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

Office of the General Counsel

3 November 2015

SEC-OGC Opinion No. 15-14
Re: Foreign Equity Limitations on Ground Handling Services

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Attention: Atty. Cynthia Roxas-del Castillo and
Atty. Carlos Martin M. Tayag

Gentlemen:

This is in response to your letter dated 25 October 2011 on behalf of your client, requesting our opinion on whether a 100% foreign-owned domestic corporation may undertake the business of providing ground handling services.

In your letter, you represented that your client is a 100% foreign owned domestic corporation duly registered with the Commission, authorized to do business in the Philippines as a domestic market enterprise under the Foreign Investments Act of 1991, as amended, and having a paid-in equity capital of at least US$200,000.00. Your client seeks to engage in the business of providing ground handling services in the Philippines, which include moving of aircraft (i.e., towing in and/or pushing back aircraft using tow-in and/or push back tractors) and baggage handling (i.e., preparation and delivery of baggage to and from aircraft).

You noted that the provision of ground handling services as described above is not an investment area or activity where foreign ownership is limited under the Eighth Foreign Investment Negative List[1] (currently the Tenth Foreign Investment Negative List).[2]

In view thereof, you seek confirmation of your position that the business of providing ground handling services, as described above, may be engaged in by a corporation which is 100% foreign owned, duly registered with the Commission, authorized to do business in the Philippines as a domestic market enterprise under the Foreign Investments Act of 1991, as amended, and having a paid-in equity capital of at least US$200,000.00.

A perusal of the Tenth Foreign Investment Negative List ("FINL-10") confirms that the business of providing ground handling services is not among those business activities which are expressly stated as having restricted foreign equity participation. However, it

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[1] Executive Order No. 858, S. 2010.
[2] Executive Order No. 184 (2015).

should be emphasized that **it is the nature, *not the name*, of the activity which determines whether or not the business activity is covered by the Negative List**.

Under the FINL-10, foreign equity participation in corporations engaging in the operation and management of public utilities is limited to a maximum of forty percent (40%).[3] 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.[4] Further, a public utility is defined as "business or service which is engaged in regularly supplying the public with some commodity or service of public consequence x x x." This definition reveals that what determines whether a particular entity is a public utility is the character of the service itself, i.e., it must have a public consequence.[5]

Previously, the Secretary of Justice opined[6] that NAIA Terminal III is a "public service" or a "public utility" within the contemplation of the law. It explained:

> As xxx defined, a "public service" includes every person that may "own, operate, manage, or control xxx for hire or compensation, with general or limited clientele, whether permanent, occasional or accidental, and done for general business purposes, any xxx wharf or dock xxx and other similar public services xxx
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> "Wharf" is defined in Section 13(o) of P.D. No. 857 as —
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> > "xxx a continuous structure built parallel to along the margin of the sea or alongside riverbanks, canals, or waterways where vessels may lie alongside to receive or discharge cargo, embark or disembark passengers, or lie at rest."
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> On the other hand, "dock" as defined in Section 3(j) "includes locks, cuts entrances, graving docks, inclined planes, slipways, quays, and other works and things appertaining to any dock."
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> In the case of Albano vs. Reyes (175 SCRA 264), the Supreme Court noted that the Manila International Container Port (MICP) could be considered a public utility, or a public service on the theory that it is a "wharf" or a "dock" as contemplated under the Public Service Act.
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> Since the NAIA Terminal III is intended to serve as a facility for passenger handling and other services related to the movement of passengers, baggages and goods, as well as the care, convenience and security of passengers, visitors and other airport users, it is believed that the NAIA Terminal III is a public service similar to a "wharf" or "dock," and, therefore, it is deemed to be a "public utility" or "public service" within the contemplation of the Public Service Act and of R.A. No. 6957, as amended. This is consistent with the ruling that an airport, with its beacons, land

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[3] List "A" No. 19.
[4] *Bagatsing vs. Committee on Privatization, et al.*, G.R. No. 112399, 14 July 1995.
[5] DOJ Opinion No. 074, Series of 1998, dated 16 June 1998, addressed to Mr. Carlos L. Agustin, citing *Glenbrook Development Co. v. Brea*, 253 Cal App 267, 61 Cal Rptr 189.
[6] DOJ Opinion No. 78, Series of 1995, dated 12 August 1995, addressed to the General Manager of Manila International Airport Authority.

> fields, runways and hangers is analogous to a harbor with its lights, wharves and docks (Coleman v. City of Oakland, 295 p. 59; Dupart v. St. Louis, 321 Mo. 514).

Airport authorities therefore, such as the Manila International Airport Authority,[7] Subic Bay Metropolitan Authority,[8] Clark International Airport Corporation,[9] the Mactan-Cebu International Airport Authority,[10] and the Civil Aviation Authority of the Philippines,[11] are operators of public utility.

In an Opinion,[12] the Secretary of Justice concluded that port service contractors and port facility operators, although mere contractors of the Philippine Ports Authority (PPA), in the execution of their respective contracts and undertakings with the PPA, aid the latter in the fulfillment of the PPA's mandate to provide services within the Port Districts and approaches thereof. This arrangement places the port service contractors and port facility operators under the category of public utility.

The same conclusion applies to your query. There is no question that services to facilitate passenger handling and other services related to the movement of passengers, baggages and goods, as well as the care, convenience and security of passengers, visitors and other airport users are necessarily part and parcel of airport operations. Obviously, ground handling services which include both aircraft movement and baggage handling, are activities essential to airport operations. Thus, such activities are the business of public utilities.

Following the conclusion of the Secretary of Justice,[13] if the ground handling services are not carried out by the public utility, but rather contracted out to corporations or firms, the contractors are actually aiding the public utility to provide the services incidental to its airport operations. This arrangement likewise places the contractor corporations under the category of public utility.

In view of the foregoing, a corporation which is 100% foreign owned, duly registered with the Commission, authorized to do business in the Philippines as a domestic market enterprise under the Foreign Investments Act of 1991, as amended, and having a paid-in equity capital of at least US$200,000.00, may not engage in the business of airport ground handling services, which include moving of aircraft and baggage handling.

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 and 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. If, upon further

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[7] As regards the Ninoy Aquino International Airport, by virtue of Executive Order No. 903, Series of 1983.
[8] As regards the Subic Bay International Airport, by virtue of Republic Act No. 7227 (1992).
[9] As regards the Diosdado Macapagal International Airport, by virtue of Executive Order No. 193, series of 2003.
[10] As regards the Mactan-Cebu International Airport Authority, by virtue of Republic Act No. 6958 (1990).
[11] As regards all other public airports, by virtue of Republic Act No. 9497 (2008).
[12] See note 5.
[13] See note 12.

inquiry and investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.[14]

Please be guided accordingly.

Very truly yours,

CAMILO S. CORREA
General Counsel

/mpb/vjbg

[14] SEC Memorandum Cricular No. 15, Series of 2003.