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

OFFICE OF THE GENERAL COUNSEL

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SEC Opinion No. 09-20
Corporate Powers:
Ultra Vires Acts

Sir:

We reply to your letter dated 5 June 2009 requesting confirmation that, although the primary purpose of Shell Gas (LPG) Philippines, Inc. (SGLPI) does not specifically use the word "import" or "importation", the term "trading" necessarily includes the activity of "importation".

The articles of incorporation of SGLPI states its primary purpose as:

> "To carry on the business of trading liquefied petroleum gas, gaseous hydrocarbons, petroleum/petrochemical products of any kind and, accordingly to operate and maintain storage terminal, machinery, equipment, dock, harbor and transport facilities and all things used in the business."

The word "trade" is ordinarily used in three senses: (1) in that of exchanging goods or commodities by barter or by buying or selling for money; (2) in that of a business occupation generally; (3) in that of a mechanical employment, in contradistinction to the learned professions, agriculture or the liberal arts.[1]

Importation, on the other hand, is defined as "the act of bringing goods and merchandise into a country from a foreign country."[2]

The word "trading" has long been associated with "exportation" and "importation", particularly in the realm of international trade in the history of human commerce.[3] The trade of goods and services occurs not only within a state but also

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[1] Black's Law Dictionary, 6th Edition, p. 1492.
[2] Black's Law Dictionary, 6th Edition, p. 765.
[3] The Online Etymology Dictionary traces the word "trade" with the following entry:
"c.1375, "path, track, course of action," introduced by the Hanse merchants, from M.Du. or M.L.G. *trade* "track, course" (probably originally of a trading ship), cognate with O.E. *tredan* (see ***tread***). Sense of "one's habitual business" (1546) developed from the notion of "way, course, manner of life" (1456); sense of "buying and selling" is first recorded 1555. *Trade wind* (1650) has nothing to do with commerce, but preserves the obsolete sense of "in a habitual or

between states; hence, importation and exportation are necessary activities in engaging in international trade. The close intertwining of trade and importation can be shown by the economic concept of balance of trade, which is defined as "*the difference in value over a period of time between a country's imports and exports of goods and services, usually expressed in the unit of currency of a particular country or economic union.*"[4]

The consequent issue, therefore, is whether an importation of the products listed in the primary purpose of SGLPI's articles of incorporation would be an *ultra vires* act that is beyond the corporate powers conferred to it by the State.

We hold the opinion that it is not.

A corporation has both express and implied or incidental powers. Express powers are those which are enumerated in Section 36 of the Corporation Code and those which are sanctioned by the State in the corporation's articles of incorporation. Implied or incidental powers, on the other hand, are the corporation's "*powers, attributes and properties... incident to its existence*",[5] which may be "*essential or necessary to carry out its purpose or purposes as stated in its articles of incorporation.*"[6] Acts beyond these powers are *ultra vires* acts and the statutory provision prohibiting them is Section 45 of the Corporation Code. The species of *ultra vires* acts that concerns this opinion are acts and contracts done beyond the powers of the corporation as provided for in the law or its articles of incorporation.[7]

In the case of *Montelibano v. Bacolod-Murcia Milling Co., Inc.*,[8] the Supreme Court laid down the test in determining *ultra vires* acts:

> "It is a question, therefore, in each case, of the logical relation of the act as to the corporate purpose expressed in the charter. If that act is one which is lawful in itself, and not otherwise prohibited, is done for the purpose of serving corporate ends, and is reasonably tributary to the promotion of those ends, in a substantial, and not in a remote and fanciful sense, it may fairly be considered within charter powers. The test to be applied is whether the act in question is in direct and immediate furtherance of the corporation's business, fairly incident to the express powers and reasonably necessary to their exercise. If so, the corporation has the power to do it; otherwise, not." [Underscoring supplied.]

The primary purpose of SGLPI authorizes it to trade in liquefied petroleum gas, gaseous hydrocarbons and other petroleum or petrochemical products of any kind and to operate and maintain storage terminal, machinery, equipment, dock,

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regular course." *Trademark* first attested 1838; in figurative sense, 1873. *Trade union* is attested from 1831.": http://www.etymonline.com/index.php?l=t&p=17, accessed on 30 July 2009.

[4] Encyclopedia Britannica: http://www.britannica.com/EBchecked/topic/601625/balance-of-trade, accessed on 30 July 2009.

[5] Section 2 of the Corporation Code.

[6] Section 36 (11) of the Corporation Code. Section 45 also states a similar rule.

[7] The other two are: 1) acts or contracts entered into in behalf of the corporations by persons who have no corporate authority; and 2) acts or contracts which are per se illegal as being contrary to law.

[8] G.R. No. L-15092, 18 May 1962.

harbor and transport facilities. With the inclusion of the words "dock", "harbor" and "transport facilities", it would not be unreasonable to infer that SGLPI intended to bring into their storage terminals and ship out its raw materials and finished products.

Applying the test in *Montelibano*, we ask: Is the act of importing liquefied petroleum gas, gaseous hydrocarbons and petroleum/petrochemical products of any kind by SGLPI in direct and immediate furtherance of the corporation's business? We believe so, considering that the said products can be used or sold by SGLPI as a natural consequence of its business. Is it fairly incident to its express powers and reasonably necessary to their exercise? Noting again that SGLPI's primary clause authorizes the operation and maintenance of dock, harbor and transport facilities, we can reasonably surmise that such facilities were intended not only for domestic transport, but also for international transport because the Philippines is an oil-importing country which relies on the importation of oil and other petroleum products in meeting its energy needs. The Department of Energy's Oil Supply/Demand Report for Fiscal Year 2008[9] contains the following statement:

> With regard to LPG supply, there appeared some sort of shortage particularly in the Luzon areas because of the long queues of tank trucks at the LPG import terminals/bulk plants by the last week of December. There were reports of queues of trucks with empty LPG cylinders at the refilling plants, as well as lack of LPG in cylinders at the dealer and retail levels, and in taxi garage/terminals and even auto-LPG stations. [Underscoring supplied.]

Furthermore, a letter dated 18 March 1997 to Mr. Amjad Javed from the former Corporate and Legal Department (now Company Registration and Monitoring Department) of this Commission, the word "trading" was already understood in its generic sense so as to "include the import and export business and considered as incidental and necessary in the attainment of the primary purpose of trading."

Hence, we confirm your position that even if the word "importation" is not included in the primary clause of SGLPI's articles of incorporation, it is still subsumed in the word "trading" in the context of the oil and gas industry.

We must, however, qualify this opinion as being issued only for purposes of clarifying the powers of SGLPI granted by the State, and that the importation of oil and other petroleum products by SGLPI are not *ultra vires* acts. Moreover, our interpretation should not preclude the interpretation by other government agencies or the courts from applying different treatments for "trading" and "importation" within their respective jurisdictions.

It shall also be understood 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 a standing rule binding upon the Commission in other cases of similar or dissimilar circumstances. If upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

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[9] http://www.doe.gov.ph/DO/Report2008.htm, accessed on 4 August 2009.

Please be guided accordingly.

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