Republic of the Philippines
SECURITIES AND EXCHANGE COMMISSION
SEC Building, EDSA, Greenhills, City of Mandaluyong

28 April 2009

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SEC Opinion No.09-09
Control Test: Alien
Acquisition of Land.

Gentlemen:

This refers to your letter dated 14 January 2009 requesting confirmation on the following:

> "(a) Sagittarius Mines, Inc. ("SMI" for brevity) is a Filipino national; and
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> (b) if SMI were to lose its Philippine nationality, the effect thereof to the landholdings of its proposed fully-owned subsidiary ("Landco").

Sagittarius Mines, Inc., a domestic corporation registered under Philippine laws with SEC Registration No. DS-03030 is engaged in the business of mining operations.[1] It is a Philippine national (under the control test) considering that its equity structure consists of 71.42% Filipino and 28.58% foreign.[2]

[1] To carry on the business of operating gold and copper and other mineral mines; and of prospecting, exploration and of mining, milling, concentrating, converting, smelting, treating, refining, distributing, preparing for market, manufacturing, buying, selling, exchanging, acquiring, conveying, storing, marketing, and otherwise producing and dealing in all other kinds of ores, metals, and minerals, hydrocarbons, acids, and chemicals, and in the products and by-products of every kind and description and by whatsoever process, the same can be or may hereafter be produced; to enter into and/or take assignment of financial and technical assistance agreements for the large scale exploration, development and utilization of mineral resources or otherwise engage in mining activities or enter into agreements as may be allowed by law, to render exploration and other related services as well as all aspects of technical and management services to individuals, partnerships, associations, and corporations and engaged in exploration or mining; individuals, partnerships, associations, and corporations engaged in exploration or mining; to give financial assistance to

R.A. 7042, otherwise known as the Foreign Investment Act ("FIA"), as amended by R.A. 8179, and its Amended Implementing Rules and Regulations, spell out the rules on the determination of corporate nationality in this wise:

Section 3 of R.A. 7042, as amended, reads thus:

> '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 each of both

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local mineral exploration enterprises or corporations; to extend financial assistance to local mineral exploration enterprises and mineral tenement owners through service contracts and to provide technical and managerial services in the execution of such exploration activities as prospecting, geo-technical surveying, drilling, boring, tunneling, bulk sampling, metallurgical testing and other studies in evaluating the development potential of metal and mineral deposits of all kinds to acquire an interest in such enterprises or corporations to the extent allowable by law; to enter into contracts with local mineral tenement owners, mineral exploration enterprises and mining enterprises in connection with the above activities; in connection with the foregoing to enter into agreements with the President of the Philippines or other agencies of the Philippine government to provide technical and/or financial assistance to the large scale exploration, development and utilization of minerals, petroleum and other mineral oils; to perform any and all such activities authorized by and all such agreements and any ancillary processing or exploration permits granted to it, to purchase, use, lease, option, locate, or otherwise, acquire, own, exchange, sell, assign or otherwise dispose of pledge, mortgage, exchange, deed, in trust, hypothecate, and deal in imines, mining claims, mineral lands, coal lands, timber lands, water and water rights, and other property, both real and personal; (, Sagittarius Mines, Inc. Amended Articles of Incorporation, June 27, 2003).

[2] Company Registration and Monitoring Department (CRMD) Memorandum dtd. February 6, 2009.

corporations must be citizens of the Philippines, in order that the corporation shall be considered a Philippine national."

In the same vein, **Section 1(b) of the Amendments to the Implementing Rules and Regulations of R.A. 7042 (Foreign Investments Act of 1991) as amended by R.A. 8179** 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 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)"

The foregoing adopts the well-entrenched ruling in the **Far Southeast Gold Resources** case[3] which laid down the "control test" rule stating:

> "It further appears that on February 28, 1967, the SEC promulgated rules and regulations on the implementation of

[3] DOJ Opinion No. 18 s.1989, dated January 19, 1989.

the constitutional and statutory requirements that the controlling interests of enterprises engaged in the exploitation of the natural resources should be held by citizens of the Philippines or by corporations or by associations at least 60% of the capital of which is owned by such citizens, and which provide for the following rule in the determination of citizenship of corporations with alien equity, to wit:

> '**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 the corporation or partnership at least 60% of the capital stock or capital respectively, of which belong to Filipino citizens, all of the 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.'

Said rule was substantially reiterated on September 7, 1972 and approved by the Secretary of Commerce and Industry on September 12, 1972; and this rule has been followed up to the time as basis for determining the nationality of corporate stockholders.

With due respect, it is believed that the said query should be resolved by that Office by applying its aforecited rule.

Opinion No. 84, s. 1988 cited in your query is not meant to overrule the aforesaid SEC rule. There is nothing in said Opinion that precludes the application of the said SEC rule in appropriate cases. It is quite clear from said SEC rule that **the 'Grandfather Rule'**, which evolved and applied by the SEC in several cases, **will not apply in cases where the 60-40 Filipino**

> **alien equity ownership** in a particular natural resource corporation **is not in doubt."**

On the basis of the foregoing citations, it can be safely said that SMI is of Philippine nationality qualified to own land in the Philippines or acquire the entire capital of a Philippine corporation which owns land in the Philippines.

Your **second query** shall now be answered. In the event, however, that SMI becomes a foreign national, the nationality of its proposed **wholly owned subsidiary**,i.e. "Landco", intending to engage in business of owning, acquiring or otherwise holding lands or any interest therein, shall also be affected. The latter loses its Philippine nationality and its right to own or acquire land in this jurisdiction. It should be emphasized that only Filipinos or Philippine nationals have the right to own and acquire land (a scarce economic resource) in the Philippines to the exclusion of aliens.[4]

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[4] A reading of Sections 1 and 4 of Article XIII, as originally drafted by its framers, leaves no doubt that the policy of the Constitution was to reserve to Filipinos the disposition, exploitation development or utilization of agricultural lands, public (section 1) or private (section 5), as well as all other natural resources of the Philippines. The "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 this Court has already so ruled in *Commissioner of Internal Revenue vs. Guerrero, et al.*, L-20942, 22 September 1967, 21 SCRA 181, per Justice Enrique M. Fernando:

> While good faith, no less than adherence to the categorical wording of the Ordinance, requires that all the rights and privileges thus granted to Americans and business enterprises owned and controlled by them be respected, anything further would not be warranted. Nothing less would suffice but anything more is not justified.

The basis for the strict interpretation was given by former President of the University of the Philippines, Hon. Vicente G. Sinco (Congressional Record, House of Representatives, Volume 1, No. 26, page 561):

> It should be emphatically stated that the provisions of our Constitution which limit to Filipinos the rights to develop the natural resources and to operate the public utilities of the Philippines is one of the bulwarks of our national integrity. The Filipino people decided to include it in our Constitution in order that it may have the stability and permanency that its importance requires. It is written in our Constitution so that it may neither be the subject of barter nor be impaired in the give and take of politics. With our natural resources, our sources of power and energy, our public lands, and our public utilities, the material basis of the nation's existence, in the hands of aliens over whom the Philippine Government does not have complete control, the Filipinos may soon find themselves deprived of their patrimony and living as it were, in a house that no longer belongs to them. *(Republic et al vs. William H. Quasha, G.R. No. L-30299 August 17, 1972).*

The disqualification of the former Philippine national does not entail the outright deprivation of its right or interest over the real property. It may dispose, transfer or convey the same to qualified citizens within one (1) year from date of disqualification due to change in the equity structure or loss of Philippine citizenship. As held in *Elizabeth Lee vs. Republic of the Philippines* et al . G.R. No. 128195, October 3, 2001

> *"In this case, subsequent circumstances militate against escheat proceedings because the land is now in the hands of Filipinos. The original vendee, Lee Liong, has since died and the land has been inherited by his heirs and subsequently their heirs, petitioners herein. Petitioners are Filipino citizens, a fact the Solicitor General does not dispute.*
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> *The constitutional proscription on alien ownership of lands of the public or private domain was intended to protect lands from falling in the hands of non-Filipinos. In this case, however, there would be no more public policy violated since the land is in the hands of Filipinos qualified to acquire and own such land. "If land is invalidly transferred to an alien who subsequently becomes a citizen or **transfers it to a citizen**, the flaw in the original transaction is considered cured and the title of the transferee is rendered valid.[35] Thus, the subsequent transfer of the property to qualified Filipinos may no longer be impugned on the basis of the invalidity of the initial transfer.[34] The objective of the constitutional provision to keep our lands in Filipino hands has been achieved"*

It shall be understood, however, that the foregoing opinion is rendered based solely on the facts disclosed in the query and relevant solely to the particular issues raised therein and shall not be used in the nature of standing rule binding upon the Commission in other cases whether of similar or dissimilar circumstances

Very truly yours,

VERNETTE G. UMALI-PACO
General Counsel