Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

17 November 2017

SEC-OGC Opinion No. 17-14
RE: International Freight Forwarding; Applicability of Anti-Dummy Law

VALDECANTOS & VALENCIA LAW OFFICE
Untis 16-IJ1 and 16-IJ2, 16th Floor
Burgundy Corporate Tower
252 Sen. Gil J. Puyat Ave.,
Makati City 1200

Attention: Atty. Jose B. Valencia

Dear Atty. Valencia,

This refers to your letter dated 03 August 2016 requesting for confirmation of the legality of the proposed increase of the foreign equity participation in MOL Logistics (Phils.), Inc., (MOL Logistics) and the applicability of Commonwealth Act No. 108, as amended (Anti-Dummy Law).

As stated in your letter, MOL Logistics is a domestic corporation engaged in the **business of international freight forwarding** with the primary purpose as follows:

> "to engage in and carry on the business of **international ocean and air freight forwarding** and logistics including distribution, warehousing, packaging, crating, labeling, inventory management and control of general cargo, merchandise, plant and heavy machinery, household goods and personal effects; to act as cargo consolidator, representative, contractor, or consultant of companies or individuals directly or indirectly, wholly or partially engaged or related to any or all the above businesses; and/or operate as an **international non-vessel operating common carrier**"

Currently, MOL Logistics is 60% owned by Filipino shareholders and 40% owned by shareholders of foreign nationality. Moreover, you disclosed that it seeks to increase its foreign equity to about 80%, effected through buyout of shares of stock belonging to Filipino shareholders.

Based on the foregoing, you now pose the following queries:

1. Whether a corporation doing business as an international freight forwarder can increase its foreign equity to more than 40% without violating the Constitution and other laws.

2. Whether said corporation can elect a foreign citizen as its President.

With respect to the first issue, a freight forwarder is considered as 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, telephone or telegraph service." [1]

Under Article XII of the 1987 Philippine Constitution, foreign ownership is restricted in corporations or associations operating a public utility, to wit:

> **"Section 11. <u>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;</u>** 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

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[1] *Albano v. Reyes,* G.R. No. 83551, 11 July 1989; *NAPOCOR v. Court of Appeals,* G.R. No. 112702, 26 September 1997; *JG Summit Holdings, Inc., v. Court of Appeals et. al.,* G.R. No. 124293, 24 September 2003.

such corporation or association must be citizens of the Philippines"[2] (Emphasis and underscoring supplied).

In SEC-OGC Opinion No. 08-21, it was opined that air freight forwarding is tantamount to engaging in domestic air commerce and/or air transportation.[3] However, this foreign ownership restriction finds no application in cases where the public utility is engaged exclusively in international commerce.

In a recent related opinion, SEC-OGC Opinion No. 16-08,[4] the Commission opined that utility firms such as international freight forwarders engaged exclusively in international commerce are beyond the Constitutional prohibition limiting foreign ownership to 40% of the capital of a corporation.

SEC-OGC Opinion 16-08 provided a summary of the related DOJ and SEC opinions regarding the inapplicability of the foreign equity restrictions to international freight forwarding, to wit:

> "In the Department of Justice (DOJ) Opinion No. 98 dated 09 November 2004,[5] 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.
>
> 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.[6]
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> 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." [7]

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[2] 1987 Philippine Constitution, Article XII, Section 11.
[3] SEC-OGC Opinion No. 08-21, dated 29 October 2008, addressed to Atty. Agerico T. Paras.
[4] SEC-OGC Opinion No. 16-08 dated 20 April 2016 addressed to Mr. Takuma Yamaguchi.
[5] Letter to Mr. Domingo I. Bagaporo, Director, Board of Investments. 08 October 2014
[6] DOJ Opinion No. 191, s. 1982, 31 August 1982 addressed to Maritime Industry Authority
[7] SEC-OGC Opinion No. 16-08 dated 20 April 2016 addressed to Mr. Takuma Yamaguchi.

Thus, 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.

Consequently, the prohibition under the Anti-Dummy Law, specifically as to electing a foreign citizen as its President, does not apply to corporations engaged in international freight forwarding as they are not considered to be engaged in any nationalized or partly nationalized activity.[8]

It shall be understood, however, that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issue raised therein. It shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts whether of similar or dissimilar circumstances.[9] 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.

CAMILO S. CORREA
General Counsel

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[8] SEC Opinion dated 28 May 1985 addressed to Mr. Esteban N. Eugenio. Jr.
[9] SEC Memorandum Circular 2003-15, No.7