**Republic of the Philippines**
**SECURITIES AND EXCHANGE COMMISSION**
**SEC Bldg. EDSA, Greenhills, Mandaluyong City**

**OFFICE OF THE GENERAL COUNSEL**

15 November 2010

SEC-OGC Opinion No.10-30

Re: Foreign Ownership Limitations on International Freight Forwarders

Mr. Arvin D. Delima
Head – Human Resources and Administration
Manila Int'l. Freight Forwarders, Inc.
Unit C Oyster Plaza, Dr. A. Santos Avenue
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Brgy. San Dionisio, Parañaque City

Sir:

This refers to your query dated 4 October 2010 on whether your company, Manila Int'l. Freight Forwarders, Inc. ("MIFFI") is covered by Executive Order No. 858 dated 5 February 2010, otherwise known as the Eighth Regular Foreign Investment Negative List ("FINL 2010").

In particular, you are seeking clarification regarding the foreign ownership limitation of up to 40% of Philippine companies provided in FINL 2010 List A[1] paragraph 19, on the operation and management of public utilities as provided for in Article XII, Section 11 of the 1987 Constitution[2] and Section 16 of Commonwealth Act 146.[3]

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[1] Foreign Ownership is Limited by the Mandate of the Constitution and Specific Laws.

[2] Art. XII 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. (Italics supplied)

[3] The Public Service Law, approved: November 7, 1936, as amended, and as modified particularly by P.D. No. 1, Integrated Reorganization Plan and EO 546, Creating A Ministry Of Public Works and A Ministry Of Transportation And Communications, July 23, 1979) xxx Section 16. Proceedings of the

We reply in the affirmative.

MIFFI is subject to the 40% foreign investment limitation. MIFFI was duly registered with the Commission on 21 June 1988, with SEC Registration No. 152458. In 1995, Hitachi Transport System of Tokyo, Japan bought forty percent (40 %) of MIFFI. You have stated that MIFFI is currently engaged in international freight forwarding, design and supply of packaging materials, importation, and third party logistics-3PL (packing, inventory management, warehousing, transport and production line feeding) mostly for export oriented companies.

The Commission's records show that the amendment to the Second Article, Primary Purpose of MIFFI's Articles of Incorporation was approved on 19 March 2009, thus:

> "To engage in the business of freight and cargo forwarders, hauling, carrying, handling, distributing, loading and unloading, and importation of general cargoes, and all classes of goods, wares and merchandise and to receive and collect fees for such services; to engage in the business of importation; to engage in the business of Non-Vessel Operating Common Carrier (NVOCC)[4] and Cargo Consolidation Service and underline succeeding lines. (as amended on February 1, 2009)"

Based on the nature of its business, MIFFI is an operator of a public utility, which is defined as a business or service engaged in regularly supplying the public with some commodity or service of public consequence such as electricity, gas, water, *transportation*, or telephone or telegraph service.[7] A "public utility" under the Constitution and the Public Service Law is one organized "for hire or compensation" to serve the public, which is given the right to demand its service.[8] In the case *of Luzon Brokerage Co., Inc., vs. The Public Service Commission*,[9] "public utility" and

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Commission, upon notice and hearing. — The Commission shall have power, upon proper notice and hearing in accordance with the rules and provisions of this Act, subject to the limitations and exceptions mentioned and saving provisions to the contrary:xxx To issue certificates which shall be known as certificates of public convenience, authorizing the operation of public service within the Philippines whenever the Commission finds that the operation of the public service proposed and the authorization to do business will promote the public interest in a proper and suitable manner. Provided, That thereafter, certificates of public convenience and certificates of public convenience and necessity will be granted only to citizens of the Philippines xxx or to corporations, co-partnerships, associations or joint-stock companies constituted and organized under the laws of the Philippines; Provided, That *sixty per centum* of the stock or paid-up capital of any such corporations, co-partnership, association or joint-stock company must belong entirely to citizens of the Philippines xxx

[4] Definition:US designation for a shipment consolidator *or freight forwarder who does not own any vessel,* but functions as a 'carrier' by issuing its own bills of lading or air waybills and assuming responsibility for the shipments. http://www.businessdictionary.com/definition/non-vessel-operating-common-carrier-NVOCC.html (accessed 29 October 2010).

[7] Glenbrook Development Co. v. Brea 253 Cal App 2d 267, 61 Cal Rptr 189, 64 Am Jur 2d, Public Securities and Obligations, §1 (1972).

[8] Bagatsing vs. Committee on Privatization, et al. G.R. No. 112399 July 14, 1995; Neptali A. Gonzales, et al. vs. Delfin Lazaro et al. G.R. No. 115994 July 14, 1995.

[9] G.R. No. L-37661, November 16, 1932.

"public service" were used interchangeably. Section 13(b) of CA 146 defines "public service" thus:

> "The term "public service" includes every person that now or hereafter may own, operate, manage, or control in the Philippines, for hire or compensation, with general or limited clientele, whether permanent, occasional or accidental, and done for general business purposes, any common carrier, railroad, street railway, traction railway, sub-way motor vehicle, *either for freight or passenger, or both* with or without fixed route and whatever may be its classification, *freight or carrier service of any class*, express service, steamboat or steamship line, pontines, ferries, and water craft, *engaged in the transportation of passengers or freight or both*, shipyard, marine railways, marine repair shop, [warehouse] wharf or dock, ice plant, ice-refrigeration plant, canal, irrigation system, gas, electric light, heat and power water supply and power, petroleum, sewerage system, wire or wireless communications system, wire or wireless broadcasting stations and other similar public services: xxx" (Italics supplied)

In one opinion,[10] this Office had the occasion to opine that an air freight forwarding is tantamount to engaging in domestic air commerce and/or transportation by citing Section 1(ll) of Presidential Decree Number 1462 in relation to Section to Section 3(f) of R.A. No. 776. [11]

Moreover, Section 16 of Commonwealth Act 146 requiring that "*sixty per centum* of the stock or paid-up capital of any corporation, co-partnership, association or joint-stock company must belong entirely to citizens of the Philippines" applies to MIFFI, and so does the forty percent foreign ownership limitation of Philippine corporations under Article XII, Section 11 of the Constitution on public utilities. Republic Act No. 8179[12] defines the term 'Philippine national' as xxx a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; xxx"

Finally, the foreign equity limitation does not change, despite the Department of Justice ("DOJ") Opinion No. 098, series of 2004 (the "2004 DOJ Opinion") cited by MIFFI. The Opinion harmonized the conflicting opinions of the DOJ issued in 1946, 1975, 1976, and 1999 on the issue of whether or not international airfreight for-

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[10] SEC-OGC Opinion No. 21-08 dated 29 October 2008.

[11] "(ll) "Air freight 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." (P.D. No. 1462)

(f) "Air carrier" means a person who undertakes, whether directly or indirectly, or by a lease or any other arrangements, to engage in air transportation or air commerce.(R.A. No. 776)"

[12] Approved 28 March 1996, An Act to Further Liberalize Foreign Investments, Amending for the Purpose Republic Act No. 7042, and for Other Purposes

warders are subject to the nationality requirement imposed by the Constitution for a public utility.

Applying the 2004 DOJ Opinion to MIFFI, the foreign equity limitation still applies. The 2004 DOJ Opinion states in part: "xxx we revert to our view expressed in our Opinion dated September 11, 1946 that the nationality requirement applies only to domestic air commerce and/or air transportation, and does not apply to international air freight forwarders.xxx" In its penultimate paragraph, the 2004 DOJ Opinion states:

> "xxx an air carrier will be classified as a domestic air carrier if (1) it is a citizen of the Philippines, or (2) if it is not a citizen of the Philippines but has been allowed to engage in domestic and/or foreign air transportation, or domestic and/or foreign air commerce by virtue of the provisions of Section 12[16] of R.A. No. 776, as amended. Thus, if a foreign air carrier is not operating or conducting its business in the country pursuant to the aforesaid Section 12, then it need not comply with the citizenship requirement of R.A. No. 776, as amended.xxx"

Inasmuch as MIFFI is a domestic corporation engaged in foreign AND domestic activities, it cannot escape the citizenship requirement provided in the laws cited herein. In view of the foregoing, MIFFI is required to comply with the 40% foreign equity participation in a public utility corporation.

It shall be understood that the foregoing opinion is rendered based solely on the facts and circumstances disclosed 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 whether of similar or dissimilar circumstances. If, upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.

Please be guided accordingly.

Very truly yours,

**VERNETTE G. UMALI-PACO**
General Counsel

[16] *Id.*, Section 12. Citizenship requirement. — Except as otherwise provided in the Constitution and existing treaty or treaties, a permit authorizing a person to engage in domestic air commerce and/or air transportation shall be issued only to citizens of the Philippines.