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

April 20, 2016
SEC-OGC Opinion No. 16-08
RE: International Sea Freight Forwarding/Sub-contracting

Takuma Yamaguchi
President
Fujitrans Philippines, Inc.
23/F GT Tower International
6813 Ayala Avenue, Makati City

Sir:

This refers to your letter dated 27 February 2015 requesting the Commission to render an opinion on whether Fujitrans Philippines, Inc., an international sea freight forwarding company, can provide trucking service through sub-contracting.

As disclosed in your letter, Fujitrans Philippines, Inc. (Fujitrans) is a domestic corporation with more than 40% foreign equity and was duly organized and existing under the Philippine laws. Fujitrans has been requested by your client to render a trucking service and as such, you intend to sub-contract the same to a local trucking company. A trucking service agreement will be entered into between Fujitrans and the client. Consequently, Fujitrans will bill directly the client. On the other hand, a sub-contracting agreement will be entered into between Fujitrans and a local company to render the actual trucking service to the client. Accordingly, Fujitrans will pay the service of the local trucking company.

Based on the said transaction, Fujitrans considers the sub-contracting of the trucking service to be related to logistics as stated in its primary purpose.

The following queries were then posed:

1. Whether an international freight forwarding company with more than 40% foreign equity can provide trucking service to its client through sub-contracting it to a local trucking; and

2. Whether Fujitrans can bill directly the said trucking service to its client.

Notably, the Purpose of Fujitrans, as evidenced by its Articles of Incorporation, which was attached to your letter, is:

> "To engage in business as international freight and cargo forwarders of all classes of goods and merchandise and in such other business and activities directly and indirectly connected to the said business. It aims also to undertake and carry the business as non-vessel operating common carrier (NVOCC), shipping agency, cargo consolidator, cargo packing, break bulk agent, warehousing, logistics service inside of customer's manufacturing plant and other business related to logistics."

Being a freight forwarder, Fujitrans is considered an operator of a public utility.[1] Public Utility 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.[2]

It is well settled that a public utility must comply with the foreign equity limitations, as provided in the 10th Regular Foreign Investment Negative List[3], in relation to Article XII, Section 11 of the 1987 Philippine Constitution which provides:

> "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."

In the Department of Justice (DOJ) Opinion No. 98 dated 09 November 2004, the DOJ clarified several opinions in relation to international freight 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.[4]

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 of which is owned by citizens of the Philippines.[5]

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[1] SEC-OGC Opinion No. 08-21, 29 October 2008 addressed to Atty. Agerico T. Paras
[2] Metropolitan Cebu Water District v. Adala, G.R. No. 168914, 4 July 2007
[3] Executive Order No. 184
[4] Letter to Mr. Domingo I. Bagaporo, Director, Board of Investments. 08 October 2014
[5] DOJ Opinion No. 191, s.1982, 31 August 1982 addressed to Maritime Industry Authority

This was reiterated in SEC-OGC Opinions 08-21[6] and 10-30[7] 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.

The question now is whether Fujitrans can, as an international (sea) freight forwarder, provide trucking services to its clients without violating nationality requirements.

The articles of incorporation is the measure of a corporation's powers and it should not transact business and enter into contracts and agreement beyond what is authorized under it.[8] It is a familiar doctrine 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 corporation may do whatever is necessary or expedient to their existence.[9]

The Philippine Shippers' Bureau,[10] which is mandated to register, accredit and regulate covered firms, including an international (sea) freight forwarder,[11] issued an Administrative Order No. 06 Series of 2005 (PSB-AO) defining **"International Freight Forwarder"** under Rule I, Section 2(d) thereof, to wit:

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

It is clear from the PSB-AO that an international (sea) freight forwarder can perform "other forwarding services such as trucking."

Thus, while "trucking" is not expressly stated in the Articles of Incorporation of Fujitrans, the latter can nonetheless engage in trucking, by itself or by a sub-contractor, as such activity is necessarily included in, or implied by, its business as an international (sea) freight forwarder.

Hence, we answer your queries in the affirmative.

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[6] Id. Note 1.
[7] 15 November 2010 addressed to Mr. Arvin D. Delima
[8] SEC Opinion dated 3 November 1998 addressed to Atty. Manuel R. Singson
[9] SEC Opinion No. 24, s. 2003, 19 May 2003 addressed to Philippine Long Distance Telephone Company
[10] Now Fair Trade Enforcement Bureau (FTEB) under Department of Trade and Industry (DTI)
[11] Non-Vessel Operating Common Carrier (NVOCC) including Cargo Consolidator; International Freight Forwarder (IFF) including Breakbulk Agent; and Domestic Freight Forwarder (DFF). PSB A.O. No. 06, s. 2005. Rule II, Section 3.

It shall be understood that the foregoing opinion is rendered based solely on the facts and circumstances disclosed in the queries relevant solely to the particular issues raised therein and shall not be used in the nature of a standing rule binding on the Commission in other cases whether similar or dissimilar circumstances. If upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be considered as null and void.

CAMILO S. CORREA
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