Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

6 December 2018

SEC-OGC Opinion No. 18-23
RE: Applicability of Anti-Dummy Law

ANTONIO G. MARFORI
Chairman
Southwestmin Corporation
San Rafael, San Marcelino
2207, Zambales

Dear Mr. Marfori:

This refers to your letter dated 12 April 2018 requesting for an opinion on whether the appointment of a foreign national as President of the Southwestmin Corporation (Southwestmin) is violative of the Anti-Dummy Law (Commonwealth Act No. 108)[1].

In your letter, you stated that Southwestmin is a domestic corporation duly registered with the Commission primarily engaged in the business of quarrying, mining, cutting strip, finishing, setting, purchasing on wholesale basis and dealing in non-metallic ore, among others. At present, you have two (2) foreign nationals as stockholders with aggregate shareholdings totaling 1.17% and one of them sits as a Board Director. You are contemplating on appointing this director as President of the corporation because he has specialized knowledge in an onshore mining technique called "borehole process."

Under the circumstances presented, we opine that you cannot appoint this director as President.

The business activity of Southwestmin is mining, which is a partly nationalized activity. The law has specific citizenship requirements when a mining corporation is involved, viz:

Article XII, Section 2 of the Constitution provides that:

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[1] Approved 30 October 1936

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

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

In a previous opinion, the Commission was explicit in stating that:

> "On the citizenship requirement of corporate officers. Sec. 2-A of Commonwealth Act No. 108[3] , as amended, bans foreigners from being elected or appointed to management

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[2] Executive Order No. 65 dated 29 October 2018

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

positions as **president**, vice-president, treasurer, secretary, etc. **in business activities where there is a constitutional or statutory provision imposing a specific nationality requirement as a requisite for the exercise or enjoyment of a right, franchise or privilege."** [4] (Emphasis supplied.)

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

> "A reading of Section 2-A readily reveals the legislative intent to complement our nationalization laws by closing any avenue whereby aliens may defeat their purpose [King vs. Hernaez, 4 SCRA 792, (1962)]. It penalizes the employment of aliens in any position pertaining to management, operation, administration and control, "whether as an officer, employee, or laborer therein", which means that the employment of a person who is not a Filipino citizen even in a minor or clerical or non-control position is prohibited. xxx In arriving at this conclusion, I am guided by the underlying intent behind the nationalization of employment provided for in the Anti-Dummy Law, which is to eradicate the shackles of foreign economic control and domination in the country." [King vs. Hernaez, supra, at p. 804; Universal Corn Products, Inc. vs. Riceand Corn Board, 20 SCRA1048 (1967).]"[5]

Hence, being a domestic corporation engaged in a partly nationalized activity, Southwestmin cannot have a foreign national as its President.

It shall be understood, however, that the foregoing opinion is rendered based solely on facts and circumstances disclosed and relevant solely to the particular issues raised therein and shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts whether of similar or dissimilar circumstances. If, upon further inquiry and investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.[6]

Please be guided accordingly.

CAMILO S. CORREA
General Counsel

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[4] SEC Opinion addressed to Mr. K. J. Mctavish dated December 8, 1995.
[5] DOJ Opinion No. 037, s. 1976, 2 nd Indorsement, February 26, 1976.
[6] SEC Memorandum Circular No. 15, s. of 2003