NATIONALITY OF JURIDICAL PERSONS: EVALUATION AND DEPARTURE

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I. INTRODUCTION

For a people subjected to colonial rule for more than four hundred years, it is more like a natural reaction that certain provisions of the Fundamental Law and of some statutes be caught under the pervading influence of the nationalistic spirit. As a matter of Constitutional and statutory policy, the state's natural resources, its public utilities, agriculture and some economic activities have been declared to be beyond the reach of alien control or influence. There is this noble duty to conserve and develop the national patrimony and to preserve certain economic activities believed to be of primary importance to society for the benefit of the future generations of Filipinos. It is in this context that the nationality of juridical persons should be evaluated. This is because of the fact that possession of the required equity is made *sine qua non* to the opportunity to enter the "reserved and prohibited zone." But there is one phenomenon which is of more than passing interest. This is the situation of juridical persons created and organized under the laws of a foreign country but whose stock ownership is wholly or majority Filipino owned. The nationality, effects and implications of such "foreign corporations" should be integrated and contextualized in order to have a complete panorama of the discussion on the nationality of juridical persons.

II. CONCEPT OF JURIDICAL PERSON

A. *Creation, Powers and Attributes*

In Philippine law, juridical persons may either be: (1) the State and its political subdivisions; (2) other corporations, institutions and entities for public interest or purposes; or (3) corporations, partnerships and associations for private interest or purpose.[1] As a general concept, a juridical person is an abstract being with a personality and existence separate and distinct from its members, to which the law has granted capacity for rights and obligations and created for the realization of collective purposes.[2] But for the purposes of this study, the focus would be on corporations for private interest or purpose.

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[1] CIVIL CODE, art. 44.

[2] 1 TOLENTINO, CIVIL CODE OF THE PHILIPPINES 185 (1983).

Originally, corporations were created either by royal charter or special act of the legislative body with special privileges of exploration, colonization and trading.[3] But this system of special acts led to abuses and scandals, leading to a reaction against it, and coupled with the feeling that there should be full equality of opportunity to incorporation, the scandals encouraged the adoption of general incorporation acts.[4] Nowadays, therefore, corporations are formed and organized by merely following the requirements and procedures laid down by such general incorporation acts. Consequently, it is no longer entirely accurate to say that the corporations are "mere creatures" of the State; perhaps, they are at the same time and probably more so, a product of the agreement of the parties.[5]

The Corporation Code[6] delineates the attributes of a corporation: an artificial being, created by operation of law, having the right of succession, and powers, attributes and properties expressly authorized by law or incident to its existence. Implicit from the above attributes is the separate juridical personality of a corporation which distinguishes it from other associations or organizations created for certain purposes. It is this separate being, functioning through its officers and agents, that exercises the different powers granted it by law: express powers, implied powers or incidental powers. The express powers include, inter alia, power to sue and be sued, adopt a corporate seal, adopt by-laws, hold and convey property, etc.[7] Other parts of the Code[8] add more express powers like the powers over corporate term, to increase or decrease capital stock, among others. The implied powers could be based on the proviso of one section: "except such as are necessary or incidental to the exercise of the powers so conferred," in relation to another section which provides: "To exercise such other powers as may be essential or necessary to carry out its purpose or purposes as stated in its articles of incorporation.[9] As to incidental powers, Fletcher[10] has this to say: "These powers are: power of succession; power to sue and be sued; power to purchase, hold and convey real and personal property for such purposes as are within the objects of its creation; power to have a common zeal; power to make laws for its government; and power, in proper cases, to disenfranchise or remove members." Clearly, it can be seen that there is no clearcut distinctions of these powers, but they are broad enough to justify acts and obligations entered into by the corporation.

B. *Theories on Nationality of Juridical Persons*

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[3] *See* BALLENTINE, ON CORPORATION 31 (1946); 1 DODD, CASES ON BUSINESS ASSOCIATIONS 19-20 (1940); 2 AGBAYANI, COMMERCIAL LAWS OF THE PHILIPPINES 3 (1979).

[4] Dodd, *supra* note 3, at 20.

[5] CAMPOS, CORPORATION CODE 184 (1981).

[6] CORPORATION CODE, sec. 2.

[7] CORPORATION CODE, sec. 36.

[8] CORPORATION CODE, secs. 37 to 44.

[9] CORPORATION CODE, sec. 45 in relation to sec. 35 (11).

[10] AGBAYANI, *supra* note 3, at 4 *citing* 6 FLETCHER 189-90.

Under the orthodox common law rule, a corporation's nationality coincides with the place where it is incorporated or with jurisdiction that chartered it."[11] The determinant factor is the state of incorporation since under this theory, corporations are deemed creations of the state under which they are incorporated. This rule obtains in England and the U.S.

The civil law rule is that the nationality of a corporation coincides with its place of business or central administration — the company seat, *sitz,* sometimes called *siege social,* the rationale being that the most important business decisions, the management and control of the enterprise, the nerve center of the whole business, may be found in its business seat, its principal place of business.[12] Most countries in Continental Europe including Spain, France and Germany adhere to this rule.

C. *The Rule in the Philippines*

Being a former colony of both Spain and the United States, each of which adhere to contending schools of thought, there appears to be an anomaly as to the rule prevailing in Philippine law. But this anomaly is more apparent than real since the Philippine law on corporations is actually an American transplant. Consequently, it is the common law rule which prevails in this jurisdiction.

The common law rule as applied in the Philippines became subject to certain exceptions: (1) a state may wish to prevent its natural resources, public utilities, commerce, agriculture, and the like from passing into the hands of aliens, and (2) a corporation organized under the laws of the Philippines may be considered an enemy alien during wartime where the shares are controlled by aliens whose country is at war with the Philippines.[13] This paper is more interested with the first exception although for purposes of jurisprudential development, resort may be had to cases decided on the basis of the second exception.

III. STATUTORY AND JURISPRUDENTIAL DEVELOPMENT

The Philippine law on corporations being an American extract adheres to the common law rule, i.e., place of incorporation ad determinative. Thus, the early case of *Philippine Sugar Estate v. U.S.* stated: "The sovereignty by which a corporation was created under whose laws it was organized determines its national character, and the fact that some of its incorporators were residents or citizens of a foreign country does not change this rule."[14] But this general rule prevails only in ordinary cases and during ordinary times. During extraordinary times, i.e., war or in extraordinary cases, i.e.,

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[11] SALONGA, PRIVATE INTERNATIONAL LAW 338 (1979) *citing* II RABEL 31-32.
[12] *Id.* at 339 *citing* Ehrenzweig Treaties, sec. 145 at 411 et seq; 2 RABEL 33-38.
[13] *Id.* at 340.
[14] *Id.* at 338.

conservation of natural resources, public utilities and vital economic areas, this rule gives way to the exception: the doctrine of control of stocks or the "control test."

In *Haw Pia v. China Banking Corp.*,[15] involving the sequestration by the Japanese Military Government of a certain amount of money, the Supreme Court applied the control test and ruled: "China Banking Corp. comes within the meaning of the word "enemy" as used in the Trading with the Enemy Act because not only it was controlled by Japan's enemies, but it was besides incorporated under the laws of the country with which Japan is at war. Three years later, the Court amplified the control test in the case of *Filipinas Compania de Seguros v. Christein, Huenefeld and Co.*:[16] "There is no question that majority of the stockholders of the respondent corporation were German subjects. This being so, we have to rule that said respondent became an enemy corporation upon the outbreak of the war between U.S. and Germany. The English and American cases relied upon by the Court of Appeals have lost their force in view of the latest decision of the Supreme Court of the U.S. in *Clark v. Uebersee Finanz* in which the control test has been adopted." The later case of *S. Davis Winship v. Philippine Trust Co.*[17] reiterated this ruling.

Of a more recent vintage is the leading case of *Palting v. San Jose Petroleum*[18] where the Court ruled in clear and unequivocal terms: "The privilege to utilize, exploit and develop the natural resources of this country was granted by Art. XIII of the Constitution to Filipino *citizens* or to corporations or associations 60% of the capital of which is *owned by such citizens*. With the Parity Amendments to the Constitution, the same right was extended to *citizens* of the US, and business enterprises *owned or controlled directly or indirectly by such citizens* . . . . There should be no serious doubt as to the meaning of the word "citizen" used in the aforementioned provisions of the Constitution. The right was granted to two types of persons: natural persons (Filipino or American citizens) and juridical persons (corporations 60% of which capital is owned by Filipinos and business owned or controlled directly by the citizens of the U.S."

B. *100% Rule (Traditional Areas of Investment)*

One writer[19] believes that the making of the 1935 Constitution was during the height of nationalism as evidenced by various nationalistic policies and provisions incorporated thereon. However, the framers did not deem necessary, for whatever reason, to incorporate a 100% rule viz. full Filipino ownership as a prerequisite for the enjoyment of certain

[15] 80 Phil. 604, 622 (1948).
[16] 89 Phil. 54, 56 (1951).
[17] 90 Phil. 744, 747 (1952).
[18] G.R. No. 14441, December 17, 1966, 18 SCRA 925, 936 (1966).
[19] *See* 2 ARUEGO, THE FRAMING OF THE PHILIPPINE CONSTITUTION (1937); BERNAS, PHILIPPINE CONSTITUTION LAW (1984).

rights and privileges. It was the enactment of the Retail Trade Act[20] that laid the basis for the eventual integration of the 100% rule with respect to the traditional areas of investment in the 1973 Constitution.

The Retail Trade Act which was approved on June 19, 1954 has been the object of severe constitutional attack by the aliens who were to be disenfranchised by the operation of the law. And the Court through the pen of Justice Labrador upheld the constitutionality of the law in the landmark case of *Ichong v. Hernandez*.[21] Emphasizing the importance of the retail trade to national interest, the Court said: "In a primitive economy where families produce all that they consume and consume all they produce, the dealer is unknown.... As villages develop into big communities and specialization in production begins, the dealer's importance is enhanced.... Retail dealers perform the function of capillaries in the human body, thru which all the needed food and supplies are ministered to members of the communities comprising the nation."[22] Given the increasing alien predominance in retail trade, the Court put into context the whole situation: "But the dangers arising from alien participation in the retail trade does not seem to lie in the predominance alone; there is a prevailing feeling that such predominance may truly endanger the national interest. With ample capital, unity of purpose and action and thorough organization, alien retailers and merchants can act in such complete unison and concert on such vital matters as the fixing of prices, the determination of the amount of goods or articles that they would and would not patronize or distributes that fears of dislocation of the national economy and of the complete subservience of national retailers and of the consuming public as not entirely unfounded. Nationals, producers and consumers alike can be placed completely at their mercy.... The present dominance of the alien retailer especially in the big centers of population therefore becomes a potential source of danger on occasion of war or other calamity."[23] The Court brushed aside equal protection of laws argument by saying that citizenship has been held to be a valid ground for classification and that said classification is reasonable. As to the due process of law argument, the Court noted that if the laws passed have a reasonable relation to a proper legislative purpose, and are neither arbitrary or discriminatory, then the requirements of due process are satisfied. And placing the law in its proper perspective, the Court solemnly declared: "If political independence is a legitimate aspiration of a people, then economic independence is none the less legitimate. Freedom and liberty are not real and positive if the people are subject to the economic control and domination of others especially if not of their own race or country. The removal and eradication of the shackles of foreign economic control and domination is one of the noblest motives that a

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[20] Rep. Act No. 1180 (1954), 9 LAWS & RES. 381.
[21] 101 Phil. 1155 (1957).
[22] *Id.* at 1166-67.
[23] *Id.* at 1172-74.

national legislature may pursue. It is impossible to conceive that a legislation that seeks to bring it about can infringe the constitutional limitation of the process."[24]

The 1973 Constitution included the 100% rule with respect to traditional areas of investment in order to erase any doubt as to the standing of such an economic policy. Thus, Art. XIV, section 3 provides: "The Batasang Pambansa, shall upon recommendation of the National Economic and Development Authority, reserve to citizens of the Philippines or to corporations or associations wholly owned by such citizens, certain traditional areas of investments when the national interest so dictates."

C. *60% Rule (Public Utilities)*

1. *Scope of the Term*

The term "public utilities" is loosely defined as public services either for free or for a fee. But technically, the Public Service Act[25] defines the term as including "every person that may own, operate, manage or control in the Philippines, for hire or compensation, with general or limited clientele, whether permanent, occasional or accidental, and done for general business purposes, any common carrier, railroad, street railways, traction railway, sub-way motor vehicle, either for freight or passenger, or both with or without fixed route and whatever may be its classification, freight or carrier service of any class, express service, steamboat or steamship line, pontiness, ferries, and water craft engaged in the transportation of passengers or freight or both, shipyard, marine railways, marine repair shop, wharf or dock, ice plant, ice-refrigeration plant, canal, irrigation system, gas, electric light, heat and power water supply and power, petroleum, sewerage system, wire or wireless communication system, wire or wireless broadcasting stations and other similar public services." The cases of *Co Chiong v. Cuaderno*[26] and *Co Chiong v. Mayor of Manila*[27] add another public utility: public markets.

2. *Vessels*

The 1902 legislation, Act No. 355 or Customs Administrative Act, limited the protection and flag of the U.S. to vessels owned by U.S. citizens or by native inhabitants of the Philippine Islands. In 1904, Act No. 1235 extended this to corporations or companies created under the laws of the U.S., any of the states thereof, or of the Philippine Islands. The Administrative Codes of 1916 and 1917 reiterated this rule. However, Act No. 2761 returned to the restrictive rule limiting protection to vessels owned by citizens, implying full ownership thereof. But in 1957, the Tariff and Customs

[24] *Id.* at 1185.
[25] Com. Act No. 146 (1936), sec. 13(b).
[26] 83 Phil. 232 (1949).
[27] 83 Phil. 257 (1949).

Code was enacted and defined domestic ownership which is a requirement for the issuance of Philippine registry as "ownership vested in citizens of the Philippines, or corporations organized under the laws of the Philippines at least 60% of the capital of which is wholly owned by citizens of the Philippines."[28] The foregoing development of law as to majority equity is indicative of the general trend in our laws.

3. *Public Utilities, proper*

The nationalistic trend is also discernible in this area of legislation. The 1903 law on franchises of public utilities, Act No. 667, and the 1910 legislation on the same matter, Act No. 2307, mentioned nothing as to ownership equity insofar as necessary for the determination of nationality. Hence, it can be assumed that any corporation created under the laws of the US; or of any State thereof or of the Philippine Islands may be qualified to avail of this privilege granted by law regardless of equity ownership. But by 1936, the Public Service Act,[29] a citizenship requirement of at least 60% capital stock equity to be owned by citizens of the Philippines or of the U.S. This law was later on amended but this requirement remained.

The reason why the 60% rule was incorporated in both the Tariff and Customs Code and the Public Service Law is the fact that in the interim, said rule has been made applicable by the 1935 Constitution which became effective on November 15, 1935, with respect to franchises, certificate, or any other form of authorization for the operation of a public utility.[30] The 1973 Constitution restated the wordings of the 1935 Constitution with the following qualification: "The State shall encourage equity participation in public utilities by the general public. The participation of foreign investors in the governing of any public utility enterprise shall be limited to their proportionate share in the capital thereof."[31]

4. *Rationale for the rule*

At least at present, there is no problem as to the legal foundation of enactments adhering to the 60% rule because the same is expressly provided for in the Fundamental Law. But prior to this, as early as 1919, the Supreme Court in the case of *Smith Bill & Co. v. Natividad*[32] justified it in this wise: "The Philippine Legislature representing the mandate of the Filipino people and the guardian of their rights .... has desired for these Islands' safety from foreign interlopers the use of the common property exclusively by its citizens and the citizens of the U.S., and the protection for the common good of the people. Who can say, therefore, especially can

28 Rep. Act No. 1937 (1957) as amended, sec. 806 (2).
29 Com. Act No. 146 (1936) as amended, sec. 10 (a).
30 CONST. (1935), Art. XIII, sec. 1.
31 CONST., Art. XIV, sec. 8.
32 40 Phil. 136, 154 (1919).

a court, that with all the facts and circumstances affecting the Filipino people before it, the Philippine Legislature has erred in the enactment of Act No. 2761?"

5. *Vested Rights Doctrine*

A question may be asked as to the effect of this requirement with respect to rights and privileges acquired prior to the enactment or provision embodying said rule. This "vested right" argument as to these franchises or authorization for the operation of public utilities may be attacked with the counter-argument that there is no right to speak of but merely a privilege, and being a mere privilege which is but a grace from the lawful authority, it may be revoked anytime by the issuing authority. The Supreme Court however erased this question by affirmatively declaring in the case of *Ishi v. PSC*[33] that the requirements extends to all public utilities "except those rights that may have been acquired prior to the adoption thereof." Hence, existing rights may not be prejudiced by this prohibition and this is in accord with the legal doctrine of prospectivity of laws unless expressly provided and with the due process of law principle.

6. *Time When Prohibition Applied*

When a corporation not having the required 60% equity and intending to engage in the public utilities business, initiates the incorporation process, does the constitutional prohibition apply? This question was answered negatively by the Supreme Court in the case of *People v. Quasha*,[34] a falsification of public documents case decided in 1953, in this wise: "The Constitution does not prohibit the mere formation of a public utility corporation without the required proportion of Filipino capital. What it does prohibit is the granting of a franchise or other form of authorization for the operation of a public utility to a corporation already in existence but without the requisite proportion of Filipino capital." Consequently, the critical moment as to the determination of whether the required Filipino equity exists or not would be the corporation's stock equity at the time it applies for a franchise to operate a public utility. It seems of no practical value to require the 60% equity proportion at the time of the formation of the corporation since this original equity may be changed anytime by means of alienation or any other forms of transfer to persons other than the original stockholders/subscribers.

D. *60% Rule (Natural Resources)*

Another area where the nationalistic policy had strong imprint is the matter of natural resources. This is but logical because natural resources is literally the wealth of the nation whose conservation and proper develop-

[33] 63 Phil. 428, 430-31 (1936).
[34] 93 Phil. 333, 338 (1953).

ment must be for the benefit of the Filipino people. The prevailing idea is that the conservation, utilization, exploitation and development of the country's patrimony would redound more to the Filipino people if reserved to citizens only or to entities controlled by Filipino equity.

Thus, the 1935 Constitution provided for a 60-40 Filipino equity in cases where juridical persons apply for the privilege to utilize, exploit or develop the country's resources.[35] The same doctrine was copied by the 1973 Constitution."[36]

1. *The Prohibition in Relation to the Parity Amendment*

Like the matter of public utilities, this is also subject or limited by the Parity Rights Amendment to the 1935 Constitution.[37] The controversial amendment and its ramifications in relation to this nationalistic provision on natural resources was extensively discussed and finally disposed of in the exhaustive leading case of *Palting v. San Jose Petroleum.*

In that case, San Jose Petroleum, a corporation organized and existing in Panama, filed with the SEC a sworn registration statement for the registration and licensing for sale in the Philippines 2,000,000 (later increased to five million) shares of its capital stock. It was alleged that the entire proceeds in will be devoted/used exclusively to finance the operations of San Jose Oil Co. Inc., a domestic mining corporation which has fourteen petroleum exploration concessions scattered in the counrty. Palting and others who are allegedly prospective investors in the shares of San Jose Petroleum opposed the registration and licensing arguing *inter alia,* that the tie-up between the issues, San Jose Petroleum, and San Jose Oil violates the Constitution of the Philippines, the Corporation Law and the Petroleum Act of 1949. The registrant claimed party rights under the Ordinance appealed to the Constitution which parity right, with respect to universal resources in the Philippines, may be exercised pursuant to the Laurel-Langley Agreement only through the medium of a corporation organized under the laws of the Philippines. The SEC granted the application for registration and licensed to sell. On review by certiorari, the Supreme Court held:

"The privilege to utilize, exploit and develop the natural resources of this country was granted, by Art. XIII of the Constitution, to Filipino *citizens* or to corporations or associations 60% of the capital of which is *owned by such citizens.* With the Parity Amendments to the Constitution, the same right was extended to *citizens* of the United States and business enterprises *owned or controlled, directly or indirectly, by citizens of the United States.*

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[35] CONST. (1935), Art. XIII, sec. 1.
[36] CONST., Art. XIV, sec. 8 in relation to sec. 9.
[37] *See* CONST. (1935), Parity Rights Amendment.

There should be no serious doubt as to the meaning of the word "citizens" used in the aforementioned provisions of the Constitution. The right was granted to two types of persons: natural persons (Filipino or American citizens) and juridical persons (corporations 60% of which capital is owned by Filipinos and business enterprises owned or controlled directly or indirectly by citizens of the U.S.)...."

"These concepts clarified, is San Jose Petroleum an American business enterprise entitled to party rights in the Philippines? The answer must be in the negative, for the following reasons:

Firstly — It is not owned *directly* by citizens of the U.S., because it is owned and controlled by a corporation, the Oil Investments, another Panamanian corporation.

Secondly — Neither can it be said that it is *indirectly* owned and controlled by American citizens through the Oil Investment for this latter corporation is in turn owned and controlled, not by citizens of the U.S., but still by two Venezuelan corporations, the Pantepec Oil Company and Pancoastal Petroleum.

Thirdly — Although it is claimed that these two last corporations are owned and controlled respectively by 12,373 and 9,976 stockholders residing in the different American states, there is no showing in the certification furnished by respondent that the stockholders of Pancoastal or those of them holding the controlling stock, are citizens of the U.S.

Fourthly — Granting that these individual stockholders are American citizens, it is yet necessary to establish that the different states of which they are citizens, allow Filipino citizens or corporations or associations owned or controlled by Filipino citizens, to engage in the exploitation, etc. of the natural resources of these states (see paragraph 3, Art. VI of the Laurel-Langley Agreement. Respondent has presented no proof to this effect.

Fifthly — But even if the requirements mentioned in the two immediately preceding paragraph are satisfied, nevertheless to hold that the set-up disclosed in this case, with a long chain of intervening foreign corporation, comes within the purview of the Parity Amendment regarding business enterprices indirectly owned or controlled by citizens of the U.S., is to unduly stretch and strain the language and intent of the law. For, to what extent must the word "indirectly" be carried? Must we trace the ownership or control of these various corporations *ad infinitum* for the purpose of determining whether the American ownership-control requirement is satisfied? Add to this the admitted fact that the shares of stocks of the Pantepec and Cancoastal, which are allegedly owned or controlled directly by citizens of the U.S. are traded in the stock exchange in New York and you have a situation where it becomes a practical impossibility to determine at any

given time the citizenship of the controlling stock required by law. In the circumstances, we have to hold that the respondent San Jose Petroleum as presently constituted, is not a business enterprise that is authorized to exercise the parity privileges under the Parity Ordinance, the Laurel-Langley Agreement and the Petroleum Law. Its tie-up with San Jose Oil is consequently illegal.

What then, would be the status of San Jose Oil, about 90% of whose stock is owned by San Jose Petroleum? This is a query which we need not resolve in this case as San Jose Oil is not a party and it is not necessary to dispose of the present controversy. But it is a matter that probably the Solicitor General would want to look into."[38]

2. *Vested rights doctrine*

The application of the vested rights doctrine or the respect accorded by a subsequent law to rights perfected prior to its effectivity on grounds of public policy and as a matter of justice, to matters covered by the constitutional policy on conservation of natural resources is stated in the case of *Gold Creek Mining Corp. v. Rodriguez*.[39] There, a mining claim perfected before the inauguration of the Commonwealth was held by the Supreme Court to be no longer part of the unalienable public domain and consequently, title to it may be granted to a private party even after the constitution has come into full force and effect.

E. *Alienable Public Lands*

As early as 1908, the phrase "public agricultural lands" was held by the Supreme Court in *Mapa v. Insular Government*[40] to mean those public public lands acquired from Spain which are neither mineral or timber lands. This holding was reiterated in a long line of decisions[41] and the case of *Ibañez de Aldecoa v. Insular Government*[42] even went further to declare that the phrase includes residential lands. The landmark case of *Krivenko v. Register of Deeds*[43] justified this above ruling: "In determining whether a parcel of land is agricultural, the test is not only whether it is actually agricultural, but also its susceptibility to cultivation for agricultural purposes. But whatever the test might be, the fact remains that at the time the Constitution was adopted, lands of public domain were classified in our laws and jurisprudence into agricultural, mineral and timber, and that the term public agricultural lands was construed as referring to those lands that were not timber or mineral, and including residential lands. It may be safely presumed therefore that what the members of the Constitutional Conven-

[38] G.R. No. 14441, December 17, 1966, 18 SCRA 925, 936-38 (1966).
[39] 66 Phil. 259, *cited in* SINCO, PHILIPPINE POLITICAL LAW 447 (1965).
[40] 10 Phil. 175 (1908).
[41] Montano v. Insular Government, 12 Phil. 572 (1909); Ramos v. Director of Lands, 39 Phil. 175 (1918); Ankron v. Government, 40 Phil. 10 (1919).
[42] 13 Phil. 159 (1909).
[43] 79 Phil. 461, 469 (1957).

tion had in mind when they drafted the Constitution was this well-known classification and its technical meaning then prevailing." With the ratification of the 1973 Constitution however, this classification long held as doctrinal was expressly rendered inefficacious by a provision thereof:[44] "Lands of the public domain are classified into agricultural, industrial or commercial, residential, resettlement, mineral, timber or forest, and grazing lands, and such other classes as may be provided by law.[44] For all intents therefore, all doubts that bedevilled the former limited classification have been effectively laid to rest.

It must be noted however that Commonwealth Act No. 141 (otherwise known as the Public Land Act), sec. 9 classified the "disposable or alienable lands" into the following, at least for purposes of administration and disposition: (a) agricultural; (b) residential, commercial, industrial, or for similar productive purposes; (c) educational, charitable or other similar purposes; and (d) reservations for town site and for public and quasi-public uses.

1. *Development of the law*

The statutory history on this area reflects a flow towards nationalistic posture. The Public Land Act of 1903[45] originally granted the right to purchase or lease as the case may be any tract of unoccupied, unappropriated and unreserved non-mineral agricultural public lands to any corporation organized under the laws of the Philippine Islands or of the U.S. or any state, territory or insular possession thereof. The clear implication is that the citizenship of the majority equity owners is absolutely immaterial. The next Public Land Act[46] sought to impose at least 61% capital ownership equity of Philippine Islands' or U.S. citizens as a precondition for the privilege to purchase or otherwise alienate public agricultural lands. However the same legislation permitted aliens to acquire public agricultural lands used for industrial or residential purposes. This wavering attitude embodied in our law was cured by the Public Land Act of 1938[47] which required at least 60% capital stock equity belonging to Filipino citizens as precondition for purchase or lease of public agricultural lands without any further derogation of this provision. The same act extended this citizenship requirement to the purchase or lease of lands for residential, commercial or industrial purposes.[48]

It may be said however that the Public Land Act of 1938 was merely an implementation of a previous nationalistic policy as to public agricultural lands, and truly, that is the case because the 1935 Constitution had much

[44] CONST. Art. XIV, sec. 10.
[45] Act No. 926 (1903).
[46] Act No. 2874 ( ).
[47] Com. Act No. 141 (1936), sec. 22 and 33.
[48] *Id.* at sec. 60.

earlier provided that no private corporation may acquire, lease or hold public agricultural lands in excess of 1,024 hectares if the 60% capital stock equity of Filipinos is not fulfilled.[49] The 1973 Constitution amplifies this provision[50] although this is now subject to various conditions: First, "natural resources shall not be alienated except aagricultural, industrial or commercial, residential and resettlement lands of the public domain." Second, the qualified juridical persons may hold by lease alienable lands only to a maximum of 1,000 hectares, and they may not hold by lean, concession, license or permit, timber or forest lands in excess of 100,000 hectares although the Batasang Pambansa may increase said area upon recommendation by the NEDA. And third, qualified corporations may no longer acquire said alienable lands unlike in the 1935 Constitution; the most that can be had is a lease agreement.[51] Notwithstanding these developments, the same 60-40% rule continues to prevail as the mode for determination of corporation citizenship.

2. *Vested rights doctrine*

At this stage, this doctrine has been put forward twice, in the previous discussion on public utilities and on natural resources. But in those areas, there is a dearth of cases detailing the applicability of said doctrine, much less the justifications therefore. As to alienable lands however, the Supreme Court had occasion to precisely do this in the case of *Lauson Ayog v. Judge Cusi.*[52]

In that case involving the application of section 11, Article XIV of the 1973 Constitution to a 1953 sales award for which a sales patent and Torrens title wetre issued in 1975, the Court ruled: "The said constitutional prohibition has no retroactive application to the sales application of Biñan Development Co. because it had already acquired a vested right to the land applied for at the time the 1973 Constitution took effect. That vested right has to be respected. It could not be abrogated by the New Constitution. Section 2, Article XIII of the 1935 Constitution allows private corporations to purchase public agricultural lands not exceeding 1,024 hectares . . . Petitioner's prohibition is barred by the doctrine of vested rights in constitutional law." The *raison d'etre* of this doctrine according to the Court lies in the due process clause: "The due process clause prohibits the annihilation of vested rights. A state may not impair vested rights by legislative enactment, by the enactment or repeal of a municipal ordinance, or by a change in the constitution of the State, except in a legitimate exercise of the police power." It went on to say that the term 'vested rights' expresses the concept of present fixed interest, which in right reason and natural justice should

[49] CONST., (1935), Art. XII, sec. 1 in relation Art. XVII, sec. 2.
[50] CONST., Art. XIV, sec. 8.
[51] CONST., Art. XIV, secs. 9 and 11.
[52] G.R. No. 46729, November 19, 1982, 118 SCRA 492 (1982).

be protected against arbitrary state action, or an innately just and imperative right which an enlightened free society, sensitive to inherent and irrefragable individual rights cannot deny."

3. *Corporation sole and association*

The reference of the prohibition is "corporation or associations." There may be no problem as to corporations in fulfilling the 60% equity in capital stock of Filipino citizens but an interesting issue arises with respect to associations where there is no capital stock to speak of from which the 60% equity may be reckoned with.

In the early case of *Register of Deeds v. Ung Siu Temple*,[53] the Supreme Court said: "The purpose of the 60% requirement is obviously to ensure that corporations or associations allowed to acquire agricultural land or to exploit natural resources shall be controlled by Filipinos; and the spirit of the Constitution demands that in the absence of capital stock, the controlling membership should be composed of Filipino citizens." In that case, an association composed mostly of Vietnamese Buddhist monks was denied the privilege of owning an alienable land but the logical implication is very clear, that an unincorporated association may be entitled to the reserved rights/privileges as long as the nationality of its membership will comply with the 100% or the 60% rules as the case may be. This reasoning may have been critical when the Court in the case of *Roman Catholic Archbishop v. Land Registration Commission*[54] ruled that the corporation sole of the Roman Catholic Church, duly registered, can register its land holdings, the 60% requirement being met by the nationality of its faithful and also the percentage of its Filipino clergy. But if it were the case, it is incomprehensible why the Iglesia ni Kristo (INK) was not accorded the same privilege in the case of *Republic v. Judge Villanueva*. The Supreme Court in denying the application for registration by said Church of a parcel of land it acquired from a private person who originally acquired it as an alienable public land, ruled: "The Iglesia ni Cristo, as a corporation sole or a juridical person, is disqualified to acquire or hold alienable lands of the public domain because of the constitutional prohibition, and because said church is not entitled to avail itself of the benefits of sec. 48(b) of the Public Land Law which applies only to Filipino citizens or natural persons. A corporation sole (an "unhappy freak of English Law") has no nationality."[55] The flaw or at least the flip-flop decision-making is even more apparent if we consider that the INK, being controlled by Filipinos and composed almost exclusively by Filipinos, is even more fit to the 60% requirement than the Roman Catholic corporation sole, and consequently, there is much lesser basis than in the *Roman Catholic Archbishop v. Land Registration* case for the fear expressed in the Ung Siu Temple case to arise: "revival of alien religious

[53] 97 Phil. 58, 61 (1955).
[54] 102 Phil. 596.
[55] G.R. No. 55289, June 29, 1982, 114 SCRA 875, 881 (1982).

land holdings, complaints upon which, *inter alia,* sparked the Revolution of 1896." And in fact, in the early case of *Susi v. Razon and Director of Lands,*[56] the Supreme Court laid down the principle that an alienable public land acquired by a private person becomes private land and subsequent alienation thereof would be governed not by the law governing alienations of alienable public lands but by the law governing transfers of private lands. Based on this doctrine, the INK ruling becomes outrageously untenable. It is understandable therefore for two dissenting opinions[57] in the above mentioned INK case to note strongly that there may be no reasons to differentiate the corporation sole of the INK from the corporation sole of the Roman Catholic Church and that there may be no justification to devite from the *Susi* case principle.

It may be noted in passing however that in the 1959 case of *Alvarez v. Director of Lands,*[58] the Court ruled that insofar as alienable public lands are concerned, the corporation or association must be incorporated inasmuch as there is a need to attach their articles of incorporation or association in the lease application as the case may be. It may seem therefore that there must be a prior registration with the SEC in order to avail of the various "reserved rights/privileges" though one may argue that this attaching of articles of incorporation or association is merely a procedural devise which does not invalidate the rights involved thereon.

F. *Private Agricultural Lands*

For example, "A" acquired alienable public lands in 1949 then sold them as "residential or industrial lands" in 1953 to "B", an alien. Is this sale invalid as violative of the Constitution? The answer is no. This is because under the *Susi* case,[59] alienable public lands acquired by private persons become private lands, and being private lands, the owner thereof may dispose of said land subject only to the Constitutional prohibition that except in hereditary succession, private agricultural land may not be transferred or assigned to persons or corporations not qualified to hold lands of the public domain. The reference of the prohibition if "private agricultural land" and here the gaping void in the law is obvious since any person may stifle this provision by the mere expedient of making improvements on the land to transform it to "residential or industrial" land. Consequently, after the improvements, the alienation no longer involves private agricultural land but private residential land or private industrial land as the case may be and this effectively bar the Constitutional provision to operate. Hence, by some legal fiction, a basic public policy is laid to naught.

[56] 48 Phil. 424 (1925).
[57] Dissenting opinions of C.J. Fernando and J. Teehankee in Republic v. Judge Villanueva.
[58] 105 Phil. 115 (1959).
[59] 48 Phil. 424 (1925).

The imperative nature of determining the scope and breadth of the phrase "private agricultural land" was fulfilled when the Supreme Court had occasion in the leading case of *Krivenko v. Register of Deeds*[60] to resolve this. Confronted with the issue of whether or not a residential land comes within the prohibition on private agricultural land, the Court in answering in the affirmative had the following to say: "Under sec. 1 of Art. XIII of the Constitution 'natural resources, with the exception of public agricultural land, shall not be alienated' and with respect to public agricultural lands, their alienation is liimted to Filipino citizens. But this constitutional purpose conserving agricultural resources in the hands of Filipino citizens may easily be defeated by Filipino citizens themselves who may alienate their agricultural lands in favor of aliens. It is partly to prevent this result that sec. 5 is included in Art. XIII.... This constitutional provision closes the only remaining avenue through which agricultural resources may leak into aliens' hands. It would certainly be futile to prohibit alienation of public agricultural lands to aliens if, after all, they may be freely so alienated upon their becoming private agricultural lands in the hands of Filipino citizens.... Sec. 5 is intended to insure the policy of nationalization contained in sec. 1. Both sections must, therefore, be read together for they have the same purpose and the same subject matter.... Since 'agricultural land' under sec. 1 includes residential lots, the same technical meaning should be attached to 'agricultural land' under sec. 5. It is a rule of statutory construction that 'a word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears' (II Sutherland, Statutory Construction, p. 758). The only difference between 'agricultural land' under sec. 1 and under 5 is that is that the former is public and the latter private. But such difference refers to ownership and not to the class of the land. The lands are the same in both section, and for the conservation of national patrimony, what is important is the nature or class of the property regarding it is owned by the State or by its citizens."[61]

The validity of above definition was fully applicable only for the period *prior* to the 1973 Constitution inasmuch as said Constitution took out the word "agricultural" in the phrase to remove any vestige of doubt that could arise. Thus, it provides: "Save in cases of hereditary succession, no *private lands* shall be transferred or conveyed except to individuals, corporations or associations qualified to acquire or hold lands of the public domain."[62] This broader and clearer term prevents all the troubles confronted in the previous phraseology and taken hand in hand with the clearly defined and delineated term "public agricultural lands," they conceivably prove more effective and beneficial. This marked improvement avoids the absurdity created by the inconsistent use of terms under the 1935 Constitution.

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[60] 79 Phil. 461 (1947).
[61] *Id.* at 472-74.
[62] CONST., Art. XIV, sec. 14.

1. *Development of the law*

Formerly, the citizenship requirement as to acquisition or holding of private agricultural lands adhered strictly to the place of incorporation rule. Hence, the Friar Land Act[63] provided that just like in Public Land Act of 1903, any corporation or association of persons organized under the laws of the Philippine Islands, or of the U.S. or State or Territory or any Insular possession thereof may be qualified, regardless of equity ownership. By the ratification of the 1935 Constitution, the 60% ownership by Filipino citizens of the corporations is a requirement for holdings of private agricultural lands including the original friar lands.[64] The same 60% Filipino stock ownership was retained in the 1973 Constitution.[65]

2. *Vested rights doctrine*

Like in other "reserved areas," the vested rights doctrine applies herein. These, in *Haw Pia v. Omaña,*[66] the Supreme Court had this to say: "Sec. 5 in connection with sec. 1, Art. XII of the Constitution prohibits the transfer or assignment or private agricultural lands to individuals and corporations or associations not qualified to hold lands of the public domain. The petitioner being a citizen of the Chinese Republic is included within the prohibition but as the transfer of the land had already been consummated when the Constitution took effect on November 15, 1936, this court is of the opinion and so holds that the constitutional provisions are inapplicable to the present case and the prohibition therefore does not affect the eptitioner." The premise of this decision is undoubtedly the vested rights doctrine, the raison d'etere of which is public policy coupled by justice and due process. Indeed, the justification detailed in the case of *Lauson Ayog v. Judge Cusi*[67] cannot be more emphatic and clear.

3. *Parity Amendments, Application*

The question as to whether the Parity Amendments of 1946 applies also to private lands was settled by the Court in the landmark case of *Republic v. Quasha*[68] where it held: "This argument of respondent Quasha rests not upon the text of the Constitutional Amendment but upon a mere inference therefrom. If it was ever intended to create also an exception to sec. 5 of Art. XIII, why was mention therein made only of sec. 1 of Art XIII and sec. 8 of Art. XIV and of no other? When the text of the Amendment was submitted for popular ratification, did the voters understand that three sections of the Constitution were to be modified, when only two sections were therein mentioned?" The Court further said: "The

63 Act No. 1120, sec. 9.
64 CONST. (1935), Art. XIII in relation to secs. 1 and 3.
65 CONST., Art. XIX, sec. 14 in relation to secs. 8 and 9.
66 64 Phil. 469, 472-73 (1937).
67 G.R. No. 46729, November 19, 1982, 118 SCRA 492 (1982).
68 G.R. No. 30299, August 17, 1972, 46 SCRA 160, 169 (1972).

Parity Amendment created exceptions to that constitutional policy and in consequence to the sovereignty of the Philippines. By all canons of construction, such exceptions must be given strict interpretation." And if the purchase be valid, would Quasha's rights expire on July 3, 1974 or not, the Court has the following to say: "It is apparent that American business enterprises are more favored than Philippine Organization during the period of the parity in that, first, they need not be owned by American citizens up to 60% of their capital; all that is required is that they be *controlled* by US citizens, a control that is allowed by ownership of only 51% of the capital stock; and second, that the control by US citizens may be direct or indirect (voting trusts, pyramiding, etc.) which *indirect* control is not allowed in the case of Philippine nationals. That Filipinos should be placed under the so-called Parity in a more disadvantageous position than US citizens in the disposition, exploitation, development and utlization of the public lands, forests, bines, oils and other natural resources *of their own country* is certainly rank injustice and inequity that warrants a most strict interpretation of the Parity Amendment in order that the dishonorable inferiority in which Filipinos find themselves at present in the land of their ancestors should not be prolonged more than is necessary."[69]

4. *Effects of Violation of the Prohibition*

In a situation where a Filipino citizen sells or otherwise disposes of his property in favor of an alien or a corporation not having the required equity holdings, the Supreme Court had occasions to resolve in several cases. In 1953, the court in *Rellosa v. Gaw Chee Hua*[70] applied the *pari delicto* rule and disallowed the vendor from recovering the land sold to an alien, and reasoned in the following manner: "The contract does not come under this exception because it is not intrinsically contrary to public policy, nor one where the illegality itself consists in its opposition to public policy. It is illegal not because it is against public policy but because it is against the Constitution .... To adopt the contrary view would be merely to benefit the petitioner and not to enhance public interest." This ruling was followed by several decisions applying the same. But in 1967, the Court re-examined the application of the *pari delicto* rule and decided the case of *Philippine Banking Corp. v. Lui She*[71] in this view: "The constitutional provision... is an expression of public policy to conserve lands for the Filipinos .... That policy would be defeated and its continued violation sanctioned if instead of setting the contracts aside and ordering the restoration of the land to the estate of the deceased, this Court should apply the principle of *pari delicto*. To the extent that our ruling in this case conflict with that laid down in *Rellosa v. Gaw Chee Gun* and subsequent

[69] *Id.* at 178.
[70] 93 Phil. 827, 832 (1953), *cited in* BERNAS, *supra* note 19.
[71] G.R. No. 17587, September 12, 1967, 21 SCRA 52, 67-68 (1967).

cases, the latter must be considered as *pro tanto* modified."[72] It should be noted however that the *Lui She* doctrine does not exclude in some cases the possibility of barring the recovery of the vendor. Hence, in cases of the alien vendee alienating in good faith the land in question to a Filipino citizen,[73] recovery is not allowed. The same is true in case the alien vendee acquired Filipino citizenship subsequent to the sale.[74]

G. *Enforcement and Efficacy of the Rules*

For a policy to be properly implemented and rendered effective, some sanctions must accompany it—criminal, civil or administrative. As regards the nationalistic policies embodied in the Constitution, the "teeth" is the Anti-Dummy Act as amended.[75] This paper's concern being on the corporation angle, focus be had on sanctions as to violation of the Act by them. In case of false simulation of existence of the required stock capital ownership of Filipinos, the president or managers and director or trustees of corporations as associations convicted of such shall be punished by imprisonment of not less than 2 years nor more than 10 years, and by a fine of not less than ₱2,000 nor more than ₱10,000.[76] In case a corporation or association having a right, franchise, property or business expressly reserved by the Constitution to citizens or 60% Filipino-owned corporations, which permits the use, exploitation or enjoyment of such right, etc., or leases or in any way transfers or conveys the same to persons or corporations, or which allows persons not having the qualifications required to intervene in the management, operation, administration or control thereof, shall be punished by imprisonment for not less than 5 nor more than 15 years and by a fine of not less than the value of the right, franchise, etc. likewise, there shall be the forfeiture of such right, franchise, etc.[77] Further, any corporation or association which violated the provisions of the Act shall be dissolved upon proper court proceedings.[78]

The Supreme Court in several cases had occasion to decide issues relating to this Anti-Dummy Act. Thus, in the 1962 case of *King v. Hernaez*[79] the Court ruled: "When the law says that you cannot employ an alien in any position pertaining to management, operation, administration and control whether as an officer, employee or laborer therein, it only means one thing: the employment of a person who is not a Filipino citizen even a minor or clerical or non-control position is prohibited." And the reason of this rather strict interpretation is "to plug any loophole or close

72 93 Phil. 827 (1953).
73 Sarsosa Vda. de Barsobia v. Aunco, G.R. No. 33048, April 16, 1982, 113 SCRA 547 (1982).
74 Vasquez v. Giap, 96 Phil. 447 (1955).
75 Com. Act No. 108, as amended.
76 *Id.*, sec. 2.
77 *Id.*, sec. 2-A.
78 *Id.*, sec. 3.
79 G.R. No. 14859, March 31, 1962, 4 SCRA 792, 802 (1962).

any avenue that an unscrupulous alien may resort to flout the law or defeat its purpose, for no one can deny that while one may be employed in a non-control position who apparently is harmless, he may later on turn out to be a mere tool to urther the evil designs of the employer. It is imperative that the law be interpreted in a manner that would stave off any attempt at circumvention of this legislative intent."

And in its attempt to galvanize an effective enforcement process for these nationalistic policies, the Supreme Court in the case of *Zobel v. Concepcion, Jr.*[80] stated "if the city fiscal of Manila can prosecute violations of the Anti-Dummy Law independently and without coordination with the agencies of the Anti-Dummy Board, there would be no need for this provision [Sec. 6 of RA 1130]. Were the city fiscal or the provincial fiscals who have the power to prosecute violations of all laws and ordinances allowed... independently of the Anti-Dummy Board, there would be no order, concert, cooperation and coordination between the said agencies of the government. The function of coordination which is entrusted to the Anti-Dummy Board is evident from secs. 1, 2, 3 and 6 of RA 1130."

For as early as 1954, Republic Act No. 1130 was enacted which created the Anti-Dummy Board whose "main purpose is to insure the implementation of all provisions of the Constitution, nationalization laws, and other legal provisions which require Philippine citizenship to citizenship of any other specific country for the exercise or enjoyment of a right, franchise or privilege, property or business, and further to coordinate as far as practicable, all government agencies charged with the enforcement of the said provisions of the Constitution and laws, and in particular, Commonwealth Act No. 108 or the Anti-Dummy Law."[81]

In the 1972 case of *Luzon Stevedoring Corp. v. Anti-Dummy Board*, the Court brushed aside the argument that sec. 2-A of CA 108 as amended excludes those partly nationalized business for it merely comprehends wholly nationalized ones: "Neither the law nor the explanatory note distinguish between wholly or partly nationalized business. It is axiomatic that where the law does not distinguish, we should not distinguish... [for] ... the policy of the amendatory law was to plug all loopholes that may be utilized by designing foreigners to circumvent the nationalization laws of the country, regardless of whether such laws provide for complete or partial nationalization of right, franchise, privilege, property, or business covered thereby."[82] The underlying reasons as viewed by the Court were that: "Aside from employing dummies, the stockholders who own 40% of the capital stock of a public utility, may effectively control its operations by employing aliens to subvert our territorial integrity and our economic

[80] G.R. No. 17806, June 29, 1968, 5 SCRA 428.
[81] Rep. Act No. 1130, sec. 2.
[82] 46 SCRA 474, 487-488 (1972).

stability. Shipping lines . . . are the vital arteries of commerce, perhaps more vital to our security and independence than the nationalization of retail trade. Alien control of inter-island navigation means economic control and political domination of hostile aliens who actually man and operate the ships. In times of peace, such vessels may be utilized for smuggling not only of prohibited or dutiable goods but also of hostile human cargo as well as for gun-running. In times of war, the peril of the State is greater because the officers and employees manning the ships or directing their operations may be enemy aliens."[83]

It is clear therefore that the necessary tools for effective implementation of the law were at our disposal. However, there is such a lamentable dearth of cases arising from the implementation of the "teeth" of the nationalization laws. Though this by no means can be interpreted as indicative of the law's ineffectiveness, the ominous absence of illustrative cases suggests that no legal issues arose because there may have been no enforcement to speak of in the first place, or if there was, it was haphazardly done; and this is evidentiary of the lack of concerns lest loyalty to official duties. To detail the reasons here would be beyond the scope of this paper and be purely conjectural in character.

IV. "FOREIGN CORPORATIONS": A DEPARTURE

A. *Hypothetical Situations*

(1) Corporation X was incorporated in England by Filipinos in 1982. All shares of stocks were owned by them. Said corporation was created to engage in the mining business. In 1983, it applied for, and was granted, a license to do business in the Philippines. In the same year, it applied for a mining claim. At the time of its application for said claim, Corporation X was still wholly Filipino owned.

(2) A certain multinational corporation is engaged in the steel business. It is governed and operated by mother Corporation A, a corporation duly registered under the laws of California, USA, and whose capital stock is 80% owned by Filipino residents in the same state. For its iron ore requirements, said multinational corporation operates extensive iron mines in several countries. Wishing to avail of the vast iron deposits of and of cheap labor in the Philippines, the same corporation established a satellite corporation B, wholly owned by the former. Now, corporation B applies for a mining grant in the mountains of Cotabato.

(3) In 1980, corporation Y was created and organized under the laws of Philippines with its capital divided in this propertion: 80%, British nationals ownership; 16% Filipino equity; and 4% owned by other nationalities. Said corporation is engaged in the profitable lumber/timber

[83] *Id.* at 490.

business in the Philippines but its headquarters, its company seat, is located in Munich, West Germany. It appears that corporation Y is part of an integrated corporate system engaged in lumber/timber business, pulp making, paper-making and related businesses, encompassing various corporations scattered around the world. All major decisions and the policy making are done at the headquarters, upon recommendation of the area companies.

B. *Nationality Question: Double Nationality?*

The core of the question is the application of the various theories in the determination of the nationality of juridical persons. It appears however that no matter how one looks at it, an inevitable "double nationality" arises in the various hypothetical situations.

In the first situation, Corporation X is a British Corporation since it was incorporated in England in 1982. This is the result of the "place of incorporation theory." However, it may also be considered as Philippine corporation inasmuch as at least 80% of the capital stock thereof is Filipino-owned. This is the result of the application of the "equity ratio" rule. Hence, we have a dual Philippine-British Corporation.

In the second situation, the place of incorporation rule applies in both ways: as to mother corporation A which is an American corporation, and satellite corporation B which is a Philippine corporation. However, the matter of indirect stock ownership adds more confusion to this legal merry-go-round. The question now is: Does the "grandfather rule" "apply in this case considering that 80% of the capital stock of the mother corporation is Filipino owned? True, these two corporations are of different nationalities, but for purposes of availing certain reserved rights/privileges, would the 80% Filipino equity be retained with respect to corporation B? It is submitted that the grandfather rule applies and consequently, the 80% Filipino equity is carried over to corporation B inasmuch as this corporation is wholly owned by a corporation bearing said equity ratio.

The third situation presents a more interesting nationality issue. Under the place of incorporation rule which operates in the Philippines as a general rule, Corporation Y is a Philippine corporation. But Germany which follows the *siege social theory* would declare that said corporation is a German corporation because the company seat is located in Munich. And then, we have to account for the 80% British ownership of the corporation's stocks. For all intents therefore, we have an example of a corporation with "multiple nationality"—Philippine, German and British, all at the same time.

These results are but offshoots of the divergence in the rules applied by different countries and correspondingly, the vigorous application of the rules would lead to a blank wall. But certainly, we cannot avoid this.

Reality of some corporations existing in appropriate or analogous conditions demands a broad outline of the effects and implications of the above hypothetical situations.

C. *Legal Effects and Implications*

1. *Tax*

One of the basic principles of taxation is the territoriality principle. This principle requires that the person or property taxed must be subject to the jurisdiction of the taxing state. Hence, all persons, whether natural or juridical, are subject to tax by the sovereign authority provided that they are within its jurisdiction. It must be noted that as to citizens, jurisdiction of the state over him is personal and thus follows the citizen wherever he goes.

Bearing in mind the "multiple nationality" problem set forth in the first part of this title, it is respectfully submitted that each state involved in the hypothetical situations could tax the corporation directly or if the same is not possible, then indirectly thru the individual taxpayers. Taxation is a purely municipal matter, and provided that the entity subject to tax is within the territorial jurisdiction of the taxing power and performing a certain activity therein, or is a national thereof ,the proper tax could be imposed. This result however is without prejudice to the application of tax credits when proper.

Even when the various states can impose taxes upon the corporations subject to its jurisdiction, there arises another problem: at what rate would the tax impositions be? We have to note that the rate of tax may differ depending on whether the corporation is a domestic corporation, a foreign resident corporation, or a foreign non-resident corporation engaged in business in the Philippines. Caution therefore must be had in giving labels because of the innate nationality issue presented by the situations above. Again, assuming that the proper rate be applied, would there not be a case of double taxation? The list of possible anomalies can grow longer. It is submitted however that at least for purposes of tax collection, and based on the Philippine point of view, the nationality of corporations should be based on the general rule of place of incorporation. For it must be admitted that the exceptions, i.e., capital equity ratio rule, applies only in certain special circumstances, and collection of taxes is not one of them.

2. *Right to reserved privileges, franchises and properties.*

There is no problem with direct Filipino ownership of capital stock of a corporation in the determination of the nationality of said corporation. Thus, corporation X in situation 1 can certainly avail of the reserved rights, privileges and properties since this is a case of "direct Filipino ownership" of at least 60% of the capital stock. But how about "indirect

ownership" as in corporation A and B in situation 2? Is this covered by the said grant of reserved privileges? It is submitted that such indirect ownership is covered. Logic and reason demand such a result. For if a person or a collective of persons own substantially a corporation which totally owns another corporation, there is no gain-saying that the ownership proportion is not maintained. And the so-called "grandfather rule" in corporation law supports this view. We are not unaware however of an equally persuasive theory based on the separate personality principle in corporation law. Under said theory, the other corporation is owned by the first corporation as a distinct and separate person from the individual stockholders. For though the corporate stockholders of the first corporation have definitely economic interests on the second corporation, the legal title or ownership belongs exclusively to the first corporation as a distinct person.

Some statutes[84] require in addition to the 60% Filipino equity precondition that the applicant corporation must be created and organized under the laws of the Philippines. This clearly prevents the problem in the first situation described earlier. But in at least one law[85] on these reserved rights and privileges, there is no such requirement for application to avail of the reserved rights/privileges. This brings us again to square one.

3. *Right to sue and be sued*

If the hypothetical corporations were established to be nationals of a particular state especially if this be the result of the place of corporation rule, there is no question that said corporations have personality to sue and be sued before the courts of their respective national states.

Assuming for example that the Philippine government decides to nationalize the industry where the various "foreign" corporations, there may be created problems of great international repercussions. Before Philippine courts, such ill-fated corporations may not be able to sue the government because of the principle of non-suability of states. Hence, unless the States consents of its being sued before its own courts, and this consent may be either expressed or implied from certain statutes, no suit can prosper against it. Admittedly, the results may be harsh but public policy and stability in governance require this principle. Besides, it is basic that the *dura lex sed lex* principle applies herein.

But how about the international character of the problem? How would we account for the other countries to which the same corporation is national? In the hypothetical situations, England may afford diplomatic protection to corporation X which is its national by place of incorporation,

[84] TARIFF AND CUSTOMS CODE and Petroleum Act for example.
[85] Public Service Law as amended.

and maybe, to corporation Y which can be considered its national by virtue of the substantial interest of British citizens thereto and US may grant diplomatic protection to corporation B by virtue of the fact that a US corporation, A, wholly owns it. It must be noted here however that the process of diplomatic protection is wholly discretionary to the various states and every state acts pursuant thereto if the national interests are deemed affected thereby. Various extra-legal considerations play important roles in this decision-making process like foreign policy, foreign relations, and the like.

Assuming that the various state may take the cudgels on behalf of its national, the problem of venue and ultimately jurisdiction of the tribunals deciding the issue will arise. Of course, this stage presupposes that the various means of settlement of disputes viz, negotiation, arbitration, among others, have proven to be ineffective. This problem may not arise if the concession agreement for example provides for the forum. But what if it does not? Certainly, the dynamics of judicial litigations of international disputes may now operate in full force and effect.

The uncertainty of diplomatic protection, and the consequent anvil of anxiety hanging over the fate of "foreign investments" led to the International Convention on the Settlement of Investment Disputes. Here the foreign corporation is granted personality to sue before an international forum in its own right. This is a fine improvement on the tedious and complex problems on the capacity of corporations. However, this is once again subject to an ominous condition: that the country of origin of the corporation and the country of its operation are both states-party to the Convention. Otherwise, this privilege does not arise. For basic in international law that states who are not parties to a treaty or convention are not bound thereto. *Pacta tertiis nec nocent nec prosunt.*

V. CONCLUSIONS

There is a discernible trend in the statutory development of the 'nationality requirement" towards a restrictive idea of prohibiting non-citizens from certain reserved privileges, franchises and properties. From a liberal attitude of permitting corporations incorporated in the Philippines to avail of any franchise or privilege or property prevailing in the early 20th century (except vessels), the late 1930s saw the imposition of the stable ownership quota. The critical timeframe is 1935 when this attitude was firmly entrenched in the Constitution. The second significant development was in 1954 when the 100% rule was recognied in certain areas of investment and which was subsequently entrenched in the 1973 Constitution.

The Court itself, in a notable degree of social awareness, recognized an exception to the general rule of place of incorporation in a string of cases; and this facilitated the effectivity of the policy enunciated by the law-

makers. Notice must be had to the leading case of *Palting v. San Jose Petroleum* where the Court settled in remarkable bluntness and decisiveness the problems attending the nationality issue. Yet the same Court was not blind to certain vested rights which it recognized as not impaired whatsoever. Nobody should also miss the leading case of *Republic v. Quasha* where the "oppressive" Parity Amendments was hacked to pieces, literally at a critical moment in times of its application.

But the same Court is also the epitome of fluctuating legal comprehension. At one point, it declares that membership would be determinative of the nationality. At another point, it declares this is not so. This wavering doctrinal attitude has great repercussions on the nationality of, among others, corporation soles. The absence of a determinative decision setting to rest this apparent conflict invites the thoughts of injustice, partiality or plain mistaken application of legal concepts, to the mind of any person analyzing the same. To say that a legal pronouncement must be understood within the peculiar circumstances of each case is to beg the issue.

Legally, it may seem as incomprehensible the failure of the "teeth" of the nationalistic policies and provisions of the Constitution and the statutes inspite of the enforcement tools on our disposal, re the Anti-Dummy Act as amended and the Anti-Dummy Board Law. Perhaps, the fault may lie with the enforcement agencies which for one reason or another failed to fulfill the role contemplated for them by the legislature. Or perhaps the ultimate fault may lie with the Filipino people themselves who were not vigilant enough and who were tempted easily by the glint and reckoning force of money and fortune. However, there is no purpose in pointing an accusing finger. The problem is there: the nationalistic policies and provisions have been enforced way below satisfactory levels. For that reason, it may even be said that the purpose of these policies and provision may have been rendered nugatory and in vain.

The departure chapter presents to us a startling phenomenon: that of double or multiple nationality of juridical persons. The brief outline of legal effects and implications present an interesting subject of future studies. And certainly, this phenomenon must be accepted as a matter of fact and an eventuality as long as the various states of the world continue to adopt divergent theories on the determination of the nationality of juridical persons. One last point. Where multiple nationality has continuously befuddled legal writers in both municipal law and international law before, we now have another case of multiple nationality, this time, of juridical persons. And this new matter is as complex, challenging and interesting as the first.