Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

13 March 2019

SEC-OGC Opinion No. 19-10
Re: Foreigner in a partially-nationalized corporation and the Anti-Dummy Law

MARTINEZ VERGARA GONZALEZ & SERRANO
3RD Floor, the Orient Square
F. Ortigas, Jr., Road
Ortigas Center
1600 Pasig City

Attention: Atty. Mark O. Vergara, Atty. Gino Paulo O. Uy
Atty. Kathleen Mae C. Tuason

Gentlemen:

This refers to your letter dated 25 June 2018 requesting confirmation from the Commission that the business activities that Green Siam Resources Corporation (the Company) is authorized to engage in are not reserved, wholly or partially, to Philippine nationals under the Constitution, existing law, or the Foreign Investment Negative List (FINL) and that accordingly, the Company is not under the purview of the Anti-Dummy Law.

As you mentioned, the Articles of Incorporation of the Company states that its primary purpose is "to engage in the business of baling and trading on a wholesale basis, all types of non-toxic recyclable industrial materials such as but not limited to paper, carton, plastic, textile, wooden scrap and all types of metals." The Company is 60%-owned by Greenkraft Corporation, a domestic corporation, and 40%-owned by SCG Trading Co., Ltd., a limited company established under the laws of Thailand. **The Company does not own land.**

In this regard, the pertinent provisions of the Foreign Investment Act of 1991 (FIA)[1] are as follows:

> Section. 7. *Foreign Investments in Domestic Market Enterprises* – Non-Philippine nationals may own up to one hundred percent (100%) of domestic

[1] Republic Act No. 7042, as amended by Republic Act No 8179.

market enterprises unless foreign ownership therein is prohibited or limited by the Constitution and existing law or the Foreign Investment Negative List under Section 8 hereof.

Secion 8. *List of Investment Areas Reserved to Philippine Nationals* (*Foreign Investment Negative List*). - The Foreign Investment Negative List shall have three (3) component lists: A, B, and C:

a. List A shall enumerate the areas of activities reserved to Philippine nationals by mandate of the Constitution and specific laws.

b. List B shall contain the areas of activities and enterprises regulated pursuant to law:

xxx xxx xxx

Small and medium-sized domestic market enterprise with paid-in capital less than the equivalent of Two Hundred Thousand US Dollars (US$ 200,000.00), are reserved to Philippine nationals[2]: Provided, That if (1) They involve advance 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. (Emphasis ours).

xxx xxx.

Pursuant to this, Item 6 List B of the Eleventh Foreign Investment Negative List (11th FINL)[3] provides that "domestic market enterprises with paid-in equity capital of less than the equivalent of US$200,000 shall not be more than forty percent (40%) foreign-owned."

Thus, the general rule is that non-Philippine nationals can own up to one hundred percent (100%) of the equity in export as well as domestic market enterprises. However, the 11th FINL restricts foreign ownership to a maximum of forty percent (40%) of the equity in small and medium-sized domestic market enterprises in cases where the paid-in capital is less than the equivalent of Two Hundred Thousand US Dollars (US $200,000). Nonetheless, a paid-in capital of at least the equivalent of One Hundred Thousand US dollars (US$ 100,000) is sufficient so long as the enterprise either (1) involves advance technology

---

[2] *Ibid.* **Section 3. *Definitions.*** - As used in this Act:
a) The term "Philippine national" shall mean a citizen of the Philippines or a domestic partnership or association wholly owned by citizens of the Philippines; or a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; xxx.

[3] Executive Order No. 65

as determined by the Department of Science and Technology, or (2) employs at least fifty (50) direct employees, and the foreign equity restriction shall not apply.[4]

You stated that the 40% foreign equity limitation under List B of the 10th FINL (now 11thFINL) applicable to domestic market enterprises will not apply to the Company since its paid-up capital amounts to P127,500,000.00, which is much higher than the US$200,000.00 (or approximately PhP10,200,000.00[5]) threshold. m

However, the Company's Articles of Incorporation shows a paid-up capital of P7,968,787.50 only, which is less than US$200,000.00. The amount of P127,500,000.00 pertains to the Company's authorized capital stock, not paid-up capital. Paid-up capital is that portion of the authorized capital stock which has been both subscribed and paid.[6] In this connection, the FIA requires "paid-in equity capital" which is the total investment that has been paid-in.[7]

Based on the facts you gave us, the total investment that has been paid-in by the Company amounts to P7,968,787.50 representing the payment of only 25% of the total subscription as shown in the Company's Articles of Incorporation:

Name	Nationality	Shares Subscribed	Amount Subscribed	Amount Paid
Sarasin, Kalin	Thai	1	₱ 10.00	₱ 10.00
Sangsuban, Kajhonet	Thai	1	10.00	10.00
Jumaquio, Florentino S.	Filipino	1	10.00	10.00
Lim, Nixon Y.	Filipino	1	10.00	10.00
Chua, Clement O.	Filipino	1	10.00	10.00
SCT Co., Ltd.,	Thai	1,274,998	12,749,980.00	3,187,495.00
Greenkraft Corporation	Filipino	1,912,497	19,124,970.00	4,781,242.50
Total		3,187,500	₱ 31,875,000.00	₱ 7,968,787.50

Thus, we opine that the Company falls under Item No. 6 List B of the 11th FINL, and hence is a partially nationalized corporation. Accordingly, the Company cannot hire any foreigner who will intervene in its management, operation, administration or control.

---

[4] SEC Opinion No. 11-27 dated 20 April 2011 addressed to Ms. Cristine P. Base

[5] @PhP52.00/US$1.00

[6] MSCI-NACUSIP Local Chapter vs. National Wages and Productivity Commission, 269 SCRA 173, 80 SCAD 155 [1997])

[7] Rule 1, Section 1 (p) of the Implementing Rules and Regulations of R.A. 7042, the term "paid-in equity capital," for purposes of the required capitalization under the FIA, is defined as the total investment in a business that has been paid-in a corporation or partnership or investment in a single proprietorship, which may be in cash or property. It shall refer to inward remittance or assigned capital in the case of foreign corporations. Further, under Rule 1(d) of the above-mentioned Rules, the term "investment" refers to equity participation on any enterprise organized or existing under the laws of the Philippines. It includes both original and additional investments, whether made directly as a stock subscription, or indirectly through the transfer of equity from one investor to another as in stock purchase.

A partially nationalized corporation cannot hire any foreigner to intervene in its management, operation, administration or control, whether as an officer, employee or laborer therein with or without remuneration except as technical personnel whose employment may be specifically authorized by the Secretary of Justice, because to do otherwise is a violation of Section 2-A of Commonwealth Act No. 108.[8]

It shall be understood, however that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issue raised therein. It shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts whether of similar or dissimilar circumstances. [9] If, upon further inquiry or investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.

CARLO S. CORREA
General Counsel

---

[8] **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 a the Constitution or the laws of the Philippines; or leases, or in any other way, transfers or conveys said right, franchise, privilege, property or business to a person, corporation or association not otherwise qualified under the Constitution, or the provisions of the existing laws; or in any manner permits or allows any person, not possessing the qualifications required by the Constitution, or existing laws to acquire, use, exploit or enjoy a right, franchise, privilege, property or business, the exercise and enjoyment of which are expressly reserved by the Constitution or existing laws to citizens of the Philippines or of any other specific country, 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.[3]

[9] SEC Memorandum Circular 2003-15, No. 7