Transplantation Is the Best Form of Flattery: A Study of Legal Transplantation in *Total Office Products and Services (TOPROS), Inc. v. John Charles Chang, Jr., et al.*

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I. INTRODUCTION

According to Alan Watson, the act of legal transplantation refers to "the moving of a rule or a system of law from one country to another, or from one people to another[.]"[1] He explains that the process of legal transplantation is a phenomenon that can be observed throughout recorded history, and in fact has existed as early as 1700 B.C., when the ancient Babylonians in the Code of Hammurabi adopted the earlier 1800 B.C. rules of the ancient Sumerian city of Eshnunna on the determination of liability when one's ox gores another person.[2]

The Philippines in the 21st century is no stranger to the process of legal transplantation. As regard to statutes, the legislature has taken into consideration foreign statutes in crafting recent laws, with one example that closely resembles foreign law — particularly that of the United States (U.S.) and the European Union (EU) — being the Philippine Competition Act.[3]

Aside from legislative acts, legal transplantation similarly occurs in cases decided by the Supreme Court of the Philippines. As early as the pre-war era, the Court, in the case of *Philippine Trust Co. et al. v. Yatco*,[4] applied case law coming from the U.S. Supreme Court in resolving the constitutionality of the provision of taxes on capital, deposits, and circulation of banks under Section 1499 of the Revised Administrative Code.[5] And as of the time of this Comment, a survey of the Court's decisions reveals that legal transplantation has occurred in

1. ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 21 (2d ed. 1993).

2. *Id.* at 22-23.

3. An Act Providing for a National Competition Policy Prohibiting Anti-Competitive Agreements, Abuse of Dominant Position and Anti-Competitive Mergers and Acquisitions, Establishing the Philippine Competition Commission and Appropriating Funds Therefor [Philippine Competition Act], Republic Act No. 10667 (2015). *See generally* Alizedney M. Ditucalan, *The Philippine Competition Act: A Mestiza?*, 9 KLRI J. L. & LEGIS. 113, 148 (2019).

4. Philippine Trust Co. et al. v. Yatco, 69 Phil. 420 (1940).

5. *Id.* at 422-23. (citing Union Bank & Trust Co. v. Phelps, 288 U.S. 181, 186-88 (1933) & Merchants' & Manufacturers' Nat. Bank of Pittsburgh v. Commonwealth of Pennsylvania, 167 U.S. 461, 463-65 (1897)).

a slew of cases in different fields of law such as taxation law,[6] constitutional law,[7] and commercial law.[8] In transplanting foreign legal rules into the country's legal

6. *See, e.g.*, Tan Tiong Bio v. Commissioner of Internal Revenue, G.R. No. L-15778, 4 SCRA 986, 1000 (1962) (citing Bacon v. Robertson, 59 U.S. 480, 487-88 (1855); Curran v. Arkansas, 56 U.S. 304, 307 (1853); McWilliams v. Excelsior Coal Co., 298 F. 884, 886 (8th Cir. 1924) (U.S.); Quinn v. McLendon, 238 S.W. 32, 33-34 (1922) (U.S.); & Wonder Bakeries Co. v. United States, 6 F. Supp. 228, 233 (Ct. Cl. 1934)); Collector of Internal Revenue v. Binalbagan Estate, Inc., G.R. No. L-12752, 13 SCRA 1, 8 (1965) (citing 3 JACOB MERTENS, JR., LAW ON FEDERAL INCOME TAXATION 375 (1934))); Basilan Estates, Inc. v. Commissioner of Internal Revenue, G.R. No. L-22492, 21 SCRA 17, 23 (1967) (citing City of Knoxville v. Knoxville Water Co., 212 U.S. 1, 14 (1909); Detroit Edison Co. v. Commissioner of Internal Revenue, 131 F. 2d 619, 622 (1943) (U.S.); Palmer v. State Commission of Revenue & Taxation, 135 P. 2d 899, 904 (Kan. 1943) (U.S.); & Southern Weaving Co. v. Query et al., 34 S.E. 2d 51, 54 (S.C. 1945) (U.S.)); Commissioner of Internal Revenue v. Citytrust Investment Phils., Inc., G.R. No. 139786, 503 SCRA 398, 410 (2006) (citing Commissioner of Internal Revenue v. Solidbank Corporation, G.R. No. 148191, 416 SCRA 436, 453-54 (2003) (citing Lucky Lager Brewing Co. v. Commissioner of Internal Revenue, 246 F. 2d, 621, 622 (9th Cir. 1957) (U.S.) & State v. United Electric Light & Water Co., 97 A. 857, 859 (Conn. 1916) (U.S.))); Chamber of Real Estate and Builders' Associations, Inc., v. Romulo, G.R. No. 160756, 614 SCRA 605, 628-29 (2010) (citing Okin v. Commissioner of Internal Revenue, 808 F. 2d 1338, 1342 (9th Cir. 1987) (U.S.)); Freeman v. Commissioner of Internal Revenue, No. 131950-99, 2001 WL 1150022, at *10 (T.C. 2001) (Westlaw, U.S.); Wyly v. United States, 662 F. 2d 397, 403-06 (5th Cir. Nov. 1981) (U.S.); Klaasen v. Commissioner of Internal Revenue, No. 98-9035, 1999 WL 197172, at *3-4 (10th Cir. 1999) (Westlaw, U.S.) (unreported); Helvering v. Independent Life Insurance Co., 292 U.S. 371, 381 (1934) (citing Burnet v. Thompson Oil & Gas Co., 283 U.S. 301, 304 (1931); Stanton v. Baltic Mining Co., 240 U.S. 103, 112-13 (1916); & Brushaber v. Union Pacific Railroad Co., 240 U.S. 1, 23-26 (1916); & New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934))); & Aces Philippines Cellular Satellite Corporation v. Commissioner of Internal Revenue, G.R. No. 226680, Aug. 30, 2022, at 13-14, *available at* https://sc.judiciary.gov.ph/wp-content/uploads/2023/02/226680.pdf (last accessed Jan. 31, 2023) (citing Commissioner of Internal Revenue v. Piedras Negras Broadcasting Co., 127 F. 2d 260, 261 (5th Cir. 1942) (U.S.)).

7. *See, e.g.*, King v. Hernaez, G.R. No. L-14859, 4 SCRA 792, 804 (1962) (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)); Republic v. Cokeng, G.R. No. L-19829, 23 SCRA 559, 563-64 (1968) (citing United States v. Nopoulos, 225 F. 656, 661 (S.D. Iowa 1915) (U.S.); United States v. Plaistow, 189 F. 1006, 1009-10 (W.D.N.Y. 1910) (U.S.); Grahl v. United States, 261 F. 487, 489-90 (7th Cir. 1919) (U.S.); United States v. Koopmans, 290 F. 545, 546 (E.D.N.Y. 1923) (U.S.); United

States v. Khan, 1 F.2d 1006, 1007 (W.D. Penn. 1924) (U.S.); United States v. Ness, 245 U.S. 319, 324-25 (1917); United States v. Ginsberg, 243 U.S. 472, 475 (1917); & United States v. Beda, 118 F. 2d 458, 459 (2d Cir. 1941) (U.S.)); Javellana v. The Executive Secretary, G.R. No. L-36142, 50 SCRA 30, 80 (1973) (citing *In re* Opinion of the Justices, 107 A. 673, 674 (Me. 1919) (U.S.); Crawford v. Gilchrist, 59 So. 963, 966-67 (Fla. 1912) (U.S.); McAdams v. Henley, 273 S.W. 355, 357-58 (Ark. 1925) (U.S.); Egbert v. City of Dunseith, 24 N.W.2d 907, 909 (N.D. 1946) (U.S.); State *ex rel*. Landis v. Thompson, 163 So. 270, 277 (Fla. 1935) (U.S.); National Prohibition Cases, 253 U.S. 350, 386 (1920); Ellingham v. Dye, 99 N.E. 1, 18 (Ind. 1912) (U.S.); & Johnson v. Craft, 87 So. 375, 381 (Ala. 1921) (U.S.)); Habana v. National Labor Relations Commission, G.R. No. 129418, 314 SCRA 187, 196 (1999) (citing Stanley v. Illinois, 405 U.S. 645, 656 (1972)); Francisco, Jr. v. The House of Representatives, 460 Phil. 830, 922-24 (2003) (citing Demetria v. Alba, G.R. No. L-71977, 148 SCRA 208, 210, & 210-11 n. 4 (1987) (citing Ashwander v. Valley Authority, 297 U.S. 288, 346-48 (1936) (J. Brandeis, concurring opinion))); & Francis "Kiko" N. Pangilinan, et al. v. Alan Peter S. Cayetano, et al., G.R. No. 238875, July 21, 2021, *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/67374 (last accessed Jan. 31, 2023) (citing Goldwater v. Carter, 444 U.S. 996, 999 & 1003 (1979) (J. Powell, concurring opinion & C.J. Rehnquist, concurring opinion)).

8. *See, e.g.*, Transimex Co. v. Mafre Asian Insurance Corp., G.R. No. 190271, 802 SCRA 667, 683-84 (2016) (citing 13 A.L.R. Fed. 323 (1972) (citing Georgia-Pacific Corporation v. Motorship Marilyn, 331 F. Supp. 776, 782 (E.D. Va. 1971) (U.S.); New Rotterdam Insurance Co. v. S.S. Loppersum, 215 F. Supp. 563, 566 (S.D.N.Y. 1963) (U.S.); Freedman & Slater, Inc. v. M. V. Tofevo, 222 F. Supp. 964, 967 (S.D.N.Y. 1963) (U.S.); R.T. Jones Lumber Company v. Roen Steamship Company, 270 F. 2d 456, 458 (2d Cir.1959) (U.S.); R.T. Jones Lumber Co. v. Roen S.S. Co., 213 F. 2d 370, 373 (7th Cir. 1954) (U.S.); Waterman S.S. Corp. v. United States S. R. & M Co., 155 F. 2d 687, 692 (5th Cir. 1946) (U.S.); J. Gerber & Co. v. S.S. Sabine Howaldt, 437 F. 2d 580, 596 (2d Cir. 1971) (U.S.); Nichimen Co. v. M/V Farland, 333 F. Supp. 691, 698 (S.D.N.Y. 1971) (U.S.); *New Rotterdam Insurance Co.*, 215 F. Supp. at 567; *M.V. Tofevo*, 222 F. Supp. at 970; *Roen Steamship Company*, 270 F. 2d at 458; Government of Pakistan, etc. v. The S.S. Ionian Trader, 173 F. Supp. 29, 30 (S.D.N.Y. 1959) (U.S.); Petition of Moore-McCormack Lines, Inc., 164 F. Supp. 198, 211 (S.D.N.Y. 1958) (U.S.); Palmer Distributing Corp. v. The S.S. American Counselor, 158 F. Supp. 264, 266 (S.D.N.Y. 1957) (U.S.); States Steamship Company v. United States, 259 F.2d 458, 462-63 (9th Cir. 1957) (U.S.); Diethelm & Co. v. S.S. The Flying Trader, 141 F. Supp. 271, 272-73 (S.D.N.Y. 1956) (U.S.); Establissements Edouard Materne v. The S.S. Leerdam, 143 F. Supp. 367, 369 (S.D.N.Y. 1956) (U.S.); *Roen S.S. Co.*, 213 F. 2d at 373; Continex, Inc. v. The Flying Independent, 106 F. Supp. 319, 322 (S.D.N.Y. 1952) (U.S.); Artemis Maritime Co. v. Southwestern Sugar & M. Co., 189 F. 2d 488, 491-92 (4th Cir. 1951) (U.S.); Middle East Agency v. The John B. Waterman, 86 F. Supp. 487, 489

system, the Court would generally premise the adoption of the former rule in this manner[9] — "*while cases decided in other jurisdictions are not controlling, they have persuasive effect*." On the other hand, the persuasiveness of foreign rules is premised in this manner — "*the law in question was patterned after* [*insert foreign jurisdiction*] *which was adopted by the Philippines*."

It should be noted, however, that the foregoing permutation has changed over time. Initially, the persuasiveness of other jurisdictions, primarily that of American law, had "controlling persuasive effect" in the Court's words.[10] Nonetheless, the Court had also made it clear that the adoption of foreign rules should not be done hook, line, and sinker as stated in the case of *Sanders v. Hon. Veridiano II*[11] —

> We appreciate the assistance foreign decisions offer us, and not only from the [U.S.] but also from Spain and other countries from which we have derived some[,] if not most[,] of our own laws. But we should not place undue and fawning reliance upon them and regard them as indispensable mental crutches without which we cannot come to our own decisions through the employment of our own endowments. We live in a different ambience and must decide our own problems in the light of our own interests and needs, and of our qualities and even idiosyncrasies as a people, and always with our own concept of law and justice.[12]

As of the writing of this Comment, the Court has tried to temper the broadness of its transplantation by providing certain limitations, as exhibited in the case of *Pangilinan v. Cayetano*[13] where the Court, speaking through Associate Justice (now Senior Associate Justice) Marvic M.V.F. Leonen, held —

(S.D.N.Y. 1949) (U.S.); The Norte, 69 F. Supp. 881, 887 (E.D. Penn. 1947) (U.S.); The Vizcaya, 63 F. Supp. 898, 903-04 (E.D. Penn. 1945) (U.S.); Ore Steamship Corporation v. D/S A/S Hassel, 137 F. 2d 326, 328-29 (2d Cir. 1943) (U.S.); & The Schickshinny, 45 F. Supp. 813, 817-18 (S.D. Ga. 1942) (U.S.))); & Ient v. Tullett Prebon (Philippines), Inc., G.R. No. 189158, 814 SCRA 184, 215-16 (2017) (citing Smith v. Doe, 538 U.S. 84, 94-95 (2003) (citing United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364-65 (1984))).

9. The subsequent formulation is the Author's attempt of summarizing and paraphrasing how legal transplantation operates in the Philippine legal system.

10. *Philippine Trust Co.*, 69 Phil. at 423.

11. Sanders v. Hon. Veridiano II, G.R. No. L-46930, 162 SCRA 88 (1988).

12. *Id.* at 99.

13. *Pangilinan*, G.R. No. 238875.

> To be clear, however, while legal principles in a legal system similar to ours may hold persuasive value in our courts, we will not adopt such principles *without considering our own unique cultural, political, and economic contexts*. The Philippines has long struggled against colonialism. We will not betray efforts at evolving our own just but unique modalities for judicial review by summarily adopting foreign notions.[14]

More recently, the process of legal transplantation was applied in the field of corporate law. In the recent case of *Total Office Products and Services (TOPROS), Inc., v. John Charles Chang, Jr., et.al*,[15] the Court, in a decision penned by Associate Justice Henri Jean Paul B. Inting, adopted the corporate opportunity doctrine as understood in American common law, as a guide in determining whether a corporate director or officer has breached their duty of loyalty under then Sections 31 and 34 of the Corporation Code of the Philippines (now Sections 30 and 33 of the Revised Corporation Code).[16]

The controversy in *TOPROS* stemmed from an intra-corporate dispute filed by Total Office Products and Services, Inc. (TOPROS) against John Charles Chang, Jr. and others for Chang's alleged violation of his duty of loyalty in relation to Sections 31 and 34 of the Corporation Code.[17] In its complaint, TOPROS accused Chang of the following acts of disloyalty during his tenure as its President and General Manager: (1) the issuance of receipts to its customers from TOPGOLD Philippines, Inc. (TOPGOLD), the Golden Exim Trading & Commercial Corporation, and the Identic International Corporation (the respondent corporations), all of whose shares are substantially owned by Chang; and (2) Chang and his co-respondents' alleged siphoning of TOPROS' assets, funds, goodwill, equipment, and resources in favor of the said respondent corporations.[18]

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14. *Id.* at 42 (emphasis supplied).

15. Total Office Products and Services (TOPROS), Inc. v. Chang, Jr., et al., G.R. No. 200070, Dec. 7, 2021, *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/68119 (last accessed Jan. 31, 2023).

16. *Id.* (citing The Corporation Code of the Philippines [CORP. CODE], Batas Pambansa Blg. 68, §§ 31 & 34 (1980) (repealed in 2019) & An Act Providing for the Revised Corporation Code of the Philippines [REV. CORP. CODE], Republic Act No. 11232, § 30 & 33 (2019)).

17. *See generally TOPROS, Inc.*, G.R. No. 200070. *See also* CORP. CODE, §§ 31 & 34 (repealed in 2019).

18. *Id.*

The Regional Trial Court ruled against Chang and held that he violated his fiduciary duties and was guilty of disloyalty.[19] The following were considered as acts of disloyalty: (1) Chang established the respondent corporations that were in the same line of business as TOPROS while he was still an officer and director of the latter; (2) he acquired business opportunities which should have belonged to TOPROS, such as the service contract entered into between Golden Exim and Linde Refrigeration Phils. (Golden Exim), a client of the petitioner; (3) as shown by a certification, TOPGOLD was appointed by TOPROS as its authorized distributor; (4) Chang's signing of a deed of assignment assigning to TOPGOLD the rights of TOPROS to the lease of office equipment; (5) TOPGOLD using the same address as petitioner; (6) the land where TOPROS' building stands was registered in the name of Golden Exim for the reason that Chang "had to have his own living."[20] In view of Chang's acts, the trial court ordered Chang and the respondent corporations to pay for damages, and account for all the profits and properties which otherwise should have accrued to petitioner and refund the same to it.[21] Aggrieved, Chang and companies filed their respective appeals with the Court of Appeals (CA).[22]

Acting on the appeal, the CA ruled in favor of the respondents and accordingly reversed the trial court's decision.[23] It held that TOPROS' mere allegation that Chang siphoned off its funds to establish the respondent corporations "[did] not amount to clear and convincing evidence [ ] to support allegations of fraud."[24] It also held that the trial court's finding of disloyalty regarding Chang's "subsequent acquisition of the service contract [ ] entered between [petitioner and Linde] failed to consider that during [the said period, petitioner] was either closing down or had already closed down."[25] Moreover, it held that the testimonies of petitioner's witnesses stating the different irregularities were inadmissible for being hearsay.[26]

In resolving the petition, the Court undertook to elucidate the history of the corporate opportunity doctrine as found in Philippine case law and found

19. *TOPROS, Inc.*, G.R. No. 200070.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *TOPROS, Inc.*, G.R. No. 200070.

26. *Id.*

that this country has yet to provide for parameters in determining whether the duty of loyalty has been breached by a corporate officer and director.[27] This led the Court to rely on foreign sources of law to develop its parameters, particularly case law from the U.S.[28]

As can be observed, the Court has seemingly reverted to its usual permutation in transplanting foreign case law as the standard to be used to determine whether the duty of loyalty has been breached.

The foregoing circumstances leads the Author — and potentially the reader — to ask the following question: *Is there really a proper formula in conducting legal* (*in a judicial sense*) *transplantation within the Philippine legal framework?* In this relation, *was the adoption of the doctrine of corporate opportunity as espoused in American corporate law, proper?*

In answering these questions, it is necessary to first have a proper understanding of legal transplantation as a process before attempting to use the same in the Philippine context. Thus, the Comment herein shall be divided into four parts. The *first part* shall serve as the introduction of the Comment as already discussed herein. The *second part* will present the understanding by the Court of the corporate opportunity doctrine before and after *TOPROS*. The *third part*, on the other hand, will provide a more detailed discussion on the process of legal transplantation and a determination of whether the process of transplanting the corporate opportunity doctrine was proper. Finally, the *last part* of the Comment shall discuss suggestions from the Author, which shall culminate in a restatement of the Court's parameters as enunciated in *TOPROS*.

II. THE CORPORATE OPPORTUNITY DOCTRINE AS UNDERSTOOD IN PRE-TOPROS AND POST-TOPROS

As held in the case of *Strategic Alliance Development Corporation v. Radstock Securities Limited*,[29] members of the board of directors have a three-fold duty: duty of obedience, duty of diligence, and duty of loyalty.[30] In particular, the duty of loyalty presupposes that a member of the board does "not acquire any

27. *Id.*

28. *Id.*

29. Strategic Alliance Development Corporation v. Radstock Securities Limited, G.R. No. 178158, 607 SCRA 413, 459-60 (2009).

30. *Id.* at 439-40 (citing CESAR L. VILLANUEVA, PHILIPPINE CORPORATE LAW 377-78 (2018) & CORP. CODE, § 31 (repealed in 2019)).

personal or pecuniary interest in conflict with their duty as such directors or trustees."[31]

A. The Corporate Opportunity Doctrine Pre-TOPROS

Under the Corporation Code, the board member's duty of loyalty, together with the consequence of the breach thereof, were provided under Sections 31 and 34,[32] to wit —

> Section 31. *Liability of directors, trustees*[,] *or officers*. — Directors or trustees who [willfully] and knowingly vote for[,] or assent to patently unlawful acts of the corporation[,] or who are guilty of gross negligence or bad faith in directing the affairs of the corporation[,] or acquire any personal or pecuniary interest in conflict with their duty as such directors or trustees[,] shall be liable jointly and severally for all damages resulting therefrom suffered by the corporation, its stockholders or members[,] and other persons.
>
> When a director, trustee[,] or officer attempts to acquire[,] or acquires, in violation of his duty, any interest adverse to the corporation[,] in respect of any matter which has been reposed in him in confidence, as to which equity imposes a disability upon him to deal in his own behalf, he shall be liable as a trustee for the corporation and must account for the profits which otherwise would have accrued to the corporation.
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> ...
>
> Section 34. *Disloyalty of a director*. — Where a director, by virtue of his office, acquires for himself a business opportunity which should belong to the corporation, thereby obtaining profits to the prejudice of such corporation, he must account to the latter for all such profits by refunding the same, unless his act has been ratified by a vote of the stockholders[,] owning or representing at least two-thirds (2/3) of the outstanding capital stock. This provision shall be applicable, notwithstanding the fact that the director risked his own funds in the venture.[33]

The two provisions were introduced in the Corporate Code to crystallize the corporate opportunity doctrine.[34] The doctrine, which is of common law origin, was first applied by the Court in *Gokongwei, Jr. v. Securities and Exchange*

31. *Strategic Alliance Development Corporation*, 607 SCRA at 460 (citing CORP. CODE, § 31 (repealed in 2019)).

32. CORP. CODE, §§ 31 & 34 (repealed in 2019).

33. *Id.*

34. *Ient*, 814 SCRA at 231.

Commission[35] to determine whether an act would amount to a breach of the duty of loyalty.[36] As explained in *Gokongwei*, the doctrine is premised on

> [the] recognition by the courts that the fiduciary standards could not be upheld where the fiduciary was acting for two entities with competing interests. This doctrine rests fundamentally on the unfairness, in particular circumstances, of an officer or director taking advantage of an opportunity for his own personal profit when the interest of the corporation justly calls for protection.[37]

Despite the length of time during which the corporate opportunity doctrine has existed in this jurisdiction, an examination of Philippine jurisprudence would reveal that certain aspects of this doctrine, as applied to Sections 31 and 34 of the Corporation Code (and transposed to today's Revised Corporation Code), had yet to be expounded by the Court. Particularly, the Court had yet to determine what constitutes "a business opportunity which should belong to the corporation"[38] that, when taken, amounts to a breach of the doctrine.

At most, the Court had applied the doctrine in its general understanding, without the determination of whether a business opportunity must be accounted for by the corporate officer or director. In *Gokongwei*, the doctrine was applied in holding that a corporation has the power to declare a person employed in the service of a rival company ineligible to be a member of the former's board of directors.[39] In *Prime White Cement v. Intermediate Appellate Court*,[40] the doctrine was applied insofar as to determine whether a dealership agreement entered into by the corporation and its president was valid and enforceable.[41] In *Ponce v. Legaspi*,[42] the Court applied the doctrine insofar as to hold that a fiduciary was not entitled to damages due to one's violation of the

35. Gokongwei, Jr. v. Securities and Exchange Commission, G.R. No. L-45911, 89 SCRA 336 (1979).

36. *Id.* at 371.

37. *Id.* (citing Paulman v. Kritzer, 291 N.E. 2d 541 (Ill. App. Ct. 1966) (U.S.) & Tower Recreation, Inc. v. Beard, 231 N.E. 2d 154 (Ind. Ct. App. 1967) (U.S.)).

38. CORP. CODE, § 34 (repealed in 2019).

39. *Gokongwei*, 89 SCRA at 369.

40. Prime White Cement Corp. v. Intermediate Appellate Court, G.R. No. 68555, 220 SCRA 103, 109 (1993).

41. *Id.*

42. Ponce v. Legaspi, G.R. No. 79184, 208 SCRA 377 (1992).

said doctrine.[43] Most recently, in *Ient v. Tullet Prebon (Philippines), Inc.*,[44] the corporate opportunity doctrine was cited to the extent of discussing the legislative intent behind Sections 31 and 34 of the Corporation Code, specifically as to whether the foregoing provisions are a cause of action for criminal prosecution under Section 144 of the same law.[45]

B. The Corporate Opportunity Doctrine Post-TOPROS

As observed by now retired Senior Associate Justice Estela M. Perlas-Bernabe in her concurrence in *TOPROS*, it is evident that the Court had yet to apply the corporate opportunity doctrine, as understood in *Gokongwei* and *Prime White Cement*, to a situation similar to the facts of the present case.[46] Considering the foregoing, the Court took the opportunity to look into the varying interpretations of the doctrine of corporate opportunity in other jurisdictions, primarily those in the U.S.[47] In making a survey on how the parameters of the corporate opportunity doctrine should be appreciated, the *ponencia* takes into consideration the suggestions of Justice Perlas-Bernabe, as well as those coming from Justices Leonen, Alfredo Benjamin S. Caguioa, and Amy C. Lazaro-Javier.[48]

In presenting her proposed parameters, Justice Perlas-Bernabe notes that the different U.S. states have established different tests in their respective jurisdictions to determine whether an opportunity belongs to the corporation.[49] The first test is related to the *line of business test*, which looks at the "scope of [a corporation's] own activities and of present or potential advantage to it;" the second refers to the *expectancy test*, which prevents a corporate officer or director from taking an opportunity which a corporation has an existing interest in, or has an expectancy over the same through an existing right; the last test is the *American Law Institute (ALI) test*, focusing on whether the opportunity is something that leads a corporate officer or director to offer the same to the corporation.[50]

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43. *Id.* at 390.

44. *See generally Ient*, 814 SCRA at 211.

45. *Id.* & CORP. CODE, §§ 31 & 34 (repealed in 2019).

46. *TOPROS*, G.R. No. 200070 (J. Perlas-Bernabe, concurring opinion).

47. *TOPROS*, G.R. No. 200070.

48. *Id.*

49. *TOPROS*, G.R. No. 200070 (J. Perlas-Bernabe, concurring opinion).

50. *Id.*

Based on the foregoing tests, Justice Perlas-Bernabe nonetheless suggests that the test provided in *Guth v. Loft, Inc.*,[51] decided by the State Supreme Court of Delaware — and as synthesized in the subsequent case of *Broz v. Cellular Information Systems, Inc.*[52] — be adopted in this jurisdiction, considering how the foregoing cases reiterates the importance that "[c]orporate officers and directors are not permitted to use their position of trust and confidence to further their private interests."[53] Thus, Justice Perlas-Bernabe suggests that a claim of damages against a disloyal corporate officer or director under Section 34 of the Corporation Code arises when the corporation is able to show that:

> (1) [It is] financially able to exploit the opportunity;
>
> (2) [T]he opportunity is within the corporation's line of business;
>
> (3) [T]he corporation has an interest or expectancy in the opportunity; and
>
> (4) [B]y taking the opportunity for [one's] own, [the corporate officer or director] will [ ] be placed in a position inimical to [one's] duties [in] the corporation.[54]

Justice Leonen, on the other hand, applies the ruling in *Gokongwei* in developing his suggested test of whether Section 34 of the Corporation Code has been violated.[55] In his concurrence, Justice Leonen opines that the test in *Gokongwei* centered on whether the businesses involved compete with each other.[56] Nonetheless, he agrees with the four parameters espoused by Justice Perlas-Bernabe in her opinion (as adopted by the *ponencia*).[57]

Justice Caguioa, in his concurring opinion, offers other tests to be taken into consideration consistent with Justice Perlas-Bernabe's suggestion of consulting American case law in defining the parameters of Section 34 of the Corporation Code.[58] He proposed the consideration of the "*fairness*" *test* — whether "an opportunity is a corporate one rests on the [question] of whether

51. Guth v. Loft, Inc., 5 A. 2d 503, 510 (Del. 1939) (U.S.).

52. Broz v. Cellular Information Systems, Inc., 673 A. 2d 148, 154-55 (Del. 1996) (U.S.).

53. *Guth*, 5 A. 2d at 510.

54. *TOPROS*, G.R. No. 200070 (J. Perlas-Bernabe, concurring opinion).

55. *TOPROS*, G.R. No. 200070 (J. Leonen, concurring opinion).

56. *Id.*

57. *Id.*

58. *TOPROS*, G.R. No. 200070 (J. Caguioa, concurring opinion).

a fiduciary's appropriation would fail the 'ethical standards of what is fair and equitable in a particular set of facts.'"[59] Moreover, he similarly opines that aside from the cases of *Guth* and *Broz*, the cases of *Thorpe by Castleman v. CERBCO, Inc.*[60] and *Benefore v. Cha*[61] are likewise instructive as to the determination of liability under Section 34 of the Corporation Code.[62] *Thorpe* enunciated that, despite the breach of the duty of loyalty, there can be no injury to the corporation when the controlling shareholders have the power to veto transactions amounting to such breach.[63] *Benefore* similarly presents a defense available to the erring corporate officer or director (i.e., the corporate opportunity will not be breached when the corporation is incapable of undertaking the corporate opportunity).[64] Finally, Justice Caguioa likewise suggests the "*source*" *defense*, which states that there is no breach of the corporate opportunity doctrine when the opportunity arose from the corporate officer's personal skill and expertise.[65]

Finally, Justice Lazaro-Javier analyzes the provisions of Sections 31 and 34 of the Corporation Code using case law from both the U.S. and Canada.[66] Citing case law from the U.S. State of Maine, she expounds on tests as to whether the opportunity belongs to the corporation, which likewise includes the *line of business test*, the *fairness test*, a combined test of the aforementioned two, and the *ALI test*.[67] In contrast to Justices Perlas-Bernabe's and Caguioa's similar positions on the parameters, Justice Lazaro-Javier argues that they do

59. *TOPROS*, G.R. No. 200070 (citing Eric Talley & Mira Hashmall, The Corporate Opportunity Doctrine, at 8, *available at* https://weblaw.usc.edu/why/academics/cle/icc/assets/docs/articles/iccfinal.pdf (last accessed Jan. 31, 2023) [https://perma.cc/N6ZF-EUCC]) (citing Durfee v. Durfee & Canning. Inc., 80 N.E. 2d 522, 529 (Mass. 1948) (U.S.)).

60. Thorpe by Castleman v. CERBCO, Inc. 676 A. 2d 436, 442 (Del. 1996) (U.S.).

61. Benefore v. Jung Woong Cha, C.A. No. 14614, 1998 Del. Ch. LEXIS 28, at *14 (Del. Ch. 1998) (U.S.).

62. *TOPROS*, G.R. No. 200070, (J. Caguioa, concurring opinion).

63. *Thorpe*, 676 A. 2d at 444.

64. *Benefore*, 1998 Del. Ch. LEXIS 28, at *14.

65. *TOPROS*, G.R. No. 200070 (J. Caguioa, concurring opinion) (citing Talley & Hashmall, *supra* note 59, at 13).

66. *TOPROS*, G.R. No. 200070 (J. Lazaro-Javier, concurring opinion).

67. *TOPROS*, G.R. No. 200070 (J. Lazaro-Javier, concurring opinion) (citing Northeast Harbor Golf Club, Inc. v. Harris, 661 A. 2d 1146, 1149-51 (Me. 1995) (U.S.)).

not accurately reflect the Philippine statutory provision that the opportunity should belong to the corporation, and that the legislative history merely requires that the opportunity may be available to the corporation.[68] Citing Canadian case law, the factors to be considered in determining whether a corporate opportunity should belong to the corporation are: (a) the maturity of the opportunity; (b) whether the opportunity was actively pursued; (c) the line of business; (d) how the opportunity arose; (e) the knowledge of the other corporate directors; and (f) the consent given by the other corporate directors.[69]

After due consideration of the panoply of parameters proposed by the Justices of the Court, the *ponente* adopted the proposed parameters of Justice Perlas-Bernabe, particularly that based on the ruling in *Guth,* finding the same as the most appropriate.[70] A reading of the body of the *ponencia* does not shine a light as to the ratio of adopting the *Guth* test. Neither did it use the general premise of the Court — that foreign cases have persuasive effect considering that the law in question was adopted from a foreign source — in adopting the *Guth* test in its Decision.[71] Thus, the question raised early in the Comment becomes relevant: *Was the transplantation of the doctrine of corporate opportunity from American corporate law within the Philippine corporate law system, proper?*

III. UNDERSTANDING LEGAL TRANSPLANTATION AS A PROCESS: THE LEGAL TRANSPLANTATION OF AMERICAN CORPORATE LAW IN OTHER JURISDICTIONS

As earlier mentioned, legal transplantation refers to the process of a rule or system of law from one country to another.[72] The process may, however, be done voluntarily or involuntarily.[73]

68. *TOPROS*, G.R. No. 200070 (J. Lazaro-Javier, concurring opinion) (citing CORP. CODE, § 31 (repealed in 2019) & REV. CORP. CODE, § 34).

69. *TOPROS*, G.R. No. 200070 (J. Lazaro-Javier, concurring opinion) (citing Matic v. Waldner, 2016 MBCA 60, ¶ 153 (Can.)).

70. *TOPROS*, G.R. No. 200070.

71. *See id*.

72. WATSON, *supra* note 1.

73. George Mousourakis, *Legal Transplants and Legal Development: A Jurisprudential and Comparative Law Approach*, 54 ACTA JURIDICA HUNGARICA 219, 224-25 (2013).

Involuntary legal transplantation occurs when the introduction of foreign law is done as a result of conquest or colonial expansion.[74] In the context of the Philippines, involuntary legal transplantation can be seen in its Revised Penal Code[75] and New Civil Code,[76] both of which are vestiges of the Philippines' past as a Spanish colony for almost four centuries.[77]

On the other hand, *voluntary legal transplantation* simply results in the borrowing of foreign rules and doctrines to fill a gap or need of an importing country.[78] Watson categorizes voluntary transplants traditionally into three main categories: *first*, when a group of people move into a new territory with no comparable civilization and take their law with it;[79] *second*, when persons move into a different territory where there is a comparable civilization and take their law with it;[80] and *third*, when people voluntarily accept a large part of the system of another group of people[81] — which resembles the present understanding of legal transplantation.

A. Why Do States Legally Transplant Rules?

It has been observed by Hideki Kanda and Curtis J. Milhaupt that the motivations for the frequent use of legal transplantation vary.[82] They list the following motivations in legal transplantation as follows: (a) practical utility motivation or the fact that legal transplant is a "quick and [ ] fruitful source of new law and ... may be the only feasible means of [legal] reform" (e.g., the adoption of the Philippine Competition Act as discussed above); (b) political

74. *Id.*

75. *See generally* An Act Revising the Penal Code and Other Penal Laws [REV. PENAL CODE], Act No. 3815 (1930) (repealed in 2011).

76. *See generally* An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386 (1949).

77. Pacifico Agabin, *The Philippines*, *in* MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 459 (Vernon Valentine Palmer 2d ed., 2012).

78. Mousourakis, *supra* note 73, at 227.

79. WATSON, *supra* note 1, at 29 (The *first* categorization seems to be applicable when people arrive in territories considered to be *terra nullius*.).

80. *Id.* at 29-30 (The *second* categorization seems to resemble involuntary legal transplantation; the probable difference between the two would refer to two groups of people following the same legal tradition.).

81. *Id.* at 30.

82. Hideki Kanda & Curtis J. Milhaupt, *Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51 AM. J. COMP. L. 887, 889 (2003).

motivation or "legal change [following] colonization or military occupation" (e.g., the adoption of features of the Spanish criminal and civil systems in the Philippines' legal system); (c) symbolic motivation or legal change affected by the legal profession itself as lawmaking requires the need to find authority coming from foreign sources of law;[83] and (d) blind copying where "some rules [were] transplanted in haste and without adequate preparation or familiarity with the operation of the rule in the home country[.]"[84]

B. What Constitutes a Successful Legal Transplantation?

The foregoing motivations are indicative in analyzing whether legal transplantation of a rule or system of rules is successful or not. Kanda and Milhaupt argue that practical utility as a system's motivation in transplanting a rule has a high likelihood of success considering that it may complement the existing legal infrastructure of a country.[85] In comparison to practical utility as the motivation of transplantation, political or symbolic motivation do not produce similar success.[86]

Despite these observations, Kanda and Milhaupt note that the success of a legal transplantation may be further simplified to a question whether the imported rule has been used the same way as it would be used from the source.[87] They, however, qualify the same that the use of imported rule is of course subject to adaptations of the rule to local conditions.[88] Holger Fleischer similarly opines that the indicator of success in legal transplantation can be measured through the "smooth adaptation" of the transplanted rule in the preexisting legal environment.[89] These observations are consistent with Watson's concept of a successful legal transplantation. To Watson, a successful transplantation is similar to that of the human organ transplant — the rule should be able to grow and develop in the new legal system.[90] On the other

83. The Author notes that the Philippine Competition Act may likewise be situated under the symbolic motivation. *See* Ditucalan, *supra* note 3, at 122.

84. Kanda & Milhaupt, *supra* note 82, at 889.

85. *Id.* at 891.

86. *Id.*

87. *Id.* at 890.

88. *Id.*

89. Holger Fleischer, *Legal Transplants in European Company Law — The Case of Fiduciary Duties*, 2 EUR. COMPANY & FIN. L. REV. 378, 392 (2005).

90. WATSON, *supra* note 1, at 27.

hand, a legal transplant is considered a failure when the imported rule does not take root in the importing country and is ignored by its relevant actors.[91]

C. Factors in Legal Transplantation of American Corporate Law in Other Jurisdictions

Other than the general reasons for generally transplanting legal rules from the source country into the host country's legal system, there seems to be other factors considered with respect to the transplantation of American corporate law in other legal systems.

In this relation, Fleischer presents factors that may be considered as a framework transplantation in American corporate law into the French and German legal systems.[92] *First*, the host country should investigate the common structures of the source's corporate law and its own corporate law; *second*, globalization in business and the economy necessitates the exchange of legal ideas and rules; and *lastly*, the adoption of American corporate law into their legal systems can attract investors and signify that these States comply with domestic legal standards.[93]

Similarly, Martin Gelter and Genevieve Helleringer likewise made certain observations as to why American corporate law is transplanted into the French and German legal systems, particularly that of the American corporate opportunity doctrine.[94] *First*, they argue that adopting the corporate opportunity doctrine contains more benefits in comparison to other models; *second*, the American model allows the organic development of the doctrine on a case-by-case basis; *third*, and similar to Fleischer's observation, adopting the American model can attract investors and signify that these States comply with domestic legal standard; *lastly*, the persons who undertake the process of legally transplanting American law are trained and educated under the American corporate law tradition.[95]

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91. Kanda & Milhaupt, *supra* note 82, at 890.

92. Fleischer, *supra* note 89, at 382–85.

93. *Id.* at 386–88.

94. Martin Gelter & Geneviève Helleringer, *Opportunity Makes a Thief: Corporate Opportunities as Legal Transplant and Convergence in Corporate Law*, 15 BERKELEY BUS. L.J. 92, 147–49 (2018).

95. *Id.*

D. Transplanting the Doctrine of Corporate Opportunity into the Philippines

Based on the foregoing considerations presented by Fleischer, Gelter, and Helleringer with respect to the transplantation of American corporate law (i.e., the corporate opportunity doctrine) in other jurisdictions, the Author respectfully submits that these considerations may have justified the Court's transplantation of the *Guth* test into the Philippine corporate law system.

Applying Fleischer's *first factor*, it can be observed that the structure of Philippine corporate law has similarities with American corporate law. Similar to American corporate law,[96] Philippine corporate law places importance on the fiduciary duties that directors owe to their corporations.[97] In the same manner, Justice Leonen's observation in the case of *Gokongwei* provides weight to the similarity of structure in relation to corporate opportunities. As was discussed in his separate concurrence, *Gokongwei* presents the test of whether the businesses involved compete with each other — the same test can be attributed to the *line of business test* or the second parameter of the *Guth* test.[98] Another example of a similarity in American and Philippine corporate law system is the business judgment rule — where courts are barred from intruding into the business judgments of the corporation, when the same are made in good faith.[99]

Aside from the similarities of the structure of American and Philippine corporate law with respect to the fiduciary duties of corporate officers and directors, it is likewise submitted that globalization may have a hand in adopting the parameters found in *Guth*. This can be seen from Gelter and

96. *See generally* Thomas A. D'Ambrosio, *The Duty of Care and the Duty of Loyalty in the Revised Model Business Corporation Act*, 40 VAND. L. REV. 663 (1987) & Floyd v. Hefner, No. H-03-5693, 2006 U.S. Dist. LEXIS 70922, at *21 (S.D. Tex. 2006) (U.S.).

97. *See Strategic Alliance Development Corporation*, 607 SCRA at 459-60.

98. *TOPROS*, G.R. No. 200070 (citing *Broz*, 673 A. 2d at 154-55).

99. *See, e.g.*, Lori McMillan, *The Business Judgment Rule as an Immunity Doctrine*, 4 WM. & MARY BUS. L. REV. 521, 526 (2013) (citing Samuel Arsht, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93, 93 (1979)); Metroplex Berhad & Paxell Investment Limited v. Sinophil Corporation, et al., G.R. No. 208281, June 28, 2021, *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/67635 (last accessed Jan. 31, 2023); & Philippine Stock Exchange, Inc. v. Court of Appeals, G.R. No. 125469, 281 SCRA 232, 251 (1997).

Helleringer's findings that German and French corporate law have adopted the same standards in their corporate law systems.[100]

Moreover, it can also be observed that the Court, in adopting the *Guth* test as the parameters of the corporate opportunity doctrine, may have been primarily motivated based on the test's practical utility — that a legal transplant is a "quick and [ ] fruitful source of new law ... and may be the only feasible means of law reform[.]"[101] This is because the *Guth* test already incorporates the *line of business*, *expectancy*, and *ALI tests* within its parameters,[102] which makes adapting the same more convenient for the Court in further developing the parameters of corporate opportunity. In this relation, it should be noted that the *Guth* test has been the prevailing test of corporate opportunity that has been further streamlined in the case of *Broz*.[103] Aside from the practical utility motivation standpoint, the adoption of the *Guth* test may also have political motivations — the historical relationship between Philippine and American corporate law as can be traced in the country's corporate case law.[104]

To the Author's mind, the foregoing discussions, when taken together, serve to satisfy Justice Leonen's efforts to qualify the process of legal transplantation as stated in *Pangilinan*, where the adoption of principles should take into consideration "[the Philippines'] own unique cultural, political, and economic contexts."[105] Moreover, the same discussion lends credence to the idea that the *Guth* test of the corporate opportunity doctrine, as further refined in *Broz*, is compatible, and hence adoptable, within the Philippine corporate law framework.

IV. Final Thoughts: A Restatement of the Corporate Opportunity Doctrine in *TOPROS*

As discussed in the third part of this Comment, the adoption of the *Guth* test in the Philippine legal system is supported based on parallel corporate law structures, historical underpinnings, and practical utility. However, it was noted by the members of the Court in *TOPROS* that the parameters are mere general

100. Gelter & Helleringer, *supra* note 94, at 142.

101. Kanda & Milhaupt, *supra* note 82, at 889.

102. *See TOPROS*, G.R. No. 200070 (citing *Broz*, 673 A. 2d at 154-55).

103. Gelter & Helleringer, *supra* note 94, at 114. *See also* Kanda & Milhaupt, *supra* note 82, at 892.

104. *See, e.g.*, *Gokongwei*, 89 SCRA at 369 & *Ient*, 814 SCRA at 211.

105. *Pangilinan*, G.R. No. 238875.

guideposts that should be applied on a case-to-case basis and be allowed to organically develop in the Philippines.[106] Despite the foregoing, the Author respectfully deems it proper to further elaborate on each parameter as future reference should there be an instance where the corporate opportunity doctrine would be applied again in future cases.

To reiterate, the *Guth* test looks into: (a) the corporation's financial capability to undertake the corporate opportunity; (b) the corporation's line of business; (c) the corporation's interest or expectancy in the opportunity; and (d) the act of the corporate director or officer taking the opportunity for his own, thereby placing himself in a position inimical to his duties to the corporation.[107]

As regards the parameter of financial capability, it is observed that there is a presumption that the corporation is financially able to undertake a corporate opportunity inasmuch as the burden of proving a corporation's capability rests with the disloyal officer or director.[108] It should be noted, however, that different jurisdictions employ different degrees of incapacity.[109] Some jurisdictions adopt the requirement of *actual* insolvency, while other jurisdictions adopt *practical* insolvency where courts may determine the capability of the corporation to undertake the corporate opportunity on a case-to-case basis.[110] Aside from financial incapacity, a corporation's capability to exploit a corporate opportunity may likewise be limited by other forms of legal restrictions, such as restrictions on the nature of corporation.[111]

Anent the parameter of the corporation's line of business, it is presupposed that an opportunity belongs to the corporation when it is related to or is in the company's line of activities.[112] To determine whether an opportunity falls within a corporation's line of business, the following sub-factors may be considered:

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106. *TOPROS*, G.R. No. 200070 (J. Leonen, concurring opinion).

107. *See TOPROS*, G.R. No. 200070 (J. Leonen, concurring opinion) (citing *Broz*, 673 A. 2d at 154-55).

108. *See* 2 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 11:8 3 (3d ed. 2010) & 3 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 862.10 1-2 (2022).

109. 3 FLETCHER, *supra* note 108, at 2.

110. *Id.*

111. *Id.* at 1.

112. *Id.*

(1) the relationship of the opportunity to the corporation's business purposes and current activities, whether essential, necessary, or merely desirable to its reasonable needs and aspirations;

(2) whether or not the opportunity embraces areas adaptable to the corporation's business and into which it might easily, naturally, or logically expand;

(3) the competitive nature of the opportunity, whether or not prospectively harmful or unfair;

(4) whether or not the opportunity includes activities as to which the corporation has fundamental knowledge, practical experience, facilities, equipment, personnel, and the ability to pursue; and

(5) whether or not the acquisition by the director or officer would defeat the plans and purposes of the corporation in carrying on or developing the legitimate business for which it has been created.[113]

As to the parameter of interest or expectancy, it is imperative to answer the question of "whether the corporation could realistically expect to seize and develop the [corporate] opportunity[.]"[114] The tangibility of the interest or expectancy refers to those growing out of a preexisting right or relationship with the opportunity, such as those proven by a contractual agreement.[115]

Finally, the Author respectfully submits that the determination of the existence of the fourth parameter is the most important to be proven and considered by the courts, considering that it is premised not only on the statutory prohibition found in the Corporation Code, but it is in keeping with the principle behind the corporate opportunity doctrine — the unfairness, in particular circumstances, of an officer or director taking advantage of an opportunity for his own personal profit when the interest of the corporation justly calls for protection.

On the flip side, and taking into consideration the wording of Sections 31 and 34 of the Corporation Code,[116] as well as the *Guth* test, the corporate

113. 19 C.J.S. *Corporations* § 595 (2023) (citing Miller v. Miller, 222 N.W. 2d 71, 81 (Minn. 1974) (U.S.); Rogers v. The Mississippi Bar, 731 So. 2d 1158, 1168 (Miss. 1999) (U.S.); & Lindenhurst Drugs, Inc. v. Becker, 506 N.E. 2d 645, 650 (III. App. 2 Dist. 1987) (U.S.)).

114. 19 C.J.S. *Corporations* § 594 (citing Shapiro v. Greenfield, 764 A. 2d 270, 278 (Md. Ct. Spec. App. 2000) (U.S.)).

115. 19 C.J.S. *Corporations* § 594. *See also* 3 FLETCHER, *supra* note 108, at § 861.30.

116. CORP. CODE, §§ 31 & 34 (repealed in 2019).

director or officer may set up the following defenses to refute the existence of factors such as: (1) that his or her act has been ratified in accordance with the requirements of the Corporation Code; (2) the corporation is incapacitated to undertake the business opportunity; (3) the business opportunity is not in line with the business or purpose of the corporation; (4) the corporation does not have any actual interest or expectancy to undertake the business opportunity; (5) he or she received the information on the opportunity in his or her personal capacity; or (6) he or she did not use the corporation's assets or resources in undertaking the opportunity. In other words, the corporate director or officer must prove that his act of entering into the transaction by himself was fair and in good faith which can also be observed in Justice Caguioa's presentation of the *fairness test*.[117]

Furthermore, in assessing whether or not there is a breach of the corporate opportunity doctrine, it is likewise important to mention that either: (a) the corporate director or officer; or (b) even the corporation, may likewise be estopped from claiming the corporate opportunity.

Anent the corporate officer or director, a limitation may be placed in the by-laws of the corporation preventing a corporate director or officer from having adverse interests against the corporation as held in *Gokongwei*.[118] This is justified because the corporate by-laws, as an intramural document, is meant to "regulate, govern[,] and control its own actions, affairs[,] and concerns[,] and its stockholders or members and directors and officers with relation thereto and among themselves in their relation to it[.]"[119] By becoming part of the fundamental law of the corporation, the corporate directors or officers must comply with the same.[120] Thus, the corporate director or officer may waive his or her right to conduct activities which are adverse to the interests of the corporation.

As regards to the corporation, it may be estopped from enforcing its right over the corporate opportunity upon a showing of the corporation's formal rejection of the same. As can be discerned from the deliberations of the

117. *See* Ostrowski v. Avery, No. CV-91-027-82-97-S, 1996 Conn. Super. LEXIS 2557, at *22-23 (Conn. Super. Ct. 1996) (U.S.) & Murphy v. Wakelee, 721 A. 2d 1181, 1184 (Conn. 1998) (U.S.).

118. *Gokongwei*, 89 SCRA at 367-68.

119. Loyola Grand Villas Homeowners (South) Association, Inc., v. Court of Appeals, G.R. No. 117188, 276 SCRA 681, 697 (1997).

120. Bernas, et al. v. Cinco et al., 762 Phil. 386, 411 (2015) (citing Peña v. Court of Appeals, G.R. No. 91478, 193 SCRA 717, 729 (1991)).

Corporation Code, cited in *Ient*,[121] a corporate director or officer may avoid the consequences of the breach of one's duty of loyalty, provided that he or she can make the opportunity known to the corporation, propose such opportunity to it, and allow the corporation to formally reject the same.[122]

In view of the foregoing discussion, the Author humbly proposes a restatement of the parameters in determining whether or not a corporate director or officer breached his duty of loyalty, in relation to the corporate opportunity doctrine and Sections 31 and 34 of the Corporation Code (now Sections 30 and 33 of R.A. No. 11232),[123] as follows:

A "corporate opportunity" exists when an activity is reasonably incident to the corporation's present or prospective business and is one in which the corporation has the capacity to engage. In order to prove that the corporate director or officer violated the duty of loyalty in relation to the corporate opportunity doctrine and Sections 31 and 34 of the Corporation Code (now Sections 31 and 34 of R.A. No. 11232), it is imperative for the plaintiff corporation to identify the individual transactions that are deemed as "a corporate opportunity or opportunities" taken by the said director or officer, and prove the existence of the following parameters in each opportunity:

(a) That the plaintiff corporation has the financial capability to undertake the corporate opportunity, which is presumed. Aside from such financial capability, the plaintiff corporation must also show that its capability to undertake the corporate opportunity is not otherwise limited by any form of legal restrictions preventing it from doing so;

(b) That the corporate opportunity is within the corporation's line of business, or at the very least, related thereto such that the corporation may be reasonably expected to enter into the same, based on various factors (e.g., areas in which the corporation's business can easily, naturally, or logically expand);

(c) That the corporation can realistically expect to seize and develop the corporate opportunity based on a preexisting right or relationship thereto, with the tangibility thereof referring to those growing out of a preexisting right or relationship with such opportunity (e.g., a preexisting contractual relationship with a client); and

121. *Ient*, 814 SCRA at 221–29.

122. *Id.* at 225.

123. CORP. CODE, §§ 31 & 34 (repealed in 2019) & REV. CORP. CODE, §§ 30 & 33.

(d) Most importantly, by taking the opportunity for himself, the corporate director or officer places himself in a position inimical to his duties to the corporation.

In defense, the corporate director or officer may prove that his act of claiming the opportunity for himself was fair and in good faith, by setting up the following defenses to refute the existence of factors such as: (1) that his or her act has been ratified in accordance with the requirements of the Corporation Code; (2) the corporation is incapacitated to undertake the business opportunity; (3) the business opportunity is not in line with the business or purpose of the corporation; (4) the corporation does not have any actual interest or expectancy to undertake the business opportunity; (5) he or she received the information on the opportunity in his or her personal capacity; or (6) he or she did not use corporation's assets or resources in undertaking the opportunity.

The corporation — through a formal rejection upon offer of the opportunity — or the corporate director or officer — through a limitation found in the corporation's by-laws — may be estopped from claiming the corporate opportunity.

Despite the elaboration and restatement made by the Author anent the corporate opportunity doctrine, the true test of whether the *Guth* test is effective on Philippine soil will be test of time. Only time will tell whether the foregoing parameters will adapt to the Philippines' "own unique cultural, political, and economic contexts."[124]

124. *Pangilinan*, G.R. No. 238875. *See also* Kanda & Milhaupt, *supra* note 82, at 890.