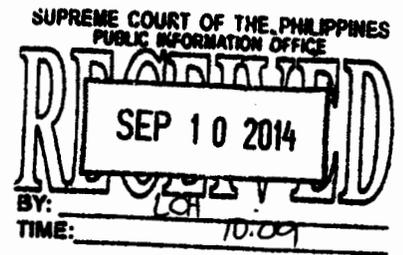




Republic of the Philippines  
Supreme Court  
Manila



EN BANC

NOTICE

Sirs/Mesdames:

*Please take notice that the Court en banc issued a Resolution dated August 26, 2014, which reads as follows:*

**G.R. No. 210885 (James Mark Terry L. Ridon and Jonas Julius Caesar N. Azura v. AXN Networks Philippines, Inc., Securities and Exchange Commission, National Telecommunications Commission, and Movie and Television Review and Classification Board); G.R. No. 210886 (James Mark Terry L. Ridon and Jonas Julius Caesar N. Azura v. Fox International Channels Philippines Corporation, Securities and Exchange Commission, National Telecommunications Commission and Movie and Television Review and Classification Board).** - In these two (2) consolidated petitions<sup>1</sup> filed under Rule 65 of the Rules of Court, the Court is being called to decide whether the Securities and Exchange Commission (SEC) failed in performing its statutory duty of enforcing the nationality requirements,<sup>2</sup> prescribed in Section 11, Article XVI of the Constitution, on the ownership and management of mass media and those that are engaged in the advertising agency when it granted franchises through the issuance of certificates of registration<sup>3</sup> in favor of AXN Networks Philippines, Inc. (AXN) and Fox International Channels Philippines Corporation (FOX).

Petitioners James Mark Terry L. Ridon (*Rep. Ridon*), a member of the House of Representatives and the Integrated Bar of the Philippines (IBP) and Atty. Jonas Julius Caesar N. Azura (*Atty. Azura*), also a member of the IBP, allege that the SEC effectively allowed AXN and FOX to engage as mass media and advertising entities despite being 99.99% controlled by aliens, thus, violating the constitutionally prescribed foreign ownership restrictions on nationalized industries.

<sup>1</sup> *Rollo* (G.R. No. 210885), pp. 3-32; *rollo* (G.R. No. 210886), pp. 3-34.

<sup>2</sup> *Heirs of Gamboa v. Teves, et al.*, G.R. No. 176579, June 28, 2011, 652 SCRA 690, 743.

<sup>3</sup> *Rollo* (G.R. No. 210885), p. 36; *rollo*, (G.R. No. 210886), p. 38.

The 1987 Constitution embodies the policy of Filipinization as a continuing expression of the collective sense of nationalism that sprung in the early days of the Republic.<sup>4</sup> It prohibits and/or limits the participation of aliens in enterprises considered sensitive and vital to both the national economy and national security. Thus, paragraph 1, Section 11 of Article XVI of the Constitution<sup>5</sup> restricts the ownership and management of mass media to citizens of the Philippines, or to corporations, cooperatives or associations, wholly-owned and managed by such citizens. Paragraph 2<sup>6</sup> of the same article likewise restricts engagement in the advertising industry to Filipino citizens or corporations or associations with at least seventy *per centum* of its capital owned by such citizens.

### *The Factual Antecedents*

In his privilege speech,<sup>7</sup> labeled by the media as the “State of Philippine Cable Television”<sup>8</sup> and delivered on January 27, 2014 before the House of Representatives, petitioner Rep. Ridon accused foreign-dominated companies, specifically AXN and FOX, of “*encroaching upon protected industries including the mass media and the advertising. He said that based on the last documents submitted to the Securities and Exchange Commission (SEC), corporations, xxx xxx xxx including those abovementioned, have foreign shares which constitute 99.99 percent of ownership—a clear violation of the Constitution’ [that] xxx xxx xxx these corporations cannot be allowed to engage in mass media by providing programming content to CATV operators or engaging in advertising pursuant to the limitation under the 1987 Constitution and other statutes governing the mass media industry.*”<sup>9</sup> Thus, he said that “[t]he failure of government regulation over

<sup>4</sup> *Heirs of Gamboa v. Teves, et al.*, supra note 2, citing Bernas, *The Constitution of the Republic of the Philippines*, p. 452, citing *Smith, Bell and Co. v. Natividad*, 40 Phil. 136, 148 (1919); *Luzon Stevedoring Corporation v. Anti-Dummy Board*, 150-B Phil. 380 (1972).

<sup>5</sup> The 1987 Constitution, Art. XVI, Sec. 11, par. 1. The ownership and management of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or associations, wholly-owned and managed by such citizens.

The Congress shall regulate or prohibit monopolies in commercial mass media when the public interest so requires. No combinations in restraint of trade or unfair competition therein shall be allowed.

<sup>6</sup> The 1987 Constitution, Art. XVI, Sec. 11, par. 2. The advertising industry is impressed with public interest, and shall be regulated by law for the protection of consumers and the promotion of the general welfare.

Only Filipino citizens or corporations or associations at least seventy *per centum* of the capital of which is owned by such citizens shall be allowed to engage in the advertising industry.

<sup>7</sup> III Record, House 16<sup>th</sup> Congress 1<sup>st</sup> Session 6 (January 27, 2014) [http://www.congress.gov.ph/download/congrec/16th/1st/16C\\_1RS-40-012714.pdf](http://www.congress.gov.ph/download/congrec/16th/1st/16C_1RS-40-012714.pdf); Last visited August 19, 2014.

<sup>8</sup> Lawmaker slaps AXN, Fox with pile of raps  
<<http://www.manilatimes.net/lawmaker-slaps-axn-fox-with-pile-of-raps/75237/>> Last visited August 19, 2014.

<sup>9</sup> III Record, House 16<sup>th</sup> Congress 1<sup>st</sup> Session 7 (January 27, 2014) [http://www.congress.gov.ph/download/congrec/16th/1st/16C\\_1RS-40-012714.pdf](http://www.congress.gov.ph/download/congrec/16th/1st/16C_1RS-40-012714.pdf); Last visited August 19, 2014.

*the activities of these corporations has allowed these corporations to directly compete with legally existing domestic corporations engaged in similar activities in the mass media industry. Big cable operators may not have any problem with this, but what about the hundreds of other small local cable TV operators and local content providers and advertisers?”<sup>10</sup>*

Fearing “*that the direct but unwarranted competition of these foreign-owned corporations with legally existing domestic corporations, engaged in similar activities poses threats to the continuing viability of constitutionally protected domestic industries and employment of their thousands of workers,*” Rep. Ridon urged the House of Representatives “*to investigate the state of compliance of the cable television industry, including CATV operators and programming content providers, with the nationality restrictions of the 1987 Constitution and other existing statutes.*”<sup>11</sup>

On February 7, 2014, Rep. Ridon and Atty. Azura formally brought the issue to the attention of the Court through the filing of these consolidated petitions. The petitioners believe that the failure of AXN and FOX to fulfill the minimum nationality requirements should have prevented the SEC from issuing the pertinent certificates of registration for being contrary to the Constitution.

According to the petitioners, AXN and FOX were given by the SEC the authorization to engage in mass media and advertising despite being 99.99% controlled by aliens. As the pertinent General Information Sheets<sup>12</sup> would show, AXN is 99.99 % owned by South Asian Regional Investments, Inc., an entity organized under the laws of the State of Delaware, U.S.A.; and FOX is 99.99% owned by Star Television Advertising Ltd., an entity organized under the laws of the British Virgin Islands.

Under AXN’s Amended Articles of Incorporation (AOI),<sup>13</sup> which was approved by the SEC on January 20, 2012, its primary purpose was “[t]o **buy or sell** for its own account or as agent, **television advertising time** for television companies and to conduct **promotional and other similar activities** for that purpose.”<sup>14</sup> One of its secondary purposes was “[t]o deal and engage in, for its own account, on commission or for such fees as may be proper and legal, any lawful arrangements and agreements involving the use of television airtime by television operators such as but not limited to

<sup>10</sup> III Record, House 16<sup>th</sup> Congress 1<sup>st</sup> Session 7 (January 27, 2014) <[http://www.congress.gov.ph/download/congrec/16th/1st/16C\\_IRS-40-012714.pdf](http://www.congress.gov.ph/download/congrec/16th/1st/16C_IRS-40-012714.pdf)> Last visited August 19, 2014.

<sup>11</sup> III Record, House 16<sup>th</sup> Congress 1<sup>st</sup> Session 7 (January 27, 2014) <[http://www.congress.gov.ph/download/congrec/16th/1st/16C\\_IRS-40-012714.pdf](http://www.congress.gov.ph/download/congrec/16th/1st/16C_IRS-40-012714.pdf)> Last visited August 19, 2014.

<sup>12</sup> Rollo (G.R. No. 210885), pp. 48-54; rollo (G.R. No. 210886), pp. 59-64.

<sup>13</sup> Rollo (G.R. No. 210885), pp. 39-44.

<sup>14</sup> Id. at 39. [Emphases ours]

carriage agreements, **and to provide marketing, promotional, support, and other similar services for this purpose.**"<sup>15</sup>

On the other hand, FOX, based on its Amended AOI<sup>16</sup> which was approved by the SEC on November 17, 2010, was organized primarily "[t]o provide **consulting, liaison, marketing and promotional**, after-sales, technical and training services to cable and television operators." Secondary to that purpose, Fox was to provide **advertising, sponsorship and related activities.**<sup>17</sup>

To the petitioners, the authority conferred under the issued AOIs to AXN and FOX should not have been given in the first place, as it runs afoul of the Constitutional proscription on alien domination of mass media and advertising. Hence, as taxpayers and Filipino citizens, the petitioners pray that the Court:

[1] Declare null and void the SEC issuance of the certificates of registration to AXN and FOX for being patently unconstitutional;

[2] Order the SEC to suspend or revoke the said certificates;

[3] Enjoin and prohibit AXN and FOX from continuing to operate under the said certificates;

[4] Enjoin and prohibit the SEC from issuing any further certificates to applicants that fail to comply with the requirements on ownership provided under the Constitution; and

[5] Enjoin and prohibit the National Telecommunications Commission (*NTC*) and the Movie and Television Review and Classification Board (*MTRCB*) from allowing the airing of all cable channels bearing content illegally distributed and/or produced by AXN and FOX.<sup>18</sup>

In their consolidated Comment,<sup>19</sup> the SEC, the NTC and the MTRCB, through their counsel, the Office of the Solicitor General (*OSG*), disagree and pray for the dismissal of the petitions. AXN and FOX, in their

<sup>15</sup> Id. [Emphasis ours]

<sup>16</sup> *Rollo* (G.R. No. 210886), pp. 41-50.

<sup>17</sup> Id.

<sup>18</sup> *Rollo* (G.R. No. 210885), pp. 29-30; *rollo* (G.R. No. 210886), pp. 31-32.

<sup>19</sup> *Rollo* (G.R. No. 210885), pp. 234-281.

Opposition<sup>20</sup> and Comment/Opposition,<sup>21</sup> similarly pray that the petitions be dismissed for the following reasons:

[1] The petitioners failed to first exhaust all available administrative remedies before the SEC, the NTC and the MTRCB;

[2] Assuming that the failure to exhaust remedies may be excused, the petitioners still palpably disregarded the principle of hierarchy of courts;

[3] There is no justiciable controversy that is ripe for judicial adjudication in the present case;

[4] The petitioners lack the requisite legal standing to file the petitions;

[5] The petitioners are not entitled to an injunction, as they have no right *in esse* that warrants immediate protection from the courts; there will be no irreparable injury that will result even if injunction is denied; if the injunction is granted, it would be tantamount to prejudgment on the merits of the case; if it is the government that is being enjoined from implementing an issuance that enjoys the presumption of validity, the discretion in granting or denying applications for injunctive writs must be exercised with utmost caution; and

[6] Lastly, the nationality requirements under the Constitution do not apply, because AXN and FOX are not engaged in mass media or the advertising business.<sup>22</sup>

In addition, the respondents insist that the ownership restriction under the Constitution does not apply to them, as they do not broadcast signals to the public. Thus, they cannot be considered as mass media entities.

Furthermore, they assert the inapplicability of the 70:30 nationality rule as they are not engaged in the business of advertising.

### The Issue

In issuing the pertinent certificates of registration, did the SEC effectively allow AXN and FOX to engage in mass media and advertising despite being 99.99% controlled by aliens and, thus, violate the foreign ownership restrictions under Section 11 Article XVI of the 1987 Constitution?

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<sup>20</sup> Id. at 61-82.

<sup>21</sup> *Rollo* (G.R. No. 210886), pp. 108-153.

<sup>22</sup> *Rollo* (G.R. No. 210885), pp. 61-81 and pp. 183-228.

To properly resolve the issue, the Court must first rule on the propriety of the petitioners' direct recourse via Rule 65.

### The Court's Ruling

The primary relief being prayed for by the petitioners is for the Court to declare as unconstitutional the issuance by the SEC of the certificates of registration in favor of AXN and FOX. This essentially means that the SEC is being accused of violating the Constitution – an allegation of grave abuse of discretion,<sup>23</sup> although not as precisely worded as that, for having allegedly committed an act in utter and blatant disregard of the constitutionally mandated foreign ownership restrictions in protected industries.

The success of these petitions and of all the other reliefs prayed for depends on the Court's exercise of its extraordinary power of judicial review. It is a review meant to put to a test the constitutionality of the SEC's issuance via a petition for review on *certiorari* under Section 1 of Rule 65. The provision reads as follows:

**Section 1. *Petition for certiorari.*** — When any tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board or officer, and granting such incidental reliefs as law and justice may require.<sup>24</sup>

A plain reading of the above shows that *certiorari* may lie only when a tribunal, board, or officer exercises a judicial or quasi-judicial function with grave abuse of discretion. In *Dacudao v. Gonzales*,<sup>25</sup> the Court once again said that for a special civil action for *certiorari* to prosper, xxx it must be directed against a tribunal, board or officer exercising judicial or quasi-judicial functions.

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<sup>23</sup> Grave abuse of discretion is the capricious and whimsical exercise of judgment on the part of the public officer concerned, which is equivalent to an excess or lack of jurisdiction. The abuse of discretion must be so patent and gross as to amount to an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law as where the power is exercised in an arbitrary and despotic manner by reason of passion or hostility. See *Presidential Ad Hoc Committee on Behest Loans v. Tabasondra*, G.R. No. 133756, July 4, 2008, 557 SCRA 31, 45.

<sup>24</sup> Rules of Court, Rule 65, Sec. 1.

<sup>25</sup> G.R. No. 188056, January 8, 2013, 688 SCRA 109.

Thus, the question: Does the SEC function as a judicial body or as a quasi-judicial body when it issues a certificate of registration or grants a franchise?

It does not.

The exercise of judicial function consists of the power to determine what the law is and what the legal rights of the parties are, and then to adjudicate upon the rights of the parties. The term “quasi-judicial function” applies to the action and discretion of public administrative officers or bodies that are required to investigate facts or ascertain the existence of facts, hold hearings, and draw conclusions from them as a basis for their official action and to exercise discretion of a judicial nature.<sup>26</sup>

The SEC, in issuing certificates of registration in favor of a corporation, is not called upon to adjudicate the rights of contending parties or to exercise, in any manner, discretion of a judicial nature; nor does it conduct investigations and then draw conclusions from them as basis for its actions. What it does is merely to verify the documents submitted for incorporation in order to determine if there has been substantial compliance with the list of requirements of the Code. Thus, **in the process of incorporation**, the SEC is clearly not acting in any judicial or quasi-judicial capacity.

Constitutional law teaches that the State’s authorization for creating a private corporation such as AXN and FOX emanates from Congress and is expressed through a general law enacted for that specific purpose.<sup>27</sup> That law is the Corporation Code (*Code*),<sup>28</sup> which gives the SEC the power to approve or reject the AOI of any corporation in accordance with the statutory requirements of the Code.<sup>29</sup> Thus, when the SEC gives the State’s consent for a corporate entity to exist through the approval of the latter’s AOI and the subsequent issuance of a certificate of registration, it is as if Congress itself approves the creation of that corporation.

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<sup>26</sup> *Saraya v. Ongsuco*, G.R. No. 182065, October 27, 2009, 604 SCRA 499.

<sup>27</sup> The 1987 Constitution, Art. XII, Sec. 16. The Congress shall not, except by general law, provide for the formation, organization, or regulation of private corporations. Government-owned or controlled corporations may be created or established by special charters in the interest of the common good and subject to the test of economic viability.

<sup>28</sup> Batas Pambansa Blg. 68.

<sup>29</sup> The Corporation Code, Sec. 19. *Commencement of corporate existence*. – A private corporation formed or organized under this Code commences to have corporate existence and juridical personality and is **deemed incorporated from the date the Securities and Exchange Commission issues a certificate of incorporation under its official seal**; and thereupon the incorporators, stockholders/members and their successors shall constitute a body politic and corporate under the name stated in the articles of incorporation for the period of time mentioned therein, unless said period is extended or the corporation is sooner dissolved in accordance with law.

This being the case, there is no reason to excuse the glaring absence of one of the requirements of judicial review. Without a doubt, the absence of an assailed act derived from the exercise of a quasi-judicial or judicial function removes from the Court the power to decide these petitions by way of *certiorari*.

Moreover, the rule requires that in availing of the remedy of special civil action for *certiorari*, there must have been neither an appeal nor any plain, speedy, and adequate remedy in the ordinary course of law.<sup>30</sup> Here, the petitioners came directly to this Court without exhausting other remedies that could have been plain, speedy and adequate. They state without detail that to require them to make a prior resort to the processes of the SEC would constitute no less than a denial of a plain, speedy and adequate remedy and would cause great and irreparable damage to the petitioners as well as to the Constitution itself.

While exhausting administrative remedies may be dispensed with when what is being questioned is the validity of the acts of political departments under the expanded power of judicial review via Rule 65, this circumstance would not give blanket authority to the Court to resolve the question. The nature of the reliefs prayed for must also be considered.

In these petitions, the Court is being asked to declare the SEC's issuance of the certificates of registration to AXN and FOX null and void for being patently unconstitutional. The necessary consequence of granting the petitioners' prayer would be to order the SEC to withdraw the certificates of registration issued to AXN and FOX. Because the issuance of the pertinent certificates gave the latter corporate life, the withdrawal or revocation of their certificates would necessarily mean their corporate death. In other words, by the nature of the reliefs prayed for, it is clear that the petitioners basically seek the revocation of the very existence of AXN and FOX.

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<sup>30</sup> Rules of Court, Rule 65, Sec. 1, *Sps. Crisologo v. JEW M Agro-Industrial Corporation*, G.R. No. 196894, March 3, 2014.



Under Presidential Decree (*P.D.*) No. 902-A,<sup>31</sup> the authority to suspend or revoke the franchise or certificate of registration of corporations, partnerships or associations upon any of the grounds provided by law lies with the SEC. Section 6(i) of this decree specifically mandates that the decision must be arrived at after proper **notice and hearing**.<sup>32</sup> Conducting a hearing is not the function of this Court, for it is not a trier of facts.<sup>33</sup> Neither can it require the presentation of evidence in order to appreciate the factual milieu of a case. Prior resort to administrative remedies in this case must not be perceived as a mere procedural matter that can easily be dispensed with. It is a step that goes to the very core of the constitutional right to due process, to which AXN and FOX have an entitlement.

Thus, to comply with the constitutional mandate of affording both parties the opportunity to properly present their positions on the issue of compliance with the nationality requirements, especially for AXN and FOX to defend their threatened corporate life, a hearing must have been availed of at the level of the SEC, a body no less equipped with the needed expertise to rule on the issue .

As a matter of policy, the courts will not resolve a controversy involving a question that is within the jurisdiction of an administrative tribunal prior to the latter's resolution of that question, which demands the exercise of sound administrative discretion. It is a discretion requiring the pertinent tribunal's specialized knowledge, experience and services of the administrative tribunal to determine technical and intricate matters of fact as well as to maintain a uniformity of ruling, which is essential to a compliance with the premises of the regulatory statute it administers.<sup>34</sup>

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<sup>31</sup> Sec. 6(i). In order to effectively exercise such jurisdiction, the Commission shall possess the following powers:

xxx      xxx      xxx

(i) To suspend, or revoke, after proper notice and hearing, the franchise or certificate of registration of corporations, partnerships or associations, upon any of the grounds provided by law, including the following:

- [1] Fraud in procuring its certificate of registration;
- [2] Serious misrepresentation as to what the corporation can do or is doing to the great prejudice of or damage to the general public;
- [3] Refusal to comply or defiance of any lawful order of the Commission restraining commission of acts which would amount to a grave violation of its franchise;
- [4] Continuous inoperation for a period of at least five (5) years;
- [5] Failure to file by-laws within the required period;
- [6] Failure to file required reports in appropriate forms as determined by the Commission within the prescribed period;

<sup>32</sup> *Id.*

<sup>33</sup> *Adriano v. Sps. Lasala*, G.R. No. 197842, October 8, 2013, 707 SCRA 346, 355.

<sup>34</sup> *Smart Communications, Inc. v. Globe Telecom, Inc.*, 456 Phil. 145, 158 (2003), citing *Fabia v. Court of Appeals*, 437 Phil. 389 (2002).

It must be stressed further that the requirement of exhausting administrative remedies is a sound practice and policy. The doctrine insures an orderly procedure that favors a preliminary sifting process and withholds judicial interference until the administrative process would have been duly allowed to run its course. The underlying principle of the rule rests on the presumption that the administrative agency, if afforded a complete chance to pass upon the matter, will decide correctly.<sup>35</sup>

To repeat, the petitioners fundamentally seek the revocation of the franchises of AXN and FOX – a matter that is within the competence of the SEC. To this Court, recourse to the SEC is a plain, speedy, adequate and equitable remedy.

And should the SEC act upon the petitioners' resort to it, then any decision arising therefrom may be the proper subject of the remedies available under the law and the Rules of Court. A SEC decision would finally give birth to a justiciable controversy that is ripe for judicial determination, one that does not exist yet in this case.

At this point, worth mentioning is the requirement that for the Court to exercise its power of judicial review, it must adjudicate a definite and concrete dispute touching on the legal relations of parties having adverse legal interests, which may be resolved by a court of law through the application of a law.<sup>36</sup> Courts do not sit to adjudicate mere academic questions to satisfy scholarly interest, however intellectually challenging. As a condition precedent to the exercise of judicial power, an actual controversy between litigants must first exist.<sup>37</sup>

At any rate, well-established in this jurisdiction is the rule that corporate existence cannot be collaterally attacked. Section 20 of the Code states that the due incorporation of any corporation claiming in good faith to be a corporation under this Code, and its right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which the corporation may be a party. Such inquiry may be made by the Solicitor General in a *quo warranto* proceeding. In filing these petitions, the petitioners are in effect making a collateral attack on the corporate existence

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<sup>35</sup> *Dimson (Manila) Inc., v. Local Water Utilities Administration*, G.R. No. 168656, September 22, 2010, 631 SCRA 59, citing *Carale v. Abarintos*, 336 Phil. 126 (1997).

<sup>36</sup> *Remman Enterprises Inc., v. Professional Regulatory Board of Real Estate Service and Professional Regulation Commission*, G.R. No. 197676, February 4, 2014, citing *Information Technology Foundation of the Phils. v. COMELEC*, 499 Phil. 281, 304-305 (2005); *Cutaran v. DENR*, 403 Phil. 654, 662 (2001).

<sup>37</sup> *Guingona v. CA*, 354 Phil. 415, 426 (1998), citing *Angara v. Electoral Commission*, 63 Phil. 139, 158, (1936).

of AXN and FOX in the guise of an action questioning the SEC's issuance of the pertinent certificates of registration.<sup>38</sup>

In the end, the Court would not want to preempt the prerogative to withdraw or uphold the State's imprimatur on a corporate existence by giving due course to these petitions. This prerogative rests not on the Court, but on the SEC pursuant to a congressional delegation under the Corporation Code; it can also be exercised via a *quo warranto* proceeding instituted by the Solicitor General.

There being an impropriety in the remedy resorted to by the petitioners and in the absence of the indispensable minimums for judicial review, the Court cannot give due course to these petitions.

**WHEREFORE**, the petitions are **DISMISSED**, without prejudice." Carpio, J., no part. Brion, J., on leave. Villarama, Jr. and Perlas-Bernabe, JJ., on official leave. Jardeleza, J., on leave. (adv44)

Very truly yours,

  
ENRIQUETA E. VIDAL  
Clerk of Court

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<sup>38</sup> The Corporation Code, Sec. 20.

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