Republic of the Philippines
Department of Finance
Securities and Exchange Commission
SEC Bldg. EDSA, Greenhills, Mandaluyong City

OFFICE OF THE GENERAL COUNSEL

OGC Opinion No. 08-03
January 15, 2008

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Gentlemen:

This pertains to your letter dated 21 August 2007 requesting confirmation that the investment by a Philippine holding company ("Holdco") in a Philippine landholding company ("Landco") is classified as Philippine-owned for purposes of Landco's compliance with the nationality requirements.

In your letter, you disclosed that the capital stock of Holdco will consist of common shares and preferred shares. The common shares will have a par value of One Peso (Php 1.00) per common share while the 16% cumulative preferred shares will have a par value of Thirteen and 50/100 Pesos (Php 13.50) per preferred share. You disclosed further that the preferred shares comprising forty percent (40%) of the total number of shares of Holdco will be owned by a foreign investor while two Philippine corporations - "Philippine Investor 1" and "Philippine Investor 2" - will own the common shares, representing forty percent (40%) and twenty percent (20%), respectively, of the total number of issued shares of Holdco.

You further stated that both the common and preferred shares shall have voting rights equal to one (1) vote per share. At least sixty percent (60%) of the members of the Board of Directors of Holdco will be citizens and residents of the Philippines, representing the interests of Philippine investors 1 & 2.

In determining the nationality of a corporation with foreign equity, the Commission, on the basis of the opinion of the Department of Justice Opinion No. 18, s. 1989, dated January 19, 1989, resolved to do away with the strict application/computation of the so called "grandfather rule" (Re: Far Southeast Gold Resources, Inc. FSEGRI), and instead applied the

so called "control test" method of determining corporate nationality for purposes of investment in another corporation. Under this test, the nationality of the corporation depends on the nationality of the controlling stockholders. The method as applied in the said case states as follows:

> "Shares belonging to corporations or partnerships at least 60% of the capital of which is owned by Filipino citizens shall be considered as of Philippine nationality, but if the percentage of Filipino ownership in the corporation or partnership is less than 60%, only the number of shares corresponding to such percentage shall be counted as of Philippine nationality. Thus, if 100,000 shares are registered in the name of a corporation or partnership at least 60% of the capital stock or capital, respectively, of which belong to Filipino citizens, all of said shares shall be recorded as owned by Filipinos. But if less than 60%, or say only 50% of the capital stock or capital of the corporation or partnership, respectively, belongs to Filipino citizens, only 50,000 shares shall be counted as owned by Filipinos and the other 50,000 shares shall be recorded as belonging to aliens."

This ruling is now expressly embodied under R.A. 7042, otherwise known as the Foreign Investment Act (FIA) as amended by R.A. 8179, which reads thus:

> "Section 3 (a) the term 'Philippine National shall mean a citizen of the Philippines; or a domestic partnership or association wholly owned by citizens of the Philippines; or ***a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines***; or a corporation organized abroad and registered as doing business in the Philippines under the Corporation Code of which one hundred percent (100%) of the capital stock outstanding and entitled to vote is wholly owned by Filipinos or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty percent (60%) of the fund will accrue to the benefit of Philippine nationals: Provided, That where a corporation and its non-Filipino stockholders own stocks in a Securities and Exchange Commission (SEC) registered enterprise, ***at least sixty-percent (60%) of the capital stock outstanding and entitled to vote of each of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of both corporations must be citizens of the Philippines***, in order that the corporation shall be considered a Philippine national."(Emphasis supplied)

Moreover, Section 1 (b) of the Amendments to the Implementing Rules and Regulations of R.A. 7042, as amended provides:

> "(b) Philippine National shall mean a citizen of the Philippines or a domestic partnership or association wholly owned by citizens of the Philippines; or a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; or a corporation organized abroad and

registered as doing business in the Philippines under the Corporation Code of which 100% of the capital stock outstanding and entitled to vote is wholly owned by Filipinos; or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty percent (60%) of the fund will accrue to the benefits of Philippine nationals; Provided, that where a corporation and its non-Filipino stockholders own stocks in a Securities and Exchange Commission (SEC) registered enterprise, at least sixty percent (60%) of the capital stock outstanding and entitled to vote of each of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of each of both corporations must be citizens of the Philippines, in order that the corporation shall be considered a Philippine national. **The control test shall be applied for this purpose."** (Underlining supplied)

Hence, we confirm your view that the test for compliance with the nationality requirement is based on the total outstanding capital stock irrespective of the amount of the par value of shares.[1] Under the control test rule mandated by Amendments to the IRR of FIA, dissection or further inquiry on the ownership of the shareholders both in the investing and investee corporation shall be dispensed with once it is clearly established that the participating corporations are 60% owned by Filipino citizens. In the absence of any doubt that the bidding corporation is 60% Filipino owned, the entity shall be deemed as "Philippine national" and may thus be allowed to bid or invest in legally permissible areas of investment.[2]

Accordingly, if the aforequoted statutory provisions are complied with, the investment referred to in your letter may be considered that of a Philippine National, and therefore the investment by Holdco, may be deemed to have qualified to own lands in the Philippines or acquire the entire stocks of a Philippine corporation which own lands in the Philippines.

Finally, please be reminded that the foregoing opinion is based solely on the facts and circumstances disclosed in your request and relevant only to the particular issue raised therein and shall not be used in the nature of a standing rule binding upon the Commission in other cases whether of similar or dissimilar circumstances. If upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.

For your information and guidance.

VERNETTE G. UMALI-PACO
General Counsel

1 SEC Opinion dated December 22, 2004 addressed to Romulo Mabanta Buenavetura Sayoc & De Los Angeles
2 SEC Opinion dated September 27, 2007 addressed to Mr. Reynaldo G. David

(7)