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

25 April 2014

SEC-OGC Opinion No. 14-05
Re: Foreign Directors and Officers
in a land-owning corporation

**ATTY. RESTER JOHN L. NONATO**
Nonato Nonato & Nonato Law Offices
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Mandaue City, Cebu

Dear Atty. Nonato:

This pertains to your letter requesting for confirmation on whether Magic Island Dive Resort Inc. (MIDRI), a 100% foreign-owned corporation, is entitled to have foreign officers and two (2) foreign individuals to become directors in said corporation.

To answer your query, it is necessary to look into the primary purpose of MIDRI to determine the kind of activity it is allowed to engage into and whether it is subject to foreign ownership restrictions under Philippine laws. If its activity is subject to foreign ownership restrictions, MIDRI's Board of Directors and corporate officers are subject to specific citizenship requirements.

As stated in your letter-query and in the corporation's Articles of Incorporation, which was attached to the letter-query, MIDRI's primary purpose is "to acquire by lease, lands and interest in land, or to acquire by purchase buildings or improvements in lands, and **to own,** hold, improve, develop and manage **any real estate so acquired by lease** and to erect or cause to be erected on any lands leased by the corporation, buildings and other structures with their appurtenances, and to rebuild, enlarge, alter or improve any buildings or other structures now or hereafter erected on any lands so leased, and to mortgage, sell, lease or otherwise dispose of any interest in buildings or other structures, and any stores, shops, suites, rooms or part of any buildings or other structures at anytime owned or held by the corporation."

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Clearly, its Articles of Incorporation allows MIDRI to own any real estate including lands and any interests therein. Thus, MIDRI is considered to be engaged in a partly-nationalized activity, i.e. ownership of any land.

Note that the legal capacity of a corporation to acquire land in the Philippines is regulated by the Constitution and the Public Land Act. Section 7, Article XII of the Philippine Constitution provides:

> "Save in cases of hereditary succession, no private lands shall be transferred except to individuals, corporations or associations qualified to acquire or hold lands in public domain."

Corollary thereto, Sections 22 and 23 of the Public Land Act, quoted in part hereunder, expressly provide as to who are qualified to acquire land in the Philippines:

> "SECTION 22. Any citizen of lawful age of the Philippines and any such citizen not of lawful age who is a head of a family, and any corporation or association of which at least sixty percentum of the capital stock belongs wholly to citizens of the Philippines, and which is organized and constituted under the laws of the Philippines, authorized under their charter, to do so, may purchase any tract of public agricultural land disposable under this Act . . . ."

> "SECTION 23. No person, corporation, association, or partnership other than those mentioned in the last preceding section, may acquire or own agricultural public land or land of any other denomination or classification, which is at the time or was originally really or presumptively of the public domain, or any permanent improvement thereon, or any real right on such land and improvement, . . . ."

Accordingly, MIDRI must observe and comply with the 40% foreign ownership threshold in order to be qualified to acquire private lands or disposable lands of public domain in the Philippines. It should take note of SEC Memorandum Circular No. 8, series of 2013 for this purpose.

This being the case, it follows that Section 2-A of Commonwealth Act No. 108,[1] otherwise known as "An Act to Punish Acts of Evasion of the Laws on the

[1] "Section 2-A. *Unlawful Use, Exploitation or Enjoyment* — Any person, corporation, or association which, having in its name or under its control, a right, franchise, privilege, property or business, the exercise or enjoyment of which is expressly reserved by the Constitution or the laws to citizens of the Philippines or of any other specific country, or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens, permits or allows the use, exploitation or enjoyment thereof by a person, corporation or association not possessing the requisites prescribed by a the Constitution or the laws of the Philippines; or leases, or in any other way, transfers or conveys said right, franchise, privilege,

Nationalization of Certain Rights, Franchises or Privileges" (The Anti Dummy Law), applies to MIDRI.

In previous opinions,[2] the Commission held that foreigners can be elected as directors in proportion to their participation or share in the capital of corporations engaged in activities that are reserved to Filipinos, but are prohibited from being elected as officers of a corporation, such as the President, Vice-President, Treasurer and Secretary, *viz* –

> "On the citizenship requirement of corporate officers. Sec. 2-A of Commonwealth Act No. 108, as amended, bans foreigners from being elected or appointed to management positions as president, vice-president, treasurer, secretary, etc. **in business activities where there is a constitutional or statutory provision imposing a specific nationality requirement as a requisite for the exercise or enjoyment of a right, franchise or privilege.**
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> However, while in nationalized business activities foreigners are prohibited from being elected or appointed as corporate officers, they can be elected as directors in proportion to their participation or share in the capital of such business entities pursuant to PD 715 which amends CA 108. Thus, the Department of Justice had opined that "in determining the representation of

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property or business to a person, corporation or association not otherwise qualified under the Constitution, or the provisions of the existing laws; or in any manner permits or allows any person, not possessing the qualifications required by the Constitution, or existing laws to acquire, use, exploit or enjoy a right, franchise, privilege, property or business, the exercise and enjoyment of which are expressly reserved by the Constitution or existing laws to citizens of the Philippines or of any other specific country, to intervene in the management, operation, administration or control thereof, whether as an officer, employee or laborer therein with or without remuneration except technical personnel whose employment may be specifically authorized by the Secretary of Justice, and any person who knowingly aids, assists or abets in the planning consummation or perpetration of any of the acts herein above enumerated shall be punished by imprisonment for not less than five nor more than fifteen years and by a fine of not less than the value of the right, franchise or privilege enjoyed or acquired in violation of the provisions hereof but in no case less than five thousand pesos: Provided, however, That the president, managers or persons in charge of corporations, associations or partnerships violating the provisions of this section shall be criminally liable in lieu thereof: Provided, further, That any person, corporation or association shall, in addition to the penalty imposed herein, forfeit such right, franchise, privilege, and the property or business enjoyed or acquired in violation of the provisions of this Act: And provided, finally, That the election of aliens as members of the board of directors or governing body of corporations or associations engaging in partially nationalized activities shall be allowed in proportion to their allowable participation or share in the capital of such entities."

[2] SEC-OGC Opinion No. 12-01, citing SEC Opinion dated 08 December 1995, addressed to Mr. K.J. Mctavish.

> alien stockholders in the board of directors of corporations engaged in partially nationalized activities, the basis should be the actual share of the alien stockholders in the capital of the corporation which share, however, should not exceed the foreign equity ceiling prescribed by law for a particular corporation or association. (DOJ Opinion No. 161, S. 1994)" (Emphasis supplied.)

This is consistent with the previous rulings of the Department of Justice[3], stating that in firms engaged in wholly or partially nationalized activities, aliens are banned from being appointed as officers of the corporation, such as the president, vice-president, treasurer, auditor, etc. of said companies, although they can be elected directors in proportion to their allowable participation or share in the capital of such activities in accordance with the Anti-Dummy Law.

In this connection, please take note that only those who are given such character either by the Corporation Code, or the charter or its by-laws are considered as officers of a corporation, and if a corporation is covered by the Anti-Dummy Law, any corporate function which is specifically and/or specially spelled out and intended under its by-laws to be belonging to such officers of the corporation cannot be delegated to a foreigner because the same would be tantamount to a circumvention of the said law, viz –

> The only officers of a corporation are those who are given that character either by the Corporation Code, specifically by Sections 24 and 25 thereof, or the charter or by-laws; the rest can be considered merely as employees or subordinate officials. The president, vice president, treasurer and secretary are commonly regarded as the principal or executive officers of the corporation. Additional offices may, however, be created as long as the same are so enumerated and authorized by the laws; this is the import of the term *"officers'* in the phrase *"and such other officers as may be provided for in the by-laws'* contained in paragraph one (1) of Section 25 of the Corporation Code.
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> That said, please take note that per UNG's By-Laws, the Board may authorize *"other officers',* and not non-officers, to perform the President's duty of countersigning all checks, drafts, notes and orders for the payment of money against the fund of the corporation.
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> At any rate, if a corporation is covered by the Anti-Dummy Law, any corporate function which is specifically and/or specially spelled out and intended under its By-Laws to be belonging to its President cannot be delegated to an alien because the same would be tantamount to a circumvention of the said law.[4]

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[3] DOJ Opinion No. 113, series of 1981; DOJ Opinion No. 37, series of 1976.
[4] SEC-OGC Opinion No. 09-17.

Accordingly, foreigners cannot be elected or appointed as MIDRI's officers holding positions pertaining to management, operation, administration and control of its business.

On the other hand, foreigners can be elected as members of MIDRI's Board of Directors in proportion to their allowable participation. Since MIDRI's Articles of Incorporation indicate that its Board of Directors shall be composed of five (5) members and MIDRI is subject to forty (40%) percent foreign ownership restriction, it follows that only two (2) foreigners may be elected as members of MIDRI's Board of Directors.

The foregoing opinion rendered is 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 whether of similar or dissimilar circumstances.[5] If, upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.

**CAMILO S. CORREA**
General Counsel

[5] SEC Memorandum Circular No. 15, series of 2003.

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