



**Republic of the Philippines
Department of Finance
Securities and Exchange Commission**

OFFICE OF THE GENERAL COUNSEL

19 November 2019

SEC-OGC Opinion No. 19-55
RE: International Freight Forwarding and
NVOCC; Nationality Requirement

FAIR CONSULTING GROUP PHILIPPINES, INC.

Unit 2103, 21/F, Philippine Axa Life Centre,
1286 Sen. Gil Puyat Ave. cor. Tindalo St.,
Makati City

ATTENTION: NATY ALAYON

Dear Ms. Alayon:

This refers to your letter dated 25 September 2018 requesting the Commission's opinion on queries regarding the intended business activities of the proposed subsidiary of your client, Sun Ocean Corporation ("SOC"), a company located in Japan.

In your letter, you stated that the proposed subsidiary intends to engage in the following business activities:

1. To do business related to logistics by acting as logistics coordinator and/or cargo agent of the customer;
2. To arrange the needed mode of transportation for the efficient transfer of goods, products, merchandise, items, etc. through outsourcing all relevant services to subcontractors, suppliers, and service providers such as International Freight Forwarding/Forwarder ("IFF"), Non-Vessel Operating Common Carrier ("NVOCC"), Domestic Freight Forwarding/Forwarder ("DFF"), customs brokerage, warehousing, equipment installation, insurance and trucking services;

3. To negotiate with suppliers for cargo space, freight cost on behalf of the customer;
4. To pay necessary freight charges in advance on behalf of the customer; and
5. To do packing of goods on behalf of the local or overseas shipper.

Thus, the following queries are raised:

1. Is SOC allowed to establish a 100% foreign-owned domestic corporation engaged in IFF and NVOCC business activities under the Foreign Investment Act ("FIA")?
2. Is it possible for SOC's domestic subsidiary to act as a logistics agent between its clients and licensed domestic IFF and DFF corporations and for its domestic subsidiary to issue a Forwarder's Bill of Lading (House Bill of Lading)?
3. Is it necessary for SOC's domestic subsidiary to acquire a license to subcontract to other companies which already have the required IFF and NVOCC licenses?

With regard to the first query, the Commission opined that a freight forwarding corporation is considered an operator of a public utility.¹ As such, it must comply with Article XII, Section 11 of the Constitution² which limits foreign ownership at forty percent (40%) for the operation of public utilities. Conversely, Filipino citizens must have sixty percent (60%) of the capital of the proposed domestic corporation.

In SEC-OGC Opinion No. 17-14, we opined that "corporations engaged exclusively in international freight forwarding are considered beyond the purview of the nationality requirement for the operation of public utilities and therefore, may be owned up to 100% by foreigners", thus:

"SEC-OGC Opinion No. 16-08 provided a summary of the related DOJ and SEC opinions regarding the **inapplicability of the foreign equity restrictions on international freight forwarding**, to wit:

In the Department of Justice (DOJ) Opinion No. 98 dated 09 November 2004, the DOJ clarified several opinions in relation to international freight

¹ SEC-OGC Opinion No. 08-21 dated 09 October 2008.

² SECTION 11. **No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens**, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital, and all the executive and managing officers of such corporation or association must be citizens of the Philippines. (Emphasis supplied)

forwarding vis-à-vis foreign participation in the said business endeavor, stating that **the nationality requirement applies only to domestic air transport and not to international air freight forwarders.**

In another DOJ Opinion involving Maritime Shipping, it was held that **public utilities which are engaged exclusively in international commerce are beyond the purview of the constitutional provision limiting operation of public utilities to citizens of the Philippines or to corporations or entities at least 60% of the capital stock of which is owned by citizens of the Philippines.**

This was reiterated in SEC-OGC Opinions 08-21 and 10-30 issued in 2008 and 2010 respectively, wherein, this Commission interpreted that a corporation engaging in international (air) freight forwarding is beyond the purview of the nationality requirement for the operation of public utilities and may be 100% foreign.”³ (Emphasis supplied)

Based from the foregoing, the general rule is that freight forwarding corporations must comply with the nationality requirement – Filipinos must have at least 60% of the capital of the corporation. On the other hand, the above rule does not apply where the said freight forwarding corporation engages exclusively in international freight forwarding.

Therefore, SOC may establish a 100% foreign-owned domestic subsidiary **provided** that the said corporation shall engage **exclusively** in international freight forwarding.

It is important to note, however, that the domestic subsidiary's intended business activities as indicated in its business purposes include outsourcing to a DFF services that are relevant to the transportation of goods, products, merchandise, items, etc. Hence, the above stated nationality restriction may apply. The Commission suggests a reformation of its proposed business purposes to conform with the above stated rules.

As to your second and third queries, we regret to inform you that as a matter of policy, the Commission refrains from rendering an opinion on requests, such as said queries, which involve interpretation of administrative rules and issuances of other government agencies considering that it is the promulgating agencies which are competent to undertake such construction by reason of their knowledge of the specific intent and extent of application of the subject issuances.⁴

However, **for purposes of information only**, the following may be imparted.

The articles of incorporation is the measure of a corporation's powers and should thus transact business within said authority.⁵ Nonetheless, it is established that every express grant of power to a corporation carries with it all the powers that may be implied from or which are incidental or necessary or expedient to those expressly conferred, and the

³ SEC-OGC Opinion No. 17-14 dated 17 November 2017.

⁴ Sec. 5.6, SEC Memorandum Circular No. 15, Series of 2003.

⁵ SEC-OGC Opinion No. 16-08, citing SEC Opinion dated 3 November 1998.

corporation may do all that is necessary to its existence.⁶ Hence, even when the primary purpose of the corporation does not expressly authorize certain engagements or activities, the same may still be carried out provided these are incidental, necessary, or expedient to what was expressly conferred.

Moreover, there are certain fields where a license must be secured or obtained from the relevant primary regulatory agency before one may engage in certain activities.

Section 1 of Memorandum Circular No. 30, which was issued pursuant to Presidential Decree No. 474, otherwise known as the charter of Maritime Industry Authority ("MARINA"), requires persons, both natural or juridical, to secure a valid license prior to engaging in the business of a NVOCC or an ocean freight forwarders, thus:

"Section 1. No person, natural or juridical, shall engage in the Philippines in the business of non-vessel operating common carrier or an ocean freight forwarder without a valid license for this Purpose from the Maritime Industry Authority."

Failure to secure such license shall result to the imposition of a fine as well as the temporary closure of the entity engaging in such activities without a valid license.⁷

Furthermore, the Philippine Shippers' Bureau ("PSB"), an agency under the Department of Trade and Industry ("DTI") that is responsible for the registration and accreditation of NVOCCs, freight forwarders, among others⁸, issued Administrative Order ("AO") No. 06, Series of 2005 requiring the accreditation of NVOCCs and IFFs with the PSB before these entities can legally engage in sea freight forwarding business with respect to their particular functions and/or operations, to wit:

"Section 3. Covered firms – The five (5) categories namely: Non-Vessel Operating Common Carrier (NVOCC), Cargo Consolidator (CC), International Freight Forwarder (IFF), Breakbulk Agent (BBA) and Domestic Freight Forwarder (DFF) are hereby simplified into three (3) namely: **Non-Vessel Operating Common Carrier (NVOCC), International Freight Forwarder (IFF)** and Domestic Freight Forwarder (DFF) which are defined above. Non-Vessel Operating Common Carrier includes the functions of a Cargo Consolidator; International Freight Forwarder includes the functions of a Breakbulk Agent. **These three (3) categories** are referred to as "covered firms" under this Order; hence, they **must be accredited first before they can legally engage in the said functions and/or operations.**" (Emphasis supplied)

The AO defines an IFF as a "local entity that acts as a cargo intermediary and facilitates transport of goods on behalf of its client without assuming the role of a carrier. It can also perform other forwarding services, such as booking cargo space, negotiating freight rates, preparing documents, advancing freight payments, providing packing/crating, trucking and warehousing, engaging as an agent/representative of a foreign NVOCC/cargo consolidator

⁶ SEC-OGC Opinion No. 16-08, citing SEC Opinion No. 24, s. 2003 dated 19 May 2003.

⁷ Section 9 of MARINA Memorandum Circular No. 30.

⁸ Executive Order No. 514, Series of 1992.

named in a Master Bill of Lading as consignee of a consolidated shipment, and other related undertakings.”⁹

Finally, no airfreight forwarder shall engage in any activities mentioned under Section 3, Paragraph (ll)¹⁰ of Republic Act (“R.A.”) No. 776, as amended, otherwise known as the Civil Aeronautics Act of the Philippines, unless such entity is authorized by the Civil Aeronautics Board (“CAB”), hence:

“Section 11. Nature, terms and conditions. – Certificate of Public Convenience and Necessity is a permit issued by the Board authorizing a person to engage in air commerce and/or transportation, foreign and/or domestic. No person shall engage in air commerce unless there is in force a permit issued by the Board.

No general sales agent, cargo sales agent or airfreight forwarder shall engage in any of the activities mentioned in Section 3 paragraphs (jj), (kk) and (ll) respectively, unless there is in force a permit or any other form of authorization issued by the Board.”

Thus, the scope and extent of activities covered by the license as well as whether the licensee is allowed to subcontract its services are best addressed to these agencies.

It shall be understood that the 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 standing rule binding upon the Commission in other cases or upon the courts whether of similar or dissimilar circumstances.¹¹ If, upon further inquiry or investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.


ROMUALD C. PADILLA
Officer-in-Charge

⁹ SEC-OGC Opinion No. 16-08 dated 20 April 2016, *citing* Rule I, Section 2 (d) of PSB-AO No. 6, Series of 2005.

¹⁰ Section 3, Paragraph (ll) of R.A. 776 - “Airfreight forwarder” means any indirect air carrier which, in the ordinary and usual course of its undertaking, assembles and consolidates or provides for assembling and consolidating such property or performs or provides for the performance of break-bulk and distributing operations with respect to consolidated shipments, and is responsible for the transportation of property from the point of receipt to point of destination and utilizes for the whole or any part of such transportation the services of a direct air carrier.

¹¹ SEC Memorandum Circular No. 15, Series of 2003.