# Foreign Investment Regulation in the Renewable Energy Sector: Addressing the Overlapping Jurisdictions of the ERC, DOE, and the SEC in Determining the Allowable Foreign Investments in the Energy Generation Industry

*Jan Dominic C. Castro*[★]



★ '20 J.D., *with honors*, Ateneo de Manila University School of Law. The Author is currently an Associate at Go and Umali Partners-at-Law, who handles corporate and litigation (civil and criminal) practice. This Note is an abridged version of the Author's Juris Doctor thesis, which won the Dean's Award for Best Thesis of Class 2020 of the Ateneo de Manila University School of Law (on file with the Professional Schools Library, Ateneo de Manila University).

*Cite as* 67 ATENEO L.J. 796 (2023).

## I. INTRODUCTION

### *A. Background of the Study*

In 2022, the Department of Justice (DOJ) released a legal opinion on the allowable foreign equity participation in the Renewable Energy Industry.[1] According to the DOJ, "the term 'natural resources' could not include the sun, the wind, or the ocean *as they are not subject to appropriation*."[2] In effect, corporations involved in the Renewable Energy Industry need not comply with the constitutional requirement on foreign-equity with respect to exploitation, development, and utilization of the natural resources of the State.[3] Based on the opinion itself and as concurred by the Author, however, the same opinion does not have force and effect or is not legally binding unless and until the Implementing Rules and Regulations (IRR) of the Renewable Energy Law (RE Law) is amended.

In order to engage in the capital-intensive renewable energy industry in the Philippines, a corporation must comply with several legal requirements and be under the jurisdiction of regulatory agencies before it can fully operate.[4] One of these requirements that most foreign investors and Renewable Energy (RE) advocates consider as a barrier in the development of the RE industry in the country is the Filipino-foreign ownership limitation in the exploration, development, and utilization of natural resources (EDU activities).[5] At present, the Constitution limits foreign participation in the renewable energy sector, in general, to 40% ownership in capital considering that such activity involves EDU activities specifically on all forces of potential energy.[6]

---

1. *See generally* Department of Justice, Opinion on the Maximum Foreign Equity Participation Allowable in the Exploration, Development, and Utilization (EDU) of Solar, Wind, Hydro, and Ocean or Tidal Energy Resources Under Section 2, Article XII of the 1987 Constitution, Advisory Opinion No. 21, Series of 2022 (Sept. 29, 2022).

2. *Id.* at 2 (emphasis supplied).

3. *Id.* at 3.

4. Aya Lowe, *Limit on Foreign Stake in Renewable Energy 'Unhelpful'*, RAPPLER, Feb. 19, 2013, *available at* https://www.rappler.com/business/22123-renewable-energy-investors-lament-foreign-ownership-cap (last accessed Jan. 31, 2023) [https://perma.cc/KE4E-4QEE].

5. *Id.*

6. PHIL CONST. art. XII, § 2, para. 1.

In Philippine jurisdiction, three regulatory agencies exercise supervision over corporations engaged in the renewable energy sector. Upon incorporation and during the corporate life of the RE company, the Securities and Exchange Commission (SEC) will look into the ownership and control of a corporation that will engage or is engaged in nationalized industries.[7] Hence, as early as the incorporation stage, a determination of nationality and compliance with foreign ownership limitation has already been done by the SEC.[8] Furthermore, the Department of Energy (DOE) will once again look into the nationality of a corporation when the RE company files an application to secure a service contract, as mandated by the RE Law and in compliance with the regulatory framework issued by the Department.[9] Lastly, the Energy Regulatory Commission (ERC), as mandated by Electric Power Industry Reform Act (EPIRA) to issue a Certificate of Compliance ("COC") before a generation participant can operate its facility, will also determine if the applicant has complied with the standards provided by EPIRA and guidelines issued by the Commission.[10]

The interface among these agencies was put under the spotlight, when the ERC, claiming authority under the EPIRA, refused to act on the COC application of Majestic Energy, a renewable energy corporation, on the basis that it had not complied with the foreign equity limitation under the Constitution and the RE Law.[11] According to the official press release of the ERC, effective control of the renewable energy corporation "did not fall on Filipino shareholders."[12] The ERC found that the Articles of Incorporation (AOI) of the applicant showed that an affirmative vote of 75% of the

7. An Act Providing for the Revised Corporation Code, [REV. CORP. CODE], Republic Act No. 11232, § 179 (2019).

8. *See id*.

9. Department of Energy, Rules and Regulations Implementing the Renewable Energy Act of 2008, Republic Act No. 9513, rule 6, § 19 (B) (2009).

10. Department of Energy, Rules and Regulations Implementing the Electric Power Industry Reform Act of 2001, Republic Act No. 9136, rule 5, § 1 (2002).

11. Victor V. Saulon, *ERC Junks Majestic Energy's Application for CoC*, BUSINESSWORLD, June 20, 2018, *available at* https://www.bworldonline.com/corporate/2018/06/20/166441/erc-junks-majestic-energys-application-for-coc (last accessed Jan. 31, 2023) [https://perma.cc/6APG-LKTY].

12. Press Release *by* the Energy Regulatory Commission, *ERC Nixes COC Application Due to Ownership Issues* (June 2018) (on file with the Energy Regulatory Commission).

outstanding and issued shares is generally required to approve corporate resolutions pertaining to fundamental and management issues.[13] Effectively, "any decision made by the Filipino majority can be overturned by the foreign minority at will."[14] Furthermore, the funding for the redemption of the redeemable preferred shares and the conveyance of other preferred and common shares appears to be sourced from a Singaporean company, thus casting doubt on the legitimacy of transactions entered into by the renewable energy corporation.[15] Prior to the ERC's findings, however, the SEC[16] and DOE[17] had already determined Majestic Energy's the nationality. Thus, there appears to be a conflict among these agencies due to their varying determinations with regard to the matter. Also, looking at the ERC's charter and related issuances, there is no specific mandate in relation to its independent determination of foreign equity compliance. Nor is there a requisite compliance with foreign equity restrictions prior to the issuance of a COC.[18]

Though it might also be argued that equity changes were made after the registration by the SEC and the issuance of the service contract by the DOE,

13. *Id.*

14. *Id.*

15. *Id.*

16. *Cf.* E-mail *from* the Office of the General Counsel, Securities and Exchange Commission *to* Alberto Espiritu (Mar. 10, 2021) (on file with the Author) (where the Office of the General Counsel responded to a query regarding the SEC's Decision on Majestic Energy's foreign ownership, and stated that the subject corporation has never been a party to any case pending before the it).

17. *See* Lenie Lectura, *DOE to Retain Majestic Energy's FiT Slot*, BUSINESSMIRROR, Nov. 20, 2018, *available at* https://businessmirror.com.ph/2018/11/20/doe-to-retain-majestic-energys-fit-slot (last accessed Jan. 31, 2023) [https://perma.cc/F87M-UJUA].

18. *See* An Act Ordaining Reforms in the Electric Power Industry, Amending for the Purpose Certain Laws and for Other Purposes [Electric Power Industry Reform Act of 2001], Republic Act No. 9136 (2001); Energy Regulatory Commission, A Resolution Adopting the Revised Rules of Procedure of the Energy Regulatory Commission, Resolution No. 1, Series of 2021 (Dec. 17, 2020); & Energy Regulatory Commission, A Resolution Adopting the Amendments to Section 1, Article III, and VII of the 2014 Revised Rules for the Issuance of Certificates of Compliance (COCs) for Generation Companies, Qualified End-Users, and Entities with Self-Generation Facilities, Resolution No. 18, Series of 2018 (Sept. 21, 2018).

these agencies are those mandated by law to ensure continuing compliance.[19] A problem also exists as to the seeming discord between the supervisory powers of the SEC and DOE after the repeal of the favorable recommendation requirement under the Old Corporation Code in relation to the amendment or approval of articles of incorporation.[20] The overlapping authorities gave rise to the issue now of which among these agencies equipped with supervisory powers should determine compliance with foreign equity restrictions.

*B. Statement of the Problem*

Being in a capital-intensive industry, regulatory agencies exercising jurisdictions over foreign investments in nationalized industries should be clearly determined as to its extent, and the issues these agencies address should be properly delineated. However, when three regulatory agencies exercise parallel authority and independently invoke its powers in interpreting laws and doctrines governing foreign equity restrictions in one specific industry without proper determination and delineation of its exercise of powers, legal havoc will surely arise.

Using as a benchmark the discussion of the Organization for Economic Cooperation and Development (OECD) on overlapping jurisdictions of competition agencies and other sector-specific regulatory agencies, whenever there is a sector-specific regulation, there is a need to define jurisdictional boundaries among regulators.[21] In this case, as embedded in the

19. REV. CORP. CODE, § 6, paras. 6 & 8 & An Act Promoting the Development, Utilization and Commercialization of the Renewable Energy Resources and for Other Purposes [Renewable Energy Act of 2008], Republic Act No. 9513, § 5. (2008).

20. *See* The Corporation Code of the Philippine [CORP. CODE], Batas Pambansa Blg. 68, § 17 (1980).

21. Andreanne Hannah B. Dimaandal, Sectoral Regulation in the Wholesale Electricity Spot Market: Examining the Overlapping Jurisdictions of the Philippine Competition Commission and the Energy Regulatory Commission in the Philippine Electricity Spot Market, at 9 (2018) (unpublished J.D. thesis, Ateneo de Manila University) (on file with the Ateneo Professional Schools Library, Ateneo de Manila University) (citing Organization for Economic Cooperation and Development, Relationship Between Regulators and Competition Authorities, at 10, *available at* https://www.oecd.org/competition/sectors/1920556.pdf (last accessed Jan. 31, 2023) [https://perma.cc/U4D4-434J]).

laws, rules, and regulations, the SEC, DOE, and ERC administer in relation to ensuring compliance with foreign equity restrictions, it is necessary to address the issues concerning the gaps and overlaps in the exercise of these agencies' concurrent supervisory and regulatory powers in the renewable energy sector.

The following are the legal issues that the Author discusses in this Note:

(a) Which agency or agencies has the proper authority in determining the nationality of corporations engaged in the EDU activities?

(b) In the case of ERC, does the EPIRA, in relation to other existing laws and issuances empowered the Commission to independently determine the nationality of corporations at the risk of having a contrary finding with the DOE or SEC?

(c) Due to the ambiguity and broad supervisory powers on the SEC and DOE over the corporate sector and energy projects respectively, what would be the extent of supervisory powers these government agencies exercise in the said industry? Does the lack of "favorable recommendation" requirement in the Revised Corporation Code during amendments or approval of AOI prevent other sector-specific regulatory agencies, like the DOE to validly exercise supervisory powers over its corporate participants in terms of foreign equity restrictions? What will then be the legal implication of such gap or absence in the law? Which agency can exercise supervisory powers over the renewable energy sector participants given such gap?

(d) How does the apparent overlapping of authority to determine compliance with foreign equity restriction be reconciled and/or delineated?

*C. Significance of the Study*

The Note aims to promote legal stability in the country's renewable energy sector by identifying which agency has the authority and the extent of this authority in determining nationality and compliance with the Constitution and statutes on foreign equity restriction. This will avoid the possibility of conflicting decisions and grave abuse of discretion by other government agencies. The Note also seeks to encourage more participants in the renewable energy sector by providing clarification as to the applicable laws and jurisprudence governing EDU activities involving natural resources.

*D. Scope and Limitations*

The Author limits the analysis to the authority of and interplay among three government agencies namely: SEC, DOE, and ERC. The Note's focus is limited to these agencies because they are directly involved in the recent rejection of Majestics Energy's application for a COC.[22] ERC is responsible for the issuance of a COC before a generation facility can operate.[23] Meanwhile, DOE is the agency in charge of issuing a Certificate of Endorsement ("COE") before the ERC can act on the COC application.[24] At the same time, the DOE is a party in all RE service/operating contracts which require that foreign corporations that engage in the RE industry must have a maximum of 40% in equity participation.[25] Lastly, the SEC, is the agency in-charge of the registration of corporations in the country.[26] Hence, upon examination of their enabling statutes and the rules these agencies administer, an apparent overlapping of powers in determining the nationality of corporations and compliance with foreign equity limitation exists.

## II. THE CONSTITUTIONAL MANDATE TO PRESERVE PATRIMONY OVER SOURCES OF RENEWABLE ENERGY

The 1987 Constitution is the guiding provision on foreign equity restriction in EDU activities involving natural resources. Article XII of the Constitution provides —

> 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*. Such agreements may be for a period not exceeding [25] years, renewable for not more than [25] years, and under such terms and conditions as may be

22. Lectura, *supra* note 17.

23. Rules and Regulations Implementing the Electric Power Industry Reform Act of 2001, rule 5, § 1.

24. Rules and Regulations Implementing the Renewable Energy Act of 2008, rule 5, § 18 (C).

25. *Id.* rule 6, § 19 (B).

26. REV. CORP. CODE, § 18.

> provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.[27]

Thus, the Constitution itself reserves ownership of all forces of potential energy with the State.[28] As per the first paragraph of Section 2 of Article XII of the 1987 Constitution, EDU activities involving natural resources should be under the exclusive and full control of the State.[29] The constitutional provision also lays down the foundations on the participation of foreigners in EDU activities of natural resources in the country to ensure that this activity, being imbued with public interest, is protected and fully enjoyed by Philippine citizens.[30]

The foregoing constitutional mandate is the basis for succeeding legislation concerning foreign equity restrictions such as the Foreign Investments Act of 1991 (FIA)[31] and the Renewable Energy Act of 2008 (RE Law).[32] The foregoing laws define the lines of allowable foreign participation in corporations involved in EDU activities. Uniformly, foreign ownership in such corporations cannot exceed 40% in equity participation.[33] Noteworthy is the fact that under the FIA, the SEC is given the ultimate authority to determine whether there has been compliance with the foreign equity requirement with respect to corporations,[34] while it is the DOE who retains the same power under the RE Law when the corporation is involved in the Renewable Energy Business.[35]

---

27. PHIL. CONST. art. XII, § 2, para. 1 (emphases supplied).
28. PHIL. CONST. art. XII, § 2, para. 1.
29. PHIL. CONST. art. XII, § 2, para. 1.
30. PHIL. CONST. art. XII, § 2, para. 1.
31. An Act to Promote Foreign Investments, Prescribe the Procedures for Registering Enterprises Doing Business in the Philippines, and for Other Purposes [Foreign Investments Act of 1991], Republic Act No. 7042 (1991).
32. Renewable Energy Act of 2008.
33. Foreign Investments Act of 1991, § 9 (a) & Rules and Regulations Implementing the Renewable Energy Act of 2008, rule 6, § 19 (B).
34. Foreign Investments Act of 1991, § 5.
35. Renewable Energy Act of 2008, § 5.

Furthermore, landmark cases, such as *Gamboa v. Teves*[36] and *Roy III v. Herbosa*,[37] provide illustrations of the nuances found in Section 11 of Article XII.[38]

In the case of *Gamboa*, the Court ultimately held that the term "capital" pertains to both the shares of stock entitled to vote[39] and the beneficial ownership of the corporation.[40]

*Roy III* hosted the controversy questioning the validity of SEC Memorandum Circular No. 8 series of 2013, which requires that 60% Filipino ownership shall be applied to both "the total number of shares entitled to vote in the election of directors," and "the total number of outstanding shares of stock[ ] whether or not entitled to vote" in the election of directors for being contrary to the resolution of the Court in the case of *Gamboa*.[41] The Court denied the petition and ruled that the SEC formulated the said Memorandum Circular to implement the Court's unambiguous pronouncement that full beneficial ownership of 60% of the outstanding capital stock coupled with 60% of the voting rights is required.[42]

---

36. Gamboa v. Teves, G.R. No. 176579, 652 SCRA 690 (2011).

37. Roy III v. Herbosa, G.R. No. 207246, 810 SCRA 1 (2016).

38. PHIL. CONST. art. XII, § 11.

> Sec. 11. No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least [60] per centum of whose capital is owned by such citizens, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than [50] years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its *capital*, and all the executive and managing officers of such corporation or association must be citizens of the Philippines.

PHIL. CONST. art. XII, § 11.

39. *Gamboa*, 652 SCRA at 723.

40. *Id.* at 737.

41. *Roy III*, 810 SCRA at 24.

42. *Id.* at 49.

Hence, the *Gamboa* and *Roy III* doctrines provide that to comply with the 60-40 requirement provided in the constitution, Filipino citizens must own at least 60% of the shares of stocks entitled to vote and the outstanding capital shares whether or not entitled to vote.[43]

*A. Applicability of Foreign Equity Restrictions in the Renewable Energy Sector*

1. Regulated Activities in the Energy Sector

After the restructuring of the electric power industry in 2001, the industry has been unbundled and classified into four different sectors.[44]

First, the generation sector, which is recognized as "a business affecting the public interest" and is mandated to be both "competitive and open."[45] A generation company is a "person or entity authorized by the ERC to operate facilities used in the generation of electricity."[46]

Second, the transmission of electric power sector, which is considered a "regulated common electricity carrier business,"[47] requiring a national franchise and "subject to the rate-making powers of the ERC."[48]

Third, the distribution of electricity to end-users sector, which is "a regulated common electricity carrier business requiring a national franchise."[49] Distribution of electric power to end-users "may be undertaken by private distribution utilities, cooperatives, local government units[,] ... and other duly authorized entities, subject to regulation by the ERC."[50]

Lastly, the supply sector, which is also regarded as "a business affecting public interest."[51] A supplier is "any person or entity authorized by the ERC to sell, broker, market[,] or aggregate electricity to end-users."[52] Moreover,

43. *Id.*

44. Electric Power Industry Reform Act of 2001, § 5.

45. *Id.* § 6.

46. *Id.* § 4 (x).

47. *Id.* § 7.

48. Rules and Regulations Implementing Electric Power Industry Reform Act of 2001, rule 6, § 1.

49. Electric Power Industry Reform Act of 2001, § 22.

50. *Id.*

51. *Id.* § 29.

52. *Id.* § 4 (xx).

"[e]xcept for distribution utilities and electric cooperatives with respect to their existing franchise areas, all suppliers of electricity to the contestable market require a license from the ERC."[53]

2. Ownership and Market Restrictions

The business of power generation by itself is not subject to foreign ownership limitations.[54] According to the EPIRA-IRR, the power generation sector is not considered a public utility operation and therefore not considered a nationalized activity.[55] The issue of foreign ownership only arises, as this Note also focuses on, when the power generation is involved in EDU activities[56] as provided in the RE Law.

Following the implementation of the RE Law was the increase of participants in the RE power sector in response to several incentives extended to RE developers, including the introduction of a feed-in-tariff-system.[57] In the RE Law and its IRR, corporations which are parties to the service contracts must have at least 60% of its equity owned by Filipinos.[58]

*B. Authority to Determine Foreign Equity Compliance in the RE Sector*

The Author is prompted to pursue the topic because of the refusal by the ERC to act on the application of Majestic Energy Corporation's COC to operate its solar rooftop project in Cavite.[59] According to the official press statement issued by the ERC, the application was rejected due to the dubious legitimacy of Filipino equity in Majestic Energy Corporation.[60]

The press statement implies that ERC exercises authority in determining the nationality of a renewable energy corporation and its compliance with the constitutional and statutory requirements on foreign equity

53. *Id.*

54. Foreign Investments Act of 1991, § 2, para. 2.

55. Rules and Regulations Implementing Electric Power Industry Reform Act of 2001, rule 5, § 1.

56. *See* Renewable Energy Act of 2008, § 2 (a) & (b).

57. Rules and Regulations Implementing Renewable Energy Act of 2008, rule 2, § 5.

58. *Id.* rule 6, § 19 (B).

59. Energy Regulatory Commission, *supra* note 12.

60. *Id.*

participation.[61] Moreover, the ERC recognizes the authority of other agencies in determining compliance in furtherance of an energy project, but chooses to exercise its authority nonetheless over the other agencies.[62]

Under the requirements provided in the ERC's Revised Rules for the issuance of COCs,[63] however, there is no mention of the foreign equity limitation for renewable energy corporations.[64] Aside from the documentary, financial, technical, and legal requirements, the Rules also require a COE from the DOE before a COC can be issued in favor of an RE generation company.[65]

It should be noted that prior to an application for a COC before the ERC, a corporation engaged in renewable energy will have to secure first a Service Contract from the DOE as mandated by the RE Law.[66] Furthermore, the DOE only issues the relevant contracts and certificates only after it has been satisfied that the applicant is in compliance with the constitutional and statutory requirements on foreign equity restrictions, among others.[67]

The overlapping of authorities in the energy sector becomes more complex as the IRR of the Foreign Investment Act[68] provides that the SEC

61. *See id.*

62. *Id.*

63. Energy Regulatory Commission, A Resolution Adopting the 2014 Revised Rules for the Issuance of Certificates of Compliance (COCs) for Generation Companies, Qualified End-Users and Entities with Self-Generation Facilities, Resolution No. 16, Series of 2014 [ERC Res. No. 16, s. 2014], art. III, § 1 (Sept. 15, 2014).

64. *See generally id.*

65. *Id.*

66. Rules and Regulations Implementing the Renewable Energy Act of 2008, rule 6, § 19 (C).

67. Department of Energy, Omnibus Guidelines Governing the Award and Administration of Renewable Energy Contracts and the Registration of Renewable Energy Developers, Department Circular No. 2019-10-0013 [DOE DC. No. 2019-10-0013] § 20.1 (Oct. 1, 2019).

68. National Economic and Development Authority, Rules and Regulations Implementing the Foreign Investment Act of 1991, Republic Act No. 7042 (1991) (as amended).

has the authority to monitor compliance with the equity requirements provided under the Act.[69]

There are presently three agencies exercising concurrent authority in determining the nationality and compliance with foreign equity restrictions of corporations engaged in the renewable energy sector. The Author, through this Note, addresses the apparent overlapping of powers and functions and introduces a resolution to the legal issue through an analysis of the legal bases these agencies invoke for their authority, and by proposing a delineation and coordination of issues through legislative amendment and memorandum of agreement.

## III. GUIDING LIGHT: AN OVERVIEW OF THE ELECTRIC POWER INDUSTRY IN THE PHILIPPINES

### *A. Pre-EPIRA: Historical Development of Laws Governing the Energy Industry*

#### 1. Electric Power Industry as a Public Utility

Prior to the enactment of EPIRA, the energy sector was heavily regulated because it is a public utility subject to foreign equity restrictions and the Congressional franchise requirement.[70] In the case of *JG Summit Holdings, Inc. v. Court of Appeals*,[71] the Court defined public utility as "a business or service engaged in regularly supplying the public with some commodity or service of public consequence such as electricity, gas, water, transportation, telephone[,] or telegraph service."[72] Furthermore, Act 3108 or the Public Service Act defines what constitutes "public service" or "public utility" and part of which is the services of electric light for public consumption.[73] Also, the law provides that prior to operation in the Philippines, a public utility operator is required to secure a Certificate of Public Convenience and

69. *Id.* rule 3, § 2.

70. *See* PHIL. CONST. art. XII § 2, para. 1.

71. JG Summit Holdings, Inc. v. Court of Appeals, G.R. No. 124293, 412 SCRA 10 (2003).

72. *Id.* at 20.

73. An Act to Recognize the Public Service Commission, Prescribe Its Powers and Duties, Define and Regulate Public Services, Provide and Fix the Rates and Quota of Expenses to be Paid by the Same for Other Purposes [Public Service Act], Commonwealth Act 3108, §14 (1923).

Necessity from the Public Service Commission to ensure that the operation will promote general public interests.[74]

The generation sector was then "dominated by the National Power Corporation (NPC)."[75] Prior to the 1990s, only the NPC was allowed to own all the generating plants,[76] while Independent Power Producers (IPPs) were restricted from directly connecting to electric distribution utility.[77] It is only when the Electric Power Crisis Act of 1993 and the Expanded Build-Operate-Transfer Financing Law of 1994 were enacted that IPPs were allowed to participate specifically on distribution utilities, thus bypassing the NPC grid.[78]

After almost a decade after the crisis, EPIRA was passed by Congress in order to address the issues on quality, reliability, security, and affordability of the electric industry.[79] Through EPIRA, the industry was able to undertake serious organizational, financial, institutional, and policy restructuring, and reforms, allowing for stricter accountability for generation, distribution, and transmission utilities.[80] The generation sector has since become open and more competitive while the majority of the transmission sector is still monopolized by the government, with distribution being dominated by private investor-owned utilities.[81]

### *B. Post-EPIRA: The Philippine Electric Power Industry*

#### 1. Deregulation of the Electric Industry

After the enactment of EPIRA, the operation and ownership of the electric power industry in the country were unbundled into four sectors allowing for both private and public sector participation.[82]

---

74. *Id.* § 15.

75. Epicetus E. Patalinghug, An Analysis of the Philippine Electric Power Industry, at 3, *available at* https://www.ombudsman.gov.ph/UNDP4/wp-content/uploads/2013/01/An-Analysis-of-the-Philippine-Electric_Patilinhug.pdf (last accessed Jan. 31, 2023) [https://perma.cc/K6QZ-PWJX].

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Patalinghug, *supra* note 75, at 3.

82. Electric Power Industry Reform Act of 2001, § 5.

Prior to EPIRA, the generation sector was monopolized by the NPC and was considered to be a public utility.[83] Due to its high cost maintenance and the Philippine power crisis experienced in the 1990s, NPC was forced to augment the energy generating capacity to IPPs through energy supply agreements.[84] When EPIRA was enacted, the generation sector was restructured to be more open and competitive.[85] Generation companies are required to secure permits from the ERC to operate its electric facilities.[86] It is not regulated and the parties to supply agreements are generally allowed to freely negotiate to a mutually acceptable tariff.[87]

The generation sector has transformed from a monopolized public utility to a privately-owned electric power sector without the need to comply with the foreign equity restriction and requirement of legislative franchise.[88] The issue of foreign ownership, however, arises when the power generation involves the EDU activities of natural resources such as renewable energy.[89]

The transmission sector, on the other hand, is a regulated common electricity carrier business which makes it a public utility subject to foreign ownership restrictions and legislative franchise.[90] At the same time, it is subject to the ratemaking powers of the ERC.[91] Under the EPIRA, while the generation assets have already been privatized, the transmission function of NPC will be retained under a new corporate structure called the National Transmission Corporation (TRANSCO).[92] TRANSCO assumes the functions of NPC such as planning, construction, and centralization of grid operation and maintenance of high-voltage transmission facilities.[93]

---

83. Patalinghug, *supra* note 75, at 3.

84. *Id.*

85. Electric Power Industry Reform Act of 2001, § 2 (c).

86. Rules and Regulations Implementing Electric Power Industry Reform Act of 2001, rule 5, § 1.

87. Monalisa C. Dimalanta, et al., 7 ENERGY REGULATION & MARKETS REV. 337 (2018) (on file with Author).

88. *Id.*

89. *Id.*

90. *Id.*

91. Electric Power Industry Reform Act of 2001, § 7.

92. *Id.* § 8.

93. *Id.*

The distribution of electricity to end-users is undertaken by private utilities, electric cooperatives, LGU-operated utilities, and other duly authorized entities.[94] Like the transmission sector, the distribution sector is also a regulated common electricity carrier business which is required to secure a national franchise.[95] The distribution sector is also subject to the regulation of the ERC.[96] The terms and conditions of services of the distribution utilities to its end-users cannot be unilaterally changed without the approval of the ERC.[97]

Lastly, the supply of electricity to end-users is a competitive and contestable activity.[98] The contestable market refers to electricity end-users with a monthly average peak demand of at least 750 kilowatts over the preceding 12 months.[99] Furthermore, being a business imbued with public interest, suppliers should seek an authorization from the ERC to sell, broker, market, or aggregate electricity to end users.[100] Except for distribution utilities and electric cooperatives, all suppliers of electricity to contestable market require license from ERC.[101]

### *C. Renewable Energy Sector in the Philippines and the Asia Pacific*

#### 1. The Philippine Renewable Energy Industry

A decade ago, the country's renewable energy contribution was considered as relatively advanced compared to the Philippines' neighboring countries.[102] The government saw the significant potential to further clean energy

94. Patalinghug, *supra* note 75, at 7.

95. Electric Power Industry Reform Act of 2001, § 22.

96. *Id.*

97. Patalinghug, *supra* note 75, at 7.

98. *Id.*

99. Electric Power Industry Reform Act of 2001, § 31.

100. *Id.* § 29.

101. *Id.*

102. Stephen Webb, Renewable Energy in the Asia Pacific Region (4th ed. 2017), at 98, *available at* https://s3.amazonaws.com/documents.lexology.com/1fd50341-49f2-45e0-aac9-23355550cd8b.pdf?AWSAccessKeyId=AKIAVYILUYJ754JTDY6T&Expires=1678725493&Signature=2r7BfiWoSo4AvBkoxxFttoMyBYU%3D (last accessed Jan. 31, 2023) [https://perma.cc/VXS3-SLX2].

development and maximize renewable resources.[103] To this end, the Philippine legislature passed the RE Law.[104]

The RE Law serves as the primary law that governs the renewable energy industry.[105] It seeks to accelerate the exploration and development of renewable energy sources while at the same time increase the utilization of renewable energy.[106] The resources under the law are enumerated in a non-exclusive manner.[107] These resources are as follows: biomass, solar, wind, hydropower, geothermal, ocean energy sources, and hybrid systems.[108] The DOE has been mandated to be the lead agency to implement the objectives of the law.[109] Furthermore, the law requires DOE to establish a renewable energy market which is operated under the Wholesale Electricity Spot Market created under the EPIRA.[110]

In May of 2013, the DOE issued guidelines on the selection and awarding of certificates for renewable energy projects.[111] With the guaranteed feed-in-tariff rates for 20 years, several RE projects have commenced commercial operation and in various stages of developments.[112]

In Philippine jurisdiction, the renewable energy industry is subject to foreign investment and ownership restrictions because the said sector involves EDU activities of natural resources which are within the ambit of Section 2 of Article XII of the 1987 Constitution.[113] The Constitutional provision mandates that the allowable foreign participation in corporations

103. *Id.*

104. *Id.*

105. *See generally* Renewable Energy Act of 2008.

106. Webb, *supra* note 102, at 100.

107. Renewable Energy Act of 2008, § 2 (a).

108. *Id.*

109. *Id.* § 5.

110. Renewable Energy Act of 2008, § 8.

111. Department of Energy, Guidelines for the Selection Process of Renewable Energy Projects Under Feed-In Tariff System and the Award of Certificate for Feed-in Tariff Eligibility, Department Circular No. 2013-5-0009, Series of 2013 [D.C. No. 2013-5-0009, s. 2013], (May 28, 2013).

112. Webb, *supra* note 102, at 98.

113. PHIL. CONST. art. XII, § 2 & Dimalanta, *supra* note 87.

engaged in the RE industry is 40% in equity.[114] It must be noted that this requirement has been considered as a major limiting factor for foreign investors in the renewable energy sector in the Philippines.[115] The Philippines remains as one of the few jurisdictions that has foreign restrictions in the RE industry.

2. The Renewable Energy Industry in the Asia Pacific

*a. Indonesia*

In Indonesia, the government enacted their Investment Law No. 25/2007 which requires foreign investors to obtain a foreign investment license from the Capital Investment Coordinating Board (BKPM).[116] Like the Philippines, Indonesia also releases a "Negative List" for foreign investment.[117] Based on Presidential Regulation No. 44/2016, the allowable foreign ownership in corporations engaged in the production, transmission, and distribution of electricity is 95%.[118]

*b. China*

According to the Catalogue for Guidance of Foreign Investment amended by the Chinese government in 2015, foreign investment in renewable energy must be made consistent with Chinese policy and will promote the development of China.[119] Foreign investment, however, is much stricter in the nuclear power generation and grid industry,[120] it was provided that the

114. PHIL. CONST. art. XII, § 2, para. 1.

115. Webb, *supra* note 102, at 100.

116. The Law Concerning Investment, Law of the Republic of Indonesia No. 25/2007, art. 25 (4) (2007) (Indon.).

117. Webb, *supra* note 102, at 45. *See, e.g.*, List of Business Fields That Are Closed and Business Fields That Are Open with Conditions in the Investment Sector, Presidential Regulation No. 44 of 2016 (2016) (Indon.).

118. List of Business Fields That Are Closed and Business Fields That Are Open with Conditions in the Investment Sector, nos. 146-48.

119. Catalogue for the Guidance of Foreign Investment Industries (Revised in 2015), Order of the National Development and Reform Commission and the Ministry of Commerce No. 22 (2015) (China).

120. *Id.* at 19.3-19.4.

government requires the need to create joint ventures with and controlled by Chinese companies.[121]

*c. Hong Kong*

Hong Kong is viewed to be very "attractive" for foreign investment in Asia.[122] Aside from low taxes, good business infrastructure, and proximity with mainland China, there is almost no foreign investment restriction in the energy sector.[123] Given the absence of investment restrictions, it can be said that 100% foreign equity ownership in Hong Kong energy sector is allowed.[124]

*d. Japan*

Though there are no specific restrictions for foreign corporations to enjoy the feed-in-tariff regime, the government requires foreign companies that seek to obtain a share of a non-listed company or a share of more than 10% of a listed company, to submit a report to the Minister of Finance and Minister of Economy, Trade, and Industry.[125]

*e. Malaysia*

Malaysia has been considered to have a "liberal foreign investment policy" across its industries.[126] A foreign company, however, to enjoy the feed-in tariff regime, must comply with the Malaysian feed-in tariff rule that only allows a maximum of 49% of foreign ownership.[127]

---

121. *Id.*

122. Webb, *supra* note 102, at 29.

123. *Id.*

124. *Id.*

125. *Id.* at 51.

126. *Id.* at 57.

127. Energy Commission, Guidelines on Large Scale Solar Photovoltaic Plant for Connection to Electricity Networks [Electricity Supply Act (Amendment) 2015 (Act A1501)], at 14, app. A, *available at* https://www.st.gov.my/contents/2019/LSS/Guideline%20on%20LSSPV%20for%20Connection%20to%20Electricity%20Networks_%20February%202019.PDF (last accessed Jan. 31, 2023) [https://perma.cc/DPQ5-2GLX].

*f. Korea*

South Korea's foreign investment landscape is principally governed by the Foreign Investment Act of 1998.[128] The said law grants foreign-owned companies the same rights enjoyed by domestic companies.[129] Foreign ownership in Korea has been considered to be common and the rules governing formation of companies allows for complete foreign ownership in companies engaged in the energy sector.[130]

Generation companies require massive funding either from local or foreign investors.[131] Foreign investors' participation, however, is limited whenever the power generation sector involves EDU activities of natural resources.[132] The country remains as part of the limited few that enforces foreign investment or ownership restriction in the energy industry specifically in the Asia-Pacific region.

## IV. INTER-PLAY: THE LEGAL BASES OF THE POWERS AND FUNCTIONS OF THE SECURITIES AND EXCHANGE COMMISSION, DEPARTMENT OF ENERGY, AND ENERGY REGULATORY COMMISSION

### *A. Securities and Exchange Commission*

#### 1. Overview

*a. History and Mandate of the SEC*

On 26 October 1936, Commonwealth Act No. 83, or the Securities Act, established the SEC.[133] During that time, the SEC's major functions were the registration and analysis of securities, evaluation of the financial condition of an applicant for security issue, screening of application for broker's or dealer's license, and supervision of stock and bond brokers as well as the stock

128. Foreign Investment Promotion Act, Act No. 5559 (1998) (S. Kor.).

129. *Id.* art. 3 (2).

130. Webb, *supra* note 102, at 106.

131. Brooke Tomasetti, Capital Intensity Ratio, *available at* https://www.carboncollective.co/sustainable-investing/capital-intensity-ratio (last accessed Jan. 31, 2023) [https://perma.cc/99S5-49WR].

132. PHIL. CONST. art. XII, § 2.

133. An Act to Regulate the Sale of Securities, to Create a Securities and Exchange Commission to Enforce the Provisions of the Same, and to Appropriate Funds Therefor [Securities Act], Commonwealth Act No. 83, § 3 (a) (1936).

exchanges.[134] The SEC was temporarily abolished during the Japanese occupation and was replaced by the Philippine Executive Commission.[135] In 1947, it was reactivated.[136] In 1976, former President Ferdinand Marcos reorganized the Commission and granted it quasi-judicial powers under P.D. 902-A.[137] Further reorganization was introduced in year 2000 by the Securities Regulation Code, which currently empowers the SEC as the overall overseer of the corporate sector in the country.[138]

The SEC has been considered as the national government agency charged with supervision over the following matters:

(a) Corporate sector, in general;

(b) Capital market participants;

(c) Securities and investment instruments market; and

(d) Investing public.[139]

As the SEC supervises the registration of corporate entities in the country, it is considered as the registrar and overseer of more than 500,000 active corporations.[140]

After Commonwealth Act No. 83, several laws were enacted to broaden the SEC's powers and functions, including the following:

134. *Id.* §§ 4, 11, & 14.

135. Securities and Exchange Commission, History, *available at* https://www.sec.gov.ph/about-us/history (last accessed Jan. 31, 2023) [https://perma.cc/D957-ZRWR].

136. *Id.*

137. Reorganization of the Securities and Exchange Commission with Additional Powers and Placing the Said Agency Under the Administrative Supervision of the Office of the President [SEC Reorganization Act], Presidential Decree No. 902-A, § 3 (1976) (as amended) & Securities and Exchange Commission, *supra* note 135.

138. Securities and Exchange Commission, *supra* note 135.

139. Securities and Exchange Commission, Mission, Mandate, Mission, Values, and Vision, *available at* https://www.sec.gov.ph/mandate-mission-values-and-vision (last accessed Jan. 31, 2023) [https://perma.cc/QL4P-27G7].

140. *Id.*

(a) *Presidential Decree 902-A as amended by Presidential Decrees 1653, 1758, and 1799* which gives the SEC the power to protect the public and their investments through the grant of quasi-judicial powers over intra-corporate disputes.[141] Furthermore, the SEC has been granted with absolute jurisdiction, supervision, and control over all corporations, partnerships, or associations that are grantees of primary franchise and/or license by the government to operate in the Philippines.[142]

(b) *Revised Corporation Code* which was recently enacted amending the almost four-decade-old Batas Pambansa Blg. 68 or the Corporation Code of the Philippines.[143] In this newly-enacted law, the SEC is mandated to promulgate rules to facilitate the documents required under the code.[144]

(c) *Securities Regulation Code* which intensifies the role of the SEC in capital market development and fostering good corporate governance.[145] It also transfer the jurisdiction of the SEC under Section 5 of PD 902-A to the courts of general jurisdiction or appropriate RTC.[146]

(d) *Foreign Investments Act of 1991* which mandates the SEC and Bureau of Trade Regulation and Consumer Protection (BTRCP) to ensure compliance with the equity requirements provided by the law.[147]

These laws will be discussed in detail in the succeeding paragraphs in order to have a deeper understanding of SEC's authority in determining the nationality of corporations and compliance with foreign equity restrictions.

---

141. SEC Reorganization Act, § 3 (as amended).

142. *Id.*

143. REV. CORP. CODE & The Corporation Code of the Philippines [CORP. CODE], Batas Pambansa Blg. 68 (1980) (as amended).

144. REV. CORP. CODE, § 179 (c).

145. The Securities Regulation Code [SEC. REG. CODE], Republic Act No. 8799 (2000).

146. *Id.* § 5.2.

147. Foreign Investments Act of 1991, § 5.

2. Laws Relating to the Supervisory and Regulatory Powers of the SEC

*a. SEC Reorganization Act (PD 902-A, as Amended)*

The Author submits that the first basis that SEC can invoke to show its authority to determine the nationality of corporations and compliance with foreign equity restriction is PD 902-A, as amended.

Under the law, the SEC can refuse or deny the registration of corporation, partnership, or association, or any form of organization if its establishment, organization, or operation is inconsistent with the declared economic policies of the state.[148] Section 6 (h) of the law provides —

> Sec. 6. In order to effectively exercise such jurisdiction, the Commission shall possess the following powers:
>
> ...
>
> (h) *To pass upon, refuse*[,] *or deny*, after consultation with the Board of Investments, Department of Industry, National Economic and Development Authority or any other appropriate government agency, *the application for registration of any corporation, partnership*[,] *or association*[,] *or any form of organization falling within its jurisdiction, if their establishment, organization or operation will not be consistent with the declared national economic policies.*[149]

Furthermore, Section 6 (i) of the same law provides for the instances wherein the SEC can revoke the certificates of registration of corporations, partnerships or organizations.[150] To wit —

> (i) *To suspend, or revoke, after proper notice and hearing, the franchise or certificate of registration of corporations, partnerships*[,] *or associations*, upon any of the grounds provided by law, including the following:
>
> (1) Fraud in procuring its certificate of registration;
>
> (2) *Serious misrepresentation as to what the corporation can do or is doing to the great prejudice of or damage to the general public*[ ][151]
>
> ...

148. SEC Reorganization Act, § 6 (h).

149. *Id.* (emphases supplied).

150. *Id.* § 6 (i).

151. *Id.* § 6 (j) (emphases supplied).

Lastly, as a catch-all provision, Section 6 (j) of the same law provides —

> (j) To exercise such other powers as implied, necessary or incidental to the carrying out the express powers granted to the Commission or to achieve the objectives and purposes of this Decree.[152]

In this case, the Author submits that the constitutional mandate of reserving the EDU activities involving natural resources under the effective control of Filipino citizens is an expressed national economic policy.[153] The SEC should, at all times, ensure that entities within its jurisdiction comply with the economic policies provided.[154] To faithfully perform its mandate, the SEC should be allowed to exercise its necessary powers to inquire and determine a corporation, partnership, association, or organization's compliance, which in this case is compliance with the foreign equity restriction provided by the Constitution. In case of non-compliance or commission of acts that would constitute damage to the general public, the SEC has the authority to suspend or revoke the franchise or certificate of registration of the said entities subject to due process requirement of notice and hearing.[155]

*b. Revised Corporation Code*

The second basis for the SEC to claim authority in determining the nationality of corporations is the Revised Corporation Code.

According to Section 179 paragraphs (a), (c), (f), and (p) of the said law, the following are the powers, functions, and jurisdiction of the SEC over the corporate sector which is relevant in the present subject matter —

> Sec.179. Powers, Functions, and Jurisdiction of the Commission. — The Commission shall have the power and authority to:
>
> (a) Exercise *supervision and jurisdiction over all corporations and persons acting on their behalf*, except as otherwise provided under this Code;
>
> ...

152. *Id.*

153. *See* Department of Energy, Philippine Energy Plan 2016-2030, at 6, *available at* https://www.doe.gov.ph/sites/default/files/pdf/pep/2016-2030_pep.pdf (last accessed Jan. 31, 2023) [https://perma.cc/N8QR-JGF6] & PHIL. CONST. art. XII, § 2.

154. SEC Reorganization Act, § 6 (j).

155. *Id.* § 6 (i).

> (c) *Impose sanctions for the violations of this code, its implementing rules*[,] *and orders of the Commission;*
>
> ...
>
> (f) *Issue cease and desist orders ex parte to prevent imminent fraud or injury to the public;*
>
> ...
>
> (p) *Exercise such other powers provided by law or those which may be necessary or incidental to carrying out the powers expressly granted to the Commission.*[156]

Furthermore, the Code also mandates corporations doing business in the Philippines to comply with the reportorial requirements. Section 177 of the Code is instructive in this matter. It provides —

> Sec. 177. Reportorial Requirements of Corporations. – Except as otherwise provided in this Code or in the rules issued by the Commission, *every corporation, domestic or foreign, doing business in the Philippines shall submit to the Commission:*
>
> ...
>
> (b) A general information sheet
>
> ...
>
> The *reportorial requirements shall be submitted annually and within such period as may be prescribed by the Commission.*
>
> The *Commission may place the corporation under delinquent status in case of failure to submit the reportorial requirements* three (3) times, consecutively or intermittently, within a period of five (5) years. The *Commission shall give reasonable notice to and coordinate with the appropriate regulatory agency prior to placing on delinquent status companies under their special regulatory jurisdiction.*[157]

In addition, as discussed in the previous chapters, the SEC issued Memorandum Circular No. 17, series of 2018, which requires all corporations to declare in its general information sheet the ultimate beneficial owner of its stocks.[158] This is to ensure transparency and accuracy of the

---

156. REV. CORP. CODE, §§ 179 (a), (c), (f), & (p) (emphases supplied).

157. *Id.* § 177 (emphases supplied).

158. Securities and Exchange Commission, Revision of the General Information Sheet to Include Beneficial Ownership Information, Memorandum Circular No. 17, Series of 2018 [SEC Memo. Circ. No. 17, s. 2018], § 3 (Nov. 27, 2018).

documents submitted to the Commission and to enforce its regulatory powers.[159]

Also, to ensure that the SEC can effectively exercise its supervisory powers and jurisdiction over the corporate sector, the Revised Corporation Code empowered the Commission to impose administrative sanctions such as imposition of fine, permanent cease-and-desist order, suspension or revocation, and dissolution of assets of corporations found to have violated the rules, regulations, or any of the Commission's orders.[160]

In this regard, the provisions of the Revised Corporation Code support the proposition that the SEC exercises the authority to determine the nationality of corporations by virtue of the supervisory and regulatory powers granted to it by law. Furthermore, through the reportorial requirements mandated by law, the Commission will be able to ensure compliance with the foreign equity restriction provided by the Constitution and other laws. Also, the Revised Corporation Code allows the Commission to take necessary measures to enforce its authority over the corporate sector.[161]

*c. The Securities Regulation Code and its IRR*

Third, under Section 5 of the Securities Regulation Code, the powers and functions of the Commission relevant to this study has been enumerated and these are as follows —

> Sec. 5. Powers and Functions of the Commission. — ...
>
> (a) Have *jurisdiction and supervision over all corporations*, partnerships or associations who are the grantees of primary franchises and/or a license or permit issued by the Government;
>
> ...
>
> (c) *Approve, reject, suspend, revoke*[,] *or require amendments to registration statements, and registration and licensing* application[.]s[162]

Furthermore, Rule 4, paragraph 1 (d) of SRC's implementing rules and regulations provide for the role of the Commission's Company Registration and Monitoring Department. The Rule provides —

---

159. *Id.*

160. REV. CORP. CODE, § 158.

161. *See id.* § 13 (j).

162. *Id.* § 5 (emphases supplied).

> SRC Rule 4, Securities and Exchange Commission —
>
> ...
>
> (d) [ ] *Company Registration and Monitoring Department is responsible for the registration of domestic corporations, partnerships*[,] *and associations*, including representative offices and foreign corporations intending to do business in the Philippines. It is *also responsible for the supervision and monitoring of such entities relative to their compliance with laws, rules*[,] *and regulations administered by the Commission*.[163]

Based from the foregoing provisions, the SRC maintains the same proposition that the Commission is duty bound by law to ensure compliance with the laws, rules, and regulations administered by it which in this case are the laws governing foreign equity restriction in the EDU activities involving natural resources. Furthermore, it is in harmony with the other laws recognizing the jurisdiction and supervisory powers of the Commission over the corporate sector. Without the necessary powers of suspension and revocation, then the SEC will be unable to fully exercise its authority over the corporate sector.

*d. Foreign Investments Act of 1991 and Its IRR*

Fourth, and most relevant of all the laws pertaining to nationality determination by the Commission, is the FIA and its corresponding IRR. Section 5 of FIA requires that investing non-Philippine nationals are required to register with the SEC in cases of corporation, partnership, or associations or with the BTRCP in cases of single proprietorships.[164] Furthermore, non-Philippine nationals are allowed to invest 100% of its capital in domestic enterprises, unless their participation is prohibited or limited by laws.[165] Relevant portions of Section 5 is reproduced to read —

> Sec. 5. Registration of Investments of Non-Philippine Nationals. — Without need of prior approval, *a non-Philippine national, as that term is defined in Section 3 (a), and not otherwise disqualified by law may, upon registration with the Securities and Exchange Commission (SEC), or with the Bureau of Trade Regulation and Consumer Protection (BTRCP) of the Department of Trade and Industry in the case of single proprietorships, do business as defined in Section 3 (d)*

163. Securities and Exchange Commission, Rules and Regulations Implementing Securities and Regulation Code, Republic Act No. 8799, rule 4 (1) (d) (2015) (emphases supplied).

164. Foreign Investments Act of 1991, § 5.

165. *Id.*

> *of this Act or invest in a domestic enterprise up to one hundred percent (100%) of its capital, unless participation of non-Philippine nationals in the enterprise is prohibited or limited to a smaller percentage by existing law and/or under the provisions of this Act.* The SEC or BTRCP, as the case may be, shall not impose any limitations on the extent of foreign ownership in an enterprise additional to those provided in this Act.[166]

One of those limitations is the Negative List subsequently issued by the President upon the recommendation of NEDA as provided in Section 8 of the law.[167] Section 8 of the FIA provides that Foreign Investment Negative Lists are composed of two component lists namely: Negative List A — which shall enumerate the areas of activities reserved to Philippine nationals by mandate of the Constitution and specific laws, and Negative List B — which contain the areas of activities and enterprises regulated pursuant to law.[168]

The Foreign Investment Negative List is regularly updated through an Executive Order issued by the President.[169] In October 2018, President Rodrigo Roa Duterte issued the 11th Foreign Investment Negative List.[170] According to the Executive Order, the Negative List is only applicable to investment areas and/or activities listed which shall be reserved for Philippine nationals, subject to the exceptions and conditions indicated.[171] Furthermore, the Executive Order provides that Negative List A can be updated any time to reflect changes instituted in specific laws, while Negative List B shall not be amended more often than once every two years.[172]

In the case of *Garcia v. Executive Secretary*,[173] the constitutionality of several provisions of the FIA was put into question, specifically Section 5 wherein the law allows non-Philippine nationals to invest in domestic enterprises without the need of securing a prior approval from the Board of

166. *Id.* (emphasis supplied).

167. *Id.* § 8.

168. *Id.*

169. *Id.*

170. Office of the President, Promulgating the Eleventh Regular Foreign Investment Negative List, Executive Order No. 65, Series of 2018 [E.O. No. 65 s. 2018] (Oct. 29, 2018).

171. *Id.* § 1.

172. *Id.* § 2.

173. Garcia v. Executive Secretary, G.R. No. 10127, 204 SCRA 516 (1991).

Investments and by only registering with the SEC or BTRCP.[174] The petitioner claims that because of this, the law gives undue advantage to foreign enterprises and neglected the domestic investments.[175]

The Court rejected the petition for being not ripe for judicial determination due to the absence of the IRR.[176] The Court considers the petition as purely conjectural and anticipatory and that it involves political question for it puts into issue the wisdom of the law.[177]

Meanwhile, Section 14 of the same law allows the Commission to impose administrative sanctions for any violation of the FIA and its implementing rules and regulations.[178]

Lastly, the implementing rules and regulations of the FIA mandates the Commission and BTRCP to monitor and ensure compliance with the equity requirements provided by the law. Rule III, Section 2 of the IRR is directive on this matter which states, "[Sec. 2. Monitoring of compliance with the equity requirements.] *The SEC or BTRCP, as applicable, shall monitor the compliance with the equity requirements of the Act*."[179]

Based from the foregoing, it necessarily follows that the Commission has the power to determine the nationality of corporations engaged in industries reserved by the Constitution and/or other laws by virtue of the authority granted to it in the registration of foreign investments and the monitoring of compliance with the equity requirements. As also opined by the Solicitor General in the case of *Garcia*, the registration with the SEC has been viewed as the regulation and exercise of authority of the government over foreign investments and that the laws providing for the SEC's licensing requirements should be duly complied first before it be allowed to do business in the country.[180]

---

174. *Id.* at 518.

175. *Id.*

176. *Id.* at 522.

177. *Id.*

178. Foreign Investments Act of 1991, § 5.

179. Rules and Regulations Implementing the Foreign Investments Act of 1991, rule III, § 2 (1991) (emphasis supplied).

180. *Garcia*, 204 SCRA at 520.

*e. Legal Doctrine: Gamboa, Roy III, and the Powers Granted by Law to the SEC*

Apart from resolving the controversy regarding the proper interpretation of "capital" in Section 11, Article XII of the 1987 Constitution, the Court in *Heirs of Gamboa v. Teves*[181] was also confronted with the issue on whether PLDT is an indispensable party and whether the SEC has been impleaded in the case.[182] In resolving the matter that the SEC has been properly impleaded by virtue of the prayer for mandamus by the petitioner, the Court also explicitly ruled that the dispositive portion of the case is addressed to the SEC which is the administrative agency tasked to enforce the 60% to 40% ownership requirement in favor of Filipino citizens in Section 11 of Article XII of the Constitution.[183] Subsequently, the SEC issued Memorandum Circular No. 8, series of 2013.[184] The Circular provides for the guidelines to determine compliance with the required percentage of Filipino-foreign ownership in corporations engaged in nationalized and partly-nationalized activities.[185] According to the Circular, the required Filipino ownership must be applied in both "total number of outstanding shares of stock entitled to vote in the election of directors" and "total number of outstanding shares of stock, whether or not entitled to vote in the election of directors."[186] Furthermore, the Commission ordered the corporate secretaries to ensure compliance with the FIA, its IRR, and other laws and circulars pertaining to the same subject matter.[187]

The guidelines provided in SEC Memorandum Circular No. 8, series of 2013 were initially questioned before the court in the case of *Roy III v. Herbosa.* The petitioners claim that the SEC gravely abused its discretion when it required that the test of Filipino ownership should be applied to

181. Heirs of Gamboa v. Teves, G.R. No. 176579, 682 SCRA 397 (2012).

182. *Id.* at 459.

183. *Id.* at 464.

184. Securities and Exchange Commission, 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, Memorandum Circular No. 8, Series of 2013 [SEC Memo. Circ. No. 8, s. 2013] (May 20, 2013).

185. *Id.* § 1.

186. *Id.* § 2.

187. *Id.* § 3.

both voting and non-voting shares.[188] Furthermore, the petitioners argue that based on the dispositive portion of the decision in *Gamboa*, the Circular is in direct contravention of the Court's ruling.[189] However, the Court disagreed with the petitioners and upheld the validity of the said Circular. The Court emphasized that there is nothing in the Circular that modified the *Gamboa* decision.[190] Though there appears to be an apparent conflict with the decretal portion and the *fallo* of *Gamboa* which the petitioners argue, the Court emphasized that the SEC Circular is in harmony with the ruling that Filipino-foreign ownership requirement must be applied to each class of shares, regardless of differences in voting rights, privileges, and restrictions.[191]

With that said, the Court has already recognized the role of the Commission in determining the nationality of a corporation and ensuring compliance with the foreign equity restrictions in favor of the Filipino citizens.[192] Though in *Heirs of Gamboa*, the Constitutional provision which is in issue is on the operation of public utilities, the Author submits that it can also serve as a directive and it necessarily follows that it can also be applied with the foreign equity restrictions in the EDU activities involving natural resources.[193] The case of *Roy III v. Herbosa*, on the other hand, all but confirms the authority of the SEC in determining whether a corporation complies with the constitutionally mandated Foreign Equity Restrictions.[194] Hence, it is the SEC, which should also be considered as the administrative agency in-charge of enforcing the mandate of Section 2 of Article XII of the Constitution.

188. *Roy III*, 810 SCRA at 24.

189. *Id.* at 26-27.

190. *Id.* at 47.

191. *Id.* at 49.

192. *See* Narra Nickel Mining and Development Corp. v. Redmont Consolidated Mines Corp, G.R. No. 195580, 748 SCRA 455, 464 (2015) (where the Court applied the FIA, Philippine Mining Act of 1995, and the Rules promulgated by the SEC in applying the "Control Test" in verifying the nationality of corporate entities).

193. *See Heirs of Gamboa*, 682 SCRA at 459.

194. *See Roy III*, 810 SCRA at 41.

*f. SEC Reportorial Requirements and Guidelines*

Aside from laws and jurisprudence, several sector-specific regulators also provide for issuances to address the mandate on foreign equity restrictions. In Philippine jurisdiction, the SEC has several issuances that deal with the subject matter.

First of which is the memorandum circular on the disclosure of beneficial owners in its general information sheet. According to SEC Memorandum Circular No. 17, Series of 2018, all registered domestic corporations are now required to disclose the beneficial owners of the shares of stocks of SEC registered domestic corporations in their general information sheet.[195] Beneficial owner has been defined as "any natural person who: [u]ltimately owns or controls the corporation; or [h]as ultimate effective control over the corporation."[196] Furthermore, ultimate effective control has been referred to as "any situation [wherein] ownership [or] control is exercised through actual or a chain of ownership [ ] other than direct control."[197] The memorandum circular provides for an open list of instances wherein ultimate effective control is given to another person.[198] Though the memorandum circular is primarily geared towards assisting the implementation of the Anti-Money Laundering Act, it can also be effectively used to ensure the adequacy and accuracy of the current information on the beneficial ownership and control of the registered corporations.[199]

Second, SEC Memorandum Circular No. 10, Series of 2016 provides for the guidelines on the issuance of certification on the nationality of non-stock corporations.[200] In this memorandum circular, the SEC used the definition of "Philippine national" under the FIA to enumerate the requirements to be complied with by a non-stock corporation.[201] It is worth noting that the SEC only issues certification on the nationality of non-stock corporations

195. SEC Memo. Circ. 17, s. 2018, § 3.

196. *Id.* § 2 (2.1).

197. *Id.* § 2 (2.2).

198. *Id.* §§ 2 (2.2) (a)-(c).

199. *See id.*

200. Securities and Exchange Commission, Guidelines on the Issuance of Certification on the Nationality of Non-Stock Corporations, SEC Memorandum Circular No. 10, Series of 2016 [SEC Memo. Circ. 10, s. 2016] (July 28, 2016).

201. *Id.*

with the exclusion of stock corporations upon request to the commission by the registered non-stock corporation.[202]

Third, though the Court in *Gamboa*, citing the SRC, specified that the opinions of SEC legal officers do not have the force and effect of SEC rules,[203] the Author deems it best to also discuss the SEC-OGC Opinion No. 18-24 issued to Romulo Mabanta Law Offices for it summarizes the relevant discussions on the previous paragraphs on the tests in determining nationality of corporations.[204] In the said opinion, the SEC made a clarification as regards the existing tests on the determination of a "Philippine national."[205] The SEC Opinion reiterated that the term "capital" should be construed in light of the rulings both in *Gamboa v. Teves* and *Roy III v. Herbosa*.[206] In light of the two aforementioned cases, 60% of capital must be with the voting stocks and the outstanding shares whether voting or not.[207] Furthermore, the two-tiered test and the grandfather rule should only be used when Filipino-foreign ownership is dubious such as when the investing corporation has less than 60% Filipino stockholdings and that the investee corporation has a 60% to 40% Filipino ownership ratio or less than 60% Filipino shareholdings.[208]

Hence, based from the plethora of legal bases, the SEC is empowered by law to determine the nationality of corporations and ensure compliance with foreign equity restrictions in general.

---

202. *Id.*

203. *Heirs of Gamboa*, 682 SCRA at 419.

204. Securities and Exchange Commission-Office of the General Counsel, Opinion Issued to Romulo Mabanta Buenaventura Sayoc & De los Angeles, SEC-OGC Opinion No. 18-24 (Dec. 20, 2018).

205. *Id.* at 4-7.

206. *Id.* at 5-6.

207. SEC-OGC Opinion No. 18-24, at 6 (citing Securities and Exchange Commission, 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, Memorandum Circular No. 8, Series of 2013 [SEC Memo. Circ. No. 8, s. 2013], § 2 (May 22, 2013)).

208. SEC-OGC Opinion No. 18-24, at 7 (citing Narra Nickel Mining and Development Corporation, v. Redmont Consolidated Mines Corporation, 748 SCRA 455, 465 (2015)).

*B. Department of Energy*

1. Overview

*a. History and Mandate of the DOE*

On 6 October 1977, then President Ferdinand Marcos issued Presidential Decree No. 1206 creating the Department of Energy (DOE).[209] The DOE then assumed the powers conferred to the Philippine Atomic Energy Commission (PAEC) from the Office of the President.[210] Furthermore, the National Electrification Administration (NEA) was also attached to the MOE in 1978.[211] Aside from the NEA, the NPC was also attached to the Ministry for purposes of policy coordination and integration of several sectoral programs.[212]

When former President Corazon Aquino assumed office, however, the ministry was abolished.[213] It was only when President Fidel V. Ramos succeeded the presidency when the DOE was established through Republic Act No. 7638 or also known as the Department of Energy Act of 1992.[214] Aside from its charter, several laws expanded the powers of DOE namely,

209. Creating the Department of Energy, Presidential Decree No. 1206, § 2 (1977). *But see* Department of Energy, History, *available at* https://www.doe.gov.ph/who-we-are?withshield=1#main-content (last accessed Jan. 31, 2023) [https://perma.cc/7LSU-YXG9] (where the Department of Energy was referred to as the Ministry of Energy).

210. Presidential Decree No. 1206, § 8.

211. *Id.* § 10.

212. *Id.*

213. Reorganizing the Ministry of Natural Resources and Renaming it as the Department of Environment, Energy and Natural Resources Abolishing the Ministry of Energy Integrating All Offices and Agencies Whose Functions Relate to Energy and Natural Resources Into the Ministry Defining Its Powers and Functions and for Other Purposes [Reorganization Act of the Ministry of Environment, Energy and Natural Resources], Executive Order No. 131, § 2 (1987).

214. An Act Creating the Department of Energy, Rationalizing the Organization and Functions of Government Agencies Related to Energy, and for Other Purposes [Department of Energy Act of 1992], Republic Act No. 7638, § 4 (1992).

the Electric Power Industry Reform Act of 2001 or EPIRA, the Biofuels Act of 2006, and the Renewable Energy Act of 2008.[215]

2. Laws Relating to the Supervisory and Regulatory Powers of DOE Over Energy Projects

*a. Department of Energy Act of 1992 and the Electric Power Industry Reform Act of 2001*

The DOE has been re-established during the time of former President Ramos by virtue of R.A. No. 7638 or also known as the Department of Energy Act of 1992. Section 2 of the DOE charter laid down the State's policy that the DOE must carry out. It provides —

> Sec. 2. Declaration of Policy. — It is hereby declared the policy of the State: (a) to *ensure a continuous, adequate, and economic supply of energy with* the end in view of ultimately achieving self-reliance in the country's energy requirements through the integrated and intensive exploration, production, management, and development of the country's indigenous energy resources, and through the judicious conservation, renewal, and efficient utilization of energy to keep pace with the country's growth and economic development and *taking into consideration the active participation of the private sector in the various areas on energy resource development*; and (b) to *rationalize, integrate, and coordinate the various programs of the Government* towards self-sufficiency and enhanced productivity in power energy without sacrificing ecological concerns.[216]

Furthermore, the DOE has been charged to *prepare*, *integrate*, *coordinate*, *supervise*, and *control* all plans, programs, projects, and activities of the government relative to energy exploration, development, utilization, distribution, and conservation.[217]

Also, Section 5 of the said law enumerated the powers and functions that the Department exercises.[218] It has been amended and its powers have been expanded by Section 37 of the EPIRA which mandates the DOE to supervise the restructuring of the electricity industry.[219] Hence, based on the

---

215. Department of Energy, *supra* note 209.

216. Department of Energy Act of 1992, § 2 (emphases supplied).

217. *Id.* § 4.

218. *Id.* § 5.

219. Electric Power Industry Reform Act of 2001, § 37.

amendatory act, the following are the Department's enumerated powers that the Author deems relevant to this Note —

> Sec. 37. Powers and Functions of the DOE. —
>
> ...
>
> (g) *Establish and administer programs* for the exploration, transportation, marketing, distribution, utilization, conservation, stockpiling, and storage of energy resources of all forms, whether conventional or nonconventional;
>
> (h) *Exercise supervision and control over all government activities relative to energy projects* in order to attain the goals embodied in Section 2 of RA 7638;
>
> (i) *Monitor private sector activities relative to energy projects* in order to attain the goals of the restructuring, privatization, and modernization of the electric power sector as provided for under existing laws. Provided, That the *Department shall endeavor to provide for an environment conducive to free and active private sector participation and investment in all energy activities*;
>
> ...
>
> (q) *Exercise such other powers as may be necessary or incidental to attain the objectives of this Act*.[220]

Based from the foregoing provisions of the DOE charter, as amended by EPIRA, the DOE is given a broad mandate with regard to the supervision and control over all energy projects and to ensure that the policies laid down by its charter, and other relevant laws are complied with.[221] It can be argued that from these legal bases, the authority of the DOE to determine nationality of corporations that will engage in energy projects is also present. Furthermore, aside from the power of supervision and control, the DOE is also given the authority to monitor private sector participation when it comes to energy projects.[222] It can be said that the DOE is empowered to oversee the entry of foreign participants and investments in the energy sector. This function would also allow the Department to ensure compliance with foreign equity restrictions provided by other laws that affects the energy sector.

---

220. *Id.* § 37 (g)-(i) & (q) (emphases supplied).

221. *Id.* § 37 (h).

222. *Id.* § 37 (i).

*b. Renewable Energy Act of 2008, Its IRR, and Other Related Issuances*

The RE Law enforces the policy of the State in accelerating the exploration and development of natural resources.[223] At the same time, the law is also geared towards increasing the utilization of renewable energy by institutionalizing the development of national and local capabilities in the use of renewable energy systems.[224] Its IRR provides for the requirements in order for a participant to validly secure a renewable energy service or operating contract. According to the IRR, the State owns all forces of potential energy and to be a party to a service or operating contract, a corporation or association who is interested must be at least 60% of whose capital is owned by Filipinos.[225] Also, it reiterated that the capital requirement is in lieu of the mandate provided by Section 2 of Article XII of the Constitution which states that the EDU activities of natural resources shall be under the full control and supervision of the State.[226]

In the case of *IDEALS, Inc. v. PSALM*,[227] the Court allowed a Korean corporation to utilize the water for hydroelectric power purposes so long as the water rights over the water resources where the dam waters are extracted remains with a Filipino corporation, which is the NPC.[228] In denying the petition, the Court reiterated the opinion of then DOJ Secretary Gonzalez that utilization by foreign nationals or in case of corporations, whose foreign equity is more than 40%, can only be allowed once the natural resources have been validly extracted from the source by qualified persons or entities.[229] The rationale is that after extraction, it no longer forms part of the natural resources of the country, and they now become subject of ordinary commerce.[230] Hence, once the resources are still in its pre-extracted or raw state, the foreign equity restriction still applies.[231]

---

223. Renewable Energy Act of 2008, § 2 (a).

224. *Id.* § 2 (b).

225. Rules and Regulations Implementing Renewable Energy Act of 2008, § 19 (b).

226. *Id.*

227. IDEALS, Inc. v. PSALM, G.R. No. 192088, 682 SCRA 602 (2012).

228. *Id.* at 670.

229. *Id.* at 661.

230. *Id.*

231. *Id.*

Section 4 (e) of RE Law defined DOE as provided —

> (e) Department of Energy (DOE) refers to the government agency created pursuant to Republic Act No. 7638 whose functions are expanded in Republic Act No. 9136 and *further expanded in this act*[.][232]

Furthermore, Section 5 of the same law mandated the DOE to serve as the lead agency to implement the provisions of the act.[233] Also, the law created the Renewable Energy Management Bureau (REMB), which will be under the DOE for purposes of implementing the provisions of the RE law.[234]

According to Section 32 of the RE law, the following are the powers and functions of the REMB —

> Sec. 32. Creation of the Renewable Energy Management Bureau —
>
> ...
>
> (e) Supervise and monitor activities of government and private companies and entities on renewable energy resources development and utilization to ensure compliance with existing rules, regulations, guidelines[,] and standards;
>
> ...
>
> (g) *Perform other functions that may be necessary for the effective implementation of this Act* and the accelerated development and utilization of the renewable energy resources in the country.[235]

In addition, Section 36 of the same law empowered the DOE to impose administrative fines and penalties for any violation of the act, its IRR, and other issuances relative to the act.[236]

Meanwhile, the IRR provides under Rule 6, Section 19 (B) that parties to a service/operating contract must be compliant with Section 2 of Article XII of the Constitution specifically on the required capital owned by Filipinos in cases of corporations, organizations, or associations.[237] In

---

232. Renewable Energy Act of 2008, § 4 (e) (emphasis supplied).

233. *Id.* § 5.

234. *Id.* § 32 (e) & (g).

235. *Id.* (emphasis supplied).

236. *Id.* § 36.

237. Rules and Regulations Implementing Renewable Energy Act of 2008, rule 6, § 19 (B).

connection to the equity requirement, the Department was tasked to formulate and promulgate the regulatory framework containing the guidelines governing a transparent and competitive system of awarding RE Service/Operating Contracts.[238]

In compliance with its mandate, the DOE recently issued Department Order (D.O.) No. 2017-04-0005 which prescribes the new guidelines in the processing of applications for Renewable Energy Service/Operating Contracts.[239] In the D.O., the Renewable Energy–Review and Evaluation Committee is the one tasked to look into the service/operating contracts application and make proper recommendation to the DOE Secretary for approval.[240]

Aside from D.O. 2017-04-0005, DOE Circular No. 2009-07-11 provides for the guidelines on the award of RE Service/Operating Contracts specifically covering both the pre-development and development stages either for power or non-power applications.[241] Furthermore, it also includes transition of the existing service contracts and agreements on the EDU activities of RE sources with the DOE to RE contracts.[242] Also, the said Department Circular has provided for the following rules as to who may apply for an RE Contract.[243] The Department Circular distinguished geothermal resources and allowed in this case both Filipino or foreign corporation to engage in the EDU activities of natural resources.[244] Furthermore, when geothermal resources are subject to large-scale EDU activities, the Department Circular provides that it should be consistent with

238. *Id.* rule 6, § 19 (B).

239. Department of Energy, Prescribing the New Guidelines in the Processing of Applications for Renewable Energy Service/Operating Contracts, Department Order No. 2017-04-0005, Series of 2017 [D.O. No. 2017-04-0005, s. 2017] (Apr. 7, 2017).

240. *Id.* § 6.

241. Department of Energy, Guidelines Governing a Transparent and Competitive System of Awarding Renewable Energy Service/Operating Contracts and Providing for the Registration Process of Renewable Energy Developers, DOE Circular No. 2009-07-11, Series of 2009 [DOE Circ. No. 2009-07-11, s. 2009] (July 12, 2009).

242. *Id.* § 2.

243. *Id.* § 6 (a).

244. *Id.* § 6 (a) (ii).

the Constitution as regards FTAAs.[245] As to the rest, the Department only requires that in cases of a corporate participant, it must be a Filipino corporation at least 60% of its capitalization are owned by Filipinos.[246]

It is clear from the provisions cited under the RE law, its IRR, and relevant issuances that the DOE plays a vital role in the implementation of the mandate governing the renewable energy industry. The DOE's power has been clearly expanded by the RE law by making it as the lead implementing agency entitling it to supervision, monitoring, and control of the renewable energy industry. It required the DOE to create committees, coordinate with other bureaus and agencies to achieve the policies of the law. Furthermore, the role of the DOE in determining the nationality of a corporation and ensuring compliance with the Constitutional mandate on foreign equity restriction has been concretize by the Department's participation in the issuance of service/operating contracts for RE participants in general and for the release of Certificate of Endorsement for RE participants that would like to enjoy the fiscal incentives provided by the law.

### *C. Energy Regulatory Commission*

#### 1. Overview

##### *a. History and Mandate*

On 7 November 1936, Commonwealth Act No. 146, also known as the Public Service Law, was enacted and led to the creation of the Public Service Commission.[247] The Commission was empowered by law to take jurisdiction, supervise, and control public services.[248] During that time, the energy industry particularly the electric power service is considered a public utility subject to the Commission's regulatory powers.[249]

---

245. *Id.* § 6 (a) (iii).

246. *Id.* § 6 (a) (i).

247. The Public Service Law [Public Service Act], Commonwealth Act No. 146, § 2 (1936) (as amended) & Energy Regulatory Commission, History, *available at* https://www.erc.gov.ph/ContentPage/13 (last accessed Jan. 31, 2023) [https://perma.cc/8XP4-AEC7].

248. Public Service Act, § 13 (a).

249. Energy Regulatory Commission, *supra* note 247.

After almost four decades, several laws were passed specifically addressing the regulatory issues concerning the electric power industry.[250]

On 24 September 1972, former President Ferdinand E. Marcos issued Presidential Decree No. 1 ordering the preparation of an organization plan.[251] The plan abolished the Public Service Commission and transferred the regulatory and adjudicatory functions pertaining to the electricity industry and water resources to the then Board of Power and Waterworks.[252] After more than a decade, former President Corazon Aquino issued Executive Order No. 172 wherein the Energy Regulatory Board was reconstituted.[253] In the Executive Order, it provides that the ERB is created in order to be a single agency that exercises both regulatory powers over rates and services of the electric utilities and at the same time adjudicatory functions pertaining to the energy sector in general.[254] However, in light of the aim of further restructuring and privatization of the electric power industry in the country, Congress enacted EPIRA abolishing the ERB and creating the ERC.[255]

2. Laws Empowering the ERC Over Energy Projects and Energy Sector Participants

*a. Jurisprudence on the Powers of the ERC*

As discussed in the preceding paragraph, the ERC has been created by the EPIRA as an independent quasi-judicial regulatory body.[256] Furthermore,

250. *Id.*

251. Reorganizing the Executive Branch of the National Government, Presidential Decree No. 1, para. 4 (1972).

252. Policy Brief *by* Senate Economic Planning Office, Senate of the Philippines (Dec 2021), at 2 (on file with the Senate of the Philippines) (with reference No. PB-21-03) & Energy Regulatory Commission, *supra* note 247.

253. Creating the Energy Regulatory Board, Executive Order No. 172, Series of 1987 [E.O. No. 172, s. 1987], § 1 (May 8, 1987).

254. *Id.* § 3.

255. Electric Power Industry Reform Act of 2001, § 38.

256. *Id.*

Section 43[257] of the said law and Rule 3, Section 4 of its IRR[258] enumerate the powers and functions to be exercised by the Commission.

In the case of *Freedom from Debt Coalition v. Energy Regulatory Commission*,[259] the Court ruled that the power of the ERC is not limited by those enumerated under Section 43 of the EPIRA and its IRR. Instead, Sections 44 and 80 of the same law are instructive as regards the applicability of other laws in vesting the ERC the authority to fulfill its mandate as the independent agency in-charge of regulating the energy sector.[260]

Sections 44 and 80 of the EPIRA respectively provide —

> Sec. 44. Transfer of Powers and Functions. — *The powers and functions of the Energy Regulatory Board not inconsistent with the provisions of this Act are hereby transferred to the ERC.* The foregoing transfer of powers and functions shall include all applicable funds and appropriations, records, equipment, property[,] and personnel as may be necessary.[261]
>
> Sec. 80. Applicability and Repealing Clause. — The applicability provisions of *Commonwealth Act No. 146*, as amended, otherwise known as the "Public Services Act;" *Republic Act 6395*, as amended, revising the charter of NPC; *Presidential Decree 269*, as amended, referred to as the National Electrification Decree; Republic Act 7638, otherwise known as the "*Department of Energy Act of 1992*;" *Executive Order 172,* as amended, creating the ERB; *Republic Act No. 7832*[,] otherwise known as the "Anti-Electricity and Electric Transmission Lines/Materials Pilferage Act of 1994;" *shall continue to have full force and effect except insofar as they are inconsistent with this Act.*[262]

In the abovementioned case, the Court upheld the authority of the ERC to approve provisional rate increases citing the Public Service Commission and the ERB Charter which were not in conflict with the EPIRA.[263] The legislature included Section 80 of the EPIRA in order to avoid the superfluity

257. *Id.* § 43.

258. Rules and Regulations Implementing the Electric Power Industry Reform Act of 2001, rule 3, § 4.

259. Freedom from Debt Coalition v. Energy Regulatory Commission, G.R. No. 161113, 432 SCRA 157 (2004).

260. *Freedom from Debt Coalition*, 432 SCRA at 174.

261. Electric Power Industry Reform Act of 2001, § 44 (emphasis supplied).

262. *Id.* § 80 (emphases supplied).

263. *Freedom from Debt Coalition*, 432 SCRA at 174.

of the ERC's powers by enumerating once again the powers and functions already provided in other laws.[264] Furthermore, the Court is of the opinion that the EPIRA only expanded the powers and functions of the ERC which were already existing from the previous laws empowering its predecessors.[265]

Hence, whenever the authority of the ERC is put into question, there is a vital need to consult not only what was provided by EPIRA, but also other laws enacted empowering its predecessors. Furthermore, it is imperative to analyze whether these powers and functions from earlier laws are in harmony with the EPIRA and its over-all mandate as provided by law.

*b. EPIRA and Its IRR*

The Author submits that Section 43 (r) in relation to Section 6 of the EPIRA is the ERC's basis for refusing to grant the COC to a corporation engaged in renewable energy generation sector when it found that there exists doubt as to the corporation's existing Filipino equity. The law provides —

> Sec. 43. Functions of the ERC.
>
> ...
>
> (r) In the exercise of its *investigative and quasi-judicial powers, act against any participant or player in the energy sector for violations of any law, rule*[,] *and regulation governing the same*, including the rules on cross-ownership, anti-competitive practices, abuse of market positions and similar or related acts by any participant in the energy sector or by any person, as may be provided by law, and require any person or entity to submit any report or data relative to any investigation or hearing conducted pursuant to this Act.[266]

Moreover, Section 6 provides —

> Sec. 6. Generation Sector. — Generation of electric power, a business affected with public interest, shall be competitive and open.
>
> Upon the effectivity of this Act, *any new generation company shall, before it operates, secure from the Energy Regulatory Commission (ERC) a certificate of compliance pursuant to the standards set forth in this Act, as well as health, safety*[,]

264. *Id.* at 176.

265. *Id.* at 182.

266. Electric Power Industry Reform Act of 2001, § 43 (r) (emphasis supplied).

> *and environmental clearances from the appropriate government agencies under existing laws.*[267]

Based from the wording of Section 43 (r), the ERC is allowed to exercise its quasi-judicial powers in determining violations of any, law, rule, and regulation it administers, such as the EPIRA.[268] Under the EPIRA, generation companies are required to secure a COC from the ERC before it can operate its facilities.[269]

Rule 5 of the EPIRA's IRR provides for standards in the issuance of the COC. According to Section 1,

> [no] Person may engage in the Generation of Electricity as a new Generation Company unless such Person has received a COC from the ERC to operate facilities used in the Generation of Electricity. *A Person that demonstrates compliance with the standards and requirements of this Rule 5, and such other terms and conditions as determined by the ERC to be appropriate to ensure that Persons comply with all applicable legal and regulatory requirements, shall be issued a COC.*[270]

The sentence focusing on the "terms and conditions as determined by the ERC" should be interpreted as pertaining to the ERC Resolution providing for the Revised Rules of Issuance of Certificates of Compliance. In 2014, the ERC through Resolution No. 16 adopted the Revised Rules for the Issuance of Certificates of Compliance for Generation Companies, Qualified End-Users, and Entities with Self-Generation Facilities.[271] In the Resolution, there is nothing that indicates that the ERC requires RE generation applicants to show compliance with foreign-equity restrictions.[272] Furthermore, for COC, the ERC only requires the company to submit a COE from the DOE.[273]

Article II, Section 2 (viii) of the Resolution provides —

> viii. *A Generation Company operating an RE Plant eligible to avail of the FIT System* shall indicate in its COC application its intention to operate under

---

267. *Id.* § 6 (emphasis supplied).

268. *Id.* § 43.

269. *Id.* § 6.

270. Rules and Regulations Implementing the Electric Power Industry Reform Act of 2001, rule 5, § 1 (emphasis supplied).

271. ERC Res. No. 16, s. 2014.

272. *See generally id.*

273. *Id.* art. III, § 1.

> the FIT System. The said *Generation Company shall be allowed to operate and be entitled to payment of FIT only upon the issuance of a COC explicitly indicating FIT Eligibility of the said RE Plant. No COC which grants FIT Eligibility (FIT-Eligible COC) shall be issued in favor of a Generation Company operating an RE plant unless it has been issued the appropriate Certificate of Endorsement (COE) for FIT Eligibility by the Department of Energy (DOE).*[274]

The ERC's regulatory and quasi-judicial powers in determining compliance with foreign equity restrictions should only be limited to the prevailing laws, rules, and regulations it administers. Neither the EPIRA, its IRR, nor the 2014 Resolution require or provide the authority to determine compliance with nationality requirements. Instead, the ERC is only tasked to rely on the COE provided by the DOE for purposes of granting a COC.[275] Hence, the ERC committed grave abuse when it exercised its quasi-judicial powers for purposes of issuing COC and based its refusal to act on the matter on a ground which is not provided by the law, rules, and regulations it administers.

Aside from the non-application of the previous provisions, Section 43 (u) cannot also be used as a legal basis by the ERC despite its broad wording. Section 43 (u) provides for the catch-all provision of the law. It states —

> (u) The ERC shall have the original and exclusive jurisdiction over all cases contesting rates, fees, fines[,] and penalties imposed by the ERC in the exercise of the above-mentioned powers, functions[,] and responsibilities *and over all cases involving disputes between and among participants or players in the energy sector.*[276]

In relation to this, Rule 3 Section 4 (n) qualifies the abovementioned provision.

> (n) The ERC shall have the original and exclusive jurisdiction over all cases contesting rates, fees, fines[,] and penalties imposed in the exercise of its powers, functions and responsibilities and *over all cases involving disputes between and among participants or players in the energy sector relating to the foregoing powers, functions and responsibilities.*[277]

---

274. *Id.* art. II, § 2 (viii) (emphases supplied).

275. *Id.*

276. Electric Power Industry Reform Act of 2001, § 43 (u) (emphasis supplied).

277. Rules and Regulations Implementing Electric Power Industry Reform Act of 2001, rule 3, § 4 (n) (emphasis supplied).

In *Mactan Electric Company v. NPC*,[278] however, the Court ruled that the dispute contemplated under the provisions above relates to cross-ownership, abuse of market power, cartelization, and anti-competitive, or discriminatory behavior by any electric power industry participant as defined and penalized under Section 45[279] of EPIRA and Sections 3,[280] 4,[281] 5,[282] and 8,[283] Rule 11 of the Implementing Rules.[284]

Hence, even the catch-all provision by the EPIRA has been construed to be in relation to the primary function of ERC, which is to promote competition, consumer choice, and penalize abuse of market power.[285] Nationality determination has not been defined as within the ambit of abuse of market power, cartelization, and anti-competitive or discriminatory behavior under the law. Furthermore, basic is the statutory construction rule that powers enumerated under a law, such as the EPIRA, in this case, should be construed in relation to the entirety of said law.[286] Hence, the catch-all

278. Mactan Electric Company v. National Power Corporation, G.R. No. 172960, 616 SCRA 595 (2010).

279. *Id.* at 606 (citing Electric Power Industry Reform Act of 2001, § 45).

> Sec. 45. Cross Ownership, Market Power Abuse and Anti-Competitive Behavior. — No participant in the electricity industry or any other person may engage in any anti-competitive behavior including, but not limited to, cross-subsidization, price or market manipulation, or other unfair trade practices detrimental to the encouragement and protection of contestable markets.

Electric Power Industry Reform Act of 2001, § 45.

280. *Mactan Electric Company*, 616 SCRA at 606 (citing Rules and Regulations Implementing Electric Power Industry Reform Act of 2001, rule 11, § 3).

281. *Mactan Electric Company*, 616 SCRA at 606 (citing Rules and Regulations Implementing Electric Power Industry Reform Act of 2001, rule 11, § 4).

282. *Mactan Electric Company*, 616 SCRA at 606 (citing Rules and Regulations Implementing Electric Power Industry Reform Act of 2001, rule 11, § 5).

283. *Mactan Electric Company*, 616 SCRA at 606 (citing Rules and Regulations Implementing Electric Power Industry Reform Act of 2001, rule 11, § 8).

284. *Id.*

285. *Mactan Electric Company*, 616 SCRA at 607 (citing Electric Power Industry Reform Act of 2001, § 43).

286. *Freedom from Debt Coalition*, 432 SCRA at 182 (citing Aisporna v. Court of Appeals, G.R. No. L-39419, 113 SCRA 459, 466 (1982)).

provision, being interpreted in relation to the other laws the ERC administers or other functions enumerated, cannot be a valid source of authority to invoke the jurisdiction to determine the nationality of RE sector participants.

Even looking at the laws that its predecessors have administered, there is no reference as to the authority of the ERC to deal with matters specifically with foreign equity restriction for purposes of issuing certificate of compliance.

## V. ANALYSIS: ADDRESSING THE GAPS AND OVERLAPS IN THE POWERS AND FUNCTIONS OF THE SEC, DOE, AND ERC IN DETERMINING THE NATIONALITY OF RENEWABLE ENERGY GENERATION SECTOR PARTICIPANTS

### *A. The SEC, DOE, and ERC: Analysis of Their Powers and Functions*

| | SEC | DOE | ERC |
|---|---|---|---|
| *Nature of Power Involved* | Jurisdiction, supervision, and control over the corporate sector.[287] | Supervision and control over all government activities related to energy projects.[288]<br>Lead implementing agency of the RE law.[289] | Independent, quasi-judicial regulatory body in the restructured electricity industry.[290] |
| *Provision of Law in Claiming Authority to Determine Nationality and Compliance with Foreign Equity Requirements* | The Commission may disapprove the AOI or any amendment thereof and one of the grounds enumerated is that the required | The Department shall monitor private sector activities relative to energy projects in order to attain the goals of the restructuring, | "[A]ny new generation company shall, before it operates, secure from the [ERC] a certificate of compliance |

287. REV. CORP. CODE, § 179.

288. Renewable Energy Act of 2008, § 5.

289. *Id.*

290. Electric Power Industry Reform Act of 2001, § 38.

| | SEC | DOE | ERC |
|---|---|---|---|
| | percentage of Filipino ownership under existing laws has not been complied.[291]<br><br>Also, the IRR of FIA provides that the "SEC or BTRCP, as applicable, shall monitor the compliance with the equity requirements of the Act."[292] | privatization, and modernization of the electric power sector as provided for under existing laws.[293]<br><br>Also, the RE law provides that the REMB under the DOE shall "[s]upervise and monitor activities of government and private companies and entities on renewable energy resources development and utilization to ensure compliance with existing rules, regulations, guidelines[,] and standard."[294]<br><br>Lastly, the IRR mandated the DOE to promulgate a regulatory | pursuant to the standards set forth in this Act ... ."[296]<br><br>Also, the IRR of EPIRA provides that the Commission shall "have [ ] original and exclusive jurisdiction over all cases contesting rates, fees, fines[,] and penalties imposed in the exercise of its powers, functions[,] and responsibilities[,] and over all cases involving disputes between and among participants or players in the energy sector relating to the foregoing powers, functions[,] and responsibilities."[297] |

291. *Id.* § 17.

292. Rules and Regulations Implementing Foreign Investments Act of 1991, rule III, § 2.

293. Electric Power Industry Reform Act of 2001, § 37 (h).

294. Renewable Energy Act of 2008, § 32 (e).

296. Electric Power Industry Reform Act of 2001, § 6.

297. Rules and Regulations Implementing the Electric Power Industry Reform Act of 2001, rule 3, § 4 (n).

| | SEC | DOE | ERC |
|---|---|---|---|
| | | framework for the transparent and competitive process of awarding service contract.[295] | |
| *Extent of Authority/Purpose* | Continuing — from incorporation onwards.[298] | Under the Old Corporation Code: From incorporation then onwards.[299]<br><br>Under the Revised Corporation Code: From the engagement industry/application for Service Contract then onwards.[300] | During the application for COC.[301] |

Table 1. The powers and functions of the SEC, DOE, and ERC.

Based on the table above providing for the legal bases of the SEC, DOE, and ERC in determining the nationality of corporations engaged in the renewable energy sector, the SEC and DOE are clearly empowered by their respective enabling statutes and the laws they administer to exercise such functions. The SEC and DOE, by the nature and purpose of their creation as government agencies, were empowered to supervise the corporate sector and energy projects respectively. In this case, corporations engaged in renewable energy projects are under the supervisory powers of both the SEC and DOE.

295. Rules and Regulations Implementing Renewable Energy Act of 2008, rule 6, § 19 (A).

298. *See* CESAR VILLANUEVA & TERESA VILLANUEVA-TIANSAY, PHILIPPINE CORPORATE LAW 19 (2013 ed.).

299. *See* CORP. CODE, § 19.

300. *See* Electric Power Industry Reform Act of 2001, § 37.

301. *See id.* § 38.

Meanwhile, the ERC has no clear grant of power to determine nationality of corporations or ensure compliance with foreign equity restrictions based on the provisions of the law that creates it and based on the laws and issuances it administers. It is also worth noting that just recently, the Supreme Court in *Alyansa v. Energy Regulation Commission*[302] took a very restrictive approach in interpreting the powers and functions of the ERC which will be applicable in addressing the ERC's exercise of jurisdiction in the RE generation industry.[303]

*B. Implications of the Case of Alyansa v. ERC*

1. The ERC Did Not Validly Exercise Its Quasi-Judicial or Regulatory Powers in Issuing COC. Therefore, It Cannot Validly Invoke Sections 43 (r) in Relation to Section 6 and Section 43 (u) of EPIRA

Based on the discussions in the previous Chapter, and looking at the provisions of the EPIRA, particularly Section 43, enumerating the powers and functions of the Commission, there is nothing in the law that would allow the Commission to exercise the authority to determine nationality for purposes of issuing a COC. The Author has tried to use the provisions in the EPIRA which grants the ERC the broad mandate and power to exercise its investigative and quasi-judicial powers. However, as previously mentioned in *Freedom from Debt Coalition* and as a long-standing rule in statutory construction, the provisions of a statute must be read as a whole and should not be read separately.[304] Reading Sections 43 (r) in relation to Section 6 and 43 (u) in relation to the other enumerated powers of the ERC, there is no provision that mandates the Commission to enforce and determine compliance with foreign equity restrictions.[305] Nor is there any provision which allows it to look into the nationality of a corporation for purposes of issuing a COC.[306]

302. Alyansa Para sa Bagong Pilipinas (ABP) v. Energy Regulatory Commission, G.R. No. 227670, May 3, 2019, *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65064 (last accessed Jan. 31, 2023).

303. *Id.* at 13-21.

304. *Freedom from Debt Coalition,* 432 SCRA at 182 (citing Aisporna v. Court of Appeals, G.R. No. L-39419, 113 SCRA 459, 466 (1982)).

305. Electric Power Industry Reform Act of 2001, §§ 43 (r), 43 (u), & 6.

306. *Id.*

In the case of *Alyansa*, the Court was restrictive in interpreting the ERC's quasi-judicial powers.[307] According to the Court, the ERC's quasi-judicial power is only exercised when there are adverse parties involved and that it adjudicates the rights and obligations of parties.[308] In granting a COC, there are no adverse parties involved.[309] A COC is considered to be a clearance to operate and no adjudication of rights or obligation arises from the said certificate.[310] Furthermore, the ERC is not even required to look at the law concerning nationality, instead it should only rely on the COE issued by DOE as provided by its own resolution.[311] Also, it is worth emphasizing that the case of *Mactan Electric* is instructive on the matter that the exercise of quasi-judicial powers of the ERC must be related to issues involving cross-ownership, abuse of market power, cartelization, and anti-competitive or discriminatory behavior by any electric power industry participant.[312] The EPIRA has defined these issues and none of these issues touch on foreign equity restriction.

Hence, the ERC cannot invoke its quasi-judicial powers nor its regulatory powers in claiming that it is empowered by law to determine nationality of corporation engaged in the renewable energy generation sector for purposes of issuing a COC. As an administrative agency, it can only exercise powers which are granted or conferred to it by law.[313] Anything in excess of it is void.[314]

2. Despite Not Being Judicial, Quasi-Judicial, or Ministerial, the ERC's Act of Refusing to Issue a COC on the Basis of Dubious Filipino Ownership Constitutes Grave Abuse of Discretion Subject to Certiorari or Prohibition

As discussed previously, the issuance of a COC by the ERC to enjoy the benefits granted under the RE law does not constitute an exercise of the

307. *Alyansa Para sa Bagong Pilipinas,* G.R. No. 227670, at 13-21.

308. *Id.* at 16.

309. *Id.*

310. *Id.*

311. Energy Regulatory Commission Reso. No. 16, s. 2014, § 2 (ee) (v).

312. *Mactan Electric Company*, 616 SCRA at 596.

313. *See* Christian General Assembly v. Sps. Ignacio, G.R. No. 164789, 597 SCRA 266, 276 (2009) (where the Court ruled that the jurisdiction of HLURB, an administrative agency, is conferred only by law).

314. *Id.*

Commission's quasi-judicial power for it does not involve an adjudication of rights of adverse parties.[315] Furthermore, it is also not within the enumerated subject matter to which the ERC can adjudicate.[316] However, though it is not a quasi-judicial agency and appears to be purely executive as it only enforces the rules and regulations promulgated by it and the DOE in light of the RE law, the ERC can still be said to have gravely abused its discretion.[317]

Grave abuse of discretion amounting to lack or excess of jurisdiction can exist even if the government branch or instrumentality of the government does not exercise judicial, quasi-judicial, or ministerial functions.[318] It has also been ruled that a petition for certiorari and prohibition can be filed to set right, undo, and restrain an act of grave abuse amounting to lack or excess of jurisdiction.[319] It is not enough, however, that a government agency has abused its discretion — "such abuse must be grave."[320]

In order to be considered grave, such act, as defined by jurisprudence, must be

> [e]xercised in an arbitrary or despotic manner by reason of passion or personal hostility and must be so *patent and gross as to amount to an evasion of positive duty* or to a *virtual refusal to perform the duty enjoined by or to act at all in contemplation of law.*[321]

In this case, independently determining nationality of corporations without a law empowering it do so and ignoring its own rules and regulations that issuance of a COC is not dependent on a corporation's compliance with foreign equity requirements clearly constitute grave abuse of discretion.[322] It is an outright refusal of the ERC to exercise its function which is clearly

315. *Alyansa Para sa Bagong Pilipinas,* G.R. No. 227670, at 16.

316. *Id.*

317. *Id.* at 13.

318. *Id.* at 29.

319. *Id.* at 11.

320. *Alyansa Para sa Bagong Pilipinas*, at 11 (citing Pilipino Telephone Corporation v. NTC, G.R. No. 138295, 410 SCRA 82, 90 (2003) (citing Benito v. Commission on Elections, G.R. No. 134913, 349 SCRA 705, 714 (2001))).

321. *Id.* (emphases supplied).

322. *See id.* at 16.

enjoined by law — that is to grant a COC to a generation applicant without the need of considering its Filipino-foreign ownership.[323]

### *C. The DOE's Power of Supervision and Control over Energy Projects in the Country*

#### 1. DOE's Role in Determining Nationality of Corporations

The first basis for a valid claim of authority to determine the nationality of corporations engaging in energy projects is the Department of Energy Act of 1992 as amended by EPIRA. Its broad mandate provides that its function is to supervise and control all government activities pertaining to energy projects.[324] Also, EPIRA provides that it has the power to monitor private activities relative to energy projects.[325] Lastly, the Renewable Energy Law designated the DOE as the lead implementing agency and tasked to formulate a transparent and competitive award process of service contracts.[326]

From these broad mandates arise the plausible claim of determining nationality of corporations for purposes of ensuring that the participants in the RE industry, which, under the Constitution, is reserved to Filipino citizens.[327] It is in the exercise of DOE's supervisory and regulatory powers provided by its charter and the law that it administers that allow the DOE to determine compliance with Filipino-foreign ownership.[328]

### *D. The SEC's Authority to Supervise Equity Compliance and to Take Jurisdiction Over the Corporate Sector*

#### 1. SEC's Role in Determining Nationality of Corporations

Jurisprudence has already recognized the authority of the SEC to ensure compliance with the Filipino-foreign ownership requirement under the Constitution. The case of *Heirs of Gamboa v. Teves* has been explicit in saying that it is the SEC which is the government agency tasked to enforce the

323. *Id.*

324. Electric Power Industry Reform Act of 2001, § 37 (h).

325. *Id.* § 37 (j).

326. Renewable Energy Act of 2008, § 5.

327. PHIL. CONST. art. XII, § 2.

328 Renewable Energy Act of 2008, § 5.

nationality requirements provided under the Constitution.[329] Furthermore, even the FIA has been specific in mandating SEC to monitor compliance with equity requirements provided under it.[330] The Securities Regulation Code and the Revised Corporation Code gave the SEC broad mandate of supervising and exercising jurisdiction over the corporate sector.[331] Also, the Revised Corporation Code provided for the instances on how the SEC can ensure that its supervisory powers and jurisdiction over the corporate sector will be validly exercised.[332] These include, but are not limited to: mandating corporations to comply with reportorial requirements, imposition of fines and penalties for erring corporations, approval and disapproval of articles of incorporations and voting trusts agreements, and others.[333]

### *E. Ambiguity and Broad Provisions of the Law: The DOE and SEC's Overlapping Supervisory/Regulatory Powers*

#### 1. EPA-OSHA Case Study: Causes of Overlapping Jurisdictions in Relation to the SEC-DOE Setting

Several reasons have been introduced by scholars pertaining to causes why administrative jurisdictions overlap. In the U.S., the most common case study for overlapping statutory authorities is the case of the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA).[334] Both EPA and OSHA were found to be empowered by their enabling statutes to regulate risks in the workplace caused by exposures to hazardous and toxic substances.[335] The EPA is empowered by the environmental statutes it administers while the OSHA was specifically granted the regulatory authority under the Occupational Safety and Health Act.[336] According to the article, EPA-OSHA case best illustrates how overlapping legal categories exists, because regulating

329. *Heirs of Gamboa*, 682 SCRA at 464.

330. Rules and Regulations Implementing Foreign Investments Act of 1991, rule III, § 2.

331. REV. CORP. CODE, § 179 & SEC. REG. CODE, § 5.

332. REV. CORP. CODE, § 158.

333. *Id.*

334. Todd S. Aagaard, *Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities*, 29 VA. ENVTL. L.J. 238, 240 (2011).

335. *Id.* at 240.

336. *Id.*

exposure to hazardous and toxic substances encompasses environmental and labor law concerns.[337]

The first reason of regulatory overlap the article introduced is the concept of "byproduct of delegation."[338] It further states that regulatory overlap has been caused by agencies having broad and ambiguously delineated jurisdictions.[339] Because of this, multiple agencies often claim that a particular issue or performing a particular function enables them to address other core issues and perform other core functions.[340] Furthermore, as a result of broad and ambiguous delegations, several different agencies may have plausible claims that every time an issue arises, it is within their jurisdiction.[341] Going back to the EPA-OSHA case study, vapor intrusion issue has been considered to be a good example of regulatory overlap arising from broad and ambiguous delegation.[342] Neither the EPA nor OSHA had a clear delineation as to addressing vapor intrusion in the workplace.[343] This would then lead to both agencies claiming that their existing authorities can regulate and address the issue.[344]

Applying this concept in the SEC-DOE setting based on the table provided in this Chapter, both agencies are given broad supervisory mandate. The SEC is given the jurisdiction and supervisory powers over the corporate sector,[345] while the DOE is given the power of supervision and control over government activities pertaining to energy projects.[346] Whenever a corporation engages with the government to participate in the energy industry, Both the SEC and DOE have a plausible claim to exercise their powers and functions. Without proper delineation or harmonizing of their authorities, the energy participant will find itself in a situation where two different agencies resolve a specific issue in which it is involved.

---

337. *Id.* at 241.

338. *Id.* at 277.

339. *Id.*

340. Aagard, *supra* note 334, at 277.

341. *Id.*

342. *Id.* at 277.

343. *Id.*

344. *Id.*

345. REV. CORP. CODE, §§ 17 & 179.

346. Electric Power Industry Reform Act of 2001, § 37 (h).

Second are the overlapping legal fields. This has been clearly illustrated by EPA-OSHA case. The risk of hazardous and toxic substance to workers provides for a good example of overlapping legal fields — environmental law and labor law.[347] According to the article, occupational exposures to toxic substances as a local pollution is within the ambit of environmental law administered by the EPA.[348] Same occupational exposures when it involves the conditions of employment fall within the boundaries of labor and employment law under the jurisdiction of OSHA.[349]

In the SEC-DOE setting, two legal fields also overlap, corporation law and constitutional/energy law. The corporation law side is administered by the SEC.[350] The SEC, under the Revised Corporation Code, is given the mandate to exercise jurisdiction over the corporate sector and at the same time determine compliance with the required Filipino ownership.[351] This mandate overlaps with that of the DOE as it administers the Constitution in relation to Energy Law.[352] The DOE also looks into a corporation's compliance with the foreign equity restriction for purposes of engaging in the renewable energy sector which involves EDU activities of natural resources, which under the Constitution is reserved to Filipino citizens.[353]

Aside from these causes laid down by EPA-OSHA case study, the Author, as provided in the table above, was able to juxtapose the following grounds which can also can serve as a basis to claim that indeed overlapping exists between the SEC and DOE: *First*, as to the nature of power, both agencies exercise supervisory powers in their respective fields. *Second*, as to issues addressed, both agencies claim the authority to determine nationality and compliance with foreign equity restrictions. *Third*, as to the extent of authority, the SEC and the DOE are both required to ensure the continuing compliance with foreign equity limitation of corporations engaged in energy projects.

---

347. Aagard, *supra* note 334, at 282.

348. *Id.*

349. *Id.*

350. REV. CORP. CODE, § 17.

351. *Id.* § 179.

352. Renewable Energy Act of 2008, § 32 (e).

353. PHIL. CONST. art. XII, § 2.

2. Disadvantages of Overlapping Authorities

The redundancy of multiple agency activity breeds conflict.[354] Irreconcilable and overlapping authorities result to duplicated efforts, inconsistent, and overlapping results that create temporal inefficiency that frustrate the sector participants in the legal dynamics.[355] The main criticisms in regulatory overlap are duplication and conflict.[356]

Duplication is believed to be a traditional criticism of regulatory overlap for it leads to waste of government resources.[357] In furtherance of the principle of economy, the purpose why overlapping and duplication of activity is avoided is to save both in overhead expense and in clerical, inspectional, and other subordinate work.[358] Duplication may arise whenever agencies exercise concurrent regulatory jurisdiction over parties or because they concurrently pursue a general or specific policy.[359] In the case of the SEC and DOE, these two agencies commit duplicative actions in furtherance of its regulatory powers. The SEC and DOE both determine the nationality of corporations and compliance with foreign equity restrictions.

Giving multiple agencies jurisdiction to regulate in the same area — which in this case the determination of nationality of corporation and compliance with foreign equity restrictions — creates opportunities for conflicting regulations.[360] Without coordination, regulations that conflict or work inconsistently create incoherence, undermine each other's effectiveness, and increase compliance burdens on the targets of regulation.[361] Conflicting decisions with regard to the issue on nationality is possible when both the SEC and DOE, claim through their ambiguous supervisory powers over corporate entities engaged in energy projects. Like what happened in the recent action of the ERC in denying the COC of Majestics, if different agencies are given the authority to determine nationality of corporations, it is not impossible that the DOE will have a

354. Louis J. Jr. Sirico, *Agencies in Conflict: Overlapping Agencies and the Legitimacy of the Administrative Process*, 33 VAND. L. REV. 101, 112 (1980).

355. *Id.*

356. Aagard, *supra* note 334, at 286.

357. *Id.* at 287.

358. *Id.*

359. Sirico, *supra* note 354, at 114.

360. *Id.* at 287.

361. *Id.*

varying interpretation or findings from the SEC if these powers will not be properly reconciled or delineated by an amendment in legislation. Hence, instability will occur as to resolving and regulating issues of nationality in the RE generation industry.

3. SEC and DOE: Overlapping Supervisory/Regulatory Powers

At this point, it has been made clear that both the SEC and DOE, by virtue of its enabling statutes and laws that it administers are empowered to supervise the corporate sector and energy projects respectively.[362] Hence, when a corporation engages in the energy industry, both the SEC and DOE can validly exercise its powers.[363]

The SEC begins exercising its supervisory powers from the time of registration as a corporation in the country and upon vesting of legal personality.[364] As provided in the SEC Reorganization Act, Revised Corporation Code, Securities Regulation Code, and Foreign Investment Act, which were discussed in the previous chapter, the SEC is given the jurisdiction and power of supervision over the corporate sector.[365] Furthermore, the SEC is also given the necessary powers in order to validly enforce its supervisory and regulatory powers. According to the case of *Heirs of Gamboa*, the SEC is given the power to suspend or revoke registration, impose fines or penalties, and compel legal and regulatory compliances for violations of the implementing rules, laws, and directives of the SEC.[366]

While, the DOE begins to exercise its supervisory powers from the time the participant engages in the industry up to the time that its obligation stands as regard the particular energy project.[367] According to the EPIRA, the DOE supervises the restructuring of the energy industry and all government activities pertaining to energy projects.[368] Furthermore, it is also given the

362. REV. CORP. CODE, § 179 & Electric Power Industry Reform Act of 2001, § 37 (h).

363. *Id.*

364. VILLANUEVA & VILLANUEVA-TIANSAY, *supra* note 298.

365. REV. CORP. CODE, § 179.

366. *Heirs of Gamboa,* 652 SCRA at 742 (citing Securities and Exchange Commission v. Court of Appeals, G.R. Nos. 106425 & 106431-32, 246 SCRA 738, 741 (1995)).

367. Electric Power Industry Reform Act of 2001, § 37 (h).

368. *Id.* § 37.

power to monitor private activities in the energy industry.[369] These supervisory and regulatory powers are being enforced by allowing the DOE to promulgate rules and guidelines as the lead policymaking body in the energy sector.[370] At the same time, in case of RE projects, the DOE through issuance of service contract regulates who may apply and operate in the said industry.[371]

Therefore, in the case of ensuring compliance with the Filipino-foreign ownership in the RE industry, which is a continuing requirement, both the SEC and DOE's supervisory powers overlap. The problem in this overlapping only becomes apparent with what happened in Majestic Corporation. In the case of Majestic Energy Corporation, despite the apparent violation of the Filipino-foreign ownership reflecting in its AOI, the SEC was not able to report this irregularity with the DOE for purposes of continuing compliance with the nationality requirement of the service contract.[372] Furthermore, it appears that during the interregnum or after the issuance of relevant certificates and contracts from the two agencies, only the SEC has the current reportorial requirements pertaining to corporate and equity structure related to Filipino-foreign ownership.[373] Hence, not only will the possibility of conflicting findings/interpretation will arise, but also the possibility of circumvention of the law because of the lack of coordination among agencies exercising concurrent supervisory powers exists.

4. Legal Implication of Lack of Favorable Recommendation Requirement from Corporations Under Sector-Specific Regulatory Agencies

The Author submits that lack of "favorable recommendation" requirement under the Revised Corporation Code on the part of other sector-specific regulatory agencies exercising supervisory powers in relation to Filipino-foreign ownership is a gap in the law. Also, this would appear that corporations engaged in specific nationalized industries can freely amend their articles of incorporation or alter their equity structure, hence affecting their capacity to continue operating in the said industries without the

369. *Id.* § 37 (j).

370. Dimalanta, *supra* note 87.

371. Rules and Regulations implementing Renewable Energy Law of 2008, rule 6, § 19 (C).

372. Office of the General Counsel, *supra* note 16.

373. *See* REV. CORP. CODE, § 177.

imprimatur of other sector-specific agencies. It appears also that the SEC, for this purpose, exercises exclusive authority in ensuring that Filipino equity mandated by the Constitution is duly complied with.

Provided below is a comparison of the provision of the Corporation Code and the Revised Corporation Code on the favorable recommendation requirement for purposes of approving the articles of incorporation.

| OLD CORPORATION CODE | REVISED CORPORATION CODE |
|---|---|
| Sec. 17. Grounds when articles of incorporation or amendment may be rejected or disapproved. — The Securities and Exchange Commission *may reject* the articles of incorporation or disapprove any amendment thereto if the same is not in compliance with the requirements of this Code: Provided, That the Commission shall give the incorporators a reasonable time within which to correct or modify the objectionable portions of the articles or amendment. The following are grounds for such rejection or disapproval: | Sec. 16. Grounds When Articles of Incorporation or Amendment may be Disapproved. — The Commission may *disapprove* the articles of incorporation or any amendment thereto if the same is not compliant with the requirements of this Code: Provided, That the Commission shall give the incorporators, directors, trustees, or officers a reasonable time from receipt of the disapproval within which to modify the objectionable portions of the articles or amendment. The following are grounds for such disapproval: |
| (1) That the articles of incorporation or any amendment thereto is not substantially in accordance with the form prescribed herein; | (a) The articles of incorporation or any amendment thereto is not substantially in accordance with the form prescribed herein; |
| (2) That the purpose or purposes of the corporation are patently unconstitutional, illegal, immoral, or contrary to government rules and regulations; | (b) The purpose or purposes of the corporation are patently unconstitutional, illegal, immoral, or contrary to government rules and regulations; |
| (3) That the Treasurer's Affidavit concerning the amount of capital | (c) The certification concerning the amount of capital stock subscribed and/or paid is false; and |

| OLD CORPORATION CODE | REVISED CORPORATION CODE |
|---|---|
| stock subscribed and/or paid is false;<br><br>(4) That the percentage of ownership of the capital stock to be owned by citizens of the Philippines has not been complied with as required by existing laws or the Constitution.<br><br>No articles of incorporation or amendment to articles of incorporation of *banks, banking and quasi-banking institutions, building and loan associations, trust companies and other financial intermediaries, insurance companies, public utilities, educational institutions, and other corporations governed by special laws* shall be accepted or approved by the Commission *unless accompanied by a favorable recommendation of the appropriate government agency to the effect that such articles or amendment is in accordance with law.*[374] | (d) The required percentage of Filipino ownership of the capital stock under existing laws or the Constitution has not been complied with.<br><br>No articles of incorporation or amendment to articles of incorporation of banks, banking and quasi-banking institutions, preneed, insurance and trust companies, NSSLAS, pawnshops, and other financial intermediaries shall be approved by the Commission unless accompanied by a favorable recommendation of the appropriate government agency to the effect that such articles or amendment is in accordance with law.[375] |

Table 2. A comparison of grounds when articles of incorporation or amendment may be rejected or disapproved.

From the clear wording of the law, there is only a limited number of industries or corporations required by the Revised Corporation Code to secure a favorable recommendation from the appropriate government agency to ensure that the AOI is in accordance with law before the SEC can act on the matter.[376] Among the enumerated industries, the renewable energy generation, a nationalized industry, governed by a sector-specific government agency, does not fall within the ambit of any of those provided

374. CORP. CODE, § 17 (emphases supplied).

375. REV. CORP. CODE, § 16 (emphases supplied).

376. *Id.*

by law to secure a favorable recommendation.[377] In this case, the Author submits that this serves as a clear gap in the law for excluding these kinds of industries to secure the said requirement.

The sector-specific agencies are deprived of ensuring that companies engaged in nationalized industries under their regulatory/supervisory powers remain compliant as regards Filipino-foreign ownership as reflected in their AOI. Also, in the case of overlapping supervisory powers on the part of the SEC and DOE, this serves as a discord as regards their mandate of ensuring continuous compliance with the equity requirement.

Lastly, though it can be argued that at present the SEC requires an endorsement clearance from the DOE prior to registration of corporations, in the absence of a legislation nor an agreement between these agencies, the possibility of circumvention caused by lack of coordination by these agencies whenever issues of nationality will remain possible.[378] Furthermore, aside from an endorsement clearance the Author submits that other safeguards such as inter-agency notification upon issues or violation of Filipino ownership requirement should be introduced.

### *F. Reconciling the Overlapping Authorities with the Revised Corporation Code and Ruling in Gamboa v. Teves*

#### 1. SEC Has the Required Expertise and Specialization in Determining Nationality of Corporations

The Author submits that in order to reconcile the overlapping exercise of powers and functions when it comes to determination of nationality and compliance with required Filipino-foreign ownership, the following factors must be considered: (1) nature of the issue involved; (2) agency expertise; and (3) the ultimate relief sought. These factors were derived from the principles on administrative law and the exercise of the Court's deference with administrative findings.[379]

---

377. *Id.*

378. E-mail *from* Freedom of Information Philippines *to* Jan Dominic C. Castro (July 26, 2019) (on file with Author).

379. *See* A.Z. Arnaiz Realty, Inc. v. Office of the President, G.R. No. 170623, 624 SCRA 494, 507-08 (2010) (citing Department of Agrarian Reform v. Uy, G.R. No. 169277, 515 SCRA 376, 402 (2007)) (where the Court ruled that factual findings of administrative agencies are generally accorded with great respect

*On the nature of the issue in relation to the required skills and expertise* — several SEC opinions, orders, and memorandum circulars have already been issued as regards the true characterization and identification of rules governing foreign equity and its relationship with the nationalized industries. In the case of *Roy III v. Herbosa*, SEC Memorandum Circular No. 8, Series of 2013 which touches on the SEC's guidelines providing for the control test and beneficial ownership test was assailed as invalid for its non-compliance with the *Heirs of Gamboa* decision.[380] The Court, however, refused to grant the petition and upheld the validity of the said Memorandum Circular.[381] Aside from that, recently, the SEC has also required corporations to declare in its updated General Information Sheet the ultimate beneficial owners of its stock.[382] This can also be used in order to ensure compliance with the two tests provided under the *Heirs of Gamboa* and *Roy III* decisions.[383] Also, the Revised Corporation Code and the FIA were specific with regard to the role of the SEC when it comes to equity and corporate structure in relation to Filipino-foreign ownership limitation.[384]

Based on the foregoing, the SEC, as compared to other agencies, has the more direct and specific authority provided by law concerning equity compliance. Also, the Author submits that the SEC, in the exercise of its rule-making power is in the best position to interpret its own rules.[385] Furthermore, in its exercise of interpreting its own rules, the SEC is presumed to possess the necessary expertise with regard to determining equity and corporate structure, which is the crux of controversies whenever the issue of nationality and eligibility to engage in nationalized industries will arise.[386] Lastly, the fact that SEC is empowered by law to mandate corporations to comply with reportorial requirements[387] is also a manifestation that the SEC is in the best position that corporations comply

---

because of their special knowledge and expertise over the matters falling under its jurisdiction).

380. *Roy III*, 810 SCRA at 2.

381. *Id.* at 49.

382. SEC Memo. Circ. No. 17, s. 2018, § 3.

383. *Heirs of Gamboa*, 652 SCRA at 777 & *Roy III*, 810 SCRA at 152.

384. REV. CORP. CODE, § 143 & Foreign Investments Act of 1991, § 5.

385. Eastern Telecommunications v. International Communications Corp., G.R. No. 135992, 481 SCRA 163, 167 (2006).

386 *Id.*

387. *See* REV. CORP. CODE, § 177.

with its continuing requirement for it will be updated by these participants regularly.

*On the ultimate relief/effect once determination has been made* — the act of issuance of certificate of registration by the SEC vests corporation the legal personality, or the capacity to act and enter into contracts.[388] The Author submits that whenever an issue pertaining to a corporation's compliance with the laws, rules, and regulations the SEC administer will be raised and that a violation of which could probably result to a deregistration that would divest the corporation of its legal personality, then it necessarily follows that it also loses its standing or capacity to contract.[389] In a situation wherein a corporation engaged in the renewable energy industry will be found to have violated the Filipino-foreign ownership provided under the Constitution, statutes, and rules that the SEC administer, then the Commission should be allowed to exercise its regulatory powers such as the authority to deregister, with the requisite due process, a corporation and at the same time coordinate with other sector-specific agencies involved for the possible consequences of deregistration, one of which is the lack of the legal personality to continue with the obligations under the existing contract.

As provided in the Revised Corporation Code, there are specific instances wherein the SEC is required to coordinate with other regulatory agency, examples of which are during investigation, involuntary dissolution, failure to use its own charter and operate, and failure to comply with the reportorial requirements.[390] It is about time that a provision of law be introduced that requires other sector-specific agency to initiate in informing or coordinating with the SEC whenever issues that are within the expertise and specialized field of the Commission, which in this case is compliance with foreign equity restriction is raised. As previously discussed, the lack of favorable recommendation requirement serves as a gap with the SEC and other sector-specific agency when it comes to addressing the issues at hand. Hence, coordination in law must also be a two-way process.

388. VILLANUEVA & VILLANUEVA-TIANSAY, *supra* note 298.

389. REV. CORP. CODE, § 158.

390. REV. CORP. CODE, §§ 158, 154, 138, 21, & 129.

## VI. Conclusion

### *A. Preliminary Legal Issues*

#### 1. Corporations Engaged in Renewable Energy Industry Subject to 40% Foreign Ownership Limitation; Specific Rules for Large Scale EDU Activities Involving Geothermal Resources

Corporate participants engaged in the renewable energy sector are subject to a maximum of 40% foreign ownership in capital as provided by the Constitution.[391] This is because the renewable energy industry is within the ambit of EDU activities involving natural resources specifically on all forces of potential energy.[392] The case of *IDEALS, Inc. v. PSALM*, together with the RE Law, its IRR and relative issuances, and the 11th Foreign Investment Negative List echo the same mandate of foreign investment restriction in the renewable energy industry. In the case of *IDEALS, Inc.*, the Court said that foreign participation is limited when the natural resources is on its pre-extracted state and not when it is already in the ordinary commerce of men.[393] Furthermore, the RE Law, its IRR in relation to the DOE-related issuances provide that applicants for service contract which are corporations must be 60% owned by Filipinos.[394] When the renewable energy participant deals with large scale geothermal project, however, the issuance provides that 100% foreign participation is allowed so long as control remains with the State as provided in the validly entered FTAA.[395]

#### 2. Generation Sector, Subject to Foreign Ownership Limitation Only When Involves in the Exploration, Development, and Utilization of Natural Resources

After the restructuring of the electric power industry in 2001, the generation sector has become more competitive and open.[396] The generation sector as compared to the distribution and transmission industry does not require a

391. Rules and Regulations Implementing Renewable Energy Act of 2008, rule 6, § 19 (B).

392. Renewable Energy Act of 2008, § 2 (a).

393. *IDEALS, Inc.*, 682 SCRA at 661.

394. Rules and Regulations Implementing Renewable Energy Act of 2008, rule 6, § 19 (B).

395. DOE Circ. No. 2009-07-11, s. 2009, § 23.

396. Electric Power Industry Reform Act of 2001, § 6.

franchise and is not considered a public utility.[397] Hence, being private, it is not ordinarily subject to foreign ownership limitation.[398] The Filipino-foreign ownership requirement under the Constitution only becomes relevant when the generation sector engages in EDU activities involving natural resources.[399] Again, citing the case of *IDEALS, Inc.*, a nuisance must be made as to the specific activity the corporation is engaged with because not all activities constitute EDU activities of natural resources as provided by the Constitution.[400] The participation must be as to the extraction or actual appropriation of natural resources.[401]

*B. Main Legal Issues*

1. SEC and DOE Possess Supervisory Powers to Determine Nationality of Corporations; ERC Is Devoid of the Such Authority

Both the SEC and DOE are empowered to supervise and monitor the corporate sector and the government activities pertaining to energy projects respectively by the statutes they administer.[402] The SEC has been expressly granted by law the power of supervision over the corporate sector.[403] It has also been given the mandate to monitor compliance with equity requirements provided under the FIA.[404] Also, the SEC has been given the necessary powers to exercise its jurisdiction over the corporate sector by allowing the Commission to regulate the entry of corporations in the country through the system of registration and impose administrative sanctions over those corporations that will found to have violated the laws, rules, and issuances administered by the SEC.[405] In the case of the DOE, the EPIRA gave the Department the power of supervision and control over government

397. *Id.*

398. *Id.*

399. PHIL. CONST. art. XII, § 2.

400. *IDEALS, Inc.*, 682 SCRA at 661.

401. *Id.*

402. REV. CORP. CODE, § 179 & Electric Power Industry Reform Act of 2001, § 37 (h).

403. REV. CORP. CODE, § 179.

404. Rules and Regulations Implementing Foreign Investments Act of 1991, rule III, § 2.

405. REV. CORP. CODE, § 158.

activities pertaining to energy projects.[406] The Department was also empowered to monitor private activities in the energy industry.[407] Lastly, the DOE serves as the lead implementing agency of the RE law.[408] The Department through the REMB, ensures that the mandate of the Constitution is duly complied with.[409]

While the ERC is devoid of authority to exercise the same function, in construing EPIRA as a whole and understanding the intent of the legislature from the wording of the law, the ERC is created for purposes of promoting free market trading, competition, and avoiding anti-competitive behavior.[410] Also, the ERC's regulatory powers mainly focuses on fixing of rates, imposing of fines, and penalties to energy sector participants.[411] In light of the recent ruling in *Alyansa,* the Court took a very restrictive approach in interpreting the powers and functions of the ERC.[412] It only considered the provisions enumerated under the EPIRA.[413] After examining the EPIRA and the related issuances pertaining to the grant of Certificate of Compliance by the ERC, there has been no mention of the Filipino-foreign ownership restriction as a separate requirement. In the absence of a clear grant authority to the ERC as compared to the mandate given to the DOE, the ERC must refuse to pass upon the issue of nationality of corporations engaged in the renewable energy generation industry.

2. SEC and DOE's Supervisory Powers Overlap on the Issue of Nationality of Corporations

As both agencies were granted the broad mandate of supervision and control over the corporate sector and government activities in energy projects, both agencies have the plausible claim that the authority to determine compliance with Filipino-foreign ownership requirement is subsumed under its supervisory/regulatory powers. For purposes of registration, the SEC determines nationality of a corporation by looking at its primary purpose on

406. Electric Power Industry Reform Act of 2001, § 37 (h).

407. *Id.* § 37 (j).

408. Renewable Energy Act of 2008, § 5.

409. Rules and Regulations Implementing Renewable Energy Act of 2008, rule 6, § 19 (B).

410. Electric Power Industry Reform Act of 2001, § 43.

411. *Id.* § 43 (u).

412. *Alyansa Para sa Bagong Pilipinas*, G.R. No. 227670, at 13-21.

413. *Id.* (citing Electric Power Industry Reform Act of 2001, § 37).

whether it engages in a nationalized industry and as to other relevant documents that will show its current equity structure.[414] The registration with the SEC has been recognized as a valid exercise of the Commission's regulatory power.[415] Meanwhile, the DOE exercises its supervisory/regulatory powers through the process of the transparent and competitive awarding of service contracts to RE industry participants.[416] As provided in the RE Law and the relevant issuances, applicants must be 60% owned by Filipinos which is in compliance with the Constitution which is the legal basis for foreign ownership restriction in EDU activities involving natural resources.[417] Furthermore, these two agencies, as provided by law, should ensure that the corporation engaged in the renewable energy industry should continuously comply with the nationality requirement throughout its obligation.

The overlapping is clear as regards the supervision on the continuous compliance of the corporations engaged in the renewable energy generation sector. The DOE is tasked to ensure the continuing compliance as the party to the service contract and as mandated to ensure that the obligation of the RE participant is duly complied with.[418] In the case of the SEC, the Commission is also mandated by the laws it administer to ensure that the equity requirements are duly complied with.[419] Therefore, without proper delineation and coordination with these two agencies, the possibility of conflicting decisions and findings will surely exist.

3. SEC Must Exercise the Exclusive Authority to Determine Nationality and Must Coordinate with Other Sector-Specific Agencies in Ensuring This Mandate

The Author submits that in order to properly delineate the powers and functions of these three agencies claiming authority to determine the nationality of corporations and ensure compliance with Filipino-foreign ownership provided by the Constitution, the exclusive authority should be given to the agency which was specifically mandated by law on the issue

414. REV. CORP. CODE, §§ 17 & 177 (b) & SEC Memo. Circ. No. 17, s. 2018, § 3.

415. *Gamboa*, 652 SCRA at 742.

416. Rules and Regulations Implementing Renewable Energy Act of 2008, rule 6, § 19 (B).

417. *Id.*

418. *Id.*

419. REV. CORP. CODE, §§ 17 & 177 (b) & SEC Memo. Circ. No. 17, s. 2018, § 3.

involved, which is equity compliance under the Constitution and relevant statutes.[420] Furthermore, the issue must be resolved the agency which has the required knowledge and necessary expertise.[421] Lastly, the agency to be given the exclusive authority must be equipped by the necessary powers to enforce its findings and judgments.[422] In this case, it is the SEC which has the required expertise and necessary powers to resolve the issue on foreign equity compliance. The more specific mandate should govern compared to the general mandate granted to the DOE. Therefore, after vesting the exclusive authority with the SEC, to ensure that this authority will be faithfully exercised with the specific nationalized industries, which in this case, the renewable energy industry, a regulatory framework should be introduced tailored specifically for the said industry specifying the role of its sector-specific regulatory agencies.

## VII. RECOMMENDATION

As provided in the previous chapters, the absence and overlapping of powers and functions of regulatory agencies pertaining to a specific subject matter cause a lot of issues from determination of who has the proper authority, the extent of authority, and the delineation of the exercise of said authority. According to a report submitted to the Administrative Conference of the U.S., there are several illustrations of multiple-agency delegations of congress namely, "overlapping agency functions," "related jurisdictional assignments," "interacting jurisdictional assignments," and "delegations requiring concurrence."[423] From these situations, the report provided for coordination and consolidation tools that the Congress or the President can consider in promoting interagency coordination and maximization of benefits and minimizing the costs of shared regulatory space.[424] From the

420. PHIL. CONST. art XII, § 2.

421. *Heirs of Gamboa*, 682 SCRA at 532 (J. Velasco, dissenting opinion).

422. *See* REV. CORP. CODE, §§ 158, 154, 138, 21, & 129.

423. Jody Freeman & Jim Rossi, Improving Coordination of Related Agency Responsibilities (Final Report on the Administrative Convention of the United States, May 30, 2012), at 8, *available at* https://www.acus.gov/sites/default/files/documents/Freeman-Rossi-ACUS-Report-5-30-12-PDF.pdf (last accessed Jan. 31, 2023) [https://perma.cc/QNS7-KK85].

424. *Id.* at 19.

tools enumerated, the Author deems relevant the consultation provisions and interagency agreements.[425]

As discussed in the analysis Chapter, aside from the fact that the SEC, at present, does not exercise the exclusive authority to determine the nationality of corporations, our current legal landscape also lack specific legislation that would ensure coordination among agencies in ensuring compliance with foreign equity requirements, and that the mandate granted to the SEC will be faithfully complied in sector-specific industries, which in this case is the renewable energy.

In the U.S., it is quite common for Congress to create situations where an agency that exercises exclusive authority does not proceed without first consulting another agency whose mission is implicated in the agency's decision making.[426] Applying this situation in our jurisdiction, allowing the SEC to exercise exclusive authority does not mean that it will be the sole entity to enforce the nationality requirements across all industries. The SEC should also be mandated to coordinate by means of interagency consultation with sector-specific regulatory agencies, which in this case is the DOE and the ERC.

Furthermore, interagency agreements have been considered as one of the most pervasive instruments of coordination.[427] Through a memorandum of agreement, responsibility for specific tasks are assigned, procedures are established, and it binds agencies to fulfill mutual commitments.[428] Agencies usually sign these kinds of agreements for a variety of purposes namely, delineation of jurisdictional lines, establishing procedures for information sharing, collaboration in a common mission, and coordinating reviews or approvals when there is more than one agency mandated to act in a particular substantive area.[429]

The Author therefore adopts these coordination tools to address the overlapping of supervisory and regulatory powers of the SEC, DOE, and ERC pertaining to determining Filipino-foreign ownership requirement in the renewable energy generation sector.

---

425. *Id.*

426. *Id.* at 21.

427. *Id.* at 25.

428. *Id.*

429. Freeman & Rossi, *supra* note 423, at 25.

### *A. Amendment in the Foreign Investment Act Mandating the SEC to Exercise Exclusive Authority in Ensuring Equity Compliance Provided Under the Act and Coordinate with Sector-Specific Regulatory Agencies*

As discussed in the preceding Chapter, given the issue at hand, the required expertise and technical knowledge, and the ultimate relief sought, the SEC should be given the exclusive authority to supervise and monitor equity compliance. As explicitly mentioned in *Heirs of Gamboa*, the SEC is the government agency tasked in enforcing the nationality requirements provided in the Constitution.[430] Within its exclusive supervisory powers, the SEC's determination of nationality of corporations and compliance with Filipino-foreign ownership requirement should be binding and conclusive to other sector-specific agencies.[431] Despite such, however, the Commission is still in-charge of coordinating with other agencies in order to ensure that the latter will be updated with current equity structure of a corporation and its continuing compliance with the nationality requirements.[432]

Hence, any changes in equity by a corporation should be religiously coordinated by the SEC to the sector-specific agencies in order to ensure that the corporations engaged in the nationalized industries maintain its legal standing to pursue its obligation, its standing being dependent with its Filipino ownership. Also, coordination efforts must not only be subject to the SEC's initiative. Sector-specific agencies should also be mandated to raise nationality and equity compliance issues before the SEC. These agencies should defer ruling or refuse to independently determine compliance with foreign equity restrictions and instead allow the SEC to exclusively resolve the matter.

### *B. In the Interim, SEC Should Forge a Memorandum of Agreement with the Department of Energy and the Energy Regulatory Commission Delineating Its Powers and Functions*

Given that the amendment introduced in the FIA requires the SEC and sector-specific regulatory agencies like the DOE and the ERC to coordinate, these coordination efforts must be concretize as regards notification matters, issue deference, and consultation arrangements whenever nationality of corporations engaged in the renewable energy industry will be raised through a memorandum of agreement among these three agencies. The

---

430. *Heirs of Gamboa*, 682 SCRA at 464.

431. *See id*.

432. *See* REV. CORP. CODE, § 177.

memorandum of agreement should include the extent of authority these three agencies will exercise with regard to the issue of Filipino-foreign ownership, how this authority will be exercised, and at the same time, how the sector-specific regulatory agencies and SEC should notify each other whenever changes in equity and/or possible circumvention of the law will arise.

The Author uses as a benchmark the existing memoranda of agreements between the Philippine Competition Commission (PCC) and Department of Trade and Industry (DTI), and PCC with the SEC in fostering inter-agency coordination as regards information sharing and notification issues in addressing competition complaints and cases.

ADDENDUM

*Annex A: Proposed Further Amendment of the Foreign Investment Act of 1991, as Amended*

EIGHTEENTH CONGRESS OF THE REPUBLIC )
OF THE PHILIPPINES )
*Second Regular Session* )

S E N A T E
Senate Bill No. _____

Prepared by the Committee on Economic Affairs

EXPLANATORY NOTE

The Foreign Investment Act of 1991 has been enacted in order to liberalize foreign participation in the economic industry in the country. It contains Negative Lists A and B which contain the enumerated industries with limited allowable foreign participation in equity. Furthermore, based on its implementing rules and regulations, the SEC or BTRCP, whichever is applicable, is in-charge of ensuring compliance with the equity requirements under the act. However, the possibility of overlapping and conflicting supervisory powers with other sector-specific regulatory agencies in monitoring compliance with the equity requirements was not then foreseen causing instability in the affected nationalized industries and going against the very purpose of institutionalizing a liberalized and systematized entry of foreign investments.

This bill seeks to introduce a provision that mandates the SEC or BTRCP to exercise exclusive authority in determining the nationality of corporation and equity compliance provided under the Constitution and the law. Furthermore, this provision would also warrant that the findings of the said two agencies will be binding and conclusive as to other agencies. Also, this bill seeks to amend Section 12 of Republic Act No. 7042 as amended by Republic Act No. 8179 to mandate the SEC and the sector-specific regulatory agencies to coordinate whenever issues of nationality and equity compliance will arise.

EIGHTEENTH CONGRESS OF THE REPUBLIC )
OF THE PHILIPPINES )
*Second Regular Session* )

S E N A T E
Senate Bill No. _____

Prepared by the Committee on Economic Affairs

AN ACT FURTHER AMENDING REPUBLIC ACT NO. 7042 AS AMENDED BY REPUBLIC ACT NO. 8179 OR AN ACT TO PROMOTE FOREIGN INVESTMENTS, PRESCRIBE THE PROCEDURES FOR REGISTERING ENTERPRISES DOING BUSINESS IN THE PHILIPPINES, AND FOR OTHER PURPOSES[433]

*Be it enacted by the Senate and the House of Representatives of the Philippines in Congress assembled:*

SECTION 1. The Foreign Investment Act is further amended by inserting a new section designated as Section 12 to read as follows —

"*Sec. 12. Monitoring of Compliance with Equity Participation Requirements.* — The SEC or BTRCP, as applicable, shall exercise exclusive authority in monitoring the equity compliance provided in this Act. The findings and recommendations of the SEC or BTRCP, shall be binding and conclusive to other regulatory agencies exercising concurrent supervisory powers over a specific nationalized industry."

SECTION 2. Section 12, of Republic Act No. 7042 as amended by Republic Act No. 8179, is hereby renumbered as Section 13 and amended to read as follows —

"*Sec. 13. Consistent Government Action* — No agency, instrumentality or political subdivision of the Government shall take any action in conflict with or which will nullify the provisions of this Act, or any certificate or authority granted hereunder. Sector-specific regulatory agencies, shall coordinate with the SEC or BTRCP to address possible circumvention of the requirements provided under this act. The SEC or BTRCP, are also in-charge to inform and coordinate with other regulatory agencies as regards equity compliance

433. This proposed amendment is patterned after Republic Act No. 8179.

of entities engaged in nationalized industries under the latter's concurrent supervisory powers."

SECTION 3. *Separability Clause* — If any part or section of this Act is declared unconstitutional for any reason whatsoever, such declaration shall not in any way affect the other parts or sections of this Act.

SECTION 5. *Repealing Clause* — All other laws or parts of laws inconsistent with the provisions of this Act are hereby repealed or modified accordingly.

SECTION 6. *Effectivity* — This Act take effect from fifteen (15) days after approval and publication in two (2) newspapers of general circulation in the Philippines.

*Annex B: Proposed Memorandum of Agreement to be Entered into by the Securities and Exchange Commission, Department of Energy, and the Energy Regulatory Commission*

MEMORANDUM OF AGREEMENT[434]

RE: ON DETERMINING COMPLIANCE WITH FILIPINO-FOREIGN OWNERSHIP REQUIREMENT IN THE RENEWABLE ENERGY INDUSTRY

This Memorandum of Agreement (this "Agreement") is entered into on this ____ day of _____ 2023 by the following parties:

> *THE SECURITIES AND EXCHANGE COMMISSION,* hereafter to be referred to as the "*SEC*," a government agency duly organized and existing under and by virtue of Commonwealth Act No. 83, as amended and reorganized under Republic Act No. 8799 otherwise known as the Securities Regulation Code with principal office address at PICC Complex Roxas Boulevard, Metro Manila Philippines and represented in this act by its Chairman and CEO, Emilio Benito Aquino;
>
> -and-
>
> *THE DEPARTMENT OF ENERGY*, hereafter to be referred to as the "*DOE*," a government agency duly organized and existing under and by virtue of Republic Act 7638, as amended by Republic Act No. 9136, with principal office address at Energy

434. This Memorandum of Agreement is patterned after the Memorandum of Agreement between the Philippine Competition Commission and the Department of Trade and Industry (Feb. 15, 2019) and the Memorandum of Agreement between Securities and Exchange Commission and the Philippine Competition Commission (Dec. 5, 2016).

Center, 34th street cor. Rizal Drive, Bonifacio Global City, Taguig, represented herein by its Secretary Alfonso Cusi;

-and-

*THE ENERGY REGULATORY COMMISSION*, hereafter to be referred to as the "*ERC*," a quasi-judicial body established pursuant to Republic Act No. 9136, with address at San Miguel Ave., Ortigas Center, Pasig City, and represented in this Act by its Chairperson and CEO, Agnes Devanadera.

(The SEC, DOE, and ERC, are collectively referred to in this agreement as "Parties")

WITNESSETH

*WHEREAS*, Section 12, Article XII of the 1987 Constitution provides that 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 60% of whose capital is owned by such citizens.

*WHEREAS*, List A of the 11th Negative List provides that the exploration, development, and utilization of natural resources is subject to a maximum of 40% foreign participation in capital.

*WHEREAS*, the Implementing Rules and Regulations of the Renewable Energy Law provides that a corporation or association that is a party to a service contract must at least be 60% owned by Filipinos. Foreign RE Developers may also be allowed to undertake RE development through an RE Service/Operating Contract with the government, subject to Article XII, Section 2 of the Philippine Constitution.

*WHEREAS*, the case of *Gamboa v. Teves* provides that the SEC is the government agency tasked with the statutory duty to enforce the nationality requirements of the Constitution.

*WHEREAS*, Section 12 of the amended Foreign Investment Act provides that the SEC shall exercise exclusive authority in determining the nationality of corporations and ensuring compliance with the equity requirements

*WHEREAS*, Section 179 of the Revised Corporation Code provides that the SEC has the power of supervision and jurisdiction over the corporate sector in the country.

*WHEREAS*, Section 37 (h) of Republic Act No. 9136 provides that the DOE has the power of supervision and control over all government activities relative to energy projects.

*WHEREAS*, Section 6 of Republic Act No. 9136 in relation to the 2014 Guidelines on the Issuance of Certificate of Compliance provides that entities that will engage in the generation sector should secure a Certificate of Compliance with the ERC.

*WHEREAS*, Section 13 of the amended Foreign Investment Act provides that sector-specific regulatory agencies are mandated to coordinate with the SEC whenever possible circumvention of the equity requirements will arise. Furthermore, the same provision of law mandates the SEC to coordinate with the regulatory agencies exercising supervisory powers over specific nationalized industries.

*WHEREAS*, the Parties acknowledge that the renewable energy generation industry, being capitally-intensive and being the only country in Asia-Pacific with stringent foreign investment regulating the industry, should avoid conflicting findings and decisions by properly delineating the extent of its powers and functions.

*WHEREAS*, the Parties recognize that in order to ensure that the nationality requirements provided under the Constitution and related statutes are not circumvented, coordination measures should be adopted and enforced.

*WHEREFORE*, in furtherance of the mandate to coordinate as regards compliance with equity requirements provided by law, the Parties agreed as follows:

SECTION 1. Obligations of Parties

(a) *Securities and Exchange Commission* — The SEC, exercising its supervisory powers and jurisdiction over the corporate sector, is in-charge of exclusively determining the nationality of corporations and compliance with the equity requirements

provided under this Agreement, the Constitution, and relevant statutes governing the renewable energy generation industry. The SEC should, at the time of registration and after the issuance of certificate of registration, ensure the continuing compliance with the equity requirements.

(b) *Department of Energy* — The DOE, exercising its power of supervision and control over all government activities related to energy projects and the monitoring of private participation in the energy industry, should assist and coordinate with the SEC as regards the issue concerning nationality of corporate entities engaged in the renewable energy generation industry.

Nothing in this Agreement should be construed as a derogation of the DOE's authority in exercising its regulatory powers in granting the Service Contract to RE developers. *The mandate of assistance and coordination should only be limited to issues relating to compliance with the equity requirements*.

Upon the SEC's findings that the corporation is compliant with the required Filipino-foreign ownership, and the corporation also complied with other legal, technical, and financial requirements and in the absence of any ground for disqualification, the DOE should then issue the Service Contract. A Certificate of Endorsement should also be issued in favor of the RE developer to be forwarded to the ERC.

(c) *Energy Regulatory Commission* — In the absence of a law, rule, or regulation that makes the Filipino-foreign ownership as a requirement prior to the ERC's grant of Certificate of Compliance, *the ERC, should rely only with the Certificate of Endorsement to be issued by the DOE containing the favorable findings of the Department*.

SECTION 2. Coordination and Cooperation

(a) *Monitoring of equity compliance of corporate participants in the RE generation industry* — Where one "Party" receives or otherwise becomes aware of any matter involving compliance with equity requirements provided by the Constitution as to the exploration, development, and utilization of natural resources, such Party shall promptly inform the other "Parties", with a view to coordinating, as appropriate, on the actions or measures to be taken by each "Party" in relation to the matter involving

the equity requirements. Subject to Section 3 of this Agreement, a notification under this Section shall be transmitted together with copies of all documents and records pertaining to the notified matter that are within the custody or control of the notifying party.[435]

(b) *Consultations between the SEC and DOE on concurrent supervisory powers* — Whenever necessary, the SEC and DOE shall endeavor to jointly issue Joint Guidelines on the engagement of corporate participants in the renewable energy generation sector to operationalize the provisions of this Agreement and revisions or addenda thereto.[436]

(c) *Referral to the SEC* — Upon receipt by the SEC of the referral from the DOE, the SEC shall conduct investigation and enforcement support mechanisms to the DOE on matters pertaining to the nationality of the renewable energy generation participant and its compliance with the equity requirements provided by the Constitution, RE Law, and other statutes governing the exploration, development, utilization of natural resources.

Furthermore, any proposed action of a corporation engaged in the renewable energy generation sector that would affect its compliance with the equity requirements provided by the Constitution or would alter its equity structure should be accompanied first by an endorsement by the DOE before the SEC can validly act on the said proposal.

(d) *Capacity-building* — Subject to resource and operational considerations, the Parties may agree to organize joint capacity-building activities for the purpose of promoting coordination and cooperation under this Agreement.[437]

(e) *Continuing review* — The parties undertake to keep the operation of this Agreement under review and execute amendments or supplements to this Agreement for purposes of improving its

435. Lifted from the MOA between PCC and DTI (Feb. 15, 2019).

436. *Id.*

437. *Id.*

operation and resolving any issue that may arise during its implementation.[438]

SECTION 3. Access to Information

(a) *Access to Information and Documents* — Subject to the requirements of the Data Privacy Act on data sharing, each Party, upon request of the other, shall promptly provide access to information and documents (e.g., reports, analysis, papers, assessments, notices, opinions, and guidelines) within the custody or control of the requested Party and which are relevant and necessary to the effective enforcement of this Agreement, the Constitution, and other laws governing equity requirements in the renewable energy generation sector. Access to information and documents under this Section shall be subject to the Data Privacy Act and other applicable rules on confidentiality and privilege under relevant laws, rules, and regulations.[439]

(b) *Confidentiality* — Except as may otherwise be required or allowed by law, the Parties shall keep confidential and shall not, without the prior written consent of the other, divulge to any third party any documents, records, data, or other information of a confidential or privileged nature arising from or in any way related to this Agreement, and furnished directly or indirectly by one Party to the other.[440]

For purposes of this Agreement, information of a confidential or privileged nature shall refer to information disclosed by one Party to the other which is labeled or designated as confidential or privileged by the disclosing Party, or is determined to be confidential or privileged pursuant to applicable rules on confidentiality and privilege under relevant laws, rules, and regulations.[441]

(c) *Communications to the Public* — The Parties, where appropriate, shall liaise with each other in preparing statements and responses relating to matters of media interest and as regards arrangements

438. *Id.*

439. *Id.*

440. *Id.*

441. Lifted from the MOA between PCC and DTI (Feb. 15, 2019).

for the publication of information for and consultations with relevant stakeholders.[442]

(d) *Use of Information and Documents* — The Parties agree to limit the use of any and all information and documents obtained pursuant to this Agreement for lawful purposes and in pursuance of the objectives of this Agreement as well as the respective mandates of the Parties.[443]

SECTION 4. Notices and Authorized Representatives

(a) *Notices*[444] — Any notice, request, or other communication given under, or in connection with the implementation or enforcement of this Agreement shall be in writing and sent by the concerned Party's Authorized representative(s) through any of the following modes:

(a) By courier or personal delivery to the addresses stated in this Agreement;

(b) By electronic mail to the email following email addresses

(i) For SEC: _____

(ii) For DOE: _____

(iii) For ERC: _____

A notice is deemed to have been received at the time of delivery if such notice is given by courier or personal delivery. If written notice is given by electronic mail, the notice is deemed to have been received at the time of transmission of said electronic mail.

(b) *Authorized Representatives*[445] — The Parties hereby designate the following persons as their respective Authorized Representatives, who shall be responsible for the implementation or enforcement of this Agreement:

442. *Id.*

443. *Id.*

444. *Id.*

445. *Id.*

(i) For SEC: (From the Company Registration and Monitoring Division)

(ii) For DOE: (From the Renewable Energy Management Bureau)

(iii) For ERC: (From the Licensing & Market Monitoring Division)

Each Party may appoint additional Authorized Representative(s), as may be necessary for the efficient implementation of this Agreement. Any change in the designated Authorized Representative(s) of each Party shall be notified immediately to the other Party and deemed effective upon the other Party's receipt of said notice.

SECTION 5. General Provisions

(a) *Effectivity*[446] — This Agreement shall become effective upon execution by the Parties and shall remain in force until terminated in accordance with Section 4 (b) hereof.

(b) *Termination*[447] — Either Party may terminate this Agreement, with or without cause, by serving a written notice of termination to the other Party. Said termination by either Party shall become effective immediately upon receipt of such written notice by other Party.

(c) *Amendments*[448] — Subsequent revisions, amendments, repeals, and supplements to this Agreement shall be made upon mutual written agreement by the Parties.

(d) *Separability*[449] — If any one of the provisions contained in this Agreement shall be declared invalid, illegal or unenforceable in any respect under any applicable law, the validity, legality, and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby.

446. *Id.*

447. Lifted from the MOA between PCC and DTI (Feb. 15, 2019).

448. *Id.*

449. *Id.*

(e) *No waiver*[450] — No failure, omission, or delay of any of the parties in exercising any of its rights, privileges, or remedies hereunder shall operate as a waiver thereof.

No waiver or departure from the terms of this Agreement shall be valid unless made in writing and signed by the party's authorized representative. Such waiver shall be effective only in specific instance and the purpose for which it was given.

(f) *Effectivity*[451] — This Agreement shall take effect on the date of signing by the Parties.

*IN WITNESS THEREOF*, the Parties have caused this Agreement to be signed by their duly authorized representatives on the date and place first above written.

Securities and Exchange Commission:

_____
Chairman Emilio Benito Aquino

Department of Energy:

_____
Secretary Alfonso Cusi

Energy Regulatory Commission:

_____
Chairman Agnes Devanadera

450. *Id.*

451. *Id.*