."

To implement this provision, Executive Order No. 584 or the Seventh Regular Foreign Investment Negative List ("FINL") provides:

> "List B.
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> **Foreign ownership is limited up to 40% foreign equity for protection of small and medium scale enterprises:**
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> **Domestic market enterprises with paid-in equity capital of less than the equivalent of US$200,000.00.**

[3] SEC Opinion No. 12, Series of 2002 (dated 21 November 2002) addressed to Mr. Jose L. Gonzales.
[4] Department of Justice Primer on Anti-Dummy Law, Department of Justice Website.

Domestic market enterprises which involve advanced technology or employ at least fifty (50) direct employees with paid-in equity capital of less than the equivalent of US$100,000.00."

Accordingly, the Commission opined that a domestic company engaged in construction of all types of houses and buildings as well as roads and bridges will be considered as engaged in an undertaking classified as partially nationalized activity because its paid-up capital is only one million pesos (P1,000,000.00), which is roughly equivalent to US$18,182.00; as such, the Anti-Dummy Law was applied to the said corporation.[5]

The above was reiterated by the Commission in a 2004 Opinion which stated that *"the business activity of a domestic corporation with 40% foreign equity participation whose paid-in equity is less than the equivalent of US$200,000.00 is considered a nationalized business, and hence, subject to the provisions of the Anti-Dummy Law."* [6]

Applying the foregoing authorities, absent any allegation, much less substantiation, that its enterprise involves advanced technology or employs at least fifty (50) direct employees, JPNB Rental is within the coverage of the Anti-Dummy Law because it only has six million two hundred fifty thousand Philippine pesos (P6,250,000.00) as paid-in capital, which is far below the two hundred thousand US dollar ($200,000.00) requirement.

This notwithstanding, we are of the opinion that under the circumstances, the two (2) Japanese nationals are qualified to become directors of JPNB Rental.

In 2002, the Commission already had occasion to opine that a local bank can nominate a foreign national, in lieu of a qualified Filipino, as a member of the Board of Directors of a local financing company (which is 40% owned by such local bank and 60% owned by a foreign company) without violating the Anti-Dummy Law. **This is because the said law is silent as to whether a local company, e.g. local bank, is prohibited to nominate as its *"nominee"* a foreign national to the board of directors of a partially nationalized corporation, e.g. financing company.** Further, considering that no more than three (3) foreigners are in the financing company's Board of Directors, then it is within the requirements of the law."[7]

Thus, in that same 2002 Opinion, the Commission reiterated that a person to whom one share of stock has been transferred for the express purpose of qualifying him as a director is qualified, provided that the transfer contains a description that the trustee holds the stock merely as a *"nominee"* for purposes of qualifying him as member of the Board. It even stressed that it is not necessary that the foreigner himself must own shares as will qualify him to be nominated as director. Accordingly, while a corporation cannot be directly elected as a member of the Board of Directors, its duly authorized officer, agent or trustee who has been designated as *"nominee"* in accordance with the above procedure, may be eligible to be elected as director to represent the local bank.[8]

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[5] SEC Opinion No. 50, Series of 2003 (dated 23 October 2003) addressed to Mr. Yasutaka Honda. See also SEC Opinion No. 16, Series of 2003 (dated 30 April 2003) addressed to De Borja Medialdea Bello Guevarra & Gerodias.

[6] SEC Opinion No. 04-8 dated 11 March 2004 addressed to Attys. Ariben C. Sebastian and Jemilyn S. Camania.

[7] SEC Opinion No. 03, Series of 2002 (dated 16 July 2002) addressed to Narciso Jimenez Gonzalez Liwanag Bello Valdes & Caluya and signed by Commissioner Ma. Juanita E. Cuelo.

[8] Ibid.

In the same vein, JPNB, undoubtedly a Philippine national who wholly-owns JPNB Rental, can legally nominate the two (2) Japanese nationals as directors of its subsidiary. This will also be well within the requirements of the Anti-Dummy Law as there will only be two (2) foreigners in the Board, in compliance with the 40% limit.

Otherwise stated, the two (2) Japanese nationals can legally become directors of JPNB Rental by virtue of the circumstance, as disclosed, that they hold shares therein as nominees or trustees of JPNB and only for the purpose of qualifying them to the five (5)-member Board of Directors. As adverted to above, it is necessary, however, that the transfer contains a description that the trustee holds the stock merely as a *"nominee"* for purposes of qualifying him as member of the Board and that the total number of such trustees will not exceed 40% of the Board's membership.

The opinion is based solely on the facts disclosed in the queries and relevant solely to the particular issues raised therein. It shall likewise be understood that the foregoing shall not be used in the nature of a standing rule binding upon the Commission in other cases.[9]

Please be guided accordingly.

Very truly yours,

VERNETTE G. UMALI-PACO
General Counsel

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