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

Office of the General Counsel

31 January 2012

SEC-OGC Opinion No. 12-01
Foreign president in a real estate development corporation

ATTY. SHERYL C. SANTOS-CENTENO
Sheryl C. Santos-Centeno Law Office
3rd Floor, Salud Building,
General Hizon Avenue,
Sto. Rosario, San Fernando,
Pampanga

Dear Atty. Santos-Centeno:

This refers to your letter dated 12 August 2011 requesting legal opinion, with respect to the predicament of Philippine Land Group Inc. (PLGI), a corporation engaged in the business of real estate development wherein sixty percent (60%) of its shares are owned by Filipino citizens and its incumbent President is an Australian citizen.

As disclosed in your letter, our Office advised you that the President of a corporation must be a Filipino citizen. However, PLGI's Board of Directors had difficulty accepting said advice as it will grossly affect PLGI considering that its incumbent President, Mr. Van Merkensteijn, has been unanimously elected to said position. In this regard, you are seeking for legal opinion as to the reason for requiring the President of a corporation to be a Filipino citizen and if there are exemptions to the same.

To answer your query, it is necessary to look into what kind of a corporation PLGI is, as this would determine whether it is a corporation engaged in an activity where foreign ownership is restricted under Philippine laws. In such a case, the Board of Directors and corporate officers of said corporation are subject to specific citizenship requirements.

The Articles of Incorporation of PLGI states that the primary purpose of the corporation is "to acquire by purchase, lease, or otherwise, lands or interest in lands and realty, and to own, hold, improve, develop, manage and operate said land or lands or real estate so acquired, and to erect or cause to be erected on any lands, owned, held, occupied, or acquired by the corporation, buildings and other structures with their appurtenances and to rebuild, enlarge, alter, improve, or remodel any building or other structures now or hereafter erected on any lands or real estates so owned, held or occupied, or otherwise dispose of any lands or real estate or interests in land or real estates and in buildings and other structures at anytime owned or held by the corporation." Clearly, PLGI is engaged in the business of acquiring land, which is a partly nationalized activity subject to specific citizenship requirements, viz:

Article XII, Section 7 of the Constitution provides that:

> "Section 7. Save in cases of hereditary succession, no private lands shall be transferred or conveyed except to individuals, corporations or associations qualified to acquire or hold lands of the public domain."

Chapter IV, Section 22 of Commonwealth Act No. 141, as amended, also provides that:

> "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 or of any interest in said capital stock belongs wholly to citizens of the Philippines, and which is organized and constituted under the laws of Philippines, and corporate bodies organized in the Philippines authorized under their charters to do so; may purchase any tract of public agricultural land disposable under this Act, not to exceed one hundred and forty-four hectares in the case of an individual and one thousand and twenty-four hectares in that of a corporation or association, by proceeding as prescribed in this chapter; Provided, That partnerships shall be entitled to purchase not to exceed one hundred and forty-four hectares for each member thereof. But the total area so purchased shall in no case exceed the one thousand and twenty-four hectares authorized in this Section for associations and corporations."

The foregoing Constitutional and statutory provisions are reflected in the Foreign Investment Negative List,[1] which states that foreign ownership is limited up to 40% in the acquisition of private lands.

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

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[1] Executive Order No. 858 dated 05 February 2010.

[2] "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, 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

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

In a previous opinion, 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 in management positions such as the President, *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 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)[3]" (Emphasis supplied.)

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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." (Emphasis supplied.)

[3] SEC Opinion dated 08 December 1995, addressed to Mr. K.J. Mctavish.

This is consistent with the previous ruling of the Department of Justice in Opinion No. 37, Series of 1976, stating that in firms engaged in wholly or partially nationalized activities, aliens are banned from being appointed to management positions as 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.

The rationale behind Section 2-A of the Anti-Dummy Law particularly the prohibition on election or appointment of foreigners in management positions is to prevent the circumvention of the nationalization laws[4] such as Article XII, Section 7 of the Constitution and Chapter IV, Section 22 of Commonwealth Act No. 141, as amended. In King v. Hernaez,[5] the Supreme Court explained the rationale for such a prohibition, viz –

> "When the law says that you cannot employ an alien in any position pertaining to management, operation, administration and control, 'whether as an officer, employee, or laborer therein,' it only means one thing: the employment of a person who is not a Filipino citizen even in a minor or clerical or non-control position is prohibited. The reason is obvious: to plug any loophole or close any avenue that an unscrupulous alien may resort to flout the law or defeat its purpose, for no one can deny that while one may be employed in a non-control position who apparently is harmless he may later turn out to be a mere tool to further the evil designs of the employer. It is imperative that the law be interpreted in a manner that would stave off any attempt at circumvention of this legislative purpose."

Accordingly, PLGI cannot have a foreigner as its President because it is engaged in a partly nationalized activity subject to specific citizenship requirements.

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.[6] 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

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[4] DOJ Primer on the Employment of Aliens under the Anti-Dummy Law.
[5] 4 SCRA 792, 31 March 1962.
[6] SEC Memorandum Circular No. 15, series of 2003.