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

OFFICE OF THE GENERAL COUNSEL

10 November 2014

SEC-OGC Opinion No. 14-32
Foreign Ownership restrictions

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Sir:

This refers to your letters dated November 13 and December 10, 2012 concerning your client, **STI Education Systems Holdings Incorporated ("STI-ESH")**, regarding the applicability of foreign ownership restrictions by reason of its controlling ownership of STI Education Services Group Inc. ("STI-ESG"), an educational institution, and its primary purpose of owning land.

You disclosed that STI-ESH (formerly JTH Davies Holdings Inc.) is a domestic corporation, a holding company registered under SEC Registration No. 0000001746. STI-ESH is the substantial owner of shares of STI-ESG, an educational institution offering vocational and tertiary courses through its network of 65 schools throughout the Philippines, registered with the Commission under SEC Registration No. 0000113156.

You further informed that STI-ESH, as of December 2, 2012, owns 98% of the issued and outstanding capital stock of STI-ESG, mainly through share-swapping transactions and agreements with several stockholders of STI-ESG. You likewise attached the following documents: (1) Amended Articles of Incorporation of STI-ESG; (2) The Amended Articles of Incorporation of STI-ESH; and (2) the latest General Information Sheet of STI-ESH, which indicates that that as of the date of its filing, September 27, 2012, STI-ESH is 99.90% Filipino-owned.

The primary purpose of STI-ESH as indicated in its Amended Articles of Incorporation reads as follows:

> "To invest in, **purchase or otherwise acquire or own, hold, use, sell, assign, transfer, lease, mortgage, pledge, exchange, or otherwise dispose of real properties** as well as personal and movable property of any kind and

> description, including shares of stock, bonds, debentures, notes, evidence of indebtedness and other securities or obligations of any corporation or corporations, association or associations, domestic or foreign and to possess and exercise in respect thereof all the rights, powers and privileges of ownership, including all voting powers of any stock so owned, but not to act as dealer in securities and to invest in and manage any company or institution."
>
> (Emphasis and underscoring supplied)

Thus, you would like to confirm (1) whether or not STI-ESH is subject to the forty per cent (40%) foreign ownership restriction with respect to educational institutions, since it owns substantially all of the outstanding capital stock of STI-ESG; and (2) whether or not STI-ESH is likewise subject to foreign ownership restrictions to a maximum of 40% of its issued and outstanding capital stock, for as long as the corporation and its subsidiaries own land.

Article XIV, Section 4 (2), of the 1987 Constitution specifically provides nationality restrictions for educational institutions:

> "Section 4. xxx
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> "(2) Educational institutions, other than those established by religious groups and mission boards, **shall be owned solely by citizens of the Philippines or corporations or associations at least sixty per centum of the capital of which is owned by such citizens.** The Congress may, however, require increased Filipino equity participation in all educational institutions.
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> **"The control and administration of educational institutions shall be vested in citizens of the Philippines.**
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> "No educational institution **shall be established exclusively for aliens** and no group of aliens shall comprise more than one-third of the enrolment in any school. **The provisions of this subsection shall not apply to schools established for foreign diplomatic personnel and their dependents and, unless otherwise provided by law, for other foreign temporary residents.**"
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> (Emphasis and underscoring supplied)

This provision of the Constitution is implemented by Presidential Decree No. 176,[1] Section 1 of which states as follows:

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[1] The Decree is entitled **"IMPLEMENTING SECTION 8 (7), ARTICLE XV, OF THE NEW CONSTITUTION"**, to implement Article XV Sec. 8(7) of the 1973 Constitution. The said law now implements Article XIV, Section 4 (2), of the 1987 Constitution. (SEC Opinions dated November 7, 1991 and November 10, 1992)

> "1. **Ownership.** All educational institutions, other than those which are already established or which may hereafter be established by religious orders, mission boards and charitable organizations, **shall be owned solely by citizens of the Philippines or corporations or associations at least sixty per centum (60%) of the capital of which is owned by such citizens.** xxx"
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> "2. **Control and Administration**. The control and administration of all educational institutions already established or hereafter to be established in the Philippines **shall be vested in citizens of the Philippines**. **Membership in the governing bodies or boards** of such educational institutions **shall be limited to citizens of the Philippines**. Appointments and designations to, and employment in, positions involving the exercise of administrative discretion in the management of such educational institutions **shall likewise be limited to citizens of the Philippines**. xxx"
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> (Emphasis and underscoring supplied)

Pursuant to the foregoing, all educational institutions, other than those established by religious orders and mission boards, and those established for foreign diplomatic personnel and their dependents, and for other foreign temporary residents, is subject to 40% foreign ownership limitation.[2] Likewise, foreigners are not allowed any control and administration of educational institutions, thus are barred from becoming members of the Board of Directors/Trustees of educational institutions. The above prohibition/restriction against foreigners applies to all persons who are not citizens of the Philippines, including natural-born citizens of the Philippines who have lost their Philippine citizenship by acquiring naturalized citizenship.[3]

Indeed, STI-ESG must comply with the foreign ownership requirement, being an educational institution under its Articles of Incorporation.[4] **However, the foreign ownership restriction on educational institutions is inapplicable to STI-ESH.**

As was previously opined by the Commission, a holding company, having a separate corporate existence, is to be treated as a separate entity with peculiar requirements of its own, despite being the controlling shareholder thereof. Thus:

> "A holding company xxx has been aptly defined as "a corporation organized to hold the stock of another or other corporations." Its essential feature is that it holds stock. **The**

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[2] SEC-OGC Opinion No.09-08, March 27, 2009, addressed to Picazo Buyco Tan Fider and Santos.
[3] SEC-OGC Opinion No. 14-20, August 5, 2014, addressed to Nonato Nonato and Nonato Law Offices, citing SEC Opinion dated November 10, 1992, addressed to Mr. Eleno L. dela Cruz.
[4] Said primary purpose of STI-ESG in its Articles of Incorporation reads as follows: ""To **maintain, establish and operate educational institutions** providing pre-elementary, elementary, secondary and tertiary as well as post-graduate courses, post-secondary, lower tertiary non-degree programs and other technical-vocational programs and in connection therewith develop, adopt and/or acquire, entirely or in part, such curricula or academic services as may be necessary in the pursuance thereof, relating but not limited to information technology services, nursing, education, care giving, etc." (Emphasis and underscoring supplied)

> **term "holding company" is equivalent to a parent corporation, having such an interest in another corporation, or power of control, that it may elect its directors and influence its management.** A parent or holding company is one that controls another as a subsidiary or affiliate by the power to elect its management. Affiliates are those concerns that are subject to common control and operated as part of a system.
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> xxx xxx
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> "As a general rule, a "holding company" or "parent company" **has a separate corporate existence, and is to be treated as a separate entity**, unless such corporate existence is a mere sham, or has been used as an instrument for concealing the truth, or where the organization or control is shown to be such as that it is but an instrumentality or adjunct of another corporation. So a holding company is generally held not to be doing or transacting business through its subsidiary where the corporate separate entities are maintained. Thus, **if properly used to perform legitimate functions, the subsidiary and affiliate such as ETPI may maintain its separate juridical personality distinct from** its controlling corporation or stockholder, ISM. Therefore, **the fact that EPTI is the grantee of the legislative franchise to operate a public utility (the operation of telecommunications),** that is **subject to the foreign ownership restriction** under Article XII, Section 11 of the Constitution, **it does NOT follow that ISM, the holding company is also subject to the same**. xxx"[5]
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> (Emphasis and underscoring supplied)

As to ownership of land, the legal capacity of a corporation to acquire land in the Philippines is regulated by the Constitution and the Public Land Act.[6] Section 7, Article XII of the 1987 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."

This is in relation to Sections 22 and 23 of the Public Land Act, 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 per centum of the capital stock belongs wholly to citizens of the Philippines**, and which is organized and

[5] SEC-OGC Opinion No. 11-15, February 10, 2011, addressed to Mr. Rodolfo Ma. A. Ponferrada. Citations omitted.

[6] SEC-OGC Opinion No. 12-03, February 6, 2012, addressed to Atty. Joan A. Giduquio-Baron.

> 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 . . . ."
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> "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 ...."
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> (Emphasis and underscoring supplied)

Verily, considering that STI-ESH's Amended Articles of Incorporation provides a primary purpose that includes ownership of lands, it must comply with the 40% foreign equity threshold.

Additionally, Section 8 of the Foreign Investments Act ("FIA")[7] and Item 6, List B of the Ninth Regular Foreign Investment List ("FINL"),[8] provide that a domestic market enterprise with paid-in equity capital of less than the equivalent of US$200,000.00 is partially reserved to Philippine nationals, *i.e.* foreign equity participation is limited only up to forty percent (40%) for foreigners. As previously opined by the Commission, a holding company is deemed a domestic market enterprise subject to the minimum capitalization as required under the FIA.[9] Hence, STI-ESH, being a holding company, will be subject to the aforesaid provisions of the FIA and the FINL if its paid-in equity capital is less than the equivalent of US$200,000.00.

It shall 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 courts, or upon the Commission in other cases of similar or dissimilar circumstances.[10] If upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.

CAMILO S. CORREA
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[7] Republic Act No. 7042, as amended by Republic Act No. 8179.
[8] Executive Order No. 98, series of 2012, dated October 29, 2012.
[9] SEC-OGC Opinion No. 09-30, November 23, 2009, addressed to Gonzales Batiller David Leabres and Reyes.
[10] SEC Memorandum Circular 2003-15.